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Message from the President
Benjamin Ostrer

As I commence my term as NYSACDL’s 26th President it is important to recognize where we have been and where we hope to travel.

NYSACDL has grown from its founding in 1987 to be the premier Criminal Bar Association in New York, committed to bettering our system of justice through education, advocacy and diligent pursuit of the rights of the accused. We have more than 750 active members throughout the State, toiling daily in the trenches of the court system to protect the rights guaranteed by our Constitution. The Sixth Amendment provides that: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” For most of our history the rights of the accused, and legal services for the indigent, were practically non-existent outside the largest of metropolitan areas, and very limited within them. The Sixth Amendment was not applied to defendants in state courts until 1932, when lawyers from New York persuaded the United States Supreme Court in the landmark “Scottsboro Boys case” (Powell v. Alabama) that a right to counsel existed, at least in State cases where capital punishment was a possibility. The nine Scottsboro Boys had been convicted of raping two young women, one of whom later recanted. Ten years later, in 1942, the Supreme Court declined to expand the right to counsel beyond capital cases in Betts v. Brady. It took another two decades before the Supreme Court made clear that the accused had a Sixth Amendment right to counsel in state felony proceedings. 2013 marks the 50th anniversary of Gideon v. Wainwright, which overruled Betts v. Brady and established that an accused in state court had a right to an attorney. Each advance was obtained largely based upon the efforts of dedicated counsel. Principles which we now take for granted were gained through the hard work of members of the criminal defense bar.

The rights secured for the accused are the result of the tireless and courageous efforts of many upon whose shoulders we stand. NYSACDL will continue to lead the way in support of the efforts of its membership in pressing for legislation to eliminate the discovery abuses and prosecutorial bias which have produced too many wrongful convictions. We look forward to adoption of not only discovery reform but also an expungement statute which is so crucial to the rehabilitative process. Sadly, too many able and worthy individuals are denied employment based upon convictions from years earlier. NYSACDL’s amicus efforts and Lawyers Strike Force Assistance Committee, chaired by Immediate Past President Richard Willstatter, and the Prosecutorial and Judicial Complaint Committee chaired by Past President Jim Harrington, provide exceptional voice to issues confronting the defense bar and the citizens of New York.
Message from the President

NYSACDL stands apart from all other bar associations as we take on the hard battles, and through our lobbying efforts have blunted attempts to erode the rights of defendants in New York State. Our Amicus efforts have resulted in vindication of important points of law in both State and Federal appeals courts. The criminal justice system demands that the accused receive effective representation.

NYSACDL through our membership is dedicated to the preservation and expansion of the rights of the accused.

Please make an effort to join us and become active in the Association as we move forward through 2013.

— Ben Ostrer

“There is no client as scary as an innocent man.”

J. Michael Haller, Criminal Defense Attorney (Michael Connelly, The Lincoln Lawyer)
Editor’s Page

This issue of *Atticus* is our annual legislative issue. The New York State Legislature meets in session from January to June each year, and generally spends the first few months wrangling over budgetary matters before getting down to the business of making laws that affect the daily lives of our citizenry. As you’ll see inside the magazine, our Legislative Committee, headed by Vice-President Andy Kossover, is hard at work promoting the interests of criminal defense lawyers, and working to assure that the criminal justice system treats all involved in a fair and impartial manner. Discovery reform is at the top of our agenda, and we encourage all members to become and stay current with the progress of the legislative effort, and to help out when needed, with phone calls, emails, and personal contact with your own legislators.

This year marks the 50th anniversary of the landmark decision of the United States Supreme Court in *Gideon v. Wainwright*. That watershed action was the impetus for public defender offices and assigned counsel plans across New York State and the rest of the nation, but in spite of the clear Constitutional mandate to provide counsel to indigent defendants facing loss of liberty, governments everywhere are cutting back and making our life in the trenches even more difficult. Witness Mayor Bloomberg’s recent dismantling of the 18b system in New York City, and the difficulty faced by upstate attorneys in getting paid in a timely fashion, without having their vouchers passed under some bureaucratic microscope and unfairly cut, in the name of cost saving. It is only the continued vigilance and active participation of criminal defense lawyers, the members of this Association, which will keep the spirit of *Gideon* alive. After all, there are very few people who have less of a voice in the public debate than criminal defendants, and it is only defense counsel who have any chance of being heard.

One whose voice has been heard loudly and clearly is Joel Rudin, a noted fighter for the rights of defendants, whose recent victory in *People v. Bedi* is extraordinary for the Court’s excoriation of the Queens District Attorney’s Office in its decision granting the defendant’s motion for a new trial of a 13 year old homicide conviction. Joel is a past recipient of our Thurgood Marshall Award for Outstanding Criminal Practitioner, and a longtime supporter of NYSACDL. His writeup of the events surrounding the decision is worth a detailed read, and NYSACDL will be in the forefront on this issue in the weeks and months to come.

We’d like to thank our contributors, who make this magazine possible. Peter Gertstenzang, who took the time to write our keynote article on DWI reform; read it carefully, and take heed of his warnings, even if they’re not given within two hours! Lisa Peebles, the very busy Federal Defender in the NDNY, who has graciously taken over the Second Thoughts column and given us updates from the Circuit. Mitch Dinnerstein and Mike Baker, NYSACDL Directors, who have provided some insightful approaches to practicing. As always, our regular book review column features some thought-provoking material for your leisure time.

We hope you enjoy this magazine, and find it useful. We encourage your feedback, and hope you’ll contribute content for the next and future issues. Contact the Editors with any comments, positive or negative, and please consider writing for us.

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Since when do you have to agree with people to defend them from injustice?

Lillian Hellman
Finding that the Queens District Attorney’s Office employs a plainly unconstitutional “custom” of hiding from trial prosecutors the deals it makes with relocated witnesses, a Queens Supreme Court justice has handed down a 59-page decision overturning the 13-year-old murder conviction of Petros Bedi, and granting him a new trial, because of a prosecutor’s reliance upon false testimony by a key witness denying any knowledge of $20,000 in witness payments he had received. People v. Petros Bedi, Indictment # 4107/96. The decision raises disturbing questions about the validity of hundreds of other murder and serious felony convictions obtained over the last 20 years by current Queens District Attorney Richard Brown, whose office has followed the unlawful “custom.”

Bedi’s motion, filed by the author on August 13, 2012, contended that Queens prosecutors had relied on, and failed to correct, false testimony by a key eyewitness denying any knowledge that any payments had been made to him or on his behalf. The withheld evidence, which my office had just compelled the D.A.’s Office to disclose through a court order under the State’s Freedom of Information Law, showed that the witness had personally received 16 cash installments, totaling more than $3,000, including a series of payments just as the trial was starting.

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By Joel B. Rudin, Esq.
and knew as well that he had benefitted from nearly $17,000 in hotel payments. The witness, Seraphim Koumpouras, falsely testified that he and his girlfriend had paid the hotel bills, and lied that he had no knowledge of any other benefits. The withheld records included 16 receipts for cash, and three witness assistance agreements acknowledging such payments, which he had personally signed, including several receipts he had signed just a few days before he testified.

In defending the conduct of the trial prosecutor, Assistant District Attorney Debra Lynn Pomodore, who is still in the Office, the D.A.’s Office argued that she was not responsible for the false testimony, for failing to correct it, and for making false argument that the testimony was truthful. The Office contended that she did not know the truth about Koumpouras because of the Office’s practice of keeping trial prosecutors in the dark about the contents of its witness security files.

In response, the reply papers denounced such a “Don’t ask, don’t tell” or deliberate-ignorance policy, citing United States Supreme Court and New York Court of Appeals cases, going back more than 50 years, holding that the District Attorney’s Office, as an entity, is required to disclose exculpatory evidence and to correct false testimony. We produced overwhelming evidence, including sworn testimony by former members of the District Attorney’s Office, that prosecutors were trained in such an illegal policy, and cited several federal and state appellate decisions denouncing it.

One witness, the chief of the District Attorney’s witness security unit, Michael Mansfield, testified in 2008 that the Office follows what he termed a “Chinese Wall” policy of keeping trial prosecutors in the dark about witness security agreements and payments, and that the policy is followed in “hundreds” of cases each year. He testified at an evidentiary hearing that led to the overturning of the murder conviction of Kareem Bellamy. One of the claims in Mr. Bellamy’s pending federal civil rights lawsuit is that the “Chinese Wall” policy is illegal and caused him millions of dollars in damages. (The Bellamy lawsuit is being handled by Manhattan attorney Thomas Hoffman.)

The decision in the Bedi case, by veteran Acting Supreme Court Justice, James Griffin, vacates Mr. Bedi’s murder conviction on the grounds that the People violated Mr. Bedi’s constitutional rights by knowingly relying on false testimony and argument and by withholding “Brady” and “Rosario” material. The decision set the case down for further proceedings to be held on April 18.
Legislative Committee Report:

Discovery Reform in Our Lifetime?

by Andy Kossover
Chair, NYSACDL Legislative Committee

If you take a look at the two photos accompanying this month’s column, you will see how long we have been waiting for meaningful discovery reform in New York. The young lawyer standing in front of the Appellate Division 2nd Dept. in Brooklyn is yours truly. The year was 1979, the same year the legislature enacted Criminal Procedure Law §240 (effective January 1, 1980). The other photo is of your humble author today. It’s a fair observation that the subject of those two photographs has changed more than CPL §240 over the same time period.

