PROGRAM MATERIALS
Program #31186
August 18, 2021

Thinking Outside the Box for Solutions to Difficult or Impossible Cases

- Thomas Liotti, Esq. - Thomas F. Liotti, LLC

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August 18th, 2021- Live Program: 31186

Thinking Outside the Box for Solutions to Difficult or Impossible Cases

Description of Program:

When you have a difficult or impossible case conventional thinking should go out the window. How do you broaden the scope of your case so that your legal issues predominate the discussion about resolutions, settlements or plea bargains? The webinar will address multiple considerations for possible strategies; the use of experts; focus groups and the media; surveys; lie detector exams; judicial notice; Stipulated Facts; Motions *in limine*; severance; Attorney and Judicial Misconduct and spoliation of evidence and solicitation of *amicus curiae.*

1. Learning everything about your client medically, socially and economically.
2. The Process of Thinking Outside of the Box
    a. Ask yourselves how you would represent people in the news.
    b. What is different about your strategy and what will jurors believe?
3. Have the courage to set precedent and make new law.
4. Trying your case outside the courtroom.
    a. Reshaping public opinion.
5. When, how and why to attack your adversary or the judge, if ever.
6. When to settle.

Outside Counsel

When Settlements "Hit The Wall"

By **Thomas F. Liotti** And **Lucia Maria Ciaravino**

At the 23rd mile of the Boston Marathon, runners hit what is known as "The Wall," also known as "Heartbreak Hill." Champions break through the "wall," while others are unable to finish. So it is with settlements, which "hit the wall" or reach an impasse, where the other side has a seemingly intractable position, and the client is unable to see the "forest for the trees." This article demonstrates techniques that might be used by lawyers to convince or persuade the client or the other side to settle, because it is in their best interest to do so.

1. Understanding How the Brain Works. Convincing parties to settle requires some understanding of how the human brain works. Neuroscience tells us that we should be focused on the prefrontal cortex or the "judgment center" of the brain. Other parts of the brain deal with emotions. So the first rule of settlement is to recognize the difference in these parts of the brain, while focusing on good, objective judgments or facts, as opposed to judgments that are based upon subjective emotions such as revenge, anger, and hate, which are, of course, personal.

2. Opening the Mind to Alternative Thinking. We know that cognitive reasoning generally declines with age, but that is not always the case. In order to overcome the visceral rejection of a settlement by an obstinate person, lawyers might want to find out about a person's age and education. How do they spend their time? The lawyer might test or challenge the person's myopic thinking by diverting to discussions of books, art, music, or an interesting Op-Ed piece. This can show a commonality of thinking on those subjects, which may then transition or segue into an agreement on settlements. The idea is to focus on the positive. The power of negativity poses a threat to reason.

3. Lawyers and Clients Have Interests in Common. Taking time to explain the lawyer's role as an advocate and the work already done on the case, as well as pyrrhic victories such as the winning of pre-trial motions or the gaining of admission in discovery or examinations-before-trial and hearings. Also, if the lawyer has made a brilliant legal argument and the client was either present for it or if a transcript of it can be read, these may be selling points. In a contingency case the client might be told "we are, in a sense, partners in the case. I want you to get as much as possible, because the more you get, the more I get."

There is definitely an art to settlement negotiations, if not a science. It is something that every lawyer, both transactional attorneys and litigators alike can learn.

4. Introducing the Business Judgment Rule. It has often been said by judges that: "a good settlement is one where neither side is happy." The Business Judgment Rule introduces the client or adversaries to a dose of reality. When is the case likely to be tried? What will be the cost for both sides in time and money? Can you really afford to go to trial? There is the cost of legal time in and out of court for preparation, experts and other expenses.

5. What is the Likelihood of Success at Trial? Assuming best case scenarios, what are you likely to win? Assuming worst case scenarios what are you likely to lose? This involves a candid discussion of the pluses and minuses of a case. Some clients believe that when a lawyer discusses the negative aspects of a case or how a client might lose, that the lawyer has lost confidence in the case or has joined the other side. Starting with positives is always better and gradually introducing the negatives by describing them as the other side's contentions, does not put you "in bed" with your adversary.

6. Explaining the Dynamics of the Settlement Process. It is essentially the same process for both civil and criminal cases. Explaining the conflicting and roles of counsel is the lawyer's task. What is the job of each lawyer in the case? What is the role of an insurance company and an adjuster? When is the best time to settle the case? Usually it is at the end of the year, when insurance companies must unload their reserves. It is also the best time to negotiate pleas and sentences, because jurors and judges tend to be in a lighthearted mood from Thanksgiving through the end of the year holidays. A demand figure is first based upon what a jury would likely award. Then it ordinarily goes back-and-forth, like a ping-pong match, until you "hit the wall," again where both sides are at irreconcilable differences. Does it then make sense to settle, or to hold out for another day, perhaps after jury selection? What are the advantages between now and later? (See, Liotti, Thomas F. and Edward A Paltzik, Strategies for Settling Civil and Criminal Cases, American Bar Association White Collar Crime Committee Newsletter, Summer, 2011).

There is definitely an art to settlement negotiations, if not a science. It is something that every lawyer, both transactional attorneys and litigators alike can learn.

THOMAS F. LIOTTI *is an attorney with the Law Offices of Thomas F. Liotti in Garden City and a village justice in Westbury. He is the co-author of a Practice Guide to Village, Town and District Courts of New York (Thomson, Reuters West, 1995-present).* LUCIA MARIA , *is an associate with the Law Offices of Thomas F. Liotti.*

AMERICAN BAR ASSOCIATION
Criminal Justice Section

WHITE COLLAR CRIME COMMITTEE NEWSLETTER

SUMMER 2011

ABA CRIMINAL JUSTICE SECTION WCC Committee

MESSAGE FROM THE NEWSLETTER SUBCOMMITTEE CHAIR

By Martinique E. Busino

Welcome to the Summer edition of the **White Collar Crime Committee Newsletter**. I am excited to present this issue and to work on publishing future Newsletters that are engaging and useful resources for white collar practitioners.

I would like to thank those who contributed to this edition and the ABA staff-members, whose hard work makes this Newsletter possible.

Finally, I encourage you to submit an article for future editions, which will include Newsletters devoted to specific topics including *Brady* and electronic discovery in the criminal context. If you would like to submit an article for our next edition or have ideas on a subject for a topical Newsletter, please contact me at mbusino@crowell.com or Salma S. Safiedine at Salma.Safiedine@americanbar.org

FEATURED ARTICLES

Triple-Barrelled Critique of U.S. Foreign Anti-Corruption Efforts—But is there Cause for Concern?

By T. Markus Funk and Caryn Lara Trombino

T. Markus Funk and Caryn Trombino examine the OECD and the US Chamber of Commerce's recent criticisms - as well as compliments - directed at U.S. global anti-corruption efforts, and also discuss each entity's specific suggestions for reform. These proposals, as well as the recent drop in U.S. ranking on Transparency International's Corruption Perception Index, suggest that U.S. global anti-corruption efforts are still a work in progress.

T. Markus Funk, who from 2000-10 served as an Assistant US Attorney in Chicago, is a Partner in Perkins Coie's Investigations and White Collar Defense Group. Caryn Lara Trombino is a senior associate in the Group.

Bribery in China: The Clash of Culture, Law, and Globalization

By Rupert Utley

This article reviews bribery and corruption in China, the impact of anti-bribery legislation, and offers suggestions for effective compliance programs.
Mr. Rupert Utley is the Managing Director of LECG Greater China and heads up the practice from Shanghai. He has over 25 years of investigation and risk advisory experience, the last ten years of which have been building and leading investigation and forensic accounting practices, primarily in China.

Representing the Individual in Internal Investigations

By Evan A. Jenness

Internal investigations may serve companies' interest in preventing or limiting corporate exposure, but they present substantial hazards for some corporate constituents. While the rights, rules and laws applicable to law enforcement investigations have developed over many years, internal investigations are a relatively new phenomenon and subject to no mandatory procedural or substantive requirements. Representing the individual in an internal investigation requires an informed and cautious strategy aimed at minimizing potential legal exposure, adverse employment consequences and other collateral risks, in what often will be an evolving situation.

Evan A. Jenness is a criminal defense attorney whose offices are in Santa Monica, California. She specializes in white collar and other complex federal criminal matters, and is a former Deputy Federal Public Defender.

Strategies For Settling Civil and Criminal Cases

By Thomas F. Liotti and Edward Paltzik

The article gives you a method for winning your case without a trial. It is all about negotiating strategies that give you the best result for your client.

Thomas F. Liotti is an attorney with offices in Garden City, New York and a Village Justice in Westbury. Edward Paltzik is an Associate in his firm.

Issues Confronting Responsible Corporate Officers In the New Era of Government Food & Drug Enforcement

By Christopher R. Hall and Gregory G. Schwab

This article seeks to help practitioners understand the legal basis for the government's stated intent to pursue executives, in select cases, based on their "status" as Responsible Corporate Officers (as opposed to evidence of criminal conduct). The article also seeks to help attorneys assess whether their client's current compliance processes will adequately serve to avoid falling within this government initiative. The authors strive to do this by (1) tracing the RCO doctrine to its roots, (2) identifying the elements of a misdemeanor violation under the doctrine and the shifting burdens of proof that apply, (3) reviewing the exclusion provisions triggered by an RCO conviction, (4) exploring an active RCO case in detail, and (5) suggesting best practices to avoid RCO liability and exclusion.

Christopher Hall, a former Assistant United States Attorney, is a partner in the Philadelphia office of Saul Ewing LLP. Mr. Hall represents corporations and individuals during internal investigations, government criminal investigations, government civil enforcement actions, and related civil proceedings. Greg Schwab, also in the Philadelphia office, is an Associate in the Litigation Department and member of the firm's White Collar and Government Enforcement Practice Group. Mr. Schwab represents companies and individuals during internal investigations and related enforcement actions and civil proceedings.

CJS UPCOMING EVENTS

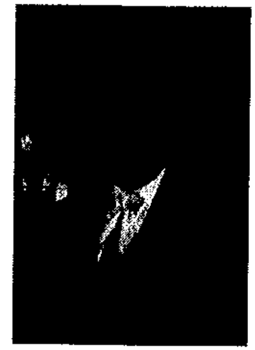
CJS Annual Meeting Schedule (See also the **comprehensive descriptions of criminal justice programs**) **Aug 5-7, 2011; Toronto, Canada**

NEW PUBLICATIONS

The State of Criminal Justice 2011 This annual publication reports on the major issues, trends and significant changes in the criminal justice system -- includes a chapter on White Collar Crime. Edited by Prof. Myrna Raeder

VISIT THE WHITE COLLAR CRIME COMMITTEE WEBSITE FOR UPDATES AND RECENT NEWS

Edward A. Paltzik



Thomas F. Liotti

Strategies For Settling Civil and Criminal Cases

By: Thomas F. Liotti and Edward Paltzik[1]

The strategies for securing favorable settlements in civil cases and plea bargains in criminal cases are often remarkably the same. To be a great settler in either area requires an approach different than that of the mediator or judge, both of whom often look for middle ground in a Solomon-like manner. Judges typically say "a good settlement is one where neither side is satisfied." The attorney is not satisfied with middle ground. Convincing your adversary to settle on your terms is an art and science. It is a matter of winning the case without a trial.

Conduct a Thorough Investigation

The first order of business is to learn all that you can about your case. What are the critical issues in the case that you hope to learn in discovery, through examinations before trial or simply by way of a thorough interview with your client? Do you need a private investigator to interview potential witnesses or an accident reconstruction expert?[2] Are there psychiatric issues in the case that need to be addressed?

In cases where your client's behavior may be partially or entirely justifiable as a result of a psychiatric or medical condition, you need to promptly pursue that aspect of the case with the help of a psychiatrist and/or doctor.[3] Cases involving theft or other financial loss will require the services of a forensic accountant.[4] Evidence is likely to degrade or disappear due to natural conditions (exposure to weather), repairs, cleanup efforts or even due to wrongful conduct by the other side.[5] The passage of time is also likely to have an impact on witnesses, as memories fade and witnesses move or die. Therefore, the decisions of whether to retain the services of an investigator should be made early in the case.[6]

Consider Worst-Case Scenarios

The attorney must provide the client with a fact-based assessment of the case. In a civil case, prior to entering settlement discussions, the attorney must determine the damages; consider whether liability can be proven, and measure comparative fault for all parties. In a criminal case, prior to entering into plea discussions, the attorney must consider all plausible defenses; analyze whether the case is overcharged; account for the effect of pre-trial publicity[7] on potential jurors; attempt to determine what charges, if any, are likely to come out of the grand jury; and ultimately, determine whether the prosecutor can meet their burden of proof.[8] In all cases before an attorney can negotiate effectively, he/she must consider how the case will be viewed by a jury, and how it will be viewed by the judge, in deciding pre-trial motions.

In civil cases, attorneys should research comparative verdicts. The New York Law Journal and Verdict Search[9] are helpful places to look. Consider the high end and low end of the range of possible damage awards if the case goes to a jury. In criminal cases, consider the minimum and maximum penalties that your client faces if convicted after trial, and whether it is more likely that the penalties imposed will be closer to the minimum or the maximum. Consider whether your client faces any collateral consequences (such as the loss of a professional license or other privilege) in the event of a conviction.

There are many attorneys who take the first money or plea offer made to them instead of formulating a realistic demand. Generally, the worst settlement and plea bargain offers are given to attorneys who never try cases. In order to extract the best settlement or plea offer, prepare your case as if it is going to trial.

Early Settlement Discussions: "The Ballpark" Analogy

You must remember to never bid against yourself. In civil cases, it is never too early to cultivate a relationship with the defendant's attorney and the assigned adjuster for the defendant's insurance carrier. In criminal cases, the same applies to the prosecutor. You should also research your adversary's background; the insurance carrier's track record on coverage and settlements. There is also a chain of command or protocols involving settlements. Committees, Bureau Chiefs and Supervisors may all have to be consulted.

In making a settlement demand or requesting a specific plea offer, you must know what your parameters. In the early stages of a negotiation, before concrete ideas have been exchanged, there will be "code language," to wit: "I have some flexibility" or "I have a little flexibility" or "I have no flexibility." We prefer to use code language in the form of a "ballpark analogy." The ballpark analogy is the best example of the code language that permeates the early stages of settlement and plea negotiations. As negotiations progress, the use of code language will decrease as the parties go into a more fact-based discussion. For example, if you have a wrongful death case that in your view is worth in the high six figures, then you might say to the other side: "The case is at least a six figure case. In order for us to even have a discussion about settlement, you must come into my ballpark. You do that by telling me that you recognize that this is a six figure case." In another example, suppose you have a criminal case in which your client is charged with Grand Larceny, a felony. You might say to the Assistant District Attorney: "We cannot accept any deal that involves a felony. I need to know that you have a realistic view of the evidence and the mitigating circumstances in this case." In either example, if you get the answer you are looking for, you will know that you have at least one hundred thousand dollars on the table or that you have at worst a misdemeanor plea offer on the table. You also know that there is a basis for continued discussions.

Once you determine that your adversary is prepared to enter your ballpark, it is appropriate to make a monetary demand or a plea demand. Once you give a demand do not change it until the other side bids against it. In a civil case if you are representing the plaintiff, the idea is to get the other side to come up to your number. In a criminal case, the idea is to get the prosecutors down to the offense and punishment level that you and your client deem favorable under the circumstances.

Advanced Settlement Discussions: Maximize the Strength of Your Case

As you prepare for the more advanced stages of a settlement or plea negotiation, anticipate "battleground" topics. This way of thinking is no different than the approach that a Presidential candidate may have. With so many states either solidly Democratic or solidly Republican, Presidential candidates in recent years must be pragmatic and realize that there are certain states that they will not be able to carry, no matter how hard they try. Therefore, candidates identify so-called "battleground" states, where the outcome could go either way and could turn on the smallest of details – states such as Ohio, Virginia and Missouri. As an attorney negotiating a settlement or plea, you must find your "Ohio, Virginia and Missouri." As your case progresses, you will realize that certain topics will not yield beneficial results for your client no matter how skillfully you present the issue to the other side. Instead, focus on the battleground issues that you believe will inure to your client's benefit.

In civil cases, an excellent example of a favorable battleground issue that a plaintiff's attorney may repeatedly encounter is life expectancy. In a recent wrongful death lawsuit, we represented the widow of an elderly man who had been struck and killed by a school bus while riding his bicycle to church without a helmet.[10] The decedent was 76 years old at the time of the accident and lived for 11 hours after it with conscious pain and suffering during some of that time. The school district's insurance carrier insisted that damages (including lost pension payments, Social Security payments, lost salary from part-time work and assorted other losses) be calculated on the basis of an 80 year life expectancy. However, the carrier's assertion of an 80 year life expectancy lacked any factual basis. The decedent had been in perfect health before the accident, did not drink, did not smoke, did not take any medication and exercised regularly. It seemed improbable that his life expectancy at the time of death was only 4 years. In order to refute the carrier's working number of 80 years, we referred to the Actuarial Life Table at www.ssa.gov (The Government's Social Security website and Department of Labor statistics), which revealed that the average life expectancy of a 76-year-old male was almost 10 years. Using that figure, we were able to change the dynamic of the negotiation by presenting the carrier with documentary evidence that the decedent would likely have lived perhaps twice as long as the carrier contended. We were then able to argue that all of the damages figures should be, at a minimum, doubled. Life expectancy arguments can be especially powerful because an increase in life expectancy immediately increases damages across the board.

In addition to identification of battleground issues, you should search for and identify "hidden values." The wrongful death lawsuit described above also provides an example of "hidden value." During the course of our investigation in that case, we learned that our client and the decedent received several free cruises annually in exchange for the decedent's service as a lecturer. Our client, the surviving spouse, only received the free cruises because of her husband's lecturing. After carefully questioning our client about the nature of the accommodations on the cruises and the locations of the cruises, we were able to determine the value of the cruises by examining the cruise line website. Coupled with the life expectancy increase, the value of the free cruises increased the value of the ultimate settlement.

Conclusion

There is both an art and science to settlement and plea negotiations. Consider your methodology for doing so before your next discussion in that regard. One final point is that the holiday season of December also presents an opportune time for resolution since carriers must dispose of their reserves and juries, judges and adversaries are in a giving and forgiving mood.

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[1]Thomas F. Liotti is an attorney with offices in Garden City, New York and a Village Justice in Westbury. Edward Paltzik is an Associate in his firm.

[2] See *People v. Barry Feinstein*, alleged double vehicular homicide, (Suffolk County, 1994). Mr. Liotti's firm conducted an investigation, which included the assistance of private investigators and an accident reconstruction firm. The District Attorney elected not to prosecute. Smith, Estelle Lander, Teen Won't Be Prosecuted In Crash, Newsday, (Suffolk edition) January 7, 1994 at 35. See also, People v. Jesenia Vega, (Suffolk County, 2007-2009. Defendant was accused of running over and dragging her boyfriend to his death following a drunken argument at a block party. Accident reconstruction showed that the defendant did not deliberately run over her boyfriend, which contributed to a reduced charge and sentence of 1 to 3 years. See Alfonso A. Castillo, 'Hysterical drunk,' or fearing for life? Woman faces charges in boyfriend's death. Newsday, August 31, 2007 at A20. Long Island Woman Denies Charges In Death of Boyfriend, Associate Press, August 30, 2007. See also, Laura Rivera and Joseph Mallia, Her Take on Tragic Night, Driver Accused of Fatally Dragging Her Boyfriend in July Says She Was Only Trying to Escape His Abuse, Newsday, December 27, 2007 at A22. The resolution in both the *Feinstein* and *Vega* criminal cases foreclosed any civil actions from occurring.

[3] *People v. Kathleen Prisco*, (Suffolk County, 2009). Wife accused of murdering husband, an attorney. On October 28, 2010 the defendant entered a Not Guilty By Reason Of Insanity (N.G.R.I.) plea before the Hon. Robert Doyle. Mr. Liotti's firm retained the services of a psychiatrist, who determined that the defendant was suffering from a mental disease or defect, in which diagnosis the District Attorney's psychiatrists concurred. See also, Carl McGowan, Fort Salonga Murder Suspect Admits She Stabbed Husband, newsday.com, October 28, 2010; Cark McGowan, Wife Admits Stabbing In Insanity Plea, Newsday, October 29, 2010 at A18; November 1, 2010, New York Law Journal, News In Brief, Andrew Keshner, Woman Who Killed Attorney-Husband Will Not Face Trial.

[4] *People v. Anthony Galasso* (Nassau County, 2008). Alleged Grand Larceny. Indictment, concerning theft of $4.3 to $8 million in escrow and other money from brother's law firm. Mr. Liotti's firm retained the services of a forensic accountant, who attributed only $600,000 of the alleged theft to the defendant. The forensic accountant's finding contributed to eventual compromise on $2 million as the amount attributable to defendant and a favorable plea deal involving a 2 ½ to 7 ½ year sentence. See Ann Givens, Bookkeeper Sentenced, L.I. Briefs, Newsday, June 7, 2008 at A13.

[5] See Thomas F. Liotti and Drummond Smith, Spoliation of Evidence by Prosecutors, Verdict (a magazine published by the National Coalition of Concerned Legal Professionals, July, 2008 at 1, 3 and 4 and New York Criminal Law Newsletter (a publication of the Criminal Justice Section of the New York State Bar Association), Summer, 2008, Vol. 6, No. 3 at 9.

[6] In *People v. Clarey* (Nassau County, 2–5-2006), an investigator was able to secure two sworn statements from eyewitnesses attesting to the fact that our client, an attorney, charged with D.W.I. and leaving the scene, did not cause the accident and death of a motorcyclist. See Zachary R. Dowdy, West Hempstead, Attorney Sentenced In Fatal D.W.I. Hit-Run, Newsday, September 15, 2006 at A57. The defendant was sentenced to 30 days and served 15 of them.

[7] See Thomas F. Liotti, Media at What Price, New York Law Journal, Perspectives Column, September 1, 1994 at 2 and Thomas F. Liotti, Lawyers and Media - Are You Savvy?, The Attorney of Nassau County, December, 2003 at 4, 5, 10, 11, 12 and 13. See also January 24, 2001, Annual Meeting of the New York State Bar Association, Committee on Media Law, Thomas F. Liotti, guest speaker and panelist on the topic of Law Enforcement and the Media.

[8] See Thomas F. Liotti, Avoiding Prosecutions, New York State Bar Journal, February 1995 at 49-58.

[9] See Verdict Search (verdictsearch.com).

[10] See Estate of Joseph Shannon v. The City of Long Beach and The City of Long Beach School District (Nassau County Supreme Court, Index No. 010359/09). Settled for $610,000 ($10,000 from the City of Long Beach and $600,000 from School District). See Joseph Kellard, School District Settles Death Suit, Family of Cyclist Hit By School Bus Awarded $610,000.00, Long Beach Herald, March 25-31, 2010 at 1 & 3 and Verdict Search, New York, March 29, 2010 edition Vol. XXVII, Issue 39 at 19 & 20 and Laura Rivera, $600G Settlement In Bus Fatality, Newsday, April 7, 2010 at A23.

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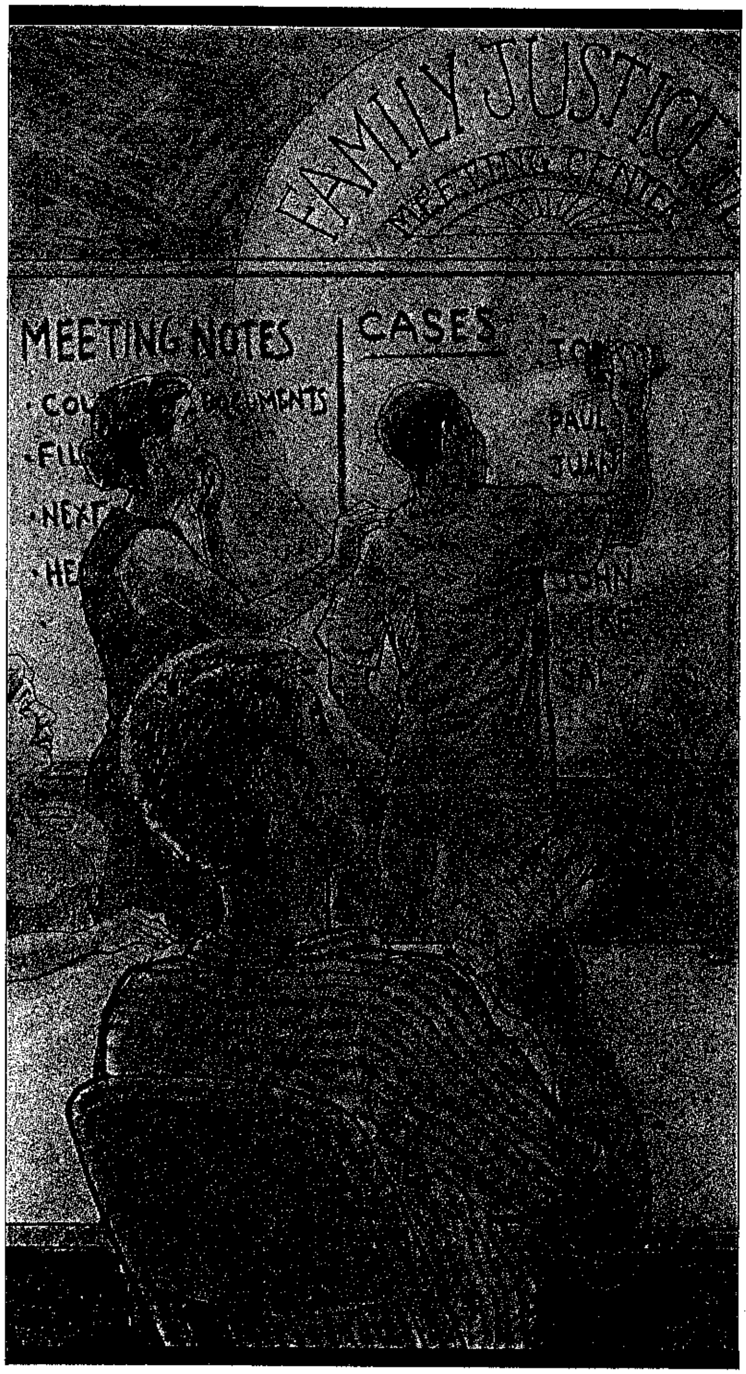


The Promise and Potential Pitfalls of Limited Scope Representation and Unbundled Legal Services

Philip M. Genty, Esq.

America's Most Dangerous Place

Thomas F. Liotti, Esq.

Civil Gideon Would Not Solve the Need for Poor People's Legal Representation

Jonathan A. Weiss, Esq.

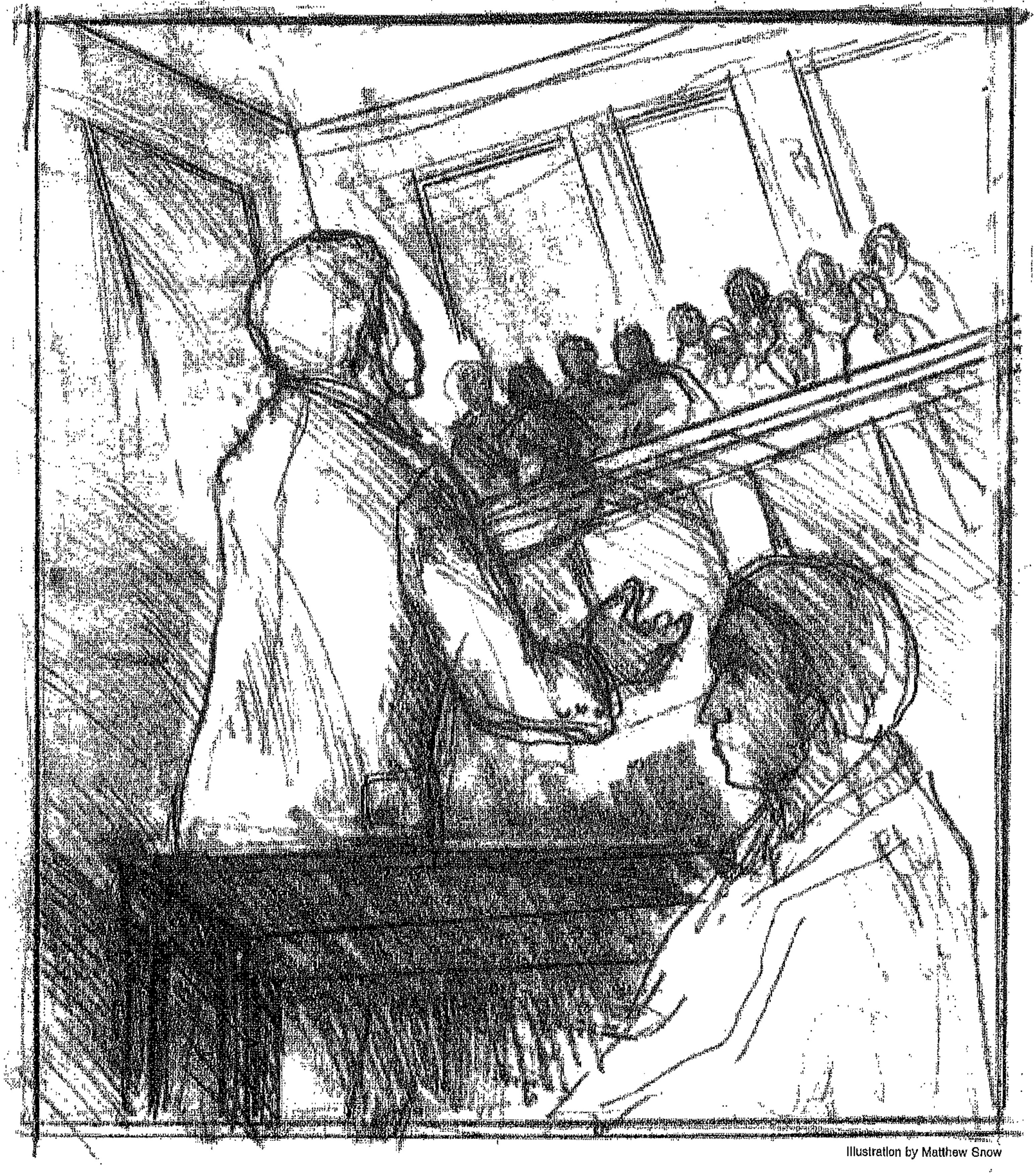
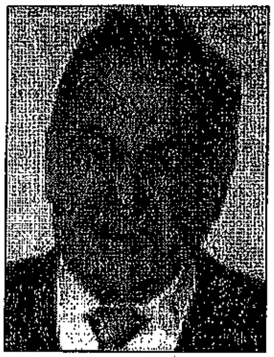


Illustration by Matthew Snow

America's Most Dangerous Place

by Thomas F. Liotti, Esq.



Editor's note: The despicable treatment of minorities by the criminal justice system in this country has become more highly publicized over the past year, especially in regard to officer-involved shootings of unarmed minority males. Truly, those egregious situations represent only the tip of the iceberg, the iceberg in this case being a criminal justice system that targets poor, especially minority working communities, tears apart families with insufficient employment opportunities, and warehouses its members, especially its men. If they dare to resist, the ultimate penalty, which courts themselves are loath to impose, is meted out summarily and justified by necessity. Either the victim or the individual policeman or woman becomes the fall-guy in a system that creates these situations but remains beyond hope of fundamental change: the best we hear is that government will attempt to better train its employees.

Yet, no one really is prepared to deal with the fundamental problem that underlies these recurring tragedies, which is that our working families have insufficient jobs and incomes to sustain them, and rather than deal with that problem programmatically by providing them with living wages and jobs, government finds it easier to engage in mass incarceration, scapegoatism, etc. It is well known that most of the three million prisoners in the United States (by far the most in the world, in gross and per capita) are there for drug offenses, are members of minority groups, mostly male. Instead of investing in communities where drug dealing is the only lucrative business, legalizing the drugs to cut their cost and hence the profit derived from them, and cleaning up addicts and putting them to work, our governments have invested in prisons. There will be no end to the killing of suspects by police charged with protecting communities by patrolling them to fill jails elsewhere until the larger issue is dealt with succinctly.

With the backdrop of this policy of blaming the community-as-victim for the flight of capital from it and the country as a whole, a process in which the government also plays no small part, the availability of the courts and the willingness and ability of competent attorneys to work to reverse it is all that those communities can rely on. But the absence of juries in over 90% of criminal court dispositions, the underfunding of defense initiatives, as well as the poverty of those communities, further compound the problem of vindicating the rights of poor minorities. Attorneys who attempt to zealously defend individuals in this context often find themselves the subject of attack.

Thomas Liotti is an outspoken and prolific writer on subjects relating to the improvement of the criminal justice system. His experiences show that no lawyer seeking to change the system is immune from attack by the very system he or she is trying to protect and advance.

When you think of dangerous places, you might surmise that they are near nuclear power plants or crime-ridden areas, but you would not consider a court in that vein. Courts are supposed to be places where justice is obtained; where fair-minded jurists preside and where lawyers are free to advocate for their clients. For more than 37 years as an attorney and 24 as a part-time Village Justice in my local community of Westbury, Long Island, New York, I never considered courts to be dangerous places — not until, that is, my arrival in the United States Court of Appeals for the Fourth Circuit, located in the former Capital of the South during the Civil War, Richmond, Virginia.

Of course, those who are charged with crimes, mostly minority and poor, might not have a sanguine view of Courts. Once arrested, in the main, they are under tremendous pressure to plead out from the moment of their first appearance in Court. They are advised that things will go better for them if they just accept a prison term and waive their right to jury trial and appeal. They are generally told that while in custody by an attorney who is underprepared, and they are routinely told that the deal will only be offered for a very short period of time. Many will agree to plead guilty just to "get the matter over with," and will disappear from their local community for a period of years, emerging with a strike against them that will preclude meaningful employment throughout their lives. For those individuals, courts are dangerous places indeed, as are the neighborhoods in which they grow up.

Perhaps because of the history of the Southern States going back to slavery, the Civil War and post-war Reconstruction, those in positions of power in this former center of the Confederacy remain particularly reactive to Northerners who insist that they should treat minority criminal defendants less harshly and respect all procedural requirements intended to blunt the naked power of law enforcement. My experiences with the Court should be instructive to those, especially from the Northern part of the country who may have occasion to represent clients in the states within the Fourth Circuit. They would do well to associate local counsel and keep a low profile if they value their law licenses and their freedom.

The Fourth Circuit Court, one of 13 federal circuits nationwide, was established in 1891 with two judicial

Thomas F. Liotti is an attorney and Village Justice in Long Island, New York. He is a Fellow on the American Board of Criminal Lawyers (ABCL), a Life Member of the National Association of Criminal Defense Lawyers (NACDL), a former Chair of the Criminal Justice Section of the New York State Bar Association, a Past President of the Criminal Courts Bar Association of Nassau County and the New York State Association of Criminal Defense Lawyers (NYSACDL).

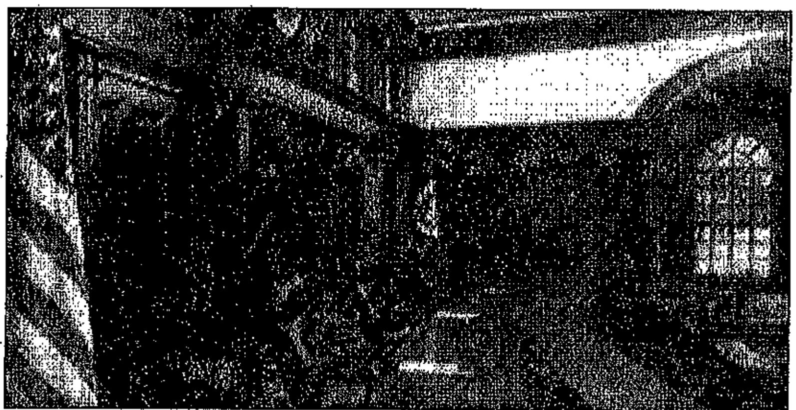


Photo Illustration by Peter K. McDonnell

seats. Today the Court has 15 jurists. They have life tenure and are immensely powerful. Although it is categorized as an intermediate appellate court, for all intents and purposes its word is law, since *certiorari* petitions to the Supreme Court of the United States are so seldom granted. The Fourth Circuit hears cases from Maryland, North Carolina, Virginia, West Virginia and South Carolina.

The Fourth Circuit has been the toughest of all Circuits with respect to appeals for death row inmates. Between 1973 and 1995, the Circuit granted new hearings in only 9% of the capital *habeas corpus* cases it reviewed. In *Atkins v. Virginia*, 536 US 304 (2002), the Supreme Court of the United States reversed and remanded a holding from Virginia's Supreme Court that allowed for the execution of a mentally retarded defendant. The Supreme Court of the United States found that executions of mentally retarded individuals charged with crime are "cruel and unusual punishments prohibited by the Eighth Amendment." As part of the *dicta* in the Supreme Court of the United States holding, Justice Stevens, writing for the majority, noted that only five states since 1989 had executed offenders possessing known IQ scores of less than 70. They are Alabama, Texas, Louisiana, South Carolina and Virginia. The issue of executing the mentally retarded was tested in the U.S. Supreme Court during oral arguments on March 3, 2014 in the case of *Hall v. Florida*, No. 12-10882, where Florida had set an IQ score of 70 or less to determine mental disability such that a defendant might avoid the death penalty. To put it in more legalistic terms, a defendant with an IQ under 70 is presumed unable to form the requisite intent for the commission of most crimes, including murder.

On January 4, 2012, the Fourth Circuit issued a Notice of Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases. The Fourth Circuit determined that requests for compensation in amounts of $100,000 per attorney would be presumed excessive at the District Court level if made in connection with a federal capital prosecution, and amounts in excess of $50,000 at the appellate level will also be presumed excessive. In cases involving federal *habeas corpus* petitioners from state or federal courts, compensation requests of over $50,000 at the District Court level and $30,000 at the appellate level are presumed to be excessive. No restrictions were placed on funding or expenses by prosecutors in these cases.

The Fourth Circuit has also been known as the "Rocket Docket" ever since they adopted the policies of strict adherence to deadlines as promulgated by Judge Albert V. Ryan, Jr., a former federal judge who in the 1960s sat in the Eastern District of Virginia at Alexandria, often ruling from the Bench and concluding trials in a single day. Today the Court takes an average of seven months to decide an appeal, and it has the highest non-publication rate of its decisions of all federal appellate courts. More than 85% of its cases are decided by summary orders or unpublished decisions. Lawyers are not permitted to refer or to cite to unpublished decisions and summary orders.

The Fourth Circuit has acted far outside the norm of all other courts, and, in the realm of constitutional protections, its record has been dismal. Many in the country today, and not just in the North, are calling for an end to systemic discrimination in the police enforcement and criminal justice systems; even while state legislatures have been allowed to pass laws limiting voting and other civil rights. In this context, the history and ingrained regional biases of jurists and juries have serious constitutional implications. Given the historic role of the federal government in the struggle to overcome such local biases, the condition of its judiciary is of the greatest significance. For example, and there are many others, in *Dickerson v. United States*, the

Fourth Circuit attempted to destroy the *Miranda* rule requiring that police advise those they arrest of their Fifth and Sixth Amendment rights. It was reversed by the Supreme Court of the United States, 530 US 428 (2000).

