



ONONDAGA COUNTY BAR ASSOCIATION **BAR REPORTER**



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1000 State Tower Building | 109 South Warren Street | Syracuse, NY 13202 | 315.471.2667

Nicholas DeMartino Sworn in as President of Onondaga County Bar Association for 2014

Nick is a life-long resident of Syracuse, and of the City's "Northside." A graduate of Henninger High School, Nick holds a Bachelor of Science Degree (summa cum laude) in Political Science from Brockport State University, in Brockport, New York, and a Juris Doctor Degree from Western New England College, School of Law, in Springfield, Massachusetts.

Nick began his legal career in 1986 by serving as a Deputy County Attorney with the Onondaga County Department of Law, where he prosecuted child abuse and neglect cases. Nick then went on to serve for 15 years as an Assistant District Attorney with the Onondaga County District Attorney's Office. During his tenure as an ADA, Nick prosecuted general felony cases, violent felony and career criminal cases, as well as narcotics cases. He also served as Chief of the White Collar Bureau and was assigned to the Homicide Bureau for 11 years. As an ADA, Nick's administrative duties included serving as Supervisor of Project PROUD, the District Attorney's felony drug diversion program, Supervisor of Project Safe Schools, and was the District Attorney's liaison to both the Neighborhood Watch Groups of Syracuse and Neighborhood Watch of Central New York.

Nick left the District Attorney's Office in 2004 as a Chief Assistant assigned to the Homicide Bureau, which included the prosecution of capital cases.

In 2001, Nick served as a Syracuse City Court Judge, during which time, among his other duties, he initiated and presided over Syracuse Community Court.

In 2004 he joined the Syracuse law firm of Costello,

Cooney & Fearon as Special Counsel, where he specialized in Family Law, Criminal Defense and Insurance Defense.

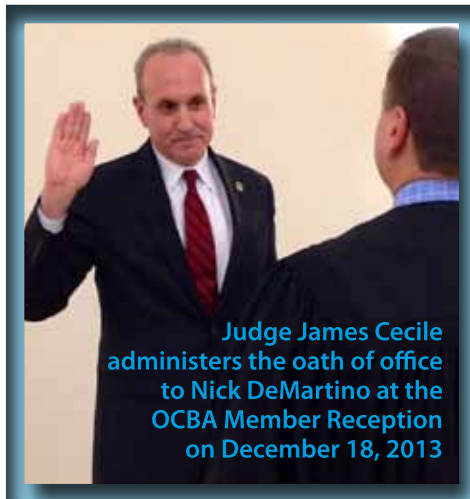
Nick served as an Adjunct Professor of Law at Cazenovia College for 20 years, where he taught Business Law, Sports Law and Legal and Business Ethics. He also frequently serves as a guest lecturer at Syracuse University and at the Syracuse University College of Law.

In 2007, Nick resumed his work as a prosecutor when he joined the New York State Attorney General's Office, Criminal Prosecutions Bureau. As an AAG, Nick covers a seven-county Central New York Region, and focuses primarily on the investigation and prosecution of white collar and financial crimes.

Nick currently serves on the New York State Bar Association, Criminal Justice Section Executive Committee, and serves as the Committee's representative to the New York State Bar House of Delegates. He also serves as Chairperson of both the Criminal Law Section, and Membership Committee of the Onondaga County Bar Association, and is a member of the OCBA's Pro Bono "Talk To a Lawyer Clinic."

Nick also serves as President of The Friends of Schiller Park, has served as Chairperson of The Columbus Day Parade Through Little Italy, has coached soccer at the Eastwood Soccer League, and basketball at Our Lady of Pompei School. Nick has also served as the host of the radio show "Music D'Italia."

Nick is the proud father of his daughter Elizabeth, a Junior at Bishop Ludden High School, and son Joe, a Junior at R.I.T., in Rochester, New York.



Judge James Cecile administers the oath of office to Nick DeMartino at the OCBA Member Reception on December 18, 2013

MISSION :

...to inspire excellence in the legal profession, to foster the fair administration of justice, to promote equal access to the legal system, and to serve and support our members.

UPCOMING 2014 EVENTS:

Memorial Observance Ceremony
Bridge the Gap CLE
Bruce Bryan | CLE Writing Series
Annual Law Day Luncheon

Thursday | February 6
Thursday | March 20
Wednesdays | April 30 thru May 28
Friday | May 2



from **THE PRESIDENT**

To begin, I would like to thank Annie Dotzler, Chele Stirpe, and the Editorial Board for reviving this Bar Reporter, and for giving the OCBA an effective avenue to communicate and to reach out to our members.

As we look ahead to 2014, there are three areas that I would like the OCBA to concentrate on this year. The first, is PROMOTION. By that, I mean promotion of ourselves as a profession and the OCBA as an organization. I suspect that the public in general has little understanding of exactly what we do on a daily basis. I further suspect that any preconceptions that may be held by the public in general of what we do, is in large part based on what is seen on television shows, in movies, or on radio and TV ads. It also unfortunately appears that on those rare occasions when an attorney is “featured” in the news, it is sadly because they have committed some type of newsworthy impropriety. What seems to be missed, and what we do not often hear about, however, are the countless number of local attorneys who regularly and selflessly volunteer their time and provide pro bono legal services in our courts, our schools, and throughout our community. Our ever growing Volunteer Lawyer Project is a shining example of all that is good about our local attorneys and about our profession. Our attorneys volunteer their time through the “Talk to a Lawyer “ program, they serve as judges in the annual high school mock trial competition and volunteer their time in places such as Small Claims and Landlord Tenant Court. The list goes on. Yet the community never seems to hear about this. I think it’s time.

