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Civil Actions for Criminal Acts

PAPERS AND PRESENTATIONS

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ANATOMY OF A TRIAL AGAINST CHILD PROTECTION SERVICES

Litigating claims on behalf of children who have been abused, catastrophically injured, or killed while under the supervision or custody of child protection services raises a host of special concerns and challenges. In December of 2013 Beth Baldinger and her partner, David Mazie won a landmark verdict of $166,000,000 against New Jersey's child protection agency and its caseworkers for their failure to protect a 4 month old infant from his biological father who assaulted him causing him catastrophically brain injuries. The caseworkers knew that the father was an unmedicated bi-polar with a history of psychiatric hospitalizations, domestic violence, and drug abuse. The baby had unexplained bruises on both cheeks and blood in his eyes, and the doctor consulted strongly suspected child abuse. They also knew that the baby's mother had bruises on her arms caused by the father, but denied they were due to domestic violence. Nevertheless, the child protection workers failed to follow the agency's policies and procedures in investigating the allegations of abuse and failed to remove the baby. Prior to trial, plaintiffs settled with various doctors and hospitals for $7.45 million for failing to report various injuries to the baby to CPS and otherwise take appropriate steps to protect him.

A year earlier, in December of 2012, they obtained a $5,000,000 settlement from CPS on behalf of a young girl who had been abused at the hands of her biological father. The agency placed the 2 year old girl with her 22 year old father when they had no proof of paternity and knew he was a statutory rapist -- as the birth mother was 15 years old. The caseworkers failed to properly investigate the baby's multiple burns, a hospitalization for intoxication, and failed to conduct monthly visits to check on the baby. Caseworkers admitted to violating court orders requiring paternity testing, the placement of a licensed homemaker and certified child day care provider. The child was finally removed – 5 months after placement – when she was found hanging from a door with her hands bound with a cord. The child had multiple burns and had been sexually and physically abused. The child suffered from selective mutism, post-traumatic

[1] Beth Baldinger is a highly respected trial lawyer with Mazie Slater Katz & Freeman, LLC specializing in representing victims suffering catastrophic injuries and substantial losses due to the fault of others. Nationally recognized in the field of crime victims' rights for 25 years, Ms. Baldinger has championed the rights of children injured in state foster care and daycare settings; survivors of sexual assaults and domestic violence; estates of those lost to homicides; citizen's whose civil rights were violated by police misconduct; and those injured due to inadequate security. In both state and federal courts Ms. Baldinger has pressed forward with cutting-edge claims and novel issues in individual cases, class actions, mass tort matters and multi district litigation. She has a proven track record in cases of child abuse, medical, legal and professional malpractice, products liability, health care and health insurance rights, traumatic brain injuries, sports injuries and wrongful death claims against government entities, multi-national corporations, individuals as well as non-profit entities. Beth Baldinger has been recognized in New Jersey as a Super Lawyer and is listed in the Best Lawyers in America. Her cases have been publicized in the national and local media. She lectures nationally on crime victims' rights and has volunteered for national and local organizations.

stress disorder and permanent scars from the burns. The jury returned a verdict for $3,250,000 and the case settled prior to the punitive damage trial.

Cases against child protection services and their caseworkers involve unique issues, including case screening, party selection, governmental immunity and jurisdiction issues, discovery and litigation tactics, trial preparation and trial strategy. This presentation will illustrate the power of using video tape depositions, computerized time lines, and other evidence to educate and empower the jury in their decision making.

Representation of the Child

Who has legal standing to represent the child depends upon who has legal custody and guardianship of the child at the time counsel is consulted and retained. You need to be assured that your client has the right to sign a retainer agreement and to represent the interests of the child. Depending on the circumstances, appointment of a legal guardian maybe required. In wrongful death cases an Administrator and Administrator Ad Prosequendum must be appointed to represent the child's estate.

Pre-suit investigation

Child Protective Services (CPS) records are statutorily protected from disclosure and a court order is required to obtain them, which most often is not obtained until after the lawsuit against CPS is filed. Consequently, pre-suit investigation is based on the client's account, any records from peripheral agencies or providers, such as police reports, doctor and hospital records, and school records, and witness accounts. Have the client bring all paperwork from CPS and any other agencies or providers. It is helpful to have the client provide a family tree outlining all family members, significant others, and foster home placements, as well as a chronological outline of all key events and persons including the names of all CPS caseworkers and supervisors as they should be named as defendants.

What were the circumstances under which CPS became involved. Obtain all details as to the circumstances which triggered the initial report of child abuse, what the initial report entailed, any subsequent or additional reports of abuse made, and all details as to CPS's response until the child was finally removed from the danger or source of abuse.

Obtain names of all hospitals, doctors and other professionals who have treated the child and secure all treatment records.

Were there any mandatory reporters who failed to report a reasonable suspicion or belief that the child was being abused or neglected (i.e., teachers and school personnel, doctors and nurses), if so consider joining them as defendants. Medical malpractice/negligence claims may be asserted against a physician who was aware of the child's injuries and failed to make a timely report to CPS. Consult with a medical expert as to the applicable standard of care to support such a claim. See Also, L.A. v. New Jersey Division of Youth and Family Services, 217 N.J. 311 (2014) (Emergency room physician who diagnosed child with accidental ingestion of alcohol was required to report it to CPS if, objectively viewing the circumstances of child's admittance, an emergency room specialist should have believed that the child's parents or guardians had been reckless or grossly negligent in supervising her or allowing her to access and/or consume cologne containing alcohol).

Family Court records documenting CPS actions are an invaluable resource of information. Obtaining Family Court records will require a court order from the judge in the civil case and/or an application to the presiding judge of the Family Court. Your application for the Family court records should include a request for the entire file --- complaint, motions,

certifications, affidavits, court orders, as well as permission to order the transcripts of all hearings and proceedings. Sworn complaints, affidavits and certifications filed by CPS caseworkers provide prior sworn testimony that can be used to establish those facts which may be critical to your case against them, i.e. knowledge and admissions of abuse. In addition, any expert testimony that CPS presented to the family court may also be used in the civil case, under principles of res judicata and collateral estoppel, to establish abuse, trauma and/or damages. Most significant are the family court orders mandating that certain services be provided by CPS and/or actions be taken by CPS. In the event that CPS failed to follow a family court's order is compelling evidence to support liability under both state and federal theories of liability. Family court orders will also spell out the relationship as between CPS, the parents and/or foster care placements which are critical to the issue as to who had legal and physical custody of the child and supervisory responsibility for the child at the time he or she was abused or injured.

Obtain all relevant criminal court records, investigation reports, interviews and witness statements, and of course, transcripts of guilty plea, sentencing report and sentencing transcript. Results of criminal background checks are also key.

Governing Law and Theories of Liability

State laws and standards of care which govern CPS duties and obligations

There exist well-established standards of care governing child welfare services upon which negligence claims are based. Following passage of the federal Child Abuse Prevention Act in 1980 every state was required to implement its requirements by enacting their own state laws and regulations. These state laws and regulations authorize the state to act and how they are to act in responding and handling cases of child abuse and neglect cases. CPS agencies have standard policies and procedures which further define how they do their work so that they meet the requirements of the laws and regulations.

Throughout the country safeguarding children with protective measures and prompt structured investigations is the core focus of child protective services. Review the state laws, regulations and codes –as well as the CPS agencies' SOP's - that govern the CPS agency's role, functions and duties. Outline all steps to be taken, time frames in which they must be done, and persons responsible for each step. Look for all mandatory language – "shall", "must" – as these can be used to assert that a duty to act was mandatory - not discretionary - which impacts on governmental immunity and the good faith defense.

General state tort theories of liability against CPS include general negligence against the caseworkers and supervisors; negligent hiring, training, retention, and supervision against supervisors and the agency; negligence in failing to implement policies and procedures against supervisors and the agency; and claims for respondeat superior liability.

Governmental immunity from state law tort claims

State laws providing governmental immunity from state tort claims applies to CPS agencies and their employees. Every possible statutory immunity – and its exceptions -- must be thoroughly analyzed in laying out the theories of liability and plotting the discovery strategy before suit is filed. Analyzing cases on point is also essential to understand how the immunities have been interpreted in the governing jurisdiction. Be prepared to address the governmental immunity issue – and the exceptions – in depositions in order to defeat a motion for summary judgment.

By way of example the following caseworkers' testimony was used to defeat a claim of immunity which CPS raised for placing the 2 year old child with her biological father – who was a statutory rapist.

Q. Were you made aware that sexual relations between a 15 year old and someone who is 21 or 22 years old constitutes statutory rape in this state?

A. I understand that.

Q. Okay. In your training as a caseworker for DYFS, did not the age difference between them constitute sexual abuse?

A. Yes

Q: When you first joined DYFS in approximately March of 1997 up through the time period where you continued to work with [S.A.], would it be fair to say that you were trained that under circumstances under which you had a reasonable basis to believe that a child had been physically abused or sexually abused, that it was your obligation to make an official report of it and to open an investigation pertaining to that abuse?

A. Yes.

Q. At anytime while you were working on this case involving S.A., did you make any request of anyone to investigate the circumstances under which L.B. was presumably or allegedly impregnated by Kyle Lyons resulting in the birth of S.A.

A. No.

Q. Can you tell me why not?

A. I have no reason.

Allocation of resources immunity. Conduct discovery as to the recommended case load assignment for the caseworkers and supervisors in your case and the number of cases they were actually assigned at the time of the subject events. (This is fact sensitive, different types of CPS units or workers, i.e. High Risk cases, may be assigned different case loads). A common perception is that CPS workers have too many cases and are overworked. While true historically, reforms have corrected this problem in most jurisdictions. Dispel this perception and the allocation of resources defense with admissions and/or documentation showing the

caseworker and supervisor did not have caseloads or assignments which exceeded recommended limits.

Statutory claims may not be subject to governmental immunity

A private right of action may be asserted based upon state laws which confer rights on children in foster care, or those in 'out of home' placement. These statutory claims may provide an important advantage as they may not be subject to governmental immunities from tort claims. Consequently, even if CPS and its workers are immunized from a tort claim, they may not be so immunized from a statutory claim.

By way of example, New Jersey statute N.J.S.A. 9:6B-1, Child Placement Bill of Rights provides that a child in foster care has numerous explicit rights including the right to be free from physical and psychological abuse; the right to have and receive adequate, safe and appropriate housing; the right to receive adequate and appropriate medical care; to be free from unwarranted physical restraint and isolation; and to have services of a high quality to maintain and advance the child's mental and physical well-being. In K.J. v. Division of Youth and Family Services, 36 F. Supp 2d 728 (D.N.J. 2005) the court ruled that this statute conferred a private right of action against CPS and its workers to which the state tort claims immunity provisions did not apply, hence they were subject to liability.

Federal claims under 42 U.S.C. §1983

As CPS workers are acting 'under color of law' they, along with the CPS agency, may be subject to liability under 42 U.S.C. Section 1983. The 14th Amendment to the U.S. Constitution guarantees each child in custody of the State substantive due process rights which include but are not limited to the right not to be harmed – physically, emotionally, developmentally; the right to protection from harm; as well as the right to receive medical care, treatment and other services as warranted. Children who are under a state's legal custody – in foster care - have the right to have these fundamental rights safeguarded and protected and to not have them violated by virtue of CPS's actions and omissions. Violations of these rights give rise to claims under 42 U.S.C. §1983.

A critical issue is who had physical custody and legal custody over the child at the time the abuse occurred.

The DeShaney decision and exceptions

In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), a state's department of social services received several reports that a young child was being abused while in his father's custody. After the state failed to intervene, the father severely beat the child, causing a permanent brain injury. The child's mother sued the state and its employees under 42 U.S.C. §1983 alleging that their failure to intervene deprived the child of his liberty interest without due process of law. Id. at 193. The Supreme Court rejected the claim, finding that the Fourteenth Amendment provides no affirmative right to governmental aid or protection from violence occurring at the hands of private individuals. Id. at 195-96. Thus, because the child was not harmed while he was in the state's custody, but while he was in the custody of his natural father, he had no valid §1983 claim. Id. at 201. However the Supreme Court's decision made it clear that the state can be liable under §1983 if a plaintiff can demonstrate that he/she falls within either of two exceptions to this general rule –special relationship or state created danger doctrines. Id. at 201 and n.9.

Special Relationship Doctrine

The first exception to DeShaney is where the state takes a child into custody, as this creates a "special relationship" which imposes obligations on the state to assure the child's safety and well-being. "This affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id. at 199-200. Thus, when the state enters into a special relationship with a child, the state can be liable if it fails to assure the child's safety and well-being. The second exception to DeShaney is where the state places a person in a position of danger that she would not otherwise have been in but for the state's action. This is known as "state created danger" exception. Strumph v. Ventura, 369 N.J. Super. 516, 525 (App. Div. 2004). See Also, Knapp v. Tender, 95 F.3d 1199, 1201 (3d Cir. 1996); D.R. v. Middle Bucks Area Vocational Tech. Sch. 972 F.2d 1362, 1374 (3d Cir. 1992); Nicene v. Mora, 212 F.3d 798, 808 (3d Cir. 2000).

In order to state a cause of action under the "special relationship" doctrine, the plaintiff must allege (1) a protected interest; and (2) a sufficient relationship with the government actor. Nicene v. Mora, 212 F.3d at 810. In discussing the "special relationship" doctrine, the court in K.J. ex. rel. Lowry v. Division of Youth and Family Services, 363 F. Supp. 2d. 728, 739 (D.N.J. 2005) explained that once the state places a child in state-regulated foster care, the state and its actors have entered into a "special relationship" with the child, which imposes affirmative duties on the state to protect the child from harm. See, Nicini v. Morra, 212 F.3d at 808. (State enters into a special relationship with a child when it places her in state-regulated foster care, which imposes affirmative duties on it to protect the child from harm at the hands of state-regulated foster parents.) A special relationship arises between the state and a foster child by virtue of the state's affirmative act in finding the children and placing them with state-approved families. Taylor by and through Walker v. Ledbetter, 818 F.2d 791, 794-797 (11th Cir. 1987), cert. denied, Ledbetter v. Taylor, 489 U.S. 1065 (1991). "By so doing, the state assumes pervasive responsibility for the child's well-being. In addition, the child's placement renders him dependant upon the state, through the foster family, to meet his or her basic needs." Id. Inherent in the special relationship is the state's affirmative obligation to protect a child from harm throughout the term of the relationship. By placing the child in a state approved home, "the state assumes an important continuing, if not immediate, responsibility for the child's well-being." Nicini, 212 F.3d at 808, citing D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (citing Taylor by and through Walker v. Ledbetter, Id. at 794-97 (11th Cir. 1987); Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir. 1990) (Children placed in state-regulated foster homes have a substantive due process right to personal safety); Doe v. New York City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983) (Child abused in foster home has a substantive due process right to be free from unnecessary harm). Moreover, there is no requirement that the state-approved home be formally classified as a "foster home" in order for a special relationship to exist. To the contrary, where CPS has custody of a child and consents to the child staying in a private home, a special relationship still exists. Nicini, 212 F.3d. at 809 (A special relationship existed where the child lived with a private family with CPS's consent but remained under CPS supervision.)

Once a special relationship is created -- and the state breaches its duty to protect the child from harm -- the state is liable under §1983 if its conduct is "sufficiently egregious." See, K.J. 363 F. Supp. 2d at 738. The exact degree of wrongfulness necessary to reach the "sufficiently egregious" level is assessed on a case-by-case basis. Nicini, 212 F. 3d at 810. In foster care

cases, the Third Circuit has held that in determining if conduct is sufficiently egregious the state's actions should be judged under the deliberate indifference standard. Id. at 811. In K.J., the court found that the infant plaintiffs had a viable cause of action against CPS and its employees under §1983. The court found that when the state placed the children into surrogate care, it impinged on the children's liberty interests so that a special relationship was created. Id. 363 F. Supp. 2d at 738-739. The court also found that the conduct of the CPS defendants was sufficiently egregious to support a claim. Specifically, the children alleged that CPS failed to perform proper inspections of the living conditions in their foster/adoptive home and failed to obtain proper medical records to verify they were not being harmed. As a result, CPS failed to detect that the children were being seriously abused by their foster parents, suffered from severe malnutrition, and were in dire need of medical care. The court held that CPS's conduct was sufficiently egregious to support a §1983 claim under the special relationship exception.

State Created Danger Doctrine

Plaintiff also has a viable §1983 claim based upon the "state created danger" exception to DeShaney which holds state actors liable when their affirmative acts injure someone, or render the individual more vulnerable to injury than if the state had not acted at all. Kneipp v. Tedder, 95 F.3d 1199, 1207-08 (3d Cir. 1996); Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006), quoting Schieber v. City of Philadelphia, 320 F.3d 409, 416 (3d Cir. 2003), cert denied, 127 S.Ct. 1483 (2007)). As the Third Circuit has stated:

> If the State puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.
>
> D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1374 (3d. Cir. 1992), citing Hayes v. Erie County Office of Children and Youth, 497 F.Supp. 2d 684, 693 (W.D. Pa 2007), citing Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

State-created danger liability is triggered where a state creates plaintiffs' peril, increases her risk of harm, or acts to render her more vulnerable to the violence encountered. D.R. v. Middle Bucks Area Vocational Technical School, Id. at 1373-74, citing Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) (Prison officials who permitted a violent prisoner to work in a public building and gave him access to dangerous weapons while he was being supervised by an untrained city employee, were liable to a town employee who was abducted and held hostage by the prisoner). Significantly, courts have found that the state created danger doctrine applies in a child custody setting where the state's actions render a child more vulnerable to injury at the hands of her biological parent. Ford v. Johnson, 899 F. Supp. 229 (E.D.Pa. 1995). In Ford, the mother of a child who was beaten to death by the father sued various state agencies for placing the child with the father. She alleged that the state failed to properly investigate the father and that it intentionally ignored the fact that the father's former girlfriend had obtained a restraining order against him, which should have disqualified him from having custody. In upholding plaintiffs' §1983 claim under the state-created danger rule, the court stated:

> The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies

> and their employees conduct their investigations. It is important to remember that in the case at bar [the child] had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation. Id. at 233.

See also, Tazioly v. City of Philadelphia, 1998 WL 633747 (E.D.Pa. Sep. 10, 1998) (State employees were not shielded from liability where they placed the child with his biological mother when they had actual knowledge that she was unfit and dangerous). [1] In fact, there is no requirement under the state-created danger rule that there be a custodial relationship between the victim and the state for liability to attach. In Pinder v. Johnson, 54 F.3d 1169, 1177 (4th Cir. 1995), the court addressed this issue stating:

> When the State itself creates the dangerous situation that resulted in the victim's injury, the absence of a custodial relationship may not be dispositive. In such instances, the State is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing the harm to the injured party." Id. 1175.

Thus, the state created danger rule even applies in the absence of a "special relationship."

To state a claim under the state created danger doctrine, a plaintiff must allege that (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the plaintiffs' safety; (3) there was some relationship between the state and the plaintiff; and (4) the state actor used his authority to create an opportunity for danger that otherwise would not have existed. Sanford v. Stiles, 456 F.3d 298, 304-05 (3d Cir. 2006); Bright v. Westmoreland County, 443 F.3d 276, 281–82 (3d Cir. 2006); Gonzales v. City of Camden, 357 N.J. Super. 339, 347 (App. Div. 2003).

It is well established that "a child in state custody has the right not to be handed over by state officers to a foster parent or other custodian, private or public, whom the state knows or suspects to be a child abuser." White v. Chambliss, 112 F.3d 731, 737 (4th Cir. 1997) (Emphasis added.). K.H. ex. rel. Murphy v. Morgan, 914 F.2d 846, 852 (7th Cir. 1990); accord, Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir. 1990); Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1981); Doe v. New York City Dept. of Social Servs., 649 F.2d 134, 141 (2d Cir. 1981); Doe v. South Carolina Department of Social Services, 597 F.3d 163, 176 (4th Cir. 2010) (Where the state has custody and control over a child and is charged with making placement decisions, the state has a "corresponding duty to refrain from placing her in a known, dangerous environment in deliberate indifference to her right to personal safety and security.")

Shock the Conscious Standard

To act with a willful disregard of the victim's safety is to act with a "degree of culpability that shocks the conscience" citing Ortiz v. Division of Youth and Family Services, 2008 WL 1767019, *4 (D.N.J. April 15, 2008) citing Phillips v. County of Allegheny, Id. at 240. There is no set formula as to how to measure the egregiousness of the conduct that will reach the "conscience-shocking level", as it depends on the unique facts and circumstances of the particular case. Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999). However, "deliberate indifference" will satisfy this standard. Sacramento v. Lewis, 522 U.S. 833, 846 (1998). When assessing culpability, the "time in which the government actor had to respond to an incident is significant." Phillips, Id. at 240. Where a state actor has the time to deliberate

about his or her actions and is not under pressure to make hurried judgments, the state actor's conduct will be sufficiently "conscience shocking" if it displays a deliberate indifference toward a substantial risk of serious harm to the plaintiff. Sacramento v. Lewis, 523 U.S. 833, 851 (1998). Deliberate indifference requires the defendants to have consciously disregarded a substantial risk of serious harm. Ziccardi v. Philadelphia, 288 F.3d 57, 66 (3d Cir. 2002), and it clearly applies to decisions regarding the placement of a child into foster care. Nicini, at 811. It also applies to CPS's decision to leave a child in an abusive home. In Ortiz, CPS was notified that the child was being abused by his father or stepmother but took no action although it had several months to investigate the abuse. The court held that such conduct was sufficient to show a "deliberate indifference to the results of their actions [which] are sufficient to establish a level of culpability that shocks the conscience." See, Ortiz v. DYFS, Id. at *4 (D.N.J. April 15, 2008) (citations omitted).

Defense of Qualified Immunity

The CPS defendants will contend that they are immune from liability under §1983 because their actions are protected by the doctrine of qualified immunity. It is defendant's to establish qualified immunity by proving that 1) there was no violation of any constitutional right; and 2) that a reasonable state actor would not have understood that his actions were prohibited at the time that he acted. Bennett v. Murphy, 274 F.3d 133, 136-37 (3d Cir. 2002).

Standards of Care for CPS services and individual caseworkers:

National CPS Agency standards:

There exist national standards of care derived from years of research, policy manuals, program protocols. Familiarize yourself with national standards for CPS services. Obtain copies of the CPS standard policies and procedures and have your expert determine whether they comport with national standards. Oftentimes, the CPS standard policies and procedures comport with national standards for services to be provided, the negligence arises from the failures to follow or implement the policies and procedures.

CPS Case File

It is essential that you obtain a complete copy of the CPS file. Most times the court will require an in-camera review before ordering disclosure. After the file is produced, index every item in the file and cross-reference it to the CPS policies and procedures to determine what was and what was not done as the policies, laws or regulations. Insist on viewing the original file at CPS office. Only after you examine the file produced will you be in position to review the original file to find drafts, duplications with different entries, and other documents that may not have been produced earlier.

CPS computerized systems, such as SPIRIT, are also a source of valuable information. Any concern that a document was created in the system after the fact, altered or otherwise does not seem right – make a discovery demand to see the original screen shot of the document and the stored electronic data documenting the date and time the document was first created on the system and all date and time amendments or changes. You may use any discrepancy to show the caseworker attempted to hide their tracks or alter documents.

Ask for all e-mails of the caseworker and all others from CPS regarding your client's case; all phone records – including direct dial and cell phone records – of the caseworker to show

the calls made or received from your client or others concerned about the child; all office sign-in sheets showing the dates that your clients may have been at the office to make reports of abuse.

Standardized Decision Making Tools:

Historically, CPS services were dependent on the ability of caseworkers to accurately assess the risks to a child and to recognize signs of abuse which were ripe with subjective decision making. However, standardized decision making tools that objectively assess risk and safety have streamlined this process and removed this subjective judgment and decision making element. CPS policies detail the value of these tools:

DYFS Policy-DYFS Structured Decision Making Initiative, 4-5-2004 states:

> Structured Decision-Making [is] a uniform process for Division – wide decision making regarding critical aspects of agency intervention…from screening, through intake, to case management and closure. SDM assessment tools are research and evidence based. The system assists field staff to make critical decisions, based on the facts of a case, rather than relying solely on individual judgment by agency staff and others.

The purpose of the Safety Assessment is to (1) assess whether any child is currently in immediate and/or impending danger of serious physical harm which may require protective intervention and (2) to determine what interventions should be provided as the appropriate protection. The Safety Assessment guides decisions about the removal and return of a child to his family, as well as whether or not the child may remain in the home. To compare, the risk assessment is used to evaluate the likelihood of future maltreatment and also serves to guide actions to be taken to protect the child from those future risks of harm.

Identify those state laws and regulations which require safety and risk assessments be conducted by CPS. CPS policies and procedures will then incorporate the statutory requirements to conduct these assessments. In each case you need to know when they are required to be done; whether they were done, if so were they done correctly and was the corresponding required action taken.

Standards of Care for CPS hiring, training and supervision

Obtain copies of the personnel files for the defendant caseworkers and supervisors. This should include their records as to screening for hiring, training received, courses taken, tests taken for promotions, etc. You may find evidence to support your claim that the individual defendants were not properly trained, or that they were promoted than demoted, or otherwise not competent. Request copies of the training materials for pertinent classes taken. There is a wealth of information to be used to establish a standard of care that the caseworker was trained in but failed to follow. This, too, may be used as the basis for supervisory liability. Also as part of the personnel file request ask for attendance records, time sheets, vacation and sick time records for the entire period of time the caseworker or supervisor was assigned to this particular case. You may find that they were on vacation, sick leave, or otherwise absent and there was a lack of case supervision in their absence.

Chain of Command

Know the chain of command. What is required of the caseworker, supervisor and their supervisors or office mangers in terms of reporting on the case, supervision to ensure that required actions were taken. In Child Welfare Services, the supervisor's role is vital to ensuring the proper delivery of services. A 2004 publication by the United States Office on Child abuse and Neglect states in relevant parts that supervisors must "make sure all relevant laws and policies are followed and maintain the standards of performance of the unit …. Through their actions, supervisors directly influence the nature of unit and individual staff performance … The ultimate goal for every supervisor is to develop a work group that is motivated to achieve the mission and goals of the agency … When a unit is cohesive: children are better protected (and) excellence in performance is evident." In addition, there is a mutual responsibility for supervisors and managers to keep each other informed and to be aligned in critical decisions involving individual clients and families.

Studies and statistics

There are numerous studies and statistics about child abuse. Particularly, the rise of incidents of child abuse where there also exists other risk factors such as drug abuse, domestic violence, psychiatric conditions, etc. Look for multiple risk factors which CPS knew or should have known of and whether they took appropriate steps to protect the child.

As to injuries as indicators of abuse, there are a host of publications and literature on this topic and you need to know all aspects of the subject child's presentation. CPS policies detail type of injuries which are 'red flags' of abuse or indictors of abuse and how those injuries are to be evaluated. Most CPS agencies employ 'allegation-based' investigation policies – meaning that the steps of the investigation are driven by the type of injuries involved. Retain a child abuse pediatrician as an expert.

System Overhauls --- implementation and results

CPS system flaws have been studied and reforms put into place. If there has been a study and overhaul obtain the public report and the testimony taken to support that report's findings. The testimony about systemic flaws are extremely important, particularly if the same flaws exist in your case.

Role of Experts – Team approach

CPS expert

Pediatric Child Abuse Expert

Psychiatrist

Medical Experts

Life Care Planner

Economist

TRIAL TIPS

Time line

Chart out every step required to be done (use cites to policy/laws)

Show each step not done or done improperly

Show admissions as to no excuse or no explanation why not done.

Work the chain of command

Defeat the defenses -- not overwhelmed by case load, had support from supervisors, fellow caseworkers, investigators, medical resources.

Proximate Cause.

Demonstrate the damages

Apportionment of Liability – CPS vs. the abuser.

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WHAT HAPPENED TO CHILD PORNOGRAPHY VICTIMS IN THE UNITED STATES SUPREME COURT

Earlier this year, the United States Supreme Court issued an important decision in the Marsh Law Firm's long-running effort to obtain compensation for victims of child pornography. The case, Paroline v. United States et.al., attracted 14 amicus briefs supporting a victim named Amy whose quest for restitution started in 2008.

Background

Our client Amy was sexually abused as a young girl in order to produce child pornography. When she was 17, she learned that images of her abuse were being trafficked on the Internet, in effect repeating the original wrongs, for she knew that her humiliation and hurt would be renewed well into the future as thousands of additional wrongdoers witnessed those crimes.

The defendant in this case, Doyle Randall Paroline, pleaded guilty in federal court to possessing images of child pornography which included Amy, in violation of the federal child pornography laws. Amy sought restitution under 18 U.S.C.§ 2259, the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, for lost income and future treatment and counseling costs.

After several years of litigation in the lower courts and the Fifth Circuit Court of Appeals, the case was accepted by the Supreme Court on June 27, 2013. Oral argument occurred on January

[1] A graduate of the University of Michigan Law School and its acclaimed Child Advocacy Law Clinic, James R. Marsh represents victims of sex abuse in schools, colleges, churches, and government and military institutions; online sexual exploitation; child pornography; and revenge porn. His case on compensation for victims of child pornography and child sex abuse in federal criminal restitution proceedings was recently heard by the United States Supreme Court. Mr. Marsh has represented clients in wrongful adoption, civil rights, RICO, Title IX sex harassment, Section 1983, special education, high stakes testing, student discipline, child welfare, and adoption cases before state and federal trial and appellate courts. Mr. Marsh is an experienced trial attorney and frequent commentator, lecturer, and author on legal issues affecting children. He founded the nationally recognized Children's Law Center in Washington, DC and currently serves as co-chair of its emeritus board. He now leads the Marsh Law Firm in New York which is a premier law firm helping sexually abused victims obtain justice and rebuild their lives with dignity and respect.

22, 2014.

Amy's Legal Theory

Amy, whose story was featured last year in the New York Times Magazine and popularized earlier this month by Law and Order SVU as Downloaded Child (watch apparently did not influence the justices in our case), argued that joint and several liability would hold not just Paroline responsible, but every other defendant who trades and collects her child sex abuse images.
obligation was unfair, they could seek contribution from other defendants—like Amy has been doing for six years now—to even things out.

The Court's Majority Decision

In a split 5-3-1 decision, the Court rejected Amy's legal theory with all three sides calling for Congressional reform of the law. The majority decision, which was written by Justice Kennedy and Joined by Justices Ginsburg, Breyer, Alito, and Kagan, recognized the terrible harm caused by child pornography, but created a regime which will be hard to implement in the lower courts and lead to years, if not decades, of additional litigation about the proper amount of restitution in any given case.

Critically for victims, the Court acknowledged in the strongest possible terms, the devastating nature of this pernicious crime:

The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever- increasing number of wrongdoers witnessed the crimes committed against her.

The majority explained that:

There can be no question that it would produce anomalous results to say that no restitution is appropriate in these circumstances. It is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view mages of the sexual abuse she endured…. Harms of this sort are a major reason why child pornography is outlawed…in a sense, every viewing of child pornography is a repetition of the victim's abuse.

Ultimately, however, the Court rejected Amy's solution of joint and several liability with contribution, and adopted an almost nonsensical standard for determining restitution:

a court should order restitution in an amount that comports with the defendant's relative role in the causal process that under1ies the victim's general losses

the amount should not be severe
the amount should not be token or nominal
the award should be reasonable and circumscribed
the award should recognize the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role
trivial restitution orders are prohibited
the victim should someday collect restitution for all her child pornography losses

restitution orders should represent an application of law, not a decision-maker's caprice

The majority urged the lower courts to "use discretion and sound judgment without resorting to a "precise mathematical inquiry."

In other words, the majority decision basically accepted the Government's rejoinder at oral argument that there should be a "fudge factor" when fixing compensation for victims of child pornography, while adopting "rough guideposts" for "determining an amount that fits the offense."

The Court's Dissent

The dissent, which was written by Chief Justice Roberts and joined by Justices Scalia and Thomas, declared that under the majority's proposal "Amy will be stuck litigating for years to come" and that the best she can hope to obtain is "piecemeal restitution" and "trivial restitution orders."

"Congress set up a restitution system sure to fail in cases like this one" which "effectively precluded restitution in most cases involving possession or distribution of child pornography." When it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that amount."

The dissent concluded:

The Court's decision today means that Amy will not go home with nothing. But it would be a mistake for that salutary outcome to lead readers to conclude that Amy has prevailed or that Congress has done justice for victims of child pornography. The statute as written allows no recovery; we ought to say so, and give Congress a chance to fix it.

Sotomayor, Congress, and Fixing the Law

Justice Sotomayor, who was alone in her dissent, found that the majority's approach cannot be reconciled with the restitution law that Congress enacted: Congress mandated restitution for the full amount of a victim's losses—with defendants held jointly and severally liable for the indivisible consequences of their intentional, concerted conduct.

One key problem that Justice Sotomayor identified is the proper standard of causation and how that gets applied in a world where child pornography victims suffer harm at the hands of numerous offenders who possess their images in common.

Justice Sotomayor's solution to this quandary is aggregate causation.

Aggregate causation applies when concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the director proximate

cause of a single injury." In this case, any defendant may be held liable •even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other" defendants.

The policy issue is simple: the child pornography restitution statute offers no safety-in-numbers exception for defendants who possess images of a child's sex abuse in common with other offenders. The aggregate causation standard exists to avoid exactly that kind of exception. Congress did not intend the law to create a safe harbor for those who inflict upon their victims the proverbial death by a thousand cuts.

After critiquing the majority's decision as preventing restitution "in cases where the victim's losses are caused by too many offenders, and the dissenter's decision as foreclosing •entry of restitution in cases where a victim suffers indivisible losses as a result of the aggregate conduct of numerous offenders," Justice Sotomayor proposed her own solution.

Joint and Several Liability with Contribution

Justice Sotomayor explains that "the nature of the child pornography industry and the indivisible quality of the injuries suffered by its victims make this a paradigmatic situation in which traditional tort law principles would require joint and several liability."

This means that individuals who act together, with the common end of trafficking in the market for images of child sexual abuse" cannot "hide behind the anonymity of a computer screen. As joint actors, they are all each liable for the full amount of the victim's losses. This is especially important because "the injuries caused by child pornography possessors are impossible to apportion in any practical sense.

Child pornography possessors are jointly liable under this standard, for they act in concert as part of a global network of possessors, distributors, and producers who pursue the common purpose of trafficking in images of child sexual abuse. As Congress itself recognized, "possessors of such material" are an integral part of the "market for the sexual exploitative use of children."

By communally browsing and downloading Internet child pornography, offenders like Paroline "fuel the process" that allows the industry to flourish. Indeed, one expert describes Internet child pornography networks as "an example of a complex criminal conspiracy," the quintessential concerted action to which joint and several liability attaches.

In order to mitigate any unfairness from holding one or even several defendants responsible for the entire amount of a victim's losses, defendants must be able to seek contribution from all similarly situated defendants. Adding joint and several liability with a right to contribution to the child pornography restitution law will solve two of the problems which vexed both the majority and the dissent.

What Congress Must Do

As Justice Sotomayor recognized, "in the end, of course, it is Congress that will have the final say." If Congress wishes to re-codify its full restitution command, "it can do so in language perhaps even more clear than § 2259's 'mandatory' directive to order restitution for the 'full amount of the victim's losses.'"

According to Sotomayor, Congress might amend the statute, for example, to include the term "aggregate causation.'' Alternatively, "to avoid the uncertainty in the Court's apportionment approach, Congress might wish to enact fixed minimum restitution amounts.''

Congress Proposes to Fix Restitution for Child Pornography Victims

Faced with a draconian decision by the United States Supreme Court in late April which all but eliminated meaningful restitution for child pornography victims, U.S. Senators Orrin Hatch (R-Utah) and Chuck Schumer (D-N.Y.) spearheaded a comprehensive legislative fix (S.2301)which addresses the concerns outlined by the Court in Paroline.

The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014 was introduced exactly two weeks after the Supreme Court's decision.

Just six weeks later, U.S. Representative Matt Cartwright (D-PA-17), along with co-leads Rep. Tom Cotton {R-AK-4), Rep. Suzan DelBene (D-WA-1), Rep. Randy Weber (R-TX-14), Rep. Judy Chu (D-CA-27),and Rep.Doc Hastings (R-WA-4) introduced the bipartisan House companion bill (H.R. 4981)with the support of 69 House colleagues.

Over 100 Members of Congress from both parties are co-sponsoring the Amy and Vicky Act. National advocacy groups like the National Center for Missing and Exploited Children, the National Crime Victim Law Institute, the National Center for Victims of Crime, and the National Task Force to End Sexual and Domestic Violence Against Women are also supporting this bill.

Here's how this novel new law will allow victims of child pornography to receive meaningful and timely compensation.

About the Act

A longstanding federal statute which was passed as part of the Violence Against Women Act in 1994 (18 U.S.C.§2259) requires that a defendant in a federal child sexual exploitation case must pay restitution for "the full amount of the victim's losses.• This works fine for crimes in which a defendant directly causes specific harm to a victim, but child pornography crimes are different. A

child pornography victim is harmed by the initial child pornography production-which includes child sex abuse—and then by the distribution, transportation, and possession of the resulting child sex abuse images and videos.

The Supreme Court has recognized that victims are harmed by the ongoing "trade" and "the continuing traffic" in child sex abuse images. "In a sense, the Court said, every viewing of child pornography is a repetition of the victim's abuse. This is why child pornography is not protected by the First Amendment. Unfortunately on the Internet, that abuse never ends.

Each step in the child pornography process—production, distribution, transportation, and possession—increases the harm to victims while making it more difficult to identify those responsible. The vulnerable victims of this crime, who were sexually abused and exploited as children, are especially in need of compensation to help put their lives back together.

"Amy" and "Vicky" are the victims in two of the most widely-distributed child pornography series in the world. On April 23, 2014, in Paroline v. United States, which reviewed Amy's case, the Supreme Court found that the existing restitution statute is ill-suited for cases like theirs because it requires proving the impossible: how one person's possession of particular images concretely harms an individual victim. This standard unnecessarily places the burden on victims to forever pursue defendants across the country while recovering next to nothing.

The Amy and Vicky Act responds to Paroline and does three things that addresses the unique nature of these crimes.

First, it considers the total lifetime harm to victims from the initial sexual grooming to the last possessor.

Second, it requires meaningful and timely restitution.

Third, it allows defendants who have contributed to the same victim's harm to spread the restitution cost among themselves.

Those who continue a victim's abuse should not be able to hide in the crowd; there can be no safely in numbers. Victims should not have to prove the impossible. The Amy and Vicky Act creates a practical process, based on the unique kind of harms from child pornography, that both puts the burden on defendants where it belongs and provides meaningful and timely restitution for victims.

Highlights

A victim's losses include medical services, therapy, rehabilitation, transportation, child care, and lost income. Restitution does not include pain and suffering, emotional damages, or punitive damages.

If a victim was harmed by a single defendant, that defendant must pay full restitution for the victim's losses.

If a victim was harmed by multiple individuals, including those not yet identified, a judge can impose restitution on an individual defendant in two ways depending on the circumstances of the case:

the defendant must pay "the full amount of the victim's losses" OR
at least $250,000 for production, $150,000 for distribution, or $25,000 for possession.

Federal law already provides a mechanism for creating a fair and balanced payment schedule according to each defendant's ability to pay.

Multiple defendants who have harmed the same victim and who are liable for the "full amount" are jointly and severally liable and may sue each other for contribution to equalize their restitution obligation.

The Congressional findings are clear and unequivocal: "The unlawful collective conduct of every individual who reproduces, distributes, or possesses the images of a victim's childhood sexual abuse plays a part in sustaining and aggravating the harms to that individual victim. Multiple actors independently commit intentional crimes that combine to produce an indivisible injury to a victim."

Vast Majority of Federal Child Pornography Criminals Pay ZERO Restitution to Victims

Despite Congress' long-standing mandate that each and every federal child pornography defendant pay restitution to victims, in reality the vast majority of convicted child pornography criminals pay no restitution at all.

New facts present a dismal reality for victims of child rape and sexual assault which results in child pornography.

The United States Sentencing Commission recently compiled the following statistics about child pornography offenders subject to fines and restitution:

Of 1922 child pornography cases in the federal court system in 2013, no fine or restitution was ordered in 1423 of those cases. That means that 74% of convicted criminals subject to Congress' mandatory restitution requirement under current law were ordered to pay NOTHING.

Just 286 offenders—or about 15% of convicted defendants—were ordered to pay any restitution.

Shockingly, 190 defendants who were found financially capable of paying a fine (which means the probation officer determined that the defendant had demonstrated financial resources) were not ordered to pay restitution. Only 23 defendants were ordered to pay both a fine and restitution.

Of 437 child pornography defendants who were ordered to pay anything—either a fine or restitution or both—the median payment ordered was just $3000.

Clearly, full mandatory restitution for child pornography crimes, from every defendant in every case for every victim, is an illusion. If it passes, the bipartisan Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014 will guarantee that victims receive restitution from every convicted criminal in every case. No longer will victims be relegated to a handful of defendants paying token amounts in just a few dozen cases per year.

Mandatory restitution should be just that—mandatory. Congress should pass S.2301/ H.R 4981. Child pornography victims deserve no less than full compensation for their endless online exploitation. Congress must fix the law to restore justice and fairness to a restitution system which has gone seriously awry.

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Responding to Victims of Child Pornography:

Recent Findings of Interest to Civil Attorneys

The National Center for Victims of Crime, together with the Crimes Against Children Research Center at the University of New Hampshire and the National Children's Alliance, recently conducted a multiphase research project to improve the response to victims of child pornography. This effort, funded by the Office for Victims of Crime, U.S. Department of Justice, will help guide our nation's efforts in meeting the needs of these underserved victims of crime. While the final report and recommendations have not yet been released, many of the early findings are of interest to civil attorneys.

Findings from a Survey of Adult Survivors of Child Pornography

As part of this wide-ranging examination, project staff conducted an online survey of adult survivors of child pornography. A total of 133 respondents completed the survey.

[1] For more than 20 years, Susan Smith Howley has worked to develop and implement changes in national, state, and local public policies that affect crime victims. As the National Center for Victims of Crime's director of public policy since 1999, she has become a nationally recognized authority on victim-related legislation, advising advocates on such issues as promoting compliance with victims' rights laws and supporting funding for victim services. She also spearheaded the National Center's work on VictimLaw.info, a publicly available online database of crime victims' rights laws. Ms. Howley has testified before Congress and state legislatures and helped draft and implement key federal legislation. She has also served on the Victims Advisory Group to the U.S. Sentencing Commission and the National Advisory Committee on Violence Against Women.

[2] Brittany Ericksen is a Staff Attorney at the National Center for Victims of Crime. She is involved in a variety of public policy projects, including improving the response to victims of child pornography, addressing the rape kit backlog, and bridging the gap from research to practice.

Because participants were invited to take the survey through victim service providers, their responses do not represent the experiences of all adult survivors of child pornography production but only a subset who had contact with certain victim service providers. Approximately one-third of respondents were male, and just under two-thirds were female. More than half were over age 35, and the vast majority were white. Most participants (72 percent) were age nine or younger when they were first photographed, and most (93 percent) had suffered hands-on child sexual abuse.

Reporting and financial recovery

Only 23 percent of adult survivors stated the crime had been reported to police or child welfare. Only 11 percent reported that the perpetrator had been convicted. Thus, high majorities had never applied for victim compensation (90 percent), received a court order of restitution (97 percent), or retained a civil attorney to sue for damages (94 percent).

Impact of child pornography reported by adult survivors

For most of the adult survivor respondents, issues related to the images were not uppermost among their concerns. This may well be a reflection that for 83 percent of the respondents, the crime had happened 10 or more years ago, when the Internet was less developed. In fact, 31 percent said they did not know whether their images were distributed on the Internet, and 52 percent said the images had not been shared or given to other people.

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About one-third of respondents said the images were the most difficult aspect of the crime. They reported anxiety about whether the images still existed, knowledge that the images could not be recovered, fear of who might see the images, and disgust about the possibility of people using them for sexual purposes.

Approximately half of respondents, however, reported specific difficulties related to being depicted in child pornography, including avoidance of being photographed or videotaped by friends or family (70 percent), fear of being recognized (73 percent), and worry that people would see them as a willing participant (73 percent).

The survey included the 40-item version of the Trauma Symptom Checklist (TSC-40). Respondents reported a range of ongoing trauma symptoms.

Experienced the following symptoms "often" during the previous two months:

Feeling isolated from others	64%
Insomnia (trouble getting to sleep)	57%
Restless sleep	56%
Sadness	55%
Not feeling rested in the morning	55%
Loneliness	55%
"Spacing out" (going away in your mind)	54%
Sexual problems	51%

Experienced the following symptoms “sometimes” or “often” during the past two months:

“Flashbacks” (sudden, vivid, distracting memories	83%
Feeling tense all the time	76%
Feelings of inferiority	74%
Anxiety attacks	73%
Waking up in the middle of the night	73%
Nightmares	72%
Feelings of guilt	71%

Civil Recovery in Cases of Child Pornography

Victims in cases involving child pornography suffer not only the same damages as other victims of child sexual abuse; they often have additional damages relating to the capturing of the images or their actual or feared circulation. Victims have a real interest

in being able to pursue civil recovery. Extended statutes of limitation, and special civil causes of action, can increase victim access to civil justice.

Civil statutes of limitation specifically referencing child pornography

The majority of state statutes of limitation do not directly reference any child pornography crimes. However, as states increasingly respond to the unique nature of child pornography, states have begun creating statutes of limitation specifically for child pornography crimes. These special limitations periods vary widely:

- No limitation: Alaska (production and distribution of child pornography).[3]
- Thirty years after the victim turns 18: Louisiana (all child pornography crimes). [4]
- Before victim reaches 45 years of age: Wisconsin (production or distribution of child pornography).[5]
- 25 years after victim turns 18: Tennessee (all child pornography crimes).[6]
- 20 years after victim turns 18: Texas (production of child pornography only).[7]
- 12 years after discovery, but no limitation if law enforcement is notified within 12 years: Oklahoma (production of child pornography only).[8]
- Before victim is 30 or 12 years after reported to law enforcement: Oregon (production of child pornography only).[9]
- 10 years from date of production: California (production of child pornography only).[10]

[3] Alaska Stat. § 12.10.10 (2013).
[4] La. Code Crim. Pro. Ann. art 571.1 (2013).
[5] Wisc. Stat. § 939.74 (2013).
[6] Tenn. Code Ann. § 40-2-101 (2013).
[7] Tex. Code Crim. Proc. Ann. art § 12.01 (West 2013).
[8] Okla. Stat. tit. 22, § 152 (2013).
[9] Or. Rev. Stat. § 131.125 (2013).
[10] Cal. Penal Code § 801.2 (West 2013).

- 10 years after the offense or before victim's 21st birthday: Michigan (all child pornography crimes).[11]
- 7 years after commission of the offense or 7 years after victim's 16th birthday, whichever is later: Nebraska (possession only, production would likely come under sexual assault of a child, for which there is no statute of limitation).[12]
- 5 years after victim reaches 18 years: Montana (all child pornography crimes).[13]
- 1 year after victim reaches 18 years: Illinois (all child pornography crimes).[14]

Special civil causes of action for child pornography

Federal law provides a means for victims of child sexual exploitation—including victims of child pornography production, distribution, or possession—to seek civil damages. The victim may recover the actual damages plus the costs of the suit, including reasonable attorney's fees. Importantly, the law sets a presumptive amount of damages of $150,000. While a conviction is not required, a defendant must be proven to have committed the underlying offense by a preponderance of the evidence. *Doe v. Liberatore*, 478 F. Supp. 2d 742 (MD Pa, 2007). Actions must be filed 10 years after the offense or within 3 years of the child turning 18.

Several states have adopted similar provisions. See the attached chart for details.

[11] Mich. Comp. Laws § 767.24 (2013).
[12] Neb. Rev. Stat. § 29-110 (2013).
[13] Mont. Code Ann. § 45-1-205 (2013).
[14] 720 Ill. Comp. Stat. 5/3-6 (2013).

STATE SPECIAL CIVIL CAUSES OF ACTION FOR VICTIMS OF CHILD PORNOGRAPHY

State/ Statute	Offenses	Presumptive Damages	Damages	Exemplary/ Punitive Damages	Injunctive Relief	Who Can File	Limitations	Other
Florida Fla. Stat. § 847.01357	Production, distribution, or possession of CP	$150,000	Actual damages and the cost of the suit, including reasonable attorney's fees			Victim, Attorney General at the victim's request	3 years after the later of: conclusion of criminal case; notice to victim by law enforcement of production, distribution, or possession of images; victim reaches 18	Victim may request pseudonym in filings

State/ Statute	Offenses	Presumptive Damages	Damages	Exemplary/ Punitive Damages	Injunctive Relief	Who Can File	Limitations	Other
Kansas Kan. Stat. Ann. § 60-5001	Production, distribution, or possession of CP	$150,000	Actual damages, including reasonable attorney's fees			Victim, Attorney General at victim's request	3 years after the later of: conclusion of criminal case; notice to victim by law enforcement of production, distribution, or possession of images; victim reaches 18	
Louisiana La. Civ. Code Ann. Art. 2315.3	Production, distribution, or possession of CP			If proof that injuries were caused by wanton and reckless disregard for victim's rights and safety				Statute is limited to the addition of exemplary damages in a case involving child pornography

State/ Statute	Offenses	Presumptive Damages	Damages	Exemplary/ Punitive Damages	Injunctive Relief	Who Can File	Limitations	Other
Nebraska Neb. Rev. Stat. § 25-21, 290 to 25-21, 296	Production, distribution, or possession of CP	$150,000	Actual damages and the cost of the suit, including reasonable attorney's fees		Temporary, preliminary, and permanent injunctive relief as the court deems appropriate	Victim, parents or guardian; Attorney General upon victim's request	3 years after the later of: conclusion of criminal case; notice to victim, parent, or guardian by law enforcement of **the identification of** the producer, distributor, or possessor of images; victim reaches 18	Excludes those 16 or older who voluntarily participate in the creation of images. Victim may request pseudonym in filings

State/ Statute	Offenses	Presumptive Damages	Damages	Exemplary/ Punitive Damages	Injunctive Relief	Who Can File	Limitations	Other
Nevada Nev. Rev. Stat. Ann. § 41.1396	Production or distribution, of CP	$150,000	Actual damages and the cost of the suit, including attorney's fees					Limited to victims under 16 where defendant is over 18. Victim may request pseudonym in filings
New Jersey N.J. Stat. Ann. § 2A:30B-1 through 7	Production or distribution of CP	3 times the financial gain made by those exploiting the victim	Also costs and attorney's fees		Injunctive relief to halt production and distribution of child pornography	Child, through parent, guardian, or child advocacy organization; victim upon reaching majority	2 years after victim reaches 18	If parent or guardian is defendant, court may appoint special guardian to bring action on behalf of child

State/ Statute	Offenses	Presumptive Damages	Damages	Exemplary/ Punitive Damages	Injunctive Relief	Who Can File	Limitations	Other
Oklahoma Okla. Stat. tit. 21, § 1040.56	Production, distribution, or possession of CP		Actual and special damages, and costs of the suit, including reasonable attorney's fees	√			3 years after the later of: conclusion of criminal case; notice to victim by law enforcement of production, distribution, or possession of images; victim reaches 18	Requires a conviction for a sexual offense against the child, and that some portion of the offense was related to the production of CP

State/ Statute	Offenses	Presumptive Damages	Damages	Exemplary/ Punitive Damages	Injunctive Relief	Who Can File	Limitations	Other
South Dakota S.D. Code § 22-24A-7 – 14	Production or distribution of CP		Economic damages, including costs of treatment and loss of productivity; noneconomic damages, including pain and suffering, physical impairment, emotional distress, mental anguish, disfigurement, loss of enjoyment, loss of companionship, services, and consortium, and other non-pecuniary losses proximately caused by the proscribed conduct; attorney's fees	√		Child; child's parent, guardian, or sibling; any entity funding a treatment program or providing services to the child; any other person injured by the conduct	6 years after plaintiff knew or had reason to know of any injury caused by offense (knowledge of parent or guardian not imputed to plaintiff); tolled while plaintiff is a minor	Defendant must be over 18

Current through 2013.

Victims' Rights in Child Pornography Cases

Victims of crime in every state enjoy certain basic rights, including the right to be notified of events and proceedings in the case, the right to make a statement at sentencing, and the right to seek restitution. The basic crime victims' rights laws in forty states explicitly apply to cases involving the production, distribution, and possession of child pornography. In addition, Delaware's victims' rights law applies in cases involving the production or distribution of child pornography, and the laws of Kentucky and the District of Columbia also include the production of child pornography. While the language of the victims' rights statutes in the remaining eight states do not include child pornography offenses, they would likely be applied in cases involving production—especially in those cases depicting hands-on sexual abuse, since victims' rights laws always apply in cases of child sexual abuse.

The attached chart sets out in detail the applicability of the victims' rights statutes in each state.

WHAT CONSTITUTES A CRIME UNDER VICTIM RIGHTS LAWS:
INCLUSIONOF CHILD PORNOGRAPHY OFFENSES

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Alabama Ala. Code § 15-23-60		☑			☑		Criminal offense. Conduct that gives a law enforcement officer or prosecutor probable cause to believe that a felony involving physical injury, the threat of physical injury, or a sexual offense, or any offense involving spousal abuse or domestic violence has been committed. Child pornography offenses are listed under "Offenses Against Health and Morals," not "Offenses Involving Danger to the Person," which includes "Sexual Offenses."	*		
Alaska Alaska Stat. § 12.61.900 Alaska Stat. § 11.61.123 Alaska Stat. § 11.61.125 Alaska Stat. § 11.61.127	☑			☑			Simply "an offense."	☑	☑	☑

* = Even though these states do not specifically include any child pornography crimes under their victim rights statutes, the statutes likely encompass at least the victims of child pornography production, since child pornography production charges are often accompanied by sexual offense charges.

[15] "violent" = involving physical injury, the threat of physical injury, or a sexual offense.