My Background

During my 37 years of practice I have been qualified as an expert on Professional Ethics. On April 23, 1997, I was appointed by the Hon. Charles P. Sifton, Chief Judge of the United States District Court for the Eastern District of New York (as per Administrative Order No. 97-5) to the "Panel of Attorneys who are members of the Bar of this Court to advise and assist the Committee on Grievances of the Board of Judges in connection with the discipline of attorneys pursuant to Rule 1.5(a) of the General Rules of the United States District Court for the Eastern District of New York." In 2005, I was recommended by more than 200 elected officials, lawyers, judges and civic leaders for a seat on the Second Circuit bench of the United States District Court. I was vetted by Governor George Pataki's Federal Judiciary Screening Committee, and in 2007 I was vetted by Senator Schumer's Committee. I passed muster in both cases but was not nominated.

I have been married for more than 37 years to my wife, Wendy, a Salutatorian of her high school class and an honorable graduate from Duke University in Durham, North Carolina with a Master's Degree in Fine Arts from Pratt Institute. We have three grown children, all college graduates. We have lived in the same house for 35 years. Our children went to both public and private schools. From the time my wife and I were first married, we invested ourselves into community affairs. I became President of the Kiwanis Club; we were Directors of the community theatre group which raised $50,000 in scholarship monies; and we fundraised for the American Cancer Society and the March of Dimes. Wendy taught in a private school and founded an Art Academy. At first, I had a local practice, doing mostly real estate closings and separation agreements. I ran for Supervisor in my Town of North Hempstead, as a Democrat and Independent in a Republican-dominated county. I lost.

I became involved in legal organizations, taking on all kinds of cases. My theory was that if one lawyer could make a difference, a whole bar association could really have an impact on reform and change. I soon learned that not all lawyers desire change. I first became President of the Columbian Lawyers' Association and later the first trial lawyer to win their Distinguished Service Award. While that is still one of my proudest achievements, the award of which I am most proud was received from Nassau County and its Human Rights Commission, the Martin Luther King, Jr. Award, based upon "over 30 years of extraordinary work as a community activist, lawyer and judge."

I became President of the New York State Association of Criminal Defense Lawyers; my wife became President of the Friends of the National Association of Criminal Defense Lawyers and League of Women Voters. I was Chair of the New York State Bar Association's Criminal Justice Section and President of my local Criminal Courts Bar Association. I also became a Fellow in the American Board of Criminal Lawyers which required the completion of over 50 jury trials to become a member. It is a select group of two hundred lawyers nationwide. I have been General Counsel to an all-minority school district, quite possibly the poorest in New York. I was also appointed as a member of the Town of North Hempstead Councilmanic Commission which recommended the establishment of a minority district, which was then created after the approval of voters. I have been a Special Counsel and Fact Finder to a Town.

I have represented nearly 10,000 clients. I have tried over 100 cases of all kinds, winning most of them. I have had an equal number of appeals as well. I have twice been *amicus curiae* counsel in the Supreme Court of the United States with winning arguments each time. I have also been *amicus curiae* in the New York Court of Appeals on questions of professional ethics. I have given Continuing Legal Education programs throughout New York and the United States on professional ethics and other topics. I have volunteered to be *pro bono publico* counsel to prisoners on Florida's death row.

I have published 200 legal articles; 6 books and 36 reported decisions, so I was more than surprised by the attacks made upon me by Government prosecutors from South Carolina, joined by their colleagues of the Fourth Circuit and, later, by prosecutors at the Department of Justice.

Background of the Case

My appearance before the Fourth Circuit Court of Appeals came about because of my representation in *U.S. v. Giannone (District Court Docket #06-CR849, Circuit Docket #07-4844, 08-5020, 08-8386).* My 19-year-old client, Jonathan Giannone, who had no prior record, was charged with identity theft in Columbia, South Carolina, a place he had never visited. He was from New York and was accused of attempting to sell $600 in stolen credit cards by phone to a confidential informant who was in the custody of Secret Service agents in Columbia. We filed a motion for change of venue, which was summarily denied. Jonathan then went to trial and was convicted.

When we arrived in Columbia for trial, we were informed by the Government that their Confidential Informant (CI), Brett Johnson, would not be testifying. They said nothing more. Our estimate of the length of trial (two or three weeks) was predicated upon Johnson testifying. The Government had estimated less time, but this is never considered to be a controlling factor. Without Johnson testifying, the trial lasted less than a week, ending on March 12, 2007.

Unbeknownst to us, Johnson had written and mailed a letter to the Trial Court Judge on March 1st. Judge Currie, the Trial Court Judge, stated that it was not received in the courthouse until March 13th. Johnson's letter was highly critical of the Agents who were guarding him, claiming, among other things, that they watched pornography and that he was permitted to commit other crimes, including tax fraud and tax evasion, on their watch. While we never were able to secure exact details, these Agents were apparently disciplined because of their actions.

Illustration by Ramsés Morales

Judge Cameron McGowan Currie did not immediately notify us of the Johnson letter and refused to conduct a hearing about it. We then took the issue to the Circuit Court, claiming that Judge Currie had "suppressed" the letter and that, had we known of it and the additional crimes committed by Johnson, we would have called him as our witness at trial.

My client was sentenced to 65 months in prison (five years and five months). Prior to sentencing but after the jury's verdict, Jonathan cooperated with prosecutors in return for their promise to give him what is known as a 5K1.1 letter; they would inform the Judge of his efforts, and he would be eligible for a lighter sentence. Jonathan made a huge cybercrime case for the Government against one Max Butler, allegedly the world's foremost cybercrime thief. Jonathan's efforts were written about and also aired on television. See Kevin Poulsen, "Catch Me If You Can," *Wired Magazine*, January, 2009, and CNBC, American Greed, Case File: Cybercrime: Max Butler, Episode #36.

Notwithstanding his extensive efforts, Jonathan was denied a 5K1.1 letter by the Government, and the Trial Judge declined to override that determination. On appeal, the Fourth Circuit affirmed, but reduced the sentence to 57 months (four years and nine months).

A 65-month sentence (or even a 57-month sentence for a first-offense), for a $600 attempted identity theft, is unheard of in New York and most other parts of the country. The Government's denial of a 5K1.1 letter, the trial Judge's refusal to override the Government's refusal, and the Circuit Court's affirmance clearly show the disparity of treatment. In the Second Circuit (including New York), a defendant must only make a sufficient showing of bad faith and misconduct on the part of the prosecutor before the Court will override prosecutorial discretion. See, *U.S. v. Roe*, 445 F.3d 202 (2nd Circuit, 2006). Bad faith pervaded many aspects of the prosecutor's case and post-verdict dealings.

By contrast, the burden on the defendant is far greater in the Fourth Circuit. In *Wade v. U.S.*, 504 U.S. 181, 185-6, 112 S. Ct. 1840, 118 L. Ed.2d 524 (1992), the Supreme Court of the United States held that courts can review a prosecutor's refusal to file a substantial assistance motion if the defendant makes a substantial threshold showing of "unconstitutional motive" or of a prosecutorial choice not rationally related to legitimate government objectives. However, the Fourth Circuit has held that a defendant "must first make a substantial threshold showing that the refusal resulted from improper or suspect motives"; mere allegations of unconstitutional motives of the prosecutor are not enough to carry this burden. The Fourth Circuit, standing by itself, has said that the proper inquiry under Wade is whether the government's refusal to file a substantial assistance motion was based on an unconstitutional motive or was unrelated to *"any legitimate government end."* (emphasis added). See *U.S. v. Wallace*, 22 F.3d 84 (4th Cir. 1994); *U.S. v. Lockhart* 58 F.3d 86 (4th Cir. 1995); *U.S. v. LeRose*, 219 F.3d 335 (4th Cir. 2000); *U.S. v. Snow*, 234 F.3d 187 (4th Cir. 2000) and *U.S. v. Butler*, 272 F.3d 683 (4th Cir. 2001).

The language of the defense throughout the *Giannone* case was meant to meet the burdens placed upon the defendant by the Fourth Circuit's holdings, which are more harsh and unreasonable in every respect than those of other Circuits. While the Circuit Court objected to language used by me as defense counsel, there is no way to pierce the veil of secrecy maintained by the government without using such language.

The Trial Court conducted a superficial hearing which did not scratch the surface of government misconduct on the 5K1.1 issue. Had the hearing been conducted in the Eastern or Southern Districts of New York, there is little doubt that Mr. Giannone would have received a 5K1.1 letter, a reduced sentence, and most likely a new trial based upon the disclosure of the Johnson letter and the misconduct of the Agents.

We appealed the judgment. When I appeared before the Fourth Circuit Court of Appeals on December 2, 2009, one of the judges stated that, by using the word "suppression" in regard to Judge Currie, I had accused her of an impeachable offense. I was completely thrown off by this comment. I merely responded that that was not my intent and that impeachment under the Constitution requires the commission of "high crimes and misdemeanors." This, in turn, became the source of the grotesque accusation that I accused the trial judge of having committed "high crimes and misdemeanors." It also showed the extent to which this Court would go to trip me up on any slight *faux pas*. In the entire history of the Republic, there have been only seven federal judges impeached and removed from office. None were charged with "sitting on a letter" from a CI and refusing to hold a hearing. Nowhere did we ever suggest, nor would we have suggested, that Judge Currie had committed criminal behavior. We were complaining about the inability of my client to confront his accuser in a meaningful way at an appropriate time, one of the hallmarks of due process and fair trial.

After the oral argument, I was first directed to provide the Court within five days with a declaration explaining my authority for stating that Secret Service agents had been disciplined because of the CI issue. I provided that response. I heard nothing for a year. In January 2011 I was served with an Order to Show Cause listing five charges and directing me to respond within a few days. According to their rules, I was entitled to


Photo Illustration by Peter K. McDonnell

counsel from New York to represent my interests and to have New York's Code of Professional Responsibility apply. I asked for both.

I quickly learned that there were no comparable cases in New York, the Fourth Circuit, or anywhere else in the country; the Court was fashioning its own set of rules just for me. To be an effective criminal defense lawyer, you have to take on unpopular causes and win. You have to be willing to make financial and other sacrifices. Most of all, you have to be willing to take and stand up to attacks from your clients, colleagues and Courts. The profession is no place for lawyers with glass jaws. And when you are an outspoken, high profile, zealous advocate, you become a target.

I had taken Gianonne's case through a Petition for a *Writ of Certiorari* to the Supreme Court of the United States. I submitted a voucher for payment of legal fees and printing costs for just over $60,000 as assigned counsel under the Criminal Justice Act. My voucher was cut in half to just over $31,000. It was more punishment. All of my expenses and legal time in defending against the Order to Show Cause have been out of pocket, at this juncture amounting to hundreds of thousands of dollars.

The unfathomable, trifling charges against me consisted of:

(1) That I joined two, unrelated paragraphs in my reply brief to create the false impression that the identity of the card holders was unknown. (This was a harmless oversight in drafting for which I had no evil intent).

(2) That in my post-argument declaration I denied using the word "suppressed" to describe Judge Currie's conduct with respect to the Johnson letter. (When we first checked, we did not find it and later we discovered that we had used the word once. But many courts have already determined that far more strident language concerning the conduct of the judiciary is protected free speech, see *Standing Committee on Discipline v. Yagman*, 856 F.Supp.1384, 1386 (C.D.Cal. (1994) and *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)).

(3) That we had alleged that the Government and the Court had acted in *pari delicto* to keep the case in South Carolina by estimating the trial at two weeks when in fact they had estimated three days and we had said two weeks. (The reality is that the confusion was created when the Government, on the eve of trial, decided not to use Johnson as a witness. Our change of venue motion which was earlier denied by the Fourth Circuit had nothing to do with this statement, which was harmless. It is noteworthy that when Louis Freeh served as a federal prosecutor in the so-called Pizza Connection case in New York, he represented that the trial would last five months; it lasted 17 months with a 41,000-page record and 20,000 exhibits. His reward for this oversight was a federal judgeship, and he later became Director of the FBI).

(4) That in preparation for trial, Giannone engaged in an on-line conversation in my office, which was witnessed by one of my Associates, Drummond Smith, Esq.; that this on-line conversation appeared to tie another party to the criminal activity being attributed to Giannone. That I subsequently filed my own Declaration "under penalties of perjury" in the District Court describing how this conversation was conducted and its contents, and suggesting this new evidence established Giannone's innocence. By filing this Declaration, that I arguably became a witness in my own client's case. On appeal, that I relied on my Declaration and Giannone's purported on-line chat as evidence demonstrating the Government's insufficient proof of Giannone's guilt. That I presented this contention, despite Defendant Giannone's subsequent admission to having faked an

on-line chat, an admission that I did not bring to the attention of the District Court or this Court. (What actually happened was that Giannone was in our office reviewing discovery and my Associate, Drummond Smith, was supervising but not watching Jonathan every minute. I was not even present. When we were advised of the chat by Jonathan, we had no reason to believe it was false. We were not witnesses and were never called as witnesses to anything. After the trial, Jonathan attempted to "cooperate," and as a condition for it, the Government said that he would have to admit to fabricating the chat. The Government contended that he made that admission, but we were not present for it. Later, when Jonathan was turned down for the 5K1.1 letter, he denied having made that admission. The truth of Jonathan's contention or the Government's counter-contention was never proven or even offered in evidence at trial, but I had no direct knowledge of either, contrary to the Court's mischaracterization).

(5) That we made unsubstantiated statements concerning Government discipline of the Secret Service agents. (These might have been resolved had the AUSA been forthcoming with their status and the CI's conduct, or had the Trial Judge held a hearing, or had the Circuit Court remanded for that purpose).

I never had a hearing on the disciplinary charges where witnesses were called and cross-examined, a due process requirement in disciplinary proceedings, which are quasi-criminal in nature. In a published opinion, the Circuit sustained the charges and publicly censured me. I filed a petition for *certiorari* to the Supreme Court of the United States. It was denied.

The prosecutors at the Department of Justice then wrote to my Departmental Grievance Committee in New York to request reciprocity. The First Department granted that request and the New York Court of Appeals denied leave to appeal. My motion to renew and reargue was likewise denied. I was therefore censured by the State of New York.

These actions were undertaken notwithstanding the statement made in the Fourth Circuit's own opinion: "To his credit, Mr. Liotti handled Giannone's appeal on a court-appointed basis and achieved success for his client on the sentencing issues. Furthermore, we readily accept the proposition that Liotti is a capable attorney and that, as a trial lawyer, he possesses a fine reputation for being a zealous advocate for his clients."

In other words, whatever my conduct at the trial and appeal of the matter, my representation was both effective for my client and not prejudicial to the prosecution or the court. The purpose of the censure was to punish me for attempting to bring facts to light in order that justice be done. And *that*, in my opinion, is dangerous.

I have written to my Senator Charles Schumer, a member of the Senate Judiciary Committee, and Senator Patrick Leahy, the former Chair of that Committee, and to the current Chair, to request an opportunity to testify before it, to request the suspension of funding to the Fourth Circuit and to ask that disciplinary action be taken against it for the political vendetta they initiated against me. I have not heard back from them. I have also written to the so-called liberal wing of Associate Justices in the Supreme Court as to why *certiorari* was not granted since there are no comparable cases anywhere in the United States. I have also written to the Attorney General to complain about Assistant United States Attorneys at the Department of Justice, not admitted to practice in New York, who wrote letters against me to my Grievance Committee. I did not receive a response. There should not be reciprocity with an order from the 4th Circuit that denied me due process of law and which smacked of discrimination against me because I am a New York, high-profile practitioner with an ethnic last name and a client with one.

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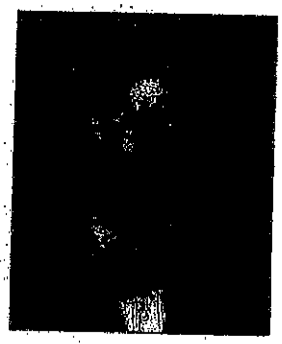
Commercial and Federal Litigation Section Newsletter

A publication of the Commercial and Federal Litigation Section of the New York State Bar Association

Message from the Outgoing Chair



Jonathan D. Lupkin

My mind is just spinning. I cannot believe that my year at the helm of the Commercial and Federal Litigation Section has drawn to a close. And what a year it has been!

After giving much thought to this, my last "Chair's Message," I have decided against recapping all that we have accomplished over the last year. To be sure, from our Mentoring Initiative to our soon-to-be released compendium of "Best Practices for Electronic Discovery in the Federal and State Courts," we have been extremely busy. But to use this final column like an Egyptian obelisk, recording our successes for posterity, would be antithetical to what our Section stands for.

If I had to define the Commercial and Federal Litigation Section in a single word, that word would be "service." As expressed by that great poet, Bob Dylan:

> "You may be an ambassador to England or France
> You may like to gamble, you might like

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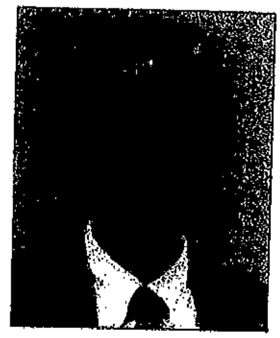
Message from the Incoming Chair



David H. Tennant

Taking over the helm of the Section may be a particularly appropriate image given our Spring Meeting in Newport and the hard fought (but not close) race between "The Federals" and "The Commercials" in 12-meter America's Cup yacht racing. If so, I have inherited a beautiful, sleek, ocean-going vessel, handed down from exceptionally gifted (back-to-back) "skippers," Captains Vince Syracuse and Jonathan Lupkin. OK; enough of that. The ship has sailed on all nautical analogies. Working closely with Jonathan this year has been exceptionally rewarding both personally and professionally. I am inspired by his vision for the profession, legal ability, humanity, and devotion to a remarkable family. Mazel Tov! Thank you, Jonathan, for an outstanding year of leadership.

Standing at the helm, for what will be the blink of another year, is both daunting and invigorating: there is so much to do! If you did not attend the Spring Meeting, you may not have heard the ideas of the real David Ten-

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Inside

NYSBA

Opinion Piece
Sanctions and Costs: The Enemy of Advocacy

By Thomas F. Liotti and Drummond C. Smith

Our litigious society, together with fiscal, budgetary constraints, has glutted our dockets. Judges and staff are underpaid, and there are not enough of them. Our courthouses are inadequate to meet these burgeoning demands. Outside arbitrators and mediators have a new cottage industry taking the overflow of cases and alleviating some of the stressors in the system. Tort reform periodically surfaces as the panacea for high insurance costs but, at the same time, curtails access to the courts and jury or judicial determinations on the merits. In criminal law the federalization of crime by the enactment of more than approximately 4,450 federal crimes, the 1,483% increase in Federal Laws since the country's founding, and the creation of a vast prison bureaucracy that now costs nearly seven billion dollars per year just to maintain[1] has engulfed our system with a deluge of cases that command pleas. Each year fewer and fewer civil and criminal cases go to trial.

In order to accommodate these statistics, Judges spend more time conferencing cases and encouraging settlements where the parties cannot do it themselves. This then raises the question of how judicial resources and time are properly spent. What is the best use of those resources? For example, how much of a Judge's valuable time should be spent settling cases or resolving disputes over discovery. As frustrating as these management issues have become, the answer deployed by our courts and judges to resolve some of them has been the use of Federal Rule of Civil Procedure 11 and Part 130 of New York's Code, Rules and Regulations. These tangential tools may have the effect of reducing the numbers of cases and lawyers in the system. But at the same time, the benefits derived from the proper use of those rules must be measured against the negative impact that occurs when they are abused, either unwittingly or intentionally, by members of the Bar, *pro se* litigants, or the Judiciary.[2] Costs are limited by the CPLR for both the Trial and Appellate Courts (see CPLR 8201).

This article addresses the dangers that may occur from the improper use of those rules, but more importantly, why the law requires that they be used sparingly or not at all. The purpose of the rules was to deter the conduct of attorneys or *pro se* litigants who have shown an unbridled pattern of frivolous litigation. While tort reformers may market the notion that frivolous litigation or uncapped awards are driving up the costs of insurance or bankrupting companies, they are not. On the contrary, truly frivolous litigation within the context of the aforementioned rules involves a minuscule number of cases. The point of this article, then, is to suggest that the reaction of the Judiciary to those problems is an overreaction much like trying to kill a fly with a shotgun.

It should also be noted that the "American rule" does not allow for the imposition of costs in favor of the prevailing party except when authorized by statute. For private actions brought under 42 U.S.C. 1983, Congress established an exception to the "American rule" that the prevailing litigant is ordinarily not entitled to collect "attorney's" fees from the loser.[3] Under the Civil Rights Attorney's Fees Act of 1976, "attorneys" fees are available to the prevailing party.[4]

Rule 11

When Rule 11 was first adopted in 1983, there was no state rule equivalent. Rule 11 has no application in criminal cases. Likewise, costs and sanctions may not be imposed in New York State criminal cases. Nonetheless, the Rule was adopted with grave trepidations, particularly among members of the plaintiffs' Bar.[5]

The Advisory Committee Notes from 1983 provided:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel, or another member of the bar.

The Rule provides for the signing of pleadings by the attorneys of record; and in doing so, they make certain representations as a matter of law. The attorney or unrepresented party, by signing the pleading or other papers submitted to the Court, certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (b)(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

There is a "safe harbor" provision in the federal law not included in Part 130. It provides that a motion for sanctions must be separately made but only after the attorney making the averment or the affiant is given notice of the challenge and potential sanctions and then is given 21 days from the notice, or such other time as the Court may set, to withdraw and correct the pleading.

The Advisory Committee Notes concerning the 1993 Amendments to the Rule give more insight into its application.

> Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, *e.g.* New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).
>
> The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.
>
> Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.
>
> Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine.

Part 130

The enactment of Rule 11 then caused 22 NYCRR 130 to evolve and be adopted, albeit not by the Legislature. Part 130 does not provide for the "Safe Harbor" provisions that Rule 11 does. It also does not share the same Advisory Committee Notes or other analysis through legal articles and case law that Rule 11 has undergone since Rule 11 is statutory and Part 130 is not. The deployment of Part 130 then frequently takes the Court and attorneys into unchartered territory.

Part 130 allows for the imposition of costs in the form of the reimbursement of actual expenses reasonably incurred and reasonable attorney's fees resulting from "frivolous conduct." Section 130-1.1(c) defines "frivolous conduct" as:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The purported frivolity or bad faith of a pleading for the most part depends upon the subjective evaluation of the jurist reviewing it. The operation of the author's state of mind in drafting the document is not a factor that is considered. It should be a requirement that a movant or a Court considering the imposition of sanctions prove that the author intended the harm contemplated by part 130. A pattern of such conduct may help to prove it, but the nature of a pattern has yet to be defined. It also remains subjective.

Courts can await the outcome of discovery and other litigation, including motions for summary judgment, or the actual verdict itself before reaching a determination on costs or sanctions. The imposition of sanctions, particularly during the course of litigation, may also cause disciplinary action to occur. The imposition of costs and/or sanctions against an attorney or litigant can drive a wedge between attorneys and their clients or create a conflict. Clients lose confidence or trust in their attorneys when costs or sanctions are imposed. They can also result in the clients being left without any counsel. Costs and sanctions then should be the weapons of last resort when all else has failed and it becomes necessary to pull the trigger on the nuclear option.

Conclusion

Courts should be mindful that the imposition of costs and sanctions or even the requests for them pose a serious and deleterious effect on the role of advocates and access to the courts. It can be a totally unfair, premature, and preemptive strike against an attorney or litigant. It is therefore an initiative that must be very carefully weighed and considered. Many other options are available, including deferment of the issues pending the outcome of the litigation. While Courts may question the conduct of attorneys against whom costs and sanction applications are made, they should be even more circumspect of attorneys who cavalierly or irresponsibly make such applications. Their efforts are not only destructive of the litigation and attorney/client relationships but even more damaging to our system of justice as a whole. Courts that do not adequately consider these issues then become partners, enablers, and aiders and abetters in the unfortunate consequences that then occur. Judges too far removed from the actual practice of law and the representation of clients run the risks of overlooking these issues when they are considering the imposition of costs or sanctions.

Endnotes

1. *See* Adam Liftak, *Right and Left Join to Take on U.S. in Criminal Justice Cases*, The New York Times, November 24, 2009, at 1 and A22. *See also* World Net Daily, August 21, 2008, at 72912; Kevin Johnson, *2011 Budget gives Federal Prisons $528 million*, USA Today, February 4, 2010.
2. *See* Thomas F. Liotti and Drummond Smith, *Judicial Civility*, The Attorney of Nassau County, July 2009, at 6, 10, 11.
3. *Sole v. Wyner*, 551 U.S. 74, 127 S. Ct. 2188 (2007).
4. 42 U.S.C. 1988; *Perdue v. Kenny A. ex. rel. Winn*, __ U.S.__ 130 S. Ct. 1662 (2010). *See* Pattern Jury Instructions, New York, Second Edition, vol. 2, PJI 3:60 at 632 (2011).
5. "Experience shows that in practice Rule 11 has not been effective in deterring abuses." Charles A. Wright & Arthur Miller, 6 Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action; (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. *See* Rodes, Ripple & Mooney, *Sanctions Imposable For Violations of the Federal Rules of Civil Procedure* 64-65 (Federal Judicial Center 1981).

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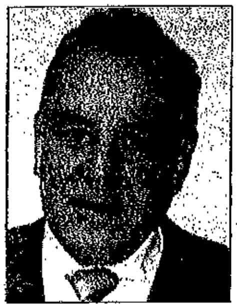
WikiLeaks and WikiWars

On May 2, 2011, the NYSBA hosted *"WikiLeaks and WikiWars—Litigation Responses and Beyond,"* a panel discussion held at the historic Union League Club of New York. The event, which was attended by over 70 people, was sponsored by the Internet and IP Litigation Committee of the Commercial and Federal Litigation Section and was moderated by Committee Co-Chair Joseph V. DeMarco of DeVore & DeMarco LLP. David E. McCraw, Vice President of and Assistant General Counsel for The New York Times Company, discussed that newspaper's decision to print material posted by WikiLeaks and what factors an attorney advising a news organization must weigh in determining whether to publish "leaked" materials. After focusing on the particular circumstances of the WikiLeaks story—including fascinating insights and anecdotes regarding the interaction between Julian Assange and newspaper officials—DeMarco and McCraw discussed how the news industry would, and should, handle analogous situations where corporate, rather than governmental, secret information is disclosed. Following Mr. McCraw's remarks, questions from the audience provoked discussion of the role of the press as a "gatekeeper" of information, an attorney's ethical responsibilities with regard to leaked information, and the implications of the ability to reach a broad audience on the Internet without need for traditional media organizations.

Reconsidering Standards for Neglect in Custody and Visitation

by Thomas F. Liotti, Esq. and Lucia M. Ciaravino, Esq.



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Editor's Note: In custody disputes, New York courts are bound to make determinations based on "the best interests of the child." Before legislating this standard the "tender years" doctrine prevailed, which provides that, when all other factors are equal, custody of a child of tender years — generally under the age of thirteen years — should be awarded to the mother. Before implementation of the "tender years" doctrine, "parental fitness" was the major issue in custody disputes. Marital fault was a key factor and the "gross immorality" of the parent was a basis for denying that parent custody. Under the "tender years" doctrine, however, regardless of the statutory language as to the equality of parental rights, the mother had the advantage in questions of custody, unless she was shown to be unfit or to have abandoned the child. See Application of Kades, *25 Misc 2d 246, 202 NYS2d 362.*

Most states have eliminated this presumption that favored the mother and some courts have held that the "tender years" doctrine violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it discriminates on the basis of sex.

Domestic Relations Law §240 was enacted in 1962, implementing the "best interests of the child" standard. It purported to mandate parity between fathers and mothers with respect to child custody and provides that neither parent has a prima facie *right to child custody, which is to be determined solely by the "best interests of the child." This standard was intended to focus attention on the needs of the child, rather than attributes of the parents and gave judges the purported freedom to interpret what was the best interest of the child in any particular case. Nonetheless, until the 1970s, the legacy of the "tender-years" presumption continued to influence custody decisions, so the "best interests" standard, despite its literal meaning, was interpreted primarily to justify the mother's preferential claim in custody disputes. In most states, however, the "tender years" presumption has now been superseded by the "best interests" standard, interpreted to mean that the primary caretaker is presumed to be the best parent to handle primary custody of a small child.*

As Mr. Liotti notes, this change has allowed a broadening of the factors considered and removal of existing presumptions in favor of a mother's custody. However, the previous parental fitness standard, by its terms, was no more or less "child centered" than that which replaced it. The problem the author has identified lies in the willingness of judges to be swayed by prejudicial submissions of parties, especially when their claims are not substantiated and those must be addressed by able attorneys who zealously protect their client's rights. For this, competent legal representation is essential and cannot be based on ability to pay.

Until the early 1970's New York followed what was known as the "tender year's" doctrine with respect to custody issues. That doctrine was superseded by what became known as the "best interest" of the child standard, which since then has been the abiding legal standard. The purpose of this article is to show how this amorphous "best interest" of the child standard allows for introduction of tangential matters involving disputes between parents, which do not necessarily have any bearing on the "best interests" standard.

The Effect of "Parental Alienation Syndrome"

Many of the break-away cases in this area of the law arose in Suffolk County, New York, where the "best interest" standard has been extended in a variety of

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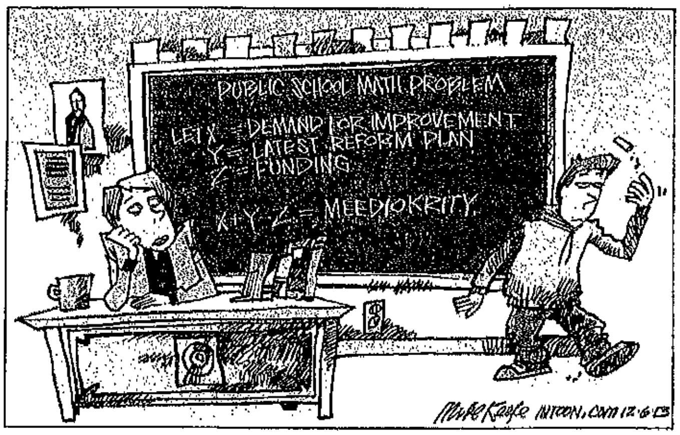

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circumstances, usually involving allegations of misconduct by one spouse against the other, which are later not proven.

This area of the law was first noted by Dr. Richard Gardner in 1986, when he characterized the misbehavior of a spouse toward a co-parent as parental alienation syndrome. However, the concept of parental alienation syndrome has not been adopted by *The Diagnostic and Statistical Manual of Medical Disorders* (DSM) (5th Ed.; DSM-5; American Psychiatric Association) or any court, civil or criminal. The syndrome involves accusing a spouse of neglect, abuse or other misconduct and often attempting to brainwash children about the "bad" parent or reporting that parent to Child Protective Services (CPS) or even the police in order to gain advantages in custody, visitation, child support and maintenance.

An entire field of litigation has grown out of these disputes, involving trials of criminal or domestic violence cases, together with proceedings for contempt or violations of protective orders; support, neglect and visitation proceedings in Family Court and *de novo* proceedings in the Supreme Court on some of these issues, as well as questions of marital fault involving depletion of assets, arrears and non-disclosure of finances. Some of these matters may evolve into federal criminal cases involving non-support, contempt, absconding and even kidnapping. In addition, there are also substantial Constitutional issues arising out of those events, including allegations involving invasion of privacy, violations of civil rights and due process of law.

It is, to say the least, a burgeoning field where our courts are still grappling with how these multiplicative legal, social and psychological issues can comfortably be processed within a Unified Court System.

The Lack of an Objective Standard

Arguably, while Family Law and the Penal Law have undergone changes both by statute and common law and evolved to consider a broader range of issues and evidence, they have not yet resulted in objective standards for legal determinations involving neglect and custody. As a result, the legal standards governing determinations of neglect and custody are often subjective, violating rules of vagueness or the *Doctrine of Lenity*, which is a judicial doctrine requiring that ambiguities in a criminal statute relating to prohibition and penalties be resolved in favor of the defendant if it is not contrary to legislative intent. It is also referred to as "strict construction," which directs courts to construe statutory ambiguities in favor of criminal defendants. See, *United States v. Bass*, 404 U.S. 336, 347 (1971). Determinations regarding parental rights are then made, not on the basis of evidence together with expert opinions predicated upon a "reasonable degree of psychological certainty" under *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923) or *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), but rather on the basis of an amorphous, convoluted standard, which ignores direct evidence, or the absence of it, in favor of the "rubber stamping" of court-appointed expert testimony, irrespective of how unreliable it may be shown to be.

A trial court that bases its "findings of fact" on such tenuous evidence is playing "Russian-roulette" with the law and thereby depriving the litigants before it of the due process of law. It is doing so because there is no law, or at least not one that is defined. It is law decided on a case-by-case basis, by whim and caprice. It is law like that decided by Judge Draco in 400 B.C., where only he and a few noblemen knew why he was deciding a certain way, including a sentence of death in most of his cases. The taking of young children away from a mother whose only crime may be to care for her children and try to survive the precarious circumstances and/or financial situation vindictively orchestrated by a husband in a hotly contested matrimonial proceeding would be as lacking in rhyme or reason as one of Draco's death sentences.

The Definition of "Neglect"

The drafters of Article 10 of the Family Court Act were "deeply concerned" that an imprecise definition of child neglect might result in "unwarranted state intervention into private family life." See, Besharov, *Practice Commentaries, McKinney's Con. Laws of NY*, Book 29A, Family Ct Act § 1012, at 320 (1999. Ed). The first statutory element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child. *See, Matter of Nassau County Dept. of Social Servs. Dante M. v. Denise J.*, 87 N.Y.2d 73, 78-79 (1995). This pre-requisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. "Imminent danger" reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed; "imminent danger of impairment to a child is an independent and separate ground on which a neglect finding may be based." *See, Dante M.*, 87 N.Y.2d at 79. "Imminent danger, however, must be near or impending, *not merely possible*." *See, Nicholson v. Scoppetta*, 3 N.Y.3d 357, 787 N.Y.S.2d 196 (2004) (Emphasis added).

Assuming that actual or imminent danger to the child has been shown, "neglect" also requires proof of the parent's failure to exercise a minimum degree of care. As the Second Circuit observed, "a fundamental interpretive question is what conduct satisfies the broad, tort-like phrase, 'a minimum degree of care.' The Court of Appeals has not yet addressed that question, which would be critical to defining appropriate parental behavior." *See, Nicholson v. Scoppetta*, 344 F.3d at 169.

"[M]inimum degree of care" is a "baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet." *See,* Besharov, *Practice Commentaries, McKinney's Cons Laws of NY,* Book 29A, Family Ct Act § 1012, at 326 (1999 Ed). "Notably, the statutory test is 'minimum degree of care' not maximum, not best, not ideal and, again, *the failure must be actual, not threatened.*" (Emphasis added). *See, Nicholson v. Scoppetta,* 344 F.3d at 169, quoting, e.g., *Matter of Hofbauer,* 47 N.Y.2d 648, 656 (1979) (recognizing, in the context of medical neglect, the court's role is not as surrogate parent and the inquiry is not posed in absolute terms of whether the parent has made the "right" or "wrong" decision).

Courts must evaluate parental behavior objectively: "would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing." *See, Matter of Jessica YY.,* 258 A.D.2d 743, 744 (3d Dept 1999). The standard takes into account the special vulnerabilities of the child, even where general physical health is not implicated. *See, Matter of Sayeh R.,* 91 N.Y.2d 306, 315, 317 (1997). Thus, when the inquiry is whether a mother and domestic violence victim failed to exercise a minimum degree of care, the focus must be on whether she has met the standard of the reasonable and prudent person in similar circumstances.

A Case of "Parental Alienation Syndrome?"

A case that has set the tone in this area is *Olivier A. v. Christina A.,* 9 Misc.3d 1104(A), 806 N.Y.S.2d 446 (2005), N.Y. Slip Op 51400(u), WL 2171176 (2005), decided by Suffolk County Supreme Court Justice Joseph Farneti, in a 35-page decision on August 25, 2005, following a lengthy matrimonial trial.

The crux of the case centered around issues of custody between a Caucasian father, originally from France, and an African-American mother, originally from Nigeria. They had a son together, Nicholas, (age four at the time of the divorce proceedings) and the mother also had a child from a previous marriage named Joy. The marital home was in Suffolk County, New York. The wife was seeking a Master's Degree in the NYU School

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of Business. She was employed by a large domestic corporation. The husband had studied at Bernard M. Baruch College and was self-employed, working at home as a financial consultant.

A Law Guardian was appointed together with a forensic examiner. In addition, the defendant (mother) called two additional forensic examiners. While the record was extensive in all respects, the case turned solely on the issue of the defendant (mother's) credibility and in particular, her alleged false reporting of marital fault, child abuse and domestic violence on the part of the husband. The father was awarded custody. Justice Farneti's decision was affirmed. However, as will be shown herein, this hallmark case, perhaps one of first impression, brought us a wave of other cases that have literally reshaped not only the law of custody, but also the manner in which cases of domestic violence must be defended in light of the ripple effect that they have in Family Court and Supreme Court matters. Records are available in all courts and once findings of fact, including matters relative to credibility are decided, they impact on all aspects of the litigation, including the financial issues. Practitioners who are unacquainted with one or more of these issues may find that the strategies which they thought they had are hamstrung.

Justice Farneti held:

> *For any court considering questions of child custody, the standard by which we*

are guided is to make every effort to determine "what is for the best interest of the child and what will best promote its welfare and happiness" (see, Eschbach v. Eschbach, *56 N.Y.2d 167, 451 N.Y.S.2d 658 (1982) quoting DRL §70). In determining the best interests of the child, the Court must review the totality of the circumstances presented* (see, Friederwitzer v. Friederwitzer, *55 N.Y.2d 89, 447 N.Y.S.2d 893 (1982);* Hom v. Hom, *249 A.D.2d 447, 671 N.Y.S.2d 682 (1998). In making a best interests determination, the factors to be considered include the quality of the home environment and the parental guidance provided for the child; the ability of each parent to provide for the child's emotional and intellectual development; the financial status and ability of each parent to provide for the child; the relative fitness of the respective parents and the effect an award of custody to one parent might have on the child's relationship with the other parent [*see, Eschbach v. Eschbach, *56 N.Y.2d 167, supra; Matter of Ring v. Ring, 15 A.D.3d 406, 790 N.Y.S.2d 51 (2005);* Miller v. Pipia, *297 A.D.2d 362, 746 N.Y.S.2d 729 (2002)]. In addition, the Courts may consider the length of time of the present custody arrangement [*see, Fanelli v. Fanelli, *215 A.D.2d 718, 627 N.Y.S.2d 425 (1995);* Matter of Garvin v. Garvin, *176 A.D.2d 318; 574 N.Y.S.2d 760 (1991), mot lv app den 79 N.Y.2d 752, 580 N.Y.S.2d 199 (1992)]; which parent is the more likely to assure meaningful contact between the child and the non-custodial parent [see,* Matter of Green v. Gordon, *7 A.D.3d 528, 776 N.Y.S.2d 73 (2004);* Matter of Dobbins v. Vartabedian, *304 A.D.2d 665, 758 N.Y.S.2d 153 (2003), mot lv app den 100 N.Y.2d 506, 763 N.Y.S.2d 812 (2003)], or whether there has been an abduction or defiance of legal process [*see, Matter of Green v. Gordan, *7 A.D.3d 528,* supra; Matter of Fallon v. Fallon, *4 A.D.3d 426, 771 N.Y.S.2d 381 (2004)]. In making its determination on the issue of custody, the Court is to evaluate the testimony, credibility, character, temperament, demeanor and sincerity of the parties and other witnesses [*see, Matter of Rory H. v. Mary M., *13 A.D.3d 373, 786 N.Y.S.2d 153 (2004); Matter of Dobbins v. Vartabedian, 304 A.D.2d 665,* supra; Matter of McLaren v. Heuthe, *296 A.D.2d 500, 745 N.Y.S.2d 482 (2002)].*

Further DRL §240(1)(a) provides in pertinent part: Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the *allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act and such allegations are proven by a preponderance of the evidence, the Court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the Court deems relevant in making a direction pursuant to this section. [McKinney's Con. Laws of New York, Book 14, Domestic Relations Law §240 (1)(a)].*

Based upon the testimony in this case, the fundamental cause of the plaintiff's concern for his son is not based upon any mistreatment of Nicolas by the defendant, but rather the defendant's aggressive and often times ill-conceived attempts to discredit the plaintiff. The difference is that the defendant has engaged in conduct which she intended to improve her position in the litigation, which has resulted in the law guardian, the neutral forensic psychologist, the Department of Social Services and the plaintiff to conclude that she is unable to be truthful. The conclusion has been that the defendant will do or say whatever it takes to discredit the plaintiff in the eyes of anyone who may have an impact on the outcome of this litigation. Her contrary nature, in this Court's opinion, has caused these individuals to react against the defendant and return her accusations and assertions with accusations and assertions of their own.

