



ONONDAGA COUNTY BAR ASSOCIATION BAR REPORTER

VOLUME 62 NUMBER 1 | January 2017

CNY Philanthropy Center | 431 East Fayette St. | Syracuse, NY 13202 | Phone: 315-471-2667



Happy New Year 2017!!!



UPCOMING EVENTS:

Events	Dates
CLE Professional Conduct	2/1
Annual Memorial Ceremony	2/2
CLE Lawyer on Board (NFPs)	2/9
County Mock Trial Championships	4/12
Law Day	5/2

MISSION:

To maintain the honor and dignity of the profession of law, to cultivate social discourse among its members, and to increase its significance in promoting the due administration of Justice.

FROM THE PRESIDENT

Happy New Year! 2017 will no doubt be another event-filled year for OCBA. I hope that you have been as pleased as I have by our reinvigorated Bar Reporter and our regular use of social media to keep you informed of the range of activities of our active Association.

The New Year brings changes in leadership in two organizations that provide free legal services to low income people in Onondaga County. In late December, the Board of Directors of the Assigned Counsel Program selected Kathleen Dougherty to serve as the new executive director of the program. Ms. Dougherty has been a deputy attorney in the Law Department of Onondaga County. She begins her new job with ACP in mid-January, and will take a leadership role along with the ACP Board in implementing changes to the program that include hiring new staff -- a deputy director, quality enhancement attorney and a chief financial officer.

The Board of Directors of the Frank H. Hiscock Legal Aid Society has selected attorney Linda Gehron to serve as the next President/CEO of the organization succeeding retiring President/CEO Susan Horn. Prior to her selection, Ms. Gehron had worked as a supervising attorney in the program. She assumes her new position on February 1. In this issue of the Reporter there is an interview with Ms. Gehron. We look forward to doing a feature with Ms. Dougherty in a future issue focusing on new developments at ACP. We wish both new leaders success in their new endeavors.

It was great seeing so many members at OCBA's Holiday Open House on December 14th at the Philanthropy Center. It was a wonderful opportunity to catch up with friends and colleagues and offer congratulations to our newly elected Judges Matthew Doran and Gregory Gilbert, re-elected Judge Deborah Karalunas and newly appointed Judge Derek Thomas, and offer recognition and thanks to retiring Judge Anthony Aloï. Several Judges were in attendance as well including Hon. David Peebles, Hon. James Murphy, Hon. Martha Mulroy, Hon. Steve Dougherty, Hon. Mary Ann Doherty, Hon. Anthony Paris and Village Justice Anthony LaValle.



Our Holiday gathering also provided an opportunity for guests to donate to the OCBA Community Engagement Committee sponsored holiday gifts for a Syrian family newly arrived to Syracuse introduced to us by InterfaithWorks. In the coming year, the Community Engagement Committee will be identifying many opportunities for our members to become more involved in community service.

Also, watch your e-mail for the date and time of the Committee's first CLE program on February 9th as part of its effort to support and encourage our members' volunteer activities in the community. Consider registering for [Lawyer on Board: Service on Not-for-Profits and a Primer for Reading Financial Statements](#). Committee Members Chris Wiles and John Sindoni along with lawyer Mary Anne Cody and CPA Joseph Mocciano will be presenting this CLE for lawyer board members of nonprofits focusing on board member responsibilities.

We hope to see you at OCBA's Annual Memorial for members who passed away during the last year to be held on Friday, February 2 at 9:00 AM at Legislative Chambers at the Onondaga County Courthouse. This year we will be remembering 25 of our members during the hour-long ceremony.

A handwritten signature in black ink that reads "Jim Williams". The signature is written in a cursive, flowing style.

Linda Gehron Named President/CEO of Hiscock Legal Aid Society

By: Carrie Chantler, Editor



Linda Gehron, newly named president and CEO of the Frank H. Hiscock Legal Aid Society, lives by a few choice words.

She cites 19th century English novelist William Makepeace Thackeray, who said “A lawyer must think of nothing but the law.”

The quote occurs to her when she thinks of the HLAS mission to promote the fundamental right of every person to equal justice under the law, and why she wanted to work at the agency.

Since law school and from her time working as an Assigned Counsel Program panelist, Gehron has held the HLAS mission in high regard.

“I really wanted to work there my whole career. I was always an admirer from afar,” she said.

In court, she respected the HLAS attorneys she’d meet and their steady focus on their large caseload and the positive impact they made on behalf of their clients.

Noting the camaraderie of the HLAS lawyers while zealously representing their clients, she’d say to herself, “I would love to be a part of that team.”

As of February 1, Gehron officially takes the helm of that team. She succeeds Susan Horn, who led the society for 27 years, and who oversaw significant growth not only in its reach to serve Syracuse’s neediest citizens, but in the agency’s financial stability. Under Horn’s watch, the HLAS annual budget increased from \$800,000 to \$5.4 million.

Such an incumbency might shake her successor’s confidence, but not Gehron.

“I’m excited,” she said.

“I’m being left with a strong organization and dedicated people who know how to do what they’re doing.”

But no doubt about it, she’s awed by the

High Goals Set by Gehron as New HLAS Leader

accomplishments of her predecessor.

"I don't think it's possible to replace Susan," she said.

"There are no words to express how much she's helping me to learn the nuts and bolts of the organization.

Hired in 2012, Gehron began at HLAS as a Senior Attorney. Within four months, she was promoted to the Supervising Attorney position of the Family Court Program. Then, as now, her sight was set on being part of a team that helps low-income people and families to navigate complex civil actions, parole hearings and appeals.

