ATTICUS
Publication of the
New York State Association of
Criminal Defense Lawyers

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The East Africa Bombing Trial
By Steve Zissou – Page 14

MARK YOUR CALENDAR!
September 9th, 2011
Manhattan CLE
Federal Practice Seminar
See page 3 for details.

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Message from the President

Having been President of this Association for six months now, I have noticed that there is a difference between NYSACDL and other Bar associations (just one!?). Like most bar associations, our business is largely carried out by numerous committees. The difference is that these committees are populated almost completely by members of the Board of Directors. “Regular” members do not participate in committee work. In other Associations, the committees are primarily made up of members. This gives the membership an opportunity to shape the policies and direction of the organization. It allows members to “own” the future of the organization.

NYSACDL has never excluded members from our committees. We have not, however, made any serious attempts to include members. That stops today. I would like to take this opportunity to invite any members with an interest to volunteer on one or more of our committees. The full list of those committees can be found on our website under “Member Resources”; look over the list and contact any one of the committee chairs. Let me suggest some possibilities:

1. CONTINUING LEGAL EDUCATION – This is one of the busiest and most important assignments. If you have ideas for programs, speakers, or specific topics, please join. We are constantly planning programs and welcome any input.
2. AMICUS CURIAE – If you like to write on appellate issues – or know someone who you can convince to take on a writing assignment – this is a good place for you.
3. PUBLICATIONS (ATTICUS) – This excellent magazine you are reading does not compose itself! We need writers, editors, and content!
4. LEGISLATIVE – Take part in shaping the law. Work with our lobbyist to persuade political leaders to do the right thing.

These are a few areas where the knowledge, experience, and advocacy skills of our members can combine to advance the interests of the profession, the Association, and our clients.

Please join us in this effort!

Kevin D. O’Connell, NYSACDL President
In the News

May, 2011 — Town of Southold, Long Island, New York. Garden City attorney Thomas F. Liotti has announced that his office has just secured a reversal of the conviction of Paul Bellisimo originally arrested and charged on an alleged domestic violence crime of assault and criminal trespass. A jury convicted the defendant of criminal trespass and an appeal was taken. The Appellate Term remanded for a suppression hearing in the Trial Court which then denied that application to suppress statements attributed to the defendant. A second appeal was taken and the conviction was reversed with the accusatory statement dismissed.

Thomas F. Liotti, the attorney for Bellisimo said: “It took us four years but it was worth it. The trial attorney, Brian J. Hughes of Southold gave us a great record to work from. An Associate in my office, Jennifer L. McCann was largely responsible for this victory. It is a big victory for the client, Mr. Hughes, for this firm and for Jennifer, a natural talent in the law with a promising future ahead of her. She is a star on the horizon.” Jennifer L. McCann, Esq. the attorney from Mr. Liotti’s office who wrote the briefs and argued them on appeal said: “It is too often the case that when justice is delayed that it is denied. We are grateful that the Appellate Term did not let that happen here.”

To read the full judgement please visit www.nysacdl.org

Continuing Legal Education

MANHATTAN CLE
September 9, 2011
Federal Practice Seminar

SYRACUSE FALL TRAINER CLE
October 29, 2011
This 4 hour seminar will cover DWI / Interlock Ignition issues as well as developments in sentencing practices under the new drug laws.

BROOKLYN CLE – WEAPONS FOR THE FIREFIGHT
October, 2011
More information coming soon

Visit our website www.nysacdl.org for registration information or contact:
Margaret Alverson, Executive Director malverson@nysacdl.org 212-532-4434
Editor’s Page

Cheryl and I welcome John Wallenstein, the Secretary of our organization, as a co-editor of Atticus. John has previously supplied assistance in reviewing and editing many members submissions. His generous contribution of his time is shown in the quality of the magazine, NYSACDL is proud to circulate to its members. While the organization has some regular features contributed by JaneAnne Murray, Ray Kelly and Richard Willstatter, we continue to welcome contributions from members and associates of the organization on topics of general interest or narratives of interesting cases. The member biography section this issue contains only one contribution and we encourage all our readers to submit short biographies with your e-mail contact. You will note that a membership list is now included. We will endeavor in future issues to include e-mail contact information and to highlight new members who have joined during the preceding quarter. Best wishes to all for an enjoyable summer season.

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Events

NYSACDL 2011 Board Meetings

September 17, 2011:  
Location TBD

November 19, 2011:  
New York City

Kindly check www.nysacdl.org for dates and locations of future Board Meetings.

It is a practice to schedule board meetings throughout the state.

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Legislative Committee Report

In the Winter 2011 edition of Atticus, we published our Legislative agenda, as well as updates on our efforts on behalf of the defense community. Our public positions, and the publication of them in our magazine, have helped solidify our position with legislative and executive leadership in Albany as a “go to” organization in the criminal justice arena. Our proposed sealing statute is now being sponsored by Assembly Member Daniel O'Donnell, and is assigned bill number A6664. It will undoubtedly be revised as it proceeds through the various stages of the legislative process, but the process has begun. The introduction of this proposed law signifies a milestone for NYSACDL and demonstrates our ability to influence legislation and to represent the interests of our clients and the people of the State of New York.

During the recent weeks, members of NYSACDL’s Legislative Committee called upon numerous legislators and their staffs in Albany, accompanied by our lobbyist, Sandra Rivera of Manatt, Phelps & Phillips, LLP. We emphasized to the members of the Assembly, Senate, and Executive branch the importance of passing a strong sealing statute. We also advocated the need for discovery reform. One of the lessons we took away from these visits was that success depends upon our ability to build coalitions. We found legislators and gubernatorial staff sympathetic to our cause, and they recommended coordination of support from other criminal justice organizations, where possible. We have already taken steps to enlist the support of other organizations, some of which may not be our natural allies but with whom we share common ground on issues of importance.

We have invited the Legislative Committee of the District Attorneys Association of the State of New York and the Government Relations Committee of the State Bar Association to discuss and identify issues of common interest which, with the support of such a coalition, would garner the support of New York’s legislative and executive leadership.

Chief Judge Jonathan Lippman’s annual Law Day address spoke of correcting a “longstanding failure” (consistent with his 2010 Hurrell-Harring opinion) by assuring that within the next year legal counsel will represent most criminal defendants at arraignment. In the case of rural upstate regions, logistical difficulties may require legislative action, an issue suitable for input from the contemplated coalition. Our efforts have placed NYSACDL in the forefront on issues affecting the criminal justice system, particularly in these difficult financial times.

NYSACDL has joined the New York State Bar Association and other bar associations in supporting same sex marriage. Marriage equality is a bipartisan issue of basic freedom which in not so subtle ways impacts upon the rights of the accused. If same sex marriage becomes the law in this State, it will have the effect of granting equal rights in many areas that affect the criminal justice system and the ability of counsel to defend our clients. For instance, bail decisions must recognize family ties; evidentiary issues are affected because of the marital privilege; prisoners would be afforded greater access to loved ones; and defense counsel will be able to communicate more freely with clients’ spouses or partners.
Memorable Events:

**Marty Adelman passed along the following from his vast collection of memorable Events**

A case is on trial in which the following exchange occurs between a defense attorney and his client during some particularly graphic and damaging testimony by a prosecution witness.

**Defendant:** [Pulling on attorney’s sleeve at counsel table] “Juror number 2 is sleeping!”

**Attorney:** [in a whisper] “What? — you want him to hear this?”

If you have any specific issues you would like to bring to the legislative committee, contact the chair, Andy Kossover. If you have any relationships with your local politicians, or believe your local district attorney would support sealing or discovery reform, it would be helpful for the legislative committee to be aware of that as well. Feel free to contact any of the members above if you are interested in participating in legislative work. It is particularly helpful if you have an expertise that we can draw on in those final moments of the session when bills are being proposed and passed very quickly.

“One thing about murder cases — there is always one less witness to worry about”

Murray Richman
As readers of this column may recall, last October 18 the Second Circuit reversed a panel’s earlier decision which had found New York’s discretionary persistent felony statute unconstitutional. Besser v. Walsh, 601 F.3d 163 (2d Cir. 2010). The en banc decision, Portalatin v. Graham, 624 F.3d 69 (2d Cir. 2010), found that the application of the discretionary persistent felony statute was not an unreasonable application of the federal constitution. Certiorari was denied for the petitioners in March.

Not to be deterred, we have filed an amicus curiae brief in support of a petition for a writ of certiorari seeking Supreme Court review from a decision of the New York Court of Appeals, People v. Battles, 16 N.Y.3d 54 (2010). Chief Judge Jonathan Lippman dissented from the Court of Appeals’ decision, remarking “I do not believe that our persistent felony offender sentencing provisions can ultimately survive constitutional scrutiny and, practically, see nothing to be gained, and much to be lost, in clinging, during what will undoubtedly be further protracted litigation, to a legally flawed sentencing scheme whose entirely proper objectives are capable of being met without constitutional offense.”

The petition is appropriately captioned Battles v. New York, 10 9465 and was submitted by Andrew C. Fine of the New York City Legal Aid Society’s Criminal Appeals Bureau. Although Mr. Fine’s petition was ably prepared, we sought to raise the level of interest in it by filing a brief in support. Our brief was prepared on very short notice by Jonathan Marcus and Brian D. Ginsberg of Covington & Burling. We strongly believe that if the Supreme Court grants the petition, the New York law will ultimately be found unconstitutional. And, happily, we can report that the Court asked the District Attorney to file a response to the petition by May 26, 2011. That may augue well for Mr. Battles.

We also filed a brief in support of a petition for a writ of certiorari in the case of Richard Rosario, the man who was convicted of a Bronx murder after his lawyers failed to bring numerous alibi witnesses to trial from Florida. This was a federal habeas corpus case in which the federal appeals court had held that New York’s “meaningful representation” standard for ineffective assistance of counsel is not inconsistent with the familiar two-pronged (ineptitude and prejudice) standard of Strickland v. Washington, 466 U.S. 668 (1984). In essence, the
lawyers’ incompetent representation of their client was excused because other aspects of their work were good. We initially filed a brief in support of Rosario’s application for a rehearing en banc. An unusual opinion was published back on August 10, 2010 in which Judge Wesley explained for the majority why the case would not be heard en banc. Rosario v. Ercole, 617 F.3d 683 (2d Cir. 2010). Chief Judge Dennis Jacobs, along with three other Circuit Judges, dissented, pointing out that “Because the New York standard allows the gravity of individual errors to be discounted indulgently by a broader view of counsel’s overall performance, it is contrary to Strickland.” Id. at 686.

Rosario then filed his petition for a writ of certiorari, captioned Rosario v. Griffin, 10-854. NYSACDL was joined by the National Association of Criminal Defense Lawyers in an amici curiae brief in support of the petition authored (once again) by Jonathan Marcus and Brian D. Ginsberg, but this time joined by James M. Smith, Roger A. Ford, and Jason A. Levine of Covington & Burling. We argued that the very nature of the New York “meaningful representation” test is contrary to the Strickland standard. New York courts confronted with potentially prejudicial counsel errors have regularly found that counsel provided “meaningful representation” so long as he performed adequately in enough other areas. The Supreme Court directed the prosecutors to respond to Rosario’s petition and as this is written, a conference was held on May 12, 2011, so a decision whether to accept the case may be made by press time.

NYSACDL filed an amici curiae brief in the Brown v. Blumenfeld Article 78 proceeding in the Appellate Division, Second Department. The Queens District Attorney claims that Justice Joel Blumenfeld must be stopped from even considering –in the context of a Huntley hearing motion to suppress post-arrest statements obtained by law enforcement– whether the D.A.’s policy in taking such statements is legal and/or ethical. The policy in question was to interrogate soon-to-be defendants just prior to filing the accusatory instruments (thus avoiding the attachment of the right to counsel) and before their arraignments in Queens Criminal Court. Justice Blumenfeld asked a law professor to opine whether District Attorney Brown’s policy was consistent with a lawyer’s ethical obligations or whether it violated any of the Rules of Professional Conduct. Not surprisingly, the ethics expert criticized Mr. Brown’s policy. We argued that the District Attorney’s petition is an unjustifiable attack on the independence of the judiciary. NYSACDL argued that it is well within the power of the judiciary to consider whether law enforcement has engaged in unethical conduct in an attempt to obtain an arrested person’s statements. We also argued that an Article 78 cannot be used to stop a judge from rendering a decision on a motion to suppress, and pointed out that Brown’s policy delays the filing of accusatory instruments in violation of CPL § 140.20 which requires an arrested person to be brought before a court “without unnecessary delay.” Our brief was written by me and Marshall A. Mintz, NYSACDL Amicus Committee co-chair.

