In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
Message from the President

Benjamin Ostrer

To All Who Support Quality Criminal Defense,

The Board of Directors and Executive Officers are pleased to present the Summer 2013 edition of Atticus as we mark several firsts for NYSACDL. Our membership numbers have once again improved over the prior year, as we move towards our goal of 1,000 strong. We are very pleased to introduce our new Executive Director Jennifer Ciulla Van Ort, who brings her considerable experience in the Not for Profit field to NYSACDL. Jennifer most recently served as an executive in alumni relations at a Capital District SUNY institution and will be NYSACDL’s first full-time ED. We collectively thank Meg Alverson for her four years of service to NYSACDL and to Sandy Wissell who ably manned the NYSACDL office. We are also proud to announce the opening on June 1, 2013 of the NYSACDL offices to 90 State Street, Suite 700 in Albany, N.Y. Our members are invited to stop by if you need a place to hang your hat, while in Albany or just to say hello. We are now only steps away from the New York State Court of Appeals, Appellate Division Third Department and the hub of our state government.

The strategic location of our offices will enhance our legislative programs and our visibility in the halls of the New York State Assembly and Senate. As New York’s largest bar association comprised of criminal defense lawyers we have become a resource to legislators and their staffs on criminal justice topics. Our efforts have balanced what had been an unfavorable tipping of the scales in favor of prosecution legislation. We look forward to being vocal on matters of importance to the criminal defense community. You are invited to join a committee, by simply emailing your interest to Jen at our offices or by communicating with the respective chairpersons. The contributions of our members to Atticus, CLE, Amicus and the ListServ have been key to our successes. Planning has already begun on an extensive CLE schedule for the fall. We have expanded our presence on social media. Our CLE programs remain the finest available in New York and we have broadened the availability of our programs with expanded online delivery.

We have begun planning for a series of public service messages dealing with criminal justice topics to be carried in various media before the close of 2013. Please follow our CLE programming and mark your calendar for the annual dinner on January 30, 2014. Your thoughts and input are always welcome. Please feel free to contact me directly concerning any aspect of NYSACDL.

— Ben Ostrer
The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter. All his force dares not cross the threshold of the ruined tenement.

― William Pitt, House of Commons speech on the excise bill, March 1763
From the Editor’s Desk

The Crisis in Indigent Defense

It was no surprise that in this 50th Anniversary year of the Supreme Court’s historic *Gideon* decision, commentators would bemoan the sorry state of indigent defense services throughout the nation. Persistent underfunding and the pervasive failure of states to adopt and enforce performance and caseload standards left the dream of *Gideon* unfulfilled in most jurisdictions throughout the nation. But there was one bright spot in the nation’s long saga of struggle to secure first rate counsel for the indigent accused: the federal indigent defense system. The hybrid mix of adequately resourced federal defenders, complemented by similarly well-supported panels of qualified private practitioners, has provided high quality representation in most Federal District and Circuit Courts throughout the nation. Now that bejeweled model is itself in serious danger of becoming the poster child for *Gideon’s* failure.

The problem began when leadership in the Administrative Office of the Courts began to trim spending on indigent defense. And then the federal sequestration hit. Deep cuts were imposed on Federal Defender Offices with severe and immediate impact on lawyers and the clients who depend upon them. In the current fiscal year, Federal Defenders have had to impose up to 20 days of unpaid furloughs, open positions have gone unfilled and in some venues layoffs have been necessary. This is just the beginning.

With budget analysts predicting a shortfall in the defender budget of approximately $100 million in the Fiscal Year 2014 budget, Federal Defenders face funding cuts of 20 percent or more. This may necessitate laying off one-third to one-half of the staff in some defender offices. There are already reports that many districts are closing some offices, and others are simply shutting down for several weeks. The implications of this for client representation will be staggering.

In past fiscal crises, the Administrative Office of the Courts, the judicial entity which oversees federal indigent defense, has responded not by chopping Federal Defenders, but rather by deferring payments to Criminal Justice Act (CJA) panel attorneys. While deferred payments impose significant hardship on lawyers who depend upon regular payments to maintain their offices and cover overhead, eventually they have been made whole when funding was restored. But this time, court leadership has been unwilling to consider this option, thus far imposing the entire burden upon federal defenders. Some federal defenders have responded to their dire situation by making the argument that federal defenders provide representation at a lower cost, and there have even been suggestions that they also provide higher quality representation. This tension between private assigned counsel and public defenders has been a hallmark of dysfunctional state and local indigent defense systems for years. It is what happens when funders starve the system and relegate the dedicated women and men who serve the indigent to fighting over crumbs. This strife must be avoided at all costs.

Fortunately, many Federal Defenders, including David Patton, the Federal Defender

Continued on next page

About morals, I know only that what is moral is what you feel good after and what is immoral is what you feel bad after.

– Ernest M. Hemingway, *Death in the Afternoon*
for the Southern and Eastern Districts of New York, and Lisa Peebles, the Federal Defender for the Northern District (and a NYSACDL Director) have spoken eloquently in support of the hybrid system, recognizing that public and private defenders must work together. Many panel leaders have similarly voiced wholehearted support for their federal defender colleagues, and many are urging judicial administrators to address the crisis by planning for an extensive deferral of panel payments in Fiscal Year 2014. This commendable collaboration is essential to avoid calamity. There can be little doubt that when it becomes clear that Federal Defender offices can no longer absorb further cuts, the axe will be wielded against CJA vouchers, with the very real prospect that the compensation rate itself will be reduced. Painful experience teaches what the ultimate result is when indigent defense systems are degraded: staggering caseloads, substandard representation and wrongful convictions. This outcome can be avoided, but it will take leadership and commitment. First and foremost, the federal judiciary must fight for the resources necessary to defend the Sixth Amendment and preserve the quality of the federal indigent defense system. As long as indigent defender services are a unit within the Administrative Office of the Courts, the protection of this fundamental constitutional right is the judiciary’s solemn duty. The current structure has worked because the leadership of the federal judiciary has fulfilled that duty. But times like these serve as a reminder that the first of the ABA’s Ten Principles of Indigent Defense is that a defender system must be independent. The American Bar Association has long advocated for an independent federally funded Center for Indigent Defense Services that would ensure the provision of effective assistance of counsel for the indigent accused in states and localities. NACDL recently urged that such an entity should also be assigned responsibility for the federal indigent defense system. If the judiciary is unwilling or unable to protect funding for indigent defense services, perhaps it is time to consider such an approach.

One thing is certain: any resolution of the impending crisis demands concerted effort. It requires that the entire criminal defense bar, indeed the legal profession as a whole, must stand up protected by the Constitution. The Department of Justice, and the law enforcement agents and personnel in other agencies, are “essential” personnel whose jobs and livelihoods are not in jeopardy. It is only the defense bar that faces Draconian reductions in money and personnel, and if the third leg of the stool is crippled, the entire structure collapses. Our mandate to provide zealous, effective representation to those accused of crime is grounded firmly in the Sixth Amendment, and we are no less essential to the fair administration of justice than the Courts or the prosecutors. It is only defense attorneys who stand between the citizens and the government to say, as did the wizard Gandalf to the Balrog in the Lord of the Rings, “you shall not pass!”

Benjamin Ostrer
John S. Wallenstein,
Editors
The Editors thank Susan Walsh, Esq., a NYSACDL Director, for her assistance in preparation of this editorial.

---

The Board of Directors of NYSACDL strongly supports the efforts of the Federal Defenders and CJA panelists throughout New York State and elsewhere to demonstrate the real value of our services, not only to those individuals whom we represent, but to the public at large and the criminal justice system itself. It is imperative that all of our members take the time to write and call our representatives and senators, and urge them to take action to restore indigent defense funding before the crisis consumes us.
Meet NYSACDL’s New Executive Director, Jennifer Ciulla Van Ort

The New York State Association of Criminal Defense Lawyers (NYSACDL) has a long and successful history of supporting criminal defense lawyers and those they serve. I am excited to be embarking with NYSACDL, as Executive Director, on a new chapter in the Association’s journey. The new State Street office in Albany is up and running, and I invite you to stop by and introduce yourself if you are in the area. My philosophy as Executive Director is simple – NYSACDL is its members. My responsibility is to grow this member-centric organization; to listen and respond to your needs; and to maintain and develop opportunities for education and collaboration. I am honored to be a part of the leadership team that supports the important work you do.

A NYSACDL Past-President came by the office recently to introduce himself and asked me “Who is Jennifer Van Ort?” This issue of Atticus gives me the opportunity to answer that question and give you a brief glimpse into the path I’ve taken to becoming your Executive Director. As a graduate of the University of Wisconsin School of Business, with a Master of Arts in Business: Arts Administration, I bring a unique combination of for-profit and not-for-profit knowledge to NYSACDL. While in Wisconsin, the experience I gained running several statewide initiatives for the Wisconsin Arts Board showed me the importance of creating successful collaborations and effective communications with the variety of constituents involved in the life of a vibrant organization. After returning from Wisconsin, I held a variety of positions in several Capital District performance arts organizations, including the Palace Theatre and the Albany Symphony Orchestra, with responsibilities ranging from customer service and box office management to fundraising, event planning, membership development and overall administration.

Most recently, a combination of positions in government administration and higher education have helped round out the qualifications I bring to NYSACDL’s Executive Director position. Working on public relations and special initiatives for the Saratoga County Board of Supervisors brought unique perspective on the internal workings of New York’s local governments and the challenges they face. I also had the advantage of having friends working close by – my father, John Ciulla, Saratoga County Public Defender, and his staff of attorneys and office administrators. Although I had grown up and had my first job as an assistant in Dad’s private practice, working for Saratoga County afforded me the opportunity to get a glimpse of the day-to-day experiences and challenges the Public Defender’s Office faced.

Continued on next page
Executive Director  
Continued from page 6

As Coordinator of Development for Schenectady County Community College (SCCC) and the SCCC Foundation, I was able to bring together my municipal experience with my not-for-profit experience. I am proud to have been a part of a growing, thriving college community and to have been a transformative part of the Development Office. Working with the Executive Director, in the past several years the SCCC Foundation has grown its fundraising capacity; seen increased participation from faculty, staff, alumni and community members; and increased its visibility among the Capital Region and throughout SUNY. I was able to play a significant role in both the day-to-day and long-term strategic planning of the SCCC Foundation. The knowledge and experience I gained working on a variety of administrative and program related initiatives will be a valuable resource to me at NYSACDL.

On a personal level, I enjoy being a productive member of the Capital Region community, volunteering for a variety of organizations and projects. My husband and I live locally and we enjoy time with family, friends and our two four-legged kids, dog Clyde and cat Bonnie. I have maintained an active involvement and interest in the performing arts as a local musician in several community bands and wind ensembles. I have an insatiable quest for learning and exploring new and unfamiliar concepts, resulting in a variety of interests and an ability to interact with people from all walks of life.

Since arriving in the Albany office recently, NYSACDL has had a flurry of activity. Starting with the Appellate Advocacy Seminar in Brooklyn and ending most recently with a Board of Directors meeting in Manhattan, my time has been focused on making sure all goes off smoothly, while beginning to plan for the remainder of 2013 and 2014. The Board and I have exciting membership development plans in the works, including soliciting feedback from current and lapsed members in a variety of ways. We want to know why you belong to NYSACDL, why you renew (or don’t), what features and programs are of most interest, what are of least. I encourage you to look for the opportunities coming soon to participate and provide feedback. Your knowledge of the current environment and what you need from an association like NYSACDL will help determine our outreach and program development.

I hope that, in addition to seeing you at a regional CLE seminar or in the Albany area, that I can also come visit you in your region of the state. Perhaps you have colleagues that could be encouraged to join NYSACDL with a personal visit from us? As current members, you are NYSACDL’s best cheerleaders, and your referrals could soon result in a benefit for both you and a colleague you encourage to join.

Administratively, the Board and I will be taking a look at how our systems and processes benefit our members and NYSACDL as a whole. Over the next several months, I will begin looking closely at items such as NYSACDL’s website, member communication processes, how we store and use member and other contact information, to name a few, to assess the current status and make any necessary immediate changes and other recommendations to the Board for improvements. Again, I look forward to your input in this process to be sure that we are meeting the needs of our end-users, the criminal defense lawyers of NYS.

This is just a quick snapshot of what’s in store for NYSACDL over the next several months. Of course, there is much I have yet to learn and understand about NYSACDL’s history and the direction in which we want to move. I invite you to reach out to me via e-mail or telephone, or, as I said, I’d be happy to make an appointment with you to visit in person.

