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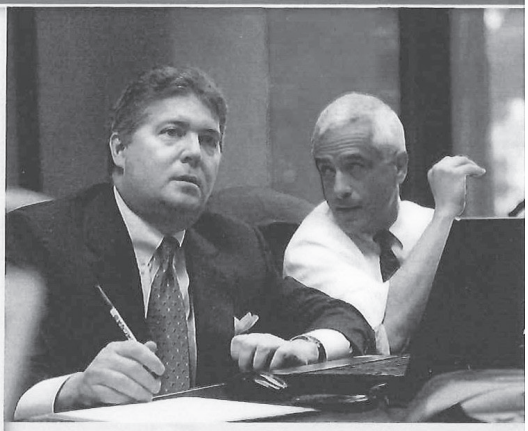

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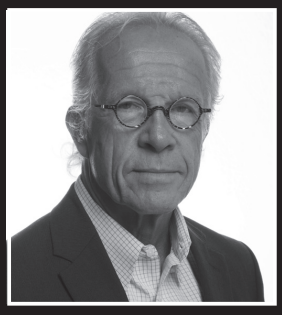

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Jeff Anderson & Associates pa

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Peterson v. Sta-Rite Industries
$104 Million - Verdict, Products Liability/Pool Pump Entrapment

Barrak v. Report Investment Corporation
$102 Million - Verdict, Negligent Security

Hinton v. 2331 Adams Street Corp
$100 Million - Verdict, Premises Liability

Bustos v. Leiva, et al.
$21 Million - Verdict, Auto Accident/Negligence

"John Doe" v. XYZ Company (Confidential)
$17.2 Million - Settlement, Negligent Security

JKS Co. v. Provident General Life Insurance
$17.6 Million - Verdict

"John Trauma" v. Tim-Bar Corp
$14 Million - Settlement, Train Accident/Negligence

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National Crime Victim Bar Association
Civil Actions for Criminal Acts

Papers and Presentations

Papers and Presentations *cont.*

Managing and Examining Defense Childhood Sexual Abuse Psychiatric Experts

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I. BACKGROUND

a. Historical v. Current Approaches
   i. In and out v. Confront and score points
   ii. Deposition is argument, a laboratory for your trial presentation. Road test all trial arguments that are relevant to an expert witness during the deposition of that witness.
   iii. Fewer cases go to trial
   iv. Video
   v. Do not save (generally) something for trial (that rarely comes to fruition)
   vi. Experts are more likely to be less prepared for depositions than trial
      - diligent investigation
      - familiarity with literature
      - confront
      - obtain transcripts of prior testimony

b. Experts vs. Mental Health Experts
   i. Pathology and symptoms- due to other things
   ii. Exaggerated pathology (aka malingering)

c. Put expert on heels re: exposure
   i. Subscribe to certain statements contained in ethical guidelines?
   ii. Has your testimony been on YouTube?
   iii. Professional embarrassment/licensing/board complaint

II. CONFRONT/CHALLENGE EXPERT

a. Stress contradictions and omissions
b. Financial compensation
c. Evidence from psychological testing

III. MALINGERING

a. What objective evidence exists?
b. Any confirmation with third parties?

Managing and Examining Defense Childhood Sexual Abuse Psychiatric Experts: Background

Managing and Examining Defense Childhood Sexual Abuse Psychiatric Experts: Background

Roderick W. Pettis, M.D.
3569 Sacramento Street
San Francisco, California 94118
Telephone (415) 441-5716
Facsimile (415) 441-1327

Education

Doctor of Medicine degree, 1989
Boston University School of Medicine
Boston, Massachusetts

Doctor of Jurisprudence degree, 1979
Golden Gate University School of Law
San Francisco, California

Bachelor of Arts degree - Political Science, 1976
Johnson C. Smith University
Charlotte, North Carolina

Fellowship

Harvard Medical School
Department of Psychiatry
Gaughan Fellow in Forensic and Correctional Psychiatry
and Clinical Fellow in Psychiatry
Massachusetts Mental Health Center and
Bridgewater State Hospital 1991 to 1992
The Fellowship involved inpatient clinical assessment and treatment of criminal offenders, psychotherapy cases, forensic evaluations for competency to stand trial, criminal responsibility, aid to sentencing and ability to serve time in a penal facility, preparation of court-ordered forensic reports, courtroom testimony and individual forensic research projects.

Residency

Harvard Medical School
Harvard Longwood Psychiatry Program
Chief Resident, Outpatient Department
Beth Israel Hospital
Boston, Massachusetts
PGY IV 1994

Harvard Medical School
Beth Israel Hospital
Department of Psychiatry
Boston, Massachusetts
PGY II and III 1992-1994

VITA

William T. O'Donohue, Ph.D.

Total pages: 32
Publications: 221
Presentations: 13
Presented papers: 72

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Email: wto@unr.edu
Date of Birth: August 18, 1957
Marital Status: Married, two children

EDUCATION:

M.A.	May 1988	Indiana University Bloomington, IN	Major: Philosophy
Ph.D.	June 1986	SUNY at Stony Brook Stony Brook, NY	Major: Clinical Psychology
M.A.	August 1982	SUNY at Stony Brook Stony Brook, NY	Major: Clinical Psychology
B.S.	August 1979	University of Illinois Urbana-Champaign, IL	Major: Psychology with honors

AREAS OF SPECIALIZATION AND/OR PRESENT RESEARCH INTERESTS:

Quality in mental health service delivery, integrated care, human sexuality (sexual harassment; assessment and treatment of victims and pedophiles), forensic psychology, management and administration, behavior therapy, philosophy of psychology

PROFESSIONAL EXPERIENCE:

Academic:

Professor
University of Nevada, Reno
July, 2005 – present

Director, Victims of Crimes Treatment Center
University of Nevada, Reno
October 1996-present

Faculty, The National Judicial College, University of Nevada, Reno
June 2009 - present

Nicholas Cummings Professor of Organized Behavioral Healthcare Delivery
University of Nevada Reno

Updated January 2010

Keynote, Missouri Psychological Association Convention, Maryville University, St. Louis, MO, June 8-10 2007 –Integrated Healthcare: The Promise, Progress, and Problems."

Invited address to the American Enterprise Institute, November 2007, Washington D.C. –The Role of Psychology in Reforming the Politically Correct University."

Invited address to The California Foundation, September 2007 –How to Implement Integrated Care."

Faculty participant in California Attorneys for Criminal Justice (CACJ) 2009 Annual Fall Criminal Defense Seminar, December 11 & 12, 2009, San Francisco. Presentation on Forensic Interviews of Children.

O'Donohue, W. Invited address. Quality process in behavioral health. Japanese Association of Behavior Therapy, Nagoya, Japan, December, 2010.

O'Donohue, W. Workshop. The assessment and treatment of sexual deviance. Japanese Association of Behavior Therapy, Nagoya, Japan, December, 2010.

O'Donohue, W. Panel presentation. The history of behavior therapy. Japanese Association of Behavior Therapy, Nagoya, Japan, December, 2010.

O'Donohue, W. Invited address. Integrated care. Kyoto University, Kyoto, Japan, December, 2010.

PAPER/POSTER PRESENTATIONS:

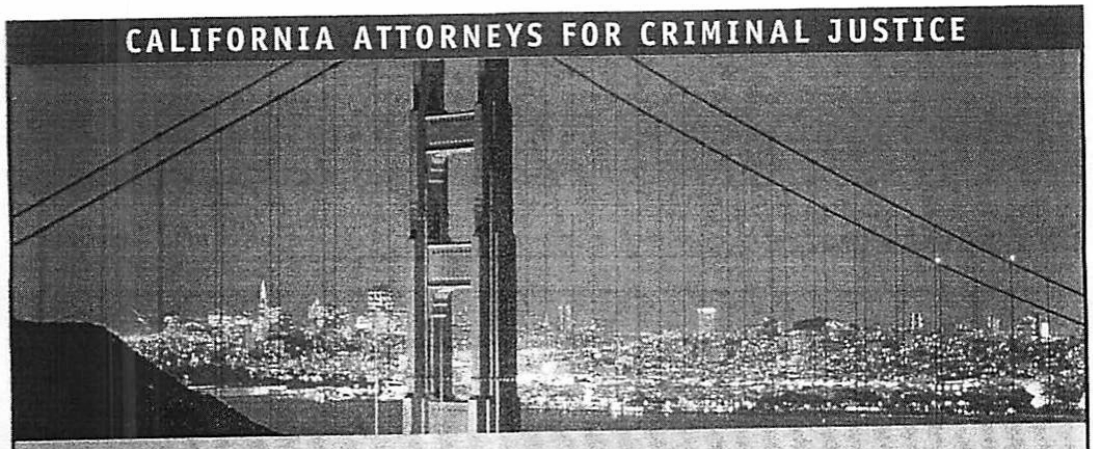
Avina, C., & O'Donohue, W. T. (1998) Measuring sexual behavior: Psychometric considerations. Paper presented at the 32nd annual meeting for the Association for the Advancement of Behavior Therapy, Washington, D.C.

Brunswig, K. A. & O'Donohue, W. (1998) . Relapse Prevention, Harm Reduction and Sexual Harassment: Confronting Sexual Misbehavior in the Workplace. Workshop presented at the 17th Annual Meeting of the Association for the Treatment of Sexual Abusers, Vancouver British Columbia, Canada

O'Donohue, W. T., Swingen, D., Dopke, C., & Regev, L. (1998). Psychotherapy for Male Sexual Dysfunction: A Review. Paper presented at the 23rd annual meeting of the Society for Sex Therapy and Research, Ft. Lauderdale, FL

Penix, T. M. & O'Donohue, W. (1998). Post hoc reasoning in possible cases of child sexual abuse: Symptoms of unknown origin. Poster presented at the annual convention of the International Academy of Sex Researchers, Sirmione, Italy.

Penix, T. M. & O'Donohue, W. (1998). The development of a clinical training program on CD-ROM for clinicians that work with sexual offenders. Paper presented at the annual convention of the Association for the Treatment of Sexual Abusers, Vancouver, British



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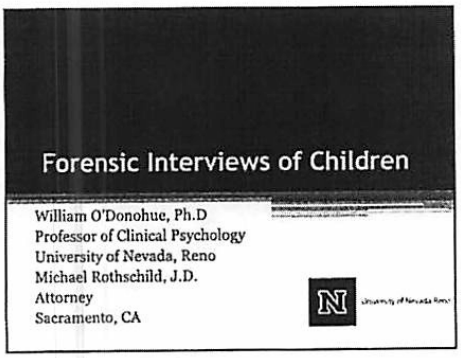
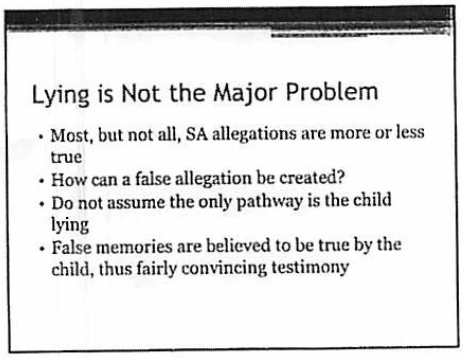
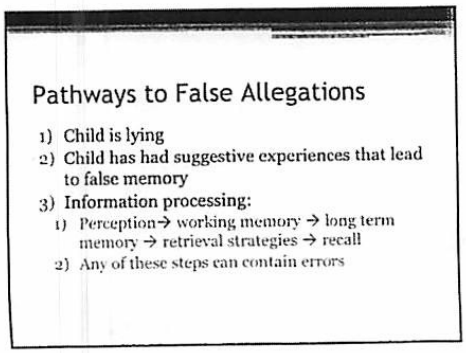

Forensic Interviews of Children
William O'Donohue, Ph.D
Professor of Clinical Psychology
University of Nevada, Reno
Michael Rothschild, J.D.
Attorney
Sacramento, CA


Lying is Not the Major Problem
• Most, but not all, SA allegations are more or less true
• How can a false allegation be created?
• Do not assume the only pathway is the child lying
• False memories are believed to be true by the child, thus fairly convincing testimony


Pathways to False Allegations
1) Child is lying
2) Child has had suggestive experiences that lead to false memory
3) Information processing:
1) Perception→ working memory → long term memory → retrieval strategies → recall
2) Any of these steps can contain errors

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Managing and Examining Defense Childhood Sexual Abuse Psychiatric Experts: Background

Q. Okay. You are a former president of the American Academy, AAPL?
A. I am.
Q. You are a member for 30 years or so?
A. I think I first joined in 1980, I believe. So yeah, 30 or so.
Q. You are familiar with the practice of forensic psychiatry promulgated by the American -- the ethics guidelines for the practice of forensic psychiatry promulgated by the American Academy of Psychiatry and the Law?
A. Yes.
Q. Do you conduct your forensic practice in accordance with those guidelines?
A. I certainly try to.
Q. Are the fellows in the forensic -- what is it, the law and psychiatry program in Colorado?
A. We have a forensic fellowship, yes.
Q. Are the fellows in the fellowship program taught to comply with those ethical guidelines?
A. Yes.
Q. Do you subscribe to a statement that "Psychiatrists practicing in a forensic role enhance the honesty and objectivity of their work by basing their forensic opinions, forensic reports, and forensic

testimony on all available data"?
A. It depends on what you mean by all available data. I think to the extent that that means all available data that you have in front of you and not picking and choosing, yes, I agree.
To the extent it means all available data, some of which you aren't aware of, I wouldn't call it unethical if you don't know what is not available.
Q. Fair enough. All right. Have you ever had your deposition testimony published in a peer-reviewed publication?
A. Not that I'm aware of that it had been published in a peer-reviewed -- I have had -- I have had my testimony peer-reviewed. I've never had any testimony, to my knowledge, published in a peer-reviewed journal.
Q. Or in any publication -- newsletter, chapter in a book?
A. I have gone on the Internet and seen things by me that may have included something that happened in court. I'm not considering --
Q. I'm not going that --
A. I'm not aware of any excerpts of any testimony in a peer-reviewed journal. Are you aware of such a thing? That would be news to me.
Q. I'm not.

A. I'm glad to hear that.
Q. It's true that you have never testified in a case where you have ignored information or data that was available and known to you when -- if that information undercut or went against the opinions you were providing?
A. Not knowingly. I mean I could imagine putting weight differently than another expert might do. I'm not aware of ever ignoring something that didn't support my opinion.
Q. You don't teach fellows to advocate on behalf of parties, do you?
A. Well, first of all, it depends on why they are retained. If you are retained -- I get retained all the time to do a consultation to improve the mental health system. I certainly advocate in that context.
Q. Let me limit the question to as an expert in civil cases, providing expert testimony in a civil case. Do you teach fellows to be an advocate or to more broadly comply with the American Academy of Psychiatric and Law practice standards of forensic psychiatry?
A. I'll tell you that within AAPL and the ethic guidelines, there is controversy about the exact issue that you are talking about. A lot of people would say that when you have an opinion, you advocate your

opinion. Whether you are saying you advocate for your opinion or stand by your opinion or you -- so there are varying degrees.
I don't have problems with people who have a basis for their opinion and advocate for their opinion. I have problems with people who have a philosophy that they then bend their opinion to go along with that philosophy. I don't teach the fellows to do that. I do teach fellows to stand up for your opinion and don't be apologetic about it.
Q. Have you ever had an ethics complaint filed against you with any professional organization?
A. I have had, I think -- I believe I have had at least one ethics complaint filed probably 30 years ago. She also filed with the board of medical examiners, which -- do you want to hear the details?
Q. Just generally.
A. This was a lady who was psychotic, who I found incompetent to proceed, and who, for the next 15 years, sent me letters, and to the board of medical examiners and everyone she could, on how I wronged her by -- I never had any ethical complaint or complaint to the board upheld. And any complaint I have had to the board -- we have a 30-day process -- it has never gone to hearing. They have always been dismissed. And they

Managing and Examining Defense Childhood Sexual Abuse Psychiatric Experts: Background

Opinions and Recommendations

1. It is my opinion that Ms. [redacted] more likely than not suffered distress at the time of the alleged abuse and in March 2008, after she viewed the news story regarding Father Beltran. However, the extent of her distress is hard to determine in light of her approach to the examination and numerous alternative stressors. I have indicated a possible Anxiety Disorder, N.O.S. if any diagnosis is to be applied to her recent distress. The current litigation appears to be a significant

cause of her anxiety episodes. She also reported depression that has responded to treatment and is in remission.

2. In my opinion, Ms. [redacted] had several factors to which her damages should be apportioned. They are as follows:

    a. The severe physical and emotional abuse, infidelity and breakup with her former fiancé;
    b. With regard to her issues with men: The naiveté that resulted from her overprotected upbringing combined with such fear-inducing misinformation about the outcome of such things as kissing a boy, which she was told would result in pregnancy;
    c. The death of her father in 2003;
    d. The current illness of her mother;
    e. The stress Ms. [redacted] experiences in her current employment in combination with the stress of raising a child as a single parent with the added difficulty of sharing parentage with her abusive former fiancé;
    f. The stress of the current litigation.

3. In my opinion, Ms. [redacted] is not a candidate for psychotherapy and is unlikely to utilize it much after her litigation is completed. She was poorly compliant even at what she reported was the height of her distress and informed me that she is reducing her visits in order to spend more time with her child.

Finally, it is the policy of this evaluator to reserve the right to alter/change my opinion/s should new information become available.

Thank you for the opportunity to assist you in this matter.

Respectfully submitted,

Roderick W. Pettis, M.D.
Diplomate in Psychiatry
American Board of Psychiatry and Neurology

however, that Mr. [redacted] had retained the ability to be selective about when and where he will confront authority.

Opinions and Recommendation

It is my opinion that Mr. [redacted] has longstanding character development issues and that those issues relate more directly to his failures in life. Regarding the damages due to the alleged abuse, it is my opinion that Mr. [redacted] is exaggerating (i.e. malingering) any effects of said abuse. The exaggeration is related to issues of secondary gain and is his attempt to enhance his claim for damages. By his report he had never suffered from depression and such severe anxiety until after he disclosed the abuse and filed suit. His claim that his life course was altered by the abuse and all his life's failure would not have occurred but for the alleged abuse are in this examiner's opinion not credible. It is worth noting that Mr. [redacted] did not recall his abuse when his sister filed suit against the same priest in 2008 but recalled it in 2009 when she informed him she had settled the case—though they did not discuss the terms of her settlement.

It is outside the expertise of this examiner to assess the loss of faith except to observe that loss of faith does not seem to have had a bearing on his social and occupational functioning.

Mr. [redacted] did not convey much interest in counseling or therapy and in the two years since he has experienced distress, he has not sought or participated in any counseling or therapy.

Finally, it is the policy of this evaluator to reserve the right to alter/change my opinion/s should new information become available.

Thank for referring Mr. [redacted] for evaluation and report.

Sincerely yours,

Roderick W. Pettis, M.D.
Diplomate, American Board of Psychiatry and Neurology

Managing and Examining Defense Childhood Sexual Abuse Psychiatric Experts: Background

Although now reports severe psychological distress, records reviewed failed to identify any other times when has reported similar psychological problems. In fact, Dr reported in the deposition that filled out a questionnaire in October 2012 and made notes regarding making plans online and incidents with a teacher, in which indicated he participated willingly. There were no notes indicating any depression, anxiety, or PTSD resulting from these interactions. also did not report symptoms during his police interviews or deposition, although these are not clinical contexts.] high scores on the assessment instruments administered and recent reports of distress may be due to one of the following: there are problems with the psychometric properties of the measures used; symptoms have recently increased; or is exaggerating his symptoms.

Major depressive disorder, generalized anxiety and even PTSD (if eventually criterion A is found to obtain) can be best treated with a short term course (12-18 sessions) of cognitive behavior therapy or psychotropic medications or some combination of these. Progress is also determined by patient motivation and ability to understand the verbal content of therapy.

The opinions, conclusions, and recommendations contained herein are clinical in nature, and assume accuracy of the available information. The accuracy of these conclusions is also limited and the conclusions should be regarded as preliminary for legal reasons I was not able to obtain all information I desired and deemed necessary. For example I was not able to have collateral contacts (e.g., with mother), or to obtain all treatment records. Collateral contacts are important especially with individuals with developmental disabilities. These missing data are particularly important given cognitive limitations. He was unable to provide me with information due to these deficits and I was unable to pursue these other sources in order to obtain that information. In addition, it is important to obtain medical records to discover the diagnoses and clinical impressions of other professionals, especially because there was some indications that his clinical presentation with me was more intense and possibly exaggerated. This can be the case in legal contexts. As stated I was not able to obtain these.

William O'Donohue, Ph.D.
Licensed Psychologist

Ethics Guidelines I AAPL - American Academy of Psychiatry and the Law

Ethics Guidelines for the Practice of Forensic Psychiatry

Adopted May, 2005

I. Preamble

The American Academy of Psychiatry and the Law (AAPL) is dedicated to the highest standards of practice in forensic psychiatry. Recognizing the unique aspects of this practice, which is at the interface of the professions of psychiatry and the law, the Academy presents these guidelines for the ethical practice of forensic psychiatry.

> **Commentary**
>
> Forensic Psychiatry is a subspecialty of psychiatry in which scientific and clinical expertise is applied in legal contexts involving civil, criminal, correctional, regulatory or legislative matters, and in specialized clinical consultations in areas such as risk assessment or employment. These guidelines apply to psychiatrists practicing in a forensic role.
> These guidelines supplement the Annotations Especially Applicable to Psychiatry of the American Psychiatric Association to the Principles of Medical Ethics of the American Medical Association.
> Forensic psychiatrists practice at the interface of law and psychiatry, each of which has developed its own institutions, policies, procedures, values, and vocabulary. As a consequence, the practice of forensic psychiatry entails inherent potentials for complications, conflicts, misunderstandings and abuses.
> Psychiatrists in a forensic role are called upon to practice in a manner that balances competing duties to the individual and to society. In doing so, they should be bound by underlying ethical principles of respect for persons, honesty, justice, and social responsibility. However, when a treatment relationship exists, such as in correctional settings, the usual physician-patient duties apply.

II. Confidentiality

Respect for the individual's right of privacy and the maintenance of confidentiality should be major concerns when performing forensic evaluations. Psychiatrists should maintain confidentiality to the extent possible, given the legal context. Special attention should be paid to the evaluee's understanding of medical confidentiality. A forensic evaluation requires notice to the evaluee and to collateral sources of reasonably anticipated limitations on confidentiality. Information or reports derived from a forensic evaluation are subject to the rules of confidentiality that apply to the particular evaluation, and any disclosure should be restricted accordingly.

> **Commentary**

Okay. This is a letter dated October 10th, 2014, which precedes the report here by a few months. Is there a reason why the documents listed in the letter to you of October 10th, 2014 are not indicated as being reviewed in your evaluation of [redacted] dated February 6th, 2015?

MS. UHRHAMMER: Lacks foundation, misstates the evidence.

You can answer.

THE WITNESS: At one point I was thinking I was going to prepare two separate reports, one on the -- an independent psychological evaluation that would be much more clinical and a second one that would articulate more opinions that I had on the case.

So what I did is just listed the materials I reviewed that I thought were most relevant for the independent psychological evaluation in this document, and I have another document that I supplied in my file called "Notes" where I summarized all of the materials and made other sorts of conclusions.

Q. BY MR. GEORGE, SR.: So you reviewed documents that you did not disclose in the report because you

Page 42

thought those documents weren't relative -- relevant, I'm sorry, to an independent psychological evaluation of David Bean; is that correct?

MS. UHRHAMMER: Misstates his testimony.

THE WITNESS: They were less -- I was given such a volume of documents, that I reviewed in the report the ones that were most directly relevant and I summarized the other ones in another location.

Q. BY MR. GEORGE, SR.: And what criteria did you employ to decide what was, quote, most directly relevant, close quote?

Q. So how do you make a determination that the Roseville Police Department record isn't relevant to that undertaking?

MS. UHRHAMMER: Mischaracterizes the evidence, misstates his testimony, and lacks foundation.

You can answer.

THE WITNESS: Yeah, I didn't say it wasn't at all relevant, but it wasn't directly relevant, for example, in me deciding whether diagnostic criteria for depression were met or not.

I mean, often a healthcare professional has a vast array of information available, and part of it has to be to -- part of the task to arrive at conclusions has to be to properly weigh the importance of this information, determine relevance of this information, and also then communicate conclusions in a way that's reasonable, and an entire summary of everything that they evaluate may not be the best way to communicate.

Q. BY MR. GEORGE, SR.: So I'm curious as to why you didn't disclose, as the author of this evaluation report, that you had read the police report.

MS. UHRHAMMER: It's argumentative.

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You can answer.
THE WITNESS: I wasn't trying to hide anything. I thought that I was going to author a second report that went beyond these kind of clinical issues and I was going to summarize and disclose that there.
Q. BY MR. GEORGE, SR.: Is it your testimony that nothing in the police report has any effect upon your evaluation of the psychological condition of ?
MS. UHRHAMMER: It's argumentative, misstates prior testimony, mischaracterizes testimony.
You may answer.
THE WITNESS: No.
Q. BY MR. GEORGE, SR.: Is it your testimony that there is relevance within the police report with regard to the psychological condition of ?
A. Yes.
Q. What specifically?
Excuse me. Strike that. Let me see if I understand this correctly.
So you read the police report before you authored this evaluation, correct?
A. Yes.
Q. And you considered what you had read, correct?
A. Yes.
Q. Yet you didn't disclose that you had read the

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police report and incorporated your thought processes into your conclusions, correct?
MS. UHRHAMMER: It's vague and ambiguous, mischaracterizes testimony.
You can answer.
THE WITNESS: Can you repeat the question again?
Q. BY MR. GEORGE, SR.: Sure. You read the report, you digested the contents, and you didn't disclose that you had considered what was in the police report with regard to your conclusions of .
A. I didn't summarize it in this document, that's correct.
Q. Not only did you not summarize it, you didn't mention it, did you?
A. I did mention it --
Q. Where?
A. -- I believe.
Q. Where?
A. Let's see. On page 14, Detective Wilson on both 11-19 in 2010 and 2-22 in 2011. Making abuse allegations, Detective Wilson, on 10-10-2012.
Q. So therefore, if you're going to incorporate certain pieces of it, why is it that you didn't disclose it again as a material that you reviewed?

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Q. What percentage of the criminal cases you testify in are you critical of the forensic interview procedures?
A. About a hundred percent.
Q. So then, , is a case where a kid wouldn't acknowledge initially, correct?
A. Correct. Well, wouldn't acknowledge. That assumes that it did occur. He made no allegation at first.
Q. In fact, he denied?
A. Yes.
Q. It's not about volunteering. He denied when asked directly, correct?
A. Yes.
Q. Okay.
A. But that --
Q. You -- you -- I'm sorry. No, I'm sorry. I didn't mean to cut you off.
A. Well, "acknowledge," you know, implies that it

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did occur and a person won't say that it did.
Q. I'm sorry. Could you repeat that, please?
A. "Acknowledge," as I understand the use of that word, means that something did happen and you won't admit it. And I didn't want to say yes to that, because that assumes that it did occur.
Q. Because you don't buy into Prop 1, the first part of that. Something did happen, correct? You don't --
A. I'm agnostic on that, yes.
Q. Okay. So -- but you did read the police report where in the fall of 2010 texted Preston Howard Lewis with words to the effect "You make me smile when you suck me off"?
A. Yes, I remember that in general.
Q. Yeah. And you did conduct an evaluation of that indicates he was not psychotic, correct?
A. Correct, he's not psychotic.
Q. What's your understanding of why would send a text to Preston Howard Lewis in the fall of 2010 that says, "You make me laugh when you suck me off," if, indeed, he had not been sucked off prior thereto?
A. What are other possible explanations?
Q. As an expert psychologist, full professor at

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the University of Nevada, Reno, who heads up the Victims of Crime center for 19 years at the University of Nevada, Reno, licensed psychologist, yeah. What do you understand that to mean?

A. One possibility is obviously that he has been abused and he's making reference to it. Another possibility is they're engaging in some sort of inappropriate, you know, verbal sexting, but it doesn't necessarily make accurate reference to other external events that have happened. Because when I look at the totality of that, including when talks to me about his allegations, he doesn't mention anything like that.

Q. Like no oral copulation?

A. No, specifically that. He never said, "This person made me smile when he sucks me off."

Q. Did you ask him if Lewis made him smile when he was sucked off by Lewis?

MS. UHRHAMMER: Assumes facts not in evidence.

You can answer.

THE WITNESS: I asked him how this made him feel, and he never made any reference to smiling or happiness or joy or anything like that.

Q. BY MR. GEORGE, SR.: That's not a core detail in your professional publications, is it?

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A. Yes.

Q. That's a core detail?

A. Consequences of abuse, how the abuse makes people feel, is a core detail.

Q. That this kid with a 71 IQ needs to use the exact phrase four years later to an open-ended question by an examiner that he had put in a text message? That's your testimony today?

MS. UHRHAMMER: Misstates testimony.

You can answer.

THE WITNESS: No, no.

Q. BY MR. GEORGE, SR.: Well, you --

A. You loaded up that question with all sorts of statements.

Q. I sure did.

MS. UHRHAMMER: Let him finish his answer.

Q. BY MR. GEORGE, SR.: I thought you asked him an open -- open-ended question, "How did it make you feel?"

A. Yes, I did.

Q. Okay. And he didn't say, "It made me smile," correct?

A. Or anything close to that, correct.

Q. And you didn't ask him, "Did it make you smile," correct?

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A. Did I follow up with a specific question about --

Q. Correct.

A. I believe I did not, no.

Q. And you didn't follow up on that question because you didn't want a "yes" answer --

MS. UHRHAMMER: Argumentative.

Q. BY MR. GEORGE, SR.: -- correct?

MS. UHRHAMMER: You don't have to answer that.

THE WITNESS: Oh, no.

Q. BY MR. GEORGE, SR.: Why didn't you ask him --

A. No, no, no.

Q. -- the specific --

(Deposition interrupted.)

Q. Let me finish, please.

Why didn't you ask him specifically if the oral copulation made him smile?

MS. UHRHAMMER: Assumes facts not in evidence.

You can answer.

THE WITNESS: I'm not sure at this point.

Q. BY MR. GEORGE, SR.: Okay. One possibility was, with regard to the text message, that it, quote, did happen, the second possibility was, quote, inappropriate sexting, correct?

A. Correct.

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Q. Based upon your 19 years as a director of the victims center and a licensed psychologist and full professor, what's the percentages of likelihood on number one and number two?

MS. UHRHAMMER: Lacks foundation, calls for speculation, it's vague and ambiguous.

You can answer.

THE WITNESS: I can't give exact percentages. And I have to look at more the totality of the information I have, not just that.

when you read the text message as stated in the police report, taken from a phone in fall 2010, "You make me laugh when you suck me off"?
A. That it was concerning and inappropriate --
Q. What --
A. -- and may reflect abuse.
Q. And it's true that in order to address the two possibilities that you've listed you would want to know the response to that text, wouldn't you?
A. Yes.
Q. And what was the response to that text?
A. I don't remember it verbatim.
Q. How about generally?
A. Don't remember at this point.
Q. How would the response affect your

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understanding of that -- or the meaning, I should say -- I'm sorry.
How would the response affect your understanding of the meaning of that text?
A. It would be relevant. But I can't remember the response, so it's hard to --
Q. How would it be relevant?
A. In the general ways a response is relevant to understanding an interaction and dialogue.
Q. Why don't you give me a specific example with regard to this statement.
A. I don't know what more I could say.
Q. Well, if someone sent you that text, how would you respond?
MS. UHRHAMMER: Calls for speculation, it's an incomplete hypothetical.
THE WITNESS: I would say, "I don't know what you're talking about."
Q. BY MR. GEORGE, SR.: And you know from your work in the criminal defense bar -- with the criminal defense bar, that any response other than that is incriminating, correct?
MS. UHRHAMMER: Lacks foundation, calls for speculation.
THE WITNESS: I mean, incriminating would be a

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legal conclusion, and I don't make those. But, yeah, it would be worrisome in terms of what's happening, yes. But again --
Q. BY MR. GEORGE, SR.: And you would tell the lawyer, the criminal defense lawyer who hired you, that there's a problem in that regard, wouldn't you?
MS. UHRHAMMER: Lacks foundation, calls for speculation, it's an incomplete hypothetical.
THE WITNESS: You know, I would -- if you look at my reports, I really opine about pretext calls, and that's where often that kind of stuff occurs. But I summarize those materials, but that's not my expertise in evaluating and interpreting pretext calls.
Q. BY MR. GEORGE, SR.: As a psychologist who's conducted an evaluation of [redacted] and produced 45 pages of notes, is there any psychological significance to Preston Howard Lewis's response from the fall of 2010, "I like to make you smile"?
MS. UHRHAMMER: Lacks foundation.
You can answer.
It's also vague and ambiguous.
THE WITNESS: Is there any psychological significance? Yes. It deviates from "I don't know what you're talking about," or a message like that, which is concerning, yes.

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Psyc – Expert

Malingering

1. What is malingering? Malingering is defined as "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs."

2. Malingering is not recognized as a mental illness in the DSM, correct? (V65.2)

3. What is the best method for a psychiatrist to detect malingering?

4. There have been a number of research reports published indicating a low reliability for diagnosis of malingering, correct? Is it true that there is a paucity of research on the detection of malingering? Is it true that there is an absence of research demonstrating that clinicians have the ability to detect malingering? It is true isn't it, that what little research exists is often contrary to the assertion that malingering is readily detectable?

5. It is true that the conclusion in the professional literature is that the clinicians' ability to detect malingering is doubtful?

6. Do you know of research which clearly validates a particular method or formula for distinguishing between claimants who are malingering from those who are not?

7. There is no definitive means by which the clinician can determine, in most cases, whether his judgments about malingering are actually correct?

8. What research has been done in the past 10 years to establish the reliability and validity of the diagnosis of malingering?

9. There are still considerable disagreements over what constitutes malingering, correct?

10. Does the research evidence show the MMPI indicators are less accurate than a psychiatrist's clinical judgment?

11. "Falsification" scales of certain psychological tests are virtually the only clinical devices for which there is validating research support, correct?

12. Did you obtain information from any witnesses other than plaintiff and the law firm that hired you?

13. (If there is no MMPI) Did you obtain an MMPI in this case? Doesn't that test provide some numerical indicators of malingering? Wouldn't it be useful to have such indicators in a case like this in addition to your own subjective judgment? Richard Rogers book: Clinical Assessment of Malingering and Deception.

14. The DSM-5 (V65.2) also provides additional factors that should lead professionals to strongly suspect the use of malingering. These factors are as follows: (1) an individual is presenting with symptoms within a medicolegal context, (2) there are marked discrepancies between the person's subjective account of stress/disability and objective findings, (3) the individual is uncooperative during evaluation or non-compliant with the prescribed treatment regimen, (4) the presence of Antisocial Personality Disorder.

Q. You gave me some sort of overview. You were talking about categorizations and schizophrenia and exaggeration and that kind of thing.
Generally, when -- when you evaluate malingering, do you utilize psychological testing?
A. It's a part -- part of it. I wouldn't -- I wouldn't necessarily have to have it to evaluate malingering. But it's one of the things that we include in a comprehensive evaluation, yes.
Q. Why would you include psychological testing as part of a comprehensive evaluation?
A. Well, there are some -- some aspects of the MMPI, for instance, which can pick up malingering. Sometimes there are tests. One, I think, is a test of memory malingering or malingering memory, the TOMM, which can sometimes be given more often in sort of brain-damage cases where people are claiming bad memory. But you can use -- you might use those for those instances.
Q. Do you consider yourself an expert in psychological testing?
A. No.
Q. Do you consider yourself an expert in the psychometric assessment of malingering?
A. The psychometric?

Q. Yes.
A. As in testing?
Q. As in testing.
A. No. No.
Q. You mentioned a couple of tests. The TOMM, and you mentioned certain aspects of the MMPI can, quote, pick up malingering; correct? Do you have any expertise in the MMPI in that regard?
A. No.
Q. Do you have any education or training with use of the MMPI in the assessment of malingering?
A. Yes. In forensic training, we would -- we would have included some material about, you know, the aspects of the MMPI that -- the questions embedded in it and the way the exam is constructed, in order to assess whether someone is exaggerating symptoms or what's called "faking bad," that kind of thing.
Q. Well, your forensic training predated the MMPI-2, did it not?
A. The MMPI-2 it did, yes.
Q. There was a Fake Bad Scale on the MMPI?
A. That far back, I don't know.
Q. Okay. Well, that was during your forensic training; right?
A. Right. Yeah. Well --

Q. You said --
A. Further --
Q. I'm sorry.
A. -- training goes through your career in terms of going back to CME's and conferences and that kind of thing. So I couldn't tell you specific dates.
Q. Thank you.
A. But I know there are review courses and lectures that have included some material on MMPI, but I am not an expert on that.
Q. I'll ask you about that. Thanks. I appreciate the qualification. Because I was asking you about your fourth year residency, I guess. You had a forensic --
A. Right.
Q. -- fourth year; correct?
A. Right.
Q. Okay. What aspects of the MMPI can pick up malingering?
A. Well, there are -- there's a scale in the MMPI. Again, this is not my area. But there's a scale in the MMPI that picks up whether someone is faking bad or faking good, which -- which is that their endorsement of symptoms is such that they will have elevations on things that produce some inconsistencies that will -- the test will give you an indication the person is

presenting themselves in a good light. Maybe they're giving abnormally good responses, responding positively to things or negatively to things that a normative population of people would not.
And those things can come together and indicate that a person is presenting in such a way that it would indicate to the clinician that you need to look at other things because this person is answering in such a way. Sometimes, in some cases, the Fake Bad Scale is so elevated that it invalidates the test altogether.
Q. Have you ever read any professional articles on the use of the FB scale and the detection of malingering?
A. The -- I have a book on the MMPI and probably have read some articles.
Q. What book? I'm sorry. I'm sorry.
If I answer, in part, it's to move us along. But I don't mean to caught you off.
A. That's fine.
Q. You know that.
What book do you have on the MMPI?
A. You know, I don't know. I can get that for you, but I don't know.
Q. Is that on the bookshelf behind you?
A. No. It's at my office.

Q. Do you know the name of the author of the MMPI --
A. I don't.
Q. Is it -- do you know who Jim Butcher is?
A. Not ringing a bell.
Q. Okay. Do you know who Ken Pope is?
A. Yes.
Q. Is it the Pope-Butcher book?
A. You know, I'm just not recalling it at this time.
Q. Okay. You can check that out for us as well?
A. I certainly can, yes.
Q. And in any event, you may have read something about the Faking Bad Scale in the book you have on the MMPI. And my question, I guess, is -- well, let me move on then.
What elevations of the FB scale suggest malingering?
A. Well, you're -- now you're asking me more of a technical question about the exam, and what I get from the exam, not being an expert in the MMPI, is I read the narrative reports of it. So now you're asking questions that you would have to ask Dr. Roberts.
Q. Okay. In your report of (-- and we'll get to that in a bit. It will be marked. You

indicated that she had a Faking Bad Scale of nearly 90.
Do you remember writing that?
A. I think so, yes.
Q. Yeah. Did you review --
A. Yes. Mm-hmm.
Q. -- your report for your deposition testimony today?
A. Yes. Yes.
Q. Okay. And you remember writing that she had an FB of nearly 90?
A. Yes.
Q. And what significance was that to you when you wrote that in your report?
A. Just that the scale was elevated. When you have things above 65 or so, they are significant. And so an elevation of 90 is pretty high.
Q. What's the mean FB scale of patients who have confirmed PTSD, do you know?
A. No.
Q. In your report on you cited several other scales.
Do you remember that?
A. Yes.
Q. Those particular scales, you enumerated the score.

Do you remember that?
A. Yes.
Q. Why did you enumerate those other scores but not in specifically enumerate the FB score?
A. I don't recall why I would have done that.
Q. You think you would have done that to buttress your opinion that she was a malingerer?
A. I didn't need to do that.
Q. You didn't need to do that?
A. No.
Q. Is there a reason why you didn't say her FB score was 85?
A. No reason that I can think of.
Q. Okay. So it's just -- no reason why you would say depression is X, anxiety is Y, psychasthenia is Q, and the other one is almost 90.
A. No.
Q. Okay. Did you recall ever in -- in your training on the MMPI that 90 is a cutoff score on FB, where that would suggest malingering? Above 90?
A. I'm aware of that.
Q. What are you aware of in that regard?
A. That that would be -- I probably should give you a frame on this because you're kind of going into the -- the more technical aspects of the MMPI, which I don't

use.
My purpose in giving the scores was a part of the total evaluation in the sense of I could have left the scores out and said she had elevated -- elevations on all these scales --
Q. Right.
A. -- and they were, you know, pretty high elevations. But I didn't need to include any of those scores on it. I would have come up with the same conclusions. I included them because I had them, but I didn't need them.
Q. What do you mean you didn't need them?
A. Well, the narrative report is what I go by because I'm not technically trained in MMPI. That's why I hire neuropsychologists for that purpose. But what I got in the narrative was mention of the elevation on those scales. But -- but what you get is a presentation of extreme symptoms, and that was really what's significant to me.
Q. Why -- you asked if Dr. Roberts could conduct the nervous psych eval?
A. Yes.
Q. And why did you do that?
A. It's a -- it's a part of what I consider to be a comprehensive independent medical evaluation in these

situations.
Q. And was it your custom and practice throughout your forensic career to pretty much include a psychologist to obtain psychometric test data?
A. Probably more often than not, yes.

