

February 10, 2009

Dear Panelist,

This letter addresses the following topics:

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- CLE – Spring Program – Criminal Courts
- New Jail Visiting Hours
- Crimetime Program Available
- Experts Not on Panel
- Communication With Clients
- 30.30 Motions
- Preserving Dismissal Issue for Appeal
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- Mendoza and Motions to Suppress
- Notice of Other CLE Programs
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CLE – SPRING PROGRAM – FAMILY COURT

The Spring CLE program for Family Court practitioners has not been finalized, but a date and time have been set. The program will be held at Domus on May 7, 2009 from 5:30 to 8:30 PM. Please save the date if you wish to attend. This program is free to all 18B attorneys in good standing.

CLE SPRING PROGRAM – CRIMINAL COURTS

We have not yet finalized the CLE program for criminal practitioners for the Spring of 2009. If you have a suggested topic that you think would benefit our panelists and/or if you are willing to participate in such program, please note your suggestions on the attached sheet and fax it back to me at your earliest convenience. Thank you.

NEW JAIL VISITING HOURS

Effective February 20, 2009, there will be no attorney jail visits on Thursday or Friday mornings. In addition, visiting is closed on all Saturdays, Sundays and County holidays.

That leaves the following visiting hours for attorneys and family members:

Monday, Tuesday and Wednesday: 8 to 11 AM and 12 to 4 PM

Thursday and Friday : 12 to 3 PM and 4 to 8 PM

Panelist Joe Lo Piccolo points out that the reality of the 4 to 8 PM visits is, as a practical matter, 7 to 8 PM, because the feeding of inmates and staff during those hours will effectively prevent prisoner movement before 7 PM.

CRIMETIME PROGRAM AVAILABLE

Crimetime is the free sentencing software program that used to be on the Hotlinks section of our website but is no longer there because the program was not updated after the death of its founder, George Dentes.

I have now learned that the program has been acquired and updated by the New York Prosecutor's Training Institute (NYPTI) and is available to all, including criminal defense attorneys, on the NYPTI website. To access the program, go to "crimetime.nypti.org" and enter your email address under the disclaimer section at the bottom of the page. Note: you may have to disable your popup blocker temporarily, in order to access the sentencing information.

EXPERTS NOT ON PANEL

As you know, we have an extensive list of Experts in virtually every field. You can access the complete list on our website (nassau18b.org).

Recently, I received applications from experts who were not on our list but who sought to be included because **they had already rendered services on an 18B case at the request of an 18B panelist**. This is impermissible. If you need an expert, use one who is on the Expert's Panel. If there are none there, call me and I will work with you to find one and get him/her on the Panel **before, not after**, you use their services.

COMMUNICATIONS WITH CLIENTS

I continue to receive phone calls and letters from inmates at the jail to the effect that "I've been in jail for four months and I've never seen my lawyer". I'm aware that sometimes these complaints are exaggerated. I am also aware that in many cases they are not. **The number one problem that causes a breakdown in the attorney-client relationship is a failure on the part of the attorney to keep an open line of communication with the client.**

You are reminded of paragraphs 8 and 9 of our Rules and Regulations and asked to be sure to comply with them:

8. Panelists should visit incarcerated defendants within 48 hours of assignment. Travel time to and from court is not billable, but travel time to and from the jail is billable.
9. Panelists should communicate with assigned clients in person, immediately after each court appearance and by letter or telephone when there was a conference where the incarcerated defendant was not produced.

30.30 MOTIONS

It has been brought to my attention that in cases where there is a viable 30.30 motion before the court, the District Attorney's Office is moving to dismiss in the interest of justice rather than allow the case to be dismissed on speedy trial grounds. This is presumably being done to avoid embarrassing statistics in the 30.30 area. I am trying to determine if these instances are isolated, or part of a bigger picture. If you have had any personal experience with such a situation, please let me know by completing and faxing me the annexed sheet. Thank you.