[16] "violent" = involving physical injury, the threat of physical injury, or a sexual offense.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Arizona Ariz. Rev. Stat. Ann. § 13-4401 Ariz. Rev. Stat. Ann. § 13-3552	☑			☑			"Criminal offense" means conduct that gives a peace officer or prosecutor probable cause to believe that a felony, a misdemeanor, a petty offense, or a violation of a local criminal ordinance has occurred.	☑	☑	☑
Arkansas Ark. Code Ann. § 16-90-1101 Ark. Code Ann. § 5-27-603		☑[17]			☑[18]		"Crime" means an act or omission committed by a person, whether or not competent or an adult, which is punishable by incarceration if committed by a competent adult; "Victim" means a victim of a sex offense or an offense against a victim who is a minor and a victim of any violent crime. "Sex offense" includes: (P) Computer child pornography, § 5-27-603;	☑	☑	☑
California Cal. Penal Code § 679.01 Cal. Penal Code § 311.1 Cal. Penal Code § 311.3 Cal. Penal Code § 311.11	☑			☑			"Crime" means an act committed in this state which, if committed by a competent adult, would constitute a misdemeanor or felony.	☑	☑	☑
Colorado Colo. Rev. Stat. § 24-4.1-302			☑			☑	See § 24-4.1-302 (1)(a)-(kk).	☑	☑	☑

[17] Also includes any felony offense against a minor victim.
[18] Also includes any misdemeanor offense against a minor victim.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Connecticut Conn. Gen. Stat. § 51-286e Conn. Gen. Stat. § 53a-196b-g	☑			☑			"Crime" means any act which is a felony, as defined in section 53a-25, or misdemeanor, as defined in section 53a-26, and includes any crime committed by a juvenile.	☑	☑	☑
Delaware Del. Code. Ann. § 9401			☑			☑	"Crime" means an act or omission committed by a person, whether or not competent or an adult, which, if committed by a competent adult, is punishable by incarceration and which violates 1 or more of the following sections of this title: § 1108. Sexual exploitation of a child; class B felony.	☑	☑	
District of Columbia D.C. Code § 23-190 D.C. Code § 22-3102	☑				☑		The commission of any felony or violent misdemeanor in violation of any criminal statute in the District of Columbia.	☑		

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Florida Fla. Stat. § 960.197 Fla. Stat. § 827.071 Fla. Stat. § 847.012 Fla. Stat. § 847.0135	☑			☑			No statutory definition, but: **Florida ATTORNEY GENERAL OPINIONS 2008** Office of the Attorney General of the State of Florida, No. 2008-54 (2008) Question Pursuant to section 960.001(1) of the Florida Statutes, under what circumstances is a law enforcement official required to provide a crime victim with a victim's right information card or brochure? Conclusion Section 960.001(1) of the Florida Statutes requires law enforcement officials to provide a victim's right information card or brochure "at the crime scene, during the criminal investigation, and in any other appropriate manner" to crime victims at "the earliest possible time." **Because nothing in section 960.001(1) limits the application of this provision to certain victims or crimes, all crime victims, regardless of the nature of the crime, must be provided with a victim's right information card or brochure.**	☑	☑	☑

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Georgia Ga. Code Ann. § 17-17-3			☑			☑	"Crime" means an act committed in this state which constitutes any violation of Chapter 5 of Title 16 (Crimes against persons); Chapter 6 of Title 16 (sexual offenses); Article 1, 3, or 4 of Chapter 7 of Title 16; Article 1 or 2 of Chapter 8 of Title 16 (Theft and deprivation); Chapter 9 of Title 16 (Forgery and Fraud); Part 3 of Article 3 of Chapter 12 of Title 16 (Sale and distribution of harmful material to minors); Code Section 30-5-8 (Failure to report abuse); Code Section 40-6-393; Code Section 40-6-393.1; or Code Section 40-6-394 (serious traffic offenses).	*		
Hawaii Haw. Rev. Stat. § 801D-2 Haw. Rev. Stat. § 707-750 Haw. Rev. Stat. § 707-751 Haw. Rev. Stat. § 707-752		☑			☑		"Crime" means an act or omission committed by an adult or juvenile that would constitute an offense against the person under the Penal Code of this State.	☑	☑	☑
Idaho Idaho Code Ann. § 19-5306 Idaho Code Ann. § 18-1506 Idaho Code Ann. § 18-1507 Idaho Code Ann. § 18-1507A	☑				☑		"Criminal offense" is any charged felony or a misdemeanor involving physical injury, or the threat of physical injury, or a sexual offense.	☑	☑	☑

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Illinois 725 Ill. Comp. Stat. 120/3 720 Ill. Comp. Stat. 5/11-20.1 720 Ill. Comp. Stat. 5/11-20.1B 720 Ill. Comp. Stat. 5/11-20.3		☑			☑		"Crime victim" means (1) a person physically injured in this State as a result of a violent crime perpetrated or attempted against that person or (2) a person who suffers injury to or loss of property as a result of a violent crime perpetrated or attempted against that person. . .	☑	☑	☑
Indiana Ind. Code § 35-40-4-3 Ind. Code § 35-42-4-4	☑			☑			"Crime" includes a delinquent act.	☑	☑	☑
Iowa Iowa Code § 915.10 Iowa Code § 728.12	☑				☑[19]		"A public offense or a delinquent act, other than a simple misdemeanor, committed in this state."	☑	☑	☑

[19] This may include a few (arguably) non-violent, but serious, misdemeanors, such as theft.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Kansas Kan. Stat. Ann. § 74-7301 Kan. Stat. Ann. § 21-3516	☑			☑			"Criminally injurious conduct" means conduct that: (1) (A) Occurs or is attempted in this state or occurs to a person whose domicile is in Kansas who is the victim of a violent crime which occurs in another state, possession, or territory of the United States of America may make an application for compensation if: (i) The crimes would be compensable had it occurred in the state of Kansas; and (ii) the places the crimes occurred are states, possessions or territories of the United States of America not having eligible crime victim compensation programs.	☑	☑	☑
Kentucky Ky. Rev. Stat. Ann. § 421.500 Ky. Rev. Stat. Ann. § 531.310			☑			☑	Commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, or incest.	☑		

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Louisiana La. Rev. Stat. Ann. § 46:1842 La. Rev. Stat. Ann. § 14:81.1 La. Rev. Stat. Ann. § 14:81.5		☑[20]			☑[21]		"Crime" means an act defined as a felony, misdemeanor, or delinquency under state law. "Victim" means a person against whom any of the following offenses have been committed: (a) Any homicide, or any felony offense defined or enumerated in R.S. 14:2(13). (b) Any sexual offense. (c) The offenses of vehicular negligent injuring and first degree vehicular negligent injuring. (d) Any offense against the person as defined in the Criminal Code committed against a family or household member as defined in R.S. 46:2132(4) or dating partner as defined in R.S. 46:2151(B).	☑	☑	☑
Maine Me. Rev. Stat. tit. 17A, § 1171 Me. Rev. Stat. tit. 17-A, § 282 Me. Rev. Stat. tit. 17A, § 283 Me. Rev. Stat. tit. 17A, § 284	☑			☑			CRIME. "A criminal offense in which, as defined, there is a victim."	☑	☑	☑

[20] Includes negligent driving offenses.
[21] Includes negligent driving offenses.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Maryland Md. Code Ann. Crim. Law § 11-104 Md. Code Ann. Crim. Law § 11-207 Md. Code Ann. Crim. Law § 11-208	☑			☑			"Crime or delinquent act."[22]	☑	☑	☑
Massachusetts Mass. Gen. Laws Ch. 258B, § 1 Mass. Gen. Laws Ch. 272, § 29A Mass. Gen. Laws Ch. 272, § 29B Mass. Gen. Laws Ch. 272, § 29C	☑			☑			"Crime," an act committed in the commonwealth which would constitute a crime if committed by a competent adult including any act which may result in an adjudication of delinquency.	☑	☑	☑
Michigan Mich. Comp. Laws § 780.752 Mich. Comp. Laws § 750.145c Mich. Comp. Laws § 811.	☑					☑	"Crime" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony. "Victim" means any of the following: (i) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a serious misdemeanor,	☑	☑	☑

[22] No general definition, this is in the notice section.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Minnesota Minn. Stat. § 611A.01 Minn. Stat. § 617.241 Minn. Stat. § 617.246 Minn. Stat. § 617.247	☑					☑[23]	"Crime" means conduct that is prohibited by local ordinance and results in bodily harm to an individual; or conduct that is included within the definition of "crime" in section 609.02, subdivision 1. . . 609.02 DEFINITIONS. Subdivision 1. Crime. "Crime" means conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment, with or without a fine.	☑	☑	☑
Mississippi Miss. Code Ann. § 99-43-3 Miss. Code Ann. § 97-5-31 Miss. Code Ann. § 97-5-33		☑				☑	"Criminal offense" means conduct that gives a law enforcement officer or prosecutor probable cause to believe that a felony involving physical injury, the threat of physical injury, a sexual offense, or any offense involving spousal abuse or domestic violence has been committed. **This depends on whether child pornography counts as a sexual offense. It is termed a sex crime under mandatory reporting laws, so it probably applies.**	☑	☑	☑

[23] Only includes misdemeanors where imprisonment is permitted.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Missouri Mo. Rev. Stat. § 595.200 Mo. Rev. Stat. § 573.025 Mo. Rev. Stat. § 573.035 Mo. Rev. Stat. § 573.037	☑			☑			"Crime," an act which would constitute a violation of any criminal statute including any act which may result in an adjudication of delinquency.	☑	☑	☑
Montana Mont. Code Ann. § 46-24-104 Mont. Code Ann. § 45-5-325	☑				☑		Felony offense or a misdemeanor offense involving actual, threatened, or potential bodily injury to the victim.[24]	☑	☑	☑
Nebraska Neb. Rev. Stat. § 81-1848			☑			☑	A homicide under sections 28-302 to 28-306, a first degree sexual assault under section 28-319, a first degree assault under section 28-308, a sexual assault of a child in the second or third degree under section 28-320.01, a sexual assault of a child in the first degree under section 28-319.01, a second degree assault under section 28-309, a first degree false imprisonment under section 28-314, a second degree sexual assault under section 28-320, or a robbery under section 28-324, DUI victims.	*		

[24] This definition comes from the right to notice/consultation section of the victim rights act; Montana does not have an overarching definition of crime, but all sections presumably encompass this definition, and some sections could potentially be expanded to victims of any crime.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Nevada Nev. Rev. Stat. § 178.569 Nev. Rev. Stat. § 200.720 Nev. Rev. Stat. § 200.275 Nev. Rev. Stat. § 200.730	☑			☑			No clear definition applying across rights. This comes from the protection chapter. Just "a crime."	☑	☑	☑
New Hampshire N.H. Rev. Stat. Ann. § 21-M:8-k N.H. Rev. Stat. Ann. § 649-A:3 N.H. Rev. Stat. Ann. § 649-A:3A N.H. Rev. Stat. Ann. § 649-A:3B	☑						"Crime" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than one year or an offense expressly designated by law to be a felony.	☑	☑	☑
New Jersey N.J. Const. Art. I, § 22 N.J. Stat. Ann. § 2C:24-4	☑			☑			"Result of crime or incident involving another person operating a motor vehicle while under the influence of drugs or alcohol."	☑	☑	☑
New Mexico N.M. Stat. Ann. § 31-26-3			☑			☑	See **§** 31-26-3 (B)(1)-(21).	*		

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
New York N.Y. Exec. Law § 261 N.Y. Penal Law § 263.15			☑			☑	"Victim" shall mean (a) a person who suffers personal physical injury as a direct result of a crime; (b) a person who is the victim of either the crime of (1) unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, (2) kidnapping in the second degree as defined in section 135.20 of the penal law, (3) kidnapping in the first degree as defined in section 135.25 of the penal law, (4) labor trafficking as defined in section 135.35 of the penal law, or (5) sex trafficking as defined in section 230.34 of the penal law; or a person who has had a frivolous lawsuit filed against them. "Crime" shall mean (a) an act committed in New York state which would, if committed by a mentally competent criminally responsible adult, who has no legal exemption or defense, constitute a crime as defined in and proscribed by law. "Child victim" shall mean a person less than eighteen years of age who suffers physical, mental or emotional injury, or loss or damage, as a direct result of a crime or as a result of witnessing a crime.	*		

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
North Carolina N.C. Gen. Stat. § 15A-830 N.C. Gen. Stat. § 14-190.16 N.C. Gen. Stat. § 14-190.17 N.C. Gen. Stat. § 14-190.17A			☑			☑	Victim. -- A person against whom there is probable cause to believe one of the following crimes was committed: a. A Class A, B1, B2, C, D, or E felony. b. A Class F felony if it is a violation of one of the following: G.S. 14-16.6(b); 14-16.6(c); 14-18; 14-32.1(e); 14-32.2(b)(3); 14-32.3(a); 14-32.4; 14-34.2; 14-34.6(c); 14-41; 14-43.3; 14-43.11; 14-190.17; 14-190.19; 14-202.1; 14-277.3A; 14-288.9; 20-138.5; or former G.S. 14-277.3. c. A Class G felony if it is a violation of one of the following: G.S. 14-32.3(b); 14-51; 14-58; 14-87.1; or 20-141.4. d. A Class H felony if it is a violation of one of the following: G.S. 14-32.3(a); 14-32.3(c); 14-33.2; 14-277.3A; or former G.S. 14-277.3 e. A Class I felony if it is a violation of one of the following: G.S. 14-32.3(b); 14-34.6(b); or 14-190.17A. f. An attempt of any of the felonies listed in this subdivision if the attempted felony is punishable as a felony. g. Any of the following misdemeanor offenses when the offense is committed between persons who have a personal relationship as defined in G.S. 50B-1(b): G.S. 14-33(c)(1); 14-33(c)(2); 14-33(a); 14-34; 14-134.3; 14-277.3A; or former G.S. 14-277.3.	☑	☑	☑
							h. Any violation of a valid protective order under G.S. 50B-4.1.			

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
North Dakota N.D. Cent. Code § 12.1-34-01 N.D. Cent. Code § 12.1-27.2-.04 N.D. Cent. Code § 12.1-27.2-04.1	☑					☑	"Crime" includes all felony offenses; class A misdemeanors, excluding violations of section 6-08-16.1 for no-account checks; all violations of chapters 12.1-17 and 12.1-20, including all corresponding violations of municipal ordinances; and any of the offenses in this subsection that may result in adjudication of delinquency.	☑	☑	☑
Ohio Ohio Rev. Code Ann. § 2930.01 Ohio Rev. Code Ann. § 2907.322 Ohio Rev. Code Ann. § 2907.323	☑					☑	"Crime" means any of the following: (1) A felony; (2) A violation of section 2903.05, 2903.06, 2903.13, 2903.21, 2903.211 [2903.21.1], 2903.22, 2907.06, 2919.25, or 2921.04 of the Revised Code, a violation of section 2903.07 of the Revised Code as it existed prior to March 23, 2000, or a violation of a substantially equivalent municipal ordinance.	☑	☑	☑
Oklahoma Okla. Stat. tit. 21, § 142A-1 Okla. Stat. tit. 21, § 1021 Okla. Stat. tit. 21, § 1024.2	☑			☑			"Crime victim" or "victim" means any person against whom a crime was committed.[25]	☑	☑	☑

[25] Oklahoma's victim compensation statute (Okla. Stat. tit. 21, §§ 142.1-.18) and the victim rights statute's provision for victim impact statements (Okla. Stat. tit. 21, § 142A-1 (9)) only apply to victims of violent crime.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Oregon Or. Rev. Stat. § 147.500 Or. Rev. Stat. § 163.684 Or. Rev. Stat. § 163.686 Or. Rev. Stat. § 163.687 Or. Rev. Stat. § 163.688 Or. Rev. Stat. § 163.689	☑			☑			"Crime" includes an act committed by a person who is under 18 years of age that, if committed by an adult, would constitute a misdemeanor or felony.	☑	☑	☑
Pennsylvania 18 Pa. Cons. Stat. § 11.103 18 Pa. Cons. Stat. § 6312	☑			☑			"Crime." An act which was committed: (1) In this Commonwealth by a person, including a juvenile, without regard to legal exemption or defense which would constitute a crime under the following: (ii) 18 Pa.C.S. (relating to crimes and offenses). (iii) The laws of the United States.	☑	☑	☑
Rhode Island R.I. Gen. Laws § 12-28-3 R.I. Gen. Laws § 11-9-1.3	☑			☑			No definition, just "crime."	☑	☑	☑

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
South Carolina S.C. Code Ann. § 16-3-1510 S.C. Code Ann. § 16-3-820 S.C. Code Ann. § 16-15-395 S.C. Code Ann. § 16-15-405 S.C. Code Ann. § 16-15-410			☑			☑	"Criminal offense" means an offense against the person of an individual when physical or psychological harm occurs, or the property of an individual when the value of the property stolen or destroyed, or the cost of the damage to the property is in excess of one thousand dollars. This includes both common law and statutory offenses, the offenses contained in Sections 16-25-20, 16-25-30, 16-25-50, 56-5-1210, 56-5-2910, 56-5-2920, 56-5-2930, 56-5-2945, and the common law offense of attempt, punishable pursuant to Section 16-1-80. However, "criminal offense" specifically excludes the drawing or uttering of a fraudulent check or an offense contained in Title 56 that does not involve personal injury or death.	☑	☑	☑

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
South Dakota S.D. Codified Laws § 23A-28C-4		☑[26]			☑[27]		A crime of violence as defined by subdivision 22-1-2(9), simple assault between family or household members as defined in subdivision 25-10-1(2), stalking as defined in chapter 22-19A, a violation of chapter 22-22 [sex offenses], or a driving under the influence vehicle accident, under the laws of South Dakota or the laws of the United States. "Crime of violence" includes any of the following crimes or an attempt to commit, or a conspiracy to commit, or a solicitation to commit any of the following crimes: murder, manslaughter, rape, aggravated assault, riot, robbery, burglary in the first degree, arson, kidnapping, felony sexual contact as defined in § 22-22-7, felony child abuse as defined in § 26-10-1, or any other felony in the commission of which the perpetrator used force, or was armed with a dangerous weapon, or used any explosive or destructive device.	*		

[26] Includes DUI offenses.
[27] Includes DUI offenses.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Tennessee Tenn. Code Ann. § 40-38-302 Tenn. Code Ann. § 39-17-1003 Tenn. Code Ann. § 39-17-1004 Tenn. Code Ann. § 39-17-1005	☑					☑	As used in this part, unless the context otherwise requires: (1) "Crime" means: (A) Any offense the punishment for which is a Class A, B, C, D or E felony; (B) First degree murder; or (C) Assault under § 39-13-101(a)(1).	☑	☑	☑
Texas Tex. Code Crim. Proc. Ann. art. 56.01		☑			☑		Offense of sexual assault, kidnapping, aggravated robbery, or injury to a child, elderly individual, or disabled individual or who has suffered personal injury or death as a result of the criminal conduct of another.	*		
Utah Utah Code Ann. § 77-37-5	☑					☑	The provisions of this chapter shall apply to: (1) any felony filed in the courts of the state; (2) to any class A and class B misdemeanor filed in the courts of the state; and (3) to cases in the juvenile court as provided in Section 78A-6-114.	☑	☑	☑
Vermont Vt. Stat. Ann. tit. 13, § 5301			☑			☑	See § 5301 (7)(A)-(EE).	*		

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Virginia Va. Code Ann. § 19.2-11.01 Va. Code Ann. § 198.2-374.1 Va. Code Ann. § 198.2-374.1:1	☑					☑	Commission of a felony or of assault and battery in violation of § 18.2-57 or § 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted sexual battery in violation of § 18.2-67.5, maiming or driving while intoxicated in violation of § 18.2-51.4 or § 18.2-266.	☑	☑	☑
Washington Wash. Rev. Code § 7.69.020 Wash. Rev. Code § 9.68A.050 Wash. Rev. Code § 9.68A.060 Wash. Rev. Code § 9.68A.070	☑			☑			"Crime" means an act punishable as a felony, gross misdemeanor, or misdemeanor under the laws of this state or equivalent federal or local law.	☑	☑	☑
West Virginia W. Va. Code § 61-11A-2 W. Va. Code § 61-8C-3 W. Va. Code § 61-8D-6	☑				☑[28]		A felony, or, where a death occurs during the commission of a felony or a misdemeanor.[29]	☑	☑	☑

[28] Includes only some violent misdemeanors (when a death occurs during commission).
[29] This definition comes from the right to testify section of the victims' rights act; West Virginia does not have an all compassing definition of crime, but generally focuses on felonies and violent misdemeanors.

	Any Felony	Violent Felonies[15]	Listed Felonies	Any Misdemeanors	Violent Misdemeanor[16]	Listed Misdemeanors	Notes	CP Production	CP Distribution	CP Possession
Wisconsin Wis. Stat. § 950.02 Wis. Stat. § 948.05 Wis. Stat. § 948.12	☑			☑			"Crime" means an act committed in this state which, if committed by a competent adult, would constitute a crime, as defined in s. 939.12. 939.12 A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both.	☑	☑	☑
Wyoming Wyo. Stat. Ann. § 1-40-202 Wyo. Stat. Ann. § 6-4-303	☑			☑			"Criminal act" means conduct which would constitute a crime as defined by the laws of this state.	☑	☑	☑

Current through 2013.

Peggy Klein[1]
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THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN: ANALYTICAL AND LEGAL RESOURCES AVAILABLE TO ASSIST CHILD PORNOGRAPHY VICTIMS

Introduction

The National Center for Missing and Exploited Children® (NCMEC) was established in 1984 as a private, non-profit 26 U.S.C. 501(c)(3) organization and has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children."[2] NCMEC provides services to families, private industry, law enforcement, victims, and the general public to assist in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC receives federal, corporate, and private funds as well as in-kind donations that enable it to perform 22 functions, several of which relate to assisting victims of child pornography.[3] NCMEC works with federal, state, local, and international law enforcement agencies, state missing children clearinghouses, other non-profits, attorneys and private corporations to further its programs of work.

NCMEC serves as a central repository in the United States for information relating to child pornography reports. NCMEC's functions include operating specific programs to help stop the sexual exploitation of children, including: providing technical assistance and training to law enforcement agencies relating to online child sexual exploitation cases; working with law enforcement, state educational agencies, child welfare agencies, attorneys and private sector industry leaders to reduce the proliferation of child pornography; operating a child victim identification program to assist in the identification of victims of child pornography; and operating the CyberTipline® reporting mechanism to which the public and electronic service providers (ESPs) can report apparent child sexual exploitation.[4]

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[1] Peggy Klein joined NCMEC in 2006 after several years of prosecutorial experience serving as Assistant Attorney General for the Office of the Illinois Attorney General and Assistant District Attorney for the Milwaukee County District Attorney's Office in which she specialized in child sexual exploitation cases and represented numerous state agencies in federal and state courts. Currently, Peggy serves as Litigation Counsel for NCMEC, responsible for responding to subpoenas and requests to testify and providing case specific technical assistance to prosecutors, law enforcement agencies, industry and civil attorneys. Peggy received a Bachelors of Arts and Juris Doctor from Marquette University.

[2] 42 U.S.C. § 5773(b)(1)(B).

[3] 42 U.S.C. § 5773(b); E. Clay Shaw, Jr. Missing Children's Assistance Reauthorization Act of 2013, Pub. L. No. 113-38, 127 Stat. 527 (2013).

[4] See 42 U.S.C. § 5773 *et seq.*; 18 U.S.C. § 2258A; 18 U.S.C. § 2258C.

The CyberTipline

NCMEC's expertise on the issue of child pornography stems from two of its core programs: the CyberTipline and the Child Victim Identification Program (CVIP). The CyberTipline serves as a national clearinghouse for tips and leads relating to child sexual exploitation. Launched in 1998, the CyberTipline is a mechanism for members of the public and ESPs to report instances of apparent child sexual exploitation, including online child pornography.[5] The reporting categories for the CyberTipline are: child pornography; online enticement of children for sexual acts; prostitution of children; child sexual molestation; child sex tourism; unsolicited obscene material sent to a child; misleading domain names; and misleading words/ digital images.

Since 1998, NCMEC has received more than 2,470,000 CyberTipline reports, of which more than 2,300,000 reports related to images of apparent child pornography.[6] In 2013, NCMEC received more than 505,000 CyberTipline reports, of which more than 489,000 related to child pornography. The number of reports received through the CyberTipline has grown steadily each year, from 223,374 to 326,310 to 415,650 to 505,280 in 2010, 2011, 2012, and 2013 respectively.

Members of the public and ESPs choose the amount and type of information to submit to the CyberTipline. Upon receipt of a report, NCMEC reviews the report and uses publicly available online information to determine a potential location related to the report. NCMEC then makes the report available to law enforcement for independent review and potential investigation. Numerous international law enforcement agencies also have access to CyberTipline reports relating to their country.

Electronic Service Providers are required to report instances of apparent child pornography to the CyberTipline.[7] The criminal statutes cited in the reporting obligation generally prohibit the production and distribution of child pornography, exploitation of minors for purposes of producing child pornography, and misleading domain names.[8] ESPs may also voluntarily provide additional information such as the time/date of the reporting incident; email address/screen name of person being reported; the Internet Protocol (IP) address associated with the reported incident; and all images and videos being reported.[9] ESPs are not required to proactively search their servers for child pornography images; rather their duty to report only arises upon the discovery of such images.

Upon submission of a CyberTipline report, the report is treated as a "preservation" request, requiring the ESPs to preserve the content associated with the report for 90 days.[10] If

[5] 42 U.S.C. § 5773(b)(1)(P).
[6] As of May 27, 2014.
[7] 18 U.S.C. § 2258A.
[8] *Id.*
[9] *Id.*
[10] *Id.*

ESPs preserve images of apparent child pornography that were uploaded to the CyberTipline with their report, the ESPs are then required to implement appropriate safeguards to protect against unauthorized access to the materials. These safeguards include storing images in a secure location, implementing procedures to limit employee access and to minimize the number of employees with access.[11] Providers are also required to permanently destroy images upon request by a law enforcement agency.[12]

If an electronic service provider willfully and knowingly fails to comply with its reporting obligation, it can be fined up to $150,000 for a first offense and $300,000 for any second or subsequent offenses.[13] ESPs and NCMEC are provided immunity from civil and criminal claims in federal or state court.[14] The immunity is limited. If NCMEC or an ESP act with actual malice, reckless disregard to risk of physical injury, or for a purpose other than complying with the reporting obligation, then immunity does not apply.[15]

The obligation of ESPs to report apparent violations of child pornography laws is not new. The requirement has existed since 1998 when Congress amended the Victims of Child Abuse Act of 1990 to create requirements that electronic communications or remote computing service providers report apparent instances of child pornography.[16] To that end, NCMEC works with ESPs in a combined goal and effort to reduce the proliferation of these child sexual abuse images. NCMEC is allowed to share elements of child pornography images with ESPs for purposes of preventing the further transmission of the images.[17] To date, more than 1,067 ESPs have registered with the CyberTipline.

Child Victim Identification Program

NCMEC also operates CVIP, which has a dual mission: (1) to provide information relevant to child pornography investigations; and (2) to assist in the identification of child victims depicted in pornographic images.[18] CVIP analysts review copies of child pornography that law enforcement has taken into custody and submitted to NCMEC to determine which image or video files include child victims previously identified by law enforcement.[19] NCMEC also utilizes its Child Recognition and Identification System (CRIS), a proprietary software program, to determine whether a file under review shows a previously identified child. If it appears a child in an image or video was previously identified by law enforcement, CRIS generates a Child

[11] 18 U.S.C. § 2258A(2)(h)(4); 18 U.S.C. § 2258B(c).
[12] 18 U.S.C. § 2258B(c).
[13] *Ibid.*
[14] 18 U.S.C. § 2258B and 18 U.S.C. § 2258D.
[15] *Id.*
[16] See 42 U.S.C. § 13032 (repealed).
[17] 18 U.S.C. § 2258B.
[18] 42 U.S.C. § 5773(b)(1)(R).
[19] NCMEC knows which children are identified and when their images are being traded and/or viewed by offenders only if we are informed by law enforcement. NCMEC has no independent means to make an assessment of how widely a child pornography series is seen or traded.

Identification Report that includes information on the series[20] and contact information for the law enforcement agency that originally identified the child.

To date, CVIP analysts have conducted over 42,000 requests for victim identification, consisting of more than 112,000,000 image and video files. CRIS now contains information on over 5,600 child pornography victims who have been identified by law enforcement.[21]

Based upon information reported to NCMEC, 92% of the child pornography series identified by law enforcement were produced in the United States, and 8% were produced outside the United States. Of the identified series, approximately 83% are not traded and 17% are actively traded.[22] Of the actively traded series, 60% are female; 40% are male; 9% depict an infant or toddler; 66% depict pre-pubescent children; and 25% depict pubescent children.

The files in the actively traded series portray several types of sexually exploitative activity, including oral copulation (45%), anal and/or vaginal penetration (52%), manual stimulation (60%), bondage and/or sado-masochism (11%), urination and/or defecation (11%), and bestiality (2%).[23]

The relationship of the abuser to the child victim in the actively traded series demonstrates that the majority of the abuse is committed by an individual known to the child victim, including family friend/neighbor (33%); parent/guardian (23%); other relative (11%); baby sitter/coach (8%); self-production (6%); online enticement (6%); human trafficker or someone unknown to child (5%); and parent/guardian's partner (3%).[24]

In 2013 CVIP analysts conducted in excess of 5,014 requests for victim identification comprising more than 23,800,000 images and videos. The number of images and videos reviewed by NCMEC has risen steadily each year, from 13,673,167 to 17,306,044 to 19,052,069 to 23,881,197 in 2010, 2011, 2012, and 2013 respectively, illustrating the growing task of monitoring the distribution of child pornography.

Child Pornography Victim Assistance, known as CVPA, is the U.S. Department of Justice's program responsible for notification to identified victims. Newly identified series are entered at NCMEC. NCMEC notifies the Office of Victim of Assistance for the Federal Bureau of Investigation of newly identified victims and when an existing identified victim is seen in a CRIS review.

Office of Legal Counsel

[20] Offenders often name a collection or "series" of child pornography images and/or videos taken of a single or multiple child victims over a period of time. A series typically includes pornographic and non-pornographic images of the child victim(s).
[21] As of May 27, 2014.
[22] NCMEC considers an actively traded series as one that has been seen in 5 or more CyberTipline reports or requests for victim identification.
[23] Data reflects actively traded, identified series as classified by NCMEC as of January 2014. The percentages do not sum to 100 because some series contain images depicting content in multiple categories.
[24] Data based upon information submitted to NCMEC by law enforcement as of December 31, 2013. The data represent the known relationships from 522 actively distributed series and 930 identified victims.

Cases involving child sexual abuse images often raise difficult and complex issues. NCMEC's Office of Legal Counsel (OLC) provides valuable resources for civil attorneys representing victims of child pornography, including case specific legal, educational, technical and related research and analysis, as well as affidavits, and other trial related materials.

OLC can assist attorneys representing victims of child pornography and their families in collecting and producing information contained in NCMEC databases concerning specific individuals, child victims, child pornography series, internet profiles and companies. OLC can provide a general description of a child pornography series, as well as affidavits containing information concerning Technical Assistance reports generated by NCMEC's Exploited Children Division. The affidavit can include the number of image files submitted by law enforcement to NCMEC associated with a child pornography series, the number of law enforcement victim identification requests and the submitting agency's contact information, and a listing of the international law enforcement agencies who have reported to NCMEC that they have seen a particular series in their investigation. A sample affidavit is attached.

NCMEC also submits amicus briefs on issues that NCMEC is specially situated to address given its mission and Congressional designation. NCMEC recently filed amicus briefs in four U.S. Supreme Court cases: *Lozano v. Alvarez*,[25] (Hague Convention's one-year "deadline" cannot be tolled or extended, even in cases where the child has been concealed by an abductor or the child could not otherwise be located until more than a year after the abduction); *Chafin v. Chafin*,[26] (court order under Hague Convention to return abducted child to foreign country of their habitual residence does not render appeal of that order moot), *Amy, the Victim in the "Misty" Child Pornography Series v. Monzel*,[27] (brief supporting Petition for Writ of Cert concerning restitution for child pornography victims); and *Paroline v. United States*,[28] (offender possessing child pornography must pay restitution to identified victim in an amount more than trivial, but defendant is not responsible for total harm suffered).

Family Advocacy Division

Child pornography is not a victimless crime. The crime of child pornography causes lifelong psychological, financial, and social harms to its victims often extending far beyond the harm inflicted during its creation. NCMEC employs master-level trained mental health and child welfare professionals to proactively help families, social service agencies and mental health agencies by providing a support network for child victims and their families. NCMEC's Family Advocacy Division can provide immediate assistance and referrals to appropriate agencies and mental health professionals.

Team HOPE (Help Offering Parents Empowerment) is a central part of our Family Advocacy Division. Team HOPE volunteers are ordinary people who have experienced the trauma of having a missing or sexually exploited child. Team HOPE provides peer and emotional support to victims and their families.

[25] 2014 U.S. LEXIS 1786
[26] 133 S. Ct. 1017 (2013)
[27] Case No. 11-85
[28] 2014 U.S. LEXIS 2936

Being involved in cases concerning child sexual abuse images can create secondary trauma on the professionals representing and assisting the victims of this crime. NCMEC developed the Safeguard Program to address the traumatic effects of viewing abuse images. The Safeguard Program is designed to provide individuals exposed to these images coping strategies through the use of peer support and psycho educational training.

Growing Problem of Child Pornography

NCMEC's analysis indicates that the number of images being collected and traded by offenders worldwide continues to expand exponentially, and these images include graphic and violent abuse and feature young children, including infants. Despite criminal and civil efforts to stem its tide, child pornography remains a pervasive, and indeed growing, problem. The United States Sentencing Commission and the Department of Justice confirm that the quantity and severity of child pornography on the Internet has increased dramatically. Child pornography is now a crime of international distribution.[29] Images are transmitted to offenders around the world via the Internet; once distributed in this manner, it is impossible to eradicate all copies.[30]

In recent years, the demand for child pornography files has found increasing outlets in technological advances, including the move to digital recording devices, more storage capacity, and faster Internet speeds.[31] The ready availability of digital cameras (with no need for an outside developer), recording devices, and smart phones has facilitated the creation of new child pornography, while increased storage capacity and faster Internet speeds have permitted offenders to view and share larger numbers of photos and videos.[32] In particular, the growing popularity of "peer-to-peer" file sharing, which permits direct, anonymous file-sharing between two or more users without cost to either user, has made distribution a common aspect of child pornography offenses.[33] It is estimated that 57% of global Internet traffic in 2011 was peer-to-peer traffic.[34]

Collectively, these technological changes have facilitated offenders' ability to create, possess, and distribute ever-larger volumes of child pornography. The U.S. Sentencing Commission has noted an "exponential" increase in the volume and ready accessibility of child pornography.[35] Alarmingly, this increase includes graphic images involving very young victims, a genre of child pornography that previously was not known to be widely circulated.[36] There also has been an increase in the distribution of images depicting violent, sadistic acts. U.S. Sentencing Commission data between 2002 and 2008 show a 65% increase during that period for sentencing enhancements due to sadistic, masochistic, or violent images.[37]

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[29] Sentencing Commission Report at vii.
[30] *Ibid.*
[31] Sentencing Commission Report at 5.
[32] *Id.* at 5, 42.
[33] *Id.* at 5.
[34] *Id.* at 51.
[35] Sentencing Commission Report at 6.
[36] *Ibid.*
[37] DOJ Report at 22.

Reflecting this trend, federal prosecutions for child pornography offenses have also increased steadily in recent years, and U.S. attorneys prosecuted a total of 8,352 such cases between 2005 and 2009.[38] The number of child pornography videos and images submitted to NCMEC in connection with the process of identifying child victims concomitantly increased by 432% during this same period.[39] Viewing child pornography also directly harms additional victims by "driv[ing] a market for the production of new content and thus encourag[ing] production and direct exploitation and abuse."[40] High demand for child pornography leads individuals to sexually abuse children and "commission" the abuse for profit or status.[41]

There is evidence that offenders produce new images and videos in order to gain access.[42] In one investigation, the Federal Bureau of Investigation interviewed a man who admitted to molesting his daughter and videotaping the sometimes violent assaults. He told agents that he did this because he needed "fresh" images for other people on the Internet before they would trade their own newest images with him. His daughter was nine at the time and said her father began abusing her when she was five.[43] One examination of three such communities found that there was a definitive hierarchy with "producers, posters of new materials, and prolific re-posters at the top of the pyramid."[44] Thus, child pornography files are used as the coin in trade to rise in status within these communities, a process that often involves harm to additional child victims.

Even as it offers a community for offenders, the Internet also offers perceived anonymity. The Internet permits distribution and communication across geographic boundaries, further expanding the market for child pornography as well as complicating law enforcement action against offenders.[45] Child pornography offenders span all professional, educational, and income levels. A 2000 study of law enforcement data funded by the Department of Justice showed that, while the majority of all individuals in the study who were arrested for possession of child pornography were white males over the age of twenty five, their income and educational levels varied greatly.[46] A little over half of the offenders were single, divorced, or widowed (62%), while the remainder were married or living with a partner (38%). They were distributed fairly evenly among urban (22%), suburban/large town (41%), and small town/rural (33%) settings.[47] Forty percent of arrested possessors were "dual offenders" who both sexually victimized children and possessed child pornography, with both crimes discovered in the same investigation; an additional 15% were dual offenders who attempted to sexually victimize children by soliciting undercover investigators who posed online as minors.[48]

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[38] DOJ Report at 11.
[39] *Ibid.*
[40] Michael C. Seto, *Internet Sex Offenders* 56 (2013).
[41] DOJ Report at 17.
[42] Sentencing Commission Report at 96.
[43] DOJ Report at 18.
[44] Sentencing Commission Report at 96.
[45] Sentencing Commission Report at 3.
[46] See Janis Wolak et al., *Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study* 2-3 (2005).
[47] *Ibid.*
[48] *Id.* at viii.

Child Pornography Offenders Cause Severe Harm to Victims

Victims of child pornography incur severe and lasting harm from the repeated viewing of their abuse by others for sexual gratification. Studies indicate that child victims are at a higher risk for depression, guilt, poor self-esteem, feelings of inferiority, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorders than other child sexual assault victims.[49] Victims also frequently experience feelings of guilt and shame.[50] The feelings of guilt and shame can be so powerful that some victims deny the abuse even in the presence of photographic evidence.[51]

The symptoms of distress exhibited by child victims of sexual abuse continue from the actual sexual exploitation, through the time of disclosure, and into the post-disclosure phase. This psychological harm frequently extends into adulthood and impacts victims' ability to form healthy relationships with others.[52] In fact, one study of 100 victims interviewed about the effects of their abuse reported that "initial feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness."[53]

Child pornography victims are particularly injured by their inability to remove or control the images and videos of their sexual abuse. Studies have demonstrated that child victims experience intense feelings of powerlessness from knowing that there is nothing they can do to prevent others from viewing their pornographic images.[54] This harm is exacerbated by the fact that the Internet allows for wide circulation of abusive images and videos worldwide and precludes their permanent eradication. As Congress has recognized, "technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography,"[55] which in turn allows child pornography to be distributed to an ever growing audience of offenders.

A significant part of the healing process for children traumatized by sexual abuse is the ability to control when, how, and to whom to disclose their abusive experiences.[56] Children victimized through the distribution and possession of child pornography images are forever deprived of that capability.[57] The repeated uncontrolled distribution and possession of child pornography images online re-victimizes children and exposes them to further trauma and the attendant physical and mental repercussions.[58]

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[49] Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in Viewing Child Pornography on the Internet* 71 (Ethel Quayle & Max Taylor eds. 2005).
[50] Sentencing Commission Report 111.
[51] *Ibid.*
[52] Sentencing Commission Report 113-114.
[53] Richard Wortley & Stephen Smallbone, U.S. Dep't of Justice, Community Oriented Policy Services No. 41, *Child Pornography on the Internet* 15 (2012).
[54] See generally National Society for the Prevention of Cruelty to Children, *Images of Abuse: A Review of the Evidence on Child Pornography* (2006).
[55] Pub. L. No. 109-248, § 501.
[56] See generally Ethel Quayle, et al., *Child Pornography and Sexual Exploitation of Children Online* (2008).
[57] *Id*. at 50-51.
[58] *Ibid*.

Child victims suffer a perpetual invasion of their privacy because it is impossible to ensure the removal of images and videos of the victim's abuse from an unknown offender's personal collection or from continued distribution on the Internet.[59] Those who possess child pornography files add to the ongoing harm to child victims.[60] Indeed, each notification to a child victim that a new offender has been arrested for possessing images of his or her abuse can further exacerbate a victim's psychological injuries.[61] The long-lasting and profound psychological harm suffered by child pornography victims demonstrates the need for civil and criminal remedies to combat and address this growing and devastating crime.

Conclusion

The National Center for Missing and Exploited Children believes every child deserves a safe childhood. Since 1984, our mission has been to keep children safer from abduction and sexual exploitation. In all of our programs of work, we collaborate with families, corporations, professionals, attorneys, law enforcement and communities to provide resources and information to help prevent the future victimization of children. Child pornography cases can be overwhelming for a legal practitioner. NCMEC's resources are available to assist attorneys representing victims of sexual abuse images.

[59] DOJ Study at 27.
[60] *Ibid*.
[61] See Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Laws*, 45 Ga. L. Rev. 1167, 1193–1194 (2011).

SAMPLE AFFIDAVIT

AFFIDAVIT OF [Insert name of affiant]

COMMONWEALTH OF VIRGINIA)

) SS

CITY OF ALEXANDRIA)

NOW COMES THE AFFIANT, [insert name of affiant], having been duly sworn to law, who deposes and states the following:

1. I am currently employed as a [insert job title] in the Exploited Children Division ("ECD") at The National Center for Missing and Exploited Children ("NCMEC") and have been employed by NCMEC since [insert date]. I am responsible for [insert job description].

2. NCMEC is a private, nonprofit corporation, incorporated under the laws of the District of Columbia. NCMEC is not an agency or instrumentality of the United States government, and neither NCMEC nor I are employees of the United States government.

Child Victim Identification Program

3. The Child Victim Identification Program ("CVIP") primarily helps to verify whether or not child pornography images appear to depict children who have been identified by law enforcement agencies as actual (rather than virtual or computer-generated) children.

4. NCMEC automatically generates and maintains a report detailing ECD's analysis in the regular course of business. Reports generated from reviews of images seized by law enforcement are referred to as Technical Assistance (TA) reports.

5. On [insert date], [insert name of attorney] submitted a request to NCMEC indicating that he represents an individual named [insert name or initials of victim] and requesting that NCMEC conduct a search of ECD records relating to [insert name or initials of victim] for the following jurisdictions: [insert names of jurisdictions].

6. Based upon my training and experience with NCMEC, I am familiar with a series of apparent child pornography images depicting a [describe number and gender of victim], referred to as [insert name of series]. Upon information and belief, I understand that the child victim depicted in the [insert name] series is [insert name or initials of victim].

7. The [insert name] series contains [provide general description of images depicted in series].

8. On [insert date], an ECD analyst conducted a search of the Technical Assistance reports relating to the [insert name] series for [list jurisdictions] that yielded the below-referenced results:

Information Relevant to [insert name of jurisdiction; e.g., Texas]:

a. ECD analysts' searched the Technical Assistance reports and located [insert number] of reports indicating that the [insert name] series was apparently identified on the media submitted by the requesting law enforcement agency. See Appendix A.

Information Relevant to [insert name of jurisdiction; e.g., Missouri]:

a. ECD analysts' searched the Technical Assistance reports and located [insert number] of reports indicating that the [insert name] series was apparently identified on the media submitted by the requesting law enforcement agency. See Appendix B.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

The foregoing instrument was subscribed and sworn before me this ____ day of [insert month], 2012 by [insert name of affiant].

/s/_____ _____
Name of Affiant DATE

_____
NOTARIZED DATE

City of Alexandria
Commonwealth of Virginia

The foregoing instrument was subscribed and sworn before me this ____ day of [insert month], 2014 by [name of affiant].

_____
Notary Public

My commission expires: _____

ATTACHMENT A

Past TA Reports for [insert name of jurisdiction; e.g., Texas]

#	**ECD Report Number**	**Date of Submission to NCMEC**	**Law Enforcement Agency Contact Information**	**Law Enforcement Agency Case Number**
1.	CT 000001	01/01/2009	Sgt. Steve Smith Dallas Police Dept. 214-000-0000 Email address	01-000-2009
2.	CT 000002	02/01/2009	Det. Jerry Jones Houston Police Dept. 713-000-0000 Email address	2009-01-01
3.	TA 000003	03/01/2009	Det. Larry Doe Austin Police Dept. 512-000-0000 Email address	09-000-0001
4.	TA 000004	04/10/2009	Lt. John Day Waco Police Dept. 254-000-0000 Email address	09-09-0000

ATTACHMENT B

Past TA Reports for [insert name of jurisdiction; e.g., Missouri]

#	ECD Report Number	Date of Submission to NCMEC	Law Enforcement Agency Contact Information	Law Enforcement Agency Case Number
1.	CT 000005	01/11/2009	Sgt. Sam Smith St. Louis Police Dept. 203-000-0000 Email address	01-000-2019
2.	CT 000006	02/11/2009	Det. Jeff Jones St. Louis Police Dept. 743-000-0000 Email address	2009-01-11
3.	TA 000007	03/11/2009	Det. David Doe Springfield Police Dept. 502-000-0000 Email address	09-000-0011
4.	TA 000009	04/11/2009	Lt. Josh Day Chesterfield Police Dept. 264-000-0000 Email address	09-09-0010

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CHILDREN AND GRIEF – A "HOW TO" GUIDE TO HELP

INTRODUCTION

3.5% of children under the age of 18 in the United States have experienced the death of a parent."[2] If you apply that percentage to the population of children under the age of 18 in the United States (73,941,848) that would mean that 2,587,964 children have experienced the death of a parent.[3] Also, "one out of every four children will experience a traumatic event prior to the age of 16."[4]

Unfortunately, as you can see from these statistics, grief and trauma affects more and more children every year. It is important for people who interact with grieving children (parents, family, friends, first responders, medical professionals, legal professionals, and teachers) to understand what childhood grief and trauma look like and how to help. In this "how to" guide, normal (sometimes also called "uncomplicated") grief for a child will be discussed, along with complicated or traumatic children's grief. Each presents different symptoms and reactions and these will be explored.

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1. Linda M. Turner, M.S. Pastoral Counseling is a surviving spouse of Kurt Turner who was killed by a drunk driver in Easton Maryland on September 15, 1999. She obtained her Master's Degree in Pastoral Counseling from Loyola College in 2006 because of her determination to help others in their grief after her husband's tragic death. She started volunteering for Hospice of the Chesapeake in 2002, then had a two and a half year clinical internship there specializing in grief and trauma for adults and children. Since 2002 she has been involved with Camp Nabi, Hospice of the Chesapeake's children's bereavement camps, as a big buddy, group facilitator for seven years and for the past 6 years has served as the director of the program. Linda also has a private practice where she specializes in grief and trauma for adults and children.
2. Social Security Administration. Intermediate Assumptions of the 2000 Trustees Report. Washington, DC Office of the Chief Actuary of the Social Security Administration; 2000
3. National Association for the Education of Young Children, Critical Facts about Children and Families *available at* www.nacyc.org/policy/advocacy/childrenandfamiliesfacts.
4. National Child Traumatic Stress Network, Understanding Childhood Traumatic Stress available at www.nctsn.org/sites/defualt/files/assests/pdfs/understanding_child_traumatic_stress_brochure_9-29-05.pdf

Once an understanding of a child's normal grief reactions verses traumatic grief reactions are established, the goal of this paper is to provide you with what you can do to help. How to talk to the child about death and what occurred, having discussions around the funeral, how to build rapport with the child to gain their trust, how to reassure a child and ask them questions about the death, suggestions for parents and caretakers, identifying when the child needs further help, and providing additional resources for further help will all be provided.

DEFINITIONS

Grief is defined as the emotional response that one has to a death. Bereavement is the "state or fact of being bereaved or having lost a loved one to death".[5] Mourning is the ritual or customs that one performs around a death to memorialize or honor the person who died.

WHAT IS CHILDHOOD GRIEF?

Grief is the natural, emotional reaction one has to a death. When someone a child loves or is close to dies, they go through grief just like adults do, but it manifests differently for children. Most children experience normal or "uncomplicated" grief after the death of a loved one. In uncomplicated grief a child can exhibit many different responses that affect their emotions, behaviors, cognitive ability and thoughts, and physical reactions.

Emotionally, they can feel anger, depression, guilt, intense feelings, hysteria, loneliness, sadness, relief, anxiety, mood swings, helplessness, feeling unreal, rage, fear, numb, ashamed, insecure, powerless and remorseful.[6] These emotions can arise at any time and change at any time. Frequently children grieve in short periods of time, unlike adults who grieve on a constant continuum. These "grief bursts" come out of nowhere, they are short intense bursts of emotion that come and go at will depending on different "triggers". Triggers are events, memories, thoughts, experiences or activities that create a grief burst to happen. An example of this is when a child is playing soccer and sees another boy get a high five from his father. All of a sudden he feels such overwhelming sadness and anger that he has to run off the field and sit with his family. He's angry and sad that his dad is no longer there to watch his soccer games like the other boys on the team. After a few minutes of sitting on the sidelines, he gets an urge to just get back on the field and play again. This is a good example of a grief burst which was brought on by the trigger of seeing his friend interact with his dad.

5. The National Child Traumatic Stress Network Childhood Traumatic Grief Educational Materials available at www.nctsn.org/nctsn_assets/pdfs/reports/childhood_traumatic_grief.pdf
6. Linda Goldman, *Life & Loss A Guide to Help Grieving Children*, 44 (3rd ed. 2014)

A grieving child can exhibit a variety of behaviors that express their grief, especially children who are too young or just unable to express themselves through emotions and other outlets. Such behaviors include: sleeplessness or too much sleeping, crying, sighing, clinging, verbal attacks, bed-wetting, loss of appetite or over appetite, nightmares, listlessness, over activeness, fighting, lack of self-care and hygiene, impulsivity, unpredictable or odd behaviors, poor grades, dreams of deceased, absentmindedness, can't concentrate/focus, lack of interest in activities, social withdrawal and becoming extremely quiet.[7]

A grieving child struggles cognitively as well. Their thoughts are often filled with constantly thinking about the person who died, persistent thoughts about the way the person died, disbelief of the death and the concept of finality, constant and intrusive thoughts about death, worried about themselves or someone else dying, difficulty making decisions, confusion, memory impairment, inability to concentrate, lower self-esteem and self-confidence, believing the death was their fault and self-destructive thoughts.[8] As a grief counselor, I often advise parents that it is normal for a child's grades to fall after a death and that given time, they should come back to what they were before the death. Also, I make them aware that fear of losing someone else is usually the top emotion that they feel after someone close to them dies and because of that they may become more clingy and anxious. It's helpful if parents can reassure them that they take good care of themselves and they plan to be around for a long time to take care of them. It's also a good idea to have a plan in case something should happen to a caretaker. That's a huge fear of a child and it should be addressed.

A grieving child may exhibit physical reactions as a result of their grief. Such physical reactions include: headaches, body aches, sickness, stomach aches, fatigue, dizziness, shortness of breath, pounding heart, tightness in chest, heavy feeling in body, feeling empty, dry mouth and changes in appetite.[9] Often a grieving child will go to school and present to the nurse's office with stomach aches, headaches and overall body aches.

FOUR PSYCHOLOGICAL TASKS OF GRIEVING

Just like with adults there are four psychological tasks that grieving children must progress through to heal. They are understanding, grieving, commemorating, and going on.[10]

7. Linda Goldman, Life & Loss A Guide to Help Grieving Children, 44 (3rd ed. 2014)
8. The National Child Traumatic Stress Network Childhood Traumatic Grief Educational Materials available at www.nctsn.org/nctsn_assets/pdfs/reports/childhood_traumatic_grief.pdf
9. Linda Goldman, Life & Loss A Guide to Help Grieving Children, 44 (3rd ed. 2014)
10. Id..

The first one, understanding, is basically a child's understanding of the concept of death. The understanding of death is different for a child at various ages throughout his life. "Kids perceive death differently at various childhood stages, and that their perceptions are a predictable influence of grief".[11] Children will continuously have to reformulate their understanding of the death at each development stage throughout their entire life. Because of that, in working with grieving children and their families, we often tell them that their child with grieve throughout their entire life. However, the grief changes and is never the same at each stage. It is never as raw or overwhelming as it is in the beginning, but it will always be there, finding a way to sneak up to the surface. Especially at life events such as religious ceremonies, graduations, school events, dating, learning to drive, going to college, wedding, childbirth and even when the child reaches the parent's age of death. As the child progresses through these life events they have to reprocess the loss and try to understand and make sense of it all over again.

In trying to understand the death, children are often challenged with things like magical thinking and common clichés.[12] Young children are naturally ego centric and they see the world through their magical thinking. This hampers their ability to grieve and understand the true nature of death. As magical thinkers, children often feel responsible for the death. For example, if a child has a fight with his mom before school and says, "I hate you! I wish you were dead" and then the mom dies that day in car accident, automatically that child will feel like *they* were responsible for that death.

Common clichés are the nebulous explanations that well-meaning people offer to children after someone has died. "Daddy's gone to a better place" or "We lost mommy today". These statements are very confusing to a child because they take them literally. Well-meaning people feel that they are protecting a child by not telling them the plain truth. Well-meaning people are actually doing the children a disservice by not telling them the facts. Children need to hear the facts of what happened in an age appropriate manner. In order to start the understanding process, children have to be told that their loved one has died followed by an explanation and discussion of what death means, again in an age appropriate manner. Be prepared for the child to potentially ask a lot of questions about death. The answers should be as direct and clear as possible.

11. Linda Goldman, Life & Loss A Guide to Help Grieving Children, 37 (3rd ed. 2014)
12. Linda Goldman, Life & Loss A Guide to Help Grieving Children, 38 (3rd ed. 2014)

The second psychological task they need to master is grief and it's four phases: shock and disbelief, searching and yearning, disorganization and despair and rebuilding and healing.[13] It can take years for a child to go through all of these phases, or it might take less time. Grief is different for everyone and has no timeline. This is no different for children, but even more so, they grieve over a lifetime as explained earlier.

The initial phase of grieving when a child learns of a death is shock and disbelief. It is similar with adults, but is probably even more so because of a young child's still developing brain. Because the shock and disbelief is too much for a child's brain to absorb (like with adults), a child will often seem like they aren't grieving at all. They may appear to others as they are "doing just fine". They might burst out in a fit of rage one minute then want to go out and play the next. It's very confusing for the people around children who don't understand that they can't easily absorb what has just happened. These things take time, especially with children.

The second phase of grieving is comprised of searching and yearning. Searching can be literally wondering where the person who died is and when they will be coming back or searching for meaning in the death. Yearning is that intense physical need to be with the person. For a child these two phases can happen interchangeably because of the child's life time process of grieving and understanding the loss.

The third phase of grieving is disorganization and despair. A bereaved child's life is turned upside down when someone close to them dies. They may need to move to a new home, or even live with a new family. They can lose everything that was familiar to them. This is very confusing and unfortunately contributes to complicated grief. Usually with a death there is not just one loss but multiple losses for both adults and children. For children, this equates to a loss of security in their world. Unfortunately, if not attended to properly the loss and the disorganization can lead to despair.

The last phase of grieving for a child is at some point they will rebuild and heal. The rebuilding and healing is a process that comes over time with the love, care and support of all those surrounding the child (the family, school, community, friends, churches, legal professionals). Often it's helpful for a child to receive some assistance in helping them work through their grief. Counseling through school, community agencies, grief counselors or their church is helpful for children to understand what they are going through and be able to express their feelings freely without concern of hurting someone else's feelings. There is incredible power in the group dynamics for children. In a group of their peers who are also grieving, children learn they aren't alone.

13. Linda Goldman, Life & Loss A Guide to Help Grieving Children, 43 (3rd ed. 2014)

Children feel very different from everyone else when they are grieving and to be with other children like them is incredibly healing. Children's grief groups and camps can be found in just about every city in the United States. A call to the school or local hospice can usually help someone find a good resource in their area.

The third psychological task is commemorating. It is very important for the family and community surrounding the child helps the child find ways to remember and honor their loved one. A child often finds creating a scrapbook of photos or memory boxes are very helpful and comforting. In grief groups and camps, children often participate in many activities that help them remember and memorialize their loved one. There are various art projects like collage, making stepping stones, and pillow cases to remember their loved one. Ceremonies are very important as well where the child can make a flag or sign a balloon to be flown in honor of their loved one. All of these things are very important for quite a while for the child to still feel that loving connection with their special person who died.

Finally the last psychological task is going on. Being careful not to confuse with "moving on", "going on" means that child can continue to participate in life as a changed and transformed person, not pushing the memory of their loved one out of their life, but instead carrying that memory with them and incorporating it in a healthy way throughout their life. Often it's very harmful when someone suggest to a child that they need to just "move on with their life" or "put the past behind them" or "get over it". All of these clichés are very damaging. The truth is a child never "gets over" the loss of a significant loved one like a parent or sibling. It is just not possible! We hope that that child learns how to incorporate the loss in their life in a positive way and can find meaning in the loss that helps them to go on.

The goals when helping grieving children are to help them eventually accept the reality and permanence of the death, learn how to experience and cope with difficult emotions, adjust to the changes in their life and identity, develop new relationships with people that are supportive in their grief journey, maintaining the continuing bonds with their loved one through ritual and memorializing, making meaning of the death, and normally continue through all their developmental stages of childhood and adolescence. [14]

14. The National Child Traumatic Stress Network Childhood Traumatic Grief Educational Materials available at www.nctsn.org/nctsn_assets/pdfs/reports/childhood_traumatic_grief.pdf

WHAT IS CHILDHOOD TRAUMATIC GRIEF AND HOW IS IT DIFFERENT FROM UNCOMPLICATED GRIEF?

"Childhood traumatic grief may occur following the death of a loved one when the child perceives the experience as traumatic. They death may have been sudden and unexpected (as with a car accident or a sudden medical condition) or it may have been an anticipated death due to illness or other natural causes."[15]

For the majority of you reading this, you probably work with a population of families that have been a victim of a sudden, unanticipated and maybe even violent death. It is important to understand the differences in traumatic grief verses normal, uncomplicated grief which was described earlier. When a child experiences a traumatic loss which can be anything from losing a close loved one like a parent, caregiver or sibling, to being a part of or witnessing a violent death of a loved one, there are tasks that must be mastered before the child can even being to grieve in a way described earlier. The trauma must first be addressed and worked on before anything else can happen. As a lawyer that will be working with such families in this situation, you must first understand what traumatic grief looks like verses normal uncomplicated grief. If you can recognize this in your clients, you can be very helpful in moving the family along in getting the proper help for their child.

"Childhood traumatic grief is distinct from the normal bereavement process and PTSD, but it shares features of both. The distinguishing feature of childhood traumatic grief is that trauma symptoms interfere with the child's ability to navigate the typical bereavement process"[16]

While a grieving child may show both symptoms of traumatic grief and uncomplicated grief there are some major signs that they need to process the trauma first. It is highly recommended that if a child is experiencing any of these traumatic symptoms to find a qualified mental health professional that specializes in children and traumatic grief to help the child work through these more complicated emotions.

Traumatic grief symptoms are different over different age groups, but in general there are three signs on trauma. The first one is intrusive memories about the death which are played out in nightmares, experienced in feelings of guilt or self-blame about how the person died, or recurrent or intrusive thoughts about the horrifying nature of the death.[17]

15. The National Child Traumatic Stress Network Childhood Traumatic Grief Educational Materials available at www.nctsn.org/nctsn_assets/pdfs/reports/childhood_traumatic_grief.pdf
16. Id..
17. Id..

The second is avoidance and numbing which is expressed through withdrawal, avoidance of reminders of the person or how they died or the child acting as if nothing ever happened.[18] The third sign is hyper arousal which includes irritability, anger, trouble sleeping, decreased concentration, poor grades, head and stomach aches, increased vigilance, and safety fears for themselves or others.[19]

"In childhood traumatic grief, the interaction of traumatic and grief symptoms is such that any thoughts or reminders, even happy ones, about the person that died can lead to frightening thoughts, images, or memories of how the person died."[20]

The concept of grief bursts brought on by "triggers" was explained earlier. In traumatic grief, triggers can interject very distressing emotions into a child's everyday life at any moment. The unpredictable nature of it is very scary for a child. Such triggers can be found in trauma reminders such as places, situations, people, sights, smells, and sound that remind them of the death.[21] An example of this would be every time the child drives by the site where his mom was killed, he will be reminded of the horrifying trauma. Another trigger could be reminders of the person who died through special objects, certain people, events, places and thoughts.[22] A good example is a child who is asked to bring in a photo of their family for their "star week" at school and talk about their family. Having to look a photo much less talk about it would be very horrifying for a traumatized child. Another trigger is a reminder of the changes in their life.[23] For example if a child has to move to a new school and has no friends at the school and has to sit alone at lunch. This will stir up many powerful emotions related to the death more than the change to the new school.

All of these triggers mentioned here and earlier force the traumatized child to re-experience the traumatic events surrounding the death over and over again. The terror of this experience continually playing in their life results in hyper- arousal symptoms that are very uncomfortable and frightening to the child. In order to protect themselves from such feelings they turn to avoidance of the death and any reminders and numbing of their feelings just to survive.

18. The National Child Traumatic Stress Network Childhood Traumatic Grief Educational Materials available at www.nctsn.org/nctsn_assets/pdfs/reports/childhood_traumatic_grief.pdf
19. Id..
20. Id..
21. Id..
22. Id..
23. Id..
24. Id..

HOW YOU CAN HELP

IMMEDIATELY AFTER THE DEATH AND THE FUNERAL

As an attorney your encounter with the family and child will probably be after the funeral but not too long after the death. If by chance, you are involved with the family immediately after the loss, you might find yourself in a situation where you have to explain death to a child and what happened to their loved one. If you are asked to help with this, using age appropriate language, tell the child the truth of what happened. "Children must understand why their loved one died. If children don't understand the real reason their loved one has died, they are more likely to come up with explanations that cause guilt or shame. Offer a brief explanation, using simple and direct language. Graphic details aren't necessary and should be avoided especially if the death was violent."[25] A good way to explain it to most children is that when person dies, their body no longer works; their brain doesn't work, they can't hear, or see or touch or smell, they can't talk or walk, they can't breathe and their heart stops beating.