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Q. Exactly. Okay. Can you tell me a course or a workshop in which malingering was the primary subject matter that you took over the last ten years?
A. I can't think of a specific course. It gets included in any review of forensic issues. So it may have been covered in a conference. It may -- I can't

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give you any specific.
Q. Okay. Do you recall ever taking a workshop on malingering?
A. Specifically on malingering? No.
Q. Right. You're a member the American Academy of Psychiatry and the Law?
A. Yes.
Q. Do you go to those meetings?
A. I have until recent years, yes.
Q. What do you mean by that?
A. In the last, I don't know, several years I haven't -- as I say, I've been winding out of forensics. So I haven't gone.
Q. Okay. The next question I'm going to ask you is how many national meetings have you gone to at the American Academy? You can estimate.
A. I would say one every year, I think, for years. So I would say, maybe, ten or twelve. I'm not sure.
Q. Okay. Thank you. What other kind and -- and well, why don't I ask you: Could you tell me generally what you were talking about here when you say malingering is part of information or --
A. Well, the teaching right from the beginning is that you -- one of the things, again, that you're assessing is it's not a comprehensive forensic

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assessment if you don't give some thought to the possibility of malingering. So there, you know -- that is just an integral part of the training to consider that, review it, and look at elements that suggest it. Or don't.
Q. Research on malingering has changed dramatically over the last decade, hasn't it?
A. I don't know about that.
Q. You don't know?
A. No.
Q. Have you ever read a book, textbook on malingering?
A. Rogers.
Q. You consider Richard Rogers an authority on malingering in your field?
A. Well, I wouldn't look at just Rogers, no. But he -- but that's just one of the people that I know sticks out in my mind.
Q. And that's an authoritative textbook, is it not?
A. Yes.
Q. Do you know of any other authoritative textbooks on malingering?
A. Textbooks off the top of my head, no.
Q. Any other authors who are noted in malingering as far as -- as far as you're concerned? I understand

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there might be dozens of other authors.
A. Nobody else that sticks out, no.
Q. You know who Phil Resnick is?
A. Yes.
Q. Do you have any familiarity with his work on malingering?
A. Phil Resnick is one of the teachers that you would -- would have run some of the courses that I've been in, yes.
Q. The American Academy?
A. Right.
Q. Now, as a member of the American Academy of Psychiatry and Law, you subscribe to the ethical guidelines promulgated for the practice of forensic psychiatry?
A. Well, without having reviewed them presently, I would have to qualify my answer. So I can't -- actually, I can't answer that because I haven't reviewed them recently. They may have changed.
Q. When was the last time they changed, as far as you know?
A. I don't know.
Q. When was the last time you reviewed them, as far as you know?
A. Well, certainly when they -- when they were

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published many years ago, and I just can't recall when the last time I looked at them.

Q. Okay. Okay. I apologize that I don't know this. But as a physician, are you required to certify to the Medical Board, like, a certain number of continuing education MCE hours every --

A. Yes. As a state licensed.

Q. Right.

A. Requirement of the state licensing board.

Q. Is that every couple of years?

A. License now is every two years, yeah.

Q. And is there any particular association or group that you're affiliated with that you've used -- that you go to, you know, those presentations or workshops for hours that satisfy that requirement?

A. Well, the way it works --

Q. Do you understand -- do you understand what I'm asking?

A. I think so.

Q. It's poorly worded, believe me.

A. I think so. I mean, so for instance in the years that I was going to the American Academy of Psychiatry and Law, you would get, maybe, from somewhere between 19 to 25 CME for that.

I would -- I've done them all. Just all kinds

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is not helpful at all. Sometimes it's just some form of guidance about how you want to approach some particular areas or questions. But...
Q. On the bottom of page 7 of your report, Dr. Pettis, you quote from the PAI, which is the Personality Assessment Inventory.
Do you see that right at the bottom?
A. Yes.
Q. It says on the Personality Assessment Inventory a pattern of, quote, mild exaggeration of complaints and problems, close quote, emerged.
Was that to support your conclusion of malingering?
A. I don't know -- I don't know that I was writing that in support of it. It just...
Q. Well, reading it now, you would -- do you believe that is evidence of -- to support your claim that she exaggerated symptoms?
A. I believe all of the test instruments suggested exaggeration, yes. I think that that's part of -- part of what goes into it, yes.
Q. I'm not asking about all of them right now.
A. Right.
Q. I'm asking about the PAI.
And is that part of the basis for your

assessment, that quote?
A. Not the quote, no. Just the reading of the PAI. Not the quote.
Q. Well, does the -- the fact that it says that there was a mild exaggeration of complaints and problems, does that support your conclusion of malingering?
A. That statement doesn't. The contents of the PAI is what supports my conclusion.
Q. Do you have the PAI there?
A. I have the Dr. Roberts report. That might be more likely where that came from. Yeah. I'm actually quoting from Dr. -- in this section, that's Dr. Roberts's report.
(Discussion held off the record.)
Q. MR. GEORGE: That sentence that's written there about what emerged on the PAI, you lifted from, so to speak, Dr. Roberts's report --
A. That's --
Q. -- not the PAI instrument itself?
A. No. No. That was -- yeah. I was noting that was under his report, and that's where this was taken from.
Q. Thank you.
MR. GEORGE, JR: Roberts page 5, mild

exaggeration.
Q. MR. GEORGE: Okay. Would you look at then Dr. Roberts's report, page 5?
A. Okay.
Q. Under results. Of the PAI.
A. I'm going to go to Dr. Roberts's actual report?
Q. Pardon me?
A. Do you want me to go look at his actual report?
Q. Please. I want -- I'm trying to authenticate the source of your information.
A. Okay. I get it. I get it.
Q. Because it's not what the PAI says.
A. Does his report say that?
Q. No.
A. It doesn't? Neither one?
Q. Correct.
A. Okay. So...
Q. I mean, if it's a mistake, it's a mistake.
A. I guess it's a mistake.
Q. Then I just want ask you about it --
A. Okay.
Q. -- because it's slightly significant.
A. Okay. So let me look. What page is that on, by the way?
Q. Roberts, page 5 --

A. Page 5.
Q. First full paragraph, results from the PAI.
A. Okay.
Okay. So that's looks like -- if it was quoted, it was kind of not quoted accurately. It raises the possibility of a mild exaggeration of complaints and problems.
MR. GREENE: Third sentence in the first paragraph.
THE WITNESS: Right.
MR. GREENE: After that results from -- the heading the result from PAI on page 5 of the Roberts report, sentence number 3 of the first paragraph.
MR. GEORGE, JR: Sentence 2.
THE WITNESS: Oh, sentence 2, yeah. Not 3. So it should have been raises the -- what did I put? Looks like it's --
MR. GREENE: Looks like there may be a word inserted.
THE WITNESS: Mild exaggeration of complaints and problems. Looks like I lifted that part of the sentence.
So you're saying it wasn't in Roberts's PAI results?
(Discussion held off the record.)

Q. MR. GEORGE: Okay. Well, do you see that you didn't include that, a possibility?
A. That's right.
Q. You see it? You report it as a fact, that it emerged; correct?
A. Right.
Q. And that's a misstatement, yes?
A. Right. That's a misstatement.
Q. Thank you. We're out of time, Dr. Pettis. I'm sorry that we're scrambling a little bit.
A. That's all right. It's been a day for all of us.

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Blending of Victims' Rights in Criminal, Civil, Family and Juvenile Courts and Creative Solutions

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DAVID V. SIGNAL (E.D. LA. 2015)

A LABOR TRAFFICKING CASE SUCCESS STORY

On February 18, 2015, a jury in Federal Court in New Orleans returned a verdict awarding over $14 million in compensatory and punitive damages to five blue collar workers from India against their employer, the marine fabrication company Signal International, and the labor recruiters and immigration lawyer hired by Signal to recruit Indian workers. This was the first of more than a dozen trials scheduled in cases involving over 200 plaintiffs, and the verdict bankrupted the company. According to the U.S. State Department, this was the largest such trafficking verdict in U.S. history[1], and the lessons learned and delivered extend beyond the case itself. But the story begins with the facts of the case, which are compelling yet all too common.

The Facts

In the aftermath of Hurricanes Katrina and Rita in 2005, Signal used the government's H-2B visa guestworker program to import nearly 500 welder and pipefitters from India to repair damaged oil rigs at its Mississippi and Texas shipyards. The workers, however, were not told that their visas and jobs were temporary. Instead, they were lured by false promises of permanent employment and permanent residency in the U.S. for them and their families. In reliance on those false promises, made by

[1] *Trafficking in Persons Report July 2015*, U.S. Department of State, at p. 357 ("In 2015, a federal jury awarded $14 million in damages to five Indian guest workers victimized in a labor trafficking scheme in Mississippi who filed civil claims. This amount was the largest ever awarded by a jury in a labor trafficking case in the United States.")

Signal's agents, the workers paid between $10,000 and $20,000 each in recruitment fees, for which they had to sell personal property and incur substantial debts. Those debts, and the restrictions of the H-2B program which bind guestworkers to their one sponsoring U.S. employer, entrapped the workers and left them ripe for exploitation. And exploit them is exactly what Signal did.

Upon arrival at Signal, the workers were required to sign housing agreements pledging to live in labor camps which Signal had erected on their shipyards in Mississippi and Texas solely for Indians. These labor camps, which Signal workers called the "reservations", consisted of pre-fabricated trailers 36 feet by 24 feet, each housing 24 workers. Thirteen trailers, intended to house 300 workers in each camp, covered grounds no longer than a baseball infield. The record was replete with accounts of overcrowding, filth, shoddy plumbing, and rampant illness. The camps were fenced, with guards who checked the workers' badges and belongings upon entry and enforced the company's no alcohol and no visitor rules. For the privilege of living in these conditions, each worker was charged $1,050 per month.

Refusing to sign the housing agreement was not an option for any worker. Nor was refusal to follow Signal's strict rules. Nor was refusal to accept wage reductions which were imposed on a significant number of workers. That is because Signal made it clear that the only other option available to the workers was to get on a plane and go back to India, which was not an option at all. Because of the debts the workers had incurred to pay the recruiting fees charged by Signal's agents, which the workers could not hope to repay with wages in India, the workers had no choice but to stay and work at Signal.

Not only did Signal's actions create a trap for the workers, but Signal took steps to reinforce that trap. When some of the workers reached out through a local church in Pascagoula to the Immigrant Justice Project at the Southern Poverty Law Center, and tried to organize the workers to assert their legal rights, Signal used security guards to round up the leaders of the organizing effort to forcibly deport them to India as an example to the others. One of those workers was so distraught, he attempted suicide. In discovery Signal was compelled to produce a cache of internal e-mails, which included one from the Senior Vice President just before the "Black Friday" roundup: "Remember the best defense is a strong offense. . . . Before the week is over the Indians will know we're not afraid to fight, and so should their liberal lawyers." That same Senior Vice President was recorded on a worker's cell phone telling the entire Mississippi camp that if any worker filed a lawsuit against Signal, all of the workers would be sent back to India.

The motive for Signal's behavior was clear and unsurprising. Signal stood to earn over $20 million in profits on account of its Indian labor force. In the period following the hurricanes, there was an abundance of work to repair oil rigs damaged in the storms, but the local workforce had been displaced. Signal's alternative was contract labor at $35 per hour, or two to three times what Signal paid the Indian workers. Access to low-cost Indian labor allowed Signal to complete contracts that were in danger of expensive delays and gave Signal a competitive advantage over rival bidders for new repair contracts. The profits made by Signal in 2007 – the one full year it employed the Indian workers – were so substantial that Signal's private equity owners gave Signal's CEO, Richard Marler, a $4 million bonus, although he told the jury it was "only $2.6 million after taxes."

In addition to the profit motive, the individual managers of Signal, as well as their recruiters and attorney, exploited the Indian workers because they viewed them as second-class citizens who neither required nor were entitled to the same level of treatment as American workers. To these workers, whom Signal management assumed lived in slums and "pooped in ditches," the labor trailers would seem like the "Taj Majal." But even if the workers were not satisfied with their conditions, what could they do about it?

The Lawsuit

What the workers did about it was to organize in March 2008 a mass walk-out from Signal, a march from the Gulf Coast to Washington, DC, a hunger strike, and the filing of a class action lawsuit. Counsel of record included the Southern Poverty Law Center, the ACLU and the American Asian Legal Defense Fund. When defense motions to dismiss were filed, counsel from the now defunct law firm of Dewey & LeBoeuf quickly joined the effort to begin what was a precedent-setting partnership of public interest lawyers and private firm lawyers acting in a pro bono capacity.

After almost four years during which Defendants expended every effort to defeat or otherwise stall the case, Plaintiffs' motion for class certification was denied. This result was not a surprise given the high standard for class certification in the Fifth Circuit, but the resources required to prosecute hundreds of individual claims was sufficiently daunting to dissuade Plaintiffs' counsel from voluntarily pursuing that option. When class certification was denied, however, that became the only path to justice, and the call went out to pro bono coordinating counsel and other friends and contacts at AmLaw 100 firms, and more than a dozen such firms answered the call.

Over the next three years, well over 100 attorneys of all levels of seniority, at some of the most renown firms in the country, devoted thousands of hours to advance the claims of hundreds of the Indian workers. Signal quite literally did not know what hit them. The deposition of the CEO, for example, lasted five days and featured examination by senior attorneys from Crowell & Moring, Skadden Arps, Latham & Watkins, Manett Phelps & Phillips, Covington & Burlington, as well as the EEOC which had filed its own discrimination case against Signal on the strength of the evidence adduced during the class certification phase. The level of coordination and cooperation among Plaintiffs' counsel – from firms that often are on opposite sides of commercial disputes – was extraordinary, and there was an unspoken understanding that the import of all the effort for the betterment of the lives of the Indian workers, while justified on that basis alone, went far beyond just these workers.

The Ramifications

The initial class action lawsuit and follow-on individual lawsuits bankrupted Signal and substantially impacted the businesses of the Defendant recruiters and attorney. In the Signal bankruptcy proceedings, in which the Debtor had over $90 million of secured debt, attorneys for the private firms expended hundreds more pro bono hours and devoted their expertise to secure approval of a plan to pay $22 million to the Indian workers on account of their unsecured litigation claims. But the Signal lawsuit(s) resulted in more than just compensation for the workers.

First, the rulings of District Judge Morgan in the *David v. Signal* trial established important precedent for future cases involving claims under the Trafficking Victims Protection Act, 18 U.S.C. 1589. In particular, Judge Morgan confirmed that the element

of threat of serious harm to establish forced labor under 18 U.S.C. § 1859, as well as trafficking in forced labor under 18 U.S.C. § 1590, could be satisfied with evidence of psychological and/or financial harm. In the case of Signal, its knowledge of the financial duress on its workers from the debts they incurred and its threats to deport workers who refused to accept Signal's conditions of employment or who asserted their legal rights, were more than sufficient to state forced labor and trafficking claims. Physical threats were not required.

This ruling also neutralized Signal's primary defenses to the worker's claims, namely that Plaintiffs were not physically forced to work for Signal, that they were well compensated and that they were free to leave Signal at any time. Those undeniable facts made proving forced labor and trafficking claims a challenge, and some thought was even given to abandoning those claims and pursuing only the more simple fraud, discrimination and breach of contract claims. Ultimately, the opportunity to establish precedent for future victims of similar exploitation by employers was too important to give up, and we were confident that the jury would be able to visualize the trap that had been sprung on these workers.

The *David v. Signal* case also shined a light on the inherent pitfalls of the government's H-2B system. The facts of the case have been shared with Congress as part of hearings on immigration reform, and have supported arguments for changes such as eliminating the single sponsoring employer limitation on worker mobility, and making U.S. employers directly liable for the costs of their foreign recruiters. These changes were part of the proposed immigration legislation reform that was drafted in the Senate in 2013, legislation that hopefully will be revived in the near future.

In the meantime, the jury's verdict delivered a strong message to employers who use H-2B guestworkers, and indeed all American employers, that exploitation of the type in which Signal engaged is unacceptable. Even more, there will be attorneys from both public service organizations and private law firms who stand ready and able to bring justice to victims of those companies that put profits over people.

NEGLIGENT SECURITY GAMEPLAN: "BLOCKING AND TACKLING FUNDAMENTALS MIXED WITH SOME RAZZLE DAZZLE"

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Preparation is crucial to any game plan. Coaches and players alike pour through hours and hours of video of their opponents to prepare for the battle. Practices consist of implementing different drills and plays to address the specific opponent. Game time is the implementation of everything that is done prior to the battle, which results in the culmination of the team coming together and getting the victory. Negligent security cases are no different. There is the head coach (Lead Attorney or Partner Handling the Case), assistant coach (Other Partner or Associate) and the players. The players consist of your client, family members, and the other witnesses you intend on bringing into court to obtain the victory. This paper is focused on the pre-trial fundamentals of a negligent security case and the verdicts and settlements that result therefrom. With there being so many moving parts, it is crucial to breakdown each one to understand how to individually address and prepare. The discussion will focus on the following:

1. Investigation;
2. Witnesses;
3. Depositions;
4. Experts; and
5. Trial or Mediation

These enumerated sections above are not mutually exclusive. The preparation begins with your investigation of the case and within investigation; you address all aspects of Liability and Damages. Each aspect is dependent on the other to effectively move your negligent security case forward. Neglect on one section will result in ineffective preparation on the next and can cause fatal consequences to your case. Each must be given the same amount of attention, passion and understanding in order to obtain the victory on behalf of your client. In a negligent security case, always remember the jury will be instructed that:

401.13 PREEPMTIVE CHARGES

> The Court has determined and now instructs you that the circumstances at the time and place of the incident involved in this case were such that [defendant] had a duty to employ reasonable security measures to protect [plaintiff/decedent] from reasonably foreseeable criminal activity.[1]

[1] *L.K. v. Water's Edge Association*, 532 So.2d 1097 (Fla. 3d DCA 1988). This instruction has become a standard with respect to negligent security cases.

From here, the jury will be instructed:

401.18a. ISSUES ON PLAINTIFF'S CLAIM – NEGLIGENCE

> The issues you must decide on [plaintiff's] claim are whether [defendant(s)] was/were negligent in failing to employ reasonable security measures and, if so, whether such negligence was a legal cause of loss, injury, or damage to [plaintiff][2]

The two jury instructions above are the foundation of your negligent security case. Developing your game plan around these instructions is crucial because you are laying the foundation to illustrate the breach and causation. A full understanding of what is required of you with respect to your burden of proof is non-negotiable. Failing to be aware of the bar against which the defendant's actions will be measured is inexcusable.

1. INVESTIGATION

Although it seems like an obvious starting point to obtain the crucial information regarding your case, the manner in which you conduct this investigation can make or break your case. From a liability standpoint, negligent security cases require investigation on two aspects: 1) the prior criminal history on the property; and 2) the circumstances surrounding your incident. Each one requires detailed and pointed investigative techniques to substantiate your liability case.

Dealing with the first aspect of criminal history, you must order all the police reports and calls for service for the property. The information will establish the pattern of crime occurring on the property in the years leading up to the incident wherein your client was either injured or killed. Absent obtaining this historical data, you will be unable to establish the direct or constructive knowledge on the part of the defendant(s). Once you obtain this data, it has to be synthesized on multiple levels, some of which will be discussed in other sections. However, as you are compiling this information, the level of crime occurring on the property will be revealed. The crucial nature of this information cannot be emphasized enough.

The premise that the owner or operator had such a crime problem that required their immediate attention is shown through the historical criminal data. From there, this information is juxtaposed to the security measures in place at the time of your incident. Without this crucial data, your case will lack the information to attack the defendant(s) during deposition and at the time of trial. Imagine preparing for a deposition and the information is not there for you to establish what crime the defendant was aware of at the time of your client's incident. I have lost count of the times where I have received discovery responses from defendants wherein their sworn Interrogatory answers list a couple of crimes that were domestic in nature. It baffles me that the defendant(s) testify regarding their awareness on how to obtain police reports for the property or actually

[2] *Id*.

have obtained calls for service, but when in deposition, their responses are that they were only aware of the limited crimes in frequency and nature.

The most effective way to shed light on this inconsistency is by the criminal data. This is why it is so crucial for you obtain this information. Also, the police reports are going to reveal additional information of crime victims and possible involvement by your deponent. Crime victims are so important in a negligent security case because their testimony assists in establishing that the owner or operator had inadequate security at the time of their incident. Rarely do crime victims testify their crime occurred despite the wonderful security measures in place at the time of their robbery, assault or battery. You have now been able to solidify a time in which the jury will be able to question whatever the defendant(s) states about the adequacy of security prior to your incident. It is easy to fall into a formulaic game plan that has been successful. Negligent security cases evolve as time goes on and so do the defendant(s) and the law firms defending these cases. This technique is a perfect way to "block" the defendant form squirming out of unartful discovery answers or admissions.

Often, negligent security cases will have the criminal case running simultaneously if you represent the client near the time of the incident. This can present multiple challenges to your case. For instance, if your client was tragically killed, a homicide investigation will ensue and the information you would be entitled to will be limited. The detectives will not provide any non-exempt information regarding the incident and this presents a major challenge to blocking a targeted defense. Plus, you represent a crime victim or their family, so you do not want to impede or halt any investigation either. Your time is limited in that once an arrest is made and criminal charges are filed, discovery in the criminal case is going to be public record and available to anyone.

You are now on the clock to make sure you obtain the information before the other side does. Unless you have filed suit immediately, you have the benefit of being unknown at this point. This is as crucial time to speak with everyone and anyone who has information regarding the incident. If the police report has not been released yet, scour the media. Name after name can appear in media reports, and this allows you to find the witness and obtain a statement from the very beginning. This is where you block. Once you have made contact with that witness by the time an investigator or defense lawyer speaks to them you have already set the tone. Each and every witness will tell the truth and not be susceptible to a change in their statement. There are obviously no guarantees, but to not do this would be catastrophic.

These two aspects of the investigation, although not exhaustive, set the tone and pace for the game. You must be focused and relentless in obtaining the police reports and the State Attorney's or police file for your incident. Waiting for it to come to you is detrimental because the entire case will be slowed and leave you scrambling. You'll be in for a long game if you take this approach.

2. WITNESSES

Throughout the formulation of the game plan you have to determine who will be first, second and third string on offense and defense. Even though your final lineup will not be done until the time of trial, your investigation will have revealed crucial players for your case. Going back to the police reports, you have to pick your position players from the reports and the State Attorney file. Former crime victims will be within the reports you obtain through your request. Even though the level of strength is dependent on the crime on the property, multiple robberies will yield great witnesses to establish the lack of security on the property. These witnesses can also establish a lack of response from the property manager or owner if they reported the crime.

In one case our firm handled, we found a former crime victim from a property that had endured some of the most violent crime one could imagine. The crime is why the property obtained off-duty police officers to perform patrols on the property seven days a week. Generally speaking, the use of off-duty police officers is the highest formed of armed security a property can employ. However, the off-duty officers are considered county employees and although police agencies will assist in looking at crime problems and providing statistics, the agency will not guarantee any assessment or recommendation because of the issue of exposing the county to liability. The defendant testified at trial that the police officers were in constant communication and had a good feel for the crime occurring on the property. The property manager also testified that the officers set the hours to be random, but only had one off-duty officer per shift.

The reports served their purpose well by establishing a high level of crime, of which the defendant was aware. It also revealed a crime victim who was visiting a friend on the property. While outside of the apartment speaking with friends, two individuals came from the shadows with AK-47 assault rifles clearly visible. The assailants walked up the stairs where the group was standing, talking and laughing. The assailants pointed the assault rifles at the victims and told them to get on the ground. From there, with the rifle barrels pointed at the victims' heads, the assailants relieved them all of their phones, wallets and money. When one of the victims merely looked back, the assailant took the butt of the rifle and smashed the victim in the head. The crime victim provided compelling testimony about how brazen the assailants were, how long the incident lasted, and the lack of any security presence on the property during the time of the crime.

This example raises the question, "the defendant obviously did something to secure the property, and how was their response inadequate?" The answer to that question is: when you breakdown the shifts in terms of time, frequency and randomness, a pattern evolved where the police were not present on the property after midnight. The pattern was never evaluated and the crimes were never reviewed past putting the report in a file. Had the defendant took the time to look at whether the security was effective the defendant would have seen they required more officers at particular times. The crime involving the two assailants occurred after midnight and our incident did as well.

The application of what needs to be done during the investigation is evidenced by the results of obtaining the police reports, synthesizing the information and locating the first string witness to testify during trial resulted in the victory we prepared for over the

duration of eighteen months. We tackled multiple aspects of our case by showing violent crime was occurring, the defendant knew about the crime, and the security measures in place were inadequate for the level of crime occurring prior to our incident. If we had waited for the information to come to us the game would have been in control of the defendant.[3]

3. DEPOSITIONS

By the time you have identified the witnesses who will play offense and defense for you in your case, all of your investigation should be complete. You should have received all of the police reports, State Attorney's file, and discovery and so on. It is now time to put together a game plan of how to attack your opponent with each witness. It might seem counter intuitive to the analogy, but adverse witnesses are a part of your team. An adverse witness might appear to be playing for the other team, but if you have conducted your investigation appropriately, you have the ability to control their movements, and set the tone for the remainder of the game.

In another one of our cases, a man was killed at an apartment complex. We conducted our investigation and had all the police reports of the all the crime on the property, all media articles, and the internet promotions by the management company promoting a "safe and gated community." During the deposition of the property manager, we obtained all the admissions you would want in terms of the failure to secure the property and keep the tenants and guests safe. However, the case was unable to resolve and we proceeded to trial. We decided to call the property manager live and I conducted the cross-examination. Within the first five or so questions the property manager decided to change her testimony. All of the preparation and diligence coalesced at this very moment. My impeachment video was queued and ready to be played for the jury. At the first opportunity I played her video deposition testimony and impeached her.

The look on her face when she saw herself on the giant screen is something I will never forget. She attempted to change her testimony again and I played her video deposition for impeachment once again. After the second time I impeached her, she gave me every admission I had planned for in my cross-examination. I was trying the case with my partner Douglas McCarron. I finished my entire cross-examination and asked the judge to confer with my trial partner. I walked over to our counsel table and asked him if he thought we needed anything else. Doug leaned over and told me, "She will give you any answer you want." I walked back over and began to continue my cross-examination and sure enough, Doug was right. She continued to admit that the defendant did nothing to secure the property. She admitted the defendant was aware of the crime and did nothing. I could not have scripted her cross-examination better. The dedication to cover all angles of the game plan (our burden of proof) culminated in one of the most damaging cross-examinations I have ever conducted. She became a player for our team and brought down the other side. The case was over.

[3] There are many other aspects of planning offensive and defensive witnesses, but limitations prohibit going through all of them.

4. EXPERTS

An entire paper could be dedicated to experts. This section is particularly important because an expert is trained, prepared, and focused to destroy all the work you have done before they even become involved. The expert is the quarterback of the opponent. Depending on their knowledge, experience, and skill, an expert can lend validity to what you find to be clear failures by the defendant. If you do not apply all that you have done leading up to the showdown with the expert then you are doing your client a disservice. It is crucial to understand the importance of being able to challenge and conduct a deposition that will prevent that expert from ever testifying again.

My firm represented a client who was shot during a robbery. The defense hired an expert on behalf of the bank where our client was shot. Our firm prides itself on obtaining prior testimony and other information to pick apart the expert. Just like with the investigation, you have all the police reports and the State Attorneys file prepared to use against the expert. All the liability witnesses have been deposed. Being that as it may, entering the deposition only armed with that information is not enough. This position leaves you vulnerable because you are playing on their home turf at this point. Expert depositions require applying the same fervor to obtaining "dirt" on the expert as you did with the investigation.[4]

My firm dedicates massive time and resources in compiling information on experts. It is important to collect as much information as possible, but it must be related to your case. Procuring one prior deposition on point is more effective than 50 prior depositions where the expert has testified on dissimilar facts to your case. The expert in the bank robbery case was a ghost. We scoured all the resources we normally use, called other experts, and even utilized other databases we have not previously used. All of our efforts turned up nothing. The search continued and after months and months of searching, we obtained an affidavit and report filed this expert in a Federal case.

The Federal case where this expert testified was on behalf of the plaintiff. In this Federal case, the expert opined the bank was responsible for the death of a check cashing store business owner who was killed after withdrawing a large sum of cash. The expert found no comparative fault on the decedent, found complete liability on the defendant bank, and went so far as to testify that even though the decedent had previously killed two other would-be robbers in prior incidents and fought back during the incident that lead to his death, the bank should have provided an armed escort or never let him leave with the large sum of money.

This deposition put the final touch on our case. I deposed this expert and allowed him to bolster his opinions. I allowed him to provide narrative after narrative on the adequacy of the bank's security and compliance with the Federal Bank Protection Act.

[4] The "Expert" section is abridged for purposes of this paper. If you would like additional information and techniques on how to decimate experts in your negligent security case, please refer to my other publication, "Slicing and Dicing: How to Destroy the Expert."

The expert went on and on, each statement more confident than the last. Once I felt he had dug himself a deep enough hole, I spent 30 minutes contradicting everything he just said with his prior testimony. Each question caused visible angst. He twisted and turned in his seat, looked over at counsel for the defendant and looked over to see if I had the actual deposition.

After the deposition was concluded everyone shook hands and the expert held onto my hand and said, "Where did you get that deposition?" The case was officially over. There was no way for the defendant to come back from what just happened. The expert could not help himself from asking me that question and it struck me as unconventional. His question made me proud that our game plan was executed to perfection because this expert appeared to know the deposition existed, but his tone suggested he thought it would never be uncovered…he was wrong.

5. Mediation and Trial

No lawyer can predict or control the actions of the defendant or their willingness to resolve a case. Everything that has been discussed needs to be prepared for trial. Believing the topics above can be developed later or at some other point during the litigation is dangerous and detrimental to your client's case. Once you have reached the point of execution, the victory is obtained at mediation or trial. Many people believe holding back during mediation is the appropriate strategy. If you know mediation is not going to be fruitful then that is the exception not the rule.

If you have done everything you need to do then showing the game plan at mediation should positively impact your case. The client deserves your best effort to try and resolve their case when the opportunity arises. However, the client also deserves to have their case in a position ready to be tried when you enter the room. Putting forth a mediation presentation replete with hypothetical scenarios or presenting "evidence to come" is useless. The mediation should be a preview of trial and present a position where nothing the defendant tries will change the outcome. All the case examples discussed in this paper were mediated. All of cases were in the position they needed to be in for trial.

Every fact presented during the mediations of the case examples was solidified. The facts we presented and the form that they were presented in were the facts we intended to present during our case in chief to the jury. We held nothing back and showed why our case was going to result in a plaintiff's verdict for the amount we believed the jury would award. Each case resulted in an impasse and was resolved prior to trial or resulted in a jury verdict.

CONCLUSION

Victory comes from preparation. Relaxing through any one of the topics discussed will have an unintended consequence of failure. There is no ill intent involved in the loss, but your preparation must have purpose and it starts with the active, strong investigation. Set the tone of the game before kickoff. To treat your case any other way

provides your opponent the opportunity for victory. Negligent security cases require undivided attention, teamwork and motivation. Assume your opponent already has the playbook and knows your game plan.

If you engage under those assumptions then you will never be caught off guard because you know with 100% certainty when you are going to “tackle” or “block” there is nothing the other side can do about it.

Perks and Pitfalls of Using Social Media to Select Jurors

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"It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is the most adaptable to change."

--Charles Darwin

"When you give everyone a voice and give people power, the system usually ends up in a really good place."

--Mark Zuckerberg, CEO and Founder of Facebook

One of the most dramatic changes that occurred within the last decade in the practice of law happened in cyberspace. For it is there that 96% of all college students and 47% of all adults now meet several times a day on a variety of social media networks to share their thoughts, experiences, opinions, activities, likes/dislikes, photographs, and videos. These individuals are our present and future clients, adversaries, opposing counsel, judges, and jurors. And they have all left a trail of information and evidence that can be a treasure trove for trial attorneys who know how to mine such valuable social media data.

Because of the tremendous growth and impact that social media networks have had on society, all trial lawyers must now accept and understand their importance. People are now spending more time on the Internet than watching television. The average adult, for example, spends more than five hours per day on the Internet. And the reason for this is clear: the speed at which information can be obtained and shared on the Internet is staggering. The ease with which people can now stay connected is equally

impressive – particularly through social media websites. The information that users of these sites volunteer and post is amazing. One young man even chose to post a confession to a drunk-driving vehicular homicide on YouTube entitled, "I Killed a Man". Although his video went viral, he is now serving a six-and-a-half year sentence and has forfeited his driving privileges for life.[1] A supposedly savvy communications director for United States Representative Steve Fincher (R-Tenn.), Elizabeth Lauten, found herself without a job after posting controversial and unkind comments berating Sasha and Malia Obama on Facebook in November of 2014. Social media has also been credited with mobilizing huge numbers of protestors in various cities nationwide in the aftermath of the grand jury's decision not to indict Officer Darren Wilson following the shooting of teenager Michael Brown in Ferguson, Missouri. And after protestors burned down buildings and torched police cars, the touching photograph of a helmeted white police officer (Sgt. Bret Barnum) hugging a teary-eyed African-American boy (Devonte Hart) at a protest in Portland, Oregon went viral on social media immediately after it was posted – and became an inspiring source of hope for peace in troubled times.

Simply put, the role of social media in our society cannot be underestimated or ignored. As of December of 2014, the most popular social media websites in this country are:

1. **Facebook**: 900,000,000 estimated unique monthly visitors
2. **Twitter**: 310,000,000 estimated unique monthly visitors
3. **LinkedIn:** 255,000,000 estimated unique monthly visitors

[1] 22-year-old Matthew Cordle posted a YouTube video on September 3, 2012 confessing to driving while drunk and killing 61-year-old Vincent Canzani on June 22, 2012. He surrendered to authorities several days later.

4. **Pinterest**: 250,000,000 estimated unique monthly visitors

5. **Google Plus+**: 120,000,000 estimated unique monthly visitors

6. **Tumblir:** 110,000,000 estimated unique monthly visitors

7. **Instagram**: 100,000,000 estimated unique monthly visitors

Even the White House is not immune to this phenomenon. In May of 2009, President Barack Obama's administration linked the official White House website to Facebook, MySpace, and Twitter, and within hours had thousands of new followers. By June of 2012, President Obama had amassed over 16 million followers on Twitter alone. His innovative uses of social media have, in fact, been credited with playing a part in his successful re-election campaign. The White House now has a dedicated digital team that includes a dozen aides with expertise in social medial content, graphic design, analytics, and technology. There are now more than forty official White House Twitter accounts.

Not surprisingly, not all lawyers have embraced and taken an active part in this phenomenon. According to the 2013 American Bar Association Legal Technology Survey Report, the use of social media by lawyers and their law firms this year has grown at a snail's pace compared to other occupations.[2] As a group, we are too busy to tweet or maintain a constant presence on Facebook to reflect our personal lives. 81% of lawyers, however, have reported using social media for **professional** purposes.

If you do not indulge in the latest trends involving social media, you better make sure you know about them. Our Rules of Professional Conduct require us to be competent in the representation of our clients – and that competency necessitates keeping

[2] R. Ambrogi, "Lawyers' Social Media Use Grows Modestly, ABA Annual Tech Survey Shows", www.lawsitesblog.com (August 5, 2013)

abreast of such trends. Given the vast amounts of information available on these sites about our clients, opposing parties, judges and potential jurors, it would be incompetent for us not to know, appreciate, and understand the ethical and legal issues surrounding such information. Some commentators have in fact insinuated that any lawyer "who does not make the use of [such] sources is bordering on malpractice."[3] According to the American Academy of Matrimonial Lawyers, more than 66 % of family lawyers use Facebook to obtain useful evidence in their cases. In both criminal and civil trials, cases can often be lost or won based on what a plaintiff, defendant, or witness said or posted on a social media website. It has thus been argued that "[i]f the diligent attorney must be zealous in pursuing a matter on his client's behalf, it seems possible that more than familiarity may be required – actual use of social media may be necessary."[4]

Using Social Media To Help Pick Your Jury

Social media provides trial attorneys with invaluable opportunities to learn personal biographical information about potential jurors. It is now possible to perform searches on the Internet of virtually anyone who has a job, owns a home, or lives in a community. A simple Google search yields surprising results. The staggering growth and popularity of Facebook and Twitter makes it probable that some of your jurors will have accounts on one or more of these sites. Think about it: the very purpose of these social networking sites is to allow people, including some of your potential jurors, to share and post information about themselves for others to see and appreciate.

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[3] Carol J. Williams, "Jury Duty? May Want to Edit Online Profile", Los Angeles Times, September 29, 2008, http://articles.latimes.com/print/2008/sep/29/nation/na-jury29.

[4] M. DiBianca, "Ethical Risks Arising From Lawyers' Use of (And Refusal to Use) Social Media", 12 Del.L.Rev. 179 (2011).

Searching on one of these sites often yields a remarkable amount of information and provides invaluable insight into a person's personality. If you have an e-mail address, you can become a member or establish an account on either Facebook or MySpace. Once you are on one of these sites, you may use their search engines to "find a friend", aka your potential jurors, and review any available profiles or status updates. You can anonymously search for someone by full name, state, gender, age, high school, date of birth, or e-mail address. Once you are able to find a potential juror, you can usually view a photo of that person and read a wide range of information on his or her profile. Although these sites enable the user to select security settings that limit information to people who have been approved as "friends", many users do not activate this feature. By leaving their profiles public, users are able to update information about themselves and receive messages from acquaintances. A typical user is on Facebook for the purpose of reconnecting with people from their past, and those people must be able to review the user's profile. As a result, most profiles are not private. If you find a profile that is not private, you can often find the following information: the user's sex, birthday, hometown, relationship status, interests, aspirations, political views/affiliations, religious views, favorite music, television shows, and movies, education, occupation, opinions, and affiliations.

Twitter is now one of the fastest growing fads and a powerful form of communication that is sweeping the world. It graced the prominent cover of *Time* magazine in June of 2009, which described it as "changing the way we live – and showing us the future of innovation." Based on the premise that users can enter a profile and post and send "tweets" or messages of 140 characters or less, Twitter enables

someone to read real-time posts by virtually anyone. Intended to answer the question, "What are you doing?" or "What's happening?", Twitter devotees post their thoughts and recent activities – and their answers can be immediately accessed by millions of people around the globe.

By using the Twitter search box, anyone can anonymously search a person to get a real-time glimpse into the ongoing chatter from that person about his thoughts, feelings, or activities. The search, however, requires you to know the user's Twitter username. If you cannot find a potential juror on Twitter, you can try to locate them on Facebook or MySpace and use the link feature to find that person's Twitter page. Otherwise, try searching the person's first or last name to see if that yields results. It is amazing how much information one can learn in 140 words or less – and in mere seconds.

Accessing these social media sites in any courtroom can now be done from most courtrooms through the use of either the wireless Internet services available in or near the courthouse – or through the use of mobile hotspots and Internet devices. Many lawyers now have designated paralegals poised and ready on their iPads to conduct social media and Internet searches of potential jurors, and results of those searches can be in the trial lawyer's hands within minutes. Others use services such as Jury Scout, which provides a prospective juror's public social media information in real time for a fee.

Legal and Ethical Considerations

Some lawyers and judges are reluctant to embrace the use of social media during jury selection because of their hesitancy to invade or intrude on the privacy of potential jurors. Many appellate courts, however, have long recognized that users of such social networking sites "logically lack a legitimate expectation of privacy in the materials

intended for publication or public posting." *Guest v. Leis*, 255 F.3d 325, 332 (6th Cir. 2001). *See also Independent Newspapers, Inc. v. Brodie*,, 966 A.2d 432, 438 n.3 (Md. 2009)("the act of posting information on social media, without the poster limiting access to that information, makes whatever is posted available to the world at large."); *Yath v. Fairview Clinics,* 767 N.W.2d 34, 43-44 (Minn. Ct. App. 2009)(information posted on social network sites deemed public information).

For many years, there were no rules or opinions that specifically addressed the use of social media by attorneys during jury selection. A recent survey conducted by the Federal Judicial Center revealed that the vast majority of federal judges surveyed do not specifically address the use of social media by attorneys to research prospective jurors.[5] Out of 466 federal judges responding to the survey, 120 refused to allow attorneys to use social media during voir dire. Most of the responding judges simply did not know whether attorneys in their courtrooms conducted social media searches on potential jurors in their trials.

On April 24, 2014, the American Bar Association ("ABA") issued Formal Opinion 466, which specifically addressed the issue of "Lawyer Reviewing Jurors' Internet Presence". In this Opinion, the ABA Standing Committee on Ethics and Professional Responsibility stated the following:

> Unless limited by law or court order, **a lawyer may review a juror's or potential juror's Internet presence**, which may including postings by the juror or potential juror **in advance of and during a trial,** but **a lawyer may not communicate directly or through another with a juror or potential juror.**

[5] M. Dunn, "Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management," Federal Judicial Center (May 1, 2014) at pp. 13-15.

> **A lawyer may not, either personally or through another, send an access request to a juror's electronic social media**. . . .
>
> The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).
>
> In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of a juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

ABA Formal Opinion 466 (April 24, 2014) (emphasis added). In sanctioning the use of such social media during voir dire, the ABA also stated that the Committee was not taking a position of whether the standard of care for competent lawyer performance **required** the use of such research – but added that "we are also mindful of the recent addition of Comment [8] to Model Rule 1.1 . . . [stating] that a lawyer 'should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.'" *Id.* at n.3.

The ABA Standing Committee on Ethics and Professional Responsibility also cited the Court's ruling in *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010). In that case, the plaintiff's counsel in a medical malpractice trial inquired during voir dire whether anyone on the panel had ever been a party to a lawsuit. One prospective juror concealed her litigation history and became a juror. After a defense verdict, the trial court granted a new trial when research revealed the juror's multiple previous lawsuits. The Supreme Court, however, reversed the trial court, and stated:

> However, **in light of advances in technology allowing greater access to information** that can inform a trial court about the past litigation history of venire members, **it is appropriate to place a greater burden on the parties** to bring such matters to the court's attention at an earlier state.

> Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . when, in many instances, the search could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being impaneled.

Id. at 558-59 (emphasis added). At least two State bar associations have similarly recognized that attorneys have an affirmative duty to use such social media. *See* New Hampshire Bar Association, Op. 2012-13/05 (lawyers "have a general to be aware of social media as a source of potentially useful information in litigation to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Association of the Bar of the City of New York, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case").

Inherent in these opinions is the presumption that the trial lawyer using social media during jury selection will understand how to use it without violating these ethical rules. A lawyer who is inexperienced in either the use of such sites or electronic devices may want to leave the searching tasks to someone else. In a recent trial, one lawyer using an iPad for the first time inadvertently sent a Facebook friend request to a potential juror in the middle of the voir dire process – causing considerable consternation in the potential juror, opposing counsel, other potential jurors, and the judge.

Conclusion

Today's trial lawyer, therefore, must be familiar with the ever-changing world of social media and the vast amounts of information it can yield. The time for ignoring social networking sites or delaying getting involved is over. As Sean Parker remarked in *The Social Network,* a movie about the rise of Facebook, "[w]e lived on farms, then we

lived in cities, and now we're going to live on the Internet!" Lawyers must now choose whether they will continue to exist only in the farms and cities – or follow their clients and jurors and join them on the Internet.

