President’s Letter

By Giles P. Manias

Civilization Takes a Step Forward

I have three things I want to talk about in this letter.

First: We recently witnessed a significant moment in history with the election and inaugura-
tion of President Obama. I believe it has world-
wide historical importance. It was a defining
moment: the kind of moment that turns mere
belief into reality.

These moments are rare, when civilization
takes a step forward. I am of course mindful of the
ugly and selfish forces that brought us to that
moment. But something very good happened at
that moment that will last a long time.

At the time of the inauguration, I was involved
in a trial before Judge NeMoyer. I was actually the
plaintiff in a jury trial. The judge was kind
enough to have his clerk turn his computer screen
around so that those of us left in the courtroom
during the lunch break could see the inaugura-
tion.

So I stayed in the courtroom and was joined by
six jurors. No one talked but there was an atmos-
phere that something very important to them was
going on. When the National Anthem was sung,
we stood with hands on heart. After Mr. Obama
took the oath, they all stood up and applauded
loudly. I noticed tears in the eyes of several. After
the new President spoke, they cheered and
applauded. A white juror, who I thought looked
tired, during the morning session, walked over
to the only black juror and took his hand.

“This is a great thing for all of us,” he said. Then he sat down and wiped his eyes.

Bar, Medical Society, CPAs & Dentists Join Forces
to Sponsor Domestic Violence Seminar

Domestic violence should not happen to anyone,
ever. But it does - and when it happens, it is incumbent
upon all of us, particularly in the legal and medical
communities, to help. Looking the other way is never
the answer - domestic violence is everybody’s business.

By conservative estimates, 1.5 million women and
355,000 men in the United States are assaulted by
their intimate partners every year. Many of these vic-
tims are among us, but invisible (see the article by
Buffalo lawyer Patricia Stroman Walker on page 5 of
this issue). To continue the conversation that was
started at our February noonday lecture entitled
“Bystander, Victim, Attorney: Your Role in the
Domestic Violence Epidemic,” the Bar Association
of Erie County has joined forces with the Medical Society
of the County of Erie, the Buffalo Chapter of the NYS
Society of CPAs and the Eighth District Dental Society
to present a CLE/CME seminar on the subject of
domestic/spousal abuse.

The seminar will be held on Wednesday, April 15
at the Millennium Hotel at the Walden Galleria from
12:30 to 4:30 p.m. The keynote speaker is Buffalo
physician Nancy Nielsen, M.D., who is currently
serving as president of the American Medical
Association. Nielsen is only the second woman in the
organization’s history to hold its highest office. She will
discuss the domestic violence epidemic from a national
perspective.

Family Court Judge Lisa Bloch Rodwin, who
prosecuted the notorious Noon-Nill case while working
in the Erie County District Attorney’s office, will also
speak at the seminar. Other speakers include:

- Linda Ray, executive director of the Family
Justice Center, who will discuss services available
to victims;
- BAEC member and domestic violence survivor
Patricia Stroman Walker, who will explore the
“professional face of the problem;”
- Police officer Cindy Herberger, who will present
statistical information;
- BAEC member Kristin Areumi, who will explain
reporting requirements for lawyers; and
- Nicole Traubold, Ph.D, who will discuss counsel-
ing services for victims and exactly how to
address the issue with clients.

For further information or to register for the
seminar, watch your mail for further details or
contact Mary Kohlbacher at 852-5687 or
mkohlbacher@eriebar.org.

Experience a Work of Art at the 2009 President’s Ball!

The sparkling new Burchfield Penney Art Center at Buffalo State College is the venue for the 2009
President’s Ball, to be held in honor of president Giles
P. Manias and the Association’s past presidents on
Saturday, March 28 from 7:00 until 10:00 p.m.

The College is located at 1300 Elmwood Avenue in
Buffalo.

The black-tie optional gala will feature a cocktail
reception catered by Oliver’s, along with live music and
dancing to the sounds of the Allen Street Jazz Band,
featuring Rose Bond, and Jim Whiffield’s Real Beat
Band. The lively unveiled art museum is the perfect
place to pay tribute to our current president, who is
also a professional painter. The museum’s distinctive
gallery spaces feature 12 captivating exhibitions that
celebrate the history, diversity, and beauty of western
New York art.

Tickets to the gala are $75 per person. Watch your
mail for further details or contact Maureen Gorski at
852-5687 or mgorski@eriebar.org.

continued on page 2
President’s Letter continued from page 1

It was an amazing moment in that court room that I am sure was repeated throughout the country and indeed around the world. I won’t soon forget it. It was a moment that I revisited in my role in the law and the Constitutional values we are so lucky to share.

It also made me proud to be a lawyer, because of the role lawyers have played in bringing our civilization to that moment in history.

It was a Dark and Stormy Night…

The second thing is a story about a very stormy night in Buffalo. It was January 25, 2009, the night that a young French woman lawyer had picked to give a “thank you” party for those who had helped her while she was here in our international sister city program.

Audrey Demunyk Leger was leaving the next morning for France to start her career as a lawyer. But the snow was blowing so fast it was difficult to drive, and what little traffic there was barely crawled down Elkwood Avenue. The drifts were high and the falling snow cast halos around every light. I thought no one in Buffalo-good-neighbor thing,” caring about someone laughter about her experiences and the memories they brought gifts, photos, and presents with spouses and children. They weren’t going to let from Legal Aid, M&T Bank, and the courts showed up snow cast halos around every light. I thought no one in Buffalo-good-neighbor thing, “a Buffalo-good-nurseries, e.g., the presence of friends, family, and a sincere willingness to contribute. I wish they were my partners in a law firm. What a dynamic bunch of people! They contribute positively, and a sincere willingness to contribute.

Unseen Heroes

Finally, I want to talk about something that is rarely talked about. I want to tell you about the great job our board of directors and officers are doing. No one ever sees it, much less talks about it.

I would like to name them all individually and I could tell you specific contributions each one has made so far this term. It would take a very long time. They never cease to impress me with how well they function as a group, they are wise, they have common sense, and a sincere willingness to contribute.

I wish they were my partners in a law firm. What a dynamic bunch of people! They contribute positively, quickly, and creatively. I am lucky to be sitting at the head of the table with such a wealth of talent to back me up. You will be hearing soon about some wonderful ideas they are working to bring to realization, ideas that will benefit all of us in this organization, now and in the future.

continue on page 4

All we are saying is give peace a chance.”

Special thanks to A. Angelo DiMillo of Lockport, who wrote to us that the above quote, which appeared on page one of the January issue in connection with a recent mediation seminar, was incorrectly attributed to the Beatles. DiMillo clarified that John Lennon wrote the song above after the Beatles broke up.

All letters 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 (preferred) or by mail to: Bulletin Editor, 438 Main Street, Sixth Floor, Buffalo, NY 14002.

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.

* * *

April 2009 Bulletin DEADLINE * * *

The next deadline for All Bulletin contributors and advertisers is Friday, March 6, 2009.
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; reorganization; 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.

**Pauline Costanzo Will** has been named a partner at Watson, Bennett, Colligan, Johnson & Schechter after six years as a senior trial lawyer with the firm. A trial attorney, Will focuses her practice on trucking defense, toxic torts, products liability and other personal injury litigation.

**Philip D. Leone** recently opened a law office at 403 Main Street, Suite 723A, in Buffalo. Leone’s new practice will focus on plaintiff representation in medical malpractice actions, construction litigation, fidelity claims, and professional negligence.

**Katherine E. Cauley** and Catherine G. Grantier Cooley have been named partners at Hodgson Russ LLP. Cauley is a member of the firm’s estates and trusts practice group and focuses on tax and estate planning and administration, private foundations and charitable giving, trust administration, cross-border tax and estate planning, and business succession planning. Cooley, a member of the business litigation practice group, represents securities firms, investment advisors, broker-dealers, and brokers in FINRA arbitrations and arbitrations. She also practices construction law and represents insurers and employees in ERISA-related litigation.

**Joseph M. Hanna** was recently elected a partner in Goldberg Segalla LLP. He concentrates his practice on commercial litigation with a focus on intellectual property law, construction litigation, fidelity and surety law, and sports and entertainment law. Hanna is active in the Defense Research Institute (DRI) and also serves on the MBA’s Judicial Internship Opportunity Program Screening Committee. He was appointed vice chair of the MBA Young Lawyers Division Minorities in the Profession Committee and is also vice chair of the Arts, Entertainment and Sports Law section.

**Diane Tiveron** has been named a partner in HoganWillig. She joined the firm in 1989 and has focused her practice on business and commercial law, civil litigation and bankruptcy cases. Tiveron has been serving as the firm’s managing attorney and will continue her position as managing partner.

**Gregory Zini, Heidi Pleasner Ruchala, Jeffery D. Palumbo and Eric C. Naegley** have been named partners in Damon & Morey LLP. Zini concentrates his practice on commercial litigation and intellectual property litigation. He works primarily with corporations and professional clients in complex litigation involving commercial transactions, corporate governance, dissolution of business entities, non-compete and confidentiality agreements, franchise litigation, unfair competition, trademark infringement, fraud, and other business torts.

Ruchala focuses on the defense of personal injury, products liability, toxic substance, sports and recreation liability and trucking litigation in both state and federal courts. She also defends organizations involved with the care and placement of developmentally disabled youths and adults.

Palumbo concentrates his practice on environmental and real estate issues, including real estate development, land use planning, use and area variances, site plan and subdivision approvals, residential and commercial sales, and state regulatory procedures.

Hanna focuses on the defense of personal injury, products liability, toxic substance, sports and recreation liability and trucking litigation in both state and federal courts. She also defends organizations involved with the care and placement of developmentally disabled youths and adults.

The Company of friends

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

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 Kelly Bardis at 620-4882. All services are individualized and completely confidential.

NY Bar Foundation
Bestows Lifetime Achievement Award

Former BAEC and NYSBA president Maryann Saccomando Freedman has received The New York Bar Foundation’s Lifetime Achievement Award for her work advancing the Foundation’s purposes and for her dedication to the legal profession.

The award was presented during the recent annual dinner meeting of the Fellows of The New York Bar Foundation at the Metropolitan Club in New York City.

Saccomando Freedman is of counsel at Cohen & Lombardo in Buffalo, where she maintains a general civil practice and is chair of its matrimonial and family law department. She was the first woman president of both the Bar Association of Erie County and the New York State Bar Association. Saccomando Freedman has been a member of the NYSBA House of Delegates since 1989 and was awarded the state bar’s prestigious Ruth G. Schapiro Award in 1994.

Established in 1950, The New York Bar Foundation is dedicated to aiding charitable and educational projects to meet the law-related needs of the public and the legal profession. The Foundation solicits charitable contributions and provides funding to increase public understanding of the law, improve the justice system and the law, facilitate the delivery of legal services and enhance professional competence and ethics.

**Expand your mind and improve your practice!**

A group of Erie County lawyers will travel to Washington, D.C. next month to be admitted to the U.S. Supreme Court Bar. To join them, call Dennis J. Bischof at 630-6500.