While not mentioned in Justice Farneti's decision, there is the added problem of perjury for those fabricating false claims in the context of a heated matrimonial or custody fight. At the same time, an attorney knowingly proffering such fabricated testimony may be guilty of suborning perjury. Both the client and the attorney better have a good faith basis for standing by false claims. Investigative reports and lie detector tests may insulate both from liability.

The Impact of a "Messy House"

The second case to continue the breaking of the "best interests" *per se* mold was *Matter of Young v Young*, 2011 N.Y. Slip Op 04061, 84 A.D.3d 972 (May 10, 2011). This was originally a complex matrimonial matter that had been seemingly resolved by a stipulation of settlement, yet mysteriously erupted into a media frenzied neglect and custody proceeding in the Suffolk County Family Court before the Honorable John Kelly.

On October 31, 2006, in the "so-ordered" stipulation of settlement resolving their divorce, the husband consented and stipulated to sole custody of the children with the wife. The husband had been estranged from his wife and children for many years and failed to pay child support, maintenance and other household expenses ordered by the court. The wife and the children were alleged victims of severe domestic violence by the husband for many years during the marriage.

Nonetheless, the subsequent claims in this matter arise from an incident on February 21, 2007, in which the husband allegedly trashed the wife's residence in Lindenhurst, New York, while she was away in upstate New York with the children, to thereby create the appearance of an unsafe and unsanitary home. He allegedly then entered the residence without the wife's consent or authorization, contacted CPS, the police and the media and invited the media to film the inside of the wife's home, causing the wife untold public humiliation and caused the children to be removed from her custody and placed in foster care, where they remained for over three years. The wife asserted that the husband's actions on that day were allegedly part of a false reporting conspiracy to purposefully cause her to lose custody of her three children.

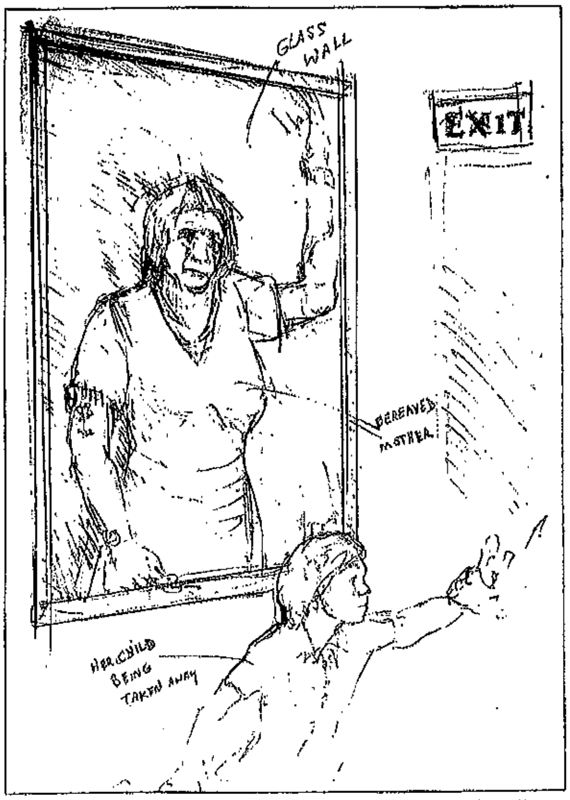


Illustration by Matthew Snow

On May 4, 2007, in Suffolk County Family Court, under the alleged coercive advice of her then counsel and after being subjected to unmentionable public scrutiny and humiliation without a proper hearing of the facts and being promised that her children would be immediately returned to her care, the wife reluctantly admitted that she had "suffered from a mental health condition that negatively impacted her ability to care for the children." She subsequently moved to vacate this admission, which she claimed was made under extreme duress and the ineffective assistance of her then counsel. Nonetheless, on January 27, 2010, the Family Court, in a questionable proceeding, awarded sole custody of the children to the husband, an alleged perpetrator of extreme domestic violence.

The Second Department found that the Family Court did not err in summarily denying the mother's motion to suppress certain evidence regarding the condition of the home, which she alleged was obtained illegally. They held that

> *in a custody case, the court is required to determine 'solely what is for the best interest of the child and what will best promote its welfare and happiness, and make an award accordingly.' [Domestic Relations Law § 70 (a)]. 'The best interests of the child are determined by a review of the totality of the circumstances.' See, Matter of Andrews v Mouzon, 80 A.D.3d 761, 762 (2011).*

The Court further held that

> *application of the exclusionary rule to prevent the court from considering factors relevant to that determination, pertaining here to the condition of the home of a parent who is seeking custody, would have a 'detrimental impact upon the fact-finding process and the State's enormous interest in protecting the welfare of children,' which outweighs the deterrent effect of applying the exclusionary rule. See, Matter of Diane P., 110 A.D.2d 354, 354 (1985).*

The Court rejected the mother's contention that the Family Court should have conducted a pretrial hearing as to the voluntariness of an admission she made and the effectiveness of her counsel in a neglect proceeding, which had been brought against her.

Illustration by Matthew Snow

The Court held that because custody determinations depend to a great extent upon an assessment of the character and credibility of the parties and witnesses, deference is accorded to the trial court's findings and such findings will not be disturbed unless they lack a sound and substantial basis in the record. *See, Matter of Rodriguez v Guerra*, 28 A.D.3d 775 (2006).

This case left many pertinent questions unanswered: Is the Family Court decision regarding custody "final," when the issue had been determined by a stipulation of settlement in the Supreme Court? What effect does the Family Court matter and the stipulation of settlement in the matrimonial case have on equitable distribution? After agreeing to custody with the mother in Supreme

Court, can that be changed by a finding of neglect in Family Court?

This case also leaves open the question of what bearing does a purportedly "messy house" have on the "best interests" of the children, particularly when the allegations surrounding the condition of the home were denied and contested and the children were not found to be present in the condition. In *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982) and *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658 (1983), the Court of Appeals firmly established a "totality of the circumstances" approach to all custody determinations, indicating that no one factor should be determinative in deciding what is in the best interest of the child. It held that a determination as to whether a custody award should be modified depends upon whether the "totality of the circumstances" including the existence of the prior award, warrants such a change in the best interests of the child.

In *Friederwitzer, supra*, Judge Bernard S. Meyer wrote:

> *The only absolute in the law governing custody of children is that there are no absolutes. ... Indeed, in Matter of Nehra v. Uhlar, we were at pains to point out many of the factors to be considered and the order of their priority. Thus, we noted that 'Paramount in child custody cases, of course, is the ultimate best interest of the child' ... that stability is important but the disruption of change is not necessarily determinative ... that the desires of the child are to be considered, but can be manipulated and may not be in the child's best interests ... that self-help through abduction by the non-custodial parent must be deterred but even that 'must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child' ... that the relative fitness of the respective parents as well as length of time the present custody had continued are also to be considered ... that 'Priority, not as an absolute but as a weighty factor, should in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement' ... whereas of lesser priority will be the abduction, elopement or other defiance of legal process as well as the preferences of the child." See,* Nehra v. Uhlar, *43 N.Y.2d 242, 401 N.Y.S.2d 168 (1977).*

A Quantum Leap

The third case examined herein is *In the Matter of Salvatore M. (Nicole M. – Thomas M.)*, 2013 N.Y. Slip Op 01554 (Decided on March 13, 2013). In a child protective proceeding pursuant to Family Court Act, Article 10, the mother appealed from an order of the Family Court, Suffolk County (Loguercio, J.), dated November 18, 2011, which after a fact-finding hearing, found that she had neglected the subject child and an order of disposition of the same court dated December 22, 2011, which after a dispositional hearing, *inter alia*, directed her to obtain a mental health evaluation and follow the recommended treatment.

The Second Department affirmed the Family Court's determination holding that the mother's neglect is supported by a preponderance of the credible evidence. *See*, Family Ct Act §§ 1012(f)(i)(B); 1046(b)(i). The Court found that the evidence offered at the hearing established that the mother made repeated unfounded allegations of sex abuse against the father, resulting in the child undergoing multiple medical examinations and being interviewed by police officers and caseworkers. On certain occasions, the mother also withheld visitation from the father. After the child was removed from the mother's care, it was alleged that she continued to relentlessly scrutinize the child for signs of abuse during her supervised visitations with the child. Contrary to the mother's contentions, the Court found that her actions were not those of a reasonable and prudent parent. *See, Matter of Afton C. (James C.)*, 17 N.Y.3d 1, 9; *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 370. It was found that the mother failed to exercise a minimum degree of care in providing the child with proper supervision or guardianship. *See, Nicholson v. Scoppetta*, 3 N.Y.3d at 370; *Matter of Kevin M.H. (Kenneth H.)*, 76 A.D.3d 1015; *Matter of Morgan P.*, 60 A.D.3d 1362; *Matter of Daniel D.*, 57 A.D.3d 444; *Matter of Andrew B.*, 49 A.D.3d 638; *Matter of Ramazan U.*, 303 A.D.2d 516, 517. The order of disposition, which required the mother to undergo a mental health evaluation, held it was in the best interests of the child. *See, Matter of Carlena B.*, 61 A.D.3d 752; *Matter of Lemar H.*, 23 A.D.3d 383, 384).

In the Matter of Salvatore M. (Nicole M. Thomas M.), supra, the Family Court's finding of neglect was predominantly based upon the putative testimony of one expert, who did not make any diagnosis of the mother. It is this fictive testimony of one expert and her highly questionable suppositions that led the Family Court to make a finding of neglect.

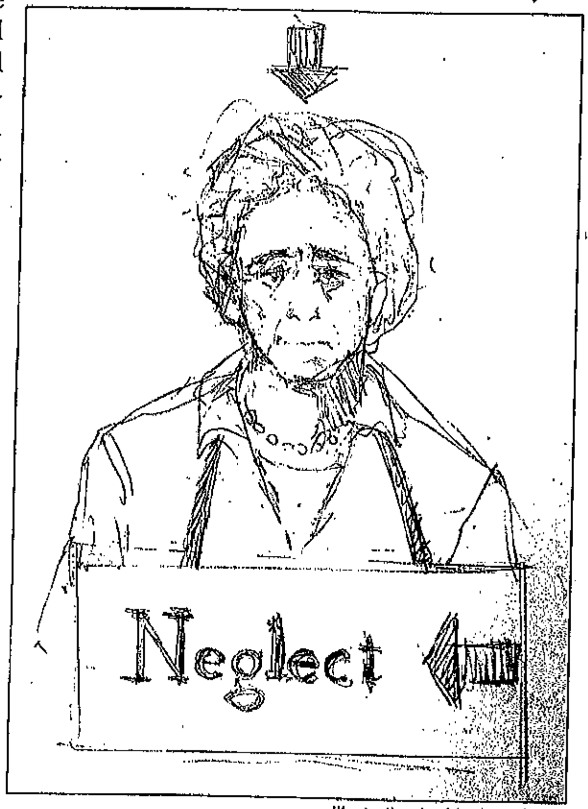


Illustration by Matthew Snow

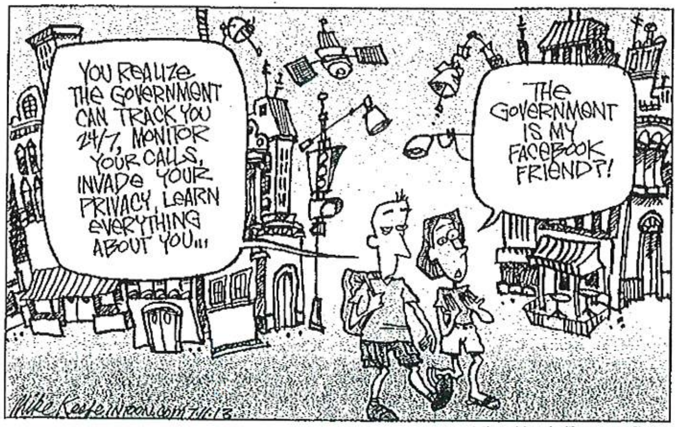
The expert doctor took a quantum leap in suggesting to the Trial Judge that because the mother reported multiple instances of child abuse, (in particular, digital, anal penetration of her son by the father), which were determined to be "unfounded," that means that she was a neglectful parent. However, this highly questionable or dubious conclusion is blatantly unsupported by the Trial Judge's findings in other respects. Judge Loguercio in her November 18, 2011, Decision and Order found:

> *In relevant part, F.C.A. §1012(e) specifies that a child is abused when his or her parent "... inflicts or allows to be inflicted upon such child physical injury by other than accidental means, which causes or creates a substantial risk of...protracted impairment of physical or emotional health..." Section 1012(f) (B) of the Family Court Act specifies that a child is neglectedwhen his or her physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent...to exercise a minimum degree of care...in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof...or by any other acts of a similarly serious nature requiring the aid of the court... After a thorough review of the documentary and*

testimonial evidence and the applicable law, the Court finds that the County failed to prove by a preponderance of the evidence that (the mother) abused her son within the meaning of F.C.A. §1012(e). There was no evidence presented to the Court that [the mother] inflicted physical injury upon [her son] that caused or created a substantial risk of protracted impairment of [his] physical or emotional health, or that she allowed anyone else to do so. Although by her actions, [the mother] caused [her son] to undergo multiple medical physical examinations and police and child protective interviews, [the child] was not physically harmed by the medical examinations or interviews, nor was he at risk of physical harm because of the medical examinations or treatment he was given (compare, Matter of Anesia E. v. Antoinetta W., *23 A.D.3d 465, 805 N.Y.S.2d 623 (2d Dept. 2005). The Court finds that the consequent emotional harm that [the child] suffered and the imminent risk to his emotional health by the mother's actions did not rise to the level of abuse.*

Nonetheless, Judge Loguercio then seemingly made an inconsistent determination by finding:

> *However, for the reasons set forth herein, the County did prove by a preponderance of the evidence that by her repeated allegations that [the child] was being sexually and physically abused by his father and abused by his paternal grandmother, by the consequent medical examinations and law enforcement and child protective interviews of her allegations of abuse, by repeatedly subjecting [the child] to medical examinations and by withholding visitation between [the child] and his father, [the mother] placed her very young son at imminent risk of becoming physically, mentally or emotionally impaired. As such, [the mother] neglected [the child] within the meaning of F.C.A. §1012(f); [see,* Matter of Morgan P., *60 A.D.3d 1362, 875 N.Y.S.2d 401 (4th Dept. 2009); see also,* Matter of Jessica G.,



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> *151 Misc.2d 694, 573 N.Y.S.2d 694 (Family Ct. Richmond Cty., 1991)].*

The trial court then further entered into the gray area of what constitutes neglect when it held: "At the outset, the Court recognizes that [the mother] loves her son and wants to be with him."

The trial court then built on its undependable thesis by holding:

> *[The expert doctor] noted that [the child] only gave her the information that his father hurt his coolie when he was specifically asked if his father hurt his coolie and she stated that "it is the only statement to which [the child] gives a consistent and positive response." As per [the expert doctor], "this pattern of reporting in a child is consistent with coaching and/or inadvertent shaping of a child's initial verbal description of a specific experience."*

The Court then continues with its legal conjecture stating that findings of neglect have been made by other Courts where allegations were made that were determined to be false.

It must be noted in this case that the allegations made by the mother were *never* factually determined to be false or a fabrication, or a lie, so as to secure a tactical advantage in a matrimonial or custody proceeding. "Unfounded" applies to a legal standard that in view of CPS was not met in this case; that does not, however, mean that the mother lied or that she was even incorrect. There is no evil intent or *mens rea* on her part. All of the evidence in this case shows that the mother was sincere in making her reports. Indeed, she was duty bound as a parent and as a mandated reporter, to do so. Clearly she could have been charged with neglect for not reporting it, if CPS would have later found the child to have been abused.

Notably, the Family Court did not find that the child had been injured emotionally or otherwise by any action of the mother. Arguably, if Judge Loguercio was so concerned by the mother's repeated allegations or concerns for her son, a single "refrain from" Order of Protection preventing her from making the reports in the absence of a CPS or court approval, would suffice. However, the Court did not use this half measure, and except for the one hour a week of supervised visitation, the mother was unable to see or speak to her son. A young child has been taken from his mother on the basis of legal and psychological conjecture finding that repeated reports *might* injure a child, but which was not *proven* by any of the evidence presented before the trial court.

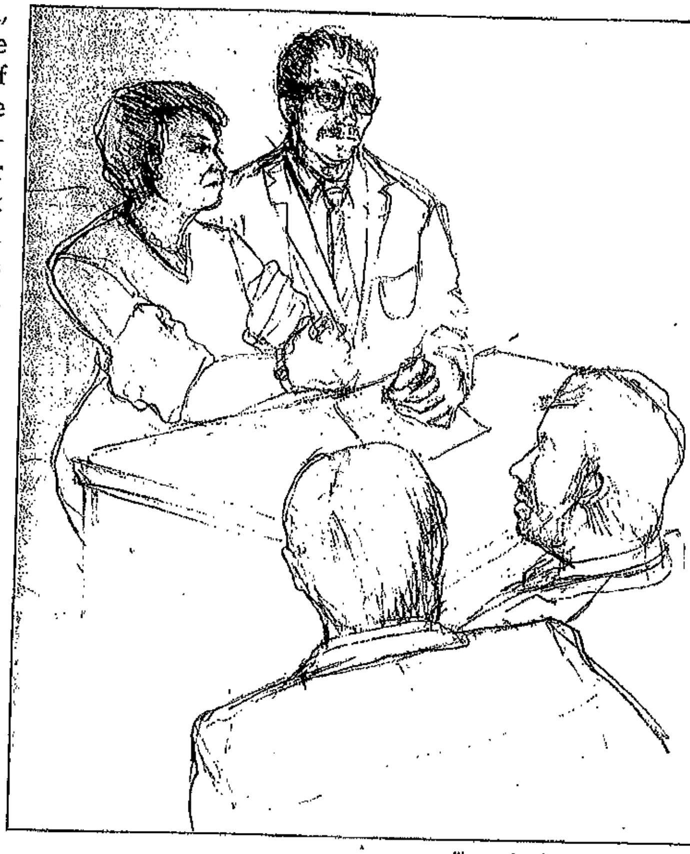
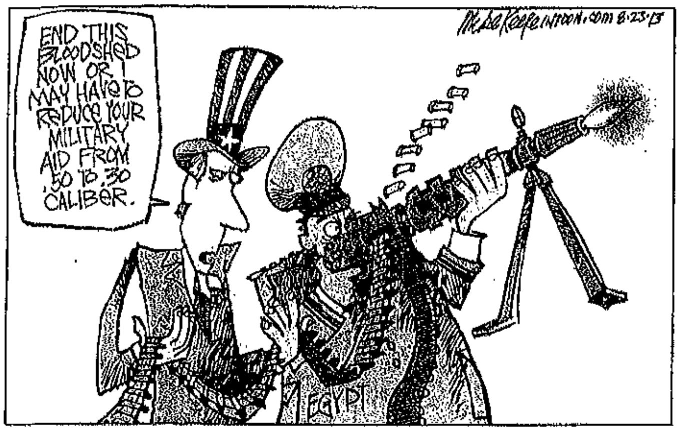


Illustration by Matthew Snow

A Finding of Neglect Without Evidence

The final case examined herein is *In the Matter of Makenzie C. [sic] Makenzy C. and Kassidy C. (Allison C.)*, Appellate Division Docket No. 2012-10627 (Decided on October 15, 2012 by the Honorable David R. Freundlich). In a child protective proceeding pursuant to Family Court Act, Article 10, the Suffolk County Department of Social Services (hereinafter referred to as "DSS" or the "County") filed a petition of neglect against the mother on March 8, 2012, seeking, *inter alia*, a determination of neglect and appropriate disposition pursuant to Section 1012 of the Family Court Act. Following a fact-finding hearing it was determined that the County had established by a preponderance of the evidence that the Appellant placed the children at imminent risk of serious mental, emotional and physical harm and as such, that she neglected her daughters within the meaning of Family Court Act § 1012 (f). Notably, the Family Court's finding of neglect in this instance was, again, predominately based upon the putative testimony of the very same expert, who similarly, did not make any definite diagnosis of the mother. It is this fictive testimony of the doctor, and her highly questionable suppositions that led to the removal of the children and the Family Court's finding of neglect.

Arguably, the petition presented to the lower court, which effectuated the removal of the two children, was fatally defective. It is extremely important to note that the mother had never met, nor was she ever interviewed by the County's caseworker, who evidently executed and verified the petition. Accordingly, she possessed no actual knowledge of anything contained in the petition or accompanying Addendum that was filed with the lower court. Nonetheless, the children were removed from the mother's custody and care based on wholly unsubstantiated



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declarations that were contained in a petition and Addendum, which was unsigned and not verified.

The petition's Addendum contained numerous unsubstantiated allegations that were purportedly based on undocumented collateral source information. Specifically, with respect to the mother, the County failed to cite to or offer a connection to any part of the DSM, (more specifically the current DSM-IV-TR, (a "text revision" of the DSM-IV, published in 2000), since amended, published by the American Psychiatric Association, which provides common language and standard criteria for the classification of mental disorders. Further, notably, it appears that the allegations asserted in the petition parroted precisely the alleged false accusations made by the non-respondent father and his counsel in his papers in the pending matrimonial action. Nonetheless, these unverified allegations were put before the court in a petition, which resulted in the unwarranted and unsubstantiated removal of the parties' children from their mother.

Accordingly, despite the repeated attempts to characterize the mother's mental state, there is no actual evidence in the record or otherwise, of psychological impairment or psychopathology, or any reason specifically documented as to why the mother would be incapable of parenting her children or justifying their removal. The Court apparently relied upon psychological characterizations of the expert that were not based on any actual evidence.

The Need for a Standard

Arguably, what we have learned from these recent cases is that the law and psychology cannot co-exist under such circumstances. The window dressing of a hearing to show a symbiotic relationship between law and psychology cannot exist unless expert opinion can be supported by actual evidence, not hearsay and conjecture. A finding of neglect and a change in custody are too important to be decided on the basis of inexact science. A mistake by a single forensic examiner can result in dire consequences for a child and his or her parents. That is what has occurred when a finding of neglect and a change in custody were made on the basis of conjecture and speculation.

Assuming *arguendo*, if a father claims that the mother is planting seeds against him with the children, the Court must still determine what the objective evidence of that is. It cannot do so upon uncorroborated and unsubstantiated statements. The standard of proof or measurement of neglect and best interests of the children should be uniform and not idiosyncratic. At some point, in the absence of real science to the contrary, we must as a society, give way to natural law; perhaps there is a need to return to the "tender years" doctrine.

Afterword: A solution is not simple and while it may be tempting to return to the "tender years" doctrine, as providing a presumption that arguably tended to limit often tempestuous and emotion-driven character assassination of one spouse by the other, that doctrine was rejected for both legal reasons (lack of equal protection) and because of fundamental socio-economic changes. By the 1970's it was no longer common that one parent, the father, worked while the mother stayed home and cared for the children. Instead, both parents were working to support the family and as more and more women moved into the workplace, it might be the father who stayed home in the "tender years."

As the authors indicate, the best interests of the child standard as it stands, has proven inadequate. The broadening of the "totality of circumstances" to be taken into account has allowed unscientific expert "evidence" and opinions from undocumented collateral sources, and even mere allegations to be considered. Such factors mandate competent representation of both sides by counsel who have the time, abilities and resources necessary to build the law in this area that the Legislature has directed be decided case by case.

In theory, the "best interests" test should not alter results achieved under a "parental fitness" standard (by definition, one's parental fitness always demands the ability to properly prioritize the best interests of children.) But such issues arise in the context of contested divorce proceedings between adults whose subjective emotion, not objective reason, often drives their conduct. This is another reason why competent counsel is so essential.

Where the parties are so intent on fighting one another that they lose objective perspective, the Court not only has to arbite between them, but it must decide whether the conduct of the parties negates a grant of custody to either of them. The State is always a de facto *party, either because it is going to have to pick up the tab or organize foster or other placement, with its inherent negativities and limitations, or because society will later pay for difficulties in child development. This again increases the importance of access to competent counsel who can ensure that the disposition will allow the child to thrive to the maximum extent possible.*

Counsel's role also demands effective advocacy of the child's best interests. This may constitute an ethical conflict between the attorney as officer of the court and the attorney as zealous representative of the interests of his or her client-parent, requiring even more objectivity and skill on the part of each attorney.

American Board of Criminal Lawyers

THE ROUNDTABLE

Vol. MMIX, No. 9 September 2009

Living In Danger As A Defense Attorney

By: Thomas F. Liotti[1]

A few years ago a contract on my life was made from a Colombian jail.[2] I believe that it was actually made by a former D.E.A. Agent that I had taken down in one of my cases.[3] I reported the death contract to the D.E.A. and the Department of Justice. I sought their protection and got none. Defense Lawyers work in perilous, dangerous waters against confidential informants, undercover agents, corrupt politicians and sometimes their own clients. The Simels case in New York shows the fine line that defense attorneys must walk in defending their clients without becoming part of criminal activity themselves. Constitutional Law is taught in law school but survival skills are not. They should be and not just in Ethics classes but in the streets where live rounds instead of rubber bullets are used.

The Lynne Stewart case is another example of a superb lawyer being taken down because she found herself in that dangerous territory where legal advice and practical solutions may collide. The recent assassination of Mexico's finest defense lawyer, Silvia Raquenel Villanueva, "The Lady of Steel" and "The Bulletproof Lawyer" reminds us of the treacherous work in which we are engaged. Lee Marc Lacy, Mexico Lawyer Who Defended Drug Traffickers Is Shot Dead, The New York Times, August 10, 2009 @ A6.

Many of us have been there, but even when you are watching your back there is always someone ready to put a dagger in it. I've gotten those calls in the middle of the night from heavy breathers and hang ups. I've had contract killers come to my office pursued by federal agents and organized crime. They put loaded guns on my desk. They said they could tell me where the bodies are buried.

I have had my phone records administratively subpoenaed by federal agents without a warrant. They got nothing.[4] I have had to wear a flak jacket to court and be met by Court Officers or Marshalls as escorts. I have had to travel with bodyguards. I have seen imposters pose as lawyers when in fact they were spies for the Colombian Drug Cartel.[5] The Government knew all about them but never told defense counsel, thus exposing us to considerable risk. I have been taken blindfolded to meet with clients and I have seen judges appoint shadow counsel.[6]

The level of danger for lawyers is festering, no it is accentuating into a crescendo. An entire legal system has been dismantled in Pakistan; martial law has been declared in many countries such as Iran and elsewhere dictators rule. We should be different, but are we? Our Government has developed an arsenal of dirty tricks and other measures that serve to compromise the defense function.[7] The Government's requirement that defense lawyers obtain a special license from the Treasury Department before attorneys can be paid to represent foreign clients designated by our government as either "terrorists" or "Drug King Pins", is an attack on the right to counsel provisions of the Sixth Amendment.[8]

But there is more, much more in the way of unfair and illegal practices being used by the federal government that deserve investigation and an entire revamping of government policies. And, I am not referring just to the limited investigation ordered by Attorney General Holder in the aftermath of the Senator Stevens case where prosecutors withheld vital exculpatory evidence. This practice is routine as is the spoliation of evidence by prosecutors.[9] . We are also referring to more, far more than the reprisals made against former federal prosecutors for not using their offices during the Bush Administration for political purposes.

We are talking about the erosion of the Bill of Rights and the very foundation of our government. We are talking about bogus disqualification motions, illegal eavesdropping and surveillance, the keeping of dossiers on enemies, holding defendants indefinitely without charges and lawyers and still more.

It is time for us to establish a special Commission outside of government to review Government Misconduct and to closely study the policies and scope of the so-called law enforcement function from top to bottom. We are on the verge of becoming a police state if our policies and legislation are not reviewed and re-written. This is a most important mission equal to any other that we face as a nation. If we do not act or if we proceed with too much caution then FBI and other government programs such as COINTELPRO will proliferate. It is time to stop the destruction of our Constitution and time to rebuild it from the ground up with a fresh perspective. This September 17, 2009 is Constitution Day. We should celebrate it with the establishment of the aforesaid Commission.

[1]Thomas F. Liotti is an attorney in Garden City, New York.

[2]Mead, Julia C., Lawyer Criticizes D.E.A. On Death Threat Response, The New York Times, March 20, 2006 at B5. The article was reprinted in the April, 2006 edition of The Round Table, a publication of the American Board of Criminal Lawyers, Vol. MMVI, No. 4 at 3.

[3]U.S. v. Sornoza, (U.S.D.C., E.D.N.Y. Hon. Denis R. Hurley) See Robert E. Kessler, Affair To Remember, DEA Agent Resigns After Tapes Prove Liaison With Suspect's Wife, Newsday, February 27, 2003 at A3 and A22 and Aly Sujo and William J. Gorta, Sizzling Affair With Drug Wife Sinks Narc, Addicted To Love, DEA Man, Drug Wife In Affair, New York Post, February 28, 2003 at page one (with photo) and A7. See also Robert E. Kessler, Major L.I. Drug Dealer Pleads Guilty, Newsday, October 16, 2003 at A22; Lisa Pulitzer, The Junk's on Him, Dealer Cops Plea After Wife's Affair, New York Post, October 16, 2003 at 25; Kenny Herzog, Hid Day In Court, Sornoza Weeps Over Vega While Copping Plea, Long Island Press, October 23, 2003 and Robert Woliver, Fed. Fatale, The Drug Lord, His Lady - The Federal Agent, Their Torrid Affair, The Secret Tapes, An Exclusive Interview With Monique Vega, Long Island Press, October 23, 2003, cover story at 1, 24-29 and 66.

[4]Joan L. Cobb, Esq., Legal Editor for the Bureau of National Affairs, Inc. wrote two articles for the BNA Criminal Practice Manual concerning the wrongful issuance of administrative subpoenas by U.S. Attorneys and the D.E.A. Ms. Cobb received the Front Page Award presented by Local 35 of the Washington-Baltimore Newspaper Guild recognizing superlative research, reporting and writing of these articles examining the use of administrative subpoenas. Mr. Liotti was the subject of the article, in particular, the fact that his phone records were wrongfully subpoenaed by the D.E.A. and an Assistant United States Attorney. See, "Underhanded" DEA Subpoena Seeks Lawyer's Phone Records, BNA Criminal Practice Manual, Trial Practice Series, June 24, 1992, Vol. 8, No. 13. See also, Fox, Martin, Phone Info Subpoenas Draws Fire, The National Law Journal, Monday, May 25, 1992 at 14; April 22, 1994 - Address to the Syracuse Association of Criminal Defense Lawyers - Topic: Federal Administrative Subpoenas; and, The Drug Policy Foundation and the American Civil Liberties Union, co-sponsored a practical, international seminar for lawyers involved in civil and criminal law litigation, entitled: Drugs and the Law, November 11-14, 1992, Washington, D.C. Mr. Liotti presented the idea for the seminar, and presented a paper entitled: The Use Of Administrative Subpoenas To Get Client Information. Co-Panelists included: Gerald H. Goldstein, Esq. of San Antonio, TX; William B. Moffitt, Esq. and John K. Zwerling, Esq., both of Washington, D.C.

[5]Tarlow, Barry, RICO Report, Invasion of the Defense Camp, The Champion, April, 1997 at 50-52. This article by a prominent Los Angeles lawyer reviews a problem of prosecutorial misconduct where a paralegal posing as a lawyer and acting as a spy for a Columbian drug cartel attended joint defense meetings unbeknownst to Mr. Liotti and his client. She was prosecuted for acting in the imposter role. The Government was aware of imposter's role since she had acted similarly in five other cases going back to 1994. They did not disclose this fact to Mr. Liotti or his client, thereby endangering their lives.

[6]Liotti, Thomas F. and Fasano, H. Raymond, Shadow Counsel and the Deception of Justice, The Attorney of Nassau County, April, 1997 at 9.

[7]Liotti, Thomas F. and Smith, Drummond C., Government Dirty Tricks And The War On Drugs, Verdict, a magazine published by the National Coalition of Concerned Legal Professionals, July, 2009 at cover, 1, 26-44. See also, Liotti, Thomas F., A War On Drugs: At What Cost To Our Liberty?, Perspective, New York Law Journal, February 28, 1990 at 2 and The Nassau Lawyer, April, 1990 at 2.

[8]Liotti, Thomas F. and Smith, Drummond C., Representing A Foreign Client? Better Check The SDN List First, Nassau Lawyer, July/August, 2009 at 18 and 19.

[9]Liotti, Thomas F. and Smith, Drummond, Spoliation of Evidence by Prosecutors, Verdict (a magazine published by the National Coalition of Concerned Legal Professionals, July, 2008 at 1, 3 and 4 and New York Criminal Law Newsletter (a publication of the Criminal Justice Section of the New York State Bar Association), Summer, 2008, Vol. 6, No. 3 at 9.

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Government Dirty Tricks and the War on Drugs

Thomas F. Liotti, Esq.
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GOVERNMENT DIRTY TRICKS AND THE WAR ON DRUGS

by Thomas F. Liotti, Esq. and Drummond C. Smith, Esq.

Thomas F. Liotti, Esq.

Drummond C. Smith, Esq.

Editor's Note: With the advent of the Obama administration headed by two professors of Constitutional law, pledging "change," and while one in every 31 adult Americans are in prison, jail, on probation or parole, the authors ask whether the new administration is willing to change a pattern of practice of "dirty tricks" by police and prosecutors, which they argue violate fundamental rights under the Constitution, and has extended, in their view, into violations of foreign sovereignty, war mongering and drug trafficking, over 50 years, all under the guise of "national security" and a "war on drugs." The authors have cogently placed the timely and serious questions for members of the legal profession: Is it all worth the cost? And what price do we as a society place on accountability, adherence to rule of law and transparency in our government?

The prosecution of federal criminal drug cases has significantly evolved over the past thirty years, and as a result, has engendered a sophisticated weaponry that is frequently employed by police and prosecutors. The facts reflect this: From 1995 to 2003, inmates in federal prison for drug offenses have accounted for 49 percent of total prison population growth.[1] The number of federal prisoners has dramatically increased from roughly 20,000 federal prisoners in 1981 to over 7 million[2] people in jail, on parole, or on probation at year-end 2007.[3] Other influences are less visible, among them the covert agenda of the CIA; the declaration of the "War on Drugs" and resultant creation of the Drug Enforcement Administration (DEA); passage of the Racketeering Influenced and Corrupt Organizations Act (RICO) laws, the USA Patriot Act, among the more than 4,450[4] separate, newly created federal criminal offenses[5] and all the resulting implications of the implementation of these laws.

For example, the government's prosecution of so-called drug cases has often masked a more sinister motive based upon racism, and cultural bias and a class struggle between the dominant Caucasians and everyone else: Asians, African Americans, and Hispanics.[6] The most obvious example demonstrating racial bias is

The number of federal prisoners has dramatically increased from roughly 20,000 federal prisoners in 1981 to over 7 million people in jail, on parole, or on probation at year-end 2007.

the disparity in sentencing for offenses involving powder cocaine (most commonly used by Whites) and crack-cocaine (most commonly used by Blacks).[7]

The existence of federal and state derivative crime laws breeds a culture of "prosecutorial entrepreneurship"[8] whereby prosecutors are encouraged and rewarded for the creative development of newly criminalized behavior.[9] The 2005 conviction of University of Alabama booster Logan Young for paying a high school football coach to direct his star recruit to play for University of Alabama, demonstrates how derivative crime laws can be used to transform a single offense into several, allowing prosecutors to pile on charges in a way that encourages a guilty plea.[10]

Under the threat of lengthy prison sentences and the ethical requirement that defense counsel discuss "cooperation" with their clients, many defendants are forced to cave in and cooperate. They also get two points off of their Federal Sentencing Guidelines for "early acceptance of responsibility," which then reduces their prison sentence.[11] Defendants who cooperate get a so-called "Queen for a Day Letter" which gives them some limited immunity — what is referred

Thomas F. Liotti, has practiced law for over thirty years in Garden City, New York. He has served as the Village Justice for the Village of Westbury, New York for the past 17 years. Mr. Liotti is the former Chair of the Criminal Justice Section of the New York State Bar Association and former Editor of the Section's Journal.

Drummond C. Smith, Esq., is an Associate in Mr. Liotti's firm and is a former Assistant District Attorney in Niagara County, New York and a former Legal Aid Attorney in Suffolk County, New York.

to as "use or derivative use" immunity, which means that the government may use the information obtained during a "cooperation" or "debriefing" session to develop leads and further their investigation. Heretofore that information was not to be used against a defendant who was cooperating and providing the information.[12]

Recently, the immunity defendants have come to expect has undergone a massive change. It used to be that proffer statements could only be used against a defendant who decides to take the stand in his own defense. Now, under the recent case of *U.S. v. Barrow*, 400 F.3d 109, 66 Fed.R. Evid. Serv. 734 (2d Cir. 2005), if a defendant who has elected to no longer cooperate and instead go to trial, and then contradicts his proffer in an opening statement or through cross-examination, the government may then use statements obtained during the defendant's proffer against him as part of their direct case. No such warning is given in the government's written proffer and cooperation agreements. This is a blatant deception on the part of the government, one which is condoned by our courts.[13] It exemplifies a court-sanctioned "dirty trick" employed by federal prosecutors with no notice to defendants.

More dirty tricks, developed over time, involve the denigration of the Rules of Evidence in drug cases to allow for hearsay in cases of alleged conspiracy. Now the agreement can be shown by circumstantial evidence. Overt acts need not be proven or charged to the jury. There are many

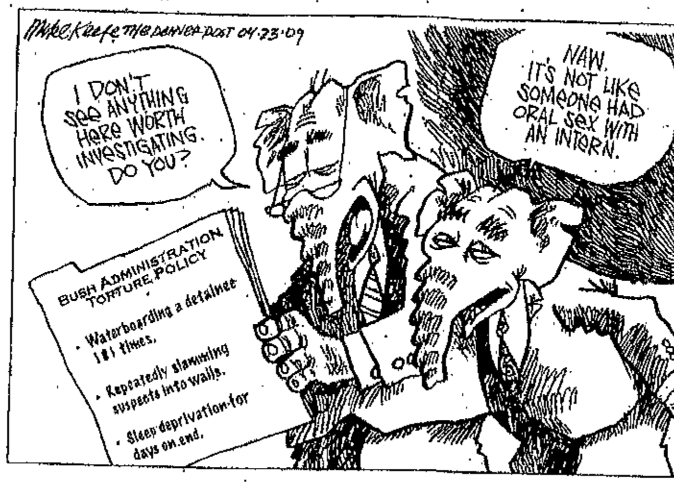

Illustration by Mike Keefe/Denver Post

cases where witnesses were supposedly unavailable and not subject to cross-examination at all.[14]

Until the Supreme Court of the United States decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), courts were not required to charge juries on quantity of drugs as an element of the charges and judges were free to determine quantity at the time of sentencing.