CPL §240 is, of course, the statute controlling criminal justice discovery in New York. When first introduced, it was believed it would remedy many inequities in discovery practice, and it did so to a limited extent. However, we now know it failed to create the level playing field that was hoped for.

March 18, 2013 marks the 50th anniversary of the United States Supreme Court’s decision in Gideon v. Wainwright, forever establishing that a fair trial cannot be assured without representation by counsel. Fundamentally, Gideon v. Wainwright

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is about due process. Since the ruling in Gideon, numerous court decisions have interpreted and enhanced Gideon’s promise of a fairer criminal justice system. Along with the constitutional right to counsel, true discovery in criminal cases is perhaps equally vital to a fair trial. Discovery of important information within the control of the District Attorney, if withheld until right before trial, under the protection of New York’s current statutory scheme, makes its disclosure virtually meaningless. Defense attorneys are unable to conduct any significant investigation or evaluation of the material on the eve of (or worse, during) trial. This also places the presiding judge in conflict with balancing the economy of moving ahead with a trial, often when jurors are already seated, against the defendant’s right to a fair trial. Furthermore, earlier disclosure would serve the interest of earlier resolution in many cases if the evidence provided convinces the defendant to enter into a plea disposition. This would constitute a significant cost savings to the administration of justice.

District Attorneys throughout the State acknowledge the need for reform, including perhaps most significantly, District Attorneys Association of the State of New York (DAASNY) President Cyrus Vance, Jr., who described New York as “among the most restrictive states in terms of providing criminal discovery.” Despite this stance, the District Attorneys Association declines to support any of the discovery reform bills that have been introduced in Albany. DAASNY is traditionally a very strong voice in Albany on criminal justice issues. However, in its zealouslyness to obtain convictions and protect victims, DAASNY is at risk of losing credibility. DAASNY appears ready to oppose any meaningful reform that would not only eliminate the notion of “trial by ambush,” but would also reduce wrongful convictions. Many prosecutors support “open file” discovery reform, but their colleagues who remain opposed to true reform may simply be on the wrong side of history on this issue, just as the Florida Attorney General was in Gideon. The time has come for New York to pass discovery reform legislation with or without the support of the District Attorneys Association.

Although several discovery reform bills have been introduced in the Assembly and Senate, NYSACDL calls on all interested parties to form a coalition and convene to prepare a fair and just bill for the Legislature to consider this session. Our bill will not be devoid of sensitivity to the concerns of prosecutors. Organizations which have already devoted time and energy to this endeavor include: Chief Judge Jonathan Lippman’s New York State Task Force on Wrongful Convictions, the New York State Office of Court Administration’s Subcommittee on Discovery Reform, the New York State Bar Association (Task Force on Criminal Discovery Reform), the Legal Aid Society of New York City, New York State Defenders Association, the Innocence Project, the grassroots group known as “It Could Happen to You,” and of course, the New York State Association of Criminal Defense Lawyers (NYSACDL). The Legislative Committee will coordinate efforts to convene this coalition and prepare model legislation. We will be realistic in our
proposals and will invite comment from the District Attorneys.

Due process doesn’t only include the right to counsel, rich or poor, but that counsel is able to provide meaningful representation. That representation should include early and full disclosure. Only then will Gideon’s promise of a level playing field be fulfilled.

In addition to Discovery Reform, the proposed coalition will be able to set forth a meaningful sealing statute, raising of the age of criminal responsibility and Youthful Offender treatment, videotaping of interrogations of criminal suspects, double-blind identification procedures, and other safeguards to assure convictions are accurately justified. As most of you are aware, Governor Andrew Cuomo has endorsed videotaping of interrogations, and double-blind identification procedures.

Furthermore, NYSACDL not only speaks to the larger criminal justice issues, but we have recently submitted critical analysis to State leadership in connection with the Governor’s proposal to restrict plea-bargaining on speeding tickets in excess of 20 mph above the speed limit.

I wish to extend grateful appreciation to our lobbyist Sandra Rivera of Manatt, Phelps & Phillips, LLP and our new President of the Association, Ben Ostrer, for their support in advancing our goal of fairness in the criminal justice system, to Peter Gerstenzang for his comprehensive research and analysis of the new Vehicle and Traffic Law measures, and to all the contributors to this Legislative Issue of Atticus for moving us a little closer to fulfilling Gideon’s promise.

“The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow…” — Atticus Finch
Continuing Legal Education

NYSACDL is noted for our innovative, interesting and informative CLE programs, which we present at various locations around the state each year. The schedule for the upcoming months is still in progress, but the following programs will be presented:

**APRIL 20**
*Annual Syracuse Spring Trainer.* Onondaga Community College, 8:30 a.m.-4:30 p.m. 6 credit hours in skills. faculty and topics will be announced; please check the website for updates.

**APRIL 26**
*Cross to Kill,* one of our signature CLE programs, offering 6 CLE credit hours in skills. The program will be held at New York Law School in Manhattan, and features:
- Paul Schoeman, Esq., on cross of government tax experts.
- Steven Epstein, Esq., on cross of Breathalyzer technicians and other DWI related experts.
- Sharon McCarthy, Esq. on cross of government experts.

**MAY 9**
*Cross Examination Techniques.* Presented in Syracuse in conjunction with the Federal Defenders, NDNY, and NYSDA. This all day program at the Genesee Grande Hotel in Syracuse features Terrence McCarthy, Federal Defender Emeritus from the ND Illinois discussing winning cross examination techniques.

**MAY 31** *(DATE TENTATIVE):*
*Appellate Practice.* This program will feature Appellate Division judges and practitioners explaining how to hone your appeals skills.

Other programs are in the works. Watch the website and emails for continual updates to the calendar.

If you have an idea or a request for a CLE program, contact any Board member or our CLE chair, Bruce Barket. Committee members and contacts are published elsewhere in this magazine.
Cutting Edge CLE

Federal Practice Seminar
U.S. Courthouse, SDNY, March 6, 2013

On March 6, NYSACDL presented our annual Federal Practice Seminar at the Southern District Courthouse. The emphasis was Sentencing Advocacy, and the 55 or so attendees were treated to significant detailed presentations, moderated by Immediate Past President Richard Willstatter.

We led off with our own forfeiture maven, Steven L. Kessler, a frequent lecturer and noted authority on the subject, who gave the assembled lawyers a primer on forfeiture, restitution and fines, with an emphasis on how to handle the issues that arise in these cases. His insight and materials are invaluable.

JaneAnne Murray, a former Director of NYSACDL and a frequent contributor to Atticus as well as the author of the Second Circuit blog, flew in from her new home in Minneapolis expressly to talk to us about Creative Sentencing Advocacy. As always, her presentation was first class, and all present learned some interesting ways to advocate for our clients at sentencing. Next up was Amy Baron-Evans, National Sentencing Resource Counsel for the Federal Defenders, who works out of Boston. Amy has written and presented extensively on the subject of “Deconstructing the Guidelines”, and she explained in detail how the Guidelines can be used to advocate for better sentences, by using the Congressional intent and the Sentencing Commission’s own inadequacies. Both Amy and JaneAnne provided examples and materials that assist counsel in the preparation of detailed and persuasive sentencing memoranda.

The afternoon came to a close with NYSACDL Past President Joshua Dratel interviewing U.S. District Judge Shira Scheindlin, eliciting her views on sentencing advocacy and offering practice tips for us. Judge Scheindlin was both enlightening and entertaining, and was well received by the attendees.

We urge our members to attend our cutting edge CLE programs around the state, and to encourage their friends and colleagues who have not yet joined the Association to do so as well. CLE programs later this year include our signature Cross to Kill and Weapons for the Firefight panels, as well as an Appellate Practice program and regional trainers in Syracuse, the Hudson Valley, and Buffalo.
Second Thoughts

Updates from the Second Circuit Court of Appeals

By Lisa Peebles

Statutory Interpretation:


In Beardsley, the Second Circuit held that the modified categorical approach cannot be applied to determine whether a defendant’s prior conviction for endangering the welfare of a minor, in violation of N.Y. Penal Law § 260.10, triggers application of the statutory sentencing enhancements for child pornography offense under 18 U.S.C. 2252 (b).

Although the Court had previously held that the modified categorical approach can only be used when a statute is divisible, it had not yet defined the term. The Beardsley Court noted that a predicate statute is clearly divisible when it contains distinct subsections or a list of proscribed conduct. What about when the statute, such as endangering the welfare of a minor, uses general language to proscribe a broad range of conduct?

For the first time, the Second Circuit in Beardsley held that the modified categorical approach may not be used to determine how a defendant committed a crime proscribing a broad range of conduct. According to the Beardsley Court, a statute “merely broadly worded, so as to encompass conduct that might match the federal predicate offenses, does not suffice.” Accordingly, if a prior offense can only be said to be related to a law proscribing sexual abuse by examining at sentencing how a defendant committed the prior offense, then the prior offense is not divisible and the statutory sentencing enhancement cannot be applied.