BAR ASSOCIATION OF ERIE COUNTY

It’s great to belong to something this good.

PAGE 3

March 2009 | www.eriebar.org
citations

FROM PARIS WITHOUT LOVE

They fell in love in Paris.
The capital of romance.
And made a prenuptial agreement
Under the civil laws of France.

Their love came sadly undone
And they sought to divide the assets
Which they had acquired by the ton.

Not so fast, said the court.
With your equitable distribution
For your prenuptial agreement
Still binds your asset resolution.


SQUASHING SEQUENTIAL SENTENCING

Our Fourth Department has modified the imposition of sequential DWI sentences, the court noting that the convictions arose out of a "single, continuous act." (Pro. v. Tuzynski, __AD3rd__, 12/31/08, #1271) See also Pro. v. Smith, __AD3rd__, 12/31/08, #1490.

SUPPRESSION LESSONS

Marijuana found in defendant’s mobile home after a fire was suppressed by our Fourth Department, which noted that the marijuana was found by a deputy sher-iff after the fire was under control and the “emergency” had ended. (Pro. v. Christianson, __AD3rd__, 12/31/08, #1122) See also Pro. v. Stock, __AD3rd__, 12/31/08, #1477 (DWI traffic stop), and Pro. v. Harris, __AD3rd__, 12/31/08, #1478 (reasonable suspicion base on the totality of circumstances).

RENUNCIATION ELABORATION

The Fourth Department held that the affirmative defense of “renunciation” should have been charged at defendant’s trial, the high court noting a reasonable view of the evidence that the defendant had abandoned his attempted rape of the alleged victim. (Pro. v. Ervin, __AD3rd__, 12/31/08, #1367)

LEGAL PUGILISTICS OVER PROPERTY

(aka “DUELING OVER DIRT”)

Whether or not a Puwa Hiit parcel has an easement for parking and access through an adjoining plaza is the fascinating topic reviewed in Franklin Park Plaza, LLC v. RJ National Enterprises, LLC, __AD3rd__, 12/31/08, #1516.

In Glacial Aggregates LLC v. Town of Yorkville, __AD3rd__, 12/31/08, #1336 use of property for sand and gravel mining was held to not qualify as a nonconforming use. See also Jones and Jones-Carroll, Inc. v. Town of Carroll, __AD3rd__, #1261.

TIME LINES REFINED

Plaintiff’s claims based upon allegations of health problems related to a mold condition at the house he leased from the defendant was dismissed by our Fourth Department, noting that over three years had elapsed since the discovery of the condition. (Marzorati v. Castle, __AD3rd__, 12/31/08, #1436)

Extension of time to serve summons and complaint was denied where application was made 20 months after filing of the action. (Sheffield v. Business, __AD3rd__, #69 NYS2nd 877, 12/18/08).

SLIP TIPS AND STUMBLE BUMBLES

Factual issues precluded summary judgment where plaintiff allegedly slipped and fell on ice in defendant’s parking lot. (Dietzen v. Amyell Development Corp. et al., __AD3rd__, 12/31/08, #1665) See also Espinell v. Dickson, __AD3rd__, 869 NYS3rd, 12/9/08. (S/J in defendant’s favor)

In Peters et al. v. United Refining Co. et al. (___AD3rd___, 12/31/08, #1662), our Fourth Department held that the dismissal motion of the third party defendant plowing contractor should have been granted.

In Dietzen v. Mid Inc. (___AD3rd___, 12/31/08, #1664), our Fourth Department held that factual issues precluded summary judgment where plaintiff tripped over a wooden pallet at defendant’s store.

In DeJesus v. NYC Housing Auth (___NY3rd___, 12/18/08), a fall down case was dismissed where there was insufficiency showing that the defendant was either the creator of the condition or had notice of the condition.

Note differing results in these “slippery floor” cases: "Spicker et al v. 1725 York Owners Corp. et al., ___AD3rd___, 869 NYS2nd 12, 11/12/08, (S/J denied), and Purcell v. York Building Maintenance Corp., __AD3rd__, 869 NYS2nd 32, 12/2/08. (S/J granted to defendant).

CONFLICTING CASES CAN COLLATERAL ESTOPPEL

In Gaston et al v. American Transit Insurance Co. (___NY3rd___, 12/16/08) the Court of Appeals held that the doctrine of collateral estoppel was not warranted where there were conflicting judgments on the same issue (whether the car that hit the bus in which the injured plaintiffs were traveling was insured).

STUCK WITH THE STEP

Ratification of stipulated agreement by husband despite alleged anticipatory breach by the wife precluded him from now challenging the agreement. (Hirechberg v. Hirechberg, __AD3rd__, 396 NYS2nd 23, 1st Dept., 11/25/08).

IMPUTATION ELABORATION

The Appellate Division upheld Supreme Court’s imputations of additional income due to husband’s ‘early’ retirement. (Liles v. Liles, __AD3rd__, 869 NYS2nd 97, 11/12/08, 2nd Dept.)

PONDERING PERSNOCKEY PLEDINGS

Affirming Justice Gerald Whalen, the Fourth Department declined to allow a complaint to be amended where the named defendant was merely a “trademark” name, and there was no showing that the correct defendant had been “in fact” served. (Studley v. Tim Hortons, __AD3rd__, 12/31/08, #1462).

Affirming Justice Frank Carseo, our Fourth Department has upheld the court’s denial of defendant doctor’s demand for a further bill of particulars in a case of alleged medical malpractice. (Sudin v. Dr. Cherik, __AD3rd__, 12/31/08, #123)

President’s Letter

(continued from page 2)

When this column gets published, president-elect Bob Conlin will be in Chicago taking the last leader training course. It is a great experience and all our presidents have participated in it. But Bob is as well-equipped intellectually and very gifted as a leader already. I know that when he term as president begins, we will be in extremely capable hands. He has already proven that in his contributions as vice president. He makes it look easy, and he has a great sense of humor, too.

They are watching over your interests, and working hard for you. You have chosen them wisely and I am honored to serve with them.

I just thought you should know. [B]
Domestic Violence Victims

Beyond the Shadows: BAEC Joins Forces with Medical Society to Help Domestic Violence Victims

By Patricia Stroman Walker

Having recently outed myself as a survivor of domestic violence, I want to think those people who were kind enough pass along encouraging words or share their stories of survival. Those stories only reinforce the point that domestic violence isn’t just confined to “other people” like we may think it is; it crosses economic, racial, ethnic, religious, age and gender boundaries and affects all of us, including lawyers, doctors and others who are viewed as being higher up on the occupational food chain. The Buffalo News recently reported that violent crime is up in Amherst, fueled by a hike in aggravated assaults. The chief of police suggests the increase in that statistic may stem from the increasing likelihood that domestic violence will be reported. If there’s domestic violence in Amherst, it’s in Orchard Park, East Aurora and Clarence, just as it is in every other neighborhood, and some of those involved are our neighbors and friends.

By conservative estimates, 1.5 million women and 835,000 men in the United States are assaulted by their intimate partners every year. Many of these victims are among us, but6 invisibly. I have heard the story of a male attorney who was physically and verbally assaulted by his wife. How would you like to be told you’d better not go to sleep tonight by someone who’d come after you with a butcher knife? On the rare occasions he would attempt to restrain her, this man’s wife would call the police and claim he was the perpetrator. As he succinctly asked, “Who do you think they believed?”

I have also heard the story of ongoing abuse of a female physician by her physician ex-husband in which the court system and her local police have been of little or no assistance. I was astounded that he was a victim, thinking, “But she’s a doctor; she’s beautiful, she’s thin, she’s blonde, she drives a fancy car!” How could this be? I was shocked and saddened that these people were dealing with such violence and its terrible effects. Their stories only reaffirm that professionals who appear to have all of the advantages in life — can be in the same shoes as millions of other victims, struggling to hide the reality of their lives just as the rest of us do.

When I decided that it was time to help raise awareness of this issue among my colleagues, I went to a complete stranger, Kathie Bifaro, the executive director of our bar association, to pitch a very nebulous idea. Her silence after I told her what I had in mind was deafening. Resounding. Overwhelming! She hates it, I thought. Instead, Kathie was speechless, having been, as many of us are, unacquainted with domestic violence and how common it is in our community. That was the last of her silence and she immediately sprang into action, contacting the executive directors of other local professional societies to mobilize them around the issue.

To that end, please consider attending the half-day seminar coming up on April 15th in which the Bar Association of Erie County will co-sponsor with the Medical Society of the County of Erie to educate both doctors and lawyers on the issue (see article on page one). Dr. Nancy Nielson, the president of the American Medical Association and a dynamic speaker, will be our lead presenter and other speakers will include Judge Lisa Bloch Robison, Linda Ray, executive director of the Family Justice Center, and others who will educate us not only on what domestic violence is and where it is, but also what exactly to do about it and how to go about helping those in need. Of note, social workers will be available to provide immediate assistance to any attendee who finds the seminar strikes too close to home. This promises to be an outstanding session.

As the American Bar Association urges in its Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking (see http://www.abanet.org/domviol/docs/StandardsBlackLetter.pdf), “The need for protection from violence cannot be underestimated.” The effects of domestic violence are devastating not only to vic-

continued on page 6
Tax Deductions for Fun or Profit?

Section 162 of the Internal Revenue Code (“IRC”) allows taxpayers to deduct ordinary and necessary business expenses. Section 212 of the IRC allows for the deduction of expenses incurred for the production or collection of income. But being in business or involved in the production or collection of income is not sufficient to secure a deduction for individuals and sub-s corporations because the deductions allowed by IRC § 162 and § 212 are limited by IRC § 183. That section prohibits deductions incurred in an activity “if such activity is not engaged in for profit” (except for deductions to the extent of income derived from an activity not engaged in for profit).

IRC § 183(d) also provides a rebuttable presumption that an activity was “engaged in for profit” if it made a profit in three of the last five years, ending with the year at issue. For an activity that consists in major part of the breeding, training, showing, or racing of horses, the presumption arises if it was profitable in just two of the last seven years. IRC § 183(d) also allows the taxpayer to elect to hold open a tax year long enough to allow the five-year or seven-year rules to run their course. Otherwise, a taxpayer might be audited in the third year of an activity that takes four or more years to turn a profit, thereby eliminating the possibility of using the presumption for the first three years.

Section 183 is known as the “hobby loss” provision because it was enacted to prevent individuals from deducting expenses associated with hobbies. But it applies as well to activities that might not otherwise appear to be hobbies. The issue is whether the taxpayer was engaged in the activity for profit, not whether other people engage in the same activity for profit.