Forensic Pediatrics: An Evidence Based Approach to the Diagnosis, Management and Assessment of Risk for Potential Child Abuse

Jennifer Canter MD MPH FAAP[1]

Introduction:

The recognition, diagnosis and management of potential child physical abuse, sexual abuse and neglect present unique social and legal complexities. Professionals interacting with children have unique opportunities to identify child abuse by recognizing abuse indicators, such as suspicious skin bruises or frequent school absences. Education and experience with child abuse indicators, both in professional training and through continuing education, as well as mandatory reporting, can increase rates of recognition and reporting. The threshold for mandated reporting of child abuse varies depending on the reporter's training, experience, institutional policies and procedures, and geographical variances in the availability of expert resources. Timely reporting triggers responsive action by child protection services whose intervention may serve the most important of functions – protection of the child.

After reporting, communication and follow-up with protective and law enforcement professionals involved in these cases has a pivotal role in the investigative process. Missed abuse by the spectrum of professionals responding to the report also has significant consequences. Most importantly, it may place children and adolescents at an increased risk of further physical and emotional trauma, but also has future medical,

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social and behavioral consequences. From a medical perspective, there are differential diagnoses to be explored to assessing whether a clinical finding or behavior is indicative of abuse. The medical provider must follow the appropriate standard of care in working through the differential diagnosis particularly as they face potential civil or criminal liability if abuse is missed.

This paper and related presentation will explore missed child abuse including abuse indicators, differential diagnosis, mandated reporting, interface with investigative professionals and risk for future harm from the perspective of a child abuse pediatrician.

Abuse Indicators and Imitators:

An 'indicator' of child abuse is a physical or behavioral finding that warrants consideration for physical abuse, sexual abuse and/or neglect. Although there are a few sentinel injuries diagnostic of abuse, most abuse indicators should be put into context. The professional must consider presenting history, development, and the child/adolescent's presentation in totality in determining whether or not there is reasonable suspicion for abuse. Depending on the professional's role, the opportunity and capacity to identify abuse indicators within the child/professional interaction varies. For example, a medical provider may have the opportunity to visualize bruises on the upper arms during a medical examination, while a school teacher may see that same child regularly wearing long sleeves in warm weather or may observe regressed development.

Examples of physical findings that warrant consideration of abuse or neglect include:

- Any injury to a pre-ambulatory infant including but not limited to fractures, intracranial injury, abdominal injury, burns, bruises and soft tissue injury
- Bruises in a mobile child/adolescent in locations unlikely to be injured accidentally such as the buttocks, torso, abdomen, inner thighs, ears, face and neck or in patterned distribution
- Injuries with a reported mechanism that is implausible with child/adolescent's developmental capabilities
- Injuries to multiple organ systems and/or injuries in multiple stages of healing
- Multiple visits for unexplained non-specific symptoms such as seizures, vomiting, or apnea
- Failure to seek prompt and appropriate medical care
- Unexplained weight loss, or failure to gain weight, in a child
- Genital or anal bruising, bleeding, discharge
- Sexually transmitted disease and/or pregnancy

Examples of behavioral findings that warrant consideration of abuse include a child/adolescent who:

- Is unusually frightened of a parent or another adult
- Does not show emotion when hurt
- Offers implausible explanations of injuries

- Absent from school without an explanation
- Wears inappropriately hot clothing for the weather (covering body parts)
- Is displaying aggressive, destructive/disruptive behavior, regression of development (i.e. – bedwetting)

Mandated Reporting:

Mandated Reporting and the Subsequent Multi-Disciplinary Team/Child Advocacy Center Approach

Although nuances as to the circumstances under which an individual is required to report abuse vary from state to state, in general a report is required when, in their professional role, an individual has 'reason to believe' or 'reasonable suspicion' that abuse is occurring. The individual(s) responsible for inflicting, or allowing to be inflicted, such abuse (the 'subject' of the report) must be legally responsible for the care of the under 18 year old child/adolescent.

The Federal Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C.A. § 5106g), as amended by the CAPTA Reauthorization Act of 2010, defines child abuse and neglect as, at minimum: "Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation"; or "An act or failure to act which presents an imminent risk of serious harm." At the State level, child abuse and neglect in its various forms is defined in both civil and criminal statutes, thus influencing reporting practices and whether or not a report is accepted by the governing authority. States also vary in the procedural aspects of reporting and whether a reporter's mandate can be transferred to a supervisor or institutional designee. There is room for interpretation as to what a reasonably prudent provider or professional would have 'reasonable suspicion' for abuse. Clearly, the mandated reporter's burden is only to report the circumstances leading to the suspicion, not to prove such abuse occurred. This differs from the subsequent multi-disciplinary investigation by child protective services, law enforcement and medical professionals to determine whether or not the report of abuse is likely to have occurred and make a determination of founded or unfounded, and take appropriate action as the circumstances warrant.

In the majority of municipalities, after a report is made of suspected abuse there is a response from agencies of multiple disciplines including child protective services, law enforcement, prosecution, medical, mental health and victim advocacy. A multi-disciplinary team (MDT) is a group of professionals from specific, distinct disciplines that facilitate a coordinated response so as to reduce further potential trauma to children and families, and maximize flow of information between disciplines. A Child Advocacy Center (CAC) is the setting where this interagency system response takes place. According to the National Children's Alliance, the accrediting organization for CACs,

there are close to 800 accredited CACs across the county.[2] To become accredited, an MDT/CAC must demonstrate adherence to stringent requirements in the following areas, and maintain/report quality compliance measures on a regular basis:[3]

- Multidisciplinary Team
- Cultural Competency and Diversity
- Forensic Interviews
- Victim Support and Advocacy
- Medical Evaluation
- Mental Health
- Case Review
- Case Tracking
- Organizational Capacity
- Child-Focused Setting

The Child Abuse/Forensic Pediatrician's Role in the Investigation of Potential Abuse

Child abuse pediatricians can be an invaluable resource for community pediatricians, protective authorities and law enforcement in assuring that evaluations of suspected abuse are comprehensive and objective. Furthermore, child abuse pediatricians work through the differential diagnosis, and consider medical and/or accidental explanations from an evidence based perspective.[4] Using information from a comprehensive multidisciplinary investigation (involving child protective services and law enforcement) and a review of medical records and medical literature, the child abuse pediatrician is able to offer an opinion on each of these cases. Over-diagnosis of child abuse may lead to serious criminal and family outcomes and child abuse pediatricians are specially trained to exclude medical imitators of abuse.

Medical Differential Diagnosis and Workup of Suspected Abuse

Whereas medical conditions exist that mimic various forms of abuse, testing to exclude such diseases on the differential diagnosis is warranted.[5] In some situations, a medical provider may have already done testing to exclude medical imitators of abuse and the reported medical finding will be more specific (more likely to accurately identify abuse). In other situations, a medical provider or other mandated reporter may have reasonable

[2] http://www.nationalchildrensalliance.org/our-story

[3] http://www.nationalchildrensalliance.org/sites/default/files/downloads/NCA-Standards-for-Accredited-Members-2017.pdf

[4] The American Board of Pediatrics designated child abuse pediatrics as a formal sub-specialty in 2006.

[5] Hymel KP, Boos S. Conditions mistaken for child physical abuse. In: Reece RM, Christian CW, eds. Child Abuse Medical Diagnosis and Management. 3rd ed. Elk Grove Village, IL: American Academy of Pediatrics; 2009:227–255

suspicion for a finding that has other causes, and the report will be more sensitive (more likely to have picked up on abuse if it indeed was there). In lieu of a complete workup for medical imitators, the child abuse/forensic pediatrics approach would consider other explanations on the differential and correlate these with information obtained through the multi-disciplinary team investigation.

Skin and Soft Tissue Findings: Cutaneous (skin) injuries such as bruises are the most common and clearly apparent manifestations of child physical abuse. At the same time, bruises are common in healthy, active children, therefore interpreting bruises can be a diagnostic challenge. Interpreting bruises requires consideration of contextual factors including age, development, and history of presentation, location of injury and pattern of the skin finding. Accidental bruises are commonly found in young mobile children as they develop independent mobility and are usually on the anterior bony prominences, such as the forehead and shins.[3] Accidental bruising in infants younger than six months is extremely rare. Accidental bruising is reported as uncommon to nonexistent on the posterior body surfaces (including the buttocks and thighs), the torso (including chest and abdomen), and the ears in all age groups.[6] In children of all ages, less than 2% had bruises to the thorax, abdomen, pelvis, or buttocks, and less than 1% had bruises to the chin, ears, or neck. Bruises to the ears and buttocks in particular have been emphasized in research as a strong indicator of abuse. Certain medical conditions may, however, mimic abusive bruises. For bruises, the differential diagnoses include the following:

- Birth marks ("Mongolian spots" which are collections of melanocyte cells producing a bluish color present at birth in 80% of black children and in many other ethnicities)
- Erythema multiforme (multishaped red lesions believed to be a sensitivity reaction)
- Hemangiomas (overgrowth of capillaries)
- Eczema
- Phytophotodermatitis (cutaneous phototoxic cutaneous eruption)
- Idiopathic thrombocytopenic purpura (ITP)
- Bleeding disorders - Whereas bleeding disorders may present in a manner similar to child abuse, in some situations warranting a medical workup for bleeding disorders before diagnosing abuse with certainty.[7] Other medical imitators of abusive bruising include:
- Malignancy
- Ehlers-Danlos syndrome
- Osteogenesis imperfecta (OI) type I
- Folk-healing practices (e.g., coining, cupping)

[6] Labbé J1, Caouette GPediatrics. Recent skin injuries in normal children. 2001 Aug;108(2):271-6.

[7] James D. Anderst, Shannon L. Carpenter, Thomas C. Abshire SECTION ON HEMATOLOGY/ONCOLOGY and COMMITTEE ON CHILD ABUSE AND NEGLECT Evaluation for Bleeding Disorders in Suspected Child Abuse Pediatrics April 2013, VOLUME 131 / ISSUE 4

Burns are another skin finding that raise concern for abuse. Burns may be explained by accidental mechanisms (that may have a supervisory neglect element). Certain medical conditions may mimic abusive burns. For burns, the differential diagnoses include the following:

- Staphylococcal impetigo
- Bacterial cellulitis
- Pyoderma gangrenosum
- Photosensitivity
- Frostbite
- Herpes, zoster
- Epidermolysis bullosa
- Contact dermatitis, allergic or irritant
- Chemical burns

Another skin/soft tissue abuse indicator is a torn/lacerated frenulum; a small piece of tissue connecting the gum to the inner upper lip, the tongue to the base of the mouth, and the gum to the lower inner lip.[8] A torn frenulum may occur from a direct blow to the upper lip (accidental or inflicted), intubation, forced feeding, gagging, gripping or violent rubbing.[9] Facial and intra-oral trauma has been described in up to 49% of infants and 38% of toddlers who have been physically abused.[10, 11, 12]

Fractures: Skeletal fractures are the second most common injury caused by child physical abuse. [13] In children under the age of 3 who were diagnosed with abusive fractures, more than 20% had at least one previous physician visit at which abuse was missed, with a median time to correct diagnosis from the first visit of eight days.[14]

[8] Cameron JM, Johnson HRM, Camps FE. The battered child syndrome. Med Sci Law 1966;6:2–21.

[9] Tate RJ. Facial injuries associated with the battered child syndrome. Br J Oral Surg 1971;9(1):41–5.

[10] Becker, DB (1978). Child abuse and dentistry; orofacial trauma and its recognition by dentists. J Am Dent Assoc , 97(1): 24-8.

[11] McMahon P (1995). Soft-tisue injury as an indication of child abuse. J Bone Joint Surg Am , 77(8) 1179-83.

[12] Maguire, Sabine et al.Diagnosing abuse: a systematic review of torn frenum and other intra-oral injuries. Archive of Disease in Childhood December 2007: 92 (12)

[13] Loder RT, Feinberg JR Orthopaedic injuries in children with nonaccidental trauma: demographics and incidence from the 2000 kids' inpatient database [published correction appears in J Pediatr Orthop. 2008;28(6):699]. J Pediatr Orthop. 2007;27(4):421–426pmid:17513964

[14] Ravichandiran N, Schuh S, Bejuk M, et al Delayed identification of pediatric abuse-related fractures. Pediatrics. 2010;125(1):60–66pmid:19948569

Fractures may also be missed because of either misread radiographs, or radiographs done before the time the fracture would be identified on film. In considering the potential for abuse, the provider must consider the location and type of fracture, the child's age and development, the mechanism described and the possibility of additional injuries. Certain medical conditions may mimic abusive fractures. For fractures, the differential diagnoses include the following:

- Birth trauma
- Accidental trauma
- Osteogenesis imperfecta
- Rickets
- Leukemia
- Hypophosphatasia
- Neuroblastoma
- Osteomyelitis or septic arthritis
- Neurogenic sensory deficit
- Scurvy
- Menkes syndrome
- Syphilis
- Infantile cortical hyperostosis
- Osteoid osteoma

Other Injuries: There are many other forms of child abuse (i.e. - intracranial trauma, medical child abuse, and unexplained infant death) that are beyond the scope of this paper, yet explored in exceptional detail in comprehensive forensic pediatrics texts.[15, 16]

*Workup of Potential Abus*e - Below is a summary of recommended studies/laboratory evaluations for suspected abuse in young children created by this author and used in a trauma/children's hospital.

[15] Jenny, C. Child Abuse and Neglect – Diagnosis, Treatment and Evidence. Saunders; Har/Psc edition (September 29, 2010)

[16] Kleinman, P. Diagnostic Imaging of Child Abuse. Cambridge University Press; 3 edition (October 14, 2015)

Test/Consult	Purpose	Notes/Indications
Head CT Scan	Identify occult or overt head injury	Consider for all infants and children with a suspected intracranial injury. Signs/Symptoms include but are not limited to: difficulty feeding, seizures, unexplained ALTE, bruising, fracture, abdominal trauma, report of witnessed trauma (punch, throw, hit, shake), lethargy, neglect/failure to thrive.
Abdominal Trauma Screening Studies: ALT, AST, amylase, lipase (CMP), urinalysis PT/PTT/CBC if abdominal trauma suspected	Identify occult abdominal trauma	Consider for all children with an injury concerning for physical abuse.
Abdominal CT scan, preferably spiral with intravenous contrast	Identify occult or overt abdominal trauma with clinical suspicion or AST/ALT greater than 80	Mandatory for children with signs or symptoms of abdominal trauma. Mandatory for children with abnormal findings on abdominal trauma screen.
Urine Toxicology	Identify potential for toxicological substance	Mandatory for any child with suspected abuse
Skeletal Survey (children 0-2, and consider in children 2-5)	Identify additional fractures or bony pathology	Should be completed when Pediatric Radiologist or designee is physically present in radiology suite. Should be reported to outside agencies only when interpreted as final by an attending.
Coagulopathy Workup: CBC, PT, PTT, Von Willebrand factor, Factor levels, Bleeding time	Identify coagulopathy that may be related to multiple bruises	Consider in children with multiple non-pattern bruises and/or hemorrhages
Assessment of Bone Health: Calcium, Phosphorous, Alkaline Phosphatase, 25-hydroxy Vitamin D levels	Identify osteodystrophy or abnormality in bone formation/destruction in child with fractures.	Consider in children with multiple fractures.
MRI of head	For + CT scan and/or HIGH index of suspicion with negative CT of head	Consider with any CT findings including subdural “hygromas” Consider with negative CT scan but any clinical suspicion of prior trauma. CT: best for new trauma & fractures MRI: best for old trauma, not fractures. BOTH studies optimal in coordination for any head trauma possibly related to abuse.
Dilated fundoscopic examination	Identify retinal hemorrhages if + CT, + MRI, + bruise, + Fracture and/or + Abdominal Trauma	Assure attending signs note and has observed examination prior to discharge. Use of retinal camera for all positive findings mandatory for cases of suspected abuse.

Why Abuse May Be Missed by Medical Providers[17]

Failure to report child abuse by physicians has been well documented.[18, 19, 20] Many barriers to the recognition and reporting of child abuse by physicians have been identified. Lack of experience can create a sense of discomfort and self-doubt on the part of the clinician when confronted with the possibility of child abuse. Familiarity with the family may lead a practitioner to conclude that a parent they have known for years is not capable of abusing a child. A family's race or socioeconomic status as well as the physician's personal biases may play a role. Recognizing potential child abuse is only part of a physician's responsibility. Although the specific statutes vary somewhat from state to state, physicians are mandated to report child abuse in all 50 states. The statutes mandate that physicians make a report when there is a "reasonable suspicion" of abuse. Studies have found, however, that many physicians do not report their suspicions to child protective services even when they appropriately identify signs of abuse. Physician surveys have identified reasons for underreporting, including fear of jeopardizing their relationship with the family, discomfort at the possibility of having to testify in court, and lack of understanding of the state mandate. Absolute certainty that abuse has occurred is not required to trigger the mandated reporter's responsibility under state law-and there is considerable variability in how "reasonable suspicion" is defined by physicians, leading to inconsistent reporting.

Inadequate educational exposure to child abuse during and following training is often a factor in missed cases. Physicians who have received more training and education in child abuse are more likely to report suspected cases of child maltreatment.[20] However, many residents have limited experience or training in recognizing and reporting child abuse. Only 41% of accredited pediatric residency programs in the United States have required clinical rotations in child abuse and neglect. In fact, 25% of residency programs have no child abuse rotation.[19] Pediatrics residency training programs and other training

[17] Section adapted from: Canter J, Butt N, Altman R. Two Missed Cases of Abuse: Lessons Learned. Consultant for Pediatricians. 4/2012

[18] Flaherty EG1, Sege R. Barriers to physician identification and reporting of child abuse. Pediatr Ann. 2005 May;34(5):349-56.

[19] Narayan AP1, Socolar RR, St Claire K. Pediatric residency training in child abuse and neglect in the United States. Pediatrics. 2006 Jun;117(6):2215-21.

[20] Van Haeringen AR1, Dadds M, Armstrong KL. The child abuse lottery--will the doctor suspect and report? Physician attitudes towards and reporting of suspected child abuse and neglect. Child Abuse Negl. 1998 Mar;22(3):159-69.

venues need to actively involve residents in the process of reporting concerns about child abuse to child protective services. Residents who are required to call child protective services as part of their training will be more comfortable with this process. Continuing medical education in child abuse is also important. Physicians with some training in the field of child abuse after residency are more likely to report all suspected cases of child abuse to child protective services than are physicians without such continuing education.

Assessment of Risk and Future Harm:

Exposure to abuse and other adverse childhood experiences influence how the brain functions, thus increasing the risk for physical, social and behavioral health impairments later in life. [21, 22] Thus, the damages after abuse extend well beyond physical ailments and prompt the need for rehabilitation and post-trauma mental health support.

Much of the outcomes research in this area focuses upon the "Adverse Childhood Experiences (ACE) Study" (hereinafter "ACE Study"). This study evaluated the association between maltreatment in childhood and later-life health and well-being. It is the largest study of its kind and considered the landmark body of research addressing future risk of harm after childhood abuse. The study population includes more than 17,000 Health Maintenance Organization (HMO) members who underwent comprehensive physical examinations and extensive surveys providing detailed information on childhood experiences termed Adverse Childhood Experiences (ACEs) and current behaviors and health parameters. Data collected in the surveys included experience of physical abuse, sexual abuse, neglect, emotional abuse and other elements of family dysfunction, including exposure to caregiver substance abuse. Utilizing this data, there have been more than 150 peer-reviewed scientific articles and conference presentations.[23]

The goals of the ACE study included understanding potential connections between adverse childhood events and health, future illness, premature death, and quality of life so as to create early proactive preventive practices or otherwise address prevention. An individual has experienced an Adverse Childhood Experience (ACE) if he or she experienced any of the following conditions in the household prior to age 18:

[21] Shonkoff JP. Building a new biodevelopmental framework to guide the future of early childhood policy. Child Dev. 2010;81(1):357–367pmid:20331672

[22] Johnson SB, Riley AW, Granger DA, Riis J. The science of early life toxic stress for pediatric practice and advocacy. Pediatrics. 2013;131(2):319–327pmid:23339224

[23] http://www.cdc.gov/violenceprevention/acestudy/pyramid.html

1. Physical abuse[24]
2. Emotional abuse[25]
3. Contact sexual abuse[26]
4. An alcohol and/or drug abuser in the household
5. An incarcerated household member
6. Family member who is depressed, suicidal, mentally ill, institutionalized
7. Mother is treated violently[27]
8. One or no parents
9. Physical neglect[28]
10. Emotional neglect[29]

Using the survey responses, subjects are given an "ACE Score" which represents a total sum of the number of ACEs reported by study participants. Exposure to one category of ACE, qualifies as one point. When the points are added up, the total ACE Score is determined. This score represents the total amount of toxic stress during childhood. Hundreds of research studies utilizing ACE data demonstrate increased risk for medical, social and behavioral conditions correlated with ACE exposure. As the ACE score increases, there is increased risk for the following health problems, behaviors, and quality of life issues including-- but not limited to – the following: [30]

[24] Defined as "Sometimes, often, or very often pushed, grabbed, slapped, or had something thrown at you or ever hit you so hard that you had marks or were injured."

[25] Defined as "Often or very often a parent or other adult in the household swore at you, insulted you, or put you down and sometimes, often or very often acted in a way that made you think that you might be physically hurt."

[26] Defined as "An adult or person at least 5 years older ever touched or fondled you in a sexual way, or had you touch their body in a sexual way, or attempted oral, anal, or vaginal intercourse with you or actually had oral, anal, or vaginal intercourse with you."

[27] Defined as "Your mother or stepmother was sometimes, often, or very often pushed, grabbed, slapped, or had something thrown at her and/or sometimes often, or very often kicked, bitten, hit with a fist, or hit with something hard, or ever repeatedly hit over at least a few minutes or ever threatened or hurt by a knife or gun."

[28] Respondents were asked whether there was enough to eat, if their parents drinking interfered with their care, if they ever wore dirty clothes, and if there was someone to take them to the doctor utilizing a Childhood Trauma Questionnaire (CTQ) short form.

[29] Respondents were asked whether their family made them feel special, loved, and if their family was a source of strength, support, and protection utilizing a Childhood Trauma Questionnaire (CTQ) short form.

[30] Felitti V, Anda R, Nordenberg D, et al, Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults. The Adverse Childhood Experiences (ACE) Study, Am J Prev Med. 1998 May;14(4):245-58.

1. Cardiovascular disease including heart disease and stroke
2. Asthma
3. Cancer
4. Neurological Conditions
5. Autoimmune Disease
6. Liver disease
7. Diabetes
8. Obesity
9. Health risk behaviors including smoking and high risk sexual activity.
10. Substance Abuse.
11. Cyclical Abuse (subsequent abuse of offspring)
12. Mental Illness including eating disorders and suicide
13. Criminal Activity

Summary:

Professionals working with children are in the unique position to identify potential indicators of abuse or neglect. The ability to identify such indicators is influenced by training, experience and the context within which the professional is exposed to the child. Subsequent mandated reporting behavior depends on a multitude of factors including but not limited to experience handling potential abuse concerns, regional and institutional procedures, concern for the professional-client relationship (i.e. – teacher/student, doctor/patient), and bias. After a report is generated, the investigation of abuse includes input and information sharing from multiple agencies, most often including child abuse/forensic pediatricians. The role of the child abuse/forensic pediatrician is to exclude medical imitators of abuse, correlate information obtained during the investigations with findings, and provide expert input for protective and prosecutorial authorities. Damages after abuse are not limited to direct physical outcomes as individuals exposed to abuse in childhood are at an elevated risk for a multitude of behavioral, social and medical conditions throughout the lifespan.

This paper accompanies Dr. Canter's presentation at the National Center for Victims of Crime National Training Institute on September 19, 2106 in Philadelphia, PA.

STALKING LITIGATION

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WHAT IS STALKING?

The term "stalker" typically evokes the image of a creepy man in the bushes, furtively following the woman of his obsession. It is not uncommon for the media to report the apprehension of a fanatic who crept his way into a celebrity's home – or worse. The Rebecca Schaeffer and John Lennon cases are notorious illustrations of the extremes to which a celebrity stalker will go. We hear far too often of ex-lovers and spouses that refuse to accept the end of relationship and who continue to follow, harass, and threaten, who violate orders of protection, and who sometimes even injure or kill their victims. These are the classic examples of stalking, stalking encompasses behavior far more expansive than headline grabbing celebrity cases or tragic domestic matters.

Stalkers can be friends, co-workers, fellow students, neighbors or complete strangers. Stalking behaviors can include surveillance, following, telephoning, emailing, texting, posting or searching on social media, sending unwanted letters or gifts, contacting friends or family, vandalizing, harassing, threatening or physically attacking. Stalking victims may not even know they are being stalked until someone tells them, or their stalker takes an overt act. Stalking can take place over the course of days, weeks, months or years.

In short, stalking cannot be specifically defined. The NCVC provides a very simple yet entirely accurate description of stalking: "*Stalking is a pattern of behavior that makes you feel*

afraid, nervous, harassed, or in danger. It is when someone repeatedly contacts you, follows you, sends you things, talks to you when you don't want them to, or threatens you."[1]

All 50 states have some form of a criminal stalking statute that provides a legal definition of stalking. Criminal stalking statutes all provide that stalking involves a course of conduct, as opposed to a single act. Notably, criminal statutory definitions of stalking focus exclusively on the state of mind of the *perpetrator*. For example, the Illinois Stalking No Contact Order Act[2] defines it as follows:

> *"Stalking" means engaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety or the safety of a third person or suffer emotional distress.*

To win a guilty verdict in a criminal prosecution, the state is required to prove that the defendant either intended or reasonably should have known that his pattern of behavior would cause someone to fear for her safety or suffer emotional distress. But the stalking victim's actual fear and emotional distress is not an element of the prosecutor's case. Note that the above Illinois statute does not even refer to the victim of the crime, only to a hypothetical "reasonable person".

The actual impact of the stalking on the victim is typically left unaddressed in a criminal prosecution. While some states allow the criminal court to afford the victim a limited degree of restitution for out-of-pocket losses (i.e., property damage, expenses for security, and the like), a criminal court cannot assess and award compensation for the victim's past, present and future

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[1] "Stalking". *Victimsofcrime.org*., Web. 14 July. 2016. https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/bulletins-for-teens/stalking

[2] Illinois No Stalking Contact Order Act - 740 ILCS 21/1 *et seq*.

emotional distress, pain and suffering and loss of enjoyment of life. Nor can a criminal court adjudicate or award punitive damages. This is where our jobs as victim advocates comes in.

CIVIL ACTIONS FOR STALKING VICTIMS

As civil litigators, our mission is to recover money to compensate our victim clients for the damages they suffered at the hands of their perpetrators. In pursuing civil justice for our clients we are not bound to the constraints of the criminal statutes defining stalking. We need not prove the perpetrator's guilt beyond a reasonable doubt. While a few states provide us with statutory civil causes of action, we are limited only by our creativity in applying common law tort theories to the facts of our cases.

- **Monetary Damages**

Stalking victims can suffer innumerable forms of loss and damage depending on the behaviors of the perpetrator, the circumstances attendant to the stalker's course of conduct, and the unique characteristics of the victim. A victim might suffer out-of-pocket losses for property damage in the case of vandalism to her car or house. She might have money or personal property stolen from her. She might need to have a security system installed or live in hotel. In the cases where a stalker causes physical injury, the victim's past and future medical expenses, physical pain and suffering, and permanency are fully compensable just as in any other personal injury case.

Psychological and emotional distress damages are frequently at the center of stalking litigation. A full discussion of the psychological impact of stalking upon its victims is well beyond this summary, but the effects can be pervasive, devastating and lasting. Victims are often fearful of taking steps to deal with their situation: they may be embarrassed or think they will not be taken seriously. They may blame themselves. They may fear further retribution from

their stalker. All of these things add to the toll upon the victim in a downward and perpetual cycle. Stalking can undermine both mental health and physical well-being, it can erode performance at school and at work, and it can infect personal relationships. Whether or not your client elects to pursue a civil suit, it is almost always advisable to encourage a stalking victim to seek some form psychological evaluation and assistance.

Depending on the jurisdiction, punitive or exemplary damages may be recoverable for intentional or reckless conduct. As discussed below, attorneys may face challenges in crafting their causes of action to a preserve punitive damages claims while simultaneously invoking potential insurance coverage.

- **Deterrence and Injunctive Relief**

Somewhat surprisingly, the ramifications of a civil suit sometimes have a greater deterrent effect on a perpetrator than the criminal justice system itself. Some perpetrators simply do not fear arrest, restraining orders or even prison. Other times, a lethargic or overtaxed criminal justice system simply doesn't work the way it should to hold perpetrators accountable for their crimes. A slap on the wrist (or less) can embolden a stalker to continue or repeat his behavior. But being sued civilly by their victim can turn the tables on a stalker. A civil suit can give the victim, as plaintiff, a degree of control of the situation. In a criminal case the defendant has no obligation to testify – he may never have to answer directly to his victim. But represented by skilled counsel in a civil suit, the victim can compel the perpetrator to testify under oath. In a civil suit, the defendant cannot hide behind the Fifth Amendment – his silence allows the court to draw negative inferences. This loss of control to his victim, combined with the possibility of significant financial obligation, can serve to alter a stalker's perspective.

In many states, a criminal court has limited power when it comes to injunctive relief. For example, under the Illinois a Stalking No Contact Order Act, a no contact order cannot extend beyond two years unless there a judgment of conviction is entered.[3] The realities of the criminal system are such that negotiated pleas frequently preclude convictions, especially in cases of first offenses. A civil action is not subject to such limitation. Negotiating the settlement of a civil action can – and always should – include a voluntary and *permanent* civil no contact agreement with liquidated damages for each violation.

CAUSES OF ACTION

- **Statutory Remedies**

There is no tort of "stalking" at common law. A few states provide a distinct statutory civil cause of action for stalking. For example, California's Civil Code[4] statutorily creates a "tort of stalking" by statute as follows:

> (a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:
>
> (1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.
>
> (2) As a result of that pattern of conduct, either of the following occurred:
>
> (A) The plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this subparagraph, "immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household.

[3] Illinois No Stalking Contact Order Act - 740 ILCS 21/105(b)
[4] Cal Civ Code § 1708.7 (2014), Stalking; tort action; damages and equitable remedies.

(B) The plaintiff suffered substantial emotional distress, and the pattern of conduct would cause a reasonable person to suffer substantial emotional distress.

(3) One of the following:

(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with either (i) the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member, or (ii) reckless disregard for the safety of the plaintiff or that of an immediate family member. In addition, the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiff's communication of the demand impractical or unsafe.

(B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of **Civil** Procedure, prohibiting any act described in subdivision (a).

As is apparent, the California statute sets forth very specific elements required to establish the tort of stalking. Texas also provides a statutory civil cause of action for stalking[5] with very detailed elements of proof:

Sec. 85.003. PROOF. (a) A claimant proves stalking against a defendant by showing:

(1) on more than one occasion the defendant engaged in harassing behavior;

(2) as a result of the harassing behavior, the claimant reasonably feared for the claimant's safety or the safety of a member of the claimant's family; and

(3) the defendant violated a restraining order prohibiting harassing behavior or:

(A) the defendant, while engaged in harassing behavior, by acts or words threatened to inflict bodily injury on the claimant or to commit an offense against the claimant, a member of the claimant's family, or the claimant's property;

(B) the defendant had the apparent ability to carry out the threat;

(C) the defendant's apparent ability to carry out the threat caused the claimant to reasonably fear for the claimant's safety or the safety of a family member;

[5] Tex. Civ. Prac. & Rem., Sec. 85.001 *et seq.*

(D) the claimant at least once clearly demanded that the defendant stop the defendant's harassing behavior;

(E) after the demand to stop by the claimant, the defendant continued the harassing behavior; and

(F) the harassing behavior has been reported to the police as a stalking offense.

(b) The claimant must, as part of the proof of the behavior described by Subsection (a)(1), submit evidence other than evidence based on the claimant's own perceptions and beliefs.

Statutory civil remedies for stalking should not be ignored in those states that offer it, but they should not be the exclusive avenues for pursuing recovery. Common law affords civil litigators great flexibility in seeking compensation for clients victimized by stalking.

- **Common Law Torts**

Any or all of the traditional common law tort claims can be utilized in stalking litigation, depending on what the facts and circumstances of the particular case warrant**:**

- Intentional Infliction of Emotional Distress
- Invasion of Privacy (Intrusion Upon Personal Seclusion)
- Trespass (to Land or Property)
- Assault
- Battery
- False Imprisonment
- Defamation (Libel/Slander)
- Conversion

Discussion of the elements of each of these torts is beyond the scope of this summary (although additional attention will be given to Intentional Infliction of Emotional Distress and Invasion of Privacy in the discussion of insurance, below).

- **Third Party Liability / Alternative Causes of Action**

Stalking litigation most typically involves an individual perpetrator-defendant. However, counsel should always consider whether there are any potentially culpable additional or third parties. If the facts warrant it, there may be viable claims for:

- Negligent security
- Negligent hiring
- Negligent discharge from psychiatric or hospital care
- Parental responsibility laws (in the case of minor defendants)
- Civil conspiracy (in the case of co-stalkers)

LITIGATION

- **Client Relationships**

It is critical that stalking victims understand what civil litigation can – and cannot-accomplish for them. Setting and managing client expectations can be particularly sensitive with victims of crime, and none are more anguished, fearful and emotionally exhausted than stalking victims. Make certain to talk extensively and candidly with potential clients about both the positive and negative aspects of litigation. Be wary of clients with unreasonable or unattainable goals, or those that seek retribution as opposed to civil justice.

If your client has not had mental treatment in connection with the stalking activity, consider whether a professional evaluation is warranted or advisable. Be cognizant of the discoverability of medical records in deciding whether to have the client seek treatment from an independent counselor, or to retain an expert to provide an evaluation and opinions for the purposes of litigation.

Once you are retained, have your client write you a letter (or a series of letters) detailing all of their observations, thoughts, feelings and perceptions about the matter. A letter addressed to you and prepared for litigation purposes is privileged and non-discoverable – unlike a contemporaneous journal or diary, which may be. It is a great way to capture facts and nuances that might otherwise be forgotten or overlooked.

- **Insurance**

Although holding the perpetrator financially responsible for his actions is a primary goal of stalking litigation, making maximum recovery for your client is of paramount importance. Unless you are fortunate enough to have a "collectable" defendant, insurance may be the difference between a Phyrric victory and a substantive settlement. Although virtually no insurance policy provides coverage for intentional torts or criminal acts, many homeowners and umbrella policies afford coverage for certain negligent acts, including invasions of privacy.

Your first notice of representation to the perpetrator should make a demand that he immediately tender notice of the claim to his homeowner's and/or umbrella insurance carrier and that he produce copies of all applicable policies to you (include commercial liability and E&O coverage if the perpetrator's conduct was in any manner connected to his business dealings). Remind the perpetrator that his failure to timely tender the claim may result in possible insurance coverage being denied. There are three goals here: (1) to give the perpetrator the first indication that you are coming after him financially; (2) to get your hands on a copy of any potentially applicable insurance policies as early in the process as possible, and (3) to set up the dichotomy of a simultaneously adversary and cooperative relationship in the litigation. This last point will be a valuable tool in the litigation.

There is no disincentive for producing copies of the applicable policies, and it is likely the perpetrator or his counsel will provide them. If not, then you'll need to formally seek production in discovery after suit is filed.

Once you get a copy of the policy, examine it thoroughly. Carefully study the coverages and the exclusions. Review every definition, word and phrase. You may be surprised to find broad coverage for acts that you can readily plead, such as invasion of privacy or trespass – but more likely you will find a confusing patchwork of coverages and exclusions, replete with internal

cross-references and ambiguities. Develop at least some of your causes of action around the policy language, keeping in mind that your objective at the pleading stage is simply to get the insurance company involved in the case. If the insurer is remotely concerned about having a coverage obligation it will provide a defense, even if under a reservation of rights.

An excellent tactic is to openly share your assessment of the policy with the perpetrator and his counsel. Remind them that even though you are adverse parties, your interests are aligned with respect to wanting the insurance company involved.

- **Initiating Suit**

Depending on the nature of the circumstances and your client's desire for anonymity, determine if there is need for a "Jane Doe" or "John Doe" filing, and if it is permissible in your jurisdiction.

Your complaint should include all of the causes of action you have determined are applicable in the case. Plead in detail and in narrative fashion (if permitted in your jurisdiction) as this public airing adds to the pressure you are bringing to bear on the defendant.

If there is insurance coverage, plead to the policy - making sure to include at least one cause of action that arguably falls within the terms of coverage. Be creative in your drafting and strategies. If the stalking behavior occurred over the course of more than a year, can you plead separate counts in an effort to invoke coverage under more than one policy? If the stalking behavior took place in more than one geographic area, which is the best forum for your lawsuit – or do the facts support separate lawsuits in two different forums? Endeavor to create as much potential exposure and uncertainty about coverage obligations as possible. It is very unlikely that the insurer has dealt with a stalking case before – leverage their desire to avoid an adverse decision.

Another excellent tactic is to immediately seek to the entry a protective order upon the filing of the lawsuit to enjoin the defendant from being physically near your client in court proceedings and depositions. This procedure not only spares your client the stress of seeing her stalker, it is a way of getting the gist of the case before your judge early on. Even if the relief requested is denied or limited, you've educated the court and sent an early message to the judge and opposing counsel about the gravity of the case.

- **Discovery**

Stalking cases are unique in that they necessarily involve an ongoing course of conduct as opposed to a distinct event. In some cases, your discovery efforts may cover months or even years of activity, particularly if the defendant denies some or all of the alleged conduct. There is no boilerplate set of "stalker" discovery requests as every case is so unique. Carefully craft your discovery to specifics of your case, using requests to admit, subpoenas and depositions to piece together relevant timelines and locations of stalking behavior. If there was a criminal case, make sure to obtain and review all available public records and transcripts for admissions or other information that may lead to avenues of discovery.

A very effective discovery technique (if your jurisdiction allows it) is to demand detailed information about the defendant's personal finances. Some states allow the inquiry where there is a claim for punitive damages. Explore every conceivable asset – bank accounts, real estate, investments, collections, vehicles, inheritances. Request several years' worth of complete tax returns. This kind of inquiry immediately engages defendant on a very personal level and reinforces both the shift in control and the potential financial ramifications of the civil suit.

- **Settlement**

As in any litigation, all of your efforts will be geared toward being prepared for trial – but settlement is typically the goal. The greatest leverage you will have is likely the uncertainty of how a jury will value a stalking victim's emotional distress or how severely they will punish the stalker. Where an insurance company is involved, an effective strategy is to continue to pit the defendant against the insurer: make your demand for policy limits but be clear that settlement requires personal contribution from the defendant as well. Endeavor to shift the focus of negotiations to an internal struggle between the insurer and the insured: make your demand firm and leave it to them to apportion it.

Every settlement of a stalking case should include a voluntary, permanent no contact order with a liquidated damages provision and method for enforcement. This should be non-negotiable, and a defendant is hard-pressed to justify a refusal.

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Third-Party Liability for Sexual Assault and Other Wrongdoing on Campus

By: Douglas E. Fierberg*

I. Introduction

According to the Bureau of Justice Statistics, on average, 526,000 college students are victims of violent crime (rape, robbery, aggravated assault) each year. The U.S. Department of Education reports that in 2009, 31 students were murdered at college, whether on campus, on public property within or immediately adjacent to campus, or in or on noncampus buildings or property owned or controlled by the institution. In the same year, 3,284 were victims of forcible sexual assault and 4,981 of aggravated assault. These statistics do not even include the additional deaths and injuries on U.S. campuses from deaths caused by negligence and hazing – including the forced consumption of lethal amounts of alcohol in fraternity pledging and initiation events – which is a criminal act in most states.

In many instances, persons other than the assailant had some connection with the specific circumstances surrounding the criminal act, such as some prior knowledge of suspect behavior on the part of the assailant, or bore some responsibility for overseeing, managing, or executing school safety measures. But holding such persons *liable* for victims of school-related violence requires overcoming formidable obstacles. One such obstacle is the established doctrine of the common law that persons do not generally owe a duty to control the conduct of a third person – the assailant – so as to prevent him or her from causing physical harm by criminal acts. A related barricade is the public policy argument that students today are or should be mature enough to care for their own safety – one of the legacies of the student activism of the 60's and 70's – so that colleges do not stand *in loco parentis* to their students or otherwise have a duty to protect them from harm caused by third parties.[i] When a public school is involved, sovereign immunity may bar suit or substantially limit recovery. Similarly, many states have charitable immunity statutes that protect private educational and charitable institutions from liability.

Nonetheless, school administrators and others can be held accountable to victims of school violence through traditional civil remedies tailored to the unique circumstances of these types of cases. Discussed below are avenues which have been successfully traversed to overcome some of the major roadblocks and successfully assert the existence of a duty owed by universities, campus institutions, and individuals to recover for harm caused by criminal violence.

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II. Duties of Schools, Universities, and State Employees

It is the law in every jurisdiction that the tort of negligence requires proof that (1) the defendant was under a duty to protect the plaintiff from injury, (2) the defendant breached that duty, (3) the plaintiff suffered actual injury or loss, and (4) the loss or injury proximately resulted from the defendant's breach of the duty. As noted above, successfully alleging and proving the existence of a duty on the part of schools, fraternities and others can be problematic. Depending on the circumstances, any of the following exceptions to the general "no duty" rule may apply.

A. Assumed Duties

In the wake of the tragedies at Columbine High School, Virginia Tech, Appalachian School of Law, Northern Illinois University, and University of Alabama Huntsville, among others, schools have adopted increasingly stringent and specific rules and procedures for detecting and responding to threats posed to students and teachers by emotionally disturbed persons at educational institutions. At a minimum, pursuant to amendments to the Jeanne Clery Act enacted in August 2008, colleges are required to "immediately notify" students and staff of a "significant emergency" on campus. The Clery Act does not establish a duty or standard of care for civil litigation. But pursuant to the common law of "assumed duty," by undertaking the responsibility for emergency preparations and response, more likely than not, schools have a duty to take reasonable steps to protect students in these situations.

The common law in many states recognizes the doctrine of "assumed duty," which is also set forth in the Restatement (Second) of Torts. As Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Although a student is not in ordinary circumstances "helpless" to protect herself, one could argue that she is helpless "adequately to aid or protect [her]self" from potential criminal violence of which she is unaware (but of which the school may be aware because of, *e.g.,* repeated incidents of criminal activity, threats, or reports of a student's mental instability).

