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Inside this Issue

New York State Association of Criminal Defense Lawyers

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Message from the President

With pride and purpose, NYSACDL brings you another ATTICUS legislative issue. Since NYSACDL’s founding in 1986, it has accomplished much as a voice on criminal justice issues. But, there is so much more to do.

Many years ago when I lived outside of New York, I interviewed for a position with a defender office. Following the usual interview topics, the time came for me to pose questions. At the beginning of what I hoped would be a long career as a criminal defense lawyer, I asked what future public policy and legislative issues the lawyers thought would be critical to their practice and ways that criminal defense lawyers could be involved. After the interview, I received a follow-up call from one of the lawyers explaining that my question had been surprising, maybe even naïve, because the caseload demands of the job did not leave time to be involved in policy development and legislative side projects.

As criminal defense lawyers, we witness the daily injustices in our nation’s and state’s criminal system. We would never remain silent in the courtroom when confronted with them. We must not sit silently on the sidelines as the rules of the game are made and changed. Recent years have demonstrated yet again that we need to be actively engaged in public policy advocacy. We are living through a time where tremendous opportunities exist for meaningful reform and we must take advantage of them for our clients, our profession, and the improvement of the justice system.

This year at the state level, we know there will be new efforts by the District Attorneys Association and others to increase mandatory minimums for certain kinds of offenses and to further slant the playing field against the defense by amending the criminal procedure law. At the federal level, we must continue to push the government and the bench to expand opportunities for alternatives to incarceration (like the initiatives occurring in the Eastern District of New York), to find new ways for deconstructing the Federal Sentencing Guidelines, and to fend off future challenges to adequate funding of indigent defense. At both levels, we can count on seeing more cases where prosecutors resist much needed systemic Brady and discovery reforms, further undermining public trust in our system and eroding the right to a trial. NYSACDL will remain vigilant and aggressive in our advocacy on these issues and the others discussed in this issue.
At a time when many bar associations have thinning ranks, ours are growing. We are a statewide organization with a broad, inclusive and vibrant membership of over 750 private practitioners and public defenders. The breadth and depth of our membership is a tribute to the camaraderie members share, the forum provided for exchanging ideas and best practices, and the importance of our cause. Thank you for your membership in NYSACDL and thank you for supporting our public policy efforts.

Best regards,

Aaron Mysliwiec

"It is the land that freemen till, where freedom broadens slowly down from precedent to precedent." — Tennyson
As this issue goes to press, the newspapers and TV news reports (at least in the New York City metropolitan area) are dominated by issues on which the New York State Association of Criminal Defense Lawyers has taken a strong position. Two high profile cases provide examples.

A sixteen year old is charged as an adult with Murder and Arson, having allegedly set fire to a mattress in a building hallway because he was “bored”, as the press reported. Tragically, two police officers responding to the emergency were overcome by the smoke and heat, and one officer died. The defendant faces 25 years to life in prison, because he will be prosecuted as an adult. NYSACDL has called for raising the age at which young people are prosecuted as adults in our system, and for granting Youthful Offender treatment to more of those defendants, who in many ways are still children, in spite of their crimes.

Elsewhere in this issue, Susannah Karlsson of the Brooklyn Defenders has written on the subject of raising the age of criminal responsibility; we urge the Legislature to take heed.

A Brooklyn man was exonerated after twenty-five years in prison for a murder he did not commit, and on its face it would seem that the fault lies with the prosecutor and police officers, who either deliberately buried, or recklessly ignored, exculpatory evidence that was readily available and easily evaluated. This case highlights the necessity for discovery reform in the State of New York. Lawyers in minor civil cases are required to provide, and regularly receive, far more information about cases involving paltry sums of money than we as criminal defense practitioners ever get when the freedom of...
our clients is at stake. NYSACDL calls upon the legislature to reform and revamp the discovery statutes in criminal cases, in the interest of fairness and justice.

NYSACDL also continues its long effort to see a sealing or expungement law passed in New York. Our efforts on this critical issue include lobbying legislators, writing a draft bill, and a letter to the Albany Times Union on the subject that was published earlier this year. The organization’s draft bill was adopted and introduced in both the Assembly and Senate in prior years, but not passed. This year, Judge Lippman also advocated for an expungement law and outlined his own proposal. We will continue the fight on this issue and hope to see a new law in the near future.

ATTICUS is your voice, as members of NYSACDL. Help the leadership of the Association keep our voice in the forefront; we are the largest criminal defense bar organization in the state, and as an affiliate of the National Association of Criminal Defense lawyers, we have the ability to present our members’ views nationwide. We welcome your contributions, your articles, your letters, and even your criticism. Take the time to comment; it will benefit us all.

Ben Ostrer, John Wallenstein, Jessica Horani
Submit an Article to Atticus

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

Jennifer Van Ort, Executive Director, NYSACDL
518-443-2000
jlvanort@nysacdl.org

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

1. Use footnotes rather than endnotes.

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

3. Articles longer than 4 pages may be edited or serialized.

Dispatches from 90 State

Jennifer Van Ort
Executive Director

This issue of ATTICUS focuses on the work the NYSACDL Board of Directors and Legislative Committee does to give a voice to the criminal defense bar across New York State to our representatives in Albany. Your membership is an important part of this effort; the more members we have, the stronger that voice is. This year, NYSACDL is focused on an important new goal – 1,000 members by the end of 2014 (preferably sooner). Why 1,000 – what is the significance of that number?

A membership 1,000 strong, with geographic, ethnic and gender diversity, shows our representatives the weight of the issues facing the criminal defense bar, including sealing and discovery reform. When a member of the Legislative Committee is in the room with a state Senator or Assembly member, the number of concerned citizens he or she represents is an important part of the conversation. On the Federal level, when we partner with the National Association of Criminal Defense Lawyers (NACDL) on issues of national importance, our membership total is added to the total of all NACDL members and affiliates to show the power of the Criminal Defense Bar across the country – a number cresting 40,000. Do you have a colleague expressing interest and frustration with the issues we are dealing with? Invite him or her to join and make their voice heard.

Over 70% of NYSACDL members join our active and helpful NYSACDL listserv. At a membership level of 1,000, that’s over 700 people available to respond to questions and needs almost instantaneously when you are on trial or facing challenges in your practice. Think about the colleagues who provide the best answers to your questions face-to-face – are they NYSACDL members? Are they on the listserv? If they are willing to bring their expertise to better the Criminal Defense Bar as a whole, ask them to join and extend the power of local collegial relationships statewide.

The NYSACDL online Member Directory is a frequently visited resource for the public. As the geographic reach and practice areas of our membership increase, we are able to expand on our mission to protect the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar. Members whose practice areas extend beyond criminal defense are valuable, as colleagues often need references for clients with other needs and/or in other regions of the state.
Lastly, 1,000 members enables NYSACDL to keep CLE seminar registration costs at affordable levels. As our membership base increases, CLE sponsorships, which include Atticus advertising, become more and more attractive to the businesses our members interact with every day. These sponsorships help NYSACDL present interesting and educational CLE seminars, including bringing nationally-known practitioners in to offer their experience and expertise. We are able to offer significant discounts to public defense practitioners and scholarships for those who need assistance with registration costs.

You, as a current member, are an important part of NYSACDL reaching its 2014 membership goal. Share this publication, or the online version, with colleagues in your area. Talk about the great work NYSACDL is doing and where we hope to go. Invite them to go online and join our community today. Together, we will celebrate a new milestone in NYSACDL history.

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In an effort to make ATTICUS even better, the editors would like to start a "letters to the editor" feature. We encourage members to tell us what they like, what they don’t like and to comment about anything in the magazine. **Letters should be no longer than 100 words** and should be sent to atticus@nysacdl.org. We cannot, however, guarantee that all letters will be printed.
With the 2014 legislative session underway, your Legislative Committee looks forward to working with our lobbying counsel, Sandra Rivera, to achieve enactment of the NYSACDL 2014 legislative agenda.

Discovery Reform

Discovery Reform continues to be the single most important initiative of our organization. No other issue so fundamentally influences the fairness of New York’s criminal justice system and directly affects each and every one of our clients. Unfortunately, despite our best efforts, we appear unable to convince prosecutors throughout the State of New York that open file discovery not only reduces wrongful convictions, but also provides for a fairer and more economical justice system. Despite many District Attorneys understanding the importance of meaningful reform, there are still those who prefer the competitive edge they enjoy under current law with limited disclosure. A “team” approach would have a greater chance of success, but even without the support of the District Attorneys, we still persevere. We need to educate and motivate politically those legislators who blindly rely on the State District Attorneys Association. NYSACDL has spearheaded a coalition of legal organizations statewide to define core principles of discovery reform and to ultimately aid in accomplishing their enactment.
Raising The Age Of Criminal Responsibility

Governor Andrew Cuomo has endorsed raising the age of criminal responsibility to 18 from 16, an issue also promoted by Chief Judge Jonathan Lippman. New York and North Carolina are the only states that allow teens as young as 16 to be prosecuted in adult criminal courts. NYSACDL has been advocating for this change in juvenile justice for several years. The United States Supreme Court has said the adolescent brain is not developed at age 16 to the point where it recognizes criminal responsibility (Miller v. Alabama, 132 S.Ct. 2455, [2012]). In fact, NYSACDL also supports raising the age of Youthful Offender treatment based upon the same reasoning. The Governor has asked his Commission on Youth, Public Safety & Justice to Help New York State “Raise the Age” to make recommendations on not whether, but how, to raise the age this year.

Education In Prison

The Governor has also asked the State legislature to rapidly endorse his college education in prison agenda. NYSACDL supports this initiative. Many politicians reacted strongly to this proposal, recognizing regular college kids are graduating college with significant debt and experiencing difficulty finding a job to retire that debt. The proposal is not “kids vs. cons”, as some would characterize it. Prisons already offer classes to help those inside get equivalency diplomas and to learn trades. If the State is able to help people find employment when they are released from prison, a Bard College study found that it dramatically cuts down on the rate of recidivism and, in turn, would reduce the millions the State wastes on those who keep coming back. Furthermore, lower recidivism means fewer robberies, burglaries, drug sales, and other crimes in cities and towns across the State.

Sealing

NYSACDL continues to push for the passage of a meaningful sealing statute. All of us who practice criminal defense know all too well that we are in the business of “second chances.” We know, perhaps better than anyone else, that certain clients, despite committing, and answering for, some form of criminal conduct, truly deserve a second chance. Moreover, without sealing, people’s ability to obtain employment, maintain housing, or continue on a chosen educational path can be adversely affected. The most recent proposed legislation would amend the Criminal Procedure Law by adding a new section 160.65, to provide a second chance to certain persons convicted of crime in the past by allowing them to apply to a court for an order sealing their criminal record. Next, the measure would amend Section 160.55(1), to clarify that sealing records upon a conviction of a petty offense is authorized in all cases, regardless of the top count of the accusatory instrument by which an individual was originally charged.

The measure also includes an amendment to section 296 (16) of the Executive Law (part of the State’s Human Rights Law) to make it an unlawful discriminatory practice to inquire about a person’s sealed criminal convictions when such inquiry is in the context of that person’s application for licensing, employment, credit or insurance.

Legislative Committee

The Committee welcomes Lisa Schreibersdorf, a long time Committee member and Past President of NYSACDL, as co-Chair of the Committee. Lisa has been very active in the work of the Legislative Committee for years, and in real life is Executive Director of Brooklyn Defenders.