The second is RELEVANCE. Unfortunately, there is a segment of our local profession who perceives that the bar association has no relevance to them or to their practice. As a result, there is no interest for them to join the bar. One of our missions this year should be to create opportunities for those colleagues who have traditionally viewed the OCBA as neither useful nor relevant and to dispel those perceptions. One such program opportunity, now in its second year, is the Criminal Law Section. In 2013, this section presented a series of 18 one hour Criminal Law CLE seminars, and enrolled over 30 new members to the bar, consisting mostly of solo practitioners and public service attorneys. Similar success was found this past year with the resurgence of the Family Law Section. These efforts need to grow and continue.

The last, is MEMBERSHIP. Membership is the life blood of our organization. We need to create new and proactive ways of both maintaining current members and attracting new ones. I believe that membership will grow, in large part, through promoting our organization and by creating new and relevant opportunities for those who have traditionally not considered joining the OCBA. This can be accomplished through the creation of new sections, CLE’s and social events. Within the next few weeks, I will be proposing that the OCBA create a “Young Lawyers Section,” and a “Law Student Section.”

My ideal is to have an organization that everyone wants to be a part of.

Thank you for being a part of the OCBA. Thank you for your continuing support of the OCBA. Thank you for what you do. Here’s to a fantastic 2014.

Nicholas J. DeMartino | OCBA *President*

Annual Holiday Reception Provides Festive Backdrop for Swearing-In Ceremony of New OCBA Officers and Directors



Once again, the ballroom of the Central New York Community Foundation's Philanthropy Center was site of OCBA's annual end-of-year holiday gathering, which included the swearing in of new directors and officers for 2014.

Outgoing OCBA President Nancy L. Pontius welcomed the guests and thanked them for their support and attendance.

The Hon. James Cecile administered the Oath of Office to incoming President Nick DeMartino. The Hon. Michael Hanuszcak, he himself completing his third and final year as a member of the OCBA Board and its Executive Committee, then administered the Oath to newly elected OCBA Board members Hon. James P. Murphy, Supreme Court Justice; Scott A. Lickstein, Newman & Lickstein;

Blaine T. Bettinger, Bond Schoeneck & King; Gordon J. Cuffy, Onondaga County Attorney; and Romana A. Lavalas, Onondaga County Assistant District Attorney. These five new directors will serve three-year terms through 2016.

Finally, Judge Hanuszcak administered the Oath to James M. Williams, Legal Services of Central New York, who is serving as the new Association Secretary; and Jean Marie Westlake, DeFrancisco & Falgiatano, who is President-Elect. Anne Burak Dotzler, Hiscock & Barclay, will serve as Vice President in 2014.

Congratulations to the new officers and directors as they begin the work of continuing OCBA's mission and expanded programs through the new year.

2014 OCBA BOARD OF DIRECTORS

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“RETAINING FEES AND DOMESTIC RELATIONS MATTERS”

Fifth Judicial District Attorney Grievance Committee Appellate Division, Fourth Department

by Anthony J. Gigliotti, Principal Counsel*

Years ago, lawyers initiated professional services with a client's check, (or cash payment), and a handshake. In those days, the most prominent rule governing new engagements was the prohibition against charging fees below set minimums. The forces of “consumerism” and the changing culture of our profession have ushered in the era of “full disclosure, confirmed in writing.” Rules dictating how and where to deposit fees and a client's money have also complicated the daily office routines. This article highlights important documentation requirements related to the initiation of professional engagements in domestic relations matters and the rules regarding the deposit of fees and other client payments.

A retaining fee is the payment made by a client upon engaging a lawyer's services. Typically, the requested payment includes the anticipated, minimum cost of the lawyer's services and anticipated costs which will be incurred. Such “retainers” are normally paid to the attorney in a single personal check.

The following hypothetical illustrates the steps which must be taken upon the receipt and expenditure of such payments from clients.

At an initial consultation, attorney Smith agreed to represent a prospective client in a divorce matter. Smith then requested a payment of \$5,000 from the client “in order to get started.” Smith explained that \$4,500 will be applied to his fee for professional services and \$500 will be used to pay filing fees. Smith also cautioned the client that if the proceeding became contentious, additional charges would be required. The client promptly issued a personal check for \$5,000, payable to Attorney Smith.

Upon receiving the client's retaining fee, Smith provided the client with a fully executed Retainer Agreement that complies with the requirements found at 22 N.Y.C.R.R. §1400.3, and the Statement of Client's Rights and Responsibilities, as set forth in 22 N.Y.C.R.R. §1400.2. The attorney promptly deposited the client's check into his attorney trust account. Within a reasonable time after the deposited funds were collected by Smith's bank, attorney Smith withdrew the \$4,500 designated in the retainer agreement as an advanced fee payment. When attorney Smith filed the Summons and Complaint he paid the filing fee from the client's funds on deposit with an attorney trust account check payable to the Court. In addition to the bank records generated by the foregoing transactions, Smith's office staff created an individual client account record identifying the date, source and description of each item deposited to Smith's attorney trust account, as well as the date, payee and purpose of each withdrawal or disbursement therefrom.

At least every 60 days, Smith issued billing statements to his client, itemizing the fees charged, the costs paid from client funds, and the services performed. After being fully compensated at the conclusion of the divorce case, Smith provided the client with his file, retaining both paper and electronic copies for his records.

Divorces are one of several *domestic relations* matters defined as such in §1.0(g) of the Rules of Professional Conduct, hereinafter referred to as RPC. In addition to matrimonial actions, matters returnable in Family Court involving custody, visitation, maintenance, child support or alimony are included in the definition of *domestic*

relations matters. Attorney Smith complied with §1.5 (d)(5)(ii) of the RPC by executing the Retainer Agreement and Clients' Rights' Statement, required upon collecting any fee in all domestic relations matters. Because lawyers must file retainer agreements with the Supreme Court in matrimonial actions, compliance with the foregoing RPC in such matters is self-enforcing. Lawyers are less vigilant about executing Retainer Agreements in *domestic relations* matters returnable in Family Court. Regrettably, lawyers who do not comply with the requirements of RPC §1.15(d)(5)(ii) are often denied any payment for their services by Arbitrators and Judges who strictly enforce the words A. . . shall not . . . collect any fee in a *domestic relations* matter if a written retainer agreement has not been signed, etc.” See: *Hunt v. Hunt*, 273 A.D.2d 875, 709 N.Y. S.2d 744 (AD, 4th Dept., 2000).

