

**Update Your  
Directory Listing**  
pg 12

**Champions  
for Justice**  
pg 18

**Thank You  
Arbitrators!**  
pg 6

# Bulletin

[www.eriebar.org](http://www.eriebar.org)

BAR ASSOCIATION OF ERIE COUNTY

VOL. 54 | NO. 5 | JANUARY 2016



## President's Letter

KEVIN W. SPITLER

Happy New Year everyone. Hope the New Year brings all peace, joy, and prosperity.

As I write this letter, it has been less than two weeks since the terrorist attacks in Paris and Mali, which came so quickly on the heels of the downing of the Russian jetliner. All this loss of life is so hard to take in.

It leaves me with two questions. First, why do people do this to other human beings? It can't be justified under any possible religious tenet. It is such a distorted view that it has

continued on page 4



**Save the Date for  
the President's Ball!**  
Saturday, April 16 at the  
Twentieth Century Club  
Further details to come.



**Take to  
the Slopes  
at Holimont**  
Friday  
February 19  
pg 9

## New Member Benefit Can Reduce Student Loan Debt

According to the Federal Reserve Bank of New York, outstanding student loan debt in this country has risen to about \$1 trillion, surpassing auto loans and credit card debt to become the second-highest category of debt, behind only mortgages. Student loan debt also makes it difficult or impossible for newer lawyers to become homeowners.

To help address this problem, the Bar Association of Erie County has entered into a partnership with Credible, a company that simplifies the student loan refinancing process. Members and their families can quickly and easily refinance their student debt and realize significant savings. For example, an attorney with student loan debt of \$140,000 can save approximately \$40,000 through this program.

Credible is an independent, impartial online platform that aggregates lenders who refinance student loans. It works along the same lines as Kayak and Expedia in the travel market. Because the option of refinancing student loans is not widely publicized, borrowers often don't realize that they have this opportunity. The process of applying to each lender separately to find the best loan is tedious and time-consuming. Credible eliminates that process by enabling borrowers to complete a single, universal form and receive multiple offers to refinance from a panel of lenders.

The process is further simplified because of Credible's partnership with Intuit, the operator of Quicken and TurboTax. Intuit's technology enables applicants to securely link all of their loan data directly from their accounts, a con-



siderable time saver. Once the form is complete, Credible securely transmits borrower data to participating lenders. The lenders then respond through the platform with their offers. It is up to the borrower to decide which offer - if any - best suits his or her circumstances.

Credible is not a lender - rather, it's a transparent, independent and impartial service, which puts the borrower in control of the process. For further information, please visit [www.credible.com/partners/ECBA](http://www.credible.com/partners/ECBA) or call 415-801-0482. [B]



## 2016 *Judicial Welcoming Ceremony*

Please join us to ring in the New Year and welcome new and existing members of the judiciary to the bench. The ceremony, sponsored by the Bar Association of Erie County, The Minority Bar Association of Western New York and the Women's Bar Association of the State of New York, Western New York Chapter, will be held on **Wednesday, January 13, 2016** at 1:00 p.m. in the Ceremonial Courtroom, Part 1 of Supreme Court at 92 Franklin Street, Buffalo.

continued on page 4

“We will open the book. Its pages are blank. We are going to put words on them ourselves. The book is called Opportunity and its first chapter is New Year's Day.”

— EDITH LOVEJOY PIERCE

The board and staff of your Bar Association extend our warmest wishes for a New Year filled with promise and possibility.





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



Meyer

**Harry G. Meyer** was recognized by the United States Coast Guard for his service chairing the WNY Region Area Maritime Security Committee for 11 years. Meyer was honored in a ceremony conducted on a Sector Buffalo vessel stationed at the Coast Guard base, where he was cited for his involvement in several major maritime events. He became involved with the Coast Guard while chairing Erie County's Local Emergency Planning Committee (LEPC) for 12 years. During that time, the LEPC received a national award for having the best program out of 3500 in the country, pursuant to the Federal Emergency Planning and Community Right to Know Act. Meyer is the only person to have chaired a maritime security committee without being a current or former Coast Guard or Navy officer.



Berkman

**Lucy M. Berkman** and **Jeffrey J. Tyrpak** have joined Lipsitz Green Scime Cambria as associates in the firm's estates, wills and trusts department. Berkman is focusing her practice on wills and estate planning. She is experienced in guardianships, trusts, and Medicaid planning and applications. A graduate of



Tyrpak

SUNY at Buffalo and the University of Miami School of Law, Berkman has represented estate fiduciaries in general probate/administration and has contested issues such as accountings and probate.

Tyrpak's practice is focused on estate planning and he is experienced in probate, Medicaid planning, and guardianships. He has engaged in ERISA litigation and transactional work, representing benefit plans in federal litigation against employers and in audits by the U.S. Department of Labor. A graduate of Fordham University, Tyrpak received his J.D. cum laude from SUNY at Buffalo Law School.



Cobb

**Charles H. Cobb** has been named to the board of directors of HOME (Housing Opportunities Made Equal). A graduate of Syracuse University, Cobb earned his J.D. from SUNY Buffalo Law School. He formerly served as executive director of the Western New York Peace Center. Cobb is also a founding member of the Clean Air Coalition of Western New York and served as the organization's first board chair. He is also active with the Coalition for Economic Justice.



Friedman



Cross

**Scott E. Friedman** has been named chairman and CEO of Lippe Mathias Wexler Friedman and **Kevin J. Cross** has succeeded him as managing partner. Friedman is a partner and member of the firm's executive committee. He received his J.D. from Washington University School of Law and his LLM from the University of Pennsylvania Law School. He serves on several community boards, including the Roswell Park Alliance Foundation and The Law Enforcement Foundation of WNY.

Cross is a partner, member of the executive committee and former chair of the firm's litigation practice group. He concentrates his practice in state and federal business litigation, as well as environmental matters, and provides legal coun-

continued on page 20

## Roemer Named Magistrate Judge



Roemer

Michael J. Roemer, federal court clerk for the past six years, has begun serving as a magistrate judge for the Western District of New York, filling the seat previously held by Hon. Hugh B. Scott. Roemer was unanimously selected by a panel of district judges in Buffalo and Rochester. Scott is now semi-retired and handling a reduced caseload.

A graduate of the U.S. Military Academy at West Point, Roemer is a magna cum laude graduate of Cornell Law School. He began his legal career at Jones, Day, Reavis and Pogue in Cleveland before spending 17 years as law clerk to U.S. District Judge Richard J. Arcara. In his most recent position as clerk of the court and chief administrative officer for the U.S. District Court, Roemer was responsible for managing two courthouses and a multi-million dollar budget.

In announcing the appointment, Chief U.S. District Judge Frank P. Geraci Jr. said that Roemer was selected for his "ability to analyze, as well as communicate, complex legal issues." He is also credited with playing an instrumental role in getting Buffalo's \$137 million federal courthouse funded and built.

Roemer's term will expire in August of 2023.

[B]



## LAWYERS HELPING LAWYERS...

A confidential channel of communication for members of the bench and bar struggling with substance abuse.

The New Year is the perfect time for a fresh start. Call 852-1777 to learn more.



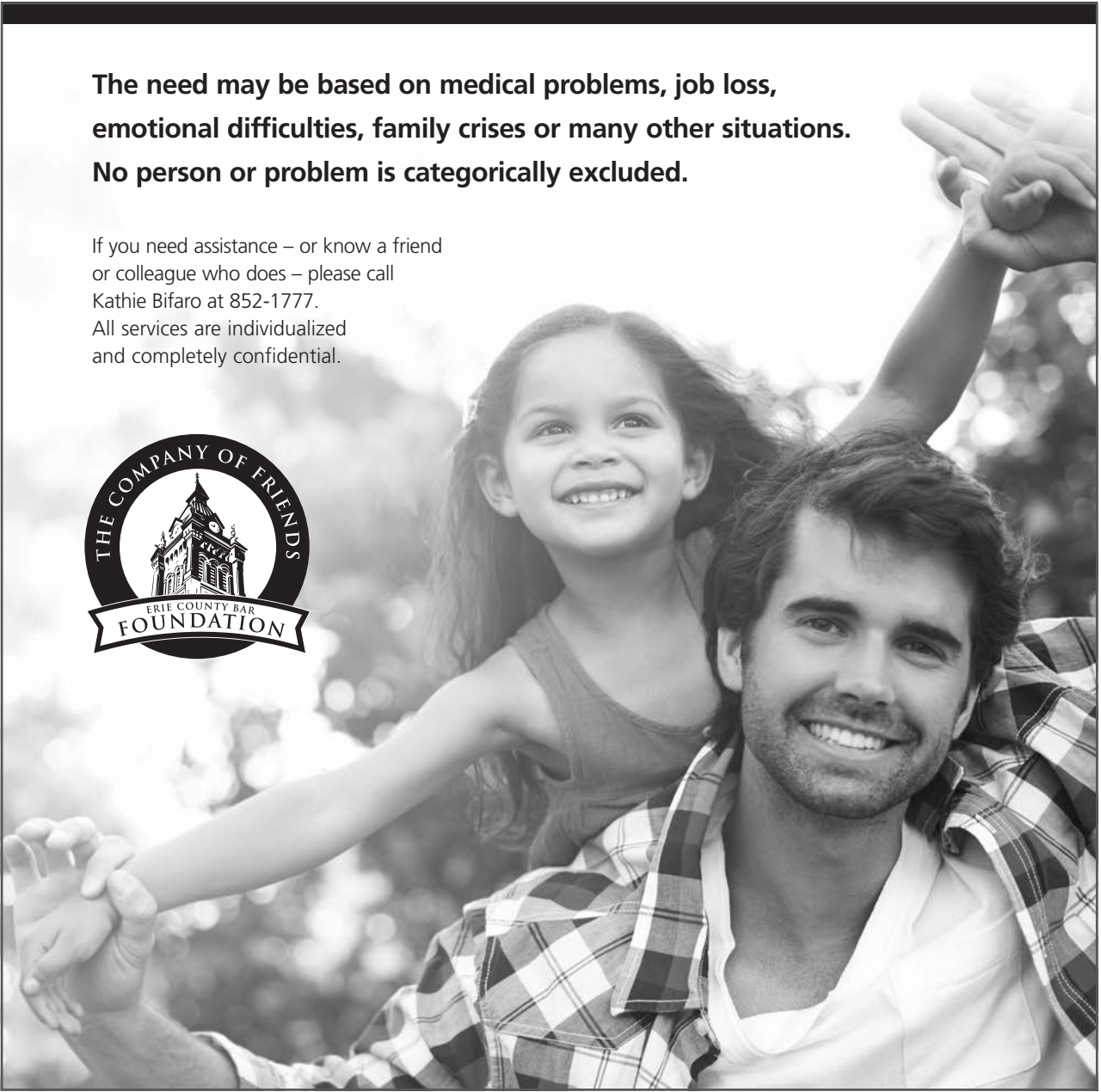
BAR ASSOCIATION OF ERIE COUNTY



*It's great to belong to something this good.*

The need may be based on medical problems, job loss, emotional difficulties, family crises or many other situations. No person or problem is categorically excluded.