Most of the cases that reached the courts on the application of IRC § 183 involve activities that can be for fun or profit, or even both. The focus is on determining whether the taxpayer’s subjective purpose for engaging in the activity was for profit. That subjective intent is determined by an objective analysis of nine major factors set forth in Treasury Regulation §1.183-2(b):

1. The manner in which the taxpayer carries on the activity.
2. The expertise of the taxpayer or his/her advisors.
3. The time and effort expended by the taxpayer in carrying on the activity.
4. An expectation that assets used in the activity might appreciate in value.
5. The success of the taxpayer in carrying on other business activities.
6. The taxpayer’s history of income or losses with respect to the activity.
7. The amount of occasional profits, if any, which are earned.
8. The financial status of the taxpayer.
9. Elements of personal pleasure or recreation.

The courts have consistently held that no one factor is controlling, nor is it merely a matter of assigning sides to each factor and then adding up the score.

Whether [the taxpayer] had the requisite profit motive is a question of fact to be determined on the basis of the entire record. The regulations set forth the relevant factors, derived from prior case law, which are to be considered in determining the applicability of section 183. [Citations omitted]. The regulations further provide that no one factor is dispositive and, thus, we do not reach our decision herein by merely counting the factors which support each party’s position.

Dunn v. Commissioner of Internal Revenue, 70 T.C. 715, 720 (1978). However, an analysis of the facts used by the courts in previously decided cases is useful for purposes of determining the facts one should be prepared to address in an audit or on appeal.

I. The manner in which the taxpayer carries on the activity.

The first factor is usually divided into five sub-questions:

A. Did the taxpayer have and follow a business plan?
B. Did the taxpayer separate business from pleasure?
C. Did the taxpayer promote the activity in a business-like manner?
D. Did the taxpayer maintain and use adequate books and records?
E. Did the taxpayer make changes in response to unexpected losses?

None of these factual inquiries is controlling, but a taxpayer who fails all five of them will have a difficult time convincing the court that they were engaged in the activity for profit.

A. The Business Plan

The first factor the court delves into is whether the taxpayers had developed a business plan before starting the activity at issue. The court is also impressed with taxpayers who update their initial business plans to reflect unexpected occurrences or new directions to increase the chance of a profitability.

continued from page 5
CONSTITUTIONAL LAW

In Doe v. Green (07-CV-6530L, 1/6/09), the court granted a motion to dismiss §1983 claims against assistant district attorneys and police officials who allegedly manipulated grand jury proceedings so as to prevent the indictment of police officers involved in an altercation with plaintiffs. Among other holdings, the court dismissed the claims against the prosecutors based on absolute immunity for conduct associated with the grand jury proceeding and based on qualified immunity for statements made to the media, and it dismissed plaintiffs’ claims against the defendant county on the ground that a district attorney acts on behalf of the state, not the county.

EMPLOYMENT LAW

In Ferrari v. KeyBank, National Association (06-CV-6525, 1/5/09), former employees sued for compensation they were allegedly owed under an “incentive plan.” The court granted the defendant former employer summary judgment dismissing plaintiffs’ breach of contract claims because the plan gave the employer “sole and absolute discretionary authority and power” to determine eligibility for and the amount of benefits, and to modify any awards. The court dismissed plaintiffs’ claims for breach of the implied covenant of good faith and fair dealing on the same ground, and also on the ground that those claims were based on the same facts as the breach of contract claims; it dismissed plaintiffs’ promissory estoppel claims against the defendant assignee to recover on two debts guaranteed by the defendant, a resident of Florida. The court denied the assignee’s motion for judgment as a matter of law or for a new trial following a jury verdict finding that plaintiff’s complaint of sexual harassment was a motivating factor in the defendant city’s decision to terminate her employment. In so holding, the judge rejected the city’s argument that a prior decision granting its motion for summary judgment on plaintiffs’ substantive claims of employment discrimination defeated her claim of retaliatory discharge, finding sufficient evidence that plaintiff had a “good faith belief” that she was a victim of a hostile work environment.

EXPERT TESTIMONY

In Cosentino v. Garlock Equipment Co. (05-CV-6553-CJS, 1/13/09), a product liability lawsuit, the defendant moved to bar plaintiff’s expert from testifying on the ground that the expert had not tested the alternative design he claimed would have prevented the accident. The court denied the motion, holding that the expert’s theory was sufficiently reliable under federal Rule of Evidence 702 because it was based on his knowledge of scientific principles and metallurgical properties, and that the expert’s failure to bolster his opinion with experiments, other than a so-called “conceptual thought experiment,” went to the weight, rather than the admissibility, of his proposed testimony.

JURISDICTION AND VENUE

In Duke, Holzman, Photiadis & Gresens LLP v. Guarantors (05-CV-0437, 1/8/09), plaintiff sued as assignee to recover on two debts guaranteed by the defendant, a resident of Florida. The court denied defendant’s motion to dismiss for lack of personal jurisdiction on the basis that he transacted business in New York, guaranteed a debt of a New York corporation and guaranteed performance of an obligation in New York, such that exercising personal jurisdiction under the long arm statute complied with due process require-

ments. The court also denied defendant’s motion to transfer venue to the Southern District of Florida, holding that he did not offer any “exceptional facts” to show that the forum selection clause in the guarantees should not be enforced.

SOCIAL SECURITY DISABILITY

In Scott v. Barnhart (07-CV-6561L, 1/3/09), plaintiff sought judicial review for the fourth time of the denial of her deceased father’s claims for Social Security disability benefits. Finding that the commissioner’s decision again was based on legal error and was not supported by substantial evidence, the court remanded the case to be considered, on an expedited basis, by an ALJ not previously involved in the case. First, the court held that the claimant had not engaged in “substantial gainful activity” during the period at issue because his farm showed no profits, giving rise to a presumption that he was not making a substantial income. The court also found that the ALJ erroneously relied on prior findings of an earlier ALJ, both with respect to the claimant’s residual functional capacity and his ability to perform past relevant work, that an earlier court had already found were defective. Finally, the commissioner failed to sustain her burden of proving that the claimant could perform other work, in part because the ALJ adopted a prior ALJ’s decision without correcting certain legal and factual deficiencies in that decision.
The business plan does not need to be a product of a Harvard business-school graduate but it should at least set forth projections of income and expense with an anticipated date of profitability. The plan, however, cannot be merely “to make money.”

A valid business plan would follow the outline provided by the United States Small Business Administration as set forth at http://www.sba.gov. However, the business plan does not need to be that formalistic. It does not even need to be in writing so long as the taxpayer can articulate the plan and the evidence establishes that the taxpayer acted in accordance with the unwritten business plan. But taxpayers who did not have a business plan of any sort will have difficulty convincing the court that they intended to make a profit given that they had no plan on how to do so.

B. Separating Business from Pleasure

The court is impressed with taxpayers who separate their business activities from their personal affairs. At a minimum, the court expects people engaged in a business to maintain bank accounts separate from their personal accounts. Other helpful distinctions include a business telephone number, a business address, and separating business assets from personal assets. Again, none of these separations is absolutely necessary, but if they exist they will help persuade the IRS that the activity was engaged in for profit.

C. Promotion of Business

The court often depicts minimal advertising efforts as mere attempts to sell personal assets rather than promotion of a business. The court believes that a person engaged in an activity for profit will employ advertising and other activities to promote the business as a going concern as well as to sell specific services or goods.

The advertising and promotion need not be a Madison Avenue devised Super Bowl campaign. But business cards, a business telephone number for purposes of being listed in the yellow pages, and an engaging advertisement activity placed in media expected to reach potential customers are a lot more impressive to the court than simply relying on “word of mouth.”

D. Use of Business Records

The court expects people engaged in an activity for profit to keep and regularly review records pertaining to profit and loss. Simply keeping records for purposes of completing a tax return is not enough. The court believes that people in business will not only keep detailed financial records but will also regularly analyze those records to improve prospects for profitability.

E. Changes in Response to Losses

If losses are incurred in excess of those contemplated by the business plan, or if losses are incurred in absence of a business plan, then the court will want to know what action, if any, the taxpayer undertook to eliminate or reduce such losses. The court assumes that people engaged in an activity for pleasure view expenses for the activity as consumption. In contrast, people engaged in an activity for profit view losses as a cancer that needs to be treated and contained.

2. The expertise of the taxpayer or his advisors.

The court will look for expertise in the substantive aspects of the activity (e.g., knowledge about raising, training, and breeding horses) and expertise in the financial aspects of the activity (e.g., knowledge about operating a profitable horse business). Taxpayers can obtain the expertise from personal experience, self-study, or consultation with people who have such expertise.

The court recognizes that many starting businesses don’t have the resources to hire financial consultants. However, the court expects that a person intent on making a profit from an activity will engage in some sort of fact finding about the economic aspects of the activity. As in the case of record keeping, this involves more than just seeking information about the cost of an activity. A person contemplating the start of a business is expected to investigate both the expense and income aspects of the activity, or to rely on others with such knowledge.

3. The time and effort expended by the taxpayer in carrying on the activity.

This factor tries to distinguish the behavior of people engaged in a hobby from the behavior of people engaged in a business. The court often reasons that people who spend more than their normal active recreational time on an activity are more likely to be engaged in the activity for profit. Likewise, people who employ others to care for their activity when they are unable to do so are also more likely to be engaged in the activity for profit than someone who merely lets the activity remain dormant when they are unable to attend to it.

This factor also looks to the taxpayer’s extra-curricular activities related to the alleged business activity. Membership in trade associations rather than just consumer oriented clubs is a positive factor. Participation in trade shows, seminars, and other extra-curricular activities focused on the economic aspects of the activity is also a positive factor.

4. An expectation that assets used in the activity may appreciate in value.

A reasonable expectation of appreciation of business assets helps to establish that the activity is engaged in for profit. The taxpayer, however, has to offer some concrete evidence to support such a claimed expectation. Actual appreciation of the assets owned by the taxpayer needs to be shown. In addition, the court will look for corroborating evidence such as insurance of the assets to protect appreciation from a casualty.

5. The success of the taxpayer in carrying on other business activities.

The taxpayer’s prior success in other similarly situated businesses shows the court that the taxpayer has a factual basis for his or her subjective intent to make a profit in the business at issue.

6. The taxpayer’s history of income or losses with respect to the activity.

The taxpayer needs to explain away losses that exceed the normal starting period. This is usually shown by unexpected events or economic circumstances beyond the taxpayer’s control.

7. The amount of occasional profits, if any, which are earned.

This factor tries to qualify the actual, the profit and loss history of the activity. Continued profits, regardless of size, are indicative of the lack of a profit motive. However, if losses are incurred in excess of those contemplated by the business plan, or if losses are incurred in absence of a business plan, then the court will want to know what action, if any, the taxpayer undertook to reduce such losses. The court assumes that people engaged in an activity for pleasure view expenses for the activity as consumption. In contrast, people engaged in an activity for profit view losses as a cancer that needs to be treated and contained.

8. The financial status of the taxpayer.

This factor attempts to distinguish between taxpayers who are financially dependent on the activity and those who are focused on other sources for their financial security. The premise is that someone who needs to make a profit at some time in the near future is more likely to be engaged in the activity for profit than a person who has separate career that they depend on for their financial security.

