THE SARATOGA COUNTY BAR ASSOCIATION

Serving the Interests of Justice

LAW NOTES

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TORTS AND CIVIL PRACTICE: SELECTED CASES FROM THE APPELLATE DIVISION, 3RD DEPARTMENT

TIMOTHY J. HIGGINS, ESQ.

EMPLOYER'S THIRD-PARTY LIABILITY FOR "GRAVE INJURY"

Barclay v. Techno-Design, Inc.
(Devine, J., 2/19/15)

Plaintiff sustained serious arm and hand injuries when, allegedly at the direction of his employer, he reached into a food processing machine to adjust nozzles. He filed a product liability suit against the manufacturer of the machine; and that defendant sued plaintiff's employer for contribution and indemnification. Under Workers' Compensation Law § 11, such a third-party claim against plaintiff's employer requires the defendant to show plaintiff suffered a "grave injury", about which Supreme Court (Giardino, J., Fulton Co.) found a question of fact, and denied the employer's motion to dismiss. The Third Department reversed and dismissed the third-party suit, finding that plaintiff's injury (which included a 90% loss of use of the hand and 60% loss of use of the fingers due to dysfunction of the middle, ring and pinky fingers) did not meet the "grave" standard at issue: "permanent and total loss of use or amputation of an arm, leg, hand or foot".

DISCOVERY OVERSIGHT LEADS TO REJECTION OF WITNESS AFFIDAVIT

Epps v. Bibicoff
(Peters, P.J., 1/22/15)

Plaintiff alleged a shoulder injury when he was struck by a slate tile that fell off the roof of the rental property next to his residence. The defendant property owner moved for summary judgment claiming, among other things, lack of notice that the roof was in a dangerous condition. Supreme Court (Buchanan, J., Schenectady Co.) granted the motion; refusing to consider the affidavit of plaintiff's wife, who claimed to have "made multiple complaints to defendants regarding the state of the roof". Affirming, the Third Department found no fault with the trial court's exclusion of the wife's affidavit because she had not been identified as a 'notice' witness during discovery and plaintiff provided no reasonable excuse for such failure.

OUT-OF-POSSESSION LANDLORD LIABILITY

Miller v. Genoa AG Center, Inc.
(Devine, J., 1/22/15)

The general rule in New York is that an out-of-possession landlord will not be held responsible for dangerous conditions on leased premises once the tenant is using the property. One exception to the general rule; when the hazard giving rise to the injury was affirmatively created by the landlord; came into play here as Supreme Court (Rumsey, J., Tompkins Co.) denied the defendant's motion for summary judgment. Plaintiff's decedent was employed by the tenant; which operated a propane tank refinishing business in the defendant's building. A propane leak led to an explosion which severely burned Mr. Miller and ultimately caused his death. The Third Department affirmed denial of the motion for summary judgment, noting plaintiff's proof that the fatal explosion was most likely caused by an electrical spark from an exhaust fan motor or a lighting source; both of which were installed by the defendant prior to the tenant's occupation of the building.

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TORTS AND CIVIL PRACTICE, CONTINUED...

(Continued from page 1)

Feuerherm v. Grodinsky
(Egan, Jr., J., 1/29/15)

Defendant's rental property was a 3-story duplex that contained 7 bedrooms, one of which faced the rear of the premises and provided access (by climbing out a window) to a portion of the roof. Plaintiff left a bar across the street from the rental property at about 3:00 a.m., and was found about 5 hours later on the ground in the backyard; apparently injured in a fall from the roof. Supreme Court (Rumsey, J., Cortland Co.) granted the out-of-possession landlord's motion for summary judgment upon a showing that defendant did not create and had no knowledge of the allegedly hazardous condition; the foreseeable use of the unprotected section of roof by some tenants "to hang out or smoke". The Third Department affirmed, concluding no violation by the defendant of the state's Property Maintenance Code's requirement for railings or guards because the roof was not being used for "living, sleeping, eating or cooking".

MOTOR VEHICLE LIABILITY

Wallace v. Barody
(Garry, J., 1/29/15)

Defendant was driving through an intersection when her vehicle struck and killed a pedestrian who was crossing against the light but in a crosswalk. After concluding that decedent "darted" suddenly into the path of the defendant's vehicle; making the collision unavoidable; Supreme Court (Ferradino, J., Saratoga Co.) granted summary judgment dismissing the action, and was affirmed by the Third Department. Defendant testified that she was travelling at about 30 mph (below the posted speed limit), and defendant's failure to sound her car's horn before impact did not violate the statutory duty to do so "when necessary" in light of the uncontradicted evidence that defendant's view of the pedestrian was blocked by a cargo van in the adjacent lane and that there was no time to give warning before the moment of impact.

Smith v. Allen
(Peters, P.J., 1/22/15)

Plaintiff was a passenger in the defendant Boutelle's truck, and was seriously hurt when she was struck by a deer that; having first been hit by the defendant Allen's vehicle, was propelled into the air, and then crashed through Boutelle's windshield. Supreme Court (Nolan, J., Saratoga Co.) granted both defendants motions for summary judgment, based in part on evidence that neither driver was speeding or distracted and that neither operator saw the deer until it came into contact with their respective vehicles. Affirming, the Third Department rejected the affidavit of plaintiff's accident reconstruction expert as "of questionable probative value" due to the absence of calculations supporting his conclusion that the defendants had sufficient time to react and avoid hitting the deer.

Rouse-Harris v. City of Schenectady
(Clark, J., 1/22/15)

Plaintiff was hurt when her car was struck by a police cruiser. Defendant moved for summary judgment relying on the qualified immunity afforded under Vehicle & Traffic Law § 1104 where the police officer is in pursuit of a suspect and does not act recklessly. Supreme Court (Kramer, J., Schenectady Co.) dismissed the claim and the Third Department affirmed, characterizing the officer's failure to activate the cruiser's emergency lights or siren as "nothing more than a momentary lapse of judgment" not reaching the standard of 'reckless disregard' for the safety of the other drivers.

NEW TRIAL ORDERED AFTER JURY'S INADEQUATE DAMAGES AWARD

Killon v. Parrotta
(Lynch, J., 2/26/15)

Supreme Court (Muller, J., Warren Co.) granted plaintiff's motion to set aside a jury's award for past ($0) and future ($25K) pain and suffering after it concluded that the defendant negligently struck plaintiff in the face with a metal baseball bat, causing injuries including a shattered jaw and multiple broken bones in his mouth. The Third Department affirmed the trial court's order of a new trial on pain and suffering damages unless defendant stipulates to an award of $200K for past and $150K for future.

