

Albany County Bar Association

— NEWSLETTER —

October 2006

1 Lodge Street • Albany, NY 12207 • (518) 445-7691 • acba@albanycountybar.com

President's Message

A client once mentioned that he would never be represented by a lawyer who is a good golfer. There is little danger that I will lose that client as a result of my showing at the recent Tri-County Golf Outing. Judging from the posted scores and the damaged turf, most of the other lawyers golfing that day will also be retaining their clients.

Our clients' expectations for our undivided time and attention are understandable. Most clients will use a lawyer only a few times in their lives. They will conduct routine business and resolve minor disputes without assistance, and will engage attorneys only for their largest transactions and the few disputes that require litigation. They call a lawyer only for extraordinary events, and reasonably expect that the most important matters in their lives will be the most important in ours.

Notwithstanding the demands of our busy practices, we still need to build reasonable balance into our lives. A singular focus on work can be unhealthy. Not surprising, a study conducted by the University of Maryland Medical School concluded that stress increases the risk of cardiovascular disease. Laughing reduces the risk. The researchers found that blood flow decreased by 35% after experiencing stress, but increased by 22% after laughter. On the other hand, before you quit your day job, a study conducted by the Department of Psychology at Florida International University found that comedians die younger.

Collegiality is also important to reduce occupational stress. A study of human service workers at the University of Calgary found that the lack of collegiality was a major factor in increased worker stress.

A balanced life is also needed to hone our skills as lawyers. We are paid to be skilled communicators,



James T. Potter, President

but if we remain walled away in our offices glued to a Westlaw or Lexis screen, our abilities to persuade judges, jurors and adversaries will surely atrophy. We become better lawyers by being well rounded.

Researchers at MIT recently developed a machine designed to help autistic people tell whether they are boring or annoying the person they're talking to. The machine records facial expressions with a tiny camera attached to the wearer's eyeglasses. It feeds the information to a wearable computer that uses facial recognition software to characterize emotions. If the listener is not engaged, the device vibrates to alert the wearer. They call it the Emotional Social Intelligence Prosthetic. Psychologists have coined the term Emotional Social Intelligence to describe a person's ability to read and interact with others. Frankly, the researchers at MIT have missed their target market. Many of our long-winded colleagues might benefit from this prosthetic.

I'm convinced that participation in the ACBA golf outing has increased my longevity and made me a better lawyer. The shots were often laughable, the ridiculing advanced collegiality, and my social intelligence improved by restraining comment after judicial shot-making.

Our next effort to increase the lifespan of our members will occur on October 5, when the Young Lawyers Committee hosts its cocktail party beginning at 5:30 at Yonos. Several judges from the state and federal benches have graciously offered their time to advance the collegiality between bench and bar. The cocktail party is open to all, and we urge you to exhibit your social intelligence by enjoying the laughter and collegiality that will surely abound.

James T. Potter, President



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Pro Bono Corner

Siobhan Blank, ProBono Coordinator

Thank you!

Our sincerest thanks to **Peter Scagnelli** and **Anne Reynolds Copps** for taking pro bono cases in September! All the attorneys who take cases for us have our deepest appreciation and gratitude for helping us to fill our role in access to justice.

Family Court Help Desk

As you may know, the ACBA has been working with Albany Family Court to staff the Help Desk there. Currently I, the Pro Bono Coordinator, spend one day a week offering procedural assistance and information to petitioners. In an effort to increase help desk hours and staff, the ACBA has been actively trying to recruit law students. On September 21st David Cardona, Regina Treffiletti, Meghan Cardona and I spoke to about 35 students who were interested in volunteering. Thanks to our collaborative efforts we are anticipating good results in achieving access to justice. We would like to thank **Olivia Nix** and **Willow Baer** for their initiative on this project!

They're Here!!!

ACBA Pictorial Directory

The Albany County Bar Association's Pictorial Directory is here!! Put a face with the voice on the phone! Stop by the ACBA's office in The Stedman House, 1 Lodge Street, 2nd Floor (behind the Albany County Courthouse and you have to enter through the new Judicial Center) to pick up your copy. It is \$20 for the directory and if you would like it mailed to you just send us an additional \$4 for shipping and handling fees. If you didn't get your picture taken but would still like a copy of this handy desk reference, not a problem, we have plenty.

They're Here, Too!!!

2007 Entertainment Books

They're Back! The Albany County Bar Association is once again selling the Entertainment Book !! Only \$30 this year!! Same price as last year! Get an early start on your Holiday shopping! It makes a wonderful gift, or keep it for yourself and get great savings at area businesses, restaurants and activities. All proceeds go to benefit our Pro Bono Program! Contact us for further details or just stop in and pick one up!





Tri-County Golf Outing

Mother Nature smiled upon us on Monday Sept. 18th for our Tri-County Golf Outing. Everyone in attendance had a wonderful time!

Our thanks to our Chair, David Miranda, for all his help.

Special thanks to those who donated door prizes:

Albany Marriott, Albany Symphony, Amo La Bella NY Rest., Capital Rep, CBS Coverage Group, Inc., Choices Hair Studio, The Egg, Hoffman's Car Wash, LaSerre Rest., Monroe Title Ins. Corp, Sneeringer, Monahan, Provost, Redgrave Title Agency, Spectrum Theatres, Stewart Title Insurance, Strategies for Wealth, and Uncommon Grounds.

We also want to thank those who sponsored holes: Heslin, Rothenberg, Farley & Mesiti, Justice for All Campaign of the Legal Aid Society, Monroe Title Insurance Company, Old Republic Title Insurance Company, CBS Coverage Group, Inc., Sneeringer Monahan Provost Redgrave Title Agency, and Tech Valley Communications.

And our appreciation to Sneeringer, Monahan, Provost, Redgrave Title Agency for also sponsoring the Cocktail Party.



Lillian Moy, Legal Aid Society, and John Seebold, Schenectady County Bar Association, enjoying the cocktail hour.



Chair, David Miranda and Barbara Davis



Sneeringer Monahan Provost Redgrave Title Agency sponsored the cocktail hour

Save The Date

The Court of Appeals Dinner will be held on February 15, 2007 at the Albany Marriott. Please mark your calendars – we look forward to seeing you there!!

Parent Education and Awareness Program

Thanks to the vision of NYS's Chief Judge, Judith S. Kaye, the 19-member Advisory Board chaired by the Hon. Evelyn Frazer and the Chief Administrative Judge Jonathan Lippman and the Administrative Board who approved the new Rule (Part 144 of the Rules of the Chief Administrator) promulgated in July 2006 permitting judges, in their discretion, to mandate parent education. Parent education is offered by certified providers to help parents separating from their spouse or partner, or going through a divorce, better understand the effects of their breakup on their children and to give them information and ideas about how to make the new family situation easier and more livable for themselves and their children. Please check the website at www.nycourts.gov/ip/parent-ed for a list of certified providers and other information about the program. You can contact the Program by e-mail at nyparent-ed@courts.state.ny.us or (888) 809-2798.



Torts and Civil Practice



*By Patrick J. Higgins, Esq.
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This is my last column. I have been privileged to report the decisions of the Third Department for the last six years. The Court is a generous and thoughtful instructor, and I am grateful for the education. Starting next month, Laura M. Jordan, Esq., will pick up reporting duties.

This month we report on new court rules. And we discuss a subject near and dear to any litigator in this expert intensive world – conduit hearsay.

The New Court Rules

Lawyer Advertising – “Step away from the camera please”

Effective January 15, 2007,¹ barring unforeseen events, new regulations will supplement existing limitations on lawyer advertising.² Among other things, the new regulations bar testimonials from former clients, restrict statements that may create expectations about results, or compare lawyers’ services with other law firms, ban nicknames, mottos or trade names that suggest

an ability to obtain results, and prohibit fictionalized portrayals of clients, judges, and lawyers.

The regulations also prohibit re-enactments that are not authentic, bar depiction of the use of a courthouse or courtroom, mandate certain disclaimers in advertising, and the disclosure that the client in a personal injury action will remain liable for other expenses regardless of case outcome. There is also a 30 day moratorium on solicitation of wrongful death or personal injury clients, and restrictions on the use of internet advertising, and e-mail, bans on pop-ups, and chat room solicitation. This is not an exhaustive list. The full proposed regulations are available online from the Office of Court Administration,³ and the ACBA website.

Depositions – “Everyone behave please”

Effective October 1, 2006, new court rules will govern the taking of depositions.⁴

An attorney defending a deposition is limited to a short objection, and conferences with deponents are now limited to determining whether a matter is privileged. An attorney cannot direct his witness not to answer a question unless the answer would disclose privileged or confidential matters or violate the deponent’s constitutional rights. A direction not to answer may also issue when the question is plainly improper and answering would significantly prejudice the witness.⁵

This last category will need some defining -- lest it swallow the rule whole. Attorneys cannot object at deposition on grounds that are preserved at the deposition.⁶

Please read the rules carefully. There are some wrinkles.