9. Elements of personal pleasure or recreation.

The fact that the taxpayer enjoys his or her work is not indicative of the lack of a profit motive. However, if the taxpayer participates in the activity to the exclusion of all other recreational activities, the court may find that the pleasure derived by the taxpayer from the activity overrides any intent to make a profit from it.
death and taxes

Recent Surrogate’s Court Decisions and Other Estate Planning Matters

Editor’s Note: This column marks the first installment of a new feature in the Bulletin. Its goal is to keep practitioners apprised of significant estate and trust decisions, primarily within the Fourth Department. Occasionally, the authors will also analyze a current probate topic, examine a significant court opinion, or comment upon an estate planning issue. While two 2008 Court of Appeals decisions and a 2008 Fourth Department case are covered in this first article, future columns will focus on current cases. As always, your questions and comments are invited.


Matter of Abraham XX is a fact-specific case involving a Supplemental Needs Trust (SNT). However, the decision is of general interest because now-retired Chief Judge Judith Kaye used the occasion to write a comprehensive discussion of the history and use of Supplemental Needs Trusts (SNT). In the case, the court held when the lifetime beneficiary of the SNT containing “pay back” provisions dies, the state may recover the “total medical assistance paid” from remaining assets of the SNT, including Medicaid payments made before establishment of the SNT.

Abraham XX suffered serious birth injuries. Abraham’s mother sued her physicians for malpractice and Abraham received a $5 million settlement. Due to post-settlement litigation, about a year and a half passed between the date of the settlement and the funding of the SNT. During that period, since Abraham had the settlement proceeds, he was ineligible for Medicaid. However, according to the decision, the settlement was “retroactively” placed in the SNT to the date of the settlement, thereby reviving Abraham’s Medicaid eligibility, and Medicaid paid for Abraham’s care for that period. After Abraham’s death, the state claimed that all Medicaid assistance given Abraham should be reimbursed out of the SNT assets. Abraham’s estate claimed that only Medicaid assistance provided after the funding of the SNT should be reimbursed.

The estate argued that the Medicaid assistance given in the period between the date of the settlement and the funding of the SNT was funded should not be reimbursed.

The Court of Appeals noted the trust’s language directed reimbursement of Medicaid expenses “to the extent then required by law,” a reference to existing federal and New York Medicaid laws, and concluded this phrase included assistance given to Abraham between the retroactive date of the trust and the actual funding.

The Court noted the state would not be entitled to reimbursement if Abraham’s family had not created the SNT, but of equal significance was the fact that Abraham could not have received Medicaid payments without existence of an SNT. Weighing both factors, the Court concluded “[t]hat the result may sometimes inure to the state’s benefit as opposed to the beneficiary’s estate is the product of a calculated legislative decision and a calculated choice by the family in setting up the SNT.”


In Matter of Piel, the Court of Appeals reversed the Fourth Department, holding that a child adopted out of a family may not share in a class gift created by inter vivos trusts, regardless of the date when the trusts were created. The Court’s decision relied heavily upon policy considerations discussed in the landmark decision Matter of Best, 66 N.Y.2d. 1515 (N.Y. 1985).

In Best, the Court of Appeals had considered § 117 of the Domestic Relations Law, which by an amendment in 1963, terminated intestate succession rights from their biological family for adopted-out children. However, the statute provided that it did not “affect the right of any child to a distribution of property under the will... or inter vivos trust instrument.” The
Court in *Best* held that the quoted language in § 117 did not permit inheritance of a class gift by implication under a will by an adopted-out child, holding that the language only protects an adopted-out child's right to inherit when specifically identified in the will or trust.

Following the Court's decision in *Best*, the Legislature amended §117 to specifically provide that an adopted-out child generally would not be included in class gifts to family members under wills and trust instruments. However, the section also provided that this exclusion of an adopted-out child would not apply if the will or trust indicated a contrary intention, or if the child was adopted by his/her step-parent, grandparent or issue of a grandparent, and the testator or creator of the trust was a grandparent or issue of a grandparent.

In *Piel*, the Fourth Department held that since the trusts before it were created in 1926 and 1963, prior to the amendments made in 1963 and 1966 to §117 which had been effective in *Best*, the *Best* decision should not apply and the adopted-out child should be permitted to inherit.

The Court of Appeals reversed in *Piel*, holding that when the trusts were executed in 1926 and 1963, the Domestic Relations Law permitted inheritance by adopted-out children by intestate succession, but the statute did not create rights for an adopted-out child to share in class gifts by implication. The Court in *Piel* reaffirmed *Best*, noting that "nothing in the pre-1964 legislative history or case law, moreover, indicates that an adopted-out child would share in a class gift to a biological parent's issue, descendants or children."

In *Piel*, the Court stated that "strong policy considerations" called for adherence to *Best*, including the legislature's objective of a child's full assimilation into his/her new family, and maintaining the confidentiality of adoption records.

The Court further noted that allowing adopted-out children to inherit under instruments created prior to 1965 posed "practical problems" such as locating old adoption decrees or identifying witnesses who could recall the adoption. The Court found the finality of court decrees and the need for stability in property titles, as in *Best*, weighed against the adopted-out child inheriting a portion of the class gift.


In *Matter of Zupa*, the Fourth Department affirmed the Erie County Surrogate, holding that annuities owned by a decedent constituted testamentary substitutes for right of election purposes.

Surrogate Barbara Howe held that annuities owned by the decedent were subject to the surviving spouse's right of election, and were not considered life insurance. On appeal, the Fourth Department agreed with Judge Howe, and held that the reasoning of *Matter of Boyd*, 161 Misc.2d 191, 613 N.Y.S.2d 330 (N.Y. Surr. 1994) was not applicable to an annuity contract.

In *Boyd*, Surrogate C. Raymond Radigan held that although EPTL 5-1.1-A could be read broadly to include life insurance contracts within the statutory definition of testamentary substitutes, the legislative history clearly demonstrated that life insurance policies were not intended by the legislature to be considered testamentary substitutes for purposes of a surviving spouse's right of election.

In *Zupa*, the Fourth Department noted the legislative history behind EPTL 5-1.1-A, discussed in *Boyd*, and held that no such legislative history existed for annuities. Further, the court noted although an annuity related to the life of the annuitant, the purpose of an annuity differed from the purpose of a life insurance contract, making an analogy between the two instruments inapplicable.
This will be the question increasingly asked in the low-income households around the state in 2009 and 2010, given the perilous status of government funding for civil legal services. In the Eighth Judicial District, there are tens of thousands of minimum wage workers, single mothers needing child support, disabled people, children in foster care, terminally ill patients, grandmothers raising grandchildren on fixed incomes, the homebound frail elderly, families impacted by HIV/AIDS, developmentally disabled children, adults in sheltered workshops, victims of domestic violence, families facing eviction after layoffs, the unemployed, the sick and uninsured, homeless veterans, psychiatrically impaired street people and others who live at, or below, the Federal Poverty Level (FPL).

The U.S. Census Bureau estimated the 2007 poverty populations in the counties of the Eighth Judicial district as follows: Erie (121,701), Niagara (25,118), Orleans (5,317), Genesee (6,771), Wyoming (3,625), Allegany (7,443), Chautauqua (19,386), and Cattaraugus (12,247). That totals 201,607 people in the district at or below the poverty level. There are thousands more who are only marginally above that level who suffer the indignities of poverty no less. The Census figures have surely increased over the last year as the regional unemployment rate has gone up and the economic crisis devastates more of our neighbors. In fact, there are tens of thousands of people in our region whose household incomes would actually go up substantially if they could be raised to the Federal Poverty Level (FPL).

The FPL is a standard more generous than the public assistance levels in New York. Thus, in the most elemental sense, among myriad other concerns, our clients often rely on free civil legal services lawyers and paralegals to advocate for the bare essentials of their lives—to keep them warm, to keep them fed, and to keep them housed. It’s an unfortunate fact of life: Western New York has great poverty.

During the most prosperous of times, available funding never even met 20 percent of the projected need for our services. We are now facing what may be the most serious of times, and questions of the viability of our services, and the survival of our poor and disabled clients, are looming on the horizon.

As New York state develops a 2009-10 budget aimed at reducing more than $13 billion dollars in red ink, and as the New York State IOLA Fund suggests potential for an 80-90 percent reduction in funding in 2010, we can easily predict a dismantling of the already tenuous legal services delivery system in western New York.
It Couldn’t Happen to Me

continued from page 11

wanted more. One drink was not enough. So, often
when I did take a drink, I could not
endure the bout of inebriation. Once I picked up the first drink, I could not
promise sobriety which are coming into being in my
mind, and a newfound happiness are just a few of the
promise of sobriety which are coming into being in my
life, one day at a time.

For those of you who think you have a problem with drinking and/or drugs, there is a solution, if you want
it. There are many of us who were where you are now, who stand ready to help.

Editor’s note: If you or a colleague are
struggling with substance abuse, help is readily available. Call 552-1777 for com-
pletely confidential assistance.

• It was difficult for me to take what appeared at the
time to be a humiliating step: to admit that I was pow-
erless over alcohol. However, by taking that first step,
by honestly facing myself, I began a new life, a much
better life. I surrendered to win. Freedom, peace of
mind, and a newfound happiness are just a few of the
promises of sobriety which are coming into being in my
life, one day at a time.

During the last four years of my drinking, I used
alcohol more frequently to cope with the ups and
downs of life. My hangovers became worse. Fear, guilt
and remorse, which used to visit me on “the day after,”
became more frequent companions. Motivation and
productivity at work lessened. More and more I iso-
lated myself from people. My wall was up. I did not
know that I was suffering from the disease of alco-
holism. As it often times is, I was the last to know.

It was difficult for me to take what appeared at the
time to be a humiliating step: to admit that I was pow-
erless over alcohol. However, by taking that first step,
by honestly facing myself, I began a new life, a much
better life. I surrendered to win. Freedom, peace of
mind, and a newfound happiness are just a few of the
promises of sobriety which are coming into being in my
life, one day at a time.

For those of you who think you have a problem with drinking and/or drugs, there is a solution, if you want
it. There are many of us who were where you are now, who stand ready to help.

Welcome
New Attorneys!!

On behalf of the Bar Association of Erie County, officers, board of directors, mem-
bers and staff, we warm welcome to the following newly admitted attorneys:

A reception in their honor will be held on Tuesday, March 10 at Harry’s
Harbour Place Grille. For further information, call the Bar offices at 552-8687.
From time to time, the BAEC’s Committee on Professional Ethics shares opinions of general interest to the practicing bar. Please contact Committee Chair Thomas S. Wiswall at 847-7031 with comments or questions.

Opinion 2009-01

Topic: Conflicts of Interest

Digest: When there is insufficient liability insurance coverage or other recoverable assets to fully compensate an injured party and his or her medical insurance carrier, it is unethical for an attorney who represents the injured party in a negligence action against the tortfeasor to also represent the medical insurance carrier to enforce its subrogation rights.

