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BAR ASSOCIATION OF ERIE COUNTY

VOL. 57 | NO. 8 | APRIL 2018



President's Letter



MELINDA G. DISARE

It is time!! Actually, the time is long overdue. The federal court vacancy in Buffalo must be filled and it must be filled soon. The situation, like the backlog of cases resulting from it, has languished too long.

As reported by Phil Fairbanks in the Buffalo News last September, only 11 of the other 93 federal court systems across the country have a greater percentage of civil cases that are at least three years old. The backlog has exceeded 3,600 cases in each of the past five years. Judges here handle more cases than all but six other courts across the nation. Buffalo has one of the busiest federal courts in the country, ranking seventh among 94 court systems in terms of pending cases per judge.

Delays in case processing result in frustrations for litigants and lawyers alike. At best, witness memories fade. At worst, witnesses pass away or cannot be located. The ability to identify, locate, and produce other relevant evidence can also be impacted.

Numerous short-term solutions have been implemented to address the situation. Thankfully, Judges Arcara, Skretny,

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Law Day Luncheon, Awards Scheduled for May 1



Vilardo

Hon. Lawrence J. Vilardo, U.S. District Judge for the Western District of New York, will deliver the keynote address at the BAEC's annual Law Day luncheon. The luncheon will be held on **Tuesday, May 1** at Statler City beginning at 12:00 noon. Tickets are \$38 per person and can be ordered at eriebar.org or by calling 852-8687.

The 2018 national Law Day theme is "Separation of Powers: Framework for Freedom." This theme allows us to reflect on how the separation of powers among Congress, the Presidency and the Supreme Court is fundamental to our constitutional purpose and to consider how our governmental system is working for ourselves and for posterity.

"We the people must continually act to ensure that our constitutional democracy endures, preserving our liberties and advancing our rights," according to a statement from the ABA.

About Judge Vilardo

Judge Vilardo took office in 2015, following nomination by President Barack Obama and unanimous confirmation by the Senate. A summa cum laude graduate of Canisius College, he received his law degree from Harvard Law School, magna cum laude.

Before his appointment and confirmation, Vilardo was a founding partner of the Buffalo firm of Connors & Vilardo, where he conducted a wide range of civil and criminal litigation in state and federal courts at the trial and appellate levels. Prior to that, he was an associate at Damon, Morey, Sawyer & Moot, now Barclay Damon LLP.

Annual Awards to Be Presented

Each year, as legal communities across the country pay tribute to the justice system, the Bar Association of Erie County honors those who have distinguished themselves in service to the law.

Liberty Bell Award

Established in 1964, the Liberty Bell Award is the highest award bestowed at the Law Day program. The purpose of this award is to recognize community service that has strengthened the American system of freedom under the law and to accord public recognition to those who, among other criteria, have encouraged a greater respect for the law and the courts; fostered a better understanding and appreciation of the rule of law; and stimulated a deeper sense of individual responsibility so that citizens recognize their duties as well as their rights.

The recipients of this year's award are **Peter J. Galie, Ph.D.** and **Fidèle Menavanza**.

Dr. Galie is a retired professor from Canisius College, where he focused on constitutional law and political philosophy. His efforts in advancing public awareness of last year's constitutional vote are among the reasons for his selection. Galie has long been recognized as an expert on the Constitution and is the author of "New York State Constitution: A Reference Guide" (Oxford Publishing 2012). He devoted a great deal of time before the vote educating both lawyers and the community at large about the Constitution and the convention.

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Join Us at the 2018 President's Ball!

Please join **President Melinda G. Disare** at the 2018 President's Ball **Saturday, April 21** at the Buffalo Club from 7:00 until 10:00 p.m. The black-tie optional gala includes a cocktail hour, buffet dinner, and dancing to the sounds of Total Eclipse. Candidates who are running for bar offices will also be introduced for the first time.

Tickets are \$125 per person and \$1100 for groups of ten (limited availability). **Please RSVP by April 14th** at eriebar.org or by contacting Susan Kohlbacher at 852-8687 or skohlbacher@eriebar.org.

Come help us celebrate our past, present and future leadership - reserve your place today!



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Be Inspired

Attend one of these presentations being held in April. Former U.S. Attorney **William J. Hochul, Jr.** will present "A Journey of Justice and Mercy" (see page 7) and Princeton Professor **Robert P. George** will discuss "Constitutional Structures, Civic Virtue, and Political Culture" (see page 15).



The Human Rights Committee of the Bar Association will present a CLE program entitled "The Economic Aftermath of Violence Against Women: Economic Issues Affecting Domestic Violence and Sexual Assault Survivors" on **Friday, April 27** from 8:30 a.m. until 12:30 p.m. at the Bar Association. See full details and register at eriebar.org.

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"Your honor, he's badgering the witness!"

President's Message

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Siragusa, Larimer, and Telesca, who are on senior status, continue to oversee active caseloads. Non-senior status federal judges from Rochester regularly handle Buffalo-based cases. Our court has entered into a three-year agreement with the federal court system in Vermont to allow judges there to oversee cases here. Magistrate judges are relied upon extensively. Settlement week initiatives have been undertaken. These short-term fixes are welcome, but they are insufficient.

Our Bar Association went on record about a year ago urging that steps be taken to address this need. Nothing has yet occurred.

The problems created by the one recognized vacancy are apparent to all those who practice in federal court and to all those employed by the federal court who are dealing with the problem on a daily basis. The current vacancy needs to be

filled immediately. Frankly, a judicial conference in 1992 recommended a third district court judge for Buffalo. Consequently, we ought not settle for the filling of one vacancy in this area. We should be pushing forward for the filling of two federal court judgeships.

Unfortunately, a long-term solution does not appear imminent. It appears we may enter the upcoming election cycle without one, let alone two, federal judges being appointed for this area. Should that be the case, it is incumbent upon us to ask each person running for federal office exactly what steps they have taken to address this problem, what their position is with regard to the creation of an additional judicial position in Buffalo, and exactly what steps they intend to take to address the clear need, if they are elected. Merely exposing the issue has not remedied it. We need to do more. [B]

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...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 style, space and content.

Send all submissions as Word documents to obrian57@comcast.net (preferred) or by mail to: Bulletin Editor, 438 Main Street, Sixth Floor, Buffalo, NY 14202.

Deadline**May 2018 Bulletin**

The next deadline for ALL Bulletin contributors and advertisers is

Friday, March 30, 2018

**Call Dimitri Malliaris
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bench and bar in the news

How to place an announcement:

If you are a BAEC 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. Notices must be submitted in writing and limited to 100 words. They are printed at no cost to members and are subject to editing. Email your notice and high resolution photo (300 dpi) to Bonnie O'Brian at obrian57@comcast.net. Talks, speeches (unless they are of international stature), CLE presentations and political announcements are not accepted. In addition, we do not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, etc.).



Ponterio

Jillian M. Ponterio has joined Lipsitz & Ponterio, LLC as an associate attorney. She will focus her practice on representing individuals suffering from occupational diseases, including mesothelioma and lung cancer. A cum laude graduate of Canisius College, Ponterio received her J.D. from the University at Buffalo Law School. While pursuing her law degree, she served as a law clerk at the firm, assisting litigators with research, trial preparation, and drafting and editing motions.



Roberts

Diane M. Perri Roberts and **Matthew B. Morey** have been named senior partners with Lipsitz Green Scime Cambria. Perri Roberts focuses on employment litigation and commercial litigation. A graduate of the State University College of New York at Buffalo, she received her J.D. from the University at Buffalo Law School and also holds an MBA from Niagara University. Morey focuses on business and corporate law. A graduate of the University at Buffalo, he holds a J.D. from Syracuse University College of Law.



Morey



Burden

Donna L. Burden, founding partner of Burden, Hafner & Hansen, LLC, recently chaired the 8th Annual Themis Advocates Group Conference & Seminar held in Miami. The group works to improve legal services to clients through a national network of law firms that share information, procedures, technology, and client feedback.



Hansen

Sarah E. Hansen, a partner in Burden, Hafner & Hansen, LLC has been accepted as a member into the Trucking Industry Defense Association. Membership is by invitation and consists of about 1,600 industry professionals who work to reduce loss costs to the trucking industry.

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Klein

Mark S. Klein has been named chairman at Hodgson Russ LLP. He has been with the firm for more than 35 years representing a wide range of business and individual clients.

He succeeds Daniel C. Oliverio pursuant to the firm's leadership transition and succession plan.

Oliverio will serve as chairman emeritus and continue his practice in business litigation and related areas. Klein will work closely with the firm's managing partner, Rick W. Kennedy, to focus on "strengthening client relationships, growing the firm's client base, enhancing collegiality, and serving our communities."



Breen

Lauren Breen has been promoted to executive director at Neighborhood Legal Services, a civil legal services non-profit serving low-income, disabled and other residents in need in western New York. She was selected after a national search facilitated by The John R. Oishei Foundation. Breen was a staff attorney at NLS in her early career and later served on its board as president from 1997-

1999. She retired from the University at Buffalo Law School after nearly 24 years as a clinical professor and returned to NLS as deputy director last year. A graduate of Georgetown University, Breen holds a J.D. from the University at Buffalo Law School.