Miscellaneous Changes

Also, as of October 1, 2006 attorneys must notify adverse parties of requests for a preliminary injunction or a temporary restraining order.⁷ Courts as of October 1, 2006 may also order an insurance carrier or lien holder to appear at a pre-trial conference.⁸ And the courts have modified the rule enacted in March of 2006 requiring a movant to notify a court when sixty days had passed since submission of the motion. Effective October 1, 2006, the Office of Court Administration will send a computer generated entry instead of the attorney letter.⁹

Conduit Hearsay

a. The problem

Hearsay is an out of court statement offered for the truth of the matter asserted. The law limits admission of these out of court statements unless the statements are reliable. The admission against interest, the business records rule, and the dying declaration, among others, exist because they assure such reliability. They allow out of court statements to enter the record without destroying the integrity of the proof required to decide the case.



Enter the retained expert -- with opinion testimony that usually rests in part on out of court statements. This presents a dilemma for the courts. They cannot admit unreliable out of court material through an expert, or allow an expert to opine based on such statements.¹⁰ But there is no inherent mechanism assuring reliability in this situation. The resulting flow of unreliable information through the experts is called “conduit hearsay.” It includes out of court material,¹¹ veiled as an opinion, or the same material directly introduced into the record by the expert.¹²

b. The Solution

In *Hamsch v. NYCTA*,¹³ the Court of Appeals held that an expert witness may provide opinion evidence based on otherwise inadmissible hearsay, if it is the type of material commonly relied on in the profession.¹⁴ The out of court material is only admitted to inform the jury of the bases of the expert’s opinion. A party cannot introduce this hearsay evidence for the truth of the matter.¹⁵

c. The criteria for showing professional reliability

The out of court material must form a basis for the expert’s opinion. Documents simply part of the expert’s file will not qualify. Once the expert has testified that he relied on out of court material to form his opinions, he must demonstrate two core facts:

1. The out of court material must be of the kind generally accepted as reliable in the expert’s field; and
2. the out of court material is accompanied by evidence establishing its reliability.¹⁶

The field or discipline at issue - not just the expert - must consider the out of court material professionally reliable. And the out of court

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material must be considered professionally reliable as related to the issue at bar.¹⁷ The mere fact that a report was a medical report does not suffice to render it reliable.¹⁸ The courts strictly enforce these requirements.¹⁹

The out of court material must not constitute the principal basis for the expert's opinion. It must only serve as a single link in the chain of data leading the expert to his conclusion.²⁰

The reliability concerns are self evident. If an expert bases his opinion solely on out of court materials, then those materials – not the expert – are testifying. The Courts do not favor this.²¹

d. The most recent Third Department Decision on professional reliability

On August 31, 2006 the Court decided *People v. Wlasiuk*.²² The People charged defendant with suffocating his wife and driving her body and the family car into a lake. Defendant claimed that his wife lost control of the car while driving and died in the resulting tragic accident.

The Court reversed the murder conviction. The People's accident reconstructionist did not establish the professional reliability of out of court materials on which he based his opinions. He relied almost exclusively on a Michigan State Police study ("the Star Report") which analyzed floating patterns of thirty one vehicles when submerged. The

trial court also allowed into evidence a hearsay video tape prepared in conjunction with the Star Report. The trial court instructed the jury that the video tape was not to be considered evidence in chief, but merely as something that illustrated the bases for the expert's opinion.

The Court found the accident reconstructionist's testimony problematic. The findings of the Star Report were admitted into evidence either directly or through the expert. However, the People did not prove that the Star report was of the type reasonably relied on by experts in the particular field. There was also no proof that the information or the methodology of the Star Report was reliable. (The People apparently did not attempt to lay an independent foundation for the report by calling the authors of the study to testify at trial).

There was also a larger problem. The accident reconstructionist offered no independent opinions. He told the jury of the findings of the Star Report, implied that they were authoritative, and stated that the defendant's account of the accident was inconsistent with the Star Report. He then concluded that the defendant's story could not have occurred because it was inconsistent with the Star Report.

The Court was looking for a well rounded expert opinion that included the expert's accident reconstruction training and

experience, and the facts contained in the trial record. That didn't happen, perhaps because the expert had never reconstructed an underwater crash.

Conclusion

It is good practice (where possible) to admit everything that the expert will rely on into evidence before the expert testifies. Many of the cases where experts' opinions (and the offending out of court materials) are excluded could have ended differently. It is probable that the Courts will continue narrowly construing the *Hambusch* professional reliability exception. They are understandably cautious in this area. This suggests that the trial bar rely on the professional reliability exception as a last resort when admitting evidence and opinions at trial.

Footnotes

1. The original November 1, 2006 effective date will reportedly be moved back.
2. 22 NYCRR 1200.1, 1200.6, 1200.8, 1200.7, 1200.41-a, Section 130-1.1.
3. www.nycourts.gov/rules/proposedamendments.shtml.
4. 22 NYCRR 221 entitled "Uniform Rules for the Conduct of Depositions."
5. The last reported Third Department decision on this issue before the new rules take effect is *Barber v. BPS Venture Inc* (7/13/06 Carpinello, J, (500013)(affirming a direction not to answer a deposition question where the witness was asked to testify about legal conclusions and finding such question to be palpably improper).
6. 22 NYCRR 221.1(a).
7. 22 NYCRR 202.7(f).
8. 22 NYCRR 202.26(e).



9. 22 NYCRR 202.8(h).

10. Out of court materials not offered for the truth of the matter are not hearsay. See *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636 (2006)(upholding admission of a written logarithm in a medical malpractice case offered only for demonstrative purposes and not for its truth).

11. Conduit hearsay excludes out of court materials relied on by an expert that are otherwise independently admissible under any other exception to the hearsay rule. These materials presumably would be admitted before the expert testified and would be part of the trial record on which the expert could base opinions.

12. See *In Re Colarusso*, 7 Misc.3d 1025(A), 801 N.Y.S.2d 231 (Sup Ct. Franklin Co. 2005)(finding that without professional reliability of the out of court statement, that receipt of the substance of the statement was objectionable in itself, independent of the admissibility of the opinion tendered; *Borden v. Brady*, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497 (3rd Dep't 1983) (reaching the same conclusion).

13. 63 N.Y.2d 723, 726 (1984); see also *People v. Sugden*, 35 N.Y.2d 453, 460-61, 363 N.Y.S.2d 923, (1974).

14. *Hambsch v. New York City Transit Auth.* 63 N.Y.2d 723, 726 (1984); see also *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636 (2006).

15. *Wagman v. Bradshaw*, 292 A.D.2d 84, 739 N.Y.S.2d 421 (2d Dep't 2000) (reminding the bar that testimony as to the express contents of the out-of-court material is inadmissible even if the expert properly testifies that the out of court statement formed a basis for his opinion); but Cf. *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636 (2006)(leaving open the question of whether evidence may become admissible solely because of its use as a basis for expert testimony).

16. *Hambsch* 63 N.Y.2d at 726; *Wagman*, 292 A.D.2d at 85.

17. See *Tassone v. Mid-Valley Oil Co., Inc.* 5 A.D.3d 931 773 N.Y.S.2d 744 (3rd Dep't 2004)(finding that plaintiff's expert economist properly relied on an out of court letter as a bases for his opinion where the economist

testified that the letter was the type of thing that economists generally considered professionally reliable on the issue at bar).

18. *Sunnyside Plus, Inc. v. Allstate Ins. Co.* 92 N.Y.S.2d 838, 8 Misc.3d 306 (Queens Co. Civ. Ct. 2005); *Borden v. Brady*, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497 (3rd Dept. 1983); *Wagman*, 292 A.D.2d at 87, 739 N.Y.S.2d 421, *supra*; *People v. Sugden*, 35 N.Y.2d 453, 460-61, 363 N.Y.S.2d 923, (1974).

19. See *Scanga v. Family Practice Associates of Rockland, P.C.* 27 A.D.3d 547, 813 N.Y.S.2d 112 (2d Dep't 2006)(holding that defense pathologist that based his opinions on recut pathology slides should not have been allowed to testify, where no evidence demonstrated the reliability of the recut pathology slides, and the accession numbers on the recut slides and the originals differed.)

20. *Borden*, 92 A.D.2d at 984, 461 N.Y.S.2d 497 (3rd Dept. 1983).

