



MEDICAL MALPRACTICE DEPARTMENT

Distracted Doctoring Gone Wild!

For at least a decade, hospitals and doctors' offices, hoping to improve medical care, have been equipping their offices, operating rooms and staff with nifty computers, ipads, smartphones and other electronic devices. This is great for quickly digging up patient data and drug information. But it also has a dark side.

Doctors, nurses and technicians, just like the rest of us, can get addicted to the "fun" side of these new technologies - social media, texting, tweeting, etc. So addicted, in fact, that they text, tweet, talk and web-surf during important medical procedures.

Apparently, America's gadget addiction has even penetrated the operating room. For example, more than half of technicians who monitor bypass machines admit they have texted during surgery.

Other examples abound. A nurse in an Oregon hospital was caught checking airfares on a computer in the operating room. In Texas, an anesthesiologist admitted, at a deposition, that he had been texting, accessing websites, and reading e-books during the surgery. He was so wrapped up in his screen that he did not notice the patient's dangerously low blood-oxygen levels until 15 or 20 minutes after she turned blue.

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WELCOME TO THE

Michaels & Smolak newsletter!

Don't hesitate to send your comments (*the good, the bad and the ugly!*) to Mike Bersani at bersani@michaels-smolak.com.

And if you like what you see, please add us on Facebook, follow us on Twitter ([@cnylawyers](https://twitter.com/cnylawyers)) and subscribe to our blog (centralnewyorkinjurylawyer.com).

Our Team



Lee Michaels



Jan Smolak



Michael Bersani



David Kalabanka

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the

MICHAELS

& SMOLAK

pledge

we deeply appreciate the trust our clients have placed in us and we will strive to uphold that trust by working hard and fighting for our clients' rights.

Not to be outdone, a neurosurgeon in Colorado made at least 10 personal phone calls while operating. His patient ended up partially paralyzed and sued. Needless to say, the doctor settled his malpractice case out of court.

Welcome to the brave new age of electronic media devices. Tweeting while treating. Emailing while examining. Posting while prescribing. It's all the same thing: distracting doctoring.

But there's one thing that might make a doctor think twice about pulling out his or her smart phone during surgery: fear of lawsuits. Yes, despite all the negatives you have heard from the medical community and others about medical malpractice lawsuits, they exist for a reason: To protect you and your family from negligent doctoring.

DEPARTMENT OF COMMUNITY SERVICE

Michaels & Smolak Honors "Hometown Heroes" Again!

For the second year in a row, Michaels & Smolak is honoring United Way of Cayuga County volunteers as "hometown heroes" at all 38 Auburn Doubledays home games this year.

Here's how it works: At each home game, one United Way volunteer is publicly recognized and honored as a "hometown hero" and receives four game tickets and food vouchers for his or her family and friends, all funded by Michaels & Smolak. A different volunteer is honored at each home game.

"It's a wonderful program and I am thrilled that they are generously continuing it again this year," says Carrie Collins-Fadell, Executive Director of the United Way of Cayuga County.

The unique aspect of this program is how it recognizes that volunteering is not just an individual effort, but a family, community one.

Michaels & Smolak attorney Dave Kalabanka, who started and runs the program, explains, “if family and friends aren’t right next to the volunteers while they are giving of their time and talents, then they are often helping them balance things at home and work, so that they can volunteer. That’s why we at Michaels & Smolak Injury Law Firm are treating not only the volunteers, but their family and friends, as well.”

Jan Smolak, another Michaels & Smolak partner, says, “there are amazing volunteers in our community that are doing all the things - little and big - that help us remain a successful community. We are happy to recognize and celebrate them for their volunteer efforts.”

Judy Lepak, a 16 year United Way volunteer, was the first honored “hometown hero” of the 2014 season, followed by Melissa Flask, also a United Way volunteer, who treated her father and friends to the game on Father’s Day. A list of all honorees will be available at the conclusion of the 2014 Auburn Doubledays’ season at the United Way of Cayuga County website.

If you know of any Cayuga County United Way volunteers who deserve recognition, email Dave Kalabanka at Kalabanka@michaels-smolak.com. He’ll pass your nomination along to the Cayuga County United Way.



SAFETY DEPARTMENT

New York ATV Law And Safety

At Michaels & Smolak, we’ve seen a lot of bad ATV accidents in Central New York. We can’t help the victims get better, but we can sometimes help them get compensation. The best cases are those in which the accident was not our client’s fault. But unfortunately, many times severely injured victims of ATV crashes are themselves to blame.

