

# From My Vantage Point\*

by Jonathan E. Gradess

## Hope for 2003

I wish for each of you a New Year filled with hope—a hope for joy, for peace, and for the continued opportunity to fight for justice even when it seems but fleeting. That said, we have our work cut out for us.

The end of 2002 foretold much—but not all—of what this new year will bring.

## Public Defense Services

The “90/90” train I wrote about last summer (\$90 per hour in-court/\$90 per hour out-of-court) continues to move toward Albany. As it does, counties have begun to look at abandoning their assigned counsel programs to avoid cost increases arising from the *New York County Lawyers Association* and *Nicholson* cases, and extraordinary fee litigation around the state. Monroe and Broome counties are exploring conflict defender offices. Cattaraugus and Essex counties have switched to Public Defender offices. New York City has cut its assigned counsel budget in half, increased funding to The Legal Aid Society, and is looking to place its assigned counsel family court cases with other institutional providers. More change promises to be on the way.

We must remain vigilant to make sure that new public defense models, forged in the cauldron of cost savings, are effective delivery mechanisms for our clients. If new models are not, we must be ready to fight for their improvement.

I will be spending time this year trying to garner more support for the establishment of an Independent Public Defense Commission, which can act to promulgate standards and serve as the conduit for state funding of public defense services. The events described above make clearer than ever the need for a commission. No guidelines exist for switching and redesigning systems. No standards are in place for what new systems should look like. No brake has been systematically placed on caseloads. There has been no assurance of parity with the prosecution. What we have seen is the abandonment of old systems for new based on fear that the cost of a constitutional assigned counsel defense will be too much to bear. If any new systems work well, they will do so because luck was with our clients or because good people intervened, not because we have a method in place to assure the right to effective defense services.

Such a state of affairs simply cannot continue.

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\* The REPORT will periodically feature a column by the Association's Executive Director on major issues concerning public defense in New York State.

## Drug Law Reform

We ended the election year without Rockefeller Drug Law reform. Some think that by not achieving change in an election year, we lost our best shot. They may be right, but sentencing reform has never been more needed than it is today. The drug laws and drug law enforcement have never been seen as more bankrupt. Voters, polled on the subject, continue to believe in treatment. Mandatory sentencing and long-term incarceration, daily discredited, will some day be gone in New York. Ours is the challenge to get rid of them no matter how long it takes. While I had hoped for reform in 2002, I'm reminded by history that election-year reforms usually wreak havoc for our clients. I take heart from the recent repeal of Michigan's mandatory minimum sentences for most drug crimes, and press on.

## Looking Backward For A Moment

A major reform of the substantive and procedural criminal law of this state took place between 1964 and 1971, resulting in the “new Penal Law” of September 1, 1967 and the Criminal Procedure Law of 1971. Consequently, by the fall of 1971 a defense lawyer in New York representing someone on any offense below a homicide had the opportunity (using the numerous sentencing tools made available in the CPL) to fully advocate, under the Penal Law, for an appropriate alternative to incarceration. Within 24 months, Governor Rockefeller's 1973 drug law cut short these widespread, meaningful, yet nascent reforms. Legislatively-determined mandatory sentences, since shown to be cruel, costly and counterproductive, replaced the work of the New York State Commission on Revision of the Penal Law and Criminal Code. Hopes for the flowering of genuine sentencing advocacy, the fashioning of meaningful sanctions, the adversarial testing of proposed dispositions in open court, and a distinct role for probation, prosecution, defense and judge were dashed.

The laws which indecently married second felony offender and drug law sentencing (1973) have been generating election-year clones for the ensuing three decades: 1976—designated felonies; 1978—violent felony offender and juvenile offender laws; 1980—mandatory gun sentencing; 1982 to 1986—proposed racially discriminatory sentencing guidelines; 1994 to 1995—executions; and 1998—Jenna's Law, with its labyrinthine calculations of post-release supervision replacing parole.