21. *Brown v. County of Albany* 271 A.D.2d 819 706 N.Y.S.2d 261 (3rd Dep't 2000)(affirming preclusion of non-treating physician's medical opinion on causation when it was based on a history from the admitted records of a treating physician and where the expert based his opinion on causation solely on the history from those records); *Erosa v. Rinaldi* 270 A.D.2d 384, 704 N.Y.S.2d 891 (2d Dep't 2000)(reversing verdict for plaintiff and granting a new trial where plaintiff's sole medical expert testified based on out of court medical records from non-testifying physicians that were never admitted and which otherwise were not established to be reliable); *Murphy v. Columbia University*, 4 A.D.3d 200, 773 N.Y.S.2d 10 (1st Dep't 2004)(reversing plaintiff's verdict when plaintiff's treating physician relied on an unsworn MRI report that was not shown to be reliable).

22. ___ A.D.2d ___, ___ N.Y.S.2d ___ (3rd Dep't 2006)(14652).

Special Thank You

The Albany County Bar Association is sad to announce that Patrick Higgins has decided to not continue writing his column. We understand the continued demands on his schedule and will miss his monthly column. Thank you, Pat, for helping to make our newsletter informative and enjoyable for the past six years.

New York State Bar Association

The NYSBA Young Lawyers Section (YLS) is seeking nominations for the 2007 YLS Outstanding Young Lawyer Award for a young lawyer who had made significant contributions to the legal profession or your community. The deadline is November 17, 2006. Contact Megan O'Toole, NYSBA, 463-3200.

Nominations

The Committee on Attorney Professionalism is seeking nominations for the NYSBA Attorney Professionalism Award to be presented during the 2007 Annual Meeting in New York. Nominations must be postmarked no later than October 20, 2006. Contact Lucille A. Fontana, NYSBA, 463-3200.



Environmental Update



by Daniel Coffey
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This past month, New York filed a further court challenge to the federal new source review (“NSR”) regulations while issuing its own proposed NSR regulations. The NDNY issued a ruling on a *Daubert* challenge in the damages-phase of a long-running gasoline cleanup recovery action.

Spitzer Petitions Court on New Source Review

New York State Attorney General Eliot Spitzer on August 16, 2006 joined thirteen other states and a number of cities in filing a petition with the US Court of Appeals for the District Court of Columbia Circuit asking that Court to compel the EPA to revise its new source review (“NSR”) regulations. NSR requires stationary sources of air pollution to install modern

pollution controls when plant modifications are made which increase emissions. The EPA issued changes to NSR regulations in 2002 to narrow the scope of actions that would trigger reporting requirements. The D.C. Circuit previously ordered EPA to make a showing as to how it could enforce portions of the new regulations (concerning recordkeeping) or to revise the regulations. According to this latest petition, the EPA has not yet complied with the D.C. Circuit order. More than twenty environmental groups also recently wrote to the EPA inquiring as to whether/when EPA will comply with the prior D.C. Circuit ruling.

NYSDEC Publishes Proposed Regulations to Reduce Mercury Emissions

The New York State Department of Environmental Conservation (“NYSDEC”) on September 6 published proposed regulations in the state Register requiring a reduction of 50% of total mercury emissions by coal-fired power plants by January 1, 2010. The emissions would be reduced further (down to a 90% reduction) by 2015. Unlike the federal cap-and-trade program, New York would not allow power plants to trade emissions with other facilities within or outside of the state. Three public hearings will be held throughout the state

October 11-13. Written comments may be submitted until October 20, 2006. Opponents to the regulations contend the reductions are overly aggressive and will affect New York State’s ability to be competitive with other states.

On September 6, the NYSDEC also proposed additional regulations that would revise New York State’s New Source Review requirements for new and modified sources of air pollution. New York’s proposed regulations are more stringent than federal requirements in a number of areas, most notably as to what constitutes the type of “routine maintenance repair and replacement” which triggers NSR requirements.

Federal Judge Rejects Daubert Challenge in Petroleum Soil Contamination Case

Lambrinos vs. Exxon Mobil Corp., NDNY, 1:00-CV-1734 (8/04/06)

Plaintiff John Lambrinos is the owner of a restaurant named “Gus’ Red Hots” in Plattsburgh. (I note from personal experience that this restaurant specializes in “Michigans”, a type of hot dog covered in meat sauce). Gus’ has been in business at its Route 9 location for 25 years. A Mobil gas station used to be located next door, but the property is now vacant. Gasoline was discovered



in the soil at the gas station and restaurant, and litigation ensued between Lambrinos, ExxonMobil and the former gas station owner as to responsibility for the cleanup costs. In September 2004, Judge Hurd held ExxonMobil and the former owner strictly liable under Section 181 of New York's Navigation Law. The Court found these defendants were responsible to conduct a cleanup of the petroleum product that had leaked and flowed from the gas station to the neighboring restaurant parcel.

Left remaining for trial was the issue of damages. Plaintiff disclosed a geologist who was to

testify that the preferred cleanup methodology for the site would be excavation of soil underneath the restaurant. Plaintiff's expert was to opine that other methods for addressing the contamination would not be as successful in restoring the soil to pre-spill condition. ExxonMobil made a *Daubert* motion challenging plaintiff's expert on the grounds that his expected testimony was not based upon sufficient facts or data; was not the product of reliable principles and methods; and did not apply reliably to the facts of the case. Defendant noted that a cleanup plan involving

removing soil below a building would be "extraordinary, extreme remediation effort" and that such a step is rarely undertaken. Judge Hurd rejected this challenge, finding that ExxonMobil failed to present authority for the proposition that "rarity of the measure equates to feasibility of the measure." The Court also rejected plaintiff's challenge to defendants' experts, leaving it the jury to decide whether it is feasible to return the restaurant to pre-spill conditions and, if not, what the scope of remediation (and expense) should be.

Speakers Bureau

Albany County Family Court **Judge W. Dennis Duggan** spoke to over 300 probation officers and other court service personnel at the national conference of the National Juvenile Court Services Association held in Providence, Rhode Island last month. The title of his presentation was "From Robes To Reeboks: Courts Communicating with Kids." The conference was also sponsored by the National Council of Juvenile and Family Court Judges with whom Judge Duggan is a Board Member.

On August 1, 2006, **Jill A. Dunn**, Deputy Commissioner and Counsel at the NYS Dept.

of Motor Vehicles, spoke at the American Association of Motor Vehicle Administrators Annual Motor Vehicle and Traffic Law Institute in Denver, Colorado on the topic "Challenges to Licensing Procedures." specifically focusing on New York State DMV's recent success in defending a prominent class action lawsuit challenging licensing procedures. Attendees at the conference included attorneys and policymakers who administer motor vehicle and traffic laws across the U.S. and Canada.

If you have participated in a speaking engagement, please fax the details to the Bar Association Office for inclusion in our newsletter; 445-7511.

Seminars

Paralegals Association

The Capital District Paralegals Association invites all area paralegals to its CLE dinner to be held on October 17 at 6:00 p.m. at the Route 7 Diner, Latham. Cathy Anderson-Harmon, RN, paralegal at Napierski, Vandenburg & Napierski, will give a presentation on medical records, terminology and HIPAA. The dinner is \$20 for members and \$25 for non-members. Please RSVP by October 13 to Theresa Miller at CLE@cdpa.info or 843-0043. Attendees receive 1 hour of CLE credit from NFPA.



Judicial Qualification Committee

Albany County Bar Association Judicial Qualifications Committee met on September 20, 2006. With rating categories ranging from Outstanding, Well Qualified, Qualified and Not Recommended: Frederick M. Altman, Jill A. Dunn and Richard Platkin received ratings of "Qualified"; Eugene P. Devine received the rating of "Well Qualified"; and Hon. W. Dennis Duggan, Hon. Gerard E. Maney, Hon. Patrick McGrath and Hon. Karen Peters received ratings of "Outstanding".

Special thanks to our Committee: Hon. Kevin Moss, Chair, John T. Bicone, Hon. E. David Duncan, Peter Gerstenzang, Hon. Nicholas J. Greisler, Patrick J. Higgins, Bernard Kaplowitz, Peter A. Lynch, Ira Mendleson, III, Terence P. O'Connor, Susan C. Picotte, John J. Privitera, John W. Tabner, Hon. Leonard A. Weiss and William N. Young, Jr. If anyone is interested in serving on this committee contact the ACBA office.

NEW RULES

Pursuant to the authority vested in the Chief Administrative Judge of the Courts, and with the advice and consent of the Administrative Board of the Courts:

- effective October 1, 2006, section 202.8(h) of the Uniform Civil Rules for the Supreme and County Courts, and in its place promulgate, effective October 1, 2006, a new section 202.8(h), relating to procedures for pending motions in the Supreme Court.
- amended, effective October 1, 2006, section 202.7 of the Uniform Civil Rules for the Supreme and County Courts, to add a new subdivision (f), relating to temporary restraining orders.
- amended, effective October 1, 2006, section 202.26(e) of the Uniform Civil Rules of the Supreme and County Courts, relating to pre-trial conference.
- adopted, effective October 1, 2006, a new Part 221 of the Uniform Rules for the trial Courts, relating to the conduct of depositions.
- effective January 15, 2007, §1200 on lawyer advertising

Please visit our website at www.albanycountybar.com for a copy of these new rules.