In New York, absent any written agreement characterizing the funds otherwise, the \$4,500 fee paid to Smith became the lawyer's property upon receipt. Smith properly deposited the \$5,000 check into his attorney trust account to safeguard the client's \$500 until needed to pay filing fees. If Smith subsequently failed to withdraw his \$4,500 fee, he would have risked a charge of commingling his funds with those of others being maintained in his attorney trust accounts, in violation of §1.15(a) of the RPC.. See: *Matter of Sullivan*, 253 A.D.2d 999, 678 N.Y.S.2d 169 (AD 3rd Dept., 1998)

While Rule 1.15(e) requires all disbursements from an attorney trust account to be by check and to named payees, the Rule also allows for electronic bank transfers only *with the prior written approval* of the party entitled to the proceeds. Attorney trust account checks may not be issued to *cash*. Other cash withdrawals or transactions using an ATM card are similarly prohibited. Smith would also be prohibited from paying a personal obligation from his \$4,500 fee without first re-depositing the collected fee into his business account. *In re Cronk*, 52 AD 3d 54, 856 NYS2d 186 (AD 2d Dept., 2003)

Why do some New York lawyers mistakenly assume that retaining fees must be maintained on deposit in attorney trust accounts until “earned?” When asked, many lawyers express a desire to self-regulate draws against advanced fees. Unlike New York, a majority of states actually mandate the deposit and maintenance of retaining fees into attorney trust accounts until “earned.” New York lawyers who wish to self-regulate withdrawals from retaining fees can establish a separate business account into which all such advanced fee payments may be deposited and held until the services are rendered.. **BOTTOM LINE: DO NOT KEEP FEES IN ATTORNEY TRUST ACCOUNTS.**

Smith also complied with §1.15(d) of the RPC which sets forth, in 8 subparagraphs, the records and contemporaneous account entries that are required to be maintained and preserved for 7 years after the events that they record. Interestingly, §1.15(d) contains the only reference in the RPC to records which must be maintained and preserved for a specified time period. Briefly stated, these include: (i) records of all deposits into and withdrawals from attorney trust accounts, specifically identifying the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement; (ii) source of all funds deposited into attorney trust accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to were disbursed; (iii)

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Three Boards Gather to Share in the Holiday Spirit

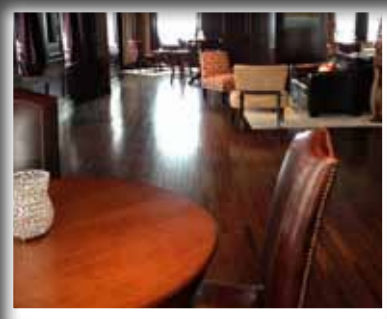
The recently completed “High Peaks Club” located on the 20th floor of the beautiful and historic State Tower Building – which is also home to the Onondaga County Bar Association and the Volunteer Lawyers Project (on its 10th floor!) – was the setting for the first-ever combined Holiday Luncheon on December 11 for the boards of OCBA, the VLP and the Onondaga County Bar Foundation.

On this snowy, sunny Wednesday, board members took in the nearly 360-degree views while visiting with their colleagues and meeting members from the other boards, including newly elected members.

While the luncheon was intended to be casual and informal, there were two important matters to be undertaken: the acknowledgements of outgoing OCBA President Nancy Pontius and outgoing OCBF President Paul Mullin. Mary John, OCBA’s Immediate Past President, presented Nancy with a token of appreciation – an arts and crafts-style wooden clock, invoking the hundreds of hours of time she has spent working for the Association over the past nine years she has been a dedicated volunteer. Stuart LaRose, incoming OCBF President, presented Paul with a similar clock, acknowledging the extra year of service he gave as Foundation President.

The newly formed Volunteer Lawyers Project, led by President Chris Wiles, took this opportunity to thank the members of both the Association and Foundation for their support over the past several years which ultimately led to its own successful incorporation, the hiring of Executive Director Sally Curran and, most recently, the addition of Mary John as Family Law and Divorce Staff Attorney.

All members in attendance appreciated the opportunity to network, to celebrate the successful year each organization enjoyed in 2013 – and to ring in 2014 with warm wishes for all.



ATTORNEY SPOTLIGHT

Bruce R. Bryan | Law is a Continuing Adventure



Growing up along the Great South Bay of Long Island, Bruce Bryan loved the outdoors and the sea, becoming an Eagle Scout at 14, a deckhand at 16, a captain at 18, and an officer of a tall ship and a freighter in the Caribbean in his 20's. He rescued stranded inhabitants on an island in the teeth of a hurricane and survived a mutiny of his West Indian crew during a deadly storm. Law became Bruce's next adventure. After graduating from Fordham Law School, Bruce worked as a corporate attorney on Wall Street and a commercial trial attorney in Palm Beach. There, Bruce met his wife, a resident of Syracuse. They moved here to start a family. Bruce began a practice in civil and criminal appeals and assisting with legal issues in trial courts. They have three wonderful children.

For the past nine years Bruce has taught as an Adjunct Professor at Cornell Law School a course entitled: Advanced Persuasive Writing and Oral Advocacy. He is also a legal author. Bruce has handled many difficult appeals before high-level courts, including an appeal before the Supreme Court on a thorny issue of international law. Bruce is on the Attorney Advisory Committee on the Local Rules for the Second Circuit. He has represented individuals in high-profile cases, and was appointed to represent Mamdouh Salim, the alleged mastermind of the Embassy Bombings in Africa and a cofounder of Al Qaeda with Osama Bin Laden.

