It is time for the New York State Legislature to enact a pay raise for the judges of New York State. Our members appear daily before judges at all levels of the court system. As such, we see the impact on our clients and their families of a high quality judiciary. In order to insure that quality, it is essential that judicial salaries be raised to a level that reflects the realities of economic life in this state.

Some of the facts regarding this issue are stark. New York judges have not received a raise of any kind since 1999, the longest of any state. During that period every other state gave at least cost of living increases which aggregated to approximately 24%. Federal judges received seven pay raises during that period. New York now ranks 38th in the nation when salaries are adjusted for cost of living and metropolitan area judges are dead last in this calculation. In the past two years, 117 judges have borrowed against their pensions, a fourfold increase. These are clear signs of a situation in need of change.

Judicial pay raises should not be tied to legislative pay raises, as the Legislature is seeking to do. Assigned counsel in New York State has had the unfortunate experience of waiting almost a decade for the legislature to act on the issue of inadequate compensation rates. It took lawsuits and years of lobbying to force the legislature to acknowledge what the Constitution demands.

Judges, though, are not represented by unions, bar associations or other high-profile vote generating organizations. The judiciary is uniquely dependant on the good judgment and recognition by the executive and legislative branches that the effective operation of this branch of government is not an ordinary political issue.

While the Governor and legislative leaders seem not to be able to agree on much, they should at least be able to put politics aside and agree that our treatment of the state's judiciary is just shameful. The judiciary needs and deserves a long overdue retroactive increase in its compensation. It is simply the right thing to do.
DNA LEGISLATION HURTS THOSE IT SHOULD HELP

The Governor’s proposal to expand the number of people required to give DNA samples seeks to entice support by allowing greater use of the DNA databank to people who are wrongly accused. These provisions which support “fairness” for the unjustly convicted should be enacted on their own merits. Instead, the governor is using them to garner support for a bill that not only casts too wide a net but also limits access to the courts for those who seek to challenge the validity of their convictions. When viewed in its entirety the governor’s bill takes away many more rights than it bestows.

The Governor’s bill would require any person convicted of any crime in New York to give a DNA sample. In addition, it would require any young person adjudicated a youthful offender to give a DNA sample. The very purpose of a youthful offender adjudication is undermined by further criminalizing the nature of such cases. Adding to the indirect tax on people of limited means, the bill authorizes the enactment of local laws that would require the payment of up to $50.00 to probation departments for the taking of DNA samples from people who are not on probation. The bill authorizes the use of “reasonable” force to take DNA samples from the unwilling. Although the bill professes to provide further protection for people who are unjustly accused or convicted by giving them access to the DNA databank, it limits their access to the courts by providing that a motion pursuant to CPL §440.10 must be denied if previously made and denied, except as to newly discovered evidence.

A time limit for such a collateral challenge is set at one year after the conclusion of direct review further limiting a wrongfully convicted persons access to the court except in the case of newly discovered evidence, but even in such case there is a requirement that the defendant make a showing of “due diligence.” It is deeply troubling that, on the one hand the Governor is able to see the merit of extending into perpetuity the statute of limitations where DNA evidence exists, but at the same time sets extraordinarily short time limits for those who may have been falsely convicted and have not had access to DNA analysis in order to demonstrate their innocence.

The Governor’s bill seeks to appease and gain support from the advocates who have labored in the trenches for years representing the innocent who have been unjustly convicted. Any provision that helps to exonerate and compensate the unjustly convicted should be applauded but setting unreasonable limits on access to the technology which will set free those whom the system has failed is unwise, unfair and unconscionable. The time has come for the Governor to propose a stand alone bill that recognizes the human errors that riddle our criminal justice system without requiring all New Yorkers to surrender other of their liberty interests.
The NYSACDL in conjunction with the Jacob Burns Ethics Center of Benjamin Cardozo School of Law presented a 150th Anniversary Celebration in honor of Clarence Darrow on April 18 at Cardozo Law School.

The evening, hosted by Herald Price Fahringer, featured readings of Darrow’s works presented by (in alphabetical order) President Daniel N. Arshack, Benjamin Brafman, Fahringer, Past-President Jack T. Litman, Anthony Ricco, Past-President Murray Richman, Joseph Ryan, Lynne Stewart, Hon. Albert Tomei and Professor Ellen Yaroshefsky.

Joseph Ryan, Past-President Murray Richman, Anthony Ricco, Past-President Jack T. Litman, Lynne Stewart, President Daniel N. Arshack, Professor Ellen Yaroshefsky, Herald Price Fahringer, Benjamin Brafman and Hon. Albert Tomei honored Clarence Darrow on the 150th Anniversary of his birth at a celebration hosted by the NYSACDL at Cardozo School of Law.

President Daniel N. Arshack, Judge Albert Tomei, Joseph Ryan and Murray Richman.

Master of Ceremonies Herald Price Fahringer and Professor Ellen Yaroshefsky.

Past-President Ira D. London, Past-President Murray Richman, Benjamin Brafman and Past-President Jack T. Litman.
Conviction of many sex offenses may result in greater punishment than for other crimes:

- a $1,000 “supplemental sex offender victim fee,” Penal Law §60.35(1)(b). The victim does not receive the “victim fee,” however.
- if probation is imposed, a longer period is imposed, including for Youthful Offenders. Additionally, with a level 3 sex offender sentenced to probation, one mandatory condition is that the defendant not enter onto school grounds. Penal Law §65.10(4-a).
- DNA registration and payment of DNA databank fee. Penal Law § 60.35(1)(v).
- registration under the Sex Offender Registration Act.
- sex offender registration fee. Penal Law § 60.35(1)(iv).
- civil confinement / civil commitment. Mental Hygiene Law art. 10 (L. 2007, ch. 7).

**SORA**

Under the Sex Offender Registration Act, Correction Law article 6-C, convicted offenders of specified crimes are required to register with the NYS Division of Criminal Justice Services. New York State’s version of Megan’s Law was enacted in 1995 and has been amended several times since. See Doe v. Pataki, 481 F3d 69 (2d Cir 2007). SORA’s constitutionality has been upheld. Doe v. Pataki, 120 F3d 1263 (2d Cir 1997).

A version of Megan’s Law exists in all 50 states. See People v. Kennedy, 7 NY3d 87, 93, n. 1, 817 NYS2d 614, 850 NE2d 661 (2006) (Graffeo, concurring).

Registration under SORA is a “collateral consequence” of a conviction, thus a guilty plea induced by ignorance of it is not ground for withdrawal of the plea. People v. Dorsey, 28 AD3d 351, 813 NYS2d 81 (1st Dept 2006); People v. Coss, 19 AD3d 943, 798 NYS2d 170 (3d Dept 2005); People v. Smith, 37 AD3d 1141, 829 NYS2d 375 (4th Dept 2007).

Because of SORA requirements, defense counsel during negotiations may seek a plea to a non-SORA offense, such as Assault 3rd degree or EWOC. Counsel should be mindful of plea bargaining restrictions post-indictment.

**REGISTRATION**

Initial registration must occur at least ten days before discharge from incarceration, or at the time of sentencing, if a sentence other than incarceration is imposed. Corr Law §168-f(1). Thereafter, registration annually (more frequently for certain offenders) is required. Corr Law §168-f(2).

For the categories of sexual predator, sexually violent offender and predicate sex offender, registration is annually for life, regardless of risk level. Corr Law §168-b(2). A change of address must be reported ten days before. Corr Law § 168-f.

Failure to register is itself a crime (first time a misdemeanor, second time a class D felony), and is grounds for revocation of parole. Corr Law §168-t. It is a strict liability crime, although the offender must be given notice of the obligation to register. People v. Patterson, 185 Misc2d 519, 708 NYS2d 815 (City Crim Cr 2000).

As part of the Adam Walsh Child Protection and Safety Act of 2006, Pub L. No. 109-248, a national registry of sex offenders is established. Failure to register is a federal felony.

**CONVICTIONS REQUIRING SORA REGISTRATION**

SORA applies to most Penal Law article 130 crimes (including attempt crimes), kidnaping offenses where the victim is less than 17 years old, and other offenses. A list of crimes is available at: http://criminaljustice.state.ny.us/nsor/sortab1.htm

SORA registration applies to abduction-related convictions, despite the absence of a sexual aspect or motive. People v. Downey, 34 AD3d 342, 824 NYS2d 287 (1st Dept 2006); see also People v. Cassano, 34 AD3d 239, 823 NYS2d 395 (1st Dept 2006) (constitutional as applied); People v. Cintron, 13 Misc3d 833, 827 NYS2d 445 (Sup 2006).

A juvenile offender conviction comes within SORA. A Youthful Offender adjudication does not require SORA registration Corr Law §168-(a). However, a previous Youthful Offender adjudication for a sex offense can be used in assessing the risk level, People v. Peterson, 8 AD3d 626 (4th Dept 2004), as may a juvenile delinquency adjudication for a sex offense. People v. Dort, 18 AD3d 23, 792 NYS2d 236 (3d Dept 2005).

A defendant who was imprisoned for attempted rape before SORA was enacted, and had received additional consecutive sentences, was not required to register under SORA. He was not imprisoned, paroled, or on probation for the sex offense conviction at the time of SORA’s effective date. People v. Roberson, 172 Misc2d 486, 658 NYS2d 557 (Sup 1997). But see People v. Curley, 285 AD2d 274, 730 NYS2d 625 (4th Dept 1997).

Where the issue is whether the conviction is a registerable offense, the appropriate method of review may be a CPLR article 78 proceeding, rather than a SORA classification hearing, according to
some decisions. People v. Williams, 24 AD3d 894, 805 NYS2d 191 (3d Dept 2005). The Third Department alone appears to continue to take this approach. Other courts hold that it may be raised on direct appeal. Sims v. Sperrazza, 20 AD3d 944, 800 NYS2d 486 (4th Dept 2006). See also, People v. Kennedy, 7 NY3d 87, 817 NYS2d 614, 850 NE2d 661 (2006); People v. Gundel, 2002 WL 205884 (Co Ct 2002); Corr Law § 168-d(3).

A defendant who was convicted out of state and released in 1996 contended that he was not subject to registration in New York State. County Court was limited to assigning a risk level classification; the issue of registrability is a challenge to the determination of an administrative agency, which is more properly the subject of a CPLR article 78 proceeding. People v. Stafford, 32 AD3d 1133, 822 NYS2d 317 (3d Dept 2006). See also, People v. Pride, 37 AD3d 957, 829 NYS2d 741 (3d Dept 2007).

A CPL 440.20 motion is not a proper vehicle to challenge a SORA certification. People v. Lisle-Cannon, 31 AD3d 467, 820 NYS2d 280 (2d Dept 2006).

OUT-OF-STATE CONVICTIONS

Megan’s Law applies to federal and out-of-state convictions that have the same elements of an offense in New York State that would require registration. Corr Law §§168-a(2)(d), 168-k. An offender who moves to New York State and is adjudicated a sex offender is entitled to a hearing to contest the level. See People v. Carabello, 309 AD2d 1227, 765 NYS2d 724 (4th Dept 2003).

In making the comparison, the analysis is the same as used in determining whether an out-of-state felony constitutes a prior felony conviction, i.e., the “essential elements” test. North v. Board of Sex Examiners, __ NY3d __, 2007 WL 1879401 (2007). The strict equivalency standard used with enhanced sentencing to determine equivalency does not apply in the SORA context: the court may review the underlying conduct.

A court-martial conviction may require SORA registration if it meets the essential elements test. See People v. Kennedy, 7 NY3d 87, 817 NYS2d 614, 850 NE2d 661 (2006).

Upon conviction the court must certify whether a person is a sex offender under SORA. Corr Law §168-d. The determination may be made by the judge who heard the case and sentenced or, in the statute’s wording, by “the sentencing court”—i.e., another judge of that court or even a different superior court. See People v. Marinconz, 178 Misc2d 30, 679 NYS2d 244 (Sup 1998).

