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# SCHENECTADY COUNTY BAR ASSOCIATION, INC.

## NEWSLETTER

June 2007

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**SCHENECTADY COUNTY BAR ASSOCIATION  
ANNUAL MEETING**

**June 21, 2007  
12 pm  
Glen Sanders Mansion**

Call for reservations  
377-9096

### IMPORTANT ANNOUNCEMENT:

The membership directory will be updated and printed in early summer. Please take the time to send us address/phone number updates. We would like to include email addresses, if we don't already have it please send us your email address:

Schenectady County Bar Association  
PO Box 1728  
Schenectady, NY 12301  
Fax 518-377-5450  
Email:  
schenectadybar@aol.com

## ANNUAL AWARDS

At the Law Day Spring Social, the association honored the following individuals:

### **LIFETIME ACHIEVEMENT AWARD**

This award was presented to Frank Parisi for his dedication to the highest standards of legal service and his contributions to the Schenectady County Bar Association.

### **EXCELLENCE IN SERVICE AWARD**

This award was presented to Charlie Bosworth for his excellence service and extreme patience in dealing with the public in our local city courts.

### **LAWYER IN SERVICE TO COMMUNITY AWARD**

This award was presented to J. David Burke to acknowledge his contributions to our local bar association and for his ongoing organization of the Pro Bono Matrimonial Bar clinics.

### **LIBERTY BELL AWARD**

This award was presented to Dr. Heidi VanBellingam, a health care professional who assists the mentally ill jail inmates and ensures that their medical needs are met.



## **Don't Go It Alone**

**LAP—The Lawyer's Assistance Program of the Schenectady County Bar Association—is here to help members of the County Bench and Bar.**

LAP is concerned about your welfare. We want to help. Whether you are facing illness, alcohol or drug addiction, a gambling problem, psychological problems or financial difficulties, LAP is here to provide you with free, completely confidential assistance.

All you have to do is ask. Call or write:

Honorable Vincent Reilly 612 State St. Schenectady, NY 12301 285-8422

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

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

Editor's Note:

Due to a printing error the April Newsletter printed both the April column and February from Judge Caruso. We are reprinting the April column in its entirety because of its important subject matter. Our sincerest apologies to Judge Caruso.



## **SHARED BENCH**

**VITO C. CARUSO, JSC**

As is evidenced by February's newsletter, pro bono is a hot topic. The courts are actively engaged in meetings and discussions with bar associations and others on the issue of pro bono legal service in the State of New York, and how it would interact with the courts and the bar. The scope and complexity of New York's law and court structure make the assistance of a lawyer critical in obtaining civil justice. Everyone is well aware of the foundation of criminal assigned counsel and public defenders for every litigant in a criminal proceeding. However, the amount of free legal help available to low income persons for their civil legal needs is totally insufficient.

The Legal Services Corporation recently completed the first nationally comprehensive study of unmet civil legal needs of low income Americans and issued a report. The report found that 80% of the needs of low income Americans for civil legal assistance are not being met. Further, for each person who received legal assistance from a Legal Services Corporation funded program, in subject areas in which the program provided service, at least one eligible client was turned away due to a lack of resources. A study of the NYS Bar Association reported that New York's poor households experienced an average of two plus unmet civil legal needs annually. A total of approximately 2.5 million legal problems for which no lawyer is available. A reasonable estimate is that 10 million additional hours of attorney assistance may be required annually to provide New York's poor with even a bare minimum amount of the legal help that they need. Who will provide these additional millions of hours of pro bono legal services? The answer is obvious - it is attorneys such as yourselves, through bar associations working together with the court system, who will fill this void. A statewide survey in 2002 of pro bono activities of the New York Bar found that 46% of New York lawyers provided some pro bono service to the poor; in other words, 54% provided no such services. Moreover, just 26.5% provided more than 20 hours of service, the amount recommended by the Administrative Board of the Courts in its 1997 pro bono resolution. Also in 2002, the New York Unified Court System hosted 4 pro bono convocations to brainstorm issues and develop tangible, feasible ideas and strategies for expanding pro

bono service in New York. Judges, bar leaders and practicing attorneys, and legal educators from New York and elsewhere, were among those who participated in the convocations. From these convocations the following findings emerged:

First, a need existed to increase pro bono services in NYS. Next, it also determined a formal statewide initiative was necessary and desirable. Further, stakeholders should be involved in the statewide program that is to be developed to expand pro bono and that the judiciary should have a significant role in the statewide program, but local leadership design, implementation and control are essential for a comprehensive and workable program. And most importantly, pro bono service should be voluntary. The convocations made specific recommendations including the following:

1. That local pro bono action committees throughout New York State, supported by a statewide standing committee on pro bono, should develop local pro bono action plans;
2. That the Judiciary's leadership role in increasing pro bono services should include, among other things, development of educational recruitment and recognition programs for attorneys;
3. That court based initiatives should be developed to facilitate court access for litigants with pro bono attorneys;
4. Pilot projects should be set-up to test the viability of discreet task representation, better known as "unbundled legal services", as a way to increase pro bono service;
5. Material for law students and newly admitted attorneys should emphasize pro bono service; and finally,
6. A methodology should be developed for the ongoing collection of data about pro bono service levels.

