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MARK YOUR CALENDAR!
December 3rd and 4th, 2010
Defending Against DNA & Scientific Evidence
Brockport, New York
See Page 12 for details.
Message from the President

The traditional summer hiatus is over and, as I write this message for the third issue of the new Atticus, the fall trial season is well under way. Defense lawyers state-wide face difficult cases, hard adversaries and often impatient and unsympathetic jurists as we protect our clients’ rights to fair trials and just verdicts. Thankfully, we are not alone; just looking at our list serve on any given day proves that. Over the past weeks, since Labor Day, many, many lawyers have sought the assistance of colleagues with trial strategies, thorny evidentiary questions, the vetting of experts and the other myriad issues that confront us as we try our cases. Every colleague asking for help has received it within minutes, or, at most, hours, saving critical preparation time for the questioner. Those of us who practiced before instant internet communication marvel at the new world of defense lawyer community. To those of you who have always had this luxury, I say please don’t take it for granted. It doesn’t happen by itself - and it costs us and groups like ours money and time spent by a dedicated staff to better serve you so that we can live by our adage that “nobody practices alone and in our unity lies our strength.”

The same is true for our ever-expanding and successful Continuing Legal Education, amicus and lobbying efforts, and Atticus. It all costs money which, in large part, comes from your dues. It is just about time to write us a check, or pull out the credit card, and go online to renew for 2011. I know you will. Nobody can resist paying less than fifty cents a day to watch the membership try to explain to Ira how he can take the train from Penn Station to St. Francis in Brooklyn Heights. So we are secure in the knowledge that you will be back, stay on the list, attend the upcoming dinner and come to Brockport to learn how to defend DNA cases. But this message asks each of you to do just one more thing for NYSACDL and the New York State defense community. Each of us must make it his or her business to bring one colleague into the fold. Get one person to join so that we become the largest NACDL affiliate in the United States. You can do it with a phone call. You can do it with an e-mail, you can do it over coffee, face to face. All you need to do is tell a friend, an office mate, co-counsel or colleague about what Marty Adelman (borrowing from Will Shakespeare) likes to call our “band of brothers.” Tell them what we do for each other and our clients, for the legal community and the Constitution that the public too often finds an inconvenience. We know that it is only kept alive by lawyers toiling daily in the trenches of the criminal justice system, against the often merciless cry for vengeance on the imperfect among us who are addicted, mentally ill and, for the most part, dangerous to themselves more than the rest of us. You can do this, and I am confident that you will. Thank you.

George Goltzer, NYSACDL President
It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.


Editors Note: For an interesting use of the quote see NY Times Bestseller, The MadOnes, by Tom Folsom, chronicling the life and death of Crazy Joe Gallo; (Weinstein Books, 2008 at page 138)
Editor’s Page

The Board of NYSACDL and Editors hope you enjoy this issue of ATTICUS. We greatly appreciate the contributions of our members and the interest shown in our magazine by people outside our organization. This issue includes articles and commentary by Hon. Joseph W. Bellacosa, on open discovery and an opinion piece by Harvey Silverglate regarding his take on prosecutorial excesses. We again have contributions from Ray Kelly, JaneAnn Murray, Richard Willstatter’s Amicus Update and first time contributors Jared Kneifel, Mark D. Hosken and an interesting history by life-member Tom Liotti. A special thanks to Meg Alversion and John Wallenstein for their efforts at improving our content.

Our Winter issue will include the annual dinner and a few new features. We depend on the members of NYSACDL for your contributions so please don’t be bashful about your favorable verdicts or appellate decisions or any item you feel may be of interest to our membership.

NYSACDL has some exciting upcoming CLE programs including a two day seminar at SUNY Brockport on December 3rd and 4th, which should not be missed.

This years Annual Dinner is being held at a wonderful new venue. The choice of dinner location evidences our support of the good works of Common Ground which renovated the Prince George Hotel Ballroom. The dinner will be held on January 27, 2011 during State Bar Week in hopes that more of our members will be able to attend. We hope to see you there.

Thank you for your comments and contributions.

Co-Editors

Cheryl Meyers Buth
cmeyers@tomburton.com

Ben Ostrer
ostrerben@aol.com

Additional copies of this issue of ATTICUS can be downloaded at www.NYSACDL.com website.
Legislative Committee Report

On October 13, 2010, Chief Judge Jonathan Lippman announced the formation of a permanent commission to review and make recommendations to improve New York’s unduly complicated patchwork of sentencing statutes. At the next NYSACDL Board of Directors meeting, the Legislative Committee will raise the issue of whether the Association should be taking a position regarding the composition of the Commission and/or how the Association can best act as a resource to the Commission.

The Legislative Committee is in the process of deciding our agenda for the next New York State Legislative session. Issues under consideration include reform to:

1. Sealing/expungement
2. Discovery
3. Parole
4. Justice/District/Regional courts
5. Sentencing
6. Categorization of violent vs. nonviolent (e.g. Burglary 2nd)

Once our legislative agenda is set, further consideration is being given to the preparation of a NYSACDL Legislative Initiative Booklet to be distributed to key legislators to assist our Albany lobbyist, Brown & Weinraub, PLLC, to advance our agenda accordingly. The Legislative Committee welcomes your thoughts on these or any other initiatives.

Andy Kossover, Chair
NYSACDL Legislative Committee
ak@kossoverlaw.com

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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.

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Legislative Committee:

Andy Kossover, Chairman
(New Paltz)

Wayne Bodden (Brooklyn)

Andy Correia (Wayne)

Tim Donaher (Rochester)

Ray Kelly (Albany)

Greg Lubow (Greene)

Aaron Mysliwiec (New York City)

Alan Rosenthal (Syracuse)

Lisa Schreibersdorf (Brooklyn)

Don Thompson (Rochester)
NEW YORK DISCRETIONARY PERSISTENT FELON STATUTE

On October 18, 2010, the Second Circuit rendered a 9 to 3 en banc decision reversing a panel’s earlier decision in Besser v. Walsh, et al., 601 F.3d 163 (2d Cir. 2010). The new decision, Portalatin v. Graham, et al., Docket Nos. 07-1599-pr, 06-3550-pr, 07-3588-pr, is a huge disappointment. Judge Richard C. Wesley, a former state Court of Appeals judge, writing for the majority, found that the New York discretionary persistent felon statute was constitutional insofar as its application was not an unreasonable interpretation of the United States Constitution as previously determined by the Supreme Court. To reach this dubious conclusion, the majority approved the state court’s determination that because only those defendants who are eligible for persistent felony offender (“PFO”) status can be subject to life terms, the sentencing judge’s decision whether to impose such a sentence is akin to the usual sentencing decisions judges make, i.e., what the appropriate punishment should be, within a particular sentencing range. Judge Wesleys 61-page opinion defers to the New York courts’ own defense of the PFO statute. See People v. Quinones, 12 N.Y.3d 116, 131 (2009); People v. Rivera, 5 N.Y.3d 61, 71 (2005); People v. Rosen, 96 N.Y.2d 329, 336 (2001).

As the dissent by Senior Circuit Judge Ralph K. Winter points out, similar arguments have been advanced and rejected by the Supreme Court in Cunningham v. California, 549 U.S. 270, 288-89, 292 (2007) and Blakely v. Washington, 542 U.S. 296, 30304 (2004). Further, Judge Winter pointed out that because the reasoning adopted by the majority with respect to analyzing the maximum sentence for Apprendi purposes has thus been expressly rejected by the Supreme Court, “AEDPA deference” is inapplicable. Judge Winter focused on the obvious judicial fact-finding inherent in the determination that a defendant warrants the higher sentencing range for PFO defendants. “Conspicuously absent from my colleagues’ opinion is any clear denial that, in petitioners’ cases, “step two” consideration of evidence relating to the character, history, and nature of the criminal conduct of the defendant involved fact-finding beyond the multiple prior felonies.”

Richard D. Willstatter is a criminal defense lawyer in Westchester County. He can be reached at willstatter@msn.com. He is the Amicus Curiae Committee Chair.
We expect petitions for writs of certiorari to be filed by the petitioners in these consolidated cases. Every time an analogous case has reached the Supreme Court, the Court has reaffirmed that it means what it says about the reach of the Sixth Amendment right to trial by jury. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Hopefully, this case—or at least the discretionary PFO issue—will soon attract the Supreme Court’s attention.

**QUEENS D.A. VIDEOTAPING**

We expect to file an *amicus curiae* brief in the highly unusual Article 78 proceeding brought in the Appellate Division for the Second Judicial Department by Queens District Attorney Richard Brown against Justice Joel Blumenfeld of the Queens Supreme Court. Brown argued that the judge should be forbidden—in the context of a Huntley hearing motion to suppress post-arrest statements obtained by law enforcement—from even considering whether Brown’s policy in taking such statements is legal and/or ethical.

The Queens DA has had a policy for some three years of interrogating 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, Ellen Yaroshefsky, to opine whether Brown’s policy was consistent with a lawyer’s ethical obligations or whether it violated any of the Rules of Professional Conduct. Brown’s office and Brown personally responded with an *ad hominem* attack against Prof. Yaroshefsky. Because she helped Lynne Stewart’s defense lawyers, Brown suggested that the professor had somehow advised Lynne Stewart to commit the crime of which Stewart was convicted. This was one of several arguments advanced by Brown to attack the sitting judge and to prevent him from rendering a decision critical of Brown’s office and policy. Our position will be that judges are always permitted to consider whether law enforcement has engaged in unethical conduct in an attempt to obtain an arrested person’s statements. We will argue that Brown’s Article 78 petition is a naked attack on the independence of the judiciary and an arrogant denunciation of anyone who would dare to question his motives. We will suggest that the People have a perfectly good remedy if the Court issues an order of suppression: they have a statutory right to appeal any such order. We will argue that an Article 78 cannot be used to stop a judge from rendering a decision on a motion to suppress. Finally, we will argue that Brown’s policy is a calculated and deliberate attempt to delay the filing of accusatory instruments in violation of CPL § 140.20 and to use that time to convince soon-to-be defendants that they should give up their rights to counsel and self-incrimination before their imminent arraignment.

**RIGHT OF CONFRONTATION**

The federal appeal on the question of whether a defendant’s Sixth Amendment right of confrontation is abridged when a district court prevents him from cross-examining a newspaper reporter who gave inculpatory evidence in the form of statements attributed to the defendant was argued recently. The case is *United States v. Treacy*, 09-3939-cr. This is the case where Mr. Treacy’s lawyers were prevented from cross-examining a *Wall Street Journal* reporter in any meaningful manner because of misplaced concerns for the government witness’s First Amendment right. Our amicus author, Joel B. Rudin of New York City, reports that the Second Circuit was interested in the issues raised in our brief.

*Baseball is almost the only orderly thing in a very unorderly world. If you get three strikes, even the best lawyer in the world can’t get you off.*

Bill Veeck
Former owner of the St. Louis Browns and Chicago White Sox
Side Bar

Life Member Terry Kindlon has three criminal cases on the calendar for argument in the Court of Appeals. One of which he was not trial counsel but did argue the appeal, unsuccessfully, in the Third Department. One of the cases People v. Porco, a murder in Albany County which was transferred to Orange County for trial because all of the judges on the Third Department disqualified themselves (the victim was law clerk to the presiding justice). The appeal was thereafter assigned to the Second Department which unanimously upheld the conviction. Associate Court of Appeals Judge Robert Smith granted leave to appeal. With three appeals pending Terry reports he is spending so much of his spare time with his “63 year old nose in a book these days that I’m starting to feel like I’m back in law school”.

SUBPOENAS FOR FILM OUTTAKES

No final decision has yet been rendered by the Circuit in the case of In re Application of Chevron Corporation, 10-1918(L) and 10-1966(con). NACDL filed an amicus brief in support of the right of criminal defendants in a foreign country to subpoena “outtakes” of a documentary made to support litigation against them and the company they represented as lawyers. As previously reported, the Second Court ordered, as interim relief, the film maker to turn over all footage of interviews with counsel for the plaintiffs in the underlying civil case as well as those with experts in that case. On remand, the filmmakers turned over to Chevron 446 full tapes and 16 partial tapes containing outtakes pursuant to the Circuit’s order. The filmmakers later admitted that these outtakes contain “references in the outtakes to the potential instigation of criminal proceedings in Ecuador.” The lawyers for the filmmakers wrote to the Circuit Court to correct their previous arguments in which they had incorrectly suggested the outtakes did not contain such references. In essence, it appears that the outtakes contain evidence favorable to the Ecuadorian criminal defendants. A final decision is awaited but our supportive efforts have already borne fruit.

The Amicus Curiae Committee can be contacted if you have, or learn of, a matter in which our participation is solicited. However, members are reminded to contact us as early as possible in the course of the case because it does take time to recruit an author, prepare, edit, print, copy and file a brief. You may contact our Chair, Richard D. Willstatter, at willstatter@msn.com or by phone at (914) 948-5656 or co-chair Marshall A. Mintz at mmintz@minopp.com or at (212) 447-1800.

Submit an Article to Atticus

Members wishing to submit articles for inclusion in Atticus should send them to the attention of:

Margaret Alverson, Executive Director, NYSACDL
2 Wall Street, New York, New York 10005

The editor reserves 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. Submit articles via email to atticus@nysacdl.com
4. Articles longer than 3-4 pages will be edited.

Did You Know?