One issue that may arise is whether SORA registration applies to a person whose sentence was completed prior to enactment or amendment of SORA. See Coram v. Board of Examiners, 195 Misc2d 392, 758 NYS2d 235 (Sup 2003) (court-martial adjudication). In determining this, it should be borne in mind that New York’s statute has been amended and extended several times, with different effective dates.

An offender who relocates outside of New York State must be informed by DCJS of the general notification and registration requirements elsewhere. See Corr Law §168-c(4).

SORA RISK LEVELS

There are three levels of offenders, based upon whether the risk of a repeat offense is determined to be low, moderate, or high. Corr Law §168-l(6). This classification scheme is based in part upon a point system. The registry last for at least 20 years, and may last for life. Corr Law §168-h.

A court order setting a risk classification level is appealable. Corr Law § 168-d(3); Sims v. Sperrazza, 20 AD3d 944, 800 NYS2d 486 (4th Dept 2005).

With a level 3 sex offender sentenced to probation, one mandatory condition is that the offender not enter onto “school grounds,” as defined by statute. Penal Law §65.10(4-a).

<table>
<thead>
<tr>
<th>SEX OFFENDER REGISTRATION ACT LEVELS</th>
</tr>
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<tbody>
<tr>
<td>Level</td>
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<tr>
<td>-------</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
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<tr>
<td>3</td>
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</tbody>
</table>

| CLASSIFICATION OF PREDATOR, OFFENDER, SEX OFFENDER |

In addition to the risk level classification, further classification as a “sexual predator,” “sexually violent offender” and “predicate sex offender” applies to persons as of March 11, 2002 who have not been released from their sentence of incarceration (L. 2002, ch. 11, §§4, 24). Corr Law §168-n(1); People v. Thornton, 16 AD3d 1169, 791 NYS2d 750 (4th Dept 2005). These terms are defined in Corr Law §168-a(7).

Such classification affects the length of registration: offenders so classified must register annually for life. Corr Law §168-h. Additionally, both level 3 offenders and sexual predators must verify their address every 90 days.

In the long-running federal litigation over New York’s version of Megan’s Law, the 2007 Second Circuit decision in Doe v. Pataki provides a useful summary of the statute’s history as well as the risk levels and classifications:

“the SORA, as it currently exists, provides the following. Level one offenders, other than those who have been classified as ‘sexual predators,’ ‘sexually violent offenders,’ or ‘predicate sex offenders,’ must register for twenty years, and information about all level one offenders can be distributed to entities with vulnerable populations but is not maintained in the publicly accessible subdirectory. Level two and level three offenders and all offenders who have been classified as ‘sexual predators,’ ‘sexually violent offenders,’ or ‘predicate sex offenders,’ regardless of risk level, must register for life, though level two offenders who have not received such classifications may petition for relief after thirty years. Level two and three offenders are identified in a publicly accessible subdirectory.” Doe v. Pataki, 481 F3d 69 (2d Cir 2007).

(continued on page 6)
REPORTING REQUIREMENTS, REGISTRATION LENGTH, AND COMMUNITY ACCESS

The SORA risk level and designation will determine the length of registration, frequency of reporting, and extent of information disseminated about an offender.

There is a $50 initial registration fee, imposed at the time of sentencing, and $10 fee for change of address. Penal Law §60.35(1)(iv); Corr Law §168-b(8).

A toll-free number allows the public to find out if an individual is on the registry. Corr Law §168-p. DCJS maintains an Internet site of Level 2 and Level 3 offenders. Corr Law §168-q. Additional information regarding offenders is available to the public under federal law.

Falsely disseminating a notice that a person is a registered sex offender is a crime. Penal Law §240.48. See also, Corr Law §168-q(2).

### NYS SEX OFFENDER REGISTRATION ACT

**Corr Law §§168 et seq.**

<table>
<thead>
<tr>
<th>Risk level</th>
<th>Designation</th>
<th>Duration of registration</th>
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<tr>
<td>§168-a(7)</td>
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<td>§168-h</td>
<td>§168-h(3)</td>
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<td></td>
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<tr>
<td></td>
<td>Predicate sex offender</td>
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<td>Sexually violent offender</td>
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<td>Predicate sex offender</td>
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</tr>
<tr>
<td></td>
<td>No designation, or Lifetime registration designation subject to petition for relief.</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

* Can petition for relief after registration for 30 years. Corr Law §168-o(1).
RISK ASSESSMENT INSTRUMENT


A “Risk Assessment Instrument,” in which points are assessed based on 15 different criteria, is prepared. The RAI is usually provided by the Board of Examiners of Sex Offenders, though it may be prepared by the local prosecutor where the defendant is not sentenced to imprisonment. Corr Law §168-d(3).

The RAI must be prepared. People v. Sass, 27 AD3d 968, 812 NYS2d 150 (3d Dept 2006); People v. Sanchez, 20 AD3d 693, 798 NYS2d 258 (3d Dept 2005). Even where there is an override factor, the RAI must be completed. See People McClelland, 38 AD3d 1274, 832 NYS2d 373 (4th Dept 2007) (harmless error). Conducting a SORA hearing before sentencing and without the Board’s recommendation violates due process. Where a defendant is to be sentenced to incarceration, the risk level determination should not be made until 30 days before release from custody. Corr Law §168-n(2); People v. Black, 33 AD3d 981, 823 NYS2d 485 (2d Dept 2006).

Counsel may obtain a copy of the November 1997 guidelines from the Board of Examiners of Sex Offenders, 1220 Washington Ave, Albany, NY 12226-2050. For further information: http://criminaljustice.state.ny.us/nsor.faq.htm

Also included with the RAI is a “Case Summary,” the Board’s evaluation of the offender and amplification of reasons for its recommendation, along with a presentence investigation report and other information.

At the hearing, the defense should consider objecting to the case summary as not constituting reliable hearsay.

RAI FACTORS

The Risk Assessment Instrument is divided into four areas: current offenses; criminal history; post-offense behavior; and release environment. The RAI lists 15 risk factors that will result in points being added. These are listed, with examples:

• Use of violence

Adding points for weapons possession was improper where the offender, who had entered an Alford guilty plea, had not admitted that he possessed a dangerous weapon. People v. Gonzalez, 28 AD3d 1073, 814 NYS2d 834 (4th Dept 2006).

• Sexual contact with victim
• Number of victims
• Duration of offense conduct with victim

The court erred by adding extra points for multiple acts with the same victim within a one-day period. The court also incorrectly found an attempted act to be a completed act of intercourse. People v. Madlin, 302 AD2d 751, 755 NYS2d 121 (3d Dept 2003); People v. Donk, 39 AD3d 1268, 833 NYS2d 828 (4th Dept 2007).

Points for continuing conduct were inappropriate with contacting an undercover detective via the Internet. People v. Costello, 35 AD3d 754, 826 NYS2d 429 (2d Dept 2006).

• Age of victim

Adding points for both age of victim and physical helplessness resulted in double counting. People v. Fisher, 22 AD3d 358, 803 NYS2d 45 (1st Dept 2005).

• Other victim characteristics (mental defect, physical helplessness)
• Relationship between offender and victim

Points were properly assessed where the grand jury testimony supported a reasonable inference that victim and offender did not know each other. People v. O’Neal, 35 AD3d 302, 828 NYS2d 24 (1st Dept 2006); see also People v. Gaines, 39 AD3d 1212, 834 NYS2d 417 (4th Dept 2007).

• Age at first sex crime
• Number and nature of prior crimes

A 17 year old prior sex offense conviction could be considered. People v. Oginski, 35 AD3d 952, 824 NYS2d 810 (3d Dept 2006).

Points were properly included for a prior Youthful Offender adjudication. People v. Goodwin, 35 AD3d 1285, 825 NYS2d 414 (4th Dept 2006).

A subsequent conviction could not be used under this factor. See People v. Milks, 28 AD3d 1163, 815 NYS2d 384 (4th Dept 2006).

• Recency of prior felony or sex crime
• Drug or alcohol abuse

The Board had recommended an upward departure based on the offender’s mental health and drug dependency. The recommendation was duplicative of factors for which maximum points were already assessed. There was no evidence that the offender’s depression was causally related to risk of recidivism. People v. Perkins, 35 AD3d 1167, 826 NYS2d 875 (4th Dept 2006).

A prior drinking-driving conviction did not establish the drug/alcohol risk factor. People v. Guaman, 12 Misc3d 707, 819 NYS2d 390 (Sup 2006).

Points were improperly where the offender had been alcohol-free for eight years. People v. Wilbert, 35 AD3d 1220, 825 NYS2d 884 (4th Dept 2006).

(continued on page 8)
Drug-related convictions were excessively remote, and no evidence was shown of a current problem. *People v. Irizarry*, 36 AD3d 473, 827 NYS2d 152 (1st Dept 2007).

- Acceptance of responsibility

After pleading guilty, the offender at the PSI interview transferred blame to the victim and indicated that she misled him about her age. *People v. Dubuque*, 35 AD3d 1011, 824 NYS2d 823 (3d Dept 2006); see also, *People v. Lewis*, 37 AD3d 689, 830 NYS2d 312 (2d Dept 2007).

Points were properly added for an offender who entered an *Alford* plea and thereafter denied guilt while in prison and refused to enter sex offender treatment. *People v. Donhauser*, 37 AD3d 1053, 829 NYS2d 772 (4th Dept 2007); see also, *People v. Brister*, 38 AD3d 634, 832 NYS2d 246 (2d Dept 2007) (expulsion from sex offender treatment).

The prosecution appealed a Level 2 determination. The offender’s statements in the PSI in which he denied sexual contact established failure to take personal responsibility for his conduct, resulted in additional points and a Level 3 finding. *People v. Carman*, 33 AD3d 1145, 822 NYS2d 819 (3d Dept 2006).

- Conduct while confined or under supervision

Tier III prison disciplinary adjudications for nonssexual offenses resulted in points for unsatisfactory conduct while confined. *People v. Peterson*, 8 AD3d 1124, 778 NYS2d 626 (4th Dept 2004).

Tier II prison violations were of a sexual nature. *People v. Ferguson*, 39 AD3d 1258, 833 NYS2d 806 (4th Dept 2007).

Points were improperly added for conduct while supervised or confined when the offender’s behavior on parole was “exemplary.” Additionally, duplicative points were added under different categories. *People v. Wilbert*, 35 AD3d 1220, 825 NYS2d 884 (4th Dept 2006). Cf. *People v. Scott*, 35 AD3d 1015, 825 NYS2d 325 (3d Dept 2006) (no reduction in points for postrelease behavior).

- Supervision

Points were properly added where the offender served the maximum prison sentence and was released without supervision. *People v. Donhauser*, 37 AD3d 1053, 829 NYS2d 772 (4th Dept 2007); see also, *People v. Lewis*, 37 AD3d 689, 830 NYS2d 312 (2d Dept 2007).

- Living or employment situation

Living near an elementary school may result in an increase in points. However, the fact of a person’s living situation being uncertain should not result in points being increased. *People v. Ruddy*, 31 AD3d 517, 818 NYS2d 271 (2d Dept 2006). The difficulty is that a living situation may be short-lived, while a risk level is essentially permanent.

**OVERRIDES**

The Guidelines and RAI contain four “overrides” that automatically result in a presumptive risk assessment of Level 3:

- prior felony conviction for a sex crime
- infliction of serious physical injury or causing death.

The term “serious physical injury” is defined in Penal Law §10.00(10).

The override was proper. While the offender was assessed points for violence, there was no double assessment where serious physical injury occurred. *People v. Dorsett*, 35 AD3d 279, 826 NYS2d 242 (1st Dept 2006).

