UNC SCHOOL OF GOVERNMENT

2016 Spring Public Defender Attorney & Investigator Conference (INVESTIGATOR TRACK)

May 11-13, 2016 – Great Wolf Lodge, Concord, NC

ELECTRONIC CONFERENCE MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

2016 Spring Public Defender Attorney and Investigator Conference

May 11-13, 2016 — Great Wolf Lodge, Concord NC

Sponsored by the UNC-Chapel Hill School of Government,
North Carolina Office of Indigent Defense Services,
North Carolina Association of Public Defenders, &
North Carolina Association of Public Defender Investigators

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INVESTIGATOR AGENDA

(This conference offers 12 hours of investigator credit and 12 hours of CLE credit. All hours are general credit hours unless otherwise noted.)

WEDNESDAY, MAY 11

11:30 Check-in *(Conference Center Foyer)*

1:20 Welcome & Announcements *(White Pine Ballroom)*
Alyson Grine, Defender Educator, UNC School of Government, Chapel Hill, NC;

1:30 **Bar Complaints: How to Avoid or Handle Them [Ethics, 60 min.]**
Brad Bannon, Attorney, Cheshire, Parker, Schneider, & Bryan, Raleigh, NC;
Richard Rosen, Professor of Law Emeritus, UNC Chapel Hill School of Law

2:30 **Framing Your Case to Get to Reasonable Doubt (What's Driving the Fact Finder) [45 min.]**
Artemis Malekpour, Attorney and Trial Consultant, Malekpour & Ball, Chapel Hill, NC

3:15 Break

3:45 NC Public Defender Association Business Meeting [20 min.]

4:05 **Indigent Defense Update [60 min.]**
Susan Brooks, Public Defender Administrator and Tom Maher, Executive Director,
NC Office of Indigent Defense Services, Durham, NC

5:05 Reception *(Terrace and Conference Center)*

THURSDAY, MAY 12 (A.M.)

7:45 Breakfast *(Conference Center Foyer)*
(IDS employees may not claim reimbursement for breakfast)

8:45 **Social Media: What's New and How to Access Information [75 min.]** *(The Oaks)*
Shannon Tufts, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC

10:00 Break *(Conference Center Foyer)*

10:15 **Human Trafficking [45 min.]**
Brandon Hodges, Investigator, Office of the Public Defender, Fayetteville,, NC

11:00 **Client Based Investigation and Representation [60 min.]**
Tonya Craft, Consultant, Chattanooga, TN

12:00 Lunch on your own

THURSDAY, MAY 12 (P.M.)

1:30 **Crime Scene Investigation [60 min.]**
Brian Yarborough, Investigator, Office of the Public Defender, Greensboro, NC

2:30 Break *(Conference Center Foyer)*

2:45 **Crime Scene Investigation [45 min.]**
Brian Yarborough, Investigator, Office of the Public Defender, Greensboro, NC

3:30 Break *(Conference Center Foyer)*

3:45 **Best Practices: Case Studies and Roundtable Discussion [75 min.]**

5:00 NC Public Defender Investigator Business Meeting [15 min.]
Marvin Jeffcoat, Chief Investigator, Office of the Public Defender, Charlotte, NC

5:15 Adjourn (dinner on your own)

UNC SCHOOL OF GOVERNMENT

FRIDAY, MAY 13

8:00 Breakfast *(Conference Center Foyer)*
(IDS employees may not claim reimbursement for breakfast)

9:00 **C.A.R.E. Interviewing System [75 min.]** *(The Oaks)*
Charles Williams
HDI Investigation, Inc., Indian Trail, NC

10:15 Break *(Conference Center Foyer)*

10:30 **Understanding and Mitigating Street Gang Involvement [60 min.]**
Thomas W. Cadwallader, Assistant Professor, Department of Criminal Justice
North Carolina Central University, Durham, NC

11:30 **Identification and Treatment of Stress Related Mental Health Conditions [Substance Abuse/Mental Health, 60 min.]** *(White Pine Ballroom)*
Stacey Daughters, Clinical Psychologist and Associate Professor, UNC Chapel Hill Department of Psychology and Neuroscience

12:30 Adjourn

INVESTIGATOR CREDIT HOURS
Total Credit Hours: 12.0

CLE HOURS
General Hour(s): 10.0
Ethics Hour(s): 1.0
Substance Abuse/Mental Health Hour(s): 1.0
Total CLE Hours: 12.00

BAR COMPLAINTS

April 13, 2016

Margaret McDermott Hunt - President, North Carolina State Bar
Mark W. Merritt - President-Elect, North Carolina State Bar
John M. Silverstein - Vice-President, North Carolina State Bar
Ronald L. Gibson - Past-President, North Carolina State Bar
L. Thomas Lunsford II – Secretary/Treasurer, North Carolina State Bar
217 E. Edenton St.
PO Box 25908
Raleigh, NC 27611-5908

Dear North Carolina State Bar Officers:

As members of the North Carolina State Bar, we are writing to express our concern and anger over recent Bar disciplinary prosecutions against three attorneys for their actions in recent social justice litigation. Specifically, we are questioning the Bar's pursuit of disciplinary sanctions against Cassandra Stubbs and Gretchen Engel for their actions in litigation brought under the North Carolina Racial Justice Act, as well as the Bar's attempt to impose devastating sanctions against Christine Mumma by bringing multiple charges, including allegations that she acted with deceit and dishonesty, related to her efforts to achieve the exoneration of an innocent man, Joseph Sledge. These three targets of the Bar's prosecutorial efforts are highly respected lawyers who have devoted their lives to defending those most in need of protection – indigent criminal defendants who have been convicted of serious crimes. Ms. Stubbs and Ms. Engels represent defendants sentenced to death, and Ms. Mumma works on behalf of those who have been wrongly convicted and imprisoned. All three have done immense good in their professional life, and we, and our colleagues in the profession, know them as devoted, ethical and responsible advocates. The charges brought against these individuals were dramatically out of proportion to any conceivable wrongdoing on their part.

The DHC panels that heard these cases for the most part entered decisions largely favorable to the three public interest advocates, with all charges dismissed except for the most minor charge against Ms. Mumma, with an admonishment, the lowest level of discipline possible, issued on that charge. However, we believe that by relentlessly pursuing a series of

largely unwarranted charges and seeking grossly disproportionate penalties, the State Bar has not only caused the three lawyers unnecessary anguish and expense, but has called into question the Bar's fairness and neutrality. The fervor with which the Bar prosecutors pursued these cases, even in the absence of any evidence of dishonesty or deceit or of demonstrable harm to anyone, seems to reflect a desire to single out for punishment those who have used their legal skills to challenge the fairness of our criminal justice system. This is all the more apparent when considered in light of the Bar's failure to even investigate potentially unethical actions by prosecutors in the RJA and Sledge cases.

Ms. Stubbs and Ms. Engel were members of a team of lawyers who represented Marcus Robinson in a proceeding in Cumberland County Superior Court. Mr. Robinson had been sentenced to death and had raised claims under the North Carolina Racial Justice Act. The RJA litigation was lengthy and hotly contested, and resulted in a finding by the Superior Court of Cumberland County that prosecutors in Cumberland County, and across the state, had intentionally discriminated against African American potential jurors in Robinson's and other capital cases. After an evidentiary hearing, the Superior Court issued an order overturning the death penalty in Robinson's case. This order has subsequently been vacated by the North Carolina Supreme Court and the case remanded for further proceedings. The bar complaint alleged that Ms. Stubbs and Ms. Engel had violated ethical rules because there were factual mistakes made in affidavits signed by witnesses that they submitted to the Court. The errors were minor, and involved confusion about a neighborhood where something occurred, and whether jurors had been questioned individually or as a group. Significantly, the errors had been brought to the attention of the Superior Court, who, after hearing the matter, found that the factual errors were not material to the pending litigation. In sum, the Bar was seeking to impose sanctions on Ms. Stubbs and Ms. Engel because they had offered into evidence signed affidavits which had several minor errors in them, errors which had been deemed to be immaterial by a judge, and this in litigation in which hundreds of pages of affidavits had been submitted to the court. There was no evidence, nor any allegation, that Ms. Stubbs and Ms. Engel had acted with an intent to deceive or gain an unfair adversarial advantage. The Bar also had access to evidence that the prosecutors in the RJA litigation had submitted affidavits with similar errors.

All lawyers make mistakes, in many different ways. Quite often, especially during the course of complex and lengthy litigation, these mistakes find their way into pleadings and affidavits. In criminal cases, for instance, prosecutors file numerous charges and indictments every day, and many of them contain mistakes like the ones alleged here. That is why we have rules that allow prosecutors to amend charges. That these frivolous complaints against Ms. Engel and Ms. Stubbs were not immediately dismissed is both inexplicable and outrageous.

There is yet another reason to question the Bar proceedings against Ms. Stubbs and Ms. Engel. The Grievance Committee which initially considered the complaint in the RJA-related cases against Ms. Stubbs and Ms. Engel included a former District Attorney who had been perhaps the leading opponent of the RJA, both publicly and in the legislature. Another member of the Committee was the former wife of an assistant district attorney in Cumberland County whose conduct had been found to be intentionally discriminatory by the Judge in the RJA litigation. The participation of these individuals in the consideration of the charges against Ms. Stubbs and Ms. Engel inevitably tainted the Committee's consideration of the charges.

We recognize that the proceedings against Ms. Mumma raise different concerns. One set of charges, for providing evasive answers in an email exchange were, like the charges against Ms. Engel and Ms. Stubbs, patently frivolous and were ultimately and unsurprisingly dismissed by the Bar panel. However, the charges relating to the inadvertent retention of the disposable bottled water and subsequent DNA testing raise more difficult issues relating to the competing obligations of a lawyer in such a situation. The DHC panel unanimously found that Ms. Mumma at most had committed a violation of ethical standards when, trying to balance her duties to an innocent man facing the rest of his life in prison with any obligations to the possible owner of the bottle, she retained the bottle and sent it off for testing. In issuing its decision, the panel indicated that they found this to be a very close question, and further stated their desire to impose the least serious sanction allowed by Bar rules. Many among us would agree with the testimony at Ms. Mumma's DHC hearing by a former President of the North Carolina State Bar and former Chair of the Bar's Disciplinary Hearing Commission to the effect that her actions in retaining and obtaining testing on the bottle did not violate any ethical rules. We acknowledge, however, that the DHC panel was not unreasonable in reaching a different conclusion. But we are at a loss to understand why this case ever reached the stage of a hearing before a DHC panel, or why the

case proceeded on multiple charges involving deceit and dishonesty. Such charges are especially hard to understand given that Ms. Mumma herself, almost immediately after sending the bottle off for DNA testing, voluntarily revealed her retention and testing of the bottle to the prosecutor's office involved in the case as well as to the North Carolina Innocence Inquiry Commission. Even more disturbing was the obvious intention of Bar counsel to obtain harsh punishment against Ms. Mumma for her actions.

There was no allegation that Ms. Mumma stole or otherwise unlawfully possessed the water bottle. She knew Ms. Andrus, whose home had been the repository of the bottle, did not want DNA testing done. On the other hand, Ms. Mumma was representing a defendant, Joseph Sledge, whose innocence had been established based upon DNA evidence and the recantation of critical trial testimony, and who later was declared innocent by a three-judge panel. She had spent over a year trying to get the district attorney with jurisdiction over the case to pay attention to the evidence of innocence, without success. She was concerned that, given the attitude of the district attorney, her innocent client might die in prison. The bottle offered the prospect of conclusively proving guilt of another suspect, and thus leading to the freeing of an innocent man, and much sooner than otherwise would have been possible. Ms. Mumma chose to keep the bottle and get it tested – not an easy choice, and one which, after the fact, the DHC panel found to violate the ethical rules.

This is a case which could have, and should have, been resolved at the Grievance Committee level. At the most, it should have proceeded on the single charge involving her retention and testing of the bottle. Instead, Bar counsel brought multiple and excessive charges against Ms. Mumma involving dishonesty and deceit and joined these charges with the patently frivolous allegation involving her email response to an attorney after the litigation in the Sledge case had concluded. Throughout the process, Bar counsel threatened Ms. Mumma with eight different rule violations.

In the eyes of the public, the proceedings against Ms. Mumma are all the more questionable when considered in light of the Bar's inaction towards the prosecutorial misconduct that the investigation initiated by Ms. Mumma had unearthed in Joseph Sledge's case. The investigation revealed that the trial prosecutor had not given the defense several statements in which a jailhouse informant, in direct contradiction to his in-court testimony, denied that Mr.

Sledge had confessed to the crime. The investigation also found that in return for their testimony the informants had received substantial, and non-disclosed, rewards, including a monetary payment and an early release from prison. We understand that Bar rules currently limit the ability of the Bar to prosecute disciplinary violations which occurred years in the past. This case suggests that the Bar might do well to examine the possibility of revisiting rules which allow evident ethical violations that resulted in an innocent man spending thirty-seven years in prison to go unpunished.

Inevitably, both for us and the public, the proceedings against Ms. Stubbs, Ms. Engel and Ms. Mumma call into question of the role of Bar counsel in these proceedings. Under the rules of the North Carolina State Bar, Bar counsel play a crucial role in the disciplinary process. Counsel provides recommendations to the chair of the Grievance Committee as to whether a grievance should be initially dismissed, and whether there is probable cause that a violation has occurred. The Grievance Committee's, or a subcommittee's, decision to resolve a grievance by issuing a censure or lesser punishment, on one hand, or to recommend that the case proceed to the Disciplinary Hearing Commission, on the other, is based largely on the information provided by the Report of Counsel. If a case proceeds to the DHC, of course, the counsel serves as the plaintiff's lawyer. To preserve the integrity of the disciplinary process, it is therefore of vital importance that Bar counsel act with utter impartiality, and, of equal importance, that counsel be perceived as acting with such impartiality.

These cases cause us to lack such confidence. Rather, in trying to understand why the Bar proceeded so disproportionately and so vigorously against Ms. Stubbs, Ms. Engel, and Ms. Mumma, we have to ask if the answer is related to the Bar's practice – of recent vintage, as far as we know – of staffing its counsel's office with former criminal prosecutors, both from the North Carolina Attorney General's Office and other criminal prosecution agencies, a category in which the deputy counsel involved in the cases of Ms. Stubbs, Ms. Engel and Ms. Mumma all fall.

Under our system of justice, criminal defense attorneys and prosecutors have a necessarily adversarial relationship, and while they can enjoy personally collegial relations, it is not unusual for them to develop competing viewpoints and loyalties. Prosecutors attend conferences with other prosecutors and develop common professional interests and viewpoints. Some, although not all, prosecutors view successful defense attorneys as the enemy, if not

personally, then professionally. We are not arguing that a prior job as a public prosecutor should disqualify someone for a position in the counsel's office with the North Carolina State Bar. But we do feel that a balance must be kept to ensure both the reality and the perception of fairness, and that for many in the criminal defense and social justice community, the Bar's over-vigorous prosecution of these three attorneys – attorneys who achieved remarkable results for criminal defendants despite vehement opposition from prosecutors – can best be explained by the decision of the Bar to turn so heavily to prosecutorial agencies for its staffing needs in the counsel's office.