A family may need some advice on whether or not to allow the child to attend the funeral. This is something that should definitely be discussed. Most experts would agree that allowing children to attend the viewing, funeral or memorial service is good for the child to experience because it allows them to understand death that much more. It's good for them to see and understand customs that we practice surrounding death. Now to the contrary, if the family feels that the viewing or funeral services would be too upsetting to the child, ultimately it is their decision what's best for their child. A good rule of thumb is for the family to explain to the child, if they have not previously attended a funeral, to explain what it is and what they should expect to see. Then the child should be able to choose whether or not they want to attend or to what degree they would like to participate. Do they want to come to the funeral home to help with the arrangements or pick out a casket? Do they want to attend an open casket viewing? Would they like to make something to put in their loved ones casket? Do they want to say something at the memorial service or funeral? Do they want to help carry the casket? There's many different options for a child or adolescent to be a part of the funeral plans if they so wish. These options should be discussed and a child should have the power to decide what they want to do or not do. In my work with children that weren't allowed to attend the funeral, they have regrets about it many years later. If the decision was not carefully made, the regret of not attending can last for years because you cannot get the experience back.

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25. David J. Schonfeld, MD & Marcia Quackenbush, MS, MFT, CHES, After a Loved Once Dies – How Children Grieve and How Parents and Other Adults Can Support Them, 5 (2009).

AFTER THE FUNERAL

If your relationship with the family and child starts after the funeral, you can also be helpful in many ways. Just attending this presentation and having a better understanding of children and grief you will already be better equipped to help a grieving child.

When you first meet with the family, spend some time talking with them about their loss and how it's affecting the family. The first step in being able to help a grieving child is to get the child to like and trust you. Remember this is a traumatic time for the child so they will probably be guarded, but with some patience, kindness, understanding and attention, you can start to build a rapport with the child. To build rapport with a child it is helpful to know what the child likes to do and what are some of their favorite things. Talk about those things. Bring them small gifts or simply offer to play a game or color a coloring book with them. It doesn't take much to build rapport; it's simply meeting the child on their level and entering their world.

Once that rapport is established and the child feels that they can trust you, they will be more willing to share and open up to you. If the child seems to be experiencing normal or uncomplicated grief symptoms as described earlier, it would be helpful to say to them:

"I'm sorry this happened to you."

"I'm glad you're safe."

"It's normal to feel (any grief emotion) at a time like this."

"Having frightening feelings doesn't mean you are going crazy. All of this is normal for what you've been through."

"I can see you are very (feeling) right now, how can I help you?"[26]

By just saying these simple things, makes the child feel that you understand and you are on their side. It is not your job to take away their grief. You can't do that. No one can do that. Instead you can be someone who they trust will just listen to them and not overreact at anything they may tell you.

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26. Debra Whiting Alexander, PhD., Children Changed by Trauma A Healing Guide, 7, (1999).

Your advice and influence can help a family help their children since they are the ones closest to them and spend the most time with them. Here are some communication tips to provide to the families:

1. Continuously check in with the children and give them the space to talk if they would like to.
2. Never push a child to talk if they are not ready.
3. Acknowledge that these conversations can be difficult but talking about it is helpful.
4. Help older children and adolescents identity other people outside of the family that they could confide in if needed. These could be counselors at school, teachers, coaches, friends, neighbors, clergy, or a mental health counselor.
5. Allow children to express their grief through different methods other than talking which could be play, art, music, writing, sports and drama.
6. Remember that children watch adults and learn from them. Children will grieve the way they are seeing their parents or adults in the home grieve. Don't be afraid to show your emotions around your child as long as they aren't too extreme. Be a good model for your children when it comes to expressing and sharing your grief.

If the child is experiencing any of the traumatic grief symptoms described earlier you can be most helpful by just being able to identify that they are stuck in the trauma and need additional professional help. The best thing you can do is to talk to the family and encourage them to seek professional help for their child. The family will trust you and your advice, so this should be well received. You can provide them with a list of resources in your area where they can get help. A good place to start is a local hospice. Most provide support groups and counseling to community members and if they do not they will have a place to refer you to. You can also contact the children's school to see if they have a list of resources. There are also resources available in this guide.

CONCLUSION

In conclusion, in your role as the family's attorney you are a guidepost and a lighthouse for a grieving family. They will trust you and look to you for advice as they move through their grief. By learning about children and grief and how to identify traumatic grief, you are better equipped to help the family and ultimately the grieving children. You are now aware of the emotions the children may experience and what stages they may go through in their attempts to integrate this loss into their life. You know how to build rapport with a child and over time gain their trust. You know what questions you can ask the child and how to make them feel understand simply by listening and offering proper responses. You know what to look out for in case the child is exhibiting symptoms of traumatic grief and what needs to be done to get them additional help. Just by having this knowledge you can be of great assistance to a family that is too overwhelmed to even know where to start to get help. Finally, armed with a list of additional resources, you

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JUSTICE DELAYED:

Lessons from the Trial and Tribulations of Litigating Against a Pro Se Defendant

Introduction

For most of us, litigating against a pro se defendant in a significant civil case is an exceedingly rare event. This is because the situation is only likely to arise if you represent a client bringing civil claims against a defendant who has the means to satisfy a judgment, but is unwilling or unable to use his/her resources to fund a defense. This is precisely the situation we faced in an important case spanning the last several years. The case was important not only for our individual client, but for the principles we members of NVCBA believe strongly in pursuing. This paper will briefly review the unusual circumstances that led to this litigation and jury trial against a pro se defendant, and will attempt to stimulate discussion of valuable strategies, challenges and lessons that came out of the case.

In writing this paper, I am constrained by the fact that the case is on appeal and, as a result, important issues remain unresolved. For this reason, the paper reads as more of a narrative of what happened than anything else. The information contained here is all available in the court files, public testimony, media coverage and police investigation materials. None comes from privileged conversations with my client or any other nonpublic source.

The Facts Leading to the Case.

In January 2009, Mary Margaret Farren, her husband John Michael Farren and their two young daughters lived in the wealthy bedroom community of New Canaan, Connecticut. Both

[1] Paul Slager has represented victims of some of Connecticut's most notorious crimes, including: the sexual assault of a mother in front of her children in the Stamford Marriott parking garage; the victim of the Willow Springs Condominium complex home invasion, strangulation and sexual assault; the family of Annie Le, the Yale graduate student who was murdered in a Yale University laboratory; numerous child victims of child sexual abuse by priests, educators and Boy Scout leaders; and, recently, the subject of this paper, the spouse victim of the brutal assault by J. Michael Farren, former Deputy White House Counsel to Pres. George W. Bush. His representation of plaintiffs in catastrophic civil cases has earned him an AV Rating by Martindale Hubbell, as well as numerous other professional recognitions, including being listed in the Best Lawyers of America, one of the "Top 50 Connecticut Super Lawyers" and one of the "Top 100 New England Super Lawyers" in the six state New England region. Paul graduated from the Honors College of the University of Michigan and obtained his law degree from the University of Michigan Law School. A more complete summary of his professional background can be found at **www.sgtlaw.com**.

Mr. and Mrs. Farren were highly accomplished attorneys. Mrs. Farren was a senior associate in the Washington, D.C. offices of Skadden Arps, and a rising star in that firm's energy regulatory practice group. Farren was not working in January 2009, but had previously served as General Counsel of Xerox Corporation in Connecticut, and, more recently, as Deputy White House Counsel in the West Wing of the White House, serving under President George W. Bush.

For a number of reasons, Mrs. Farren filed for divorce from Farren and informed him of her decision. In response, he instructed her to withdraw her divorce petition. Although she agreed to put the divorce on hold if Farren sought counseling, he refused, and insisted she unconditionally withdraw the divorce filing. When she again refused as they were discussing the matter in their master bedroom, Farren attacked, strangling her, punching her, pulling her hair out, slamming her head against the floor and, finally, grabbing a large metal flashlight from beside the bed and repeatedly hitting her head and face with it. The Farrens' young daughters were in their bedrooms just down the hall on the same floor of the house.

Farren next went to the kitchen to retrieve a large kitchen knife. Mrs. Farren floated in and out of consciousness, but somehow managed to escape the room, gather her two daughters and make it to her car in the garage. Half-blind from the blood in her eyes and the force of the brutal assault, she made it to a neighbor's driveway, then stumbled to the front door, rang the bell and collapsed on the foyer floor. The neighbors called the police, and police and emergency rescue personnel arrived, stabilized Mrs. Farren and transported her to the hospital. The police also surrounded the family house, and found Farren, who surrendered. His hands had blood on them, and blood and chunks of hair covered areas of the master bedroom floor where the attack had taken place.

Mrs. Farren suffered a fractured mandible, multiple head lacerations and bruises, facial scarring, traumatic brain injury and post-traumatic stress disorder. She has not returned to work as an attorney due to her injuries and even today remains in hiding for fear of her husband finding and killing her.

Farren was charged with multiple crimes, including attempted murder and first degree assault (with a weapon). Although the charges are serious, he was quickly released on bond and continued to live in the community, albeit with certain restrictions, including ankle bracelet monitoring. Mrs. Farren went into hiding with her two young children, leaving her divorce case and the criminal case pending in Connecticut courts. She also retained my partner, Ernie Teitell, and me to represent her in pursuing civil claims

Civil Proceedings.

There were many complicated considerations related to pursuing the civil case. I will briefly outline some of these factors, along with the way we dealt with them.

Did a Civil Case Make Financial Sense?

Unlike many alleged perpetrators of domestic violence, Farren had millions of dollars of liquid financial assets, so asserting civil claims on behalf of his victim made financial sense.[2] If

[2] Farren was required to publicly file financial affidavits in connection with the pending divorce matter, which revealed the value of his brokerage accounts and retirement benefits.

Ms. Farren proved her civil claims, she could recover a meaningful financial award. As in many states, Connecticut procedure permits pre-judgment remedies under some circumstances, to permit claimants to preserve assets of a defendant when the claimant can show a probability of prevailing on the merits and a need to preserve assets for a potential judgment.

Step one in the civil case was to obtain this remedy, which was successfully accomplished only months after the attack. After hearing, which required detailed testimony and cross-examination of Ms. Farren as well as a bevy of expert witnesses to discuss her injuries and economic losses, a prejudgment remedy was obtained in an amount greater than his liquid assets. This was effectively a lien against Farren's assets, which turned out to be critical, as Farren initially wished to spend significant sums on his criminal defense, civil defense and divorce attorneys, and related expert witnesses, all of which would have depleted Mrs. Farren's potential civil recovery.

The Potential Impact of the Civil Case on the Pending Criminal Case.

As is usually the case in civil cases involving criminal acts, we needed to carefully consider every step in the civil case to ensure no aspect of the civil case impeded the prosecutors' pursuit of the criminal case. Because of the need to ensure that Farren did not deplete is assets while the criminal case was ongoing, the civil case proceeded at the same time as the criminal prosecution (and, in this case, the divorce proceedings as well).

Mrs. Farren's civil claims sounded in intentional torts, assault and battery. As was mentioned above, any judgment would come from Farren himself, not an insurance company. The fact the civil and criminal cases proceeded simultaneously had interesting ramifications. While Farren enjoyed the Fifth Amendment protection from self-incrimination, Connecticut law is clear that the benefits of this privilege are available in criminal cases only, and not civil cases. Thus, although Farren was free to exercise his Constitutional right to avoid self-incrimination in the civil case, his decision to do so could be used against him in a civil case in that the jury would be instructed it could draw an adverse inference in the civil case from his decision to invoke the Fifth Amendment.[3]

A jury in a civil case in Connecticut, therefore, would be instructed it could consider and draw an adverse inference from his decision to invoke the Fifth Amendment as evidence in its consideration of his civil liability to Ms. Farren. We deposed Farren on videotape, and he asserted his Fifth Amendment Privilege in response to virtually every question relating to his civil responsibility for causing Ms. Farren's injuries.[4]

Farren's Legal Representation.

Farren initially hired attorneys to defend the civil claims. These lawyers represented him in the prejudgment remedy hearing, the depositions and by filing numerous defensive pleadings

[3]This principle is stated by the Connecticut Supreme Court in *Olin Corp. v. Castells*, 180 Conn. 49, 53 (Conn. 1980).

[4] We also deposed Farren's sister and brother-in-law, with whom he was living while out on bond, to learn more about the circumstances before and after the attack.

in the case. As the case progressed through discovery and motion practice, however, Farren informed the court he was disenchanted with his attorneys and wished to fire his attorneys and represent himself in the civil case. I objected strenuously to Farren's request, arguing that his representation of himself would be disruptive to moving the process along in a professional and expeditious way. My objection was overruled, but the judge cautioned Farren he would be treated the same as if he was represented by counsel, and would catch no special breaks by representing himself.

Once on his own, Farren filed numerous motions, objections and otherwise actively litigated the case in his own defense. He filed and obtained numerous extensions of the trial date, arguing that he should not be forced to try the civil case before the criminal case (a point we agreed with for some period of time). He also disclosed a neuropsychologist, Stephen Sarfaty, Ph.D. in Connecticut, who, despite never examining Ms. Farren, was willing to offer the opinion that Ms. Farren had not suffered traumatic brain injury and was not suffering the effects of post-concussive syndrome. I deposed Dr. Sarfaty in person while he was on vacation in northern New York, and Farren, due to probation restrictions, attended the deposition by videoconference.

Timing of the Criminal and Civil Cases.

As mentioned above, one of the challenging aspects of this case was the fact that the event at issue took place in January 2009, but we were still litigating the case in 2013. Even more challenging, by the end of 2013, the prosecutors were not ready to try the criminal case, although Farren apparently had little interest in reaching a reasonable plea bargain. In mid-2013, we were faced with the choice of continuing to wait for resolution of the criminal case (with no trial date assigned and no end in sight), or press forward with the civil case in advance of the criminal case. We asked for a firm trial date for the civil case, without regard to the criminal trial date, and were assigned a December 2013 date, which the judge clearly stated would be a final date, notwithstanding the fact the criminal cases was not yet assigned.

The Civil Trial

In December 2013, after having been delayed by six motions to continuance by Farren, jury selection began in the civil case. Farren attended *voir dire* and introduced himself to each prospective juror, including those who were eventually seated on the jury. He also exercised preemptory challenges when he deemed it appropriate. He also did another interesting and alarming thing: numerous times during jury selection, he informed the judge he was receiving psychiatric treatment and inquired of the judge what would happen if he became unavailable for the evidence portion of the trial due to his mental health condition. The judge informed him repeatedly that he would require testimony, not simply letters, from health care providers before he would continue the trial due to Farren's health concerns.

The following facts also raised serious questions about Farren's intentions:

- Farren sought a continuance on the eve of trial, which the Court denied on December 2, 2013;
- During the December 2 hearing, Farren asserted that he believed the Court's denial of his Motion for Change of Venue filed before trial constituted a final

judgment, which would require a mandatory stay pending appeal that would necessarily postpone the civil trial date;

- On December 2, 2013, during a hearing at which the Court scheduled jury selection to begin the next day, Farren tried to delay the start by first saying he needed the time for preparation. Then, he changed his basis for delaying jury selection by stating that he needed to schedule a psychiatric appointment. When the Court indicated that it would accommodate his need for this appointment by either delaying *voir dire* until later in the morning or by ending the day early, Farren then indicated that he just might not appear;
- Farren repeatedly suggested to the Court that he was planning a hospitalization by making several inquiries of the Court before and during *voir dire* about what would happen in the case if he became unable to come to court due to hospitalization (to which the Court responded that it would require live testimony from a health care provider in order to consider further postponing the trial);
- Once again revealing his plans to seek hospitalization in order to postpone or avoid the trial, Farren approached the State's Attorneys' Office, and asked if it would be a violation of his conditions of bond if he became hospitalized at a psychiatric institution;

Nonetheless, jury selection proceeded, and, after a full week, a jury of six, and three alternates was seated. Evidence was to commence the following Monday. On the Sunday afternoon immediately before, Farren sent an email to the judge's clerk, informing her he was to be hospitalized at Hartford Hospital that day, and would be unavailable to attend his trial the following morning. Despite having received this email, we arrived at court at the scheduled time and requested permission to commence the trial without Farren present. The judge declined our request, and instead said he would wait another 24 hours in hopes of receiving additional information from Farren.

Farren initiated no further contact with the Court during the ensuing 24 hours. The next morning we again presented to court, moved for default for failure to appear at trial and requested permission to begin with opening statements and evidence with or without Farren. The judge granted our motion, instructed us to begin with our opening statement, and we proceeded with the case.

The trial itself was an unusual experience, to say the least. We presented witness after witness, including Ms. Farren, through a series of careful direct examinations. We presented nearly twenty witnesses. There was no cross-examination, as Farren never showed up. His continued absence without further explanation was a mystery throughout the trial. Our witnesses included: the husband and wife whose door Ms. Farren knocked on after her beating; Ms. Farren's family members; the family au pair; multiple treating physicians who testified about the details of her injuries; expert witnesses, including a forensic neuropsychologist and economist; and, the managing partner of the Washington, D.C. offices of Skadden Arps.

After two weeks of evidence and closing arguments, the jury returned a verdict of $28.6 million. The jury deliberated an hour and a half.

Post-Trial Proceedings.

As expected, attaining the civil verdict was only a first step, though it was step that took nearly five years to complete. At the time of the verdict, the criminal case still had not been assigned a trial date. Farren filed timely post-trial briefs, arguing that he was involuntarily committed in the psychiatric ward of a Hartford Hospital throughout the trial. As a result, he argued, he had been held against his will and prevented by physicians from attending the trial. He attached copies of materials related to the involuntary commitment application filed by the psychiatrist and other probate court proceedings related to his involuntary admission.

These materials provided little information about what happened, but did indicate he was admitted involuntarily throughout the trial, and sought permission to be freed of the admission after the verdict was returned. We argued that the limited facts provided were not enough to set aside the verdict, and that the circumstances suggested by the materials were dubious, at best. I argued the entire hospital admission was an elaborate ruse to avoid the civil trial.

Rather than deciding on the motions and arguments, the trial judge set an evidentiary hearing and pre-hearing discovery schedule for matters relating to the hearing. We requested authorizations to obtain his hospital records, mental health records and records of the probate court proceedings. Citing his Fifth Amendment Privilege, Farren objected to providing any of the requested materials. The judge upheld the objections, but also warned Farren that his objections could affect the evidence he was allowed to introduce at the hearing.

Under Connecticut law, it was Farren's burden of proving why the jury verdict should be set aside.[5] He was required to disclose any witnesses and exhibits he intended to introduce in advance of the hearing. He listed the same materials he had provided the Court before and indicated he would not be calling any witnesses.

In reliance on this and knowing it was his burden of proof, we informed the Court we would be objecting to his proposed exhibits, and, in reliance on his disclosed lists, we would be offering no witnesses or exhibits.

When the hearing began, Farren offered his exhibits as evidence. We objected to each as hearsay. None were authenticated, no foundation was established for the admission of any and no witnesses was presented who could testify as to foundational requirements or substance contained in the proposed exhibits. Nonetheless, the judge admitted each exhibit as a full exhibit. My argument emphasized that there simply was not enough information in the exhibits offered by Farren to justify setting aside the jury verdict.

Ultimately, the Court agreed, denying the motion to vacate judgment and upholding the verdict. The Court's decision was based on the fact Farren did not introduce sufficient evidence explaining his absence from trial. Farren has since filed an appeal (in the last few weeks), which is pending in a very early, pre-brief stage.

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[5] In Connecticut, the power of a court to set aside a default judgment is governed by General Statutes § 52-212, and Practice Book §17-43. To obtain the relief sought here by Farren, "the movant must make a two part showing that (1) a good defense existed at the time an adverse judgment was rendered; *and* (2) the defense was not at that time raised by reason of mistake, accident or other reasonable cause... " *Triton Assocs. v. Six New Corp.*, 14 Conn. App. 172, 175 (1988) (emphasis added).

A Footnote: the Criminal Case

In June 2014, the criminal case finally was tried and went to verdict. Farren was convicted on all counts (attempted murder, assault with a weapon) and faces a prison sentence, to be handed down after this paper is due. Ironically, Farren waived his right to attend the criminal trial, explaining on the record that he could not stand to be in Court to hear the evidence against him.

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PROTECTING THE RIGHTS OF CRIME VICTIMS

WHY DO WE DO WHAT WE DO?

First - because we care. Everyone who represents crime victims does so because something drew you to this line of work. If you did not truly care, then it would just be frustrating, disappointing and unfulfilling. And, second - because we Can. As attorneys, we have great power to help people who cannot help themselves. Yes, our profession has been the butt of many jokes. Trial attorneys have been under attack for a long time for being exploitative, selfish ambulance chasers. However, in the world of crime victim representation the vast majority of attorneys do what they do for all the right reasons - because they care and because they can, and they will put themselves on the line and will use their knowledge and legal skill to assist those people whose lives have been damaged due to the bad acts of others.

People think of us as civil attorneys. There was a time when I thought of myself that way, mainly because that was just the label that others decided on for me. There came a point in time when I realized that the role I played in the lives of crime victims could not be restricted to that of a civil attorney. Yes, I am a trial attorney that handles civil cases. And I do not represent criminal defendants. But, many of the causes I champion and the cases I take are not and cannot become civil cases. If that is the case, then why take them? Because I Care, and because I Can. And through my work in those pro bono cases, I have met great people, I have helped a lot of great people, and also through pro bono work I have been referred some of my biggest civil cases.

[1] Mr. Edwards practices in the fields of Personal Injury and Wrongful Death, with a focus on representing crime victims and their families. He has represented crime victims in state and federal courts, in nearly every type of case imaginable, including Negligent Security / Premises Liability civil actions arising out of shootings, stabbings and rapes; Sexual Abuse cases; transmission of STDs; and complicated schemes to defraud. Mr. Edwards has passionately upheld the rights of crime victims throughout this legal career. Before entering private practice, Mr. Edwards was lead trial attorney at the Broward County State Attorney's Office, prosecuting many violent criminals. Since leaving the State Attorney's Office, Mr. Edwards has continued to devote his practice and his life to fighting for the rights of crime victims, oftentimes in complicated and hotly contested complex civil jury trials. Mr. Edwards is currently pursuing a precedent setting case in Federal Court, on a pro bono basis, on behalf of young girls who were sexually molested by a well-connected billionaire, wherein he is litigating to uphold the rights of crime victims under Crime Victims' Rights Act.

One message that I want to stress is for more attorneys to get involved representing crime victims, even in situations where there is no civil action. In deciding whether to take a case or a client, do not exclusively look at the chances of financial discovery. Instead, consider other compelling factors such as: the innocence or vulnerability of the victim, the egregiousness of the crime, the degree of harm done, and the extent to which you can help to correct the wrong that was done. While anyone can be a victim of a crime, predators tend to specifically seek out particularly vulnerable people. What makes them vulnerable? Age, disability, lack of familial support, trust, being alone, substance abuse, financially poor, unable to defend himself/herself, and otherwise unequal bargaining power. These are the people that we represent, and who need us to help even the playing field.

The Crime Victims Rights Act, 18 U.S.C. §3771

With that introduction, I am going discuss the Crime Victims Rights Act, 18 U.S.C. §3771. I am going to do so in the context of an actual case that I have been litigating for more than 6 years now. It highlights many of the reasons why crime victims need us to protect them, and why we must continue to take on pro bono projects. It also highlights the pervasiveness of sex abuse and sex trafficking, and that despite how far we have come in the victim's rights movement, there is still a long way to go. This presentation will focus on a single case that will set ground-breaking precedent for crime victims in the future.

Because the case is ongoing, there are many deep details I cannot share. One day the whole story will be told, but for now I am going to share what I can and expect for everyone to take something away from it.

TOPICS OF DISCUSSION

We will discuss: exactly what rights crime victims have in criminal proceedings; what rights they don't have; when those rights are triggered; what forum victims have to enforce those rights; and finally what recourse crime victims might have if their rights are violated. If time permits, I will also address an issue that was decided by the 11th Circuit Court of Appeals during this case, which relates to written communications between Prosecutors and Criminal Defense Counsel.

The citation for the case I will be discussing, which can be found on PACER, is: Jane Does 1 and 2 v. United States of America, 08-80736, United States District Court, Southern District of Florida. Thus far one issue has gone up on appeal to the 11th Circuit, and the citation for that opinion is: Doe No. 1, Doe No. 2 v. United States of America, Roy Black, Martin G. Weinberg, Jeffrey Epstein, 749 F.3d 999 (11th Cir. 2014).

For quick reference, here is the Crime Victims Rights Act (CVRA):

The Crime Victim's Rights Act, 18 U.S.C. 3771

18 U.S.C. §3771. Crime victims' rights

(a) Rights of Crime Victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights Afforded.—

(1) In general.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.—

(A) In general.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.—

(i) In general.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation.—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition.—For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best Efforts To Accord Rights.—

(1) Government.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation,

or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and Limitations.—

(1) Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be

construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.—For the purposes of this chapter, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) Procedures To Promote Compliance.—

(1) Regulations.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

(Added Pub. L. 108–405, title I, §102(a), Oct. 30, 2004, 118 Stat. 2261; amended Pub. L. 109–248, title II, §212, July 27, 2006, 120 Stat. 616; Pub. L. 111–16, §3(12), May 7, 2009, 123 Stat. 1608.)

BRIEF RELEVANT HISTORY

For the written materials, a history and understanding of how the Crime Victims Rights Act came to be will provide some context. The crime victims' rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system. Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of crime victims' legitimate interests. These advocates urged reforms to give more attention to victims' concerns, including protecting the victim's right to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

In 1982 of the Report of the President's Task Force concluded that the criminal justice system "has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the

helpless of its protection .... The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed.'" PRESIDENT'S TASK FORCE **ON** VICTIMS OF CRIME, FINAL REPORT 114 (1982). The Task Force advocated multiple reforms. It recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution." Id.

The Task Force also proposed adding to the Sixth Amendment's protections for defendants' rights a provision allowing crime victims to be present and heard: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." Id. at 114. Crime victims' advocates then began considering how best to pursue a federal constitutional amendment that would protect victims' rights throughout the country.

Recognizing the difficulty of obtaining the consensus required to amend the United States Constitution, advocates decided to go to the states first to pursue state victims' rights amendments. This "states-first" strategy**"** met with considerable success. In Florida, our constitution addresses the rights of crime victims in Article I, **§** 16.

The success in the many states also successfully prodded the federal system to recognize victims' rights. In 1982 Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act (VWPA). The VWPA had three primary goals: (1) to expand and protect the role of victims and witnesses in the criminal justice process; (2) to ensure that the federal government used all available resources to protect and assist victims without infringing defendants' constitutional rights; and (3) to provide a model for state and local legislation. Since passage of the VWPA, Congress has remained active in this area of the law, passing several acts further protecting victims' rights, such as the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, and the Victim Rights Clarification Act of 1997.

These statutes spawned guidelines for how federal prosecutors should treat crime victims. In 2000, Attorney General Reno updated and expanded the guidelines. The revised guidelines heightened the notification requirements, requiring prosecutors and law enforcement agents to notify victims of important criminal justice events and to confer with victims about important decisions in the process. U.S. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 31-37 (2000) [hereinafter 2000 A.G. **GUIDELINES].** The Guidelines were more recently revised. *See* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2005) [hereinafter 2005 A.G. GUIDELINES].

Because of the difficulty accompanying the statutory protection of victims' rights, victims' advocates decided to press for a federal constitutional amendment. They argued that the statutory protections could not sufficiently guarantee victims' rights. The effort was spearheaded by Senators Kyl and Feinstein multiple times between 1997 and 2003. In 2003, there was hope

initially, although it became clear that the necessary super-majority votes to amend the Constitution were not attainable. In April 2004, victims' advocates met with Senators Kyl and Feinstein to decide whether to push yet again for a federal constitutional amendment. Conceding that the amendment had only majority support in Congress rather than the necessary super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. In exchange for backing off from the federal amendment, victims' advocates received near-universal congressional support for a broad and encompassing" statutory victims' bill of rights. This new approach not only established a string of victims' rights but also provided funding for victims' legal services and created remedies for the violation of victims' rights.

In October 2004, Congress passed and the President signed into law the Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2251 (codified at 18 U.S.C. § 3771). Congress was concerned that in the federal system crime victims were "treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough ... and by a court system that simply did not have a place for them." 150 CONG. REC. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein). To remedy this problem, the CVRA gave "crime victims enforceable rights to participate in federal criminal proceedings," which basically just gives victims "the simple right to know what is going on, and to participate in the process ...." Congress Opinion at 14.

Despite the passage of the CVRA, and the minimal additional obligations it may place on prosecutors, it has not solved the problem of the victims being an afterthought in the investigation and prosecution of cases. During the Doe v. United States case, we have been confronted with issues we could not have possibly seen coming, and through today have had to fight for every morsel of information we have, both about the facts of the underlying criminal investigation of serial child molester Jeffrey Epstein and about the circumstances surrounding the denial of the victims' rights. The overwhelming frustration with the lack of cooperation from the United States has been amplified by the evidence of extreme cooperation between the United States prosecutors and the criminal defendant, Jeffrey Epstein. My co-counsel Paul Cassell, and I, were both prosecutors who, when we were prosecutors, believed crime victims came first, and in the end of this case we hope to, at the very least, correct the misalignment of forces from the current posture of Government and Defendants against Victims to Government and Victims against Defendants.

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WHO IS RESPONSIBLE FOR CHILD SEXUAL ABUSE

I. TWO MAIN TYPES OF SEXUAL ABUSE CIVIL ACTIONS

A. Direct Civil Actions Against the Perpetrators:

1. Considerations before filing Against the Perpetrator:

a. What is the stage of the criminal case, if there is one at all? Has the criminal case completed?

b. Is the Defendant collectable? Somewhat different analysis than when deciding whether to sue an uninsured person for negligence, (such as a MVA), because Defendants find money to pay in these types of cases, in order to prevent public exposure, avoid the stigma, or to "make things right".

i. Be Creative with Settlements

c. Will insurance cover this? (e.g. Negligent Transmission of Herpes case – has gone both ways).

d. Does your client benefit most from the filing of a lawsuit or from resolving the case without a lawsuit?

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2. Typical Common Law Counts: Battery, Intentional Infliction of Emotional Distress, False Imprisonment, Intentional or Negligent transmission of STD.

3. Additional Statutory Counts to consider: F.S. §796.09, 18 USC 2255.

B. <u>Civil Actions Against 3rd parties whose Negligence allowed the crime:</u>

1. Negligent Entrustment (Gun/Rape case)

2. Negligent Supervision, Hiring, Training of Employees (when crime committed by employee)

3. Negligent Security (Failure to protect against foreseeable criminal acts) (if sexual assault, prior felony opportunistic crimes – other Sexual Battery, Robbery, Kidnapping - are necessary)

4. Punitive Damages Punitive against a company – F.S. §768.72 (3) (if company allows employee to continue working, then they have "ratified" the conduct)

IF YOU DECIDE THERE IS NO CIVIL CASE, YOU CAN STILL HELP THE VICTIM (See F.S. §914.17, §960.001, 18 USC 3771)

II. <u>AFTER DECIDING TO TAKE THE CASE, WHAT DO YOU DO NOW</u>?

You MUST simultaneously do what is best for your client and the case:

Which means:

A. <u>PRE-SUIT INVESTIGATON/WORK UP:</u>

1. **Work with the Prosecutors and the Police – Make sure you don't do anything that will jeopardize the criminal investigation or prosecution;**

2. Get your client to victim services or trauma services at the State Attorney's Office or through the investigating Police Agency.

   a. It is free, good for the client, and good for the case because it gives additional support for your client and a "neutral" expert

   b. Start gathering all of your clients records (health and medical, school, psychological records) – you want to know everything you can before filing suit.

3. Get your testifying Psychologist (who specializes in sexual abuse!) on board early – ask for an assessment and a treatment evaluation

4. Hire your security expert early

5. Stress the importance of your client regularly seeing the therapist

6. Help your client apply for Crime Victim's Compensation (phone number is: 850-414-3300)

7. If you will be assisting your client in during the criminal investigation, have her sign a retainer explaining that representation

B. FILING SUIT:

1. Pre-Suit Discussion**: Before filing, discuss the pros and cons in depth, and make sure that your client understands:**

   a. that he or she needs to maintain contact with you (get as many methods of contacting your client as possible)

   b. that the discovery process will be invasive and could be tough

2. Names v. Pseudonyms

   a. **Plaintiff** – You probably want to file under a pseudonym. Most courts will allow it.

   b. **Defendant** – You might want to file under a pseudonym, if: he doesn't believe you will file suit, and you think he will settle the case for fair value once the case is filed but before he is publicly exposed. Sometimes you lose leverage for early settlement when you expose him early.

      - My inclination is to expose him early, and detail the bad facts in the complaint for the world to see. You client is empowered, the Court knows about the Defendant, and if the Defendant calls to settle, you can always offer to agree to allow a redacted complaint to replace the originally filed complaint in the court file so that the defendant feels that he gains something by settling.

      - Also, witnesses come out of the woodwork when you expose the name of the Defendant.

C. EXAMPLE MOTION TO PROCEED ANONYMOUSLY:

COMES NOW the Plaintiff, Jane Doe, by and through her undersigned counsel and

moves this Court to enter an Order granting Plaintiff permission to proceed in this action under the pseudonym "Jane Doe" and as grounds would state as follows:

1. As outlined in detail in the Complaint, the Plaintiff, Doe, was sexually abused by the Defendant when she was very young.

2. The abuse caused much embarrassment, humiliation, and psychological trauma for the Plaintiff, Doe.

3. This embarrassment, humiliation and psychological trauma would be greatly exacerbated if her name was revealed publicly as the subject of the alleged abuse.

4. The subject matter of the Complaint clearly contains highly sensitive and intimate information about the Plaintiff, Doe.

5. During the criminal investigation of the Defendant and up and through this point in time, the identity of all of Doe has been protected, as all parties recognize the highly sensitive subject matter of the charges and the need to protect the privacy interest of the Plaintiff, Doe's true identity.

6. The Defendant has been provided in the past with the true identity of the Plaintiff, Doe.

7. In this civil action, the Defendant will be provided with the Plaintiff, Doe's true identity; therefore, he will know the identity of the Plaintiff, Doe., and will not be prejudiced by the non-disclosure of Doe's true identity.

8. There is a great need, in this case, to protect intimate information about the Plaintiff, Doe, and to protect her privacy interest.

D. **MEMORANDUM OF LAW**:

Despite the general presumption against anonymous or pseudonymous pleadings, it is common for this presumption to be overcome in certain types of cases, and courts have discretion to permit such pleading in appropriate circumstances. See *Doe v. Del Rio*, 241 F.R.D. 154, 157 (S.D.N.Y. 2006) (citing *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)). The courts typically grant such requests for pseudonymity in matters of a sensitive and highly personal nature. *Id* at 157 (citing *Heather K. v. City of Mallard*, 887 F.Supp.1249, 1255 (N.D.Iowa 1995)). In deciding whether to permit pseudonymous pleadings, courts must balance "the Plaintiff's right to privacy and security against the public's interest in identification of the litigants and the harm to the defendant stemming from suppression of Plaintiff's name." *Doe v. Smith*, 105 F.Supp.2d 40, 44 (E.D.N.Y. 1999). The ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary presumption of openness in judicial proceedings. *Free Speech v. Reno*, 1999 WL 47310, at 2 (S.D.N.Y. Feb. 1, 1999). In undertaking this balance, courts typically consider such factors as whether the plaintiff would be compelled to disclose intimate information, whether the plaintiff would be compelled to admit her intention to engage in illegal conduct, whether the plaintiff would risk injury if identified, whether the party defending the suit would be prejudiced by the non-disclosure of the plaintiff's name, the age of the plaintiff whose identity is being suppressed, the extent to which the identity of the plaintiff has been kept confidential, as well as the interest the public has in knowing the names of the litigants. 241 FRD at 157.

The Supreme Court has implicitly recognized pseudonyms in abortion cases, with minimal discussion. *Roe v. Wade*, 410 U.S. 113, 120-121, 93 S.Ct. 705 (1973); *See also*, *E.E.O.C. v. ABM Industries, Inc.*, 249 F.R.D. 588 (E.D. Cal. 2008). Likewise, pseudonym filing is typically accepted by the courts in other cases where the nature of the pleading unveils highly sensitive information and detail about the plaintiff, such that the non-disclosure of the party's name is necessary to protect her from harassment, injury, ridicule, or personal embarrassment. *Does v. Advanced Textile Corp.*, 214

F.3d 1058, 1067-1068 (9th Cir. 2000) (citing *United States v. Doe*, 655 F.2d 920; *E.E.O.C.*, 249 F.R.D. at 588).

In this case, it is clear from the allegations in the Complaint that the information is of a highly sensitive nature – i.e., allegations involving sexual abuse of a minor. The Defendant will not be prejudiced in any way by this pseudonym pleading, as he has been provided with her name in the past. While the public does have a right to the openness of judicial proceedings, the right to know the true identity of the Plaintiff, Doe., is greatly outweighed by Doe's privacy interest in this case. Of course, other than the identity of the then minor, all other aspects of the case will still be available to the public.

WHEREFORE, the Plaintiff, Doe, moves this Court to enter an Order granting this Motion, and thus allowing her to proceed in this litigation under the Doe pseudonym.

E. PREPARE YOUR CASE FOR TRIAL FROM THE BEGINNING

1. If possible, start with Verdict Form and Jury Instructions and work backwards; This will focus your discovery and investigation and not allow you to get distracted.

2. Avoid unnecessary delay

F. DISCOVERY IN SEX ABUSE CASES:

1. FROM DEFENDANT:

a. **Written Discovery Direct Case**: Defendant will likely invoke the 5th, with few exceptions such as negligent transmission of STD, or cases where the defendant does not have a realistic chance of being prosecuted. In those cases, you can and should ask "pressure point questions" – those Q's defendant does not want to answer.

- (Example of a Pressure Interrogatory in an STD transmission case: List separately the names, address and phone number of all females, excluding Jane Doe, with whom you have had sexual activity since first time you had sexual intercourse, (by year)up through your current age. Describe the nature of the sexual activity, the date(s) and whether you received or paid money or other consideration to or from the person.)

b. Find the witness with no dog in the fight: ex-employee, ex-girlfriend, (take out newspaper ad, advertise on website, go to unemployment office, look through employee records, search social media)

2. FROM PLAINTIFF:

a. Prepare him/her for what the defense will likely be permitted to do:
    1. Ask about all traumatic experiences, sexual and otherwise
    2. Talk to boyfriends and girlfriends about intimate things
    3. Surveillance
    4. Pressure Interrogatory or deposition question

III. State v. Federal

A. Under the Federal Rules of Evidence, specifically 414, in a child molestation case, other allegations of child molestation are automatically admissible (subject only to a 403 prejudice exclusion if the prejudice substantially outweighs probative value). So typically you are going to get all other allegations in if you are in federal court.

B. Federal Rule of Evidence 412 (Rape Shield), although with some causes of action, Defendants get around this, at least in the Discovery phase.

IV. WHAT MAKES SEX ABUSE CASES DIFFERENT FROM REPRESENTING OTHER CRIME VICTIMS?

LESS EVIDENCE

The type of injury typically leads these vulnerable victims to re-victimization, place themselves in vulnerable positions allowing them to be exploited. They often suffer from a great loss of self-esteem and self worth, long term psychological issues, and often self-medicate and have drug abuse problems.

More so than any other type of case, be ready for a lifetime commitment to each client! Your relationship will not end when the case ends. Oftentimes you become the only person the victim ever trusts.

V. APPLICABLE RULES AND STATUTES:

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or
(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) *Criminal Cases*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil Cases*. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) *Motion*. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
(C) serve the motion on all parties; and
(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Rule 413. Similar Crimes in Sexual-Assault Cases:

(a) **Permitted Uses**. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) **Disclosure to the Defendant**. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) **Effect on Other Rules**. This rule does not limit the admission or consideration of evidence under any other rule.

(d) **Definition of "Sexual Assault**." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;
(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;
(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

USCS Fed Rules Evid R 414

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of Child and Child Molestation. In this rule and Rule 415:

(1) child means a person below the age of 14; and

(2) child molestation means a crime under federal law or under state law (as state is defined in *18 U.S.C. § 513*) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
(B) any conduct prohibited by 18 U.S.C. chapter 110;
(C) contact between any part of the defendant's body--or an object--and a child's genitals or anus;
(D) contact between the defendant's genitals or anus and any part of a child's body;
(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a
child; or
(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

Fla. Stat. § 768.735

§ 768.735. Punitive damages; exceptions; limitation

(1) Sections 768.72(2)-(4), 768.725, and 768.73 do not apply to any civil action based upon child abuse, abuse of the elderly under chapter 415, or abuse of the developmentally disabled. Such actions are governed by applicable statutes and controlling judicial precedent. This section does not apply to claims brought pursuant to *s. 400.023* or *s. 429.29*.

(2) (a) In any civil action based upon child abuse, abuse of the elderly under chapter 415, or abuse of the developmentally disabled, and involving the award of punitive damages, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph

(b). This subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances that were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s.768.74 in determining the reasonableness of an award of punitive damages which is less than three times the amount of compensatory damages.

(d) The jury may not be instructed or informed as to the provisions of this section.

(3) This section is remedial in nature and shall take effect upon becoming a law.

Fla. Stat. § 768.72

§ 768.72. Pleading in civil actions; claim for punitive damages

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) ″Intentional misconduct″ means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) ″Gross negligence″ means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

(4) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

Fla. Stat. § 914.17

§914.17. Appointment of advocate for victims or witnesses who are minors or persons with mental Retardation

(1) A guardian ad litem or other advocate shall be appointed by the court to represent a minor in any criminal proceeding if the minor is a victim of or witness to child abuse or neglect, or if the minor is a victim of a sexual offense or a witness to a sexual offense committed against another minor. The court may appoint a guardian ad litem or other advocate in any other criminal proceeding in which a minor is involved as either a victim or a witness. The guardian ad litem or other advocate shall have full access to all evidence and reports introduced during the proceedings, may interview witnesses, may make recommendations to the court, shall be noticed and have the right to appear on behalf of the minor at all proceedings, and may request additional examinations by medical doctors, psychiatrists, or psychologists. It is the duty of the guardian ad litem or other advocate to perform the following services:

(a) To explain, in language understandable to the minor, all legal proceedings in which the minor shall be involved;

(b) To act, as a friend of the court, to advise the judge, whenever appropriate, of the minor's ability to understand and cooperate with any court proceeding; and

(c) To assist the minor and the minor's family in coping with the emotional effects of the crime and subsequent criminal proceedings in which the minor is involved.

(2) An advocate shall be appointed by the court to represent a person with mental retardation as defined in *s. 393.063* in any criminal proceeding if the person with mental retardation is a victim of or witness to abuse or neglect, or if the person with mental retardation is a victim of a sexual offense or a witness to a sexual offense committed against a minor or person with mental retardation. The court may appoint an advocate in any other criminal proceeding in which a person with mental retardation is involved as either a victim or a witness. The advocate shall have full access to all evidence and reports introduced during the proceedings, may interview witnesses, may make recommendations to the court, shall be noticed and have the right to appear on behalf of the person with mental retardation at all proceedings, and may request additional examinations by medical doctors, psychiatrists, or psychologists. It is the duty of the advocate to perform the following services:

(a) To explain, in language understandable to the person with mental retardation, all legal proceedings in which the person shall be involved;
(b) To act, as a friend of the court, to advise the judge, whenever appropriate, of the person with mental retardation's ability to understand and cooperate with any court proceedings; and
(c) To assist the person with mental retardation and the person's family in coping with the emotional effects of the crime and subsequent criminal proceedings in which the person with mental retardation is involved.

(3) Any person participating in a judicial proceeding as a guardian ad litem or other advocate shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.

Fla. Stat. § 92.56

§ 92.56. Judicial proceedings and court records involving sexual offenses

(1) (a) The confidential and exempt status of criminal intelligence information or criminal investigative information made confidential and exempt pursuant to *s. 119.071(2)(h)* must be maintained in court records pursuant to *s. 119.0714(1)(h)* and in court proceedings, including testimony from witnesses.

(b) If a petition for access to such confidential and exempt records is filed with the trial court having jurisdiction over the alleged offense, the confidential and exempt status of such information shall be maintained by the court if the state or the victim demonstrates that:

1. The identity of the victim is not already known in the community;
2. The victim has not voluntarily called public attention to the offense;
3. The identity of the victim has not otherwise become a reasonable subject of public concern;
4. The disclosure of the victim's identity would be offensive to a reasonable person; and
5. The disclosure of the victim's identity would:

a. Endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim;
b. Endanger the victim because of the likelihood of retaliation, harassment, or intimidation;
c. Cause severe emotional or mental harm to the victim;
d. Make the victim unwilling to testify as a witness; or
e. Be inappropriate for other good cause shown.

(2) A defendant charged with a crime described in chapter 794 or chapter 800, or with child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, may apply to the trial court for an order of disclosure of information in court records held confidential and exempt pursuant to *s. 119.0714(1)(h)* or maintained as confidential and exempt pursuant to court order under this section. Such identifying information concerning the victim may be released to the defendant or his or her attorney in order to prepare the defense. The confidential and exempt status of this information may not be construed to prevent the disclosure of the victim's identity to the defendant; however, the defendant may not disclose the victim's identity to any person other than the defendant's attorney or any other person directly involved in the preparation of the defense. A willful and knowing disclosure of the identity of the victim to any other person by the defendant constitutes contempt.

(3) The state may use a pseudonym instead of the victim's name to designate the victim of a crime described in chapter 794 or chapter 800, or of child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, or any crime involving the production, possession, or promotion of child pornography as described in chapter 847, in all court records and records of court proceedings, both civil and criminal.

(4) The protection of this section may be waived by the victim of the alleged offense in a writing filed with the court, in which the victim consents to the use or release of identifying information during court proceedings and in the records of court proceedings.

(5) This section does not prohibit the publication or broadcast of the substance of trial testimony in a prosecution for an offense described in chapter 794 or chapter 800, or a crime of child abuse, aggravated child abuse, or sexual performance by a child, as described in chapter 827, but the publication or broadcast may not include an identifying photograph, an identifiable voice, or the name or address of the victim, unless the victim has consented in writing to the publication and filed such consent with the court or unless the court has declared such records not confidential and exempt as provided for in subsection (1).

(6) A willful and knowing violation of this section or a willful and knowing failure to obey any court order issued under this section constitutes contempt.

Fla. Stat. § 90.5035
§ 90.5035. Sexual assault counselor-victim privilege

(1) For purposes of this section:
(a) A ″rape crisis center″ is any public or private agency that offers assistance to victims of sexual assault or sexual battery and their families.

(b) A ″sexual assault counselor″ is any employee of a rape crisis center whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault or sexual battery.

(c) A ″trained volunteer″ is a person who volunteers at a rape crisis center, has completed 30 hours of training in assisting victims of sexual violence and related topics provided by the rape crisis center, is supervised by members of the staff of the rape crisis center, and is included on a list of volunteers that is maintained by the rape crisis center.

(d) A ″victim″ is a person who consults a sexual assault counselor or a trained volunteer for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or sexual battery, an alleged sexual assault or sexual battery, or an attempted sexual assault or sexual battery.

(e) A communication between a sexual assault counselor or trained volunteer and a victim is ″confidential ″ if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim.

Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship.

(3) The privilege may be claimed by:

(a) The victim or the victim's attorney on his or her behalf.
(b) A guardian or conservator of the victim.
(c) The personal representative of a deceased victim.
(d) The sexual assault counselor or trained volunteer, but only on behalf of the victim. The authority of a sexual assault counselor or trained volunteer to claim the privilege is presumed in the absence of evidence to the contrary.

Fla. Stat. § 960.001

§ 960.001. Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems

(1) The Department of Legal Affairs, the state attorneys, the Department of Corrections, the Department of Juvenile Justice, the Parole Commission, the State Courts Administrator and circuit court administrators, the Department of Law Enforcement, and every sheriff's department, police department, or other law enforcement agency as defined in *s. 943.10(4)* shall develop and implement guidelines for the use of their respective agencies, which guidelines are consistent with the purposes of this act and *s. 16(b), Art. I of the State Constitution* and are designed to implement the provisions of *s. 16(b), Art. I of the State Constitution* and to achieve the following objectives:

(a) *Information concerning services available to victims of adult and juvenile crime.* -- As provided in *s. 27.0065*, state attorneys and public defenders shall gather information regarding the following services in the geographic boundaries of their respective circuits and shall provide such information to each law enforcement agency with jurisdiction within such geographic boundaries. Law enforcement personnel shall ensure, through distribution of a victim's rights information card or brochure at the crime scene, during the criminal investigation, and in any other appropriate manner, that victims are given, as a matter of course at the earliest possible time, information about:

1. The availability of crime victim compensation, when applicable;

2. Crisis intervention services, supportive or bereavement counseling, social service support referrals, and community-based victim treatment programs;

3. The role of the victim in the criminal or juvenile justice process, including what the victim may expect from the system as well as what the system expects from the victim;

4. The stages in the criminal or juvenile justice process which are of significance to the victim and the manner in which information about such stages can be obtained;

5. The right of a victim, who is not incarcerated, including the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the

victim's parent or guardian if the victim is a minor, and the next of kin of a homicide victim, to be informed, to be present, and to be heard when relevant, at all crucial stages of a criminal or juvenile proceeding, to the extent that this right does not interfere with constitutional rights of the accused, as provided by s. 16(b), Art. I of the State Constitution;

6. In the case of incarcerated victims, the right to be informed and to submit written statements at all crucial stages of the criminal proceedings, parole proceedings, or juvenile proceedings; and

7. The right of a victim to a prompt and timely disposition of the case in order to minimize the period during which the victim must endure the responsibilities and stress involved to the extent that this right does not interfere with the constitutional rights of the accused.

(b) *Information for purposes of notifying victim or appropriate next of kin of victim or other designated contact of victim.* -- In the case of a homicide, pursuant to chapter 782; or a sexual offense, pursuant to chapter 794; or an attempted murder or sexual offense, pursuant to chapter 777; or stalking, pursuant to *s. 784.048*; or domestic violence, pursuant to *s. 25.385*:

1. The arresting law enforcement officer or personnel of an organization that provides assistance to a victim or to the appropriate next of kin of the victim or other designated contact must request that the victim or appropriate next of kin of the victim or other designated contact complete a victim notification card. However, the victim or appropriate next of kin of the victim or other designated contact may choose not to complete the victim notification card.

2. Unless the victim or the appropriate next of kin of the victim or other designated contact waives the option to complete the victim notification card, a copy of the victim notification card must be filed with the incident report or warrant in the sheriff's office of the jurisdiction in which the incident report or warrant originated. The notification card shall, at a minimum, consist of:

a. The name, address, and phone number of the victim; or
b. The name, address, and phone number of the appropriate next of kin of the victim; or
c. The name, address, and phone number of a designated contact other than the victim or appropriate next of kin of the victim; and
d. Any relevant identification or case numbers assigned to the case.

3. The chief administrator, or a person designated by the chief administrator, of a county jail, municipal jail, juvenile detention facility, or residential commitment facility shall make a reasonable attempt to notify the alleged victim or appropriate next of kin of the alleged victim or other designated contact within 4 hours following the release of the defendant on bail or, in the case of a juvenile offender, upon the release from residential detention or commitment. If the chief administrator, or designee, is unable to contact the alleged victim or appropriate next of kin of the alleged victim or other designated contact by telephone, the chief administrator, or designee, must send to the alleged victim or appropriate next of kin of the alleged victim or other designated contact a written notification of the defendant's release.

4. Unless otherwise requested by the victim or the appropriate next of kin of the victim or other designated contact, the information contained on the victim notification card must be sent by the chief administrator, or designee, of the appropriate facility to the subsequent correctional or residential commitment facility following the sentencing and incarceration of the defendant, and unless otherwise requested by the victim or the appropriate next of kin of the victim or other designated contact, he or she must be notified of the release of the defendant from incarceration as provided by law.

5. If the defendant was arrested pursuant to a warrant issued or taken into custody pursuant to s. 985.101 in a jurisdiction other than the jurisdiction in which the defendant is being released, and the alleged victim or appropriate next of kin of the alleged victim or other designated contact does not waive the option for notification of release, the chief correctional officer or chief administrator of the facility releasing the defendant shall make a reasonable attempt to immediately notify the chief correctional officer of the jurisdiction in which the warrant was issued or the juvenile was taken into custody pursuant to s. 985.101, and the chief correctional officer of that jurisdiction shall make a reasonable attempt to notify the alleged victim or appropriate next of kin of the alleged victim or other designated contact, as provided in this paragraph, that the defendant has been or will be released.

(c) *Information concerning protection available to victim or witness.* -- A victim or witness shall be furnished, as a matter of course, with information on steps that are available to law enforcement officers and state attorneys to protect victims and witnesses from intimidation. Victims of domestic violence shall also be given information about the address confidentiality program provided under *s. 741.403*.

(d) *Notification of scheduling changes. -- Each victim or witness who has been scheduled to attend a criminal or juvenile justice proceeding shall be notified as soon as possible by the agency scheduling his or her appearance of any change in scheduling which will affect his or her appearance.*

(e) Advance notification to victim or relative of victim concerning judicial proceedings; right to be present.

-- Any victim, parent, guardian, or lawful representative of a minor who is a victim, or relative of a homicide victim shall receive from the appropriate agency, at the address found in the police report or the victim notification card if such has been provided to the agency, prompt advance notification, unless the agency itself does not have advance notification, of judicial and postjudicial proceedings relating to his or her case, including all proceedings or hearings relating to:

1. The arrest of an accused;

2. The release of the accused pending judicial proceedings or any modification of release conditions; and

3. Proceedings in the prosecution or petition for delinquency of the accused, including the filing of the accusatory instrument, the arraignment, disposition of the accusatory instrument, trial or adjudicatory hearing, sentencing or disposition hearing, appellate review, subsequent modification of sentence, collateral attack of a judgment, and, when a term of imprisonment, detention, or residential commitment is imposed, the release of the defendant or juvenile offender from such imprisonment, detention, or residential commitment by expiration of sentence or parole and any meeting held to consider such release.

A victim, a victim's parent or guardian if the victim is a minor, a lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or a victim's next of kin may not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify, unless, upon motion, the court determines such person's presence to be prejudicial. The appropriate agency with respect to notification under subparagraph 1 is the arresting law enforcement agency, and the appropriate agency with respect to notification under subparagraphs 2 and 3 is the Attorney General or state attorney, unless the notification relates to a hearing concerning parole, in which case the appropriate agency is the Parole Commission. The Department of Corrections, the Department of Juvenile Justice, or the sheriff is the appropriate agency with respect to release by expiration of sentence or any other release program provided by law. Any victim may waive notification at any time, and such waiver shall be noted in the agency's files.

(f) *Information concerning release from incarceration from a county jail, municipal jail, juvenile detention facility, or residential commitment facility.* -- The chief administrator, or a person designated by the chief administrator, of a county jail, municipal jail, juvenile detention facility, or residential commitment facility shall, upon the request of the victim or the appropriate next of kin of a victim or other designated contact of the victim of any of the crimes specified in paragraph (b), make a reasonable attempt to notify the victim or appropriate next of kin of the victim or other designated contact prior to the defendant's or offender's release from incarceration, detention, or residential commitment if the victim notification card has been provided pursuant to paragraph (b). If prior notification is not successful, a reasonable attempt must be made to notify the victim or appropriate next of kin of the victim or other designated contact within 4 hours following the release of the defendant or offender from incarceration, detention, or residential commitment. If the defendant is released following sentencing, disposition, or furlough, the chief administrator or designee shall make a reasonable attempt to notify the victim or the appropriate next of kin of the victim or other designated contact within 4 hours following the release of the defendant. If the chief administrator or designee is unable to contact the victim or appropriate next of kin of the victim or other designated contact by telephone, the chief administrator or designee must send to the victim or appropriate next of kin of the victim or other designated contact a written notification of the defendant's or offender's release.

(g) *Consultation with victim or guardian or family of victim.*

1. In addition to being notified of the provisions of *s. 921.143*, the victim of a felony involving physical or emotional injury or trauma or, in a case in which the victim is a minor child or in a homicide, the guardian or family of the victim shall be consulted by the state attorney in order to obtain the views of the victim or family about the

disposition of any criminal or juvenile case brought as a result of such crime, including the views of the victim or family about:

a. The release of the accused pending judicial proceedings;
b. Plea agreements;
c. Participation in pretrial diversion programs; and
d. Sentencing of the accused.

2. Upon request, the state attorney shall permit the victim, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the victim's next of kin in the case of a homicide to review a copy of the presentence investigation report prior to the sentencing hearing if one was completed. Any confidential information that pertains to medical history, mental health, or substance abuse and any information that pertains to any other victim shall be redacted from the copy of the report. Any person who reviews the report pursuant to this paragraph must maintain the confidentiality of the report and shall not disclose its contents to any person except statements made to the state attorney or the court.

3. When an inmate has been approved for community work release, the Department of Corrections shall, upon request and as provided in s. 944.605, notify the victim, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the victim's next of kin if the victim is a homicide victim.

(h) *Return of property to victim.* -- Law enforcement agencies and the state attorney shall promptly return a victim's property held for evidentiary purposes unless there is a compelling law enforcement reason for retaining it. The trial or juvenile court exercising jurisdiction over the criminal or juvenile proceeding may enter appropriate orders to implement the provisions of this subsection, including allowing photographs of the victim's property to be used as evidence at the criminal trial or the juvenile proceeding in place of the victim's property when no substantial evidentiary issue related thereto is in dispute.