Since 1973, New York has squandered taxpayer money to finance drug enforcement policies that cast primarily Black and Latino people into concrete dungeons. Sentences that are cruel, mandatory, and disproportionate destroy them, their families, and their communities. At the same time, mandatory drug law sentencing has radically altered the courtroom, restricting the power of judges and enhancing the power of district attorneys.

**What Should Be**

Judges should be legally allowed to view people individually, protecting public safety by interdicting obvious patterns of addiction and drug abuse through *meaningful* treatment. People charged with crimes, yet dependent on drugs, should presumptively be treated, not punished. Credible extenuating circumstances to counter this presumption can be presented by prosecutors in the old-fashioned way—in open court.

Returning to the time when drug treatment could be a court disposition for any case should be the standard. Against this measure, the election-year proposals by the Governor and the Assembly both fell short.

Exclusions in both bills would have continued the discredited practice of legislatively defining in advance the appropriate disposition for drug dependent people. But the Governor and the Legislature cannot define based on the names of penal offenses who should and who should not receive treatment. This should be a clinical and judicial decision made on a case-by-case basis at the appropriate time and place, under all the circumstances, with the prosecutor available to protect the public interest if any particular offender is deemed unworthy of therapeutic intervention.

The basic dignity of the human person and respect for the men, women, and children left in the wake of drug dependent criminality should be ensured by the repeal of the Rockefeller/Wilson/Carey/Cuomo/Pataki drug laws, not left to tinker's chance or the readied whim of prosecutorial discretion.

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**The Future—Joint Re-entry Efforts, Gideon at 40, Back to BTSP**

At the end of 2002, we started a dialogue among civil legal services providers and defenders to begin efforts at collaborative representation and service delivery for prisoners reentering society. A meeting late last year forged an alliance between us and with client community representatives that will bear fruit this year. You will be hearing

David Feige, Trial Chief at The Bronx Defenders, received the Reginald Heber Smith Award at the 2002 National Legal Aid and Defender Association (NLADA) Annual Conference in November.



more about this as the groups work in partnership with one another to reduce disabilities for ex-offenders, draft a reentry manual, and develop greater civil/criminal cooperation.

By February, we hope to have a second community organizer working within the client community to help give voice to client efforts to improve the quality of public defense services. In cooperation with our client advisory board, this organizer will be continuing our fact finding hearings—in the client community, among farm workers, and with Native American communities—and helping to develop client community support for improvements in the public defense system.

On March 18, 2003, we hope to have all of you in the capital for the 40th anniversary of *Gideon v Wainwright*. In addition to Gideon Coalition legislative visits, a press conference and an exhibit in the hall of the Legislative Office Building, we will be holding a Client Speak Out in the Capitol.

Also, I'm happy to announce that after a one-year hiatus caused by last year's budget debacle, the Basic Trial Skills Program will be back. Plan for it—bigger and stronger than ever, June 1-7, 2003.

We expect to have a hard budget year but also work that fills us with challenge and opportunity. We welcome your input, your help, and your continued support.

**Some Final Thoughts**

In 2003, as we face the world of problem courts that treat human services for our clients as if they were a newly minted coin, we must together be vigilant. As we face a year in which 9/11 and the national recession will be used to excuse services cuts, we must together call for responsible progressive taxation. As we see further encroachments on the rights of our clients, less respect for the Bill of Rights, more use of secrecy, and less fidelity to the Constitution, we must together stand up for what we believe is right regardless of the unpopularity or the price of doing so.

It is an honor to work shoulder to shoulder with people like you, devoted to justice. ♪

The NLADA Conference brought together NYSDA Advisory Board Chair Marion H. Hathaway (far right), Executive Director



Jonathan E. Gradess, Lawyer Jolanta Teresé Litvinskė of the Public Defender Office of Vilnius, Lithuania (far left) and Valerie A. Wattenberg, Esq., consultant to the Vilnius Public Defenders Office.