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EVEN COPS NEED DEFENSE LAWYERS

As defenders of fellow human beings, we have learned to walk a mile in our clients' moccasins in order to provide client-centered representation. Such representation is the hallmark of what we do. We have learned that we cannot fight the battles of the citizen-accused without understanding their frailties, their shortcomings, their humanity. We understand these frailties because we have seen them in ourselves and those we allow to get close to us.

How often have we spent our last ounce of energy, effort and devotion defending a fellow human being against the power and intimidation inherent in the criminal justice system? Too often, judges, prosecutors and cops use the intimidation and power of the criminal justice system to its fullest extent against both our clients and ourselves. We grow to despise this intimidation, intolerance, judgmentalism and polarization. If called upon, how could we ever represent those possessed of such power and intimidation?

What happens when a cop becomes the citizen-accused? What happens when the "noble cause" that is at the heart of police culture so drastically pushes a cop's buttons that his/her moral compass goes tragically astray? Whether it be police testifying at a suppression hearing or the tragic death of a fellow citizen at police hands, in the "us-against-them" mentality that pervades our world and American society in general, how could any of us ever represent a cop?

We have no choice. Unlike some of our legal brethren who have dabbled in criminal law only to join the silkstocking set, we understand that we have no right to become judgmental regarding our clients. Regardless of whether it is Louima, Diallo or other far too frequent New York tragedies, we recognize that our professional obligation is to undertake, investigate and zealously represent. If cops are so moved by "noble cause" that the ends justify the means, what is our obligation to experience, understand and place into context the daily experience of policing on cops' moral centers? As defenders, how do we effectively meet the challenge of presenting (1) the dichotomy between the police responsibility to help different and often conflicting cultures co-exist in a society compartmentalized along class, racial, ethnic and religious lines and (2) the everyday experience of the beat cop both on the street and in the station house?

Our duties as lawyers, our duties as citizens intimately involved with the criminal justice system are clearly defined. As defenders of fellow human beings, our duty is to make meaningful to the whole of society the protections of our constitutions. Our duty is to protect all citizens from the powers of government. This protection provided to any one member of our society guarantees that such protection extends to every member of our society. Even when those we defend are cops.

— Ray

"When I was a boy I was told that anybody could become President. Now I believe it!"

See page 18 for details of our Law and Forensic Science seminar being presented with The Henry Lee Institute of Forensic Science at the Marriott Financial Center Hotel on Saturday, January 27.
ANNUAL DINNER 2007

NYSACDL ANNUAL DINNER
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.

HON. WILLIAM BRENNAN AWARD TO HONORABLE GEORGE BUNDY SMITH


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Ben Brafman will receive the first Clarence Darrow Award for Distinguished Practitioner for his contributions to the criminal defense bar.

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.

2007 BOARD MEETING SCHEDULE

January 26.................................................................New York City
March 17.................................................................New York City
May 19.................................................................Syracuse
September 8..........................................................Rochester
October 5..............................................................Syracuse
December 8.............................................................New York City
The DWI Reform Act (Chapter 732 of the Laws of 2006) became effective on November 1, 2006, with drastic impact for any motorist charged with DWI. This article addresses various complex consequences of the new law.

1. What new crimes were enacted?
   A new crime of Aggravated DWI (ADWI) was enacted. DWI with a Blood Alcohol Content (BAC) of .18 grams (.10% over the .08% DWI BAC limit) will be charged as a ADWI. Conviction of ADWI will have greater maximum penalties, including one-year license revocation and fines up to $2,500.00. VTL § 1192-2-a. The new law does not properly define the ratio of blood to breath, and will be challenged in the courts on legal sufficiency and constitutional grounds. The drafting error has been conceded by the Governor’s office, which expects a legislative technical correction.

   An interlock ignition device must be installed, upon conviction of ADWI, and if sentenced to probation, even for first-offenders. VTL § 1192(10)(d).

   A new crime of Driving While Ability Impaired by combination of Drugs and/or Alcohol (DWAIDA) was also enacted. VTL § 1192-4-a. It prohibits driving under the influence of either a combination of more than one drug, or any drug and any amount of alcohol. The new law provides the same penalties as provided for a misdemeanor DWI conviction. VTL § 1193(1)(b); 1193(2)(b)(1); 1193(2)(b)(2). A new crime of Aggravated Unlicensed Operation in the First degree (AUO 1st) was also enacted for violations of “permanent” license revocation. VTL § 511(3)(a)(iii).

2. Can ADWI or DWAIDA be charged as felonies?
   Yes. Like any other DWI offense, either may be charged as a felony if the motorist has a prior DWI conviction within 10 years, and either will constitute a predicate for future DWI felony prosecution. VTL § 1193(1)(c).

3. What is required for screening and evaluation and who is authorized to perform these tests under the new law?
   Alcohol/substance abuse screening and/or treatment will be required pretrial for virtually all DWI defendants. Screening is required of any DWI defendant with an alleged .15% BAC or below, or if the motorist is alleged to have refused a breathalyzer test. VTL § 1198-a. If upon screening, the motorist is assessed to be abusing alcohol or drugs, or is reported to have a BAC of above .15%, then, a prior VTL § 1992 conviction within 5-years or two prior § 1992 convictions within 10-years, an “evaluation” is mandated by an OASAS provider. VTL § 1198-a(2).

4. What is OASAS?
   Screening and/or treatment may be performed only by a New York State Office of Alcohol and Substance Abuse Services (OASAS) certified provider. VTL § 1198-a(2). Many alcohol/substance abuse counselors have been DMV-approved for issuing certificates of rehabilitation (required of 2d offenders within 10 years), but most such individual DMV-approved providers are not OASAS-approved providers. For a www search list of OASAS providers, see: http://www.oasas.state.ny.us

5. What does permanent revocation mean?
   Under the new law, some recidivists face “permanent” revocation; however, discretionary reinstatement is allowed by DMV under limited circumstances after 5 or 8 years. VTL § 1193(2)(b)(12). A new crime of AUO 1st was also enacted for violations of “permanent” license revocation. VTL § 511(3)(a)(iii). The new law does not include the element of operating a motor vehicle, and will be challenged in the courts on legal sufficiency and constitutional grounds.

6. How have breathalyzer refusal penalties increased?
   The revocation for a first-time refusal is increased from six months to one year, and penalties for most repeat offenders who refuse will be increased from one year to 18 months. VTL § 1198-a.

(continued on page 4)
1194(2)(d)(1). The civil penalty for a first-offenders will increase from $300.00 to $500.00. VTL § 1194(2)(d)(2).

7. How does the law restrict plea-bargains?

Any plea from a DWI charge to a reduced charge of Driving While Ability Impaired by Alcohol (DWAI) requires that treatment be a condition of the sentence. The new law allows eligibility to attend the Drinking Driver Program (DDP) in satisfaction of mandated treatment, even if the defendant is otherwise ineligible for DDP and/or a conditional license. VTL § 1192(10)(a).

8. How does the law increase penalties for fatalities?

The new law adds to the ways in which a motorist can commit Vehicular Assault 1st (VA1st)(PL § 120.04) and Vehicular Manslaughter 1st (VM1st)(PL § 125.13). Under prior law, the only element that enhanced a VA2d to VA 1st was if Aggravated Unlicensed Operation (AUO) was in conjunction with a Vehicular Assault 2d; and the only element that enhanced a VM2d was if in conjunction with a AUO. Under the Reform Act, these crimes may also be charged upon enhancements based on BAC (.18% or above) or enumerated multiple prior DWI convictions or refusals.

9. What about out-of-state offenses committed by New York State motorists?

Prior to the November 1, 2006, a prior out-of state driving-offense, regardless of its elements, was treated as a DWAI (a traffic infraction) for computing penalties and administrative sanctions against NYS motorists. Under the Chapter 231 of the Laws of 2006, the prior out-of-state conviction will be treated as if classified as an equivalent, analogous offense under New York law. VTL § 1192(8).

10. How can you represent DWI defendants, who are so despised because of MADD, etc.?

My feelings are well expressed by Richard Gere, who portrayed defense attorney Martin Vail, in the 1996 movie, Primal Fear:

I believe in the notion that people are innocent until proven guilty.
I believe in that notion because I choose to believe in the basic goodness of people.
I choose to believe that not all crimes are committed by bad people.
I try to understand that some very good people do some very bad things.

Department of Motor Vehicles (NYDMV) maintains an informative web site concerning VTL penalties and DMV policies, including forms which may be downloaded, at: http://nydmv.state.ny.us/index.htm

FOR THE RECORD...

Condolences to Director Bruce Barket upon the death of his father.

Congratulations to proud parents Treasurer Steven Kessler and his wife Maria. Their children Rachel and Michael competed in the Speedo Total Teamwares Winter Championship in Florida. Twelve year old Rachel competed in 9 events, 9 finals, 9 medals, including gold in her 200 Butterfly, which ranked her 4th in the United States in the 1,000 yard freestyle and 16th in the country in the 500 yard freestyle among 12 & under girls. Their 9 year old son Michael had 8 out of 10 personal best times and a medal in the 500 freestyle.

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.

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In a previous article, Subsection b of C.P.L. Sec. 440.10 was analyzed and considered. That Section considers the particular ground to vacate a Judgment with a Post-Conviction Motion when 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.