Second Circuit Justice Harold Medina (1888-1990) was likely the first Spanish Judge appointed to the Federal Appeals Bench in New York when he succeeded Learned Hand in 1953. Judge Medina’s father was naturalized citizen from Yucatan, Mexico. Although remembered for his long tenure on the Federal Bench and his scholarship, Judge Medina’s exploits as a defense attorney are worthy of note in ATTICUS; for an interesting side bar on Medina’s representation of the German saboteurs who landed on eastern Long Island during World War II see page 43.
In 1992, I proffered an exhortation for a modest improvement of the criminal justice system, (People v. Banch, 80 NY 2d 610, dissenting at 626-27). My pitch, ancillary to the main issue in the series of cases, was for “less games-playing” and towards “a right sense of justice”, through early discovery of prosecutors’ files (see also, People v. Joseph, 86 NY 2d 565, at 572, Bellacosa, J., dissenting). Unfortunately, my adoption of the misnomer “open files”, an unqualified description of the process, connotes a per se gusher that may partly explain why the idea has generally fizzled.

Despite the passage of time, I remain steadfast that this notion has merit because the framework in which the improvement was proposed — the infamous per se Rosario remedy (see, People v. Dana Jones, 70 NY 2d 547, at 553 [Bellacosa, J., concurring]) — was itself rolled back, with the elimination of disproportionate per se automatic reversals (CPL section 240.45 [effective 2001]; see also, The Rosario Per Se Rule: Rest In Peace, by Mark Baker, N.Y.L.J., 3/14/01, p.1, col. 1). Thus, hope springs eternal for a procedure that will shed brighter light on the ideal and reality of JUSTICE.

When the editors of Atticus graciously asked me to consider preparing an article on a subject of my choosing, I concluded that it was time again for yet another prompt, posed under an alternative caption: Transparency vs. Secrecy. The contemporary buzz word is framed against its converse; the latter conjures up its world of suspicions: harboring strategic jacks-in-boxes and engaging in cagey tactics. True or not, such ace-in-the-hole vibes countermand a give-and-take, open-dealing culture, and instead generate a cat-and-mouse or hide-and-seek gamesmanship.

In an idealized environment, amplified pre-trial discovery is still worthy of serious legislative consideration and enactment. While sustained prosecutorial resistance to the idea over the years has kept it on a back-burner, it has survived (see, e.g. “The Case For Pretrial Discovery in Criminal Prosecutions,” by Brian S. McNamara, N.Y.L.J., 10/08/03, p.4, col. 4). The notion even shows signs of life in an operational setting at the Brooklyn District Attorney’s Office (see, infra). Thus, my “CPR” spark here might hopefully jump-start some momentum for a fresh look and some action.

A threshold objection from the prosecutors’ guild needs comment. Opening files tips the equilibrium of the adversarial process, as they calculate the odds.
Idealists and mathematicians may prefer precise balances and angles, but this is criminal justice trench warfare where the defense, of course, need not turn over anything — by constitutional command — as one of the bulwarks of this Nation’s rightly balanced and heralded system of JUSTICE. It is a given, therefore, that there will never be a tit-for-tat dueling exchange — and there should not be — considering the weighted resources on the prosecution side of the table. Burdening that side with the singular duty to prove a case, with no helping hand from the accused, is an absolutely correct calibration that was ingeniously established under our Nation’s system of Laws. Equalized pre-trial turnovers, quite frankly, is a prosecutorial straw-argument that does not stand up, and should pose no rational obstacle to the improvement proposed here. Rather, the embrace of this step forward represents a mature open—mindedness, that would shed needed transparency and accountability on the over-arching objective — the true and fair administration of JUSTICE.

Another unpersuasive strand of resistance is found in the “enough already” attitude that prosecutors sometimes display when turning over all Brady and Rosario materials. True, I am urging an expansion of the turnover products at the earliest time in the assembly line for an additional reason, to wit, the sometimes grudging compliance with which some prosecutors execute their Brady and Rosario duties. That, too, needs a shake up because the precious parsing in satisfying these two inescapable requirements, all too often boomerangs when smart lawyers search records only to discover for an appellate court that the prosecutors initially peeled the onion back too finely, by withholding what at the time may have seemed like arguable Brady or Rosario items. Lo and Behold, the pettifoggery backfires, and out goes some hard-fought and otherwise entirely valid conviction in a reversal that morphs the “law enforcer’s nightmare” into “the perpetrator’s delight”, with an unexpected and unwarranted bonanza remedy, that at least as of 2001 is not per se and automatic (see, People v. Dana Jones, supra, at 557 [dissenting opn., Bellacosa, J.]; CPL section 240.45, supra).

Importantly, my modest proposal is not some unrealistic net that scoops up every fishtail in sight with yet another per se sweep. Privileged material, confidential sources, leads and aspects relating to ongoing investigations, and any like categories of inappropriate snooping must remain protected (not to be overlooked, either: safety of witnesses or other personnel, protective order materials, and avoidance of an array of clever and devious intimidations, etc.). These categories would all continue to be shielded and necessarily held back by redaction or outright non-availability (compare sections in Article 240 of the CPL). The cultural shift I suggest, instead, addresses the myriad of ordinary cases that would benefit from presumptive “open sesame” of prosecutors’ files, not at all compromising those exceptional situations that would remain exempted from the early sunlight.

That said, I acknowledge another perspective. The vast majority of prosecutors are in their chosen career because they intend, and even render oaths, to perform their public duties as zealously and professionally as possible within standards of law and high ethical norms, geared to the proper administration of JUSTICE. Yet, the culture of even their slice of the profession and the comfort zone of past practices pose high hurdles against anyone fiddling with well-worn practices. The hard-boiled attitude of keeping the opposition at bay and in the dark is hard to crack. Prosecutors, like most of human nature, not surprisingly prefer clinging to what works (or seems to work, blinded by the platitudinous

“If there were no bad people, there would be no good lawyers.”

Charles Dickens
rubric of “don’t fix what ain’t broke”). Besides, most folks do not like coughing up strategic advantages to an adversary by open-dealing. The gladiatorial (adversarial system) state of mind, with all its risk-averse intuitions, more often predominates to produce a modus operandi that thrives on a zero-sum game playing field. That stubborn mind set, with its tough poses and macho stances and grimaces, induces one not to give an inch, lest a foot be taken.

Legislation cannot change human nature and I may be perceived as engaging in “eggheady” wishful thinking, summoning “the better angels of ourselves”, as officers of the court in some nostalgic reverie about our classically dubbed learned profession. If that is the interpretation, then so be it. I readily tip my hat to the reality (ruefully, however) that records of wins, convictions, acquittals — the stuff of the professional, reputational or media-enhanced scorecards, the — next-case retainer to pay the overhead and payroll, or the super-charged ambitions for continued incumbency or advancement to the next higher public office — usually trump any of the Utopian-sounding slogans, solutions and principles of progressive practice and procedure.

Nevertheless, I remain undismayed and point to one significant illustration

1 Lincoln, Gettysburg Address, phrase; see, Cardozo’s “Walked with Angels Unawares” in VALUES address delivered at exercises of the Jewish Institute of Religion [1931], p. 5 Selected Writings of Benjamin Nathan Cardozo, Margaret Hall, bound edition, Matthew Bender; see also, Cardozo’s idealistic and spiritual peroration re the vocation of service at the Bar to the first class of law graduates of St. John’s University School of Law in 1928 entitled OUR LADY OF THE COMMON LAW, at pp. 96-97, ibid.

Prosecutors, therefore, should be able to overcome some of the inbred biases of stuck-in-the-mud methodologies to work outside the box and well beyond the box, as has occurred in my own beloved borough of Brooklyn. They have the range of discretionary authority, sua sponte, to be fairer and to garner efficiencies for their offices. Such confident boldness lessens not one iota the core duty to prosecute criminal wrongdoers to the fullest extent of the law. Yet, it better serves the criminal justice system overall, by turning all appropriate file cards up on the table. Nevertheless, a state-wide statutory authorization, with uniform standards of application and accountability would be even better.

It is my hope (I cannot yet bring myself to call it an expectation in view of the present-day dysfunction in Albany) that those in authority may at least be listening, and perhaps even open enough to choose Transparency over Secrecy. Finally, this proposal is not some massive transformation in the balance of criminal justice power. Rather, the idea would just smartly push the system forward a step or two, with the bonus of more fairness, to boot. The goal: SEEKING JUSTICE BY SHEDDING LIGHT.
# Defending Against DNA and Scientific Evidence

**10 CLE Credit Hours in Skills**
**2 CLE Credit Hour in Ethics**

**December 3 – 4, 2010**
**SUNY Brockport Campus – Seymour College Union**

## Friday, December 3

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<th>Time</th>
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<td>8:30 – 9:00</td>
<td>Registration</td>
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<td>9:00 – 10:50</td>
<td>Understanding DNA Evidence: A Criminal Defense Perspective, Dr. Michael Baird, Ph.D</td>
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<td>10:50–11:10</td>
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<td>11:10–12:00</td>
<td>Daubert / Frye Motions: DNA and Beyond, William Easton, Esq.</td>
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<td>Obtaining Discovery: What to Ask For and How to Get It, Jill Paperno, Esq., and Kimberly Duguay, Esq.</td>
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<td>2:00–2:50</td>
<td>Understanding DNA Discovery: What to do with it now that you have it, Benjamin Ostrer, Esq.</td>
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<td>3:10–4:00</td>
<td>Panel Discussion: Wrongful Convictions and Defense Counsel’s Obligations, Exonerees: Steven Barnes, Frank Sterling, Jeffrey Deskovic and Betty Tyson. Moderated by Donald M. Thompson, Esq. and R. J. Byington, Reid Associates (Ethics)</td>
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Dinner and Presentation of the Jeffrey Jacobs Memorial Award

## Saturday, December 4

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<td>9:10 – 10:00</td>
<td>Cross-Examination of the DNA Expert I: The “Nuts-and-Bolts” of Crossing a DNA Expert, Erik Teifke, Esq.</td>
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<td>10:00–10:50</td>
<td>Cross-Examination of the DNA Expert II: A Primer for the Scientifically Challenged Lawyer Presented by a Very Scientifically Challenged Lawyer, George Goltzer, Esq.</td>
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<td>11:10–12:00</td>
<td>Guilty Pleas and Wrongful Convictions, Brian Shiffrin, Esq. and Donald M. Thompson, Esq. (Ethics)</td>
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<td>12:00–1:00</td>
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<td>The Case of Frank Sterling: When the Confession Does Not Match the Facts, R. J. Byington, Reid Associates</td>
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<td>2:50–3:10</td>
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<td>3:10–4:00</td>
<td>Examining the Firearms Examiner, David M. Abbato, Jr., Esq.</td>
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## FOR MORE INFORMATION CONTACT:

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Monroe County Public Defender’s Office
Tel: (585) 753-4031
BRIAN SHIFFRIN, Esq. // Member of the firm Easton Thompson Kasperek Shiffrin, LLP. He is a cum laude graduate of the University of Pennsylvania Law School. During the period 1981–2008, Mr. Shiffrin served as the attorney in charge of the Monroe County Public Defender’s Appeals Bureau. Mr. Shiffrin is Past President of the Rochester Chapter of American Inns of Court, a former Trustee of the Monroe County Bar Association, has twice served as Chair of the Criminal Justice Section of the Monroe County Bar Association. He is the co-author of the chapter on Appeals in Criminal Cases in the NYSBA's Criminal Practice Handbook. Mr. Shiffrin has been awarded the Monroe County Bar Association’s Charles F. Crimi and Raymond J. Pauley awards and the Daily Record’s Nathaniel Award. He is on the adjunct faculty at RIT where he teaches courses on Courts and Wrongful Convictions

DON THOMPSON, Esq. // For over twenty years, Don has maintained a private practice devoted to trial, appellate and post–appellate representation of the criminally accused. Additionally, he has served as counsel for defendants facing the death penalty in both state and federal courts. Don has represented death row inmates in conjunction with the Southern Prisoners’ Defense League, in state and federal habeas corpus proceedings and before the United States Supreme Court. Don has worked independently and together with the Innocence Project to obtain the release and exoneration of wrongfully convicted defendants, most recently securing the exonerations of Douglas Warney, who was released after serving 10 years of a 25 to life sentence after renewed DNA testing helped establish that he was innocent of the murder for which he had been convicted. In 2005, Don was the recipient of the New York State Bar Association’s Charles F. Crimi Memorial Award, as well as the Monroe County Bar Association’s Charles F. Crimi Memorial Award, which recognizes a lawyer who demonstrates his commitment to the legal needs of the poor and disadvantaged.

ERIK TEIFKE, Esq. // Serves as a Special Assistant Public Defender in Monroe County where he has worked since 1995. Erik handles violent felony and major drug cases. Erik is a top flight litigator having won acquittals in three murder trials as well as countless other types of cases. He is a frequent lecturer at in house CLE’s presented to junior and senior staff at the Monroe County Public Defender’s Office. He has also lectured at programs presented by the NYSACDL (Sept 2008) and at NYSDA’s Annual Convention (July 2009) on cross examining child witnesses in felony sex cases.

DAVID M. ABBATAY, Jr. // Is a graduate of the University at Buffalo Law School. He has served as an Assistant Monroe County Public Defender in the office’s appeals unit since 2005. Over that time, Mr. Abbatoy has briefed, argued, and litigated over 100 criminal appeals at the Court of Appeals, Fourth Department, and Monroe County Court. He has recently brought challenges in Monroe County Supreme Court testing the reliability and admissibility of testimony traditionally given by firearms and toolmark examiners in major felony prosecutions.