One example of such liability is illustrated in the complaint (attached hereto) that was filed in the United States District Court for the District of Connecticut, *Jane Doe v. Beta Theta Pi, Wesleyan University, et al.* The gravamen of the claims alleged against Wesleyan University was that it was responsible for the rape of Jane Doe in a fraternity house during a Halloween party because it knew that the fraternity's chapter house was dangerous and that the safety of students could not be protected. The University had warned its student body about the fraternity the preceding semester, when Jane Doe was not yet enrolled. The warning was not again provided during the fall semester when Jane entered her freshman year. The basis for the claims set forth against the local and national fraternity are fairly apparent in the complaint. The case settled shortly after commencement of discovery after a prior victim of sexual assault at the fraternity had been identified and deposed.

The "assumed duty" doctrine may also have applicability in regard to the prevention of crimes and wrongdoing other than a violent criminal attack. By way of example only, by providing resident directors and house managers in other university owned housing, the university has undertaken duties to act with reasonable care (e.g. regarding hiring, retention,

supervision, and the specific conduct of the university's agents in managing the housing) for the residents' safety.

B. "Special Relationship"

In the absence of safety rules and procedures which may establish a duty and a standard of care, the common law doctrine of the "special relationship" may provide for such a duty in the right circumstances.[ii]

For example, in *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (2002), which arose from a student's suicide, the school had substantial notice of his intention to hurt himself prior to his death, yet failed to notify his parents or intervene meaningfully. In that case the District Court in Virginia denied the College's motion for summary judgment on the grounds that a special relationship can arise, and create an affirmative duty to protect, when harm is *foreseeable*. The Court reached this conclusion by noting the common factor in all the special relationships which existed as a matter of law in Virginia was the foreseeability of harm. Therefore, the Court concluded although it would be "unlikely that Virginia would conclude that a special relationship exists as a matter of law between colleges and universities and their students," when a particular harm to a student was foreseeable, those courts would find a special relationship and an affirmative duty to act. 236 F.Supp. 2d at 609.

In *Schieszler,* the facts showing the student, Michael Frentzel, was in danger were compelling: Frentzel was a full-time student at Ferrum College. He lived in an on-campus dormitory. The defendants were aware that Frentzel had emotional problems; they required him to seek anger management counseling before permitting him to return to school for a second semester. The defendants knew Frentzel was found by campus police, within days of his death, alone in his room with bruises on his head and he claimed these bruises were self-inflicted. The defendants knew Frentzel had, at around the same time, sent a message to his girlfriend in which he stated that he intended to kill himself. The defendants knew Frentzel had sent other communications, to his girlfriend and to another friend, suggesting that he intended to kill himself. After Frentzel was found alone in his room with bruises on his head, the defendants required Frentzel to sign a statement that he would not hurt himself. This last fact, more than any other, indicates the defendants believed Frentzel was likely to harm himself. Based on these alleged facts, the court concluded a jury could reasonably find there was an "imminent probability" that Frentzel would try to hurt himself, and the defendants had notice, upon which they had a duty to act.

Another example is *Shin v. MIT*, 19 Mass. L. Rep. 570 (2005), a case arising from Elizabeth Shin's suicide and her estate's claims that school administrators failed to reasonably intervene to prevent her suicide. In *Shin*, the court denied MIT's motion for summary judgment, finding that a special relationship existed between the MIT administration and the student, creating a duty to take affirmative action with reasonable care to protect that student from harm, because that particular harm was foreseeable. School administrators had received repeated reports of Elizabeth's mental health problems, and over an extended period of time, including a report that she was planning to commit suicide. The court found this was sufficient evidence that a jury could find that school administrators could reasonably foresee that Elizabeth would hurt herself without proper supervision. Accordingly, there was a "special relationship" between the MIT administrators and Elizabeth, imposing a duty on them to exercise reasonable care to protect Elizabeth from harm.

C. Premises Liability

The highest percentages of violent incidents occur inside a school building. When crimes and other misconduct occur on university property, another basis for liability to consider is premises liability. The key to premises liability, as with the existence of a special relationship, is

foreseeability. That is, in general a landlord is responsible to protect only against dangers of which it knew or should have known, or which it created. It would be unlikely that a university would incur premises liability for a violent criminal attack unless there were pre-existing indications of danger of which it knew and about which it did not take reasonable steps to prevent or avoid. Though, unfortunately, many schools and universities experience substantial criminal activity, the substance of which can often be reviewed in the school's annual security report required by the Clery Act. Clery Reports are often vague and incomplete,[1] meaning the practitioner also needs to review records from local police. As a result of such knowledge, universities may be found liable for failing to act responsibly to protect students from such harm on campus.

The complaint appended hereto in the *Jane Doe v. Beta Theta Pi Fraternity, Wesleyan University et al.* sets forth such claims in detail. This case resulted in a substantial settlement with the university and fraternity defendants.

D. Respondeat Superior

Universities and fraternities – like any corporate entities – act, or fail to act, through their agents and employees. Therefore, generally, a university enters into a special relationship with students and/or assumes a duty through the actions of its agents and employees. There may, however, be circumstances where an agent or employee has, for example, assumed a duty which assumption cannot fairly be attributed to the university: the assumption may have been *ultra vires*. In most jurisdictions the fact that an agent has acted outside the scope of the agency does not end the analysis of potential *respondeat superior* liability. Even if the agent has disobeyed instructions, the principal may be liable for the negligence of the agent if the agency relationship contemplates significant independent action on the part of the agent.

An example of this principle in real life involves a student who was sexually assaulted by a male security guard at a university in the Northeast. The student had been out with friends that evening and was visibly intoxicated and distressed because her brother had recently been diagnosed with a severe illness. At about 1:00 am she was standing outside of her dormitory, in her pajamas, and unable to get in because she had lost her keycard. She was approached by a female security guard and they engaged in a conversation. It was a small campus and the student was casually friendly with another security guard who happened to be on duty at that same time. Rather than take the student to university health services or the campus police station, as required by university policy, the female security guard took the student to another location on campus where the male security guard was conducting patrols in his vehicle. The student got into the car of the male security guard and was sexually assaulted.

This matter resulted in a significant confidential financial settlement to the student. Central to the negotiations was the issue of *respondeat superior* because under the applicable law of that state, an employer/university is not liable for the criminal acts of its employees because such actions are beyond the scope of their employment. Hence, the university could not be liable for the criminal misconduct of the male security guard. But, that was not the end of the inquiry. The first security guard's misconduct was not criminal. It was simple negligence in that she failed to act reasonably and in accordance with university safety policies when she failed to adequately protect the student. There was simply no valid reason for her to deliver the student to a male security guard. She should have been taken to university health services or the campus police. To do otherwise was to act negligently in the scope of her employment. And, the university was liable under principles of *respondeat superior* for the harm that followed, e.g. the sexual assault.

E. Title IX and 42 § 1983

[1] The Clery Act does not create a private cause of action.

Universities and other educational institutions receiving federal funding can be held liable under Title IX for being deliberately indifferent to severe, pervasive, and objectively offensive student-on-student harassment/violence. *Davis v. Monroe County Board of Education (1999, S. Ct. GA)*. And, such theories may be combined with § 1983 civil rights claims, particularly where the public school's liability is based upon a failure to train employees on handling sexual assault investigations, and its deliberate indifference to ongoing harassment suffered by the victim. A good example of how such claims are raised is set forth in the attached Complaint *Madison King, et al. v. Chad Curtis, et al.*

In that case, plaintiffs were regularly removed from their classes or weight room training to receive "therapeutic" massages by Curtis, a former major league baseball player for the Detroit Tiger and New York Yankees. Curtis sexually assaulted plaintiffs during such encounters. After the students reported the assaults to the school they were terribly harassed, bullied, and ostracized by classmates and others in the community. Curtis and his family were well-known members of the community, and the young victims were cast as liars. Instead of taking affirmative actions to protect the students, the school decided to remain "neutral" while it awaited conclusion of the criminal proceedings. None of its administrators, including its Title IX Coordinator, had received Title IX training. All essentially believed that Title IX related solely to creating equal opportunities in sports for male and female students.

As a result, plaintiffs were subjected to cruel treatment and bullying. They complained to school officials; learned their complaints resulted in no discipline against offending students; and, ultimately, learned the school was not going to intervene on their behalf. Plaintiffs suffered emotionally, dropped sports and extracurricular activities, one transferred from the school, and all sought counseling.

While the case remains in litigation, the legal support for such claims is set forth in the attached opinion by that same court, *Jane Doe v. Forest Hills School District, et al. (No. 1:13-cv-428 D.C. WD MI).*

III. Duties of National Fraternal Organizations

Statistics, insurance claims analyses, studies and reports, and widely known incidents of catastrophic injury and death have for decades demonstrated the foreseeable risk of dangerous injury and death from the excessive consumption of alcohol in fraternities and particularly by prospective new members during fraternity bid, pledge, Big Brother and other initiation events in which participation is required for admission to the brotherhood. The Fraternal Information and Programming Group ("FIPG"), a consortium of Greek organizations comprising approximately 70% of the men's and women's fraternities/sororities in North America, widely published in the late 1980s that "fraternities and sororities were ranked by the National Association of Insurance Commissioners as the sixth worst risk for insurance companies – just behind hazardous waste disposal companies and asbestos contractors."

A well-known survey conducted by Harvey Wechsler of the Harvard School of Health in 2001 showed that three-quarters of fraternity and sorority members are binge drinkers. As Dr. Wechsler put it in his book on the subject, "Dying to Drink," "the single strongest predictor of binge drinking is fraternity or sorority residence or membership." In 2007, the National Center on Addiction and Substance Abuse at Columbia University ("CASA"), reported in "Wasting the Best and the Brightest: Substance Abuse at America's Colleges and Universities," that binge drinking in Greek housing is 89% higher than it is for students in university housing, and that fraternity officers are the worst substance abusers of all, by a wide margin.

In general, national and local fraternities and associated organizations (such as local corporations created to buy and own fraternity housing) may be subject to the same duties as are

universities: because of the existence of a "special relationship" with their members and pledges; invitees to their events, pursuant to assumed duties to supervise events or act reasonably when a guest is in trouble, or when criminal activity or other misconduct occurs in fraternity-owned housing.

An example of these legal theories in action is set forth in the attached complaint, *Cabri Chamberlin v. Psi Upsilon Fraternity, Inc. et al.* In that case, plaintiff was invited to attend a show put on by the pledges of the fraternity at the chapter house. The show turned into a strip show, fueled by a great deal of alcohol provided by the fraternity to attendees. Plaintiff became uncomfortable and headed for the exit through a gauntlet of drunk fraternity members and pledges. Near the exit, a fraternity pledge grabbed her, pulled her over onto a couch, and raped her. The claims against the fraternity entities (local and national) were essentially based upon duties assumed as a result of their qualification as program housing, the inherent negligence of their risk management policies and practices, premises liability, and, as to the national, its negligence in failing to ban alcohol from fraternity chapters and leaving the management of alcohol up to its undergraduate members (who are not legally able to consume the product they are entrusted to manage). The lawsuit resulted in substantial settlements from the fraternities and from the private funds of the perpetrator.

Finally, liability has been successfully asserted against fraternities for the rape of women who become intoxicated/incapacitated at fraternity events. In these circumstances, principles set forth in the Restatement of Tort, giving rise to a duty to act reasonably towards a person who is in a position of peril as a result of another's actions, have supported claims against fraternities and fraternity members who fail to protect women who become grossly intoxicated at fraternity events. To the entities and persons who gave substantial assistance to the activities that caused the victim's incapacity, they have duties under concerted action theories to act reasonably and prevent an intoxicated female from being raped.

But there are many pitfalls for the unwary. A full discussion of the wide-range of legal issues related to the fraternity industry and its unprecedented record of injury and death is beyond the scope of this article. Those particularly interested in this subject are encouraged to contact our office directly for additional information.

IV. CONCLUSION

Civil remedies for victims of sexual assault at schools are often available against third-parties. Yet, in order to be effective, legal counsel and other advocates must gain a thorough understanding of the scope of these problems and the unique factual and legal issues involving universities, schools and student victims.

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[i] *See, e.g., University of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987).
[ii] *See* Section 314A of the Restatement (Second) of Torts (1965).

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MY CLIENT AND THE ABUSER FILED BANKRUPTCY (&#%!@?!)[1]: WHAT DO I DO NOW?

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[1] In a 1964 article for the National Cartoonist Society, *Beetle Bailey* creator Mort Walker coined the term *grawlix,* which now refers to the string of typographical symbols that stands for profanity.

THE SURVIVOR'S BANKRUPTCY: ADMINISTRATION OF THE ABUSE CLAIM

You have filed your abuse complaint and have beaten back motions to dismiss and motions for summary judgment. Finally, your client's deposition is being taken. Opposing counsel asks, almost as an afterthought, "Have you ever filed bankruptcy?" Your client answers, "Yeah, but it was a long time ago and I can't remember much about it." Your case just got a bit more complicated.

Your case just got a bit more complicated because a bankruptcy filing commenced by the filing of a petition for relief creates an estate that initially includes the abuse claim. Bankruptcy Code §541(a) provides that the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." State law determines the existence of the legal or equitable interests (see below on statutes of limitation and statutes of repose). Any legal interest that exists as of the filing of the petition is property of the estate. The client's cause of action based on the abuse is an interest that is property of the estate. While there are arguments that your client's claim should not be included in the estate (*e.g.*, a statute of limitations reform revived your client's claim which was time barred when the bankruptcy was filed), there is no dispute that an abuse claim filed within the applicable statute of limitations is property of the bankruptcy estate.

In most cases, your client does not control the bankruptcy estate. In every bankruptcy case, the bankruptcy estate has a representative who administers the estate's property. In a Chapter 7 (liquidation) case, the estate representative is a trustee, typically appointed by the Office of the United States Trustee (a branch of the U.S. Department of Justice) from a pre-qualified panel of trustees. In a Chapter 13 case (wage earner reorganization); your client is the estate representative. Chapter 13 trustees handle the disbursement of payments to creditors; they are not estate representatives. In Chapter 11 cases (reorganization, rarely used by individuals), your client is the estate representative subject to the Court's ability to appoint a trustee.

If your client does not have the Bankruptcy Court case number, check with bankruptcy counsel who filed the case. If bankruptcy counsel cannot be contacted or has destroyed the file, search the Bankruptcy Court's filings on www.pacer.gov. For cases pre-dating PACER, the Bankruptcy Court clerk's office may be able to perform a case-search based on the client's name. Identify the trustee and confirm with the trustee's office that the trustee is still serving as trustee in bankruptcy cases. *See* section regarding re-opening a bankruptcy case on what to do if the trustee is no longer serving on the trustee panel.

A debtor in a bankruptcy case has the duty to file Schedules of Assets under penalty of perjury. Schedule A requires a list of all of the debtor's property. Unless your client's abuse claim was extinguished under state law, your client should have scheduled the claim on Schedule A. Specifically, Schedule A, Part 11 (no. 74) requires the debtor to schedule: "Causes of action against third parties (whether or not a lawsuit has been filed); the nature of the claim and the amount requested." If that required disclosure does not cover the abuse claim, the next one surely does (no. 75): "Other contingent and unliquidated claims or causes of action of every nature, including counterclaims of the debtor and rights to set off claims, nature of claim, amount requested." This particular form of the Schedules came into effect December 2015. Prior schedule forms required substantially the same information and the committee notes to the revised schedule did not note any substantive changes.

The client's failure to schedule the abuse claim does not mean that the claim is outside of the estate. Obviously, a debtor cannot determine the assets from which its creditors can collect. Even if the bankruptcy case has been closed by the Bankruptcy Court, the bankruptcy estate still exists and it still includes unscheduled assets. *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir.2004) ("By operation of statute, assets that [debtor] failed to schedule remained the bankruptcy estate's property, even after the court discharged his debt."); *In re Lopez*, 283 B.R. 22, 28 (9th Cir. BAP 2002). Thus, your opponent has a range of tactics to deprive your client of his/her ability to prosecute the claim.

Your opponent can ask a court to bar the prosecution of the claim on an estoppel theory, i.e. that the case should be dismissed because its prosecution is inconsistent with the representations in the Schedules that no claim existed. There is federal and state law on the elements of an estoppel defense and the case law is not clear whether the federal law or state law or a mix of the two applies to the failure to schedule the abuse claim. While the federal and state estoppel laws have common purposes and substantial similarities, differences do exist. A survey of each law and their similarities/differences is beyond the scope of this article. For a discussion of the similarities and differences and a discussion of which law should apply, *see* Eric Hilmo, *Bankrupt Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors*, 81 Fordham L. Rev. 1353 (2013). Available at: http://ir.lawnet.fordham.edu/flr/vol81/iss3/4.

A common response to an estoppel attack is that the claim did not exist at the time of the bankruptcy because either a statute of limitations or statute of repose barred the claim or the claim had not accrued, i.e. the survivor had not "connected the dots" between the abuse and the injury. Since most courts consider a "good faith mistake" response to a judicial estoppel claim, a debtor/survivor may contend that the nondisclosure of the abuse claim was based on counsel's advice that there was no claim, i.e. that the claim was barred by the statute of limitations. While statute of limitations defenses generally are waivable and do not extinguish a cause of action, the debtor/survivor's nondisclosure may be understandable and therefore forgivable. If the litigation was pending at the time of the non-disclosure, at least one Circuit's three judge panel recently has held that the non-disclosure is not curable. *Slater v. U.S. Steel Corp*., No. 12-15548, *slip op.* (11th Cir.

2016)(decision is being review *en banc*). On the other hand, a claim that is extinguished by a statute of limitations or a statute of repose as of the bankruptcy petition date is not an asset of the estate and therefore did not have to be disclosed. If the claim had not accrued as of the bankruptcy petition date, the estoppel attack might be defeated although the claim was part of the estate. *See Miller v. Campbell*, 137 Wash.App. 762, 771, 155 P.3d 154 (2007). If the trustee substitutes in to the action as the real party in interest, the estoppel defense may be inapplicable to the trustee. *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011); *Bartley-Williams*, 134 Wash.App. at 102, 138 P.3d 1103 ("To prohibit the trustee from pursuing the claim on behalf of the estate may create a windfall for the party seeking to invoke judicial estoppel at the expense of the bankruptcy creditors."). Whether the estoppel will bar the debtor from receiving funds after the trustee pays the creditors in full is another matter; perhaps better left to the Bankruptcy Court as opposed to the state court.

Your opponent may ask the trustee to administer the abuse claim as an asset of the estate and then settle the claim with the trustee. Bankruptcy Code §363 (use, sale or lease of property) and Bankruptcy Rule 9019 grant the authority for the trustee to settle the abuse claim. Section 363 is implicated because most settlement of abuse claims are really sales of the claims to the defendant as the defendant rarely has any claims against the plaintiff to compromise. A bankruptcy court will approve a sale of an estate asset if the sale is supported by the trustee's reasonable business judgment. Trustees may compromise claims of the estate pursuant to Bankruptcy Rule 9019. Generally, a bankruptcy court will approve a compromise if it is "fair and equitable". The bankruptcy court will consider a number of factors, including (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation; (3) the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the extent to which the settlement is the product of arm's length bargaining and (6) public interest.

Alternatively, the trustee may be willing to prosecute the abuse claim. This option obviously requires the debtor's cooperation which typically would include employment of plaintiff's counsel as special counsel to the trustee on a contingency fee basis. Bankruptcy Code §327(e) (Trustee may employ an attorney who has represented the debtor as special counsel); Bankruptcy Code §328(a). Employment as special counsel requires Bankruptcy Court approval and the employment application should spell out the risks in the representation to minimize the possibility that the court will modify the contingency fee after the representation is completed. *Id*. (Court may modify compensation if terms are "improvident" in light of developments not capable of being anticipated at time of retention.)

The trustee's decision to prosecute the abuse claim depends, to a large extent, on whether the claim is exempted from property of the estate. If state law allows, a debtor can elect either the federal exemptions or the exemption of his/her state of residency. You must carefully review the state law applicable to the exemption claim; some states allow a debtor to use the federal exemption, some forbid it and some incorporate portions of the federal exemptions. The federal exemptions cover the Debtor's right to receive…a

disability, illness or unemployment benefit." Bankruptcy Code §522(d)(10)(C). The exemption is for the "right to receive" the award. However, a Florida bankruptcy court appears to have held that funds already received as of the filing of a bankruptcy are exempt. *In re Green*, 178 B.R. 533 (Bankr. M.D. Fla. 1995). State laws vary widely on whether personal injury claims are exempt; ranging from no exemption to a blanket exemption to an exemption limited to an amount necessary for the plaintiff's support. Some states also have a "wildcard" exemption of a certain dollar amount that may cover a portion of an otherwise non-exempt recovery. Some state exemptions apply only to enforcement of judgments and some apply to both judgment enforcement proceedings and bankruptcies.

In a bankruptcy case, exemptions are claimed on Schedule C. If the debtor did not pick the "right" exemptions to maximize protection of the abuse claim, the schedules may be amended as a matter of right prior to the closing of the bankruptcy case. Bankruptcy Rule 1009. If the case has been closed, the debtor must get bankruptcy court approval to re-open the case so that Schedule C can be amended. An amendment may expose previously exempted property to the claims of the trustee.

Even if the abuse claim is exempt, the debtor may elect to waive the exemption because the bankruptcy trustee may be able to defeat a judicial estoppel defense that the court otherwise would sustain. In that case, the debtor and the trustee can negotiate how much of the recovery will go to the estate. The trustee will consider the administrative costs of administering the estate and the claims in the case. The debtor will consider whether any of the claims are non-dischargeable in bankruptcy, i.e. certain tax claims, whether the trustee will want his compensation based on the entire recovery v. the amount payable to the estate and whether the trustee will release a portion of the recovery before the administration of the bankruptcy estate (now funded with some money) is completed (a process that can take several months). Any agreement that shares the exempt asset with the estate should be approved by the bankruptcy court. If the trustee prosecutes the abuse claim, any settlement requires bankruptcy court approval under Bankruptcy 9019. Payment of counsel's fees requires a noticed bankruptcy court order unless the retention agreement provides for payment upon funding of a settlement or payment of the judgment.

THE PERPETRATOR'S BANKRUPTCY: THE NON-DISCHARGEABLE CLAIM

If your pre-bankruptcy lawsuit is against the individual perpetrator, it will be stayed, pending further court order, pursuant to Bankruptcy Code §362.[2] Generally, the primary purpose for filing the bankruptcy is to discharge the abuse claim. A bankruptcy discharge is a permanent injunction of all pre-bankruptcy claims against the debtor regardless of the procedural posture of the claims and voids any judgments for which the perpetrator would have personal liability. The impact of the discharge is ameliorated by a creditor's right to object to the discharge in its entirety (an "objection to discharge") and exceptions to the discharge for specific debts. See Bankruptcy Code §727 (objections to discharge) and 523 (non-dischargeability of specific debts).

While the balance of this article discusses issues directly related to the non-dischargeability of the abuse claim, certain tactics in the perpetrator's bankruptcy may be useful in the underlying action against the non-debtor defendant as well. For example, you will have the right to examine the debtor-perpetrator at a meeting of creditors at which the debtor must testify under oath regarding his liabilities and his assets at a meeting of creditors. This type of meeting generally is attended only by the debtor's bankruptcy attorney and it might afford you an opportunity to obtain some discovery without an experienced defense counsel objecting to your questions. You also may get some discovery regarding insurance since the debtor-perpetrator's estate includes any liability insurance policies that might cover his actions as a named or unnamed insured. In many states, discovery of insurance coverage is not allowed before judgment; however, in a bankruptcy case discovery of insurance assets should be allowed.

As a creditor in the bankruptcy, your client should get a notice that the case has been filed. This notice will include a specific deadline by which you must object to the discharge or file a complaint for non-dischargeability in the Bankruptcy Court.[3] If you or your client is actually aware of the **bankruptcy case** but do not receive a notice, you can be charged with knowledge of the **filing deadline** nonetheless. The filing deadline may be extended but the motion to extend must be filed **before** the deadline.

The bankruptcy court has limited jurisdiction over a non-dischargeability claim that involves liquidation of a personal injury claim. The bankruptcy court does not have jurisdiction to liquidate a personal injury claim. 28 U.S.C. §157(b)(5). The bankruptcy court could: (a) theoretically bifurcate the non-dischargeability aspects from the liability and damages portions of the action and refer the liability and damages portion to the U.S. district court, (b) more likely, refer the trial to the U.S. district court (retaining

[2] If the state court includes an institutional defendant, the perpetrator's bankruptcy could have a serious impact on the case against both defendants. For example, the state court might stay the action against the non-debtor defendant pending developments in the bankruptcy case or the non-debtor defendant may seek to remove the action to the bankruptcy court on the basis of an indemnity claim against the debtor-perpetrator. *See* 28 U.S.C. §1452; Bankruptcy Rule 9027.

[3] Certain claims may be non-dischargeable without filing a complaint.

jurisdiction on pretrial matters and dispositive motions). If a prepetition action is pending, the bankruptcy court could abstain and grant stay relief for a adjudication of the case which would then be returned to the bankruptcy court for a non-dischargeability determination. And just to keep the jurisdiction issue interesting, the debtor or a non-debtor defendant may remove the action to the bankruptcy court without hearing, subject to the a remand motion.

The abuse survivor plaintiff is not entitled to a jury trial on the non - dischargeability complaint. The Supreme Court has ruled that creditors are not entitled to jury trials because bankruptcy is an equitable proceeding and historically, courts of equity did not conduct jury trials. Circuit courts have extended this holding to non-dischargeability suits. *Person Education, Inc. v. Almgren*, 685 F.3d 691,696 (8th Cir. 2012); *In re CBI Holding Co*., 529 F.3d 432, 466 (2d Cir. 2008); *In re Kennedy*, 108 F.3d 1015, 1018 (9th Cir. 1997) *Billing v. Ravin, Greenberg & Zackin, P.A*., 22 F.3d 1242, 1249 (3d Cir. 1994); *In re Hallahan*, 936 F.2d 1496, 1505 (7th Cir. 1991).

The non-dischargeability of a claim in a perpetrator's case is most frequently based on the "willful and malicious injury by the debtor to another entity…." Bankruptcy Code §523(a)(6).[4] Claims based on assault generally are non-dischargeable. While one might assume that child abuse certainly is a "willful and malicious" injury, a perpetrator who claims that he intended no injury complicates the analysis. The terms "willful" and "malicious" have a specific separate meanings in bankruptcy law; however, the courts are "all over the lot" in providing a precise definition. *See Jendusa-Nicolai v. Larsen*, 677 F.3d 320 (7th Cir. 2012) for a circuit survey of decisions. The U.S. Supreme Court provided some guidance on the issue in *Kawaauhau v. Geiger*, 523 U.S. 118 (1998). The Court, in a case involving medical malpractice resulting in amputation of a leg, held that an intentional act was not enough to trigger non-dischargeability. The Court, noting that the Bankruptcy Code requires a "willful injury", stated that the debtor must intend the "consequences of an act." *See Markowitz v. Campbell*, 190 F.3d 455 (6th Cir. 1990) ("Thus, only acts done with the intent to cause injury -- and not merely acts done intentionally -- can cause willful and malicious injury.")

Courts are divided on whether the debtor's intent to cause harm is determined on a subjective or objective test. Most courts have adopted a subjective intent approach requiring that the debtor believe that injury is substantially certain to result from the conduct. 4 Collier on Bankruptcy, ¶523.12[2] at 523-93 (16th Ed.). The Fifth Circuit has posed an alternative to the subjective test, finding willfulness if there is objective substantial certainty of harm. *In re Miller*, 156 F.3d 598 (5th Cir. 1998).

While malice is a separate element from willfulness, the courts do not provide a clear explanation on how to separate analyze the concepts. In *In re Miller*, supra, the Fifth Circuit conflated the two elements holding that an "implied malice" was sufficient, rather than special malice against the plaintiff. In other circuits, the courts have looked

[4] If the perpetrator transferred assets to avoid collection, the underlying abuse claim also §may be non-dischargeable on the grounds of fraud under Bankruptcy Code §523(a) (2) (A). *Husky v. Ritz*, 578 U.S. ____(2016).

for aggravated circumstances but do not require hatred or spite. 4 Collier on Bankruptcy, ¶523.12[2] at 523-92 (16th Ed.).

If you litigated your abuse claim to judgment against the debtor-perpetrator, the doctrine of collateral estoppel may enable you to seek summary judgment in the non-dischargeability case. *Grogan v. Garner*, 498 U.S. 279 (1991); *Matter of Schwager*, 121 F.3d 177 (5th Cir. 1997). Collateral estoppel generally requires: (1) that the facts sought to be litigated in the second action (i.e., the adversary proceeding) were fully and fairly litigated in the prior action (i.e., the state-court lawsuit); (2) that those facts were essential to the judgment in the first action; (3) that the parties were cast as adversaries in the first action, (4) that the issues in the prior action be "identical" to the issues in the second action and (5) the burden of persuasion in the discharge proceeding must not be significantly heavier than the burden of persuasion in the initial action. As collateral estoppel require pleading the issues **identically** to the requirements of the Bankruptcy Code and the law in the applicable circuit.

The Other Penn State Story: 15 Years of Non-Stop Pursuit of Justice for a Victim of Sexual Abuse

By: Jeffrey Fritz, Daniel Hartstein and Brian Kent

The 15 Year Long Pursuit of Justice for Paul

Paul McLaughlin was sexually abused by a prominent special education professor, John T. Neisworth, from Penn State University between 1976-1981 when he was between 11 and 16 years old. However, Paul repressed memories of the abuse until 2000 and tried to seek criminal prosecution for the crimes against him, but was told by prosecutors that no criminal prosecution would occur due to the passing of the criminal statute limitations in every jurisdiction in which he was abused (PA, DE, MD & NJ). In 2001, Paul contacted the NCVBA to seek civil justice and was referred to NCVBA members Dan Hartstein and Jeff Fritz. Dan successfully represented Paul in pursuing a civil case for one of the assaults which took place in New Jersey, utilizing the NJ discovery rule which permits a claim to be asserted by a victim of childhood sexual abuse within two years of the victim's recognition that the abuse caused injury to him. Here, Paul had suffered from traumatic amnesia for nearly twenty years and thus had two years from his recollection of the abuse (and realization of his injury caused by the abuse) in which to bring suit against his perpetrator. The settlement included a confidentiality agreement. In 2002, in an effort to protect other potential victims, Paul reported the abuse to Penn State University, who ignored him and his evidence.

After the settling the case, in 2003, Paul's wife disclosed to the Maryland States' Attorneys' office evidence of the abuse in the form of incriminating tape recorded admissions of the perpetrator made by Paul. He then learned that the MD criminal statute of limitations had not passed, contrary to the information he was told three years earlier. In 2004, the MD States' Attorney indicted the perpetrator for multiple counts of child sexual abuse.

In 2005, however, Neisworth then sued Paul and his wife for allegedly violating the New Jersey settlement confidentiality agreement. Paul and his wife believed that the true reason for Neisworth's lawsuit was to intimidate his victim into dropping criminal charges. Undaunted, in 2006, Paul counterclaimed alleging malicious prosecution (of a civil action), abuse of process and infliction of emotional distress. Paul alleged that disclosure of evidence of child sexual abuse was permitted and in fact compelled under New Jersey law and Maryland law. New Jersey law holds that "[i]t is an obstruction of justice to stifle, suppress or destroy evidence knowing that it may be wanted in a judicial proceeding or is being sought by investigating law enforcement officers." See *State v. Cassatly*, 93 N.J. Super. 111, (App. Div. 1966)(establishing that the refusal to provide authorities with *recorded conversations*, like here, amounted to obstruction of justice.) Maryland law provides for the same result. *See Food Fair Stores, Inc. v. Joy*, 283 Md. 205 (1978) (holding that agreements which tend to stifle prosecution, whether by suppressing a criminal investigation or by deterring citizens from their pubic duty to assist detection of a crime, are void against public policy and in violation of Maryland's

obstruction of justice statute, MD Code, Criminal Law, section 9-306. One New Jersey Court has held:

[f]requently, an agreement relating to the suppression of criminal prosecutions is one of the terms in a settlement with the victim of a crime. Such settlements, which usually involve compensation by the offender (or by someone acting in his interest) for the injuries resulting from the crime, or restitution of the property wrongfully appropriated, are made with the understanding that the offender is not to be prosecuted. The making of such an arrangement is void as against public policy. *Wilson v. United States Lines*, 114 N.J. Super. 175 (Law. Div.1971)(emphasis supplied).

Around this same time, Paul became a national advocate for male survivors of sexual abuse. Between 2006-2010, Jeff Fritz then spent four years pursuing Paul's claims against the perpetrator, involving a bankruptcy filing by the defendant, assignment of insurance rights claims and a bad faith lawsuit against the perpetrator's insurer which had denied Neisworth insurance coverage for malicious prosecution and abuse of process.

Then, in 2011, in the wake of the abuse charges against Penn State University coach, Jerry Sandusky, Paul McLaughlin came forward in the media to tell how in 2002, Penn State had ignored evidence of his abuse by the PSU special education professor. Penn State repeatedly attempted to discredit McLaughlin's story in the national media. In 2013, Paul countered by suing Penn State and its employees for false light and defamation. NCVBA members Brian Kent & Paul Bucci represented Paul in pursuit of these claims.

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One-Party and Two-Party Consent in Recorded Conversations

Daniel P. Hartstein, Esquire

In 2001, Paul McLaughlin was a 36 year old male survivor of child sex abuse. The abuse occurred during the mid 1970's through 1981 and he had only recovered the repressed recollection in 2000. Paul McLaughlin was desperate for civil representation against the men who abused him because he had been advised (incorrectly) that all criminal statutes of limitations had passed in the jurisdictions in which he was victimized and that law enforcement would not be conducting any criminal investigation. Unfortunately, Paul had no evidence to prove the abuse had ever occurred and the men he was accusing had no known criminal records. Paul did recall who the men were and he was able to locate contact information for one of them, a psychology professor at Penn State University.

Paul alleged the abuse occurred over a lengthy period of time in Delaware[1], Maryland and Pennsylvania. At that time, Delaware law provided for a two-year statute of limitations and Pennsylvania permitted victims of child sex abuse to file civil lawsuits only until their 30th birthday. Paul also recalled that his abusers took him to Atlantic City, New Jersey, for a weekend and sexually assaulted him under the boardwalk. However, unlike the other jurisdictions, in New Jersey, a victim who recovered a repressed recollection of child sex abuse had two years from the date of his recollection to file suit. The problem, however, remained how to prove that any of this occurred.

This is where Paul's knowledge of wiretap laws opened the door for him to gain civil justice against his abuser in various ways over the course of years. A licensed private investigator in Arizona, Paul was aware that Arizona is a one-party consent state, meaning that he could legally record a telephone call originating in Arizona. In a chilling telephone call to the professor who had abused him twenty-five years earlier, Paul drew his abuser into a lengthy conversation wherein the abuser admitted to many accounts of abusing Paul. Importantly, he admitted to abusing Paul under the boardwalk in Atlantic City, New Jersey. Paul now had the evidence. But the abuser was in Pennsylvania when the telephone call was made.

Was this evidence admissible in New Jersey? Was the recording of a telephone call originating from Arizona, a one-party consent state, to Pennsylvania, an all-party consent state (requiring permission of all parties to the conversation), legal? Even if not considered legal in Pennsylvania, would the audiotaped recording be admissible in New Jersey? There was no clear, simple answer to these questions.

The question of consent to a recording of a conversation between parties in the same state is relatively uncomplicated. In the vast majority of states (38) and the District

[1] Delaware's two-year window for claims of child sex abuse was enacted in 2007.

of Columbia, only one party must consent to the recording[2], thereby rendering any such recording legal under state law. This one-party consent generally applies to any party to the conversation or a third-party gaining such consent. However, twelve states[3] require the consent of all parties in recording a conversation. In such states, the consent of all parties to the conversation within the jurisdiction must consent to the recording.

But how is the legality of a recording of a conversation determined when the parties to the conversation are located in different states or jurisdictions? Generally, the law of the jurisdiction where the recording device is located will apply in the case of multi-state conversations. However, some states look to the law of the jurisdiction where the party being recorded is located. The Pennsylvania Superior Court examined this issue in *Larrison v. Larrison*, 750 A.2d 895 (Pa. Super. 2000), wherein a party in New York, a one-party consent state, recorded a telephone conversation made from a party in Pennsylvania, an all-party consent state. The Pennsylvania court held that where a telephone call is recorded in a one-party consent state, as long as it is relevant in the underlying proceedings, it is admissible as well. This was despite the recording being clearly in violation of Pennsylvania law and Federal wiretap laws. California, an all-party consent state, has a much stricter view of recordings made of multi-state conversations. In such scenarios, even if the recording is made in a one-party consent state, California applies the stricter of the laws and, thereby, must have consent of all parties. In Paul's case, there was some precedent in New Jersey for the concept that even if the recording was illegally made it still constituted the best evidence of what occurred and therefore could be admissible.

The only certain safe way to record a telephone conversation between parties in different states is to comply with the strictest laws and to get consent of all parties to record. In so doing, the laws of all jurisdictions have been satisfied as to consent and the recording was made legally. However, a one-party consent state recording of another party in a one-party consent state or to any jurisdiction that clearly recognizes and follows the law on recording in the one-party originating state, appears to be safely legal.

There are many variations between state laws as to consent causing some uncertainty. Some examples of this include Connecticut, an all-party consent state regarding telephonic conversations but requires the consent of only one-party for in-person communications. Illinois is generally considered an all-party consent state yet Illinois courts have held that this only applies in situations involving "eavesdropping". Although largely considered an all-party consent state, Michigan requires such consent only in the case of a third-party interception of a conversation. Any participant in a conversation in Michigan has the right to record. *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W. 2d 58 (1982). Montana makes an exception to all-party consent for elected or appointed public officials or public employees when the recording occurs in the

[2] Federal law permits recording telephone calls and in-person conversations with the consent of at least one of the parties. See 18 U.S.C.A. § 2511(2)(d). .

[3] California, Connecticut, Florida, Illinois, Maryland, Massachusetts Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington.

performance of an official duty. The New Hampshire Supreme Court has held that a party "efficaciously" consented to the recording of a conversation based upon evidence of surrounding circumstances. Oregon is a one-party state as to electronic communications but an all-party consent state as to in-person communications. Vermont has no controlling statute or case law as to who must consent but has not outwardly required all parties to consent to communications.

There are variations of the uses of electronic recordings of conversations. For example, in Wisconsin, the recording of a conversation is "totally inadmissible" in civil cases, except when the party is informed of the communication and evidence from the conversation may be used in a court of law. Note that in New Jersey a recording that may not have been obtained illegally could possibly be used solely for the purpose of impeaching the credibility of a witness in a civil case.

In the case of Paul McLaughlin, the legal recording of his conversation with his abuser not only served as proof of his abuser's crimes committed more than two decades earlier but also to establish jurisdiction in a state with a favorable statute of limitations in which to pursue civil justice.

Tape-recording laws at a glance[4]

Jurisdiction	Is consent of all parties required?	Are there criminal penalties?	Does the statute allow for civil suits?	Is there a specific hidden camera law?	Additional penalties for disclosing or publishing information?
Federal		✔	✔		✔
Alabama		✔		✔	✔
Alaska		✔		✔	✔
Arizona		✔	✔	✔	✔
Arkansas		✔		✔	✔
California	✔	✔	✔	✔	✔
Colorado		✔		✔	✔
Connecticut	✔	✔	✔	✔	✔
Delaware		✔	✔	✔	✔
D.C.		✔	✔	✔	✔

[4] Reporter's Reporting Guide, 2012, http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf

Jurisdiction	Is consent of all parties required?	Are there criminal penalties?	Does the statute allow for civil suits?	Is there a specific hidden camera law?	Additional penalties for disclosing or publishing information?
Florida	✔	✔	✔	✔	✔
Georgia		✔		✔	✔
Hawaii		✔	✔	✔	✔
Idaho		✔	✔	✔	✔
Illinois	✔	✔	✔	✔	✔
Indiana		✔	✔	✔	✔
Iowa		✔	✔	✔	✔
Kansas		✔	✔	✔	✔
Kentucky		✔		✔	✔
Louisiana		✔	✔	✔	✔
Maine		✔	✔	✔	✔
Maryland	✔	✔	✔	✔	✔
Massachusetts	✔	✔	✔	✔	✔
Michigan	✔	✔	✔	✔	✔
Minnesota		✔	✔	✔	✔
Mississippi		✔	✔	✔	✔
Missouri		✔	✔	✔	✔
Montana	✔	✔		✔	
Nebraska		✔	✔	✔	✔
Nevada	✔	✔	✔	✔	✔
New Hampshire	✔	✔	✔	✔	✔
New Jersey		✔	✔	✔	✔
New Mexico		✔	✔	✔	✔
New York		✔		✔	✔
North Carolina		✔	✔	✔	✔

North Dakota		✔		✔	✔
Jurisdiction	**Is consent of all parties required?**	**Are there criminal penalties?**	**Does the statute allow for civil suits?**	**Is there a specific hidden camera law?**	**Additional penalties for disclosing or publishing information?**
Ohio		✔	✔	✔	✔
Oklahoma		✔		✔	✔
Oregon		✔	✔	✔	✔
Pennsylvania	✔	✔	✔	✔	✔
Rhode Island		✔	✔	✔	✔
South Carolina		✔	✔	✔	✔
South Dakota		✔		✔	
Tennessee		✔	✔	✔	✔
Texas		✔	✔	✔	✔
Utah		✔	✔	✔	✔
Vermont				✔	
Virginia		✔	✔	✔	✔
Washington	✔	✔	✔	✔	
West Virginia		✔	✔	✔	✔
Wisconsin		✔	✔	✔	✔
Wyoming		✔	✔	✔	✔

The Victim's Causes of Action When Sued by the Perpetrator

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Proving the old adage argued often by defense lawyers that anyone who can pay the court's filing fee can bring a lawsuit, consider these *actual* cases:

- In 2009 in Topeka, KS, a couple held hostage by a fugitive fleeing from police in Colorado sued the perpetrator for damages. While being held hostage the perpetrator actually watched a movie, "Patch Adams", with his victims. When he fell asleep, the victims contacted the police and managed to escape. In response to the victims' lawsuit, the perpetrator, *pro se,* counterclaimed asserting that the victims reneged on an oral promise not to call the police after he left the home and that he incurred medical bills after the police shot him.. Not surprisingly, he lost because of the illegal nature of the alleged contract and because the victims called the police while he was still present.[5]

- In 2012, a northern California man broke into a 90-year old victim's home to rob him. The victim convinced the would-be burglar to use the bathroom where he retrieved his .357 from his toilet tank and exited the bathroom. The criminal took the gun, shot his victim once in the cheek; however, the victim, a WWII veteran and body builder, responded by emptying his rounds into the burglar. The criminal miraculously survived and managed to get the gun, attempting to shoot the victim again but the gun had been emptied of all bullets. Following this, the perpetrator sued his victim for negligently discharging the gun causing his injuries.[6] His lawsuit was unsuccessful and he serves a life sentence in a California prison.

