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PRESIDENT’S MESSAGE

by Ray Kelly

NYSACDL member Mitch Dinnerstein was assaulted in open court during trial by his client. Despite the attack which sent him to the hospital with stab wounds, Mitch acted with grace, dignity and compassion by continuing to protect his client's rights when he was subdued following the attack. Mitch even reached out to his client when they were both taken to the hospital in an effort to maintain Mitch's vision of client-centered representation. Such devotion to professionalism should not go unnoticed.

Mitch recognizes that true representation of all his clients lies in the relationship between attorney and client. Far too often, many defenders and clients are deprived of this relationship. Because American society is segregated by class, ethnicity and race, many lawyers come to criminal defense work without an adequate appreciation of the experience of their clients. Many of us have grown from middle-class roots, from lives of privilege, often with no experience of social pain, deprivation or loss. The intuitive expectation of discrimination in daily living is not part of our experience, the routine short end of the stick not our usual lot. The "Pavlovian"reaction of the underclass to challenge the structured injustice of institutional classism and the pounding power of racial prejudice are beyond the genuine personal experience of all but a handful of committed lawyers championing the rights of humans wrecked desolate by poverty, circumstances, class, color or hatred.

Many of NYSACDL’s members, like Mitch, realize that understanding the experience of indigence and need is vital to our role in defending fellow human beings. We recognize that our representation of our relations with our clients, and our reactions to complaints and problems all suffer from a basic impediment. There are unnatural distances between our clients and us. Far too often, defenders differ in class, race and ethnicity from the clients they are called upon to serve. Yet many of us are called upon to represent all persons charged with a crime within their "catchment area". Caseloads in the hundreds, sometimes thousands, docket filled with strangers, nameless faces, and an endless stream of humanity in pain — this is the experience of defending fellow human beings.

Law schools do not teach us what days our clients receive public assistance checks or what stresses are present in the immediate 72 hours before the check arrives. Middle class attorneys do not know how long a normal wait is in a health clinic, what identification is present on a Medicaid card, who may permissibly live with a family receiving assistance, what information might be subpoenaed from a housing project or how often one must recertify for welfare. We are not attuned with how to deal with the embarrassment our clients feel when a manager of a supermarket slights them for using food stamps. The invasive information child protective services chronicles on the lifestyles and habits of our clients is something we have to learn. We don't automatically recognize who qualifies for SSI. CLE courses don't teach us how to handle the illegal interest charged to a low income client on a grocery account in an upstate mom-and-pop store or New York City bodega.

Mitch Dinnerstein truly embodies the qualities of client-centered representation. Rather than reacting with judgmentalism and revenge, Mitch understood and sought healing, forgiveness and reconciliation in a valiant attempt to work through his client's deficits. We should all recognize and thank Mitch for the professionalism exhibited in maintaining client-centered representation despite a most difficult situation.

— Ray

"I have never killed a man, but I have read many obituaries with great pleasure."
— Clarence Darrow
NYSACDL ANNUAL DINNER
AT MARRIOTT FINANCIAL CENTER HOTEL
THURSDAY, JANUARY 25, 2007

The New York State Association of Criminal Defense Lawyers’ Annual Dinner will be held at the Marriott Financial Center Hotel, Thursday evening, January 25, 2007. Tickets for the dinner are $150 for members, judges and court personnel and $175 for non-members. The cocktail reception will begin at 6:00 p.m., and dinner will be served at 7:30 p.m.

HON. WILLIAM BRENNAN AWARD TO HONORABLE GEORGE BUNDY SMITH


BARRY KAMINS TO RECEIVE HON. THURGOOD MARSHALL AWARD


NYSACDL ANNUAL MEMBERSHIP AND BOARD MEETING

All members of the NYSACDL are invited to attend the Annual Membership and Board Meeting on Friday, January 26, 2007.
And then along with the stories you hear about violence in this country of recent date, you hear the stories of the juvenile justice system in shambles. You hear the stories of a kid beaten to death in a boot camp here in Florida. You see similar stories in other parts of the country.

Ladies and gentlemen, we should take strength in the abilities represented by this organization across this country, and focus on the juvenile justice systems of our states and ensure that they are ger- mane, that they are effective, that they can make a difference, that they're funded adequately, and that they have the chance of giving a child a real fresh start in life.

We have got to recognize that when a 12-year-old gets in trouble, two 12-year-olds, one with a good family structure at home, the family is down at the police station as soon as they're called, everybody's trying to respond — but the other kid who committed the same offense never met his father, his mother has been in jail for the last two years, and his grandmother is raising him. How do we create the level of playing field for that child at 12 to give him the real opportunity to be his best and go out and to have a fresh start, and to cope with growing up in America in the Inner City?

I think we can do it if lawyers work together and put their energy into making a system work from the beginning. Because we are not going to solve the problem if we wait until the kid is charged in juvenile court. We've got to start earlier, and we have got to make sure that our decisions with respect to secured attention are fair and evenly applied. We have got to make sure that we direct-pile on only those kids who — for whom there is no program in the juvenile court.

But it's going to require that lawyers look at the juvenile court and the juvenile justice system, and take the same measure, effective measure that you have to solve problems and solve them in that context. A great juvenile court judge is something to behold. A juvenile justice system that works is something to be prized.

I think we can do a better job in America of building the juvenile system that will protect our children and will protect our nation, as well.

Secondly, this nation faces a crisis in that America is growing old. Twenty-six percent of the people will be over 65 in another 10 or 15 years. Our greater percentage of Americans will be over 65 and suffering from disease. Our smaller percentage of Americans will be in their young to middle-age supporting the elderly.

(continued on page 4)
We have seen in these last two or three days reports of people dying from heat. Shut-in people with no air conditioning, nobody to care for them, dying a miserable death. Let us take that example. Let us take the challenges that we see in this country and figure out how lawyers can do their best to help communities design programs that will prevent problems like this in the first place, that will protect our elderly from crime. That will address issue of the victim and the perpetrator’s family. They are related. What is the answer when frustration causes them to give out, and to just be unable to cope anymore? It is a whole new ball game.

I took child abuse and translated it into elder abuse in the Office of Justice Programs when I was in the Attorney General’s office because there was no mechanism for addressing the issue of elder abuse. We have got to make sure that we use the strengths of this organization that have made such a difference to so many Americans and utilize this ability or this capacity to do good and to bring justice to a situation, to protect our elderly, and to do it the right way.

And finally, we have a rare opportunity to work together to solve a problem, and that is what can we learn from the Innocence Project, that Barry Scheck and Peter Neufeld have done such a magnificent job of? What we can learn from cases in which people have been exonerated for crimes in which they did not commit, but were — for which they have been convicted? How can we take this information and translate it into action that will prevent crimes like this — prevent wrongful convictions in cases in which DNA is not applicable and not available?

We can do it. We have already seen steps taken in over 180 exonerations. We have seen the information collected about Florida’s eyewitness identification system. And we have the chance through the HAS’s Institute of Forensic Science and the commission that Neil referred to, to look at these cases and say this is how we can improve eyewitness identification procedures and make a difference.

This is how we can show people that wrongful confessions, false confessions can be achieved in the most insidious ways, and that we should have tapings, full tapings of the interrogation before we admit confessions in the system.

We have got to learn what is a forensic science, the basics of forensic science, and make sure that we have standards that will permit the proper prosecution in accordance with sound scientific theory of cases using evidence that is questionable. I think, again, we can do it. But it is going to require that more and more lawyers talk the language of science, and understand the scientist when they talk. That is easier said than done.

Having majored in chemistry at Cornell, that was my last experience with science. I have learned a lot since then. But we have got to be able to speak the language of science in the courts. We have got to be able to explain to judges and to juries what science is all about in a particular case. We have got to take the knowledge that exists in this country, of both scientists and lawyers, and say we are small enough, and we are effective enough to use this information the right way to protect and defend the innocence of those who are innocent — innocent of a crime.

My experience as Attorney General gave me a whole new regard for lawyers. I said at the time when I came to Washington that I loved lawyers. Particularly, dedicated, caring lawyers. I don’t like indifferent, ineffective lawyers. But I have discovered after all my experience as attorney general that the lawyers of America are for the great — far greatest part, wonderful people who care deeply about their clients, deeply about solutions to problems that we all face, and deeply about this country, and it makes me very proud that they’ve been recognized today, and I thank you all so very much.

FOR THE RECORD...

Condolences to the wife and daughter of Larry Simon on his untimely death...to Jerry Labush’s wife and daughters on his passing...

Congratulations to Past-President Larry Goldman and his wife Kathi on the birth of their first grandchild...to Louise Luck and her husband Bernie on the birth of their daughter Lauren and their new granddaughter and grandson...to President Ray Kelly and his wife Mary Jo on daughter Devon's winning the New York State Section 2 diving championship.

ON THE RECORD...

This vignette was forwarded to the attention of Atticus by Past-President Murray Richman.

ADA Kaplan:

It came to the testimony of Virgil Smith, Mr. Richman’s finger came within about two inches of my eye.

I am not saying it was done on purpose, but it was pointed at me as if to say I am the one who did not turn this item over; okay.

Judge, in the streets of the Bronx, which I grew up, you put a finger two inches from somebody’s eye, there is going to be — you better be prepared to defend yourself.

Murray Richman:

Now as for his challenge that I pointed a finger two inches from his face, Your Honor, I never even came two inches close to the man.

You are talking about Smith’s testimony which was five days ago and now suddenly recognizes it from the streets of the Bronx where he comes from.

What, Riverdale has tough guys?
POST-CONVICTION MOTIONS

by Andrew J. Schatkin

This is the first of a two-part series.

Andrew J. Schatkin is a member of the NYSACDL. He is in private practice in Jericho.

