**Bar Association of Erie County**

**BULLETIN**

**vol. 50 | no. 5 | january 2011**

**www.eriebar.org**

**President’s Letter**

By Scott M. Schwartz

**Holiday Wish List**

In the time-honored tradition — started last year by Bob Convissar — I hereby disclose, for in-camera inspection, in no particular order, my Hanukkah, Christmas, Kwanzaa and winter advice wish list as follows:

That Joel Daniels have a year with no attorneys as clients.

That Judge Fabey get a gift card from LensCrafters — wouldn’t you love to see him in designer specs?

That the Seneca Indians be able to sell, with no sales tax, nicotine patches instead of cigarettes.

That Buffalo Place sign Bob Dylan for Thursday in the Square.

That the Erie Institute of Law have a CLE on how to use the television digital cable remote control.

That Mark and Tom, the hot dog cart guys at Franklin & West Eagle and Delaware & West Eagle, have a mild winter and add chicken breast sandwiches to next year’s menu.

That Chief Justice Roberts render future opinions as warm and engaging as he is in person.

That Judge Skretny rule unconstitutional the new blue and orange license plates as a violation of the good taste clause of the Constitution.

That all Erie County Attorneys and Law Firms list e-mail addresses in the Court Directory so when you have to call, but really hope for voicemail, you can e-mail instead.

That Judge Caruso not sign that contract to appear nightly in the lounge at the Bellagio.

**“March Madonna” Comes to the Bar Association**

The Bar Association will host a “Division I NCAA Men’s Basketball Championship” event featuring games, pizza, wings, and other “health food” on the afternoons of March 17 and 19 at Bar Headquarters, 438 Main Street as downtown Buffalo. Tip-off is at noon both days with staggered start times so members are welcome to drop in anytime between noon and 5:00 p.m. either or both days.

“At the suggestion of our president and point guard, Scott Schwartz, this inaugural ‘March madness’ event will offer an opportunity for camaraderie and competition as two large-screen TVs provide access to all the action CBS and Turner Broadcasting can throw at the airwaves,” according to RAEC director and former Canisius basketball star Kevin W. Spitaler, who is head- ing up the front line for this event, along with former board members and basketball players Peter F. Brady and Kathleen M. Sweet.

Participants will have the opportunity to choose the winners within each bracket for a $10 fee. All winnings will be donated to the participating organization of choice, including Lawyers for Learning, the Volunteer Lawyers Project, Legal Services for the Elderly and the Erie County Bar Foundation.

Mark your calendars now and watch for further details — including an opportunity to become the organizing committee in full uniform — in the February Bulletin. (They are all really tall!)

**Feroleto to Receive Kulick Memorial Award**

The Lawyers Helping Lawyers Committee of the Bar Association of Erie County recently presented the 2010 Sandy Kulick Memorial Award to Hon. Paula L. Feroleto in a private ceremony hosted by the Committee.

Attorneys experience alcohol and drug addiction at nearly twice the rate of the general population. The BAEC’s Lawyers Helping Lawyers Committee was established in 1975 to provide a confidential channel of communication for attorneys and judges experiencing alcohol or drug-related difficulties. The group consists of volunteer lawyers and judges who have experienced dependency on alcohol and drugs and are now in recovery. All aspects of the committee’s work are completely confi- dential.

**Manias Coaxed Out of Ex-President Cave**

Former Bar Association of Erie County president Giles P. Manias has graciously agreed to lend his artistic talents to the Bulletin in the form of editorial cartoons. Manias, who served as BAEC president from 2008-09, is also a painter who initi- ated the “Artful Lawyer” exhibit to showcase the artistic, musical and photographic talents of local attorneys. He promises that the exhibit will return from time to time when sponsorship funding can be raised. During his year as president, Manias also chose to host the 2009 President’s Ball at the newly built Burchfield-Penny Art Center at Buffalo State College.

Manias has often referred to “the cave” into which ex-presidents are banished without moments of reminiscing the gavel. Our intrepid reporters discovered the cave “somewhere here in Carl Country” but refused to disclose its exact whereabouts (“we else we’d have to kill you…”).

The former prez was recently sighted peering out of a cave littered with drawings. When asked what he “used to be somebody,” Manias just kept repeating a line from an old Mel Brooks movie: “It’s good to be King! It’s good to be King…” After a few double expres- sions and a cold shower, he was coerced (oops, we mean convinced) to put pen to paper and create some edito- rial cartoons for the benefit of Bulletin readers.

continued on page 4
Editor's Note: The following letter appeared in the NY Daily Record recently in response to a column written by Michael Giuliano.

Dear Mr. Giuliano:

I read with interest your recent column entitled “A Tammany-style judgeship machine?” I don’t disagree with your premise that judicial elections are too political, and that candidates’ nominations are subject to the whim of bar organizations. How should a bar association, such as Monroe or Erie, express its opinion on the qualifications of judicial candidates? You suggest, and I here must disagree, that a bar is public is provided “nothing of importance” by the Bar Association, upon which to base their votes. Is this not a major point of the Bar Association’s existence? Bar Association ratings are the public’s only vehicle for evaluating the qualifications of judicial candidates.

The reason behind the ultimate rating of a candidate cannot be easily articulated when a significant number of people are voting, with each one voting their individual conscience. Nevertheless, the ratings are based upon a consensus. If the public wishes to elect a candidate rather than “qualified,” so be it. As it is, at your column suggests, “ballot position, name recognition, or party affiliation.” We will never really know, as for the reason each voter is in the eye of the beholder. Again, I believe that the voice of the Bar Association is material and relevant and should be heard.

I suggest that a fair representation of litigation attorneys, representing plaintiffs and defendants in civil actions, representing the People and criminal defendants, representing plaintiffs and defendants in criminal matters, would know more about who is and who is a “good judge” than, perhaps, the butche, the baker or the political campaign machinery.

Regarding your reference to our local Ken Case for Court County television ad, citing the erosion of his opponent’s 20 years prior, such is not and was not, standing alone, deemed improper campaign material. What was deemed improper by our Bar Association was the harsh and sensational manner of delivering that message, in addition to its failure to refer to the opponent’s qualifications. What was deemed improper by our Bar Association was that candidates should not have collective opinion on candidates from the prospective bar candidates. The fact that the rating process is as apolitical as it can possibly be. Our committee membership is comprised of bar association leaders, and no member is allowed to support, endorse or contribute to any political campaign in the current election year, or in the preceding year. Our committee’s criteria are intended to be diverse by gender, ethnicity and practice specialty. Members are selected from practice areas which put them in court on a regular basis.

The next deadline for ALL contributors and advertisers isContinued on page 4

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

Send all submissions as Word documents to or by mail to: Bulletin Editor, 438 Main Street, Sixth Floor, Buffalo, NY 14202.

DEADLINE

The next deadline for articles, letters and advertisements is THURSDAY, December 30, 2010.

Call Susan Kohlbacher at Bar Headquarters for more information, (716) 852-8687.
How to place an announcement:
If you are a RAE member in good standing and you’ve moved, been promoted, hired an associate, taken on a partner, or received an award, we’d like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, we will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, etc.). Notices must be submitted in writing and limited to 100 words. They are printed at no cost to members and are subject to editing. E-mail your notice and high-resolution photo (300 dpi) to obrian@eriebar.org.

Charles D. J. Case has joined the law firm of Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC as an associate, where he will focus his practice on commercial litigation. A graduate of St. Bonaventure University, Case received his JD from the University at Buffalo School of Law. He formerly represented mortgage lenders in foreclosure proceedings and title disputes and also has experience in government affairs and representing municipalities and legislative bodies in a wide range of matters. Case also worked for the New York State Assembly for four years and directed the government affairs department of a large, statewide organization. During law school, he served as vice president of the Buffalo Law Student Bar Association and was a member of the Special Education Law Clinic, which advocates for students with disabilities.

Jennifer A. Mucha has joined Phillips Lytle LLP as an associate in its litigation group. She will concentrate her practice in business litigation matters, including representing emerging and established technology-focused companies. Mucha is the prior owner and operations manager of a Buffalo-based Internet technology developer. She serves on the board of infoTech Niagara and is the Buffalo representative of the Upstate Tech Corridor. Mucha also volunteers for the Make-A-Wish Foundation. A magna cum laude graduate of the University at Buffalo Law School, Mucha serves as an alumnus coach for UB Law’s Jessup Moot Court, is a GOLD Group member of the school’s alumni association and a member of the Phi Alpha Delta Law Fraternity.

Johanna Healy (formerly Johanna Dash), a partner at Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, has received the 2010 Pro Bono Award from the Judiciary of the Western District of New York for her “exemplary pro bono work representing low-income clients in civil cases.” The award was presented by Hon. William Skretny and Hon. Jeremiah McCarthy at the 20th annual Bench and Bar Dinner recently sponsored by the Monroe County Bar Association and the Bar Association of Erie County. Healy is a litigation attorney who focuses her practice on insurance coverage and insurance defense including premises liability, lead paint, toxic torts, New York State Labor Law, products liability and subrogation for insurance carriers.