While some Circuits have suggested that the reliability of informants should be tested by mini-hearings before the trial judge prior to a witness taking the stand, few judges follow this policy. See *Bourjaily v. United States*, 483 U.S. 171 (1987).

The government also uses administrative subpoenas to secure information from banking, credit card, and phone records of attorneys and their clients. In many cases, this is done purely by the issuance of subpoenas by the D.E.A. and requires no administrative oversight by an attorney or advance approval by a judge.[15]

There have also been cases where the government was aware that a spy from a Columbian drug cartel represented herself to be an attorney for purposes of meeting with defendants and their counsel. If any lawyer or defendant had spoken of cooperation, he or she would have been marked for death.[16]

The government may or may not reveal their actions when they violate the rights of defendants and their lawyers or the extent of their snooping, spying, surveillance, listening in or overhearing. For example, when defendants are arrested and incarcerated, they are informed that their phone calls may be monitored for security reasons to avoid the smuggling of contraband and to prevent escape attempts. What they are not told is that phone calls with their spouses and attorneys may be listened to by the government and their defenses may be tracked, and their statements may be used against them. The jailhouse waivers they sign are being interpreted by courts and prosecutors as waivers of spousal and attorney/client privilege.

Mike Keefe/Denver Post

Former President Bush believed that he might decide when to listen in to phone conversations.[17] His Justice Department gave him legal opinions indicating that people could be held indefinitely without charges, attorneys or a trial. He also received legal opinions on the use of torture. It remains to be seen whether those policies, some or all of them, will carry over into the Obama administration. In late February 2009, the Obama administration told a federal judge that military detainees in Afghanistan have no legal right to challenge their imprisonment.[18]

Mike Keefe/Denver Post

The new tactics being developed by the federal government are dirty, underhanded, and patently unfair; yet courts are allowing these initiatives and others under broad rubrics of national security and claims that the ends of catching drug dealers justify any means for doing so.

The FBI: COINTELPRO and Beyond

According to the FBI, its motivation for creating COINTELPRO, the Counter Intelligence Program, was "protecting national security, preventing violence, and maintaining the existing social and political order." A later investigation by the Senate's Church Committee stated that "COINTELPRO began in 1956, in part because of frustration with Supreme Court rulings limiting the Government's power to proceed overtly against dissident groups."[19] According to FBI records, approximately 15% of COINTELPRO resources were expended to marginalize and subvert "white hate groups," while the remaining 85% of COINTELPRO resources were expended on those targets that were suspected of being subversive, which included a vast variety of organizations.

One such organization was the Black Panther Party (BPP), which COINTELPRO effectively demonized in the public eye. The BPP, working from a 10-point socialist program for black self-determination, formed legal armed street patrols to deter the KKK and police brutality, gave out free food and health care, and fought against hard drugs. The BPP was instrumental in forging a broad-based "rainbow coalition" against U.S. intervention abroad and for community control of the police, schools, and other key institutions at home. FBI Director Hoover ordered FBI agents to "expose, disrupt, misdirect, discredit, or otherwise neutralize" the activities of the Black Panther Party and other organizations involved with the communist, socialist, and women's rights movement, as well as leaders involved in the non-violent civil rights movement, such as Martin Luther King, Jr. Several court cases later concluded that the COINTELPRO operations against socialist and communist groups exceeded statutory limits on FBI activity and violated Constitutional guarantees of freedom of speech and association.[20] The FBI also planted drugs and other illegal evidence against dissidents.[21]

Although COINTELPRO was officially terminated in April of 1971 "for security reasons," many of the tactics utilized by this program continue to be used indirectly, as well as directly, as the Bureau has even acknowledged two new instances of "COINTELPRO-type" operations.[22]

The Watergate scandal took place a year after the FBI declared that COINTELPRO was disassembled; yet a number of illegal tactics were used during this investigation under the direction of FBI Director J. Edgar Hoover and William Mark Felt, chief inspector who previously sat on the directorate of COINTELPRO.[23] In his capacity, Felt chose not to reveal illegal conduct by FBI agents nationwide that went on for years

Illustration by Pete McDonnell

and, instead, monitored and approved a host of illegal operations directed at hundreds of individual targets, including harassment, false prosecutions, threats, blackmail, and inciting violence.[24] As a huge advocate of continuing COINTELPRO's illegal tactics, he even ordered illegal wiretaps after FBI Director Hoover's death. Despite the fact that Felt was hauled before a U.S. Senate committee investigating COINTELPRO five times, prosecuted and convicted for his misdeeds, he was pardoned by President Ronald Reagan and escaped punishment for all his crimes.[25]

The "new FBI" — developed under the direction of two federal judges William Webster and William Sessions — "cultivated a low-visibility managerial style and discreetly avoided public attack on prominent liberals." They used the lingo of today's issues, such as "counter-terrorism" and "the war on drugs" to rebuild the image of the

FBI in the public eye as a genuine protector of democratic rights.[26]

After the attacks on September 11, 2001, there were immediate calls to renew COINTELPRO-style surveillance and release intelligence agencies from the restrictions of the Church Committee-era laws[27], calls to repeal the Posse Comitatus Act, which separates police and military functions, and renewed surveillance and disruption by the Pentagon's Defense Intelligence Agency (DIA), CIA, National Security Agency (NSA), FBI, Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS), Transportation Security Agency (TSA), Director of National Intelligence (DNI) and by certain provisions of the USA Patriot Act.

Curcio Hearings and Attorney Disqualifications

The disqualification of counsel is another dirty trick used by the government. Prosecutors allege conflicts between attorneys and their clients, then force *Curcio*[28] hearings and threaten that counsel or his client may be charged with obstruction of justice. See *U.S. v. Murph*, Docket No. CR 08 322. This is also another way for the government to avoid speedy trial compliance because the speedy trial clock is tolled during the pendency of the Curcio issue. Phony issues like these serve to deplete precious defense resources and they engender distrust between clients and defense counsel.

When the defense asks for the appointment of a Special Prosecutor, a change of venue or even when they allege that evidence has been destroyed[29], these applications are almost always denied. Similarly, requests that ethical misconduct on the part of prosecutors be referred to Grievance Committees or the Board of Judges nearly always falls on deaf ears.[30]

Office of Foreign Asset Control and the Treasury Department

In representing those accused of being fugitives, a number of startling events surface. The government and Department of the Treasury have published in the

Federal Register requirements for the legal representation of alleged "Drug King Pins" and "Terrorists."[31] They also publish a list of fugitives in the *Register*, and attorneys who have been asked to represent such persons or who seek to be retained must first obtain a license from the Treasury Department Office of Foreign Asset Control to do so.[32] They must then have their fees approved and must account for them.[33] There have been reports of some American defense attorneys acting as double agents and bounty hunters who are literally hunting down alleged fugitives for legal fees and rewards particularly in Central and South America. They may be friendly with government prosecutors, they may use their clients to testify against each other, they may also recommend that unapproved defense lawyers be investigated by the Treasury Department and extract legal fees from desperate family members. They arrange with United States authorities for apprehension and kidnapping back to the United States without compliance with foreign law regarding extradition.[34] The United States is one of the leading violators of international law and its own treaties with foreign nations. The use of so-called "shadow counsel" is an enormous problem both strategically and constitutionally, but it is another arrow in the government's quiver of dirty tricks.[35]

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Creation of the Drug Enforcement Administration (DEA) & Racketeering Influenced and Corrupt Organizations Act (RICO)

The weapons utilized by the government to prosecute drug cases drastically changed in the early "1970s," upon the Nixon Administration's creation of the Drug Enforcement Administration (DEA) and the enactment of Racketeering Influenced and Corrupt

Organizations Act (RICO).[36] The DEA consolidated the efforts of the Bureau of Narcotics and Dangerous Drugs (BNDD), Office for Drug Abuse Law Enforcement (ODALE), Office of National Narcotics Intelligence (ONNI), and Customs Intelligence. Under the auspices of this agency, agents were permitted to and did act above the law. ODALE, for example, was authorized to conduct no knock search warrants and warrantless raids, as well as to use court ordered wiretaps.[37] ONNI has been described as being "little more than a White House private police force."[38] From an economic perspective, the budget, manpower and activity of the DEA continues to grow each year, employing 10,900 people,[39] arresting 27,780 people domestically, and its budget reaching $2.3 billion, as of 2007.[40]

The enactment of RICO laws in 1970 added no value to the federal criminal code because it is a derivative crime law, making it redundant legislation. It was designed merely to facilitate convictions. In addition, this law enables the government to seize a defendant's assets immediately after indicting him, making it almost impossible to finance an effective defense.

New York's Rockefeller Drug Laws

Prior to the Reagan Administration's War on Drugs, New York State had passed the infamous Rockefeller Drug Laws in 1973, providing that defendants could, and still do, receive life sentences for the possession of relatively small amounts of cocaine. Generally, the statutes required judges to impose a sentence of 15 years to life for anyone convicted of selling two ounces, or possessing four ounces of narcotics. The justification for these harsh penalties was that it would curtail the sale and use of drugs.[41] It did not and, between 1980 and 1992, New York's prison population tripled from about 20,000 to 62,000. In 1973, the state prison population was approximately 10,000. It was not for another 30 years that New York finally saw fit to amend its drug laws to provide for less Draconian sentences for addicts and mere possessors of cocaine. But, by that time, the government had ruined untold lives and families, and the prison lobby had proliferated with spiraling costs to taxpayers.[42] Between 1982-83 and the repeal of these laws, the share of the State General Fund spending going towards funding the prisons more than doubled from 10% to 25%.[43]

The Reagan and First Bush Administrations[44]

It was during the first term of the Reagan administration that the government launched criminal forfeiture statutes[45] and introduced IRS Form 8300.[46] Government forfeiture laws and Form 8300 were attempts to seize ill-gotten gains but, at the same time, they prevented defendants from securing counsel of their choice. Instead, Criminal Justice Act Panels expanded and more lawyers, again at taxpayer expense, were paid by the federal government.

The 1980s also brought on the beginnings of the era of dual sovereignty prosecutions[47] where crimes that had been state or street crimes concomitantly became the province of the federal government. The double jeopardy clause of the Fifth Amendment became an irrelevant part of the Bill of Rights.[48] There was a huge proliferation of federal crimes that had, until then, always been the province of the states.

When the Attorney General of the United States, Richard Thornburgh, announced a change in policy known as the Thornburgh Memo,[49] it was an attempt by the federal government to circumvent Codes of Professional Responsibility of the various states and make prosecutors exempt from them by allegedly authorizing them to contact represented parties in order to make defendants into so-called "cooperators." This is what happened in the third and final prosecution of John Gotti when Sammy "the Bull" Gravano was persuaded to turn against Gotti.[50] Mr. Gravano was called a hero by a federal judge, was given witness protection and received a five-year sentence for 19 murders.[51] He was later arrested, charged and convicted of drug offenses and other crimes for which he is now serving a life sentence.

illustration by Pete McDonnell

When President George H.W. Bush announced his continuation of the War on Drugs,[52] he was justifying the invasion of Panama and the kidnapping of General Manuel Noriega without a declaration of war. With a hand-picked conservative Supreme Court, these illegal actions were upheld in the absence of treaties or lawful arrests and extradition. Our government believes that other countries should respect our laws, but we think nothing of riding roughshod over theirs.[53]

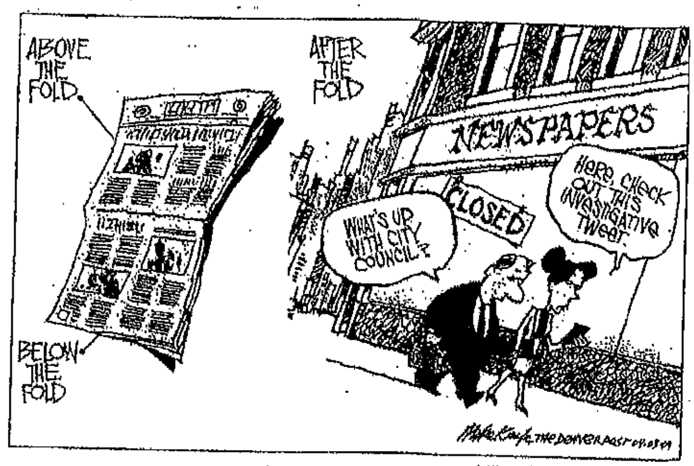
How the Federal Sentencing Guidelines Empower Prosecutors

The Sentencing Guidelines serve as yet another weapon utilized by federal prosecutors to coerce criminal defendants into cooperating with the government. When the Federal Sentencing Guidelines went into effect on November 1, 1987, they were enacted to augment uniform and comparative sentencing, but they were soon considered by the judiciary to be mandatory.[54] They resulted in the incarceration of just about anyone charged with a federal felony. The United States then became the most incarcerated nation in the world, causing Associate Justice Anthony Kennedy in a speech before the ABA House of Delegates in 2005 to criticize our undue emphasis on jail as a purported solution to other social and economic ills.[55] The Department of

Justice statistics tell us that, in the year 2007, almost two million people were incarcerated in either state or federal correctional facilities.[56] At the same time there has been criticism that the Guidelines and provisions within them such as 5K1.1, which allows prosecutors to write letters to judges encouraging them to be lenient on cooperating witnesses, has taken control of the sentencing function away from the judiciary. Mandatory minimum sentences have also done that, as have so-called "Drug Kingpin" statutes[57] and the death penalty.

After still more lives were ruined, the Supreme Court of the United States ruled in *U.S. v. Booker* (04-104) and *U.S. v. Fanfan* (04-105), 543 U.S. 220, 125 S.Ct. 738 (2005) that the Guidelines were merely advisory and not mandatory; as a result, some power over sentencing is finally being taken back by the judiciary. Now, the government prefers to group people into a conspiracy. Few motions for a severance are ever granted.[58] Since the Bail Reform Act of 1984, few defendants charged with drug cases make bail since there is a presumption of a flight risk and therefore need for detention.[59] Similarly, the government is permitted to routinely violate the Speedy Trial Act, which requires a trial within 70 days of arraignment, by describing the case as a complex case.

Based on the Sentencing Guidelines, cooperating with the government is often the only viable way for a defendant to substantially reduce his sentence. Yet 5K1.1 has taken much of the discretion of sentencing away from judges and given that over to prosecutors. 5K1.1 letters drive sentencing proceedings. This has also conflated the law of comparative sentencing because alleged facts of the underlying crime must be distinguished from or meshed with cooperation efforts. The ability to impose comparative sentences[60] among defendants in the same case or others becomes complicated and often lends itself to disparate sentences.[61]



Mike Keefe/Denver Post

With more than one million people legally using marijuana in the State of California,[62] how can we reconcile convictions and sentences for marijuana possession elsewhere in the United States?

Discovery Violations

Courts deny timely discovery of Jenks Act and *Brady* material. In *U.S. v. John Gil*, 297 F.3d 93 (2002), a two-week jury trial in which John Gil was convicted of conspiracy, mail fraud and money laundering charges, which stemmed from a contract that John Gil Construction, Inc. had with New York City O.T.B. to renovate and install new air conditioning systems in over twenty O.T.B. branches, "federal prosecutors suppressed evidence that would have aided the man's defense."[63] Therefore, a retrial was granted. A few days before trial, the Government turned over one piece of exculpatory evidence buried amidst approximately 3000 pages of discovery.[64] The Circuit Court excoriated the Government for its late disclosure because defense counsel did not have sufficient time to make use of it.[65] Wrongful convictions, jail and lengthy, expensive appeals often occur before the procedural failure by the government is corrected. As a result, a wrongly convicted defendant will rot in jail as his appeal works its way through the system.

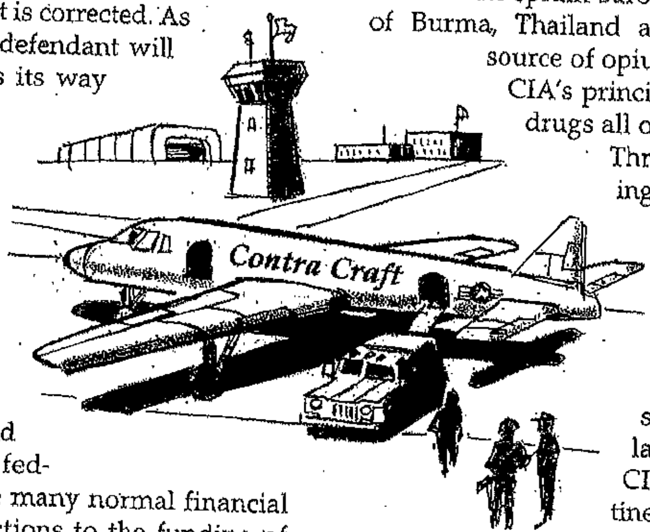


Illustration by Pete McDonnell

USA Patriot Act

Title 31, 18 USC §5331 passed in 2001, permits the Department of Homeland Security access to all types of information, such as telephone calls, e-mail communications, medical, financial, and other records. This Act enables federal investigators to criminalize many normal financial transactions by alleging connections to the funding of terrorism or other illegal activity, regardless of how nebulous these connections actually are. For example, in 2003, the money laundering provision of the Patriot Act was used by federal prosecutors against Las Vegas officials accused of taking bribes from a strip club owner.[66]

The Clandestine Operation of the CIA

Any discussion about drug use and drug sales in America and their resulting prosecutions would be missing the main player if the CIA were left out. It has been well documented that the CIA has been involved in the use and experimentation of, the importation of, and the facilitation of drug proceeds through Wall Street since the inception of the agency in 1947, including providing arms, money, and disinformation to Corsican criminal syndicates in Marseilles in the late 1940s in their struggle with the French Communist Party to control the port. The Corsicans used their new-found political influence and control over the docks to turn Marseilles into the postwar heroin capital of the Western world.[67]

In Southeast Asia in the early 1950s the CIA aided the anti-communist Chinese (KMT) army, to wage war against Communist China, positioning the KMT to become the opium Barons of The Golden Triangle (parts of Burma, Thailand and Laos), the world's largest source of opium and heroin. Air America, the CIA's principal airline proprietary, flew the drugs all over Southeast Asia.[68]

Throughout the 1950s to 1970s during U.S. military involvement in Laos and other parts of Indochina, the CIA provided funds and planes to Hmong commander, General Vang Pao, who became a world class player in the heroin market, supplying heroin refined in a laboratory at Long Tieng, the CIA's headquarters for clandestine operations in northern Laos, reputed to be one of the world's largest heroin processing plants. They supplied heroin to U.S. troops in Vietnam, among others. After a decade of American military intervention, Southeast Asia had become the source of 70 percent of the world's illicit opium and the major supplier of raw materials for America's growing heroin market.[69]

In South and Central America, the CIA's involvement in facilitating drug running developed in the 1970s and 1980s, with the covert war waged by the CIA against the government of Nicaragua. In Panama, for example, Panamanian President Manuel Noriega was a highly paid CIA asset and collaborator, who facilitated "guns-for-drugs" flights for the Contras, providing protection and pilots, as well as safe havens for drug cartel officials, and discreet banking facilities. The U.S. government only turned against Noriega, invading Panama in December 1989 and kidnapping the General, once they discovered he was providing intelligence and services to the Cubans and Sandinistas. Ironically, drug trafficking through Panama has increased since the US invasion.[70]

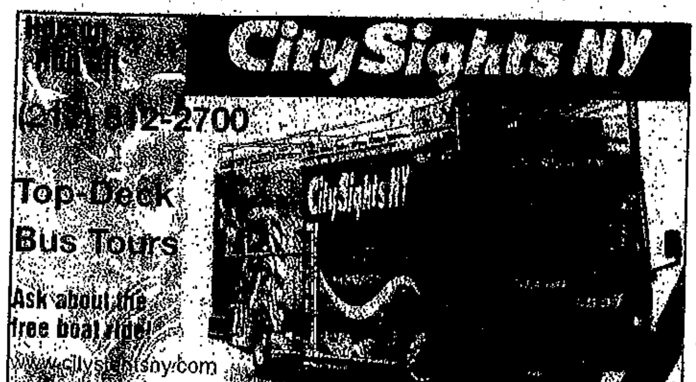
The Reagan administration officials tolerated drug trafficking, which included importing drugs into the

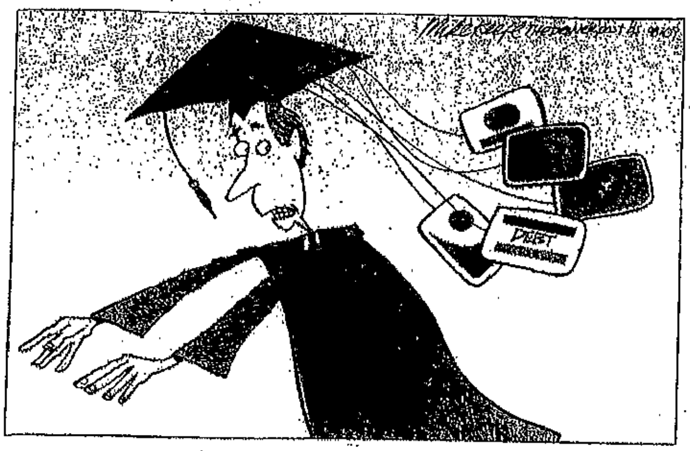
United States by drug kingpins, as long as the traffickers gave support to the Contras. In 1989, the Senate Subcommittee on Terrorism, Narcotics, and International Operations (the Kerry committee) concluded a three-year investigation by stating:

> *There was substantial evidence of drug smuggling through the war zones on the part of individual Contras, Contra suppliers, Contra pilots, mercenaries who worked with the Contras, and Contra supporters throughout the region... U.S. officials involved in Central America failed to address the drug issue for fear of jeopardizing the war efforts against Nicaragua... In each case, one or another agency of the U.S. government had information regarding the involvement either while it was occurring, or immediately thereafter... Senior U.S. policy makers were not immune to the idea that drug money was a perfect solution to the Contras' funding problems.*[71]

The Contras provided both protection and infra structure (access to planes, pilots, airstrips, warehous es, front companies and banks) to these CIA-linke drug networks. At least four transport companie under investigation for drug trafficking received U.S government contracts to carry non-lethal supplies t the Contras.[72] Southern Air Transport, "formerly" CIA owned, and later under Pentagon contract, wa involved in the drug running as well. Cocaine-lade planes flew to Florida, Texas, Louisiana and other loca tions, including several military bases. Designated a 'Contra Craft,' these shipments were not to be inspect ed. When some authority wasn't clued in, and made a arrest, powerful strings were pulled on behalf of drop ping the case, acquittal, reduced sentence, o deportation.[73]

The most recent location of CIA connection to drug trafficking is in Afghanistan where CIA-supported Mujahideen rebels engaged heavily in drug trafficking while fighting against the Soviet-supported government and its plans to reform the very backward Afghan society. The Agency's principal client was Gulbuddin Hikmatyar, one of the leading drug lords and a leading





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heroin refiner, who received more than half of the CIA's covert resources, estimated to be worth $2 billion over the ten-year war. Hikmatyar came to dominate the Afghan Mujahideen. CIA-supplied trucks and mules, which had carried arms into Afghanistan, were used to transport opium to laboratories along the Afghan/Pakistan border. The output provided up to one-half of the heroin used annually in the United States and three-quarters of that used in Western Europe. The United Nations International Drug Control Program noted in early 2001 that "It is no coincidence that Afghanistan began to emerge as a significant producer of illicit opium in precisely the period of protracted war that began in 1979 with the U.S.-sponsored intervention and still persists." David Musto, Yale University psychiatrist and former White House advisor on drug policy, noted that "the number of drug-related deaths in New York City rose by 77 percent."[75]

Postscript

Under the Taliban, beginning in 1994, opium production in Afghanistan was reduced to negligible levels. Taliban — in collaboration with the United Nations — had imposed a successful ban on poppy cultivation in 2000. Opium production declined by more than 90 percent in 2001. However, after the US-led military operation resulting in the downfall of the Taliban regime in 2001, opium production surged once again.

The success of Afghanistan's 2000 drug eradication program under the Taliban had been acknowledged at the October 2001 session of the UN General Assembly (which took place barely a few days after the beginning of the 2001 bombing raids). No other UNODC member country was able to implement a comparable program:

Turning first to drug control, I had expected to concentrate my remarks on the implications of the Taliban's ban on opium poppy cultivation in areas under their control... We now have the results of our annual ground survey of poppy cultivation in Afghanistan. This year's production [2001] is around 185 tons. This is down from the 3300 tons last year [2000], a decrease of over 94 percent. Compared to the record harvest of 4700 tons two years ago, the decrease is well over 97 percent.

Any decrease in illicit cultivation is welcomed, especially in cases like this when no displacement, locally or in other countries, took place to weaken the achievement.

Today, Afghanistan produces 93 percent of the world's heroin. By 2007 the production reached 7,700 tons and it is higher today.[77]

Conclusion

The global drug trade has been thriving for over fifty years in the United States and would not survive without the continued support and complicity of the CIA, FBI and DEA. According to the State Department, Afghanistan is "probably the world's largest producer of opium for export" and "the poppy source for a majority of the Southwest Asian heroin found in the United States."[78] Yet, U.S. officials fail to take action to curb production, understanding that impeding this trade would disrupt the processes of smoothing relations with Pakistani leaders and Pakistan's Directorate for Inter-Services Intelligence (ISI)[79] who are heavily implicated in the heroin trade and helping to channel CIA support to Afghan rebels.[80]

Similarly, after admitting that Miguel Nazar Haro was its "most important source in Mexico and Central America," the CIA intervened to prevent his indictment in the United States when he was linked to a multi-million-dollar stolen car ring several years later.[81] The United States continues to be a main consumer of the drugs produced in Latin America. According to three former presidents of Latin American nations, "The war on drugs has failed."[82]

What is required is an absolute shift in existing drug policies, and a move toward reducing the harm caused by drugs, decreasing drug consumption through education, and aggressively combating organized crime.[83] Perhaps the time has come to change the "status of addicts from drug buyers in the illegal market to patients cared for by the public health system."[84] Another idea is to consider the legalization or, more precisely, the decriminalization of the possession of, at the very least, cannabis for personal use. While it is claimed that the consumption of cannabis may have an adverse effects on a person's health, so may cigarettes,

The global drug trade has been thriving for over fifty years in the United States, and would not survive without the continued support and complicity of the CIA, FBI and DEA.

soda, and high fructose corn syrup; so should we also criminalize possession of those items? Hollywood has embraced cannabis for personal use; maybe it's time for the federal government to do so as well.

With the United States earning the title of the most incarcerated nation in the world, perhaps Albany has it right in its attempt to repeal the remnants of New York State's Rockefeller Drug Laws. In 2004, New York State's Legislature eliminated the most stringent provisions of these drug laws by doing away with life sentences for drug crimes and reducing other penalties for the most serious offenses.[85] The present goal is to eliminate mandatory sentences for drug crimes, thereby eliminating laws that require a prosecutor's consent before judges can send felons to drug treatments instead of prison.[86] While prosecutors have expressed concern that changes in existing drug laws may strip them of their role as a "check and balance" against the judiciary, the laws as they currently stand have required judges to impose mandatory prison terms for many nonviolent drug offenses, without any discretion.[87] It may be time for both the legislature and the judiciary to serve as a "check and balance" against each other.

Nassau County's drug treatment program, "D-TAP," and its re-sentencing statutes[88] should be adopted as national policies whereby those addicted can be rehabilitated, wipe their criminal records clean, and earn their way back into society.

The Congress, the courts and attorneys must be aware of how covert and clandestine drug campaigns in both the United States and abroad are often riddled with corruption and self-dealing, even among our highest leaders in Washington and elsewhere. The poppies in Afghanistan and Thailand and the coca in Colombia, Bolivia, Peru, and Ecuador would not be allowed to grow except for official corruption. It has unfortunately been the case that the illegality of some drugs, particularly marijuana and cocaine, has allowed for, and indeed created, much of the corruption that exists. The corruption has led to a distortion of patriotism and obliteration of Constitutional rights under the banner of a "War on Drugs." This campaign against drugs is in reality a war against minorities and the poor at home[89] and abroad. It has also led to the ruination of countless lives and families across the globe. It has spoiled diplomatic relations for years, and has allowed for unholy relations among world leaders, drug traffickers, and organized crime.[90] It has also led to a variety of dirty tricks and Constitutional deprivations, with the end justifying the means mentality.

Agents and prosecutors are in the front lines fighting a war that is costly, unnecessary, and which cannot be won, while world leaders continue to profit from the drug trade. Agents and prosecutors take their marching orders that then allow them to attack those accused of possession or distribution and their lawyers with a variety of dirty tricks. Their battle plans are destined to fail.

This is condoned by courts and judges who are compelled by the fear of impeachment to enforce laws that are inherently unconstitutional.[91] Defense lawyers are alone, with limited resources. They fight against these policies and dirty tricks used to implement them on a daily basis. If this is a time for change as President Obama keeps promising, then the war on drugs and the dirty tricks used to perpetuate it are policies worth changing. Much like the wars in Iraq and Afghanistan and prohibition before it, we need to decide whether the war on drugs is worth the financial,[92] public policy, and constitutional costs that are required for its perpetuation.

*Messrs. Liotti and Smith gratefully acknowledge their Law Clerk, Seema Pereira, a law school graduate from Penn State University Dickinson School of Law, for her indispensable work in the research and drafting of this article.

1 "United Inmates of America: 7 Million in Jail, on Parole or Probation," Associated Press, Friday, December 1, 2006.

2 Jessica Riordan and Andrew McDonald, "1 in 31 U.S. Adults are Behind Bars, on Parole or Probation," Pew Press Release on March 2, 2009, available at http://www.pewcenteronthestates.org.

3 One in every 31 adults are currently behind bars, on probation or on parole, according to the U.S. Department of Justice Bureau of Justice Statistics, available at http://ojp.usdoj.gov.

4 www.heritage.org/Research/LegalIssues/upload/2008_Baker_appendix.pdf

Mike Keefe/ Denver Post

5 In 1998, according to Chief Justice Rehnquist, "Over the last decade, Congress has contributed significantly to the rising case-load by continuing to federalize crimes already covered by state laws...Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be."

6 "President Nixon emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to." —H.R. Haldeman to his Diary.

7 The penalties for possession of crack-cocaine are much greater than the penalties for powder cocaine. Despite a recent amendment to the Federal Sentencing Guidelines that reduces penalties for crack cocaine offenses, there still exists a 100:1 quantity ratio between the amount of powder and crack-cocaine needed to trigger mandatory minimum sentences that drives Federal sentencing policy. Shaun L. Gabbidon and Helen Taylor Greene, Race, Crime, and Justice: A Reader, New York: Routledge (2005).

8 William L. Anderson and Candice E. Jackson, Overreach of the Federal Tentacles: The Illegal Conviction of Logan Young; William Anderson Archives, February 4, 2005.

9 Recall the high-profile cases of Martha Stewart and Michael Millken.

10 William Anderson and Candice E. Jackson, Washington's Biggest Crime Problem: The Federal Government's Ever-Expanding Criminal Code Is an Affront to Justice and the Constitution, April 2004.

11 United States Sentencing Guidelines §3E1.1.

12 18 U.S.C. §6002 (the use immunity statute) allows the government to prosecute the witness using evidence obtained independently of the witness's immunized testimony.

13 U.S. v. Murph, Docket No. CR 08 322.

14 U.S. v. Deluna, 38 Fed. Appx. 644 (2002).

15 Joan L. Cobb, Esq., Legal Editor for the Bureau of National Affairs, Inc., wrote two articles for the BNA Criminal Practice Manual concerning the wrongful issuance of administrative subpoenas by U.S. Attorneys and the D.E.A. Ms. Cobb received the Front Page Award presented by Local 35 of the Washington-Baltimore Newspaper Guild recognizing superlative research, reporting and writing of these articles examining the use of administrative subpoenas. Mr. Liotti was the subject of the article, in particular, the fact that his phone records were wrongfully subpoenaed by the D.E.A. and an Assistant United States Attorney. See, "'Underhanded' DEA Subpoena Seeks Lawyer's Phone Records," BNA Criminal Practice Manual, Trial Practice Series, *June 24, 1992; Vol. 8, No. 13. Also, on April 22, 1994, Mr. Liotti addressed the Syracuse Association of Criminal Defense Lawyers on the topic of Federal Administrative Subpoenas. In another example, The Drug Policy Foundation and the American Civil Liberties Union co-sponsored a practical, international seminar for lawyers involved in civil and criminal law litigation, entitled: Drugs and the Law, November 11-14, 1992, Washington, D.C. Mr. Liotti presented the idea for the seminar, and presented a paper entitled: "The Use of Administrative Subpoenas to Get Client Information." Co-Panelists included: Gerald H. Goldstein, Esq. of San Antonio, TX; William B. Moffitt, Esq. and John K. Zwerling, Esq., both of Washington, D.C.*

16 U.S.A. v. Juan Montoya (1997, S.D.N.Y., Judge Shira A. Scheindlin). Multi-defendant, federal cocaine case (750 kilograms). The defendant was allegedly a mid-level participant in a Columbian-based cartel known as the Lamos organization. The defendant did not cooperate but received credit for a "minor role;" "early acceptance of responsibility;" "safety valve" protection and agreed to be deported at the conclusion of his sentence. The defendant received a sentence of 87 months. At the time of sentencing he had been in jail for 15 months and received credit for time served. An interesting development occurred in the case when Mr. Liotti scheduled a joint defense meeting of all defense counsel and their clients at the Metropolitan Correctional Center in New York. Unbeknownst to Mr. Liotti and the others present, the meeting was attended by an imposter and spy for the drug cartel who represented herself to be a lawyer. In her imposter role she had handled numerous drug cases from 1994-1996. The Government knew of her role but did not disclose it to counsel, thereby subjecting counsel and the defendants to substantial risk and a violation of attorney-client privilege. The imposter was later prosecuted and her cases had to be undone. To date, neither Mr. Liotti nor any of the other defendants or counsel in the case have been threatened or harmed. See Tarlow, Barry, "RICO Report, Invasion of the Defense Camp," The Champion, April 1997 at 50 and Guart, Al, "Bogus Barrister May Have Spied For Drug Lords," New York Post, October 11, 1996 at 20.

17 Former U.S. President George W. Bush issued an executive order that authorized the National Security Agency (NSA) to conduct surveillance of certain telephone calls without obtaining a warrant from the Foreign Intelligence Surveillance Court (FISC), as stipulated by Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1802, 50 U.S.C. § 1809.

18 "Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan," by Charlie Savage, The New York Times, February 22, 2009.

19 Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Final Report of the Select Committee to Study Governmental Operations, April 23, 1976, available at http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIa.htm.

20 See Hobson v. Wilson, 737 F.2d 1 (1984); Rugiero v. U.S. Dept. of Justice, 257 F.3d 534, 536 (2001).

21 Brian Glick, War at Home: Covert Action Against U.S. Activists and What We Can Do About It; Boston: South End Press, 1989.

22 Bud Schultz and Ruth Schultz, The Price of Dissent: Testimonies to Political Repression in America; California: University of California Press, 2001.

23 Michael Richardson, "Deep Throat's Operation COINTELPRO Dwarfed Watergate in Criminality;" December 22, 2008, available at http://www.examiner.com/x_1969_Boston_Progressive_Examiner~y2008m12d22_Deep_Throats_Operation_COINTELPRO_dwarfed_Watergate_in_criminality.

24 Ibid.

Mike Keefe/ Denver Post

25 Ibid.

26 Ibid: "The old myth of the FBI as crime-busting protector of democratic rights has been revived in modern garb by films like Mississippi Burning and the television series, Mancuso."

27 The Church Committee-era laws include the establishment of the Foreign Intelligence Surveillance Act Court to pre-approve Presidential surveillance programs.

28 United States v. Curcio, 680 F.2d 881 (2d Cir. 1982).

29 Thomas F. Liotti and Drummond Smith, "Spoliation of Evidence by Prosecutors," Verdict, July, 2008 at 1, 3 and 4 and New York Criminal Law Newsletter (a publication of the Criminal Justice Section of the New York State Bar Association), Summer, 2008, Vol. 6, No. 3 at 9.

30 Thomas F. Liotti and Christopher Zeh, "Uneven Playing Field: Ethical Disparities Between The Prosecution and Defense Functions in Criminal Cases," Touro Law Review, Vol. 17, No. 2, Winter 2001 at pp. 467-501; and Verdict, April 2002.

31 Federal Register: December 23, 2008 (Volume 73, Number 247); 31 CFR Parts 594, 595, and 597, available at http://edocket.access.gpo.gov/2008/E8-30532.htm.

32 United States Department of the Treasury Office of Foreign Assets Control website, available at http://www.treas.gov/offices/enforcement/ofac/forms/index.shtml.

33 The designation of a client as a "kingpin" requires an attorney to obtain a license from the Treasury Department Office of Foreign Asset Control to represent and receive compensation for representation under 31 C.F.R. 501.801 as well as the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. 1905(d). The license applies only to the specific client in their specific case, and the license remains subject to the authority of the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. Part 598, the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-1908 and U.S.C. § 1182.

34 See United States v. Jorge Mario Paredes-Cordova, Docket No. CR 03-987.

35 See George Packer's article, "Left Behind," New York Times Magazine, September 22, 2002, regarding the dissenting opinion by Justice Murphy in the first Lynne Stewart case. The appointment of shadow counsel drove a wedge between Ms. Stewart and her client. While Ms. Stewart had negotiated a plea bargain of 15 years, the shadow counsel appointed by the trial judge managed to get the defendant an extra 100 years on top of that. Instead of finishing his sentence, the defendant committed suicide.

36 The Racketeer Influenced and Corrupt Organizations Act, Section 901(a) of the Organized Crime Control Act of 1970. 18 U.S.C. 1961-1968.

37 Peter Knight, Conspiracy Theories in American History: An Encyclopedia (2003).

38 Ibid.

39 Drug Enforcement Administration Snapshot, available at http://www.vault.com/companies/company_main.jsp?product_id=25310&co_page=2&tabnum=2&v=1.

40 U.S. Drug Enforcement Administration Staffing and Budget, available at http://www.usdoj.gov/dea/agency/staffing.htm.

41 As early as 1977, the Committee on New York Drug Evaluations, a partnership between the Association of the Bar of the City of New York and the Drug Abuse Council, Inc. issued a report that was highly critical of the Rockefeller Laws. The report determined that heroin use and related crime was as widespread in mid 1976 as pre 1973 despite $76 million spent and the appointment of 49 additional judges to handle the surge of cases.

42 Today the outsourcing of prisons to private corporations such as Wackenhut Securities and the Corrections Corporation of America, has exploded to the tune of 264 correction facilities and almost 100,000 adult offenders. Several studies have demonstrated that this outsourcing has no cost savings and in fact resulted in higher costs to taxpayers.

43 Aaron D. Wilson, "Rockefeller Drug Laws Information Sheet," Partnership for Responsible Drug Information, available at http://www.prdi.org/rocklawfact.html.

44 See generally, Thomas F. Liotti's book review of Naomi Wolf's The End of America: Letter of Warning to a Young Patriot, published in Lawyer's Bookshelf, New York Law Journal, March 27, 2008 at 2; Naomi Wolf, Give Me Liberty: A Handbook for American Revolutionaries, New York: Simon & Schuster Paperbacks, 2008.