We are now in the formative stages of implementing a pro bono plan for the 4<sup>th</sup> Judicial District. The goal will be to increase pro bono activity in the entire 4<sup>th</sup> District through the cooperative efforts of Judges, lawyers, bar associations and entities already engaged in improving poor people's access to justice in the District, such as the Legal Aid Society of Northeastern New York, the Rural Law Center of New York and the Legal Project of the Capital District Women's Bar Association. It is not my intention to re-invent the wheel, however, so I will be looking to each of these organizations to see what has been working for them and find ways to increase lawyer participation. So, you can see that pro bono solutions begin and end with you - each of you and your commitment to providing pro bono services. The Judges will do everything within their power and ethical considerations to make this an easier task. To the extent feasible, we will provide flexible scheduling and docket preferences for pro bono cases, when doing so will not contravene statutes or policies that give preference to other cases. We will consider other accommodations, such as providing courthouse space, free copying and telephone access for pro bono attorneys with limited resources, and the like. Important in this plan would be to coordinate training and legal education programs for pro bono counsel. We will continue to develop and present, during the next year, continuing legal education "best practice seminars" in each of the 11 counties in the 4<sup>th</sup> Judicial District. The presenters at those programs will include a resident Supreme Court Justice, in each

county available, along with the other judges, court personnel and lawyers. It is anticipated that there will be an ethics component, which is often highly sought after by practitioners at each program. There will be no charge to attendees. The attendees however, will, in exchange for CLE credit, agree to accept at least one pro bono case or program, or provide other pro bono services, for instance staff or paralegals or the like. In addition, we will refine methods to recruit, retain, train and increase the 4<sup>th</sup> District's pro bono activities through additional programs, not the least of which will be judicial public acknowledgment of those who participate in exemplary pro bono services. I hope that each of you will consider a role in the formation and development of pro bono programs in the counties where you live and practice.

In quoting former Attorney General Katzenbach in his discussions when civil legal issues were initiated in the war on poverty, "too often", he said, "the poor man sees the law only as something which garnishes his salary, which repossesses his refrigerator, which evicts him from his house, which cancels his welfare, which binds him to usury or which deprives him of his liberty because he cannot afford bail. The adversarial system on which our courts are based fails whenever one side goes unrepresented and judgment is entered by default." You and I must fight against such failure. It will take the combined contribution of our time, talents and treasure to accomplish a successful end to this problem. There is no cause more critical. The fundamental fairness of our legal system is at stake. We cannot sit idly by and leave this to others. By committing to this effort now, we will preserve for our children and our children's children, the greatest legal system in the world.

### **Classified Advertising**

#### **Professional Office Suite**

Class A Offices, British American Office Park, Latham. Several windowed offices for rent within professional offices. Conference room, secretarial stations, and kitchen. Available immediately. 1992 sq ft or partial. Contact L. McGregor 690-7000.

#### **Professional Office**

Offices for rent, with or without furniture, conference room, fax, photo, library, reception, etc. 250-650 month. Contact Richard Antokol, 514 State Street, Schenectady, NY 12305, 377-2500

## **RECENT PROGRAMS**

### **Law Day**

On May 4, 2007 the Law Day Committee presented a day long series of events for 80 Schenectady Middle School Students. The committee presented a mock trial and an overview of who is who is in the courtroom. The day concluded with a demonstration by the Sheriff's Department and its canine unit. The Schenectady County Bar Association would like to thank the following committee members:

William Lotze, who developed the fact pattern and organized the trial team  
Michael Tiffany, the professional boxer/victim  
Wendy Altonberg, the defendant  
Tracy Chance, who won an acquittal!  
Christina Temante, who kept a straight face despite her witness's testimony  
Daniel Lavelele, our local police officer  
Honorable Judge Clark, who presided over the trial.

The Bar Association would like to thank the following firms for donating the T Shirts that were given to the students and teachers:

The Harding Law Firm  
The DeLorenzo Law Firm  
Gordon, Tepper & DeCoursey

## **Moot Court**

This year's competition was won by Notre Dame Bishop Gibbons. The winning team will be honored at our annual meeting. The Schenectady Bar Association would like to thank Judge Mark Powers and Andrea McConnell for the many hours they spent organizing the event. The bar association would like to acknowledge the following attorneys whose assistance made this year's event possible:

Cynthia Amrhein  
Daniel Burns  
Eleanor DeCoursey  
Brian DeLaFleur  
Dennis Englert  
Sheila Ferruci  
Alan Gebell  
Kenneth Gibbons  
William Lotze  
Lucas Machuta  
Kathryn McCary  
Phillip Mueller  
Keith Muse