"We're the go-to place when no one else can help," she said.

"We have some of the most difficult cases."

Despite the long hours and toil expended by HLAS attorneys, some legal problems still seem insurmountable. And while it doesn't often happen, people are sometimes turned away.

"That's the hardest part. There is such a deep need," she said. "But, we must try."

Syracuse bears a distinction no city its size would wish for. According to a November 2015 Atlantic Monthly article, the salt city boasts

the nation's highest rates of both black and Hispanic concentrations of poverty, where 40 percent of the population live below the federal poverty line — when a family of four lives on an annual income of \$24,000. Grim housing and employment statistics don't improve this landscape.

"We have some of the poorest neighborhoods in the country," Gehron said.

HLAS lawyers assist poor residents by protecting their fundamental rights and seeking justice for all. HLAS represents clients through its Family Court, Appeals and General Civil Programs as well as its Cancer Legal Advocacy Program, among others.

"We try to help people get and keep jobs, meet child support obligations, deal with wrongful terminations," she said. "We advocate for what people need so families can stay together."

Raised in Pennsylvania and New Jersey, Gehron was surrounded by hard-working, thoughtful folks. Her father, a successful Manhattan ad man often invoked a Bible verse his daughter took to heart: "Whatsoever thy hand findeth to do, do it with thy might".

"Which means if you decide to do something, *really do it*," she said.

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And grateful parents across the nation can thank Carl Stotz, her great uncle, for founding Little League Baseball.

These influences set up this Class of 1981 Syracuse University College of Law graduate to understand, from an early age, that defending those without a clear voice or a channel to communicate their needs, particularly the vulnerable, would be the path she'd pursue.

"In my work I would see children in deplorable conditions and I said 'I've got to do something about that,'" she said. "There is worth in every human being. And we have to as a society affirm their worth, because they're here, they're often alone and we have to take care of them."

Putting herself through teacher's college, working full-time as an office clerk, she found herself a year after graduation at SUCoL. A new experimental program resulted in the cum laude graduate receiving her J.D. in just two years, and a week before giving birth to her first child. That accelerated program is no longer offered.

"It was hard," Gehron said.

She recalls receiving legal writing instruction from the Hon. John J. Brunetti while at S.U. Since

then, he has been one of her mentors. "He is one of the people, who for whatever reason, saw something in me."

"We try to help people get and keep jobs, meet child support obligations, deal with wrongful terminations," she said. "We advocate for what people need so families can stay together."

As she raised her three children, now accomplished adults, Gehron also worked as a Law Guardian and Attorney for the Child for the Appellate Division, Fourth Department. In a 30-year private practice, and as an ACP panelist, her caseload included misdemeanors, felonies and homicides. She also served as Lecturer in Law at her law school alma mater on the topic of juvenile advocacy. In recognition for her vigorous effort on behalf of children, Gehron was a recipient of the Dillon Award for Law Guardian Advocacy from the Fourth Department.

Gehron is hopeful about the future, her own and that of the clients HLAS helps. She sees "good people" all over our community trying to improve the conditions that result in homelessness and problems with the law.

"In the courts, there's an approach moving towards being less punitive and more rehabilitative," she said.

"There are good minds paying attention to these issues and trying to find solutions."

The legal community is grateful Gehron is among them.

FROM THE EDITORIAL BOARD

To advertise in the Bar Reporter, call the Onondaga County Bar Association at 315.579.2578.

The Editorial Board encourages members to submit articles for publication concerning issues presented in each edition or other issues related to the legal community. Submissions should be sent to OCBA, Attention Bar Reporter or Email cchantler@onbar.org. Editor Emeritus: John A. Cirando, Esq. Editorial Board Members:

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**HISCOCK
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Bar
Association



Memorial Observance

Onondaga County Courthouse
Legislative Chambers, Room 407
Thursday, February 2, 2017, 9-10:00 a.m.

*Presiding: The Hon. Stephen J. Dougherty,
Onondaga County Court*

In Memoriam

*Bruce Bolton
Carl F. Dobe
Robert D. Essig, Sr.
John M. Freyer
John W. Gormley, Sr.
Charles R. Greiner
Richard D. Grossman
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Patrick J. Pedro
George C. Shattuck
Steven W. Snyder
Marilyn A. Westlake*

Please advise Peggy Walker at pwalker@onbar.org of other members of our profession whom we have lost.



Bruce Bolton



Carl Dobe



Robert Essig Sr.



John Freyer



John Gormley Sr.



Charles Greiner



Richard Grossman



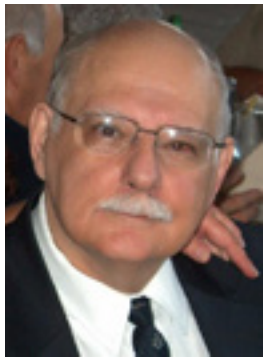
Raymond Hackbarth



Peter Hopkins



Clarence Johnson Jr.



Joseph LaFay Jr.



Richard Lang



John Lindauer



Burton Lowitz



Carl Marino



James McDonald



Hon. Jeffrey Merrill



Beverly Michaels



Leroy Natanson



August Nordone



Dennis O'Hara



Patrick Pedro



George Shattuck



Steven Snyder



Marilyn Westlake

College of Law's Criminal Defense Clinic Attains Presidential Pardon for Client

The College of Law's Criminal Defense Clinic's Presidential pardon petition for one of its clients has resulted in a full Presidential pardon from President Obama.