Finally, as you may note from reviewing the list of Legislative Committee members on page 8, we have revamped our Committee to become even more effective this year. Each member of the Committee is charged with one or more areas of particular expertise. We are excited about how this reorganization of the Committee will reenergize our efforts and are looking forward to future accomplishments and achieving a better criminal justice system in New York. Check the NYSACDL website for updates. If you’re a member of NYSACDL and wish to contribute some of your precious time to this Committee, kindly contact either of the Co-Chairs or NYSACDL President Aaron Mysliwiec.
In 2005, the Supreme Court declared what most parents intuitively know: when it comes to culpability, adolescents are not the same as adults. Roper v. Simmons, 543 U.S. 551 (2005). Writing for the majority, Justice Kennedy relied on three fundamental differences to distinguish young people from adults in the criminal justice context: (1) a lack of maturity; (2) a higher susceptibility to negative influences; and (3) personality traits that are “more transitory, less fixed.” Id. at 569–70. In reaching this conclusion, Justice Kennedy relied on brain science that established that adolescents are not just miniature adults: their inability to conform their behavior to adult standards is not necessarily a moral failing or character flaw, but rather a normal boundary-testing step along the way to developing individual character. Assigning the full panoply of adult consequences to entirely normal, if unacceptable, adolescent conduct, if follows, is inappropriate and probably counter-productive.

The vast majority of states’ criminal jurisdiction provisions reflect this sensitivity and keep children under 18 out of adult court, sparing them the collateral consequences of criminal court contact that would follow them into adulthood. But New York still presumptively holds children as young as 16 criminally responsible for their conduct in the adult courts, and sends them to adult prisons when they are convicted. In 2012, nearly 40,000 16 and 17 year olds were charged in New York’s adult criminal courts, where they were far less likely to receive the services they need to become successful adults. More than 2,700 of these children were sent to adult prison or jail, where they were at increased risk of sexual violence, solitary confinement, mental health issues, and suicide.

In response to the calls of juvenile justice advocates to “raise the age” in New York, Chief Judge Lippman spearheaded a reform effort that has been gaining momentum in various corners of the criminal justice system – from criminal justice academics to probation experts and District Attorneys alike – and in January, Governor Cuomo announced the creation of a Commission on Youth, Public Safety & Justice that he tasked with developing a plan for raising the age of criminal responsibility in New York by the end of the year.

This shift toward treating teens as teens in the criminal justice system should be applauded. But simply changing the age of criminal court jurisdiction, although a seductively simple answer, masks complexities of consequence for these young people that deserve our consideration.

Removing 16 and 17 year olds from the adult court system or imposing the Family Court Act (“FCA”) wholesale, without carefully considering the ramifications of FCA procedures on this older adolescent population, could result in numerous negative outcomes for these youth: a Family Court system that may be appropriate for younger children presents serious due process, governmental intrusion, and proportionality concerns when applied to 16 and 17 year old adolescents. Furthermore, it would be a mistake to eliminate the positive aspects of the adult system as they have developed to apply to adolescents.

Judge Lippman recently proposed a sort of hybrid “Youth Court” for 16 and 17 year olds charged with non-violent, low-level offenses that would blend youth-protective elements of the adult criminal court and the FCA system. The proposal would eliminate some of the more substantial government intrusions into the lives of teens mandated by the FCA, including the use of preventive detention and imposition of mandatory pre-adjudicatory services, while providing young defendants with additional protections in police custody, opportunities for pre-court diversion through an “adjustment” process, and dispositional options appropriate to their age and maturity. The proposed Youth Court would implement the Criminal Procedure Law, which provides greater procedural protec-

Raise the Age

By Susannah Karlsson
tions than the FCA does, during the guilt phase. But if a teen is found guilty of a criminal offense, the more protective provisions of the FCA would then apply: no criminal record would result from the adjudication; broad dispositional options driven by the “least restrictive alternative” would be available; and immediate record-sealing provisions would apply to the young people adjudicated in the new court part.

To be sure, this approach indicates a greater appreciation for the elements of the adult court system that have worked well for older teens and reflects an awareness that many provisions of the FCA would be unnecessarily intrusive and disproportionate when applied to this group. But inefficiencies, disproportionalities, and gaps in services remain unaddressed by the proposal.

Specifically, the Youth Court would preserve “adjustment,” an FCA procedure whereby a young arrestee and his parents are directed by the police to meet with a probation officer who decides whether to “adjust” the respondent’s case, thereby holding up prosecution of the open case on the condition that the young person complete activities intended to promote positive youth development. However, the proposal makes no age-appropriate modifications to an adjustment process that delves into the lives of parents at least as much as the children being adjusted and informs its calculations with metrics like current school attendance and parental involvement, which simply aren’t as relevant in assessing the rehabilitative prospects of older youth.

Additionally, while basic criminal procedure law will be carried over from the adult court the proposal doesn’t add necessary youth-protective enhancements to court procedures, such as ensuring the right to counsel at adjustment and guaranteeing a jury trial to anyone seeking to contest the allegations against them, whatever the charge.

Moreover, the proposal does not address whether a full probation report should be required for every Youth Court disposition, regardless of how minor the infraction. The FCA requires that the court order the Department of Probation to make and submit a report containing certain facts about the respondent, including “the history of the juvenile including previous conduct, the family situation, any previous psychological and psychiatric reports, school adjustment, previous social assistance provided by voluntary or public agencies and the response of the juvenile to such assistance” prior to any disposition in the case. See § 351.1. While such intrusions into the intimate lives of very young children’s families may be justified when they commit criminal offenses, delving into the psychological records and family dynamics of a 17 year old caught smoking pot seems less appropriate, overly intrusive, and probably unnecessary.

Critically, the Youth Court proposal also offers no relief for 16 and 17 year olds charged with a violent felony offense, and makes no suggestions concerning teens imprisoned in adult facilities. Young people charged with serious offenses still require procedures consistent with their age and capacity for culpability, and deserve developmentally-appropriate rehabilitative care if imprisoned. While it is true that only a small percentage of these young people are imprisoned, 800 were incarcerated in adult facilities in 2010. During the 24 hours between arrest and arraignment, these adolescents are mingled with adults of all ages who have committed every type of crime. These 24 hours in jail can be deeply traumatizing to a young person. And New York’s prisons are often unsafe for adults, let alone teenagers: the rates of suicide among youth incarcerated in adult facilities are very high, and a shocking number suffer from post-traumatic stress disorder. Serious consideration should be paid to when and under what circumstances incarceration is appropriate for those youth charged with more serious offenses.

In sum, Judge Lippman’s more nuanced proposal is a promising variation on the impulse to “raise the age,” but there is more work to be done to make the criminal justice system functionally proportionate and fair for New York’s youth.

Susannah Karlsson is a staff attorney at Brooklyn Defender Services
**Member Adam Konta** started off 2014 with not one but two consecutive trial wins in New York County. In *The People of the State of New York v. Daniel Torres* (Indictment Number 3013-2013) the defendant, Mr. Torres, was arrested and charged with felony possession of a weapon during the execution of a search warrant in a five-bedroom apartment in Harlem. The police were looking for anything related to a suspected heroin ring during the search and ultimately recovered a stun gun on the windowsill in a front room next to where Mr. Torres was found sleeping. Police further claimed that he told them, “I live here, it’s my apartment.”

Mr. Torres did not live in the apartment, but was staying there only temporarily. Because Mr. Torres was a predicate felon, he faced a minimum of 1.5-3 years and a maximum of 3.5-7 years in prison if convicted. Mr. Konta tracked down the actual tenant of the apartment, met with her in person, and convinced her to testify on his client’s behalf. Through Mr. Konta’s efforts, the witness was allowed to testify as to her possession of the apartment as well as many of the belongings in the apartment while taking the fifth as to the ownership of the stun gun. The establishment of another party as the actual possessor of the apartment and the brief stay of the defendant in the apartment along with other contradictions in the People’s case created enough reasonable doubt to result in a full acquittal for Mr. Torres.

In March Mr. Konta took *The People of the State of New York vs. David Diaz* (Indictment 3691-2013) to trial. Mr. Diaz was in a car accident with a NYC cab driver, which led to a brief physical scuffle between the two men. Mr. Diaz and the cab driver blamed each other, both for causing the car accident and initiating the fight. They agreed, however, that the fight ended when Mr. Diaz kicked the cab driver in the face, breaking his nose, orbital bones, and both his front and rear sinuses. Charged by indictment with Assault in the Third Degree the case went to trial in Supreme Court. During the trial, a doctor testified she had only seen such severe injuries in car accidents when an airbag didn’t deploy. The cab driver claimed he was picking up his glasses after Mr. Diaz pushed him when he was violently kicked, while Mr. Diaz maintained that the kick was an act of self-defense and that the cab driver had been charging towards him.

An independent eyewitness (a doorman who was working directly across the street at the time of the incident) claimed to have seen the whole thing, and corroborated the cab driver’s story that Mr. Diaz had started the fight by pushing him aggressively. He said he also heard Mr. Diaz yell an obscenity at the cab driver while he was picking up his glasses, just before kicking him in the face. Mr. Konta successfully argued justification to the jury, pointing out inconsistencies among the three witness’ testimony and convincing the jury that if his client reasonably believed that he was being charged at, then he was justified in his actions even if the facts actually showed that the cab driver was merely reaching for his glasses. After the acquittal a juror told Mr. Konta that he had, “…turned a sow’s ear into a silk purse”, showing how ‘bad facts’ can still become successful verdicts with a strong defense.

**Members William Easton and Cheryl Meyers Buth** achieved an acquittal in an attempted rape case on Monday, December 9, 2013 in Steuben County in a case which garnered intense media attention and divided the community. In the case of *The People of the State of New York v. Jordan Frysinger*, Mr. Easton along with Ms. Buth represented the former Corning Hawks athlete who had earned All-state honors and a football scholarship to the University of Illinois prior to the accusation of attempted rape of Congressman Tom Reed’s niece. Mr. Frysinger faced three counts of attempted rape in the first degree and one count of attempted criminal sexual act in the first degree. The charges stemmed from an incident at an after-prom party...
Gastro esophageal reflux disease, commonly referred to as GERD, is a digestive disorder that affects an estimated 30 million Americans annually. Attorneys who handle DWI cases should screen clients for GERD since GERD can compromise a person’s ability to give a forensically reliable breath sample.

By Steven B. Epstein
Most individuals charged with DWI offenses in New York will be asked to submit to a breath test to measure their blood alcohol concentration (BAC). Breath testing requires the collection and testing of a sample of deep lung or alveolar air. Simply stated, a person who has GERD is unable to provide an uncontaminated sample of alveolar air. That contamination causes falsely high BAC measurements.

This article will address the science of the disease, discuss how it affects the reliability of a breath test, and suggest ways the DWI practitioner can utilize it as a defense at trial.

GERD can affect the lower esophageal sphincter (LES), the ring of muscle between the esophagus and stomach. In normal digestion, the lower esophageal sphincter opens to allow food to pass into the stomach and closes to prevent solids, liquids or gases from flowing back into the esophagus. Gastro esophageal reflux occurs when the LES is weak or relaxes inappropriately, allowing the stomach’s contents to flow up into the esophagus. This is often associated with heartburn or acid indigestion, a symptom of the disease. The passage of gases, liquids or solids from the stomach into the oral cavity occurs continuously, regardless of the presence of symptoms such as heartburn.

GERD is relevant in evaluating the reliability of a breath sample because the alveolar air sample collected from a person with GERD will necessarily be contaminated with gas from the stomach, and may be contaminated with liquid or, even worse, solids that have a vastly higher concentration of alcohol than the alveolar air. The result is an artificially inflated BAC.