Sven Paul  
Deanna Siegel  
Ben Shaw  
Margaret Tabak  
Bruce Trachtenberg  
Timothy Wilkins

### **Judges:**

Honorable Christine Clark  
Honorable Mark Powers  
Honorable Eli Taub  
Honorable Vincent Reilly  
Honorable G. Douglas Griset

## **MISSING WILLS OR FILES**

**We are looking for wills from the following attorneys:**

Richard Brown  
John Desmond  
Pat/Paul Mulligan

If you know who has custody of wills drafted by any of the above, please contact  
SCBA: 393-4115 or [dianeherrmannesq@yahoo.com](mailto:dianeherrmannesq@yahoo.com)

Mike Horan is looking for files from Henry Horseman, please contact him at 374-0468

**ASSISTANCE**

The bar association was recently contacted by a community member seeking a sponsor for his friend, a lawyer from Romania. If you have any interest please contact Henry Worth, 399-6556

**MEMBER ANNOUNCEMENTS**

**Corrections:**

**Richard Fuerst, Esq.**, has recently been made a partner in the law firm of Higgins, Roberts, Beyerl, & Coan, P.C.

**Lawrence DeAngelus, Esq.**, has recently has been made a partner in the law firm of Higgins, Roberts, Beyerl, & Coan, P.C.

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**DO YOU HAVE NEWSLETTER CONTRIBUTIONS?**

If you have something you want included in a future newsletter, July 1, 2007 is the deadline for the Summer Newsletter

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**CLE UPDATE**

Our 2006-2007 program year ended with the ever popular Real Estate practice seminar. 161 local attorneys attended. Thanks to the committee members for their assistance in planning the event, especially Laurence Naviasky and Larry DeAngelus. Special thanks go out to Peter Coffey, who spends countless hours researching his “updates” section and who always receives the highest evaluations from the attendees.

This summer we will be busy planning fall 2007. If you have program ideas please email, [dianeherrmannesq@yahoo.com](mailto:dianeherrmannesq@yahoo.com).

Under consideration are: a “Totally Ethics” program, allowing you to earn all your ethics credits at once; DUI, a basic session with important updates; Trial Techniques covering the basics (direct, cross examination, how to introduce evidence); and a ½ day program on Special Education Law.

## Joseph F. Egan Schenectady County Supreme Court Law Library: An Update By Laurie Barber

Schenectady County Judicial Building  
612 State Street, Third Floor

The Schenectady County Supreme Court Law Library, also known as the Joseph F. Egan Library, exists as part of the New York State Unified Court System public access library network. Its mission is to provide legal reference information, materials and professional library services to support the needs of the bench, the bar and the general public. It is open to and welcomes attorneys, students and the public from 9:00 AM to 4:45 PM daily, Monday through Friday.

The library has an extensive collection of primary New York and Federal materials as well as treatises, loose leafs, formbooks and other books relevant to the work of the courts and the legal reference needs of the community.

The Unified Court System provides free wireless access for personal laptop users in the library and no cost access to commercial legal databases (WESTLAW, LEXIS, and Lois law) as well as the Unified Court System’s website Court Help. There are currently two public access computers and a printer available for online research. Downloaded material can be printed for a nominal per page charge or emailed. The computers are used on a thirty minute first come first serve basis. In addition, appointments can be made in advance to reserve online legal research time by calling 285-8518.

### **RECENT DECISIONS**

Prepared by J. David Burke

## ATTORNEYS

***Matter of Giaquinto v Commissioner NYS Dept. of Health*, \_\_\_AD3d\_\_\_ [April 5, 2007]**

Petitioner was the prevailing party in a 42 USC §1983 where he raised interrelated claims based upon violation of his rights under both state and federal statutes pertaining to Medicaid. Because he only sought retrospective relief (remedying a prior erroneous decision) against a state officer acting in her official capacity, he was not entitled to counsel fees against the State under 42 USC §1988.

***Rudolf v Shane, Dachs, Stanisci, Corker & Sauer*, \_\_\_NY3d\_\_\_ [April 26, 2007]**

In a negligence action plaintiff's counsel asks the court to give an erroneous charge that placed a greater duty upon the plaintiff than the correct charge. Jury returns a \$255,000 verdict. Verdict set aside and before jury returned verdict in second trial, plaintiff settled for \$750,000. Now comes the malpractice action against lawyer number 1. In that action, Court holds that plaintiff is entitled to recover the litigation expenses incurred to correct attorney # 1's error and the expert fees for the second trial. Court held plaintiff was not entitled to recover interest on the \$750,000 settlement from the date of the first trial because it is pure speculation that, had the first jury been properly charged, it would have returned a \$750,000 verdict. I suppose one may ask why the judge gave the wrong charge in the first place.

