This has been an exciting and productive year for the NYSACDL. For starters, we welcomed an infusion of new Board members whose vitality and enthusiasm were a great pleasure. We finalized the NYSACDL website and have the listserv up and running well. We had some of our most successful CLEs and are planning a weekend CLE event in the upcoming year as well as hoping to form a trial college. In addition, we are currently forming a 501(c)(3) tax-exempt foundation to fulfill the educational purposes of the Association. We continued our Strike Force and Amicus work as well, coming to the aid of individual members when needed and having a voice in developing important caselaw.

The most significant development this year was that for the first time, the NYSACDL has a Legislative Committee, headed by Don Thompson of Rochester and we have retained the services of the public relations firm Brown, McMahon and Weinraub. This year we were instrumental in helping fashion the legislative fix for Post-Release Supervision violations. We can thank board member Aaron Mysliwiec for using his expertise on PRS to the benefit of the thousands of inmates now facing re-sentence. Additionally, as a result of our demonstrated expertise, we have been asked to comment on a number of issues that are coming to fruition in the upcoming session. Perhaps more important than serving in an advisory capacity, we have developed an affirmative agenda regarding discovery reform and the need for expungement of criminal records, both of which are gaining ground. With the changing landscape in Albany, we are perfectly positioned to push for legislation that will bring fairness back into a system that has been tipping decidedly towards the prosecution for decades.

Another important change is one that has not yet come, but is in process. That is the decision that the NYSACDL will employ an Executive Director who has experience in criminal defense policy. To that end, we had determined that Past-President Dick Barbuto would be our interim ED, but unfortunately Dick was unable to proceed due to health concerns. This is a disappointment to the Board of Directors since we were looking forward to working with Dick. However, you will soon see a job advertisement and I ask you to forward it to everyone you know who may know someone who would be a perfect ED for our Association.

The addition of an Executive Director who understands criminal defense work will be an asset to the Association and an asset to our profession. It is important that the NYSACDL be more vocal and visible than our current structure supports. Our Presidents have always been active and involved in the issues of the day, but we have all been full-time practitioners. One of my most fervent hopes is that a new ED will have the time and expertise to help the President stay on top of the issues statewide, locally and in the federal system.

This year as President has been very rewarding for me. I have had a chance to get to know a lot of the members whom I did not previously know. I was able to work with a wonderful Board of Directors, many of them new to the job, but willing to put the time and effort into making the NYSACDL the best Association it can be. I am particularly pleased with our lobbying efforts because I have long believed that the NYSACDL should be more active in Albany.

Thank you for allowing me the privilege to serve as your President for this year. I would not have been willing to give my time to any cause other than our common one — to be the best advocates we can be for our clients, to work towards achieving the respect and admiration our profession deserves and to be an instrument of change in an often unfair and unbalanced system. I have the utmost respect for all of you, my co-warriors in our common cause.
ANNUAL DINNER 2009

The New York State Association of Criminal Defense Lawyers’ Annual Dinner be held at the Marriott Downtown Hotel on Thursday evening, January 22, 2009. Tickets are $175 for members, and $200 for non-members.

HONORABLE WILLIAM BRENNAN AWARD TO HONORABLE KATE ROSENTHAL


JAMES P. HARRINGTON TO RECEIVE HON. THURGOOD MARSHALL AWARD


MARTIN B. ADELMAN RECIPIENT OF LIFETIME ACHIEVEMENT AWARD

Past-President Martin B. Adelman will receive a Lifetime Achievement Award. Prior recipients of the award are Jack T. Litman, Ira D. London and Gustav Newman.

STEPHEN J. PITTARI RECIPIENT OF SERVICE TO THE CRIMINAL BAR AWARD

Stephen J. Pittari, who served as a Vice President of the NYSACDL will be honored with a Service to the Criminal Bar Award. Prior recipients include Malvina Nathanson, David Steinberg and Alan Rosenthal.
Introduction

What is mitigation? Mitigation is a biopsychosocial evaluation of the client’s social and psychological history informed by the facts of the case with appropriate recommendations as a means to minimize the negative legal outcome. This paper will outline the background, process, purpose, and scope of mitigation for the criminal defense lawyer.¹

BACKGROUND

Origins of Mitigation

In the old days, defense lawyers who had a death penalty case would approach the defendant’s grandmother and priest (or rabbi) for letters that would inevitably state that Johnny was a wonderful child whose life should be spared. This was counterproductive inasmuch as Johnny was obviously not a good boy as evidenced by the fact that he killed another person. In other words, the letters from the family members were well-meaning but said nothing about Johnny as a person or his biopsychosocial history. In time, lawyers turned to social workers to obtain a professionally prepared death penalty mitigation report.

Today’s Law

Mitigation was made law by the Supreme Court in Wiggins v. Smith, 539 U.S. 510 (2003),² which found that a lawyer’s failure to procure a psychosocial report explaining the troubled background of a defendant in a capital case was an error of counsel. Wiggins has been used more broadly in conceptual terms and today mitigation is used not just in death penalty cases but in almost every kind of criminal issue, including relatively minor offenses to serious white-collar crime.

The Mitigator

The mitigation expert’s role should compliment the lawyer’s role in that the lawyer advocates for the legal rights of the client and provides legal counsel, while the mitigation expert advocates for the client through professional clinical expertise illuminating all possible issues in the defendant’s background to effectuate a better legal outcome. Additionally, while lawyers tend to think in linear terms (black letter law) mitigation experts tend to consider broader systemic issues that affect the defendant and his case.

About half of mitigation experts in the United States are licensed social workers and the remainder comprise psychologists, psychiatrists, lawyers, and non-clinical experts some who have had experience in the prison system.³ The major seminars and educational forums for mitigation in the United States narrowly focus on death penalty cases, however the reality is that mitigation is invaluable in many other criminal legal contexts. I have personally mitigated cases for gun possession, DUI, identity theft, mortgage fraud, embezzlement, jewel heist, sexual assault, bank fraud, race-based crimes, murder, parole hearings, and criminal immigration matters.

PURPOSE of MITIGATION

Humanizes the Defendant

While prosecutors are generally overwhelmed with a huge caseload and may have little contact with the defendant, the mitigation report forces the prosecutor to consider the defendant as a real person. The Mitigation report induces empathy into the reader by humanizing the defendant through a sympathetic narrative and by illustrating details from the person’s life history while relating facts about their behavior, thoughts, and feelings. The elucidation of personal details humanizes the defendant allowing the reader to identify with the person’s personal background, feel concerned understanding, and ultimately sympathy and even empathy.

Mitigation Prevents Guesswork

Mitigation prevents guesswork on the part of the prosecutor. Because it is natural for people to find patterns and meaning in things even if they are not present, people naturally tend to fill in untrue or irrelevant facts into things that they see. Mitigation reports help to minimize this, or even eliminate assumptions, prejudices, and biases of the prosecutor by completing an otherwise incomplete picture prohibiting the assumption of facts (that may be false and dangerous) and replace them with an accurately complete picture.

Single Document

TheMitigation report can also serve as a “single document.” Often the prosecutor is snowed under with well-meaning documents concerning the defendant, including educational, family, employment, and various other reports. The prosecutor may express gratitude for a single condensed package prepared by a mitigation expert that incorporates all such matters outlining the pertinent issues, especially if the prosecutor does not have the time (or know-how)
to digest various professional documents, which can be confusing and overwhelming. Additionally, the mitigation report can serve as a kind of peace offering between the defense and prosecution inasmuch as the mitigation report imparts a gentle informational package about the defendant providing insights and ideas that are new to the prosecutor.

Example. In a case where the client, an eight year old boy, was accused of fondling his younger male cousin the prosecutor felt unsure about how to proceed given the lack of information from investigators. The mitigation report permitted the prosecutor to conceptually experience a day in the life of the eight year old boy allowing for some insight into the defendant’s basic interactive behaviors with peers, school, and family as well as his thoughts and feelings concerning his limited life experiences in his home and community.

Conceptual / Strategic Consult
The best feedback I can receive from a lawyer is that the mitigation report assisted the lawyer to better conceptualize the factual issues in the case serving as a strategic tool for the defense. As a lawyer, I am well aware that law school neglects to instruct students into everyday lawyer roles that see the lawyer interacting with the client. For example, few if any law schools offer courses in case assessment, deposition interrogatives, managing the difficult client who appears chronically dissatisfied, and other essential areas related to the human dimension of the client. The mitigation consultant, who is also expert in the psychosocial history of the client, will illuminate the client’s world and systems elucidating for the defense lawyer unknown facts in a nuts and bolts manner. In turn, the lawyer may develop strategic avenues not yet considered.

THE TEN R’S OF MITIGATION

1. Reality – facing a full narrative
The mitigation report often has an objective summary of the case facts. Naturally, no factual summary is ever truly objective given the oppositional nature of the parties, yet in many cases the prosecutor does not have a set of laid out facts, but rather a smorgasbord of issues. Prosecutors have a huge case load and the presentation of a case’s facts can be quite helpful to place into perspective a time line, the relevant players, the major issues, the minor facts that can be quite crucial, the context, and so on. Most prosecutors have two or three main points that they keep in their head forming the parameters of how they conceptualize the case, in contrast the factual summary will serve to have the prosecutor face a full narrative.

2. Rea – mens rea / intent / volition
This examines the defendant’s intent or volition in the case. This is not a legal consideration, but a human consideration about what was going on in the person’s mind. People commit crimes due to anger, stupidity, ignorance, fear, etc. Because intent in the law is often simplistic it fails to capture the nuances of a person’s thinking and the subtleties of their decision-making process.

The stating of relevant facts and issues must be undertaken with the utmost care so as not to suggest that the defendant wishes to try his criminal case in a mitigation report, but rather that he simply wants the prosecutor to be aware of the full range of surrounding facts and his thinking in this matter so that his perspective is understood.

Example. In a white-collar securities case the client used the mitigation report as a means to better explain his thinking and behavior in the criminal matter, as he believed that the prosecutor did not understand what was going through his mind and that his intentions were in no way malevolent.

3. Recency – when did the crime occur
This factor can be quite relevant when the client’s plea occurs many months or even years after the illegal behavior was committed, as the client’s perception or understanding of their behavior may have changed. Additionally, a crime that is a hot topic in the paper may be softened with time in the sense that the prosecutor may see the events in a different light after some time has passed, especially if they are no longer pressured by the media, public, or a vengeful family.

The recency of the illegal behavior is extremely important because the time or distance from the behavior, especially if found in the distant past, serves to empirically show to the judge that the client’s interest in such conduct is remote. The best way to emphasize this is by showing everything and anything positive that the client has undertaken in the intervening years. While rehabilitation shows the defendant’s personal efforts to become a better person “recency” concretely places a time barrier between the defendant and the behavior. Time heals all wounds is the main idea here and can have a powerful effect. The proof of intervening and superseding good behaviors demonstrates how attenuated, detached, and foreign the illegal behavior is from the current lifestyle and values of the client.

4. Repetition – examine the client’s overall record
The mitigation expert will consider the overall record and life behavior of the defendant to better understand the case. Even crimes that are repeated may be done for a reason that is not apparent to the prosecutor or even the defense lawyer. There are three scenarios for “repetitive.” Those clients who repeat their illegal behavior multiple times, those who repeat the act only once, and those who never repeat their illegal behavior.
For many judges repetition of an illegal behavior negates the possibility of rehabilitation and / or that the client must necessarily be feigning remorse because he fears long term prison; this must be rebutted by the psychosocial report or the client will indeed lose his case. Where repetitive acts occur or multiple illegal behaviors that are related occur the case needs to be dealt with in the context of patterns found in the person’s psychosocial history that would explain such conduct either in a broader context or with regards to a specific issue.

Being arrested is harmful and self-destructive and it is important to understand why a person would be willing to put themselves in harms way. Also, a person who repeats an illegal behavior and is arrested on multiple occasions has either not learned his lesson or the lesson of incarceration, which is no picnic, is less pressing than a more primary need that motivates the client towards such behavior. Uncovering the reason for the self-destructive behavior informed by the primary motive will help clarify the case and permit the reader to identify with certain aspects of the client’s life and finally to empathize or sympathize with the psychosocial deficits, idiosyncratic weaknesses, or mental health pathologies that the person has battled in their lifetime that have contributed to or directly led to his illegal behavior.

**Example.** A client suffered from a devastating history of sexual abuse by her father while her mother relocated to the United States to begin a better life for the client. The client turned to shoplifting valueless items in the United States. The trauma from her childhood and the current repetitive acts of larceny were shown to be connected permitting the judge to appreciate that the client was responding to internal fears and anxieties, rather than malevolence against society.