If you need assistance – or know a friend or colleague who does – please call Kathie Bifaro at 852-1777. All services are individualized and completely confidential.



# Law Day and Annual Dinner Award Nominations Sought

The Bar Association is now accepting nominations for this year's Law Day and Annual Dinner awards.

## LAW DAY AWARDS

Our annual Law Day luncheon and awards ceremony marks the culmination of months of law-related educational activities, including the high school Mock Trial Tournament. In addition, members of our Speakers Bureau have been educating the public about the justice system in schools and community organizations.

Our long-standing Law Day tradition involves honoring local attorneys and non-attorneys who have distinguished themselves in service to the law and the ideals of the Constitution. The Bar Association presents several awards on Law Day, including the:

- Liberty Bell Award
- Special Service Award
- Police Officer Award
- Justice Award
- Media Award

## How to Nominate a Candidate for a Law Day Award

Nomination forms for candidates for all the Law Day Awards are available at [www.eriebar.org](http://www.eriebar.org). Completed forms should be forwarded to Daniel J. Marren, Awards Committee Chair, at the Bar Association office. **The deadline for receipt of nominations is January 1, 2016.**

## ANNUAL DINNER AWARDS

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

Winners are selected by nominations sent from the membership to the Awards Committee. The board of directors reviews the recommendations of the Awards Committee and makes the final determinations. Please consider submitting your nomination(s) for the following awards:

- Lawyer of the Year Award
- Outstanding Jurist Award
- Charles H. Dougherty Civility Award
- Special Service Award
- Award of Merit

## How to Nominate a Candidate for an Annual Dinner Award

Nomination forms for candidates for all Annual Dinner Awards are available at [www.eriebar.org](http://www.eriebar.org). Completed forms should be forwarded to Daniel J. Marren, Awards Committee Chair, at the Bar Association office. **The deadline for receipt of nominations is February 5, 2016.**

For further details and award criteria visit [www.eriebar.org](http://www.eriebar.org). [B]

# 2016 Judicial Welcoming Ceremony

continued from page 1

The following members of the judiciary will be welcomed:

**United States District Court  
Western District of New York**  
Hon. Lawrence J. Vilardo  
Hon. Michael J. Roemer

**New York State Court of Claims**  
Hon. J. David Sampson

**New York State Court of Claims/Acting Supreme**  
Hon. Mark J. Grisanti

**New York State Supreme Court**  
Hon. Emilio L. Colaiacovo  
Hon. Frank A. Sedita, III

**Erie County Court**  
Hon. James F. Bargnesi  
Hon. Sheila A. DiTullio

**Erie County Family Court**  
Hon. Brenda M. Freedman

**Buffalo City Court**  
Hon. JaHarr S. Pridgen



## Become a Contributing Member!

The BAEC bylaws confer “contributing member” status on any member who resides or maintains an office in Erie County and elects to pay an additional \$50 in annual dues to help support Association programs. Contributing members have the same rights and privileges as regular members and “such additional rights and privileges as the board of directors shall bestow,” including special recognition in the Bulletin, annual dinner program and other publications.

# President’s Letter

continued from page 1

blinded those who carry out these attacks. I can’t imagine what I could say to the people who commit these inhumane acts that would cause them to reflect, reconsider, and cease their senseless actions.

My second question is just as troubling to me. How can some of my fellow citizens, blessed with the rights and freedoms we enjoy in this country, be so selfish as to deny those same rights and freedoms to those immigrants who are seeking the safety of our shores?

Are we really so frightened of these fleeing fellow sisters and brothers of ours, as to advocate that we turn them away in their hour of need? If we are afraid of them, what have these men, women, and children done to have put us in such a state? Nothing. They seek our help, our understanding, our compassion, and our love.

Where would we be today if our forefathers were too afraid to rise up and seek their own freedom back in 1776? Where would be today if we had ignored those who needed our help during World War I and World War II? I can only imagine how frightened those soldiers were as those boats approached the beaches at Normandy. We are so very fortunate that they didn’t say “Let’s turn around and go back home – let the Third Reich control Europe. We don’t have to worry. They can’t get to us. We have a vast ocean to protect us.”

We’re fortunate that they didn’t say “We don’t have to worry about the Pacific battlefields. The ocean will protect us from those aggressors as well.” They didn’t say “Too bad for those folks who are going to be subject to the tyranny of those despots.” We as a nation didn’t turn our backs on others at that time, and I pray we won’t at this time.

I look at those images of the immigrants, and I see engineers, teachers, scientists, mechanics, builders, entrepreneurs, people who will only enhance our lives, our children’s lives, and the lives of our grandchildren. As I look at that mass of humanity trudging forward, away from their homeland, driven out – I envision that person in the crowd who will find a cure for an incurable disease. I envision that Nobel Peace Prize winner. I envision that person who will be my next-door neighbor and friend.

As a nation, we made a mistake when we interned American citizens of Japanese descent. Will we not make a similar mistake if we turn our backs to these people so in need? I don’t know what additional tragedies will befall us and them between the time I write this and when you read it. But I am confident that as lawyers, we will do all we can to help those less fortunate than ourselves.

I know that in this holiday season just past, we lawyers spent many hours gathering gifts, food, and clothing for those in our community in need of those items. I suggest that these displaced citizens need from us the same commitment that we just showed to our fellow western New Yorkers.

I started my letter with a wish for all of you for peace, joy, and prosperity. I close with that very same wish for all of those people who find themselves waiting to be welcomed in by their fellow citizens of the world. [B]





## Lawyers Helping Lawyers I Hated the World

Just a few years ago, unless I was drinking, I hated myself and everything around me. Today, I don’t drink and like who I am and what is around me. Here’s my story.

Although I grew up with enough food, clothes, shelter, friends and family support, I always felt alone and different. That was until I discovered alcohol. After taking my first drink, I was like everyone else, able to do whatever I wanted. By the time I reached my 20s, alcohol had become my constant companion. Before, during, and after most of my activities, I drank. It was not an option. It enabled me to escape from fear and worry.

By my 30s, although constantly drinking, I was doing pretty well. I made it through high school, college, law school and passed the bar. In a short time, I got a job, met my wife and had a couple of kids. It seemed all was going my way. But through it all, I drank to feel comfortable. Increasing episodes of yelling, arguing, fighting, and ultimate self-loathing ensued. Abusive behavior became the norm for me. While blaming the world for all my problems, I could not stand me. Anyone in my path suffered. In my early 40s, no one intentionally remained in my path too long. I was usually drunk. At work or at home, no one could predict when I’d either say or do something unacceptable. I had lost all my friends and was close to losing my family and job. That was then.

My life has changed dramatically. What happened? While eating dinner alone and having a few too many, I started talking to a guy sitting next to me. What I said, or how I spoke, is a mystery to me. I remember what the guy said to me. He asked, “Do you want to stop drinking?” He added,

continued on page 6

## Connors to Receive Jaeckle Award



Connors

Buffalo attorney Terrence M. Connors, a founding member of Connors and Vilardo, has been chosen to receive SUNY Buffalo Law School’s highest honor, the Edwin F. Jaeckle Award.

A 1971 graduate of the Law School, Connors will receive the award on Jan. 29 in Manhattan during the week of the NYSBA meeting. The award is given annually to “an individual who has distinguished himself or herself and has made significant contributions to the Law School and the legal profession.” As part of the school’s annual New York Alumni Luncheon, the presentation will take place at the Union League Club, 38 E. 37th St.

Connors, founding member of the Buffalo firm Connors and Vilardo, (now Connors LLP), has been active with the Law School in many ways, including teaching aspects of trial technique. He is a major supporter of the school’s newly formed Advocacy Institute – which encompasses three key areas of legal training: trial advocacy, appellate advocacy and alternative dispute resolution – and the institute’s advisory board. Additionally, Connors has served on the Dean’s Advisory Council, which consults with the Law School dean on curricular and other matters.

Connors is a fellow of the American College of Trial Lawyers, whose membership is limited to one percent of the lawyers in each state, and of the International Academy of Trial Lawyers, whose membership comprises just 500 trial lawyers in the United States. His previous recognitions include the BAEC’s Lawyer of the Year Award, the New York State Bar Association’s Attorney Professionalism Award, and most recently the Charles F. Crimi Memorial Award from the Criminal Justice Section of the state Bar Association. The SUNY Buffalo Law Alumni Association also has honored him with the Distinguished Alumnus Award. [B]

## Defense Trial Lawyers Elect Officers

The Defense Trial Lawyers of Western New York elected the following officers and directors at its annual meeting in December:

- President – Elizabeth M. Midgley
- Vice President – Nicole B. Palmerton
- Treasurer – Thomas P. Kawalec
- Secretary – Michelle Parker
- Directors – Elise L. Cassar  
John P. Gaughan  
Erin E. Molisani

Immediate past president Vicky-Marie J. Brunette will remain on the board for a one-year emeritus term. Sheldon K. Smith and emeritus/past president Kelly Phillips were honored at the meeting as their terms on the board came to a close.

Board members serve three-year terms. Kevin M. O’Neill and Melissa L. Vinton will complete the last year of two vacant board seats. For further information about the group, contact any officer or director.

## Loewenguth Named to Federal Court Post



Loewenguth

Mary C. Loewenguth, executive director of the 2,000-member Monroe County Bar Association, has been named clerk of the federal court for the Western District of New York. She succeeds Michael C. Roemer, who has begun serving as a magistrate judge (see page 3).

Loewenguth assumes her new position on January 4. She will be responsible for the management and operations of the federal courthouses in Buffalo and Rochester. A graduate of St. John Fisher College, Loewenguth has served as executive director of the Monroe County Bar since 2001. In that capacity, she has overseen a \$1 million annual budget and worked with two governing boards. Loewenguth is also credited for her role in developing Rochester’s Telesca Center for Justice, which unites the city’s civil legal service providers for the disadvantaged under a single roof. [B]



# An Arbor Arbitration

The neighbors had a boundary  
Encumbered by beautiful trees  
Giving both much shade  
And shielding a winter breeze.

Petitioners ordered tree removal  
Without their neighbor’s approval  
So the neighbor went to court  
To resolve this arbor tort.

The parties went to arbitration  
To get a determination fast  
And perhaps resolve the suit  
With the payment of a little cash.

When triple damages were awarded  
Petitioners were aghast  
Never expecting  
This large financial blast.

The award was challenged  
In Court Supreme  
Claiming the determination  
Was entirely off beam.