Perhaps most importantly, we have started planning our 2014 Annual Dinner, so save the date of Thursday, January 30, 2014 in New York City – see you then if not before!

“If by the mere force of numbers, a majority should deprive a minority of clearly written constitutional right, it might, in a moral point of view, justify revolution – certainly would if such a right were a vital one.”

–Abraham Lincoln, First Inaugural Address, March 4, 1861
Immediate Past President, Richard D. Willstatter, along with Clinton W. Calhoun, III achieved a significant victory for their clients in the Southern District of New York in the case of United States v. Post and Charles, Case No. 08-CR-243 (KMK). Messrs. Willstatter and Calhoun were retained as counsel for the defendants after their conviction by a jury in 2009 of mail fraud or honest services fraud and conspiracy to commit mail or honest services fraud. They filed a post-trial motion to vacate the convictions based on the Supreme Court’s grant of certiorari in the Skilling and Black cases in which the “honest services” fraud theory used to convict the defendants was ultimately found to be improper. See Skilling v. United States, 130 S.Ct. 2896 (2010) and Black v. United States, 130 S. Ct. 2963 (2010). Both clients remained out of custody while the case was litigated and the motion to vacate was granted as to the two principal counts by Judge Kenneth M. Karas in a 39 page opinion on June 4, 2013. Judge Karas found that the jury may well have convicted on an improperly vague honest services theory due to the government’s presentation of the honest services fraud as an alternate theory for conviction. Defendant Charles has not been sentenced on the one remaining conviction of one count of making a false statement as the government determines whether to appeal or retry the defendants.

Member Matthew Galluzzo was successful on appeal in the Appellate Division, Third Department for a client whose plea was negotiated by counsel while maintaining an ‘of counsel’ relationship with his co-defendant’s attorney. In The People of the State of New York v. Darwyn J. Lynch, the defendant and a co-defendant were indicted on charges of rape stemming from an alleged incident with a fellow student at SUNY Delhi in September 2009. The co-defendant’s attorney was ‘of counsel’ to defendant Lynch’s attorney’s firm. Leading up to trial, the co-defendant’s attorney negotiated a plea for his client which included agreeing to testify against Lynch at trial. Defendant Lynch was not advised of a possible conflict of interest arising from the counsels’ legal association prior to entering a plea of guilty to a lesser included offense in exchange for a promised sentence of three years. After retaining new counsel defendant Lynch was unsuccessful in withdrawing his plea prior to sentencing and moving to vacate his conviction on grounds that he was denied effective assistance of counsel based on the undisclosed potential conflict of interest. Subsequently, Mr. Galluzzo handled the appeal of both the conviction and denial of defendant’s CPL 440.10 motion resulting in a favorable decision on March 28, 2013 vacating defendant’s plea and reversing the judgment of conviction. The written decision cited the existence of a “clear” conflict of interest which defendant never waived.

“First they ignore you, then they ridicule you, then they fight you, and then you win.”

–Mahatma Ghandi
Member Daniel E. Bertolino obtained an acquittal after a jury trial in a Driving While Intoxicated case in Orange County on June 25, 2013. The case involved a 26 year old female who was stopped by police after pulling over without signaling on her way home from a friend’s engagement party. The defendant was arrested for DWI following her roadside failure of a horizontal gaze nystagmus test and positive Alco-Sensor reading. Defendant threw up on the way to the station and registered a .15 blood alcohol content while at the station. At trial, Mr. Bertolino successfully challenged the arresting officer on cross examination using the Standardized Field Sobriety Testing Student’s Manual to show that 23 of the 24 ‘cues’ for detecting drunk driving were not observed by the officer as well as showing that nystagmus may be due to causes other than alcohol. Mr. Bertolino also had his client testify; explaining that her throwing up on the way to the station was a result of car sickness, which she frequently suffers from, which was aggravated by riding in the back seat of the police cruiser with her hands cuffed behind her back. A potentially fatal inculpatory statement by the defendant was successfully precluded during a pretrial Huntley/Dunaway hearing as the statement was found to have been unnoticed per CPL 710.30. Key to the success of the trial was the preclusion argument which would have been waived if counsel missed the lack of notice and argued instead for suppression.

NYSACDL Member Oliver S. Storch, Esq, was awarded by the Abraham House the Justice and Compassion Award in recognition of his commitment to second chances.

Lisa Shreibersdorf, Executive Director of Brooklyn Defenders and a past president of NYSACDL, has recently received the Judith Kaye Public Service Award from the New York Women’s Bar Association.

NYSACDL Member Anne Rudman was appointed Chair of the Board of Directors of Lawyers Without Borders. Over the past six years, Rudman has worked with Lawyers Without Borders to implement trial advocacy programs in Liberia, Kenya and Uganda.

Experience should teach us to be most on our guard to protect liberty when the government’s purposes are benificent.

– Louis D. Brandeis, dissenting opinion Olmstead v. United States, 277 U.S. 438 (1928)
Parole Release Decisions and the Rule of Law

By Alan Rosenthal and Patricia Warth

Introduction

On March 31, 2011 several significant amendments to New York's statutes governing parole release procedures were signed into law, including a revision of Executive Law § 259-c(4) which now requires the Parole Board to:

*Establish written procedures* for its use in making parole decisions as required by law. Such written procedures *shall incorporate risk and needs principles* to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

The effective date of this mandate was October 1, 2011, and though more than two years have passed since the Parole Board was made aware of this legislation, the Parole Board has failed to comply.

It should be no surprise to the Parole Board that there is a controversy brewing regarding its failure to fulfill the requirement of the 2011 amendment. This issue has been percolating since the amendment to the statute and over the last twenty-two months has been explored in legal journals.¹ Early on one court weighed in, informing the Parole Board that it attached great significance to the amendment to

Executive Law § 259-c(4), and describing this amendment as “remedial in nature and designed to modernize decision-making in the area of Parole Release.”

The issue now emerging in the courts is whether the Parole Board has complied with Executive Law § 259-c(4)’s mandate that it establish written procedures that incorporate risk and needs principles for use in its decision-making. The Parole Board takes the position that an October 5, 2011 one and a half page memo written by Parole Board Chairwoman Andrea Evans to other members of the Parole Board constitutes the written procedures required by the 2011 amendment to the Executive Law. By April 1, 2013, two courts had reached opposing views on this assertion, with one court (in an unreported decision) agreeing, and another court soundly rejecting the Parole Board’s position, stating as follows:

…this Court finds nothing in the record to suggest that the written procedures mandated by the amended version of Executive Law § 259-c(4) were established, much less implemented and considered in the context of determining whether or not petitioner should be released to parole supervision.

Other courts, in unreported, pro se proceedings, had expressed little concern that the Parole Board was out of compliance with the Executive Law § 259-c(4) mandate. Finally, on April 12, 2013, in the first case decided by a court that had the benefit of a full briefing on Executive Law § 259-c(4) compliance by a Petitioner represented by counsel, Justice Mott issued a thoughtful and firm analysis. In Matter of Morris Justice Mott held that “the Evans Memorandum itself is not and cannot serve as the required procedures” and for that reason the “parole hearing was unlawful.”

---

3 Memorandum from Andrea Evans, Chairwoman, NYS Board of Parole, to Members, NYS Board of Parole (Oct. 5, 2011) (on file with authors) (hereinafter “Evans’ Memo”).
6 Like shooting fish in a barrel, the Attorney General enjoyed a string of successes with trial courts left without the benefit of memoranda of law from pro se Petitioners.
8 Id. at 857.
COMPAS, TAP, and “Risk and Needs Principles”: A Brief Explanation

With the amendment to Executive Law § 259-c(4) and the addition of Correction Law § 112(4) and § 71-a, the following three new terms have been added to the parole lexicon.

RISK AND NEEDS PRINCIPLES

Prior to the 2011 amendment to Executive Law § 259-c(4), the parole Board’s consideration of a risk and needs assessment instrument was discretionary. The 2011 amendment explicitly mandates incorporation of risk and needs principles into written procedures and, in so doing, implicitly mandates the use of a risk and needs assessment instrument.

Evidence-based practice utilizes the “principles of effective intervention” which have been developed by researchers through review and analysis of studies over the past thirty years. These principles, which are highly interdependent, include actuarial risk and needs assessment and risk and needs principles. In the context of parole release consideration, risk and needs principles have a particular meaning. The risk principle requires assessment, identification and consideration of the risk level of the individual. To engage the risk principle requires a comprehensive examination and evaluation of both dynamic (changeable) and static (historical and/or demographic) actuarial, evidence-based factors that research shows correlate to a higher risk of recidivism. The needs principle requires assessment, identification and focus on the crime-producing (criminogenic) needs of the individual.

Assessment of risk and needs requires use of an assessment instrument. The Legislature recognized this and for that reason, in the same legislative session during which Executive Law § 259-c(4) was enacted, it also enacted Correction Law § 112(4), which provides as follows:

The Commissioner and the Chair of the Parole Board shall work jointly to develop and implement, as soon as practicable, a risk and needs assessment instrument or instruments, which shall be empirically validated, that would be administered to inmates...

To this end, DOCCS, the Parole Board, and the Legislature have invested significant resources into the development of the COMPAS Reentry Risk Assessment Instrument for use as the empirically validated tool for identifying risk factors and criminogenic needs so that risk and needs principles can be incorporated into the parole release decision-making.

As the Parole Board’s use of COMPAS is necessary to comply with Executive Law § 259-c(4) it would seem indisputable that even the most rudimentary of written procedures must include an explanation of how the Parole Board is to use COMPAS in its parole release decision-making. The “Evans’ Memo” does not instruct the Parole Board on how they are to use COMPAS, or what weight to give it. Most significantly, it fails to even instruct the Parole Board to use COMPAS.

COMPAS

In order to incorporate risk and needs principles into any decision-making there must be an assessment and identification of both risk and needs. An assessment instrument is the engine that drives evidence-based practice. The

---

10 Brendan J. Lyons, State Tells Parole Officers to Surrender Guns, TIMES UNION (February 24, 2012).
13 The concept of risk and needs principles was pioneered in the research and writing of Don Andrews, James Bonta, Edward Latessa, and Paul Gendreau. See Christopher T. Lowenkamp, Jennifer Pealer, Paula Smith, & Edward J. Latessa, Adhering to the Risk and Need Principles: Does It Matter for Supervision-Based Programs, 70 FEDERAL PROBATION, 3-4 (December 2006).
COMPAS Reentry Risk Assessment Instrument (COMPAS) is a fourth generation risk and needs assessment instrument first developed in 1998 by Northpointe Public Institute for Public Management to assess the criminogenic needs and risk of recidivism of people who have been convicted of a crime. Empirically developed, COMPAS focuses on predictors known to correlate with increased rates of recidivism. The COMPAS Reentry Instrument used by DOCCS was specifically designed by Northpointe for New York.

From documentation obtained through FOIL, it is now clear that: COMPAS is prepared by DOCCS staff for all individuals appearing before the Parole Board for release consideration; it is supposed to be considered by the Parole Board in every case; and the COMPAS instrument is intended for their use specifically in order to comply with Executive Law §259-c(4). In fact the Evidence Based Frequently Asked Questions (FAQ’s) document that Parole Board Members were provided for training purposes explains the relationship between the 2011 amendment to the Executive Law and the COMPAS instrument in the following way:

Q: Why is the Board using the COMPAS instrument at this time?

A: For some time, the incorporation of evidence based practices into the Parole Board’s decision-making practices has been envisioned. More recently, the Executive Law was amended (Executive Law § 259-c(4)) so as to require the Board have written procedures for its use in making parole decisions and that such written procedures incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release and assist members of the Board in determining which inmates may be released to parole supervision. The COMPAS instrument is a document which embodies the risk and needs principles contemplated by the Executive Law. (Emphasis added).

The Legislature was fully aware that the Parole Board would need COMPAS or some risk and needs assessment instrument in order to comply with Executive Law § 259-c(4). It is exactly for this reason that the Legislature enacted Correction Law § 112(4) to require the development and implementation of the COMPAS risk and needs assessment instrument. The above-quoted FAQ provided to the Parole Board recognized the obvious: in order to use risk and needs principles a risk and needs assessment instrument is required.

TAP

During the same legislative session in which Executive Law § 259-c(4) was enacted, the Legislature also enacted Correction Law § 71-a, requiring the development and use of a Transitional Accountability Plan (TAP), perhaps best described as a case management plan. Parole describes TAP as “…a coordinated case management plan which identifies the actions which need to take place in order to effectively prepare an individual for release to community supervision… guide programming…[and] provide critical information to the Parole Board for release decision making…”

The “Evans Memo” does provide some guidance, albeit not procedures, for the use of the TAP. In sum the guidance is to use the TAP if available.