Maryann Saccamando Freedman and Michelle M. F. Schwaich of Cohen & Lombardo have been named officers with the Association for a Buffalo Presidential Center (ABPC). Freedman, who is Of Counsel to the firm, has been elected inaugural president of the group. Schwaich, an attorney at Cohen & Lombardo, was elected secretary. The ABPC is dedicated to exploring the legacies of Presidents Grover Cleveland and Millard Fillmore and the roles of other western New Yorkers who helped to shape our nation’s history. The Association will also focus on contemporary issues related to the presidency, including elections and national policies. They will provide educational programs, public symposia, electronic publications, and exhibitions to advance WNY as a center for the development of the U.S. Presidency throughout history.

Women Lawyers Name Officers, Lawyer of the Year
Gina Marie DePrima has been named president of the Women Lawyers of Western New York (WLWNY). The group was founded in 1913 and is the first and oldest women’s organization in the region. WLWNY is dedicated to the advancement of women in the legal profession, scholarships for female law students, and charitable and educational causes related to women and the law.

Claudia S. Schultz has been awarded the Woman Lawyer of the Year Award by the Women Lawyers of Western New York. Schultz is currently the deputy administrator of the Assigned Counsel Program, where she has educated, trained, supervised and monitored countless criminal defense attorneys in Erie County. Prior to her arrival in Buffalo in 2004, Schultz spent 24 years in Nassau County as a criminal defense attorney for both private firms and the Legal Aid Society. Schultz was selected for the award due to her “commitment to the highest standards of legal advocacy for her clients and our community.” [8]
President’s Letter continued from page 1

in Vegas, so he is available for future Judicial Candidate gigs.

That all Bank and Insurance Companies phone systems answer “Hello, if you know your party’s exten- sion, please dial it now” before another word is spoken, in English or Spanish.

That our State Legislature, if nothing else, pass a law that prohibits a magazine from sending a “your subscription is expiring” notice within the first eleven months after you have renewed your subscription.

That Lipsitz Green Scime Cambria LLP continue to believe that I work there and continue to be sup- portive of my time and effort for the Bar Association and its members.

That Future Judicial Candidates understand that the public deserves and expects more of their campaign ads than they do of party political ads.

That the rhythmic citations of Jeff Spencer keep coming – as he is the Bar Bulletin resident poet, though now retiring, we have appreciated his efforts – and we certainly want to be sure he knows it.

That Judge NeMoyer, as the only – or one of two - Supreme Court candidate(s) next year gives the toast- master at the Judicial Candidates Luncheon more to work with than Judge Faber did this year.

That Mark Grisanti runs a newspaper that is the same respect that a criminal defense attorney deserves.

That health care providers called as witnesses by personal injury attorneys give them a no-fee guar- antee (or at least a reasonable fee).

That judicial campaign parties in the Eighth Judicial District be for candidates running in the Eighth Judicial District.

That our next President, Art Russ, be able to enjoy next year’s election campaign season more than we all did this year.

That Mike Dammern, Kurt Sapela, Jeff Spencer, Mike Nowak, Jim Arcudi and Sharon Gersteinman enjoy their retirements from public service, and that the state add three years of contributions to the 401ks of us private practice attorneys.

That the special Commission on Judicial Compensation sees fit to award our state Judges the raises that they have waited over a decade to receive. (Kindly note that’s S-C-J-W-A-C-R-Z.)

That the Erie Institute of Law, along with live seminars, CDs, DVDs, and soon-to-be Webinars, offer CLE presentations in tablet or gel-cap form.

That very soon, light bulbs start popping in My Head for my final Bar Bulletin columns.

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Manias Coaxed Out of Ex-Presidential Cave continued from page 1

Former BARC president Hon. David J. Mahoney served as editorial cartoonist for the Bulletin from 1960 until his death in 2008. Manias began doing the annual presidential caricatures which line the walls at Bar Headquarters after Justice Mahoney’s passing. He promises to supply us with cartoons “as long as there is light in the cave and lawyers and judges continue to be funny.”

Manias’ inaugural cartoon appears on page 2 of this issue. The Mahoney cartoons will continue to appear from time to time “whenever snow blocks the entrance to the cave, or if lawyer advertising is removed from TV,” Manias said. [B]
Did you know that a donation of just $15 can feed a family of four for a week? Or that – contrary to popular belief – the hungry people in our community and across the nation are not just the homeless? They are often employed, or live in a household with someone who is. They are the working poor who struggle to provide the daily necessities that so many of us take for granted. For the past 20 years, the Bar Association of Erie County has expressed its commitment to helping the hungry in our community through its Have-A-Heart food drive. Over the history of the drive, several tons of food and substantial financial support have been provided to the Food Bank of Western New York.

This year’s drive will again focus primarily on monetary contributions. Law firms that wish to collect non-perishable food items may continue to do so and the Food Bank of Western New York will arrange to pick up the donated items. Please help the hungry in our community by mailing your donation to the Food Bank of Western New York, 91 Holt Street, Buffalo, New York 14206. Checks should be made payable to the Food Bank of Western New York and received by Valentine’s Day, Monday, February 14th. All donors will receive written confirmation of their contribution directly from the Food Bank.

Welcome New Members

THE BAR ASSOCIATION OF ERIE COUNTY IS PLEASED TO WELCOME THE FOLLOWING NEW MEMBERS:

Christina Akers
Carol A. Becker
Steven G. Biltekoff
Allison Bozinski
Stephanie J. Calhoun
Michael S. Das
William A. Evans, III
Michael Hecker
Ashley J. Litwin
Barbara H. O’Neill
Matthew A. Parham
Tyson R. Prince
Peter J. Savage
Stefanie Wiegand
Kimberly Worling

It’s great to belong to something this good.
Introducing the Attorney Grievance Committee

By Deanne M. Tripi, Chair
Eighth Judicial District Grievance Committee

The goal of this article and future monthly articles to come is to give attorneys a better understanding of the Attorney Grievance Committee, the grievance process, rules frequently implicated, and advice to avoid a grievance complaint.

The Attorney Grievance Committee of the Eighth Judicial District is an auxiliary agency of the Appellate Division, Fourth Judicial District. The Committee investigates complaints containing allegations of attorney misconduct and ethical rule violations.

The Eighth Judicial District Grievance Committee has four staff attorneys: Roderick Quebral and Margaret Callanan are principal counsel and Susan Eagan and Guy Giancarlo are associate counsel. The Committee has three investigators, as well as a very hard-working staff of employees who participate in ensuring the efficiency, professionalism and confidentiality of the grievance process, rules frequently implicated, and advice to avoid a grievance complaint.

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The Grievance Committee is comprised of 23 volunteers, which includes the chair, Deanne M. Tripi, the vice chair, Dale Robbins and three members who are non-lawyers. The attorneys appointed to the Committee for the Eighth Judicial District are from Allegany County, Chautauqua County, Cattaraugus County, Erie County, Genesee County, Niagara County, Orleans County and Wyoming County, all appointed by the Presiding Justice of the Appellate Division to serve three-year terms.

When a complaint is filed with the Grievance Committee, a response from the attorney the complaint is concerning (the respondent attorney) is frequently requested. Please do not ignore letters from the Grievance Committee. Failing to respond to a complaint and/or failing to cooperate with a Grievance Committee investigation is sanctionable and frequently compounds and aggravates the severity of the allegations before the Grievance Committee.

There are approximately 2,400 to 2,500 complaints filed each year in the entire Fourth Department, which consists of the Fifth, Seventh and Eighth Judicial Districts. The Eighth Judicial District has approximately 1,000 to 1,200 complaints filed each year, which represents about 46 percent of the filings in the Fourth Department. A large majority of complaints filed are dismissed. However, those not dismissed are either presented to the chair for determination or to the Committee. The Fourth Department is unique in that the respondent attorney may appear before the Committee and orally present his position, as well as answer questions from the Committee. The Committee then deliberates and can do the following:

Disposal of the Complaint: When the evidence produced does not establish probable cause for a finding of professional misconduct, the Committee may vote to dismiss the complaint against the respondent attorney.

Letter of Caution: This is a non-disciplinary and non-public disposition of a complaint which informs the respondent attorney that conduct complained of has violated the spirit, if not the letter, of an ethical standard. The letter is meant to educate the attorney. A Letter of Caution is reserved for minor violations of the ethical standards not resulting in detriment to the public.

Letter of Admonition: This is a non-disciplinary discipline by the Committee and does not interrupt the respondent’s privilege to practice law. Admonition represents a violation of the ethical rules and is the least serious form of disciplinary sanctions.

Referral to the Appellate Division: If the evidence before the Committee demonstrates probable cause to believe that serious misconduct has occurred, referral to the Appellate Division is appropriate. If the Committee votes for the Fourth Department to hear the matter, a formal petition is filed against the respondent attorney and the attorney must then file an answer. The Appellate Division may then dismiss the petition, return the matter to the Committee, consider, suspend or order the respondent attorney.