The good news about ATV accidents is that there are fewer of them than before. ATV Deaths and accidents have been going down steadily year after year since 2006. That’s because ATV’s are built safer, in part because of lawsuits brought by lawyers like those at Michaels & Smolak, which force manufacturers to make them safer. (Remember the old three-wheelers, and the tip-over accidents that plagued them? Personal injury lawyers like us sued them into oblivion!)

But there are still too many ATV accidents. The safety rules below are aimed at helping ATV users, and their parents, avoid accidents (and tickets!).

First, let’s look at New York ATV law, which is really an embodiment of good safety rules:

- No passengers allowed unless the ATV is designed for two (Most ATV’s are designed to carry only one person because you need to have “interactive driving”, that is, the driver must be able to shift his

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weight freely in all directions to properly maintain control around curves, etc.)

- Helmets are NOT optional.
- All ATVs must be registered, with renewals once a year, with the Department of Motor Vehicles.
- An ATV cannot be used on highways except to cross them.
- No one under 10 may ride or operate an ATV.
- Operators between 10 and 15 may ride an ATV only if they are on a parent's land and supervised by a parent, or on a parent's land and have a safety training certificate.
- A lighted headlight and taillight are required from ½ hour after sunset to ½ hour before sunrise.

Additionally, we strongly recommend you:

- Get your kid some ATV training (statistics show that training reduces accident risk big time!)
- Don't ride on paved roads (ATV's are tough to control on paved roads because of how they are made, and collisions with cars are deadly.)
- Make sure kids under 16 are on age-appropriate ATV's.

Enjoy your ATV, but BE SAFE!



RECENT CASE LAW

The Importance of Promptly Demanding that Surveillance Videos be Preserved

Surveillance cameras are virtually everywhere now: In our streets, stores, businesses, banks, schools and traffic lights. Yet most surveillance tapes are automatically taped over after a certain period of time, perhaps in less than a week. So these days almost every time a new case comes into our office, our first thoughts are, "might there be surveillance videos? Who might have them?"

One of the first things we do is send out a letter to anyone who might have surveillance videos demanding that they be preserved. Our letter also lets the reader know that, if the videos are not preserved, we will seek "sanctions" in court for unlawful destruction of evidence. That works pretty well and we have had good results in preserving evidence that otherwise might have been destroyed.

Not all lawyers are so cautious.

A recent case published in the New York Law Journal illustrates the importance of personal injury lawyers promptly demanding that surveillance videos be preserved. In *Rodriguez v City of New York* a child was assaulted at school. The family's lawyer

claimed the school provided negligent or insufficient supervision, thus facilitating the attack. After suit was commenced, during the deposition of one of the school employees, the employee testified that she had reviewed a surveillance video taken the day of the incident. When the lawyer then demanded the video, the School responded that it had been taped over. It turns out that the surveillance video system was set up so that the videos automatically got taped over every sixty days.

The kid's lawyer asked the judge to throw out the school's defense to the case, and grant the kid a judgment, because the school had destroyed evidence. But the judge refused to go so far, in part because the destruction of the video was not really "willful".

But if the kid's lawyer had sent out a letter early on, as we do at Michaels & Smolak, and the School had allowed the video to be taped over, the judge probably would have found that the destruction was willful, and maybe would have granted the kid's attorney's request.

So the lesson to take from this case, and others like it, is for lawyers to send out, early on, letters demanding that all surveillance videos be preserved.

What if everyone, including the at-fault party, claims that no surveillance videos exist, even though cameras were present? A persistent lawyer doesn't just give up. He or she *subpoenas* the surveillance videos. To do this, a lawsuit must be filed. This gives the lawyer "subpoena power". Although some at-fault parties or insurance adjusters might lie about the existence of surveillance videos, they usually won't lie under a subpoena. That can be a very serious offense.

In one case Michaels & Smolak handled, involving a slip and fall in the foyer to a movie theatre, the insurance adjuster for the movie theatre claimed that the surveillance tape had been accidentally destroyed. After the movie theatre was sued, the surveillance tape magically re-appeared. It showed an employee mopping the foyer, failing to put up the required "wet floor" signs, and then the customer walking in and slipping on the wet floor. Needless to say, our client received appropriate compensation on the case.

areas in which WE CAN HELP

our attorneys can help
with all personal injury &
malpractice cases such as:

- Motor Vehicle Accidents
- Catastrophic Injuries
- Construction Accidents
- Slip/Trip and Falls
- Wrongful Death
- Medical and Legal Malpractice
- Defective Products
- Almost any Accident or
Malpractice Case of Any Kind

attention attorneys

INJURY & MALPRACTICE REFERRALS

a lot of lawyers and law firms refer all their injury and malpractice cases to Michaels & Smolak. Why?

