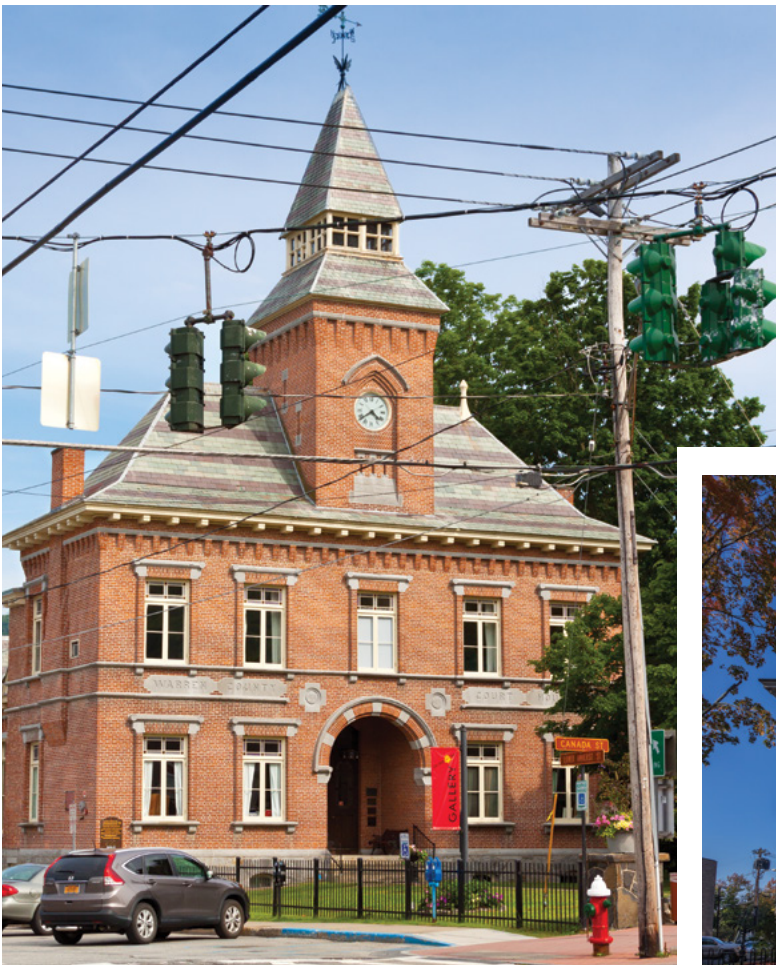


New York Criminal Law Newsletter



A publication of the Criminal Justice Section
of the New York State Bar Association



Inside

- Town and Village Justice Court Report Approved by the House of Delegates
- 2018 Spring Meeting
- Bail—A Bone of Contention
- *United States v. Carpenter*: Reasonable Expectation of Privacy
- United States Supreme Court News

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2019

JANUARY 14–18

NEW YORK CITY | NEW YORK HILTON MIDTOWN

JANUARY / 2019

JANUARY / 2019							3	4
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	10	11
30	31	1 New Year's Day	2	3	4	5	17	18
6	7	8	9	10	11	12	24	25
NYSBA Annual Meeting Week								
20	21 Martin Luther King Day	22	23	24	25	26		
27	28	29	30	31				
3	4	5	6	7				

One Week Earlier!



Join nearly 5,000 members of the New York State Bar Association from around the state and beyond at the 2019 Annual Meeting. Take advantage of the excellent schedule of events presented by the Association's sections and committees, network at the member receptions and make connections with the exciting array of exhibitors.

WWW.NYSBA.ORG/AM2019



Table of Contents

Message from the Chair	Page 4
<i>Tucker C. Stanclift</i>	
Message from the Editor	5
<i>Jay Shapiro</i>	
Feature Articles	
Town and Village Justice Court Report Approved by the House of Delegates	6
Spring at the Sagamore	15-17
A View from the Bench: Bail—A Bone of Contention.....	20
<i>Hon. Jonah Triebwasser</i>	
<i>United States v. Carpenter</i> : Has the Supreme Court Learned from the N.Y. Court of Appeals on the Subject of Reasonable Expectation of Privacy?	23
<i>Jay Shapiro</i>	
United States Supreme Court News.....	26
<i>Spiros Tsimbinos</i>	
Section Committees and Chairs	28

NEW YORK STATE BAR ASSOCIATION

"Pro Bono in Your PJs"

**Log onto
NY.freelegalanswers.org
and sign up to be a
volunteer today!**

Questions?

Contact Kristen Wagner
Director, Pro Bono Services, NYSBA
kwagner@nysba.org | 518.487.5640



Message from the Chair

I am excited to serve a second term as Chair of the Criminal Justice Section for 2018-2019. This message is focused on the work that we do directly affecting you. We continue our efforts with bail reform; improving justice in local courts throughout the state; federal sealing legislation for former offenders; and raising rates for all 18-B lawyers. Our membership is diverse and widespread across the state. We've held training programs in Nassau County, New York City, Seneca Falls, Albany and Lake George. I am pleased to announce that our Fall program will be in Buffalo with a U.S. Supreme Court update and a presentation for criminal defense practitioners in Family Court as a result of the "Raise the Age" legislation that will be going into effect this Fall.

We intentionally move our programs around the state because of the need for quality programs upstate, as well as in the New York City area. I encourage you to attend a program in your region. Please feel free to ap-



proach me or any officer to let us know how we can improve your overall experience with the Criminal Justice Section.

In my view, there are multiple benefits attained by attending our programs. Participants receive important and unique subject matter lessons, have the opportunity for face-to-face interaction with our presenters and, of course, get to network with esteemed colleagues. You cannot experience these values from your home or office watching an online CLE program. So, get out there! Come to Buffalo this Fall.

Finally, we have several committees that need help doing the "work" of the Section. Our Legislation Committee is the most active, but committees such as Vehicle and Traffic Law, Membership, and Discovery Reform could also use assistance from interested members, including law students.

You will see from this edition of our *Newsletter* the breadth of legal issues we pursue and geographic regions we endeavor to serve. As Chair, my hope is that our reach touches you and your career in a positive and supportive way.

Tucker Stanclift

NEW YORK STATE BAR ASSOCIATION

If you have written an article you would like considered for publication, or have an idea for one, please contact *New York Criminal Law Newsletter* Editor:

Jay Shapiro
cjseditor@outlook.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

REQUEST FOR ARTICLES



Message from the Editor

This issue truly demonstrates a point that the Chair speaks about in his message: We are the Criminal Justice Section of the New York State Bar Association. Our interests, concerns and reach are state-wide.

Our Section certainly has a substantial number of downstate members, but our activities and reach are felt throughout the state. In this issue, we have an article from a judge from Dutchess County, a review of our Spring Meeting on Lake George, and a report authored by an upstate Assistant Public Defender that covers procedures throughout the state. Finally, we have a Supreme Court column from our former editor, who resides in that southern New York suburb of Florida!



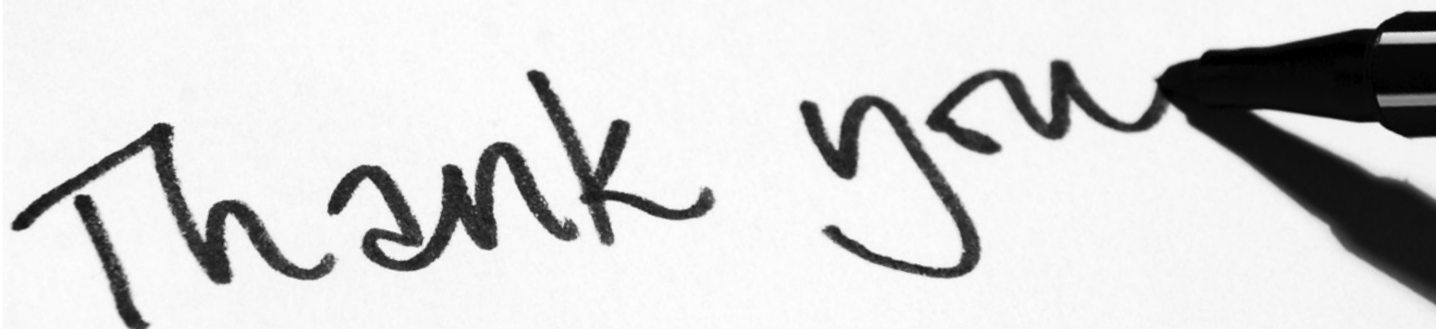
Criminal justice issues in New York State know no geographic boundaries. We can learn from each other about best practices. Cities, towns and villages can and should share techniques and procedures that work. Of course, New York City has its own peculiar and specific issues. But other cities, from Buffalo to Albany, have the potential to teach us downstaters about innovative approaches.

Our past and present Section Chairs have frequently emphasized the importance of networking. The goal is not purely social—we learn from each other and can create valuable contacts.

We all have something to offer. While it certainly is nice to see everyone in Manhattan at our Annual Meeting, let's not be strangers the other 11 months of the year.

Jay Shapiro

NEW YORK STATE BAR ASSOCIATION



As a New York State Bar Association member you recognize the value and relevance of NYSBA membership.

For that, we say thank you.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Michael Miller
President

Pamela McDevitt
Executive Director



Town and Village Justice Court Report Approved by the House of Delegatesⁱ

In June 2015, the Criminal Justice Section created the Town and Village Justice Courts Committee. That Committee has focused its review of local courts to three topics: counsel at first appearance (CAFA), training and education of justice court personnel, as well as court consolidation. After a thorough review of previous reports' studies and recommendations on the topics—as well as interviews with public defender and 18-B offices, the Office of Justice Court Support, and other professional associations—and an analysis of current court structure, the committee issued its own report on these topics. The report lists 10 recommendations for modernizing the practice of criminal law in those areas.

The Criminal Justice Section Executive Committee approved the report at its January 2018 meeting. The report was presented to NYSBA's Executive Committee and House of Delegates on April 13 and 14, 2018. After extensive debate on the issues contained therein, the report was approved unanimously by both of those bodies.

The Committee provides you with the portion of the report listing the CAFA programs already in place (excluding the few that it was unable to contact). We hope that this information assists counties in developing and in adjusting their CAFA programs, as needed.

NYSBA has approved the report and recommendations of its Criminal Justice Section regarding issues in the state's more than 1,200 town and village courts.

Please visit www.nysba.org/WorkArea/DownloadAsset.aspx?id=81267 and <https://totalwebcasting.com/view/?func=VIEW&id=nysbar&date=2018-04-14&seq=1> to review the full report and House of Delegates webcast.

CAFA awards

As a result of *Hurrell-Harring's* groundbreaking decision, the New York State Office of Indigent Legal Services (ILS) issued a Request for Proposal (RFP) in 2012 to relieve the burdens preventing counsel from representing defendants at arraignment. The competitive RFP would disburse \$12 million over a three-year period for CAFA. Twenty-five counties applied for those grants:

1. Albany	2. Broome
3. Cattaraugus	4. Cayuga
5. Chemung	6. Dutchess
7. Erie	8. Herkimer
9. Monroe	10. Nassau
11. Niagara	12. Oneida

13. Onondaga	14. Ontario
15. Oswego	16. Rensselaer
17. Rockland	18. Schuyler
19. St. Lawrence	20. Suffolk
21. Tompkins	22. Ulster
23. Westchester	24. Wyoming
25. Yates	

Those counties included four counties within the *Hurrell-Harring* settlement (Onondaga, Ontario, Schuyler, and Suffolk), as well as counties outside of the settlement.

ILS also established new eligibility guidelines for defendants applying for public defense and 18B representation. Under the new guidelines, "[a]n applicant shall be eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for a competent defense, and the reasonable living expenses of the applicant and any dependents. Applicants are presumptively eligible for assignment of counsel if their net income is at or below 250 percent of the Federal Poverty Guidelines."¹ As a result of the new guidelines, eligibility for "assigned counsel" has been raised from 125 percent to 250 percent, and it is expected that more defendants will qualify for and be represented by court-appointed attorneys and likely mandated representation caseloads will increase.