Bruce has fought for many causes, including the defense of refugees fleeing death squads in El Salvador, the plight of runaway children in New York City, and the mentoring of disadvantaged, inner-city youths in Syracuse. In 1990, Bruce learned that numerous infants could be saved from a lifetime of deafness if they received a simple, non-invasive, test at birth for hearing loss. Bruce persuaded Congressman Walsh to introduce legislation to test all newborn infants and worked with his staff to mobilize support. In 1999, legislation passed and countless children have since been saved. After a delegation from China observed Bruce teach at Cornell, he was invited in the summer of 2013 to teach Criminal Advocacy and Trial Techniques at one of China's top law schools in Beijing. His effort is a step toward forging a legal understanding between our countries.

BR: *What has been the biggest obstacle you have had to overcome?*

BB: When I was young and it came time to learn to read, I couldn't. The nuns in my school had never heard of dyslexia. They just thought I was slow and in time I began to think I might be too. But I wanted to be a lawyer so badly like my father that when it came time to enter high school I decided to memorize every word my teachers said in class and then stay up late into the night reading the assignments over and over until I got them. It took me years but somehow my determination made my brain rewired. By the time I reached college I had no disability.

BR: *What event illustrates the most important thing that got you to where you are today?*

BB: I was in high school and was up very late one night struggling to read. No matter how hard I tried, I couldn't read the words well enough to comprehend. I was extremely discouraged and ready to give up. My father awoke and saw how discouraged I was. He told me something I have not forgotten to this day. "With God, all things are possible." He was right.

BR: *What advice would you give to newly admitted attorneys?*

BB: Find your gifts and interests in law and pursue them. Don't let the pursuit of money be your sole guide. Have the courage to change your field or position if what you're doing isn't working out. Life is too short to be doing what you don't like. When you pursue your gifts and interests, you will likely be good at them. Success and purpose will naturally follow.

BR: *What do you enjoy most about your practice?*

BB: My practice fits my intellectually creative bent. I like looking at a case from multiple angles and having an informed conversation with a judge in an oral argument. My practice also gives me the chance to overturn unjust results and help people who deserve a second chance.

Bruce is on the Board of Directors of the OCBA, a member of its CLE Committee, and a lecturer at CLE courses. This spring he will teach a series of CLE classes entitled "The Winning Advocate - Persuasive Writing and Oral Skills in Trial and Appellate Courts."

Fourth Department Family Court Case Notes

By Sara Langan | Law Clerk to Hon. Julie A. Cecile, Family Court Judge

Attorney For The Child - Party Status

Kessler v Fancher, 2013 NY Slip Op 08701 (Fourth Department, December 27, 2013). AFC cannot appeal from an order dismissing a parent's petition to modify custody where the parent does not also appeal. "The children, while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned. . . . [C]hildren in custody cases should [not] be given full party status such that their consent is necessary to effectuate a settlement. . . . There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to chart the course of litigation."

Child Protective - Right to be Present

In re Alesha P., 110 AD3d 1461 (Fourth Department, October 4, 2013). In an Article 10 case, the Family Court did not abuse its discretion in excluding father from the courtroom during his stepdaughters' testimony. The Family Court properly balanced the respective interests of the parties, and reasonably concluded that the stepdaughters would suffer substantial emotional trauma if they were compelled to testify in open court, based upon hearing testimony and on a social worker's affidavit that father's abuse of the children compromised their ability to give clear and accurate testimony in his presence.

Counsel: Linda M. Campbell, Syracuse, for Father; Allison J. Nelson for Oswego County Department of Social Services; John G. Koslosky, Utica, Attorney for the Child; Theodore W. Stenuf, Minoa, Attorney for the Child.

In re Skyla H., 111 AD3d 1285 (Fourth Department, November 8, 2013). Father did not have the right to be present where he was incarcerated on criminal charges stemming from his conviction of sexually abusing one of his daughters, i.e., the same conduct that formed the basis for the Article 10 proceeding. There was nothing the father could have stated at the appearance that would warrant the denial of the Department of Social Services' motion for summary judgment of a finding of abuse based on his criminal conviction.

Counsel: David J. Pajak, Alden, for Jefferson County Department of Social Services; Michael D. Werner, Watertown, for Father; Kimberly A. Wood, Watertown, Attorney for the Children

Child Support - Conforming the Pleadings to the Evidence

Barton v Barton, 111 AD3d 1348 (Fourth Department, November 8, 2013). In her petition for upward modification of father's child support obligation, mother alleged that her income had decreased by 25%. After a hearing, the Support Magistrate determined that, while mother failed to demonstrate that she had a 25% decrease in income, father had more than a 25% increase in income, and thereafter recalculated the father's child support obligation. On appeal,

father did not dispute that his income has increased more than 25%, but contended that the Support Magistrate should have dismissed the petition after finding that the mother failed to demonstrate that she had a 25% decrease in income. The Appellate Division held that while father is correct that Family Court Act § 441 requires a court to dismiss a petition for modification of child support if the allegations of the petition are not established by competent proof, pleadings are to be liberally construed and courts may sua sponte conform the pleadings to the evidence. In this case, the Support Magistrate properly conformed the petition to the proof, and father was not prejudiced thereby.

Counsel: Cynthia Feathers, Glens Falls, for Father.

Custody And Visitation - Delegation of Authority for Supervised Visitation

Green v Bontzolakes, 111 AD3d 1282 (Fourth Department, November 8, 2013). By ordering only that visitation "shall take place through the Catholic Charities Therapeutic Supervised Visitation program," the court improperly delegated its authority to the supervising agency. In addition, the court erred in merely indicating that "access should include the child's siblings, if that can be accommodated by the program." If the court determined that sibling visitation is indeed in the best interests of the child, the court should

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Mary Anne Doherty was sworn in as our new City Court Judge on December 20. Mayor Stephanie Miner administered the oath of office as Mary Anne's children William and Kate held the bible and her partner, Mary, looked on. The ceremony took place in the Common Council chambers in City Hall.