Bischof Appointed to Chair Committee



Bischof

Dennis J. Bischof has been named as chair of the BAEC's Solo & Small Firm Practice Committee. The principal in Dennis J. Bischof LLC, he has been active in the Bar Association for many years and continues to coordinate the annual Supreme Court admissions program, organizing an excursion to Washington, D.C. every spring. A former recipient of the Special Service Award for that program, he has also chaired the Negligence Committee and served as deputy treasurer and treasurer on the board of directors.

The committee was initially developed to provide solo practitioners and those in small law offices with a forum to discuss technology and how it could enhance the efficiency of their law practices. Bischof plans to expand that to focus on a range of practical issues, including business development, law practice management, networking, problem solving and more.

The committee will meet four times per year and is currently accepting new members of all ages and experience levels. The next meeting is scheduled for **Thursday, May 24** at 12:15 p.m. at the Bar Association. Contact Alyssa Lauck at 852-8687 or alauck@eriebar.org if you're interested in joining. [B]



Connect with your colleagues at the Law Day Luncheon on May 1st at Statler City at 12:00 noon.



BAR ASSOCIATION OF ERIE COUNTY

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Law Day Luncheon, Awards Scheduled for May 1

continued from page 1

“Although he supported the convention, his purpose was not necessarily to persuade others that his view was correct; rather, his purpose was to educate the voters so they could make an informed decision,” according to a report from the Awards Committee. “His enthusiasm for the topic was infectious. He performed an admirable and important public service that is easy to overlook, especially when public opinion is so seemingly entrenched against you.”

Fidèle Menavanza is a paralegal at the Center for Elder Law and Justice, where he works with refugees and people seeking asylum from repressive and hostile regimes, especially in conjunction with the CRLS Project, which assists newcomers with resolving civil legal issues. He has made significant outreach to a variety of ethnic communities including Karans, Royhinga, Somalis, Iraqis, Nepalese, Congolese and Burmese. He has organized community meetings with the police to alleviate fear in these communities. He was instrumental in helping to spur the police to install a language line in every officer's car so they could communicate immediately with anyone in need of help.

“His efforts have led to less suspicion and outright fear of the police and our system of justice,” according to the Awards Committee. “He has made great strides in reaching out to the immigrant community.”

Menavanza was a successful attorney with the government in the Democratic Republic of Congo but left when he detected corruption. He got a job sweeping floors before applying for and obtaining his current position. County Executive Mark Poloncarz appointed him to the Committee on the Care of Elder Immigrants in Erie County. Menavanza also works with Judge Lisa Bloch Rodwin on her immigrants' committee and assists private practitioners who represent individuals from these communities.

Justice Award

The Justice Award is bestowed only when circumstances warrant and not necessarily on an annual basis. The purpose of this award is to recognize individuals and programs that have substantially contributed to the improvement of our system of justice.

This year's award will be presented to **Gayle Towne Murphy**, pro bono manager at the Volunteer Lawyers Project, Inc., in recognition of her “tireless commitment to mentoring women and men in the practice of law, fostering diversity in the legal profession and increasing the number of attorneys who provide pro bono services.” At VLP, she works with law firms, private attorneys and the various bar associations to increase awareness about the value of pro bono work.

Murphy collaborates with the UB Law School to recruit and train law student volunteers at VLP and is also involved with the Attorney Emeritus Program, supporting attorneys over 55 in providing pro bono legal services. These efforts have “increased access to quality legal services to low-income individuals in Erie County.”

Special Service Award

The Special Service Award is presented each year to a non-lawyer connected with a governmental agency or the court system who has provided outstanding service to the legal community. **Tiffany Szymanek Pavone** and **Denise J. Daniels** have been selected to receive this year's award.

Pavone serves as director of operations at the Family Justice Center (FJC). Among those nominating her were the BAEC's ADR and Practice and Procedure in Family Court Committees, Hon. Michael F. Griffith, Supervising Judge of Family Courts in the Eighth District, and Mary Murphy, executive director of the Family Justice Center. She is credited for her administrative duties and advocacy, strong working relationship with the bench and bar, and, most importantly, assisting domestic violence victims and others through the FJC. Pavone has been “instrumental in expanding the FJC's profile, reputation and success through strategic planning and public outreach.”

Daniels is the long-time deputy courtroom clerk for Hon. Richard J. Arcara. She received numerous letters of support characterizing her as “an extremely hard working and conscientious individual dedicated to her job of serving the needs of the court and all the attorneys appearing before Judge Arcara.” Nominating materials describe her as being of great assistance to attorneys, helping with their cases and proceedings before the court. “Despite the stressors of working in a very busy court, she has always treated attorneys with courtesy and understanding” and all who nominated her expressed a strong desire that she be recognized for her many years of dedicated service.

Police Officer Award

The Police Officer Award is presented to a member of the local law enforcement community in recognition of service that strengthens the justice system; encourages respect for the law; and demonstrates a concern for society and appreciation of the dignity of all people. The 2018 recipient is **Craig E. Lehner**, Buffalo police lieutenant, posthumously.

Media coverage about Lehner was widespread following his tragic death in October of 2017 during a training opera-

tion with the BPD Underwater Recovery Team. According to a nomination from the BAEC's Criminal Law Committee, “it is our hope that by bestowing this award to Officer Lehner, people will remember him for how he lived, not just how he died.”

“What an incredible life of public service, sacrifice and dedication,” his partner Tommy Champion said in his eulogy, noting Lehner's accomplishments as an athlete, a decorated soldier in many deployments and missions, and a decorated police and K9 officer.

A man of “integrity and conviction, Lehner worked tirelessly to serve and protect our community,” according to nominating materials. “He respected the people with whom he came into contact - victims, witnesses, and suspects alike. He used humor and humanity to diffuse tense situations. His calm, unflappable demeanor made him particularly suited to the demands of his chosen profession.”

Media Award

The Media Award is intended to recognize exceptional achievement in the print and electronic media which strengthens our system of justice under the law. The 2018 award will be presented to **Jerry Zremski** and **Derek Gee** of The Buffalo News.

Zremski has been with The News since 1984 and has been the Washington bureau chief since 2007. Gee is a photographer who started in 1999 and has been chief photographer since 2009. They are being recognized for a series of articles and photographs on Burmese immigrants in the city of Buffalo. The articles and photos introduced readers to the nearly 9,000 Burmese immigrants in the city and showcased a community which had to assimilate new laws, customs and obligations because of oppression and poverty in their native land.

“Through these articles, we can see the Constitution at work for many who didn't even know of its existence,” according to the Awards Committee. Zremski and Gee “removed the mystery behind these recent immigrants and showed the real-life effect of our justice system and the freedoms of those who live here, both citizens and non-citizens.”

Rev. A. Joseph Bissonette Pro Bono Award

The Bar Association's Rev. A. Joseph Bissonette Pro Bono Award honors the memory of Father Bissonette, who received the Liberty Bell Award posthumously in 1987. Created through the generosity of Raymond Bissonette, Father Bissonette's brother, the award recognizes and memorializes Father Bissonette's “life's work with the inner city poor and his commitment to social justice.”

This year's recipient is **Gary R. Gaffney**, who will be recognized for his “extraordinary commitment to providing pro bono legal services to those in need in our community for 34 years.” Much of this work has been devoted to representing low-income tenants facing eviction in city court through the Volunteer Lawyers Project's Attorney of the Morning program. He has also assisted with bankruptcies, divorces, real property matters, wills/estates and more. Gaffney has also served as a VLP board member for many years.

Mock Trial Award

An award will also be presented to the winning team of the 2018 High School Mock Trial Tournament. Special appreciation goes out to the following for their support of the Mock Trial Tournament:

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left to right: Louis Nucheren and Ryan Gill

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April Tax Update



By Deborah Weber & Gary Bluestein

With filing season upon us once again, in addition to the regular chaos of gathering and organizing records and receipts, tax professionals will be grappling with the new tax legislation. On December 22, 2017, President Trump signed the Tax Cuts & Job Act that, while not affecting the tax returns that are filed for 2017, will have a major impact on millions of taxpayers when they file their 2018 returns next year.

Weber



Before highlighting some of the significant changes included in this tax legislation, in the spirit of filing season, it is important to note that the extension relates to filing only; it does not relate to or extend the due date for the payment of the tax.

Bluestein

I.R.C. §6651 provides for penalties relating to delinquent filing and delinquent payment. The failure to timely file penalty accumulates at a rate of five percent per month, to a maximum penalty of 25 percent of the tax due. This penalty for failure to timely pay is half a percent per month, also for a maximum of 25 percent of the tax. In order to avoid the hefty failure-to-file penalty, and potential criminal exposure, one should never fail to file a return. The filing of an extension, assuming the return is ultimately filed by the extension date, eliminates the failure-to-file penalty but only if the tax is paid as closely as possible to the ultimate amount owed, with the extension. If the payment cannot be made with the extension, it is better to file a return without payment than not to file.

