

# BULLETIN

www.eriebar.org

## President's Letter

By Giles P. Manias



Eight bar presidents ago, we signed an agreement with le Barreau de Lille; we have honored that agreement since then and have endeavored to develop it. There have been a handful of our lawyers who have volunteered their time and abilities to make it work. We didn't know where it would take us, but it seemed a good thing to do.

Since then we have had 14 or so French law graduates here to do part of their required internship. We have assisted them in their program of work and study. Many of them have gone on to do very well and to spread the word about Buffalo and the Bar Association. We have increased our agreements to include the Kent Law Society of Great Britain. We got to know these individuals and their bar leaders. We have put faces to names, and we got to know our French and British counterparts as individuals. We learned that they act, think and behave almost exactly the same as we do, only in different countries.

In their parts of the world they are the ones who do what we do. They make things happen. Because of our joint sister-cities initiatives, we can now offer each other opportunities with tremendous potential for our clients and ourselves. We merely have to reach out to take advantage of it.

So, about 11 months ago we accepted the invitation of the president of the Lille Bar to participate in their just-completed International Conference. Fifty-two hundred lawyers attended from Europe and around the world. The conference was produced by the National Bar Association of France, and hosted by the Lille Bar Association.

### Suspicious Activities?

As I mentioned in my last column, my part was to participate in a panel discussion about "lawyer-client confidentiality" and "professional secrets exclusion" (lawyer work-product). I presented the American law comparisons. The European Union has had to issue sweeping directives, sustained by recent landmark case deci-

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## Mortgage Foreclosure Defense Explained in CLE Program

Home foreclosures have recently reached epidemic levels in the United States. According to a recent report by the Mortgage Bankers Association, nearly 10 percent of homeowners with mortgages faced foreclosure or fell behind in their payments during the first three months of 2008. By the end of 2007, foreclosures had already risen to a 23-year high.

Erie County has been hit especially hard by the foreclosure crisis. A foreclosure study conducted by the Western New York Law Center (WNYLC), which consists of an analysis of *lis pendens* filings in 2006, 2007 and 2008 (to date), shows that the number of foreclosure filings each year has hovered around 3000. A significant number of homeowners are affected, especially given the declining population of Erie County. A review of mortgages filed in Erie County in 2007 and 2008 shows that over 20 percent of these loans have adjustable interest rates.

The mortgage crisis has created an overwhelming need for legal assistance for struggling homeowners who are bewildered by the foreclosure process. To help address that need, the Erie Institute of Law, in cooperation with the WNYLC, has developed a two-day CLE program entitled **Mortgage Foreclosure Defense Training**, to be held on Thursday, **December 11** and Friday, **December 12** at the Hyatt Regency Buffalo.

The program will cover the foreclosure process and defenses to foreclosure, including both federal and state claims. Presenters will include attorneys from the

National Consumer Law Center and New York state attorneys handling cases under the new subprime legislation in New York. Speakers from the Neighborhood Economic Development Advocacy Program (NEDAP) and Empire Justice are also expected to participate in the seminar.

In addition to explaining the foreclosure process in New York, the program will cover adjustable rate mortgage issues, understanding and evaluating appraisals, the consequences of secondary market players and securitization, consumer claims and defenses, major federal laws, HOEPA, and more. Hypothetical case studies will be used for group analysis and discussion.

### Legislation Offers Help for Homeowners Facing Foreclosure

In an effort to target the negative impact of the mortgage foreclosure crisis on borrowers and communities throughout the state, comprehensive legislation (A.10817-A; S.8143-A), was passed by the New York State Legislature and signed into law by Governor David Paterson in August of this year. As of September 1, homeowners facing foreclosure had new legal tools and resources available to help them remain in their homes. The legislation provides for assistance to borrowers with sub-prime, high-cost and non-traditional mortgage loans that are in danger of losing their

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Please Join Us in Welcoming Newly Elected Members of the Judiciary to the Bench on Thursday, January 8 at 1:00 pm in the Ceremonial Courtroom, Part One, Erie County Hall, 92 Franklin Street, Buffalo, New York.

## Lawyers' Holiday Drive to Benefit Local Children in Need

For the fourth year in a row, Buffalo Christmas Wishes will be providing Christmas gifts to local students in need. Thanks to the generosity and enthusiastic support of the legal community, Buffalo Christmas Wishes was able to give over 1,000 gifts to 330 students attending the Niagara and Enterprise Charter Schools last Christmas season.

This year for the second time, the St. Augustine Scholars and the St. Monica Scholars schools will be a part of this program, raising the total number of deserving students to over 380. As in previous years, almost all of these children qualify for the federal lunch assistance program.

"If you are not familiar with Christmas Wishes, the concept is simple: make the holidays a little brighter

for students in our city by providing gifts for those who might not otherwise receive them," according to Buffalo lawyer and program organizer Brian Biggie.

Please visit [www.buffalochristmaswishes.com](http://www.buffalochristmaswishes.com) for further information. The Web site lists each of the students along with their holiday wishes. If you decide to participate, choose a child, and simply sign up to provide that child with a gift right on the Web site. After the child is chosen, a confirmation page will appear. Please print this page and attach it to your gifts. Most participants spend approximately \$20 on a gift for their child.

Given the increased number of students this year, Buffalo Christmas Wishes is also accepting cash donations for additional gifts and wrapping supplies. Please

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"Blessed is the season which engages the whole world in a conspiracy of love."

~ HAMILTON WRIGHT MABIE

ON BEHALF OF THE BOARD OF DIRECTORS AND STAFF OF THE BAR ASSOCIATION OF ERIE COUNTY, PLEASE ACCEPT OUR MOST HEARTFELT WISHES FOR A HAPPY HOLIDAY SEASON AND A BRIGHT AND PROMISING NEW YEAR!



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Organized 1887

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**Letters to the Editor**

Dear Editor:

It has been a bad year. Paul Ivan Birzon and Mark G. Hirschorn have left us. I was uniquely gifted to know them, as associate and partner, as PIB and MGH. In 1979, as a second-year law student, I was about to be married and had no job. Vic Fuzak from Hodgson Russ (my dad's partner), went to bat and found me a place with Paul Birzon, Nelson Zakia and the Hon Janice M. Rosa. They were then known as Birzon, Zakia & Rosa. I was hired to help work up a personal injury case featuring a young man who lost his arms in an industrial accident. After that summer, when the project was over, I kept coming to work and they kept paying me.

I cannot believe how much I learned from Paul (Dean of Evidence), Nelson (the most creative lawyer in WNY) and Jan (the most practical and sensitive lawyer in WNY). In 1990, Paul Birzon decided to restructure the firm. Feeling that it was time for a change, I called Mark Hirschorn and asked if he and Herb Siegel had a place for a 10-year associate. The next day we had lunch at Mother's and the deal was made. Let there be no mistake, Paul and Herb did not like one another. I had partnered with Paul on two or three big cases that went to trial against Mark and Herb. Yet, Herb, Mark and Paul were most gracious and allowed me to change teams without losing relationships or friends.

My career in the law has been greatly shaped by Paul and Mark. My debt to them and my other mentors cannot be described or repaid. Paul and Mark were central figures in my life. 2008 has been a bad year. Paul Birzon has taught many of the bench and bar in his evidence course at the law school. Mark Hirschorn has been a partner, colleague and mentor to many. I worked with and against Mark for almost 30 years. The same for Paul Birzon. I will continue to practice, but I will love it less. They were both giants, and the practice of matrimonial law will be diminished by their loss.

~ Kenneth A. Olena  
Buffalo

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**Letters to the editor** and short articles of general interest to our readers are always welcome. All materials submitted for publication in the *Bulletin* are subject to editing for reasons of style, space and content.

Send all submissions as Word documents to [obrian@eriebar.org](mailto:obrian@eriebar.org) (preferred) or by mail to: **Bulletin Editor, 438 Main Street, Sixth Floor, Buffalo, NY 14202.**

**DEADLINE**• • • **January 2009 Bulletin DEADLINE** • • •The next deadline for ALL *Bulletin* contributors and advertisers is**Wednesday, November 26, 2008.**

Call Susan Kohlbacher at Bar Headquarters for more information, 852-8687.

## bench and bar in the news



This "members only" column is published each month to share news and information among BAEC members. Submissions should be limited to 100 words and will be edited for space and other considerations.

Bench & Bar in the News is reserved to announce items such as: new members of a law firm; name change or relocation; formation, merger, or new affiliation of law practice(s); change in job status; and professional appointments, honors, or awards. Announcements which do not fall into these categories may be published in the Bulletin as paid advertisements.



Maccagnano

**Michelle D. Maccagnano** has joined the firm of Goldberg Segalla LLP as an associate. She will concentrate her practice in commercial and business litigation with an emphasis on debtor/creditor's rights, collection litigation and judgment enforcement. Maccagnano received her undergraduate degree from Rensselaer Polytechnic Institute and her J.D. from the University at Buffalo with a concentration in financial transactions. Maccagnano was previously in-house counsel and vice president of risk assessment for a mortgage company.



Zeftel

**Bruce S. Zeftel** has opened a law office at 69 Delaware Avenue, Suite 1010, Buffalo, New York 14202, 381-9141, bzeftel@zeftel.com. A practicing attorney for 30 years, Zeftel was a partner in Saperston & Day, and Hiscock & Barclay. Before entering private practice, he served as a clerk in the Court of Claims and as an assistant attorney general. He will continue to concentrate his practice in commercial and industrial tax certioraris, real estate, zoning and title litigation, as well as bankruptcy, commercial and estate litigation. He is a regular speaker at Erie Institute of Law CLE seminars and serves as a mediator for the Federal District Court, Western District of New York. Zeftel is a board member of the Erie County Bar Foundation and is chairing its 2008 fund drive.



Hill

**Kate L. Hill** has joined the law firm of Harris Beach as an associate with the educational institutions team and labor and employment law practice group. She practices from both the Buffalo and Rochester offices and focuses her practice in education law, with an emphasis on special education and disability issues. Hill previously worked for a Rochester law firm and also served as an assistant public defender in the Monroe County Public Defender's Office. An attorney coach for the Charles Finney High School Mock Trial Team and a volunteer for Literacy for Life and Buffalo Meals on Wheels, Hill holds a B.A. from the University at Buffalo and a J.D. from its Law School.



Buchanan

Erie County Family Court Judge **Paul G. Buchanan** was awarded the Youth Advocacy Award by Compass House during its recent annual meeting. Compass House provides shelter to homeless children, along with counseling services for them and their families. Judge Buchanan presides over the Juvenile Justice Park of Erie County Family Court. Buchanan was also elected Fourth Department delegate by the New York State Family Court Judges' Association. Family Court Judge **Margaret O. Szczur** was elected vice president of the Association.



Szczur



Doxey

**Deborah A. Doxey**, a partner with Phillips Lytle LLP, has been elected secretary of the New York State Bar Association Business Law Section for 2009. She will continue to serve as a member of its executive committee and is on the leadership progression to chair the Business Law Section in 2012. With a membership of approximately 4,500, the Section is one of NYSBA's largest. Doxey focuses her practice on banking and commercial lending, including secured transactions, asset-based finance, acquisition financing and commercial real estate transactions. She holds a J.D. from Duke University School of Law and a B.A., *summa cum laude*, from the State University of New York at Albany.



Condren



Feeley



Mineo

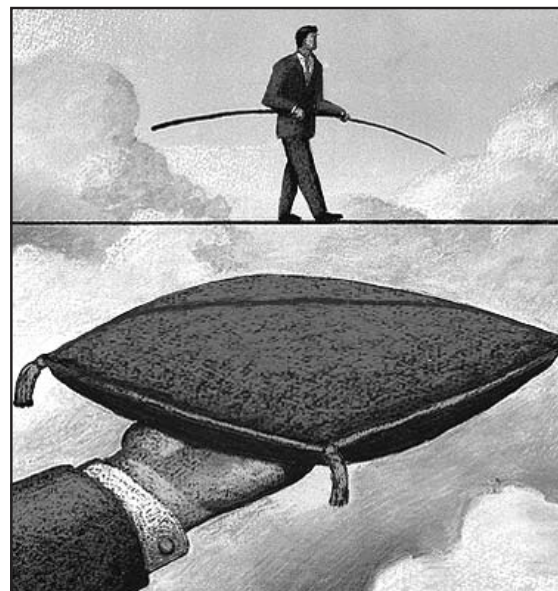
**John R. Condren, Michael T. Feeley, and Nicholas L. Mineo** have joined the law firm of Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC. Condren and Feeley join the firm as partners and Mineo joins as an associate. Condren is a trial attorney concentrating his practice in insurance coverage and insurance defense. He holds a J.D. from the University of Toledo College of Law. Feeley is also a trial attorney, with a practice in insurance defense litigation, insurance coverage, municipal defense, and commercial litigation. He received his J.D. from the University at Buffalo Law School. Mineo focuses his practice on insurance defense issues including premises liability, automobile accidents, and New York State labor law. He holds a J.D. from the Albany Law School of Union University. Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC represents a wide cross section of both local and national clients and the practice includes corporate, real estate and trial attorneys. [B]



## Farewell to the Chief

Paying tribute to retiring Chief Judge Judith S. Kaye at a recent meeting of the New York State Bar Association House of Delegates are former BAEC and NYSBA president Maryann Saccomando Freedman, Lucia B. Whisenand, a director of The New York Bar Foundation, and John R. Horan, Foundation president. The evening included a serenade by NYSBA president Bernice K. Leber, president-elect Michael E. Getnick and the Association's past presidents, with original lyrics composed by Albert M. Rosenblatt and set to the tune of "Sunrise, Sunset."