**5. Rung – what level of seriousness is involved**

The seriousness of the crime is considered by the mitigation expert to place the defendant’s illegal behavior in the broader context of their lives. It seems increasingly the case that white-collar defendants’ lawyers are seeking quick plea agreements with the prosecutor rather than mitigating the case as best as possible. Because some white-collar crimes are publicly offensive to a wide audience the client needs a mitigation report all the more urgently because such white-collar criminals need to have their lives humanized and understood by the prosecutor. Moreover, many white-collar defendants are quite frankly arrogant and unapologetic (if only in their body language) for their crimes and a mitigation report will present a family and community-oriented side to the person that can be invaluable.

**6. Recompense / Restorative – has the client righted his wrong**

Here the mitigation expert would include any and all behavior to right a wrong. This may include community or volunteer work initiated on the defendant’s own or restorative financial or monetary compensation even before it is required through the penalty phase of the proceedings. Often a creative or innovative behavior on the part of the defendant can be quite sympathetic, especially if the defendant begins this work immediately and has remained actively involved in such conduct for many months before pleading.

**7. Rehabilitation – client has / can / will change or grow**

Rehabilitation concerns the degree to which the client has made substantive changes in his life to remove himself as best as possible from the illegal behavior and the specific steps, if available, the client has pursued to this end. A client who sold drugs ten years before and after a brief period of incarceration never repeated the illegal behavior is considered fully rehabilitated. This is an important matter because recidivism is extremely high and only a minority of criminals learn from their past illegal behavior and are rarely rehabilitated.

Proof of rehabilitation should begin from the moment the criminal plea is entered or from the moment when a guilty verdict is rendered. The client’s steps towards rehabilitation are also very important, such as volunteer work in jail, completing an educational degree or diploma, religious adherence, work programs, and early release while incarcerated. Letters from parole officers, drug counselors, mental health professionals, clergymen, and other recommendations of the client’s good behavior, moral conduct or rehabilitative efforts can be quite valuable. Many clients themselves become counselors for youths or young adults who have committed similar illegal behaviors.

If the illegal behavior is the result of a primary problem, or pathology, such as stealing to pay for drugs, then both aspects of wrongdoing should be noted. As such, in the above example, it would be helpful to show that the person is both rehabilitated with regards to their illegal behavior and also rehabilitated with regards to their substance abuse.

**Example.** To show the extent of rehabilitation in a particular case I inserted the client’s resume since their release from prison. The educational and employment accomplishments were succinctly stated and reflected in just two pages all the judge needed to appreciate the full extent of the client’s rehabilitation. It is therefore helpful to show that a person’s everyday behaviors at the time of the illegal behavior and their current lifestyle are so dissimilar that for all intents and purposes the client is all but a different human being and thus fully rehabilitated.

(continued on page 6)
8. Remorse / Regret

Does the client understand and accept his actions

While rehabilitation is often based on objective evidence, remorse and regret is a subjective standard based on the client’s personal admission of wrongdoing. The best way to prepare the client is to have him acknowledge and review in detail the illegal behavior in a calm, honest, and rational fashion.

Begging for mercy can have as much positive impact or more than any of the above issues discussed. Begging for mercy differs from remorse and regret in that the former is a subjective acknowledgment of wrongdoing while the latter is a plea for clemency. Both are important and one need not be used to the exclusion of the other. Begging for mercy is not groveling, but rather a temporary abandonment of personal control in the case permitting the judge or prosecutor to appreciate that they will literally make a life changing decision for the defendant that will impact every aspect of the health and safety of his and his family’s lives for probably the rest of their lives. It should be noted that begging for mercy inculcates power and control in another person, even an adverse party, which can actually induce that person towards greater leniency and compassion – and even outright forgiveness.

There are five central reasons why a client would not express remorse and regret for their illegal behavior even though doing so is in their best interest.

A. Psychopaths – Some persons who commit illegal behaviors are psychopaths, that is, they have no conscience and the harm they cause others does not affect them emotionally. Such persons often have a long history of immoral behavior and feel no genuine remorse or guilt for their conduct and the harm caused to other people through wanton disregard for the health and safety of others. Such persons are often diagnosed with Antisocial Personality Disorder, as characterized by a pervasive pattern of disregard for the well-being of others, failing to follow the laws or norms of society, acting in a deceitful way, acting with reckless behavior, disregarding the safety of others, displaying general irresponsible and even child-like behaviors, leading a parasitic life-style, and displaying a lack of genuine remorse even after being hurtful. Such persons show glibness about the harm they may cause and may act with superficial charm.

B. Low Intelligence / Poor Education – Some clients suffer from low intelligence, a deprived educational background, learning disabilities, or a combination of the three.

Example. A client assisted in managing a pool hall was told to carry a firearm owned by the pool hall owner when the client locked up at night and to bring the firearm back in the morning. One night while closing the pool hall the client saw a police officer and stupidly threw the gun in a garbage can nearby. The police officer became suspicious, saw the gun, and arrested the client. The client, who was uneducated, grew up in a poor and dangerous environment in South America and did not understand that carrying a gun without a license, even at the insistence of a boss, was still an illegal behavior. He said that he never used the gun, kept it unloaded, never brandished the firearm, and never harmed anyone. He could not understand how his actions constituted an illegal behavior.

C. Self-Blame - Such clients take the responsibility for their behavior so seriously and honestly that the client never forgives himself for the illegal behavior and the prosecutor or judge may actually identify with the client’s admission and acceptance of guilt and, paradoxically, be inclined to be harsher on the client.

Example. A client who accidentally killed his girlfriend all but shouted that he was a murderer because he felt so guilty for the killing. While it may sound good that the client has taken total responsibility for his actions representing himself as totally responsible, he also might just convince the judge that this is true. The client needed guidance to place his actions, acceptance of responsibility, and the goal of the case into better perspective.

D. Distant Event / Change in Personality – Some illegal behaviors have occurred so long ago that the client feels inclined to believe that he is a different person or that time heals all wounds. The client’s attitude may lead the prosecutor to believe that the client is flippant or dismissive of the seriousness of the matter. Such clients need to be reminded that in the eyes of the court and prosecutor the fact that an illegal behavior is many years old may have little or no bearing on the present case.

E. Belief in Innocence – Some clients stubbornly insist they are innocent of wrongdoing even after the defense lawyer has shown the client the black letter law of which he is accused.

Example. A male client was arrested for spousal abuse after his wife made a false accusation to the police. The wife had done this with the hope that her husband would be automatically deported upon arrest. While this did not occur she did manage to have the arrest stick and it remained on his permanent record. The client refused to admit any wrong-doing through a plea to a lesser charge and said that swearing that he harmed his wife when in fact he did not would be a lie and a sin. The client could not be persuaded and was not even moved by the fact that this incident could jeopardize his entire case.

9. Roles

It is essential to emphasize any and all positive roles that the client holds in the community, workplace, family, church, volunteer work, and any other redeeming aspect as his role as father, husband, son, and sibling who may well provide physical, emotional, financial, or instrumental care, love, and support for his immediate or extended family members. In turn, the extreme hardships that family members would endure if the client is incarcerated should be outlined. This section of the report may in fact be
the most length, along with the client’s family background material, and can express the immediate life, duties, and responsibilities of the client from a positive vantage.

10. Recommendations
The mitigation expert may offer an array of recommendations through community resources that best suit the client’s needs now and in the future. The recommendations will also consider how the goals of punishment / deterrence are best met, what can be saved in this person, and who is harmed by incarceration, that is, hardship to family members. In this respect, the four central questions are: what will the client’s experience be like in prison, who will be harmed by incarceration, what benefit will be gained by incarceration for the community, what will the client’s future look like? The prosecutor can then recommend by balancing the client’s positive role(s) in family, work, community, education, employment with the possible future harm the person may commit.

EVIDENTARY CONSIDERATIONS

Background
The facts that go into a mitigation report can be quite broad. Such facts may be considered by the prosecutor, induce the prosecutor to extend his investigation of the crime, look to others as possible defendants, or even consider alternate theories of the crime. However, it is crucial to understand that the range of facts presented in a mitigation report may be prohibited at the trial phase of proceedings. As such, the criminal lawyer must adopt a use it or lose it attitude.

Evidence: Lost & Found
Trial evidence considers the relevance of the witness or facts by weighing the probative vs. prejudicial effects of having such material made known to the jury. If the criminal lawyer wishes to preserve possible evidence which may be barred at trial such facts may be presented in a mitigation report for early consideration, so that at the very least such facts have been made known to the prosecutor. As such, it is important to illuminate all the facts by assessing separately what a prosecutor does hear vs. what a judge might hear vs. what a jury can hear.

Example. An eight-year-old boy (“Bobby”) accuses the defendant of touching his penis. There are no witnesses or physical evidence, and the mental health of the boy cannot be ascertained. Most criminal lawyers would recommend a plea so that the defendant will be spared the humiliation and exorbitant cost of a trial, which may well result in a longer sentence than a plea agreement. A lawyer who requested a consult from myself presented the following few facts to me.

1) Bobby lives with his parents who have histories of illicit substance abuse (quality and quantity unknown),
2) Bobby has an older teenage brother, Joe, with mental retardation, and
3) Some years earlier Joe had made a similar accusation against a different person concerning a sexual assault.
4) The defendant has no history of illegal conduct.

These facts and related information provide important implications. While such information may well serve to produce an effective mitigation report such facts, and their implications, would probably be barred at trial due to either a lack of probative substance or because they are deemed overly prejudicial. As such, it is crucial to make those facts and related implications known through a mitigation report.

WHEN TO USE MITIGATION
It’s never too early and it’s never too late to get a mitigation report. I have undertaken mitigation reports even before charges have been brought and as late as pre-sentencing, and even at parole hearings. Mitigation reports are effective as preliminary support, consultative forums, or investigation and it is clearly best to start early because the longer the litigation process goes on the more entrenched each side will become.

Early use of the mitigation report will permit the prosecutor to consider, weigh, and possibly investigate the factual issues in the broadest reasonable light. Mitigation reports can be used at the 1) pre-plead stage, 2) post-plead stage, 3) to counter a prison board report, 4) pre-sentence, and 5) even before parole hearings to assess and outline a post-release plan.

It should be understood that a mitigation report prepared at the pre-plead stage can later be used as a pre-sentence report with little or no changes to the document. Some lawyers see this as killing two birds with one stone and obtaining for one price a document with two uses.

CLIENTS WHO MOST BENEFIT FROM MITIGATION

Various clients in numerous types of situations benefit from a mitigation report.

1. Clients with mental health problems are good candidates, especially as the mitigation report will contextualize that person’s psychiatric issues within the greater context of their life. This is especially true where there is the confluence of mental health and social deficits.
2. A client who suffered early life traumas, such as an impoverished childhood, would also benefit, as the mitigation report can outline the defendant’s fears, sadness, anxieties, loneliness, and uncertainties in early developmental periods of their lives.

(continued on page 8)
3. Those clients with inter-family dependence or family members who would experience extreme physical, emotional, and financial hardships if the defendant is incarcerated are also good candidates. In such cases it is crucial to note, for example, how a child’s social and educational tracks can be completely derailed by a father’s incarceration.

4. Clients with poor language or communication skills, poor self-care, or poor decision-making in general would also benefit.

5. Clients who possess a fear of authority are important because they need to speak broadly about their life experiences. It is important to understand that the mitigator’s professional expression can replace the poor self-expression of the client.

6. Finally, lawyers who feel “stuck,” overwhelmed, or at their wits end with a difficult client should consider a mitigation expert for assistance.

Example. A client arrested for selling A-K47s refused to accept an extremely generous plea agreement. An evaluation revealed that the defendant had multiple issues, some of which were connected to his perception that the lawyer, though very experienced, did not really listen to his concerns. The mitigation evaluation and report served to flesh-out the client’s fears and anxieties permitting him a great outcome while permitting the system to avoid unnecessarily incarcerating someone who they really did not want.

MITIGATION REPORTS VS. PSYCHOLOGICAL REPORTS

The mitigation report is not a psychological report and the mitigation expert that hands in exclusively a psychological report outlining the client’s psychiatric issues is negligent. While psychological issues are important they stand as one piece of the puzzle at best. While psychologists and psychiatrists can provide expert testimony about mental illness, the social worker is called on to provide expert assistance in this area and also to inform the court about a wide range of matters that may serve to mitigate a defendant’s case. Indeed, there are defendants who present with psychopathology, but the main mitigation questions concern non-psychopathological issues. And there are defendants who present without psychopathology, yet have strong mitigation evidence, given their biopsychosocial history that the expert forensic social worker must present to the prosecutor or court.

MIDDLE-CLASS AND WHITE-COLLAR DEFENDANTS

There is no question that to some extent the mitigation report is a “sob story” to the degree that the material is meant to invoke an emotional reaction and there is no question that many of our clients in fact have had a rather desultory life. However, I also undertake mitigation reports for middle class and white-collar clients who had rather healthy and safe upbringings. For such clients, trying to mine the client’s childhood as one of poverty and neglect is often a waste of time. Rather, it is crucial to present how the client perceived different aspects of their development and the impact on their lives. At the same time, do not assume that simply because a client grew up with a white picket fence in their front yard that everything was normal.