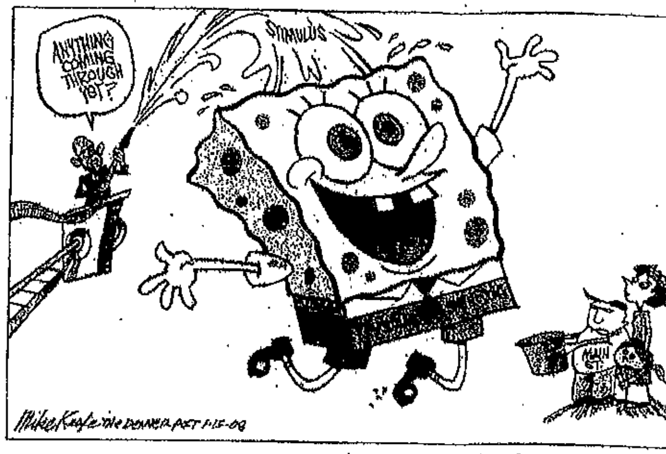
45 See, USC §982.

46 IRS Form 8300, Report of Cash Payments Over $10,000 Received in a Trade or Business, available at http://www.irs.gov/pub/irs_pdf/f8300.pdf.

47 Thomas F. Liotti, "Double Jeopardy and the Variance Doctrine in Conspiracy Prosecutions," New York State Bar Journal, November 1998 at 32, 33, 34, 35, 36, 38, 40 and 41.

48 See, Houston v. Moore, 18 U.S. 1 (1820). See also, Justice Black's dissent in Bartkus v. Illinois, 359 U.S. 121 (1959) (Justice Black dissenting) and most recently U.S. v. Lopez, 514 U.S. 549 (1995).

49 Richard Thornburgh, Memorandum to All Justice Department Litigators Re: Communications with Persons Represented by Counsel (published in the August 4, 1994 Federal Register), in In re Doe, 801 F.Supp. 478, 489-93 (D.N.M. 1992). See also, "Note: Wisdom without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules," Todd S. Schulman, 71 New York University Law Review, 1067, October 1996. See, specifically, Footnote 43, Letter from Thomas F. Liotti, Attorney at Law, to President William Clinton (August 23, 1993), on file with the New York University Law Review, objecting to positions expressed in the Reno Rule. Under the direction of Attorney General Janet Reno, the Department of Justice codified a slightly modified version of the Thornburgh Memorandum into a Departmental regulation that went into effect September 6,1994, exempting federal prosecutors from the no-contact rule and suggesting that defense attorneys will mount an "avalanche of litigation" and will not "submit to allowing Government attorneys into the defense camp" and a Letter from New York State Association of Criminal Defense Lawyers to the Office of the Association Attorney General (March 21, 1994) (on file with the New York University Law Review), asserting that members of the Association will report any violation of no-contact rule by New York licensed federal prosecutors because, notwithstanding Reno Rule, Association members are bound to do so. See also The Second Circuit Review--1983-1984 Term: Part I: Forward: "Summary Orders In The Second Circuit



Mike Keefe/ Denver Post

Under Rule 0.23," George C. Pratt, Spring 1985, 51 Brooklyn L. Rev. 479. See Footnote 38, Thomas F. Liotti, "Caution Urged on Trimming," Opinions, New York Law Journal, April 11, 1983 at 2, col. 6 (Letter to the Editor).

50 U.S. v. Gotti, 791 F.Supp. 380 (1992).

51 Selwyn Raab, Five Families: The Rise, Decline, and Resurgence of America's Most Powerful Mafia Empires (2005).

52 Thomas F. Liotti, "A War On Drugs: At What Cost To Our Liberty?" Perspective, New York Law Journal, February 28, 1990 at 2 and The Nassau Lawyer, April, 1990 at 2.

53 During the Iran-Contra affair, which took place between 1985-1992, high officials of the Reagan administration were discovered to have used funds raised by covert arms sales through Israel to Iran in order to finance the activities of the 'Contra' revolutionaries against the Sandinista regime in Nicaragua, every step of which violated declared government policy, domestic law and/or international law.

54 Thomas F. Liotti, "Departing From Federal Sentencing Guidelines," Verdict, July 1998, Vol. 4, No. 3 at 13.

55 Thomas F. Liotti, "Support for the 'Land of the Second Chance,' The Justice Kennedy Commission Report to the ABA House of Delegates," Opinion/Editorial, The Attorney of Nassau County, November, 2004 at 13 and 14 and The Suffolk Lawyer, November, 2004 at 5 as well as a version of the article as it appeared in the Attorney of Nassau County (Nov. 2004), reprinted in the Roundtable (a newsletter by the American Board of Criminal Lawyers), January, 2005 Vol. MMV, No. 1 at 5.

56 William J. Sabol, Ph.D., and Heather Couture, U.S. Department of Justice: Justice Statistics Bulletin, Prison Inmates at Midyear 2007, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf-Bureau. According to a report released by the Pew Center on the States on March 2, 2009, 7.3 million people are currently incarcerated, on probation or on parole.

57 See 21 U.S.C. § 848 (the federal "kingpin" statute).

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59 See Federal Bail Reform Act of 1984, 18 U.S.C. §§.3141-3150.

60 Solem v. Helm, 463 U.S. 277 (1983).

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62 U.S. v. Brett Schreiber, Docket No. 2:07-CR-20-01 (District of Vermont); U.S. v. Ferraris, Docket No. 05-CR-886 (5-2)-8 (Eastern District of New York).

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90 In 1942, the United States government, through the nation's new espionage agency, the Office of Strategic Service (OSS), created the top-secret "Operation Underworld" for the recruitment of organized crime figures to counter Nazi saboteurs along the U.S. eastern seaboard. According to Sally Denton and Roger Morris's book, The Money and the Power: The Making of Las Vegas and Its Hold on America, 1947-2000, New York: First Vintage Books (2001), "Government agents employed mobsters and their labor goons in a campaign of coercion and bribery ostensibly to prevent sabotage and quell uncontrolled leftist unions on New York docks." According to this book, which quotes a former White House official, "The dirty little secret of Operation Underworld was that the United States Government needed Meyer Lansky, a gangster who was instrumental in the development of The Commission in the United States and organized crime, to force an industrial peace and a policing of sabotage on the wharves and in the warehouses. The government turned to him because hiring thugs was what government and business had been doing for so long to control workers, and because it could conceive little other choice in the system at hand."

91 U.S. v. Baylis, 701 F.2d 222 (1983).

92 According to Amy Belasco's CRS Report for Congress, titled "The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11," updated on October 15, 2008, and available at http://www.fas.org/sgp/crs/natsec/RL33110.pdf, "With enactment of the FY2008 Supplemental and FY2009 Bridge Fund (H.R. 2642/P.L. 110-252) on June 30, 2008, Congress has approved a total of about $864 billion for military operations, base security reconstruction, foreign aid embassy costs, and veterans' health care for the three operations initiated since the 9/11 attacks: Operation Enduring Freedom (OEF) Afghanistan and other counter terror operations; Operation Noble Eagle (ONE), providing enhanced security at military bases; and Operation Iraqi Freedom (OIF). This $884 billion total covers all war-related appropriations from FY2001 through part of FY2009."

Nullification As A Defense

By Thomas F. Liotti and
Drummond C. Smith*

Nullification is not listed as a legal defense anywhere. In fact, lawyers are not ethically permitted to tell jurors to disregard the law. Model Rules of Professional Conduct Rule 3.5; see also U.S. v. Thomas, 116 F.3d 606 (1997). Yet, in many cases that is precisely what lawyers try to do and had done for years after the nation's founding. The Founders understood that trials by juries and ordinary citizens, fully informed of their powers as jurors, would confine the government to its proper rule as the servant, not the master of the people. For example, a necessity defense is in essence a form of nullification. *U.S. v. Berrigan*, 283 F.Supp. 336 (1968). It says that a protest is politically necessary in order to stop death that might result from nuclear power plants, other environmental hazards and war. The defense has to do with getting jurors so angry at the government's conduct that they vote to acquit even though an application of the law to the facts, might point in the direction of guilt. In the case entitled *Zengers Case*, 1735, the defendant Mr. Zenger had been arrested and charged with printing critical but true stories about the Governor of New York Colony, the court told the jury that "Truth is not defense." But the jury acquitted and gave us the basis of the law which holds that truth is a defense to a defamation claim.

In order to effectively assert the defense of nullification, the jurors need to know from pre-trial publicity why the case is a political one. Nullification defenses are based upon challenges to government policies or sometimes challenges to procedures that may violate civil or human rights. It becomes a matter of publicly stating what the political issues are and how they will be challenged in the courts, through the judicial process. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a well known attorney held a press conference and was suspended from the practice of law for two years. Attorney Dominic Gentile, during a pretrial press conference read the following prepared statements regarding his client Grady Sanders;

"When this case goes to trial...you're going to see that the evidence will prove not only that Grady Sanders is an innocent person...but that the person that was in the most direct position to have stolen the drugs and money is Detective Scholl.

I feel that Grady Sanders is being used as a scapegoat.

With respect to these other charges...the so-called victims...four of them are known drug dealers and convicted money launderers..."

Then, citing ethical restrictions, Gentile answered only a few press questions, stating the following; "I know I represent an innocent man," when referring to the outcome of an earlier charge in the indictment, stated; "...and I told you that the case would be dismissed and it was."

Ultimately, Mr. Sanders was acquitted after a jury trial.

The Nevada State Bar alleged that Gentile had violated its disciplinary rule which is the equivalent of the ABA Model Rule of Professional Conduct 3.6 by making statements to the effect that:

- the evidence demonstrated the client's interest;
- the likely thief was a police detective;
- the other alleged victims were not credible.

The matter was affirmed by the Nevada Supreme Court, but on a 5-4 vote, the Supreme Court of the United States reversed. The majority wrote the following:

"The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press..."

The Supreme Court later held that his speech was protected by the First Amendment. Similarly, Steve Yagman, known civil rights lawyer based in California, found that his criticism of judges was protected by the First Amendment as opinion. See Standing Committee on Discipline v. Yagman, 55 F.3d 1430 (1995) and Thomas F. Liotti, A Perspective On Yagman: The Outer Limits Of Judicial Criticism, The Attorney of Nassau County (May, 1996) at 6 and 19.

In nullification cases, lawyers are striving to inform prospective jurors or actual jurors of legal issues or facts that are not necessarily before them. Pre-trial publicity is an ingredient that can inform jurors of issues that lawyers may not be able to bring out during the course of trial itself.

In a civil case the summons and complaint or the notice of claim may, by themselves, signal the start of a political case or a challenge to government policy. The lawyer chosen to advance these issues may also be identified as a spokesperson for the cause. For example, when the late William Kunstler was defending against a heinous criminal charge, the public knew that in addition to questioning the alleged facts, he might also be fighting against police brutality or other violations of his clients' civil rights. In representing African

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Americans he would often allege that the police in the City of New York had engaged in systematic discrimination against the minority community. *People v. Larry Davis*, N.Y.S.2d 430 (1988).

Driving While Black (DWB) cases along the Jersey Turnpike were used to show the lack of probable cause for arrests or even stops by the police there. The video of Rodney King being savagely beaten by Stacey Koon, a well known Los Angeles police officer, was used in the civil and criminal cases arising out of that incident, but also the first O.J. Simpson verdict was, in part, considered to be the result of a payback by jurors for what happened to Rodney King. The O.J. case highlighted the use of the "N" word in extra-judicial statements by Mark Furman.

The deaths of 85 people at the Branch Davidian compound in Waco, Texas was blamed on the F.B.I. and private militia in criminal cases arising out of that incident. *U.S. v. Branch*, 91 F.3d 699 (5th Cir. 1996); *United States v. Castillo*, 179 F.3d 321 (5th Cir. 1999); *Castillo v. United States*, 530 U.S. 120 (2000). In the Chicago 7 cases lawyers eventually won victory and marketed their opposition to President Johnson, the Vietnam War and Mayor Daly's Chicago police, by making their trial into a political one. They made federal judge, Julius Hoffman and his bizarre judicial rulings into an analogy which then enabled them to criticize the federal government as a whole. *U.S. v. Dellinger*, 472 F.2d 340 (1972).

Lawyers representing Abner Louima not only repelled criminal charges against their client, but also had the police prosecuted and obtained a large civil award against them. *U.S. v. Schwarz*, 283 F.3d 76 (2002). This result was achieved in some measure by the political pressure placed upon City of New York as a result of the pre-trial publicity. That publicity caused investigations by Internal Affairs, the F.B.I. and others. It also resulted in the suspension, termination and jailing of police officers.

Nullification may also occur during voir dire. Submitting proposed questions in federal court, for the court to ask in a questionnaire or in its actual questioning of jurors may augment what the lawyer can do to advance nullification. These questions may begin with: "Have you ever sued or been a party to litigation of any kind with the state or federal government? If so, state the nature of the suit and the outcome." Other questions that may be asked by the federal court or the lawyer in state court may include:

1. If you are the sole juror who feels a certain way, do you have the courage of conviction necessary to deliberate, and if unpersuaded, stick to your opinion?
2. What is your understanding of an indictment that is frivolous or brought in bad faith?
3. Do you believe that prosecutors/agents who bring wrongful, malicious prosecutions should be penalized for doing so?
4. Will you follow the instruction given by the judge?
5. What will you do if you disagree with the judge's instructions?
6. Do you understand that you can disagree with your fellow jurors?
7. Will you vote to go along and get out of here?
8. Do you think that the police ever lie?
9. Do you think that the police ever cover up?
10. Are you familiar with the term, "shoot first, ask questions later"?
11. How do you know if a witness is a perjurer?
12. How do you know if the government is suborning perjury?
13. If you think that the judge is being unfair in his/her ruling to one side or the other, what will you do about it?

Opening statements are a time to lay down more tracks to further the idea of nullification.

1. "The judge, and the lawyers take an oath which says that we promise to uphold, 'protect and defend the Constitution of the United States. To the extent that we do or do not means that we have either followed our oaths or broken them. To that extent, I remind you that the Constitution is on trial in every case and I am here to defend it and the rights of my client or you if you were in his unenviable position of sitting over there."
2. "The government holds up this flag and announces to you that they represent the United States of America. Well that is true, but they are from the Department of Justice. Listen to that word. Justice. Justice. It is their responsibility to do justice and not merely prosecute because they can or because they have the great might and resources of the government behind them. We do not have that. On our side we have just the two of us to defend against the prosecution team. Just the two of us that is and the Constitution and all of you. You really are the essence of democracy, the final check and balance. Your duty is to question the evidence, the motives of witnesses, and that of the government in bringing these trumped up frivolous charges."
3. "We have one judge, one defense lawyer and one prosecutor. Our jobs are not as important as yours. Why? Because it takes twelve of you to do it."

Cross examination requires a good faith basis for asking questions. It is up to the reader to decide if he has that, but if you do then here are some questions to consider:

1. "Tell me in your own words what the probable cause was for my client's arrest?"
2. "Have you ever taken a bribe?"
3. "Have you ever lied?"
4. "Have you ever told a white lie?"
5. "Have you ever been sued civilly?"
6. "Were you taught in the Police Academy to lie, testify?"
7. "Will you get a promotion or a raise if you get more collars?"
8. "Do you dislike me for asking these questions?"
9. "We don't need the jury, do we? You think the defendant is guilty? You want these jurors to believe you, don't you?

Closing arguments follow the theme which you have established.

1. "By now you have seen and heard the government's case. You may wonder why you are here, that they have the wrong man. You are allowed to have your own thoughts, to be free thinkers, to disagree with your fellow jurors and they must deliberate with you. If you are resolute in your views after listening to your fellow jurors, then you may stick to your guns, that is your right. That is a fair trial."

Although nullification is not a named legal defense, it has served as a valid and powerful mechanism advanced by lawyers since the formation of America's justice system. Lawyers play a crucial role as spokespersons advocating for needed change in political or governmental policy, but equally important is the attention media gives to these topics. If media is a reflection of the pulse of the common man, lawyers are simply employing a legal tool through the judicial process to reflect the present concerns of a changing society. Allowing nullification to serve as a defense is, in essence, preserving and promoting the fabric of our nation's democratic principles and ensuring a government that continues to function "by the people" and "for the people." In a nation as young as America, the use of nullification as a defense is one way among many to allow for growth and advancement according to the political and social necessities of any particular time.

Intellectual Property Update
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and 2002 suggests that "patent trolls" do not place an unusual burden on the legal system and do not hinder business and economic progress disproportionately through the targeting of deep-pocketed large companies. The study found that economically small patent holders brought suits against other economically small firms or corporations far more often than against economically large or medium firms or corporations.

Although no universally accepted definition exists, persons that obtain patents and attempt to profit by suing others for infringing those patents, but who do not themselves manufacture products, are often characterized with the derogatory term of "patent troll." Leaders of large corporations have argued that the patent system as currently operated is allowing such patent trolls to unfairly hold up their economic progress, which in turn hurts society as more money is directed to legal efforts as opposed to job creation. The study performed by University of Illinois Law Professor Jay Kesan and his research fellow Gwendolyn Ball, in part analyzed litigation behavior of small-sized plaintiffs to gain insight into effects of such patent trolls.

Kesan and Ball gathered information about the economic size of plaintiffs and defendants in patent cases from the years 2000 and 2002, and the stage in litigation at which these patent suits ended. The parties from these patent suits were classified as large, medium or small if their annual sales were for more than $500 million, between $500 million and $10 million, or for less than $10 million, respectively. Licensing firms, which might be the best candidates to be considered patent trolls, were also particularly analyzed, and were found to be almost completely in the small-sized grouping.

Small-sized parties were found to be quite active in litigation, as over half of the plaintiffs in patent suits in 2000 and 2002 were individuals or small companies. Small-sized parties, however, sued other small-sized parties or medium-sized parties far more often than they sued large-sized parties. In 2000 and 2002, small plaintiffs brought suit 2110 times against other small plaintiffs, 641 times against medium-sized plaintiffs, and 724 times against large plaintiffs. Thus, these statistics do not support concerns that small-sized groups, that are not actively manufacturing products, are particularly targeting large companies and thereby hindering society's economic growth.

Licensing firms appeared as plaintiffs in only a small amount of the patent infringement suits, and were thereby considered by the authors not to provide any particularly large economic obstructing effects. In patent suits from 2000 and 2002, only 157 plaintiffs were licensing firms, which constituted only 3% of the plaintiffs in those years. Licensing firms were observed to settle more often than other small-sized plaintiffs when suing large companies. The authors thought the small sample size of licensing firms might be the sole reason for this difference in settling behavior, but also suggested as causes that licensing firms might have more sophistication and skill in negotiating settlements than a typical small-sized plaintiff, or that large companies might be more wary of litigating against licensing firms and thus more willing to settle.

The study also appeared to show that small-sized plaintiffs were overcoming the barrier of the high costs of litigation. Small-sized plaintiffs were also found to be more likely than medium or large-sized plaintiffs to pursue litigation to a judgment and were found to be as likely as large-sized plaintiffs to take the litigation as far as trial. The study also appeared to show that under the assumption that patents with more claims and more cited prior art references have received more attention and are thus stronger patents, small-sized parties usually pursued litigation with stronger patents than those used in litigation by medium-sized and large-sized parties. The authors speculated that many small-sized plaintiffs rely on contingency law firms for representation, and those contingency firms would particularly try to weed out weak and average cases.

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UNEVEN PLAYING FIELD: ETHICAL DISPARITIES BETWEEN THE PROSECUTION AND DEFENSE FUNCTIONS IN CRIMINAL CASES

THOMAS F. LIOTTI, ESQ. AND CHRISTOPHER ZEH, ESQ.

THE UNEVEN PLAYING FIELD: ETHICAL DISPARITIES BETWEEN THE PROSECUTION AND DEFENSE FUNCTIONS IN CRIMINAL CASES

Thomas F. Liotti
Christopher Zeh[1]

I. INTRODUCTION

Since the early 1900's criminal defense attorneys have been subject to governmental and prosecutorial scrutiny for the methods they use in conducting trials and securing verdicts.[2] Defense

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[1]Thomas F. Liotti, B.S., M.P.A. and J.D. Mr. Liotti is an attorney in Garden City, New York and Village Justice for the Incorporated Village of Westbury, New York (1991-present). He is a Past President of the New York State Association of Criminal Defense Lawyers and the Criminal Courts Bar Association of Nassau County, Inc. He is co-author of *Convictions: Political Prisoners Their Stories* (Maryknoll, 1981) and *A Practice Guide: Village, Town and District Courts* (West Group, 1997). Mr. Liotti is the incoming Chair of the New York State Bar Association Criminal Justice Section and Editor of the Section's Journal.

Christopher W. Zeh is a 1999 graduate of St. John's University School of Law (he currently awaits admission to the Bar). He is an attorney and associate in Mr. Liotti's Garden City firm. Mr. Liotti gratefully acknowledges his participation, assistance and contributions in the research and writing of this article.

[2] *See* Shambie Singer, *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*, 19 J. LEGAL PROF. 235 (1995). *See* Shirley E. Perlman and Tom Demoretky, *No Charge In Foot Fetish Case: Queens Teen Alleged Advances By Ex-ADA*, NEWSDAY, March 4, 1994 at 3. Former Nassau County Prosecutor Kenneth Littman was forced to resign after asking a seventeen year old girl if he could be her "sex slave." In an eleven page report to State Supreme Court Justice Leo F. McGinity, then Chief Administrative Judge for Nassau County, Suffolk District Attorney James M. Catterson, Jr. concluded Littman's suggestions to the girl "may appear bizarre and socially unacceptable," but were not criminal.

Littman, 44 years old at the time, allegedly offered Kelly Charron $150 to put on high-heeled shoes so that he could "worship" at her feet. Charron was disappointed at the outcome of this incident, feeling as if she was solicited like a prostitute. It is unclear what Littman is currently doing. He was never criminally prosecuted or professionally disciplined for these alleged acts. In contrast, Amy Fisher, the Long Island Lolita, recently made a bid for resentencing in part based upon an alleged sexual relationship between her and her attorney at the time of her plea. Amy Fisher was originally sentenced in lawyers challenge the *status quo*. Indeed, in fighting for freedom, due process and the Constitution, it is their obligation to do so.[3] Clarence Darrow, arguably the greatest lawyer of this century and nicknamed the "Attorney for the Damned," devoted much of his

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accord with her attempted murder of Mary Jo Buttafucco. *See* Kara Blond, *Mary Jo, Amy to Meet Again, Both Due In Court, Thursday In Step Toward Freedom*, NEWSDAY, April 19, 1999 at A6.

[3] The Canons of Professional Responsibility require defense lawyers to represent clients zealously and within the bounds of the law. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101, 102 (1997), and 22 N.Y.C.R.R. 1200.32 (2001). Traditionally, these Canons have been applied to defense lawyers, but not prosecutors. *See People v. Appel*, 120 A.D.2d 319, 509 N.Y.S.2d 438 (3d Dep't 1986); *Matter of Malone*, 105 A.D.2d 455, 480 N.Y.S.2d 603 (3d Dep't 1984); *In re Robinson*, 151 A.D. 589, 136 N.Y.S. 548 (1st Dep't 1912); *People v. Salquerro*, 107 Misc. 2d 155, 433 N.Y.S.2d 711 (N.Y. County 1980) (establishing specific obligations for a trial attorney if he learns that his client plans to commit perjury). *See also* NASSAU COUNTY COMMITTEE ON PROFESSIONAL ETHICS, OPINION 91-12. *See* Jan Hoffman, *Police Tactics Chipping Away at Suspects' Rights*, N.Y. TIMES, March 29, 1998, §1 at 1; and Jan Hoffman, *Police Refine Methods So Potent Even the Innocent Have Confessed*, N.Y. TIMES, March 30, 1998, at A6.

While these obligations apply to defense lawyers, prosecutors routinely allow police officers to avoid compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). During the *Knapp* and *Mollen* Commissions we learned about police corruption and "testilying", lying under oath by police officers. *See* Liotti and Ginnis, *Testilying: Law Enforcement's Specialty?*, THE ATTORNEY OF NASSAU COUNTY, August, 1995 at 4 and 6.

"Testifying" is practiced and learned during police training. This problem of police perjury and lying is so prevalent that Professor Alan Dershowitz, when testifying before the House of Representatives Judiciary Committee (the "Impeachment Committee"), in December, 1998, suggested to the Committee that they condone perjury by the police. By raising this point, a Congressman during Professor Dershowitz's testimony accused him of not being a "real American." Professor Dershowitz is a defense lawyer. He has recently published a book entitled "Sexual McCarthyism" concerning the investigation of the President of the United States by Special Prosecutor Kenneth Starr and the House Judiciary Committee hearings on impeachment. *See* News: Police/Court Digest, NEWSDAY, July 8, 1987 at 39. Former Chief of the Nassau District Attorney's Civil/Forfeiture Bureau, Eric Bettelheim was arrested at a service station in Bellmore, Nassau County. Bettelheim, along with another young man, were spotted by neighbors engaged in an act of oral sex. Bettelheim resigned from the District Attorney's Office to go into private law practice. His criminal case was resolved by a disposition of an Adjournment in Contemplation of Dismissal (A.C.O.D.). No disciplinary action was taken or reported.

professional life to representing workers' rights.[4] Darrow's career had its ups and downs. As a passionate advocate and fierce litigator, Darrow was recruited by Samuel Gompers and other high profile labor leaders to represent two brothers charged with bombing the Los Angeles Times building and killing twenty men.[5] The case, known as the "McNamara Trial," pitted Darrow and his defense team against powerful Los Angeles prosecutors.[6] The McNamara brothers pleaded guilty in exchange for reduced sentences.[7]

Two days before the final plea agreement was reached, word got out that a member of the defense team allegedly bribed a juror who sat in on the trial. The Los Angeles prosecutor contended that it was Darrow himself who initiated the bribery scheme.[8] The Prosecutor's Office alleged that if Darrow could show he was participating in the plea negotiations then he had no motive for bribing the jury, should the story ever come to light.[9] Shortly after the first arrests had been made in connection with this alleged bribery scheme, information about the earlier, alleged bribery of a different juror came to the prosecution's attention.[10] Within two months Darrow was indicted for his alleged involvement with both bribery schemes.[11] Darrow was ultimately acquitted of the bribery charges.[12]

This is an early example of how the government will stop at nothing to oppress individuals whose voices and actions are feared.[13] Those voices and actions project constitutionally

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[4] 19 J. LEGAL PROF. 235 (1995).
[5] *Id.*
[6] *Id.* at 240.
[7] *Id.*
[8] *Id.* at 240-41.
[9] 19 J. LEGAL PROF. 235 (1995).
[10] *Id*
[11] *Id.*
[12] *Id.*
[13] *See Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), where the Supreme Court denied Raphael Konigsberg certification to practice law claiming that he did not satisfactorily prove to them that he was of good moral character and that he did not advocate the overthrow of the Government of the United States or California by unconstitutional means. The Court reversed the holding that Konigsberg's membership in the Communist Party in 1941 was not a sufficient basis to deny him admission. Opponents to Konigsberg argued that

protected messages that may contradict governmental policy.[14] The Los Angeles County Prosecutor's Office had no direct evidence of the alleged bribery scheme in which they claimed Darrow was involved.[15] The prosecutors acted on a hunch, a gut feeling.

Today, we see the same kind of misconduct from prosecutors' offices, both federal and state.[16] On May 17, 1996, F. Lee Bailey ended a standoff with federal prosecutors when he relinquished approximately $18 million in stock, owned by a former client who had pleaded guilty to federal drug trafficking charges.[17] Bailey sat in a federal jail for over one month after he failed to surrender the stock and pay the Government $700,000, the amount he apparently received after selling shares of stock and borrowing money against the remainder.[18] Federal prosecutors said they thought Bailey was holding the stock in trust for the government, while Bailey asserted it was his fee for representing

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his rhetoric, beliefs and disloyalty made him unfit to practice law. Yet, Konigsberg's language is not unlike what most defense lawyers must say and do every day of their lives. Konigsberg had written:

> Loyalty to America, in my opinion, has always meant adherence to the basic principles of our Constitution and Declaration of Independence – not loyalty to any man or group of men. Loyalty to America means belief in and militant support of her noble ideals and faith of her people. Loyalty to America today, therefore, must mean opposition to those who are betraying our country's traditions, who are squandering her manpower, her honor and her riches.

Id. at 272.

Today, the New York Judiciary Law § 466 (2000) and Article XIII § 1 of the New York State Constitution requires all attorneys to take the following Constitutional Oath upon admission: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of attorney, according to the best of my ability...." N.Y. CONST. amend XIII, § 1 (2000).

[14] *See* U.S. CONST. amend. I.

[15] *See supra*, note 2.

[16] *See infra* note 37; *see also* Thomas F. Liotti, Lecture at Hofstra University School of Law, to Professor Roy D. Simons' class on Professional Responsibility March 21, 1997 (on file with the author).

[17] *See* Joseph Wharton, *F. Lee Bailey Wins Freedom With Deal*, 2 ABA JOURNAL, July, 1996.

[18] *Id.*

his client. P. Michael Patterson, U.S. Attorney for the Northern District of Florida stated: "Mr. Bailey's alleged claim to the stock was without merit."[19]

Mr. Bailey's incarceration was a result of his alleged refusal to account for legal fees. Bailey's legal troubles stemmed from an unusual plea bargain in which stock owned by an accused drug smuggler client, Claude Louis Duboc, was transferred to Bailey's Swiss Bank account.[20] There is no doubt that prosecutors were angry with the deal struck by Bailey and wanted to seize the money of his client. They determined that the best way to do this was to go after Bailey himself.[21]

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[19] *Id.*

[20] *Id.*

[21] One of the more astonishing cases of attacks on the defense bar occurred in *People v. Lynne Stewart*, 230 A.D.2d 116, 656 N.Y.S.2d 210 (1st Dep't 1997), where the Appellate Division, First Department reversed a decision of the trial court and reinstated an indictment against a prominent defense attorney. The attorney, Lynne Stewart, refused to reveal the source of fee information in a criminal case and was thereafter charged with criminal contempt in the first degree (N.Y. PENAL LAW § 215.51 (2000)). According to the prosecution, Ms. Stewart represented the head of a drug ring who had provided a fee to her to represent one of six persons charged in a drug conspiracy case. The trial judge, on the drug conspiracy case, Leslie Crocker Snyder, had assigned a "shadow counsel" to simultaneously represent Ms. Stewart's client, without Ms. Stewart's knowledge or consent. In a stinging rebuke, the former Presiding Judge of the Appellate Division issued an extraordinary dissent:

> Finally, while I agree with the majority that lawyers are not entitled to special treatment and, accordingly, that a felony prosecution is not avoidable simply because conviction entails the loss of one's license to practice law, it would seem to me equally and corellatively [sic] clear that lawyers – and particularly defense lawyers representing a particularly despised clientele -- ought not to be singled out by reason of their vocation for disparate prosecutorial treatment. I doubt that there is another case – and certainly research reveals none -- in which an attorney's basic right to litigate on her own behalf and that of her client has been so grievously and systematically subverted Ms. Stewart has been treated in an uncommonly deplorable way by her prosecutorial adversaries, and it is for that reason and not upon some claim to preferential treatment by reason of professional status, that Ms. Stewart is entitled to dismissal in the furtherance of justice. Parity of treatment is a fine concept. It would be well if the majority applied it, not to some hypothetical selected out

A blatant abuse of government power occurred in this case. There were many alternatives that could have been followed in order to receive an itemized accounting of Bailey's attorney fees without incarcerating him. For example, the Government might have sued him civilly. The Government could have employed the same retrieval methods used to recover money from Swiss Banks on behalf of Holocaust survivors.[22]

Rarely is there a case where a prosecutor is punished for alleged wrongdoing.[23] However, former Attorney General John Mitchell was suspected of criminal wrongdoing in connection with

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> of thin air to facilitate nice-sounding utterance, but to the case at bar.

230 A.D.2d at 158, 656 N.Y.S.2d at 235-36 (Murphy, P.J., dissenting).

Before leaving the underlying case, Lynne Stewart was able to negotiate a plea bargain of 15 years to life which her client rejected upon the advice of "Shadow Counsel," who also advised the client to cooperate. The defendant then received a sentence of 115 years and committed suicide in an upstate penitentiary. People v. Stewart, 91 N.Y.2d 900, 691 N.E.2d 1024, 668 N.Y.S.2d 1000 (1998).

[22] *See* James Bone, *Swiss Pay $1.25b To End Feud With Holocaust Jews*, TIMES (London), Friday, August 14, 1998.

[23] Prosecutors, in fact, seem to go to extraordinary lengths to protect one another. For example, in *People v. Michael*, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979), the New York Court of Appeals admonished a sitting judge for just the second time in its long history. The Judge was Supreme Court Justice Arnold Fraiman, a former prosecutor. He was admonished by the High Court for declaring a mistrial in a criminal case over the objection of the prosecutor. Justice Fraiman stated that he and several jurors had vacation plans requiring the mistrial after a defense counsel absented himself from the trial due to the death of his father. The charges against Michael were then dismissed by the High Court on double jeopardy grounds. Michael had been charged with rape, assault, robbery and other serious charges. He had been convicted in the second trial and sentenced to over 20 years in prison, serving seven at the time of the reversal. The Association of the Bar protected its own by appointing a special committee headed by Whitney North Seymour, a former federal prosecutor to review Justice Fraiman's conduct. Justice Fraiman received a clean bill of health. Robert Morgenthau, the New York County prosecutor and a former federal prosecutor, wrote to the federal prosecutor at the time, Robert Fiske, urging Michael's prosecution. He was prosecuted and acquitted in Federal Court. Department of Immigration prosecutors subsequently went after Michael. He was voluntarily deported back to his native country of Haiti. This author represented him in his federal and immigration cases. *See also* Connie Bruck, *Fraiman Defendant Pursued by State and Federal Prosecutors*, and *Review of Judge Fraiman Still in Committee*, AM. LAW. MAG., Mar. 1980, 1, 12-13.

the Watergate scandal.[24] After criminal proceedings were initiated against Mitchell and other high-ranking officials, guilty pleas were entered.[25] Mitchell was also convicted of perjury before a Senate Select Committee and a grand jury.[26]

In addition to the Watergate scandal, it has been alleged that Mitchell received $230,000 in bogus consulting fees from Deborah Gore Dean, a top aide to Samuel Pierce, former Secretary of Health, Education and Welfare.[27] Due to Mitchell's death in 1988, he avoided prosecution on that charge.[28]

On the other hand, former Attorney General Edwin Meese, an aide to President Reagan with alleged ties to the Iran-Contra affair, was never prosecuted.[29] Attorney General Janet Reno was not prosecuted for ordering the FBI to use deadly force to end a fifty-one day stand-off in Waco, Texas.[30] Reno had been in office for approximately two months. Seventy-six men, women and children, members of an obscure, fifty year old religious group called The Branch Davidians, were gassed, suffocated, shot and burned to death.[31]

In the late summer of 1971, the nation's focus was on the small New York town of Attica where the bloodiest prison uprising in the country's history had just occurred.[32] Prisoners, confined to unbearable living conditions, revolted and took over the prison in

[24] *See* Senator Carl Levin & Elise, J. Bean, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1997).

[25] *Id.*

[26] *See* Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L. & COMP. L. 307, 363 (1996).

[27] *See* Robert Hornstein, *Mean Things Happening In This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U. L. REV. 257, 259 (1996).

[28] *Id.*

[29] *See* Simon Lazarus & Jane E. Larson, *The Constitutionality of the Independent Counsel Statute*, 25 AM. CRIM. L. REV. 187 (1987).

[30] *See* Henry Cabot Beck, *A Cold Clear Look at Waco Raid*, THE STAR LEDGER, Friday, June 13, 1997; and Yolanda Rodriguez, *Lawyer: Jury Saw Through 'Coverup', Government Faulted for Role in [Waco] Tragedy*, NEWSDAY (national desk), February 27, 1994 at 19.

[31] *Id.*

[32] *See* Josh Getlin, *Attica After 20 Years, the Bloody Prison Uprising Is Being Replayed at the Trial of Inmates' Class-Action Suite*, L.A. TIMES, January 8, 1992.

what turned into a four-day standoff with police.[33] The standoff ended in unconscionable violence when police stormed the prison killing thirty-nine people.[34] Initially, it was believed that inmates killed the victims.[35] However, after New York began prosecuting scores of Attica inmates, former Governor Hugh Carey pardoned all those involved in the revolt amid findings that prosecutors ignored evidence of police and law enforcement misconduct.[36] The prosecutors were not disciplined.

In the above mentioned instances, there were no investigations made by any grievance committees. These federal prosecutors and top legal aides were never subject to disciplinary actions.[37] Ironically, the worst calamity of the Clinton Presidency was probably Waco, not Monica Lewinsky.[38] Yet, Waco never became a campaign issue, most likely because Congress would have had to take on the F.B.I. and Ms. Reno, a prosecutor, in order to do so.

II. PROSECUTORIAL ADVANTAGES

It is a given that prosecutors have far more at their disposal in the way of financial resources than do defense lawyers.[39] Defense lawyers generally expect to be outgunned in that respect.[40] But, when it comes to ethics and the Code of Professional Responsibility, most attorneys taking their oaths start their careers

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Reno left office on January 28, 2001 when George W. Bush was sworn in as President, and Edwin Meese is back practicing law in California.
[38] *See supra* note 30.
[39] *See generally* County Law § 18-b and 722-c.; *see also* Stephen B. Bright, *Counsel For the Poor: The Death Sentence Not For The Worst Crime But For The Worst Lawyer*, 103 YALE L.J. 1835, 1841 (1994).
[40] Thomas F. Liotti, *A Commentary, Advocating The Assigned Case*, The Defender, January/February, 1983 at 17 and 18; Thomas F. Liotti, *Despite Inferior Resources, Keep Standards High While Serving The Poor*, The NAT'L L.J. July 21, 1986 at 28; Thomas F. Liotti, *Thoroughness Is Key When Representing The Poor*, The Nassau Lawyer, October, 1986 at 11 and 13 and Carolyn Colwell, *Indigent - Lawyer System Facing A Trial Of Sorts*, and Carolyn Colwell, *He's The King Of The Caseload*, NEWSDAY, February, 1987.

believing that all lawyers are treated equal before the Bar.[41] Sadly, this is not the case. Most experienced attorneys come to appreciate the disparities between the prosecution and the defense functions.[42] Typically, they realize these disparities in financial resources.[43]

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[41] *See* Speech by Thomas F. Liotti to Italian-American law students on March 15 1997 for the Confederation of Columbian Lawyer Associations at the Italian Consulate of New York. Topic: *Your Oath As An Attorney: What Does It Mean?*; and a lecture by Thomas F. Liotti, Hofstra University School of Law, March 21, 1997 to Professor Roy D. Simon's class on Professional Responsibility. Topic: *Prosecutorial Misconduct. See also* Thomas F. Liotti *Why Should You Have Clients If You Do Not Deserve Them? Or, Getting Clients The Old Fashioned Way*, The Attorney of Nassau County, June, 1995 at 8 and 14.

[42] *See* Thomas F. Liotti, *A War On Drugs: At What Cost To Our Liberty?*, Perspective, N.Y. L.J. February 28, 1990 at 2; and, Thomas F. Liotti, *The Rape Of Our Profession: A Prophylactic Defense Is Too Sublime*, THE MOUTHPIECE, June/July, 1992 at 5 (a publication of the New York State Association of Criminal Defense Lawyers). This article is taken from a reprinting of remarks given in an address by Mr. Liotti to the Criminal Law and Procedure Committee of the Bar Association of Nassau County, Inc. at or about the time of said publication. *See also* Barry Tarlow, *Hitting Rogue Prosecutors Where it Hurts*, 23 THE CHAMPION 40, March, 1999. "When a rogue prosecutor commits misconduct during trial that does not prejudice the defendant so as to require reversal, there are essentially no meaningful consequences."