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Timothy J. Higgins is a partner at Lemire, Johnson & Higgins, LLC in Malta, New York. His litigation practice includes all types of personal injury and wrongful death litigation, including representation of persons hurt in automobile and workplace (construction site) accidents, and medical malpractice. Mr. Higgins also represents and litigates on behalf of employers and municipalities in matters involving claims of employment discrimination and civil rights violations.

Prior to joining the firm, Mr. Higgins was a partner with Powers & Santola, LLP, in Albany, where he had worked since graduating from law school. Before beginning his legal studies and career, Mr. Higgins worked for ten years as a news reporter and sports broadcaster at WGY 810 AM in Schenectady as well as radio stations in Saratoga Springs and Glens Falls.

Mr. Higgins is regularly called upon by various bar associations and groups to lecture to other lawyers, on topics ranging from "The Basics of Civil Practice" to "Discovery for Experienced Litigators" to "The Art of Trial Advocacy: Demonstrative Evidence for Television Generation Jurors."

THE STATE OF THE JUDICIARY: A DISSENTING POINT OF VIEW

MICHAEL FRIEDMAN, ESQ.

"To me this is the judiciary's constitutional mission, to foster equal justice. This is what we should be doing, and as the leader of the judiciary, this is my first priority, whatever role I am performing, either on the cases or administratively." Chief Judge Lippman, Leaveworthy, Winter 2015

"The judiciary must not take on the coloration of whatever may be popular at the moment. We are guardian of rights, and we have to tell people things they often do not like to hear." Rose Bird, Chief Justice of California, 1967-1987

On February 17, 2015, Chief Judge Lippman gave his final State of the Judiciary address. He titled it, "Access to Justice: Making the Ideal a Reality." His first words: Access to Justice is the defining principle of our court system. He recommended several new laws including reforming the Grand Jury process stating, "Of immediate concern are the perceptions of some that prosecutors' offices, which work so closely with the police as they must and should, are unable to objectively present to the grand jury cases arising out of police-civilian encounters. Such perceptions, while broad brush, clearly can undermine public trust and confidence in the justice system."

Judge Lippman and I have the following in common: We love the judicial system in New York. That's about it. You see, Judge Lippman does not have the vaguest idea of why that system exists, and why it is so great. Like all systems of justice, it is a process for people to resolve their differences in a civil and appropriate manner. It has nothing to do with perceptions that undermine public trust and confidence in the court system. The great thing about the judiciary is that it accomplishes its goals in spite of public perceptions. It is above public trust. It is above public confidence. It applies the law to facts and renders a decision so people can get on with their lives. That's it.

If being a judge was about public trust and confidence, the greatest decisions of Jonathan Lippman's lifetime would never exist. Brown v. Board of Education of Topeka[i] hardly engendered trust in the judiciary for the people of Topeka, Kansas and elsewhere, but so what? Ask George Wallace and many citizens of Alabama what they thought about the Supreme Court when Vivian Malone and James Hood showed up to enroll in the University of Alabama. Judge Arthur Garrity was vilified for desegregating Boston's schools in 1974. That led to violence and public unrest, but the rule of law prevailed. In 1976 the United States Supreme Court suspended capital punishment in spite of support for killing criminals by 60% of Americans.[ii] You see, Judge Lippman, it is not about the public perception of the Judiciary. It is about doing what is right, and the perception of the public be damned.

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Michael Friedman has been practicing law for over 30 years and has maintained a private practice since 1981. He is the recipient of numerous awards such as the Distinguished Service Award from the Legal Aid Society of Northeastern New York, the Albany County Bar Association President's award, the Albany County Bar Association Pro Bono Award, and the New York State Bar Association President's Pro Bono Service Attorney Award. Mr. Friedman is the author of numerous articles on matrimonial practice including The Case for Parental Access Guidelines in New York and the Case for Joint Custody in New York for the New York State Bar Association's Family Law Review, Pensions and Retirement Plans: Valuation Strategies for the New York Domestic Relations Reporter and a monthly matrimonial article for the Albany County Bar Association.

Mr. Friedman has served as President of the Albany County Bar Association and was a member of the House of Delegates of the New York State Bar Association. He practices before all local Family and Supreme Courts and has argued numerous matrimonial cases in the Appellate Division, Third Department and New York's highest court, The Court of Appeals. He has been a frequent judge for the Dominick L. Gabrielli National Family Law Moot Court Competition. He is also a frequent lecturer and writer for the New York State Bar Association Family Law Section's Continuing Legal Education programs.

INSIGHT INTO IMMIGRATION

IMMIGRATION NEWS FROM MEYERS & MEYERS, LLP

Some time has now passed since President Obama announced on November 20, 2014 his intention to go it alone to "fix" of our "broken immigration system." Since that announcement, lawyers such as myself were hopeful that we could start working with clients on their applications for expanded relief under Deferred Action for Childhood Arrivals ("DACA"), and later this Spring under the President's new "deferred action" program for the parents of U.S. citizens and lawful permanent residents ("LPR's), commonly known as "DAPA".

That all came to a screeching halt on February 16, 2015, when Texas federal district Judge Andrew S. Hanen granted a temporary injunction against the implementation of President Obama's executive action regarding the DAPA program and the expansion of the June 2012 DACA initiative. The injunction temporarily blocks President Obama's executive action aimed at providing administrative relief from removal to millions of immigrants. President Obama has vowed to appeal, and has done so.

On February 23, 2015, the federal government filed an emergency expedited motion on the preliminary injunction requesting that the court stay, pending appeal, its February 16, 2015 Order, or in the alternative, stay its Order beyond application in Texas. On March 12, 2015, in the absence of any indication from Judge Hanen that he would rule on their motion, the Obama Administration filed an emergency motion for a stay pending appeal, requesting that the 5th Circuit Court of Appeals lift the current injunction in place. The government is asking the 5th Circuit to lift the injunction "in its entirety or, at minimum, stay it with respect to implementation in states other than Texas, or states that are not parties to the suit." On the same day, fourteen states and the District of Columbia filed an amicus brief with the 5th Circuit in support of the government's motion to stay Judge Hanen's preliminary injunction. The 5th Circuit will hear the government's appeal on April 17, 2015.