(i) Notification to employer and explanation to creditors of victim or witness. -- A victim or witness who so requests shall be assisted by law enforcement agencies and the state attorney in informing his or her employer that the need for victim and witness cooperation in the prosecution of the case may necessitate the absence of that victim or witness from work. A victim or witness who, as a direct result of a crime or of his or her cooperation with law enforcement agencies or a state attorney, is subjected to serious financial strain shall be assisted by such agencies and state attorney in explaining to the creditors of such victim or witness the reason for such serious financial strain.

(j) Notification of right to request restitution. -- Law enforcement agencies and the state attorney shall inform the victim of the victim's right to request and receive restitution pursuant to s. 775.089 or s. 985.437, and of the victim's rights of enforcement under ss. 775.089(6) and 985.0301 in the event an offender does not comply with a restitution order. The state attorney shall seek the assistance of the victim in the documentation of the victim's losses for the purpose of requesting and receiving restitution. In addition, the state attorney shall inform the

victim if and when restitution is ordered. If an order of restitution is converted to a civil lien or civil judgment against the defendant, the clerks shall make available at their office, as well as on their website, information provided by the Secretary of State, the court, or The Florida Bar on enforcing the civil lien or judgment.

(k) Notification of right to submit impact statement. -- The state attorney shall inform the victim of the victim's right to submit an oral or written impact statement pursuant to s. 921.143 and shall assist in the preparation of such statement if necessary.

(l) *Local witness coordination services.* -- The requirements for notification provided for in paragraphs (c), (d), and (i) may be performed by the state attorney or public defender for their own witnesses.

(m) *Victim assistance education and training.* -- Victim assistance education and training shall be offered to persons taking courses at law enforcement training facilities and to state attorneys and assistant state attorneys so that victims may be promptly, properly, and completely assisted.

(n) *General victim assistance.* -- Victims and witnesses shall be provided with such other assistance, such as transportation, parking, separate pretrial waiting areas, and translator services in attending court, as is practicable.

(o) *Victim's rights information card or brochure.* -- A victim of a crime shall be provided with a victim's rights information card or brochure containing essential information concerning the rights of a victim and services available to a victim as required by state law.

(p) *Information concerning escape from a state correctional institution, county jail, juvenile detention facility, or residential commitment facility.* -- In any case where an offender escapes from a state correctional institution, private correctional facility, county jail, juvenile detention facility, or residential commitment facility, the institution of confinement shall immediately notify the state attorney of the jurisdiction where the criminal charge or petition for delinquency arose and the judge who imposed the sentence of incarceration. The state attorney shall thereupon make every effort to notify the victim, material witness, parents or legal guardian of a minor who is a victim or witness, or immediate relatives of a homicide victim of the escapee. The state attorney shall also notify the sheriff of the county where the criminal charge or petition for delinquency arose. The sheriff shall offer assistance upon request. When an escaped offender is subsequently captured or is captured and returned to the institution of confinement, the institution of confinement shall again immediately notify the appropriate state attorney and sentencing judge pursuant to this section.

(q) *Presence of victim advocate during discovery deposition; testimony of victim of a sexual offense.* – At the request of the victim or the victim's parent, guardian, or lawful representative, the victim advocate designated by state attorney's office, sheriff's office, or municipal police department, or one representative from a not-for-profit victim services organization, including, but not limited to, rape crisis centers, domestic violence advocacy groups, and alcohol abuse or substance abuse groups shall be permitted to attend and be present during any deposition of the victim. The victim of a sexual offense shall be informed of the right to have the courtroom

cleared of certain persons as provided in *s. 918.16* when the victim is testifying concerning that offense.

(r) *Implementing crime prevention in order to protect the safety of persons and property, as prescribed in the State Comprehensive Plan.* -- By preventing crimes that create victims or further harm former victims, crime prevention efforts are an essential part of providing effective service for victims and witnesses. Therefore, the agencies identified in this subsection may participate in and expend funds for crime prevention, public awareness, public participation, and educational activities directly relating to, and in furtherance of, existing public safety statutes. Furthermore, funds may not be expended for the purpose of influencing public opinion on public policy issues that have not been resolved by the Legislature or the electorate.

(s) *Attendance of victim at same school as defendant.* -- When the victim of an offense committed by a juvenile is a minor, the Department of Juvenile Justice shall request information to determine if the victim, or any sibling of the victim, attends or is eligible to attend the same school as the offender. However, if the offender is subject to a presentence investigation by the Department of Corrections, the Department of Corrections shall make such request. If the victim or any sibling of the victim attends or is eligible to attend the same school as that of the offender, the appropriate agency shall notify the victim's parent or legal guardian of the right to attend the sentencing or disposition of the offender and request that the offender be required to attend a different school.

(t) Use of a polygraph examination or other truth-telling device with victim. -- No law enforcement officer, prosecuting attorney, or other government official shall ask or require an adult, youth, or child victim of an alleged sexual battery as defined in chapter 794 or other sexual offense to submit to a polygraph examination or other truth-telling device as a condition of proceeding with the investigation of such an offense. The refusal of a victim to submit to such an examination shall not prevent the investigation, charging, or prosecution of the offense.

(u) Presence of victim advocates during forensic medical examination. -- At the request of the victim or the victim's parent, guardian, or lawful representative, a victim advocate from a certified rape crisis center shall be permitted to attend any forensic medical examination.

(2) The secretary of the Department of Juvenile Justice, and sheriff, chief administrator, or any of their respective designees, who acts in good faith in making a reasonable attempt to comply with the provisions of this section with respect to timely victim notification, shall be immune from civil or criminal liability for an inability to timely notify the victim or appropriate next of kin of the victim or other designated contact of such information. A good faith effort shall be evidenced by a log entry noting that an attempt was made to notify the victim within the time period specified by this section.

(3) (a) A copy of the guidelines and an implementation plan adopted by each agency shall be filed with the Governor, and subsequent changes or amendments thereto shall be likewise filed when adopted.

(b) A copy of a budget request prepared pursuant to chapter 216 shall also be filed for the sole purpose of carrying out the activities and services outlined in the guidelines.

(c) The Governor shall advise state agencies of any statutory changes which require an amendment to their guidelines.

(d) The Executive Office of the Governor shall review the guidelines submitted pursuant to this section:

1. To determine whether all affected agencies have developed guidelines which address all appropriate aspects of this section;
2. To encourage consistency in the guidelines and plans in their implementation in each judicial circuit and throughout the state; and
3. To determine when an agency needs to amend or modify its existing guidelines.

(e) The Executive Office of the Governor shall issue an annual report detailing each agency's compliance or noncompliance with its duties as provided under this section. In addition, the Governor may apply to the circuit court of the county where the headquarters of such agency is located for injunctive relief against any agency which has failed to comply with any of the requirements of this section, which has failed to file the guidelines, or which has filed guidelines in violation of this section, to compel compliance with this section.

(4) The state attorney and one or more of the law enforcement agencies within each judicial circuit may develop and file joint agency guidelines, as required by this section, which allocate the statutory duties among the participating agencies. Responsibility for successful execution of the entire guidelines lies with all parties.
(5) Nothing in this section or in the guidelines adopted pursuant to this section shall be construed as creating a cause of action against the state or any of its agencies or political subdivisions.
(6) Victims and witnesses who are not incarcerated shall not be required to attend discovery depositions in any correctional facility.
(7) The victim of a crime, the victim's parent or guardian if the victim is a minor, and the state attorney, with the consent of the victim or the victim's parent or guardian if the victim is a minor, have standing to assert the rights of a crime victim which are provided by law or s. 16(b), Art. I of the State Constitution.

(8) For the purposes of this section, a law enforcement agency or the office of the state attorney may release any information deemed relevant to adequately inform the victim if the offense was committed by a juvenile. Information gained by the victim pursuant to this chapter, including the next of kin of a homicide victim, regarding any case handled in juvenile court, must not be revealed to any outside party, except as is reasonably necessary in pursuit of legal remedies.

(9) As used in this section, the term "chief administrator" □includes the appropriate chief correctional officers of a county jail or municipal jail, and the appropriate chief administrator of a juvenile detention facility or residential commitment facility.

18 USCS § 2255

§ 2255. Civil remedy for personal injuries

(a) In general. Any person who, while a minor, was a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this *title [18 USCS § 2241(c)*, *2242*, *2243*, *2251*, *2251A*, *2252*, *2252A*, *2260*, *2421*, *2422*, or *2423*] and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $ 150,000 in value.

(b) Statute of limitations. Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability[.]

18 USCS § 3771

§ 3771. Crime victims' rights

(a) Rights of crime victims. A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.

(1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.

The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.

(A) In general. In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.

(i) In general. These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).
(ii) Multiple victims. In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation. This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. For purposes of this paragraph, the term ″crime victim″ means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights.

(1) Government. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.

(1) Rights. The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith

within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if--

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and
(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action. Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter [this section], the term crime victim means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.

(1) Regulations. Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. The regulations promulgated under paragraph (1) shall--

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;
(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and
(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

VI. EXAMPLE OF A CRIME VICTIM'S RIGHTS ACT CASE THAT I AM CURRENTLY LITIGATING:

Does v. United States of America, 08-80736 (Southern District of Florida)

VII. HELPFUL RESOURCES ON THE WEB:

Child Sexual Abuse Resources Website:
http://www.vachss.com/help_text/child_sexual_abuse.html

Best Website for Sex Crimes/Child Abuse Laws
www.locatethelaw.org

FDLE Sexual offenders:
http://offender.fdle.state.fl.us/offender/homepage.do

Florida Statutes:
www.leg.state.fl.us

Florida Department of Corrections
http://www.dc.state.fl.us/

National Center for Missing and Exploited Children:
www.missingkids.com

Sexual Abuse Educational Seminar Material and Information:
http://www.abuseandassault.com/Abuse_Seminars

Statute of Limitations:
www.sol-reform.com

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Preventing Child Sexual Abuse in Youth-Serving Organizations

Introduction

Child sexual abuse (CSA) is an insidious crime that can destroy the lives of innocent children and leave their families devastated. The topic of child sexual abuse is, at best, a difficult subject to discuss and at worst, a horrifying one.

Child sexual abuse has been defined as the following:

"Child sexual abuse involves any sexual activity with a child where consent is not or cannot be given. This includes sexual contact that is accomplished by force or threat of force, regardless o the age of the participants, and all sexual contact between an adult and a child, regardless of whether there is deception or the child understands the sexual nature of the activity. Sexual contact between an older and a younger child also can be abusive if there is a significant disparity in age, development, or size, rendering the younger child incapable of giving informed consent. The sexually abusive acts may include sexual penetration, sexual touching, or non- contact sexual acts such as exposure or voyeurism."

Interpreting the Data

Estimating how many children are being or have ever been sexually abused is problematic. Some of the challenges that are faced include: inconsistent state definitions of child sexual abuse, under and non-reporting, a variety of report receiving/data collecting agencies and how the data is reported.

1. Inconsistent State Definitions of Child Sexual Abuse: There is no single definition of

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child sexual abuse used currently. States vary in what age is considered a "child" as well as who can legally be held responsible for child sexual abuse.

2. Under and non-reporting: Many cases of child sexual abuse are not reported right away and some are never reported. Therefore, the actual number of children who are or have ever been sexually abused is currently unknown.

3. Report Receiving Agencies: Depending upon how a state defines child sexual abuse, reports will usually be reported to either local law enforcement or Child Protective Services. However, many instances of sexual abuse never reach these agencies and are dealt with internally by the organizations and/or individuals involved.

4. Data Collecting Agencies: There are a number of agencies that collect data on child sexual abuse. The National Child Abuse and Neglect Data System (NCANDS), the data collecting system of the National Data Archive on Child Abuse and Neglect (NDACAN), gathers information from participating CPS agencies. However, they do not collect data from local law enforcement. This means that current data collecting systems only capture a portion of the total incidents of CSA.

5. How the Data is Reported: Understanding the scope of child sexual abuse means taking into account both prevalence and incidence rates.

The number of child sexual abuse cases will be reported in one of two ways: incidence or prevalence. "Incidence rates are based on how many children were abused in a single year. Prevalence rates are based on a lifetime or a full childhood, such as what percentage of all children were ever abused."

The Scope of the Problem

1. Intra-and Extra-Familial Sexual Abuse: The reality of child sexual abuse is that most offenders are known to their victims, including relatives and family members. It is estimated that approximately 90% of juvenile sexual abuse victims know their perpetrator in some way. However, the first gap in research and statistics of child sexual abuse is the challenge of categorizing offenders of child sexual abuse. Part of this can be attributed to the inherent complexity and nature of human relationships. Individuals can have family members, relatives, biological and non-biological parents/relatives, close friends, friends, acquaintances, friends of the family, trusted known persons, known persons, and strangers. It is no small feat to attempt to classify each case of sexual abuse into one of these categories, and therefore the categories are often condensed for purposes of simplicity. Some studies condense the categories of offenders to "known" versus "stranger", while others attempt to elaborate and separate offenders into categories of relative/family member, acquaintance, and stranger.

The lack of uniformity about how to characterize offenders leads to poor estimates of the perpetrator data for child sexual abuse. Within the data analysis, how to distinguish a trusted coach who is a "friend of the family" from a worker at a local youth organization, who does not share a similar relationship to the family, remains an enigma. Because most child sexual abuse occurs within the family, traditional research may place less importance on the other categories of victim/ offender relationships. This may be why the data for intra-familial child sexual abuse is more thorough than that for extra-familial child sexual abuse.

However, attention has shifted in recent years as a result of numerous child sexual abuse scandals reported by the press. The media has highlighted the need to be aware of individuals who are not immediately related to the child or are acquaintances of the family, but who may be working with the child in another capacity such as a coach, teacher, day care worker, or youth volunteer.

This publication will highlight some youth-serving organizations where the extra- familial relationships can be found. Substantial efforts are being made within these organizations to combat CSA. The organizations discussed include: the Boy Scouts of America (BSA), YMCA, the Amateur Athletic Union (AAU), Big Brothers Big Sisters of America, and the Boys and Girls Club of America.

2. Disclosure of the Abuse: In addition to facing categorization difficulties, data regarding child sexual abuse is also skewed because of delayed disclosure or non-disclosure. Consequently, the exact number of children who are sexually abused annually is difficult to estimate. Yet, according to the Darkness to Light organization, "even if the true prevalence of child abuse is not known, most professionals agree that there will be 500,000 babies in the US this year that will be sexually abused before they turn 18 if steps are not taken to prevent it."

While the concept of non-disclosure poses a problem similar to that of delayed disclosure, the term "disclosure" itself lacks a clear and concise definition among researchers. *Disclosure* in this publication means the victim making sexual abuse public.

One of the main factors in whether children decide to disclose incidences of sexual abuse has primarily to do with who they are reporting it to and how likely those people are to believe what the children are saying. Parents should therefore maintain and create comfortable communication between themselves and their children. Studies have shown that "more than half of all child abuse incidents are never reported because the victims are too afraid or too confused to be able to report their experiences."

As a result of the fear of disclosing, the average age of disclosure of child sexual abuse is around 25 years, and only one third of those sexually abused disclosed it before the age of 18. This is called *delayed disclosure*, and is often linked with repressed memories and other illnesses stemming from the abuse. *Delayed disclosures* are often difficult to substantiate because of the time that has lapsed between the sexual abuse and the report.

3. Limited Prosecution of Offenders: Another challenge to the accuracy of child sexual abuse rates is the limited prosecution of child sexual abuse cases. For example, arrests are made in only 29% of the cases reported to the police, with arrests being made more often in incidents involving older children (32%). Arrests are made in only 19% of cases involving children under the age of 6.14 In many cases where arrests are made, there is no prosecution.

Another possible reason for a case to not be prosecuted is the retraction of the accusation. Due to the pressure and encouragement of some adults, there are situations in which children will take back their accusations. There are a number of possible reasons why parents or guardians would pressure children into retracting their statements. One of the main reasons is that parents are concerned that their child would suffer more if made to go through an investigation and trial. This is often done on "behalf of the child," so as not to put them through additional trauma.

Another reason for there to be no prosecution may be a lack of sufficient evidence. It is for this reason that reporting, interviewing, and investigative protocols are crucially important. They may be the difference between prosecuting the crime or not.

The reported number of child sexual abuse incidents is therefore lower than the actual frequency. This is due to cases being dropped, unsubstantiated, or retracted, even though the crime may have occurred.

Reporting sexual abuse is difficult and complex. There may be a number of reasons why a child withholds this information. A few examples cited by victims are: shame and guilt, fear of backlash, not being "heard" or understood, getting in trouble or the fear of getting in trouble, poor communication with the adults in their lives, fear of repeat victimization, being threatened by the offender, and being in a position where contact with the offender is continuing. As previously mentioned, offenders are usually someone the child knows and may continue to see. They may endure not only the fear of disclosing but the fear of being sexually abused again.

Offender Characteristics

Offenders may have some similar attributes and grooming patterns, however, there is no profile, per se, of a typical abuser. There are no standard characteristics that are predicative of an offender of child sexual abuse. Hearing the word "profile" can turn into prejudice and assumption of guilt on certain persons. While there may be common traits, not everyone that has one of these traits (e.g., not being married) is by any means automatically an abuser.

Grooming

"Grooming" is the process of how offenders make initial contact with the intended victims and the methods they use to develop a relationship with children in an attempt to normalize their behavior. It is a premeditated behavior intended to manipulate potential victims into complying with the sexual abuse. (footnote 23)

Victim Characteristics

Similar to their being no definitive "profile" of an offender, there is also no "profile" of a typical victim of child sexual abuse. However certain characteristics may make some children more vulnerable to abuse or to an offender. Jerry Sandusky targeted young boys in the Second Mile charity organization which was geared towards at-risk children living in disadvantaged circumstances.

One method used to help understand victimization is to gather information directly from the individuals who sexually abuse children regarding how they choose their victims. This perspective is invaluable to future procedures and policies to prevent child sexual abuse. One offender commented, "You can spot the child who is unsure of himself and target him with compliments and positive attention."27 Others placed importance on having a special relationship with the intended victim.

Guidelines

This portion of the publication highlights specific components to the prevention of child sexual abuse within youth-serving organizations including appropriate pre-employment practices, the training of personnel, protocol on the interaction of personnel and youth participants, and the physical design elements of a facility that can act as a possible deterrent to potential abusers. Also illustrated are examples of policies already implemented by organizations that can act as guidelines for how to be proactive against child sexual abuse.

Pre-Employment Screening and Background Investigations

The first step in developing a program to reduce the risk that a youth-serving organization will hire a sex offender is to establish a comprehensive pre-employment screening program for all employees, volunteers, and contract employees who may have contact with the children being served by the organization.

While management for the YSO may not have direct control over the background checks conducted of contract employees (e.g., security personnel, cleaning staff, kitchen staff, etc.}, specific requirements for those checks can be addressed in the contracts between the organization and contracting agency. It is important that management of a YSO establish minimal background check requirements for all staff, regardless of their employment relationship to the organization.

There is no guarantee that careful and considerate pre-employment screening will weed out all those unsuitable for a particular position. Unfortunately, there are a number of sex offenders who have no previous sexual offense history because they were never caught or because the accusations never amounted to charges or prosecution.

However, a reasonable effort to check the background and verify the information provided by the applicant will help reduce the likelihood that a child sex offender is hired to work with children.

Legal Issues

There are several legal issues that employers need to consider. Every state has different laws and frequently, certain federal laws will also affect the way organizations can conduct background investigation. Remember, laws change often. This text is not meant to serve as a substitute for legal advice. The reader is advised to outline a pre-employment screening program for their company using this book as a guideline. Prior to implementing a program, have the proposed program reviewed by an attorney experienced in employment law.

The most common legal issues encountered in pre-employment screening programs include:

- Negligent hiring liability
- Employee privacy rights
- Employment discrimination and violations of federal and local state statutes

Negligent Hiring Liability

Negligence in hiring must be understood before employers and their human resource managers can establish a loss prevention program to avoid it. Negligent hiring is defined as the failure of an employer to exercise reasonable care in selecting an applicant in light of the risk created by the position to be filled.

Negligent Hiring versus Traditional Employer Liability

Negligent hiring is easily distinguished from traditional employer liability. The difference is that traditional employer liability is actually vicarious or direct liability for the actions of employees while they are working on behalf of the employer. Negligent hiring is liability imposed for the employer's own negligence in the selection process.

In the traditional form of employer liability, the legal doctrine of *respondeat superior* operates on the principle that employers are responsible for the actions of their employees when tasks are performed on behalf of the employer and in the employer's general interest. If through the action of the employee a member of the public is injured, the employer can be held financially responsible.

However,this doctrine does have its limitations. If the employee committed a harmful act outside the scope of employment and not to the benefit of the employer,the company many not likely be responsible. If the harmful conduct clearly falls outside the scope of employment, including acts that could not be reasonably anticipated by the employer,then the doctrine of *respondeat superior* does not apply and no recovery would be made against the employer. An example of an act falling outside the "scope of employment" could include assault, robbery, rape or other crime.

Employers are not always exposed to liability just because they failed to check an applicant's background. Liability results when an adequate and legal investigation would have revealed a background logically connected to the wrongful conduct. For example,the failure to discover that an applicant was convicted of child molestation, when he is allowed to work in a day care center for children could result in liability should he subsequently molest a child at the center.

Steps of an Effective Screening Process

Corporate Policy Statement

Managers need to establish an organizational position statement on the subject of criminal history checks which will indicate that the organization does check this data and the importance of such investigations. A policy statement should indicate very clearly that this program is important and is to be adhered to by managers as applied within the organization.

Risk Associated Positions

Management needs to determine which job positions represent a potential risk to others, should these employees be able to use their position to cause harm. Different job positions within a company or organization can pose a variety of risks by virtue of the work or tasks performed .

While there are certain categories of jobs that include inherent risks (e.g. working with children) most positions may not be that obvious.The employer must look at what exposures are created when the employee has "unsupervised access" to vulnerable people or dangerous objects.

"Unsupervised access" is the key in understanding how one determines whether or not the position sought to be filled is a high or low risk. Using this criterion, managers should write down each type of unsupervised activity/access that each position represents and ask themselves the following: If we hire a person with serious criminal conviction(s), especially for violent crime,are we placing our clientele at risk?

Risk Factors

Prior cases can be helpful to identify what factors constitute "risk" for a position in the place of employment. A common example of a position of "risk" is created by the unsupervised access to a variety of vulnerable individuals or circumstances creating an opportunity to cause harm. "Risk" is not a function of the employee's wages, job title or skill set. Consider an employee's unsupervised access to the following as examples:

- Children
- Master keys
- Elderly persons
- Persons who are disabled
- Private homes
- Narcotics
- Patients - mental and/or physical illness
- Explosives
- Dangerous chemicals
- Weapons

The following is a representative list of risk factors related specifically to child sexual abuse within youth- serving organizations . Note that the emphasis is on "unsupervised" access to children in a variety of ways.

- Unsupervised contact with children
- Transportation of children
- Long term contact with children in live-in situation
- Extreme physical exertion in a remote setting with children
- Visit to children's homes
- Helping children change clothes, bathe, or with other personal activities
- Coaching sports in which physical contact between adult and child is routine
- Delivery of meals to children's homes

Supervision of Staff and Volunteers-Policies and Procedures

Creating, adapting and maintaining a Policies and Procedures Manual in youth-serving organizations is a component of providing safety and well-being to children as well as employees and volunteers. Many YSOs have already implemented and documented in their employee handbooks such things as "Code of Ethics, Standard Care Practices, and Guidelines for Conduct." The following section compiles multiple sources to offer a wide variety of policies to be taken as recommendations . Also, YSOs should check with their local state legislature to ensure that all state mandated policies are being followed.

Adult/Child Interaction

Adult and child interaction policies are important to preventing child sexual abuse, they also help to reduce suspicious or inappropriate behavior between adults and children.

Adult and child interaction refers to how many adults are required to be present with a single child. These guidelines help limit the frequency of situations where potential child abusers are left alone with a child or children.

Organizations should assess adult and child ratios based on their missions and nature of service. Organizations such as Big Brother Big Sister provide one-on-one mentoring between an adult and child as a regular part of their service. Consequently, necessary steps and precautions should be taken in these circumstances to ensure that abuse is being prevented and risk of abuse reduced. Each organization should also ensure that the adult to child ratios applies whenever possible.

Sample YSO Adult/Child Interaction Policies

Boy Scouts of America: In 1987, the Boy Scouts of America implemented the two-deep leadership policy. "One-on-one contact between adults and youth members is not permitted. In compliance with SSA's "two-deep" leadership policy, two registered adult leaders or one registered adult leader and a parent of a participant, or other adult, one of whom must be 21 years of age or older, are required on all trips and outings. In situations requiring a personal conference, such as a Scoutmaster's conference, the meeting is to be conducted in view of
other adults and youth. The chartered organization is responsible for ensuring that sufficient leadership is provided for all Scouting activities."

Supervision-Physical Design of Facilities

There are two general components to the supervision of staff and volunteers at a YSO. The first, discussed previously, is the establishment of policies and procedures that are designed to regulate the interaction between children and adults.

This section of the publication addresses the other component to supervision, the design of the facilities and a variety of physical security measures available to YSO's.

In the 1980's the architectural profession developed a concept known as *Crime Prevention Through Environmental Design (CPTED)*. The basic premise of CPTED is to design a facility-both the interior and exterior, in such a way that the ability to observe areas and define physical boundaries is maximized. Designing spaces that are open and visible through the facility
ensures that individuals with a propensity to commit child sexual abuse do not feel comfortable pursuing their abhorrent behavior.

The YSO facility can be designed to minimize opportunities for offenders to be alone with children in spaces, that due to their design, provide cover for the adult.

Visibility improvement suggestions included "landscaping, clear lines of sight, secure areas, windows in doors, no closed door; policies, and bright lighting." However reasonable these approaches are, more steps must be taken to provide more concise and in depth procedures to effectively institute each or some of these techniques. Prior to suggesting these facets to improving the environment and prohibiting child sexual abuse, researchers must study environmental design and analyze to what extent, if any, these techniques would or would not be useful to preventing child sexual abuse in youth organizations.

Organizations should realize that many of these design features rely on the already established facility. A number of youth organizations take up residence in older, brick buildings, which can pose a number of detrimental design flaws including a lack of sufficient lighting, isolation spots, closed or locked doors, hallways empty of supervision or staff, a lack of visibility into rooms or areas and restrooms that may be located in isolated areas. Older buildings also struggle with a "front desk" area which would enable supervision over who enters and exits the facility and their whereabouts when inside.

In youth facilities that struggle with such physical environments, other policies and procedures should be implemented to compensate for the shortcomings. This would include extra staff to supervise children and areas that may be isolated, perhaps installing CCTV cameras is isolated spots, making sure that children do not go to restrooms unescorted, and implementing such procedures as two-deep, where it is required that each child be with at least 2 adult supervisors at all times. Access control on entry and exit doors could be useful in combatting difficult sight lines, so that all personnel and outside visitors must access the same front door and pass by a staff member who would act as a leading security system into the building.

Conclusion

In conclusion, while many of the YSO's have undertaken a number of steps to keep the children safe, there are many such organizations who have not faced the facts about the profound risks to children that exists every day.

At a minimum, the following issues need to be addressed by YSO's and a wide variety of governmental agencies and academic institutions.

- Universal Definition
- Perpetrator Types
- Single Data Source
- Identify Responsible State Agencies
- Consistent Policies
- Proactive Approach

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DISCOVERING THE HIDDEN CRIME BEHIND THE CAR WRECK

On a country road in East Texas, just before 10 o'clock on a Saturday night, a pick-up truck driven by a 26-year old crossed over the double-yellow line and hit, head-on, a pick-up occupied by a husband & wife, who were parents of kids in high school & college. The husband, Bill, was killed.

Deaths every bit as tragic occur thousands of times a year. Only the vivid quality of the evidence of damages was exceptional: a 9-1-1 audio of six minutes of Bill fighting to get free while his wife, Karen, shattered & helpless, watched him burn as flames overtook the pick-up.

In all other respects, it appeared to be the same unjust cards we have all been dealt:

- Minimum limits insurance dwarfed in every way by the damages.
- The 26-y.o. defendant was driving a pick-up he had owned for 6 months.
- And he was driving for purely personal reasons; not to work, from work, or for work. In fact, he had not worked at all that day.

There was no hint that the driver was in the *course & scope* of his employment. Nor was there any work-related connection apparent at all to inspire a *negligent employment (hiring, retention, training, supervision*, etc.) analysis. The first three lawyers the family had consulted all assessed the case the same: take the limits.

But Bill's brother -- Karen's brother-in-law -- kept searching, and somehow found me. I had no idea how I could help. But Karen hired me anyway on the promise that, "I will try to find a way."

What I found was a homicidal conspiracy designed by a trained risk-manager. The aspiration of this presentation is to teach you how to find it, too.

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[1] Marc C. Lenahan is the 2014 President of the National Crime Victim Bar Association, an honor he takes great pride in. And though he is also the recipient of many other honors & awards, he is quick to describe most of those to prospective clients as "meaningless nonsense." He knows he owes credit for his successes to colleagues, mentors, friends, obsession, fear, and having studied archaic poetry at the University of Texas. His failures are all his own doing, and are follow him: slow-moving, relentless, zombies of once-living cases. Marc is licensed in Texas and in North Dakota, and has secured 7-figure results under the laws of four different states.

I. WRITTEN REFERENCE MATERIALS

What's What with this Paper, and What's Not

The goals of the *live* presentation will be (a) to teach you the homicidal scheme so you can be on the lookout for it. And then to (b) to share ideas on how to get the evidence you need, (c) to show you how to apply that evidence with under-appreciated law, and (d) to demonstrate one way to explain your case to your Jury.

The goal of this *paper*, on the other hand, is far more mundane: to identify and unpack three aspects of those under-appreciated laws for your reference arsenal:

- *The Risk-Utility Test* within *Negligence*;
- The Power in what a a TRANSPORTATION CODE Does *Not* Say; and
- The Tremendous Reach of *Negligent Employment* causes.

But, first, the paper briefly distinguishes the most used approach to seeking to hold an employer liable -- *Course & Scope* -- so that the contrast with the others is clear.

Other Stuff You'll Find in the Appendixes

Appendix I provides some of my favorite excerpts from *Restatements* and from *Drafts* of *Restatements*; wonderful stuff for Pleadings, inspiration, MSJ responses, and Jury Arguments.

In *Appendix II*, you'll find four charts seeking to provide *some overlapping* laws for the other 49 states to Texas laws applied in this case on these issues:

- Mechanics of Challenging Assertions of the 5th Amendment;
- Employer's Statutory Duty to Perform Negligence Analysis;
- Negligent Hiring as a Direct Liability Cause of Action; and
- Negligent Entrustment (Just in Case).

II. UNPACKING UNDER-APPRECIATED LAWS

Course & Scope: When it is Needed, and When it is Not

We begin by putting *course & scope* in proper context. Only then can we see the importance of what comes after.

Yes, it is wonderfully clean to hold an employer liable when the employee causes the accident while in the *course & scope* of employment at the time. And so, when the phone rings, we ask questions along the line of:

- "Was the other driver in a company vehicle?"
- "Do we know if he was driving for work? Wearing a uniform?"
- "Did you hear anybody say anything about where the other driver was coming from, or where he was going to?"

We all know that *exceptions* in law are, by their nature, narrow. As in, "The statute of limitations is two years *except when*...." Likewise, *course & scope* is narrow because it is an exception: "A non-negligent employer is not liable for the torts of its employee *except when* the tort is within the course & scope of the employment...." Exceptions are narrow. Therefore, many times, you won't be able to help your client get to a commercial policy through *course & scope*.

Course & scope is a simple way of holding *innocent* employers liable. Yes, when the employer is non-negligent, decent, kind, stray-dog-adopting, and rainbow-farting,[2] then your best chance of helping your clients is *course & scope*.

But when *course & scope* is too narrow to help, you're then left with the underlying rule itself: "A non-negligent employer is not liable for the torts of its employee."

So go to a different rule: everybody is responsible for their own torts.[3]

Whereas *course & scope* is for holding *non*-negligent employers liable, this paper presents three aspects of law to help you hold *negligent* employers liable for their own tort's role in the tort of the employee. If the employer committed its own underlying tort, the injury from the tort of the employee is attributable to the employer whether the employee was in *course & scope* or not.

So, let's identify some tools.

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[2] *In re Elliot A. Glicksman,* slip opinion (Miami, Florida -- about 2 minutes ago) (noting a roygbiv arch shimmering delightfully in the sunlight over his chair).

[3] Except young children, governments & medical providers.

Risk-Utility Test: The Overlooked Seed of "Duty"

Your Jury will be at peace with legalese-free discussion as to *breach of duty*: "You will be deciding if what Defendant Boss did was what a *reasonable boss would have done*, knowing what he knew and standing in his shoes." Nice and simple, even when you add the "or should have known" stuff.

But when the prospective client calls on the phone, we might forget "nice and simple" and instead look for some relationship through the employee that might trigger a duty. But let's look towards the *acts or omissions* of the employer, not the employee.

The Jury is well qualified to determine in a single bound if Defendant Boss's actions were something a reasonable boss in his shoes would not have done. Duty & breach? Check.

But in responding to the *Motion for Summary Judgment* that alleges "no duty," include in your argument an application of the oft-overlooked *Risk-Utility Test*, versions of which exist in the jurisprudence of most states.[4] Sterilized expressions of the Risk-Utility Test are easily found in products liability cases. But you want one that embraces the original common law theme of justice, not one twisted into a rule of economics.

> "Appellate courts apply a risk-utility balancing test in determining whether a duty exists *under common law*. In determining whether a *common law duty exists*, an appellate court considers the risk, foreseeability, and likelihood of injury, and then weighs these factors "against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."[5]

Note that it is the employer's own actions, not the relationships, that really underlie the duty analysis. In fact, the employer's relationship to the employee is only an *optional* factor to consider as an opportunity for "control."

Being free to show the existence of a duty via the *Risk-Utility Test* is not pro-plaintiff. *It is pro plaintiffs' attorneys*. It begs for arguments of morality & justice, and thrives upon creativity, metaphor and passion. These are our natural tools. You get to argue for the existence of a duty by appealing to the sense of right & wrong.

But so many factors, the articulation of the Rule can be cumbersome. Therefore, chart your version for your Judge, so the Court can rest at ease that it is partitioning the elements appropriately.

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[4] Via adoption of some relevant part of the *Restatements*, the *Hand Test*, the balancing test, the multi-factor test, or the Prosser factors.

[5] "Appellate courts apply a risk-utility balancing test in determining whether a duty exists under commo*Midwest Employers Cas. Co. v. Harpole*, 293 S.W.3d 770, 779 (Tex.App. - 4th Dist. 2009) (internal citations omitted).

Factor	Evidence & Analysis
	*** STEP ONE: REQUIRED WEIGHING OF SIX FACTORS ***
Risk	
Foreseeability	
Likelihood of Injury	
	*** BALANCED AGAINST ***
Societal Utility of Actor's Conduct	
The Burden of Guarding Against the Injury and the Consequence of Placing the Burden on the Defendant	
	*** STEP TWO: CONSIDER FIVE <u>OPTIONAL</u> FACTORS ***
Superior Knowledge of the Risk	
Right to Control Another	
Societal Changes	
Conflict with Statutory Law	
Countervailing Concerns	

Transportation Code: Hidden Greatness

You know how super heroes are often depicted as regular folks, blending in with the crowd, but who then transform into their resplendent magnificence right before your eyes? Clark Kent, Dr. Banner, Diana Prince, Barry Bonds. Such is the case with a totally ignored little statute at Section 521.459 of the TEXAS TRANSPORTATION CODE.

So, first things first, trying to use a Texas law for motor vehicle injuries outside of Texas. Some possibilities:

- Search for overlapping language in your state. If the only similar language your find is expressly for *commercial* vehicles:
    1. A commercial *statute* is still a stout place to ground a non-commercial *standard*.
    2. The more vehicles the defendant owns, or if they own other vehicles that are commercial, it is also a great standard to apply. Your Jury won't like the employer saying, "We did checks for Fred, Sandy, and John, but not for Bob because we didn't have to."
    3. Remember that even if the vehicle isn't designated as a commercial vehicle, it might still be one depending on number of passengers, hazardous materials it may be hauling, or because it is towing something that puts the combined gross combination weight over the threshold.
- Do investigations & discovery to see if your defendant company does some business in a state that has a statute like the one in Texas and would (or should) then apply it for some employees.

- Remember that a statute in Texas, where "tort reform" is so virulent, is excellent evidence of the same *standard* elsewhere. Fleet management experts will agree. And so will the underwriter who inked the insurance policy at issue.
- Finally, as discussed in a moment, the existence of statute in Texas, makes satisfying the *Risk-Utility* factors *everywhere* easier.

Why it is that this wonderful little statute remains obscure and unapplied? I propose a two-part theory. First, it hides behind a misleading caption: "Sec. 521.459. EMPLOYMENT OF UNLICENSED DRIVER." As we'll see, it goes well beyond the mere scope of unlicensed drivers. Second, it mandates actions that have necessary consequences, but does not expressly state what those consequences are. I will.

Yes, as the caption implies, it requires the employer to verify from the State that the employee has a license. That is done with eight words, at (a)(2), right in the middle: "a verification that the person has a license."

> Sec. 521.459. EMPLOYMENT OF UNLICENSED DRIVER.
>
> (a) Before employing a person as an operator of **a motor vehicle** used to transport persons or property, an employer shall request from the department [of motor vehicles]:
>
> (1) a **list of convictions for traffic violations** contained in the department records on the potential employee; and
>
> (2) **a verification that the person has a license**.
>
> (b) A person may not employ a person as an operator of a motor vehicle used to transport persons or property who does not hold the appropriate driver's license to operate **the vehicle** as provided by this chapter.
>
> [Emphasis added.]

But what of those golden nuggets to be found? Let's note three.

First, (a)(1) mandates the employer's requesting "a list of traffic violations." But note that it doesn't say what the employer is to do once it has received the list of employee's traffic violations. This section -- (a)(1) -- could have been completely omitted if the only goal was to

confirm a valid license. So what is the purpose of making an employer hold in their hand a list of traffic violations and accidents if they don't have to do anything with them? What the law does is to make "knew or should have known" a statutory requirement, not just a common law duty. With the statute, it is *negligence per se* not to perform a "reasonable employer" negligence analysis. Wonderful.

This mandate to request a list of traffic violations from the Department of Public Safety does *not* include any guidance on *how* an employer should assess an employee's driving history once it has the list in front of it. Rather, it merely requires that the employer *know* what the list of convictions includes. It is a *statutory* requirement that the employer must make a *negligence* evaluation. There is real wisdom in the statute. It is the employer who is best situated to assess the *fit* that the employee offers to the *specifics of the driving* task at issue.

Consider a car dealership. For the after-hours job of re-arranging vehicles on the back lot and re-stocking tires and parts from storage, an employer can responsibly tolerate all manner of imperfections on the driver's history. If only the employer's own property, and no people, are ever at risk, that is within a reasonable employer's judgment call.

Contrast that position at the dealership with the position of an auto sales person. The sales person who takes customers on test-drives every day must present to the employer with a far more respectable driving history.

The statutory requirement is that the employer *look & know*, so that it can make a *negligence-based decision as to fit*: "an employer shall request from the department (1) a list of convictions for traffic violations contained in the department records on the potential employee...." The requirement changes what an employer "should know" to what an employer "must know and actually does know."

Second, the statute subtly & logically implies that the employer makes the assessment as to *fit* with a *specific vehicle in mind*: "to operate *the* vehicle." And including "the vehicle" in the assessment is, of course, the only responsible way to make the evaluation. A Vespa scooter delivering "Get Well" cards is less lethal than a 2014 heavy-duty pick-up. And 2014 heavy-duty pick-up is less lethal than a 30-year old heavy-duty pick-up that hasn't seen a new set of tires in over 200,000 miles. In requiring an employer to consider "the vehicle," the statute has the employer providing a degree of vehicle inspection commensurate with the circumstance. And once they've done that, you have a *negligent undertaking* if it was poorly done.

Finally, notice that the statute does *not* distinguish between a vehicle owned by the employer, one owned by the employee, or one owned by third party. *Ownership is moot*. Only "transport persons or property" triggers application. And so, too, is *quantity* of the stuff being transported, the *frequency* of the transporting, and the *distance* to be transported.

Even if the prospective employee will be doing transport for the job *sometimes*, the statute applies. This interpretation is consistent with others that govern the same issue. For example, in regulations implementing the FEDERAL MOTOR CARRIER SAFETY ACT the term "driver" is described:

> driver ... includes, but is not limited to: Full time, regularly employed drivers; **casual, intermittent or occasional drivers**; leased drivers and independent owner-operator contractors.[6]

The statute is violated, and *breach* established, where (1) the Defendant "employ[s] a person as an operator of a motor vehicle used to transport persons or property" and such person "does not hold the appropriate driver's license to operate the vehicle." Additionally, the statute is separately violated where (2) the employer fails to request a list of convictions for traffic

[6] 49 C.F.R § 382.107 (emphasis added).

violations from the Department of Public Transportation. It is also violated (3) if the employer fails to request a verification that the potential employee has a license.

Liability is established if any of these three breaches are a proximate cause of the injuries complained of. There is no requirement that the unlicensed driver be in the course and scope of employment at the time of the accident. Nor is there a requirement that the vehicle be company-owned. Nor that the entrustor have any right of control at the time of the accident.

The statute applies on its face to any employee transporting company property in any vehicle, even if it is not being delivered at the time. Liability is triggered solely by evidence that the employer violated the statute if the negligence of the employee was a proximate cause of the damages complained of.

But what if the employer fully complied with the statute? That's great, too. Once the employer knows about any risks the prospective employee presents because they did the statutory check for his purpose, they are charged with actual knowledge of any revealed risks for all purposes at all times.

Let's go one step further by looking back at the *Risk-Utility* chart. If the employer has the knowledge already, there is no further burden in asking that they acquire the knowldege. If performing this diligence is statutory law in Texas, then all of the factors that ask if the Plaintiff is seeking a new duty that would change society or conflict with other laws, are conclusively answered in the negative.

Therefore, the existence of the statute in Texas, makes satisfying the *Risk-Utility* factors *everywhere* easier.

Be warned, however, that your defendant may seek to argue that the statute's use of the word "employ" means the duty applies only on the single day the person is hired. And,

therefore, if on the day of hire, it was not foreseen that the new employee would transport people or goods, they are exempt from the law's application. But the statute does not use the words "hire" or "hired" though the Texas Legislature uses both words hundreds of times elsewhere. Instead, the Legislature chose the word "employ" -- meaning "to use" or "to use an employee." And it is the "use" definition that provides the only sound interpretation of the statute. *Black's Law Dictionary* defines the verb-tense of "Use" as follows, emphasis added:

> To make use of; to convert to one's service; ***to employ***; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.[7]

The statute applies regardless the employee's job title, and to argue otherwise is to inject limiting language that does not appear in the text of the statute. Moreover, it would allow employers to circumvent the statute by assigning an employee a particular job title that did not reflect that employee's driving responsibilities, or to add driving responsibilities after the initial date of hire. Such an interpretation would therefore be contrary to the entire motivating purpose of the rule. In fact, it would be grotesque.

[7] *Deluxe, Sixth Edition*, 1990.

Negligent Employment: "Some Connection" is a Huge Net

A *negligent employment* claim is a simple negligence cause of action based on an employer's direct negligence, rather than on vicarious liability.[8]

To recover under a theory of negligent employment, "a plaintiff must prove that (1) the employer owed a legal duty to protect third parties from the employee's actions and (2) the third party's sustained damages were proximately caused by the employer's breach of that duty."[9] A breach of the employer's duty may occur if the employer hires an incompetent or unfit employee whom it knows, or by the exercise of reasonable care, should have known, was incompetent or unfit; thereby creating an unreasonable risk of harm to others.[10]

If the employer's negligence in hiring or retaining an employee is a proximate cause of harm, the employer is liable for that harm.[11] This is the case whether or not the employee is on the clock at the time of the accident, and whether or not the title to the vehicle is still in the company's name. Ownership is moot.

Core claims may be proven with evidence of proximate cause linking the fact of the employment with the tort committed by the employee. As the courts describe it, there must merely be "*some connection* between the plaintiff's injury and the fact of employment."[12] This much broader standard governs *negligent hiring* and *retention* cases, where the burden is solely to establish that the *negligent hiring* or *retention* of the employee was *a* proximate cause of the injuries. This is the standard even in cases where the employee is off-duty and outside the course

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8 *TXI Transp. Co. v. Hughes*, 224 SW 3d 870 - Tex. App. -- Fort Worth 2007, no pet).

9 *Bedford*, 166 S.W.3d at 463 (citing *Rosell v. Cent. W. Motor Stages, Inc*., 89 S.W.3d 643, 655 (Tex.App.-Dallas 2002, pet. denied)).

10 *Leake v. Half Price Books, Records, Magazines, Inc*., 918 S.W.2d 559, 563 (Tex. App.-Dallas 1996, no writ); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex.Civ.App.-Tyler 1979, writ ref'd n.r.e.).

11 *See Morris v. JTM Materials, Inc*., 78 S.W.3d 28, 49 (Tex.App.-Fort Worth 2002, no pet.)

12 *See Robertson v. Church of God, Intern*., 978 S.W.2d 120, 126 (Tex. App.-- Tyler 1997, pet. denied)(emphasis added).

and scope of his employment at the time of the injury.[13] Because liability is *direct*, and not vicarious, there is "no requirement that the employee be in the course and scope of employment at the time of the accident."[14] Rather, Plaintiff must merely establish "some connection between the plaintiff's injury and the fact of employment."[15] Rather, there must only be "*some connection* between the plaintiff's injury and the fact of employment." And:

> One who retains the services of another has a duty to investigate the background of that individual for fitness for the position, to remain knowledgeable of that fitness and is liable if another person is *injured in some manner related to his employment* because of a lack of fitness.[16]

Thus, the *sole* causation question with such an issue is whether the employer's failure to exercise reasonable care in the hiring, retention, or supervision of the employee was a proximate cause of the Plaintiffs' injuries. That is, taken as a whole, whether the hiring, retention, or supervision of the employee was *a* cause-in-fact of the accident and resulting injuries, and whether such an accident was foreseeable to the employer.

> Liability for negligent hiring and retention is not dependent, however, upon a finding that the employee was acting in the course and scope of his employment when the tortious act occurred. Instead, the employer is liable if its negligence in hiring or retaining the unfit employee was a proximate cause of the plaintiff's injuries.[17]

To recover under a theory of negligent hiring, "a plaintiff must prove that (1) the employer owed a legal duty to protect third parties from the employee's actions and (2) the third

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[13] *See Morris v. JTM Materials*, 78 S.W.3d 28 (Tex.App.--Fort Worth 2002, no pet.).

[14] *See Morris v. JTM Materials*, 78 S.W.3d 28, 49-50 (Tex.App.--Fort Worth 2002, no pet.); *Tex. Transp. Code § 521.459.*

[15] *Robertson v. Church of God*, 978 S.W.2d 120 (Tex.App.--Tyler 1997, pet. denied); *see also Dieter v. Baker Service Tools*, 739 S.W.2d 405, 408 (Tex.App.-Corpus Christi 1987, writ denied) ("negligent hiring and supervision is *not dependent upon a finding that the employee was acting within the course and scope of his employment* when the tortious act occurred").

[16] *Doe v. Boys Clubs of Greater Dallas, Inc*., 907 S.W.2d 472 (Tex.1995) (emphasis added); *Dieter*, 739 S.W.2d at 408.

[17] *Morris v. JTM Materials, Inc*., 78 S.W.3d 28, 49 (Tex.App.-Fort Worth 2002, no pet.).., citing *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 408 (Tex.App.-Corpus Christi 1987, writ denied).

party's sustained damages were proximately caused by the employer's breach of that duty."[18] A breach of the employer's duty may occur if the employer hires an incompetent or unfit employee whom it knows, or by the exercise of reasonable care, should have known, was incompetent or unfit; thereby creating an unreasonable risk of harm to others.[19]

If the employer's negligence in hiring or retaining an employee is a proximate cause of harm, the employer is liable for that harm.[20] This is the case whether or not the employee is on the clock at the time of the accident, and whether or not the title to the vehicle is still in the company's name. Ownership is moot.

Conclusion

All in all, mere tools that may inspire an idea that helps you in your search for an opportunity to help your client. In the live presentation, you'll see how some of these provided leverage for us.

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[18] *Bedford*, 166 S.W.3d at 463 (citing *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 655 (Tex.App.-Dallas 2002, pet. denied)).

[19] *Leake v. Half Price Books, Records, Magazines, Inc.*, 918 S.W.2d 559, 563 (Tex. App.-Dallas 1996, no writ); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex.Civ.App.-Tyler 1979, writ ref'd n.r.e.).

[20] *See Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex.App.-Fort Worth 2002, no pet.)

Appendix I

Restatements Goodies

Torts: Liability for Physical Harm
Scope of Liability (Proximate Cause)

§ 19 Conduct That Is Negligent Because of the Prospect of Improper Conduct by the Plaintiff or Third Party

The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or third party.

§ 26 Factual Cause

Tortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

§ 27 Multiple Sufficient Causes

If multiple acts exist, each of which alone would have been a factual cause under §26 of the physical harm at the same time, each act is regarded as a factual cause of the harm.

§ 36 Trivial Contributions to Multiple Sufficient Causes

When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of physical harm under § 27, the harm is not within the scope of the actor's liability.

Comment j:

So long as an actor's tortious conduct is a necessary condition to produce the harm it is a factual cause of harm, without qualification. The concept of a necessary condition does not admit of any gradations, but rather exists or not.

Section 27 also makes clear that even an insufficient condition (along with background causes) can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm, even if there also exist other sets of causes sufficient to cause the harm.

The limitation on the scope of liability provided in this Section is not applicable if the trivial contributing cause is necessary for the outcome; this Section is only applicable when the outcome is overdetermined (§ 27). By contrast, the actor who negligently provides the straw that breaks the camel's back is subject to liability for the broken back.

§ 39 Duty Based on Prior Conduct Creating a Risk of Physical Harm

When an actor's prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.

Comment a:

History and cross-reference. Section 321 of the first and Second Restatements of Torts imposed a duty of reasonable care on an actor whose earlier conduct, although not negligent, created an unreasonable and continuing risk of harm to another. If at the time of the conduct an actor reasonably fails to appreciate the risk, but later appreciates or should appreciate the risk, the actor must employ reasonable care to prevent the harm from occurring.

Comment c:

Risk of a type characteristic of conduct. The duty imposed by this Section is conditioned on the creation of a continuing risk characteristic of the actor's conduct. To create such a risk of harm, the actor's conduct necessarily must be a cause, at the time of the conduct, of a risk of subsequent physical harm. But merely being a cause of a continuing risk is not sufficient for a duty under this Section. The conduct must also be sufficiently connected with the potential for later harm that imposing a duty to prevent or mitigate the harm is appropriate. The duty imposed by this Section is justified by the actor's creating a risk (even if non-tortiously) and the absence of the pragmatic and autonomy reasons for the no-duty rule in § 37.

§ 41 Duty to Third Persons Based on Special Relationship with Person Posing Risks

(a) An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

(1) a parent with dependent children,

(2) a custodian with those in its custody,

(3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and

(4) a mental-health professional with patients.

Comment c:

Duty of reasonable care. The duty imposed by this Section is to exercise reasonable care under the circumstances. It is not to insure that the other person is controlled. If a risk exists, an actor must take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring. In addition, the relationships identified in this Section are ones in which the actor has some degree of control over the other person. The extent of that control also bears on whether the actor exercised reasonable care.

Comment e:

Duty of employers. The duty provided in Subsection (3) encompasses the employer's duty to exercise reasonable care in the hiring, training, supervision, and retention of employees, although the ordinary duty imposed by § 7 will often overlap with the duty provided in this subsection. The duty of employers provided in this subsection is independent of the vicarious liability of an employer for an employee's tortious conduct and extends to conduct by the employee that occurs outside the scope of employment when the employment facilitates the employee causing harm to third parties.

Employment facilitates harm to others when the employment provides the employee access to physical locations, such as the place of employment, or to instrumentalities, such as a police officer carrying a concealed weapon while off duty, or other means by which to cause harm that would otherwise not be available to the employee.

§ 42 Duty Based on Undertaking

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

Comment g:

Scope of the undertaking. In some cases, a question arises about whether the risk that caused the harm or the actor's negligence - typically an omission - was within the scope of the undertaking. The scope of an undertaking can be determined only from the facts and circumstances of the case. When reasonable minds can differ about whether the risk or negligence was within the scope of the undertaking, it is a question of fact for the factfinder.

§ 43 Duty to Third Persons Based on Undertaking to Another

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:

(a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking,

(b) the actor has undertaken to perform a duty owed by the other to the third person, or

(c) the person to whom the services are rendered, the third party, or another relies on the actor's exercising reasonable care in the undertaking.

Comment e:

Reliance. Reliance on an undertaking is another way in which the risk of harm may be increased. Such reliance may create an appearance of safety or make alternative arrangements appear unnecessary. The manner in which reliance is a cause of harm does not matter. Nor does it matter who relies on the undertaking being performed in a nonnegligent fashion.

Comment f:

Threshold for an undertaking. The requirement of knowledge explained in § 42, Comment d, is applicable as well to the duty provided in this Section. The actor need not know who the third person is who is subject to risk. The knowledge requirement is satisfied so long as the actor knows or should know that the undertaking reduces the risk of harm to a class of persons that includes the third-person victim.

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RESTATEMENT (SECOND) OF TORTS -- 1965

§ 317 Duty of Master to Control Conduct of Servant

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

§ 321 Duty to Act When Prior Conduct is Found to be Dangerous

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Comment a:

The rule stated in Subsection (1) applies whenever the actor realizes or should realize that his act has created a condition which involves an unreasonable risk of harm to another, or is leading to consequences which involve such a risk. The rule applies whether the original act is tortious or innocent. If the act is negligent, the actor's responsibility continues in the form of a duty to exercise reasonable care to avert the consequences which he recognizes or should recognize as likely to follow. But even where he has had no reason to believe, at the time of the act, that it would involve any unreasonable risk of physical harm to another, he is under a duty to exercise reasonable care when, because of a change of circumstances, or further knowledge of the situation which he has acquired, he realizes or should realize that he has created such a risk.

Appendix II

The Search for Nearly Equivalent Laws

State	Trial Court Review of Each 5th Amend. Claim	Citation
Texas	Thus, each question for which the [5th Amendment] privilege [against self-incrimination] is claimed must be studied and the court must forecast whether an answer to the question could tend to incriminate the witness in a crime.	*Warford v. Beard*, 653 S.W. 2d 908, 911 (Tex.App. - Amarillo 1983, no writ).
Alabama	If a party reasonably apprehends a risk of self-incrimination, he may claim the Fifth Amendment privilege although no criminal charges are pending against him and even if the risk of prosecution is remote. Clearly, it is not for the witness, but for the court to determine whether the fear of incrimination is well founded. This protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.' However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" Although no actual criminal charges are filed, the trial judge must have sufficient evidence before him to clearly reveal that a criminal investigation was ongoing.	*Ex Parte Coastal Training Inst.*, 583 So. 2d 979, 981-82 (Ala. 1991).
Alaska	The witness must demonstrate to the court a reasonable basis for the privilege against self-incrimination claim. The trial court need not be left to speculate over the nexus between a witness's seemingly innocent answer and some subsequent prosecution.	*McConkey v. State*, 504 P.2d 823, 827 (Alaska 1972) (C.J. Rabinowitz concurring).
Arizona	The broad scope of the privilege can no longer be questioned. In determining whether the privilege can be invoked, a court should construe the scope of the privilege liberally and not in a hostile spirit. This constitutionally-guaranteed privilege extends beyond obvious admissions of guilt to encompass statements which may only tend to incriminate by furnishing one link in the chain of evidence required to convict. The claim of privilege thus protects a party when that person's answer might furnish one tiny link in the chain of evidence tending to establish criminal liability.	*State v. Ott*, 808 P.2d 305, 311 (Ariz. 1990).
Arkansas	In determining the validity of a privilege against self-incrimination claim, the court must determine the applicability of same privilege based on the current case at hand. A trial judge can overrule a claim where the privilege is not applicable in a civil proceedings	*Edwards v. Stills*, 984 S.W.2d 366, 379-80 (Ark. 1998).
California	In assessing whether the court properly allowed the witness to invoke the privilege against self-incrimination, it need not be decided whether his testimony actually would have incriminated him, but rather whether it would have given him "reasonable cause to apprehend danger from the testimony.	*People v. Smith*,150 P.3d 1224, 1252 (Cal. 2007).
Colorado	Before a court can compel a response or punish for contempt in the face of a claim of the privilege against self incrimination, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency" to incriminate. A determination regarding the likelihood of self-incrimination must be made.	*People v. Razatos*, 699 P.2d 970, 976 (Colo.1985).
Connecticut	A court may not deny a witness' invocation of the fifth amendment privilege against compelled self-incrimination unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have [a] tendency to incriminate."	*Martin v. Flanagan*, 789 A.2d 979, 984 (Conn. 2002).