Photo by Colleen Brescia provided courtesy of the State Bar News.



## The Security of a Safety Net

If you are struggling with health issues, depression, substance abuse or other difficulties, help is here.

Simply call 852-1777 to be connected with colleagues and counselors who can help to break your fall and lift you back up where you belong.

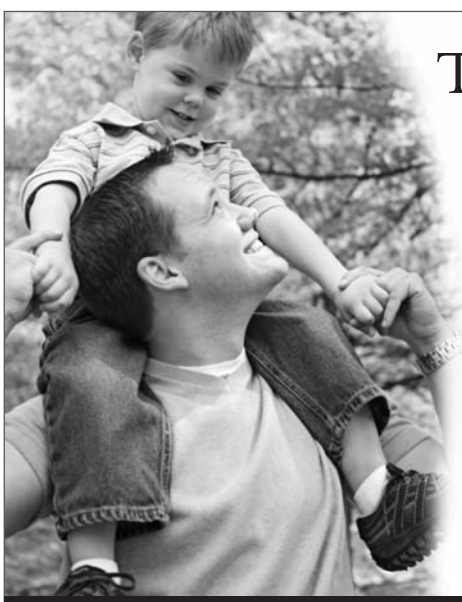


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*It's great to belong to something this good.*



## THE COMPANY OF friends

The Erie County Bar Foundation exists to provide a helping hand to lawyers in need.



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The need may be based on medical problems, job loss, emotional difficulties, family crises or many other situations. No person or problem is categorically excluded.

If you need assistance – or know a friend or colleague who does – please call Ginger Maiman at 481-3486. All services are individualized and completely confidential.

## President's Letter

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sions, that severely impact ethical confidentiality and require lawyers to file "suspicious activity reports" on their own clients. If the lawyer suspects that his client is engaging in activities that are likely to launder money across borders, he or she must report that suspicion to the bar president. The goal is to prevent the possible support of terrorism, organized crime or corporate violations of law by money laundering. It is also necessary to protect the unified monetary system of the European Union.

My co-panelists were the president-elect of the French National Bar, the president-elect of the Law Society of the United Kingdom and Wales, the former presidents of the Belgian and French Bar Associations ... all heavy-hitters and me. I was the first speaker on the first day in the first workshop. I have only recently stopped sweating from the anxiety. I wish to report that I upheld our end of the program. In fact, I have received a request from Lugarno, Switzerland for a copy of my remarks; so somebody liked what I had to say.

Endeavors such as this bestow greater stature upon our own bar association. There are now 5,200 more lawyers in the world who know our name and who respect our participation and effort. Of all the bar associations in the United States, including the ABA and the NYSBA, the only bar association to present on any topic was ours. Even the powerful New York County Lawyers Association (NYCLA), which has a similar agreement with Lille, did not present.

So why did I do it? Because it was good for us ... all of us. I hope you can take advantage of these professional relationships yourself in the future and grow from them. Our bar has put much effort into creating professional relationships throughout our country and now internationally with Lille and Kent. There is a closeness developing and hopefully a broadening of our horizons. We have received many requests from our foreign partners for our members to visit them. It would be good for many reasons to make more use of these relations.

By the way, Lille is a beautiful city, with preserved areas built in the 14th and 15th centuries. Narrow cobblestone streets with small pocket parks at many intersections still carry the modern traffic. There are wide, tree-lined boulevards. There are small shops everywhere, which seem to survive well. Architecturally, the city reminds me of Paris, only less expensive. The people could not have been nicer. They generally are warm-hearted and like Americans. If you make any effort to engage them, they are extremely friendly and ask lots of questions about our politics. They still appreciate what we did in World War II, and speak reverently of our sacrifice. They are in the part of France known as "Flanders," not too far from the beaches where thousands of Americans died and are buried. They have the typical European cultural imperative to be good and generous hosts. Their food is outstanding, and their lawyers have put a lot of effort into developing a relationship with us.

As an aside, I presented about 30 gold buffalo lapel pins to the Lille and British bar leaders, at the mammoth reception held at the Palais des Beaux Arts and to the lawyers who helped us. They became a hot item

and strangers were asking for them by the end of the evening.

I hope I have piqued your interest and curiosity to know more about this unique law-related relationship and opportunity. If you want to learn more and participate, please let us know and you will be notified of upcoming planning meetings and activities.

By the way, in response to the many members who have asked me about whether a sister-city agreement with an Italian Bar Association is a possibility, I also met with a couple members of the board of directors of the Siena, Italy bar association. There is renewed interest on their part to enter into a similar agreement with us. I think we will be able to report progress in a few months.

### Focus on Professionalism

I want to report to you that as a result of the response from many of our members, I am forming a "task force" of respected members of our association to discuss and formulate the structure and purpose of a committee on professionalism. It is my hope that we can develop a program of mentoring and critiquing of behavior of our members in an instructive effort to make the practice of law in our area better for all of us.

We all know lawyers who will think they are above such efforts, and still try to use discourtesy to their benefit. Perhaps by involving the judiciary in these informal efforts, a significant message can be delivered to these colleagues. I'll report any progress as it develops.

### Judicial Candidates Roast

I would like to thank Justice Frank Caruso and all the judicial candidates for their good humor in making this year's judicial candidates roast such a success. This unique tradition has served to keep the bench and bar of Erie County on a friendly even keel for many years. It has proven one more time that this legal community works best when we recognize each other's humanity and keep it real with a little humor. It is much easier to show respect for one another when we can walk a bit in the other's shoes and laugh at ourselves. Thanks again to all! [B]

## Mortgage Foreclosure Defense

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homes. It amends various existing laws to address abusive mortgage loans and servicing and to target distressed property consultants. It also establishes the crime of residential mortgage fraud. The purpose of this legislation is to ensure that borrowers are placed in affordable home loans and hopefully will deter individuals from engaging in the kinds of lending abuses which led to the current mortgage crisis.

Key features of the bill include pre-foreclosure notice requirements and mandatory court settlement conferences. Lenders and mortgage loan servicers are now required to send homeowners a pre-foreclosure notice at least 90 days prior to the commencement of the legal action. The notice refers borrowers to agencies that assist homeowners in negotiating a work-out with lenders, such as a loan modification, easier payment plan, or a period of loan forbearance. The lender or mortgage servicer must attach a list of at least five government-approved housing counseling agencies in the homeowner's geographic region that provide free or low-cost counseling services. A homeowner may raise a violation of this section as a defense to foreclosure action.

Mandatory settlement conferences are required for foreclosure actions filed after September 1, 2008, involving loans covered under the law. If a homeowner appears *pro se* at the conference, he or she will be deemed to have made a motion to proceed as a poor person pursuant to the CPLR and the court may assign counsel. If an action involving one of these loans was filed before September 1, 2008 and has not gone to judgment, a defendant can request that a settlement conference be held. In such cases, the court shall request the plaintiff to identify if the loan is a sub-prime or high-cost home loan.

In order to meet the objectives of this legislation, New York state has allocated funding to housing counseling and legal services agencies to assist homeowners in foreclosure throughout the state. The WNYLC was awarded a grant from the Department of Housing and Community Renewal to implement a sub-prime foreclosure prevention program in Erie County. Together with HomeFront Inc, a HUD-approved housing counseling agency, WNYLC will serve Erie County residents by providing foreclosure prevention services.

Experienced default counselors from HomeFront will work with borrowers in an effort to resolve cases. The WNYLC will represent borrowers in mandatory settlement conferences. Both agencies will accept referrals from all area housing counseling agencies and will work collaboratively with local legal services agencies to provide comprehensive legal services to area homeowners facing foreclosure.

Watch your mail for further information about the seminar. To register now, contact Mary Kohlbacher at 852-8687 or mkohlbacher@eriebar.org. [B]

## Holiday Drive

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provide your name along with your donation and you will be notified what your donation provided. If you wish to send a check, please make it payable to Goldberg Segalla, LLP.

Please drop off your unwrapped gifts to the attention of Brian Biggie at Goldberg Segalla LLP, 665 Main Street, Suite 400 in Buffalo, **before December 18**. If you have any questions about this program, contact Brian at bbiggie@goldbergsegalla.com at any time. Thank you for your continued support in making this worthwhile program a success! [B]

## western district case notes



By Paul K. Stecker and Kevin M. Hogan

### CIVIL RIGHTS

In *Dean v. City of Buffalo* (02-CV-6029P, 9/30/08), two guests sued a hotel, its security contractor and an off-duty police officer employed by the contractor for injuries they sustained when they were arrested in the hotel. The magistrate judge granted the hotel defendants and the security contractor summary judgment dismissing plaintiffs' claims for negligent hiring, training and supervision, but denied the police officer's motion to dismiss plaintiffs' §1983 claim, finding disputed issues of material fact concerning whether he had participated in the arrest and acted under color of law. The decision addresses principles that would apply in other cases involving claims of liability for acts of security guards, especially off-duty police officers.

### MEDIATION

In *Fisher v. SmithKline Beecham Corp.* (07-CV-347A(F), 9/29/08), defendant filed a summary judgment motion based on the statute of limitations the day before a scheduled mediation session. Plaintiffs' counsel traveled from New Orleans to Buffalo to attend the mediation, at which defendant's counsel stated that it

would offer only \$1,000 absent resolution of the statute of limitations issue. The magistrate judge granted plaintiffs' application for fees and expenses related to the mediation, finding that defendant failed to mediate in good faith by not filing the motion in time to permit plaintiffs to seek an adjournment until after the summary judgment motion was decided. [B]

## THINGS YOU NEED TO KNOW

### Supreme Court Protocol for Emergency Applications

The Unified Court System recently set up a protocol by which attorneys can seek assignment of a judge for an emergency civil application in Supreme Court when the courthouse is closed. To assist attorneys in locating a judge, the Court has established a central point of contact with the following toll-free telephone number and e-mail address: (800) 430-8457 or [emergency@nycourts.gov](mailto:emergency@nycourts.gov).

"OCA staff will answer the call or e-mail, obtain basic information from the attorney, and contact the appropriate administrative judge, who will make the necessary arrangements," according to Hon. Ann Pfau, Chief Administrative Judge for New York's Unified Court System.

### Denman Courthouse Holiday Hours

In addition to Thursday, December 25, 2008 and Thursday, January 1, 2009, the M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York will be closed on Friday, December 26,

2008 and Friday, January 2, 2009.

Filings due on Friday, December 26, 2008, will be accepted until 5:00 p.m. on Monday, December 29, 2008, according to JoAnn M. Wahl, Clerk of Court. Filings due on Friday, January 2, 2009 will be accepted until 5:00 p.m. on Monday, January 5, 2009.

### Looking for a Few Good Adjudicators

The Buffalo Public Schools have started a debate program within all high schools. If you are interested in volunteering your time for one or all of the following debates, please contact W. Charles Brandy, director of social studies for the Buffalo Public Schools at 816-3048, extension 8779 or [WBrandy@buffaloschools.org](mailto:WBrandy@buffaloschools.org).

### Debate Dates and Times:

January 16, 2009 . . . . . 9:00 AM – 11:30 AM  
 March 13, 2009 . . . . . 9:00 AM – 11:30 AM  
 May 11, 2009 . . . . . 9:00 AM – 11:30 AM

## citations



By Jeff Spencer

### BEAVER DAM BUST

The county workers dug a little too deep  
Then the pond waters started to seep  
At first just a little, then with a rush  
The beaver dam burst with one mighty flush.

To court went the homeowner  
Whose yard was now a swamp  
Money or dry land  
Was what we want.

The court looked over the papers  
Finding no lack  
They proceeded to find  
A clear issue of fact.