Although TAP is required by Correction

16 Northpointe, PRACTITIONERS GUIDE TO COMPAS, 1 (2011).

17 NYS Board of Parole, EVIDENCE BASED PRACTICE FAQ’S (included with October 12, 2012 letter from Patrick Lawlor, Esq., Board of Parole, Counsel’s Office, FOIL Unit, to Alan Rosenthal, Esq., in response to a request for materials used to train the NYS Board Parole on the use of risk and needs principles and the risk and needs instrument (COMPAS) (on file with authors) (hereinafter EVIDENCE BASED PRACTICE FAQ’S).
Parole Release Decisions  
Continued from page 13

Law § 71-a, and seems to be required for Parole Board consideration by the “Evans’ Memo” if available, it appears that the Parole Board intends to abandon its use. At a recent parole hearing, Parole Commissioner Ferguson, in response to a question by a parole applicant about his TAP, answered that:

Tap is not something that has been rolled out yet. In fact, it’s probably not going to happen. It’s going to be replaced with a new and updated version of COMPAS.19

The confusion over whether TAP has been abandoned or is still in use highlights the need for specific procedures setting forth what documents or instruments are to be considered by the Parole Board and how they are to be used.

THE PAROLE BOARD HAS FAILED TO FOLLOW THE REQUIREMENTS OF EXECUTIVE LAW § 259-C(4)

There is no official indication that the Parole Board has promulgated the procedures required by Executive Law § 259-c(4). Indeed, a review of the state register and the official compilation of codes, rules and regulations of the State of New York, where such rules and procedures would be published, reveals nothing, not even the “Evans Memo.”20 In light of the plain language of the amendment to Executive Law §259-c(4) the Court in Matter of Morris found it “inexplicable” that Respondent “still has adopted no new procedures.”21

Though the Parole Board has taken the extraordinary position that the “Evans Memo” constitutes the written procedures required by Executive Law § 259-c(4), other statements issued on behalf of the Parole Board seem to concede that they have not yet established procedures. The April 12, 2012 official response to a FOIL request from attorney Edward Hammock, a former Chairman of the Parole Board, stated as follows:

The written procedures to be implemented pursuant to the amendment of Executive Law §259-c(4) are currently being developed by the Board and Department staff.22

This FOIL response goes on to reference the “Evans Memo” as providing interim direction and guidance.

Chairwoman Evans, during testimony before the Assembly Committee on Correction, on November 10, 2011, made no reference to her October 5, 2011 memo as establishing procedures, and instead stated that the procedures will be established in the future and that “the Board’s written procedures will call for the use and careful consideration of these documents,” referring to the COMPAS instrument and TAP.23

The “Evans Memo” is not a promulgated procedure. It is nothing more than an acknowledgement that Executive Law § 259-c(4) has been amended, a reminder to use the TAP instrument when available, a reminder that there has been training on the COMPAS Risk and Needs Assessment instrument, a recitation of the long standing statutory factors contained in Executive Law § 259-i(2)(c)(A), and a reminder that rehabilitation is a factor that Board members should continue to consider. By no stretch of the imagination can it be said that the “Evans’ Memo” sets out the procedures required by Executive Law § 259-c(4), or any procedures at all.

More importantly, while the “Evans’ Memo” reminds the Parole Board that they have been trained on COMPAS, it does not set forth any procedures for using the COMPAS instrument. This omission is critical when considered in light of the fact that the Parole Board acknowledges that the COMPAS Reentry Risk Assessment Instrument “is a document which embodies the risk and need principles contemplated by the Executive Law.”24

The “Evans Memo” is just that, a memo. It fails to accomplish the Legislative goal of requiring the Parole Board to rely on evidence-based decision-making; rather, it is a green light to the


20 At the very least one would expect that if the Parole Board stood by its contention that “Evans Memo” was the written procedure that govern its conduct in compliance with Executive Law § 259-c(4) that it would be included in Title 9 of NYCRR, as required by 9 NYCRR § 8000.1.

21 See Matter of Morris, supra note 7 at 856.

22 See EVIDENCE BASED PRACTICE FAQ’S, supra note 14.

23 Written testimony of Andrea Evans, Chair of NYS Div. of Parole, before Assembly Committee on Corrections (Nov. 10, 2011) (on file with authors).

24 Letter from Patrick Lawlor, Esq., Board of Parole, Counsel's Office, FOIL Unit, to Edward Hammock, former Chair, NYS Div. of Parole (April 18, 2012) (on file with authors).
Parole Board to carry on with the “correctional quackery” of the past.

The Parole Board’s refusal to establish written procedures undermines the rule of law. As noted in Nicholas v. Kahn:

The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation.25

The Parole Board has utterly failed to “fill in the interstices.” As the Nicholas court aptly concluded, “[t]he safeguard against arbitrary administrative action lies in the promulgation of adequate standards…” Without the procedures required by Executive Law § 259-c(4), all resulting administrative decisions, unguided by procedures, will be inherently arbitrary. This lack of procedures or standards will also thwart judicial review. Without procedures, how is a court to know whether the primary standard set by the Legislature has been followed?

TO BE VALID A RULE, REGULATION OR PROCEDURE MUST BE FILED

Even if the “Evans Memo” did establish meaningful procedures for implementing the 2011 requirements of Executive Law § 259-c(4), it cannot be considered valid. In order for any rule, regulation or procedure to be valid it must be properly promulgated and filed according to the requirements of Executive Law § 101-a and § 102, State Administrative Procedure Act (SAPA) § 202 and § 203, and the New York State Constitution, Art. IV, § 8.

The Executive Law, SAPA and the State Constitution all impose a severe consequence for failure to file with the Secretary of State or Department of State: the rule is not effective until filed.26 The procedures required by SAPA apply to all agencies. 27 The term agency is define in SAPA §102(1) to mean “any…board…authorized by law to make rules or to make final decisions in adjudicatory proceedings.” The Parole Board is a “board” and is authorized by law to make “rules” and “final decisions in adjudicatory proceedings” thus clearly placing it within the mean-

with SAPA an agency must: 1) prior to the adoption of a rule, submit a notice of proposed rule making to the Secretary of State for publication in the state register;30 and 2) file the rule with the Secretary of State along with a notice of adoption for publication in the state register.31 It is clear that procedures required by Executive Law § 259-c(4) fall within the definition of “rule” as that term is defined in SAPA § 102(2) (a), which defines “rule” to mean “the whole or part of each agency statement, regulation or code of general applicability that implements or applies law…or the procedures or practice requirements of any agency…”

The Court of Appeals has further interpreted the term “rule,” subject to the constitutional and SAPA filing requirements as “a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers.”32 The procedures required by Executive Law § 259-c(4) fall well within this definition. Certainly the procedures required by the newly amended Executive Law are rules that would “establish a course of conduct for the future.”33 In Matter of Morris the Parole Board conjured up several excuses for their failure to promulgate this rule. The Court soundly rejected the Parole Board’s sophistry and held that the Legislature’s amendment of the statute required the Parole Board to “engage in rule making” and pursuant to SAPA, the rule must

26 Executive Law § 102(1), SAPA § 203(1) and Article IV, § 8.
27 SAPA §201. 28 Department of Corrections and Community Supervision (DOCCS).
29 Department of Corrections and Community Supervision (DOCCS).
31 SAPA § 202(1).
33 People v. Cull, 10 N.Y.2d 123 (1961).
Parole Release Decisions

Continued from page 21

be “filed with the Secretary of State.”34 New York courts have repeatedly – and without hesitation – invalidated agency actions that fail to comply with SAPA’s filing requirements.35

When the Legislature enacted the 2011 amendment to the Executive Law it intended that the Parole Board would put procedures in place so as to create a process for the Parole Board to follow when making release decisions that would use risk and needs principles driven by a risk and needs assessment instrument. This was a specifically intended legislative program. Assemblyman Aubry, who was largely responsible for inserting this provision into the new statute, said he “intended the risk assessment to play a major role in helping the parole board determine if an offender is ready for release.”36 The purpose of SAPA is to aid in effecting the legislative purpose and to make a legislative program work.37 By its failure to both establish written procedures and to comply with SAPA the Parole Board has undermined this legislative program that would ensure that the Parole Board use risk and needs principles, by the use of an assessment instrument, to inform parole release decisions.

The “Evans’ Memo” … fails to accomplish the Legislative goal of requiring the Parole Board to rely on evidence-based decision-making; rather, it is a green light to the Parole Board to carry on with the “correctional quackery” of the past.

The “Evans’ Memo” … fails to accomplish the Legislative goal of requiring the Parole Board to rely on evidence-based decision-making; rather, it is a green light to the Parole Board to carry on with the “correctional quackery” of the past.

CONCLUSION

In 2011 the New York Legislature gave very specific direction to the Parole Board. To comply with this legislative mandate the Parole Board was required to:

1) Establish written procedures.

2) Incorporate into the procedures a process by which the Parole Board would use a risk and needs instrument, such as COMPAS.

3) In order for the procedures to provide any meaningful guidance whatsoever they would, at a bare minimum, have to indicate that a risk and needs assessment instrument (COMPAS) was to be used, how to use it, what weight to give to it, and under what circumstances the Parole Board could depart from the instrument so as to make its own judgment as to whether the parole applicant “will live and remain at liberty without violating the law.”38

In response to the amendment of Executive Law § 259-c(4) the Parole Board took no action to establish written procedures, instead apparently relying upon the “Evans’ Memo” to suffice. Upon inspection and investigation of this memo a simple truth emerges. The memo does not contain the procedures required to satisfy the 2011 amendment and it has not been promulgated by proper filing with the Department of State, the Secretary of State, or publication in the state register. Therefore any action taken by the Parole Board to deny parole to any person coming before it would be made in violation of Executive Law § 259-c(4) because it would have been made without first establishing or following proper procedures, thus inviting judicial annulment.

Men and women go to prison to serve duly imposed sentences. We expect that they will be treated in a manner that promotes their respect for the law. Isn’t this penological goal undermined when the Parole Board itself ignores the rule of law? A

34 Matter of Morris, supra note 7, at 855, 856.
38 Executive Law § 259-j(2)(c)(A).
Developed around 1983 by Dr. Roland Summit as a diagnostic tool, Child Sexual Abuse Accommodation Syndrome, CSAAS, has been at the center of litigation. It is widely disputed as to whether CSAAS can be used to distinguish between abused and non-abused children if the cluster of defined symptoms is present. That cluster consisted of five experiences described by the doctor as typically occurring in sexually abused children: secrecy about the sexual abuse, often ensured by threats of negative consequences of disclosure; emotional helplessness to resist or complain; entrapment and accommodation, where the child sees no way to escape ongoing abuse and thus learns to adapt; delayed, conflicted, and unconvincing disclosure of the abuse; and retraction of the child’s allegations in an attempt to restore order to the family structure when the disclosure threatens to destroy it. "Bobby Joe Steward v. State of Indiana," 95 Ind. 43 (1995), citing Roland C. Summit, “The Child Sexual Abuse Accommodation Syndrome,” 7 Child Abuse & Neglect 177, 181-88 (1983).

Significantly, Summit has noted that since his original identification and description of CSAAS, which he refers to as “a clinical observation,” it “has become both elevated as gospel and denounced as dangerous pseudoscience.” "Steward," citing Roland C. Summit, “Abuse of the Child Sexual Abuse Accommodation Syndrome,” 1 J. of Child Sexual Abuse 153, 153 (1992).
Legislative Committee:

Andy Kossover, Chairman (New Paltz)
James Baker (Ithaca)
Michael Baker (Binghamton)
Bruce Barket (Garden City)
Wayne Bodden (Brooklyn)
Andy Correia (Wayne County)
Tim Donaher (Rochester)
Stefani Goldin (Mineola)
Ray Kelly (Albany)
Greg Lubow (Greene County)
Aaron Mysliwiec (New York City)
Kevin O’Connell (New York City)
Alan Rosenthal (Syracuse)
Lisa Schreibersdorf (Brooklyn)
Don Thompson (Rochester)
Andre Vitale (Rochester)
Nikki Zeichner (New York City)

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

CSAAS

Continued from page 17

In New York, expert testimony concerning CSAAS has been admitted to assist the jury in understanding the unusual conduct of victims of child sexual abuse, provided that the testimony is general in nature and does “not attempt to impermissibly prove that the charged crimes occurred”. *People v Carroll*, 95 NY2d 375, 387; see *People v Gillard*, 7 AD3d 540, lv denied 3 NY3d 659; *People v Doherty*, 305 AD2d 867, 868, lv denied 100 NY2d 580; *People v Miles*, 294 AD2d 930, lv denied 98 NY2d 678. “Although the therapeutic concept of a posttraumatic stress syndrome associated with sexual assault was developed by studying women rape victims, New York courts, relying on *People v Taylor*, 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131 (1990), have held that other victims of sexual assault may exhibit an analogous syndrome. Female children who are the victims of rape or attempted rape may suffer from what scientists label “child sexual abuse syndrome” which, under appropriate circumstances, can be explained by expert testimony”. *People v Yates*, 168 Misc.2d 101 (S.Ct N.Y Cty 1995)(emphasis added)(citations omitted).

