



# NEW YORK DEFENDER

Chief Defenders Association of New York  
Newsletter

## PRESIDENT'S MESSAGE

**LAURETTE D. MULRY**

*Attorney in Charge, Legal Aid  
Society of Suffolk County, Inc.*

**Welcome to the inaugural  
issue of the New York  
Defender, a digital  
newsletter offered to CDANY  
members quarterly to  
keep us in touch, informed**

**and inspired.** This newsletter offers the opportunity to provide a recap of the work of CDANY, from topics of interest discussed on Friday Chiefs Calls, to the valuable and vibrant accomplishments of our Standing Committees and ad hoc Task Forces. We also want to keep you informed about CDANY's considerable efforts as a voice for our membership, and in collaboration with affinity associations and community alliances to effect much-needed systemic reform.

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Welcome to the first issue of  
CDANY's Quarterly Newsletter!

In this issue, we're covering  
CDANY activities and highlights  
through the end of 2020 and  
into 2021.

In each subsequent issue, look  
for details and highlights from  
the previous quarter!

Have suggestions? Email us at  
[cdanyoffice@gmail.com](mailto:cdanyoffice@gmail.com).

Chief Defenders Association of New York  
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[www.cdany.info](http://www.cdany.info)

We will include a list of advocacy letters to which we signed on, memos of support we have issued, and missives of particular concern we have sent, further examples of the presence and persuasive efforts of our group.

Our association has grown in leaps and bounds in less than a decade. This is due to the tireless and continuing efforts of so many dedicated Chiefs whose foresight guides us to always want to do better for our clients. The collaboration and support of our members helps us to achieve our goals, as administrators and attorneys. I myself have learned so much from all of you, and have found an invaluable support system of fellow Chiefs in these challenging times.

We are publishing our inaugural issue in March, a month which of course marks a solemn anniversary for all of us. It was one year ago that we transitioned from actual courtrooms to virtual courtrooms, and from brick-and-mortar offices to at-home offices. As we reflect on the lessons learned from this tumultuous year, one thing is for certain...we have persevered! We shifted the very

nature of the work we do and how we help our clients. We have adapted and embraced technology in ways that are otherwise anathema to public defenders who rely on in-person proceedings and confidential client communications. We fought a humanitarian crisis in our jails and prisons, a continuing and valiant effort that shows how deeply we care about our clients. We have never stopped fighting.

As we embark on a second year of pandemic strife, CDANY stands strong and ready to help our members through the arduous journey ahead. I can think of no better group with which to navigate these troubled waters. We will be stronger for it!



## CDANY Board of Directors

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# Highlights from Fall & Winter 2020

At July's CDANY Annual Meeting, we shared our Annual Report from July 2019 - June 2020. You can review that report online here: <http://bit.ly/CDANYAnn20>

Below, please find some highlights from the Fall & Winter of 2020 as a follow-up to that report!

- Established **Family Court & Appellate Practice committees** to review issues related specifically to those practice areas
- Signed on to five **Amicus Curiae** briefs:
  - People v. Nolis Ogando & People v. Lance Rodriguez: Appeal Waivers in Police Misconduct Suppression Issue Cases;
  - People v. Bernard Shanks: Involves the waiver of the right to appeal after a trial of a judicial misconduct/right to counsel claim;
  - People v. Howard Powell: Involves the admissibility of false-confession expert testimony.
  - People v. Donovan Buyund: Asks whether a sentencing court's certification of defendant as a sex offender is part of the sentence which would make it reviewable on direct appeal of the judgment of conviction-under review.
- **Legislative Committee** began meeting twice a month on Mondays to prepare for upcoming 2021 Legislative Session. A survey was sent to CDANY members to help establish CDANY's legislative priorities (available here: <http://bit.ly/CDANYLegPri21>).
- Issued a statement condemning the killing of Daniel Prude and advocating for actual justice in our justice system (available here: <http://bit.ly/CDANYPrude>)
- Co-hosted with NYSDA and with input from the Office of Indigent Legal Services the Third Annual Public Defender Career Fair through the University at Buffalo School of Law. The career fair was held via Zoom and had attendees from throughout the United States and internationally.
- Continued to hold regular Friday morning membership meetings via Zoom to discuss important and timely issues. Once a month, these meetings are held with presentations from NYSDA and ILS as part of the agenda. We also highlight other guest speakers on topics of interest.
- The **Race in Public Defense Task Force** sponsored a training with Diversity, Equity & Inclusion Officers for members.
- Signed on to endorse the Justice Roadmap "combating the criminal and immigration legal systems that oppress and criminalize Black and brown communities": <https://justiceroadmapny.org/>