*Nowak v. County of Wayne*, \_\_AD3rd\_\_, 4th Dept., 10/3/08, #1079. (See also *Vanderstow v. Acker*, \_\_AD3rd\_\_, 4th Dept., 10/3/08)

### FOILING A FORECLOSURE

Since tender of payment is a valid defense to a foreclosure, defendant raised a triable factual issue when he submitted evidence that plaintiff had failed to produce payoff figures requested by the defendant mortgagor. (*Cassara v. Wynn*, \_\_AD3rd\_\_, 4th Dept., 10/3/08, #1101)

### LOWERING THE BOOM AFTER OBSCENITIES IN THE BATHROOM

Our Fourth Department has upheld a burglary conviction where the defendant entered the apartment of his former girlfriend in violation of an order of protection and shouted obscenities at her while she was showering. (*Peo. v. Dombrowski*, \_\_AD3rd\_\_, #1110) (Affirming Judge Michael Pietruszka)

### DETAIL DEFICIENCY DECISIVE

Our Fourth Department has upheld Justice Frank Caruso's denial of a preliminary injunction against former employees of the plaintiff. The Fourth upheld Justice Caruso's finding that insufficient evidentiary detail had been presented that defendants had utilized plaintiff's customer lists and records to solicit plaintiff's customers. (*Glazer v. Brown and Rizzo*, \_\_AD3rd\_\_, 10/3/08, #1168)

### DISCUS DISASTER

Plaintiffs' infant was struck by a discus during track team practice. Our Fourth Department noted that the child had assumed this general risk, however, a factual issue had been raised as to the adequacy of the supervision. (*Miller v. Spencerport Cent. Sch. Dist.*, \_\_AD3rd\_\_, 10/3/08, #1173)

### NO LIGHT LIABILITY IN ATV TRAGEDY

The Fourth Department has upheld Justice Joseph Mintz's denial of summary judgment to the defendant county, where plaintiff was injured by an unlit cable across an entrance to one of defendant's closed parks. (*Surface v. County of Erie*, \_\_AD3rd\_\_, 10/3/08, #1193)

### INTER VIVOS GIFT TIFT

The requirements for a successful "inter vivos" gift are reviewed by our Fourth Department in *Bader v. Dingey*, (\_\_AD3rd\_\_, 10/3/08, #1015).

### INCLUSION NOT CONFUSIN'

Affirming Judge Shirley Troutman, our Fourth Department has upheld a conviction where the defendant was charged as a principal to the crime but convicted as an accessory. (*Peo. v. Young*, \_\_AD3rd\_\_, 10/3/08, #631)

### NO TRUMP FOR TITLE

The fact that a bank account is titled a "joint account" is not sufficient in itself to establish a "joint tenancy" in that account. (In the *Mtr. of the Estate of Mary F. Degnan*, \_\_AD3rd\_\_, 4th Dept., 10/3/08, #715)

### MATRIMONIAL MERRY-GO-ROUND

The Court of Appeals has held that the meaning of a "cohabitation" clause in an agreement depends on the intent of the parties. (*Graev v. Graev*, \_\_NY3rd\_\_, 10/21/08, NYLJ 10/22/08)

Severance payments were found to be separate property and defendant was given credit for voluntary child support payments in *Bink v. Bink* (\_\_AD3rd\_\_, 4th Dept., 10/3/08, #767).

### PRESUMPTION AGAINST SUICIDE PREVAILS

A medical examiner's conclusion that decedent's death was a suicide (via drugs) was overturned by our Fourth Department, noting the multiple medications which had been prescribed for decedent, her religious background, and the presumption against suicide. (In the *Mtr. of Infante v. Dignan*, \_\_AD3rd\_\_, 10/3/08, #835)

### BOOKCASE SUIT BOUNCED

Plaintiff was allegedly injured when a bookcase fell on her while preparing for an office move. Our Fourth Department affirmed Justice Joseph Glowonia's dismissal of the suit against the moving company. (*Case v. Lincoln Moving & Storage of Buffalo, Inc.*, \_\_AD3rd\_\_, 10/3/08, #1017)

### SLIP TIPS AND STUMBLE BUMBLES

Factual issues preclude summary judgment where plaintiff's daughter allegedly tripped and fell as a result of a one inch sidewalk differential. *Cuebas v. Buffalo Motor Lodge*, \_\_AD3rd\_\_, 4th Dept., 10/3/08, #1118. (Affirming Justice Rose Sconiers)

Our Fourth Department upheld Justice Frank Sedita's denial of summary judgment where plaintiff allegedly tripped and fell while leaving defendant's bowling alley. (*Seivert v. Kingpin Enterprises, Inc.*, \_\_AD3rd\_\_, 10/3/08, #1199)

### "DECK" OR "DOCK" DEBATE

In *Mtr. of RSM West Lake Road LLC, et al. v. Town of Canandaigua Zoning Bd. of Appeals, et al.* (\_\_AD3rd\_\_, 10/3/08, #485), our Fourth Department wrestles with the always perplexing distinction between a "deck" and a "dock." A number of interesting procedural zoning law issues are also covered. [B]

## Speaking Out About the Law

The Bar Association wishes to thank the following member of the Speakers Bureau who volunteered his time to help make particular areas of the law more comprehensible to students and other lay people in western New York.

### David M. Block

*Tort Law — Contributory Negligence v. Comparative Negligence*  
Williamsville North High School

If you haven't already done so, why not consider becoming a member of the Speakers Bureau? Take the opportunity to share your valuable insight on the legal topics of your choice. Not only is speaking out about the law a great community service, but it is also an effective practice-building technique. Call Susan Kohlbacher at the Bar Association (852-8687 ext. 21) to sign up today!

## Letters to the Editor

continued from page 1

temple where Mark's service was held was filled with people he had worked with (and against) in his long career as a matrimonial lawyer. As Mark's life and practice were summed up, one could not help but be moved by the respect and affection shown by these lawyers, judges and others who came to say goodbye to their friend.

In each of these instances, the outpouring of friendship shown by my fellow attorneys struck me as something wonderful. I don't know if this sort of thing happens everywhere — but I know it happens here and I will be forever grateful to be part of this legal community.

~ Brian R. Welsh  
Clarence

## Do You Know Me?



By Patricia Stroman Walker

Do you know me? I've been a lawyer for over 15 years. I'm also a survivor of domestic violence. Surprised? Maybe even uncomfortable knowing that? You may be more surprised and discomfited to learn that I'm not the only one around you, even though it's something we hear very, very little about in people "like us."

Domestic violence is very prevalent in our society, with an estimated one in four women and one in nine men being victims at some point in their lives. Despite the stereotype that it occurs on the wrong side of the tracks among people with lower incomes, perpetrated by men with beer guts wearing the charmingly-named "wife beater" t-shirts, domestic violence is all too common among professionals. In fact, a 1994 Justice Department study found minimal difference in the incidence of domestic violence in those earning below \$10,000 annually and those earning above \$50,000. I wish I'd known that fact sooner rather than later as it would have assured me that I'm not some sort of aberration - the only "smart" woman who wasn't smart enough to figure her way out of the maelstrom of violence that her life had become.

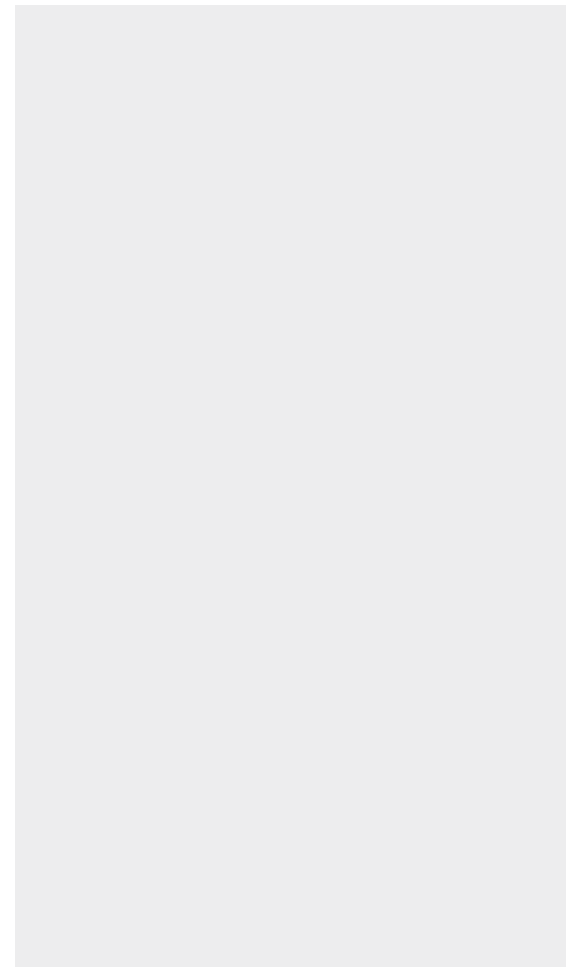
Domestic abuse isn't just physical violence. The abuse can also be verbal, emotional or all of those things combined. All of those types of abuse can leave painful scars of one sort or another. The pattern of domestic violence is that the victim is ashamed and blames herself, even though the only one who should be ashamed is the abuser. A victim can't believe what has hap-

pened, hopes vainly (and incorrectly) that this will be the last time and is often embarrassed to ask for help. You can't tell your family what's happening - they'll worry. You can't tell your friends - you'll be ashamed to admit you're living as you are, even if you're so demoralized by the situation that you can't even think straight about how to get out. You can't tell your coworkers - how will anyone think of you as an effective lawyer when you can't even stand up for yourself? And when things are especially rough, you can't call the police - what will the neighbors think? You just sleep with the phone under your pillow wishing you had the courage to call. Sound bad? It is, and that's only the tip of the iceberg. One of the worst parts is that domestic violence is all around us yet each victim think she's the only one. Is it incomprehensible that anyone would put up with it? Absolutely, until it's happening to you and you learn first-hand how complex a problem it is.



If domestic violence is not a part of your life, or, at least, not a part you know about, look around - it is almost certainly part of the lives of some of your colleagues, friends or coworkers, although you may find that hard to believe.

That's why I'm not ashamed to raise my voice to ask you, if you're a victim, to realize that you're not the only one and to encourage you to ask for help. It took years but I finally called the police and you know what? None of the neighbors said a word and the police were instrumental in short-circuiting the continuing pattern. I was also lucky enough to happen upon the Family Justice Center which offers every service imaginable to victims of domestic violence all under one roof so they, too, can turn into survivors. The wonderful professionals there helped put me back together when I was crumbling from the stress of trying to be a good mother, a good lawyer and a just a functioning human being who was living under the crushing weight of a very bad situation. When I called the Family Justice Center, I had no idea what to ask for or even what they offered. The person who answered my call knew what they could do for me, however, and they did it with compassion and competence. I will always be grateful to the Center's staff for their help. Their number is 558-SAFE and their services are free and confidential.