This article will consider Subsection (h) of C.P.L. Sec. 440.10, which sets forth an additional ground and basis to vacate a Judgment or conviction by way of a Post-Conviction Motion, on the ground that the Judgment was obtained in violation of a right of the defendant under the Constitution of this State or of the United States. The general rule is that a writ of coram nobis can be used to set aside a Judgment obtained in violation of a Constitutional right.1

It is also the law, however, that coram nobis requires, in addition to the assertion of a fundamental constitutional right, that the opportunity to assert the same has been substantially impaired or denied.2

There is the law that the remedy of the Writ of Coram Nobis, may not be extended to procedural irregularities, where the defendant has not been denied some Constitutional or fundamental right or prejudice in some manner.3

There is also a rule that the remedy of coram nobis, codified in subsection (h) of C.P.L. 440.10, is only available when the violation of a defendant’s Constitutional rights appears in the record.4

There is a more specific rule that where there is a charge that the defendant has been denied a fair trial, this is a subject for collateral attack under C.P.L. 440.10 (h). Thus, in People v. Smith5, the Appellate Division Third Department ruled that defendant was required to proceed by way of postjudgment motion with respect to claim that he was deprived of fair trial by People’s failure to timely disclose tape recording of drug transaction between defendant and informant, where the state did provide a tape recording prior to trial and issues of whether tapes were different and if so, whether defendant was prejudiced as result thereof, were factual issues, which could not be resolved on evidence in record on appeal.

The general rule is that where a jury sees the defendants in handcuffs, this cannot be the basis for post-conviction relief, where the defendant did not object at trial or request an instruction to the jury to disregard it.6

Another section and basis for post-conviction relief under subsection (h) of C.P.L. Sec. 440.10, is where the Judge absent himself from the courtroom. An example of this is found in People v. Hernandez7. In Hernandez, the Appellate Court held that an integral component of the defendant’s right to trial by jury is the supervision of a Judge, and in any case where the Judge’s absence from trial proceedings prevents performance of an essential, non-delegable judicial function, such as absence from a read back, reversal is required.8

Another area in connection with subsection (h) of C.P.L. Sec. 440.10 is where judicial misconduct has been charged. An example of this may be found in People v. Bayes9. In Bayes, it was held by

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1. People v. Farina, 65 Misc. 2d 970, 319 N.Y.S.2d 166 (District Court, Suffolk County, 1971); People v. Cohen, 81 N.Y.S.2d 495 (1948)
2. People v. Bennett, 30 N.Y.2d 283, 32 N.Y.S.2d 867 (1972)
3. People v. Fiato, 206 Misc. 111, 132 N.Y.S.2d 188 (Broome County Court, 1954)
8. On this, see also People v. Pinkney, 272 A.D.2d 52, 709 N.Y.S.2d 10 (1st Dept. 2000) (Judge absent from jury selection and voir dire)
POST-CONVICTION MOTIONS
continued from page 5

the Court of Appeals of the State of New York, that the defendant was deprived of a fair trial where the town court Judge allowed attorneys to answer questions posed by the jury concerning the Court's instructions; the Court of Appeals held that the Court's surrender of its non-delegable judicial responsibility to supervise jury deliberation, deprived the defendant of his fundamental right to trial by jury. 10

More specifically, there is law concerning what comments or remark of the trial judge constitutes judicial misconduct. In general, most comments or remarks of a judge do not constitute judicial misconduct. Thus, in People v. Spellman11, the Appellate Division Second Department held that the defendant's claims that the trial judge commented to the jury on his failure to testify, made known to the jury that he had a prior criminal record and gave an additional instruction to the jury, in the defendant's absence, afforded no basis for coram nobis relief, where the asserted errors appeared on the face of the record, and could have been raised on Appeal from the Judgment or Conviction.

Another area of law in relation to this issue is Prosecutorial Misconduct. It is the law that Prosecutorial Misconduct could result in vacation of a Judgment pursuant to Post-Conviction Motion. A good example of this may be found in People v. Qualls12. In Qualls the Court stated that the defendant was entitled to an evidentiary hearing on his motion to vacate judgment, based on claim of prosecutorial misconduct. The Court said that the evidence raised fact issues as to whether a specific promise had been made to prosecution witness to reduce his sentence in exchange for his testimony; agreement with prosecution, was different from that represented. Another area of prosecutorial misconduct is where there are improper comments or remarks on the part of the prosecutor. Thus, in People v. Lauderdale13, the Appellate Division Second Department held, that a manslaughter defendant was deprived of a fair trial by the prosecutor's 31 references to his highly prejudicial nickname “Homicide.”

Another area of law in connection with C.P.L. Sec. 440.10 is that of pretrial publicity. The prejudicial pretrial publicity must be overwhelming. Thus, in People v. Fink14, the New York State Court of Appeals held that there was sufficient evidence to support findings of coram nobis court that the petitioner pleaded guilty to the reduced charge of murder in the 2nd Degree to escape the possibility of far harsher punishment, not because of the notoriety given the case by the press.

Finally, it is a general rule that a defendant who pleads guilty cannot seek coram nobis relief on the ground that his confession was coerced. 15

CONCLUSION
This analysis of subsection (h) of C.P.L. 440.10, which sets forth an additional ground and basis to vacate a judgment of conviction by way of a post-conviction motion on the ground that the judgment was obtained in violation of a right of the defendant under the Constitution of this state or the United States reveals a number of areas, threads, and strands. The general rule is the writ of coram nobis can be used to set aside a judgment obtained in violation of a Constitutional right, but there is also law to the effect that coram nobis requires, in addition to the assertion of a fundamental Constitutional right, that the opportunity to assert the same has been substantially impaired or denied. There is law to the effect that the writ of coram nobis may not be extended to procedural irregularities. There is also a rule that the writ of coram nobis is only available when the violation of a defendant’s constitutional rights appears in the record.

Following this, there are a number of rules concerning the various bases that exist to grant this motion pursuant to C.P.L. 440.10 (h). These include a charge that the defendant has been denied a fair trial; where a judge absents himself from the courtroom during an integral and important portion of the trial; where judicial misconduct has been charged; where the trial judge’s misconduct consists of improper comments or remarks; where there is allegation of prosecutorial misconduct or improper comments or remarks of the prosecutor; and where there is a charge of prejudicial pretrial publicity.

It is hoped that this brief review and analysis of the case law interpreting and construing this statutory subsection of C.P.L. 440.10, will serve as a guide to both defense counsel and the prosecutor.


EVALUATING AND CHALLENGING FORENSIC IDENTIFICATION EVIDENCE

by William A. Tobin and William C. Thompson

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Television dramas like the popular “CSI” series have highlighted the importance of forensic science in criminal investigations. These programs show forensic scientists solving crimes with unerring accuracy by examining and comparing bloodstains, hairs, bullets, glass fragments, handwriting, toolmarks, latent prints and other items of physical evidence. Ironically, while television has been glorifying crime labs, there has been growing skepticism among real scientists about the claims that forensic scientists have been making in court. The conclusions they state so confidently on television and in real courtrooms often cannot withstand critical scrutiny. A recent article in the prominent journal Science argued that the “forensic identification sciences” are largely “underresearched and oversold” and called for major new efforts to test and validate claims that forensic scientists have routinely been making in courtroom testimony.

For criminal defense lawyers, these developments are both a challenge and an opportunity. It will not be easy to dispute the prevailing wisdom, fed by CSI-style media fantasies, that forensic science is virtually infallible. Yet the intellectual weaknesses of many of the “forensic sciences” are now becoming increasingly apparent. Accordingly, it is timely to take a fresh and skeptical look at forensic evidence of all types. This article will present a general framework for evaluating the often nebulous and questionable claims of forensic experts. It will discuss strategies and techniques that can be used to evaluate any type of forensic identification evidence.

In developing the general framework, we will draw many lessons from the recent successful challenge to Comparative Bullet Lead Analysis (CBLA), a forensic technique that the FBI used in criminal investigations since the 1960s to link bullets found at crime scenes to boxes of ammunition owned by suspects. FBI analysts used sophisticated instruments to measure the level of various elements in the lead alloy of each bullet in order to develop a chemical profile of the bullet. If the profile or the crime scene bullet “matched” the profiles of bullets in a box of ammunition owned by a suspect, the expert would conclude that the crime scene bullet came from the same molten source at the manufacturer and, frequently, from the same box. CBLA was particularly important in cases where the crime scene bullet was too damaged or fragmented to compare to a particular gun, or where no gun was recovered.

Although FBI analysts have been testifying about bullet lead “matches” since the 1960s, the validity and probative value of CBLA evidence was only recently called into question. As a result of the challenge, on September 1, 2005 the FBI announced that it would no longer continue this type of testing. Because the FBI operated the only laboratory in the United States that routinely performed

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CBLA, its decision effectively ends the technique, at least for now. According to FBI Laboratory Director Dwight Adams, the decision to discontinue CBLA was “based primarily on the inability of scientists or manufacturers to definitively evaluate the significance of an association between bullets made in the course of a bullet lead examination.” In other words, the FBI decided there is no point in continuing to generate CBLA evidence because no one can say for sure what this evidence means. This development raises two questions that we invite readers to contemplate. Why did it take so many years to recognize this fatal weakness in bullet lead evidence? And how many other types of forensic evidence might have similar flaws or weaknesses?

In developing our general framework for analyzing forensic evidence we will also draw lessons from DNA evidence, which has been more thoroughly and carefully validated than most other areas of forensic identification science. Many fundamental questions about the meaning and value of DNA have been addressed with solid scientific research while similar questions about other types of forensic evidence are left to intuition and guesswork. While DNA evidence is hardly infallible, and the results of DNA tests can say for sure what this evidence means. This development raises two questions that we invite readers to contemplate. Why did it take so many years to recognize this fatal weakness in bullet lead evidence? And how many other types of forensic evidence might have similar flaws or weaknesses?

In Phase 1 (evaluation and analysis), the analyst assesses the physical, chemical, and/or mechanical characteristics of the samples. For many types of evidence such as latent prints, bitemarks, and toolmarks this assessment involves a simple visual examination, sometimes aided by a magnifying glass or microscope. For other types of evidence, such as biological and chemical samples, the assessment may begin with a visual examination and then proceed to the use of sophisticated analytic instruments to generate more detailed information about the composition or other characteristics of the samples. Forensic scientists use a variety of impressive instruments, including nuclear reactors, genetic analyzers, and complex radiation sensing and electronic counting equipment. It is a mistake, however, to assume that use of a sophisticated instrument will necessarily lead to valid conclusions. The error in this thinking is nicely illustrated by CBLA evidence, where FBI analysts used magnificent and enormously expensive instruments such as a nuclear reactor and later a technique known as inductively coupled plasma atomic- (or optical-) emission spectrometers, to generate conclusions that were meaningless.