“Not so,” said the Judge  
“By law we cannot budge.”  
At your neighbor you may chose to glower  
But the award was well within the arbitrator’s powers.

*In the Mtr. Of the Arb. Between Svenson and Swegan et al.,  
\_AD3rd\_, 4th Dept., 11/20/15 #935 (affirming decession of  
Justice Deborah Chimes)*

# Lawyers Helping Lawyers I Hated the World

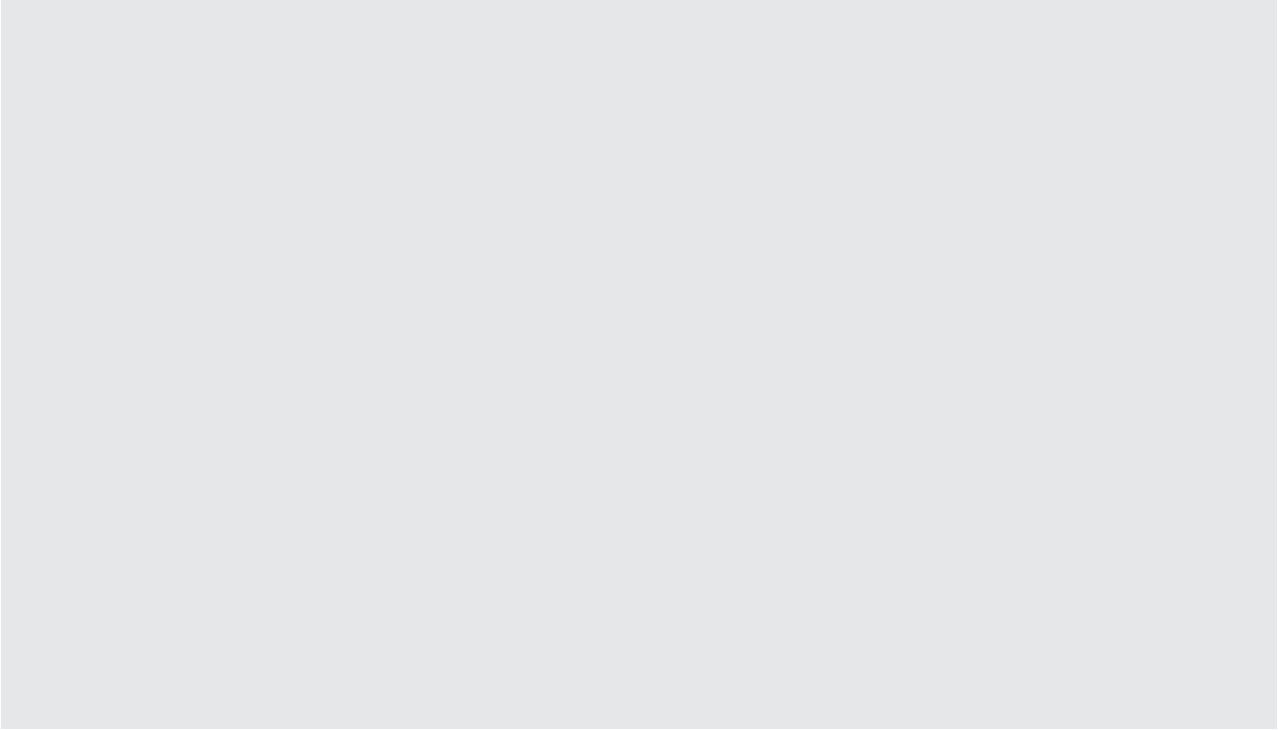
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“I’ve seen you before. I’m a lawyer too. I used to drink.” After that, I only know that when I came to the next day, two phone numbers were in my pocket. One was for Lawyers Helping Lawyers, the other for Alcoholics Anonymous.

Many times people told me that I drank too much and that I’d better stop before losing everything. But I never listened. Yet rather than make a demand, when another lawyer asked me a question and told me about himself, giving me phone numbers to obtain information – well, that finally moved me. I was able to admit that I had a drinking problem. It was the root of all my other problems.

I called Lawyers Helping Lawyers. Anonymously, they helped me learn what steps to take so I could live comfortably without alcohol. Now, in my late 40s, I have a comfortable personal and professional life. My life today is filled with fun, laughter, and success. When I have a problem, I no longer have to drink to deal with it. [B]

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



# “You and the Law” Educates Public on Legal Issues

We appreciate the time that the following members of our legal community have taken to educate the public about legal matters by volunteering their time to appear on *You and the Law*. The program airs every Friday at 5:45 p.m. during NPR’s “All Things Considered.”



**Hon. Barbara Howe**  
*What’s New in Surrogate’s Court*

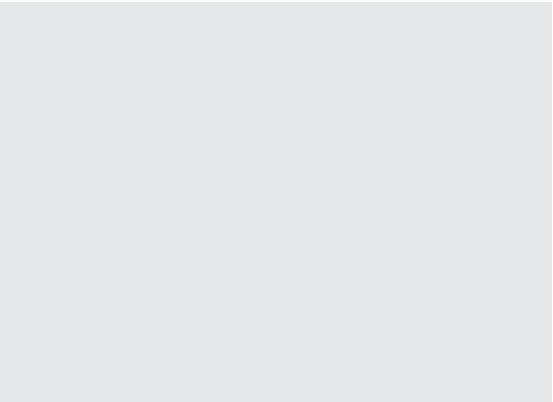
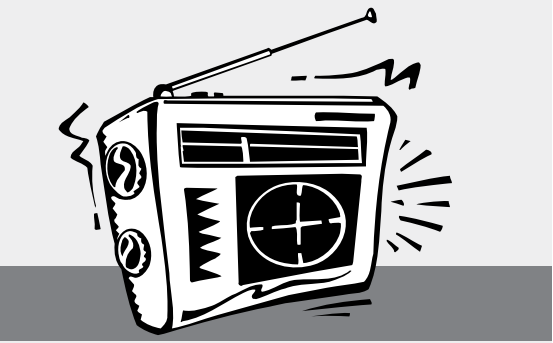


**Laurie Menzies**  
*Why you need to talk with your parents about their plans for aging...(while you’re together for the holidays!)*



**Howard B. Cohen**  
*Personal Injury Claims: How and When to Hire a Lawyer*

*You and the Law* is underwritten by the Erie County Bar Foundation and the Lawyer Referral and Information Service of the BAEC. If you would like to appear as a guest on the program, please contact **Celeste Walsh** at call **852-8687 ext. 118** or by email at [cwalsh@eriebar.org](mailto:cwalsh@eriebar.org).



# Special Thanks to Our Attorney Arbitrators!

On behalf of the board of directors and staff of the Bar Association, we extend our deepest appreciation to the attorneys who volunteered their expertise to arbitrate fee disputes during 2015. The dispute resolution program is a valuable public service. And it simply could not be operated without the generous contributions of time and talent given by these dedicated volunteers. (Names are listed chronologically according to hearing dates.) Special thanks to all who participated!

- Bruce Kevin Koren
- Jeffrey C. Mannillo
- F. Gerard Hogan
- Salvatore T. Sanfilippo
- Susan S. Hogan
- Timothy M. O’Mara
- Sharon Nosenchuck
- David B. Smith
- Eileen Katz
- Lynn Murphy
- Kristin Langdon Arcuri
- Randolph C. Oppenheimer
- Gary M. Kanaley
- James M. Shaw
- Paul D. Pearson
- Scott A. Bylewski
- Thomas R. Cassano
- Bridget M. O’Connell
- Christopher S. Mattingly
- Edward J. Snyder
- Ayoka A. Tucker
- Joseph A. Matteliano
- E. Michael Semple
- Courtland R. LaVallee
- Scott M. Schwartz
- Paul A. Vance
- Anthony C. Mancinelli
- John C. Spitzmiller
- Jeffrey P. Markello
- Krista Gottlieb
- Steven Sugarman
- Catherine T. Wettlaufer
- James P. Shea





# cyberlaw: the brave new e-world

By Anne F. Downey



## E-Signatures

From time to time, attorneys ask me about the validity of e-signatures and electronic records. The issue involves both federal and state law.

On the federal side, the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. 7001 et seq, was e-signed into law by President Bill Clinton on June 30, 2000. Section 7001(a) states that a “signature, contract or other record relating to any transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form.” As to contracts, Section 7001(a) states that contracts “may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation.” Thus, for transactions in interstate or foreign commerce, electronic signatures and records are as good as paper equivalents.

There are exceptions set forth in the ESIGN Act, including wills, codicils, trusts, adoption or divorce papers, notices terminating utility services or health or life insurance benefits, default notices under mortgages on a primary residence, and product recall notices. The Act also excludes electronic records if they are not in a form capable of being retained and accurately reproduced for later reference.

Consumer consent to electronic records is required in some circumstances, including certain banking notices. The Federal Reserve Bank in Minneapolis reported in 2014 that its “examiners continue to identify violations involving electronic delivery of disclosures during consumer compliance examinations...Banks’ reliance on the electronic version of a disclosure related to a loan, deposit account or banking service triggers the requirements of the ESIGN Act. Put simply, banks must ensure that they meet requirements of the ESIGN Act as they eliminate paper disclosures.”

Where consumer consent is required under the ESIGN Act, the consumer must – prior to consent – receive a clear and conspicuous notice of the right to have records made available by paper and the right to withdraw consent to electronic records. But note that the consent requirement applies only to electronic records provided to consumers, not electronic records obtained from them. Also note that consumer consent is required only with respect to electronic records that are used to satisfy a legal requirement that information be provided or made available to a consumer in writing. No consent is required before providing consumers with electronic information that is not required.

Other than the rules for consumer transactions, the Act does not affirmatively require that there be any agreement to use or accept electronic records or signatures in order for them to be valid and effective. A party’s use of e-signatures or e-records, or behavior consistent with acceptance, should be sufficient to evidence that party’s willingness and to make applicable ESIGN’s provisions.

The ESIGN Act does not mandate the use of any specific technology for e-signatures. Rather, the Act simply defines an e-signature as any “electronic sound, symbol or process attached to or logically associated with a contract or other record executed or adopted by a person with intent to sign the record and be legally bound.” Under the ESIGN Act, federal agencies may interpret how e-signatures will work in the industries that they regulate. For example, FDIC regulations require an e-signature to appear in “typed form.”

The federal Act does not fully preempt state law. If a state has enacted the Uniform Electronic Transactions Act (UETA), that law applies unless inconsistent with ESIGN. New York is one of the few states that has not enacted UETA.

New York’s statutory provisions on electronic signatures and records are found in the Electronic Signatures and Records Act (ESRA), in Article Three of the State Technology Law. ESRA, which became effective in August 1999, is largely consistent with the ESIGN Act. It provides that “the use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.”