Post-Judgment or Post-Conviction Motions in New York Criminal Practice, are governed by Section 440.10 of the Criminal Procedure Law entitled “Motion to Vacate Judgment”. The section provides, in pertinent part, that at any time after a Judgment the Court, in which it was entered may, upon motion of the defendant, vacate that Judgment upon a number of enumerated grounds. Subsection 2 of Section 440.10 of the Criminal Procedure Law, in essence, provides under certain conditions for denial of the motion. For example, where the issue raised in the Post-Conviction Motion has been previously determined on Appeal; where the motion is being used as a substitute for an Appeal; or where the ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

Subsection 440.10 of the Criminal Procedure Law is designed to embrace all non-Appellate, Post-Judgment remedies and motions to challenge the validity of a Judgment of conviction. The Section replaces the Common-Law writs that it directly covers and, for the most part, it replaces the Common-Law Writ of Coram Nobis.

This article proposes to analyze and consider the ground to vacate the judgment set forth in subsection (b) of Section 440.10 of the Criminal Procedure Law. That section provides, as a ground to vacate the judgment, that the judgment was procured by duress, misrepresentation, or fraud on the part of the court, or a prosecutor, or a person acting for or on behalf of a court or prosecutor.

In general, it is the law that a Judgment based on trickery, deceit, coercion, or fraud in the procurement of a guilty plea may be corrected by a Motion to Vacate. The averment of fraud and misrepresentation must be supported factually. A number of cases have analyzed what constitutes threats or coercion or duress or fraud. For example, in People v. Henzey the Appellate Division held that the refusal of the District Attorney to consent to a reduced plea from the younger brother of the nineteen year old defendant, unless the defendant pled guilty to a reduced charge, was not a form of coercion depriving defendant of his constitutional rights and did not entitle her to Coram Nobis relief from the judgement, convicting her of the crime to which she pled guilty, even if the plea was made to protect the brother from the hazard of a First-Degree Murder Conviction, in the absence of threats against defendant or his brother. Again, in People v. Keeher, the Appellate Division held that even if district attorney had stated in the presence of defendant’s attorney, that if defendant pled guilty to a felony, his uncle, who was also charged with felony, would be permitted to plead to a misdemeanor and would thereby get a good break and, even if defendant had been told that he would receive a small sentence to Rikers Island, such statements, which were not coercive or threatening, would not entitle defendant to the vacation of judgment.

The next topic, which will be considered in this article, is the issue of fraud, duress, or coercion in connection with confessions or statements. The law is that a defendant who has knowingly and voluntarily pled guilty, may not thereafter attack the judgment of conviction on the ground that he had been coerced into confessing, and that the existence of the confession induced him to enter a plea of guilty. The defendant must contest the voluntariness of the confession by pleading not guilty and then raising the point upon trial.

A twist on this may be found in People v. Ortiz. In Ortiz, the trial court held that contentions that a plea of guilty was made as a result of court’s adverse rulings on admissibility of alleged coerced confessions and that, because of such introduction thereof, defendant was subjected to pressure to change his plea from not guilty to guilty, constituted no legal basis to grant a writ of error Coram Nobis and did not entitle defendant to a hearing.

There is another area to be considered in connection with the issue of coercion, duress, or fraud, as it relates to post-judgment motions under C.P.L. Sec. 440.10. This area is alleged coercion, duress, or fraud in connection with pleas of guilt. The general rule is that a post-conviction motion, brought on the ground that the defendant was coerced by counsel to plead guilty, is insufficient where it alleges no facts from which it can be inferred that the defendant’s will was overborne and that his plea was not his free choice.

On the other hand, the law is clear that where a defendant has been coerced by the Judge or Prosecutor into pleading guilty, the judgment or conviction should be set aside. Thus, for example, in People v. Picciotti, the Court of Appeals held that if the defendant, who was indicted in 1950 for burglary, robbery, and larceny, but was not brought to trial, and who in 1955, was indicted for robbery and criminally receiving stolen property, pled guilty to a count charging receiving stolen property, because of a threat by the Assistant District Attorney that if he did not plead guilty that all the indictments return against him in 1950 and 1955 would be brought on for trial, and that if the defendant were convicted he would receive the longest and heaviest sentence possible, such threats would amount to coercion in the procurement of the guilty plea and the defendant would be entitled to relief by way of coram nobis. Similarly in People v. Wright, the Appellate Division First Department held that the defendant was entitled to a writ of error, of Coram Nobis, where he indicated that he did not want to plead guilty; the judge told him that as long as he would rather do 10-20 instead of 1-2 he would get a trial, and that the Judge was having a lot of trouble with him for no reason, and the defendant then pled guilty.

Another subtopic as to what constitutes duress or fraud in connection with a guilty plea, is the involvement of the Court or law (continued on page 6)
enforcement officers. An example of this is People v. Guariglia. In that case, the New York Court of Appeals held that if the Judge in Chambers told the accused, who was not represented by counsel, that it would be best to plead guilty, that the Court would be lenient because of the youth of the accused, and that the accused might be soon released without informing the accused that the maximum sentence could be for life imprisonment, thus inducing the withdrawal of the plea of not guilty and substituting the plea of guilty, the accused would be entitled to an Order of coram nobis.

Another example of improper court action and involvement resulting in vacation of a guilty plea pursuant to this statutory section is in People v. Shelton. In Shelton, the Appellate Division First Department held that, inasmuch as the sentence promised at the time of the defendant’s guilty plea to drug charges, could not be fulfilled, thus denying the defendant the benefit of his plea bargain, he was entitled to vacatur of his sentence and withdrawal of the plea thereby restoring him to his prior position.

An interesting case in this area of coercion and duress, in connection with improper court action, or improper law enforcement personnel actions, is found in People v. Calero. In Calero, the Appellate Division Second Department held that if the defendant and his counsel were induced to refrain from moving to suppress evidence because of the allegedly false swearing of the detective at the arraignment that the search and seizure had been conducted pursuant to a search warrant, and if the defendant were induced to plead guilty by the alleged fraud and perjury, he was entitled to relief on his coram nobis application.

Another subtopic in the area of coercion, fraud, or duress under Section 440.10 is where the prosecutor’s acts, with respect to the guilty plea, constitute duress or fraud. Thus, an example of this is in People v. Selikoff. In that case, the New York Court of Appeals held that, although the defendant may have been innocent of any wrongdoing on the charge, post-conviction procedures were available to correct any injustice due to any off-the-record promises of the prosecutor, which were unfulfilled; in any such proceeding the defendant would not be barred from showing, among other possibilities, that in the off-the-record plea negotiations he was mislead into not protesting his innocence.

On the other hand, there is much case law as to what constitutes acts of the prosecutor that do not constitute inducement of the guilty plea by duress or fraud. Thus, in People v. Hunt, the Appellate Division Third Department held that even if the Assistant District Attorney, with the approval of the County Judge, had offered a suspended sentence, and dropping of one of the two counts of First Degree Grand Larceny, if the defendant pled guilty to the indictment, the defendant was not so prejudiced as to be entitled to coram nobis relief where the defendant pled guilty to the first count and was sentenced to 2 to 10 years.

There are a number of cases with respect to sentencing and this particular statutory subsection. For example, in People v. Hazen the Appellate Division Third Department held that the failure to advise the defendant, during plea proceedings, or at sentencing, that his determinate prison term would be followed by a period of post release supervision, required vacation of the guilty plea, even though the defendant did not make a formal motion to withdraw his plea.

In the same fashion, in People v. Keyes the Appellate Division Third Department held that a guilty plea was required to be withdrawn, requiring vacation of the sentence and remittal of case to the trial court, even though the defendant failed to preserve the issue by an appropriate post-conviction motion; the trial court failed to advise the defendant of a 5-year statutorily mandated period of post release supervision.

There is also law on the issue of defense counsel’s acts constituting fraud or duress. The significant weight of the case law in this area is that, for the most part, defense counsel’s alleged improper actions, in general, do not carry sufficient weight or credibility to prove duress or fraud on this part. Thus, in People v. Singh, defense counsel’s statements that defendant’s codefendant brother would testify against him, and that defendant could receive consecutive sentences if convicted of first-degree robbery and second-degree murder as charged in indictment, did not show that defense counsel coerced defendant to plead guilty to second-degree murder; the assertion that the defendant could be sentenced consecutively was not erroneous, and although defendant’s brother stated that he did not intend to testify against defendant, brother admitted that he had agreed to testify against defendant as condition of his plea agreement.

In People v. Meyers, in the same way, the Appellate Division Second Department held that the alleged fact that the defendant, solely through the alleged misrepresentations of his own counsel, was induced to change plea from not guilty to guilty was not a basis for relief in a coram nobis proceeding.

CONCLUSION
This analysis and overview of what may constitute, under the law, duress, misrepresentation, or fraud on the part of the court, or the prosecutor, or a person acting for or on the behalf of a court or prosecutor reveal a number of strands. One area is the issue of fraud, duress, or coercion in connection with confessions or statements. Another subtopic is what constitutes coercion, duress, or fraud in connection with pleas of guilt; a third area is where a defendant has purportedly been coerced by the judge or prosecutor into pleading guilty, or where law enforcement officers are involved in some sort of fraud, duress or coercion.

Another area of law in connection with alleged coercion, fraud, or duress under Section 440.10 is where the prosecutor’s acts with respect to the guilty plea, constitute duress or fraud. There is a fair amount of case law with respect to fraud in connection with sentencing. Finally, there is the issue whether defense counsel’s acts constitute fraud or duress.