[43] In *People v. Williams*, 210 A.D.2d 361, 620 N.Y.S.2d 85 (2d Dep't 1994), the defendant appealed his 1978 kidnapping conviction claiming that the prosecutor chose the jury on racial grounds. (This became and is at this writing, the largest kidnapping case in United States history, since a $750,000 ransom was paid and never recovered.) The prosecutor, Edward McCarty, could not remember or explain the rationale for his challenges. Mr. Williams served nearly 19 years in prison at the time of his reversal. He then, through counsel, negotiated a Serrano/Alford plea, received credit for time served in prison and was released. For this grave miscarriage of justice, the prosecutor became a Justice of the Supreme Court. This writer represented Mr. Williams. *See* Robin Topping, *Around The Island/Crime and Courts, Jailhouse Attorney Can't Appeal Mortality Health May Dictate a Plea in Kidnapping*, NEWSDAY, July 9, 1996 at A22; Pete Bowles, *Man Convicted in '74 Kings Pt. Kidnap Wins Bail Reduction*, NEWSDAY, October 18, 1996 at A38; Tom Demoretcky, *Plea in '74 Kidnap to Free Defendant*, NEWSDAY, May 22, 1997 at A28; Crowley, Kieran, *Kidnapper Walks After He Pleads No contest*, N.Y. POST, June 25, 1997 at 22; and John T. McQuiston, *Decades After Kidnapping, Victim Vents His Anger in a Courtroom*, N.Y. TIMES, (Metro Section), June 25, 1997 at B1, column 2.

In the Matter of Cooperman, 82 N.Y.2d 745, 622 N.E.2d 299, 602 N.Y.S.2d 798 (1994), a well-known defense lawyer received an unprecedented suspension from the practice of law because he utilized non-refundable fee retainer

However, in recent years a new trend has emerged where prosecutors are now taking affirmative steps to remove their conduct from the scrutiny of the Canons of Ethics and state disciplinary proceedings, while at the same time using these and other avenues to attack defense lawyers.[44]

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agreements. This author testified as an expert on legal fees for *Cooperman* and obtained the support of the New York State Bar Association as *amicus curiae* for *Cooperman*. *See also* Adams, Edward A., *Fallout From Fee Decision: Some Arrangements Doomed, "If...defendants,"* N.Y. L.J., March 21, 1994 at 1; and Gary Spencer, *Judges Weigh Non-Refundable Fee Retainers; Client's Rights Balanced Against Effect On Lawyers,"* N.Y. L.J., February 9, 1994 at 1.

[44] Joseph F. Soviero was a well-known federal prosecutor, former counsel to, and law partner of, the former Speaker of the New York State Assembly. Mr. Soviero was President of many legal organizations. He was also a renowned and controversial defense lawyer. In the early 1990's, he and other lawyers statewide were charged with failing to file state tax returns. Mr. Soviero pled guilty to one misdemeanor charge in satisfaction of the charges against him. He paid fines and penalties. The Grievance Committee and its lawyers followed the criminal proceedings. When the criminal proceedings concluded, the Committee charged Mr. Soviero with disciplinary charges arising out of the incident. He was censured. Shortly thereafter, Mr. Soviero came to represent a defendant in a criminal case, while simultaneously representing the defendant and his wife in a real estate transaction. Mr. Soviero did not have a written retainer on the criminal matter and had received only a portion of his fee from the defendant. Later, while the criminal case was pending, the buyers and Mr. Soviero's client had a dispute with respect to the real estate transaction. Mr. Soviero claimed that the buyers defaulted and breached the contract, enabling his clients to retain the down-payment proceeds. When the buyers failed to attend a closing or to obtain a stay regarding the release of the down-payment monies, Mr. Soviero released from escrow $13,500.00 in down-payment monies to his clients and $5,000.00 to himself, with his client's approval and written release. The later $5,000.00 represented the balance of legal fees owed Mr. Soviero for the criminal matter. Thereafter, the Grievance Committee proceeded against Mr. Soviero alleging a conversion of the clients' monies. It is noteworthy that his clients did not lodge a complaint against Soviero with the Committee. The same prosecutor who had pursued Mr. Soviero in the first case, came after him in the second. Was this a case where the prosecutor was unhappy with the result he achieved in the first case and vindictively pursued him in the second? Mr. Soviero retired from the practice of law in 1995. The Committee and the Appellate Division, Second Department would not accept his resignation from the Roll of Attorneys. He was disbarred three years later. This author represented Mr. Soviero. *See In the Matter of Soviero*, 211 A.D.2d 62, 627 N.Y.S.2d 933 (2d Dep't 1995). *See also In the Matter of Soviero*, 246 A.D.2d 240, 676 N.Y.S.2d 667 (2d. Dep't 1998).

No matter how wanton the misconduct, prosecutors always seem to be insulated from disciplinary sanctions, whereas defense lawyers appear to be held to a higher standard. While few prosecutors are disciplined, until recent years, prosecutors have been content with this malaise on the part of grievance committees. Yet, most practicing attorneys believed that there was a backstop in place, namely the Code of Professional Responsibility and its Canons, Disciplinary Rules and Ethical Considerations. This, they believed, would stop prosecutors from going too far. And while grievance committees have traditionally closed their eyes to prosecutorial misconduct,[45] defense lawyers believed that they might just be napping rather than taking a long sleep.

This article suggests that prosecutors are no longer content to rely upon the ambivalence of grievance committees. This article will demonstrate that in the past fifteen years prosecutors have turned our Federal and State Constitutions on their heads, and have become so aggressive in their attacks on criminal defendants and criminal defense lawyers that they now believe their own actions can no longer withstand the scrutiny of grievance committees.

III. AMERICAN BAR ASSOCIATION STANDARDS

The Criminal Justice Section of the American Bar Association has given us a model set of standards for both the prosecution and defense function. They have been written and published due to the limitations and lack of specificity in state ethical codes. The standards provide that prosecutors will utilize their discretion in determining which cases to prosecute and that their first obligation is to insure that justice is done.[46] The

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[45] *See generally* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (West Group, 2d ed. 1999); David E. Rovella, *Putting Defendants on the Defensive: The Criminal Defense Bar Says the DOJ is Treating Some Lawyers in Drug Cases Like Criminals*, NAT'L L.J., Apr. 2, 2001, 1, A15; MICHAEL ZINN, MAD DOG PROSECUTORS AND OTHER HAZARDS OF AMERICAN BUSINESS (1999).

[46] *See People v. Miller*, 149 A.D.2d 439, 539 N.Y.S.2d 782 (2d Dep't 1989). *See also People v. Pugh*, 107 A.D.2d 521, 487 N.Y.S.2d 415 (4th Dep't 1985); *People v. Brown*, 66 A.D.2d 158, 412 N.Y.S.2d 522 (4th Dep't 1979); *People v. Castelo*, 24 A.D.2d 827, 264 N.Y.S.2d 136 (4th Dep't 1965); *People v. Gelfand*, 131 Misc. 2d 268, 499 N.Y.S.2d 573 (N.Y. Sup. Ct. Crim. T. Kings County 1986); *People v. Heller*, 120 Misc. 2d 85, 465 N.Y.S.2d 671 (Sup. Ct. Crim. T.

standards, if adhered to, can be the foundation upon which both the prosecution and defense may rely.

The ABA's Standards for Criminal Justice defines the functions of the prosecutor and defense counsel as follows:

> **Standard 3-1.2 The Function of the Prosecutor**:
>
> (a) The office of the prosecutor is charged with the responsibility for prosecutions in its jurisdiction.
>
> (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her function.
>
> (c) The duty of the prosecutor is to seek justice, not merely to convict.
>
> (d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.
>
> (e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's

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Kings County 1983); and *People v. Bolla*, 112 Misc. 2d 703, 447 N.Y.S.2d 398 (Sup. Ct. Erie County 1982) and *People v. Fox*, 157 Misc. 2d 238, 596 N.Y.S.2d 984 (J. Ct. of Westbury Nassau County 1993); *See also* McKinney's Consolidated Laws of New York Annotated, Book 62A, Supplemental Practice Commentaries by Carrieri, Joseph R., where a prosecutor was collaterally estopped from denying his earlier dismissal of similar offenses on other cases for the same reasons, to wit: the obliteration of posted speeding signs by foliage. *See also* Al Kohn, *Collateral Estoppel Defeats Prosecution For Speeding*, N.Y. L.J., March 9, 1993 at 2.

When a prosecutor has committed misconduct, the Appellate Division may, but usually does not, condemn the prosecutor publicly, direct commencement of disciplinary proceedings and preclude the prosecutor from making court appearances for a specified period of time. *See People v. Roopchaud*, 107 A.D.2d 35, 485 N.Y.S.2d 332 (2d Dep't 1985). When a prosecutor in a homicide investigation issues a subpoena returnable to him to out-of-state banks, a sanction was imposed, albeit not a disciplinary one. *See* People v. Warmus, 148 Misc. 2d 374, 561 N.Y.S.2d 111 (N.Y. County Ct. 1990).

jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in Standard 4-1.5.[47]

Standard 4-1.2 The Function of Defense Counsel:

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense

[47] *See* AMERICAN BAR ASS'N CRIMINAL JUSTICE STANDARDS COMMITTEE, PROSECUTION FUNCTION AND DEF. FUNCTION (3d ed. 1993).

> counsel is the professional representative of the accused, not the accused's alter ego.
> (f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.
> (g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
> (h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.[48]

Clearly, defense attorneys are held to a higher standard. For example, in 3-1.2(e) the drafters list a set of standards describing how prosecutors should conduct themselves.[49] That list includes "professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction."[50] Defense counsel, as stated in Standard 4-1.2(e), is subject to "standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct."[51] If the drafters of these provisions intended both prosecutors and defense attorneys to be treated equally, they simply would have used the same language in subdivision (e) of each standard. Their failure to do so is conclusive evidence of the higher standard that is imposed on defense attorneys.

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[48] *See* AMERICAN BAR ASS'N CRIMINAL JUSTICE STANDARDS COMMITTEE, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEF. SERVICES (3d ed. 1992) (providing guidelines for the assignment of attorneys for persons unable to afford counsel).

[49] *See* AMERICAN BAR ASS'N CRIMINAL JUSTICE STANDARDS COMMITTEE, PROSECUTION FUNCTION AND DEF. FUNCTION (3d ed. 1993).

[50] *Id.*

[51] *Id.*

Often prosecutors are able to pick and choose which case they will pursue. Promotions, raises, and praise are often based on the number of convictions one attains.[52] Often, prosecutors who are assigned a "winless" case will be more willing to strike a deal in an attempt to avoid tarnishing their conviction rate. This practice is unethical and does not comport with the administration of justice. The Standards are not enforced against prosecutors and therefore are frequently ignored.

IV. THE FEDERAL COURTS

Until 1997, the federal courts, for the most part, allowed state grievance committees to do their work for them, as lawyers are admitted state by state. Their federal court admission is derivative, following state oaths and the signing of the roll of attorneys there. In 1997, the General Rules of the United States District Courts for the Eastern and Southern Districts of New York were amended to establish a Special Panel of Attorneys, who are members of the Bar of those federal courts.[53] The purpose of this Panel is to advise and assist the Committee on Grievances of the Boards of Judges in connection with the discipline of attorneys pursuant to Rule 1.5(a).

The Panel ordinarily springs into action following a determination on disciplinary conduct in the state court or on a referral or recommendation from a Judge of the Court. In the year and one-half since its establishment, the work of this Panel has been benign.[54]

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[52] When Rudolph Guiliani was a prosecutor at the Department of Justice and later United States Attorney for the Southern District of New York, he was frequently criticized for being overzealous in pursuit of prosecutions and headlines. There is no doubt that he successfully parlayed his publicity and high profile prosecutions into a career in politics which, at this writing, includes being elected to two terms as Mayor of the City of New York. Yet, he was never prosecuted or disciplined for grand jury leaks, misconduct or violations of the Canons of Ethics. *See* D.D. Guttenplan, & Jennifer Preston, *Rudy Guiliani's Roots Show Him As A Man Apart: He's Banking On Ambition, Drive To Bring Him Success*, NEWSDAY, October 22, 1989 at 6.

[53] Thomas F. Liotti & H. Raymond Fasano, *Federal Courts Focus on Attorney Discipline*, The Attorney of Nassau County, April, 1997 at 11.

[54] The Department of Justice has its own Internal Affairs Section for investigations of alleged breaches of the Canons of Ethics or other misconduct

V. THE STATE CODE OF PROFESSIONAL RESPONSIBILITY

The New York State Code of Professional Responsibility illuminates the roles to be played by prosecutors. DR7-103 provides:

> A. A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.[55]
>
> B. A public prosecutor . . . in criminal litigation shall make timely disclosure to counsel for the

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on the part of prosecutors. *See* Barry Tarlow, RICO Report, *Invasion Of The Defense Camp*, 21 Champion 50, 50-52 (1997). This article by a prominent Los Angeles lawyer reviews a problem of prosecutorial misconduct in the Southern District of New York where a paralegal posing as a lawyer and acting as a spy for a Columbian drug cartel attended joint defense meetings unbeknownst to Mr. Liotti and his client, thereby endangering their lives. She was prosecuted in a neighboring District (E.D.N.Y.) where she had engaged in similar conduct. The Department of Justice found no evidence of an ethical breach by their prosecutors. Efforts to attain any statistics regarding the number of prosecutors actually charged, pursuant to the International Affairs Section, were unsuccessful.

[55] It has been determined that a prosecutor's discretion is not unlimited. *See People v. Nelson*, 103 Misc. 2d 847, 427 N.Y.S.2d 194 (Syracuse City Ct. 1980). There are many instances where prosecutors and government agencies are notorious for issuing "mail covers" or agency subpoenas for the production of business records. Agency or administrative subpoenas as they are sometimes called, do not require judicial oversight. They may be issued *ex parte* by prosecutors and federal agents. After the issuance of a subpoena for this writer's phone records in order to obtain information about a fugitive and possibly use that information to charge or prosecute this defense lawyer with obstructing justice, a change in Department of Justice policy occurred. After vigorous complaints to the Department of Justice, supervisory approval within the United States Attorney's Office must be obtained before an agency or an Assistant United States Attorney may issue an administrative subpoena. *See* Martin Fox, *Defense Bar Alarmed Over Use of Agency Subpoenas*, N.Y. L.J., May 11, 1992 at 1, col. 4; Martin Fox, *Phone Info Subpoenas Draws Fire*, THE NAT'L L.J., May 25, 1992 at 14; Joan L. Cobb, *Underhanded DEA Subpoena Seeks Lawyer's Phone Records*, BNA Criminal Practice Manual, Trial Practice Series, June 24, 1992, Vol. 8, No. 13 and *Foresight Can Ease Task of Handling Fugitive Case*, BNA Criminal Practice Manual, March, 1994 at 135.

> defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

The disparities between the defense and prosecution functions are rampant. In the genre of professional responsibility, prosecutors may argue that defense lawyers are more prone to ethical conflict since they often, by virtue of their contact with clients accused of criminal activity, are placed into situations of conflict, ethical dilemmas and even illegality. Some defense lawyers may even have difficulty in separating their roles from that of the accused. The defense lawyer must be constantly on guard against actions suggested by clients that may cause the lawyer to traverse the ethical thin line that usually separates him from his clients. Sometimes that line can become blurred or even fade entirely. When it does, the defense attorney may be exposed to ethical conflict or, more poignantly, illegality and possible prosecution.[56]

Prosecutors, as will be seen in this article, may be exposed to their share of ethical dilemmas. In their quest to prosecute they may be over-zealous, selective or even vindictive.[57] Yet, when these actions occur, unlike defense lawyers, prosecutors are rarely prosecuted or grieved against through Bar Committees.[58] This

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[56] *See* Thomas F. Liotti, *The Act of Avoiding Prosecutions*, The Attorney of Nassau County, August, 1994 at 6.

[57] The right to a jury trial in the 6th Amendment was incorporated within the concept of due process and hence applicable to the states in serious criminal cases because a jury was deemed to give the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complainant, biased or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). *See also Young v. U.S.*, 481 U.S. 787, 807 (1987). Prosecutors may, on occasion, be overzealous and become overly committed to obtaining a conviction. *U.S. v. Goodwin*, 457 U.S. 368 (1982).

[58] *See Imber v. Pachtman*, 424 U.S. 409, 420 (1976) (holding that prosecutors are absolutely immune from liability in suits challenging their decision to initiate criminal prosecutions as well as suits challenging their decisions concerning the conduct of trial and the presentation of evidence); *Barrett v. U.S.*, 798 F.2d 565 (2d Cir. 1986) (holding a lower court ruling that an Assistant Attorney General defending New York State in a medical malpractice action

writer could not find a single reported case where a prosecutor was disciplined for any of these actions or misconduct. Similarly, there are few reported cases where prosecutors have been chastised for their actions and none where a judge has referred the actions of a prosecutor to a Grievance Committee for further consideration. A defense attorney must object to prosecutorial misconduct at the time it occurs, or any subsequent claim of error predicated on that misconduct may be waived.[59]

This may be explained in several respects. First, Grievance Committee lawyers are prosecutors and former judges[60] and their inaction may be explained under the "birds of a feather" theory.[61] Second, many judges are former prosecutors while few judges are former defense lawyers. Similarly, the Judicial Conduct Commission is comprised of prosecutors. While the Judicial Conduct Commission takes disciplinary action against state judges, such as removal from office, it does not, as a practice, make

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was absolutely immune from liability in a suit charging that he had participated with federal officials in a conspiracy to "cover up" the federal government's involvement in illegal drug testing).

[59] *See U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 265 (1939); *U.S. v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991); and *People v. Lambert*, 52 Cal. App. 3d 905, 908 (Ct. App. 1975).

[60] *See Massameno v. Statewide Grievance Committee*, 663 A.2d 317 (Conn. 1995), where plaintiffs (prosecutors) did not acknowledge the power the judiciary shares with the executive branch to investigate, discipline or recommend the suspension or removal of prosecutors. They argued that such power lies exclusively within the executive branch of government and, furthermore, that any attempt by the judicial branch to regulate the ethical conduct of prosecutors is an unconstitutional interference with the essential functions of another branch of government. *See also* Bruce A. Green, *Policing Federal Prosecutors: Do too Many Regulators Produce Too Little Enforcement?* 8 ST. THOMAS L. REV. 69 (Fall 1995):

When federal prosecutors appear to have violated professional standards such as those incorporated by reference in local rules of the court, district courts may rely equally on state or federal disciplinary bodies. This is not to say that district courts simply ignore prosecutorial misconduct. In some instances, courts themselves refer errant prosecutors to the relevant disciplinary authorities. In the view of some commentators, however, courts do so too infrequently.

Id. at 83.

[61] *See* Burton Stevenson, THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES (Macmillan 1965) (1948) (citing the exact quote as: "Beast knows beast; birds of a feather flock together." from Aristotle, *Rhetoric*, BK i, Ch. 11, Sec. 25, quoted as Proverbs).

referrals to Grievance Committees for disciplinary proceedings against judges or former judges. Generally, the Judicial Conduct Commission relies upon Grievance Committees to follow their proceedings or relies upon complaining witnesses to contact Grievance Committees after the Judicial Conduct Commission has completed its work.[62]

VI. THE THORNBURGH MEMORANDUM

A Memorandum, dated June 8, 1989, written by former Attorney General Dick Thornburgh had a major impact on the legal community. The purpose of the Memo was to advise all Justice Department litigators that federal prosecutors were exempt from adhering to Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct in the course of a criminal investigation.[63] The Memo stated that contact with a

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[62] Some prosecutors just "push the envelope" so far that their conduct cannot be overlooked. Recently, one former prosecutor turned Judge saw himself as invincible and so powerful that he could threaten this defense lawyer and his family; commit perjury before the Judicial Conduct Commission and encourage others to do likewise. He managed to secure character testimony from lawyers, judges and prosecutors. At the same time, state and federal prosecutors declined to prosecute him for his attacks on a defense lawyer. However, the Judicial Conduct Commission sought and secured his removal from the bench while a Grievance Committee sought his suspension and disbarment. At this writing he has been removed from the bench as a County Court Judge and disbarred. Jan Hoffman, *The Judge and the Lawyer: Some Not-So-Judicious Letters*, N.Y. TIMES, February 22, 1996; *See also* In Re Mogil, 682 N.Y.S.2d 70 (1998).

[63] Disciplinary Rule 7-104(A)(1) states:

> During the course of his representation of a client a lawyer shall not: communicate or cause another to communicate on the subject of the representation by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1997).
Rule 4.2 of the MODEL RULES OF PROFESSIONAL CONDUCT, adopted by the House of Delegates of the ABA in August, 1983, and amended in February, 1983, provides, with respect to *ex parte* contacts, "[i]n representing a client a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The rule was derived from Canon 9 of the American Bar Association Canons of

represented individual in the course of authorized law enforcement activity does not violate DR7-104.[64] The Memo further stated that under the Supremacy Clause of the United States Constitution, state regulation placing a substantial burden on the federal government was invalid, and that DR7-104 as adopted by the states represented such a burden.[65]

The "Thornburgh Memorandum" represents an attempt by the former Attorney General to make law via an unauthorized fiat. Prosecutors who rely upon the Memorandum do so at their peril, since it is not law.[66]

The American Bar Association and many other organizations have rallied against the Memorandum.[67] The courts have nearly unanimously expressed their dissatisfaction with the Memorandum.[68]

Professional Ethics, which was superseded by the American Bar Association Model Code of Professional Responsibility in 1970.

[64] *See* Memorandum from Richard Thornburgh, to All Justice Department Litigators (June 8, 1989) (reprinted as Exhibit E in *Matter of Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992)).

[65] *Id.*

[66] When the Bar Association of Nassau County, Inc. honored Attorney General Thornburgh, this author and others, including the New York State Association of Criminal Defense Lawyers at this writer's urging, protested his invitation primarily due to the Thornburgh Memo. *See* Eric Nagourney, *Objections to Thornburgh Award, County Bar to Fete Attorney General*, NEWSDAY, April 16, 1991; *see also*, Todd S. Schulman, Note: *Wisdom Without Poser: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1075 n. 43 (1996) (citing a letter from Thomas F. Liotti to President William Jefferson Clinton (August 23, 1993) (on file with the New York University Law Review) that objects to positions expressed in Reno Rule and suggests that defense attorneys will mount an "avalanche of litigation" and will not "submit to allowing Government attorneys into the Defense camp," and a letter from the New York State Association of Criminal Defense Lawyers to the Office of the Associate Attorney General (March 21, 1994) (on file with the New York University Law Review) that asserts that members of the association will report any violation of the no-contact rule by New York licensed federal prosecutors because notwithstanding Reno Rule, Association members are bound to do so).

[67] *See* Standing Comm. on Prof'l Discipline et al., *Recommendation and Report to the House of Delegates*, 115 A.B.A. REPORTS 1447 (1990).

[68] *See U.S. v. Lopez*, 765 F. Supp. 1433, 1447-48, (N.D. Cal. 1991) (rejecting Thornburgh's Supremacy Clause argument and held that communications by prosecutors with represented parties were not "authorized by law" because there

Historically, attorneys are licensed to practice by the states following their passage of a bar examination, including an ethics section.[69] Each state, territory, and the District of Columbia, has its own rules governing the conduct of attorneys. States have their own Character and Fitness processes, which require prospective attorneys to complete a lengthy application, consent to an investigation and submit to interviews, which generally encompass ethical questions, before they may be admitted to practice. There is no bar or ethics examination for admission to the federal courts.

There are times when attorneys would like nothing better than to communicate with adverse parties, thus circumventing opposing counsel. They usually resist the temptation to do so because of DR 7-104. Even when an adverse party, on his or her own, attempts to communicate with opposing counsel, opposing counsel does not accept these overtures and the initiator of the communication is directed to communicate through his or her own counsel. Naturally, this is a source of frustration if it is believed that a matter could be resolved but for the conduct of opposing counsel. However, it may also be recognized that the preservation of the adversary system is paramount to illegal contacts with adverse parties in violation of DR 7-104.

Throughout the long history of the common law, certain of our rules have remained sacrosanct. DR 7-104 never created a problem for the Government in its prosecution of crime.[70]

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were no judicial decisions permitting them, and because the Memorandum did not constitute "law."); *See In re Doe*, 801 F. Supp. 478 (D.N.M. 1992) (expressing horror over the Memorandum's mandate of unethical behavior.) *See also In re Gorence*, 810 F. Supp. 1234, 1238 (D.N.M. 1992) and *U.S. v. Ferrara*, 847 F. Supp 964, 969 (D.D.C. 1993). *See also U.S. v. Hammond*, 858 F. 2d 834, 838 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *U.S. v. Pinto*, 850 F. 2d 927, 934 (2d Cir.1988); and *U.S. v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1224 n.3 (E.D.N.Y. 1981).

[69] *See, e.g., Leis v. Flynt*, 439 U.S. 438, 442 (1929); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) and *Feldman v. Gardner*, 661 F.2d 1295, 1308 (D.C. Ct. App. 1981).

[70] *See U.S. v. Kenny*, 645 F.2d 1323, 1339 (1981) (taping of represented person made in non-custodial, pre-indictment, pre-arrest context does not implicate the ethical problems addressed by DR 7-104(A)(1)); *U.S. v. Partin*, 601 F. 2d 1000. 1005 (1979) (finding that a government attorney in charge of the trials of defendant and his former co-defendants, violated a disciplinary rule when he communicated with a former co-defendant without informing the former co-

Government attorneys are protected against civil liability for their actions by immunity and the protective arms of the Government with its considerable resources.[71] The Department of Justice suggests that the "Thornburgh Memo" will keep the defense honest, ascertain defense strategies, take away witnesses and target new defendants, including lawyers.[72]

While the Government has sought to skirt around or even usurp DR 7-104(A)(1) by allowing prosecutors to contact

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defendant's attorney and any infringement of the former co-defendant's 6th Amendment right to counsel arising from the violation did not provide a basis for reversing defendant's conviction . . . defendant did not have standing to assert the alleged violation of the prosecutor's ethical duty to the former co-defendant as ground for reversal of defendant's conviction); *U.S. v. Hammond*, 858 F. 2d 834, 836-42 (2d Cir. 1988) (holding that the use of informants by government prosecutors in a pre-indictment, non-custodial situation will generally fall within the "authorized by law" exception to DR 7-104(A)(1) and therefore will not be subject to sanctions); *U.S. v. DeVillio*, 983 F.2d 1185 (2d Cir. 1993) (finding no violation of the disciplinary rule where pre-indictment conversations with two suspects, who were represented by counsel, were recorded by a government informant); *U.S. v. Scozzafaua*, 833 F. Supp. 203, (W.D.N.Y. 1993) (holding that an Assistant U.S. Attorney responsible for the investigation, did not violate DR 7-104 when she originated the plan of using the informant to communicate with an individual known to be represented by counsel); *U.S. v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982) (rejecting a rule that would allow criminal suspects to avoid investigation simply by retaining counsel); and *U.S. v. Chestman*, 704 F. Supp. 451, 453-4 (S.D.N.Y. 1989) (holding that a prosecutor who authorized tape recordings of a defendant and a cooperating witness did not violate DR 7-104).

[71] *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995), "[Assistant District Attorney's] failure to turn over Brady material...after the prosecutorial phase of the case had begun and therefore is protected as a discretionary advocacy function" for which an Assistant District Attorney was accorded absolute immunity from liability under 42 U.S.C. § 1983; *Friedman v. Younger*, 282 F. Supp. 710 (C.D. Cal. 1968), (holding district attorney and his deputies are "immune from liability for damages under the [Federal] Civil Rights Act"; *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974), the defense of immunity is based upon the fact that officials are often times required to exercise a degree of discretion in the course of performing their official duties and that immunizing them from civil liability for discretionary actions within the scope of their authority protects the important decision making process essential to effective government; *Dale v. Kelley*, 908 F. Supp. 125, 132 (W.D.N.Y. 1995) (holding that Assistant District Attorney was absolutely immune from liability in civil rights action on malicious prosecution claim).

[72] *See supra* footnote 48.

represented parties directly, courts have condemned similar conduct by defense lawyers.[73]

Recently, however, the Tenth Circuit Court of Appeals handed down a decision sending ripples through the entire legal community.[74] 18 U.S.C. § 201(c)(2) states:

> whoever . . . directly or indirectly gives, offers or promises anything of value to any person for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.[75]

The Tenth Circuit briefly held in *United States v. Singleton*,[76] that leniency in return for testimony was considered something of value, thus 18 U.S.C. § 201(c)(2) applied to federal prosecutors.[77] The court stated that "the state of mind required to

[73] *In Re Simels*, 1993 U.S. Dist. Lexis 17454 (SDNY), a highly regarded defense attorney was censured by the Court for interviewing a represented witness, (citing *U.S. v. Jamel*, 546 F. Supp. 646 at 653-54 (E.D.N.Y. 1982) reversed on other grounds, 707 F.2d 638 (2d Cir. 1983)).

[74] Thomas F. Liotti & Christopher W. Zeh, *Will Decision Affect 'Art Of The Deal?'"*, The Attorney of Nassau County, August, 1998 at 4 and 17. It is commonplace in the Department of Justice and throughout state prosecutor's offices to offer lenient sentences in exchange for the testimony of defendants. These, however, are not the average defendants. These defendants turn against their partners in crime, usually through interrogation by police and prosecutors, and become cooperating witnesses. Often the offer of leniency is made to the defendant without defense counsel present or by contacting the defendant individually. This is a clear violation of the Canons. *See also* Kubecka v. Avelino, 1995 Wl 540055 (1995).

[75] 18 U.S.C. § 201 (c)(2) (1994).

[76] *United States v. Singleton*, 144 F.3d 1343 *vacated*, 144 F.3d 1361(10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (1999).

[77] *Id.* at 1348. In *Singleton*, the defendant was appealing a conviction of one count of conspiracy to distribute cocaine and seven counts of money laundering. *Id.* at 1343. The District Court sentenced her to 46 months imprisonment on each count, to be served concurrently, and to be followed by three years of supervised release. Before trial the defendant moved to suppress testimony obtained from one Douglas, a co-conspirator who had entered into an agreement

violate the statute is knowledge that the thing of value is given for or because of the testimony."[78] The court referred to the practice of offering lenient sentences in exchange for testimony as "buying testimony."[79]

While the original decision in *Singleton* must be praised, prosecutors who violated the statute and broke the law were not disciplined. Their conduct was not subject to review by a Grievance Committee. Prosecutors declined to even comment on the holding before it was vacated and subsequently reversed *en banc*.[80]

This decision would have totally changed the way prosecutors handled some cases. It will be interesting to speculate how many convictions would have been overturned and how many prosecutors would have been disciplined for such illegal practices. At the time of this writing, none were.

Accordingly the conduct of Independent Counsel Kenneth Starr may come under scrutiny in light of *Singleton* and other ethical considerations. Starr, in an attempt to extract information from Monica Lewinsky, used federal agents and prosecutors to confront Ms. Lewinsky and present her with photographs and transcripts of recorded conversations with Linda Tripp.[81] Ms. Lewinsky was confined to a hotel in Washington for several hours and questioned without counsel's knowledge or consent.[82]

The Department of Justice has been characterized as the world's largest law firm and its various Divisions "work together toward the ultimate objective for which they were created -- to promote the interests of the sovereign and of the public . . . .As the nation's litigator, the Department and its attorneys must be held accountable to the same court-adopted ethical rules that govern all attorneys."[83]

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with the government whereby he would testify against the defendant in return for a lenient sentence.

[78] *Id.* at 1345.

[79] *Id.* at 1360.

[80] *See* William Glaberson, *Ruling Puts Leniency, A Top Tool For Prosecutors, Under Scrutiny*, N.Y. TIMES, Tuesday, October 27, 1998 at 1, A20.

[81] *See* Elkan Abramowitz, *Ex Parte Contacts From the Justice Department*, N.Y. L.J., March 3, 1998 at 3, col. 1.

[82] *Id.*

[83] *Id.*

There are also a great many other unfair burdens placed on the defense by all three branches of government acting in tandem with each other. Meanwhile, the powerless, to wit: defense lawyers and defendants, lose more and more ground. They are confronted by the "Draconian" Federal Sentencing Guidelines.[84] A mean and vindictive spirit now permeates our courtrooms.[85] Defense lawyers are viewed as a disease that prevents the free flow of the toboggan to the penitentiary.[86]

The advent of sanctions, including substantial fines being levied against defense lawyers, "gag" orders being imposed against them, and being prosecuted for criminal contempt when it is alleged that they have violated "gag" orders, has produced a chilling effect within our courts.[87] Judges and prosecutors who join forces together to prosecute, discipline, jail and disbar outstanding defense lawyers have blunted strong advocacy for

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[84] *See* Thomas F. Liotti, *Departing From The Federal Sentencing Guidelines*, 4 VERDICT 3 (1998).

[85] *See*, David Luban, *Are Criminal Defenders Different?* 91 MICH. L. REV. 1729 (1993).

[86] *Id.*

[87] *See* Thomas F. Liotti, *Lawyers and the First Amendment - Mutually Exclusive Terms?*, N.Y. L.J., December 30, 1991 at 2. This article is about two lawyers, a defense lawyer (William Kunstler), and a prosecutor (Elizabeth Holtzman), and the treatment they received in attempting to advocate for their respective positions. Mr. Kunstler was found in contempt in the Central Park jogger case because he referred to the Judge as a "disgrace" for not considering his motion for a new trial. *See Kunstler v. Galligan*, 168 A.D.2d 146, 571 N.Y.S.2d 930 (1st Dep't) *aff'd* 79 N.Y.2d 775, 587 N.E.2d 286, 579 N.Y.S.2d 648 (1991) (Holtzman, a former member of the House of Representatives Judiciary Committee who voted for the impeachment of President Nixon was the District Attorney in Kings County when she erroneously claimed in an out of court press conference that a trial judge had compelled a complaining witness in a rape case to crawl on all fours in the well of the courtroom in order to demonstrate how a rape had allegedly occurred. Ms. Holtzman refused to back away from her position even after her own trial assistant told her that she was in error. The incident was referred to the Grievance Committee by the trial judge. The local Committee recused itself and referred the matter out to the Committee on Long Island for prosecution. Ms. Holtzman was censured and lost her bid for reversal of that holding in the New York Court of Appeals and the Supreme Court of the United States. *See In the Matter of Elizabeth Holtzman*, 78 N.Y.2d 184 (1991); *Elizabeth Holtzman v. Grievance Committee for the Tenth Judicial District*, 502 U.S. 1009 (1991).

defendants.[88] Judges, all too pro-prosecution, not only allow it to happen, but encourage it by holding recusal hearings and permitting the government to advance speculative and non-existent claims of conflict.[89]

VII. RECUSAL

Recusal is another weapon frequently used by prosecutors to remove formidable defense lawyers as adversaries.[90] In the last John Gotti, Sr., case, Bruce Cutler and Gerald Shargel, two prominent defense lawyers, were recused by the trial judge, I. Leo Glasser. Glasser acted on the basis of then prosecutor John Gleeson's claim that Cutler and Shargel would be called as witnesses and as in-house counsel to the Gambino Crime Family. This, however, proved to be a ruse in order to remove Cutler and Shargel.[91] Gleeson never called Cutler and Shargel as witnesses. John Gotti, Sr., lost his lawyers of choice. Mr. Gotti was convicted and received a life sentence. The prosecutor became a federal judge. Bruce Cutler was also charged with criminal contempt as a misdemeanor for allegedly violating a "gag" order imposed by Judge Glasser.[92]

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[88] *See* Thomas F. Liotti, *The Rape Of Our Profession: A Prophylactic Defense Is Too Sublime*, The Mouthpiece, a publication of the New York State Association of Criminal Defense Lawyers, June/July, 1992 at 5 (reprinting remarks by the author from an address given by him to the Criminal Law and Procedure Committee of the Bar Association of Nassau County, Inc.).

[89] Such was the case of John Gotti brought in the Eastern District of New York. Thus, John Gotti will always have the satisfaction of knowing that the fight he lost was not a fair one. *See U.S. v. John Gotti*, 784 F. Supp 1017 (E.D.N.Y. 1992).

[90] *See People v. T&C Design Inc. and Carmela Cardoza*, 178 Misc. 2d 971, 680 N.Y.S. 2d 832 (Westbury Vill. Ct. 1998). *See also, Judge Refers Issue Of Recusal to Another Judge For Determination,* Decisions of Interst, N.Y. L.J. September 24, 1998 at 1, 21 and 28, col. 5; Official Reporter for New York State, Advance Sheet No. 106, March 17, 1999. *See also* A. Anthony Miller, *Should Judges Decide Own Recusal Motions*, The Attorney of Nassau County, October, 1998 at 18.

[91] The lawyers had beaten the Government many times. The lawyers had been so successful that John Gotti, Sr. became known as the "Teflon Don."

[92] Cutler was found guilty before Judge Thomas Platt, the former Chief Judge in the Eastern District of New York and suspended from the practice of law in the

Just prior to Gleeson becoming a federal judge this writer came to represent Gene Gotti, the brother of John Gotti, Sr., and John Carneglia, in an application to secure the names and addresses of sequestered jurors from their last trial.[93] Gleeson appeared on the Government's brief in the Second Circuit as an attorney of record. Shortly after he became a federal judge and on the heals of his appearance in the aforementioned case, this writer became counsel to a defendant in a drug importation case assigned to a new federal judge, John Gleeson. This writer moved for his recusal. That was denied. This writer also moved for the severance of his case from the co-defendant. When that failed, this writer moved for the recusal of the co-defendant's counsel, since his client was cooperating with the Government, and the co-defendant's counsel had been the prosecutor of Gene Gotti and John Carneglia during their last trial where they had been convicted and given life sentences. Gleeson had also worked on and supervised that case. Gleeson refused to recuse himself or the co-defendant's Criminal Justice Act counsel. Thereafter, this writer made a motion to be relieved, alleging that the Court could not be fair to his client as long as this writer remained involved in the case. The court granted the application and immediately assigned a Criminal Justice Act lawyer to the defendant. While the defendant had previously stated his desire to proceed to trial, he soon became a cooperating witness.[94]

Gerald Lefcourt of New York City, former defense counsel to Abbie Hoffman in the Chicago Seven Conspiracy trial and Past President of the National Association of Criminal Defense Lawyers, had been retained to represent a law firm, its principals and their wives. The firm represented the New York City Police Benevolent Association and was accused of, among other things, paying kickbacks to union officials in order to obtain the pre-paid legal services contract and other business. The Government sought

federal courts for six (6) months. *U.S. v. Cutler*, 840 F. Supp. 959 (E.D.N.Y. 1994).

[93] *U.S. v. Ruggiero*, 850 F. Supp. 186 (E.D.N.Y. 1994).

[94] *U.S. v. Oluwafemi*, 883 F. Supp. 885 (E.D.N.Y. 1995).

and obtained Lefcourt's recusal.[95] The defendants were then convicted following a jury trial.[96]

VIII. FREE SPEECH AND ADVOCACY

There can be little doubt that prosecutors and the police usually get first dibs at defendants, extracting confessions, completing their investigations and orchestrating what has been described as "the Walk."[97] "The Walk" is usually accompanied by press releases and press conferences by the police and prosecutors. The press is alerted to the fact that the defendant will be available for a photo opportunity as he or she is led from the stationhouse to the courthouse for arraignment. Naturally, after hours of being arrested and questioned by the police, most defendants appear unshaven or disheveled, hardly a portrayal that enhances their presumption of innocence. When the parade of the defendant before the cameras is accompanied by the release of mug shots or

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[95] *See U.S. v. Reale*, 1997 WL 225829 (S.D.N.Y. 1997); *see also U.S. v. Curcio*, 680 F.2d 881 (2d Cir. 1982).