The importance of obtaining a sample of uncontaminated air has been long recognized by the New York State Department of Health, which promulgates rules and regulations concerning breath analysis techniques and methods. Section 59.5 of the New York State Codes, Rules and Regulations requires that a breath sample of alveolar air must be collected free of contamination from any other source. This is the reason for the requirement that prior to the collection of the breath sample the subject must be observed for a minimum period of fifteen minutes (the “Deprivation Period”) to be certain he has not ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked or been allowed to place anything in his or her mouth. GERD makes it impossible for a Deprivation Period to be effective due to the subject’s inability to completely close the esophageal or laryngeal sphincter muscle, subjecting the person to continuous regurgitation of stomach gases.

As a result, it is essential that any attorney representing a client on a DWI case where a breath test was administered inquire about whether the client has ever been diagnosed with GERD and, if so, obtain the client’s complete medical records. In doing so, be sure to determine whether an endoscopy was ever performed, as this will conclusively establish the medical diagnosis of GERD. Moreover, since GERD is a chronic condition, an endoscopy is relevant regardless of whether it was done.

Steven B. Epstein is a founding partner in the Firm of Barket, Marion, Epstein and Kearon, LLP. He has over 21 years of courtroom and trial experience having handled cases ranging from traffic tickets to murder, and extensive experience in DWI and Vehicular Assault/Homicide defense. He is a Member of the National College for DUI Defense, and has lectured, taught workshops and continuing legal education classes on the subjects of Criminal Law and DWI defense across the New York metropolitan area and upstate New York for many organizations, including NYSACDL and the Legal Aid Society. Mr. Epstein was born and raised on the sidewalks of New York City. He received his B.A. from the State University of New York, College at Oneonta and his J.D. from Pace University School of Law. He is admitted to practice in New York, Connecticut, and the United States District Courts for the Eastern, Southern and Northern Districts of New York and the United States Supreme Court.
contemporaneously with the client’s arrest, so long as it pre-dates the breath test. In the absence of an endoscopy, a physician may have examined your client and prescribed a course of medications based on a diagnosis of GERD, but an endoscopy is preferred since it would show the amount of any deterioration of the lower or upper esophageal sphincters.

From an evidentiary perspective, be prepared to meet the challenges of a prosecutor for failure to comply with discovery obligations. Any medical records you intend to introduce may be discoverable pursuant to Criminal Procedure Law §240.30(a).

Also be prepared to address any challenges by the prosecutor seeking to preclude testimony related to GERD on the basis that the evidence, although technically relevant, will be excluded if it is too “slight, remote, or conjectural to have a legitimate influence in determining the fact at issue.” People v. Lent, 29 Misc.3d 14 (App. Term 9th and 10th Judicial Districts, 2010).

Since the subject of the proffered testimony concerns human physiology and the effects of diseases on the respiratory system, the reliability of the principle or protocols used to arrive at conclusions in the scientific community at large are not at issue. The testimony is (1) relevant to an issue in the case, (2) proffered by a qualified expert, (3) on a topic beyond the ken of the average juror, and (4) based on principles that are generally accepted as reliable by the scientific community, which include published studies by experts in their field. People v. LeGrand, 8 N.Y.3d 449 (2007).

Despite meeting the above mentioned requirements of expert testimony, those without a scientific understanding of GERD may attempt to misstate the issue. The issue is not whether the client can establish as a foundation that he had “an episode” of GERD at the time of the breath test. So long as you can proffer that the client had been diagnosed with GERD prior to the breath test, an expert who reviews the client’s medical records (preferably along with the testimony of the treating physician) can testify that reflux which occurs continuously in a patient with GERD is, in essence, the equivalent of the regurgitation specifically referenced in 10 NYCRR 59.5 and therefore the defendant is an unsuitable breath test candidate.

Though GERD is a continuous process which compromises a person’s ability to provide an uncontaminated sample of alveolar air, there are things which can further exacerbate reflux, thus further affecting the reliability of the sample obtained, including the ingestion of alcohol, which is often admitted in a breath test case, obesity, and the stress attendant to the client’s arrest.

Also of note in any breath test involving a subject with GERD is the pressure caused by a forced exhalation of breath attendant with giving a breath sample. The client is instructed to take a deep breath and then forcefully exhale into the breath tube until near maximum exhalation. This forced exhaled volume is necessary to collect an acceptable breath alcohol sample. Forced exhalation occurs via abdominal muscle contraction, which increases pressure surrounding the stomach. The principal of Boyle’s Law provides that the increasing pressure around the stomach causes a volume of ethanol vapors within the stomach to flow out. Additionally the external pressure on the stomach caused by having to lean over to give a breath sample can be an additional aggravating factor.

It is also often the case that police officers indicate that the client exhibited the odor of alcohol on his breath at the time the breath sample is given. This indicates the presence of alcohol still in the stomach in liquid and gas forms, indicating that the LES was less than patent at the time of the breath test.

Several studies conducted by professionals in the field of forensic toxicology have concluded that esophageal reflux causes considerable distortion of the breath alcohol value. See e.g. Breath-Alcohol Analysis of a Subject with Gastric Regurgitation, David Wells and John Ferrar Office of Forensic Medicine, and Drager Australia Melbourne, Victoria Australia, 11th International Conference on Alcohol, Drugs, and Traffic Safety, Chicago (1989); Gastric Reflux, Regurgitation, and The Potential Impact of Mouth-Alchol On The Results of Breath-Alcohol Testing, A.W.
From an evidentiary perspective, be prepared to meet the challenges of a prosecutor for failure to comply with discovery obligations.

Jones, August, 2006. A.W. Jones, one of the leading experts in the field of breath testing wrote in his article “Reflections on the GERD Defense,” which appeared in the September 2005 edition of the DWI Journal: Law and Science that:

The most compelling evidence that GERD might be a potential problem in connection with evidential breath-alcohol testing is related to the so-called “mouth-alcohol effect.”

While there appear to be no published decisions in New York directly on the issue of whether expert testimony is permissible on GERD, the issue of mouth alcohol certainly is relevant. See People v. McDonough, 132 A.D.2d 997 (4th Dept., 1987).

States other than New York have admitted expert testimony specifically related to GERD. See State v. Rebisz, 2009 WL 2223475 (N.J. Super. Ct. App. Div. July 28, 2009); State v. Moroney, 2006 WL 3877558 (Kansas Ct. of App., 2006). Notably in an Illinois case, People v. Bonutti, 212 Ill. 2d 182, 186-87, 817 N.E.2d 489, 492 (Sup. Ct. of Ill., 2004), the defendant presented medical testimony to support his claim that he suffered from and had been treated for GERD. The court found that GERD causes acid and fluid from the stomach to travel up the esophagus to the back of the throat, that reflux episodes are often silent and unnoticeable to an outside observer, and that “reflux” is synonymous with “regurgitation.” On the basis of this testimony, the trial court concluded that defendant met his burden of demonstrating that the breath-alcohol test results were unreliable. Accordingly, those test results were suppressed. People v. Bonutti, 212 Ill. 2d 182, 186-87, 817 N.E.2d 489, 492 (2004).

Complications of GERD can include difficulty swallowing, regurgitation, discomfort and an increased risk of cancer. These symptoms typically result in seeing a doctor for care. A doctor can treat this disease once it is diagnosed; but a lawyer representing a client who has GERD can do nothing about it unless he is aware of the diagnosis, knows its impact on the reliability of the breath sample, and can utilize that knowledge to Get Enough Reasonable Doubt!
Cross Examination of the Prosecution’s Child Sexual Abuse Accommodation Syndrome Validator

By David I. Goldstein

The purpose of this article is to provide the practitioner with enough ammunition to completely discredit Dr. Anne Meltzer, an “expert” witness often called by prosecutors in child sexual abuse cases to validate the syndrome.

It is to be read in conjunction with an article previously published in the Atticus summer issue on “Child Sexual Abuse Accommodation Syndrome,” by Amy B. Marion, Esq.

David I Goldstein has offices in Rockland County. He is a member of the Board of Directors of NYSACDL, and a frequent lecturer at CLE programs around the state, as well as a contributor to Atticus.
Robert, in his sixty years, never had contact with the law. His girlfriend’s daughter, Tina, dramatically changed that. After five years as a part of their family, Denise’s fourteen year old daughter, Tina, alleged that on two occasions, during August and September of 2012, Robert sexually abused her.

This startling revelation came about on Christmas Eve, 2012. After getting dressed to go to the mall with her mother and older sister, Tina came downstairs to the kitchen where the family was gathered. Her shocking outfit led to ridicule. Especially mad at Robert for laughing, she cursed at him and ran upstairs. Only then did she disclose the “abuse” to her sister and her mother, Denise.

Tina was interviewed by a psychologist, who was mandated to report the allegations to Child Protective Services (“CPS”). Tina was thereafter interviewed by a CPS caseworker, and eventually by the police.

Robert was arrested for various sexual abuse and forcible touching crimes. The criminal charges were dismissed, leaving abuse and forcible touching crimes. The police. As per the Court’s Order, said meetings were recorded. Those recordings were later introduced into evidence at the trial.

Following the two sessions, Dr. Meltzer opined, to a reasonable degree of psychological certainty, the child’s status was consistent with a child who had been sexually abused.

Right off the bat, Dr. Meltzer misrepresented herself. She outright lied about her credentials! On the first day of her testimony, she indicated she was not qualified to give objective psychological tests, and that she sends “them” out to others. On the second day, she testified she was qualified to administer such tests. Also on day one, as per her testimony and Curriculum Vitae, she was a member of New York State Best Practices. On the second day, she admitted she was not actually a member. Rather, she was part of an “informal gathering,” but that nothing ever materialized.

In Family Court, out-of-court statements made by the child are admissible in evidence. They must be corroborated to support a fact-finding determination of proof by a preponderance of the evidence. As such, prior to the proceeding, Dr. Anne Meltzer was appointed as a “validator” to interview Tina and make a determination as to whether she believed sexual abuse occurred. Dr. Meltzer holds herself out to provide independent evaluations of children alleged to have been sexually and/or physically abused. She met with Tina on two occasions, after Tina had already recited the alleged incidents to her sister, mother, therapist, CPS caseworker, and the police. As per the Court’s Order, said meetings were recorded. Those recordings were later introduced into evidence at the trial.

The defense impeached Dr. Meltzer with a transcript of her previous testimony before a Brooklyn Court, where Dr. Meltzer testified the secrecy stage was very important.

Dr. Meltzer’s own report was used to impeach her credibility at the fact-finding hearing. In said report, Dr. Meltzer quoted Tina’s statements made during her interview, indicating she may have changed pronouns (i.e. from “she” to “her”). Cross examination revealed those quotes were absolutely not in the recordings! When confronted, it was irrefutably shown by the defense Dr. Meltzer totally misrepresented purported “quotes” by Tina. For example, Dr. Meltzer’s written report indicated, “Tina never told any big lies.” A review of the video revealed Dr. Meltzer asking Tina if she had ever told any big lies. Tina’s response: “no, not really.” Tina explained to Dr. Meltzer about a time where she had lied.

Another misquote took place where Dr. Meltzer, in her report, stated, “no one told her (Tina) what to say.” In fact, that was a question posed by Dr. Meltzer, of which Tina simply nodded. While the prosecution argued the essence of the content was the same, such a misrepresentation using quotes in her report, goes directly toward Dr. Meltzer’s credibility and reliability as a court-appointed “neutral” validator.

Dr. Meltzer did not only misquote Tina, but she picked and chose pieces of Tina’s statements to satisfy her own agenda. For example, Dr. Meltzer’s report indicated that Tina stated, “his hand went too far.” That was all she reported. However, the video clearly showed Tina stating, “…and his hand...