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# Highlights from Fall & Winter 2020

- Endorsed a Release Aging People in Prison (RAPP) Campaign letter calling on the leaders of the Senate and Assembly to support two parole-reform bills: Fair and Timely Parole (S497-A/S4346-A); Elder Parole (S2144/A9040).
- Sent a joint statement with NYSACDL & NYSDA calling on Governor Cuomo to sign the Driver's License Suspension Reform Act (available here: <http://bit.ly/JointDLBill>)

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## Regional Chiefs Meetings in Western New York

David Schopp,  
CDANY Membership Committee Chair  
& Past-President

Over the past few years, most of the chief defenders from the 16 counties in the in the 7th and 8th Judicial Districts have been meeting on a somewhat regular basis to discuss a wide variety of regional and statewide issues. Leanne Lapp, the Ontario County Public Defender, organizes most of the meetings in the 7th Judicial District, and I, the Executive Director of the Legal Aid Bureau of Buffalo, schedules most of the meetings in the 8th Judicial District. Although these meetings have necessarily been virtual over the past year, they previously were in person and often included lunch.

The agendas for our meetings consist of topics suggested by meeting participants as well as the meeting organizer. Meeting agenda items have included of a wide range of issues affecting our offices and clients. For example, some of our recent meetings have included discussions of the following: the ILS 195 report; possible collaborations between offices within the District; County and ILS funding issues; compliance with standards; recruitment issues; changes in the law; issues with the District's Administrative Judges; upcoming CLEs and other training opportunities; differences between county District Attorney offices regarding plea policies; problems in town and village courts; participation or lack thereof in police reform task forces; technology needs in light of increased discovery; and ideas to increase diversity within our offices. Occasionally, representatives from ILS and NYSDA have been invited to participate in these meetings as well as service providers in the area that might be of use to our clients, offices or staffs.

In addition to affording participants a great vehicle for sharing ideas and concerns with regional colleagues, the meetings help foster strong supportive relationships between chief defenders within the district that facilitate the development of a strong united voice when needed to address to a particular issue. For example, when the court system began making court reopening plans, we in the 8th Judicial District objected to the failure to involve our offices in the planning. As a consequence, our administrative judge now seeks out the opinion of each of the District's chief defenders on reopening issues.

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# Trial Lawyer Strategies for Weakening an Appeal Waiver

The **Appellate Practice Committee** of the Chief Defenders Association of New York recommends the following as strategies for defenders to use when the prosecutor seeks an appeal waiver as part of a plea bargain.

**Appellate  
Practice  
Committee**

The case law on appeal waivers is complex, and many waivers are struck down as being badly taken in light of the waiver colloquy or written waiver. Whether an appeal waiver in a particular case will be upheld depends upon a balancing of factors.

It is understood that, depending on the individual circumstances, and the mores of the particular jurisdiction, objections to the appeal waiver may be fruitless, unnecessary, or unwise, in which case they can just be allowed to proceed. None of the following strategies should be used where doing so would genuinely endanger the bargain. Absent such circumstances, however, the following strategies will serve to lower the chances that the appellate court will enforce the appeal waiver:

1. We recommend that public defender organizations adopt a policy, similar to the one adopted by the Legal Aid Societies in NYC and Nassau, of not having their attorneys sign the written appeal waiver. The lack of such signature does not in itself invalidate the waiver, but the signature's presence has been cited by appellate courts as a strong indicator that the waiver in question was knowing and voluntary.
2. In the appropriate case, the defense attorney should ask, on the record, that there be no appeal waiver, either at all or as to a specific issue. If the DA or judge refuses to accommodate that request, then the attorney can of course accede to the waiver. But the DA/judge might agree. The fact that the attorney made the request shows that the defendant is not a "happy camper" and will weaken the waiver.
3. The Second Department has disapproved of appeal waivers initiated by the judge rather than the DA. If it is the judge—not the DA—who is insisting on the waiver, the defense attorney should ask the judge whether that is appropriate. If the judge insists, then the waiver will be at the very least weakened.
4. If there is a suppression issue that would otherwise be allowed to be raised on appeal notwithstanding a guilty plea, the attorney could ask on the record whether it is really the DA's intent that a "police misconduct" issue not be reviewable by the appellate court, and whether that is appropriate. See also item #2 above. If the DA insists, then the waiver is weakened.
5. If the defendant is going upstate for a significant amount of time, with a more-than-minimum sentence, ask that the waiver not cover an excessive sentence argument. See also item #2 above. Again, even an unsuccessful ask weakens the waiver.

## Trial Lawyer Strategies for Weakening an Appeal Waiver

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6. If there is a preserved CPL 30.30 issue followed by the guilty plea, state on the record at the time of the plea that it is counsel's understanding that the 30.30 issue is reviewable on appeal notwithstanding the guilty plea and appeal waiver. (Off the record, of course, advise the defendant that such may not be the case.) If that statement goes unanswered, then it is possible that the defendant can ask the appellate court to vacate his plea as unknowing and involuntary if the 30.30 issue ends up not being reviewable because of the plea or an appeal waiver—and if the defendant wants to raise that issue after being counseled by their appellate lawyer as to the risks involved in plea withdrawal.

7. It is the court's responsibility to make the record reflect that the waiver is valid, not defense counsel's. The defense lawyer should accurately advise their client, off the record, as to the meaning and validity of the waiver's terms, but not make the record better. If the record reveals a flaw in the waiver, counsel should so advise the client but not correct the record.

8. We recommend that the defense organization adopt a policy, with a script such as the ones that the Legal Aid Societies in NYC and Nassau have adopted, of always and as a matter of course asking the sentencing judge to sign a CPL 380.55 order where the defendant is being sentenced to a term in State prison, especially where there is an appeal waiver. (Alternatively, the policy should be that an application to the appellate court for the assignment of appellate counsel should always be made in such circumstance.)

This is a sample script accompanying an on-the-record request for a CPL 380.55 order:

*It's the policy of my office to preserve the right to appeal for every client who's sentenced on a felony conviction. So, notwithstanding the waiver of appeal, our office will be filing a notice of appeal, and then ask that the client be granted poor person relief. CPL 380.55 was enacted in order to streamline the assignment of counsel by having the sentencing court deem the defendant a poor person for the purposes of the appeal.*

## Important Dates & Events

- *Thursday, March 25, 1pm - 4pm: **Second CDANY Technology Meeting for IT Staff***
- *Friday, April 9, 8:45am: **CDANY Membership Meeting** - Guests: Bill Leahy & Patricia Warth, ILS; Susan Bryant, NYSDA*
- *Friday, April 16, 8:45am: **CDANY Membership Meeting** - Lobbying 101 with CDANY Lobbyist Bob Perry - Staff Invited!*
- *Thursday, April 22, 1pm - 4pm: **Public Defenders Virtual Career Fair***
- *Friday, May 7, 8:45am: **CDANY Membership Meeting** - Guests: Bill Leahy & Patricia Warth, ILS; Susan Bryant, NYSDA*
- *Friday, May 21, 8:45am: **CDANY Membership Meeting***
- *Friday, June 4, 8:45am: **CDANY Membership Meeting** - Guests: ILS; Susan Bryant, NYSDA*
- *Friday, June 18, 8:45am: **CDANY Membership Meeting***

# CDANY Board & Committee Updates

The CDANY **Board of Directors** meets monthly to discuss issues relevant to Public Defense and the membership. Recently, the Board voted to send a letter, drafted by the **Court Reopening Committee**, to Governor Andrew Cuomo and NY State Department of Health Commissioner Howard A. Zucker, M.D., J.D. calling for the expansion of Covid-19 vaccination eligibility in Phase 1B to include public defenders,

assigned counsel attorneys, attorneys for the children, and mandated family court attorneys. The letter also included advocacy for incarcerated clients who now reside in the various correctional facilities across the State to have vaccine priority.