Example. An adult son and his father were charged with massive mortgage fraud. While they appeared to be a rather typical middle class family it became apparent that my client, the son, had been terrorized by his tyrannical father’s verbal and emotional abuse. The report centered on the fact that the son, while admitting his part in the mortgage fraud, conveyed through the mitigation report that he lived an existence not unlike a battered spouse who found himself in a cornered life from which he could not extricate himself. The spousal abuse metaphor served this client well and could at a minimum relate to the reader his idiosyncratic experiences serving a domineering father with erratic behaviors and unpredictable moods.
## MITIGATION ISSUES

| Family-Systems Analysis |  |
|-------------------------|  |
| Parental Care           |  |
| Sibling Relationships   |  |
| Childhood Development   |  |
| Developmental Milestones|  |
| Social Skills & Peer Rejection |  |
| Young Adulthood & Changes |  |
| Sexual Development      |  |
| Hobbies & Interests     |  |
| Community Ties          |  |
| Community Safety        |  |
| Resources               |  |
| Physical Environment    |  |
| Emotional Environment   |  |
| Education & Employment  |  |
| Corruptive Influences   |  |
| Positive Influences     |  |
| Finances & Poverty      |  |
| Legal Issues            |  |
| Military Service        |  |
| Cultural Issues         |  |
| Role Models             |  |
| Religious Devotion      |  |
| Self-care (ADL's)       |  |
| Mental Health Issues    |  |
| Psychiatric Diagnoses   |  |
| Medical Health          |  |
| Physical Limitations    |  |
| Drug & Alcohol History  |  |
| Racism & Prejudice      |  |
| Support System/Caregivers |  |
| Role & Communication    |  |
| Languages - spoken/written |  |
|  |
| Arrests & Criminal History |  |
| Volunteer, Community/Charity |  |
| Violence, Abuses, Trauma, War |  |
| Residences & Transitions |  |
| Future Plans            |  |
| Social Services Involvement |  |
| Autobiographical Statements |  |
| Shame & Humiliation     |  |
| Values, Ideals, Hopes   |  |
| Identification with     |  |
| Self-Defeating / Misguided |  |
| Internal World:         |  |
| ❑ Fears                 |  |
| ❑ Sadness               |  |
| ❑ Anxiety               |  |
| ❑ Isolation             |  |
| ❑ Uncertainties         |  |
| ❑ Instability           |  |
| ❑ Frustrations          |  |
| ❑ Anger                 |  |
| ❑ Vulnerabilities       |  |
| ❑ Confusion             |  |
| ❑ Disappointments       |  |
| ❑ Resentment            |  |
| ❑ Loses                 |  |

(continued on page 10)
MITIGATION FUNDAMENTALS

continued from page 9

CONCLUSION

Mitigation is a biopsychosocial evaluation of the client’s social and psychological history informed by the facts of the case with appropriate recommendations as a means to minimize the negative legal outcome. This paper has outlined the background, process, purpose, and scope of mitigation for the criminal defense lawyer. Use it early and use it often to the benefit of your client and your criminal law practice as a whole.

Notes
1. However, mitigation is used for other lawyers, such as immigration lawyers, especially where there is both criminal and immigration legal issue. Silver, M.S. and Burack, OR. “The Benefits of Immigration lawyers, especially where there is both criminal and immigration law practice as a whole.

4. Judge Scalia, in a dissenting opinion in the Wiggins case, refers to mitigation material as hearsay evidence.
5. This example is fully presented in: Silver, M.S. “Starting Mitigation Immediately: Using Facts to Broadly Consider Alternate Theories of the Alleged Crime” Atticus. 20 (1) 10-12. 2007.
6. This matter is fully explored in: Silver, M.S. “Avoiding Legal Malpractice Claims: Knowing How to Interact with and Appear the Demanding or Dissatisfied Client,” the Champion, 31 (1), 18- 20. (2007).

EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE NYSACDL’S PROSECUTORIAL AND JUDICIAL COMPLAINT CENTER

The New York State Association of Criminal Defense Lawyers’ Prosecutorial and Judicial Complaint Center (PJCC) was formed in 2004 to deal with the persistent problem of prosecutorial and judicial misconduct. The committee receives reports and complaints of misconduct from whatever sources, including published newspaper accounts. The PJCC conducts investigations and, where appropriate, files complaints, referrals or asks for investigations by the Commission on Judicial Misconduct, or the appropriate department disciplinary committees.

Despite the increase in prosecutorial misconduct reported in the media and growing complaints from the defense bar, few if any complaints are actually filed against prosecutors. Some attribute this to fear by defense attorneys of potential repercussions, while others cynically believe that it is futile to file, since “nothing will be done anyway.” The study committee met with officials from the New York State Commission on Judicial Conduct and the Departmental Disciplinary Committees, and reported that contrary to the popular perception, these agencies would respond to complaints from the NYSACDL.

The NYSACDL is the filing party when forwarding a complaint or referral. It is expected that the PJCC will not limit itself to single episodes of misconduct, but tries to establish systemic and repeated abuses as well. One area of growing concern has been the perceived lack of respect for counsel as evidenced by unnecessarily caustic or intemperate remarks. There has also been the belief that in some courtrooms a failure to agree to a particular course of action can result in an increase of bail and a client’s incarceration.

If you wish to file a complaint, contact Eric Seiff at (212) 371-4500.
For more information on the PJCC, visit our website at www.nysacdl.org.

ATTICUS REQUESTS SUBMISSION OF ARTICLES

Members wishing to submit articles for inclusion in Atticus should send them to the attention of Patricia Marcus, Executive Director, NYSACDL 245 Fifth Avenue, 19th Floor, New York, New York 10016. The editor reserves the right to modify any submissions for style, grammar, space and accuracy.

Authors are requested to follow these guidelines:
1. Use footnotes rather than endnotes.
2. When a case is mentioned in the text, its citation should be in the text as well.
3. Submit articles in hard copy with disk in either WordPerfect or Word.
4. Articles longer than 3-4 pages will be edited.

( 10 ) Atticus Volume 21 • Number 2 • January 2009 New York State Association of Criminal Defense Lawyers
NEW AND HIGHER SURCHARGES FOR CRIMES, TRAFFIC CHARGES

by Gary Muldoon

Gary Muldoon is a member of the NYSACDL. He is in private practice in Rochester.

When a criminal defendant or motorist is convicted of an offense, a variety of penalties may be imposed. Aside from punishment such as incarceration or probation, there is a burgeoning list of financial sanctions.

When first enacted in 1982 (L 1982, ch 55, §81), the “penalty assessment,” as originally called, was $75 for a felony, $25 for a misdemeanor and $15 for a violation. The law was changed a year later, now called a “mandatory surcharge,” to reinforce that judges lack authority to not impose them.

Bellicose Words

At the time, Joseph Bellacosa wrote: “It is difficult to imagine how the financial benefits to be achieved will justify the cost of implementing this ‘p.r.’ gimmick. Even if relatively successful, the use of the criminal court system to produce additional State revenues is a troubling concept which deserves reevaluation. Moreover, the amounts imposed have the potential to trivialize the seriousness with which society’s outrage at the commission especially of malum in se crimes should be expressed.” See former Practice Commentary to McKinney’s CPL 420.35.

This observation now has a quaint quality to it, like 30 cents for a gallon gasoline. Times have changed, and the State Legislature has increasingly found “taxing crime” as a way to seemingly balance the state budget.

Traffic infractions did not initially come within the statute’s ambit. Surcharge laws have since been expanded so that errant motorists now come within the mandatory surcharge.

Different Types of Fees

Some fees went into effect as of July 1, 2008, others as of August 1, 2008. The list of financial sanctions that courts impose include: mandatory surcharge, additional surcharge, second additional surcharge, crime victim assistance fee (CVAF), sex offender victim fee, supplemental sex offender victim fee, and sex offender registration fee, as well as DNA databank fee.

If the conviction is in a town or village court, there is an additional $5. VTL §1809(9).

DNA AND DNA and DNA

The $50 DNA databank fee applies to many misdemeanors and all felonies. Penal Law §60.35(10); Exec L §995(7). New York State estimates that nearly half of all persons convicted of Penal Law offenses will require the DNA sample and consequent fee. See http://www.criminaljustice.state.ny.us/forensic/dnaoffenses.htm

Y.O., Adrian

Youthful Offenders must now also pay the mandatory surcharge and CVAF, a statutory change that occurred effective February 2005. Penal Law § 60.35, VTL § 1809.

A person adjudicated as a Y.O. does not pay the DNA databank fee, SORA registration fee, or supplemental sex offender victim fee. Penal Law § 60.02(3).

Restitution and Reparation

If restitution or reparation has already been made, no mandatory surcharge or CVAF is imposed. Penal Law §60.35(6), VTL §1809(6).

That’s Fine for You

With the plethora of fees, and their mushrooming size, an offender really need be less concerned about a fine, which is usually discretionary with the court. After all the assessments are assessed, a judge who feels the need to include a discretionary fine may be perceived as engaging in “piling on.”

Excelsior (“Ever Upward”)

Thus, where a driver pleads guilty to a traffic ticket, a town or village justice may conclude that an “unconditional discharge” or “conditional discharge” is appropriate. But the person doesn’t leave the courthouse without paying a mandatory surcharge ($55), additional surcharge ($20), crime victim assistance fee ($5), and the fee ($5) that town and village court charge. Total: $85.

An equipment violation will require $55 in mandatory fees.

As does the aforementioned crime victim assistance fee.
Drinking-driving Offenses

Next on the list of those to be penalized are those convicted of drinking-driving offenses, of any level. They will pay a (largely mandatory) fine. Plus the surcharge. Plus the crime victim assistance fee. Plus, after the court case is concluded, for the next three years an annual $250 Driver Responsibility Assessment (DRA). VTL §§503(4), 1199. A person who refuses to take the chemical test also pays the DRA. VTL §1199(1).

A drinking-driving defendant will also pay an “additional surcharge” of $25, and a “second additional surcharge” of $170.

Thus a defendant convicted of misdemeanor DWI will henceforth typically pay six separate assessments: a fine of $500 to $1000, surcharge of $175, additional surcharge of $25, second additional surcharge of $170, a crime victim assistance fee of $25, and a town/village court fee of $5. And afterwards, the $250 DRA for each of three years.

Counties also may adopt a local law to add a $30 monthly administrative fee for probation for VTL article 31 (drinking-driving) convictions. This shall not constitute a condition of probation. Exec L §257-c.

Traffic

Another group who must pay are those who commit traffic infractions. Such an offender must pay the (possible though not mandatory) fine, plus the newly increased surcharge, as well as the crime victim assistance fee. And, a driver who has accumulated more than six points on a driver’s license must pay the Driver Responsibility Assessment. If six or more points are accumulated within an 18-month period, the driver must pay $100 for a three year period, plus an additional $25 per year for each additional point above six that remains on the license. VTL §§503(4), 1199.

The new surcharges that are now in effect (pursuant to L 2008, ch 58, Part DD), are found in Penal Law §60.35 and VTL §§1809 et seq. For further information, see http://www.communityalternatives.org/pdfs/fees%20chart.pdf

Don’t Scoff

Where a driver’s license has been suspended for failure to appear or pay a fine, the suspension remains in effect until a $35 termination of suspension fee is paid. The fee is paid for each suspension terminated, up to a total of $200. VTL §503(j-a)(i).

### Mandatory Assessments

<table>
<thead>
<tr>
<th>Description</th>
<th>Surcharge</th>
<th>Additional surcharge</th>
<th>Second additional surcharge</th>
<th>CVAF</th>
<th>Town Village fee</th>
<th>Total</th>
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<tbody>
<tr>
<td>Felony</td>
<td>300</td>
<td></td>
<td></td>
<td>25</td>
<td></td>
<td>$325</td>
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<tr>
<td>Misdemeanor</td>
<td>175</td>
<td></td>
<td></td>
<td>25</td>
<td>5</td>
<td>$205</td>
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<tr>
<td>Violation</td>
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<td></td>
<td></td>
<td>25</td>
<td>5</td>
<td>$125</td>
</tr>
<tr>
<td>DWI felony</td>
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<td>25</td>
<td>170</td>
<td>25</td>
<td></td>
<td>$520</td>
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<tr>
<td>DWI misdemeanor</td>
<td>175</td>
<td>25</td>
<td>170</td>
<td>25</td>
<td>5</td>
<td>$400</td>
</tr>
<tr>
<td>DWAI</td>
<td>55</td>
<td>25</td>
<td>170</td>
<td>5</td>
<td>5</td>
<td>$260</td>
</tr>
<tr>
<td>VTL infraction (except standing,</td>
<td>55</td>
<td>20</td>
<td>5</td>
<td>5</td>
<td></td>
<td>$85</td>
</tr>
<tr>
<td>parking, pedestrian, bicyclist)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>VTL equipment violations (VTL§375)</td>
<td>25</td>
<td>20</td>
<td>5</td>
<td>5</td>
<td></td>
<td>$55</td>
</tr>
<tr>
<td>Non-Penal Law misdemeanor</td>
<td>175</td>
<td></td>
<td></td>
<td>25</td>
<td>5</td>
<td>$205</td>
</tr>
</tbody>
</table>
Refund of an improper surcharge may be had with the state comptroller. VTL §1809(4). Rather few may be expected to apply.