The Court of Appeals has dictated that the victim’s delay in disclosing the abuse must become a significant issue at trial for the prosecutor to be able to present testimony about psychological explanations for delayed disclosure of childhood sexual abuse (*People v. Spicola*, 16 N.Y.3d 441, 922 N.Y.S.2d 846, 947 N.E.2d 620 [2011], cert. denied —— U.S. ——, 132 S.Ct. 400, 181 L.Ed.2d 257 [2011]). As Chief Judge Lippman cautioned in his dissenting opinion, even though an expert does not expressly render an opinion as to whether or not a complainant was a victim of sexual abuse, the expert’s confirmation of nearly every detail of the case and of complainant’s behavior as consistent with that of a victim of sexual abuse is the functional equivalent of rendering an opinion as to complainant’s truthfulness (*id*. citing *Ciaccio*, 47 N.Y.2d at 439, 418 N.Y.S.2d 371, 391 N.E.2d 1347). An expert is not permitted to bolster the testimony of another witness “by explaining that his version of the events is more believable than the defendant’s ….” (*id*).

Recently, the Court of Appeals once again issued a ruling regarding the admissibility of CSAAS testimony in the case of *People v. Williams*, 20 N.Y.3d 579, —— N.E.2d —— (March 26, 2013). There, the court found that:

the expert’s testimony exceeded permissible bounds when the prosecutor tailored the hypothetical questions to include facts concerning the abuse that occurred in this particular case. Such testimony went beyond explaining victim behavior that might be beyond the ken of a jury, and had the prejudicial effect of implying that the expert found the testimony of this particular complainant to be credible—even though the witness began his testimony claiming no knowledge of the case before the court.

Continued on next page
Id. Given the particular record before it, the error was deemed harmless in juxta-position to what the court determined was overwhelming evidence of guilt.

In Williams, the People called an expert on CSAAS who explained that he did not meet the complainants nor was he rendering any opinion about any facts specific to the case. Id. He testified about the five stages of CSAAS:

the “engagement” phase, during which an adult who is an authority figure with respect to the child utilizes his or her position within the family to change from a caretaking relationship with the child to a sexual relationship.

the second stage, “sexual interaction,” . . . where the adult, in some way, has a physical relationship with a child. The sexual acts that occur may be progressive, meaning, that over time they may become more intrusive. There may be more than one act, and the sexual interaction phase may last for a long period of time or it may be a brief period of time depending on the circumstances.’

The third stage, described as “secrecy,” [] explained in terms of both what an abuser does and why the child keeps the matter secret – because of embarrassment or shame, ‘sometimes enforced’ by the adult telling the child to keep it secret or suggesting negative consequences if it is revealed.

the stage of “disclosure,” which… may be delayed because of the child’s fear, shame, or emotional confusion.

[The] final stage called “repression,” [which] involve[s] the child’s difficulty in thinking about or remembering the abuse.

Id.

Discussing its prior holdings, the court explained that “expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand.”

Id., quoting People v. Carroll, 95 N.Y.2d 375, 387 [2000]. This testimony is permitted to explain why a child may not have immediately reported sexual abuse (id.) or to rehabilitate a complainant’s credibility (People v. Spicola, 16 N.Y.3d 441, 922 N.Y.S.2d 846, 947 N.E.2d 620). Such testimony is not permitted to show that the expert considers a particular complainant to be credible. Id. Nor is the expert permitted to give an opinion concerning whether the abuse actually occurred. Id., see also People v. Lawrence, 81 A.D.3d 1326, 1327, 916 N.Y.S.2d 393, 395 leave to appeal denied, 17 N.Y.3d 797, 952 N.E.2d 1100 (2011) citing People v. Martinez, 68 A.D.3d 1757, 1757–1758, 891 N.Y.S.2d 811, lv. denied 14 N.Y.3d 803, 899 N.Y.S.2d 137, 925 N.E.2d 941.
“An expert is not permitted to testify to behavioral changes exhibited by the victim that were associated with sexual abuse in children, nor is an expert allowed to testify to general behavioral after-effects exhibited by victims of sexual abuse that are indicative of victimization. Such testimony goes beyond explaining specific behavior that might be unusual or beyond the ken of a jury; instead, it has the effect of tending to prove that the crimes took place.”

 CSAAS
Continued from page 21


Although the presence of behavioral symptoms does not necessarily indicate that an act of sexual abuse took place, the clear implication of such testimony is that it was more likely than not that the child had been sexually abused. Shay, 210 A.D.2d 735 citing Taylor, 75 N.Y.2d at 284, 293. An expert is not permitted to testify to behavioral changes exhibited by the victim that were associated with sexual abuse in children, nor is an expert allowed to testify to general behavioral after-effects exhibited by victims of sexual abuse that are indicative of victimization. Such testimony goes beyond explaining specific behavior that might be unusual or beyond the ken of a jury; instead, it has the effect of tending to prove that the crimes took place. Id. citing People v. Mercado, 188 A.D.2d 941. Even where the court finds that the delay in disclosure was put into issue, the court is still required to appropriately balance the probative value of the testimony in helping to explain delayed disclosure against the risk of prejudice to a defendant. People v. Hughes, 93 A.D.3d 889, 890-91, 940 N.Y.S.2d 183, 185-86 leave to appeal denied, 19 N.Y.3d 961, 973 N.E.2d 211 (2012).

In Spicola, the court examined and explained its prior decisions regarding the admissibility of expert testimony of rape trauma and CSAAS testimony. Beginning with People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 883, 502 N.E.2d 577 (1986), the court looked to its reasoning in concluding that the “range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents is not a subject within the ken of the typical juror, and therefore may be addressed by expert testimony . . . .” Id. Factually, it was important for the court to note that the defendant had “attempted to discredit the children by evidence that they had not promptly complained of the crimes”. Id. citing People v. Taylor, 75 N.Y.2d 277, 288, 552 N.Y.S.2d 883, 552 N.E.2d 131 [1990]. Turning to Matter of Nicole V., 71 N.Y.2d 112, 524 N.Y.S.2d 19, 518 N.E.2d 914 (1987), the court distinguished those facts, where the accused abuser (the child’s father) challenged the child’s statements
to her therapist, claiming that this was not proper corroboration required by the Family Court Act. The factual distinction highlighted in this case was the basis for allowing the testimony which corroborated the victim’s account where “[t]he psychological and behavioral characteristics and reactions typically shared by victims of abuse in a familial setting are not generally known by the average person . . . .” *Id.* at 120, 524 N.Y.S.2d 19, 518 N.E.2d 914.

Continuing with its review, the court looked to *People v. Taylor*, decided with *People v. Banks*, 75 N.Y.2d 277, 552 N.Y.S.2d 883, 552 N.E.2d 131 (1990). In *Taylor*, rape trauma syndrome testimony was admitted to explain the rape victim’s unusual behavior of initially stating that she did not know who attacked her and, to explain what also may seem as unusual, her appearing quiet, calm and controlled within hours of the attack. *Id.* at 283, 552 N.Y.S.2d 883, 552 N.E.2d 131. In *Banks*, the court found that the expert’s testimony was used to show that the complainant’s symptoms were consistent with “a diagnosis of rape trauma syndrome”, thus constituting unfair prejudice which warranted reversal. *Id.* at 285, 552 N.Y.S.2d 883, 552 N.E.2d 131 [emphasis added]. Finding that the “evidence was not offered to explain behavior exhibited by the victim that the jury might not understand; instead, it was offered to show that the behavior that the complainant had exhibited after the incident was consistent with a set of symptoms commonly associated with women who had been forcibly attacked. The clear implication of such testimony would be that because the complainant exhibited these symptoms, it was more likely than not that she had been forcibly raped”. *Spicola*, 16 N.Y.3d at 441 citing Banks, 75 N.Y.2d at 293, 552 N.Y.S.2d 883, 552 N.E.2d 131. The court specifically “emphasized that this type of evidence may not be introduced to show that a crime took place”. *Id.*

In *Spicola*, the court reasoned that “for defendant to succeed at trial, the jurors had to conclude that the [complainant] was likely deliberately lying”, therefore the entire defense had to be based upon attacking the complainant’s credibility, which the court found was done by the defense’s attack upon the complainant’s failure to report the abuse promptly and his continued association with the defendant. *Id.* Based upon those facts, the court found that the trial judge did not abuse its discretion by allowing the expert to testify about CSAAS for the purpose of rehabilitating the complainant’s credibility.

In conclusion, practitioners should be mindful in their litigation strategy to create doubt as to the factual accounts of the complainant without specifically calling upon jurors to conclude that a complainant was deliberately lying. Obviously, each case requires its own balancing act between the gains to be gotten from an attack of the complaining witness versus the preservation of an appellate claim regarding the improper and prejudicial introduction of CSAAS testimony. Nevertheless, a prosecutor is not permitted to tailor hypothetical questions to include facts concerning the abuse that occurred in the particular case being tried. Such testimony has the prejudicial effect of implying that the expert has found the complainant credible and has concluded that the abuse did in fact occur. This is true, even where an expert states that she has no prior knowledge of the case for which she has been called upon to give testimony. A
In addition to important decisions on the Defense of Marriage Act and the Voting Rights Act of which the general public is aware, this Spring saw a flurry of decisions from the Supreme Court which merit examination and thought by criminal defense lawyers. The coalitions that form the majorities appear to shift mysteriously. Yet, for most of us, it is the result in each case and ensuing reality of criminal practice that is our concern. A few of the Court’s criminal justice decisions are presented for your consideration.

DNA IS KING

Many of us heard about the result in the DNA collection case, *Maryland v. King*, 12-207. There, the Court found that the DNA samples collected from people who are arrested does not violate their Fourth Amendment rights. Mr. King was not a particularly sympathetic litigant. He had been convicted of a previously-unsolved rape on the basis of a DNA match from a later arrest for menacing a group of people with a shotgun. Writing for the majority, Justice Kennedy was quick to sing the praises of DNA testing’s “unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” Slip. Op. 3 quoting District Attorney’s Office for Third Judicial Dist. v. Osborne, 557 U. S. 52, 55 (2009). To Justice Kennedy, the taking of a buccal swab for DNA from an arrested person’s cheek is indistinguishable from taking his fingerprints except for “the unparalleled accuracy DNA provides.” Slip. Op. 13. The majority opinion looks forward to the day when instant DNA testing can be performed so as to form a basis for detention of “guilty” defendants instead of their release on bail, noting that the FBI is now testing “devices that will enable police to process the DNA of arrestees within 90 minutes.” Slip. Op. 22. The case is therefore a useful precedent in those rare cases where the defense is demanding that DNA testing be conducted and done so expeditiously.

More troubling for many defense lawyers is that it never seems to occur to Justice Kennedy that DNA testing results can be erroneous. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009) (“Serious deficiencies have been found in the forensic evidence used in criminal trials”). For him and the majority, the Fourth Amendment is much less important than the state’s interest in prosecuting criminals and, accordingly, the “gentle rub” of a buccal swab from the mouths those who have been arrested is entirely “reasonable.” Slip. Op. 24, 26.

The *King* decision rests upon the probable cause for the defendant’s arrest after which the defendant’s DNA was seized. Accordingly, if such a case was later dismissed or the defendant acquitted, an argument could be advanced that there was no probable cause for the arrest in the first place, and therefore no probable cause to seize the DNA material. The effectiveness of the argument may well depend on the degree to which the prior arrest can be characterized as baseless and, to be cynical,
the seriousness of the offense of which the defendant is later accused.