Technology On-Line

Visit the Albany County Bar Association at www.albanycountybar.com. If you would like to be listed in the ACBA's Membership Directory, which is FREE, please complete the following form and FAX it to the ACBA's office at 445-7511. (Please note that inclusion in the Directory is available only upon request). You do not need an e-mail address to be included.

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Check here if you would like to be included in the AREAS OF PRACTICE DIRECTORY. (There is a \$5 fee per listing, per year, payable to the Albany County Bar Association). Please List Areas. Please let us know what you think of our web site or how we can make it even better. Call us at 445-7691 or email acba@albanycountybar.com.

Albany County Bar Association — Newsletter —

Barbara Davis, Editor

The Albany County Bar Association Newsletter is published monthly by the Albany County Bar Association.

We welcome the submission of articles or other items of interest to the bar and also encourage your comments on the ACBA, recent articles, columns or other letters.

The ACBA may reject or edit for style and length any article or letters submitted (Anonymous letters are not published).

The views expressed in the letters and columns reflect the opinions of the authors and may not reflect the views of the Association, its Officers or Directors.

Address all communications to
The Editor at
Albany County Bar Association
The Stedman House, 1 Lodge Street, 2nd Floor
Albany, NY 12207



Bench and Bar in the News

Any news to share, fax us at 445-7511!

Congratulations to the following members:

Albany County Family Court **Judge W. Dennis Duggan** was a featured presenter at the XVII World Congress of the International Association of Youth and Juvenile Judges and Magistrates held in Belfast, Northern Ireland from August 27 to September 1, 2006. The World Congress brought together over 550 judges, family attorneys and court personnel from six continents and fifty nations. Judge Duggan presented a paper on the law of international relocation of children.

Other featured speakers included retired Supreme Court Justice Sandra Day O'Connor; the Right Honorable Sir Brian Kerr, Lord Chief Justice of Northern Ireland; Mary McAleese, the President of Ireland; The Right Honorable Sir Mark Potter, President of the Family Division and Head of Family Justice for England; Baroness Butler-Sloss, former President of the Family Division for England and Wales; Mr. Justice Iftikhar Muhammad Chaudry, Chief Justice for Pakistan; Ms. Mehr Kahn Williams, United Nations Deputy High Commissioner for Human Rights; Judge Andrew Becroft, Principal Youth Court Judge for New Zealand; and Queen's Counsel and wife of Prime Minister Tony Blair, Cherrie Booth.

The theme of the conference was "The Child in the Family---A Child's Right to Family Life." It was well noted at the conference that only two nations in the world have not ratified the International Charter on the Rights of Children, Somalia and the United States. As a result of the program the International Association will be issuing the "Belfast Recommendations" that came out of the presentations.

The Rensselaer County Legislature recently honored North Greenbush Town Justice **Raymond Elliott, III** on his election as President of the Association of Towns of the State of New York. Judge Elliott has been involved with the Association of Towns for over 12 years and this year has been elected to serve as President. Judge Elliott has been a North Greenbush Town Justice for 22 years.

Stephen L. Ferraro, CPA/ABV, CVA has successfully completed the certification process with the National Association of Certified Valuation Analysts (NACVA) to earn his designation of Certified Forensic Financial Analyst (CFFA). Ferraro is a Senior Partner with BST Valuation & Litigation Advisors, LLC.

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Young Lawyers Committee

We would like to congratulate all the new associates who have completed the bar exam this summer and are now starting their journey into the practice of law. Being a first year associate is a scary and exciting adventure. There is no better way to get through the tests that you will surely face than having peers to talk to who understand what you are going through. The Young Lawyers Committee members can provide you with support, encouragement and advice as you make your way in the law. We welcome you to join.

On September 21st, Judge Graffeo gave YLC members a tour of the Court of Appeals. It was an amazing experience to have the opportunity to get an up close and personal look at the highest Court in New York. On behalf of everyone that attended, we would like to thank Judge Graffeo for taking the time out of her busy schedule, not only to be our tour guide, but for also taking the time to answer any questions we had.

Thank you to our members who provided ideas and suggestions for the committee. There were a lot of great ideas proposed and we would like to implement them. First, we would like to show our dedication to the community by organizing a Habitat for Humanity build in Albany. Please contact us if you are interested in taking the lead in planning the event.

Upcoming Events...

On October 5th, the YLC is sponsoring a cocktail party with state and local members of the bench. The event is open to all ACBA members and their guests. It will take place at Yono's beginning at 5:30 p.m. Admission to

the event is \$20.00 for Young Lawyers and \$25.00 for all others. This will be an incredible opportunity to meet distinguished members of the bench as well as other ACBA members. Quite a few Judges will be attending so don't miss this opportunity! Please see page 13, for registration information.

Our monthly business meeting and happy hour is to take place on October 12th at 5:30 pm at the Victory Cafe. All are welcome to attend even if you are not a current member of the YLC.

We are co-sponsoring the fall meeting of the New York State Bar Association's Young Lawyer Section. The meeting will take place, here in Albany, on October 20th and 21st at the New York State Bar Center located on Elk Street. There is a welcome event planned for Friday night, numerous CLEs offered on Saturday, as well as a dinner Saturday night to be held at the New York State Museum. The price for the entire weekend, including dinner and 9 CLE credits, is \$100.00 for newly admitted attorneys (less than 2 years) and \$150.00 for everyone else. The best part is that ACBA members who are not NYSBA members can attend for the NYSBA price! (If you are not a NYSBA member and plan on attending, please note on the registration form that you are an ACBA member.)

Further information including a complete list of the CLEs that will be offered as well as registration materials can be found at www.nysba.org/yls

The next Happy Hour CLE will take place at the Bayou Café in downtown Albany. Donald Boyajian, E. Stewart Jones, and Stephen Coffey, three of the areas best litigators, will be giving practical pointers on obtaining employment, building a practice,

pitfalls to watch for, and advice and words of wisdom for young attorneys starting out in the practice of law. This is a transitional program and is open to everyone. 1.5 credits in practice management will be awarded. The event is \$20 for ACBA members and \$35 for non-members. Immediately following the CLE we will be having a lite fare and hope everyone will stay to socialize afterwards. Please see page 13, for registration information.

Just a reminder, we have been sending out e-alerts for upcoming events and meetings. If you have not been receiving these emails, and would like to, please let us know and we will add you to the list.

As always, we welcome questions, comments and suggestions so please do not hesitate to contact us. We would enjoy hearing from you!



April Wilson, Co-Chair,
Dreyer Boyajian, LLP



Janet Silver, Co-Chair,
Hinman Straub. P.C.



**Albany County Bar Association's
Young Lawyers Committee**

Proudly Presents

The Young Lawyers Happy Hour CLE

at

The Bayou Café
79 No. Pearl Street, Albany

on

November 9, 2006
5:00 p.m.

Hear from Donald Boyajian, Stephen R. Coffey and E. Stewart Jones give "Practical Pointers From the Pros -How to Succeed in the Practice of Law"

This outstanding panel comprised of the area's best trial attorneys will share stories from their experience, give practical pointers on obtaining employment, building a practice and will offer advice and words of wisdom for young attorneys on starting out in the practice of law and the pitfalls to watch out for.

\$20 ACBA members - \$35 Non-members
1.5 CLE Hours of Practice Management
Transitional Program

A Lite Fare will be served after the program

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My check for \$ _____ is included.

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and Remit to: The Stedman House, 1 Lodge
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For additional information, please contact 445-7691**

**Albany County Bar Association's
Young Lawyers Committee**

Proudly Presents

***The Young Lawyers Cocktail Party
For the Bench and Bar***

at

The Hampton Inn on Chapel Street
Catered by Yono's

on

October 5, 2006
at 5:30 p. m.

Come join us for a networking reception
& meet some distinguished
members of the Bench and Bar!!

Young Lawyers: \$20
(Admitted 10 years or less or 37
years old or younger)

All Others: \$25

Law Students and Paralegals: \$10

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Belfast Report



By W. Dennis Duggan, F.C.J., © September, 2006



“Peace Wall,” Bombay Street, Belfast

Belfast is a British City. Dublin is a Viking City. Continuously settled since 795, when the Vikings invaded Ireland, Dublin huddles closely to both banks of the Liffey and its streets meander without rhyme or reason. Belfast, on the other hand, has the look and feel of the Empire. Its City Hall, as magnificent as any in the world, anchors the city center. Its High Court of Justice, two blocks away, is larger than our Supreme Court building and rivals it in opulence. The other Irish cities all resemble Dublin. Cork, Killarney, Limerick, Galway, Sligo, Donegal and Derry all crowd up on and straddle rivers with access to the sea. Looking at the geography of Ireland, one wonders why it did not become a great seafaring nation. Their resources were at least as good as Portugal's. However, being under the thumb of the British for nearly 800 years explains a lot.