Delaware	"The trial court must determine whether a witness invoking his or her Fifth Amendment privilege 'is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination.'"	*Brown v. State*, 729 A.2d 259, 263 (Del. 1999).
Florida	A witness may assert the privilege against self-incrimination during discovery in a civil case when he has reasonable grounds to believe that his answers would provide a link in the chain of evidence necessary for a criminal conviction. A witness may assert the privilege against self-incrimination during discovery in a civil case when he has reasonable grounds to believe that his answers would provide a link in the chain of evidence necessary for a criminal conviction. A witness may assert the privilege against self-incrimination during discovery in a civil case when he has reasonable grounds to believe that his answers would provide a link in the chain of evidence necessary for a criminal conviction. The court must sustain the privilege unless it is " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Florida caselaw also states that it must be a "substantial and 'real' " threat of incrimination and not one that is "merely trifling or imaginary."	*Belniak v. McWilliams*, 44 So. 3d 1282, 1284-85 (Fla. Ct. App. 2010).
Georgia	The Georgia Constitution contains a similar privilege (to the United States Constitution) against self-incrimination, providing that no person shall be compelled to give testimony tending in any manner to be self-incriminating. When questioning does not tend to incriminate a person as a matter of law, the trial court must determine if the answers could incriminate the witness. If so, then the decision whether it might must be left to the defendant. If the witness then says under oath that his answer would incriminate him, then "the court can demand no other testimony of the fact." The court determines if the questions posed to the witness could not have been incriminating. If, however, the trial court determines in its inquiry that the questions could have been incriminating, then the witness could have properly asserted his privilege against self-incrimination if he determined that the questions might incriminate him.	*Begner v. State Ethics Comm'n*, 552 S.E.2d 431, 433-34 (Ga. Ct. App. 2001).
Hawaii	The privilege against self-incrimination does not protect against "remote possibilities [of future prosecution] out of the ordinary course of law," but is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."It is the province of the trial court to determine whether such reasonable cause exists.	*State v. Kupihea*, 909 P.2d 1122, 1128 (Haw. 1996).
Idaho	The custom is for the trial judge to examine the protesting witness out of the presence of the jury in order to determine the validity of his privilege against self-incrimination claim. Once the court satisfies itself that the claim is well-grounded as to the testimony desired, it may, in its discretion, decline to permit either party to place the witness on the stand for the purpose of eliciting a claim of privilege or to comment on this circumstance. In doing so, the court must decide whether the fifth amendment claim is valid and there exists a real danger of self-incrimination.	*State v. Ramsey*, 576 P.2d 572, 575 (Idaho 1978).
Illinois	The privilege against self-incrimination does not exist where there are no reasonable grounds to fear self-incrimination. Neither an unreasonable fear of self-incrimination nor a mere reluctance to testify is a ground for claiming the privilege. Once a witness asserts his fifth amendment privilege not to incriminate himself, then "it is for the circuit court to determine if under the particular facts there is a real danger of incrimination." The witness is not required to prove that the answer to a particular question would necessarily subject him to prosecution. In determining this, the Idaho courts rely on the United Supreme Court decision in *Hoffman* which provided: "[I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be [305] compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The *trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence*.'"	*People v. Redd*., 553 N.E.2d 316, 339 (Ill. 1990) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (U.S. 1951).
Indiana	In evaluating a privilege of self-incrimination claim, the court is to determine whether the invocation of the privilege is justified. In doing so, the court makes a particularized inquiry into the propriety of witness's assertion of the privilege.	*Resnover v. State*, 507 N.E.2d 1382, 1389 (Ind. 1987).

Iowa	The power to decide if the witness may assert his privilege against self-incrimination is thus vested in the trial court to be exercised in its sound discretion under all the circumstances then present. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."	*State v. Parham*, 220 N.W.2d 623, 626 (Iowa 1974) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-487 (U.S. 1951).
Kansas	When a witness called by the state refuses to testify and claims the Fifth Amendment privilege against self-incrimination, the court may hold a hearing in chambers to determine if the claim is justified to determine the validity of such claim.	*State v. McQueen*, 582 P.2d 251, 259 (Kan. 1978).
Kentucky	In determining whether a witness should be allowed to invoke the privilege against self-incrimination, the court must determine what crimes might reasonably have been anticipated to be disclosed by the witness' responses to the questions. Such determination is to be made upon examining the questions to be asked, not in isolation, but [901] in relationship to their scope and possible implications. The court must find that a witness has properly claimed the privilege if it appears that a responsive answer would furnish a necessary link in the chain of evidence which might convict or implicate a witness.	*Commonwealth v. Gettys*, 610 S.W.2d 899, 900 (Ky. Ct. App. 1980).
Louisiana	Claims of privilege are preferably determined outside the presence of the jury. A trial judge may allow witnesses to be examined outside the presence of the jury in order to determine if the privilege against self incrimination claim is proper. The privilege against self incrimination must be liberally construed in favor of the accused or witness. The judge determines whether the questions would require inculpatory responses.	*State v. Jones*, 587 So. 2d 787, 795 (La. Ct. App. 1991).
Maine	The constitutional privilege against self-incrimination protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. The danger of criminal prosecution, however, must be real and based on reasonable cause. "And, in determining whether a real apprehension of danger exists, the judge before whom the problem is raised must [328] give the benefit of any reasonable doubt to the person claiming the privilege. It is essential, however, to proper judicial administration that the exercise of the privilege not depend upon a purely arbitrary or capricious claim of apprehension of incriminating danger made by the person refusing to answer, and it is for the court to decide whether the fear of self-incrimination entertained by the witness or party is real or imaginary, substantial in character or so improbable or unrealistic that no reasonable person would suffer it to influence his conduct."	*State v. Vickers*, 309 A.2d 324, 327-328 (Me. 1973) (quoting *Collett v. Bither*, 262 A.2d 353 (Me. 1970).
Maryland	The trial court must determine whether the claim of the Fifth Amendment privilege is in good faith or lacks any reasonable basis.	*Gray v. State*, 796 A.2d 697, 707 n.13 (Md. 2001).
Massachusetts	A witness may refuse to testify based on their invocation of the privilege "unless it is 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency' to incriminate." The witness must have reasonable cause to apprehend danger from a direct answer. It is for the judge, rather than the witness and the attorney to determine whether silence is justified.	*Pontes v. New Eng. Power Co.*, 2004 Mass. Super. Lexis 340 at *2-3 (Mass. Sup. Ct. 2004).
Michigan	When the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken. The court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate privilege, as was done in the instant case. This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. The trial court determines whether the witness has a legitimate privilege.	*People v. Poma*, 294 N.W.2d 221, 222-223 (Mich. Ct. App. 1980).
Minnesota	Trial courts have broad discretion in deciding whether a claim of privilege is valid. the trial court should not require the witness to prove the hazard of incrimination, as to do so would require the witness to surrender the very protection which the privilege is designed to guarantee.	*State v. Manley*, 664 N.W.2d 275, 286 (Minn 2003).
Mississippi	When a witness desires to claim the privilege of the Fifth Amendment, "he is required to give the court sufficient information for the court to determine, in fact, that answering the question would tend to incriminate the witness." The claim of privilege, applicable in a civil case, is to be determined by the court. The privilege, if claimed, must be done so on a question by question basis. The witness must tender sufficient information so that the court can make an informed decision. Though we do not say that an attorney may not represent his client in matters of privilege, we do require that the witness make some affirmative indication that he himself invokes the privilege.	*Harrell v. Duncan*, 593So. 2d 1, 6 (Miss. 1991).

Missouri	The court must determine whether the specific privilege against self-incrimination claim is justified. This determination creates a perplexing problem. The privilege not only extends to answers which would in themselves support a conviction of a crime but likewise embraces those answers which would simply furnish a link in the chain of evidence needed to prosecute the [witness] for a crime. The court cannot compel the [witness] to answer unless it would be impossible for the [witness] to incriminate himself. the application of this rule quite often depends upon the setting or context in which a particular question is asked. If an otherwise innocuous question is asked in a setting or context which suggests a real hazard of incrimination, the court obviously cannot say, as a matter of law, that incrimination is impossible and, therefore, the court cannot compel the [witness] to answer the question nor sensibly compel him to explain the self-evident reasons for invoking his privilege against self-incrimination. However, if the question remains innocuous even when viewed in its setting and context, the court can require the [witness] to describe, in general terms, a rational basis upon which his answers could conceivably incriminate him. If a rational basis for incrimination is provided, the court obviously cannot say, as a matter of law, that incrimination is impossible.	*State ex rel. Newman v. Anderson*, 607 S.W.2d 445, 447-448 (Mo. Ct. App. 1980).
Montana		
Nebraska	The trial court's role in determining the sufficiency of the privilege [against self-incrimination] as follows: "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.'"	*State v. Robinson*, 715 N.W.2d 531, 554 (Neb. 2006) (quoting *State v. Bittner*, 196 N.W.2d 186, 188 (Neb.1972).
Nevada	Determining how to proceed in response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination is a matter within the discretion of the district court. The court looks at whether answering the question could be incriminating on the witness.	*Francis v. Wynn Las Vegas, LLC*, 262 P.3d 705, 710-712 (Nev. 2011).
New Hampshire	The privilege against self-incrimination extends not only to answers that in themselves would support a conviction, but also to any information sought which would furnish a link in the chain of evidence needed to prosecute. Whether a witness' claim of the privilege is justified is a decision which rests within the trial court's exercise of sound discretion. The privilege should be raised separately with respect to each question propounded, and the witness should present the court with adequate information upon which it can determine if the privilege applies.	*State v. O'Connell*, 550 A.2d 747, 748 (N.H. 1988).
New Jersey	The privilege against self-incrimination cannot be invoked unless the trial court makes its own determination as to the realistic, not speculative, likelihood of the witness' possible answer exposing him to criminal liability.	*In re Pillo*, 93 A.2d 176 , 182-183 (N.J. 1952).
New Mexico		
New York	Determining whether the privilege is available in given circumstances thus involves essentially a factual inquiry (id.). A judge must determine, " 'from the implications of the question, in the setting in which it is asked,' whether 'a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result' "	*Matter of East 51st St. Crane Collapse Litig.*, 916 N.Y.S. 2d 471, 479 (N.Y. App. Div. 2010).
North Carolina	In determining whether the privilege against self-incrimination is valid, the court must determine whether a real threat of prosecution exists.	*Leonard v. Williams*, 397 S.E.2d 321, 324-325 (N.C. Ct. App. 1990).
North Dakota	The witness must claim the privilege against self-incrimination with respect to particular questions is that the court can determine whether the witness reasonably believes there is a real and appreciable danger that an answer would either directly incriminate them or furnish a link in the chain of evidence necessary to prosecute them.	*Grajedas by & Through Takes the Horse v. Holum (In re Grejedas)*, 515 N.W.2d 444, 449 (N.D. 1994).
Ohio	The Fifth Amendment privilege against self-incrimination protects a witness from answering a question which might incriminate him if it is determined in the sound discretion of the trial court that there is a reasonable basis for the witness to apprehend that a direct answer would incriminate him. It is within the discretion of the court to warn a witness about the possibility of incriminating herself, just so long as the court does not abuse that discretion by so actively encouraging a witness's silence that advice becomes intimidation.	*State v. Poole*, 923 N.E.2d 167, 171 (Ohio Ct. App. 2009).

Oklahoma	The determination of whether an answer to a specific question put to persons called as witnesses before will in fact tend to incriminate that person rests primarily with the court, but at the same time it should be emphasized that where the witness on oath declares his belief that the answer to the question incriminates, or tends to incriminate him, the court cannot compel him to answer, unless it is perfectly clear, from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot possibly have such tendency.	*Layman v. Webb*, 350 P.2d 323, 333-334 (Okla. Crim. App. 1960).
Oregon	The modern rule is that the trial court is first to determine whether in law, under all the circumstances, the witnesses should be accorded the privilege. The court shall determine whether there is reasonable ground to apprehend danger under all the circumstances of the case, including the evidence sought to be adduced in the particular case. This rule is now well settled although the courts use different language in stating it.	*In re Jennings*, 59 P.2d 702, 716-718 (Or. 1936).
Pennsylvania	In the first instance, the trial judge must evaluate the use of the privilege against self-incrimination to determine whether that proposed use is real or illusory. The following are guidelines with respect to the exercise of the privilege against self-incrimination and the trial court's evaluation of that exercise: It is not necessary that a real danger of prosecution exists to justify the exercise of the privilege against self-incrimination. It is sufficient if the person questioned has reasonable cause to apprehend such danger. Moreover, the privilege extends not only to the disclosure of facts which would in themselves establish guilt, but also to any fact which might constitute an essential link in a chain of evidence by which guilt can be established. When an individual . . . is called to testify . . . in a judicial proceeding, he or she is not exonerated from answering questions merely upon a declaration that in so doing it would be self incriminating. It is also for the court to judge if the silence is justified, and an illusory claim should be rejected. However, for the court to properly overrule the claim of privilege, it must be perfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded cannot possibly have such a tendency.	*Commonwealth v. Long*, 625 A.2d 630(Pa. 1993).
Rhode Island	The duty of the court to refrain from placing upon the witness the burden of establishing the incriminatory nature of responses to the question by making disclosures that in themselves would be incriminatory. the court's appraisal of the claim of privilege must be controlled in substantial part by its own perception of the peculiarities of the case. This constitutes a limitation as to the extent of the inquiry that the trial court properly may make on the issue. In short, the court is required to exercise its fact-finding power as much on the basis of inferences that may be drawn from the circumstances that the question posits as from the direct statements of the witness. If the circumstances to which the question relates in themselves are susceptible of a reasonable inference that would tend to incriminate the witness, it is the duty of the trial judge to give full weight to this inference when determining whether the privilege was properly invoked.	*Hummell v. Superior Court*, 211 A.2d 272, 275 (R.I. 1965).
South Carolina	A court judging the invocation of the privilege against self-incrimination asks first whether the information is incriminating in nature, and second, whether there is a sufficient possibility of criminal prosecution to trigger the privilege. In determining whether the information is incriminating, at least two categories of potentially incriminating questions exist. First, there are questions whose incriminating nature is evident on the question's face in light of the question asked and the surrounding circumstances. Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof.	*Grosshuesch v. Cramer*, 659 S.E.2d 112, 117-118 (S.C. 2008).
South Dakota		
Tennessee	When a witness asserts a Fifth Amendment privilege with respect to certain questions, the trial court has to determine if a response by the witness to the particular question might lead to an injurious disclosure. (Note: the Tennessee Court likewise follows the United States Supreme Court test in *Hoffman v. United States*, 341 U.S. 479 (U.S. 1951).	*Prime Succession of TN.*, 2007 Tenn. App. Lexis 517 *16-20 (Tenn. Ct. App. 2007).

Utah	In ruling on the propriety of invoking the privilege, whether under the State or Federal Constitution, a court should construe the scope of the privilege liberally and not in a hostile spirit. The standard to be applied is stated in Hoffman v. United States, 341 U.S. 479 (U.S. 1951) which provides: The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embrace those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime . . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." In applying this test, the judge should not deny the privilege unless it is "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate."	*First Fed. Sav. & Loan Ass'n v. Schamanek*, 684P.2d 1257, 1263 (Utah 1984).
Vermont	A related aspect of this issue must also be addressed. HN8 Although a defendant may refuse to take the stand at all, a witness may only assert the privilege regarding specific incriminating answers. A trial court should exercise discretion in limiting assertion of the privilege to questions raising a real danger of injurious disclosure.	*State v. Couture*, 502 A.2d 846, 851 (Vt. 1985).
Virginia	The trial court determines whether the witness is justified in invoking the privilege against self-incrimination with respect to each of the questions propounded. The Virigina courts apply the *Hoffman* test which provides that in order to sustain the privilege, it is necessary ". . . (1) That the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant."	*North American Mortg. Investors v. Pomponio*, 252 S.E.2d 345, 348-349 (Va. 1979).
Washington	The power to decide whether the witness shall be immune from answering certain questions put to him on the ground that the answers will incriminate him is thus vested in the trial court to be exercised in its sound discretion under all of the circumstances then present. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.	*Seventh Elect Chruch in Isr. v. Rogers*,660 P.2d 280, 286 (Wash. Ct. App. 1983).
West Virginia	To determine whether questions are facially self-incriminating, the following must occur: (a) the court must have previously determined the existence of self-inculpatory statements by the witness, (b) the party seeking to question the witness must be allowed to pose relevant individual questions to the witness, (c) before the witness responds in any way to each question, the court must sua sponte make a determination as to whether each question is facially self-incriminating, and (d) if a question is facially self-incriminating the witness may not be compelled to answer the question absent a grant of immunity from prosecution by the court.	*In the Interest of Anthony Ray Mc.*, 489 S.E.2d 289 (W. Va. 1997).
Wisconsin	When it is clear to the circuit court from the circumstances "that the testimony of the witness 'might be dangerous because injurious disclosure could result,' the need for specific inquiry into the basis for the claimed privilege is diminished." The standard the courts should apply in determining whether uphold a witness' Fifth Amendment claim is enunciated in *Hoffman v. United States*, 341 U.S. 479, 486-87 (U.S. 1951): The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence. . . . But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. (citation omitted). The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, (citation omitted), and to require him to answer if "it clearly appears to the court that he is mistaken." However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the	*State v. Marks*, 533 N.W.2d 730, 735-36 (Wis. 1995).

	claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."	
Wyoming		

State	Duty of Employer to Check Driving History	Citation
Texas	(a) Before employing a person as an operator of a motor vehicle used to transport persons or property, an employer shall request from the department: (1) a list of convictions for traffic violations contained in the department records on the potential employee; and (2) a verification that the person has a license. (b) A person may not employ a person as an operator of a motor vehicle used to transport persons or property who does not hold the appropriate driver's license to operate the vehicle as provided by this chapter.	Texas Transportation Code § 521.459
Alabama	"(a) Each employer must require the applicant to provide information specified in Section 32-6-49.5(c). (b) No employer may knowingly allow, permit, or authorize a driver to drive a commercial motor vehicle during any period: (1) in which the driver has had his or her commercial driver license suspended, revoked, or cancelled by any state, is currently disqualified from driving a commercial vehicle, or subject to an out of service order in any state; or (2) in which the driver has more than one driver license."	Alabama Code § 32-6-49.6
Alaska	(b) a person may not authorize or knowingly permit a motor vehicle owned by the person or under the control of the person to be driven in this state by a person who is not validly licensed. An employer of a commercial motor vehicle driver (1) shall require an applicant for employment to provide the information required under AS. 28.33.110(c); (2) may not knowingly allow, require, permit, assign, or authorize a driver to drive a commercial motor vehicle during a period in which (A) the driver's license is suspended, revoked, or canceled by a state; (B) the driver has lose the privilege to drive a commercial motor vehicle in the state; (C) the driver has been disqualified from driving a commercial motor vehicle; (D) the driver has more than one driver's license; (E) the driver is not licensed to drive a commercial motor vehicle; or (3) may not knowingly allow, require, permit, assign, or authorize the driver to operate a commercial vehicle in violation of a federal or state statute or regulation, or a local law or ordinance, relating to railroad-highway grade crossings.	AS § 28.15.281; AS §28.33.120
Arizona	A person shall not authorize or knowingly permit a motor vehicle owned by that person or under that person's control to be driven on a highway by any other person who is not authorized under this chapter or in violation of this chapter.	Arizona Transportation Code § 28-3475
Arkansas	No person shall authorize or knowingly permit a motor vehicle owned by him or her or under his or her control to be driven upon any highway by any person who is not authorized under this chapter or is in violation of any provisions of this act.; (a) each employer must require the applicant to provide information specified in 27-23-105(c). (b) No employer ma knowingly allow, permit, or authorize a driver to drive a commercial motor vehicle during any period: (1) in which the driver has a driver license suspended, revoked, or cancelled by a state; has lost the privilege to drive a commercial motor vehicle in a state, or has been disqualified from driving a commercial motor vehicle; (2) in which the driver has more than one (1) driver license; or (3) in which the employee, the motor carrier, the driver, or the vehicle operated by the employee or driver is subject to an out-of-service order. (c)(1) any employer who once violates the provisions of subdivision (b)(1) or (2) of the section shall, upon conviction, be fined a sum of five hundred dollars ($500), and each day's violation and each driver's violation shall constitute a separate offense and shall be punished as such. Any employer who violates the provisions of subdivision (b)(1) or (2) of this section a second or subsequent time shall, upon conviction, be fined a sum of one thousand dollars ($1,000), and each day's violation and each driver's violation shall constitute a separate offense and shall be punished as such. (2) An employer convicted of a violation of subdivision (b)(3) of this section is subject to a civil penalty of not less than two thousand seven hundred fifty dollars ($2,750) but not more than twenty-five thousand dollars ($25,000). (3) An employer who knowingly allows, requires, permits, or authorizes a driver to operate a	Arkansas Code § 27-16-304; Arkansas Code § 27-23-106

	commercial motor vehicle in violation of federal, state, or local law or regulation pertaining to one (1) or more of the offenses listed in 27-23-112(d) at a railroad-highway grade crossing is subject to a civil penalty of not less than two thousand seven hundred fifty dollars ($2,750) but not more than ten thousand dollars ($10,000).	
California		
Colorado		
Connecticut	(d) Any person who applies for employment as a driver of a commercial motor vehicle shall provide his prospective employer, at the time of application, with the following information for the ten years preceding the date of application: (1) A list of names and addresses of the applicant's previous employers for which the applicant was a driver of a commercial motor vehicle; (2) The dates between which the applicant drove for each employer; and (3) The reason for leaving that employer. The applicant must certify that all information furnished is true and complete. An employer may require an applicant to provide additional information. (e) Each employer shall require the applicant to provide the information specified in subsection (d) of this section. (f) No employer shall knowingly permit or require a driver to drive a commercial motor vehicle during any period (1) in which the driver has had his driver's license suspended, revoked or cancelled by the commissioner, or operating privilege suspended, revoked or cancelled by any other state, or has been disqualified from driving a commercial motor vehicle, or is subject to an out-of-service order, or (2) in which the driver has more than one driver's license. (g) (1) Any person who violates any provision of this section shall be deemed to have committed an infraction, and, for any subsequent offense, shall be fined not more than five hundred dollars. (2) Any employer which knowingly permits or requires a driver to operate a commercial motor vehicle in violation of an out-of-service order shall be subject to the civil penalties prescribed in 49 CFR Section 383.53, as amended from time to time.	CT Gen Stat § 14-44j
Delaware	No person shall employ any person to operate a motor vehicle who is not licensed as provided in this chapter.	21 DE Code § 2754
Florida	No person shall employ as a driver of a motor vehicle any person not then licensed to operate such vehicle as provided in this chapter. Violation of this section is a noncriminal traffic infraction subject to the penalty provided in s. 318.18(2).	Florida Motor Vehicle Code § 322.37
Georgia	"No person shall knowingly authorize or permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized under this chapter or who is not licensed for the type or class of vehicles to be driven or in violation of any of the provisions of this chapter."	Georgia Code § 40-5-122
Hawaii	No person shall employ as a driver of a certain category of motor vehicle any person who is not licensed under this part to operate that category of motor vehicle.	Haw. Rev. Stat. § 286-134
Idaho	(5) No employer shall knowingly allow, permit, require or authorize an employee to operate a commercial motor vehicle in the United States during any period: (a) In which the employee has a driver's license suspended, revoked or canceled by a state, has lost the privilege to operate a commercial motor vehicle in a state or has been disqualified from operating a commercial motor vehicle; or (b) In which the employee has more than one (1) driver's license; or (c) In which the employee, or the motor vehicle being driven, or the motor carrier operation, is subject to an out-of-service order. (6) An employer who is convicted of a violation of subsection (5)(c) of this section shall be subject to a civil penalty of not less than two thousand seven hundred fifty dollars ($2,750) nor more than twenty-five thousand dollars ($25,000). (7) No employer shall knowingly allow, permit, require or authorize an employee to operate a commercial motor vehicle in the United States in violation of any federal, state or local law or federal regulation pertaining to railroad grade crossings. An employer who is convicted of a violation of this subsection (7) shall, in addition to the general penalties provided for in this title, be subject to a civil penalty of not more than ten thousand dollars ($10,000). (8) Each employer shall require the information specified in subsection (4) of this section to be provided by the employee.	ID Code § 49-337
Illinois		
Indiana		

Iowa		
Kansas		
Kentucky	(1) No person shall authorize or knowingly permit a motor vehicle owned or controlled by him to be driven by any person who has no legal right to drive it or in violation of any of the provisions of KRS 186.400 to 186.640. (2) No person who has not applied for an operator's license or whose operator's license has been denied, canceled, suspended or revoked, or whose privilege to operate a motor vehicle has been withdrawn, shall operate any motor vehicle upon the highways while the license is denied, canceled, suspended, or revoked or his privilege to operate a motor vehicle is withdrawn, or the license has not been applied for. (3) If the operator of a motor vehicle on a public highway is requested by a peace officer, authorized to arrest a person for a violation of subsection (2) of this section or KRS 189A.090, to display his operator's license and fails to display his operator's license, that fact shall be admissible in court and shall be prima facie proof of violation of subsection (2) of this section or KRS 189A.090. (4) It shall be a defense to a charge under this section and KRS 189A.090 if the person charged presents to the court an operator's license issued to him before the date of the charge and which was valid on the date of the charge.	KY Rev. Stat. § 186.620
Louisiana	Commercial motor vehicle drivers; employer responsibilities A. For purposes of this Section and R.S. 32:414.4 "employee" means an operator of a commercial motor vehicle, including an independent contractor while in the course of operating a commercial motor vehicle, who is employed by an employer. B. For purposes of this Section and R.S. 32:414.4, "employer" means any person, including the United States, a state, or a political subdivision of a state, who owns or leases a commercial motor vehicle, or assigns employees to operate a commercial motor vehicle. **Allowing unlicensed person under the age of seventeen to drive** A. It shall be unlawful for any person to cause or knowingly permit a minor child under the age of seventeen to drive a motor vehicle or a power cycle upon any public road or highway in this state unless such child shall have first obtained a license to drive a motor vehicle or a power cycle. However, the provisions of this Subsection shall not apply to a minor who is participating in a driver education course or a prelicensing training course approved and certified by the Department of Public Safety and Corrections, public safety services. B. It shall be unlawful for any person knowingly to rent for hire a motor vehicle to be operated by any person who does not have a current license or, in the case of a non-resident who has not been licensed to drive a motor vehicle under the laws of his resident state, if the laws of his resident state so require. C. It shall be unlawful for any person or entity to employ any person as a driver of a motor vehicle if said person being employed does not have a current, valid license issued by the department in accordance with the provisions of this Chapter. D. Any person who causes or who knowingly permits an unlicensed minor under the age of seventeen to drive a motor vehicle or power cycle on a public road or highway and the owner of a vehicle who knowingly gives or furnishes a motor vehicle or power cycle to an unlicensed minor under the age of seventeen shall be jointly and severally liable for damages caused by the negligence or wilfull misconduct of the minor driving the vehicle. E. The following penalties shall be imposed for a violation of this Section: (1) The person shall be fined not less than one hundred dollars and not more than five hundred dollars for each offense, or imprisoned for not more than six months, or both. (2) However, if an unlicensed minor under the age of seventeen is involved in a collision which results in the serious bodily injury or death of another person, the person shall be subject to the penalties provided for in R.S. 14:92.2(B)(3). For purposes of this Paragraph, "serious bodily injury" means a bodily injury which involves unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.	LA Rev. Stat. § 32:414.3; LA Rev. Stat. § 32:417
Maine		

Maryland	"(a) Each employer shall require the information specified in § 16-805(c) of this subtitle to be provided by the applicant. (b) An employer may not knowingly allow, require, permit, or authorize a driver to drive a commercial motor vehicle in the United States: (1) During any period in which the driver has a driver's license suspended, revoked, or canceled by a state or has lost the privilege to operate a commercial motor vehicle in a state; (2) During any period in which the driver has been disqualified from driving a commercial motor vehicle; (3) During any period in which the driver has more than 1 driver's license; (4) During any period in which the driver, the motor vehicle he or she is driving, or the motor carrier operation, is subject to an out-of-service order; or (5) In violation of any of the provisions of §§ 21-701 through 21-704 of this article pertaining to railroad crossings or any other federal, state, or local law or regulation substantially similar to a provision of §§ 21-701 through 21-704 of this article, pertaining to railroad grade crossings."	Maryland Transportation Code § 16-806
Massachusetts	Section 12. (a) Whoever knowingly employs for hire as a motor vehicle operator any person not licensed in accordance with this chapter shall be punished for a first offense by a fine of not more than $1,000 and, for a second or subsequent offense, by a fine of not less than $1,000 nor more than $1,500 or imprisonment in the house of correction for not more than 1 year, or both such fine and imprisonment. (b) Whoever, being the owner or person in control of a motor vehicle, knowingly permits such motor vehicle to be operated by a person who is unlicensed or whose license has been suspended or revoked shall be punished for a first offense by a fine of not more than $1,000 or by imprisonment in a house of correction for not more than 1 year or, for a second or subsequent offense by a fine of not less than $1,000 and not more than $1,500 or imprisonment in a house of correction for not more than 2 1/2 years, or both such fine and imprisonment. (c) Whoever knowingly permits a motor vehicle owned by him or under his control, which is not equipped with a functioning ignition interlock device, to be operated by a person who has an ignition interlock restricted license shall be punished by 1 year in the house of correction and a fine of not more than $500 for a first offense or, for a second or subsequent offense by a fine of not more than $1,000 or imprisonment in a house of correction for not more than 2 1/2 years, or both. For the purposes of this section the term "certified ignition interlock device" shall mean an alcohol breath screening device that prevents a vehicle from starting if it detects a blood alcohol concentration over a preset limit of.02 or 20 mg of alcohol per 100 ml of blood. (d) The registrar may suspend for not more than 1 year the motor vehicle registration of a vehicle used in the commission of a violation of this section or the license or right to operate of the person who commits a violation of this section, or both.	Massachusetts General Laws 90-12
Michigan		
Minnesota		
Mississippi	(1) Each employer shall require the applicant to provide the information specified in Section 63-3-205(c). (2) No employer may knowingly allow, require, permit or authorize a driver to operate a commercial motor vehicle in the United States: (a) During any period in which the driver has a CMV driver's license suspended, revoked, or cancelled by a state or has lost the privilege to operate a commercial motor vehicle in a state, or has been disqualified from operating a commercial motor vehicle; (b) During any period in which the driver has more than one (1) CMV driver's license; (c) During any period in which the driver, or the CMV the driver is driving, or the motor carrier operation, is subject to an out-of-service order; or (d) In violation of a federal, state or local law or regulation pertaining to railroad-highway grade crossings.	MS Code § 63-1-206
Missouri	No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of sections 302.010 to 302.260.	MO Rev. Stat. § 302.260
Montana	No person shall employ as a commercial vehicle operator any person not then licensed as provided by this chapter.	M.C.A. § 61-5-305

Nebraska	An employer may apply to the Department of Motor Vehicles for a file check from the National Driver Register on a current or prospective employee. The employer shall pay a fee of two dollars for each check. Upon receipt of the application and fee, the department shall furnish the check to the employer and remit the fees to the State Treasurer for credit to the Department of Motor Vehicles Cash Fund. (1) Each employer shall require prospective applicants for employment as a driver of a commercial motor vehicle to provide the information required by section 60-4,161. (2) No employer may knowingly allow, require, permit, or authorize a driver to operate a commercial motor vehicle in the United States in any of the following circumstances: (a) During any period in which the driver does not have a current commercial learner's permit or commercial driver's license or does not have a commercial learner's permit or commercial driver's license with the proper class or endorsements. An employer may not use a driver to operate a commercial motor vehicle who violates any restriction on the driver's commercial learner's permit or commercial driver's license; (b) During any period in which the driver has a commercial learner's permit or commercial driver's license disqualified by a state, has lost the right to operate a commercial motor vehicle in a state, or has been disqualified from operating a commercial motor vehicle; (c) During any period in which the driver has more than one commercial learner's permit or commercial driver's license; (d) During any period in which the driver, the commercial motor vehicle he or she is operating, or the motor carrier operation is subject to an out-of-service order; or (e) In violation of a federal, state, or local law or regulation pertaining to railroad-highway grade crossings. (3) Any employer who violates this section shall, upon conviction, be guilty of a Class III misdemeanor.	N.R.S. § 60-483.01; N.R.S. § 60-4,162
Nevada	No person shall employ as a driver of a motor vehicle any person not then licensed as provided in NRS 483.010 to 483.630, inclusive.	N.R.S. 483.600
New Hampshire	I. Each employer shall require the applicant to provide the information specified in RSA 263:84, III. II. No employer shall knowingly allow, permit, or authorize a driver to drive a commercial motor vehicle during any period in which: (a) The driver has a driver's license suspended, revoked, or cancelled by a state; has lost the privilege to drive a commercial motor vehicle in a state; or has been disqualified from driving a commercial motor vehicle; (b) The driver has more than one driver's license, except during the 10-day period beginning on the date the person is issued a driver's license, and, until December 31, 1989, whenever a state law enacted on or before June 1, 1986, requires the person to have more than one driver's license; or (c) The driver does not possess a valid commercial driver license.	N.H.S. § 263:85
New Jersey	6. a. Before issuing a commercial driver license to an applicant, the chief administrator shall notify the Commercial Driver License Information System of the proposed issuance and shall request driving record information from the Commercial Driver License Information System, the National Driver Register, and from any other state which has issued a commercial driver license, non-commercial motor vehicle driver license or basic driver license to the applicant to determine whether the applicant has a commercial driver license, non-commercial motor vehicle driver license or basic driver license issued by another state, whether the applicant's driving privilege has been suspended, revoked, cancelled, or whether the applicant has been disqualified from operating a commercial motor vehicle. The chief administrator also shall provide driving record and other information to the licensing authority of any other state, or province or territory of Canada, which requests such information in connection with a commercial driver license. The chief administrator may charge such fees as are deemed appropriate to cover the costs of providing information, except that no fee shall be charged if the other jurisdiction does not charge this State for similar requests. b. Within 10 days after the issuance of a commercial driver license, the chief administrator	N.J. Rev. Stat. §39:3-10.14

	shall notify the Commercial Driver License Information System of that fact, providing all information required to ensure identification of the licensee.	
New Mexico	No person shall employ as a driver of a motor vehicle any person not licensed as provided in this article.	N.M. Stat. § 66-5-42
New York	§ 509-r. Investigations and inquiries. Every commercial motor carrier shall make an investigation and inquiry of each commercial driver it hires on and after the effective date of this article in accordance with rules and regulations of the commissioner of transportation.	NY Veh. & Traf. L. § 509-R
North Carolina	20-37.19. Employer responsibilities. (a) Each employer shall require the applicant to provide the information specified in G.S. 20-37.18(c). (b) No employer shall knowingly allow, permit, or authorize a driver to drive a commercial motor vehicle during any period: (1) In which the driver has had his commercial driver license suspended, revoked, or cancelled by any state, is currently disqualified from driving a commercial vehicle, or is subject to an out-of-service order in any state; or (2) In which the driver has more than one driver license; [or] (3) In which the driver, the commercial motor vehicle being operated, or the motor carrier operation, is subject to an out-of-service order. (c) The employer of any employee or applicant who tests positive or of any employee who refuses to participate in a drug or alcohol test required under 49 C.F.R. Part 382 and 49 C.F.R. Part 655 must notify the Division in writing within five business days following the employer's receipt of confirmation of a positive drug or alcohol test or of the employee's refusal to participate in the test. The notification must include the driver's name, address, drivers license number, social security number, and results of the drug or alcohol test or documentation from the employer of the refusal by the employee to take the test. (1989, c. 771, s. 2; 2005-156, s. 1; 2007-492, s. 2; 2009-416, s. 6.)	NC Gen. Stat. § 20-37.19
North Dakota	1. Each employer shall require the applicant to provide the information specified in section 39-06.2-04. 2. No employer may knowingly allow, permit, or authorize a driver to drive a commercial motor vehicle during any period: a. In which the driver's commercial driver's license is suspended, revoked, or canceled by any state or in which the driver is currently disqualified from driving a commercial vehicle or subject to an out-of-service order in any state; or b. In which the driver has more than one driver's license.	N.H.Century Code § 39-06.2-05.
Ohio	(A) Each employer shall require every applicant for employment as a driver of a commercial motor vehicle to provide the applicant's employment history for the ten years preceding the date the employment application is submitted to the prospective employer. The following information shall be submitted: (1) A list of the names and addresses of the applicant's previous employers for which the applicant was the operator of a commercial motor vehicle; (2) The dates the applicant was employed by these employers; (3) The reason for leaving each of these employers. (B) No employer shall knowingly permit or authorize any driver employed by the employer to drive a commercial motor vehicle during any period in which any of the following apply: (1) The driver's commercial driver's license is suspended, revoked, or canceled by any state or a foreign jurisdiction; (2) The driver has lost the privilege to drive, or currently is disqualified from driving, a commercial motor vehicle in any state or foreign jurisdiction; (3) The driver, the commercial motor vehicle the driver is driving, or the motor carrier operation is subject to an out-of-service order in any state or foreign jurisdiction; (4) The driver has more than one driver's license. (C) No employer shall knowingly permit or authorize a driver to operate a commercial motor vehicle in violation of section 4506.15 of the Revised Code. (D) (1) Whoever violates division (A) or (B) of this section is guilty of a misdemeanor of the first degree. (2) Whoever violates division (C) of this section may be assessed a fine not to exceed ten thousand dollars.	Ohio Rev. Code § 4506.20
Oklahoma	No employer shall permit a person to operate a motor vehicle under his control unless the person has a valid license for the class of vehicle being operated.	O.S. § 47.6.306

Oregon		
Pennsylvania	(a) General rule.--No person shall authorize or permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized under this chapter or who is not licensed for the type or class of vehicle to be driven. (b) Penalty.--Any person violating the provisions of subsection (a) is guilty of a summary offense and shall be jointly and severally liable with the driver for any damages caused by the negligence of such driver in operating the vehicle. (a) Requirements.--Each employer shall require the applicant to provide the information specified in section 1604(c) (relating to notification requirements for drivers). Each employer shall inform the applicant that the information he provides in accordance with section 1604(c) may be used and the applicant's previous employers may be contacted for the purpose of investigating the applicant's work history. (b) Prohibitions.--No employer shall knowingly allow, require, permit or authorize a driver to drive a commercial motor vehicle: (1) during any period in which: (i) the driver's license was suspended, revoked or canceled by a state; (ii) the driver has lost the privilege to drive a commercial motor vehicle in a state; (iii) the driver has been disqualified from driving a commercial motor vehicle; (iv) the driver is not licensed to drive a commercial vehicle; (v) the driver is not qualified by required class or endorsement to operate the commercial vehicle being driven; or (vi) the driver, or the commercial motor vehicle the driver is driving, or the motor carrier operation is subject to an out-of-service order; (2) during any period in which the driver has more than one driver's license; or (3) in violation of a Federal, State or local law or regulation pertaining to railroad-highway grade crossing. (c) Test vehicles.--Each employer shall provide a representative vehicle to any employee who as a result of the Commercial Motor Vehicle Safety Act of 1986 (Public Law 99-570, 49 U.S.C. app. § 2701 et seq.) must obtain a commercial driver's license to continue his present occupation. This section includes, but is not limited to, current commercial motor vehicle drivers, construction equipment operators, utility truck operators, mechanics and vehicle inspectors employed prior to March 31, 1992. It is the employer's discretion to provide a representative vehicle to any employee who wishes to obtain a commercial driver's license if the Commercial Motor Vehicle Safety Act of 1986 does not require the employee to obtain a commercial driver's license for his current position. (d) Test dates.--An employer shall provide a commercial driver the necessary time off for a driver to take the required knowledge exam and skills test when the tests have been scheduled. (e) Penalties.--Any person who violates any provision of this section commits a summary offense and shall, upon conviction, be sentenced to pay a fine of $1,000, except that if the violation relates to an out-of-service order, then the person shall, upon conviction, be sentenced to pay a fine of $2,750.	Penn. C.S. § 75-1574; Penn. C.S.§ 75-1605
Rhode Island	§ 31-10.3-29 Employer responsibilities. – No employer shall knowingly allow, permit, or authorize an employee to operate a commercial motor vehicle in the United States or province of Canada during any period: (1) In which the employee has more than one license; (2) Prior to obtaining, on a written application, the information specified in § 31-10.3-28(c); (3) When the employee's license is suspended, revoked, cancelled, or otherwise withdrawn; (4) During any period in which the driver, or the commercial motor vehicle he or she is driving, or the motor carrier operator, is subject to an out-of-service order; or (5) In violation of a federal, state, or local law or regulation pertaining to railroad-highway grade crossings.	RI Gen. L. § 31-10.3-29

South Carolina	(A) Each employer shall require the information specified in Section 56-1-2050(C). (B) An employer knowingly may not allow, permit, or authorize a person to drive a commercial motor vehicle during a period in which: (1) the person's commercial driver's license is suspended, revoked, or canceled by a state, has lost the privilege to drive a commercial motor vehicle in a state, is disqualified from driving a commercial motor vehicle, or is subject to an out-of-service order in a state; (2) the person has more than one driver's license, except during the ten- day period beginning on the date the employee is issued a driver's license; (3) an employer who knowingly allows, permits, or authorizes a person to drive a commercial motor vehicle during a period in which either the vehicle or the person is subject to an out-of-service order is subject to a civil penalty of not less than two thousand seven hundred fifty dollars nor more than eleven thousand dollars; or (4) the employer is in violation of a federal, state, or local law or regulation pertaining to railroad-highway grade crossings. (C) An employer who is convicted of a violation of 49 CFR 383.37(d) is subject to a civil penalty of not more than ten thousand dollars.	SC Code § 56-1-2060
South Dakota	32-12A-5. Information required by employer. Each employer shall require the applicant to provide the information specified in § 32-12A-4. No employer may knowingly allow a driver to operate a commercial motor vehicle: (1) During any period in which the driver has had an operator's license suspended, revoked or cancelled by any state, has lost the right to operate a commercial motor vehicle in any state, is currently disqualified from driving a commercial vehicle, or subject to an out-of-service order in any state; (2) During any period in which the driver has more than one operator's license; (3) During any period in which the employee, or the motor vehicle the employee is driving, or the motor carrier operation, is subject to an out-of-service order; or (4) In violation of any federal, state, or local law or regulation pertaining to railroad-highway grade crossings.	SD Codified L § 32-12A-5
Tennessee	No employer shall knowingly allow, permit, or authorize an employee to operate a commercial motor vehicle in the United States during any period: (1) In which the employee has a driver license suspended, revoked, or cancelled by a state, has lost the privilege to operate a commercial motor vehicle in a state, or has been disqualified from operating a commercial motor vehicle; (2) In which the employee has more than one (1) driver license, except during the ten-day period beginning on the date the employee is issued a driver license and, until December 31, 1989, except whenever a state law enacted on or before June 1, 1986, requires the employee to have more than one (1) driver license. Each employer shall require the information specified in § 55-50-402(c) to be provided by the applicant; (3) In which the driver, or the CMV the employee is driving, or the motor carrier operation, is subject to an out-of-service order; or (4) In violation of a federal, state or local law or regulation pertaining to railroad-highway grade crossings.	Tenn. Code § 55-50-403
Utah		
Vermont		
Virginia		
Washington	(1) An employer shall require the applicant to provide the information specified in RCW 46.25.030(3). (2) No employer may knowingly allow, permit, or authorize a driver to drive a commercial motor vehicle during any period: (a) In which the driver has a driver's license suspended, revoked, or canceled by a state, has lost the privilege to drive a commercial motor vehicle in a state, or has been disqualified from driving a commercial motor vehicle; or (b) In which the driver has more than one driver's license.	WA Rev. Code § 46.25.040
West Virginia	No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of this chapter. No person shall employ as a chauffeur of a motor vehicle any person not then licensed as provided in this chapter.	W.V. Code § 17B-4-4; W.V. Code § 17B-4-5
Wisconsin		

Wyoming	No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven or towed upon any highway by any person who is not licensed for the type or class of vehicles to be driven or is in violation of any provision of this act. (a) Each employer must require the applicant to provide the information required in W.S. 31-7-301. (b) No employer may knowingly allow, permit or authorize a driver to drive a commercial motor vehicle during any period in which the driver has: (i) Not been licensed to drive a commercial vehicle; (ii) A driver license suspended, revoked or canceled by a state; (iii) Lost the privilege to drive a commercial motor vehicle in a state; (iv) Been disqualified from driving a commercial motor vehicle; or (v) More than one (1) driver license.	WY Stat § 31-7-135; WY Stat § 31-7-302

State	**Neg. Hiring, etc., is *not* Vicarious Liability**	**Citation**
Texas	Liability for negligent hiring and retention is not dependent, however, upon a finding that the employee was acting in the course and scope of his employment when the tortious act occurred. Instead, the employer is liable if its negligence in hiring or retaining the unfit employee was a proximate cause of the plaintiff's injuries.	*Morris v. JTM Materials*, 78 S.W.3d 28, 49 (Tex.App.--Fort Worth 2002, no pet.)
Alabama	An employer has a duty to exercise reasonable care for the safety of his customers, patrons, or other invitees, and in fulfilling this duty he must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. However, the complaint did not allege that the servant was acting within the line and scope of his employment at the time of the assult nor that the servant was in any way furthering the master's business at the time and place of the assault. Therefore, the plaintiff did not seek to recover on the principal agent or employer-employee relationship.	*Brown v. Vanity Fair Mills, Inc.*, 277 So. 2d 893, 895 (Ala. 1973).
Alaska		
Arizona	If the defendant employees were actually negligent at the time of the accident and proximately caused the accident, this is sufficient to establish the defendant's liability. But the failure of an employer to hire only competent and experienced employees does not of itself constitute an independent ground of actionable negligence.	*Lewis v. Southern Pac. Co.*, 425 P.2d 840, 842 (Ariz. 1967).
Arkansas	It is irrelevant to the negligent hiring claim that the defendant's employee might not have been up to the level of expected performance in his previous jobs or in his position as an installer with Comcast. There must be a direct causal connection between an inadequate background check and the criminal act for which the appellant is attempting to hold the employer liable. Employer had no indication that its employee might be a risk to customers.	*Saine v. Comcast Cablevision of Ark., Inc.*, 126 S.W.3d 339,345 (Ark. 2003).

California	Plaintiff's claims for ordinary negligence and negligent hiring and supervision were barred by a release the plaintiff signed with the defendant motorcross track operator. The Release at issue provided that the plaintiff agreed to waive his right to sue the defendant for any losses or damages suffered on account of an injury related to using the track, "whether caused by the negligence of [the Defendant] or otherwise." The court ruled this Release waived the plaintiff's right to sue the Defendant for ordinary negligence as well as negligent hiring and supervision.	*Rosencrans v. Dover Images, Ltd.*, 122 Cal. Rptr. 3d 22, 30(Cal. Ct. App. 2011).
Colorado	The tort of negligent hiring, when applicable under the circumstances of a particular case, can operate to hold an employer liable for intentional or negligent acts of an employee that are either within or outside of the scope of employment. Under the facts of this case, however, the trial court should not have submitted the negligent hiring claim to the jury; having done so, it should have granted judgment in favor of the employer notwithstanding the verdict. The accident occurred after the employee had finished his work day. The scope of the employer's duty under the tort of negligent hiring did not extend to the plaintiffs because the job for which it hired the employee did not include driving to and from work.	*Raleigh v. Performance Plumbing & Heating, Inc.*, 130 P.3d 1011, 1015 (Col. 2006).
Connecticut	The tort of negligent hiring extends to any situation where a third party is injured by an employer's own negligence in failing to select an employee fit or competent to perform the services of employment. The foreseeability test applies in cases alleging negligent hiring, supervision, or retention; whether the claim is for negligent hiring, negligent supervision or negligent retention, a plaintiff must allege facts that support the element of foreseeability. Because there generally is no duty that requires one person or entity to protect another from the tortious acts of a third party, the plaintiff must allege facts that place this case in the exception to this general rule. That is, the plaintiff must allege facts demonstrating that the employer's own conduct created or increased the foreseeable risk that she would be harmed by the employer's employee.	*O'Connell v. Salon Shahin, Inc.*, 2013 Conn. Super. LEXIS 2816 at **8-13 (Conn. App. Ct. 2013).
Delaware	"An employer is liable for negligent hiring or supervision where the employer is negligent . . . in the employment of improper persons involving the risk of harm to others or in the supervision of the employee's activities." This is the direct liability of the employer rather than its employee's negligence imputed through vicarious liability. In order to state a claim for negligent hiring the plaintiff needed to allege that the defendant employer was on notice of the employee's risk of tortious behavior at the time it hired her. The plaintiff failed to do so; because the court cannot draw any inference from the employer that it knew or should have known it was a risk at the time of hiring, the negligent hiring claim must be dismissed.	*Fanean v. Rite Aid Corp. of Del., Inc.*, 984 A.2d 812, 825-26 (Del. Super. Ct. 2009).
Florida	The employer was found not liable for negligent hiring because the employer's employee committed the assault outside the line and scope of employment.	*Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. App. 1986).

Georgia	An employer may not be held liable for negligent hiring or retention unless the plaintiff shows the employer knew or should have known of the employee's violent and criminal propensities. The plaintiffs must show that the Church and the Conference knew or should have known of Boen's propensity for sexual misconduct. The Church was not liable because there was nothing showing the Church or Conference should have been on notice prior to ordaining Boen that he had a propensity for sexual misconduct.	*Alpharetta First United Methodist Church v. Stewart*, 472 S.W.2d 532,536 (Ga. Ct. App. 1996).
Hawaii	The existence of a duty under a negligent hiring theory depends upon foreseeability, that is, "whether the risk of harm from the dangerous employee to a person such as the plaintiff was reasonably foreseeable as a result of the employment."	*Janssen v. American Hawaii Cruises*, 731 P.2d 163, 166 (Haw. 1987).
Idaho		
Illinois	The act causing the accident must be "collateral" to the performance of the work for which the employer's employee was engaged under a negligent hiring theory.	*Insurance Co. of North America v. Hewitt-Robbins, Inc.*, 301 N.E.2d 78, 80 (Ill. Ct. App. 1973).
Indiana	In a negligent hiring cause, the plaintiff must show evidence that the defendant employee acted within the scope of his or her employment when he or she injured the plaintiff to establish liability on the employee's employer.	*City of Fort Wayne v. Moore*, 706 N.E.2d 604, 607-08 (Ind. Ct. App. 1999).
Iowa	Iowa recognizes a claim by an injured third party for negligent hiring and conclude that an employer has a duty to exercise reasonable care in hiring individuals, who, because of their employment, may pose a threat of injury to members of the public. Evidence showing the employer had knowledge at the time of the hiring that the employee had a past history of inappropriate conduct must be shown by the plaintiff.	*Godar v. Edwards*, 588 N.W.2d 701, 708-09 (Iowa 1999).
Kansas	Plaintiff must submit evidence that defendant employer knew or should have known that the employee had the propensity for the conduct that caused harm. Without such evidence, it cannot be shown that the employer had a reason to believe the employee's employment would result in an undue risk of harm to others or that the employer needed to take any special steps to properly supervise or control the employee's conduct. Such evidence goes towards foreseeability.	*Wayman v. Accor N. Am., Inc.*, 251 P.3d 640, 650-51 (Kan. Ct. App. 2011).
Kentucky	A potential employer must have a modicum of faith and trust in a job applicant. Plaintiffs must present evidence that retaining or hiring an employee presented an unreasonable risk of harm to the plaintiff; evidence must show the employer could have foreseen the employee's action.	*Carberry v. Golden Hawk Transp. Co.*, 402 S.W.3d 556, 563-64 (Ky. Ct. App. 2013).
Louisiana	Defendant sheriff's department was not liable for negligent hiring of defendant deputy sheriff because the defendant deputy's acts were unquestionably outside the scope of his employment.	*Roberts v. Benoit*, 605 So. 2d 1032, 1046 (La. 1991).

Maine	Evidence must be presented showing the employee was acting within apparent authority at the time the tort was committed for liability to attach on the employer for negligent hiring/supervision.	*Gniadek v. Camp Sunshine at Sebago Lake, Inc.*, 11 A.3d 308, 317 (Me. 2011).
Maryland	Where an employee is expected to come into contact with the public (in this case a bartender), it has been held that the employer must make some reasonable inquiry before hiring or retaining the employee to ascertain his fitness, or the employer must otherwise have some basis for believing that he can rely on the employee. The nature and extent of the inquiry that is needed will naturally vary with the circumstances. The cases hold if the employer makes adequate inquiry or otherwise has a sufficient basis to rely on the employee, there is no need to inquire about a possible criminal record. In this case, there was no evidence whatever that the defendant knew or should have known that the employee bartender was potentially dangerous. The defendant did inquire about employee bartender before employing him, asking the former owner of the employer who had been the employee's employer for eighteen months. The former employee's employer recommended the employee to the defendant, telling him that he was a "good worker" and that he would employ him.	*Evans v. Morsell*, 395 A.2d 480,484-85 (Md. 1978).
Massachusetts	The fact that Kelley had a criminal record, by itself, is not enough to establish, as matter of law, the employer's negligence. Evidence must be submitted showing it was reasonably foreseeable to the employer that the employee posed a threat to the members of the public for liability to attach to the employer.	*Coughlin v. Titus & Bean Graphics, Inc.*, 767 N.E.2d 106, 112 (Mass. App. Ct. 2002)
Michigan	Hospital employer was not vicariously liable for negligent hiring of the employee because the employee was not acting within the scope of his employment when he engaged in acts of sexual misconduct with the patient.	*Zsigo v. Hurley Med. Ctr.*, 716 N.W.2d 220, 228-29 (Mich. 2006).
Minnesota	An employer cannot breach this duty if a reasonable investigation would not have revealed the employee's inherent propensity for dangerous conduct. Allegations concerning negligent hiring were properly dismissed because the abuse did not occur during a school-sanctioned actvity nor did it occur during school hours. Furthermore, no evidence was presented that the defendant school district have any notice that secual contact had occurred between the employee and child; any investigation into the employee's background would not have disclosed his pedophilia or sexual preferences.	*L.R.M. v. Engstrom*, 1995 Minn. App. LEXIS 711 at *8-9 (Minn. Ct. App. 1995).
Mississippi	Plaintiff must show credible evidence that the employee's wrongful act was reasonably foreseeable to the employer in order for liability to attach to the employer.	*Holmes v. Campbell Props.*, 47 So. 3d 721,724-25 (Miss. Ct. App. 2010)

Missouri	The Missouri authorities should be read as being in line with the majority view which recognizes negligent hiring as providing a basis for recovery against the employer. To recover the plaintiff must carry the burden of proving that the defendant employer knew or should have known of the dangerous proclivities of the employee. Even if the employer has a duty to investigate the employee's prior criminal history, its failure to do so would produce liability to plaintiff only if the failure to investigate was the proximate cause of her injury. The injuries/acts occurred long after the employee's duties had concluded, likewise, the employee's actions deviated from the employer's policies and procedures, and thus, his acts were not authorized by the employer. Without evidence to the contrary, the plaintiff failed to carry its burden of proving negligent hiring.	*Strauss v. Hotel Continental Co.*, 610 S.W.2d 10, 114-15 (Mo. Ct. App. 1980).
Montana		
Nebraska	Employer was not vicariously liable for the damages its employees caused in an altercation because the altercation occurred after the company-sponsored party had ended; the altercation occurred at a location different form the location of the company-sponsored-party; and no evidence was presented showing the employees' conduct was authorized or ratified by the employer. Furthermore, the company was not negligent in hiring same employees because they were not unsuitable for their work as distributors.	*Strong v. K & K Invs.*, 343 N.W.2d 912, 915-16 (Neb. 1984).
Nevada	To be liable for negligent hiring, evidence must show that the employer failed to conduct a reasonable background check of its employees, or failed to use reasonable care in the hiring, supervision, and retention of its employees to ensure their fitness for their respective jobs; evidence showing that the employer knew or should have known that some of its employees were engaged in a conspiracy to defraud the casino (the act) must be presented to survive summary judgment.	*Vinci v. Las Vegas Sands, Inc.*, 984 P.2d 750, 751 (Nev. 1999).
New Hampshire	Defendant was not negligent in its hiring of its employee managers based on the evidence that some employees were competent and knowledgeable in their fields commensurate with their responsibilities. Likewise, the defendant could not, in reasonable diligence, have become aware of the existence of the published rates would made the basis of the plaintiff's claim.	*Clark & Lavey Benefits Solutions, Inc., v. Educ. Dev. Ctr., Inc.*, 2007 N.H. Super. LEXIS 96 at •6-7 (N.H. Sup. Ct. 2007).
New Jersey	An employer may be held responsible for the torts of an employee under three theories: respondeat superior, negligent entrustment, and negligent hiring and supervision. The court recognized the tort of negligent hiring as a tort not dependent on principles of respondeat superior. Under respondeat superior an employer is responsible for only those acts committed within the scope of employment while negligent hiring covers acts outside the scope of employment. Thus, once a determination is made that the act is not within the scope of employment, the action becomes one of negligent hiring and supervision.	*Cosgrove v. Lawrence*, 520 A.2d 844, 849 (N.J. Super. Ct. App. Div. 1986).

New Mexico	Liability in New Mexico for negligent hiring or retention of an employee is grounded upon the "knew or should have known" standard, and not solely upon "actual knowledge". This result is consistent with the "knew or should have known" standard applied in other areas of negligence. The question of "foreseeability" or "proximate cause" must be resolved before defendant's liability can be determined. It is not enough that plaintiff prove that defendant [700] was negligent in hiring or retaining Sanders. In addition, plaintiff must prove that the negligent hiring or retention of Sanders was the proximate cause of the harm.	*F & T Co. v. Woods*, 594 P.2d 745, 747-48 (N.M. 1979).
New York	Defendant department store not found liable for negligent hiring where a routine check of its employee's background would not have revealed the employee's prior sodomy conviction and were not revealed to the public and to require any more exhaustive search into an employee's background would place an unfair burden on the business community.	*Stevens v. Lankard*, 297 N.Y.S. 2d 686, 688 (N.Y. App. Div. 1968).
North Carolina	There must be a duty owed by the employer to the plaintiff in order to support an action for negligent hiring. The foreseeability of a risk of harm is insufficient unless defendants' negligent hiring or retention of the employee in some manner actually caused the injury in question. Even if the defendants were negligent in hiring the employee, the negligence must be a proximate cause of the plaintiffs' injuries.	*Little v. Omega Meats I, Inc.*, 615 S.E.2d 45, 49-50 (N.C. Ct. App. 2005).
North Dakota		
Ohio	The tort of negligent hiring is recognized in Ohio. Whether considering a claim based upon negligent hiring, the issue of whether a duty is owed is based upon the foreseeability of the injury. Concerning criminal acts of a third party which the defendant might reasonably anticipate, "the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant." Rather, "it is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed." The scope of the duty, however, is "limited to cover only those intervening causes which lie within the scope of the foreseeable risk, or have at least some reasonable connection with it."	*Evans v. Ohio State Univ.*, 680 N.E.2d 161, 171-72 (Ohio Ct. App. 1996).
Oklahoma	The critical element for recovery is the employer's prior knowledge of the servant's propensities to create the specific danger resulting in damage. To recover, the plaintiff must show the employer had notice of the employee's deviant behavior that is related to the employee's harmful acts.	*N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 595,600-01 (Okla. 1999)
Oregon	Plaintiff's negligent hiring claim against the parking lot owner was rejected because the plaintiff was unlawfully using the premises at the time of the assault; the defendant parking lot employer owed no duty to plaintiff.	*Hansen v. Cohen*, 276 P. 2d 391, 394 (Or. 1955).