- recent threat to reoffend by committing a sexual or violent crime
- clinical assessment of a psychological, physical or organic abnormality. See *Corr Law §168-a(8).*

The offender’s conduct was not controllable when he was noncompliant with prescribed medications. The RAI’s Level 1 rating was recommended by the Board to be increased to Level 2, and was raised by the court to level 3 based on mental abnormality. *People v. Andrychuk*, 38 AD3d 1242, 831 NYS2d 795 (4th Dept 2007). See also, *People v. Vasquez*, 37 AD3d 193, 829 NYS2d 475 (1st Dept 2007).

**UPWARD DEPARTURE**

The SORA guidelines borrow language from federal sentencing procedure of “upward departure” and “downward departure” in allowing a variance in the risk level as calculated by the RAI’s numerical score.

A departure from the RAI is warranted only where an aggravating or mitigating factor exists of a kind, or to a degree not otherwise adequately taken into account by the guidelines. The finding should be based on special, nonduplicative circumstances. *People v. Joslyn*, 27 AD3d 1033, 811 NYS2d 807 (3d Dept 2006). There must be clear and convincing evidence of the existence of a special circumstance to warrant any departure. *People v. Dexter*, 21 AD3d 403, 799 NYS2d 807 (2d Dept 2005); *People v. Inghilleri*, 21 AD3d 404, 799 NYS2d 793 (2d Dept 2005).

One problem that may arise, particularly with departures, is double counting. *People v. Fisher*, 22 AD3d 358, 803 NYS2d 45 (1st Dept 2005). Points in one risk factor may instead require assessment of a different number of points in another. See *People v. Smith*, 35 AD3d 693, 828 NYS2d 112 (2d Dept 2006).

Even where there is no point duplication, an upward departure might occur where the Board seeks, not to add points but instead to raise the risk level. This may be improper: for example, if 20 points are normally assessed for certain conduct, yet an increase in a full risk level is sought, that may penalize the offender beyond the points allocated by the RAI methodology. Cf. *People v. Garrison*, 38 AD3d 1099, 831 NYS2d 593 (3d Dept 2007).
Where the factors (prior conviction and alcohol abuse) were already considered and the offender was assessed the maximum number of points for those categories, upward departure was inappropriate. *People v. Mount*, 17 AD3d 714, 792 NYS2d 697 (3d Dept 2005).

Upward departure was found appropriate in the following cases:

- The paternal relationship between offender and victim, that victim was helpless when left alone with the offender, and guns threats. *People v. Ferrer*, 35 AD3d 297, 826 NYS2d 70 (1st Dept 2006).
- The offender’s articulated desire was to be a spokesperson for an organization advocating sexual contact between adult males and minor boys. *People v. Kwiatkowski*, 24 AD3d 878, 805 NYS2d 188 (3d Dept 2005).

Upward departure was inappropriate in the following:

- The offender led an exemplary life for 17 years, which was not considered by the RAI or by the decision in a redetermination proceeding. *People v. Abdullah*, 31 AD3d 515, 818 NYS2d 267 (2d Dept 2006).
- The factors justifying a departure were ones for which the offender was already assessed points. *People v. Foley*, 35 AD3d 1240, 826 NYS2d 868 (4th Dept 2006).
- Mental illness did not warrant upward departure. The record was devoid of evidence that the mental illnesses were causally related to any risk of reoffense or indicated any risk of recidivism, and threats had already been taken into account in the RAI. *People v. Zehner*, 24 AD3d 826, 804 NYS2d 852 (3d Dept 2005).

**DOWNWARD DEPARTURE**

Under the Board’s Guidelines and Commentary, a downward departure may occur where the offender suffers from a physical condition that minimizes the risk of reoffense, such as advanced age or debilitating illness. See Corr Law §168-l(5)(d).

The court stated it was powerless to consider potential mitigation circumstances of drug treatment when SORA requires the court to determine mitigating circumstances for downward departure. *People v. McCormick*, 21 AD3d 1221, 801 NYS2d 432 (3d Dept 2005).

The following merited downward departure:


The following have been found not to require downward departure:

- acceptance of responsibility for conduct. *See People v. Dort*, 18 AD3d 23, 792 NYS2d 236 (3d Dept 2005),

**NOTICE TO OFFENDER, ADJOURNMENT OF SORA HEARING**

The Board must notify the offender 30 days before its recommendation that the case is under review and allow the offender to submit information to the Board. Corr Law § 168-n(3); see also Corr Law §168-m.

The prosecution must provide to the court and the offender a written statement 15 days before the hearing setting forth the determinations sought together with the reasons for seeking them. Corr Law §168-d(3); *People v. Davila*, 299 AD2d 573, 750 NYS2d 196 (3d Dept 2002). A prosecutor who seeks a determination that differs from the Board’s recommendation must provide a statement to the court and the offender at least ten days before the hearing. Corr Law §168-n(3).

Where the prosecution does not provide proper notice of its intent to seek an upward departure, an objection should be made to preserve the issue.

Where the proper risk level is in dispute, the court shall adjourn the hearing to allow parties to obtain materials from the Board or any state or local facility. Materials may be obtained by subpoena if not voluntarily provided. Corr Law §168-n(3).

Where the defendant comes up for classification, defense counsel should consider obtaining (through demand for discovery or subpoena) the documents that the Board used in making its recommendation.

It may be appropriate for the defense to request the services of an investigator or expert witness, based on due process or County Law §722-c. No reported cases address the applicability in a SORA context.

**SORA HEARING**

The offender has the right of: judicial determination of risk level classification; advance notice of the classification proceeding; notice of proceeding, including a statement of its purpose and the recommended risk level classification; assistance of counsel; clear and convincing standard of proof; and right to appeal. These due process rights are incorporated in Corr Law §168-n(3). *People v. Black*, 33 AD3d 981, 823 NYS2d 485 (3d Dept 2006). See also, *People v. David W.*, 95 NY2d 130, 711 NYS2d 134, 733 NE2d 206 (2000).

The offender is entitled to assigned counsel at the hearing. Corr Law §168-n(3); *People v. Lasch*, 309 AD2d 1086, 765 NYS2d 916 (3d Dept 2003). The offender may appear and be heard at the hearing. Corr Law §168-n(3); *see People v. Black, supra*. Cf. 22 NYCRR §200.11(c),(d).

Where the prosecution does not provide proper notice of its intent to seek an upward departure, an objection should be made to preserve the issue. The court may conduct the hearing and make a determination in absentia. Corr Law §168-d(4). Waiver is shown by evidence that the defendant was advised of the hearing date, of the right to be present, and that the hearing would be conducted in his absence. Reliable hearsay is sufficient. *People v. Porter*, 37 AD3d 797, 832 NYS2d 53 (2d Dept 2007).

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Defense counsel should consider approaching the hearing similar to sentencing, by obtaining information such as letters of recommendation and a psychological evaluation. Additionally, live testimony may be introduced.

It may be useful to have a sex offender risk evaluation prepared, such as Static-99 or SONAR, discussed above, and introduce that and call the professional who prepared it.

Documentation relied upon in the hearing decision should be that which is received into evidence. A PSI or indictment should be used by the judge only if both parties have had the opportunity to review these documents; otherwise, using it may be a due process violation. If additional documents are offered that have not been provided previously, defense counsel should request an adjournment to review them. Corr Law §168-n(3).

**EVIDENCE:**

**“RELIABLE HEARSAY” REQUIRED**

By statute, the court may consider “reliable hearsay” evidence in reaching its determination. Corr Law §168-n(3).

Facts determined at the trial or at the guilty plea may not be relitigated. Corr Law §168-n(3); People v. Miller, 36 AD3d 428, 828 NYS2d 26 (1st Dept 2007). Under the SORA statute, facts proven at trial or elicited at the guilty plea are deemed established and need not be relitigated. Corr Law §168-n(3). In some situations, the statutory language may apply for the defense. If the factual colloquy disputes portions of the charges, e.g., number of incidents or whether force was used, those facts could be “deemed established” under the statute and the prosecution disallowed from relitigating what the charges alleged. Statements of or concessions by counsel at the time of colloquy, such as the complainant’s age, might also come within the statutory language.

Where a defendant pleads guilty without admitting all counts, or disputes certain allegations, it may be useful to obtain a transcript of the plea colloquy.

At the hearing the offender may offer psychological evidence. See Van Dover v. Czajka, 276 AD2d 945, 714 NYS2d 793 (3d Dept 2000).

The defense has no right to call the victim to testify at the hearing. People v. Tucker, 177 Misc2d 418, 676 NYS2d 841 (Co Ct 1998).

The following have been found to be reliable hearsay:

- an offender’s admissions contained in a PSI. People v. Arnold, 35 AD3d 827, 828 NYS2d 119 (2d Dept 2006).
- grand jury testimony. People v. Concepcion, 38 AD3d 739, 830 NYS2d 906 (2 Dept 2007).

However, in another classification hearing involving an out-of-state conviction, the report was not denominated as a probation report or signed by a probation officer, was not based on reliable hearsay and did not appear that any effort was made to independently verify its reliability. People v. Brown, 7 AD3d 831, 776 NYS2d 366 (3d Dept 2004).

The prosecution failed to specify or submit any evidence of the offender’s prior juvenile delinquency adjudication or placement. See People v. Ross, 37 AD3d 1117, 829 NYS2d 365 (4th Dept 2007).

Adding points for weapons possession was improper where the offender, who had entered an Alford guilty plea, had not admitted that he possessed a dangerous weapon. Neither the victim’s equivocal statements nor the unreliable statements in the presentence report sufficed to support the point assessment. People v. Gonzalez, 28 AD3d 1073, 814 NYS2d 834 (4th Dept 2006).

**“REDETERMINATION HEARING” UNDER DOE v. PATAKI**

For certain sex offenders under the 2004 consent order in Doe v. Pataki, 3 F Supp 2d 456 (SDNY 1998), a “redetermination hearing” must be conducted. A copy of the consent order can be found at: http://www.criminaljustice.state.ny.us/nsor/sora_settlement.pdf. However, the class of offenders covered by the Doe v Pataki consent order are not exempt from further amendments of SORA enacted by the State Legislature. Doe v. Pataki, 481 F3d 69 (2d Cir 2007).

Under the consent decree, one factor to consider is whether the defendant’s behavior since initial registration made risk of reoffense more or less likely. The hearing court’s failure to address this was not error where the defendant offered no competent evidence of his behavior since release. People v. Ferrara, 38 AD3d 1302, 832 NYS2d 365 (4th Dept 2007).

**ORDER AFTER HEARING**

The hearing court has discretion to vary from the Board’s assessment. Board of Examiners of Sex Offenders v. Ransom, 249 AD2d 891, 672 NYS2d 185 (4th Dept 1998). The court may reconsider and redetermine the risk level even for reasons and grounds not set forth in the statute. People v. Wroten, 286 AD2d 189, 732 NYS2d 513 (4th Dept 2001).

The hearing court must make a written order. Corr Law §168-n(3); People v. Lasch, 309 AD2d 1086, 765 NYS2d 916 (3d Dept 2003); People v. Hill, 17 AD3d 715, 792 NYS2d 695 (3d Dept 2005). It should be denominated as an order or state “It is so ordered” to make clear that it is an appealable document. See People v. Joslyn, 27 AD3d 1033, 811 NYS2d 807 (3d Dept 2006).
A standardized form that adopted the Board’s recommendation, without further explanation, was insufficient to comply with the requirement of findings and conclusions. People v. Marr, 20 AD3d 692, 798 NYS2d 260 (3d Dept 2005); People v. Sanchez, 20 AD3d 693, 798 NYS2d 258 (3d Dept 2005); People v. Miranda, 24 AD3d 909, 806 NYS2d 729 (3d Dept 2005); People v Millar, 39 AD3d 1181, 832 NYS2d 856 (4th Dept 2007).