Court of Appeals Criminal Law Case Notes

By Bradley E. Keem, Esq. | D.J. & J.A. Cirando, Esqs.

Deportation/Ineffective Assistance of Counsel

People v. Peque, People v. Diaz, People v. Thomas, November 19, 2013 Cases No. 163, 164, 165 - Due process compels that a trial court must apprise a defendant, that if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony. The holding overturns *People v. Ford* (86 N.Y.2d 397), and stresses that as a result of changes in immigration law and enforcement practices, the conviction of a felony renders deportation an automatic consequence of a guilty plea for most non-citizen defendants. The trial court must provide a short, straightforward statement, on the Record, notifying the defendant that if he or she is not a United States citizen, he or she may be deported upon a guilty plea.

Depraved Indifference Murder

People v. Heidgen, People v. Taylor, People v. McPherson, November 21, 2013 Cases No. 174, 176, 177 - In *Heidgen*, the defendant consumed 20 drinks before driving 2 ½ miles on the wrong side of a parkway, passing multiple “wrong way” signs, before crashing into a limousine that was bringing home several family members from a wedding. Three of the passengers in the limousine were killed, and several others were injured.

In *Taylor*, the defendant consumed Ecstasy, drank one beer, and smoked marijuana. She then took her girlfriend’s car,

over her girlfriend’s vigorous objections, stating she wanted to drive “as fast as the car would take her.” On a local road with a speed limit of 35, she drove 80-90 miles per hour, struck and killed a pedestrian, hit another vehicle injuring its occupants, and then her car flipped over. Defendant exited her vehicle and chanted “money, power, respect.” When police arrived, defendant tried to drive away in an unattended squad car, but was stopped and arrested.

In *McPherson*, defendant, after consuming alcohol, and with contraband implicating him in an earlier shooting, drove down the wrong side of a parkway passing eight “wrong way” signs, and 21 large signs that could only be seen by drivers moving in the proper direction. The defendant eventually crashed head-on into another vehicle, killing that driver.

The Court of Appeals reasoned that despite the defendants’ seemingly inexplicable behavior, a rational jury could have found that the defendants, emboldened by alcohol or drugs, appreciated that he or she was engaging in conduct that presented a grave risk of death, and totally disregarded that risk, with catastrophic consequences. Thus, while recognizing that intoxicated driving cases that present facts supporting the depraved indifference to human life state of mind are rare, each of the three cases supported such a conviction.

Ineffective Assistance of Counsel

People v. Howard, People v. Stanley, Court of Appeals, November 26, 2013 Cases No. 189, 190 - Respective defendants were not deprived of effective representation at trial where defense counsel failed to raise the affirmative defense that one of the two weapons displayed during a robbery “was not a loaded weapon from which a shot, readily capable of producing death or serious physical injury, could be discharged” (Penal Law §160.15 [4]). Such a failure was found to be a reasonable strategy choice.

Moreover, the showup identification was proper. The Court of Appeals acknowledged that it was possible to disagree with the lower court’s finding, but that the Court of Appeals power of review regarding mixed questions of law and fact is restricted to situations in which there is no record support for the determination made by the lower court. The Court of Appeals indicated that since it could not be said that there was no record support for the lower court’s determination, it must stand.

Consecutive/Concurrent Sentences

People v. Brown, People v. Harris, November 14, 2013 Cases No. 199, 200, 201 - Consecutive sentencing is prohibited where a single act or omission constitutes two offenses, or where a single act or omission constitutes one of the offenses and a material element of another (*People v. Laureano*, 87 N.Y.2d 640, 643). So long as a defendant knowingly and unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime

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APPEALS

Civil, Criminal, Administrative
Referrals Welcome
(315) 474-1285

John A.

CIRANDO

Attorney at Law

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We APPEAL To You®

We Remember ...

The annual Memorial Observance held by the Onondaga County Bar Association is scheduled for 9:00 a.m. on Thursday, February 6, 2014 in the Ceremonial Courtroom of the Onondaga County Court House.

If you are aware of any other attorneys or judges who we may have missed who should be remembered at this ceremony, please contact Peggy Walker at the Bar Association – 579-2582.

Richard J.P. Hanlon	January 16, 2013	Thomas A. Rill	August 16, 2013
Bruce G. Soden	February 10, 2013	Harold Silverman	September 9, 2013
A. Victor Chini	March 28, 2013	John S. Kenny	October 9, 2013
Theodore M. Hagelin	May 18, 2013	Hon. Morris Schneider	November 26, 2013
Donald B. Kruttschnitt	May 19, 2013		
Ronald J. Pelligra	June 23, 2013		
Morris B. Swartz	August 2, 2013		
Donald A. Marshall	August 9, 2013		

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Court of Appeals Criminal Law Case Notes

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has already been completed, and consecutive sentencing is permissible. Thus, the conviction of a crime for the “simple” knowing, unlawful possession of a weapon---as opposed to with intent to use---may properly run consecutively to the sentence for another crime committed with the same weapon.

Guilty Plea

People v. Worden, November 21, 2013 Case No. 203 - RAPE IN THE THIRD DEGREE requires that lack of consent be by reason of some factor other than incapacity to consent. Here, in his plea allocution, defendant indicated, in response to questions by the prosecutor and the trial court, that during the incident the complainant was unable to consent because she was incapacitated. Thus, the judgment of conviction was reversed, and the guilty plea vacated.