Suppression:


On the Government’s appeal from the District Court’s (Hurd, J.) Order suppressing evidence seized pursuant to a vehicle stop initiated by members of the St. Regis Mohawk Police Department in violation of New York State Law and Immigration and Customs Enforcement policy, the Second Circuit reversed, holding that

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probable cause determination under the Fourth Amendment is not affected by law enforcement territorial jurisdiction.


Court approved application of the “public safety” exception to the Miranda requirement when defendant was questioned more than one hour after his arrest, because, in the circumstances of this case, law enforcement officers had an objectively reasonable need to protect the public from a realistic threat.


Court held that a given mandatory minimum trumps 18 U.S.C. § 3553 (a)’s parsimony provision, which requires the sentencing court to impose a sentence “sufficient, but not greater than necessary” to achieve the aims of sentencing policy.


In an unpublished decision, the Court upheld the order of restitution imposed on a defendant convicted of possessing and receiving child pornography. Perhaps most significantly, the Court found that the defendant proximately caused the victim's losses, because “her representative had informed her of this action, and that her knowledge that Hagerman was among those who had downloaded her picture had caused her actual and ongoing psychological harm, as demonstrated in her victim impact statement and psychological evaluations.” However, the Court found that the District Court erred in holding that the defendant must prove that he actually used a firearm for sporting purposes to receive the guideline reduction under U.S.S.G. § 2K2.1. As the guideline makes plain, a defendant need only show that he intended to use the firearm for sporting purposes.

**Immigration:**


Court holds that the third prong of the collateral attack provision of 8 U.S.C. § 1326 (d) requires a defendant to prove that there is a reasonable probability that his presence at a prior removal proceeding, in which deportation was ordered in absentia, would have produced a different result. Although defendant’s prior criminal conviction leading to his removal was not yet final at the time of the removal proceeding, Circuit held that District Court did not err in concluding that defendant’s presence at proceeding would not have led to discretionary relief from deportation.

**Waivers**


Court held that defendant who expressed his desire to refrain from being transferred to the Southern District of New York for fear of being assaulted by prison guards did not knowingly and voluntarily waive his right to be present during the sentencing hearing under Rule 43 (a) (3) of the Federal Rules of Criminal Procedure. Court held that waiver was the result of “fears of intimidation and physical abuse,” not his own free will. Lesson: Counsel can waive a defendant’s right to appearance, but Circuit affirmed that “a defendant’s waiver through counsel, like all waivers of constitutional rights, still must be knowing and voluntary on the part of the defendant.” Letter from defense counsel waiving a defendant’s right to in-person appearance must reference the knowing and voluntariness requirements of a waiver.

**Sentencing:**


Court held that the District Court erred in holding that a defendant must prove that he actually used a firearm for sporting purposes to receive the guideline reduction under U.S.S.G. § 2K2.1. As the guideline makes plain, a defendant need only show that he intended to use the firearm for sporting purposes.
(Senate Bill 1941; Assembly Bill 2285)
“Relates to Driving While Intoxicated and the Installation of Ignition Interlock Devices”

The bill referenced above is pending in the Senate and the Assembly. The thrust of the bill is focused on ensuring that people convicted of DWI are penalized through
installation of ignition interlock devices. Its scope encompasses far more, however, and provides dramatically severe consequences which significantly impact people convicted of DWI.

REPEAL OF THE 20-DAY STAY

Vehicle and Traffic Law (VTL) § 1193(2)(d) entitled “Suspension or revocation; sentencing” is amended to eliminate the 20-day order. Accordingly, a defendant who is convicted of Driving While Intoxicated or Driving While Ability Impaired will be put in the position of having no driving privileges unless and until he or she is able to secure them from the Department of Motor Vehicles.

Under the present system, an eligible defendant is convicted and his or her license is suspended or revoked, but the suspension or revocation is stayed for 20 days to allow time for the Department of Motor Vehicles to process the conviction, and notify motorists that they are eligible for the conditional license and the Drinking Driver Program.

In that manner, a defendant is allowed to drive and maintain his or her employment and continue with his or her life pending DMV processing.

If the proposed amendment is enacted, we will find ourselves in a situation in which every defendant sentenced on any violation of VTL § 1192 will not be able to drive away from the Court. They will be stranded for weeks. Jobs will be lost and there will be desperate motorists besieging the Department of Motor Vehicles to process their conviction immediately and issue them a conditional license.

The apparent legislative rationale for wreaking this havoc and misery is that the 20-day stay “might” be interpreted as a right to drive without an interlock. To the contrary, that is neither the law, nor the practice in local criminal courts.

People convicted of DWI are prohibited from operating any motor vehicle without an interlock from the date of sentence. Nothing in the law or DMV regulations indicates anything to the contrary. If there were any confusion, it has been clarified by memos from the Department of Motor Vehicles addressed to the Courts explicitly stating that a 20-day order does not allow a person convicted of DWI to operate a vehicle without an interlock.

Insofar as the defense bar is concerned, the general practice is to ensure that the interlock is installed prior to sentencing so that the client can legally drive out of the Court parking lot. The pre-sentence installation of the interlock has become so pervasive that another portion of this bill now gives interlock credit for such installation.

A. 2285, at § 13.

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The need to drive is a powerful incentive that could be harnessed to obtain abstinence and adherence to law.

**CREDIT FOR EARLY INTERLOCK INSTALLATION**

This provision recognizes the fact that a defendant who is going to be able to drive after sentencing for a DWI conviction must have the interlock installed prior to sentencing. Otherwise, the motorist might have a 20-day order granted at sentencing, but would not have a vehicle equipped with an ignition interlock that he could drive.

Absent the installation of the interlock, the 20-day order is useless. This provision simply recognizes that necessity and gives the motorist credit for the time that the interlock is actually installed.

The period of interlock restriction shall commence from the date of sentencing or, in the case of a plea disposition, may commence from the date of installation of an ignition interlock device at a date in advance of sentencing. The ignition interlock device shall be installed for no less than six months, regardless of the commencement date.

A. 2285, at § 1.

**DEFINITION OF OWN OR OPERATE EXPANDED**

The bill expands the present “own or operate” to “any motor vehicle titled, registered or otherwise owned or operated by defendant.”

A. 2285, at § 1.

**YOUTHFUL OFFENDERS INCLUDED**

While the statute has been interpreted to include youthful offenders, the bill specifically includes them within the purview of the interlock legislation.

A. 2285, at § 1.

**MUST INSTALL INTERLOCK OR TRANSDERMAL ALCOHOL MONITORING DEVICE**

In response to a highly questionable allegation that only one-third of the people convicted of DWI actually install an ignition interlock, the bill provides a rather extreme mandate. It essentially requires an extensive judicial inquiry to establish that the motorist does not have a vehicle in which to install the interlock. It then mandates a far more onerous alternative requirement that the motorist wear a transdermal alcohol detecting device.

The stated purpose of these provisions is to avoid motorists transferring their vehicles in order to avoid the installation of an ignition interlock.

Since a large percentage of the motorists convicted of DWI are not eligible for any driving privileges, it makes perfect sense for them to transfer their vehicles. Why pay the cost of both the depreciating vehicle as well as the costs associated with the interlock?

The logic of this is enhanced by the fact that the vehicle has to be brought back to the installer on a regular basis for interlock maintenance. If you drive it there, you commit a crime. If the vehicle is not brought in for maintenance, it violates the conditional discharge.

The person whose privileges are revoked should not be driving regardless of whether they have an interlock or not. The removal of the car is a far better guarantor of compliance than the installation of an interlock.

For those motorists who are eligible for a conditional license after sentencing, the ignition interlock is an absolute essential. Operation of a motor vehicle without an ignition interlock is a crime which most prosecutors tend to prosecute vigorously. In addition, another part of this bill requires proof of interlock installation in order to obtain a conditional license in the first place.

In light of these facts, this portion of the bill can only be seen as a measure designed to impose the interlock as a punishment upon the defendants who are not eligible for driving privileges. The alternative requirement of the transdermal alcohol monitoring bracelet is almost Orwellian in its intrusiveness.

Abstinence is not generally a condition of the conditional discharge as a result of a conviction for DWI. The proposed legislation requires that the motorist wearing the transdermal device be
monitored and that a report be made to the court in the event that the court does impose abstinence, and to the Department of Motor Vehicles even though the condition of abstinence is not imposed.

Evidence of alcohol consumption may be considered by the Department of Motor Vehicles in determining whether to relicense the motorist once the motorist becomes eligible to apply for reinstatement of privileges. This is not the case where the interlock is installed.

This portion of the bill turns the original intent of the interlock legislation on its head and now puts the motorist who does not have a car in which to install an interlock at a distinct disadvantage. That motorist will suffer greater restrictions and sanctions as a result of not having a car in which to install an interlock. The motorist would be better off to buy a car in which to install the ignition interlock even though the motorist would not be able to drive that car.