Code: DR 5-106 [22 NYCRR §1200.25]
DR 5-105 [22 NYCRR §1200.241

QUESTION

1. May a lawyer, in the same action in which the lawyer seeks damages for an injured plaintiff, also represent the plaintiff’s medical insurance carrier to assert its subrogation rights, when there is insufficient insurance coverage or other recoverable assets to fully compensate both the injured party and the medical insurance carrier?

DISCUSSION

2. When there is insufficient insurance coverage or other recoverable assets to fully compensate the injured party and the medical insurance carrier, any payment to a medical insurance carrier, pursuant to the medical insurance carrier’s right of subrogation, would, of necessity, reduce the sums available to the plaintiff as a result of plaintiff’s personal injury.

3. DR 5-106 [22 NYCRR §1200.25] provides: A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and the risks involved, including the existence and nature of all claims involved and the participation of each person in the settlement.

4. DR 5-105 [22 NYCRR §1200.24] provides, in part, as follows: (A) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(c).

5. Since it is the obligation of a lawyer for an injured plaintiff to secure the maximum amount for a personal injury plaintiff, and since any payment to a medical insurance carrier, pursuant to the subrogation rights of a medical insurance carrier under the circumstances set forth in paragraph 2 above, would reduce the payment to a personal injury plaintiff, representation of both the plaintiff and a medical insurance carrier’s subrogation rights presents a conflict of interest.

6. Under the circumstances set forth in paragraph 2 above, it is our opinion that a disinterested lawyer would not believe that a lawyer can competently represent the interests of a personal injury plaintiff and a medical insurance carrier seeking to enforce the medical insurance carrier’s subrogation rights. Thus, representation of a personal injury plaintiff and a medical insurance carrier asserting subrogation rights presents a non-waivable conflict of interest and is unethical.

CONCLUSION

7. When there is insufficient coverage or other recoverable assets to fully compensate an injured party and a medical insurance carrier, representation of a personal injury plaintiff and a medical insurance carrier seeking to enforce the subrogation rights of such medical insurance carrier presents a conflict of interest, and a lawyer cannot represent a personal injury plaintiff and a medical insurance provider seeking to enforce subrogation rights in the same proceeding.

[The text continues]
There is an unwritten rule at English dinner parties that it is unwise to discuss religion or politics. I am not eating at the moment so I will take it that the rule doesn’t apply. I think the former subject is too much of a minefield but if you will indulge me, I hope you may find interest in my observations on the latter.

I should say that I have been encouraged to commit this social sin by your editor, with whom I have had an interesting e-mail exchange on the subject – it all started with her comments on the weather (very English!). I replied that our press had suggested your new President can sort out any problem and hoped that he would be able to fix that too – with a reasonable dose of irony. The British press is very enthusiastic about your new President. Our new (or now not so new) Prime Minister is seen to be too downbeat all the time, failing to acknowledge his role in the economic downturn despite having been the Finance Minister for the last 10 years. It is perhaps symptomatic of our media that the grass is always greener on the other side.

President Bush was very enthusiastic about Tony Blair but that enthusiasm caused ridicule here. He was referred to frequently as “Bush’s Poodle.” He had only just accepted the Presidential Medal of Freedom days before the inauguration. He has still not collected the Congressional Medal of Honour that he was awarded some years ago. He dare not receive it whilst he was in office or too close to it for fear of proving the very accusation.

McCain’s choice of running mate surprised the British media – not because she would be good or bad but because they did not know whether you would think she would be (subtle lawyer’s distinction there).
By Melissa A. Foti

The Young Lawyer’s Committee is pleased to announce that this year’s high school mock trial tournament is well underway. The tournament got off to a great start with a judges’ training seminar held at the Bar Association headquarters on February 2, 2009. The seminar’s panel of speakers included Hon. Jeremiah McCarthy, Richard T. Sullivan of Harris Beach PLLC, and Randy S. Margulis. The panel addressed important aspects of this year’s case. Special thanks to the panelists and all who attended. As of press time, the preliminary and elimination rounds have been completed. The quarter and semifinal rounds are going to be held on March 21, 2009. Good luck to all the teams who advanced!

The Committee rang in the New Year with a mid-winter happy hour at Pearl Street Grill. Over 30 members attended this event and enjoyed exceptional food and drink served by Pearl Street Grill. Our special thanks to event sponsors Weir Financial Resources, LLC; ClearPlan Financial, Inc.; and Putnam Investments. We would also like to thank everyone for attending!

Our next committee meeting will be held on March 20, 2009. Further details will be announced shortly. As always, thank you for your support.

Pictured above at the YLC mid-winter happy hour are, left to right, committee co-chairs Melissa A. Foti, Pietra G. Lettieri, Jonathan Weir of Weir Financial Resources LLC (behind Pietra), and Robert Kloss of ClearPlan Financial, Inc. Not pictured are Kevin Christner of ClearPlan Financial, Inc. and Vince Leese of Putnam Investments.

News from the Young Lawyers Committee

Pictured above at the Pearl Street Grill are Jane M. Mogavero, Donor Relations Manager for Hospice WNY, Brian Liebenow of the Erie County Attorney’s Office, Michael F. Helwig and Amanda L. Tuberdyck of Kenney, Shelton, Liptak & Nowak, LLP.

Pictured above: Daniel R. Archilla, Jill Florkowski, Timothy R. Hedges and Thomas D. Seaman, all attorneys with The Law Office of Daniel R. Archilla, were on hand for the event, along with Scott Orndorf of Chelus, Herdzik, Speyer, Monte & Pajak, P.C.

Photo by Glenn Edward Murray
As dedicated members of the Erie County bar, you consistently show your commitment not only to upholding the professional standards of the legal system but to the betterment of the entire western New York community. I want to let you know about two programs available in the Erie County Clerk’s office and Auto Bureaus that can benefit Bar Association members, as well as helping to keep much needed revenue in Erie County.

Beginning in June 2009, the Department of Homeland Security will require travelers to have either a Passport or an Enhanced Driver’s License (EDL) or Enhanced non-driver ID Card for land/seaf travel to Canada, Mexico, Bermuda and the Caribbean. With so many Bar Association members being regular visitors to Canada, I am urging you to take advantage of the shorter wait times at this time of year at our Auto Bureaus to apply for your EDL.

Erie County already leads New York state in issuing EDLs. As the deadline gets closer, lines and wait times for EDLs are certain to get longer. Another advantage of “super-sizing” your license to an EDL is that you can renew your license at the same time, even if it is not up for renewal and save on any future increases from the state. License holders are given a credit for the time remaining on your license, so you can get an eight-year EDL by coming in now.

Passport services are also available at the Erie County Clerk’s Office at 92 Franklin Street, first floor, from 9:00 a.m. - 4:45 p.m. Monday through Friday. Association members can log onto the County Clerk’s Web site at www.erie.gov/clerk to get all the details on locations, hours and required forms of identification to apply for your Enhanced Driver’s License, Enhanced non-driver ID Card and/or Passport.

Another program that offers you convenience and helps keep revenue in Erie County (rather than sending money to Albany) is the “Just Mail It/Just Drop It” campaign. Renew your vehicle registration through the Clerk’s Office by either mailing the registration to the office or dropping off the renewal at one of 12 Auto Bureau outlets throughout Erie County, and a percentage of the fee is retained by Erie County. The Web site at www.erie.gov/clerk also has a “Just Mail It” icon and the Clerk’s Office will send you a green, postage-paid envelope for your vehicle registration renewals. The three to four day turn around time is MUCH faster than renewing with the state by mail or on-line, and by requesting the postage paid envelope on-line, you can save even more. The Web site at www.erie.gov/clerk also has a “Just Mail It” icon and the Clerk’s Office will send you a green, postage-paid envelope for your vehicle registration renewals. The three to four day turn around time is MUCH faster than renewing with the state by mail or on-line, and by requesting the postage paid envelope on-line, you can save even more.

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.

John R. Licata and Rick Grossman (not pictured)
Auto and Home Owner’s Insurance
Rhonda Ley
Impact of Unions in the Workplace
Jean Harris Gustafson
Medicaid and Estate Planning
Marianne Koenig
Medicaid and Estate Planning
Bruce Ikefugi
Buying and Selling Real Estate

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.
If it Looks too Good to be True…Vonage and Other VoIP Options

A friend of mine recently made me aware of a pending class action lawsuit brought against Vonage for the internet phone provider’s purported misleading statements about the quality (or lack thereof) of fax service it supports. Vonage provides telephone services under a technical configuration called “Voice over Internet Protocol” or “VoIP” for short. VoIP offers all sorts of great options and features at incredible prices, but it’s not without its risks, some of which could put the system owner (read: employer) at significant risk.

While I don’t consider myself someone who is unwilling to accept - if not embrace - change, I’ve never been a fan of Vonage or its equivalents because I believe that like any good marketer, those who market these services promise only the great strengths of the services without clearly presenting the risks. And herein lies the basis of the aforementioned lawsuit, Bustos et al v. Vonage America Inc. and Vonage Holdings Corp., (60-CX-2308 (HAZ), D.N.J.).

VoIP and other IP-enabled phone systems and technologies make a good deal of sense. As a result of the technologies upon which they are based, such systems, and delivery mechanisms are able to deliver voice and data communications with sophisticated features at a significantly reduced cost. Telecommunications consultant Garrett Myers of the Gateway Group of Grosse Pointe, MI (http://www.ggmi.com), who also has an office in London, is a satisfied Vonage customer.

“My overall bill is about half of what it was with the previous carriers,” he said recently. “That’s not to say that the original carrier wasn’t affordable. But Vonage has provided me with affordable advanced functionalities.”

“In addition,” he continued, “they are easier to deal with than my previous provider. They answer the phones, the bills are understandable and the online service makes it clear what I’m buying and what I’m not.”

Lack of Oversight Poses Risks

In spite of these benefits, Myers is aware of the disadvantages: “I know that the risks are huge.”

One of the reasons that the risks are significant is because of the nature of the services that Vonage and other IP providers offer, where there is no oversight or accountability to the New York Public Service Commission or any other telecommunications regulatory body. A company that does business with a traditional carrier, such as Verizon or Pacific among others, knows (or should know) that in the event of a major financial disaster on the part of the provider, it would not be left without dial tone without both notice and time to make adequate accommodations. With a provider such as Vonage that is not a “carrier” but a service provider that bases its offering(s) on someone else’s broadband connection (it uses the broadband services provided by an entity such as Time Warner or Comcast), that is not the case. In 2007, SunRocket, a company whose offerings were similar to those offered by Vonage, ran out of cash, leaving its customers not only without dial tone, but without notice, service or recourse. SunRocket simply pulled the plug.

A second area of concern is patent infringement. Since VoIP is a relatively young technology, many patents covering the underlying technology are still enforceable. Since 2007, Vonage has settled patent disputes with telecom behemoths Verizon, Nortel and SprintNextel. And not without cost. Vonage paid SprintNextel an eye-popping $69.3 million to settle six patent claims and $55 million to settle other claims with Verizon. However, according to Kent Roberts, a patent attorney at Hodgson Russ, with clients servicing the international telecom market, these amounts are not surprising.