***Muriel Siebert & Co. v Intuit Inc.* \_\_\_NY3d\_\_\_ [May 8, 2007]**

Plaintiff sues defendant for breach of contract. D, plaintiff's employee, was an important participant in the events underlying the lawsuit to the extent he was privy to discussions concerning plaintiff's litigation strategy. Plaintiff fires D. Without telling plaintiff, defendant's attorneys interview D. Should they be disqualified from representing defendant? Court says no, because as long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct *ex parte* interviews of an opposing party's former employee. Here, defendant's attorneys advised D that he should not disclose any privileged or confidential information and did not elicit such information nor inquire about plaintiff's litigation strategy. One may ask was the *ex parte* conversation worth the aggravation? I doubt it.

## CRIMINAL LAW

***People v Walker*, \_\_\_AD3d\_\_\_ [March. 22, 2007]**

It never hurts to try. After his 5<sup>th</sup> DWI conviction, defendant requests that he be allowed to undergo inpatient treatment at St Joseph's Rehab Center. Washes out 3 days later, goes off to jail. On appeal argues that his placement in a religious based rehab facility was a violation of his rights under the Establishment Clause of the 1<sup>st</sup> Amendment. Gee, the Court didn't agree.

***People v Gomcin*, \_\_\_NY3d\_\_\_ [March 27, 2007]**

Guy in a bar strolls up to female undercover cop and ask her “if she wanted to take a hit of cocaine.” Probable cause to arrest? Court says no, because without knowing the context of the conversation, defendant’s bare statement does not support the inference that he possessed cocaine. Even so, not a good pick up line.

***People v LeGrand***, \_\_\_NY3d\_\_\_ [March 27, 2007]

Court holds that where the case turns on the accuracy of eyewitness identification and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for the trial court to exclude expert testimony on the reliability of eyewitness identification

***People v Rowland***, \_\_\_NY3d\_\_\_ [March 29, 2007]

In ***People v Pichardo*** (1 NY3d 126 [2006]) the Court held that where a guilty plea is induced by the Court’s explicit promise that the defendant will receive a shorter sentence to run concurrently with a longer sentence in a prior case and the conviction in the prior case is reversed, the defendant may withdraw his or her plea. Court holds that the ***Pichardo*** rule even applies where the second sentence is longer than the sentence on the first conviction that is subsequently reversed.

***People v Havrith***, \_\_\_NY3d\_\_\_ [April 3, 2007]

Order of protection directs defendant to turn over his guns to the police. He turns over an unlicensed handgun and is charged with criminal possession of a weapon. Defendant moves to suppress claiming he was compelled to produce evidence protected by the Fifth Amendment. Applying the act of production doctrine, the Court agrees. Under this doctrine even if the thing demanded is not privileged, the act of production may be. To determine whether the doctrine applies the court must first assess whether the compelled act of production is testimonial (it reveals the defendant’s subjective knowledge or thought processes) and secondly must determine whether the act of production is incriminating.

***People v Mack***, \_\_\_AD3d\_\_\_ [April 5, 2007]

Inherent in the right to assistance of counsel is the right of a defendant to representation by an attorney of his or her own choosing if he or she can pay for the representation or the attorney is willing to represent the defendant *pro bono*. Where this right is wrongly denied such deprivation constitutes a violation of the Sixth Amendment that is not subject to a harmless error analysis.

***People v Hines***, \_\_\_AD3d\_\_\_ [April 12, 2007]

Defendant argues that the count of an indictment charging him with assault was duplicitous because it covered acts occurring both inside and outside an apartment. Court says no because the assault happened over a short period of time, without apparent abeyance, and was triggered by a single incident of anger.

***People v Jenner***, \_\_\_AD3d\_\_\_ [April 26, 2007]

Defendant has gripe against DSS, tells DSS worker I’ll get a gun. And I’ll take care of that \*\*\*\*\*once and for all, and I’m not kidding. That statement, among others, gets you

indicted for making a terrorist threat (Penal Law §490.20 [1]).

***People v Jackson***, \_\_\_AD3d\_\_\_ [April 26, 2007]

Before case law changed, defendant pled guilty to depraved indifference murder and waived his right to appeal. He now challenges the factual sufficiency of his plea allocution. Sorry, this claim is foreclosed by the appeal waiver which encompasses any argument that does not involve a right of constitutional dimension going to the very heart of the process.

***People v Chiddick***, \_\_\_NY3d\_\_\_ [May 1, 2007]

Penal Law defines “physical injury” as the impairment of physical condition or substantial pain. In determining whether the defendant inflicted substantial pain such factors as the objective view of the injury, the victim’s subjective description of what he or she felt, whether the victim sought medical treatment and the motive of the offender should be considered. Here the offender bit the victim’s left ring finger which caused the fingernail to crack and his finger to bleed, injuries that required the administration of a tetanus shot and a bandage. Court, applying the foregoing factors, found that offender inflicted substantial pain. I’d say the defendant bit off more than he could chew. Sorry.

***People v Newton***, \_\_\_NY3d\_\_\_ [May 1, 2007]

For the purposes of third-degree sodomy, the proper inquiry for the jury on the lack of consent issue is not whether the defendant actually perceives a lack of consent, but whether the victim, by words or actions, clearly expresses an unwillingness to engage in the sexual act in such a way that a neutral observer would have understood that the victim was not consenting.