THE ADVICE OF (GENERAL) COUNSEL
On the last day of the term, the Court announced its decision in Sekhar v. United States, 12-357, holding that a person's attempted blackmailing of the New York State Comptroller's general counsel – in an effort to coerce him into recommending a state investment – was not extortion. Mr. Sekhar was convicted of a “Hobbs Act” extortion of the general counsel by trying to force him to give a favorable opinion of Sekhar's company by threatening to make public the general counsel's extramarital affair.

The Court declined to view this conduct as an “extortion” because the defendant was not attempting to gain control of “obtainable property,” such as money. The general counsel's recommendation was not a thing of value that can be owned and transferred to another person. The federal Hobbs Act was derived from New York State's Penal Law of extortion but New York also enacted the crime of coercion. In New York, extortion requires the criminal acquisition of property, while coercion is the use of threats to compel someone to do something or refrain from doing that thing which the victim has a right to do or abstain from doing. Compare New York Penal Law § 155.05(e) with Penal Law § 135.60. By his act of blackmail, Sekhar committed only the state crime of coercion, not the federal crime of extortion.

The Supreme Court also pointed out that the general counsel's opinion was not a sort of “intangible property right” that could be acquired by extortion. Accordingly, defense counsel may seek application of the Sekhar decision to those fraud prosecutions in which the government seeks to expand the “property” sought to be fraudulently obtained to include so-called “intangible” property – such as the opinion of a public official or a corporate officer. We may expect such imaginative arguments from the Department of Justice in the wake of Skilling v. United States, 130 S. Ct. 2896 (2010)(restricting “honest services” fraud to bribes and kickbacks).

NOW BOARDING FOR APPRENDI-LAND
After the decision in Apprendi v. New Jersey, 530 U. S. 466 (2000), defense challenges to mandatory minimum sentences were optimistically pursued on the theory that any fact finding that raises a sentencing range, that is, the minimum as well as the maximum, would have to be found by a jury, not merely a judge. That optimism was misplaced, however, as demonstrated by Harris v. United States, 536 U. S. 545 (2002) which held that so long as the statutory maximum was not raised by the fact finding, the Sixth Amendment did not prohibit a judge from finding facts that would raise a defendant's minimum sentence. Back in 2002, Justice Breyer voted with the Harris majority (and with the minority in several other opinions in the Apprendi line of cases). Indeed, Justice Scalia famously criticized Justice Breyer's concurrence in Ring v. Arizona, 536 U. S. 584 (2002) for agreeing to strike down Arizona's death penalty while failing to “buy a ticket to Apprendi-land.” Id. at 612-613.

In Allenye v. United States, 11-9335, the Court overruled Harris, this time with Justice Breyer in the majority. Writing for the majority was Justice Thomas – who had dissented in Harris along with Justices Stevens, Souter and Ginsburg. He wrote:

> It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime… When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submit-

Thus, the federal law punishing the carrying and use of a firearm in relation to a drug crime or crime of violence, 18 U.S.C. § 924(c), has a life maximum but five, seven and ten years depending on whether the defendant merely carried the gun, brandished it or discharged it. Now a defendant cannot face the higher seven or ten year sentences unless a jury finds he did so. This decision sparked an animated discussion of the stare decisis doctrine and the circumstances under which a decision like Harris should be overruled. Perhaps this discussion foreshadows a future argument on the validity of Roe v. Wade but for the present we can at least be pleased that what many of us viewed as a bad decision has been corrected.

‘EX POST FACTO’ AND GUIDELINE SENTENCING
For years it seemed to be a given, under the sentencing guidelines regime, that the sentencing court was obligated to find the applicable guidelines range as a starting point or initial benchmark for sentencing. Before United States v. Booker, 543 U.S. 220 (2005) (finding the guidelines to be merely advisory), the selection of a guidelines range usually dictated that the sentence would be one with that usually narrow range. Both before and after Booker, the guidelines' range is critical to the outcome. The guidelines themselves recognize that the amendment to provide for a new, higher range could violate the constitutional prohibition against ex post facto laws so that, in such circumstances, the guideline in effect when the offense was committed applies. U.S. Const. Art. I, §9, cl. 3; Art. I, §10; U.S.S.G. § 1B1.11(b)(1).

Some courts – notably the Seventh Circuit – apparently thought that since the

Continued on next page
guidelines are now advisory, it doesn’t matter that the new guideline range violates the ex post facto clause as applied to a particular defendant. After all, these courts reasoned, the district court always has to find the sentence “sufficient but not greater than necessary” to meet the goals of the Sentencing Reform Act anyway.

Sensibly, however, the Supreme Court reined in those courts, confirming once again the significance of finding the correct range from which sentencing courts may then depart. In Peugh v. United States, 12-62, the Court found that the ex post facto clause of the Constitution is violated by the application of a higher guideline range enacted after the crime was committed. At the time he engaged in bank fraud, Mr. Peugh’s sentencing range was 30 to 37 months but when he was sentenced, the range had been raised to 70 to 87 months.

In finding that the use of the new guidelines’ range violated the Ex Post Facto Clause, Justice Sotomayor recounted that the guidelines range is the initial benchmark and starting point for every federal sentence, that a major variance from that range should be supported by a more significant justification than a minor one, and the expectation that most sentences will be imposed within that range. Slip. Op. 11 quoting Freeman v. United States, 131 S. Ct. 2685, 2688 (2011) (plurality opinion). “Common sense indicates that in general, this system will steer district courts to more within-Guideline sentences.” Slip. Op. 12. The empirical evidence supports the power of the guidelines: “In less than one-fifth of cases since 2007 have district courts imposed above – or below – Guidelines sentences absent a Government motion.” Slip. Op. 12-13. The Court examined the channeling effect of the guidelines to find an ex post facto violation by use of guidelines enacted after the crime was committed, finding that principles of “fundamental justice” require Peugh’s sentence to be vacated. Because it was seeking to affirm Peugh’s sentence, the government argued that “the Guidelines are just one among many persuasive sources a sentencing court can consult, no different from a ‘policy paper.’” Slip. Op. 17. The defense bar might be pleased to support this notion, even at Peugh’s expense. Yet the Court properly rejected the government’s position because the sentencing guidelines are much more significant than some scholarly academic paper. We work assiduously to negotiate a plea agreement with a stipulated sentencing range because both parties know the significance of an agreed-upon range. The “Guidelines will anchor both the district court’s discretion and the appellate review process[,]” Slip. Op. 18.

The “anchoring” effect of the guidelines was recognized—just four days after Peugh was decided—in Second Circuit Judge Guido Calabresi’s concurring opinion in United States v. Ingram, Docket No. 12-1058 (June 14, 2013). Finding that W.D.N.Y. Judge Richard J. Arcara’s below-guideline sentence of 12 years was reasonable, the Circuit affirmed in a per curiam opinion, rejecting the argument that the “career offender” guidelines themselves overstated the seriousness of the defendant’s past offenses. Judge Calabresi urged lawyers in such cases to seek a “horizontal” downward departure in criminal history category (which had not been sought by Ingram’s counsel). He reasoned that, although district judges can deviate from the guidelines, they are psychologically anchored to the final guideline range and loathe to stray far from it.

The so-called “anchoring effects” long described by cognitive scientists and behavioral economists, see Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1974), show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point. When people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to “anchor” their subsequent judgments— as to someone’s age, a house’s worth, how many cans of soup to buy, or even what sentence a defendant deserves—to the initial number given. Slip. Op. 5-6.

In view of Peugh and Ingram, counsel should consider carefully whether to seek guideline-based departure arguments in addition to 3553(a) variances. Although Peugh is a victory for the defense, some sentencing courts may read into it a call for additional caution to justify sentences lower than those called for by the sentencing guidelines. We can and should point out that the Peugh court’s commentary was meant to justify its application of the Ex Post Facto Clause to reverse an improperly high sentence and did not call for adherence to the guidelines generally. On the other hand, we would do well to provide case-specific reasons for a below guideline sentence particularly if we seek a significant variance from the guidelines.

REMAINING SILENT CAN BE USED AGAINST YOU

The defense bar has expressed great consternation in the wake of Salinas v. Texas, 12-246. Mr. Salinas was convicted of a double murder by shotgun. In a non-custodial interview at a police station, he answered questions for approximately one hour. During the interview, the police asked Salinas whether the shotgun shells found at the crime scene would match his own shotgun. Salinas did not answer verbally but instead—
Louis D. Brandeis

The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can produce them in court and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

– Louis D. Brandeis, dissenting opinion, Olmstead v. United States, 277 U.S. 438 (1928)
Confidential or material informants have been a key asset of law enforcement in the 40-year-old War on Drugs. Informants are typically people who are arrested on drug charges and, in return for leniency from the prosecutor or judge, cooperate with law enforcement agents to help arrest others, such as by making controlled buys. In a typical controlled buy, an informant meets with the supervising law enforcement agents and is searched to ensure he is not in possession of money or contraband. Then the informant is provided with “buy money” in prerecorded bills and a hidden recording device. The transaction itself is monitored to ensure the integrity of the evidence, as informants have been known to lie or steal to serve their own interests. The universal axiom among drug police is, “Never trust an informant.” After all, deceitfulness is what makes a successful informant.

There are so many possible variables involved that there exist no formal, universally accepted protocol standards for controlled buys. While some law enforcement handbooks provide general guidance and suggestions, specific procedures are largely left to individual police departments and agencies. The nature and quality of train-
ing may vary greatly. If agents do a bad job of supervising an informant during a controlled buy, the evidence can be compromised. An informant can steal a portion of the buy money or drugs. At its worst, poor monitoring can even make it possible for a rogue informant to frame a totally innocent person.

We’ve all seen movies in which a totally innocent person is “set up” by the police or their agents and accused of a crime. Drama ensues as the unjustly accused protagonist struggles to prove his or her innocence. The narrative may take liberties with legal principles and practices, and the story may become unrealistic. But the real life potential for an innocent person to be framed for a crime is not quite as far-fetched as one might think, especially in the case of an insufficiently supervised controlled buy.

My criminal practice is national in scope and centered on the health, fitness and sports fields, including competitive bodybuilding, and often involves performance enhancing drug allegations. I have the privilege of practicing in myriad jurisdictions across America, with able local counsel assisting. A recent case I defended involving a client we’ll call “Jane” (not her real name) provides an excellent opportunity to examine what can go wrong during a controlled buy.

Jane is a very muscular competitive female bodybuilder in a very small town in a southwestern state. She was arrested by the local drug task force for selling an anabolic steroid to an undercover “material informant” inside the gym she owned and managed. She had never been in any type of legal trouble before. She contacted me to defend her, swearing that she was absolutely innocent of the charges.

Streamlining the relevant facts for the purposes of this examination, the case began when the informant, who had signed a cooperation agreement with the local authorities in hopes of getting his own felony drug charges reduced to a misdemeanor plea, “cold called” Jane at her gym. After this telephone conversation with Jane, he reported to the task force detective he was working with that Jane had agreed to sell him a 10 cc vial of testosterone, an anabolic steroid and a controlled substance. More specifically, he told them that the price was $100; that he was instructed to come by the gym the next day to conduct the transaction; and that she would conceal the steroid vial inside a bottle of multivitamins. Less than 24 hours later, the informant met with his supervising detectives. They patted him down for money or drugs and did a quick search of his car. Finding nothing, they gave him the cash, put a hidden high-sensitivity recording device on him, and let him drive to the gym.
while they followed in their car and then waited nearby. They watched as the informant entered the gym, and reemerged a half hour later. He had given the money to Jane and she had given him the multivitamin bottle. He handed the vitamin bottle to the detectives. They opened it and, just as expected, inside was the thumb-sized 10 cc vial of testosterone. The detectives viewed it as an open and shut case, as did the prosecutor, who offered my client the standard first-time offender “no jail” felony plea. However, as was the local policy, if the plea was not accepted at the first appearance post-arraignment the offer would be withdrawn and no further offers would be extended. Jane would be facing substantial prison time.

While the pressure of the plea policy was unsettling, I had the advantage of two discovery procedures. First, I promptly demanded and was provided a copy of the hidden recorder audiotape of the transaction. When I listened to it, I understood what the informant had done. Second, I demanded to interview the informant before trial. The opportunity to interview or depose a prosecution witness other than in a pre-trial court hearing or during the trial itself is not afforded in most jurisdictions. Luckily for Jane, this was one of the few jurisdictions permitting it (another takeaway from this case is the importance of pretrial depositions to ensure justice for the innocent, rather than the “trial by ambush” scheme that exists in New York and most states).