In 2017, the Criminal Defense Clinic, under the leadership of Director Todd Berger and Practitioner-in-Residence Jason Hoge and with assistance of students Rachel Campbell and Jaclyn Morgese submitted a pardon application on behalf of Lisa Jandro. On January 17, 2017, the petition was one of 64 individuals to receive a pardon.

"Presidential pardons are extremely rare, so it is with great honor that the College of Law was able to help our client regain her basic civil rights," said Berger. "This was the result of the hard work and dedication from our students, applying what they had learned in the classroom to work with a real client that had significant implications."

In support of the petition, the Criminal Defense Clinic team worked with Jandro in her submission to the Office of the Pardon attorney and continued to work with her throughout the close to three year process.

Jandro was found guilty of money laundering and conspiracy to commit money laundering in the District of Hawaii and was sentenced in 2000 to 33 months' imprisonment.



COMMERCIAL REAL ESTATE ATTORNEY



Bousquet Holstein PLLC, a multi-disciplined law firm located in Syracuse, NY, is seeking to hire an experienced commercial real estate attorney. Candidates should have experience representing purchasers, sellers, developers, lenders, investors, landlords, and tenants. Desired experience includes all aspects of the commercial real estate development process including the drafting of complex purchase and option agreements, site review, zoning and right to build, project financing, industrial development agency transactions and PILOT agreements, mortgages and secured transactions, commercial and retail leasing, condominiums, TICs, and other sophisticated real estate structures. Creative problem-solving and drafting skills are required.

Inquiries will be kept confidential and should be submitted via email to hr@bhlawpllc.com or to Human Resources, Bousquet Holstein PLLC, 110 West Fayette Street, Suite 1000, Syracuse, NY 13202.

The Impact of Fordham's Neuroscience and Law Center on Civil and Criminal Cases

By: Charles Lupia, Esq.



Since the 1970's, developments in medical technology have made CT scans, MRIs and PET scans available to us. We are now able to see, to a considerable extent, the inner workings of the body, including the brain.

These developments have consequently caused a revolution in neuroscience, affecting not merely the medical field but also, to some extent, the legal system. In many criminal cases, a number of defendants are affected with traumatic brain injuries, and may have committed the acts in question as a result of those injuries. Neuroscience also tells us much about adolescent brain development, and is thus important in juvenile cases.

In response to these developments, Professor Deborah Denno established the Neuroscience and Law Center at Fordham University's School of Law, located near Lincoln Center in midtown Manhattan. I attended a CLE there in February.

The CLE featured an impressive array of federal judges, including Jed Rakoff of the U.S. Southern District of New York. Being interdisciplinary, it also featured legal experts and such neuroscientists as Dr. Donald Pfaff and Dr. Ruben Gur.



The panelists considered neuroscience technology, with its scans of the brain's injuries and abnormalities, to currently be of limited value in explaining an individual's behavior. One legal expert, Erin Murphy of N.Y.U., stated that much testimony from neuroscience has been allowed in courtrooms, but she did not believe cohesive case law has yet developed in the area.

Yet this field of science has been rapidly developing, and further developments are expected in the near future. Its potential for changing the legal system, particularly in criminal cases, is considerable.

Fordham's Law and Neuroscience Center is expected to have another CLE in 2017, although a date has not yet been set. Further inform can be obtained at: www.fordham.edu/info/24639/neuroscience_and_law_center.

Charles Lupia, Esq. has a B.A. and J.D. from Syracuse University. He is a solo practitioner in Syracuse, with a practice concentration on criminal and family law. His articles have appeared in numerous publications, including the New York State Bar Journal and Life in the Finger Lakes.

Anticipate the Future – Will Lawyers be Replaced by Robots?

By: Brani Andreev, Associated Services

With Professor Andrew Perlman at the helm, Suffolk University Law School in Boston recently created the [Institute on Law Practice Technology & Innovation](#). Its purpose: To “study how technology is revolutionizing the practice of law.” The future holds a great deal of uncertainty for lawyers.

In a recent round table discussion at Law Practice Today, a panel of legal professionals offered their insights about the future of law practice and shared their advice about how lawyers can best prepare and prosper. From harnessing new technologies, to minimizing costs through alternate workspace arrangements and law firm structures, and expanding a firm’s online presence through social media and other avenues of client engagement and management, the practice of law is rapidly changing and as the pace of technological innovation accelerates the legal world will have to continue evolving to keep up. What does the future look like for the practice of law?

Law Practice Outlook

The legal profession is in the early stages of digital transformation. Lawyers of the future who will still be practicing law as we think of it today, meaning trading time for dollars, will be doing so because they are experts with deep subject matter knowledge and experience applying that knowledge to assist a specific group of clients. In addition, new roles will emerge for lawyers with diversified skill sets that address changing consumer expectations. These skills may include knowledge management, data analysis, and process development, among others. According to the legal professionals at Law Practice

Today, the industry will see more fixed-pricing based on “best practices” developed by each firm. For small firms, there will be more collaboration with outside third parties to mimic—and in some cases exceed—the capabilities of larger firms. Solo practitioners will also learn to be more collaborative with other

solos and other service providers. In smaller, younger practices, we are already seeing that the law practice of the future will be cloud-based, it will facilitate remote work, and many of its repetitive tasks will be automated. The legal experts also believe that more and more firms that traditionally cling to the billable hour model will be shifting to fixed-fee billing practices or alternatively fade away altogether.