We believe that it is no accident that the three lawyers brought before the Bar are all vigorous advocates for criminal defendants, and that these lawyers had sought to vindicate their clients' rights by demonstrating that their clients have been wrongly treated by the criminal justice system of North Carolina. We also note that the charges only arose after they achieved some success in this endeavor. In the RJA cases, Ms. Stubbs and Ms. Engel, and their co-counsel, proved, to the satisfaction of a Superior Court judge, that the Cumberland County prosecutors had intentionally discriminated against African American potential jurors who sought to be included in a capital jury. While this order has now been vacated for procedural reasons, it has not been repudiated. Ms. Mumma demonstrated that the State of North Carolina, and the prosecutors of the Thirteenth District, had sent a man to prison for a crime he did not commit. We can only wonder if Bar counsel sought to punish Ms. Stubbs, Ms. Engel, and Ms. Mumma for thus proving that the North Carolina criminal justice system, and those most responsible for enforcing the criminal laws, the prosecutors, failed in carrying out their responsibilities.

The legislature of North Carolina has granted the North Carolina State Bar the authority to self-regulate, and thus the responsibility to enforce the rules and ethical standards of the profession. We understand the need for self-regulation, as we accept the notion that those lawyers who clearly violate the rules and standards need to be disciplined. Lawyers who lie to a court, or misappropriate funds, need to be punished. But that is not what these three lawyers did in the cases we are discussing. They fought for their clients, in the highest tradition of the Bar. The public can only ask, as do we, why Ms. Stubbs and Ms. Engel were singled out for possible discipline for making the kind of mistake that is inevitable in any substantial litigation, and in

fact was made by the prosecutors in the same litigation. And we and the public deserve to know why Ms. Mumma was forced to fight for her professional survival for making a reasonable decision when facing a difficult dilemma in her quest to free an innocent man.

The prosecution of these three lawyers has harmed the Bar and the profession. We can only hope that the Bar will undertake an examination to find out why, in these cases, the Bar's disciplinary procedures went awry, and that this pattern of one-sided and disproportionate disciplinary actions will not be repeated.

Respectfully submitted,

Kenneth S. Broun
N.C. State Bar #5926 (*Pro bono* emeritus status)

Jay H. Ferguson
N.C. State Bar #16624

Malcolm Ray Hunter, Jr.
N.C. State Bar #7174

Richard A. Rosen
N.C. State Bar # 7296 (*Pro bono* emeritus status)

Adam Stein
N.C. State Bar #4143

NORTH CAROLINA STATE BAR ETHICS ENFORCEMENT AND CRIMINAL LAWYERS

By Bradley Bannon[1]

May 11, 2016[2]

In the wake of the North Carolina State Bar's recent handling of grievances against several criminal defense attorneys related to their representation of indigent clients in separate cases, some people have raised questions about the State Bar ethics enforcement process, whether the State Bar is going after criminal defense attorneys too aggressively (while giving a free pass to criminal prosecutors), and, if that's the case, why that might be so.

In my opinion, these are complicated questions that do not lend themselves to easy or objective answers. I can only offer my observations, based on experience monitoring the State Bar's public actions over the last 15 years, representing lawyers charged with professional misconduct for the last 5 years, and serving as an advisory member of the Ethics Committee for the last 2 years.

The State Bar Ethics Enforcement Process: Generally

The North Carolina State Bar is responsible for self-regulating the legal profession.[3] Its governing body, the State Bar **Council**, is made up 59 lawyer members (including 4 officers elected by the Council to 1-year terms: President, President-Elect, Vice-President, and Immediate Past President) and 3 public members. The lawyer members of the Council are elected by the lawyers in their judicial districts and represent those districts. At a minimum, there is 1 councilor per judicial district; beyond that, 16 additional lawyer members are apportioned to various districts every 6 years based on the number of lawyers in those various districts. The 3 public (non-lawyer) members are appointed by the Governor. Councilors serve 3-year terms, with a maximum of 3 consecutive terms. As a practical matter, many councilors end up serving 9 consecutive years on the Council.

While the State Bar serves numerous functions related to the legal profession, its primary function is to pass, interpret, and fairly enforce the North Carolina Rules of Professional Conduct for the ultimate purpose of protecting the public from lawyer misconduct.

Although every analogy breaks down at some level, and although I've been unable to find any regulatory enforcement body that procedurally operates quite like the State Bar process, I think it's helpful to try to analogize the process to the three branches of government.

The Legislative Branch

The State Bar **Ethics Committee** studies and makes recommendations to the Council about changes to the Rules of Professional Conduct and the comments and ethics opinions that interpret them. If the Council agrees with the Committee's recommended amendments to the Rules, the **North Carolina Supreme Court** ultimately decides whether to adopt the amendments. The Court does so in conference,

[1] I began working as a law clerk for Joe Cheshire in May 1996 and continued as a lawyer at Cheshire Parker Schneider & Bryan, PLLC after I was licensed in August 1997. In that time, I have represented a lot of people accused and convicted of crimes and accused of professional misconduct before the North Carolina State Bar.

[2] I completed the research for this manuscript on February 1, 2016.

[3] Chapter 84 of the North Carolina General Statutes and Title 27 of the North Carolina Administrative Code establish and govern the operations of the North Carolina State Bar. You can find them at the beginning of the *Lawyer's Handbook*, which is updated every year and available for free download at the North Carolina State Bar's website.

confidentially, with no public record of the deliberations or vote.

The Ethics Committee is made up of selected members of the State Bar Council and advisory members appointed on an annual basis by the President. Currently there are 18 Councilors and 15 advisory members on the Ethics Committee.

The Executive Branch

The procedural entry point for ethics enforcement at the State Bar is the **Office of Counsel**, often referred to as the State Bar Prosecutor's Office. Continuing with the criminal law enforcement analogy, the Office is staffed by the General Counsel (read: District Attorney), Deputy Counsel (read: Assistant District Attorneys), investigators (read: law enforcement agents), and additional support staff. Allegations of ethical misconduct may come to the attention of the Office of Counsel from a specific complainant (such as a client, another lawyer, a judge, or any other citizen) or by Counsel's review of media reports. When Grievance files are opened, Deputy Counsel investigate them (or decline to investigate them[4]), make recommendations to the Grievance Committee about how the matters should be handled, and then take direction from the Grievance Committee about how to handle the matters from there.

The State Bar **Grievance Committee** is currently made up of 37 members of the State Bar Council, 3 lawyer advisory members, 3 non-lawyer advisory members, and 3 public members, all appointed by the President. The Committee is led by a Chair and divided into three Panels. The Committee Chair and Panel Vice-Chairs are appointed by the President. Grievance matters that are not declined for investigation or handled solely by the Chair are reviewed by one of the Panels to determine probable cause of Rule violations. Deputy Counsel are assigned to specific Panels, meaning the assignment of a Grievance file to a Deputy Counsel *ipso facto* determines which Grievance Committee Panel will ultimately make the probable cause determination. Each Panel has at least 10 Councilors, 1 non-lawyer, and 1 non-Councilor (advisory) lawyer. Half the members of the Panel (excluding the Chair) must be present for a quorum, and at least half the members present must find probable cause. For example, given the current makeup of Panel III, only 8 Panel members would have to be present for a probable cause determination, and only 5 of them would have to find probable cause for the disciplinary matter to proceed forward. Actions taken by a Panel are rarely (if ever) debated, rejected, or modified by the full Committee. Grievance Panels are sometimes likened to grand juries, even by the State Bar on its website, but that analogy is not entirely apt; while grand juries are generally rubber stamps for the criminal prosecutor, and while Panels are similarly deferential to the State Bar prosecutor's recommendations, Panels are not as likely as grand juries to follow the prosecutor's recommendation in *all* cases.

Whatever the recommendation, Grievance Committee Panels have several options in assessing probable cause and disposing of Grievances at that level: (1) private **Dismissal** outright; (2) private dismissal with a **Letter of Caution**;[5] (3) private dismissal with a **Letter of Warning**;[6] (4) private written

[4] Section .0111(e) of the State Bar's Discipline and Disability Rules allows the Office of Counsel to decline to investigate the following allegations: (1) a lawyer's advice or strategy in a civil or criminal case was inadequate or ineffective; (2) a criminal defense lawyer provided ineffective assistance of counsel, *unless* a court has granted relief to the defendant on that basis; and/or (3) a counseled criminal defendant entered a plea involuntarily and unknowingly, *unless* a court has granted relief to the defendant on that basis. Furthermore, under Section .0111(f), all Grievances must be initiated within 6 years after "the last act giving rise to the grievance," *except* in the following circumstances: (1) the allegation is based on the lawyer's plea or conviction of a felony; (2) the alleged misconduct constitutes a felony, without regarding to whether the lawyer was charged, prosecuted, or convicted; and/or (3) a state or federal court has found that a lawyer *intentionally* violated the Rules.

[5] **Letter of Caution**: The Panel finds no probable cause of a rule violation but does find the conduct "unprofessional or not in accord with accepted professional practice," warranting a letter advising the lawyer to "be more professional."

[6] **Letter of Warning**: The Panel finds no probable cause of a rule violation but does find "an unintentional, minor, or technical violation of the Rules," warranting a letter advising the lawyer that she "may be subject to discipline if such conduct is continued or repeated."

Admonition;[7] (5) public written **Reprimand**;[8] (5) public written **Censure**;[9] or (6) **referral to the Disciplinary Hearing Commission** for public trial upon complaint, in the manner of civil litigation.[10]

Following the Panel's decision, the full Grievance Committee Chair is vested with significant power and discretion to act individually as the "client" of the State Bar prosecutors as the case moves forward, whether at the Grievance level (such as having final authority over the language of any written disposition) or at the Disciplinary Hearing Commission level (such as having final authority over the language of the complaint, the language of any consent order disposing of the matter, and/or pre-trial and trial strategy).

As a general rule, if an allegation of ethical misconduct is resolved at the Grievance level by way of a private disposition (i.e., outright dismissal, Letter of Caution dismissal, Letter of Warning dismissal, or Admonition), no one at the State Bar is authorized to disclose any information whatsoever about it. The only exception is when the Grievance file was opened based on a referral from an outside complainant who *declined* anonymity, in which case the Office of Counsel is required to provide that complainant with a summary of the disposition, such as a letter indicating that it was dismissed, or dismissed with a Letter of Caution or Warning, or that an Admonition was entered. So the only two ways to know how the State Bar handled a particular allegation of professional misconduct against a specific lawyer at the Grievance level are (1) it ended with a Reprimand or Censure, which are public by definition; or (2) it began with a referral from an outside complainant who did *not* request anonymity and therefore received a report about the final disposition from the Office of Counsel.

Of course, because some Grievance files are opened by the State Bar itself (instead of an outside complainant), and because many others are opened based on referrals from complainants who request anonymity (and are therefore not entitled to know the final disposition), and because still others are resolved at the Grievance level short of a public Reprimand or Censure, that means the State Bar is prohibited from disclosing *any* details about much of its work at the Grievance level.

Understandably and reasonably, the general secrecy of the Grievance process, like the general secrecy of the criminal grand jury process, is designed to protect the accused from the negative public impact of unfounded allegations of misconduct or resolutions of professional missteps so minor as to warrant only private warning or admonition. Unfortunately, the unintended consequence of that secrecy is that members of the profession and public are unable to assess how allegations of professional misconduct are being handled where the majority of them begin and end: at the Grievance level.

The Judicial Branch

The State Bar **Disciplinary Hearing Commission** (DHC) is made up of 12 lawyer members and 8 non-lawyer (public) members. The DHC is the tribunal that handles ethical disputes that could not be resolved at the Grievance level by the State Bar and the accused lawyer. The DHC hears those disputes in 3-member Panels consisting of 1 non-lawyer and 2 lawyers, one of the latter of whom, as Panel Chair, presides over the case and makes all non-dispositive legal rulings.

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[7] **Admonition**: The Panel finds probable cause of a minor Rule violation warranting a written Admonition.

[8] **Reprimand**: The Panel finds probable cause of one or more Rule violations that caused or had the potential to cause harm to a client, the profession, the public, or the administration of justice, warranting a public, written form of discipline more serious than Admonition but less serious than Censure.

[9] **Censure**: The Panel finds probable cause of one or more Rule violations that caused or had the potential to cause significant harm to a client, the profession, the public, or the administration of justice, warranting a public, written form of discipline more serious than Admonition but less serious than a Suspension.

[10] If the Panel recommends referral to the Disciplinary Hearing Commission, it is up to the Deputy Counsel, not the Panel, to identify which particular rule violations to allege in the Complaint.

The 12 lawyer members of the DHC (including its Chair and Vice Chair) are appointed by the State Bar Council but may not be members of the Council. Of the 8 non-lawyer members, 4 are appointed by the Governor, 2 are appointed by the Speaker of the House, and 2 are appointed by the President Pro Tempore of the Senate. Commissioners generally serve 3-year terms and may not serve more than 7 consecutive years, except for the Chair, who may serve an additional 3 years in that role.

In the manner of civil litigation, DHC trials proceed in two phases. At Phase 1, the Panel determines (by majority vote) whether the State Bar has proved any alleged Rule violation by clear, cogent, and convincing evidence. If not, the State Bar's Complaint is dismissed. If so, at Phase 2, the Panel determines the appropriate discipline. In addition to most of the dispositions available to the Grievance Committee Panel, the Disciplinary Hearing Commission Panel may enter an order of **Suspension** of a lawyer's license for up to five years, with the option of staying all or part of the suspension in favor of a probationary period, or it may enter an order of **Disbarment** altogether, depending on the seriousness of the violations and the relevant facts and circumstances.

Once a matter reaches the DHC level, the DHC Panel assigned to the matter must review and approve any proposed agreement by the parties about how to resolve the matter, such as a consent order of discipline. And all dispositions at the DHC level are public, regardless of whether they would have been private at the Grievance level (such as an Admonition).

Confidentiality, Transparency, and Accountability

It's very difficult to get a handle on the true scope of how professional misconduct allegations are handled by the State Bar, let alone as they relate to specific areas of the law or types of practitioner, let alone as compared to other areas of the law and other types of practitioner.

First, not every allegation of professional misconduct even makes it to the State Bar. If no one who is aware of the alleged misconduct--whether fellow lawyers, opposing counsel, presiding judges, or others--refers the matter to the State Bar, and if the matter does not receive sufficient media attention to bring it to the State Bar's attention independently, then a Grievance file will never be opened at all, let alone investigated and acted upon. In short, you cannot blame the State Bar for failing to act on misconduct that it knows nothing about. If such misconduct is occurring but not being reported, then you must blame the people who are not reporting it, or the judges who are not doing anything about it, despite their concurrent jurisdiction over legal ethics enforcement in North Carolina.

Furthermore, if "the last act giving rise to the grievance" occurred more than 6 years before the Grievance referral, the Office of Counsel is prohibited from acting on it *unless* (1) the allegation is based on the lawyer's plea or conviction of a felony; (2) the alleged misconduct constitutes a felony, even if never charged or convicted; and/or (3) a state or federal court has found that the lawyer *intentionally* violated the Rules of Professional Conduct.[11]

But suppose an allegation of misconduct does make it to the Office of Counsel and is not time-barred. If it is resolved at the Grievance level short of a public Reprimand or Censure, no one is likely to know anything about how it was handled by the Office of Counsel and/or Grievance Committee. The only way someone could find out is if that someone actually referred the allegation to the State Bar and waived anonymity.[12] In that case, the Office of Counsel is still only obligated to report the ultimate disposition,

[11] For example, consider the post-conviction investigation by criminal defense counsel which reveals *Brady* material that the original criminal trial prosecutor failed to disclose. If that failure occurred more than 6 years before it was discovered and referred to the State Bar, the State Bar is powerless to proceed against the prosecutor absent evidence that the failure also constituted felonious conduct *or* that a court found as fact that the prosecutor intentionally committed a Rules violation.