Ineffective Assistance of Counsel Immigration

People v. Hernandez, November 19, 2013 Case No. 211 - Defendant, a lawful permanent resident of the United States originally from the Dominican Republic, was charged with ATTEMPTED RAPE IN THE FIRST DEGREE, SEXUAL ABUSE IN THE FIRST DEGREE (2 counts), and ATTEMPTED SEXUAL ABUSE IN THE FIRST DEGREE. Defendant pled guilty to SEXUAL ABUSE IN THE FIRST DEGREE in full satisfaction of the Indictment. After sentencing, federal immigration authorities sought to deport defendant based on his conviction. At a Removal Hearing, defendant was ordered to be deported. Subsequently, defendant filed a Motion pursuant to Criminal Procedure Law §440.10 asserting that his attorney was ineffective for failing to inform him that deportation would be mandatory upon his guilty plea. The trial court, and Appellate Division denied the Motion. The Court of Appeals reaffirmed the rule in *Strickland v. Washington*, 466 U.S. 668, 687-688 [1984]),

that even if counsel’s performance is deficient, a defendant’s conviction will not be reversed unless “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Here, there was support for the lower court’s determination that defendant failed to show a reasonable probability that, if counsel had informed him that he was certain to be deported as a result of his guilty plea, he would not have pleaded guilty and would have gone to trial. Thus, the Order of the Appellate Division was affirmed.

Guilty Plea

People v. Tyrell, December 12, 2013 Cases No. 230, 231 - A defendant who enters a guilty plea must voluntarily waive several federal constitutional rights, including, his right to a trial by jury, the right to confront one’s accusers, and the privilege against self-incrimination (*Boykin v. Alabama*, 395 U.S. 238 [1969]). In the case at bar, during two different guilty plea allocutions, involving separate incidents, defendant was not informed of his *Boykin* rights. In fact, there was a complete absence of discussion of any of the pertinent constitutional rights, or any indication that defendant spoke with his attorney regarding the constitutional consequences of taking a plea. The error was not preserved by a post-allocation Motion. Nevertheless, the Court of Appeals found the matter reviewable because: defendant could not have brought a Criminal Procedure Law §220.60 Motion since the plea and sentence occurred in the same proceeding; could not have filed a Criminal Procedure Law §440.10 Motion because the error was “clear from the face of the trial record;” and the error could be viewed as a mode of proceedings error since it went to the heart of the proceedings. Accordingly, the judgment of conviction was reversed, defendant’s guilty plea vacated, and the misdemeanor complaint dismissed.

LEGAL BRIEFS

Hinman, Howard & Kattell, LLP Announces New Staff

Megan E. Curinga has become a Partner in the firm as of January 1, 2014. Ms. Curinga is a member of the HH&K Real Estate, Oil and Gas, and Credit Union Practice Groups. Ms. Curinga concentrates her practice in advising both clients and lending institutions with respect to all aspects of residential and commercial real estate transactions. Ms. Curinga practices in HH&K’s Binghamton and Syracuse offices.

Kelly C. O’Connor has joined the firm as Special Counsel. Ms. O’Connor is a member of the firm’s Worker’s Compensation and Disability Benefits Practice Group, and is based in our Syracuse, NY office. Ms. O’Connor has practiced in this area of law since graduating from the Syracuse University College of Law in 2006.

New York State Assembly Bill A06552B

Syracuse City Court will receive another full-time judge in addition to the current 8 judges. The bill was passed by the State Legislature in June 2013 and signed Wednesday, December 18, 2013, by Governor Andrew Cuomo.

The last time a judge was added to the Syracuse City Court bench was in 2006. If the bill goes into effect, the position will be filled by election during the November 2014 election cycle.

VOLUNTEER LAWYERS KEEP 61 FAMILIES FROM HOMELESSNESS DURING HOLIDAYS

By Deborah O'Shea | *Coordinator, Volunteer Lawyer Project*

Volunteer attorneys were front and center in City Court the week of December 16th through December 23rd assisting any person facing eviction before the holidays as part of "Home for the Holidays," a joint effort of the Volunteer Lawyers Project, Legal Services of Central New York, Hiscock Legal Aid Society and the Legal Aid Society of Mid-New York.

In total sixty-one families were represented and supported through their appearances during the week. The benefits of legal representation for these clients were powerful: eviction was either prevented or delayed to allow the family to seek alternate housing for 74% of the clients and the remaining 26% benefited by avoiding or reducing charges by landlords or by receiving advice and counsel.

A total of twenty-eight attorneys helped throughout the week to represent low-income tenants facing eviction. The volunteer attorneys came from all areas of legal practice including public interest, public service and private practice.

A special thank you goes out to the following attorneys who gave to these families their time, concern and professional expertise:

David Burch
Paula Conan
Josh Cotter
Meghan McLees Craner
Sally Curran
Greg Dewan
Crystal Doody
Ken Ehersman
Christina El Bayadi
Derek English
Melanie Goldberg
Dennis Kaufman
Patrick Lannon
Rob LaBerge

Lewis Liebler
Mike Livolsi
Gigi Myers
Tom Myers
Mike Ranieri
Ginny Robbins
Meghan Ryan
Mark Shulte
Tracy Sullivan
Shelly Tsai
Christine Waters
Esther Weingarten
Sam Young
Susan Young

Recent law graduate Eamon Kelleher & law student Christian Tracy also assisted with intake during the week:

Appreciation is also expressed to the judge presiding in Landlord Tenant Court throughout the week, the Honorable Vanessa E. Bogan, and to the private bar representing landlords for their efforts to settle most cases without hearing, reducing the burden on court resources. Deb O'Shea again coordinated volunteers for this collaborative effort. For more information call 579-2577

A brief note from the Executive Director...

As we begin this new year, I wanted to take this opportunity to acknowledge the tremendous efforts of the best volunteers and staff I've had the pleasure to work with – and to thank them personally for their support of me during this past year.

As many of you may know, I was diagnosed with Stage 3 colon cancer in June, was immediately scheduled for surgery and then discovered that I needed to follow that up with six months of chemotherapy. This is, of course, unwelcome news at any time. But, coming as it did just a year-and-a-half into my tenure here, I was worried about my ability to continue the necessary work of OCBA and the Foundation while following through with my treatments.