New RFPs for CAFA were released for competitive application in January 2017. The grants will last three years, again, and it is expected that \$2.25 million more will be available for disbursement. Knowing that those amounts of money may not be enough for the influx (and approval) of applicants, ILS has requested a budget increase of \$8 million for CAFA.² Thirty-seven counties applied; however, only 30 were approved:³

1. Albany	2. Allegany
3. Broome	4. Cattaraugus
5. Cayuga	6. Chemung
7. Columbia	8. Dutchess
9. Erie	10. Fulton
11. Genesee	12. Greene
13. Madison	14. Monroe
15. Montgomery	16. Nassau
17. Niagara	18. Oneida
19. Oswego	20. Putnam
21. Rensselaer	22. Rockland

23. Saratoga	24. Schenectady
25. St. Lawrence	26. Tompkins
27. Warren	28. Wayne
29. Westchester	30. Wyoming

CAFA programs

In each grant application, the counties outlined their plans to implement CAFA. Several different plans currently exist:

1. Albany County

(1) The Public Defender Office administers the RFP. It groups 18 of its attorneys (down from 24-26 at the program's inception) into teams of 3 attorneys each. Each team is on call for one week at a time. Each team covers arraignments 24 hours a day, 7 days per week.

(2) Court clerks and judges notify attorneys of arraignments by calling their personal cell phones. Court clerks notify during business hours, and judges notify after business hours. Each Friday, the office distributes a list to all clerks and judges of the team of attorneys on call for the next week along with their contact information.

(3) The attorneys on call for the week receive a bonus added to their regular salaries, regardless of the number of arraignments they attend. They are not compensated additionally for mileage.⁴

2. Allegany County

(1) The Public Defender's Office administers the RFP. It will hire an attorney whose sole responsibility will include covering after-business-hours and weekend arraignments. That attorney will not have a regular case-load until the office assures that the attorney is not overwhelmed or exhausted by after-business-hours calls. It has not begun covering those arraignments, yet, because it is accepting applications, but it has not received many.⁵

3. Broome County

(1) The Assigned Counsel Program implements the RFP. The Public Defender's Office handles arraignments during regularly scheduled PD court dates or when assigned counsel is unavailable.

(2) Attorneys cover felony arraignments on a weekly, rotating basis from 5 p.m. to 7 a.m. As a result, each attorney covers about 4 weeks per year.

(3) One attorney is assigned to city court for weekday arraignments. City court also dedicates Saturdays 8 a.m.-10 a.m. for weekend arraignments.

(4) Courts call either of two dedicated telephone numbers during regular business hours to notify attorneys of arraignments.

(5) Attorneys are paid for mileage; however, they receive no additional compensation to cover 24/7 ar-

raignments. Attorneys are paid only up to 37½ hours per week.⁶

4. Cattaraugus County

(1) The Public Defender's Office administers the RFP. The office's seven attorneys participate in arraignments; however, the RFP was used to hire one attorney, one investigator, and part-time clerical assistance.

(2) Six of the seven attorneys are on a weekly on-call schedule, 24/7. The seventh attorney serves as back-up. The city courts have regular Saturday morning arraignment sessions for defendants who are arrested Friday evening, overnight, or Saturday morning.

(3) City police notify attorneys of arraignments in city courts, the Allegany Town Court Judge notifies them of arraignments in his court, and the Sheriff's Department notifies of arraignments in all other justice courts. During business hours, they call the Public Defender's Office, but after business hours, they notify by dialing a designated telephone number, and those calls are forwarded to the on-call attorney's personal cell phone. The designated telephone number was distributed to each court and police agency, as well as printed onto business cards.

(4) Business-hours and on-call arraignments are part of the attorneys' job descriptions; therefore, they do not receive additional compensation for it.⁷

5. Cayuga County

(1) The Assigned Counsel Program implements the RFP. Eight attorneys rotate on an on-call basis from 9 a.m. to 4 p.m. Monday through Friday to handle arraignments in Auburn City Court. Off-hours arraignments occur without counsel.

(2) The attorney-of-the-day appears in court each morning to handle any arraignments from arrests overnight. The Assigned Counsel Coordinator gives the court a monthly calendar of which attorney is assigned to which day, along with each attorney's personal cell phone number to contact that attorney, and the court will use that list to notify the on-call attorney of any arraignments that occur after the morning.

(3) Each attorney is paid \$200 per day.

(4) In the next round of RFP applications, the county will apply for funding to include arraignment coverage 24/7 countywide.⁸

6. Chemung County

(1) The Conflict Defender implements the RFP. The Public or Conflict Defender's Offices handle daytime arraignments. An "Arraignment Bureau" handles arraignments from 4:30 p.m. to 8:30 a.m. Monday through Friday, weekends, and holidays.

(2) Four part-time attorneys and one clerical assistant staff the bureau (former or current employees of the pub-

lic or conflict defender offices). The attorneys rotate an on-call schedule.

(3) Courts contact the regular Public or Conflict Defender's Office during regular business hours to notify of arraignments. Law enforcement or courts call a designated Google telephone number, and when called, it forwards directly to the attorney's private telephone. The attorney responds to the court, interviews the defendant, and then, appears for arraignment.

(4) The four attorneys are paid a salary for their services based on their rotation hours. The attorney working every Monday and Tuesday night, as well as one weekend per month earns the most. The two attorneys who work every other Wednesday and Thursday night, as well as one weekend per month each earn about one-half as the first. The attorney who works one weekend per month earns about one-quarter as the first.⁹

7. Columbia County

(1) The Public Defender's office administers the RFP. Originally (three to four years ago), staff attorneys would have received a stipend to cover arraignments after business hours; however, the county's comptroller refused to authorize stipends for salaried attorneys.

(2) Instead of appearing at arraignments in person, staff attorneys were provided with arraignment cell phones. Each attorney carried the phone one week at a time, and judges notified attorneys of arraignments by calling the telephone number after business hours.

(3) Attorneys spoke with defendants over the phone, then, they conferenced the matter with judges.

(4) Now, the new grant proposes for one attorney to work on cases and appeals overnight. That attorney would appear in person for arraignments at any of five selected arraignment courts (courts selected based on high arraignment values).¹⁰

8. Dutchess County

(1) The Public Defender's Office implements the RFP. Three full-time staff attorneys cover arraignments county-wide 24/7. Other staff attorneys provide back-up to cover arraignments when those three attorneys are unavailable.

(2) Less than 1 percent of arraignments occur without an attorney, as a result of the arraighing court not calling or not waiting until the attorney arrives.

(3) Courts call designated telephone numbers to notify the attorney of an arraignment.

(4) Further information about Dutchess County's program is available from a report being prepared by SUNY Albany.¹¹

9. Erie County

(1) The Assigned Counsel Program implements the RFP. Assigned Counsel covers the justice courts and city courts (other than Buffalo City Court, which is covered by Legal Aid Bureau of Buffalo Criminal Defense Unit under a separate contract). There are two programs: Attorney of the Day (AOD) and Attorney on Call (AOC).

(2) Under AOD, attorneys are assigned only to the most congested day courts. Attorneys are re-trained on procedures regarding arraignment and bail in local courts, and submit a summary of the arraignments along with copies of accusatory instruments within 24 hours of each arraignment. They verify 24 hours in advance whether they will be needed for a regularly scheduled court calendar.

(3) The balance of the courts receives AOCs. Erie County is arbitrarily divided into geographical zones. At least one AOC is available 24 hours a day, seven days a week per zone. Judges or court clerks contact the AOC at least one hour before arraignments occur; court personnel call a special line (which is reset once weekly) which connects to the attorney's personal cell phone. 18B panel members have volunteered to handle specific courts, and they are rotated weekly by agreement among themselves.

(4) At first, AOCs received an iPad mini with 4G data service to access an online portal to enter on-call cases. AOCs also were provided a special cell phone. As of July 2015, however, use of the iPads, special cell phones, and web portal became unnecessary and cost prohibitive; therefore, the iPads and cell phones have been discontinued.

(5) AODs are paid hourly for time spent in court; however, they were capped at 2-4 billable hours. AOCs are paid by quarterly stipend based on the number of cases they handled and mileage traveled. In July 2015, the 2-4 cap disappeared, as some less congested day courts required AODs to remain several hours for regular arraignment dockets.

(6) Assigned Counsel holds regular meetings to set coverage calendars in each court.¹²

10. Genesee County

(1) The office will rely on a list of qualified attorneys from the 18B panel of the local and six adjoining counties. Those attorneys would cover arraignments one week at a time on a rotating basis.

(2) Judges or law enforcement will notify the attorneys of arraignments by contacting them by a designated telephone number. The attorneys will rotate that designated cell phone. They would have to appear in court for arraignment within a reasonable amount of time.

(3) The attorneys will rotate a smart phone and iPad, equipped with the necessary apps to advocate zealously

for defendants. They also may contact the Public Defender by telephone at any time for additional assistance.

(4) After arraignment, the attorneys will prepare a report immediately after the arraignment and scan it to the Public Defender's office. The report will attach all papers received from the court and from law enforcement. That will allow the office to follow up with the defendant.

(5) Attorneys will cover only after business hours arraignments. Attorneys will not cover arraignments during business hours unless they occur during the court's regularly scheduled calendar when an attorney already is present.

(6) Attorneys will receive weekly stipends when they are on call, as well as mileage per arraignment and an hourly rate per arraignment (\$75 per hour).¹³

11. Greene County

(1) The Public Defender's Office administers the RFP. Three attorneys will participate in the program, with one on-call attorney and one back-up attorney at all times. Each attorney will have a cell phone at which they will be notified of arraignments.

(2) Five courts will participate in the program.

(3) Judges will notify the primary on-call attorney of arraignments, then the back-up attorney, if needed.

(4) The on-call attorney will receive more compensation than the back-up attorney, and weekends and holidays have different compensation rates.¹⁴

12. Herkimer County

This committee has contacted Herkimer County for information on its CAFA program and looks forward to receiving its response. Upon information and belief, while the grant was awarded, the county chose to reject the grant.

13. Madison County

(1) The Public Defender's Office administers the RFP. Seven attorneys cover arraignments 24/7. One attorney covers off-hours arraignments per week.

(2) Dispatch notifies attorneys of after-business-hours arraignments by calling the attorney's telephone number. Courts notify attorneys of business-hours arraignments by calling the public defender's office.

(3) Attorneys receive \$150 per week that they are on-call, as well as \$150 per arraignment after business hours.¹⁵

14. Monroe County

(1) The Public Defender's Office always covered arraignments in the county and city court. The CAFA program began under the first RFP, allowing the office to cover arraignments in the justice courts, as well, then the

program was expanded in 2015 when additional funding became available.

(2) At first, attorneys covered only daytime arraignments (8 a.m. to 8 p.m.) with some weekend coverage (8 a.m. to 8 p.m.). Attorneys in the Town Court Division of the office rotated coverage Monday through Friday with two attorneys on call at two special cell phone numbers each day. Non-Town Court attorneys covered weekend arraignments. Justice Courts contacted attorneys at those numbers to notify them of arraignments. Courts also combined arraignment dockets with regular court schedules and disposition dockets to dispose of arraignments at other scheduled court appearances.

At first, no additional attorneys were hired; instead, the attorneys on staff participated in the program. In 2015, the program expanded to 24/7 coverage. Additional funding allowed the hiring of additional staff. One attorney per night from the Criminal Division is on call for overnight arraignments Monday through Thursday from 8 p.m. to 8 a.m. One attorney from Friday 8 p.m. through Monday 8 a.m. is on call for weekend arraignments.

Fifty-three attorneys are in the Criminal Division and participate in the program (including the Town Court Division). Attorneys in the appeals and family court divisions do not participate.

(3) The attorney who answers the call receives background information about the defendant. The attorney then notifies pre-trial services about that information, and pre-trial assesses the defendant over the phone and issues a release assessment.

(4) Payment is included as part of the attorneys' salaries.¹⁶

15. Montgomery County

This committee has contacted Montgomery County for information on its CAFA program and looks forward to receiving its response.

16. Nassau County

This committee has contacted Nassau County for information on its CAFA program and looks forward to receiving its response.

17. Niagara County

(1) The Public Defender's Office Administers the RFP. The RFP contracts for coverage of Niagara Falls City Court, City of Lockport City Court, and Town of Lockport Justice Court. There are approximately 15-18 attorneys covering a variety of criminal matters (felonies and misdemeanors).

(2) One full-time public defender is stationed at Niagara Falls City Court five days a week during business hours to cover arraignments. One part-time public defender covers the City of Lockport City Court five days a

week during business hours, as well as on-call on weekends. That same part-time attorney also covers the Town of Lockport Justice Court 24/7 on call.