MICHAEL L. BAIRD, Ph.D. // Is DNA Diagnostics Center’s Chief Scientific Officer, Laboratory Director, and DNA Technical Leader. He received his doctorate in genetics from the University of Chicago. He was a postdoctoral fellow for one year at the University of Michigan in the department of human genetics where he studied sickle cell anemia. He next joined Columbia University as a Research Associate in the department a human genetics and medicine where, over a three year period, he studied the molecular basis of the blood genetic disease thalassemia. He then joined Lifecodes Corporation at its inception as a Senior Scientist where he pioneered DNA methods for the determination of parentage, forensic identity and tissue transplantation. During his 20 years at Lifecodes, Dr. Baird held the positions of, Senior Scientist, Laboratory Director, and Vice President of Laboratory Operations. After leaving Lifecodes, Dr. Baird joined DNA Diagnostics Center in Fairfield, Ohio.

Dr. Baird has published over 50 articles in peer review journals as well as chapters in books about the use of DNA for identification. He was the first to testify in a criminal trial involving DNA evidence and has since testified in over 350 criminal cases. He has presented at dozens of scientific meetings around the world about DNA testing for identification. He served on the panel of the Office of Technology Assessment for the U.S. Congress studying the use of DNA for identification. He also presented information to the panels of the National Research Council that studied DNA testing methods and issued reports in 1992 and 1996.

Dr. Baird currently serves as a chair of the Relationship Testing Standards Committee of the AABB. He has served as chair of the Parentage Testing Accreditation Program Unit of the AABB from 1997 through 2002. Prior to that, he was a member of the Parentage Testing Standards Committee of the AABB. Dr Baird has served as Treasurer and is currently President of
the Human Identity Trade Association (HITA), a trade association of companies in the human identification field. Dr. Baird is a fellow in the American Academy of Forensic Sciences, and member of the AABB, American Society of Human Genetics, the American Genetics Society, the American Society of Histocompatibility and Immunogeneitcs, the International Society of Forensic Genetics, and the American Society of Hematology.

Dr. Baird has appeared on TV as the DNA consultant for NBC during the O.J. Simpson trial, the DNA expert for the Anna Nicole Smith case, and on the Judge David Young show. He has also been interviewed by dozens of TV and print journalists on issues involving DNA testing and specific cases.

**JILL PAPERNO, Esq.** is the Second Assistant Public Defender, Monroe County Public Defender’s Office. Jill Paperno graduated from the State University of New York at Albany in 1981, and Buffalo Law School in 1984. She was a staff attorney for Prisoners’ Legal Services of New York from 1984 until 1987, representing state prison inmates in state and federal court on prisoners’ rights matters. Ms. Paperno has worked for the Monroe County Public Defender’s Office since 1987. She trained and supervised City and Parole sections of the office for ten years as the City Court Supervisor, and since 2009 has supervised felony staff as the Second Assistant Public Defender. She has tried numerous felony cases, including homicides and sex offenses, during the past 22 years. Ms. Paperno assisted in developing the training program for Monroe County Public Defender’s Office attorneys, and has presented CLEs on numerous topics over the years.

**WILLIAM T. EASTON, Esq.** Bill Easton has over twenty-five years of experience handling criminal trials and appeals with an emphasis on complex criminal cases in upstate New York. He has served as trial counsel for defendants charged with homicides in over twenty counties in upstate New York. Prior to private practice, Bill worked for over ten years at the New York State Capital Defender Office. As the supervising attorney of the regional office of the Capital Defender Office, Bill served as the lead attorney or consultant in every capital trial held in western New York since the reenactment of the death penalty. Bill has been designated the by United States District Court to serve as “Learned Counsel” in four multi-jurisdiction murder cases tried in the Western District of New York including the first federal death penalty prosecution in the Rochester area. Previously, he was a partner at a law firm, focusing on criminal litigation in federal and state courts, and he started his legal career as an assistant public defender in the Monroe County Public Defender’s Office.

In 1999, Bill was presented with the Charles F. Crimi Award by the Monroe County Bar Association for his skilled advocacy for the poor. In addition to his practice, Bill also serves as an adjunct professor of law at the University at Buffalo Law school and has lectured on criminal law at Cornell Law School and Syracuse Law School. Bill serves as a fact-finder for the New York State Commission on Judicial Conduct and has presented to professional associations on a variety of topics regarding capital defense and jury selection.”

**BEN OSTRER, Esq.** New York Law School 1976; admitted New York and in Federal District Courts and Second Circuit. A partner in the firm of Ostrer Rosenwasser LLP and a director of the Legal Aid Society of Orange County. Ben has developed a significant expertise in the field of forensic and DNA evidence. He is a frequent lecturer on the use of DNA in criminal cases. He obtained a not-guilty verdict with the use of forensic evidence on behalf of a young Ulster County man accused of shaken-baby homicide. His defense of Michael Maragh resulted in a reversal of a homicide conviction by the Court of Appeals and a new pattern Jury instruction on juror expertise.

**GEORGE R. GOLTZER, Esq.** Specializes in criminal defense. Current President of the New York State Association of Criminal Defense Lawyers, he lectures at Continuing Legal Education seminars on assorted criminal defense topics. Mr. Goltzer has extensive trial experience in high profile matters. He secured acquittals after three month trials in both the Detective Vendetti murder and first Columbo War cases, tried the Jonathan Levin murder case and won acquittal of the first degree murder charge, secured dismissal of all charges for Louis Montero in the Brian Watkins Utah tourist murder case, and tried the Arohn Kee serial murders involving both nuclear and mitochondrial DNA issues. Mr. Goltzer currently represents Vincent Basiano in defense of an authorized capital prosecution in the United States District Court for the Eastern District of New York. Mr. Goltzer resides in New York City with his wife and two children.
As part of the defending Against DNA and Scientific Evidence seminar, NYSACDL and the Monroe County Public Defender’s Office will present a panel discussion: Wrongful Convictions and Defense Counsel’s Obligations, moderated by Donald M. Thompson, Esq., Easton Thompson Kasperek Shiffrin LLP, 2010 recipient of NYSDA’s Service of Justice Award, and Richard J. Byington, an instructor for John E. Reid and Associates, the world’s largest trainer of interview and interrogation techniques to law enforcement agencies, who was instrumental in securing evidence leading to Frank Sterling’s exoneration.

The Panel Discussion will provide an opportunity to hear first hand from people who collectively served almost 80 years in prison for crimes they did not commit. This discussion will underscore not only the importance of DNA evidence as an investigative resource to prove innocence as well as culpability but the need for defense counsel to aggressively investigate and to be ever vigilant in fighting to protect the rights of the accused. The Exonerees are:

**FRANK STERLING**: Freed after serving nearly 19 years for a murder he did not commit following “touch DNA” testing and investigation in a collaborative effort by the Innocence Project, Richard Byington of John E. Reid and Associates, Cardozo School of Law students, Weil, Gotshal & Manges, Kroll Investigations, and Dr. Richard Leo. No physical evidence connected Sterling to the murder of which he was convicted; the sole evidence used to convict him was a hypnotically-induced false confession. When confronted with the DNA evidence, Mark Christie, whose confessions to the crime were discounted by law enforcement at the time of Mr. Sterling’s trial, again confessed to the murder. Mr. Christie is currently serving time for strangling his 4-year old neighbor, a murder committed after Mr. Sterling was charged for the first murder Mr. Christie committed.

**STEVEN BARNES**: After serving almost two decades in prison for a murder and rape he did not commit, Barnes was freed on November 25, 2008 and on January 9, 2009, when prosecutors announced that they were dropping all charges, after DNA testing demonstrated the he could not have been the perpetrator of the crimes for which he was convicted. The Innocence Project first began representing Barnes, and engaging in DNA testing with the consent of the Oneida County District Attorney in 1993. False testimony of a jailhouse informant and mistaken eyewitness testimony contributed to Mr. Barnes’s wrongful conviction.

**JEFFREY DESKOVIC**: In September 2006, the Innocence Project’s DNA testing of forensic evidence contributed by the actual perpetrator in Deskovic’s case revealed that it matched not Deskovic, but convicted murderer Steven Cunningham who was in prison for strangling the sister of his live-in girlfriend. On September 20, 2006, Jeff Deskovic was released from prison. Following an apology from the assistant district attorney, the court dismissed Deskovic’s indictment on the grounds of actual innocence. Thereafter, Steven Cunningham confessed to the crime for which Jeff Deskovic served nearly 16 years. A false confession and police misconduct contributed to Deskovic’s wrongful conviction.

**BETTY TYSON**: New York’s longest-serving wrongfully convicted female prisoner, Ms. Tyson was released after serving 25 years for a murder she did not commit after it was revealed that the lead investigator on the case physically threatened witnesses into making false statements and hid exculpatory evidence. Tyson was denied parole based on her refusal to accept responsibility for the murder she did not commit.
On October 6, the New York Friends of The Southern Center for Human Rights (SCHR) held a fundraiser entitled “Justice Taking Root” at Moore Brothers Wine Company in Manhattan. This event marked the launch of a New York-based grassroots effort to build awareness of and support for SCHR. The event was co-hosted by Aaron Mysliwiec (Offices of Joshua L. Dratel, P.C.) and Emily Slater (Debevoise & Plimpton LLP). In addition to Aaron Mysliwiec, who serves as the Treasurer for NYSACDL, NYSACDL First Vice President Richard Willstatter, Past-Presidents Joshua Dratel and Dan Arshack and members Dennis Murphy (Director of Training for The Legal Aid Society), Rick Greenberg, (Attorney-in-Charge, Office of the Appellate Defender) and Executive Director Margaret Alverson attended. Remarks were offered by SCHR Senior Attorney William Montross and the keynote address was delivered by nationally acclaimed capital defense attorney and SCHR President, Stephen Bright.

The Southern Center for Human Rights was founded in 1976 in response to the Supreme Court’s reinstatement of the death penalty that year and to the horrendous conditions in Southern prisons and jails. Since then, SCHR has defended individuals sentenced to death, represented prisoners and detainees subjected to inhumane conditions of confinement, and otherwise responded to requests for help from those who have been wronged, abused, tortured, injured, and denigrated by the criminal justice system in the South.† In the course of so doing, SCHR has seen—and in turn publicized—the variety and brutality of the abuses inflicted by these criminal justice systems. However, the organization continues to need the resources necessary to systematically leverage the power and knowledge acquired from its legal work into broader reforms.

While SCHR is located in the South and the cases and activities take place in Georgia or Alabama, what occurs there is not confined to the Deep South. The issues confronting SCHR clients, lawyers and investigators strike at the very heart of the justice system, and often make a mockery of the constitution. Given the nature of SCHR’s mission, the organization faces unique financial challenges unlike other nonprofit organizations.

The proceeds and support from this event and the growing group of New York Friends of SCHR will support SCHR’s ongoing efforts to promote the civil and human rights of the poor in the criminal justice system and to make the system more open, fair and accountable. Gifts to SCHR allows them to provide representation for people facing the death penalty, take civil action to enforce the constitutional rights of people in prisons and jails and advocate the end of practices which impact the most vulnerable and marginalized in our society. For more information, contact Sara J. Totonchi, Law Offices of the Southern Center for Human Rights, 404-688-1202 ext 209; www.schr.org.

From left: The Southern Center for Human Rights President and Senior Counsel, Stephen Bright; Event Host, Aaron Mysliwiec; The Southern Center for Human Rights Senior Attorney, William Montross; The Southern Center for Human Rights Executive Director, Sara J. Totoncji.
As recipient of the 2010 Jack T. Litman Twelve Angry Men scholarship, it is with distinct honor and pleasure that I am afforded the opportunity to express my gratitude to the Twelve Angry Men committee of the New York State Association of Criminal Defense Lawyers. The Twelve Angry Men generously awards a scholarship each year to a member of the NYSACDL to attend the National Criminal Defense College’s Trial Practice Institute, a two-week intensive trial advocacy program in Macon, Georgia.


How do I describe what is the best professional training course I’ve ever attended? Though my colleagues humorously referred to the NCDC as “summer camp for criminal defense lawyers” this characterization misses the mark. As with all truly memorable experiences, you just had to be there.

Each of the 96 criminal defense attorneys in attendance – solo practitioners, public defense attorneys, and assistant federal defenders – brought their passion for the people they represent. As a body, we shared best practices, ideas, and war stories from nearly every state in the union including Alaska.

Jared Kneifel maintains a solo practice in New York City focusing on criminal defense and civil rights (police misconduct). He represented Issa Sesay, the Interim Leader of the Revolutionary United Front, before the Special Court for Sierra Leone, an international war crimes tribunal. Mr. Kneitel has also been qualified to practice before the United States Military Commissions (Guantánamo). He serves as a member of the adjunct faculty at Fordham University School of Law. He can be reached via email at Jared@KneitelLegal.com.
At the outset, Deryl Dantzler, Dean of the NCDC, encouraged us to work hard and play hard. The faculty separately pushed us to expand beyond our comfort zones and utilize the new techniques that we were learning.

Each of us was assigned a client and a case file. At first glance, the facts were daunting; victory beyond reach. However, at the end of the two weeks, each of us “graduated” with the courage, confidence, and assurance that we could achieve the best results for our clients.

Each morning we promptly arrived at Mercer Law School for large lectures, small group sections, and demonstrations. After school, we relaxed pool-side, barbecued, explored Macon, and on the last evening, skits were performed by the students (almost all of which made fun of the faculty; yes, that part was a bit campy).

The lectures were conducted by high caliber attorneys – all of whom are exceptional and incredibly gifted. The small group sections were comprised of eight students each led by a member of the faculty. Our own exercises were recorded with a talented group of actors standing in as clients, witnesses, and jurors. I mused to myself – as an adjunct professor at Fordham University School of Law in which my students’ exercises are recorded – “now I know how my students feel.” I’ve already incorporated many of the teachings and exercises from the NCDC into my syllabus; they’ve been received with praise.