We note that excellent amicus briefs were submitted by Ronald C. Minkoff and others for the Ethics Institute of the New York County Lawyers’ Association, by Lawrence J. Fox for several Legal Ethics professors, and by Thomas O’Brien of the Legal Aid Society’s Special Litigation Unit. Mr. O’Brien, in particular, deserves our thanks for this memorable paragraph:

“The authority of a famously busy appellate court should not be invoked to appease the collective vanity of lawyers who designed a program of interrogation that transgresses the ethical lines that other prosecutorial officers have managed to practice within. The surest remedy for reputational anxiety is to respect the boundaries surrounding the attorney client relationship and honor the ethical rules that restrain all attorneys.”

Oral argument was held in the Brown v. Blumenfeld case, which is itself unusual in an Article 78 proceeding; a decision is awaited.

In United States v. Treacy, 2011 U.S. App. LEXIS 4623 (2d Cir. Mar. 29, 2011), the Second Circuit acknowledged that Mr. Treacy’s constitutional right to confrontation was violated by the trial court’s prohibition of cross-examination of a Wall Street Journal reporter in any meaningful manner because of its misplaced concerns for the government witness’s First Amendment right. The Court held that “once a trial court has determined that the Government has made the required showing to overcome the journalist’s privilege and compel a reporter’s direct testimony, the trial court may not, consistent with the Sixth Amendment’s Confrontation Clause, thereafter employ the privilege to restrict the defendant’s cross examination of the reporter to a greater degree than it would restrict such cross examination in a case where no privilege was at issue.” Our amicus author, Joel B. Rudin of New York City, argued for both this Association and NACDL. Although we won the academic point, that victory did not help Mr. Treacy as the Court of Appeals panel found the error to have been harmless. A

Editors Note:
Cert. was denied by the Supreme Court in the Rosario case. The cert. petition in Battles is still pending.

---------------------------------------------
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Plaintiff vs. GALEN ROSE, Defendant

NOTICE OF MOTION
FILE NO.: 09-CR-329(A)

SIRS:
PLEASE TAKE NOTICE, that upon
the annexed Affirmation of Daniel J.
Henry, Jr., Esq., along with co-counsel
Peter J. Pullano, Esq. and upon all
the proceedings heretofore had, the
undersigned will move this Court on
behalf of Galen Rose at a date and
time designated by the Court, for
orders granting the relief requested in
Counsel’s Affirmation, and for such
other and further relief as is just and
proper under all circumstances.

Dated: March 16, 2011
Hamburg, New York

Respectfully submitted,

/s/ Daniel J. Henry, Jr.
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PETER J. PULLANO, ESQ.
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To: United States Magistrate
Judge Hugh B. Scott
United States District Court
418 U. S. Courthouse
68 Court Street
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Joseph M. Tripi, Esq.
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138 Delaware Ave.
Buffalo, New York 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Plaintiff vs. GALEN ROSE, Defendant

AFFIRMATION
FILE NO.: 09-CR-329(A)

STATE OF NEW YORK  )
COUNTY OF ERIE    ) ss:
VILLAGE OF HAMBURG )

DANIEL J. HENRY, JR., ESQ., being
duly sworn, deposes and says:
1. I am an attorney admitted to
practice before the United States
District Court of the Western
District of New York.

2. I am the attorney, along with
co-counsel Peter J. Pullano, Esq.,
representing the Defendant, Galen
Rose, in the above-captioned action.

3. This Affirmation is submitted
in support of Mr. Rose’s motion
pursuant to Federal Rules of
Evidence Rules 104(a), 401, 403,
702, 703, and the Fifth and Sixth
Amendments to the United States
Constitution, seeking exclusion of
gunshot residue evidence.

4. The grounds for this motion are:
   a. There is no reliable scientific
      basis for this proposed
testimony, and thus the
testimony is inadmissible
      under Daubert v. Merrell Dow
      Pharmaceuticals, Inc., 509 U.S.
      579 (1993) and Kumho Tire Co.
   b. The testimony is inadmissible
      under Rule 702 in that
      i. The testimony is not based
         upon sufficient facts or data;
      ii. The testimony is not the
          product of reliable principles
          and methods; and
      iii. The analysts who performed
           the comparison in this
           case have not applied the
           principles and methods
           reliably to the facts of the
           case;
   c. The subjective conclusion that an
      object contains gunshot residue
      related particles is so weak as to
      lack any probative value; and
   d. Any weak probative value
      of the proposed testimony is
      also substantially outweighed
      by the danger of unfair
      prejudice, confusion of the
      issues, and misleading the
      jury, and by consideration of
      undue delay, waste of time
and needless presentation of cumulative evidence, and is thus inadmissible under F.R. Evid. 403 and the due process and fair trial provisions of the Constitution.

5. This motion addresses the admissibility of gunshot residue analyst testimony, based on microscopic analysis of objects and hands, as described in Government’s discovery documents #001907-001910 entitled “Gunshot Residue Analysis” from RJ Lee Group, Inc. (Exhibit A).

BACKGROUND

6. On April 3, 2005, at the Buffalo Police Homicide Office, the following items were collected from Galen Rose and labeled as “Evidence Items 28 A-E”:

   GSR Kit
   A. Right Palm
   B. Right Back
   C. Left Palm
   D. Left Back
   E. Control

   Hoodie, Black “ICEBOAT 4XL” w/dirt/mud and other unknown stains on sleeves and back.

7. On April 3, 2005, while at 341 Seneca Street, the following item labeled as “Evidence Item 36” was removed from the trunk of a 1996 Caddy, 4DSD, green in color, bearing New Hampshire registration 183 1903 and VIN #1G6KD52Y3TU209701:

   GSR Kit
   A. Right Palm
   B. Right Back
   C. Left Palm
   D. Left Back
   E. Control

   Hoodie, Black “ICEBOAT 4XL” w/dirt/mud and other unknown stains on sleeves and back.

8. The said items in Paragraphs 6 and 7, more than five (5) years later, were submitted to RJ Lee Group, Inc., Monroeville, Pennsylvania, for gunshot residue analysis, which generated a report dated December 3, 2010. (Exhibit A).

ARGUMENT

A. THE DISTRICT COURT’S GATEKEEPING RESPONSIBILITY

As the Supreme Court has noted, “[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect.” Ake v. Oklahoma, 470 U.S. 68, 82 n.7 (1985) (citation omitted). Consequently, when a party moves to introduce scientific, technical, or specialized expertise, this Court is obligated, under Federal Rules of Evidence 104(a) and 702, to act as a “gatekeeper” to ensure the evidence “is not only relevant, but reliable.” Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579, 589 (1993) (emphasis added); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (expanding Daubert’s holding to expertise deemed “technical” or “specialized knowledge” under Rule 702); General Electric Co. v. Joiner, 522 U.S. 137, 142 (1997). In order to faithfully carry out its gatekeeping responsibility, this Court must adhere to the principles articulated in Daubert, Kumho Tire, and Joiner.

In Daubert, the Supreme Court articulated the legal framework for how non-science federal judges are to distinguish between reliable science and “science that is junky.” Kumho Tire, 526 U.S. at 159 (Scalia, J., concurring). This framework entails considering five (non-exhaustive) factors. First, whether the forensic “theory or technique…can be (and has been tested).” Daubert, 509 U.S. at 593. Second, “whether the theory or technique has been subjected to peer review and publication.” Id. Third, whether the technique has a “known or potential rate of error.” Id. at 594. Fourth, whether there exists any “standards controlling the technique’s operation.” Id. Fifth, whether the technique is “generally accepted” by the scientific community. Id. These factors should assist district courts in determining “whether the reasoning or methodology underlying the testimony is…valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Id. at 592-593.

Rule 702 further requires that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. As Daubert explains, this “condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” Daubert, 509 U.S. at 591 (citation omitted).

These key principles were incorporated into the amended Rule 702, which now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This “newly-expanded rule goes further than Kumho to ‘provide…some general standards that the trial court must use to assess the reliability and helpfulness
We do not consecrate the flag by punishing its desecration, for in doing so, we dilute the freedom this cherished emblem represents.

William J. Brennan


“While the inquiry into ‘reliable principles and methods’ has been a familiar feature of admissibility analysis under Daubert, the new Rule 702 appears to require a trial judge to make an evaluation that delves more into the facts than was recommended in Daubert, including as the rule does an inquiry into the sufficiency of the testimony’s basis (‘the testimony is based upon sufficient facts or data’) and an inquiry into the application of a methodology to the facts (‘the witness has applied the method to the data.’); United States v. Horn, 5 F. Supp. 2d 530, 554 (D. Md., 2002) (“Following the Kumho Tire decision and the December 2000 changes to Rule 702, a detailed analysis of the factual sufficiency and reliability of the methodology underlying expert testimony is required for all scientific, technical or specialized evidence, not just ‘novel scientific’ evidence.”).

As a result of these changes, although “for many decades ballistics testimony was accepted almost without question in most federal courts in the United States”, “like many other forms of expert testimony, this practice [is now] subject to new scrutiny in light of Daubert and Kumho Tire and the subsequent amendment to Federal Rule of Evidence 702, which gave to the courts a more significant gatekeeper role with respect to the admissibility of scientific and technical evidence than courts previously had played.” United States v. Glynn, 578 F. Supp. 2d 569 (S.D.N.Y. 2008).

Besides Rule 702, this Court must also evaluate whether the probative value of an expert’s testimony is substantially outweighed by the risk of unfair prejudice, confusion, or undue consumption of time. See, e.g., Fed. R. Evid. 403; United States v. Chischilly, 30 F. 3d 1144, 1156 (9th Cir. 1994). In other words, “the expert’s methods must be evaluated, not only for [this Court’s] gatekeeping role, but also to understand the impact of the evidence on the jury’s job as the factfinder.” United States v. Green, 405 F. Supp. 2d at 119 (D. Mass., 2005).

The federal rules are structured to ensure that only the most accurate information is being presented to and processed by the triers of fact. More specifically, the federal rules try to make certain that “(a) the opinions and conclusions of the expert are accompanied by information that enables the factfinder to evaluate the likely accuracy of the expert’s opinion, and (b) the information is presented in such a way that factfinders will not

2 As Justice Blackmun emphasized in Daubert: Rule 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses. Daubert, 509 U.S. at 595 (citation omitted); see also United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) (“expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse.”); United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) (“a certain patina attaches to an expert’s testimony unlike any other witness; this is ‘science’, a professional’s judgment, the jury may think, and give more credence to the testimony than it may deserve.”).
be fooled into excessively overvaluing the testimony.”’” Green, 405 F. Supp. 2d at 119 (quoting Michael J. Saks, The Legal and Scientific Evaluation of Forensic Science (Especially Fingerprint Expert Testimony), 33 Seton Hall L. Rev. 1167, 1167 (2003)) (emphasis added); see id. at 37 (Daubert and Kumho Tire’s ruling “derive from the Court’s concern about the impact of expert testimony on the jury.”). These concerns are especially present in the case at bar, where the Government’s Gunshot Residue Expert purports to conclude that component particles are found on the hands of Galen Rose and component particles and possible component particles are found on the sweatshirt.

While “district courts have considerable leeway in determining how to assess reliability, they do not have the discretion to simply abandon their gate-keeping function by foregoing a reliability analysis”. Kumho Tire, 526 U.S. at 158-59 (Scalia, J., concurring); Joiner, 522 U.S. at 147-148 (Breyer, J., concurring) (“neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the ‘gatekeeper’ duties that the Federal Rules impose.”). A district court’s failure or refusal to critically review evidence through Daubert’s prism may “be unreasonable, and hence an abuse of discretion.” Kumho Tire, 526 U.S. at 158-59 (Scalia, J., concurring); United States v. Nacchio, 555 F. 3d 1234, 1240 (10th Cir. 2009) (en banc) (“Though the district court has discretion in how it conducts the gatekeeper function, we have recognized that it has no discretion to avoid performing the gatekeeper function.”), quoting Dodge v. Cotter Corp., 328 F. 3d 1212, 1223 (10th Cir. 2003); United States v. Workinger, 90 F. 3d 1409, 1412 (9th Cir. 1996).