Highlights of the New Tax Bill

The new tax bill keeps the seven income tax brackets, but lowers the rates in each. These income levels will rise each year with inflation, but this will occur more slowly than in the past because increases are based on the chained consumer price index.

Additionally, the Act legislates simplification for both taxpayers and the IRS with the significant increase in the standard deduction while decreasing or removing entirely certain itemized deductions. It doubles the standard deduction while eliminating the right to claim many deductions. While keeping deductions for charitable contributions, retirement savings, student loan interest, and mortgage interest on a first money mortgage purchase, it eliminates interest on home equity line of credit, limits state and local taxes, moving

Troutman Named Co-Chair of Franklin H. Williams Judicial Commission



Troutman

Chief Judge Janet DiFiore has designated **Justice Shirley Troutman** one of two co-chairs of the Franklin H. Williams Judicial Commission, which works to promote equal participation and equal justice for minorities in the court system. The other co-chair is Justice Troy K. Webber of the First Department. Hon. Richard B. Lowe III will step down as chair, having led the Commission since December 2015.

Hon. Shirley Troutman was appointed to the Appellate Division, Fourth Department, in 2016. She previously served as a trial judge in State Supreme Court in the Eighth Judicial District. Prior to her election to State Supreme Court, she was an Erie County Court. She began her judicial career in Buffalo City Court, to which she was elected in 1994. Prior to her ascension to the bench, she served as an assistant United States attorney for the Western District of New York, an assistant

attorney general for the State of New York, and an assistant district attorney in Erie County.

Troutman is active in various professional and civic organizations, and has served as an adjunct professor at the University at Buffalo Law School, a lecturer at the New York State Judicial Institute, and a faculty member on the National Judicial Institute on Domestic Violence. A graduate of the University at Buffalo, she earned her J.D. from Albany Law School.

Hon. Troy K. Webber was elevated to the Appellate Division, First Department, in 2016. She previously sat in State Supreme Court, Bronx County-Criminal Term, and since 2009 served as an acting Surrogate in New York County. Before her 2002 election to State Supreme Court, she was a New York City Civil Court judge. She was designated an acting Supreme Court justice in 2000. Prior to her judicial career, she was a deputy bureau chief with the New York City Law Department, a senior associate at a private law firm, a law clerk to Justice William Davis and an assistant district attorney in Manhattan. [B]

expenses and entertainment. Finally, on the estate tax front, the Act doubles the estate tax deduction to \$11.2 million for single individuals and \$22.4 for married couples.

Update on Tax Enforcement

Passport Revocation

For several years, New York state has enforced collection by suspending delinquent taxpayer's driver's licenses. This appears to be a trend by many jurisdictions to restrict personal liberties in the interest of tax enforcement. Now the IRS is utilizing a tool of its own. Recently enacted I.R.C. §7345 of the Internal Revenue Code authorizes the IRS to make a referral to the State Department where there is a tax debt greater than \$50,000. Such a debt is characterized as a "seriously delinquent tax debt" under the statute. After the IRS certifies that the debt is in fact greater than \$50,000, the

Treasury will transmit certification to the Secretary of State for passport revocation. Procedures stated in the Internal Revenue Manual 5.1.12.27.7 indicate that the State Department will hold the matter for 90 days to resolve the certification issues. Enumerated ways to resolve the outstanding tax liability would be:

- Full payment of the tax;
- Entry into an installment agreement for the payment of the liability; or
- Acceptance of an offer in compromise settling the liability.

Considering the number of taxpayers who have liabilities in excess of \$50,000, there will be many who are surprised and negatively impacted by this new enforcement vehicle.

continued on page 6

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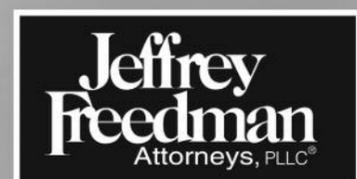
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cyberlaw: brave new e-world

By Anne F. Downey and Jessica L. Copeland



The GDPR: EU's Most Recent Privacy Regulations Will Impact US as Much as EU

The most significant change in data privacy regulation in more than two decades will go into effect on May 25, 2018. The EU General Data Protection Regulation ("GDPR" or "Regs") not only requires compliance by EU organizations but also by any non-EU organization that offers goods or services to, or monitors the behavior of, EU "data subjects" (i.e., EU residents). Failure to comply may result in significant penalties.

Many U.S. companies, including numerous law firms, will be impacted by the Regs. There is no size threshold for compliance, and smaller businesses may be surprised to learn that they are subject to them. That is because the Regs focus on the data being processed or controlled by enterprises instead of the enterprise itself. (There is an exception for organizations with fewer than 250 employees, but the exception applies only in limited circumstances.)

Specifically, the GDPR regulates the processing and holding of personal data of EU data subjects. Under the GDPR, "personal data" is defined broadly and includes the following: an individual's name, photo, email address, bank information, online identification, identification number, location data, social media information, medical information, computer IP address, and countless other items that may be used alone or in conjunction with other information to identify an individual.

Under the Regs, the Data Protection Principles require that personal data be (a) processed lawfully and transparently, (b) collected and processed only for specified and legitimate purposes, (c) limited to what is necessary, (d) accurate and up to date, (e) kept in a form permitting identification of data subjects for only so long as is necessary, and (f) processed securely.

Additionally, the Regs require consumer consent to process data, use data for profiling, or transfer data cross-border. The consent must be freely given, specific, informed, and unambiguous. Consent must be provided in an easily accessible form, without the typical terms and conditions or legalese we are accustomed to seeing. It will no longer be sufficient for websites and social media sites to generically warn users that they are consenting to the use of their personal information. Asking a user to click on a link to a lengthy terms and conditions document will be improper and pose a risk of penalties under the GDPR. Explicit consent is required for each proposed use of the personal data, such as

sharing the data with third parties and sending the user promotional emails. Significantly, data subjects must be able to withdraw their consent at any time and be informed of the right of withdrawal at the time of consenting.

U.S. entities will need to meet certain standards for protecting personal data once collected. Companies complying with existing standards such as PCI DSS, ISO 27001, and NIST may still have difficulty complying with the Regs, because these standards focus on compliance with a technical focus as opposed to the GDPR, which places its primary focus on protecting personal data of EU residents.

Entities must determine if they engage in large-scale data monitoring or large scale data processing. Such entities, as well as public authorities, must appoint a Data Protection Officer ("DPO"). However, even entities that do not engage in large-scale monitoring or processing may wish to appoint a DPO (or similar corporate privacy or information security officer) to help ensure ongoing compliance with the GDPR.

So what happens if your entity suffers a data breach? The Regs impose strict data breach notification requirements. Under the GDPR, data breaches affecting EU data subjects must be reported without undue delay, and where feasible, not later than 72 hours after becoming aware of the breach. Notification must be sent to the relevant governmental authority and, in certain cases, the individuals affected by the breach.

What are the penalties for non compliance? Under the GDPR, failure to comply may result in fines of up to four percent of an organization's annual global turnover or approximately \$24.5 million (U.S. Dollars), whichever is greater. Penalties may be imposed for a variety of non-compliance issues, including failure to keep records according to the Regs, failure to obtain customer consent as proscribed by the Regs, or failure to comply with the notification regime established by the Regs. These are just a few examples of scenarios that may trigger the imposition of penalties.

U.S. entities are already receiving requests from European business partners for a copy of their GDPR policies. While the GDPR does not come into force until May 2018, law firms and their clients need to take action as soon as possible. It should be noted that certification under the EU-U.S. Privacy Shield does not constitute compliance with the GDPR. [B]

April Tax Update

continued from page 5

Continued Criminal Prosecution for Payroll Tax Violations

Over the last several years, the IRS and the Department of Justice have emphasized payroll tax crimes as a major initiative. Under IRC Section 6672, the IRS has always actively pursued individuals who are deemed to be responsible parties in a corporation for unpaid trust fund taxes (the withheld portion of the payroll tax). Under this section, an individual who is determined to be a responsible person who willfully failed to remit the trust fund taxes is personally liable for that portion not turned over to the government.

Although I.R.C. §7202, which provides for criminal prosecution for failure to remit trust fund taxes, has always been available to the government, only in recent years has there been an emphasis on this type of prosecution. The elements in these two provisions are virtually identical. However, §7202 makes said individual guilty of a felony punishable by up to five years in prison and there have been a significant number of successful prosecutions by the government in the last two years. It is important to advise clients who have financially troubled businesses that in choosing what creditor to "stiff," the payroll taxes should be the last choice. New York sales tax would also fall into the last choice category.

Increase in Prosecutions for Evasion of Payment under IRC Section 7201

According to 26 US Code Section 7201, any person who willfully attempts to evade or defeat any tax imposed shall be guilty of a felony and, upon conviction, can be fined up to \$100,000 and imprisoned for up to five years or both. Historically, this provision was routinely used to prosecute chronic non-filers where an affirmative act demonstrated an intent to evade tax due to the non-filing of a tax return. However, this section is now increasingly becoming a basis for prosecution where a return has been filed but allegations of evasion are linked to non-payment of the tax.