Despite the lack of findings of fact and conclusions of law, the order after the hearing was found proper. People v. Forney, 28 AD3d 446, 812 NYS2d 143 (2d Dept 2006).

APEAL OF SORA RULING

The sentencing court’s “certification” of a defendant as a sex offender upon conviction is part of the final adjudication and may be challenged on direct appeal. Corr Law §168-(d)(3), 168-n(3); People v. Hernandez, 93 NY2d 261, 689 NYS2d 695, 711 NE2d 972 (1999).


The appeal is civil in nature. See People v. Sumpter, 177 Misc2d 492, 476 NYS2d 825 (City Crim Ct 1998). A civil filing fee of $315 is required, CPLR 8022, unless the appellant is represented by a Legal Aid office or public defender or has been found indigent. With an offender who is financially unable to afford counsel, assignment of counsel continues through the appeal, and the offender may appeal as a poor person. Corr Law §168-n(3).

A written order from the hearing court is required to appeal a SORA determination. A copy of the order, with notice of entry, should be served by the prevailing party upon the other party.

Civil rules govern SORA appellate procedure. Within 30 days, one copy of the notice of appeal is served on the opposing party, and two copies filed with the county clerk. CPLR 5515. An attorney’s signature must be on the notice of appeal, as on all civil papers. 22 NYCRR §130-1.1a.

After decision by the intermediate appellate court, a request for leave to appeal to the Court of Appeals should be made by motion rather than by letter. A $45 filing fee for a civil motion is required. 22 NYCRR § 500.11.

A SORA appeal from town court is to county court, and then to the Appellate Division. See also, People v. David W., 95 NY2d 130, 711 NYS2d 134, 733 NE2d 206 (2000).
CRIMINAL DEFENSE OF IMMIGRANTS IN STATE DRUG CASES - THE IMPACT OF LOPEZ V. GONZALES

by Marianne Yang and Manny Vargas

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This advisory is the Immigrant Defense Project’s third in a series of practice advisories on the impact of the Supreme Court’s decision in Lopez v. Gonzales (No. 05-547) (Dec. 5, 2006). The Court’s decision answers an important question for criminal lawyers representing immigrants: What state drug offenses are “aggravated felonies” and thereby trigger mandatory deportation without the possibility of a waiver?

What the Supreme Court decided in Lopez

The Supreme Court held that the federal government may not apply the aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that state first-time drug simple possession offenses—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are NOT aggravated felonies, even if classified as a felony by the state. Thus, while noncitizen clients convicted of such offenses will generally still face regular drug offense deportability or inadmissibility, some may be eligible to seek discretionary relief from removal in later immigration proceedings, e.g., cancellation of removal, asylum or naturalization.

What Lopez means for state criminal defense practice

1. Conviction of, or mere guilty plea to, virtually any drug offense still generally triggers deportability and/or inadmissibility. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver.

2. Lopez, however, makes clear that most first-time drug possession offenses will not trigger the more certain mandatory deportation consequences attached to the “aggravated felony” label.

3. Whether a second possession offense may be deemed an aggravated felony remains uncertain and may depend on the law of the federal circuit in which your client’s removal case later arises.

4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal felony “trafficking” offense continues to trigger aggravated felony mandatory deportation consequences.

Background: More on Lopez

Pre-Lopez case law conflict. Before Lopez, the Board of Immigration Appeals (BIA) had reversed position and federal courts had been split on what state drug offenses constitute a “drug trafficking” aggravated felony for immigration purposes.

The immigration statute defines “aggravated felony” to include “illicit trafficking in a controlled substance …, including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code),” See INA 101(a)(43)(B). The BIA had initially interpreted INA 101(a)(43)(B) and 18 U.S.C. 924(c) to hold that a state drug offense qualifies as an aggravated felony only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered “illicit trafficking” as commonly defined or (2) regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act (the so-called federal felony approach). Matter of L-G-, 21 I&N Dec. 89 (BIA 1995), reaffirmed by Matter of K-V-D-, 22 I&N Dec. 1163 (BIA 1999).

In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including possession with intent to distribute), but simple possession drug offenses are generally misdemeanors. See 21 U.S.C. 801 et seq. and 21 U.S.C. 844 (penalizing possession offenses as misdemeanors unless the prosecution has charged and proven a prior final drug conviction, or possession of more than five grams of cocaine base or any amount of flunitrazepam).

Before and after Matter of L-G-, however, several federal circuit courts concluded, in the context of the prior aggravated felony sentence enhancement for the federal crime of illegal reentry after removal, that a state simple possession drug offense is an aggravated felony if it is classified as a felony under state law, even if it is not punishable as a felony under federal law (the so-called state felony approach). See U.S. v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996); U.S. v. Polanco, 29 F.3d 35 (2d Cir. 1994); U.S. v. Wilson, 316 F.3d 506 (4th Cir. 2003); U.S. v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 2001); U.S. v. Briones-Mata, 116 F.3d 308 (8th Cir. 1997); U.S. v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000); U.S. v. Cabrera-Sosa, 81 F.3d 998 (10th Cir. 1996); U.S. v. Simon, 168 F.3d 1271 (11th Cir. 1999).

In 2002, in response to the trend in sentencing cases, the BIA, in Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002), reversed course and adopted the reasoning of the federal courts in the sentencing context and found that a state simple possession drug offense is an aggravated felony for immigration purposes if it is classified as a felony under state law, unless the case arises in a federal circuit with a contrary rule.
After Matter of Yanez-Garcia, conflict in the case law only increased. Some federal circuit courts applied the state felony approach in both the immigration and sentencing contexts, see, e.g., the lower court decision in the case before the Supreme Court—Lopez v. Gonzales, 413 F.3d 934 (8th Cir. 2005). At the same time, several other courts lined up in support of the federal felony approach, at least in the immigration context. See, e.g., Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002)(immigration context), Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004)(immigration context), U.S. v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005)(sentencing context, but applicable also in the immigration context), and Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006)(immigration context). Two Circuits — the Second and Ninth — adopted different rules for sentencing and immigration cases. Compare U.S. v. Pernose-Garcia, 171 F.3d 142 (2d Cir. 1999) and U.S. v. Ibarra-Galindo, supra (sentencing cases following state felony approach), with Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996) and Cazarez-Gutierrez v. Ashcroft, supra (immigration cases following federal felony approach). Yet other courts went so far as to find or suggest that a state drug offense is an aggravated felony if it is a felony under either state or federal law (the so-called “either or” approach). See, e.g., Amaral v. INS, 977 F.2d 33 (1st Cir. 1992)(immigration context); U.S. v. Simpson, 319 F.3d 81 (2d Cir. 2002)(sentencing context); U.S. v. Sanchez-Villalobos, 413 F.3d 575 (5th Cir. 2005)(sentencing context, but Fifth Circuit followed same rule in immigration and sentencing contexts).

Lopez resolves case law conflict.

With Lopez, the Supreme Court resolved this conflict, ruling in favor of the federal felony approach to interpreting the meaning of the 18 U.S.C. 924(c) “drug trafficking crime” term referenced in the aggravated felony definition. Thus, the government may no longer deem a state felony possession offense to be an aggravated felony unless it would be a felony under federal law.

The Court relied in part on the ordinary meaning of “trafficking,” noting that “[t]he everyday understanding of ‘trafficking’ should count for a lot here, for the statutes in play do not define the term . . . .” Lopez, slip op. at 5. Noting that “ordinarily ‘trafficking’ means some sort of commercial dealing,” it stated that reading 924(c) the government’s way would nevertheless turn simple possession into trafficking, “just what the English language tells us not to expect.” Lopez at 3. Although there are exceptions, the Court found that typically federal law treats non-trafficking offenses as misdemeanors, and therefore such offenses generally should not be deemed “drug trafficking crimes” in the absence of express Congressional command. The “inclusion of a few possession offenses in the definition of ‘illicit trafficking’ does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning.” Lopez at n.6. Moreover, the Court made clear that it did not matter what quantity of the controlled substance was possessed, since federal law punishes virtually all simple possession offenses as misdemeanors without, in general, designating such offenses as felonies based on the quantity involved. See Lopez at 11-12.

The only exceptions to the general rule that simple possession offenses are misdemeanors under federal law, the Court noted, are offenses involving possession of two specific controlled substances—crack cocaine and flunitrazepam—as well as “recidivist possession,” citing 21 U.S.C. 844(a) (providing sentence enhancements for possession of more than five grams of cocaine base, known as “crack cocaine,” possession of any amount of flunitrazepam, and possession of a controlled substance after a prior drug conviction has become final). See Lopez at n.4 & n.6. The Court indicated that state counterparts may be deemed aggravated felonies if the state offense “corresponds” to the analogous federal offense. See Lopez at n. 6.

What Lopez means for state criminal defense practice

We distill the import of Lopez for state criminal defenders into the following four general principles:

1. Conviction of, or mere guilty plea to, virtually any drug offense still generally triggers deportability and/or inadmissibility, even if later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver. If your noncitizen client is convicted of virtually any drug offense relating to a controlled substance, he or she will become removable despite the Supreme Court decision in Lopez. Your client’s conviction will trigger regular controlled substance offense deportability for lawfully admitted immigrants, or inadmissibility for others who now or in the future may be seeking lawful admission. The only exception is for deportability purposes and applies only to lawfully admitted immigrants convicted of a single offense involving possession for one’s own use of thirty grams or less of marijuana.

Even a drug conviction later expunged via a rehabilitative statute — or even a mere guilty plea to a drug offense later vacated, e.g., due to successful completion of a drug treatment program — may be sufficient for your client to be deemed convicted for immigration purposes and rendered removable (unless the disposition involves a first-time possession offense and the removal case later arises in the Ninth Circuit).

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Moreover, if your client is a lawful permanent resident immigrant (“green card” holder) who was admitted to the United States less than seven years before the alleged commission of the drug offense, conviction or plea to a drug offense may trigger mandatory deportation. And, if your client is a noncitizen who does not have lawful permanent resident status, conviction or plea to virtually any drug offense will trigger inadmissibility without a waiver if the client is now applying, or in the future plans to apply, for permanent resident status.

2. Lopez, however, dictates that most first-time drug possession convictions will no longer trigger the more certain mandatory deportation consequences attached to the “aggravated felony” label. Your client convicted of a first-time possession offense—even if deemed a felony under state law—will no longer be deemed convicted of an aggravated felony. The only exceptions would be if your client was convicted of possession of more than five grams of crack cocaine or any amount of flunitrazepam since such offenses would be felonies under federal law. This is important. If your client is convicted of a first-time drug possession offense, he or she may avoid the statutory aggravated felony bars for eligibility for removal relief such as cancellation of removal for certain lawful permanent residents, asylum, withholding of removal, and termination of removal proceedings in order to pursue naturalization. Whether your client may be able to obtain such relief will depend on whether he or she is otherwise eligible and the strength of the claim.

For example, if your client is a lawful permanent resident and is convicted of a drug offense that triggers removability but is not an aggravated felony, your client may later be eligible for the relief of cancellation of removal as long as s/he has resided continuously in the United States for at least seven years prior to commission of the offense. To be granted such relief, your client will have to show favorable factors such as family ties within the United States, residency of long duration in the country, evidence of hardship to the individual and family if deportation were to occur, service in the armed forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation, and evidence attesting to good moral character. It is estimated that about one-half of applicants whose applications for the similar “212(c) waiver” cancellation predecessor form of relief were decided between 1989 and 1995 were granted such relief.

Finally, it should be noted that avoiding the aggravated felony label also avoids other negative immigration consequences under the immigration laws, such as the stiff sentence enhancements that exist for the federal crime of illegal reentry after deportation subsequent to an aggravated felony conviction.