PRESERVING DISMISSAL ISSUE FOR APPEAL

Last fall the Court of Appeals decided *People v. Hawkins*¹, wherein they ruled that in order to preserve for appellate review a challenge to the legal sufficiency of the evidence, the defense attorney must not only move to dismiss but must refer specifically to the challenged area.

In *Hawkins*, at the close of trial, the defense attorney moved for an order of dismissal as follows:

“ I respectfully submit that the People have failed to prove a prima facie case of depraved indifference murder. Not only have they failed to prove a prima facie case that my client Bryan Hawkins was the perpetrator of the homicide. . . but they failed to prove that Mr. Hawkins acted with depraved indifference murder in that matter.

In ruling that this generic language **was insufficient to preserve the issue for appeal**, the Court noted:

To preserve for this Court's review a challenge to the legal sufficiency of a conviction... the argument must be “specifically directed” at the error being urged—general motions simply do not create questions of law for this Court's review....

¹ 11NY3D 484 (2008)

Sound reasons underlie this preservation requirement ...a specific motion brings the claim to the trial court's attention, alerting all parties in a timely fashion to any alleged deficiency in the evidence, ...A defendant's motion for a trial order of dismissal that specifies the alleged infirmity helps to assure that legally insufficient charges will not be submitted for the jury's consideration, and serves the overall interest in an efficient, effective justice system.

Viewing the preservation requirement in the context of the individual trial, it is defense counsel who is charged with the single-minded zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the argument to be advanced on the client's behalf.

Please keep this in mind when you move to dismiss for lack of evidence. If you do not specifically address the area of infirmity, our Appellate Panelists will not be able to argue the point(s) on appeal.

DWI – PRINGLE HEARINGS

Although DWI defendants are not normally 18B defendants, there are times when they might be. That, coupled with the District Attorney's draconian policies regarding DWIs with readings over .13, led to Panelist Steve Raiser's suggestion that in such cases it's important for us to utilize all of the weapons at our disposal.

Steve suggests that the little known Pringle Hearing² is one such weapon and in fact a great one. Steve indicated that after reading **Pringle** carefully, he invoked it for the first time in Arraignment B last month and, based thereon, the license of his client (.15 BAC) was not suspended pending prosecution.

I am advised that Panelist Karl (Chip) Seman wrote a comprehensive two-part article on this topic. Chip advises me that you can access this article on his website (gslawyers.com) by typing "Pringle" in the search box at the bottom of the homepage. My thanks to Steve for bringing this matter to my attention and to Chip for his valuable research on the topic.

DWI – CONDITIONAL LICENSES

Panelist Kim Lerner received a letter from the New York State Department of Motor Vehicles, indicating that in a DWI case where a defendant is placed on probation and is subject to "condition number 6", a probationer can now, after the revocation period expires and with Probation's consent, obtain a full license, rather than only a conditional one as was previously thought to be the case. A copy of that letter is enclosed for anyone interested. We thank Kim for her contribution.

² Pringle v. Wolfe 88NY2d426(1996)

MENDOZA AND MOTIONS TO SUPPRESS

C.P.L. 710.60 states that on a motion to suppress evidence, the defendant's motion papers must state the grounds for the motion and must also contain "sworn allegation of fact" supporting such grounds. In the case of *People v. Mendoza*³ the Court of Appeals ruled that conclusory allegations of a general constitutional violation or lack of probable cause are of no avail in meeting the statutory requirement.

Panelist Steve Raiser filed a motion to suppress late last year with Judge Ricigliano who denied it based upon *Mendoza*. Steve then filed a motion to reargue and, based upon the papers he submitted, Judge Ricigliano reversed himself and granted the hearing. Part of Steve's reasoning was that a particular part of *Mendoza* originally cited by the court was not a sword for the government but a shield for the defense. If anyone wants a copy of Steve's reargument papers, please call the office and we will fax them to you. Again my thanks to Steve for sharing this with us.

NOTICE OF OTHER CLE PROGRAMS

A Dean's Hour at Domus, entitled "Immigration Consequences of Criminal Convictions" will be held from 12:30 to 2 PM on Thursday, March 19, 2009. Cost is \$35 for 1 CLE credit and lunch.