The erroneous imposition of fees can be a fertile ground for appellate litigation, e.g., where the fee was not in effect at the time the offense was committed. See, e.g., People v. Febres, 11 AD3d 319, 783 NYS2d 545 (1st Dept 2004). As an example, assigned appellate counsel and prosecutorial response as well as judicial review by five judges resulted in a $50 DNA fee being removed. People v Moses, 19 AD3d 248, 798 NYS2d 12 (1st Dept 2005). Is the juice worth the squeeze?

“Sentencing for Dollars”

Many people are able to pay fines and all these other assessments. But a legislator who ever visited a typical courthouse would find it largely dealing with indigent defendants. Public defenders and assigned counsel represent most defendants, whose ability to pay these fees is largely illusory.

Where the defendant is incarcerated, the state may need to obtain these sums via a judgment, to be deducted from whatever is earned while incarcerated. Penal Law §60.35(5)(a). A judge may also specify in the “Remarks” section of commitment papers that fees are not to be collected from inmate funds.

Or, the court may be burdened with the need to conduct a “financial hardship hearing” – not for waiver of a fee but deferral. The court must set forth findings and facts on the record. CPL 420.40(4). The CPL stresses that “Under no circumstances shall the mandatory surcharge ... be waived,” CPL 420.35(2), and adjures the judge that “In assessing such information the superior court shall be mindful of ... the important criminal justice and victim services sustained by such fees.” CPL 420.40(3).

Keeping track of which of these fees applies to which offenses and the applicable time period for the applicable fee may be daunting for any clerk or judge or attorney seeking to advise a client. The state, in its efforts to ensure that no fee is left behind, has a password-protected website for checking these fees: www.nycourts.gov/justicecourts.

Making these multiple fees mandatory and non-waivable may be turning the courts of this state from a system of justice into a bill collection agency, akin to the DMV’s administrative adjudication bureau. VTL §225.
The purpose of this article is to update you on an issue of immediate and pressing importance. Recent developments regarding post-release supervision ("PRS") potentially affect thousands, even tens of thousands, of defendants. Issues relating to PRS are either percolating in the courts now, or are matters that defense lawyers should consider when representing a client directed to appear for resentencing or who has a predicate conviction in which PRS was unlawfully imposed. The many open questions in this developing area create opportunities for aggressive advocacy for our clients.

After providing some background, I will outline some of these issues— with the following caveats: Most of my experience is limited to New York County, and the issues and approaches I discuss are drawn primarily from my experiences there. Second, while you should be aware of the collateral issue of civil damages—which some clients (particularly those who were incarcerated for violating administratively imposed PRS) may have interest in pursuing—this article does not address the merits or viability of such claims. I point out here only that a client’s interest in seeking damages could affect some of the strategic choices you make in approaching a potential resentencing.

Background

PRS resulted from Jenna’s Law, which was signed in 1998 and was part of an initiative begun in 1995 to introduce truth-in-sentencing principles to New York State’s sentencing structure for all violent felony offenders. Jenna’s Law eliminated indeterminate sentences for all violent felonies committed on or after August 6, 1998. Violent felony offenders would be eligible for release only after serving 85% of their prison term (their Conditional Release or “CR” date), if they maintained good disciplinary records, and PRS terms became mandatory for all violent felony offenders upon their release from prison. Penal Law § 70.45 sets out the terms of PRS and its general operation.

While PRS is mandatory, there are ranges depending on whether the defendant is a first or second felony offender:

For any second felony offender (both second felony offenders and second violent felony offenders) the term of PRS must be 5 years.

For first felony offenders, there is a range, depending on the level of the instant offense:

for B and C violents, the range is 2 to 5 years;
for D and E violents, the range is 1 to 3 years.

These ranges become important, as I’ll discuss below, when you are before the court on a possible resentencing.

Note that PRS has been expanded to apply to drug crimes, and the ranges for certain crimes (most notably sex crimes) have significantly increased. These developments, however, are not likely to affect the issues of concern in this article, which primarily arose in sentencings occurring between 1998 and 2005.

PRS is like parole, in that it is administered by the Division of Parole and the restrictions and reporting requirements are similar. However, it is different in a crucial way: while parole is subsumed within the indeterminate term, PRS is tacked on after the determinate term; it is a separate component of the sentence. The legislative and judicial failure to appreciate that crucial difference might account for why judges were not routinely pronouncing it at sentencing for the years immediately following its enactment—having never needed to pronounce parole, judges were not doing so for what appeared to be its substitute, PRS.

Any violation of PRS, even for something like curfew, results in mandatory incarceration of at least 6 months.

PRS and Guilty Pleas

The first litigation involving PRS concerned guilty pleas. If the defendant was not told about PRS before pleading guilty was the plea validly entered? If not, was s/he entitled to per se reversal of the conviction? The Court of Appeals answered both questions in a series of cases beginning with People v. Catu, 4 N.Y.3d 242 (2005). In Catu, the Court held that PRS is a direct consequence of pleading guilty that courts must advise a defendant about before s/he pleads guilty, and that the plea is rendered invalid if the defendant is not so informed. The Court clarified that harmless error analysis did not apply. Reversal is required without the defendant needing to establish that s/he would not have pleaded guilty but for the imposition of PRS.

In a series of cases after Catu, the Court of Appeals reaffirmed its ruling in Catu, rebuffing a variety of prosecution challenges: People v. Van Deusen, 7 N.Y.3d 744 (2006) (finding the defendant entitled to plea withdrawal where the court failed to mention PRS at the plea, notwithstanding that overall sentence imposed, while including a period of PRS, did not exceed the sentencing range defendant was originally promised); People v. Hill, 9 N.Y.3d 189 (2007) (finding reversal of the conviction required where the lower court, on a subsequent Catu challenge on Catu grounds, reduced the determinate term from 15 years to 12 years and added 2 years of PRS, so that the determinate term plus PRS equaled the 15-year determinate term originally promised); People v. Louree, 8 N.Y.3d 541 (2007) (holding that a Catu issue must be raised on direct appeal, not by 440 motion, but that it does not require preservation by postallocation motion).
The Legislature passed L. 2008, ch. 141. In brief: that would permit resentencings to PRS, and a plan to implement it. DOCS, OCA and the Division of Parole, hurried to craft legislation ing their determinate terms. Defendants who, like courts now concerns the courts power to impose PRS on defen-

In response to Sparber and Garner, the Legislature called for the implementation of this legislation. They sought to prioritize cases and establish a schedule for referral of the cases to resentencing courts. The schedule provides for three “waves” of defendants:

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**Catu** has important ramifications for guilty plea clients who face potential resentencing to PRS.

**Sparber and Garner**

Catu and its progeny dealt with a court’s silence at the plea concerning PRS. In People v. Sparber, et al, 10 N.Y.3d 457 (2008) and Matter of Garner v. New York State Dept. Of Correctional Servs, 10 N.Y.3d 358 (2008), the New York Court of Appeals considered the issue of a court’s silence regarding PRS at sentencing, and the effect of DOCS’s administrative addition of PRS to defendants’ sentences. The Court of Appeals held, in rulings that have had a tremendous impact on the criminal justice system:

- DOCS cannot administratively add PRS to a defendant’s sentence;
- Under state law (CPL §§ 380.20, 380.40) PRS must be pronounced by the judge at sentencing, in open court and in the defendant’s presence;
- PRS cannot be added by the court clerk on the Sentence and Commitment or the court activity worksheet;
- Administratively-imposed PRS is a nullity.

These are very important rulings, but equally importantly, the Court rejected defense arguments in Sparber and its companion cases that PRS could not now be imposed. In those cases, where the defendants were still serving their determinate sentences and the cases were on direct appeal, the Court remitted to Supreme Court for “resentencing.”

In Garner, which originated with an Article 78 and where the petitioner had completed his determinate term, the Court of Appeals did not decide the issue of resentencing, instead dropping a footnote that stated, “Our holding here is without prejudice to any ability that either the People of DOCS may have to seek the appropriate resentencing of a defendant in a proper forum.” Garner, 10 N.Y.3d at 363, fn. 4. Much of the current litigation in the lower courts now concerns the courts power to impose PRS on defendants who, like Garner, have completed, or almost completed, serving their determinate terms.

**Legislative and Executive Response to Sparber/Garner**

In response to Sparber/Garner, the Legislature, along with DOCS, OCA and the Division of Parole, hurried to craft legislation that would permit resentencings to PRS, and a plan to implement it. The Legislature passed L. 2008, ch. 141. In brief:

- Corr. Law § 601-d requires DOCS to identify cases where PRS does not appear on the sentence and commitment order, and refer such “designated persons” to the courts for possible resentencing. The court is required to obtain plea and sentence minutes (or re-

construct same). The court shall appoint counsel. Importantly, Corr. Law § 601-d (5) directs the court to notify the agency that referred the case whenever it “(a) resentsences the defendant to a sentence that includes a term of post-release supervision; or (b) determines that it will not resentence the defendant under this section or otherwise.” New York County judges have appeared to accept that this section contemplates two legitimate outcomes: the court may either impose PRS or it may decline to resentence at all — in which case the original PRS-free sentence is permitted to stand. This latter option is an important tool for advocacy, as it does not require the DA’s consent.

**Practice Note:** Although the courts are obligated to obtain the minutes, you might want to order them yourself to expedite the process. The plea and sentence minutes are key to the arguments you will be able to make. You should also ascertain all relevant dates of your client’s service of his sentence — this can be found via the DOCS website, inmate locator link (http://www.docs.state.ny.us/). From there, you can learn your client’s CR date, when s/he was released, maximum expiration date, and PRS maximum expiration date.

- PL § 70.85 permits courts, but only with the DA’s consent, “to re-impose the originally imposed determinate sentence . . . without any term of PRS, which shall be deemed a lawful sentence.” This provision is geared toward avoiding the Catu problem, namely, that a defendant who was not advised of PRS either at the plea or sentence, will seek to vacate his plea under Catu if PRS is imposed upon resentencing; the addition of PRS would render his plea invalid since he had not been advised of it at the plea proceeding. PL § 70.85 allows the court and DA to bypass this problem by resentencing without PRS.

Note that if the court, under Corr. Law § 601-d (5) has the power to not resentence the defendant at all, with or without the DA’s consent, then PL § 70.85 would seem somewhat superfluous. The higher courts will eventually need to resolve whether 601-d(5) simply refers to action taken pursuant to PL § 70.85, or whether, as we have argued to trial judges, it grants court the discretion, without the DA’s consent, to decline to impose PRS. As it stands now, lower courts have both “resentenced” defendants to the original determinate sentence with the DA’s consent under PL § 70.85, and have also simply let the original PRS-free sentence stand, without taking any action, consistent with our reading of 601-d(5). As discussed at the end of this section, there may be circumstances where it is to the defendant’s benefit to be formally resentenced.

Following this legislation, OCA, DOCS, and the Division of Parole signed a Memorandum of Understanding in July 2008 adopting a plan for implementation of this legislation. They sought to “prioritize cases and establish a schedule for referral of the cases to resentencing courts.” The schedule provides for three “waves” of defendants:

(continued on page 16)
Wave 1- referred back to the sentencing court defendants who were in custody on PRS violations. This group of defendants was to be resentenced by July 31, 2008, and, for the most part, is largely complete.

Wave 2- concerns defendants currently on PRS, where PRS was not lawfully imposed. A staggered schedule of referral called for this group to be completed by December 1. At least in New York County, many defendants are before the court each day, and this process, while winding down, is still ongoing.

Wave 3- concerns defendants currently serving their determinate sentences in prison, and provides for them to be referred to the sentencing court as their release dates come up, from 45 to 60 days prior to their release date. It is possible they will be referred sooner.

Arguments Available Upon Resentencing

What arguments you have available in representing a “designated person” directed to appear for the court to consider resentencing depends on a number of factors mentioned above.

Did your client plead guilty or go to trial? And if he pleaded guilty, was he advised of PRS at the plea? Until very recently, this has been the single most important factor in terms of our negotiating power at a resentencing. Why? Because neither the DA nor the court relished the prospect of trying an old case – the potential consequence, we believed, if PRS were imposed upon resentencing. The common assumption has been that the client would be entitled to plea withdrawal under Catu if a term of PRS that he or she was never advised about were now imposed at resentencing.