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1 Names of the parties have been changed.
just went a little too far, but I’m not really sure if he meant it or whatever happened…” Why was this left out of her report and her testimony?

Dr. Meltzer’s report and testimony also indicated that as a result of the alleged abuse, Tina placed a lock on her bedroom door. Dr. Meltzer’s report surreptitiously omitted a highly relevant fact. Tina’s video interview revealed she placed the lock on her door because she felt that since she was getting old, she needed more privacy due to the fact that her mother and older sister were always coming into her room, that the lock had nothing to with Robert! Dr. Meltzer’s report indicated the lock was due to Robert, which was clearly false! This, along with the misquotes, lead the Court to directly question Dr. Meltzer on the subject. In the future, how can Dr. Meltzer’s report and testimony, which may include quotes, ever be reliable?

Tina was a fourteen-year-old honors student with no psychological issues. During Dr. Meltzer’s interview, Tina was unable to describe anything regarding the alleged events with any degree of certainty. As such, Tina responded to Dr. Meltzer’s questions with, “not really,” “I’m not sure,” or “maybe.” Tina also stated the alleged incidents could have been a misunderstanding. The defense proved to the Court how Dr. Meltzer purposely omitted this information from her report!

While it is advised that a Court appointed validator gather information from secondary sources, Dr. Meltzer did not do so. She did not obtain CPS records, the notes from Tina’s therapist, or conduct any interviews other than a brief session with Tina’s mother. Had she done so, then perhaps she would have been able to review a complete record and see the various inconsistencies in Tina’s reporting, which were clearly shown by the defense. For example, Tina indicated to her therapist, as reflected in his notes (which were not sought or obtained by Dr. Meltzer), that she awoke when Robert touched her. Tina also indicated to Dr. Meltzer, she “awoke” to find Robert touching her. This “awakening” was completely left out of Dr. Meltzer’s report, yet during her testimony, Dr. Meltzer indicated Tina was never asleep!

Dr. Meltzer followed no prescribed methodologies, and failed to utilize objective tests. … Thus, Dr. Meltzer violated her duty, legally and ethically, to form an accurate and neutral opinion.

In rebuttal, Dr. Eileen Treacy was called as a witness in Robert’s case. Dr. Treacy had an opportunity to review the video tapes of Dr. Meltzer’s interviews with Tina. She claimed Dr. Meltzer did not follow the protocol of “New York State Children’s Justice Task Force Forensic Interviewing Best Practices,” and criticized Dr. Meltzer’s methodologies. At one point, Tina indicated “it (the touching) was a misunderstanding.” Dr. Treacy was baffled by the fact that Dr. Meltzer, at that point, stopped the interview! It was there that Dr. Treacy indicated Tina may have been presenting an alternative hypothesis. Due to issues like this one, Dr. Treacy opined Dr. Meltzer did not have a sufficient basis to conclude no alternative hypotheses existed.

Dr. Treacy further testified how, in conducting these interviews, it is imperative to never interrupt a child, as Dr. Meltzer did at such a crucial point, as well as at various times during the interviews. It is against all protocols to interrupt a child, and Dr. Treacy and her colleagues all teach to be active listeners. Dr. Treacy opined Dr. Meltzer did not employ proper questioning methodology, using leading questions, closed questions, and often putting words in Tina’s mouth. The interruptions, leading questions, and yes/no questions (of which Dr. Meltzer employed in over 50% of her questions) violate all protocols.

Dr. Treacy testified to the existence of New York State Best Practices, its interviewing techniques, and its frequent use in the field. She even taught a three day course of New York State Best Practices, and its interviewing protocols, during the pendency of these proceedings. Dr. Treacy testified that Dr. Meltzer never was a part of New York State Best Practices, nor did she ever attend the seminars on Best Practices.

Nor did Dr. Meltzer sufficiently explore the issue of “secondary gain,” or “motive.” The time of disclosure was after Robert made fun of Tina. The Court found the timing of the disclosure (four months after the purported events, during which Robert was often left alone with Tina) curious. Further, Tina disclosed that her mom, Denise, was “all over him” (Robert). Tina explained how Denise paid a lot of attention to him (Robert). Tina also expressed how her

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Beyond a Reasonable Doubt

An “Appropriate” Standard in a Non-Jury Trial Motion for a Trial Order of Dismissal

by Jared Kneitel

Story begins on next page
Reasonable Doubt

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Introduction – The Need For An “Appropriate” Standard

In a criminal trial, at the close of the prosecution’s case-in-chief, the defense may make a motion for a Trial Order of Dismissal on one or more offenses charged. If the motion is unsuccessful and the defense presents a case, the defense can make another motion for a Trial Order of Dismissal at the close of the entire case. This article concerns only the motion at the end of the prosecution’s case-in-chief. At present, the motion will succeed only if the prosecution has not presented legally sufficient evidence of all the elements of the particular offense or offenses.

Presently, the Criminal Procedure Law does not refer to any specific standard to be employed on a Trial Order of Dismissal in a non-jury trial other than instructing to, “wherever appropriate,” follow the provisions governing jury trials. In particular, CPL § 320.20(4) states that “The provisions governing motion practice and general procedure with respect to a jury trial are, wherever appropriate, applicable to a non-jury trial” and CPL § 350.10(4) states that “The provisions governing motion practice and general procedure with respect to a jury trial of an indictment are, wherever appropriate, applicable to a non-jury trial of an information.”

This article discusses why it is inappropriate – as violative of the Fifth and Fourteenth Amendments – to employ only the legal sufficiency standard on a Trial Order of Dismissal in a bench trial. This article argues that the beyond a reasonable doubt standard – alongside the legal sufficiency standard – is an appropriate standard when the bench considers a motion for a Trial Order of Dismissal in a non-jury trial. Not knowing whether the prosecution has proven – in the judge’s mind – the defendant’s guilt before inviting the defendant to present a case actually militates against the presumption of innocence, the assurance that the government discharges its burden, and the defendant’s right to remain silent.

This article examines the historical (lack of) development of the Trial Order of Dismissal and the perceived Constitutional preclusion against the beyond a reasonable doubt standard. Namely, the bench – as the arbiter of law – cannot usurp a defendant’s Sixth Amendment protection to be tried by a jury of his peers. Of course, in a non-jury trial, the bench is both the arbiter of law and the finder of fact and, hence, there is no Sixth Amendment preclusion.

Although the arguments made in this article for use of the beyond a reasonable doubt standard in a non-jury trial might still be made without any amendments

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On January 30, more than 250 members and guests from around New York State gathered at the Prince George Ballroom in Manhattan, for NYSACDL’s Annual Dinner and Awards Ceremony. After an extended cocktail hour, outgoing President Benjamin Ostrer installed President Aaron Mysliwiec, who spoke of the Association’s achievements, and our goals for the coming year.

This year’s gathering was especially poignant, coming as it did during the time when Federal defender offices throughout the country suffered drastic and disastrous cuts to their budgets, forcing extensive furloughs, and the layoff of many dedicated defenders and support staff. Through it all, the federal defenders across New York State managed to continue to provide the highest quality defense to their clients, as did the CJA panel attorneys, whose rates were cut by a significant percentage as well.

NYSACDL chose this time to honor those Defenders with the Hon. Thurgood Marshall Award, given annually to an outstanding criminal defense practitioner. This year saw the award bestowed jointly on David Patton, chief of the Federal Defenders of New York, Inc, the defender for the Southern and Eastern Districts; Lisa Peebles, Federal Defender for the Western District (and a member of the NYSACDL Board of Directors); and Marianne Mariano, Federal Defender for the Western District. NYSACDL Director Susan Walsh introduced the Defenders, and spoke eloquently of their dedication.

The Hon. William J. Brennan Award for Outstanding Jurist was given to Hon. John Gleeson, United States District Judge for the Eastern District of New York, a longtime advocate for defense services, and an outspoken judge on many subjects, whose reputation for integrity and fairness in the administration of justice made him an easy choice for this prestigious award. He was introduced by NYSACDL Vice-President John S. Wallenstein, and Judge Gleeson’s remarks are published in this issue; they are quite enlightening.

NYSACDL also honored the late Hon. Theodore Jones of the New York State Court of Appeals, for his lifelong dedication to justice. NYSACDL President-Elect Wayne C. Bodden presented the award to Judge Jones’ family, who attended as our guests.
2014 Annual Dinner

Past President Ben Ostrer (right) installs President Aaron Mysliwiec

Vice-President John Wallenstein presents the Hon. Thurgood Marshall Award to Judge Gleeson as immediate Past President Ben Ostrer looks on.

Past President Ben Ostrer, President-Elect Wayne Bodden, and the Jones Family

NYSACDL Executive Director Jennifer Van Ort

Bob Leighton, Gerry Lefcourt and Aaron Mysliwiec

Larry Hochbeiser, Dan Hochbeiser and Murray Richman
Honorees and Guests

(Left to right): Ben Ostrer, Judge Sheila Abdus-Salaam, President-Elect Wayne Bodden and Wesley Jones

Jean Barrett and Sam Schmidt

Joel Rudin and Julia Kuan

Donna Newman (l), Michael Bachrach (r) and guests

Secretary Arnold Levine and Jane Fisher-Byrlielsen

Mitch Dinnerstein and Florian Miedel

Vice-Presidents John Wallenstein and Danielle Eaddy
Remarks of Hon. John Gleeson,  
United States District Judge

Recipient of  
The Hon. William Brennan Award for Outstanding Jurist

Thanks John. Aaron, congratulations and good luck in your coming year as President of this venerable association; Ben congratulations to you on your tenure as President. I want to congratulate the family and friends of Judge Jones, who really was a true Champion of Justice and an inspiration to us all. Finally, my heartfelt congratulations to the recipients of the Thurgood Marshall Award – David, Marianne and Lisa – and my thanks to you, on behalf of the entire federal judiciary, for all you and your colleagues to advance the cause of justice in our courtrooms.

Life is short but careers are long, and they sure can take their twists and turns. I know quite a few members of this association for a long time, and I met most of you during the ten years I was a prosecutor. I had a reputation as a pretty tough prosecutor, and I know for a fact I was not exactly the darling of the defense bar back in the day. Let’s face it, think back to September of 1994, just before I became a judge. Suppose this association had asked itself the following question:

Which of the following three events is least likely to happen in the next 20 years:
America will elect a black president;

The Pope would say, referring to gay people, “Who am I to judge?”;

At that point you’d have been sweating it out – both of those things were awfully unlikely 20 years ago. But then the third is this: The New York State Association of Criminal Defense Attorneys will honor John Gleeson.

Whew!, you’d have gone. Now that one is simply impossible.

The fact that I stand before you tonight to receive this prestigious award is living proof of the fact that people can change. Over time they can grow up, they can mature, see the light, become different people, better people. And I am so proud of all of you that you’ve done that, and that you finally see me for what I’ve been all along.

I couldn’t for the life of me fathom how lawyers who tried to help criminals beat cases could look themselves in the mirror in the morning.

I want to tell you sincerely that it’s an honor to receive this award. Thank you so much. And don’t mistake what I’m about to say for false modesty; the truth is I’m proud of what I’ve done so far in my career and of what I’m doing now, and I feel like I have served the public as well as I could. But I honestly don’t feel I deserve your recognition. I accept it; I will keep the hardware; I may even brag about it; but I don’t deserve it. First, I know my place, and I do not belong in the company of the prior recipients of this award. Second, and this is a little harder to explain, but nothing I have done to try to advance the interests of the Defender Program – meaning all the Federal Defenders and all the Criminal Justice Act panel attorneys around the country – strikes me as something I or anyone else should be honored for. I don’t mean any of it is easy, in fact it’s all been quite hard. But it is so obviously the right thing to do – the only thing to do. It has come so
naturally to me that it strikes me as odd that it would warrant special recognition.