The validity of an e-signature can be challenged in litigation, just as the validity of a traditional signature can. In some cases, the validity of an e-signature may be easier to prove if there is an electronic trail of emails and other online activity that confirms the transaction.

There are several New York cases dealing with e-signatures, including *Prudential Ins. Co. of Am. v. Dukoff*, 647 F. Supp.2d 401 (E.D.N.Y.2009). Prudential brought suit to void a life insurance policy on the life of Shari Dukoff, who died of cancer. Plaintiff alleged that the online application misrepresented Mrs. Dukoff’s health history. Mr. Dukoff, the surviving spouse, argued that the insurance contract provided that only signed statements of fact may be held against the insured, and there was no physical signature. He cited an Opinion of the Superintendent of Insurance in which elec-

tronic signatures were deemed acceptable for New York insurance contracts only if the insurance company verified the identity of the person applying for insurance. Prudential argued that the detailed identifying information listed in the online application – including Social Security number and physical description of Mrs. Dukoff – served as the necessary verification. The court refused to grant Dukoff’s motion for summary judgment because there was a triable issue of fact whether the detailed identifying information in the online application was sufficient under the Insurance Department’s Opinion to verify the identity of the applicant.

A 2013 decision of the Appellate Division, Second Department, examined what constitutes an e-signature under New York law. In *Forcelli v. Gelco*, 109 A.D. 3d 244 (2d Dept. 2013), the communication in question was an email from an insurance claims adjuster, Brenda Greene, who summarized the terms the parties had agreed upon to settle a car accident claim. The email stated that Mr. Forcelli, whose car was struck by Gelco Corporation’s vehicle, would be paid \$230,000 in exchange for a release. The email concluded with “Thanks, Brenda Greene.” Gelco’s counsel thereafter tried to reject the settlement and argued that there was no signed settlement agreement, but the court ruled that the email “signature” was sufficient to create a binding agreement.

The court stated “[E]mail messages cannot be signed in the traditional sense. Nevertheless, this lack of ‘subscription’ in the form of a handwritten signature has not prevented other courts from concluding that an email message, which is otherwise valid as a stipulation between parties, can be enforced pursuant to CPLR 2104. In the case of *Williamson v. Delsener* (59 AD3d 291, 291 [2009]), the Appellate

Division, First Department, stated that ‘e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds.’

In the case of *Brighton Inv., Ltd. v. Har-Zvi* (88 AD3d 1220, 1222 [2011]), the Appellate Division, Third Department, stated that ‘an exchange of emails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents, when the communications are sufficiently clear and concrete to establish such an intent’ (internal quotation marks omitted). Moreover, given the now widespread use of email as a form of written communication in both personal and business affairs, it would be unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 simply because they cannot be physically signed in a traditional fashion (see *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477-478 [2011] [‘email agreement set forth all relevant terms of the agreement...and thus, constituted a meeting of the minds’]).”

Thus, under U.S. federal law and New York law, e-signatures and electronic records are generally recognized and enforceable. [B]



## It’s a Brave New E-world...

...and your favorite Bar Association is now available on your favorite social networking sites!

In addition to our website, [www.eriebar.org](http://www.eriebar.org), news, information and updates can now be found on Facebook, Twitter and LinkedIn.

As part of our ongoing effort to communicate timely information to our members, you will also receive e-newsletters from us about upcoming CLE programs, career opportunities and news items that come to our attention between issues of the Bulletin. If for any reason, you have not been receiving these materials or choose not to receive them, please contact the BAEC at 852-8687.

As always, your comments, questions and suggestions are invited.

# News from Kent, Our Sister City

By Jonathan Smithers



Another column written on a plane. This time returning from an International Bar Association conference in Zambia. But more of that later!

When I last wrote, I was just about to leave for Sydney, Australia for the Law Asia conference. From London, it is about 23 hours flying time with a couple of hours layover in Hong Kong, plus they are 11 hours ahead. I have met many people who have done the journey and will now be more appreciative of what real jet lag feels like. They say it takes a week to catch up but I was only there for five days so was just about getting there when it was time to come home.

The conference was a great success. An opportunity to meet bar leaders from Sri Lanka, Vietnam, Laos, Cambodia, India, Singapore, Malaysia, Hong Kong, China...the list goes on. We have members working in some of those jurisdictions and have been collaborating with others to open up their legal markets. Inward trade and investment in emerging economies can be stifled if the investors cannot use the lawyers they trust so restrictive practices, whilst understandable, can be counterintuitive and may actually end up damaging the economy.

I led a panel talking about the UN guiding principles on business and human rights. Some of the jurisdictions have very real rule of law issues so keeping this on the agenda is a hard sell but nonetheless necessary.

I managed a little sightseeing although the weather was a trifle inclement. We were treated to a boat trip around Sydney Harbor. Apparently, sharks are spotted in those waters but I reckoned we would be safe, as the old joke goes a shark won't attack a lawyer out of professional courtesy!

Back to London for a couple of days, which included an invitation to a reception to mark the visit of the Indian Prime Minister Narendra Modi. India is one of our largest trading partners but with a population of 1.25 billion, there is scope for so much more. Their markets (including legal) tend to be restricted but Prime Minister Modi has been pushing hard for liberalization with some success so a number of deals have been struck and of course we had to have an event to announce them, hence my invitation.

Then after a very quick trip home, which included an after dinner speech with the local Law Society in my home town which happened to be that evening, I packed my bags again to find the real Africa!

Zambia, a Commonwealth country with a common law jurisdiction, gained independence from the UK half a century ago. It has a relatively small and dispersed rural population of 12 million but a vibrant if small legal profession. It is strategically placed, sharing borders with Zimbabwe, South Africa, Botswana and Angola. The IBA initiative is designed to provide a forum for these lawyers who have some different – but many similar – challenges, not unlike those I met in the Far East. For many, we are still viewed as the mother country so try to assist by providing advice and encouragement. My own session there was entitled “Excellence in Bar Leadership” and it provoked some interesting discussion about the balance between advocating on members’ behalf and providing tools to assist in better business management.

The international work is extremely interesting and quite a different perspective to that at home. Sometimes our domestic problems need to be viewed in a different light so my challenge is explaining that to our members. No one said it was easy!

A happy New Year from me to all the staff and members of the Bar Association of Erie County!



Jonathan Smithers is pictured above with some native dancers in Zambia. Below he is shown with Linda Kopena, vice president of the Law Association of Zambia.





# death and taxes

By Peter J. and Jillian E. Brevorka



## Matter of Regina L.F., 2015 NY Slip Op 07359 (4th Dept., 2015)

The standard form Health Care Proxy found in §2981 of the New York Public Health Law does not contain any directions with regard to life-sustaining treatment. While the form encourages notifying the named agent about artificial nutrition and hydration, this case indicates that it would be preferable to set out those directions in the proxy.

This is an appeal in a guardianship proceeding under Article 18 of the Mental Hygiene Law. The order below included a provision directing that “comfort care shall always be provided [to the Alleged Incapacitated Person], and shall always include food and hydration, whether orally or artificially, including comatose conditions.”

When she was age 66 and competent, the Alleged Incapacitated Person had executed a Health Care Proxy which provided that “[i]f I should have an incurable or irreversible condition that is likely to cause my death within a relatively short time,...no artificial administered nourishment or liquids shall be furnished to me unless necessary for my comfort or to alleviate pain.” The proxy further stated that, should she be in a state of permanent unconsciousness or profound dementia, all nourishment or liquids not necessary for her comfort or to alleviate pain “are to be withheld or withdrawn.”

The Appellate Division reversed the order below insofar as it contained the direction requiring the provision of food and hydration. The Fourth Department noted that a competent adult generally has the right to make health care decisions, including the right to refuse life-sustaining treatment, and that this right must be respected even when the person later becomes incompetent.

The Appellate Division noted that the Court of Appeals in Matter of Westchester County Med. Ctr. [OConnor] 72 NY2d 528 determined that “clear and convincing evidence” of a person’s pre-incompetency desire to refuse life-sustaining treatment is required, and further that a formal writing would satisfy that standard.

In the case at hand, the Alleged Incapacitated Person had executed a health care proxy which contained the directions mentioned above. This, held the Fourth Department, constituted a clear and unambiguous expression of her wishes, and could not be overridden by the court below.

## Matter of Estate of Petti, 2015 NY Slip Op. 08286 (4th Dept., 2015)

Decedent died in 1996. He left a will directing that whatever was due him from his father’s estate be held in trust for

his then six-year-old son until the son turned 21.

The respondent was named executor of the decedent’s estate and a guardian of the person and property of the son. In 2000, the administrator of the estate of decedent’s father issued payments of approximately \$17,000 to the executor of decedents estate.

After attaining age 21, the decedent’s son brought a proceeding to compel the executor of the decedent’s estate to account. The Surrogate dismissed the proceeding based upon a release which the son had previously executed.

In 2009, when the son was 19, he signed a release providing that, in consideration of \$5,000 received from respondent and his wife, in which the son released them “from all actions....whatsoever.” The release further provided that it was “more particularly in connection with a certain guardianship of the person and property of [the son] made in...Surrogate’s Court...and the discharge of said Releasee(s) by Releasor for any and all accounting of all funds received by said Releasee(s) during said guardianship which were previously given or spent on [the son]...for his care and custody through his years of minority while residing with Releasee(s).”

The Appellate Division unanimously reversed the Surrogate, and remanded for further proceedings. The Fourth Department held that the release applied only to respondent and his wife in their roles as guardians, and did not foreclose the son from maintaining an action against respondent in his role as executor of decedent’s estate.

## Matter of Estate of Fizzinoglia, N.Y. Court of Appeals (2015)

This case involves the validity of a prenuptial agreement which lacked financial disclosure. While financial disclosure in a prenuptial agreement is not required in New York (see EPTL 5-1.1-A), the case indicates that such disclosure, or an affirmative waiver of such disclosure, might avoid unnecessary litigation.

The decedent died intestate, survived by his wife and his

father. The wife filed a petition seeking Letters of Administration, and seeking to invalidate a prenuptial agreement under which the wife waived her right to an intestate share of the decedent’s estate. The decedent’s father opposed the wife’s petition.

The wife claimed that the prenuptial agreement was invalid and unenforceable because an essential term was omitted from the agreement, and that the agreement was procured by overreaching. Notably, an addendum attached to the agreement as Exhibit A, upon which the parties were supposed to list their assets and liabilities, had been left blank.

Upon her pre-trial deposition, the wife testified that she was aware when the agreement was signed that Exhibit A was blank, that she was not concerned by the omission, and that the decedent’s financial status made no difference to her before the marriage.

The Surrogate granted summary judgment dismissing the wife’s petition at the close of her case.

On appeal, the Second Department affirmed (118 A.D.3d 994), holding that the wife had failed to establish any fact-based particularized inequality with the decedent so as to shift the burden to the decedent’s father to disprove fraud or overreaching.