A copy of that letter is available on CDANY's web site here:

<http://bit.ly/CDANYVaccineLet>

**Board &  
Executive  
Committee**

Recently, Governor Cuomo announced that public facing not-for-profit and government employees are eligible for vaccination, which includes many of CDANY's members. The Board will continue to advocate for those who are not included.

The Executive Committee is also meeting with CDANY's Past-Presidents to discuss Bill Leahy's retirement from the Office of Indigent Legal Services and the vacancy that creates, as well as the vacancy on the ILS Board.

The CDANY **Amicus Committee** will be filing in a New York Court of Appeals case of People v. Shanks soon; NYSACDL will also be joining on the brief. The issue is the waiver of the right to appeal after a trial of a judicial misconduct/right to counsel claim. It is also considering a possible amicus in People v. Quaniece Taylor related to a Batson issue. This is a recent NY Court of Appeals leave grant, which is on for full briefing.

**Amicus  
Committee**

In February, an amicus was approved and filed in the NYCA case of People v. Howard Powell (admissibility of false confession expert testimony) which will be orally argued in March. The issue is the admissibility of expert testimony on false confessions.

## Registration Now Open For Spring Public Defense Virtual Career Fair!

Thursday, April 22 - 1pm - 4pm

The Spring Career Fair, sponsored by CDANY, NYSDA and the Career and Professional Development Center at Albany Law School is a wonderful opportunity for public defense organizations and other criminal/family defense providers from across the state to recruit potential attorneys and law student interns. If you are interested in participating in the Career Fair, please register online: <http://bit.ly/SpringPDFair> (click "New Employer Registration" if needed). There is no registration fee.

**Recruitment  
Committee**

# CDANY Board & Committee Updates

Following the completion of CDANY's 2021 Legislative Priorities, the CDANY **Legislative Committee** continues to meet regularly to advocate for these priorities and other issues as they arise throughout the 2021 NY Legislative Session. Highlights from the session include:

## Legislative Committee

- Release of CDANY's Legislative Priorities document to the Governor, Senate and Assembly via email and mail.
- Continuing to monitor and support the advocacy for the Marijuana Regulation and Taxation Act (MRTA)
- Participating in online Public Defense Lobby Days in conjunction with NYSACDL & NYSDA.
- Worked with Family Court Committee on online advocacy day for funds for Parental Representation Pilot Program
- Issued a memo of support for the Survivors of Trafficking Attaining Relief Together (START) Act - available online here: <http://bit.ly/CDANYSTARTmem>
- Issued a statement applauding the approval of the "Walking While Trans" repeal - available online here: <https://bit.ly/CDANYWWT21>
- Issued a memo in support for the prohibition of using chemical agents by police against children - available online here: <https://bit.ly/CDANYMemo2S4002>
- Issued a memo of support for the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act - available online here: <http://bit.ly/CDANYHALTmemo>

**Interested in improving your advocacy and lobbying skills?** Please join CDANY Lobbyist Bob Perry at the Membership Meeting on April 16th for a "Lobbying 101" session! This meeting will be open to CDANY member Chief Defenders as well as staff.

## Family Court Committee

The CDANY **Family Court Committee** meets regularly to discuss issues specific to this unique Public Defense practice area. They have created a list of important advocacy topics, which were added to CDANY's docket of Legislative Priorities. Included in this was funding in the New York State 2021 budget for a pilot Parental Representation Program. Regarding this topic, the committee

worked with the Legislative Committee and CDANY Lobbyist Bob Perry to hold a series of productive advocacy meetings with State Senate and Assembly members.