(3) Attorneys cover arraignments in other justice courts only during regularly-scheduled court calendars. Those courts do not call the office for arraignment coverage off-hours.

(4) Attorneys under the program are paid as part of their salary.

18. Oneida County

(1) The Public Defender's Office administers the RFP. It provides one full-time public defender and one part-time public defender (along with one investigator).

(2) Attorneys appear daily at regularly-scheduled court hours during the mornings and evenings on weekends and on holidays in the city courts of Utica and Rome. Attorneys are on call at other times in those city courts. Attorneys also appear at regularly scheduled court hours to continue vertical representation of the defendants at whose arraignments they appeared.

(3) In 2016, the Fifth Judicial District Administrative Judge ended off-hours arraignments in those city courts; instead, he created regular arraignment hours on weekends and holidays (8:30 a.m. to 10:00 a.m.). He also provided security and court clerks during those hours. Despite this system, specific public defenders remain on-call for emergency arraignments in those courts; however, none have occurred, yet.

19. Onondaga County

(1) The Assigned Counsel Program (ACP) provides attorneys to cover arraignments. Fifty-seven attorneys participate in the program.

(2) Only half of the justice courts received arraignment coverage during regular court sessions. One qualified felony ACP and one qualified misdemeanor ACP appear at each session. A 15th court receives coverage, but it only is covered by one ACP.

(3) As a result of the *Hurrell-Harring* settlement, the other 13 justice courts receive one ACP at each regular court session to cover arraignments. To cover off-hours arraignments in all 28 justice courts, the County was divided into seven geographic regions with a list of on-call attorneys available in each of those regions. Two attorneys are on call at all times, and each attorney has a designated "on-call telephone." On-call attorneys receive \$25 per day and \$150 per arraignment at which they appear. Judges call the attorneys on the designated telephones to notify them of the arraignments.¹⁷

20. Ontario County

(1) The Public Defender's Office implements the RFP. It includes 1 public defender and 12 staff attorneys. At-

torneys cover arraignments at regular "DA sessions" in justice courts.

(2) Attorneys cover off-hours arraignments in three on-call rotations:

(A) 8:30 a.m. - 5:00 p.m.

(B) 5:00 p.m. - 10:00 p.m.

(C) 8:30 a.m. - 10:00 p.m. on weekends and holidays

(3) There are no attorneys available for arraignments that occur after 10 p.m. Defendants arrested after 10 p.m. are detained and arraigned with counsel in the morning in either Canandaigua or Geneva City Court.

(4) As a result of the *Hurrell-Harring* settlement, the Public Defender's Office anticipated hiring two additional staff attorneys to cover arraignments at non-DA court sessions. The Public Defender's Office would create a list of private attorneys to be available for on-call arraignments on evenings, weekends, and holidays.

(5) There is no salary increase for the staff attorneys covering on-call or off-hours arraignments. Private attorneys participating in the program would receive \$75 per arraignment plus an additional \$150 per day; \$300 per weekend; or \$300 per holiday, whichever applies.

(6) For defendants arraigned after 10 p.m., the Public Defender's Office reviewed the jail list each morning to identify defendants who were arraigned without counsel, then, it scheduled an immediate arraignment.¹⁸

21. Oswego County

This committee has contacted Oswego County for information on its CAFA program and looks forward to receiving its response.

22. Putnam County

This committee has contacted Putnam County for information on its CAFA program and looks forward to receiving its response.

23. Rensselaer County

(1) The Public Defender's Office administers the RFP.

(2) The Conflict Defender has a part-time attorney who organizes the on-call schedule, handles reporting requirements, and covers arraignments from 9 a.m. to 5 p.m. if other staff attorneys are unavailable.

(3) The RFP covers six major courts for arraignments (county court, city courts, and three justice courts: Brunswick, North Greenbush, and East Greenbush). That covers 85-90 percent of the county-wide arraignments.

(4) There are 24/7 arraignments.

(5) The attorney is on-call for one week at a time in both offices. The court or police agency call a Google

Voice account phone number, which transfers to the on-call attorney's personal cell phone to notify the attorney of an arraignment. Each attorney participating in the program has her number entered into the voice account. There is one voice account for the Conflict Defender and one for the Public Defender, and the organization on call for the week verifies that the account is set to dial the correct attorney for the week.

(6) County and city courts handle arraignments only during business hours Monday through Friday, and city-court has holding cells to incarcerate inmates overnight to be arraigned the next morning.¹⁹

24. Rockland County

(1) The Public Defender's Office administers the RFP. It employs 19 attorneys; however with the RFP, it was able to hire two part-time attorneys and one part-time secretary. The two part-time attorneys cover after business hours and weekend arraignments for one week at a time.

(2) Courts contact the attorneys on a special cell phone (flip phone) to notify them of after business hours arraignments. Office attorneys cover several arraignments at the end of regularly scheduled court calendars, as well.

(3) If courts call attorneys or the office during non-calendar business hours to notify of arraignments, though, no one appears to represent the defendants, and arraignments proceed without counsel; the office investigator will interview those defendants the next morning, and a bail application will be argued, as needed.

(4) Attorneys covering court-calendar arraignments or full-time attorneys covering after business hours arraignments (as needed) do not receive additional compensation. The RFP funds were used to hire the part-time attorneys and secretary.²⁰

25. Saratoga County

(1) The Public Defender's Office administers the RFP. Five attorneys would cover arraignments 24/7. They would receive telephones upon which the arraigning judge would notify them of arraignments.

(2) Arraignments would occur at either of two locations: a northern court and a southern court.

(3) Primary attorneys on call Monday through Thursday would receive \$150 for being available, whether they are able to appear at the arraignments. The back-up attorney would receive \$150 for appearing at arraignments at which the primary attorney would be unable to appear. The attorney on call Friday through Sunday would receive \$750 for being available, whether or not she is able to appear at the arraignments.²¹

26. Schenectady County

(1) The Public Defender's Office administers the RFP. Schenectady is awaiting receipt of ILS CAFA 2 funding before creating or implementing its program.²²

27. Schuyler County

(1) The Public Defender's Office implements the RFP. Two full-time public defenders cover all off-hours arraignments during business hours. One part-time public defender covers arraignments during 5:00 p.m. - 11:30 p.m. The three attorneys also cover arraignments at all regular court DA-sessions.

(2) Judges notify the attorneys of arraignments by calling an on-call telephone number.

(3) Although the attorneys are unavailable for overnight arraignments, judges notify them of those arraignments. Attorneys track the number of arraignments that way, as well as arrange for immediate morning arraignments for defendants arraigned without counsel the night before.

(4) As a result of the *Hurrell-Harring* settlement, an on-call attorney covers weekend and holiday arraignments from 9 a.m. to 9 p.m. The attorney is paid \$200 per day. Judges notify the attorney of arraignments by calling a special on-call telephone. Defendants arraigned after 9 p.m. without counsel are arraigned immediately the next morning with counsel.

(5) Also under the settlement, the Public Defender could hire an additional full-time and part-time attorney to cover off-hours, non-DA session arraignments, unless arresting officers increase the issuance of appearance tickets returnable on DA-session dates.²³

28. St. Lawrence County

(1) The County administers the RFP. The County orders the courts to assign attorneys at arraignment. If the CAFA attorney cannot remain on the case, though, the Public Defender's Office will continue representing the defendant.

(2) The Assigned Counsel Program, Public Defender and Conflict Defender give a list to courts of attorneys available for arraignments at which times of day, along with their personal contact telephone numbers. Judges call the attorneys to notify them of arraignments.

(3) Attorneys are paid \$75 per hour per arraignment.²⁴

29. Suffolk County

(1) The Legal Aid Society (LAS) and Assigned Counsel Program (ACP) implement the RFP. District Court covers five western towns in Suffolk County. Two parts cover arraignments: D-11 covers those who are detained and arraigned the next day (operates seven days per week), and SAP covers defendants who are issued an ap-

pearance ticket and scheduled for arraignment on a specific day (operates five days per week). LAS covers D-11 arraignments.

(2) West End Village Court arraignments are covered by LAS. LAS covers all scheduled court sessions.

(3) East End arraignments encompass four town courts. LAS covers court session and off-hours arraignments in those courts. No one covers weekend arraignments in those courts, though.

(4) As a result of the *Hurrell-Harring* settlement, ACP covers D-11 conflicts, as well as SAP. Also, LAS could hire two additional attorneys to cover weekday coverage for the rest of the East End courts (five more courts). Finally, the County would contract with private attorneys to be on-call for weekend and holiday arraignments, and ACP would handle the administration of the on-call program.²⁵

30. Tompkins County

(1) The Assigned Counsel Program implements CAFA. Assigned Counsel has 30 attorneys in its CAFA program. Only one attorney is on call from 12:00 p.m. to 12:00 p.m. each day. Each justice court judge has a list of which attorney is on call for which day, as well as each attorney's contact information (home and cell phone—there is no dedicated CAFA telephone number). Judges call the attorneys to notify them of arraignments.

(2) When there are simultaneous arraignments in different courts, the attorney on call may ask the judge to wait. If the judge cannot wait, then the judge may call the supervising Assigned Counsel Coordinator to represent the defendant at arraignment.

(3) The Assigned Counsel Coordinator schedules attorneys one to two months ahead of time according to the attorneys' availabilities. The coordinator gives those finalized schedules to the judges.

(4) Attorneys are paid hourly at assigned counsel rates. Attorneys covering holidays (10 holidays per year) are paid an additional \$250 stipend per holiday.²⁶

31. Ulster County

(1) Ulster County applied for the grant in 2014, and it was approved; however no plan has been implemented, yet, because the county has received only ILS formulated money, so far.

(2) The original plan called for four arraignment courts (county in quadrants): two attorneys assigned to each quadrant (keeping the geographical residence of attorneys in mind—a 15-to-20 minute ride to each court). There would be overnight arraignment coverage. Daytime arraignments would be without counsel (usually, one of the adjacent courts were operating, and an attorney would be present to cover it).

(3) Each attorney would be issued a tablet that would have a notification, and they would respond. Courts would notify attorneys of arraignments.

(4) Centralized arraignments will allow a reduction from four to two attorneys.

(5) Attorneys would be paid extra with grant money with a stipend.²⁷

32. Warren County

(1) The Public Defender's Office administers the RFP. Eight attorneys participate in CAFA. The attorneys cover arraignments throughout the day, after business hours (only until 10 p.m.), on weekends, and on holidays.

(2) The attorneys that cover after-business hours arraignments rotate a telephone among each other to be notified of arraignments. The District Attorney's office, police, or judges notify them of those arraignments via a telephone call or text message.

(3) Payment for arraignment coverage is incorporated into the attorneys' salaries and vacation time.²⁸

33. Wayne County

(1) The Public Defender's Office administers the RFP. Originally, it used formulated money for a part-time position to cover all 24/7 arraignments countywide, but it soon realized that CAFA was too overwhelming for just one part-time position. Then, it began a pilot project to provide attorneys at arraignments 24/7 in four of its justice courts. The courts include Arcadia Town Court, Newark Village Court, Palmyra Town Court, and Palmyra Village Court.

(2) Seven attorneys are available for Palmyra arraignments, and five attorneys are available for Arcadia and Newark arraignments. The office provides judges with a list of three attorneys to call and telephone numbers by which to call them. The first attorney is the primary attorney on-call, and the next two are back-ups.

(3) Monday through Friday during business hours, the three full-time public defenders appear for on-call arraignments in those courts. Almost all daytime arraignments are covered. Evenings, weekends, and holidays are covered by lists of public defenders and available 18B attorneys. Arraignment coverage lasts 7 a.m. - 9 a.m. and 5 p.m.-10 p.m. Monday through Thursday, as well as 5 p.m. Friday-9 a.m. Monday.

(4) Weekday after business hours arraignments pay \$150 per arraignment. Weekend and holiday arraignments pay \$200 per arraignment. Funds are paid from the formulated money set aside for the part-time position. The rates used to be \$50 lower in each category; however they were raised to retain interest and participants in the program.²⁹

34. Westchester County

(1) The Legal Aid Society of Westchester County (LAS) administers the RFP. During business hours, it assigns two attorneys to appear at any court for arraignments. Attorneys also appear during regularly scheduled justice court sessions and cover arraignments, as necessary (not considered a CAFA appearance). After business hours, two staff attorneys per region are on-call from 5 p.m. to 8 a.m. (except just one attorney on Friday) and on weekends.