The Appellate Division noted that while there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties, an agreement between spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress or other inequitable conduct.

Since the wife continued to have the burden to prove fraud, duress or other inequitable conduct, and she had failed to do so, the Appellate Division unanimously upheld the order of the Surrogate dismissing the wife’s petition.

On appeal, the Court of Appeals noted the wife’s deposition testimony, and further noted that the record did not contain any indication that the decedent attempted to conceal or misrepresent the nature and extent of his finances. The Court agreed with the courts below that the wife had failed in her burden of proof, and that summary judgment dismissing her petition was appropriate. [B]

“Clear and convincing evidence of a person’s pre-incompetency desire to refuse life-sustaining treatment is required.”

# Friday, February 19, 2016

6921 Route 242 • Ellicottville, New York  
\$65 per person includes Lift Ticket and Après Ski Party  
Slopes open at 9:30 a.m. • Après Ski Party from 4 – 6 p.m.  
Après Ski Party includes beer, wine and hors d'oeuvres



## Reservation Form

Bar Association of Erie County's Ski Day | Friday, February 19, 2016 | \$65

Name: \_\_\_\_\_

Please list additional skiers’ names on separate sheet of paper.

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Number of skiers \_\_\_\_\_ @ \$65 per person Total enclosed: \$ \_\_\_\_\_

☐ Check enclosed Charge my reservation to: ☐ Visa ☐ MasterCard

Card Number \_\_\_\_\_ Exp. Date \_\_\_\_\_

Billing Address \_\_\_\_\_

Name (as it appears on card) \_\_\_\_\_

Signature \_\_\_\_\_

Please mail with payment by **Friday, February 12, 2016** to:  
Bar Association of Erie County | 438 Main Street | Sixth Floor | Buffalo, New York 14202  
Attn: Susan L. Kohlbacher





Get your copy today by calling 852-8687. The 2016-17 Directories will not be available until June.



## New Member Discount on Flowers

Our members can now enjoy discounts at **1-800Flowers.com** through our partnership with NPP (see ad below).

Save 20% at both **1-800Flowers.com** and **1-800Baskets.com**. Discounts are also available on Fruit Bouquets, Cheryl's, Fannie May, The Popcorn Factory, Wolferman's, and Harry & David.

If you haven't already joined, call 800-810-3909 or visit [www.mynpp.com](http://www.mynpp.com) to learn more about this and other discounts available to our members.



# lost in (techno) space

By Martha Buyer



## Wi-Fi Blocking: Don’t Tolerate It - and Certainly Don’t Do It or Condone It

Can’t get your hotspot to work in a hotel or conference center? That’s a problem the FCC is interested in hearing about. Willful or malicious interference with Wi-Fi hot spots is illegal. Often known as “jamming,” such actions are illegal and perpetrators of these bad acts – regardless of purpose – will pay dearly. Period. In early November, the FCC issued an enforcement advisory regarding two separate jamming problems where wi-fi interference in one instance not only occurred, but was achieved (a dubious distinction to be sure) beyond the property where the jam was intended. In the second case, the problem was – and continues to be – the perpetrator’s lack of response to FCC queries about jamming at its properties. The cases are different, but the take-away is the same. Don’t do it, and don’t let your company/clients/friends do it.

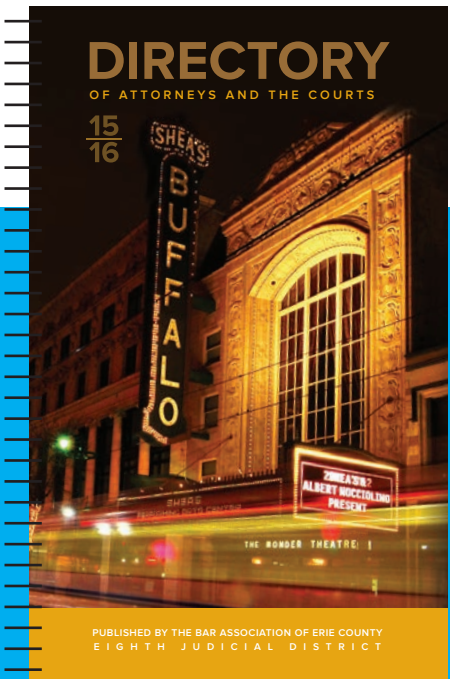
“Jamming,” in this context (as opposed to the musical one), is defined as the intentional creation of interference to disrupt a communications signal. (As an interesting side note, film actress Hedy Lamarr, along with avant garde musician George Antheil, held the first patent granted in the United States for the most widely used type of anti-jamming processes currently in use – frequency hopping spread spectrum technology.) Perhaps recognizing the potential catastrophes interfering signals could cause, Section 333 of the Communications Act of 1934 (as amended) clearly prohibits

“willful or malicious interference with any radio communications of any station licensed or authorized by or under the Act or operated by the United States Government.” Additionally, Section 302 of the Communications Act, along with Section 2.803(a) of the FCC’s rules clearly prohibits the “manufacture, importation, marketing, sale or operation of devices deliberately designed to jam or disrupt wireless communications.” (47 U.S.C. Section 302(a)(b)) and 47 C.F.R. Section 2.803(a). So it’s illegal to sell jamming devices and illegal to use them. Period.

In the first case, M.C. Dean as the ostensibly exclusive provider of wi-fi services for the Baltimore Convention Center, was accused of blocking wi-fi within the Convention Center, effectively preventing others from establishing hot spots at conventions and trade shows held in the facility. M.C. Dean, a well-established electrical contractor, through its actions, tried to force guests and others at the Baltimore Convention Center to use its own wi-fi at a cost of \$1,095 per event. Those who didn’t pay for access were denied access, plain and simple.

Over several visits to the facility, FCC field agents were able to determine that, not only was the wi-fi within the facility blocked, but additionally, the blocking that was tak-

continued on page 14

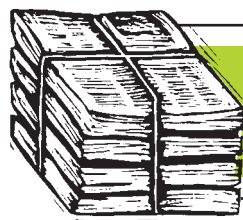


We are now beginning work on the

2016-17 ATTORNEY DIRECTORY.

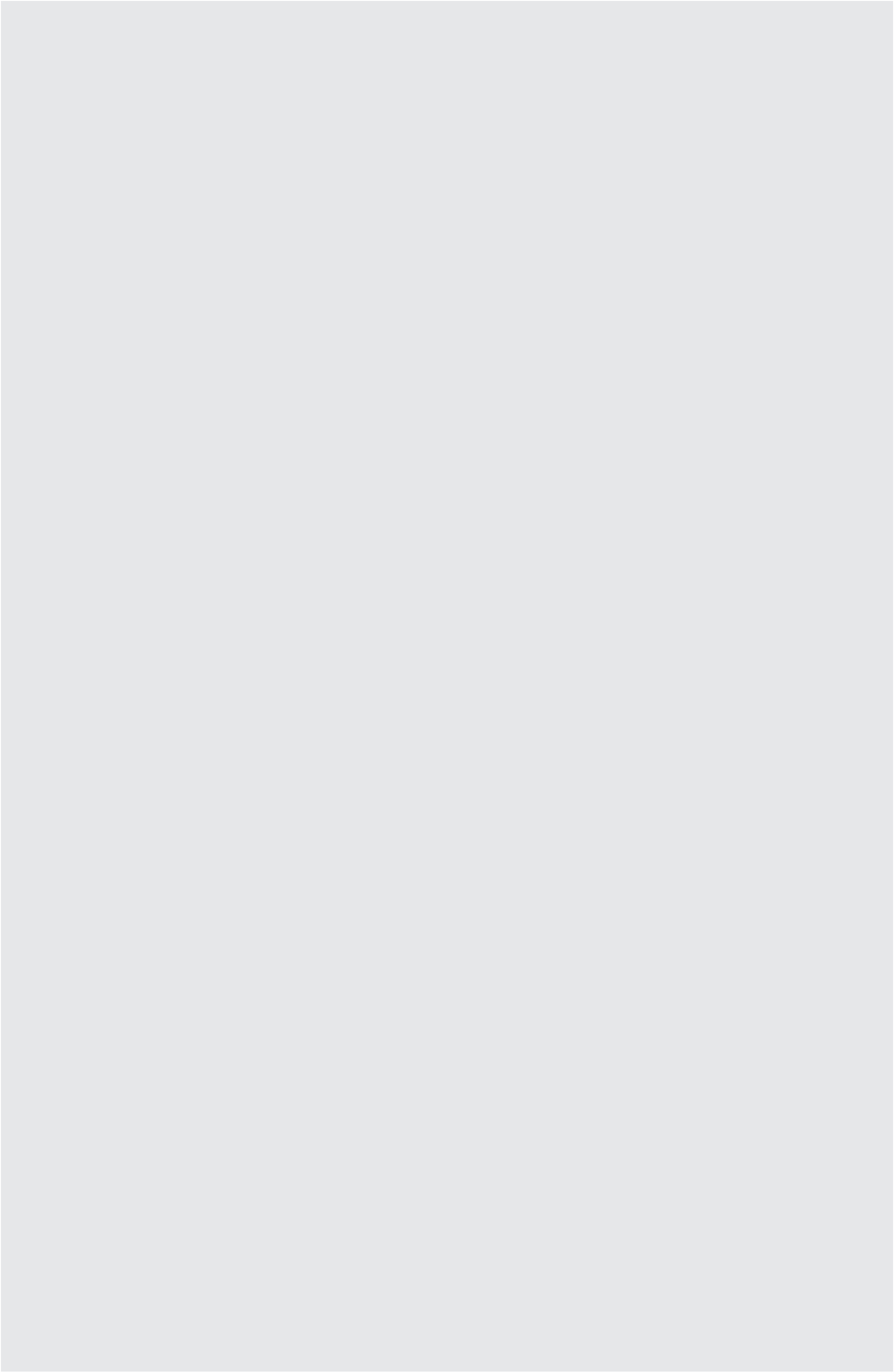
IF YOU HAVE ANY CHANGES TO YOUR CURRENT LISTING, YOU MUST SUBMIT THEM NO LATER THAN MARCH 1.

See page 5 of the current Directory for further details.



BE GREEN — RECYCLE YOUR BULLETIN





## Lost in Space

continued from page 11

ing place reached beyond the physical perimeter of the facility itself to include not only adjacent sidewalks but passing vehicles as well. As a result, the FCC charged M.C. Dean with intentionally violating Section 333 of the Communications Act. The initial fine? \$718,000.

In the second recent case, the FCC has proposed a modest fine against Hilton Worldwide Holdings, Inc. for what the FCC has called “apparent obstruction of an investigation into whether Hilton engaged in the blocking of consumers’ Wi-Fi devices.” What got Hilton in trouble (and the fun is just beginning) is its unwillingness to respond to an FCC Letter of Inquiry regarding the hotel conglomerate’s practices with respect to alleged wi-fi blocking.