3. Whether a conviction of a second possession offense may be deemed an aggravated felony remains uncertain, and may depend on the law of the federal court circuit in which your client’s removal case later arises. The only drug offense plea that is currently safe from aggravated felony consequences is a first-time possession offense. If preceded by a prior drug conviction, even a misdemeanor possession offense might be deemed an aggravated felony. This is because the government may continue to argue, as it has in the past, that under the federal felony approach adopted by the Supreme Court in Lopez, a misdemeanor possession offense preceded by a prior drug conviction must be deemed an aggravated felony because of the authority under federal law to penalize a second or subsequent possession conviction as a felony.
Some federal circuits have adopted this position. However, other circuits have applied the federal felony approach to find that the later conviction does not correspond to a federal “recidivism possession” 21 U.S.C. 844(a) felony offense if the state conviction did not involve notice and proof of the prior conviction as required for a federal possession recidivism conviction under 21 U.S.C. 851. In addition, even if a circuit has stated that a second or subsequent possession offense may be deemed an aggravated felony, it may not so find if the prior conviction was not yet final at the time of commission of the later offense. This is because a second or subsequent state drug possession conviction is subject to an 844(a) recidivism sentence enhancement only if the prior conviction was final at the time of commission of the later offense. It should be noted that the Ninth Circuit Court of Appeals has ruled that a second or subsequent state drug possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a “felony” punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement; however, be aware that the Lopez decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year as “felonies” falling within the 18 U.S.C. 924(c)(2) “drug trafficking crime” definition. See Lopez at n.6.

4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal “trafficking” offense continues to trigger aggravated felony mandatory deportation consequences. Any state drug offense that corresponds to a federal felony drug offense listed at 18 U.S.C. 841 et seq.—generally true trafficking-type offenses such as drug distribution or intent to distribute offenses—is an aggravated felony. However, conviction of a state offense that covers conduct that may not be a federal felony (e.g., possession, transfer of marijuana without remuneration, or maybe offer to sell—see practice tips below), as well as conduct that would be a federal felony, may not necessarily be deemed an aggravated felony unless the federal government is able to establish, through the state record of conviction, that your client was convicted of that portion of the statute relating to the covered conduct that would be a federal felony.

Practice Tips

In light of Lopez, state criminal defense practitioners representing noncitizen clients facing state drug charges may wish to consider the following tips:

Q. Avoid drug conviction or plea, if possible.

A. As explained above, virtually any drug offense—other than a single offense involving possession for one’s own use of thirty grams or less of marijuana—triggers controlled substance deportability for a lawfully admitted noncitizen client. Moreover, any drug offense triggers inadmissibility for a noncitizen client who is not yet lawfully admitted. Therefore, if possible, you should avoid conviction of a drug offense for a noncitizen client. This includes a guilty plea to a drug offense combined with some penalty or restraint ordered by a court (e.g., court-ordered commitment to a drug treatment program) since such a disposition may be deemed a conviction for immigration purposes even if the plea is later vacated. See, supra, note 4. If possible, when there is a possibility of placement in a drug treatment or other alternative-to-incarceration program, try to negotiate a disposition that does not involve an upfront guilty plea to a drug offense.

Q. If this is your client’s first drug offense charge, plead to possession rather than sale.

A. As discussed above, Lopez makes clear that any first-time drug possession offense—although it will still trigger removability—may not be deemed an aggravated felony triggering mandatory removal of a lawful permanent resident immigrant. Thus, if your permanent resident client will plead guilty, you should negotiate a plea to a simple possession offense rather than a sale or possession with intent-to-sell or other trafficking-type offense in order to preserve the possibility of relief from removal. Moreover, since the Court made clear that it did not matter what quantity of the controlled substance was possessed as long as the possession offense does not contain a distribution, intent to distribute, or other federal “trafficking” element, your client may in some states be able to

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offer a plea to a simple possession offense that is of a comparable or even higher level than the “trafficking” offense charged. Even if your client is not a permanent resident, avoiding the aggravated felony label may enable your client to apply for asylum if otherwise eligible or, if your client is deported, may avoid the stiff federal prior aggravated felony sentence enhancement if your client is charged and convicted in the future of the crime of illegal reentry after deportation.

Q. If your client has a prior drug conviction(s), file an appeal of the prior conviction(s), or seek leave to appeal the prior conviction(s), if possible.

A. Lopez leaves open the question of whether a second state drug possession conviction may be deemed an aggravated felony. However, a second state possession offense should not be deemed to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the prior conviction was not final at the time of commission of the later offense. Thus, if your client is still within the time to file an appeal of the prior conviction as of right, you might advise your client that he or she may avoid aggravated felony consequences for the current case if he or she appeals the prior conviction. If the time for an appeal of right has passed but there is still time to seek discretionary leave to appeal the prior conviction, you might advise your client to seek such leave. See Smith v. Gonzales, 468 F.3d 272 (5th Cir. 2006)(later offense committed while individual still within the time to seek leave to appeal the prior conviction).

Q. If your client has a prior drug conviction(s), avoid plea to offense that involves charge and proof of the prior conviction(s).

A. As discussed above, a second state drug possession conviction might be deemed not to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the conviction does not include charging and proof of the prior drug conviction. Thus, if your state has separate offenses for those convicted of possession depending on whether the prosecution chooses to charge and prove a prior conviction of a drug offense, you should seek to avoid the offense involving proof of the prior conviction. This strategy should work in particular if your client’s later removal case is likely to fall within the jurisdiction of the U.S. Courts of Appeals for the First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island) or the Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands). See Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006); Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001). Be aware, however, that this strategy may not work if your client’s later removal case falls within the jurisdiction of the Second Circuit (Connecticut, New York, Vermont) or the Fifth Circuit (Canal Zone, Louisiana, Mississippi, Texas). See U.S. v. Simpson, 319 F.3d 81 (2d Cir. 2002); U.S. v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005).

Q. If possible, plead to a preparatory or accessory-after-the-fact offense.

A. For removal cases arising in the Ninth Circuit, a state conviction of a free-standing preparatory or accessory offense such as solicitation, even if the underlying offense is a drug offense, should not be deemed an aggravated felony. See Levy-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999). Therefore, if your noncitizen client is charged with a drug offense, you might offer an alternate plea to such a preparatory or accessory offense. At present, this strategy may work only if your client’s later removal case falls within the jurisdiction of the Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington); however, even for clients whose cases will probably not fall within Ninth Circuit jurisdiction, such a disposition may offer your client an argument to avoid removal or mandatory removal.

Q. If your client will plead guilty to a state drug offense that covers conduct that would be an aggravated felony but also conduct that would not, keep out of the record of conviction any information that would help establish that the conduct is an aggravated felony.

A. Under immigration case law, an offense that covers some conduct that is an aggravated felony and some that is not may not categorically be determined to be an aggravated felony. For example, the Third Circuit has found that a state marijuana “sale” offense that might cover transfer of a small amount of marijuana for no compensation should not categorically be considered a “drug trafficking crime” or an “illicit trafficking” aggravated felony since such a transfer would be treated as a misdemeanor under federal law. See 21 U.S.C. 841(b)(4) (“distributing a small amount of marijuana for no remuneration” treated as simple possession misdemeanor under 21 U.S.C. 844); Wilson v. Ashcroft, 350 F.3d 377 (3d Cir. 2004); Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001). Similarly, the Ninth Circuit has found that a state drug offense that includes “offers” to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct and, therefore, could not categorically be determined to be an aggravated felony. See U.S. v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001). However, be aware that the immigration authorities may look to the record of conviction to determine whether your client was convicted of that portion of the statute relating to conduct that would be an aggravated felony. Therefore you may help your noncitizen client avoid removal if you either make sure the record of conviction establishes conduct that would not be considered an aggravated felony, or keep out of the record of conviction any information that would help the government establish conduct that would be an aggravated felony.
Q. If your client will plead guilty to a state drug offense whose elements do not establish the controlled substance involved, keep out of the record of conviction any information that would help establish that the substance involved is one listed in the federal controlled substance schedules.

A. The aggravated felony definition at INA 101(a)(43)(B) covers only drug offenses that relate to a substance included in the federal definition of “controlled substance” in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 U.S.C. 812). However, many states define “controlled substance” to include some substances that do not appear in the federal controlled substance schedules. Therefore, if you are able to avoid the record of conviction in your client’s state criminal case establishing the particular controlled substance involved, this may offer your client an argument in later immigration proceedings that his or her particular offense is not necessarily an aggravated felony.

Q. If your client will plead guilty based on an understanding that the plea will not trigger removal, or at least mandatory removal, advise your client to allocute to his or her understanding.

A. You might advise your client to include such a statement of his or her understanding in the plea allocution in order to provide some basis for a later withdrawal of the plea should this understanding be upset by later legal developments.

For the latest legal developments or litigation support on any of the issues discussed in this advisory, contact the IDP’s Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208, or for support on issues involving drug possible alternative-to-incarceration (ATI) disposition cases, contact Alina Das at (718) 858-9658 ext. 203. They may also be contacted by email at bjain@nysda.org, mvargas@nysda.org and adas@nysda.org.

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.
MARK YOUR CALENDAR! DETAILS TO FOLLOW!

Watch your mail for details of the *Defense of a Sex Abuse Case in the Age of Civil Commitment* program coordinated by Past-President Jim Harrington, Dan Henry and Donald Thompson. The program is scheduled for September in Buffalo.

Appellate practitioners should mark their calendars for the *Appellate Practice Update* coordinated by Malvina Nathanson and Mark Mahoney, Friday, September 7 at St. Francis College.

A *Criminal Law Update* coordinated by Craig Schlanger will be held at the Syracuse University College of Law on Saturday, September 29.

St. Francis College will be the site of our annual *Weapons for the Firefight* seminar on Friday, October 13.

A *DNA Update* featuring DNA Associates will be held in Rochester on Saturday, October 27.

The *Annual Nyack Trainer* coordinated by David Goldstein is scheduled for Friday, November 2.

A *Criminal Trial Practice* seminar will be held at St. Francis College on Friday, November 16.

Our popular *Last Chance Ethics* program will be held at St. Francis College on Saturday, December 1.
Governor Spitzer’s new DNA proposal actually moves well-beyond its stated scope and broadly changes the face of post-conviction proceedings in New York. The new proposal disallows any post-conviction motion which is filed one year past the time the conviction is considered final. This new limit is fundamentally unfair.

Although DNA exonerations get all of the press, people do not often discuss the real bread and butter of the New York criminal justice system—pleas of guilty. Last year there were over 150,000 thousand pleas of guilty in New York City alone. The criminal justice system is crushed with cases and this overburdened system processes cases in a fast-paced, assembly-line fashion. It is hard to do justice in every case with so little time.

To dispose of cases quickly, often defendants in New York City are given excellent deals which end the case with small fines or time served (the time spent in custody before they see a judge).

Even innocent defendants will take those deals because (a) they are so lenient, (b) they keep the defendant from having to come back to court repeatedly to receive justice, (c) the defendants are kept in the dark about the true consequences of the convictions, and (d) especially in arraignment pleas, they are not given sufficient time to consider the legal ramifications of their case.

For example, an officer arrests two people because he finds a few grams of cocaine in their car. Although one of them did not know about the drugs, they both come through the system and plead guilty to get out of jail with no sentence at all. Two years later, the innocent defendant finds out that his ill-considered plea of guilty will keep him from getting a student loan, or will cause his mother (who he lives with) to be evicted from public housing, or he will be forever barred from the chance for citizenship when he marries a United States citizen. He then finds out that because of an overburdened system, the Court did not have the time to properly arraign him or properly conduct the plea proceedings, and that he would normally have a right to vacate his plea if not for the new legislation. Governor Spitzer’s new bill would forever bar correction of this life-altering mistake. This would be a tragedy on a grand scale. Thank God for CPL 440.10 as it now stands.