## **EVIDENCE**

***Anderson v Dainack***, \_\_\_AD3d\_\_\_ [April 19, 2007]

A medical expert may be permitted to rely upon inadmissible hearsay evidence (a report completed by another doctor who did not testify) if the evidence is deemed reliable as a basis for such expert opinion in a given field provided such evidence is not the principal basis for the expert's opinion, but only a link in the chain of data supporting his or her opinion.

## **FAMILY LAW**

***Matter of Commissioner of Social Servs v Powell***, \_\_\_Ad3d\_\_\_ [April 5, 2007]

On a motion to vacate an order of filiation the dispositive issue is not whether the

respondent is the child's biological father, but whether he has made a sufficient showing that the order of filiation should be vacated.

***Matter of Vandusen v Vandusen***, \_\_\_AD3d\_\_\_ [April 5, 2007]

Family Court issues order of custody based on parties' agreement. On a petition to modify the order, the order is just one factor in the best interests analysis, but;

***Matter of Leo v Leo***, \_\_\_AD3d\_\_\_ [April 5, 2005]

Where Family Court issues a custody order after a full hearing a petitioner seeking to modify the order must show a sufficient change in circumstances making modification necessary for the continued best interests of the kids. I know you guys know that, but repetition never hurts, especially when you are, like me, on the brink of senility, or maybe over it as in my case.

***Matter of Kayla F.*** \_\_\_AD3d\_\_\_ [April 12, 2007]

A child's consistent repetition of a statement to multiple persons does not satisfy the corroboration requirements of Family Law §1046, but statements of different kids regarding the same incident can cross-corroborate each other.

***Matter of Walker v Gilbert***, \_\_\_AD3d\_\_\_ [April 26, 2007]

Spouse receives a non-recurring large sum of money (negligence settlement). Court holds that it may treat the entire net settlement award as available for child support purposes even though preferred approach is to increase the support obligation by applying a reasonable rate of return to the funds received and imputing that amount of income to the spouse as income.

## MUNICIPAL LAW

***Perlmutter v Four Star Dev. Assocs.*** \_\_\_AD3d\_\_\_ [March 29, 2007]

Absent a formal act adopting the property as a public street, a town's acceptance of a deed conveying the fee to an unimproved strip of land is not enough to create a public highway. Also, the six-year limitation on the life of an unused public easement set forth in Highway Law §205 does not apply where a town has acquired a fee to the land in question.

***Matter of Palladino v Zoning Bd. Of Appeals***, \_\_\_AD3d\_\_\_ [April. 12, 2007]

Zoning Board vote on petitioner's application for a variance was tied. When there is a tie vote judicial review encompasses an examination of the entire record, including transcripts of the meeting at which the vote was taken along with the affidavits submitted in the CPLR article 78 proceeding

***Matter of Clinton County v Miner***, \_\_\_AD3d\_\_\_ [April 12, 2007]

Default judgment in tax foreclosure proceeding. Under RPTL §1131 you have one month after entry of judgment to move to open the default and must proffer a reasonable excuse for the default as well as a meritorious defense.

***Matter of Ohrenstein v Zoning Bd of Town of Canaan***, \_\_\_AD3d\_\_\_ [April. 19, 2007]

Zoning Board grants variance, doesn't make findings, determination annulled? Not necessarily if a review of the record demonstrates that the ZBA did make specific factual findings supporting its determination. In addition to the record, Court may also look to the agency's formal return to ensure that the necessary record support for the decision exists.

***Matter of North Country Citizens for Responsible Growth v Town Bd.*** \_\_\_AD3d\_\_\_ [April 26, 2007]

When does the 30 day Statute of Limitations begin to run? On October 25, 2005 the Town's ZBA approves Wal-Mart's request for a variance. On October 5, 2005, the Planning Board issued its SEQRA findings and on October 26, 2005 approved Wal-Mart's site plan. Court holds that when the same agency makes the SEQRA determination and approves the site plan, the petitioners do not suffer a concrete injury until the site plan is approved. Thus the Statute began to run on October 26 instead of October 5. But watch out, the rule is different when the SEQRA determination is made by one agency and review of the action is made by a second agency or legislative body.

## **NEGLIGENCE AND OTHER TORTS**

***Hazelton v D.A. Lajeunesse Bldg. & Remodeling***, \_\_\_AD3d\_\_\_ [March 15, 2007]

Violations of the V & T Laws that constitute negligence *per se* may be excused if the automobile accident clearly results from an unforeseen and unexpected medical emergency. Here, defendant's claim that he "blacked out" that was unsupported by any medical evidence did not create an issue of fact regarding an unforeseen medical emergency.

***Oboler v City of New York***, \_\_\_NY3d\_\_\_ [March 22, 2007]

Points out that the affirmative negligence exception to prior written notice laws is limited to work by a municipality that immediately results in the existence of a dangerous condition.

