

September 29, 2008

Dear Panelist:

This letter covers the following topics:

- Eyewitness Identification Expert
- Responsibilities Regarding Plea Offers
- ACODs In Arraignment B – Information Form
- ACODs – Additional Information
- Funerals for Clients’ Relatives
- Integrated Domestic Violence Court
- Annual Criminal Law & Procedure Update
- Additions To Experts’ Panel

### **EYEWITNESS IDENTIFICATION EXPERT**

Earlier this year, Dr. Jennifer Dysart, a Stanford Ph.D who specializes in eyewitness identification, addressed the Criminal Law and Procedure Committee at the Bar Association. Her talk was memorable and included loss, distortion and failure of memory, eyewitness suggestibility effects, source monitoring errors, weapon focus, emotion, stress, age, transfer effects, mugshot exposure effects, cross-race identification, verbal overshadowing and standard police lineup practices.

After her talk, I asked her if she would consider joining our Experts Panel. She told me that she was too busy but that I should call her in a few months. I did, and am pleased to announce that she is now a member of our panel. All of the reviews I have heard about her, including her ability on the witness stand, are excellent. Her contact information can be found at the end of this letter.

## RESPONSIBILITIES REGARDING PLEA OFFERS

You are reminded that it is your obligation to keep the defendant informed of all plea offers and to advise the defendant fully on whether you consider a particular plea to be desirable or undesirable. Note, however, that, **it is the defendant's decision as to whether a plea should be accepted**<sup>1</sup>. The foregoing applies to all courtrooms, including Arraignment B.

### ACODs IN ARRAIGNMENT B INFORMATION FORM

I am aware that some 18B attorneys don't like to deal with ACODs in Arraignment B because they don't have the time to discuss with the defendant the potential adverse consequences of an ACOD. That is understandable, but insofar as it conflicts with the ethical obligations set forth above, it is unacceptable.

If the District Attorney's office offers an ACOD in Arraignment B, it is your responsibility to let the defendant know and to discuss the ramifications of accepting it. Since I know that time is of the essence in Arraignment B, I have prepared the enclosed ACOD Information sheet, explaining what an ACOD is, and setting forth the pluses and minuses of accepting one. If you are the attorney of the day in Arraignment B you should give this form to every defendant as soon as you know an ACOD is being offered on the case. The defendant should be told read it and to discuss it with you before proceeding.

In order to give you and the defendant enough time to do this, I spoke to Administrative Judge Quinn. I advised him that this new form is being introduced in Arraignment B and asked him to instruct the Judges in Arraignment B to mark for second call all cases on which ACODs are offered. If you are on the District Court Panel, you should begin using this form at your next scheduled Arraignment B date. Please let me know if you experience any problems with the Judge failing to give you enough time to do your job properly.

### ACODS - ADDITIONAL INFORMATION

There are two statements in the "Disadvantage" section of the ACOD Information Form that require some discussion. First, there is a statement that if a defendant accepts an ACOD "you will forfeit your right to sue for malicious prosecution and you **may** also forfeit your right to sue for false arrest and/or false imprisonment." (emphasis supplied). It is stated this way because the law on this subject is confusing. The law is clear that an ACOD will constitute a bar to a claim of malicious prosecution. In the annotations to CPL § 170.55 (Note 17), however, a 1983 Court of Appeals case is cited, which indicates that an ACOD does **not** bar an action for false imprisonment<sup>2</sup>. Thereafter, two cases from the First Department are cited, both of which state that a defendant's acceptance of an ACOD operates as a waiver of his right to challenge the probable cause for his arrest and thus the ACOD **does** bar an action for false arrest and false

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<sup>1</sup> See N.Y. Lawyer's Code of Professional Responsibility E.C. 7-7, 7-8. ABA Standards For The Defense Function 4-3.8, 4-6.2

<sup>2</sup> Hollender v. Trump Village Cooperative Inc. 58NY2d420 (1983)

imprisonment<sup>3</sup>. These cases are in direct conflict with each other. If anyone can shed any light on this confusion, please let me know.

The second statement in the form that requires discussion is the one indicating that if a defendant accepts an ACOD, prospective employers will have access to the court records of the ACOD during the adjournment period and, “as a practical matter, they may have such access even after the case is dismissed.” This is because, even though the paperwork on an ACOD should be sealed pursuant to CPL § 160.50 after the adjournment period, the District Court Clerk does not always notify the District Attorney’s Office, the Police Department or the Division of Criminal Justice Services in a timely manner. It is therefore suggested that whenever you have a defendant accept an ACOD, **you advise the client to go to the District Court Clerk’s Office, shortly after the adjournment period has ended, to make sure that such notifications have taken place.** Only then will the defendant be sure that prospective employers will not know about the case.

### **FUNERALS FOR CLIENTS’ RELATIVES**

Panelists Jeff Groder and Joe LoPiccolo point out that although you can make a motion to have your incarcerated client attend the funeral of a family member, you may be able to accomplish the same thing without judicial intervention merely by calling transportation at the Jail (572.3700), providing them a letter from the funeral home as to the date of the funeral and providing some proof of relationship. Furthermore, the foregoing can often be handled by a family member of the defendant, without your getting involved at all. My thanks to Jeff and Joe for this information.

### **INTEGRATED DOMESTIC VIOLENCE COURT**

I have been advised by the Court that certain attorneys on the IDV Panel are avoiding IDV cases because they don’t feel comfortable with the dual nature (Family Court – criminal court) of the representation. The whole point of having such a Panel is to have attorneys on it who are able to handle the dual aspects of the case. If you are one who feels uncomfortable and want to be removed from the IDV Panel, let me know and I will accommodate you. If you choose to remain on this panel, please do not shy away from such cases in the future. Thank you.

### **ANNUAL CRIMINAL LAW AND PROCEDURE UPDATE**

Our Annual Criminal Law and Procedure Update will be held on Friday, October 17, 2008, from 1:30 to 4:30 PM in the Central Jury Room of Supreme Court. A flyer is enclosed with this mailing. Please fill it out and **fax it back to the Nassau academy of law at 747.4147** if you wish to attend. This program is free to all 18B Panelists in good standing.

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<sup>3</sup>Hock v. Kline 304AD2d477 (1<sup>st</sup> Dept. 2003)  
Molina v. City of New York 28AD3d372 (1<sup>st</sup> Dept. 2006)

## **ADDITIONS TO EXPERTS' PANEL**

The following experts have been added to our Experts' Panel

### **EYEWITNESS IDENTIFICATION**

Dr. Jennifer Dysart  
John Jay College  
Dept. of Psychology  
445 W. 59<sup>th</sup> Street  
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212.484.1160

### **INVESTIGATION**

Rick Arden  
Private Investigator  
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Robert M. Picciano  
2469 Merrick Ave.  
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718.979.6700  
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I thank you all for your continued contributions to the 18B program.

Very truly yours,

Patrick L. McCloskey