On that people-can-change topic I joked about a moment ago, let me get serious for a moment. I became a prosecutor in 1985, and like a lot of young prosecutors I saw the world in black and white. There were good guys, and I was one of them, and then there were bad guys who deserved to be in prison. And then there were these other players whose job seemed to be to frustrate my efforts to put those bad guys where they belonged – defense counsel and, to a lesser extent, judges. I couldn’t for the life of me fathom how lawyers who tried to help criminals beat cases could look themselves in the mirror in the morning.

There’s really nothing unusual about that – lots of inexperienced prosecutors are narrow-minded in that way. And you know full well that some defense lawyers suffer from the same disability. You know what I’m talking about; some defense lawyers believe that from the moment prosecutors wake up, before they even brush their teeth, every single one of them starts thinking about whose constitutional rights they’re going to trample on that day, or which innocent people they’re going to frame. Anyway, lots of young prosecutors start out like I did, and many of them grow out of it with experience.

What was unusual for me was my first case as a prosecutor 100% confirmed and reinforced the dim view of the defense bar I brought to the job. That was the first federal RICO prosecution of John Gotti – the case people almost always leave out when they introduce me. I’m often introduced as the guy who convicted John Gotti, but the complete truth is I batted .500 against him. That first case was a seven-month trial. Two prosecutors, no case agents or paralegals at the table, just the two of us surrounded by seven defendants and eight lawyers in the most toxic, hostile atmosphere I’ve ever seen in 30 years in court. Defense counsel in that case subpoenaed my wife’s personnel file mid-trial, a subpoena the trial judge quashed sua sponte as harassment, pure and simple. Then they called a witness in the defense case who testified that my wife and I plied him with drugs in an effort to get him to give false testimony against John Gotti. The same witness testified that the lead prosecutor, Diane Giacalone, tried to obtain his perjured testimony by giving him her underwear to take back into the MCC. And after seven months all seven defendants walked, the highest-profile and for the government the most humiliating acquittal ever in New York. Shortly after the acquittal, that defense witness pled guilty to perjury and identified the four defense lawyers in the case who scripted his false testimony. Gotti also bought a juror in that case, who himself was later convicted for taking a bribe. Two years later, I tried the RICO case against Mike Cioro, a longtime lawyer for Gotti and his crew who was in fact one of the lawyers in that first case. Mike was convicted, and in that same year I successfully prosecuted the Oswaldo Silvera, a lawyer for Delroy Edwards, a Jamaican gang leader I prosecuted.

In 1994, who would have believed that in 20 years NYSACDL would honor John Gleeson?

In the second Gotti case, I moved to disqualify five lawyers on the defense team. And since there were only three defendants, that’s saying something. They didn’t take it lying down; they cross-moved to disqualify me. My motion was granted – all five were out because of various conflicts and improprieties. Their cross-motion, I should add, was denied.

I matured in my decade as a prosecutor, but those formative experiences did not exactly leave me with a warm and fuzzy feeling for the defense function or the defense bar. So a few years later, after I got appointed to the bench, every Federal Defender and every panel attorney in the country had reason to groan when Chief Justice Rehnquist appointed me to the Defender Services Committee. So did I. I had no interest in that committee and told them so before the appointment.

And so began a nine-year period in which I met regularly, around the country, with defenders and panel attorneys to discuss the problems and issues they face. And that was in fact transformational for me. I can’t begin to tell you how much I have learned and benefitted from my association with the defender program, which for a variety of reasons really hasn’t ended even though my nine years on the committee ended in 2008.

First of all, and I don’t want to make too much of this, but I hung around with prosecutors for a decade and then with...
Judge Gleeson

Continued from previous page

Defenders and Panel Attorneys for a similar amount of time. You people party better. I’m not sure what that’s relevant to, maybe nothing, but it’s a fact.

Second, being around defenders and panel attorneys brought out the advocate in me again. I wondered after I became a judge if I’d miss the lawyering, but getting assigned to the Defender Services Committee took care of that. You probably know this already, being criminal defense lawyers: criminal defense lawyers are not all that popular out there. When I started on the Committee I thought the job was to keep the Defenders and Panel Attorneys in line, but I soon discovered that they need all the help they can get, both within the judiciary and outside it.

Third, I really do see the world differently now because of my association with you. I notice how frequently judges freely express – even in public gatherings – their affinity with U.S. Attorney’s offices. I’m self-conscious about the fact that for every former criminal defense lawyer on the bench there’s more than dozen former prosecutors. I feel in my bones how fundamentally wrong it is to have a Sentencing Commission which has an ex officio seat for the prosecutors without also having one for the Defenders.

Finally, whether I deserve to or not, I bask in your reflected glory. I’ll go to my grave proud of my work as an AUSA, but I am just as proud of my association with the Federal Defenders and Panel Attorneys around the country. Why? Because here we are, 51 years after Gideon. In so many places the promise of that case has gone unfulfilled. But when I started on the Committee I thought the job was to keep the Defenders and Panel Attorneys in line, but I soon discovered that they need all the help they can get, both within the judiciary and outside it.

The Federal Defenders are regarded throughout the country as the gold standard – not just for indigent defense, but for all criminal defense. They are one of the crown jewels of the judiciary.

The national results of our move to determinate sentencing are well-known. Six years ago we passed the one in one hundred number – more than one in 100 American adults is in prison. We have 5% of the world’s population and 5% of its crime, but we have 25% of the world’s prisoners. Our incarceration rates dwarf those of every country in the world. One in every 30 men between 20 and 34 is in prison; for black males in that age group the number is a jarring one in nine. The federal Sentencing Guidelines increased the average drug sentence 2 and half times in the five-year period between 1986 and 1991, and they’ve stayed at those elevated rates. Before the Guidelines almost half of federal defendants got probation; now it’s fewer than 6%. Our prisons are bursting with an inmate population that at 140% of capacity.

I was at an ABA Roundtable about sentencing a few years ago and the discussion drifted to how much more punitive we are than everyone else, and especially the Western European countries that seem so comparable to us in other ways. Our incarceration rates, sentence lengths, costs of incarceration are so out of whack, one of the law professors there said, that it’s a miracle that our system of justice garners any respect at all, let alone the considerable respect it has earned.

It was just a figure of speech, but it got me thinking about why our system is respected and in fact emulated even though it looks for all the world to see like one big voracious incarceration machine, and I have no doubt that it’s in large part because of the role you as defense lawyers play and how well you play it. The work you do is universally praised, not just in the big cases where the world watches, but in all the other below-the-radar cases that I think are the best measure of a criminal justice system.

Indulge me for just a moment while I thank my family. The families of federal judges don’t ask for or deserve sympathy from...
anyone. Like a lot of us here, Susan and I are from relatively modest backgrounds. I’m the youngest of seven and when I was born that made nine of us in our two-bedroom apartment in the Bronx. So no one appreciates more than Susan and me how well-off all of the public servants in this room are, in absolute terms and also when compared to the rest of our society. But the fact remains that there are opportunity costs of public service; they are real, especially in places like New York, and the people who bear them are the spouses and the kids of judges. And they bear them without the enormous satisfaction that comes from being a public servant – from serving you, your clients and our community. So once again, I find myself thanking Susan, who’s home in Suffolk County tonight with our Nora, and our Molly, who’s right there. When I got married almost 37 years ago, I was a foreman in a house painting company and had my own painting business on the side. Financially, it’s been downhill ever since, and now my family is stuck with a public servant for life. But Susan and our beautiful girls know how much my job means to me, and so they put up with me and even support me in it. I will be eternally grateful to them as a result.

My extended family – and by that of course I mean my law clerks – is well represented here tonight. My current clerks, Taz Shahabuddin, Peter Aronoff and Adam Herling, are all here, and there a few former clerks here as well. Law clerks are the very best part of a judges’ job, which is saying something, because there are a lot of great parts of a judge’s job. So I want to thank them as well.

I’m afraid I have overstayed my welcome, so I’ll sit down. Thanks again for the honor. Thank you for listening and enjoy the rest of the evening.

Reasonable Doubt

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to the Criminal Procedure Law (by citation to CPL § 320.20(4) and CPL § 350.10(4) and arguing that it is inappropriate to use only the legal sufficiency standard), to prospectively make explicitly clear that the beyond a reasonable doubt standard is an appropriate standard for the bench to employ on a motion for a Trial Order of Dismissal in a non-jury trial, the author proposes amending the Criminal Procedure Law to include a new provision, CPL § 350.30: “Non-Jury Trial – Trial Order of Dismissal.”

For Centuries, Legislative and Judicial Oversight

The motion for a Trial Order of Dismissal in criminal cases evolved from its counterpart in civil procedure. Federally, in the late 1700s, civil judges could withdraw a civil case from a jury and decide the case; then came the common law motion for non-suit; and finally, in the mid-19th century, the civil motion for a directed verdict. “The motion for judgment of acquittal in criminal cases came later still and was probably influenced by these earlier developments in the civil trial.” "[T]he early cases directing acquittal did so without citing any authority but apparently assumed such power was inherent in the judge's role as presiding officer." 3

The New York State Criminal Procedure Law is derived first from the Revised Statutes of 1827/1828; the Code of Criminal Procedure (1881); and then the modern Criminal Procedure Law (1971). Through 1971, there was no statute in our criminal procedure specifically outlining the procedure in a non-jury trial.5

Concerning the Trial Order of Dismissal, the legislature developed the standard in a jury trial only. In 1882, §410 of the Code of Criminal Procedure stated “If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant and they must follow the advice.” Emphasis added. The 105th Session of the Legislature of the State of New York (1882) did not consider the application of this statute in non-jury bench trials.

In 1936, the 159th Session of the Legislature revised §410 of the Code of Criminal Procedure as follows: “If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction of one or more of the crimes in the indictment or information, it may advise the jury to acquit the defendant thereof and they must follow the advice.” Emphasis added. Again, there was no consideration of bench trials.

2 Id., at 1152.
5 “Prior to the enactment of the Criminal Procedure Law, effective in 1971 there was no statute specifically outlining procedure in the conduct of a non-jury trial.” Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 350.10. at 213

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Reasonable Doubt

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In 1967, the Proposed New York Criminal Procedure Law, “§150.10 Trial Order of Dismissal,” was considered for introduction. The text of §150.10 read: “At the conclusion of the people’s case or at the conclusion of all the evidence, the court may, upon motion of the defendant or upon its own motion, issue a ‘trial order of dismissal,’ dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.” Of note, however, §150.10 fell within the confines of Article 150 of the Proposed New York Criminal Procedure Law which was limited to only jury trials. The heading of Article 150, in full, read “Article 150–Jury Trial–Trial Order of Dismissal.”

Finally, in 1971, our modern CPL § 320 and CPL § 350.10 (Waiver of Jury Trial and Conduct of Non-Jury Trial; and Non-Jury Trials, respectively) were introduced. Still, there is no specific provision for the standards to be employed on a motion for a Trial Order of Dismissal other than, “wherever appropriate” (CPL § 320.20(4), CPL § 350.10(4)), following the provisions governing jury trials.

There still remains no legislation specifically directed towards a Trial Order of Dismissal in a non-jury trial. This is due to a legislative oversight based, seemingly, on the mere importation of the standards employed in a jury trial into a non-jury trial without appropriate consideration for the defendant’s exposure to a deprivation of his liberty, his right to remain silent, the prosecution’s burden of proving the defendant guilty beyond a reasonable doubt rather than by a preponderance, and the presumption of the defendant’s innocence.