Pennsylvania	Defendant truck company not liable for negligent hiring and retention of its employee driver because the employee driver's acts were unrelated to his truck driving duties; were unrelated to his driving, and his criminal acts were unforeseeable to the defendant employer.	*Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36,44-45 (Pa. 2000).
Rhode Island	Liability of the employer is premised on its failure to exercise reasonable care in selecting a person who the employer knew or should have known was unfit or incompetent for the employment, thereby exposing third parties to an unreasonable risk of harm. Plaintiff must show that the employer would have discovered the employee's reluctance or inability to perform if it had performed the recommended and customary investigation into his previous clinical activities. Motion for directed verdict was upheld on appeal because there was no evidence that would have put the employer on notice of the employee's incompetency.	*Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 464 (R.I. 1993).
South Carolina	In circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring the employee. Negligent hiring cases generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties. Plaintiff must present evidence establishing that the employer could foresee that employing the employee would create an undue risk of harm to the public.	*Kase v. Ebert*, 707 S.E.2d 456, 459 (S.C. Ct. App. 2011).
South Dakota	The employer's duty exists at the time the employee is hired and depends on the degree of contact the employee will have with the public in the prospective job. The court looks at what the employee's duties were specifically at the time of hire not what the employee's duties were at the time of the incident, in deciding whether an employer negligently hired same employee.	*Iverson v. NPC Int'l, Inc.*, 801 N.W.2d 275, 280 (S.D. 2011).
Tennessee	The principle was stated to be that the employer must exercise the degree of care commensurate with the nature and danger of the business in which he is engaged. More than past criminal conduct is required to prove negligent hiring; evidence must be shown that the employer knew or should have known the employee posed an unreasonable risk to others.	*Gates v. McQuiddy Office Prods.*, 1999 Tenn. App. Lexis 715 at *6-7 (Tenn. Ct. App. 1995).
Utah		
Vermont		

Virginia	Negligent hiring liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others. Even though negligent hiring is primary and not vicarious liability, it seems incongruous that an employer could be liable based on conduct of an employee when the employee himself would not be civilly liable.	*Goforth v. Office Max*, 1999 Va. Cir. Lexis 120 at *7-14 (Va. Cir. Ct. 1999).
Washington	The defendant school district was found not liable for the negligent hiring of teacher because the sexual relationship between the teacher and student occurred after school hours and off school premises. Furthermore, there was nothing in the teacher's background indicating he would have sexual relationship with student.	*Scott v. Blanchet*, 747 P.2d 1124, 1129-30 (Wash. Ct. App. 1987).
West Virginia	A primary question in determining whether an employer may be held liable, based on a theory of negligent hiring or retention, is the nature of the employee's job assignment, duties and responsibilities -- with the employer's duty with respect to hiring or retaining an employee increasing, as the risks to third persons associated with a particular job increase. Evidence showing the causal link between the injurious act and the aforementioned factors must be shown to determine employer liability per the tort.	*McCormick v. West Virginia Dep't of Pub. Safety*, 503 S.E. 2d 502,507 (W. Va. 1998).
Wisconsin		
Wyoming		

State	**Trial Court Review of Each 5th Amend. Claim**	**Citation**
Texas	Thus, each question for which the [5th Amendment] privilege [against self-incrimination] is claimed must be studied and the court must forecast whether an answer to the question could tend to incriminate the witness in a crime.	*Warford v. Beard*, 653 S.W. 2d 908, 911 (Tex.App. - Amarillo 1983, no writ).
Alabama	If a party reasonably apprehends a risk of self-incrimination, he may claim the Fifth Amendment privilege although no criminal charges are pending against him and even if the risk of prosecution is remote. Clearly, it is not for the witness, but for the court to determine whether the fear of incrimination is well founded. This protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.' However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" Although no actual criminal charges are filed, the trial judge must have sufficient evidence before him to clearly reveal that a criminal	*Ex Parte Coastal Training Inst.*, 583 So. 2d 979, 981-82 (Ala. 1991).

	investigation was ongoing.	
Alaska	The witness must demonstrate to the court a reasonable basis for the privilege against self-incrimination claim. The trial court need not be left to speculate over the nexus between a witness's seemingly innocent answer and some subsequent prosecution.	*McConkey v. State*, 504 P.2d 823, 827 (Alaska 1972) (C.J. Rabinowitz concurring).
Arizona	The broad scope of the privilege can no longer be questioned. In determining whether the privilege can be invoked, a court should construe the scope of the privilege liberally and not in a hostile spirit. This constitutionally-guaranteed privilege extends beyond obvious admissions of guilt to encompass statements which may only tend to incriminate by furnishing one link in the chain of evidence required to convict. The claim of privilege thus protects a party when that person's answer might furnish one tiny link in the chain of evidence tending to establish criminal liability.	*State v. Ott*, 808 P.2d 305, 311 (Ariz. 1990).
Arkansas	In determining the validity the of a privilege against self-incrimination claim, the court must determine the applicability of same privilege based on the current case at hand. A trial judge can overrule a claim where the privilege is not applicable in a civil proceedings	*Edwards v. Stills*, 984 S.W.2d 366, 379-80 (Ark. 1998).
California	In assessing whether the court properly allowed the witness to invoke the privilege against self-incrimination, it need not be decided whether his testimony actually would have incriminated him, but rather whether it would have given him “reasonable cause to apprehend danger from the testimony.	*People v. Smith*,150 P.3d 1224, 1252 (Cal. 2007).
Colorado	Before a court can compel a response or punish for contempt in the face of a claim of the privilege against self incrimination, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency" to incriminate. A determination regarding the likelihood of self-incrimination must be made.	*People v. Razatos*, 699 P.2d 970, 976 (Colo.1985).
Connecticut	A court may not deny a witness' invocation of the fifth amendment privilege against compelled self-incrimination unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have [a] tendency to incriminate."	*Martin v. Flanagan*, 789 A.2d 979, 984 (Conn. 2002).
Delaware	"The trial court must determine whether a witness invoking his or her Fifth Amendment privilege 'is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination.'"	*Brown v. State*, 729 A.2d 259, 263 (Del. 1999).
Florida	A witness may assert the privilege against self-incrimination during discovery in a civil case when he has reasonable grounds to believe that his answers would provide a link in the chain of evidence necessary for a criminal conviction. A witness may assert the privilege against self-incrimination during discovery in a civil case when he has reasonable grounds to believe that his answers would provide a link in the chain of evidence necessary for a criminal conviction. A witness may assert the privilege against self-incrimination during discovery in a civil case when he has reasonable grounds to believe that his answers would provide a link in the chain of evidence necessary for a criminal conviction. The court must sustain the privilege unless it is " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Florida caselaw also states that it must be a "substantial and 'real' " threat of incrimination and not one that is "merely trifling or imaginary."	*Belniak v. McWilliams*, 44 So. 3d 1282, 1284-85 (Fla. Ct. App. 2010).
Georgia	The Georgia Constitution contains a similar privilege (to the United States Constitution) against self-incrimination, providing that no person shall be compelled to give testimony tending in any manner to be self-incriminating. When questioning does not tend to incriminate a person as a matter of law, the trial court must determine if the answers could incriminate the witness. If so, then the decision whether it might must be left to the defendant. If the witness then says under oath that his answer would incriminate him, then "the court can demand no other testimony of the fact." The court determines if the questions posed to the witness could not have been incriminating. If, however, the trial court determines in its inquiry that the questions could have been incriminating, then the witness could have properly asserted his privilege against self-incrimination if he determined that the questions might incriminate him.	*Begner v. State Ethics Comm'n*, 552 S.E.2d 431, 433-34 (Ga. Ct. App. 2001).
Hawaii	The privilege against self-incrimination does not protect against "remote possibilities [of future prosecution] out of the ordinary course of law," but is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." It is the province of the trial court to determine whether such reasonable cause exists.	*State v. Kupihea*, 909 P.2d 1122, 1128 (Haw. 1996).

Idaho	The custom is for the trial judge to examine the protesting witness out of the presence of the jury in order to determine the validity of his privilege against self-incrimination claim. Once the court satisfies itself that the claim is well-grounded as to the testimony desired, it may, in its discretion, decline to permit either party to place the witness on the stand for the purpose of eliciting a claim of privilege or to comment on this circumstance. In doing so, the court must decide whether the fifth amendment claim is valid and there exists a real danger of self-incrimination.	*State v. Ramsey*, 576 P.2d 572, 575 (Idaho 1978).
Illinois	The privilege against self-incrimination does not exist where there are no reasonable grounds to fear self-incrimination. Neither an unreasonable fear of self-incrimination nor a mere reluctance to testify is a ground for claiming the privilege. Once a witness asserts his fifth amendment privilege not to incriminate himself, then "it is for the circuit court to determine if under the particular facts there is a real danger of incrimination." The witness is not required to prove that the answer to a particular question would necessarily subject him to prosecution. In determining this, the Idaho courts rely on the United Supreme Court decision in *Hoffman* which provided: "[I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be [305] compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The *trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence*.'"	*People v. Redd*., 553 N.E.2d 316, 339 (Ill. 1990) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (U.S. 1951).
Indiana	In evaluating a privilege of self-incrimination claim, the court is to determine whether the invocation of the privilege is justified. In doing so, the court makes a particularized inquiry into the propriety of witness's assertion of the privilege.	*Resnover v. State*, 507 N.E.2d 1382, 1389 (Ind. 1987).
Iowa	The power to decide if the witness may assert his privilege against self-incrimination is thus vested in the trial court to be exercised in its sound discretion under all the circumstances then present. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."	*State v. Parham*, 220 N.W.2d 623, 626 (Iowa 1974) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-487 (U.S. 1951).
Kansas	When a witness called by the state refuses to testify and claims the Fifth Amendment privilege against self-incrimination, the court may hold a hearing in chambers to determine if the claim is justified to determine the validity of such claim.	*State v. McQueen*, 582 P.2d 251, 259 (Kan. 1978).
Kentucky	In determining whether a witness should be allowed to invoke the privilege against self-incrimination, the court must determine what crimes might reasonably have been anticipated to be disclosed by the witness' responses to the questions. Such determination is to be made upon examining the questions to be asked, not in isolation, but [901] in relationship to their scope and possible implications. The court must find that a witness has properly claimed the privilege if it appears that a responsive answer would furnish a necessary link in the chain of evidence which might convict or implicate a witness.	*Commonwealth v. Gettys*, 610 S.W.2d 899, 900 (Ky. Ct. App. 1980).
Louisiana	Claims of privilege are preferably determined outside the presence of the jury. A trial judge may allow witnesses to be examined outside the presence of the jury in order to determine if the privilege against self incrimination claim is proper. The privilege against self incrimination must be liberally construed in favor of the accused or witness. The judge determines whether the questions would require inculpatory responses.	*State v. Jones*, 587 So. 2d 787, 795 (La. Ct. App. 1991).
Maine	The constitutional privilege against self-incrimination protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. The danger of criminal prosecution, however, must be real and based on reasonable cause. "And, in determining whether a real apprehension of danger exists, the judge before whom the problem is raised must [328] give the benefit of any reasonable doubt to the person claiming the privilege. It is essential, however, to proper judicial administration that the exercise of the privilege not depend upon a purely arbitrary or capricious claim of apprehension of incriminating danger made by the person refusing to answer, and it is for the court to decide whether the fear of self-incrimination entertained by the witness or party is real or imaginary, substantial in character or so improbable or unrealistic that no reasonable person would suffer it to influence his conduct."	*State v. Vickers*, 309 A.2d 324, 327-328 (Me. 1973) (quoting *Collett v. Bither*, 262 A.2d 353 (Me. 1970).
Maryland	The trial court must determine whether the claim of the Fifth Amendment privilege is in good faith or lacks any reasonable basis.	*Gray v. State*, 796 A.2d 697, 707 n.13 (Md. 2001).

Massachusetts	A witness may refuse to testify based on their invocation of the privilege "unless it is 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency' to incriminate." The witness must have reasonable cause to apprehend danger from a direct answer. It is for the judge, rather than the witness and the attorney to determine whether silence is justified.	*Pontes v. New Eng. Power Co.*, 2004 Mass. Super. Lexis 340 at *2-3 (Mass. Sup. Ct. 2004).
Michigan	When the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken. The court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate privilege, as was done in the instant case. This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. The trial court determines whether the witness has a legitimate privilege.	*People v. Poma*, 294 N.W.2d 221, 222-223 (Mich. Ct. App. 1980).
Minnesota	Trial courts have broad discretion in deciding whether a claim of privilege is valid. the trial court should not require the witness to prove the hazard of incrimination, as to do so would require the witness to surrender the very protection which the privilege is designed to guarantee.	*State v. Manley*, 664 N.W.2d 275, 286 (Minn 2003).
Mississippi	When a witness desires to claim the privilege of the Fifth Amendment, "he is required to give the court sufficient information for the court to determine, in fact, that answering the question would tend to incriminate the witness." The claim of privilege, applicable in a civil case, is to be determined by the court. The privilege, if claimed, must be done so on a question by question basis. The witness must tender sufficient information so that the court can make an informed decision. Though we do not say that an attorney may not represent his client in matters of privilege, we do require that the witness make some affirmative indication that he himself invokes the privilege.	*Harrell v. Duncan*, 593So. 2d 1, 6 (Miss. 1991).
Missouri	The court must determine whether the specific privilege against self-incrimination claim is justified. This determination creates a perplexing problem. The privilege not only extends to answers which would in themselves support a conviction of a crime but likewise embraces those answers which would simply furnish a link in the chain of evidence needed to prosecute the [witness] for a crime. The court cannot compel the [witness] to answer unless it would be impossible for the [witness] to incriminate himself. the application of this rule quite often depends upon the setting or context in which a particular question is asked. If an otherwise innocuous question is asked in a setting or context which suggests a real hazard of incrimination, the court obviously cannot say, as a matter of law, that incrimination is impossible and, therefore, the court cannot compel the [witness] to answer the question nor sensibly compel him to explain the self-evident reasons for invoking his privilege against self-incrimination. However, if the question remains innocuous even when viewed in its setting and context, the court can require the [witness] to describe, in general terms, a rational basis upon which his answers could conceivably incriminate him. If a rational basis for incrimination is provided, the court obviously cannot say, as a matter of law, that incrimination is impossible.	*State ex rel. Newman v. Anderson*, 607 S.W.2d 445, 447-448 (Mo. Ct. App. 1980).
Montana		
Nebraska	The trial court's role in determining the sufficiency of the privilege [against self-incrimination] as follows: "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.'"	*State v. Robinson*, 715 N.W.2d 531, 554 (Neb. 2006) (quoting *State v. Bittner*, 196 N.W.2d 186, 188 (Neb.1972).
Nevada	Determining how to proceed in response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination is a matter within the discretion of the district court. The court looks at whether answering the question could be incriminating on the witness.	*Francis v. Wynn Las Vegas, LLC*, 262 P.3d 705, 710-712 (Nev. 2011).
New Hampshire	The privilege against self-incrimination extends not only to answers that in themselves would support a conviction, but also to any information sought which would furnish a link in the chain of evidence needed to prosecute. Whether a witness' claim of the privilege is justified is a decision which rests within the trial court's exercise of sound discretion. The privilege should be raised separately with respect to each question propounded, and the witness should present the court with adequate information upon which it can determine if the privilege applies.	*State v. O'Connell*, 550 A.2d 747, 748 (N.H. 1988).
New Jersey	The privilege against self-incrimination cannot be invoked unless the trial court makes its own determination as to the realistic, not speculative, likelihood of the witness' possible answer exposing him to criminal liability.	*In re Pillo*, 93 A.2d 176 , 182-183 (N.J. 1952).
New Mexico		

New York	Determining whether the privilege is available in given circumstances thus involves essentially a factual inquiry (id.). A judge must determine, " 'from the implications of the question, in the setting in which it is asked,' whether 'a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result' "	*Matter of East 51st St. Crane Collapse Litig.*, 916 N.Y.S. 2d 471, 479 (N.Y. App. Div. 2010).
North Carolina	In determining whether the privilege against self-incrimination is valid, the court must determine whether a real threat of prosecution exists.	*Leonard v. Williams*, 397 S.E.2d 321, 324-325 (N.C. Ct. App. 1990).
North Dakota	The witness must claim the privilege against self-incrimination with respect to particular questions os that the court can determine whether the witness reasonably believes there is a real and appreciable danger that an answer would either directly incriminate them or furnish a link in the chain of evidence necessary to prosecute them.	*Grajedas by & Through Takes the Horse v. Holum (In re Grejedas)*, 515 N.W.2d 444, 449 (N.D. 1994).
Ohio	The Fifth Amendment privilege against self-incrimination protects a witness from answering a question which might incriminate him if it is determined in the sound discretion of the trial court that there is a reasonable basis for the witness to apprehend that a direct answer would incriminate him. It is within the discretion of the court to warn a witness about the possibility of incriminating herself, just so long as the court does not abuse that discretion by so actively encouraging a witness's silence that advice becomes intimidation.	*State v. Poole*, 923 N.E.2d 167, 171 (Ohio Ct. App. 2009).
Oklahoma	The determination of whether an answer to a specific question put to persons called as witnesses before will in fact tend to incriminate that person rests primarily with the court, but at the same time it should be emphasized that where the witness on oath declares his belief that the answer to the question incriminates, or tends to incriminate him, the court cannot compel him to answer, unless it is perfectly clear, from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot possibly have such tendency.	*Layman v. Webb*, 350 P.2d 323, 333-334 (Okla. Crim. App. 1960).
Oregon	The modern rule is that the trial court is first to determine whether in law, under all the circumstances, the witnesses should be accorded the privilege. The court shall determine whether there is reasonable ground to apprehend danger under all the circumstances of the case, including the evidence sought to be adduced in the particular case. This rule is now well settled although the courts use different language in stating it.	*In re Jennings*, 59 P.2d 702, 716-718 (Or. 1936).
Pennsylvania	In the first instance, the trial judge must evaluate the use of the privilege against self-incrimination to determine whether that proposed use is real or illusory. The following are guidelines with respect to the exercise of the privilege against self-incrimination and the trial court's evaluation of that exercise: It is not necessary that a real danger of prosecution exists to justify the exercise of the privilege against self-incrimination. It is sufficient if the person questioned has reasonable cause to apprehend such danger. Moreover, the privilege extends not only to the disclosure of facts which would in themselves establish guilt, but also to any fact which might constitute an essential link in a chain of evidence by which guilt can be established. When an individual . . . is called to testify . . . in a judicial proceeding, he or she is not exonerated from answering questions merely upon a declaration that in so doing it would be self incriminating. It is also for the court to judge if the silence is justified, and an illusory claim should be rejected. However, for the court to properly overrule the claim of privilege, it must be perfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers demanded cannot possibly have such a tendency.	*Commonwealth v. Long*, 625 A.2d 630(Pa. 1993).
Rhode Island	The duty of the court to refrain from placing upon the witness the burden of establishing the incriminatory nature of responses to the question by making disclosures that in themselves would be incriminatory. the court's appraisal of the claim of privilege must be controlled in substantial part by its own perception of the peculiarities of the case. This constitutes a limitation as to the extent of the inquiry that the trial court properly may make on the issue. In short, the court is required to exercise its fact-finding power as much on the basis of inferences that may be drawn from the circumstances that the question posits as from the direct statements of the witness. If the circumstances to which the question relates in themselves are susceptible of a reasonable inference that would tend to incriminate the witness, it is the duty of the trial judge to give full weight to this inference when determining whether the privilege was properly invoked.	*Hummell v. Superior Court*, 211 A.2d 272, 275 (R.I. 1965).

South Carolina	A court judging the invocation of the privilege against self-incrimination asks first whether the information is incriminating in nature, and second, whether there is a sufficient possibility of criminal prosecution to trigger the privilege. In determining whether the information is incriminating, at least two categories of potentially incriminating questions exist. First, there are questions whose incriminating nature is evident on the question's face in light of the question asked and the surrounding circumstances. Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof.	*Grosshuesch v. Cramer*, 659 S.E.2d 112, 117-118 (S.C. 2008).
South Dakota		
Tennessee	When a witness asserts a Fifth Amendment privilege with respect to certain questions, the trial court has to determine if a response by the witness to the particular question might lead to an injurious disclosure. (Note: the Tennessee Court likewise follows th United States Supreme Court test in *Hoffman v. United States*, 341 U.S. 479 (U.S. 1951).	*Prime Succession of TN.*, 2007 Tenn. App. Lexis 517 *16-20 (Tenn. Ct. App. 2007).
Utah	In ruling on the propriety of invoking the privilege, whether under the State or Federal Constitution, a court should construe the scope of the privilege liberally and not in a hostile spirit. The standard to be applied is stated in Hoffman v. United States, 341 U.S. 479 (U.S. 1951) which provides: The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embrace those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime . . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." In applying this test, the judge should not deny the privilege unless it is "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate."	*First Fed. Sav. & Loan Ass'n v. Schamanek*, 684P.2d 1257, 1263 (Utah 1984).
Vermont	A related aspect of this issue must also be addressed. HN8 Although a defendant may refuse to take the stand at all, a witness may only assert the privilege regarding specific incriminating answers. A trial court should exercise discretion in limiting assertion of the privilege to questions raising a real danger of injurious disclosure.	*State v. Couture*, 502 A.2d 846, 851 (Vt. 1985).
Virginia	The trial court determines whether the witness is justified in invoking the privilege against self-incrimination with respect to each of the questions propounded. The Virginia courts apply the *Hoffman* test which provides that in order to sustain the privilege, it is necessary ". . . (1) That the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant."	*North American Mortg. Investors v. Pomponio*, 252 S.E.2d 345, 348-349 (Va. 1979).
Washington	The power to decide whether the witness shall be immune from answering certain questions put to him on the ground that the answers will incriminate him is thus vested in the trial court to be exercised in its sound discretion under all of the circumstances then present. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.	*Seventh Elect Chruch in Isr. v. Rogers*,660 P.2d 280, 286 (Wash. Ct. App. 1983).
West Virginia	To determine whether questions are facially self-incriminating, the following must occur: (a) the court must have previously determined the existence of self-inculpatory statements by the witness, (b) the party seeking to question the witness must be allowed to pose relevant individual questions to the witness, (c) before the witness responds in any way to each question, the court must sua sponte make a determination as to whether each question is facially self-incriminating, and (d) if a question is facially self-incriminating the witness may not be compelled to answer the question absent a grant of immunity from prosecution by the court.	*In the Interest of Anthony Ray Mc.*, 489 S.E.2d 289 (W. Va. 1997).

Wisconsin	When it is clear to the circuit court from the circumstances "that the testimony of the witness 'might be dangerous because injurious disclosure could result,' the need for specific inquiry into the basis for the claimed privilege is diminished." The standard the courts should apply in determining whether uphold a witness' Fifth Amendment claim is enunciated in *Hoffman v. United States*, 341 U.S. 479, 486-87 (U.S. 1951): The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence. . . . But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. (citation omitted). The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, (citation omitted), and to require him to answer if "it clearly appears to the court that he is mistaken." . However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."	*State v. Marks*, 533 N.W.2d 730, 735-36 (Wis. 1995).
Wyoming		

COMMUNICATION ARTS FOR THE PROFESSIONAL

ON PAPER VS. IN PERSON:
FROM WRITER TO ACTOR

COMMUNICATION TECHNIQUES
FOR PERSUASIVE ADVOCACY

by
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FROM "ON PAPER" TO "IN PERSON"

Communication Arts for the Professional assembles and applies the skills of the working theatre artist -- actors, directors, and writers of theatre, film, and television -- to the specific communication requirements of trial advocacy:

What transforms presentation into persuasion?

While jurors observe and respect the advocate's presentation of evidence and knowledge of the law, what they *respond* to is the live human event that the advocate creates in the courtroom. Often, settlements are offered because opponents assess that you will do in court what they can't: marshal the jurors' feelings as well as the facts. Animate jurors with the full force of your credibility. Move jurors into action on your client's behalf. What are the *live communication* tools fundamental to the moment-to-moment exigencies of pleading, proving, examining, convincing, or even deposing, telephone negotiating, and first client meetings? Law school trains litigators to write for what will be *read*; the advocate in the courtroom must write not merely for what will be read, but for what must be *spoken* . . . and then heard, and felt, and believed.

Once the facts have been transmitted, how will the listeners' knowing be transformed into the listeners' caring . . . and choosing? How does an entire courtroom of individuals become a single body of attention, and how is that attention held, built and carried to an undeniable conclusion?

These skills are the foundation of the theatre artist's craft. Through their application, the most skillful of opposing counsel, the most idiosyncratic of judge or jury, the most challenging of witnesses -- even the very courtroom space which houses them -- can all become allies rather than obstacles in the successful "live event" of delivering into the courtroom the advocacy that persuades.

PERSUASIVE ADVOCACY:
THE ACTOR/DIRECTOR/WRITER'S
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- Properly Preparing Your Witness for Depositions and Testimony
- Effectively Preparing Your Experts for Deposition and Testimony

The following pages offer ideas and exercises which have been developed as part of workshops, clinics, tutorials and case consultations and which are helpful to the attorney preparing for and engaging in trial.

ON PAPER VS. IN PERSON

II. FROM WRITER TO ACTOR: BREATHING PERSUASION INTO AN AIR TIGHT CASE

When television writers attend on-the-set rehearsals of scripts they have written for weekly shows, they often become anxious and agitated at what they are not yet hearing, or at what they are hearing that differs from what they've written and are still reading right in front of them. A director of one landmark series, who, though trained for the classics, had known her first onstage fame as an improvisational actress, would counsel these anxious writers, "Close your scripts. Watch the play." Otherwise, they would miss what was actually working better on stage than it did on the page, or miss what should now be cut from the page, because if you were listening instead of reading, you could hear that this or that part of the script wasn't working.

The advocate who goes into the courtroom is usually the writer of the script, as well as the presenter of the script . . . the actor. Hours, weeks, years of preparation have gone into the script. Although the judge is not yet seated at the bench, indeed not a single oath has yet been taken, the writer's job is over. The advocate must close the script and enter the play. The attorney who walks into court must leave the writer in the office and activate a whole other set of priorities from those of the writer. It is not always easy to make the transition:

A. <u>Voice</u>

The writer need never utter one word aloud. The actor needs to be heard by every single member of the jury, and by the judge, the court reporter, the witness, the opposing counsel . . . and heard in a voice to which the jury wants to keep listening.

A widely circulated study reports that over a third of what listeners will take away from spoken communication comes not from the “language content,” (which accounts for less than a tenth), but from the “audio content” -- pitch, volume, tone, inflection, intonation, emphasis, emotion, pace, and pause. Not what is said, but how it’s said.

And, the actor's voice needs to be a supple enough instrument that it can credibly carry the listener through the shifting emotions of the story's progress --for example, from the unconsciously rambunctious racket of a family road trip, to the terror of the crash, to the choking grief of the children's funerals, to the numbing march through the surviving parent's endless grief -- all without that over-deliberate vocal affectation that in calling attention to itself incurs the accusation of "playing for the jurors' sympathy" and "overacting."

(*For more on voice, see V. VOCAL WARM-UP)*

B. Questions

The writer proceeds rhetorically, never asking a question, as law school teaches, without knowing the answer in advance. But the actor is asking the question to focus everyone's attention on the answer and how it is given. If the actor does not appear to need the answer, the jury will not be compelled to follow the testimony, no matter how vital it is. If the advocate appears unaffected by the answer, or does not acknowledge it, or poses the follow-up question unmindful of it, the jury will not be drawn into the conversation. Speaking merely for the written record, or "to establish a foundation," may be meaningless to the jury. Conversely, what jurors have been instructed to ignore, or what an attorney wants to "strike from the record," may be precisely what jurors most clearly recall.

1. The Sense of a Question: Text

When preparing questions, rehearse them aloud. Can they actually be asked, or are they so convoluted that they last longer than the listener's attention span? Attorneys agree in theory that in voir dire, asking open-ended questions (that is, questions which invite/require more of an answer than a "yes" or a "no") encourages prospective jurors to reveal themselves; but by "handing over the microphone," these questions often cause the attorney to feel a loss of control. This sense can be so disconcerting that the open-ended question will be crammed with multiple qualifiers until it becomes an unwieldy behemoth of syntax. Consider the following question, offered in a how-to article on voir dire as a sample open-ended question merely because it

begins with the word "what" and therefore escapes calling for a "yes" or "no" answer:

"What do you think is entailed in the setting of insurance premiums and what do you know about how insurance companies invest the money from these premiums in volatile markets and the way in which the resultant extreme fluctuations in income actually are responsible for insurance premium rates?"

Assuming this question is even allowable, is it understandable? Listeners will have forgotten the first part of the question by the time the questioner has arrived at the end. Even if the question *reads* open-ended, it doesn't *play* open-ended, and it probably will not uncork any geyser of self-disclosure from a prospective juror.

2. The Sound of a Question: Inflection

In almost all languages, a rising inflection signals that the questioner is dependent upon getting an answer in order to continue the dialogue. If the inflection doesn't rise, the speaker doesn't seem to care. Consider how, after hours on her feet, the wary waitress asks, "What'll ya have?" The inflection falls, along with her arches. Whatever your order, it won't make the difference in her day. Compare this with the sound of a question that requires an answer, such as when asking your child about curfew: "You are to be in this house by twelve o'clock. Do you hear me?" The inflection on "me" rises unmistakably, even if "hear" may receive the vocal stress.

On which word of a question does the inflection rise? It need not be on the last syllable of the last word, but when it is, the jurors' attention between the question and the answer is the most tightly controlled. If too many words follow the rising inflection, the speaker obviously does not need an answer more than he or she needs to continue speaking . . . preferring monologue to dialogue.

To understand how the placement of the inflection and the order of the words in a question influence each other, ask the following question six times to six different people: "How do you feel about the accountability of a doctor?" Each time, raise the inflection on a different word -- "how," "do," "you," "feel," "accountability," and "doctor." The question will be perceived differently by each person. Each will report feeling a different level of

invitation, responsibility, challenge, confrontation, or expectation; and each will answer with varying degrees of candor, defensiveness, expansiveness, and self-revelation. Then, try re-ordering the words, letting the inflection rise and the stress fall where they may: "The accountability of a doctor . . . how do you feel about that?" "What kind of feelings have you about doctors' accountability?" " 'Doctors' accountability' . . . do you have feelings?" Here again, the answers will reveal subtle but significant differences in precisely what the person feels he or she is actually being asked.

3. <u>In the Wake of the Question: Silence</u>

The writer need never deal with the space between questions and answers transpiring in "real time" -- the writer need never tolerate silence in public. A study once claimed that teachers find the silence that follows asking a question so harrowing that they wait an average of less than one second after having asked a question before giving the answer themselves. Many lawyers share this inability to tolerate silence. Fearing that the silence indicates a loss of momentum or control, they will keep talking, filling in, embellishing -- *writing aloud.*

The actor, on the other hand, must be able to use the silence and stay connected to the other players during the silence. This is why it is often said that great acting lies not in the speaking of the lines, but in the listening . . . in the re-acting. In voir dire, how prospective jurors "see" you stopping talking to actually listen to and receive their fellows may have a far more powerful effect on how willing they are to answer you, than the particular content of any individual question you ask. During examination, allowing the pause that swells pregnant can provide exactly the opportunity that shifts jurors from passively sitting back and waiting for information, to leaning forward in their seats, actively seeking that information.

Conducting an effective dialogue in the courtroom can be the result of combining two skills: inflecting upward on the question, and then tolerating the silence that follows, the silence in which the drama of suspense is born. Lawyers often fill closing arguments with rhetorical questions, but then short-change themselves of their full, inter-active value by failing to inflect them with an upward, and then waiting the necessary moment . . . letting the

jurors answer in their minds, before you echo that answer aloud. Why tell the jurors, when you can give them the opportunity to be telling you?

C. Eye Contact

No one watches the writer when the writer works. No one is expecting the writer to "look up" or "look back." Everyone is looking at the actor, or should be, if that is where the director wants the audience's focus. The actor must be willing to look directly into the eyes of everyone in the play at any given moment to gather and hold their attention. And, depending upon how the director envisions that particular moment in the courtroom, the jurors, more likely than not, are *with* the advocate/actor "in the play," and not some observing audience existing outside it.

With some jurors, direct eye contact may not be the best choice, but assess this based on the juror's comforts and needs, not your own. "Voir dire," the name of that initial conversation between lawyer and prospective jurors, translates from the French as "to see, to speak." Some say instead that it is a corruption of the old French, "Vrai dire," "to speak the truth." Either way, more than mere words are required -- eye contact as well as language -- particularly if the prospective jurors are to believe you truly view them as vital participants in the impending event. Certainly, there will be times you will be looking away, for example, when taking or referring to notes. But after you have consulted the notes, re-establish eye contact with the person you are addressing before you resume talking. While looking down at what is written, feel free to stop talking. This moment of silence while reading may feel awkward to you, but it will not look or feel awkward to the juror -- particularly if a sustained inflection on the last word before the pause has indicated that more is coming. (Generally speaking, the rising inflection passes audio responsibility on to whomever you are addressing; a sustained inflection signifies that the silence that follows your speaking is only an interim pause, belonging to you, and that you are ready to resume speaking once the purpose of that silence, as orchestrated by you, has been fulfilled.)

After completing a voir dire question, maintain eye contact with jurors if you want them to believe that you value their answers. To deliberately deny eye contact is a technique employed during cross examination to isolate or exclude a witness from the "conversation" you and the jurors are having together. In voir dire and direct examination, while you are being answered, resist the temptation to sneak a

look at your notes for fear you won't be ready with your next question the second the answer is completed. Reading or writing during the answer signals either that you are not listening, or that if you are listening your course will not be diverted or influenced by the answer. Or -- and this may perhaps be the most damaging -- that *what* you are hearing means more to you than *who* is telling it to you. On direct examination if jurors see that you not actively listening *to the person* who is giving the testimony -- your own witness -- why should they?

D. Body Language and Movement

The writer need never worry about what to do with the hands; the fingers need only move enough to fill one page and reach the next. Writers can fidget and pace all they want. The actor must reach the audience and/or other players, even if they are at the other end of the room and the actor is pinned behind a podium. Although the actor can move more freely than the writer, the actor must know how and when to move. Movement must be purposeful, and not distracting.

As a general rule, in the courtroom move to further the message and/or your connection to the jury, not to massage your nerves. You can adjust your stance or posture to release tension, as long as the adjustment appears to clear the way for deeper communication. Your can toss your hair out of your eyes once, and the audience will believe you need to get a better look at them. You can clasp your hands, stare down at the floor, stroke your chin . . . once, maybe twice. But if you *repeat* these movements -- as in aimlessly pacing, shifting your weight, or rocking -- the jurors will regard your movements as characteristic, habitual gestures of self-medication for nervous tension. You are not using the gestures, the gestures are using you.

One goal of voir dire is to engage jurors sufficiently enough that they reveal their emotions, values, and attitudes; their physical expressions are often far more revealing of these than the verbal ones. Most articles on jury selection advise attorneys to have an observer in court during voir dire specifically to watch and note the prospective jurors' body language. The importance of this has only been emphasized in the now widely disseminated finding that *over half* of what is absorbed by listeners from spoken communication is derived from the "non-verbals" -- posture, gesture, facial expressions, physical animation, etc. -- beyond any specific words used or the sounds of any voice with which those words are spoken.

You can elicit revealing behavior from jurors by freeing up your own expressive behaviors. "Freeing up" does not mean pasting on borrowed or canned gestures, or brandishing "theatrical" or ornamental flourishes, but rather integrating a range of your natural physical vocabulary into your communication. You can discover this by "telling" your opening statement to a few people in your office without speaking. Act it out. Use mime, charades, sign language -- however you can make yourself understood without sound. Then, have your audience narrate back to you what they have understood. Still not talking, you fill in the details by acting out those parts of the story that the listeners have missed.

By exploring this technique, you will uncover resources of eloquent storytelling that you bypass when relying solely on words. Movements and gestures that tell the client's story far more effectively than speech become part of your "working vocabulary." If you have never done this, you will be surprised by how quickly and deeply the "listeners" are moved by the emotions in your client's story. By acting out the story in small sections, and only proceeding once your listeners have narrated back to you what they have understood, you also become more in sync with your audience, more in partnership with the pace of their developing ownership of your client's story. You discover how much more involved they come when you are communicating with your whole self and body, and not just from the neck up.

When you, and not just your vocabulary, are communicating, physical gestures emanate out from the spine, since this is the main "weight-bearing support" of the body. Is your spine is actively engaged in your communication? Is your face involved? If your communication involves your spine and your face, as well as your voice, you will encourage the jurors' communication back to you in expressive behaviors that reveal themselves far beyond the mere content of their words.

(*For more on gesture, see the closing two paragraphs of III. STORYTELLING AND THE OPENING STATEMENT.)*

E. Being "In the Moment"

The writer can stop and leave, take a break. Not only can the actor not leave, he or she must appear to be *more* present in the on-going events than anyone else in the room if that is the actor who becomes our representative in the proceedings -- the one through whom we experience the "reality of the play."

What this means for the advocate in the courtroom is that the writer's discipline of shutting out all distractions must give way to the actor's skill of fielding, incorporating, or even celebrating the unexpected. An advocate who ignores or denies the obvious suffers before the jury. They see it and hear it; why don't you? If someone in the courtroom sneezes, or you drop something, or a door bangs, or the lights flicker, acknowledge it and move on. You don't have to make a speech about it. Just don't ignore it. If you pretend not to see and hear what everyone else does, you appear less alive to the immediate environment, and thus, less reliable and trustworthy as our leader or guide.

The writer follows an outline of pre-selected information. The actor must not just follow, but actually respond to, whatever has just happened -- a withering objection, a juror's yawn, a judge's bark or glare. Otherwise, the advocate is no more alive/alert to what is actually happening than the pieces of paper on which the notes are written. Nothing *lives* on that page of the legal pad -- not the client's loss or suffering, not the advocate's credibility, not the juror's capacity to care. No audience in the theatre is ever moved to empathy or action by how perfectly the actors demonstrate their ability to remember their lines verbatim. We do not gasp or weep or stand to cheer because an actor never "lost his place."

During trial, there are so many "realities" floating within the net of the jurors' attention -- those presented by your opponent, by the judge, or those brought in by the jurors themselves from their own life experiences. You are asking the jurors to enter and value your client's reality; you must be demonstrably willing to share in theirs. The advocate who brings a spontaneity of presence, a sensory awareness and aliveness to the very courtroom environment the jurors are experiencing -- a full surrender to the communal here-and-now -- assures the jurors this advocate is not hiding the truth or standing sentinel before some secret agenda. Rather, "we are all in this together."

F. Relationships

Most writers work alone, and must usually isolate themselves, physically as well as psychologically, to accomplish the task. The writer need only present a "voice," not a self, nor a self capable of engagement. But the audience needs to see and feel relationships; it's what they follow. We trust the actor who seems to be offering up his or her full, true self to the other characters. Who we don't trust are

actors who seem more concerned with presenting themselves, with protecting their performance -- with "acting" -- than with connecting with others. Just as an actor must be able to kiss a creep with bad breath if we are to believe that we are seeing a love scene, you must be able to draw sympathetic testimony for your witness, even if you personally find him/her creepy. If you are recoiling from said creep, this will not happen. (He may be a creep, but he's *your* creep.) So, from a director's point of view, witness preparation may not be so much a process of rehearsing what is said, as it is working out how the parties engaged in the dialogue appear to feel about each other. How truly comfortable and confident the attorney and the witness are with each other are what jurors will feel and recall long after specific bits of testimony have been lost along the way.

During voir dire, the attorney is establishing two kinds of relationships: the relationship between the attorney and the individual juror, and the relationship that the jurors observe the attorney has with him- or herself. If you are too out of touch with yourself, the jurors cannot identify a "you" with whom they can connect. I once worked with an attorney during a voir dire workshop, and it was obvious the jurors did not like him. He was so anxious and uncomfortable, how could they? His eyes never left his notes, and his reaction to each answer was the same impervious scribbling. He asked one woman, as he had asked each person before her, her marital status. "Married," she stammered after a long pause, and then looked down, struggling to correct herself. " . . . Uh, no. I'm sorry, that's wrong. I'm single. I'm widowed. Four months ago. My husband died." "Any children, " he said, moving on to his next question, without raising his eyes or his inflection.

At this point, I had to interrupt. He was a perfectly nice man and they were *hating* him. "Excuse me. In *any* other situation, if someone told you her husband had died four months ago, c'mon, John, what would you say?"

He flushed, because he realized he had heard information but he had not heard *her*. He looked directly at her and immediately said, "I'm so sorry." He meant it, too. He allowed a human connection to develop between them. His eyes softened. He smiled. Blood flowed in and out of his face. The voir dire didn't take any longer for it. In fact, it then proceeded at a swifter pace because he wasn't needing to back-pedal through the group's hostility. By the time he finished, the mock jurors had become so partial to him that they wanted to know when the actual trial was to begin and how they could get on "his" jury.

If because you are nervous, or to save time, you bulldoze through your prepared questions, if you are more connected to the legal pad than to the person you are addressing, the prospective juror has no one else to bond with except the other prospective jurors -- or opposing counsel, if they are more available. Jurors must feel that their answers personally register with you and prompt a human response. Unless you appear to have received something from them as people, there has been no exchange, only the giving and noting of information. No transactions, only broadcasts.

The attorney in the voir dire workshop discovered one of the stage director's axioms: When the on-stage action is dragging, the amateur speeds up; the professional slows down. The action feels like it's dragging because nothing is really "happening" or "connecting." You may be reciting, but if you are reacting to no one, or being affected by no one, you will be convincing no one. Once the connection happens, no one is watching the clock.

G. Role Playing

Conventional wisdom holds that you should not become fixated on jurors whom you feel do not like you, and that in voir dire you should trust your instincts about people whom you do not like. But sometimes we misread others. Or we see them accurately enough, but our perception affects us too personally, inappropriately. For example, I may intellectually accept that the judge is not my father, but his wrath may be affecting me as if he were.

In such instances, it can be helpful to use the actor's role playing skills and simply pretend the person to whom you are speaking is someone else. Plant some physical detail of the imaginary person onto the body of the person whom you are addressing. For example, in your mind's eye, put a clown's nose, a pink tutu and ballet shoes on an intimidating opposing counsel, or treat a hostile prospective juror as if he were your grandfather suffering from physical pain or Alzheimer's disease. When the opposing expert antagonizes you, but irritability will backfire, picture a zipper running down the back side, and "realize" that your poor beloved wife is trapped in the body-suit of this arrogant, pompous creature, desperate to escape.

Remarkably, this technique often radically changes the other person's behavior. And, if it doesn't and the person's behavior remains negative after your behavior has changed, the jurors begin to perceive the other person as seriously

disturbed because this other's behavior is so unilateral, so inappropriate in the context of how this person is actually being treated.

There are also times when your public or professional self has become worn down or burned out. Perhaps your client has exhausted your patience, or you just do not feel like being in court, or you're nervous and you hear a legal robot usurping your own personality. In such instances, instead of projecting a different role onto another person, allow your imagination to toy, for just a moment, with the possibility of what if

. . . *you* were someone else. Re-cast *your* role. What if someone else were called in to do your job? Or pretend that -- again, just for a moment -- that you actually were someone else. Allow yourself, for just a moment, to walk, talk, and react as if you were another person, real or fictitious. Spiderman. Al Pacino. Miss Piggy. Abraham Lincoln. Aunt Ida. Yoda. For most of us, our gifts of impersonation are not so powerful that the observer will detect a metamorphosis or a splintering of personality, only an enlivening release and sharper focus on whomever we are addressing. Since our presentational selves -- our "professional personalities"-- are only a bookmark in the fuller volume of our inner selves, anyway, who often emerges from this exercise is a more "real" you, who has been buried under layers of the lawyer's burdens.

If your customary "lawyerly" cadences of speech have been taking over, practice your voir dire, your opening statement, your examination questions while jogging, in dialects, as cartoon characters, as opera, as country western songs, as rap -- *whatever* you need to jostle the armor, displace the mask. Rehearsing questions and openings in character voices and dialects also liberates your writing skills, because you surprise yourself by spontaneously using words that are more direct, more colorful, and more evocative than those of the default settings of your customary style. Instead of toning down your actor to accommodate your writer, you find your writer begins to serve your newly limber, refreshed actor.

H. Stage Fright

The writer need never worry about how nerves and fears restrict voice, movement, or expressive behavior. The actor must be able to manage these nerves or fears not just as they affect imagination (as in writer's block), but as they affect the physical self. The actor cannot hide behind the words.

The writer can begin working cold, or while eating, drinking, or smoking. The actor's machine, however, is run on blood and breath. Unlike the writer's word processor or Dictaphone, which is at full power as soon as it is plugged in or booted up, the actor's machine must be warmed-up if the nervous tension is to be released through voice and behavior, rather than being walled up behind them. If an advocate suppresses fears instead of releasing them, the jury will perceive the overlay of self-control for exactly what it is: having something to hide.

A proper warm-up puts the actor's nerves and fears at the disposal of the character's purpose, rather than at war with it, and at the disposal of the physical instrument of the presenter, rather than inhibiting it. The purpose of an actor's warm-up is not to create any single mask of presentation, but rather, to release whatever constrains the individual's unique powers of presentation.

There is no one ideal presentational style. Many young advocates, eager for the confidence they attribute to successful experience, believe the goal is to appear "comfortable" or "smooth." But credibility is not granted to the person making the least effort; rather, it is vested in the one whose effort requires overcoming the greatest obstacle. In fact, this very *struggle* to overcome the obstacle is what make for the drama. So, the audience will always watch the actor who limps, or listen to the actor who stammers, as long as they can see and hear that actor struggling through those personal barriers to achieve their goal.

The advocate who mistakenly tries to establish credibility by banishing any indication of the personal cost of standing before the jurors lets them direct their sympathies and sense of justice elsewhere. If the speaker could just as easily be somewhere else as here, why shouldn't the audience?

Any attorney can captivate the jurors' hearts and minds if, in telling the client's story, he or she allows the jurors to see the full, unguarded person inside the professional . . . the self beneath the suit. Once you are so present that you cannot hide your vulnerabilities, jurors can believe they are with someone who is willing to forgo self-protection in order to protect the client.

The physical and vocal relaxation essential for this spontaneous, fully "present" behavior may indeed surface of its own accord well into the trial, but actors make certain it is available from before their first entrance. Given the bond that you can form with prospective jurors during voir dire, and the opening statement's impact on jurors, the third day may be too late.

One purpose of an actor's warm-up is to release the voice out from under the aegis of the daily personality, so that it is ready for whatever it may be called upon to do. And because voice is carried on breath, the breath is the first place to direct your attention in warming up, the first thing to "let go."

(*For more on breath, see V. VOCAL WARM-UP, and VII. BREATHING EXERCISES FOR VOCAL AND PHYSICAL RELAXATION.*)

Fear causes us to hold our breath in a biological response that directs all the body's energy for survival into instinctual fight or flight. We may not physically flee the courtroom, but we certainly flee from real intimacy with the jury and hide behind some pose or prose, behind some legal pad of the mind. A widely quoted piece of research purports that the fear of speaking in public -- the minimum required for a courtroom appearance -- rates as the number one fear in human beings. As long as you are holding your breath, poised at the self preservation of fight-or-flight -- you cannot hold the jury or the client. So the warm-up's first purpose, even before sound is released, is to allow the advocate to release the breath and be fully present: in the body, in the room, on behalf of the client, in relationship to the jurors. Long before any words are shared, the advocate has begun the process by which stagefright transforms into stage *presence*.

III. STORYTELLING AND THE OPENING STATEMENT

In an article which appeared in the now long-ago American Bar Association Journal issue of April 1, 1986, Gerry Spence considered the question, "How do we make a complex case come alive for the jury?" His answer has been quoted and re-quoted so many times:

"Give me the story -- please, the story. If I can finally understand the case in simple terms, I can, in turn, tell the same story to the jury and make them understand it as well. I go about my life confused most of the time, but when I get something clear I usually can communicate it. Getting it clear is not the work of huge minds, which often are baffled by themselves, but the labor of ordinary minds that understand simplest of stories... most of all, lawyers must be storytellers. That is what the art of advocacy comes down to -- the telling of the true story of one's case.

“Drive down the highway in your car addressing the jury in the rear view mirror. Tell the story, the alarm on your watch set for three minutes. Tell them why you care about your client. When you arrive home, gather up your children and tell them a bedtime story for practice, for if you can explain it to your children then you finally have acquired the skill to speak to a jury. I say this not out of disrespect for the jury but for the lawyers who cannot speak to children. It takes little skill to mouth the puckery brine of legal gibberish. But it takes skill, indeed, to relate a clear and understandable tale that our children will cherish."

It has been suggested by evolutionary anthropologists that appetite for story is encoded in the genes of the human race. Our studies of other primates and of cetaceans reveal capacities of language in these species that far exceed earlier suppositions, but the creation of stories, those irreducible molecules of beginning-middle-and-end, appear to remain an exclusively human offering. It has also been suggested that the social organization necessary for dividing the hunting from the hearth labors in our species almost 15,000 years ago was only possible because of the ability of the hunters, on their return to the caves, to relate their experiences in story to those who'd stayed to tend the fire. (Cave paintings functioned as visual aids.) These stories had to sufficiently impress the fire tenders with the dangers the hunters had encountered so that the tenders would be willing to forego the adventures. But the stories also had to render the adventures thrilling enough that the hunters would retain importance within the cave once they'd brought the meat and the tenders had eaten. The tenders had to feel as if they had been with the hunter: they had to believe the hunter's story. And visa versa -- the travails of the fire tenders had to be narrated sufficiently to command sufficient respect for the arrangement to continue.

This basic desire for, and vulnerability to, a good story may also lie at the root of that now repudiated but widely circulated finding from the University of Chicago study that 80% of jurors are decided at the end of opening statements. It appears that the evidence is weighed in the context of the story, and not the other way around. (If you bring back only one scrawny bison, instead of your usual half dozen, you better have a good explanation. If it's good enough, I'll feel grateful for what you've brought, and grateful to you for bringing it. If the story isn't good enough, I'll feel you've either been playing while you should've been hunting, or that you ate the rest on your way home, or that you're keeping another cave elsewhere. Similarly, the fire tender needs a good story if the fire has gone out in the hunters' absence.) The evidence sends me looking for a story in which to support it, but the evidence

does not create the story on its own. To Mr. Spence, the ability to tell the prevailing story is paramount, but the advocate faces a crucial obstacle:

"The problem is that we, as lawyers, have forgotten how to speak to ordinary folks... lawyers long ago abandoned ordinary English. Worse, their minds have been smashed and serialized, and their brain cells restacked so that they no longer can explode in every direction -- with joy, love and rage. They cannot see in the many colors of feeling. The passion is gone, replaced with the deadly droning of intellect. And the sounds we make are all alike, like machines mumbling and grinding away, because what was once free -- the stuff of storytelling -- has become rigid, flanges and gears that convey nothing...

“By the time the case has become processed through the ears of the lawyer, ears trained to listen for words and phrases from which justiciable issues can be formed, the paranoid ears of the litigator tuned to lineal arguments, ears tuned out to the human issues that drove the client to the lawyer's office in the first place -- by the time the simple case has been forced into complex boxes called ‘causes of action’ and run through the judicial mechanisms of interrogatories and depositions, all rendered by the pound and billed for by the hour -- by the time the simple case is finally presented to the jury like one's loved one is delivered up by the pathologist, the liver sliced in neat sections, the brain laid out the same way, the belly gaping open to expose each and every organ, and after all that was extracted for examination is dumped back into the bloody cavity and sewed up again in a glorious final argument -- by that time the once simple case too often has become an abominable soup..."

The jury wants to hear a story. They're hard-wired for it. And you want to tell them a story, depositing in their laps and conscience the responsibility for providing one and only one ending -- the ending you are seeking. Since they are not going to read the story, or hear it off an audiotape, but going to have it told to them live, by you, they have to believe that you are as human as your client is, as they are, at least as human as you are asking them to be. If the iron mask of Lawrence or Lydia Lawyer has descended upon you -- be it in a bid for credibility, from stage fright, in an effort to contain strong emotions, from boredom, indignation, the reason doesn't matter -- the jurors will not be hooked on a live human event. They will be hearing a report recited, however conscientiously, by a technician of the law. If they hear it at all.

There is a wonderful passage in Tom Wolfe's *Bonfire of the Vanities*, in which he describes how after the prosecutor's voice has droned on for awhile, even the sloppiest housekeeper on the jury finds himself wondering why the city would allow the windows he is staring through to get so filthy. Jurors are wondering lots of things -- will the kids get home safe from school, will my car get vandalized in the parking lot, will the juror three seats over ask me to her group for lunch? For the teller of the tale to supersede all this and focus everyone's attention on this telling as the only true telling, the *real story*, the teller must be personally involved and be speaking as one human to a group of fellow humans. Not as a professional to amateurs. Not as a bureaucratic or corporate cog to unfortunately necessary guests. One needs to be able to tell the story as if one were talking about, or about what happened to, one's friend, wife, child, father, pet, etc.

The opening statement might be rehearsed while jogging, to so disrupt customary cadences of delivery that bespeak "lawyer," that the story forces its way through in its simplest, most emphatic terms. If you don't like how you're flattening the story, rehearse it in dialect, in gibberish, in mime, as someone else -- whatever will free you out of rote recitation, back into the excitement, discovery, and personal engagement you felt the first time you heard it. Tell the story without the use of any legal terms. "Defendant." What's a defendant? A lonely, lost little girl? Or, a drug-soaked Britney Spears wanna-be? The word "defendant" neither specifies whom the jurors are to see, nor arouses their capacity to care.

Beyond the use of non-legalese, there are some rules of thumb for choosing language that will actively engage the listener. Use active verbs. "The board came down and struck Mrs. Nussbaum's head" is not felt by the listener as fully as "the board flew down and smashed Mrs. Nussbaum's head," or "the board snapped down, smacking Mrs. Nussbaum's head." Even better, however, is "the board snaps down. It smashes..." because by using the present tense, the story is happening NOW, and the listener is inside it. It's one thing to be told, "they thought they heard an intruder. Sam remembers Jenny telling him she could hear footsteps on the stair," and quite another thing to be told "there's a noise downstairs. They hear somebody. Then, they hear somebody on the stairs. Somebody's creeping up the stairs."

The second phrasing puts the listener in Sam and Jenny's place. The first phrasing puts Sam and Jenny inside a story that happened in the irretrievable past with the advocate standing guard. The story phrased in the past tense ended the night the intruder entered the

house; the same story told in present tense does not end until the jurors do something about making sure this intruder doesn't intrude again. It also puts the advocate and the jurors on equal footing as "experiencers" of the story; the story doesn't "belong" to the teller, but to the audience and the teller together, experiencing it simultaneously.

Use sensory-awakening nouns and adjectives. If you are trying to describe a solid marriage that was destroyed by a manufacturer's negligence, you could say, "Bill and Sally had been married for twenty-five years. They took care of each other, and every one of their friends will tell you they were the most devoted of couples." Or, you could say, "Sally opened her eyes in the morning, and like every morning for the last twenty-five years, the first thing she'd become aware of was the smell of fresh brewed coffee. She waits a minute, looks up, and in walks Bill, his glasses fogged up by the steam rising from the two cups he'd bring in to start their day."

We learn and experience through our five senses. Unless a juror is handicapped in one of these five, his/her ability to touch, smell, taste, see, and hear is more or less equal to yours. If your story can enter the listeners through one of these senses, the listeners can experience the story as if it were happening to them. Again, they are on equal footing with the teller. Since sight is the most used, it is the least potent to evoke. But once your listeners' vulnerability has been dilated through touch or smell, their ability to absorb large amounts of factual information is sizably increased. This exact same amount of information, if misplaced ahead of sensory engagement, will not be absorbed. Compare the difference between, "On the night of April 26, 1994, the night in question, Felix Schlesinger arrived home quite late in what was an unusually bad storm for Flaxton County," and "Drenched, dripping wet, Felix Schlesinger parked his car and climbed back out into the pitch black downpour that had already soaked him. Flaxton County hadn't been socked with a storm like this for thirty years, but on this night, April 26, 1994, Felix can't even see his front door." Very often, the date isn't important at all, but attorneys just feel more secure announcing particulars, and using phrases such as "The night in question." If the date is significant, it will be remembered by the listener if something about being there, at that time, can be felt first.

One of the things which makes a story different from merely a description of a situation or an event is that the story moves through a beginning to a middle, and on to an

end. We've already introduced the idea that a story is more magnetizing to the listener who feels his/her active participation will be necessary for the story to achieve its proper ending. If the teller is human enough, and in direct relationship to the listeners through eye contact and properly chosen language, the listeners will even feel that they are necessary for this story to proceed, moment-to-moment. Anywhere along the way, however, it is possible to lose even the most sympathetic listener if the teller veers off the course of beginning/middle/end. A story may start anywhere -- each story has an infinite number of possible beginnings. Each one of these beginnings can lead to a finite number of middles, but each of these middles must lead to one, and only one, end. If there are 250 relevant bytes of information you need to tell the jury, and you give them all undifferentiated presentational weight, there is a line-up of data, but no story. Within the context of a certain situation, SOMETHING HAPPENED. These 250 bytes must be grouped so that they are part of a 3-part mechanism, a story with a beginning, middle, and an end.

In order to find the simple story Spence speaks of, which underlies all your facts, and which you can communicate to a jury, choose ten words that you would say to the jury, as if ten words were all you were allowed. Find out how much information can be packed into each single word. You are not making a sentence here. You are sending a telegram. So that you won't be usurping the end from the jurors, make sure your end involves a verb telling the jury what to do. (It's understood you cannot argue in opening statement, but you are forming a story skeleton here which can support your relationship to the jury even within the procedural parameters of opening statement.) Make sure that there is at least one other verb somewhere else in the ten words on which to hang what it is that HAPPENED.