[12] Criminal defense lawyers who observe or become aware of professional misconduct by prosecutors are often reluctant to report

not the details by which it came about. Otherwise, the only information available to the public about the Grievance-level process, where the overwhelming majority of disciplinary matters are resolved, is published in the Office of Counsel Annual Report.[13]

So what if someone *within* the State Bar confidentiality structure (such as a Councilor) wants to know more details about how such matters are handled by the Office of Counsel and Grievance Committee at the Grievance level? While the Grievance Committee is required to record its final actions on Grievances, it is not entirely clear whether and to what extent the State Bar maintains or is required to maintain any database with additional details about the handling of those Grievances, such as:

- Name of the lawyer;
- Area of the lawyer's practice (e.g., prosecutor or criminal defense);
- Whether the Grievance file was opened by the Office of Counsel itself, or based an outside referral from a complainant who requested anonymity, or based on an outside referral from a complainant who did *not* request anonymity;
- The Office of Counsel's initial decision to investigate or decline to investigate and, if the latter, why;
- Potential Rule violations identified by the Office of Counsel at the beginning of the process;
- General time frame between opening of Grievance file and submission to the Grievance Committee for consideration;
- The Office of Counsel's recommendation to the Grievance Committee about what should happen to the lawyer;
- The Grievance Committee's decision after the preliminary hearing;
- Rule violations found in any final written letter or admonition; and
- Whether the lawyer accepted or rejected the proposed discipline.

If these data points are *not* kept in the regular course of business, it seems that only people with anecdotal and internal "institutional" knowledge could ever be the source of information about how the State Bar handles matters involving certain types of lawyers, let alone as compared to other types of lawyers. If these types of data points *are* kept, it seems like they could be made available to the public on

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that misconduct to the State Bar, let alone waive anonymity, for fear that the prosecutor and/or colleagues of the prosecutor might retaliate against the lawyer or, more importantly, the lawyer's clients, both present and future.

[13] Grievance Committee activity summary from the Office of Counsel's 2014 Annual Report:

> During 2014, the State Bar opened 1,222 grievance files, compared with 1,205 files opened in 2013.
>
> Also in 2014, the office reviewed 34 direct mail solicitation letters. All of the reviewed letters involved minor violations of advertising ethics rules and 27 were resolved without opening grievance files. The office opened grievances against seven lawyers. The office reviewed 10 direct mail solicitation letters in 2013.
>
> All grievances received by the State Bar must be considered and acted upon by one or more members of the Grievance Committee. The committee considered a total of 1,291 grievances during 2014. Of those, 1,019 were dismissed. Seven files were dismissed and retained because the respondent lawyers had been disbarred. Three files were abated because the respondent lawyers had been transferred to disability inactive status. These files represent approximately 80 percent of the grievances considered by the committee. In addition to the grievances that were dismissed outright in 2014, 12 files were dismissed with letters of caution and 56 were dismissed with letters of warning.
>
> In 2014, the Grievance Committee issued admonitions in 33 files, reprimands in 23 files and censures in five files. One hundred-fifteen files involving 47 lawyers were referred for trial before the Disciplinary Hearing Commission (DHC). A total of 176 grievances resulted in either imposition of discipline by the Grievance Committee or referral to the DHC. That figure represents approximately fourteen percent of the grievances considered by the committee in 2014. The committee referred three lawyers to the Lawyers' Assistance Program and nine lawyers to the Trust Account Supervisory Program. At the end of 2014, one file had been continued for further investigation.

a reasonable basis, while preserving the anonymity of everyone involved.

In the meantime, the only way for members of the profession and public to analyze how the State Bar is handling lawyer discipline at anything more than an incredibly high (hence virtually meaningless) level is to monitor and review the publicly available information about Reprimands and Censures entered by the Grievance Committee and about the activities of the Disciplinary Hearing Commission. There are three ways to do that:

- Review the very high-level summary of Grievance Committee activity[14] and DHC activity[15] from the perspective of the Office of Counsel in its annual report;
- For pending DHC matters, monitor the State Bar website's page listing those matters and linking to select filings in those matters; and
- For concluded Grievance Committee matters that ended in public Reprimands and Censures, and for DHC matters regardless of how they concluded, review the public documents related to those dispositions. There are three places you can do that:
  - *State Bar Journal*. This is a quarterly-published magazine with a section entitled "The Disciplinary Department," which lists summaries of public discipline entered by the Grievance Committee and all dispositions of DHC matters in the previous quarter. In printed form, the magazine is mailed to all lawyers who are members of the State Bar. In digital form, the magazine is available on the State Bar's website in its full form for the preceding four issues, and in article-by-article form in a keyword-searchable database.
  - *State Bar Website's "Disciplinary Orders" Page*. This is a search-page portal for scanned and uploaded public dispositions of all DHC matters (regardless of the disposition, which could include dismissals of all the ethics charges) and all published discipline entered by the Grievance Committee. Unfortunately, the State Bar's search-page portal has only two search functions: (1) name of the accused lawyer; and (2) a Boolean keyword search.

[14] *See* previous footnote.

[15] DHC activity summary from the Office of Counsel's 2014 Annual Report:

> During 2014, the Office of Counsel completed a total of 44 disciplinary, reinstatement, and show cause cases before the DHC, representing 85 files referred by the Grievance Committee. Of those, 22 were resolved by hearing or default judgment, 21 were resolved by consent, and one reinstatement petition was withdrawn by the defendant. In 2013, the office completed 58 such cases. Of those, 25 were resolved by trial and 31 were resolved by consent.
>
> In 2014, the DHC entered nine orders of disbarment. In all nine cases, the lawyers misappropriated entrusted funds from a client, an estate, or from funds held in trust to pay taxes in real estate closings.
>
> In 2014, the DHC imposed five active suspensions, 13 suspensions in which the lawyer could seek a stay after serving some period of active suspension, and 8 suspensions entirely stayed upon the lawyer's compliance with various conditions. The office filed a show cause petition against one lawyer and a period of suspension was activated. The DHC censured two lawyers.
>
> ***
>
> In 2014, the DHC denied two lawyers' petitions for reinstatement. The DHC reinstated three suspended lawyers. One lawyer withdrew his reinstatement petition.

- *State Bar Clerk's Office*. Physical files of all publicly-available documents and DHC file materials are kept in the State Bar building.

As a result, even regarding the publicly-available documents of public disciplinary dispositions, unless you have the kind of time on your hands that none of us has, it's hard to get a sense at any level of detail about how the State Bar is handling disciplinary matters currently, or how it has handled them historically.

For example, if you want to know from publicly-available documents how the State Bar has pursued and defined "conduct prejudicial to the administration of justice" through its enforcement apparatus over the years, you'd have to go to the State Bar website and do multiple Boolean searches for that phrase, the previous versions of the Rules that included that ethical violation, the current Rule that includes that ethical violation, and/or the name of any lawyer you happen to know who was prosecuted by the State Bar for such alleged misconduct. You would then have to cross-reference all those documents and weed out any documents that were erroneously returned in that search, and only then would you be able to begin reviewing the substance of those documents. And you would still not be sure that you had captured all of the public dispositions of allegations of conduct prejudicial to the administration of justice. Just think how much simpler that search would be--and therefore how easier and more thorough the resulting analysis of the State Bar's enforcement of "conduct prejudicial to the administration of justice" would be--if the State Bar was required to log basic details about the dispositions (such as Rules implicated) and incorporate them into more detailed website search functions (such as a by-Rule search function).

Conclusion

Each of the foregoing committees and commissions is an entity of the North Carolina State Bar. With the exception of a small handful of public members, the State Bar Council (particularly its Executive Committee) determines who is in charge of them and sits on them. Outside of the State Bar process, I have not seen any legal enforcement mechanism, let alone one that implicates Constitutional concerns, in which the same small group of people (often a single person) determines who writes the laws (Ethics Committee); who investigates, prosecutes, and directs prosecutions of alleged violations of those laws (Grievance Committee and Office of Counsel); and who ultimately sits as tribunal over any disagreements about that enforcement (Disciplinary Hearing Commission). The fairness of that process is hard to explain to people who have a general understanding of the separation of powers, and it makes "the State Bar" appear to be a monolith that acts under the control of a small handful of people, with a singular mind, as lawmaker, accuser, judge, jury, and punisher.

The extent to which that is an *actual* problem is certainly debatable; the extent to which it's an *image* problem really isn't. Unfortunately, the only path from surface to substance is made of the quicksand of an antiquated system of maintaining and publishing public documents, and shrouded in the darkness of Grievance-level confidentiality.

The end result: when people see how the State Bar handles a high-profile public disciplinary matter, it tends to define the perception of how the State Bar handles *all* disciplinary matters, and it's hard to independently corroborate or refute that perception.

The State Bar Ethics Enforcement Process: Criminal Law

Against that backdrop, I have been following the State Bar's public work on ethics matters related to criminal law and procedure since the early 2000s, when the Ethics Committee considered amendments to Rule 3.6 regarding pre-trial publicity, and when the DHC considered allegations of professional misconduct by criminal prosecutors that led to the wrongful capital conviction and death row incarceration of a man I later had the privilege to help win exoneration in 2004: James Alan Gell. I continued to follow that work through Ethics Committee considerations of various Formal Ethics Opinions and Rules amendments that had the potential to impact criminal practice and through the highly publicized DHC proceedings involving former Durham County District Attorney Mike Nifong, at whose hearing I was called by the Office of Counsel as a key fact witness. And I have continued to follow it in my representation of lawyers at the Grievance Committee and Disciplinary Hearing Commission levels through early 2016.

I have made it a point to follow that work on two tracks: (1) The Legislative Track, i.e., how the Ethics Committee handles amendments, interpretations, and opinions about the application of the Rules in criminal law settings, and (2) The Executive & Judicial Track, i.e., how the Office of Counsel, Grievance Committee, and Disciplinary Hearing Commission handle alleged professional misconduct by criminal prosecutors. The former is quite easy to follow and assess, because it all occurs at open public meetings, with available public records, in a transparent and rather straightforward process. The latter is not nearly as easy to follow, because much of it occurs at the confidential Grievance level.

The Legislative Track: Criminal Law Impact

Since 2002, I have monitored the Ethics Committee's work on a number of proposed amendments to the Rules of Professional Conduct and dozens of Formal Ethics Opinions applying the Rules to fact patterns related to criminal practice.

Most of the substantive work of the Ethics Committee is done at the Subcommittee level. This is understandable, because Subcommittees are much smaller, can convene more frequently, and have only one issue to address when they convene. As a result, the full Committee rarely rejects the recommendation of a Subcommittee. When a particular Rules amendment or FEO is proposed, State Bar Ethics Counsel Alice Mine, with the input of the Committee Chair, will appoint a 3- to 5-member Subcommittee, including a Subcommittee Chair, to study the issue and make recommendations to the full Committee. If the proposed Rule amendment or FEO is set against an exclusively criminal practice backdrop, there is always at least one criminal defense practitioner[16] and one lawyer with prosecution experience[17] appointed to the Subcommittee. Increasingly throughout the years, Ethics Counsel's Office has also been fairly vigilant about notifying representatives of broader stakeholder groups, such as the North Carolina Advocates for Justice and the North Carolina Conference of District Attorneys, to make sure the Subcommittee has as much input during its work as possible. Based on those notices and other avenues of monitoring, I've personally observed how just about every proposed Rule amendment or FEO impacting criminal practice has been handled by the State Bar Ethics Committee process.

[16] For many of the years I have monitored this activity, the criminal defense lawyer was David Long, who served as a Wake County Bar Councilor on the Ethics Committee for 9 years.

[17] For many of the years I have monitored this activity, the lawyer with prosecutorial experience was Hon. Frank Whitney, who is now a United States District Court Judge but was once the United States Attorney for the Eastern District of North Carolina. For some of the years, it was Orange/Chatham District Attorney Jim Woodall. Since his recent election to the Council, it's been recently-retired Wayne County District Attorney Branny Vickery, along with advisory member (and Acting United States Attorney for the Eastern District of North Carolina) John Bruce.

While the Subcommittees and full Committee have occasionally made some decisions with which I disagreed, from my perspective as a representative of the accused and convicted, the process has been fair, and the Committee has mostly reached conclusions that are fair to the accused, the convicted, and their lawyers. For example, in the last 12 years:

- The Committee has amended Rule 3.6 to allow criminal defense lawyers greater leeway in responding to negative pretrial publicity not initiated by the lawyer or client;
- The Committee has amended Rule 3.8 to eliminate a "negligence" defense that previously allowed criminal prosecutors to avoid serious discipline for violating the State's discovery obligations unless the State Bar could prove intent;
- The Committee has rejected attempts to pass a Formal Ethics Opinion that would specifically and only protect criminal prosecutors against unfounded claims of professional misconduct;
- The Committee has considered the burdens of sharing voluminous discovery with incarcerated defendants and struck a thoughtful balance that ultimately protected the client's right in that situation to see the evidence against him (or her), while not ignoring the realistic constraints on counsel's ability to share that information with him (or her); and
- The Committee has considered the application of the confidentiality rules to successive counsel scenarios and consultations with other lawyers outside of the defense lawyer's own firm and struck the right balance to protect that confidentiality while not unnecessarily limiting the lawyer's ability to provide effective assistance of counsel.

In all that time, I've only been disappointed by one of the Committee's actions on an ethics matter set against a criminal law backdrop. In 2008 and 2009, the Committee considered whether to adopt iterations of then-recently-adopted Model Rules 3.8(g) and (h), which expanded the "Special Responsibilities of a Prosecutor" to include certain ethical duties in the post-conviction setting regarding credible claims of wrongful conviction and actual innocence. The North Carolina Advocates for Justice worked with Prisoner Legal Services, the Center on Actual Innocence, the Public Defenders Association, and the Innocence Projects around the state to provide a unified submission to the Subcommittee in June 2009, suggesting language that would work with North Carolina's unique post-conviction tools, while not imposing too much of an unfunded mandate on prosecutors' offices. The Subcommittee convened again in October 2009 to consider those suggestions. State and federal prosecutors continued to make negative comments about the amendments. By that time, the State Bar Office of Counsel had also submitted two negative written comments about the proposed amendments, and the General Counsel personally attended to oppose the amendments in any form.[18] That opposition prevailed at the Subcommittee level, and the Subcommittee's recommendation to reject the amendments prevailed at the full Committee level. However, at the January 2016 meeting, the Ethics Committee decided to revisit the amendments and appoint a new subcommittee to study them.

As it stands in 2016, the Ethics Committee Chair is a criminal defense lawyer, as are a number of other Councilor and advisory members, including me. The Acting United States Attorney for the Eastern

[18] While it may have happened with proposed Rules amendments I did not follow, I do not recall any other instance in which the Office of Counsel actively opposed amendments to the Rules, particularly on the theory that they would be difficult to enforce and would disproportionately impact criminal prosecutors. I was honestly surprised to see two negative written comments submitted by the Office and to see the General Counsel appear in person at the final Subcommittee meeting to argue against adoption of any version of the Model Rules.

District of North Carolina, John Bruce, is an advisory member of the Committee, and former elected District Attorney Branny Vickery is a Councilor member.