Belfast was at its peak at the turn of the Twentieth Century. The great Harland and Wolff Shipyard was turning out ships like the Titanic and the linen industry employed thousands. This coincided with the height of the British Empire, which controlled 25% of the World's land surface and 25% of the World's population in 1900. However, the price for Britain's greatness came at a heavy cost for the Irish.

The English subjugation of Ireland, began in earnest with Henry II in 1171, and progressed in fits and starts.

The Irish did not go down easily. However, with Oliver Cromwell's invasion in 1649, things got very serious. Cromwell's Sherman-like march through the Island left devastation in its wake and the English in charge. The coup de gras took place about thirty miles north of Dublin on July 12, 1690, at the Battle of the Boyne.

The run-up to this battle involved religion—but almost none of it had anything to do with theological doctrine. Protestants hated Catholics and Catholics hated Protestants. Why? Most, then or now, could not say. It had always been that way. It was as good a reason as any. And when you had God on your side, you didn't have to reflect much on the validity of your prejudice. The source of the animosities certainly weren't due to any recent grievance. By 1690, Henry VIII's break with the Church was a century and a half in the past. And then, his break had nothing to do with church doctrine. His wife had failed to give him a male heir and his girlfriend was pregnant. He needed a divorce and what better way than to declare himself the head of a new church that could and would grant kings their divorces.

The civil war in England, which lasted from 1642 to 1651, resulted in the execution of Charles I and an interregnum under Oliver Cromwell, the Lord Protector. He wore out his welcome fairly quickly (the English wishing a return to their royalty) and Charles II was restored to the throne in 1660. Charles II's death brought his brother, James II, to the throne in 1685. In the meantime, James had converted to Catholicism after marrying his cousin, the daughter of an Italian duke. This threw a scare into the English barons which escalated to an all out panic when James had a son. The thought of a Catholic dynasty was too much to bear and the barons invited a Dutch prince, William of Orange, to depose James. William also happened to be James' son-in-law.

James II fled to France but returned to Ireland where he still held the favor of the army and the Irish. The battle of the Boyne was between two English Kings, one a Dutchman and the other a Scotsman, fighting in Ireland for the right to rule England. With the Protestant William's victory, the subjugation of Ireland was complete. The confiscation of Irish lands and consolidating them into English plantations made Ireland a land of sharecroppers (called cottiers). The English Penal Laws exceeded in repressing the Irish far beyond any laws passed in the American South during the Jim Crow era. The English were most successful in imposing their plantation system in Ulster, which was quickly populated by immigrants from Scotland. Protestants in Ulster would eventually comprise 2/3rds of the population of Ulster but they held 100% of the power and would do so until just ten years ago.

Which leads us to “The Troubles.” The main struggle for Irish independence took place from 1912 to 1922. During that time there were two major risings and a civil war. The Four Courts Building in Dublin still carries the bullet scars



in its granite from that last conflict between those loyal to Eamon de Valera and those loyal to Michael Collins.

The negotiated 1921 settlement of the rebellion between Ireland and Britain was preceded by the British parliament passing the Government of Ireland Act of 1920. This act partitioned Ireland and that partition sparked the Irish civil war. Under partition, the nine counties of Ulster were reduced to six and made a permanent part of Britain. Three counties of Ulster were allowed to stay within the Irish Republic because they contained too many Catholics and would have upset the Protestant control of the North. This partitioning of Ireland would be their equivalent of our slave problem. Our founding fathers needed to duck the issue of slavery to get a constitution and the Irish would need to duck the issue of a united Ireland to get a country. Michael Collins (then only 31), who negotiated the agreement with the British, said it gave the Irish the “freedom to achieve freedom.” The resolution of both problems, slavery and partition, would eventually be written with buckets of blood.

The Irish Republican Army would conduct a guerrilla war in Northern Ireland from the Twenties until the Sixties—but with little success. Neither the IRA nor the Irish Constitution recognized the validity of the partition. However, by the late Sixties, the IRA was moribund. The Protestant establishment in the 1960’s controlled all levers of power, including the police apparatus made up of the Royal Ulster Constabulary and the Protestant militia, known as the B Specials. Their police powers were exercised through the Special Powers Act of 1921, which gave them the authority to arrest and search without a warrant, to detain without a trial and to flog.

While matters appeared calm on the surface during most of the 1960’s, the cauldron reached a boil in August, 1969 when Catholic street marches in Derry and Belfast were brutally suppressed by the RUC. After Loyalists burned Bombay Street in Catholic Belfast, the IRA was

shown to be a shell of a fighting force. Realizing that the British soldiers were not there to protect Catholics, the group splintered with the creation of the militant Provisional IRA. Vowing never to be left defenseless again, they adopted the phoenix rising out of the ashes of Bombay Street as their symbol. The British had brought troops in to keep the peace and the Catholics at first greeted them as liberators—only to later view them as oppressors. Northern Ireland became Britain’s Vietnam. It took them twenty-five years to realize that they would not be able to kill and jail their way out of the quagmire.

Britain had inserted 15,000 troops into a country of 1.5 million people. The equivalent would be if the United States now had 350,000 troops in Iraq, the only difference being that 2/3rds of Northern Ireland was loyal to Britain. They tried internment and torture, only to be met with hunger strikes and more bombing. Long Kesh, the H Blocks, the Crumlin Road Prison, Castlereagh RUC Station—these would be their Abu Ghraib.

During the Troubles, Belfast came to resemble Beirut of the 1980’s. The killing on both sides was brutal, senseless and ultimately self-defeating. The worst single day of violence was in 1974, when Ulster Volunteer Forces detonated three bombs in Dublin, killing thirty-three people. The equivalent in Baghdad today would be 330. The city center of Belfast became a walled fortress where everyone was body searched before being allowed to enter. Customers were searched again before entering stores. The iron gates were closed at 7:00 P.M. and it became a ghost town.

So what brought peace to Ireland? In part, even the combatants got tired of the killing. Only the most incendiary on either side felt that bombs and bullets would provide a pathway to peace. Probably the most incendiary and vociferous opponent of the peace process was the Reverend Ian Paisley. Paisley, a combination of George

Wallace and Reverend Jerry Falwell, opposed the peace process at every turn.

The peace process gained significant momentum when British Prime Ministers, Major and Blair showed that they were committed to negotiations that could include Sinn Fein. President Clinton added his prestige and Senator George Mitchell his diplomatic skills. The public face of the negotiations was provided by the leaders of the major opposition parties in Northern Ireland, David Trimble and John Hume. They would eventually share the Nobel Peace Prize. However, the unsung heroes of the peace process were Gerry Adams, head of Sinn Fein, the political party of the IRA and Father Alec Reid, a Belfast Priest. Adams spent ten years dancing on the head of a pin as he brought both IRA and Sinn Fein from being bombers to brokers for peace. Father Alec Reid, who acted as the confidential go-between among all of the principals, kept the peace process alive in its earliest secret stages.

Belfast is now quiet, beautiful and, on the surface, as friendly as any city could be. However, cross the A12 into West Belfast and the City still has an eerie feel. If you find yourself on the Shankill Road you will immediately know what neighborhood you have entered. Union Jacks fly from every lamp post. Paralleling the Shankill is the Falls Road, as Catholic as O’Connell Street in Dublin. Behind both streets, running in back of the houses like a spine, is the “peace wall.” The peace wall in places is ten feet of cinder block topped by twenty feet of corrugated steel, topped by ten feet of chain link. The passageway streets between the Shankill and the Falls have steel gates that still close automatically at 7:00 P.M. and reopen at 6:00 A.M. Throughout both neighborhoods are murals and memorial gardens dedicated to those who have lost their lives by “bomb or bullet.” The murals, such as the one depicting hunger striker and IRA martyr, Bobby Sands, occupy the entire sides of buildings. They represent a past which neither side can or wants to forget. Whether they can forgive—only time will tell.



Labor and Employment Practice



by *Glen P. Doherty, Esq.*
*McNamee, Lochner,
Titus & Williams, P.C.*

In September, the Court handed down a number of labor and employment decisions of interest – all pertaining to eligibility for unemployment insurance benefits.