We built a case theory: “that combination of facts beyond dispute and law which, in a common sense and emotional way, leads the jury to conclude that a fellow person is wrongfully accused (or should not be severely punished),” and then set out to persuade using technical, substantive, and emotional components.

We revamped our mindset for voir dire from picking a jury to excluding people from the jury. As a corollary, we examined our presumptuous belief that jurors want to pay attention. It is our job to keep it interesting and keep the jury awake.

We reached beyond the jurors’ minds and touched their hearts, treating each client as a person not as a case. While presenting our cases we remembered kiss: keep it simple, stupid.

On cross-examination, with “you don’t have to be cross to do cross” as our mantra, we told each of our client’s stories – though fragmented and interrupted – of innocence. This was done with no more than three words per question (subject, verb, noun; articles are free) and preferably one word per question. Long questions invite long answers; short questions invite short answers. The aim was to conduct the cross like a love affair: brief but intense.

We made mediocre sandwiches (with good stuff at the front and back, and bad stuff in the middle); we made eye connection instead of mere eye contact; and aimed to win by scoring points, not by knock out. We used the star system to impeach: show it; take it back; ask; repeat. After that we learned to SYAD: sit your ass down.

We also learned valuable lessons on the use of demonstrative evidence. Jurors retain 10-20% of what they hear, but can retain up to 80% of what they hear if combined with a visual aid. Of course, our passion is the best demonstrative evidence. Seeing truly is believing.

Warned that we are not the reason why the system doesn’t work (we are a part of the reason), we bear the responsibility – among our many responsibilities – to counter the indoctrination of jury questionnaires, jury orientation DVDs and pamphlets, and judges’ scripts to prospective jurors. When we feel tired, we aren’t burnt out, we’re just beaten down.

While leaving those two very intense, sleep-deprived, coffee-fueled, yet invigorating weeks that was the NCDC, the only question I asked myself was “when can we do it again?” Although my experience at the NCDC is ineffable, one thing I can express with certainty and clarity is my gratitude to the Twelve Angry Men Committee. Thank you for awarding me the scholarship and the experience of a lifetime.

African Proverb

“Corn can’t expect justice from a court composed of chickens.”

African Proverb
Jeffrey A. Jacobs, who served in the Monroe County Public Defender’s Office for more than 20 years, died nearly four years ago following an eight-month battle with brain cancer. He was 50.

“I worked with Jeff for a number of years and I always considered him a source of inspiration,” said Tim Donaher, the county’s current public defender. “He was the penultimate criminal defense attorney in my mind. He was always fighting for his clients.”

Jacobs will be memorialized through the creation of a new award by the Monroe County Public Defender’s Office, Donaher announced recently.

The award is the result of some discussions among senior staff in the office, and will recognize a criminal defense attorney, not necessarily a public defender, who has performed outstanding work and exemplifies Jacobs’s qualities, which Donaher said include fierce advocacy and dedication to clients, a commitment to justice and service as a role model for younger attorneys.

“We want to recognize a trial attorney,” said Donaher. “It’s just for criminal defense attorneys. It could be federal, private, public defenders — anyone in the greater Rochester area.”

**A PASSION FOR THE JOB**

Jacobs was a 1981 graduate of Boston College Law School and worked in the Monroe County Public Defender’s Office from 1982 to 1986, when he returned to Boston so his wife, Andrea, could pursue her post-graduate studies at Harvard.

The couple arrived back in Rochester in 1988, and Jacobs returned to the public defender’s office, where he rose to special assistant public defender, a senior staff position. He worked there until his death in November 2006.

Former Public Defender Edward Nowak was happy to welcome Jacobs back, he said.

“What stood out about Jeff, to me, was his passion for the job,” Nowak said. “He was truly passionate and believed in what he was doing. He believed that the most important aspect of the criminal justice system was competent defense counsel because without that, a poor person could not get a fair trial.”

Monroe County Court Judge Richard A. Keenan, who serves on the new Jacobs awards committee, was an assistant district attorney when he first met Jacobs. The two were courtroom adversaries on a number of cases in the 1980s and 1990s.

“He certainly was a vigorous opponent from the defense side,” Keenan said. “He handled a number of high-profile cases.”
Keenan also remembered Jacobs as an involved father, coaching his sons in soccer and basketball, and as a huge New York Knicks fan. Even though he wasn’t much of a basketball fan, Keenan often brought up the Knicks in conversations during the trials they covered.

“I think it’s a wonderful idea to recognize advocacy on the public attorney level,” Keenan said. “I think it is important to the legal community to recognize attorneys who have devoted their career to public advocacy at a high level, serving as assigned counsel or public defenders.”

Dianne C. Russell, another awards committee member, worked with Jacobs for 17 years in the public defender’s office. Now in private practice, she was a law clerk when she applied for the job.

“He was very encouraging,” she said of Jacobs. “What he said to me was ‘Now, you can be an advocate.’ That was very important to him. He valued that ability to advocate for individuals.”

“The younger attorneys really have looked up to him quite a bit,” Russell said. “I think he would be surprised to find out how other people saw him as an incredible mentor and teacher. He probably wouldn’t have described himself that way, but he was always available.”

Karen Bailey Turner, an attorney at Brown & Hutchinson, said Jacobs was an institution at the public defender’s office where she worked for 10 years.

“He was a great mentor and an unapologetic representative of those accused of crimes, particularly the indigent,” she said. “The man was fearless and he taught us to be fearless, too. The term ‘afraid’ and Jeff were not synonymous. I think as the cases get more difficult, the allegations get more heinous, I think it’s difficult for an attorney to go to court."

She said she misses the expert advice she would receive from Jacobs and the group talks the attorneys would have about cases.

Even though Jacobs and his wife were not from Rochester, they fell in love with the community, Andrea said. They raised two children here: Justin, a Hofstra University graduate who is an attorney working with the U.S. Court of Appeals for the Second Circuit; and Jarrett, a Peace Corps volunteer working as a natural resources manager in a remote African village.

“My husband was a very analytical person,” Andrea said. “His undergraduate degree was in biology so he’s been trained as a scientist, which I think was a really interesting combination with a law degree.”

She believes his science background was beneficial when Jacobs was assigned Monroe County’s first case involving DNA evidence. The trial transcripts were requested by O.J. Simpson’s defense team in generating their own cross examination of witnesses in the late 1990s. (The case involved the defense of Willis Knight, 47, now serving 37-and-a-half years to life for second-degree murder and first-degree rape of 18-year-old Jennifer Koon in 1993, the daughter of state Assemblyman David Koon of Perinton. Housed in the Great Meadow Correctional Facility in Washington County, Willis is not eligible for parole consideration until 2031.)

“’No one will say he is the sharpest knife in the drawer.’”

Sam Adam, Jr.
Defense attorney for Rod Blagojevich, giving his closing remarks during the former Illinois governor’s corruption trial.
A FAMILY MAN

Andrea said her husband loved fishing, hiking, camping, cooking, wine, golf and his family, teaching his sons many things.

“It was really fun around the dinner table,” she said. “He challenged his sons and me to think about things very carefully. He gave a lot of insight into how to think about problems and understand there’s always a different perspective, which I think is consistent with his being a defense attorney.”

Andrea said her husband would be pleased about the award.

“It’s fantastic,” she said. “It’s an honor and it really speaks volumes to how well respected Jeff was in the legal community.”

Andrew MacGowan, a school administrator in the Rochester City School District, knew Jacobs as a friend. MacGowan said Jacobs was like everybody’s big brother. Regardless of how old they were, Jacobs was the older, wiser, benevolent brother.

“You had to get to know him to know this,” he said. “He was humble and didn’t have the need to advertise his array of astonishing virtues.”

Jacobs was a big Grateful Dead fan, MacGowan also recalled. He sometimes arranged his vacations around the band’s tour schedule, from March 1973 until June 1995, six weeks before singer Jerry Garcia’s death.

After graduating from law school, Jeff worked for a year as an associate of A. Vincent Buzard before starting his career at the Monroe County Public Defender’s Office in December of 1982.

As a public defender, Jeff tried more than 100 felony cases in his career. Donaher said there are few attorneys in the region who have tried more felony cases than Jacobs and obtained the results he achieved for his clients.

The first Jeffrey A. Jacobs Memorial Award will be presented Dec. 3 at the Defense Community Dinner, aptly following a CLE, “Defending Against DNA & Scientific Evidence,” presented by the New York State Association of Criminal Defense Lawyers and the Monroe County Public Defender’s Office at SUNY Brockport.

For more information on the seminar, see www.nysacdl.com Details on the dinner will be announced later.

AWARDS & RECOGNITION

BOARD MEMBER ANDREW KOSSOVER AWARDED DNA SCHOLARSHIP

Andrew Kossover, NYSACDL Board Member and Chair of the Indigent Defense and Legislative Committees, has been awarded a scholarship to attend a special two-day training on “DNA for the Defense” to be held in St. Petersburg, Florida on March 14-15, 2011. Participation in the conference will provide Mr. Kossover with knowledge of the latest developments in the field of DNA forensic science. The National Clearinghouse for Science, Technology and Law is administering the program. Some of the world’s leading DNA experts will be conducting the training. Mr. Kossover is among 70 attorneys selected from throughout the United States and Canada. The US Department of Justice is providing funding for the seminar.

Mr. Kossover serves as a member of the Advisory Committee to the New York State Task Force on Wrongful Convictions. His attendance at this program will undoubtedly assist him with his contributions to the Task Force. Furthermore, the seminar is, in part, described as a “training for trainers,” thus encouraging participants to return to their respective home jurisdictions to train colleagues. In the spirit of the conference, Mr. Kossover looks forward to sharing the resources of his participation with NYSACDL members in the future.

THE DAILY RECORD PUBLISHER, KEVIN MOMOT AWARDED NLADA EMERY A. BROWNELL AWARD

The National Legal Aid & Defender Association Conference Committee has selected The Daily Record publisher, Kevin Momot, to receive the 2010 NLADA Emery A. Brownell Award. This award will be presented at the NLADA 2010 Annual Conference in Atlanta, GA at the Sheraton Atlanta Hotel on Friday, November 12 during a special Awards Luncheon. Mr. Momot was nominated by Sheila Gaddis, who wrote eloquently of his work on behalf of equal justice. Congratulations on your outstanding contributions and achievements!
I have a confession to make: I’ve always been wary of the white collar criminal defense bar. Real criminal defense lawyers defend those accused of murder, rape and other crimes of violence, right? I mean, wassup with the pinstripe suits and the Grey Poupon sensibilities of those with money to burn? Isn’t white collar work for momma’s boys and wannabes?

Harvey Silverglate has slapped me silly and forced me to see just how wrong I am. His Three Felonies A Day: How The Feds Target the Innocent, is a tale told from the trenches by a white collar warrior worthy of any courtroom. It may well be that the threat to liberty is greatest in the world of white collar crime, where prosecutors armed with vague laws, investigative grand juries and infinite resources can crush virtually anyone, regardless of whether the person has committed a crime.

Silverglate practices in Boston and writes a column for The Boston Phoenix; he is a sixty-something lawyer and litigator who managed to survive Harvard Law School without losing a taste for street smarts. I’ve never met him, but his photograph on the dust jacket of the book bears an uncanny resemblance to Robert Fogelnest, former president of the National Association of Criminal Defense Lawyers, and now an expatriate living in Mexico. Fogelnest is a good friend, so I suppose there is a danger that I read too much into Silverglate’s feisty prose, but I don’t think so.

Economic hard times make populists of all who struggle, and yield the temptation to indulge in a sort of populist dualism, separating the world in good and evil. The current bad guys are Wall Street bankers, those smarmy folks who packaged derivatives, traded them like baseball cards among themselves, exploited the Barnum-like quality in each of us that wants something for nothing, and then crashed the economy. We’re enraged, most of us, that these banking bandits pulled this off and still got a free ride from the government. What a country: The rich get bailed out by Government and ordinary people are forced into bankruptcy.

It plays, doesn’t it? This neo-populist rage slips easily off of my tongue. Tar and feather the leisure class, I say. But not so fast. Silverglate warns against this sort of easy anger. It is the sort of thing the prosecutors use to fuel prosecutions of doctors, lawyers, businessmen, salesmen, bankers, virtually everyone who, in this complex and regulated economy of ours, sell goods and services under the watchful eye of the government. Each can be prosecuted on a whim; all of us are criminals when viewed through lenses tilted just so. In the world of white collar crime, mail fraud, wire fraud, obstruction of justice, become fall back crimes prosecutors can allege when all else fails. Many defendants chose to enter pleas rather than fight costly and expensive wars than might well vindicate them but at the expense of bankruptcy.

A friend recommended Three Felonies a Day when he learned I was representing a lawyer in an ongoing federal investigation. I told my friend how terrifying the investigation was. When questions were raised about one topic, I met with the feds. I provided documents that rebutted their suspicions that anything was amiss. They acknowledged that they did not know about the documents I showed them. I assumed that the case would be closed and all would return to normal. How naive.

You see, the government wants to turn this lawyer into a witness against another lawyer. So they are sparing no expense to try to terrify my client. Federal agents have visited his neighbors, his favorite restaurants, his clients: The agents are behaving like organized crime goons, flashing badges and guns in an effort to scare up some evidence of any kind of wrongdoing that they can dream up. Why? They want my client to flip against someone who is the real target of their ire. There are reputations to be made in high-profile prosecutions, you see. The feds are trying to “climb the ladder,” as Silverglate calls it, using my client as a rung. The trouble is, there is nothing for them to seize upon.