In the event that the court makes a determination of good cause for not installing an ignition interlock device pursuant to subdivision four of section eleven hundred ninety-eight of this article on the basis that such person does not own and will not operate a motor vehicle, the ignition interlock restriction shall remain in effect for the full period of such person's conditional discharge or probation pursuant to article sixty-five of the penal law and the court shall sentence such person to wear a transdermal alcohol monitoring device for a period of not less than six months. Under no circumstances shall a conditional license be issued, or a license or privilege to operate a motor vehicle be granted or restored until such person can demonstrate compliance with either the ignition interlock or transdermal alcohol monitoring provisions of this section pursuant to subdivision nine of section five hundred ten of this chapter.

A. 2285, at § 1.

In the event the court also sentences such person to abstain or restrict his or her consumption of alcohol during the transdermal alcohol monitoring period, the detection of alcohol by the transdermal device shall be reported by probation or the monitor to the court. Where no such restriction is imposed by the court, the transdermal data will be reported to the department in a form prescribed by the commissioner for consideration during relicensing.

A. 2285, at § 3.

SCOPE OF JUDICIAL INQUIRY

Given the far greater intrusiveness of the transdermal device, coupled with its unregulated costs and unknown availability, installation of the ignition interlock appears to be a far better alternative. The transdermal device, however, still results in an interlock not being installed. Accordingly, that option does not become available unless and until the motorist has undergone vigorous judicial inquiry. That inquiry is set forth below.

It includes the submission by the motorist of a mandated sworn affidavit to the court asserting among other things:

1. Whether the motorist owned any motor vehicles at the time of the commission of the crime.

2. Whether the motorist transferred any such vehicle by sale, gift or any other means since the date of said violation.

3. A statement that the motorist has not and will not transfer ownership of any vehicle to avoid installation of an ignition interlock device.

Thus, by including this required statement in the mandated affidavit, this bill makes it unlawful to transfer a vehicle for the purpose of avoiding an interlock installation.

This is totally inappropriate. Motorists should be encouraged to transfer vehicles that they cannot lawfully operate.

A claim by such person that he or she has good cause for not installing an ignition interlock device shall be made to the court at or before sentencing, in writing in the form of a sworn affidavit signed by such person asserting under oath that such person is not the registered or titled owner of any motor vehicle and will not operate any motor vehicle during the period of restriction, or that such person does not have access to the vehicle operated by such person at the time of the violation.

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Prosecution to Persecution

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tion of section eleven hundred ninety-two of this article, or that the registered owner of that vehicle or any vehicle registered to such person's household will not give consent for the installation of an ignition interlock device on his or her vehicle. In addition, the affidavit must also include a statement regarding whether such person owned any motor vehicle on the date of the underlying violation of section eleven hundred ninety-two of this article and whether ownership of any of those vehicles has been transferred to another party by sale, gift or any other means since the date of said violation. The affidavit must include a statement from such person that he or she has not and will not transfer ownership of any vehicle to evade installation of an ignition interlock device. The affidavit must also include the address of such person's employment (if any) and how such person intends to travel to that location during the period of restriction. The person may also include any other facts and circumstances such person believes to be relevant to the claim of good cause. The court must make a finding whether good cause exists on the record and, if good cause is found, issue such finding in writing to be filed by such person with probation or the ignition interlock monitor, as appropriate. In the event the court denies such person's claim of good cause on the basis of the affidavit filed with the court, such person must be given an opportunity to be heard. Such person may also waive the opportunity to be heard. Where the court finds good cause for such person not to install an ignition interlock device, the period of interlock restriction on such person's operating record shall remain in effect for the full period of such person's conditional discharge or probation pursuant to article sixty-five of the penal law and the court shall sentence such person to wear a transdermal alcohol monitoring device for a period of not less than six months.

A. 2285, at § 3.

ISSUANCE OF CONDITIONAL REQUIRES PROOF OF COMPLIANCE

The bill requires that the motorist demonstrate compliance with either the ignition interlock requirement or the transdermal alcohol monitoring device as a condition precedent to having an application for relicensure and/or a conditional license be granted by the Department of Motor Vehicles.

Under no circumstances shall a conditional license be issued, or a license or privilege to operate a motor vehicle be granted or restored until such person can demonstrate compliance with either the ignition interlock or transdermal alcohol monitoring provisions of this section pursuant to subdivision nine of section five hundred ten of this chapter.

A. 2285, at § 1.

ISSUANCE OF CONDITIONAL MAY EXTEND INTERLOCK REQUIREMENT

If the motorist applies for a conditional license during the period of the interlock condition, that motorist will then be subject to the extension of the interlock restriction for a minimum period of six months from the date of the issuance of the conditional license. Use of a transdermal monitoring device would not shorten this period. Accordingly, if the motorist did not have an interlock installed when the initial restriction was placed on his record, a new period of a minimum of six months would commence with the issuance of the conditional license. Depending on the term of the condition imposed at sentencing, this may or may not add to the total interlock period served. The question is how this would apply to the motorist who obtained the interlock prior to sentencing, if at all.

For the purposes of obtaining a conditional license while under the period of restriction, such compliance can be demonstrated by providing proof at the time of application for a conditional license of the installation of an ignition interlock device to be monitored pursuant to section eleven hundred ninety-eight of this article for a period of no less than the first six months after the conditional license is granted. The proof will be provided to the department in a form prescribed by the commissioner.

A. 2285, at § 1.
Revoking a conditional license and/or suspending an existing driving privilege requires at least the appearance of due process.

The bill requires the revocation of a conditional license, if during the period of revocation, the motorist is charged with VTL § 511 (Aggravated Unlicensed Operation), VTL § 1192 (Driving While Intoxicated) or Operating Without an Interlock, in violation of VTL § 1198. In addition, any violation of probation or of the conditional discharge relating to the operation of a motor vehicle, or consumption of alcohol will result in the revocation of a conditional.

The conditional license or privileges described in this subdivision shall be revoked by the commissioner when there has been a finding by a court, filed with the department in a form prescribed by the commissioner, that the accusatory instrument conforms to the requirements of section 100.40 of the criminal procedure law and there exists reasonable cause to believe that the operator has committed a violation of section five hundred eleven of this chapter or operated a motor vehicle in violation of subdivision one, two, two-a, three, four or four-a of section eleven hundred ninety-two of this article or operated a motor vehicle without an ignition interlock device when required to have one pursuant to this section. The court shall make a finding and set it forth upon the record, or otherwise set it forth in writing. The finding shall be filed with the department in a form prescribed by the commissioner. At such time the licensee shall be entitled to an opportunity to make a statement regarding the charges and issues and to present evidence tending to rebut the court’s findings. The licensee may present material and relevant evidence, however, he or she may not cause the law enforcement officers involved in the underlying arrest or arrests to be called to testify unless the licensee first demonstrates to the satisfaction of the court a good faith basis to believe such officers will provide testimony inconsistent with the factual portion of the accusatory instrument which formed the basis of the court’s finding of compliance with section 100.40.

A. 2285, at § 15.

In order for the request for a conditional license to be denied on the basis of having been charged with the enumerated violations, the court must find prior to the conclusion of the proceedings for arraignment that the accusatory instrument conforms to the requirements of section 100.40 of the criminal procedure law and there exists reasonable cause to believe that such person violated the provisions of section five hundred eleven of this chapter or operated a motor vehicle in violation of subdivision one, two, two-a, three, four or four-a of section eleven hundred ninety-two of this article or operated a motor vehicle without an ignition interlock device when required to have one pursuant to this section. The court shall make a finding and set it forth upon the record, or otherwise set it forth in writing. The finding shall be filed with the department in a form prescribed by the commissioner. At such time the licensee shall be entitled to an opportunity to make a statement regarding the charges and issues and to present evidence tending to rebut the court’s findings. The licensee may present material and relevant evidence, however, he or she may not cause the law enforcement officers involved in the underlying arrest or arrests to be called to testify unless the licensee first demonstrates to the satisfaction of the court a good faith basis to believe such officers will provide testimony inconsistent with the factual portion of the accusatory instrument which formed the basis of the court’s finding of compliance with section 100.40.

A. 2285, at § 15.
Prosecution to Persecution

Continued from page 19

of the criminal procedure law and there exists reasonable cause to believe that the holder violated the sections charged. In no event shall the arraignment be adjourned or otherwise delayed more than three business days solely for the purpose of allowing the licensee to rebut the court’s finding.

A. 2285, at § 3.

**NOT TO OPERATE AT SETPOINT OF .025**

The bill presumes that operation of a motor vehicle encompasses the attempt to start a vehicle which cannot be started with a blood alcohol concentration of .025 or more. As such, it punishes the motorist who blows a .025 or more in an attempt to start their vehicle.

This provision changes the ignition interlock to a punitive measure from its original function as a preventative one. It penalizes the motorist for using the ignition interlock in exactly the manner for which it was intended.

For example, most people who drink in the evening presume that they are sober in the morning. Sometimes, they still have a residual blood alcohol concentration.