The Federal Rules of Criminal Procedure similarly suffer from this legislative oversight. 6

Turning to guidance from the courts, the standard for judging a Trial Order of Dismissal – in a federal jury trial at least – is based on Burks v. United States? “The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury’s finding the defendant guilty beyond a reasonable doubt.”8 “Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal.”9 This view is accepted on the Sixth Amendment basis that a defendant be tried by a jury of his peers; in jury trials, the court cannot substitute its judgment for that of the jury. 10 To do so would usurp the power of the jury and violate the Sixth Amendment guarantee to be tried by one’s peers 11 as well as the Fifth and Fourteenth Amendment Due Process protections. 12

To date, however, the Supreme Court of the United States has not considered the standard on a motion for judgment of acquittal in a federal non-jury trial. 13 Similarly, there has not been a decision from the New York State Court of Appeals on the standard to be employed on a motion for a Trial Order of Dismissal in a non-jury trial.

This may be because esteemed and erudite practitioners have effectively written off considering the beyond a reasonable doubt standard in bench trials and, consequently, the issue has not reached our highest courts.

For example, in Handling a Criminal

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8 Id., at 16.

9 Id., at 16.


11 See U.S. CONST. amend. VI. See also, 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 467, at 324-25 (footnote omitted) (4th ed. 2009) (“It is quite clear that a court may not direct a verdict of guilty, either in whole or in part. To permit this would invade [the] defendant’s constitutionally protected right to trial by jury.”).


13 Although Jackson v. Virginia is oft cited for the (appellate and trial) standard on determining a Motion for a Judgment of Acquittal, Jackson v. Virginia actually concerns what “sufficiency” of evidence means and whether a conviction on less than sufficient evidence would be a violation of due process.
Case in New York, Muldoon states that “The motion for a trial order of dismissal (TOD) pursuant to CPL 290.10 is the equivalent of the civil motion for a directed verdict, CPLR 4401; it seeks to end the trial at the close of the prosecution’s case on the grounds that the proof fails to establish a prima facie case.”

Of course, a criminal defendant is not guilty unless proven guilty; the prosecution bears the burden of proving the criminal defendant guilty beyond a reasonable doubt; and “the prosecution [not the defendant] must introduce evidence sufficient to persuade the fact finder, beyond a reasonable doubt, of the defendant’s guilt.”

Thus, if the prosecution did not introduce evidence to prove the defendant guilty beyond a reasonable doubt, then the defendant is not guilty.

At the conclusion of the prosecution’s case-in-chief, the prosecution’s case will presumably (and, in almost all circumstances, will) be at its highest. If the prosecution hasn’t proven its case beyond a reasonable doubt after the presentation of its evidence, when will it ever be able to prove its case beyond reasonable doubt? This begs the very simple question: if the defendant is not guilty at the conclusion of the prosecution’s case-in-chief, why should the defendant be “invited” to present a defense?

Although the prosecution may have presented legally sufficient evidence of the offenses charged, the trier of fact may not have found – at the close of the prosecution’s case – that the prosecution’s case was proven beyond a reasonable doubt. For example, the trier of fact may have found the accounts of the prosecution witnesses to be not worthy of belief (either alone or in combination) or circumstantial evidence presented too circumstantial to sustain a conviction. As always, the prosecution has to prove its case beyond a reasonable doubt. This is without the assistance of any defense evidence (including the defendant’s testimony).

Effectively, “inviting” the defendant to present a defense case – despite the uncertainty of whether the prosecution has proved its case beyond a reasonable doubt at the close of the prosecution’s case and whether the trier of fact would acquit the defendant of an offense charged – reduces the prosecution’s burden at that stage. This “invitation” to the defendant to present defense witnesses or for the defendant to testify on his own behalf militates against the prosecution’s obligation to prove its case. Such an invitation should be correctly considered as not only a reduction of the prosecution’s burden (and therefore impermissible burden shifting) but also a violation of Due Process.

Herein lies the problem. The court can readily deny a motion for a judgment of acquittal. Upon this denial, the


\[15\] Id., at § 18:363.

\[16\] Id.

\[17\] Id., at § 18:361.

\[18\] E.g., People v. Molinacoc, 168 NY 264 (1901).

\[19\] “Manifestly, the burden of proving guilt beyond a reasonable doubt in a criminal proceeding must always remain with the People.” People v. Antommarchi, 80 NY2d 247, 252, 1992, citing In re Winship, 397 US 358.

\[20\] Antommarchi, at 252.

Continued on next page
defendant is still left to speculate and guess whether the prosecution satisfied its burden – on the prosecution’s evidence – of proving the defendant guilty beyond a reasonable doubt. Thus, not knowing whether the government has discharged its burden leaves the presumption of innocence and the defendant’s right to remain silent in competition with the prosecution’s obligation to discharge its burden when, in fact, these three aims should be cooperating with one another.

Elevating the prosecution’s burden at the motion for a Trial Order of Dismissal stage to beyond a reasonable doubt actually strengthens the presumption that the defendant is not guilty.

The Proposed CPL § 350.30: “Non-Jury Trial – Trial Order of Dismissal”

Although the arguments made in this article for the use of the beyond a reasonable doubt standard in a non-jury trial might still be made without any amendments to the Criminal Procedure Law, to make explicitly clear that the beyond a reasonable doubt standard should be used on a motion for a Trial Order of Dismissal, the author proposes the following statute:

1. At the conclusion of the people’s case, the court shall, upon motion of the defendant, issue a “trial order of dismissal,” dismissing any count of an indictment or information on the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

2. At the conclusion of the people’s case, the court shall, upon motion of the defendant, issue a “trial order of dismissal,” dismissing any count of an indictment or information on the ground that the people did not prove beyond a reasonable doubt an offense charged therein.

3. Upon issuing a trial order of dismissal which dismisses the entire indictment or information, the court must immediately discharge the defendant from custody if he is in custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.

The proposed CPL § 350.30(1, 2) mirrors subsection one of CPL § 290.10(1) (a) (Jury Trial – Trial Order of Dismissal) adding the legal sufficiency standard § 350.30(1) and the beyond a reasonable doubt standard § 350.30(2). Subsections two and three of CPL § 290.10 are not mirrored here as they deal with retrial after a case is dismissed for legal insufficiency of evidence and are – in any event – “dead letters” as violative of the Constitutional protection against double jeopardy. 23 CPL § 290.10(4) is mirrored here as the proposed CPL § 350.30(3).

Conclusion

The Proposed CPL § 350.30 ensures that the defendant’s right to remain silent and his presumption of innocence work in coordination – instead of the present antagonism – with the prosecution’s discharge of its burden of proving the defendant guilty, if it can, beyond a reasonable doubt. The Proposed CPL § 350.30, which has demonstrated support in other common-law jurisdictions, can add to judicial economy or otherwise have little effect on the proceedings other than strengthening the presumption of innocence, the right to remain silent, and the discharge of the prosecution’s obligations.

Cutting Edge CLE

NYSACDL is noted for our innovative, interesting and informative CLE programs, which we present at various locations around the state each year. Our CLE schedule for the remainder of 2014 is in progress. Tentative dates and general locations are as follows:

Wrongful Convictions  NYC, September
Federal Practice For The State Practitioner  NYC, October
Syracuse Fall Trainer, Topics To Be Announced  November
Hudson Valley Fall Trainer, Topics To Be Announced  October
Buffalo Superstar Trial Seminar  November
Weapons For The Firefight  NYC, December

If you have an idea for a CLE program, or wish to participate on the CLE committee, please contact any of the CLE chairs: Bruce Barket, Jim Grable, Tim Hoover, Arnold Levine or Andre Vitale. Email addresses are included in the committee listing on page 43 of this issue. We welcome your input! Dates are subject to change, and specific topics are flexible.

CROSS TO KILL 2014
A capacity crowd, mixed with private and public practitioners, filled the Richard Harris Terrace at the Borough of Manhattan Community College on April 4th for another of NYSACDL’s annual showcase Cross to Kill CLE seminars. This year's program focused on the unique challenges presented when preparing and conducting cross-examination of scientific experts. The goal was twofold: explain some of the substantive forensic information about each field, and provide attendees with practical advice and sample questions to cross-examine experts from those fields.

NYSACDL Secretary Arnold Levine, Esq., started by providing a thorough look into the cross of a firearms identification examiner, including the important questions to ask during the cross-examination and a look at the science behind firearms identification. The morning concluded with a panel presentation featuring Mark Loudon-Brown, Esq., a Supervising Attorney at The Bronx Defenders, and Shilpy Goswami, Esq., Allison Lewis, Esq. and Richard Torres, Esq., members of the New York Legal Aid Society’s DNA Unit. This panel, moderated by NYSACDL President Aaron Mysliwiec, led those present through the cross of a DNA expert, a presentation many asked to be repeated in a full-day seminar.

In the afternoon, NYSACDL Immediate Past-President Benjamin Ostrer, Esq. was joined by Mark Taff, M.D., a nationally known medical examiner and expert witness. This presentation gave those in attendance a glimpse into the mind of a medical examiner and tips on what to ask when presented with similar evidence at trial. The day concluded with a repeat presentation by Amy Marion, Esq., of an important topic: Child Sexual Abuse Accommodation Syndrome (CSAAS) and Cross Examination of the Prosecution’s Expert Witness.

SYRACUSE TRAINER APRIL 2014
The Syracuse Spring seminar was presented on April 12. The room was full, the speakers were well received, pertinent and practical. Topics ranged from ethics to the right to present a defense to cross-examination for expert or identification witnesses.

Anthony Gigliotti, Esq. provided the ethics segment. Past President Ray Kelly presented two hours on the cross-examination of identification witnesses, followed by Past President Craig Schlanger. Craig discussed the preparation and cross-examination of expert witnesses. Finally, we concluded with the incomparable Mark Mahoney, who spent two hours discussing the Right to Present a Defense.

As always, our thanks to Vice President Rob Wells for organizing and coordinating the trainer.
Life Members

A special thanks and welcome to our four new life members who have chosen to show their support for our association by renewing their memberships as ‘life members’. Peter Brill, Daniel N. Arshack, Florian Miedel and our new president, Aaron Mysliwiec, along with our current life members, provide much needed strength and stability to our membership base through their support. We recognize and thank each of them and hope to encourage others in our membership to consider making the same commitment to our association and to each other. As Benjamin Franklin so aptly once said, “We must, indeed, all hang together or, most assuredly, we shall all hang separately.”

Peter Brill
Peter Brill has been a member of NYSACDL for over ten years and is the founding member of the Brill Legal Group, P.C., with offices in New York City and Long Island. A former Assistant District Attorney, he has been recognized by the NYPD’s Detective Borough in Queens in 2007 for his work representing law enforcement officers and members of their families charged with criminal matters. He has been selected as a New York Metro Super Lawyer and continues to do pro bono work on behalf of the American Civil Liberties Union.

Daniel N. Arshack
Past President Dan Arshack of Arshack, Hajek & Lehrman, PLLC, has broad experience in state and federal courts in high-profile criminal cases in New York and nationwide. In addition, he handles complex civil litigation and consults on matters related to national and international law reform. Dan was a founder of The Bronx Defenders in 1996 and has conducted trainings for lawyers both internationally and as an adjunct professor of trial advocacy at the Benjamin Cardozo School of Law.