The audiotape of the transaction spanned the entire half hour that the informant was inside the gym. The vast majority of the interaction took place in a small sales office, where the informant and Jane discussed virtually every conceivable aspect of bodybuilding and nutrition, with Jane pitching him on the benefits of personal training sessions. While there was some general discussion of steroids for building muscle, there was no verbal reference to any transaction. Only at the very end of the conversation did the informant ask about “the multivitamins” and the exchange took place. The critical moment in the transaction, however, occurred after the informant received the multivitamin bottle but before he delivered it to the police. He asked Jane if he could use the bathroom. Then he went in the bathroom with the bottle and closed the door. Shortly afterward he left the gym and turned over the bottle to the detectives.

Why couldn’t he have waited just five more minutes to use the rest room – until after he delivered the evidence? After all, this was the key evidence in the case, he had been instructed to deliver it forthwith, and the detectives were close by. I had the opportunity to ask him during my interview. The reason, he claimed, was a pressing need to urinate. I cross-examined him on the point, asking what level of urinary intensity would justify taking the essential evidence into a room where nobody
The most essential gift for a good writer is a built in, shock proof, shit detector. This is the writer’s radar and all great writers have had it.

– Ernest M. Hemingway (1958)

In this case, justice was done. The audiotape, designed as a way to bolster the prosecution’s case, turned out to be Jane’s salvation. But the unusual facts of Jane’s case created the opportunity for proving her innocence. I can see other scenarios in which a rogue informant might more successfully engineer a frame of an innocent person. What broader lessons can be learned from Jane’s ordeal to improve our system of justice?

1) The initial set-up call must be monitored. The informant’s initial phone conversation with Jane was not monitored or recorded. It was his word, and his uncorroborated word alone, as to what was discussed. In truth, it was actually a conversation about personal training and multivitamin recommendations. Had the detectives insisted that no calls to targets be made without their supervision, the investigation would have ended right there. Law enforcement agents should never allow informants to make unmonitored set-up calls to targets. When the informant approached them with his claim, and before they acted on it, they should have made him follow up with a monitored and recorded call, purportedly confirming or changing some term of the exchange, but corroborating at least one element of an illegal transaction.

2) Thorough pre-transaction searches must be conducted. The extent of the pre-transaction search of an informant should be defined by the size and nature of the anticipated contraband involved. In a transaction involving a suitcase filled with kilos of cocaine, a less stringent body search might be appropriate. But where the contraband is a thumb-sized glass vial, a simple pat-down is woefully insufficient to ensure that the informant isn’t bringing his own contraband to the scene. An object so small could be easily secreted and missed in a pat-down. Further, when the contraband involved is so small, allowing the informant to drive his own car to the scene is improper. A perfunctory car search is insufficient; there are simply too many places all over an automobile for a tiny object to be hidden (the police log reports...
Rogue Informant

Continued from page 29

in Jane’s case showed that the pre-transaction search of both the informant and his car took only one minute).

3) Post-transaction review is essential. In Jane’s case, the informant presented the detectives with exactly what they were expecting, so they neglected to do the minimal necessary follow up. They never found out that he had taken the evidence into the bathroom because they failed to question him after the transaction (and he obviously didn’t volunteer it) and they failed to even listen to the tape. The first time the primary detective heard the audio of the transaction was when I played it during my interview of the informant. That’s simply inexcusable. Had they listened, they would have known that the informant violated their instruction to return directly with the evidence.

4) Informant agreements shouldn’t give quotas. The terms of informant agreements vary by jurisdiction. Often, no specific number of controlled buys or targeted defendants is required. But in some jurisdictions, like Jane’s, the informant is given a specific number of people he must set up in order to get his deal. In Jane’s case it was three. He had not met his quota despite nearly a year of cooperating, and may have been running out of time. In desperation, he likely saw Jane, with her remarkable muscularity, as a believable mark for a steroid frame. While cooperation deals without specific bust numbers can allow agents to keep informants working off their cases endlessly, specific agreements can serve as an invitation for the kind of abuse that occurred here.

Hopefully, informant frame-ups of innocent clients are rare, and can be further minimized by attention to the suggestions presented. But it’s important to recognize that these sorts of nightmares can and do take place, and that ultimately it’s the job of the criminal defense attorney to be prepared to challenge the procedures involved. The lessons from Jane’s case should be instructive for defense counsel in evaluating the viability of a “frame” defense and in cross-examining both the informant and the detectives. 

ADVERTISE in ATTICUS

Statewide print & electronic distribution

Enamored readership

Affordable rates

Contact us for details & rates!

518.443.2000
atticus@nysacdl.org
Practical Cross-Examination

In the Beginning…

By Ray Kelly, Esq. and Donald G. Rehkopf Jr., Esq.

Clarence Darrow Vignettes

“You can only protect your liberties in this world by protecting the other man’s freedom. You can only be free if I am free.”

“Chase after the truth like all hell and you’ll free yourself, even though you never touch its coat tails.”

Atticus and Publius settled into their favorite watering hole. Feet propped up and nostrils sensing the alcoholic mist wafting through the air, Friday night’s relaxation time in The Chambers was their favorite time for sharing thoughts and waxing poetic utilizing not so carefully edited war stories. Young solo practitioner, Wolff, approached – Dewars on the rocks with a splash of water in hand – with several other younger members of the Bar. “A few Friday nights ago, we discussed our uneasiness with cross-examination—can we push the envelope with both of you regarding what your life’s experiences have taught regarding cross-examination—what is your definition of cross-examination?”

Atticus, eyes blazing, cautioned: “Forget whatever you may have learned in law school. Practically speaking, cross-examination is:

Testimony by the lawyer…
Speaking *ex cathedra*…
Communicating to the jury…
The theory of the case…
Through controlled questioning of the witnesses.”

Continued on page 32
“Ask yourself the following threshold questions:

Where do we need to go?
How does this witness help where we need to go?
How does this question help where we need to go?
How does this chapter of cross fit in summation?”

“And,” Publius interjected, “do no harm to your client in the process.”

Wolff’s eyes lit up. “Is that it? Do I hear you saying that the function of cross is to answer the questions ‘What do you want to say about your theory of the case to the jury through the mouth of this witness?’”

“Precisely,” Publius confirmed, and continued, “You must fine-tune your theory of the case well in advance of jury selection. Well-prepared trial lawyers create a draft summation before trial begins which, when finally delivered to the jury, is 90-95% of what was prepared in advance. By preparing your summation before jury selection, you fine-tune your theory of the case so that the ultimate simplicities which usually determine the jury verdict become crystal clear during your preparation. Each cross-examination is prepared after your summation pinpointing those critical facts to be brought forth from the mouths of the witness. Embrace your pre-trial fears. Life’s experience teaches that the antidote for fear is total preparation.”

RAY KELLY, Esq. is a criminal defense lawyer in Albany and NYSACDL Past President and Lifemember. He can be reached at rakelly@nycap.rr.com

DONALD G. REHKOFP, JR. Esq. is a Director on NYSACDL’s Board and the Co-Chair of NACDL’s Military Law Committee. He can be contacted at drehkopfjr@brennalaw.com
“What?” Wolff asked incredulously. “You two—trying cases before we were born, you have fears?” The ensemble was wide-eyed as Publius, taking a sip from his merlot, pointed to Atticus, the combat veteran, indicating that he should respond.

Pausing for a moment to collect his thoughts, Atticus looked up and spoke: “If you are not afraid when you start a trial; if you don’t have ‘butterflies’ in your gut when you start to cross-examine the prosecution’s star witness, I guarantee you that you’re not prepared. Some of you may have never heard of General George S. Patton of World War II fame. He once said, ‘There is a time to take counsel of your fears, and there is a time to never listen to any fear.’ Preparing for cross is like that—you ‘take counsel’ of your fears when you’re preparing, but when you stand to confront that witness, if you’re prepared and know how to cross-examine, you don’t need to listen to those fears.”

Publius picked up the discourse and continued. “Don’t be afraid of being afraid. It is what should prompt you long before trial to sit down and think, ‘What do I want to do with this witness on cross, and how do I control her to obtain that goal?’

Wolff gasped. “You mentioned controlled questioning of the witness. What do you mean by ‘controlled questioning’?”

Atticus intoned, “Control is the true hallmark of cross-examination. Control has two aspects. First, you must control you. This case is not about you, it is about your client and about your cause. If you are worried about how you are doing rather than what you are doing, you are creating a recipe for disaster. Check your ego and leave it with the metal detectors when you enter the courthouse. When you are presenting the case to the jury, the case is never about you.”

“Second, control means that there are no real questions actually asked in true cross examination. Control comes from the form of your questions. Controlled questioning means that you must strive for, in each question, a:

- Single fact…
- Precisely worded…
- Declarative statement…
- With a question mark at the end (voice inflection).”

Wolff tentatively asked, “Can you give us some simple techniques to follow?”

Publius chimed in, “Experience teaches that regardless of whether you intend a friendly or destructive type of cross, the following control techniques should be utilized. Invariable, there might be situations when you can let go of control. However, until you have a great deal of experience, treat the following suggestions as commandments.”

Continued on page 34
there is any reason to even cross-examine a particular witness. Sometimes the best approach—which is counter-intuitive to law school training—is no cross-examination. If the witness is simply a ‘fact’ witness and the fact either doesn’t hurt you or isn’t relevant to your defense, why cross-examine her, which could first, hurt you, and second, give the DA another opportunity to ask a question that will.”

“Huh?” queried Sienna, Wolff’s suite-mate. “You’re saying that you don’t have to cross every prosecution witness?” Publius responded, “Yep, exactly! If the DA calls the weatherman to testify that it was raining out at the time of the burglary and if that’s a fact that’s not in dispute or relevant to your defense, don’t bother. What are you going to accomplish other than look like you’re an obstructionist or an idiot. Neither helps your defense or your client.”

“I see,” said Sienna. “Never cross-examine a neutral witness, right?”

“Well, not exactly,” Publius answered as he motioned for another round of drinks. “Controlling the witness in some situations might warrant a one- or two-question cross. For example, in a murder case I did a couple of years ago, the issue was who shot the decedent—not how he died. After a 3-1/2 hour direct exam, accompanied by the usual gruesome PowerPoint™ photographs showing without dispute that death occurred from a .45 caliber bullet going through the skull. I asked one question to the pathologist: ‘Doctor, your autopsy and photographs cannot identify the shooter, can they?’ ‘No’ was the response, putting the witness and his dog and pony show into the ‘who cares’ category. I knew that because I had interviewed the pathologist before trial.”

Atticus picked up the slack. “Ask only leading questions. Leading questions suggest a specific answer. Non-leading questions invite the witness to volunteer information; you lose a measure of control over the witness and interrupt the flow to the jury of your information. Eliminate all questions beginning with ‘are’, ‘is’, ‘do’, ‘did’, ‘why’, ‘how’, ‘which’, and so on—especially if they can be answered other than with ‘yes’ or ‘no’.”

“Ask short questions limited to one fact per question. A question limited to one fact increases your control of the witness. The one fact you desire the jury to know is developed cleanly, clearly, and concisely because the witness has no opportunity to evade the desired answer.”

Wolff pressed, “Can you give us an example of what you mean by (1) a single fact (2) precisely worded (3) declarative statement (4) with a question mark at the end type of cross-examination?”

Atticus responded, “Consider the following:

Q. On July 6, the day you were arrested, you saw the police hold Ray Raym at gunpoint, right outside his house?
A. Yes.

Since you know these facts to be true, the witness can only answer ‘yes.’ And your trial record accurately reflects this evidence. But did your jury get it? With this compound form of the question, you are expecting the witness’ one ‘yes’ to convey: the date, the fact of the observer’s arrest, the place, the presence of the observer, the presence of the police, the presence of Ray Raym, the location of the observer, the actions of the police—at least nine different pieces of information. Now compare:

MR. Cohort: Let’s talk about July 6.

Q. July 6 was the day you were arrested?
A. Yes.
Q. Your arrest took place at Ray Raym’s home?
A. Yes.
Q. You were arrested when Ray Raym was arrested?
A. Yes.
Q. You saw the police knock on Ray Raym’s door?
A. Yes.
Q. You were only 10 to 15 feet away?
A. Yes.
Q. Ray Raym came to the door?
A. Yes.
Q. You could see Ray Raym’s hands?
A. Yes.
Q. Ray Raym had no gun?
A. No.
Q. Or any other weapon?
A. Correct.
Q. But the police had guns?
A. Yes.
Q. All five of them?
A. Yes.
Q. In their hands?
A. Yes.
Q. Pointing them at Ray Raym?
A. Yes.