(2) The county is divided into three regions: North, Central, and South. A telephone number is designated for each area. LAS gives the courts the telephone number to call for their specific area to notify of an arraignment. During business hours, the assigned CAFA attorneys contact their jurisdictions' police before 8 a.m. and around noon to leave the business-hours contact telephone number of the day. Generally only court clerks call to notify attorneys of arraignments, though, and police do not call.

(3) Monday through Thursday, 5 p.m. to 9 p.m., one telephone number is contacted to notify of arraignments. The secretary answering the call collects all relevant information, then relays that information to the on-call attorney. After 9 p.m., as well as on weekends, the calls are forwarded to the CAFA coordinator (an attorney from LAS or the Executive Director) who contacts the appropriate on-call attorney.

(4) Attorneys covering business-hours arraignments are not paid extra as the responsibility to represent defendants at arraignments is listed as part of their job responsibilities; however, they may seek reimbursement for mileage. CAFA attorneys are paid for being on call; however, they do not receive extra compensation for going out. Overnight CAFA attorneys are paid if they go out to an arraignment, though.

(5) Yonkers and Mount Vernon City Courts regularly schedule weekend arraignment hours.

(6) Legal Aid represents defendants charged with felonies. Defendants charged with misdemeanors or who conflict out on felonies are represented by 18B attorneys. As a result, LAS has not been available (as a rule) for misdemeanor arraignments. Nevertheless, because no defendant should be arraigned without counsel, LAS will appear for misdemeanor arraignments; however, it encourages judges and police to contact available 18B attorneys, first. LAS will ask to be relieved from further assignment after appearing at arraignment, though, because LAS's contract does not allow them to represent defendants on misdemeanors.³⁰

35. Wyoming County

(1) The Public Defender's Office implements the RFP. Three assistant public defenders are on call during business hours for arraignments in any court. If the attorneys

are unavailable, then they may select from a list of designated 18B panel members.

(2) Two of the attorneys are on call after business hours and on weekends for arraignments in the justice courts. Either judges, sheriff deputies, or sheriff's dispatch contact the defenders at a designated cell phone number to notify them of the time and place of the arraignment. If the attorneys are unavailable, then they may select from a list of designated 18B panel members.

(3) The three attorneys' business-hours arraignments are part of their job duties, and they do not receive additional compensation for those arraignments. The two attorneys who handle after-business-hours and weekend arraignments are paid a yearly stipend for their services. 18B panel members are paid hourly at \$75 per hour per arraignment (from bed to bed).

(4) Since one attorney sought alternative employment, the program changed. Now, three full-time attorneys and one part-time attorney are on call during business hours. Of those attorneys, two full-time attorneys and the part-time attorney are on call after business hours, each dedicated to a week at a time. An investigator licensed as an attorney is on call for a couple of designated courts after business hours and only during certain days of the week.³¹

36. Yates County

(1) The Public Defender's Office administers the RFP. Three part-time attorneys work for the office, and they are on-call for one week each, 24/7, for off-hours arraignments. The attorney who handles court during the day is on call for that day.

(2) The office schedules on-call availability three months ahead of time. It gives the schedules to all courts. The courts call the on-call attorney at their phone number listed (office or personal cell) to notify of an arraignment. If the attorney cannot be reached, then the court calls the Public Defender.

(3) The office used ILS grant money to hire its third part-time attorney. Otherwise, none of the attorneys receive extra compensation for being on-call; rather, they may seek reimbursement for mileage.³²

Centralized/ Off-Hours Arraignments

Recognizing the need for counsel at arraignment, the Advisory Committee on Criminal Law and Procedure proposed centralized arraignment parts ("CAP") on a rotating basis for off-hours arraignments.³³ "Off-hours" means anytime a court is not sitting in session. Such centralization would provide for the swift arraignment of defendants and to ensure counsel at arraignment. Under a centralized arraignment plan, a police officer:

- may bring the accusatory instrument to an off-hours court when no other court is open;

- may bring the accusatory instrument either to an off-hours court or to an open justice court if defense counsel is present at the justice court; or
- must bring the accusatory instrument to the off-hours court when defense counsel is not present at the open justice court.

In CAPs, jurisdictional impediments are lifted on arraignments of accusatory instruments on misdemeanors or violations; therefore, those parts with a centralized arraignment plan may have jurisdiction over any arraignment on a misdemeanor or violation in the county, whether or not the crime happened in a geographically contiguous jurisdiction. After arraignment, the part retains jurisdiction over all matters incidental thereto (handle returns on warrants, conduct bail review, hold felony hearings, etc.). After arraignment and any matters incidental thereto, then the centralized part will transfer the case back to the court that has trial jurisdiction.³⁴

Several general suggestions have been made, including the following:

- rotating judges through a central location; and
- holding defendants overnight and arraigning them in the morning.

Local administrative judges are meeting with each county's stakeholders (public defender, district attorney, 18B provider, and justice court judges) on a county-by-county basis beginning in January 2017 to develop a county-by-county centralized arraignment plan.³⁵ The Chief Administrative Judge must approve each plan before it becomes effective, but no plan will be approved before February 26, 2017.³⁶ There is no deadline by which plans must be submitted.³⁷

Some of the CAFA program administrators recognize that CAPs would alleviate many frustrations in providing attorneys at arraignments.³⁸ Nevertheless, many counties will not adopt a CAP. There is an overwhelming perception that some judges vehemently oppose CAPs.³⁹ Interviewees relate conversations in which magistrates have expressed their concerns such as: fear loss of sleep if traveling outside of their jurisdiction for multiple arraignments in one day/night before returning to their full-time jobs; having to learn a new computer system; multiple courts' computer and filing systems; and unfamiliarity with foreign courts' layouts. Some judges rely on their clerks for forms and cannot operate without their clerks' assistance, requiring clerks to appear at off-hours arraignments, as well. Because most clerks work part time, they may not be scheduled or even available the next day to scan, email, or mail paperwork to the appropriate jurisdiction. Bail receipt deposit books would not be balanced in a timely manner.

Sheriffs voiced concerns over transporting defendants from one side of the county to another, only to have

that defendant be released, and then what? How long would that sheriff be required to wait for that defendant to get a ride? What if he has no ride? Would the Sheriff be required to transport him home? Local village police objected to such situations, concerned that it would remove them from protecting their jurisdictions, violate their union contracts, make their municipality liable for some other municipality's defendants, etc.

Counties are not required to have a plan; however, four counties have initiated the following:

1. Broome County

(1) Off-hours arraignments will occur in a designated room at the county jail. Up to 10 members of the public may access the room at a time.

(2) Several private attorney-client conference rooms exist.

(3) The CAP operates Monday through Friday from 7:00 p.m. to 7:00 a.m., as well as throughout the weekend.

(4) On-call judges are required to remain within a reasonable distance from the jail during their shifts. There will be a back-up on-call judge for emergencies or conflicts.

(5) The county is also seeking a centralized booking process to facilitate law enforcement.⁴⁰

2. Oneida County

(1) A courtroom will be built at the Oneida County Sheriff's Office. A town or village Judge will be assigned to that court from 6:00 p.m. to 10:00 p.m. daily. It will be open to the public. Only defendants charged with detainable offenses (i.e. domestic violence, orders of protection, warrants) will be brought for arraignment; anyone expected to be released will be given appearance tickets. Any defendant detained after the arraignment part is closed will be arraigned the following morning in either Rome or Utica City Court. The Fifth District Administrative Judge will assign judges in conjunction with the local County Magistrates Association. Each judge will receive \$250 per evening.

(2) The Oneida County Sheriff's Office will provide security.

(3) OCA will provide computer and office equipment. Arraignment paperwork immediately will be faxed and mailed to the court of trial jurisdiction by using a file cabinet of pre-addressed envelopes.

(4) The anticipated cost (salaries for judges, security, attorneys, and costs of equipment and supplies) totals \$365,000. \$197,000 is strictly a county cost; however, the remainder is either a USC cost or ILS reimbursable.⁴¹

Continued on page 18

SPRING AT THE SAGAMORE

By Sherry Levin Wallach

The Criminal Justice Section met in May 2018 for its Spring Meeting at the beautiful Sagamore Resort in Lake George, New York. The weekend was chaired by Carrie Cohen, a former Chair of the Commercial Federal Litigation Section, and me as the Immediate Past Chair of this Section. Our gathering at the Sagamore consisted of several enjoyable networking events, a continuing legal education program, which focused on handling white collar cases in both state and federal courts, and our annual awards dinner where we recognize outstanding leaders and contributors in the criminal justice community. This year, we held our meeting in conjunction with the Commercial Federal Litigation Section, and our meeting closed with a joint CLE program on the ethics of representing corporations in criminal matters and investigations.

The weekend kicked off with a reception during which our speakers and attendees had an opportunity to meet and discuss their practice areas. After the reception, a large group of attendees including NYSBA's President-Elect Michael Miller and his wonderful wife Cindy were taken by our Chair, Tucker Stanclift, in his boat to a wonderful restaurant on the lake for dinner. This intimate setting allowed old friends to reunite and new friends to experience the wonderful camaraderie of this incredible group of practitioners and judges.

The next morning, our CLE program began with an introduction from the NYSBA President-Elect Michael Miller. The morning consisted of two panel discussions in-



cluding one on "Plea Negotiations in White Collar Cases," which was moderated by my Co-Chair, Carrie Cohen, and included speakers Amy Walsh, William Dryer and Parvin Moyne. The second panel of the morning was on "Sentencing Issues in White Collar Cases." I moderated this second panel, which included speakers, Jillian Berman, Xavier Donaldson, Lisa Peebles and Jodi Avergun. The speakers on both panels have federal and state court experience, which allowed the discussions to address the comparisons, contrasts and issues that arise when representing clients in white collar cases in both state and federal courts.

That evening the Section held its awards dinner where we honored Thomas P. Zugibe with the Outstanding Prosecutor Award, Glenn A. Garber with the David S. Michaels Memorial Award, and the Honorable Craig D. Hannah with the Outstanding Contribution to the Bar and the Community Award. The dinner was held in a beautiful tented area of the Sagamore overlooking the lake. After the awards were presented, we were all treated to some entertainment with a comedy show by Moody McCarthy.

The next morning our CLE program continued with our annual Court of Appeals Update of the year's decisions on criminal justice issues, which was led by Court of Appeals Judge Jenny Rivera, with a discussion of the cases by Dan Arshack and Robert Masters. The CLE portion of the meeting then concluded with a joint panel discussion with the Commercial Federal Litigation Section on "Privilege and Ethical Issues Encountered in Corporate Investigations," moderated by my Co-chair Carrie Cohen and included Evan Barr, Jillian Berman, Marvin Moyne and our very own *Newsletter* Editor Jay Shapiro.

The meeting was a wonderful success with participation from many of our longstanding members as well as new and younger members of the section. It is our hope as Section leaders that all of you reading this article will attend next years Spring Meeting, which will surely be another wonderful educational and professional experience.

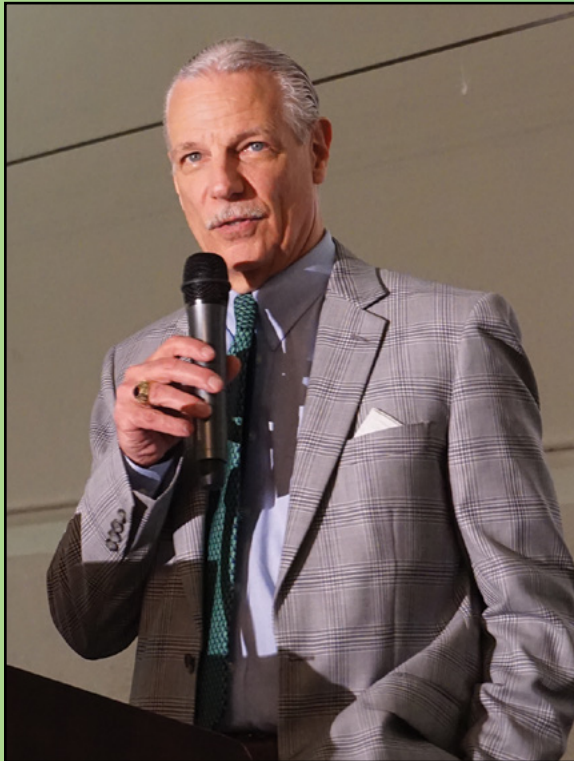
See pages 16–17 for more Spring Meeting photos





Criminal Justice Section Spring 2018 Meeting





Court Report

Continued from page 14

3. Onondaga County

(1) A courtroom will be provided at the Syracuse Public Safety Building, next to the county jail. Off-hours arraignments will occur from 6:00 p.m. to 10:00 p.m. each night.