It must be emphasized at the outset that because this case deals with highly subjective gunshot residue analysis evidence, it is of utmost importance that this Court carry out its gatekeeping responsibilities faithfully and critically. See, e.g., United States v. Glynn, 578 F. Supp. 2d at 574 (“[B]allistics examination not only lacks the rigor of science but suffers from greater uncertainty than many other kinds of forensic evidence.”); Ramirez v. State, 810 So.2d 836, 853 (Fla. 2001) (commencing on the “rising national criticism of forensic evidence” and mandating that trial judges “must…cull scientific fiction and junk science from fact.”). After carefully reviewing the gunshot residue research (or lack thereof), Mr. Rose believes it would be “arbitrary, capricious, whimsical [and] manifestly unreasonable”, and a “clear error of judgment” if this Court concluded that the gunshot residue analysis made in this case satisfy Daubert’s stringent reliability and relevancy requirements. See United States v. Nacchio, 555 F. 3d 1234, 1240 (10th Cir. 2009) (en banc) (“Provided the district court performs the role, this Court’s review is deferential: we will not disturb the ruling ‘unless it is arbitrary, capricious, whimsical or manifestly unreasonable’, or ‘we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.”).

3 The “rising national criticism of forensic evidence” is due in large part to the increasing number of wrongful convictions which can be attributed to erroneous or fraudulent forensic evidence. See, e.g., Michael J. Saks & Jonathan J. Koehler, The Coming Paradigm Shift in Forensic Identification Science, 309 Sci. 892 (Aug. 2005) (reporting that forensic testing errors were responsible for wrongful convictions in 63% of the 86 DNA exonerations cases reported by the Innocence Project); Craig Cooley, Forensic Science and Capital Punishment Reform: an “Intellectually Honest” Assessment, 17 Geo. Mason U. Civ. Rts. L. J. 299, 386 (2007) (documenting numerous cases of forensic fraud); Craig M. Cooley, Reforming the Forensic Science Community to Avert the Ultimate Injustice, 15 Stan. L. & Pol’y Rev. 381, 395-397, 435-440 (2004) (listing and discussing capital and non-capital wrongful convictions attributable to forensic evidence). As one federal judge has commented in a firearm identification case:

Indeed, recent reexaminations of relatively established forensic testimony have produced striking results. Saks and Koehler, for example, report that forensic testing errors were responsible for wrongful convictions in 63% of the 86 DNA exonerations cases reported by the Innocence Project at Cardozo Law School. Green 405 F. Supp. 2d at 109 n. 6 (citing Saks & Koehler, supra).

See also, United States v. Bentham, 414 F. Supp. 2d 472 (S.D.N.Y. 2006) (“False positives – that is, inaccurate incriminating test results – are endemic to much of what passes for ‘forensic science.’”) (citing Saks & Koehler, supra). As a State Supreme Court Justice has commented, “There are numerous examples [of forensic fraud] in the literature.” State v. Clifford, 121 P. 3d 489, 503 n.4 ) (Mont. 2005) (nelson, J., concurring) (referring to Fred Zain, Ralph Erdman, and Arnold Melnikoff).

Read the full motion online at www.nysacdl.org

"There’s no such thing as second class citizenship. That’s like telling me you can be a little bit pregnant."

H. Rap Brown
THE EAST AFRICA
EMBASSY BOMBINGS TRIAL

USA v. Bin Laden et al.
Shortly after the verdict in this case on November 17, 2010, I was asked to write an article for our members on my own experiences as part of the trial team in *USA v. Bin Laden*. Our client, Ahmed Khalfan Ghailani, was found *not guilty* of 284 (of 285) counts that were charged against him in an indictment filed in the SDNY entitled *USA v. Usama Bin Laden, et al*. The death of the lead defendant means that will never face trial on U.S. soil, but another defendant in that case did face the rigors of our criminal justice system, and it was a case that can be held up as a beacon for all that is great about the rule of law. This was the most challenging and memorable case of my career, and one that reminded me on a daily basis (and sometimes minute-by-minute) of why I became a lawyer and, in particular, a criminal defense lawyer.

**BACKGROUND**

On August 8, 1998, two massive explosions substantially destroyed two American Embassies in East Africa. When the rubble was cleared, 224 people were dead and thousands more injured. Many of the survivors were blinded from the shattered glass and other material. Most of the dead and injured were *not* American citizens. Like the terrorists who planned and carried out the attack, the vast majority of the victims were practicing Muslims. Within hours of the attack, agents from the Federal Bureau of Investigation began what one FBI agent testified was “the largest commitment of overseas resources in the history of the FBI.” It remains so today. Hundreds of agents and other specialists descended upon bomb sites in Dar es Salaam, Tanzania, and Nairobi, Kenya, in an effort to determine who and what had caused this devastating attack on America. It did not take them long. Within minutes of the attacks, Bin Laden and Al-Qaeda took responsibility for the carnage.

**THE INDICTMENT**

The indictment charged numerous individuals including, among others, Bin Laden, Muhammad Atef, (the man who flew American Airlines Flight 11 into the North Tower) and Ayman Al Zawahiri, (the founder of “Egyptian Islamic Jihad” and Al-Qaeda’s second in command), with a number of related and unrelated counts. While the core of the indictment was the bombings of the embassies, the preamble described the birth of Al-Qaeda (Arabic for “the base”) and the joining of Bin Laden’s and Al Zawahiri’s terrorist organizations. The first count charged the overall conspiracy to wage war on America and American interests and alleged hundreds of overt acts, including the bombings. And of course, the 285 counts included 224 individual counts of murder, one for each of the victims.

**THE TRIAL TEAM AND THE PREPARATION FOR TRIAL**

On February 1, 2010, just 8 months before the scheduled start of the trial, I was added to an extraordinary team of lawyers and other professionals that was led by Peter Quijano and Michael Bachrach. While I jumped at the chance to be added to such an extraordinary team and such a historically significant case, nothing that I had ever experienced in the quarter of a century that I had practiced law prepared me for what was to come.

Putting aside the need to obtain security clearance which, fortuitously, I had already obtained in an unrelated case, the discovery material in the case was well beyond voluminous. Add together all of the discovery material that you have ever had in every case that you have ever handled and you would still not come close
to the material that was made available to the defense. In a word, the volume of discovery was simply unfathomable. Adding to the complexity of this endeavor was the fact that much of the discovery material was classified. And for those folks who have not had the experience of working on a case with material that is classified or have an understanding of the Classified Information and Procedure Act (“CIPA”), what this means is that you cannot review the material outside of a secret and secure location known as the “SCIF” (secure compartmentalized information facility). Worse, if you take notes, the notes are deemed classified and must, of course, remain in the SCIF. Motions that rely upon classified material had to be prepared entirely in the SCIF — without internet access! No internet research of any kind was available. In short, it was an organizational nightmare.

After I joined the trial team and had a chance to digest the extraordinary effort that was required to gain even a rudimentary understanding of all of the evidence in the case in the short time remaining, I understood immediately that there was one thing we needed more than anything: a new trial date; one that was at least another year away. As a team, we agreed that the best interest of our client required us to make a strong argument to convince the trial judge, the Honorable Lewis A. Kaplan, that fairness demanded that the defense team be given additional time to prepare for trial. In a written submission and during a status conference in March of 2010, we explained to Judge Kaplan in irresistible detail why, despite our ongoing best efforts to do so, it was not possible for us to be ready for trial the following September.

He said no!

With Judge Kaplan’s firm and final denial of our request for additional time, the team buckled down. Trips to Africa were followed by weekends and overnights in the SCIF with naps on the 8th floor couches of the Southern District Courthouse. Although Judge Kaplan hurt the defense by insisting on an earlier trial than we asked for, he was extremely accommodating when it came to funding requests. While we had only a hint of it until the eve of trial, Judge Kaplan was determined that our client was going to receive a fair trial. To our great surprise, we would soon come to learn that funding was just the beginning.

Judge Kaplan’s willingness to fund the defense made this effort possible. In addition to the three lead lawyers, Judge Kaplan also approved 3 additional lawyers in support positions. Peter Quijano was superbly supported by Anna Sideris while Michael Bachrach worked closely with a brilliant young lawyer named Karloff Commissiong. I had the privilege of working with Hanna Antonson who served not only as the team’s document coordinator but as my trial partner, and whatever work that I did in the case that affected the outcome would not have been possible without her tireless efforts. Together, this fine group of people accomplished what seemed impossible to me just a few months before — we were close to being actually ready for trial.

But it was hardly that simple. When we finally started to receive the 3500 material from the government in August, the disclosure included material for more than 250 witnesses. Among these witnesses were hundreds of civilians, dozens of field agents and other police witnesses as well as specially trained forensic agents and other highly specialized experts. For a number of reasons, among them that I had

2 The trial team had to go back and forth between the SCIF and an unsecure office that we had in another location when we needed to do internet research. Even that “annex”, as we called it, was not provided to the defense until nearly six months after motion practice began.
an interest in the forensic part of our work, we decided that I would be assigned all of the agents and forensic experts while Peter would handle most of the civilian witnesses. Michael continued to have primary responsibility for written submissions.

THE DEFENSE (OR LACK THEREOF)

Despite our combined efforts, there was a general sense of impending doom within the trial team as the summer came to an end and the trial date grew nearer. From the outset, it was clear that the government had a very strong case. Much evidence and testimony placed the defendant at various locations associating with known Al-Qaeda operatives and engaging in conduct that aided and abetted the crimes charged in the indictment. There was simply no realistic way to separate him from some of the more damming conduct. Yet, we were confident that the government did not have an actual member of the conspiracy willing to testify against our client. In short, the government did not have a conspirator/cooperator to testify that Ghailani knowingly and intentionally joined the conspiracy.

It wasn’t much but it was all that we had. Unfortunately, this defense largely depended upon having the client testify that he was an unwitting “dupe” of the bad guys. And there was one very big problem with advancing this theory: the client was refusing to come to court, let alone testify in his own defense. Indeed, he refused to even consider it; as the days remaining before the start of the trial dwindled, we were seemingly left without a defense.

To make matters worse, although the government did not have a cooperating witness in the traditional sense, they did have something that they considered much better - a witness who was prepared to testify that our client, Ahmed Khalifan Ghailani, purchased hundreds of pounds of TNT from him just a short time before the bombings. The witness, a man named Hussein Abebe, told agents that Ghailani traveled repeatedly to Arusha, Tanzania, to purchase “Trinitrotoluene” (TNT). Trinitrotoluene was the same explosive that was used in the bombs that destroyed the embassies in Dar es Salaam and Nairobi. And although Ghailani admitted to his interrogators that he had purchased TNT from Abebe, he claimed a benign purpose in doing so. While it was clear that the government trial team considered him to be their star witness, he was only a part of what appeared to be a devastating case. Numerous other witnesses were prepared to testify about other culpable conduct engaged in by Ghailani (e.g. purchasing gas cylinders and the truck that carried one of the bombs; fleeing to Pakistan a day before the bombings).

Then there was the forensic evidence: over a thousand fingerprints, genetic material, bomb fragments and other items that linked the conspirators to the crime. And, of course, the government also had what seemed to be a smoking gun: a detonator found in Ghailani’s bedroom that matched one found at one of the two bomb making facilities in Dar es Salaam.

Given the avalanche of evidence that the government had as we approached the start of jury selection, we were faced with what looked to be an un-defendable case. The mood on the team was decidedly grim.

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3 The government conceded that all of Ghailani’s post arrest statements were not admissible at trial unless and until he testified in his own defense.
A “SEPTEMBER” SURPRISE
At our bleakest moment, however, we were all reminded that it is truly “darkest before the dawn.” In this case, it was a stunning pretrial ruling by Judge Kaplan that breathed new life into the defense. The ruling was issued in connection with what has been described as our “Kastigar” Motion.4 The motion, filed under seal because it involved classified information, essentially asked the court to preclude any evidence that was directly or indirectly obtained through illegal government conduct.5 Although we continued to call it a Kastigar motion, it was more in the nature of “fruit of the poisonous tree.” At oral argument on this motion back in March of 2010, Judge Kaplan showed little interest in our position.

The fact of the matter is, neither did we. So little regard did we have for the likelihood of success on this particular motion that we jointly decided that our primary writer, Michael Bachrach, should not waste his time on it. Accordingly, primary responsibility was given to our secondary writer (that would be me). Michael, truth be told, was hardly without work at this time. His magnificent body of work in this case included motions to dismiss on various grounds including speedy trial, due process and other constitutional violations. Unfortunately, like the Kastigar motion, most of his fine work also involved classified information and is, for the most part, not available to the public.

To our surprise, and without warning, in late August 2010, less than a month before the scheduled start of jury selection, Judge Kaplan issued a classified ruling that made it clear to us that he was giving the issue infinitely more credence than we had thought.