In conclusion, with filing season upon us and changes to the law affecting both returns being filed and the ramifications thereof, practitioners of all kinds will be well served by familiarizing themselves with the new legislation, along with trends in enforcement affecting not only the bottom line but also elements of personal liberty in various aspects of everyday life. [B]



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SISTER CITIES PROGRAM: French Law Student Completes Internship Here

Pierre Mortier, a graduate of the law school at the University of Lille, France, recently returned home following the completion of his six-month internship with the Bar Association of Erie County, coordinated by Mark McNamara of Barclay Damon.

As part of the sister city collaboration between BAEC and the Lille Bar Association, Mortier interned for six months in a variety of law placements, including the U.S. District Court for the Western District of Western New York with Hon. Lawrence J. Vilardo; the Erie County Court with Hon. Thomas P. Franczyk; the Erie County District Attorney's Office with ADA Brian McNamara; the Legal Aid Bureau with Supervising Attorney Paul Curtin; and finally with Neighborhood Legal Services with Supervising Attorney Patricia McGrath.

"Mortier is the 20th law intern from Lille who has learned more about the way we practice law."

Mortier observed numerous court proceedings at both the federal and state level, and demonstrated a willingness to roll up his sleeves and assist with legal research and drafting.

"I was immediately impressed by Pierre's command of the English language," McGrath said. "Later I realized how quickly he grasped the nuances of procedure without any struggle. I hope that we helped him in his experience. I know he helped us."

Mortier is the 20th law intern from Lille who has learned more about the way we practice law since the 2001 establishment of the program between the Bar Associations of Erie County and Lille.

UPDATE FROM KENT

We recently heard from Edward Lewis, president of Kent Law Society, about an upcoming anniversary. The group will be celebrating the 200th anniversary of its founding. Kent Law Society is thought to be the second oldest local law society in England and is known to be older than the national Law Society based in central London. On May 18, Kent will begin a year of festivities with a dinner, at which 250 to 300 people are expected to attend.

"As we have a twinning relationship with the BAEC, I wanted to let you know that this is taking place," Lewis wrote, "and if any of your members were over in the UK at the time and wanted to attend, we still have a limited number of tickets available. It would be great to see anyone who did represent you at our esteemed event."

Anyone interested in attending should contact Roger Cruttenden at roger.cruttenden@btinternet.com. [B]

Hochul to Speak at Fundraiser



Hochul

The SSJ Sister Karen Klimczak Center for Nonviolence will hold its eleventh annual fundraising event on **Sunday, April 15** at SS. Columba-Brigid Church at 75 Hickory Street at 3:00 p.m. Former U.S. Attorney and longtime supporter of the Center **William J. Hochul, Jr.** will present "A Journey of Justice and Mercy."

Hochul will share his personal story and the ideals that led him to enter the practice of law. From his experience as a federal prosecutor, he will help attendees understand the reasons that people resort to violence and what helps them to turn away from it.

"He will inspire us with ways we as a community can lead people to live nonviolent lives," according to Vivian Ruth Waltz, director of the Center.

This group will present a special award to the Buffalo Peacemakers Gang Intervention and Outreach Program to commemorate their fifth anniversary.

"The Sister Karen Center's work with the Peacemakers has made a difference in the lives of countless youth," Waltz said. "Our staff and volunteers have continued to bring the Alternatives to Violence Project to schools, correctional facilities, and community groups. Our summer program, Camp Peaceprints, has taught over a thousand children how to resolve conflicts peacefully in their own lives."

Tickets to the fundraiser are \$25 each and can be purchased by calling 362-9688, online at sisterkarencenter.org, or at the door. [B]



Pictured above are, left to right, Patricia McGrath, NLS attorney; Mark McNamara, who coordinates the Sister Cities program for the Bar Association; Pierre Mortier of Lille, France; and Lauren Breen, NLS executive director.

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western district case notes

By Kevin M. Hogan and Sean C. McPhee



FAIR LABOR STANDARDS ACT

In *Lusk v. Serve U Brands, Inc.*, No. 17-CV-6451-MAT (Feb. 12, 2018), various delivery drivers employed by defendants brought suit under the Fair Labor Standards Act (“FLSA”) claiming that defendants failed to pay them the federally mandated minimum wage or overtime at the appropriate rate. Days later, plaintiffs moved for conditional certification of the case as a collective action under the FLSA and defendants moved to dismiss for failure to state a claim. The court first determined that plaintiffs’ minimum wage allegations were insufficient because the complaint lacked the information a finder of fact would need in order to determine plaintiffs’ rate of pay. And without that information, it was impossible to conclude that they were not paid the minimum wage in any given week.

Next, the court found that plaintiffs’ blanket allegation that they had worked in excess of 40 hours on “numerous occasions” without being paid at least one and one-half times their regular rate did not satisfy the plausibility requirement, and dismissed that claim as well. Having dismissed the FLSA claims, the court then denied as moot plaintiffs’

request for conditional certification, noting it could not certify a collective action where no plausible FLSA claim had been alleged. Finally, although plaintiffs failed to comply with the requirements for making a request for leave to amend, the court found that the interests of justice would be served by affording plaintiffs an opportunity to file a properly supported motion for leave to file an amended complaint on the condition they did so within 30 days.

FALSE CLAIMS ACT

In *United States v. Strock et al*, No. 15-CV-887-FPG (Jan. 31, 2018), plaintiff commenced this action alleging violations of the False Claims Act (“FCA”) in connection with contracts awarded to service-disabled veteran owned small businesses (“SDVOSBs”). The thrust of plaintiff’s FCA claim was that defendants had falsely certified or verified that they met the relevant statute or regulatory requirements to qualify as a SDVOSBS, and that those misrepresentations fraudulently induced plaintiff to enter into the contracts and pay for work performed. A recent Supreme Court decision, *Universal Health Services, Inc. v. United States ex rel. Escobar*, clarified that misrepresentations about compliance with statutory, regulatory or contractual requirements must be material to the government’s payment decision in order to be actionable under the FCA.

In this case, the court held that plaintiff’s complaint failed to present concrete allegations from which the court could draw the reasonable inference that defendants’ alleged falsities caused plaintiff to make the reimbursement decisions involved. The court held further that Escobar’s materiality standard applied to all of plaintiff’s claims brought under FCA § 3729(a)(1)(A), regardless of whether those claims were brought under a theory of implied false certification, express false certification, or fraudulent inducement. Because the *Escobar* decision was decided after plaintiff filed its complaint, the court held that fairness required that plaintiff be afforded a chance to amend its complaint, notwithstanding defendants’ objections to the contrary.

MOTION TO STRIKE DEFENSES

In *White v. Fein, Such & Crane, LLP*, No. 15-CV-438-LJV-HKS (Feb. 20, 2018), plaintiff filed a class action complaint alleging violations of the Fair Debt Collection

Practices Act and New York General Business Law § 349 arising from attorneys’ fees charged by defendant for legal services pertaining to mortgage foreclosure actions against plaintiffs. After defendant’s motion to dismiss was denied, plaintiffs amended their complaint and defendant served an answer to the amended complaint, which included 23 affirmative defenses. Plaintiff then moved to strike 16 of the affirmative defenses, arguing that the defenses failed to meet the specificity requirements of Fed. R. Civ. P. 8. The court first noted that motions to strike affirmative defenses are generally disfavored, but also observed that such motions should be granted where there is no question of law or fact which might allow the defense to succeed, and the plaintiff would be prejudiced by its inclusion.

The court then determined that defendant’s defense of failure to state a claim should be stricken because defendant’s motion to dismiss on that ground was previously denied, rendering the purported defense without a legal basis. However, the court denied the balance of plaintiffs’ motion because those affirmative defenses (i) were sufficiently entwined with the merits of the claims asserted by plaintiffs; (ii) had been sufficiently developed through discovery; and/or (iii) did not prejudice plaintiffs.

DISCOVERY

In *Cimato v. State Farm Fire and Casualty Co.*, No. 16-CV-94-A(Sr) (Jan. 31 2018), plaintiff sued in state court claiming breach of a homeowner’s insurance contract and seeking to enforce the appraisal provision. After the matter was removed, defendant denied plaintiff’s insurance claim. Plaintiff moved to compel disclosure of documents prepared prior to the denial of the insurance claim on the basis that the documents had been prepared in the ordinary course of business, notwithstanding defendant’s argument that the documents were privileged because they were prepared in anticipation of litigation or were attorney-client privileged communications with outside counsel.

The court held that the documents could not be deemed privileged as documents prepared in anticipation of litigation when they were prepared prior to the determination of whether to accept or reject plaintiff’s insurance claim. That fact, however, did not preclude a determination that the documents might be protected by the attorney-client

privilege, and required the court to conduct an in-camera review to determine whether they were primarily reports of an investigation of plaintiff’s claim, and therefore discoverable, or primarily of a legal character and therefore protected by the attorney-client privilege.

