**Don’t Hang Up!**

Sometime within the next few weeks, you will be sitting at your desk, lost in deep legal thoughts - or maybe, like Yours Truly, just lost in general. The phone will ring. You will leap to the receiver, certain that this is the hot stock tip that will turn your life around (“Can you please hold for Mr. . . .?) Only it won’t be a stock tip. It will be one of your colleagues, requesting a donation to the Erie County Bar Foundation. Don’t hang up.

Okay, calm down - I’m not going to get all preachy on you. But let me gently suggest that, in deciding where to spend our charitable dollars, we not forget our own. Although I have not (yet, at least) had occasion to seek assistance from the Foundation, I know something of how it can feel for a lawyer when things are not going well. Fifteen years ago, my colleagues and I turned out the lights at the late, great law firm of Mock & Sprague, where I had spent the first 12 years of my legal career, and where I had planned to end it. During the final year of that firm’s existence, we all spent many a sleepless night, wondering where the next draw would come from, or whether the ship could stay afloat. It’s not a pleasant feeling, especially when you’re dealing with the normal pressures of practice during your waking hours. At times during that year, I felt truly desperate, and while we don’t often speak of it, I suspect that many of my colleagues did too.

I was fortunate to find a new position at Phillips Lytle, but I will never again take my good fortune for granted. And if my good fortune should someday leave me - if I need a grant or loan, or career counseling, or help with alcohol or drug abuse - I know that the silent heroes at the firm’s existence, we all spent many a sleepless night, wondering where the next draw would come from, or whether the ship could stay afloat. It’s not a pleasant feeling, especially when you’re dealing with the normal pressures of practice during your waking hours. At times during that year, I felt truly desperate, and while we don’t often speak of it, I suspect that many of my colleagues did too.

I was fortunate to find a new position at Phillips Lytle, but I will never again take my good fortune for granted. And if my good fortune should someday leave me - if I need a grant or loan, or career counseling, or help with alcohol or drug abuse - I know that the silent heroes at the Bar Foundation will be there for me. Without fanfare, In total confidence. No questions asked.

When that phone rings, take the call.

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**President’s Letter**

By Jeremiah J. McCarthy

Don’t Hang Up!

The Bar Association of Erie County will host a reception in honor of Justice Mario L. Rossetti and Ronald H. Tills on Wednesday, December 7 from 5:30 until 7:30 pm. Both Rossetti and Tills are serving as Acting Supreme Court Justices and will retire as State Court of Claims judges at the end of the year. The reception will be held at Shanghai Red’s restaurant located at Two Templeton Terrace on the Buffalo waterfront (on the former Crawdaddy’s site).

Justice Rossetti has served in his present capacity since 1997. He was appointed a New York State Court of Claims judge by Governor Mario Cuomo that year and re-appointed for a nine-year term in 1991. Governor George Pataki re-appointed him for an additional nine-year term in 2001. A former director of the BAE, Rossetti engaged in the general practice of law, including civil and criminal trial work, for 26 years prior to his appointment to the bench. Admitted to the New York bar in 1960, he received his J.D. degree from the University at Buffalo Law School.

Justice Tills has served as an Acting Supreme Court Justice since 1995 and was appointed to the New York State Court of Claims by Governor Pataki the same year. A former member of the New York State Bar Association in 1960, Tills received his J.D. degree from the University at Buffalo Law School.

Former NLS Board Member Appointed to LSC by Bush

Service Phillips, a former Neighborhood Legal Services board member, has been appointed by President George W. Bush to a seat on the 11-member board of directors of the Legal Services Corporation (LSC). Phillips’ appointment has now been confirmed by the United States Senate.

Known as “America’s Partner for Equal Justice,” the Legal Services Corporation, located in Washington, D.C., is the federally funded agency which administers over $330 million dollars in grants to 140 agencies throughout the United States and its territories. These agencies provide free civil legal services to low-income people. Neighborhood Legal Services has been a Legal Services Corporation grantee since the 1970s.