The Executive & Judicial Track: Criminal Prosecutor Discipline

I recently did several Boolean keyword searches of the database of public Grievance Committee and DHC dispositions in the hope of identifying all public dispositions involving allegations of professional misconduct by prosecutors *as* prosecutors.[19] Those searches returned distinct links to over 150 documents that I scanned, weeding out all but the dispositions related to prosecutors' conduct when they were prosecutors. Several additional dispositions were brought to my attention that were not captured in those searches. All told, I found and reviewed 29 public dispositions of professional misconduct allegations against prosecutors from 1991 to 2015. Not all resulted in discipline. Also, while I'm comfortable saying it's most of them, I cannot certainly say that I found *all* of the public dispositions of misconduct allegations against prosecutors, because of the limited search functions. But here's a summary of the ones I found and reviewed:[20]

- **Janet Branch (1991)**. Before and during a very high-profile capital murder prosecution, the prosecutor met with media sources about selling her story, which created a potential conflict with her duties as a prosecutor and created the appearance that the prosecution was motivated, at least in part, by the prosecutor's own personal and financial interests. For engaging in a conflict and conduct prejudicial to the administration of justice, she received a ***Reprimand***.
- **Douglas Osborn, Jr. (1991)**. Prosecutor was convicted of sexual exploitation of a minor by possessing videos depicting minors engaging in sexual activity. He was sentenced to an active prison term and post-release supervision. He received a 5-year ***Suspension***, with the option to apply for a stay of the suspension upon his release from prison.
- **Jonathan Silverman (1992)**. As part of plea negotiations, prosecutor and defense attorney agreed that co-defendant's charge would be dismissed, but neither lawyer brought that term to the court's attention during the entry of plea. Prosecutor reneged on that term and pursued charge against co-defendant. Defendant moved to set aside his plea, and, during the motion on that hearing, prosecutor did not inform the court that he had agreed to the co-defendant dismissal term. For conduct prejudicial to the administration of justice, prosecutor received an ***Admonition***.
- **Johnson Britt (1995)**. Prosecutor's staff sent letters to witnesses informing them that they might be contacted by defense investigators, that any information they provided to the investigators would be used by the defense against them in court, and that they had no obligation whatsoever to talk to anyone other than the prosecutor's staff. For conduct prejudicial to the administration of justice that resulted from those misleading letters, prosecutor received a ***Reprimand***.
- **Scott Wilkinson (1997)**. Federal prosecutor obtained an indictment, informed a reporter about it, and then falsely denied to the indicted defendant's lawyer that the indictment had been returned. Prosecutor then made materially false statements in response to the Grievance about that conduct. For making multiple false statements to opposing counsel and the disciplinary authority, which was aggravated by his refusal to acknowledge the wrongfulness of his conduct, prosecutor received a ***Reprimand***.

[19] Search terms included: "Assistant," "District," "Attorney," "3.8," and "prosecutor."

[20] These are my summaries based on my review of the published orders. Each order is available for independent review on the State Bar's website.

- **Brian Beasley** and **Ralph Strickland (1999)**. For their respective roles in a back-room deal to dispose of a DWI case outside the normal process, one prosecutor received a ***Reprimand*** and the other prosecutor, whose conduct was aggravated by his refusal to acknowledge the wrongful nature of his conduct and by making false statements during the disciplinary process, received a 3-year ***Suspension***, with all but the first 120 days stayed on various conditions.

- **Todd Stanley (1999)**. For making a statement to a reporter about evidence in a pending murder case that a reasonable person would anticipate to be published and materially prejudice the pending matter, prosecutor received a ***Reprimand***.

- **John Bennett (2000)**. Federal prosecutor argued to the jury (and later the sentencing judge) that the defendant charged with drug and gun crimes not only shot into a car but killed the driver, when the prosecutor knew that another person had killed the driver and been convicted of that offense in state court. The 4th Circuit later vacated the conviction based on the improper and misleading closing argument about the killing. For his misleading remarks to the jury and the judge, the prosecutor received a ***Censure***.

- **Gary Goodman (2001)**. In three separate cases, prosecutor failed to timely disclose *Brady* material,[21] resulting in multiple findings of conduct prejudicial to the administration of justice and violations of the special responsibilities of a prosecutor, aggravated by the existence of a pattern of misconduct, multiple violations, and multiple vulnerable victims, resulting in a 2-year ***Suspension*** that was entirely stayed.

- **King Dozier (2002)**. Prosecutor failed to disclose leniency deals with two testifying co-defendants and failed to correct false trial testimony on that subject matter. For engaging in conduct prejudicial to the administration of justice and violating his duty of candor to the tribunal, the prosecutor received a 2-year ***Suspension*** that was entirely stayed.

- **Michael Johnson (2002)**. Prosecutor continued to engage in the private practice of law after being sworn in as a prosecutor, resulting in a ***Censure***.

- **David Hoke** and **Debra Graves (2004)**. Prosecutors did not review their entire file in a capital murder case and unreasonably delegated the task of identifying *Brady* information to a law enforcement agent, resulting in the State's failure to disclose exculpatory evidence that resulted in the conviction and death row incarceration of an innocent man. The prosecutors received ***Reprimands***.[22]

- **Scott Brewer** and **Kenneth Honeycutt (2006)**. In violation of a court order and applicable constitutional law, prosecutors chose not to disclose *Brady* material in a capital murder prosecution and took various steps to cover up that choice, including production of altered documents to the defense and misrepresentations to the court. The prosecutors also continued to oppose the defendant's post-conviction MAR after conceding his entitlement to that relief. The DHC Panel ***procedurally dismissed*** the State Bar's Complaint regarding the pre-trial and trial conduct as time-barred, not reaching the facts or appropriate discipline. The Panel ***substantively dismissed*** the Complaint regarding the post-conviction conduct, because the prosecutors were not representing the State in the MAR, and Rule 3.1 does not impose vicarious ethical liability on

[21] Some people distinguish between "exculpatory" and "impeachment" material in the *Brady* analysis; because the applicable case law regarding the prosecutor's disclosure obligation does not, I'm not going to either.

[22] I attended this DHC trial.

trial prosecutors for the State's conduct and positions in post-conviction MAR proceedings.[23]

- **Johnson Britt (2006)**. For making pre-trial public statements about evidence and his opinion regarding the guilt of the accused, the prosecutor received a ***Reprimand***.

- **Mike Nifong (2007)**. In a single case, prosecutor made multiple prejudicial pre-trial statements, directed an expert to prepare a report in violation of applicable law, withheld discovery materials required to be disclosed by applicable law and court orders, falsely represented to opposing counsel and the court that he had complied with his discovery obligations, falsely represented to opposing counsel and the court that he was unaware of the existence of any other *Brady* material, and made false statements to the Grievance Committee during the disciplinary process. For multiple acts of conduct prejudicial to the administration of justice, multiple misrepresentations, and multiple violations of the special responsibilities of a prosecutor, he was ***Disbarred***.[24]

- **Assata Buffaloe (2010)**. By failing to review his own office file, prosecutor failed to learn of or disclose *Brady* material before making two plea offers. They were rejected by the defendant, who remained incarcerated pending trial until the prosecutor learned of the *Brady* material, at which time he dismissed the case. For failing to exercise diligence under Rule 1.3 and engaging in conduct prejudicial to the administration of justice, the prosecutor received a ***Reprimand***.

- **Samantha Alsup (2010)**. In an arson case, the prosecutor decided not to disclose statements by two witnesses that she was required to disclose by applicable statutory and constitutional law, which tended to exculpate the defendant and impeach the State's witnesses. When the defense lawyer found out about it and brought it to the court's attention during trial, the court declared a mistrial and found that the prosecutor engaged in prosecutorial misconduct. For failing to disclose information that she should have disclosed, violating her special responsibilities as a prosecutor, and engaging in conduct prejudicial to the administration of justice, the prosecutor received a 1-year ***Suspension*** that was entirely stayed for 1 year.[25]

- **Joel Brewer (2010)**. This prosecutor pled guilty to seven counts of assault on a female, impersonating an officer, and willful failure to discharge the duties of his office for abusing his position as a prosecutor in various ways related to various female victims. He received an interim ***Suspension*** and was later ***Disbarred***.

- **Greg Butler (2010)**. Butler was the third prosecutor assigned to prosecute a murder case and inherited the DA's Office's "working file" of the case. Based on representations by the previous prosecutors and law enforcement officers involved in the case, Butler believed the defense had received all of the investigative file materials and represented as much to opposing counsel and the court. During trial preparation, Butler was provided with a document from a law enforcement agent that he had not seen before, prompting him to direct that agency to copy and provide its entire file to the defense. In that file were materials that had not previously been disclosed to the defense, including *Brady* material. The court found that the defendant had been prejudiced by the late disclosure and delayed the trial. The DHC Panel found that "[t]he events of this case … stemmed from a systemic failure of the District Attorney's Office for the Eleventh Prosecutorial District, where procedures and mechanisms for ensuring compliance with North Carolina's Open File Discovery Law were demonstrably inadequate." The Panel found that the Office of Counsel

[23] I attended the pre-trial hearings in this DHC matter.

[24] I attended this DHC trial.

[25] I attended this DHC trial.

had proved by clear, cogent, and convincing evidence that the DA's Office *collectively* failed to disclose materials it should have disclosed to the defendant, violating its special responsibilities as a prosecutor, and engaging in conduct prejudicial to the administration of justice. However, the Panel found that while "Defendant Butler contributed to the systemic failure of the District Attorney's Office," he "should not be held individually responsible for this failure." The Panel ***Dismissed*** the case against Butler but indicated that it would have imposed a ***Reprimand*** on the entire DA's Office if North Carolina was a jurisdiction that allowed its disciplinary tribunal to enter discipline against law firms, law departments, and DA's Offices as a whole.[26]

- **David Folmar (2010)**. Federal prosecutor practiced for over 6 years as an AUSA without have an active status license to practice in any jurisdiction, which is a requirement to serve as an Assistant United States Attorney. Near the beginning of that 6-year period, he received a notice of suspension from the State Bar for failure to meet the CLE requirements. He never responded to it and was suspended. Despite being suspended and not having an active license in any jurisdiction, he continued to practice law as an AUSA for 6 years. He also concealed his suspension from his supervisors. He falsely held himself out to the courts, his colleagues, and the public as authorized to practice law. For making misrepresentations and engaging in conduct prejudicial to the administration of justice, which were aggravated and mitigated by various factors, he received a 5-year ***Suspension*** with the ability to apply for a stay of the suspension after 18 months.

- **Cynthia Jaeger (2010)**. This prosecutor pled guilty to 10 counts of felony obstruction of justice and 10 counts of felonious alteration of court records, all arising out of a ticket-fixing scheme that she helped execute in her final days as an Assistant District Attorney. She was ***Disbarred***.

- **Janice Paul (2012)**. At the end of the State's case, the court dismissed two child sex offense charges and let a third stand. When the prosecutor learned that the child victim would be spending the weekend in the lawful custody of her mother, who was the defendant's girlfriend, the prosecutor directed law enforcement to obtain and execute arrest warrants against the mother for accessory after the fact to the two child sex offenses that the court had just dismissed against the principal (making the accessory-after-the-fact charges against the mother *illegal*), and aiding and abetting the only surviving charge. The prosecutor sought the charges for the sole purpose of preventing the mother's lawful visitation with the child that weekend, which would be the likely result, given the presumptive bonds for the charged offenses. The court found out about the charges and dismissed all three of them. For violating her special responsibilities as a prosecutor and engaging in conduct prejudicial to the administration of justice, the prosecutor received a 1-year ***Suspension*** that was entirely stayed.

- **Rex Gore** and **Elaine Kelley (2014)**. While they were Elected DA and Assistant DA, respectively, the prosecutors executed a plan whereby the latter would receive additional compensation for her employment by submitting and receiving reimbursement for mileage expenses to which she was not entitled. Each was convicted of a misdemeanor criminal offense and received a 4-year ***Suspension***, with credit for their interim suspension periods, and with the ability to apply for a stay 2 years into the suspensions.

- **Tracey Cline (2015)**. Elected District Attorney instructed an investigator to obtain prison visitation records of three inmates based on false statements about pending MARs by those inmates; made misrepresentations to the court about those matters; and made baseless and inflammatory allegations about the Senior Resident Superior Court Judge in court filings. Based on that conduct,

[26] I attended this DHC trial.

she was removed from office upon petition. For multiple misrepresentations, frivolous claims, lack of candor to the tribunal, conduct prejudicial to the administration of justice, and violating her special responsibilities as a prosecutor, she received a 5-year ***Suspension***, with credit for the interim suspension period, and with the ability to apply for a stay 2 years into the suspension.

- **Paul Jackson (2015)**. The defendant was charged with cocaine possession and rape and incarcerated in lieu of bail. The State Crime Lab's DNA testing of the rape kit excluded the defendant as the perpetrator on 9/12/12. At a status hearing on the case on 1/10/13, the prosecutor made inaccurate and misleading statements on the record creating the "misapprehension" that he had contacted the Crime Lab about the status of the DNA testing the month before and, based on various factors, could not answer the question of when the DNA tests would be done and the results available. When the prosecutor finally learned that the DNA cleared the defendant, on 1/24/13, he dismissed the rape charge the same day. Four days later, he dismissed the cocaine charge, because the defendant has been incarcerated longer than the maximum active sentence he could have received on that charge. Because the prosecutor failed to conduct a reasonably diligent inquiry of the Crime Lab's progress on the DNA testing, the innocent defendant spent four more months in custody than he should have under the rape charge, and the court spent unnecessary time conducting hearings on the defendant's speedy trial motions and discovery inquiries. For violating his duty of diligence under Rule 1.3, failing to conduct a reasonably diligent inquiry and turn over discoverable materials under Rule 3.8(d) and Rule 3.4(d)(2), and engaging in conduct prejudicial to the administration of justice by doing those things and "[b]y making inaccurate statements of material fact to a tribunal without making a reasonably diligent inquiry to confirm the accuracy of those statements," the prosecutor received a 1-year ***Suspension*** that was entirely stayed for 2 years.

I have not conducted a similar search of the database to identify all public dispositions of allegations of professional misconduct by criminal defense lawyers *as* criminal defense attorneys, because it would be prohibitively burdensome in the absence of greater and more reliable search functions.[27]

The foregoing list makes clear that, at least with respect to the handful of disciplinary dispositions in the public record, the State Bar has not entirely "given a pass" to prosecutors whose professional misconduct has come to the State Bar's attention.

Furthermore, of the 29 foregoing matters, at least 4 were pursued directly by the General Counsel, and at least 8 more were handled by Deputy Counsel with prior criminal prosecution experience.