***Thyroff v Nationwide Mutual Ins. Co.***, \_\_\_NY3d\_\_\_ [March 22, 2007]

Holds that the common law cause of action of conversion applies to documents stored on a computer. If you are interested in legal history this case contains a neat history of the development of the conversion cause of action. I think it's time for me to get a life if the history of conversion excites me.

***Monreal v NYS Dept. of Health***, \_\_\_AD3d\_\_\_ [March 22, 2007]

Doctor, the subject of a disciplinary investigation, sues the Dept. of Health & Office of Professional Medical Conduct for harassment. Sorry Doc, where the decision to undertake disciplinary action involves the exercise of discretion of a judicial or quasi-judicial nature, the disciplinarians are immune from suit. In any event, New York does not recognize a common-law

cause of action to recover damages for harassment.

***Lawliss v Quellman*, \_\_\_AD3d\_\_\_ [March 22, 2007]**

Plaintiff hurts shoulder in workplace accident. His doctor recommends immediate surgery. Plaintiff undergoes IME for Workers' Comp. The IME doctor tells plaintiff you don't need surgery, physical therapy will do the trick. It doesn't, plaintiff sues IME doctor for malpractice. Court points out that, while an IME performed at the request of a third party does not give rise to an actionable physician-patient relationship; such relationship may be implied where the IME physician affirmatively advises the patient.

***Ryan v Preferred Mut. Ins. Co.*, \_\_\_AD3d\_\_\_ [March 29, 2007]**

Fire loss, insurance adjuster tells plaintiff the insurer would cover the loss. Plaintiff goes ahead and makes repairs. Insurer denies coverage. Plaintiff sues adjuster for negligent misrepresentations. Court points out that as a general rule an insurance adjuster, acting as an agent for a disclosed principal and whose actions were undertaken at the behest and direction of the insurer, cannot be held personally liable to an injured plaintiff. Here, because the Court found that the relationship between the adjuster and plaintiff was so close as to approach privity, it did not dismiss the complaint.

***Rose v Heaton*, \_\_\_AD3d\_\_\_ [April 5, 2007]**

A dog case, I can't resist. Plaintiff predicated liability upon claimed violation of a local dog ordinance. Sorry, plaintiff may only proceed under strict liability based on the owner's knowledge of the dog's vicious propensities, citing *Bard v Jahnke*, 6 NY3d 592. Also see, *Alia v Fiorina*, \_\_\_AD3d\_\_\_ [April 19, 2007] A violation of leash law does not give rise to an inference that the owner had knowledge of the dog's propensity to interfere in traffic.

***Dobson v Gioia* \_\_\_AD3d\_\_\_ [April 12, 2007]**

Under Navigation Law §48 an owner of a vessel is liable for injuries that result from the negligent use or operation of the vessel. A certificate of title is *prima facie* evidence of ownership, but such presumption may be rebutted by evidence that a non-title holder had a possessory interest in the vessel with its attendant characteristics of dominion and control.

***Forget v Smith*, \_\_\_AD3d\_\_\_ [April 26, 2007]**

A plaintiff's sudden stop provides a non-negligent explanation for a rear-end collision sufficient to overcome a *prima facie* case of negligence, particularly when there is no evidence that anything other than the abrupt stop caused the collision, or that the sudden stop was unexplained or was undertaken without proper signaling. Here, Plaintiff stopped to avoid deer, jury held in favor of Defendant.

***White Plains Coat & Aprilon Co. v Cintas Corp.*, \_\_\_NY3d\_\_\_ [April 26, 2007]**

Case points out there is a distinction between tortious interference with existing and enforceable contracts and tortious interference with prospective contracts with greater protection being accorded an interest in an existing contract where the respect for individual contract rights outweighs the public benefit derived from unfettered competition as opposed to the

more speculative interest in a prospective contractual relationship.

## PROCEDURE

***Matter of Palmateer v Greene County Indus. Dev. Agency***, \_\_\_AD3d\_\_\_ [March 15, 2007]

When you are seeking an extension of time to serve a summons under the “interest of justice” standard (CPLR 306-b) don’t think the Court can’t consider your diligence, or more likely lack of diligence, in serving the summons within the statutory period.

***Kolnacki v State of New York***, \_\_\_NY3d\_\_\_ [March. 22, 2007]

When you file a claim in the Court of Claims, be sure you include the “total sum” of monetary damages because, if you don’t, you go home because it is a jurisdictional defect. Of course in other contexts it is wrong to include a specific amount of damages (CPLR 3017 [c]). Why lawyers age rapidly.

***Newmark v Animal Emergency Clinic of Hudson Valley***, \_\_\_AD3d\_\_\_ [March 22, 2007]

During trial plaintiff request an adjournment to produce her expert witness. Court states that generally it is an improvident exercise of discretion to deny such request where the evidence is material, and the application is properly made and is not made for the purposes of delay, and where the need for an adjournment does not result from the failure to exercise due diligence.