He rejected most of the government’s arguments and ordered a hearing to determine if the government could persuade him that the one witness who would be affected by a ruling in their favor should not be precluded from testifying. That witness was none other than the government’s star witness — Hussein Abebe — the man who sold the explosives that were used to destroy two American Embassies.

A GAME CHANGER
Sitting in the SCIF reading the classified order granting a pretrial hearing, Michael and I realized instantly that everything had changed. We called Peter and hastily arranged a meeting. As we tried to digest the ruling, it was at first difficult for us to embrace the potential benefit if we could somehow prevail at the hearing. At the same time, we knew that in just a short time, more than a thousand 30 page jury questionnaires would arrive at our door, not to mention the rolling disclosure of 3500 material for 270 witnesses. If we could prevail, if the witness was not permitted to testify, we would be able to avoid having to call the client to the witness stand. It might be enough, given his innocent youthful appearance, if we could just get him to the courtroom.

When the hearing got underway, it was clear from the outset that Judge Kaplan was not unwilling to preclude the witness. The defense at the hearing, handled brilliantly by Peter and Anna, was well prepared, but it was Judge Kaplan himself who inflicted most of the damage on the government case. During oral argument after the last witness testified, he openly questioned the credibility of the government’s star witness. A few days later, the ruling was issued: Abebe would not be permitted to testify. In the written opinion that followed, Judge Kaplan wrote that he was “acutely aware of the perilous nature of the world in which we live.” And in words that filled us all with pride, he proclaimed “the Constitution is the rock upon which our nation rests,” and, he added, “[W]e must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand.” The judge delayed the trial’s opening until the following Tuesday to give the government an opportunity to appeal the ruling.

In that one moment, everything changed. We suddenly had life.

THE TRIAL
Selecting a jury in a case involving a terrorist act is among the most difficult things a lawyer will ever do; selecting one that charges your client with being part of Al-Qaeda makes it doubly so. But selecting an anonymous and partially sequestered jury in a courthouse that sits in the foothills of the wreckage of the World Trade Center, in an Al-Qaeda terrorist case? Well, that’s not something that seems likely to result in a fair jury. But somehow, someway, we got one. And while I would love to be able to say that it was a result of our detailed questionnaires and carefully calibrated screening process, the fact is, we just got plain lucky. The jury that was impaneled included, not surprisingly, people from all over Manhattan and Westchester and included both a JD and an MD, among other people with advanced degrees. What was a surprise was the fact that the panel itself was dominated by people of color. Of the 12 citizens who deliberated, only two were Caucasian.

As the trial began, the mood in the courtroom had shifted from just a short time before. On the wings of an extraordinary ruling from the court and what we believed was an exceptional jury, the defense was no longer in the depths of despair. Adding to our exuberance was our client’s

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5 The specific grounds are still classified.
sudden and unexpected willingness to attend the trial. This was hardly of minor significance. The client had a particularly youthful and innocent appearance and he was attired (thank you, Anna) to take advantage of this. While we were infused with a new-found enthusiasm, the mood of government team was somber. Knowing that the Attorney General and the President of the United States would likely be receiving daily updates during the trial must have added to the tension that they felt. Having suffered the stunning loss of their star witness and without a traditional cooperating witness, it seemed as if they knew that the trial might not go as smoothly as they had planned.

And it didn’t. Day after day, witness after witness, the case against our client seemed to weaken. The civilian witnesses of significance, skillfully cross-examined by veteran criminal trial lawyer Peter Quijano, simply did not provide the knockout blow that it appeared that they might. But the government still had what looked, on paper at least, to be an overwhelming amount of forensic evidence. And of course, they had the smoking gun - the matching detonator found in the client’s bedroom. More than enough, you might think, to provide the crucial link in the chain of evidence against him.

THE FORENSIC EVIDENCE
As one might expect in the case with the largest commitment of overseas resources in the history of the FBI, the amount of forensic evidence was enough to keep a dozen lawyers working full time for a year. Hundreds of specially trained forensic agents and evidence collection teams descended upon various sites in Dar es Salaam and Nairobi in the search for clues to the perpetrators. Within days, agents located the two bomb-making sites and subjected them to intensive searches. Agents also located a number of other sites that were of particular relevance to the client, including his home and his place of employment. But as we combed through the forensic evidence, we realized that something was missing: a solid link to the client. Among the thousands of items recovered by the FBI and subjected to rigorous testing of every kind, very little could be connected to the client. For example, of the 1,029 fingerprints, genetic material, fibers and similar evidence lifted from various locations, very little linking the client was found at any location of significance. Significantly, given the commitment of resources and the efforts to recover every single piece of evidence from each relevant location, it was impossible for the government to argue that the agents simply overlooked evidence that might have connected the defendant to the crime.

But they still had the detonator.

THE SMOKING GUN MISFIRES
Within a week after the bombings, agents identified Ghailani as a possible suspect and located his residence in Dar es Salaam; 15 Amani Street was a private residence owned by a friend of the defendant. It had 4 bedrooms, one of which was used by the client. And in a locked armoire that a witness testified Ghailani had exclusive control over, agents found an explosive detonator. An expert witness testified that the detonator matched a similar looking detonator located at the bomb-making facility a short distance away. In addition, agents recovered clothes from the same armoire and these clothes tested positive for residue of TNT, the same explosive used to make the bombs that destroyed the embassies. Together, this find in the defendant’s own bedroom seemed to be irrefutable evidence of his complicity in the deaths of over 200 people. But, in spite of all that, there was one very big problem for the government.

Given the nature of this case and the extraordinary effort by hundreds of field agents and other law enforcement personnel in what was then the largest terrorist attack on America, the last thing that we expected to find was a botched search. But that is exactly what happened at 15 Amani Street. Perhaps before they realized the significance of the location, agents entered the client’s residence along with local police. The locals conducted the room by room search with an FBI agent assisting. Among other things, they broke open the armoire and searched it, cataloging everything that they found. The search lasted the better part of a day. Inexplicably, the detonator was not found. Two days later, agents returned and searched the same armoire and, again inexplicably, there it was. It was hardly convincing. Compounding the error was the fact that agents commingled garments and other clothing and did not properly secure these items for testing. The failure to follow established protocol rendered the subsequent findings of explosive residue relatively meaningless. And since we made sure to remind the jury at every opportunity with every forensic witness how important it was to follow procedure, the blunders at 15 Amani were a critical factor in undermining the value of the government’s smoking gun.

THE DELIBERATIONS, VERDICT AND CONSCIOUS AVOIDANCE
The jury had been quietly deliberating over four days when it sent out a note to the judge, asking how much the defendant needed to know about Al Qaeda’s conspiracies to bomb and kill in order to be convicted. Just prior to that substantive request for a legal instruction, there was little else that they asked for except one potentially significant request — the testimony of the FBI agent who had botched the search at 15 Amani. I understood immediately that it was a pivotal moment in the trial, as we had
been arguing that he was duped into assisting in the conspiracy. If the jury did not believe the testimony about the detonator mysteriously found in the armoire, the case might come down to the instruction that Judge Kaplan would give to them.

There was an intense argument (outside the jury’s presence) about the theory of “conscious avoidance.” Over the objection of the defense, the judge had included such an instruction in his original charge to the jury. Now the lead prosecutor in the case argued that Ghailani needed only to know there was “some illegal purpose” to his activity. I argued for a higher degree of knowledge — that Ghailani had to have known the ultimate aims of the charged conspiracies. We broke for the day without answering the note and later that same night I sent an email to the defense team: “This is it right here. The entire case rests on this charge. Everybody please think and dream about this all night and let’s be ready tomorrow.” A flurry of email exchanges continued through the night. By 7:00 am the next morning Michael submitted a letter request to the Judge that included the language we wanted.

Thus, the entire trial came down to a single instruction on “conscious avoidance.” The jury wanted to know whether Ghailani could be convicted if he had suspected that something illegal was under way without knowing what. If that were the case, they asked, did he need to know the specific objectives of the conspiracy, as charged in the indictment? Or was it enough to say that he knew something unlawful was going on?

Although the instruction that the Judge ultimately gave to the jury included most of what we asked for, he eliminated some language that made it a little easier to fill the gap in proof that he had knowingly aided the conspiracy. A short time later, without any further requests of any kind, the jury sent in a note announcing that they had reached a verdict. After giving the media horde some time to assemble, the jury entered a packed courtroom that was filled with agents and AUSAs. As the jury foreman announced the unanimous verdict of the jury, we all sat in stunned silence as a jury made up of residents of the City and State of New York, sitting in a courtroom on the 26th floor of a courthouse just a short distance from Ground Zero, found Ahmed Khalfan Ghailani not guilty of 284 of 285 counts including 224 murder counts! With their verdict, they assured that he would be the only Guantanamo Bay detainee ever tried in a civilian court.

“I have a lifetime appointment and I intend to serve it. I expect to die at 110, shot by a jealous husband.”

Hon. Thurgood Marshall
What must you do if you are relieved as counsel?

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From time to time, lawyers are replaced by new counsel during the course of a criminal proceeding. An appointed lawyer may be replaced by another appointed lawyer or by retained counsel. On other occasions, a retained lawyer is replaced by a newly hired lawyer or by appointed counsel. In any case, the former lawyer has certain obligations to his erstwhile client.

A duty of loyalty is owed to one’s former clients. Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995); In re 1 Successor Corp., 321 B.R. 640, 649 (S.D.N.Y. 2005); People v. Luzzi, 167 A.D.2d 963 (4th Dept. 1990)(the duty of loyalty to a former client is broader than the attorney-client privilege). So, even if you are upset that your client has chosen to, as Abraham Lincoln once said, swap horses in midstream, you still owe him your faithful service in ending your relationship.

First and foremost, the prior lawyer is responsible for turning his file over to the new lawyer. The Code of Professional Responsibility provides that “a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the [former] client, including . . . delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.” CPR §1.16(e).

Likewise, CPR § 1.15(c)(4) calls upon counsel to “promptly pay or deliver to the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.” Before the enactment of the Code, the Disciplinary Rules of New York contained essentially the same requirements. DR 2-110 (A) (2) (22 NYCRR 1200.15 [a] [2]) and DR 9-102(c)(4) (22 NYCRR 1200.46).

In Khalil v. United States, 2011 U.S. Dist. LEXIS 6021 (E.D.N.Y Jan. 21, 2011), Judge John Gleeson found that a habeas corpus petitioner had a right to obtain his trial counsel’s file. The petitioner there had an arguable constitutional right to the entire trial record, but in any event, fairness required its disclosure. The court also relied upon Rule 1.16 of the New York Rules of Professional Conduct in finding that trial counsel was required to produce pretrial motion papers, responses and minutes, motions to quash, alibi notice, and stipulations. Id. at *6, n.2.

The State Court of Appeals has held that:

Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, “such originals and copies of other documents possessed by the lawyer relating to the representation as the … [former] client reasonably needs.” Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 91 N.Y.2d 30, 35 (1997). The Court opined that “an attorney’s fiduciary relationship with a client may continue even after representation has concluded. Among the duties of an attorney as a fiduciary and agent of the client are those of openness and conscientious disclosure.” Id. at 37.

Nor is there any justification for withholding so-called attorney work-product. The client is the one
who paid for the lawyer’s work product. In the Sage case, the Court of Appeals explicitly rejected the view that attorney work-product is exempt from disclosure. There is “no principled basis upon which exclusive property rights to an attorney’s work product in a client’s file spring into being in favor of the attorney at the conclusion of a represented matter.” Id. at 36.

The file belongs to the defendant and if prior counsel wishes to retain copies, he may do so at his own expense. NY State Bar Assn. Comm. on Professional Ethics, Op. No. 780 (2004)[1] (“a lawyer may retain copies of the file at the lawyer’s expense”). Cf. Moore v. Ackerman, 2009 NY Slip Op 29105, 24 Misc. 3d 275 (Kings Sup. Ct. 2009) (holding that because in a personal injury case, counsel is required to retain his file pursuant to 22 NYCCR 691.20(f), the reasonable cost of copying may be charged).