This article only presents a skeletal overview of this complicated, complex, and involved area of law. It is the hope, however, of the author, that enough law has been touched upon and presented such as to guide defense counsel, or the prosecutor, as to what may be said to constitute or not constitute fraud, duress, or coercion, as to require vacation of the guilty plea under Section 440.10 of the Criminal Procedure Law.
(d) The ground or issue raised relates solely to the validity of
the sentence and not to the validity of the conviction.
3. See People v. Corso, 40 N.Y.2d 578, 388 N.Y.S.2d 886, 357
N.E.2d 377 (1976) and People v. Jackson, 78 N.Y.2d 638, 578
191 (1958); People v. Dayter, 33 A.D.2d 1055, 307 N.Y.S.2d 244
5. People Ex Rel. Johnson v. Batterman, 68 Misc.2d 26, 324
1967). See on this also, People v. Goldstein, 1 A.D.2d 1044, 152
N.Y.S.2d 330 (2nd Dept. 1956).
N.E.2d 190 (1962). See also on this People v. Willis, 49 A.D.2d
See also People v. McCabe, 289 A.D.2d 603, 733 N.Y.S.2d 782
(3rd Dept. 2001); People v. Ward, 34 A.D.2d 865, 612 N.Y.S.2d
99 (2nd Dept. 1970); People v. Jones, 17 A.D.2d 970, 234 N.Y.S.2d
108 (2nd Dept. 1962); and People v. Fairfax, 9 A.D.2d 981, 194
12. People v. Pellegrino, 37 Misc. 2d 313, 233 N.Y.S.2d 276 (Court
of Special Sessions, Westchester Co. 1962).
Kings Co. 1995) and People v. Hanley, 255 A.D.2d 837, 682 N.Y.S.
245 (3rd Dept. 1998).
16. 303 N.Y.3d 227 (1951). See also on this People v. Didonato, 263
A.D.2d 677, 695 N.Y.S.2d 145 (3rd Dept. 1999) and People v.
17. 100 A.D.2d 775, 474 N.Y.S.2d 49 (1st Dept. 1984).
20. 31 A.D.2d 846, 297 N.Y.S.2d 5 (3rd Dept. 1969). See also on
this People v. Gaiss, 20 A.D.2d 715, 247 N.Y.S.2d 249 (2nd Dept.
1964); People v. Heffernan, Misc. 2d 35 213, 230 N.Y.S.2d 405
(1962).
22. 300 A.D.2d 909, 753 N.Y.S.2d 159 (3rd Dept. 2002). See also on
this People v. Jachimowicz, 292 A.D.2d 688, 738 N.Y.S.2d
770 (3rd Dept. 2002); People v. Stanton, 24 A.D.2d 876, 264
N.Y.S.2d 386 (2nd Dept. 1965). Cf. however, People v. Pichardo,
298 A.D.2d 101, 748 N.Y.S.2d 545 (1st Dept. 2002); People v.
24. 16 A.D.2d 704, 227 N.Y.S.2d 969 (1962). See also on this
1962); People v. Robertson, 35 Misc. 2d 166, 229 N.Y.S.2d 37 (Ct.
of General Sessions, N.Y. Co. 1962); People v. Brim, 22 Misc.
2d 335, 199 N.Y.S.2d 744 (Ct. of General Sessions, N.Y. Co. 1960);
People v. Saladak, 15 Misc. 2d 506, 183 N.Y.S.2d 276 (Westchester
Co. 1958).
In the early days of my law practice, the general wisdom about jury selection was that you never asked the jury to express any bad opinions or attitudes that might be unfavorable to your case. The thinking in those days was that if one panel member expressed a bad opinion, it would somehow “taint” the rest of the panel. If a bad opinion was stated in open court, a young lawyer was advised to request a mistrial and start over, trying not to tread into that dangerous territory again. In my 25 years of practice, this was some of the worst advice I ever received about how to select a jury. This approach did not work then and does not work now.

Jury panels today are more educated than ever before about the judicial process, the rules of evidence, and the conduct of trials. Potential jurors come to the courtroom with strong attitudes and opinions about criminal trials, lawyers, and the accused person sitting in the chair next to you. Some have the same kind of beliefs you may have expressed about problems with the legal system. Some of them come to the courtroom with an agenda, i.e., that they are not going to be like those other “crazy juries” that let someone off on a technicality. Ironically, as jurors have gotten more opinionated and biased, many judges have responded by limiting jury selection so these “attitudes” are not openly expressed, rather than recognizing that, the more biased the jury pool, the greater the need for an extensive voir dire.

Your job in jury selection, if the judge allows you to question the panel, is to identify and eliminate those “agenda” jurors who are there to wreak havoc in the jury room, who will disregard the presumption of innocence and, regardless of whether there is proof beyond a reasonable doubt, will lead the charge to convict. The only way to do that is to ask them the things that scare you most. If you do not bring the attitudes of those jurors out in voir dire, they will, without your knowledge, take those attitudes back to the jury room and, behind closed doors, do everything they can to prevent an acquittal, even when your client is innocent.

I. Getting The Panel To Talk To You

There you are standing in front of a group of 30-70 complete strangers and you want them to open up to you about their secret, innermost fears and feelings about crime, lawyers, and the legal system. How do you get them talking? In this age of Oprah Winfrey-style talk shows and self-confessions, it is easier than you might think. The key is to focus on what should be the three goals of jury selection: gather information; educate the jury about your case and the legal process; and develop rapport.

A. Gather Information

The more you know about a potential juror, the better off you are. If you are given enough time for a thorough voir dire, you must get sufficient information from a panel member to help you decide whether they are “one of yours”, “a disciple of the prosecution,” or somewhere in the mushy middle. Without that information you will not be able to challenge for cause or intelligently exercise a peremptory challenge. Here is how you get them talking:

1) Ask Open-Ended Questions

If you want jurors to talk to you, then you must ask them questions that cannot be answered merely with a yes or no. Start your questions with the journalist’s five W’s or an H — Who?, What?, When?, Where?, Why?, and How? To that list, you can add open-ended questions that ask them to “describe” or that start with “How many of you ...think feel or believe...” This last question gives those answering some comfort that there may be other people who feel the way they do and makes them believe they will not be the only one raising their hand in answer to your question.

2) Let Them Talk More Than You

The voir dire process is a terrifying one for most lawyers, who are typically control freaks. It’s not like direct or cross-examination where you know what the witnesses will say and can thoroughly prepare to deal with those limited areas. In jury selection, no matter how much you prepare, you have no idea what may come out of the mouths of some of these prospective jurors. Jury selection is like walking across a tightrope without a net.

Many lawyers cope with their fear of jury selection by doing all the talking. This keeps you from having to deal with any unexpected juror answers, but also prevents you from really gaining any information from the panel. Ask your question, then be quiet and listen to the answers. Do not explain things to them. Let them explain things to you. That is the best way to gather the most information possible.

3) No Lawyer Words

A former client once postulated (a lawyer word) that attorneys deliberately use Latin phrases and big words so they can justify their high fees. Although some people think big words work for fee setting, speaking in a foreign lawyer language does nothing to aid communications with your prospective jury panel.
If they do not understand the words you are using, they will not let you know. It is embarrassing to admit in public that you have no idea what somebody is talking about. Rather than question your phrasing, most jurors will just nod as if they know what you are talking about and you will not get an accurate answer to the things you are concerned about.

Contrary to the belief of some attorneys, jurors are not impressed by ten-dollar words. They tend to gravitate toward the lawyer in the courtroom that speaks in their language. Some examples of words to use, rather than the words on the right:

- The accused/name not the defendant
- The prosecutor not the state, the people’s lawyer
- Before/after not prior/subsequent
- Car/truck not vehicle
- Jury selection not voir dire

4) **Do Not Be Judgmental**

Nothing will stop the flow of information like a well placed “tsk, tsk,” even if it is under your breath. Even worse is asking that the juror be excused for cause in front of the other panel members. No one else will talk to you about their true feelings and risk public humiliation.

No matter how abhorrent the opinion being given, thank the prospective juror for his or her honesty. You should mean it. If the candidate had not been honest with you, you would not know that you needed to strike him or her. If you have made a decision to try and strike the prospective juror for cause, keep gathering sufficient information for your challenge. Once you have enough information, move on or “bounce” (see below) off another juror.

5) **No Note Taking**

How would you feel if someone you were having a conversation with began writing down everything that you said? Chances are you would stop talking to the person who was writing down your comments. The prospective jurors feel the same way.

No matter how small your office, you cannot afford to do voir dire alone and try to keep track of the information being provided by the jurors. If you do not have the resources to hire a jury consultant, then have a friend, a secretary, an associate, or some intuitive person from off the street be responsible for writing down the information provided by the jurors. This will free you to maintain eye contact with each juror and to carry on a conversation that encourages them to provide more information.

B. **Educate The Jury About Your Case And The Court System**

Modern jurors now come to the courtroom with some information and a great deal of misinformation about how the court system works. Although they may have watched all of the Scott Peterson trial, they still may not understand some of the simpler concepts like the difference between a criminal and civil case or the plaintiff and the defendant. They look for someone in the courtroom to help them understand all these things. Although voir dire is not the time to explain all of your case or all of the intricacies of the criminal justice system, if you are doing your job, a jury’s education begins at that time.

1) **No Lecturing. Make Them Think**

How much information do you remember from all of those classroom lectures you heard in high school and college? Unless the speaker was unusually dynamic, you probably do not remember much. Most learning comes not from someone telling you what to think, but from thinking things out yourself. The same is true for your prospective jurors.

You will get nowhere by telling them what to think. Avoid the standard lawyer questions you hear in voir dire that begin with the following:

- I am sure we can all agree that ________.
- Do you all agree that everyone deserves a fair trial (before you send them off to prison)?
- By your silence, I assume all of you can be fair and impartial to my client.

None of these lecturing-type statements get you anywhere with the jury. A juror is unlikely to challenge you on a statement of a legal principle, even if he or she disagrees. Some will nod their heads, most will do nothing, and you will have no idea about their true feelings.