Also notably, after significant negative public comment by members of the profession (including members of the Council) about the State Bar's handling of the discipline of David Hoke and Debra Graves in 2004, the Bar convened a special Disciplinary Review Committee to study the handling of the case. The Committee reached several conclusions about how the Office of Counsel and Disciplinary Hearing Commission could work better and recommended that the Ethics Committee update Rule 3.8(d)(Special Responsibilities of a Prosecutor in pre-trial discovery) to track more closely to prosecutors' Constitutional obligations and eliminate the "negligence" defense for prosecutors who fail to conduct reasonably diligent

[27] For example, to see how many public documents might be available online, I entered the keyword "the" into the search box on the State Bar's website portal to those documents. I thought that word would probably appear in every available document in the database, hence the search would return links to all available documents. The search returned 500 distinct links to documents. However, as I scanned the links it returned, I saw that the list included only 1 of the prosecutor dispositions listed above (Douglas Osborn, Jr.), and it did not appear to include *any* disposition after 1992. I have no idea why it chose to return those 500 links, and it calls into question the reliability of the search function using other keywords.

inquiries to fulfill the State's discovery obligations, as required by the Constitution.[28]

On the other side of the negative public comment spectrum, I can also say, from personal experience and knowledge, that the State Bar Office of Counsel came under significant attack from the state's prosecutors in, around, and after 2010--a year when 6 of the public disciplinary actions against lawyers involved criminal prosecutors. The State Bar was particularly attacked for its 2010 handling of misconduct allegations against Greg Butler, which was seen by a number of the state's criminal prosecutors as overreaching and clear proof that, since the 2007 disciplinary prosecution and disbarment of Mike Nifong, it had been "open season" on prosecutors at the State Bar.

The State Bar's Recent Pursuit of Public Discipline Against Criminal Defense Lawyers

Because of the State Bar's recent pursuit of ethics charges against several criminal defense attorneys, a number of people now voice concern that, by 2015, the ethics enforcement pendulum had swung too far back in the other direction: open season on criminal defense lawyers. Many of the same people believe the season is now entirely closed on criminal prosecutors.

By now, you should know that it is impossible to independently assess those broad claims. Even if you have enough time in your life to obtain and organize and read every single available public document related to public disciplinary dispositions, you will never be able to know details about the overwhelming majority of disciplinary dispositions, because they occur at the confidential Grievance level.

However, the recent pursuit of multiple criminal defense attorneys on parallel public disciplinary tracks, with former criminal prosecutors advancing the accusations on behalf of the Office of Counsel, pursuing multiple theories of Rules violations that were largely and ultimately rejected by the DHC, some of which raised serious concerns among the civil litigation bar, and none of which was pursued at the same level against criminal prosecutors in those same matters, has raised questions about whether the Executive Branch of the State Bar is treating criminal prosecutors and defense lawyers disparately. And, if so, why?

As I wrote at the beginning of this memo, objective answers to these questions are elusive and subject to dueling anecdotes. State Bar Deputy Counsel with past criminal prosecution experience have participated in disciplinary proceedings against criminal prosecutors as well as criminal defense attorneys. Criminal defense lawyers are the only lawyers who have special protection against unfounded claims of misconduct at the initial Grievance screening level.[29]

Ultimately, doing a broader comparative study of how the State Bar treats criminal defense attorneys and criminal prosecutors, as it relates to each other and other areas of practice, will not be possible until data about the Grievance-level process becomes more accessible and searchable, and until documents related to public dispositions of disciplinary matters become more reliably searchable.

In the meantime, people are left to wonder about how much appearance is reality. And they're left to trust what they're told by their leaders. That's easier for some than others. Either way, the State Bar should always be willing to entertain reasonable questions about the way it wields its power at all levels, and it should not dismiss those questions or believe the institution is somehow above it all.

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[28] Working in Subcommittees, the Disciplinary Review Committee took testimony from dozens of people and produced a final report with various recommendations, including the amendment of Rule 3.8(d) to eliminate the "negligence" defense for prosecutors whose failure to review their entire case file results in the State's failure to provide discovery as required by law. The Council accepted the latter recommendation, which the Supreme Court adopted as well, making North Carolina's version of Model Rule 3.8(d) unique among its corollaries in other states.

[29] *See* Footnote 4.

At the same time, questions about the way the State Bar wields its power should be informed by facts and reason and should avoid personalities and hyperbole.

And, when such questions are reasonably informed and presented, the State Bar should not receive them as personal attacks, but as opportunities to correct unfounded criticism, embrace founded criticism and reform, and make the entire process of self-regulation less likely to produce recurring cycles of varying confidence levels.

That is the way power should be questioned, and that is the way power should respond.

Topics for Discussion & Suggestions for Change

As one member of the bar who has dedicated a significant amount of time to the profession and how the profession is regulated, particularly against the backdrop of criminal law, I have the following thoughts about potential areas for discussion and potential change in the ethics enforcement process:

- The State Bar should consider tracking more data about the Grievance-level process and making that data available to the public in a way that protects the confidentiality of all involved.[30]
- The State Bar should consider updating data input and search functions regarding online public disciplinary dispositions, to make those searches easier and more reliable.
- The State Bar should consider a separate webpage, if at all, for matters ultimately dismissed by the Disciplinary Hearing Commission. As it currently stands, such dismissals are published via the same webpage that is labeled "Disciplinary Orders," when those matters did not end in discipline.
- For online publication of pleadings related to pending matters, the State Bar should consider posting all of the pleadings, not just the Complaint and Answer.
- The State Bar should publish all back issues of the quarterly *State Bar Journal* online, not just the four most recent issues.
- The State Bar should publish all annual Reports of the Office of Counsel conspicuously online, not just the previous year's Report, which takes some time to find.
- The State Bar should publish the standards by which it chooses to open Grievance files in its own name, without an outside referral. Is it only when someone at the State Bar learns about potential misconduct from media reports? Does it happen when they learn of potential misconduct by other lawyers during a Grievance investigation, or just the lawyer subject to the Grievance they're investigating?
- Because it's more of a traditionally legislative function than a judicial function, the process by which the Supreme Court adopts or rejects amendments to the Rules of Professional Conduct by the North Carolina State Bar Council should be more transparent. There's a good reason why Supreme Court judicial deliberations about cases before the Court are confidential; there's not a good reason why its legislative deliberations about Rules amendments are.
- The Ethics Committee and its Subcommittees should continue to notify stakeholders and seek input from stakeholders when crafting Rules amendments and Formal Ethics Opinions.
- The State Bar ethics enforcement apparatus should reconsider its growing "catchall" use of Rule 8.4(d) (Conduct Prejudicial to the Administration of Justice) and Rule 1.3 (Diligence) to pursue

[30] *See* the bullet-point list on page 5.

allegations of misconduct that just do not seem to fit under any other Rule. If alleged misconduct doesn't readily fit under any other Rule, that's a strong indication that it might not be a Rule violation, or at least not a Rule violation of which reasonable lawyers would have notice. The more conduct gets plugged into the definition of "conduct prejudicial to the administration of justice," the less that serious term has any serious meaning. The more conduct that has nothing to do with harm to a client or the client's legal position gets plugged into the attorney's duty of diligence *to the client*, the more Rule 1.3 can become a disciplinary dumping ground for allegations of misconduct that do not fit under any Rule, but just do not seem to sit right with the Office of Counsel and Grievance Committee. Such malleability can easily lead to inconsistent enforcement and lack of fair warning to lawyers of what conduct might be actionable under the Rules.

- The State Bar should consider how to address concerns about diversity in the prior practice experience of members of the Office of Counsel. This should not necessarily involve "quotas," and all decisions of personnel must ultimately yield to availability and quality of lawyers, as I'm sure they have in the Office of Counsel up to this point. But when one area of prior practice becomes the dominant area of prior practice in the Office of Counsel, it may be worth balancing that previous experience with training or some other type of exposure to different areas of experience.

I don't claim to have a corner on the market of reason and wisdom. I might not even be in that market at all. I also recognize that my experience as a defender of people accused of criminal misconduct and professional misconduct influences my thinking. How could it not? But I also believe these ideas are worthy of consideration and discussion, and I believe that grown-ups can and should have that discussion without making it personal or taking it personally. Most of all, I believe in our system of ethics enforcement, but only so long as that system believes it is no less deserving of scrutiny and accountability than any other system of law or regulatory enforcement.

Quis custodiet ipsos custodes?

We all should.

-- END OF MEMO --

FRAMING YOUR CASE

Revised 2/18/14

Reptilian[1] *Beyond Reasonable Doubt*

from
Artemis Malekpour (artemis@consultmmb.com)
David Ball (ball@nc.rr.com)
Malekpour & Ball Consulting

We will email this on request to any criminal defense attorney.
You may post this to any criminal defense blogs, listserves, etc.

> The prisons are full of people whose attorneys whiffed "Beyond Reasonable Doubt."

Normally, the Reptile works for the prosecution even when the prosecutor has never heard of the Reptile. You can reverse this with the method below. Do it exactly as described, except as you must adjust for the Court's demands. (Let us know if you need help with adjustments.)

This method will prevent many if not most convictions. That sounds like a big statement, but it's true: The frequency of jurors either misunderstanding or not applying BRD is a big problem, and this method fixes it.

Reptile BRD has three goals:

A) **To give jurors a helpful (to us) and clear (to jurors) explanation** of BRD. Jurors who think they're correctly applying BRD usually aren't. And attorneys who think they're providing a good explanation usually leave out the most important parts.

B) **To *motivate*** jurors to apply BRD. Just explaining BRD does not motivate them.

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[1]Criminal defense lawyers unfamiliar with Reptilian advocacy should read *Reptile* (David Ball, Don Keenan, Reptilekeenanball.com). The book is for civil cases but criminal defense lawyers should review at least the first 40 pages or so to learn the underlying principles of Reptilian advocacy. You can't do this stuff without understanding it. You can probably borrow a copy from any good plaintiff's lawyer.

C) **To motivate jurors to *make the other jurors*** apply BRD. The Reptile has a powerful way to 2 and 3, as you'll see below.

These three goals are reliably achieved by diligently using *all* the following steps:

1) AVOID TAKING UP THE BURDEN: Defense attorneys often imply – perhaps inadvertently – that they have a burden. *You must never seem to take upon yourself the burden of proving there are reasonable doubts.* Rather, your job is to point out that the **prosecutor has not ruled them out.**

So: "Folks, you are here for one reason: To see whether the prosecutor can *rule out* every reasonable doubt."[2]

Don't blow it! For example, when you say, "You'll see that John was elsewhere," or even, "You'll see that John could have been elsewhere," you have implicitly – but clearly and dangerously – taken up a burden. Instead, say: **"You'll see that *the prosecutor cannot rule* out the [___][3] possibility that John was elsewhere."** Don't say, "*We'll show you* that the prosecutor cannot rule out the **[___]** possibility John was elsewhere." "We'll show you" implies that you have some burden. You don't. You don't. You don't.

And explain: **"Any [___] possibility the prosecutor does not rule out is a reasonable doubt."** And make the jurors understand that their *only* job is to decide whether or not the prosecution **ruled out** every **[___]** reasonable doubt. "Ruled out" is your primary topic, your fundamental and often only rule, your main theme, your mantra, your raison d'etre. You may not want to tattoo "Ruled out" on your behind, but in trial it's more important than everything else combined.

(NB: Never say you "don't have to prove anything." It is makes many jurors think you're admitting you think you don't have much of a case. Explaining rule-out without saying "I don't have to prove anything" conveys the same concept without that risk.)

In jury voir dire: Ask, "*Some folks* think that the law forcing the prosecutor to *rule out* every [___] reasonable doubt, even the very small ones, makes it too hard on the

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[2]For an expansion of this "polarizing" approach, see Rick Friedman's brilliant *Polarizing the Case* (Trial Guides.) It is for civil cases, but its principles are helpful in BRD and other criminal matters.

[3]Depending on venue, you may need a word such as "real" before "possibility."

prosecutor and too easy for us. *Other folks* are OK with it. Which way do you lean?"[4]

And follow up with

> "Tell me about that," and "Please tell me more about that."

After questioning every prospective juror about this, say,

> "I had to ask about that because the law says you must decide 'not guilty if the prosecutor does not rule out every [__] reasonable doubt. Mr. Prosecutor agrees. And at the end of the trial, her Honor will verify it's the law. So Mr. Juror, what trouble would you have, even a little, following that law?" [Ask this of every juror who said they felt, even a little, that it makes things too hard on the prosecutor.]

Then use a solid, well-tested method of homing that juror into a cause dismissal. See, for example, pp. 312 - 315 *David Ball on Damages,* Edition Three. Don't wing it.

Opening: "The prosecution's evidence *does not rule out* the [___] possibility that John was elsewhere, or the [___] possibility that the gun was not his, or that .... etc."

Testimony: "Mr. Policeman, can you *rule out* even a small [___] possibility that John was asleep?"

Closing: "Here's what the prosecutor could not *rule out*."

Everything else in the case revolves around those steps. Don't stray.

2) SIZE DOES NOT COUNT. Explain that a [___] reasonable doubt is a [___] reasonable doubt, *no matter how small.* This overhauls juror understanding of BRD. **Do not ignore this pivotal point just because this paragraph is short.** We put it in large type so you won't miss it.

You might not be allowed to say "tiny" or "minuscule" reasonable doubt, but you should be allowed to say "small." If a person has even a small doubt about whether the house is on fire, he should not go back to sleep. (Same with "tiny" and "minuscule," but if the

[4] For full instructions on asking all voir dire questions in this necessary way, and how to follow up the responses, see p. 297 in *David Ball on Damages,* Edition Three.

judge won't allow them, "small" does the job.)

3) DOUBT *MEANS* DOUBT. Jurors need not believe that the reasonable doubt is true. They can doubt it. They usually don't know this. Tell them they need only believe it is [___] *possible* – no matter how much they doubt it, as long as they can't rule it out. That's why it's called a doubt.

So if the answer to "Could John have been elsewhere?" is "I **seriously doubt** it," then it's a reasonable doubt.

4) "NOT GUILTY" DOES NOT MEAN "INNOCENT." You already know you must explain that "not guilty" merely means "not proven beyond a reasonable doubt." You might ask for an instruction that says this. It makes it easier for borderline jurors to vote not guilty.

Ask in voir dire:

> "Some folks feel that jurors should decide 'not guilty' only when they're convinced the defendant is innocent – that he actually did not do the crime. Other folks feel that 'not guilty' only means not *proven – that there's a reasonable doubt.* So a 'not guilty' verdict can send someone back into society who might have done the crime. Some folks don't like that; others are OK with it. Which way do you lean?"[5]

Follow up with:

> "Tell me about that," etc.

After questioning everyone about this, ask:

> "I had to ask you about that because if there are [___] reasonable doubts, you have to decide "not guilty" even if you think he's probably really guilty. Everyone here agrees, including Mr. Prosecutor – and the judge, who'll explain it at the end of the

[5]Don't be afraid that this poisons some jurors into worrying about sending a maybe-guilty defendant back into society. They're already worrying about it, but with this question you can either get rid of them for cause or at least get the judge to educate them about the real definition of "not guilty."

case. So Mr. ____, what trouble might you have, even a little, going along with that as a juror in this case?"[6]

This is fertile ground for cause dismissals. Be sure you know the law on cause dismissals. Not every venue allows rehabilitation, or rehabilitation by use of leading questions. A well-researched motion in advance can sometimes get you these or other helpful voir dire rules.

This particular questioning identifies not only jurors who will think "not guilty" must mean innocent – but also jurors who will likely be pro-prosecution on just about everything.

(You should ask about this before you ask about the topic in section 1 above.)

5) JUROR'S RIGHTS. This section takes time and effort to learn, but you must do it. It provides the Reptilian force that makes jurors 1) follow BRD and 2) insist that all the other jurors follow it, too. Use the Jurors' Rights questions from *David Ball on Damages*, Edition Three, pp. 66 - 67. The gist is,**"No one has the right to argue or bully you, or try to persuade you, into having to go home after the trial knowing you've been on a jury that made its decision by stepping outside the law that you took a personal oath or affirmation to follow."** This yanks the Reptile out of its default position of working for the prosecutor. (You need more than just the gist; you *must* see the full method in the Damages book. If you do only criminal cases and can't justify the cost of the Damages book, let us know and we'll send you the pertinent pages.)