In Phase 2 (comparison), the analyst compares the analytical results for “questioned” and “known” evidentiary samples with each other, and sometimes with known reference samples. When the analyst is trying to link a crime scene sample to a suspect, the analyst typically compares the analytical results for the evidentiary sample to those from the suspect. For example, a latent print is compared to the suspect’s inked “ten print” card or the DNA profile of a bloodstain is compared to the DNA profile of a blood sample from the suspect. When the analyst is trying to identify the nature of the sample — whether white powder seized from a suspect is cocaine, for example, or whether particles from the suspect’s hand are gunshot residue (GSR) — the analyst will typically compare the analytical results for the evidentiary sample to the results for known standards representing the substance in question. In either case, the analyst is trying to determine whether the evidentiary sample can be distinguished from the “known”, reference sample, or standard. If the analytical results are sufficiently different to indicate the items could not have a common source, then the analyst declares the items “analytically distinguishable” (this conclusion is sometimes characterized as a “non-match” or “exclusion”). On the other hand, if the analyst cannot rule out the possibility of a common source, the analyst will deem the results to be “analytically indistinguishable.” Forensic scientists sometimes use the term “match” or “inclusion” to describe this conclusion. When dealing with more than a few samples, they may divide them into groups

5. Letter from Dwight Adams to Ralph Grunewald, Executive Director of the National Association of Criminal Defense Lawyers, Sept 1, 2005 (on file with authors).
such that items within each group are deemed “analytically indistinguishable” from each other.

One problem analysts face when deciding whether items are “analytically distinguishable” is that the history of each item may unknowingly affect the analytical results. Aggressively cleaning a gun may alter the markings that the gun makes on bullets, for example, such that the striation pattern on an evidentiary bullet may differ somewhat from the pattern on a reference bullet fired from the same gun. Exposing a biological sample to the environment may degrade it in ways that cause its DNA profiles to differ from the profile of a reference sample from the same person. Thus, analysts must make allowance for some differences in analytical results in order to avoid mistakenly “excluding” samples.

When using analytical instruments to make comparisons, analysts also face the related problem of measurement error. Analytical testing is always subject to a degree of imprecision or measurement error. If you test the same sample twice, you won’t get exactly the same reading — there is a margin of error that must also be taken into account when deciding whether two unknown samples are “analytically indistinguishable.”

In order to avoid “false negatives” — that is, in instances in which samples or marks with a common source are mistakenly called a “non-match” or “exclusion,” analysts must make allowance for differences in analytical results produced by the different history of the samples and by measurement error. If they make too many allowances, however, they greatly increase the chances of a “false positive”— i.e., “matching” or “grouping” samples or marks from different sources. Ideally, the analyst will set the threshold or standard for declaring a “match” (hereafter “match criterion”) in a manner that minimizes the likelihood of false negatives and false positives. Whether the match criterion employed in a particular case was appropriate is always an issue that warrants close scrutiny. The use of sophisticated instruments does not guarantee that analysts will use sophisticated or reasonable match criteria, regardless of the precision of the instrumentation. Nor is it always the case that the match criterion is part of an established and written protocol. Even when there is a written protocol that describes the criterion used to claim a match, it is not always based on reliable scientific studies and may, as was the case for CBLA, be completely arbitrary and subjective. Whether the match criteria that a laboratory is applying makes sense or not in light of available research is sometimes a difficult question that can only be evaluated by a statistician or a scientist with overlapping expertise in statistics.

For some types of forensic analyses, such as handwriting, bitemark and toolmark examination, the judgment that items “match” or are “analytically indistinguishable” appears to rest entirely on the analyst’s subjective judgement. The only “standards” these fields claim to apply are, on close examination, merely vague statements amenable to almost any interpretation that the analyst chooses to give them. To make matters worse, analysts often fail to record, photographically or otherwise, what features or characteristics led them to conclude that two samples “match” or do not “match.” Hence, the match determination is difficult or impossible to assess and rests entirely on the *ipse dixit* of the expert.

In Phase 3 (assessing likelihood or relative frequency of the matching characteristics), the forensic analyst either explicitly or implicitly assesses the likelihood of the match. In other words, the analyst assesses the chance of a coincidental match in the relevant population of similar items. Suppose, for example, that two bloodstains are analyzed and each is found to contain genetic factor X. In order to assess the value of this match, the analyst must obviously consider the probability of finding factor X in both samples if the samples came from different people. This probability will depend on the rarity of factor X. If factor X is found in one person in a billion the “match” is far more significant than if factor X is found in one person in ten. And, of course, this match means nothing if everyone has factor X. So without knowing the rarity of factor X, it is impossible to draw any meaningful conclusions about the likelihood the samples had a common source from evidence about the “match” based on factor X. In the case of a bullet composition match, the match obviously means nothing if everyone who owns bullets in the locality of the crime owns bullets of similar composition.

When assessing the overall value of a “match” implying common source, the analyst should consider two factors: first, the probability of obtaining the observed results if the samples have the same source; and second, the probability of obtaining the observed results if the samples have a different source. The probative value of the forensic evidence (for proving the samples have the same source) depends on the extent to which the first probability exceeds the second. Consequently, accurate assessment of these probabilities is a crucial foundational element for any statement that any forensic scientists might make about the meaning of any forensic “match.”

In Phase 4, which we call the inference/conclusion phase, the analyst draws explicit conclusions about the meaning of the claimed “match”—such as whether it means that the items had (or probably had) a common source. With CBLA evidence, FBI analysts often testified that “analytically indistinguishable” bullets came from (or likely came from) the same box of bullets or from boxes manufactured in the same facility on the same day. With fingerprint and toolmark evidence, analysts often testify that “analytically indistinguishable” marks are certain to have been made by the same finger or same tool to the exclusion of all other fingers (or tools) in the world. With DNA evidence, analysts sometimes testify “to a scientific certainty” that samples with matching profiles came from the same person. The logic underlying such inferences is often questionable and demands close examination. All too often forensic analysts leap from the observation of “same characteristics” to the conclusion of “same source” without any convincing evidence.

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of the connection. The “same composition = same source” fallacy passed muster in the courtroom for decades in the case of CBLA evidence before it was recognized as an absurdity. In other areas of forensic identification science, similar forms of fallacious logic have yet to be challenged.

**Evaluating A Case**

The most important step in preparation for facing the forensic expert is to *request a curriculum vitae and all bench notes, underlying data and demonstrative exhibits* of the prospective expert as early as possible. Some of the data resulting from the sophisticated instrumental analyses used today can require days to review, graph and evaluate. In many jurisdictions defense counsel are routinely provided only one or two line reports on forensic examinations and conclusions; nothing more. It may have been standard practice in the past to proceed to trial based on such reports without examining the underlying laboratory notes and data. It may now constitute ineffective assistance of counsel, or even malpractice. To effectively represent a client who is incriminated by forensic identification evidence, you must get the bench notes, study them, and understand exactly what was done. Then you must evaluate each of the four phases of the forensic comparison process and identify any scientific weaknesses or flaws.

**Evaluation of Phase One (Analysis)**

When evaluating Phase One (sample evaluation and analysis), it is crucial to know exactly which features of the samples were examined or considered in the analysis (and which features were not considered). If the analyst looked at a latent print, which features of the print were identified as significant or probative, and which features were disregarded? If the analyst looked at striations on a bullet, what was the exact pattern that was seen and where were the striae observed? If an instrument was used to analyze the samples, what exactly did it measure (did it capture a significantly relevant characteristic?), how much of the sample was characterized (was it “representative” of the bulk?), where on the sample was it measured, and what were the specific findings? Knowing the specific features that were considered in the analysis is a necessary first step toward assessing the match criteria that were applied (Phase 2), the likelihood of a coincidental match (Phase 3), and the ultimate conclusions drawn from the analysis (Phase 4). It is important to consider whether any instrument being used in the analysis is appropriate for that specific purpose. Do not make the mistake of assuming that an instrument that is useful and reliable for another purpose is necessarily appropriate for the specific forensic analysis you are evaluating. While it may seem absurd to think that defense lawyers should be responsible for evaluating the appropriateness of the instrumentation employed in a forensic lab, history has shown the necessity of asking this basic question. The technique of choice for comparative bullet lead analysis for over 25 years (from the early 1960s until about 1995) was neutron activation analysis (NAA), which required use of a nuclear reactor. Although this was sophisticated high-tech analytical instrumentation at its finest, it was inappropirate for the conclusions rendered in bullet lead cases because it could only effectively analyze for three elements (analytes): antimony, copper and arsenic, and could not sufficiently discriminate compositions within the most common range for bullets.6

The use of NAA for analysis of bullet lead illustrates two key points. First, it shows the longstanding tendency of forensic scientists to present misleading testimony based on inadequately validated methods. Second, it shows the importance of knowing exactly what is being tested in a forensic assay. For years, FBI examiners got away with asserting that their test produced a chemical profile of bullets that could identify with great accuracy bullets that originated in the same molten source of lead, same manufacturer, or even the same box. As it turned out, they were wrong. Yet it is only by considering exactly what the assay was testing (levels of antimony, copper and arsenic only) that one can begin to ask sophisticated questions that can identify flaws in the evidence — like how the FBI analysts decided that two samples were similar enough in the levels of these elements to be deemed a “match” (Phase 2), how likely such a “match” might be if the bullet came from different molten sources, different manufacturers, or different boxes (Phase 3), and whether a “match” really means that the bullets in question are likely to be from the same box (Phase 4).