But they want their man. So they dog my client, sending almost daily
reminders of their ability to root through all the electronic trash they can find: banking records, credit card receipts, old tax returns. They will press until they find something they can use as a club to bludgeon my client. All this with the aid of a secret grand jury, a body that was intended to protect liberty but not serves as the American equivalent of Stalin’s secret police.

I’ve handled white collar cases before, cases involving government employees, bank employees and those alleged to have abused positions of trust. But, frankly, I did not see the political significance of each of these prosecutions clearly enough.

The defense of a crime of violence is challenging. Jurors are terrified by glimpses of a frightening world. Stepping across the divide separating law-abiding jurors and the blood and gore of the event alleged is difficult. Jurors look upon the allegations as they would upon a foreign culture.

But in white collar cases, there is no divide. When the government can accuse anyone of a crime and the crime is simply engaging in business, or taking advice from a professional, we are all potential defendants. The gap between juror and defendant is eliminated. What is evil now is not the blood on the murder weapon. No, what is evil now is the secret hand of a federal agent, lying, intimidating and insinuating his way into our lives. White collar work, Silverglate persuades, is one of the front lines in the battle against abuse of government power.

Silverglate radicalized me. There is no mob quite so dangerous as a self-righteous mob, and populism is the rage of the day. White collar defense is less the work of those who don’t want to get blood on their lapels than it is a world in which spreadsheets and ledgers become the new Molotov cocktail. Reading Silverglate made me eager to get into the front lines and trade blows with a government all too ready to take without restraint.

Read Three Felonies a Day.

Norm Pattis practices criminal law in Connecticut and has tried more than 100 cases to verdict. He has appeared on NBC and CBS Today Show. He maintains a very interesting and informative blog: normpattis/blogspot and can be reached via his firm’s website at www.nompattis.com
This year, the NYSACDL Annual Dinner moves to a new location, the Prince George Ballroom. Located inside of the Prince George Hotel, the Ballroom was renovated and restored to its turn of the twentieth century elegance by Common Ground, a nonprofit group whose mission is to end homelessness. The cocktail reception will be held in the World Monuments Fund Art Gallery which serves as the passageway to the Ballroom.

Built in 1904 and once one of New York City’s premier hotels, the Prince George Hotel became, by the 1980’s, the City’s largest welfare hotel and a virtual crime scene with drug dealing, prostitution, and robberies a daily occurrence. By 1990, the Hotel had become abandoned. Enter Common Ground which undertook to convert the entire structure to provide affordable housing and support services to over 400 low income New Yorkers and people with AIDS. By 1999, restoration was complete and the Prince George is now listed on the National Register of Historic Places.

The ballroom in which NYSACDL will host its dinner was refurbished by Common Ground with grants and donations from foundations, individuals, and corporations. In keeping with its overall mission to assist people in getting back on their feet, Common Ground employed the homeless and low income New Yorkers to work on the restoration. Proceeds from the rental of the space go to support Common Ground’s housing development work.

The 2011 Annual Dinner promises to be a truly special event, with expanded reception and exciting fare as well as a chance to visit with friends and colleagues from around the State, to celebrate victories and to celebrate the new year. Be sure to mark your calendars – invitations and advertising opportunities for the dinner journal will follow. Please contact Executive Director Margaret Alverson at malverson@nysacdl.com or Assistant to the Executive Director, Sandy Wissell at scwissell@nysacdl.com with any questions.
Let’s say, by some cruel twist of fate, you’ve been accused of a crime you didn’t commit. You know you’re innocent; federal prosecutors believe otherwise.

In order to prove your guilt beyond a reasonable doubt, prosecutors attempt to show not only that you broke the law, but that you did so knowingly and intentionally. To this end, the government enlists so-called “cooperating witnesses.”

Former friends and associates, under prosecutors’ pressure, testify as to your nefarious ways, in stories woven largely from whole cloth. Despite your complete innocence, a jury of your peers ultimately finds you guilty. The truth, it turns out, has not set you free.

Trust Me: Justice is my Last Name

By Harvey A. Silverglate
How common is such a miscarriage of justice? Criminal trial lawyers (including yours truly) all have “war stories,” the shocking accounts of prosecutors “turning” witnesses to give jurors the odor of a crime. But a number of recent cases in which judges have tossed out criminal charges—explicitly rebuking overzealous prosecutors in the process—indicate that the problem may be more widespread than once acknowledged by legal observers. Even more disturbing are the numerous cases in which the stories pedaled by cooperating witnesses have turned out to be lies.

Those who have not had disastrous or even disturbing run-ins with the law might base their views of government on different—perhaps more benign—interactions. But such manufacturing of convictions makes America’s oft-touted badge as “land of the free” seem less like worthy aspiration and more like brutal irony. In the long run, as increasing numbers of innocent citizens see the dark side of federal criminal justice, the rot in the system can produce much wreckage, including a pervasive loss of faith in what passes for justice.

Justice, simply put, is supposed to be based on a search for truth. When prosecutors obscure truth in pursuit of conviction, the repercussions are evident, even to the Department itself. In January, following a string of high-profile dismissals, the DOJ issued a memorandum to all U.S. Attorneys’ offices, focusing on what evidence, if any, prosecutors need to share with defense attorneys that might help show innocence (a constitutional requirement the Supreme Court has long held to be a component of “due process of law”). In the memorandum, Deputy Attorney General David Ogden conceded that “even isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system.”

One of the most disturbing realizations that we lawyers have attained is the recognition that for every case in which judges publicly identify and penalize prosecutorial overreach, it’s a safe bet that countless others have flown under the radar, ending with a lengthy prison sentence for someone who did not get a fair trial and who might well be innocent. It’s worth keeping in mind when considering the following instances of prosecutorial overreach.

Former Broadcom executives were accused in June 2008 of securities fraud for the controversial, but not clearly criminal, practice of backdating stock options. They sought to present three witnesses familiar with Broadcom’s accounting practices to demonstrate that backdating, far from being a nefarious secret plan hatched by higher-ups, was widely known and approved within the corporate hierarchy. Prosecutors, on the other hand, sought to portray the program as surreptitious and to persuade cooperating witnesses to testify in order to establish the defendants’ criminal intent.

Prosecutors contacted one witness’s new employer, made “inappropriate statements” and caused her to lose her job; another was promised leniency if he would testify against a defendant; the third was subjected to as many as 30 “grueling” interrogations and pressured to “plead guilty to a crime he did not commit,” according to court findings. Because such conduct improperly influenced the three witnesses whose testimony would have been highly exculpatory, federal district Judge Cormac J. Carney acquitted defendants William Ruehle and Henry Nicholas in December 2009.

These tactics, to be sure, are not reserved for corporate crimes. In pursuit of Georgia attorney J. Mark Shelnutt, the government offered light sentences to drug dealers willing to testify that Shelnutt was involved in a money laundering scheme. Recognizing this perversion of justice, trial Judge Clay D. Land acquitted Shelnutt.

Harvey A. Silverglate, a Boston criminal defense and civil liberties lawyer, can be reached via his very interesting and informative website www.harveysilverglate.com. He was assisted in preparation of this article by research assistant Kyle Smeallie.
If the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of the government for there are no oppressions which the government may not authorize by law.

Lysander Spooner

Trial by Jury

in November 2009. By “negotiating sweetheart plea deals” with drug dealers, the U.S. attorney’s office “may have become clouded by its zeal to bring down a prominent defense attorney,” Judge Land wrote.

And in the much-ballyhooed corruption case of former Alaska Sen. Ted Stevens, a federal jury in October 2008 found the 40-plus-year senator guilty of lying on Senate disclosure forms. Weeks later (and after Stevens had lost his re-election bid), FBI whistle-blower Chad Joy exposed the government’s own multifaceted corruption: withholding information about the reliability of key witnesses and doctoring reports to reflect the prosecutors’ version of events, among other violations.

The DOJ, recognizing the damage done to its case, moved to vacate Stevens’ conviction in April 2009. Judge Emmet G. Sullivan, incensed at the government misconduct, took the extraordinary step of ordering a special investigation (still ongoing) into whether prosecutors’ actions rose to the level of criminal violations. “In nearly 25 years on the bench,” Sullivan said from the bench, “I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case.”

Such misconduct puts Justice Department statistics in perhaps a different light. That almost all federal convictions come by way of guilty plea--95%, according to the most recent data available--likely reflects a shifting cost-benefit calculus, rather than an overwhelming recognition by defendants of their own culpability. With the prospect of decades-long prison terms and witnesses willing to throw former colleagues under the bus in exchange for a reward doled out by prosecutors, there’s little wonder that federal criminal trials have become rarities; a guilty plea may appear to be even an innocent defendant’s best option.

Why do the feds stoop to such tactics,
and why have they so long gotten away with it? The answer, in my estimation, lies in large measure in the extraordinary vagueness of the underlying federal statutes, the focus of my book, Three Felonies a Day: How the Feds Target the Innocent (Encounter Books, 2009).

In backdating cases, for example, there is little consensus that the securities fraud laws provide fair notice that the practice is illegal—if indeed it is illegal. (Judge Carney, in dismissing the Broadcom charges, noted that Apple and Microsoft used similar accounting techniques, though neither company was indicted.) Regarding attorney Shelnutt’s case, lawyers are legally permitted to accept fees derived from criminal activity, but that hasn’t stopped similar prosecutions under vague money laundering formulations, such as that of Miami attorney Ben Kuehne last year (in which prosecutors eventually abandoned the remaining charges last November after a judge dismissed most of them).

By getting cooperating witnesses to “compose” damning testimony that indicates defendants operated stealthily and hence with guilty intent, the feds push defendants to plead guilty rather than proceed to trial. As a result, laws that fail to provide adequate notice of proscribed conduct go unchallenged. It’s a veritable two-headed monster: Where the government’s case may be weakest, win-at-all-costs prosecutors may be most tempted to teach witnesses, in the pithy formulation of Harvard Law Professor Alan Dershowitz, “not only to sing, but also to compose.”

The federal criminal code is replete with such statutes; federal court dockets are loaded with such prosecutions; and federal prisons are packed with innocent citizens who had no way of knowing that their quite ordinary activities would be so disastrous for them. It’s little wonder why trust in federal prosecutions has steadily diminished among those most familiar with the working of the system.

What, then, are prospects for reform? It’s worth noting where prior attempts have failed. A dozen years ago federal courts had a golden opportunity to pull back the curtain behind which modern-day DOJ Wizards of Oz brazenly manipulate the line separating truth from falsity in the federal criminal justice system.

Sonya Singleton, a Kansas woman accused of assisting her drug-dealing husband and others launder illicit funds, sought to disallow the trial testimony of a co-conspirator whose lenient plea deal assured that his words were prosecution-approved. The text of the federal witness tampering statute, Singleton pointed out, makes it a crime to give or promise “anything of value” in exchange for testimony—no apparent exceptions. Why should prosecutors and their “plea bargain” deals be above the law?

To nearly everyone’s surprise, a three-judge panel sided with Singleton. Panic-stricken, the Justice Department obtained further review by the full Tenth Circuit bench. “In light of the longstanding practice of leniency for testimony,” the court concluded, it must be “presumed” that Congress intended to give prosecutors this free pass. The full bench reversed the upstart panel that had seen the obvious problems in the purchased and coerced testimony against Singleton. U.S. attorneys quickly resumed their practice of acting as maestro, teaching witnesses to both sing and compose. With it, willingness to trust results of the federal justice system understandably suffered among those who knew what the underbelly of the system really looked like.

But recent developments offer some hope that at least one phenomenon that enables what has become, essentially, a corrupt system—namely, vague statutes that can ensnare the innocent—might be remedied. On May 5 the Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL) published Without Intent, a co-authored report detailing a major shortcoming of Congress’ drafting of criminal laws. The report found that of the 446 non-violent, non-drug related criminal laws presented in the 109th Congress, more than half lacked a requirement that a defendant act with criminal intent. Whether by design or by mere consequence, Congress has been making it easier for average citizens who did not intend to break the law to be convicted in federal criminal courts.

The combination of vague federal criminal statutes and a plea-bargaining system geared to coerce guilty pleas because of unreliable testimony will not easily nor quickly disappear. But avowedly nonpartisan efforts like Without Intent—the conservative Heritage Foundation joining forces with the liberal NACDL to fight overcriminalization and vagueness—give cause for hope that resistance to prosecutorial abuse may spread. Perhaps it’s a sign that civil society, spurred by recent judicial scrutiny, is beginning to fight back—seeking to restore public trust in a federal criminal justice system that has lost much of its claim for respect.

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Editor’s Note:
Harvey is the author of Three Felonies a Day: How the Feds Target the Innocent (Encounter Books, 2009). It is a must read for anyone involved in criminal defense. It is available at most booksellers. A review by Norm Pattis can be found on page 23.
Winning arguments come not from great lawyers so much as from concerned human beings who engage in client and life centered representation. The first real lesson for the trial lawyer is to live life deeply and authentically so as to draw beyond the superficialities of law to embrace the stories which bind us together. Story gives meaning to cold facts and places life’s vagaries into context. Good stories evoke feeling, tap memories, and open our eyes to the realities of tragic occurrence, cruel coincidence and accompanying circumstance. Recall the stuttering public defender in My Cousin Vinny who told the jury in opening statement that “the prosecution’s case is circumstantial and coincidental.” Story has the power to make the dry concepts of the law come alive in the courtroom. Each generation of trial lawyers writes its own history of effective advocacy through the stories utilized in crafting persuasive arguments.