A mother of three, Phillips is a lifelong Buffalo resident and a former caseworker and advocate with Buffalo Prenatal-Perinatal Network, where she counseled pregnant and parenting teenage mothers about nutrition and proper health care. She also served as a member of the Neighborhood Legal Services, Inc., board of directors before being recommended by Senator Hillary Clinton as a nominee to the LSC board.

Neighborhood Legal Services, Inc. serves Erie, Niagara, Orleans, Genesee and Wyoming counties with offices located in Buffalo, Niagara Falls and Batavia. The program will receive $2,224,289 in LSC funding in 2005 for a budget which is just under $4 million.

Philips was sworn in by Justice Sharon Townsend, Assembly. Tills was a partner in the law firm of Abbott, Tills and Knapp and its forerunner from 1966 until 1995. He also served as an elected Town justice in Hamburg. Admitted to the New York State and Federal Bar Associations in 1960, Tills received his J.D. degree from the University at Buffalo Law School.

The Bar Association began an annual tradition to publicly recognize retiring members of the judiciary in December of 2003. Please call Shariene Hall at 852-8687 for further information and tickets to the reception.

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**Bar Association of Erie County**

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Please do all that you can to help the Bar Foundation this year. To someone facing the unimaginable, your support will be more important than you know.
DAIRY FARMER MILKS "TEAT DIP" DEFENDANT
A recovery by a dairy farmer for damages allegedly resulting from use of a defective “teat dip” on his cows has been “udderly” upheld by our Fourth Department in Triple R Farm Partnership v. IBA, Inc., __AD2nd__, 9/30/05, #944.

DIFFERENTIATING DEPRAVED INDIFFERENCE
A “depraved indifference” murder conviction has been modified, and reduced to manslaughter. The Fourth Department noted that the defendant “intended to stab the victim, but did not intend to kill him. (Pee. v. Lawhorn, __AD2nd__, 9/30/05, #982)

ELEVATION OF IMPUTATION
The imputation of $70,000 of income in a support proceeding has been upheld by our Fourth Department in Mtr. of Monroe County Support Collection v. Wills (__AD2nd__, 9/30/05, #1040). A concise analysis of the proper basis for such an imputation of income is provided by the Court.

DEED DEAL DELIBERATION
Justice Frank A. Sedita’s denial of summary judgment in a contract enforcement action was upheld by our Fourth Department in NVR, Inc. v. Edwards (__AD2nd__, 9/30/05, #1005). The case is a good review of the deed/merger doctrine in real estate transactions and exceptions to the doctrine.

EQUITABLE NOT ALWAYS EQUAL
A matrimonial determination awarding plaintiff 70 percent of the parties’ investment and savings accounts has been upheld by our Fourth Department. (Schiffmacher v. Schiffmacher, __AD2nd__, 9/30/05, #1110, affirming a decision by Justice John F. O’Donnell)

“ACCIDENTAL” CLAIM CANNED
Our Fourth Department has upheld Justice Patrick Ne’Goyes’ determination that decedent’s death was caused by medical actions which were excluded from NeMoyer’s determination that decedent’s death was caused by negligence. (Abdellatif v. Smith v. Tabb et al., __AD2nd__, 9/30/05, #973)

VANDALISM EVALUATION
Factual issues as to whether or not the premises were vacant for 30 days precluded summary judgment on an insurance claim. (Little v. Livinston Mutual Ins. Co., __AD2nd__, 4th Dept., 9/30/05, #949)

SLIP TIPS AND STUMBLE BUMBLEs
Plaintiff allegedly slipped on ice at defendant’s premises. The Fourth Department upheld Justice Eugene Fahey’s finding that the defendants could not have had actual notice of the condition, as they were away on vacation. The plaintiff’s allegation of constructive notice was allowed to stand (Robertson v. Massaro, __AD2nd__, 9/30/05, #942). See also Abdellatif v. Smith v. Tabb et al., __AD2nd__, 9/30/05, #965), where a landlord was alleged to have failed to replace a downspout allowing ice to accumulate; and Wolf v. The Sher (__AD2nd__, 4th Dept., 9/30/05, #1064), upholding that part of the complaint which alleged that the defendant restaurant had affirmatively created a dangerous icy condition; and Rader v. Walton (__AD2nd__, 4th Dept., 9/30/05, #1144), which dismissed a complaint by a pedestrian who fell on a public sidewalk which abutted defendant’s property. [B]