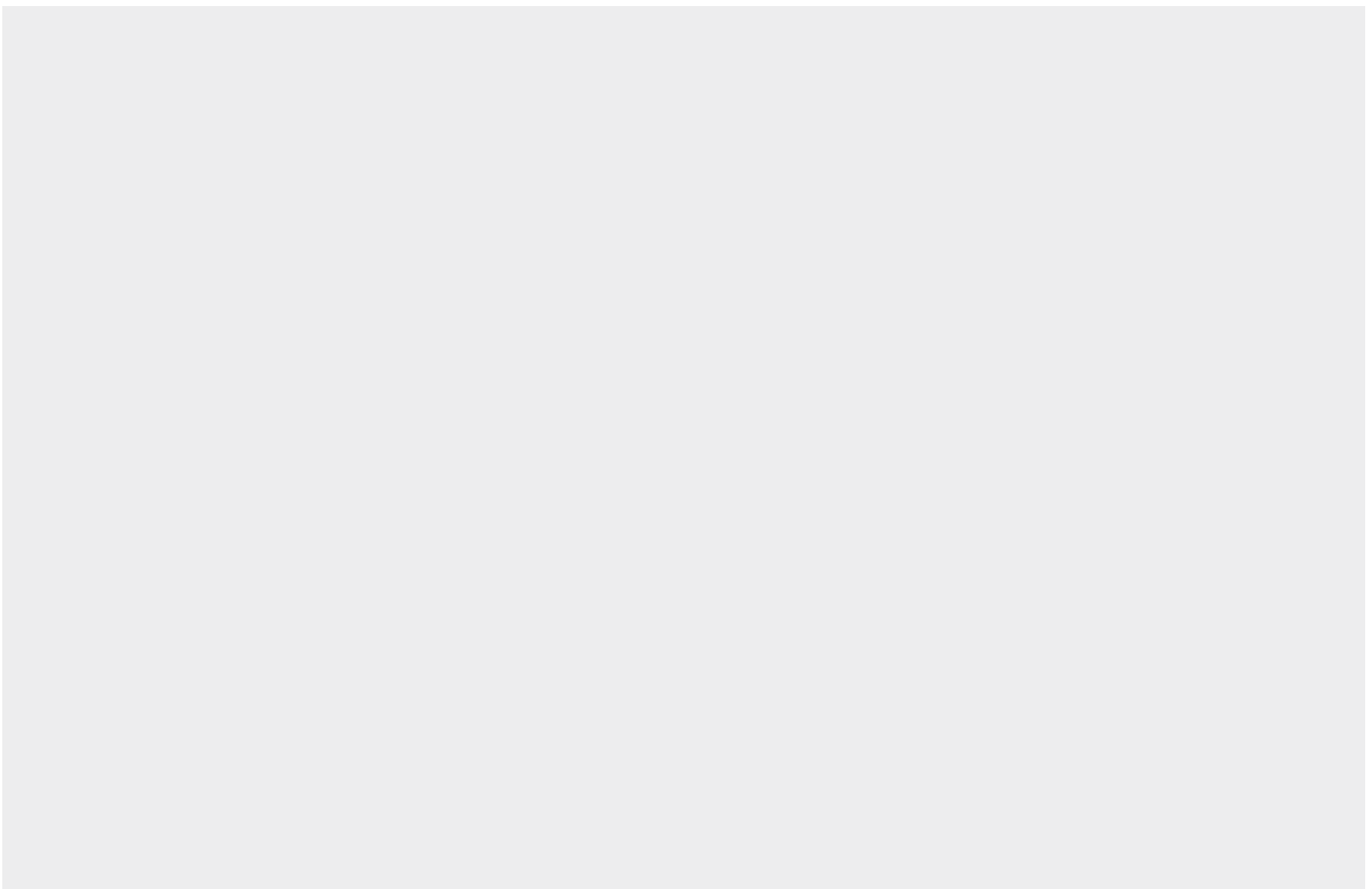


If domestic violence is not a part of your life, or, at least, not a part you know about, look around - it is almost certainly part of the lives of some of your colleagues, friends or coworkers, although you may find that hard to believe. Don't take a lack of physical evidence as an assurance that there is no problem. Bruises can be unseen, either on the body from physical abuse or on the soul from verbal or emotional abuse. After all, if any of you ever had a deposition with me, would you have ever guessed that the night before I was having things thrown at me and being told I was stupid and should have my head put through the wall?

You're going to be hearing more of my voice as I encourage all of you to learn about the issue and to do what you can do to help yourself or someone else.

Because I'm not the only one.

[B]



## in the public service



By Karen Nicolson  
Executive Director  
Legal Services for the Elderly, Disabled  
or Disadvantaged of WNY

In the previous “In the Public Service,” Bob Elardo told you about our December 5th joint anniversary celebration at the Hyatt. Looking back at all of our struggles, I cannot believe that we have lasted 30 years and 25 years respectively. Looking forward, I wonder how many non-profits will be around once we come out of this current recession.

We have weathered cuts before, most recently during the 2005 Erie County fiscal crisis. However, two things make this recession particularly troubling. The fact that these are mid-year financial cuts coupled with the devastating impact that the current financial crisis will have on the major funder of civil legal services for the poor in New York, The IOLA Fund.

New York state has cut most programs by six percent for this current fiscal year and is reconvening in mid-November for further current year reductions. Since we have allocated and spent these funds, more cuts will mean immediate layoffs for most programs. My agency and many other smaller non-profits do not have the reserves to handle unplanned mid-year cuts. In addition, our second largest funder is the IOLA Fund, which is dependent upon payments from the interest on attorney trust accounts to provide funding for programs such as mine. All you need to do is look on their Web site to see how the economy has impacted their resources ([www.IOLA.org](http://www.IOLA.org)).

The irony about the situation is that we are losing money and staff just when more and more

folks find themselves needing our help. With the expected increase in foreclosures and layoffs, we will get more calls from people who will need our help to save their homes, or access public benefits. There is already such a high demand for human services in our area, since Buffalo is the second poorest large city in the nation. Complicating matters for my agency in particular, is the fact that we have a local population that is aging faster than the national average. The Erie County Department of Senior Services estimates that by 2015, one in four residents will be age 60 or over. Erie County’s frailest seniors (those aged 85 and over) have increased by 35 percent between 1990-2000 and that number is projected to increase another 28 percent by 2015. Where will we find the resources to help all of these people?

We will continue to do the best we can with what we have. We will try to increase efficiency, as we have with the shared-space collaboration between the Volunteer Lawyers Project, Legal Services for the Elderly and Disabled and the Western New York Law Center. We will continue efforts to bring state and federal grants to the Buffalo area, such as the funding from the state Banking Department, which has allowed us to continue our mortgage foreclosure prevention work. Finally, we will continue to ask you to support us, as you have graciously done for the past 30 years.[B]

“The irony about the situation is that we are losing money and staff just when more and more folks find themselves needing our help.”

## Experienced Attorney Available For Contract/ Consulting Work

Extensive civil litigation experience, including personal injury, product liability and negligence cases in the form of legal research, writing and motion work.

Also has extensive experience analyzing medical records, charts and reports and related disability regulations and laws as well as drafting hundreds of administrative appellate level disability decisions. Contact Sherry Palermo at 852-8687 or [spalermo@eriebar.org](mailto:spalermo@eriebar.org) for full details and resume.

## Lost in (Techno) Space



By Martha Buyer

### Belt-Tightening in Telecom: Opportunities and Risks

As we all face the holiday season with tightened belts (just after Thanksgiving turkey but before the holiday party season gets into modified swing), attorneys and staff at many offices are considering what changes can be made to cut the largely heretofore unnoticed office expense fat as the economy continues to tighten. Telecommunications is certainly one area in which economies can be found, but as with anything else, changes in telecommunications equipment, networking and policies should be made with great care.

In the past several months, I have been brought in to resolve problems where the end-user was offered the moon for a song by a skilled salesperson who had no basis for the claims made other than his own vivid imagination. In both cases, the customer bought what

he was selling hook, line and sinker, without any knowledge that the salesman didn't know what he was selling. Secondly, he was actively misleading the customer in terms of penalties and other onerous charges that could—and did—apply. With this in mind, here are some items to consider when looking to save money.

Since the landmark Telecommunications Act of 1996, telecom providers (both equipment and service) have had numerous opportunities for corporate combination, acquisition or other realignment. While the bulk of the PacMan type activity happened shortly after the 1996 legislation became law, in fact, over the past eight years, the mega-mergers have continued to make their way through the U.S. Justice Department Antitrust

Division, the FCC and the state regulatory authorities where appropriate. In the anti-regulation era of the past administration, a number of these mergers have moved through the process with few conditions, a process which, in my opinion, has not served consumers—whether they are enterprise, government or individual.

Although there are fewer players in the telecom space than there were eight years ago, most experts believe that the merger mania isn't quite over. The biggest players, including Verizon, AT&T and Comcast, for example, will remain dominant. What has yet to be seen is which of the smaller players will survive in the latest chapter of "Darwin Takes on the Telecom Companies."

From the consumer perspective, however, this may be a terrific opportunity to take advantage of the creative products, services, and prices that are being offered by the smaller players. There is certainly risk associated with signing on with a smaller provider. However, for everyone but the 800-pound gorillas in the market, this is a time when innovation will make the difference between who survives and who doesn't. Local competitors like Paetec and One Communications can offer a significant savings over the "big boys," while posing only a small risk. My advice is don't be afraid to sign up for two to three-year

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## Lost in (Techno) Space

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deals, but be sure to understand the escape options if the need arises.

### Wireless: To Own or Not to Own?

The second area where money can be saved is with wireless. Although this isn't always the popular stance, it is my belief that enterprises should NOT own the wireless devices which it provides to employees. Aside from creating additional liability in the event of an accident when an employee is driving and talking or worse, texting, employers who provide wireless devices to employees are not only subsidizing non-work related usage, but they are subjecting their employees to an additional tax burden (wireless devices are considered "listed property" by the IRS, and as such are subject to taxation) which will show up on the employee's W-2 form.

The flip side of this issue, however, is corporate security, consistency and management. Wireless consultant Michael Finneran, Principal of dBrn Associates, Inc. (<http://www.dbrnassociates.com>) in Hewlett Neck, NY sees this issue another way.

"Given the overall importance of mobility and the challenges in maintaining security, I'm a firm believer in having the company own the phone, managing/paying the bill, and ensuring the security features (which includes limiting what data and applications can be installed on it)," he said recently. "If cost control is the only issue, as long as we can get a decent corporate contract with computerized billing (so we have the info we need to choose the best contract), I don't see much risk with users owning the phone- as long as it's not a smartphone. Once we have applications and data storage capabilities on the phone, then we've got to be able to manage and secure it just like a PC. Unfortunately, even 'basic' phones now have contact and calendar capabilities, and that can also be sensitive 'company' information."

Thus, while there may be other operational issues, the fact remains that reimbursing an employee for work-related wireless device usage may save—both in terms of expenses and bill management and oversight. This decision, however, must be made when considering all of the options and associated obstacles.

Finally, as the market gets tighter, there are more people who are in need of the next big sale. If the deal you're being offered sounds too good to be true, it probably is. Telecommunications carriers like to lock up customers for extended periods of time. My preference is for deals that last no longer than two years, although under some circumstances three-year deals make sense. Rarely (okay, never!) does a five-year contract make sense. The technology changes too quickly, and the contracts are too fraught with subtleties to be beneficial to the customer for this length of time. Furthermore, many account execs are compensated differently based upon the length of the agreement, which is why they push longer agreements on customers who should refuse them.

Please accept my very best wishes for a festive holiday season and a happy new 2009! [B]

## Law Line Educates Public on Legal Issues

Since 1997, *The Law Line* has engaged the minds of thoughtful western New Yorkers who tune in to WNED-AM (970) at 10:00 on Saturday mornings. Host Mike Desmond talks to lawyers and judges from our legal community on wide-ranging topics related to the law. The program provides a valuable public service that reaches about 4,000 listeners each week.

We appreciate the time that the following members of our Association have taken to educate the public about legal matters by volunteering their time to appear on *The Law Line*. Members are listed in order of appearance.

### Dennis J. Bischof

*Who Pays Medical Bills When You Are in a Car Accident?*

### Anne F. Downey

*Trademark Law*

### Hon. Shirley Troutman

*Science & the Law*

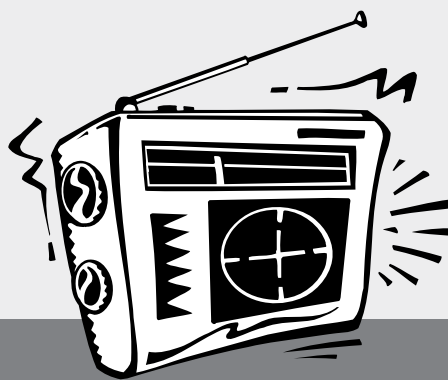
### Daniel J. Henry, Jr.

*Miranda Rights*

### Diane R. Tiveron

*Bankruptcy Issues*

*The Law Line* is underwritten by the Erie County Bar Foundation and the Lawyer Referral and Information Service of the BAEC. If you would like to appear as a guest on the program, please contact **Maureen Gorski** at 852-8687 or by e-mail at [mgorski@eriebar.org](mailto:mgorski@eriebar.org).



## Law Day Award Nominations Sought

Each year, bar associations across the country pause to pay tribute to the American system of law and justice on Law Day. Traditionally observed on or around May 1, Law Day is a focal point for many community activities. The Bar Association of Erie County's Law Day luncheon and awards ceremony marks the culmination of months of law-related educational activities, including a high school mock trial tournament, poster contest and community outreach.

Our long-standing Law Day tradition involves honoring local attorneys and non-attorneys who have distinguished themselves in service to the law and the ideals of the Constitution. The Bar Association of Erie County will present several awards on Law Day, including the prestigious **Liberty Bell Award**, bestowed in appreciation of outstanding service to the community. This award is presented to individuals or organizations that have distinguished themselves in at least one of the following areas:

- Promoting a better understanding of our Constitution and the Bill of Rights;
- Encouraging a greater respect for law and the courts;
- Stimulating a deeper sense of individual responsibility so that citizens recognize their duties as well as their rights;
- Contributing to the effective functioning of our institutions of government; and
- Fostering a better understanding and appreciation of the rule of law.

Last year's Liberty Bell Award was presented to **Scott Gehl**, Executive Director of Housing Opportunities Made Equal.

### Special Service Award

Presented to a non-lawyer who is connected with a governmental agency or the courts, this award recognizes outstanding service to the legal community.

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## News from the Young Lawyers Committee



by Melissa Foti

The Young Lawyers Committee is pleased to report that our November meeting, featuring Robert Kloss and Kevin Christner of Clearplan Financial, who spoke on “Scary Market Conditions and What to Do with Your Money,” was a huge success. We would like to thank everyone for attending. The next committee meeting will be held on **December 19, 2008**. Further details will be announced shortly. Additionally, keep your calendars open as the Young Lawyers Committee will be hosting a holiday party...details will be forthcoming shortly!