While some types of work, like litigation, are going to stick to billable hours, many other tasks are better suited to fixed-fee billing. In the age of mass commoditization of services, clients want to know what they are budgeting for and what they are getting when they pay for something.



Excellence in Legal Services for Over 30 Years

Here are some of the current trends occurring in the legal industry right now:

Commoditization is Inevitable

Advances in technology will serve to commoditize the more routine aspects of the legal profession. It has already occurred in legal research, in e-discovery, electronic filing, and in trial software, and it will continue at an ever-increasing pace in other areas of the law.

DID YOU KNOW ...

The CLE Committee is an essential resource for the local law community. This important OCBA panel reviews, approves and generates continuing legal education seminars in a wide variety of legal topics. If you are interested in becoming a member of the committee, contact

**Carrie Chantler at 579-2578
or email cchantler@onbar.org**

Anticipate the Future – Will Lawyers be Replaced by Robots?

Alternative Business Structures

Entities that provide both legal and non-legal expertise will arise. The UK and Australia are experimenting with these models and I expect them to spread over the next 20 years.

Work-Life Integration

As new generations enter the workforce, work-life balance will become a key factor in recruiting and retaining talent. The practice of law will always require long hours, so to the extent that firms and law departments can accommodate the whole of the employee and not merely view them as a unit of production, they will have a competitive advantage in the battle for talent.

Globalized Economy

Despite what appears today to be a trend toward closed borders and restricted trade, in the long run a more globalized economy is likely to prevail. Consequently, linguistic and cultural fluency will be huge pluses in the law practice of the future.

Within recent memory, lawyers were the prime sources of legal knowledge and services. Law firms, government entities, corporations, nonprofits and others accessed legal resources appropriate to their needs and their means principally from 'their lawyers.' The providers of these services enjoyed a monopoly guaranteed by the system, with competition centered principally within legal sectors. Today, we see technology changing traditional ways

of providing legal services. This has led to greater democratization of the 'industry,' and introduced new competition and continual searching for better and more efficient ways of providing legal services. These trends promise to continue as legal resources and intelligence become increasingly accessible through various technological advances.



Brani Andreev is the owner of Associated Services, a legal support and management services agency located in Syracuse, NY. She is a frequent speaker on the topics of headache-free process serving and law firm management.

DID YOU KNOW ...

OCBA receives calls every week from clients who are trying to locate documents or files once held by their attorneys, after that attorney has moved, stopped practicing or passed away.

If you know where your files will go after you're gone, Contact Membership Coordinator:

**Peggy Walker at 579-2582
or email pwalker@onbar.org**



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Balestra New Shareholder of Menter, Rudin & Trivelpiece



Menter, Rudin & Trivelpiece, P.C. is pleased to announce that Michael J. Balestra has become a shareholder of the Firm. Mr. Balestra is a member of the firm's Construction Law, Labor and Employment Law and Litigation practice groups. Mr. Balestra has experience representing

clients throughout New York State in contract disputes, construction claims, and other commercial matters. He has also defended employers in a variety of employment discrimination and unemployment insurance claims before the New York State Division of Human Rights, Workers' Compensation Board, Department of Labor, and the Equal Employment Opportunity Commission. He is a 2008 graduate of the University of Kentucky College of Law.

Joshua Werbeck Elected Member at Bousquet Holstein

Bousquet Holstein PLLC is pleased to announce that Joshua S. Werbeck has been elected Member effective January 1, 2017. Josh is a Central New York native and a part of the Firm's Real Estate and Business Practice Groups. Josh Werbeck's practice



includes employment, real estate, and transactional legal matters. Josh is a 2016 recipient of the Central New York Business Journal's "40 Under Forty" award and a member of the 2017 Leadership Greater Syracuse class.

Lovejoy-Grinnell joins Melvin & Melvin in Family Law

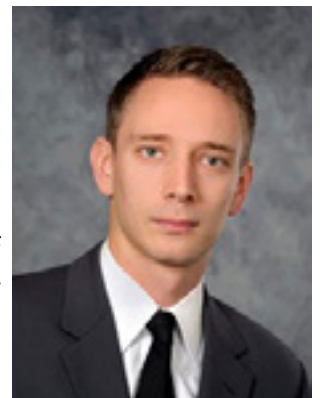


Melvin & Melvin PLLC announced that Bryn Lovejoy-Grinnell recently joined the firm as a Family Law Attorney. Lovejoy-Grinnell graduated from Harvard University and Cornell Law School. Prior to joining Melvin & Melvin, she worked as a senior attorney in the

Domestic Violence Program at the Frank H. Hiscock Legal Aid Society in Syracuse. Ms. Lovejoy-Grinnell has represented clients in divorce and family law proceedings with a particular focus on victims of domestic violence and sexual abuse. She has also represented clients in unemployment insurance benefit hearings and in summary eviction proceedings. She is President-Elect of the Central New York Women's Bar Association and serves on the board of the Volunteer Lawyers Project and the Greater Strathmore Neighborhood Association.

James O'Shea New Partner at Hancock Estabrook

Hancock Estabrook, LLP is proud to announce that James J. O'Shea has been promoted to the Firm's partnership. Mr. O'Shea is a member of the Litigation Practice. He focuses his practice in the areas of commercial litigation, debtor and creditor rights, estate litigation, insurance defense and personal injury. The law firm of Hancock Estabrook has offices located in



Albany, Ithaca, Rome, Syracuse and Utica.

Do you have a Newsmaker?