- Not limited to crimes of violence or stupid U.S. lawsuits, in 2008 in England, an employee unsuccessfully attempted to steal money from his flooring company employer by writing out a check to himself from the company's account.[7] He was caught by his employer who made him turn himself into the police by walking down to the police station wearing a cardboard sign which read:

[5] http://www.nydailynews.com/news/national/colorado-kidnapper-jessie-dimmick-sues-victims-breaking-oral-contract-hide-police-article-1.984457

[6] http://www.huffingtonpost.com/2012/10/29/samuel-joseph-cutrufelli-jay-leone-lawsuit-robber-sues-victim_n_2040468.html

[7] http://www.telegraph.co.uk/news/uknews/law-and-order/7904324/Thief-paraded-down-street-sues-boss.html

"THIEF. I Stole £845 am on my way to the police station"

The theft charges were dropped against the employee but incredibly the employer was criminally charged with false imprisonment. The false imprisonment charges were eventually dropped but that didn't stop the employee from successfully bringing civil claims against his former employer for lost wages, humiliation and emotional distress. The employer eventually settled the case for 5,000 pounds in damages and 8,000 pounds in court costs, which was less than the ongoing court costs he faced.[8]

- In 1995, Tacoma, WA businessman Larry Shandola shot and killed his former business partner, Robert Henry, following a successful civil lawsuit Henry brought against Shandola for punching him.[9] In 2001, Shandola was convicted of murder and sentenced to a 31 year prison term in Washington. In 2011, Shandola, a Canadian citizen, petitioned the court to serve the remaining portion of his sentence in a Canadian prison. When Henry's widow opposed his request, calling him a "sociopath", Shandola sued her and three others for invasion of privacy and emotional distress. The Washington Court eventually dismissed Shandola's lawsuit as frivolous and fined him $40,000.00.

When a criminal sues his victim following a civil case or criminal prosecution, this can re-victimize and cause the victim to relive the crime often leading to further psychological damage. Sometimes, in response to the victim's civil lawsuit, the perpetrator may strike back by countersuing using various theories against the perpetrator. Regardless of the scenario, depending on the legal theories available in the applicable jurisdiction, the victim may pursue civil justice for his/her re-victimization. In some cases, a counterclaim against the perpetrator may also be covered by the perpetrator's liability insurance policy, even where the underlying crime may not have represented a covered loss.

[8] http://www.dailymail.co.uk/news/article-1357217/Boss-Simon-Cremer-forced-pay-worker-THIEF-13-000-humiliating-him.html
[9] http://www.thenewstribune.com/opinion/editorials/article30957963.html

More recently, there have been several high profile cases which have led to lawsuits in which the alleged perpetrator has sued his victim. One example is comedian Bill Cosby's 2016 lawsuit for breach of contract and unjust enrichment against an alleged sexual assault victim with whom he settled a sexual assault lawsuit in 2006. He also sued the victim's mother and her attorneys for allegedly violating the confidentiality provisions in the settlement agreement, after Cosby's deposition was released by a court reporting agency. A federal judge from the Eastern District of Pennsylvania ruled in July, 2016 that a portion of Cosby's lawsuit could proceed for the victim's actions in tweeting about the incidents although she did not identify Cosby by name and in giving an interview to the Toronto Sun. Judge Robreno at the same time dismissed a majority of the claims on the ground that a private agreement to keep allegations of a crime confidential could not trump the obligation to cooperate with law enforcement investigating possible crimes and any such ruling to the contrary would violate public policy.

Judge Robreno relied upon the following federal precedent in his ruling:

> "Where the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). "To declare a contract unenforceable on public policy grounds, . . . courts must first determine that the public policy at issue is 'well defined and dominant.'" *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (quoting *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)). Here, the question is whether there is a robust public policy against the enforcement of contracts that purport to prevent individuals from voluntarily providing information concerning alleged criminal conduct to law enforcement authorities."[10]

The court also relied upon other authority in which courts have held and commentators have recognized that concealing information about a crime through private agreement violates public policy:

- *Branzburg v. Hayes*, 408 U.S. 665, 696-97 (stating that "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy" and concluding that "[i]t is apparent . . . that concealment of crime and agreements to do so are not looked upon with favor")
- *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) ("It is public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity.")

[10] *Cosby v. American Media, Inc.,* Civil Action No. 16-508 (E.D.Pa. July 15, 2016) (Robreno, J.).

- *Baker v. Citizens Bank of Guntersville*, 208 So. 2d 601, 606 (Ala. 1968) ("[A] contract based upon a promise or agreement to conceal or keep secret a crime which has been committed is opposed to public policy and offensive to the law.")
- Restatement (First) of Contracts § 548(1) (1932) ("A bargain in which either a promised performance or the consideration for a promise is concealing or compounding a crime or alleged crime is illegal.")
- 6A Arthur L. Corbin, Corbin on Contracts § 1421, at 355-56 (1962) ("A bargain the purpose of which is the stifling of a prosecution is in all cases contrary to public policy and illegal even though it may not itself be a crime. This is true . . . whether the prosecution has or has not been started at the time the bargain is made. Bargains of this kind are in various forms, including promises not to prosecute or not to give evidence to the prosecuting officers . . . .").

Cosby attempted to argue that his victim's voluntary disclosure to law enforcement, as compared with disclosures made in response to a subpoena, should be treated differently and could be the basis of a breach of contract action. The court rejected Cosby's argument and found no distinction. Within two weeks of Judge Robreno's ruling, Cosby dismissed his action against his victim, her mother and her attorneys.[11] It is presently unknown if the victim will bring an action for malicious prosecution or abuse of process.

Possible Causes of Action Which May be Brought by the Victim

A. Malicious Prosecution vs. Abuse (or Use) of Process

Both the torts of malicious prosecution and abuse of process involve the improper use of a court system (civil or criminal) for a purpose other than its intended purpose. However, the main difference between the two typically is that the tort of malicious prosecution relates to the origination of an action (civil or criminal), whereas the tort of abuse of process more broadly includes the misuse of *any* process or procedure in the legal system for an improper purpose after the action is brought. One Court described this distinction as follows:

> "Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251], internal citations omitted.)

[11] http://www.usatoday.com/story/life/people/2016/07/28/cosby-drops-lawsuit-against-andrea-constand/87674214/

Many courts rely upon the definition contained in the Restatement (Second) of the Law of Torts § 680, which provides:

> "One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if
> "(a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and
> "(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

Malicious Prosecution	Abuse of Process
criminal *or* civil prosecution	misuse of *any* part of the legal system
without reasonable grounds	improper purpose
purpose other than obtaining judgment	purpose other than obtaining judgment
laws usually required that the proceeding be terminated in favor of victim	laws usually require proceeding to be terminated in favor of the victim

Where a victim brings a cause of action for malicious prosecution or abuse of process it is important to plead and prove the *new* damages or injury incurred as a result of the improper lawsuit. This can include humiliation, mental distress, physical injuries, legal fees in defending the lawsuit, or lost wages and income jurisdictions, and punitive damages. The perpetrator's lawsuit may trigger recurrence or exacerbation of PTSD or other emotional injuries in the victim, especially where PTSD is triggered by reminders of the underlying traumatic event. Certainly a lawsuit by the perpetrator could be traumatic to a victim of any crime. In Paul's case, this included chest pain, nausea, cold sweats, anxiety, depression and suicidal thoughts requiring in-patient treatment.

> Some jurisdictions have codified the common law tort of abuse of process/malicious prosecution. In Paul's case, the action was pursued against the perpetrator pursuant to Pennsylvania's statute, "Wrongful Use of Civil Proceedings" which provides:

(a) ELEMENTS OF ACTION.-- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

(1) He acts in a ***grossly negligent manner*** ***or without probable cause*** and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
(2) The proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S.A. § 8351 (emphasis added); *see also, Consulting Engineers, Inc. v. Insurance Company of North America*, 710 A.2d 82 (Pa. Super. 1998)**.**

Significantly, some liability insurance policies, such as many umbrella policies, provide insurance coverage for "malicious prosecution" without further definition of what is encompassed by that term.[12] Some courts have found that the term "malicious prosecution" is ambiguous as a matter of law, leading to the grant of coverage.[13] This has been held at times to extend coverage to claims for abuse of process, as well as malicious prosecution of civil and criminal actions.[14] *but see Parker Supply Co., Inc. v. Travelers Indem. Co.*, 588 F.2d 180 (5th Cir. 1979); *Narragansett Bay Ins. Co. v. Kaplan,* (D. Mass. 2015) (malicious prosecution covered under policy but abuse of process was not covered because it was not specifically contained in the policy); *Heil Co. v. Hartford Acc. and Indem. Co.*, 937 F. Supp. 1355, 1363 n.4 (E.D. Wis. 1996) (malicious prosecution and abuse of process are distinct torts and policy covering malicious prosecution does not cover abuse of process claim); *Lunsford v. American Guar. & Liab. Ins. Co.*, 775 F.Supp. 1574, 1582 (N.D. Cal. 1991); *R. A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn. App. 290 (Wash. Ct. App. 1980) (coverage for "malicious prosecution" does not provide coverage

[12] *see, e.g.*, *Carolina Cas. Ins. Co. v. Nanodetex Corp.*, 733 F.3d 1018 (10th Cir. N.M. 2013).
[13] *See Lunsford v. American Guar. & Liab. Ins. Co*., 18 F.3d 653, 655 (9th Cir. 1994) (the term "malicious prosecution" is ambiguous as a matter of law because it is undefined in the policy and because a "layperson could believe reasonably that the words 'malicious prosecution' only required a lawsuit or other legal proceeding to be brought maliciously or spitefully for an improper purpose"); *Martin's Herend Imports, Inc. v. Twin City Fire Ins. Co*., 2000 U.S. Dist. LEXIS 8690 at *19-20 (S.D. Tex. Mar. 31, 2000) (the undefined term "malicious prosecution" is ambiguous and must be construed to cover the distinct but closely related tort of abuse of process); *Toll Bros., Inc. v. Gen. Accident Ins. Co*., 1999 Del. Super. LEXIS 313 at *28-29 (Del. Super. Ct. Aug. 4, 1999) (viewed through the eyes of a layperson, the term "malicious prosecution" would cover actions deriving from abuse of process, because the two torts are so intertwined that the distinction is difficult even for attorneys); *Koehring v. American Mut. Liab. Ins. Co.*, 564 F.Supp. 303, 311-12 (E.D.Wis. 1983) ("ordinary man" may believe that coverage for malicious prosecution includes coverage for abuse of process such that insurer should have specifically excluded abuse of process); *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*, 1999 U.S. Dist. LEXIS 23858 (M.D. La. Jan. 11, 1999); *United States Fid. & Guar. Co. v. Ridge*, 1999 U.S. Dist. LEXIS 18359 (D. Kan. Sept. 27, 1999).
[14] *Id.*

for the separate tort of "abuse of process"). Coverage for "malicious prosecution" is typically found in the "personal injury" (as compared with "bodily injury") section of a liability policy. We have seen policies that include "malicious prosecution" within the definition of covered "personal injury" or "personal and advertising injury" sections of the policies.

In Paul's case, there was arguably insurance coverage for: negligence; recklessness; gross negligence; negligent infliction of emotional distress; and malicious prosecution leading to bodily injury and personal injury. Here, because Pennsylvania recognized a statutory cause of action for "wrongful use" which was premised upon "grossly negligent" conduct, the intentional acts exclusion found in the Neisworth policy (and every insurance policy) was inapplicable. Pennsylvania Courts have also expressly found that "wrongful use of civil proceedings" claims are to be covered by an insurer. (see *Consulting Engineers, Incorporated v. Insurance Company of North America*, 710 A.2d 82 (Pa. Super. 1998), *affirmed by*, 743 A.2d 911 (2000).

Because of the wide discrepancy by courts in coverage for "malicious prosecution" and "abuse of process", it is recommended that where facts support each cause of action, both be plead on behalf of the victim.

In defense of the action, the insurer argued that the cause of action and damages arose out of the sexual abuse and thus was subject to a sexual abuse exclusion in the policy. The insurer also attempted to argue that intentional acts would not be covered. However, the torts of malicious prosecution and abuse of process, or the Pennsylvania statutory cause of action for wrongful use, are not inherently intentional torts, such that it would be difficult for an insurer to defeat coverage on this basis alone. We argued that the claims we limited to injuries Paul sustained solely and directly as a result of having been sued by his perpetrator and that the sexual abuse injuries and damages had been suffered and adjudicated years before. It was helpful in our case to demonstrate, through our expert, the difference in injuries that Paul had suffered following the abuse vs. following having been sued by his perpetrator.

B. Negligent and Intentional Infliction of Emotional Distress

In addition to the wrongful use and malicious prosecution claims asserted on Paul's behalf, we pursued claims for negligent and intentional infliction of emotional distress caused by Paul having been sued by his perpetrator. In Pennsylvania and other jurisdictions, claims for intentional infliction of emotional distress are not limited to purely intentional conduct and mere reckless conduct can support a recovery under this tort.

Claims Against Those Who Make Public Statements Calling Into Question a Survivor's Credibility

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Often times, especially in high-profile cases, a perpetrator or organization/institution will make public statements that may call into question the veracity of the survivor, either directly or indirectly. This is nothing short of a re-victimization of the survivor. Courts more and more are viewing such public statements as actionable and not merely a response to a public matter. Moreover, in cases in which the statute of limitations for the assault/abuse has passed, it gives survivors an opportunity to hold those responsible for the abuse potentially accountable when they otherwise would not have been able to. As an introduction, one must examine the backdrop and statements involved in Mr. McLaughlin's case to understand all of the legal issues involved.

Following Paul McLaughlin recording Professor Neisworth admitting to abusing him when Paul was a child, in an effort to inform Penn State that one of its professors was a pedophile and to protect past, current and future victims from that pedophile, Mr. McLaughlin began calling Penn State University. Eventually, Paul called Professor Neisworth's direct supervisor, David Monk, Dean of the College of Education at Penn State, in an effort to inform Dean Monk that Neisworth was a serious danger to the safety of children and that Mr. McLaughlin had a taped admission of Neisworth wherein Neisworth admitted performing oral and anal sex on Mr. McLaughlin when he was twelve (12) years old. To give some context to the timing, this conversation between Paul and Dean Monk took place roughly two (2) weeks following Michael McQueary witnessing Penn State University football defense coordinator Jerry Sandusky sexually assaulting a young boy in the shower at Penn State's athletic facility.

During his phone conversation with Dean Monk, Mr. McLaughlin informed Dean Monk of the horrific acts of sexual abuse committed by Professor Neisworth on Mr. McLaughlin and that he had Professor Neisworth's taped admission. However, upon learning that Mr. McLaughlin had evidence confirming Neisworth's abuse, Dean Monk turned suddenly hostile and the conversation ended. Following the conversation between Mr. McLaughlin and Dean Monk, Mr. McLaughlin sent the tape recorded admission of Professor Neisworth to Dean Monk. The tape was returned by Dean Monk's office unopened to Mr. McLaughlin's residence.

After the tape recording of Professor Neisworth's admission to the abuse was returned to Mr. McLaughlin, Mr. McLaughlin contacted Dean Monk a second time via telephone. During that conversation, Dean Monk was threatening and hostile towards Mr. McLaughlin, threatening Mr. McLaughlin with harassment charges and arrest.

Mr. McLaughlin then contacted former Penn State President Graham Spanier and informed him of the abuse committed by Professor Neisworth, warned him that children may be in danger and that Professor Neisworth could be using his position as a Penn

State professor of education to gain access to children in order to commit further acts of sexual abuse. President Spanier, just like Dean Monk did previously, ignored the warnings that children could be in danger and that Penn State was employing a pedophile, took a defensive posture and told Mr. McLaughlin that whatever Mr. McLaughlin wanted to get from the school, he wasn't going to get it. President Spanier further told Mr. McLaughlin that Professor Neisworth had an impeccable reputation and that unless Professor Neisworth was convicted of a crime, they weren't interested in his "groundless accusations and fabricated, so-called, evidence."

Additionally, after informing President Spanier that Mr. McLaughlin possessed an audiotape wherein Professor Neisworth admitted to the abuse, President Spanier told Mr. McLaughlin "Don't bother." However, Mr. McLaughlin sent the taped admission of Neisworth to President Spanier anyway. President Spanier ignored the evidence and never returned the evidence to Mr. McLaughlin.

Similar to the pattern of conduct by Penn State involving Jerry Sandusky, after Professor Neisworth was reported to have sexually abused at least one child numerous times at Penn State while a professor on staff, Professor Neisworth was allowed to graciously retire as a full-time tenured professor with his reputation and credibility. Again similar to the pattern of conduct by Penn State involving Jerry Sandusky, less than a year later in 2003, Professor Neisworth was granted emeritus status and Penn State permitted him to continue teaching university courses, to be listed as a member of the faculty with a physical office at Penn State, a direct phone line in that office and a dedicated Penn State email address.

Between the time of the Maryland indictment of Professor Neisworth in or around 2004 and the time the events concerning Jerry Sandusky came to light in or around 2011, Mr. McLaughlin was coping with the abuse that had occurred to him and was dedicated to helping prevent the sexual abuse of children and helping those that had been sexually abused. After hearing of the indictment of former Penn State football coach Jerry Sandusky and the alleged cover up of reports of abuse committed by Sandusky at Penn State around the same period of time that Mr. McLaughlin had reported Neisworth's abuse to Penn State, Mr. McLaughlin traveled to Philadelphia, Pennsylvania as a victims' advocate to support those that had been victimized by Sandusky and Penn State.

After traveling to Philadelphia to advocate on behalf of child sexual abuse survivors, Mr. McLaughlin was contacted by ABC News and was subsequently asked to participate in an interview concerning the abuse committed by Sandusky and Neisworth. During the interview which subsequently aired on ABC's "*Nightline*," Mr. McLaughlin described the abuse he suffered at the hands of Professor Neisworth at Penn State, his reporting of the abuse to Penn State officials and Penn State's decision to take no action concerning the reported abuse committed by one its professors as described more fully in this Complaint. Following the ABC News interview, Mr. McLaughlin then traveled to Harrisburg, Pennsylvania where he lobbied on behalf of survivors of sexual abuse and gave further interviews regarding the reporting of the Neisworth abuse to PSU administrators and their response.

Immediately following the airing of the "*Nightline*" interview of Mr. McLaughlin, Dean David Monk made several statements to Wall Street Journal reporter James Haggerty, based in Pittsburgh, Pennsylvania, which were published and disseminated nationwide, and included, in relevant part:

> At the time we learned of this, we immediately made sure that Neisworth's work at this campus did not involve children. [Paul adduced evidence that Mr. Neisworth's work did still involve work with children.]
>
> We considered other actions as well, but court cases were ongoing at the time and ultimately the charges were dismissed against Neisworth. [There was evidence that this was false as well since there was only one case ongoing at the time Mr. McLaughlin reported the abuse to Penn State, which was a civil claim filed by Mr. McLaughlin against Professor Neisworth for the abuse. However, that case was not "dismissed." It was settled by Neisworth and, according to Professor Neisworth, he informed Dean Monk that he was trying to settle the case when Dean Monk learned about it.]
>
> That prevented the university from taking any other action with McLaughlin who was not a student and with Neisworth who had already retired from our campus. [Again, another blatantly false statement as there was nothing preventing the university from conducting their own investigation or taking action against Neisworth. In fact, Neisworth testified no one from Penn State ever spoke to him regarding the allegations other than a two minute conversation between Neisworth and Monk when the abuse allegations were going to be reported in the media back in 2002.]

On November 19, 2011, Dean David Monk made statements in an email to the Wall Street Journal again which were published and disseminated. He stated that the university privately took actions years ago in response to Mr. McLaughlin's accusations against him. He did not identify what actions were taken. He reiterated that he made sure Professor Neisworth was not involved with children on campus.

On November 21, 2011, Dean David Monk made statements to a New York Times reporter who was reporting on a story about Graham Spanier and the Sandusky scandal as well as the reporting of abuse by Paul McLaughlin. According to the article, when questioned about Mr. McLaughlin, Dean Monk stated that he had "no personal contact from Mr. McLaughlin at any point." He further stated that he was not offered the recording of Professor Neisworth. Dean Monk reiterated that "Mr. Neisworth's Penn State duties did not involve direct contact with children."

On December 16, 2011, Director of Public Information for Penn State, Lisa Powers, made statements to National Public Radio located in Washington, DC which were broadcast nationwide, as follows:

> Graham Spanier is no longer with the University and I don't know if he was ever contacted by Mr. McLaughlin. I checked and the office of the president has no record in their logs of a letter coming in to Dr. Spanier from Mr. McLaughlin. There is no record kept for phone calls Dr. Spanier would have received during his tenure.
>
> Although Mr. McLaughlin was not a student at Penn State, we do know that Neisworth was a professor here during the time of the terrible incidents that have been reported. Dean David Monk has stated unequivocally that he has had no personal contact from Mr. McLaughlin at any point and was never offered access to a tape recording. He also never received a tape in the mail from Mr. McLaughlin. Dean Monk learned about the allegations from Mr. Neisworth shortly before the story appeared in the press in 2002. The dean did hear from a member of Mr. McLaughlin's family about the situation.
>
> Upon learning of the charges, the university immediately moved to ensure that Neisworth's work at this campus did not involve children. It did not. Additional actions were considered, but when we learned of the allegations in 2002, law enforcement was already deeply involved. Shortly thereafter, Mr. Neisworth decided to retire from his faculty position at Penn State. Subsequently, the charges were dismissed against Mr. Neisworth. That prevented the university from taking any other action with either McLaughlin, who was not a student, and with Neisworth, who had already retired from our campus.
>
> Mr. Neisworth taught in an online distance education program following his retirement from this college. He no longer teaches at Penn State.
>
> President Erickson did receive a letter just last week from Mr. McLaughlin. A response from the University should be forthcoming.
>
> We remain concerned about Mr. McLaughlin's allegations and reiterate Penn State's willingness to make counseling services available to him if he wishes to receive this assistance. In fact, our vice president for student affairs has attempted contact on several occasions, but has not had any luck in getting a response. We have been in touch with colleagues at a local university in Arizona to see if they might contact Mr. McLaughlin as well and go through the appropriate channels for counseling options.

Ms. Powers further stated with regard to Professor Neisworth:

> The emeritus title was granted after the charges were declared unfounded by police and the courts. It is common in academe to grant emeritus status – so he remains listed in our database as do our other emeriti faculty. He is not on campus and has not had an office since he retired. He no longer teaches here in any capacity.

Defendants denied Mr. McLaughlin's account of his communication with Penn State and Penn State officials, and from Mr. McLaughlin's perspective, knowingly misrepresented that they could take no action against Neisworth because of police and court activity and that charges against Neisworth were "unfounded," knowingly misrepresented the reputation of Professor Neisworth as having an impeccable reputation and that Professor Neisworth did not have any contact with children on campus. Taken together, this painted Paul in a false light in media outlets nationwide. Several of the issues below arose, however, which must be kept in mind before and during litigating the defamation case on behalf of the survivor.

1. Is your defamation claim within statute of limitations?

Paul McLaughlin was long beyond the statute of limitations to file suit against Penn State for the actual abuse. However, the publicly made statements by Penn State officials allowed him to file suit against Penn State for re-victimizing him in the public eye. So while he was unable to bring a claim for the actual abuse against Penn State and litigate the underlying facts of the abuse, he was still able to bring claims against them and bring to light the underlying facts of the abuse as they were relevant to his defamation case. Many states have short statutes however. Below is a list of states' statutes of limitations for defamation claims:

ALABAMA	A two-year statute of limitation applies to defamation actions.
ALASKA	A two-year statute of limitation applies to defamation actions.
ARIZONA	A one-year statute of limitation applies to defamation actions.
ARKANSAS	A one-year statute of limitation applies to slanders actions, while a three-year statute of limitation applies to libel actions.
CALIFORNIA	A one-year statute of limitation applies to defamation actions.
COLORADO	A one-year statute of limitation applies to defamation actions.

CONNECTICUT	A two-year statute of limitation applies to defamation actions.
DELAWARE	A two-year statute of limitation applies to defamation actions.
DISTRICT OF COLUMBIA	A one-year statute of limitation applies to defamation actions.
FLORIDA	A two-year statute of limitation applies to defamation actions.
GEORGIA	A one-year statute of limitation applies to defamation actions.
HAWAII	A two-year statute of limitation applies to defamation actions.
IDAHO	A two-year statute of limitation applies to defamation actions.
ILLINOIS	A one-year statute of limitation applies to defamation actions.
INDIANA	A two-year statute of limitation applies to defamation actions.
IOWA	A two-year statute of limitation applies to defamation actions.
KANSAS	A one-year statute of limitation applies to defamation actions.
KENTUCKY	A one-year statute of limitation applies to defamation actions.
LOUISIANA	A one-year statute of limitation applies to defamation actions.
MAINE	A two-year statute of limitation applies to defamation actions.
MARYLAND	A one-year statute of limitation applies to defamation actions.
MASSACHUSETTS	A three-year statute of limitation applies to defamation actions.

MICHIGAN	A one-year statute of limitation applies to defamation actions.
MINNESOTA	A two-year statute of limitation applies to defamation actions.
MISSISSIPPI	A one-year statute of limitation applies to defamation actions.
MISSOURI	A two-year statute of limitation applies to defamation actions.
MONTANA	A two-year statute of limitation applies to defamation actions.
NEBRASKA	A one-year statute of limitation applies to defamation actions.
NEVADA	A two-year statute of limitation applies to defamation actions.
NEW HAMPSHIRE	A three-year statute of limitation applies to defamation actions.
NEW JERSEY	A one-year statute of limitation applies to defamation actions.
NEW MEXICO	A three-year statute of limitation applies to defamation actions.
NEW YORK	A one-year statute of limitation applies to defamation actions.
NORTH CAROLINA	A one-year statute of limitation applies to defamation actions.
NORTH DAKOTA	A two-year statute of limitation applies to defamation actions.
OHIO	A one-year statute of limitation applies to defamation actions.
OKLAHOMA	A one-year statute of limitation applies to defamation actions.
OREGON	A one-year statute of limitation applies to defamation actions.

PENNSYLVANIA	A one-year statute of limitation applies to defamation actions.
RHODE ISLAND	A one-year statute of limitation applies to slander actions. A three-year statute of limitation applies to libel actions.
SOUTH CAROLINA	A two-year statute of limitation applies to defamation actions.
SOUTH DAKOTA	A two-year statute of limitation applies to defamation actions.
TENNESSEE	A six-month statute of limitation applies to slander actions. A one-year statute of limitation applies to libel actions.
TEXAS	A one-year statute of limitation applies to defamation actions.
UTAH	A one-year statute of limitation applies to defamation actions.
VERMONT	A three-year statute of limitation applies to defamation actions.
VIRGINIA	A one-year statute of limitation applies to defamation actions.
WASHINGTON	A two-year statute of limitation applies to defamation actions.
WEST VIRGINIA	A one-year statute of limitation applies to defamation actions.
WISCONSIN	A two-year statute of limitation applies to defamation actions.
WYOMING	A one-year statute of limitation applies to defamation actions

2. Is it defamation? *i.e.* is it capable of defamatory meaning? Is it defamation *per se* or by innuendo?

Not every public statement made by a perpetrator or institution regarding abuse that may have occurred is defamation. The attorney must evaluate the statements and scrutinize whether they really paint your client as not truthful or in a detrimental light and that such statements have injured their reputation in the public. In the context of sexual assault and abuse survivors, Courts have understood that calling into question survivors credibility can cause significant harm and have acted favorably towards survivors when statements are made that paint them in a false light, especially because of the re-victimization that it can cause those survivors.

After establishing that your claim is within the statute of limitations for your state, you must examine whether or not the statements are capable of defamatory meaning. To establish a cause of action for defamation, the plaintiff must establish: "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) a reference to the plaintiff; (4) a recipient's understanding of the communication's defamatory character and its application to plaintiff; (5) special harm resulting from the publication; and (6) abuse of any conditional privilege."[15]

Defamation is ... that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. It necessarily, however, involves the idea of disgrace.[16]" A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.[17] In determining whether the challenged communication is defamatory, the court must decide whether the communication complained of can fairly and reasonably be construed to have the libelous meaning ascribed to it by the complaining party.[18] In making this determination upon the article must be construed as a whole and each word must be read in the context of all the other words.[19]

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[15] *Smith v. Wagner*, 403 Pa.Super. 316, 321, 588 A.2d 1308, 1311 (1991). See: 42 Pa.C.S. § 8343(a). *See also*: *Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072, 1077-1078 (3d Cir.1985), *cert. denied*, 474 U.S. 864, 106 S.Ct. 182, 88 L.Ed.2d 151 (1985).

[16] Prosser, *Law of Torts,* 4th Ed., Sec. 111, p. 739.

[17] *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 270 (3rd Cir. 1980); *Marcone v. Penthouse International, Ltd.*, 533 F.Supp. 353, 357 (E.D.Pa. 1982); *Corabi v. Curtis Publishing Co.*, 441 Pa. at 442, 273 A.2d at 904; *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. at 317-18, 182 A.2d at 753; *Rybas v. Wapner*, 311 Pa.Super. at 54, 457 A.2d at 110.

[18] *Corabi v. Curtis Publishing Co.*, *supra*; *Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Beckman v. Dunn*, 276 Pa.Super. 527, 533, 419 A.2d 583, 586 (1980); *Doman v. Rosner*, 246 Pa.Super. 616, 371 A.2d 1002 (1977).

[19] *MacRae v. Afro-American Co.,* 172 F.Supp. 184, 186 (E.D.Pa. 1959), *aff'd*., 274 F.2d 287 (3rd Cir. 1960).

However, even if there is no defamation *per se*, many Courts have stated that a claim for defamation can be made out when it is made by innuendo.[20] The legal test to be applied is whether the challenged language could "fairly and reasonably be construed" to imply the defamatory meaning alleged by a plaintiff. Assuming after viewing the entirety of the statement, you have concluded that it is capable of defamatory meaning, then you must determine whether your client is a public or private figure.

3. Is your client a private or public figure? Have they made themselves a public figure by being interviewed or placing themselves in the public eye?

Whether your client is a public or private figure for defamation purposes determines the requisite burden you must show in a defamation case against the perpetrator/institution/organization. This is significant in the crime victim context. In many high-profile assault/abuse cases, often times the survivor is interviewed or may be speaking out publicly about a cover-up or the abuse that occurred to them. When a survivor puts themselves out in the public view or initiates contact with the media, it could transform them from "private" figure to "public" figure for purposes of defamation. This has implications in the defamation claim.

For a "private" individual, a claimant must only show that the defendant acted negligently in issuing the false or misleading statements. However, in *New York Times v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964) and *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967), the Supreme Court mandated that public officials and public figures must prove an additional element of "actual malice" in order to recover damages in a defamation action, that is, "that the defamatory statements were made with knowledge of their falsity or with reckless disregard of the truth." *Avins v. White*, 627 F.2d 637, 646 (3d Cir.1980), *cert. denied*, 449 U.S. 982, 101 S.Ct. 398, 66 L.Ed.2d 244 (1980). Subsequently, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), *cert. denied*, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983), the Court identified two classes of public figures:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.[21]

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[20] *Today's Housing v. Times Shamrock Communications, Inc.*, 21 A.3d 1209 (Pa. Super. 2011); *See, e.g. Thomas Merton Center v. Rockwell Int'l Corp.,* 442 A.2d 213, 217 (1981), *cert. denied* 457 U.S. 1134, 1351.

[21] *Id.* 418 U.S. at 351, 94 S.Ct. at 3013, 41 L.Ed.2d at 812.

You must be conscious of the fact that your client can become a “public figure” for purposes of defamation if they inject themselves into the public eye. A person may become a limited purpose public figure if he "thrust[s] himself into the vortex of the discussion of pressing public concerns.[22]" Such a person uses "purposeful activity" to thrust "his personality" into a "public controversy.[23]" He becomes a limited purpose public figure because he invites and merits "attention and comment.[24]" A person may become a limited purpose public figure if he attempts to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.[25] A private individual," however, "is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention[26]" and mere newsworthiness alone does not create a public controversy.[27]

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, *the outcome of which affects the general public or some segment of it in an appreciable way*. The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention.
>
> To determine whether a controversy indeed existed . . . the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment . . . . If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.[28]

(emphasis added). *Waldbaum v. Fairchild Publications, Inc.*, *supra* 627 F.2d at 1296-1297.

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[22] *Rosenblatt v. Baer,* 383 U.S. 75, 86 n. 12, 86 S.Ct. 669, 676 n. 12, 15 L.Ed.2d 597, 606 n. 12 (1966).
[23] *Curtis Publishing Co. v. Butts*, supra, 388 U.S. at 155, 87 S.Ct. at 1991, 18 L.Ed.2d at 1111 (1967).
[24] *Gertz v. Robert Welch, Inc.*, supra, 418 U.S. at 346, 94 S.Ct. at 3009, 41 L.Ed.2d at 808 (1974).
[25] *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C.Cir.1980), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980).
[26] *Wolston v. Reader's Digest Assoc.*, 443 U.S. 157, 167, 99 S.Ct. 2701, 2707, 61 L.Ed.2d 450, 460 (1979).
[27] *Marcone v. Penthouse Int'l Magazine for Men*, *supra*, 754 F.2d at 1083.
[28] *Waldbaum v. Fairchild Publications, Inc.*, *supra* 627 F.2d at 1296-1297.

As the court observed in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 591 (1st Cir.1980), "Gertz's requirement that in order for private individuals . . . to merit public figure status, they must 'have thrust themselves to the forefront of particular public controversies' seems to imply a pre-existing controversy." *See also Rutt,* 335 Pa.Super. at 181-82, 484 A.2d at 81. Moreover, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411, 431 (1979).

However, it should be clear that a defamation plaintiff does not become a public figure as a "limited purpose public figure" simply because news outlets interview him regarding a matter. In *Hutchinson*, 443 U.S. 111 (1979), the Supreme Court of the United States found that the plaintiff was not considered a limited purpose public figure even though the plaintiff was interviewed by several media outlets and those statements were disseminated widely. In that case, the Plaintiff was being sponsored by several government affiliated groups to study emotional behavior. *Id.* A Senator began sending copies of plaintiff's expenditures to government groups. *Id.* In response, the plaintiff made a public comment about the inaccuracies in the report to several news media outlets which were reported. The Court found that plaintiff making statements to the several news outlets did not make him a limited purpose public figure.

In Paul McLaughlin's case, like the cases noted above, we argued that there was no prior existing controversy. The outcome of the dispute between Paul McLaughlin and Penn State did not *"affect the general public or some segment of it in an appreciable way*.[29]" Nor did it have foreseeable and substantial ramifications for non-participants. The trial court agreed even though Paul was interviewed before the Penn State employees.

4. Has the defendant refused or failed to recant/withdraw the statements after notice they may be false?

Sometimes a defendant may fail to recant or withdraw statements it made *before* your client was interviewed or the defendant was on notice of the fact that their statements may be false. Mere inaction by the defendant at that point may be enough to substantiate a claim for defamation. An argument can be made as well that the act of defamation continues until a recantation has been made and may be a vehicle for extending the statute of limitations for your defamation case if such is true in your case. Look carefully at when the declarants were first put on notice that their statements may be false and what action did they take to remedy or correct their statements.

Many courts have adopted the Restatement (Second) of Torts § 580A, cmt. d (2006), which discusses the effect of a defendant's refusal to retract a statement after it

[29] *Id*. at 1296-1297.

has been demonstrated to him to be both false and defamatory stating, "Under certain circumstances evidence to this effect might be relevant in showing recklessness at the time the statement was published.[30]" The Restatement further recognizes that a state might constitutionally treat a deliberate refusal to retract a clearly false defamatory statement as meeting the knowledge-or-reckless-disregard standard, even though the conduct occurred subsequent to the publication. Restatement (Second) of Torts § 580A, cmt. d (2006). The Fifth Circuit Court of Appeals did just that in *Zerangue v. TSP Newspapers Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987), where it held that refusal to retract an exposed error tends to support a finding of actual malice.

Republications, retractions and refusals to retract are similar in that they are subsequent acts used to demonstrate a previous state of mind. The United States Supreme Court has held that:

> The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility be-tween the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration. The plaintiff may show that the defendant had drawn a pistol at the time he uttered the words complained of; that defendant had tried to kiss and embrace plaintiff just prior to the defamatory publication; or that defendant had failed to make a proper investigation before publication of the statement in question. On cross-examination the defendant may be questioned as to his intent in making the publication.[31]

This list makes it clear that subsequent acts can be relevant to the determination of previous states of mind and a subsequent act of republication after a defendant is put on notice that alleges defamation is relevant to a determination of actual malice in the initial publication.

The defamation claim can be a powerful vehicle for survivors to bring those who may have been prevented from being held accountable for the underlying abuse by way of statutes of limitations to court. While the underlying abuse or assault may not be

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[30] *Id. See Hoffman v. Washington Post*, 433 F. Supp. 600, 605 (D.D.C.1977), *affirmed*, 188 U.S. App. D.C. 200, 578 F.2d 442 (D.C.Cir. 1978).

[31] *Herbert v. Lando*, 441 U.S. 153, 164 n. 12, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979)

recoverable, we have argued that this is a re-victimization of what occurred to the survivor. As such, juries will hear the underlying facts of the abuse or assault and often times see the publicly false statements equally as bad as the underlying conduct as they not only are responsible for the abuse or assault, but are now calling the survivor a liar. This has allowed survivors to present their story in a powerful way and hold those people accountable when they otherwise would not have been able to. Careful attention needs to be given however to ensure that legal hurdles as described above are not a barrier.

How to Avoid Jeopardizing a Criminal Prosecution

by Prosecutor Sherri Bevan Walsh
Summit County, Ohio

"Victims might want to hasten civil litigation for their own peace of mind. They want to put the entire ordeal behind them. A civil trial necessitates a very difficult public recitation of what was probably one of the most traumatic incidents in the plaintiff's life."

Is it Wrong to Sue for Rape? Lininger, Duke Law Journal, Volume 57, Number 6 (April 2008)

Fact Pattern:

It was a dark and stormy night. John, having just turned 21 and without anything else to do, decided to call up his friends and suggested they all meet at the new bar that just opened down the street. Once John and his group of friends entered the bar they were greeted by Sam, the owner, who welcomed them to his establishment. The guys soon realized that most of the patrons were older gentlemen and many of them had biker colors on their leather jackets.

John ordered a few drinks, quickly downed them, and made his way toward an attractive younger lady. When she turned down his offer to buy her a drink John became insistent. A bearded gentleman in all leather intervened. John, under the effects of his drinks, told the man to mind his own business and made fun of his clothing choice. John then gave the man a light shove. The next thing John remembered was seeing the bar owner looking at him while standing within reach, but just behind the counter. At this time, John saw the bearded gentleman pull a hunting knife and stab it into John's side. Following the stabbing, the bar owner said "that is enough Bill, I have warned you before about your temper."

John was transported to the local hospital where, following emergency surgery, he made a full recovery. John incurred numerous medical bills and missed three weeks of work as a result of this incident and lost his job.

Attorney #1 reviews this matter. He advised John of the potential for filing an action not only against the Older Gentleman but against the Bar Owner. Due to the numerous bills coming from the medical providers and the lack of employment John asks that a civil action be filed immediately.

Attorney #2 reviews this matter. She has determined that "Bill" the older gentleman should be charged with Felonious Assault a second degree felony offense. From all of the police reports it appears that Sam, the bar owner is the best eyewitness to the entire episode.

Significance

Attorney #1 is a civil attorney; Attorney #2 is a criminal prosecutor. While each has a job to perform in the interest of John, their interests may compete against each other's ability to obtain the best results for John. Attorney #1 has a responsibility to protect John's financial rights and will need to file actions against all responsible parties which may include the bar

owner who was aware of the older man's propensity toward this type of act. Statute of Limitations may also come into play forcing actions to be filed prior to the resolutions of any criminal proceedings. Attorney #2 is responsible for proving their case beyond a reasonable doubt and is concerned that a civil action against the "best eyewitness" may affect that witness' memory or cooperation. Other issues, such as the need to communicate with a represented party may add additional hurdles for the prosecutor to deal with in order to avoid any disciplinary violations.

Prosecutor's Concerns of Dual Actions

- Due to competing interests and lack of understanding of each other's responsibilities, prosecutors are skeptical of civil attorneys. Generic concerns such as "They are only interested in the money!" exist and must be acknowledged to be able to work through this.

- Normally prosecutors do not have a policy regarding communication with a civil attorney, or the prosecutors cite that they are too busy to discuss their case with the civil attorney so the communication ends up being between victim advocates and civil attorneys and the classic game of telephone occurs. This leads to miscommunication.

- Actual communication may lead to opposing defense attorneys charging that the prosecutor and civil attorney are acting in collusion and that one is directing the other. This will be turned into an undue influence or bias claim either in status hearings or trials.

- The caseloads of many prosecutors prohibit the ability to communicate in the manner that would permit either side to present their concerns. Prosecutors with 400 cases on their docket cannot make and/or wait for return calls from civil counsel before they set up or schedule witness meetings.

- Prosecutors are focused on their status hearings and discovery responsibilities without an understanding of civil pleading deadlines and discovery cut offs. They also have concerns that criminal defense attorneys will be able to obtain depositions, responses to requests for admissions and interrogatories without the prosecutors having the same access. This makes for potential Brady violations. On the other hand, too friendly of a relationship could also cause claims that the prosecutor is directing the civil action to obtain information they would not normally have access to.

- Prosecutors are sometimes criticized by civil attorneys. Some civil attorneys advise clients that they cannot file action or motions because the prosecutor may become

angry. Those victims potentially form an attitude that the prosecutor is not looking out for their interest and they become less cooperative.