“In this industry, patents can be quite valuable,” Roberts said. “Not only in terms of the amounts that might be paid by competitors as part of a settlement, but also in forcing competitors to conduct their businesses in ways that do not infringe a patent.”

Things have been calm (or at least calmer) on the patent front since these settlements, but big payouts like these don’t do much to encourage either consumer or investor confidence. And without investors, particularly in these financially frosty days, consumers have good reason to be very concerned.

IP Technology Presents Challenges

Another concern is that internet phone providers do not automatically support two obvious features which most of us take for granted – 911 access and power failure operation. Carriers including Vonage offer special 9911 capabilities, but at an additional cost. Such additional features are mandatory under federal law, but they are only as reliable as the systems that host them. And while none of us plan to call 911, the fact is that when you need 911, you simply don’t have the luxury of time or unreliability. It simply has to work.

In addition, IP telephony relies upon computers to deliver service. As such, when there is no power to support the hosting computer, there is no dial tone. We don’t experience major power failures often, but, for example, during the October 2007 storm, customers who relied upon Vonage or other similar services and were without power, were also without phone service unless they had sufficient battery back-up to keep the computers running long after the power shut off. A traditional corded landline phone does not require an additional source of power (unlike a cordless phone, which operates on battery power, for as long as it lasts).

Finally, and this is the topic of the lawsuit at hand, is the issue of how services, like faxing, for example, don’t work the same way on an IP-based system as they do in the more traditional environment.
In the Public Service
continued from page 11

York. Increasingly, there are days when we fear we’ll
soon be needing a giant bake sale just to keep the
continued from page 11
courthouse doors from slamming shut on our clients.

In a real sense, there is no rhyme or reason to the dis-
tribution of government funds for the legal services
needs of low-income people in this country. This is
clearly demonstrated when, from
time to time, certain priority areas
become highly funded, (presently
mortgage foreclosures), while
whole other areas where services
are crucial to the lives of people
(homelessness prevention, domestic
violence, eviction defense), lose pri-
ority and then receive inadequate,
or no dedicated funding. This is the
work that our society believes lends
to fulfilling its promise to ensure
equal access to justice for all
Americans. The local civil legal
services providers, all not-for-profit
agencies, are the ones charged with
the obligation to cobble together
sufficient government and founda-
tion grants to support this critical
work. So what does that involve?
Neighborhood Legal Services
(NLS) presently has 35 or more
projects, (for which it had to com-
pete), that it uses to provide its
services to the community.

Desperate Times Call for Creative
Measures

In these very threatening times, NLS and the other
providers will continue to seek creative approaches to
continue our work. One such approach being pursued
by NLS is to work locally to expand the concept of
Medical-Legal Partnerships (MLP). These partner-
ships have sprung up around the country over the last
decade in places like New York, Boston, Cleveland and
other major cities. NLS is one of such a partnership for four
years at Roswell Park Cancer Institute (RPCI) through a
very successful collaboration with Dr. Kerry
Rodabaugh, an RPCI gynecological oncologist and sur-
gon. In 2003, we partnered with Dr. Rodabaugh on a
joint pilot project grant application to the New York
State Department of Health. Our grant application was
one of five statewide-funded awards in 2003 to pro-
vide legal services to low-income cancer patients. The
state at that time recognized the critical legal needs of
patients who needed legal assistance for matters as
diverse as planning for the care of their children, pre-
vading eviction, maintaining their eligibility for gov-
ernment benefits and resolving health insurance
disputes.

The Department of Health grant lasted for two years and
funded an NLS attorney and a RPCI Social Worker
team who worked closely to identify eligible patients
and to accept referrals from the medical staff when
the patient indicated legal needs.

Thereafter, Dr. Rodabaugh, who
recently relocated to the University of Nebraska Medical Center in Omaha, applied for and received 50
percent of the project’s funding for
continue from page 18
two years from the Roswell Park
Alliance Foundation with which we
carried the project at a reduced level
until September 2008. NLS then
carried the project on some limited
funding through the end of 2008.

Dawn Miyaka, the NLS attorney
assigned to the RPCI project, han-
dled a broad general practice but
was also able to rely on the special
expertise of other NLS lawyers and
paralegals. Aside from the great
medical legal achievements achieved by elimi-
nating the very stressful legal prob-
lems for very all people, the work of the
NLS attorney actually had a very
positive benefit to RPCI. During the project the hospital
received hundreds of thousands of
dollars in insurance payments as a
result of NLS’ advocacy challenging denials of
Medicaid, Medicare and other health insurance
benefits. But for her advocacy, the benefits obtained by
Ms. Miyaka would have otherwise been written off as unins-
sured care and a total loss to RPCI.

NLS is now interested in expanding this model to
other local health care providers who will get both
the patient health benefits of relieving the stress of legal
issues on struggling low-income individuals and fami-
lies, and the reductions in uninsured care write-offs
which we believe should be sufficient to sustain the cost
of NLS project staff. Members of the local bar have always played an
essential role in supporting the local providers of civil
legal services. In these times of great reductions in gov-
ernment funding and ever more creative approaches to
grant funding, your financial help and your ongoing
support for our government funding, as demonstrated
by the Bar Association of Erie County resolution passed
at a recent board of directors meeting, are even more
appreciated. If we can all be adequately funded in the
2009-10 state and federal budgets, it will sure beat
holding a bake sale to get our clients into the court-
house.

Lost in Techno Space
continued from page 17

According to consultant Garrett Meyers, “with a tradi-
tional phone system, it’s obviously possible to pass a
E911 (international standard for fax transmission) sig-

nals over a phone line.”

As a result, we’ve all gotten used to the fact that fax
machines are reasonably reliable. “However,” Meyers
continued, “that signaling works over VoIP only some
of the time, and definitely not all of the time. Whether
it’s Vonage or A2V or Mitel or anything else, fax oper-
ations over a VoIP connection are always iffy. The line
will allow for the transmission of a few pages and then
break the connection. Try to do 20 pages, and you can
just forget it.”

If you require reliability from a fax, then the best
approach is to use a traditional POTS (plain old tele-
phone service) line for two purposes - fax and E911.

It’s reliable, it’s relatively inexpensive, and it works.

Enhanced Driver’s License
continued from page 16

can also suggest how the money that stays in Erie
County gets spent? These green envelopes, as well as
information on Enhanced Driver’s Licenses are avail-
able at the Bar Association of Erie County offices, 438
Main Street, Sixth floor.

I sincerely appreciate the opportunity to communi-
cate with members of the Bar Association and wel-
come your feedback on these programs, as well as all of
the operations at the Erie County Clerk’s Office, at
855-2505.
IN MEMORIAM

ELLYCE KAUSNER

Among the victims of Continental Express Flight 3407 was 24-year-old Ellyce Kausner of Clarence. A second-year student at Florida Coastal School of Law in Jacksonville, Kausner was the 2006 recipient of the annual Michael F. Dillon Scholarship awarded by Canisius College. The award is presented each year to a Canisius associate director of the Frank G. Raichle Center for Disability Studies. Also aided in disaster relief programs in her young life to the causes she believed in.

Kausner is remembered as a bright, vibrant young woman who loved to be the center of attention. Her brother, Chris Kausner, told Good Morning America that “Ellie had a flair for the dramatic. She was very exciting to be around... she would have wanted) her picture on national TV.”

In her scholarship application essay, Kausner wrote that law had been her passion for as long as she could remember. “For me, the appeal of law has always been about justice and doing what is right.”

In addition to earning a 3.95 GPA at Canisius, Kausner devoted countless hours of her young life to the causes she believed in. She worked in orphanages in Guyana and aided in disaster relief programs in Honduras. Closer to home, Kausner devoted her time to caring for the elderly in her nephews must refrain from solicitation for 30 days.” (DR 2-103, 22 NYSRR 1200.8, see also Judiciary Law 479 and 462.)

The MDR Committee consists of two dozen attorneys who are prepared to provide pro bono assistance for victims’ short-term needs following a disaster. The group mobilizes volunteer attorneys to:

1. Inform victims of a disaster and their families about how the legal system functions to resolve disputes which arise out of mass disaster;
2. Monitor the conduct of attorneys at a disaster site;
3. Make victims of a disaster, their families, and the public aware that personal solicitation of clients by attorneys, at the site of a disaster, is unethical; and
4. Advise those who require legal assistance how to make an informed selection of an attorney.

Beginning on the Friday morning following the crash, Parker worked with Harry Meyer of Hodgson Russ (former chair of the Erie County Local Emergency Planning Committee and current vice-chair of the Coast Guard Area Maritime Security Committee) to develop contacts with National Transportation Safety Board (NTSB) personnel and the airline, in order to create an MDR service location at the Family Assistance Center.

“We were up and running on the Saturday following the crash,” Parker recalled, “to counsel family members regarding the myriad of legal questions that they had following the incident. Volunteer attorneys started arriving Friday night from Albany, Plattsburgh, and Long Island, and then others came from New York City and Albany.”

Robert Saltzman, deputy chief counsel to the Grievance Committees for the Second and Eleventh Judicial Districts in Brooklyn, chairs the committee. In the past, the committee has been activated for multiple events, including an Amtrak crash in 2001, the aftermath of 9/11, the American Airlines Flight 587 incident in Queens, the 2005 Staten Island Ferry Disaster, a 2005 bus crash near Rochester, and the recent matter of U.S. Airways Flight 1549.

“Our heartfelt thoughts and prayers go out to the friends and families affected by this horrible tragedy,” NYSBA president Bernice Leber said, commending the members of the MDR Committee for their “outstanding efforts and quick response in ensuring that the families involved in this terrible accident receive the help and support they need.”

“Of course, we must remember the importance of respecting the privacy of the families of these crash victims.” Continental Airlines established a hotline number for the family and friends of crash victims at 800-621-3263.

Teams staffed the MDR location from Saturday until the following Thursday morning. All told, the committee members volunteered nearly 300 hours of their time to assist the families.

“Being part of the effort to assist the families of Flight 3407 has been the most meaningful experience of my legal career,” Parker said.
“I lost my job.”
These were the first words spoken by the young attorney who recently called the Erie County Bar Foundation for assistance.

“I just never imagined that the economic problems in the world would reach my small corner of the legal profession in Buffalo. However, the decline in overall business volume forced my former firm to reduce overhead. Unfortunately, I was one of the several people, lawyers and support staff, who was let go.”

The attorney has been practicing for less than seven years.

“I have never been without a job since the summer after my first year in law school,” he continued. “I worked hard and was well thought of within the firm, so being laid off was a shock. I was in a bind because I had some obligations that I could not meet, particularly the COBRA payments for health insurance for my family. That’s why I turned to the Foundation for temporary assistance while I continued my job search.”