DISCOVERY

In *Middlesex Mutual Assurance Co. v. Britton*, No. 16-CV-814A(Sc) (Feb. 7, 2018), a diversity subrogation action involving a fire insurance policy, plaintiff moved to compel defendant’s deposition and defendant cross-moved to compel

continued on page 10



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Case Notes continued from page 8

the deposition of plaintiff's witnesses and other discovery. In opposing plaintiff's motion, defendant argued that she was entitled to priority of her depositions because they were noticed first. The court rejected that argument, noting that affording priority to the first noticed deposition was abolished from the federal rules in 1970. While the court had the discretion to determine the order of the depositions, it declined to do so and instead ordered the parties to use their good faith efforts to work out an examination schedule convenient to all, and warned that, if the parties cannot agree on such a schedule, the court likely would exercise its discretion and set a random schedule with little regard for the convenience of the parties, witnesses, or counsel. Defendant also sought to compel plaintiff to serve a bill of particulars, which the court denied because bills of particulars had been abolished from the federal rules since 1948.

MORTGAGE FORECLOSURE AND DEFAULT JUDGMENT

In *Nationstar Mortgage LLC v. Atanas*, No. 16-CV-6832-EAW (Jan. 29, 2018), plaintiff commenced an action to foreclose a mortgage and defendants failed to appear. Plaintiff then filed a motion for default judgment and a judgment of foreclosure and sale, which was denied without prejudice to the filing of a renewed motion that corrected the deficiencies identified by the court. Plaintiff timely filed the

renewed motion, which was granted in part and denied in part. Specifically, because the court found that plaintiff had now satisfied the procedural requirements for obtaining a default judgment, that request was granted.

However, notwithstanding a provision in the underlying note that permitted plaintiff to recover reasonable attorneys' fees, the court refused to award any, finding plaintiff "again failed to provide contemporaneous time records," and set forth fewer attorney and paralegal hours than the first application "for what appear[ed] to be the same work," leaving the court to "question the accuracy of counsel's recording practices." Finally, the court denied the request for entry of a judgment of foreclosure and sale without prejudice because plaintiff failed to provide invoices, receipts or other documentary support sufficient to satisfy its burden of demonstrating the amount of its damages to a reasonable certainty.

RES JUDICATA

In *U.S. v. Strader*, 15-CV-6243-FPG (Feb. 1, 2018), the United States filed a complaint to recover a student loan debt

assigned to it five years earlier. Defendant answered, admitting only that the court had jurisdiction to hear the case and that venue was proper. After plaintiff's first motion for summary judgment was denied without prejudice, plaintiff moved for summary judgment a second time. That motion was also denied and plaintiff's counsel was ordered to show cause why he should not be sanctioned for failing to comply with the court's local rules. Plaintiff then moved for summary judgment a third time, and defendant failed to oppose the motion.

Noting that the non-moving party's failure to respond to a motion for summary judgment does not itself justify granting summary judgment, the court then denied the motion based on the doctrine of *res judicata* because a valid final judgment was entered against defendant 25 years ago for the same indebtedness. And while plaintiff was not the holder of the underlying note at the time the prior judgment was entered, as the successor-in-interest, there was sufficient privity for purposes of *res judicata*. Accordingly, the court held that plaintiff's claim was barred, and the action was dismissed with prejudice. [B]

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in the public service

By Ashley L. Springsteen



I am proud to join the Legal Aid Bureau of Buffalo team for the upcoming year as an Equal Justice Works Fellow providing legal services to immigrant and refugee communities in western New York as part of the Legal Aid Bureau's Coordinated Refugee/Asylee Legal Services Project (CRLS).

I was selected as one of twelve Equal Justice Works legal fellows to participate in the New York State Family Security Project (NYSFSP), which focuses on fostering family security and community education through the delivery of high-quality legal services to immigrant families across the state. NYSFSP is part of a broader state initiative known as Liberty Defense Project, a state-wide initiative announced by Governor Andrew M. Cuomo last March in response to the surge in demand for help that is overwhelming non-profit organizations serving immigrants.

This important work is also made possible by a generous \$9,000 contribution to the Legal

Aid Bureau from the Reverend A. Joseph Bissonette Memorial Fund. This generosity will help enhance the overall quality and reach of our services to immigrant and refugee communities in western New York.

"Immigrants in the United States face a maze of complex law and policy that govern even the most fundamental aspects of their lives."

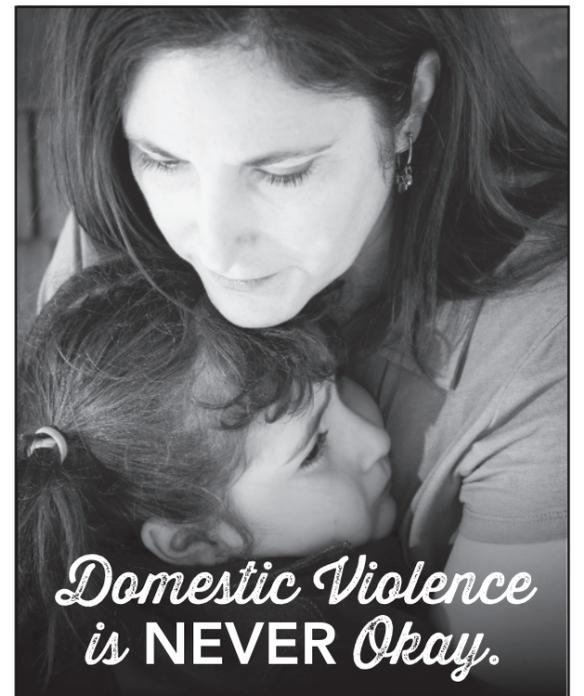
As of 2017, immigrants and their U.S. born children numbered approximately 86.4 million people, or 27 percent of the overall U.S. population. More than 4.4 million immigrants live in New York, and more than 1.2 million live outside of New York City. Approximately two million people, 45 percent of New York's immigrants, are not naturalized U.S. citizens, and therefore subject to removal from the country under certain circumstances.

Immigrants in the United States face a maze of complex law and policy that govern even the most fundamental aspects of their lives. Moreover, many of these individuals have to overcome

significant language and cultural barriers to access basic legal services that could ultimately determine their future in the United States. Helping individuals to develop a better understanding of their legal rights will undoubtedly improve the safety and security of immigrant New Yorkers, their families and our communities as a whole.

"New York continues to take action to deliver the protection and opportunities to immigrant men and woman that they deserve," according to Governor Andrew M. Cuomo. "These experts will help provide the legal services immigrant families need, while reaffirming our commitment to justice and equal rights for everyone."

My role as Legal Aid's in-house immigration attorney will act to complement the variety of legal services currently offered by the organization. During my fellowship, I will be helping immigrants obtain citizenship, conducting community outreach and education, and organizing pro bono training and placement. I am eager to play a critical role in advancing the mission of the Legal Aid Bureau and to provide holistic advocacy for clients. [B]



Domestic Violence is NEVER Okay.

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James J. Kelleher

death and taxes

By Peter J. and Jillian E. Brevorka



Late Allocation of the Increased GST Exemption

The 2017 Tax Reform Act contains what appears to be an opportunity to apply the increased GST exemption to existing trusts which at the time of creation exceeded the GST exemption.

The new language in Internal Revenue Code ("IRC") § 2010(c)(3)(C) states: *In the case of estates of decedents dying or gifts made after December 31, 2017, and before January 1, 2026, subparagraph (A) shall be applied by substituting "\$10,000,000" for "\$5,000,000".* [Emphasis Supplied.]

The "and before January 1, 2026," language would appear to make the expansion of the GST exemption apply to all trusts now in existence.

IRC §2631(c), which was not changed by the new law, states: "For purposes of subsection (a), the GST exemption amount for any calendar year shall be equal to the basic exclusion amount under section 2010(c) for such calendar year."

IRC § 2631(a) states: "For purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor."

Some commentators think this is a loophole which will be closed by correcting legislation. But since the Democrats currently appear disinclined to help fix the errors in the 2017 Act to which they were not a party, the problem may not be cured.

This apparent windfall has been discussed on the American College of Trust and Estate Counsel (ACTEC) listserv, and below are some of the comments:

"The grant of additional GST exemption,

including for late allocations, seems wholly intended by Congress. See pp. 313-14 of the H.R. 1 conference report, which correctly states that GST exemption is equal to the (basic) estate tax exemption amount, and that allocations have the effect of reducing the GST tax rate on 'transferred' (nota bene past tense) property."

"Staff of the Joint Committee on Taxation, 'General Explanation of Tax Legislation Enacted in 1998, Part Two: Internal Revenue Service Restructuring and Reform Act of 1998,' p. 169-170, which states clearly that indexing increases in the GST exemption can be applied to prior transfers by a late allocation. There is no logical reason why this same analysis does not apply to other increases in the GST exemption. Indeed, it would be tricky to figure out how to determine what part of one's GST exemption is attributable to these increases and what part to indexing."

"It should be noted that late allocation of the GST exemption may be made under IRC §2642(b)(3), without IRS approval."

