

Criminal Trial Manual Updated

The Institute discusses the forthcoming publication of the Trial Manual for the Defense of Criminal Cases (6th Edition) with authors Randy A. Hertz and Anthony G. Amsterdam of NYU School of Law.

The *Trial Manual*, published by The American Law Institute Continuing Legal Education (ALI CLE), is an update of the widely used how-to guide for handling criminal court cases last published in 1988, which was a joint project of the American College of Trial Lawyers, National Defender Project of the National Legal Aid and Defender Association, and ALI-ABA Committee on Continuing Professional Education.

For those unfamiliar with previous editions, what is the goal of the *Trial Manual for the Defense of Criminal Cases*?

The primary goal of the manual has always been – and continues to be – to serve as a resource for criminal defense lawyers at the trial level. It covers the information a defense attorney has to know, and the strategic factors s/he should consider, at each of the stages of the criminal trial process. It is organized for easy access by practitioners who need ideas and information quickly in order to jump-start their work at any given stage. For example, an early chapter canvasses the three common situations in which a defense attorney enters a criminal proceeding – when s/he gets a call to represent someone who has just been arrested and is still in police custody; when s/he gets an inquiry from or on behalf of someone who may be “wanted” by the authorities; and when s/he is appointed or retained to represent a defendant at the defendant’s initial court appearance. Taking each of these scenarios, we go step-by-step through the things that the attorney will need to know, decide, and do, in order of immediacy but with an eye to which actions will have the most important long-run consequences.

As another example, instead of organizing our analysis of search-and-seizure law in the way that a doctrinal treatise would, we start it off with a list of questions about the nature of the police activity that a client or a witness recounts to the defense attorney. Did this case involve an on-the-sidewalk accosting, questioning, pat-down, and arrest? Or did it involve a vehicle stop? Or police entry into a building or dwelling unit? For each situation, the manual steers the reader to a subsequent detailed discussion of the legal, factual, and tactical issues potentially implicated.

At the macro level, the manual tracks the handling of a criminal case from the point at which defense counsel picks it up – his or her initial dealings with a client, police and prosecutors – through investigation, discovery, pretrial motions, plea bargaining, suppression and other pretrial hearings, trial preparation, trial, sentencing, and post-verdict motions. We’ve designed the table of contents and the index so that practitioners can zero in immediately on what they need to ask, find out, and think about at each specific stage.

The book also can be of use to other people who want summary or detailed information about how the criminal trial process works: – appellate defenders; postconviction lawyers; civil lawyers who handle false arrest cases and various claims relating to the criminal justice system; law students; academics; news reporters.

How have criminal trials changed since the last edition was published (1989)? What segment of criminal defense has changed the most, as far as case law is concerned?

The first half of that question alone tempts us to give you the kind of 40-volume answer anticipated by the famous Ph.D. thesis proposal submitted by an ambitious history graduate student, “The influence of the Eighteenth Century on the Nineteenth.” We’ll resist that temptation and give you the short version.

A whole lot has changed – more even than you might imagine if you were revising a quarter-century-old academic treatise or deskbook for judges. Suppose that you are writing for trial judges. The Supreme Court of the United States hands down a decision relaxing the restrictions on certain sorts of police interrogation or evidence-seizure practices. Your revision describes this ruling and tells your reader/judges that it requires them to deny defense suppression motions that they would previously have granted. So the result has changed: the defendant loses. But in our book, we don’t want the result to change. We don’t want the bottom line to be that the defendant loses. So we have to address alternative – often more complex – ways in which defense counsel can deal with the fall-out from the Supreme Court decision. Are there alternative legal/analytic or factual approaches that will enable the defense to obtain suppression of the same incriminating evidence? Or, at the least, are there sufficiently colorable arguments regarding the scope of the Supreme Court decision so that a defense suppression motion can be expected to improve the defendant’s bargaining position in plea negotiations? And if not, what potentially winning approaches can defense counsel take to litigating a case in which evidence will be available to the prosecution that would have been suppressed in 1989 or in 2000?

The interconnectedness of legal, factual and tactical aspects of criminal trial defense work makes the second half of your question difficult to answer. Changes in one doctrinal sector or at one stage of the criminal trial process have strategic implications that spread broadly across other sectors and stages. Numerous U.S. Supreme Court decisions regulating state and federal criminal procedure have sent these broad reverberations through the length and breadth of criminal practice. And that, of course, is only a part of what has changed since 1989. New police investigative tools and new forensic technologies, new bodies of information generated by the internet, new methods of record-keeping, new modes of presenting evidence at hearings and trials, more diversity in the composition of trial juries, changes in judicial attitudes toward particular sorts of criminal charges, defendants, and complainants – all of this impacts the whole web of defense practice.

It's clearly complicated. So, are there any areas that you'd particularly flag as sites of major departure from the ways in which you addressed criminal-defense practice in the Fifth Edition? Any trends in the law or in the circumstances surrounding the commission of criminal offenses and the prosecution of criminal charges that you thought particularly important from the standpoint of a 2016 readership?"

