

# Message from the Chair



This is my last column as Chair of the Section. As it is written on February 4, 2013, the prospects for change on several issues—eyewitness identification, false confessions, *Brady* compliance—are currently being discussed in various forums. The Justice Task Force convened by Justice Lippman has commenced discussions re discovery reform and the New York State

Bar Association has a committee appointed by President Seymour James dealing with discovery issues. At the Annual Executive Committee Meeting in January, 2013, I announced, after discussions with the officers, that the Section would form a Litigation Reform Committee which would simultaneously investigate and report on the problem of ineffective assistance of counsel and how that issue is dealt with by the disciplinary system, a subcommittee which would explore the creation of a model CLE program for teaching *Brady* compliance and also develop a publication which would delve into the ethical obligations associated with the same, and finally a subcommittee which would engage in a root cause analysis of *Brady* non-compliance and make appropriate recommendations for change. The last committee would be comprised of an equal number of prosecutors and defense attorneys with a non-voting chair. We can expect that the work of all the committees will take a year.

The *Brady* non-compliance subcommittee is the most controversial. The reasons for establishing such a committee are self-evident. First, the cases keep on coming. In *Lopez v. Miller*, Judge Garaufis found that the defendant did not receive a fair trial and ordered his release from prison after 23 years of incarceration. Mr. Lopez was the victim of the perfect storm: ineffective assistance of counsel, judicial failure to give meaningful consideration to powerful defense arguments, and the prosecutor's false representation to the trial court that a "contract" was not discussed with the witness when in fact it had been discussed in another court before another judge, the "contract" being testimony against Mr. Lopez in return for consideration on a pending VOP. The court, echoing words that were previously alluded to by Judge Walker in *People v. Waters*, a Bronx case where a mistrial was granted because of the prosecutor's "act of deceit," said Mr. Lopez had been wronged at the hands of "an overzealous and deceitful trial prosecutor." The defense attorney, egregiously, had failed to interview alibi witnesses that could have been helpful to the defense.

In Sullivan County, Judge Frank LaBuda declared a mistrial in a sexual abuse case when it was discovered at trial that *Brady* material had not been revealed to the defense. In his decision Judge LaBuda rejected the prosecutor's claims that the material was not *Brady*, noting that the material was clearly identifiable as *Brady* material and that it had not been given to the defense in a timely manner so as to permit its proper usage in defending the client. Additionally, the court stated that aside from the duty to disclose *Brady* material, there is an additional duty to inform the court of the "existence of material not believed by them to require disclosure but as to which there may exist an element of doubt." *People v. Gonzales*, 74 AD 2d 763, 765 (emphasis supplied).

The *Brady* issue is not going away. The National Association of Criminal Defense Attorneys has secured sponsorship of a *Brady* reform bill before Congress. Three different authors have recently written law review articles analyzing the possible causes of non-compliance. Section member Joel Rudin has written a law review article in the *Fordham Law Review* which recounts several *Brady* abuses occurring in New York City cases. Jack Welch of the Department of Justice has written in the *National Law Journal* that *Brady* problems stem from a "conflict of interest" that prosecutors have since they believe the person they are prosecuting committed the crime but are confronted by evidence which may indicate that is not the case. This focused attention requires that the issue be undertaken by the Section.

As you are aware, in September the Section Executive Committee passed a motion that it is *not* the position of the Section that District Attorneys teach their assistants to violate *Brady*. That alone, in conjunction with the currency of the issue, should be enough to insure that the Section undertakes a position. Far more important, however, is the need to air this issue in a fair way so as to end the disconnect between the prosecutors and the defense bar regarding this issue. Many defense counsels believe that *Brady* material is withheld, just as many prosecutors claim there is no *Brady* problem at all. Such a gulf on any issue among lawyers for both sides must be bridged if there is to be an end to the far too many cases where the courts continue to find *Brady* being violated.

To be sure there are many prosecutors who have never violated the *Brady* mandate but are at a loss to provide an explanation for the repeated violations. Yet the case law clearly indicates that a pattern of violations exists from the highest levels of the Department of Justice all the way down to local courts. Some prosecutors have advanced the notion that more training is needed. In July/August, 2012, however, several prosecutors in letters to the *New York Law*

*Journal* indicated that training is already being done, and in fact, extra training is the order of the day. If that is so then something is wrong with the training based on the case law results. More importantly, no one has offered a concrete reason why training is the answer because no one has yet analyzed what is causing the non-compliance. Is it seriously being contended that after 50 years of decisions and training programs prosecutors do not understand *Brady*? Several authors have suggested the problem lies in the lack of accountability, specifically a veiled disciplinary system that rarely sanctions prosecutors for *Brady* failures. Of the many parts to the puzzle clearly the disciplinary system which applies to all lawyers is in serious need of reform.

Change is difficult and often engenders resistance. Some people are ready to change and others are not. Change will come, however, because our system of justice has yet to attain the levels of fairness guaranteed by the Constitution. Compliance is merely following the law. As for the Section, we will be better off for tackling this issue by having all voices heard even if the debate will be painful. We simply can no longer look the other way.

**Marvin E. Schechter**

**The opinion expressed in this column are solely those of the Chair and do not reflect the position of the New York State Bar Association or the Criminal Justice Section.**

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