**Send your legal news and press releases to Carrie Chantler
at cchantler@onbar.org.**

NEWSMAKERS NEWSMAKERS NEWSMAKERS



Syrian Family Gets Warm Welcome to Syracuse from OCBA This Holiday

By: Michele Maciejewski, OCBA Marketing Assistant

December is the start of a tough time to live in Syracuse. And it must be even tougher if you've just moved here from another country with a totally different climate. For one Syrian family, including Hassan and wife Eiman, daughters Salam and Bayan and son Yaser, the holiday time was made a little brighter with all the wonderful donations gathered from OCBA members, including current President Jim Williams and former President Nancy Pontius.

Our newly formed Community Engagement Committee connected with the family through Interfaith Works of Central New York. OCBA members and staffers wrapped and delivered all the goodies to the family's home on the North Side of Syracuse. The parents received towels, mugs and over \$100 in TOPS gift cards while the kids received gloves, hats and toys. Eiman, who's lived in many places, welcomed the gifts and visitors with fig cookies and Syrian coffee but noted that Brazil has the best brew. The family is thrilled and now much more ready for the cold winter.

Community Engagement organized the family sponsorship as a way to give back locally at the holidays but is only getting started. The group, which meets the 1st Monday of every month at the CNY Philanthropy Center, has a mission to offer OCBA members opportunities to volunteer and develop the CNY community through means other than pro bono legal work. E-mail Committee Chair Jim Williams at jwilliams@lscny.org to join the committee.

Litigation/Insurance Attorney

Barclay Damon, LLP, a 275-attorney law firm, with 33 practice offerings and eleven offices throughout New York State and the Northeast, is seeking a full time Associate to join its Rochester, Syracuse or Buffalo offices in the Torts & Insurance Practice Group. This attorney will work in a collaborative environment, evaluating complex insurance issues and litigating insurance disputes in New York and other jurisdictions across the nation. Practicing attorneys with 3-5 years of litigation experience are encouraged to apply.

Candidate must be licensed to practice in the state of New York; have superior verbal, written, and interpersonal skills and have demonstrated abilities to work directly with clients. Qualified applicants should submit a cover letter, resume, writing sample and law school transcript in confidence to:

Recruitment Coordinator
Barclay Damon, LLP
Barclay Damon Tower
125 East Jefferson Street
Syracuse, NY 13202

Contact: Recruitment Coordinator
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OPENING FOR ATTORNEY AT MELVIN & MELVIN, PLLC

Mid-size Syracuse law firm seeks to hire a self-starting, energetic attorney with 2-5 years' experience for its commercial law and transactional practices. The successful candidate will have excellent verbal, interpersonal, and research and writing skills. Must be licensed to practice in New York. Please forward resume to hiringpartner@melvinlaw.com.

OPENING FOR MATRIMONIAL ATTORNEY AT MELVIN & MELVIN, PLLC

Mid-size Syracuse law firm seeks to hire a self-starting, energetic attorney with 2-5 years' experience for its matrimonial practice. Please forward resume to hiringpartner@melvinlaw.com.

OPENING FOR ATTORNEY AT KOWALCZYK, DEERY & BROADBENT, LLP

A Utica Law Firm is seeking to hire an attorney with preferred 3-5 years experience in business law, commercial law, real estate, estates, family law and general law. Strong legal research and writing skills necessary. Please forward resume to (315) 724-3212, or blh@ktdlaw.com.

LABOR & EMPLOYMENT ASSOCIATE AT NIXON PEABODY IN ROCHESTER

Nixon Peabody is seeking an associate to join our Labor & Employment Practice Group in the Rochester office. To learn more, and to apply online, please visit our website at <http://www.nixonpeabody.com/careers>.

COMMERCIAL LAW FIRM SEEKS EXPERIENCED PARALEGALS/LEGAL ASSISTANTS

Cheney & Blair, LLP is interviewing candidates for a senior real estate paralegal position and a paralegal/legal assistant to assist with lenders' work, business/corporate matters, and litigation in the firm's Skaneateles offices. Competitive salaries are accompanied by benefits. Qualified candidates should forward their letters of interest and resumes to admin@fingerlakeslaw.com.

M&A AND CORPORATE TRANSACTIONS ASSOCIATE IN ROCHESTER-NIXON PEABODY

Nixon Peabody LLP is seeking an associate to join our M&A and Corporate Transactions Practice Group in the Rochester office. To learn more, and to apply online, please visit our website at <http://www.nixonpeabody.com/careers>.

FROM THE COURTS

Fifth District Judicial Assignments Announced

The Fifth Judicial District Held Its First Meeting with the 2017 Administrative Team at the Onondaga County Courthouse.

"This team will be ready to take on whatever the variety of issues are that come their way," says Fifth Judicial District Administrative Judge James C. Tormey.

[Check out the full press release here.](#)



Onondaga County Surrogate's Court eFiling Mandatory

Pursuant to Administrative Order of the Chief Administrative Judge of the Courts [AO/24/17], the Onondaga County Surrogate's Court is now a mandatory eFiling court for probate and administrative proceedings and miscellaneous proceedings relating thereto for such proceedings commenced on or after January 18th, 2017.

[Read the full order here.](#)



[Pro Se Law Clerk Positions Available in Rochester](#)

One full-time and one temporary part-time law clerk position will open up in 2017 for the United States District Court Western District of New York in Rochester, NY. Applications will be accepted until January 20, 2017 or until the positions are filled.