“Failing to respond to a complaint and/or failing to cooperate with a Grievance Committee investigation is sanctionable and frequently compounds and aggravates the severity of the allegations.”

WE ARE NOW BEGINNING WORK ON THE

2011-12 ATTORNEY DIRECTORY.

If you have ANY CHANGES to your current listing, you MUST submit them no later than MARCH 1.

See page 5 of the current Directory for further details.

New York’s Voluntary Disclosure and Compliance Program

By Deanne M. Latulippe, Senior Investigative Counsel, New York State Department of Taxation and Finance; and William J. Comiskey, Partner, Hodgson Russ LLP and former Deputy Commissioner of the Department of Taxation and Finance.

Imagine Mr. Smith and Mr. Jones have each failed to file their New York state income tax returns for the past four years. Both owed substantial amounts of money each year. Both are potentially facing substantial civil penalties and interest on top of the tax owed. Both are facing possible felony and misdemeanor charges and criminal prosecution by the state of New York. Mr. Smith was, in fact, publicly charged and convicted of criminal tax fraud, and faced sentencing as well as civil penalties. Mr. Jones, on the other hand, confidentially repaid the tax without civil penalty and was not prosecuted.

Why were these two people, in identical situations, treated differently? Because Mr. Jones’ attorney advised him to take advantage of New York’s Voluntary Disclosure and Compliance Program (“VDCP”) before the Tax Department found out about his tax liabilities.

The scenario above is not fiction. Repeatedly, individuals and businesses under criminal investigation have had their criminal cases closed because prior to the commencement of the investigation (or civil audit), they had applied for and were accepted into VDCP. One need not retain an attorney or a representative to participate in this program.

VDCP has also been largely successful and a great source of revenue for the state, bringing in over $152,000,000 since its inception, with a projected $75,000,000 in proceeds this fiscal year alone. Over 5,600 people and businesses have applied for the pro-
Bar Association of Erie County Professional Ethics Opinion

Topic: Disclosure of confidential information

Digest: A lawyer who obtains information from a prospective client concerning the physical well being of the client’s adult parents may disclose such information in order to protect the physical well being and safety of the parents.

Rules: 1.16, 1.16(b)(1).

QUESTION

May a lawyer, who obtains information from prospective clients concerning risks of physical harm and well being to the client’s elderly parents at the hands of a sibling, but who is not later retained, disclose that information in an effort to seek protection for the elderly parents?

FACTS

The lawyer was approached by several adult children of two elderly parents. They described what they believed to be a situation of elder abuse at the hands of another sibling, including financial, emotional and physical abuse. Due to disagreements among the siblings, the lawyer has not been retained.

OPINION

Subject to exceptions not relevant here, Rule 1.16 of the New York Rules of Professional Conduct expressly provides that “(b) even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation….”

Rule 1.6 directs that a lawyer may not knowingly reveal confidential information, which is defined in the Rule as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” Given the details imparted by the prospective clients to the lawyer, such information likely would be characterized as “confidential information” under the Rule.

The enactment of the Rules of Professional Conduct in 2009 added a new provision, at Rule 1.6(b)(1) which permits a lawyer to “… reveal or use confidential information to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm…” If the information, therefore, does not fall within the definition set forth in Rule 1.6, then it is not “confidential” and may be disclosed. If, however, the information can be deemed “confidential,” and if the lawyer “reasonably believes that the information will ‘prevent reasonably certain … substantial bodily harm,’” the information, though “confidential,” nonetheless may be disclosed by the lawyer.

CONCLUSION

A lawyer who receives “confidential information” from a prospective client may disclose that information if the lawyer reasonably believes it necessary in order to prevent reasonably certain death or substantial bodily harm.

Meet the Ethics Committee

By Thomas S. Wiswall, Chair

The Ethics Committee welcomes participation by additional lawyers interested in promoting the understanding and adherence to the rules of ethics. Although membership on the Committee requires approval by the president of the bar association, any lawyer who would like to be considered for membership on the Committee is urged to inform the Bar Association or me of their interest.

Elsewhere on this page, you will find a recent ethics opinion for your review. The next several editions of the Bulletin will contain similar opinions which I hope you will find helpful. As always, your questions and comments are invited and encouraged.
Craigslist Legal Issues

Craigslist is an online network of free classified ads. If you want to sell a used set of law books or the hideous oil painting that the managing partner insists on hanging in your firm’s reception area, you can post an ad on Craigslist and hope to connect with a buyer. Craig Newmark launched Craigslist in 1995 as an e-mail distribution list among friends in the San Francisco Bay area. The next year, the service switched from e-mail to a Web site at www.craigslist.org. By 2003, the service had expanded into 74 cities, and today it operates throughout the U.S. and in many other countries. According to Wikipedia, the site serves over 20 billion page views per month, putting it 33rd overall among Web sites worldwide. The Buffalo-area listings on Craigslist can be found at http://buffalo.craigslist.org/

Most ads can be posted without charge, but there are a few exceptions, including job postings in select cities (not Buffalo), brokered apartment rental listings in New York City, and “therapeutic services.” A quick check of the Therapeutic Services category indicates a heavy emphasis on massage and “bodywork.” Hmm.

Postings are limited to one metropolitan area; you cannot post an ad across the entire nationwide network. Postings may cover a wide variety of matters, such as merchandise or services for sale, community events, personals, housing, jobs, résumés, and discussion forums. Across the U.S. and locally, some attorneys are using Craigslist to post law firm ads. The ads can be seen by clicking on the Legal Services link. One local law firm recently ran an ad under the heading “Grieved? WE SURE AS HELL CAN STOP YOURS!”

CENSORED: Questionable Postings

Over the past few years, Craigslist has come under fire for allowing postings related to prostitution and similar activities. The original name of the link in question was Erotic Services. In March 2009, a Brooklyn man was stabbed to death allegedly by a teen who had answered an Erotic Services ad. In April 2009, Philip Markoff, a medical student at Boston University, was arrested for the murder of a按摩师 he allegedly met through the Erotic Services link. In May 2009, a Queens prosecution attorney that advertised on Craigslist was busted by New York authorities. That same month, Craigslist changed the Erotic Services name to Adult Services and set up a team of attorneys to review the postings. Nevertheless, heavy criticism continued and eventually the attorneys general to 19 states (not New York) demanded that Craigslist remove the Adult Services link. On September 4, 2010, Craigslist suddenly deactivated the Adult Services link and posted a “CENSORED” banner in its place. By September 8, the Adult Services link was completely removed.

Could Craigslist have told the state attorneys general to take a hike? The legal issues are complex. One of the laws that Craigslist has cited in its favor is Section 230 of the Communications Decency Act, which protects online service providers from actions such as merchandise or services for sale, community events, personals, housing, jobs, résumés, and discussion forums. Among the cases related to Craigslist and Section 230 is the eBay v. Craigslist suit brought by Craigslist – whether eBay unlawfully made use of confidential information, i.e., whether eBay – i.e.,

Despite the deactivation of Adult Services, the Craigslist link for Therapeutic Services continues, and similar ads are cropping up under the Personals category. Craigslist CEO Jim Buckmaster noted that taking down the Adult Services link was unlikely to stop the ads, saying “it is not as though we would be getting rid of the ads – we would be dispensing them through other parts of the site.”

Inappropriate postings may be flagged by other users. When a posting is flagged by a certain number of users, the posting is taken down. The magic number of users. When a posting is flagged by a certain number of users. When a posting is flagged by a certain number of users. When a posting is flagged by a certain number of users. When a posting is flagged by a certain number of users. When a posting is flagged by a certain number of users. When a posting is flagged by a certain number of users.
Spectrum Utilization and Interference: Issues for a Wireless-Driven World

As the New Year begins, many of us are shopping—and using new wireless communications-driven gadgets that were welcomed into homes and businesses during the holiday season. In fact, the expansion in use of wireless devices is expected to grow by as much as 37% over the next five years, according to research done by Cisco Systems and the Yankee Group, among others. Every day, we can communicate from an incredible array of locations (including close to the summit of Mt. Everest) without the limitation or bother of being tethered by a cord. The issue that the ubiquity of wireless devices has created is that spectrum, which is the highway that enables these connections, is a limited commodity that’s supporting an increasingly unlimited number of services. These range from radio to broadcast radio to handheld mobile devices to beepers, and include just about everything in between.

Spectrum is a limited commodity. Once it’s gone (either in use or allocated for future use), it’s gone. Given the huge growth (both actual and anticipated) in the wireless sector of telecommunications, the only option to support the onslaught of additional wireless services is for the National Telecommunications and Information Administration, the FCC (which is responsible for the licensing of such spectrum) and other affected government agencies to work together to raise the level of spectrum efficiency to a higher level while minimizing interference. Additionally, the sale of spectrum by the federal government raises a decent chunk of change. A 2008 auction of some prime real estate spectrum in the C Band raised a whopping $19.6 billion.