Finally, the Young Lawyers Committee is gearing up for the annual High School Mock Trial Tournament. As of press time we have an orientation scheduled for December 3rd. Our program affords area high school students an unparalleled opportunity to develop their advocacy skills. Through our volunteer lawyers and judges, students gain a broad understanding of our legal system. We will be looking for volunteers to judge the preliminary and final rounds. Look for our announcement and more details in next month's *Bulletin*. As always, thank you for your support! [B]

## Correspondence from Kent, Our Sister City in Great Britain

By Jonathan Smithers, President, Kent Law Society

I recently heard an eminent lawyer theorizing that the practice of law now was just a business and should no longer be regarded as a profession. Whilst I profoundly disagree with that sentiment our individual legal practices now compete with each other in a way that was unheard of 20 or 30 years ago. Our government prefers to regulate us rather than trust us to behave us like professionals. Whilst as lawyers we are all used to dealing with rules, much of the regulation – and its enforcement – is perceived to touch only the innocent, who comply with the rules, and not being heavy-handed enough on those who do not.

One of my themes during my year as president of Kent Law Society has been to encourage more cooperation between lawyers in our region. Membership of Kent Law Society is voluntary. There are over 2,000 solicitors in the County of Kent and some 750 are members of our Society. As I have mentioned in previous columns, there are other smaller Law Societies around the region; again membership is voluntary. Medway Law Society, in the Northeast, has around 150 members. Tunbridge Wells, Tonbridge & District Law Society in the West has another 240 members. Some lawyers are members of more than one society – some to show professional camaraderie, others just to get cheaper professional education lectures!

I have recently held a social event to bring together members of Kent, Medway and Tunbridge Wells, Tonbridge & District Law Societies. Just outside my hometown is an old railway line closed many years ago but now re-opened by volunteer enthusiasts. A steam train was run along five miles of reclaimed track before we visited a local hostelry for a few drinks and then came back again on the same train. Meeting other lawyers face to face is increasingly difficult in our competitive world. One of the roles which Kent Law Society can play, as the biggest society in the region, is to make



**All Aboard! Three British Bar Presidents Share a Common Journey** ~ Pictured above on the footplate of an old steam train are, left to right, Emma Palmer, president of the Medway Law Society, Jonathan Smithers, president of the Kent Law Society, and Michael McNally, president of Tunbridge Wells, Tonbridge & District Law Society.

sure that we face outwards and to the future, which includes ensuring cooperation between societies. Individual societies may thrive on their own but if they work together, they will enjoy even greater success. [B]

## In Memoriam

*“Memory is a way of holding on to the things you love, the things you are, the things you never want to lose.”*

~ Kevin Arnold

We wish to honor the memory of the following members of our Bar Association. Memorial gifts to the Erie County Bar Foundation are an excellent way to remember friends and colleagues, as gifts are used for the benefit of the entire profession.



*Roy R. Cesar*

*Mark G. Hirschorn*

*John W. Condon, Jr.*



RECYCLE YOUR BULLETIN

## Court of Appeals Sits in Buffalo

On October 16th and 17th, 2008, the United States Court of Appeals for the Second Circuit, which normally sits in New York City, made an unprecedented visit to the federal court in Buffalo to hear appeals from cases originating from Buffalo, Rochester and throughout upstate New York. This was the first time that the court ever convened in western New York.

“This historic visit allowed local attorneys and the public the opportunity to observe a federal appellate court firsthand as it heard oral arguments on cases that have been appealed,” according to Hon. Richard Arcara, Chief Judge of the local federal district court for both Buffalo and Rochester.

While in Buffalo, the Court also held a Special Admissions Ceremony for local attorneys who wished to be admitted to practice before the Second Circuit. Over 100 attorneys applied for admission. Hearing the appeals were Chief Circuit Judge Dennis Jacobs and Circuit Judge Richard C. Wesley from the Second Circuit Court of Appeals, along with Chief Judge Arcara, who was specially designated as an appellate judge for the occasion. [B]



Photos above provided courtesy of Jim Courtney/Business First.

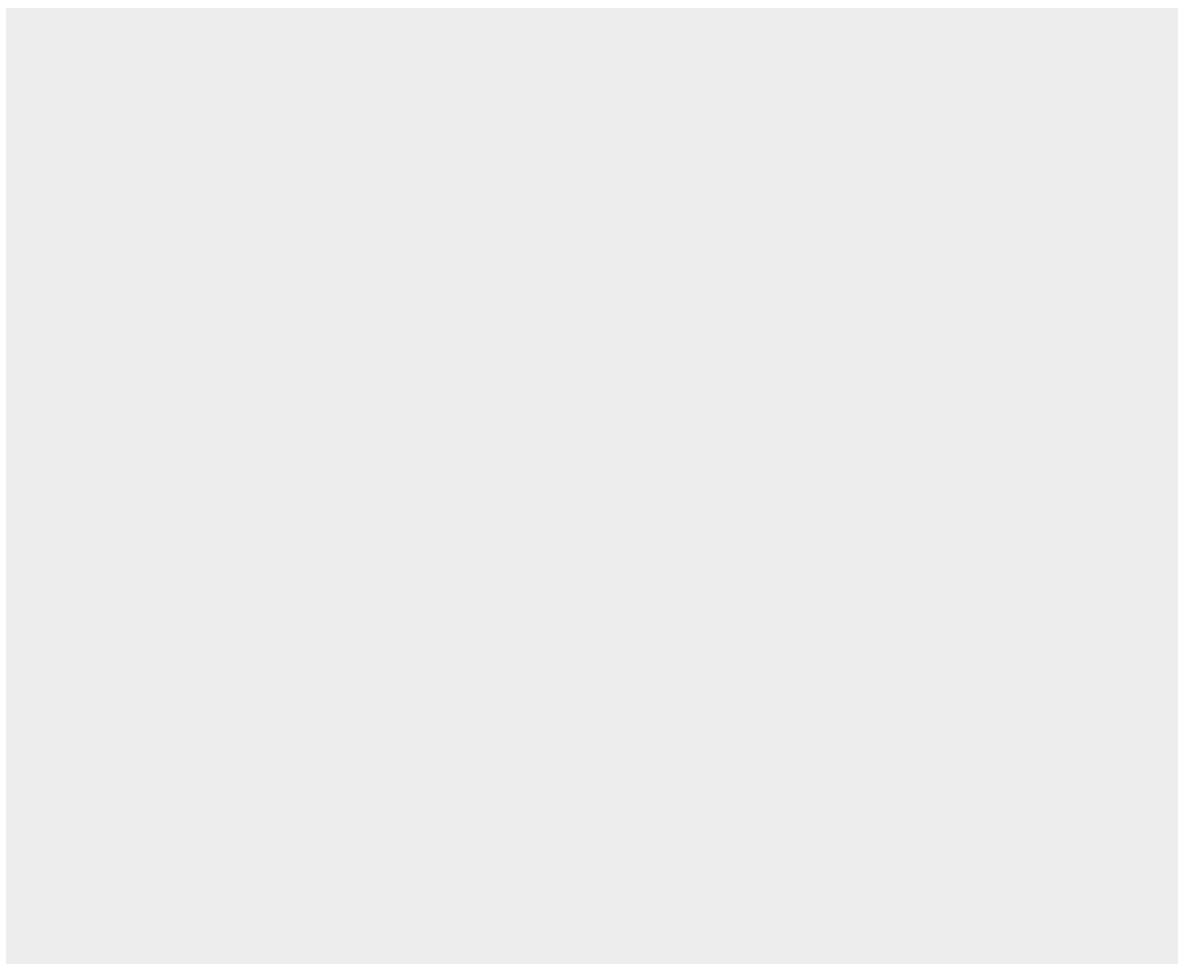


Photo by Glenn Edward Murray

# LILLE | FRANCE




**Convention Nationale des Avocats**  
 A delegation of Buffalo lawyers and judges recently traveled to our sister city of Lille, France, to participate in an international law conference (see President's Letter for further details).  
*Photos by Deanne Tripi and Cory Loudenslager*



## Become a Contributing Member!

The BAEC bylaws confer "contributing member" status on any member who resides or maintains an office in Erie County and elects to pay an additional \$40 in annual dues to help support Association programs. Contributing members have the same rights and privileges as regular members and "such additional rights and privileges as the board of directors shall bestow," including special recognition in the *Bulletin*, annual dinner program and other publications.

## Bar Foundation Provides Hope

I am one of those “lawyers with depression” you have probably read about in the *Bulletin* or elsewhere. Like many people with clinical depression, my first major depressive episode occurred in my early twenties. I got through it and was later put on medication. The medication worked so well for me that it didn’t bother me at all when the doctors told me I would probably have to take it for the rest of my life.

With the help of my antidepressant medication, I went on to pursue the goals I had set for myself. I graduated law school, had a baby, got married and practiced law for four years. I always assumed that as long as I took my medication I would be okay, and no one ever warned me otherwise.

Then, after eight years, the medication just stopped working. The dark clouds rolled back into my life and I could feel myself slipping into a horribly dark and lonely place. I reluctantly took a leave of absence from my job. Still, I was sure that the doctors could fix me with medication and I would be back to work in a couple of months.

I tried at least 12 different antidepressant medications and “medication cocktails.” Nothing worked. I tried electroconvulsive therapy, the treatment of last resort for severe life-threatening depression. It didn’t work. The doctors labeled me “treatment resistant.” I gave up hope of ever getting better and was sure that my life was over. I just wanted the dark clouds to sweep me up and carry me away forever.

I lost my job, and with it, my family’s health insurance coverage. I was desperate. We could not be without health insurance, and my husband’s meager salary as a cook made us ineligible for any of the subsidized health insurance programs.

Although I had been a lawyer and member of the Bar Association of Erie County for four years, I did not

“Please know that your support of the Foundation has helped to provide much needed support and hope to at least one attorney.”

know much about the Bar Foundation. It was my therapist who referred me to Ginger Maiman, the Foundation’s social worker. I called her and she met with me almost immediately.

The generosity and compassion of Ginger and the Foundation’s board of directors amazed me. Ginger kept in close contact with me and provided me with encouragement and support throughout this grim chapter of my life. The Foundation has paid my family’s health insurance premiums for the past year. After my husband lost his job in September, the Foundation picked up the cost of my co-payments for my medications and doctor visits and provided me with financial assistance for personal expenses at times. Last

Christmas, the Foundation even sent me a gift card to buy a Christmas gift for my son. I cried when I opened it. I couldn’t believe there were people out there who cared so much.

Ginger advocated for me when I was too hopeless and disgraced to advocate for myself. She linked me to lawyers in the community to help me through some legal problems, and each and every one of these lawyers was so kind and eager to help. Ginger also got me an appointment with one of the best psychiatrists in the area, an appointment that would have taken at least nine months to get without her intervention on my behalf.

As wonderful as the help I received from the Foundation was, I felt uneasy about taking so much. I didn’t think I deserved it. I never expected to be sick for so long, and I worried that I was sucking up too much of the Foundation’s resources. Every time I expressed my uneasiness, however, I always got the same answer from Ginger and the attorneys who helped me: “This is what the Foundation is here for.”

I am pleased to say that my depression is finally in remission, thanks largely to the intensive therapy I recently received at one of the country’s best psychiatric facilities. I would never have had the opportunity to participate in this program without the help of the Foundation. I still have work to do, but I am hopeful about my future for the first time in a very long time.

I am eternally grateful to all of you who have contributed to the Foundation, both financially and by providing your services to lawyers in need. Please know that your support of the Foundation has helped to provide much needed support and hope to at least one attorney. Indeed, the Bar Foundation may very well have saved my life.

*If you or a colleague are suffering from depression, help is readily available. Start by visiting [www.lawyer-withdepression.com](http://www.lawyer-withdepression.com) or attending the next meeting of the support group for lawyers with depression, which meets on the second and fourth Friday of each month (except holidays). Meetings are held at Bar Headquarters, 438 Main Street, Sixth Floor, at 12:30 pm and lunch is provided. There is no need to pre-register. For further information, call 852-1777 in complete confidence.* [B]



Photo by Glenn Edward Murray

### Return Your Pledge Card Now!

If you haven’t already done so, please return your pledge card for the Bar Foundation’s Campaign ’08 now. Every gift matters and can make an enormous difference in a lawyer’s life.

If you did not receive a pledge card and wish to make a donation, please call 852-8687 today.

THANK YOU FOR YOUR SUPPORT!!

## Managing Holiday Stress

Unless you happen to live inside a Norman Rockwell painting, stress and depression can ruin your holidays and hurt your health. For many of us, the holidays bring up sad or unpleasant memories. We blame ourselves when everything isn't picture-perfect and people don't behave as we wish they would. Some avoid holiday celebrations altogether, only to feel isolated and lonely.