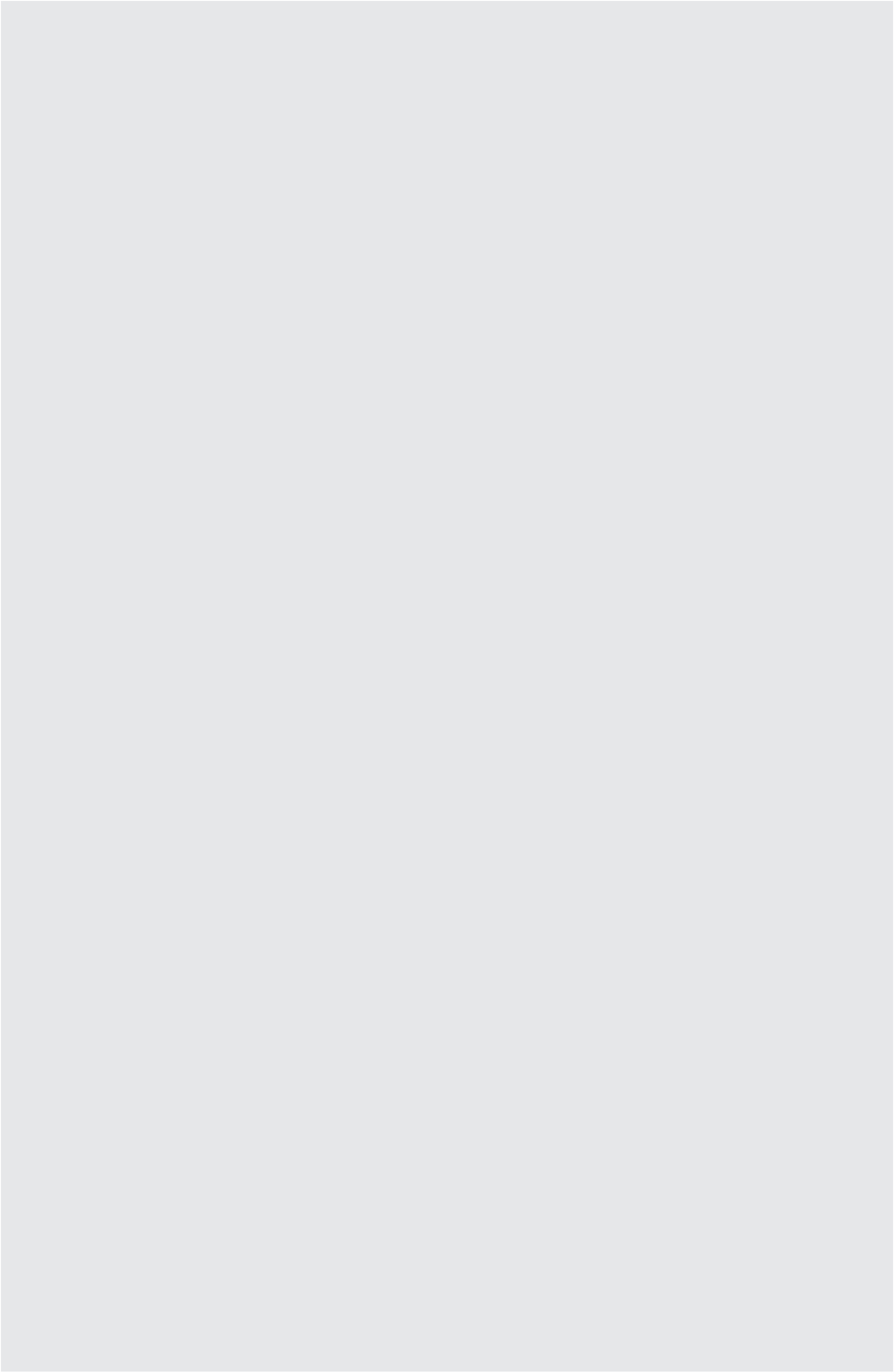
Specifically, last November (2014), the FCC, following receipt of at least one consumer complaint, mailed a letter of inquiry to the company requesting copies of relevant corporate policies, as well as specific information regarding wi-fi management at Hilton properties throughout the United States. To date, Hilton has failed to provide “the requested information for the vast majority of its properties,” according to the FCC. The \$25,000 fine is only the first shot across the hotel behemoth’s bow...absent a speedy response, the chain is in for much higher fines and penalties.

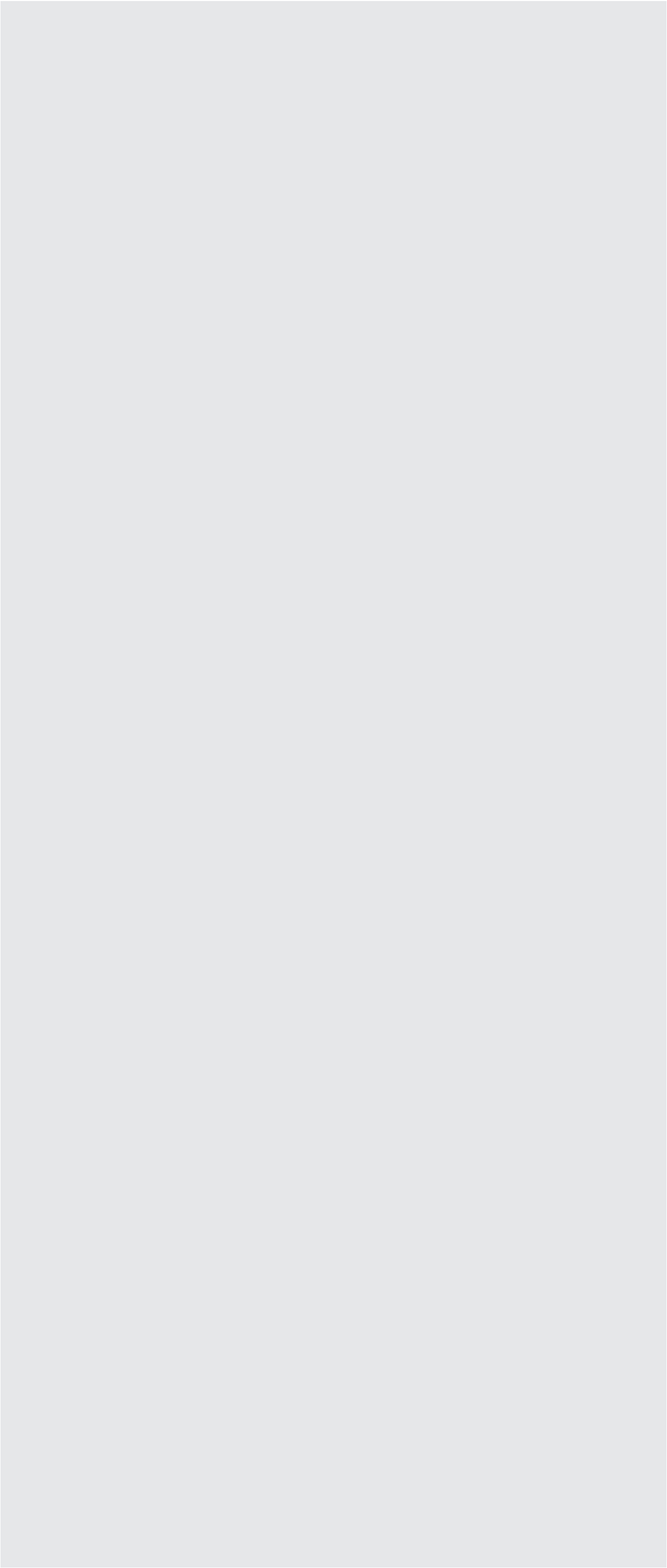
Hilton’s lack of response may be a problem of untidy management – or ignorance or general disinterest – but it disregards the FCC’s rules at its peril. Last year, the FCC fined two Marriott entities (Marriott International, Inc. and Marriott Hotel Services, Inc.,) \$600,000 for activities that took place at its Gaylord Opryland Hotel and Convention Center in Nashville. Earlier this year, the FCC fined Smart City Holdings – an entity that manages convention facilities – \$750,000.

Federal law provides for much steeper penalties. These include up to \$112,500 for any single act of jamming with an additional \$16,000 per day for continuing violations. The government further has the right to seize the equipment, and the criminal penalties for using such equipment can include imprisonment.

What drives these steep penalties is the incredible harm to the general public that can be caused when wi-fi signals cannot get through. This is really all about the ability of first responders (police, fire, ambulance, other) to communicate point to point if and when the need arises. Whatever the reason for blocking inside convention centers and hotels, it’s most likely driven by the ability to generate revenue. But it’s simply not tolerable – practically or legally – when compared with the interests of public safety. [B]





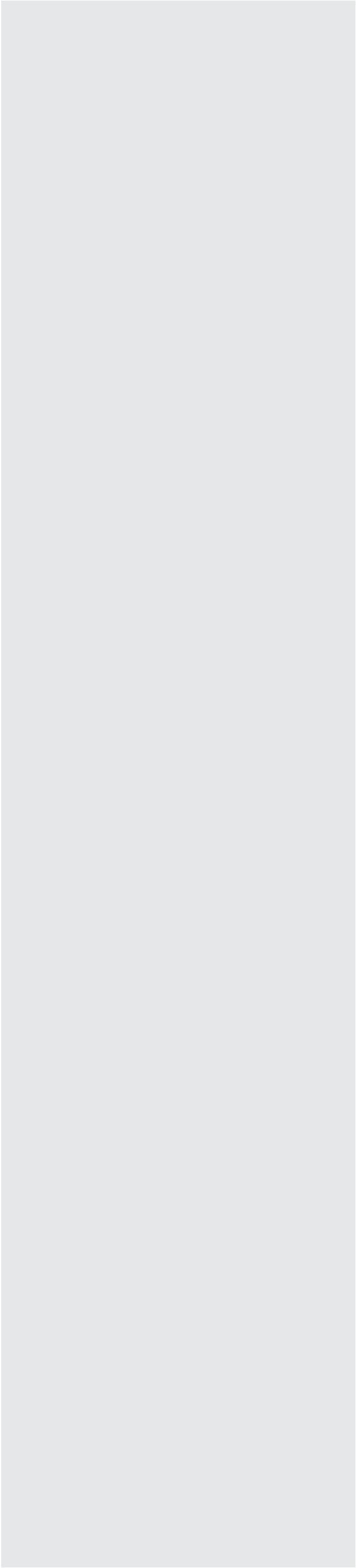


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WORTH QUOTING

*“You must live in the present, launch yourself on every wave, find your eternity in each moment.”*  
– Henry David Thoreau

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# Annual Food Drive Effort to Focus on Monetary Donations

Did you know that a donation of just \$15 can feed a family of four for a week? Or that – contrary to popular belief – the hungry people in our community and across the nation are not just the homeless? They are often employed, or live in a household with someone who is. They are the working poor who struggle to provide the daily necessities that so many of us take for granted. For the past 26 years, the Bar Association of Erie County has expressed its commitment to helping the hungry in our community through its Have-A-Heart food drive. Over the history of the drive, several tons of food and substantial financial support have been provided to the Food Bank of Western New York.