In late June, President Obama directed the NTIA, an agency which operates under the Department of Commerce, and the FCC to work together to identify and secure 500 MHz of additional spectrum during the next 10 years to support the burgeoning industry without harming essential users of such service including, among others, the Department of Defense, the National Security Agency and the FAA.

The first “sound” spectrum is 155 MHz which will be secured from two distinct sources. The first segment of 100 MHz currently is allocated to federal radar bands within the U.S. that are beyond the reach of radar currently in use. The second segment of spectrum is the result of the consolidation of spectrum bands currently used for meteorological observation systems. (There’s a weather joke here, but I’m not biting). There also remains a great deal of un- and under-utilized spectrum which is currently assigned to commercial users, including television stations and satellite phone service providers. Reallocation of this spectrum lies up ahead, although such action is not expected to happen in the near term (one year). In any case, freeing up unused spectrum so that it can be put to work is in everyone’s best interest.

Increasing Interference on the Horizon

However, as more devices use the spectrum that is available, the problem of interference will increase. Interestingly, at least to me, is the fact that harmful interference is caused not by transmitting devices but rather by receivers. As various governmental and academic experts confront what’s likely to be a significant problem, they are finding that the only way to minimize this is to minimize interference. [B]

New York’s Voluntary Disclosure and Compliance Program

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New York’s Voluntary Disclosure and Compliance Program

In the past, many wireless devices are not licensed. In 2006, FCC Commissioner Michael Copps said “The genius of this unlicensed technology is that no central authority controls or manages how and where these networks spring up. Instead, any private or commercial operator who sees a need for a local Wi-Fi network may build and operate one. The price that Wi-Fi users pay for this freedom is that they must accept interference from other devices in the unlicensed bands. But the nation’s half-decade of experience with this new technology has made it quite plain that this trade-off is more than worth it.” When it comes to providing broadband over the unlicensed bands, the airwaves are truly the people’s airwaves.” However, in the four years since Commissioner Copps’ comments, attitudes may have changed, particularly as more people scramble for more spectrum.

One of the problems is that since such services are unlicensed, interference problems are difficult to resolve because it’s virtually impossible to find someone to hold accountable for the interference. Given that interference is time-sensitive, the amount of time necessary to identify, locate and work with an unmonitored bad actor (not every entity that creates interference is aware of the problem it creates) makes speedy problem solving virtually impossible. Secondly, interference isn’t always a deal-breaker. As Ellen Goodman, a Professor of Law at Rutgers said in a recent paper, “harmful interference should be a yield sign, not a stop sign.” Her position is that harmful interference (and the word “harmful” is important) should be both “a tool to define rights and a tool to assign liabilities for interference.”

Secondly, an unwillingness or inability to deal with interference problems created by receiving devices places obligations on those who aren’t even aware of the problems that their equipment is causing. In other words, the entity wreaking havoc on a wireless operation may have no idea about the consequences of its seemingly harmless devices. For the time being, the FCC has not set standards which monitor or manage receiver performance. Given that the FCC is probably the only entity that might be successful in seizing such an opportunity, this too creates additional challenges for managing interference.

There is an Italian proverb which reads “the best armor is to keep out of range.” While this is true, in a wireless world, it’s neither practical nor possible. With this in mind, creative academics and regulators must look to find innovative and practical ways to utilize spectrum as efficiently as possible, while simultaneously minimizing interference.
SSDI Beneficiaries Face Loss of Benefits

SSDI beneficiaries are given a nine-month trial work period (TWP), during which they can earn any amount of money and still qualify for SSDI. After nine TWP months (in 2011, months with $720 or more in gross wages for the life of their BOND project participation will be subject to the usual rules), the participant will then receive three more SSDI checks and then lose their entire SSDI payment. Several work incentives can gainful activity by earning more than $1,000 in 2011. Mary worked for seven months at the same rate of pay, $1,290 per month, at $10 per hour ($1,290 per month) and after seven months she stood to lose $1,650 in monthly SSDI and her two minor children were each receiving $275 per month when Mary went to work. Mary worked for seven months at the same rate of pay, $12,000), the excess amount is divided by 12 to determine how much each month is subject to the $1 for $2 offset test. First, Social Security will estimate her income or $290 per month that is subject to the offset test. Mary will have $3,480 in projected excess income or $290 per month that is subject to the offset test. Here is how Mary’s SSDI check will be calculated:

$955 New SSDI payment amount
$145 Countable wages
$1,100 Regular SSDI payment
$145 Countable wages
$955 New SSDI payment amount

Mary has now earned $1,290 per month and her SSDI check is reduced by $145, with her children’s benefits untouched.

BOND Participants to Receive Incentives Counseling Services

Individuals recruited by Social Security’s contractor, Abt Associates, will be assigned to a control group (get-
News from Kent, Our Sister City in Great Britain

By Jonathan Smithers

I recently read a quotation which went along the lines of “there is plenty of room on the extra mile.”

This reminded me of a question raised by my late father when, as a youngster, he asked me about the tune that I was humming. I admitted that it was “I am in with the in crowd.” I then received a lecture about how the people that get things done are not those that follow the herd. They don’t necessarily have to be leaders – although they often turn out to be – but are usually those not afraid to think their own thoughts. Thus being with the “in crowd” was not what I should be striving for!

As a teenager, I am sure that I was quite resentful of this parental direction, however true and necessary the sentiment. I suspect my father knew that but, like all good parents, said it anyway in the hope that it might sink in somewhere. Well, judging from the fact that I am writing this well over 30 years later, his hope was not in vain.

I have recently signed off on a piece of work for the Law Society of England & Wales relating to real estate contracts. The idea has been around for a long time, but I and a couple of others kick-started it as a first draft. It has been looked at by many people and pulled into what should now be an industry-standard document for all residential property transactions in the country.

As a very interested observer, I think without exception all the people who actually contributed had taken the time and trouble to read the whole document and make an informed comment. It became very clear to the authors that some of the correspondents simply wanted a voice without reading that upon which they were commenting; others used it as a soapbox to voice an opinion, sometimes at a complete tangent to the job at hand.

A thorough debate has, I hope, brought us to a position where professionals can rely on policies and procedures that have been well thought through and are designed to assist not only themselves, but more importantly their clients.

The extra mile that I was talking about? Those of us who commenced the project were not compelled to do so. Nobody twisted our arm or forced us, but we saw an opportunity and have run with it. Although we asked for and received opinions, because we went out on our own, we had the freedom to push boundaries and explore how we might change things for the better.

Time will tell whether we can overcome some entrenched positions – you all know what lawyers are like! [B]
Recent Surrogate’s Court Decisions and Other
Estate Planning Matters

**Matter of Woolworth**, 76 A.D.3d 160 (4th Dept., 2010)

This case deals with creation of a Supplemental Needs
Trust (SNT) by court order to shelter a tort recovery.
Generally speaking, a trust funded by an individual’s
own assets (a so-called self-settled trust) will disqualify
the individual from qualifying for Medicaid. However,
42 U.S.C. §1396p(d)(4)(A) and N.Y. Social Services Law
§366(2)(b)(2)(ii) provide that a self-settled SNT will
not disqualify an individual if: (1) the individual is
under 65 and disabled; (2) the trust was created by a
parent, grandparent, or guardian of the individual, or
by a court; and (3) the trust provides that at the death
of the individual, Medicaid will be reimbursed for
assistance given to the individual.

Ronald Woolworth died as the result of medical mal-
pactice. His widow, as administrator of his estate,
commenced an action seeking damages for wrongful
death and conscious pain and suffering. The action was
settled, and $516,876 was paid into the decedent’s
estate. The widow’s entire share of the settlement. The widow
sought the approval of an SNT funded by the
settlement.

In an opinion by Justice Samuel Green, the Appellate
Division unanimously reversed and granted the peti-
tion in its entirety.

The Fourth Department held that, while the deci-
sion of whether to establish or approve an SNT is dis-
ccretionary with the Surrogate, in this case the
Surrogate had abused his discretion by denying the
request. The Court reviewed the background of SNTs, and
especially noted the Court of Appeals’ discussion in
**Matter of Abraham**, 11 NY3d 429, that the SNT
represents a bargain struck between the SNT benefi-
ciary and the state in which the state agrees to continue
providing Medicaid assistance in exchange for the pos-
sibility of reimbursement from the SNT upon the death
of the beneficiary.

The Court noted:

In refusing to approve the funding of the proposed
SNT with a sum greater than $100,000, the
Surrogate skewed the balance fashioned by the
legislature in favor of the state and to the detri-
ment of the petitioner. By placing that limitation on the
funding of the SNT, the Surrogate ensured
that petitioner would lose her eligibility for
Medicaid, a result that is inconsistent with the
public policy underlying SNTs and the Surrogate’s
function in approving and supervising their estab-
lishment.