The setpoint on the ignition interlock device is .025 or the rough equivalent of the alcohol in 12-1/2 ounces or 1-1/2 bottles of beer in a 160 pound person.

The motorist would tend to feel completely sober and would innocently attempt to start his or her vehicle. The ignition interlock device is there to prevent such a person from making this mistake and driving with alcohol in his or her system.

Unless the motorist has been directed to abstain from all consumption of alcoholic beverages, this provision penalizes consumption and transcends the issue of preventing drinking and driving.

A. 2285, at § 1.

**EMPLOYER VEHICLE EXEMPTION REQUIRES COURT APPROVAL**

Under the present statute, an employee can operate employer=s vehicles without an interlock in the course of his employment if he has the written permission of his employer which acknowledges the employer=s understanding of the employee=s conviction and the interlock requirement. Court approval is not required. Under this portion of the bill, that is amended to specifically require Court approval and creates additional administrative requirements for both the motorist and the Court.

The court may grant or deny such person=s request to operate a motor vehicle, owned by said person=s employer, in the course and scope of his or her employment without installation of an approved ignition interlock device. Where the court grants the request, it must be granted in writing in a form prescribed by the commissioner to be filed with probation or the monitor, as appropriate, and to be carried by such person whenever said person is operating the employer=s vehicle in accordance with this section and such person must produce said document to a law enforcement officer upon request. Additionally, the commissioner shall note on the operator=s record of any person authorized to operate an employer vehicle pursuant

**Unless the motorist has been directed to abstain from all consumption of alcoholic beverages, this proposed law penalizes consumption and transcends the issue of preventing drinking and driving.**

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted or adjudicated a youthful offender for a violation of subdivision two, two-a, three or paragraph (b) of subdivision four-a of section eleven hundred ninety-two of this article to a period of probation or conditional discharge, as a condition of which it shall order such person not to operate a motor vehicle without an ignition interlock device, not to operate a motor vehicle with a blood alcohol concentration above the setpoint of the ignition interlock device.

A. 2285, at § 1.
to this subdivision that such person is only authorized to operate without an ignition interlock device while driving an employer vehicle within the course and scope of his or her employment.

A. 2285, at § 4.

**POST RELEASE MONITORING OF PAROLEES’ INTERLOCKS**

While the law provides for the interlock to be imposed upon released parolees, this provision specifies the responsible monitoring authorities, and provides that the interlock period run concurrent with any similar court imposed interlock provision.

This mandatory installation of an ignition interlock device as a condition of release shall run concurrently with any required installation of an ignition interlock device ordered by the court as a condition of a consecutive period of conditional discharge or probation pursuant to section 60.21 of the penal law. Monitoring during the period of parole shall be provided by the division of parole. If there is an additional period of probation extending beyond the period of parole, monitoring of any remaining period of ignition interlock restriction shall be transferred from the division of parole to probation at the conclusion of parole.

A. 2285, at § 5.

**MAXED OUT DEFENDANT CAN GET ADDITIONAL 90 DAYS**

In those situations where people served the maximum prison sentence; and then were required to complete the IID requirement upon their release from prison, there was no additional jail time to be imposed for violation of the interlock conditions because they had already served the maximum. Accordingly, this portion of the legislation provides for an additional 90 day possible sentence for people who violate the IID requirements after having served their prison sentence.

Where a person is sentenced to the maximum term of incarceration with a consecutive period of conditional discharge or probation, and the court finds such person to have violated the conditions of discharge or probation, the court in its discretion may sentence the defendant to an additional period of incarceration not to exceed ninety days for each violation. Nothing contained in this section shall prohibit a court from imposing any other sentence or modification permitted by law.

A. 2285, at § 7.

**DMV MUST CORRECT COURT “ERROR” RE: INTERLOCK**

The bill specifically requires the Department of Motor Vehicles to supersede the Court and to correct any “mistakes” that might have been made by the Court in its handling of the IID requirements.

(10) Action required by commissioner. Where a court fails to impose, or incorrectly imposes, a suspension or revocation required by this subdivision, or an interlock restriction required by section eleven hundred ninety-eight of this article, the commissioner shall, upon receipt of a certificate of conviction filed pursuant to section five hundred fourteen of this chapter or upon notice of an ignition interlock requirement before the sentence date as part of a plea disposition, impose such mandated suspension, revocation or restriction which shall supersede any such order which the court may have imposed.

A. 2285, at § 8.

**DWAI DRUGS REVISED TO REQUIRE INTERLOCK**

The bill creates two sections where there was one in regard to VTL § 1192(4-a). VTL § 1192(4-a) is now going to have a new subdivision so it will become 1192(4-a)(a); and, (b). VTL § 1192(4-a)(a) will deal strictly with operating under the influence of drugs, and VTL § 1192(4-a)(b) will be under the alcohol and drugs and this will now require an ignition interlock for a violation of section eleven hundred ninety-two four-a (b).

§ 11. Subdivision 4-a of section 1192 of the vehicle and traffic law, as added by chapter 732 of the laws of 2006, is amended to read as follows:

4-a. Driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs. (a) No person shall

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Annual Dinner and Awards Ceremony 2013

January 24, 2013 at the Prince George Ballroom in Manhattan

David McMahon and Sarah Burns accept the Justice Through the Arts Award

Past President Willstatter swears in President Ostrer

Judge Jeffrey Berry accepts the Hon. William Brennan Award from Honorable Martin Goldberg

Josh Dratel, Harvey Fishbein and Stacy Richman

Susan Necheles accepts the Thurgood Marshall Award

Earl Ward and Larry Goldman

Murray Richman, Judge Renee Hill and guests

Ray Kelly, John Wallenstein, Gerry Damiani, Ben Ostrer, Larry Goldman and David Goldstein
He has blasphemed!!
Why do we still need witnesses?

Caiaphas the High Priest
(at the trial of Jesus of Nazareth for blasphemy and treason)

At present, existing law requires certain Vehicle and Traffic law misdemeanors to be printed. Specifically, any misdemeanor or defined outside the penal law which would constitute a felony if such person had a previous judgment of conviction for a crime.

This encompasses any misdemeanor covered by section 1192 of the Vehicle and Traffic Law.

This proposed expansion will bring in such misdemeanors as VTL § 1212 (Reckless Driving); and VTL § 511 (Aggravated Unlicensed Operation of a Motor Vehicle).

In the vast majority of the state, these are crimes for which uniform traffic tickets are issued without the need of taking the defendant into custody.

The immediate impact of this proposed legislation will be upon police sergeants who must allocate limited patrol resources to obtain the most coverage.

It is hard to imagine a sergeant who would tolerate a police officer taking him or herself off the road to process a defendant charged with Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree. This charge most commonly arises out of the failure to pay a fine or to respond to a ticket.

If this is enacted, it is likely that AUO 3d, as well as charges for other relatively minor V&T misdemeanors will very rapidly disappear from court dockets.

A. 2285, at § 14.

PROOF OF SENTENCE COMPLIANCE REQUIRED FOR LICENSE RESTORATION

The bill provides that in addition to satisfying the Court, the motorist must provide documentary proof that the motorist has complied with all the requirements imposed by the Court and the law prior to having his or her privileges restored. So, in addition to the paperwork associated with providing proof to the Court and to the IID monitor, the motorist now must provide documentation of sentence compliance to DMV before his or her license will be restored.

A. 2285, at § 9.

CONCLUSION

The provisions contained in this bill will dramatically impact people convicted of Driving While Intoxicated. More and more of them will simply drive illegally. That is unfortunate since the same tools that are used in this legislation to punish could easily be used to educate and rehabilitate. Instead of lengthy revocations, driving privileges could be tied to the use of the interlock and/or the transdermal alcohol monitoring device. The need to drive is a powerful incentive that could be harnessed to obtain abstinence and adherence to law.
All of us who practice criminal law in New York have occasionally had the experience of representing a youth under the age of 19, who is eligible to be treated as a Youthful Offender under the CPL. When the case is concluded and the YO adjudication substituted for the conviction, we cheerfully advise our clients that he has not been convicted of a crime, and that his next felony will be his first, not his second. While that is true if the defendant’s next arrest is in state court, the Federal system holds a trap for the unwary and unwise who find themselves on the short end of a federal indictment for possession of controlled substances, among other crimes. This article is meant to address a proposal for a change in the Youthful Offender statute under CPL § 720.
A defendant charged in federal court under Title 21 USC § 841 (the controlled substance statute) must receive a mandatory minimum sentence of ten years if convicted under subsection (b)(1)(A), and five years under subsection (b)(1)(B). These sentences are doubled in the event the defendant had a previous felony conviction if the United States Attorney files an information with the court advising of that prior conviction. Title 21 USC § 851.