This, of course, begs the question of whether the President's actions were lawful. I think they were.

David W. Meyers, who joined his father at Meyers and Meyers, LLP in 1997 after a decade as an executive assistant to United States Senator Alfonse M. D'Amato, focuses primarily on family- and business-related immigration matters, commercial litigation, residential and commercial real estate transactions, trusts and estates, and general and appellate practice.

A (VERY) BRIEF HISTORY OF PREVIOUS EXERCISES OF DISCRETIONARY RELIEF

President Obama's administrative action was but the latest among many of his predecessors in the Oval Office who relied on their executive authority to deal with important immigration issues during their administrations. According to the American Immigration Council, since 1956, there have been at least thirty nine (39) instances where a president has exercised his executive authority to protect thousands and sometimes millions of immigrants, in the United States at the time without status, usually in the humanitarian interest of simply keeping families together.[i] So why all the fuss now?

PROSECUTORIAL DISCRETION, THE IMMIGRATION LAW AND REGULATIONS, AND THE SUPREME COURT

DACA was established by executive action in June 2012, and was expanded by the President's announcement in November 2014. DAPA was first announced by the President in November 2014. Prosecutorial discretion generally refers to the authority of the Department of Homeland Security ("DHS") to decide how the immigration laws should be applied, and it is a legal practice that has existed in law enforcement for quite some time.

For example, the Immigration and Nationality Act ("INA") and its implementing regulations are replete with examples where DHS will either refrain from an enforcement action, like electing not to serve and thereafter file a charging document (commonly known as a Notice to Appear) with the Immigration Court, as well as decisions to provide a discretionary remedies when an immigrant is already in removal proceedings, such as granting stays of removal (8 C.F.R. § 241.6), granting parole (INA § 212(d)(5)), or granting deferred action (8 C.F.R. § 274a.12(c)(14)).

The INA itself authorizes the President's legal authority to exercise prosecutorial discretion, including by prohibiting judicial review of three (3) types of actions involving the exercise of prosecutorial discretion (i.e., the decisions to commence removal proceedings, to adjudicate cases, and to execute removal orders). See INA § 242(g).

Congress has also legislated deferred action in the INA itself as a means by which the executive branch may use, in the exercise of its prosecutorial discretion, to protect certain victims of crime, abuse, or human trafficking. See INA §§ 237(d)(2), 204(a)(1)(D)(i)(II,IV).

Notably, the INA also has a specific provision which recognizes the President's authority to authorize employment for non-citizens who do not otherwise receive it automatically by virtue of their particular immigration status. See INA § 274A (h)(3). It is this provision, in conjunction with other regulations, that currently confers eligibility for work authorization

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INSIGHT TO IMMIGRATION, *CONTINUED*

(Continued from page 4)

under DACA (and would do so again under expanded DACA and DAPA). The term "deferred action" is defined in one regulation (related to classes of aliens authorized to accept employment) as "an act of administrative convenience to the government which gives some cases lower priority" and goes on to authorize work permits for those who receive deferred action (provided they establish economic necessity). See 8 C.F.R. § 274a.12(c)(14).

Beyond this, memoranda issued by federal agencies authorized to implement and enforce our immigration laws have recognized prosecutorial discretion too, including a seminal one issued by legacy-Immigration and Naturalization Service ("INS") Commissioner Doris Meissner in 1990 to her senior agency staff.[ii] There are earlier memoranda as well opining as to the legality of prosecutorial discretion too.[iii]

Finally, the Supreme Court held in Arizona v. United States that a "[a] principal feature of the [deportation] system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue [deportation] at all . . . ." Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

As a result of all of the above (i.e., the INA and its implementing regulations, Supreme Court decisions, and agency memoranda), there have been at least thirty nine (39) instances since 1956 where a president has exercised his executive authority to protect aliens, generally in the interest of simply keeping families together.

SO WHAT HAPPENS NOW?

Our history is replete with examples of U.S. presidents, in the name of prosecutorial discretion, issuing directives that provided for deferred action (or whatever they may have called it at the time) to non-citizens of the United States, and indeed Judge Hanen, in his written decision, affirmed the executive branch's right to exercise prosecutorial discretion.

Previous lawsuits against similar executive actions have failed in the past. Indeed a similarly politically motivated lawsuit was thrown out in December 2014 when Maricopa County Sheriff Joe Arpaio argued that President Obama's announcements were unconstitutional. In 2012, the State of Mississippi challenged the legality of DACA in a case similar to the current Texas lawsuit, and that case was dismissed because the judge found the perceived economic hardship the state claimed was purely speculative.

As I have previously argued and substantiated in this column, studies have shown that deferred action initiatives, apart from being the right thing to do, are economically beneficial to our country. In his decision, Judge Hanen cites the government's "failure to secure the borders" and then goes on to support the plaintiffs' position of supposed costs to the states without any evidence whatsoever in the record. The American Immigration Lawyers Association ("AILA") and others have argued that Judge Hanen disregarded information submitted by the government and AILA as to the widespread economic and social benefits that the expanded DACA and DAPA programs would provide. They're right.

I am cautiously optimistic that the government will prevail in its appeal. In the meantime, it's noteworthy to point out that those who have previously been granted DACA are not at all affected by Judge Hanen's ruling. This ruling only delays the start of DAPA and the expansion of DACA.

[i] See http://www.immigrationpolicy.org/just-facts/executive-grants-temporary-immigration-relief-1956-present.
[ii] See Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion 1 (Nov. 17, 2000), http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf.
[iii] See e.g., Sam Bernsen, INS General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

TORTS AND CIVIL PRACTICE, *CONTINUED*

(Continued from page 2)

CONSTRUCTION SITE LIABILITY UNDER LABOR LAW

Larkin v. Sano-Rubin Constr. Co., Inc.
(Garry, J., 1/29/15)

Plaintiff was employed by a subcontractor on a school renovation project, and was hurt when a window panel slid down its frame above him and pinned his shoulder. His claim for damages against the defendant construction manager under Labor Law § 240 was dismissed by Supreme Court (Devine, J., Albany Co.) and affirmed by the Third Department. Construction managers can be held liable under § 240 if they have "the authority to direct, supervise or control the work which brought about the injury", regardless of whether such control is actually exercised. The contract documents for this project actually read to the contrary for Sano-Rubin, and plaintiff's proof in opposition (mostly a private investigator's report) failed to raise a question of fact.