In Roman v. Commissioner of Labor (500312), claimant worked as a program director for a health care agency for about three years. He resigned his position because he felt that his supervisor was verbally and sexually harassing him, and was also discriminating against him in the assignment of work projects. The Unemployment Insurance Appeal Board (“Board”) disqualified claimant from receiving unemployment insurance benefits, finding that he voluntarily left his employment without good cause.

In affirming the Board, the Court held that criticism by one’s supervisor does not constitute good cause to leave employment. Of significance to the Court was that claimant did not take reasonable steps to protect his employment by filing a complaint about his supervisor’s conduct, and giving the employer an opportunity to address it prior to tendering his resignation.

In Limoncelli v. Commissioner of Labor (500310), claimant, a cook, was responsible for serving meals to residents of a health care facility. While she was preparing a meal on December 12, 2004, she failed to follow her employer’s policy of checking the temperature of the food prior to serving it and of recording the temperature in the appropriate log. In fact, claimant indicated in the log that she did not have time to check the temperature of the food because she was too busy with other tasks. Claimant was discharged as a result, and she filed a claim for unemployment insurance benefits. The Board disqualified her from receiving benefits on the ground that she lost her employment due to misconduct.

In affirming the Board, the Court held that an employee’s failure to follow an employer’s reasonable policy which, in turn, has a detrimental effect upon the employer’s interest constitutes disqualifying misconduct. According to the Court,

the purpose of the employer’s policy was to ensure that food was served at the proper temperature in accordance with health recognitions. It was undisputed that claimant knew of the policy and disregarded it on the date in question.

In Warmesley v. Commissioner of Labor (500098), claimant relocated from New York to Ohio and was employed as a treasury supervisor at a bank from September 20, 2004 until she resigned on November 17, 2004. Claimant testified that she resigned because her daughter, who was unhappy about the relocation, had run away, and that her father’s deteriorating health required the round-the-clock care. The Board ruled that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily left her employment without good cause.

In affirming the Board, the Court found that claimant never discussed the seriousness of her family situation or ascertained whether some sort of leave of absence was available prior to resigning. Under these circumstances, the Court held that claimant was disqualified from receiving benefits, for she failed to take reasonable steps to protect her employment prior to resigning.

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Workers Comp, Social Security Disability and Long Term Disability Committee

By Raymond Seligman

Silverman, Silverman & Seligman, P.C.

We've been gone for a while but we're back to tackle some of the recent changes in Workers' Compensation. Where better to start than the recent case of Burns v. Varriale Jr. handed down by the Appellate Division on August 31. While not "undoing" Kelly v. State Insurance Fund, a landmark case from 1983, it certainly puts some dents in it.

First some theory. When a Claimant has a work related injury that also generates a Third Party Action (let's leave auto accidents out of the picture for now) and gets a recovery from the Third Party Defendant, Section 29 basically says that first we have to satisfy the comp carrier's lien. But it says more than that. It also says that the Comp Carrier has to contribute towards the expense of obtaining that recovery, basically the Third Party attorney fees. Why? Because they are getting their money back through no efforts of their own – they should contribute to the cost of the recovery. But it doesn't end there because in addition to getting their lien satisfied (less the 1/3 that would be attributable to legal fees) they also get an offset against future payments. In other words, if the Claimant received a net recovery in his/her pocket for \$25,000, the Comp carrier would have a "holiday" until they would have paid, but for the settlement, \$25,000 in future comp benefits which of course stop at the time of the settlement. Along comes Kelly which in essence says that this "holiday" is also a benefit received by the Comp carrier through no effort of their own and they should contribute their share, assumed for now to be 1/3, to the cost of obtaining that "holiday" by the Claimant. In other words, they should "kick in" 1/3 of the offset they receive (present value?) towards the legal fee, even if that means kicking in "new" money. The problem however is that Kelly was too simple; it was a death case and the future "holiday" was easily determinable by actuarial tables since nothing the surviving spouse did (other than remarry) would affect his/her entitlement to the ongoing compensation payments, but for the TPA recovery. Thus the carrier's lien would be reduced or eliminated (requiring new money by the carrier) as based on the Total benefit they received including payments made to date PLUS the value of payments they would no longer be required to pay. This worked fine.

But now comes Burns which is not a death case. Here the comp carrier successfully argued 'how can we know how much money we have saved paying the Claimant in the future when it is speculative as to how much he would have received in the future'. Unlike a death case, or even a scheduled loss of use case, entitlement to ongoing benefits

permanent partial disability payments can be challenged by the carrier due for example to the Claimant's return to work or removal from the labor market. Since it's speculative, they argued, they should not have to contribute today in advance for the cost of a recovery that they theoretically might not receive. The Appellate Division agreed.

It is important to note that the AD did NOT say that the comp carrier was relieved of their obligation to contribute to the legal fees of the settlement, but they were not required to do so up front. Thus when each comp payment (which was not being paid due to the settlement) came due the carrier would have to contribute their 1/3 to the Claimant as a contribution to the legal fees.

How will this work in practice? Will the comp carrier be required to continue to pay 1/3 every two weeks? Will we need a comp hearing every 6 months? The outcome will be very, very case specific. But in general it would certainly make life easier to try to settle the comp case prior to the TPA and to have the TPA attorney and the comp attorney work closely in resolving the entire claim.

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Matrimonial and Family Law



by *Michael P. Friedman, Esq.*
Friedman & Molinsek

“You don’t know a woman till you’ve met her in court.” Norman Mailer

“There’s two theories to arguing with a woman. Neither one works.” Will Rogers

“The quickest way to a man’s heart is through his chest.” Roseanne Barr

Just in time for the autumnal solstice comes cheery news about our profession. While we lag behind 105 other professions in many categories, we top the list of those with Major Depressive Disorders per capita according to a study at Johns Hopkins University, and you know if that lacrosse powerhouse says it’s so, it is. It seems we’re 3.6 times more likely to be majorly depressed than other professionals. We also suffer from alcoholism and drug abuse at rates far higher than other professions, and not surprising we divorce more often than other professionals. The culprit in all this? For the most part, the hours we work. In the 1960’s, most partners billed between 1,200 and 1,400 hours per year and most associates between 1,400 and 1,600 hours. Today, over half of the associates and almost a quarter of the partners in private practice bill at least 2,000 hours per year. In the biggest law firms, almost everyone bills close to 2,000 hours, and

many bill 2,500 hours or more. Does it have anything to do with the mandates of our courts that we bill only on the hourly rate for matrimonial practice, leaving us slaves to the hourly rate or the amount of time we spend at work? Maybe the powers that be ought to look to alternative methods of billing for us, like premium billing for results, or being able to get a bonus if we resolve matters quickly and without litigation. How many of us have done yeoman’s work to bring large cases to a quick and painless resolutions only to be out billed by the realtor who had a few open houses and sold the marital residence? We ought to think about these things when we establish our hourly rates, which for the most part are far too low in the Capital District.

But enough of that. How about the state of appellate law in New York. Did you ever suffer from *nostra sponte*? No, this isn’t a form of gelato or a virus causing sinus infections. It’s a term for an appellate court to decide something even if not asked, *nostra* being “us” as opposed to *sua* (its) *sponte*. You know when the AD refers to itself as “us”, something bad is coming down for someone. That someone was attorney Matthew Hearle in the First Department. While this is not a matrimonial case, it should give us all some foresight when we advise a client to appeal. Mr. Hearle represented Yenom Corp. who sued to get the stock of 155 Wooster Street, Inc., a corporation owning, you guessed it, 155 Wooster Street. In trying to enforce an oral contract of sale of the stock, Yenom filed a *lis pendence* and filed a summons and complaint. The defendant successfully moved to dismiss, and the trial court granted the motion and awarded sanctions for frivolous conduct against the plaintiff and the aforesaid Mr. Hearle. The amount of the sanctions was the legal fees involved, a hefty \$44,500, which is good work for a motion to dismiss if you can get it. Mr. Hearle and his client promptly appealed and lost¹, and then sought leave to the Court of Appeals, unsuccessfully². That’s when all the *nostra* sponting stuff started, as the court sent Mr. Hearle

a letter asking him to explain why he and his client should not be sanctioned for a frivolous appeal. Gulp. After reviewing the responses, the court went through each argument and concluded that the appeal was pure poppycock, including the appeal of a determination that the whole thing was frivolous in the first place³. My favorite argument by plaintiff’s counsel was that he didn’t have time to investigate whether his lawsuit was useless because the motion to dismiss was served shortly prior to the 4th of July. So the court set it down for a hearing on the “significant amounts” expended by the defendants in the appeal.