(2) It is estimated to save about \$1 million annually (a combination of state and local tax money). Savings come from the efficiencies of having to staff only one courtroom per night.

(3) Regular security would staff the courtroom so that police officers could return to patrolling immediately.

(4) Judges would be paid for off-hours arraignments, whereas they do not receive extra compensation for off-hours arraignments that do not occur in a CAP. One judge would rotate per night.

(5) There would be a staffed prosecutor and two defense attorneys. Defense attorneys would meet with their clients in private rooms.

(6) Arraignments are open to the public.

(7) This system will work because the county has enough after-business-hours arraignments to justify a scheduled court.⁴²

4. Washington County

(1) A courtroom will be provided at the visitor's area of the Washington County Law Enforcement Center (located within the Washington County Jail). A town or village judge will be assigned by the Washington County Magistrates' Association to that courtroom for all after hours, weekend, evening, and holiday arrests; however, arraignments will be held at 9:00 a.m., 7:00 p.m., and other times, as "emergency" arraignments. It will be open to the public.

(2) The centralized part will have a separate conference room for the on-call attorney to meet with the defendant.

(3) Security includes magnetometers, one security officer, and locked filing cabinets.

(4) The CAFA judge will give the on-call attorney copies of the accusatory instruments, supporting depositions, and RAP sheets.

(5) If a defendant is released after arraignment, he will be allowed to call for transportation to his residence, as well as to wait in the facility staffed by the Sheriff while awaiting his transportation. The arraignment part conveniently is located across from a gas station/convenient store/restaurant facility.

(6) The Sheriff's Department will collect posted bail and transfer it to the court of original jurisdiction. The centralized part should not collect bail from defendants.

(7) All arraignment paperwork immediately will be scanned, emailed, and mailed to the court of trial jurisdiction. The arraignment judge will keep an arraignment log to track his arraignments.

(8) If a defendant pleads guilty at arraignment, then the arraignment judge's original jurisdiction will assume jurisdiction of the fine and surcharge owed. The defendant will be given a reasonable period within which to make payment.

(9) Arraignment judges will be paid according to UJCA § 106 (2) at a rate of compensation to be approved by OCA, along with mileage reimbursement, after completion and approval of their payment vouchers.

Leah Rene Nowotarski, Esq.

Co-Chair, Town and Village Justice Courts Committee

Report's Author

Clare J. Degnan, Esq.

Co-Chair, Town & Village Justice Courts Committee

Thanks to:

Sherry Levin Wallach, Esq., former Chair, Criminal Justice Section
Eugene Frenkel, former liaison, Law Student Committee

Natasha Pooran, Priyanka Verma, Nishat Tabassum

Members, Law Student Committee

Daniela Parra, Michelle Tarangelo, Robert Jereski

CUNY Law School

Endnotes

1. *Criteria and Procedures for Determining Assigned Counsel Eligibility*, NYS Office of Indigent Legal Services (Apr. 4, 2016).
2. ILS Budget Request for FY 2017-2018.
3. Second Counsel at First Appearance Tentative Awardee's, NYS Office of Indigent Legal Services, <https://www.ils.ny.gov/files/Hurrell-Harring/Counsel%20At%20Arraignment/Second%20Counsel%20at%20First%20Appearance%20Counties.pdf> (accessed May 10, 2017).
4. All of the information about Albany County's CAFA program was provided via a telephone interview with Tina Sodhi, Assistant Public Defender, Albany County (Apr. 19, 2014).
5. All of the information about Allegany County's CAFA program was provided via a telephone and email interview with Barbara Kelley, Public Defender, Allegany County (Oct. 3, 2017).
6. All of the information about Broome County's CAFA program was provided via a telephone and email interview by Michelle Tarangelo with Jay L. Wilber, Public Defender, Broome County (Mar. 7, 2014).
7. All of the information about Cattaraugus County's CAFA program was provided via an email interview with Mark S. Williams, Public Defender, Cattaraugus County (Apr. 13, 2017).

8. All of the information about Cayuga County's CAFA program was provided via a telephone and email interview by Robert Jereski with Lloyd E. Hoskins, Assigned Counsel Administrator, Cayuga County (Mar. 22 and 23 2017).
9. All of the information about Chemung County's CAFA program was provided via a telephone and email interview by Robert Jereski with John P. Brennan, Conflict Defender, Chemung County (Mar. 21, 2017).
10. All of the information about Columbia County's CAFA program was provided via a telephone and email interview by Sherry Levin Wallach with Robert Linville, Public Defender, Columbia County (Sept. 18, 2017).
11. All of the information about Dutchess County's CAFA program was provided via a telephone and email interview by Michelle Tarangelo with Thomas N. Angell, Public Defender, Dutchess County (Feb. 24, 2017).
12. All of the information about Erie County's CAFA program was provided via an email interview with James Auricchio, CAFA Coordinator, Bar Association of Erie County Assigned Counsel (Nov. 22, 2016).
13. All of the information about Genesee County's CAFA program was provided via an email interview with Jerry Ader, Public Defender, Genesee County (Oct. 2, 2017).
14. All of the information about Greene County's CAFA program was provided via a telephone interview by Priyanka Verma with Angelo F. Scaturro, Public Defender, Greene County (Oct. 16, 2017).
15. All of the information about Madison County's CAFA program was provided via a telephone and email interview by Nishat Tabassum with Paul Hadley, Public Defender, Madison County (Oct. 20, 2017).
16. All of the information about Monroe County's CAFA program was provided via a telephone interview with Timothy P. Donaher, Public Defender, Monroe County (Feb. 1, 2017).
17. All of the information on Onondaga County's CAFA program comes from: Implementing the Counsel at Arraignment Obligations in the *Hurrell-Harring v. The State of New York* Settlement 2016 Update, <https://www.ils.ny.gov/files/Hurrell-Harring/Quality%20Improvement/Hurrell-Harring%20Updated%20Quality%20Improvement%20Plan%20111016.pdf> (accessed Mar. 3, 2017); Interview, *supra* at n 212.
18. *Id.*
19. All of the information about Rensselaer County's CAFA program was provided via a telephone and email interview by Robert Jereski with Sandra McCarthy, Conflict Defender, Rensselaer County (Mar. 27, 2017).
20. All of the information about Rockland County's CAFA program was provided via a telephone interview with James D. Licata, Public Defender, Rockland County (Apr. 11, 2017).
21. All of the information about Saratoga County's CAFA program was provided via a telephone interview by Priyanka Verma with Oscar Schreiber, Public Defender, Saratoga County (Oct. 13, 2017).
22. All of the information about Schenectady County's CAFA program was provided via a telephone interview by Priyanka Verma with Stephen M. Signore, Public Defender, Schenectady County (Oct. 13, 2017).
23. All of the information on Schuyler County's CAFA program comes from Implementing Obligations, *supra* at n 271; Interview, *supra* at n 219.
24. All of the information about St. Lawrence County's CAFA program was provided via a telephone and email interview by Michelle Tarangelo with Scott B. Goldie, Assigned Counsel Administrator, St. Lawrence County (Mar. 28, 2017).
25. Implementing Obligations, *supra* at n 273; Interview, *supra* at 219.
26. All of the information about Tompkins County's CAFA program was provided via a telephone and email interview by Michelle Tarangelo with Julia P. Hughes, Assigned Counsel Coordinator, Tompkins County (Mar. 17 and 20, 2017).
27. All of the information about Ulster County's CAFA program was provided via an email interview with Andrew Kossover, Public Defender, Ulster County (Feb. 22, 2017).
28. All of the information about Warren County's CAFA program was provided via a telephone and email interview by Priyanka Verma with Marcy I. Flores, Public Defender, Warren County (Oct. 2, 2017).
29. All of the information about Wayne County's CAFA program was provided via an email interview with Andrew D. Correia, First Assistant Public Defender, Wayne County (Sept. 18, 2017).
30. All of the information about Westchester County's CAFA program was provided via an email interview with Clare J. Degnan, Executive Director, Legal Aid Society of Westchester County (Mar. 30, 2017).
31. All of the information about Wyoming County's CAFA program and its justice courts was provided via an in-person interview with Norman P. Effman, Public Defender, Wyoming County (Oct. 5, 2016 and January 10, 2018).
32. All of the information about Yates County's CAFA program and its justice courts was provided via a telephone interview with Edward J. Brockman, Public Defender, Yates County (Apr. 5, 2017).
33. 2016 NY Senate-Assembly Bill S7209-A, A10360.
34. All of the information regarding "off-hours" and centralized arraignment plans comes from the Town & Village Justice Courts Committee Meeting (Jan. 24, 2017).
35. Centralized Arraignment Parts for Off-Hours Arraignments Stakeholders' Meeting, (Dec. 19, 2016, Albany, NY).
36. *Id.*
37. *Id.*
38. Interviews, *supra* at nn. 259; 283; 285; 287.
39. The New York State Magistrates Association does not oppose CAPs.
40. Arrested after-hours in Broome County? A judge will meet you at the jail, <http://www.pressconnects.com/story/news/public-safety/2017/10/06/arrested-after-hours-broome-county-judge-meet-you-jail/736213001/> (accessed Oct. 23, 2017).
41. All of Oneida County's centralized arraignment plan information comes from Centralized Arraignment Part Oneida County, Fifth Judicial District.
42. Syracuse courts push radical shakeup in way suspects are arraigned off hours, http://www.syracuse.com/crime/index.ssf/2017/02/syracuse_courts_push_radical_shakeup_in_way_suspects_are_arraigned_after_hours.html (accessed Oct. 23, 2017).

A View from the Bench: Bail—A Bone of Contention

By Hon. Jonah Triebwasser

With bail and alternatives to incarceration much in the news of late, your Criminal Justice Section thought that a review of the bail alternatives available in New York courts would be of timely assistance to our members. These procedures are utilized when ROR—release on recognizance—is not ordered by the court.

ROR is defined in CPL 500.10(2) as follows:

“Release on own recognizance.” A court releases a principal on his own recognizance when, having acquired control over his person, it permits him to be at liberty during the pendency of the criminal action or proceeding involved upon condition that he will appear thereat whenever his attendance may be required and will at all times render himself amenable to the orders and processes of the court.

Forms of Bail

The Criminal Procedure Law 520.10(1) offers nine possible forms of bail:

- (a) Cash bail
- (b) An insurance company bail bond
- (c) A secured surety bond
- (d) A secured appearance bond
- (e) A partially secured surety bond
- (f) A partially secured appearance bond
- (g) An unsecured surety bond
- (h) An unsecured appearance bond
- (i) Credit card or similar device

Courts are guided in the determination of bail by CPL § 520.10(2):

2. The methods of fixing bail are as follows: (a) A court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one; (b) The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms;

The usual practice is for courts to direct that bail be in the forms of cash, insurance company bond or secured surety bond. It is rare that a court accepts the other possibilities. To expand the possibility of using these alternatives, let us explore together what these are.