***D’Orazio v Mainetti***, \_\_\_AD3d\_\_\_ [April 12, 2007]

On a motion for leave to amend pleadings, the proponent of the motion is required to make an evidentiary showing sufficient to support the proposed claim.

***Sherry v North Colonie Cent. School Dist.***, \_\_\_AD3d\_\_\_ [April 12, 2007]

When a retrial has been ordered, the parties are put in the same position as if no trial had been conducted, unless the court restricted the scope of the retrial.

***Cahill v Lat***, \_\_\_AD3d\_\_\_ [April 12, 2007]

In this medical malpractice case Court points out that neither the infancy toll nor the continuous treatment doctrine toll applies to derivative claims.

***Robare v Fortune Brands***, \_\_\_AD3d\_\_\_ [April 19, 2007]

Plaintiff smoked for 30 years until he got throat cancer in 1991. More than 3 years later, sued tobacco companies who raised Statute of Limitations defense. Plaintiff asserts they should be equitably estopped from asserting such defense. Court said no because tobacco companies’ mere denial of wrongdoing is not sufficient to create an estoppel nor was there was any fiduciary relationship between the parties which imposed upon the tobacco companies the obligation to inform plaintiff of the facts underlying the claim.

***Manufacturer's & Traders Trust Co. v Reliance Ins. Co.***, \_\_\_NY3d\_\_\_ [May 3, 2007]

Escrow agent begins interpleader action against 3 claimants (A, B, C) to escrowed funds. Eventually, it was determined that the funds belonged to A who then sought interest against B and C. Court, citing CPLR 5001 (a), said no because there was no sum awarded against B and/or C and no benefit to them that would justify requiring them to pay interest.

***Ross v Louise Wise Servs., Inc.*** \_\_\_NY3d\_\_\_ [May 3, 2007]

When plaintiffs adopted a baby in 1961, as was the norm at that time the adoption agency did not tell the adoptive parents that both of the birth parents and members of their families had suffered from emotional disturbance. In 1995 the child was diagnosed as a paranoid schizophrenic. In 1999 plaintiffs filed suit alleging a cause of action for wrongful adoption/fraud and seeking punitive damages. Although the defendant conceded that it intentionally misrepresented facts regarding the child's background, punitive damages are not allowable since its conduct did not evince a high degree of moral turpitude inasmuch it was the policy in the 1960s not to disclose certain information about a child's biological background.

## **REAL PROPERTY LAW**

***328 Owners Corp. v 330 West 86 Oaks, Corp.*** \_\_\_NY3d\_\_\_ [April 3, 2007]

A deed should not be construed merely by reference to the language in the *habendum* clause (whatever that is) but rather the parties' intent should be gathered from the whole instrument.

## **WORKERS' COMPENSATION**

***Matter of LaCroix v Syracuse Executive Air Serv.*** \_\_\_NY3d\_\_\_ [March 29, 2007]

Holds that Workers' Compensation Law §25 precludes the payment of compensation for loss of a body part due to permanent partial disability in a lump sum, rather payment must be made bi-weekly or as wages customarily accrue.

## **MINUTES--SCHENECTADY COUNTY BAR ASSOCIATION--MEMBERSHIP**

REGULAR MEETING--April 19, 2007--12:00 p.m.--The Glen Sanders Mansion, Scotia, NY

The meeting was called to order by President Drago at 12:30 p.m., 40 members of the Association

being then present and constituting a quorum.  
President Drago welcomed the judges present.

#### TREASURER'S REPORT

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

#### PRESIDENT'S REPORT

The Association has some CLE presentations upcoming—members should encourage fellow practitioners to attend. The Family Law seminar will be on April 27 and the Real Estate seminar on May 17. Association committees are already working on seminars for next year.

Roland Faulkner has been appointed as the Association's delegate to a Judicial Salary Panel being organized by the Office of Court Administration.

Joanne Haelen and Dave Burke will be the Association's delegates to the State Bar Association.

City Court Judge Vincent Versaci just had a son, Michael.

#### ELECTION OF THE NOMINATING COMMITTEE

President Drago appointed Frank Putorti, Mike Basile and Jean Carney as tellers to distribute, collect and count ballots for the election of a nominating committee.

#### COMMITTEE REPORTS

##### MEMBERSHIP

The following have applied for, and were admitted to, membership in the Association:

Andrew J. Healey, sponsor Frank Putorti  
Annette L. Kahler, sponsor Kathryn McCary  
Leah Hallenbeck Olson, sponsor Robert Hoffman  
Anne B. Stapleton, sponsor Bruce Trachtenberg  
James E. Tyner, sponsor Anthony Fazzone  
Margaret A. Vella, sponsor Barbara King

##### MOCK TRIAL

Mark Powers announced that the final contest is this week; this has been a year of spirited trials.

##### REAL ESTATE

Chair Larry Naviasky announced that the seminar will be held May 19, and promises to be very informative.