- In crimes where acts are intentional, civil attorneys may be concerned that a conviction or guilty plea may give the insurance company with "deep pockets" a way to avoid responsibility for paying the victim's claim. Civil attorneys may contact the prosecutor to see if they could resolve the intentional act as a reckless or negligent act (without realizing a substantially lower penalty exists) in order to avoid loss of coverage.

- Prosecutors or civil attorneys may unfairly judge the other based on experiences or interactions they have had with other prosecutors or civil attorneys in the past.

Understanding

In a 2009 *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, by Ellen Bublick published at www.vawnet.org the author states:

> In one South Dakota Supreme Court case, a woman alleged that she had been raped by her doctor while the doctor was ostensibly performing a pelvic exam. Although three other women came forward with similar claims, a jury acquitted the doctor on all criminal charges. In a subsequent tort action against the doctor, each victim was awarded $450,000 in damages. (*St. Paul Fire and Marine Insurance v. Engelmann, 2002*). At times, the difference in outcomes can be explained by differences between the standards of proof in criminal and civil cases. Criminal cases require 'proof beyond a reasonable doubt' while civil cases require only a 'preponderance of the evidence.' Also, the process of 'discovery' or exchange of information is different in criminal versus civil cases. In criminal cases, the prosecution must disclose exculpatory information to the defense, but the defense has no obligation to respond in kind. In civil cases, both parties must disclose relevant information or face court sanctions (Bublick, 2006). The defendant-heavy protections that apply in criminal cases to protect those facing government prosecution and punishment do not apply in the civil law where jail is not a possible penalty.

Bublick continued noting:

> Potential benefits to victims of tort actions are numerous. The victim, as a plaintiff in a civil action, controls many important decisions in the litigation whether to file a case, proceed with it, settle the case or pursue further action. In short, the victim gets to direct the course of litigation (within the confines of the law). **This is in stark contrast with criminal law, in which the state is the party in interest and the prosecutor represents the state or commonwealth**; the victim is a mere witness in the state's case, subject to a subpoena or at times even contempt for failure to appear.

Bublick concluded with an acknowledgement that:

> Finally, the filing of a tort case prior to a criminal action may compromise the success of an existing criminal case against the perpetrator. Although tort compensation is analogous to restitution in a criminal proceeding, defense attorneys and media may use the existence of the tort suit to undermine the victim's credibility by portraying her as a person seeking financial gain from her accusations. (Lininger, 2008).

Another publication has created recommendations that will assist in the education of victims and their option of civil action. The National Criminal Justice Research Service, at www.ncjrs.gov, has published *Civil Remedies Recommendations from the Field*.

Recommendation #4 states:

> Civil attorneys should work with victim service providers, law enforcement officials, and prosecutors in their communities to develop an easy-to-understand pamphlet about civil remedies for crime victims.
>
> Most crime victims do not understand the criminal, let alone the civil, justice process. Before victims decide to pursue a civil lawsuit, they must know the advantages and disadvantages of bringing such a suit. At a minimum, brochures should be developed to help explain the civil justice and court system to victims, including how victims can access civil legal advocacy and assistance.

To assist with the understanding of how and when a civil case relating to a criminal action might be pursued, Suffolk University Law published a chapter on *Civil Consequences of Criminal Cases.* This chapter is found at http://www.suffolk.edu/documents/LawMCP/Ch43CivilConsequences.pdf. In this 2012 review it notes:

> The disposition of a criminal case may affect the criminal defendant in later civil litigation. This chapter discusses (1) collateral estoppel, which may prevent the defendant from contesting issues in a later civil case; (2) the effect of the criminal case on the common types of civil claims brought by former criminal defendants; (3) releases that may resolve both the civil and criminal cases including accord and satisfaction; (4) investigation of a case that may later result in a civil suit; and (5) civil statute of limitations.

Directly on point, the chapter suggests that there is an effect not only on the prosecutors but also on the criminal defendant's attorney. It continues stating:

> "Any defense strategy should consider the potential collateral consequences of the criminal case. The disposition of a criminal case may affect a later civil suit regarding the same incident…"

As prosecutors, we are aware that the filing of a civil suit by our victim will affect the pending criminal case. Courts throughout the country have upheld the right to cross-examine a victim on a civil suit arising from the same incident as the criminal charges. A Wisconsin trial court's decision to prohibit cross-examination for bias absent the prior establishment of fabrication was overruled. In Texas, *Carroll v. State*, 916 S.W.2d 494 (Tex.Cr.App. 1996), held that a witness' pecuniary interest in the outcome of the trial is also an appropriate area of cross-examination. *Carroll* cited *Shelby v. State*, 819 S.W.2d 544, 550-551 (Tex.Cr.App.1991), a holding that extended cross that a defendant is entitled to question child victim's mother concerning her pecuniary interest in a lawsuit filed against the apartment complex where child was sexually assaulted. This is consistent with Florida law agreeing that where a witness has filed a civil suit against the defendant or a third party arising out of the criminal incident, inquiry is relevant to the witness' motivation in testifying at the criminal trial. *Payne v. State*, 541 So.2d 699 (Fla. 1st DCA 1989). The understanding that civil action is fodder for cross-examination is further used in New York in discovery motions noting:

> All evidence within the custody or knowledge of the People which might adversely affect the credibility of any witness that the prosecution intends to call at trial (see *Giglio v. United States*, 405 U.S. 150 (1972); *People v. Geaslen*, 54 N.Y.2d 510, 446 N.Y.S.2d 227 (1981); *People v. Cwikla*, 46 N.Y.2d 434, 414 N.Y.S.2d 102 (1979); *People v. Wallert*, 98 A.D.2d 47, 469 N.Y.S.2d 722 (1st Dep't 1983); *People v. Hopper*, 87 A.D.2d 193, 450 N.Y.S.2d 798 (1st Dep't 1982)).
>
> The Court in Wallert summarized just why disclosure is of such significance:
>
> Here, given the nature of the People's evidence, it was fundamentally obvious that the complainant's credibility and motive for testifying would be a crucial issue. We have before emphasized a prosecutor's duty in such situations to, at the very least, submit to the Trial Judge the question of whether disclosure is required. (Cf. *People v Gonzalez*, 74 A.D.2d 763, 764-765.) "The purpose of the duty is * * * to make of the trial a search for truth informed by all relevant material." (*United States v. Bryant*, 439 F.2d 642, 648 [per WRIGHT, J.]).

> The violation of this duty was aggravated at trial since the defendant had to admit on the stand that he could think of no reason why the complainant should make such charges against him, and the prosecutor emphasized it in his summation: 'There is no motive this woman would come in here and falsify and accuse him of rape. Absolutely no motive * * * even he [the defendant] admits no motive to lie.' Even defense counsel conceded this in summation, and the court repeatedly referred to the motive and interest of the witnesses in its charge. The cumulative effect was to make this the crucial issue.
>
> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. (*Napue v. Illinois*, 360 U.S. 264, 269).
>
> In sum, the failure of the prosecutor to inform defendant of the civil suit was a clear Brady violation 'inasmuch as [that fact] had the possibility of assisting the defendant and raising a reasonable doubt.' (*People v Kitt*, 86 A.D.2d 465, 467).
>
> [98 A.D.2d 51]
>
> Plus, the additional wrong of the prosecutor's arguing that which wasn't, denied *Wallert* of a fair trial in violation of his right to due process. We therefore reverse the conviction and order a new trial.

In the Duke Law Journal "*Is it Wrong to Sue for Rape*", cited at the top of these materials, various prosecutorial concerns are noted with the filing of a civil claim simultaneously with a criminal action. The number one reason is the same as what has already been discussed; many criminal cases depend heavily on the credibility of the victim or accuser. The article further cites that jurors may see the victim as greedy, and prosecutors may find themselves facing additional concerns of the victim using the criminal case to gain tactical advantage in the civil matter, whether information derived during a parallel action will create inconsistent statements – which must be turned over to the defendant pursuant to *Brady v. Maryland*, and will the Defendant have a greater opportunity in the civil discovery process to find "bad facts" or areas of impeachment about the victim or any supporting witnesses. The author warns that parallel criminal and civil actions may create a "trilateral adversarial contest" where there are three distinct interests; the government, the criminal and the victim. The result is that together the adverse impact falls upon the government and victim and ultimately works to the criminal's benefit.

How to Best Deal with these Concerns?

Communication is the number one solution. When both sides respect the other's job and acknowledge what their goals are, both can work simultaneously towards the goal of seeking justice for the victim. We can only prepare for what we are aware of. Understanding the volume of work of a prosecutor, cannot be underestimated. Phone calls and letters are necessary. Through consultation with the prosecutor, a civil attorney can weigh and advise their client of the need and benefit to proceed as well as the options of holding off until the criminal case is concluded.

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IMMIGRATION VISAS FOR CRIME VICTIMS: MINDING YOUR P'S AND Q'S

Sonia S. Figueroa, Esq.[1]

***The measure of a country's greatness should be based on how well it cares for its most vulnerable populations*. ~ Mahatma Gandhi**

Let's say that a victim walks into your office. They have been victimized in such a way that there are damages to be had. However, the victim mentions the fact that they are undocumented. Does this mean that they are precluded from obtaining an award? No. In most cases undocumented immigrants are guaranteed the rights equal to those of a documented individual. However, you are concerned about the future of the victim, and possibly damages related to their future potential here in this country. Exploring the possibility of gaining status, because of their status as a victim should be explored. Considering the length of trials and legal proceedings, an immigrant could potentially gain legal status, while still in proceedings, that would take away the question of their continuing presence in the United States and also afford them documentation, which in the long run, could lead to citizenship.

Immigrant populations are some of the most vulnerable in our society and the undocumented even more so. Undocumented immigrants have many of the same rights as those that have status in the United States. For example, undocumented immigrants have

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been recognized as "persons" who are guaranteed due process of law by the Fifth and Fourteenth Amendments.[2] Undocumented immigrants also have many state statutory and common-law rights. However, many of these rights are limited by the immigrant's status, regardless of documentation. This is often seen when an immigrant is attempting to recover damages for injuries sustained as the victim of a crime.

Sometimes, however, there is relief that can lead to protection from deportation, a work authorization card or even legal status that ultimately results in U.S. citizenship. These visas or other forms of protection could directly impact the determination of damages and future losses that might not have been available otherwise. Knowing the various avenues for possible relief could assist the attorney in determining the value of a case and its potential limitations.[3]

There are various forms of relief available that are sometimes the direct result of the harm suffered by undocumented immigrants.[4] The following are the more common:

1. Non-immigrant visas: S, T and U visas
2. Special Immigrant Juvenile Status
3. Protections under Violence Against Women Act (VAWA)

NON-IMMIGRANT VISAS

There are 3 types of non-immigrant visas that are available to victims of crimes. Although each of these can lead to a green card, they are called "non-immigrant" visas because the authority for them can be found under the INA § 101(a)(15). The S Visa is commonly referred to as the "snitch" visa, the T Visa is the trafficking victims visa and the U Visa is for victims of "qualifying crimes."[5] All three visas, however, allow the immigrant to become permanent residents. Also, all three visas allow for derivatives,

[2] *Plyler v. Doe*, 457 U.S. 202, 210 (1982)

[3] This presentation is a basic introduction to the various types of immigration relief. There are various nuances, circumstances, exceptions, etc. that are not touched upon. Please confer with an immigration attorney that does humanitarian visas and victim relief to discuss potential viability of an immigration case.

[4] Authority found in the Immigration and Nationality Act (INA), 8 Code of Federal Regulations (8 CFR), Board of Immigration Appeals (BIA) decisions (I&N Dec.), regional Circuit Court of Appeals and US Supreme Court

[5] Authority for the S Visa can be found in INA § 101(15)(S), for the T Visa can be found in INA § 101(15)(T) and for the U Visa can be found in INA § 101(15)(U).

designated family members that are permitted to receive the same benefits as the principal beneficiary of the visa.

S Visa[6]

The S Visa is given to informants that assist law enforcement in their investigation and prosecution of cases involving crimes and terrorist activities. In order to be considered for the visa, the person has to have knowledge of a crime or plot, be willing to testify before the court, and be of continued use to law enforcement. The S-5 visa is for possession of reliable information on criminal activity. The S-6 visa is for possession of information as related to terrorist activities. The S-7 visa allows for derivatives, such as spouses, children/sons and daughters and parents.

The benefits of the visa include the waivers of most inadmissibilities (reasons why a person would not be allowed to enter the US or qualify for adjustment of status). These waivers can be the difference between being allowed to stay and being deported. S-visa recipients have often committed offenses that would render them ineligible to become permanent residents or often deportable. Therefore, this visa could be vital in their legalization, which would be unavailable to them otherwise. Other common issues include unlawful presence or entry without inspection.

There are a few drawbacks to this visa. The visa can only be requested by the law enforcement agency (*i.e.* Federal Bureau of Investigation, Homeland Security Investigations, local police departments, etc.). Attorneys cannot submit the petition for this visa on their clients' behalf. Also, the visa puts the client at the mercy of the law enforcement agency. If, for example, the agency were to decide that the immigrant failed to provide substantial contributions to the investigation, the agency can terminate the visa. The available numbers of visas are capped at 200 per year. The S-6 category only gets 50 of those 200 per year.

T Visa[7]

[6] *See* I-854, Inter-Agency Alien Witness and Informant Record [Instructions and forms], retrieved from https://www.uscis.gov/i-854 (May 2, 2016).

The T visa is designed to protect victims of human trafficking. Human trafficking can take on many forms, such as labor trafficking, sex trafficking or panhandling/peddling. To be designated a victim of human trafficking for immigration purposes, an immigrant must be the victim of a severe form of trafficking in persons; physically present in the US or its territories on account of the trafficking; complied with reasonable requests by law enforcement for assistance in the investigation of the traffickers; and demonstrate the victim would suffer extreme hardship if they were to return to their home country.

There are 5,000 visas allocated each year. To date, this cap has never been met. The benefits of this visa include broad waivers of inadmissibilities, immediacy of permanent resident status eligibility and access to public benefits. There is no filing fee associated with the T visa and the filing fee can be waived when applying for adjustment of status. A T visa applicant should be put in contact with a social worker or case manager that can assist the applicant in gaining access to services that address physical, emotional and psychological needs.

To apply for a T visa, the immigrant should have a certification form signed, but unlike with the U visa, it is not fatal to the case if the immigrant is unable to obtain one. The date of the trafficking is irrelevant, meaning it could have happened last week or 10 years ago. Waivers of most inadmissibilities are possible with this visa, which is good, especially if the victim, for example has been convicted of various crimes that would normally make them otherwise inadmissible or deportable. For example, if the immigrant has been arrested and convicted repeatedly for theft, but these convictions can be tied back to the trafficking, then, although this would normally make the person inadmissible, in this scenario, the crimes can be waived.

Once a T visa is approved it is relatively easy to apply for the adjustment of status. Physical presence of at least three years after T visa approval is required or the continued presence of the immigrant through the investigation or prosecution, until it is complete. The immigrant must also show good moral character during the T visa period. Also, must show that the immigrant complied with any reasonable requests for assistance

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[7] *See* Victims of Human Trafficking: T Nonimmigrant Status [Instructions and forms], retrieved from https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status and https://www.uscis.gov/i-914 (May 2, 2016).

in any investigation or prosecution of the traffickers. The immigrant must also show that the immigrant would suffer extreme hardship if removed.

U Visa[8]

The U visa is probably the most relevant and useful to the practitioners here. There are very specific and enumerated crimes that are considered "qualifying" crimes. Most of these crimes are considered felonious assaults on the person. Although trafficking and domestic violence can warrant a U visa, protections under the T visa and VAWA provisions (for domestic violence) should be considered first as they are easier to obtain and take much less time.

Qualifying Criminal Activities

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contracting
- Hostage
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint
- Other Related Crimes*†

*Includes any similar activity where the elements of the crime are substantially similar.

†Also includes attempt, conspiracy, or solicitation to commit any of the above and other related crimes.

To qualify for a U visa, the immigrant must be the victim of one of the crimes above in the United States. The immigrant must cooperate with law enforcement, as this visa was designed to encourage cooperation between law enforcement and the undocumented immigrant population. However, this also means that law enforcement ***must*** sign a certification form stating that the immigrant is the victim of a qualifying crime and has cooperated with law enforcement.

[8] *See* Victims of Criminal Activity: U Nonimmigrant Status [Instructions and forms], retrieved from https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status and https://www.uscis.gov/i-918 (May 2, 2016).

Like the other non-immigrant visas, there are broad waivers available. Once approved, the visa is good for four years. Like the other visas, the applicant is able to include their family members as derivatives on their visa application. This can assist with family unification. After the third year of the visa, the applicant can apply to adjust status.

SPECIAL IMMIGRANT JUVENILE STATUS[9]

If your victim is below the age of 21 (18 in some states), and the child has been abandoned, abused and neglected, which resulted in the harm suffered, then there might be a legal status available to him or her. Special Immigrant Juvenile Status ("SIJS") is a state-federal designation that allows children to be granted a green card. The victim is declared a dependent of the court in either family or probate court. In other words, the child is determined to be unable to be reunited with one or both of their parents. Once this is determined, the child can apply to USCIS for their SIJS. If this is granted, then the approved petition can be used to apply for legal permanent residency. The drawback to this status is the fact that once the child becomes a US citizen, they will be unable to petition for their parents should they want to do so in the future. Also there are legal requirements. For example, the child cannot be over 21 by the time the petition is filed, the child cannot be married and the child must be living in the US.

PROTECTIONS UNDER VIOLENCE AGAINST WOMEN ACT (VAWA)[10]

VAWA is a law that was passed two decades ago to protect primarily women and children from their abusive spouses/parents. Typically an undocumented immigrant can obtain status through their family members, which in particular, is possible through marriage or parentage. However, when there is a significant power differential between the spouses or children and parents, this can be used against the more vulnerable of the two. Victims of domestic violence by US citizen or permanent resident spouses are potentially eligible to seek permanent resident status without the petition by the legal

[9] See Special Immigrant Juvenile Status [instructions and forms], retrieved from https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status (June 16, 2016).

[10] *See* Battered Spouse, Children and Parents retrieved at https://www.uscis.gov/humanitarian/battered-spouse-children-parents (June 16, 2016)

relative. This is a very effective way of obtaining protections that might allow a victim of various forms of violence obtain status, thus stabilizing their presence in the US.

All persons are vulnerable to society at large. However, those that are undocumented are more vulnerable than most. In light of this fact, the INA has outlined some scenarios where an undocumented immigrant can obtain protection and sometimes outright legal status because they have suffered in the US. If you come across a case where the person's immigration status could be a factor in the proceedings, consider some of the forms of relief referenced above. Consultation with an experienced immigration attorney, that focuses on humanitarian relief/visas, would also be well worth it to insure that your client receives the best protections available to them.

NATIONAL CRIME VICTIM BAR ASSOCIATION
2016 NATIONAL CONFERENCE

Ethics for Crime Victims' Lawyers

Jerome F. O'Neill
Erin K. Olson

For each of the following issues:

1. What can you do?
2. What can't you do?
3. What must you do?

(1) During settlement negotiations in a child sexual abuse case against a well-known religious institution, a defendant's attorney advises you that that the settlement agreement must contain the following terms:

a) All settlement terms are confidential.
b) Your client will never speak of the incident at issue in the case again.
c) Your client will never speak disparagingly about the defendant again.
d) <u>You</u> will never take another case against the defendant.
e) Your client will not issue a press release announcing the settlement.
f) <u>You</u> will agree not to list the settlement on your website, even with the identity of the defendant concealed.

Rule 1.6 - Confidentiality Of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

* * *

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.8 - Conflict Of Interest: Current Clients: Specific Rules:

* * *

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent,[1] except as permitted or required by these Rules

Rule 2.1 – Advisor:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 5.6 - Restrictions On Right To Practice:

A lawyer shall not participate in offering or making:

* * *

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

(2) You have a survival claim arising from the sexual assault of a woman in a nursing home who died shortly after the assault of causes unrelated to the assault. There is a substantial Medicaid lien that will reduce the heirs' recovery to virtually nothing if paid in full. During a mediation, the mediator tells you the defense has offered to stipulate to the amendment of the complaint to allege wrongful death, and will stipulate that the settlement money is for the wrongful death claim.

[1] ABA Model Rule 1.0 (e) provides, "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Rule 3.1 - Meritorious Claims And Contentions:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

* * *

Rule 3.3 - Candor Toward The Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

* * *

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

* * *

Rule 8.3 - Reporting Professional Misconduct:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

(3) You have a contingent fee agreement with your client, and he is offered a parcel of valuable real property to settle the case.

Rule 1.5 – Fees:

* * *

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 1.8 - Conflict Of Interest: Current Clients: Specific Rules:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

* * *

(4) You represent five clients who were harmed by the same defendant, and their economic damages alone exceed $2 million. The defendant has an insurance policy with $1 million limits, and files for bankruptcy shortly after you file the lawsuit.

Rule 1.7 - Conflict Of Interest: Current Clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 - Conflict Of Interest: Current Clients: Specific Rules:

* * *

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(5) Your contingent-fee client fires you and hires new counsel after you have invested significant time and money into the case.

Rule 1.5 – Fees:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be

liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

* * *

Rule 1.8 - Conflict Of Interest: Current Clients: Specific Rules:

*** * ***

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.16 - Declining Or Terminating Representation:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

* * *

(3) the lawyer is discharged.

* * *

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.15 - Safekeeping Property:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

* * *

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(6) After his deposition, your client is extremely angry at his still-living perpetrator and tells you he knows where he lives and has identified a broken window through which he could access his perpetrator's house.

Rule 1.6 - Confidentiality of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules[.]

* * *

(7) You represent the interests of a 10 year-old child through his mother, the court-appointed guardian *ad litem*. In their answer to the complaint, the defendants allege that the mother is also at fault for the child's injuries for failing to adequately supervise the child.

Rule 1.7 - Conflict Of Interest: Current Clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(8) A fellow plaintiff's attorney calls and offers to refer you a case in exchange for a referral fee of 25% of your standard contingent fee.

-- What if the attorney states she will only refer you the case on these terms if you charge a 45% contingent fee?

-- What if the referral comes from the National Crime Victim Bar Association and they want you to sign an agreement imposing conditions on your receipt of the referral?

Rule 5.4 -Professional Independence Of A Lawyer:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

* * *

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

* * *

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

* * *

Rule 7.2 – Advertising:

* * *

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

* * *

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

* * *

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.

* * *

Ethics of a Non-Profit Organization Operating a Lawyer Referral Service

Lawyer referral services were established more than 75[2] years ago to serve an important function – to increase the general public's access to justice.[3] Lawyer referral

[2] https://www.smartlaw.org/index.cfm?fuseaction=AboutLRIS&PageID=1403

services educate and connect the public with licensed practitioners in certain practice areas in their geographic location. The public expects lawyer referral services to be consumer-oriented, with any benefits to participating attorneys as secondary.[4] Thus, in 1989, the American Bar Association adopted Model Rules of Professional Conduct ("Model Rules") for the operation of public service attorney referral programs to ensure an emphasis on consumer protection.[5]

The two relevant Model Rules in determining the ethics of the operation of a non-profit lawyer referral service are Rules 5.4 and 7.2.

Model Rule 5.4 governs the professional independence of a lawyer, which is rooted in the objective to protect attorney-client relationships from injurious lay interference.[6] As the comments to Model Rule 5.4 explain, the "provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client … such arrangements should not interfere with the lawyer's professional judgment."[7] Thus as a general rule, a "lawyer or law firm shall not share legal fees with a nonlawyer …."[8] Model Rule 5.4, however, carves out an exception for nonprofit organizations providing referrals, providing:

(a) A lawyer shall not share legal fees with a nonlawyer, except that:

…

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

To fall into the exception in subsection (4), it appears there two main elements. First, the referral must be made by a non-profit organization and second, the legal fees must be "court-awarded." Certain states have articulated these elements in more detail. As to the non-profit requirement, the District of Columbia states that the nonprofit organization must qualify "under Section 501(c)(3) of the Internal Revenue Code.[9] Similarly, New Hampshire requires tax recognition of exemption.[10] With respect to the second requirement that the legal fees be court-awarded, some states have eliminated the requirement altogether or have augmented the scope of what constitutes court-awarded.

[3] Model Supreme Court Rules Governing Lawyer Referral and Information Services (1993) http://www.americanbar.org/groups/lawyer_referral/policy.html
[4] Id.
[5] It is important to note that only non-profit lawyer referral services are analyzed for the purposes of this paper. For-profit or legal services plans have vastly different considerations.
[6] R.Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1110 (1989)
[7] Model Rules of Prof'l Conduct R. 5.4 cmt. (2009).
[8] Model Rules of Professional Conduct Rule 5.4 Model Rules of Prof'l Conduct R. 5.4 (2009).
[9] District Rules of Prof'l Conduct R. 5.4 (2007).
[10] New Hampshire Rules of Prof'l Conduct R. 7.2 cmt. (2004).

For example, the New Hampshire ethics committee provides that New Hampshire "permits a lawyer to share legal fees, whether or not court-awarded, with a nonprofit entity pursuant to Rule 5.4(a)(4)."[11] The District of Columbia permits the sharing of fees "whether awarded by a tribunal or received in a settlement of a matter…."[12] Rhode Island allows the sharing of a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such award, if the organization is a non-profit and tax exempt, the referral is made to advance the purposes of the organization, and the tribunal approves the fee sharing agreement.[13]

Thus, the Model Rules contemplate non-profit lawyer referral services. Moreover, if the non-profit is recognized as a tax exempt organization and if the shared fee is court awarded, the operation of the lawyer referral services are ethically permissible.

The second Model Rule pertinent in the examination of whether non-profit lawyer referral services are ethically authorized is Rule 7.2, which regulates advertising. It provides in part:

> (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
>
> …
>
> (2) pay the usual charges of a legal service plan or a non-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority

The impetus behind Rule 7.2 is "to assist the public in learning about and obtaining legal services" balanced against "undignified" advertising and the risk of practices that are "misleading or overreaching."[14] In carving out an exception for nonprofit lawyer referral services, the Model Rules recognized the value provided by such services.

The Model Rule does not further explain what "usual charges" are; however, South Carolina's Rules of Professional Conduct is illustrative. South Carolina Rules of Professional Conduct Rule 7.2 comment provides that the "usual charges" for a not-for-profit, "may include a portion of legal fees collected by an attorney from clients referred by the service when that portion of fees is collected to support the expenses projected from the referral service."[15] Also descriptive is Arizona's Rules of Professional Conduct Rule 7.2, which states that a lawyer shall not give anything of value (i.e. pay) to a person for recommending the lawyer's services except that a lawyer may "(2) pay the usual charges of a … not-for-profit …, which may include in addition to any membership fee, a

[11] New Hampshire Rules of Prof'l Conduct R. 5.4 cmt. (2004).
[12] District Rules of Prof'l Conduct R. 5.4 (2007).
[13] Rhode Island Rules of Prof'l Conduct Rule 5.4 (2007).
[14] Model Rules of Prof'l Conduct R. 7.2 cmt. (2009).
[15] South Carolina Rules of Prof'l Conduct Rule 7.2 cmt. (2015).

fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any such percentage fee shall not exceed ten percent, and shall be used only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of pro bono services. The fees paid by a client referred by such service shall not exceed the total charges that the client would have paid had no service been involved."[16]

Model Rule 7.2 carves out exceptions for non-profits *or* qualified lawyer referral services.[17] A non-profit lawyer referral service is "any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of representation and afford other client protections, such as complaint procedures or malpractice insurance. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified referral service."[18] Indiana's Rule of Professional Conduct Rule 7.3 governs direct contact with prospective clients. It states that a "lawyer shall not accept referrals from, make referrals to, or solicit clients on behalf of any referral service unless such service falls within clauses (1)-(4).[19]" The relevant clause here is subsection (4), which refers to non-profit organizations that recommend, furnish, or pay for legal services to their members. Four conditions imposed are: (A) the primary purpose does not include the rendition of legal services; (B) the recommending is incidental to the purposes of such organization; (C) the organization does not derive a financial benefit from the rendition of legal services by the lawyer; and (D) the client is the individual and not the organization.[20] It is thus clear that Model Rule 7.2 ethically permits the operation of nonprofit attorney referral services.

American Bar Association Standing Committee on Ethics and Professional Responsibility analyzed the Model Rules 5.4 and 7.2 in issuing a formal opinion on the sharing of court-awarded fees with sponsoring pro bono organizations.[21] The Committee was presented with the "ethical propriety of a lawyer who undertakes a pro bono litigation representation in the instance of an organization that is engaged in sponsoring such pro bono litigation sharing with the sponsoring organization court-awarded fees resulting from the representation." [22] The Committee concluded that "none of the policy considerations underlying the prohibition of Rule 5.4(a), Rule 7.2(c) or their predecessor

[16] ER 3.1, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

[17] A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. Model Rules of Prof'l Conduct R. 7.2 cmt. (2009).

[18] Model Rules of Prof'l Conduct R. 7.2 cmt. (2009)., further describing a qualified lawyer referral service as one that is "approved by an appropriate regulatory authority as affording adequate protections for the public ..."

[19] Indiana Rules of Prof'l Conduct R. 7.3(d)(4) (2015).

[20] Indiana Rules of Prof'l Conduct R. 7.2 (2015).

[21] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993) (discussing sharing of court-awarded fees with sponsoring pro bono organizations).

[22] Id.

provisions in the Model Code, would be served by precluding a lawyer who undertakes a pro bono representation … on referral from a sponsoring pro bono organization..."[23]

In so concluding, the Committee considered two critical features. First, is that the fee was shared with a non-profit organization, "a fact that has weight both in relation to the letter and purposes of the Model Rules and as a legal matter."[24] And second, that the fee is court-awarded, meaning it is not does not come from the client, rather, the opposing side, and that it was a result of a type of ligation that served a public purpose, which is to be encouraged.[25] The Committee analyzing the Model Rule 5.4, in preventing lay interference in the attorney-client relationship, recognized that for a non-profit organization, any incentive to intervene in litigation is much more likely to relate to the merits of the case rather than a pecuniary interest in a fee award, thus minimizing the danger for improper interference.[26] The Committee also noted that the fees shared are only court-awarded fees, which assumes that the fees were reasonable and serving a public purpose.[27]

All the States and the District of Columbia have adopted verbatim or their version of the Model Rules with respect to the operation of lawyer referral services. Some states, including California, Florida, Georgia, Missouri, Ohio, Tennessee, and Texas have imposed specific application and/or certification processes to operate a non-profit lawyer referral service that is consumer-oriented.

It is important to note that in addition to Rules of Professional Conduct, many jurisdictions may have other entities regulating lawyer referral services, which may not affect ethics per se, but rather potential liability for any non-compliance. For example, California's Business and Professions Code §§ 6155 and 6156[28] provides requirements for attorneys referral services such as registration with the State Bar of California, that a potential client would not be charged more than what he or she would have been without the referral service, and that a referral service shall not be owned or operated by those who collect more than 20% of the referrals made.[29] Liability for failure to comply is to be assessed and recovered in a civil action. Some state supreme courts, such as Nevada and Tennessee also regulate the operation of lawyer referral services. For example, in Tennessee, "intermediary organizations," such as lawyer referral services, are governed by Rule 44 of the Supreme Court of Tennessee.

Non-profit lawyer referral services, like the National Crime Victim Bar Association Attorney Referral Service[30] (NCVBA ARS) provided a value service in

[23] Id at n23.
[24] Id at n1.
[25] Id.
[26] Id.
[27] Id.
[28] Cal. Bus. Prof. Code §6155(a)(1),(2)
[29] Cal. Bus. Code §6156(a)
[30] The NCVBA ARS is in the process of transitioning to a fee-based system. Currently, the NCVBA ARS is certified in Florida, Missouri, and Tennessee, in those states that have specific certification requirements. The ABA is not accepting applications at this time.

increasing the public's access to justice. The Model Rules not only contemplate the use of nonprofit lawyer referral services, but specifically authorize the operation thereof.

(9) Your client lies about a material matter during his deposition.

Rule 1.6 Confidentiality Of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

* * *

(6) to comply with other law or a court order; or

* * *

Rule 3.3 - Candor Toward The Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

* * * or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer

evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

* * *

Rule 8.4 - Misconduct:

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice[.]

(10) You have resolved a case in which there was a protective order covering all discovery produced by the defense. An attorney friend of yours has a case involving the same defendant, and wants to review the discovery from your case.

Rule 1.6 - Confidentiality Of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

* * *

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.9 - Duties To Former Clients:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

* * *

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 3.4 - Fairness To Opposing Party And Counsel:

A lawyer shall not:

* * *

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

* * *

Rule 4.4 - Respect For Rights Of Third Persons:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

* * *

Rule 8.4 - Misconduct:

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice[.]

(11) Your client wants to obtain a loan against his personal injury claim from a company he learned about on late-night TV, executes the necessary documents to relieve you of your duties of confidentiality and attorney-client privilege, and demands that you sign the required documents.

Rule 1.2 - Scope of Representation And Allocation Of Authority Between Client And Lawyer:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. * * *

* * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.7 - Conflict Of Interest: Current Clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> * * *
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

*** * ***

Rule 2.1 – Advisor:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 5.4 - Professional Independence Of A Lawyer:

* * *

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Rule 8.4 – Misconduct:

It is professional misconduct for a lawyer to:

* * *

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

See, e.g., Florida Bar Opinion 00-3, New York City Bar Formal Opinion 2011-2.

(12) Your client discloses that since sustaining the head injury in the crash for which you represent him, he has had uncontrollable bursts of anger that have resulted in him striking and injuring his child.

Rule 1.6 - Confidentiality Of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

* * *

(13) You suspect that there are other victims of a perpetrator besides your client, and you want to:

a) Issue a press release when you file the lawsuit in the hope that the media attention will lead more clients to you.

b) Offer a $5,000 donation to "CrimeStoppers" if they will offer a reward for information leading to the prosecution of your client's perpetrator.

c) Send your investigator to contact other potential victims under the guise of contacting potential witnesses.

Rule 3.6 - Trial Publicity:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest[.]

***** ***** *****

Rule 7.2 – Advertising:

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

* * *

Rule 7.3 - Solicitation of Clients:

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain * * *[.]

(14) You want until the last minute to file a complaint, and miscalculated the statute of limitations. The case is dismissed with prejudice, but you believe the judge did not property apply a tolling rule, and want to advance an appeal.

Rule 1.1- Competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

* * *

Rule 1.3 – Diligence:

A lawyer shall act with reasonable diligence and promptness in representing a client.

* * *

Rule 1.7 - Conflict Of Interest: Current Clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* * *

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; [and]

* * *

(4) each affected client gives informed consent, confirmed in writing.

(15) After completing discovery and extensive motion practice in a negligence case, the sole defendant files for bankruptcy, leaving a $100,000 insurance policy as the sole source of recovery. You have advanced $60,000 in costs, and your fee agreement entitles you to 40% of the gross recovery, with costs coming out of your client's share of the recovery.

Rule 1.5 – Fees:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

* * *

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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Issues in Litigating Child-on-Child Sex Abuse Cases: Peer sexual abuse in institutional settings

INTRODUCTION

A parent or guardian calls your office and tells you the following:

"My child was placed at a facility because he has issues with x, y, and z. The facility called me and said that they caught my child with another boy in their room. I guess the facility called the police and my child was already interviewed by law enforcement. The cops are telling me they can't really do much in terms of criminal charges because of the mental capacity of the boy who hurt my child. I trusted this place – they were supposed to keep my child safe. I don't know what to do."

Unfortunately, this story is a common one. Despite the shift towards community-centered environments for children, residential treatment centers for children are doing a big business in the United States today for the large number of children diagnosed with behavioral problems or a diagnosis on the Autism spectrum. These institutions claim to provide an array of psychological and therapeutic services to troubled children. However, despite having a psychiatrist on staff, a couple of therapists, and a few nurses, residential treatment centers are, generally, run by non-clinical administrators who have to answer to the corporation's president or CEO.

What are we talking about when we say "institutional settings"?

- Residential treatment centers
- Foster care
- Juvenile detention settings
- Group homes

The focus of this presentation is on peer sexual abuse in institutional settings, but many of these principles can be applied to other scenarios – peer sexual abuse in schools, daycares, church groups, in a private home (i.e. babysitter/neighbor situation).

PRELIMINARY INVESTIGATION

In cases involving children in an institutional setting, there is typically a tremendous paper trail to help not just build a solid case, but to build a potentially very powerful case. The following are things to track down right away in the investigation stage:

Police investigation

As always, get a copy of the full and complete law enforcement investigation if one was done. If you can get a copy of the Safe House or forensic interview of the child/children without a subpoena, get it right away. Also, request the full police call – the log that shows when law enforcement was notified, who was dispatched, all the communications between dispatch and the officers, etc. We have also found it very helpful to get a copy of the 911 call. It helps to have the institution's employees' words (not the lawyers' characterization) of the incident. For instance, when we file these cases we allege that our child was raped or sexually assaulted by another peer at the facility. The attorneys for the facility almost always attempt to characterize the incident(s) as "consensual" and "just sexual exploration". It is useful to have a 911 transcript in which the institution's employee who makes the 911 call reports it as a "rape" or "sexual assault".

Complete set of the child's records from the institution

At the very beginning of the case, send an authorization to the institution and get a complete copy of the entire file for the child from the institution. Depending on the type of facility and the length of time that the child was there, this could be a very extensive set of documents. In the residential treatment center context, for example, one of our client's had only been at the facility for three months and there was 2,000 pages of documents in his file. The offending boy in that case was at the facility for almost four years and there were over 15,000 pages of records for him. The child's file from the institution is essential in these cases.

Admissions Assessments

The admissions paperwork will frequently have great information for the case. It will talk about all of the problems and concerns with the child, highlight any vulnerabilities that the facility has identified, and these documents will frequently characterize the child as requiring a lot of assistance and care. Remember, these are facilities that are generally either billing Medicaid or some sort of private health insurance and have to justify the reason why the child needs to be at this type of institution. The admissions documents are the perfect place to start building the duties and obligations that the institution had to the child.

Treatment Plans/Therapist Notes

The child's treatment plans will build on the duties and will go further to set the standards of care for the institution. The treatment plans will frequently address what the child's issues are, what the institution is doing to address them, any safety issues, the level of necessary supervision, and documentation about concerning incidents. Moreover, the therapist's notes are also a good source of information, in particular immediately

following the rape or abuse if the child was not removed immediately from the institution.

Daily Progress Notes/Daily Documentation

These types of notes are written by the regular staff (as opposed to the clinical professionals) and document what the child did throughout the entire shift. While it is tedious to go through all of these, typically, handwritten documents, they can be very helpful to the case because they will often have information concerning other incidents or they can clearly evidence that these direct care staff persons are not doing their jobs.

Physician's Orders

The physician's orders typically document if there is a need for a heightened level of supervision for the child – another standard of care that was likely breached by the staff assigned to supervise and allowing for the assault to occur. In addition, check for any changes in medication for the child around the time of the assault.

Discharge Summary

We have seen repeatedly that the discharge summary and admissions documents are typically a stark contrast to each other. Upon admission the institution is trying to characterize the child as in need of significant assistance; however on discharge (and after the rape that occurred in their facility and on their time), the tone shifts to the child and/or the child's parents/guardians being untruthful, not complying with the physician's orders, etc.

Open records requests to governmental institutions that regulate/license the institution

Most all child institutions are regulated in some fashion by the government. Figure out which department is responsible for their licensure and certification and send an open records request for all incident reports for a given time period and all investigations/reviews of the institution. In addition, most of these institutions accept Medicaid. Send an open records request for all amounts paid to the facility by Medicaid for a given time period. The dollar amount is staggering.

Open record requests to governmental entities which have information about the offending child. It is not uncommon for there to be a great wealth of information about the offending child in various governmental depositories:

1. School police departments
2. Juvenile detention intake records
3. All police reports from all addresses where the child lived

Institution's website/promotional materials

Capture the website or any promotional materials you can find for the institution as quickly as you can. We frequently use the statements the institution makes on the website in the lawsuit itself.

Interview the offending child's parents

Often times in these cases in which a child is raped or sexually assaulted by another child, we take the position that the institution failed both children. In a few of our cases, we have been able to get in touch with the parents for the offending child. These parents are upset and feel betrayed by the facility that promised they would supervise and keep their kid safe too. We have gotten a lot of good information from these parents about (a) things that were in the offending kid's past that the parents communicated to the facility before the rape; (b) other complaints about the facility; etc.

Private Investigators

A diligent private investigator can collect a lot of information in a very short amount of time. They can interview persons identified in the open records collected and help create a picture of the offending child at the time he was admitted to the facility/institution. Developing a concise chronology of the violent and dangerous behaviors the offending child exhibited prior to his admission can be very helpful when determining the standard of care applicable to supervision of that offender when placed in the treatment setting. We always take the position that the facility had a duty to know and appreciate the risks associated with the offender's pre-admission behavior and history.

LAWSUIT

Usually we bring state law claims for negligence, premises liability, breach of contract – third party beneficiary, professional negligence, and breach of fiduciary duty. Certainly be on the lookout for whether the institution is run or operated by a governmental entity. If so, there could be governmental liability for negligence – if sovereign immunity has been waived - or possibly civil rights claims under 42 U.S.C. § 1983.

DISCOVERY

The first thing to ask for in written discovery is the offending child's complete file from the institution. As we explained earlier, this file has an incredible wealth of information about exactly what the facility knew about the child, including any propensities he may have had. Thus far, we have always been successful in getting the offending child's records. However, we generally have to go through some sort of process to obtain those records. On a couple of occasions we had the ability to get a signed authorization from the parent of the offending child which streamlined the process significantly. If not, the facility typically takes the position that it will only produce the offending child's records with a court order because of HIPAA and confidentiality constraints under state laws and regulations. Whatever hoops you have to jump through to get these records, you must do it because these records typically make the case.

Also make sure to ask for all incident reports from the facility. Again, expect a big fight but we have been very successful in getting New Mexico courts to order production of not only the institution at issue's incident reports for a given time period, but also our courts have ordered that the national company produce incident reports for peer-to-peer sexual contact from all similar facilities across the country. These documents are for purposes of notice and to enable experts to comment on whether the Defendant treatment

facility met the standard of care for discovering, documenting, and responding to incidents posing a risk of harm to the residents. Prior incident reports, of course, also strengthen the case for punitive damages. The reports typically reveal that the institution has significant notice about the incidents of violence, assault and rape in the facility but does little or nothing to implement measures designed to reduce and eliminate these dangerous events.