That common assumption suffered a potentially serious blow in a recent First Department decision, which appears to stand as the only appellate decision addressing plea withdrawal at a resentencing. In People v. Hogue, 2008 WL 5334377 (1st Dept. December 23, 2008), the trial court had failed to mention PRS during the plea allocution and did not impose any term of PRS at sentencing. The defendant had raised a Catu claim by 440 motion, and the Court found that the claim was procedurally barred under Louree. The court remanded for resentencing. In a final paragraph, the Court gratuitously warned that the failure to raise the Catu claim on direct appeal would also bar the defendant from plea withdrawal at the resentencing even if the court were to impose PRS. That issue had neither been briefed nor argued before the Court.

At the time of this writing, Mr. Hogue is moving for reargument on this point.

The impact of Hogue will become clear in a short time. If the lower courts follow it (and a decision from the Appellate Division is binding on them), then our clients will lose a profoundly important tool in trying to avoid the imposition of PRS. There would be little reason for the DAs to consent to a sentence without PRS under PL § 70.85 if the defendant were not entitled to plea withdrawal.

The decision, however, appears wrongly decided, and concern that it may not hold up might motivate DAs to continue consenting to the non-imposition of PRS in plea cases. First, PL § 70.85 was enacted in contemplation of defendants seeking, and being entitled to, plea withdrawal. The Governor’s Memorandum in support of the bill thus states, referring to PL § 70.85, that “[t]he bill . . . addresses an issue arising from the Court of Appeals decision in People v. Catu,” insofar as “[w]hen a defendant who pleads guilty has not been informed that the sentence would include a term of PRS, the defendant may later seek for the plea to be vacated.” By allowing the DA to consent to re-sentencing to the original determinate term without any term of PRS, and thereby “allowing defendants . . . the benefit of their plea bargains, there should be no need for the pleas to be vacated.” See Governor’s Memorandum. Penal Law § 70.85 does not exclude defendants who appealed and failed to raise plea withdrawal on the appeal. Therefore, Hogue appears at odds with the understanding of the law that motivated the Legislature to draft PL § 70.85.

Further, it could be argued that where the PRS term does not appear on the sentence and commitment, the defendant had no notice that PRS was even considered part of his sentence, and therefore had no record basis for challenging the plea on direct appeal on Catu grounds. Finally, to the extent Hogue should have any application, it should be limited to those defendants who appealed their convictions after Louree was decided in 2007. Defendants appealing before then should not have been expected to raise a Catu claim on direct appeal, as that was not the settled mechanism for challenging a plea on Catu grounds. Such defendants should not be penalized for failing to appeal on Catu grounds.

Putting Hogue to the side, be aware that the plea withdrawal option could require certain strategy decisions. In New York County at least, the DAs have sometimes forced a game of chicken, declaring that they have determined the case is “viable” for trial. Further, they say, if plea withdrawal is sought, they will request bail. In such instances, you must assess your client’s readiness to force the issue. It is possible that if he is perfectly willing to go to trial (and note: you must assess and advise him of any risks in vacating the plea), the DA may well blink first. If your client is not willing to play this game — and clients who have completed their determinate sentences and are out may have no interest in opening this can of worms — then consider other arguments (discussed below) you may have either to persuade the court not to impose PRS, or to impose a lower term.

Note that courts have held that, at least in the case of first violent felony offenders, even if PRS is generally mentioned at the plea, but no specific term is imposed, the defendant is entitled to plea withdrawal. The exact term of PRS must be stated at the plea to obviate the Catu problem. See People v. Boyd, 51 A.D.3d 325 (1st Dept. 2008), leave granted June 10, 2008 (McGuire, J)(dissenting judge); People v. Dean, 52 A.D.3d 1308 (4th Dept. 2008).

Is your client “in” or “out”? Your client’s custody status will impact what arguments are available to you, and their relative strength:
Is your client in custody on a violation of DOCS-imposed PRS? While most of this group was dealt with by the courts in Wave 1, there may still be instances where a client serving administratively imposed PRS has been violated and is now before the court for possible resentencing. The number one issue here is that your client is entitled to immediate release. You may have to bring a state writ of habeas corpus for this to happen, but the writ should be granted. It is now quite well established that a violation of administratively imposed PRS is a nullity, and defendants incarcerated on such nullities are entitled to release. See, e.g., People ex rel. Benton v. Warden, 20 Misc.3d 516 (Sup. Ct. Bronx Co. 2008); see also People ex rel. Lewis v. Warden, 51 A.D.3d 512 (1st Dept. 2008); People ex rel. Gerard v. Kralick, 51 A.D.3d 1045 (2d Dept. 2008); People ex rel. Foote v. Piscotti, 51 A.D.3d 1407 (4th Dept. 2008).

Accordingly, in New York County, most judges agree that a violation of administratively added PRS is a nullity and will order the immediate release of any defendant incarcerated as a result of the PRS violation. Once the parole warrant is vacated, the question will remain of whether the client can be resentenced to PRS.

Note too that resentencing to PRS will not revive the violation. “The issue is whether the re-sentencing of the petitioner nunc pro tunc to add the PRS component, can cure the infirmity of a petition being violated for a PRS that was imposed by DOCS or the Division. In this Court’s opinion, it does not.” Benton, supra. Accordingly, whether the court resentsences the defendant to PRS, resentences under PL § 70.85 without imposing PRS, or declines to resentence altogether, the language of the court’s order should reflect that any “pending Division of Parole Warrant, as well as any violations of post-release supervision previously sustained or initiated under the indictment are deemed a nullity and are hereby vacated.”

Further, a defendant will receive credit for time served under the administrative PRS term (including time spent in custody on violations later deemed nullities), regardless of whether or not the resentencing is deemed nunc pro tunc.

Is your client out on PRS after completing his determinate term? A defendant who has finished serving his determinate term (i.e., reached the maximum expiration date) and is currently serving an administratively imposed period of PRS has a variety arguments available to rebuff resentencing (and then to raise on appeal if he is resentedenced nonetheless and wishes to appeal). A defendant who is not only out but a first offender will have additional arguments as well.

For clients who have completed their determinate terms, the following arguments should be made:

1. The court’s inherent authority to correct an illegality has lapsed. Although the Court in Sparber stated that a court’s power to correct its own sentencing errors is not limited by the one year granted to the People to correct illegal sentences under CPL § 440.40, see Sparber, 10 N.Y.3d at 467 fn.6, the Court did not decide whether this power was unlimited, and left it open in its footnote in Garner. You should argue that whatever inherent power the court has certainly terminates upon completion of the determinate term. It would represent an unprecedented and dangerous leap to permit exercise of a court’s inherent power to correct an illegality after the defendant has actually completed serving the only sentence ever imposed on him. To permit a court to exercise its inherent powers beyond service of the determinate sentence itself would vitiate the Legislature’s intent to place a reasonable time limit on the power to correct sentences by endowing the court with a wholly undefined and virtually limitless power to do so. See Matter of Campbell v. Pesce, 60 N.Y.2d 165, 169 (1983). It would erode any notion of finality of judgments, keeping the defendant in a constant state of limbo.

A subset of this argument holds that the court’s exercise of its inherent authority is discretionary, meaning that the court, while possessing the inherent authority to correct an illegal sentence, is not required to exercise that authority. Therefore, even if the court’s inherent authority survives service of the determinate term, the court should exercise its discretion not to correct the sentence and decline to resentence, whether under Corr. Law § 601-d(5) or simply as a matter of discretion. Factors that you might invoke to convince the court to exercise its discretion in this manner include passage of time and any favorable circumstances you can cite specific to your client’s circumstances.

2. Double jeopardy and due process bar resentencing. Essentially, these arguments hold that a defendant who has completed serving his determinate term has a legitimate expectation of finality in that sentence. Therefore, it would violate double jeopardy and due process to now enhance it by adding a period of PRS. See United States v. Silvers, 90 F.3d 95, 101 (4th Cir. 1996)(Double Jeopardy Clause bars the resentencing of defendant on conviction for which the defendant has fully discharged his sentence). These arguments have met with some success in the lower courts. See

(continued on page 18)
3. Loss of jurisdiction. Resentencing after so many years would violate CPL § 380.30, which requires courts to pronounce sentence without unreasonable delay. See People v. Drake, 61 N.Y.2d 359, 366 (1984); Albergottie, supra. Nor did the defendant contribute to or cause the delay, which is wholly attributable to inaction by the court and the prosecution.

These arguments are before the Appellate Division, First Department in two cases to be argued in January 2009: People v. Darrell Williams and People v. Efrain Hernandez.

Is your client either on conditional release or incarcerated and still serving his determinate term? Again, if your client pleaded guilty and was not advised of PRS at the plea proceeding, this may be a bargaining chip for avoiding imposition of PRS, depending on Hogue's effect. Your incarcerated client may want plea withdrawal, but the DA can avoid this under PL § 70.85.

If plea withdrawal is not an option, you should assert the arguments outlined above notwithstanding that your client is still serving his or her sentence. The closer your client is to completing the determinate term, the stronger your argument that his or her expectation of finality has crystallized to the point where a resentencing would violate both due process and double jeopardy. See Stewart v. Scully, 925 F.2d 58 (2d Cir. 1991); Breest v. Helgemore, 579 F.2d 95 (1st Cir. 1978) (“the power of a resentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit.”).

What arguments do you have if the court intends to impose PRS? Argue in the alternative that if the court nonetheless determines to resentence your client to PRS, the court should modify or “rejigger” the overall sentence, that is, reduce the incarceratory term and add PRS to that lowered term, in order to match the original sentence as closely as possible. See People v. Campanella, 297 A.D.2d 642, 642-43 (2d Dept. 2002)(7-to-21 year resentence violated prohibition against double jeopardy, because defendant established a legitimate expectation of finality in his original 18-year maximum sentence; matter remanded for reduction of minimum term of imprisonment to one third of the maximum).

This approach is premised on the theory that the proceeding is a “resentencing” and therefore that the entire package is in play. CPL §§380.20 and 380.40 mandate that courts “must pronounce sentence in every case where a conviction is entered” and that “the defendant must be personally present at the time sentence is pronounced.” A sentence imposed in violation of either statutory mandate must be vacated and resentencing conducted. People v. Sturgis, 69 N.Y.2d 816, 816 (1987) (regarding CPL §380.20); People v. Stroman, 36 N.Y.2d 939 (1975) (regarding CPL §380.40). Citing Sturgis and Stroman, the Court of Appeals in Sparber held that the “sole remedy” for violation of these statutory mandates was to “vacate the sentence” and to remit for a resentencing hearing that would “include the proper pronouncement” of the appropriate PRS term. Sparber, 10 N.Y.3d at 471-73.

Asserting this argument is particularly important for second felony offenders, for whom the PRS term is a mandatory 5 years. In such instances, the court does not have the discretion to impose a shorter term of PRS, as it does for first violent felony offenders, see post. Marshal facts about your client’s situation to support the appropriateness and fairness of an overall reduction for your client. This argument has met with some success in NY County.

If your client is a first offender, you will have additional arguments available. Alternatively, there is the potential of working out a disposition with the DA beforehand. An “agreement” with the DA to the minimum period of PRS has been a fairly common result for willing defendants in New York County.

For an “out” defendant, the main consideration will likely be whether a lower-range term of PRS would have the same practical effect as no PRS at all, meaning that he would be done serving PRS. This may be a good result for him (though bear in mind possible negative implications for claiming damages), a quick solution for the DA, and an acceptable outcome to the court. Consider what factual arguments you can make in support of imposition of a shorter term (i.e., no violations, employment, drug counseling, good prison record, length of original sentence - was it close to the minimum? facts of underlying offense). Consider contacting your client’s parole officer to confirm favorable information; also ordering prison records, if you believe they will reflect favorably upon your client.

Other important considerations flowing from Sparber/Garner

Upsetting your client’s predicate status: when you may WANT to pursue resentencing to PRS. Resentencing to PRS will change the judgment date of the conviction. This could have a potentially important collateral effect — currently being litigated in a few cases — namely, upsetting the sequentiality required for second offender and persistent status adjudication. The second offender statutes require that the sentence on the prior conviction have been imposed “before commission of the present felony.” See PL 70.04, 70.06. For a violent persistent, the Court of Appeals has held that there must be sequentiality between the present and predicate convictions and between the predicate convictions themselves. See People v. Morse, 62 N.Y.2d 205 (1984). Therefore, upsetting the
obtaining the best possible result.

in prison and out, will assist you in putting forth the best arguments for your client and
cate convictions, to their conditional release and maximum expiration dates, to their record
emerge. In general, getting a handle on your client’s complete situation, from their predi-
pervision has emerged as significant issue for the defense bar, both in terms of advocating
against its imposition at resentencing proceedings, and litigating the collateral consequences
of unlawfully-imposed PRS.  As issues are resolved by higher courts, more are likely to
proceedings.

petition for Civil Management brought pursuant to Article 10 of the Mental Hygiene Law
Article 10 petition to be brought. Therefore, a judge in Bronx Supreme Court dismissed a
of the 10-year period during which sentence must have been imposed for a convic-
imposition of PRS in a predicate felony and forcing resentencing could have obvious

In general however, upsetting your client’s predicate status by challenging the illegal
imposition of PRS in a predicate felony and forcing resentencing could have obvious
beneficial consequences for your client in terms of plea negotiations, plea bargaining re-
strictions, and his future status.