Instead, educate them through questions about some of the unique challenges they may be facing as jurors in your case. Do you remember the Socratic Method? That is how we learned to think like lawyers and how the jurors can learn to do their jobs in this case. Remember, many of the things they will be asked to do are new to them. They may never have thought about how they will accomplish these tasks. Asking them questions about how they will judge credibility will tell you much about their thinking process and will educate both you and them along the way. Consider the following example:

Q. How many of you have ever had to decide between two people (your kids, your employees) who was telling the truth?
Q. How did you go about determining who was telling the truth between those two people?

Q. What factors were important to you in making that determination?

Q. Can you think of some reasons why a person (or your children) might lie? [You might go to several jurors for the answers to these questions. They will probably come up with the reasons pertinent to your case — for money, to get out of trouble, for revenge. If not, then ask whether they have ever seen people lie for those reasons]

Q. Can you think of some reasons why a person, even an “eyewitness,” might be mistaken? [Again, go to several jurors to elicit the factors that apply to your case — had light-ing, distance, fear, etc.]

Q. Are there some things you should not use in deciding whether one person is telling the truth and another is not?

• How about the race of the person? Why should not that be used?
• How about a person’s occupation? Why should not that be used?
• How about the sex of the person? Why should not that be used?

2) Intersperse Facts With Questions

In Texas, you can give your opening statement in voir dire. In Arizona, you can give a brief opening before jury selection begins. For those of you who practice in those jurisdictions, have it at. Every where else, you have to intersperse your facts and questions.

Although most judges feel voir dire is not a time to give your complete opening statement, you have to give the jury some idea of what your case is about in order for them to intelligently evaluate their own biases and give you honest answers to your questions. Once prospective jurors have an understanding of the facts of the case, they are more easily able to identify and tell you about their own personal biases.

In truth, lawyers do not eliminate jurors as much as jurors eliminate themselves by an honest recitation of their potential prejudices. That works best when they know more facts about the case. Even the most restrictive judges should understand that the jury has to know something about the case to (a) respond to your questions and (b) not get angry that you are asking these personal questions for no reason. For example, it would be rude to ask for a show of hands of all those women who have been raped or had family members raped, without first explaining that your case involves a sexual assault.

The best and probably the most interesting way to let the jury know about the important facts of your case in voir dire is to intersperse the facts with your questions. For example, does your case involve self-defense? Tell the jury that before you ask them whether they have ever been in a situation where they were afraid they might be hurt or killed.

3) Questions Should Be Related To Your Theme/Theories of The Case

Why wait until opening to try out the themes in your case? For example, if one of the theories of the case is police misconduct, you have to run that up the flagpole in jury selection and see how your jurors respond. Despite the Rodney King case, some of the panel will still never believe that law enforcement officers could ever act improperly or “testilie.” If they are unwilling to even consider what may be a central theory of your case, you want to find them and hopefully, exclude them.

4) Use Current Events To Elicit True Feelings

Although many prospective jurors are reluctant to admit that they are biased or prejudiced in any way, their views of cases in the news may give you their true feelings about some of the issues in your case. For example, a panel member’s reaction to either the Kobe Bryant or Scott Peterson cases may reveal something about his/her true feelings about allegations of sexual assault or accusations of marital homicide. Find a case with controversial issues that have been already debated in the press and ask your jurors about it. The things they reveal in their discussions of the case may reveal prejudices they would be reluctant to admit head-on.

5) Bounce Prospective Jurors’ Opinions Off Other Candidates

My best jury selections occurred when one or two jurors took extreme positions on issues. Realizing that I would never talk them out of their positions, I asked the other jurors what they thought about these extreme positions. What ensued was a rousing debate over the issue in question, with the vast majority of jurors standing up against these extreme opinions and explaining why our criminal justice system, with all its flaws, was the best in the world because it erred on the side of letting a questionably guilty person free, to protect the innocent. Those ideas came from the jurors, not me.

When one juror espouses an extreme position, explore that briefly (unless you want to lay the foundation for a cause challenge through leading questions). You and your assistants should watch for those who are nodding in agreement
with the abhorrent opinion. Then ask whether any other jurors disagree with that position. Talk to those on the opposite side of the issue and see who nods in agreement with them.

6) **Put Them In The Shoes Of Your Client**
You understand a person’s position best by being asked to argue for it. If a juror states a negative opinion towards your client’s case, test the strength of their convictions by asking them how they would go about convincing someone else of the position they have just rejected. Those who are unable to do so may be so thoroughly entrenched that you wish to seek a cause challenge. Those who are able to see the other side may make good jurors.

C. **Develop Rapport**
The best way to establish a rapport with a jury is to be honest with them. That means being honest about some of your concerns, your own fears about their views and your views about the judicial system.

Most importantly, you must ask the things that scare you the most. Some of the ten things that should scare you the most in a criminal case are listed in the next section.

II. **The Ten Scariest Jury Issues In A Criminal Case**
The advent of Court TV and in-court cameras has resulted in jurors who are more educated that ever before about the criminal justice system. As we know from the hazards of eyewitness testimony, a group of people can all witness the same thing and come away with very different views. So it is with the media-watching public. Most of the panel will have a great fear of crime (despite the fact that crime statistics are down, the latest brutal murder is beamed instantly into our living room). Some will mistrust the government and its ability to catch and prosecute the right person. Some will believe that juries can not be trusted. All will believe that they, personally, can be trusted to do the right thing.

The good news is that the average American citizen still wants to do what is fair and right. Those citizens want the system to work correctly and believe their presence on the jury will make that happen. In talking with them about the things that concern them, you need to be looking for people who have no pre-set agenda but can be fair.

Although *voir dire* is unique for every case, here are the top ten areas you may need to talk to them about:

1) **Fear Of Crime/Victim Rage**
We are all afraid of crime. On every jury panel you will find that the majority of jurors or their family members have been victims of some kind of crime, whether burglary, sexual assault, or even homicide. No one wants to be soft on crime or to be perceived by their neighbors as being soft on crime. How do you help people set that aside so they can fairly hear the case before them? You must match the fear of crime with something that should be a greater fear — the fear of wrongfully convicting an innocent person.

If you have time, first find out what each juror’s experience is with being a crime victim. How did they feel after the crime? Did they catch the person who did it? What happened to that person? How did they feel about how the criminal justice system handled the case? Remember, the most important information is not what happened to them, but how it affected them. Then explore some of the things you are most concerned about:

Q. How many of you think that criminals have too many rights or that the courts have made it too difficult to prosecute and convict criminals?

Q. What kind of rights do you think we should give to criminals? Should we change the criminal justice system to make it easier to convict people? How should we change it?

Q. Now let me change the question a little bit. Rather than use the word “criminal,” let me ask how many of you think that American citizens, including those who might be accused of a crime, have too many rights?

Q. What rights would you want if you were falsely accused of a crime?

Q. How many of you at any time in your life, including your childhood, have ever been falsely accused of something you did not do?

Q. What happened when you were falsely accused?

Q. Did people believe you based on your word when you said you did not do it?

Q. Were you able to prove that you did not do it?

Q. How did you go about proving you were innocent?

Q. Were you able to prove your innocence? Are there still people who do not believe you?

Q. You think there would have been a fairer result if your accusers had to prove you were guilty, rather than you proving you did not do it?

Q. When you hear that a guilty person went free or an innocent person was convicted, which seems worse to you? Why?

Q. Have you thought about what kind of proof you are going to require before you convict a person? What things will be important to you in making that decision?

Q. You have probably heard the phrase “proof beyond a reasonable doubt” in criminal cases. What do you think about the state having that burden?

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VOIR DIRE  
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Q. What would you do if you thought the accused person was probably guilty, but the state had not convinced you of his/her guilt beyond a reasonable doubt?

2) The Accused’s Previous Record

Q. What do you think about someone who has admitted breaking the law in the past?

Q. Once a person has admitted breaking the law, can they ever be trusted again?

Q. How many of you have ever known someone that made a mistake in the past and then straightened out his/her life?

Q. Tell me about that person. How do you feel about him/her now? Would you trust him/her?

Q. If something turned up missing at your house and that person was there, would you suspect him/her? Why or why not?

Q. The reason I am asking you about these things is because (client’s name) is someone who made a mistake (or some mistakes) in the past. When he/she was younger, he/she stole some money, was caught, admitted his/her guilt and went to prison. Since then he/she has worked very hard to overcome that mistake. That past mistake is one of the reasons the police suspected him/her in this case... but he/she did not commit this crime. I am concerned that because of that past mistake, you may not listen to what he/she has to say. How do you think this past mistake will affect you in listening to the evidence in this case?

Q. Have you ever heard of an innocent person being picked up and falsely accused by the police because of a past criminal record? Why do you think that happens?

Q. How are you going to keep the kind of biases the police have against ex-felons from affecting your decision in this case?

3) Racial Issues

Q. How many of you have ever had family, friends, or have yourself ever been discriminated against or witnessed discrimination against another person?

Q. Tell me about your experience. How did it make you feel when it happened? What did you do when it happened?

Q. What do you think about affirmative action programs in the workplace or for college admission? Have you ever felt discriminated against because of those programs? What did you do about it? Who do you blame for that discrimination?

Q. Have you ever felt that any minority groups have been getting ahead too quickly in the last ten years?

Q. How do you feel about inter-racial dating? How about in your own family?

Q. Would you say this is a good place or a bad place for a (Hispanic, African-American, Asian, etc.) to stand trial? (This question courtesy of Michael Stout, who always accuses me of stealing his best stuff without giving him credit). Why? (I am sure Michael would come up with that “Why” question too).