It should be noted that late allocation of the GST exemption may be made under IRC §2642(b)(3), without IRS approval. If late allocation of GST exemption is made under §2642(b)(3), the trust has to be valued at current values. But that may be small cost if the trust can be made GST exempt.

Fiduciary Income Tax: Maximizing Deductibility of Fees and Commissions

The new section 67(g) of the Code disallows "miscellaneous" deductions subject to the two percent floor for all tax years beginning in 2018. Attorney fees and executor commissions for an estate are deductible under section 67(e) as costs which are paid or incurred in connection with the administration of the estate which would not have been incurred if the property were not held in the estate.

Prior to 2018, in the final year of an estate, if the deductions for things such as attorney fees and executor commissions exceed taxable income, those excess deductions could be distributed to the residuary beneficiaries of the estate, and the beneficiaries could claim those excess deductions as miscellaneous deductions subject to the two percent floor on their personal income tax returns.

But with the disallowance of miscellaneous deductions under the new section 67(g), the use of such excess deductions is lost.

As the result of the increases in the estate tax exemptions for the federal and the New York state estate taxes, the only place where legal fees and executor commissions will get much tax mileage in many estates will be on the estate's income tax return. But with the loss of the miscellaneous deduction by estate beneficiaries, the fees and commissions claimed as income tax deductions in the final year of the estate may lose their impact if they exceed taxable income in that final year.

There are two solutions to this problem if the estate assets have increased in value during the estate administration.

One solution is to sell appreciated assets to a residuary beneficiary. The estate would realize income on the sale, and the fees and commissions could be claimed as deductions

continued on page 14

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Smithers Down Under

By Jonathan Smithers, Chief Executive Officer
Law Council of Australia



My journey through the intricacies of immersion into a new and different culture has been an interesting one. Many perceive Australia to be Westernized and Anglicized. Perhaps 50 years ago, that was more true than it is now. Visitors without unconscious bias will find a vibrant and multicultural nation where over 50 percent of the population were either born or have at least one parent born abroad. In the last decade or two, the immigration net has widened to the East and Far East. Getting in and staying in is still not easy, as there are high hurdles over which to jump, but the economically active have helped to build and stabilize the economy and bring new skills to it. As with many things, the gain does not come without some pain. There are always those within the populace who dislike the effects of that change, whether it be the disappearance of old industries and the replacement with new technologies, possibly in different geographical locations, which cause social upheaval. It is also intricately mixed up with politics, as immigration always is.

In Australia, of course there is also very significant heritage and history. Captain Cook explored and for the first time mapped the whole of the Australian East coast in 1770. Contrary to popular belief, he did not commence colonization of the land. That came some years later when Captain Arthur Philip sailed into what is now Sydney Harbour on 26 January 1788 with the First Fleet, comprising 11 ships and some 1420 souls, having sailed 17,000 nautical miles. Whilst the colonizers/invasers (call them what you will, there are many suggestions), declared the land Terra Nullius - that is, owned by no one and therefore to be claimed. It had in fact been inhabited for as much as 40,000 years, and quite probably longer by a number of aboriginal groups and tribes. It is said in fact to have been the oldest continuous occupation of land known in the world.

Much has been written, and will continue to be, on the treatment of indigenous peoples, and by today's standards the gross mistreatment of them, which continued for gener-

ations, and some say still does. Over the last few decades, there have been great strides towards reconciliation and acknowledgement but there is still a very long way to go and, I suspect, few understand what the endpoint might even look like as there are so many different points of view.

There is an annual event which brings many of these issues to the fore, that is the celebration of a public holiday, Australia Day, the date being the anniversary of the landing of the First Fleet. I understand from colleagues that these arguments are growing stronger year on year. Senior figures are now questioning whether holding to this date is sustainable, as some feel that celebrating what is then referred to as 'invasion day' is not only culturally insensitive but insulting and continues to embed prejudice, demonstrating that true reconciliation is still on the distant horizon.

When asked recently about moving the date, the Prime Minister Malcolm Turnbull was dismissive saying that the celebration was for all Australians regardless of their racial heritage. I recently heard a former Prime Minister, Kevin Rudd, being questioned on the same subject. He sidestepped the answer (clearly a political minefield) by saying that he would listen to the leaders of the aboriginal community, who said that an argument over the precise date was a side track to the real issues of inequality between indigenous and nonindigenous peoples, including higher incarceration rates, greater inequality, lower life expectancy and so on.

After the Sandy Hook shootings in 2012 and following the lead of your then-president, I wrote on the issue of gun control. Following that, I had an interesting correspondence with a number of your members on this most controversial of subjects. The Marjory Stoneman Douglas High School shooting has once again raised these issues but I wanted to use this opportunity to inform from my perception of the Australian perspective, formed substantially following a mass shooting here in 1996, which I know has been mentioned in the U.S. media and is referred to as the Port Arthur massacre.

It occurred in 1996 when a young man murdered 35 innocent bystanders at a tourist attraction in Tasmania. Port Arthur is part of a restored 19th century penal colony including prison buildings where many transported prisoners were kept. The then-Prime Minister, John Howard, introduced very stringent gun laws which remain to this day and are said to have been instrumental in preventing a repetition.

One other point struck me, which was the almost total anonymity of the gunman. He was captured by police and remains in jail. Rather than the notoriety he might have expected, one has to search the Internet to find anything about him. His name is simply not spoken. Coincidentally, I visited that site recently and, whilst the guide mentioned the incident, it was clear that his details were taboo. No blaze of glory for that criminal.

Whether this is important or instrumental is not for me to judge but one reads that mass shootings have enabled disaffected and troubled individuals to gain their 15 minutes of fame. Perhaps ensuring that it is denied may make at least one potential perpetrator reconsider.

"One other point struck me, which was the almost total anonymity of the gunman."

Princeton Professor To Speak at Canisius



George

The Canisius College Frank G. Raichle Lecture Series on Law in American Society will welcome **Robert P. George** to campus on **Thursday, April 12** at 7:15 p.m. in the Grupp Fireside Lounge. The event, "Constitutional Structures, Civic Virtue, and Political Culture," is free and open to the public.

George is the McCormick Professor of Jurisprudence and director of the James Madison Program in American Ideals and Institutions at Princeton University. He has served as Chairman of the United States Commission on International Religious Freedom. George has also served on the President's Council on Bioethics, as a presidential appointee to the United States Commission on Civil Rights, and as the U.S. member of UNESCO's World Commission on the Ethics of Science and Technology. He is a former Judicial Fellow at the Supreme Court of the United States, where he received the Justice Tom C. Clark Award.

For further information, call 888-2695.

[B]

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Death & Taxes continued from page 12

against that income. The beneficiary would get a stepped-up basis on the assets he or she purchased, and upon distribution of the estate the beneficiary would get back much, if not all, of the cash paid into the estate to make the purchase.

If the beneficiary lacks the cash to make the purchase, the assets could be sold on the market, the gains offset by the deductions, and the cash distributed to the beneficiary.

Another solution would be to have the executor could make the election under Section 643(e)(3) to recognize gain on distribution of the estate assets. That gain could then be offset by the deductible fees and commissions. The beneficiaries would get a stepped up basis on the assets they received. One drawback of this solution, however, is that the election to recognize gain must apply to all of the assets distributed. Therefore, if gains exceed deductions the excess gains will be distributed to the beneficiaries as "phantom income," since they will not receive cash with which to pay the tax on the gains.

Matter of JP Morgan Chase Bank, N.A., 2018 NY Slip Op 00775 (4th Dept., 2018)

In this case, the trustee had filed a proceeding for judicial settlement of its account and fixing of attorney fees. Objections to the account were filed, but dismissed by the Surrogate. In a previous appeal involving the subject trust, the Fourth Department had affirmed the dismissal of objections to the account and remitted to the Surrogate to fix attorney fees.

The Surrogate fixed attorney fees and awarded trustee commissions under SCPA 2309. Objectants appealed again.

The Appellate Division held that approval of requested attorney fees by the Surrogate without consideration of the factors mentioned in *Matter of Potts* (213 A.D. 39) – time spent, difficulties involved, professional standing of counsel and results obtained – was improper. Since the Surrogate failed to make any findings in that regard, the Appellate Division was unable to review whether the Surrogate's determination of attorney fees was reasonable.

Therefore, the award of legal fees was vacated, and the matter remanded for a determination of whether the fees requested were reasonable.

As to the award of trustee commissions, the objectants claimed that the Surrogate did not consider the *McDonald* factors in awarding commissions to the corporate trustee. *Matter of McDonald*, 139 Misc.3d 577 (Surr. Ct., 1988) held that a determination of "reasonable" commissions under SPCA 2312, required consideration of factors similar to those set out in *Matter of Potts*. Commission schedules adopted by a corporate trustee are not binding upon a court in determining "reasonable" commissions.