After verifying that the instrument used was appropriate, it is also important to check that the instrument was properly calibrated, that proper control samples were run, and that the instrument produced the expected results for all control samples. Typically laboratories will run “positive controls” (samples of known composition) to demonstrate that the instrument is capable of producing accurate results (rather than “false negatives”). Labs also run “negative controls” (sometimes called “blanks”) that are known not to contain the element or characteristic the instrument is designed to detect in order to demonstrate that the instrument is not giving “false positive” readings. If the controls produce unexpected results, it indicates something is wrong with the procedure and therefore invalidates any conclusions drawn from it. Hence, any hint of problems on control samples warrants close attention. If the laboratory fails to provide complete information about controls, the reported results should be viewed with suspicion.

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It is also important to identify any instances in which the analyst relied on subjective judgment to modify or override instrumental results. In DNA analysis, for example, analysts can use software to modify the results produced by genetic analyzers. If the analyst thinks a particular “allele” (genetic marker) detected by the instrument is spurious, the analyst can simply delete it. In bullet lead comparisons, analysts frequently ignored one of the critical analytes (copper) if copper didn’t match, asserting probable jacket contamination. Whether such deletions are appropriate or not is, obviously, impossible to assess if you do not know that it occurred. Although a competent, conscientious analyst will document any “overrides” in laboratory notes, many analysts are not so careful. In some instances, operator interventions to “modify” test results become apparent only when an independent expert is allowed to re-analyze the original instrumental data. Fortunately, many modern analytical instruments store a copy of the original instrumental output (often called “raw data”) as a computer file. Obtaining copies of these files and having them re-analyzed can sometimes be very revealing. Labs that refuse to disclose such files (or claim that they discard such files routinely) should be viewed with suspicion. There is no good reason for destroying the scientific data underlying a forensic analysis or for refusing to disclose it to defense counsel.

Evaluation of Phase Two (Comparison)

When assessing the comparison of samples, it is important first to satisfy yourself that appropriate samples are being compared. If a forensic expert is comparing soil found on a suspect’s boot to soil from a crime scene, was the comparison soil collected from the right places? In one such comparison known to the first author, the reference soil samples were obtained from six-inches below the surface of the ground (supposedly to preclude surface contaminants). How many suspects flee a crime by stepping on soil six inches below the surface of the ground? The effort to obtain an uncontaminated reference sample produced an unrepresentative (and possibly meaningless) reference sample.

In cases where an evidentiary sample was exposed to conditions that may have changed its properties, such as a fire, explosion or exposure to a harsh environment, forensic analysts sometimes find it helpful to expose reference samples to similar conditions before making the comparison. However, exact duplication of the relevant conditions is often impossible (even if the conditions are known) and seemingly insignificant changes in the simulated conditions often have dramatic effects on the subsequent comparisons. Consequently, any forensic analysis that involves “simulation” of “relevant conditions” warrants close scrutiny.

Second, consider whether the analyst used an appropriate criterion (match standard) to reach conclusions about “matches,” “positive associations,” or “inclusions.” If the laboratory is using a quantitative standard for declaring a “match,” are there studies to support that particular threshold or cut-off used? Were those studies conducted under conditions similar to those that apply in the case at hand? And what do those studies say about the probability of a false inclusion or a false exclusion under the relevant conditions? If you cannot answer these questions, you need to dig deeper into the underlying scientific validation for the match standard.

If the forensic analyst declared a “match” based on subjective criteria (as typically happens in latent print and toolmark examinations) what evidence is there that such subjective judgments can be made reliably—that is, that different experts would agree regarding what constitutes a “match” and what does not? And more importantly, what evidence is there that the expert’s subjective determinations are accurate? Is there any research on this expert’s (and any other experts’) false positive and false negative rate when evaluating similar samples? If the standard for declaring a match is simply the say-so of the expert, is there any evidence to support the claim that this expert can draw such conclusions accurately? Without very good and convincing answers to these questions, the subjective judgment of the analyst is impossible to evaluate.

A key issue is whether a sufficient number of characteristics have been examined in the effort to distinguish the samples. Items that appear to be identical in all physical and even chemical aspects can be quite different as to mechanical properties. In such a case, if it walks like a duck, quacks like a duck, and looks like a duck, it may still not be a duck. Opinions about “matches” or positive associations can be quite vulnerable to error if too few, or non-meaningful, properties or characteristics are compared. The FBI’s practice of examining only three analytes when using NAA to compare bullets is an excellent example of this problem.

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Third, consider whether the analyst took adequate measures to control for “observer effects” or “confirmation bias” — that is, for the human tendency to see what one expects and/or desires to see. When an analyst analyzes and evaluates an evidence sample, it is all too easy to be influenced by knowledge of the reference sample, particularly if the analyst is aware of other evidence regarding whether the samples should “match.” When FBI fingerprint examiners evaluated the notorious fingerprint from the Spanish train bombing case, for example, they were apparently influenced by their knowledge of the details of the reference print from the suspect Oregon attorney Brandon Mayfield. Sections of the crime scene print that were similar to Mayfield’s were credited as reliable data. Sections of the evidence print that differed from Mayfield’s were dismissed as the product of distortion in the underlying surface or an overlay from another print. In this manner, the FBI examiners managed to incorrectly “match” Mayfield to a print that was not his. Spanish authorities determined that the print was actually that of an Algerian suspected terrorist named Ouhnane Daoud.

Observer effects have been the source of a great deal of scientific error and self-deception. In his iconic book Galileo’s Revenge: Junk Science in the Courtroom (1991), Peter Huber traced several false scientific theories to misinterpretation of data arising from uncontrolled observer effects. A scientist who is committed to a pet theory inevitably (and unconsciously) interprets data in a manner consistent with that theory. By Huber’s account, uncontrolled observer effects are one of the hallmarks of junk science. Unfortunately, this hallmark of junk science is “a rampant and uncontrolled part of normal practice” in the field of forensic science. While academic scientists generally take careful steps to control for observer effects, such as conducting studies in a “blind” or even “double-blind” manner, forensic scientists almost always fail to do so.

Observer effects are most likely to introduce bias and distortion when analysts are relying on subjective judgment to decide which features of the data are important and whether the samples are sufficiently similar to constitute a “match.” Hence, observer effects are likely to be particularly influential for fingerprint and toolmark evaluations, which rely almost entirely on subjective determinations (and often are inadequately documented as well). However, subjective judgment can play an important role even in the interpretation of seemingly more objective instrument-based tests like DNA and CBLA analysis, so the potential for observer effects is important to consider there as well.

Forensic scientists can generally control for observer effects if they care to do so. Evidentiary samples should be evaluated and analyzed while the analyst is “blind” to the features of reference samples. For example, the FBI fingerprint examiners should have decided which features of the Spanish train print constituted reliable data, and which were distorted or overlaid, before knowing whether the features were consistent or inconsistent with Mayfield’s fingerprint. Similarly, DNA analysts should decide which “alleles” in an evidentiary sample profile are real and which are spurious before knowing whether those alleles match up with a suspect’s. Analysts who are “blind” to the consequences of the “match” determination should generally be the ones who make the comparison.

One approach to blind interpretation is to separate the various parts of the analysis and assign them to different people. The evidentiary and reference samples could be analyzed and evaluated by different analysts. A third person, who knows nothing about the case, could decide whether the samples “match.” Another approach is simply to perform the analysis and evaluation of various samples in a sequence so that analysis and interpretation of early samples cannot be influenced by knowledge of the later samples. Evidentiary samples, which are generally more difficult evaluate, can be analyzed first, before the analyst knows the features of the reference samples. If the analysis of the evidentiary sample is committed to writing before the analyst knows the features of the reference sample, then observer effects cannot influence the analysis of the evidentiary samples.

When evaluating forensic evidence, it is important to know whether simple, obvious steps to reduce observer effects, such as

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8. In 1970, scientists from Gulf General Atomic reported to the then-Atomic Energy Commission (AEC) and the Law Enforcement Assistance Administration (LEAA) that the utility of using the nuclear technology for forensic purposes of comparing bullet compositions was severely limited for this reason. Courts, and presumably prosecutors, were realistically never apprised of those pioneering findings, yet examiners had testified for decades to claimed “matches” of bullets based on only two or three elements by NAA analysis.


these, have been taken. Failure to control for observer effects may affect the reliability of the findings in ways that arguably go to their admissibility under Daubert rather than always going to their weight.

It is not sufficient simply to have a second analyst “confirm” the conclusions of the first analyst if neither analyst is blind to the expected result. Both analysts are likely to suffer from the same tendency to confirm what is expected. If the second analyst knows about the conclusions of the first analyst, the situation is even less satisfactory. The FBI’s error in linking Brandon Mayfield to the Spanish train bombing again illustrates the problem. After a prominent FBI fingerprint examiner made the initial incorrect match, two additional FBI experts examined the prints and “confirmed” the false match. A fourth examiner, hired by the defendant, also reviewed and “confirmed” the false match. Tellingly, a report issued by the FBI after the error came to light attributes the incorrect confirmatory opinions to “confirmation bias.” “[B]ecause the initial examiner was a highly respected supervisor with many years of experience,” the report states, “it was concluded that subsequent examinations were incomplete and inaccurate. To disagree was not an expected response.”12 The FBI report endorses blind verification, which would be a significant improvement over current practices. Needless to say, if blind verification is necessary to produce accurate fingerprint identifications, it is likely also to be necessary to assure the accuracy of other types of forensic identification.

**Evaluation of Phase Three**

Assuming you are satisfied that the incriminating specimens were properly characterized as indistinguishable (therefore a “match” or “inclusion”), the next step for assessment of forensic significance involves estimation of probabilities for determination of probative value. As noted earlier, there are two crucial questions: (1) how likely are the observed results if the samples had a common source; and (2) how likely are the observed results if the samples did not have a common source? Without valid answers to both questions, there is no way to assess the probative value of the forensic evidence for proving that the “matching” items had a common source. Yet there is tremendous variation in how well forensic disciplines have validated this phase of the process.