- (a) Cash bail speaks for itself. Someone posts bail using United States currency. Most courts will not accept a personal check, although some will accept a bank teller check, bank certified check or a postal money order. (See generally CPL § 520.15).
- (b) An insurance company bail bond is defined in CPL § 500.10(16) as a surety bond, executed in the form prescribed by the superintendent of financial services, in which the surety-obligor is a corporation licensed by the superintendent of financial services to engage in the business of executing bail bonds. These are the bail bonds issued by the bail bondmen and bondswomen who usually have offices with large signs just across the street from the entrance to the county jail.
- (c) A secured surety bond is defined in CPL § 500.10(17) as a bail bond secured by either: (a) personal property which is not exempt from execution and which, over and above all liabilities and encumbrances, has a value equal to or greater than the total amount of the undertaking; or (b) real property having a value of at least twice the total amount of the undertaking. For purposes of this paragraph, the value of real property is determined by either: (i) dividing the last assessed value of such property by the last given equalization rate or in a special assessing unit, as defined in article 18 of the real property tax law, the appropriate class ratio established pursuant to section 1202 of such law of the assessing municipality wherein the property is situated and by deducting from the resulting figure the total amount of any liens or other encumbrances upon such property; or (ii) the value of the property as indicated in a certified appraisal report submitted by a state certified general real estate appraiser duly licensed by the department

HON. JONAH TRIEBWASSER is the town and village justice in Red Hook, Dutchess County, New York. A graduate of New York Law School and the John Jay College of Criminal Justice, he was Deputy Regional Attorney for the New York State Department of Environmental Conservation before ascending the bench. Active in the State Bar for nearly 40 years, he currently serves on the House of Delegates, and is first vice-president of the New York State Magistrates Association. The opinions expressed here are the author's own and not necessarily those of the Unified Court System or the Criminal Justice Section of the New York State Bar Association.

of state as provided in section 160-j of the executive law, and by deducting from the appraised value the total amount of any liens or other encumbrances upon such property. A lien report issued by a title insurance company licensed under article 64 of the insurance law, that guarantees the correctness of a lien search conducted by it, shall be presumptive proof of liens upon the property.

- (d) A secured appearance bond, as defined by CPL § 500.10(14) and (17) means a bail bond in which the only obligor is the principal (defendant) which is secured as in paragraph (c), supra.
- (e) A partially secured surety bond is defined in CPL § 500.10(18) as a bail bond secured only by a deposit of a sum of money not exceeding 10 percent of the total amount of the undertaking.

As the only purpose of bail is to assure the appearance of the defendant at future court proceedings, if a court is reluctant to release a defendant on his or her own recognizance, based upon the court's belief that defendant's roots in the community are not sufficient to outweigh a temptation to flee, one can understand a court's reluctance to use this form of bail as it gives only minimal incentive for a defendant to return or, as they say in golf, "not enough skin in the game."

- (f) A partially secured appearance bond is the same as (e), supra, but with the defendant as the only obligor.

The issues for a court concerning this device are the same as in the partially secured surety bond. The monetary incentive for the defendant not to flee is minimal.

- (g) An unsecured surety bond as defined in CPL § 500.10(19) means a bail bond, other than an insurance company bail bond, not secured by any deposit of or lien upon property.

Any court that would accept this might as well ROR the defendant; the court has little recourse other than a bench warrant if the defendant fails to appear.

- (h) An unsecured appearance bond—same as (g) above with the difference being that the only obligor is the defendant and not friends or family.

Again, this is of dubious value and a defendant who qualifies for this might as well be granted ROR.

- (i) Credit card or similar device—the functional equivalent of cash bail, provided that the credit card is accepted by the credit card company.

Beware defendants who will offer a credit card for bail and then contest the charge the next day with the credit card company. As long as you have a signed credit card slip, the company will honor the charge.

Ability to Pay

In *People ex rel. Kunkeli v. Adrian Butch Anderson, Dutchess County Sheriff*, 2018 N.Y. Slip Op. 28036, New York State Supreme Court Justice Maria Rosa issued a decision from her chambers in Poughkeepsie, Dutchess County, ordering that when bail is imposed the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the state's interest in protecting individuals and the public and to reasonably assure the accused returns to court. See *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978).

"Our courts are being asked to relieve overcrowded jails and honor the presumption of innocence by placing defendants awaiting trial in the least restrictive pre-trial status possible."

Defendant Kunkeli was arraigned on a charge of petit larceny for allegedly stealing a vacuum cleaner from a local department store. He was committed to the Dutchess County Jail on \$5,000 cash bail over a \$10,000 secured bond. Defendant had a record of not appearing in court and had a history of past bench warrants. Judge Rosa held

[i]t is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution. Clearly, \$5,000 bail to someone earning \$10,000 per year, like the petitioner, without significant assets, is much more of an impediment to freedom than \$5,000 bail would be to a defendant earning substantially more and/or with significant assets. Setting that sum as to both such individuals would not be equal treatment. Yet, the Fourteenth Amendment and the New York State Constitution both require that individuals under such circumstances be treated equally. "No person shall be denied the equal protection of the laws...because of race, color, creed or religion ..." (New York State Constitution Article 1 Section 11). Perhaps it needs to be said that discrimination on any basis, including on the basis of how much money someone has, is a violation of the equal protection clauses and due process clauses of the New York State and United States Constitutions. Freedom should

not depend on an individual's economic status. *Bearden v. Georgia*, 461 U.S. 660 (1983); *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682 (1976).

RUS and EM as Alternatives

Two of the less restrictive means of ensuring the return of a defendant to court who was not a good risk for ROR that I have utilized in my court have been release to supervision of probation (RUS), where the defendant is ordered to report to probation at least once a week to be sure that he or she remains in the area and is staying out of trouble, or electronic monitoring by Probation by the use of an ankle bracelet.

The ankle bracelet, referred to also as electronic monitoring (EM), involves a defendant being required to wear a non-removable device so that his or her movements can be monitored. The use of electronic monitoring has increased dramatically in recent years. From 2000 through 2014, there was a 32 percent rise in the use of electronic monitoring. One article from the *International*

Business Times reported that around 100,000 people in the United States were under electronic monitoring. The number of people being monitored is still steadily increasing, so this number could be much higher today.

EM requires a land-line telephone be installed in the home of the defendant so that the ankle bracelet can be linked to Probation's monitoring system. This arrangement can pose a financial cost on homes where the land-line has been removed in favor of cell phones.

Assuring That the Defendant Appears

Our courts are being asked to relieve overcrowded jails and honor the presumption of innocence by placing defendants awaiting trial in the least restrictive pre-trial status possible. Release on recognizance and the various forms of bail and the alternatives to bail discussed are all available to our courts. And if the defendant does not appear after being given the benefit of these alternatives, there is always use of the bench warrant to compel compliance with the terms of release.

Have an IMPACT!

As the charitable arm of the New York State Bar Association, The Foundation seeks donations for its grant program which assists non-profit organizations across New York in providing legal services to those in need.

Why give to The Foundation

- We operate lean, fulfill our mission, provide good stewardship of your gift and contribute to a positive impact on legal service access across New York.

When you give to The Foundation your gift has a ripple effect

- Your donation is added to other gifts making a larger financial impact to those we collectively assist.

Make a difference-give today! www.tnybf.org/donation/

Double your gift...

Some companies have a matching gift program that will match your donation. See if your firm participates!



THE NEW YORK
BAR FOUNDATION

One Elk Street, Albany, NY 12207

(518) 487-5650

"I champion the work of The NY Bar Foundation since its current programs support my interest in indigent legal services, youth courts, and human trafficking.



The Foundation's assistance is critical for these types of programs to help the underserved in our communities. I'm more supportive of the work of The Foundation than ever before."

Foundation Fellow, Patricia L.R. Rodriguez

Law Office of Patricia L.R. Rodriguez,
Schenectady, NY



***United States v. Carpenter*: Has the Supreme Court Learned from the N.Y. Court of Appeals on the Subject of Reasonable Expectation of Privacy?**

By Jay Shapiro

Almost a decade ago, the N.Y. Court of Appeals expressed its concerns in *People v. Weaver*¹ that law enforcement's use of a GPS device to follow a suspect "is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or 'seeing' by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp." In its decision, the state's highest court ruled that as a matter of state constitutional law, law enforcement's use of a GPS device to track a suspect requires a warrant based on probable cause.

In *Carpenter v. United States*² one of the last decisions issued this term, the United States Supreme Court warned that "when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Carpenter* held that when the government obtains seven days of cell site location information it has conducted a search which "generally" will require a warrant based upon probable cause.

While *Weaver* was focused on ongoing, real-time surveillance and *Carpenter* concerned historical information, that distinction does not diminish the key common thread that enhanced surveillance abilities provided by technological advances present challenges to traditional search and seizure jurisprudence.

The opinion of the five-justice majority in *Carpenter* was authored by Chief Justice Roberts. The prosecution of Carpenter was for his participation in robberies of Radio Shack and T-Mobile stores in Michigan and Ohio in 2011. During the course of an FBI investigation, one participant in the crimes was arrested and provided cell phone numbers of other participants. The agents used those numbers and other information as a basis to obtain court orders pursuant to the Stored Communications Act for the cell phones of Carpenter and several others. Pursuant to the Act, those orders were obtained based upon reasonable grounds to believe that the information was relevant to an ongoing criminal investigation. The investigators obtained cell site location information (CSLI) from two carriers whose services Carpenter used. The CSLI provided the government with information concerning the location of Carpenter's phone, which was then used to demonstrate that Carpenter was near the scene of four of the robberies. The universe of information that the gov-

ernment obtained provided substantial details about Carpenter's locations: a total of 12,898 location points over the course of months, "an average of 101 data points per day."

Chief Justice Roberts explained that the Court's decision finding the government's acquisition of CSLI to be a Fourth Amendment search required analysis of the principles of expectation of privacy and the third-party doctrine of search and seizure. Expectation of privacy recognized under the Fourth Amendment has moved from traditional government trespass concerns rooted in property rights to more personal rights, those identified in the seminal decision of *Katz v. United States*.³ The Court's analysis of these personal privacy rights included reliance on its long-standing concern about police surveillance that is "too permeating." It was that perspective, for example, that underlies the Court's holding in *Kyllo v. United States*⁴ that the government's use of a thermal imager to identify heat coming from a home constituted a search. Thus, the Court recognized that the tools the government obtains through advanced technology must be taken into account when courts examine the application of the Fourth Amendment's principles. The Court also noted that in *Riley v. California*,⁵ its decision that a search of a cell phone requires a warrant, it acknowledges that the incredibly vast storage capacity of cell phones must be factored into the analysis of the breadth of a search.

In finding that the CSLI constituted information in which Carpenter had a reasonable expectation of privacy, the Majority pointed out the pervasive and informative nature of the data: "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts." The Chief Justice cited to the concerns raised by Justice Sotomayor's opinion in *United States v. Jones*,⁶ where she expressed her view of the intrusiveness of surveillance using a GPS device, but he went on to describe that CSLI actually delivers a more comprehensive view of a person's activities. Unlike a GPS, which remains with the vehicle, the cell site information emanates from a device that "faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales."

For those who follow the Court of Appeals, reading this language from the Supreme Court most certainly calls to mind Chief Judge Lippman's warning in *Weaver* that the modern GPS can disclose "trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion

clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.”⁷

For the *Carpenter* Court, the issue of whether the CSLI was of such a nature that it infringed upon a person’s reasonable expectation of privacy was only the first part of the equation. The second was whether the third-party doctrine that originated in *United States v. Miller*⁸ and *Smith v. Maryland*⁹ rendered a warrant unnecessary for CSLI. Most applicable is *Smith*, because that case involved telephone records. There, the Court ruled that a government use of a pen register was not a search because subscribers are aware that telephone numbers they dial are used by the telephone company for appropriate business purposes. The Court noted in that case that the numbers dialed by someone who used their telephone assumed the risk that the information could be provided to the police.

[T]he retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person’s movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person’s whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone.

“The Court’s statement in a footnote that ‘[i]t is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search,’ leaves open the question as to whether shorter periods of acquisition do not constitute a Fourth Amendment search.”

The Court easily distinguished *Smith*, first pointing out the difference between the types of information that the earlier decision addressed. It is one thing to learn a number that is being dialed. It is quite another to use information obtained by the service provider to determine a person’s location on an almost constant basis. The Court recognized that when *Smith* was decided there was no anticipation that one day the telephone company would also have access to detailed location information. Furthermore, the Court determined that the third-party doctrine was not applicable to CSLI because a cell phone is “indispensable to participation in modern society” and the “device logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up.... Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data.”

That concept—detailed location information—lies at the heart of *Carpenter*. Just as the New York Court of Appeals recognized how a modern GPS provided law enforcement with information about an individual’s detailed travels and stops, so, too, was the Supreme Court concerned about how CSLI gave similar information. In fact, the historical nature of the information did not reduce that apprehension. The Court warned that:

The majority described its decision as “narrow,” one that does not address the acquisition of “real-time CSLI” or all information from a single cell site during a specific time period. Furthermore, the Court’s statement in a footnote that “[i]t is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search” leaves open the question as to whether shorter periods of acquisition do not constitute a Fourth Amendment search.