But in the current case, the Surrogate awarded statutory commissions under SCPA 2309. That section awards commissions, without regard to "reasonableness." Therefore, held the Appellate Division, it was not necessary for the Surrogate to address the *McDonald* factors. [B]

LEGAL SERVICES CORPORATION

Notice of Availability of Grant Funds for Calendar Year 2019

The Legal Services Corporation (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2019. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal, will be available from <http://www.grants.lsc.gov/grants-grantee-resources> during the week of April 9, 2018. In accordance with LSC's multi-year funding policy, grants are available for only specified service areas. LSC publishes the list of service areas for which grants are available and the service area descriptions at <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas>.

Applicants must file a Notice of Intent to Compete (NJC) and the grant proposal through LSC's online application system in order to participate in the grants process. The online application system will be available at <https://lscgrants.lsc.gov/EasyGrants> Web LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleContent&Page=Login during the week of April 9, 2018.

Please visit <http://www.grants.lsc.gov/grants-granteeresources> for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov. [B]

Daemen's Paralegal Program Hosts Notary Test Preparation

Daemen's Paralegal Studies program is hosting a free test preparation for the notary public test. Open to the public, it will be held on Saturday, April 21 from 10:00 a.m. until 1:00 p.m. at Daemen College's Business Building, Room 101. All are welcome but participants must RSVP to paralegal@daemen.edu with name, email address(es), and phone number. Study materials and practice tests will be provided to all participants. The three-hour class will be taught by BAEC member Margaret Phillips, an assistant professor and director of the Paralegal Studies program.

The program was recently approved by the American Bar Association, making it one of only two programs in western New York with ABA approval. Students can obtain a bachelor of science degree in Paralegal Studies or a 21-credit certificate in Paralegal Studies (for students who already have a bachelor's degree in any subject - at a reduced price of \$350 per credit). [B]

Career Opportunities

Each week, the BAEC sends out an email listing current job openings for attorneys in western New York.

If you're an employer seeking qualified candidates, consider listing your openings in this well-read e-newsletter, which is distributed to approximately 3,400 local lawyers. Listings cost \$50 and include posting the position on our website for 30 days.

Contact Dimitri Malliaris at 852-8687 or dmalliaris@eriebar.org for further information or to post a current opening. [B]

In Memoriam



"To live in the hearts we leave behind is not to die."

~ Thomas Campbell

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.

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Bloom's Artwork to Help "Protect Winters"



Bloom

BAEC member **Eric A. Bloom** of Barclay Damon LLP is selling his artwork to raise funds for Protect Our Winters (POW), a non-profit environmental group that works to raise awareness of climate change through community-based projects, advocacy, and educational initiatives. POW mobilizes members of the snow sports community to help achieve this.

An avid skier, Bloom has skied on several continents and locally in Ellicottville for many years. He and his wife, former BAEC President Laurie Styka Bloom, have organized skiing outings for BAEC members. Bloom's winter landscapes were well received by friends and he was encouraged to sell prints of them.

"I decided that I would try, in my small way, to contribute to the fight against climate change by selling prints and cards and donating the net proceeds to Protect Our Winters," Bloom said.

For further information or to order prints, please contact Eric at EBloom@BarclayDamon.com. [B]

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

The Foundation gratefully acknowledges the following contributions:

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Bench & Bar continued from page 3



Hughes

Thomas B. Hughes has joined Lippes Mathias Wexler Friedman LLP as an associate in its corporate & securities practice group. He is also a member of the firm's asset receivable management & consumer financial services practice team. A veteran of the United States Air Force, he served as an intelligence analyst during Operation Iraqi Freedom. Hughes is a cum laude graduate of the University at Buffalo Law School and received his J.D. from St. John's University School of Law.



Goldberg

Ari M. Goldberg and **Ethan S. Notarius** have joined Colucci & Gallaher, PC as associates. Goldberg focuses on general litigation matters at the firm. A cum laude graduate of the University at Buffalo, he received his J.D., cum laude, from its Law School. He served as executive editor of the Buffalo Law Review and also won best brief, along with the George Kannar Award for best overall appellate advocate. Goldberg serves on the board of the Law Alumni's GOLD group and as secretary of the Buffalo Commons Charter School board.



Notarius

Notarius concentrates on litigation matters and primarily focuses on the defense of products liability actions. A magna cum laude graduate of SUNY

College of Environmental Science and Forestry, Notarius received his law degree from the University at Buffalo Law School, where he held a legal research and writing fellowship and served as editor-in-chief of the Buffalo Environmental Law Journal. He currently serves on the board of directors for the Lupus Alliance of Upstate New York.



Wischerath



Golba



Basinski

Melissa D. Wischerath, **Taylor Golba** and **Alexander E. Basinski** have joined Lipsitz Green Scime Cambria as associates. Wischerath practices in the personal injury department. While practicing in Oregon, she was recognized for her pro bono work and commitment to the disenfranchised. A graduate of Fordham University, she received her J.D. from the University at Buffalo Law School.

Golba practices in the personal injury department. A graduate of the University at Buffalo, he received his J.D., cum laude, from its Law School. Golba was the recipient of the Jacob D. Hyman Scholarship and was a competitor on the Law School's trial team.

Basinski practices in the criminal defense trials and appeals department. He also focuses on First Amendment law and land use and zoning issues. A graduate of Canisius College, Basinski received his J.D. from the University at Buffalo Law School. [B]

Immigration Symposium Scheduled by Law Librarian Group

"Give Us Your Tired, Your Poor: Or Not" is the title of a symposium to be held on **Friday, April 27** from 10:00 a.m. until 4:00 p.m. at the Syracuse University College of Law Library, MacNaughton Collaboratory, Room 130. The event is sponsored by the Association of Law Libraries of Upstate New York. Further details and registration can be found under Events at www.alluny.org

The symposium will cover the latest developments in immigration law, including refugee assistance, sanctuary cities, the border wall, ICE vetting software, and more. The United States has always been referred to as a "melting pot," since we have historically been a welcome port for immigrants fleeing war zones, poverty, famine, and religious or political persecution. We have also been a haven for both established scholars and young people seeking world-class educations.

"Current and developing policies are threatening to change the principles of our founding fathers and what has

made this country diverse and worldly," according to a statement from the Association of Law Libraries.

"How can we, as professionals (librarians, attorneys, counselors, etc.) help? We can provide services to these individuals in a variety of forms such as guidance with legal issues or referrals for needed services. We can prepare bibliographies for resettlement groups and assist with public meetings, to name just a few. With knowledge and familiarity of the issues faced daily by immigrants and refugees, our ability to assist increases."

Speakers at the symposium include professor **Rick Su** of the University at Buffalo School of Law; **Wedade Abdallah** of the Immigration Unit at the Legal Aid Society of Rochester; professors **Sarah Lamdan** and **Yasmin Sokkar Harker** of the City University of New York; and **Felicia Castricone** of the Refugee Resettlement Program, Catholic Charities of Onondaga County. [B]

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No Longer “Desperate and Drinking”

As far back as I can remember, I felt different. I began drinking at 14 to fit in and felt sure alcohol was the answer to what was wrong with me.

Drinking one night a week, I excelled academically. By the end of college, I drank Wednesday through Saturday. I vowed a new start at law school. But classes were tedious. The first year “partyers” found each other. We threw Jim Jones parties for our classmates and drank grain alcohol. By third year, we had our John Belushi memorials alone. I told myself these binges were innocent release but I knew there was something wrong with the way I drank. Other students and their friends were not having accidents or getting DWIs. We knew these incidents could affect our future licenses.

Free of law school pressure and companions, I drank hard weekends my first five years of practice. The pressure increased the more I drank. Beer worked too slowly. I switched to martinis – “no waiting.” I drank to obliterate the pressure and conflict, so I could work harder and win for my clients.

I stopped volunteering at church. I would not donate my alcohol-tainted blood to the Red Cross. I was too hungover

to ride my bike or make morning plans. I showed up late to family events and missed wakes and funerals I felt obligated to attend. My wife could not reserve weekend dates. I had to make up work for unproductive time spent hungover.

I came to hate my practice and was desperate not to lose it. I blamed clients, lawyers and judges for the way I felt. My dispirited wife harangued me. I knew I’d drown if she left me. I could not stop drinking. I could not refrain from taking a drink. I could not prevent the succeeding drinks until there was none left, I had no more money or I passed out.

The guilt and remorse came as sure as day followed night. I was killing myself. I bought more life insurance! I could no longer cope with life or work. I was out of ideas...I was helpless.

I knew about the Lawyers Helping Lawyers group from this Bulletin. Maybe these lawyers would help me.

I walked into a room of healthy lawyers with happy marriages and productive practices. They related their own suf-

fering. It had been much like mine. They stated what they did, how they got better. I determined to trust that I could regain my spirit and health. If I talked to them, listened to them, I could avoid alcohol one day at a time.

I have not sworn off alcohol. I could never stop drinking with that method before. Instead, I look forward to each day and work to behave the way I was taught to do.

People are nicer to me now. My wife no longer hates me. Angry lawyers and judges still hurt themselves but I don’t engage their anger. I’m alcoholic. I must leave hate, scorn, jealousy and more to those more qualified to handle it. I am left with peace and share it willingly with clients, colleagues, family and my many friends in recovery.