**Matter of Srozenski**, 2010 NY Slip Op
7276; 2010 N.Y. App. Div. LEXIS 8444 (Nov. 12, 2010)

This case confirms the jurisdiction of a New York
court over a trust created out of state and provides
some instruction on how to deal with a recalcitrant
trustee.

While a resident of New Jersey, Joseph Srozenski cre-
at a living trust some time prior to 1997, and
appointed his son, Robert, as trustee.

Robert’s sisters, who were the beneficiaries of the
trust, were residents of Monroe County, as was Robert.
The sisters brought a proceeding in Monroe County
surcharge the trustee for the sisters’ legal fees. [B]

The Surrogate ordered a hearing, at which Robert
refused to participate. The sisters put in evidence that
their brother as trustee received $127,000, which was
entirely unaccounted for. They also put in evidence that
Robert had engaged in day trading with the trust’s
assets.

The Surrogate held that where the fiduciary fails to
meet his burden to prove an accurate account, and
where the objectant provides evidence as to inaccu-
cacies, the burden then shifts back to the fiduciary
to prove by a fair preponderance of the evidence that
the account is accurate and complete. The fiduciary hav-
ing failed to participate at all, the Surrogate surcharged
him for $127,000.

The trustee appealed to the Fourth Department
which affirmed the bulk of the decision below. The
court held that although the trust agreement directed
that New Jersey law would apply to the trust, since
the trustee resided in Monroe County, the Surrogate had
jurisdiction to hear the case and apply New Jersey law,
including that state’s version of the Prudent Investor
Act, which had been enacted after the date of the trust.
The Appellate Division did hold, however, that under
New Jersey law, the Surrogate lacked jurisdiction to
surcharge the trustee for the sisters’ legal fees. [B]
ENVIRONMENTAL LAW

In NL Industries, Inc. v. Halliburton Co. (10-CV-89A, 11/2/10), the court granted in part and denied in part defendants’ motion to dismiss plaintiff’s amended complaint seeking reimbursement under CERCLA of response costs plaintiff incurred pursuant to a consent order with EPA. The court held that plaintiff was entitled to pursue recovery of its response costs under §107 of CERCLA because it had directly incurred those costs by performing the clean-up work itself, but that plaintiff could not pursue an action for contribution pursuant to §113 of CERCLA, at least at this time, because it had never been sued and no CERCLA liability had yet been imposed on it.

ERISA/INSURANCE

In Brandon v. Prudential Insurance Co. (09-CV-6166T, 11/9/10), plaintiff sued after the defendant insurer denied his claim for life insurance benefits following his wife’s death. The insurer contended that no benefit was payable and that it was entitled to rescind the policy because the wife’s application for insurance did not disclose that she suffered from mitral valve prolapse, information the insurer contended she should have disclosed in response to a question asking whether the applicant had been diagnosed with or taken medication for “heart trouble.” The court granted plaintiff’s motion for summary judgment and awarded him the death benefit (plus prejudgment interest and attorneys’ fees pursuant to ERISA), holding that (i) the question about “heart trouble” was ambiguous as a matter of law, (ii) the insured’s answer to that question accordingly could not be used as evidence of a misrepresentation, (iii) the question should instead be interpreted as asking for the applicant’s opinion as to whether she suffered from “heart trouble,” and

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SEWER SUIT WON'T GET THE BOOT
With the sound of a mighty gush
The sewer backed up
In a reverse flush!
The smell invaded all the more
As sewage spread
Across the basement floor.
The sewer district's street work
Just days before
Was clearly a culprit to explore.
The county's dismissal motion couldn't hide
That factual issues of causation
Did surely abide.

PARTIES' CHOICE STILL HAS VOICE
An application for child support modification may consider a lower threshold if that was agreed to by the parties in their stipulated agreement (in the Mtr. of Lomanto v. Schneider, __AD3rd__, 4th Dept., 11/12/10, #1203).

CASH OR CAN OK'D
Our Fourth Department has approved the use of a cash undertaking to enable a nonpaying parent to purge himself of a six-month Family Offense conviction (in the Mtr. of Riggs v. Vandusen, __AD3rd__, 11/12/10, #1282).

CONTEMPT CONVICTION CANNED
An incarcerated defendant's conviction for criminal contempt was reversed by our Fourth Department, noting that he was called to testify before the grand jury without notifying his attorney (Peo. v. Nagel, __AD3rd__, 11/19/10, #10001).

PAYBACK PARAMETERS
In a thorough opinion by Justice Rose Sconiers, our Fourth Department has held that a county department of social services is entitled to recover Medicaid payments from the estate of a decedent recipient including funds from a tort settlement (in the Mtr. of the Estate of Heard, __AD3rd__, 11/12/10, #971).

“COLLAPSE” CLASH
The meaning of the word “collapse” in a homeowner’s insurance policy was found to be a fact issue which precluded summary judgment in Khuns v. Bay State Ins. Co., __AD3rd__, 4th Dept., 11/12/10, #1090.

FINE LINES THAT BIND
Clarifying the border between two lakefront lots required the determination of an unasserted adverse possession claim to a triangular parcel which affected both neighbors (Margetin v. Jewett, __AD3rd__, 4th Dept., 11/12/10, #1011).

In Bond and Bootey v. Turner et al. (__AD3rd__, 11/12/10, #1045), our Fourth Department reviews the impact of a public-dedicated easement on property owners.

“SERIOUS” SENSITIVITIES
Chiropractic and medical submissions that plaintiff had a “serious” injury after a “rear ender” motor vehicle accident precluded summary judgment to defendant in Howard v. Robb, __AD3rd__, 4th Dept., 11/12/10, #1309, affirming Justice Ralph Boniello.

ARBITRATION ELEVATION
In Younessi v. Givens (__AD3rd__, 11/12/10, #1375), our Fourth Department affirms Justice Frank Sedita’s confirmation of an auto accident arbitration award.
Annual Dinner Awards Recognize Outstanding Contributions to the Profession

Each year at the annual dinner, the BAEC recognizes lawyers and judges who have made outstanding contributions to the Association, the legal community and the profession.

The Lawyer of the Year Award

There are no specific criteria for this award. In the past, the award has been bestowed on attorneys who have made considerable contributions to the legal profession and community, or devoted considerable time and efforts to Bar Association activities. Recent Lawyers of the Year include David Gerald Jay (2009) and Terrence M. Connors (2010).

All Bar members are eligible for this award. Those nominated should:

1. Promote the good will of the profession both within and outside the legal community.
2. Foster respect for the legal profession.
3. Elevate the standard of integrity, honor and courtesy in the profession.
4. Encourage the spirit of brotherhood and sisterhood among members of the Bar.
5. Protect and promote the interests of the public and the profession and advance the administration of justice.
6. Promote the protection of American institutions and principles.

The Outstanding Jurist Award

This award is only presented when a jurist’s devotion to the profession and the judicial system warrants singular recognition. The award recipient must receive a two-thirds vote of the board of directors in order for the award to be conferred. Recent recipients include Hon. John F. Canale (2009) and Scott A. Bylewski (2010).

1. Demonstrate courtesy and professionalism in dealings between lawyers, judges, court personnel, witnesses and clients.
2. Promote the resolution of legal matters and avoids undue burden and expense.
3. Elevate the standard of integrity, honor and courtesy in the legal profession.

How to Nominate a Candidate for an Award

Nomination forms for each of the awards are available at www.eriebar.org or by calling Sharlene Hall at 852-2497, Ext. 20. Completed forms should be forwarded to E. Michael Semple, Awards Committee Chair, at the Bar Association office. The deadline for receipt of nominations is March 4, 2011.

Charles H. Dougherty Civility Award

The Bar Association of Erie County established the Charles H. Dougherty Civility Award to recognize a lawyer in our community for demonstrating the highest standards of professionalism and civility in the practice of law. Joseph B. Mistrett and Richard N. Blewett were recognized in 2009 and the award was presented to John F. Canale in 2010.

Attorneys or judges nominated for this award should:

1. Demonstrate courtesy and professionalism in dealings between lawyers, judges, court personnel, witnesses and clients.
2. Promote the resolution of legal matters and avoids undue burden and expense.
3. Elevate the standard of integrity, honor and courtesy in the legal profession.

Are You Up For A Night of Stories?

By Paul Wolf

Being a lawyer is a tough but noble profession. We help people in some of the most important accomplishments of their lives, such as purchasing a home, starting a business and adopting a child. We also help people in some of the most difficult times of their lives, such as when they are arrested, filing bankruptcy and getting divorced.

In their representation of clients, lawyers encounter people from all walks of life in all kinds of situations. As an attorney for 19 years, I have had the opportunity while waiting for my case to be called to hear fellow attorneys tell stories that were funny, sad, inspirational and educational about their work.