Additionally, it is critical that the Court maintained the third-party doctrine remained viable as to different information sources and that “other business records that might incidentally reveal location information” were not subject to this ruling. There may be substantial law enforcement information-gathering tools that would be outside of the scope of this decision, which was admittedly focused upon location information. In rejecting the dissenting opinions of Justices Alito and Kennedy, the Chief Justice emphasized the view that CSLI provides such a detailed picture of a person’s activities that its acquisition, absent an emergency, must be pursuant to a warrant based upon probable cause.

As of the date of *Carpenter*, New York courts had a number of opportunities to review the issue of the acquisition of CSLI without a warrant. The most recent appellate court decision was by the Appellate Division, Fourth

Department, in *People v. Taylor*.¹⁰ In that case the police used CSLI in their investigation of a double-homicide. They obtained four days of CSLI without a warrant, or even a court order pursuant to the SCA. The court held that the defendant did not have a reasonable expectation of privacy in CSLI under the third-party doctrine and that there was no requirement for a search warrant under either the federal or state constitutions.

Post-*Carpenter*, it is unclear whether that view is viable. The seven-day statement in *Carpenter* leaves the question of whether the acquisition of CSLI of lesser periods are Fourth Amendment searches. However, New York courts may look at *Carpenter* and *Weaver* and find motivation to apply Article I, Section 12 of the New York Constitution to shorter periods and find that such CSLI gatherings are searches.

This uncertainty should inspire prosecutors and police departments throughout the state to be on notice that absent exigent circumstances a warrant based upon probable cause must be obtained in order to have

a provider reveal a suspect's CSLI. For periods of at least seven days, now that the Supreme Court has echoed the concerns raised by the Court of Appeals in *Weaver* about the pervasiveness of enhanced information accessible by law enforcement, New York courts must comply with the Supreme Court's mandate when it comes to CSLI.

Endnotes

1. 12 N.Y.3d 433 (2009).
2. ___ U.S. ___ (decided June 22, 2018).
3. 389 U.S. 400 (1967).
4. 533 U.S. 27 (2001).
5. 573 U.S. ___ (2014).
6. 565 U.S. 400 (2012).
7. 12 N.Y.3d at 442-443.
8. 425 U.S. 435 (1976).
9. 442 U.S. 735 (1979).
10. 158 A.D.3d 1095 (4th Dep't 2018).



NEW YORK STATE BAR ASSOCIATION

Online Publications

In Partnership with Fastcase



Already a NYSBA member with free access to Fastcase legal research?



Upgrade now to also access NYSBA Online Publications Library on the Fastcase database. Visit www.nysba.org/fastcase

With a subscription to the NYSBA Online Publications Library, you can browse or search NYSBA legal publications, such as the complete award-winning Practical Skills Series, and quickly link to the cases and statutes cited through Fastcase. In addition to traditional legal research, attorneys will enjoy online access to over 60 practice-oriented professional publications covering many different areas of practice. The NYSBA Online Publications Library is not available on any other online platform.

Get the complete NYSBA Online Publications Library and enjoy exclusive members-only savings that will more than cover your membership dues. And, your annual subscription includes all updates during the subscription period to existing titles as well as new titles – at no extra cost! Subscriptions to individual titles are also available.

A member subscription is a fraction of the cost of the complete hardbound library. For more information visit www.nysba.org/fastcase.

Not yet a NYSBA member?



Join now at www.nysba.org/whynysba

United States Supreme Court News

By Spiros Tsimbinos

Introduction

A review of the Court's 2017-18 term, which concluded at the end of June 2018, reveals a pattern of caution, narrow decisions, and in some cases avoidance of controversial issues. The Court, however, did decide some important cases that can have long-term significant economic, financial and political impacts. The end of the term also provided an opportunity to examine the voting pattern of Justice Gorsuch, who has now completed more than a full year on the bench, and to assess some indications at least with regard to criminal matters that he may not be as conservative as some might wish. On the very last day of the term, we also heard the news that Justice Kennedy was retiring, setting off another upcoming battle regarding his replacement. The important decisions rendered by the Court as it neared the final months of its term are summarized below.



On a personal note, about a year ago, when I ceased being the Editor of the *Newsletter*, I indicated that I would continue to provide the Supreme Court article for a few more issues in order to effectuate an orderly transition. Now that more than a year has passed, and I recently attended my 50th Law School Reunion and having reached the age of 75, I think it is a good time to conclude my service on the *Newsletter*. Therefore, this is my last issue in which my article on the Supreme Court will appear. I have been writing this article for about 15 years and I hope the members have found it both interesting and informative.

Guilty Plea as Waiver of a Defendant's Right to Challenge the Constitutionality of a Statute

***Class v. United States*, 138 S. Ct., p. 798 (February 21, 2018)**

In a 6-3 decision written by Justice Breyer, the United States Supreme Court held that a guilty plea by itself does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. The defendant had been indicted for possessing a firearm in his locked Jeep, which was parked in a lot on the grounds of the United States Capitol. Several months later, he pleaded guilty to possession of a firearm on U.S. Capitol grounds in violation of a federal statute. The plea agreement said nothing about the right to raise

on direct appeal a claim that the statute of conviction was unconstitutional in violation of the Second Amendment and the due process clause. The government had argued that the guilty plea by itself barred the federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. The Supreme Court majority concluded that it does not. The Court noted that the plea allocution did not expressly refer to a waiver of the right to appeal and that under the circumstances there was no acquiescence either expressly or implicitly to waive his right to appeal unconstitutional claims. The six justices majority in addition to Justice Breyer included Justices Ginsburg, Sotomayor, Kagan, Gorsuch and Chief Justice Roberts.

In an interesting development, Justice Gorsuch voted with the majority, abandoning his usual voting partners, Justices Alito and Thomas, perhaps indicating the possibility that he may be more liberal on criminal law matters than was anticipated. In another surprise, Justice Kennedy, who usually votes often with the liberal block, joined Justices Alito and Thomas in dissent.

Detention of Illegal Immigrants

***Jennings v. Rodriguez*, 138 S. Ct., p. 830 (February 27, 2018)**

On November 30, 2016, the United States Supreme Court heard oral argument on a matter which involved the issue of whether immigrants detained for possible deportation can be incarcerated indefinitely without a hearing or bond application. The issue involved the interpretation and application of 8 U.S.C. Due to the absence of Justice Scalia, the Court apparently deadlocked on a 4-4 basis and ordered that the matter be set down for rehearing. The Court thus heard a second oral argument involving the case on October 3, 2017, the opening day of its new term. Justice Gorsuch, the new addition to the Court, participated in the questioning of the attorneys and it appeared that he would be in the position of casting the determining vote on the matter. The Court issued its decision in February and held in a 5-3 vote that illegal immigrants are not entitled to periodic bond hearings. The majority consisted of Justices Kennedy, Gorsuch, Thomas, Alito and Chief Justice Roberts. Justices Breyer, Sotomayor and Ginsburg dissented. Justice Kagan had recused herself from the matter and took no part in the decision.

SPIROS TSIMBINOS is the former editor of the *New York Criminal Law Newsletter* and a recognized expert on New York Criminal Law and related subjects.

Probable Cause and Police Officer Immunity

***District of Columbia v. Wesby*, 138 S. Ct., p. 577 (January 22, 2018)**

In a 7-2 decision written by Justice Thomas, the United States Supreme Court held that police officers had probable cause to make arrests for unlawful entry and they had qualified immunity from 1983 false arrest claims filed by several of the arrestees. In the case at bar, District of Columbia police officers had responded to a complaint about loud music and illegal activities in a vacant house. When they arrived at the scene, they found a house nearly barren and in disarray. They also smelled marijuana and observed beer bottles and cups of liquor on the floor. The premises were being used as a makeshift strip club. When police arrived, partygoers scattered and people questioned gave inconsistent stories. Two women identified "Peaches" as the house's tenant and said that she had given the partygoers permission to have the party. Peaches was not there and when the officer spoke by phone to her, she was nervous, agitated and evasive. She first claimed that she was renting the house and had given the partygoers permission to have the party, but she eventually admitted that she did not have permission to use the house. The owner subsequently confirmed that he had not given anyone permission to be there. The officers then arrested the partygoers for unlawful entry.

In issuing its determination, the Supreme Court found that considering the totality of the circumstances, the officers made an entirely reasonable inference that the partygoers did not have permission to be in the house and they clearly had probable cause to believe that there was a substantial chance of criminal activity. Further, under all the circumstances, the officers were entitled to receive qualified immunity and the District Court should have granted summary judgment dismissing the petitioner's claims.

Deportation Based on a "Crime of Violence"

***Sessions v. Dimaya*, 138 S. Ct., p. 1204 (April 17, 2018)**

In a 5-4 decision, the Supreme Court determined that the statute that required legal immigrants to be deported based upon committing a crime of violence was constitutionally defective as being void for vagueness. Justice Gorsuch voted with the four liberal justices to strike down the statute. His decision reinforced the view that at least in criminal matters he may be more liberal than expected. The Court's decision was a somewhat surprising development and may lead to the necessity of further legislation to clarify the issue.

Ineffective Assistance of Counsel

***McCoy v. Louisiana*, 138 S. Ct., p. 1500 (May 14, 2018)**

In a 6-3 decision, the Supreme Court reversed a defendant's conviction on the ground that the defendant

had the right under the Sixth Amendment to insist that his counsel refrain from admitting that the defendant committed three murders during the guilt phase of a capital trial. Counsel had acted on the belief that admitting guilt afforded the defendant the best chance to avoid the death sentence. The majority opinion determined that a defendant has the right to insist that counsel refrain from admitting guilt during the guilt phase of a capital murder trial even when counsel's experience-based view is that confessing guilt offers the best chance to avoid the death penalty. The Court determined that the defendant's guarantee of a right to have effective assistance of counsel was violated and that a new trial was warranted without any need to establish prejudice. Justices Alito, Thomas and Gorsuch dissented.

Sports Betting

***Murphy v. National Collegiate Association*, 138 S. Ct., p. ____ (May 14, 2018)**

In a 6-3 decision, the Supreme Court struck down a federal law that banned sports betting. The suit had been brought by the State of New Jersey, which argued that a 1992 law that prohibited states from authorizing and licensing sports gambling violated the anti-commandeering rule of the U.S. Constitution. Justice Alito in issuing the majority opinion stated that Congress can regulate sports gambling directly but if it elects not to do so, each State is free to act on its own. Justice Alito further noted that the defect with the federal law was that it regulated state government's regulation of its own citizens and that the Constitution gave Congress no such power. The Court's ruling would allow many states to authorize and regulate sports betting at existing casinos and it could create and additional revenue source for state governments. Justices Breyer, Sotomayor and Ginsburg dissented.