Today, I’m happy. Something has changed. It began when I took up my last ounce of love for the world and walked into that meeting of Lawyers Helping Lawyers.

Editor’s note: *If you or a colleague are struggling with substance abuse, help is readily available. Call 852-1777 for completely confidential assistance.*

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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 on a weekly basis to share stories and fellowship. The group meets every Friday (except holidays). See the calendar on page 20 for meeting dates, times and locations.

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. Lukasik at 913-6309 or danieltlukasik@gmail.com. All calls are strictly confidential. We invite you to join us and share your story.

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NEW

Canadian Cottage: What's Old and What's New

Product Code 2296

1.0 CLE credit: Areas of Professional Practice

Presented on January 17, 2018

Available on CD, DVD and ON DEMAND at eriebar.org

CD or DVD: \$30 BAEC Member, \$40 Non-Member

ON DEMAND: \$40 Member (Use PROMO CODE: member2017), \$50 Non-Member

Presented by Richard S. Halinda of Richard S. Halinda Law Co. U.S. attorneys should be aware of the Canadian tax consequences related to U.S. clients buying, selling, and holding Canadian property as well as consequences of owning Canadian property at death. Learn the "deeming" rules which require U.S. residents to file Canadian tax returns and pay capital gains tax in the case of family transfers and in the case of death. Avoid penalties and interest for failure to file or on time. Learn of new taxes and new filings that are required of U.S. residents. Understand how ancillary estate proceedings are handled in Ontario. This program is useful and informative for the U.S. attorney who wants to understand how certain events can trigger Canadian tax consequences with respect to the holding of Canadian property for the benefit of your clients. It also includes a review of both existing practices and new developments that are applicable to U.S. clients.

This lecture covers the following topics:

- Procedures in transfers of Canadian property
- Procedures on ancillary probate proceedings in Ontario
- Canadian taxes applicable to transfers and dispositions
- Estate planning techniques
- Use of trusts and U.S. resident corporations
- Application of new Land Speculation Tax
- Filing requirements by U.S. resident corporations in Canada
- Filing requirements by owners of U.S. resident corporations in Canada
- Tax consequences of gifting, death and divorce
- Capital gains tax and the U.S. – Canada Tax Treaty

NEW

Case Law Update in Erie County Surrogate's Court

Product Code 2297

1.0 CLE credit: 1.0 Areas of Professional Practice

Presented on January 18, 2018

Available on CD, DVD and ON DEMAND at eriebar.org

CD: \$30 BAEC Member, \$40 Non-Member

ON DEMAND: \$40 BAEC Member (Use PROMO CODE: member2017), \$50 Non-Member

Presented by Joseph A. Shifflett, Chief Court Attorney, Erie County Surrogate's Court, this program covers important case decisions over the past year from Erie County Surrogate's Court, as well as touching upon significant decisions in surrogate's court practice from other New York courts.

NEW

Cross Examination of the Arresting Officer and Breath Test Operator in DWI Cases

Product Code 2298

2.0 CLE credits: Skills

Presented on January 23, 2018

Available on CD, DVD and ON DEMAND at eriebar.org

CD or DVD: \$55 BAEC Member, \$90 Non-Member

ON DEMAND: \$60 Member (Use PROMO CODE: member2017), \$100 Non-Member

This program is presented by Criminal Law Chair Michael Anthony Rossi and Co-chair Nicholas Michael Rossi.

NEW

Court Certified Article 81 Training

Product Code 2289

7.0 CLE credits: 1.5 Ethics, 4.0 Areas of Professional Practice, 1.5 Skills

Presented on October 20, 2017

Available on CD, DVD and ON DEMAND at eriebar.org

CD or DVD: \$125 BAEC Member, \$170 Non-Member

ON DEMAND: \$130 Member (Use PROMO CODE: member2017), \$180 Non-Member

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

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

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Admissibility of Medical Records at Trial: The Fundamentals

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1.0 CLE credit: Skills • CD

Hon. John M. Curran, Associate Justice of the Appellate Division, Fourth Department, presents this informative program.

Deposition Basics in Personal Injury Litigation

\$55 BAEC Members, \$90 Non-Members

Product Code 2261

2.0 CLE credits: Areas of Professional Practice • CD

Hear from highly knowledgeable presenters, Michael Chmiel and Ashley Trank, on this subject.

Lawyers, Cloud & Mobile Computing, and Ethics

\$30 BAEC Members, \$40 Non-Members

Product Code 2247

1.0 CLE credit: 0.5 Ethics, 0.5 Law Practice Management • CD or DVD

This seminar addresses the effects and ethical implications of the use of internet-based and mobile computing by attorneys in their law practices. The introduction consists of a broad overview of the concepts, including mobile computing, cloud computing and virtual law forms. Statistics regarding the broad-scale adoption of these technologies by the public and lawyers is also provided. Next, the discussion focuses on the ways that lawyers are using these technologies and the advantages of doing so. Ethical implications presented when lawyers use these tools are analyzed, and recommendations are given regarding best practices.

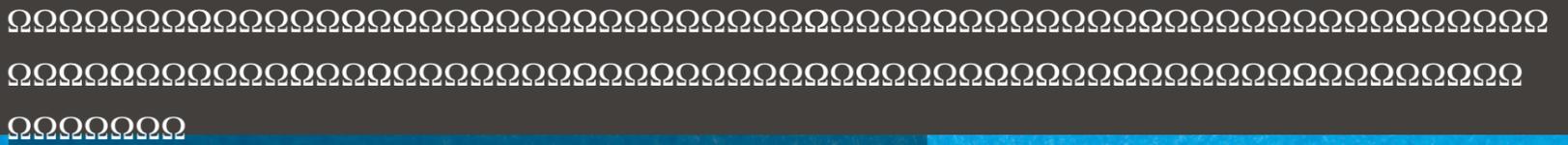
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<p>MONDAY 2</p> <p>Professional Ethics Committee 12:15 p.m. - Board Room Joseph V. McCarthy, Chair</p>	<p>WEDNESDAY 11</p> <p>Intellectual Property, Computer & Entertainment Law Committee 8:00 a.m. - Towne Restaurant, 186 Allen Street Jordan L. Walbesser, Chair</p>	<p>WEDNESDAY 18</p> <p>Foundation Board Meeting 8:00 a.m. - Board Room Stephen L. Yonaty, President</p>	<p>SATURDAY 21</p> <p>President's Ball 7:00 - 10:00 p.m - Buffalo Club Order tickets @ eriebar.org</p>
<p>TUESDAY 3</p> <p>Board of Directors 8:00 a.m. - Board Room Melinda G. Disare, President</p>	<p>THURSDAY 12</p> <p>Committee on Eminent Domain & Tax Certiorari 12:15 p.m. - Board Room Mark R. McNamara, Chair</p>	<p>THURSDAY 19</p> <p>Committee on Veterans' & Service Members' Legal Issues Noon - Brennan Room Jeffrey E. Marion, Chair</p>	<p>TUESDAY 24</p> <p>Elder Law Committee 12:15p.m. - Board Room Edward C. Robinson, Chair</p>
<p>WEDNESDAY 4</p> <p>Human Rights Committee 12:15 p.m. - Brennan Room Sharon Nosenchuck, Chair</p>	<p>FRIDAY 13</p> <p>Committee for the Disabled 12:15 p.m. - Board Room Christopher J. Grover, Chair</p>	<p>THURSDAY 19</p> <p>Alternative Dispute Resolution Committee 12:15 p.m. - Board Room Bridget M. O'Connell, Chair</p>	<p>WEDNESDAY 25</p> <p>Justice Courts Committee 12:15p.m. - Board Room Michael H. Kooshoian, Chair</p>
<p>THURSDAY 5</p> <p>Negligence Committee 12:15 p.m. - Adelbert Moot CLE Center Duane D. Schoonmaker, Chair</p>	<p>TUESDAY 17</p> <p>Board of Directors 8:00 a.m. - Board Room Melinda G. Disare, President</p>	<p>FRIDAY 20</p> <p>Young Lawyers Committee 12:15 p.m. - Board Room Katie M. Ireland & Aaron J. Aisen, Co-Chairs Committee to Assist Lawyers with Depression 12:30 p.m. - Brennan Room Daniel T. Lukasik, Chair</p>	<p>THURSDAY 26</p> <p>Surrogate's Court Committee 12:00 p.m. - Adelbert Moot CLE Center Victoria L. D'Angelo, Chair</p>
<p>FRIDAY 6</p> <p>Commercial & Bankruptcy Law Committee 12:15 p.m. - Board Room Angela Z. Miller, Chair</p>	<p>TUESDAY 10</p> <p>Real Property Law Committee 12:15 p.m. - Adelbert Moot CLE Center Nicole E. Fenz, Chair</p>	<p>FRIDAY 20</p> <p>Labor Law Committee 12:15p.m. - Brennan Room Michael E. Hickey, Chair</p>	<p>FRIDAY 27</p> <p>Committee to Assist Lawyers with Depression 12:30 p.m. - Brennan Room Daniel T. Lukasik, Chair</p>