Documents regarding the various supervision levels at the facility coupled with documents regarding the institution's daily census are frequently important in these cases. In all of the cases that we have had, the offending child had documented issues with "sexual acting out", "boundaries", etc. Accordingly, the offending child is often on a heightened level of supervision as ordered by the psychiatrist and clinical professionals. However, discovery on these cases has revealed that just because the clinical professional makes an order or recommendation, the staff and institution may or may not put that order into place. It costs money to hire the staff necessary to provide one-on one, or "line of sight" supervision of a sexually aggressive youth and these institutions are frequently not willing to forgo additional profits to follow the recommendations of the clinical professionals.

Calculating the net and gross revenue of the facility (if private) can be fairly easy with subpoenas to the payor entities and Rule 30(B)(6) depositions of the accounting and business personnel. As indicated above, the amounts paid by insurers for in-patient residential treat are enormous, and help frame the profit issue. The children placed in institutional mental health, residential treatment facilities are statistically 40 – 70% more likely to be victims of physical and/or sexual abuse. The institutions know this is true. Using simple math to show what the institution did with the revenue - staffing ratios, bed alarms, video surveillance, skill level of staff, etc. can be very powerful.

TYPICAL DEFENSES

We generally see the following defenses in cases of institutional peer-to-peer sexual abuse:

- "This is really not that bad. The kids are just exploring – it is nothing aggressive, violent or scary."
- "These kids are watched constantly, if anything happened at all, it could have only lasted for a couple of minutes."
- "This kid had a lot of problems and issues in his/her life before this happened. How could some innocent sexual exploration with another kid have any impact on him/her when there are all of these other issues in the child's past?"

DIFFERENCES FROM ADULT-ON-CHILD SEXUAL ABUSE

- No Comparative fault (offender is a child too)

- The only “monster” in these cases is the big corporations that run these institutions and make millions of dollars off of providing substandard care to very vulnerable children.

- Continuing problems with peers ---- a trusted peer hurt the child – how to have that type of relationship again?

- Abuse occurs in a place where the child is supposed to be safe (residential treatment center, hospital, detention center, school) – if it can happen here, where else can the child go now for help?

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REPRESENTING UNSYMPATHETIC CLIENTS:

OVERCOMING PREJUDICE TO OBTAIN JUSTICE

I am the mother to two children, ages 2 and under. No, they are not twins. Yes, they were both planned. No, I don't know what we were thinking. Now that that's out of the way, the reason I bring them up is because having children has fundamentally changed who I am as a person. Through this journey as a new parent, I have found myself reaching out to my friends and fellow parents in my community to share experiences and to offer and to receive support.

In doing so, I have learned how important empathy and disclosure can be in creating and strengthening my relationships with others. Doing so has made me a better parent and friend to others going through the same struggles. Through this journey, I've begun to understand that which bonds me to others in my personal life, can bond me to my prospective jurors in voir dire, and can help me in obtaining justice for some of my clients that may, at first glance, appear to be unsympathetic.

Attorneys who routinely handle negligent security cases are keenly aware of what makes adjusters, defense lawyer and jurors view our clients as 'unsympathetic' and how that can result in a lower case value or a dreaded defense verdict. Our inherent prejudices affect our ability to

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empathize with others, especially those who look, live or pray differently than we do. While uncomfortable, identifying our own prejudices, empathizing with our clients, and finally disclosing our prejudices to the panel of potential jurors during voir dire is the key to helping our clients to obtain justice.

PREJUDICE – THE MAKING OF AN "UNSYMPATHETIC CLIENT"

Prejudice is prejudgment or forming an opinion before becoming aware of the relevant facts of a case. It is often used to refer to preconceived negative judgments towards a person or group of people due to gender, race/ethnicity, nationality, religion, age or disability.[2]

In a courtroom setting, it involves transferring pre-existing prejudicial attitudes, beliefs, or stereotypes about categories of persons to the case at hand. The stereotyping may involve the plaintiff, the defendant or the witnesses. It is the perceived characteristics of the parties or dispute that causes the juror to categorize one or more trial participants as falling within a stereotyped class such that the evidence is evaluated in a biased manner or the burden of proof is improperly slanted as a result of the preexisting attitudes and beliefs.[3]

With that said, in today's world of political correctness and corporate diversity training, there is a social stigma associated with appearing to be biased. Unfortunately, this has made voir dire all the more difficult as no one wants to admit to being prejudiced against any group of people. Before we ask jurors to "put their feeling aside" when discussing groups of people who may be considered unsympathetic, we must assist them in identifying what their true

[2] John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in The Handbook of Social Psychology, 5th Ed., Vol. 2) New York: Wiley, (S. Fiske et al. eds., 2010).
[3] Neil Vildmar, *Case Studies of Pre- and Mid-Trial Prejudice in Criminal and Civil Litigation*, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1919&context=faculty_scholarship (Aug. 1, 2016, 3:30 p.m.).

feelings actually are as many people refuse to believe that they harbor prejudices against any group of people.[4]

While each case and each plaintiff is different, there are certain general characteristics (race and religion) as well as a few specific issues (criminal convictions and prior sexual assaults) that can immediately flag a plaintiff as being 'unsympathetic' due to a juror's prejudices. Below we will discuss four common areas of prejudices that can negatively affect the jurors in a personal injury civil lawsuit.

Race

A new study out of the University of Oregon Law School has found that when jurors have discretion (i.e. pain and suffering damages); they award less to black plaintiffs than to white plaintiffs. Holding the other variables in the model constant, jurors tend to award black plaintiffs only 41 percent of the amount of pain and suffering as white plaintiffs.[5] Numerous studies have shown that white jurors demonstrate prejudice and are harsher towards a black plaintiff (civil) or defendant (criminal) when race is not a prominent concern in the matter.[6] As race is rarely, if ever, mentioned in civil cases, this should be alarming to those of us representing black or Hispanic clients where whites are in our jury pool. The process of identifying and disclosing a personal race-related prejudice during voir dire may be sufficient to 'introduce race' into the matter and therefore put race in the front of the minds of jurors which studies have shown can result in a less prejudiced verdict from a white jury.

Religion

[4] Jill Liebold, *Part I: Implicit and Explicit Effects of Bias in the Courtroom*, July 31, 2009, http://www.litigationinsights.com/case-strategies/part-i-implicit-and-explicit-effects-of-bias-in-the-courtroom/
[5] Ken Broda-Bahm, *Expect Racial Bias in Civil Damage Awards*, (Aug. 2, 2016, 11:30 a.m.), http://www.persuasivelitigator.com/2015/10/expect-racial-bias-in-civil-damage-awards.html
[6] Samuel R. Sommers, *Race and the Decision Making of Juries*, in Legal and Criminal Psychology, 12, 171-187, (2007).

Representing non-Christian clients has always posed a special concern when the jury pool is comprised of majority Christians. However, in a post-911 world, when it comes to being discriminated against by jurors, perhaps the most vulnerable Plaintiff is one who is, or is perceived to be, Muslim.[7] While a civil matter more likely than not will have little or nothing to do with the Plaintiff's ethnicity or religion, the possibility of anti-Muslim and anti-Arab prejudice is rife regardless of the case.[8]

Anti-Arab/Muslim prejudice comes in a variety of forms. Some of it stems from the prejudiced belief that all Arabs and Muslims are terrorists. Some of it comes from personal experiences that jurors have had with Arabs or Muslims at work or in stores owned by Arabs or Muslims. Other jurors believe that Christianity is in a Holy War with Muslims. One juror in a commercial construction case revealed that he had problems with Muslims because "Christianity has been at war with the Muslims for 500 years".[9] Long-term studies exploring the impact of anti-Muslim biases on verdicts are not available and more research is needed to explore this important issue.

Prior Criminal Convictions

One in three working age adults in America has a criminal record.[10] The potential for undue prejudice resulting from prior criminal convictions that are allowed into evidence should unnerve even the most experienced trial lawyer. Since civil cases hinge on the credibility of the injured Plaintiff, criminal convictions can undermine the credibility of that witness and can be the

[7] Marc W. Pearce & Samantha L. Schwartz, *Can Jurors' Religious Biases Affect Verdicts In Criminal Trials?*, (Aug. 1, 2016, 4:00 p.m.), http://www.apa.org/monitor/2010/07-08/jn.aspx.
[8] Diane Wiley, *Holy War: Juror Questionnaires for Cases with Middle Eastern, Arab, Muslim or Anyone-Who-Might-Be-One-of- the-Above Parties*, September 1, 2010, http://www.thejuryexpert.com/2010/09/holy-war-juror-questionnaires-for-cases-with-middle-eastern-arab-muslim-or-anyone-who-might-be-one-of-the-above-parties/
[9] *Id*.
[10] Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records As College Diplomas* (Aug. 2, 2016, 11:00 a.m.) https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas

difference between winning and losing.[11] It is of great concern that a juror will form the opinion that the 'criminal' is undeserving of justice in the civil context.[12] When the Plaintiff is making a claim for injuries sustained in a nightclub or bar setting, there is even more of a concern that the juror will think that the plaintiff must have been up to no good or should not have been out in that setting to begin with.

Prior Sexual Assaults

Rape shield laws limit or prohibit the use of evidence of a victim's past sexual history to undermine that victim's credibility in the criminal trial of the rapist. Federal government and almost all states have some form of evidentiary protection for rape victims in criminal proceedings. However, only a few jurisdictions have adopted protections for civil plaintiffs.[13] Civil defense attorneys often appeal to rape myths and cultural stereotypes of rape victims. They also routinely argue for the admission into evidence of past sexual assaults claiming that this information is vital in order for jurors to make decisions about the apportionment of damages (i.e. arguing that the injury caused by her attacker in the instant case is less than she claims because of her previous sexual assaults). Allowing such stereotypes to creep into decision making is an implicit endorsement of the idea that women deviating from the "ideal victim" are less deserving of the protection of the law and that prior sexual assaults reduce the value of the civil case for rape.[14]

UNSYMPATHETIC CLIENTS: CONFESSIONS OF PI LAWYERS

[11] Robert I. Rubin, *Impeachment of a Civil Litigant with Criminal Convictions* (Aug. 2, 2016, 11:30 a.m.), http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/DA55DD98E5AEF66F8525765D0057FCF4

[12] James McMahon, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 Fordham L. Rev. 1063 (1986).

[13] Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, (Aug. 2, 2016, 1:30 p.m.), http://ndlawreview.org/wp-content/uploads/2013/06/Hines.pdf.

[14] *Id* at 891.

Race

As told by Attorney E.T. [15]

T.J. was a 30 year old black male who was killed in nightclub shooting. When two women, both mothers to his children, came into E.T.'s office to retain him to handle the wrongful death case, E.T. admits to making snap judgments about T.J. E.T. assumed there would be no or low lost wages, that T.J. had at least one felony conviction and that he was uninvolved in his childrens' lives. As it turned out, T.J. worked full-time as an assistant manager of a restaurant, had no criminal history and was very involved in the lives of his children.

Despite E.T. being a black man himself, who knew the pain of being on the receiving end of these same stereotypes, he still harbored these prejudicial beliefs about a fellow black man. When discussing this case with E.T., he shared that he was ashamed of his initial assumptions. He also was concerned that if that is what he assumed about his client, what would prospective white jurors think about his client?

Religion

As told by Attorney L.B.[16]

M.H. was a middle-aged man who was injured during a robbery at a hotel. He was an American citizen and a practicing Muslim. During a phone call with opposing counsel, he made it clear that the defendants and insurance carrier were pushing for him to take the case to trial as they believed they would be benefited by the prejudices of a jury that, due to the venue, would be made up of white Christians. While discussing this case with L.B., she shared that she was

[15] E.T. is a member in good standing with the Florida Bar. He is a 45 year old black male, married with two young children. He is a plaintiff's attorney who routinely handles negligent security cases. He has shared his personal experience in the matter of young black father who was killed in a nightclub shooting. E.T. has asked to remain anonymous.

[16] L.B. is a member in good standing with the Florida Bar. She is a 39 year old white married female. She is a plaintiff's attorney who routinely handles negligent security cases. She has shared her personal experience in the matter of middle-aged Muslim man who was injured at a hotel during a robbery. L.B. has asked to remain anonymous.

uncomfortable with the tactics of the defense/insurance carrier. However, she also admitted that she was somewhat relieved when the case finally settled as she felt 'uneasy' about the prospect of having to attend trial with M.H. and concerned about how and where he would pray during the trial and also that he might not follow all of her instructions as 'she was a woman and the men in his culture don't always listen to and respect women'. When I asked L.B. what prejudices she believes she had with regard to Muslims, she reported 'none'.

Prior Criminal Convictions

As told by Attorney M.S.[17]

C.S. was a twenty-something college kid who was injured by an unruly patron at a bar near his university. M.S. reported that when C.S. came in for his new client interview, his staff took down all of his demographics and made a note of his criminal history. C.S. had a DUI conviction. C.S. was injured while drinking in a bar when another patron punched him, causing a serious facial injury that required emergency surgery. M.S. reported that when he first sat down to meet with C.S., knowing of the prior DUI, the first thing he thought was "Why was this kid with a DUI at a bar drinking? He should have kept his ass at home and this wouldn't have happened". As I discussed his feelings and past experiences, M.S. admitted that he drank while underage at college and that he probably drove home on one or two occasions where perhaps he shouldn't have. Despite this, his first reaction was to shift some of the blame of what happened that night onto C.S. because of his past criminal conviction.

Prior Sexual Assault

As told by Attorney Chelsie M. Lamie

[17] M.S. is a member in good standing with the Louisiana Bar. He is a 40 year old white married male. He is a plaintiff's attorney who routinely handles negligent security cases. He has shared his personal experience in the matter of a young white man with a prior criminal conviction who was injured in a bar by an unruly patron. M.S. has asked to remain anonymous.

K.D. is a sixteen year old girl who was raped by an employee of the inpatient drug treatment center that she was court ordered to enter. She immediately reported the rape, the other employees of the facility called 911 after her disclosure, she was transported to the local rape crisis center for an examination and counseling, the rapist was immediately terminated from his employment at the facility and criminal charges were moving forward against the perpetrator. K.D. participated in counseling sessions at the local rape crisis center and finished her court ordered rehab. Contained within her rape crisis records were the details of two prior and one subsequent sexual assault.

I am a certified rape crisis counselor. I am a mother. I am a woman. And yet, my first thoughts after reading these records were "How do you get raped 4 times before you're 17?" "What types of situations is this girl putting herself in to allow this to keep happening?" and of course "How am I going to prove damages now?"

Logically I knew that K.D. was a victim. I know that once victimized, a person is more likely to be victimized again in the future. However, my gut reaction was one that I suspect many of you reading this may have had as well. More importantly, I knew in my heart, that these would be the jurors' first thoughts too.

STEP ONE – IDENTIFYING YOUR OWN PREJUDICE

People are often biased against others outside of their own social group, showing prejudice (emotional bias), stereotypes (cognitive bias), and discrimination (behavioral bias).[18] In the past, people used to be more explicit with their biases, but during the 20th century, when it became less socially acceptable to exhibit bias, such things like prejudice, stereotypes, and discrimination became more subtle (automatic, ambiguous, and ambivalent).[19] Harboring

[18] Susan T. Fiske, Prejudice, Discrimination, and Stereotyping, (Aug. 2, 2016, 3:00 p.m.), http://nobaproject.com/modules/prejudice-discrimination-and-stereotyping.
[19] *Id*.

prejudices is not something that anyone likes to admit to but it is estimated that prejudice is pervasive, affecting 90 to 95 percent of people.[20] (I strongly recommend taking fifteen minutes and examining your own preferences/biases by visiting www.understandingprejudice.org and taking the online test. I took it and was surprised by the results.)

In the cases outlined above, we examined the different reactions of four different lawyers to four "unsympathetic clients". In each case, the lawyer harbored some level of prejudice against their client. They essentially saw them as "unsympathetic" and it is to be expected that the jurors would too.

To assist the jurors in overcoming their prejudices in order to deliver justice for our clients, we must identify what we feel makes our own clients unsympathetic. We cannot expect jurors to share their own prejudices if we are not willing to admit our own. One of the best ways to identify our own prejudices is to write down one or two of the issues in the case or characteristics of the client that you think will be a 'problem' for the jury.[21] Then sit back and explore your own personal feelings about these issues or characteristics. What do you think about this issue or characteristic? What memories from your childhood does it bring up? What were you taught about this issue when you were younger? What personal experiences have you had with similar people or issues in your lifetime? This is the self-examination that must be done to uncover our own prejudices and allow us to share them in step three through disclosure with the potential jurors.

STEP TWO – CONNECTING WITH YOUR CLIENT

[20] Joel Schwarz, *Roots of Unconscious Prejudice Affect 90 to 95 Percent of People, Psychologists Demonstrate at Press Conference*, (Aug. 2, 2016, 3:30 p.m.), http://www.washington.edu/news/1998/09/29/roots-of-unconscious-prejudice-affect-90-to-95-percent-of-people-psychologists-demonstrate-at-press-conference/.

[21] Joane Garcia-Colson, *Voir Dire: The Right Preparation Allows You To Be "In The Moment" With Jurors*, October 2007, Plaintiff Magazine, http://plaintiffmagazine.com/Oct07%20articles/Garcia-Colson_Voir%20dire_The%20right%20preparation%20allows%20you%20to%20be%20in%20the%20moment%20with%20jurors_Plaintiff%20magazine.pdf.

After identifying our bias or prejudice, the second step in this process is to empathize with our client. Empathy is the experience of understanding another person's condition from their perspective. You place yourself in their shoes and feel what they are feeling. Empathy is known to increase prosocial (helping) behaviors. While American culture might be socializing people into becoming more individualistic rather than empathic, research has uncovered the existence of "mirror neurons," which react to emotions expressed by others and then reproduce them.[22]

Our ability to empathize with others can be seen in newborns. Parents have seen how the crying of a newborn, child or even adult can result in a happy baby (one that is fed, warm, and in a clean diaper) to begin to cry uncontrollably.[23] It's not just casual observation that leads us to believe that humans are born with the ability to empathize with others. A 2012 study revealed that preverbal 10-month-olds manifest sympathetic responses, evinced in their preference for attacked others according to their evaluations of the respective roles of victim, aggressor, and neutral party.[24]

Because arriving at a verdict will require jurors to identify—in varying degrees—with the participants in a case, a juror's level of empathy will directly influence verdicts.[25] While we are born with the ability to empathize, there is evidence for an inverse-U-shaped pattern across age with regard to this emotion/skill.[26] One study investigated the effects of age on empathy in three large cross-sectional samples of American adults aged 18-90 years old. The results revealed that middle-aged adults showed higher empathy than both young adults and older adults and that

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[22] Psychology Today, *Empathy*, https://www.psychologytoday.com/basics/empathy (Aug. 1, 2016, 1:30p.m.).
[23] Maria Szalavitz, *Empathy for the Rest of Us*, Pacific Standard (Aug. 1, 2016, 1:30 p.m.), https://psmag.com/empathy-for-the-rest-of-us.c6792459ad78#.u3n1fvvsu.
[24] Yasuhior Kanakogi Et Al., *Rudimentary Sympathy in Preverbal Infants: Preference for Others in Distress*. (Aug. 1, 2016, 1:30 p.m.), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0065292
[25] Owen P. Terry, *The Effects of Juror Disclosiveness, Empathy, and Interpersonal Communication Competence on Jury Selection*, (Aug. 2, 2016, 5:00 p.m.), http://aquila.usm.edu/cgi/viewcontent.cgi?article=1250&context=honors_theses.
[26] Ed O'Brien Et Al, *Empathic Concern and Perspective Taking: Linear and Quadratic Effects of Age Across the Adult Life Span*, (Aug. 1, 2016, 2:00 p.m.), https:psychsocgerentology.oxfordhournals.oeg/content/68/2/168.

women were more empathic than men. While there are no hard and fast rules when it comes to selecting jurors, this study should make us think more about middle-aged women as being potentially favorable jurors for our injured clients.

Empathy is a skill and can be practiced and improved. To empathize with your client, you must practice active listening, share a vulnerability from your own life related to the client's story or issue, and remember to withhold immediate judgment to try to gain a deeper understanding of your client's perspective. When you're listening to your client, try not to focus on how to fix the problem or issue at hand.[27] Instead, just listen. This will often result in your seeing the issue from your client's perspective. It will also explain why their actions made sense to them at the time.[28] Making a list of your client's positive attributes can also be helpful in trying to make connections with them. Being able to understand where your client is coming from and making a genuine connection with him or her is essential. Remember, if you can't do it --- how will the jury be able to?

STEP THREE – DISCLOSING AND ELICITING DISCLOSURE FROM PROSPECTIVE JURORS\

Disclosiveness, or self-disclosure, is a measure of how readily one is able to reveal personal characteristics or information to another person.[29] This disclosiveness is vital for

[27] Elliot D. Cohen, *How to Be Empathetic*, May 17, 2015, https://www.psychologytoday.com/blog/what-would-aristotle-do/201505/how-be-empathetic.
[28] The information you obtain from empathizing with your client can identify issues to touch on during voir dire and can also form a basis for an amazing direct examination of your client.
[29] Rebecca B. Rubin & Matthew M. Martin, *Development of a Measure of Interpersonal Communication Competence*, (Aug. 1, 2016, 2:00 p.m.), http://www.tandfonline.com/doi/pdf/10.1080/08824099409359938.

establishing relationships among individuals.[30] Disclosure is essential to form the important, albeit, short-term relationship between the plaintiff's attorney and the jurors.[31]

It is imperative that after you have identified your prejudice related to one of the issues in your case (for example, the race or religion of your client) that you disclose your initial feelings to the prospective jurors. It is not enough to ask them if they can be fair to your client because of X, Y or Z. The better way to handle sensitive issues in voir dire is to disclose your feelings and experiences about the issue and then ask the jurors to share their thoughts and experiences about similar issues or circumstances.[32] This has often been called the Gerry Spence Approach of "I'll show you mine, if you'll show me yours".[33] It is imperative to honor the prospective jurors feelings even if you don't like or agree with them and to thank them for their answers no matter what they say.[34]

CONCLUSION

By disclosing my prejudice and talking about the feelings that surround it, I create a safe space for the jurors to also consider and disclose their prejudices. Once the jurors have witnessed my honesty (my disclosure) and have been given a safe space to consider and disclose theirs, we have become bonded, similar to new parents who tearily confess to feeling of anger towards their crying baby in the night. This bond between the jury and attorney can extend to client, creating a

[30] Sidney Marshall Jourard, *Self-Disclosure: An Experimental Analysis of the Transparent Self,* New York: Wiley-Interscience (1971).
[31] Owen P. Terry, *The Effects of Juror Disclosiveness, Empathy, and Interpersonal Communication Competence on Jury Selection*, (Aug. 2, 2016, 5:00 p.m.), http://aquila.usm.edu/cgi/viewcontent.cgi?article=1250&context=honors_theses.

[32] Paul N. Luvera, *Gerry Spence Jury Selection Method*, August 21, 2008, http://plaintifftriallawyertips.com/gerry-spence-jury-selection-method.
[33] Lisa Blue, Ten Tips for Effective Voir Dire, (Aug. 2, 2016, 6:00 p.m.), http://www.texasbarcle.com/materials/special/blue.pdf.
[34] Paul N. Luvera, *Gerry Spence Jury Selection Method*, August 21, 2008, http://plaintifftriallawyertips.com/gerry-spence-jury-selection-method.

bubble of protection which encapsulates him or her, transforming the client from a previously unsympathetic stranger, to a person deserving of justice.

Terrorism and Negligent Security Cases: The Next Big Thing

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Terrorism has invaded our lives beyond what anyone could imagine even 15 years ago. Terrorism plays itself out almost daily, fueled in part by the 24-hour news cycle on cable news and the internet. In some ways society has become desensitized to each act of terror, seemingly requiring an even more egregious act to make the top story.

What is terrorism anyway? Terrorism has been defined as the systematic use of violence to create a general climate of fear in a population and thereby to bring about a particular political objective.

Inadequate security cases are premised on the concept of foreseeability; if the violence is a reasonably foreseeable event, then the occupier of the premises has a duty to take reasonable steps to prevent the harm to invitees. All premises security cases have at their root the concept of foreseeability. Were it not foreseeable, there would be no duty.

Given the frequency and awareness of terrorist attacks, both foreign and domestic, it cannot be said that such incidents are unforeseeable. Recent terrorist attacks on hotels in the Middle East, in

Islamabad, Mumbai, Peshawar and Jakarta, have included major American franchises such as Marriott, which have resulted in many hotel guest deaths and injuries, and substantial property damage. One of these attacks was carried out by guest suicide bombers detonating bombs manufactured in their hotel rooms. Many of these attacks have heightened the awareness of hotel operators as to the threat of terrorist attacks.

Frequently the targets of these attacks have been the American hotels ("western businesses") or American or Western tourists. It is unlikely that these attacks will be limited to incidents in foreign countries any more than the pre-September 11 attacks were not foreshadowing the attacks on the United States.

In lawsuits filed as a result of the 9/11 attacks against airlines, aircraft manufacturers and others, Judge Halerstein of the Supreme Court of New York held that the attacks were foreseeable in view of the prior history of attacks.[1]

The occurrence of the terrorist attacks of September 11, 2001, when combined with the collective experience of prior and subsequent attacks on American targets, make clear that such attacks are now foreseeable. Because of that, appropriate planning and security on the part of hotels and others in the resort, hospitality and travel industry is essential. In light of the history and industry-related risks, hotels and hospitality providers must institute additional appropriate security measures to take reasonable precautions to protect customers. There is a debate as to whether more stringent anti-terrorism security should be utilized only in "high risk" targets such as New York, Miami, Washington, Los Angeles, San Francisco and Chicago and other politically vulnerable locations.

All industries catering to tourist, travelers and the public must now assess risks, which includes an analysis of whether terrorists might perceive that a target hotel might have lax security. The passage

[1]In Re September 11 Tort Litigation, 280. F.Supp. 2d 279 (S.D.N.Y 2003).

of the Aviation and Transportation Security Act[2] ("Security Act") establishing the Transportation Security Administration ("TSA") within the Department of Transportation to perform pre-employment background checks, hiring, training and supervising of all security personnel, purchasing of essential security equipment, and addressing an extensive array of actual or perceived deficiencies that existed in transportation safety protocols, indicates that, as Judge Halerstein opined, attacks were considered to be foreseeable.

Thus, the rules for aviation, including the processing of checked baggage through use of magnetometers[3], other electronic devices for luggage screening for explosives and strict control of access to secured areas all provide a standard of care argument to be used in the event of a terrorist attack involving a hospitality industry patron.

The domestic terrorism experienced in this country provide the necessary foreseeability of potential harm at domestic and international hotels and resorts. Based upon increased terrorist activity throughout the world, substantial security policies initiated and discussed by Congress, and establishment of federal entities such as the Director of Homeland Security and the Transportation Security Administration, there is ample evidence that government officials and the industry itself acknowledges the likelihood of future attacks, thus making them a foreseeable risk. Therefore, information regarding potential or anticipated criminal or terrorist activity, general risk in the particular area of concern, and a failure to exercise reasonable care under these circumstances will likely support claims.

A classic example of failing to heed warnings is the Pan Am Lockerbie case. On December 21, 1988, a bomb exploded in flight on Pan Am flight 103 over Scotland, killing all 243 passengers and 16 crew members. Cases were brought against Pan Am and Alert, a Pan Am affiliate that provided security services in London and Frankfurt,

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[2]Aviation Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (2001)

[3]49 U.S.C. Sec. 44901 (2001); 49 C.F.R. 154

where the flight originated.[4]

The Plaintiffs contended at trial that the bomb entered the aircraft on an unaccompanied bag through willful misconduct. The Defendants failed to inspect and detect. The bomb was hidden in radio cassette player packed in a Samsonite suitcase, which traveled from Malta to Frankfurt where it was transferred to flight 103 without being x-rayed. Plaintiffs claimed that the baggage handling procedures violated the requirements in the Air Carrier Standard Security Program XV.C.1.(a), which ensured that bags matched passengers and that unaccompanied bags are physically inspected.

The trial lasted 13 weeks. The jury found that but for Pan Am's inadequate terrorist prevention techniques and deliberate indifference shown to the passengers and overt acts of willfulness, the bombing would not have occurred.

Damages were awarded to families in the first 3 cases of $9,225,000, 9,000,000, and 1,735,000. In order to defeat the $75,000 cap imposed by the Warsaw convention, the plaintiffs had to establish that Pan Am's conduct was willful.

At trial the evidence demonstrated that:

- In 1983 a Pan Am flight from Rome to NY was the target of a bomb planted in an unaccompanied suitcase. Turkish authorities conducted a passenger/bag check and discovered it. But by now the airline knew of the sabotage threat and how important bag/passenger matches were.

- In 1985 a bomb inside a radio and packed in an unaccompanied bag destroyed an Air India 747 over the North Atlantic, killing all on board. These incidents helped lead to the adoption of Safety Standards and placed Pan Am on notice of this threat.

The evidence was that Pan Am had even more notice:

[4] *In re Air Disaster at Lockerbie, Scotland on 12-21-88*, 37 F.3d 804 (2d Cir. 1994).

 In September 1986 the carrier received a report from a group of Israeli security experts that its security system was highly vulnerable to terrorist attack. The report specifically cautioned Pan Am on the use of x-ray machines as a substitute for physical searches.

 In July 1988 the FAA issued a Security Bulletin warning that terrorist retaliation from the downing of an Iranian jet was a possibility and that a raid on a terrorist group had revealed a bomb built into a Toshiba radio. The bulletin warned that such bombs were difficult to detect by x-ray.

In what many say was the most outrageous disregard for passenger safety, in December 1988 Pan Am received from the FAA a Security Bulletin advising that the US Embassy in Helsinki had received a telephone warning that a Pan Am flight from Frankfurt to London and onto New York would be bombed. The warning came 14 days before the December 21 bombing.

Despite these warnings, Pan Am failed to conduct searches of unaccompanied interline luggage and relied only on x-rays. They even failed to alert x-ray technicians to look for radios. Pan Am did not warn pilots about the unaccompanied bags on board for fear that it might make them "jittery".

In a classic move that backfired, after the explosion Pan Am attempted to backdate the FAA Helsinki warning to give investigators the impression that the warning was timely disseminated.

In May 1986 Pan Am instituted the "Alert" Security Program during a period of sharp decline in international travel due to terrorist attacks. The program was actually a misleading public relations ploy designed to make travelers feel more secure and purchase tickets.

An ad placed in the New York Times read:

> Dear Air Traveler:
>
> On June 12, 1986, Pan Am will initiate one of the most far-reaching security programs in our industry, a program that will

> screen passengers, employees, airport facilities, baggage, and aircraft with unrelenting thoroughness.

The campaign featured television ads. A security surcharge of $5 each way on overseas tickets was levied, which generated an additional $18,000,000 in revenue each year. At trial evidence revealed that Alert added more security guards only during FAA inspections in order to make it appear that there was more security. The airline also paraded untrained dogs in front of the ticket counters at JFK airport to create an appearance of security.

The airline sought to exclude evidence of prior misconduct. The Second Circuit affirmed the trial court's ruling that such evidence was relevant as to the issue of Pan Am's willful misconduct and causation.

Like the hospitality industry, the commercial office industry has also been forced to take reasonable steps to protect users of its facilities. In light of the World Trade Center bombing on February 26, 1993 when a car bomb was detonated in the north tower, there has been a wake up call to office buildings around the country. Despite the greater use of security stations and access cards at office buildings, on-site security cameras and new identification technologies — there still exists the very real danger of a terrorist attack.

Attacks at malls and shopping centers has increased, with over 60 such attacks occurring worldwide since 1998.[5] In September 2013 terrorists attacked the Westgate Shopping Mall in Nairobi, Kenya, killing 67 and wounding at least 175. The upscale mall was owned by Israelis and reportedly the attackers released Muslims but killed non-Muslims. In July 2016 an 18 year-old man with dual German-Iranian citizenship killed 9 people and injured 21 in the Olympia Einkaufszentrum mall in Munich. The shooting began at a McDonald's attached to the mall. The shooter later killed himself.

The top ranked police official in London worries that jihadists will target malls and stadiums much like the recent attack in Nice, France. Metropolitan Police Commissioner Sir Bernard Hogan-Howe has said that an

[5] LaTourrette et al., "Reducing Terrorism at Shopping Centers," The RAND Corporation (2006).

attack like those seen recently in Europe is "likely." "It means an attack is highly likely – you could say it is a case of when, not if."

In just the past few years, there have been repetitive incidents of mall and shopping center-related violence, much of it random or terrorist in nature.[6] Operators of malls and shopping centers must initiate appropriate security mechanisms to account for violence, and provide reasonable measures to protect invitees. It has long been suggested that shopping malls are "soft targets" for terrorists, as they provide a location where many innocent victims are congregated and the expectation of such harm is minimal on the part of the public. This is why in parts of the middle east the frequency of terrorist attacks in marketplaces is the greatest.

For these reasons the concept of foreseeability is now taking on new meaning. In the era of the weekly terrorist attack, aren't the commercial institutions most vulnerable to the attack responsible for taking reasonable measures to protect the guests that form the bait for terrorism? After all, terrorism cannot exist without terror. Terror does not exist if there are no innocent civilians available to be victimized. Thus the entities of commerce – malls, shopping centers, hotels, resorts, amusement parks, stadiums – must all bear responsibility in preventing and deterring terrorism. For those who fail to take state of the art steps to protect the potential victims, it may be that the tort system is required to create financial disincentives to inaction.

[6]A few recent but far from exhaustive examples: Northwoods Shopping Center, Jacksonville, FL (7/17/2009); Beverly Center, Los Angeles, CA (5/18/2009); Chambord Commons Shopping Center, Virginia Beach, VA (8/13/2009); La Gran Plaza, Ft. Worth, TX (9/22/2007); Trolley Square Shopping Center, Salt lake City, UT (2/12/2007); Ward Parkway Center, Kansas City, MO (4/30/2007); Brookside Shopping Center, Tinley Park, IL (2/3/2008); Town Center Mall, Boca Raton, FL (12/7/2007);Town Center Mall, Boca Raton, FL (12/12/2007); Westroads Mall, Omaha, NE (12/16/2007); Great Southern Shopping Center, Collier Township, PA (8/4/2009); Trinity Commons Shopping Center, Memphis, TN (2/6/2009) Westgate Shopping Mall, Nairobi, Kenya (9/21/2013); Olympia Einkaufszentrum Mall, Munich Germany (7/21/2016).

MONSTERS WALK THE EARTH

How Child Sex Predators Get Their Prey and Fool Adults

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Authored July 2015

Dedicated to you, K.S.

I will never forget the horror on your face and never lose hope for your survival.

M.D.

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PREFACE

MONSTERS AMONG US

> … as a society we tend to believe one of two things when it comes to sexual offenses: it won't happen to me or anyone close to me, or as I constantly hear, "I can tell if someone is a sex offender."
>
> Dr. Anna Salter[2]
> A psychologist who specializes in both child
> sex abuse recovery and offender treatment

Well, it happened to me, as a seven year-old child, before I was even old enough to know what sex or rape was. And it happened to at least three other children that I am aware of who lived on the same street of the Army town where I grew up, all of us at about the same time. Three of us were under age 12 at the time of the abuse. We were each from different homes. And about two dozen of the 40 homes on that street had kids living in them, so a child sex abuse victim lived in every sixth home where a child lived, at a minimum.

There were two abusers I was aware of and they weren't outsiders. They lived among us. They were unrelated, living in different homes, acting independently of each other. Both were entrusted with children who were their own, as well as those who were unrelated. My parents knew the man who bound and raped me, and threatened me into silence with a gun to my head and a knife to my throat, but they did not know he did that. They respected him for his professional position as a uniformed military officer. So unknown child sex abusers lived in every twentieth house on the street I grew up on, at a minimum. None of the adults could tell who they were.

Of us four victims, only one of us spoke up as a child to name the abuser, so only one set of parents knew that "it" had happened to someone close to them. That abuser was arrested; I never saw him again after the police drove him away. The other one, the one who abused me and another child, my friend, in my presence, was not arrested. He remains free today, almost 40 years after he committed his crimes. His many friends recently threw him a big birthday party. He remains active in his church community, his wife by his side. He boasts publicly about his grandchildren, the ones who play in his back yard to this day.

Michael Dolce

ONE

THE ENORMITY OF THE TASK AT HAND

> epidemic – *adj*. … 1. affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time. 2. excessively prevalent.[3]

Child sex abuse is an epidemic and needs to be called that, constantly, to remind us of the enormity of the task that we truly face. The numbers are as shocking as they are heartbreaking. New cases of confirmed child sex abuse are reported to law enforcement and child welfare authorities some 60,000 to 80,000 times a year in the United States alone.[4]

But authorities understand that the true number of new abuse cases each year "is far greater, because the children are afraid to tell anyone what has happened, and the legal procedure for validating an episode is difficult."[5] Some estimates are that child sex abuse crimes are underreported or are delayed in being reported by as much as 85 percent.[6] Further, underreporting is an international problem, indicating that the problem is endemic to the crime, not simply a matter of particular cultural or law enforcement sensibilities confined to the United States. As described by the World Health Organization:

> The dynamics of child sexual abuse differ from those of adult sexual abuse. In particular, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behaviour.[7]

It is also apparent that the rate of child sex abuse is not particularly getting much better, if at all. As studied and determined by the federal government, the estimated incidence of sexual abuse of children (that is, the number of children per 1,000) was only slightly smaller between 1986 and 2006, at 1.9 and 1.8 per 1,000 children, respectively. In raw numbers, complaints of child sexual abuse were higher, at 135,300 compared with 119,200 child victims, on either end of that 20 year period.[8] Similarly, the percentage of child abuse victims who suffer sexual abuse as a component of that abuse has remained essentially the same, fluctuating "only slightly" according to the U.S. Department of Health and Human Services.[9]

In addition to this annual data, the longitudinal data is equally distressing. While estimates vary, there seems to be consensus among experts that 25 to 30 percent of girls, and 16 to 20 percent of boys, will be sexually abused before reaching age 18.[10]

And as if the number of child sex crime victims was not bad enough, experts also agree that, "Only a fraction of those who commit sex offenses are held accountable for their crimes."[11] That fraction totals almost 800,000 registered sex offenders in the United

States.[A] So there are, in fact, probably millions of sex offenders walking free on our streets, many of them hunting our children.[12]

So there is much work to be done to stop the epidemic.

TWO

WHO "THEY" ARE – WHAT YOU MUST KNOW ABOUT CHILD SEX ABUSERS

> *Know your enemy and know yourself and you can fight a hundred battles without disaster.*
>
> Sun Tzu
> The Art of War

It is self-evident that to combat any enemy, at least successfully, one should learn as much as possible about that enemy, exactly who they are, where they commit their misdeeds, exactly what they do, how they do it and why they do it. There is substantial anecdotal evidence, however, that many adults -- including those employed by institutions that have a legal duty to act affirmatively to prevent child sex abuse -- do not want to know the details of who sex abusers are and therefore remain purposefully uneducated and ill-equipped to keep children safe. Those who show such apathy are employed in our schools, day care centers, residential communities, religious facilities, and even law enforcement and child welfare agencies. Far too many of them find the thought of getting to know as much as possible about child sex abusers to be too disturbing, too confusing and too ugly even to look at. This willful ignorance is a systemic problem that has resulted, and continues to result in, the creation of countless avoidable child victims.

We do not have the luxury of being able to look away from the enemy, that is, if we want to keep our kids safe, not only because of how much is at stake, but because the opponents who seek to molest and rape our children, are, more often than not it seems, well-informed, determined and cunning. As a result of their skill and the inaction of otherwise well-meaning adults, child sex abusers victimize hundreds of thousands of our children every year.

Properly educated, those to whom the welfare of children are entrusted, would know the succinct warnings of many experts about abusers, including this simple statement of who we are dealing with:

> Paedophiles are individuals who prefer sexual contact with children to adults. They are usually skilled at planning and executing strategies to involve themselves with children.[13]

Knowing that pedophiles "prefer" sexual contact with children is not nearly enough to combat them and, in fact, that information, simplistically presented, almost trivializes the

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[A] The number includes both offenders against adult victims and child victims.

nature of the problem. Despite the stated "preference" for sexual contact with children that is used to define pedophilia, the fundamental question that bears on understanding what is involved in combatting these predators is this: What really motivates someone to sexually abuse a child? Is it really just "sex"? Or does it take something more to cause child sex predators to be willing to harm an innocent child, face the risk of decades or even life in prison, and face the profound scorn of society, to bear the modern-day equivalent of the "scarlet letter," the label "sex offender" or "sex predator"? In fact, are the predators actually motivated by a drive for sex with children, as some believe, so that we are fighting against a true "sex" crime? Or is it, as others believe, that sex crimes against children are really about violence and control?

We know that the overwhelming majority of time child sex predators do not leave physical marks or exert any meaningful physical force at all, so the argument goes that sex crimes are truly ones of sex.[14] But many who have studied the issue carefully and comprehensively start to see the question of force in context, concluding, "Force, as it is typically understood, is often not involved, but perpetrators use deception, threats and other forms of coercion."[15] Experts and predators alike paint a compelling picture that sexual abuse of children is more about power and control than it is about sex, even when violent force is not present.

Abusers themselves often describe their crimes in terms of control, even leaving out any real reference to sex. One convicted child sex abuse perpetrator, who was 23 years-old when he raped his girlfriend's four year-old daughter (his second known victim; he had been in and out of prison for the first victim already), described why he abused the four year-old repeatedly, even after telling himself he should stop, and even after the child revealed the abuse the first time he committed it (he had convinced her mother that she was lying after the first attack):

> [Interviewer]: Why did you not stop yourself after the first time?
>
> [Abuser]: *Honestly I had control of the situation. I was out of control in life. I felt like I didn't have any control in the relationship. I didn't have any say so. So I was looking for a way to feel powerful. That was my way. I was able to do what I wanted. ...*

He then clarified his answer to emphasize that it was control of the child that mattered to him, a need that overpowered any fear he had of getting caught and returning to prison:

> [Interviewer]: Did you think you would get caught since you said you had control over the situation?
>
> [Abuser]: *I had control not over the situation but over her. That fear was definitely there. …*

The abuser's description of control is all the more significant in light of his acknowledgement later in the interview that he felt sexual attraction to teen and pre-teen girls before committing his crimes:

> *I did have fantasies if I was watching T.V. or something and I saw a teenage girl or a pre-teen on T.V. I would feel aroused. ... I would be attracted to what I saw. I guess I always wondered what it was going to be like.*[16]

He made no mention of these fantasies when explaining why he raped the little four year-old girl.