[96] *Lefcourt v. U.S.*, 1996 WL 252363 (S.D.N.Y. 1996). Lefcourt has also been a proponent of partial compliance with Treasury Department Form 8300. This form requires the disclosure of client and benefactor information on fees of more than $10,000. Lefcourt had filed the form but refused to reveal client and benefactor information. He was fined and paid $25,000. He then litigated the issue and lost. *Id.*

Many argue that Form 8300 and its related Currency Transaction Reports (for smaller, suspicious banking transactions), are nothing more than a means to push defense lawyers out of business by making it more and more difficult to earn a living.

[97] *See* Thomas F. Liotti, *Inflaming The Jury: The Prosecution's Techniques*, Community Newspapers of Long Island, Inc., August 10, 1995 (on file with the author). During the Mollen Commission hearings the public learned of an expertise taught to police officers at the Police Academy and on "the job" -- "testilying." "Testilying" is perjury offered by police and prosecutors seeking to insure convictions. *See* Thomas F. Liotti, and Katherina Ginnis, , *Testilying: Law Enforcement's Specialty*?, The Attorney of Nassau County, August, 1995 at 4 and 6. *See also* Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (holding that by staging a "perp walk" for the benefit of the press, where there is no other law enforcement purpose and where arrestee is "displayed to the world, against his will, in handcuffs, and in a posture connoting guilt," police unreasonably exacerbate that seizure of the arrestee in violation of his rights under the Fourth Amendment).

graphic photos of the crime scenes, the presumption of innocence is all but destroyed. The police and prosecutors have not only informed, but they have presented their evidence before, the public at large, thus contributing to the demise of the defendant's rights, the pollution of potential jurors and by the prosecutor's "spin," making the defendant into a most unpopular figure, all but insuring a guilty verdict.

Defendants are led before the cameras, handcuffed by the police, so that among other things, they are unable to shield themselves from the onslaught of camera crews. The defendants are not allowed to have a polite chat with the media. There is no rebuttal of the police or prosecution claims. Rather, they are escorted past the cameras, in a manner that is conducive to excited utterances or comments by them, again making their future representation and possible acquittal problematical.

When defense lawyers speak out as advocates either inside or outside the courtroom, their words and conduct may expose them to criticism from lawyers groups.[98] On the other hand, statements by prosecutors go uncriticized.[99]

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[98] *See* Thomas F. Liotti, *A Perspective On Yagman: The Outer Limits of Judicial Criticism*, The Attorney of Nassau County (May, 1996) at 6 and 19, where a California lawyer was suspended from the practice of law, a sanction later reversed on appeal, for accusing a judge of being incompetent, asleep during cases, an anti-Semite and drunk on the Bench. The Ninth Circuit found this to be protected speech and matters of opinion, protected by the First Amendment. *People v. Raab*, 163 Misc. 2d 382, 621 N.Y.S.2d 440 (Dist. Ct. Nassau County 1994), where this writer represented a candidate for judicial office in a trespass case. The charges were dismissed in the interests of justice by the Appellate Term of the State Supreme Court. The candidate was charged with trespass at a church feast for giving out political literature there. He made a motion to dismiss on First Amendment grounds which was denied. Following a 10 day non-jury trial, he was convicted. At sentencing his defense lawyer, this writer, alleged that his client was arrested, charged, prosecuted and convicted, in part, because he was a Democrat, a lawyer and Jewish. Two lawyer groups, The Nassau Lawyers' Association and The Criminal Courts Bar Association of Nassau County, forwarded letters to the Judge in support of him and criticizing this writer. *See* Maureen Fan, *Lawyer's Tack Ticks Off Judge*, NEWSDAY, March 25, 1995; Eric Nagourney, *The Trials of a Pol Nabbed For Trespass*, NEWSDAY, January 4, 1995; Maureen Fan, *Lawyer Sentenced For Trespass*, NEWSDAY, April 4, 1995; Daniel J. McCue, *Raab Trespass Appeal Heard*, The WESTBURY TIMES, November 20, 1997 at 3; and A. Anthony Miller, *Appellate Term Reverses Judge's Conviction*, The Attorney of Nassau County, December

Efforts by prosecutors, judges and Grievance Committees to silence defense lawyers are well known. In 1994, a prosecutor in Nassau County, New York sought to enjoin Bill Kunstler and his partner, Ron Kuby from speaking out to the media in *People v. Colin Ferguson*, the Long Island Railroad gunman case.[100] At the same time, the same prosecutor, George Peck, now a District Court Judge in Nassau County, sought to "gag" this writer from speaking out in the case of *People v. Emiliano.*[101] In both instances, the prosecutors relied upon DR 7-107 regarding trial publicity in order to prevent defense lawyers from discussing their cases with the media.

Disciplinary Rule 7-107 provides:

1997 at 14. Mr. Liotti then represented Judge Raab on appeal (Judge Raab was elected to the Bench in 1996) and secured a reversal of his conviction and a dismissal of the charges. Appellate counsel, also this writer, in *People v. Raab*, 175 Misc. 2d 287, 669 N.Y.S.2d 1018 (Sup. Ct. App. T. 2d Dep't 1997) secured a unanimous reversal of the conviction on the law and facts (Stark, J.P., Ingrassia and Floyd, J.J.). The charges were dismissed in the interests of justice by the Appellate Term. Mr. Liotti was trial Appellate counsel to Judge Raab. Martin Fox, *Lawyer Cleared In Representation Hassle*, N.Y. L.J., October 2, 1991 at 1; and Shirley E. Perlman, *Charges Against Lawyer Dropped*, NEWSDAY, October 4, 1991. Mr. Liotti represented Mr. Delloff. The charges against Mr. Delloff were dismissed in the interests of justice.

99 *See* Carolyn Colwell, *Tankleff Defense: ADA Anti-Semitic*, NEWSDAY, October 16, 1990 at 3. This article reports Mr. Liotti appearing as the "Strike Force" Attorney for the New York State Association of Criminal Defense Lawyers (NYSACDL) on behalf of Robert Gottlieb, a defense attorney in a Suffolk County, New York, murder trial where it was alleged that the Assistant District Attorney on the case had made some out-of-court, anti-semitic statements about Gottlieb during the trial. The murder trial Judge made no inquiry and no referral was made to the Grievance Committee. Not a single bar association aside from NYSACDL took any action.

Seemingly, Mr. Gottlieb, Of Counsel to this writer's law firm, was compelled to revisit the disparities in the defense and prosecution functions in 1997 and 1998 when he became counsel to Amy Grossberg, a young college student in Delaware charged with her boyfriend in a capital case for allegedly killing her new born, out-of-wedlock baby. Mr. Gottlieb participated in a television interview with Barbara Walters and his client. Notwithstanding the tremendous publicity generated by the prosecutors, the Trial Court Judge recused Gottlieb from the case and initiated a disciplinary proceeding against him.

100 248 A.D.2d 725, 670 N.Y.S.2d 327 (2d Dep't 1998).

101 246 A.D.2d 553, 666 N.Y.S.2d 933 (2d Dep't 1998).

> A. A lawyer participating in or associated with a criminal or civil matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably shows that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[102]

In both cases the prosecutors' attempts at "gagging" failed.[103] Presumably, prosecutors got this idea because they were successful in securing a "gag" order against defense lawyers in another well known Nassau County case, *People v. Joseph Buttafuoco*,[104] wherein Honorable Jack Mackston, a former County Court Judge in Nassau County, New York, enjoined defense lawyers in the case from engaging in public comment.[105]

Apparently, the Supreme Court of the United States' earlier decision upholding the right of attorney advocacy and free speech did not dissuade the prosecutors from making their applications.[106]

While Bruce Cutler and other defense lawyers have incurred the wrath of Judges and Grievance Committees, few prosecutors have, even when, for example, there have been blatant

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[102] MODEL CODE of PROF'L RESPONSIBILITY DR 7-107 (1997).

[103] *See People v. Emiliano* (Nassau County, Hon. Raymond Harrington), N.Y. L.J., June 24, 1994 at 1 and June 27, 1994 at 33, col. 1 for full decision and *see also*, Yolanda Rodriguez, *Order To Curb Lawyers' Comments Denied*, NEWSDAY, June 24, 1994 at A31.

[104] 158 Misc. 2d 174, 599 N.Y.S.2d 419 (N.Y. County Ct. 1993).

[105] One of the defense lawyers at the time remarked that it was necessary to go "tit for tat" with the prosecution concerning statements to the media. This statement was enough for the trial court to issue a restraining order. *See contra*, *Matter of Sullivan*, 185 A.D.2d 440, 586 N.Y.S.2d 322 (3d Dep't 1992), where a defense lawyer's extra-judicial comments to a live television broadcast did not warrant discipline because the remarks did not pose a substantial likelihood of materially prejudicing the trial.

[106] *See Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). *See also National Broadcasting Co., Inc. v. Cooperman*, 116 A.D.2d 287, 501 N.Y.S.2d 405 (2d Dep't 1986); and *Markfield v. Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82 (1st Dep't 1975), *appeal dismissed*, 37 N.Y.2d 794, 375 N.Y.S.2d 106 (1975).

grand jury leaks or other serious misconduct by prosecutors.[107] In the 1970s, Maurice Nadjari was appointed by then Governor Nelson Rockefeller as a Special Prosecutor in New York City to prosecute cases of corruption in the criminal justice system. Mr. Nadjari's many investigations pursued lawyers and judges in Senator Joseph McCarthy style inquisitions. Nadjari's tactics reeked of prosecutorial arrogance and vindictiveness. Nadjari addressed fellow prosecutors and told them their "true purpose is to convict the guilty man who sits at the defense table, and to go for the jugular as viciously and rapidly as possible....You must never forget that your goal is total annihilation."[108]

Nadjari's office was accused of being overzealous and insensitive to defendants' constitutional rights, which resulted in a string of dismissals, convictions overturned on appeal, and ultimately ended Nadjari's career.[109]

While numerous legal and judicial careers were ruined during the so-called "Nadjari era," due to the misconduct in the Special Prosecutor's Office, neither Nadjari nor a single prosecutor in his office were prosecuted or disciplined. Mr. Nadjari is back practicing law on Long Island.[110]

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[107] *See* Neil A. Lewis, *Judge cites Possible Improper Leaks by Starr Office* and *Excerpt From Ruling on Starr's Investigation*, N.Y. TIMES, October 31, 1998 at A9. United States District Court Judge Norman Holloway Johnson ordered members of the office of the independent counsel Kenneth Starr, to show cause why they should not be held in contempt of court for disclosure of 24 news reports in possible violation of Federal Rule of Criminal Procedure 6(e), which provides for secrecy in grand jury proceedings. The Rule specifically pertains to Government attorneys or United States' Agents concerning testimony that they either gave or to which they were privy to in the grand jury.

[108] *See supra* footnote 67.

[109] *See* Ronald Goldstock, & Steven Chananie, *Criminal Lawyers: the Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. PA. L. REV. 1855, June, 1998.

[110] *See* 1998 New York Lawyers Diary And Manual, Bar Directory of the State of New York, Skinder-Strauss Associates. *See also* 136 U. PA. L. REV. 1855, 1877:

Arguably, the experience of Maurice H. Nadjari, Special State Prosecutor for the New York City Criminal Justice System from 1972-'76, effectively illustrates these assertions. Following a number of early successes, Nadjari's office was accused of being overzealous and insensitive to defendants' constitutional rights, which resulted in a stunning string of dismissals, convictions overturned on

VIII. FORFEITURE

Generally, "forfeiture clauses" render property, which constitutes the proceeds of a crime, subject to a civil action for recovery of such proceeds.[111] Oftentimes, third parties claiming an interest in forfeited property, such as attorneys, in order to prevent a forfeiture, have the burden of proving at a post trial hearing either: (a) that his or her interest was superior to the defendant's at the time the criminal acts were committed; or (b) that he or she is a bona fide purchaser for value who, at the time of the purchase, "reasonably without cause to believe that the property was subject to forfeiture."[112] However, in New York, subdivision 12 of

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appeal and, ultimately, the end of Nadjari's otherwise respected prosecutorial career -- one that had spanned over two decades.

Mr. Nadjari, among other things, succeeded in overturning the absolute immunity doctrine which, prior to his reign, fully protected state prosecutors from civil claims. In *Cunningham v. The State of New York*, 71 A.D.2d 181, 422 N.Y.S.2d 497 (3d Dep't 1979), the State was sued by a former Bronx Democratic Leader because allegedly Mr. Nadjari's Office "failed to properly instruct the grand jury on the law, introduced inadmissible evidence, lacked an impartial attitude, lacked probable cause to bring the matter before the grand jury, overzealously cross-examined witnesses, selectively presented evidence, and introduced altered recorded conversations." The Third Department determined that:

Consequently, when engaged in the role of investigator, like that of a policeman, he should not enjoy absolute but only qualified immunity. (*Guerro v. Mulhearn*, 498 F.2d 1249 [(1st Cir. 1974)]; *Robichard v. Ronan*, 351 F.2d 533 [(9th Cir. 1965)]. In *Schanbarger v. Kellogg*, 35 A.D.2d 902, [315 N.Y.S.2d 1013 (3d Dep't 1970)], this Court held that the defendants therein were acting in a quasi-judicial capacity and, thus, were entitled to the defense of absolute immunity from suit. While we would reach this same conclusion today, we are of the view that the language used in that case to the effect that persons acting under an Assistant District Attorney are immune from civil suit for official acts performed by them in the investigation of a crime is no longer valid insofar as it may be interpreted as conferring absolute immunity upon those engaged in investigative actions. Accordingly, it is the opinion of this Court that the Court of Claims properly granted claimant permission to replead in those instances where the prosecutor was acting in other than a quasi-judicial capacity.

Id. at 183.

[111] *See* 18 U.S.C. § 1963(1) (2000), 21 U.S.C. § 853(n) (2000), and N.Y. C.P.L.R. § 1311(1) (2000).

[112] See 18 U.S.C. § 1963(1) (2000) and U.S.C. § 853(n) (2000).

C.P.L.R. § 1311 exempts property acquired in "good faith" by an attorney in payment for legal services rendered in connection with a civil or criminal forfeiture proceeding or a related criminal matter.[113] The federal government offers no such provision.

In order to provide an adequate defense in a criminal case, a defense lawyer will need to draw upon financial resources given to him or her in the form of legal fees. The government, both federal and state, are able to prosecute and try cases to the fullest extent because of ample funding. It would be impossible for criminal defense lawyers to devote the time and energy required for the highest quality of representation if they are not paid. Forfeiture clauses essentially allow monies necessary for quality representation to be attacked and attached by the government.[114] This is yet another example of the government stopping at nothing to lock up defendants and "throw away the key." Not only does the government go after the defendant, but by using the above mentioned tactics, it deprives defendants of quality defense representation by making it impossible for lawyers to be paid the necessary fees.[115]

IX. CONCLUSION

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[113] *See* N.Y. C.P.L.R. § 1311(12) (2000).

[114] *See Caplin & Drysdale Chartered v. U.S.*, 491 U.S. 617 (1989) and *U.S. v. Monsanto*, 491 U.S. 600 (1989). In addition, the "relation-back" doctrine gives the government title to the proceeds of a crime at the time of its commission by statute. *See* 18 U.S.C. § 1963(c). If an attorney is retained prior to forfeiture proceedings or before he has notice of same, he may be entitled to claim he is an innocent owner and therefore entitled to retain a fee. *U.S. v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993). *See also U.S. v. Moffit, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996). Defendants were forced to forfeit over $100,000 in attorneys' fees they received from a client charged with drug trafficking and money laundering. Client paid all legal fees in cash and refused to accept a receipt. Defendants spent most of the fee and maintained that recovery was limited to the unspent portion. However, this did not stop the government in its effort to attach and ultimately secure a forfeiture judgment.

[115] This was the case in the attack on F. Lee Bailey, mentioned *supra*. This is the case with many defense lawyers who, in addition to having knowledge of the law, must have knowledge of banking in order to account for fees. Thomas F. Liotti, *Avoiding Prosecutions*, New York State Bar Journal, February, 1995.

The deck is stacked against defense lawyers. The prosecution is not content just to use superior resources against defendants. They are in hot pursuit of defense lawyers, especially those that are highly skilled with reputations to match. Some prosecutors want civil, criminal and disciplinary immunity for their actions. They seek to further their reputations by trapping, prosecuting or obtaining disciplinary sanctions against defense lawyers. In some cases they are found to go overboard in their zeal, they want immunity and their own Code of Ethics whose violations, if any, they shall determine. The gross disparities between the defense and prosecution functions are glaring in their apparent injustices. Bar Associations, Grievance Committees and others must have dialogue on this important subject. At the same time, all must recognize that prosecutors must live by the same Canons of Ethics as all other lawyers. They must be treated the same as other lawyers and prosecuted by Grievance Committees for their misconduct. Their misconduct should not be excused because they are prosecutors or because their wrongdoing occurred in a criminal court or on the backs of defendants or the poor. Indeed, it is precisely because of the enormity of their power from the Government they represent, that they should not be cloaked with special privileges. If we continue to provide otherwise, we will be creating a special class of impervious prosecutors, unchecked in whatever violations of the Constitution and law that they may commit. The last champions of liberty - defense lawyers - will then be no more.

Avoiding Prosecutions

BY THOMAS F. LIOTTI

"And every living substance was destroyed which was upon the face of the ground, both man, and cattle, and the creeping things, and the fowl of the heaven; and they were destroyed from the earth: and Noah only remained alive, and they that were with him in the ark."

Genesis, Chapter 7:23

Skilled defense lawyers are a bit like Noah, always building arks to be prepared in case of a flood. Most of us hope that the flood will never come, but if it does, we like to think we are ready for it. Building an ark is like preparing for trial. You'll be ready if the flood comes—that horrible prosecution. There are lawyers who while building the ark, avoid the flood. You will remember that in Chapter 6 of Genesis, God was most upset because the earth was filled with corruption and violence. Of course man was not given much warning, or a chance at redemption before the flood came. On the other hand, lawyers who are skilled at avoiding prosecutions function like bats flying in a cave. They have extra sensory capabilities—human antennae and radar that can quickly survey the minefield, and bring the client through it unscathed or with a loss of as few limbs as possible. Physiologists call it Kinesthetic Awareness; a cognition of one's parts in space.

Every city has its lawyers who are noted among their peers for successfully avoiding prosecutions. In a few instances they are also skilled trial lawyers. More often than not the skills of trial lawyers and "prosecution avoiders" are not the same. Indeed, their roles are inconsistent with each other, and maybe even in conflict. Trial lawyers "make money the old fashioned way." "They earn it" by going to trial and being in the limelight. Their reputations grow if their performances receive good reviews and full acquittals, but more often, by a performance of legal dramatics which lay people rarely get to see where life is on view in the courtroom for all to see and experience, vicariously.

"Prosecution avoiders," sometimes referred to as grand jury specialists, are not necessarily famous. They labor quietly, behind the scenes, more often than not in white collar cases where legal arguments and evidence are demonstrated to a prosecutor by the fine art of persuasion. Persuasion is more than an art or a science. It is plain hard work coupled with experience, knowledge of the law and in some cases, an uncanny awareness of, and instincts for, institutional politics. A good upbringing in the streets, a/k/a "street smarts," does not hurt either.

Federal Rules of Criminal Procedure 6(e) and the laws of most states provide for secrecy which precludes prosecutors and their agents from disclosing the nature and scope of grand jury proceedings or investigations. Indeed, corporations, especially those that are publicly held, and corporate executives, prefer to avoid media attention. So, "prosecution avoiders" function quietly behind the scenes. Generally they are highly paid for what they do. Many made their reputations years ago, and survive on former contacts. Some, not favored by this writer, are literally hand picked or recommended by prosecutors to represent government witnesses as well as others in legal difficulty.

I. THE OVERVIEW

Most lawyers during their careers will never ask themselves: "what do I do best?" Introspection does not lend itself to the egomania required for survival in the trenches. Not asking those questions, defense lawyers are prone to believe they do all things equally well. This is a bit like assuming that if you are a good poker player you will be a good tennis player. It ain't necessarily so. Poker playing and tennis do not go hand in hand any more than negotiating and trial techniques do, which are analogous to the roles of architects and engineers. Architects, in consultation with the engineers, design the building. The engineer puts it up.

Gestalt psychologists tell us that patterns cannot be derived from their parts since their configuration is unified. Similarly, lawyers can err in the early phases of a case if they employ a micro analysis to the exclusion of a macro construct. The asking of what I call ultimate questions such as: "did you do it?" is outmoded and too micro a concept given the complexities of today's cases. The psychological and factual components today are far too complex even in street crime cases.

In some cases it may be inappropriate to even interview a defendant in the early phases of a case. Consider for example a case where defenses may include the Battered Woman's Syndrome, possibly combined with Post-Partum Depression and low-grade intelligence. Instead of a lawyer being a bull in a china closet, a/k/a the attorney/client conference room, he or she should consider whether it would be more appropriate to permit a psychiatric expert to conduct the first interview. This may overcome any suggestion later that the lawyer has attempted to shape the client's psyche or delivery. At the outset we must have a Weltanschauung view—a comprehensive perspective where the attorney is aware that the whole is equal to the sum of its parts.

The lawyers's first order of business is not always to get the client in the door for an interview and retainer. What can be learned about the client from other sources such as the referring attorney, prosecutors, agents, family members, fellow workers, etc.? Are there any conflicts? Are there any potential limitations to the defense? Who and where is the client in relation to the investigation, the parties within the organization, company or alleged organization itself? Can the client financially afford a first strike defense of "prosecution avoidance"? Is there an 8300 problem? Are there benefactors and friends who will need counsel? How are they to be advised concerning forfeiture, the potential for grand jury subpoenas and claims of conspiracy, etc., that may arise as a result of their intervention as benefactors and the manner in which counsel is to be paid?[1]

II. THE SCOPE OF THE ARTICLE

This article deals with avoidance of prosecution. There is no checklist of issues to consider. Each case is *sui generis.* The tactics to be employed are limited only by the law and a lawyer's imagination. There is a paucity of literature in this area of the law. Although this dearth may be explained by the secretive nature of these matters, more to the point is the fact that since these backstage machinations do not have the sexy glitz of trials, they are obscured. In any event, this article shall be confined to the lawyer's first entry, pre-indictment, up to the vote of grand jurors. Despite the fact that few cases are tried, all of our time in law school and in CLE is spent on how to try cases. Cases that are almost never tried. What we spend no time on is how to avoid prosecutions. Much more time needs to be spent on this area of law. You may want to keep this article on your desk, and re-read it once in awhile, preferably before the client's next call. Avoiding prosecution is not luck. It is always based on a very carefully planned strategy. Instincts yes, but hopefully also good lawyering.

Perhaps after reading this article when you are next asked why you were so successful in your last impossible case, you will have a greater appreciation for the process of avoiding prosecution.

III. THRESHOLD ISSUES

A. To Take a Dip or Not

It is important to know the "origin of the species." How and why the client got to the law office is important. If he used a map we want to see it. We want to know who drew it. If he got directions, we want to know who sent him and how. Lawyers are targets. Prosecutors want to get their hooks in us.[2] Thus, entering a case as a lawyer is a bit like stepping into a cold swimming pool. In order to avoid shock to the system it is far better to enter a step at a time. A law of physics tells us that the amount of water displaced is equal to a body's weight. Yet, even putting that big toe in the water often creates a ripple affect that can be seen for quite a distance.

So, the lawyer needs to ask what his involvement should be. Does the lawyer want to surface or if he does so, will the prosecutor imagine the case to be bigger than it really is.[3] Should the lawyer play a minor role or a major role? Should he turn down the retainer entirely? Turning down a case requires that the lawyer recognize that not every case requires an attorney who is overtly aggressive to the point where his strategy is conveyed much like Western Union—by telegraph. It is not always best to have the most famous or transparently suave attorney in these early stages. It is helpful if the attorney is friendly with the prosecutor, is a brilliant tactician, is well organized and persuasive. If you are lucky enough to have a prosecutor who will open a door to you and listen, you are fortunate indeed. You have earned your fee. If you have to deal with line Assistants or other inexperienced prosecutors who have little or no discretion, your power, influence and Machiavellian planning, will be limited. You have

The author gratefully acknowledges the help of Henry R. Fasano, a third year law student at Touro Law School in drafting and researching the article.

[1] Financial Ability to Employ Counsel: Persons able to Pay Reasonable Fees. EC 2-21, "A lawyer should not accept compensation or anything of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure." See also, *Ratzlaf v. United States,* 114 S.Ct. 655; 1994 U.S. Lexis 936; 126 L. Ed..2d 615; 62 U.S.L.W. 4037; 94-1 U.S. Tax Cas. (CCH) P50, 015; 94 Cal. Daily Op. Services 224; 94 Daily Journal DAR 382; 7 Fla. Law W. Fed. S 687, where a structuring conviction was averted because the defendants did not know it was illegal. All lawyers on the other hand, once passing the bar exam, are presumed to know the law and today are required to practice both law and banking. They must endeavor to know the source of their fees and that they are not procured by illegal means. This of course "puts a real damper" on an attorney's ability to get paid.

[2] BNA Criminal Practice Manual, Vol. 6 No. 13, June 24, 1992, "Underhanded" DEA Subpoena Seeks Lawyer's Phone Records.

A defendant may be able to file a motion to disclose any information the government obtained by use of a wiretap. The motion is made pursuant to 18 USC § 2518(8)(d) for an order to make available to the defendant for inspection to interception of any oral or wire communications: The Court has the authority, pursuant to 18 USC § 2518(8)(d) to "make available to [the defendant] or [his] counsel for inspection of such portions of the intercepted communications and orders as [it] determines to be in the interest of justice." In *U.S. v. In the Matter of One, etc.,* __ F. Supp. __ (DNH 1981). The Court granted some discovery to certain movants in proceedings brought pursuant to 18 USC § 2518(8)(d). However, defense counsel should be aware of the case of *In re Motion to Unseal Electronic Surveillance Evidence,* 990 F.2d 1015 (8th Cir. 1993); wherein the Court *in banc* held that the provisions of Title III Omnibus Crime Control and Safe Streets Act of 1968 did not authorize pretrial disclosure of wiretap information to private civil RICO litigants.

[3] Department of Justice, *Anti-Trust Division Manual* III-11 (1979)—policy of Justice Department division on Anti-Trust Action to only pursue indictments in cases it believes prove a clear, purposeful violation of the law.

Corporate amnesty is guaranteed if the corporation comes forward before a criminal investigation begins. Howard Adler, Jr., *GE-DeBeers Indictment Does It Portend More Aggressive Criminal Antitrust Enforcement? Business Crimes Bulletin,* Vol. 1, No. 2, March, 1994 @ 1. Corporate amnesty may also be extended to those that come forward after a criminal investigation begins. Traditionally, antitrust actions have been pursued civilly rather than criminally. *See, Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 221-22 (1939); *United States,* 306 U.S. 208, 221-22 (1939); *United States v. Container Corp. of America,* 393 U.S. 333, 337 (1969). However, the attorney should be aware of the pending case of *United States v. General Electric Co.,* No. CR-2-94-019 (N.D. Ohio) that suggests the present Antitrust Division will aggressively proceed criminally. "U.S. companies should be on notice that the new regime will vigorously enforce the antitrust laws." *Business Crimes Bulletin, supra* @ 4.

got to show the Chief Prosecutor that this is a case worthy of his or her close attention.[4] It is a case that requires an extraordinary review by the most experienced people in the prosecution camp.

It helps a great deal if you have empathy for the client. Do you believe in the client's cause? Have you got "fire in the belly" for the client or the issues the client represents.[5]

B. The Client

Who is this person asking for your help? Do they come from a Government test tube? Is your client already an informant? Is your client wired? Does he have a benefactor? Is he sent by a lawyer? Do you know the lawyer? Do you trust him? Does he want to put your head in his trophy room? Is he trying to learn about your other clients, you or a civil case or investigation or criminal investigation? Who is present? What is their agenda? What is the agenda of the person making the referral? If an attorney is making the referral, why isn't he taking the case? Are there any conflicts? It's best to try to figure this out even before you sit with the clients.

Before the client walks through the door, if possible, have you checked him out with Dun & Bradstreet; TRW; plaintiff and defendants' index, as well as trusted people on the street, if there are any? In short, is the portrait being shown a Mona Lisa or a Dorian Gray?

How will you transcend the interviewing process without being overly intrusive or intimidating? Your client may be a business person. She, in all likelihood, has not had any prior contact with the law.[6]

a. Thinking of a Defense

Some lawyers think that it happens instinctively and that a theory evolves. A few lawyers forget about the truth and create a theory that they think they can sell. Naturally, this begins the percolation of all those thoughts that lawyers should have from the beginning about perjury,[7] suborning perjury, obstruction of justice and interference with governmental administration.[8] Reviewing the Canons of Ethics and the ABA Standards For The Defense And Prosecution Functions[9] is critical at this juncture, remembering that the theory of your case has to be bought hook, line and sinker by the cops or agents, the prosecutor, maybe a grand jury or worse yet, a petit jury.[10] Chances are if you are not buying it, no one will. What is important here is not what pleases the client, but what is truthful and will work best with the aforementioned players. As the client's story in unveiled, it is important to avoid inconsistencies. Many rehearsals should be performed before the curtain goes up.

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Bad lawyers work in a vacuum. Good lawyers remember they are just lawyers and that they need clinicians to help them in interviewing clients, assist in juror profiles, juror demographics, juror surveys, *voir dire* and other related matters. Lawyers need help from real people.

So, in developing a defense, a lawyer considers "MOM"—a/k/a Means, Opportunity and Motive. Is the crime a *malun prohibitum* crime or does it require *mens rea*? Is the client rational? Did the client act in good faith? Was the client capable of forming a requisite intent at the time of the commission of the alleged crime? Does the client suffer from a mental disease or defect or an extreme emotional disturbance? Does your client have a drug, alcohol, gambling or some other disorder? Is your client taking medication? What type? Check it out in the Physicians Desk Reference (PDR). Lawyers consider the psyches of their clients and what this means for their defenses. Some will literally do a diagnosis of their clients in DSM–IV (Diagnostic and Statistical Manual–IV).[11] Lawyers should not practice medicine or psychology, but they can get quite good at superficially evaluating clients medically and psychologically, and should consider using this source until a real analysis is in place.

Observe your client closely. For example, in the case of one client, after interviewing him for thirty minutes, I noticed he was very red, particularly around his shirt collar. His red corpuscles seemed to be saying, "let me out of here." I convinced him that he should humor me by allowing me to take

[4] False Claims Act, 31 USC § 3729—False or fraudulent claims for payment or approval pursuant to a government contract. This can be brought under Civil Actions for False Claims, 31 USC § 3730. The Attorney General may bring civil action under this section against a person violating 31 USC § 3729. This requires the Government to meet a less rigorous burden of proof than under the Criminal Section. The defendant may also face a private litigant in a civil suit under the False Claims Act, 31 USC § 3730 (1988).

[5] It sometimes helps to do some "fire" reading. I occasionally go back to review the trials of Clarence Darrow for inspiration. See, generally, Weinberg, Arthur, *Attorney for the Damned, Clarence Darrow on the Courtroom*, University of Chicago Press (1989).

[6] See, generally, Pamela H. Bucy, *White Collar Crime And The Role Of Defense Counsel*, 50 Ala. Law Rev. 226 (1989).

[7] Perjury generally, 18 USC § 1621,—Having taken an oath that he will testify or depose to what is true, willfully states or subscribes any matter which he does not believe to be true. Punishment is a fine of $2,000 or imprisonment of not more than five (5) years, or both.

[8] Obstruction of Criminal Investigations, 18 USC § 1510.

[9] ABA Standards for Criminal Justice Prosecution Function and Defense Function, Third Edition, American Bar Association, Criminal Justice Standards Committee, Criminal Justice Section (1993).

See Gershman, Bennett L., *Prosecutorial Misconduct*, Clark Boardman Company, Ltd., New York, New York (1986). The Standards are reprinted as part of the Appendices.

[10] Gerstenzang, Peter, *Small Time*, Litigation Magazine, Summer, 1992. This is an excellent article giving the defense insight into how a prosecutor must think and negotiate. In short, what is persuasive and what is not.

[11] Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association, (DSM-IV 4th Edition 1994) Washington, DC (1994).

his pulse rate. We did this twice because I could not believe the readings. Each time, his resting heart rate was over 150. He was taking many different types of prescribed medication and also drinking. He had been in this condition, daily, for years. He was about to explode. We got him clinical help and because of it kept him out of jail.[12]

b. The Interview

Law Schools now offer courses on interviewing. It is an art form, not a science. They teach how to gain the client's confidence and how to get information from the client. The focus of these courses tends to be in eliciting information or at least, the client's version of the facts. In other words, a straight interview. This is useful as an introduction to the world of client contact.

This is no doubt helpful, but it does not really explore what lawyers do. These courses more aptly describe, perhaps, what psychologists or other clinical professionals do. As the defense theory of a case is taking shape, lawyers should function on a need to know basis, sometimes not even picking up a pen except for pedigree information. Even that should not always be complete, especially in the early phases of interviewing.

What lawyers need to do is consider the process of interviewing as an important, integral part of their work. Initially, it may be important to simply sit with the client, taking few notes. Recently in one of our homicide cases where a grand jury returned No True Bill, I determined that the client, a young man, would be better interviewed and prepared for his grand jury testimony mostly, by a younger Associate. It worked. I was the architect of the defense theory. I worked on the initial interviews and intermittently thereafter. I directed the crime scene investigation which enabled us to use photos, measurements, a video and diagrams for a reconstruction consistent with our defense theory. It also appeared that our client, due to trauma of the event, might have been blocking out key aspects of it. Hypnosis helped to elicit some of the missing, key facts. However, it is important to emphasize that these interviewing techniques must proceed gradually, and in some cases perhaps without an attorney's advance knowledge. In the case of hypnosis, for example, it may be more useful to learn of a client's submission to it after the fact, particularly if it has been useful in fostering recall or recollection of events. Naturally, this too depends upon whether the recollection is consistent with the defense theory.[13]

All of this leads up to a client's grand jury testimony.[14] We prepare the client to give a lengthy, hopefully uninterrupted narrative. Next, we prepare the client for the harsh questions that may be asked. Answers are reviewed for their legal and social acceptability. That is, the answer may be legally correct, but will it be socially acceptable to the Grand Jurors.

Are you representing an individual or a corporation? Is there a need for additional counsel? What is the scope of the retainer and engagement? Generally, the corporation provides counsel to all witnesses and targets. Counsel can share information and provide a unified defense. They should also consider executing a joint defense agreement.[15] Are you going to recommend or even hire co-defense counsel for others?[16] How do you select these attorneys? Have you worked with them in the past? Will there be loans made in lieu of direct payments? To what extent, if any, will your escrow account be used? Will there be separate joint defense agreements or one agreement for all defendants? Will agreements be oral or written? Will there be an acknowledgment that not all interests are identical or even in conflict with one another at various stages? What phase of the case does the agreement cover? If a party to the agreement wishes to withdraw, what notification is required to other counsel? Is there any protection of information in the event of withdrawal? Is the agreement enforceable?[17]

If the corporation is going to take the bulk of the blame, what are the consequences for it concerning licensing, fines and other penalties?[18] If the corporation pleads, can the individuals avoid liability?

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[12] Lawyers who wish to practice "prosecution avoidance" techniques, need to have a good medical-legal library at their disposal. For starters, a good dictionary is useful. Consider Schmidt, J.E., M.D., *Attorneys' Dictionary of Medicine and Word Finder, Illustrated,* Matthew Bender (1984). If your case involves drugs or medication, you may want to consider a sourcebook for background such as: Uelmen, Gerald F. and Haddox, Victor G., *Drug Abuse And The Law Sourcebook,* Clark Boardman Company, Ltd., New York, New York (1986). In order to develop an outline for your case of possible issues to consider, you may want to have at your fingertips a general criminal investigation text such as: Osterburg, James W. and Ward, Richard H., *Criminal Investigation, A Method For Reconstructing The Past,* Anderson Publishing Co./Cincinnati, OH (1992).

[13] Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 Calif. L. Rev. 313 (1980).

[14] If you must prepare your client for a grand jury, an excellent resource for that preparation is Murrell, Dan S., Editor Release #12, *The Grand Jury Project, Inc. of the National Lawyers Guild, Representation Of Witnesses Before Federal Grand Juries,* Third Edition, Clark Boardman Callaghan (1993).

[15] *Joint Defense Agreements*—Procedure and defendant's protection, set forth in *United States v. McPartlin,* 595 F.2d 1321, 1336-37 (7th Cir., 1979).

Gorelick, *Grand Jury Representation,* 1984.Trial 20. Joint defense agreements enable defendants to increase the amount of information they have to prepare their case. These agreements make sure that all defendants know that their co-defendants are not cooperating with the government.

United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir., 1989), attorney-client privilege protects statements that a represented party makes to another party's lawyer pursuant to a "Joint defense effort or strategy [that] has been decided upon or undertaken by the parties and their respective counsel."

BNA Criminal Practice Manual, p. 21: 601-28—discusses the advantages, disadvantages, and government objectives regarding joint defense agreements. This also includes a bibliography on various articles written on the subject.

[16] Prosecution of enterprises by going after benefactors: *In re: Shargel,* 742 F.2d 61, 63 n. 3 (2d Cir. 1989). The fact that a lawyer has multiple clients in no way implies connection among them. If appellants consulted with an attorney as a group rather than as individuals, the evidence would have been probative of concerted activity among the several clients. *Id.* at 64. In *United States v. Simmons,* 923 F.2d 934, 949 (2d Cir. 1991), the District Court properly admitted evidence of a lawyer's representation of multiple members of the Monsanto Crew. Evidence demonstrated that Peter Monsanto preferred that appellants use Port as their attorney and that he made benefactor payments to Port on their behalf. These facts alone created a suspicion that appellants were somehow linked.

United States v. Castellano, 610 F.Supp. 1151, 1160 (S.D.N.Y.1985). "When other suspicious circumstances are present, the decision of a number of persons to retain the same lawyer may be probative of an association among them."

[17] Tague, P.W., *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation,* 17 A. Crim. L. Rev. 301 (1980).

[18] Often the government investigates a white collar crime by a grand jury subpoena duces tecum for business records. Business records pose a significant problem for individuals that are criminally implicated by the information contained in such records because the privilege against self-incrimination cannot be vicariously asserted. A collective entity, such as a corporation or partnership, has no privilege against self-incrimination and must produce documents properly subpoenaed. See, *Braswell v. United States,* 487 U.S. 99 (1988). Documents that are voluntarily made are afforded no fifth amendment protection. *Id.* However, the act of production may have some communicative

Is it anticipated that others are likely to cooperate with the Government?[19] Will they do so with or without immunity?[20] Will there be a proffer or "Queen for a Day" agreement? Who are the pure witnesses? Identify targets, subjects, complainants and witnesses! Who are the insiders and outsiders likely to be called? What is the best deal for your client with and without cooperation? Will there be a composite deal for all defendants or just some of them? Will the deal bind other prosecuting offices, state and federal? Will it bind other departments and agencies?[21] What are the risks and rewards of discussing potential cooperation or deals with the client; his family; co-counsel and the prosecution? What is the paper trail of evidence leading to your client?[22] Are there tapes? Are they admissible? Will minimization hearings have to be held? Is your client implicated?

Shake the case out! Ignore conventional thinking! Turn it upside down, over, under—look through it! Imagine worst case scenarios! Offer ideas that others have not considered! Who are the "rats" and "snitches"? Who are weak and strong?[23] If you are representing a professional such as a stockbroker, lawyer or medical doctor, what administrative and/or disciplinary proceedings might be involved? Are there records available from those proceedings?