See also "*Massaging the Instructions"* for closing, p. 231 in *David Ball on Damages* Edition Three. It will help you frame the section of closing in which you'll explain that "... during deliberations, jurors favoring conviction must RULE OUT to *your personal satisfaction* every **[___]** possibility that, if true, would mean a not guilty verdict." Again, you *must* see the book to fully understand how to do this.

6) THE CHAIN: Not all reasonable doubts help you. To be useful, a reasonable doubt must break a link in the prosecutor's necessary chain. This sounds obvious but even the

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[6]With this or any other question, if the judge tells you, "Just ask if they can follow the law," argue that whether they can follow the law pertains solely to cause challenges, not peremptories. And show where the law requires you to gather information for peremptories, not just cause challenges. Peremptories have nothing to do with whether a juror can follow the law.

best defense attorneys screw it up. When you propose a reasonable doubt that does not break a link in the chain, you inadvertently teach jurors that reasonable doubts are really meaningless – because it's easy for them to see how your client could be guilty despite that particular reasonable doubt. It undermines the force of link-breaking reasonable doubts. So if the prosecutor cannot rule out the possibility that your client woke at noon instead eleven, don't treat it as a reasonable doubt if the time makes no difference.

On the other hand, if you are careful you can use doubts that don't break the chain to show the general shoddiness of the prosecutor's case. But clearly distinguish such unconnected doubts from chain-breaking doubts, or you can lose the case for this reason alone.

7) "HOLISTIC" CASE VIEW. A juror can have various reasonable doubts but, when taken in light of everything, still think that they have no *overall* reasonable doubt. This is a legitimate way for a juror to think. You can counter it by showing that regardless of their overall feeling, when a reasonable doubt breaks a specific link in the chain of things the prosecutor must prove, then any overall feeling must give way because that broken link is the belief's fatal flaw. This is particularly important to teach so that jurors on your side will know how to persuade jurors who have no "overall" reasonable doubt.

8) ARM YOUR JURORS. The primary purpose of closing is to teach jurors leaning your way how to persuade hostile jurors in deliberations. "If someone says 'ABC,' remind them that 'XYZ'."[7] But be careful not to sound – in word or tone – that anyone who believes the prosecution must be nuts or stupid or blind or unfair. That can harden the hearts of the jurors who are against you, making the deliberations job of your favorable jurors harder, perhaps impossible. It's an easy blunder to make when you're passionate about your case, but exhibiting your"warrior" mentality, especially in closing, can rouse warriors against you who may prove too adamant for your favorable jurors to persuade.

CONCLUSION:
BRD is our strongest – often only – tool against conviction. By mastering the steps in this paper (and by explaining to jurors the danger of convicting wrong and leaving the real perp free and re-perping somewhere out there), you will protect your client, protect the

[7] *Damages* pp. 215- 221.

community and yourself, and start winning the kinds of cases you've been losing.[8]

Questions? Comments? Email:

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David Ball – ball@nc.rr.com

Please specify how urgently you need a response; we'll do our best to comply.

[8]The flaw in the "real perp goes free" argument is, of course, that even with a not-guilty verdict, the cops and the D.A. continue to believe the defendant is guilty. After a not-guilty verdict, they virtually never go in search of the real perp. Scary. But it's still a strong jury argument.

REPTILE

The 2009 Manual of the Plaintiff's Revolution

By David Ball and Don C. Keenan

Research Team:
David Ball
James E. Fitzgerald
Gary C. Johnson
Don C. Keenan

DEDICATION

This first edition of Reptile is dedicated to the pioneers: the national array of trial attorneys who, instead of caving in to mean times, have allied themselves with the Reptile by successfully field-testing her in negotiations and in trial after trial.

ACKNOWLEDGMENTS

We are grateful to Duke University School of Law, and to Duke's medical research library. Duke Law Professor Doriane Lambelet Coleman has been of enormous help. So has Duke's Professor Norman L. Christensen, whose lucid explanations of evolution stand as a lesson to lawyers that even the most complex of concepts can be made simple enough for everyone to understand.

Thanks also to attorneys Donald H. Beskind (Raleigh), Mark Davis (Honolulu), Rick Friedman (Bremerton, WA), Paul N. Luvera (Seattle), Randi McGinn (Albuquerque), and Jim M. Perdue, Sr. (Houston), for their brilliant input. And thanks to the Inner Circle of Advocates for their input and encouragement as this project progressed.

Keenan Law Firm attorney Charles Allen was deeply involved in the research that led to this book and the Reptilian approach. And the firm's Alan Galbraith also deserves our thanks.

The Keenan's Kids Foundation's April Swanson has our deep gratitude, as does Atlanta attorney Kelly Sherrill.

Trial consultants Artemis Malekpour and Debra Miller (Miller Malekpour & Ball; Research Triangle, NC) provided key advice throughout our research and the writing of this book.

Susan C. Pochapsky and Katharine M. Wilson, as always, have been guides of constant and meticulous attention. Insofar as Reptile is readable and makes sense, the credit is theirs. Insofar as it is not, the blame is ours for not listening to them.

Finally but most of all, thanks to our amazing research partners, James E. Fitzgerald (Cheyenne) and Gary C. Johnson (Pikeville, Kentucky), towering examples of great lawyers who spare nothing to become even greater.

David Ball
Durham, NC

Don Keenan
Atlanta, GA

CONTEXT: This book is the companion volume to David Ball on Damages, which explains many techniques you'll need to help you work with the Reptile.

Two other books should be your close companions as you master the Reptile: Rules of the Road (Rick Friedman and Pat Malone), and both volumes of Closing Arguments (Ed. Don C. Keenan). Rules of the Road is essential for working with the Reptile. Closing Arguments is a treasure trove of Reptiliana to pore through after reading Reptile.

CAVEAT: The language of this book – "Reptile," "Code," "Tentacles of Danger," etc., are used to teach you how this approach works. Such words are not for the jury.

MAJOR AXIOM: When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.

Trial Advocacy Books by Don Keenan

APRIL – ADD KEENAN BOOKS

Trial Advocacy Books by David Ball

Theater Tips and Strategies for Jury Trials
How to Do Your Own Focus Groups
David Ball on Damages

David Ball is the nation's most influential jury researcher and trial consultant. His book David Ball on Damages revolutionized American trial advocacy, and provided the first and most effective methods for dealing with the worsening consequences of tort-"reform." Since 1991 Dr. Ball has consulted on civil and criminal cases across the country. He founded JuryWatch, Inc., now called Miller Malekpour & Ball, the nation's only three consultants who can authoritatively provide case guidance based on Reptilian methods. Dr. Ball teaches at law schools across the country, and is the nation's most in-demand CLE teacher. His three trial advocacy books (and his theater text analysis book) all remain best-sellers. He came to jury consulting from a long career as professional theater director, producer, theorist, and writer. He initially trained in engineering and physics, and his current hobby is his first love: physics. His favorite job was taxi driver in the early 60s, and his daddy was a Catskill Mountains bootlegger. (Contact David Ball: ball@nc.rr.com.)

Foreward

In 2006, attorneys Don Keenan (Atlanta), Jim Fitzgerald (Wyoming) , and Gary Johnson (Kentucky), along with jury research specialist and trial consultant David Ball (North Carolina), began a series of unique jury-research sessions. Our research took us well beyond juror attitudes, biases, and life experiences. Important as they all are, something immeasurably more powerful was obviously in the driver's seat. But what?

We found a clue in the work of Yale Medical School and National Institute of Mental Health physician and neuroscientist Paul D. MacLean. His groundbreaking work first posited the three-part ("triune") brain. Our particular focus was on the part he colorfully and accurately called the "Reptilian brain." More sedately known as the "R-Complex," it's the oldest part of the brain. Over millions of years of evolution, the R-Complex gave rise to the rest of the brain: the parts that think and feel.

As with most of what we know about the brain and human behavior, the concept of the triune brain derives from Freud's postulate – accepted even by those who reject much Freud's work – that most of what we do is driven by parts of the mind that are not conscious. Neuroscientist Joseph E. LeDoux, Principal Investigator for the Center for the Neuroscience of Fear and Anxiety based at New York University, puts it in perspective: "The conscious brain may get all the attention, but consciousness is a small part of what the brain does, and it's a slave to everything that works beneath it."

Dr. MacLean called the R-Complex the "Reptilian" brain because it is identical in function to the brain of reptiles. Perhaps ironically, human beings are most similar to each other – all but identical – at the Reptilian-brain level.

MacLean's work has been refined and expanded by recent imaging studies that show, among other things, how the brain's functions actually interact. Observable fact is trumping psychological speculation.

Dr. MacLean died in 2007, shortly after we began our research. But his influence on trial advocacy has come alive. This book is its birth announcement.

We also had access to the work of marketing guru Clotaire Rapaille. He developed a testing approach to investigate how the Reptilian brain drives some kinds of decision-making. We hypothesized – correctly, as it turned out – that this might include jury decision-making.

We quickly learned that the Reptile had long been working diligently and nearly invincibly for the defense in civil trials. As you will see, once we get her to switch sides, she works better far for us than for the defense. She is reversing – with a satisfying vengeance – tort-"reform's" poisoning of the jury pool.

To adopt the Reptile, you need not throw out all you have been doing. The new methods, though fundamental in concept, are used as an overlay to your current armament. It's like adding a telescopic sight to a rifle.

CAVEAT: This book is no bag of tricks. You need a rudimentary understanding of the science behind the methods, so that's where we begin. This will enable you to use the methods properly, contribute to refining them, and create new ones.

And reading about how to do something is never enough. As with any new methods, before going to trial you must practice. And practice. And practice – as do all good actors, dancers, singers, athletes, and ministers. After all, your job is no easier and no less important than theirs.

The Judge: Before using any new methods, including those in this book, be sure they will pass muster. Be prepared to argue that what you are doing is proper. Have back-up plans to get around sustained objections. Defense attorneys will be doing everything in their power to keep you from using these methods. (See Appendix B for venue-to-venue Golden-Rule decisions, and guidance on researching community safety arguments.)

So welcome to the revolution and to the world of the Reptile. She will re-energize you. And she gives new meaning to the term "Scales of Justice."

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ONE

THE SCIENCE

(Major axiom: When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.)

The Reptilian brain houses basic life functions, such as breathing, balance, hunger, the sex drive, and the fundamental life force: survival. The Reptile does not tend to these functions solely to keep you alive. Her larger purpose is to keep your genes alive and spread as many of them as possible into future generations. This impulse drives all life. Even people who want no children cannot normally get rid of the Reptilian imperative of personal survival. Nor can they get rid of the Reptilian drives that the Reptile has developed for the creation and nurturing of children (such as the sex drive).

We like to believe we are run by logic and emotion. Sometimes we are. But when something we do or don't do can affect – even a little – our safety or the propagation and safety of our genes, the Reptile takes over. If your cognitive or emotional brain resists, the Reptile turns it to her will. The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you.

In other words, the Reptile invented and built the rest of the brain, and now she runs it.

Why is she so powerful? No life form is immortal, so its existence presupposes gene survival from generation to generation. We don't eat just to live; we eat to live long enough to pass on and then protect our genes. That requires us to fight to maximize survival advantages and minimize survival dangers. Otherwise evolution eats us. Goodbye genes.

But humans are puny fighters and easy prey. We're slow, fragile, clumsy, we have comparatively weak hearing and seeing, and we stink so much that predators and most of our prey smell us miles away. But our brain makes up for those weaknesses. The brain gathers endless amounts of new information and then uses it to make survival decisions. Our ability to make complex decisions gave us enormous survival advantages over other animals, and vastly enhanced our ability to survive within changing environments.

Everything else our brain does (art appreciation, higher learning, shooting hoops) is a by-product. When survival is not at stake, the Reptile goes on auto-pilot and lets the rest of the brain fritter, free to do whatever it wants. But when our genes' survival chances can be affected, the brain shifts into Reptilian survival mode and nothing else matters. For example: A master violinist's lifelong dream is fulfilled when he finally owns the world's most precious Stradivarius. But if the Strad were suddenly the only wood to burn to keep his baby alive overnight, by morning there'd be one less Strad.

Just as the fastest running occurs when running for one's life, so does the most powerful decision-making occur when survival is at stake. So in trial, your goal is to get the juror's brain out of fritter mode and into survival mode. You do this by framing the case in terms of Reptilian survival.

Once awake, the Reptile has two powerful tools. First: In order to make us obey, the Reptile gives us a splash of Dopamine, the ultimate pleasure-giver (among other things). Control Dopamine and you control the person. We are all dopaminaholics.

That's the Reptile's pleasant tool. She uses it to get you to do what she wants.

The Reptile has a darker and more potent force: anxiety and terror, which she uses to keep you from doing what she does not want. When you make or contemplate a decision the Reptile rejects, she makes you feel really bad. In fact, our emotional systems evolved mostly so we could feel enough terror or pleasure for the Reptile to control us. The terror is so powerful that someone whose brain is forced to make an endangering decision despite a flood of terror can end up with permanent brain damage – such as post-traumatic stress disorder, which often involves physical shrinkage of part of the brain.

We are Dopamine-tropic (we like it) and terror-phobic (we fear hate it). That's how the Reptile controls us.

Does all this mean we take orders from a pea-brained snake? Yes. When we face decisions that can impact the safety of our genes, the Reptile is in full control of our emotions as well as what we think is our rational logic.

Justice ...? In trial, "justice" helps almost mainly when you show that justice equates with safety for the juror's Reptile. To show this, you need not violate the Golden Rule restriction (but see Appendix B). You will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety.

So remember the major axiom, which we cannot repeat too often: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

Now let's listen directly to the Reptile:

TWO

THE REPTILE SPEAKS

(Translated from the Reptilian)

I exist because there is danger and lethal competition in the world. If there were not, I would not exist.

I have simple needs: for my genes to survive, spread, and prosper. Don't bother me with other stuff. All I want to know is "what's in it for my genes?"

I am not you. I am your genes. I will make you protect them within you and within your progeny.

I am somnolent. Without survival at stake, I sleep.

I want to kill whatever threatener wakes me.

I don't like you. I don't like me. I don't like.

Except I like my genes. Not your neighbor's genes. Your neighbor has his own Reptile. I will work with neighbor Reptiles only if it helps me. Otherwise I'd as soon kill them.

I am not cooperative except when cooperation helps my genes survive.

Justice is of no interest to me except when it can help my genes survive. Otherwise, I don't give a _____ [untranslatable].

I waste no time or energy. I do things the easiest way. I work only when I have a chance of overcoming a survival threat. Otherwise that snoring you hear in trial is me.

I don't work for God, if there is one. My goal is everlasting life for my genes on earth. Your everlasting life is between you and God. Genes don't go to heaven or hell. If there is a God, by the way, s/he likes Reptiles. God made me before you. I am your prerequisite.

I do not get angry. I make you angry so you will do what I want you to.

I do not get scared. I make you scared so you will do what I say.

I am not smart. I invented smart for you to be able to do what I want.

I have no feelings. I invented feelings to make you do what I want.

First things first. I deal with the most immediate danger first. You won't much notice the second danger until you take care of the first. Otherwise some lion will bite off your butt while you're worrying about the tiger half a mile away.