Notably, there are significant psychological differences between rapists of adults and those of children, but control and violence are described to be at the center of those "sex crimes" too. Dr. Ron Sanchez, Supervising Psychologist at Utah State Prison, described the rapists he treats this way:

> The rapists tend to have a little different personality structure than say the child molesters or the pedophiles. Rapists generally tend to be more assertive, aggressive, have trouble with anger, perhaps come from a disordered family, violence, a lot of fights at school, oppositional defiant kind of a problem. Almost to a man they have difficulty expressing feelings.

When asked why he believes the men he treats have raped women, Dr. Sanchez stated:

> I think that certainly the act is an act of aggression, of power and control. There are a wide variety of explanations I guess. But one is to strike out an act of revenge. Even though they may not know the victim, even though the rapist might want to project an image of being invulnerable or being, you know, having a very tough exterior that many of them are very sensitive to rejection. They are very insecure about themselves and their own masculinity and what it means to be a man. … I think sex is part of it. I think it's just a vehicle for their aggression. There again, it's not just about sex. Many of these individuals at least on the surface have a relationship with women and are having sex on a regular basis. But for some reason, they have chosen to go out and victimize people in this fashion. So it's other things besides sex.[17]

So do child sex offenders go undetected for so long simply because the typical child sex abuser lacks an obvious disaffection from society or the outward anger and aggression that many rapists of adults have? The available data suggests that the answer cannot be as simple as that. First, child sex abusers are often, if not usually, prolific in their crimes, abusing dozens, scores, hundreds, and even thousands of children.[18] So, at the least, there are repetitive opportunities to detect what they are doing; there is some reason why that fact is not leading to the exposure of these criminals sooner.

Further, while many child sex predators would have an easier time accessing and controlling their victims because they are related to them and often live in the same home, the fact is that about one-third of sexual abusers are family members of the victim.[19] The remaining two-thirds victimize children over whom they would have much less control, particularly after abuse first occurs. Those predators meet their victims largely as neighbors (an estimated one in four of child sex abuse victims are victimized in their neighborhoods) and as educators (15 percent of child sex abuse victims are abused in their schools.)[20] So the predators would not, most of the time, have the level of immediate control over their victims that they would have if they only victimized children in their homes or families. So predators are silencing these victims in some other manner beyond what that access would provide.

In addition to these factors, predators are sexually abusing children at all ages. Any doubt that we are dealing with true monsters is laid to rest considering that an estimated 25 percent of child victims of completed rape are under age 10.[21] Given that the remaining child victims of completed rape (let alone other forms of sex abuse), some 75 percent of all victims, are in the age range of 11 to 17 and therefore have greater ability, developmentally-speaking, to realize when something being done to them is wrong and to seek and obtain help, it is clear that this fact is still not leading to more predators being exposed and stopped.

So one thing is clear: regardless of where child sex abusers access their victims, regardless of their relationship with the victim and regardless of the age of the victim, child sex abusers are adept at repeatedly accessing and silencing their victims. So they are certainly what the experts say they are, "skilled at planning and executing strategies to involve themselves with children," and they are achieving the control over their victims that they seek to achieve. (Tragically, the control that they achieve is profound and can be very long-lasting, well into the victim's adulthood. As one survivor put it, "… I am a survivor of incest … There are two parts to me. One part … graduated in the top 1% from [college], and the other part of me is the scared, ashamed and abnormal me. … It is difficult to use the word survivor because although he is now dead, he still has a hold on me.")[22]

Who child sex predators are probably appears best in their descriptions of themselves; how they explain who they are. A group of child sex abusers, having been caught and now being in treatment, described themselves in this list:

- *I am probably well-known and liked by you and your child.*
- *I can be a man or a woman, married or single.*
- *I can be a child, adolescent, or adult.*
- *I can be of any race, hold any religious belief and have any sexual preference.*

- *I can be a parent, stepparent, relative, family friend, teacher, clergyman, babysitter or anyone who comes in contact with children.*

- *I am likely to be stable, employed, respected member of the community.*

- *My education and my intelligence don't prevent me from molesting your child.*

- *I can be anybody.*[23]

But even this description, which give a pretty clear picture of who the abusers may be, does not make clear how they are actually effective in committing their crimes and avoiding detection. It tells us that they are typically already involved in the lives of their victims, but not someone one would readily suspect of being a danger. Even the experts have no better ability to spot a child sex abuser in advance. As psychologist Dr. Anna Salter candidly acknowledges:

> I've been doing this for more than 20 years, and I can no more identify a sexual offender than an untrained person. Sexual offenders, particularly child molesters, do so for a variety of reasons and rarely leave telltale signs in their public behavior. We want to believe that child molesters look different on the outside and that we can detect such differences when, in truth, we see them as loyal friends, good employees and responsible community members.[24]

All of this knowledge about who child sex abusers are and how hard they are to identify among us, should tell us, therefore, that the best approach to combatting them is not trying to figure out who they are in advance. We certainly cannot rely solely on whether someone has been arrested or convicted previously for committed a sexual offense against a child before allowing them access to our children – we would miss probably 90 percent of the predators. Rather we should focus on defeating their tactics and depriving them of opportunities to offend against our children.

THREE

THE TASK AT HAND: DEFEATING PREDATORY TACTICS

> There is no foolproof solution, but I do feel that more time should be spent on deflection, not detection. You would be as successful flipping a coin rather than trying to guess someone's propensity for committing a sexual offense. I would argue that looking at structures that limit the risk of a sexual offense would be more beneficial. A parent, church administrator or youth organizer needs to ask themselves the question, "Is this an attractive situation for a pedophile or other sexual offender?"
>
> Dr. Anna Salter[25]

The most knowledgeable people about the tactics child sex abusers use to prey on children are, obviously, the abusers themselves. As chilling as their statements can be, we need to pay close attention to them. This is especially true for those who operate any institution or organization that involves children. In an article jointly-written by convicted child sex abusers in treatment, they have described the process that precedes actual abuse of a targeted child:

> *Child molestation usually begins with a sex offender gaining a child's trust and friendship. The offender then begins "testing" the child's ability to protect themselves by telling sexual jokes, engaging in horseplay, back rubs, kissing or sexual games. If the child appears comfortable with or curious about this type of behavior, (and most healthy, normal children are) the offender will slowly increase the amount and type of touching to include more direct sexual touching. ... Many children do not understand that what is happening is sexual or wrong.*[26]

In further detail, the predators provided this list of how they gain access to their victims, while simultaneously working to fool the adults who would otherwise get in the way of their grotesque agenda:

- *I pay attention to your child and make them feel special.*
- *I present the appearance of being someone you and your family can trust and rely on.*
- *I get to know your child's likes and dislikes very well.*
- *I go out of my way to buy gifts or treats your child will like.*
- *I isolate your child by involving them in fun activities so we can be together – alone.*

- *If you are a single parent, I may prey on your fears about your child lacking a father figure or stable home life.*

- *If my career involves working with children, I may also choose to spend my free time helping children or taking them on "special outings" by myself.*

- *I take advantage of your child's natural curiosity about sex by telling "dirty jokes", showing them pornography and playing sexual games.*

- *I will probably know more about what kids like than you do; i.e. music, clothing, video games, language, etc.*

- *I make comments like "Anyone who molests a child should be shot!" or "Sexually abusing a kid is the sickest thing anyone can do."*

- *If I am a parent, it is even easier for me to isolate, control and molest my own children. I can sexually abuse my children without my wife ever suspecting a thing. I gradually block the communication between my children and their mother, and make it look like I'm the "good guy."*

- *I may touch your child in your presence so that he/she thinks you are comfortable with the way I touch them.*[27]

The predators themselves also describe the messages they give to children to gain their silence once they have abused them:

- *After I've begun molesting your child, I maintain their cooperation and silence through guilt, shame, fear and sometimes "love".*

- *I convince your child that they are responsible for my behavior.*

- *I make sure your child thinks no one will believe them if they tell on me.*

- *I tell your child that you will be disappointed in them for what they have done "with" me.*

- *I warn your child that they will be the one who will be punished if they talk.*

- *I may threaten your child with physical violence against them, you, a pet or another loved one.*

- *I may be so good at manipulating children that they may try to protect me because they love me.*[28]

A few important things need to be noticed in analyzing these predatory tactics:

1. As to their interaction with their intended child victims, they first build a relationship and build trust by providing the attention that children need and desire. It is not as simple as luring in children with candy and gifts – that is just one tactic and one that is not always used in isolation. Children who lack adequate attention and care from responsible adults to meet their needs are more vulnerable to these tactics.

2. They create opportunities – if allowed to do so – to be alone with their child victims before actually abusing them.

3. They make sure the child knows that they are known to the parent.

4. They work to create the appearance that they would not abuse a child.

5. As to both their child victims and the adults who would stop them, their goal is to gain trust.

Dr. Anna Salter puts these tactics in full context of what the predators must do before secretly abusing a child, and warns against the failure to see it for what it is:

> We don't give sexual offenders enough credit, but they are much better at it than we assume. … whether it be preying on children of single parents, assuming roles of authority with direct unsupervised contact with children, or targeting children with low self-esteem, the deceiver knows he/she must be careful to construct a scenario conducive to their exploits. This is part of what makes detection very difficult – can't predict private behavior based on public behavior. People often cite "niceness" as the reason why they trust an individual. Author Gavin DeBecker said, "Niceness is a decision – a strategy of social interaction; it is not a character trait."[29]

Illustrating Dr. Salter's warnings, one offender described convincing his four-year old victim to participate willingly in the "game" he staged:

> *I went to the bedroom. I put on an adult movie. I was home alone with her. I knew that eventually she would come into the room. So when she did I was in there playing with myself. She asked me what I was doing. I told her I was playing. I asked her if she wanted to play. I showed her how to masturbate me and…uhm…lick me, and then I would lick her and go in on her.*[30]

Again, the predatory tactics work if responsible adults believe that they can spot who the abusers are, rather than defeating the opportunities for them to offend. Among the primary methods to defeat all of the tactics outlined by the abusers themselves, without ever having to spot them in advance, are these:

1. Recognize that the most vulnerable children are those lacking for due attention to meet their emotional needs and work to fix that problem.

2. Ensure that any non-relative's time with children, especially any "special" or out of the ordinary time, is conducted with at least one other adult present at all times. Institutions that care for or cater to children must adopt and enforce such "two adults" policies. Any predator who realizes that he or she will not be left alone with a child will move on.

3. Recognize that predators, like roaches, run from light. Any institutional that cares for children should make sure all areas where children go must be visible at all times to multiple adults. For example, doors and rooms should have windows; when windows are not practical for any reason (such as bathrooms) it should be a dischargeable offense for one adult to be alone with a child or even multiple children in that room. The importance of zero tolerance policies like these should be impressed on all employees and volunteers, along with a strict duty to report any known or suspected abuse.[B]

4. Counteract predatory messages before they are delivered to a child:

    a. Educate and counsel children in advance of a problem arising what is and is not appropriate touch by adults. This can be as simple as reinforcing to all children that no adult, absent a medical setting where a parent is present, should touch them in an area of their body that a bathing suit covers, and that no adult should ask children to touch them in any such area.

    b. Educate and reinforce to children that they are never responsible for an adult's actions and will never be punished for revealing those actions. Assure them that they will be believed and be protected no matter what.

    c. Educate and counsel children in advance of a problem arising that even if someone is nice to them with gifts and privileges, they must speak up if physical boundaries are breached. And because the person who may breach the boundaries may be in a position of authority, children should be counseled in advance to identify multiple, unrelated adults in their lives who they can turn to in order to disclose any abuse (that is, responsible adults in and out of their school, in and out of their religious facility, in and out of their family, etc.)

[B] While training all employees and volunteers on how to spot signs of child sex abuse and predatory tactics, it is important that institutions equally stress the need to report any suspected abuse to law enforcement immediately. Despite any efforts to learn about abuse and how to prevent and respond to it in their environment, only law enforcement and child welfare officials would have the level of skill and resources necessary to investigate reports of abuse adequately. Delays cause loss of evidence. See, O'Connor, Tom, *Understanding the Psychology of Child Molesters: A Key to Getting Confessions*, The Police Chief, vol. 72, no. 12, December 2005.

5. Institutions that care for children should be wary of how the legitimate access to children that their employees and volunteers may have can be misused "after hours" and establish and enforce policies against it. For example, school teachers could be barred from driving children home alone at the end of the school day or after extra-curricular activities, even with parental consent.

Experts concur on these types of tactics. For example, the American Academy of Child & Adolescent Psychiatry offers parents this advice on preventing and stopping child sexual abuse:

> Parents can prevent or lessen the chance of sexual abuse by:
>
> • Telling children that if someone tries to touch your body and do things that make
> you feel funny, say NO to that person and tell me right away.
>
> • Teaching children that respect does not mean blind obedience to adults and to
> authority, for example, don't tell children to, Always do everything the teacher or baby-sitter tells you to do.
>
> • Encouraging professional prevention programs in the local school system.[31]

Further succinct advice was provided by a task force established by the Missouri legislature to address child sex abuse in that state:

> Children need to be taught basic and age-appropriate information on boundaries, inappropriate touches and their right to determine who touches them and how. Even a simple strategy such as teaching a child the anatomically correct terms for their body parts decreases the chances that someone will molest them because that child now has the language to describe what is happening to them.
> …
> All organizations that serve children and families must operate under the assumption that some people who sexually abuse children may want to work for them. These organizations have an obligation to create an environment that is inhospitable to people who want to sexually violate children.[32]

And here is critical, very effective advice from the Jacob Wetterling Resource Center for any institution that takes children into its care:

> Adopt a "two deep" supervision policy to defeat predators' efforts to be alone with children in order to victimize them; that is, ensuring that at

> least two adults are always present with children. Preferably, the adults should be unrelated.[33]

As for teaching children personal safety boundaries and expectations in the environment, age appropriate materials are readily available and are inexpensive for individuals or institutions to access. See, e.g., the *Safer, Smarter Kids* program, available from www.laurenskids.org "… a series of child abuse prevention education curricula designed to empower children to protect themselves in situations where someone could abuse them. Children are armed with protective principles and vocabulary to express their feelings and talk to a trusted adult"; and *Safeguarding God's Children*, available from www.churchpublising.org. "…an in-depth educational and training program for preventing and responding to child sexual abuse in everyday life and in ministry."

It is also critical to recognize the limits of traditional security measures, particularly background checks on applicants for employment to work with or around children. Child safety experts and law enforcement officials make clear what those limits are, related to the data described above as to how few predators are reported to law enforcement and so few convicted (*supra* Part 1). Child safety experts advise:

> Although a background check is important, it will only reveal those who have been convicted of a crime against a child. This is problematic because most sex offenders, even some who have abused hundreds of children, have never been charged much less convicted of a crime.[34]

Law enforcement acknowledges:

> The reality is that most true pedophiles have been molesting children for years, dating all the way back to their own childhood. Few pedophiles are caught the first time they molest a child.[35]

The fact that the foregoing methods work to defeat the ability of child sex predators from gaining access to their victims and silencing them, child sex predators in treatment have provided their own advice on what adults must do to defeat them. Among the advice they offer:

- *Don't expect your child to be able to protect themselves from me or assume that they will be able to tell you that I am abusing them.*
- *Communication: listen, believe and trust what your child tells you. Children rarely lie about sexual abuse.*
- *Education: teach your child healthy values about sexuality. If you don't teach your child… I will.*
- *Watch for any symptoms of sexual abuse your child might demonstrate.*[C]

[C] For a discussion of signs of child sex abuse, see Part Four, *infra*.

- *Give your child specific information about where on their body they should not be touched or touch others.*

- *Let them know that people who touch children's private parts need help because they have a problem with touching.*

- *Remind your child that "secret touching" is never the child's fault. Talk to your child about the ways someone might try to "trick" them into going along with the secret touching" or not telling you that it is happening to them.*

- *Make sure your child knows that you want them to tell you immediately if something should happen and that, despite what anyone else may tell them, they will not be in trouble.*

- *Get to know your child's friends and the homes in which your child plays.*

- *Be wary of older children or adults who want to spend a lot of time alone with your child.*

- *Learn about the prevention program that your school uses and discuss it with your children. Have "safety talks" with your children several times a year.*[36]

Some case examples illustrate how the failure to implement such measures to readily and relatively easily defeat the aims of the predators resulted in tragedy:

CASE EXAMPLE ONE: State v. Stephen Budd, Elementary School Teacher

I pay attention to your child and make them feel special.

I go out of my way to buy gifts or treats your child will like.

I take advantage of your child's natural curiosity about sex by … playing sexual games.

A recent criminal case in Palm Beach County, Florida, showed how a fourth-grade teacher, Stephen Budd, created an environment that made children feel special for participating in sexual games with him. As the prosecution was described, "The prosecutors said Budd used a popular classroom reward system called 'Budd Bucks' or candy to reward his student victims for the sexual acts under the teacher's desk at the Catholic school during the 2006-07 school year." The result of creating the "Budd Bucks" and providing select students access to the teacher's desk was the exact impact that predators want. As one victim testified, "we felt really special" [being his favorite students]" and "Budd bucks were the cool thing, and I of course I said yes."[37]

Educating students in advance about the type of tactics that were described in this trial would have helped ensure that the abuse did not occur. Likewise, providing a second

adult in classrooms, a volunteer parent or teacher's aide, would have also defeated Stephen Budd's ability to abuse his students by making the environment impossible for him to commit his crimes.

CASE EXAMPLE TWO: A.B. v. Mobile Home Park

I pay attention to your child and make them feel special.

I present the appearance of being someone you and your family can trust and rely on.

I isolate your child by involving them in fun activities so we can be together – alone.

A.B. was a 14 year-old girl who lived with her mother in a rented mobile home in a mobile home park. The park, and the mobile homes in it, were owned and operated by a national rental community company.

The park's maintenance employee invited A.B. into one of the vacant mobile homes when she returned home from school on the pretext that he needed her help to clean up the mobile home for a new tenant who would be moving in. This made A.B. feel important and special. But once he had her inside the locked mobile home, he grabbed her from behind when she was leaning into an oven to clean it and raped her on the kitchen floor. This was the first of at least six such attacks she suffered at his hands, each time in a vacant mobile home.

A.B. eventually found the courage to disclose what was done to her and the police were called. When interrogated, the maintenance worker confessed and was later convicted based on that confession.

Once sued by A.B., the park's owner defended on grounds that the worker's background check was clear and therefore there was no way of knowing he was a danger to children. It was true that the maintenance worker had no prior history of arrests or convictions for any crime, let alone sexually assaulting children. In fact, he lived in the park himself, with his wife and young daughter, so everyone believed that he was a good, hard-working, family man.

The park owner ultimately had to admit its liability and pay for A.B.'s damages, however, based on these facts:

- The owner was aware that vacant mobile homes in its parks across the country, and others like them, if not properly secured and managed, attracted very personal crimes, providing the space and privacy that criminals desire to perpetrate their crimes without detection. It is well-known that vacant mobile homes were places where children are victimized by drug crimes, rape and even murder. Children are particularly vulnerable to becoming victimized in the vacant mobile homes of the parks where they reside because they live, roam and play near those vacant

homes; as such, predators do not need to transport neighborhood children any significant distance in order to abuse them in private.

- It was well known that mobile home park employees who live on-site become familiar to children, often becoming like extended family members, as did the predator in this case. (The park's own expert witness had published articles on this very point, as well as the fact that 25 percent of child sex abuse victims are abused by neighbors. He had also testified in a prior case that predators are "hard to spot.")

- The park owner deliberately advertised to attract young families to its rental community, including single parents (divorcees were specifically targeted in ads) with "latch key children," but undertook absolutely no effort to evaluate, let alone guard against, risks to child safety that existed while a single parent was still at work.

- The on-site management office had only one key to each vacant mobile home and that key was maintained by the maintenance worker.

- The park owner provided its on-site manager with a comprehensive procedure manual and related written policies totaling over 300 pages. The detail was astonishing, even providing a three page description on how to answer the telephone. However, there was no policy against employees taking children into vacant mobile homes and, in fact, not one single page among the more than 300 pages of its management policies said a word about child safety. It did, however, have policies barring nepotism and dating between supervisors and subordinates. Restrictions were placed on those relationships, but no restrictions were placed on the nature of permissible relationships between employees and residents or minors.

- There were only two references to safety at all in the 300 plus pages: an outline of fire procedures; and a statement that everyone was responsible for safety and were invited to make suggestions for improved safety.

Clearly, the park owner failed to pay any attention to child safety, despite affirmative efforts to profit by attracting single parent households with "latch key children" to its rental community. Had it bothered to evaluate safety risks, the risk presented by vacant mobile homes was obvious. The risk was easy to mitigate, by establishing a policy that children were not allowed in vacant mobile homes, including with unrelated park employees. All of this was achievable without ever having to attempt to determine who the unknown predators were.

CASE EXAMPLE THREE: R.H. vs. Church

I pay attention to your child and make them feel special.

I present the appearance of being someone you and your family can trust and rely on.

I isolate your child by involving them in fun activities so we can be together – alone.

If you are a single parent, I may prey on your fears about your child lacking a father figure or stable home life.

R.H. was a 14 year-old male, being raised alone by his mother; his father was completely absent from his life. R.H.'s mother joined a church and took her son with her. The leadership of the church preached that congregants should maintain a very insular life within their community, interacting with "outside" society only as necessary, such as for work, but never socially. Similarly, the tools of "outside" society to "corrupt" youth were expressly rejected, like rock-and-roll music and alcohol.

Single mothers were specifically encouraged to allow male members of the congregation to help them with their households and to mentor any children they were raising alone.

Church leadership enforced their views by restricting the right of "corrupted" members to participate fully in services, shunning and even publically ejecting members who were deemed to be violating what was preached chronically or seriously. Those who were allowed to participate fully in the community therefore, were viewed as good influences, not "corrupting" ones.

D.M. was a single, adult male, who was part of the congregation, with no restrictions on his participation, thus he was seen as a good influence. Consistent with church leadership preaching, he infused himself into the lives of R.H. and his mother, helping with household chores and "mentoring" R.H. He volunteered to drive R.H. to various places while his mother was at work, and even to church-related functions out of town. Consistent with church preaching, R.H.'s mother permitted all of this happen.

Unknown to R.H.'s mother, D.M. started to "groom" her son for abuse and secrecy, encouraging him, for example, to listen secretly to the rock-and-roll music the church condemned and providing him with alcohol. In short order, D.M. began touching and rubbing R.H. on his legs while driving him places, before escalating to raping him in the back of his panel van. D.M. then threatened to expose R.H. for listening to rock-and-roll music and drinking alcohol, as well as making threats of physical violence, if he told anyone about the abuse.

It was established in litigation that certain church leaders knew that D.M. had previously been summarily fired from a job as a school bus driver for unspecified reasons that related to child safety. It was not clear if that information was widely disseminated among church leadership as a whole. D.M. had not, however, been criminally charged or

convicted at any time for any crimes. The church officials refused in litigation to reveal anything that they knew about D.M.'s past based on the clergy-penitent privilege and asserted that they could not have revealed to other congregants anything they learned about him in the context of that privilege.

While none of the abuse of R.H. occurred on church grounds or at church functions, and even though D.M. held no official position with the Church, liability was nonetheless established based on the foregoing facts. The Church implicitly placed D.M. into a position of trust and essentially directed R.H.'s mother to allow him into that position away from any scrutiny that would be present at church facilities or functions, including in ways that would cause R.H.to be alone with him. Further the fact that at least some church officials were aware of the suspicious circumstances of D.M.'s discharge from employment as a school bus driver compelled them to investigate further before encouraging and endorsing his "mentoring" of R.H.

The Church's conduct in this case, regardless of their intentions, plainly violated the core precepts of how to avoid creating an environment that predators will find conducive to their malicious goals.

CASE EXAMPLE FOUR: M.S. v. High School

M.S. was a special needs high school student, age 16, challenged with Autism Spectrum Disorder and social communication difficulties. As a result, his developmental age lagged behind his chronological age.

M.S. attended an off-campus school-sponsored dinner/dance event. Many adults were present; his parents were among the chaperones. The event was crowded, with about 200 students and adults present. M.S.'s parents noticed during the event that a woman appearing to be much older than their son was walking hand-in-hand with him and was otherwise very physically close to him, as if they were on a date. Upon investigation, they discovered the woman held a teaching position in the school in the special education program. They demanded that she leave their son alone; her reaction was belligerent and defensive, causing them to conclude she was intoxicated or on drugs. They had to seek the assistance of two other adult school staff members to get the teacher away from M.S. Later in the evening, however, they found her again with their son, this time trying to dance with him. They took M.S. home at that point.

The next day, M.S.'s parents wrote to the school's assistant principal, describing the events in detail, including the following statements about the specific physical contact between M.S. and the teacher that they had witnessed:

- "They were walking 'hand in hand,' at times with their arms around each other."
- The teacher "was 'all over' M.S."
- The teacher "sat down next to him, not letting go of him."

- M.S.'s mother "asked [the teacher] repeatedly to please let go of his hand (she was clasping his hand, which was positioned on his leg)" and "to please keep her face away from his, as she was touching the side of his face with hers."

- After leaving with M.S., "he talked about the 'crazy lady' that was 'all over him,' that slapped his bottom on the dance floor."

The assistant principal asserted to the police two years later that he took no action against the teacher as a result of this written complaint, and did not report the matter to the police at the time, because the complaint from the parents contained "no information about inappropriate touching." How it is that the assistant principal did not find allegations of "inappropriate touching" between an adult teacher and minor student in the foregoing quotes is simply inexplicable.

In response to their complaint, M.S.'s parents were assured that the matter would be fully investigated and their son would be kept safe and receive counseling for what he had been through. Over a year later, the parents discovered that this was not true; that the teacher had remained on staff and, while not in any classroom with M.S., continued to see him at least once a week in the hallways and had chaperoned field trips with M.S. At that time, M.S. specifically disclosed to a psychologist that the teacher had actually touched his penis through his clothing at the event.

The psychologist called the police, who then discovered that the matter had not been reported to any legal authorities; rather, the assistant principal conducted his own "investigation" by: (1) speaking to the two staff members M.S.'s parents had approached for help, who confirmed they helped, but did not witness any interaction between the teacher and MS..; and (2) speaking with the teacher herself, who tearfully denied any wrongdoing. The assistant principal directed that the teacher not be assigned to M.S. for any classes and ended his investigation there.

Among other failures, the assistant principal did not speak with any of M.S.'s teachers about his behaviors after the dinner/dance. Had he done so, he would have found that at least one teacher was so concerned about M.S. after the dinner/dance, that she wrote to his parents to report that he was unable to complete class work because "he was distracted by thoughts and acting 'out of the ordinary' all period yesterday. Something is definitely going on with him."

The assistant principal's misconduct in this case obviously began with his failure to recognize blatantly inappropriate touching by the teacher and how that touching constituted, at the least, overt "grooming" behavior that could have escalated to higher levels of offense. He failed to recognize that such conduct in a public location demonstrated a powerful compulsion on the part of the teacher to engage in sexually abusive conduct. He failed to recognize that M.S. might have initially failed to report all details of the inappropriate touching, as do many abuse victims. And he appears to have

been swayed by the “tearful” reaction of the teacher, demonstrating a failure to understand how manipulative and skilled child sex abusers can be in making adults believe that they are safe around children. In light of the facts, he should have, but failed to alert law enforcement immediately.

Upon confrontation by the police some two years after the fact, the teacher refused to answer any questions and hired a criminal defense lawyer. She then resigned the day before a scheduled administrative hearing at the school where she was supposed to provide her response to the complaint that she had sexually abused M.S. Notwithstanding, the sex crimes prosecutor assigned to the case confirmed, in writing, that the delay in reporting caused a prejudicial impact on the ability to prosecute the teacher successfully; that the teacher would have been charged had the case been reported immediately; and that as a result no criminal action could proceed against the teacher.

FOUR

SIGNS THAT A CHILD MAY HAVE BEEN SEXUALLY ABUSED

All available data indicates, unfortunately, that some children will be sexually abused despite the best of efforts to deprive predators of the opportunity to do so. When it does occur, children will sometimes exhibit behavioral abnormalities that reveal they have been abused, even if they are not vocalizing it. It is critical for all who work with children to recognize the signs for two main reasons. One, such signs can indicate the need to report possible abuse to authorities who can investigate further and get necessary help for the child. Two, to act to mitigate any risk that the child victim will act out what was done to him or her on other children in the environment, which is a known risk, despite the fact that not all child victims do so.

Pediatric mental health providers note that, "Often there are no obvious external signs of child sexual abuse," but there are many possible behavioral indicators that some abused children, but far from all, might exhibit.[38] These indicators include:

- Unusual interest in or avoidance of all things of a sexual nature
- Sleep problems or nightmares
- Depression or withdrawal from friends or family
- Seductiveness
- Statements that their bodies are dirty or damaged, or fear that there is something

wrong with them in the genital area
- Refusal to go to school
- Delinquency/conduct problems
- Secretiveness
- Aspects of sexual molestation in drawings, games, fantasies
- Unusual aggressiveness, or
- Suicidal behavior.[39]

Some children, particularly younger children, between approximately ages three and six, may also exhibit regressive behaviors as a reaction to sexual abuse; bed wetting, thumb sucking, fear of the dark, or clinging to a favorite toy that was previously abandoned.[40]

The World Health Organization, among others, has also warned about sexualized behavior and child-on-child sexual abuse as a reaction to having been sexually abused previously by an adult, finding specifically that:

> There is a growing body of research on sexualized behaviour in children and its relationship to sexual abuse. Although the majority of sexually abused children do not engage in sexualized behaviour, the presence of inappropriate sexual behaviour may be an indicator of sexual abuse. Generally speaking, sexualized behaviour in children could be defined as problematic when:

— it occurs at a greater frequency or at a much earlier stage than would be developmentally appropriate (e.g. a 10 year-old boy versus a 2 year-old boy playing with his penis in public, or a 6 year-old girl masturbating repeatedly in school);

-- it interferes with the child's development (e.g. a child learning to use sexual behaviours as a way of engaging with other people);

-- it is accompanied by the use of coercion, intimidation or force (e.g. one 4 year-old forcing another to engage in mutual fondling of the genitals or an imitation of intercourse);

…

-- it reoccurs in secrecy after intervention by caregivers."[41]

Due to these risks, governmental agencies that license child care facilities regularly provide instruction on identifying and reacting to signs of child sex abuse, including child-on-child sex abuse.[42] Failure to recognize the signs for what they are and react accordingly can have devastating results, as the next case example illustrates.

CASE EXAMPLE FIVE: A.W. v. Day Care Center

A.W. was a four year-old female child who was placed in a long-established, well-reputed day care center each day while her parents went to work. Another child, T.W., a five year-old male child, approached .A.W. in a play area and jammed his hand down the front of her pants and started rubbing her vaginal area. A.W. protested, pulled away, and told one of the day care workers what T.W. did to her. In response, the day care worker put T.W. in "time out," cautioned him that "we keep our hands and body parts to ourselves." She sent A.W. back to play. Incidents of this type continued every day for six months, as T.W. continued to victimize A.W. in this manner, also sticking his hands into the rear of her pants and fondling her posterior. A.W. was not alone; T.W. behaved this way towards at least seven other children, both male and female, during the six month period.

The day care worker continued to respond to T.W.'s behavior with ordinary discipline of "time outs" and verbal reprimands. Later, she complained that T.W., "daily sexually acts out on other children" and that she was "unable to adequately supervise him and watch all the other children." At the same time, both she and two of her superiors failed to take action to get help for T.W. or act to protect his peers, including A.W. because they, " considered the actions of the child as a 'normal developmental phase and it was normal.'"

The day care center worker simply did not appreciate the gravity of the abuse she witnessed being perpetrated by T.W. on multiple other children, every day, until it escalated literally to T.W. performing oral sex on another child in the middle room. Only then did they call the police, recognizing that T.W. was likely the victim of sexual abuse

himself (but as they waited for the police to arrive, as a final act of ignorance, they put both T.W. and the child he performed oral sex on in "time out.")

As a result of disregarding A.W.'s calls for help, and equating what was done to her as no different from ordinary misbehavior for six months, A.W. herself developed severe behavior problems, including attempting to sexually act out on her siblings and stuffed animals, and engaging in chronic masturbation. She withdrew emotionally from her parents, isolated from her peers and avoided playing with them, and exhibited violent outbursts toward her parents and other authority figures. She is expected to require at least weekly mental health counseling well into adulthood and is deemed at high risk for substance abuse and suicidal behavior by her teens.

IN PARTING

WHAT IS AT STAKE

Both individual adults and institutions that take children into their care, must take heed of the potential impact if they fail to take proper measures to defeat the ability of child sex predators to use their institution to access and brutalize children. The impact of abuse on victims is so profound, it should be clear that efforts to defeat predators must absolutely be a priority at all times, with no excuses. Few mistakes that institutions can make can result in such profound impact as allowing a child to be sexually abused.

There are millions of us who have endured child sex abuse. Many of us are surviving, and even thriving, though having paid an incredible price for achieving that and having lost so much that can never be recovered. But even as we celebrate those of us who achieve strength and success in recovery, we watch those in our community who struggle to grasp for the title, "survivor," feeling more like they are still victims. And we all know, all too well, that child sex abuse can inflict extremely vicious physical and mental health damage on children and the consequences can last a lifetime. Some of us never make it, because what is to be endured is simply too much sometimes.

Like "R.S.," child sex abuse victims have endured surgical repair of their genitalia after being raped. Like "A.M.," child sex abuse victims have grown to become so full of rage that they are a danger to others. Like "S.C.G.," child sex abuse victims have suffered from post-traumatic stress disorder into their adult lives and are even afraid to leave their homes. Like "S.G.," child sex abuse victims have developed dissociative identity disorder, their sense of self shattered into multiple distinct parts, unable to integrate into one person. Like "Kay," child sex abuse victims have developed eating disorders that have destroyed their internal organs and killed them. Like "Jeff," child sex abuse victims have placed the barrel of a gun to their own chests and, as his mother explained through her tears, "put a bullet where it hurt most, in his heart." [43]

For the victims of child sex abusers, our very lives are at stake. And it is painfully clear that the epidemic will not end until all of our society's institutions face our enemy, as we had to, and do all that is possible to deprive them of a safe haven to create another victim.

Because this clearly has not happened yet, because so many institutions continue to fail our children miserably, another child will join our ranks just minutes from now.

END NOTES

[1] Michael Dolce is a founding partner of Mager, Dolce & Paruas, LLC, located in Florida. He devotes his state-wide practice to representing victims of crime, in particular, sex crime survivors. Since 2004, he has spoken publicly of the sexual abuse he suffered at the hands of a sadistic child predator and has testified before committees of The Florida Senate and The Florida House of Representatives. He is a featured expert in the award-winning documentary, *Pursuit of Truth; Adult Survivors of Child Abuse Seeking Justice* (2013). He defeated powerful opposition in Florida's legislature after a six year battle to repeal all statutes of limitation for civil and criminal prosecution of child sexual battery (2010). He won one of the top 100 verdicts nationwide in 2009 as determined by Verdict Search on behalf of a child sex crime survivor, $19.2 million. He has volunteered 1,500 hours with domestic violence survivors, helped clients put sex predators behind bars, and represented children to block their abusive parents from maintaining access to them. And he's not done yet.

[2] Schaber, Richard J. (ed.), *Interview with Dr. Anna Salter*, Risk Reporter, Vol. 1, Issue 3; available from www.churchmutual.com, 2002.

[3] "epidemic." Merriam-Webster's Collegiate Dictionary, 10th Ed., 1998.

[4] In context with other childhood afflictions, these numbers are truly staggering. For example, there are about 250,000 children diagnosed with cancer each year, *worldwide*, of which about 16,000 are in the United States. American Childhood Cancer Assoc., /www.acco.org/about-childhood-cancer/diagnosis/childhood-cancer-statistics/. About 25,000 children in the U.S. are diagnosed annually with diabetes. U.S. Centers for Disease Control and Prevention, http://www.cdc.gov/diabetes/risk/age/youth.html.

[5] *Facts for Families*, No. 9, American Academy of Child & Adolescent Psychiatry, www.aacap.org/App_Themes/AACAP/docs/facts_for_families/09_child_sexual_abuse.pdf , March 2011.

[6] Maine Coalition Against Sexual Assault, http://www.mecasa.org/index.php/special-projects/csa; and *Statistics About Sexual Violence*, National Sexual Violence Resource Center (2011) (available at: www.nsvrc.org.)

[7] *Guidelines for medico-legal care for victims of sexual violence*, World Health Organization at p. 75, http://whqlibdoc.who.int/publications/2004/924154628x.pdf, 2003.

[8] Sedlak, A.J., et al. (2010). *Fourth National Incidence Study of Child Abuse and Neglect (NIS–4): Report to Congress.* Washington, DC: U.S. Dept. of Health and Human Services, Administration for Children and Families, 2010, at p. 3-4

[9] *Child Maltreatment 2013*, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau at p. 23, http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf, (2015).

[10] See, e.g., *Report from the Task Force on the Prevention of Sexual Abuse of Children*, Missouri Kids First, at p. 6, http://www.msbanet.org/files/governmental_relations/MoKidsFirst_Report_FINAL.pdf, 2012 (The rate of sexual abuse for girls is estimated to be 5 times that of boys.); Sedlak, A.J., supra n. 9 at p. 4-3; and *Child Sexual Abuse Prevention Overview*, National Sexual Violence Resource Center (2011); available at: www.nsvrc.org.

[11] *Report from the Task Force on the Prevention of Sexual Abuse of Children*, supra n. 10 at p. 6.

[12] See nationwide tabulation at: http://www.parentsformeganslaw.org/public/meganReportCard.html.

[13] *Guidelines for medico-legal care for victims of sexual violence*, *supra* n. 8 at p. 76.

[14] *Id.* at p. 76.

[15] *Report from the Task Force on the Prevention of Sexual Abuse of Children*, supra n. 11 at p. 6.

[16] Rocha, Daniela, *Interview with a sex offender*, The College VOICE (Mercer County Community College, West Windsor, NJ), http://www.mcccvoice.org/interview-with-a-sex-offender/, March 29, 2010.

[17] *No Safe Place: Violence Against Women – Interview: Ron Sanchez, Ph.D.*, PBS - KUED, Salt Lake City, Utah, http://www.pbs.org/kued/nosafeplace/index.html, (March 27, 1998),

[18] O'Connor, Tom, *Understanding the Psychology of Child Molesters: A Key to Getting Confessions*, The Police Chief, vol. 72, no. 12, December 2005.

[19] *Child Sexual Abuse Prevention Overview, National Sexual Violence Resource Center* (2011); available at: www.nsvrc.org; Black, M.C., et al. *The National Intimate Partner and Sexual Violence Survey* (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control,

Centers for Disease Control and Prevention, at p. 22, http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; and *Child Sexual Abuse Prevention Overview, National Sexual Violence Resource Center* (2011); available at: www.nsvrc.org.

[20] *Sexual Violence Against Youth & Young People,* National Sexual Violence Resource Center (2011); available at: www.nsvrc.org.

[21] Black, M.C., et al., *supra* n. 19 at p. 25.

[22] This statement was made to the author in an on-line support group; based on the rules of confidentiality that apply to that group, neither the site, nor the pseudonym used to identify the participant, can be revealed.

[23] *Protecting Your Children: Advice from Child Molesters*, Center for Behavioral Intervention, Beaverton, Oregon, (Article "developed and written by child molesters in treatment"); available at: http://www.co.marion.or.us/SO/Probation/protect.htm.

[24] Schaber, Richard J. (ed.), *supra* n. 2.

[25] Schaber, Richard J. (ed.), *supra* n. 2.

[26] *Protecting Your Children: Advice from Child Molesters*, Center for Behavioral Intervention, Beaverton, Oregon, (Article "developed and written by child molesters in treatment"); available at: http://www.co.marion.or.us/SO/Probation/protect.htm.

[27] *Protecting Your Children: Advice from Child Molesters*, *supra*. n. 26.

[28] *Protecting Your Children: Advice from Child Molesters*, *supra*. n. 26.

[29] Schaber, Richard J. (ed.), *supra* n. 2.

[30] Rocha, Daniela, *supra* n. 16.

[31] *Facts for Families, No. 9*, *supra* n. 5.

[32] *Report from the Task Force on the Prevention of Sexual Abuse of Children, supra* n. 10 at p. 8.

[33] *Suffer the Children: Developing Effective Church Policies on Child Maltreatment*, Jacob's Hope, Jacob Wetterling Resource Center, Vol 2, Issue 2, June 2011.

[34] Id.

[35] O'Connor, Tom, *supra* n. 18.

[36] *Protecting Your Children: Advice from Child Molesters*, *supra*. n. 26.

[37] Freeman, Marc, "Former teacher sentenced to three life terms for sex crimes," and "Former West Palm Beach Catholic school teacher stands trial on sex crimes against students," Sun-Sentinel, May 28, 2015 and June 2, 2015.

[38] Miller, K. L., Dove, M. K., & Miller, S. M. (2007, October). *A counselor's guide to child sexual abuse: Prevention, reporting and treatment strategies.* Paper based on a program presented at the Association for Counselor Education and Supervision Conference, Columbus, OH; see also, *Guidelines for medico-legal care for victims of sexual violence, supra* n. 8 at pp. 77 -78.

[39] *Facts for Families, No. 9, supra* n. 5.

[40] *Symptoms and Behaviors Associated with Exposure to Trauma*; The National Child Traumatic Stress Network; available at www.nctsn.org/trauma-types/early-childhood-trauma/Symptoms-and-Behaviors-Associated-with-Exposure-to-Trauma.

[41] *Guidelines for medico-legal care for victims of sexual violence, supra* n. 7 at pp. 77 -78.

[42] See, e.g., Child on Child Sexual Abuse Needs Assessment, Florida Dept. of Children and Families (Dec. 2009); http://centerforchildwelfare.fmhi.usf.edu/kb/Implementation/Final%20Child-On-Child%20Sexual%20Abuse%20Needs%20Assessment%20Literature%20Review%20(2)%20(2).pdf.

[43] Each case cited involves a child sex abuse survivor who was either represented by the author, in treatment with the author, or, in the case of "Jeff," his mother was involved with the author's political efforts to repeal the statutes of limitation on civil and criminal prosecution of cases related to child sexual battery.