Telling and hearing stories can be a great experience. I think it would be fun to gather a room full of lawyers together in a pub on a cold winter night to share stories about our profession. I envision a comfortable setting where people can enjoy a drink and hear stories about being a lawyer such as:

• A colleague who mentored you;
• Your most rewarding moment as an attorney;
• Your most humurous or embarrassing moment as an attorney;
• Your most difficult moment as an attorney.

If you are interested in such an event - whether to tell a story or to just listen - let me know at paulwolf2@gmail.com or by telephone at 435-4976. If there is enough interest, with the help of others, I will set something up.

How to Nominate a Candidate for an Award

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In the Public Service
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ting no special rules or services not otherwise available) or one of two participant groups: Work Incentives Counseling (WIC) or Enhanced Work Incentives Counseling (EWIC). Neighborhood Legal Services will be the lead agency for the WIC group, with those individu-
sals getting the benefit of the $1 for $2 offset test and benefits counseling services. Erie I BOCES (West) will also serve with several partners and serve the EWIC group. Those in the EWIC group will get, in addition to benefits counseling, employment-related services to assist them in finding work or vocational rehabilitation/educational services necessary to prepare for work. Both NLS and Erie I BOCES will serve partic-
ant in the same 30-county region.

With more than 10 years experience in providing benefits counseling to SSDI and Supplemental Security Income (SSI) beneficiaries, NLS understands how this service can help someone like Mary understand both the impact of work on benefits and the work incentives that can help her as she pursues her work goals. The benefits counseling provided by NLS or its partners would help Mary understand, for example: how the benefits offset formula will work for her and her family at various earnings levels; that she would retain Medicare as she moved forward with work activity; and that she could qualify for the Medicaid Buy-In for Working People with Disabilities, providing a source of no-cost or low-cost Medicaid coverage. We would also work with Mary and others, based on their unique cir-
stances, to identify other benefits and/or services to help meet their needs as they progress with work goals.

BOND Project to Begin in April 2011

The BOND project is scheduled to begin serving SSDI beneficiaries (and some who receive a combina-
tion of SSDI and SSI) within the 30-county western New York site in early April. Services will also com-
continue in nine other demonstration sites in various parts of the country. Before the full project begins, NLS and Erie I BOCES will handle a very small number of BOND pilot participants, starting in February 2011, to make sure all the protocols are in place for this ambi-
tious seven-year project.

Individuals with questions about the BOND project or any other issues related to benefits and work can call the NLS toll-free Work Incentives Hotline at 1-888-225-2030.

Western District Case Notes
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(iii) there was no evidence suggesting that plaintiff’s wife had considered her condition to be “heart trou-
bles.” Although the court held that the ERISA “arbi-

trary and capricious” standard of review did not apply, and instead applied the de novo standard, the court found that the same result would obtain under an “arbitrary and capricious” standard.

FEDERAL TORT CLAIMS

In Grace v. United States (05-CV-6056 CJS, 1/3/10), plaintiff brought malpractice claims against the Department of Veterans’ Affairs (VA) and the University of Rochester arising out of his treatment by a University of Rochester physician under contract to the VA. The court granted the Government’s motion to dismiss plaintiff’s claims, except modest as plaintiff claimed that VA employees were negligent in failing to refer him for an appointment on the ground that the physician was an independent contractor and that the “strict control” test for determining whether the physi-
cian was an employee was not satisfied merely because the VA directed where and where he would work. The court also held that plaintiff’s state law medical mal-
practice claims against the University and the physi-
cian were time-barred because the amended complaint added them as defendants did not “relate back” to the filing of the original claim against the government because the defendants were not united in interest.

PUBLIC EMPLOYEES

In Mac Fall v. City of Rochester (09-CV-6113L, 10/27/10), the court granted defendants’ motion dis-
missing §1983 and other claims by police officers who sued after they were suspended with pay following an altercation with civilians. Among other holdings, the court held that plaintiffs’ claims that they were unable to earn overtime pay during their suspensions could not form the basis of a due process claim because the collective bargaining agreement did not guarantee that officers could receive overtime pay, and plaintiffs therefore did not have a sufficient property interest to support such a claim arising out of their having been placed on paid leave.

TAXABLE COSTS

In Byrne v. Telesector Resources Group, Inc. (04-CV-

768, 11/2/10), plaintiff moved to strike the defendant’s bill of costs. Although the court denied the motion, it denied as non-taxable the defendant’s request for costs for condensed deposition transcripts and computer disks, and also for postage unrelated to the cost of service.

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 communi-
ty on wide-ranging topics related to the law. The program provides a valuable public service that reaches about 3,400 listeners each week.

We appreciate the time that the following members of our Association have taken to educate the public about legal matters by volun-
teering their time to appear on The Law Line.

William P. Moore
Premises Liability from A-Z

Hon. Carl L. Bucki
The Chapter 13 Program in Bankruptcy Court

Stephanie A. Cole
Social Networking Issues

The Law Line is underwritten by the Erie County Bar Foundation and the Lawyer Referral and Information Service of the BAEC.

If you would like to appear as a guest on the pro-
gram, please contact Maureen Gorski at 852-
8687 or by e-mail at mgorski@eriebar.org.

Citations
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CHEERLEADER SUIT GOES DOWN THE CHUTE

A suit arising out of a fall during a cheerleading stunt was dismissed in Laroco v. Cuba Rushford Cent. Sch. Dist., __AD3d__, 4th Dept., 11/19/10, #1346.

GAZEBO MUST GO

Our Fourth Department has upheld the enforcement of a development restriction, precluding defendant’s gazebos and statuary in Spaulding Law Club, Inc. v. Bong, __AD3d__, 11/19/10, #1294. See also Camperlino v. Town of Manlius et al., __AD3d__, 4th Dept., 11/19/10, #1303.
Young Lawyers Look to the Future

By William P. Moore, Chair
BAEC Young Lawyers Committee

Our “Evening with the Judiciary” was nothing short of a success! We had nearly 100 attorneys and 25 judges in attendance at the Saturn Club. The main lounge was filled with conversation, food, drink and the sounds of the crackling fireplace. It was a great opportunity for the young lawyers accustomed to their cozy offices and world of briefs to get out and meet the judges with whom they rarely interact. Thank you to the judges who took the time to interact with the young bar members.

Special thanks also go out to our sponsors:
Gold: Lipitz Green Scime Cambria; Phillips Lyttle, LLP; Hodgson Russ LLP; Jaeckle Fleischmann & Mugel, LLP; Cellino & Barnes; and Plaintiff Support Services.
Silver: Cohen & Lombardo and Kenney Shelton Leptak Novak LLP.
Bronze: Law Offices of Howard Cadmus; Law Offices of Harvey Siegel; Law Offices of Lena Johnson; Zoom Copy, Moore Family Dental and Pour L’Amour du Chocolat.

By the time of publication, the “Young Lawyers Yuletide Challenge” toy drive challenge results should be in. You can expect results in next month’s Bulletin. Thank you to all who participated — I am sure your generosity brought smiles to many children.

The New Year will bring us the high school mock trial tournament. Please stop by our next meeting on January 21 at Bar Headquarters. We are looking for more young lawyers to join our committees, especially as they relate to the mock trial program. I strongly encourage you to attend our next meeting, as we will be planning our 2011 events schedule, including ways to interact with other young professional groups, such as CPAs and financial planners.

We are always looking for new committee members and ideas. Finally, if you have not yet joined the Bar Association of Erie County, please do so. The Association has a great deal to offer you as an attorney and is an invaluable resource.

All the best in 2011!
A Jewish family and their rabbi cannot recover damages for the emotional distress they allegedly suffered when a wedding caterer mistakenly served non-kosher food, a U.S. District Court in the District of Columbia ruled. (U.S. District Court for the District of Columbia. Siegel v. Ridgewells, Inc. No. 05-1717. Sept. 30th, 2007).

The family contracted with a caterer for their daughter’s wedding reception. The agreement was understood to be for a “semi-kosher” menu. At the reception, non-kosher items were served, including a non-kosher sushi tray.

The family and their rabbi sued, claiming negligent infliction of emotional distress. The caterer sought summary judgment.

The judge granted the caterer’s motion, finding the uncertainty over whether the rabbi actually ate non-kosher sushi was not sufficient to place him in the “zone of danger.” The court stated, “there is no evidence here that the rabbi ate any sushi that contained non-kosher items.”

Further, the court found no “severe and verifiable” mental disturbance on the part of the family.

“Other than the tainted memories of the wedding reception, plaintiffs point to no evidence indicating any physical manifestation of this alleged emotional distress or long-term mental disturbance caused by the emotional distress showing that the emotional distress was ‘severe and verifiable’,” the court said.