Q. I have heard some stereotypes about (African Americans, Hispanics, Asians, etc.). Give some examples. What kind of stereotypical comments have you heard? What do you think about those comments? How should you deal with those kinds of comments in the jury room?

Q. What effect should the race of Mr./Ms. ______ have on your decision in this case?

Q. How would you feel if you were on trial in a foreign country and the judge, all the lawyers, the bailiff, and all the jurors were (African-American, Hispanic, Asian, etc.)? What concerns would you have under those circumstances about getting a fair trial?

Q. Since Mr./Ms. ______ is in that exact situation, how can he/she get a fair trial?

4) Eyewitness Identification

Q. Have you ever thought you saw someone you knew and then realized you were mistaken? Tell me about that experience.

Q. Why do you think you were mistaken?

Q. What kinds of things can make a person believe they saw someone or something they did not really see? [Bounce off several panel members to elicit all of the elements that may be in your case]

- Bad lighting
- Distance
- People look alike
- Bad vision/no glasses
- -Expecting to see a particular person there
- Similar clothing
- Corner of your eye
Q. Have you ever heard of people who are eyewitnesses to a crime being mistaken about the identity of the person there? Have you ever heard of an innocent person being convicted and sent to prison based on mistaken eyewitness testimony? What did you hear?

Q. How can that happen?

Q. What things will be important to you in deciding whether the eyewitnesses may be mistaken in this case?

5) Accused May Not Testify

Q. How many of you are aware of the constitutional right that says an accused person can never be called as a witness against himself or herself at trial?

What do you think of that rule? Why do you think that rule exists?

Q. If someone were falsely accused of a crime, can you think of a situation where he/she might not want to testify at the trial? [Again, bounce off as many jurors as possible to flesh out this answer].

- Not a very good witness
- Not very smart or educated
- Easily misled by the prosecutor
- Fear
- Too much pressure
- Embarrassed about his/her past
- The state has not proven its case

When you get the inevitable answer, “Because he/she is guilty,” try the following response:

Q. You know, that may be the reason in some cases and that is the very thing I am concerned you may think in this case if I make the decision that Mr./Ms. _________ should not testify. Unfortunately, if I decide he/she should not testify, the law does not allow us to tell you why that decision has been made. That means you will not get to know if it was because he/she was afraid, or would not make a very good witness or any other reason. How will you feel if you can not know the reason I have decided he/she should not testify?

Q. What will you think about Mr./Ms. _________ if I make the decision he/she should not take the stand?

Q. Since the law does not let me tell you the reason, how will you deal with your curiosity about that?

Q. Would it be fair to guess or speculate about the reason I have decided he/she should not testify, if you are not allowed to know?

6) War On Drugs

Q. Have you had any personal experiences, either yourself or with your family members or friends, regarding the abuse of alcohol or drugs? Tell me about your experiences.

Q. How was the person’s drug or alcohol abuse problem handled?

Q. Was the person ever arrested or put in jail? How did that affect his/her problem?

Q. Did he/she ever receive any treatment or counseling? How did that work?

Q. How do you think we should deal with the drug problem? What is most effective?

Q. What do you think about the government’s War On Drugs? Are we winning or losing? Why?

Q. Have you ever heard of any government abuses that have occurred in the name of the War On Drugs? Please tell me about them.

7) Police Misconduct

I usually discuss the police in the context of my previous credibility questions, i.e., should you believe or disbelieve a person just because of his or her occupation? Why or why not?

Probably the best discussions about police misconduct come from those who are on the police force or who know people on the police force. Identify those people and explore how well they know the police officer, whether they have ever discussed cases, crime and the criminal justice system, then ask them the following:

Q. From your own experience or your discussions with your friend/relative on the police force, have you ever heard about bad cops who are willing to lie or plant evidence? Tell me about that.

Q. Why would a police officer ever do such a thing? [You may wish to explore this with several jurors]

- To make a case
- To get a criminal they have not be able to catch
- For a promotion
- For revenge
- To make a quota

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Q. Have you ever heard of a police officer who did not deliberately lie, but who may have been mistaken — either about the evidence or about arresting the wrong person? Tell me about your experience. How can that happen?

- In a hurry
- Gets bad info from the witnesses
- A snitch lies
- Bad or incomplete investigation

Q. What things will be important to you in deciding whether the police officers who may testify in this case are lying or mistaken?

Q. Is there anyone who thinks there has been too much criticism of the police recently? Why? Are there ever any circumstances in which the police should be criticized? Tell me about those circumstances.

8) Fragile Witness — Child/Crying

If you are going to have to cross-examine a fragile witness during the course of the case, do not wait until they are on the stand to tell the jury about him/her. You must bring it up in jury selection. Again, the most effective way to do that is during your discussion of how the jury should determine credibility.

(a) The Child Witness

Q. In judging the credibility of a person, should you use a person’s age to determine whether or not he or she is telling the truth? Why or why not?

Q. Have you ever known children to tell lies? Perhaps I should ask the opposite question — have you ever known a child who has never told a lie?

Q. Why do children lie? [Use several jurors for this answer].

- To keep from getting in trouble
- To get someone else in trouble
- For attention
- For a reward
- To get even
- To keep from having to do something they do not want to do
- Because they are led to lie
- Because the adults around them ask them to
- To please a parent
- To protect someone else

Q. What will be important to you in determining whether the child in this case is telling the truth, is lying, or is mistaken?

(b) The Crying Witness

Q. In judging the credibility of a witness, should you consider whether or not the witness cries or shows emotion when he/she testifies? Why or why not?

Q. Are there other reasons a person might cry when they tell you a story, other than that they are telling you the truth? What reasons are those?

- Acting
- Upset about being in court
- Covering up their own wrongdoing
- Fear

Q. Have you ever been fooled by someone who cried when they told you a false story?

Q. How many of you saw Susan Smith crying on television before she was arrested for the drowning deaths of her two sons? How many of you believed that her sons had been kidnapped before the real story came out?

Q. I am asking you these questions because, even though this event occurred over one year ago, I expect one government witness will come in and cry for you as she testifies. We intend to show you that she is mistaken/lying, but I am concerned about how her crying may affect you. How many of you think you may be affected in your decision about credibility based on someone’s tears?

Q. How are you going to determine whether the witness is crying because of remorse, guilt or just acting? If you cannot make that determination, how many of you are willing to exclude the crying factor all together in trying to determine credibility?

9) Psychological Testimony/Defenses

Q. Have you or anyone you have ever known suffered from a mental illness? Would you mind telling us about that?

Q. What kind of effects did the mental illness have on this person? Was it as debilitating for this person as a physical disability is for some people?

Q. Did this person have any control over their behavior when they were under the influence of this disease? Did they ever get in trouble because of this illness?
Q. Who was to blame for the trouble they go into?


Q. How do you think we should deal with the mentally ill?

Q. Some people do not believe mental illness exists. How do you feel about that?

Q. Have you ever known anyone who consulted with a psychologist or psychiatrist?

Q. What do you think about psychologists or psychiatrists?

Q. What concerns will you have if you are asked to find the accused not guilty by reason of insanity?

10) Homicide/Self-Defense

Q. Mr./Ms. __________ is charged by the state with killing Joe Randall. In fact, he/she did kill Joe Randall. [Pick someone who looks shocked or distressed by this revelation]. Juror X, you looked surprised when I just told you that. What do you feel about someone who took the life of another human being?

Q. Is there ever any time when you believe one human being is justified in killing another human being? What are those circumstances?

Q. Under what circumstances is a person justified in acting in self-defense?

Q. You talked about acting in self-defense when a person is afraid. How many of you have ever been in a situation where you were afraid and thought you might have to act in self-defense? Please tell me about those situations.

Q. Why were you afraid? What did you do? Did you have a weapon? If you had one in your possession, what did you do or what would you have done? What were you thinking about at the time you were attacked or threatened?

Q. Should you have been punished if you had been pushed to use deadly force to protect yourself? Why not?

Q. How many of you think a person should be punished by a conviction or jail time if they kill someone else, even if they were acting in self-defense? What should happen to someone in that situation?

Q. How do you think a person feels after killing someone in self-defense?

Q. If that person is not convicted or does not go to jail after that kind of killing, do you think most people still suffer for what they did . . . even if it was justified at the time?

III. Developing A Challenge For Cause

Although our prospective jury panels have become more and more biased over the years, the response of many judges has been to reduce, rather than extend the time allowed to question the panel. Worse, the attitude of some judges is to try and select the jury as quickly as possible. These judges are reluctant to strike any juror for cause and will go out of their way to rehabilitate bad jurors. We have all been there. It goes something like this:

Juror to lawyer: I think if the state files criminal charges against someone, they must have done something wrong.

Judge (sensing a cause challenge jumps in) Excuse me, Mr. Juror. You really do not mean that, do you?

Juror: Of course, your Honor.

Knowing that the judge may try to rehabilitate a juror, how can you develop a cause challenge that cannot be overcome without the court risking reversal on appeal?

A. Switch To Leading Questions

Just like the rehabilitating judge did in the example above, once you decide you want to strike a juror, you should switch from non-leading questions to leading questions.

B. Cement The Juror’s Commitment To His/Her Opinion

Some jurors simply repeat what they have heard about cases and judicial system in the media. Before deciding to reject the juror, explore the depth of their commitment to the opinion they have expressed. You may want to test the opinion by asking them to argue the other side or point of view from their own (see above). If they are unable to do so, be afraid, be very afraid. In order to build your record for a cause challenge, cement and commit them to their position.

C. Complement Their Honesty And Deep Thought On The Issue

As discussed above, always thank the jurors who are honest enough to reveal their biases against your case. This might go something like this:

Juror: I think any unrelated adult who would sleep in the same bed with a child, must be a child molester.
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Lawyer: Thank you for sharing your personal view on this matter. It appears that you have given a great deal of thought to this issue, is that correct?