The 23rd Annual Metropolitan New York Trainer will be held on Saturday, February 28th, 2009 at NYU Law School; 6.5 CLE credits will be awarded.

Former Panelist George Terezakis is participating in a 3-credit CLE program entitled "The Intersection of Criminal and Immigration Law". It will be held on Wednesday, February 18, 2009 from 6 P.M. to 9 P.M. at the New York City Bar on 44th Street.

Anyone interested in attending any of these programs should call this office and we will send you a brochure.

E MAIL ADDRESSES

We are trying to compile a complete list of current E Mail addresses of our Panelists. Please complete that portion of the enclosed form and fax it back to us at your earliest convenience. Thank you.

³ 82NY2d415 (1993)

ADDITIONS TO EXPERTS PANEL

The following have been added to our Experts Panel:

INTERPRETERS

SPANISH

Rodolfo A. Escalante
19 Firwood Road
Port Washington, NY 11050
516.883.2634

Mercedes S. Lokich
26062 75th Avenue, Apt. 1
Glen Oaks, N.Y. 11004
917.864.1350

Mercedes@mercedeseis.com

UKRANIAN, RUSSIAN, ITALIAN

Yelena Posina
45 Royal Court
Rockville Centre, NY 11570
516.455.0588

HINDI, GUJARATI, BENGALI, URDU, PUNJABI

Nita Shah
47-39 157th Street
Flushing, New York 11355
917.912.0338

INVESTIGATORS

Wayne Rogers c/o Centurion Solutions
148 Cedar Drive
Massapequa, NY 11758
516.308.3437

Scott A. Flaum
134 Jefferson Ave.
Island Park, N.Y. 11558
516.398.5755

Walter L. Hickey c/o Balmoral Associates LLC
P.O. Box 512
Harriman, NY 10946
845.629.4896
Fax # 845.238.2956
Email Whickey@Balmoralinvestigations.com

Richard Kemmler
Incogna, Inc.
P.O. Box 229
Williston Park, NY 11596
516.742.5172
Fax #@ 516.873.0157

D. Rivera Investigations, Inc.
Diego Rivera
3930 Richmond Ave.
Staten Island, NY 10312
718.227.0098

POLYGRAPH

Diego Rivera
3930 Richmond Ave.
Staten Island, NY 10312
718.227.0098

PSYCHOLOGY / SOCIAL WORK

Isaac Benzaquen, Ph.D.
Benzaquen Psychological Services, PLLC
143 Maple Avenue
Cedarhurst, NY 11516
516.295.4104

Michelle Kane LCSW, BCD
26 Fairbanks Blvd.
Woodbury, NY 11797
516.367.1087

Frank A. Mannarino
Emoshuns, Inc.
237 West 37th Street
New York, N.Y. 10018
212.595.3601
Email Frank@emoshuns.com

Edward J. Tucker, LCSW
659 Cambridge Road
Paramus, NJ 07652
201.599.1049
Email Edward J. Tucker socialworkforensics@yahoo.com

SUBSTANCE ABUSE

Frank A Mannarino
Emoshuns, Inc.
237 West 37th Street
New York, NY 10018
212.595.3601
Email Frank@emoshuns.com

My best wishes to each of you for a healthy, happy and successful new year.

Sincerely,

Patrick L. McCloskey

PLEASE FAX THIS SHEET BACK TO 873.8032

IDEAS FOR SPRING CLE PROGRAM

If willing to participate, check here _____

CURRENT E MAIL ADDRESS

30.30 DISMISSAL EXPERIENCE(S)

REQUEST FOR MENDOZA PAPERWORK

PLEASE FAX ME THE PAPERWORK _____

REQUEST FOR CLE BROCHURES

PLEASE FAX ME THE DOMUS DEAN'S HOUR _____

PLEASE FAX ME THE TRAINER BROCHURE _____

PLEASE FAX ME THE IMMIGRATION BROCHURE _____

NAME (PRINT)

FAX NUMBER