

September 29, 2010

Dear Panelist,

This letter covers the following topics:

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UPCOMING CLE PROGRAMS

The Annual Criminal Law and Procedure Update will be held this year on Friday, October 29, 2010 in the Central Jury Room in Supreme Court, from 1:30 to 4:30 P.M.

The Fall “Family Court” program will be held this year on Wednesday, November 17, 2010 at Domus, from 5:30 to 8:30 P.M.

Each of these programs is free to all members in good standing – you may attend one or both, at our expense. If you wish to attend the Criminal Update, please complete the enclosed flyer and fax it to the Nassau Academy of Law at 516.747.4147. A flyer for the Family Court program will be made available in the near future.

SHARING FOR SUCCESS COMMITTEE

Judge Edmund M. Dane, Chairperson of the Sharing For Success Committee in Family Court, provided me with a 57 page Resource Manual, setting forth contact information for various services, including but not limited to anger management, adolescent services, chemical dependency, family bereavement, psychiatric care and web based resources.

A copy of this Manual is now on our website (nassau18b.org) and can be found by clicking on the “Additional Pages” box on the left side (halfway down) of our home page, then clicking on “Hotlinks”, then clicking on “Sharing For Success”.

FAMILY TREATMENT COURT

Judge Robin Kent called me recently to say that she is interested in having Family Court Panelists volunteer to appear in the Family Treatment Court at 2:15 on Wednesday afternoons, with the possibility of accepting assignments there. If you are interested and so disposed, please consider helping out. Thank you.

TEN SUGGESTIONS FOR APPELLATE PANELISTS

The following are ten suggestions compiled by two of our appellate panel members, Marianne Karas and Dick Barbuto. The suggestions are in no way exhaustive but may assist our appellate members in their brief writing and with their relationships to clients. My thanks to Dick and Marianne for their contribution.

1. Contact your client early and often after you receive an appointment from the court. Good communication is often the difference between a good and bad relationship with your client, having nothing to do with the actual brief that you write.
2. Advise your client to feel free to ask questions and make suggestions. Encourage the client to be part of the process, but see below.
3. Explain to the client that you are bound by the record and now is not the time to raise new arguments.
4. Explain to the client that you will not make frivolous arguments on his behalf. (That’s why God invented pro se briefs). That said, if there is a claim that defense counsel raised below or that you think should be raised even if it isn’t exactly the law right now—raise it. Dick started doing appeals on the defense side right as Ranghelle, the discovery case, had just come down and was wreaking havoc in the courts. Marianne got a murder case reversed, mostly because trial counsel did such a good job arguing a discovery violation. When Dick asked Marianne what even made her think of arguing it since it really wasn’t the law at trial, she said, “Honey, I’ve been doing this a long time, and

- I'll tell you something. The law changes all the time. If something doesn't feel right, argue it."
5. Explain to the client that you may not raise every argument he/she suggests and that you are in charge of the strategy and tactics to be employed in writing the appeal.
 6. Call the court reporters right away to make sure they got the order too.
 7. Check the end of the hearing to make sure the court put the ruling on the record.
 8. The District Attorney's Office Appeals Bureau is very helpful in finding pieces of the record that may be missing. Sadly, they are usually more helpful than defense counsel.
 9. Never research and brief a hearing point, no matter how exciting, before you've read the rest of the trial. Marianne had a hearing point that Dick knew was going to the U.S. Supreme Court. Unfortunately, the people knew it too and the prosecutor stood up at trial and said even though the court ruled to let the evidence in, they were not going to use it.
 10. As to the brief itself, for what it's worth, try to tie other points back to the main points. Many times, on the rare occasion the Appellate Division overturns a conviction, they'll say things like: "this thing and that thing compounded the error, necessitating reversal". Marianne had a reversal where the court said they wouldn't have looked at standing alone but, as argued, it showed a pattern and tipped the scale.

NEW CLERK IN THE APPELLATE DIVISION AND "SO ORDERED" SUBPOENAS

After many years on the job, the Chief Clerk of the Appellate Division, Second Department, James Pelzer, retired this summer. He has been replaced by Matt Kiernan. I have known Matt for a number of years and he's a good man.

I recently brought to Matt's attention a 2002 letter I wrote to our Appellate Panelists regarding "so ordered" subpoenas. I am enclosing a copy of that letter herewith. I asked Matt if he would continue to honor the agreement I had with Mr. Pelzer in this regard and he said he would. Please make note of the name change if you seek to have subpoenas "so ordered"

JAIL PROCEDURE RE ELECTRONICS

Panelist Joe LoPiccolo advises that he recently had a client who wanted to watch the video of his alleged crime in the law library at the jail. In order to accomplish this, Joe had to comply with the jail's procedure, which is set forth on a separate sheet at the end of this letter. Joe advises that this is different from a case where an attorney merely

brings in a cd/dvd for the client to see during a visit. The latter goes through the Sergeant in visiting, usually with just a phone call ahead of time.