Continued from page 31
One fact per question keeps the word picture crystal clear for the jury. Slowly building the story, one fact at a time on cross, has the added benefit of enabling the examiner to lay the foundation for subsequent impeachment or to form the basis for later arguments that there are factual inconsistencies between this witness and other witnesses or evidence.

“Use simple words—no adjectives, no adverbs, no qualifiers and no ‘weasel’ words. Remember the ‘KISS’ principle: ‘Keep It Simple, Stupid.’ Powerful statements are made without fancy adjectives and without qualifiers such as ‘occasionally’, ‘sometimes’, ‘maybe’, or ‘very’.”

“One last thing to ponder,” Publius said. “If your pretrial preparation suggests that you need to cross-examine a particular witness, before you prepare for it, you need to decide: ‘What is my goal in crossing this witness?’ Is it constructive—that is, you need to develop a specific fact or facts from this witness; or destructive—that is, he’s a liar who’d sell his soul for probation; or both? If it’s both, always, always get the constructive information first. Then and only then, destroy him.”

Wolff palm-smacked his forehead and groaned, “three years of law school, moot court and Clinic, and I’ve never heard of any of this stuff before!”

Atticus and Publius ordered another round for everyone. “The Chambers is a haunt near every courthouse in America where the wonders of trial work can be shared and passed on,” thought Publius. Atticus felt what Publius was thinking. Wolff asked, “When can we continue talking about cross?”

“Not tonight but soon.”

“In this, our land, we are called upon to give but little in return for the advantages which we receive. Shall we give that little grudgingly? Our definition of patriotism is often too narrow. Shall the lover of his country measure his loyalty only by his service as a soldier? No! Patriotism calls for the faithful and conscientious performance of all of the duties of citizenship, in small matters as well as great, at home as well as upon the tented field.”

Continuing Legal Education

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

**OCTOBER 4**  
Federal Practice for the State Practitioner. EDNY courthouse

**OCTOBER (DATE TBA)**  
Syracuse Annual Trainer. Location TBD

**NOVEMBER 1**  
Hudson Valley Trainer. Location TBD

**NOVEMBER 15 (TENTATIVE)**  
Buffalo Trainer. Location TBD

**DECEMBER 6**  
Weapons for the Firefight. NYC

**SPRING 2014**  
Wrongful Convictions. Location TBD

Dates are subject to change, and specific topics are flexible. If you have suggestions for CLE programs you would like to see NYSACDL provide, please contact any Board member or CLE Chair Bruce Barket.

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  
jvanort@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.

Please support our advertisers and tell them you saw them in ATTIGUS.
Book Review

Reviewed by William Aronwald

My Beloved World
by Justice Sonia Sotomayor (Knopf 2013)

Born June 25, 1954 in the Bronx to parents who emigrated to the United States from Puerto Rico, Sonia Sotomayor is the first Hispanic, and only the third woman, appointed to the United States Supreme Court. Having first been appointed as a federal district judge for the Southern District of New York and then to the United States Court of Appeals for the Second Circuit, her professional career has perhaps been even more noteworthy considering her humble beginnings and that she was diagnosed with Type 1 diabetes when she was only eight years old, a debilitating disease requiring daily injections of insulin, preventing her from enjoying what most consider a normal active childhood.

Born to an alcoholic father, emotionally unable to administer her necessary insulin injections, and to a working mother, Sotomayor demonstrated a maturity beyond her years, and the marked determination that has guided her throughout her life. At eight years old, she solved the problem by announcing to all within earshot that she would administer the injections herself.

This book tells her story, describing in almost exhaustive detail what it was like growing up with parents who struggled, financially and with each other, to raise their two children, Sonia and her younger brother, Juan. There is, frankly, too much detail.

As a reader, I was drawn to the book in the hope that Judge Sotomayor

Continued on page 38

William I. Aronwald maintains his office in White Plains. He was a prosecutor in the New York County District Attorney’s Office and the Organized Crime and Racketeering Section of the United States Department of Justice. A former President of NYSACDL, and life member of the NACDL, he can be reached at waronwald@aol.com.
Sotomayor, book review

Continued from page 39

would provide insight into how judges, especially appellate judges, particularly herself, come together and decide important legal issues, some of constitutional dimension, that confront them on a daily basis. How do they resolve conflicts amongst themselves as to how issues should be decided? Unfortunately, 172 pages into the book, I was disappointed to read that she was not about to give any clues into her own jurisprudence. Indeed, throughout the 302 pages, one has to search hard for any clues to her judicial philosophy. The book offers no guidance as to whether she is conservative or liberal in interpreting the Constitution.

However, the book reveals that she was driven to the law partly because other career choices were not possible due to her diabetes. Substituting a love for reading for the normal physical activities of youth, she became a voracious reader. A favorite series was the Nancy Drew detective novels. Realizing she could not become a detective, she became fixated on a legal career while watching the Perry Mason television series. Here we get some insight into her judicial mind set. Acknowledging that most assume that Perry Mason is the hero and the one who, on television, wins most of the cases, she was drawn instead to the prosecutor, Hamilton Burger, because “he was more committed to finding the truth than to winning his case.” Hardly a ringing endorsement for the criminal defense bar and also, for those of us who actually try criminal cases, far from the truth. And, in fact, after graduating from Yale Law School, Judge Sotomayor began working as an assistant district attorney in the New York County District Attorney’s Office.

Intrigued by the law, she soon realized she would prefer to be the judge rather than Perry Mason. A job she aspired to throughout law school and as an assistant district attorney, she determined to become a federal district court judge within twenty years.

In spite of her apparent determination not to give readers any clues as to her jurisprudence, the book provides some anyway. For example, although an admirer of the late Judge Harold Rothwax, whom she acknowledges was often referred to as the Prince of Darkness and Dr. Doom, she disagrees with his view that a 10-2 jury verdict was close enough to unanimous for conviction, and his presumption of guilt over the Constitutional presumption of innocence. The latter based upon his belief that statistics demonstrate that most people arrested are guilty. Although she does not take issue with the statistics, she explains that the probability of guilt is not enough to change basic and accepted standards of due process designed to protect everyone from the human frailties of law enforcement. She acknowledges that it is unconscionable that anyone have to pay for a crime for which he was unjustly convicted and agrees with Blackstone that “better that ten guilty persons escape than that one innocent suffer.”

However, the book offers no hints concerning her views on the death penalty, expansion of pre-trial discovery, mandatory sentencing, or any other hot button issues defense lawyers deal with on a daily basis. Instead, for such indications, we are left to sift through her decisions as a district and circuit court judge.

Justice Sotomayor is justifiably proud of her enormous professional accomplishments. Reading her book, it becomes apparent that she does not take her ascension to the Supreme Court lightly. She is keenly aware that much is expected of her and that her legacy will depend on how she fills those expectations.

However, the book draws a profound distinction between her professional and personal life. Diabetes has robbed her of the ability to have children. Due in substantial measure to her drive to succeed professionally and to become, at least, a federal district court judge, her marriage to a childhood sweetheart failed. Having what she describes as a special affinity for children, she is devoted to her nieces, nephews and cousin’s children. Yet, there is a hint of sadness in not having children of her own. In the book, Justice Sotomayor reveals that, since childhood, she developed a strong sense of existential independence resulting from her belief that the adults in her life were unreliable. More profoundly, as a Type 1 diabetic, she has accepted the probability that she will die young, but does not dwell on it.

The reader is left wondering whether her career choices and her life would have been different if she was not diabetic. As it is, for the most part, it seems her career is her life.
Book Review

The Treason Trial of Aaron Burr
Law, Politics and the Character Wars of the New Nation

Reviewed by Frank Quigley, Esq.

As an Assistant District Attorney in Nassau County for more than thirty years, Frank Quigley tried homicide, rape and robbery cases in the Major Offense Bureau. While Chief of Special Investigations, he prosecuted public integrity cases, including bribery, official misconduct and excessive force. A graduate of Fordham College and Fordham Law School, Quigley practices criminal defense law in Garden City.


Sound familiar? Been there? Done that? Think again: no, that wasn’t your last trial. The case was tried more than 200 years ago. It was United States v. Aaron Burr, and a couple of centuries later it is still fascinating history, an important building block in constitutional law and something of an unsolved mystery. The defendant was the former Vice President of the United States, famed as a trial lawyer in New York and a leading personality in state politics. After combat service in the Revolutionary War, Burr had worked his way up from State Assemblyman to State Attorney General.

In fact, Burr almost became President: in 1800, he and Thomas Jefferson tied in the Electoral College. Only after a bitter, bruising fight, did Jefferson manage to wrest victory in the House of Representatives and win the Presidency, while, under the rules of the time, Burr became Vice President. In 1804, Burr ran unsuccessfully for Governor of New York, antagonizing Federalist Alexander Hamilton. The two agreed to a duel.

Continued on page 40
Aaron Burr, book review

Continued from page 37

in New Jersey (where dueling was not prohibited.) Burr survived. Hamilton did not.

The usual story is that Burr headed west to reinvent himself, and that's where the mystery starts. Burr met up with General James Wilkinson, head of the United States Army and military governor of the northern portion of the Louisiana Purchase, only recently acquired from France. The odious Wilkinson would later swear that Burr solicited his participation in a conspiracy to commit treason. But exactly what the object of that alleged conspiracy was supposed to be was anything but clear then, and it remains so. There were no undercover audio and video tapes, no video surveillance, and nothing to establish what Burr or Wilkinson actually discussed. Wilkinson evidently altered a crucial prosecution document to conceal his own nefarious conduct, and to put a sinister spin on Burr's purported thinking.

President Jefferson, Burr's former political adversary, was at first slow to react to rumors of Burr's activities. However, after two no true bills, one in Kentucky, and one in Mississippi, the Government obtained an indictment of Burr by a Richmond, Virginia, Grand Jury composed of local political leaders who were anything but neutral, and Jefferson virtually directed the prosecution that followed. At trial, Wilkinson swore that Burr planned to mount an expedition to overthrow the Mexican government (then part of the Spanish empire) and to break the western States and the Louisiana Territory (including New Orleans) out of the Union. Unknown at the time was the fact that General Wilkinson was actually a secretly paid, undercover agent of the Spanish government, something Wilkinson desperately needed to keep concealed for his own self-protection. More importantly, Wilkinson's own treasonous dealings with Spain would have made for devastating cross examination, and made a mockery of the of the prosecution theory ---if defense counsel had known about it. Could the government's chief witness have been the prime mover, and set up the defendant, to cover up his own preexisting scheme? It's an old story, and a cautionary tale for prosecutors of today.

The case offers an intriguing picture of where our Federal judiciary was in its infancy, and tantalizing insight into how our system might have developed in quite different directions. Presiding over the trial was none other than the Chief Justice of the Supreme Court, John Marshall, this at a time when Justices of the Supreme Court sat on trials in the Federal circuits. President Jefferson and Chief Justice Marshall were fellow Virginians, but far apart in political philosophy; the President passionately opposed Marshall's Federalist viewpoint, while the Chief Justice stood up for the independence of the Supreme Court. He issued a subpoena duces tecum to the President for Wilkinson's correspondence and his ruling on Burr's motion to limit evidence likely constrained a reluctant trial jury to return a verdict for the defendant. In the process the Chief Justice helped to establish the judiciary as the effective third branch of government that we know today.

The Treason Trial of Aaron Burr is an excellent, thoughtful, and, at 226 pages, digestible account of a complex capital prosecution. You might keep it on your bookshelf for the next time you have that seemingly overpowering indictment in your face: the power of the government, the outrage of the community, the tidal wave of media bias. In the end the hard-fighting defense team, including Burr himself, left a legacy for American criminal trials: the tradition of a committed, tenacious, resilient defense. The deck stacked against them, Burr and his defense colleagues kept their cool and Burr kept his life.

Read all about it in Professor Newmyer's highly readable analysis of this famous Constitutional case, a testament to steel nerved defense lawyering against the odds.

---

“There are backaches in Bay Ridge, but not enough to support 19 massage parlors.”

– NYC Police Commissioner Ray Kelly (N.Y. Times 7/12/13)
Brief Examinations

Defending Jacob
Author: William Landay (Delacorte Press 2012)
b briefly examined by Dick Barbuto

Andy Barber, the Chief Assistant District Attorney of Middlesex County in the Commonwealth of Massachusetts, is about to get the shock of his life. His son, Jacob, will be charged with the brutal murder of a 14 year old classmate.