The United States Court of Appeals for the Second Circuit has determined that a New York State youthful offender adjudication under CPL Article 720 can still be used as a basis for an enhancement of punishment (i.e. doubling the mandatory minimum) by describing the youthful offender adjudication as a “conviction”. United States v. Sampson, 385 F. 3d. 183 (2nd Circ. 2004); United States v. Jackson, 504 F. 3d 250 (2nd Circ. 2007). The Second Circuit reaches this conclusion by distinguishing between the language that is in the New York State statute, which is “deemed vacated”, (the term used in CPL § 720.20 (3)) from the apparently (at least for the Second Circuit) stronger terms “dismissed” or “expunged”, essentially leaves the underlying conviction in place, thus ignoring New York’s interpretation of its own laws. The defendant, now in federal court with a prior YO adjudication, may see a doubled mandatory minimum sentence. Moreover, New York State’s public policy of giving a youthful offender a “second chance” is simply rejected by the federal courts under these circumstances. The defendant, with a New York State YO adjudication, will be treated like any other individual with a prior felony.

Our neighboring state of Vermont (which is also within the Second Circuit) has a youthful offender statute that allows a defendant to move for the dismissal of his case upon successful completion of a probationary sentence. The statute in relevant part states:

(c) If the court finds that the youth has successfully completed the terms of the probation order, it shall terminate youthful offender status, discharge the youth from probation and file a written order dismissing the family division case. The family division shall provide notice of the dismissal to the criminal division, which shall dismiss the criminal case. Title 33 V.S.A. § 5287 (c)

Therefore, the Vermont former YO defendant, now sitting in a federal court charged with violating Title 21 USC § 841, will not be considered a prior felon and not be subject to the enhanced mandatory minimum sentences, if he had previously moved for a dismissal under the Vermont statute.

Vermont requires that the motion may be filed by “the state’s attorney, the youth, the department or the court on its own motion” Title 33 V.S.A. § 5287(a). Apparently, if none of those parties make the appropriate motion upon the defendant’s successful completion of probation, then the defendant may still be subject to enhanced penalties if he is later convicted in federal court.

If an effort can be successfully made to change the New York statute to be more in line with the Vermont statute, and to provide that the Youthful Offender adjudication be “dismissed” after a successful completion of probation without any court intervention, then our wayward youth will be better served.

**YO statute, by drawing the distinction between “deemed vacated”, (the term used in CPL § 720.20 (3)) from the apparently (at least for the Second Circuit) stronger terms “dismissed” or “expunged”, essentially leaves the underlying conviction in place, thus ignoring New York’s interpretation of its own laws. The defendant, now in federal court with a prior YO adjudication, may see a doubled mandatory minimum sentence. Moreover, New York State’s public policy of giving a youthful offender a “second chance” is simply rejected by the federal courts under these circumstances. The defendant, with a New York State YO adjudication, will be treated like any other individual with a prior felony.**

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We either make ourselves miserable, or we make ourselves happy. The amount of work is the same. — Carlos Casteneda
A recent study of Public Defenders in Wisconsin revealed something which comes as no surprise to any of us: that criminal defense lawyers suffer significantly higher levels of post-traumatic stress disorder (PTSD) symptoms, depression, secondary traumatic stress, burnout, and functional impairment compared with the administrative support staff. This phenomenon, commonly known as “compassion fatigue” or “secondary stress syndrome”, is defined as the “cumulative physical, emotional and psychological effects of continual exposure to traumatic experiences suffered by another while working in a helping capacity.” While long recognized in other such “helping” professions as nursing, mental health and social work, the Wisconsin study was the first of its kind to study the effect on public defenders.

“Exposure to client trauma was assessed by asking, ‘How many clients have you worked with, within the last three months, who have experienced or been directly involved with trauma such as death, physical assault or abuse, domestic violence, rape, violence of fire?’” The results indicated that certain factors such as gender, age, years on the job, size of the local office and a personal history of childhood or adult trauma “did not significantly correlate with any of the outcome variables.” When broken down, the study found specific experiences of compassion fatigue as follows:

**Depression:** Depressed mood, loss of interest or pleasure, disturbed sleep, loss of appetite, low energy, poor concentration, feelings of low self-worth.

- General population: 10 %
- PD support staff: 19.3 %
- PD attorneys: 39.5 %

**Post-traumatic Stress Disorder:** PTSD, triggered by a terrifying event; symptoms include flashbacks, nightmares, severe anxiety, uncontrollable thoughts.

- General population: 7 %
- PD support staff: 1 %
- PD attorneys: 11 %

**Functional Impairment:** The extent to which exposure to traumatic material interferes with functioning in work, social/leisure life, and family/home life.

- PD support staff: 27.5 %
- PD attorneys: 74.8 %

**Compassion Fatigue/Secondary Traumatic Stress:** The “cost of caring” about another person who has experienced trauma; symptoms are similar to those of PTSD.

- PD support staff: 10.1 %
- PD attorneys: 34 %

**Burnout:** Job-induced physical, emotional, or mental exhaustion combined with doubts about one’s competence and the value of one’s work.

- PD support staff: 8.3 %
- PD attorneys: 37.4 %

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MICHAEL T. BAKER is Senior Assistant Public Defender in Broome County, Past President of the Broome County Bar Association, and a member of the Board of Directors of NYSACDL

Continued on page 30
Compassion Satisfaction: The study also measured “compassion satisfaction,” or the pleasure derived from one’s work. Reports of high levels of satisfaction were as follows:

PD support staff: 25.7 %  
PD attorneys: 19.3 %

Dr. Andrew Levin, medical director of the Westchester Jewish Community Center in Hartsdale, New York, who facilitated the study with the Wisconsin State Bar’s Lawyers Assistance Program (WisLAP) further determined that a “major finding” of the study “is that the extent of caseload and lawyers’ exposure to other people’s trauma were clearly related to symptoms of compassion fatigue.”

The study also found additional factors contributing to experiences of compassion fatigue, including “[t]he stress of the work setting itself, particularly a public legal setting where attorneys have high caseloads, are often not valued by clients, the justice system, or society and generally lack sufficient resources.” Other triggers of compassion fatigue are lack of control over one’s work life and lack of sufficient time to process issues and give or receive support.

Dr. Levin cautions, however, against wrongly interpreting the study as evidence that attorneys are impaired on the job. As he explained to the Wisconsin Lawyer, the results indicate “trends” as opposed to an outright diagnosis. For example, in explaining the depression statistic, “it shows almost forty-percent (40%) of attorneys are over the threshold number on the depression inventory...[but] [t]hat does not mean they have a clinical diagnosis of depression. All it means is that they have a likelihood for being at risk for depression.”

It is important to note that compassion fatigue is not necessarily synonymous with “burnout,” which develops over time and may lead to feelings of hopelessness, diminished self-worth and lack of interest. Compassion fatigue, on the other hand, can lead to heightened stress levels, disturbed sleep, irritability, pessimism, and isolation. Compassion fatigue has also been described as feeling “numb” to your clients’ plight or the sense of having a “depleted emotional bank account.”

Linda Albert, the coordinator of WisLAP who worked with Dr. Levin on the study, believes that the data shows the resiliency of the attorneys who participated in the study. She feels “despite the fact that they endure ongoing exposure to trauma and have high caseloads, they continue to meet the requirements of their employment. It’s amazing that they do. They are handling the demands of the job, but not easily and not without it having an impact on their lives.”
Over time we learn (or try to learn) how to keep our emotions in check…

It is this “resiliency,” however, which may be a factor in cases of compassion fatigue that go unnoticed until it is too late. By our nature, trial attorneys outwardly carry a certain confidence or “swagger.” Over time we learn (or try to learn) how to keep our emotions in check and to keep a healthy distance from the distress and human suffering we see on a daily basis. But eventually, as even the most hardened veteran will admit, it seeps into your psyche and changes your perception of the world around you.

Thus, it is not always easy for a colleague or supervisor to detect when an attorney in his or her charge is suffering from compassion fatigue. Tim Donaher, the Monroe County Public Defender, who oversees sixty-two attorneys practicing in both criminal and Family Courts, is acutely aware of the problem yet at the same time is hamstrung with how to effectively deal with it, since many times it may manifest itself outside of the office. “The problem is twofold. First, how do we recognize the symptoms of compassion fatigue and burnout and prevent it before it becomes a problem; and secondly, how do we deal with it in an effective matter? Due to ever-increasing caseloads coupled with dwindling available resources, it becomes even more challenging to prevent burnout.

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“A fanatic is one who can’t change his mind, and won’t change the subject.”

–Sir Winston Churchill

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and compassion fatigue among public defenders, and address it once it does occur. There are not too many areas to transition, even temporarily, within a public defender’s office to minimize its effects.”

While the WisLAP study was limited to public defenders, members of the private bar are certainly not immune from its effects and, in fact, would seem more susceptible to compassion fatigue considering the current economic climate. In addition to the stress inherent in the job itself, the private bar is faced with the added burden of maintaining a livable income in an era of slashed CJA/18-b vouchers, revisions to the assigned counsel system and smaller pool of clients with the financial ability to retain. Compassion fatigue likewise affects prosecutors and judges as well. The bottom line is that it is something we all face in this business, no matter which side we are on.