Search and Seizure

***Collins v. Virginia*, 138 S. Ct., p. 1663 (May 29, 2018)**

In an 8-1 decision, the Supreme Court held that a partially enclosed top portion of a driveway of a house in which the defendant's motorcycle was parked was curtilage for Fourth Amendment purposes and that therefore, the automobile exception to the warrant requirement for searches did not justify the police officer's actions. The warrantless search of the motorcycle should therefore have been suppressed. The majority opinion was written by Justice Sotomayor, and along with the four liberal justices, also included Chief Justice Roberts and Justices Gorsuch and Thomas. Justice Alito dissented and issued a rather strong admonition to the majority. Justice Alito remarked, "The Fourth Amendment is neither an ass nor an idiot. Its hallmark is reasonableness and the Court's strikingly unreasonable decision is based on a misun-

Continued on page 29

Section Committees and Chairs*

Appellate Practice

Robert S. Dean
Center for Appellate Litigation
120 Wall St., 28th Floor
New York, NY 10005
rdean@cfal.org

Lyle T. Hajdu
Erickson, Webb, Scolton and Hajdu
414 East Fairmount Avenue
P.O. Box 414
Lakewood, NY 14750-0414
lth@ewsh-lawfirm.com

Awards

Norman P. Effman
Wyoming County Public Defender
Wyoming County Attica Legal Aid
Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

Bail Reform

Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201-2908
hillelhoffman@verizon.net

Bylaws

Yevgeniy Frenkel
yevfrenkel@gmail.com

Continuing Legal Education

Nicholas J. DeMartino
Green & Brenneck
407 South Warren St., 2nd Floor
Syracuse, NY 13202
nick@nicholasdemartinolaw.com

Correctional System

Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

Norman P. Effman
Wyoming County Public Defender
Wyoming Cty Attica Legal Aid Bureau
Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

Defense

Harvey Fishbein
111 Broadway, Suite 701
New York, NY 10006
hf@harveyfishbein.com

Xavier Robert Donaldson
Donaldson & Chilliest LLP
1825 Park Avenue, Suite 1102
New York, NY 10035
xdonaldson@aol.com

Discovery Reform

Xavier Robert Donaldson
Donaldson & Chilliest LLP
1825 Park Avenue, Suite 1102
New York, NY 10035
xdonaldson@aol.com

Diversity

Rasheim Jamil Donaldson
625 West 164 St., Apt. 21A
New York, NY 10032
rasheim.donaldson@gmail.com

Ethics and Professional Responsibility

Lawrence S. Goldman
Goldman and Johnson
500 5th Avenue, 34th Floor
New York, NY 10110-3399
lsg@goldmanjohnson.com

Judiciary

Michael R. Sonberg
New York State Supreme Court
100 Centre Street
New York, NY 10013
msonberg@nycourts.gov

Cheryl E. Chambers
Appellate Division,
Second Judicial Dept
45 Monroe Place
Brooklyn, NY 11201
cchamber@nycourts.gov

Legal Representation of Indigents in the Criminal Process

David A. Werber
85 1st Place
Brooklyn, NY 11231
werbs@nyc.rr.com

Legislation

Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201-2908
hillelhoffman@verizon.net

Membership

Erin Kathleen Flynn
Law Offices of Eric Franz
747 Third Avenue, 20th Floor
New York, NY 10017
erin.k.flynn@gmail.com

Prosecution

John M. Ryan
Queens District Attorney
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmryan@queensda.org

Publications

Jay Shapiro
White and Williams LLP
One Penn Plaza
250 West 34th Street Suite 4110
New York, NY 10119
shapiroj@whiteandwilliams.com

Sealing

Richard D. Collins
Collins, McDonald & Gann, P.C.
138 Mineola Blvd
Mineola, NY 11501
rcollins@cmgesq.com

Jay Shapiro
White and Williams LLP
One Penn Plaza
250 West 34th Street Suite 4110
New York, NY 10119
shapiroj@whiteandwilliams.com

Sentencing and Sentencing Alternatives

Robert J. Masters
District Attorney's Office
Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415
Rjmasters@queensda.org

Sex Offender Registration Act

Robert S. Dean
Center for Appellate Litigation
120 Wall St., 28th Floor
New York, NY 10005
rdean@cfal.org

Sponsorship

David Louis Cohen
Law Office of David L. Cohen
125-10 Queens Boulevard, Suite 5
Kew Gardens, NY 11415-1522
david@davislouiscohenlaw.com

Town and Village Justice Court Task Force

Clare J. Degnan
The Legal Aid Society
of Westchester County
1 N Broadway, 9th Floor
White Plains, NY 10601-2310
cjd@laswest.org

Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

Vehicle and Traffic Law

Jonathan D. Cohn
Gerstenzang, Sills, Cohn
& Gerstenzang
210 Great Oaks Blvd
Albany, NY 12203
jcohn@pgdwi.com

White Collar Crime

Jean T. Walsh
Bronx County District
Attorney's Office
198 East 161st Street
Bronx, NY 10451
jtraceywalsh@hotmail.com

Wrongful Convictions

Barry Kamins
Aidala, Bertuna & Kamins P.C.
546 5th Avenue, 6th Floor
New York, NY 10036
judgekamins@aidalalaw.com

Linda Kenney Baden
Law Office of Linda Kenney Baden
15 West 53rd Street
New York, NY 10019
kenneybaden@msn.com

Young Lawyers

Anthony Beneduce Jr.
111-40 118th Street
South Ozone Park, NY 11420
abeneduce89@gmail.com

Andrea Luz Nieves
177 Livingston St., 7th Floor
Brooklyn, NY 11201
anieves@bds.org

* If your information listed on these pages is incorrect, contact the NYSBA Member Resource Center at 1-800-582-2452 to update our Membership system.

Supreme Court News

Continued from page 27

derstanding of Fourth Amendment basics. The Fourth Amendment prohibits unreasonable searches. What the police did in this case was entirely reasonable.”

The Fourth Amendment as Applied to Cell Phones

***Carpenter v. United States*, 138 S. Ct., _____ (June 22, 2018)**

After having granted certiorari, on June 5, 2017, the Court heard oral argument on November 29, 2017 with respect to an important matter involving the issue of whether obtaining cell tower locational data from a defendant's cell phone carrier constitutes a Fourth Amendment search which requires the obtaining of a warrant. The Sixth Circuit Court of Appeals concluded that the government was not required to obtain a search warrant for the records in light of the longstanding distinction between the contents of a communication that is protected under the Fourth Amendment and the information necessary to convey that content, which is not. The Sixth Cir-

cuit determined that because the cell site records obtained by the government did not include the content of the defendant's communication but instead only included information that facilitated his communications, the defendant had no expectation of privacy in these records. The Sixth Circuit in issuing its ruling distinguished two important United States Supreme Court decisions, *U.S. v. Jones*, 565, U.S. 400 (2012) and *Riley v. California*, 134 S. Ct. 2473 (2014), which apparently led the Supreme Court to grant review so as to clarify any confusion on the issue. Collecting cell phone data as an investigative tool has raised numerous privacy issues.

The Court on June 22, 2018 held, in a 5-4 decision, that a warrant is required. Chief Justice Roberts joined the four justices from the liberal grouping and issued the majority opinion. Justice Roberts stressed in his opinion that the Court could not grant the state unrestricted access to a person's cell phone. Justices Kennedy, Thomas, Alito and Gorsuch dissented. Further details regarding the *Carpenter* decision can be found in the article by Editor, Jay Shapiro, which is also included in this issue.

Publication and Editorial Policy

Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

Publication Policy: All articles should be e-mailed to: Jay Shapiro at cjseditor@outlook.com.

Submitted articles must include a cover letter giving permission for publication in this *Newsletter*. We will assume your submission is for the exclusive use of this *Newsletter* unless you advise to the contrary in your letter. Authors are encouraged to include a brief biography with their submissions.

Editorial Policy: The articles in this *Newsletter* represent the authors' viewpoints and research and not that of the *Newsletter* Editor or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Accommodations for Persons with Disabilities:

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

Copyright 2018 by the New York State Bar Association.
ISSN 1549-4063 (print) ISSN 1933-8600 (online)

NEW YORK CRIMINAL LAW NEWSLETTER

Editor

Jay Shapiro
White and Williams LLP
Times Square Tower
7 Times Square
New York, NY 10036
cjseditor@outlook.com

Section Officers

Chair

Tucker C. Stanclift
Stanclift Law PLLC.
704 Upper Glen Street
P.O. Box 4595
Queensbury, NY 12084
tcs@stancliftlaw.com

Vice-Chair

Robert J. Masters
District Attorney's Office Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415
Rjmasters@queensda.org

Secretary

David Louis Cohen
Law Office of David L. Cohen
125-10 Queens Boulevard, Suite 5
Kew Gardens, NY 11415
david@davidlouiscohenlaw.com

Treasurer

Leah Rene Nowotarski
Wyoming County Public Defender
18 Linwood Avenue
Warsaw, NY 14569
lnowotarski.attlegal@yahoo.com

From the NYSBA Book Store >

Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials)

Sixth Edition

Author

Lawrence N. Gray, Esq.

Former Special Assistant Attorney General
NYS Office of the Attorney General

A valuable text of first reference for any attorney whose clients are called to testify before grand juries, or in criminal or civil trials, *Evidentiary Privileges*, 6th edition, covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.

Updated with case law and sections throughout, the author provides in-depth discussions on trial privileges and procedures including state and/or federal cases and relevant legislation. *Evidentiary Privileges* features the transcript of a mock grand jury session, providing cogent examples of how some of the mentioned privileges and objections have been invoked in real cases.

Lawrence N. Gray is the author of numerous publications on criminal law and trial. This edition of *Evidentiary Privileges* draws from the author's experience as a former special assistant attorney general and his many years of practice in the field of criminal justice.

Contents at a Glance:

The Power of the Grand Jury to Compel Testimony
The Attorney-Client Privilege
The Spousal Privilege
The Fourth Amendment as Applied to Grand Juries
Contempt and the Grand Jury
More...

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB9039N



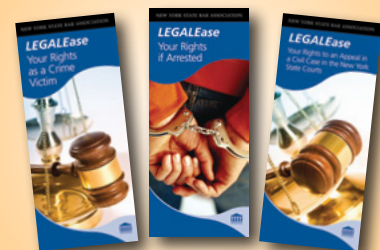
PRODUCT INFO AND PRICES

Print: 40996 | E-book: 40996E
2015 | 450 pp.

NYSBA Members	\$55
Non-members	\$75

\$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

**LEGALEase Brochure Series From
The New York State Bar Association**



Display Them. Send Them. Use Them.
Order online @ www.nysba.org/legalease

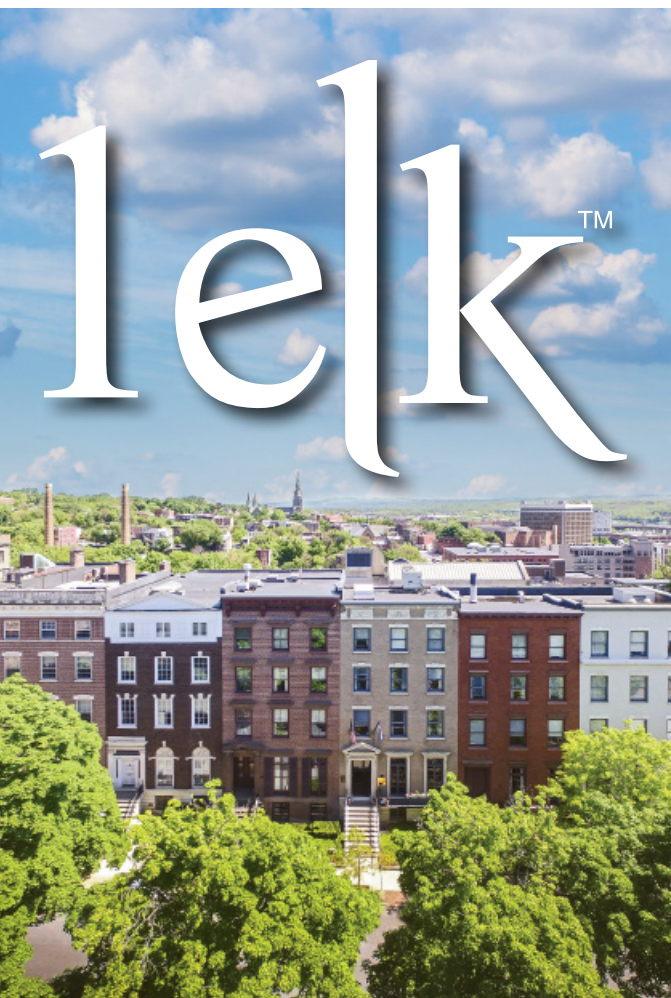




NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

One Elk Street, Albany, New York 12207-1002

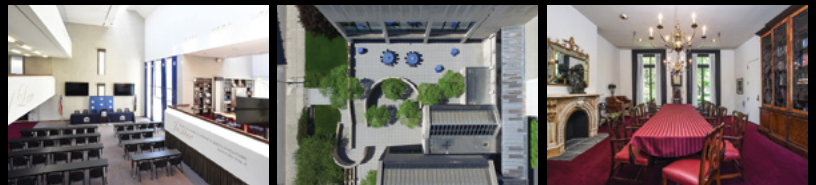
NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155



Hold Your Next Meeting, Conference or Event at One of the City's Most Historic Addresses.

Situated between the State Capitol and the Court of Appeals, and just a short walk from the Empire State Plaza and downtown Albany, 1 Elk offers a selection of settings from intimate to expansive.

Whether you are planning your next meeting, conference or reception, 1 Elk is the perfect space for your special event.



Plan Your Event Today!

www.1elk.com | events@1elk.com | 518.487.5573