IMMIGRATION HOTLINE

With the advent of **Padilla v. Kentucky** I am reminding you that the New York State Defenders Association runs the Immigrant Defense Project. This project is devoted to defending the rights of immigrants facing criminal or deportation changes. There is a free telephone hotline available for defense attorneys to call, offering legal support and guidance on criminal and immigration law issues. Hotline hours are Tuesday & Thursday from 1:30 to 4:30, but you can leave voicemails at other times. **The number is 212.725.6422.** Please make a note of it and use it whenever the need arises.

COUNTY COURT MOTION PRACTICE

As our Felony Panelists know, earlier this year, County Court published rules for the filing of motions and orders (except orders for court reporter transcripts) to be filed in the Clerk's office. A copy of the Court Rules are enclosed at the end of the letter.

Some people have described this new procedure as a nightmare but I have been advised that if you need a particular order expedited, they will hand walk it up to the Judge, will email you a copy of the signed order or will mail it to you if you provide them with a self addressed stamped envelope. If you continue to have nightmarish experiences as a result of this new procedure, please let me know.

YOU TUBE DON'T TALK TO COPS

Panelist Dick Barbuto alerted me to a very interesting video on "youtube.com". If you go to that website and type "Don't talk to cops" in the search box, you will be led to two related videos: the first by a law school professor (27 minutes 14 seconds) and the second by an experienced police officer (21 minutes 14 seconds). This presentation is entertaining, informative and thought provoking. If you practice criminal defense, you will find it quite worthwhile. If you don't, you will find it even more worthwhile.

JUDICIARY LAW ASSIGNMENTS

In 2006, the New York State Legislature enacted subdivision 8 to Section 35 of the Judiciary Law, providing for the assignment of counsel to indigent defendants in Supreme Court matrimonial cases **NOT** with respect to the matrimonial aspect of the case, but with respect to items such as permanency hearings, contempt and violation of probation hearings.

In January of 2007, I wrote to all of our Family court Panelists to advise them that pursuant to Subdivision 5 of section 35, **all expenses under the Judiciary Law are paid by the state. This includes expert witnesses.**

Recently it has come to my attention that some of our criminal court Panelists have been assigned to such cases under the Judiciary Law and have filed 18B vouchers with me. This is incorrect. If you are assigned in Supreme Court pursuant to the Judiciary law, you must obtain state vouchers and file them in accord with Supreme Court rules. If you have any questions, you should call Lynn Pinto in Supreme Court at 571.2400.

PRESERVING ERROR

Once again, the failure of some of our trial lawyers to preserve error for our Appellate Panelists rears its ugly head. It has been said that a good trial lawyer should try a case with one eye on the trial and the other on the appeal. Unfortunately, it seems that some of our “best” trial lawyers are trying their cases with two eyes on the trial and none on the appeal. Simply, and perhaps somewhat harshly, stated, if you are a good trial lawyer who is not good at preserving error on appeal, then maybe you are not such a good trial lawyer after all.

In 2008, 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 facia case of depraved indifference murder. Not only have they failed to prove a prima facie case that my client Brian Hawkins was the perpetrator of the homicide... but they failed to prove that Mr. Hawkins acted with depraved indifference murder in that matter.

¹ 11NY3D 484 (2008)

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.

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.(emphasis supplied)

Please keep this in mind. If you do not **specifically** address the area of infirmity, our Appellate Panelists may not be able to argue the point(s) on appeal. If the trial judge attempts to stop you from making a record, you can argue that the Court is denying you access to the record and/or denying your client effective assistance of counsel pursuant to Article 1, Section 6 of the New York State Constitution and pursuant to the Sixth Amendment of the United States Constitution.

GUIDE TO FULFILLING COUNSEL'S OBLIGATIONS UNDER PADILLA

I am in possession of a 12-page article entitled "A Guide to Fulfilling Counsel's Obligations under **Padilla**, to Advise Criminal Defendants of the Immigration Consequences of Criminal Dispositions". If you would like a copy faxed to you, please fill out the Request Form at the end of this letter and fax it to us at 516.873.8032.

MOTION DAYS FOR POOR PERSONS' APPEALS

Panelist Steve Barnwell advises that if you assist your convicted client in making a motion for assignment of Appellate Counsel as a poor person, be aware that such motions must be made returnable on a Friday only.

RESUMES OF EXPERT WITNESSES

Panelist John Lewis suggested that we post the resumes of all of our Experts on our website. I think it's a good idea but it will take time. In the interim, I am beginning to catalogue the resumes we do have. If you would like to compare resumes of different experts, please let me know and I will try to accommodate you.

ADDITIONS TO EXPERTS' PANEL

The following experts have been added to our Panel:

INTERPRETERS

Hebrew

Meir Turner
New York, N.Y. 10039
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Spanish

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INVESTIGATIONS

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MEDICINE

OB/GYN

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Cell: 540.741.9277
Beeper: 845.416.8920

As we enter another trial season, I thank you all for your continuing good work on the Panel.

Very truly yours,

Patrick L. McCloskey

REQUEST FORM
(To Be Faxed To 516.873.8032)

Please fax a copy of the **Padilla** article to me:

Name (Print)

Fax Number