Boots v. Bette & Cring, LLC
(Devine, J., 1/22/15)

Another plaintiff hurt during a school renovation project when his utility knife malfunctioned sued the general contractor ("GC") under Labor Law § 241(6), and relied on an Industrial Code Rule 23 provision that prohibited the use of hand tools with "split or loose…handles". Supreme Court (Ellis, J., Franklin Co.) granted summary judgment to the GC, noting plaintiff's deposition testimony that he cut his wrist because the locking mechanism on the utility knife was loose and the blade broke in half. Affirming dismissal, the Third Department ruled that while the Rule 23 regulation relied upon by the plaintiff did define a "specific" (not "general") safety standard as required to support a claim under § 241(6), the regulation was not applicable to the facts of the accident because "it makes no mention whatsoever of the locking mechanism found within a hand tool".

EMPLOYMENT LITIGATION UPDATE

SCOTT PETERSON, ESQ.

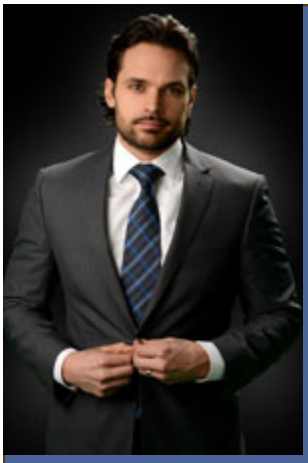
FMLA INTERFERENCE/RETALIATION

Achille v. Chestnut Ridge Transportation, Inc.
(2nd Cir., 11/25/14).

Plaintiff was out of work for an approximately two-week period. During that time he was scheduled to return to work, and failed to call in and provide any reason for his absence. After his termination he brought an action against his employer for violation of the FMLA.

The District Court dismissed the action, and in affirming the District Court's decision, the Second Circuit initially outlined the elements that a plaintiff must prove in support of an FMLA interference claim: 1) that he was an eligible employee under the FMLA; 2) that defendant is an employer as defined in the FMLA; 3) that he was entitled to take leave under the FMLA; 4) that he gave notice to the defendant of his intention to take leave; and 5) that he was denied benefits to which he was entitled under the FMLA.

Here, the Court found that even if Plaintiff had established the other requirements of an FMLA interference claim, his claim would fail on the fourth element – lack of notice. Plaintiff did not, at any point during his fourteen-day absence, communicate an FMLA eligible reason for his continued absence to his employer. As "the FMLA generally requires employees to comply with the employer's usual and customary notice and procedural requirements for requesting leave," the Court found that the employer was within its rights to terminate his employment (noting that the employer had made unsuccessful efforts at contacting the absent employee).



Scott Peterson is the founding partner at D'Orazio Peterson, which was opened to provide representation to individuals in employment and serious injury matters.
Mr. Peterson received his law degree from Albany Law School, where he served as a Managing Editor on the Albany Law Journal of Science and Technology. Prior to opening his firm, he worked for two Albany-based law firms, where he focused his practice on litigation in the areas of construction, malpractice, employment and serious injury.
Mr. Peterson has represented clients in State and Federal courts throughout New York State, has been published in several publications including the New York Law Journal, and has frequently provided commentary for local and national media outlets. He currently serves on the Executive Committee of the New York State Bar Association Trial Lawyers Section.

As for the FMLA retaliation claim, the Second Circuit likewise found that the District Court appropriately awarded summary judgment. Once again the court initially observed the elements of an FMLA retaliation claim, including the burden-shifting framework of McDonnell Douglas Corp v. Green. To that end the Court found that the Defendant had offered a legitimate, non-discriminatory reason for the termination, and that in response the Plaintiff had failed to provide any proof that the adverse action taken against him was a pretext.

Summary judgment affirmed.

PREGNANCY DISCRIMINATION

By Giovanna A. D'Orazio, Esq.

The Pregnancy Discrimination Act (PDA) amended Title VII of the Civil Rights Act of 1964 to specify that discrimination on the basis of sex includes discrimination against women who are "affected by pregnancy" and pregnancy or childbirth related medical conditions. The PDA (42 USC 2000e[k]) provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

The somewhat ambiguous wording requiring pregnant workers to be treated the same as those "similar in their ability or inability to work" has been a cause of difficulty for the courts, and this issue was argued in December 2014 before the US Supreme Court in Young v. United Parcel Service.

In Young, Plaintiff, a pregnant female delivery driver for UPS, requested light duty per order of her doctor because it was recommended that she not lift over 20 pounds. UPS denied her request (and required her to go on unpaid leave) pursuant to a policy that only permitted light duty accommodations to individuals who had been hurt on the job, had disabilities within the meaning of the Americans with Disabilities Act (ADA) or had lost their drivers' licenses. The last category of people – those who lost their drivers' licenses – included those who had lost such license because of a DUI. You can imagine that UPS had a PR problem once the word got out that it treats pregnant workers worse than drunk drivers. Not surprisingly, UPS has since changed its policy. But, in the context of the lawsuit, it continues to claim that the policy was legal and did not violate the PDA's requirement that pregnant workers be treated the same as other individuals "similar in their ability or inability to work."

The case went to the Supreme Court after the Fourth Circuit Court of Appeals agreed with UPS. UPS argued that its policy was neutral as against pregnant employees because, pursuant to collective bargaining agreements that were in place, it did not allow employees who had been injured off the job to work light duty positions either, unless that injury was a disability within the meaning of the ADA (which requires accommodations for individuals with disabilities).

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EMPLOYMENT LITIGATION..., *CONTINUED*

(Continued from page 6)

For many, it seems like common sense that pregnant workers should be afforded reasonable accommodations like lifting restrictions. However, currently, no law explicitly requires this (unless the issue rises to the level of a disability under the ADA). The federal Pregnant Workers Fairness Act is currently before the Senate, but individuals are not optimistic that it will ultimately be passed. New York also has been unable to pass the Women's Equality Act.