If you’ve determined that your client has a predicate in which PRS was administratively
imposed, consider affirmatively bringing a CPL 440.20 motion to force resentenc-
ing on the predicate.

The flipside is that if you’re before the court pursuant to 601-d notice, and your client
has a pending case (particularly a violent felony), the risk of nullifying his predicate status
may be used aggressively by the DA to negotiate the termination of the PRS resentencing
without a resentencing taking place.

Note that forcing a resentencing on a predicate will have the correlative downside of
extending the 10-year period during which sentence must have been imposed for a conviction
to qualify as a predicate felony.  See People v. Juiliano, 207 A.D.2d 414 (2d Dept.
1994).  A conviction that would otherwise be stale due to the passage of time might qualify
in the future as a predicate because of the now later date of sentence.

Civil Confinement - be aware of some of the less obvious but important consequences of Sparber/Garner: One example, a defendant must be a “detained sex offender” for an Article 10 petition to be brought. Therefore, a judge in Bronx Supreme Court dismissed a petition for Civil Management brought pursuant to Article 10 of the Mental Hygiene Law because the entire period of PRS imposed upon the defendant was a “nullity ab initio,” so the defendant was not a “detained sex offender,” a requirement for triggering Article 10 proceedings.  See State v. Robinson, 2008 WL 4694551 (Sup. Ct. Bronx Co. Oct. 15, 2008).

Civil Confinement - be aware of some of the less obvious but important consequences of Sparber/Garner. One example, a defendant must be a “detained sex offender” for an Article 10 petition to be brought. Therefore, a judge in Bronx Supreme Court dismissed a petition for Civil Management brought pursuant to Article 10 of the Mental Hygiene Law because the entire period of PRS imposed upon the defendant was a “nullity ab initio,” so the defendant was not a “detained sex offender,” a requirement for triggering Article 10 proceedings.  See State v. Robinson, 2008 WL 4694551 (Sup. Ct. Bronx Co. Oct. 15, 2008).

Due to recent Court of Appeals caselaw and the questions left open, post-release su-
ervision has emerged as significant issue for the defense bar, both in terms of advocating
against its imposition at resentencing proceedings, and litigating the collateral consequences
of unlawfully-imposed PRS.  As issues are resolved by higher courts, more are likely to
emerge. In general, getting a handle on your client’s complete situation, from their predi-
cate convictions, to their conditional release and maximum expiration dates, to their record
in prison and out, will assist you in putting forth the best arguments for your client and
obtaining the best possible result.
In handling DUI cases it is critical to distinguish different kinds of offenses, licenses and eligibility for conditional and restricted use licenses and privileges.

**DUI OFFENSES**

**DUI**. Is DUI an offense in New York? Yes, but there are several kinds and are commonly called by their sub-species:

- **DWI**. Driving While Intoxicated. Misdemeanor (VTL §§§ 1192(2)(3)).

- **Common Law DWI**. Driving while intoxicated charge (VTL §§ 1192(3)) based on physical condition.

- **Per Se DWI**. Driving while intoxicated charge (VTL §§ 1192(2)) based on proof of =>.08% Blood Alcohol Content (BAC).

- **ADWI**. Aggravated Driving While Intoxicated. Misdemeanor (VTL §§§ 1192(2-a)) if =>.18% BAC. Enhanced sentencing of 1-year revocation and fine of $1,000-2,500 (VTL §§§ 1193(2-b-2). 18-month revocation if prior within 10 years. VTL §§ 1193(2)(b)(3).

- **DWAI**. Driving While Ability Impaired (traffic infraction). VTL §§ 1192(1), based on physical condition or BAC of =>.05%. A lesser included offense of DWI. Not a lesser included offense of Driving While Impaired by Drugs (VTL §§ 1192(4)).

- **DWAID**. Driving While Ability Impaired by Drugs (misdemeanor) VTL §§ 1192(4).

- **DWAIDA**. Driving While Ability Impaired by Drugs and Alcohol. (misdemeanor) VTL §§ 1192(4-a).

- **Felony DWI**. A misdemeanor charge is enhanced to felony if the motorist has a prior misdemeanor DUI conviction within 10 years per VTL §§ 1193(1)(c)).

**Zero tolerance law** (aka “Baby DWI,” aka “Z-T”). Unlawful for motorist under age 21 to operate motor vehicle after having consumed virtually any alcohol. Per se BAC is =>.02-.07% for civil administrative finding/penalties. 6-month suspension upon BAC violation and 1-year revocation upon a chemical test refusal. VTL §§§ 1192-a, 1194-a, 1193(2)(a)(2). No CL if refusal. Z-T finding not treated as conviction but if eligible for DDP enrollment this disqualifies for DDP for 5-years. See VTL §§ 1196(4). This is the only drinking/driving disposition that allows a motorist to remain eligible for a conditional license (CL) if convicted for an offense committed within the next 5 years.

**LICENSE CLASSES**

- **Class D**: Most common license. Issued to drivers age 18 or over, and to drivers age 17 who completed Driver Education.

- **Class DJ Limited**: Junior license issued to drivers under the age of 18, for a 6-month period of time, who have not completed a driver education course. Restrictions apply.

- **Class DJ**: Junior license status of drivers under the age of 18, who have completed a driver education course, and have operated on a DJ Limited for a 6-month period of time.

- **Class E**: Taxi and Livery.

- **CDL**: Commercial Class A, Class B and Class C.

- **Class M**: Motorcycle.

- **Class MJ**: Junior Motorcycle License.
SUSPENSION vs. REVOCATION
Suspensions forfeit the privilege of operating a motor vehicle for a definite period of time or until the motorist rectifies the reason for the suspension, such as by answering a summons, filing an accident report or appearing at a hearing. A $25 suspension termination fee must be paid to terminate the suspension.

Revocations forfeit the privilege of operating a motor vehicle until a) the minimum period of revocation has elapsed, b) the motorist submits application for relicensure, and c) the application is approved by DMV. I tell clients unless and until all these requirements are met, they can wait “until the world turns to dust” and never have a valid license again. A $50 non-refundable fee must accompany the application, along with any other unpaid penalties that are due, such as a civil penalty for chemical test refusal and/or driver responsibility assessment.

Operation without a valid status may result in a criminal charge of Aggravated Unlicensed Operation (AUO) pursuant to VT§§ 511.

RESTRICTED USE LICENSES AND PRIVILEGES
Privileges. A motorist who does not have a NY driver’s license might have a privilege of operating a motor vehicle in NY that corresponds with the same limits of the motorist’s home state license. NY privileges may be revoked or suspended upon violations of the NYVTL or reports of violations in other states.

NDR. National Driver Register. Central repository of information concerning all motorists, licensed in any state, whose license or privilege to drive has been revoked, suspended, canceled or denied, or who have been convicted of serious traffic-related offenses. State driver licensing agencies obtain NDR information to determine if a motorist’s license or privilege has been sanctioned by any other State. See http://www.nvdmv.state.ny.us/forms/ndr1.pdf

RUL. Restricted use license available for certain non-alcohol related offenses. Provides limited driving privileges during some kinds of drivers license suspension/revocation. Not available for class limited DJ or MJ, CDL or E licenses. VTL §§ 530; 15 NYCRR 135.7. Most DUI RULs are governed by specific VTL sections other than §§ 530. Various DUI RULs are described below.

ARRAIGNMENT:
Prompt suspension law. Mandates court suspension of license at arraignment if BAC of =>.08%. Hardship privilege is discretionary with local court.

Refusals. Mandates court suspension of license at arraignment pending refusal hearing which terminates on the 16th day after arraignment or when a hearing is held. Refusal judge may, at his or her discretion, continue suspension if hearing is not complete or case is adjourned.

No hardship privilege is available if the license is suspended pending a refusal hearing. Revocation or reinstatement is determined by DMV.

Hardship privilege. Enumerates discretionary limited driving privileges (such as work/school only) that court may grant to ameliorate suspension pending prosecution based on BAC =>.08% VTL1193(2)(e)(7); See People v. Bridgman, 163 Misc.2d 818 (City Ct. 1995) (““extreme hardship”” factors).

Pringle hearing. Under BAC-based prompt suspension law, court must hold summary hearing before the conclusion of the proceedings required for arraignment and before the driver’s license may be suspended. Pringle v Wolfe, 88 N.Y.2d 426 (1996), cert den, 519 U.S. 1009 (1996).

Sean’s law. DJs and MJ’s are suspended at arraignment if motorists charged with VTL §§ 1192-1, 2, 2-a or 3. VTL §§ 1193(2)(e)(7)(a-1).

PRE-CONVICTION:
PCCL (pronounced “Pickle”). Pre-Conviction Conditional License. VTL §§ 1193(2)(e)(7)(d). Motorist is eligible for PCCL 30 days after suspension pending prosecution based solely on BAC, but only if eligible for post-conviction conditional license (CL).

POST-CONVICTION:
Twenty-day order. Authorizes 20 days of full driving privileges following conviction and license surrender for determination of eligibility for Conditional License (CL). VTL §§ 1193(2)(d)(2). It does not stay any other suspension or revocation.

CL. Conditional License. VTL §§ 1196(4);15 NYCRR 134.7. Limited use license some DUI defendants are eligible for, but only if convicted of DWAI or DWI or found in violation of Zero Tolerance. If charges are dismissed and refusal revocation is imposed by DMV, there is no eligibility for a CL. Thus, for driving privileges, some motorists are better off convicted than acquitted. Effective September 30, 2005, operation of a CMV on a CL is not allowed even if a Certificate of Relief from Civil Disabilities (CRD) is granted — whether or not motorist was convicted of DWAI or DWI while operating a CMV. See VTL §§ §§§ 1196(7)(g), 530(5). A CL is available only if the motorist is eligible for the Drinking Driver Program (DDP). VTL §§ 1196(4).
POST-REVOCATION:
PRCL (pronounced “Perkel”). Post-revocation conditional license. Conditional license for motorists who are eligible for relicensure, but must comply with court-ordered ignition interlock device (IID). VTL §§§ 119-a, 1198(5). Penal Law §§ 65.10(2)(k-1), VTL §§ 1193(1-a)(c)(i).

PERMANENT REVOCATION
Upon three or more DUI convictions/refusals, some motorists are subject to permanent license revocation. VTL §§ 1193(2)(b)(12). See Gerstenzang, Handling The DWI Case In New York (2007-2008 edition) §§ 54.23.

COURT DISCRETIONARY SUSPENSION/REVOCATION
Besides specifically enumerated triggers that mandate suspension or revocation, a court may suspend a driver’s license pursuant to VTL §§ 510 (3-a). This is called a discretionary or permissive suspension/revocation. A court may suspend or revoke for any VTL violation.

RELICENSURE
DMV has discretionary powers to deny limited driving privileges and/or relicensure depending on the motorist’s driving history. This discretion may be exercised despite eligibility and after the minimum statutory period of revocation has expired.

CONCURRENT v. CONSECUTIVE CALCULATION OF SUSPENSIONS/REVOCATIONS
Depending on the timing of the triggering event, some suspensions and revocations might be calculated simultaneously (concurrent) and others sequentially (consecutive). For example, the period of suspension pending prosecution (SPP) or suspension pending refusal hearing (SPRH) is never credited toward any DMV-imposed refusal revocation or any Court conviction suspension or revocation imposed thereafter. In some cases, concurrent calculation, or partial concurrent calculation, might be obtained by waiving an impending refusal hearing. In that event, the date of waiver commences the revocation period sooner than it will commence if a revocation is imposed at a future refusal hearing.

OCCUPATIONAL LICENSES
A commercial motor vehicle may not be legal operated with a limited use license, even if the court granted a Certificate of Relief from Civil Disabilities (CRD). A taxi license might be operated within some limited driving privileges if the court grants a CRD.

FORFEITURE
A conviction of any moving violation during limited driving privileges (RUL/CL) may result in forfeiture of privilege and reinstating original period of underlying suspension or revocation.

CAVEAT
This article is a mere general introduction to DUI offenses, licenses, suspensions and revocations. It does not constitute legal advice concerning any specific case or consequences. Evaluation by capable counsel of the particular client, case, court and consequences is necessary to render proper legal advice.

Articles with additional information about these topics may be obtained at www.glenmurraylaw.com and from the New York State Department of Motor Vehicles (NYDMV) website, including forms which may be downloaded at: http://nydmv.state.ny.us/index.htm
Our Amicus Curiae Committee has been actively involved in numerous appeals for our Association and on behalf of the National Association of Criminal Defense Lawyers, of which we are an affiliate. Your Amicus Chair also serves as a Vice-Chair of the NACDL’s Amicus Committee. Former NYSACDL President Joshua L. Dratel is one of the NACDL Amicus Committee’s Co-Chairs.