The Erie County Bar Foundation is funded by the private donations of attorneys in Erie County to assist lawyers and their families in need of health, financial or professional support. All assistance is rendered on a totally confidential basis. If you or someone you know may need assistance, please call Katherine Bifaro at 852-8687.

“I am grateful to the lawyers in Erie County who support the Bar Foundation,” the young lawyer said. “I knew the Foundation exists to help lawyers in need. I just never thought that I would be one of them.”

Difficult Economic Times Increase Need for Bar Foundation Assistance
Bench & Bar continued from page 3

Nagel focuses his practice on defense matters involving physicians, nurses, hospitals and nursing homes in civil matters. He also has experience in sports law and general liability. Nagel's publications include “Telemedicine: Will Technology Expand Medical Liability?” and the New York portion of the American Law Firm Association Transportation Compendium.

Buffalo City Court Judge

R. Scott Atwater has joined Gross Shuman Britzke & Gilligan, PC, as a partner. He will focus on regional and national litigation involving insurance coverage matters. With more than 30 years of legal experience, Atwater also handles closed and insolvent self-insured workers' compensation trusts, trust members and trustees, regulatory and disciplinary matters for insurance agents, and brokers and trucking litigation. He is admitted to practice in both New York and Florida.

William J. Casey and Patrick M. McNelis have joined Goldstein, Ackerhalt, & Pletcher, LLP. They will be involved with all aspects of the firm's practice, which focuses on special education and education, wills, trusts, guardianships, estate for profit corporation law, disability discrimination, health law, and vaccine injury cases.

Casey received his J.D. from Thomas M. Cooley Law School in Lansing, Michigan, and his B.A. from King's College in Wilkes-Barre, Pennsylvania. McNelis received his J.D. from the University at Buffalo School of Law, and his B.A. from SUNY Geneseo.

Dennis R. McCoy, a partner and senior trial attorney at Hickeley & Barkley, LLP, has been appointed General Awards Committee Chair for the New York State Bar Association's Tort, Insurance & Compensation Law Section. He has also been re-appointed to a two-year term on the University at Buffalo Law School Dean's Advisory Council. McCoy's practice focuses on medical litigation, products liability and professional liability, and he chairs the firm's professional liability practice area.

Jonathan S. Hickey, a member of Borden, Goldsmith & Hickey, LLC, has co-authored an article entitled "The Graves Amendment: Preemption Legislation Creates a Gap on Liability," which was published in the January issue of For The Defense, the Defense Research Institute's (DRI) national publication. Hickey is a trial attorney at the firm, where he focuses on defending transportation, products liability and commercial claims.

Richard P. Valentine, formerly a partner in Hamsher & Valentine, is continuing his practice at the offices of Rosenblad, Segal & Murnick, LLP, where he will also be of counsel to the firm. His office is now located at 300 Main Street in Buffalo. Valentine focuses his practice on medical malpractice and personal injury matters.

Thomas P. Kawalec, a partner with the law firm of Chelus, Herdzik, Speyer & Monte, PC., has been elected to the board of directors of the Defense Trial Lawyers Association of Western New York. Kawalec received his Juris Doctor and his bachelor of arts from the State University of New York at Buffalo. He focuses his practice on insurance defense litigation, insurance coverage, trials and appeals.

John P. DePaolo has been named special counsel in The Boniver Partnership's litigation group. DePaolo concentrates his practice in all areas of civil litigation. In addition to his trial work, his practice also includes labor law, commercial litigation, real-estate, and wills & trusts. He is a graduate of the University of Dayton School of Law and since 1999 has been admitted to practice law in New York and Massachusetts. DePaolo serves on the board of directors for St. Mary's School for the Deaf and is the 2008-2009 president of the Buffalo Sunrise Rotary Club.

Mario A. Giacobbe has been named a partner with The Law Offices of David V. Jaworski, located at 2925 William Street, Cheektowaga, New York. The firm will continue practice as The Law Offices of Jaworski & Giacobbe. Areas of practice include matrimonial, real estate, personal injury, estate planning and administration, social security disability, business/corporate, civil trial practice, criminal law and 1981 defense.

Rodney O. Personius and Brian M. Melber have relocated their law firm, Personius Melber LLP, to Suite 2100, Main Place Tower, Buffalo, NY 14202. The firm's telephone and fax numbers, and e-mail addresses, have not been affected by the move.
Domestic Violence is NEVER Okay.

Domestic abuse doesn't discriminate. It happens within all age ranges, ethnic backgrounds, and financial levels. If it happens once, it will happen again. The abuse may occur during a relationship, while a couple is breaking up, or after a relationship has ended.

Despite what many people believe, domestic violence is not due to an abuser's temporary loss of control over his or her behavior. In fact, violence is a deliberate choice made by the abuser in order to take control of a spouse or partner.

Look What You Made Me Do! In spite of the abuser’s efforts to “blame the victim,” domestic violence is NEVER your fault. If you or a loved one are suffering, help is just a phone call away. Please call 852-1777 in complete confidence today to be referred to a colleague who can help.

Don’t Suffer in Silence. Let Us Help You Find Your Voice.

March 2009  |  www.eriebar.org

Contributions to the Erie County Bar Foundation provide an excellent vehicle for recognizing and honoring members of our profession. Memorial gifts to the Foundation become a lasting tribute to the entire legal profession, as funds are used exclusively to assist attorneys and promote understanding of our legal system.

The Foundation gratefully acknowledges the following contributions:

In Memory of Maryann Sacconando Freedman, Recipient of the NY Bar Foundation Lifetime Achievement Award:
- Linda Korn & Richard B. McCormick
- Richard & Lorena Yellen

In Memory of Adelbert Fleschner:
- Jean C. Powers

In Memory of Arnold Galbo:
- Alice A. Curtis

In Memory of Hon. Norman J. Wolf, Jr.:
- Allan M. Lewis
- Kristen Wolf Barnes & Richard J. Barnes
- Personius Melber LLP

In Memory of John R. Moct (Brother of Richard E. Moct):
- James N. Carlo

In Memory of Hon. James L. Kane (Father of Timothy J. Kane):
- Allan M. Lewis
- Hon. Joseph J. Sedota
- Hon. Salvatore R. & Mary Dee Martoche
- Jim & Mary Shea
- John E. Ballow
- Joseph A. Notaro
- Philip H. Magner, Jr.
- William E. Carey

In Memory of Jessica Daniels (Mother of Joel L. Daniels):
- Jim & Mary Shea
- Jeffrey & Barbara Freedman
- Michael J. Flaherty
- Personius Melber LLP

In Memory of Dolores Contino (Sister of Joseph Contino):
- Jim & Mary Shea
- Philip H. Magner, Jr.

In Memory of Mark R. Lynett (Son of Leo M. Lynett, Jr.):
- James N. Carlo
- Nancy Saia
- Philip H. Magner, Jr.

In Memory of George Kassman:
- John D. Hocieniec
- Tracey A. Kassman

In Memory of Connie Costantino (Sister of Nicholas Costantino):
- James N. Carlo

In Memory of Hon. John T. Elfve:
- Bar Association of Erie County
- Ferdinand J. Ciccarelli
- Hon. John T. Curtin
- Hon. Salvatore R. & Mary Dee Martoche
- Hurwitz & Fine, PC
- Jim & Mary Shea
- Personius Melber LLP
- Philip H. Magner, Jr.

In Memory of Dolores Contino (Sister of Joseph Contino):
- Jim & Mary Shea
- Philip H. Magner, Jr.

In Memory William Rosenhoch (Father of Howard S. Rosenhoch):
- Allan M. Lewis
- Jean C. Powers
- John E. Ballow

In Memory of A. Watson Bray (Brother of John R. Bray and Uncle of Stephen N. Bray):
- James N. Carlo

In Memory of Albertine McCready (Mother of Maureen A. McCready):
- Lindy Frem

In Memory of Daniel E. Curtin, MD (Brother of Hon. John, T. Curtin, Father of Colleen Curtin Gable and Paul B. Curtin):
- Michael J. Flaherty
- Philip H. Magner, Jr.

In Memory of Montgomery Pooley:
- Bar Association of Erie County
- James N. Carlo

In Memory of Lillian J. Pino (Mother of Carmen J. Pino):
- John E. Ballow

In Memory of Sigmund T. Sajda (Father of Kurt Sajda and Father-in-Law of Amy Goldstein):
- The Employees of the Erie County District Attorney’s Office

In Memory of Dr. Thomas C. Sist
- James W. Smyton
ERIE INSTITUTE OF LAW

PROVIDING CONTINUING LEGAL EDUCATION FOR YOUR PROFESSIONAL ADVANTAGE

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.

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. Thursday, March 5, 2009
   2:00 p.m. - 5:00 p.m. Seminar
   Pearl Street Grill & Brewery
   "76 Pearl St., Buffalo"
   Parental Alienation: What It Is – What It Isn’t – Its Effect on Cases
   (Live Seminar)
   $ 5 credits
   $90 non-members
   $60 members

2. Thursday, March 12, 2009
   8:45 a.m. - 5:00 p.m.
   Shanghai Red's
   Two Templeton Terrace, Buffalo
   Life After Law School
   Basic Practice 101, Day 1
   (Live Seminar)
   8.0 credits
   $107 newly admitted
   $117 experienced attorneys
   $127 experienced non-members

3. Friday, March 13, 2009
   9:00 a.m. - 1:00 p.m.
   Adelbert Moot CLE Center
   438 Main St., 6th Floor
   Deal or No Deal: Valuing, Reporting & Transferring Intellectual Property Assets
   in Estate, Bankruptcy, Divorce and Corporate Transactions
   (Live Seminar)
   4.5 credits
   $70 members
   $100 non-members

4. Saturday, March 14, 2009
   9:00 a.m. - 1:00 p.m.
   Hyatt Regency Buffalo
   Two Fountain Plaza
   Annual Real Estate Seminar
   (Live Seminar)
   4.5 credits
   $70 members
   $100 non-members

5. Wednesday, March 18, 2009
   1:00 p.m. - 2:00 p.m.
   Adelbert Moot CLE Center
   438 Main St., 6th Floor
   Crafting Effective Non-Disclosure Agreements (And Avoiding Unintended Consequences)
   (Noonday Lecture)
   "Rescheduled from January"
   1.0 credit
   $20 members and non-members

6. Friday, March 20, 2009
   8:30 a.m. - 12:00 p.m.
   Hyatt Regency Buffalo
   Two Fountain Plaza
   New Rules of Professional Conduct
   (Live Seminar)
   5.5 credits
   $65 members
   $95 non-members

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.