I run the show. You do not.

I am not moral. I invented morality to make you do what I want.

I am the source of all your important desires. Sex to continue my genes. Importance so mates will want you and your society will protect you. Altruism, so society will protect you. And so forth.

I am the immortality of your genes.

I hate:

Lack of clarity. It's a danger sign. I don't go where things are not clear.

Anything hidden. It's dangerous.

Anyone who hides anything.

Anything that hurt or scared us when we were very young.

Immobility.

Confinement.

Arrogance. Anyone who thinks he's better than me is a danger.

Gratuitous cruelty. It means something is dangerous when it does not have to be.

Loneliness. It's dangerous.

Greed. (Not mine.)

Competition. (Against me.)

Lying to me. Dangerous

Hypocrisy. Very dangerous.

A smile that does not include the eyes. Danger sign.

Ass-kissing attempts at humor.

Ass-kissing compliments.

Ass-kissing of any kind. Can't trust it.

Legal language. Not clear. Anything not clear is dangerous.

People who use legal language.

I accept:

Me.

Importance.

Unrestricted mobility.

Altruism.

Power. Mine.

Gratitude. To me.

Family. (Mine.)

Greed. (Mine.)

Anything that made me feel safe and secure when I was young.

Openness of others.

Anything or anyone that can help me survive.

THREE

THE TOXICOLOGY OF TORT-“REFORM”

(How They Hijacked the Reptile)

Until now, the Reptile has been tort-“reform’s” tool. The forces of tort-“reform” used the Reptile to terrify more than a third of the public by fraudulently portraying plaintiff’s lawyers as a menace in the following ways:

1. Lawsuits undermine the quality and availability of health care for your family. (Threatens survival.)

2. Lawsuits ruin the local economy, threatening jobs and thus endangering your ability to feed and house yourself and your family. (Threatens survival.)

3. Lawsuits make everything more expensive, taking money you need to care for your family. (Threatens survival.)

4. Lawsuits suppress the development of new products that can keep you and your family safer. (Threatens survival.)

5. Lawsuits endanger religion. The tort-"reform” campaign has persuaded many well-meaning religious folks that plaintiff’s lawyers donate money to get liberal politicians elected, who in turn will appoint liberal judges, who in turn will make rulings to take God out of public schools, force evolution into the schools, and permit abortions and gay marriage. These religious folks are victims of a brilliantly conducted tort-“reform” fraud campaign that claims you threaten their ultimate survival.

All five survival dangers wake the Reptile. A third or more of almost every jury pool believes that a plaintiff’s victory endangers the community in some or all of those five ways. You cannot overcome that belief in (or out of) trial by explaining that the tort-“reform” claims are false. The road to bad verdicts is paved with attorneys who tried. Logic cannot budge a Reptile out of survival stance.

Tort-“reform’s” worst destruction has been in the courtroom, but it has also achieved massive judicial and legislative suppression of your work: caps, preemptions, hostile judges, etc. And as of this writing in 2009, it’s getting worse.

Because tort-“reform” has succeeded at the Reptilian level – in other words, because so many people firmly believe you are a menace to their survival – it is too late to respond with logic alone or even with emotion. Remember who’s running the show. Appeals to logic or emotion make the Reptile dig in her claws and fight you harder. The failure of the plaintiff’s bar to understand this has led to counter-productive attempts to battle

tort-“reform” by means of logical and emotional appeals. That’s like trying to placate a raging alligator by petting its nose.

By defrauding the Reptile into working for them, the insurance industry, chambers of commerce, and large corporations have achieved history’s most powerful jury-pool poisoning. When that poisoned third of the jurors learn they have been called to court for a civil case, their Reptiles are up and working, commandeering logic and emotions, and ready to kill you because you might be (“might” is the Reptile’s criminal burden of proof) a menace. The Reptile, when working for the defense, has no consideration but to protect herself from you. So she makes her juror think and feel he is being fair rejecting you. We have seen this in case after case since well before the turn of this century.

Fortunately, we now know how to get the Reptile to work for our side. And unlike her earlier defense work, the Reptile’s work for us is honest because it is based on what is real, not fraudulent. So it belongs in trial.

The Reptile prefers us for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, “Give danger a pass.”

Second, the courtroom is a safety arena. Trials were invented (by the safety-conscious ancient Greeks, not the burn-‘em-at-stake early English) for the purpose of making the public safer. So when we pursue safety, we are doing what the courtroom was invented and maintained for. That puts the honestly informed Reptile on our side. All we have to do is honestly inform her, as you will start to see on the next page.

FOUR

ANTIDOTE FOR TORT-"REFORM" POISON

(An Introduction to Danger)

The jury system's founders and the crafters of its laws intended it to be the community's safety tool. The goal was to enable the community to decide if it was in danger. If yes, the system provided a reliable fix.

So community safety is a legitimate juror concern. In trial, it relates directly to what the defendant did. Community safety is part of the public policy reason for fair compensation, which is simply a matter of jurors following the law. In sharp contrast, tort-"reform" considerations are legally unrelated to the case, and their purpose and effect have to do solely with jurors violating the law by drawing on improper considerations to under-compensate.

By default, Americans believe that the purpose of the criminal justice system is to keep them safer. They get angry when it does not. As jurors, they make the system serve that purpose as often as they can. That's why mediocre criminal prosecutors with weak violent-crime cases, despite a beyond-reasonable-doubt burden, usually win – while many of the best plaintiff's attorneys with their minuscule burden have trouble doing well even in strong cases. The difference is that the criminal defendant's alleged violent crime represents an obvious Reptilian survival threat. The Reptile doesn't give a hiss for "beyond reasonable doubt." When the goal is survival, "might have done it" is plenty

Unfortunately, jurors do not automatically know that safety is also the purpose of the civil justice system. So the Reptile does not automatically get involved. Decide against kindly old Dr. Jones? Or the nice lady who accidentally ran into your client from behind? A well-known company whose products we have used for generations? Some homeowner across town whose dog bit your client? A cop who hit a fugitive harder than necessary? Nope. None of these will push the fear buttons the way violent crime does. Jurors (i.e., Reptiles) do not automatically view such defendants as survival threats.

This is partly due to a psychological comfort-mechanism called "defensive bias." Defensive bias derives from the fact that the Reptile ignores survival threats that cannot be meliorated. When we see something bad happen to someone because of something we think we cannot change (a lethal hurricane and flood, or a mistaken diagnosis, or an invisibly dark object blocking the road at night), the Reptile does nothing. She has not survived for millions of years by wasting energy. Instead of expending her precious resources for no reason, she makes us believe we are not subject to that particular danger. One way she does this is by making us think we'd have done something different in that situation: "I'd have been careful enough to get out of New Orleans before the storm hit; I'd have asked for a second opinion; I'd have been looking carefully enough to see anything that big in my headlights." So we blame the victim: "He should have been more careful. Like I would have been!"

We are this way because evolution punishes the crime of wasting resources, and the sentence for that crime is extinction. A Reptile who wastes time, energy, worry, or adrenaline on dangers that cannot be meliorated is left with insufficient resources to survive. Between defensive bias and the forces of tort-"reform," you need a miracle to win.

But when the Reptile sees that a fair verdict will enhance safety, even by a little, the Reptile leaves defensive bias behind.

This gives us our primary goal in trial: To show the immediate danger of the kind of thing the defendant did – and how fair compensation can diminish that danger within the community. This is close to what violent-crime jurors think: they see the immediate danger of the kind of thing the defendant did – and they see that conviction can diminish that danger.

"Immediate" danger is important, because tort-"reform" dangers are mid-to-long term and the Reptile gives full priority to immediate and short–term. Even the mid-term tort-"reform" danger of plaintiff's attorneys making "too much" money gives way to the immediate dangers a fair verdict can diminish. After all, the Reptile is a Reptile, not a chess-player.

The Three Questions.
To gauge whether a defendant's act or omission was negligent – and whether it represents a community danger – jurors need answers to these three questions:

1. How likely was it that the act or omission would hurt someone?

2. How much harm could it have caused?

3. How much harm could it cause in other kinds of situations?

Answers to the three questions show jurors the width and depth of the act's potential to harm. That range defines the necessary required care. So:

1. How likely was it that the act or omission would hurt someone?
The only difference between freak accident and public menace is frequency. Freak accidents rarely awaken the Reptile because they cannot be prevented. But when something happens often, the Reptile gets concerned. By definition, an ordinarily careful or prudent person does not do anything that causes needless harm. And the more often something causes harm, the more likely it will again – so the more dangerous it is. That higher level of danger requires a higher level of care.

There are two ways to evaluate that likelihood: Theoretical and fact-based. And fact trumps theory. That is fundamental both to science and logic.

Theory: If you follow a vehicle too closely and have normal human reaction times, you may hit it.

Fact: "4,295 injury wrecks were caused last year by people following too closely."

If no one were ever hurt despite the reaction-time theory (drivers following too closely can hurt people), then the reaction-time theory would be wrong. Fact proves (or disproves) theory.

Around the year 1900, many "authorities" had a theory: Driving faster than 25 mph would suck the air out of your lungs and kill you. That theory soon gave way to the fact that once people started going faster than 25, none were hurt in that theoretical way. Today we consider that theory silly – not because we're qualified to evaluate the theory, but because the fact clearly trumps the theory: No one ever dies from going faster than 25.

This principle is often important in causation situations. A defense "expert" can theorize forever about why a low-dent or low-speed wreck means no injuries. But that theorizing collapses in the face of the simple fact of frequency: "Last year 4,295 people were thrown out of work for six months or more by wrecks with minor dents and wrecks below ten miles per hour."

The assertion that "no dents" means no harm is at best just theory, so you should have the right to show how fact contradicts it. (Frequency, obviously, is fact.)

Lacking information about frequency, no one can determine any act's real level of danger. This is why frequency is one of the primary measures by which all safety experts, safety commissions, and regulatory agencies determine how safe is safe enough. There is no rational justification for keeping this kind of information from jurors.

So when the defense says, "a 10-mph bump can't hurt anyone," frequency is as probative as you can get. The defense hates it because it raises the required level of care, demonstrates causation, and shows the widespread community danger of this kind of act. So expect the defense to fight the introduction of frequency facts. You may think it can't come in, but if you are clear that it is to show the act's level of danger, it should.

Related to frequency: How hard is it for people to protect themselves from this kind of danger? For example, to what extent did the act create a hidden danger? Or to what extent are helpless people – children, the elderly, etc. – potential victims? What proportion of the population could have reacted quickly enough to save themselves? And how helpless and endangered are we when we are, say, stopped at a light and someone coming from behind is not looking?

2. How much harm could it have caused?

By default, jurors gauge an act's danger (and thus the level of care that was required) mainly by the harm it caused in this specific case. Many lawyers make the same error. The valid measure is the maximum harm the act could have caused. Someone driving 140 mph who only broke someone's toe is outrageously dangerous, far less "prudent" than ordinary care requires. The basis is never the harm actually caused; it is always the potential maximum. After all, the defendant does not know in advance that he'll just do a little bit of harm. So he has to decide how careful to be based on maximum foreseeable harm.

3. How much harm could it cause in other kinds of situations?
The truck driver chose not to get enough sleep and so caused a wreck? Not getting enough sleep is dangerous in a wide range of activities. Your expert should explain the danger of lack of sleep by analogy to other situations. For example, how would choosing not to get enough sleep be dangerous for, say, school crossing guards? Or surgeons? Or a school teacher's ability to protect the children in her class in an emergency?

Case: A doctor damaged a baby's brain by ignoring fetal heart monitor warnings. This means he violated differential diagnosis rules. So show how that kind of violation can cause harm in various other medical situations: an E.R. doctor examining someone with chest pains, a pediatrician examining a child with a sore neck, etc. When a skier or someone using a product or a guy bowling is hurt by a negligent act, show other circumstances in which the defendant's kind of violation is dangerous. Premises negligence at a movie theater is the same kind of act that can endanger kids at an elementary school and patients in a hospital.

Your experts can say, "Allowing slippery stairs in a movie theater is like allowing slippery stairs in a school or hospital; no matter how careful people are, some are going to fall and get badly hurt." Or, "Ignoring the rules of a Differential Diagnosis will kill patients whether they are in the labor and delivery room as in this case, or in an emergency room, or in a children's clinic, or in any other medical setting." Then have the expert give examples of how it can hurt or kill in each setting. This both explains the nature of the negligence in your case and shows the width and depth of the danger of that kind of negligence.

Less dangerous in other contexts: When an act is less dangerous in contexts that jurors may be familiar with, show what makes it more dangerous in the situation of this case. For example, following three car lengths behind is safe for a car to do – but potentially deadly when an 18-wheeler does it. For jurors to understand the difference, you must show them all the ways in which trucks are more dangerous than cars, and how each of those ways makes it more dangerous for the truck to be only three lengths behind (can't stop as quickly, can't maneuver as well, can cause far more dangerous wrecks, can crush cars beneath, etc.) Otherwise, jurors who know little about trucks could conclude that following three lengths behind is safe for trucks as well as cars. That results in an improper negligence decision.

Tentacles of Danger.
Answers to the three preceding questions show the perilousness of what the defendant did – information the jurors need in order to decide whether there was negligence. The answers are Reptilian because they show that the tentacles of danger extend throughout the community.

Example: Seattle attorney and Inner-Circle member Paul Luvera and his partner Joel Cunningham sued the manufacturer of a faulty device used in open-heart surgery. This was not the kind of thing to awaken most Reptiles, because most people don't think they're ever going to need open-heart surgery.

It was a particularly difficult case. In its more than million uses, the device had never hurt anyone. That alone lets the Reptile sleep, because neither Reptiles (nor people) worry about being the victim of a one-in-a-million occurrence, especially when there seems to be no way to prevent it. Many of us have better odds of being hit by lightning, but we don't walk around cowering.

Worse: The venue was extremely conservative and insular, and the client was a Sikh Indian, replete with turban and turbaned sons – wonderful and decent folks, but the kind that such communities think of as terrorists. ("Turban = terrorist.") Even without the terrorist fear, the Reptile does not worry much about dangers to people she perceives as very different. In fact, in Reptilian terms, the more harm that happens to people unlike herself, the better.

As if all that were not enough, in the middle of trial the U.S. Supreme Court decided that manufacturers of some medical devices are exempt from lawsuits. The ruling did not apply to this case, but it was headline news for several days. Jurors would have known about it, potentially pushing them even farther from finding this case justified.

Mr. Luvera had only one thing going for him (other, of course, than being Mr. Luvera): A decade earlier, some doctor in Japan had sent the manufacturer a note that the device had overheated – but on a table, not in a patient. Focus group jurors were not impressed. "Oh for God's sake," they said, as they often do when their Reptiles are sleeping, "Nothing made by human beings can be perfect. To err is human! One in a million! And just on a table! Nothing can be safer than one in a million. The plaintiffs are asking the impossible. This is ridiculous!"

Why? Because they saw no relevance in this case to their own lives. They felt no personal connection – or at best only a very indirect and unlikely one – between their own safety and what the manufacturer had done. Insofar as they saw any connection, they saw no way of doing anything about it. How can a verdict make anything safer than one-in-a-million? They had no reason to identify with the plaintiff or his family, and no way to do so even if they wanted to. So the only danger the jurors saw to

themselves was the tort-"reform" harm of a big plaintiff's verdict. "You know who's going to be paying for this, don't you?"