A perfect example of an unconstitutional, ill-advised plea that would be unchangeable as a result of this proposed legislation is the situation in People v. McDonald, 1 N.Y.3d 109 (2003). Over a year after the plea the attorney admitted he gave McDonald ineffective advice at the time of the plea. McDonald would be forever convicted and deported if not for the present reach of 440.10.

The Times also did a multi-part piece last year which highlighted failures in the Village Courts in this State. They documented repeated failures of judges to advise defendants of the right to free counsel. I just won the vacatur of a ten-year old plea to possession of a weapon by an Irish immigrant who had no idea what his rights were and who was innocent of possession of a hunting rifle found with other passengers in a van he was driving. Without 440.10 to undo mistakes from 10 years ago, that immigrant would now be separated from his family and would be a criminal. Again, thank God for CPL 440.10.

New York state has no required catechism for pleas. People v. Nixon, 21 N.Y.2d 338 (1967). The U.S. Congress and the federal courts have mandated lengthy plea allocutions that protect the defendant’s rights. Pleas in federal court can take a half an hour while pleas in some New York City Criminal Courts take one minute and occur after a defendant has been in jail overnight with no sleep or healthy food. Although almost every federal judge or magistrate asks the defendant to state “in his own words” what he did to make himself guilty, I see that question in one out of hundred state plea transcripts that I read. In arraignment pleas, I see numerous judges asking whether the attorney waives allocution and prosecution by information and the courts proceed to sentencing without ensuring that the defendant is guilty, understands his right to a laboratory report, or understands the possible defenses to the charges. Federal Courts do not take arraignment pleas at all.

Of course, we all realize that the system relies on these numerous pleas which are processed by hundreds in assembly-line fashion each day. But that is no reason to end the chance at undoing illegal pleas several years later when the true consequences and legal infirmities of these hastily-entered convictions are discovered by an innocent defendant.

New York should not make huge changes in its post-conviction laws in a statute meant to deal with an entirely different issue—DNA collection. This one-year arbitrary limit on post-conviction litigation will have far-reaching effects which have nothing to do with DNA; and, the time-limit’s evils and strengths should be considered separately at the appropriate time. The Assembly should remove the bill’s limit on post-conviction proceedings.
POST-CONVICTON MOTIONS - PART III

by Andrew J. Schatkin

Andrew J. Schatkin is in practice in Jericho.

Editor’s Note: This is the third in a three-part article.

In two previous articles, I considered the Post-Conviction Statute of the New York State Criminal Procedure Law, Sec. 440.10. In “Post-Conviction Motions Part I,” I analyzed and considered one ground to vacate a criminal judgment, set forth in subsection (b) of Section 440.10 of the Criminal Procedure Law. In the second article entitled, “Post-Convictions Motion: Part II,” I considered the ground set forth in subsection (b) of CPL 440.10. This particular article, will consider subsection (g) of this statute, which, essentially, states that this Motion will be successful if new evidence is discovered after the judgment conviction has been entered.

This subsection, essentially and basically states that a judgment of conviction can be set aside based on the discovery of new evidence, if the evidence could not have been produced by the defendant at the trial, even with due diligence, and is of such a character as to create a robbery that, had such evidence be received at the trial, the verdict would have been more favorable to the defendant, provided that a motion based upon such ground must be made with due diligence after the discovery of such new evidence.

This article proposes to analyze this particular subsection of CPL Section 440.10.

In general, it is the law that newly discovered evidence in order to be sufficient to warrant vacating a judgment of conviction must fulfill the following requirements: 1) it must be such as would probably change the result if a new trial is granted; 2) it must have been discovered since the trial; 3) it must be such as could not have been discovered before the trial, by the exercise of due diligence; 4) it must be material to the issue at the defendant’s trial; 5) it must not be cumulative; 6) it must not be merely impeaching or contradicting the former evidence.

One important rule in connection with this statutory subsection, is that the power to grant an Order vacating a judgment of conviction and ordering a new trial based on newly discovered evidence, is purely statutory and rests in the sound discretion of the court.

I will now consider what the case law has defined as “due diligence.” In that case, the Appellate Division Third Department held that the defendant that allegedly looked about streets in his spare time to find a witness to a drug sale, who testified, after conviction, that the defendant had been framed, failed to establish requisite due diligence, and thus, the defendant’s retrial motion based on newly discovered evidence had to be denied. The Court held that the defendant and the witness knew each other from the neighborhood, lived in close proximity to each other, and had mutual acquaintances, and no diligent effort was made to canvas the neighborhood, hire investigators, or interview known acquaintances concerning the witness’ whereabouts. Similarly, in People v. Maynard, the Appellate Division Third Department had the opportunity to consider what may be said to constitute “due diligence.”

In that case, the Appellate Court held that the trial court abused its discretion by denying a Motion to Vacate a Conviction in a Murder/Robbery case due to a delay of over two years after newly discovered evidence surfaced, until the Motion was made on the ground of lack of due diligence. The Court held that the attorney for the defense was a sole practitioner, did not receive the transcript of testimony in the case, in which the accomplice was acquitted on retrial based on new evidence, for several months, and did not receive the 2,000 page trial transcript until several months later.

Another example of what an Appellate court has held to constitute due diligence is articulated in People v. Vitanza. In that case, the Appellate Division Third Department held that evidence allegedly indicating that the defendant suffered from “battered women syndrome” and personality disorders did not constitute newly discovered evidence that would warrant vacating a judgment against her, inasmuch as evidence concerning the defendant’s mental condition could have been discovered prior to trial with the exercise of due diligence.

A second aspect of this particular sub-section of CPL 440.10, may be entitled “The Probability of a More Favorable Outcome” had such new evidence been received at trial. People v. Patrick is an example of how the courts have interpreted this language. In that case, the New York State Court of Appeals held that the evidence upon which the new trial was demanded was not such as would change the verdict, as it was largely cumulative and tended to contradict former evidence.

Another example of how the courts have interpreted this language may be found in People v. Chaney. In that case, the Appellate Division Third Department held that even if the evidence that the defendant’s driver’s license was not suspended at the time of...
his arrest for driving, while not possessing a valid driver’s license, was exculpatory, and should have been disclosed, no reasonable probability existed that disclosure of that evidence to the defendant would have resulted in a jury finding the defendant not guilty for drug possession charges, as would support defendant’s Motion to Vacate the Conviction.

Another example of how the courts have interpreted this statutory subsection is found in People v. Smith14, where the Appellate Division First Department held that the refusal to vacate a judgment of conviction of rape based on post-trial DNA evidence that the defendant was not the source of semen was not error. The court held that new evidence would not have probably resulted in a more favorable verdict where it was entirely consistent with the victim’s testimony that she had intercourse with her boyfriend shortly before rape and that she did not know if the rapist ejaculated.

Finally, in People v. Maynard15 the Appellate Division Third Department held that a murder and robbery defendant satisfied the requirement for vacation of conviction based on newly discovered evidence, that the evidence be likely to change result; after trial was over the witness came forward in the retrial of accomplice, testifying that she had seen the victim tied to a chair, while one of the principal witnesses against the defendant was in the victim’s apartment, had seen the principal witness carry items from the apartment, and had alleged that principal witness admitted she killed the victim, and the testimony of the new witness in retrial of the accomplice resulted in acquittal.16

The next subtopic that will be considered as to what constitutes new evidence, is Impeachment Evidence. People v. Tai17 is one interpretation of this category. In that case, the Appellate Division First Department held that evidence of a conviction on unrelated charges of the State’s Principle Police Witness on drug prosecution did not entitle the defendant to a hearing on a Motion to Vacate Judgment, as the officer’s conviction had no direct bearing on the defendant’s case, and newly discovered evidence would have merely impeached the officer as to his general credibility and would not have probably changed the result of the defendant’s trial. Similarly, in People v. Filippone18, the Appellate Division First Department held that notation in sexual abuse victim’s medical record, made one year after the incident, did not establish that the victim gave an account of the incident that was at odds with the testimony she gave at trial, and did not amount to newly discovered evidence entitling defendant to a new trial, where the medical record failed to establish a source of statement at issue, read alone or in the context of another record, and thus could not be attributed to the victim.

Finally, in People v. Richards19, the Appellate Division Third Department held, in interpreting new evidence as impeachment evidence, stated newly discovered evidence consisting of affidavits of a used gun dealer, stating that the defendant’s alleged accomplice in burglary had come into the dealer’s shop alone and sold him a shotgun, did not warrant vacating the defendant’s judgment of conviction for second-degree burglary, though dealer’s affidavits tended to contradict accomplice’s trial testimony that he and the defendant had sold a shotgun together on the date of the burglary; dealer’s averments did not controvert the trial evidence that the defendant and accomplice broke into residence and took the shotgun and other evidence.20

Another subtopic interpreting and construing this statutory section is perjury. People v. McKnight21 is instructive. In that case, the Appellate Division Third Department held that the defendant was not entitled to a hearing prior to the Court’s denial of his Motion to Vacate his conviction for murder and criminal facilitation stemming from the defendant’s role as an accomplice, based on the affidavit from the brother of the principal offender in murder stating that the principal had lied during testimony at the defendant’s trial, where the content of material that was allegedly lied about was insufficient to create any reasonable probability of a verdict favorable to the defendant if a new trial was granted.

Similarly in People v. Welcome22, the Appellate Division First Department held that an order denying a Motion to Vacate a Judgment of Conviction on the ground of newly discovered evidence was affirmed as against the contention that the State’s witness had perjured himself, when he testified as to defendant’s incriminating statements, and had since recanted.23

Another topic interpreting this subsection is where there is retracted testimony. Thus, for example, in People v. Wong24, the Appellate Division Third Department held that the recantation of an eye-witness to murder, as well as admissions of a third party to various persons that he himself had committed murder, amounted to newly discovered evidence, capable of supporting a Motion to Vacate a Conviction. However, in People v. Citron25, the Appellate Division First Department held that, in contrast to the holding of the Third Department in the Wong Court, that recantation by a main trial witness was not reliable and therefore the defendant was not deprived of due process by denial, without a hearing, of a Motion to Vacate on the basis of newly discovered evidence; the recantation was made after the witness had become an inmate of the same penal system in which the defendant was incarcerated, two supporting affidavits did not establish that a recanting witness could not have seen the murder, and the affidavit alleging that authorities pressured the affiant to give false testimony was not newly discovered and was entirely incredible.26

Another topic in this area of new evidence is where there is a mental disease of defect of a witness. People v. Rensing27 held that where the defendant, who had been convicted of First Degree Murder, and sentenced to death, was entitled in interests of justice to a new trial on the basis of newly discovered evidence that the codefendant, who was the only witness directly implicating defendant, had had a long history of mental illness, had had visual and auditory hallucinations with marked memory defect, had been diagnosed as a case of paranoid schizophrenia, and had been discharged from a sanitarium in 1950 against medical advice. Similarly, in People v. Collins28, the Appellate Division First Department held that a judgment convicting the defendant of forcible sodomy was properly set aside based on newly discovered evidence with respect to complainant’s mental state; complainant was the only eyewitness, (continued on page 22)
her testimony contained material inconsistencies, and, following
the defendant’s conviction, complainant was arrested for slashing a
subway rider in the face with a box cutter, as a result of which the
defendant learned for the first time of complainant’s long-standing
history of mental illness and violent assaultive behavior.29

Another area of newly discovered evidence is affidavits. For
example in People v. Devito30, the Appellate Division First De-
partment held that there was sufficient evidence that allegedly newly
discovered evidence, in the form of affidavits from two recently re-
tired supervisory police officers, submitted by defendants was not
newly discovered evidence, and would not have changed the ver-
dict or result of Kastigar hearings, to support the Supreme Court’s
denial of defendants’ Motion to Vacate their Convictions; one wit-
ness was assisting defense at the time of sentencing, one affidavit
was based on hearsay, and the other was merely impeachment evi-
dence, and neither affidavit had personal knowledge bearing on the
central issue.31