[Click here for details on how to apply.](#)

Appellate and Criminal Court Case Notes

Contributed by Bradley E. Keem, Esq. | Associate, D.J. and J.A. Cirando

Catu Error and Predicate Felony Offenders

People v. Smith, and People v. Fagan, No. 149/150, Court of Appeals, 11/1/16

People v. Catu (4 N.Y.3d 24) directs that a sentence is illegal if a defendant is not informed by the trial court at sentencing that post-release supervision was part of their sentence. Contrary to the claim of the respective defendants, Catu does not require an automatic vacatur for predicate felons who received enhanced sentences for being repeat offenders prior to the ruling. The correct remedy in such situations is to impose the original sentence that the respective defendants received, which did not contain post-release supervision.

Confrontation Clause

People v. Hicks, KA-13-00168, Fourth Department, 9/30/16

Defendant's Sixth Amendment right to confrontation was violated when the victim to the alleged Sexual Assault and Burglary refused to answer defense counsel's questions regarding the recantation of her prior testimony from the first trial. The trial court failed in its duty to explore whether the victim refused to answer questions that were so closely related to the commission of the crime that all testimony from the first trial should be stricken. Given the central nature of the victim's testimony, and the "less than overwhelming" nature of the evidence, the trial court's error was not harmless, and a new trial was ordered.

Corroboration

People v. Maynard, Fourth Department, KA-14-02279, 10/7/16

Defendant's conviction of the crime of Sexual Abuse in the First Degree was contrary to the weight of the evidence because the evidence of the crime was solely based on defendant's confession. That confession, however, was not corroborated as required by Criminal Procedure Law §60.50. While that count was reversed and dismissed, the remaining convictions were affirmed.

Criminal Procedure Law

§440.10

People v. Bank, No. 160/161, Court of Appeals, 11/1/16



In a Criminal Procedure Law §440.10 Motion defendant provided evidence that defense counsel misinformed him about his potential sentence. Defendant, therefore, claimed that his guilty plea was invalid. The Court of Appeals, however, determined that despite the incorrect advice of defense counsel, there was no evidence that a reduced plea would have been offered to defendant. In fact, the trial court said at sentencing that he regretted imposing the sentences to run concurrently, as opposed to consecutively. Therefore, the Motion was denied.

Evidence

People v. Drouin, Appellate Division, Third Department, Appeal #107085, 10/20/16

Defendant, a landlord, noticed that his tools were missing from a garage he previously permitted his tenant to use. Thereafter, the landlord removed the defendant's 2003 ATV from the garage, and stored it at a friend's house. The landlord was subsequently convicted of the crime of Grand Larceny in the Third Degree.

Grand Larceny in the Third Degree requires larcenous intent, or the "intent to deprive another of property or to appropriate the same to himself or to a third person" (Penal Law §155.05 [1]). The mens rea element of the offense is not satisfied by an intent

Appellate and Criminal Court Case Notes

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to temporarily take property without the owner's position. The proof at trial supported the conclusion that defendant only planned to temporarily deprive the tenant of the ATV in order to force him to return the defendant's missing tools. Defendant expressed this plan to others, and after storing the ATV did not attempt to use or sell it. Accordingly, since all of the elements of Grand Larceny in the Third Degree were not established beyond a reasonable doubt the judgment of conviction was reversed, and the Indictment dismissed.

People v. Ocasio, Court of Appeals, No. 134, 11/1/16

Defendant was charged with Criminal Possession of a Weapon in the Fourth Degree in violation of Penal Law §265.01 [1]. The accusatory instrument alleged that a police officer observed defendant with a "rubber gripped, metal extendable baton (billy club)" in his rear pants pocket. The officer further averred that "said baton device is designed primarily as a weapon, consisting of a tubular, metal body with a rubber grip and extendable feature and used to inflict serious injury upon a person by striking or choking." Based on such allegations, the lower court granted defendant's Motion to Dismiss, and the Appellate Term affirmed.

The Court of Appeals, however, reversed. The Court of Appeals indicated that since "billy" is not defined in the Penal Law, it must be given its "ordinary" and "commonly understood" meaning. While some dictionaries define a "billy" as usually a wooden instrument, it is generally synonymous with the term "baton," and has been defined as a "small bludgeon that may be carried in the pocket; a club; especially a policeman's club" (Black's Law Dictionary, at 213 [4th ed 1951]). The common understanding of the term then is that a "billy" is a cylindrical or rounded, rigid, club or baton with a handle grip which, from its appearance and inherent characteristics, is designed to be used as a striking weapon, and not for other lawful purposes.

Accordingly, the only plausible interpretation of the term "billy" encompasses the metal baton used

herein, and as such, the matter was remitted for further proceedings upon the denial of defendant's Motion to dismiss the accusatory instrument.

Fruit of the Poisonous Tree

People v. Ashford, Fourth Department, KA-12-00098, 9/30/16

Following an armed robbery of a taxi driver, defendant, who matched the description provided, was discovered by police running. Defendant ran away from police when they approached. Eventually police, detained him, seizing money, a phone, and a "do-rag" from the pockets of his jeans. A show-up identification was conducted in which defendant was positively identified as the robber. Defendant was then taken to the Police Station where he waived his Miranda rights. In a courtyard near where defendant was apprehended items belonging to the victim were discovered.

Under such circumstances, the items seized from defendant's person should have been suppressed because the police did not have probable cause at the time to arrest him and conduct a search incident to arrest. The police, however, did have reasonable suspicion to pursue defendant and detain him for the purpose of a showup identification.

The showup identification, however, was not causally related to his unlawful arrest prior to the showup identification procedure. Thus, only the items seized from his person were suppressed, and since the erroneous suppression decision may have affected his decision to plead guilty, the plea was vacated.