In a criminal case, the need for the new lawyer to obtain his client’s file is a matter of the client’s liberty interest and implicates the court’s need to see it that the case proceeds smoothly. A prior lawyer’s delay in turning the file over to new counsel often delays the criminal case itself. The failure to deliver the client’s file (or his funds) to him has often been a reason for the imposition of professional discipline. See Matter of Sirkin, 77 A.D.3d 320 (1st Dep’t. 2010); In re Cohen, 22 A.D.3d 89 (2d Dep’t. 2005) (failure to turn files over to new counsel); Matter of Losner, 217 A.D.2d 376 (2d Dep’t. 1995) (respondent failed to promptly deliver case file); Matter of Solymosy, 252 A.D.2d 152 (1st Dep’t. 1999) (respondent refused to turn over the file to new counsel, resulting in respondent’s arrest for contempt of court order directing that the file be returned); Matter of Corcoran, 243 A.D.2d 86 (1st Dep’t. 1998) (respondent failed to return that client’s legal file after his discharge); Matter of Joseph, 237 A.D.2d 727 (3rd Dep’t. 1997) (respondent failed to promptly forward a client’s file to new counsel); Matter of Rippes, 228 A.D.2d 129 (1st Dep’t. 1997) (respondent failed to provide the new attorneys with case files, requiring the new attorney to move for a court order to compel him to turn over the file).

Short of seeking professional discipline, new counsel can gently remind prior counsel of his or her obligations. Failing to get counsel’s attention, one can file a motion with the criminal court for an order for production of the file, serving both the prosecutor and prior counsel.

Retaining liens—which apply in civil cases—cannot be used as a basis for failing to deliver the file to new counsel in a criminal case because a defendant’s urgent need to defend a criminal case can override prior counsel’s financial interest. See Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983); United States v. Ringwalt, 210 F. Supp. 2d 653 (E.D. PA 2002).

Indeed, “To honor a retaining lien in a criminal case would not only cause a delay in the trial of the case, but where the original attorney has the papers connected with the litigation, substituted counsel may not be able to prepare his case.” People v. Altvater, 78 Misc. 2d 24, 25 (Sup. Ct. Bronx 1974). In the Altvater case, the court permitted new counsel to “photostat” prior counsel’s file.

However, if your client owes you significant fees, there is substantial authority in both state and federal courts for judges to resolve fee disputes in criminal cases. You might decide to litigate against your former client to recoup fees owed but you may also have the option of asking the judge before whom the criminal case is pending to resolve your fee dispute. And you should understand that your former client could ask the court to order the return of unearned fees.

It is well established that Supreme Court has inherent power to supervise the fees attorneys charge for legal services. Stortecky v. Mazzone, 85 N.Y.2d 518, 525 (1995).

There has long been recognition of the traditional authority of the courts to supervise the charging of fees for professional services under the court’s inherent and statutory power to regulate the practice of law (Matter of First Nat. Bank of East Islip v Brower, 42 NY2d 471, 474; Gair v Peck, 6 NY2d 97; Federal Land Bank of Springfield, Mass. v Ambrosano, 89 AD2d 730, 731; see Judiciary Law, § 90, subd 2). It thus became incumbent upon respondent Judge to rule both upon the motion for leave to withdraw and the quantum meruit value of petitioner’s services to that time.


However, it would be wise to keep in mind that if the prior counsel was terminated “for cause,” the client would be entitled to a full refund of the fees paid to the first lawyer, notwithstanding his retainer agreement. Brumer, 420 F. Supp. 2d at 208 citing Garcia v. Teitler, 2004 U.S.
Retained lawyers who are replaced are entitled to be paid in quantum meruit for the work they have performed. When a client discharges an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover only the reasonable value of services rendered in quantum meruit. Matter of Cooperman, 83 N.Y.2d 465, 473 (1994); Meyer, Soozi, English & Klein, P.C. v. Vista Maro, LLC, 2011 N.Y. Misc. LEXIS 582, 2011 NY Slip Op 30173U (N.Y. Sup. Ct. Jan. 12, 2011).

In the Brumer case, Judge Kimba Wood described the factors a court considers in making a quantum meruit determination of the reasonableness of attorneys’ fees including: (1) the difficulty of the questions involved; (2) the skill required to handle the problem; (3) the time and labor required; (4) the lawyer’s experience, ability and reputation; and (5) the customary fee charged by the Bar for similar services. 420. F. Supp. 2d at 211 citing Mar Oil, S.A. v. Morrissey, 982 F.2d 830, 841 (2d Cir. 1993). Accordingly, it is always helpful for retained counsel to maintain contemporaneous records of their hours –even in a flat fee case– so that they can reasonably demonstrate the time they put into a client’s case.

When a new lawyer takes over your criminal case, the best policy is to promptly deliver the file to him or her quickly so as to avoid prejudice to the former client and problems for you.
TAX FRAUD, QUI TAM, THE NEW TAXPAYER-PROTECTION UNIT AND THE SPECIAL INVESTIGATIONS UNIT:

What does it all mean to the criminal practitioner?

The phone rings; it’s a long-time client of yours who has done very well for himself in the market. He amassed a small fortune and has been “retired” for almost five (5) years now. You know this because you attended his farewell party when he decided to leave the hustle and bustle of Manhattan and move to sunny Florida. You teased him about keeping an apartment in New York City because he would only visit it on rare occasions. Unfortunately, he visited this apartment a bit more than he planned to. He also spent time in the Hamptons with friends last summer. He is calling you and telling you this because he is undergoing a residency audit. That audit has just turned very nasty because he received a letter from the New York State Department of Taxation and Finance Special Investigation Unit (“SIU”). The letter indicates that he is now under criminal investigation. You had previously done your job, referring him to very capable tax counsel to orchestrate his leaving New York State and allow the client to get out of the oppressive burden of New York State taxes. Regrettably, once New York State gets their hooks in you, they do not want to let go. You schedule an appointment for him to come in, with his tax lawyer, to get to the bottom of this.

The next call you get is from the Manhattan District Attorney’s Office Revenue Crimes Bureau Chief. She, like your client, has received a copy of the “SIU” letter from the New York State Tax Department. She has also received the auditor’s file and is looking at a charge of Grand Larceny, based on the amount of tax that your wealthy client managed not to pay. All that you know at this point is that your client left for Florida, spent some time in NY and that very capable tax counsel has been handling NY’s claim for more money from this former resident. How can this be criminal?

Truth be told, that second call could come from either the local District Attorney’s Office or from the New York State Attorney General’s Office. The “SIU” has the authority to investigate tax crimes and refer them to prosecutors, but the “SIU” does not have the authority to prosecute the alleged crimes themselves. They need the cooperation of the local or state wide prosecutors. Since the SIU Counsel are not “prosecutors” they do not have the ability to enter into plea agreements, issue “queen for the day letters” or give appropriate credit for cooperation. Simply put, the SIU is a very well educated client of the prosecutors – the “victim” of the crime.

The next time you see an SIU letter is when you stop in your favorite local deli. The owner is scratching his head and looking at a letter from the New York State Department of Taxation and Finance. He knows that you are a lawyer and asks you to take a look at this letter. Apparently, the Deli owner has been under audit for a couple months, and the Tax Department sent in some agents to “observe” his operations. He was “assessed a penalty” based on an under reporting of Sales Tax. Now he has this “SIU” letter and wants to know what to do.
The first thing he should do is make sure he has a very good accountant and records. An “observation audit” where the department sits and watches the function of a business for a day or two can lead to some very disturbing and false conclusions on behalf of the tax department. Maybe the deli was very busy because it was a certain time of the month, a holiday season or during finals near a university. When the auditor tries to extrapolate his observations and base a year’s worth of sales tax on a couple days of watching, the results are likely to be very off. Remember, the Tax Department is the client and needs to convince a very busy prosecutor’s office to take this case on. You may be able to convince the local District Attorney or Assistant Attorney General that this case is not worth his time. After all, there are “real crimes” being committed like murder, robbery and rape. Careful with this approach though, as it does not please those in the Tax Department to hear that a theft from the State is not a “real crime”.

HOW DOES THE SIU DECIDE WHAT CASES TO TAKE?

On September 30, 2008 the New York State Department of Taxation and Finance issued guidelines for “Criminal Prosecution of Tax Fraud Cases.” These guidelines, under the direction of then Governor Spitzer, gave birth to the Special Investigations Unit (“SIU”) and charged those in the SIU with the task of identifying and developing tax fraud cases that will best advance the law enforcement objectives underlying the criminal statutes aimed at punishing and preventing tax fraud. Every single investigation opened by the SIU is one where the Department has determined that criminal sanctions are a potential outcome.

Since the creation of the SIU, prosecutors have been given an arsenal of tools to fight tax fraud and the manpower to take on large scale investigations. In fact, prosecutors recently gained the largest potential team of investigators ever assembled, the citizens of the State of New York. Yes, *Qui Tam* whistleblower plaintiffs can now bring actions under the New York False Claim Act (“NYFCA”) based on allegations of tax fraud. The recent enhancement of the False Claims Act, called the Fraud Enforcement and Recovery Act (“FERA”), was authored by Attorney General Schneiderman and brings a number of “firsts” to a state-level false claims statute, including the addition of the power to crack down on large-scale, multi-state corporate tax fraud schemes, expansion of whistle-blower protections, and closure of loopholes that made it difficult to prosecute corrupt subcontractors.

Traditionally, False Claims statutes - like the NYFCA - have imposed liability on persons who knowingly present false or fraudulent claims for payment to the state or local governments, misappropriate state or local government property, or deceptively avoid binding obligations to pay the state or a local government. Now, the NYFCA covers violations of the tax law, including submission of a fraudulent return, provided that the violator has an income over $1 million and the harm to the state exceeds $350,000. A defendant may be ordered to pay up to three times both the actual harm to the state and consequential damages, as well as a fine of between $6,000 and $12,000 for each violation of the NYFCA.

Picture this: a high level employee (one with “inside knowledge”) working for a company that owns and specializes in operating a few high-end restaurants. For the past six or so years the corporation has reported in its tax returns that it has made more than $30 million in royalty payments to a related Luxembourg corporation for the use of a trademark-protected family name in the operation of the New York restaurants. Those royalty payments were deducted from taxable earnings and reduced the corporation’s state and city tax liability by more than $10 million. Based on his position, the employee knows that the claimed deductions were false and that no royalty payments were ever made.¹

Ever heard “Cash is King”? Well, in this current enforcement environment that saying may either be remarkably true or it may lead a business owner down a road to certain disaster. Consider the arrest of a Brooklyn businessman on charges of filing false General Corporation Tax returns with the New York City Department of Finance and, as a result, evading approximately $1.2 million in taxes over three years. This owner of a medical management company was accused of claiming approximately $1 million in annual revenue, which matched his bank deposits, while cashing another nearly $14 million in checks at a Manhattan check cashing company over a period of three (3) years. As a result, the business owner was accused of evading taxes totaling over $1.2 Million in the three (3) year period. If you don’t believe the employee at the check cashing business has a strong incentive to alert the authorities, think again.²

That employee, or any other employee with this type of knowledge, has a huge incentive to reveal this fraud to the government. Under New York’s amended False Claims Act, whistleblowers can collect rewards of at least 10 percent and, in some cases, as much as 30 percent of the full amounts paid by a defendant found liable for violating the act. This


includes treble damages and penalties ranging from $6,000 to $10,000 per transaction. Even if this employee was part of the scheme, he can still recover a portion of the proceeds. Any amount due to an individual that participated in the fraud and then “found God” will be determined by the court. If the “whistleblower” has been criminally convicted for his role in the fraud, he is then barred from any recovery.

The incentive given to private citizens is clear, as the relator who files a successful claim may receive between 15 and 25 percent of any recovery when the New York State Attorney General intervenes on behalf of the state and prosecutes the case. If the state does not intervene and the whistleblower proceeds with the case on his or her own, he or she may receive between 25 and 30 percent of the recovery.

This addition to the NYFCA adds an important arrow to the quiver of New York State’s prosecutors. In conjunction with the expanded statute, New York’s Attorney General Eric Schneiderman has created the taxpayer-protection unit (“TPU”) to target multi-state corporate tax fraud schemes, corrupt contractors and firms that rip off public pension funds. The TPU, which will encourage whistleblowers to expose corruption, is specifically empowered by the newly strengthened NYFCA, which Schneiderman called “the strongest anti-fraud statute in the United States.”

The tools to combat tax fraud have expanded even beyond the creation of the SUI and TPU. For example, New York recently enhanced its criminal laws to address tax fraud. The following will offer a brief review of some other laws now available to traditional prosecutors.

A prime example of the “low hanging fruit” that prosecutors will easily pick is one’s failure to pay, collect, or remit sales tax. Prosecutors view a business owner’s failure to remit sales tax that he or she has collected as a simple larceny. Since the business owner collects and holds that sales tax “in trust” for the state, prosecutors will not hesitate to pursue criminal charges when the “trust” money is not paid over to the State. In fact, Tax Law § 1817(c) makes it a misdemeanor for the business owner to willfully fail to collect sales tax. If the amount that the business owner fails to collect is $10,000 or more, or if he or she fails to collect tax and does so through a common scheme or plan consisting of 10 or more failures to collect tax on sales of $100 or more each, the charge becomes a felony. On the income tax side of things, Tax Law § 1806 makes it a misdemeanor when a taxpayer willfully fails to collect or pay over to the state any income taxes that are required to be withheld. With these enhancements to traditional larceny charges, it is easy to see why the failure to remit (or in some cases to collect) sales tax or income tax is a favorite subject of investigation for prosecutors.