Quite frankly, we must face the sobering realization that it is not a question of whether we have been exposed to compassion fatigue in our jobs, but to what extent. While, at times, I miss the creature comforts of the private firm life, being a public defender for the past eight years is by far the most rewarding and fulfilling work I have done. Yet I realize that what I love most about this job has the potential to be most damaging: the adrenaline rush from “working in the trenches” on multiple cases at a time, the uncertainty of what is going to happen next, trying to help people who are facing, at times, insurmountable problems in their lives, the focus and discipline that comes from preparing a case for trial, etc., in other words, the daily battle. I often tell people that you cannot be a successful defense attorney and truly defend your clients to the best of your ability unless you “breathe their air.” One has to wonder though, after reading the stories of fellow attorneys who have suffered from compassion fatigue, whether we draw in more than we bargained for.

I think back to the many times while waiting for a jury where I found myself – not sitting back and relaxing – but catching up on cases and tasks that were neglected while in trial. Successful verdicts were celebrated with preparing cases for the next morning’s court calendar. Social events with friends and family were neglected while working late into the night on a motion.

Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services (and a Past-President of NYSACDL) has been a public defender for twenty-eight years and currently employs over one hundred attorneys providing public defense, family defense and immigration representation to thousands of clients each year. Lisa has seen first-hand the effects of compassion fatigue.

She first became interested in secondary trauma while researching the symptoms of PTSD when defending a client who had killed her husband. Her client’s heart-wrenching story was so horrible and traumatic that Lisa found herself in tears when she learned what had happened to her client at the hands of the now deceased husband. At the same time, she noticed that the description of PTSD had a remarkable similarity to what all of her colleagues called “burn-out.”

Lisa makes the point that, thankfully, Brooklyn houses a number of very successful drug and mental health courts and that seeing some clients recover from their bad situations can be helpful in staving off burnout and compassion fatigue. But, sometimes, she cautions, “it can work the other way—once you know how sick the client is, it is hard to keep your distance from the overwhelming nature of poverty and racism and it can drag you down.”

Lisa says her strategy is “to dive into the work of finding alternative solutions for the ill and younger clients who get caught up in the system while at the same time working towards greater systemic fairness.” She acknowledges that “an administrator may be able to
find more fruitful ways to deal with the stress but that her line attorneys are constantly focused on individual facts of cases, sad client circumstances, tragedy and destitution and it is not always possible to even think about a strategy for coping with the stress.” One thing she recommends to her staff is that they take long vacations rather than one or two days at a time; and, although going to the bar to recount the days events can be restorative, drinking too much can work against you.

All of this begs the question of “what do we do about it?” Echoing Tim Donaher’s sentiment, there are really no easy answers, but it is clear that it must start with self-recognition that the trauma and misery we see day in and day out at work is not “being left at the office.” The ABA has set forth a list of ways to help mitigate compassion fatigue, including:

**Awareness.** Understand what compassion fatigue is and periodically self-assess for it.

**Debriefing.** Talk regularly with another practitioner who understands and is supportive. This involves talking about the traumatic material, how you think and feel about it, and how you are personally affected by it.

**Self-care.** Proactively develop a program of self-care that is effective for you. This includes healthy eating, exercising regularly, getting adequate rest, and learning how to turn off the “fight-or-flight response” of your sympathetic nervous system and turn on the “relaxation response” of your parasympathetic nervous system.

**Balance and Relationships.** Take steps to simplify, do less, ask for help, and stop trying to be all things to all people, including your clients. Start thinking about how you can work on balance rather than the reasons you can’t. Working to develop and maintain healthy interpersonal relationships will also increase your resilience.

**Professional Assistance.** Treatment from a licensed provider specializing in trauma may be beneficial.

**Being Intentional.** If you are overwhelmed and struggling with depression, anxiety, substance abuse, or compassion fatigue, put a plan for change in place. Recognize that the attributes that contribute to your professional success (e.g., motivated, perfectionistic, achievement-oriented, driven, fixer) and your work environment may be contributing to an imbalance in your life. Monitor your thoughts, emotions, and behaviors. Seek assistance to help you implement change and redirect the thoughts that tell you, “I should be able to do this by myself.” Your new mantra can become, “I don't have to do it all by myself.”

A tremendous asset we have in the NYSACDL to help mitigate these symptoms is the listserve. It is a wonderful tool for helping each other both in court and out of court. While we are quick to reach out for help in the midst of a crisis during trial or seeking advice on how to handle a difficult case, we also need to be willing and able to reach out to each other when the rigors of the profession are infecting our personal

Continued on page 34
lives. While we are not mental health professionals, sometimes you need someone just to talk things through. There are so many of you out there who I feel “I know” well enough to talk to about these things despite never having met and I am sure many of you share that sentiment.

If you are uncomfortable reaching out to another member, then I would recommend the New York State Bar Association’s Lawyer Assistance Program (LAP) at 1-800-255-0569. They can provide confidential assistance for those affected by compassion fatigue. Information on the LAP can also be accessed through the NYSBA website.

Reading these mitigation tips reminds me of my days working in a law firm, where periodically a partner (usually the one in charge of tracking the associates’ billable hours) would talk to us about the need for “balance in our lives” with the same conviction of a college football coach lecturing his players about the evils of steroids.

But, experience and age have taught me that the stakes are higher now, as I have seen how this has not only affected me but also my colleagues and, at times, close friends. When I walk into my office with dozens of files strewn seemingly everywhere, I remind myself that every file represents a person’s life and that I cannot let them down; but, more importantly, I must force myself to remember at the end of the day: “physician, heal thyself.”

Continued from page 3
Book Review

A Death in Italy: The Definitive Account of the Amanda Knox Case
Author: John Follain (St. Martin’s Press, 2012)

Reviewed by Lyndsey Jefferson

On November 2, 2007, the body of Meredith Kercher was found under a duvet in her bedroom. She was naked from her waist down and her shirt had been rolled up to her chin. Among other injuries, her throat was cut. Four days later, the prosecutor in the case jailed Amanda Knox, Meredith’s flatmate and an American student, and Knox’s Italian boyfriend, Raffaele Sollecito. He also jailed Rudy Guede, an Ivory Coast drifter. The three were initially convicted and after spending four years in jail, Knox and Sollecito were acquitted by an Italian appeals court.

John Follain’s offering is a riveting, in-depth account of the investigation and subsequent criminal trial proceedings detailing the rape and murder of 21 year old Meredith Kercher on 1st November 2006 in Perugia, Italy.

Meredith Kercher, a student from England studying at the University of Perugia in Italy, shared an apartment with Amanda Knox, an American student from Seattle, Washington, and two women from Italy.

It was evident to the first detectives on the scene that a burglary had been staged. Windows had been broken, but they were too high off the ground for a burglar to have gained access into the apartment. Additionally, broken glass was in the wrong places inside the room. There was no other sign of forced entry. The police concluded that someone on the inside had been involved in the murder, or had at least let the murderer into the apartment.

Knox, aged 19 at the time of the mur-
der, quickly became the centre of the investigation. Her bizarre attitude to this horrific crime and her brazen longing for affection and physical comfort from a young age, had gained her the nickname “Foxy Knox,” a name she laughed at and encouraged.

Throughout the account, Follain manages to give a factual, impartial overview of Amanda’s character. He is keen to point out that Amanda was often her own worst enemy with her strange antics and inability to contain her emotions. This often caused her additional harm, particularly with the prosecution team, jurors and her former flatmates, not to mention the press. While it cannot be denied that there is a portrayal of her as a naïve narcissist, this is typical of many young people her age and, as much as some people wish it were, being self-involved is not a crime.

Despite Follain’s impartiality regarding his descriptions of Knox, when he refers to Sollecito, he loses a little of his journalistic integrity. It is apparent he thinks Sollecito to be a typical Italian son, pampered by his parents and seemingly unable to comprehend the seriousness of the crime of which he is accused. The innocent, “lost-boy” he portrays is, however, contradicted when several witness accounts are given throughout the book which detail his obsession with violence and habitual drug use, making him appear extremely contradictory and shifty.

Rudy Guede was the third person to finally emerge as a suspect. He alleged that he had been kissing Meredith in her bedroom and had gone to the bathroom when he heard her screams from the other room. He claimed he tried to save her. Prosecutors didn’t believe his story, especially when DNA evidence emerged that he had participated in a violent sexual encounter with Meredith. A child of a broken home and effectively an orphan, he is the only person still serving time in prison in relation to Meredith’s death, although his sentence was almost halved from the initial 30 years to now 16 years. Contaminated forensic evidence played a large part in his sentence reduction.

In stark contrast to Amanda’s embrace of fame and status, the Kercher family remain respectful, despite their evident heartbreak. They grieved quietly and away from the public view and maintained this brave display from first discovering the news of the murder to the final acquittal. They never slandered the accused or displayed acts of hatred; they only hoped that justice would prevail.

The police and prosecutors were keen to paint a drug and drink fuelled orgy gone wrong which, given the artistic licence the Italian system permits, served only to heighten the public’s perception of Amanda as a vixen and not, perhaps as we should remember, a possibly innocent young woman. “I didn’t kill. I didn’t rape. I didn’t steal,” were the final words spoken by Amanda at her last court appearance.