The Third Department doesn’t do things *nostra sponte*, preferring to refer to itself as the impersonal *sua sponte* in its decisions⁴. I believe the Third Department has never *sua sponte* or *nostra sponte* imposed sanctions on an attorney for a frivolous appeal, and it is (they are?) somewhat sympathetic to counsel who have a reasonable excuse for his or her actions. It has not hesitated to reverse sanction awards⁵. Under appropriate circumstances, it will award sanctions for a frivolous appeal as it did against a lawyer matrimonial litigant in *Fox v. Fox*⁶ but limited the award to \$7,500 and in *DeRuzzio v. DeRuzzio*⁷ the award for a frivolous appeal was a mere \$500 against the litigant and \$500 against the lawyer. However, I would not rely on the somewhat more lenient view of frivolity in the Third Department’s prior holdings. The *Yenom* decision is a warning to us to thoroughly review a trial court’s decisions before embarking on the climb up State Street to the Judicial Building for a review by the Appellate Division.

This being a matrimonial column, let’s see what we can learn from this past month’s appellate decisions. We all know that the filing date is important for equitable distribution and retroactive support. It can prevent shenanigans with the joint accounts and credit cards, and the timing of an action should be considered in every case. So, it is somewhat dismaying to have your



lawsuit dismissed for failure to serve within 120 days as required by CPLR 306-b. Of course, the trial court can exercise discretion to extend the time, but that discretion has limits. So the Second Department reversed a trial court's award of additional time and dismissed a lawsuit for the failure to proceed at a service of process hearing in Alexander v. Alexander⁸.

Finally the Mike Friedman *Chutzpah* of the Month award goes to Attorney Mary K. Henning⁹ who signed a Family Court judge's name to an order. After being convicted of criminal and civil contempt¹⁰, Ms. Henning had to deal with an application to have her disbarred before the Second Department. Her defenses? Signing a judge's name to an order is not a serious crime justifying disbarment, the order was signed by her as a litigant in her own divorce and not as an attorney, and besides, and she was seeking leave to the Court of Appeals so let's see what they do. Not a chance baby. Sayonara.

Footnotes

1. Yenom Corp. v. 155 Wooster Street, Inc., 23 A.D.3rd 259 (1st Dept., 2005)
2. Yenom Corp. v. 155 Wooster Street, Inc., 6 N.Y. 3rd 708 (2006).
3. Yenom Corp. v. 155 Wooster Street, Inc., ___ A.D.3rd ___, 818 N.Y.S.2nd 210 (1st Dept., July 13, 2006)
4. As in Matter of Amanda "RR", 293 A.D.2nd 779 (3rd Dept., 2002).
5. Gutin Nedo ex. Rel. Hamilton v. Marshall, Cheung & Diamond, P.C., 301 A.D.2nd 728 (3rd Dept., 2003) and Frank M. v. Siobahn N., 268 A.D.2nd 808 (3rd Dept., 2000), reversals of sanctions based on the facts; Kovach v. Hurlburt, 267 A.D.2nd 824 (3rd Dept., 1999), a remand for a hearing.
6. 309 A.D.2nd 1056 (3rd Dept., 2003).
7. 287 A.D.2nd 896 (3rd Dept., 2001).
8. ___ A.D. 3rd ___ (2nd Dept., August 29, 2006).
9. In re Henning, ___ A.D.3rd ___ (2nd Dept., July 25, 2006).
10. Henning v. Ritz, 22 A.D.3rd 524 (2nd Dept., 2005).

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Please respond to the ACBA's office for classified ads with our code.

Associate Wanted - Albany law firm seeks an associate with 1-3 years experience. This position requires strong research and writing skills. Competitive salary and good benefits. Send resume with writing sample to Hiring Partner, PO Box 15054, Albany, NY 12212-5054. No phone calls please.

Wanted - One of the fastest growing law firms in Albany is getting ready to grow again. We are looking to hire several lawyers with portable business. We were voted one of the best places to work in the Capitol Region partly because of our competitive salaries and great benefits. If you think that you have what it takes to join an aggressive firm with plans to be the largest law firm in Albany before the end of the next decade, then contact greg@tullylegal.com.

IP Litigation Associate – The largest IP law firm in Upstate NY is seeking an IP associate to join its Litigation Practice. Prior IP experience and admission to NYS Bar and Federal Court required. Submit writing sample, resume and references to: Heslin Rothenberg Farley & Mesiti P.C., Nick Mesiti, 5 Columbia Circle, Albany, NY 12203.

Legal Secretary Wanted - Plaintiff's personal injury firm seeks litigation secretary. Competitive salary with benefits. Send resume to Denis Hurley at Conway & Kirby, LLP, 1222 Troy-Schenectady Road, Niskayuna, New York 12309 or e-mail to drh@cklawyers.com or fax to 533-1073.

Office Space Available in Multi-Lawyer Suite - 21 Everett Road Ext., (Near I- 90 Exit 5), Receptionist, Use of Conference Room and Kitchen, Phones, Voice Mail, DSL, Legal Research Access provided. Ample parking. Reasonably Priced Rent. Contact Stephen Levy at 489-6358 or Ian Arcus at 489-1098.

Two offices available - Close to Wolf Road, One large w/ separate entrance & one small w/ other offices. Some overflow work available. Rent negotiable. Call Dennis @ 438-2174.

Commercial/Appellate Practice Committee

Please join the revamped and reinvigorated ACBA Commercial/Appellate Practice Committee. An October start-up is planned, offering CLE Opportunities, information exchanges, forums on issues of the day and collegial support for the toughest of all attorney disciplines – litigation.

Contact: Steve Herrick, Chair, 218-7100, sherrick@tullylegal.com
Barbara Davis, ACBA, 445-7691, acba@albanycountybar.com



Change of Scene

If you have relocated and would like your updated information listed in our monthly newsletter, please fax us at 445-7511.

Scott Harms has relocated his office to 24 South Main Street, P. O. Box 350, Voorheesville, NY 12186. **Tel: 765-4686; Fax: 765-9048; E-Mail: harmesq@hotmail.com**

John R. Vero is now an associate in the commercial transaction and commercial litigation practice area group at **Couch, White, LLP**, 540 Broadway, Albany, NY 12201. **Tel: 426-4600; Fax: 426-0376; E-Mail: jvero@couchwhite.com**

Web Site: <http://www.couchwhite.com/index.html>

NYS Lawyer Assistance Trust

The NYS Lawyer Assistance Trust, an initiative of Chief Judge Judith S. Kaye, was created in 2001 to bring statewide resources and awareness to the issue of alcohol and substance abuse in the legal profession. During this past year, that mission was expanded to include addressing mental health concerns among members of the profession. You can learn more about the trust and its mission and initiatives, by visiting their website at www.nylat.org If any attorney is interested and able to serve, contact David Pfalzgraf at 285-4545.

Continuing Legal Education

* = Transitional Programs

CLE Seminar - Canceled

The CLE scheduled for October 12, 2006 entitled *Trying and Defending Felony Cases: A View from the Prosecutor's Table* has been canceled. Please see future newsletters, or visit our website for the new date.

CLE Correction

The speaker for the May 4, 2007 CLE entitled *Proving and Defending Psychological Damages* was listed wrong in the CLE Brochure; the correct speaker is Edwin J. Tobin, Jr. with the firm of Maynard, O'Connor, Smith & Catalinotto. We apologize for this error and inconvenience to both parties.

CLE Seminar

Oct. 4 Hampton Inn
1:15 PM Registration
1:30 – 4:30 PM Seminar/Buffer Luncheon

Topic: *Electronic Filing in NYS Courts **

Speakers: Jeffrey Carucci, *Program Director of Electronic Filing* and Charles Diamond, *Chief Clerk of the Albany County Supreme & County Courts*

Price: ACBA Member \$70;
Non-Member \$95; Student/Paralegal \$30

CLE Credit: 3 Hours of Skills

CLE Breakfast Program

(Co-sponsored by the Government Law Center)

Oct. 19 Hampton Inn
8:15 AM Registration
8:30 – 11:30 AM Seminar/Breakfast Buffet

Topic: *How Political Trends Impact Lobbying and Update on Recent Developments in Lobbying Law **
The techniques and tactics of political campaigns are becoming part and parcel of lobbying strategies. This seminar will track and delineate the development of this factor in the hopes of assisting lawyers in their lobbying practice.

Speakers: Bruce Grory, *Hinman Straub, PC: Will be speaking about political trends in politics and how they influence lobbying. Will be updating his 2002 presentation to include the most recent polling, demographic and election data. Additionally, he will discuss how changes in voting impact political campaigns both state and national.*

Mark Glaser, *Greenburg Traurig, LLP: Will speak about lobbying ethics and plans on highlighting recent changes regarding gifts made by lobbyists to public officials*

Ralph Miccio, *Counsel, NY Temp. State*



Commission on Lobbying: Will give an update on procurement lobbying.