In addition to traditional larceny prosecutions, the New York State Tax Law criminalizes one’s failure to keep proper records or failure to file tax returns in several different ways:

- If a taxpayer fails to file an income tax return or supplies false or fraudulent information, with the intent to evade taxes, the taxpayer is guilty of a misdemeanor.\(^5\)
- Three consecutive years of failing to file with the intent to evade taxes becomes a felony.\(^4\)
- If you are required to file a sales or use tax return, and you willfully do not, you are guilty of a misdemeanor.\(^5\)

The ever increasing budget deficits are driving prosecutors’ interest in enforcing tax laws and recouping money. When we combine this with the recent creation and enhancement of enforcement tools, we obviously have a ripe environment for tax crime enforcement. Although prosecutors generally find criminal charges emerging from existing civil audits, the new energy behind enforcement has led to these specialized units employing traditional undercover operations in an effort to catch tax frauds.

The SIU is utilizing agents in a variety of ways to catch those who previously stayed under the radar. Some of the recent enforcement tactics include:

- Undercover agents posing as taxpayers with a story and a box of records visit an accountant and ask “If I have not filed in 3 years, what should I do?”
- Clients that are currently under investigation are wearing a wire while discussing less than

\(^{5}\) Tax Law § 1817(a) willful failure to file a report or return.

\(^{6}\) Tax Law §1817(b)(1) filing a fraudulent return.

\(^{7}\) Tax Law § 1817(b)(2) disclosing false information to the department.
legitimate deductions with their longtime accountant.

- Undercover agents ask a jeweler for the “cash price” on a certain high dollar piece of jewelry.
- State tax agents running computer searches to match realtors on high value real estate transactions with that realtor’s filing of a New York State income tax return.

WHAT DOES THIS MEAN TO THE EVER VIGILANT DEFENSE COUNSEL?
Your base of clients is ever expanding. Small business owners, accountants, CFO’s and high net worth individuals are all being targeted. You should reinforce the message to your clients to keep well organized tax records, establish document retention policies, establish protocols for responding to auditors and to keep your number handy in the event of a search warrant being executed.

It goes without saying that the first line of defense in these cases is a well organized and accurate set of records. This is important to allow the forensic accountants you will be hiring to get a jump start on defending the case. Depending on the type of tax return being investigated, auditors and agents may be examining records related to income, expenses, deductions, credits, sales, and even residency. The taxpayer will be well served to keep a clear and accurate record of appointment calendars, mobile phone usage, credit card statements, frequent flyer records and other items that can prove where the individual was on a given day, in case of a residency audit or investigation. These records should be kept for a minimum of three years to satisfy the general statute of limitations. However, remember that if there are allegations of fraud, there is no statute of limitations that applies to the underlying actions. Also, with the addition of Tax Law sections dealing with the failure to maintain adequate records, a client’s failure to keep this information may result in an independent and additional criminal charge.

The recent amendment of NYFCA to include Tax Fraud, coupled with the wide array of statutes and agents directed to investigate and prosecute tax fraud, makes certain that criminal practitioners will encounter more and more of these cases. One axiom stands true in every type of criminal prosecution - “Look for the money, the money.” This truism is especially appropriate in tax fraud cases now that the public has an extra incentive to assist with prosecutions. A solid stable of forensic accountants, a well educated clientele, and literal adherence to the letter of the law will go a long way in keeping your clients out of the headlines and out of criminal court.

SAMPLE LETTER

State of New York
Department of Taxation and Finance
Investigations and Criminal Enforcement Bureau
Special Investigations Unit
1740 Broadway, 17th fl., New York, NY 10019
Telephone (212) 459-7826
Facsimile (212) 459-7905

Dear ________________:

As per conversation with the Department’s audit of ________________ is now being conducted as an investigation by our Special Investigations Unit. In addition to the identification and collection of unpaid taxes and interest, this investigation is geared toward determining whether an enforcement action, including imposition of civil fraud penalties and/or referral of the matter to a prosecutor for appropriate action, is warranted in this case. Accordingly, this matter will not be conducted in the same manner as a civil audit, and will involve a review of all relevant taxes, including but not limited to sales tax.

During the course of the investigation, I will be your principal contact at this Department and will initiate all requests for documents and other information. Please furnish an updated power-of-attorney for yourself and other representatives consistent with the investigation. Also, please furnish a power-of-attorney for all owners, officers, and managers of the company that your office represents.

Thank you for your cooperation in this matter.

Very truly yours,

Associate Attorney
INTRODUCTION
Criminal sanctions play an important role in tax administration and the Legislature has recognized this fact through its enactment of numerous criminal penalties for deliberate taxpayer fraud and misconduct. It is the role of personnel assigned to the Special Investigations Unit ("SIU") to identify and develop tax fraud cases that will best advance the law enforcement objectives underlying these criminal statutes. Although the SIU is charged with the responsibility and authority to use both civil and criminal tools to investigate and fight tax fraud, every investigation opened by the SIU is one where the Department has determined that criminal sanctions are a potential outcome. While ultimate authority for pursuing prosecutions rests with prosecutors – itself an important safeguard against improvident use of the criminal law – the referral of a case for prosecutorial consideration or, even more clearly, pursuit by the Department on its own initiative of an arrest or search warrant, is itself a significant step with likely adverse consequences to the subject of the action.

Given the gravity of the decision to pursue criminal sanctions, this memorandum sets out the factors that SIU personnel must consider when opening an SIU matter and, even more importantly, when determining to seek criminal sanctions. Whether the criminal process is initiated by referral to a prosecutor or by directly initiating a prosecution using the Department’s police powers, no action should be taken without careful consideration of the factors set forth in this memorandum. The considerations set forth in this memorandum apply not only to taxpayers but also to any individuals and entities, such as tax preparers, who participate in a tax crime, cause another to commit tax crime, or aid and abet activity in violation of the criminal law that defeats the collection of taxes due the State or interferes with the proper administration of the tax system.

I. FACTORS TO CONSIDER IN DETERMINING WHETHER TO SEEK CRIMINAL SANCTIONS FOR TAX FRAUD: GENERAL CONSIDERATIONS

Punishment of the offender: One recognized objective of criminal law enforcement is to impose punishment for misconduct that is just and fair and designed to insure that the misconduct will not be repeated. The Department views deliberate tax fraud as serious misconduct which warrants punishment. Whether a criminal sanction is necessary to achieve this objective will turn on an evaluation of the particular case and the particular defendant. A comprehensive but certainly not exclusive list of factors to consider is set forth below, but in general those factors will include an assessment of:

- The nature and seriousness of the misconduct and the harm caused by that conduct.
- The putative defendant’s history of tax offenses or misconduct.
- Whether there are other non-criminal sanctions available that are sufficient to
punish the offender and to insure future compliance with the law.

**Deterrence of misconduct by others:** Another well-recognized objective of criminal law enforcement is to deter misconduct by others. Well-publicized criminal prosecutions serve as examples to others that misconduct will not be tolerated. To be effective in meeting this objective, each criminal prosecution should convey the message that taxpayers should comply with the law to avoid being likewise caught and punished for violating it.

The deterrent impact of SIU investigations and prosecutions is an essential part of the Department’s strategy to increase voluntary compliance. Thus, where the Department identifies an area where noncompliance is widespread, criminal prosecutions may be appropriate even though the individual wrongdoing does not involve significant tax losses but the cumulative impact of that wrongdoing by many individuals causes the state great harm.

**Building respect for the law and creating a fair and equitable tax system:** Finding the right balance in criminal tax enforcement is crucial to the Department’s tax gap strategies. Aggressive criminal tax enforcement is important to the Department’s efforts to build respect for the tax law (including its filing requirements, record keeping requirements, and its subpoena compliance mandates) and to level the playing field for those taxpayers who are following the rules. We know, however, that criminal enforcement that is overly aggressive and harshly inflexible can be counter-productive. Our decisions in individual cases must be just, reasonable and balanced and must reflect our appreciation of the impact of the decision to pursue criminal sanctions on the individual or company whose conduct is in question.

We have a responsibility to the public and to the individual taxpayer to enforce the law with fairness and reasonableness.

**II. SPECIFIC FACTORS TO BE CONSIDERED**

Each individual case must be addressed on its own merits and there is no litmus test to determine whether a particular case will be treated as a criminal matter. Sometimes factors beyond the four corners of the particular case will have to be considered including, for example, considerations of the Department’s resources and priorities and the preference of our partners in tax enforcement – our District Attorneys and state prosecutors. This list is not intended to be exhaustive, but is merely a guide to help SIU personnel evaluate each case as it is opened, investigated and ultimately prosecuted.
a. Factors relating to the nature and seriousness of the misconduct and the harm caused by that misconduct:

The inquiry should begin by examining what the taxpayer (or the subject of the investigation) did and how seriously wrong his or her actions were. Did the taxpayer engage in a scheme involving multiple acts of deception? Did the taxpayer repeatedly and knowingly create and file fraudulent documents? Did he or she enlist others in a criminal conspiracy? Is the target of the investigation a tax professional, rather than a taxpayer, who for compensation helped taxpayers defraud the state?

Here are some additional factors to consider when evaluating the nature and seriousness of the tax fraud or misconduct:

1. The size of the tax loss involved.
2. Whether the loss stems from multiple tax types.
3. Whether the loss persists over multiple time periods or for multiple taxpayers.
4. Whether the fraudulent tax activity is combined with other fraud or illegality.
5. The reasons for the fraud and the degree of venality displayed.

b. Factors relating to the taxpayer or the subject of the inquiry:

The individual circumstances of the taxpayer or the subject of the investigation are obviously of crucial importance in determining whether a criminal prosecution is appropriate. Is this the taxpayer’s first brush with the Department or does the taxpayer have a history of noncompliance? Has the taxpayer been cooperative, expressed remorse and made efforts to correct his misconduct and make the state whole? Can the taxpayer offer cooperation that will reveal other, perhaps more serious, misconduct by others?

It is appropriate for the Department to evaluate the remorseful, first-time offender more leniently than the recidivist who has been previously warned to comply with the law and it is also appropriate for the Department to consider offers of meaningful cooperation. Here are examples of some factors to consider:

1. The tax history of the putative defendant.
2. The criminal and other personal history of the putative defendant.
3. The circumstances of the individual putative defendant (age, health, family situation).
4. The reasons for the misconduct (whether motivated purely by greed or by some less culpable motivation).
5. The extent of restitution that the taxpayer or other subject has voluntarily made and his willingness or unwillingness to make the Department whole.
6. The putative defendant’s willingness to cooperate with the Department in its investigation or audit of his conduct.
7. The putative defendant’s willingness to cooperate in the investigation of the wrongful conduct of others known to him that can lead to significant tax recoveries or the exposure of significant fraudulent conduct by others.
8. Whether the subject of the inquiry has recognized that his or her conduct was unlawful and accepted responsibility for his actions.
9. Whether the putative defendant has demonstrated remorse for his misconduct and the resolve to correct the misconduct in the future.
10. The putative defendant’s willingness to enter into a compliance agreement and to accept terms to assure the Department that there will be future compliance with the law.
11. The collateral consequences to the subject of the inquiry or to innocent third parties that might follow a criminal investigation, prosecution or conviction (e.g., loss of a license to engage in a profession, or the loss of innocent persons’ employment; loss of vital community services, etc.).

c. Factors relating to the strength of the case:

Obviously, unless the misconduct can be proven to have occurred beyond a reasonable doubt, the case cannot be prosecuted. Here are some factors to consider that relate to whether the case can be successfully prosecuted:

1. The quality of the proof of the crime, particularly the intent elements and the resources required to pursue the case to establish those elements. Does the taxpayer have some legal defense to the possible charge that would defeat prosecution?
2. Is this a case that the prosecutor would be willing to prosecute? If the matter has been the subject of a prosecutor’s request, ordinarily much deference will be afforded to the prosecutor because as a public servant responsible for enforcement of the criminal law, the prosecutor has determined, using substantially the same considerations as those set forth in this memorandum, that the matter should be pursued through criminal investigation. Where there is no prosecutor’s request, the assessment of whether a prosecutor would pursue the matter may derive from general
law enforcement or prosecutorial experience, prior dealings with the individual prosecutor, or discussions with the prosecutor setting forth an outline of the case in a manner that does not disclose the identity of the subject or tax secret information.

d. Factors relating to the Department’s objective of achieving general deterrence:

Given the nature of the suspected misconduct and the defendant’s particular circumstances, consideration must be given to whether this a case where the Department should expend the resources needed to prove the misconduct. The pursuit of even minor criminal offenses may be appropriate where necessary to deter others from engaging in similar unlawful conduct. Because fraud investigations are often time-consuming and difficult, consideration must also be given to whether the case is of sufficient importance to the Department’s overall objectives to warrant the Department’s investment of resources.