- (1) We are known for getting top dollar (in settlement or verdict) for the referred case
- (2) We carry all expenses of the case
- (3) We give personal attention to your clients

Consider referring your cases to us!



ATTORNEY SPOTLIGHT:

Lee S. Michaels and Legal Malpractice

Lee Michaels, Michaels & Smolak's senior attorney and founding member, has been practicing law since 1967, and began focusing almost exclusively on personal injury cases in about 1980. But over twenty years ago his practice took an interesting turn.

"I can't remember exactly when I took my first legal malpractice case," Lee said. "But ever since then, my legal malpractice case load has been growing. I believe it now makes up at least 50 per cent of my practice."

A lawyer who sues other lawyers has to have a stiff spine. Lee recalls once being called to a court conference for a legal malpractice case in Western New York. "I thought that the presiding judge, who had a reputation for being very tough, was going to be hostile to me as an outsider suing a local lawyer." During the conference, Lee said to the judge "I suppose you don't like me very much, as an outsider suing one of your local lawyers." But the Judge responded, "on the contrary, we need lawyers like you to police our profession."

How did his career evolve in this unexpected way? "At first there were just one or two legal malpractice cases, and when those went very well for me, I guess word spread and I got more and more calls, usually from other lawyers trying to refer me legal malpractice cases," Lee explains. In fact, Lee is considered by many lawyers to be one of a handful of "go-to" attorneys for legal malpractice cases in Upstate New York.

Lee is no stranger to success. In his long career as a personal injury and malpractice lawyer, he has been listed consistently, since 1985, in a publication called Best Lawyers in America. The name says it all. Best Lawyers compiles lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. Lee has also received the highest ranking ("AV") in

the prestigious Martindale–Hubbell directory for over 25 years. This “AV” rating means that judges and other lawyers have rated him, compared to other lawyers, “very high to preeminent in legal ability, expertise, experience, integrity and overall professional excellence.”

Lee is not just an outstanding lawyer. He has been active for many years in the Cayuga County community, having previously served as President of the Cayuga County United Way, a member of the Board of the New York State United Way, a board member of Hospice of the Finger Lakes, and President of Congregation B’nai Israel. He has also been associated for nearly four decades with local athletics and has been a member of Auburn’s Great Race (believed to be the largest team triathlon in the United States) committee for over 37 years. He loves strength workouts, is an avid swimmer, bicyclist, and runner and competes in triathlons. “I keep as active as I can, and that keeps me young, both physically and mentally”, Lee explains.

Lee and his wife, Susan, reside a short distance east of Auburn. His two daughters, Rebecca Kornet and Emily Michaels Kolle, and five grandchildren, Jack, Rachel and Sam Kornet, Hannah Kolle and Natalie Kolle, all live in the Boston area.

SE HABLA ESPANOL!

Know any Spanish (or for that matter, French) speaking folks who need a personal injury lawyer? Attorney Mike (“Miguel”) Bersani is totally fluent in Spanish, having lived in Spain for a few years and having married a native Spanish speaker. He also speaks fluent French, having lived in Paris for five years. He’ll be happy to “hablar” or “parler” with his clients.

SAFETY DEPARTMENT

A Few Tips for Safe Motorcycle Riding in Heavy Traffic

Hey bikers, at Michaels & Smolak we see a lot of bad bike accidents. We know how they happen, and we know how you can avoid (most) of them. In our last issue, we gave you some basic motorcycle safety tips. Here are a few more “advanced” tips for riding in heavy traffic. Warning: Only expert riders should be out there with heavy traffic.

(1) RIDE IN OPEN ZONES

Look for those gaps between vehicles and try to ride them. This will keep those big hunks of moving metal away from you and give you more room to maneuver and react.

(2) BE A “LOW RIDER”

Sometimes you can avoid a collision by accelerating rather than braking. In heavy traffic, ride a gear lower than normal so you can zip forward on a moment’s notice. As a side benefit, the higher decibels you’ll be emitting will make nearby motorists take notice of you.

(3) HOVER OVER THE BRAKES

In a car, in thick traffic, you probably hover your foot over the brake pedal. The equivalent on a bike is to keep a finger on the brake lever and your right toe close to the rear brake pedal. That way, if someone suddenly cuts you off, you’ll be ready to “give them the finger”, that is, the finger on your brake.

Thanks for taking motorcycle safety seriously.

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