NYSACDL filed a brief in support of the appellant in People v. Fatin Johnson, 10 N.Y.3d 875 (2008) in the State Court of Appeals. The issue was whether the a trial court has the power, when ordering a line-up of a represented defendant, to direct it be held in a “double blind” or sequential manner. The appellant is represented by the Center for Appellate Litigation. Our author was Lorca Morello of the Legal Aid Society’s Criminal Appeals Bureau. The judgment was reversed but not on the grounds we advanced. The Court found that the Appellate Division was required to have explained more fully why the evidence against Mr. Johnson was legally sufficient. On our issue, the Court “express[ed] no opinion as to whether the trial judge possessed discretion to impose the conditions on the lineup requested by the defendant. Assuming that the trial judge was authorized to do this, she did not abuse her discretion when she denied defendant’s application: she expressed familiarity with lower court decisions and studies addressing the pro’s and con’s of various lineup procedures, and decided that the conventional simultaneous lineup requested by the People was warranted.” We take this to mean that trial level courts have the authority to order double blind lineups so our members can at least make the effort to try to get them.

NYSACDL filed an amicus brief in the matter of Portalatin v. Graham, 478 F.Supp.2d 385 (E.D.N.Y. 2007) (Gleeson, J.). This is an appeal to the Circuit from the grant of habeas corpus to a prisoner sentenced under New York’s discretionary persistent felony offender statute based on an Apprendi-Ring challenge. We have filed briefs on this same issue in the Second Circuit and State Court of Appeals in prior cases. Marshall Mintz, formerly an associate of Joshua L. Dratel, authored our brief in the Second Circuit. The case has been sub judice for months now.

NACDL’s position prevailed in the U.S. v. Stein (KPMG) case, 2008 U.S. App. LEXIS18524 (Aug.28, 2008). NACDL’s brief was authored by Lewis Liman of Cleary Gottlieb in new York City. This is a government appeal of an order by Judge Kaplan dismissing the charges against the defendants. The Court held that the Sixth Amendment right to counsel includes not only an indigent’s right to have the government appoint an attorney to represent him, but also the right of any accused, if he can provide counsel for himself but his own resources or through the aid of his family or friends, to be represented by an attorney of his own choosing. On December 1, 2008, the government announced that it would not petition the Supreme Court for a writ of certiorari.

Earlier this year, NYSACDL filed a letter brief in the Westchester County Court case of People v. Carmela Magnetti, 06-1047-02. There the District Attorney’s investigator contacted the defendant’s mother in order to undermine the defendant’s confidence in his retained counsel. Our brief was met with furious opposition from the prosecutor. The County Court denied the defendant’s motion and she was then convicted after a trial of hindering prosecution and tampering with evidence (although she was acquitted of criminal facilitation). On December 1, 2008, the defendant was sentenced to serve two and one-third to seven years’ imprisonment. We are considering filing an amicus brief in the Appellate Division.

NYSACDL filed an amicus brief in the State Court of Appeals matter of Rivera v. Firetoge, 44 A.D. 3d 957 (2d Dept. 2007). The question is “where there is evidence that the jurors may have reached a partial verdict, the jurors should be polled before a mistrial, which exposes the defendant to double jeopardy, is declared?” In Enrique River’s case, the jury appeared to indicate it might have reached a partial verdict so counsel sought a polling of the jury as to whether there was a verdict on any of the counts. Counsel correctly suspected that the defendant was acquitted of murder but that the jury failed to reach a verdict on the manslaughter. The trial court refused and declared a mistrial only to discover later what verdict had been reached by not declared in open court. The Appellate Division found that double jeopardy barred a retrial. Herald Price Fahringter and his law partner Erica Dubno wrote our amicus brief. NYSACDL member Joel K. Dranove represented the appellee, Mr. Rivera. Unfortunately, the Court of Appeals reversed the judgment on a decision issued December 2, 2008 available at. http://www.nycourts.gov/ctapps/decisions/dec08/1780np08.pdf. Our amicus brief as mentioned in the body of the opinion, suggesting the Court carefully considered our brief. There was a spirited dissent by Judge Pigott. The Court seems to have ignored or disregarded the fact that the jury had actually acquitted the defendant of murder when it was discharged.

NACDL and Families Against Mandatory Minimum Foundation filed a joint brief amici curiae in the case of United States v. Polizzi, 549 F. Supp.2d 308 (E.D.N.Y.2008). In that case, Senior United States District Judge Jack B. Weinstein decided that jury should have been instructed that the defendant faced a mandatory minimum period of imprisonment when deciding whether to convict. He ordered a new trial. And the district court decided that prevailing law prevented him from finding that Double Jeopardy prohibits a person from being convicted for both receiving and possessing child pornography even thought the elements of the offenses are virtually identical. Our brief will be authored by Steven Hut, (continued on page 24)

NACDL’s own Executive Director, Norman Reimer, assisted by Susan J. Walsh of Moskowitz & Book LLP in New York City, will prepare NYSACDL’s amicus brief in the New York State Court of Appeals on the question of whether the police must obtain a warrant before placing a GPS device on a person’s automobile. The case is People v. Scott Weaver, 52 A.D.3d 138, 860 N.Y.S.2d 223 (3d Dept. 2008). The defendant lost in the intermediate appellate court but the dissenting judge, Hon. Leslie Stein, granted the defendant leave to appeal. Our brief will be joined by the NACDL and possibly others, including the Electronic Frontier Foundation. NYCLU will file its own amicus brief.

NACDL’s White Collar Crime Project Director Stephanie Martz recruited Andrew Weissmann and another at Jenner & Block LLP to prepare an amicus brief in the matter of United States v. Ionia Management, S.A., 07-5801-cr, in the Second Circuit. The appellant is represented by NACDL past-president Irwin H. Schwartz and NACDL Ninth Circuit amicus committee vice-chair Sheryl Gordon McCloud. Amici argued that corporate criminal liability cannot be entirely vicarious. Although the undersigned assisted to some degree, Ms. Martz shouldered the laboring oar for NACDL in this case. The brief was joined the Association of Corporate Counsel, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, our own New York State Association of Criminal Defense Lawyers, and the Washington Legal Foundation. Our brief is available at www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Ionia_Mgmt_Amicus.pdf. The case was recently argued by both Mr. Schwartz and Mr. Weissman. It is unusual for the Court to hear amicus counsel at oral argument and reports are that at least Judge Calabresi was interested in our arguments. The case is sub judice.

NACDL filed an amicus brief in the support of NYSACDL member Marc Fernich’s case in the Supreme Court, Boyle v. United States, 07-1309. We recruited William W. Taylor III and Shawn P. Naunton of Zuckerman Spaeder LLP, Washington, D.C., Terrance G. Reed of Lankford, Coffield and Reed, Alexandria, Virginia and Samuel J. Buffone and Cassanra H. Welch of Ropes and Gray, Washington, D.C. to prepare this excellent brief. The issue is whether a RICO “enterprise” must have some ascertainable structure separate and apart from the pattern of racketeering activity in which members its members engaged. In Boyle’s case, the defendants simply committed a series of crimes together but did not have leadership or other attributes of an organization with some structure. Mr. Fernich will argue this case on January 14, 2009. Our brief is available at www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Boyle_Amicus.pdf.

NYSACDL members may volunteer to prepare an amicus brief for NYSACDL and such assistance would be greatly appreciated. Volunteers are invited to email me at willstatter@msn.com or to call (914) 948-5656. Requests for amicus assistance will be accepted only from counsel (and not from their clients). Please note that you should bring important issues to our attention as early as possible to increase the chances we can assist in your case.
The Motion to Suppress evidence is codified in Sec. 710.30 of the Criminal Procedure Law, and sets forth the procedure for suppressing a statement or identification of the defendant. The Motion to Suppress usually involves challenging an alleged unconstitutionally obtained statement gained involuntarily or in the absence of Miranda warnings, or the suppression of a line-up or show-up based on some sort of unconstitutionally invasive unfairness. The Section states as follows:

Motion to suppress evidence; notice to defendant of intention to offer evidence

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice, thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a statement specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70.¹

This article will consider three aspects or issues connected with this statutory section. First, I will consider whether oral notice is sufficient to generate a hearing, or rather the Motion. Second, I will consider the issue of waiver, and third, I will consider the matter of Amendment of the Notice.

ORAL NOTICE

In general, it may be said that oral notice provided by the People to the defendant of statements, or identification, is sufficient to comply with the Notice requirements of this Motion to Suppress Evidence statute. Thus, in People v. Dempsey², the Criminal trial court held that oral statement notice provided to the defendants at their arraignment provided them with an opportunity to challenge those statements at a Suppression Hearing. The trial court went on to note that the defense did not allege that such oral notice was objected to by counsel, representing the defendant, and concluded that the defense had failed to set forth a sufficient basis that would warrant preclusion in this case.

Similarly, in People v. Anderson³, the Criminal Court of Kings County held that the People had sufficiently given notice of their intent to introduce statements made by the defendants, although the People did not serve written notice until four months after the defendant were arraigned, where the People gave oral notice of the substance of statement made by the defendants at the first opportunity, the court approved that notice, and the court minutes reflected that the attorney for the Legal Aid Society, represented both defendants, and did not object to the oral notice, even though the statute requiring notice would be interpreted to require notice of statements be given in writing. The court concluded that the People should not be precluded from introducing at trial the statement made by the defendant that was orally described to the defense, based on lack of written notice of the statement, where actual substantive oral notice was given, the defense made no objection, and the court ratified the notice.⁴

WAIVER

The next issue to be considered in this article, or rather subject, is under what conditions the defendant may be said to waive the right to contest the Notice furnished by the People. For example in People v. Jackson⁵, the Appellate Division Third Department held that the defendant waived the right to contest the sufficiency of the Notice furnished by the People, where the defendant moved for a Suppression Hearing, which was held and resulted in a ruling of admissibility, prior to lodging any complaint about sufficiency of the Notice.

(continued on page 26)
Again, in *People v. Lewis* the Appellate Division Third Department held, in no uncertain terms, that the defendant waived any request to exclude statements that the defendant had allegedly made to police detectives after his arrest, based on defects in the Pre-Trial Notice, where the Suppression Hearing was initiated before any request for preclusion was made.

In *People v. Rivera* the Appellate Division held that in a criminal proceeding where the District Attorney gave notice that the defendant had made a statement without indicating its content, to whom it was made, or the circumstances, had not complied with the statute, requiring the District Attorney to specify the evidence intended to be offered, but such failure to comply, the court held, did not preclude admission of the statement into evidence in light of the fact that the defendant waived objection to the sufficiency of the notice as a matter of deliberate strategy.  

**AMENDMENT OF THE NOTICE**

A third subtopic subject or, if you will, issue to be considered in this article is the question of Amendment of the Notice. The case law is varied on this particular area. For example in *People v. Ocasio*, the Appellate Division Second Department reasoned and held that notice given to the defendant by the People, informing him of two identification witnesses, satisfied the Statute requiring such notice, although the original notice mistakenly listed the wrong witness, and the notice was subsequently amended to replace the incorrect name with the correct one. The court held and concluded that the defendant was able to timely move to suppress identification testimony and was granted a Hearing, and allowing the People to Amend the notice did not change its substance.

Similarly, in *People v. Anderson*, the Appellate Division held that where the People served the defendant with a Notice specifying that they intended to offer evidence at trial of a written statement made by the defendant to the Sheriff’s Department Investigators, but failed to notify the defendant that they also intended to offer evidence of oral and written statements given by the defendant to a state police investigator, the trial court properly sustained the defendant’s objection to the receipt of testimony regarding the non-noticed oral statements. The trial court, the Appellate court noted, properly admitted the District Attorney to serve an Amended Notice.11

In *People v. Pannell*, the Appellate Division Second Department held that the Hearing court properly permitted the People to Amend their Notice to correct an error regarding the name of one of the witnesses, who identified the defendant at a show-up. The court noted that the People had given the defense timely notice that the defendant had been identified at show-up by two witnesses, which enabled the defendant to move to Suppress the perspective identification testimony and the defendant was granted a Wade Hearing, which explored the issue of whether the show-up identifications were impermissibly suggested.

In the same way, in *People v. Moore*, the County Court held that an amendment to the original Notice of intent to offer at trial, a statement by the defendant to a law enforcement officer, which if involuntarily made would be suppressible, in which the defendant’s name was substituted for the name of a female co-defendant, which had obviously been used by mistake, would be permitted. The Court held that the Amendment and originally and timely served Notice were identical, except to the extent that the change corrected a mistake, which was readily apparent from the reading of the statement, which was obviously made by a male, rather than a female.