1. Is the type of misconduct widespread and does it relates to an area where specific or general deterrence is needed? By taking a criminal action against this offender, is other potential misconduct likely to be deterred?

2. Whether an alternative civil penalty, perhaps coupled with a compliance agreement or the appointment of a monitor at the offender’s expense, an adequate remedy to address the offender’s misconduct. Would it be adequate to prevent future misconduct and deter others from engaging in the same misconduct? Where deterrence is important, will the taxpayer waive secrecy of an administrative sanction so that the Department may publicize the administrative action to achieve a deterrent impact?

People are more afraid of the laws of Man than of God, because their punishment seems to be nearest.

William Penn
Some Fruits of Solitude

Submit an Article to Atticus

Members wishing to submit articles for inclusion in Atticus should submit them via email to atticus@nysacdl.org. Questions regarding submission may be directed to:

Margaret Alverson, Executive Director, NYSACDL
212-532-4434, malverson@nysacdl.org

The editors reserve the right to modify any submission for style, grammar, space and accuracy. Authors are requested to follow these guidelines:

1. Use footnotes rather than endnotes.

2. When a Case is mentioned in the text, its citation should be in the text as well.

3. Articles longer than 4 pages may be edited or serialized.
Evidence of uncharged crimes can be more devastating at trial than evidence of the charged one. Seeking confidence in the accuracy of their decisions, jurors often rely on familiar cues or informational shortcuts, one of which is that “past behavior predicts future conduct.” While it is well-established that “bad character” evidence may not be admitted to show propensity to commit the offense, it may come in – some might say cynically, sneak in – under a slew of other theories: to show things like intent, motive, plan and identity under Fed.R.Evid. 404(b); because it is inextricably intertwined with the evidence or necessary to complete the story; or, one of the most troubling theories of all, to show the “criminal relationship” between the defendant and alleged co-conspirators. The concern from the defense perspective is that the evidence becomes more than just diagnostic, but dispositive – that the “minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it.”

“Other act” evidence came under the microscope in the recent case of United States v. Curley, leading to a reversal and some quotable conclusions about “other act” evidence involving other people, and “other act” evidence occurring after the charged offense.

IT’S NOT THE CRIME, IT’S ALL THE OTHER ONES

Curley was convicted of stalking and harassing his wife Linda in the summer and fall of 2006, in violation of 18 U.S.C. §§2261A and 2262(a) (1). At trial, the district court admitted evidence that: (1) Curley had abused Linda over the course of many years; (2) his brother had abused Linda some sixteen years earlier; and (3) Curley was the subject of a traffic stop in 2008, during which his last will and testament, rifles, ammunition, a bullet-proof vest, and a ski mask were found in his rental car. Only the first was properly admitted, the Court held, and the admission of the other two categories required a remand for a new trial.

Curley’s contemporaneous abuse of Linda was “directly relevant to his intent and her fear,” and his abuse of her in earlier years – even predating the charged conduct by fifteen years – was similarly “probative of Curley’s intent and Linda’s reasonable fear... collectively demonstrate[ing] a pattern of activity that continued up to the time of the charged conduct.” Its probative value outweighed its prejudicial effect where “the prior acts paralleled the charged conduct” and “were no more sensational or disturbing.”

The brother’s beating of Linda sixteen years earlier, however, in which there was no allegation that Curley conspired, and did not parallel any of the underlying conduct was of “slim” probative value, and “served no real purpose than to show that [the brother] – not Curley – had a bad character.” The Court added that “the high risk of prejudicial effect” was not cured by the trial court’s single limiting instruction in its jury charge, noting that “limiting instructions cannot be regarded as a guaranty against prejudice.”

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The 2008 traffic stop lacked the necessary “close” parallel to the charged acts required before subsequent, post-offense acts may be admitted.\textsuperscript{10} There was “insufficient evidence indicating Curley’s activities that day were related to or directed at Linda” and thus, “[t]he jury could only speculate that Curley was targeting Linda in January 2008,” through “a tenuous and unduly long chain of inferences.”\textsuperscript{11} Any probative value was outweighed by its “certain[ty] to arouse the jury’s emotions against Curley.”\textsuperscript{12} Moreover, the Court pointed out that “the presumption that juries follow limiting instructions is dropped where there is an overwhelming probability that the jury will be unable to follow the court’s instructions and the evidence is devastating to the defense.”\textsuperscript{13}

Finally, the error was not harmless here, where the record could not give the Court “fair assurance” that the “highly prejudicial evidence... did not factor into the jury’s decision.”\textsuperscript{14}

Curley is significant not only because it is a rare acknowledgement that “other act” evidence can overwhelm the jury’s decision on the charged offense, but also because it highlights the prejudice of introducing the bad acts of others (not uncommon in conspiracy cases), the limitations of limiting instructions, and the higher bar to admission of “other act” evidence post-dating the charged offense.

\textbf{ARE YOU LYING NOW...}\textsuperscript{16}

As a counterpoint to Curley, the Court held in United States v. Cedeno\textsuperscript{15} that a district judge had erred – albeit harmlessly – in precluding the defense from cross-examining a detective regarding a prior adverse credibility finding against him in a state proceeding. The trial judge had premised her analysis on two factors: whether the prior judicial finding addressed the witness’s veracity in that specific case or generally, and whether the two sets of testimony involved similar subject matter.\textsuperscript{16} This inquiry was too narrow, the Court ruled, “unduly circumscrib[ing]... a defendant’s right under the Confrontation Clause to an effective cross-examination.”\textsuperscript{17} It was incumbent on the district court to consider other factors, such as “(1) whether the lie was under oath in a judicial proceeding or was made in a less formal context; (2) whether the lie was about a matter that was significant; (3) how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness; (4) the apparent motive for the lie and whether a similar motive existed in the current proceeding; and (5) whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible.”\textsuperscript{18}

These non-exhaustive factors will certainly make it harder for the government to oppose cross-examination of its witnesses who have been the subjects of adverse credibility findings. But uncovering those findings is the first hurdle, and while the government may reveal some in Brady disclosures, the defense may have to discover others – through investigation, litigation, Brady demands, FOIA requests, and requests for courts to review personnel and other files in camera.\textsuperscript{19}

\textbf{WEIGHT GAIN}\textsuperscript{18}

If the importance of a case is judged by its statistical impact, then United States v. Andino\textsuperscript{20} is one of the most significant decisions issued in the past six months. Andino clarifies a question over which the Court’s precedents were arguably in conflict: in drug conspiracies, must the government prove knowledge of the type and weight of the drug involved? The

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\begin{itemize}
\item \textsuperscript{10} Id. at 8.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id. at *10.
\item \textsuperscript{13} Id. (quoting United States v. Williams, 585 F.3d 703, 709 (2d Cir. 2009)).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} 2011 WL 1632048 (2d Cir. May 2, 2011).
\item \textsuperscript{16} Id. at *2 (citing United States v. Cruz, 894 F.2d 41, 43 (2d Cir. 1990)).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. at *3.
\item \textsuperscript{19} Cf. United States v. Nogbou, 2007 WL 4165683 (S.D.N.Y. November 19, 2007) (court did pretrial in camera review of officer’s personnel file relating to prior allegations of abuse or aggression).
\item \textsuperscript{20} 627 F.3d 41 (2d Cir. 2010).
\end{itemize}
answer – a resounding “that depends” – impacts a huge percentage of the prosecutions filed in the Second Circuit every year.21

Affirming a rule stated in several cases, the Court held that “the government need not prove scienter as to drug type or quantity when a defendant personally and directly participates in a drug transaction underlying a conspiracy charge.”22 The obvious corollary, of course, is that scienter must be proved as to drug type and quantity where the defendant’s participation in the drug transaction was “peripheral.”23 Notably, scienter in this context can be satisfied not just by knowledge, but also foreseeability.24

As Steve Statsinger points out in the Second Circuit Blog, the Andino Court has replaced one confusing legal standard with another, opening a vista of new litigation on whether a defendant is “peripheral” or not, and whether that issue is decided by the judge or the jury.25 Defense lawyers should also be sure to challenge the “reasonable foreseeability” scienter standard itself in this context, to preserve the issue for Supreme Court review. Although Second Circuit precedent holds otherwise, applying the “reasonable foreseeability” standard to weight and drug type in drug conspiracy trials improperly lowers the government’s burden of proof. After all, it is a basic principle in conspiracy prosecutions that the government must prove that “a defendant knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy.” 26

21 In fact, approximately 43% of the criminal cases filed in 2009 in the Second Circuit were drug cases. See Federal Bureau of Justice Statistics tables available at http://bjs.ojp.usdoj.gov/fjsrc.
22 Id. at 47 (emphasis in original).
23 Id.
24 Id. at 46 (quoting United States v. Santos, 541 F.3d 63, 70-71 (2d Cir. 2008) (drug conspiracy conviction requires proof that “it was either known or reasonably foreseeable to the defendant that the conspiracy involved the drug type and quantity charged”)).
26 United States v. Monaco, 194 F.3d 381 (2d Cir.1999), I owe this point to Richard Willstatter, who adds that if this “reasonable foreseeability” standard were analyzed, it will turn out that it has its origins in pre-Apprendi case-law relating to sentencing guideline enhancements, and not in cases addressing the government’s burden of proof at a trial. See, e.g., United States v. Chalarca, 95 F.3d 239 (2d Cir. 1996) (applying reasonable foreseeability standard in determining relevant conduct at sentencing). Since Apprendi, however, the law is clear that “drug quantity is an element that must always be pleaded and proved to a jury or admitted by a defendant to support conviction or sentence on an aggravated offense under § 841(b)(1)(A) or -(b)(1)(B).” United States v. Gonzalez, 420 F.3d 111, 131 (2d Cir. 2005).
I am not a Luddite. Really, I’m not. I have a cell phone, and I’m actually writing this on my laptop computer, and will send it to the editors of Atticus by email (thereby saving postage, too...what a world!). But I firmly believe that there is a time and place for everything, and times and places where one need not be instantly and constantly connected to those not actually physically present. And so, a tale of the 21st century...

It was only a B Misdemeanor bench trial, in the end, but for my client, a 60 year old clergyman with a lifelong unblemished reputation, it might as well have been a B Felony. The facts, in brief: At the end of March, 2010, the Reverend (who shall be nameless here) was arrested for the rape of a congregant. Suffice it to say that the accusation, totally false and fabricated, alleged that the crime took place on December 27, 2009 in the back seat of his Lexus in the parking lot of a hotel/restaurant in Queens County. The District Attorney’s office wrote the complaint up as an A misdemeanor, Sexual Abuse 2º, and from Day One we provided evidence to the prosecutors about previous fabrications by the complainant as well as taped recantations of them, and proof that although she claimed this crime took place on the Sunday after Christmas, she met with high church officials three or four times between then and March and never once mentioned the alleged rape, despite at least two of the meetings actually taking place at the same restaurant! Simply put, it never happened....and aren’t those the toughest cases?

Anyway, we make it crystal clear that there will never be a plea, and we ultimately get a trial after the DA reduces to a B misdemeanor to avoid a jury. So, you are asking, what’s the “pet peeve”?

Small courtroom...prosecutor and defense share one long desk, and the podium is placed next to an 8 seat jury box, so that while I am cross examining the complainant (through a Korean interpreter) I am standing over the ADA’s right shoulder, maybe three feet back. The ADA is a young woman, and it is her first trial; she has been in the office less than a year. Her supervisor sits in the jury box. This is a one witness case (for the prosecution; I called three), and she should be paying rapt attention to the key testimony, on direct and cross....BUT...incredibly...during my cross, I look over at the prosecutor, and she is sitting at the table, Blackberry® out on the desk in front of her, texting!!!! Her entire case hinges on this witness, I am having a lot of fun twisting the witness with her own inconsistencies and the impossibility of her testimony, and the prosecutor is having a text conversation with someone else!!!