OVERVIEW — BREAKING FREE OF THE COCOONS OF CONVENTION:

While almost everyone would agree that final argument is vitally important to the outcome of any case, it is that part of the trial that is most stifled by convention and inhibited by preconceived formulas.

Mimicking-mediocrity lawyers fall into the “formula trap” in two ways. One way is by conforming to a folklore standard that dictates that a certain kind of case requires a specific type of closing. A white collar crime case must close this way; a drug conspiracy case must close this way; a rape case must close this way. There is no disagreement that certain types of cases have common components that lend themselves to repetition. However, no formula method exists for emphatically conveying the story of this case. Each case is unique. This case is unique.

A second trap is the result of doing the same closing no matter what the case. It has been said that some lawyers have 30 years experience and other lawyers have the same experience for 30 years. This group is deluded into thinking that style carries the day. They simply plug the facts into the arguments they have turned into ritual. They are like evening news anchors reading the teleprompter in a ritualistic manner that has lost all immediacy for the viewing audience. Being so removed from the audience is antithetical to communication and persuasion.

To connect with jurors, you need to draw on all that you know from art, literature and life to come up with stories and analogies that will command the jury’s attention. Given that you won’t do anything that will land you in jail, the only limitation on what you can do to grab the jury in closing is your own imagination.

Final argument is your time to use a wide latitude to present your arrangement of the facts and justify the conclusions you feel should be drawn from the evidence. The goal of your closing statement is to define the issues and present them persuasively so your version of the facts dominates the jury’s thinking during deliberations. You grind the prism through which the jury will view your facts. You make the jurors virtual eyewitnesses to your facts.

While there are many who say that the jury has its mind made up by the time you get to closing, final argument is the time for dynamic communication aimed specifically at affecting each juror’s thinking. Closing argument is the final time the lawyer can add meaning to the facts in the case and work to link the facts to the law that applies. Here the law allows for the facts of the case to be put into a context that is consistent with the theory of the case and to draw every reasonable inference that the evidence and the testimony will support. Final argument is
the time to marshal your emotional resources and pursue your case with focus, energy and commitment.

Persuasion happens incrementally. It begins the moment you start working the case. While final argument may be the time designated to address the jurors for the purpose of guiding and/or channeling their thinking, it is naive to assume that you are only persuading in final argument. In fact, if you wait until final argument it may well be too late. The ideas presented in final argument begin to develop from your initial client interview. They continue to develop as the case is prepared and they incorporate information that comes up during investigation, formal and informal discovery and, quite often, during trial. Brainstorming ideas useful in closing argument is the hallmark of the adaptable trial lawyer who seize on new developments and new opportunities to persuade. Creative thinking does not stop until the jury reaches a verdict.

A communicative and persuasive argument builds with the passage of time concluding with the version of facts the attorney wants to dominate the jury’s thinking. From the initial client interview, to pretrial hearings and motions, right up to the moment the jury leaves to deliberate, you are in one persuasion mode or another.

PERUSAION AND SUMMATION:
Persuasion during summation is the final element in the trial long endeavor of educating the jury to think along your lines (i.e., your theory of the case and its accompanying logical and emotional themes).

A persuasive summation grounded in passion and common sense logic gives the jury the reasons to acquit, makes the jury comfortable in acquitting and explains how, in fulfillment of your opening statement, the case has already been won.

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No better place to begin your summation then where you want the jury to end.

Summation complements prior efforts during voir dire, opening statement, cross-examination and the defense case-in-chief in tying together the ultimate purpose of trial, i.e., the continual struggle to expose and corroborate at every opportunity your theory of defense and its accompanying logical and emotional themes.

PERSUASIVE SUMMATION AND THE ART OF STORYTELLING:

1. What Is A Story?
   - Simply, a story is a rendition of a sequence of events.
   - A good story evokes feeling, emotion and empathetic reaction in the listener-juror.
   - A persuasive story has impact with its audience because of the feelings it evokes rather than because of the cold reasoning or logic it demonstrates.
   - The persuasive story creates a memory in vivid and permanent images through the use of language which paints word pictures.

2. The Impenetrable Bond:
   - Emotion - as king.
   - Passion - as queen.
   - Identification in the listener-juror established through emotion and passion.
   - Emotion/Passion as enabling reason/logic.

3. Fear:
   - A most powerful emotion.
   - Jurors’ universal fear - conviction of an innocent person.

4. Great Storytellers...
   - Know their audience.
   - State their messages clearly.
   - Touch their audience’s emotion and passion.
   - Show their audience the appropriate course of action.
   - Recognize conflict and crisis.
   - Recognize preconceived notions/ scripts in their audience.
   - Overcome/neutralize the preconceptions of the audience.

CONTINUAL PREPARATION AS THE ULTIMATE PREREQUISITE:

1. Test of a vocation is the love of the drudgery involved (Dostoevski’s “Before I was a Genius, I was a Drudge”).

2. Fear as the ultimate ally - preparation tames the demon (i.e., tension) and is the key to getting your butterflies to fly in formation.

3. Shun idleness - it’s a rust that attaches to the most brilliant of metals.

4. We live in deeds, not years. Every summation is a unique deed carefully crafted by the persuasive advocate as the culmination of the trial’s campaign of communication.

To be continued in the next issue of Atticus...

“I have lived my life, and I have fought my battles, not against the weak and the poor — anybody can do that — but against power, against injustice, against oppression, and I have asked no odds from them, and I never shall.”

Clarence Darrow

The Department of Justice is litigating a different position. The government maintains that Ex Post Facto protection is no longer relevant in determining which version of the Guidelines manual applies even if the amended section is more onerous to the defendant. The argument seemingly relies on *Booker’s* holding that the guidelines are advisory. Simply put, the contention is that since the guidelines are advisory, there can be no risk of increased punishment. For various reasons, the government’s position is flawed.

In *Miller*, the Supreme Court held that the application of a Florida sentencing scheme, similar to the U.S.S.G., violated the defendant’s Ex Post Facto protection. The decision addressed the central inquiry of the Ex Post Facto protection: was the defendant given fair notice of the punishment? The necessary analysis is whether the law applies to events occurring before its enactment and whether it substantially disadvantages the defendant. The Florida sentencing scheme set a sentencing range of 3 1/2 years to 4 1/2 years at the time the defendant committed his offense. Later changes increased the range to 5 1/2 years to 7 years when the defendant was sentenced. This substantially disadvantaged the defendant as it made “more onerous the punishment for (conduct) committed before its enactment.” *Id* at 435. As a result, the Ex Post Facto clause was violated.

A recent example demonstrates the continued viability of Ex Post Facto protection. A defendant is convicted of defrauding the United States (18 U.S.C. § 641) by securing federal FEMA funds by falsely claiming he resided in New Orleans during the Hurricane Katrina catastrophe. The defendant’s criminal conduct was complete in September 2005.

Congress decided to increase the punishment for future fraud-related offenses similar to those occasioned by the Katrina disaster. The lawmakers enacted 18 U.S.C. § 1040 pursuant to Pub.L. 110-179. This legislation created a 30 year

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felony (Fraud in Connection with a Major Disaster or Emergency Benefits) instead of the 10 year maximum for 18 U.S.C. § 641. The effective date for the new crime was January 7, 2008. This was 27 months after the criminal conduct was completed in our example. (Obviously, the Ex Post Facto clause would prohibit the defendant in our example from being prosecuted under the new statute.) The Sentencing Commission created an enhancement [2B1.1(b)(11)] to implement the directives of the new statute. This enhancement if applied to the defendant’s completed conduct would result in a doubling of the offense level from 6 to 12. The amended enhancement became effective on November 1, 2008. This was 37 months after the criminal conduct was completed in our example.

U.S.S.G. § 1B1.11(a) directs the use of the guideline manual in effect on the date of sentencing. Such application is modified by subsection (b)(1). This caveat requires the application of the earlier manual (date of offense) if the later edition violates the Ex Post Facto clause. Thus, the proper U.S.S.G. manual is the earlier one in our example.

The government argues the sentencing court need not use the earlier - and more favorable to the defendant - guideline manual. The position presented by the government seemingly draws from an unreasonable belief that the Sentencing Guidelines no longer carry the force of law for constitutional purposes. Such claim ignores the Supreme Court’s direction that the Guidelines remain the starting point and the initial benchmark in every sentencing proceeding. *Gall v. United States*, 552 U.S. 38, 49 (2007). Numerous circuits rejected the government’s claim. These well-reasoned opinions applied the Ex Post Facto protection to post-*Booker* sentencings. See, *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007); *United States v. Wood*, 486 F.3d 781, 790-791 (3rd Cir. 2007); *United States v. Knight*, 606 F.3d 171,178 (4th Cir. 2010); *United States v. Rodarte-Vasquez*, 488 F.3d 316, 324 (5th Cir. 2007); *United States v. Lanham, __F.3d__*, 2010 WL 3305937 *12 (6th Cir., Aug. 24, 2010); *United States v. Stevens*, 462 F.3d 1169, 1170-1171 (9th Cir. 2006); *United States v. Thompson*, 518 F.3d 832, 869-870 (10th Cir. 2008), and *United States v. Turner*, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008). One circuit adopted the government’s argument. See *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006).

The Second Circuit recently reaffirmed the Ex Post Facto principle in a post-*Booker* analysis. Though the reasoning was not determinative to the issue before the Court, the panel agreed the Ex Post Facto Clause applies: “Our holding continues to prevent the Sentencing Commission and Congress from imposing a heightened punishment following the commission of the criminal conduct triggering that punishment.” *United States v. Kumar, __F.3d__*, 2010 WL 3169270,*12 (2d Cir. Aug. 12, 2010). Judge Sack, in his dissenting opinion, agrees with the majority on this point:

“The majority and I begin on common ground. We first assume that the Ex Post Facto doctrine applies to the Sentencing Guidelines after the Supreme Court decided, in *United States v. Booker*, (citation omitted), that the guidelines are advisory. We then agree that [f]or a law to contravene the Ex Post Facto clause, two critical elements must be present: First, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it.”

*Id* at *25.
Three weeks after the Second Circuit decided *Kumar*, another panel rejected the government’s argument. In *United States v. Ortiz*, __F.3d__, 2010 WL 3419898, (2d Cir., Sept. 1, 2010), the unanimous opinion concluded that a sentence can violate the Ex Post Facto clause if the court relies on “a more onerous guideline, issued by the United States Sentencing Commission after the date of an offense.” *Id* at 2010 WL 3419898, *1.

The use of the later book in our example to apply the enhancement would violate the protections of the Ex Post Facto clause. The enhancement doubling the guideline range is the result of legislative action by Congress many months after the offender’s conduct was complete. The government seeks to retroactively apply the onerous enhancement to the defendant. If successful, that guideline enhancement would apply to events that ended before the legislative amendment. Moreover, such application would disadvantage the defendant by doubling his guideline range. Such application would be unconstitutional. The proper guideline to be applied in our example is the earlier manual. Contrary to the government’s contention, the protections of the Ex Post Facto clause remain for post-Booker sentencings.

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**AWARDS & RECOGNITION**

NYSACDL board member Michael Mohun recently appeared before the New York State Court of Appeals on behalf of a defendant who argued the police lacked probable cause to detain and arrest him. In *People v. Brian King*, the Court of Appeals held that any evidence flowing from the stop must be suppressed, thereby overturning the County Court’s denial of defendant’s suppression motion. Mr. King and a friend were traveling together on motorcycles. A State Police officer flashed his emergency lights at them after apparently noticing that Mr. King’s friend had a burned out taillight. Neither driver knew who the officer was flashing; Mr. King stopped and his friend drove down an adjacent street. The officer followed the friend while Mr. King waited. Subsequently, the officer and Mr. King’s friend returned and joined Mr. King; without giving him specific instructions to stay or leave, the officer called for back-up after noticing that Mr. King appeared to be intoxicated. The officer then asked Mr. King to perform various field sobriety tests and ultimately arrested him. The Court issued a 4-3 decision in which Chief Judge Lippman and Judges Ciparick, Pigott and Jones concurred. Judge Smith wrote a dissent which Judges Graffeo and Read joined. Judge Smith disagreed with the majority’s conclusion that the defendant did not stop “voluntarily” and therefore the evidence flowing there from should be suppressed. The dissent pointed out that despite the fact the stop was not “voluntary”, the County Court had also found that the police officer did not intentionally detain the defendant. According to the dissent, the stop was, at most, “involuntary in the same way that it would be if defendant had been stopped by a flat tire-or, to use the County Court’s own analogy, if he had been a passenger in a motor vehicle that was stopped because of a traffic infraction by the driver.” *People v. Brian King*, 15 N.Y.3d 736, 906 N.Y.S.2d 802 (decision dated June 29, 2010).
Second Thoughts
A Review of Some Recent Notable Second Circuit Decisions

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The passage of Title III was bitterly fought because it invaded an individual’s privacy like no other investigative technique. As the Second Circuit graphically explained, a search warrant “is like a surprise snapshot of your home taken in your presence,” whereas a wiretap is akin to “a continuous film of events in your presence,” whereas a wiretap is akin to “a continuous film of events in your presence,” whereas a wiretap is akin to “a continuous film of events in your presence.” Two recent Second Circuit cases address this thorny question.

In United States v. Amanuel, the Court addressed the remedy to be applied for a failure properly to record and seal digital pager interceptions. Instead of electronically recording the pager interceptions as required by the warrant in question, the state police investigators had visually monitored them and entered them in a handwritten log, which was later presented to a judge for sealing once the warrant had expired.