Very often criminal investigations are coupled with civil cases.[24] Thus, it is important to assess the client's liability civilly as well as criminally.[25] Moreover, what is the likely impact on his civil case(s) of the criminal investigation?[26] For example, if the client takes the Fifth Amendment in a grand jury, does that create an "unfair inference" in the civil case?[27] To what extent, if any, do the doctrines of

aspects that are the equivalent of self-incrimination and may be protected. For instance, the act of production may be testimonial if the act of production authenticates the evidence for the prosecution. *See, Fisher v. United States*, 425 U.S. 391 (1976). Recently, in *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 90-93 (2d Cir. 1993) an individual's personal calendar had to be produced because there was no compulsion in the statements contained within the document. The contents of the document were voluntarily created.

However, you may recommend to your client that his business records, if not needed on a daily basis, should be kept at your office. When this is done, these records are not subjected to a search warrant because they are not on the premises that is subjected to the search. *See*, Joel Cohen, *Is There 'Sanctuary' for a Client's Records at a Lawyer's Office*, New York Law Journal, May 10, 1994 @ 1. While no legal impediments restrict prosecutors from issuing search warrants of lawyer's offices, prosecutors are generally reluctant to obtain such warrants. *Id.* The fact that the records are kept at a lawyer's office does not immunize them from a subpoena duces tecum. Still, the more prudent course is to store the records at the attorney's office because this assures the records will remain intact. It is "most convenient, most likely to avoid spoliation or sticky-fingered employees and most likely to avoid production by means of a search." *Id.*

19 Monroe Freedman, *The Lawyer Who Hates Snitches*, The Champion, April, 1994 @ 25-27. "Arranging for a criminal defendant to become an informer—a/k/a—a "rat," "snitch" or "rollover"—is morally and ethically offensive to me' said Barry Tarlow, Esq. who was quoted in Freedman's article on *United States v. Lopez*, 989 F.2d 1032 (9th Cir. 1993), where Tarlow refused to represent an informant. Freedman went on to write "Tarlow has a deep sense of repugnance about informers, and that is Tarlow's policy. Before being retained by the client, he makes his position clear, informing his client of the potential disadvantages of retaining him."

20 Often, prosecutors will offer informal immunity as a method of obtaining witness testimony. This forgoes the need to obtain a court order compelling the testimony. Informal immunity is granted by way of a letter promising immunity in exchange for testimony. *See*, Sullivan, *Informal Immunity Agreements: A Trap for the Unwary*, 7 White Collar Crime Reporter No. 2 February, 1993. Where immunity can only be granted by invoking a statute, it cannot be granted by court order or at the discretion of the prosecutors. There is no such thing as "constructive" immunity. *See, United States v. Doe*, 465 U.S. 605 (1984). A defendant is not afforded the same degree of protection under an informal immunity as under a statutory immunity. *Informal Agreements, supra.*

21 See, *Kastigar v. United States*, 406 U.S. 411 (1972). The United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity as provided by 18 USC 6002. "Once [a] defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the Federal prosecution, the Federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.*, at 460 quoting *Malloy v. Hogan*, 378 U.S. 52, 79 (1964).

See also, *Trimiew v. United States*, 9 F.3d 1389 (9th Cir. 1993), many different agencies are investigating a defendant's actions, information intertwined will not make it impossible to create a clear history of what information has been obtained through which sources, including defendant's testimony before the State Grand Jury.

22 The Freedom of Information Act, 5 USC § 552, provides that any person has a right of access to federal agency records with respect to a state criminal matter. *See, generally*, Note, 14 Am. Crim. L. Rev. 73 (1976) . Government agencies gather information that may be helpful to a criminal defendant. The availability of such records is limited by a total of nine exemptions and three special law enforcement record exclusions. *See*, e.g., *Nadler v. United States Department of Justice*, 955 F.2d 1479 (11th Cir. 1992). The Supreme Court has held that "rap sheets" are not accessible in a criminal investigation because it would constitute an unwarranted invasion of privacy. 5 USC § 522(b)(7)(c) (1988). *United States Department of Justice v. Reporters Committee*, 489 U.S. 749 (1989).

Recently, Attorney General Janet Reno issued a memo stating that the Justice Department will have a presumption of disclosure and will encourage agencies to make disclosures of technically exempt information whenever possible. 7 BNA Crim. Prac. Man. 510 (1993) .

23 *G. Gordon Liddy Seeing the Glare of Fame* —"I don't know of any American who was raised by his parents to be a snitch or to admire tattle tales." Propriety to the United States International, July 27, 1986.

24 For instance, the Sherman Act, 15 USC § 1-3, 15, 15(a) (1988) (antitrust); the Internal Revenue Code, 26 USC § 7201 (1988); the Securities Act of 1933, 15 USC § 774 (1988); and RICO; 18 USC § 1961-1968 (1988 and Supp III 1991). The defendant faces either a government agency or a private litigant. *See*, the False Claims Act, 31 USC § 3730 (1988).

25 "Citizen suits" are brought under RICO, 18 USC § 1964(c) (1988); Clean Water Act, 33 USC § 1365 (1988). The liabilities your client may face are the payment of restitution, 31 USC § 3729 (1988) (False Claims Act); remediation, 42 USC § 9662 (1988) (CERCLA); fines, 31 USC § 3730 (False Claims Act); and forfeiture, 15 USC § 11 (1988) (permitting seizure of property for violating antitrust laws).

26 The attorney must be aware that the government may use a civil suit as a subterfuge for a criminal investigation. For instance, when a client faces the IRS in a civil suit, the IRS must show that it has not referred the case to the Department of Justice. The Supreme Court has held that such suits were not intended to expand the D.O.J.'s discovery power. *See, United States v. LaSalle*, 437 U.S. 298; 311-13 (1978).

Generally, a civil action does not prevent a successive criminal prosecution and vice versa. *United States ex. re. Marcus Hess*, 317 U.S. 537 (1943). However, if the civil action is used as a punitive measure or as deterrent punishment, instead of remedial compensation, double jeopardy may bar a subsequent suit. In *United States v. Halper*, 490 U.S. 435 (1989), the Supreme Court held that imposing excessive civil penalties after a criminal conviction of the defendant for the same offense violated the Fifth Amendment's Double Jeopardy Clause.

27 *If client takes the Fifth Amendment in a criminal case, does that create an unfair inference of guilt or presumption in a concurrent civil case?* "The Court is authorized to draw an inference of guilt, in this civil proceeding, from a claim of privilege." *Vesey Realty v. Doherty*, 120 Misc. 2d 721, 722 (1983).

A self-incrimination claim that protects a defendant in a criminal case does not apply in a civil case. *Marine Midland Bank v. Russo*, 50 N.Y.2d 31 (1980). The jury is allowed to draw the strongest inference of guilt against a defendant that opposing evidence permits once the defendant invokes the Fifth Amendment in a civil case.

A judge may charge the jury that they may draw an unfavorable inference from the collateral estoppel and *res judicata* apply?[28] In other words, if the client asserts immunity or makes an admission, even in the proffer session, is he collaterally estopped from denying his culpability in a civil case?[29] Should a civil case be used as a collateral discovery device?

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The purpose of the Double Jeopardy Clause is to prevent successive prosecutions after an acquittal.

Double Jeopardy is not a bar to a subsequent state prosecution of a defendant following a federal prosecution for the same set of operative facts.[30] However, several states have ruled that a subsequent state prosecution is barred unless the state interest on state law grounds is different from that under federal law.[31] In *People v. Helmsley*,[32] the court held that "Since the acts charged in the state indictment either could have been alleged in the federal case, or were actually charged, all of the subsequent counts should have been barred as constituting part of the same 'criminal transaction'..."[33] It is permissible for a federal prosecution to follow a state prosecution involving the same conduct.[34]

The petite policy is a voluntary policy that bars a successive federal prosecution for the same act or acts which were already prosecuted under state law grounds. This policy was announced in 1959 by the Department of Justice in *Petite v. United States*.[35] There must be a "compelling reason" for the subsequent federal prosecution and there must be approval for a second prosecution by the Assistant Attorney General.[36]

A defendant cannot compel the government to follow the petite policy.[37] The petite policy is only an internal guideline for the exercise of prosecutorial discretion and does not create a substantive right for the defendant which he may enforce, and it is not subject to judicial review.[38] To hold the policy legally enforceable would be to invite the Attorney General to "scrap it."[39] However, the doctrine of collateral estoppel has been used by the Supreme Court to limit the government's ability to harass a defendant by a series of separate prosecutions for crimes which have an overlap of elements.[40] Aside from the overall, subsequent prosecution being imperiled, counsel should consider whether elements of it may be barred by this doctrine.

c. A Review of Legal Defenses

Good faith, justification, mistake, renunciation, alibi, psychiatric defenses, ignorance and no intent may all be ultimate defenses to be explored, to one degree or another.

You need to consider common law and statutory defenses. Other defenses such as attacking the victim, or the victim did it, or a co-defendant did it, or still other defenses such as confession and avoidance, a/k/a entrapment, should be reviewed.

Is your client physically and/or psychologically unable to proceed? This defense has worked well for Harry Helmsley, Clark Clifford, Joe Bonanno and many others.[41]

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use of the privilege in a civil case. In *Bikowicz Austin v. United States*, 113 S. Ct. 2801 (1993), it was determined that protections associated with criminal cases may apply to civil forfeiture proceedings if it is so punitive that the proceedings must reasonably be considered criminal.

United States v. Stewart, 1994 U.S. App. Lexis 5239, even if the District Court relied on evidence that a defendant has given immunity in a criminal proceeding to find probable cause in a subsequent civil forfeiture proceeding, the error is harmless.

Whether your client should invoke the Fifth Amendment is one of the most difficult issues you will face in a parallel civil and criminal proceeding. This decision is fact dependent. For instance, your client's company may have collapsed or he has already been fired. In this instance, your only concern will be the self-incrimination implications in the criminal prosecution. *See*, Andrew Levander, *Fifth Amendment and Parallel Proceedings*, New York Law Journal, May 5, 1994 @ 1. Delay this decision as long as possible. You can attempt "to seek a stay of civil proceedings pending a criminal investigation or indictment." *Id.* citing *SEC v. Power Securities Corp.*, 142 FRD 321 (D. Col., 1992). Advantages to invoking the Fifth Amendment in a civil proceeding is that the government will not obtain "a devastating admission or a crucial link or lead, such as a bank or brokerage account, telephone number or name of a close friend or relative." *Id.*

[28] If the criminal and civil actions derive from the same set of facts, the collateral estoppel doctrine may affect the outcome. *See*, *United States v. Wight*, 839 F.2d 193, 195 (4th Cir. 1987) (plea of guilty in criminal action estopped defendant from challenging subsequent forfeiture action in a civil case arising from the same set of facts). You should always keep in mind that an adverse judgment in a civil action has no effect on a subsequent criminal action because of the higher burden of proof in the criminal action. *See United States v. General Dynamics Corp.*, 828 F.2d 1356, 1361 n. 5 (9th Cir. 1987).

United States v. DiBona, 614 F. Supp. 40 (E.D. Pa., 1989) (where corporation's officers had pleaded guilty to violating False Claims Act in earlier criminal proceeding, corporation was collaterally estopped from denying liability in subsequent civil suit).

[29] Generally, a prior civil judgment will not be given collateral estoppel or *res judicata* effect in subsequent criminal proceedings. In *One Lot Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972), the defendant was acquitted of criminal charges of defrauding the United States. Following acquittal, the Government instituted a Civil forfeiture action. The Court held that a forfeiture was not barred by a previous criminal acquittal. The difference was that in the civil case the Government did not have to prove intent, as it did in the criminal case. Additionally, the different burdens of proof did not bar the subsequent civil proceeding against the defendant.

[30] *See*, *Bartels v. Illinois*, 359 U.S. 121 (1959).

[31] *See*, *People v. Cooper*, 247 N.W.2d 866 (Mich. 1978).

[32] *See*, *People v. Helmsley*, 170 A.D.2d 209, 566 N.Y.S.2d 223 (1991).

[33] *Id.* at 225.

[34] *See*, *Abbate v. United States*, 359 U.S. 187 (1959) and *United States v. Aboumoussallem*, 762 F.2d 906 (2d Cir. 1984).

[35] *See*, *Petite v. United States*, 361 U.S. 529 (1960).

[36] *See*, *Rinaldi v. United States*, 434 U.S. 24 N. 5 (1977).

[37] *See*, *United States v. Mitchell*, 778 F.2d 127 (7th Cir. 1985).

[38] *See*, *Ashe v. Swenson*, 397 U.S. 436 1970).

[39] *Id.* at 71.

[40] *See*, *Ashe v. Swenson*, 397 U.S. 436 (1970).

[41] *New York Law Journal*, p. 1, December 1, 1993, "Manhattan Judge dismissed charges against Clifford Clark citing his advanced age and health yesterday."

Judge Dismisses Charges Against Clark Clifford; BCCI Record to be Sealed. "Justice John A.K. Bradley of State Supreme Court agreed Tuesday with both the defense and prosecutors; saying Clifford's 'age and ill-health prevent his being brought to trial." The Legal Intelligence, December 2, 1993.

United States v. Harry Helmsley, 941 F.2d 71 (2d Cir. 1991), New York Law Journal, June 11, 1993 @ 1—"Southern District Judge Thomas P. Griesa yesterday reduced Leona Helmsley's four year tax evasion sentence...citing the hotel operator's age, 72, and her husband Harry's poor health." The charges against Harry Helmsley were previously dismissed due to his infirmities.

United States v. Persico, 621 F. Supp. 842 (S.D.N.Y. 1985)—defendant Thomas Dibella moved for a severance, pursuant to Rule 14, on the ground that the trial of his indictment posed a risk to his life that outweighed the Government's legitimate interest in a fair and speedy disposition of the pending charges. The Court concluded that "Dibella's health precludes his being tried at this time." *Id.* at 875.

United States v. Salerno, 632 F. Supp. 529 (S.D.N.Y. 1986)—Joseph Bonanno refused to answer a subpoena to be questioned at a deposition because he needed the deposition to be in a "hospital like setting" in Tucson. *Id.*, at 530 n2. The Court granted Bonanno's request.

Do you have a doctor or team of medical experts who will verify your client's incapacity?

If there is an identification issue, do you have an expert prepared to testify as to the subjective nature of the identification process and why it was flawed?[42] Whether your jurisdiction and judge permit this type of evidence is largely incorporal. If the prosecutor believes he or she has a hole in their case, this may be useful in negotiations.

If your case has a confession or admission, corporal or otherwise, it may be useful to obtain your client's medical and school records. They may be admissible as an exception to the hearsay rule at trial.[43] They can certainly be offered to Grand Juries and Judges during preliminary, bail and suppression hearings. In one homicide case, I obtained my client's school records which revealed that he had a 69 IQ and a first grade reading level. A psychiatrist testified that he could not understand *Miranda* warnings unless carefully explained and paraphrased. They weren't. Medical records revealed my client's poor eyesight. He did not have eyeglasses when he was allegedly shown a rights card. The Appellate Division reversed his intentional murder conviction.

No MOM. No means, no opportunity and no motive. What about it? Where is the prosecutor's weak spot, their Achilles Heel?

Senseless, meaningless street crime seems ever pervasive in our society. In both street and white collar cases, the defense should exploit the fact that there may be no economic benefit or gain to the defense, hence no motive. This can be shown either matter-of-factly or sometimes with the aid of forensic accountants and other experts where the transactions are more complicated.

d. Other Forensic Evidence

Opinion letters and reports are useful. They can sanitize and legitimize the alleged actions of your client, particularly if they were received prior to the alleged, untoward or suspicious conduct. I have used then on everything from ineffective assistance of counsel cases to commodities trading cases. They can exonerate or mitigate your client's involvement. Their reports can be voluminous, but they should be from highly credible, well credentialed sources that a reasonable person, such as your client, might rely upon.

If your client has the resources, you should consider retaining all of the credible experts that you or the prosecution might hire. This has to be done quickly.[44] There are several legal services that can provide you with the names of experts. Ask your colleagues about them, locate transcripts of their prior testimony. Lock out the prosecution!

Although obvious to some, it is a point often overlooked, but you should use polygraph experts. Some prosecutors place great reliance upon them. If you can find out who the prosecution favors as an outside polygraph expert, approach that person. Again, check them out with other defense lawyers. If they can be trusted, retain them. You may also want to have your client tested first by a more friendly polygraph expert.

If your case involves handwriting, there are just a few classic texts in the field which are quite old, but still the best sources. Read them, learn about handwriting inside and out. Prepare for cross, but preliminarily be prepared with your experts to show the prosecution why the handwriting does not match up. Your expert can give you blow ups or other demonstrative evidence, that may persuade the prosecution that their evidence is weak. You may also wish to consider cultural defenses, usually weak, but often times in tandem with another defense such as appropriate testimony on handwriting, can be useful. For example, if your client is an Asian American, schooled in China, who is accused of signing credit card receipts, your expert may testify that handwriting in China is calligraphy. Calligraphy is considered an art form where Masters spend years trying to learn and replicate common forms and symbols, exactly and uniformly. When some Asian-Americans first learn English script, they do so by employing the same methods; to wit: tedious and exacting replication. Thus, the Government's exhibits could have been signed by any number of Asian- Americans, all schooled in the same style of penmanship since there is little or no diversity among handwritings in certain ethnic cultures.

Similar arguments, not cultural, can be made for fingerprinting and ballistics. You may wish to consider confronting the prosecution with your experts early in the case. Their reports can always be bolstered later, but you may succeed in getting early discovery of the prosecution's experts, a critique of your experts and lastly, your experts may be persuasive.

In like manner, DNA, blood grouping and blood experts may disprove your client's culpability.[45] Wire-tap, linguistic, or coding experts as well as interpreters may report that the Government' s translation is wrong. A spectrograph expert may report that it was not the defendant's voice on those tapes.

It is difficult to secure discovery from medical examiners and autopsies. I have offered to have my own pathologists, toxicologists and medical examiners present during autopsies, generally without much success. I have been more successful with orders of exhumation. I have also been successful in learning early the results of an autopsy by calling up the medical examiner or speaking with him over a few cocktails. Remember, Medical Examiners are not supposed to be agents for the prosecution. They are municipal employees and

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42 See generally, Wall, Patrick M., *Eye-Witness Identification In Criminal Cases*, Charles C. Thomas, Publisher (1965).

On the issue of advancing ultimate legal issues to prosecutors as part of the pre-charging negotiations, the reader may wish to review *Guidelines For The Issuance Of Search Warrants*, published by the American Bar Association, Criminal Justice Section (1990). This one volume pamphlet presents the entire legal foundation for the proper issuance of search warrants. Again, rather than being embarrassed, your prosecutor may wish to concede the illegality of a warrant, arrest and/or search.

43 Fed. R. Evid. 803 (4).

44 For instance, an accountant can be helpful if hired as an expert early in the proceedings. Communications made by the client to the accountant may be protected by the attorney-client privilege if the attorney makes it clear, in writing, that the accountant is an expert being retained only to assist the attorney. Such precautions will bar the use of the accountant as a prosecutorial witness. See, *Kovel v. United States*, 296 F.2d 918 (2d Cir. 1961).

45 Probably the best DNA materials available were assembled for an NACDL seminar in Washington, D.C., March 16-17, 1990. The materials may still be available through NACDL. See Scheck, Barry C. and Neufeld, Peter J., *The First National Defense Symposium On DNA, Understanding, Challenging And Controlling The New Evidence Of The 90's*, 3 vols., sponsored by the National Association of Criminal Defense Lawyers in cooperation with the National Legal Aid and Defender Association and the National Criminal Defense College.

doctors whose salaries are paid by you. They should give you as much cooperation as they give the Prosecutor. I have also learned vital autopsy details by asking my medical experts to confer, informally, with the Government's. Sometimes a "friendly," off-the-record conversation among fellow professionals can produce a mountain of helpful information. Obtaining the often destroyed or misplaced dictation or Medical Examiner's notes can be useful. I did admire the fast work of one lawyer who avoided an autopsy by arranging for the body's immediate transfer to Tahiti where it was promptly cremated and the ashes dispersed at sea.

e. Do Not Join the Conspiracy

Criminal defense lawyers always worry that their clients will not have enough money to interpose a proper defense so they wind up doing more than they should. Aside from being lawyers, they become psychotherapists and investigators. The importance of having a highly competent, licensed and bonded investigator or investigation team in place at the earliest possible moment cannot be overly emphasized. Investigators not only survey the crime scene and locate missing witnesses, but they can also be useful in instituting electronic counter-measures, such as discovery and removal of wire taps and video surveillance cameras.[46]

Some investigators need to be de-energized. I recall one who offered to bring his electronically equipped attache case to a meeting. He then suggested that we leave the room while our adversaries remained behind to be tape recorded by the activated attache case. While I appreciated his enthusiasm, he did have to be told that this was eavesdropping and a crime.[47] Therefore, this could not be and was not done.

If you are fortunate to be retained prior to your client's arrest or immediately thereafter, or at or before your client's business is raided, it is most important to repress some enthusiasm so as to not inadvertently join the conspiracy or the enterprise, or to aid or abet it. For example, your clients are running a so-called "boiler room" out of Miami. They might refer to it as a telemarketing concern. They have mailed advertisements around the country which say: "YOU HAVE JUST WON A PRIZE" and if you call our 800 number you can claim it. In calling the 800 number, sales people manage to pry loose from callers their credit card numbers. The callers then wind up buying a six-month supply of vitamins with a book on nutrition for $400.00. Their prizes as advertised, are a Mercedes Benz; a cashier's check for $2,000.00; a fur coat; a watch or a television set. When their vitamins arrive, they come with the prize, a low end television that cost about $80.00. The total cost of the package, with mailing, is about $125.00 to your clients, a profit of $275.00 per unit. Millions are sold. A mail fraud investigation is commenced. A proactive counsel can recommend a number of things, some of which may not be in the nature of legal advice *per se*, but might border on joining the conspiracy. For example, if counsel knows that not all the prizes exist, he may recommend that they be purchased and given away as advertised. He may counsel his clients on proper pitches for salespeople and how these calls may be monitored to guard against rogue salespeople making unfair, illegal and unreasonable pitches. He may also counsel his clients to make refunds. There is a thin line, and counsel has to be careful not to cross over it. Is counsel giving legal advice or committing an overt act in furtherance of a conspiracy?[48]

Recently, a well-known and highly respected lawyer from New York was censured by the Second Circuit for interviewing a non-party witness without the approval of the witness' attorney. Naturally, while this certainly presents the disparity between the way in which Courts treat prosecutors and the unfair manner in which they treat defense lawyers, it also should cause all of us to at least pause before interviewing co-defendants or even non-parties.[49]

Attorneys must be on their guard to avoid Government "sting" operations; having extraneous witnesses present during the interview; not advising witnesses of their rights and overreaching employee witnesses.

Too many attorneys do not use investigators or secretaries as components of the interviewing process. Attorneys need to be aware that they can become a witness in a case and therefore be disqualified if they interview witnesses.[50]

Attorneys need to practice law both offensively and defensively. That means that memos to the file or affidavits from witnesses and staff should be considered in the context of the legal and ethical constraints referred to herein.

Rule 6 of the Federal Rules of Criminal Procedure provides for secrecy in the Grand Jury proceedings on the part of prosecutors and their

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[46] *See*, Howard Blum, *Gangland: How the FBI Broke the Mob*, Simon and Schuster (1993).

[47] Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited, 18 USC § 2511. It is a crime to intentionally intercept or endeavor to intercept any wire, oral or electronic communication and intentionally disclose or endeavor to disclose to any person any contents of any wire, oral or electronic communication.

Eavesdropping on and recording conversations where none of the participants have consented, absent a court order, is a crime. *See*, 18 USC § 2511. "While such material might give a litigant a leg up, it implicates basic notions of legal ethics and fair play, under certain circumstances, it raises questions of fraud" Arkin, *Attorneys, Tape Records and Perfidy*, New York Law Journal, April 14, 1994 @ 3. Not only is the use of secret tape recorders unethical, "it can lead a lawyer and client into criminal waters." *Id*. In 1974, the American Bar Association, in *ABA Formal Opinion 337*, said it was unethical for lawyers to secretly tape conversations.

[48] *ABA Model Rules of Professional Conduct*—Rule 1.2(d)—A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[49] See, contra, Memorandum to All Justice Department Litigators from Dick Thornburgh, Attorney General (Thornburgh Memo, June 8, 1989), wherein the Department of Justice seeks authority to override state disciplinary rules (DR7-104) by contacting represented parties. See also, contra, *U.S. v. John Gotti*, 6 F.3d 924 (1993), wherein the Government's contacts with a co-defendant, Sammy "The Bull" Gravano, were tacitly approved.

In re Simels, 1993 U.S. Dist. Lexis 17454 (S.D.N.Y.) interpreting DR7-104(A)(1) prohibiting attorney communications with a "party" represented by an attorney. A potential litigant may be a "party" within the meaning of DR7-104 citing *United States v. Jamel*, 546 F. Supp. 646 at 653-54 (E.D.N.Y. 1982) reversed on other grounds, 707 F.2d 638 (2d Cir. 1983). The Court said "the appropriate practice of attorneys in criminal cases before this Court is to determine if a potential party within a criminal proceeding is represented by counsel and then to obtain the consent of such counsel before interviewing the witness." *Id.* at 8.

[50] "Prejudice to the defendant is the common result when counsel becomes a sworn or unsworn witness in a defendant's case, regardless of whether the attorney's testimony is exculpatory or inculpatory." *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 138-39 (3d Cir. 1984).

agents. Therefore, within the limits described, attorneys or preferably their investigators may speak with Grand Jury witnesses before, during and after their testimony.[51] This makes the prosecutor very nervous because you are finding out about his secret inquisition. You can attempt to explain your client's perspective of the case and the nature of prosecutorial misconduct or abuse. Aside from learning information, the witness may become friendly once he learns what the other side of the pancake looks like.[52]

Rule 6 can also be useful if there are leaks to the press. Sometimes leaks are made by prosecutors, agents, complaining witnesses, defendants or even defense counsel. The leak may then be utilized to portray the Government for what it often is, the evil doer. It may be used to place the Government on the defensive. For example, if the Government has subpoenaed your client's records you may wish to use Rules 6 and 17 in tandem. Part of your job is to make the Government's work difficult, especially if you have a lot of exposure. Assuming that efforts to negotiate the scope of the subpoena, time for production, a custodian, etc., are pointless, Rule 17 is typically used for motions to quash subpoenas that are overly broad. In one instance I was able to secure injunctions from state and federal court against federal prosecutors for the dissemination of information to the press. When the restraining orders became public, the press had a field day at the expense of the prosecutor. Then Rule 17 was used to pare down the more than one million documents subpoenaed. The prosecution was portrayed as being vindictive and unreasonable. Once the Court pared down the number of documents available to the Government we proceeded to literally flood the Government with three truckloads of documents. I doubt they were able to even do an inventory, let alone find the documents they sought. After two (2) years of trying to piece together an investigation, the Government gave up—period—no presentment to a grand jury—case over.

The late Roy Cohn once said that if he had been retained to represent President Nixon during Watergate, he would have advised the President to destroy the tapes, or destroyed them himself. While perhaps effective in terms of destroying hard evidence, such advice would have undoubtedly resulted in an even earlier disbarment for Mr. Cohn,[53] to say nothing of an obstruction of justice charge.[54] Moreover, the destruction would have then permitted many to speculate that even more dire conversations took place. It would have also enabled a jury or the Congress to infer consciousness of guilt on the part of the President.[55] Thus, this was neither legal nor appropriate advice. It was dangerous for both the lawyer and the client.[56]

If your client is running a business in an industry that requires permits or licensing, and he does not possess either of these prerequisites, you may counsel him on how to apply for same. This is legal advice.

You may also advise your client to file tax returns or amended tax returns. This is an area fraught with danger in that an amended return may be in the nature of an admission.[57] You may not counsel your client to not pay taxes that are legitimately owed. Similarly, counsel should advise clients to use legitimate banks, declare income, report it and deposit all cash.

Inadvertently, counsel may unduly complicate a defense or draw himself into a conspiracy. For example, the mere act of being retained today places such hurdles before counsel that many able attorneys are giving up the practice of law or turning down cases. The Government is permitted to seek forfeiture of fees, property and assets acquired directly or indirectly through specified criminal activity. See 18 USC § 1963 and 21 USC § 853. The "Relation Back Doctrine," as codified by the Comprehensive Crime Control Act of 1984 provides: "all right, title and interest in [forfeitable] property...vests in the United States upon commission of the act that gives rise to forfeiture. ..." Thus, the Government can seek forfeiture of property transferred by the defendant to a third party. See 18 USC § 1963(c) and 21 USC § 853(c).

The issues involving retention of counsel are critical especially in the early stages of criminal investigations.[58] Counsel who is surreptitious about a fee may be perceived by prosecutors as being not too far removed from the alleged criminal being investigated. While defense counsel may wish to simply wave their noses at the prosecution, this gesture may not be in the client's best interests. So, counsel may wish to consider working out fees with the prosecution's approval. You've got

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[51] *U.S. v. Fayer*, 523 F.2d 661 (2d Cir. 1975) and *U.S. v. Poppers*, 635 F. Supp. 1034 (N.D. Ill. 1986). Naturally, "coaching" of witnesses is disallowed.

[52] The witness should be encouraged to present and testify concerning exculpatory evidence. See, *U.S. v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993); *U.S. v. Salerno*, 952 F.2d 623 (2d Cir. 1991); *U.S. v. Salerno*, 112 S.Ct. 2503 (1992); *U.S. v. Salerno*, 974 F.2d 321 (1992) and *U.S. v. Miller*, 904 F.2d 65 (D.C. Cir. 1990). Indeed, counsel or the witness may wish to consider communicating directly with the Chairperson of the Grand Jury by letter, including a proffer as to exculpatory evidence and documents in support thereof.

[53] *In the Matter of Roy M. Cohn*, 118 A.D.2d 15, 503 N.Y.S.2d 759 (1st Dept. 1986).

[54] Obstruction of Justice, 18 USC § 1505—It is a crime to willfully withhold, misrepresent, remove from any place, conceal, destroy or by any means destroy documentary material.

United States v. Presser, 187 F. Supp. 64 (Dc Ohio 1960)—alleged alteration, partial destruction and concealment of records sought by Senate Committee is a violation of 18 USC 1505.

[55] "Evidence of flight and concealment is often admitted to show consciousness of guilt, as well as guilt itself." *United States v. Kord*, 836 F.2d 368, 372 (7th Cir. 1988) *quoting*, *United States v. Zabic*, 745 F.2d 464, 471 (7th Cir. 1984). Such actions are not hearsay under the Federal Rules of Evidence. *See* Fed. R. Evid. 801(c) .

[56] Editorial Desk, "A Roy Cohn Sampler," N.Y. Times, July 16, 1985, @ 1.

[57] *Bardaracco v. Commissioner*, 464 U.S. 386, 399 (1984) "An amended return, of course, may constitute an admission of substantial underpayment, but will not ordinarily constitute an admission of fraud."

[58] *In the Matter of Cooperman*, 82 N.Y.2d 745 (1994) the Court held that nonrefundable retainer agreements are invalid. They are a violation of the Code of Professional Responsibility. Such an agreement is unethical because it prevents the client from discharging the lawyer at will—a right a client always has under DR2-110(B)(4). This cost the lawyer a 2 year suspension. The Court held that the agreement violated DR2-106(A) barring illegal or excessive fees and DR2-110(A)(3) requiring prompt return of any unearned portion of a fee paid in advance.

See also, Edward A. Adams, *Fallout from Fee Decision: Some Arrangements Doomed*, "If...defendants," New York Law Journal, March 1, 1994 at 1. The Appellate Division which was affirmed in the Court of Appeals, held that "The nonrefundable agreements are no more than an attempt to prevent the discharge of the attorney, by the client and to circumvent the disciplinary rules requiring an attorney to promptly return upon discharge by a client, all funds not yet earned." *New York Law Journal, "Judges Weigh Non-refundable Fee Retainers; Client's Rights Balanced Against Effect on Lawyers"* February 9, 1994, @ 1.

to know your Prosecutor before trying this.[59] Counsel also needs to remember that fee information is not privileged.[60]

There may be a corporate indemnification insurance or other insurance that will cover legal fees. Ask your client about this. Review homeowners and corporate insurance policies for the scope of protection provided and for legal fee coverage.[61]

CONCLUSION

Acquittals are wonderful. When they happen, it is only after a tremendous expenditure of time and money. The publicity for the attorney and the final vindication for the client may be very sweet. However, while not as celebrated, the quick kill of avoiding prosecution is preferred.

[59] In order to prevent forfeiture, a third party such as an attorney claiming an interest in the forfeited property has the burden of proving at a post trial hearing either: (a) that his/her interest was superior to the defendants at the time the criminal acts were committed; or (b) that he is a *bona fide* purchaser for value who at the time of the purchase was "reasonably without cause to believe that the property was subject to forfeiture." 18 USC 1963 (1) and 21 USC § 853(n). Once an attorney calls the prosecutor, his claim of *bona fides* may be undermined. Yet, this writer has seen at least one case where a prominent law firm, with the approval of the Government, liquidated all of the defendant's assets and placed them in escrow—approximately six million dollars. With this money they paid themselves eight hundred thousand dollars in legal fees and about three million dollars in restitution. The client was able to keep the balance. *See also United States v. Hilaire* (E.D.N.Y., CR 90-0046).

[60] See, *In re Grand Jury Subpoenas,* 906 F.2d 1485, 1488 (10th Cir. 1990) and *In re Grand Jury Subpoenas for Reyes-Requena,* 913 F.2d 1118, 1122-24 (5th Cir. 1990). Regrettably, in December, 1993, the IRS, pursuant to 26 USC § 6050I has imposed $25,000 fines against attorneys in Florida and New York for each instance where attorneys due to lawyer-client privilege, state bar ethical restrictions or other constitutional concerns, refused to reveal client information on IRS Form 8300. See Hingson, John Henry III, President's Column, *Sailing Between Scylla and Charybdis,* The Champion (a publication of the National Association of Criminal Defense Lawyers, March, 1994).

It is also noteworthy that legal fees since at least 1989 have *not* (emphasis added) been exempt from forfeiture. See *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617 (1989), and *U.S. v. Monsanto,* 491 U.S. 600 (1989). In addition, the so-called "relation-back" doctrine gives the government title to the proceeds of a crime at the time of its commission by statute. 18 USC § 1963(c). If an attorney is retained prior to forfeiture proceedings or before he has notice of same, he may be entitled to claim he is an innocent owner and therefore entitled to retain a fee. *U.S. v. 92 Buena Vista Avenue,* 113 St. Ct. 1126 (1993).

[61] The Delaware Corporation Law § 145 and the New York Business Corporation Law §§ 121-726 provide for indemnification of corporate officers and directors provided they did not act in bad faith or had reason to know their conduct was unlawful.

A Crack in the Antenuptial Shield: Antenuptial Agreements and Survivor Benefits from Qualified Retirement Plans

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election requirements of 29 U.S.C. § 1055(c) have been met.[60] It should also be determined whether, at the time that the antenuptial agreement was executed, any outstanding elections existed. The antenuptial agreement's purported spousal consent provision must also be examined to determine whether it complies with REA. Additionally, the election and purported spousal consent should be examined to determine whether they comply with the qualified plan's governing instrument since any failure to comply would render the noncomplying instrument ineffective for REA's purposes.[61]

Even if the spousal consent to the survivor benefits waiver is effective, when the surviving spouse is listed as the designated beneficiary in the plan's documents, the contention that the plan's documents control the beneficiary determination should be viable. Support for this contention is found in 29 U.S.C. § 1104(a)(1)(D). *McMillan v. Parrott,* which held that the beneficiary designation, as found in the qualified plan's documents, controls the disposition of benefits that are not required by REA to be distributed to the surviving spouse, also supports this contention.[62] *Fox Valley,* however, denied this relief based upon an Illinois law that required the post-divorce redesignation of the former spouse as the qualified plan's beneficiary.[63] Since the distribution of benefits is explicitly addressed by ERISA, it is submitted that the *McMillan* rule should be followed by the Courts. But, a sympathetic court may find that is unfair to reward the spouse who had knowingly and voluntarily waived her right to receive benefits from the qualified plan.[64]

V. Conclusion

An antenuptial agreement should not be regarded as an effective method to obtain spousal consent to a waiver of QPSA or QJSA benefits from a qualified plan. Adherence to the election and spousal consent requirements contained in both 29 U.S.C. § 1055(c) and the qualified plan's governing instrument is the best course of action to obtain an effective spousal consent.

[60] 29. U.S.C. § 1055(c)(2)(ii).

[61] *Callahan,* 1993 U.S. App. LEXIS 34005, *18 (6th Cir. December 20, 1993).

[62] 913 F.2d 310 (6th. Cir. 1993). *McMillan* involved the participant's failure to remove his former spouse as the designated beneficiary despite his remarriage and her waiver, in a document executed pursuant to their divorce, of the right to receive any benefits from the qualified plan. *See also* Callahan, 1993 U.S. App. LEXIS 34005 at *19-*20.

[63] *Fox Valley,* 897 F.2d 275, 281 (7th Cir. 1989).

[64] *Cf., Callahan,* 1993 U.S. App. LEXIS 34005 at *20-*22.

Double Jeopardy and the Variance Doctrine in Conspiracy Prosecutions

By Thomas F. Liotti

A deeply ingrained principle of Anglo-American jurisprudence is that the government should not be able to make repeated attempts to convict an individual for an offense, thereby subjecting someone to embarrassment, expense, ordeals and a life of continued anxiety and insecurity.[1]

The Fifth Amendment of the Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." Recognizing that this Double Jeopardy Clause is "fundamental to the American scheme of justice," the U.S. Supreme Court has interpreted it to provide three types of protections:[2] (1) against a subsequent prosecution for the same offense after an acquittal, (2) against a subsequent prosecution for the same offense after a conviction, and (3) against multiple punishments for the same offense.

Successive Prosecutions vs. Successive Punishments

The double jeopardy principle is put to the test when defendants may be exposed to one set of charges in state court and another in federal court.

To deal effectively with these challenges, it is important to understand the significant difference between successive prosecutions and successive punishments. Successive prosecutions involve subsequent proceedings against a single defendant. Successive punishments involve multiple charges against a defendant in a single proceeding. The Supreme Court highlighted the importance of the distinction as long ago as 1874, finding that the Constitution "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."[3]

The ban on successive prosecutions protects the integrity of prior decisions, prevents harassment of defendants through repetitive litigation, and precludes an unauthorized second punishment when the first trial ends. Allowing successive prosecutions would permit the government to force a defendant through the expense and rigor of a second trial in which the government could broaden the scope of its prosecution after having tested its case in the first trial by charging a narrow offense.[4] Moreover, heightened constitutional and societal interests are at stake when a person faces the prospect of repeated governmental harassment and oppression.[5] The prospect of being brought back into court to face accusations based on the "same offense" is exactly what the Double Jeopardy Clause condemns.

The Double Jeopardy Clause bars a second prosecution only if jeopardy attached in the original proceeding.[6] In a criminal proceeding, attachment occurs when the defendant faces the risk of a determination of guilt, including the possibilities that jeopardy will attach,[7] that jeopardy will attach based on a prior sentencing hearing,[8] and that jeopardy will attach once a defendant begins serving a prison term.[9]

In deciding to plead guilty to a federal crime, a defendant must admit all the elements of the charged crime.[10] When a defendant pleads guilty in a federal court, Rule 11 of the Federal Rules of Criminal Procedure governs the conduct of the government and the defendant. Rule 11(e) authorizes plea agreements when a defendant pleads guilty to the charged offense or to a lesser or related offense. Rule 11(e)(2) requires that the terms of a plea bargain be disclosed in open court when an agreement is reached or, upon a showing of good cause, *in camera* at the time the plea is offered. Rule 11 is violated unless a plea is disclosed on the record and the disclosure takes place at the time the plea is entered.[11]

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