Juror: Yes, I have.

Lawyer: And it is based on your own life experiences?

Juror: Yes, it is.

Lawyer: And your own personal and deeply held views on the value of life?

Juror: That is right.

Lawyer: Having come to this conclusion after a great deal of thought, I do not expect there is anything someone like me could do to talk you out of that view?

Juror: No.

Lawyer: Because this is based on your own life experiences, there is nothing anyone could do at this point to change your mind?

Juror: Nope.

Lawyer: Not even if it was someone in a position of authority, like the judge?

Juror: No.

D. Find All The Jurors Who Agree With The Extreme Position

Now that you have established the basis for your cause challenge, find all the other panel members who agree with the extreme position the juror has taken. Because you have been so nice and complimentary, they may be encouraged to tell you the truth. Go through similar questioning with each one to pin down the cause challenge.

E. Find All The Jurors Who Disagree With The Extreme Position

After you have uncovered all of your case-killing panel members, ask if there is anyone who disagrees with the extreme position? Switch back to open-ended questions to discover why they oppose the views expressed by those who have closed minds on this issue. Remember, you have to find your friends as well as your enemies to intelligent exercise your preemptory challenges.

We all stand on the shoulders of those who come before us. Everything I have learned about jury selection has come from those great lawyers and jury consultants who preceded me into the courtroom. This article is a compilation of the wisdom I learned from them. Thank you Cat, Michael, Linn, Charlie, Joe, Sunwolf and all of you who made me not only a better lawyer, but a better person.

TESTIMONY

Ed. Note: Here is testimony given on behalf of the New York State Association of Criminal Defense Lawyers by Vice President George Goltzer at the New York State Assembly Code Committee’s Hearings on DNA Storage. The hearings were held on Tuesday, October 10, 2006 in New York City.

NYSACDL STATEMENT ON DNA EVIDENCE PRESERVATION

The New York State Association of Criminal Defense Lawyers is a statewide bar association comprised of over eight hundred criminal defense attorneys dedicated to insuring the fairness and integrity of the criminal justice system and providing our clients with the rights afforded them by the New York State and United States Constitutions. The NYSACDL is an affiliate of the National Association of Criminal Defense Lawyers.

Since the advent of modern DNA technology nearly two hundred prisoners convicted of serious crimes have been exonerated and released from death rows or long prison terms by the application new technology to old evidence. The NYSACDL believes that many more wrongly convicted persons languish behind bars as a result of mistaken identifications, false confessions and false testimony. We recognize that we labor in an imperfect system where tragic errors are made. If our criminal justice system is to have any integrity it must be prepared to recognize and correct its mistakes.

We commend the Innocence Project of the Cardozo School of Law of Yeshiva University for its extraordinary work in correcting unjust convictions, and particularly Barry Scheck and Peter Neufeld, who have set the standards for such work around the United States.

DNA testing is an invaluable tool for both exonerating the innocent and identifying the guilty. It is imperative that New York State have a statewide system of collecting, cataloguing, preserving and using biological evidence for forensic identification. We must preserve biological evidence connected to unsolved cases, and in all cases where sentences are being served and future technology might identify a wrongful conviction. Such system should enable our sixty two counties to share information with each other and other States. There must be severe sanctions for the unauthorized destruction of biological evidence or interference with identification of wrongful convictions. These mechanisms are critical to the integrity of our criminal justice system and the protection of our citizenry.
GENERAL FORM

I, ____________, residing at _____________, __________, New York, hereby assign and consent to the release of $_______ now held by the _______ County Office of Sheriff and Correctional Facility/Department of Finance, which I posted as bail for _____________, on or about ______, __, 2-__, to ____________, Esq., Mr.______’s attorney, upon presentation of this document.

Dated: ____, __, 20__

Name of Bailor

Sworn to before me
This ___th day of __________

________________________
Notary Public
New York

NEW YORK CITY BAIL REMISSION FORM

NYC DEPARTMENT OF FINANCE
BUREAU OF TREASURY, CLIENT SERVICES UNIT
ONE CENTRE STREET, ROOM 2200
NEW YORK, NEW YORK 10007

TO: Commissioner of Finance, City of New York
Department of Finance, Client Services Unit
One Centre Street, Room 2200
New York, NY 10007

RE: BAIL ASSIGNMENT

I, _____________________________, living at ___________________________ do hereby assign, set and transfer unto ___________________________ all my rights, title, and interest in the sum of $__________ which was deposited with the Commissioner of Finance, City of New York as collateral for the cash bail in the case of the People vs. ______________________. The docket number is ______________ and the receipt number is __________. The Treasury Receipt number (TR#) if available, is ____________________.

The check should be made out to ____________________________ and mailed to the following address:
______________________________________________.

NOTE: THE ORIGINAL BAIL RECEIPT MUST BE ATTACHED TO THIS ASSIGNMENT. IF IT IS NOT AVAILABLE, A LOST BAIL RECEIPT AFFIDAVIT MUST BE COMPLETED AND SUBMITTED WITH THIS ASSIGNMENT.

STATE OF NEW YORK)
COUNTY OF )

________________________
Signature of Surety

Sworn to before me this ________
day of __________________, 20__.

________________________
NOTARY PUBLIC

________________________
Commissioner of Deeds
WEAPONS FOR THE FIREFIGHT

DNA maven Professor Larry Kobilinsky and Director Greg Clarke at the Weapons for the Firefight seminar on October 20. CD-roms of course materials from lecturers Peter Gerstenzang which included a Legislative Update and Suspension of License Pending Prosecution, Stephen Fein, Stephen Singer, Scott Greenfield and Kobilinsky are available. To order, contact us via email at nysacdl@aol.com.

DMV maven Steve Fein and Stephen Singer at the Weapons for the Firefight seminar. Fein gave a DMV Update and Singer lectured on Picking the Right Jury.

Lenny Ressler and Stephen G. Murphy at the Weapons for the Firefight seminar.

The New York State Association of Criminal Defense Lawyers is an accredited New York State Continuing Legal Education Provider.

To register or for information on our 2006 CLE Schedule, please contact Patricia Marcus at (212) 532-4434 or via email at nysacdl@aol.com or visit our website at www.nysacdl.org.
ANNUAL NYACK TRAINER

The Annual Nyack Trainer held on September 30 at the Best Western on Hudson in Nyack featured lecturers by Larry and Dan Hochheiser, Bruce Barket and our Past-President Murray Richman. CD-roms of the course material on Openings and Closings, False Confessions and Trial of a False Confession case are available. To order, email us at nysacdl@aol.com.

Renee Hill and Past-President Murray Richman at the Criminal Law Update in Nyack, where Murray was a lecturer.

(left to right) Dan Hochheiser, member Ned Hamlin and Director Bruce Barket at the Nyack seminar. Barket lectured on the defense of a false confession case.

Dan Hochheiser and Larry Hochheiser at the Criminal Law Update in Nyack.

Past-President Bill Aronwald and former Vice President Steve Pittari at the Nyack seminar.
EYEWITNESS IDENTIFICATION LITIGATION CONFERENCE
IN WASHINGTON, D.C.

by Dennis R. Murphy

The NYSACDL was represented by NYSACDL Director Dennis R. Murphy at a two-day session on Eyewitness Identification, sponsored by the District of Columbia Public Defender Service, attended by litigators from around the country. The program, part of an annual “forensic” litigation training sponsored by the PDS was part informational and part skills development.

The faculty was an all-star cast, including Jim Doyle from Massachusetts, attorneys from the Los Angeles County Public Defender's office, and Georgia Public Defender Services; policy types Barry Scheck, NACDL and Innocence project staff; noted researchers Dr. Steve Clark of University of California Riverside, Dr. Charles Morgan the VA Hospital in Connecticut, Dr. Kathy Pezdek of Claremont and Professor. Nancy Steblay from Minnesota. Dr. Morgan, in my mind, is a fabulous resource.

The goal of the program was to orient attendees to developments in eyewitness litigation and provide hands-on guidance in handling such cases. The materials are first rate and are available on the "Members Only" section of the NYSACDL website. It contains a long list of ID experts, important cases (e.g., state decisions providing more relevant factors than Manson v. Brathwaite), "best practice recommendations" (including the seminal DOJ/NIJ report, state level reform pronouncements such as the New Jersey Attorney General's package of reforms, the American Bar Association, commissions from other states like Virginia, Massachusetts, Minnesota, North Carolina, West Virginia, and California), major research efforts (e.g., law review articles, field studies documenting the success of various innovations, juror polls, NACDL Champion articles, a critique of the controversial Illinois pilot study), and pleadings (mostly District of Columbia based but well done and interesting).

Also, there is an NACDL Eyewitness ID listserv, which is coordinated by Tim O'Toole of PDS. NYSACDL members who are interested in joining this topic-specific listserv and are members of the NACDL (which is not nearly as burdensome as our own listserv) should contact Patricia Marcus, Executive Director of NYSACDL at nysacdl@aol.com

Recent posts have highlighted current reform efforts in various states (e.g., New Mexico and Massachusetts and the need for pilot studies to refute the misleading Illinois study. It is encouraging to note that there are some focused efforts in some states (District of Columbia and Maryland) to carefully develop good trial court and appellate decisions and discourage weak efforts which may make bad law.

Those of you who are particularly interested in improving the environment for effective eyewitness litigation in New York State through legislation, training, test cases, and brainstorming, please contact Board Members Gregory Clarke, the chair of NYSACDL's eyewitness subcommittee or me. We have drafted legislation and are developing a number of interesting concepts for improving.