The Court agreed with the district court’s conclusion that handwritten transcription did not satisfy the recording requirement of Title III, which was designed to “minimize human involvement and limit the opportunity for intentional alteration and human error,” and that because the interceptions were not properly recorded, they could not satisfy the statute’s sealing requirement either. The Court, however, parted company with the district court’s conclusion that the Title III violations here were ones of constitutional magnitude requiring suppression (although agreeing that the failure properly to record and seal could in some circumstances implicate a privacy right). Rather, a more limited remedy lay in Title III itself. Under 18 U.S.C. § 2518(8)(a), the presence of the seal, or “a satisfactory explanation” for its absence, is a prerequisite for the admission of testimony regarding intercepted communications at any proceeding. Here, the government could provide no “satisfactory explanation” for the absence of the seal, and accordingly, the Court ruled that the pager communications – but not their fruits – are subject to Title III’s exclusionary remedy under § 2518(8)(a).

In S.E.C. v. Rajaratnam, the Court vacated a district court order directing defendants in a criminal case to turn over wiretap evidence they had received in discovery to the S.E.C. in a related civil proceeding. Although “Title III does not prohibit all that it does not permit” and “the S.E.C. had a legitimate right of access to the materials,” the Court held that the district court had abused its discretion in ordering the disclosure prior to a finding that the recordings in question had been obtained legally and were relevant in the civil case. The Court had these choice words to say about the constitutional implications of unauthorized wiretap disclosures: “there is a distinct privacy right against the disclosure of wiretapped private communications that is separate and apart from the privacy right against the interception of such communications . . . The tapes will have been listened to, and the privacy rights of the parties to the

1 In Re U.S., 10 F.3d 931, 938 (2d Cir. 1993) (concluding that a wiretap “is obviously a far greater invasion of privacy than a [search warrant]’’); see also United States v. Somelo, 2009 WL 1924746, *11 (E.D.N.Y., July 2, 2009) (“all one has to do is to appreciate the wisdom of Title III’s stringent [DOJ] approval requirements is listen to a recording of a wholly innocent conversation that should never have been recorded”).

2 615 F.3d 117 (2d Cir. 2010) (decided July 29, 2010).

3 Id. at 123 (quoting United States v. Hermanek, 289 F. 3d 1076, 1089 (2d Cir. 2002)).

4 Note that electronic communications are not covered by Title III’s general statutory suppression remedy. See 18 U.S.C. § 2518(a).

5 2010 WL 3768060 (2d Cir. September 29, 2010). The author represents an individual who was an intervening party in this case at the district court level.

6 Id. at 8.

7 Id. at 15.
In cross-examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch.

Louis Nizer
Perhaps the Court’s most significant ruling in Martinez lies in its consideration of the defendant’s Batson challenge to the government’s exercise of its first four peremptories on men. The Second Circuit had not previously ruled on the standard of review to be applied to a district court’s determination of the first Batson step, but in Martinez, the Court elected to analyze it under an “abuse of discretion” standard. Noting that this question was a mixed one of law and fact, and in particular, that “the

question of whether an inference of discrimination can be drawn (i.e. from the fact of four straight strikes against men) is often more a question of law than fact,” the Court nonetheless concluded that the abuse of discretion standard was preferable to a two-tiered approach – clear error for factual questions, and de novo review for rulings of law. Applying the more deferential standard (and hoisting the defendant on his own petard), the Court affirmed the district court’s conclusion that the defendant had failed to make a prima facie showing of discrimination. The defendant’s striking of women had increased the ratio of men to women in the pool and thus the likelihood that the government would strike men, “based just on the numbers.” Moreover, the prosecutor, unlike the defense lawyer, had not announced any intent to exercise challenges on the basis of gender.

It remains to be seen if this standard of review of determinations under Batson’s first prong will lead to even more denials of Batson challenges. The Court in Martinez, after all, conducted what comes remarkably close to a de novo analysis of the statistical disparities at issue in that case. One thing is clear: the Court will not tolerate any kind of discriminatory intent, even if based on empirical data. The case thus highlights the importance of approaching jury selection not just with a coherent strategy on the kinds of jurors one wants, but also a consistent and defensible set of reasons for the kinds of jurors one doesn’t want.

The Second Circuit’s decision in United States v. Ortiz is a reminder that before making any of the creative challenges to the Sentencing Guidelines inspired by recent Supreme Court jurisprudence, it is important not to lose sight of the defense lawyer’s first goal at sentencing: to position the judge at the lowest possible guideline. Psychological research has shown that once people anchor at a particular conclusion, they adjust insufficiently based on new information. The guideline benchmark is therefore a critical component in most sentences.

Ortiz was sentenced on the basis of a guideline that was amended after the date of his offense, resulting in an additional enhancement. The district court had imposed a non-guidelines sentence that was approximately 70% of the bottom of the enhanced range. On appeal, Ortiz challenged his sentence on the grounds that the initial guideline calculation was incorrect.

Acknowledging that “there may be circumstances when an amended Guidelines range can influence a sentence that violates the Ex Post Facto Clause,” the Court declined to find an Ex Post Facto Clause problem here. Because the judge had granted a substantial variance in the case that was below both the amended guideline and the lower applicable guideline, the Court concluded there was “no substantial risk, indeed, no risk at all” that the district judge would have imposed an even lower sentence had she used the correct guideline.

We will never know if the judge would have departed further in this case if she had started at a lower baseline. We do know that despite increased departure and variance rates, sentencing statistics and anecdotal experience show that the Guidelines still play a key role in sentencing determinations. In addition, judges in the Eastern and Southern Districts of New York are still incarcerating at a rate of 87%. Setting the guideline benchmark, then, is one of the most important aspects of the defense advocate’s work, and requires a certain back-to-basics approach: checking to see if there’s a more favorable guideline book, a more favorable guideline, or an effective challenge to an individual enhancement. A

15 Id. at *7.
16 Id. at *8.
**Why NYSACDL?**

I remember the call from Gerry Lefcourt in 1987 asking me to become a Board Member of NYSACDL. He also told me about a facsimile machine which he had just purchased. I bought one. Gerry explained the need for NYSACDL. Defense lawyers and the Constitution were under attack by the Government. NYSACDL was an NACDL affiliate. 8300 required reporting of fee information. RICO was in full bloom and Giuliani was the U.S. Attorney in New York. Lawyers were being subpoenaed before Grand Juries; their offices were being bugged and raided; the Government was seeking to disqualify lawyers who would give them a fight. The Federal Sentencing Guidelines came into effect and judges lost their discretion. Prosecutors were controlling sentencing. These were dismal times for the defense function, yet the art of advocacy and jury trials had to be preserved; defense lawyers had to band together to uphold the integrity of the defense function.

I showed up for my first meeting held in Jack Litman’s office. Terry Connors, Paul Cambria, Larry Goldman, Marty Adelman, Gerry Lefcourt and many other luminaries were present. At the time I brought to the Board a request for assistance since my phone records had been administratively subpoenaed by the D.E.A. Barry Scheck (before O.J.) and Mark Mahoney volunteered to represent me and together we engineered a change in administrative subpoena policies, requiring supervisory oversight within the U.S. Attorney’s Office in New York before administrative subpoenas may be issued.

Much of our work as an Association also concerned opposition to the death of...
penalty; the Rockefeller Drug Laws and mandatory minimum sentencing.

There really was no other defense organization in New York dealing with these issues statewide. We became the most prominent and proactive legal organization for lawyers around the State. When mandatory CLE came into existence, we became a leading provider. Most of us were either solo practitioners or from small firms, practicing in both state and federal courts. We had a choice. We could continue to make individual fights against the resources of the Government or we could band together and pool our strengths.

In 1989, Richard Thornburgh was Attorney General and career prosecutors proposed the infamous Thornburgh Memo which would ostensibly allow prosecutors to by-pass defense lawyers and reach out to represented defendants in violation of the “no contact rule.” We got other organizations involved in opposing the memo and Thornburgh. We picketed and boycotted events where he was involved.

We were fighting on all fronts. We established an Amicus Committee; a Strike Force Committee to represent lawyers under attack by prosecutors or judges; a Strategic Litigation Committee and an Ethics Hotline. Jack Litman organized a play: “Twelve Angry Men”. We set up a scholarship trust with the proceeds from the play in order to send lawyers to the NACDL National College. Our mission and purpose were clear. The defense function had to be preserved. We became a new brand of patriot, resisting changes to Warren Court era decisions and attempts by the New Right and other wacko extremists to take over the federal judiciary. Larry Goldman, our first President, traveled the state to recruit new members. It was a proud moment when Jeanne Mettler, a former Legal Aid attorney became our first woman President.

We lobbied in Albany and with the venerated New York State Defenders Association, established Gideon Day and pushed

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3 See Eric Nagourney, Objections to Thornburgh Award, County Bar to Fete Attorney General, Newsday, April 16, 1991. Liotti asked the New York State Association of Criminal Defense Lawyers to join with him in protesting the awarding to the Attorney General of the United States, the Bar Association’s Medallion Award at its annual dinner because of the Thornburgh Memo which ostensibly allows prosecutors to contact represented parties in violation of state disciplinary rules.


6 See People v. Robert Delloff, Nassau County District Court. Lawyer charged with criminal trespass (as a Misdemeanor) for trying to see a client at a police precinct. All charges dismissed on motion by Mr. Liotti. Mr. Liotti represented the defendant pro bono publico. Police have changed their procedures for access to clients by lawyers as a result of this case. See Fox, Martin, Lawyer Cleared In Representation Hassle, New York Law Journal, October 2, 1991, at 1 & 2 and Perlman, Shirley E., Charges Against Lawyer Dropped, Newsday, October 4, 1991; People v. Ira Raab (1994), 163 Misc. 2d 382, 621 NYS2d 440 (1994). A ten day, non-jury trial in the Nassau County District Court before the Hon. Anthony Marano on a charge of trespass as a violation of state disciplinary rules. The defendant, an attorney and candidate for Judge, was arrested and convicted of passing out one piece of campaign literature on church property during a feast that was open to the public. Mr. Liotti represented Mr. Raab pro bono. At the time of sentencing Mr. Liotti indicated that Mr. Raab was found guilty because he is a Democrat, Jewish and a lawyer. Judge Marano inquired of Mr. Liotti as to whether he was stating that Judge Marano was “anti-Semitic.” Mr. Liotti answered that he did feel that way. The flap at sentencing produced a litany of news coverage. The case was appealed. See, Fan, Maureen, The Trials of a Pol Nabbed for Trespass, Newsday, March 25, 1995; Nagourney, Eric, The Trials of a Pol Nabbed for Trespass, Newsday, January 4, 1995; Fan, Maureen, Lawyer Sentenced for Trespass, Newsday, April 4, 1995. In November, 1997, Mr. Liotti argued Mr. Raab’s case in the Appellate Term of the Supreme Court. His appeal was successful. Mr. Raab was elected as a District Court Judge in 1996 and now sits on the Supreme Court, Nassau County Bench. See McCue, Daniel J., Raab Trespass Appeal Heard, The Westbury Times, November 20, 1997 at 3; Miller, A. Anthony, Appellate Term Reverses Judges Conviction, The Attorney of Nassau County, December, 1997 at 14. Appellate counsel in People v. Raab, 175 Misc. 2d 287, 669 NYS2d 1018, 1998 N.Y. Slip Op. 98106 (1998). (Appellate Term, 9th and 10th Judicial Districts, decided November 24, 1997). Argued for appellant. Conviction unanimously reversed on the law and facts (Stark, J.P., Ingrassia and Floyd, J.J.). Charges dismissed in the interests of justice by the Appellate Term. See also, People v. Laura Yantisos and John Murphy, (Hon. Samuel Levine, District Court, Nassau County, Oct. 22, 1998) where the Court disagreed with the holding of Judge Marano in the Raab case and found, the defendants’ conduct (alleged trespass) was in the nature of protected, free speech; New York Law Journal, 11/13/98 at 1, 25, 32 and 33 where Raab case is cited and Carolyn Colwell, Tankleff Defense: ADA Anti-Semitic, Newsday, October 16, 1990 at 3 and 32. Liotti was the Strike Force attorney for the New York State Association of Criminal Defense Lawyers in coming to the defense of Robert Gottlieb, Esq., a defense attorney about whom anti-Semitic remarks were made during the course of a prominent murder trial. See also Thomas F. Liotti, Judge Mojo: The True Story of One Attorney’s Fight against Judicial Terrorism published through iUniverse. Former Nassau County Court Judge B. Marc Mogil was removed from the Bench and disbarred due to his threats and harassment against Mr. Liotti.
for an increase in 18-B rates. It took 18 years to get it. We brought twenty-five lawyers from New York to NACDL’s Legislative Fly-Ins. We attended all of NACDL’s meetings promoting our members for Board seats and the Presidency, but also helping to set the national agenda on criminal justice issues. We were literally everywhere – on television and radio, writing articles and countering neo-conservatism, a/k/a, Fascism, wherever we could.

We established the Brennan and Marshall Awards. When we did, Justice Brennan appeared at our annual dinner which we also created. Representatives from Justice Marshall’s family appeared together with Professor Charles Ogletree of the Harvard Law School. Each move we made added to our credibility as a force with which to be reckoned. We had momentum. Anthony Cueto, Esq. was our hands on Executive Director and a defense lawyer himself. At one annual dinner famed civil rights attorney, William Kunstler, became our Marshall Award Honoree, a year before he died.8

The organization was also good for networking. We referred cases to each other and began to use a team approach to litigation, using experts and juror consultants from around the country. Our needs were apparent but NYSACDL helped to define and meet them. Defense lawyers from around the state, more than fifteen hundred in our heyday, wanted to be a part of our winning approach. The high profile lawyers that we had at the top of our organization acted as magnets, drawing in new members. We supported one another.