For example, there is substantial scientific literature that documents the frequency of the genetic markers used for DNA matching in a variety of human populations. So when a DNA analyst says STR profiles are unlikely to match if the samples are from different people, there is (usually) a solid scientific foundation for that conclusion.13 For most other types of forensic identification evidence, however, the scientific literature is minimal or non-existent on the frequency of the characteristics that are examined when “matching” samples. Analysts who testify about toolmarks, bitemarks, handwriting characteristics, latent prints, bullet lead compositions and the like are usually relying solely on their own implicit assessment of the rarity of “matching” features.

When pressed to explain how they know that a particular result is likely that the samples have a common source or unlikely that the samples have a different source, they usually resort to hand-waving comments about “my lengthy experience” or “my knowledge, training and expertise.” In the absence of published studies that address the relevant questions, any claims about the likelihood of these events should be viewed with skepticism. History has shown that assertions of expertise, unsupported by scientific research, are often wrong. For years FBI analysts claimed to “know” that a bullet lead match was highly unlikely if the bullets came from a different box or molten source. In fact, as the FBI Laboratory Director has now acknowledged, their claims to such knowledge were groundless. Until tested and confirmed by meaningful and comprehensive scientific studies, any claims that a forensic scientist makes about the rarity of a particular mark or characteristic in a particular population should be viewed as speculation rather than science.

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13. See W. Thompson et al., supra note 7.

Although this point may seem obvious, it has apparently escaped the notice of lawyers and judges in many cases. In 1997, a judge in a South Carolina murder case questioned how meaningful a bullet lead “match” might be — wondering whether “everybody in town” had bullets of the same composition. Although the question is obvious, it was rarely asked in other cases. The most surprising aspect of the incident is that the FBI did not and could not answer the question no one knows how common “matching” bullets might be in a particular town. While the FBI was willing to assume that a compositional match is a rare event, the frequency of matching bullets in any particular geographical locality was never actually studied until recently. Data now emerging confirm intuitive expectations and the South Carolina judge’s concern that bullets may be distributed in a manner that create regional concentrations of bullets with “matching” compositions — a possibility the FBI never bothered to check and that defense lawyers raised in only a few isolated cases.

When forensic scientists cite studies to back up their claims about the likelihood of the results, you should scrutinize the studies carefully and ask hard questions. What is the source of the samples in the study? What process was used to select samples for inclusion in the study? Are the samples representative of a relevant population (for example, how relevant are bullet compositions from Los Angeles in a Detroit murder trial)? Do the statistical estimates derived from the study depend on any assumptions, such as the assumption that different characteristics are independent? If so, is there any evidence that those assumptions are valid?

In forensic science there is a long history of questionable and misleading empirical research on statistical issues. These studies often emerge just as the claims of forensic scientists are being challenged. In response to challenges to the reliability of fingerprint identification, for example, FBI employees Stephen Meager, Bruce Budowle, and David Ziesig in 1999 produced their notorious, unpublished “50K” study in which 50,000 fingerprint images were each compared to all the others. Although this study was cited repeatedly in courtroom testimony as evidence that the probability of a false fingerprint match is infinitesimally small, academic critics have excoriated the study as a piece of scientific trash. One prominent expert called it “extraordinarily flawed and highly misleading.” Two prominent European experts said the study “so transcends reality that we are amazed that it was admitted into evidence. It is entirely unsupported.” The basic problem was that the study failed to take into account any variation in prints made by the same finger, so that its statistical conclusions represented an idealized and unrealistic situation with no connection to reality.

Similarly, when challenges were raised to CBLA evidence, the FBI came up with another misleading study that purported to prove that the probability of a CBLA match between unrelated bullets is extremely low. This study illustrates a number of common problems with forensic “databases.” The samples in the FBI’s “database” of bullets were not selected randomly from the population of bullets available commercially at a given point in time in any given locale. Instead the researchers selected bullets from casework that had been performed in the FBI lab over a period of many years.

15. Part of the reason that forensic experts have studied the frequency of DNA markers is that courts insisted on it. When DNA evidence was first introduced, forensic experts offered statistical estimates that were very poorly validated. In the early 1990’s a number of appellate courts excluded DNA evidence due to the lack of scientific consensus about the rarity of a DNA match. William C. Thompson, “Evaluating the admissibility of new genetic identification tests: Lessons from the “DNA War”. 84 J. CRIM. LAW & CRIMINOLOGY 22 (1993). Faced with the loss of this favorite weapon in the forensic arsenal, forensic scientists quickly got to work doing the population studies they should have done in the first place. Within a few years, the growing body of research had provided a more solid foundation for claims about the rarity of DNA profiles (at least for the most common types of DNA evidence), and the admissibility crisis quickly faded. Courts have not required comparable statistical validation for other types of forensic identification evidence and, not surprisingly, little such research has been done.


using several criteria apparently designed to assure the greatest possible diversity in the samples (and thereby reduce the likelihood of coincidental matches among the database samples). For example, the researchers attempted to assure that each bullet in the “database” came from a distinct molten source of lead. Yet manufacturers make thousands or millions of bullets from the same molten source and those bullets end up in different boxes of ammunition that are frequently distributed in the same geographic area. To make matters worse, the researchers threw together bullets of many different calibers and types. This further increased the diversity of the database (and reduced the likelihood of coincidental matches) because there are different metallurgical considerations underlying manufacture of the different types of bullets. A bullet from a .22 caliber handgun, for example, is unlikely to match shot lead and less likely to match a bullet from a .50 caliber military weapon. However, because casework comparisons typically involve bullets of the same caliber and type, the relevant issue at trial is the probability of a random match within a particular caliber and type of bullet (e.g., the probability of a match between two .22 caliber handgun bullets) rather than the probability of a match in the database as a whole comprising bullets from distant geographical regions. Thus, by constructing a “database” of unrepresentative samples and using it to address irrelevant and inappropriate questions, the FBI researchers created the false impression that coincidental matches in casework are rare. Fortunately, the problems in this FBI study have now been widely recognized, but it is unlikely to be the last misleading study that makes its way into the criminal courts.

**Evaluation of Phase 4: Inferences and Conclusions**

After completing the first three phases of the forensic process, the examiner reaches the inference/conclusion phase (Phase 4). At this stage the examiner prepares an opinion (inference or conclusion) for the contributing agency and possibly court. The work at this stage is the tip of the forensic iceberg — the portion most readily seen — but it depends on the work done in the previous stages. The conclusion is the culmination of a chain of inferences and is only as strong as the weakest link in that chain.

When evaluating forensic evidence, it is often helpful to create a list of the inferences that the analyst made to reach the ultimate conclusion. The inferences can usually be characterized as a series of “if-then” statements. Laying out the inferences in detail makes it easier to see weaknesses in the final conclusions. For example, the chain of inferences underlying CBLA might look like the following:

(1) IF [the instrument is properly calibrated; the controls performed as expected; the results were recorded properly, etc.] THEN [the bullet from the crime scene has the chemical profile I have specified for it; the reference bullets from the defendant’s box have the profiles I have specified for them].

(2) IF [the bullet from the crime scene has the chemical profile I have specified for it; the reference bullets from the defendant’s box have the profiles I have specified for them] THEN [the crime scene bullet is “analytically indistinguishable” from the bullets in defendant’s box].

(3) IF [the crime scene bullet is “analytically indistinguishable” from the bullets in defendant’s box] THEN [the bullets are very likely to have originated in the same molten source of lead at a manufacturer].

(4) IF [the bullets all originated from the same molten source of lead at a manufacturer] THEN [the bullets are all likely to have come from the same box].

As this example shows, the ultimate conclusion depends on a chain of “if-then” inferences. When evaluating a forensic opinion, you should be sure that each “if” step used as a foundational stepping stone to the final inference is valid, then verify that every progression between each “if” and “then” in the logic process is valid and supportable. In the case of CBLA, there were weaknesses at several stages. Although the instrumentation the FBI used was appropriate (once the FBI made the shift from NAA to more modern inductively coupled plasma emission spectrometers), the National Research Counsel strongly criticized the “match criterion” the FBI used for declaring samples to be “analytically indistinguishable,” saying it was too lenient and created to great a danger of false positives. Moreover, even if bullets are “analytically indistinguishable” there are no comprehensive or meaningful foundational studies (“no body of data” as observed by the Mikos Court) to support the next inference — that “indistinguishable” bullets likely originated in the same molten source of lead. Finally, and perhaps most

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importantly, even if bullets originated in the same molten source of lead, there is no way of knowing how probative that fact is for showing they came from the same box, given the potential for large numbers of bullets from the same molten source to appear in different boxes distributed in the same geographic area.

In Phase 4, forensic analysts often make the leap from thinking about the probability of the observed results under various hypotheses (which occurs in Phase 3) to drawing conclusions about the probability that a particular hypothesis is true. For example, a fingerprint (or toolmark) examiner will typically move from a probabilistic assessment — e.g., “it is very unlikely that I would see so many similar details if these two prints (marks) were made by different fingers (tools)” — to a conclusion, e.g., “these prints (marks) were made by the very same finger (tool) to the exclusion of all other fingers (tools) in the world.”

You should always be skeptical when a forensic scientist claims to have identified an item uniquely as originating from one and only one possible source in all the world. These claims rest implicitly on the assumption that the “matching” characteristics are so rare as to be unique — an assumption that is impossible to test or verify. Even when dealing with DNA evidence, where statistical estimates of rarity are well supported, it is problematic for an analyst to claim to have identified the source of a sample uniquely as coming from one and only one person in the universe. Such claims rest not on science but on an arbitrary conclusion that the “matching” genetic characteristics are sufficiently rare to rule out the chance that anyone else could have a duplicate DNA profile. When dealing with fingerprints, bitemarks, bullet lead compositions or toolmarks, where there is little or no scientific basis for any statistical estimates of rarity, it is even more problematic for an analyst to claim to have identified the source of a mark or bullet uniquely (although analysts in these areas have persisted in doing so).