**CONCLUSION**

This short examination of the Motion to Suppress Statute, Sec. 710.30 of the Criminal Procedure Law, focusing, most particularly on the subject issues or areas of the sufficiency of oral notice, the condition whereby the Hearing may be waived, and third, whether the Notice can be amended by the People reveals a fairly straightforward scenario. One may say that the case law leads the criminal lawyer to the conclusion that oral notice is sufficient, if detailed enough to comply with the Statute. Second, if the Hearing is held then any issue as to the sufficiency of the Notice is waived. Third, it is fairly clear and readily apparent that the courts of this State are willing to permit amendment of the Notice, as long as the defendant is not grossly and actually prejudiced.12

**ENDNOTES**

1. The case law cited in this article has its source in the annotations of McKinney’s Consolidated Laws, Sec. 330.30, Volume 11A, West Publishing Company. This is also true of the citations in the prior article entitled “An Analysis of the Motion to Set Aside a Verdict,” analyzing subsection (2) of Sec. 330.30 of the Criminal Procedure Law.
2. CPL Sec. 710.30 McKinney’s Consolidated Laws, West Publishing Co. 154 Misc.2d 1001, 587 NYS2d 114 (Crim. Co. NY County 1992)
4. See also on this, more recently, *People v. Chase*, 85 NY2d 493, 626 NYS2d 721 (1995)
5. 200 AD2d 856, 607 NYS2d 147 (3rd Dept. 1994)
6. 198 AD2d 666, 604 NYS2d 276 (3rd Dept. 1993)
7. 337, 692 NYS2d 404 (2nd Dept. 1999); *People v. Peterkin*, 245 AD2d 150, 667 NYS2d 559 (4th Dept. 1999)
9. 183 AD2d 921, 584 NYS2d 156 (2nd Dept. 1993)
10. 80 AD2d 33, 437 NYS2d 985 (1981)
11. See also on this, *People v. Ocasio*, 146 Misc. 2d 688, 552 NYS2d 514 (1990), *People v. Isenof*, 121 Misc.2d 222, 467 NYS2d 802 (1983)
12. 287 AD2d 659, 731 NYS2d 750 (2nd Dept. 2001)
LISTSERV ETIQUETTE UPDATE

by Greg D. Lubow, Esq.

Greg D. Lubow, Esq. is in private practice in Tannersville. He is a Director of the NYSACDL.

I have noticed, with great pleasure, that we have many new listserv members (or perhaps just some newly surfaced ones) - Welcome - it’s wonderful. The listserv’s success is an on-going process.

So here are just a few of my observations (and pet peeves) on listserv basics and common courtesy. Hopefully these will help make your experience more useful, efficient and pleasant. I hope I don’t offend anyone or any group.

1) I think you will find that there are some really great and thoughtful attorneys on the list, willing to give their time and thoughts and expertise for free. There have been some spectacular intellectual discussions, and some real dogs. Let’s all remember that we are members of a caring, professional community. It is nice place, this listserv, to make new personal and professional friends and acquaintances. Let’s treat each other with respect, especially when we disagree - we don’t have to be disagreeable. The only censorship we use is the personal delete button, but it can get unnecessarily burdensome, so please be considerate, especially when we are arguing. Don’t be so quick to take offense - the written word has limitations of tone, and sarcasm and cynicism can be misinferred. “You’re an idiot” can be said with love and affection, just not on the listserv.

2) The list is NOT secure. What you post there in terms of what clients say may break attorney-client privilege. Now while someone may disagree with that statement, I think it is better not to test it in a court setting somewhere. The same is true for defense strategies. Or requests for information about potential witnesses. I once posted a request for info about an ‘expert’ and found that the expert was aware of my request. Be discreet! And on the flip side, don’t reveal what you read on the list to those on the other side of our cases - judges and DA’s.

3) Some of our members have very catchy names, that don’t IDENTIFY you. If you are one of those persons, please, please, please SIGN your emails so we know who we are dealing with. And give us your physical addresses so we know where your practice in the Great State of New York. And to whomever is using the name “i’llgetyouoff.com” - cut it out - the listserv could be investigated as a porn site.

4) The listserv is STILL a work in progress. So, Whenever glitches occur, such as repeats or blanks, please be PATIENT. Rarely has anyone done something on purpose. DO NOT PUT THE LIST ON AUTO RESPOND! You can now suspend from the list ON YOUR OWN by going to our website - no longer do you need to say - Please take me off for 3 weeks - it upsets the rest of us who haven’t had any time off in 3 years.

5) The only thing worse than being irrelevant is being redundant. Some members do get frustrated with unnecessary comments on comments on comments on comments. Of course, VICTORIES should be celebrated LOUDLY.

6) A. Don’t HIJACK a subject line - it gets confusing, especially if someone reads more than just your post. Start a new subject line.
   B. If someone invites you to respond OFF LIST - take them up on it.

7) NEVER EVER EVER ask for name of an expert who will accept 18B rates. Go find the expert you want, prepare the application to retain the expert, and email MARK MAHONEY. No really, there is a wonderful paper out there by NYSDA on how to get the expert, and there is Mahoney’s “Right to Present a Defense” paper posted to our website which addresses it. We have an Experts Directory and a sample 722-C motion to help you get the expert you need.

8) USE OUR WEBSITE!!! NYSACDL has a website - Pat has taken great pains to try to provide useful daily information - like phone numbers and fax numbers to courts - when you get one - SEND it to her and it will be added to the site.

9) A. The only stupid question is the one not asked. This is the first part of a double-edged sword issue. I wholeheartedly believe in mentoring, educating, and generously giving back what was generously given to me over the years. You will find that the attorneys on the list have an infinite wealth of knowledge and experience that they are willing to share freely. they will provide case law, insight, tactical and practical suggestions on how to deal with issues as well as constructive criticism and advice. This goes for basic as well as complex questions.
   B. Do your homework. This is the second edge of the sword. For a number of reasons it is better to do your own research, take it as far as you can so that when you post a question to the list, it can be factually and legally well constructed. First you will learn it better. Plus, this will aid those responding in providing meaningful answers instead of - “Man, we need way more facts.” Don’t be lazy. Sometimes questions posted to the list could have been an-
answered by the inquirer by simply heading to the statute and spend-
ing 10 minutes reviewing it as well as any treatise on the subject.
At the same time, there are some very convoluted statutory schemes
out there, especially with regard to sentencing issues; but “will my
client lose his driver’s license if he pleads guilty to DWAI” is not
one of them.

That’s all for now. I am certain there are many more ‘suggestions’
for listserv etiquette - such as trying to spell correctly - but this
really is NOT an invitation to provide them to the list. And, what-
ever your take on this post is, please please please DON’T send it
to the list. If you agree with all, some, one or none, you can express
your opinion by either taking them - all, some or one to heart or
ignoring them all. If you feel you must reply, resist.

Wishing you all a big NOT GUILTY in the near future.

FOR THE RECORD...

Congratulations to Past-President Marty Adelman on
the birth of his grandson...to Past-President Larry
Goldman on the birth of his granddaughter...Mark
Weinstein on the birth of his grandson.

Condolences to Richard Willstatter on the death of
his sister and Past-President Tom Liotti on the death of his
parents.

ATTICUS REQUESTS
SUBMISSION OF ARTICLES

Members wishing to submit articles for inclusion in
Atticus should send them to the attention of Patricia
Marcus, Executive Director, NYSACDL 245 Fifth Av-
venue, 19th Floor, New York, New York 10016. The editor
reserves the right to modify any submissions for style,
grain, space and accuracy.

Authors are requested to follow these guidelines:

1. Use footnotes rather than endnotes.
2. When a case is mentioned in the text, its citation should
   be in the text as well.
3. Submit articles in hard copy with disk in either
   WordPerfect or Word.
4. Articles longer than 3-4 pages will be edited.

FEDERAL MENTORING COMMITTEE

The NYSACDL has established a mentor program for
members who practice in the federal courts. The mentoring
program allows members to ask experienced practitioners
from all over New York State substantive, procedural or stra-
"tic questions.

We thank these members who have volunteered to
serve as mentors. Their telephone numbers and email ad-
dresses are listed below. Anyone wishing to be consid-
ered as a mentor should contact Patricia Marcus via email
at nysacdl@aol.com, or at (212) 532-4434.

Martin B. Adelman - Manhattan
(212) 732-4343
mbadelman1@aol.com
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NYSACDL members can pick the plan that best suits
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Some plans are available only to solo practitioners
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Our rates are substantially below what you would pay
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low co-pays for office visits, and include a prescription
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If you are a firm with two or more employees, we can
tailor a plan to meet your insurance needs.

Among the health insurance plans available to
NYSACDL members are HIP, Atlantis, Oxford, Aetna, US
Healthcare, Empire Blue Cross Blue Shield and Cigna.

The NYSACDL Membership Insurance Program is
administered by Specialty Financial Advisors. For more
information, contact Mark A. Kovler, JD PH.D. CTP at
(914) 923-1160 or via email at makesq58@aol.com.
MEMBERSHIP APPLICATION

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.

(Please print or type.)

Name:__________________________________________________________________________
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❑ CJA COUNSEL  ❑ PUBLIC DEFENDER
❑ FEDERAL PRACTICE  ❑ STATE PRACTICE
❑ LEGAL AID
(check all that apply)

Firm Name:____________________________________________________________________
Address:_______________________________________________________________________
City/State/ZIP ________________________County__________________________________
Phone:  (         )_________________________  Fax: (          )_____________________________
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We need your participation. Tell us on which of the following Committees you will serve:
❑ AMICUS  ❑ CONTINUING LEGAL EDUCATION  ❑ LEGISLATIVE
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What issues and activities would you like to see NYSACDL concern itself with?
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Membership dues can be paid by check, or charged to the American Express, Master Card, Visa or Discover Card.
Please make your check payable to NYSACDL and send to:
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Please charge my credit card #_________________________________________ Expiration Date___________

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I certify that I support the purposes of the NYSACDL. I am committed to the fair administration of criminal justice and the defense of individuals accused of crime. I hereby certify that I am not a judicial or prosecutorial officer and that I am actively engaged in the defense of criminal cases.

Enclosed is my payment for membership in NYSACDL:

Signature of applicant

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❑ Regular Member $200
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  • In practice over 5 years
❑ Regular Member $125
  • Income under $50,000
  • In practice less than 5 years
  • Full-Time Public Defender
❑ Associate Member $175
❑ Law Student $50

School:_____________________________  Graduation date:________________________

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I certify that I support the purposes of the NYSACDL. I am committed to the fair administration of criminal justice and the defense of individuals accused of crime. I hereby certify that I am not a judicial or prosecutorial officer and that I am actively engaged in the defense of criminal cases.

Enclosed is my payment for membership in NYSACDL:

Signature of applicant

Lifetime Member $2,500
President’s Club $500
Sustaining Member $300
Regular Member $200
  • Income over $50,000
  • In practice over 5 years
Regular Member $125
  • Income under $50,000
  • In practice less than 5 years
  • Full-Time Public Defender
Associate Member $175
Law Student $50

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What issues and activities would you like to see NYSACDL concern itself with?
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CrimeTime was a free sentencing software program created by the late George Dentes, former Tompkins County District Attorney. In 2006, the New York Prosecutors Training Institute (NYPTI) acquired the program. NYPTI updated and converted the calculator to a web-based application that is now available on the its website: http://crimetime.nypti.org/.

On the NYPTI welcome page under the Disclaimers section you'll find a request for an email address to gain access to the system. The main search page has tabs to allow searches by PL, VTL or All Laws. Search terms must be either name or section number, e.g., assault (note that inconsistent use of dashes can impede searching by degree: assault 2nd versus assault-3rd) or 120.00. Name of crime is linked to text of statute; Select the Crime Button will lead you through the sentencing analysis. You must disable your web browser’s popup blocker to view the final result.

**NEW LAWYER CONDUCT RULES ADOPTED; STANDARDS ALIGNED WITH ABA MODEL**

Chief Judge Judith S. Kaye and the four presiding Appellate Division justices have formally adopted a new set of attorney ethics rules that proponents say brings New York lawyers in line with their counterparts in most of the rest of the country.


April 1, 2009, the Rules of Professional Conduct will replace the New York Code of Professional Responsibility.

**APPLY FOR TWELVE ANGRY MEN SCHOLARSHIP TO NATIONAL CRIMINAL DEFENSE COLLEGE**

NYSACDL members in good standing who wish to be considered for the NYSACDL’s Twelve Angry Men scholarship must first be accepted by the National Criminal Defense College in Macon, Georgia. Contact them at www.ncde.net for an application. Once you are accepted, submit your resume and a letter describing your qualifications for the scholarship. Please send your letter to Twelve Angry Men Scholarship, c/o NYSACDL, 245 Fifth Avenue - 19 Floor, New York, New York 10016.

**PRO BONO COUNSEL NEEDED FOR DEATH ROW PRISONERS**

Nearly 3,500 people are in death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals, and others.

Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The ABA Death Penalty Representation Project seeks lawyers in firms with the necessary resources to devote to his critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact Robin M. Maher, Director of the ABA Death Penalty Representation Project at 727 15 Street NW, 9th Floor, Washington, D.C. 2005. The email address is maherr@staff.abanet.org or by phone at (202) 662-1738. For more information, see the Project’s website: www.probononet/deathpenalty.
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