This year’s drive has once again focused primarily on monetary contributions. Law firms that wish to collect non-perishable food items may also continue to do so and the Food Bank of Western New York will arrange to pick up the donated items. Please help the hungry in our community by sending in your donation today.

Checks should be made payable to the Food Bank of Western New York and returned with the form at right by Valentine’s Day, February 14th. All donors will receive written confirmation of their contribution directly from the Food Bank.



## 2016 BAEC “Have A Heart” Food Drive

Firm Name \_\_\_\_\_

Contact Person \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

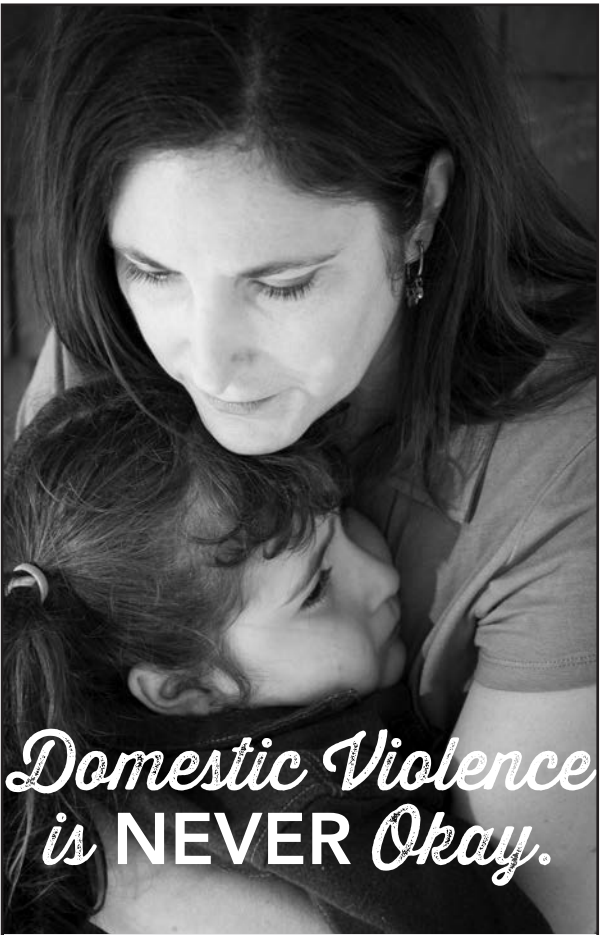
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Phone Number \_\_\_\_\_

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E-mail Address \_\_\_\_\_

Kindly complete and return this form to:  
Michael Billoni, Food Bank of Western New York  
91 Holt Street • Buffalo, New York 14206 • Telephone No. 852-1305



*Domestic Violence*  
**is NEVER Okay.**

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

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

**Look What You Made Me Do!** In spite of the abuser’s efforts to “blame the victim,” domestic violence is **NEVER** your fault. If you or a loved one are suffering, help is just a phone call away. Don’t wait. Please call the 24-hour domestic violence hotline at 884–6002.

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

in the public service

By Gayle T. Murphy, Pro Bono Coordinator Volunteer Lawyers Project, Inc. (VLP)



## Champions for Justice Bash Benefits VLP, LSED

The Eighth Annual Champions for Justice Bash was held just before Thanksgiving at the Hotel @ The Lafayette. Over 300 access to justice supporters celebrated the important work of the staff and volunteers of Legal Services for the Elderly, Disabled and Disadvantaged of WNY (LSED) and the ECBA Volunteer Lawyers Project, Inc. (VLP).

An awards reception, held immediately prior to the Bash, was hosted by BAEC President Kevin W. Spitler, who did an outstanding job as this year’s honorary chair. Spitler and Hon. Paula L. Feroletto presented individual awards to law firm, attorney, law student and community member volunteers and supporters. While every volunteer and supporter of LSED and VLP plays a critical role in assisting LSED and VLP to achieve their missions, the honorees were recognized for their exemplary service and commitment. Each award winner had a moving story highlighting their commitment to “speaking for those who are not heard.”

Karen L. Nicolson, CEO of LSED, affirms that “the attorneys of western New York have been so generous to Legal Services for the Elderly, both in terms of their financial contributions and the hundreds of pro bono hours that they provide to our clients. We are thrilled to be able to honor them each year at the Champions for Justice Bash.”

Everyone who attended the Bash would agree with Robert M. Elardo, VLP’s Managing Attorney/CEO that “it was two terrific events on one night. First, at the awards reception there were so many inspiring stories about all of the dedicated award winners. Then at the Bash, it was just fun. Great food, drink, and a chance to schmooze with no boring speeches.”

Congratulations to all the award winners! To see the awards reception and Bash photo galleries, along with a list of our sponsors, visit the LSED and VLP Facebook pages or websites at [www.lsed.org](http://www.lsed.org) and [www.ecbavlp.com](http://www.ecbavlp.com). [B]



VLP Law Student Award Winner Rachel Baldassaro, BAEC President Kevin W. Spitler, Jason Fleischer and Hon. Paula L. Feroletto

### 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 28 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](http://www.lawyerswithdepression.com) or contact Daniel T. Lukasik at 847-1010. All calls are strictly confidential. We invite you to join us and share your story.**

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An Organization for Lawyers  
in the Diocese of Buffalo, New York

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or visit our website at [www.stthomasmorewny.org](http://www.stthomasmorewny.org).





VLP award winners: From left, front row: Lydia H. Beebe, Hon. Paula L. Feroletto, Tracie L. Lopardi, Joshua Feinstein, Marc Shatkin, Charles S. Carra, Thomas A. Steffan, Gregory Della Posta and Sarah E. Fenster. From left, back row: Thomas J. Gaffney, President Spitler, Bradlee W. Townsend, Daniel S. Johnston, Robert M. Elardo, Jason Fleischer and Robert B. Heary.



President Spitler, LSED Law Student Volunteer of the Year Justin Jones and Hon. Paula L. Feroletto



From left, Hon. Sharon S. Townsend, Bradlee W. Townsend and President Spitler



Robert J. Lane, Kevin M. Kearney, Robert B. Conklin, Adair Kearney, Susan Conklin and Joshua Feinstein



# Bench and Bar

continued from page 3

sel to business and political organizations. Cross earned his J.D. from Villanova University Law School and is active with the Olmsted Center for Sight. He is also president of the board of directors of Link, Inc. Service Coordination.



**Kristen Degnan** has been promoted to partner at Brown & Kelly, LLP. Degnan is a trial attorney experienced in civil defense litigation in the areas of premises and automobile liability, lead paint, labor law, products liability, no fault and toxic torts. A magna cum laude graduate of Allegheny College, she earned her J.D. from Albany Law School. She is admitted to practice in the United States District Court, Western District of New York and the Western District of New York Bankruptcy Court.



**Paul Callahan** has joined Brown & Kelly, LLP as a partner. His experience is in the analysis and litigation of complex insurance coverage issues and also the representation of insurance companies with respect to uninsured/underinsured motorists and no-fault claims, insureds with respect to various third-party matters, and appellate practice. A graduate of SUNY at Buffalo and its Law School, Callahan is admitted to practice in the courts of the State of New York and the United States District Court for the Western District of New York. He is a frequent lecturer and author on insurance and defense related matters.

[B]



THE ERIE COUNTY  
BAR FOUNDATION

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

**The Foundation gratefully acknowledges the following contributions:**

**In Honor of Mark Kenmore:**  
Sharon Stern Gerstman

**In Honor of Emilio Colaiacovo on his new Supreme Court Judge Position:**  
Paula & Terry Newcomb

**In Honor of David Sweet:**  
Brian J. Weidner

**In Honor of Richard Blewett’s 90th Birthday:**  
Bob Freedman & Maryann Saccomando Freedman

**In Honor of Hon. Kevin Dillon:**  
Horace A. Gioia

**In Honor of Edward C. Cosgrove:**  
Robert J. Schreck

**In Honor of Brenda Freedman on her Election to Family Court:**  
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**In Honor of Kathleen Sweet:**  
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**In Honor of Grace Marie Ange:**  
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**In Honor of Hon. Sheila A. DiTullio on her Re-Election as Erie County Court Judge:**  
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**In Memory of the Proctors in Admiralty of the Old Admiralty Term in the USCD, WDNY:**  
Fenton F. Harrison

**In Memory of Hon. Edgar C. NeMoyer:**  
Kenneth A. Manning

**In Memory of Jerrold Archer (Father of Amy Archer Flaherty):**  
Jim & Mary Shea

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Anna Marie Cellino

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Anthony J. DeMarie

**In Memory of Hon. Thomas P. Flaherty:**  
Amy & Michael Flaherty

**In Memory of Richard Cox (Father of Jonathan D. Cox):**  
Anthony M. Nosek

**In Memory of Don I. Dally:**  
Arnold H. Soeder  
Bar Association of Erie County

**In Memory of Kathy Moran Gilmour & Thomas Gilmour, Parents of John J. Gilmour:**  
Daniel M. Killelea

**In Memory of Prudence Philbin:**  
David F. Davis  
Mark W. Hamberger

**In Memory of Nathan S. Silverberg:**  
David K. Silverberg

**In Memory of Christine D. Uba:**  
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**In Memory of Catherine L. Haslinger:**  
John E. Haslinger

**In Memory of Hon. James H. Boomer:**  
Amy & Michael Flaherty

**In Memory of My Father, Edward J. Dee:**  
Julie Ann Dee

**In Memory of My Mother, Genevieve “Jane” Kullman:**  
Paul W. Kullman

**In Memory of Mildred A. Fiorella (Wife of Peter J. Fiorella, Jr., Mother of Peter J. Fiorella, III):**  
Jim & Mary Shea  
John J. Carney  
Kenneth A. Manning

**In Memory of John T. Frizzell:**  
Hon. Gerald & Nora Whalen

**In Memory of Hon. Frank A. Sedita, Jr.:**  
Hon. Joseph A. Fiorella

**In Memory of Hon. Matthew J. Jasen:**  
Peter J. Brevorka

**In Memory of George Rich:**  
Michael G. Cooper  
Paula & Terry Newcomb

**In Memory of James N. Carlo:**  
Raymond W. Walter

**In Memory of Mike Ingham:**  
Robert D. Lonski

**In Memory of George Navagh:**  
Robert Farrington

**In Memory of My Father, Henry W. Jadd:**  
Robert I. Jadd

**In Memory of Steven & Toni Gittler, Parents of Jean Gittler:**  
Vincent Hauber & Jean Gittler

**In Memory of Michael J. Flaherty:**  
Amy & Michael Flaherty

**In Memory of Bernard Freedman (Father of Jeffrey M. Freedman):**  
Chris & Karen Kerr  
Kevin Wicka  
Norman J. Mattar

**In Memory of my son, Max Tillman Cohen:**  
Michele A. Brown

*In Memoriam*

*“If I am to wear this mourning cloak,  
let it be made of fabric of love,  
woven by the fine thread of memory”  
~ Molly Fumia*

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.