This is why we were founded and why we should continue to exist as New York’s most vibrant and honest legal organization. NYSACDL is needed now more then ever before, but the lessons from the past should be remembered as we build for the future. The Officers and Board of NYSACDL have been good managers, but more importantly, they have been good organizers. Social change and true reform cannot occur without those dynamic organizing skills. Just ask President Obama. A

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8 Remarkably, when I was Chair of the Speakers’ Program of the Office of the Criminal Courts Bar Association of Nassau County, I was shocked to learn that Kunstler’s speech was cancelled for political reasons. See Vincent, Suet, Kunstler Dismissed By Nassau Attorneys, Newsday, Wednesday, May 29, 1991 at 23 and 24. See also, New York Law Journal, May 28, 1991 at 1 on the same subject. Of course, Kunstler was later re-invited and spoke before a capacity crowd. During that episode I learned that there were so-called defense lawyers who did not favor free speech; who supported the death penalty and former Judge Mogil in his harassment and threats against me. The job of NYSACDL included fighting against opposition forces within our own ranks. See also, People v. John Daly, (County Court, Nassau County, Hon. Donald DeRiggi), 20 A.D.2d 542, 799 N.Y.S.2d 537 (2nd Dept. 2005); 5 N.Y.3d 882 (2005); 57 A.D.3d 914 (2d Dept., 2008).
NYSACDL standing committees are chaired by members in good standing who are appointed by the President. Committee membership is a rewarding opportunity for members to network with colleagues throughout the state and to explore various issues in depth. Members are invited to join committees to further the important work of our association. If you are interested in joining a standing committee (listed below), please contact the committee chair or the Executive Director’s office: Malverson@nysacdl.com 212-532-4434, for more information.

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What Would You Do?

While in private practice Harold Medina, later a distinguished judge in the Southern District and Second Circuit Court of Appeals, willingly accepted assignment for a number of unpopular causes of the day. His efforts on behalf of one such defendant is recounted in a footnote in the Sixth Circuit decision in Wiley v. Sowders 647 F.2d 642 (1981). The following excerpt speaks highly of Medina's conduct and points out a continuing difficulty experienced by Counsel representing the despised cause or defendant.

The Sixth Circuit opinion compared the questionable actions of defense counsel in the case before it with the conduct of Medina under somewhat similar circumstances;

"Defense counsel's closing argument, apparently a "trial tactic," contained several unequivocal admissions that the defendants were guilty while at the same time attempting to obtain mercy. The following are excerpts from defense counsel's closing argument:

"Ladies and gentlemen, I think it's very important that you realize what the function of (counsel for Elmer Wiley) and mine is in the case. We were appointed to represent these two men, [6] and we are going to represent them to the best of our ability, and that is what I want to talk to you about right now......Often times when a lawyer gets involved in a case, he gets stars in his eyes and he starts having notions that there may be some way, you know, if I examine this case and I do my homework and I go out and I investigate as much as I can and I interview all the witnesses, that I'll be able to get a man off. That I will be able to prove to a jury that he is not guilty with what they have got him charged with."

The following footnote which appears in the official report recognizes the exceptional qualities exhibited by Medina as a trial lawyer.

[6] Although not raised as error, this statement constitutes highly questionable practice. Compare with the conduct of Harold R. Medina, eminent trial attorney and later Circuit Judge of the U. S. Court of Appeals for the Second Circuit. Medina was court-appointed counsel for Anthony Cramer, an alleged German saboteur, charged with treason during World War II. Feeling ran high against Medina and, among other indignities, he was spat on by a spectator. At the close of the government's case, the trial judge asked Medina to stand and then proceeded to praise him highly for his skill and vigor in defending Cramer as assigned counsel without compensation. In response, Medina immediately took exception to the court's remarks as he had not wanted the jury to think that he personally thought Cramer was guilty and was defending him only because he had been assigned by the court to do it. Medina said:

"May it please your Honor, I have a most distressing and disagreeable task, and that is to object to the fact that you have mentioned that to this jury, and to take exception to your Honor's comment. It is something I do with the most extreme regret, but I honestly feel that my duty requires that I do it. I do not think the jury should have been told that. I have tried to keep it from them myself, and I have not mentioned it."


Editors Note:
U.S. v. Cramer tried before Hon. Henry W. Goddard; Medina accepted the assignment to represent the accused after being personally appealed to by Southern District Chief Judge John C. Knox; For more about Judge Medina see, Judge Medina a biography by Hawthorne Daniel or Judge Medina Speaks a collection of his speeches and essays published by Matthew Bender. Although out of print they can be found at many used book outlets.

See “Did you know?” on page 8.
NYSACDL Membership
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Membership Benefits

NYSACDL LISTSERV – NYSACDL offers both a Federal and State Practice Listserv which provide members with invaluable forums in which to pose questions, seek information, exchange ideas and share resources with members statewide.

CLE SEMINARS – NYSACDL is an Approved Provider accredited by the New York State CLE board. We sponsor numerous CLE seminars during the year throughout the state at reduced rates for members. Practical nuts and bolts topics alongside cutting edge issues make our CLE programs invaluable to new members as well as those with years of trial experience. Our speakers are among the most respected and experienced criminal defense attorneys and leading experts in the country.

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.

MENTORING AND STRIKE FORCE ASSISTANCE – NYSACDL members provide mentoring and assistance for other members. If a question or need arises, a member will be there to give assistance. NYSACDL members are ready to step in to help other members who are subpoenaed, threatened with contempt, or otherwise under attack for the vigorous representation of the accused.

HEALTH INSURANCE PLANS – NYSACDL members are eligible for specifically tailored health insurance plans at affordable rates which may not be available if purchased on your own. Some plans are available for solo practitioners and others are open to firms with two or more employees.
Joshua L. Dratel P.C.

Joshua L. Dratel is a Life Member and former President of NYSACDL. He is the founder of the Law Offices of Joshua L. Dratel, P.C. He has proven his ability to stand up for individual rights in complex federal and state cases, including those involving RICO, mail fraud, tax and security issues, national security, terrorism, international law and extradition, organized crime, drug charges, money laundering, violent crime charges, civil liberties issues, capital cases, and civil litigation. He has appeared for defendants in nine different federal districts, and has written or argued appeals in the First, Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits, and appeared as amicus for NACDL in the other circuits and the U.S. Supreme Court. Mr. Dratel was named one of New York's Super Lawyers and former chair of the Amicus Committee. Josh’s honors include the Frederick Douglas Human Rights Award from the Southern Center for Human Rights in 2007, the Robert C. Heeney Award from the National Association of Criminal Defense Lawyers in 2006, and the Clarence Darrow Award from the American Civil Liberties Union of Idaho in 2005. He is a frequent writer, lecturer, and has appeared as a legal commentator on MS NBC, ABC World News Tonight, CBS News, NBC Nightly News, CNN, New York 1. His firm is located at 2 Wall Street in New York City and can be contacted via email jdratel@joshuadratel.com or www.joshuadratel.com

E. Stewart Jones, Jr., Esq.

E. Stewart Jones Jr. is a Life Member of NYSACDL and practices in all courts. He has obtained successful verdicts on behalf of numerous clients in the fields of Criminal Defense, Plaintiff’s personal injury and Medical Malpractice. He is a Fellow, Inner Circle of Advocates; American College of Trial Lawyers; International Academy of Trial Lawyers; International Society of Barristers; American Board of Criminal Lawyers. Listed in The Best Lawyers in America in multiple categories from the very first edition. Presently in personal injury litigation, malpractice, white-collar criminal defense, DUI/DWI defense, and non-white-collar criminal defense. He has extensive federal and state trial practice. Board Certified in Civil and Criminal Trial Advocacy. Recognized by Super Lawyers magazine as a “Top 10 New York Super Lawyer Upstate” and has finished as either the top or second highest point getter Upstate, from the first issue. Lectured and published extensively on civil and criminal trial advocacy. His firm is located at 28 Second Street, Troy, N.Y. 12180 and can be reached at www.esjlaw.com or email info@esjlaw.com
Terence L. Kindlon is a Life Member of NYSACDL and has practiced as a criminal defense lawyer in Albany for 35 years. He began his career as an assistant public defender and entered private practice in the late 1970’s. Over the years Terry has defended many people charged with serious crimes and has tried more than 150 cases to verdict. He also maintains an extensive appellate practice. His firm of 6 lawyers includes named partner and wife Professor Laurie Shanks who spends most of her time teaching at Albany Law School and son, Lee Kindlon a former Marine Corps JAG who served with a combat battalion in Fallujah in 2005-2006 has remained in the reserves and was recently promoted to Major exceeding Terry who was Marine Sergeant in Vietnam in the ‘60’s. He is a founding member of the New York State Association of Criminal Defense Lawyers. He has lectured for NYSACDL and the Criminal Justice Section of the New York State Bar Association. He has been recognized by with the New York State Defenders Association Service of Justice Award (1989) Thurgood Marshall Unity Award by the NAACP Oneonta Area Branch (2002) and the David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System by NYSBA (2004)

The firm’s offices are located at 74 Chapel Street in Albany and he can be reached via email tkindlon@kindlon.com www.kindlon.com

Gerald B. Lefcourt is a LIFE MEMBER of NYSACDL and past President of the National Association of Criminal Defense Lawyers and a past President of the New York Criminal Bar Association. He also is a founder of the New York State Association of Criminal Defense Lawyers and one of the nation’s best trial lawyers, he is head of a four-lawyer firm in New York City, Gerald B. Lefcourt, P.C., specializing in the defense of criminal cases and complex civil litigation. Long considered one of the defense bar’s leading spokesmen and most passionate advocates, he has defended clients as diverse as Abbie Hoffman, Harry Helmsley, former New York assembly Speaker Mel Miller and Michael Milken’s co-defendant in one of the nation’s largest securities cases. Recent victories include a full acquittal of rap mogul and Murder, Inc. Records founder Irv Gotti on federal money laundering charges.

The NY State Bar gave him their “Outstanding Practitioner” Award in 1985 and again in 1993. In 1993, the National Association of Criminal Defense Lawyers gave him the Robert C. Heeney Memorial Award their highest honor. NYSACDL also presented the Thurgood Marshall Lifetime Achievement Award to Mr. Lefcourt in 1997. He maintains his offices at 148 East 78th Street New York City 10075 email at lefcourt@lefcourtlaw.com

Member Biographies can be submitted to Atticus@nysacdl.com Photos of Lifemembers are greatly appreciated.

– Editors
Brian J. Neary
_Lifemember_

Brian J. Neary, is a highly regarded criminal defense lawyer. He devotes his practice to the rigorous defense of those accused of crimes. His areas of practice include criminal law, federal crimes, street crimes, homicide, sexual assault, Internet crimes, drug offenses, and weapons offenses.

He is a certified trial attorney (NJ), he represents people in both state and federal courts and has offices located in Hackensack, Hoboken and New York City.

Widely known in the halls of justice as “the lawyer with the bow-tie,” Neary is a frequent media commentator whose client list includes professional athletes, entertainers, lawyers, doctors, business leaders, law enforcement employees, public officials, friends and neighbors.

For 20 years Neary has been selected by his colleagues in the legal community for inclusion in Best Lawyers in America in three categories – white collar criminal defense, non-white collars criminal defense and driving while intoxicated defense. He has also been named as a member of New Jersey’s Top 100 lawyers in Law and Politics magazine.

Neary has been honored as a fellow in both the American College of Trial Lawyers and the American Board of Criminal Lawyers. He is past president of the Association of Criminal Defense Lawyers – New Jersey.

Neary has served as an adjunct professor of law at Rutgers Law School in Newark for over 26 years. He is a graduate of New York University School of Law. He served as an associate counsel for the New York State Executive Advisory Commission on the Administration of Justice (Liman Commission).

Brian can be reached at his Hackensack, NJ offices or via email at brianneary@rcn.com www.nearylaw.com

Marty Adelman

Marty Adelman a founding member of the NYSACDL and its first Treasurer. He was President in 2004 and has been on the NYSACDL Strike Force and its PJCC (which was set up during his term.) He has also been President of the New York Criminal Bar Association and Chair of the State Bar Criminal Justice Section.

He is a graduate of Brooklyn Law School and frequently lectures for NYSACDL, for other bar associations, as well to judges at Judicial Seminars.

Marty’s practice is mainly white collar defense, in investigations and Federal and State Court prosecutions, with an occasional non-white collar case, which keeps him in touch with classic criminal practice frustrations. He has been listed in “Best Lawyers in America” and “Super Lawyers.”

He has fought against unfettered access of cameras in the courts, authoring a self-termed “powerful dissent” for the New York State Bar Association’s Special Committee on Cameras in the Courts. His position, and NYSACDL’s, is that cameras can be allowed but only with the parties’ consent.

NYSACDL has conferred him with its Thurgood Marshall Outstanding Practitioner and Lifetime Achievement awards. He is an inveterate addict on the listserv and claims his answers are correct over 50% of the time!

Marty maintains offices at 225 Broadway in New York City and can be contacted through his website www.adelmanlaw.net
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<td>Law Student</td>
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</tr>
<tr>
<td>School: ____________________</td>
<td></td>
</tr>
<tr>
<td>Graduation date: ____________</td>
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</tbody>
</table>

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