You should also be skeptical, and should raise objections, when a forensic scientist expresses an opinion about the probability or likelihood of any ultimate conclusion. For example, while it is generally permissible for a DNA expert to testify about the probability that an evidentiary sample would happen to match the defendant if it actually came from a random person other than the defendant, it improper for the DNA expert to testify directly about the probability that the evidentiary sample came from the defendant. (If you do not understand the distinction just drawn, please read the previous sentences again, carefully). The difference between the permissible and impermissible statement is the nature of the foundation. There often is a scientific foundation (population studies) for estimating the likelihood of finding a particular DNA profile in a person randomly drawn from the population. However, there is not and can never be a scientific foundation for estimating the probability an evidentiary sample came from the defendant because that probability depends on a variety of factors (e.g., the defendant’s alibi, other evidence in the case) that have nothing to do with scientific evidence. The forensic expert is in no position to evaluate the defendant’s alibi and other evidence, and generally has no business basing a conclusion on such factors. So, as a matter of basic evidentiary principle, such conclusions are generally improper. You should object to such conclusions on grounds that they lack proper foundation, that they invade the province of the jury, and that they go beyond the expert’s competence.22

Can Forensic Testing Be Validated By Proficiency Testing?

Often the only research that forensic analysts can muster to support their claims of accuracy in Phase One and Two is “proficiency testing.”23 Yet proficiency testing in forensic science is frequently worthless as a true indicator of examiner proficiency. It is often designed as window-dressing to create apparent support for the laboratory’s claim of competence without taking the risk of seriously testing that claim. When evaluating proficiency testing, it is important to consider several factors.

Consider first the basic structure of the test. The first author has observed proficiency testing (not necessarily at the author’s former law enforcement laboratory) where the supervisor repeatedly (over a period of years) selected the samples to be tested from a collection of only 4 or 5 samples! In that situation, the analysts become so intimately familiar with the “proficiency samples” that they don’t even need to run a complete analysis to identify them. The second author has reviewed DNA proficiency tests in which the “correct” answer in every instance was that the samples “matched.” Consider how likely an analyst would be to make a false match in that test. Consider further what it means for the analyst to announce, after taking a series of such tests, that he has never, ever, had a false match.

Another consideration is the nature of the samples — are they “real world” specimens that are representative of the samples actually tested in your case, or are they from Fantasyland? In one instance known to the first author, a lab tried to validate its proce-


23. The study was criticized by the National Research Counsel in its 2004 report on bullet lead. NRC Report, supra note 3 and Thompson, supra note 3, at 76.
dures for identifying components of an exploded bomb by doing proficiency tests on similar items obtained from retail shelves that had not been in an explosion, even though one of the elemental constituents that comprised the bomb components was particularly vulnerable to volatilization at the elevated temperatures existing during an explosion.

A key question is: what does the proficiency test test? Many proficiency tests focus on just one or two phases of the four-phase process of forensic inference outlined in this article. Asking a bullet lead analyst to measure the level of various elements in samples of lead alloy provided by NIST (National Institute of Standards and Technology) may well be a good test of the analyst’s proficiency at phase one of the process, but it does not validate CBLA as a whole. “Proficiency tests” that focus on uncontroversial phases of a forensic test, such as the first phase in CBLA analysis, while ignoring other more controversial phases, are not particularly helpful and often seem designed to provide meaningless assurance about a test rather than seriously examine its accuracy.

Another issue is whether the proficiency test has been conducted and reported fairly. Although chicanery in proficiency testing is hard to prove, there are strong incentives for “wink and a nod” testing. There is serious potential for embarrassment and loss of credibility, for the analyst and for the lab, if an error is reported. This is an area in which the strong norms of camaraderie and solidarity that exist in the law enforcement community may work against objective scientific endeavor.

Another way to virtually eliminate the possibility of proficiency failures is to devise tests that examiners can pass without much deliberation or effort. When Allan Bayle, former Scotland Yard fingerprint examiner, evaluated the FBI’s internal proficiency tests of its fingerprint examiners, he concluded they were too easy to be meaningful. Bayle testified, “[I]f I gave my experts these tests, they’d fall about laughing,” and characterized the FBI proficiency tests as “a joke.” Unfortunately, it is usually difficult to evaluate proficiency tests in any objective way due to agency secrecy and limitations on discovery.

**Conclusion**

The ancient Chinese had a famous curse: “may you live in interesting times.” These are indeed interesting times for the forensic sciences. The field has been glorified in the media and for much of its history has received a free pass into the courtroom. But times are changing. In the academic community there is growing awareness that many areas of forensic science are problematic — undervalidated and oversold. And that spells big trouble for forensic science. We are entering a weeding out period in which weaker techniques like CBLA will either improve or be abandoned, and exaggerated claims will either be moderated or excluded from testimony.

Lawyers who represent criminal defendants will play a crucial role in this process. In criminal cases, the junk science being presented in the courts is overwhelmingly prosecution junk science. Hence, the job of exposing it and challenging it, so it can be weeded out or improved, falls primarily to defense lawyers. The job is difficult but it can and must be done. We hope the framework provided in this article makes the task a bit easier.
NYSACDL AND THE
HENRY C. LEE INSTITUTE OF FORENSIC SCIENCE
TO PRESENT LAW AND FORENSIC SCIENCE
CLE SEMINAR
SATURDAY, JANUARY 27, 2007 IN NEW YORK CITY

The NYSACDL and The Henry C. Lee Institute of Forensic Science will present a 6 credit CLE program titled Law and Forensic Science on Saturday, January 27, 2007 at the Marriott Financial Center Hotel in New York City.

Tuition is $200 for NYSACDL members and $250 for non-members. Seating is limited, so reserve your seat now by contacting us at nysacdl@aol.com.

The Henry C. Lee Institute of Forensic Science links scholars, forensic scientists and the legal community in addressing the scientific and social issues confronting forensic science and the criminal justice system throughout the world. The Institute’s goal is to make the criminal justice system more effective. The faculty for the program includes Dr. Henry C. Lee, Professor of Forensic Sciences at the University of New Haven, and Director Emeritus of the Connecticut State Forensic Laboratory; Timothy Palmbach, JD, the Director of the Forensic Science Department at the University of New Haven and Albert B. Harper, Ph.D., JD., Executive Director of The Henry C. Lee Institute of Forensic Science.

Among the topics to be covered by Palmbach and Harper during the morning session, are the intersection of law and science, the fundamental principles of forensic science and general introduction to forensic science. There will also be discussions about using videotape evidence, photogrammetry, fingerprint evidence and computer forensics.

The afternoon session will be devoted an overview of forensic science by Dr. Lee, the noted criminologist., known for his work on cases including OJ Simpson, Jon Benet Ramsey, Vincent Foster and the assassination of President John Fitzgerald Kennedy.
The NYSACDL presented 4 credit hour Last Chance Ethics seminar at St. Francis College in Brooklyn on Saturday, December 2.

The half-day program featured presentations by lecturers (in alphabetical order) Martin B. Adelman on Retainer Agreements and Letters of Engagement, Daniel N. Arshack on Ethics of Interviewing Witnesses, The Ethical Implications of Alcohol, Drug and Substance Abuse by Avrom Robin, and Protecting Yourself and Your Client by Bob Fogelnest and Larry Goldman.

You can order CD-roms of the materials for $25 by emailing us at nysacdl@aol.com.
AMICUS REPORT

by Richard D. Willstatter

Richard D. Willstatter is a Director of NYSACDL and serves as Amicus Chair. He is a partner at the White Plains firm of Green & Willstatter.

NYSACDL and NACDL were prepared 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. We recruited Lawrence S. Bader of Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. to prepare our brief. It was recently announced that the Government decided to withdraw its appeal. It is always best to win without a shot being fired.

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 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, will file his Initial Brief on or about December 18, 2006.

In addition, as we previously indicated in this column, 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. We recruited Lorca Morello of the Criminal Appeals Bureau of the New York City Legal Aid Society to write our brief. The brief will be jointly submitted by the Legal Aid Society, NYSACDL and Neighborhood Defender Services of Harlem. We expect the brief will be ready for filing shortly.

On September 18, 2006, the Center for Constitutional Rights filed a brief in Walton v. NYSDOCS with the New York State Court of Appeals. The lawsuit seeks an order prohibiting the State and Verizon/MCI from charging exorbitant rates to the family members of prisoners to finance a 57.5% kick back to the State. Verizon/MCI is currently charging these family members a 630% markup over consumer rates to receive a collect call from their loved ones, the only method of calling from a DOCS institution. The Sentencing Project, a non-profit corporation based in Washington, D.C., obtained the assistance of Kramer Levin Naftalis & Frankel LLP in Manhattan to author an amicus brief. Keith M. Donoghue of that firm wrote a splendid brief arguing that the rate structure was an enormous burden on state prisoners and their families. NYSACDL and NACDL sought and received the inclusion of our concerns that the high cost of calls interferes with our clients’ right to counsel in connection with appellate and other post-conviction representation, forces poor defendants to choose between spending money on calls to home and calls to attorneys, and is a burden on financially strapped public defender organizations who must accept these collect calls. The brief amici curiae was filed on December 1, 2006. NACDL Executive Director Norman Reimer and NACDL President-Elect Carmen Hernandez were instrumental bringing this matter to our attention and seeing to it our concerns were included in the brief.