Being realistic, planning ahead and seeking support can help ward off holiday stress and depression. In an effort to pull off a perfect Hallmark holiday, you might find yourself facing a dizzying array of demands - work, parties, shopping, baking, cleaning, caring for elderly parents or kids on school break, and scores of other chores. So much for comfort and joy!

According to a recent report from the Mayo Clinic, holiday stress and depression often result from three main trigger points: relationships, finances and physical demands.

**Relationships** can cause turmoil, conflict or stress at any time. But tensions are often heightened during the holidays. Family misunderstandings and conflicts often intensify, especially if you're all thrust together for several days. Conflicts are bound to arise with so many different personalities, needs and interests. On the other hand, if you're facing the holidays without a loved one, you may find yourself feeling especially lonely or sad.

**Finances** are probably going to be an issue for most of us this year. Spending money you don't have on holiday gifts, travel, food and entertainment can further increase stress as you try to make ends meet while trying to make everyone on your gift list happy. Try to avoid creating a financial spiral that leaves you feeling hopeless and helpless.

**Physical demands** - the strain of shopping, attending social gatherings and preparing holiday meals on top of an already full schedule - can wipe you out. Feeling



exhausted increases your stress, creating a vicious cycle. Exercise and sleep - good antidotes for stress and fatigue - may take a back seat to chores and errands. High demands, stress, lack of exercise, and overindulgence in food and drink all add up to holiday illness.

### How to Prevent Holiday Stress, Depression

When stress is at its peak, it's difficult to stop and regroup. Try to prevent stress before it happens,

especially if the holidays have taken an emotional toll on you in previous years.

**Acknowledge your feelings.** If a loved one has recently died or you find yourself alone, realize that it's normal to feel sadness or grief. Give yourself permission to cry or express your feelings. You can't force yourself to be happy just because it's the holiday season.

**Seek support.** If you feel isolated or down, seek out family members and friends, or community, religious or social services. All can offer needed support and companionship. The Bar Association's Committee for Lawyers with Depression meets on the second and fourth Friday of each month (except holidays). Meetings are held at Bar Headquarters, 438 Main Street, Sixth Floor, at 12:30 pm and lunch is provided. There is no need to pre-register. For further information, call 852-1777 in complete confidence.

**Consider volunteering at a community or religious function.** Getting involved and helping others can lift your spirits and broaden your friendships. Also, enlist support for organizing holiday gatherings, as well as meal preparation and cleanup. You don't have to go it alone or become a martyr.

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## SPECIAL THANKS TO CAMPAIGN '08 SPONSORS

Pictured above at the reception for the Erie County Bar Foundation's Campaign '08 are, left to right, Campaign '08 chair Bruce S. Zefter, Mark A. Lotterer of Tigor Title Insurance Company, Matthew Wilkinson of Arbor Capital Management Company and Campaign '08 president T. Alan Brown. Support from Tigor Title Insurance Company, M&T Bank Corporation and Arbor Capital Management Company helps defray campaign costs, allowing contributions to be used directly for the Foundation's attorney assistance programs.

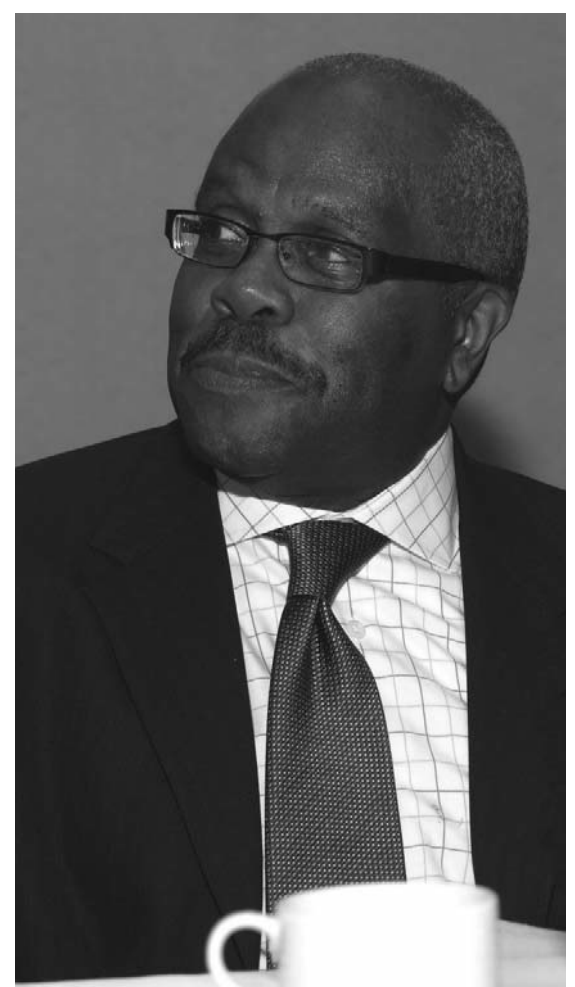
Photo by Susan L. Kohlbacher

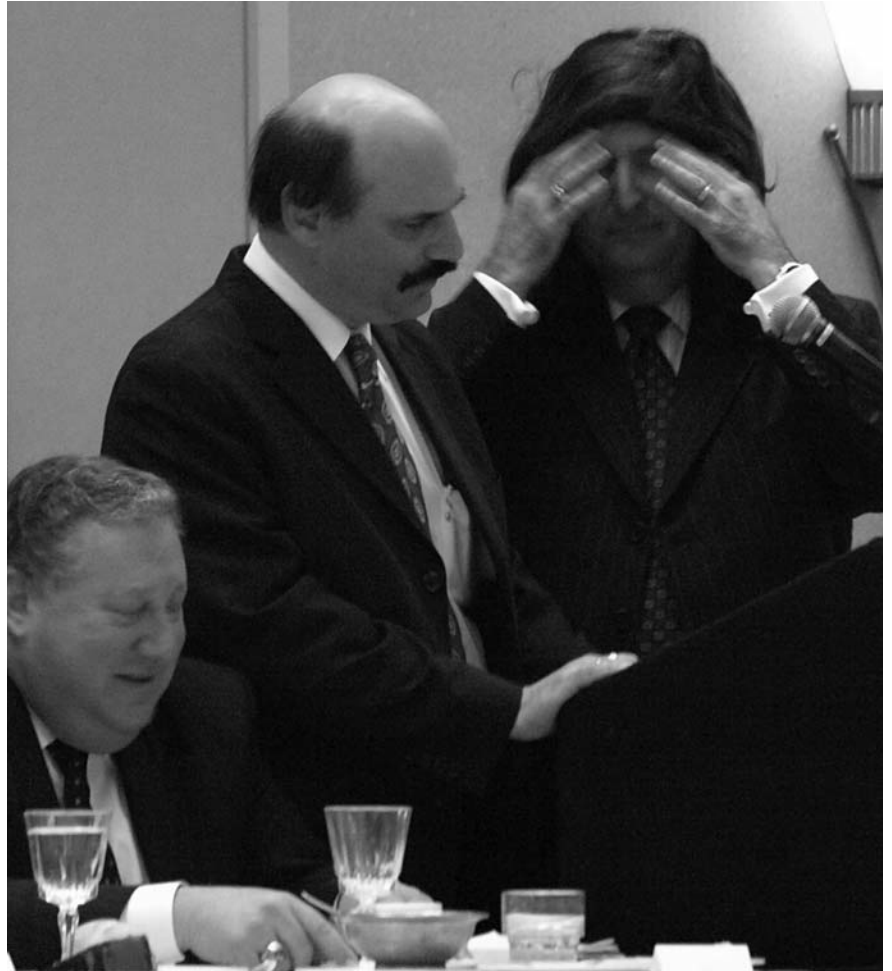
# Judicial Candidates Luncheon

Hon. Frank "Dean Martin" Caruso once again manned the bully pulpit as roastmaster at this year's Judicial Candidates Luncheon at the Hyatt Regency. More than 400 members of the local bench and bar turned out for the festivities.

The ability to laugh at ourselves is one of the many things that sets this legal community apart. Colleagues from other parts of the country find it very difficult to believe that we "roast" judges in such a high-spirited and irreverent way. Special thanks to all who participated this year:

Hon. Tracey A. Bannister  
 Hon. James A. W. McLeod  
 Hon. John A. Michalek  
 Hon. Michael Pietruszka  
 Hon. Lisa Bloch Rodwin  
 Hon. Jeffrey F. Voelkl





“It is a curious fact that people are never so trivial as when they take themselves seriously.”

— Oscar Wilde



“With the fearful strain that is on me night and day, if I did not laugh I should die.”

~ Abraham Lincoln

**Special thanks to the following sponsors for their support of this event.**

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## The Grateful Dead's Lawyer is Dead



by Lindy Korn

Who was the only lawyer in the USA with stationery inscribed as “Legally Dead”?

Who told Jerry Garcia, the band's lead guitarist, to sue Ben & Jerry's Homemade Inc. for naming one of its flavors ‘Cherry Garcia’?

Who tacitly advised the Grateful Dead hippie band to allow fans to make their own not-for-profit tapes and pass them around?

Who led the Grateful Dead to incorporate, making it one of the first bands to offer health benefits and pensions?

Harold Sanborn Kant!!  
1931—2008

As a registered Republican with an office in Beverly Hills, Hal Kant, who died at age 77, in Reno, Nevada, seems like an unlikely candidate to have spent three decades as lawyer to the San Francisco band, starting in 1971. Kant said he never charged the band a percentage but only billed hourly, and insisted the band pay a flat fee.

“The only attorneys in the music business were the attorneys for the record companies, and their job was to get as much money as they could for their company and leave as little as possible for the artists. I decided maybe the other guys should have an attorney too.”

Born in Queens and raised in the Bronx, he was the son of immigrant Russian Jews in the dry cleaning business. He earned a master's degree in psychology before service in the Navy during the Korean War, then used G.I. Bill money to study law at Harvard, graduating in 1958.

Asked in 2000 by the Boston Globe why he represented artists, he said, “The only attorneys in the music business were the attorneys for the record companies, and their job was to get as much money as they could for their company and leave as little as possible for the artists. I decided maybe the other guys should have an attorney too.”

Kant was also a top poker player, known on the circuit as Dead Man Kant, puffing on long cigars. His entrepreneurial instincts for marketing, and his understanding and compassion for the underdog was an interesting combination—against all odds!

Rest in peace, Hal...we are grateful forever. [B]

## Managing Holiday Stress

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**Be realistic.** As families change and grow, traditions and rituals often change as well. Hold on to those you can and want to. But accept that you may have to let go of others. For example, if your adult children and grandchildren can't all gather at your house as usual, find new ways to celebrate together from afar, such as sharing pictures, e-mails or videotapes.

**Set differences aside.** Try to accept family members and friends as they are, even if they don't live up to your expectations. Practice forgiveness. Set aside grievances until a more appropriate time for discussion. With stress and activity levels high, the holidays might not be conducive to making quality time for relationships. And be understanding if others get upset or distressed when something goes awry. Chances are they're feeling the effects of holiday stress and depression, too.

**Stick to a budget.** Before you go shopping, decide how much money you can afford to spend on gifts and other items. Then be sure to stick to your budget. If you don't, you could feel anxious and tense for months afterward as you struggle to pay the bills. Don't try to buy happiness with an avalanche of gifts. Donate to a charity in someone's name, give homemade gifts or start a family gift exchange.

**Plan ahead.** Set aside specific days for shopping, baking, visiting friends and other activities. Plan your menus in advance and then make one big food-shopping trip. That'll help prevent a last-minute scramble to buy forgotten ingredients. Expect travel delays, especially if you're flying.

**Learn to say no.** Believe it or not, people will understand if you can't do certain projects or activities. If you say yes only to what you really want to do, you'll avoid feeling resentful, bitter and overwhelmed. If it's really not possible to say no when your boss asks you to work overtime, try to remove something else from your agenda to make up for the lost time.

**Don't abandon healthy habits.** Don't let the holidays become a dietary free-for-all. It's fine to celebrate but overindulgence only adds to your stress and guilt. Have a healthy snack before holiday parties so that you don't go overboard on sweets, cheese or drinks. Continue to get plenty of sleep and schedule time for physical activity.

**Take a breather.** Make some time for yourself. Spending just 15 minutes alone, without distractions, may refresh you enough to handle everything you need to do. Steal away to a quiet place for a few moments of solitude. Take a walk at night and stargaze. Listen to soothing music. Find something that reduces stress by clearing your mind, slowing your breathing and restoring inner calm.

**Rethink resolutions.** Resolutions can set you up for failure if they're unrealistic. Don't resolve to change your whole life to make up for past excess. Instead, try to return to basic, healthy lifestyle routines. Set smaller, more specific goals with a reasonable time frame. Choose only those resolutions that help you feel valuable and that provide more than fleeting moments of happiness.