In July 2014, the EEOC issued guidelines with respect to pregnancy discrimination. Although the overall tone encourages employers to provide accommodations to pregnant women, there is still no law explicitly requiring accommodations to a woman simply because she is pregnant. In the context of reasonable accommodations, the EEOC appears to continue to rely on the ADA's requirement of a disability – although it repeatedly emphasizes that the ADA definition of a disability is very broad. This continues to create a loophole because, for example, a lifting restriction or encouragement by a doctor to carry a water bottle is not necessarily connected to a pregnancy-related medical issue that rises to the level of a disability under the ADA. Therefore, under the current state of the law, as long as an employer is treating non-disabled pregnant women the same as non-disabled-non-pregnant employees (the argument UPS is making to the Supreme Court) there will continue to be instances where women lose their jobs because they are pregnant.

Any attorneys who represent clients in employment related matters should be watching this case closely.

STATE OF THE JUDICIARY..., *CONTINUED*

(Continued from page 3)

But what about equal justice? Judge Lippman recently said, "I hope that I'll be remembered as someone who, not only as the chief judge, but in forty years plus service in the courts, understood the priority of the judicial branch of government - - and was someone who worked day and night with certainly every ounce of energy and every fiber of my body towards that goal of making the ideal of equal justice a reality for each and every person in our state. That certainly would be for me a great legacy."

Judge Lippman, we can debate if that was your priority, but if it was, I believe you have failed. You claim there are over 4 million civil, criminal and family proceedings in court houses across New York State. I don't think so. There certainly were when you started in 2009. Now there are a lot less than that, and your administration has seen a steady decline since you ascended to the Chief Judgeship.[iii] Not that you didn't understand what was going on as you had been the Chief Administrative Judge for thirteen years where you oversaw the crippling of the judicial system through high fees, worthless bean counting forms and Byzantine requirements to the simplest needs of the general public. When I started, it took $3 to get an index number. It now costs $210. There were no fees for motions, you could file a settlement or virtually anything else for free and there was no such thing as a Request for Judicial Intervention, a Matrimonial Request for Judicial Intervention, health insurance notices in divorces, or opting out language that required "what it would have been" to get divorced. Judges didn't have to report to Big Brother about all the cases that existed, the time since a matter was resolved or the hours worked by staff on the furtherance of what? Access to justice? Judges like you did not have cars and chauffeurs. You did not have a Communications Director (earning $181,470 in 2013) or an Assistant Communications Director (earning $117,844 in 2013). You did not publish coloring books such as A Visit to Civil Court or my favorite, the French version, Une Visite au Tribunal Civil. "Le marteau du juge et ses livres Légaux." Yeah, right. All this bureaucracy has done more than anything to diminish the view of the judiciary among the general public and to shut the doors of the courthouse to the average person seeking justice. It now costs over $300 in filing fees just to get divorced, even if you agree with your spouse about everything. The poor person application process is so daunting that someone with a college education would have trouble navigating those forms. In the 1970's there were dozens of civil jury trials every month in Albany. Why? Because it was inexpensive and productive. Now, one would be surprised to see two dozen such trials every year. It is way too expensive. It is too difficult. It is too complex.

When you became Chief Judge, you did not give a State of the Judiciary address, and for my money that was a step in the right direction. In 2010's State of the Judiciary address, you talked about 4.7 million cases in the court system straining the Judiciary's resources. Under your leadership, there have been fewer than 4 million and counting in spite of astounding budgetary requests, currently $2.5 Billion. Every year you have been Chief Judge the number of people accessing the courts has declined. So, Judge Lippman, you want to have Access to Justice as your legacy when you trundle off the bench on New Year's Eve, 2015? Try this. Just take that $85 million that you want to hand out to charities this year and use it to pay for people's index number fees in Supreme Court. By my calculation that would buy 404,761 Index Numbers or enough for at least 809,000 litigants. More than one million fewer people per year access the New York State judicial system than did when you ascended to the Court of Appeals. Fire the bean counters and communications directors, get rid of the cars and chauffeurs and stop publishing coloring books and no one would have to pay to get into a courtroom. Now that's what I call Access to Justice.

Au revoir, mon ami.

[i] 347 U.S. 483 (1954)
[ii] Furman v. Georgia, 408 U.S. 238 (1972)
[iii] The 2013 numbers were under 4 million and the 2014 numbers are not out yet.

CARTER CONBOY
ATTORNEYS AND COUNSELORS AT LAW

CARTER CONBOY WELCOMES ATTORNEY LIBBY CORENO TO THE FIRM AS DIRECTOR

Highly-respected Saratoga County attorney, M. Elizabeth "Libby" Coreno, will be joining Carter Conboy as a Director on May 18, 2015. Ms. Coreno represents a wide-range of clients, from individuals to regional businesses to Fortune 500 companies. She has significant experience and specializes in zoning, planning and real property development; complex commercial and real estate transactions; SEQRA review process and procedure; litigation; environmental law; municipal law; and appeals. Ms. Coreno's noteworthy representations include being co-counsel to GLOBALFOUNDRIES since 2008 in the development of its Fab 8 Campus in Malta; special co-counsel to Luther Forest Technology Campus in its application for local legislation for future development; and, co-counsel to The Saratoga Hospital in the development of its medical campus, Saratoga Medical Park at Malta.

"Libby joining Carter Conboy is a significant achievement as we continue to grow and diversify our firm. She is an extremely talented, accomplished and respected lawyer and we are fortunate to have her", said Michael J. Catalfimo, Carter Conboy's Chief Operating Officer. He adds, "In the past four years, Carter Conboy has achieved great success in diversifying our practice areas, deepening our bench, and broadening our geographic reach. Libby's addition to the firm will build on that success, as her depth and breadth of experience will compliment and benefit both our firm and the clients and industries we represent." Ms. Coreno joins Carter Conboy after more than 10 years of practice in a Saratoga Springs law firm. She will continue her presence in the Saratoga legal community by working regularly in Carter Conboy's Saratoga Springs Office, while also assisting the firm's Albany based real estate, banking, construction, litigation and appellate practices.

"I could not be more excited to join the distinguished and talented team of attorneys at Carter Conboy. Since the beginning of my career, I have been impressed by the depth of their collective knowledge and variety of practice areas which will now be available to my clients. I look forward to the opportunity to bring my unique practice experience to Carter Conboy."