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.
There is a trend abroad these days, one that threatens the very fabric of the criminal justice system, that places the right to a fair trial before a jury of one’s peers in jeopardy, and which requires the combined strength of all who value those things in order to stop this horrific progression.

Those who are the champions of its promulgation tend to speak of it as “progress. They brag to their colleagues about how quickly they have managed to select juries in the most serious kinds of criminal cases as if that were some kind of contest win, irrespective of the damage that may have occurred in their thirst for speed. Ignoring the simple and irrefutable facts that the number of pending criminal matters has dropped significantly, that Criminal Term judges often sit idle for great portions of the work day for the lack of “ready” cases, that they have had to take on civil matters to make up for the lack of criminal trial work, and that crime is down by any statistical measure, one wonders how they may justify this unprecedented lack of criminal trial work, and that crime is down by any statistical reference, one wonders how they may justify this unprecedented need for haste.

There is no statute which specifically governs the methodology to be employed while selecting a jury in criminal cases. There is one Court of Appeals decision, a copy of which many jurist gleefully hand out to all lawyers who come before them, in a virtual “gotcha” attitude, which grants them the right to utilize their “discretion” when overseeing the selection process. Of course, that decision calls to mind the days when there literally no limitations on what a lawyer could ask and how long he could take to go about it. In times past, jury selections frequently took longer than the testimonial portions of the trial. Was that too much freedom? Perhaps. But, is going over the top in the other direction too little freedom? Isn’t the ultimate goal to achieve a jury of twelve and two alternates who come to the table without preconceived attitudes which prevent their reaching a fair result? Isn’t that essential to the entire process? What good is the provision of a wonderfully fair trial with all the correct legal decisions, no acrimony between counsel, few sidebars, a minimum of delays, if ... at the end ... the matter is handed over to a group of laypersons who have come with an agenda of their own, who refuse to accept the legal principles upon which our system is constructed who don’t understand what we are about, and thereby reach the wrong conclusion?

When a judge in Manhattan or the Bronx (and this is happening in those counties as we speak) has such insensitivity to these concerns that they turn to counsel and direct him/her to address an audience of 45 or more prospective jurors in a 15 minute period of time, with no advance information about these folks and only a minimal interrogation by the Court, how can the concept of legitimate jury selection be carried out? The Court of Appeals has only said that they can use their discretion, not that they have the right to abrogate their discretion by instituting policies tantamount to de facto legislation, severely limiting the jury selection process without thought being given to the issues involved and the complexity of individual cases. Since the drafting of this paper the Court of Appeals recently approved a 44 person voir dire procedure situation.

And is it any better when 16 or 18 people are placed in the box and you are given 20 minutes the first round and then 15, 10 or less for all later rounds? What do jurists think has occurred after the first round of 20 minutes that instantly converts the second and third round jurors to becoming better prospects? Do they volunteer more information, or simply become better educated as to how they may cause their elimination for selfish motives?

Do judges truly believe that when they ask questions that they receive truthful answers as opposed to receiving answers that these prospects believe they are supposed to provide? How often do judges say that “I take it by your silence that would all answer ........................? Or are they afraid to speak up...embarrassed to be branded as bigots in public ...to be said to be “prejudiced” or “biased,” or worse yet, “unfair”? How many times does the judge ask a juror who has just provided a cause explanation which might disqualify him/her, if he can still he “fair”...as if that is a completely different category of response? “I’m sorry judge, but my father was murdered during a holdup in his liquor store last year, and I’m not certain that this robbery case is right for me.” ...The Judge: But you realize that this defendant didn’t murder your father, so can’t you put that aside and still be “fair?”

What nonsense! Isn’t this the very point of the voir dire to eliminate suspect individuals who in the final analysis may not be fair? Why should the judge invest any of this “valuable time” in rehabilitating bad jurors just to force attorneys to use up their peremptory challenges? We can’t look inside their heads and score their fairness in any objective way. When a layperson volunteers that kind of feeling, he or she is trying to tell you what you want to know, that they probably can’t be fair. It’s enough for many of these people to simply speak aloud in a public forum ...which many have undoubtedly never done before ...let alone to withstand the onslaught of a judge who presses them to concede that they “could be fair,” irrespective of their past traumatic experience.

Not only is that form of coercion applied, but then, when these jurors are honorable enough to admit their true prejudices and bi-
ases, they are virtually forced to state (because of other recent Court of Appeals decisions) that they could be “unquestionably" fair...not merely “try” to be fair...

even though it is obvious that they have no idea whether or not they could be. Wouldn’t it be best to simply eliminate those who “might” not be fair? Isn’t that what we are there to accomplish?

And what of the pre-selection legal charge? The judge provides a half dozen serious and complex legal concepts to all of the prospective jurors en masse, with the unrealistic assumption that even those with language difficulties, those who received their schooling in a foreign country, those whose education only stretches to the 6th grade, those who are bored and uninterested, will all accept, understand and absorb these legal principles.

Whenever I ask the jurors in the box if they understood some, most or all of these changes, the answers are most compelling. They have not gotten much from that abbreviated legal education, if anything, and we delude ourselves to believe otherwise. So, if counsel should develop that a juror may not be able to accept the thought that policepersons might get on the witness stand, in full uniform, and commit perjury, many of the precious few minutes allotted are committed to achieving an incontestable cause challenge for that juror, leaving little or no time to speak with anyone else.

Now that virtually everyone is eligible for jury service and that we must sometimes interrogate and ultimately challenge judges, attorneys (including assistant district attorneys), court officers, police officers, probation and parole officers, etc, we should be given more, not less time! I was compelled to include two police officers on my most recent jury trial because the time had run out, I had not gotten to question them in depth and from what little I had learned it was more reasonable to choose them than others who I had not spoken to at all.

We are criticized and embarrassed when we exercise peremptory challenges on the basis of profiles, racial or ethnic stereotypes and the like, vis a vis the Batson and Kern decisions. What else do we have to go by when we have never had the opportunity to speak to many of the jurors and the time has run out?

To make matters worse yet, Queens County is the most ethnically diverse locale in the Northeast. Many of our prospective jurors are from countries which utilize professional jurors, the Napoleonic Code, or came from behind what was euphemistically called the “Iron Curtain." Shouldn’t we have an extra moment or two to query those jurors about whether they would have trouble adjusting to a completely new justice system and if they can assure us they will apply our standards rather than the ones they grew up with? Many of them have never heard of our legal precepts before that day in court. And what of those who seemingly have language difficulties? Shouldn’t we explore that area of concern before it becomes a real problem? More than one local jury has had jurors sworn and the panel released, only to have a juror assert an inability to understand what was taking place much farther along in the process.

More complicating still, the Court of Appeals has rightfully declared that a juror who brings an esoteric area of expertise to the trial arena may not utilize that expertise once the matter has been turned over to the jurors for deliberation. You can readily appreciate that having an untested, unsworn, perhaps amateur or self-proclaimed “expert" in medical matters (a registered nurse, for example) or police investigation and procedure (police or court officer) who comes forward for the first time inside the jury room is unfair to both sides. Don’t we deserve an opportunity to explore this potential as well? What of those with prior criminal jury experience, many of whom have been tainted by the losing lawyer after the trial had ended. Don’t we need to examine that area of significance? There are still many areas of importance remaining after the Court has posed its generic inquiries.

The justification for speed in the selection process appears to rest upon three arguments: “the Feds do it with no lawyer input at all,” “it’s wasteful of the Court’s time,” “the questions asked by the Court covers enough ground.”

Over several decades of conservative congressional input, in stark contrast to the liberal 60’s, many federal criminal procedure statutes came into being which were tantamount to a virtual wish list from Federal prosecutors. The Feds may offer accomplice testimony without corroboration, they may Izeep the case officer (arresting officer to us) in the courtroom with them while others testify, although the officer will eventually testify as well, all sorts of hearsay evidence is permitted and the prosecution even gets a "rebuttal" summation...two closing arguments to our one. The twisted logic for some of these rules consists of nonsense like...the defendant gets to remain in the courtroom, why not the case officer...the Government has the heavy burden of proof, therefore they deserve a rebuttal summation. Is it any wonder they often have conviction rates in the high 90 per cent percentiles? The deck is entirely stacked in favor of the Government in Federal Court, so that the mere statement that the Feds have been doing it that way for a long time,” truly has no meaning. You would undoubtedly get a “fairer" trial in most state courts than in any federal court.

The federal judge does in fact interrogate all of the prospective jurors, with little or no input from the lawyers. True, attorneys are permitted to submit a list of requested questions, which are often ignored or refused “as covered" by the Court’s own interrogation. It is indeed accurate to say that juries are selected in federal court in an hour or two. Does that make it the better process merely because it is quicker?

New York State has traditionally provided its citizens with more and greater rights than the Federal Government. We have always been way out in front in the area of civil liberties, freedom from unlawful searches and seizures, and the like. Because they do it wrong, because they provide a lesser standard of justice, that is not a justification for our trying to catch up with that process, which clearly appears to be the ultimate goal for some of our judges.

The statement that voir dire is wasteful of the Court’s time, is simply untrue. Better juries are less likely to end up in hung juries. How often have we gone through a lengthy and complicated trial only to see it all wasted because one juror refused to deliberate, sneaked into the jury by deception, disguised his or her personal agenda, had “emotional” issues, or were simply never questioned about critical areas of their background because the lawyers had no
time left? These truths makes it clear that more evaluation, not less evaluation is required to protect the process from unwanted glitches. That the selection process would get “easier” each round has always been the mainstay of truly illogical reasoning about this process. Why should questioning 18 people require less time the second round (the 20, 15, 10 minute method) or the third? The number of persons to be questioned remains constant, the issues are the same, and we all know that few if any jurors volunteer additional information although we urge them to.