If you have a case in which you might be using an expert (and confronting the inevitable Frye challenge) or know of anyone who has such a case, keep us informed. A half-hearted effort that results in bad law hurts all of us. In addition, we are always looking for low-cost or no cost alternatives to presenting an ID defense. There are examples on the Members-Only section of the NYSACDL website. Please send us your ideas, jury charges, or questions. Gregory Clarke, Eyewitness Subcommittee Chair and Board Member - GClarke@bas-si.org, or Dennis R. Murphy, Eyewitness Subcommittee member and Board Member - Dennisr.murphy@gmail.com

PRO BONO COUNSEL NEEDED FOR DEATH ROW PRISONERS

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

Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The ABA Death Penalty Representation Project seeks lawyers in firms with the necessary resources to devote to his critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact Robin M. Maher, Director of the ABA Death Penalty Representation Project at 727 15 Street NW, 9th Floor, Washington, D.C. 2005. The email address is maherr@staff.abanet.org or by phone at 202 662-1738. For more information, see the Project’s website: www.probononet/deathpenalty.
HUMAN TRAFFICKING, although not a new problem, has received considerable attention in the last several years. The U.S. government estimates that between 7,500 to 18,500 people are trafficked into the U.S. each year, including into Oregon. Victims of human trafficking are often in the U.S. without authorization and may have been exposed to or involved in criminal activity incident to their trafficking. As criminal defense attorneys, it is possible that you have represented or will represent someone who is a victim or human trafficking. This article provides a general overview of human trafficking, the applicable law, how to identify a victim, the immigration relief available, and why it is important for criminal defense attorneys to understand its relevance.

WHAT IS HUMAN TRAFFICKING?

Trafficking involves the use of force, fraud or coercion in order to place a person in slavery or slavery-like conditions. Trafficking is defined as: “(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose or subjection to involuntary servitude, peonage, debt bondage, or slavery.”

In order to have trafficking, there must be both a means (force, fraud, or coercion) and an end (involuntary servitude, commercial sex act). Trafficking is distinguishable from smuggling, although smuggling can turn into trafficking. Smuggling involves the transportation of a person for illegal entry into another country and is generally done with the consent of the person being smuggled. Trafficking often includes an element of smuggling but also includes force, fraud or coercive labor or sex acts. Industries where trafficking may exist include, but are not limited to: sex workers, migrant workers, factory workers, and domestic workers.

VICTIMS OF TRAFFICKING AND VIOLENCE PREVENTION ACT OF 2000

Congress sought to address the problem of human trafficking within the U.S. by passing the Victims of Trafficking and Violence Prevention Act of 2000 (TVPA). One of the primary things that the TVPA accomplished was that it created special immigration visa categories for survivors of trafficking. The visa categories are the T visa and continued presence. A victim trafficking may pursue both continued presence and a T visa simultaneously.

IDENTIFYING A VICTIM OF HUMAN TRAFFICKING

Victims of human trafficking may be difficult to identify. Victims may first be brought to your attention due to their exposure to or involvement in criminal activity incident to the trafficking. Victims may exhibit physical or mental health problems, including STDs, malnourishment, signs of physical abuse, depression, disorientation, and post-traumatic stress disorder. They may not have any identification, and may be very distrustful of you and others, particularly law enforcement.

When interviewing a possible victim of human trafficking, your questions should focus on the means and ends described above: what type of work the person is doing and whether there is force, fraud or coercion involved in their employment. Questions about how and why they came to the U.S., what they’ve experienced since they’ve been here, and the conditions of their employment are all relevant. Some specific questions that can be useful in identifying a victim include:

- Why did you come to the U.S.?
- How did you get here?
- Do you owe money for your trip?
- Has your identification or documentation been taken from you?
- What type of work do you do?
- Were/are you paid for your work?
- Could/can you leave your job if you want?
- What were/are your living conditions like?
- Has anyone threatened you to keep you here?
- Has anyone threatened your family?

IMMIGRATION RELIEF AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING

Many victims or human trafficking are eligible for different forms of immigration relief. However, there are immigration statuses that have been designed specifically with trafficking victims in mind. These two statuses are: 1) T visas, and 2) continued presence. A victim trafficking may pursue both continued presence and a T visa simultaneously.

(continued on page 22)
HUMAN TRAFFICKING

continued from page 21

REQUIREMENTS FOR A T VIS A

In order to be eligible for a T visa, an applicant must meet the following requirements:

Applicant is a victim of a severe form of trafficking in persons
• commercial sex act induced by force, force or coercion or victim is under 18
• using force, fraud, or coercion to recruit, harbor, transport, or employ a person for labor or services in involuntary servitude, peonage, debt bondage, or slavery

Applicant is physically present in the U.S. in account of the trafficking.

Applicant has complied with reasonable requests from law enforcement.

If an applicant cannot obtain a law enforcement endorsement, the applicant can provide sufficient secondary evidence to support the claim of trafficking.

In order to obtain a T visa, an applicant must provide evidence that the applicant is a victim of trafficking.

Applicant has complied with reasonable requests by law enforcement agency must certify that the applicant is a victim of trafficking.

Continued presence is generally given for one year and may be renewed, but it can also be withdrawn at any time. Continued presence provides for temporary status. It provides a work permit for the recipient, but it does not lead to the possibility of permanent status.

In order to obtain a grant of continued presence for a victim, a federal law enforcement agency must certify that the applicant is a victim of trafficking, that an active investigation is underway and that the applicant’s assistance is needed in the investigation.

A T visa provides for non-immigrant status, but provides a way for a victim to eventually apply for permanent residency.

CONTINUED PRESENCE

Only federal law enforcement may seek continued presence for a victim. The purpose of continued presence is in order to ensure the victim’s availability as a witness or for assistance in the investigation and/or prosecution of the traffickers. Continued presence is generally given for one year and may be renewed, but it can also be withdrawn at any time. Continued presence provides for temporary status. It provides a work permit for the recipient, but it does not lead to the possibility of permanent status. In order to obtain a grant of continued presence for a victim, a federal law enforcement agency must certify that the applicant is a victim of trafficking, that an active investigation is underway and that the applicant’s assistance is needed in the investigation.

A T visa, on the other hand, may lead to permanent residency and the ability to immigrate certain family members.

WHY HUMAN TRAFFICKING IS RELEVANT TO YOU

You may be inadvertently assisting a trafficking victim in your work as an attorney. Many trafficking victims have been exposed to criminal conduct incident to their victimization. They could pass through the criminal justice system and not be recognized as a victim. Identification of

• Applicant would suffer extreme hardship involving unusual and severe harm if returned to home country.

In addition, the victim cannot be a trafficker and cannot be inadmissible. Although the subject of inadmissibility is outside the scope of this article, it is important to know that waivers of inadmissibility are available if the reason for the inadmissibility is connected to the trafficking.

In order to obtain a T visa, an applicant must provide evidence of each of these elements. As primary evidence, an applicant must attempt to obtain an endorsement from federal law enforcement, stating that the applicant is a victim of a severe form of trafficking and has complied with reasonable requests for assistance by law enforcement. If an applicant cannot obtain a law enforcement endorsement, the applicant can provide sufficient secondary evidence of her victimization and cooperation with law enforcement. In addition, the applicant must prove that her presence is due to the trafficking, meaning either that she was recently freed from her traffickers or that her continued presence is related to the trafficking, and provide evidence that she would suffer extreme hardship if returned to her home country.

The TVPA also provides for immigration status for derivative beneficiaries. Derivative beneficiaries include the spouse and children of adult victims, and the spouse, children, parents and unmarried siblings who are under 18 years of age. Identification of victims can be difficult due to the fact that victims are often not forthcoming with the details of their experience. Victims are often reluctant to share their story due to cultural and linguistic isolation, feelings of shame or guilt, lack of trust, or other challenging reasons.

If you discover that your client is a victim of human trafficking, there are many services available to them that could help them turn their life around and take steps toward recovery. Moreover, the prosecution might be willing to drop your client’s case if they learn of your client’s victimization.

SERVICES FOR VICTIMS

Catholic Charities has established a special program that focuses on assisting victims of human trafficking. The program is called Outreach and Support to Special Immigrant Populations (OSSIP).

Catholic Charities is able to provide legal representation for victims in their immigration matters. This representation includes representing the client in his or her interaction with different immigration agencies, such as Citizenship and Immigration Service (IS), Immigration and Customs Enforcement (ICE), and the Immigration Court (EOIR). Additionally, Catholic Charities attorneys represent victims with federal law enforcement, such as the FBI, and local law enforcement as it relates to the client’s immigration case.

OSSIP is also able to provide comprehensive social services for victims. These social services include safety planning, referrals to mental health and psychiatric services, shelter, clothing, medical and dental assistance, and more. These social services are critical for the survivor to rebuild his or her life.

If you discover or suspect that your client is a victim of trafficking, please err on the side of caution and contact the OSSIP 24-hour emergency line. An attorney answers this line and is able to provide confidential assistance. Additionally, through this line trafficking survivors are connected to social services.

While screening your client for trafficking victimization might seem like just one more duty in a busy practice, it could make a lot of difference for your client if they indeed turn out to be a victim.

END NOTES

1. 22 U.S.C. §7102(8).
2. Unless the victim is under 18 and is performing a commercial sex act. Immigration and Nationality Act (INA) § 101(a)(15) (T)(i)(IB)(bb).
4. INA § 101(a)(15)(T).
5. INA § 101(a)(151(T)(ii).
NYSACDL and NACDL hope to file as amici in the matter of United States v. Louis P. Gigante, 436 F.Supp.2d 647 (S.D.N.Y 2006) which is a government appeal to the Second Circuit from an order dismissing an indictment. U.S. District Judge Denny Chin wrote a well-reasoned opinion granting dismissal on statute of limitations grounds where the prosecutors filed sealed indictments to obtain more time to decide whether to add charges. The initial sealed indictment was filed just one day before the statute of limitations was to run. It charged Mr. Gigante, a restauranteur, with making a false statement in his bankruptcy proceeding. Nearly two years elapsed while the government conducted further investigation, ultimately adding a tax evasion charge and forfeiture allegations. Judge Chin found that the U.S. Attorney could not justify this delay based on its desire to investigate past criminal activity where the defendant was aware of the investigation and posed no risk of flight. Lawrence S. Bader of Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. has tentatively offered to prepare our brief.