Another area to be considered as newly discovered evidence is
scientific evidence. For example, in People v. Smith32, the Appel-
late Division First Department held that the high standard appli-
cable to newly discovered evidence, to wit, probability of effecting
the verdict, was properly applied to Motion to Vacate Judgment of
Conviction in rape prosecution based on post-conviction DNA test.
The First Department went on to state, that in that case, that the refusal
to Vacate the Judgment of Conviction of rape based on post-trial
DNA evidence, that the defendant was not the source of semen was
not error: new evidence would not have probably resulted in a more
favorable verdict, where it was entirely consistent with the victim’s
testimony that she had intercourse with her boyfriend before the
rape and that she did not know if the rapist ejaculated. In People v.
Wesley33 the Court of Appeals held that the defendant was not en-
titled to have his conviction vacated, based on the fact that proce-
dures used by deoxyribonucleic acid (DNA) testing facility, which
prepared profiling evidence in the defendant’s case, were held to be
unreliable in unrelated case; evidence at Frye hearing and at trial
established that procedures used in defendant’s case met standards
of scientific acceptance and reliability.34

Another subtopic in connection with newly discovered evidence
is newspaper articles. Romero v. U.S.35 is exemplary and represen-
tative. In Romero the United States Court of Appeals for the Sec-
ond Circuit held that an article in a newspaper that detailed im-
proper conduct on the part of agents from the Drug Enforcement
Administration (DEA), who arrested the defendant and testified at
his trial, was not “newly discovered evidence” that would warrant
a new trial. The Court of Appeals held that the defendant produced
no evidence that DEA agents acted improperly in his case and, even
assuming that each agent could be thoroughly impeached by any
information contained in a newspaper article, the remaining proof
was sufficient to sustain the defendant’s conviction.

Similarly, in People v. Wright36, the Appellate Division Third
Department held that a newspaper report about an unrelated inci-
dent involving the alleged victim that did not occur until after the
trial, was not newly discovered evidence that could have affected
the outcome of the trial and, thus, did not warrant a new trial, even
if information in the report about whether the assault victim had
acted as a police informant could have affected the victim’s credi-
bility.37

Another area of concern in what may be understood to be newly
discovered evidence is reports and, more specifically, police re-
ports. People v. DeJesus38 is interesting. In that case, the Appellate
Division First Department held that the defendant failed to estab-
lish the purported “UF61 report” generated by his freedom of in-
formation request was “newly discovered evidence” entitling him
to have the judgment vacated, in the murder prosecution; compar-
ison of contents of such report with the detective’s trial testimony
indicated that the report upon which cross-examination was based
was the same report as that upon which the defendant relied in seek-
ing a new trial, though the report utilized at trial by the defendant
was denominated an “unusual occurrence report.”

More specifically, the Appellate Division Fourth Department
held in People v. Maddox39, that computer printouts of car assign-
ments for the two uniformed police officers who arrested the de-
fendant, did not constitute newly discovered evidence, warranting
vacation of judgment of conviction; the defendant failed to demon-
strate that the information could not have been obtained before trial,
and disclosure that the officers, at some point on the day of the
defendant’s arrest, were not assigned to the same car, did not estab-
lish probability that a different verdict would result upon retrial.

On the other hand, in People v. Gurley40, the Appellate Divi-
sion Second Department held that a previously undisclosed police
report establishing that a bullet found in the victim’s body was a
.22 caliber and not a .25 caliber constituted newly discovered evi-
dence, sufficient to warrant vacating murder conviction, and grant-
ing a new trial, in that it was clearly material to issues at trial as to
the position of participants when the victim was shot, and the path
of the bullet in the victim’s body was downward.41

Finally, there is the issue as to whether pleas may constitute
new evidence under this statute. Thus, the Appellate Division Sec-
ond Department held in People v. Latella42 that applicability of stat-
ute [McKinney’s CPL Section 440.10, subd. 1(g)] permitting vaca-
tion of the judgment of conviction on the grounds of newly dis-
covered evidence is expressly conditioned upon existence of a verdict
of guilty rendered after trial and, in absence of such a verdict, as
when a defendant enters a plea of guilty and foregoes trial, relief is
precluded.

Similarly, in People v. Jackson43, the post conviction claim of
newly discovered evidence could only be raised after trial, not after
guilty plea, and, thus, the defendant who pleaded guilty too sod-
ony in the first and second degree could not raise newly discovered
evidence claim; by pleading guilty, the defendant admitted his
factual guilt and waived his right to confront his accusers.44

The final topic to be considered as to what constitutes new
evidence under the statutory scheme is exculpatory evidence. Thus,
in People v. Bryant45 the Appellate Division Second Department
held that a witness’ post-conviction statement that he “committed”
himself to prompt eye-witness’s identification of the defendant was
not exculpatory evidence that supported the defendant’s motion to
vacate his murder conviction; witness did not assert that he ever actually spoke to the eyewitness in order to carry out this “commitment” nor did the witness contradict evidence presented at the Wade Hearing that investigating detective was the only other person present when the eyewitness identified the defendant from a book of identification photographs. 46

**CONCLUSION**

This analysis and consideration of what may constitute new evidence under subsection (h) of CPL 440.10 reveals many strands. There is the issue of what is newly discovered evidence as scientific evidence or newspaper articles. Another area of newly discovered evidence as affidavits. There is also the issue of what constitutes new evidence. Another topic interpreted in this subsection is whether perjury and its relation as to what constitutes new evidence. As well there is the subject of whether reports and police reports can be understood to be newly discovered evidence. There is the issue of whether impeachment evidence can constitute new evidence, under the statutory subsection. Finally, there is the consideration as to whether pleas may constitute new evidence under the statutory subsection. Additionally, there is recanted testimony or where there is a mental disease or defect of a witness. An additional area of newly discovered evidence is affidavits. There is also to be considered the area of newly discovered evidence as scientific evidence or newspaper articles. Another area of concern is whether reports and police reports can be understood to be newly discovered evidence. There is the issue as to whether impeachments may constitute new evidence under the statutory subsection. Finally, there is the consideration as to whether exculpatory evidence can constitute new evidence, under this statutory subsection.

It is hoped that this article will provide something of a guide to the practitioner as to what the appellate and trial courts of this state have held to be newly discovered evidence under subsection (h) of CPL 440.10. 47

**END NOTES**

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
   - (b) the judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor.
2. (h) the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.
3. (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.
5. People v. Taylor, Id.; People v. Wagner, Id.; People v. Powell, 102 Misc. 2d 775, 424 NYS2d 626 (Tompkins County Court 1980)
6. 298 AD2d 617, 748 NYS2d 182 (3rd Dept. 2002)
7. See also on this People v. Ulrich, 265 AD2d 884, 697 NYS2d 410 (4th Dept. 1999); People v. Lent, 204 AD2d 885, 612 NYS2d 452 (3rd Dept. 1994)
8. 193 AD2d 363, 596 NYS2d 824 (1st Dept. 1993)
9. 183 AD2d 1099, 585 NYS2d 511 (3rd Dept. 1992)
10. 167 AD2d 763, 563 NYS2d 558 (3rd Dept. 1990)
12. 182 NY 131 (1905)
13. 298 AD2d 617, 748 NYS2d 182 (3rd Dept. 2002)
14. 245 AD2d 79, 665 NYS2d 464 (1st Dept. 1997)
15. Id.
16. See also on this People v. Crimmins, 38 NY2d 407, 381 NYS2d 1, 343 NE2d 719 (1975); People v. Priori, 164 NY 459, 58 NE 668 (1900); People v. Crisler, 303 AD2d 948, 757 NYS2d 211 (4th Dept. 2003); People v. Boyd, 256 AD2d 170, 683 NYS2d 226 (1st Dept. 1998); People v. Brown, 227 AD2d 691, 647 NYS2d 763 (3rd Dept. 1996); People v. Wright 158 AD2d 735, 552 NYS2d 180 (2nd Dept. 1990); People v. Miller, 144 AD2d 867, 534 NYS2d 809 (3rd Dept. 1988); People v. Earley, 118 AD2d 868, 500 NYS2d 353 (3rd Dept. 1986); People v. Scarnicino, 109 AD2d 928, 486 NYS2d 404 (3rd Dept. 1985); People v. Greenfield, 275 AD 862, 89 NYS2d 344 (2nd Dept. 1949); People v. Maki, 253 AD 782, 1 NYS2d 17 (3rd Dept. 1937); People v. Bonfacio, 119 AD 719, 104 NYS 181 (3rd Dept. 1907); People v. Branch, 175 Misc. 2d 933, 671 NYS2d 890 (S. Ct. Kings Co. 1998); People v. Rodriguez, 170 Misc. 2d 176, 649 NYS2d 1021 (S. Ct. Bronx Co. 1996); People v. Powell, 102 Misc. 2d 775, 424 NYS2d 626 (S. Ct. Tompkins Co. 1980); Anonymous v. Anonymous, 13 Misc. 2d 718, 180 NYS2d 183 (Court of Special Sessions of the City of NY, NY Co. 1958); People v. Latella, 112 AD2d 321, 491 NYS2d 771 (2nd Dept. 1985); People v. Knapper 230 AD 487, 245 NYS 245 (1st Dept. 1930); People v. Callace, 151 Misc. 2d 464, 573 NYS2d 137 (Suffolk Co. Ct. 1991)

(continued on page 24)
35. 28 F.2d 267 (2nd Cir. 1994)
36. 206 AD2d 750, 614 NYS2d 818 (3rd Dept. 1994)
37. See also People v. Montgomery, 188 Ad2d 677, 591 NYS2d 216 (3rd Dept. 1992) and People v. Seidenshner, 152 NYS 595 (1914)
38. 203 AD2d 196, 611 NYS2d 159 (1st Dept. 1994)
39. 256 Ad2d 1068, 683 NYS2d 360 (4th Dept. 1998)
40. 197 AD2d 534, 602 NYS2d 184 (2nd Dept. 1993)
41. See also People v. Robles, 153 Misc.2d 859, 583 NYS2d 138 (S. Ct. Kings Co. 1992)
42. 112 Ad2d 321, 491 NYS2d 771 (2nd Dept. 1985)
43. 163 Misc.2d 224, 620 NYS2d 240 (County Court, Broome Co. 1994)
44. See also People v. Sides, 242 AD2d 750, 661 NYS2d 863 (3rd Dept. 1997) and People v. Sherman, 83 Misc.2d 563, 372 NYS2d 546 (St. Ct. NY Co. 1975)
45. 247 AD2d 400, 668 NYS2d 646 (2nd Dept. 1998)
46. See also People v. Burt, 246 AD2d 919, 668 NYS2d 413 (3rd Dept. 1998)
47. It is acknowledged that the cases referred to here and the analyses of these cases may be found in the case annotations of McKinney’s Consolidated Laws of New York annotated, Criminal Procedure Law, Section 440.10. It is further acknowledged that in two previous articles published in Atticus Newsletter of the New York State Association of Criminal Defense Lawyers, Vol. 19, No. 5, November/December 2006, entitled “Post-Conviction Motions” and Vol. 19, No. 6, year end 2006, entitled “Post-Conviction Motions, Part II” that the case law cited in these articles and the analyses therein may be found in the annotations of CPL Section 440.10. Finally, it is acknowledged that in the article entitled “Notice of Alibi: An Overview and Analysis” published in Atticus the Newsletter of the New York State Association of Criminal Defense Lawyers, Vol. 20, No. 1, January/February 2007 the case law cited therein for the analysis may be found in the case annotations of McKinny’s Consolidated Laws of New York Section 250.20.
MOTION OF THE MONTH

Editors Note: This Handwriting Exemplar Motion was submitted by Past-President Mark J. Mahoney.