Date/Time/Location | Topic | CLE Credits | Price
--- | --- | --- | ---
Thursday, March 5, 2009 | Parental Alienation: What It Is – What It Isn’t – Its Effect on Cases | 5.0 credits | $60 members
| Pearl Street Grill & Brewery | (Live Seminar) | $90 non-members | $117 experienced attorneys
| "76 Pearl St., Buffalo" | The cocktail reception is sponsored by Nacheremo & Nagel, Stillers & Vance, Robert S. Stephenson, Esq., Carney & Gallanza, | | $127 experienced non-members
| | Lipsitz Green Scime Cambria and Watson, Bennett, Colligan, Johnson & Schechter. | |

Friday, March 13, 2009 | Deal or No Deal: Valuing, Reporting & Transferring Intellectual Property Assets in Estate, Bankruptcy, Divorce and Corporate Transactions | 4.5 credits | $70 members
| Adelbert Moot CLE Center | (Live Seminar) | $100 non-members | |
| 438 Main St., 6th Floor | |

Saturday, March 14, 2009 | Annual Real Estate Seminar | 4.5 credits | $70 members
| Hyatt Regency Buffalo | (Live Seminar) | $100 non-members | |
| Two Fountain Plaza | |

Wednesday, March 18, 2009 | Crafting Effective Non-Disclosure Agreements (And Avoiding Unintended Consequences) | 1.0 credit | $20 members and non-members
| Adelbert Moot CLE Center | (Noonday Lecture) | |
| 438 Main St., 6th Floor | "Rescheduled from January" | |

Friday, March 20, 2009 | New Rules of Professional Conduct | 5.5 credits | $65 members
| Hyatt Regency Buffalo | (Live Seminar) | $95 non-members | |
| Two Fountain Plaza | |

Mail or fax to: Erie Institute of Law • 438 Main Street, Sixth Floor, Buffalo, New York 14202
(716) 852-8687 • Fax (716) 852-7641

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 _____________________________________________
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:

- **Advocacy Goes to the Movies**
  - Product code 2130
  - 4.5 CLE credits: 1.0 Ethics, 3.5 Skills
  - Presented on September 12, 2008
  - Available on Audiotape, CD and DVD

  With the aid of movies, this seminar explores advocacy from pretrial preparation through closing argument. Trial work is hard work, and from the movies, you can learn trial techniques for how to deliver your case theory in an interesting and convincing way that will engage your audience—the judge and jury. With clips from 4-star films, this presentation examines the strategic and ethical dos and don’ts of advocacy as well as the principles and practical tools for successful pretrial and trial practice. Along the way, attendees will learn about the real cases that inspired many of the films.

  This highly entertaining and informative seminar includes these topics:

  - How to develop the screen play that will guide your storytelling during pretrial and trial advocacy;
  - How to edit out harmful information from the screen play with motions and objections;
  - Techniques for pretrial advocacy, with an emphasis on preparing and deposing witnesses;
  - Preparation and rehearsal of witnesses;
  - How to tell the case's story, particularly during opening statement;
  - A cross-examination methodology that works;
  - Techniques for presenting your experts and cross-examining theirs;
  - Ethical pitfalls for advocates, and
  - The art of closing argument.

  **Get Me Condon**
  - Product code 2131
  - 1.0 CLE credit: 0.5 Ethics, 0.5 Skills
  - Presented on November 12, 2008
  - Available on Audiotape or CD

  One of Buffalo’s preeminent trial lawyers, John Condon, had been scheduled to present a Noonday Lecture on November 12, 2008. When Mr. Condon and his wife were killed in a tragic automobile accident, his colleagues decided that the lecture should still be held in his memory and as a special tribute to him.

  John Condon enjoyed a nationwide reputation in the field of criminal defense. He was known for the thoroughness of his trial preparation techniques and the tenacity of his examinations. At the height of his career, an article appeared locally in recognition of his extraordinary reputation as counsel for countless high profile defendants. The caption of the piece appropriately read “Get Me Condon.”

  This program emphasizes trial skills and client relations. As Mr. Condon had originally intended. Presenters include noted Buffalo attorneys Terrence M. Connors, Joseph M. LaTona, Rodney O. Personius, Joseph V. Sedita and Michael S. Taheri.

- **Settling Your Personal Injury Case and Sleeping at Night Part II: Remedies for Sound Sleep**
  - Product code 2132
  - 4.5 CLE credits: 1.0 Ethics, 3.5 Practice Management/Professional Practice
  - Presented on December 4, 2008
  - Available on Audiotape or CD

  Back in February of 2008, this program explored a variety of concepts and issues that impact the settlement of a personal injury case. A checklist of the pitfalls and land mines of liens, public benefits and private subrogation was included. The scenario remains the same: You’re about to settle your client’s personal injury case against the defendant(s) and now, other entities claim an interest in the settlement pie. The questions that need to be asked include: What claims are you required to address? What are those claims? Can you preserve some public benefits for your client and still accept the settlement?

- **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.

Percentage: 100%  
Credit Card #:  
Exp. Date:  

**Buddy System**

**Registration Form**

<table>
<thead>
<tr>
<th>Name:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Each additional participant:</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>3.</td>
</tr>
<tr>
<td>4.</td>
<td>5.</td>
</tr>
<tr>
<td>Shipping Address (No P.O. boxes please, due to UPS shipping):</td>
<td></td>
</tr>
<tr>
<td>City:</td>
<td>State:</td>
</tr>
<tr>
<td>Phone:</td>
<td>E-mail:</td>
</tr>
<tr>
<td>All tapes will include course materials. Please indicate the audio tape/CD/Video(s) product code of your choice:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total amount enclosed (Please add $5 per tape for shipping):</td>
<td>$</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Visa</td>
<td>MasterCard</td>
</tr>
<tr>
<td>Check enclosed</td>
<td>Charge my:</td>
</tr>
<tr>
<td>Credit Card #:</td>
<td></td>
</tr>
<tr>
<td>Signature:</td>
<td></td>
</tr>
</tbody>
</table>

**Ethics Goes to the Movies**

- **Product code 2133**
- **4.0 CLE credits: Ethics**
- **Presented on December 12, 2008**
- **Available on Audiotape, CD and DVD**

  This highly entertaining and informative seminar addresses:

  - Lawyer discipline
  - Confidentiality and the use of technology
  - Inadvertent disclosure
  - Client billing
  - Supervision and supervisory issues
  - Conflicts of interest
  - outsourcing, use of vendors and temporary employees
  - Dealing with court employees
  - Researching ethics

  **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 852-8887.

  If you haven’t received your copy of our most recent CLE catalog, please call Mary Kohlbacher at 852-8887.
International Law Committee Created

The Bar Association of Erie County has a brand new International Law Committee! Ameriﬁrst attorney Marc D. Hess has been appointed to serve as chair. As outlined in its mission statement, the Committee will act to promote the practice and study of international law in Erie County and the city of Buffalo, acting as both a producer of programs and activities and a point of contact for members of the bar. To that end, the Committee will be sponsoring lunch time seminars throughout 2009, including an April 29 noonday lecture entitled “What Business Lawyers Should Know About U.S. Export Controls.” CLE credits will be available for some programs.

In addition to promoting international law in Buffalo and Erie County, the Committee has been given the privilege of acting as the parent committee to the Sister Cities sub-committee,” Hess said. The sub-committee is responsible for overseeing the Bar Association’s international alliances with its sister cities in Kent, England and Lille, France.

For those who are interested in joining the Committee, meetings will be held on the ﬁrst Wednesday of each month at 12:15 at Bar Headquarters. Both practicing attorneys and law students are welcome. Interested persons can contact Marc Hess at MarcHess@aaol.com or through the Bar Association ofﬁce, 852-8687.

MARCH 2009

MONDAY 2
Professional Ethics Committee
12:15 p.m. - Thomas S. Wysolom, Chair

TUESDAY 3
Matrimonial & Family Law Committee
12:15 p.m. - Marla M. Hess, Chair
Legal Nurse Consultants Committee
12:15 p.m. - Adelbert Moot CLE Center
Cynthia E. Wojciechowski, Chair

WEDNESDAY 4
International Law Committee
12:15 p.m. - Marc D. Hess, Chair
Legal Nurse Consultants Committee
12:15 p.m. - Adelbert Moot CLE Center
Cynthia E. Wojciechowski, Chair

THURSDAY 5
Negligence Committee
12:15 p.m. - Adelbert Moot CLE Center
William A. Gersten, Chair

FRIDAY 6
Commercial & Bankruptcy Law Committee
12:15 p.m. - Beth Ann Bivona, Chair
April Bulletin Deadline

TUESDAY 10
Depression
12:15 p.m. - Jennifer P. Stergion, Chair

TUESDAY 12
Criminal Law Committee
12:15 p.m. - Rodney Personius, Chair

FRIDAY 13
Committee for the Disabled
12:15 p.m. - Janet L. Benkoski, Chair
Practice & Procedure in Family Court
12:15 p.m. - Part 1b, Erie County Family Court
Kristin Langdon Arcuri, Chair

MONDAY 16
Banking Law Committee
12:15 p.m. - Location to be announced
Timothy P. Johnson, Chair

Workers’ Compensation Committee
12:15 p.m. - Location to be announced
Philip Satchell, Chair

TUESDAY 17
Corporation Law Committee
12:15 p.m. - Ronald J. Battaglia, Jr.
Federal Practice Committee
12:15 p.m. - Adelbert Moot CLE Center
Anna Marie Richmond, Chair

WEDNESDAY 18
Erie County Bar Foundation
12:00 p.m. - T. Alan Brown, President
Intellectual Property, Computer & Entertainment Law Committee
12:15 p.m. - Ellen Swartz Simpson, Chair
Appellate Practice Committee
12:15 p.m. - Bar Center, Broom Room
Mariann Hochfelder, Chair

THURSDAY 19
Environmental Law Committee
12:15 p.m. - R. Hugh Stephens, Chair
Practice & Procedure in Justice Courts Committee
12:15 p.m. - Bar Center, Broom Room
Jeffrey F. Vordkl, Chair
Committee on Veterans and Servicemembers’ Legal Issues
12:15 p.m. - Jennifer P. Sutphin, Chair

FRIDAY 20
Committee to Assist Lawyers with Depression
12:30 p.m. - Daniel T. Lukasik
Young Lawyers Committee
12:15 p.m. - Melissa Barnet, Chair
and Petra Lettera, Co-Chair

MONDAY 23
Alternative Dispute Resolution Committee
12:15 p.m. - Patricia H. Potts, Chair

TUESDAY 24
Board of Directors
8:00 a.m. - Giles P. Manna, President
Elder Law Committee
12:15 p.m. - Adelbert Moot CLE Center
Charles Buhinier, Chair

THURSDAY 26
Human Rights Committee
12:15 p.m. - Alan J. Bower, Chair
Municipal & School Law Committee
12:15 p.m. - Bar Center, Arbitration Room
Herbert J. Cloes, Chair
Practice & Procedure in Surrogate’s Court Committee
12:15 p.m. - Bar Center, 12th Floor
Catherine T. Wettlaufer, Chair

SATURDAY 28
President’s Ball
7:00 – 10:00 p.m.
Burchfield Penney Art Center at Buffalo State College
For more information, please call
Maureen Gorski at 852-8687 ext. 18.