Ms. Coreno is a familiar face to the local legal and professional community as a frequent speaker on topics involving land use, SEQRA, and real property zoning, planning and development. She is the current Vice-President and President-Elect of the Saratoga County Bar Association, where she also serves as Newsletter Editor. Ms. Coreno is a 2003 *cum laude* graduate of Albany Law School of Union University and a 2000 graduate of the University of Kentucky, where she earned a Bachelor of Arts in History. She is a member of the New York State Bar Association (Title and Transfer Committee and Real Property Section). She is the President-Elect of the Leadership Saratoga Alumni Association, the Secretary of the Board of Directors for Coesa, Inc., a Saratoga Springs health and wellness center, and a committee member for the Capital Region Recovery Center, Inc. Additionally, she has volunteered in various positions with the Daughters of the American Revolution (DAR), the Stillwater Mock Trial Team, Saratoga READS!, Saratoga PLAN, the Literacy Council of Northeastern New York, and the Wellspring, Inc. (formerly Domestic Violence Rape Crisis Services of Saratoga).

CATALFIMO TO MODERATE PANEL ON FINANCIAL REGULATORY ISSUES FACING THE MORTGAGE BANKING INDUSTRY IN WASHINGTON, D.C.

Michael J. Catalfimo will moderate the keynote session of ALFN + NARCA Advocacy Day in Washington, D.C. on April 14, 2015. The ALFN (American Legal and Financial Network) and NARCA (National Association of Retail Collection Attorneys) hold a joint annual conference focused on regulatory issues facing the mortgage banking industry and legislative affairs.

Mr. Catalfimo's keynote panel Real Issues/Real Talk will focus on three key topics related to financial regulatory issues: inter-regulatory relations; Congressional-Regulatory regulations; and, industry relations as perceived by both regulators and legislators. The panel is expected to discuss key legislative issues, OIG and CFPB, best practices for industry relations, and the current Congressional outlook. Mr. Catalfimo's panelists include: Representative Nancy Johnson (Senior Advisor with Baker Donelson and former member of the United States House of Representatives, serving the State of Connecticut from 1983 to 2007); Brian Montgomery (Vice Chairman of The Collingwood Group, which he co-founded in 2009. From 2005 to mid-2009, Montgomery served as Assistant Secretary of the U.S. Department of Housing and Urban Development (HUD) and FHA Commissioner); Meg Burns (Managing Director of The Collingwood Group which she joined in 2014. She previously served as the Senior Associate Director of the Office of Housing and Regulatory Policy at the Federal Housing Finance Agency (FHFA)).

Michael J. Catalfimo is a Managing Director of Carter Conboy and serves as the Firm's Chief Operating Officer. He practices in the fields of creditors' rights, business and property law, family law and general civil litigation. Mr. Catalfimo is an active member of numerous professional associations, including the American Bankruptcy Institute, the Business Litigation Practice Group of ALFA International (ALFA), and the American Legal and Financial Network (ALFN), where he serves as Chairman of the ALFN's Board of Directors. He is a past president of the Washington County Bar Association and the Federation of Bar Associations of the Fourth Judicial District, a former adjunct professor of business law at Skidmore College, and a frequent lecturer on topics related to creditors rights and real property law and litigation.

PRESS RELEASES/ANNOUNCEMENTS

SDG

THE LAW OFFICE OF STEVEN D. GREENBLATT, PLLC HAS MOVED

The Law Office of Steven D. Greenblatt, PLLC has moved to its new address. The firm is still located in the Collamer Building in downtown Saratoga Springs, but the new office is in Suite 212. All other contact information remains the same:

The Law Office of Steven D. Greenblatt, PLLC
480 Broadway, Suite 212
Saratoga Springs, New York 12866
Tel. 518-824-1254
Fax. 518-824-5704
www.sdgesq.com

LEMIRE JOHNSON, LLC
ATTORNEYS AT LAW

CHRISTOPHER R. LEMIRE AND GEORGE B. BURKE III CHAIR NYSBA WORKER'S COMPENSATION LAW UPDATE

On November 21, 2014 Christopher R. Lemire, Esq. Chaired the New York State Bar Association's Workers' Compensation Law Update - 2014 in Albany, NY. Attorney George B. Burke III presented at the conference on "Workers' Compensation Fraud". Christopher and George are partners at Lemire, Johnson & Higgins, LLC - Attorneys at Law in Malta, NY."

Perkins and Perkins
ATTORNEYS AT LAW

PERKINS AND PERKINS HAS MOVED

After more than thirty years at its Broadway location, Perkins and Perkins has relocated its office for the general practice of law to the professional building at 25 Walton Street, Saratoga Springs. Contact information remains unchanged: Telephone: (518) 584-4191 Facsimile: (518) 587-8175 Website: www.perkinslegal.com

COLLABORATIVE PRACTICE BASIC TRAINING

Presented by: The Collaborative Divorce Association of the Capital District on Friday May 1st and Saturday, May 2nd 201 from 8:30 a.m. – 4:30 p.m. each day at the Century House, 977 New Loudon Road, Latham, New York The cost of the program is $265.00.

This Two-Day Intensive Basic Training includes a complete interdisciplinary introduction to Collaborative Practice theory, practice, and skills development as well as ethics and practice development considerations. It is appropriate for professionals new to Collaborative Law as well as experienced practitioners wishing to improve upon their skills. This program provides 13 hours of Continuing Legal Education credit which includes 1.5 hours of Ethics.

If you are interested, please contact Suzanne Latimer at (518) 785-9702 or suzanne@thelatimerlawfirm.com

NEW ADMINISTRATIVE BOARD OF COURTS RULE

There has been a New Rule adopted by the Administrative Board of Courts requiring attorneys to omit or redact certain (CPI) Confidential Personal Information from court filings in the Supreme and County Court. The new rule does not alter current rules & practices addressing the sealing of documents (22 NYCRR & 216.1). Effective March 1, 2015, when the County Clerk's Office receives a filing of court documents, the Paperwork MUST BE ACCOMPANIED by a Redaction Cover Page and can be acquired by going to: www.nycourts.gov/forms/redaction. On or after March 1, 2015, UNREDACTED DOCUMENTS containing confidential personal (CPI) information as defined in the rule should be filed by parties only pursuant to the terms of an appropriate court. Attorney questions about the new ruling – please contact Holly Nelson Lutz of Counsel's Office at (518) 453-8650, or email her at hlutz@nycourts.gov.