Price: ACBA Member \$70;
Non-Member \$95; Student/Paralegal \$30

CLE Credit: 2 Hours of Practice Management and 1 Hour of Ethics

CLE Seminar

(Sponsored by Stewart Title)

Nov. 8 Albany Marriott
8:45 AM Registration
9 - 12 PM Seminar/Buffer Luncheon

Topic: *Real Property Update*

Speakers: Tim Keehan, and other Representatives From Stewart Title

Price: ACBA Member \$70;
Non-Member \$95; Student/Paralegal \$30

CLE Credit: 3 Hours of Skills

CLE Seminar

Nov. 16 Jack's Oyster House
11:45 AM Registration
12 - 2 PM Seminar/Buffer Luncheon

Topic: *Freedom of Information Law**

Speaker: Robert Freeman, Exec. Dir. of Committee on Open Gov.

Price: ACBA Members \$55;
Non-Members \$75; Law Student/Paralegal \$30

CLE Credit: 2 Hours of Professional Practice

Make all checks payable to: Albany County Bar Association
And remit to: The Stedman House
1 Lodge Street, 2nd Floor
Albany, NY 12207

Please indicate choice of seminar.

Contact: (518) 445-7691 or acba@albanycountybar.com
for further information.

CLE Seminar

Dec. 14 Albany Marriott
8:45 AM Registration/Continental Breakfast
9 - 5 PM Seminar/Buffer Luncheon

Topic: *State and Federal Bar Criminal Law Update*

Speakers & Topics:

F. Stanton Ackerman: *Update on the Most Important Criminal Cases, Primarily From the NYS Court of Appeals and/or Supreme Court Appellate Division, Third Department*

Henry Greenberg: *Thorough Court Update on Criminal Cases; Especially Cases from the United States Court of Appeals From the Second Circuit and/or Supreme Court of the United States*

Prof. Pat Connors: *Ethics*

Sarah Lord and Raymond Kelly: *Federal and State Motion Practice*

Judges Panel: Hon. Frederick J. Scullin, Jr., *Chief Judge*
Hon. Norman A. Mordue, *District Court Judge*
Hon. David R. Homer, *U.S. Magistrate Judge*
Hon. Thomas A. Breslin,
Albany County Court Judge
Hon. Polly Hoye, *Fulton County Court Judge*
Hon. John S. Hall, Jr., *Warren County Court Judge*

Michael Hutter: *Federal and State Evidence*

William Dreyer: *State and Federal Case Work-up Procedures*

E. Stewart Jones: *Jury Selection, Federal and State*

Steve Coffey and Gene Primomo:
Federal and State Sentencing

Hon. Leslie Stein: *Domestic Violence Court/Integrated Court System*

Thomas O'Hern: *Update on DWI Laws*

Price: ACBA Member \$125;
Non-Member \$175; Student/Paralegal \$50

CLE Credit: 7 Hours of Professional Practice and 1 Hour of Ethics

The Board to Fund Equal Justice
invites partners from area law firms and other friends of Legal Aid
to a complimentary reception

The 3rd Annual
**JUSTICE
FOR ALL**

Campaign Kickoff

Thursday, October 12, 2006

Angelo's 677 Prime
667 Broadway, Albany

Cocktail Reception
5:30-7:30 pm

Opening Remarks

Hon. Howard A. Levine

Retired Judge NYS Court of Appeals

Angelo's
677
prime

The Board to Fund Equal Justice

Chaired by E. Stewart Jones, Jr. and G. Kimball Williams, was founded in 2004 by area law firms. The Board's goal is to solicit multi-year leadership gifts to support the work of the Legal Aid Society of Northeastern New York in the face of unstable state and federal funding.



E. Stewart Jones, Jr.

E. Stewart Jones
E. Stewart Jones Jr., PLLC

Co-Chairs

G. Kimball Williams

G. Kimball Williams
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**Legal Aid
Society**
of Northeastern
New York, Inc.

Fighting for Fairness
Promoting Justice

Please RSVP by October 6 to: Deanne Grimaldi at 518 689-6336 or dgrimaldi@lasnny.org

JUSTICE FOR ALL CAMPAIGN

why Legal Aid matters

"Legal Aid matters because Legal Aid assures that every person's rights are protected regardless of economic status."

Bishop Howard J. Hubbard.

"Legal Aid ensures that the poor have the same rights and equal access to the justice system as the well-to-do."

E. Stewart Jones

"Legal Aid is the instrument which gives meaning to the American ideal of Fairness."

John R. Dunne

Founded in 1923, The Legal Aid Society of Northeastern New York is a full service law firm providing assistance to the neediest families in our community. From the Catskills to Canada, its 16-county service area includes offices in Albany, Saratoga Springs, Amsterdam, Canton and Plattsburgh. Last year the Legal Aid Society helped almost 25,000* clients.

* Includes advice, brief services, information and referral, individual case representation, and community legal education

Whether you support the Legal Aid Society of Northeastern New York as a firm, as an individual or both, your gift touches many lives. For our neighbors in need and their families, legal assistance can transform their lives and give them the help they need to get back on their feet.

Thank you!

2005 CAMPAIGN LEADERSHIP

\$200, or more, per firm attorney

Arroyo Copland & Associates, PLLC
Robert A. Becher, Attorney at Law
Bartlett, Pontiff, Stewart & Rhodes P.C.
Bond, Schoeneck & King, LLP
Buckley, Mendleson & Criscione, P.C.
Capasso & Massaroni, LLP
Cohen, Dax & Koenig, P.C.
Columbia County Bar Association
Crane & Parente, P.C.
Dreyer Boyajian, LLP
E. Stewart Jones, PLLC*
Englert, Coffey & McHugh, LLP
Girvin & Ferlazzo P.C.
Gleason, Dunn, Walsh & O'Shea
Goldberger & Kremer
Gordon, Tepper & DeCoursey
Harris, Balzer & Conway, PLLC
Hinman Straub P.C.
Hiscock & Barclay LLP
Iseman, Cunningham, Riestler & Hyde LLP
Kindlon and Shanks, P.C.
Law Office of Stephen A. Johnston
Law Office of Patricia Rodriguez
Law Office of Mark A. Schneider
Lavelle & Finn, LLP
Martin Harding and Mazotti, LLP
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Nixon Peabody, LLP
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The Towne Law Offices, P.C.
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Whiteman Osterman & Hanna LLP*
Young Sommer Ward Ritzenberg Baker & Moore, LLC

** designates gifts of \$10,000 and over*

**Legal Aid
Changes Lives**

Legal Aid Society of Northeastern New York



Calendar of Events

Oct. 4	CLE Seminar, Hampton Inn, 1:15 PM
Oct. 5	YLC Cocktail Party, Yono's, 5:30 PM
Oct. 10	ACBA Board & State Meeting, 4:00 PM
Oct. 19	CLE Seminar, Hampton Inn, 8:15 AM
Nov. 8	CLE Seminar, Albany Marriott
Nov. 9	YLC Happy Hour, Bayou Café, 5:00 PM
Nov. 14	ACBA Board Meeting, 4:00 PM
Nov. 16	CLE Seminar, Jack's Oyster House, 11:45 AM
Dec. 4	ACBA Memorial Service
Dec. 14	CLE Seminar, Albany Marriott, 8:45 AM
Feb. 15	Court of Appeals Dinner

Advertising Policy The ACBA Newsletter

Advertising appearing in the ACBA Newsletter does not presume endorsement of products and services by the Albany County Bar Association.

Classified Advertising Policy

All ads must be prepaid and in writing. We also hold the right to edit all ads. For display advertising rates and information, please call (518) 445-7691. All ads must contain wording "Paid Advertising" at the top. It shall be the policy of the Albany County Bar Association that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age.

Change of Scene and Bench & Bar in the News: Provided at no cost to our members. Must be submitted in writing.

Deadline: The third Friday of the prior month is a good rule of thumb. The deadline for the November issue is October 20th.

Mail ad copy and payment to Albany County Bar Association The Stedman House, 1 Lodge Street, 2nd Floor, Albany, NY 12207.

Rates and Deadlines

Albany County Bar Association Rates:
 Member: \$25 in our classified section (approximately 30-40 words) additional fees may be incurred as the number of words increase.
 Non-member: \$75 in our classified section (approximately 30-40 words) additional fees may be incurred as the number of words increase.
 There is also an additional \$10 charge for Blind Ads. Seminars announced: \$60 (approx. 30-40 words). The rates for all photo ready ads are:
 full page (8.5" x 11") = \$400
 1/2 page (8.5" x 5") = \$300
 1/4 page (3 1/2 " x 5") = \$225
 Business card size (3 1/2 " x 2 1/2 ") = \$165.

For more information contact the ACBA's office.



ALBANY COUNTY BAR ASSOCIATION
 The Stedman House
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 Albany, NY 12207

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