I needn't have worried. Your boards of directors were generous and supportive, allowing me the time necessary for bi-weekly treatments and follow-up appointments. And the OCBA staff continued their dedicated efforts on your behalf – and even took turns preparing meals for me during treatment weeks! As it turns out, I made it through the challenging regimen pretty well, and credit my ability to work throughout the treatment for keeping me energized, focused and with a reason to pull myself out of bed each morning. (The cot in my office helped, too, for late-afternoon naps!)

My final treatment was January 13, so I'm looking forward to a healthy and happy 2014 – and wish that for all of you, too. But I want to especially acknowledge your OCBA staff, Peggy Walker, Chele Stirpe, Maggie James and Delores Hnat, and VLP's Sally Curran and Deb O'Shea, for their generosity, kindness and support. And to Nancy Pontius, last year's OCBA President, who never failed to check in with me after a treatment, who encouraged me to pace myself, and sent me home more than once when she saw that I was fading. We are always and remain our parents' children and my Mom and Dad, who live 10 hours away in Williamsburg, Virginia, were especially heartened by the support they knew I was receiving from OCBA. I am blessed, and fortunate, to be surrounded by such caring people.



A handwritten signature in black ink, appearing to read 'J. Unaitis', written in a cursive style.

Here's to a great 2014!
-- Jeff Unaitis

OCBA Paralegals Committee

Karen Hawkins | Contributor

December Paralegals Holiday Luncheon

Everyone had a great time at our annual Holiday Luncheon on December 12th. The good food and pleasant conversations were enhanced by several lucky attendees winning the many donated door prizes. Thanks to everyone who donated door prizes. A special thanks to OCBA for donating a \$100 gift certificate for Mirbeau Spa. Thanks to one and all for your generous donations to benefit our adopted family from P.E.A.C.E., Inc. A special thanks to our holiday shoppers Kathrine Cook, Cindy Wade, Mae Slaunwhite, Pam Randall, Jean Swanger and Karen Hawkins, who purchased the many gifts that our adopted family received during the holidays.



available in front of the building on East Genesee Street, at the rear of the building at 510 East Fayette Street, and the parking lot between the office and Hamilton White House). EC Chair Kathrine Cook extends an invitation to paralegals who would like to find out more about serving on the Executive Committee.

We are currently looking for people who are interested in scheduling guest speakers, working on the membership subcommittee and attending the OCBA's Continuing Legal Education Committee meetings. If you are interested in attending the EC meetings to share your ideas for upcoming programs and ways to better serve the paralegal members, please contact Kathrine Cook at kathrinecook0@gmail.com. The EC could really use your help!

Job Bank

Are you an employer with a job that needs to be filled? Our Listserv can help! This service is free to employers. Just email Paralegals Committee Chair, Kathrine Cook, at kathrinecook0@gmail.com to have your job sent to OCBA Paralegal members. This Listserv is open to all OCBA Paralegal members (including students). Members



SAVE THE DATE!

February 13, 2014 – Renee Guariglia from Dominick Falcone Agency, Inc. will present on the new Healthcare Law. You won't want to miss this program. Renee promises to provide you with some valuable information regarding the new healthcare laws and how they may affect you.

The Executive Committee Could Use Your Help

The next Paralegals Executive Committee ("EC") meeting is scheduled for February 5, 2014. The EC meetings are held the first Wednesday of each month except July and August beginning at noon at Gilberti Stinziano Heintz & Smith, P.C., 555 East Genesee Street, Syracuse, NY 13202 (parking is

receive notification via e-mail. Paralegals should contact Peggy Walker at the OCBA offices (471-2667) to confirm current membership or to join the OCBA. Peggy and Kathrine work together to ensure Paralegal members are added to the Listserv.

NEW YORK STATE BAR ASSOCIATION



Attorneys Needed for Special Referral Panel to Help Veterans

The State Bar's Lawyer Referral Service is recruiting attorneys statewide to participate in a reduced rate referral panel to assist Veterans. This special program will run from Nov. 12th 2013 through Memorial Day 2014.

Attorneys interested in receiving referrals from our service for this special Veterans Referral Panel are required to:

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Questions about the program? Contact Lawyer Referral Coordinator, Eva Valentin-Espinal at Ir@nysba.org.





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Letters to the Editor: The Editorial Board accepts letters or comments for publication concerning issues presented in each edition or other issues related to the legal community. Submissions should be limited to a few paragraphs and mailed to OCBA, Attention Bar Reporter. or Email cstirpe@onbar.org.

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Retaining Fees & Domestic Relations

from page 4

to whom such funds were disbursed; (iii) copies of all retainer and compensation agreements with clients; (iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf; (v) copies of all bills rendered to clients; (vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed; (vii) copies of all retainer and closing statements filed with the Office of Court Administration; and (viii) all checkbooks and check stubs, bank statements, pre-numbered canceled checks and duplicate deposit slips.

Regrettably, compliance with the bookkeeping requirements of Rule 1.15(d) is the "Achilles Heel" of many law office operations. Ask yourself, are my records of attorney trust account transactions limited to entries in check registers and, possibly, written notes in file jackets? Many lawyers familiarize themselves with the foregoing requirements only after enduring the disciplinary investigation which inevitably follows dishonored check incidents. Such investigations require the production of all such attorney trust account records for 6 months prior to the issuance of the dishonored check. RPC §1.15(j) also subjects lawyers to disciplinary action for failing to produce such records to a disciplinary authority.

By issuing billing statements to his client at least every 60 days,

Smith complied with the clause in his Retainer Agreement, which is mandated by 22 N.Y.C.R.R. §1400.3. Periodic billing statements lessen instances of fee disputes and keeps clients reasonably informed about the status of their matters, as required by §1.4(a) (3) of the RPC.