Is it me?? Is there really something so vitally important going on elsewhere that a public prosecutor, in the courtroom, cannot pay attention to the testimony of her own witness for more than a few minutes before feeling the need to chat?

Maybe I am a Luddite after all.

By the way, it took the Judge about 10 seconds to acquit my client; she didn’t even want to hear my brilliant summation.
BRAINSTORMING YOUR FINAL ARGUMENT

Everyone in the courtroom loves a good final argument. As opposed to opening statement, now is your opportunity to argue. Suggest the inferences that should be drawn from the evidence. Go over repeatedly the word pictures you want to paint and “color-ize” them in a subtle manner consistent with common sense. Your overall approach is to use your theory and supporting themes to advance the story of acquittal. Your appeal is to common sense and life’s experiences. Be human. Speak as if you were sharing information in a business or social setting, even in a bar. This is not a summation or a final argument, but a story well told. Tell your client’s story.

ORGANIZATION OF FINAL ARGUMENT

For your “story” to be persuasive it must be a unified whole that has coherence and emphasis. Your argument is organized according to the issues the jury must decide. Have structure. Utilize a checklist for the chapters of your summation. Mimicking mediocrity is to talk about topics as they occur to you. Randomness is death to impactful storytelling. An essential ingredient in organizing the closing is the arrangement of the word pictures that tell the “story.” Resist the urge to give your conclusions. Rather, give the jurors the facts that will lead them to your conclusion. Consider your voice, pacing and emotion. Utilize courtroom geography. If something important occurred in one portion of the courtroom, use that place to make that point when telling the “story.”

CHAPTER METHOD

Each point in the final argument should be developed as a block of information. A block contains one point. The point being made is headlined to introduce the block. It is developed and explained and then it’s restated in conclusion. By arranging the blocks according to their importance to your theory, you progress through the chapters and build the presentation. Each point gets developed fully and separately. Transitions between the blocks need to be carefully worked out. Each block of information announces, develops and reinforces the point being made. The point being driven home to the jury can be seriously diluted if lesser points that tangentially overlap divert from the main point. While repetition is a big part of retention, don’t risk being redundant or boring as you drone on about the same point. Once a point is completely presented, no need exists to double back to reintroduce it.

The discrete blocks of information have their own emotional intensity and their own place in the courtroom. Utilize courtroom geography and the concept of psychological anchoring (i.e., argue from the place in the courtroom where the critical testimony occurred). As you move around the room developing each point from a different place, you can shift the emotional and vocal intensity of each point. The constant shifts make the entire presentation more dynamic and give it greater variety.

DO’S AND DON’TS

Final argument is your unique opportunity to make an emotional appeal that answers practical considerations. This is your last opportunity to answer questions raised by the evidence. Although it is improper for lawyers to advise the jury of the effect of their verdict, if the presentation at trial is clear, jurors are well aware of the effect their verdict will have. Give the fact finder all the emotional as well as the common sense interpretations which support your “story” of acquittal.
1. IT'S NOT THE TIME TO WIN IT

Final argument is not the time to win, it is the time to tell the jury how you’ve already won. Beware the paradox of advocacy, i.e., the more forcefully you argue ... the less force your argument. Your case was presented throughout the trial. Your articulated and unarticulated self has conveyed your belief in the cause throughout the trial. Resist opinionated argument. Eliminate adverbs and adjectives which involve your opinion or evaluation. Simply let your arranged facts tell the “story.”

2. LIMIT THE NUMBER OF ISSUES

To be persuasive, the final argument should contain no more than two or three issues that you can argue powerfully. These points are the focal point of your argument. Jury argument is the time to combine purpose (the goal of the persuasion), passion (the emotional themes) and perception (the insight that pulls it all together). Emotion and intellect combine to move fellow human beings to action. Too many lawyers focus on the logic only, forget about the passion, and wonder why they cannot lead the jury to a perception of the facts consistent with the desired conclusion.

3. DON'T READ

Never read a final argument. And don’t memorize. Like Sir Winston Churchill who rehearsed all of his “extemporaneous” remarks, prepare in advance to be real. Be in the moment. Your commitment is the barometer the jurors will use to gauge your message. If you are not committed to cause, the jury may not follow. Reading allows for detachment from the material and usually bores the listener. Your command of the facts persuades the jury that you believe in your client’s cause. There is congruence of message and messenger. To understand the level of commitment required imagine a plate of bacon and eggs and think: “The pig was committed; the chicken was merely involved.”

4. DON'T TRY FOR ELOQUENCE

Don’t bother trying to be eloquent and don’t worry about length. Final argument can be quite short if the most dramatic point is persuasively presented. The power and imagery of your words are more important than the length of the argument. Simple words spoken with great conviction is the heart of eloquence and the path to persuasive communication. Know your case so well that a mere one word chapter outline suffices.

5. USE VISUAL AIDS

Visual aids enhance the “story.” Our goal is that we want our tunnel-visioned view of the facts to dominate the jurors’ thinking while they deliberate. This means presenting your point of view with impact. People retain what they see and hear far longer than what they only hear. Visual reinforcement of a verbal message maximizes persuasion potential.

6. GIVE THEM A COURSE OF ACTION

It is often said that people don’t get what they want because they don’t know how to ask. Find a way to make your jurors want to find for their fellow human being. During the trial you have presented your theory and themes. Simply arrange your chapters according to the chronology of events keeping in mind the accompanying emotional strings. By doing so, you subtly show the jurors that they have already been given the tools to find in this fellow human being’s favor.

“Once slavery in America was not seen as radical. It became, instead, a revolutionary idea that slaves should be freed. When we have lived under a pernicious power long enough, no matter how oppressive, we grow so accustomed to the yoke that its removal seems frightening, even wrong.”

Gerry L. Spence
From Freedom to Slavery
7. DON’T BE PREDICTABLE
Creating a file of clever arguments and analogies is a good idea but the file can never become the only source of the argument. You cannot argue the same way each time. That will put you in a rut. When everyone in the courthouse knows how you are going to argue a certain type of case, you are in a rut and it is time to think about a new approach.

8 AVOID CHEAP SHOTS
To reemphasize, resist opinionated argument. Rely on the facts.

a. Don’t go outside the record. Improper argument invites improper argument in response. A negative spiral often ensues.

b. Don’t comment on opposing counsel. The jury will see through it and wonder why you are not remaining on message. Praising opposing counsel as “learned” or “esteemed” is seen as the insincere puffery it is.

c. Don’t appeal to the jurors’ prejudice. Many will take offense and you risk bringing a thought of condescension into the equation.

d. Don’t verbalize what verdict is needed. Your commitment to cause will convey the appropriate verdict.

e. Don’t make false statements about the facts in the case and don’t try to argue all of the evidence that was offered only for a limited purpose. Aside from courting adverse judicial response, you risk a backlash that will be visited on the human being you’re representing.

A FINAL THOUGHT ON CONVEYING THE “STORY” OF ACQUITTAL
Throughout the trial, you have been the central persuasion equation. Facts win cases. Credibility wins cases. Tie up your cross-examinations. Your voice is active. Your words are precise. Treasure being in the moment. Choose the word pictures you paint carefully. The word pictures you utilize in summation grind the lens through which the jurors will process the evidence. Your summation makes the jurors virtual eye-witnesses to the most critical facts. Brainstorm your visualization language. Group your facts into vivid word pictures. Utilize the power of “story.” Imagination is more important than logic, rules or legalese. Jurors think in pictures. Jurors are scripted to story. Your final argument is the ultimate persuasion pearl in the trial long endeavor of helping the jury to understand your “story” of acquittal. This is the ultimate challenge in our role as the “Central Persuasion Equation” throughout the trial.

No organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor any document of reasonable length contain express provisions for all possible questions.

Abraham Lincoln, First Inaugural Address, March 4, 1861
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There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets.

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All the great things are simple, and many can be expressed in a single word: freedom; justice; honor; duty; mercy; hope.

Winston Churchill

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Paul Cambria, Jr. was one of the founding members, and a past President of the NYSACDL, and was behind the creation of the NYSACDL’s Judge William Brennan Award, which was first awarded more than 20 years ago. He is a past chair of the New York State Bar Association’s Criminal Justice Committee, and is the current chair of its Continuing Legal Education Committee. He has also served on the New York State Chief Judge’s Advisory Committee on Criminal Law and Procedure since 1986, and is a past President and current member of the First Amendment Lawyers’ Association.

Paul is native of the Village of Fredonia, New York. Paul grew up working alongside his father in the family body and fender shop where, but for his abilities in the classroom, he might still be working today. His goal to become a lawyer took him far beyond the confines of his hometown, and beyond work in his father’s shop to Toledo, Ohio, where he attended the University of Toledo Law School and graduated 1st in his class in 1972. Paul Cambria returned to Western New York following his graduation from law school and began working at the law firm that now bears his name—Lipsitz Green Scime Cambria LLP. In 1981, he argued the first of his three appeals before the U.S. Supreme Court in the landmark case of New York v. Belton (453 U.S. 454 [1981]). Although the Court denied his efforts to limit the search of a vehicle to an arrestee and the “grabbable area” around him, Paul succeeded on remand before the New York State Court of Appeals in People v. Belton (50 N.Y.2d 447 [1982]), and was finally vindicated some 28 years later when the U.S. Supreme Court decided in Arizona v. Gant (129 S.Ct. 1710 [2009]) that the search of a vehicle incident to an arrest was only valid when the arrestee was unsecured and within reaching distance of the passenger compartment.

Among the numerous awards and honors he’s received in his 38 year career are the NYSBA’s Charles Crimi Award in 2003 as the outstanding criminal law practitioner in New York State, and his listing in the Best Lawyers in America in criminal defense each and every year since its founding in 1989. He is the Chair of the Corporate Fundraising Division of the Buffalo chapter of The Variety Club, an international charitable organization that raises money to benefit the care and treatment of sick children—and which is now the most efficient fundraising charity in the United States. Paul is also the Co-Host of The Variety Club’s Annual Telethon, which is broadcast each March throughout Western New York. Paul is an avid drag racing competitor. He and his wife Paula, who is also a professional drag racer and their 6 girls are regular participants in numerous races and events throughout the north east.
Paul Cambria has tried cases in 12 states and the District of Columbia, has argued appeals in 8 federal appellate Circuits, and been called to testify as an expert witness in Massachusetts and Michigan as well as before the late Sen. Ted Stevens’ Senate Committee on Science, Commerce & Transportation in 2006 regarding Internet content and the safety of children. Paul is admitted to practice in New York, California, and the District of Columbia, and is soon to be admitted in Pennsylvania. His firm maintains offices in both Buffalo, New York and Beverly Hills, California.

With no signs of a slowdown in either of his careers, Paul J. Cambria, Jr. eagerly looks ahead to the celebration of his 40th year of practice, and well beyond. Paul can be contacted at pcambria@lglaw.com.

**homicide n.**

The slaying of one human being by another. There are four kinds of homicide: felonious, excusable, justifiable, and praiseworthy, but it makes no great difference to the person slain whether he fell by one kind or another – the classification is for advantage of the lawyers.

Ambrose Gwinett Bierce

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**Editors Note:** Bierce was an interesting editorialist, writer and philosopher at the turn of the 20th century. He disappeared and was believed murdered during a visit to obtain first-hand information on the Mexican Revolution in 1913. His biography is fascinating and his disappearance can be likened to that of Jimmy Hoffa or Judge Crater.
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NCDC SCHOLARSHIP PROGRAM – NYSACDL members in good standing are eligible to apply for the Twelve Angry Men scholarship to the annual National Criminal Defense College in Macon, Georgia.

LEGISLATIVE ADVOCACY – NYSACDL’s Legislative Committee, working with a retained lobbyist, develops and pursues positions on legislative issues relating to the criminal justice system thereby providing a respected voice of the defense bar in Albany. Members have an avenue to become involved and stay informed. Our members were involved in the recent reforms of the Rockefeller Drug Laws.

AMICUS BRIEFS – NYSACDL provides amicus assistance on issues of particular import.

COMMITTEE MEMBERSHIP – NYSACDL committees are active in areas throughout the state and work on issues vital to strengthening the criminal defense community. Membership on a committee provides an excellent opportunity to pursue specific interests, serve the criminal defense bar and to network with lawyers throughout the state.

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■ To promote study and research in the field of criminal defense law and the related arts.

■ To disseminate and advance by lectures, seminars, and publications the knowledge of the law relating to criminal defense practice.

■ To promote the proper administration of criminal justice.

■ To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases.

■ To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby

■ To protect individual rights and improve the criminal law, its practices and procedures

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