Grand Jury Presentment

People v. Moss, Fourth Department, KA-14-00532, 10/7/16

Upon receiving defendant's March 1, 2013 request to appear before the Grand Jury, the People did not provide defendant with proper notice of the time and place of presentation as is required by Criminal Procedure Law §190.50 [5] [b]). A letter, from the People, and an oral statement during pre-trial

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proceedings were both insufficient because neither provided defendant with the requisite notice of the time and place of the Grand Jury presentation.

Guilty Plea

People v. Sosa, Court of Appeals, No. 212, 9/20/16

Where a defendant was aware that he had the right to a trial; had the benefit of his counsel's efforts and guidance; spoke with counsel; and chose to forgo trial in favor of entering a guilty plea, the totality of the circumstances established the voluntariness of his guilty plea (see People v. Conceicao, 26 N.Y.3d 375, 382-384).

Harsh and Excessive Sentence

People v. Davis, Fourth Department, KA-13-00582, 9/30/16

The defendant's sentence was reduced from a twelve year determinate term of imprisonment to a seven year determinate term of imprisonment. The Court stressed that the trial court did not abuse its discretion in sentencing defendant, but that it elected to utilize its power to substitute its own discretion in sentencing defendant (Criminal Procedure Law §470.20 [6]).

Ineffective Assistance of Counsel

People v. Carter, Fourth Department, KA-13-01825, 9/30/16

In a case where suppression of the gun seized from defendant would be dispositive of whether he committed the crime of Criminal Possession of a Weapon, defendant was deprived of meaningful assistance of counsel where defense counsel did not seek suppression despite evidence of unlawful police action. Thus, the matter was remitted for a Suppression Hearing, and in the event defendant prevailed, the plea is vacated and count three---the weapons charge---would be dismissed, and the matter would be remitted for further proceedings on the remaining counts of the Indictment, and if the People prevailed, the judgment should be amended

to reflect that result.

People v. Smith, Fourth Department, KA-15-01532, 10/7/16

At trial, evidence was presented that defendant sliced her estranged husband's throat with a kitchen knife. The husband was able to escape and call for assistance. Upon the police's arrival, they found defendant with allegedly self-inflicted stab wounds to the abdomen that required the removal of her spleen. Defendant testified at trial that her husband attacked her with the knife, and that her husband's neck was only cut in the ensuing struggle.

Under such circumstance, the Court concluded that there was no strategic or legitimate explanation for defense counsel to fail to examine the clothing that defendant was wearing at the time of the incident. Such clothing, according to appellate counsel and defendant demonstrated a hole that corresponded with a wound in defendant's left armpit that could not have been self-inflicted. Thus, a Hearing was ordered to be held on the Motion relating to the location of the holes in the shirts.

Jury Note

People v. Wiggs, Court of Appeals, No. 219, 10/20/16

The trial court complied with its responsibility to provide defense counsel and the prosecutor with meaningful notice of the jury's notes by reading the notes verbatim into the Record in the presence of counsel, defendant and the jury (see People v. Nealon, 26 N.Y.3d 152, 160-162). Since counsel had meaningful notice of the jury notes, the trial court's failure to provide a response to the jury's outstanding request for a readback of testimony before accepting the verdict did not constitute a mode of proceedings error (see People v. Mack, 27 N.Y.3d 534, 437). Defense counsel was required to object to preserve any claim of error for the Court of Appeal's review, and thus even if the trial court's procedure was improper, it was not a mode of proceedings error, and thus the Court of Appeals had no jurisdiction to

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review it. Accordingly, the case was remitted to the Appellate Division for consideration of the facts and issues raised, but not determined on appeal to that Court.

Out of State Felony Conviction

People v. Flores, Second Department, Appeal No. 2014-00676, 10/12/16

The defendant was sentenced as a predicate felon on the basis of a prior conviction in Pennsylvania for the crime of Burglary (see 18 P.A.C.S.A. §3502). There is no element in the Pennsylvania statute, however, comparable to the element in the analogous Penal Law statute, §140.20, that the intruder “knowingly” enters or remains unlawfully in the premises. The absence of the scienter requirement from the Pennsylvania burglary statute renders improper the use of the Pennsylvania conviction as the basis of defendant’s predicate felony adjudication. As such, resentencing was ordered.

Preservation of Speedy Trial Claim

People v. Allard, Court of Appeals, No. 129, 10/20/16

To preserve a speedy trial claim, defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period. The People, in opposition, must then identify the exclusions upon which they intend to rely. A defendant preserves his challenge to the People’s reliance on those exclusions by identifying any legal or factual impediments to the use of those exclusions.

In the instant case, while defendant failed to identify any legal or factual impediments to the People’s proffered exclusions, defendant did, pursuant to Criminal Procedure Law §210.45 request a Hearing. Since the trial court determined that defendant was entitled to a Hearing on the speedy trial Motion, it did not find that the People “conclusively refuted” defendant’s Motion “by unquestionable documentary proof.” Therefore, the Court of Appeals determined that defendant’s failure to reply was not fatal to

preservation where the defendant properly requests a Hearing and, at that Hearing, his arguments were raised and developed. The Court of Appeals, however, did recommend that defendant should raise any Criminal Procedure Law §30.30 arguments in a reply so as to ensure their preservation.

As such, the Appellate Division’s granting of defendant’s Criminal Procedure Law §30.30 Motion was affirmed.