Perhaps the remedy in this case cannot be reached via litigation and is more suitable for mediation. What interests do the parties share that still remain? Can emotional distress be understood in the context of violating religious dietary laws? Reading this fact pattern, it seems that money resulting from the caterer’s mistake may not wholly solve the plaintiff’s complaint. The following questions remain:

• What do the parties want from one another?
• Has the caterer acknowledged a mistake in the menu and its severity?
• Does the family recognize the naivety in “semi-kosher” menus?
• Are there issues of understanding the importance of kosher food at a wedding reception based on practicing Judaism?
• Does the rabbi feel misled and offended?
• Has the conflict overshadowed the wedding?
• Can each party provide education to the other, so that this mistake is not repeated?
• What can be done to restore relationships between the parties?

There are issues of emotional distress that cannot be dealt with in a motion practice. The severity of distress cannot be defined by legal parameters or “zone of danger” analysis. Rather, apologies for mistakes made, recognition of a religious practice, and the possible lack of clarity in regard to the menu contracted for the wedding reception need to be acknowledged.

There are certain events that remain memorable over time. One’s wedding reception constitutes such a time. The conflict caused by misunderstandings in this matter remains as a memory and survive the granting of the summary judgment!

Wedding Food Error & Emotional Distress: Remedy Please!

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.
Erie County Bar Foundation: Helping Those Who Help Others

By Sharon Osgood

“Lawyers are strong, aren’t they? Clients look to them to solve their legal problems. Other lawyers look to them as worthy adversaries. Friends and family look at them as smart, confident, capable people (and maybe available for free services). The community looks to them for financial and political support.

But is it always true that lawyers are so strong? Fortunately, that concept is often true, but unfortunately, not always. Therein lies a two-pronged dilemma.

Frequently, it is extremely difficult for lawyers to acknowledge to their fellow professionals, the court, clients, friends and family, and most of all, to themselves, that they are in need of help. Reasons can be many for needing help – medical conditions, mental problems, aging, loss of employment or of significant clients, or other financial catastrophes. Sometimes substance abuse leads an otherwise strong person to limited functioning. Pride and embarrassment often result in a crippling inability to reach out for help from any source. We are supposed to be the strong ones, after all.

In Erie County, however, we are fortunate to have the Bar Foundation, a unique resource to assist lawyers and their families who find themselves in crisis. With empathy and a desire to help, the Bar Foundation, through its social worker and Foundation members, stands ready to provide confidential consultation that can lead to advice on practice and financial issues, referrals to agencies or counselors, and cash grants and loans.

In its over 50 years of existence, the Foundation has quietly assisted scores of attorneys through crisis, often enabling them to return to full function or helping them to adapt to new circumstances as successfully as possible.

What is the second prong of the dilemma? Because we view each other as strong, and those needing services are afraid to acknowledge their need, we are slow to recognize the importance of a resource like the Bar Foundation and even slower at supporting it financially.

In its over 50 years of existence, the Foundation has quietly assisted scores of attorneys through crisis, often enabling them to return to full function or helping them to adapt to new circumstances as successfully as possible.

To continue to provide support, our otherwise quiet, gentle Bar Foundation must get noisy and pushy once a year. We need your help financially. We urge you to give generously to our current campaign. You have received donor cards. You are likely to receive calls. Please do not cringe. Just write a check.

And please also keep an eye out around you for attorneys who may be in distress. Do not hesitate to encourage them to contact us. The Bar Foundation is here, making a positive difference in the lives of our members who reach out to us.

Mary M. Donogher
Richard C. Marcus
Anthony L. Pusateri

In Memoriam

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

~ Kevin Arnold

We wish to honor the memory of the following members of our Bar Association. Memorial gifts to the Erie County Bar Foundation are an excellent way to remember friends and colleagues, as gifts are used for the benefit of the entire profession.
Bench and Bar continued from page 3

John G. Schmidt Jr., a partner with Phillips Lytle LLP, has been elected to a two-year term on the National Kidney Foundation of Western New York’s board of directors. The Foundation works to prevent kidney diseases, improve the health of those affected by them and increase the availability of organs for transplantation. Schmidt has also been appointed to the Campaign Cabinet of the Regional Center of Just Communities of WNY with the 2011 Community Leader Award for outstanding performance as a partner of the community. Schmidt has concentrated his practice in commercial litigation, business torts, class action defense, federal practice, e-commerce litigation and computer forensics. He serves as co-leader of the firm’s commercial litigation practice team and is involved in many local civic organizations.

Hon. Lisa Bloch Rodwin was recently honored by the WNY Women’s Bar Association as the recipient of the 2010 President’s Award for her service to the families and children of the community. Bloch Rodwin will also be honored in 2011 by the National Federation for Just Communities of WNY with the 2011 Community Leader Award for Legal Service. In addition, she recently organized and led a local conference for judges, attorneys and social workers in Family Court entitled “Working with Muslim and Immigrant Families: Breaking Cultural Barriers.”

John Coyle has been named an associate at Chen, Hendrik, Speyer & Monte, P.C., where he will focus on litigation and general practice matters. Coyle will work from both the firm’s downtown Buffalo office and its branch office in Cheektowaga. He received his JD from the University at Buffalo School of Law and his BA in Political Science from Niagara University.

Mary C. Fitzgerald has joined Brown & Kelley, LLP as Of Counsel, where she will focus her practice on insurance coverage and defense litigation, including toxic torts, motor vehicle accidents, premises liability and appeals. Fitzgerald is a graduate of the University of Chicago and Cornell University, where she received her JD cum laude. A past president and former director of the Women Lawyers of WNY, Inc., she has also been active with Women’s Bar Association of the State of New York, WNY Chapter, the Buffalo Zoological Society and Westminster Early Childhood Programs. Fitzgerald received the Special Service Award for outstanding performance as pro bono counsel from the United States District Court, Western District of New York. She is admitted to practice in New York and in the United States District Court for the Western District of New York.

Jareckl Fleischmann & Mugr, LLP has named partner Melinda G. Disare, special counsel James N. Schmit and associate Sharon A. Swift to the firm’s labor and employment practice group. The group will now have seven attorney members. Disare formerly served as partner and chair of the labor and employment practice group at Damon Mower LLP and concentrates her practice on labor and employment matters. She currently serves as vice president of the Volunteer Lawyers Project and on the board of trustees of D’Youville College. She earned her BA magna cum laude from West Virginia University, and her JD cum laude from Cornell University.

Schmit was formerly special counsel with Damon Mower’s labor and employment practice group, where he served as chair for several years. He represents employers in contract negotiations, arbitration proceedings, wrongful termination in addition to trial and appellate practice in state and federal courts. Schmit received his BA from Canisius College and his JD from Boston College.

Swift focuses on discrimination, harassment, wrongful termination and unemployment issues. She was formerly an associate at Damon Mower, and previously served as corporate counsel for Manning and Naper Information Services, LLC. She is vice president of the Board of Literacy Volunteers of America for Buffalo and Erie County, Inc. Schmit holds a BS and MBA from Canisius College and a JD magna cum laude from the University at Buffalo Law School.

Sharon Stern Gerstman has retired from the NYS Court System where she served as court attorney/referee in Niagara County for 28 years as confidential law clerk to Hon. Joseph D. Mintz. She will now be Of Counsel to Magavern Magavern Gemmill LLP, concentrating in neutral evaluation/mediations, arbitrations and appellate work. Gerstman is a former director of the BAEC and also served as president and director of the Erie County Bar Foundation. She is the BAEC’s delegate to the ABA House of Delegates and also teaches at the University at Buffalo School of Law.

Hon. John M. Curran has published a chapter in the recently-released Third Edition of “Commercial Litigation in New York State Courts” (Robert L. Haig, Editor-In-Chief), entitled “Trial and Post-Trial Motions.” This edition contains the work of 144 principal authors, including 20 New York judges. It is published by a joint venture between West Publishing and the New York County Lawyers Association, and is part of West’s New York Practice Series. Curran was also recently appointed by Chief Administrative Judge Anne T. Plan as a member of the New York State Court System E-Discovery Working Group. The group is comprised of electronic discovery experts and will work to improve the management of electronic discovery in the New York State Courts. Curran has been designated as chair of the education subcommittee, which will develop training programs on electronic discovery and technology issues for judges and court personnel.

Timothy P. Murphy has joined Lipsitz Green SQUIRE Cambria LLP as an associate in the firm’s criminal defense department. Murphy concentrates his practice in criminal and civil appeals at both the state and federal level and has handled more than 150 appeals in his career.

He also serves as a Town Justice in the Town of Pendleton. A former Niagara County prosecutor, Murphy handled white collar and environmental prosecutions as well as appeals. He also served on the U.S. Attorney’s Office Environmental Law Enforcement Coordinating Committee. Murphy earned his JD from the University of Dayton and holds a BA from Fordham University.

Are You An Attorney Struggling With Depression?

If so, you’re definitely not alone. A recent Johns Hopkins study of 108 occupations found that lawyers topped the list of those who suffered from depression. Attorneys were found to suffer from depression at a rate of four times that of the general population.

Depression is a treatable illness and the right combination of medications and therapies can significantly improve the quality of life for those who suffer from it.