##### LAW DAY

Chair Diane Herrmann reported that the event this year will take place on Friday, May 4. There will be a social hour and awards presentation for members on Law Day itself, May 1.

#### JOINT DINNER

Phil Rodriguez reported that the joint dinner was well attended, and those who attended enjoyed it. Organizing the dinner will be the Bar Association's responsibility in 2008.

##### PRACTICE CONTINUITY

Chair Mike Basile invited those interested in information concerning the committee to call him.

##### MEMORIAL AND SUNSHINE

Committee Chair Neil Moynihan offered the following resolution in memory of Wolfgang J.

Riemer:

*Whereas, Wolfgang J. Riemer, died at his residence in Schenectady on March 3, 2007, and*

*Whereas, Wolfgang J. Riemer, son of the late Josef and Elsie Riemer, was born December 10, 1927; a life long Schenectadian having graduated from Nott Terrace High School and Union College, class of 1951, where he had been manager of its cross-country team, editor of the *Concordiensis* and member of Kappa Sigma Fraternity. Wolfgang excelled at Albany Law School, where he was an honor student, editor of the Law Review and from which he received his degree *cum laude* in 1954, and*

*Whereas, Wolfgang J. Riemer served his country honorably subsequent to World War II, as a Sergeant in General McArthur's Honor Guard, one of the most elite segments of the Army from 1946 to 1947 in Tokyo, Japan, and*

*Whereas, upon his subsequent admission to the bar in 1954, Wolfgang joined the law firm of Poersch and Sevits until establishing his own law office as a sole practitioner which he continued successfully until the time of his death, covering a period in excess of 50 years. Throughout his professional career his legal skills and ability were recognized and acknowledged by his colleagues of the bar, and*

*Whereas, he was an active member of several professional, civic and community organizations; having diligently served Better Neighborhoods, Inc., Girls Club, Inc., Schenectady Economic Development Corporation, Animal Protective Foundation and Niskayuna Rotary, among others, and*

*Whereas, Attorney Riemer further served his community as a member and former chairman of the Schenectady County Board of Supervisors and its successor, Board of Representatives for 14 years, as a member of the New York State Constitutional Convention in 1967 and as the Republican Party's candidate for the United States Congressional House of Representatives, and*

*Whereas, above all else, Wolfgang J. Riemer, Esq., was an unassuming gentlemen, true to his family, his faith, as an active member of Friedens United Church of Christ, and his clients whom he served so faithfully for more than five decades, and*

*Whereas, he is survived by his wife Elliess, his four daughters, Kathryn, Cynthia, Christine and Joanne and five grandchildren, now, therefore, be it*

*Resolved, that this Schenectady County Bar Association records with deepest sorrow the death of its member **Wolfgang J. Riemer**, Esq. and takes this occasion to note publicly the loss of an attorney who, in his professional, community and family life, exemplified integrity of the highest character, and be it further*

*Resolved, that this resolution be incorporated in the minutes of this meeting and recorded in journal of proceedings, and a copy thereof be transmitted to **Wolfgang J. Riemer's** wife, Elliess and family*

Karen Drago commented that she knew Wolfgang because, when she was very young, her family lived near his. She never knew a kinder person, both professionally and personally. He was intelligent, loved his family, was a true gentleman and a wonderful man.

Bob Hoffman noted that he shared space with Wolf in the early 90's. Wolf was a mentor from he learned priorities in family and practice—and civility, Wolf was kind to everyone. His long-time secretary called him the Client Whisperer because of his skill in turning an angry client into a happy client. Wolf also did *pro bono* work within the community. However, closing his office is requiring that Bob do an archeological dig on Wolf's desk!

Bruce Trachtenberg observed that, though they didn't cross paths much, Wolf did a lot for one

and all of us by his example.

Neil Moynihan recalled commuting to and from law school with his good friend, Wolf Riemer, and that he has great memories and close fond thoughts of Wolf throughout their shared professional lives. Wolf was the most unassuming but intelligent man he had ever met—and it was at a meeting at Wolf’s home that Neil met his wife 49 years ago.

Thereupon, on Motion of Chair Neil Moynihan, the Resolution was unanimously adopted.

REPORT OF THE TELLERS

The Tellers reported that the following have been elected to serve as the Nominating Committee:

J. David Burke  
Albie Ferrucci  
Brian Ferrucci  
Phil Rodriguez  
Crystal Doolitty

ANNOUNCEMENTS

John Seebold noted that the Capital District Trial Lawyer’s Association will be honoring Judge Reilly and Albany Attorney Robert Roche at their June dinner.

Brian Ferrucci noted that the Supreme Court Law Library will be hosting an open house this coming week.

There being no additional business to come before the Membership, the meeting was adjourned at 1:00 p.m.

Respectfully submitted,  
Kathryn McCary, Secretary

Schenectady County Bar Association  
PO Box 1728

Schenectady, NY 12301