Prosecutorial Misconduct

People v. Rozier, Fourth Department, KA-14-01506, 10/07/16

During trial, the People presented testimony of a forensic expert to discuss DNA evidence collected from a gun involved in the crime. That testimony, however, was not conclusive. The expert determined that defendant was among 1 in 15 Americas who could not be excluded as a contributor to the DNA mixture discovered on the gun. Nevertheless, on summation, the prosecutor called the DNA evidence “overwhelming” proof that established defendant’s guilt “beyond all doubt” and asked, “If the defendant had not possessed the gun, wouldn’t science have excluded him?” Such a flagrant distortion of the DNA evidence caused defendant such substantial prejudice that he was denied due process of law, particularly in light of the People’s circumstantial case against him. Accordingly, a new trial was ordered.

Restitution

People v. Hutchings, Fourth Department, KA-12-01585, 9/30/16

Defendant, a former police officer, and treasurer of the Auburn Police Department’s Police Benevolent Association, stole money from the Association over a period of years. While the Record supported restitution, the sum was reduced to \$59,153.68 because the evidence did not support the amount of compensation for lost interest. Specifically, the amount of lost interest was \$7,281.42, not \$10,000.

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Right to Counsel

People v. McKenzie, Fourth Department, KA-12-02309, 9/30/16

A defendant retains authority over fundamental decisions such as the decision whether to plead guilty, waive a jury trial, testify in his or her behalf, or take an appeal. The selection of jurors, however, is a tactical decision entrusted to defense counsel, and defendants do not retain personal veto power over defense counsel's professional judgment.

In the instant case, defense counsel stated, "[f]or the record, my client is insisting over my objection to keep juror number 21. So, jurors 20 and 21 will be on the jury." Defense counsel never acceded to defendant's decision, and his position remained contrary to defendant's. The trial court, in accepting juror number 21 was solely guided by defendant's choice, not defense counsel's, which was error because it denied defendant of the "expert judgment of counsel which the Sixth Amendment entitles him." As such, the judgment of conviction was reversed, and a new trial was ordered.

Shackles

People v. Hall, Fourth Department, KA-12-01925, 9/30/16

The trial court erred in denying defendant's request to remove his shackles during the trial without making findings on the Record concerning the necessity for such restraints. Furthermore, that error was not harmless because the evidence of defendant's guilt was not overwhelming. As such, the judgment of conviction was reversed, and a new trial was ordered.

SORA

People v. Farrell, Fourth Department, KA-15-00239, 9/30/16

Defendant's statements concerning how many times he received oral sex from the victim did not specify that the incidents occurred on separate dates.

Therefore, the Supreme Court erroneously assessed 20 points under the Risk Factor of "continuous course of sexual misconduct" because the People failed to prove by clear and convincing evidence that defendant committed two or more acts of sexual contact with the victim separated by at least twenty-four hours. Without such points, defendant should have been assessed as a Risk Level I offender, and thus the determination was modified accordingly.

Tolling of Statute of Limitations

People v. Pabon, Court of Appeals, No. 156, 11/1/16

Defendant was indicted on one count of Course of Sexual Conduct in the First Degree, in violation of Penal Law §130.75 [1] [a], for acts that were committed between 1998 and 1999 when he sexually assaulted the seven year old daughter of his former partner. Defendant was charged when the victim reported the abuse to police in 2012, when she was 21 years old.

In 1996, the legislature added Criminal Procedure Law §30.10 [3] [e] and [f]. Criminal Procedure Law §30.10 [3] [e] providing that the crime of Course of Sexual Conduct in the First Degree must be commenced within five years of the latest act of sexual conduct, while Criminal Procedure Law §30.10 [3] [f] tolled the five year limitations period until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier. In 2006, the legislature eliminated the statute of limitations under Criminal Procedure Law §30.10 [3] [e], amending the language to provide that prosecution of this crime "may be commenced at any time" (Criminal Procedure Law §30.10, as amended by L 2006, ch 3).

Application of Criminal Procedure Law §30.10 [3] [f] to crimes described in Criminal Procedure Law §30.10 [3] [e] conforms to the statutory text and furthers the legislative goal of those statutes by tolling the limitations period. Therefore, defendant's prosecution is not time-barred.

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Youthful Offender

People v. Marquis A., Third Department, Appeal No. 107375, 10/27/16

Defendant, sixteen years old, stole sneakers from the victim, while displaying what appeared to be a gun. Upon an Indictment charging him with Robbery in the First Degree, defendant was sentenced to serve nine years in prison, followed by five years of post-release supervision.

Despite defendant's conviction of an armed felony, Criminal Procedure Law §720.10 [3] permits an individual to be adjudicated a Youthful Offender if: 1) there are mitigating circumstances that bear directly upon the manner in which the crime was committed; or 2) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution.

The trial court, counsel, and the Probation Department inaccurately stated that defendant was not eligible for Youthful Offender adjudication. The trial court's summary denial failed to discuss the presence or absence of the factors set forth in Criminal Procedure Law §720.10 [3].

The Appellate Division addressed the "grievous" error of the parties as a matter of discretion in the interest of justice. The Court determined not only that defendant was an "eligible youth" under Criminal Procedure Law §720.10 [3], but granted Youthful Offender Treatment. The Appellate Division stressed that defendant: did not cause physical harm to the victim; did not brandish the weapon; was only sixteen years old; and had no prior criminal record or history of violence. As such, the sentence was reduced to an indeterminate term of imprisonment having a minimum term of one year, and a maximum term of three years.



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