As mentioned in this Report previously, we will file a brief in People v. Martin Tankleff, the man who was wrongfully convicted in Suffolk County. NYSACDL and NACDL will file a joint brief to be authored by members Donald Thompson and J. Scott Porter. NYSDA, the New York Criminal Bar Association as well as retired Judges John S. Martin and Herbert Posner have expressed interest in joining our brief. The appellant, Mr. Tankleff, has not yet filed his Initial Brief.

In addition, we previously stated we will file a brief in the matter of People v. Nico LeGrand, an appeal in our State Court of Appeals on the issue of the standard by which a trial court must decide whether to admit expert testimony in one witness identification cases. Our brief will be authored by Lorca Morello of the Criminal Appeals Bureau of the New York City Legal Aid Society. The brief will be jointly submitted by the Legal Aid Society and NYSACDL but late word is that Robert Garcia of Neighborhood Defender Services will assist so it appears NDS will join as well.

We received unpleasant news from the State Court of Appeals in the matter of Gorghan v. DeAngelis, 2006 N.Y. LEXIS 3197, 2006 NY Slip Op 7516 (Oct. 19, 2006). We had argued, in a brief written by Pace Law School Professor Bennett L. Gershman, that there are cases where prosecutorial misconduct is so egregious that double jeopardy would prevent a new trial. Chief Judge Kaye wrote a unanimous opinion which stated that while the prosecutor's conduct was "deplorable," it was only intended to convict the defendant, not to provoke a mistrial. According to our Court of Appeals, double jeopardy applies only where the prosecutor's motivation is to force the defendant to seek a mistrial and thereby lose his selected jury. What prosecutor would ever admit she acted to provoke a mistrial? If the mistrial motion is denied, what trial judge would find the prosecutor was so motivated? Apparently, these questions did not concern Judge Kaye so Mr. Gorghan will have to avail himself of his right to a new trial.

You may recall that NYSACDL President Ray Kelly wrote to Chief Judge Kaye some time ago to express our concern that there is no statewide procedure for assuring that defendants are represented in People’s appeals to the State Court of Appeals. The Amicus Curae Committee hopes the Court will not continue to rely on us – or other amici – to file a pro bono brief to advance the defendant's arguments, as was the case in the matter of People v. Jason Williams, 4 N.Y.3d 535 (2005). We believe that there is no substitute for the single-minded advocacy of a lawyer whose only interest is that of his client. NYSACDL does not represent clients at all but merely advocates positions for the Association from the perspective of criminal defense lawyers.

We received a letter dated Oct. 20, 2006 from the Clerk, Stuart M. Cohen, informing us that our proposed rule "is not feasible." Mr. Cohen added that "The Court of Appeals cannot extend representation of counsel assigned by another court, such as the Appellate Division." Such rules, Mr. Cohen wrote, would have to be promulgated by each Department. NYSACDL might decide to approach the four intermediate appellate courts to seek such rules and/or we could approach the Legislature for a statutory direction.

NYSACDL members may volunteer to prepare an amicus brief for NYSACDL and such assistance would be greatly appreciated. Volunteers are invited to email me at willstatter@msn.com or to call (914) 948-5656. Requests for amicus assistance will be accepted only from counsel (and not from their clients). Please note that you should bring important issues to our attention as early as possible to increase the chances we can assist in your case.
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.
LETTERS

Ed. Note: This letter which appeared in the October 1, 2006 issue of the New York Times was written by NYSACDL President Ray Kelly in response to its three-part series on justice courts in New York State.

To the Editor:

Your series uncovers the “dirty little secret” of New York State’s “justice” court system.

It flies in the face of our Constitution and our Bill of Rights that in this day and age, human beings are tried, convicted and sentenced in justice courts by non-lawyer judges who have no legal training with no qualifications other than the backing of the local political party.

Thousands of New Yorkers have been and continue to be subjected to the abuses outlined in your expose’ on village and town “justice” courts.

A day of reckoning is on the horizon. Our next governor and the Legislature must put in place a statewide justice system that finally addresses the inequities that the current “justice” system visits upon all New Yorkers.

There has never been a system; let’s implement one now! ■

Ed. Note: This letter was sent to United States District Court Judge John G. Koeltl by NYSACDL President Ray Kelly in regard to the sentencing of Lynne Stewart.

October 6, 2006
Re: United States v. Lynne Stewart

Dear Judge Koeltl:

Please accept this letter on behalf of the New York State Association of Criminal Defense Lawyers in connection with the upcoming sentencing of Lynne Stewart. The NYSACDL is a state-wide bar association comprised of more than eight hundred criminal defense attorneys, many of whom routinely practice in the Southern District of New York.

We understand that Your Honor is receiving submissions from private members of the bar, many of them members of our association. It is our opinion that those letters best state the positions of individual attorneys who know and have worked with Ms. Stewart regarding the appropriate sentence the Court should impose. We also are confident that individual attorneys are in a good position to express the concern we all have as to the chilling effect the Lynne Stewart case has had on our practices. We ask the Court to take seriously those communications as we are gravely concerned about those issues.

The NYSACDL does not ordinarily take an organizational position with respect to individual sentences. As an organization, however, we cannot stand mute while the United States Attorney’s Office joins with the United States Probation Service to denigrate members of our organization and the criminal defense bar in general. We are outraged by the unacceptable and unfounded statements in the report that imply that defense attorneys are apt to disobey rules, commit crimes or be involved in other wrong doings absent extremely harsh retribution towards Ms. Stewart. Further-

more we think it is inappropriate for the Probation Service to imply that the Court needs to “teach” our membership or other defense lawyers a lesson about ethical or lawful behavior at her expense. Such lawyer-bashing is, at a minimum, unprofessional and outside the scope of the Probation Service’s proper function. Worse yet, such unsubstantiated group slander is being used to justify inflicting of an extremely harsh punishment on a defendant before this court - an individual who deserves an unbiased probation report untouched by dramatic accusations designed to inflame fear and hatred.

Moreover, the government’s willingness to unite with the Probation Service in casting baseless aspersions upon respected and honorable members of the legal profession for the purpose of achieving their goals in this case is appalling. We work on a daily basis with members of the United States Attorney’s office and with Judges, Law Clerks and other personnel in the court. I doubt I need to inform the Court that the level of dedication, integrity and skill amongst our members does not justify the assertions in the probation report. What is horrifying is how easily the government joined in such a baseless position simply for the purpose of obtaining a harsh sentence in this one case.

Individually and as a group, our members are devoted to defending the Constitutions of the United States and New York State. We have devoted our professional careers and our lives to be sure that those in power follow the law. We most respectfully ask the Court to condemn the misuse of power by two government agencies in making these inflammatory remarks in their official capacities. It goes without saying, as well, that Ms. Stewart’s sentence should not, in any way, be influenced by those baseless and insulting remarks. ■

Ed. Note: This letter by NYSACDL President Ray Kelly appeared in the October 25, 2006 issue of the New York Law Journal.

To the Editor:

History teaches that individual acts of conscience and bravery will be remembered and inspire others, even though such an act at the time, may raise the ire of the public. Such an act was done by United States District Judge Koeltl when he sentenced Lynne Stewart to a term of 28 months in prison. We do not applaud Judge Koeltl because of the mercy that he showed Ms. Stewart, but because of his refusal to allow his judgment to be clouded by the very powerful and angry voices calling for the harshest penalty possible. These voices openly sought to teach a lesson to an entire segment of the bar – criminal defense lawyers – by punishing one person. The implication was clear. Criminal defense lawyers are so likely to join with their clients that they require such a severe deterrent to keep them honest. To call this offensive is underwhelming. It is a frontal assault on those who stand between the Constitution and totalitarianism. To his enormous credit, Judge Koeltl did not allow these voices to unduly influence his sound judgment. In the face of this storm, Judge Koeltl performed his function as a judge, unpopular though that function can be at times. It would be demeaning to thank Judge Koeltl for doing his job under such pressure, but such bravery should not go unnoticed. ■
MEMBERSHIP APPLICATION

To promote study and research in the field of criminal defense law and the related arts.
To disseminate and advance by lectures, seminars, and publications the knowledge of the law relating to criminal defense practice.
To promote the proper administration of criminal justice.
To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases.
To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby
To protect individual rights and improve the criminal law, its practices and procedures.

(Please print or type.)

Name:__________________________________________________________

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City/State/ZIP ________________________County__________________________________

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We need your participation. Tell us on which of the following Committees you will serve:

☐ CAPITAL DEFENSE ☐ CONTINUING LEGAL EDUCATION
☐ INDIGENT DEFENSE ☐ LEGISLATIVE

What issues and activities would you like to see NYSACDL concern itself with?
__________________________________________________________________________
__________________________________________________________________________

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

Enclosed is my payment for membership in NYSACDL:

Signature of applicant

Membership dues can be paid by check, or charged to the American Express, Master Card, Visa or Discover Card.
Please make your check payable to NYSACDL and send to:
NYSACDL, 245 Fifth Avenue - 19th Floor, New York, NY 10016

Please charge my credit card #_____________________________________ Expiration Date___________

Signature of Applicant________________________________________________________________________Date________________
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NYSACDL ANNUAL DINNER

THURSDAY, JANUARY 25, 2007

MARRIOTT FINANCIAL CENTER HOTEL
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