The key question will always be: did they or didn’t they? What you believe may well depend on which country you reside in and press attitudes of the country. The British and Italian press were very hard on Knox. The American press very much less so.

This book offers you the opportunity to finally form an unbiased opinion about what really happened on that fateful evening. John Follain gives an account of the whole affair, from the murder and trial to the electrifying appeal-court decision. He does this by drawing upon the transcripts of Knox’s lengthy trial and hundreds of interviews to give what may be the definitive account of the case. Follain’s book clarifies a confusing and horrific story.
They Wished They Were Honest: The Knapp Commission and New York City Police Corruption

Author: Michael F. Armstrong (Columbia University Press, 2012)

For a period of four days in October, 1971, a crooked cop testified on national television about pervasive corruption within the New York City police department. Bill Phillips had broken the code, the “blue wall of silence,” that prevents police officers from airing the department’s dirty laundry. Through his and other officers’ testimony, the culture of corruption that permeated the NYPD was exposed in all its naked shame.

They Wished They Were Honest: The Knapp Commission and New York City Police Corruption chronicles the story and struggle of the Knapp Commission, which was established to uncover a pattern of extortion, fraud, and graft within the NYPD. Author Michael F. Armstrong, chief counsel of the commission, is a masterful storyteller. He animates characters with their own brazen grandiosity. Phillips acquired two airplanes as a result of his indiscretions. Two detectives dubbed “Batman and Robin” habitually lined up a dozen African-Americans at a time to pocket drugs and money. Officers from the 6th Precinct in Manhattan engaged in an insurance scam by conducting a fake robbery of meat from a warehouse. However, it’s not these remorseless policemen-turned-crooks who wished they were honest, but rather, the average officer whose integrity was diminished by the culture of corruption within the NYPD.

The book’s title stems from a quote of Frank Serpico’s, the incorruptible whistleblower cop who was the basis of a New York Times exposé that lead to the creation of the Knapp Commission. Serpico related, “ten percent of the cops in New York City are absolutely corrupt, ten percent are absolutely honest, and the other eighty percent—they wish they were honest.” The quote reflects a dichotomy amongst corrupt cops, a central theme in the book. “Meat eaters” are those officers that actively seek big payoffs and as a result, engage in or cover up significant crime. “Grass eaters,” on the other hand, are the officers who accept smaller bribes from petty criminals in lieu of being arrested, extort tow-truck companies in return for first call at an accident, and pay drug addicts in narcotics for stolen booze.

Angad Singh is a Staff Attorney at Brooklyn Defender Services. He can be reached at asingh@bds.org.
Though the “grass eaters” may reflect a lower level of corruption, Armstrong does not minimize their role. To the contrary, he posits a “Broken Windows Theory” of police corruption where pervasive “grass eating” enables severe criminality within the NYPD.

The “meat eater” in the book is embodied in Bill Phillips. At the commission hearings, Phillips testified that early in his career he was a “grass eater” receiving small time payoffs. One of the more fascinating and significant tales in the book, however, details the commission’s surveillance of Phillips after his transition to full-fledged carnivore. Through an informant, Teddy Ratnoff, the Commission learned that Phillips sought to receive payments from Xaviera Hollander, a madam running an upscale prostitution ring. Phillips not only offered protection from arrests, but also the ability to fix criminal cases. When Hollander’s boyfriend was charged with possession of a forged check, Phillips explained to Ratnoff, “if you get to the right people, you can fix anything, believe me.” Phillips knew of a corrupt defense attorney who could bribe the judge hearing the case. In what is the most dramatic moment in the book, Phillips pats down Ratnoff as he arrives at the attorney’s office to deliver the money. Phillips tears Ratnoff’s shirt to expose the transmitter as a sweating Ratnoff bumbles while Commission agents run to his aid.

This episode was a turning point for the Commission. That corruption reached easily beyond the NYPD into the defense bar and the judiciary was a revelation. Perhaps more surprising was Phillips quick decision to cooperate with the Commission as an informant. His cooperation may have been the Commission’s biggest blessing as Phillips’s vast knowledge and involvement in schemes allowed the Commission to probe the breadth and depth of corruption within the Department.

Though ultimately successful, the Commission endured initial embarrassments. Armstrong details how the Commission became an unwitting ally of a gypsy powerbroker who sought to manipulate the Commission to his advantage against a rival gypsy leader. The episode resulted in a television exposé not of police corruption, but of the ineptitude of the Knapp Commission. Nevertheless, Armstrong shows that the relationship between the Commission and the media was more often one of mutual benefit. The Commission used TV station cameras and operators to record footage of corrupt cops, while the media benefited from the largest scoop on police corruption since Frank Serpico.

The public hearings were a media sensation. Though Justice Louis Brandeis famously declared, “sunlight is said to be the best of disinfectants,” the Commission did more than just expose corruption. Its work was vital to investigating criminal cases despite Armstrong’s reiterations that the Commission’s purpose was to uncover a pattern of corruption within the NYPD rather than make criminal cases against individuals. Nevertheless, the Commission’s work resulted in numerous prosecutions as well as the establishment of a special prosecutor’s office to fight police corruption.

Armstrong plausibly argues that the success of the Knapp Commission and resulting reforms lead to the evisceration of the “grass eaters.” The book’s major failing, however, is to link the decline of “grass eaters” to the ascent of modern day police misconduct. New York City has recently been rocked by reports of officers planting drugs on defendants, fixing tickets for friends, and stopping and frisking minorities under dubious pretexts. Such misconduct is a direct analogue of “grass eating” as everyday officers engage in illegal searches and arrests to fulfill quotas and get promoted. The essence of Knapp-era bribery and modern misconduct is the same: an abuse of governmental power for the sake of personal gain.

Officer Adrian Schoolcraft of Brooklyn’s 81st Precinct came forth with hard evidence, via secret recordings, of the existence of quotas and officers juking crime statistics. Indeed, Schoolcraft’s story largely mirrors that of Serpico’s. Schoolcraft’s actions resulted in a 2010 piece by the Village Voice, “The NYPD Tapes,” and Serpico’s of an influential New York Times article. In retaliation, Schoolcraft was involuntarily committed to a mental hospital by the NYPD and Serpico was left for dead by his partners after being shot during a drug bust. The most glaring difference, however, is that Schoolcraft’s break with the code of silence has not resulted in a commission to investigate current widespread NYPD misconduct.

Armstrong appears puzzlingly complacent in this regard. The book ends with the line “[a]s long as Department leadership remains strong and vigilant, there should be no need for any more commissions.” But who will watch the watchmen? If the lessons of the Knapp Commission are to remain relevant today, the duty of rooting out police...
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Brief Examinations

The Guilty Ones

Author: Joanna Crispi (New York Quarterly Books, 2012)
Reviewed by Dick Barbuto

When we decided to have a book review section in *Atticus* we thought it would be fun to “briefly examine” some fiction works. After all, we can’t read only non-fiction all the time. *The Guilty Ones* is the first such effort.

Joanna Crispi is a graduate of Smith College and Harvard Law School. Her first case after graduating from law school was as a member of the Claus Von Bulow defense team headed by Alan Dershowitz. She is a criminal defense lawyer and world traveler who lives in New York City and Milan, Italy. *The Guilty Ones*, her third novel, is a story of relationships, betrayal, complex criminal litigation and finance with a little murder thrown in as well.

The story begins in the late 80’s and takes place in Rome, Paris, New York City and Rabat and tells of three individuals: Juliet, who abandoned her career as a criminal defense lawyer in New York City to marry Francois, a Parisian banker and Mike Chase, an Assistant United States Attorney in New York. One of the story lines is that Juliet and Mike are former lovers. The book opens with Francois being arrested on an extradition warrant in Rome and being held in Rebibbia jail in a suburb of Rome pending an extradition hearing. Crispi is very conversant with Italian locales, culture and society. For example, her descriptions of upper crust dinner parties and the people who frequent them have the reader believing that he is actually present at the affairs. Likewise, when outside with Mike sitting at a café, Juliet cautions him that giving money to a street urchin will result in the family of the urchin showing up looking for a handout. Mike ignores her advice and they do.

The author is particularly good at describing the various locations in the story. The reader will feel as though he is in the place where the story is taking place. I had no trouble transporting myself to Rome, Paris and Manhattan and she had me believing that I was in St. Andrews Square right down to the food carts and the pigeons. I have never been to Rabat, the capital city of Morocco, but after reading Crispi’s description of the city I want to go there. Her ability to evoke images is outstanding.

When telling the reader of the legal proceedings and strategies being employed, both in Rome and in New York, Crispi provides good descriptions of the legal process and the differences between the practices in the U.S. and Italy.

This is a well written book with wonderful imagery and great attention to detail. If you are looking for a good read set in an international milieu this may fit your bill.
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- To promote study and research in the field of criminal defense law and the related arts.
- To disseminate and advance by lectures, seminars, and publications the knowledge of the law relating to criminal defense practice.
- To promote the proper administration of criminal justice.
- To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases.
- To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby
- To protect individual rights and improve the criminal law, its practices and procedures.
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Gideon at 50

It’s time to finish what he started 50 years ago

Defending Gideon

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