COUPLE CONJURDUM CONSIDERED
An ex-husband challenged the continuation of his maintenance obligation based upon his ex-wife allegedly residing with an unrelated male. Our Fourth Department upheld the determination of Justice Stephen Burns that there was insufficient proof that the couple were living together. (Christopherson v. Perry, __AD2nd__, 9/30/05, #1001) (See also Tamara Clark v. Perry, __AD2nd__, 9/30/05, #1097, where the “serious injury” threshold was found to have been satisfied.

RES IPSA REVIEW
In Smith v. Tabo et al., __AD2nd__, 9/30/05, #1025), our Fourth Department provides a concise review of the always fascinating doctrine of “res ipso loquitur” as applied in a medical circumstance.

CONVICTION CANNED FOR ENTRY ERROR
The Fourth Department found no “exigent circumstances” which would justify this warrantless apartment search. (Pee. v. Kiilgore, __AD2nd__, 9/30/05, #924)

EASEMENT ELATION
A prescriptive easement for access and parking was upheld in Rader v. Walton, __AD2nd__, 4th Dept., 9/30/05, #1138, affirming Justice Michael Brown.

BUFFALO BOY MAKES GOOD
You may have heard that our own John G. Roberts, Jr. recently received a promotion which generated some publicity, at least in the Washington area. Although the newly-minted Chief Justice left us after the second grade to become a prosecutor, Robert Fulghum once said that “all I really need to know I learned in kindergarten.” Therefore, in my humble opinion, he owes it all to us. Regardless of where you fall on the political spectrum, Justice Roberts is someone who does us all proud. On behalf of our Association, I have sent him a plaque commemorating this auspicious occasion. I plan to call him in a few weeks to make sure it’s on his wall - and if it’s not, I’ll deal with it accordingly.

BUFFALO GIRL ALSO MAKES GOOD
Perhaps not as well known as Chief Justice Roberts, but equally impressive in her own right, is Bernice Phillips, who was recently appointed by President Bush to a seat on the 11-member Board of Directors of the Legal Services Corporation in Washington, D.C. Her appointment was confirmed by the U.S. Senate.

I had the pleasure of attending her swearing in ceremony on October 28, as many of you know, the Red Mass is sponsored by the St. Thomas More Guild to mark the official opening of the court year. It was 1:00 p.m., the Mass was winding down, and I was thinking of the 15 things I had to do that afternoon. Suddenly the speaker announced “Now we’ll hear a few words from Judge Sharon Townsend,” and my heart sank.

Now don’t get me wrong - I like Judge Townsend very much. I let me repeat - WE RY MUCH - (and even if I didn’t, would you hear it here?) But that afternoon, I had places to go, people to see. I just didn’t have time for a speech, and I was itching to leave. I’m glad I didn’t.

What I heard that day was one of the most thought-provoking speeches I’ve ever heard in a church - or anywhere else, for that matter - on the subject of religious and ethnic tolerance. At the conclusion of her remarks, Bishop Kmiec told her: “Judge, you give a religious and ethnic tolerance. At the conclusion of her remarks, Bishop Kmiec told her: “Judge, you give a "Brave Speech"

I have a confession to make. Sometimes when I’m in church, my mind tends to wander. This happened again at the Red Mass at St. Joseph’s Cathedral on September 28 (as many of you know, the Red Mass is sponsored by the St. Thomas More Guild to mark the official opening of the court year). It was 1:00 p.m., the Mass was winding down, and I was thinking of the 15 things I had to do that afternoon. Suddenly the speaker announced “Now we’ll hear a few words from Judge Sharon Townsend,” and my heart sank.

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What I heard that day was one of the most thought-provoking speeches I’ve ever heard in a church - or anywhere else, for that matter - on the subject of religious and ethnic tolerance. At the conclusion of her remarks, Bishop Kmiec told her: “Judge, you give a great homily.” Indeed she does. Any attempt by me to summarize her remarks would not do them justice; so I asked her permission to reprint them in their entirety on page two.