Help and support are just a phone call away. The Lawyers with Depression Support Group meets monthly to share stories and fellowship. The group meets every other Friday (except holidays). See the calendar on the back page for meeting dates. Meetings are held at Bar Headquarters, 430 Main Street, Smith Hall, at 12:30 pm and lunch is provided. There is no need to pre-register.

If you or a colleague are struggling with depression, there is no need to suffer in silence. For further information, visit www.lawyerswithdepression.com or contact Daniel T. Lukaski at 585-333-0242. All calls are strictly confidential. We invite you to join us and share your story.
by the taxpayer will not be used for audit selection, and it will be purged from our databases if the taxpayer is ultimately determined to be ineligible or if the taxpayer decides not to participate. However, the department can exchange actual returns or reports filed by voluntary disclosure program participants with the IRS and state and local agencies that it has exchange agreements with (as the department does with returns and reports filed by all taxpayers). There’s an important exception to this rule: if a taxpayer intentionally violates the terms of the voluntary disclosure agreement, the department may use the disclosed information against them.

Information on the department’s Web site at www.nystax.gov spells out these protections in unmistakable terms.

As an additional incentive for taxpayers who owe back taxes for more than three years, the program gives taxpayers the opportunity to request a limited look-back clause during the online application process. Under a look-back clause, taxpayers can settle their entire tax liability by only paying the amounts owed for the look-back period. Depending upon the reason for the non-payment and the type of tax not remitted, the look-back may be limited to three or six years. The availability of the limited look-back will be determined on a case by case basis and requires the consent of the Tax Department.

Taxpayers who participate and live up to their obligations under the program receive protection from state criminal prosecution that far exceeds any assurances that the department was able to provide taxpayers before the law was enacted. Simultaneously, the new statute creates an absolute prohibition on state prosecution of district attorneys from initiating tax prosecutions on the disclosed conduct against eligible taxpayers who are participating in the program and complying with their obligations under that program.

The criminal protections for taxpayers electing a look-back clause are slightly different but still greater than those that existed before the statute was enacted. The statute only creates an absolute prohibition for prosecutors based on tax obligations that are disclosed and fully paid. By taking advantage of the look-back clause, the taxpayer settled his or her case by paying for only the years in the look-back period. Thus, only the years within the look-back period receive statutory protection. This does not mean that taxpayers receive no protection against criminal prosecutions for the prior years. Instead, for those prior years the department’s agreement with the taxpayer provides that the department will not investigate the taxpayer for those prior years, share the taxpayer’s disclosure with any other agency, or refer the taxpayer to a prosecutor.

Taxpayers accepted into the program who cannot fully pay their back tax debt immediately may be allowed to pay their debt over time, under generous terms designed to ensure that they stay in business.

New York’s Voluntary Disclosure and Compliance Program offers tremendous benefits to taxpayers but it is only available to taxpayers who settle prior to a audit, review or criminal investigation. It is hoped that practitioners will counsel all of their eligible clients to take advantage of the program because it is much preferred to achieve compliance through invitation rather than through enforcement. Applying to the program is risk free, and the potential benefits are substantial and real. It is recognized, however, that some taxpayers will only come into the program if they fear the risk of being caught. This risk has increased substantially since the department has beefed up its enforcement efforts, and have coupled these increases with improvements in the technological capabilities to identify these tax scofflaws.

Detailed information on the program is available on the department’s Web site [www.nystax.gov](http://www.nystax.gov) and all practitioners are urged to review that information and judge for themselves.

**New York’s Voluntary Disclosure and Compliance Program**

**continued on page 5**
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.

<table>
<thead>
<tr>
<th>Date/Time/Location</th>
<th>Topic</th>
<th>CLE Credits</th>
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<td>Wednesday, January 19, 2011</td>
<td>Litigation in the Court of Claims</td>
<td>1.0 credit</td>
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<td>Wednesday, January 26, 2011</td>
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SAVE THE DATE!

Still A-Twitter Over Facebook? A Deeper Look at Social Networking Issues Every Lawyer Needs to Know

Friday, March 25, 2011 | Location to be determined

We’ve Got Your Ticket to Savings!

CLE Passbook Savings

- Number of discount passes: 6
- Total fees for BAEC members
  - without passbook: $480
  - with passbook: $400
- Total saving: $80

Save money every time you use a seminar pass.

Simply stated, the Bar Association of Erie County CLE Passbooks give you the opportunity to attend high-quality, convenient, half-day-educational programs at a bargain rate. One pass buys any half-day seminar for only $67 ($13 off the regular seminar price). If you want to minimize your CLE expenses and maximize educational experiences for yourself or your firm, then the CLE Passbook program is for you. The passbook guarantees the reduced price of $67 for any half-day seminar for the next two years, despite any fee increases during that time period.

How it Works

- Passes are available in books of six for $400 – six seminars for the price of five. Attach a pass when you mail your advance registration form, or bring the pass with you when you register at the door. If you intend to use the pass for a walk-in registration, please be sure to call ahead and confirm the date, location and available seating. The seminar pass will cover your registration in full.
- The pass is completely transferable and can be shared with other members of your firm, including staff members and paralegals. If you are a sole practitioner, you can share the passes with other practitioners.

Guidelines

- Passbooks are valid for two years from the date of purchase and are not replaceable if lost. No cash refunds are available for unused or expired passes. Each pass is valid for admission to any half-day BAEC CLE seminar. There is no limit to the number of passbooks an individual or firm can purchase, but all passes must be used within two years from the date of purchase, or they become void. If a scheduling conflict arises after you have registered for a seminar, just inform our office 48 hours in advance of the program, and we will return your pass for future use.

CLE Passbook Order Form

- Please send me _____ seminar passbooks
  - (one book of six passes: $400)

  Total: $ _______________

  Name: _______________________

  Firm Name: ____________________

  Address: _______________________

  City: ________________________ State: ______ Zip: ______

  Phone: ______________________ Fax: ______ E-mail: ______________________

Enclosed is my check in the amount of $ _______________ Visa MC

Card Number ___________ Exp. Date ___________

Cardholder Signature ________________

(716) 852-8687 • Fax (716) 852-7641

ERIE INSTITUTE OF LAW REGISTRATION FORM

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

1. ________________________________________
2. ________________________________________
3. ________________________________________

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.

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

PROVIDING CONTINUING LEGAL EDUCATION FOR YOUR PROFESSIONAL ADVANTAGE
COMPUTER & TECHNOLOGY TRAINING

Technology. At its best, it helps us to process information more efficiently and effectively. But the rapid-fire changes in the way we communicate can easily become overwhelming. If the Information Age sometimes makes you feel like you’re drowning in a sea of confusion, this Computer and Technology Training program was developed especially for you.

By investing just one lunch hour a week, you can quickly begin to master the basics of such popular programs as Microsoft Word, Excel, and Outlook. You’ll also learn how to use Internet Explorer to navigate the World Wide Web and bring a whole world of resources to your fingertips.

Class size is small – just six students per session to allow for personalized attention – so sign up today!

Pre-registration required · Limited to six people per session · Register early!
Computer Classes are continually offered - if these don’t fit your schedule. Check www.eriebar.org for upcoming programs.

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

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<tr>
<td>Getting Started in Excel</td>
<td>Recognize Excel features</td>
<td>Tuesday 2/1/11</td>
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<td>Navigate Excel</td>
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<td>Use basic spreadsheet features</td>
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| Using Formulas in Excel* | Construct a formula | Tuesday 2/9/11 |             |
| Good for financial analysis and other accounting needs |       |             |

| Using Excel to Determine the Value of Your Case* | Using formulas can assist you in determining the value of your case. | Tuesday 2/15/11 |             |
| Learn to use case data from Venduct or other means to help determine if you should settle or go to trial |       |             |

| Using Long Documents in Word | Using a master document | Tuesday 3/1/11 |             |
| Organize with styles |       |             |
| Control page breaks |       |             |
| Prepare the document for binding |       |             |
| Create a running header & footer |       |             |

| Introduction to Microsoft Word | This is a beginner class for those new to Microsoft Word 2003. | Tuesday 3/8/11 |             |
| This class will teach you how to draft letters and other documents |       |             |

Prices are $30/$40 per class.

Enclosed is $___________ for _____ reservation(s) for:

| BAEC Member $30 | Legal Staff $30 | Non-member $40 |

CANCELLATION POLICY: Within three business days of registering, if you can no longer attend, another individual from your organization may attend or you may transfer your registration to another program that is within three months of the original program. (A balance due to registration fee difference may apply.) No reimbursement or transfers for cancellations not made within the three days or for not attending.
SAVE THE DATE FOR THE 2011 PRESIDENT’S BALL!
Mark your calendar now and plan to attend the annual gala in honor of President Scott M. Schwartz and the Association’s past presidents. This year’s event will be held on Saturday, March 26, 2011 at the Mansion on Delaware. Watch your mail and next month’s Bulletin for further details.