So why should we require less time to evaluate and eliminate inappropriate jurors during the later rounds, other than the Court losing its patience with the procedure? If anything, the lawyers grow more tired and the burden is on us to keep the jurors involved, interested and truthful as the rounds go on. With 18 persons in the box, selection rarely takes more than two rounds anymore at any rate, so why deprive the attorneys of another five minutes or so to achieve a fairer jury? We waste far more time in late starts, long recesses, early lunch breaks, late lunch return times, etc., than the five or six extra minutes we usually ask for.

Finally, the idea that questioning by a judge is equivalent to questioning by a skilled trial lawyer is simply erroneous. Many judges were never trial lawyers themselves, many of them aren’t that interested in the process....save for getting it over quickly.....jurors are often queried as

...as a group by the Court, and jurors are unquestionably intimidated by the Court’s interrogation. The Court often doesn’t know the trial strategy of the attorneys or those issues which are important to them. How often do jurors respond with different answers when questioned individually, on a one to one basis, and perhaps with greater aplomb?

There is no case law which supports this drastically abbreviated jury selection process and no tradition behind it. There is no burning need for the speed up of the selection process or to force attorneys to attempt to question 18 or more persons at one time. Time is now on our side. We have never had so few criminal cases and there is ample time to try them with an extra half hour or so thrown into the process. There is no basis in scientific study which supports judicial interrogation (the Federal system) versus attorney interrogation as a method which tends to better insure the value of the selection process as a whole. Common experience and the opinions of most, if not all trial lawyers is that lawyers should conduct the voir dire ... an opinion equally expressed by defense attorneys and prosecutors alike.

What we truly need is a statutory rule of thumb, mandating no more than 12 persons in the box at one time during the voir dire process, and twenty minutes for each round. If that means one full court day devoted to jury selection then so be it. If the judiciary would eliminate the time that jury selection then so be it. If the judiciary would eliminate the time that is wasted for less important reasons they could easily afford to provide the brief time we need to do our job in a constitutionally effective manner. Ultimately, most experienced litigators will tell you that cases are won or lost in the jury selection. Let us have the time to do it right.

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**MY EXPERIENCES AT THE NATIONAL CRIMINAL DEFENSE COLLEGE**

by Pasqual A. Lee

Pasqual A. Lee is the NYSACDL member awarded the Association’s annual *Twelve Angry Men* scholarship to the National Criminal Defense College in Macon, Georgia.

This past summer I attended the National Criminal Defense College, intent on developing my self-confidence in jury selection, direct and cross examination, impeachment, opening statements and closing arguments. I learned a valuable self lesson while also accomplishing these goals.

I have to admit that as a young criminal defense lawyer, I don’t always know what works or what persuades. Sometimes I feel limited by my lack of experience, world view and my personal habits. I have endeavored to constantly look for ways to become a more effective advocate for my clients. In the past I often lacked faith in my own ability to convey my client’s message of “not guilty” to the judge and jury because I feared looking foolish and feared attempting the unusual by thinking outside the box.

I didn’t expect to address my fears at the NCDC, but that’s exactly what happened - and I am the better for it. Fighting through my initial embarrassment was hard work, but the faculty’s patience assisted, coupled with the constant motivation of my peers helped me to gain confidence in my ability to be myself in court.

Using applied techniques derived from literature and theater — including the use of narration and story-telling — my instructors taught me that doing what it takes to become effective is a client-focused and not personal decision.

I learned that as a criminal defense lawyer I must strive to operate with creativity in the courtroom, seeing past myself to win the case despite lousy law and the moral and emotional stresses inherent in criminal defense.

I am confident I would not have learned this lesson without experiencing the NCDC. I am thankful to the Twelve Angry Men for awarding me the such an opportunity. I have gained a greater appreciation for my clients and my work and am truly blessed to be a member of the criminal bar.

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**NYSACDL OFFERS TWELVE ANGRY MEN SCHOLARSHIP TO NATIONAL CRIMINAL DEFENSE COLLEGE TRIAL PRACTICE INSTITUTE**

The deadline for applications to the National Criminal Defense College’s Trial Practice Institute 2007 at Mercer Law School in Macon, Georgia, is April 1, 2007. 

NYSACDL members in good standing who wish to be considered for the scholarship must first be accepted by the NCDC and then submit a letter to the NYSACDL describing their practice, financial situation and qualifications. The scholarship is funded by money raised by the NYSACDL’s production of *Twelve Angry Men*.

For further information regarding the scholarship, contact Executive Director Patricia Marcus via email at nysacdl@aol.com or by phone at (212) 532-4434. To receive an application for the NCDC’s Trial Practice Institute, contact the NCDC directly at (478) 746-4151 or visit their website at www.ncdc.net.
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.
WHEN FEDERAL COURTS MISPLACE YOUR WRIT AND FAIL TO RULE

by Ephraim Margolin

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Ephraim Margolin is a member of the California Bar and a Past President of the National Association of Criminal Defense Lawyers.

You have filed your best, most carefully documented, most convincing, most “sure-fire” federal habeas corpus petition. Your client’s family hocked themselves blind to pay your fees and costs. They paid your investigators and your experts. You located your witnesses. You have created a virtual Sistine Chapel of a writ. No one could have done it better. You feel like a Genghis Khan in short pants. But the judge you drew remains unimpressed. A year goes by. Two years go by. You are facing the end of a fruitless third year. Your client concludes that you are a bum. Your witnesses gradually disappear, succumb to old age, move away, or get deported. Before the century fades, what can you do?

Last year, I had six different, involuntarily antique, habeas petitions in five different districts, before five different federal judges. Each habeas was more than two years old and seemed forgotten in the court in which it had been filed. Like a giraffe – known for sticking its neck out – my neck hurts. What should I do? What can I recommend to others in the same position?

Let’s begin with the easiest move – write a letter to the silent judge. Address the letter to the clerk of court, with a copy to the U.S. Attorney. Gently tell the judge that perhaps something is wrong. Ask, politely, whether there is anything else you can do. If new, relevant cases were decided in the interim, cite them. If any of your witnesses may be approaching old age, Alzheimer’s or deportation, mention it to the judge.

We do not choose our judges.

“I was married by a judge,” reputedly growled Groucho Marx.

“I should have asked for a jury.”

When letters do not work, bring a motion for bail. While bail is not likely to be granted, even a denial of bail requires that the case surface so that the motion can be considered. Such a motion is a device to force the court to dig up the docket, without terminally alienating the judge. File the motion in the alternative, asking for either a hearing on the habeas or a hearing for bail. If any of your prayers might be granted. Naturally, you might anger the judge with such a motion, but an angry judge is better than a comatose judge.

In 2001, I filed a federal habeas petition in the Central District of California. The judgment had been reversed after the first trial. The defendant was tried a second time and convicted again. My habeas petition asks: When is the sentence enough? We urged my client’s release. So did one of the prosecution investigators, one of the “victims,” and 50 other people who were familiar with the case. In California, denials are routine. Parole can be denied if the parole board finds any evidence to support a denial. Rumor has it that denials are frequently composed before the hearings. Many believe that parole is dead in California. Clearly, a conservative judiciary finds prison a universal solvent in all circumstances.

On April 16, 2003, after losing my habeas petition in all state courts, I filed in a Northern California District Court. Nothing much happened. The judge removed the case from her magistrates and consigned it to seeming oblivion.

In desperation, some two years later, I filed before that federal judge a motion to enjoin the state of California from conducting any future parole hearings until the issue raised in the federal habeas is resolved. The judge granted my motion, and a hearing on (continued on page 26)
the habeas petition closely followed. We lost. It took the judge two years to deny the habeas! Denial of a motion opens the possibility of a filing in the Ninth Circuit. Sometimes it takes a motion to shake out a decision on the merits.

**Judges are not required to be prompt.**

*Lillian Carter reputedly said, “Sometimes, when I look at my children, I say to myself, Lillian, you should have remained a virgin.”*

Many years ago, a federal district judge in Florida found our client in contempt of court for refusing to testify before the grand jury. We appealed. The law provided at the time that such appeals had to be decided within 30 days. I wrote the clerk of court repeatedly, citing the law, but there was no response. Subsequently, the court gave itself a 30-day extension without freeing the client. I sued in the U.S. Supreme Court. (*See In re Ruth Ellen Pearce, Eleventh Circuit, No. 84-5201.*) Within one week, we had our 2-1 circuit decision. We lost. The Supreme Court then held our writ moot. No one cared about the circuit’s violation of the law. Similar results occurred in several other cases in which courts were sued in a higher court.

Federal judges are not required to be prompt. Occasionally, federal judges are not required to obey the law. In criminal cases, the speedy trial act imposes time limits on judges. If limits are disregarded, the cases might be dismissed. In habeas practice, there appear to be no limits. Many delays are caused by cracks in the system. And yet, what a judge does with a habeas petition, and how the judge administers it, is the prime test of the quality of the judge. Frequently, it is about the prime test of a lawyer’s stamina.

**Justice delayed is injustice.**

Another of my habeas petitions, filed on July 1, 2003, in the Eastern District of California, questioned the propriety of a local sheriff bringing a willing witness to a preliminary hearing to assist in identifying the defendant. Defense counsel was not told why the witness and the police were together in court. The defendant sat alone in one section of the courtroom. The deputy sheriff had to prod the witness repeatedly, asking, “Is this the man?” The witness obliged and identified my client.

The California Court of Appeals ruled against us 2-1. The California Supreme Court, as usual nowadays, denied hearing. The federal court has remained quiescent since I filed the federal habeas petition in July 2003. In February 2005, we wrote a letter to the magistrate judge. There was no reaction. My client died in prison in June 2005. After the client’s death, the magistrate ruled in our favor in a 66-page opinion.

I could not conceive of ever retiring from the practice of law before this article was written. The essence of habeas petitions is urgency. For my clients. For me. For our entire criminal justice system. But something is wrong. Our writ practice increasingly feels like the jurisprudence of “Manana,” although less urgent. What do you think?
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