Beyond this, the other 8 words should chronicle a sensorially transmittable beginning and middle. For example, to prosecute Patty Hearst: "Heiress. Blows it. Dances with Captors. Violently Robs. Protect yourselves." Defending Patty Hearst: "Sheltered. Fine-grained. Young. Kidnapped. Raped. Armed. Forced. Responsible? Free her." Reduce your story down to its essential kernel. Know which facts are part of the beginning and which belong to the end. The other value of finding the ten words to tell your story is that in its crystallization of your central story, it clarifies the various points of view within the story and makes clear to you if you are letting them entangle in a confusing manner. For example, it would be saying something subtly but significantly different about Patty Hearst's responsibility if you said, "Heiress. Blows it. Captors become Heroes ... etc." In the earlier

version, we watch her dance. We are looking at her. In this version, the Captors suddenly become protagonists or equal value. Her responsibility is diluted. We're now paying attention to what's happening to them, not what she's doing or not doing. Amplified thousands of times in the actual narrative telling of a story and into all of the additional words and facts, such vagaries in point of view can badly confuse a jury. (At it's worst, they don't know who the hell you're talking about!)

The ten word telegram makes one aware of how much of talk is padded with piffle, gratuitous and time-wasting and useless to the story being absorbed and believed. In this category: "Your Honor. Counsel. Ladies and Gentleman of the Jury. My name is Robin Woodruff and I represent the plaintiff. I want you to know right off the bat how much this case means to me, how excited I am to have the opportunity to come before you on the Lerners' behalf. Now, over the next several days, you're going to hear lots of witnesses. And they're going to..." All of this is commonly heard in the name of establishing a relationship with the jury. That happened (or did not happen) in voir dire. Besides, your telling me you're excited to be here doesn't convince or persuade me, particularly if your body, voice, or manner belies this statement. If I believe your engagement in the story, I'll believe you. Similarly, statements such as, "Now if you'll all look over at this chart, you see here in the diagram on the left -- I don't know if you can read this from where you're sitting, what it says is --". If you're pointing and explaining, point, explain, skip the meaningless courtesies, and get on with it. On the other hand, if you're actually wanting everyone to be able to read it, stop. Make sure that they can, and if they can't, move it so they can. This last example also brings up how pronouns can be used in a way that enjoin you with the jury or that separate you from them. A statement such as, "If you'll all look over here at this chart, I'll tell you..." may just as easily be stated, "let's look over at this chart, and what we see is...". The second version puts you and the listeners on the same team.

(A final word about the application of this telegram before you even get to trial. In its oversimplification, it can give you an easy handle for wielding control over the entire case, even in pre-trial. One attorney with whom I worked was representing a client who was suing a developer. He began every contact, every phone call to the other side, regardless of whether he was answering or placing the call, with his telegram. When his secretary would buzz him that opposing counsel was on the line, he'd pick up the phone: " 'Greedy developer poisons village well. Make him pay.' How ya doin', John? Whaddya need?" He used the

telegram as a mantra, a battle slogan, and it freed him in the rest of the conversation to communicate with a friendly ease. In a previous case which he had won, he had introduced his telegram to the jurors in voir dire, begun his opening statement with it, and later learned that the jurors had then quoted it verbatim in deliberation. The confidence it gave him to initiate every contact with this telegram so unnerved John that two days before trial John came up with a very satisfying settlement.)

Our appetite for story, our deep availability to its structural momentum, our thrill of having one of us render the past into a virtual present for the rest of us, even our accessibility through our senses into our imaginations -- all these remain undiminished. What has virtually disappeared from our culture in the past thirty years are the opportunities to have these capacities satisfied. The court of law is one of the few remaining places where, despite any visual aids or visual depositions, one must be able to create a live human event by telling a story to a group of strangers and compelling their belief into action, all through the telling.

For centuries, live storytelling was all we had. On the road, in the theatre, at your table after you'd taken care of your hunger. But with technology, we are now able to acquire vital information, as well as education and entertainment, without ever sharing the oxygen with another live, present human being. There is no exchange and no guarantee of communication, merely of broadcast. The antennae and skills of live storytelling, unused and untaught, dilapidate. When radio arrived in the living room, people learned to sit and stare at a box which did absolutely nothing, but one could hear stories coming out of it. People found themselves watching it to concentrate: the imagination had a whole world to create to accompany this sound track. Ironically, television's ability to present its little moving shadow facsimiles of humans -- again in a box, but now behind glass and flickering like the fires in the caves -- further estranged us from the palpable, live immanence that had still been implicit in the blind universe of radio. Magically animated homunculi now moved and talked in our rooms right in front of us, but they were oblivious to us. Were they alive? Yes, but no. If they were alive like us, it was somewhere else than here. They couldn't see us, but we saw them. Their space was flattened into ours, and their time was sped up.

The stories which television tells are all accelerated and minced, chopped into tiny scenes sandwiched in between alien commercials. This format has trained us to limit our attention span to less than six minutes. If we are bored we change channels or get up to go

get food. The miniature human figures on television present themselves to us without ever seeing or hearing us. We could sit in front of them naked, and would they ever know or even care? We become accustomed to a disengagement between story "deliverer" and story "receiver". We become conditioned by television's pervasive presence in our lives to physical and vocal behaviors which we unconsciously bring to the task of *live* storytelling, but which are wholly inadequate to its dynamic and temporal requirements. Television-talk is snipped lean: "47 dead. 135 wounded. Film at eleven." CNN wants you to know it is there 24/7, even when you are sleeping; so go ahead and sleep, because CNN will be there when you wake up. Television's narrative arcs are short and its rhythmic presentations compressed. Even enlightened, educational *Sesame Street* cascaded at quite a clip, not to mention closing arguments on *Law and Order*. Television is not designed to sustain an audience which cannot leave, to render a long, information-laden tale, or to compel its audience to action,. And, television encourages us to form a conclusion based on what something first looks like.

This last aspect of video, the impact it imparts to initial appearance, is what makes it such a tricky tool in advocacy training. Most people recoil at what they look and sound like when they see and hear themselves on videotape. A teaching aid which leaves the student horrified at his or her own image has definite drawbacks. The student may well be left further inhibited -- trying not to look or sound a certain way. In acting terminology, this is called "playing a negative objective". It doesn't work. One is never freed from restrictive behaviors by trying not to be so weird. This is why the "what should I wear in court?" question has no ultimate answer. Some of the most celebrated trial attorneys wear weird clothes. Part of what they offer a jury is the profound exhilaration of having one's separate-ness and resistances evaporate, of being enveloped and transformed as one is swept or seduced or stalked into a story. Once we are being held in rapt attention, we are never thinking about what the storyteller looks like. Neither is the storyteller concerned about his or her appearance once this connection is made. When one is telling a personal truth, with passion, in order to persuade the listener, whatever the cost in self-consciousness -- when one has gotten this far, one is never wondering what to do with one's hands. And one never gets this far, or persuades the listener, solely on the basis of one's choice of tie. The search for the right "gesture" leads the live storyteller up this same blind alley as the search for the right image or outfit. In the last several televised elections, we have become increasingly bewildered and alienated by candidates on television pinning onto their bodies certain

gestures -- such as the jabbing forefinger, or the fist with the extended thumb -- which their handlers and spinners have advised them will read as sincere, or decisive. These signal gestures hail back to the Nineteenth Century school of acting in which certain gestures were used to signify certain emotions. A woman in despair could always be recognized by her arm flung back over her brow. But if it's a symbol, and not an organic behavior, we don't believe it. We know it has been tacked on, and therefore is obscuring our view of whatever is truer that lies beneath.

There is no single flourish of body language or single article of "power clothing" upon which the live storyteller can depend or hide behind. And, there is no purchase in trying to tell a story under the burden of the "negative objective" of trying to let the audience not-see one's true physical self. If one's first allegiance is to make the story come alive for the listeners, and one's physical self has been relaxed sufficiently to be fully available to this task, then self-imposed restrictions and externally imposed obstacles either fall away of their own accord or are burnt through by the intensity of the search to make contact. One can ask:

IV. CHECKLIST FOR COURTROOM COMMUNICATION EFFECTIVENESS

√ Am I trying to do something or to not do something?

√ Am I talking to the people present or am I broadcasting to them?

√ Am I all affect or am I receiving and adjusting to the feedback cues, non-verbal as well as verbal, which these individuals are sending me?

√ Am I in eye contact with the listeners or am I really addressing the carpet or the ceiling? Are my hands stuck in my pockets, clasped behind my back, or are they available to fulfill gestures which naturally emanate out of my telling?

√ Have I warmed up my voice and physically relaxed both my body and my breathing so that the sound of my voice can reach anyone, anywhere in the room? Is my voice ready and able to carry my intention fully through any part of my story or my questioning?

√ Have I chosen and conveyed a clear theme for this case which is underlying the strategy of my questioning?

√ Am I telling a story with a clear beginning, middle, and end?

√ Am I engaging the listeners through their senses?

√ Am I letting people to whom I ask questions -- witnesses on direct and jurors in voir dire -- answer?

√ Am I speaking in clear, active English, or am I speaking in the legal lingo that separates me from the jurors?

√ When I move, is it because the communication demands it or is it to lull myself out of nervous tension? Am I moving to further my relationship to these people, or to protect myself from their scrutiny? Am I carrying the listeners into a

process of inquiry which they will share or am I checking off a list of information, satisfied to move forward all by myself?

√ Am I in active relationship with these prospective jurors or am I in relationship with my legal pad in the presence of on-lookers?

√ Are the jurors being invited to care by a full human being, or is the jury being given an oral book report by a competent robot?

√ Am I using language which counts or am I using more words than meaning, creating sound that does not communicate?

√ Am I allowing the presence of silence as an essential a component to live communication, as essential as the sound of my own voice?

√ Am I bringing my full self, my whole person into the courtroom, or just my lawyer?

√ Am I telling a personal story?

(Find out. Put two chairs facing each other and sit across from someone. Begin your opening statement. At a hand signal from your silent partner, begin a second story, a personal story. [One Christmas when you were a kid. The funniest or saddest movie you ever saw. Your first date with your husband. How once you were unfairly or wrongly accused of something when you were a child. Your first day at your present job. Etc.] Use sensory detail and active verbs.

Share what it felt like. Make clear what happened. At a hand signal from the person across from you, switch back to your opening statement. Note the differences in your two storytelling styles. Allow your partner to keep switching you without warning from one story to the other, back and forth, beginning again if you come to the end of either, until you are talking in both stories "like yourself". Continue the exercise as you separate the chairs and slowly work yourself up to a standing position, and then a good distance away from your listener. At any point in the

separating, if you find yourself having reverted to a fixed style, be willing to stop, and continue again in the personal story. Do not make getting to the finish position your goal; your goal is to get there having maintained contact between your listener and "the real you" every inch of the way.)

V. VOCAL WARM-UP

A. Steps

1. Tension Awareness

Stand with feet at shoulder width, arms hanging loosely at your sides.

Inhale and exhale through the mouth without holding in the abdomen, allowing the ribs to expand with each inhalation.

Wrap shoulders up around ears, hold until shoulders have accepted the fact that they will be there "forever". Release shoulders, letting them fall, not placing them back where you feel they "should" be. Repeat at least three times. Extend to rest of the body, so that your shoulders, arms, hands, face, torso, buttocks and legs are tense. Release. Repeat at least three times.

Repeat this last step, including scrunching face into a tiny fist, and then opening it wide. Repeat at least three times.

2. Head Rolls

Let head fall forward, rolling gently from side to side -- ear to shoulder, not nose to shoulder. Repeat several times, until you have *relaxed* the sides and back of the neck and you are not merely moving the head on its pivot, or merely moving the neck's tension into another part of your body (such as into your fingers). Use exhalations of breath to release tension out of body.

Extend the head roll, so that it goes all the way around -- front, side, back, side. Keep it loose and free from tension, and try to pick up some speed without picking up tension. Remember to change directions often (at the end of each breath). Stop and focus eyes on a single object if you get dizzy.

3. Drop Downs

Release jaw hinge and let head fall forward, the chin onto the chest. Allow the weight of the head to lead the body all the way down, in slow motion -- one vertebra at a time -- until you are folded "in half" with your head, arms and entire top of your body dangling down. Hang there -- relax. Think to yourself that you will be in this position forever, so you can release any vestige of impatience to move on the next step. Breathe. Repeat at least three times.

4. Touching Sound

Begin by gently voicing the sound "huh". Let the sound slowly extend, one per breath, into "huuuuuhhhh". (Take several breaths to accomplish this.) Then, close the lips at the end of the sound -- "huuuuummmmmm". Collect the sound in the mouth and massage the lips with it. Repeat several times until lips are tickling. (To test if you are humming on lips, pinch your nose while humming. If sound is cut off entirely, you are humming in your nose.)

Every time you take a breath, pick a new note to hum on, thus warming up your entire vocal range.

Re-open the hum on the word "mmmmmmUUUUUUHHHHHHH".

5. Put It All Together

Begin a hum. Drop your head. Move it from side to side, and then extend this into a full head roll. Feel the hum move around in your head as your head moves in the head roll. Reverse direction of head roll. Remember to pick a new note when you take a new breath. Now, allow head to continue down, until you are in a full drop down. When you reach the bottom, open your eyes, look at a point between your legs that is behind you, open up the sound and send it to that point. Humming again, work your way back up your spine, balancing your head at the top, opening your eyes, and focussing on a spot opposite you. Open up the sound again, and send it to that spot.

Repeat steps #1 and #5.

B. <u>Reminders While Doing a Vocal Warm-up</u>:

1. Keep breathing.

2. Try always to maintain a broad balanced base, with your feet about shoulder distance apart.

3. Do not lock your knees.

4. Tension will try to hide and hang on. Check yourself often during your warm-up to see where it lurks in your body.

5. When balancing your head after coming up from a drop down, don't go "past" your stop, lifting the chin forward and crunching up your neck. Keep the face forward, so the neck extends as long as possible.

C. Articulators:

1. Scrunch your face into a teeny, tiny fist. Then open it wide -- mouth wide open, tongue out, eyes popping. Repeat.

2. Make a tiny "o" with your mouth -- just the lips. Then open your lips into a large, tight grin. Whistle and grin. Repeat.

3. With the heels of your hands, smooth down the jaw line, beginning up at the hinge connecting your upper and lower jaws, and tracing all the way down off the chin. Let the jaw hang slack, and using your hands, gently apply enough external pressure to push the jaw back and forth, and then side to side.

4. Take the tip of your tongue, and place it behind the lower front teeth. Now try to thrust the back of your tongue out of your mouth. Now relax the back of your tongue. Repeat.

5. Blow through your lips like a "motorboat". Repeat.

6. Blow through your lips and tongue like a "raspberry". Repeat.

7. Tongue twisters. Till you laugh.

D. Resonators:

"MEE-MAY-MAH-MOE-MOO"

This exercise is designed to warm up all the resonating cavities of the body. It will increase the range and placement of your voice. Do this at the end of your vocal warm-up, never cold without first some warming up.

MEE: Quack like a duck and force the voice way up in the nasal resonating region, squeaking MEE, flow down to

MAY: across the nose and sinuses in the middle of your face, honking out MAH,

flow down to

MAH: right at the mouth -- the whole mouth cavity resonating,
flow down to

MOE: down into your throat, where your vocal chords live,
flow down to

MOO: way down into your chest. If the sound is in your chest, it will vibrate when you pound your chest. STAY ON VOICE -- FULL SOUND FOR ENTIRE DURATION OF BREATH.

E. Sirens:

From all the way down to a MOO level in your chest, up through all the resonators to a MEE level, make a pure vocal sound which never breaks, but changes shape:

Oooooooo.... Oh.... Ah.... Aye.... Eeeeee.... (MOO-MOE-MAH-MAY-MEE without the "M".)

Repeat, but after "Eeeee" don't stop, reversing direction right back down again, all the way to "Oooo," completing one full, unbroken circuit.

Repeat SIREN in the other direction, beginning in the top resonator.

F. Flop Outs:

1. Let head's weight fall forward carrying down into a full drop-down position. Lift the head forward, and let it extend outward and upward, leading the spine out one vertebra at a time from the tailbone, until the spine is stretched parallel to the floor in a concave position, dipped through the small of the back. Then, again starting at the base of the spine, let the body flop down into the convex position of the drop down. The motion feels almost serpentine. Go slowly at first and then build up speed. You must be very loose to do this movement.

2. Repeat a series of flop outs opening a hum into an "Mmmmmm--uuuuuhhhhhhh".

(NOTE: Flop outs should only come in your warm-up after you have combined humming, opening the hum, and drop downs. NEVER do this exercise "cold".)

VI. CONTROLLING SOUND: INFLECTION

A. Falling Inflection:

"City Burns. Ten Dead. Details at 11." This is the inflection that means "THE END," communicating that the speaker has finished something, and is separating from the listener. "Good night, John Boy." "And they all lived happily ever after."

In court, a falling inflection is often used inappropriately in a long series of perfunctory questions (such as, "What is your name? What is your address? How long have you resided at that address?") as the speaker finishes each item in a checklist. Despite the script "pretending" to be curious or needful of response, the inflection is signalling the jurors to not listen to the answers, that the answers do not matter.

A continued pattern of falling inflections will actually make the listeners drowsy.

B. Rising Inflection:

"You took the money and did *what* ?" Most closely associated with questions asked with an actual need to learn the answer (as well as with the lilt of British Speech), this inflection invites, or demands, a response.

C. Sustained Inflection:

"Your honor, my worthy opponent is drunk, has bad breath, failed the bar more times than even I did, won't return phone calls . . ." This is the inflection we associate with lists. It keeps the speaker in audio control even if no longer speaking, communicating to the listener that more is still coming. "Once upon a time . . . "

VII. BREATHING EXERCISES FOR PHYSICAL AND VOCAL RELAXATION

Supposedly, a lot of the population tests a higher degree of fear at standing up and speaking in public than of death. One of the body's first responses to fear is to hold the breath. Postures of readiness -- the soldier at attention, the diver poised on the board, the student waiting to be told, "Bluebooks open!" -- all involve inhaling and waiting. In none of these examples, however, is the individual expected to talk. Breath is the fuel and the medium on which the voice is carried. So the advocate in the courtroom must re-learn how to verify that he or she is capable, at any moment, of taking a full, deep breath. If you want to create an audience out of the jury who will hold its collective breath waiting for the witness' answer to your drop-dead question, you must be able to consciously control your own breath. Through training the body to respond to a deep, relaxed way of breathing, stage fright can become either a thing of the past, or something quite usable.

A. Vacuum Breath

Begin by closing your eyes. Slow down and extend your inhalations and exhalations. Breathe through your mouth. Fill your body with air. Inhale down into the small of your back. After a particularly complete exhalation, stop. "Spit out" in short blows the remaining reserve of air in the lungs. Keep "spitting" until there is nothing left. Truly nothing. Then just wait. You will feel your diaphragm drop and your lungs will fill so full of air you may well cough. You have just experienced the involuntary breathing of humans. Relearning how to allow a relaxed, full breath is not a matter of having to *do* anything so much as eliminating the restrictions we have applied to our breathing.

(So. The mind proceeds from Step X on to Step X+1, satisfied and confident at having learned Step X, but the body has not had time to actually learn Step X at all. Restrictive habits of breath and posture, particularly as they govern the bodies of intellectually impatient and accomplished adults, may be doubly difficult to unlearn. Their seeds are planted, in part or in whole, long before the creature learned to read or even speak the language. As a result, issuing verbal orders in subvocalized inner monologue, i.e., telling yourself, "Okay, relax my shoulders. NOW!" can be accomplished without in any way actually entering the area of muscular tension or

relaxing the shoulders one iota. Shoulders can be obediently yanked down, with all their tension intact. In order for the mind to allow the body the risk of experiencing itself without the armor or the bandages to which it has become accustomed, or addicted, the organism must learn that it can literally survive without the "assistance" of defense provided by these habits. The organism must re-learn how to "live through" the entire breath. Appreciating the logic of these procedures in no way guarantees that the body has re-learned them. The student must slow down sufficiently to become conscious of each subtle, habitual pulling away from the simple but radical experience of breathing without interfering. Someone who is wanting to re-learn to breathe without unconsciously, "automatically" tensing the shoulders, will often be able to accomplish in little time 7/8 of an inhalation free of shoulder tension interference, but then speed through the last 1/8, trying to outrace the shoulders' entry into the process. The lesson has been "understood", but the body still has not yet experienced one full breath without the shoulders muscling their way in. It will take several attempts, each one requiring greater concentration and greater relaxation, for the mind to tolerate being present, without directing the body through the familiar paths to which both mind and body have become long accustomed. When you begin to explore the breath, you will inadvertently come across the emotional memories associated with the "sites" where you applied the restrictive habit. Your eyes may inexplicably well with tears. As you begin to remove the restrictions, your intake of oxygen is increased and you may find yourself giggling. Whatever emotions come up, notice them, respect them, but breathe through them and do not be diverted from your focus on the exercise.)

B. Taking Inventory for Vocal Production

Many vocal problems are at root breath problems. If you are trying to improve a "problem voice", begin with the breathing exercises outlined above. A wispy, squeaky, or breathy voice may drop dramatically simply by providing it with a breath that is not shallow. Smooth down the jaw line with the heels of your hand, all the way from your ears to off your chin. Use the articulation exercises outlined in the "Vocal Warm-up" to relax your tongue. Start at the highest note in your range, working down to the lowest on the sound "ah". Don't separate the notes, but let them merge in a siren, as explained in the Resonator section (*See V. D.*) from

the "Vocal Warm-up". Work your way up and down your range, going only as far as you can on each full breath. Never rush the breath to accommodate a destination. Let the range expand a single note at a time at the end you are trying to strengthen. Always make sure that you are working on full voice, filling the breath entirely with sound. Do not just push out breath -- this will damage the vocal chords. Do not try to work loudly -- if you use supported breath fully given over to carrying the sound, the volume will be more than loud enough. Find where in your range the sound is produced with the greatest ease -- this is your "natural placement".

C. Volume -- Adjusting Sound to Space

Many voices do not reach the ear of the listener. A smaller percentage shoot right past the listener's ear and into deafening decibels. Again, it may first be a question of breath. Most people who speak too softly don't take in breaths that are deep enough; most who over-shout are gulping in great gasps rather than relaxed inhalations. Once the breath has been released, imagine that you have a ping-pong ball of sound in your mouth. The sound is heard as "huh". Pop the sound out of your mouth to someone. Find out if it actually reached the person, or popped out on the floor in front of the person, or shot right past the person and bounced against the wall behind. Now have the partner pop the sound back to you. After you become comfortable conceiving of the sound as a tangible entity that you are sending back and forth to each other, play a game of ping-pong, or "vocal volleyball". By involving your whole body in the aiming, chasing, slamming, and volleying, you will re-discover your natural coordination for adjusting volume to distance. (Be honest about admitting when you've hit it off the court or into the net!)

D. Releasing Voice From the Body

Finally, stand a good distance from your partner -- as far away as across the room if it is not more than 15 feet. Stand with your feet at shoulder width, the hip bones directly beneath the shoulders, the shoulders released and dropped, the pelvis slightly tipped under but neither swayed back nor thrust forward. The arms hang loosely at the sides. The spine is released to its full extension and the head rests easily atop the spine, as if it were suspended by a helium balloon. This position is

called "the neutral stance".

Relax your face entirely. Begin your opening statement. DO NOT MOVE FROM THIS POSITION. Do not gesture. Do not employ your facial expressions, such as raised eyebrows or furrowed brows. As you make your way through your opening, keep disengaging your habitual expressions and gestures from your power to communicate. Let your voice do all the work. This is not easy. It is certainly not "natural". But you will hear (or your partner will tell you) how much clearer and more present the voice becomes when it is all on its own, and when tension is not allowed to enter anywhere in the body. When you find yourself clenching your fists or curling your toes or trying to gesture with either head, face, or limbs, stop, breathe into the location where tension has entered, and release it on the exhalation. When the tension cannot be cul-de-sac'ed into the body, when it cannot be stashed into nervous or habitual mannerism or gesture, it is forced into the vocal expression. Then, the voice will enlarge to accommodate it. The voice will learn how to carry all the feeling and information to the listener.

VIII. A REVIEW OF COURTROOM COMMUNICATION TECHNIQUES FOR ADVOCATES:

A. Vocal Warm-Up

Tension awareness/breath release
Head rolls
Drop downs
Touching sound
Humming/opening sound
Articulators
Resonators
Sirens
Flop outs

Warm-up the face and voice and shake tension out of the body before entering the courtroom. End the warm-up with tongue-twisters so that you actually get your tongue confused and make some mistakes and laugh in frustration.
The effort not-to-make-a-mistake keeps the speaker tentative and masked behind word choice. Ending the warm-up by enforcing some flubs, before engaging in inter-active communication, moves the speaker past this.

B. Controlling Sounds

Inflection: Use rising inflection on the terminal syllable of a question and then be willing to be quiet -- really "give the microphone over" to the witness or the prospective juror. If you find yourself consistently tagging questions with a phrase such as "Isn't that true?" or "Would you agree with that?" you may well be perceived as impatient, contesting, or even scolding. Consciously employ sustained and rising inflections in lieu of these tagging phrases, or connecting sounds such as "um." The inflection can direct the listener to connect ideas or answer questions and saves you "over-writing," or communicating an attitude toward the listener.

Sound exercises for directing and landing the voice.

C. Opening Statement

A jury needs to be able to follow a story with a strong storyline, for which you provide the beginning and the middle, and they provide the rightful ending.

Use of sustained inflections so the story doesn't end till it is over.

The jury needs a consistent Point of View to embrace as its own.

A jury also needs a clear EMOTIONAL basis of prosecution or defense.

There should be no wasted language or an overabundance of legalese.

When possible, use active verbs in the present tense and sensorially evocative language to create a living, felt experience for the listener.

(Create a telegram that accomplishes all this in 10 words.)

D. Personal vs. Professional Delivery

The story you tell in court must mean as much to you as an incident from your own life. We have to feel that it is PERSONALLY IMPORTANT to you that the case is decided in the favor of your client.

Let yourself laugh, early on. The laugh releases breath, facial tension, stage fright, and the human being out from under the lawyer persona.

E. Eye Contact

An advocate who can look someone in the eye, in an unprotected, neutral stance, and really ask a question that is IMPORTANT to him or her... and who can also look ME in the eye is an advocate who is speaking for ME. Before talking, take a moment to establish eye contact with the people to whom you are about to begin talking, so you are never reading at or reciting at them.

F. Five Senses

The five senses are what we all have in common. If you can make the jury understand and embrace your point of view through their senses, you will have them experiencing your client's story as your client did.

G. Movement

Remember to keep yourself on a broad balance base. Move when you are moving on in your thoughts -- in other words, when you are making a transition -- in your opening and closing. Beware of shifting around from side to side, foot to foot. Beware of shifting eyes -- look people straight in the eye. Shifty people are not on the side of truth and justice. You are. Use moving towards or away from someone or something, pointing, etc. to your advantage as a technique for giving and taking focus.

H. Examining Witnesses

Remember to treat each witness individually. Treat them in such a fashion that the jury members will regard that witness in the way that you want that witness to be regarded by the jury. Treat sympathetic witnesses like real people in your life who elicit that response from you, or like fictional personalities that elicit that response from you. (Example: your Aunt Harriet, Bambi, for sympathetic; Captain Hook, your Uncle Louis for someone you want to nail, etc.)

Also -- remember to control the focus of the jury while examining your witnesses. Is this someone that you want the jury to look at? Is this someone that you would rather the jury was not focusing on -- should they be looking at you instead?

I. Directing Juror Focus through Eye Contact During Examinations

Start the question on the witness and end it at on a juror, if you want the jury to focus on you during the answer rather than on the witness. Start the question on the juror and end it on a witness if you want the jury to focus on the witness during the answer. If you want jurors to look at you alone, don't

ever look at the witness. If you want them to look at the witness alone, only look at the witness. When you say "Objection", do so standing with a sustained inflection if you want to take back the focus. Experiment with different combinations.

J. Role Playing

Speak to witness, judge, or juror *as if* he or she were someone else.
Speak to witness, judge, or juror *as if* you were someone else.

K. Rehearsal

Rehearse aloud. By practicing aloud, you will discover that for clarity of communication, you may wish to re-phrase a lengthy question into a proposition, followed by a quick, short question. For example: "Does anyone feels doctors should not be held accountable even if they have been negligent in treating a patient and severe injuries result from that negligence?" The writer may be satisfied with this wording, but the actor will make better contact with, "Let's say in treating a patient a doctor is negligent, and severe injuries result from that negligence. Do you feel the doctor's accountable?" or "Some people would feel the doctor is definitely NOT accountable. Anyone here agree with that?"

Rehearse aloud every technical term you will mention. If the listener is going to have to own an understanding of "ankylosing spondylitis" sufficient to its effect on your client's life, your teeth, tongue, and lips must know their way unhaltingly, through this word, each sound clear enough that the listener can repeat it silently. It is possible for the writer to be so sight familiar with technical terminology that the actor has never had to actually speak it, or taken the time to rehearse it aloud, and will do so in court for the first time, awkwardly.

Rehearse aloud every amount of money you will mention. To write a number, and speak it aloud are two entirely different actions. A reticence to speak aloud of money is trained in us early and deeply. To ask a juror if there will be any difficulty in committing to compensation of several million dollars in a

voice that inadvertently drops or stumbles as it utters the "m-m-m-money" words sends a very mixed message.

After "constructing" an opening, rehearse with a listener, deliberately sabotaging your facility with language:

1. By working in mime without any words at all. This will allow you to extend your powers of communication, to discover the kinesthetic aspects of the story that truly connect to the creature reality of the listener, and to locate the human dimension of your client's case (and the appropriate body language) that words obscure;

2. By delivering it in a foreign language or gibberish or with a speech impediment that forces you to compensate with tools of persuasive behavior you normally leave dormant;

3. By delivering it as a persona other than your normal courtroom presenter (General Patton, Daffy Duck, Marilyn Monroe, Jimmy Stewart, Aunt Winifred, etc.). These alternate archetypes spontaneously offer up boldnesses of expression and conviction that your careful lawyer writer often overlooks.

L. Breathe.

COMMUNICATION ARTS FOR THE PROFESSIONAL

JOSHUA KARTON, president of the Santa Monica, California firm of Communication Arts for the Professional, specializes in teaching litigators how to apply the personal communication skills and techniques of theatre/film/television to the art of advocacy. As the former Director of Education and co-creator of the Applied Theatre Techniques Workshops™, he developed its unique step-by-step system for transforming courtroom presentation into persuasion, which trained over 8,000 attorneys nationwide (*Harper's* Index). He has served on the faculties and developed curriculum for ATLA's National College of Advocacy, Gerry Spence Trial Lawyer's College, the National Association of Criminal Defense Lawyers, multiple National Institute of Trial Advocacy colleges, the JAG Corps, ABA programs, and numerous state trial lawyer association presentations. He designs and conducts training programs for private firms, law schools, CLE programs, as well as maintaining a private practice of case consultation and witness preparation.

After attending the Universities of California and Edinburgh, Joshua Karton studied at the American Conservatory Theatre, returning there to teach after writing/directing the film and video exhibits of THEATRICAL EVOLUTION, winner of the New York Drama Desk Award. His acting students include the recipients of Oscars™ and Emmys™. Television writing and acting credits range from *Forever Fernwood* to *Beverly Hills 90210.* He is an editor at Samuel French Trade and the creator of Bantam Books' "Film Scenes for Actors," series. His museum education programs and installations have been the recipient of grants from the Arco Foundation, the Ford Motor Company Fund, the California Arts Council, and the Kellog Foundation. He serves on the faculties of the School of Theatre at the University of Southern California, Loyola Law School, and California Western School of Law.

COMMUNICATION ARTS FOR THE PROFESSIONAL assembles and applies the skills of working theatre artists -- actors, directors, and writers -- to the communication needs of the legal profession. While jurors observe and respect the advocate's presentation of evidence and knowledge of the law, what they *respond* to is the live human event that the advocate creates in the courtroom. What are the techniques -- neither gimmicks nor tricks -- that make litigation come alive off the legal pad? What are the actual mechanics of live storytelling, interviewing, examining, proving, and persuading? CAP trains advocates to "write" not merely for what will be read, but for what must be spoken . . . and then heard, and felt, and believed. CAP equips litigators in areas such as vocal range and flexibility, body language, eliminating stage fright, storytelling structure and delivery, shaping jurors' perceptions of witnesses, creating and controlling emotion in the courtroom, coordinating spontaneous behaviors into pre-written or outlined scripts, invisibly directing where jurors look, what they hear, and what they quote in deliberation.

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VIOLENT CRIME ON CRUISE SHIPS

A paper for The National Crime Victims Bar Association

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By

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CRUISE SHIPS AND CRUISE LINES; BACKGROUND.

According to Senator John D. (Jay) Rockefeller IV, "the cruise industry is large, successful, and vastly profitable. The industry's revenues top $25 billion a year. Nearly 13 million Americans took a cruise last year. The industry is growing with larger and larger ships entering service every year—some ships will carry over 5,000 passengers and crew… they are floating private cities."[2]

Cruise lines market to and want to attract families onto their ships. Carnival Cruise Lines uses the jingle of "Fun for All and All for Fun." Royal Caribbean Cruise Line uses "Way more than a cruise". Both advertise using images of children and families. And cruise lines are seen as a friendly place for singles to meet. According to one social scientist who researches criminal and other incidents on cruise ships, the collection of individuals on a cruise ship is an "artificial community."[3]Also according to Dr. Klein: while cruise holidays may be perceived by families as safe forms of travel and adventure, they are perceived by some crew and passengers as opportunities to party, find love, or express themselves sexually. This is a dangerous combination that is not explicit in advertisements, nor even implied, and is very likely a major cause of the many assaults and rapes. [3]

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[2] Statement of Senator John D. (Jay) Rockefeller IV, Chair United States Senate Committee on Commerce, Science, and Transportation, March 1, 2012, page 68. Senator Rockefeller. In that statement also observed that "…we must ask why an industry that earns billions and uses a variety of federal services—from the coast guard, to the customs bureau, to centers for disease control—pays almost no corporate income tax period." See http://www.commerce.senate.gov/public/index.cfm?p=hearings

[3] Ross A. Klein, PhD., testimony of Dr. Klein before Senate Committee on Commerce, Science, and Transportation statement provided on Thursday, July 24th 2013.

Yet, the cruise lines select their crewmembers, many of whom are young men in their 20's, from third world countries or from countries like Croatia or Bosnia and Herzegovina which have been ravaged by war and suffer from high rates of unemployment. They choose young men from these countries because often these people are desperate for jobs. The countries from which many of these crewmembers hail oftentimes do not have complete or accurate criminal or employment records. Therefore, an individual's history of employment or crime may not be accurate or complete. This creates issues for employers, such as cruise lines, in terms of conducting background checks. As a result, cruise lines conduct very minimal screening and background checking on potential employees, relying instead on the cruise lines' "hiring partners"— agents in other countries — to perform these duties during the course of the hiring process.

These young men who work and live onboard the cruise ships are surrounded by female passengers who are all on vacation and many of whom are relaxing and drinking. Drinking is a large source of revenue for the cruise lines. In the words of the former President of Carnival Corporation, Bob Dickenson, "The single largest source of revenue onboard most ships, especially in the Caribbean, is the sale of beverages. For some reason, drinking and vacationing are in the minds of many people, at least those who enjoy cruising."[4] This combination of young female passengers who are drinking and relaxing (in a place where they do not have to drive home) and these crewmembers who are away from family and friends for months at a time can be a volatile combination.

THE 3 BASIC TENETS OF A PASSENGER CASE.

There are three basic tenets which apply to any case of a passenger bringing an action against a cruise line for an injury received onboard or during the course of the cruise. First, **the general maritime law applies** to the case. The general maritime law usually is defined by the Federal Courts but can be defined by state courts as well.

Second, the standard of care applied usually is described as **reasonable care under the circumstances**.[5] As a corollary to this negligence action, comparative negligence of the passenger applies.

Third, the so called **"Passenger Ticket Contract"** governs many aspects of any suit against the cruise line. "Passenger Ticket Contract" is a misnomer. The ticket itself, that is the paper or certificate used to board the cruise ship, is generally not the Passenger Ticket Contract and does not contain all the terms and conditions of passage. The terms and conditions of passage generally are found on the cruise line's website under terms and conditions or Passenger Ticket Contract. These terms and conditions are usually contained in 14-18 pages of legal gobbledygook which have been written over time by maritime lawyers.

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[4] Dickenson, Bob and Vladimir, Andy*; Selling the $ea, An inside Look at the Cruise Industry*, Second Ed., 2008, p. 254.

[5] See, *Hall vs. Royal Caribbean Cruises, Limited*, 2004 A.M.C. 1913, 2004 WL 1621209, 29 FLWD 1672, Case No. 3D03-2132 (Fla. 3d DCA Opinion filed July 21, 2004), *Harnesk vs. Carnival Cruise Lines, Inc*, 1992 AMC 1472, 1991 WL 329584 (S. D. Fla. 1991), *Carlisle vs. Ulysses Line Limited, S.A.*, 475 So. 2d 248 (Fla. 3d DCA 1985), and *McLean v. Carnival Corporation*, 2013 WL 1024257 (S.D. Fla.), citing *Vierling v. Celebrity Cruises, Inc.*, 339 F 3rd 1309, 1319 (11th Cir. 2003)

4 BASIC TICKET TERMS: VENUE, NOTICE, STATUTES OF LIMITATIONS, AND THE ATHENS CONVENTION.

Four issues addressed on the ticket are venue, notice requirements, statute of limitations, and the Athens Convention. These are discussed in this order below.

Generally, the **venue** for bringing an action against a cruise line is the place designated in the Passenger Ticket Contract. These venue selection clauses have been held to be enforceable by the United States Supreme Court in *Carnival Cruise Line v. Shute*.[6] The following are venues for the major cruise lines:

Miami, Florida (Miami-Dade County)
Azamara Cruises
Bimini SuperFast Charter
Carnival Cruise Lines
Celebrity Cruise Lines
Norwegian Cruise Lines
Oceania Cruises
Regent Seven Seas
Royal Caribbean Cruises

Ft. Lauderdale, Florida (Broward County)
Celebration Cruise Line
Costa Crociere (where the cruise touches a U.S. port)
MSC Cruises
Silversea Cruises

Orlando, Florida (Brevard County)
Disney Cruise Line
Victory Casino Cruises

Los Angeles, California
Crystal Cruises
Cunard Line
Princess Cruises

Seattle, Washington
Holland America
Seabourn (The Yachts of Seabourn)

[6] 499 U.S. 585 (1991)

The Court in *Shute* dealt with Carnival's selection of Miami, Florida as the venue. The Court said that "Florida is not a remote alien forum" because Carnival maintains its base of operations in Florida.

More recently, the cruise lines have begun inserting a clause requiring that suit must also be filed in federal court. The "Federal Court selection clause" (not a venue selection clause) has been tested in a mid-level appellate state court in Florida which has held that such provisions are enforceable.[7]

The cruise passenger who files in Federal Court and alleges diversity jurisdiction has a right to a jury trial.[8] Where there is no diversity of citizenship between the parties, trial by jury may be granted when both parties consent to it. See, Federal Rule of Civil Procedure 39(c). In cases brought against cruise lines on the admiralty side (because of lack of diversity between the parties), courts have enforced the Federal Court selection clause where the cruise lines have consented to a trial by jury. The cruise passenger who files in state court (where the ticket does not require filing in Federal Court as in the Princess Cruises ticket), the passenger also is entitled to a jury trial.[9]

The Passenger Ticket Contract also requires that a passenger give **notice of a claim** usually within 6 months of the incident. The notice can be a letter. The notice should contain a description of the incident sufficient to allow the cruise line to investigate. As a practical matter, the cruise line will have received notice of the incident within minutes after it happened and will have investigated.

Usually, failure to provide notice of a claim should not be fatal to the claim. In *Rutledge v. NCL (Bahamas) Ltd*[10], for example, the Court held that the mere fact that the passenger advised the cruise line that the passenger had an accident onboard and was injured was not notice of a claim. However, the Court held that the next determination was whether the cruise line had been prejudiced by this failure of notice. In that case, as in most cases, the cruise had not been prejudiced and in fact the cruise line already had investigated the accident on the cruise on which it occurred.

The **statute of limitations** provided for in the typical Passenger Ticket Contract is one year. These statutes of limitations have been upheld.[11] Failure to file within the statute of limitations can be fatal.

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[7] See, e.g., *Leslie v. Carnival Corp.*, 22 So.3d 561 (Fla. 3d DCA 2008), *affirm'd*, 22 So.3d 567 (Fla. 3d DCA 2009) (en banc), *rev. den'd*, 44 So.3d 1178 (Fla. 2010), *cert. denied*, __U.S. __, 131 S.Ct. 1603, 179 L.Ed.2d 499 (2011).

[8] See, *Luera v. M/V Alberta*, 635 F.3d 181 (5th Cir. 2011) (which cited to *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963)) and *Leslie v. Carnival Corp.*, 22 So.3d 561 (Fla. 3d DCA 2008)

[9] See, *Leslie v. Carnival Corp.*, 22 So.3d 561, 563

[10] Case No. 08-21412-CIV, (S.D. Fla. 2010)

[11] See, *Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577 (11th Cir. 1985); *Crist v. Carnival Corp.*, 410 Fed.Appx. 197 (11th Cir. 2010); *Psurny v. Royal Caribbean Cruises, Ltd.*, 926 F.Supp.2d 1325 (S.D. Fla. 2013)

Passenger Ticket Contracts typically reference **the Athens Convention**. The Athens Convention is a treaty. The Passenger Ticket Contracts typically incorporate the terms of the Athens Convention because the Convention provides a cap on damages.

The Athens Convention provisions **do not apply to any voyage which touches a U.S. port.**[12] That is because the United States has not adopted the Convention. Also, the Athens Convention does not apply to cases of intentional torts such as rape.[13]

Whether the Athens Convention will apply to a claim depends on whether the terms of the convention were reasonably communicated within the Passenger Ticket Contract. That communication has to be reasonable either mechanically or physically within the ticket, for example, by use of headings and large font. The Athens Convention also has to be communicated clearly using language which does not reference multiple laws and the cap on the amount of recovery has to be presented in terms of U.S. dollars.[14] The ticket can be rendered too confusing to satisfy the requirements of reasonable communication if it includes references to multiple different conventions and statutes.[15]

The most recent version of the Athens Convention provides the cap on damages in terms of special drawing rights (SDRs) as defined by the International Monetary Fund. The 2002 protocol of the Athens Convention increased the limitation to 250,000 SDRs. As of January 22, 2014, 250,000 SDRs were equivalent to $383,225.16. Given the notice requirements of the case law, the Passenger Ticket Contract probably will provide the limitation in U.S. dollars. One question is which limitation will apply, the SDRs as converted at the time of trial, or the U.S. dollars expressed in the ticket.

PASSENGER VESSEL SECURITY AND SAFETY ACT OF 2010

In 2010, Congress enacted the Passenger Vessel Security and Safety Act. 46 USC Section 3507. That act was enacted after accounts on the news of criminal activity onboard cruise ships. Those started with the disappearance of honeymooner George Smith on July 5, 2005 which was followed by daily yearlong media coverage of the mystery of what happened to that passenger. The media recounted the cruise line destroying evidence at the scene, creating inaccurate reports of the incident to the flag state authority, in that case the Bahamian Maritime Authority, and failing to follow up on the disappearance until intense media coverage.[16] There also have been reports in the media of passenger rapes and

[12] See, e.g., *Henson v. Seabourn Cruise Lines, Ltd.*, 410 F. Supp.2d. 1246 (S.D. Fla. 2005)

[13] . *Farraway v. Oceania Cruises, Inc.*, Case No. 1:10 CV 24312 JLK (S.D. Fla. June 10, 2011)

[14] See, e.g., *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2009); *Henson v. Seabourn Cruise Lines, Ltd.*, 410 F. Supp.2d. 1246 (S.D. Fla. 2005); *Ginsberg v. Silversea Cruises, Ltd.*, 2005 WL 565 4644 (S.D. Fla.)

[15] See, *Wajnstat v. Oceania Cruises, Inc.*, 684 F. 3d 1153, 1155, 2012 AMC 1805 (11th Cir. 2012)

[16] . See, for example, http://www.nbcnews.com/id/10725129/ns/msnbc-morning_joe/t/captains-comments-stir-smith-case/#.U4X2vsZOW70.

passengers disappearing overboard. Because of these incidents, both the United States House of Representatives and the United States Senate held hearings on security on cruise ships. The author was fortunate enough to be a witness at a hearing of the House of Transportation Committee held on March 27, 2007.

The Passenger Vessel Security and Safety Act of 2010 (PVSSA) requires safety features on cruise ships like certain heights of rails,[17]peepholes in doors,[18] and security latches in time sensitive key technology[19]. The PVSSA also requires the vessel owner to maintain a video surveillance system "to assist in documenting crimes on the vessel and in providing evidence of the prosecution of such crimes, as determined by the secretary."[20] The act also requires that the owner of the vessel provide a criminal activity prevention and response guide onboard the vessel.[21] This guide should provide, among other things, "a description of medical and security personnel designated onboard to prevent and respond to criminal and medical situations with 24 hour instructions…"

In regard to sexual assault, the PVSSA requires the owner of the vessel to maintain retroviral medications[22] and, among other things, to provide the patient free and immediate access to contact information for local law enforcement, the FBI, United States Coast Guard, and the nearest United States Consulate or embassy, and the national sexual assault hotline program.[23] The Act also restricts crew access to passenger cabins.[24]

The PVSSA requires that the Secretary of Transportation maintain a statistical compilation of all incidents described therein and to post that on a website. The statute specifically refers to four sections of the Federal criminal code. Thus, it is only those specifically defined crimes which are required to be reported. Those include aggravated sexual abuse,[25] sexual abuse[26], sexual abuse of a minor or ward,[27] and abusive sexual contact.[28] The further

[17] (46 USC Section 3507 (a)(1)(A))

[18] (46 USC (Section 3507 (a)(1)(B))

[19] (46 USC Section 3507 (a)(1)(C))

[20] 46 USC Section 3507(b)(1).

[21] 46 USC Section 3507 (c)(1).

[22] 46 USC Section 3507 (d)(1)

[23] 46 USC Section 3507 (d)(5)

[24] 46 USC Section 3507 (f)

[25] 18 USC Section 2241

[26] 18 USC Section 2242

[27] 18 USC Section 2243

limitation is that the reporting is required only for incidents involving a United States Citizen or incidents occurring within United States waters[29] and where the FBI investigation has been closed.[30]

The PVSSA seems like a step in the right direction. However, the reporting requirements are limited and, most importantly, there is no private right of action for a violation of the PVSSA.[31] However, the issue of whether the PVSSA creates a standard of care or a duty which can give rise to negligence has not been decided. Further, the PVSSA creates duties to maintain certain video and documentation. That certainly can be the subject of discovery in a negligence action.

CREW MEMBERS ASSAULTING PASSENGERS

The first of the two categories is crew members assaulting passengers. The ship owner is strictly liable for the actions of the crew members in such assaults.[32] The 11th Circuit case of *Doe v. Celebrity Cruises Inc* involved a crew member rape of a passenger. The rape took place in Bermuda after the passenger met the crew member at a club just outside the port. The plaintiff in *Doe v Celebrity* brought an action for, among other things, sexual assault, sexual battery, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. The court in determining the ship owner's strict liability for the intentional conduct of its crew members toward its passengers, used the reasoning in railroad cases, which also involve "common carriers." The Court in *Doe v. Celebrity* relied upon the 1891 United States Supreme Court Case, *New Orleans & N.E.R. Co v. Jopes*[33] which involved a conductor shooting a train passenger. The Supreme Court in *Jopes,* as cited by the 11th Circuit in *Doe v. Celebrity),* relied upon a legal treatise "for the proposition that a common carrier is bound absolutely to see to it that no unlawful assault or injury is inflicted upon [passengers] by their own servants." Id. The Courts in *Jopes* and in *Doe v. Celebrity* dismissed the Defense arguments that the employees

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[28] 18 USC Section 2244

[29] 46 USC Section 3507 (g)(3)(B)

[30] 46 USC Section 3507 (g)(4)(A).

[31] See, *Fiorillo v. Carnival Corporation,* _____ F. Supp 2d _____ Case No. 12-21599-CIV-COHN/Seltzer (Order Granting Defendant's Motion for Partial Summary Judgment[FN1] dated February 20, 2013); *Perciavalle v. Carnival Corporation,* _____ F. Supp 2d _____, Case No. 12-CV-20996-Ceitz/Simonton (S.D. Fla. June 26th 2012) Order Granting in Part Motion to Dismiss,[FN2] *Rinker v. Carnival Corporation,* 753 F. Supp. 2d 1237, [FN3] (S.D. Fla. 2010).

[32] *Doe v. Celebrity Inc*, 394 F 3d 891 (11th Cir. 2004). See also *Garcia v. Carnival Corporation*, 838 F. Supp. 2d 1334 (S.D. Fla. 2012).

[33] 1891 United States Supreme Court Case, *New Orleans & N.E.R. Co v. Jopes* 142 U.S. 18, 12 S. Ct. 109, 35 L. ed. 919 (US 1891)

violent acts were willful and wanton and, accordingly, outside the scope of the employment. The Court in *Jopes* and now cited by the 11th Circuit in *Doe v. Celebrity* held that "owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment.[34] Also, the 11th Circuit in *Doe v. Celebrity* held that the negligence standards announced in the "physical condition cases" do not apply in a crew member assault on a passenger.[35]

The holding of *Doe v. Celebrity* and interpretations of that holding make it clear that nonsexual assaults are also subject to the strict liability rule. In *Garcia v. Carnival Corp*, for example, the Southern District of Florida held that Florida courts recognize battery, assault, and false imprisonment as intentional torts.[36] And, intentional torts are subject to the strict liability rule.

In *Garcia*, a passenger on a cruise ship had a "disagreement" with bartender in a casino onboard the Carnival Destiny. After that, passenger Garcia was approached by seven crew members. According to the plaintiff, the crew members "grabbed her, kicked her, and punched her and threw her to the ground multiple times." The crew members, according to the complaint, confined passenger Garcia to her cabin by placing a crew member immediately outside the cabin door and prevented her from leaving until the following day. The Court held that these allegations did state a cause of action for false imprisonment. The Court citing to an 11th Circuit case said that false imprisonment is defined as "the unlawful restraint of a person against his will, the gist of which action is unlawful detention of the plaintiff and the deprivation of his liberty."[37]

The Federal Civil Remedies for Personal Injuries statute (CRPI) also provides a cause of action if the victim was a minor. The statute applies if the attack occurred onboard a cruise ship "within the special maritime jurisdiction of the United States".[38] That statute provides for compensatory damages and attorneys' fees in the private right of action brought by the minor victim of sexual assault. The statute requires that the victim suffer a "personal injury as a result

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[34] *Doe v. Celebrity Cruises Inc.* 394 F. 3d at 906.

[35] *Doe v. Celebrity Cruises Inc*, 394 F. 3d at 910. See also, Phillip H. Budwick, "strict liability or negligence: what standard of care applies when crew members assault passengers on cruise ships?" 19 Tul. Mar. L.j. 353, 358 (1995). The 11th Circuit in *Doe v. Celebrity* also noted that "the Supreme Court continues to shape its federal maritime law from its decisions about common carriage involving trains. See, *Norfolk Southern R. Co. v. Kirby* _____ U.S. _____ 125 S.Ct. 385, 389 (2004) citing *Great Northern R. Co. v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380, 58 L. ed. 703 (1914). *Doe v. Celebrity Cruises Inc.* 394 F. 3d[FN 15] .

[36] See *Herzfeld v. Herzfeld*, 781 S. 2d 1070, 1071 (Fla. 2001).

[37] *Johnson v. Barnes & Noble Booksellers, Inc*, 437 F. 3d 1112, 1116 (11th Cir. 2006).

[38] 18 USC Section 2255

of such violation, regardless of whether the injury occurred while such person was a minor."[39] The statute also requires that suit be filed in the United States District Court. Further, the statute provides a floor of $150,000 in actual damages.[39]

The CRPI can be invoked whenever there is a violation of other incorporated criminal statutes. These include aggravated sexual abuse,[40] sexual abuse,[41] sexual abuse of a minor or ward,[42] and sexual exploitation of children.[43]

The cruise line/ship owner, as well as the perpetrator, are responsible and liable under the CRPI.[44]

PASSENGERS ASSAULTING OTHER PASSENGERS

The other category of cases is where passengers on cruise ships assault other passengers. In these cases, the reasonable care under the circumstances standard would apply.[45] The Defendant ship owner owes a "duty to exercise reasonable care under the circumstances."[46] The Defendants "duty is to warn of dangers known to the carrier in places where the passenger is invited to, or may reasonably be expected to visit."[47]

The cause of action in any passenger on passenger assault on a cruise ship will be negligence based on these standards. The breaches of duty include failing to provide security which translates into failing to hire, train, and monitor its employees; failing to provide and enforce proper

[39] The statute 18 USC Section 2255 (a)

[40] 18 USC Section 2241

[41] 18 USC Section 2242

[42] 18 USC Section 2243

[43] 18 USC Section 2251.

[44] See, *Jane Doe No. 8, v. Royal Caribbean Cruises Limited,* 860 F. Supp. 2d 1337 (S.D.Fla. 2012). The court in *Jane Doe No. 8*, relied upon *Doe v. Celebrity* in its statutory construction of the civil remedy for personal injuries statute.

[45] See, for example, *Jane Doe v. NCL (Bahamas) Ltd*, _____ F. Supp 2d _____; Case No. 11-2230-CIV-COOKE-TURNOFF (S.D. Fla. 2012) (Order Granting in Part Defendant's Motion for Summary Judgment. See, *Hall vs. Royal Caribbean Cruises, Ltd.*, 2004 A.M.C. 1913, 2004 WL 1621209, 29 FLWD 1672, Case No. 3D03-2132 (Fla. 3d DCA Opinion filed July 21, 2004).

[46] See, *Harnesk vs. Carnival Cruise Lines, Inc*, 1992 AMC 1472, 1991 WL 329584 (S. D. Fla. 1991).

[47] See, *Carlisle vs. Ulysses Line Ltd, S.A.*, 475 So. 2d 248 (Fla. 3d DCA 1985).

security measures and rules and regulations; failing to make reasonable inquiry into the unusual or apparently or potentially violent activities of passengers; failing to have or to implement adequate security measures such as surveillance video throughout the ship; failing to warn passengers about the potentially criminal activities of other passengers; failing to patrol with physical patrols the ship and to have adequate numbers of guards or patrols; and failing to monitor the service of alcohol and in fact over serving alcohol to passengers.

As referenced in the introduction of this paper, service of alcohol provides a significant portion of the gross income to cruise lines. Service of alcohol is encouraged and promoted onboard cruise ships. The cruise lines serve alcohol at bars and restaurants and waiters walk around with pre-made drinks on trays.

The dram shop statute of any state, which usually limits the liability of the server of alcohol, does not apply onboard the ship; these statutes are preempted by the General Maritime Law.[48] In *Doe v. NCL*, the court said that the field of service of alcohol "is already preempted by the general principles of negligence.[49]

In the *Doe v. NCL (Bahamas) Ltd*. case the Court held that "whether the plaintiff was visibly intoxicated is an issue for the jury and judgment as a matter of law is not warranted on the issue of the alleged over-service of alcohol by defendant."

LOCATION OF THE ASSAULT

Maritime jurisdiction, and the application of maritime law, can extend to assaults which take place off of the ship at a port of call.[50] In *Doe v. Celebrity*, the 11th Circuit held that maritime jurisdiction and therefore maritime law did apply to the rape of a passenger by a crew member in Bermuda. The passenger met the crew member at a club near the port and within view of the cruise ship itself. The passenger was inebriated and nauseous and needed assistance. She accompanied the crew member because she thought he was reliable because he was a crew member. Further, the court cited the fact that the crew member was a waiter onboard the ship and that the cruise line's own policies encouraged crew members to engage with passengers in order to persuade them to tip more. The waiter's tips were significant and in this case most if not all of the waiter's compensation.

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[48] See, *Jane Doe v. NCL (Bahamas) Ltd*, _____ F. Supp. 2d _____; Case No. 11-22230 CIV-Cooke/Turnoff (S.D. Fla 2012) (Order Granting in Part Defendant's Motion for Summary Judgment)

[49] See, for example, *Kermarec v. Co. Gen. Transatlantique*, 358 U.S. 625, 626 (1959) (rejecting New York's premises liability law in favor of the "settled principles of maritime law" that a ship owner owes a duty of reasonable care under the circumstances declining, where the guests of a cruise ship passenger sued the cruise line for injuries sustained in a fall on a stairway of the vessel).

[50] See, for example, *Doe v. Celebrity Cruises Inc*. 394 F 3d 891 (11th Cir. 2004). See also *Chaparro v. Carnival Corporation* 693 F 3d 133 (11th Cir. 2012).

The court in *Doe v. Celebrity* held that admiralty jurisdiction was probably invoked because the claim satisfied both the conditions of location and connection with maritime activity.[51] According to the 11th Circuit in *Doe v. Celebrity* the cruise line industry is maritime commerce and, accordingly, a crew member's sexual assault on a passenger "obviously has a potential disruptive impact on maritime commerce."[52] The court said that Bermuda was a scheduled port of a call "and was an integral part of the ongoing cruise or maritime activity in this case. Ports of call not only add to the enjoyment of a cruise but form an essential function of the cruise experience."[53] The 11th Circuit in *Doe v. Celebrity* also said "where a passenger or cruise vessel puts into various ports in the course of the cruise, these stopovers are the *sine qua non* of the cruise."[53]

As for location, the court cited *Norfolk Southern Railway Company v. Kirby*[54] which held that "the shore is now an artificial place to draw a line" in regard to maritime jurisdiction.[55]

Further, the extension of admiralty jurisdiction to land also applies to assaults by third parties.[56] In *Chaparro,* the 11th Circuit reversed the District Court's dismissal of the complaint. In *Chaparro* the allegations were that the plaintiff took a cruise on the Carnival Victory. At St. Thomas, a port of call, a Carnival employee encouraged the plaintiffs to visit Coki Beach. According to the allegations of the complaint, Carnival was familiar with the beach because it sold excursions to passengers to that beach and Carnival knew or should have known of the gang violence that took place in and around the beach. Yet, Carnival failed to warn the plaintiffs of these dangers. Upon return from the beach, when the plaintiffs were in a bus, gang violence resulted in gun shots. One of the bullets struck and killed a cruise passenger in the presence of the passenger's father and brother.