Well, all those trends interact, and the ramifications range from trivial to huge. In discussing the importance of attorney visits to the sites of arrests, the 1989 edition gave, as an example, the scenario in which a defense lawyer, personally viewing the scene of an arrest, is able to detect that the arresting officer's purported observations of the defendant's activities is implausible because the officer's line-of-sight would have been blocked by a telephone booth. The telephone booth had to be replaced by a street-construction barrier in 2016: There no longer are any urban street-corner phone booths – or at least any we can find. What also replaced the phone booth, of course, was an extensive analysis of judicial decisions dealing with cellphone searches and seizures and some discussion of authentication requirements for the admission of internet postings into evidence.

The best we can do in answering your question is to give you a few examples of subjects that are either entirely new or re-imagined from scratch in the *Trial Manual 6*:

(a) *Our discussion of sentencing law:*

In the past two and a half decades, criminal sentencing has changed substantially as a result of the widespread adoption – by the federal government and many States – of determinate sentencing formulas, often called “sentencing guidelines.” Defense lawyers who practice in guidelines jurisdictions need to be familiar with Supreme Court and lower court decisions that regulate these sentencing practices. Equally important, they need to develop a new array of strategies and techniques for dealing with sentencing factors and preparing effectively for sentencing, which often requires careful planning and skillful action during plea bargaining with the prosecutor, in interacting with the presentence report writer in the period leading up to sentencing, and during the sentencing hearing itself. This new edition of the book covers the relevant case law, describes the new types of sentencing procedures, and presents an inventory of steps defense counsel should consider taking at each of the relevant stages to secure the best possible sentence for his or her client.

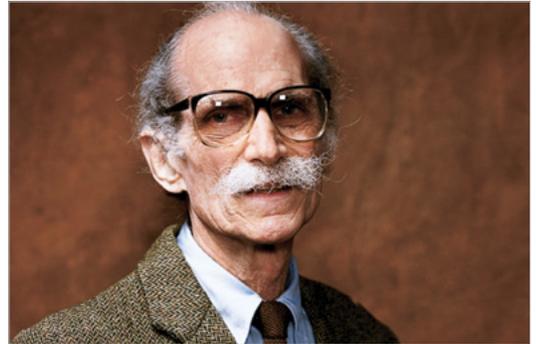
(b) *Our discussions of the implications of new technologies for various aspects of criminal trials and criminal defense practice:*

In the past two and a half decades, criminal defense practice – like all legal practice and most of our daily life activity – has been profoundly changed by technology. The police and prosecutors now rely on a wide array of technological devices, fields of forensic science, and forensic experts to put criminal cases together and to present them in court. But technological advances also have revealed that much of what passes for forensic science nowadays actually is “junk science.” This provides defenders with both an opportunity and a responsibility to uncover the flaws in prosecutorial expert evidence and to expose its weaknesses in court. Also, case law developments have created new opportunities for defenders to use experts of their own to mount effective attacks on common police investigative techniques like interrogations and eyewitness identification procedures.

But to realize these opportunities and to navigate these new dimensions of practice effectively, counsel will need to enlist the help of expert consultants



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and expert witnesses in the relevant fields. This new edition of the book provides defenders with a detailed guide for doing so. We talk, in each of the relevant parts of the book, about when and how defenders should think about using expert consultants and expert witnesses; the many functions that such experts can perform in a criminal case; the procedures for obtaining court funding for an expert and the case law that can be used to support applications for funding; how to attack prosecution experts at trial; and how to present defense experts effectively at trial.

This new edition of the book also deals with other important dimensions of technology. These include case law and practice pointers for dealing with searches and seizures of electronic evidence; video recording of interrogations; evidentiary hurdles in presenting or challenging

the introduction of emails, texts, and social media at trial; and uses of technology in the courtroom to present evidence and exhibits more effectively.

(c) *Our discussion of the uses of narrative theory:*

Another of the big changes of the past two and a half decades is that lawyers are thinking in far more sophisticated ways about how to use storytelling and narrative theory to enhance their advocacy in – and out – of the courtroom. The new edition contains extensive new material spelling out the central concepts of narrative theory and suggesting how those concepts can be used effectively by defense attorneys in preparing for and conducting pretrial hearings, trials, and sentencings. In tune with this expanded focus on fact-litigating techniques, we have also expanded the book's coverage of numerous aspects of trial skills, providing detailed suggestions of techniques for defense use in cross-examination, direct examination, making objections, and presenting opening statements and closing arguments.

There has been an increase in the use of mediation and dispute resolution in the civil sector, and alternate resolution systems are becoming more common in the criminal sector as well. Does the Sixth Edition take this into account?

Yes, that's precisely right. We have made substantial revisions to reflect the expanded use of diversion in the criminal justice system. There is a new chapter devoted entirely to this subject. Equally important, we talk about diversion at each of the stages in the process where it may be available, and we explain how defenders can make the most of these opportunities.

The criminal justice system is known to be a very slow process, frustrating many defense attorneys as well as their clients. How can this manual be used to overcome obstacles created by a delayed trial?

We talk, of course, about speedy trial motions and other motions for combatting delay and for seeking sanctions for prosecutorial delay. We also provide case law support and practice pointers that can help in seeking the release of a client on "O.R." ("own recognizance") or low bond so that a client will not sit behind bars during the lengthy pretrial process, and we suggest bond reduction motions to secure a release when delay occurs. And, because cases will often take a long time despite a defender's best efforts, we talk throughout the book about how defenders can use the lengthy pretrial period as effectively as possible: what steps need to be performed at what stages, and how to guard against the problems that may stem from delay.