Affidavit Opposing Handwriting Exemplar Motion

State of New York
Court: of ______________________________
County Grand Jury
([Pseudonym for Client])

Application for Application of the Answering Affadavit

(Name of attorney) affirms to be true and states under penalty of perjury as follows:

I am the attorney for [Pseudonym for Client], from whom handwriting exemplars are being sought by the District attorney ostensibly on behalf of the Grand Jury of___________ County. This affidavit is in opposition to the application by the People for an order compelling handwriting samples or, in the alternative, for a protective order pursuant to CPL§240.50 to safeguard the rights of this citizen and to insure the fairness of evidence gathering and the integrity of scientific methodology in the analysis of the evidence.

1. Probable Cause
The People’s application plainly fails to establish probable cause to believe that [Pseudonym for client] was the author of any of the questioned signatures.

The District Attorney’s office has identified twenty (20) checks as being “unauthorized expenditures” because these expenditures for which checks were drawn were not accompanied by a corresponding invoice, so far as the District Attorney’s investigation shows. It also happens that these “unauthorized expenditures” all had [Pseudonym for client] as a payee. There is no suggestion by the District Attorney’s office that there is anything improper about [Pseudonym for client], who was then the Executive Director, being the payee on checks. Obviously, since most of the checks payable to [Pseudonym for client] were in fact signed by two members of the Board, the checks were proper under the law, without regard to whether the internal accounting guidelines of the Pratt-Willard Revitalization Corporation were complied with.

The mere fact that [Pseudonym for client] is the named payee on checks which are now claimed to have been forged, hardly establishes probable cause to believe that [Pseudonym for client] forged the signature without more information about the disbursements of funds and the preparation of checks within this particular organization. The mere fact that [Pseudonym for client] is the payee, as noted above, is not unusual, and the affidavits supplied in connection with the People’s application hardly suggests that it was [Pseudonym for client] who “forged” the name of any board member. Neither the affidavit of__________ or the affidavit of__________ states that they did not fill out the additional required signature in addition to their own.

Moreover, I personally requested the Assistant District Attorney in charge of this case, to provide me with copies of the checks that reflect the “unauthorized expenditures” so that I could show them to my client who might be able to offer to the Court some explanation as to how these checks came into existence or the purpose for which they were prepared. The District Attorney has not complied with this request. We are, therefore, hampered in our ability to provide the District Attorney with complete information about the true nature of these documents. All that is reflected in the application is that, among numerous “unauthorized expenditures” there were five signatures putatively by one person and two by another (there is no discussion of whether these were checks in common) that were claimed by the putative authors not to be theirs; beyond that, [Pseudonym for client] is the payee named on the checks. There is no mention of the form of endorsement on any of the checks or to whom they were paid.

(continued on page 26)
There is no evidence that any comparison of signatures by an expert corroborates the claim by the putative signatories, or that there is any likeness between any endorsement and the questioned signatures. With such a reservoir of handwriting which purports to exhibit [Pseudonym for client]’s handwriting characteristics, (although he has not been given the opportunity to state whether or not these endorsements are in fact genuine), it is fatal to the People’s present application that they have not undertaking to conduct some comparison of the claimed forged signatures with the purported endorsements, so that some preliminary indication could be given that there is compatibility between those signatures. Although this matter was brought to the attention of the District Attorney’s office on __________, in the previous answering affidavit filed on the behalf of [Pseudonym for client], the present application does not address this problem.

2. **Protective Order**

Even if the court were to find probable cause, as the People concede to be required, it would be grossly unfair to allow the collection of evidence in the manner suggested by the People. What the People seek from my client at present goes beyond what is either necessary or appropriate to conduct a scientific comparison, and what they propose falls short of what is needed for a truly scientific analysis.

Since an order of the court is needed to obtain these handwriting samples, I believe that the Court must insure that it does not order to be done any procedure which is unfair or biased or be complicit in the preparation of supposedly “scientific” evidence which is inherently biased by its methodology. I believe that the court cannot delegate to the prosecutor the its obligation to insure that evidence the Court orders to be created is created fairly.

3. **Mimicry of questioned documents**

Samples of handwriting, as such, are discoverable as an “identifying physical characteristic.” The physical characteristics of the defendant’s handwriting may be gathered from a standard handwriting sample which reveals his normal handwriting or printing in the hand he normally writes with which contains, perhaps, letters of the alphabet in various combinations, and numbers. Such a handwriting sample should provide any qualified expert who wishes to conduct a proper and unbiased scientific comparison of the handwriting with an adequate sample of known handwriting for purposes of comparison.

4. **Anything other than handwriting characteristics is “testimonial”**

The government may not compel the accused to mimic questioned documents by providing a “handwriting sample” which is not in fact a sample of handwriting characteristics but a replication of the contents of questioned documents in order to create a “known” document for purposes of comparison. As such, the “exemplar” compelled from the accused becomes, by reason of its content, a testimonial communication. It is compelling the accused to utter language which the government regards as incriminating.

Discovery of a handwriting sample which does not simply reveal “pure physical habit or characteristic” is not allowed. United States v. Campbell, 732 F.2d at 1017, 1022 (1st Cir. 1984). (Dictating what is to be written is not allowed because it requires disclosure of the mental processes of the accused — like spelling — that are not subject to discovery).

5. **Mimicry is Suggestive**

The People seek to have the accused mimic questioned documents by providing a “handwriting sample” which is not in fact a sample of handwriting characteristics but a replication of the contents of questioned documents in order to create a “known” document which has a superficial and prejudicial similarity with the questioned documents. Although the state is entitled to demand from an accused examples of his physical characteristics, the state is not entitled to create suggestive evidence or, especially compel the defendant’s participation in the creation of suggestive evidence. This is the reason why the creation of eyewitness identification evidence under suggestive circumstances, or the use of hypnotically refreshed testimony, with its danger of suggestiveness, are excluded from use as evidence at trial in New York State, and, for that matter, in federal courts.

It is my belief that any qualified expert could make an identification of handwriting samples without the added crutch of having a sample of handwriting which was a suggestive mimicking of the questioned document. Not only does the People’s present demand seek the creation of suggestive evidence, but the state is entirely without the need for such suggestive evidence in order to accomplish the legitimate purpose of comparison of known examples of handwriting characteristics with a questioned document.
6. **Biased Sample of questioned documents**
The People seek to have comparisons done only with the copies of the questioned documents that the putative signatories suggest are not authentic. It skews the analysis of the questioned documents if other documents in a reasonably similar class (here, checks reflecting questioned expenditures) are allowed to be excluded from analysis. This prevents disclosure of the possibility that the putative signatories were in fact the authors of the questioned documents and allows those who have an interest in the inquiry, and who are equally suspect with my client, to in fact narrow its scope. A truly neutral analysis would require that all the checks reflecting suspected expenditures be analyzed separately concerning genuine authorship. This would help guard against the possibility that the purported signatory was the real author, and is either mistaken or dishonest in stating otherwise.

7. **Biased sample of known handwriting.**
The District Attorney apparently intends to submit for analysis not only a limited number of the checks reflecting questioned expenditures, but also intends to further suggest my client as the author by only submitting my client’s handwriting samples for analysis. This procedure, like a one-on-one” eyewitness confrontation with the police suspect, favors selection of the police suspect. It cannot come close to being considered a scientific procedure, as it automatically rules out the possibility of a conclusion that the putative signatories were in fact the authors of the signatures.

The combination of narrow selection of the suspected instruments, with suggestive inclusion of handwriting only of my client for comparison, results in a shamefully disingenuous procedure.

8. **Use of copies**
I am led to understand that the originals of the questioned documents are not in the possession of the People and that it is proposed to conduct analysis with copies, presumably the bank microfilm copies. I believe the People need to establish that such a comparison would be reliable in any event, since much of handwriting analysis is done microscopically, with emphasis on minute features which would not be visible on such a copy.

Supposing that the People establish the reliability of comparison of such documents, it then should be up to the People to demonstrate why microfilm copies of the know handwriting samples should not be used for the conducting of comparisons.

9. **Conclusion**
The court, in order to insure that it does not give license to the People to create suggestive or unreliable evidence, should require that all examples of signatures or writings on checks reflecting questioned expenditures be submitted to for analysis, and that each be compared to the others for purposes of determining common authorship.

Handwriting samples must be collected from all possible authors.

There should be a “double blind” technique imposed on this case whereby the examiner is not aware of the source of the exemplars. The handwriting samples from all persons should be identical in content, with the particular handwriting contributor identified by number rather than name.

The exemplars collected should not mimic the contents of the questioned documents.

The known handwriting samples should be reproduced in the same type of medium as the questioned documents.

WHEREFORE, the undersigned respectfully requests that the request for handwriting samples be denied; in the alternative the relief should be granted only with the entry of a protective order, CPL 240.50 containing the relief requested above.

Date:__________________________________

_____________________________________

_____________________________________

Name of attorney
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LISTSERVE ETIQUETTE

by Mark Mahoney, Esq.

Mark Mahoney is a Past-President of the NYSACDL. He is a partner in the Buffalo firm of Harrington & Mahoney.

Editors Note: This article appeared in the May/June 1999 issue of The Mouthpiece and continues to be applicable. It’s certainly worth rereading.

I offer the following thoughts concerning procedure and etiquette to those people who are new to the practice using “listserves.”

PROCEDURE:

• If you want to send a message to everyone, or reply to a message and have everyone see it, just reply to the message so that it goes to the listserve address.

• If you want to send a message to a particular person or persons, you should use the address-book capabilities of your mail software to capture (often there is a single key you can hit that will capture the e-mail addresses in the text and allow you to add them to your address book. You can always also create groups of addressees and send a message to more than one person, in most mail software.) Otherwise you have to just copy the e-mail address of the persons you want to send a message or a reply to into the “Send to” area of your new message or reply.

• In either case you have to make sure, when you send the reply or message, that you have adjusted the “Send to” information to your liking.

• If your response to a thread of messages changes the theme or content of the message thread, then change the “subject” line accordingly, so that readers can be assisted in deciding whether to open this message or not. (In most e-mail software the user can just look at the message headers to decide whether to open a message.) Some message threads change from the frivolous to the serious, and vice versa, and it is important to let the readers know this.

ETIQUETTE:

• In making replies, consider whether it is appropriate or not to make your reply public. This requires examination of your motives in replying. There are a wide range of concerns. Generally it is good to let all see useful information, and to let people know if there has been a response to useful information.

• On the other hand, criticism should be done with care, and understanding of the limits of this medium to reflect nuance and tone of speech, or else be done privately.

• Because it is often difficult to convey the tone of a message, writers must be careful to make the literal terms of a message civil and assume the best about the other writers, and avoid discouraging free flow of ideas.

• Many are self-conscious or cautious about answering a message, especially if they feel their answer out to be broadcast. Fear of giving a response that seems to be too obvious, or might be “incorrect” in the judgment of others ought not have a role if the person is trying to help.

• Judge not lest you be judged.

• Sign your messages with your name and preferably with your e-mail address. It is disconcerting to try to give a private reply to a message where you do not know the author. Especially with some e-mail packages, where the message routing header is hidden from the reader, a message to a listserve may look anonymous. There are numerous problems with this. First, it is hard to give a private response if you do not know who the sender is. First, it is hard to give a private response if you do not know who the sender is. Second, it may make critical messages appear to be designed to prevent the reader from knowing who the writer is.

• Even if the message shows the writer’s e-mail address to the reader, e-mail addresses that only use initials, or some “handle,” or a spouse or co-worker’s name, may not communicate who the author is. This is a problem as listserves grow in size. Quotes: keep quotes to a minimum. Use quotes to let readers know what yo are responding to. Most email software has a facility that allows you to select segments of an original message in order to paste into a reply. Don’t quote more of a message than is needed to make your reply understandable to the reader.
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