*Milton J. Strebel  
Michael T. Kelly*

# western district case notes

By Sean McPhee and Kevin M. Hogan



## CIVIL PROCEDURE

In *Medgraph, Inc. v. Medtronic, Inc.*, No. 09-CV-6610L (October 26, 2015), plaintiff filed a motion for an “indicative ruling” pursuant to Rule 62.1 after summary judgment was granted to defendant dismissing plaintiff’s patent infringement claims, from which plaintiff already had filed a notice of appeal to the Court of Appeals for the Federal Circuit. Following that summary judgment decision, an en banc panel of the Federal Circuit reversed a prior decision that the Medgraph court had relied on when granting summary judgment. In its motion for an indicative ruling, plaintiff sought a declaration whether, in light of the change in case law, the court would vacate its prior summary judgment decision and reopen the case for further proceedings on the issue of the alleged infringement, if the case was remanded on appeal.

The court denied the motion on two grounds, ruling first that a motion for an indicative ruling requires an underlying and timely motion for relief that the trial court lacks authority to grant because of a pending appeal. In this case, no such timely motion (such as Rule 60(b) motion) had been made. The court also ruled that an indicative ruling was not warranted in any event, in the absence of newly discovered evidence or some inadvertence or mistake of law, because the issues here centered on the effect of a recent Federal Circuit decision and the appellate court did not need the court’s advice or opinion in that regard.

## EVIDENCE

In *Wilson v. Hauck, et al.*, No. 00-CV-6458EAW (October 28, 2015), plaintiff sought relief under 42 U.S.C. § 1983, alleging violations of the Fourth and Eighth Amendments due to the alleged use of excessive force or failure to protect him from that excessive force by defendants. Earlier in the litigation, the court entered an order requiring defendants to make available at trial original videotape and photographs depicting the underlying incident. After defendants advised at the final pretrial conference that the original videotape and photographs no longer existed, the court granted plaintiff’s motion to give the jury an adverse inference instruction based on defendants’ alleged spoliation of evidence. The court held that defendants had control over the evidence, were under an obligation to preserve it, and were at least negligent in failing to do so. The court also ruled that, because plaintiff had consistently argued that copies of the videotape and photographs were of inferior quality and failed to show the detail that was visible in the originals, those alleged differences between the originals and the copies were sufficient to permit a reasonable trier of fact to conclude that the originals would have supported plaintiff’s claims.

*“...defendants had control over the evidence, were under an obligation to preserve it, and were at least negligent in failing to do so.”*

## PREJUDGMENT INTEREST

In *CSX Transp., Inc. v. Niagara Lubricant Co., Inc.*, No. 12-CV-00540 EAW (Nov. 10, 2015), plaintiff brought an action to recover for property damage caused by a fire at a facility operated by defendant. Prior to trial, the parties entered into a stipulation regarding defendant’s liability and agreed that the court would resolve any dispute concerning prejudgment interest. After the jury awarded damages in favor of plaintiff, the parties disagreed about the date from which prejudgment interest should accrue and submitted briefing to the court outlining their respective positions.


Noting first that state law applies to questions of prejudgment interest in diversity cases, the court then examined CPLR 5001, which directs that prejudgment interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Ultimately, the court awarded plaintiff prejudgment interest from the specific dates on which its damages were incurred and rejected defendant’s argument that plaintiff’s failure to

introduce evidence at trial regarding those dates precluded such an award, holding instead that a post-trial affidavit, which listed when the costs were incurred, was sufficient.

## LAY WITNESS TESTIMONY

In *Byfield v. Chapman*, No. 12-CV-6131-FPG (Oct. 22, 2015), a pro se inmate brought suit against prison officials who allegedly beat him. Following plaintiff’s deposition testimony that he saw blood in his urine after the beating, defendants filed a motion in limine to preclude such testimony at trial claiming that, without an expert, plaintiff could not properly link the blood in his urine to the alleged beating. The court denied the motion because, although a plaintiff who has been physically injured generally must offer expert medical testimony to show the cause of the injury, an exception to the general rule applies when ordinary lay persons are capable of understanding the evidence. Here, because the subject matter is not complex, plaintiff does not need expert testimony as to causation and will be allowed to testify that he observed what appeared to be blood in his urine, but cannot testify that the discoloration was actually blood because he is not an expert. [B]






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Because of the early press time of this issue, details were not finalized for a number of the programs on our calendar. Please watch our website ([www.eriebar.org/ContinuingLegalEducation/CourseCalendar](http://www.eriebar.org/ContinuingLegalEducation/CourseCalendar)) for regular updates and additions. Thank you for your continued support of the Erie Institute of Law.

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the  
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## Pros in Action: Court of Appeals Argument

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The Appellate Practice Committee invites you to join NYS Court of Appeals Judge Eugene Pigott, Jr., Buffalo attorneys Paul Cambria, Shawn Hennessy, Edward Markarian and Alan Voos as they watch and discuss video replays of *People v Spicola* and *Bissell v Town of Amherst*. These cases were well-argued at the Court of Appeals, where Judge Pigott and the other Judges of the Court heard the arguments of Cambria, Hennessy, Voos and New York City attorney Hal Friedman. The participants discuss how the issues were framed in their briefs, how they prepared for oral argument, whether questions from the court surprised them, and whether, with hindsight, they wished they had handled issues differently.

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Grain Silos by Glenn Edward Murray

# JANUARY 2016

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|   |   |   |   |
|---|---|---|---|
| <p><b>FRIDAY 1</b><br/>OFFICE CLOSED</p>  | <p>Criminal Law Committee<br/>12:15 p.m. – Old Surrogate Court Courtroom<br/>1st Floor of 92 Franklin Street.<br/>Joseph J. Terranova, Chair</p> <p>Real Property Law Committee<br/>12:15 p.m. – Keri D. Callochia, Chair</p> <p>Labor Law Committee<br/>12:15 p.m. – Josephine A. Greco, Chair</p> | <p>Committee to Assist Lawyers with Depression<br/>12:30 p.m. – Daniel T. Lukasik, Chair</p>  | <p><b>MONDAY 25</b><br/>Alternative Dispute Resolution Committee<br/>12:15 p.m. – Bridget M. O’Connell, Chair</p>   |
| <p><b>MONDAY 4</b><br/>Professional Ethics Committee<br/>12:15 p.m. – Terrence B. Newcomb, Chair</p>  |   | <p><b>MONDAY 18</b><br/>OFFICE CLOSED</p>   | <p><b>TUESDAY 26</b><br/>Board of Directors<br/>8:00 a.m. – Gregory T. Miller, President</p> <p>Elder Law Committee<br/>12:15 p.m. – Edward C. Robinson, Chair</p>  |
| <p><b>WEDNESDAY 6</b><br/>Human Rights Committee<br/>12:15 – Sharon Nosenchuck, Chair</p>   | <p><b>WEDNESDAY 13</b><br/>Intellectual Property, Computer &amp; Entertainment Law Committee<br/>12:15 p.m. – Jordan L Walbesser, Chair</p> <p>Health Care Law Committee<br/>12:15 p.m. – William Patrick Keefer, Chair</p>   | <p><b>TUESDAY 19</b><br/>Corporation Law Committee<br/>12:15 p.m. – Craig M. Fischer, Chair</p> <p>Federal Practice Committee<br/>12:15 p.m. - Adelbert Moot CLE Center<br/>Timothy J. Graber, Chair</p>  | <p><b>THURSDAY 28</b><br/>P&amp;P in Family Court Committee<br/>12:15 p.m. – Family Court Building<br/>Tina M. Hawthorne &amp; Bernadette Hoppe, Co-Chairs</p> <p>P&amp;P in Surrogate’s Court Committee<br/>12:15 p.m. – 438 Main Street, 12th Floor<br/>Sharon L. Wick, Chair</p> <p>Solo &amp; Small Firm Practice Committee<br/>12:30 p.m. – Lana V. Tupchik, Chair</p> |
| <p><b>THURSDAY 7</b><br/>Negligence Committee<br/>12:15 p.m. – Adelbert Moot CLE Center<br/>Dennis J. Bischof, Chair</p>  | <p><b>THURSDAY 14</b><br/>Committee on Eminent Domain &amp; Tax Certiorari<br/>12:15 p.m. – Mark R. McNamara, Chair</p>   | <p><b>WEDNESDAY 20</b><br/>Erie County Bar Foundation<br/>8:00 a.m. – Garry M. Graber, President</p> <p>Appellate Practice Committee<br/>12:15 p.m. – Timothy P. Murphy, Chair</p> <p>Environmental Law Committee<br/>12:15 p.m. – Jeffery C. Stravino, Chair</p> |   |
| <p><b>FRIDAY 8</b><br/>Committee for the Disabled<br/>12:15 p.m. – Jeffery Marion, Chair</p> <p>Committee to Assist Lawyers with Depression<br/>12:30 p.m. – Daniel T. Lukasik, Chair</p>   | <p><b>FRIDAY 15</b><br/>Young Lawyers Committee<br/>12:15 p.m. – Katie M. Ireland &amp; Laura Berloth, Co-Chairs</p> <p>Workers’ Compensation Committee<br/>12:15 p.m. – Ellen Shanahan Becker, Chair</p>   | <p><b>THURSDAY 21</b><br/>Committee on Veterans’ &amp; Service-Members’ Legal Issues<br/>12:15 p.m. – David J. State &amp; Jeffery Marion, Co-Chairs</p>  | <p><b>FRIDAY 29</b><br/>Committee to Assist Lawyers with Depression<br/>12:30 p.m. – Daniel T. Lukasik, Chair</p>   |
| <p><b>TUESDAY 12</b><br/>Board of Directors<br/>8:00 a.m. – Gregory T. Miller, President</p> <p>Matrimonial &amp; Family Law Committee<br/>12:15 p.m. – 25 Delaware Ave, 5th Floor<br/>Michelle Schwach Miecznikowski, Co-Chair<br/>Elizabeth DiPirro, Co-Chair</p> |   | <p><b>FRIDAY 22</b><br/>Committee to Assist Lawyers with Depression<br/>12:30 p.m. – Daniel T. Lukasik, Chair</p>   |   |

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