ANNOUNCEMENTS

ARNE EDWARD HEGGEN

Arne Edward Heggen CLIFTON PARK - Arne Edward Heggen, 85, passed away on Thursday, March 19, 2015 surrounded by his loving family. Born in Cohoes, NY on July 24, 1929, he was the son of Arne and Catherine "Blanche" Bowes. A life-long resident of Saratoga County, Arne was raised in the Town of Waterford and graduated from the Waterford High School in 1946. He entered the U.S. Navy that year, and served for 4 yrs. as a radio man aboard the USS President Jackson. He graduated from Middlebury College in Vermont in 1954 and Albany Law School in 1960. Arne was an attorney with the NYS Charities Registration Bureau for several years before going into private practice in Saratoga County. In addition to his private practice, Arne was the Malta Town Attorney for over 30 yrs., during a period of tremendous growth in Malta. He also served as an Assistant County Attorney for many years, and was appointed Saratoga County Attorney in 1985. He served in that position until he retired in 1990. At that time, he returned to the private practice of law where he was joined by his daughter Karen for 5 yrs., until he retired a second time. Arne was involved in several different organizations throughout the years including the Ballston Spa Lions Club, Malta Ridge Volunteer Fire Dept., Saratoga Bridges, Am. Legion Post 1450, Ballston Spa Central School District Board of Ed., Albany Ski Club and the Single Ski Club of Albany, where he met his wife Marilyn. They were married for 53 years. He enjoyed many activities including skiing and camping.

Arne is survived by his wife Marilyn A. (Meehan) of Clifton Park, his children Karen A. Heggen of Malta, his son Mark E. (Jennifer) Heggen of Malta, his daughter Katherine (Thomas) F. Burke of De Pere, Wisconsin and his daughter-in-law Julie Arel of Starksboro, Vermont. He was predeceased by his parents, his brother George O. Heggen and his son Arne C. Heggen. He is also survived by his grandchildren Jacqueline Burke, Meghan Burke, Andrew Heggen, Sophie Heggen, Matthew Heggen and Daniel Heggen, as well as many nieces, nephews and cousins. Funeral services will be held 9:00am Tuesday, March 24, 2015 at St. Mary's Church, 167 Milton Ave., Ballston Spa where a Mass of Christian burial will be celebrated. Relatives and friends are invited to call on Monday, March 23, 2015 from 3-7 pm at Mevec Funeral Home, 224 Milton Ave., Ballston Spa. In lieu of flowers, memorial contributions may be made in Arne's name to St. Mary's Church, 167 Milton Avenue, Ballston Spa, NY 12020.

VETEREN'S SERVICES COMMITTEE SEEKS VOLUNTEERS

The Veterans Services Committee of the Saratoga County Bar Association is seeking members to join a panel of lawyers who will commit to provide a free consultation to veterans and their immediate families residing in Saratoga County. In order to join the panel, each attorney must also agree to provide any subsequent legal services to the veteran for a legal fee at least one third less than that attorney's usual hourly rate.

If you are willing to help the people who have risked their lives for their country and for all of us, then please send information concerning your area of practice and location to Veterans Services Committee Chairman, Joseph Berger at jcberger@bergerkernan.com. Once we have at least 10 attorneys on our panel, we shall move forward with this program.

Thank you for your support of our veterans.

PRESS RELEASES

TOWNE, RYAN & PARTNERS, P.C. WELCOMES ATTORNEY MEGAN COLLELO TO THE FIRM

Albany, NY (March 3, 2015) – Towne, Ryan & Partners, P.C., Upstate New York's largest certified Women Business Enterprise (WBE) law firm, is pleased to announce that Attorney Megan Collelo has joined the firm as an Associate. Ms. Collelo will work between the firm's Albany, N.Y. and Poughkeepsie, N.Y., offices where she will focus her practice on labor and employment and litigation, as well as develop the firm's practice pursuant to the Railway Labor Act as applicable to the airline industry.

Ms. Collelo joins the team from Trans States Holdings, Inc. (Parent Company of Trans States Airlines, LLC, GoJet Airlines, LLC, & Compass Airlines, LLC) in Bridgeton, MO, where she served in the Office of General Counsel for two years. In her time with Trans States Holdings, Inc., her representation in the area of labor and employment spanned from handling grievances and arbitrations and negotiating labor contracts under the Railway Labor Act, defending lawsuits brought under Title VII, ADA, ADEA, and FMLA, as well as state anti-discrimination statutes, handling unemployment compensation appeals, conducting internal investigations and mediating employment discrimination claims before the EEOC. Ms. Collelo has also worked on appeals briefs to the 7th and 8th Circuit Courts of Appeals.

Ms. Collelo received her J.D. from University of Pittsburgh School of Law and her B.S., magna cum laude, from University of Scranton. She is admitted to practice in New York (2014), Illinois (2013), Missouri (2012) and Pennsylvania (2011).

Established in 2009, Towne, Ryan & Partners, P.C. is a certified WBE by the State of New York, the largest law firm in Upstate New York to hold this certification. A full-service law firm with offices conveniently located in Albany, Saratoga Springs, Poughkeepsie, Cobleskill, Burnt Hills and Bennington, VT, the firm's practice areas cover both transactional and litigation work across a broad range of legal fields including municipal law, representation of auto dealers, corporate and commercial law, insurance defense, real estate, employer defense, equine, racing and gaming law and many related fields. For more information, visit www.townelaw.com or call 518-452-1800.

AMICI LEGAL PODCAST SERIES LAUNCHED

The New York State Unified Court System launched the "Amici" podcast. A series created to share with the legal community and the public at large information about the courts, the legal profession and the criminal justice system.

Podcasts currently available include an interview with William Leahy, Director of the New York State Office of Indigent Legal Services, and a conversation regarding the Uniform Bar Exam with Diane Bosse, Chair of the New York State Board of Law Examiners. Both the audio and written transcript of each podcast are available.

CLASSIFIEDS

VOLUNTEER OPPORTUNITY WITH THE HOUSING COURT'S NAVIGATOR PROGRAM

The goal of the Court Navigator Program is to help litigants who are not represented by an attorney have a productive court experience by offering them non-legal support. The Court Navigator Program trains college and law students, as well as other approved volunteers to assist unrepresented litigants.