**Forget perfection.** Holiday TV specials are filled with happy endings. But in real life, people don't usually resolve problems within an hour or two. Something always comes up. You may get stuck late at the office and miss your daughter's school play, your sister may dredge up an old argument, your partner may burn the cookies, and your mother may criticize how you're raising your kids. All in the same day. Accept imperfections in yourself and in others.

**Seek professional help if you need it.** Despite your best efforts, you may find yourself feeling persistently sad or anxious, plagued by physical complaints, unable to sleep, irritable and hopeless, and unable to face routine chores. If these feelings last for several weeks, talk to your doctor, a mental health professional or call the Bar Foundation at 852-1777.

**Accept that things aren't always going to go as planned.** Then take active steps to manage stress and depression during the holidays. You may actually enjoy the holidays this year more than you thought you could. [B]

## A Look Behind the Federal Government's New Efforts to Track and Recover Medicare Liens



By Jeffrey J. Signor

In the October edition of the *Bulletin*, Robert Trusiak, Assistant U.S. Attorney for the Western District of New York, provides an analysis of recent changes to the Medicare recovery program. This article can be located at

<http://www.eriebar.org/bulletin.aspx>. In order to make certain that Medicare is made whole from Medicare-eligible plaintiffs, the new reporting requirements effectively shift the responsibility to the insurance carriers and self insured entities. It is anticipated that Medicare-eligible plaintiffs will experience significant delays, settlements will be less frequently negotiated, and there will be constitutional challenges to the new requirements. The effective date of this legislation is July 1, 2009.

Goldberg Segalla LLP is working with the Medicare Advocacy Recovery Coalition ("MARC") to clarify the practical effects and compliance requirements associated with the new legislation. MARC, as an organization composed of representatives of counsel for self-insured entities, insurance carriers, retail trade associations, risk management associations and third party administrators, stands to be affected by the new legislation. Attorneys who represent plaintiffs are also becoming members of MARC. Through its members, MARC has extensive experience with insurance benefits, claims administration and settlement, litigation and reimbursement to Medicare and other plans in all federal and state jurisdictions. MARC has carefully reviewed and analyzed the new legislation in light of the existing legal authority and the collective experience of its members.

As Mr. Trusiak states, the federal government is increasing efforts to monitor any personal injury claims that involve a recipient of Medicare benefits. Most sources estimate that at least 44 million people, either over 65 years old or disabled, are receiving some form of Medicare. When one considers the graying of our nation's baby-boomer generation, many millions more will be added to the potential pool of Medicare-eligible plaintiffs.

### Delays in Reporting

This new Medicare legislation will result in defendants and their attorneys sharing the burden of monitoring each claim and lawsuit to locate a Medicare lien. Previously, attorneys for plaintiffs were obligated to communicate with their clients and determine whether any medical care was provided by Medicare. The new legislation will expand this burden to defendants,

insurers and attorneys for the defense. The federal government, as Mr. Trusiak states in his article, will assume a more aggressive role to enforce payment of Medicare liens, and insurance carriers and self-insured entities will now be exposed to \$1,000 per day fines for non-compliance. Any entity that ultimately pays a settlement, award, judgment or other payment to a Medicare-eligible claimant will be responsible for "double damages" if the lien is not timely satisfied.

The first stage of the reporting process is to obtain conditional payment information. This step can be time consuming because the Coordination of Benefits Contractor must then submit claim information to the Medicare Secondary Payer Recovery Contractor ("MSPRC"), which is the entity charged with gathering the information. The MSPRC will then issue a conditional payment statement, which will be forwarded to the claimant and any other entity that has the claimant's consent. This step will take the most time, because it is necessary to determine how much will be required to settle a case. Once the case is resolved by a settlement, award, judgment or other payment, an obligation arises to report again. This step should not take as long, assuming the claimant's social security number and date of birth are known, and there is at least a suspicion that the claimant is a Medicare beneficiary. The Medicare-eligible plaintiff will therefore not be able to enjoy access to some of their funds for pain and suffering consistent with their needs. Some such claimants may even die before receiving any funds, which is obviously an outcome that should be avoided.

As stated by Mr. Trusiak, Medicare possesses the legal authority to commence a direct action, but it is the intent of Congress to work together cooperatively to maximize the collections of Medicare liens. Congressional intent envisions a legal landscape wherein plaintiffs and their attorneys work hand-in-hand with defendants and their attorneys, as well as the federal government, to discover the existence, amount and potential to negotiate payment of Medicare liens. It appears that there are better alternatives to expedite reporting, and MARC would like to work with the attorney general's office and the Centers for Medicare and Medicaid Services ("CMS") to arrive at such alternatives.

CMS uses as an example 42 CFR 411.25 to establish its position that there has been a "longstanding obligation" (since 1994) to determine the correct order of payment. The regulation was unclear, as originally

drafted, because it required a primary payer to place Medicare on "notice" when it "learned" that Medicare had made a payment which the primary payer either made itself or should have made. The "learned" standard was far from clear and resulted in Medicare not being advised of all possible sources of reimbursement.

The "learned" standard was deleted earlier this year when 42 CFR 411.25 was amended. The new law attempts to clarify that a primary payer's responsibility includes a judgment, or a payment conditioned upon a recipient's compromise, waiver and release (whether there is a determination or admission of liability of payment) in a claim against a primary plan. There has not been a "long-standing obligation" to make this determination. In fact, that "obligation" has only been introduced over the last several months. Primary plans and non-Group Health Plans are only now attempting to understand how to implement procedures necessary to comply with this regulation.

It is our understanding that CMS is already significantly back-logged. Therefore, once the new reporting requirements are expanded, there is a distinct likelihood that further congestion will result. Adding to this congestion is the increase in Medicare recipients as the baby-boomers reach the age of 65.

### Inability to Settle Claims

To illustrate the challenges associated with these changes, the new legislation makes those "responsible" for a tort to a Medicare beneficiary obligated to pay back Medicare. A "responsible" entity is defined as one obliged to make a payment by way of a judgment. Once "responsibility" is established, the requirement for a primary payer becomes mandatory regardless of assessment of defendant(s) fault or plaintiff's comparative fault, or whether settlement was negotiated simply on a cost of defense basis. The "all or nothing" approach is analogous to the frustrations practitioners encounter when handling a claim that involves a Workers' Compensation lien. Personal injury attorneys for the defense and plaintiffs can readily cite to cases wherein a Workers' Compensation lien inhibits settlement. Any litigation involving Medicare recipients will therefore encounter similar settlement impossibilities, not only because of the existence of a lien, but because the statute does not distinguish between the plaintiff with comparative fault or the defendant that settles a claim for nuisance value, under a cost-benefit analysis.

Most practitioners have seen it before: An elderly plaintiff slips and falls, and surgery is required to repair his or her hip. If this type of injury was a result of a motor vehicle accident, with full liability, then the hip replacement surgery could approximate a \$250,000-

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## A Look Behind the Federal Government's New Efforts to Track and Recover Medicare Liens

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\$300,000 recovery. Under a premises' liability analysis, however, such cases regularly settle in a range of \$60,000-\$80,000. Now assume that Medicare paid \$23,000 for the surgery. Under the new legislation, the defendant and attorneys representing both parties are exposed to paying "double damages" (\$46,000) if Medicare's right to recovery is not satisfied within 60 days. It will take time to obtain payment information from the MSPRC, meanwhile the funds are being held by the defendant. Medicare will want the \$23,000, plaintiff's attorney will take the usual one-third fee, and the leftovers will be relegated to the plaintiff. Since there is no basis to negotiate an allocation of fault, plaintiff may not settle, which will force more cases to trial, where CMS will ultimately honor the allocation.

### Constitutional Issues Presented

In the absence of any procedure for review or appeal

of Medicare's unilateral decision as to how much reimbursement is owed by an affected plan, there are constitutional questions presented by aspects of the Medicare statutes (1980 and 2003). The issue of whether a reimbursement program may lawfully seek to collect its lien from settlement proceeds in excess of the amount of the settlement denominated as compensation for medical care, has been addressed by the United States Supreme Court in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752 (May, 2006). In *Ahlborn*, the Court held that the Arkansas Department of Health and Human Services could not enforce its lien on the entire settlement noting that this was specifically prohibited by the federal anti-lien statute. Under *Ahlborn*, the state's right to recovery extended only to recovery of medical payments. Where, as in *Ahlborn*, the settlement proceeds sought

to be attached included compensation for more than medical payments, the state could recover only that portion of the settlement denoted as representing compensation for medical care.

The new reporting arguably runs afoul of the Equal Protection Clause because the elderly and disabled claimant will now be treated differently from a non-Medicare beneficiary claimant in a number of ways. For example, it is anticipated that a good number of Medicare beneficiaries will be denied legal services due to the complexity of Medicare reimbursement issues and unclear Medicare Set Aside procedures. It is also anticipated that health care insurance coverage may be interrupted due to inquiries made by insurance carriers and self insured entities to determine lien (reimbursement amounts) information. This will cause medical expenses to increase after claims are resolved. There is even the real possibility that health care insurance may be suspended altogether in such instances.

### Conclusion

MARC supports the government's desire to be made whole, but the process being implemented needs to undergo more discussion. The above-referenced issues need to be timely addressed, and better understood, before the MSPRC is further backlogged with millions of reported settlements that the MSPRC is not dealing with today. This will be a huge undertaking. Individuals and entities now charged with implementing a system to report to CMS are unable to comprehend exactly what must be done to comply with the new laws.

Is CMS considering a "safe harbor" provision that can apply to the self insured or insurance carrier that is not told the truth about whether a particular claimant is receiving Medicare? What about the nuisance value settlement, will CMS consider an amount that can be paid to a Medicare-eligible plaintiff without a need to report? Are senior citizens and the disabled who receive Medicare exposed to a suspension of benefits if they are involved in a personal injury claim and CMS determines that Medicare's interests were not fully considered? MARC encourages a dialogue with CMS and the attorney general's office to address the issues raised in this article. Interested readers should visit [www.marccoalition.com](http://www.marccoalition.com) for an ongoing discussion of these issues.

### Useful Links:

<http://www.cms.hhs.gov>

[www.marccoalition.com](http://www.marccoalition.com)

<http://www.kff.org/medicare>

*Jeffrey J. Signor is an associate with Goldberg Segalla LLP. He is the firm's contact with MARC and welcomes calls to discuss the issues raised in this article.*

## Law Day Award Nominations Sought

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Nominees are notable for their cooperation with members of the legal profession; efficient handling of their duties; and willingness to extend themselves to the benefit of the legal profession and the public. Last year's Special Service Award was conferred on **Rodney C. Early**, clerk of the U.S. District Court for the Western District of New York.

### Police Officer Award

The Police Officer Award is given to a law enforcement officer in Erie County whose service is in keeping with the Constitutional imperative to balance the rights of society against the rights of the accused. The BAEC's Criminal Law Committee selects the recipient of this award based on the following qualities:

- Conduct which demonstrates an understanding of the Constitution and especially the Bill of Rights;
- Conduct which encourages respect for the law and the rule of law;
- Conduct which promotes and contributes to a better understanding of, respect for, and effective functioning of the judicial process;
- Cooperation with the legal community; and
- Conduct which demonstrates a concern for society and appreciation for the dignity of all persons.

Any law enforcement officer whose jurisdiction encompasses any part of Erie County is eligible for this award. Last year's award was presented to four police agencies who served on the **Bike Path Rapist Task Force: the Buffalo Police Department, the Amherst Police Department, the Erie County Sheriff's Department and the New York State Police.**

### Justice Award

This award is presented to a lawyer or non-lawyer whose efforts have substantially contributed to the improvement of the Justice System. The Justice Award is only given when circumstances warrant. It is not necessarily presented on an annual basis. Last year the award was presented to **Dr. Peggy Brooks-Bertram** and **Dr. Barbara Seals Nevergold.**

### Media Award

The Media Award is presented to single out achievements in print and electronic media which strengthen the system of justice and freedom under the law. The 2008 recipient of this award was **Eileen Buckley**, WBFO's assistant news director/reporter.