# CDANY Board & Committee Updates

The **Staff Development & Training Committee** has been began working with IT Staff from offices around the state to develop a series of meetings focused on the technology needs of indigent defender offices. The first of these meetings focused on the increased technology needs as e-Discovery usage increases. This meeting was attended by 81 Chief Defenders and staff members from across the state and included a large group discussion as well as break-out discussions focused on specific topics.

## Staff Development & Training Committee

From this first meeting, the planning committee is putting together a second meeting on Thursday, March 25th from 1pm - 4pm focused on issues and topics raised during the first. This second meeting is again open to Chief Defender members and staff. To register, please click here: <https://us02web.zoom.us/meeting/register/tZAvCousrj4iHt2lfrdjeycRD090RMVwcjK2>

After registering, you will receive a confirmation email containing information about joining the meeting.

## Membership Committee

The CDANY **Membership Committee** has been busy renewing Chief Defender members from 2020 and recruiting new members to join CDANY in 2021. The committee is pleased to announce that, as of mid-March, membership is up 7% from 2020, including eight new member offices!

Recruitment efforts have included practice-specific letters to Assigned Counsel offices and personalized letters to non-members and lapsed members. These letters have been followed-up with phone calls and emails from committee members. As a result of this effort, the CDANY Board recently approved the creation of an Assigned Counsel Committee which will be chaired by Carrie Bleakley, Ontario County Conflict Defender and Assigned Counsel Plan Administrator.

**As a reminder, the CDANY web site has a members-only section that includes access to Monroe County's training videos!** Visit this page: <https://cdany.wildapricot.org/Training-Videos> and login to access!

In December of 2020, the **Police Reform Collaboratives Committee**, focused on Executive Order 203 - the "New York State Police Reform and Reinvention Collaborative" - drafted and released guidance for Chief Defenders on participating in the Police Reform Collaborative meetings. The EO called for the local

## Police Reform Collaboratives Committee

Public Defender who provides services to the particular municipality to be consulted and this document was drafted for provide guidance in that consultation. The document is available here: <http://bit.ly/CDANYPCG>

# CDANY Board & Committee Updates

The **Court Reopening Committee** was formed as the judicial system began to transition from virtual-only appearances to live appearances. CDANY recognized that a return to live appearances would implicate safety issues for clients and staff, and formed a committee to study these issues and weigh in on the statewide reopening process. The Committee also studied and responded to the Governor's proposal to broaden the use of virtual appearances. This Committee met numerous times throughout 2020 and into 2021. Its work included:

## Court Reopening Committee

- The creation of a survey to collect provider input regarding statewide court reopening issues during the COVID pandemic;
- Survey resulted in recommendations sent in a letter to Judge Lawrence K. Marks, Chief Administrative Judge of the Courts (see letter here: <http://bit.ly/CDANYReOpLetter>);
- Provided testimony including the recommendations to a state Senate Hearing;
- Continued outreach to stakeholders and decision makers on the issues and recommendations;
- Advocated for defenders and their clients to receive vaccine priority. <http://bit.ly/CDANYVaccineLet>
- Participated in Senate Budget Hearing and issued a memo in opposition to permanent virtual arraignments - available online here: <http://bit.ly/CDANYVirtArraign>

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## Regional Chiefs Meetings in Western New York

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Those of us who have regional meetings with our Judicial District colleagues have found them to be very worthwhile. None of us want to add any minimally useful meetings to our already overloaded schedules, but if you are in charge of an office that does not have occasional regional meetings, try to set one up with the chiefs in your Judicial District. If you have such a meeting, we believe that you also will see its value. Our experience is that sending out a meeting announcement and an availability poll is all that you need to do to initiate a first meeting of regional chiefs. Most of the chief defenders contacted will want to participate, and once they do, they are likely to attend subsequent meetings. Leanne Lapp and I are available to answer any questions you might have about the meetings we have in the 7th and 8th Judicial Districts.

David Schopp: [DSchopp@legallaidbuffalo.org](mailto:DSchopp@legallaidbuffalo.org) - Leanne Lapp: [leanne.lapp@co.ontario.ny.us](mailto:leanne.lapp@co.ontario.ny.us)