Attorney Smith's example also illustrates a forward thinking document management plan. Once the client's divorce is concluded and Smith is fully compensated, the client is entitled to receive all file documents, including all work product, which the Court of Appeals has determined to be the client's property. See: *Sage Realty v. Proskauer, Rose, Goetz* 91 NY2d 30, 666 NYS2d 985 (Ct. App. 1997) Attorneys may retain copies of file material, at their own expense, for a variety of personal and professional reasons. Electronic storage options should be fully investigated to insure confidentiality and reliability. The preservation of original wills and title abstracts may be a welcomed benefit to clients. However, the clients should be given the choice, after consultation, of the means by which such documents are to be safeguarded.

**Anthony J. Gigliotti has been counsel to the Fifth District Attorney Grievance Committee in Syracuse, New York since 1996, and regularly lectures lawyers and law students on legal ethics and the disciplinary process.*

Fourth Department Family Law Case Notes

...from page 7

specify in its order that the agency or organization designated to supervise visitation must be able to accommodate sibling visits.

Counsel: Mary Anne Connell, Buffalo, Attorney for the Child; Charles J. Greenberg, Amherst, for Mother.

Custody And Visitation - Remedy for Violation of Visitation Order

Smith Gilsey v Grisanti, 111 AD3d 1424 (Fourth Department, November 15, 2013). Requiring father to post an undertaking in order to ensure that visitation occurred, rather than modifying custody as requested by mother, was a meaningful sanction for father's failure to comply with orders concerning mother's visitation rights.

Counsel: Michael Steinberg, Rochester, for Mother; Richard D. Grisanti, Father, pro se; Jane E. Monaghan, Warsaw, Attorney for the Child.

Divorce - Counsel Fees

Suppa v Suppa, 2013 NY Slip Op 08711 (Fourth Department, December 27, 2013). The court properly exercised its discretion in awarding plaintiff approximately half the amount of her counsel fees, despite the fact that plaintiff had enough income and assets to pay her own counsel fees, because there is no requirement that a party must demonstrate an inability to pay.

Counsel: Getnick, Livingston, Atkinson & Priore, LLP, Utica (Thomas L. Atkinson of Counsel), for Defendant; Thomas F. O'Brien, Clinton, for Plaintiff.

Divorce - Vacateur of Stipulation and Imputation of Income Based on Capital Gains

Marlinski v Marlinski 111 AD3d 1268 (Fourth Department, November 8, 2013). The majority held that the parties' stipulation for child support and maintenance was properly vacated where, although parties had stipulated that the wife's income was \$15,000, her income was actually \$121,901. Wife had inherited large sums of money during the marriage, and had failed to disclose significant stock earning, which totaled over \$48,000 in one year. The majority concluded "[R] egardless whether the wife can be said to have committed fraud, her failure to disclose her earnings in the stock market resulted in an agreement that was manifestly unfair to the husband." Justice Sconiers dissented, noting that the record was devoid of proof that the wife was aware of the extent of her capital gains as of the date of the stipulation. Justice Sconiers further noted that the wife had a two year degree, had not worked outside the home since 1994, and had never earned more than \$18,000 from employment. Even after inheriting significant sums, the wife never demonstrated any particular knowledge of or success with investing. "This would explain why the parties' partial settlement attributed income to the wife of only \$15,000 per year. The only reasonable conclusion based on this record is that the wife's capital gains in 2009 were a fluke resulting from a rapidly rising stock market.

Given her losses in 2010, it is clear that the wife was about as likely to repeat her 2009 success as someone who wins the lottery or has a lucky streak at a casino." Therefore, Justice Sconiers concluded that the court also abused its discretion in imputing an annual income of \$50,000 to the wife based on nothing more than one year of capital gains income.

Counsel: Steven H. Grocott, West Seneca, for Wife Appellant; Michael J. Stachowski, for Husband Respondent.

Termination Of Parental Rights - Post-Surrender Visitation Agreements

In re Kaylee O., 111 AD3d 1273 (Fourth Department, November 8, 2013). Unless the visitation terms are incorporated into the court-ordered adoption agreement, post-surrender visitation agreements, negotiated upon the surrender of parental rights, are unenforceable.

Counsel: Evelyne A. O'Sullivan, East Amherst, for Birth Mother; Daniel J. Hartman, Buffalo, for Adoptive Parents; Charles D. Halvorsen, Legal Aid Bureau of Buffalo, Inc., Attorney for the Child.



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2012

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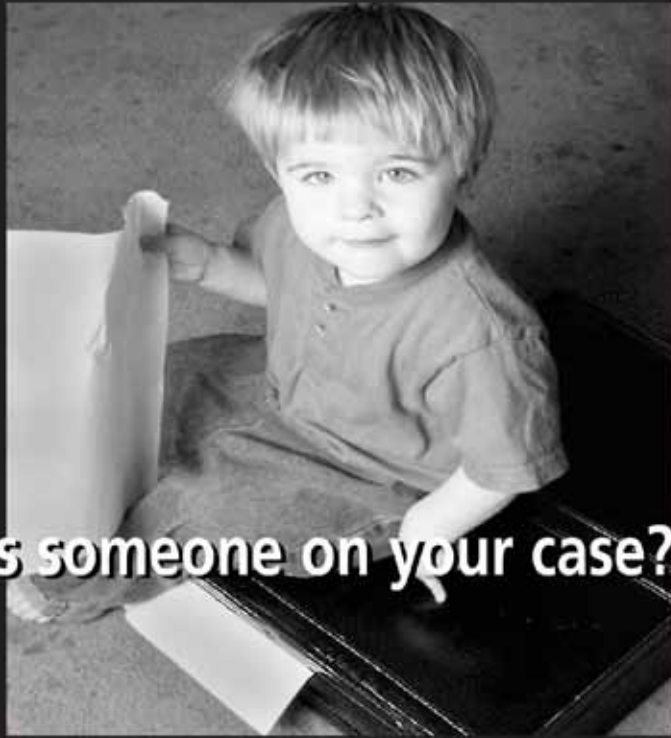
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