In *Chaparro,* the plaintiffs sued for negligence and for negligent infliction of emotional distress. The 11th Circuit held that "a cruise line owes its passengers a duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit."[57]

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[51] . United States Supreme Court case of Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co. 513 U.S. 527, 534, 115 S. CT. 1043, 1048, 130 L. ED. 2d 102 4 (1995).

[52] *Doe v. Celebrity Cruises Inc.,* 394 F 3d at 900.

[53] *Doe v. Celebrity Cruises Inc.,* 394 F 3d at 901 citing to a (9th Cir Case). In *Doe v. Celebrity Cruises Inc*, 394 F 3d at 901 citing *Isham v. Pacific Far East Line, Inc*, 476 F. 2d 835, 837 (9th Cir 1973).

[54] _____ U.S. _____ 125 S.Ct. 385, 389 (2004) citing *Great Northern R. Co. v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380, 58 L. ed. 703 (1914).

[55] Norfolk, 125 S. Ct. at 388.

[56] See, *Chaparro v. Carnival Corporation*, 693 F 3d 1333 (11th Cir. 2012).

[57] *Carlisle v. Ulysses Line Ltd.*, S.A., 475 S. 2d 248, 251 (Fla. 3d DCA 1985). *Chaparro* 693 F 3d at 1336. See also, *Koens v. Royal Caribbean Cruises Ltd*, 774 F Supp. 2d 1215, 1219-1220 (S.D. Fla. 2011); *McLaren v. Celebrity Cruises Inc*. ase No. 11-23924-CIV, 2012 WL1792632, at 8-9 (S.D.

As for negligent infliction of emotional distress, the 11th Circuit in *Chaparro* made clear that "federal maritime law has adopted *Gottshall's* application of the 'zone of danger' test which allows recovery if a plaintiff is 'placed in immediate risk of physical harm by [defendant's negligent] conduct.'"[58] The claim for negligent infliction of emotional distress requires "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and is not directly brought about by a physical injury, but that may manifest in physical symptoms.[59]

CONCLUSION.

Cruise ships are at times a cauldron of criminal activity. The General Maritime Law governs any claims for the injuries suffered as a result of the negligent acts of the cruise line or the criminal activity of the crew. The standard of care and causes of action which apply depend on the status of the perpetrator, crew or passenger.

Fla May 16, 2012); *Gentry v. Carnival Corp,* case No. 11-21580-CIV, 2011 WL4737062, at 3(S.D. Fla October 5, 2011).

[58] *Chaparro*, 693 F 3d at 1338. Citing *Stacy v. Rederit Otto Danielsen*, S.A. 609 F 3d 1033, 1035 (9th Cir. 2010); *Williams v. Carnival Cruise Lines Inc*, 907 F. Supp. 403, 406 (S.D. Fla 1995).

[59] *Consolidated Rail Corp v. Gottshall* 512 U.S. 532, 544, 114 S. CT. 2396, 2405, 129, L.Ed.2d 427 (1994)." *Chaparro* 693 F. 3d 1338. See also, *Caldwell v. Carnival Corporation*, 944 F. Supp. 2d. 1219 (S.D. Fla. 2013) (where the district court denied motion to dismiss in a slip and fall case of a passenger where the slip and fall occurred at the port, slipperiness of which the cruise line knew or should have known. The court in *Caldwell* cited to the United States Supreme Court the case of *Jerome B. Grubart Inc, Norfolk, Doe v. Celebrity Cruises and Chaparro v. Carnival*, all cited herein.

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WHAT TO CONSIDER WHEN REPRESENTING A CATASTROPHICALLY INJURED CLIENT WITH SPECIAL NEEDS

In the confusing landscape of public benefits and planning issues that arise today for trial lawyers, finding your way can be a daunting task. Should the client seek Social Security Disability (SSDI) benefits and become Medicare eligible? Doesn't that trigger the need for a Medicare Set Aside? What if the client is receiving needs based benefits such as Medicaid and/or Supplemental Security Income (SSI)? Is coverage under the Affordable Care Act (ACA)[1] a better or even an available option? How should the recovery be managed from a financial perspective? Is a trust appropriate? Should a structured settlement be considered? There are no easy answers to these questions. In the paragraphs that follow, you will find useful information related to these issues that will give trial lawyers the ability to issue spot when settling a case for a catastrophically injured client.

Let's use a real world example to identify the issues. Take Jan Smith who was the victim of medical malpractice at a hospital. Jan was in her early forties when she decided to have elective surgery on her back for degenerative disc disease. During the surgery, a problem developed while being intubated and the procedure was cancelled. Mrs. Smith was moved to the ICU and no neurologic monitoring was performed that evening after being moved from the surgical suite. The next morning Mrs. Smith was found to be quadriparetic. Unfortunately for Mrs. Smith, her condition was irreversible. Suit was brought against multiple defendants with a significant seven figure recovery secured. Mrs. Smith and her family had Medicaid coverage and SSI. She had also applied for SSDI. At the time of settlement, there was no Medicare eligibility since she had not been approved for SSDI and she wasn't sixty five. How do you protect the client's eligibility for public benefits? Is that the right thing to do? Should ACA coverage be considered? What about protection of the monies recovered on Mrs. Smith's behalf? Should a trust be created? What about structured settlements? Let's explore these questions further.

Public Benefits versus ACA Coverage

As a starting point, the first question is whether it makes sense for Mrs. Smith to give up her needs based benefits completely by taking the settlement in a lump sum and becoming privately insured through coverage under the Affordable Care Act. This isn't a question that can be answered with a simple yes or no. There are multiple considerations before deciding to eschew coverage afforded by Medicaid and Medicare along with the needs based Social Security benefit, SSI. First is whether the ACA coverage will be around for the long term. Will it be repealed at some point? Will portions of it be repealed making it a non-viable option? Second, does the case involve needs that aren't provided for by the affordable care act coverage such as in-home skilled attendant care or long term facility care? These

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services can be very costly and may be covered by Medicaid in many states but are not covered by ACA plans. In Mrs. Smith's case, she will have a significant amount of attendant care needs that can be covered by certain Medicaid programs available in her home state but not by the ACA. So does that mean she shouldn't apply for ACA coverage? Should she create a special needs trust to protect Medicaid and SSI? The answer lies in an analysis of the costs of the plans available under the ACA and the amount of spendable income that results if a special needs trust is utilized.

According to a 2013 article authored by Kevin Urbatsch and Scott MacDonald entitled "The Affordable Care and Settlement Planning"[2] the numbers favor combining ACA coverage with a special needs trust. The following chart illustrates the financial benefits of combining an SNT with ACA coverage in California.

PLANNING PROJECTIONS

(40 YEAR OLD FEMALE)

SETTLEMENT NET ASSET LEVEL =>	**$100K**	**$396K**	**$500K**	**$1 M**	**$2.868 M**
	Net Spendable Income -- Annual Amount [u][3]				
SNT Only [v][4]	$12,610	$23,751	$22,208	$33,484	$67,500
No SNT, Buy ACA Insurance [w][5]	EM[6]	EM	$11,196	$15,794	$67,504
SNT with ACA Supplemental [w]	EM	EM	$17,700	$20,684	$53,766
No SNT, Expanded Medi-Cal	$3,614	$14,291	NQ[7]	NQ	NQ
Income Percent of Federal Poverty Limit [x][8]	34.80%	138% **[y][9]**	174.06%	348.13%	600.70%
Average Annual ACA Premium (Net Subsidy) [z][10]	$0	$0	$4,508	$12,800	$15,552
Average Monthly ACA Premium (Net Subsidy)	$0	$0	$376	$1,067	$1,296

Source: Merrill Lynch Wealth Management Analysis through the Wealth Outlook Program, May 2013.

As the chart demonstrates, there can be some distinct advantages from a financial perspective to utilizing ACA coverage but also keeping Medicaid/SSI eligibility. While that is true, it also is true that a special needs trust, which would preserve Medicaid and SSI, places many restrictions on how settlement monies may be used. Accordingly, it isn't a decision that should be made just for financial reasons. A careful analysis of all of the issues is necessary. In the case of Mrs. Smith, other considerations outweighed the use of a special needs trust. She and her family didn't want the restrictions that come with the special needs trust. Since monies were allocated to her spouse and their children, all of the family's assets disqualified her for needs based benefits.

Even though she was currently ineligible for needs based benefits, that didn't mean she could never become eligible again in the future. Because she might need means tested benefits such as Medicaid/SSI in the future and could become a Medicare beneficiary at some point as well, a trust with provisions that would protect these benefits was created. The trust was created had provisions that would allow the trustee to move money into a "special needs sub-trust" and a "Medicare set aside sub-trust". The set aside sub-trust was contained within the "special needs sub-trust" so that in the event that the client was "dual

eligible", the set aside wouldn't cause an eligibility problem for needs based benefits. This planning technique will make more sense after the explanation below about the different types of public benefits and planning that can protect such benefits. Also, let's now make the assumption that the ACA coverage isn't an option or perhaps might not be around well into the future. What are the types of benefits an injury victim should be concerned about preserving and what are the techniques used to preserve them?

Public Assistance Primer

Because Mrs. Smith is eligible for Medicaid and SSI as well as having applied for SSDI, further explanation of these benefits makes sense to adequately understand the issues involved in planning for her recovery. There are two primary public benefit programs that are available to those that are injured and disabled. The first is the Medicaid program and the intertwined Supplemental Security Income benefit ("SSI"). The second is the Medicare program and the related Social Security Disability Income/Retirement benefit ("SSDI"). Both programs can be adversely impacted by an injury victim's receipt of a personal injury recovery. Understanding the basics of these programs and their differences is imperative to protecting the client's eligibility for these benefits.

Medicaid and Supplemental Security Income (hereinafter SSI) are income and asset sensitive public benefits that require special planning to preserve. In many states, one dollar of SSI benefits automatically provides Medicaid coverage. This is very important, as it is imperative in most situations to preserve some level of SSI benefits if Medicaid coverage is needed in the future. SSI is a cash assistance program administered by the Social Security Administration. It provides financial assistance to needy aged, blind, or disabled individuals. To receive SSI, the individual must be aged (sixty-five or older), blind or disabled and be a U.S. citizen. The recipient must also meet the financial eligibility requirements.[11] Medicaid provides basic health care coverage for those who cannot afford it. It is a state and federally funded program run differently in each state. Eligibility requirements and services available vary by state. Medicaid can be used to supplement Medicare coverage if the client is eligible for both programs ("dual eligible"). For example, Medicaid can pay for prescription drugs as well as Medicare co-payments or deductibles. Because Medicaid and SSI are income and asset sensitive, creation of a special needs trust may be necessary which is discussed in greater detail below.

Medicare and Social Security Disability Income (hereinafter SSDI) benefits are an entitlement and are not income or asset sensitive. Clients who meet Social Security's definition of disability and have paid in enough quarters into the system can receive disability benefits without regard to their financial situation. The SSDI benefit program is funded by the workforce's contribution into FICA (social security) or self-employment taxes. Workers earn credits based on their work history and a worker must have enough credits to get SSDI benefits should they become disabled. Medicare is a federal health insurance program. Medicare entitlement commences at age sixty-five or two years after becoming disabled under Social Security's definition of disability. Medicare coverage is available again without regard to the injury victim's financial situation. Accordingly a special needs trust is not necessary to protect eligibility for these benefits. However, the MSP may necessitate the use of a Medicare Set Aside discussed in greater detail below.

How Do We Protect Mrs. Smith Current and Potential Future Benefits?

Planning Techniques for Keeping Mrs. Smith Eligible for Medicaid/SSI

Since Mrs. Smith receives Medicaid/SSI, a special needs trust can be created to hold the recovery and preserve public benefit eligibility since assets held within a special needs trust are not a countable resource for purposes of Medicaid or SSI eligibility. The creation of a special needs trust is authorized by

Federal law.[12] Trusts commonly referred to as (d)(4)(a) special needs trusts, named after the Federal code section that authorizes their creation, are for those under the age of sixty five.[13] However, another type of trust is authorized under the Federal law with no age restriction and it is called a pooled trust, commonly referred to as a (d)(4)(c) trust.[14]

The 1396p[15] provisions in the United States Code govern the creation and requirements for such trusts. First and foremost, a client must be disabled in order to create a SNT.[16] There are two primary types of trusts that may be created to hold a personal injury recovery each with its own requirements and restrictions. First is the (d)(4)(A)[17] special needs trust which can be established only for those who are disabled and are under age 65. This trust is established with the personal injury victim's recovery and is established for the victim's own benefit. It can only be established by a parent, grandparent, guardian or court order. The injury victim can't create it on his or her own. Second is a (d)(4)(C)[18] trust typically called a Pooled Trust that may be established with the disabled victim's funds without regard to age. A pooled trust can be established by the injury victim unlike a (d)(4)(A).

Planning Techniques for Making Sure Mrs. Smith Will Not Lose Medicare Coverage in the Future

Mrs. Smith has applied for SSDI which means technically, according to CMS guidance, she has a "reasonable expectation of becoming a Medicare beneficiary within 30 months". A client who is a current Medicare beneficiary or reasonably expected to become one within 30 months should concern every trial lawyer because of the implications of the Medicare Secondary Payer Act ("MSP"). Under the MSP, Medicare isn't supposed to pay for future medical expenses covered by a liability or Workers' Compensation settlement, judgment or award. CMS recommends that injury victims set aside a sufficient amount to cover future medical expenses that are Medicare covered. CMS' recommended way to protect an injury victim's future Medicare benefit eligibility is establishment of a Medicare Set Aside ("MSA") to pay for injury related care until exhaustion.

In certain cases, a Medicare Set Aside may be advisable in order to preserve future eligibility for Medicare coverage. A Medicare set aside allows an injury victim to preserve Medicare benefits by setting aside a portion of the settlement money in a segregated account to pay for future Medicare covered healthcare. The funds in the set aside can only be used for Medicare covered expenses for the client's injury related care. Once the set aside account is exhausted, the client gets full Medicare coverage without Medicare ever looking to their remaining settlement dollars to provide for any Medicare covered health care. In certain circumstances, Medicare approves the amount to be set aside in writing and agrees to be responsible for all future expenses once the set aside funds are depleted.

Dual Eligibility: The Intersection of Medicare and Medicaid – SNT/MSA

Since Mrs. Smith is potentially a Medicaid and Medicare recipient, extra planning is in order. If it is determined that a Medicare Set Aside is appropriate or needed in the future, it raises some issues with continued Medicaid eligibility. A Medicare Set Aside account is considered an available resource for purposes of needs based benefits such as SSI/Medicaid. If the Medicare Set Aside account is not set up inside a Special Need Trust, the client will lose Medicaid/SSI eligibility. Therefore, in order for someone with dual eligibility to maintain their Medicaid/SSI benefits the MSA must be put inside a Special Needs Trust. In this instance you would have a hybrid trust which addresses both Medicaid and Medicare. It is a complicated planning tool but one that is essential when you have a client with dual eligibility.

Financial Settlement Planning Considerations

While we have discussed Mrs. Smith's public benefit preservation issues above, what about the management of her significant recovery? Should a part of it be in the form of a structured settlement? What about ongoing management of her financial affairs? Will she need help from a fiduciary such as a

corporate trustee? There are noright or wrong answers to these questions. Instead, there are options for Mrs. Smith to consider and they should be presented so that she can make an informed decision.

The first option is to take all of the personal injury recovery in a single lump sum. If this option is selected, the lump sum is not taxable, but once invested, the gains become taxable and the receipt of the money will impact his or her ability to receive public assistance.[19] A lump sum recovery does not provide any spendthrift protection and leaves the recovery at risk for creditor claims, judgments and wasting. The personal injury victim has the burden of managing the money to provide for their future needs be it lost wages or future medical. Needs based public benefits would be lost if a lump sum is taken and any reduction in the premium costs for the ACA insurance programs would also be lost.

The second option is receiving "periodic payments" known as a structured settlement[20] instead of a single lump sum payment. A structured settlement's investment gains are never taxed[21], it offers spendthrift protection and the money has enhanced protection against creditor claims as well as judgments. A structured settlement recipient can avoid disqualification from public assistance when a structured settlement is used in conjunction with the appropriate public benefit preservation trust. However, a structured settlement alone will never protect the disabled injury victim's needs based public benefits.

A third option, which should always be considered, is to create a "settlement trust" as an alternative to structured settlements. Settlement trusts are typically spendthrift irrevocable trusts managed by a professional trustee and can also contain special needs provisions to allow for preservation of needs based benefits. These trusts provide liquidity and flexibility that a structured settlement can't offer while at the same time protecting the recovery. The investment options become limitless and the trust can always be paired with a traditional structured settlement. Having a professional trustee in place that has a fiduciary duty to the client provides security for the client and a trusted resource for life and financial management issues. In certain cases, this solution makes a lot of sense because of its ability to adapt to changing circumstances. When a disabled injury victim has needs that are not easily quantifiable or predictable, the settlement trust can adjust to the needs of the client seamlessly. When a settlement trust is paired with certain fixed income investment vehicles and a deferred lifetime annuity via a structured settlement, the client can enjoy the best of both worlds with guaranteed income for life but sufficient liquidity.

What Can You Do to Identify Clients Like Mrs. Smith in Practice?

You must establish a method of screening your files to determine those that involve those who are disabled sufficiently to warrant further planning. Once you identify a client as falling into that category, you must determine if outside experts should be consulted. The easiest way to remember the process once you have identified someone as sufficiently disabled is by the acronym "CAD". The "C" stands for consult with competent experts who can help deal with these complicated issues. The "A" stands for advise the client about the available planning vehicles or have an outsize expert do so. The "D" stands for document what you did in relation to protecting the client. If the client decides that they don't want any type of planning, a choice they can make, then document the education they received about the issue with them signing an acknowledgement. If they elect to do a settlement plan, hire skilled experts to put together the plan so that they can help you document your file properly to close it compliantly.

Disabled clients especially need counseling given the likelihood they will be receiving some type of public benefits. To prevent being exposed to a malpractice cause of action, the personal injury practitioner should understand the types of public benefits that a disabled client may be eligible for and techniques that are available to preserve those benefits. Having this knowledge will help the lawyer identify disabled clients they may want to refer for further consultation with other experts.

What Do You Do if You Represent Mrs. Smith?

When a case, such as Mrs. Smith's arises, which involves the protection of public benefits or settlement assets, outside counsel is typically retained to assist with the trust devices commonly used to protect the client. Lawyers who are well versed in "settlement law" or "settlement planning" can be found and relied upon to assist with these difficult and complicated issues. The legal fees for creation of the trusts to protect the settlement monies or public benefit eligibility are normally paid for out of the injury victim's recovery. Fees can vary but the normal range is from $3,000 to $7,500 depending on the complexity of the issues.

What Was Done to Protect Mrs. Smith in the Real World?

Given Mrs. Smith's situation, a settlement trust was created. It has two "buckets". One "bucket" is an immediate fixed income portfolio of annuities that provides a high yield stream of periodic payments to the trust that the trustee can then use to provide the client with a monthly income. The fixed income portfolio was paired with a lifetime structured settlement which was deferred to maximize return but guarantee payments for life. The second "bucket" is a cash reserve that is professionally managed but can be accessed when the need arises or circumstances change. This gives the trust beneficiary the guaranteed income she needs coupled with the flexibility and liquidity that is crucial for injury victims when unforeseen needs arise.

The settlement trust which was created had provisions that gave the trustee discretion to move monies into the two sub-trusts that were identified in the trust document. These sub-trusts would allow Mrs. Smith to qualify for Medicaid/SSI as well as preserve future Medicare eligibility by utilizing special needs provisions as well as set aside provisions. Until such time as eligibility was needed for public benefits, Mrs. Smith could purchase ACA coverage and make use of the settlement monies without the restrictions that accompany a special needs trust or set aside.

It is a win, win solution in today's complicated planning environment for settlements such as Mrs. Smith's case. One final note, while I have discussed these issues in the context of settlements, all of these considerations (with the exception of a structured settlement) can be done post-verdict.

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[1] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).
[2] The Affordable Care Act and Settlement Planning, Kevin Urbatsch & Scott MacDonald, Plainiff Magazine (December 2013).
[3] Id. (**u** -- After-tax spendable income, net of premium or SNT expenses, assuming 2.5% COLA through actuarial life expectancy of the beneficiary).
[4] Id. (**v** -- Net Spendable Income for SNT options has been reduced by $3,000 expense to establish the SNT and 1% annual administrative expenses.).
[5] Id. (**w** -- Net Spendable Income for ACA options has been reduced by average annual premium and maximum annual out of pocket expenses for the respective income level (based on percent of FPL)).
[6] Id. (**EM** = Qualifies for the Expanded Medi-Cal Program).
[7] Id. (**NQ** = Not Qualified for Expanded Medi-Cal Program).
[8] Id. (**x** -- Assumes 4% annual taxable income based on the settlement net asset level).
[9] Id. (**y** -- Maximum annual income level to qualify for the Expanded Medi-Cal Program is 133% of the Federal Poverty Limit ($15,282) plus 5% ($11,490 * .05% = $574.50) any income disregard = $15,856 for 2013).
[10] Id. (**z** -- Average of highest premium rate for that income level across the 19 California regions. Amount shown is beneficiary's cost after federal subsidy).
[11] An individual can only receive up to $552.00 per month ($829.00 for couples) and no more than $2,000 in countable resources.
[12] 42 U.S.C. §1396p (d)(4).
[13] 42 U.S.C. §1396p (d)(4)(A).

[14] 42 U.S.C. §1396p (d)(4)(C).
[15] 42 U.S.C. §1396p.
[16] To be considered disabled for purposes of creating an SNT, the SNT beneficiary must meet the definition of disability for SSDI found at 42 U.S.C. §1382c.
[17] 42 U.S.C. §1396p (d)(4)(A).
[18] 42 U.S.C. §1396p (d)(4)(C).
[19] *Id.*
[20] A structured settlement is a single premium fixed annuity used to provide future periodic payments to personal physical injury victims.
[21] *See* I.R.C. § 104(a)(2) . *See also* Rev. Rul. 79-220 (1979) (holding recipient may exclude the full amount of the single premium annuity payments received as part of a personal injury settlement from gross income under section 104(a)(2) of the code).

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LITIGATING VIOLENT CRIME CASES IN RESORT SETTINGS: HOTELS, RESORTS, BARS AND THEME PARKS

Resort crimes are based on civil liability for negligent or intentional acts that arise in resort, vacation or recreational settings. These can involve aspects of hotel and motel safety, amusement and theme park liability, bars and taverns, rental car liability, and any travel and hospitality industry liability for crime victims. Resort crime can encompass a vast array of types of cases but they have one thing in common: tourists, business travelers and locals alike are all exposed to risk while traveling, vacationing or engaging in resort or pleasure activities.

The challenge in litigating security negligence cases in resort settings are many. First, the witnesses (if any) may be spread across the country or globe, as the others in attendance at an event are often visitors themselves. The defendants are usually uncooperative with authorities lest they be seen as a "high crime" venue. One thing most resorts do not want is the presence of police greeting visitors, especially in this social-media-controlled world.

Next, there are other hurdles facing the crime victim in resort settings. Often there are releases and waivers of liability that have been signed before engaging in activities, especially for those involving sporting activities. Another obstacles facing the crime victim is that the entity in control may be an "independent contractor" that is technically not the operator of the resort and in fact may have little in the way of liability insurance, assets or qualifications.

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Because Florida is a huge resort destination, and due in large part to our year round climate that encourages resort activities, these crimes against tourists occur with great frequency here. Tourists by their very nature are less attentive to dangers because they are in a strange place and are focused on enjoying the surroundings. Often there are higher duties owed to tourists because of their lack of familiarity and awareness of risks that would be otherwise known to the proprietors of certain businesses.

With 82 million visitors each year, Florida is a tourist haven. There must be places to house these visitors and facilities to entertain and amuse them. The business industry has responded, and Florida is flush with places to stay and things to do. The draw to the state includes 1200 miles of sandy beaches and over 8,000 lakes. Yet there are hazards hidden from tourists, who are usually on vacation and unaware of the dangers they face. Of the 100 most dangerous cities in America, 11 are located in Florida.[2] That reality poses issues of liability for entities in the tourism business.

Hotels, Resorts, Amusement and Theme Parks

In general, every property owner or occupier has a duty to keep its premises in a reasonably safe condition and to protect the invitee from dangers of which the owner is or should be aware or which the owner might reasonably foresee. *Newalk v. Florida Supermarkets, Inc.*, 610 So. 2d 528 (Fla. 3d DCA 1993); *Levy v. Home Depot*, 518 So. 2d 941 (Fla. 3d DCA 1988); *Winseman v. Travelodge Corporation*, 205 So. 2d 315 (Fla. 2d DCA 1967). This duty applies to hotel owners/operators as the law specifically imposes on hotel owners the duty to keep their premises in a reasonably safe condition. *Goldin v. Lipkind*, 49 So. 2d 539 (Fla. 1950); *Marhefka v. Monte Carlo Management Corp.*, 358 So. 2d 1171 (3rd DCA 1978).

<u>Theme Parks/Amusement Parks</u>

Theme parks present extraordinary hazards to the public that may not be otherwise visible. Often the theme park visitor is distracted by the many amusements and attractions, as well as by children or family. There is a natural assumption that such parks are safe, that they would not be operating a particular attraction if it wasn't, and that nothing can go wrong. But often it does.

The big daddy of them all, Walt Disney World, has only been required to report incidents at its parks to state inspectors since 2001. For a one year period – 2004-2005- there were 4 deaths and 19 injuries reported by Disney at its Florida theme parks. Rarely do the theme park operators publicize – or even report – violent crimes and sexual assaults occurring on their property.

Not everyone thinks theme parks are the happiest places on earth. Parents of children might find it uncomfortable to learn that the people in the costumes at theme parks, those working on rides, and escorting guests through the resorts might be pedophiles on the prowl.

In several "*To Catch A Predator*-style" stings, police in Florida have recently arrested a number of Disney employees for child sex offenses. CNN conducted an investigation that found

[2] 2014 statistics from: http://www.neighborhoodscout.com/neighborhoods/crime-rates/top100dangerous/.

at least **35 Disney employees have been arrested since 2006 for sex crimes involving children.** Some were caught with child porn on Disney property. One, a Disney World employee who oversaw ride repairs, was arrested when he arrived at a house thinking he was going to meet a 14 year-old girl. Instead he was arrested.

In July 2014, numerous employees of Disney and Universal were arrested when they too showed up at a house planning to meet children. One was a concierge at Disney's Animal Kingdom, who thought he was going to "fulfill a fantasy" with a 14 year-old boy.

The arrests have been documented in detail by the mass media and paint a frightening picture of the people who have access to hundreds of thousands of children every day.[3]

The predators are particularly dangerous because parents often feel that theme parks are among the safest places for their children. Many parents who would never allow their children to go someplace without their supervision freely encourage their kids freely walk these parks. But the risks from sex offenders is often greater at those venues because the pedophiles know that children will be there, and often are less aware of risks and more trusting of adults and, in particular, employees at those parks.[4]

Pedophiles tend to be smart and manipulative, making them more insidious and dangerous to our kids. The fact that dozens of Disney employees have been charged with child sex crimes does not mean that the problem is limited to Disney. Many other theme parks and similar amusements are attractive to pedophiles. Parents must remain vigilant and speak openly with their children about the risks and what is and is not acceptable. Unfortunately today's social media and electronic communications afford the pedophiles new tools that 20th century child abusers did not enjoy.

Virtually all of the major theme parks like Universal Orlando, Islands of Adventure, Busch Gardens, Hollywood Studios, Blizzard Beach, Animal Kingdom, EPCOT and Seaworld, are replete with hazards to which tourists and locals alike are exposed. Many times the harm is not catastrophic; sometimes the damages are tragic and life altering.

Of course, the owner/operator of a hotel, resort, amusement of theme park is subject to the law of respondeat superior and actual and apparent agency to the same extent any other employer is. Therefore, they are liable for the negligent acts and omissions of their employees and agents. However, in violent crime cases it is often disputed that the employee was acting within the course and scope of his or her employment when the crime took place.

Negligent security cases involving hotels, resorts, and amusement and theme parks typically involve criminal assaults, including robberies and sexual assaults. The law governing negligent security cases is largely derivative of general premises liability law. The general statement of law

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[3] http://www.cnn.com/2014/07/14/us/theme-park-employees-child-sex-stings/index.html.
[4]http://www.dailymail.co.uk/news/article-2692617/Dozens-Disney-workers-arrested-To-Catch-A-Predator-style-child-sex-stings.html.

is that one who possesses property (landlord/owner/lessee) owes a duty of care to the public (visitors, guests, invitees) to eliminate and protect them against accidental, negligent, and intentional acts of third parties. See generally, *Restatement (Second) of Torts,* § 344 (1963) (land possessor entreating members of public to do business is subject to liability to public for physical harm caused by intentionally harmful acts of third persons on property and by land possessor's failure to exercise reasonable care to provide adequate warning or protection).

The criminal act is not a supervening and intervening cause when the act is foreseeable and the defendant's negligence permitted the criminal act to occur. See generally, *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So.2d 978 (Fla. 3d DCA 1980) ("We first reject, as entirely fallacious, the defendant's claim that the brutal and deliberate act of the rapist-murderer constituted an "independent intervening cause" which served to insulate it from liability. It is well-established that if the reasonable possibility of the intervention, criminal or otherwise, of a third party is the avoidable risk of harm which itself causes one to be deemed negligent, the occurrence of that very conduct cannot be a superseding cause of a subsequent misadventure).

As the Florida Supreme Court has stated, "…a negligent tortfeasor whose acts or omissions give rise to or permit an intentional tortfeasor's actions….as a matter of public policy, negligent tortfeasors such as in the instant case should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence…." *Merrill Crossings Associates v. Wal-Mart Stores, Inc.,* 705 So. 2d 560 (Fla. 1997).

Different types of premises can give rise to different duties. Here are some examples:

Hotels:

Hotels have "a non-delegable duty to guests to provide a reasonably safe premises, including reasonable protection against third party criminal attacks." *U.S. Security Services Corp. v. Ramada Inn,* 665 So. 2d 268 (Fla. 3d DCA 1996) (landowner can contract out performance of non-delegable duty, but he is still legally responsible).

The law imposes on hotels, apartments, innkeepers, etc. the duty to keep their buildings and premises in a condition reasonably safe for the use of their guests. The duty of maintaining safe premises cannot be delegated to another. *Goldin v. Lipkind,* 40 So. 2d 539, 541 (Fla. 1950). A hotel owner's actual or constructive knowledge, based on past experience, of the likelihood of disorderly conduct by third persons in general that may be a safety risk is sufficient to establish foreseeability. *Hardy v. Pier 99 Motor Inn,* 664 So. 2d 1095 (Fla. 1st DCA 1995).

The duty to provide reasonably safe premises is non-delegable, so even though hotel/motel may contract with an independent contractor to provide required security for guests, the hotel/motel is nonetheless vicariously liable for any negligence of the security service. *U.S. Security Services Corp. v. Ramada Inn,* 665 So. 2d 268 (Fla. 3d DCA 1995).

An innkeeper must take reasonable precautions to protect its guests from foreseeable criminal assault. *Reichenbach v. Days Inn, Inc.,* 401 So.2d 1366, 1367 (Fla. 5th DCA

1981)(innkeeper may be liable if he fails to take reasonable precautions to deter the type of criminal activity which resulted in a guest's injury).

What can the operator of a hotel, inn or theme park do to minimize risks to the public?

First, they need to clearly define each job, its responsibilities and what contact may be had with the public and under what conditions. What jobs will allow contact with children or others that may be particularly vulnerable? What observation is available (natural surveillance)?

Second, a background check is an essential first step in hiring the correct personnel. There are many ways for resort and tourist businesses to perform background checks, and most involve outsourcing some or all of that to professionals who have skills in that area. One obvious example of negligent hiring is where an employee has a gap in employment or residency (which may or may not be explained by time spent incarcerated). The general rule is that any job where the employee will have unfettered access to guests or tourists, the greater the background check must be. That may include contacting references, employers, neighbors and others to see whether their stories match. Usually a prospective employee will only offer references of those he or she knows will provide a positive response. Due diligence requires several steps more – double blind reference checks – before an employee can be hired.

Third, just because a business hired an "independent contractor" does not mean that they are absolved from the responsibility for negligent hiring. If a business is responsible for placing someone in contact with a victim, they have the duty to make sure that there has been a due diligence in hiring and checking that person's background.

Beyond hiring, there is an ongoing duty of assuring that the person is performing their job properly and is not a threat to the public. Failure to do so gives rise to a case of negligent retention. That is, retaining an employee after the employer knows or should have known that the employee is unfit for that job or poses an actual or potential threat.

Negligent supervision is where the employer fails to take steps to supervise and observe the employee, therefore ensuring negligent retention by negligently or deliberately "not knowing" of hazards.

Gas Stations:

Gas stations and mini-marts are often the site of vacationers who are victimized. Often that is because the tourist is unfamiliar with the area and wanders into a neighborhood where they are vulnerable to crime. A self-service gas station's standard of care may include duty to protect customer from known ongoing attack. *Butala v. Automated Petroleum and Energy Co.*, 656 So. 2d 173 (Fla.2d DCA 1995) (plaintiff attacked by another customer, who poured gas on him and ignited it).

Bars and Nightclubs:

A duty may arise on the part of a bar where there is chronic, long-standing violence at bar, the management fails to have proper security, and injury ensues. *Adelsperger v. Riverboat,*

Inc., 573 So. 2d 80 (Fla. 2d DCA 1990) (police officer injured-application of exception to "fireman's rule"). If a bar proprietor knew or should have known of the likelihood of disorderly conduct by third parties which might endanger invitees, foreseeability exists. *Allen v. Babrab, Inc.,* 438 So. 2d 356 (Fla. 1983); see also *Stevens v. Jefferson,* 436 So. 2d 33 (Fla. 1983) (plaintiff need not show that particular assailant's propensity for violence).

A bar or saloon, although not an insurer of a patron's safety, has a duty to "use every reasonable effort to maintain order among the patrons, employees, and those who come upon the premises" and are likely to produce disorder or cause injury. *Priester v. Grand Aerie of the Fraternal Order of Eagles, Inc.,* 688 So. 2d 376 (Fla. 3d DCA 1997).

Cases have held that if it was foreseeable that rowdy patrons would cause injury to others, the bar may be held liable for their damages. *Hendry v. Zelaya,* 841 So. 2d 572 (Fla. 3d DCA 2003); see also *Hall v. Billy Jack's,* 458 So. 2d 760 (Fla. 1983); *Holiday Inns, Inc. v. Shelburne,* 576 So. 2d 322 (Fla. 4th DCA 1991); *Smith v. Hooligan's Pub & Oyster Bar*, 753 So. 2d 596 (Fla. 3d DCA 2000); *Daly v. Denny's, Inc.*, 694 So. 2d 775 (Fla. 4th DCA 1997); *Crown Liquors of Broward v. Evenrud,* 436 So. 2d 927 (Fla. 2d DCA 1983).

In recent years there has been an epidemic of "drink spiking" taking place at bars. This is where substances, often GHB or "roofies", are placed in the drink of an unsuspecting victim. The victim consumes the drink and becomes totally incapacitated and they are then taken to another location where often they are sexually assaulted. One of the features of these substances is that they often cause amnesia, so the victim does not have a clear recollection of what transpired. Even if they do, by the time they perceive what has happened the perpetrator is long gone and so is the evidence (the drink). Often the only evidence left is the toxic substance in the victim's blood stream.

Recent attempts to combat drink spiking include placing covers on drinks, and a campaign to warn guests to never take a drink from a stranger (watch the drink being poured or open it themselves. Drink spiking takes place all the time and in a variety of locations (theme parks, bars, restaurants, hotels, etc.). A hotel is particularly attractive since the perpetrator can take the victim back up to their room, complete the crime, and disappear.

The use of video cameras at bars, often in conjunction with equipment that records the ID displayed to the bouncer, provides a strong deterrent to drink spiking because there will be some proof as to who was present that evening plus it will often record who left and with whom.

<u>Common Carriers</u> (taxicabs, buses, air travel):

Almost all visitors to Florida engage in some use of common carriers. A common carrier is defined as "any person engaged in motor carrier transportation of persons… for compensation over the public highways of this state who holds his service out to the public and provides transportation over regular or irregular routes." *Nazareth v. Herndon Ambulance Service, Inc.,* 467 So. 2d 1076 (Fla. 5th DCA 1985). A special relationship is created once a common carrier accepts a passenger for transportation. See *Holland America Cruises, Inc. v. Underwood,* 470

So. 2d 19 (Fla. 2nd DCA 1985); *Nazareth v. Herndon Ambulance Service,* 467 So. 2d 1076 (Fla. 5th DCA 1985).

The special relationship imposes upon the common carrier the duty to exercise the highest degree of care for the safety of its passengers. See *Swilley v. Economy Cab Company of Jacksonville,* 46 So.2d 173 (Fla.1950); *Holland America Cruises, Inc. v. Underwood,* 470 So.2d 19 (Fla. 2nd DCA 1985); *Nazareth v. Herndon Ambulance Service, Inc.*, 467 So.2d 1076 (Fla. 5th DCA 1985); *Transit Casualty Co. v. Puchalski,* 382 So.2d 359 (Fla. 5th DCA 1980).

This heightened standard of care is due in part the nature of the carrier's undertaking whereby the passenger must entrust his or her bodily safety to the care and control of the carrier's vehicle and employees, and he or she cannot freely or independently walk away, once the undertaking has commenced. This situation creates a special duty to protect. *Nazareth v. Herndon Ambulance Service, Inc.,* supra at 1079.

The duty owed by a common carrier toward its passengers is to "exercise the highest degree of care, foresight, prudence and diligence reasonably demanded at any given time by the conditions and circumstances then affecting the passenger and the carrier during the contract of carriage." *Swilley v. Economy Cab Company of Jacksonville,* 46 So. 2d 173, 177 (Fla.1950); *Whitman v. Red Top Sedan Service,* Inc., 218 So. 2d 213, 215-216 (Fla.3rd DCA 1969) quoting *Red Top Cab & Baggage Co. v. Masilotti*, 190 F. 2d 668, 671 (5th Cir. 1951). Once a duty is established, the carrier may not delegate that duty to anyone else.

Despite the extraordinary duty a carrier owes its passengers, a common carrier is not an insurer of the safety of its passengers. *Transit Casualty Co. v. Puchalski,* 382 So. 2d 359 (Fla. 5th DCA 1980). The duty of care does not extend to the point of requiring the carrier and its employees to possess superhuman powers of anticipation or to exercise such powers in a threatened emergency. The carrier's duty also does not require it to place a guard over its passenger or to deliver him to the place of destination safely at any and all events or to keep him free from all harm under any and all circumstances. *Swilley v. Economy Cab Company of Jacksonville, supra.*

The duty of care begins when the relationship of carrier and passenger is established and does not end until that relationship ceases. *Id*. The courts have held that a common carrier passenger is "one who enters or occupies the carrier's vehicle or conveyance for the purpose of transportation with the carrier's express or implied consent, and he ceases to be a passenger at the time he safely alights from the carrier's vehicle or conveyance." *Sheir v. Metropolitan Dade County,* 375 So. 2d 1114, 1116 (Fla. 3rd DCA 1979).

Common carriers have been held to owe an even higher duty of care when it accepts passengers with unusual conditions. For example, in *Swilley v. Economy Cab Company of Jacksonville, supra,* the defendant cab company accepted and intoxicated person as a passenger. When the driver got out of the cab to fix a flat tire, the plaintiff offered to assist. The driver did not prevent the plaintiff from assisting despite his condition. The plaintiff was injured when he was hit by another vehicle as he was assisting the cab driver. The court stated: The fact that the defendant was intoxicated at the time of the acceptance of his services by the driver did not

lessen the burden of any duty owed by the defendant to the plaintiff but, if fact, increased it… Though, generally speaking, a common carrier is not bound to protect intoxicated persons from the consequences which may result from their own wrongs and follies, there may by responsibility where the carrier accepts the passenger, being aware of his intoxication and inability to take care of himself, and places him in a position where the carrier could or should foresee that he might suffer injury as the result of his exposure to danger. *Swilley v. Economy Cab Company of Jacksonville*, 46 So. 2d 173, 178 (Fla. 1950).

There was a time not long ago when rental cars were totally identifiable to the average person (and criminal). They often bore stickers identifying the rental agency, which made it easier for the company to inventory and identify their property but was a red flag to criminals. Incredibly, for years in Florida the Department of Highway Safety and Motor Vehicles issued rental car companies license plates that began with the letters "Y" and "Z". That meant that criminals shopping for an out of town tourist would find their target when they spotted cars bearing tags starting with Y or Z. There were numerous murders in the Miami area where robbers followed these cars and committed violent crimes.

Tourists identified as such are much more vulnerable. Criminals know that they are less likely to know where they are going and understand the lay of the land. More importantly they are less likely to be willing and able to return to a place far from home if and when there is an arrest and prosecution. Criminals know this and thrive on it.

Given the fact that many visitors to Florida engage a common carrier – taxicab, bus, air carrier, cruise ship – common carrier law is highly relevant to violent crimes committed upon tourists.

Rental Cars

Rental car companies reap millions, if not billions of dollars, every year from Florida tourists. Car rental agencies have a duty to warn renters of foreseeable criminal conduct and a high crime neighborhood particularly in light of the superior knowledge of the car rental company. *Shurben v. Dollar Rent-A-Car*, 676 So.2d 467 (Fla. 3rd DCA 1996)(renter was British tourist).

Agency and Respondeat Superior

An issue that often arises in resort tort cases is apparent agency. That is because often the innkeeper, resort, cruise line, transportation provider or other business may subcontract out the actual service. When tragedy ensues, the provider may claim that the tortfeasor was not its employee and was an independent contractor for which it is not liable. The Florida Supreme Court has made it clear that an independent contractor may also be an agent. *Stoll v. Noel*, 694 So. 2d 701,703 (Fla. 1997).

The rule has long been settled in Florida law that a principal is bound by the acts of his servants and/or agents. Courts employ various legal doctrines to find vicariously liability including, respondeat superior, apparent or ostensible agency, agency by estoppel and the non-

delegable duty doctrine. The authority of an agent may be actual or it may be apparent. The agent's authority may be conferred by writing, by parol, or it may be inferred from the related facts of the case. See *Stuyvesant Corp. v. Stahl*, 62 So. 2d 18, 20 (Fla. 1953).

Actual Agency

Essential to the existence of actual agency relationship is:

(1) Acknowledgment by the principal that the agent will act for him;

(2) The agent's acceptance of the undertaking; and

(3) Control by the principals over the actions by the agent.

Robbins v. Hess, 659 So. 2d 424, 427 (Fla. 4th DCA 1995)(citing *Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990); Restatement (Second) Agency § 1 (1957).

Apparent Agency

Even where control and dominion are not actual, a principal is estopped from denying an agency relationship if the principal or employer has held the agent or employee out to the public as being possessed of the requisite authority and a third person is aware of the agent's authority and has relied on it to his detriment. *National Indemnity Co. of the South v. Consolidated Ins. Serv.*, 778 so. 2d 404, 407 (Fla. 4th DCA 2001); *Irving v. Doctors Hosp. of Lake Worth*, 415, So.2d 55, 57 n. 2 (Fla. 4th DCA 1982); *Sapp v. City of Tallahassee*, 348 So.2d 363 (Fla. 1st DCA 1977); *O'Neal v. Crumpton Builders, Inc.*, 143 So.2d 344, 345 (Fla. 1st DCA 1962).

Florida long ago adopted the doctrine of apparent agency, or agency by estoppels as it is sometimes known, set forth in the Restatement (Second) Agency § 267 (1957) and which provides that:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of skill of the one appearing to be a servant or other agent as if he were such.

Irving v. Doctors Hosp. of Lake Worth, 415, So.2d 55, 57-58 (Fla. 4th DCA 1982)(citing *Thomas v. Checker Cab Co.*, 66 Mich. App. 152, 238 N.W.2d 558, 560-61 (1975) and *Mehlman v. Powell*, 281 Md. 269, 378 a.2d 1121, 1123-24 (1977)); *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442,450 (Fla. 5th CA 1981)(citing *Mercury Cab Owners Ass'n v. Jones*, 79 So. 2d 782 (Fla. 1955)).

The doctrine of apparent authority is also referred to as the "holding out" theory. Irving v. *Doctors Hasp. of Lake Worth*, 415, So.2d 55, 58 (Fla. 4th DCA 1982)(quoting *Arthur v. St. Peters Hosp.*, 169 N.J. Super. 575, 405 A.2d 443 (1979). The doctrine "imposes liability, not as a result of the reality of a contractual relationship but rather because of the actions of a principal or an employer in somehow misleading the public into believing that the relationship or the authority exists. The concept is essentially one of "estoppel." *Id*. at 59.

The estoppel works as follows:

> The principal is bound by the acts of his agent with the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. The question in every case ***is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usage and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question.

Id.

For the doctrine of apparent authority (agency) to apply, it must be demonstrated that the principal held the agent out to the public as being possessed of the requisite authority and the third person knew of his holding out and relied thereon to that third person's detriment. *H.S.A., Inc. v. Harris-in-Hollywood, Inc.,* 285 So. 690, 693 (Fla.4th DCA 1973).

Although courts commonly intertwine the doctrines of apparent agency and agency by estoppel, in fact, the two are distinct. An element of estoppel is a showing of reliance. By contrast, apparent authority exists separately from the effects it may induce in third parties, such as reliance or detrimental changes in position.

Apparent authority exists whenever third parties reasonably believe an agent to be authorized based on the principal's manifestation. Restatement of Agency (Third) § 2.03 (2000), comment c. Manifestations may take many forms, including for example, where the agent's name and affiliation with the principal are included in a listing of representatives that is provided to a third party. Id.

Often defendants argue that they cannot be vicariously liable for the acts of the parties who actually provided a service because they were independent contractors are not and cannot be, its agents. The Florida Supreme Court addressed this very issue in *Stoll v. Noel,* 694 So. 2d 701, 703 (Fla. 1997).

Ironically, in the Stoll case, independent contractor physicians employed by HRS were attempting to establish that they were agents of HRS so as to escape liability for medical malpractice under the statutory sovereign immunity provision. While the Supreme Court acknowledged the physician's independent contractor status, the Court relied upon the Restatement (Second) of Agency § 14N (1957) in holding that the physicians were also HRS's agents. Section 14N states:

> One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor.

It is well settled that the issue of agency does not turn exclusively on the labels chosen by parties to a contract. Instead, it derives from the relationship of the parties. *Robinson v. Linzer*, 758 So. 2d 1163, 1164 (Fla. 4th DCA 2000; *Shands Teaching Hosp. and Clinics, Inc. v. Pendley*, 577 So. 2d 632,634 (Fla. 1st DCA 1991); *Singer v. Star*, 510 So. 2d 637, 640 (Fla. 4th DCA

1987)(a jury may infer the existence of an agency even when the parties deny it and even when a statement in an agreement describes the parties as independent contractors). What is absolute under Florida law is that the doctrine of apparent authority rests on the appearances created by the principal, not by the agent.

Under Florida law, issues of agency, including apparent agency and ostensible agency are ordinarily questions of fact to be determined by the jury. See *Goldschmidt v. Holman*, 571 So. 2d 422, 424 (Fla. 1990)(citing *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491, 494 (Fla. 1983)); *Robbins v. Hess*, 659 So. 2d 424, 427 (Fla. 4th DCA 1995); *Kobel v. Scholosser*, 614 So. 2d 6, 7 (Fla. 4th DCA 1993); Webb v. Priest, 413 So. 2d 43, 47 n. 2 (Fla. 3rd DCA 1982); *Garcia v. Tarrio*, 380 So. 2d 1068 (Fla. 3d DCA 1980). The determination of an agency relationship can be resolved by summary judgment only when evidence is capable of just one interpretation. *Robbins*, 659 So. 2d at 427 (Fla. 4th DCA 1995); *Moore v. River Ranch, Inc.*, 642 So. 2d 642 (Fla. 2d DCA 1994)(jury question whether ultralight plane operator was the apparent agent of the resort where guest was injured when the ultralight crashed).

An interesting case is *Samuel Friedland and Family Enterprises v. Amoroso*, 604 So. 2d 827 (Fla. 4th DCA 1992). The Amoroso plaintiff was a hotel guest who rented a sailboat while staying at the Diplomat. The sailboat's crossbar broke while the guest was on the boat and she was injured. The plaintiff sued the boat owner, the rental stand company, the hotel for negligence, breaches of warranties, and strict liability.

The trial court directed a verdict in favor of the Diplomat Hotel on the grounds that there was neither a joint venture or apparent authority established the Diplomat and the boat owner or the boat rental company. The appellate court reversed the ruling as to the hotel, concluding that the hotel could be liable on a theory of apparent agency. See also *Holiday Inn v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA)(discussing apparent agency between hotel franchisor and franchisee); *Sims v. Marriot International, Inc.*, 184 F. Supp. 2d 616 (W.D. KY, 2001)(franchisee/franchisor apparent agency question); *Wyndham Hotel Co. v. Self*, 893 S.W. 2d 630 (Tex. App. 1994)(water sports, van transportation issues).

Conclusion

Negligent security case soften arise in resort and vacation settings. The target rich environment of a resort and vacation locale makes for ripe pickings to rational criminals seeking victims. Because of that, crime in resort and vacation settings will continue to be a threat to the public. Resorts and related entities, including theme and amusement parks, bars, restaurants, rental car agencies and other transportation providers are in the best position to guard against the type of crimes perpetrated on tourists and travelers. The civil justice system provides these victims with the means to hold accountable those who both profit from these travelers and are best able to provide reasonable security.

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Defeating the Preventability Defense – The Bad Guy Could Not Be Stopped

Introduction

Negligent Security cases are different than your traditional premises liability cases and bring about multiple issues. Litigating these cases are counterintuitive because you are attempting to convince a jury the defendant business owner is responsible for the actions of a third-party. Naturally, jurors look to the person who has committed this crime as bearing the responsibility. Even though Florida law prohibits the intentional tortfeasor from being put on the verdict form, it does not prohibit a defense expert from testifying about the crime and the nature of the crime.

Negligent security cases generally arise out of two types of crimes: 1) crime of opportunity; and 2) victim-targeted crimes. The second type of crime, victim-targeted, is where the plaintiff will face a defense expert who will opine that this particular crime could not have been prevented because the criminal was determined to carry out the particular crime. This defense is often proven through the use of experts. Defendants use this defense as an opportunity to shift the focus from the security issues, to the preventability of the criminal who committed the crime.

This article shall delineate the manner in which to overcome a defense expert's opinion as to why a particular offender could not be deterred. Particularly, the focus is how the defense expert uses the offender in an attempt to render the defendant's security failures irrelevant.

Preventability – Focus on the Nature of the Crime and Particular Offender

When defense experts evaluate cases, they commonly seek to provide opinions on multiple areas for the defense. When the criminal history of a defendant's property reveals an unfavorable pattern of crime, defense experts look to the specific crime that is the subject of the

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lawsuit. Typically, the expert will distinguish the crime which is the subject of the lawsuit stating that it was a victim-targeted crime, which is unlike the historical criminal patterns of the subject property. The two most common expert opinions are that the crime which is the subject of the lawsuit was either: 1) domestic; or 2) a targeted crime or "hit," and, thus, creating the unpreventable offender. Accordingly, the common denominator of these cases is that the defense expert classifies the act as a "victim-targeted crime."

The facts usually present for these particular crimes are either documentary evidence or some aspect of the crime itself that shows it was victim-targeted and, thus, unpreventable and unforeseeable to the defendant. For example, we have dealt with numerous cases involving incidents where the victim was shot multiple times or there is an inordinate amount of bullet casings at the scene of the crime. The defense expert will use evidence of multiple gunshot wounds or casings to opine that the victim was targeted. The expert will attempt to make some connection by way of an interpersonal relationship between the shooter and the victim. This can be accomplished by the expert opining there was an existing problem between them or some domestic issue that was the impetus of the shooting. The aforementioned is merely one example of the manner in which the expert seeks to shift the focus from a crime of opportunity to a victim-targeted crime.

The preparation of your case should not be altered when presented with these factual scenarios. Everything in terms of investigation and developing your case should be done in the same manner. Building your case the same way you would if the facts showed a clear "crime of opportunity", will help you prepare for the inevitable testimony that will naturally follow once you depose the defense expert.

Criminal History of the Property

The criminal history on the property reveals the patterns of crime for you to be able to combat this defense. Even though plaintiff's lawyers are looking for the standard crimes to build a case (i.e., robberies, assaults, batteries, etc.), one should take a detailed look into the type of crimes occurring. For instance, it is important to note whether the assaults are domestic in nature. What could seem to be a negative in a case involving a "crime of opportunity", may become strong evidence against the preventability defense. If the assaults and batteries on a particular property are of the nature involving boyfriends or ex-husbands entering the property, it can be used against the defense expert when they provide their preventability opinion.

If there are a substantial number of prior domestic crimes occurring on a property, then it follows that this pattern places the defendant on notice as to future domestic incidents. By showing that these domestic crimes involve only one party rightfully on the property, it makes no difference as to the nature of the crime. The individual perpetuating the crime is still unlawfully gaining access to the property – undetected – so if there are a number of these crimes occurring, it helps combat the "victim-targeted" nature of your incident. This allows the plaintiff to shift the focus back to what is important, that crime is occurring regularly on this property and the defendant should have taken reasonable measures to prevent them from occurring.

When dealing with a targeted-crime or "hit", the argument is much of the same from the defense expert. The expert will say that the crime was unforeseeable because it was targeted in nature and no measure of security would have prevented this criminal from perpetuating the crime. The defense expert will use this to deflect an appalling criminal history and what looks like solid liability on the defendant.

We have handled numerous cases involving targeted crimes. The defense expert will admit that crime occurred on the property. This expert will likely also admit that while certain crimes were foreseeable, the criminal event involving your client or the decedent was not preventable because no measure of security would have stopped this particular offender. This proposition is a fallacy and the experts generally have no basis for asserting this specific opinion. Plaintiff's must continue to assert traditional principles of protecting persons from foreseeable crimes and that the targeted nature has no bearing on preventability.

Security Measures in Place at the Time of the Incident

The preventability argument does not change the importance of the level of security in place at the time of the incident. Unlike general negligent security cases, lacking the preventability defense, where the defense expert will testify as to the reasonableness of the defendant's security measures – in cases where this defense is present, defense experts take a slightly varied approach. Therefore, the plaintiff should be prepared to attack the opinions of the defense expert by exploiting their desire to shift the focus to the offender.

For example, if there is very poor lighting at the time of the incident, the defense expert will state the lighting had no bearing on their opinion because this was a targeted crime and it makes no difference whether the lighting was sufficient, up to code, or if more was needed. With opinions such as this, you just need the admission from the expert as to the insufficiency of the lighting. Obtaining these admissions is crucial to place the expert in a position where their testimony is unreasonable.

The same is true for security personnel at the time of the incident. If there was no security guard or off-duty officer being utilized, you must make a determination as to whether that particular security measure is applicable in the case. If it is applicable to your case, the defense expert will use this security measure in two ways. First, if there was no security guard or off-duty officer at the time, the defense expert will opine that they were not necessary and should not be considered in this case because there presence would not have prevented this incident. Second, if there was security or an off-duty officer present at the time, the defense expert will opine that the offender could not be deterred because the crime was committed despite the presence of security personnel. Even if security is present at the time the crime is committed, the plaintiff must determine if the security personnel was posted where they were supposed to be or if they were conducting their patrols appropriately.

In terms of access control, the same argument applies. If there is a gate or perimeter fencing that was broken at the time of the incident, the defense expert will revert back to the preventability defense. The expert will testify that the perpetrator would have climbed the fence,

cut a hole, or broken the gate to obtain access because it was a victim-targeted crime. The plaintiff's focus must continue to attack the expert on the unreasonableness of allowing a gate, fence, or perimeter fencing to remain broken.

Therefore, maintaining the focus on the lack of reasonable security measures places the plaintiff in a position to expose the unreasonableness of the preventability defense.

Fallacy of the Preventability Defense Argument

The aforementioned admissions of a defense expert are imperative to expose the truth behind the preventability defense. When a defense expert takes this position, they are asserting: "It does not matter whether or not the defendant had security in place because this crime would have been committed anyway. Whether it was on this property or another next week, this crime was going to take place and this individual was going to be victimized." It is the plaintiff's job to utilize the admissions obtained over the course of discovery to exhibit how unreasonable and ridiculous that opinion truly is. The goal is to present these admissions to the jury to show how unreasonable the defendant acted prior to the incident and, thus, exposing the unreasonable position being taken by the defense expert. Despite the nature of the crime had the defendant taken the necessary and reasonable steps to protect the lawful persons on the property, this crime more likely would not have occurred.

CONCLUSION

Defense experts use many ways to get around the plaintiff's case. Classifying a crime as victim-targeted is one way that if not dealt with correctly, could result in a defense verdict. It is your job to deal with the facts of the case and look to determine how you will attack the defense expert opinion you know will be coming from the expert. It is a very common problem in negligent security cases and addressing them head on with a focused purpose is the only way to combat this particular type of defense.

By understanding and accepting the presence of this defense from the outset it allows the plaintiff to stay ahead. The plaintiff has to take the facts surrounding their incident and address the likelihood of certain evidence being admissible at trial. Preparing your case through traditional principles, such as prior criminal history of the property and the lack of security measures at the time, remains the same regardless of the preventability defense. The goal is to place the expert in the unconformable position of having to admit that the defendant's property was lacking in terms of security at the time of the incident. By doing this, you can effectively prepare, attack and defeat the preventability defense.