The book is presented to the reader through the eyes of Barber with chunks of it taking place with Barber being questioned in a grand jury by the new chief assistant, a fairly disagreeable character who possesses the social skills of a hyena. This is not just a tale of the trial and defense of Jacob but also asks the reader to consider whether or not one can inherit genes that can result in leading him to be predisposed to violent behavior. Parenthetically, those familiar with New York State grand jury practice will quickly note that Massachusetts has very different rules.

Landay also takes pains to provide the reader with some insights into the dynamics of the family when a member stands trial. He is particularly adept at describing both the physical and mental distress visited upon Barber’s wife as well as the harm done to the relationship to Barber and his wife, Laurie. The author has written a novel of a family whose life has gone sideways, of a mother and father’s parental instincts to protect their son despite strong evidence against him and the terrifying result of the collision of guilt, love and betrayal. If you are looking for a predictable book you should look elsewhere.

Surrounded by hype when published, the book has been hailed as one of the best of the year by Entertainment Weekly, The Boston Globe and the Kansas City Star. The hype and subsequent buzz are justified.
PRESIDENT: Benjamin Ostrer, Chester

PRESIDENT-ELECT: Aaron Mysliwiec, Manhattan

FIRST VICE-PRESIDENT: Wayne C. Bodden, Brooklyn

VICE-PRESIDENTS: Danielle Eaddy, Brooklyn Andrew Kossover, New Paltz Michael Shapiro, Manhattan Andre Vitale, Rochester John S. Wallenstein, Garden City

SECRETARY Robert G. Wells, Syracuse

TREASURER Jane Fisher-Byrialsen, Manhattan

LIFE MEMBERS
Myron Beldock
Anthony J. Colleluori
Terrence M. Connors
Anthony Cueto
Gerard M. Damiani
Telesforo Del Valle, Jr.
Joshua L. Dratel
Herald Price Fahringer
Russell M. Gioiella
Lawrence S. Goldman
E. Stewart Jones
Kathryn M. Kase
Ray Kelly
Terence L. Kindlon
Gerald B. Lefcourt
David L. Lewis
Thomas F. Liotti
Brian Joseph Neary

LIFE MEMBERS CONT.
Thomas J. O’Hern
Paul D. Petrus
Stephen J. Pittari
Frank Policelli
Murray Richman
Todd J.W. Wisner

PRESIDENT’S CLUB
Daniel J. Henry, Jr.
Michael Kennedy
Kevin O’Connell
Benjamin Ostrer
Joel B. Rudin
Richard Willstatter

SUSTAINING MEMBERS
James A. Baker
Barry Berke
Lloyd Epstein

LIFE MEMBERS CONT.
Mario Gallucci
David I. Goldstein
James Harrington
John Ingrassia
Donald Kinsella
Paul D. MacAulay
Mark Mahoney
Oscar Michelen
Gary P. Naftalis
Marcos Pagan
Steven Patterson
Roland G. Riopelle
Anastasios Sarikas
Eric A. Seiff
Oliver Storch
Vivian Storch
Harry Tilis
Harvey Weinberg

NYSACDL WELCOMES OUR NEW MEMBERS, AS OF JULY 1, 2013

CHAUTAUQUA
Michael O’Kelly

ERIE
Christopher Hayes

KINGS
Gregory Esposito

MONROE
Melissa Yeager

NASSAU
Eric Bauman
Aida Leisenring

NEW YORK
Amanda Ambrose
Daniel Bibb
Arkady Bukh
Karen Funk
Theodore Goldbergh
Rebecca Heinegg
Thomas Kenniff

ONEIDA
Jonathan Stroble

ONONDAGA
Robert Allan
Felicia Pitts-Davis

AND THANKS TO OUR RENEWING MEMBERS

A COMPLETE MEMBERSHIP LIST IS AVAILABLE ON THE WEBSITE
www.nysacdl.org/member-directory/
Join the Committee

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.

AMICUS CURIAE COMMITTEE
Chairs: Marshall Mintz (mmintz@minopp.com), Marc Fernich (maf@fernichlaw.com)
Members: Richard Willstatter

ANNUAL DINNER COMMITTEE
Chair: Aaron Mysliwiec (am@fmamlaw.com)
Members: Andrew Kossover, Ben Ostrer

CONTINUING LEGAL EDUCATION COMMITTEE
Chairs: Bruce Barket (bab@barketmarion.com)

CONTRACTS
Chair: Andrew Kossover (ak@kossoverlaw.com)
Members: Donald Rehkopf, John Wallenstein, David Goldstein

FINANCE AND PLANNING COMMITTEE
Chair: Aaron Mysliwiec (am@fmamlaw.com)
Members: Jane Byrialsen, Michael Shapiro, Kevin D. O’Connell, Benjamin Ostrer

LAWYERS STRIKE FORCE ASSISTANCE COMMITTEE
Chair: Benjamin Ostrer, President
Members: Michael Dowd, Marc Fernich, Timothy Hoover

LEGISLATIVE COMMITTEE
Chair: Andrew Kossover (ak@kossoverlaw.com)

MEMBERSHIP COMMITTEE
Chairs: Michael G. Dowd (mdowd@mgdowdlaw.com),
Members: James A. Baker, Bruce Barket, Mitchell Dinnerstein, Danielle Eaddy, James W. Grable, David Goldstein, Timothy Hoover, Greg Lubow, Aaron Mysliwiec, Lisa Peebles, Robert Wells

PROSECUTORIAL AND JUDICIAL COMPLAINT COMMITTEE
Chair: Mike Shapiro (MShapiro@clm.com)
Members: Dan Arshack, Lawrence Goldman, Aaron Mysliwiec, Donald Rehkopf, Michael Shapiro, Jane Byrialsen, Thomas O’Hearn

PUBLICATIONS COMMITTEE
Chairs: Benjamin Ostrer (ostrben@aol.com), John S. Wallenstein (jswallensteinesq@aol.com)
Members: Andrew Patel, Dick Barbuto, Jessica Horani
Membership Application

Please print or type

Name: _____________________________________________________
Firm Name: _________________________________________________
Address:____________________________________________________
City/State/Zip: ____________________ County:  ____________________
Phone:__________________________ Fax: _______________________
Email: ______________________________________________________
Website:____________________________________________________
Bar Admission State:________________ Year Admitted:____________

Please circle membership type

*All memberships include $15 donation to the NYSACDL Foundation, Inc.
☐ Please check here to remove.

- Lifetime Member $2500
- President’s Club $515
- Sustaining Member $315
- Regular Member $215
  - Income over $50,000
  - Income under $50,000
  - In practice over 5 years
  - In practice less than 5 years
  - Full-time public defender
- Regular Member $140
- Associate Member $190
- Non-lawyer
- Retired Attorney $90
- Law Student/Recent Law School Alumni (less than one year since completion) $50
  - School: __________________________
  - Graduation date: __________________

Membership dues can be paid by check or charged to American Express, MasterCard, or Visa.

Please make your check payable to NYSACDL and send it to:

NYSACDL Office
90 State Street, Suite 700
Albany, New York 12207
Phone: 518-443-2000
Fax: 888-239-4665

Please charge to my credit card.

Credit card #: __________________________
Exp. date: __________________________
Signature of applicant: __________________________
Date: __________________________

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.

YOUUMAN, MADEO & FASANO, LLP
ATTORNEYS AND COUNSELLORS AT LAW

299 BROADWAY SUITE 810
NEW YORK, NY 10007
TEL: 212-791-7791 - 212-594-6030

Immigration Consultants to the Criminal BAR
The Calf-Path
by Sam Walter Foss

One day, through the primeval wood,
A calf walked home, as good calves should;
But made a trail all bent askew,
A crooked trail as all calves do.

Since then two hundred years have fled,
And, I infer, the calf is dead.
But still he left behind his trail,
And thereby hangs my moral tale.

The trail was taken up next day
By a lone dog that passed that way;
And then a wise bell-wether sheep
Pursued the trail o’er vale and steep,
And drew the flock behind him, too,
As good bell-wethers always do.

And from that day, o’er hill and glade,
Through those old woods a path was made;
And many men wound in and out,
And dodged, and turned, and bent about
And uttered words of righteous wrath
Because ‘twas such a crooked path.
But still they followed – do not laugh –
The first migrations of that calf,
And through this winding wood-way stalked,

Because he wobbled when he walked.

This forest path became a lane,
That bent, and turned, and turned again;
This crooked lane became a road,
Where many a poor horse with his load
Toiled on beneath the burning sun,
And traveled some three miles in one.
And thus a century and a half
They trod the footsteps of that calf.
The years passed on in swiftness fleet,
The road became a village street,
And this, before men were aware,
A city’s crowded thoroughfare;
And soon the central street was this
Of a renowned metropolis;
And men two centuries and a half
Trod in the footsteps of that calf.

Each day a hundred thousand rout
Followed the zigzag calf about;
And o’er his crooked journey went
The traffic of a continent.
A hundred thousand men were led
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For thus such reverence is lent
To well-established precedent.

A moral lesson this might teach,
Were I ordained and called to preach;
For men are prone to go it blind
Along the calf-paths of the mind,
And work away from sun to sun
To do what other men have done.
They follow in the beaten track,
And out and in, and forth and back,
And still their devious course pursue,
To keep the path that others do.

But how the wise old wood-gods laugh,
Who saw the first primeval calf!
Ah! many things this tale might teach –
But I am not ordained to preach.

Sam Walter Foss (1858-1911) was an American librarian and poet whose works also included The House by the Side of the Road and The Coming American.

[Editor’s note: We thought if it was on Judge Korman’s mind it was worth sharing.]
NYSACDL Online Video CLE Seminars

Earn CLE credit quickly and conveniently from the comfort of your office or home with NYSACDL’s online video CLE seminars. These video reproductions of some of our most popular recent CLE seminars are sure to fulfill your educational needs for a great price!

Videos Available:

**WEAPONS FOR THE FIREFIGHT** 2012 – 6 CLE Hours in Skills – $135
*Featured Faculty and Topics Include:*
  - Cross of the Expert Witness - Wesley Serra, Esq.
*Recorded: December 8, 2012 - New York University Law School, New York, NY*

**CROSS TO KILL** 2012 – 7.5 CLE Hours in Skills – $150
*Featured Faculty and Topics Include:*
  - Cross Examination of the Cooperating Witness - Benjamin Brafman, Esq.
  - Cross Examining the Chicago Cop and Federal Agents; Making the Prosecution’s Witnesses Your Own - Samuel Adam, Jr., Esq.
*Recorded: November 9, 2012 - U.S. Courthouse, Buffalo, NY*

**DEFENDING A DRUG CASE** 2012 – 5 CLE Hours in Skills – $125
*Featured Faculty and Topics Include:*
  - Drug Diversion Court: A View from the Bench – Honorable Patricia Nunez
  - Defense of the Buy and Bust Case – Arnold Levine, Esq.
*Recorded: May 18, 2012 - St. Francis College, Brooklyn, NY*

**CROSS TO KILL 2012** – 5.5 CLE Hours in Skills – $130
*Featured Faculty and Topics Include:*
  - Overview and Essentials of Cross Examination – Jay Goldberg, Esq.
  - The Architecture of Constructive and Destructive Cross Examination – Bobbi Sternheim, Esq.
*Recorded: March 30, 2012 - St. Francis College, Brooklyn, NY*

**CROSS TO KILL 2011** – 5.5 CLE Hours in Skills – $130
*Featured Faculty and Topics Include:*
  - Cross Examination Based on Taped Transcripts – Susan Necheles, Esq.
  - Cross Examination of an Expert Witness – Gerald Shargel, Esq.
*Recorded: April 15, 2011 – St. Francis College, Brooklyn, NY*

**PLEASE NOTE** – this offer is for ONLINE viewing; there are no DVD or CD reproductions. **Important:** Newly admitted attorneys may not earn credit through video reproductions.

Visit www.NYSACDL.org to purchase today!

---

**Stronghold Forensics Lab 6**

**Michael O’Kelly**

Cell Phone Data Analyst
Cell Tower RF Signal Survey/Mapping
Audio Recording Recovery - Noise Elimination

2216 North Maple Ave, Asheville, New York 14710
1-800-DONT-LIE (1-800-366-8543)
1-800-FAX-A-LIE (1-888-329-2543)

---

**Frank Mannarino, LCSW**

emoshuns.com

“Feel Better, Look Better, Take Back Your Life!”

1271 Prospect Avenue
Brooklyn, NY 11218
web: www.emoshuns.com
516-521-3405
frank@emoshuns.com
Gideon at 50

IT’S TIME TO FINISH WHAT HE STARTED 50 YEARS AGO

Illustration © The Constitution Project 2013
Used by Permission