The training is FREE in exchange for 30 hours of volunteer service between April 22, 2015 and June 30, 2015, Monday-Friday, 9AM-1PM.

The training is scheduled for Friday, April 17, 2015 at New York County Housing Court.

To register for the training send an email with your resume attached to courtnavigator@nycourts.gov.

Learn more about the Court Navigator Program Training.

SEEKING CORPORATE AND TAX ASSOCIATE

McNamee, Lochner, Titus & Williams, P.C. is looking for an associate for our corporate and tax department. We have three shareholders in this department, each of whom has an L.L.M. in taxation. In our practice we advise businesses of varying size and complexity including relatively small local businesses, established major Capital Region employers and large regional companies with a presence in New York State. A substantial part of our practice is representing closely-held and family owned companies in connection with starting up, raising capital, financing transactions, real estate transactions, leases, sales, acquisitions and mergers. Most of our clients do not have in-house counsel and we are, in effect, their general counsel. An example of the types of clients we represent are – Real Estate Developers, Automobile Dealers, Manufacturers, Software Developers, Medical Practices, Breweries,….

Our corporate and tax practice is supported by other practices within the firm in the areas of environmental law, estate planning and litigation. An ideal candidate would be an associate with a solid academic record and 2 to 3 years of experience working on business and real estate transactional matters. An LL.M. is not required. Associates in our department are quickly given client contact and, assuming they establish that they are capable, are quickly handling complete transactions on smaller deals and substantial parts of larger transactions. Our firm is located in Albany, New York with an office in the Saratoga County town of Clifton Park. Interested candidates should send their resume and cover letter to Hiring Shareholder, McNamee, Lochner, Titus & Williams, P.C., 5th Floor, 677 Broadway, Albany NY 12201 or via email to hiringshareholder@mltw.com.

FULL-TIME PARALEGAL NEEDED

We have an immediate opening for a full time legal assistant/paralegal knowledgeable in defense litigation case management. Some experience in both estate/probate and real estate would be a plus. Salary negotiable. Our office is easily accessible off Alternate Route 7. Send resume and references to Robert Stockton, Esq., Stockton, Barker & Mead, LLP, 433 River St., Suite 6002, Troy, New York 12180, (518) 435-1919, Ext 225

NYS UNIFIED COURT SYSTEM ANNOUNCES COURT INTPRETER EXAM FOR LANGUAGES OTHER THAN SPANISH

The New York State Unified Court System provides interpreting services in over 100 languages to ensure that non-English speaking persons and those who are hearing impaired can clearly understand court proceedings. Individuals fluent in English and another language (other than Spanish) are encouraged to apply for the Written English Proficiency Exam for languages other than Spanish. Applications must be postmarked or received by Friday, April 24, 2015.

The exam is scheduled to be held on Saturday, June 13, 2015. Visit our website to download an application and learn more about the exam.

Note: The exam for Spanish-language court interpreters will be offered in late 2015.

SEEKING CIVIL AND COMMERICAL LITIGATION ASSOCIATE

We are a growing, Albany based, New York State certified Women Business Enterprise ("WBE"), regional law firm seeking an associate with 3-5 years of experience in civil and commercial litigation and a strong background in research, writing and case management. Transactional experience and book of business a plus. If you are a team player interested in growing along with us, send your resume, cover letter and salary requirements to james.towne@townelaw.com.

SEEKING ASSOCIATE

Position available at Colonie litigation firm for an associate with a strong background in research and writing. Experience in civil litigation preferred but not necessary. We offer a competitive salary and benefits package. Please submit resume and cover letter to: Carol, Thorn Gershon Tymann and Bonanni, LLP, PO Box 15054, Albany, NY 12212-5054. Or e-mail to carol.delisiis@tglawyers.com.

ATTORNEY PER-DIEM WORK AVAILABLE

O'Brien & Associates is looking for an attorney to do some per diem work. If interested, please contact Laura Hoffman at lhoffman@obrienassociateslaw.com

OFFICE SPACE AVAILABLE

Attractive, quiet, private office with skylight and file storage area available. This office opens to a common room with waiting area, reception, separate conference room, kitchenette and two other private offices. The conference room is furnished, secretarial desk and filing cabinets are available. Vaulted ceiling, bright, classy working environment. Perfect for an attorney, accountant, other professional or small business. This

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space is currently shared by three attorneys. The office is located on the upper level of an attractive 5000 sq. ft. professional building in which 12 other small businesses are located. 7/10 mile from Broadway, on Route 29 (Washington Street), three blocks from Saratoga Hospital. Excellent off-street parking. Avoid the summer traffic! Join us in this lovely space. $600 a month, utilities included! Will share equipment, copier, etc. Wi-Fi available. Dog friendly.

OFFICE SPACE AVAILABLE

Spacious office and conference or two office suite available. Connecting doors, rent one or both spaces. Plenty of light, nice rooms, freshly painted, radiant heat in the floor. Separate waiting area available. Attractive professional building on Saratoga's west side. Other tenants include psychotherapists, masseuses, chiropractor, attorneys, radiologists, a builder and more. Excellent off-street parking. Located on Washington St (Rt 29), just before West Ave intersection. Walk to West side services or 7/10th mile to Broadway. Handicap lift available. $625 and $700 separately or $1150/mo for both, all utilities included. Wifi available for nominal fee.

SEEKING TRUST & ESTATE ASSOCIATE

Law firm with significant trusts and estates client base in Saratoga Springs and Clifton Park, Albany, Schenectady and Troy, seeks additional attorney to support existing clients and contribute to the momentum of the practice. Requirements: 5 years of estate planning experience in private practice; strong tax background; ability and desire to work as part of a team as well as independently; and long term commitment to Saratoga-Capital Region.

Compensation package commensurate with experience, expertise, and contributions to the firm. Partnership track.

Please email your letter, resume and references to: lawyers7180@gmail.com **Inquires will be kept strictly confidential.

SUBMISSIONS NEEDED!

We are always looking to improve our newsletter for the benefit of our members. If you are an attorney who practices in the following areas of law, we would love to add you to our list of columnists:

Estate Planning
Criminal
Bankruptcy
Gaming
Entertainment
Healthcare
(all other areas of law that are not currently a part of this publication)

If you're interested in having an article or advertising in *Law Notes*, please contact:
Libby Coreno at
lcoreno@saratogalaw.com
(518) 587-0080