Aaron Mysliwiec
NYSACDL President Aaron Mysliwiec of Miedel & Mysliwiec LLP, represents clients in both state and federal criminal prosecutions ranging from complex white collar matters to traditional criminal matters. He has also represented individuals and companies in civil litigation matters. His professional background includes working as a Litigation Associate at Dorsey & Whitney LLP, a Supervising Attorney at The Bronx Defenders, and as a Partner at Dratel & Mysliwiec P.C. Aaron has been an instructor for continuing legal education seminars for NYSACDL as well as for the Assigned Counsel Plan and The Bronx Defenders. He brings both his leadership and support to our association.

Florian Miedel
Florian Miedel is a partner at Miedel & Mysliwiec LLP, where he represents clients in State and Federal courts at both the trial and appellate levels. He has achieved acquittals in Federal Court in such serious matters as murder in aid of racketeering, narcotics conspiracy and more. Prior to entering private practice, Florian was the Legal Director of The Bronx Defenders as well as serving as a trial attorney in the Federal Defenders Office for the Eastern District of New York and the Neighborhood Defender Service of Harlem.

“...The secret of all victory lies in the organization of the non-obvious.” -- Marcus Aurelius
in May 2012 at the Keuka Lake home of Mr. Frysinger’s parents. Ontario County District Attorney Michael Tantillo represented the People as Steuben County District Attorney Brooks Baker had a conflict of interest due to his prior employment by the Congressman’s family.

The victim and three eyewitnesses testified for the prosecution. The victim claimed she was unconscious at the time due to intoxication at the party. Cedric Hairston, who initially was charged as a co-defendant, also testified for the People. Mr. Hairston had accepted a plea deal to felony reckless endangerment prior to his testimony. Under cross examination by Mr. Easton, Mr. Hairston admitted that despite his plea, the alleged victim was not unconscious when the various sex acts were attempted. The defense also called a toxicologist to testify that during the two hours that the alleged victim was at the party, it would have been impossible for her to consume enough alcohol to have suffered from acute alcohol poisoning and be rendered unconscious. The defense called one eyewitness who disputed the version of events testified to by the prosecution witnesses. The defendant did not take the stand during the week-long trial. After the jury of seven men and five women deliberated for just over three hours, they rendered a verdict acquitting Mr. Frysinger of all charges.

Jessica Horani and client

Several members of the jury met with Mr. Goode and counsel after the trial; one juror who had lost a niece to a heroin overdose weeks prior to the trial expressed that although the experience had been difficult, it had been cathartic as well. Mr. Goode, his family and Ms. Horani celebrated the win weeks later at a family dinner. Mr. Goode hasn’t used narcotics since his arrest and jail detox in 2012.
Taking the Stand: My Life in the Law
By Alan Dershowitz (Crown Publishers 2013)

Reviewed by Joanna Crispi

Taking the Stand reveals Alan Dershowitz as a man who loves his family, likes his friends, supports his students and fights for his clients. For anyone who knows Dershowitz, as I do, first as a student and research assistant and later a colleague, this is true. However brash and vituperative his public persona, in private he is soft-spoken, kind and surprisingly self-effacing.

A hybrid of memoir and autobiography, Taking the Stand is replete with “vignettes” consisting of jokes, asides and anecdotes that provide minor, colorful digressions from the more traditional narrative. Dershowitz starts at the beginning: “I was born on September 1, 1938, in a hospital--the first in my family not delivered at home.” From there he goes on to recount his formative years as an Orthodox Jew in Boro Park, Brooklyn, not shying away from the more intimate discoveries of adolescence: “I need to thank my local synagogue for helping me discover sex. …When I reached a certain height, the top of the bench in front of me, which had a curve, was exactly parallel to my genitals…” Enough said. Dershowitz’s early years as a student are proof that high schools are terrible at predicting success. Having won his first legal battle

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Joanna Crispi is a lawyer and writer who lives in New York City and Milan, Italy. Her most recent novel is The Guilty Ones (NYQ Books, 2012).
to force his high school to allow him to take the NYS Regents Scholarship Exam, he began to soar.

Dershowitz takes the reader along on his journey from law professor to practicing lawyer to best-selling author, television guest and world-wide advocate for Israel, recounting the cases, clients, and legal issues that took him there. In addition to doing what he loves, or perhaps because of it, he is indefatigable, in his own words, afflicted with “FOM,” “fear of missing something.” His openness to people and ideas, evident throughout the book, is an essential aspect of his success. He was willing to give research opportunities to interested students and never berated them. A team would assemble in his office in the final days before a brief was due, drafts and research in hand. Dershowitz wrote the final draft himself, sitting behind his cluttered desk, oblivious to time and the activity around him, a yellow pad on his lap, his head bent as his scribbling hand tried to keep pace with his thoughts.

Dershowitz avoids detail about the Claus von Bulow and O.J. Simpson cases, having devoted earlier books to them. In a game of trivia a good question might be, who was the lawyer who won the acquittal of Claus von Bulow? Most people would answer, Alan Dershowitz. This brings up something missing from Taking the Stand. The way Dershowitz tells his life story, he is the passive recipient of one remarkable spontaneous opportunity after another. He never appears to acknowledge his love of the limelight. I worked with him throughout his brilliant handling of the successful von Bulow appeal, recounted in his book Reversal of Fortune. After the appeal, I continued to represent von Bulow as part of the team of lawyers at the second trial at which Dershowitz played little role. On the first day of jury selection, my co-counsel Andrew Citron and I, both practicing attorneys, were swarmed by press, asking, “Are you the Dershowitz students?” I wonder where they got that idea? Not many people will remember that the lawyer who won the von Bulow trial, no less brilliantly, was the late Thomas Puccio.

After the von Bulow reversal Dershowitz, labeled a “C-List date” by his high school prom committee, began cavorting with “A-List” celebrities. Accordingly, the narrative is festooned with the bon mots and dirty laundry of the rich and famous. In a more serious vein, Dershowitz, an unabashed champion of the causes he values, illustrates through analysis and behind-the-scenes insights how his arguments have shaped the law in these areas. As a Supreme Court clerk he drafted the famous Escobedo opinion, which paved the way for the Miranda decision. A tireless champion of the First and Fourth Amendments, he has rallied his support in many forums in and out of court. He chronicles his successes and setbacks in the fight to abolish capital punishment. On the basis of his representation of former boxing champion Mike Tyson, and the more recent Dominique Strauss-Kahn case, he discusses the potential unfairness of date rape prosecutions. His testament to the late Senator Ted Kennedy under the heading, THE CASE I STILL CAN’T TALK ABOUT; CHAPPAQUIDDICK, proves both his unflappable loyalty to a friend and his commitment to liberalism. Although he considers himself a liberal, “70’s liberal” in my view is a better characterization of where he stands: “It’s not that I always trust the citizenry; it’s that I never trust the government,” Dershowitz writes.

Dinner parties and summers in Martha's Vineyard notwithstanding, Dershowitz appears to recognize his “liberalism” has increasingly less in common with the ideology espoused by today’s leftists. His commitment to Israel, where upon reflection he believes his legacy will lie, seems foremost in his thoughts at this stage in his life as he describes his encounters on both ends of the spectrum, with Israeli Prime Minister Benjamin Netanyahu, a longtime friend, and his public challenges to former Iranian president Mahmoud Ahmadinejad. Though some would criticize his penchant for publicity, it has resulted in opening to the public an education otherwise reserved for a law school in Cambridge, MA. For this he is owed a debt of gratitude.

Taking the Stand is Dershowitz’s summation at the end of a one-witness trial based almost entirely on direct examination with a little cross thrown in for credibility. Intrepid as always, he invites the reader to act as jury. Assuredly whatever the verdict, consistent with his tenacious litigation style and his obsession with having the last word, it is unlikely to end there. At a recent event in New York City students from his last criminal law class informed me that the classes were being videotaped. My guess – Professor Dershowitz, The Documentary? A
Brief Examinations

The Illustrated Guide to Criminal Law
By Nathaniel Burney (Jones McClure Publishing 2012)

Briefly examined by Sally Ramage

This paperback has 17 chapters and is 335 pages long, but unlike any other law book, it is offered as a series of comic strip stories illustrating crime and punishment. It also includes such topics as mens rea, actus reus, inchoate crimes and some defenses.

One reason for this illustrated guide is to debunk many myths about criminal law. We have all heard, for example, that “an undercover police officer has to tell you if he is a cop. Otherwise it’s entrapment.” This kind of nonsense is repeated on street corners, locker rooms and on websites every day. The author uses a very light approach to straighten out the reader in a way that is fun and amusing. Even a cursory glance at a few pages “illustrates” that the author has done well in his quest. The reader should be aware, however, that the book covers some very technical topics doing so in a clear and clever way. So that we are very clear here, this book departs entirely from the format of a traditional law book in that it does not cite any cases, statutes or regulation. To use a phrase commonly used today, this book employs out of the box thinking in the extreme.

In New York especially, crime stories are featured on the front pages of newspapers and other media all the time and this is not new. Crime sells newspapers, etc. One has only to remember the murder of John Lennon in 1980; the ridiculously high crime rates in the 70’s and 80’s when the New York City murder rate sometimes went over 2000 in one year; bombings and other acts of terror which continue to this day, to see a little history of crime and its coverage in New York and other locations. And if the reader cares to look at national statistics compiled by the FBI and other agencies, it is clear that the people

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Illustrated Guide
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of the United States have seen their share of crime. That crime is a feature of life is all the more reason for an illustrated book of criminal law. What better way to educate the public, adults and young people alike, in the whys and wherefores of the criminal law.

As noted above, this book takes a different approach. Where else can you find a law book that utilizes Schrödinger’s Cat Theory? For those of you that must know (and have an understanding of quantum mechanics), you can find this out where the author uses Schrodinger’s cat to illustrate a point in evidence law.

Nathaniel Burney introduces criminal law to lawyers and non-lawyers, adults and youngsters, in an ingenious way. His book is written in such a way that the subject matter is more accessible than it would be in a traditional law book or blog. It breaks the law down into easy pieces and is written in a casual way. Speaking of accessibility, it is a paperback and cheaper than your average law book. The book is certainly novel and written in a most refreshing way. It should be placed in every library in the country so that the public and especially young people might (unwittingly even) be drawn to understand criminal law.

Buy the book. Give it to your local library, a would be lawyer or a would be criminal. You might even read it yourself. It is very funny.

CSAAS
Continued from page 20

mother did more stuff for him (Robert) and herself. The Court believed Tina was upset at her mother for paying so much attention to Robert.

Dr. Treacy also believed Dr. Meltzer did not adequately explore an alternative hypothesis. Such alleged touching may not have been sexually oriented. Dr. Meltzer did not, at all, seek information regarding this issue. The Court even found, in arguendo, that had the touching taken place, it was not possible for the Court to conclude it was for the purpose of sexual gratification. Dr. Treacy testified Tina was an honor student, yet could not be sure what actually occurred. She found this to be suspicious due to a fourteen-year-old child’s ability to remember and communicate. Tina explained on the taped interview, “I think it was a misunderstanding,” “I don’t really know,” “maybe,” and “I’m not sure.”

Dr. Treacy testified as to the proper methodology to employ as a validator pursuant to various protocols, including initial contact, establishing rapport, making an assessment, determining competency, conducting interviews of other sources, analyzing alternative hypotheses, and finally forming an informed conclusion. These protocols were developed to determine reliability, or lack thereof. Dr. Meltzer followed no prescribed methodologies, and failed to utilize objective tests. Dr. Meltzer’s conclusions were reached to satisfy her own agenda, not on the information presented to her. Thus, Dr. Meltzer violated her duty, legally and ethically, to form an accurate and neutral opinion.