### How to Nominate a Candidate

Nomination forms for candidates for all the Law Day Awards are available from Sharlene Hall, 852-8687, Ext. 20. The deadline for receipt of nominations for 2009 Law Day Awards is **Friday, February 6, 2009.** [B]



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# ERIE INSTITUTE OF LAW

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**PLEASE NOTE: The Erie Institute of Law is unable to issue partial credit for seminars, except for multiple session programs such as the Tax and Leadership Institutes. If you have questions about whether a program qualifies for partial credit, please call Mary Kohlbacher at 852-8687.**

Date/Time/Location	Topic	CLE Credits	Price
Wednesday, December 3, 2008 1:00 p.m. - 2:00 p.m. Adelbert Moot CLE Center	Current Topics in Professional Ethics (Noonday)	1.0 credit	\$20 members and non-members
Thursday, December 4, 2008 1:00 p.m. - 5:00 p.m. - Seminar 5:00 p.m. - 6:00 p.m. - Reception Shanghai Red's Two Templeton Terrace	Settling Your Personal Injury Case and Sleeping at Night Part II: Remedies for Sound Sleep (Live Seminar) A reception sponsored by Paul K. Isaac of Settlement Professionals, Inc. will follow the program.	4.5 credits	\$70 members \$100 non-members
Thursday, December 11, 2008 11:30 a.m. - 5:00 p.m. Hyatt Regency Buffalo Two Fountain Plaza	Mortgage Foreclosure Defense Training - Day 1 (Live Seminar)	5.5 credits	\$60 members and non-members
Friday, December 12, 2008 8:30 a.m. - 5:00 p.m. Hyatt Regency Buffalo Two Fountain Plaza	Mortgage Foreclosure Defense Training - Day 2 (Live Seminar)	8.0 credits	\$110 members and non-members
Friday, December 12, 2008 9:00 a.m. - 12:40 p.m. Hyatt Regency Buffalo Two Fountain Plaza	Ethics Goes to the Movies (Noonday Lecture)	4.0 credits	\$70 members \$100 non-members
<b>SAVE THE DATE</b> Wednesday, January 21, 2009 12: 15 p.m. - 5:45 p.m. Social hour to conclude program Hyatt Regency Buffalo Two Fountain Plaza	Mediation: Let's Make a Deal (Live Seminar) <i>"All we are saying...is give peace a chance." ~ The Beatles</i>	4.5 credits	\$70 members \$100 non-members

Mail or fax to: Erie Institute of Law • 438 Main Street, Sixth Floor, Buffalo, New York 14202

(716) 852-8687 • Fax (716) 852-7641

## ERIE INSTITUTE OF LAW REGISTRATION FORM

Please register me for the following  
Erie Institute of Law sponsored events:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Name \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_ E-mail \_\_\_\_\_

Enclosed is my check in the amount of \$ \_\_\_\_\_  Visa  MC

Card Number \_\_\_\_\_ Exp. Date \_\_\_\_\_

Cardholder Signature \_\_\_\_\_

Cancellation Policy: If you are unable to attend a seminar, for which you have already registered, call Mary Kohlbacher at 852-8687 ext. 15. For a full refund, notice of your cancellation must be received before the date of the program. Registrants who are pre-registered and fail to attend will receive course materials in lieu of a refund.

# LISTEN, LEARN & EARN!

In today's competitive, fast-paced legal environment, effective time management is essential. Take advantage of the Erie Institute of Law tape library and start earning your CLE credits when the time is convenient for you.

The Erie Institute of Law offers many of our most popular CLE seminars on compact disc, as well as on cassette tape and videotape.

All of our seminars are professionally edited and are accompanied by a full set of written course materials.

Among our most recent selections:

## Court Certified Article 81 Training Product code 2111

6.0 CLE credits: 1.0 Ethics, 4.0 Practice  
Management/Professional Practice, 1.0 Skills  
Presented on May 17, 2007  
Available on CD and cassette only  
\$120 BAEC Members, \$140 non-members

This full-day program meets the legal requirements of the NYS Office of Court Administration Guardian and Fiduciary Services; therefore, all participants of this program are eligible for enrollment on the list of the Chief Administrator, pursuant to Part 36 of the Rules of the Chief Judge, in the category of "Guardian, Court Evaluator and Attorney for Alleged Incapacitated Person."

The program takes a functional approach to determining whether an alleged incapacitated person requires a guardian and places a premium on employing the least restrictive intervention to preserve independence and self-determination. Article 81 requires the appointment of a court evaluator in all cases to determine the functional strengths and weaknesses of the alleged incapacitated person, to explain the court proceedings and to advise the person of his or her rights, including the right to counsel. The authority and powers of the guardian are then tailored to the specific needs of the incapacitated person and may be reduced or increased over time as the person's needs change. You'll hear from attorneys, court representatives and others with expertise in this important area of practice.

## Surrogate's Court Guardian Ad Litem Product code 2125

5.5 CLE credits: 1.0 Ethics, 3.5 Practice  
Management/Professional Practice, 1.0 Skills  
Presented on May 14, 2008  
Available on Audiotape or CD

This program provides the information necessary to allow an attorney to qualify as a Guardian Ad Litem in Surrogate's Court proceedings. It includes information concerning Part 36 and the duties of a Guardian Ad Litem in various types of Surrogate's Court proceedings. Learn what you need to be aware of with respect to Part 36 of the NYCRR,

including the required forms and appointment process. Your obligations as a Guardian Ad Litem in various types of proceedings are thoroughly explained.

## Electronic Filing in New York State: Surrogate's Court in the 21st Century Product code 2127

2.0 CLE credits: Skills  
Presented on June 26, 2008  
Available on DVD only (must be returned at completion of program)  
DVDs can be rented at no charge for individuals not seeking CLE Credit.  
\$35 BAEC members and non-members

The New York State court system recently introduced electronic filing and service through the New York State Courts Electronic Filing System ("NYSCEF") in Erie County Surrogate's Court. Erie County is a pilot venue for E-filing in Surrogate's Court and NYSCEF is available in probate or administration proceedings, miscellaneous proceedings related thereto, and such other proceedings as the court permits.

E-filing provides the following benefits to attorneys:

- Documents can be filed in court or served 24/7 from anywhere in the world.
- Court fees can be paid online by credit card at any time.
- The electronic case file is accessible at any time from anywhere, both to attorneys and self-represented parties in the case.
- The system is easy to learn and use.
- There are no fees to use the system other than the normal filing fees.
- Documents can be printed from the file at no charge.
- The system provides instantaneous e-mail notice to participating e-filers when the court issues and files a decree, order, or judgment in a case.
- Commonly-used hardware and software are all that is required.

Attorneys and self-represented litigants must register as NYSCEF users and obtain a secure password. The simple process for doing so is explained in the program.

## 2008 Update on Civil Practice and Procedure Product code 2129

4.5 CLE credits: 0.5 Ethics, 4.0 Practice  
Management/Professional Practice  
Presented on September 18, 2008  
Available on Audiotape or CD

Catherine Grantier Cooley, Hugh M. Russ, III and Melissa N. Subjeck present the 2008 update. Among the topics they address are:

- Jurisdiction
- Long Arm Jurisdiction
- Forum Non Conveniens
- Venue
- Pleadings
- Service of Process
- Commencement of the Action
- Statute of Limitations
- Continuous Treatment Doctrine
- Relation Back Doctrine
- Estoppel
- The Borrowing Statute
- Addition and Substitution of Parties
- Interpleader
- Intervention
- Guardians
- Sanctions
- Injunctive Relief
- Accelerated Judgment
- Discovery
- Non-Party Disclosure
- Expert Disclosure
- Privileges
- Spoliation
- Settlement
- Jury Selection
- Article 78 Proceedings
- Arbitration
- Recent Cases of Interest
- Recent Statutory Changes

### Each seminar is priced as follows (unless otherwise stated):

CD/Audiotape: \$70 BAEC Members, \$100 Non-Members

To order, please send check payable to:  
The Erie Institute of Law  
438 Main Street, Sixth Floor  
Buffalo, New York 14202

Be sure to include your name and address for mailing purposes; add \$5 shipping and handling for each tape purchased. Tapes are mailed via UPS, no P.O. boxes please. To order by phone using your Visa or MasterCard, call Mary Kohlbacher at 852-8687.

If you haven't received your copy of our most recent CLE catalog, please call Mary Kohlbacher at 852-8687.

## The Buddy System [For CLE Audio Tapes]

Accreditation for viewing a CLE tape is handled on an individual basis. Each lawyer must pay the requisite fee, fulfill the requirements for accreditation, and acquire and retain his or her own certificates of completed continuing legal education activity.

However, as a service to our members who wish to participate in group or sequential viewing of CLE tapes, the Erie Institute of Law offers the following alternative: One member in the group may purchase the audio tape of their choice, paying the listed price; all other members in the viewing group who wish to receive accreditation for viewing the tape will receive a \$20 discount. One set of audiotapes will be mailed along with course materials for each participant.

In order to administer CLE credit, the names of all participating attorneys **must** be given at the time of purchase. No more than five people per tape allowed.

The Buddy System applies to programs costing \$70 and up.

Name: _____		<b>Buddy System Registration Form</b>
Each additional participant:		
2. _____	3. _____	
4. _____	5. _____	
Shipping Address (No P.O. boxes please, due to UPS shipping):		
Firm: _____		
Street Address: _____		
City: _____	State: _____	Zip: _____
Phone: _____	E-mail: _____	
All tapes will include course materials. Please indicate the audio tape/CD/Video(s) product code of your choice: _____		
Total amount enclosed (Please add \$5 per tape for shipping): \$ _____		
[ ] Check enclosed Charge my: [ ] Visa [ ] MasterCard		
Credit Card #: _____	Exp. Date: _____	
Name (as it appears on card): _____		
Signature: _____		



*The Adirondacks*

Photo by Glenn Edward Murray

 <p><b>DECEMBER 2008</b></p>	<p><b>ALL MEETINGS HELD IN THE BAR CENTER, 438 Main Street, Sixth Floor, unless otherwise noted. The Adelbert Moot CLE Center is also located at 438 Main Street, Sixth Floor.</b></p>		
	<p><b>MONDAY 1</b> Professional Ethics Committee 12:15 p.m. - Bar Center, Brennan Room Thomas S. Wiswall, Chair</p> <p><b>TUESDAY 2</b> Board of Directors 8:00 a.m. - Giles P. Manias, President</p> <p>Matrimonial &amp; Family Law Committee 12:15 p.m. - 25 Delaware, 5th Floor Catherine E. Nagel, Chair</p> <p><b>WEDNESDAY 3</b> Legal Nurse Consultants Committee 12:15 p.m. - Cynthia E. Wojciechowski, Chair</p> <p>Practice &amp; Procedure in Family Court Holiday Party 5:30 p.m. - 8:30 p.m. - Midday Club For further information, please contact Tracey Kassman at 845-7449.</p> <p><b>THURSDAY 4</b> Negligence Committee 12:15 p.m. - Adelbert Moot CLE Center William A. Gersten, Chair</p> <p>Practice &amp; Procedure in Justice Courts Committee 12:15 p.m. - Jeffrey F. Voelkl, Chair</p>	<p><b>FRIDAY 5</b> Commercial &amp; Bankruptcy Law Committee 12:15 p.m. - Adelbert Moot CLE Center Beth Ann Bivona, Chair</p> <p><b>TUESDAY 9</b> Labor Law Committee 12:15 p.m. - Sean P. Beiter, Chair</p> <p>Real Property Law Committee 12:15 p.m. - Adelbert Moot CLE Center W. Clark Trow, Chair</p> <p><b>WEDNESDAY 10</b> Health Care Law Committee 12:15 p.m. - Lisa McDougall, Chair</p> <p>Unlawful Practice Committee 12:15 p.m. - Bar Center, Brennan Room Patricia L. Fulwiler, Chair</p> <p><b>THURSDAY 11</b> Criminal Law Committee 12:15 p.m. - Rodney Personius, Chair</p> <p>Committee on Veterans and Servicemembers Legal Issues 12:15 p.m. - Adelbert Moot CLE Center Jennifer P. Stergion, Chair</p> <p><b>FRIDAY 12</b> Committee for the Disabled 12:15 p.m. - Janet L. Bensman, Chair</p>	<p><b>MONDAY 15</b> Banking Law Committee 12:15 p.m. - Location to be announced Timothy P. Johnson, Chair</p> <p>Workers' Compensation Committee 12:15 p.m. - Location to be announced Philip Scaffidi, Chair</p> <p><b>TUESDAY 16</b> Board of Directors 8:00 a.m. - Giles P. Manias, President</p> <p>Corporation Law Committee 12:15 p.m. - Bar Center, Brennan Room Ronald J. Battaglia, Jr.</p> <p>Federal Practice Committee 12:15 p.m. - Anna Marie Richmond, Chair</p> <p><b>WEDNESDAY 17</b> Erie County Bar Foundation 8:00 a.m. - T. Alan Brown, President</p> <p>Appellate Practice Committee 12:15 p.m. - Marilyn Hochfield, Chair</p> <p>Intellectual Property, Computer &amp; Entertainment Law Committee 12:15 p.m. - Bar Center, Brennan Room Ellen Swartz Simpson, Chair</p> <p><b>THURSDAY 18</b> Environmental Law Committee 12:15 p.m. - R. Hugh Stephens, Chair</p>
	<p><a href="http://www.eriebar.org">www.eriebar.org</a></p>		