Ultimately, Dr. Meltzer offered an opinion to corroborate the child’s out-of-court statements. She opined that to a reasonable degree of certainty the child’s status was consistent with that of a child who was sexually abused. Dr. Treacy concluded there was insufficient evidence to declare, with a reasonable degree of psychological certainty, that the child had been sexually abused.

Due to numerous flaws in Dr. Meltzer’s questioning of Tina, flaws in her written report, and her inconsistent testimony, as well as the rebuttal testimony of Dr. Eileen Treacy, the Court disagreed with Dr. Meltzer’s opinion.

The Court determined Dr. Meltzer had not corroborated the statements of Tina and the statements made by Tina to Dr. Meltzer were inconsistent. The Court dismissed the allegations against Robert, ending his nightmare.

Brief Examinations

Representing the Accused, A Practical Guide to Criminal Defense
By Jill Paperno (Thomson Reuters/Aspatore 2012)

If you are a law student in a criminal law clinic, a lawyer beginning to practice criminal law either privately or with an institutional defender or a general practitioner who gets into criminal law cases from time to time, this is a book that belongs in your library.

This book is not a criminal law book in the usual sense. It is, rather, as the title suggests a “How To” book and while it very much is concerned with New York criminal law, attorneys practicing in other jurisdictions can benefit from this book as well. It is not until Chapter six beginning at page 91, entitled Arrest, arraignment and Bail Procedures that the author gets into the law. One of the beauties of the first sections of the book is that it offers advice on what is useful in any type of criminal case and ways to look at and approach all criminal cases.

I particularly like the author’s treatment of subpoenas and hearings. In my view, most practical criminal law and “how to” books are sadly deficient when discussing the law surrounding the use of subpoenas as well as the law that may give rise to the use of subpoenas, i.e., what a subpoena is and how one can be used. The author gives a good overview of the constitutional law in this area with references to cases with citations. Of great use to anyone engaging in subpoena practice is a list of questions an attorney must ask herself once she has decided what information she is seeking (page 174). I wish I had this list when I was starting out.

In the section on hearings Ms. Paperno asks the practitioner to determine what his/her goals are with respect to the conduct of the hearing in a given case. Most beginning lawyers will automatically respond that the goal of the hearing is to win it. More experienced practitioners will

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realize that there are multiple goals to consider in the preparation of your cross examination. Do you wish to engage in discovery, do you wish to get a witness committed to certain statements, etc. This book offers different strategies for your cross examination depending upon what the goals are.

It is not my intention to go through each chapter of this book but I have tried to demonstrate how this can be a very useful work. Jill Paperno has succeeded in writing an excellent book and a great tool for representing the accused. The book provides insight and guidance on how to efficiently and effectively manage each step in the handling of a criminal case. The author is the second assistant public defender in the Monroe County Public Defender’s Office in Rochester, New York and has been with that office for twenty-five years. During that time she has handled numerous violent crimes and narcotics cases and has assisted in the development of the training program for that office. She is also a well-known lecturer and has participated in numerous continuing legal education programs. Jill also blogs on NewYorkCriminalDefense.blogspot.com. Ms. Paperno knows what she writes about and I am pleased to have this book as a part of my criminal law library.
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www.nysacdl.org/member-directory/
NYSACDL standing committees are chaired by members in good standing who are appointed by the President. Committee membership is a rewarding opportunity for members to network with colleagues throughout the state and to explore various issues in depth. Members are invited to join committees to further the important work of our association. If you are interested in joining a standing committee (listed below), please contact the committee chair or the Executive Director’s office: jivanort@nysacdl.org, 518-443-2000, for more information.

**Join the Committee**

<table>
<thead>
<tr>
<th>AMICUS CURIAE COMMITTEE</th>
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<tbody>
<tr>
<td>Chairs: Marc Fernich (<a href="mailto:maf@fernichlaw.com">maf@fernichlaw.com</a>), Brendan White (<a href="mailto:brendan@whiwhi.com">brendan@whiwhi.com</a>)</td>
<td>Chairs: Andrew Kossover (<a href="mailto:ak@kossoverlaw.com">ak@kossoverlaw.com</a>), Lisa Schreiersdorf (<a href="mailto:lschreib@bds.org">lschreib@bds.org</a>)</td>
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<tr>
<th>ANNUAL DINNER COMMITTEE</th>
<th>LETTERS TO THE EDITOR COMMITTEE</th>
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<td>Chair: Aaron Mysliwiec (<a href="mailto:am@fmamlaw.com">am@fmamlaw.com</a>)</td>
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<tr>
<td>Members: Lori Cohen, Danielle Eaddy, Andrew Kossover, Aaron Mysliwiec, Benjamin Ostrer, John Wallenstein</td>
<td>Members: Alice Fontier, Andrew Kossover, Marshall Mintz, Joshua Saunders, Lisa Schreiersdorf, Susan Walsh</td>
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<tr>
<th>CONTINUING LEGAL EDUCATION COMMITTEE</th>
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<tr>
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<tr>
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<td>Members: Bruce Barket, Mitch Dinnerstein, Peter Dumas, David Goldstein, James Grable, Timothy Hoover, André Vitale</td>
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<tr>
<th>CONTRACTS COMMITTEE</th>
<th>PROSECUTORIAL AND JUDICIAL COMPLAINT COMMITTEE</th>
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<tr>
<td>Chair: Andrew Kossover</td>
<td>Chair: Michael Shapiro (<a href="mailto:MShapiro@clm.com">MShapiro@clm.com</a>)</td>
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<tr>
<td>Member: David Goldstein</td>
<td>Members: Daniel Arshack, Danielle Eaddy, Alice Fontier, Lawrence Goldman, Florian Miedel, Thomas O’Hearn, Benjamin Ostrer, Donald Rehkof</td>
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<tr>
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<th>PUBLICATIONS COMMITTEE</th>
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<tr>
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<tr>
<td>Members: Joshua Saunders, Susan Walsh</td>
<td>Members: Richard Barbuto, Jessica Horani, Lisa Peebles</td>
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<th>FINANCE AND PLANNING COMMITTEE</th>
<th>WHITE COLLAR CRIME COMMITTEE</th>
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<tr>
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<td>Chairs: Joshua Dratel (<a href="mailto:jdratel@joshuadratel.com">jdratel@joshuadratel.com</a>), Aaron Mysliwiec (<a href="mailto:am@fmamlaw.com">am@fmamlaw.com</a>)</td>
</tr>
<tr>
<td>Members: Aaron Mysliwiec, Kevin O’Connell, Benjamin Ostrer, Michael Shapiro</td>
<td>Members: Robert Caliendo, James Grable, Timothy Hoover, Arnold Levine, Brian Melber, Kenneth Moynihan, Michael Shapiro, Robert Wells, Richard Willstatter</td>
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*All memberships include $15 donation to the NYSACDL Foundation, Inc.
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<th>Membership Type</th>
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<tbody>
<tr>
<td>Lifetime Member</td>
<td>$2500</td>
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<tr>
<td>President’s Club</td>
<td>$515</td>
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<tr>
<td>Sustaining Member</td>
<td>$315</td>
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<tr>
<td>Regular Member</td>
<td>$215</td>
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<tr>
<td>Income over $50,000</td>
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<tr>
<td>In practice over 5 years</td>
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<tr>
<td>Regular Member</td>
<td>$140</td>
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<tr>
<td>Income under $50,000</td>
<td></td>
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<tr>
<td>In practice less than 5 years</td>
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<tr>
<td>Full-time public defender</td>
<td></td>
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<tr>
<td>Associate Member</td>
<td>$190</td>
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<tr>
<td>Non-lawyer</td>
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<tr>
<td>Retired Attorney</td>
<td>$90</td>
</tr>
<tr>
<td>Law Student/Recent Law School Alumni</td>
<td>$50</td>
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<td>(less than one year since completion)</td>
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<tr>
<td>School: ____________________________</td>
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<td>Graduation date: _________________</td>
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Our Mission

- 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.
MEMBER BIOGRAPHICAL INFORMATION IN OUR MEMBER PROFILE – Members can now include brief biographical information (positions held, bar admissions, schools attended, honors or publications) in our online searchable Membership Directory. This directory is available to the general public and is referenced by those seeking counsel and assistance throughout the state.

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

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

NCDC SCHOLARSHIP PROGRAM – NYSACDL members in good standing are eligible to apply for the Twelve Angry Men scholarship to the annual National Criminal Defense College in Macon, Georgia.

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

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

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

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

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A Conversation with Assemblymember
Daniel J. O’Donnell

Assemblyman O’Donnell represents the 69th Assembly District located in Manhattan’s Upper West Side.

Can you tell our members about your background and how you came to be a New York State Assemblymember?

I began my legal career as a public defender at the Legal Aid Society in Brooklyn from 1987 to 1995. After leaving Legal Aid, I opened my own public interest law firm on the Upper West Side of Manhattan, where I handled a wide range of cases, including tenant representation and civil rights litigation that ranged from employee discrimination to First Amendment rights. After serving on Manhattan’s Community Board 9 for seven years, I was elected to the Assembly in 2002.

Can you explain the areas of jurisdiction and your role as Chair of the Corrections Committee?

The Correction Committee has jurisdiction over all of New York State’s correction law and the portions of the executive law relating to the State Board of Parole. We are consulted by other Assembly committees about any issues relating to criminal convictions. The committee also advances legislation for needed changes and reforms in our areas of law.

We also have a role in the executive budget process, ensuring funding for progressive non-profits, supporting or opposing legislation proposed by the governor and the Senate, and promoting our own budgetary agenda. As Chair, I meet with stakeholders and hold hearings to gather information on correctional and post-conviction issues. I also advocate for prisoners or parolees in need of help.

What do you see as the important issues this year and over the next few years for your committee and the Assembly in general?

I see parole reform and reduction in the use of Special Housing Units (SHU), especially for specialized populations, as two of the most essential issues for Correction Committee in coming months. The drastic need for reform in both of those areas has become more and more clear in recent years; reforms must be made and I am certainly going to do my best to make sure they get accomplished.

What can be done by our organization and our individual members to advance these goals?

In Albany, all too often only one voice on a particular topic is heard. For corrections issues, it is essential that the wide range of perspectives is known; the best way for that to happen is for individuals and organizations to contact their own Assembly Members and State Senators to share their views. That will shift the dialogue and make the consequences of current corrections problems more widely known, as well as making solutions for them more acceptable.

Over the past few years, as you know, key issues for NYSACDL have included the insufficient discovery in criminal cases and the lack of sealing or expungement for people who have been convicted of a crime and have not re-offended for a period of time. Can you tell our members the status of these issues?

Right now there are several bills relating to sealing and discovery in the Assembly. I personally carry several of them, including A3492, A7653, A7770, and A8973. The Chair of the Assembly Codes Committee, Assembly Member Joe Lentol, carries a number more. Unfortunately, only one of those bills has a majority sponsor in the State Senate—Assembly Member Lentol’s bill A3801, which is also sponsored by Senator Diane Savino as S4089. That bill would require broad disclosure of evidence in criminal trials. It passed the Assembly in 2013, but died in the Senate and is currently awaiting action in the Senate Codes Committee. For the other bills, without a majority sponsor in the State Senate, it is unlikely the Senate will pass them. In the Assembly, we will continue to advocate for the bills to push the issue forward and ensure it stays at the forefront of criminal justice conversations.
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- Dan Arshack
- Matthew Kluger
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and Attorneys from the Federal Defenders Office of New York

To request a panel of judges, or if you have questions about the program, contact NYSACDL’s Executive Director, Jennifer Van Ort

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