Mr. Luvera handled this in large part by showing that the kind of thing the defendant had done was an immediate threat to everyone in the community – thus shoving tort-“reform” considerations not only to a back burner but off the back of the stove. He showed that this case was not about a unique event or an accident, and that it was not just about his client. He showed that it was a ready and waiting menace to everyone in the community, including those who think they'll never need heart surgery.

How?

With elegant simplicity. His expert explained that anytime anyone goes into a clinic or hospital and looks at all the medical equipment – on carts, bolted to walls, on tables, in cabinets – devices that go in you, around you, over you, up you, or the kind you go in, around, over, or up – every one of those devices, even those little hypodermic needles for blood tests – if the manufacturer had violated the patient-safety rule that was violated in this case, that device could kill the patient.

As of that point, the case was no longer about some rare surgery or a terrorist in a turban or a medical device that had never hurt a patient. Now it was about a lethal violation directly relevant to the jurors and their kids. Now, by means of a compensation verdict, the jury could show that when any company commits this kind of violation, the consequences will be payment of full compensation. Now, jurors – despite their xenophobia – could fully identify with the plaintiff, because people of every different kind, even those at war with each other, quickly get together when endangered by the same outside force. Mr. Luvera made the jurors and his client into allies. And now, jurors could see that the case represented lethal threats that are more immediate than the tort-"reform" mid-to-long-term dangers.

Result? A record compensation verdict and substantial punitive damages.

As you will see, this technique is just one of many Reptilian methods that work not only in trial, but in mediation and even witness preparation.

And yes, it is applicable to stipulated cases (see Chapter Twenty).

Again, here are the three questions so you don’t lose the thread:

1. How likely was it that the act or omission would hurt someone?

2. How much harm could it have caused?

3. How much harm could it cause in other kinds of situations?

Jurors don't come in knowing the answers. For example, they rarely know the full danger created by a physician's failure to do a proper differential diagnosis. They don't know the danger of a driver glancing away from the road long enough to hit the stopped car in front at just 15 mph.

Once they know the answers and understand the public menace such practices create, and that a proper verdict can diminish the menace, the Reptile is in your employ. This is true even with a tort-"reformed" Reptile, because the dangers you've shown are more immediate than the posited dangers of tort-"reform."

Possible to Meliorate.
Once you have established the community danger of the defendant's act or omission, you are most of the way to waking up the Reptile. But remember: The Reptile does not fight dangers unless you also show how the dangers can be meliorated. You must convey to jurors that they are in charge of the level of required safety in this community, and that by means of their verdict they have great power – even in small cases – to affect it. "You are the guardians of the community." Justice enables them to protect.

It's not that jurors will think, "Gee, fair compensation will instantly make highways safe!" But to the Reptile, a small increment of melioration is better than none, and much better than allowing things to get worse. After all, tort-"reformed" jurors believe that a verdict against you, even in a small case, will help them. The only difference now is that they are going to help themselves by helping your client get justice, instead of helping the defense get an unjust pass.

Depending on venue, you can argue to a greater or lesser extent that a proper (fair, just, etc.) verdict will prevent, lessen, or distance the danger. In many venues you can argue in closing the public policy underlying compensation and negligence laws – which includes public safety. But even if you cannot, your answers to the three questions will lead the Reptile there on her own.

Does enlisting the Reptile mean appealing to jurors' emotions? No. Our method and purpose is to get jurors to decide on the entirely logical basis of what is just and safe, not what is emotionally moving. Jurors are often emotionally moved, and we always want jurors to "feel" strongly that we should win. But the Reptile gets jurors to that point not on the basis of sentiment, but what is safe.

We are often asked, "How does all this negligence stuff relate to causation and damages?" It relates in the most important way: It gives jurors personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict your way can make them safer. This does not mean that jurors will decide dishonestly or unjustly. It simply means they will no longer be led by fraudulent tort-"reform" terrors. Instead, jurors will focus on the real dangers that lie at the heart of your case and extend throughout the community.

Again, remember – memorize! – the major axiom: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

FIVE

WHAT DOES THE REPTILE MAKE US WANT?

Everything about us evolved as a tool for our genes' survival – everything from brain to toenail, opposable thumb to goose bumps, terror to sense of humor, anger to gentleness, every instinct, and even the appendix, which still serves a survival purpose today. Anything that did not at some point increase the chances of survival did not itself survive.

Pleasure. One of our most powerful survival traits is the pleasure we take in certain things. Sexual pleasure, for example, did not evolve to amuse us. Sexual pleasure is powerful enough to impel sex, an absolute necessity of gene survival. Even in our society – the least "primitive" in history – sexual drive shapes and motivates what cognitively seems an inordinate portion of our culture. In vain do the forces of purity and abstinence resist. The Reptile's command is "Just do it!" And the reward is an extra-large dose of Dopamine.

Okay, in trial our sex-drive trait is not much use. But some pleasure-motivated survival characteristics are of great use. Judges appeal to one of them when they tell jurors to take satisfaction (a kind of pleasure) in fulfilling their jury duty. That's a mild Reptilian appeal: your ancestors who fulfilled their duty were more likely to have survived, because groups (tribes) survive better when members fulfill their group functions (i.e., their duty). And in times of duress, the group protects members that fulfill their duties, and not the loafers who don't.

But duty is a relatively weak Reptilian drive, so of only limited use in trial. So let's look at another pleasure-motivated (i.e., Dopamined) evolved trait.

Altruism. When a juror can feel altruistic by means of a fair verdict, she will be more impelled to provide one. Brain scans show that when a person does something altruistic, the Reptile Dopamines us into feeling pleasure. Altruism is a survival trait stronger than duty. Societies are cooperative ventures, and altruism is the ultimate form of cooperation. So the altruistic individual makes his tribe – and thus himself – more likely to survive. And altruists are unlikely to harm other people in the community. So during periods of danger, society tends to protect its altruistic members because they are less expendable as well as safer than others to have around. So altruism is a powerful "select-in" trait. Not as powerful as sex, but powerful enough to drive behavior.

Why would this help in trial? Because altruism happens only in the face of a want or need. No one altruistically gives a multi-millionaire money. The Reptile puts money in a verdict for someone else (i.e., makes a juror Dopaminically altruistic) when the money can help the Reptile protect herself by making the community safer.

So it's never enough to tell a juror that your client "deserves" money. Who cares? You need to show that the "deserved" money will do some good for your client. This lets the Reptile make the juror feel the pleasure of altruism in providing a fair verdict – thereby protecting the Reptile.

CAVEAT: Never explicitly appeal to altruism. Just show how the money will help the client or society. “Full compensation will tell companies that if they come here and needlessly endanger our community, they will be made to pay in full measure.” Or, “It’s up to you to decide how badly a company can violate safety rules before this community will rise up and make them meet their responsibility.”

Now here's a Reptilian drive motivated by the pleasure of much more Dopamine, so it’s much stronger than altruism:

Importance. Virtually everyone derives deep pleasure from the pursuit and attainment of importance. Importance helps Reptilian survival, because in rough times, the group protects its important members and sacrifices the less important. Importance even trumps altruism – by a lot. So the ancients sacrificed lovely but easily replaceable and therefore unimportant young girls, instead of any of the very few irreplaceable – and therefore important – proven generals. This is Reptilian economics.

The Reptile gives people pleasure in bragging rights. So you should give jurors something to brag about: let them see that the verdict you seek will make them important, while a defense verdict won't. (E.g., “Either this case will be long-remembered, or forgotten by the time we all leave the courthouse.”) A juror who sees that a fair verdict on your behalf will make him important, even briefly, within his neighborhood, town, tribe, tavern, workplace, or nation, and who understands there's no importance in siding with the defendant or in providing a low verdict, has a Reptile-motivated reason to side with you.

Even beyond bragging rights, the simple knowledge of helping to make the community safer carries a sense of importance. As this book goes on, you will see a number of ways to let jurors see they have this opportunity.

Importance even makes it more likely that a person will find mates.

Tort-“reform” has made a third of the public feel – long before trial – that deciding against you will make them important by protecting the community against you. For years, that dark factor has motivated unjust outcomes and undermined the ability of judges to provide fair trials. You reverse this by saying something like, "You have in your hands the power to tell people [companies, doctors, drivers, whatever] that they can't violate public-safety rules around here without people like you saying, 'Enough! Pay full compensation'. That's what makes your work important.”

The more important a juror feels in deciding your way, the more adamantly he will do so.

In applying the law from Judge Smith, you act on behalf of everyone in Randolph County. Some say a jury is the community's conscience, or the community's guardian. This is because you speak for the community. So the closer you come to providing full compensation, the more important your voice will be – by making it clear that Randolph County won't let companies get away with violating safety rules and hurting people.

Even without a punitives issue, you are usually within bounds in pointing out the effects of proper compensation if you do not use those effects as a measure of what the compensation should be.

A jury represents the community. The jury's job is to apply the law to the facts – on behalf of the community. So as you do that, consider the effect your decision has on the community.

A little research will show you how explicit you can be. (See Appendix B.)

Justice. Justice is not a Reptilian drive. It is, rather, an excuse – a feel-good rationale – for people to protect themselves and their families. When a juror's reptile thinks you're more a danger to her than is the defendant, the Reptile makes the juror see the evidence in defendant's best light.

Reverse this. Show the Reptile that a good verdict for you facilitates her survival. Cases are not won by logic, because in every trial, both sides have a logical path to winning. Otherwise it's a directed verdict, or should be. So you need to get the Reptile tell the logical part of the juror's brain to act on your behalf. To get the Reptile to do that, you have to offer safety.

In ancient times when the tribe believed that burning a virgin to death pleased the gods, people wanted to make themselves logically think it would be good for her. "Don't worry, Crthanxeia dear, the gods will take you to their bosom!" Don't laugh; we do the same thing today. No matter what mental gymnastics it takes, we almost always make ourselves believe our survival measures are "just." Both sides in almost every war do that. "God's on our side!" or "Those poor devils will be happier once we force them into our way of life." Both sides think that way.

Fortunately, in trial only our side offers safety by means of justice. Few civil defense wins can make a community safer.

What about protecting wrongfully accused defendants? Isn't that a good thing? Absolutely. But plaintiff's lawyers can't afford the time or money to prosecute a defendant who did nothing wrong. You don't get paid win or lose, and you gamble your own resources.

For years, tort-"reformed" poison has kept many jurors from making decisions based on the case. Our enlistment of the Reptile has the opposite effect. It unites jurors – including the poisoned jurors – under the banner of "legitimate justice = legitimate

protection." And it relies not on outside-of-trial factors, as does tort-"reform," but factors material to the case.

Logic Revisited.
Today's neuroscience shows that the logical part of the brain is the servant, not the master. That's why you can never trust what a juror or anyone else tells you about why they made a particular decision. They only think they know. It's the primitive part of the brain that controls decision-making. It's the Reptile, even more primitive than the emotional part. It certainly is not this Johnny-come-lately, whippersnapper "logical" part – servant to the Reptile.

Some of America's smartest attorneys are hampered by their touching faith in the power of logic. But if my Reptile feels safer making you lose, then dammit, you lose.

Is this blasphemy against the Creator who gave us logical thinking? No. S/he also gave us the greater gift of survival, and entrusted it to the most trustworthy part of the brain: the Reptile.

Emotion, too, works for the Reptile. The emotional part of the brain makes you want to decide the way the Reptile directs. In fact, as the more primitive part of the brain, emotion has far more to do with the decision-making process than does logic.

Let's look at how this works.

The "Selfish Jury."
We told groups of research participants case facts about a man whose widow claimed was killed by medical negligence. We told the participants that another group would decide the issues for the parties, but that this group was here solely to render a verdict which would help the community. We told them to take into account only what would be good and bad for the community. Here's what they told us:

<u>BAD EFFECTS OF GIVING MONEY</u>:

It would make doctors leave the state.

It would increase insurance rates.

It would make doctors more indecisive.

It would encourage more lawsuits.

It would make doctors run unnecessary tests.

These bad effects exactly echoed tort-"reform."

GOOD EFFECTS OF GIVING MONEY:

It would tell other doctors to be more careful.

It would make the community safer (and feel safer) because doctors are accountable.

It would put the public on guard so they'll ask their doctors more questions.

It would get rid of bad doctors.

It would make doctors set better, clearer standards.

It would make for better care in the future.

It would make doctors run all the necessary tests whether or not they want to.

We then asked the participants to use both lists – and nothing else – as their basis for a "selfish" verdict. In other words, we wanted to see which were their greater concerns.

On their own, the participants reached the unanimous conclusion that the bad effects (the tort-"reform" issues) were, as they said, "long-term effects that might or might not happen." They compared this to the good effects: what were the near-term, near-certain dangers that a plaintiff's verdict would reduce?

So this mixed group – with more than the usual number of tort-"reformers" – unanimously dismissed all tort-"reform" issues and decided the community would be better off – safer – with a plaintiff's verdict.

No fuzzy psychology in this. It's brain chemistry, start to finish. We do have some free will as to how to protect our genes, but we have virtually no free will as to whether we will. This is for the same reason that you can't suffocate yourself by holding your breath. It's controlled entirely by the same part of the brain; the R-Complex – the Reptile – runs the survival show. The regulation of breathing – and every other kind of survival imperative including full control of survival-related decisions – is housed in the Reptilian brain.

So, for example, it is all but impossible to logic your way into killing your own child. Almost the only way it happens is when the Reptilian control of the brain has gone seriously awry.

Our "selfish" research jurors showed us what real jurors do in trial – we have all seen it happen – when jurors feel they are protecting their communities, their families, and themselves. It happens rarely in civil cases, but frequently in violent crime cases. (See p. _broken arm____) Yet when you lead the community's civil jurors to see 1) a danger to themselves that 2) a fair verdict can diminish, you have successfully enlisted the

Reptile. When jurors do not see both of these things, many jurors default to finding ways to decide against you in order to protect themselves from the myths of tort-"reform."

Stress.
Our research partner Gary Johnson points out that when faced with the prospect of danger, the Reptile makes us feel stress. The verdict goes our way when it can send the jurors home with less stress than a defense verdict. So when you provide the Reptile a reason for you to win, she paves the way for you to win by diminishing the prospect of stress for a plaintiff's win. A juror worried about the negative consequences of a jury verdict is not going to side with you.

In other words, the goal is to let the Reptile make the decision. Anything else creates stress.

CAVEAT: The Reptile will not help if your case is not legitimate. The vast majority of jurors want to feel they are doing the right thing. You have to give them a logic-based way to do that, which means there must be a legitimately logical way for jurors to see the case your way.

In trial, you will start your community-safety campaign as early as jury selection. (See Chapter Ten.) You will awaken the Reptile by showing reasons for her to protect herself, and then giving her the legal and logical means to do it.

SIX

SAFETY RULES AND THE REPTILE

CAVEAT MAJEUR. For complete guidance to "The Rules," see the master work: Malone and Friedman's Rules of the Road. Master its techniques before taking another case. You need it all, not just the fragment below, which we have borrowed and heavily adapted for the Reptile.

ALGEBRA LESSON:

SAFETY RULE + 0 = 0

SAFETY RULE + DANGER = REPTILE

Never separate a rule from the danger it was designed to prevent. Safety rules are powerful trial tools. But the only kind of safety-rule violation the Reptile cares about is the kind that can endanger her. The greater the danger, the more the Reptile cares.

Some safety-rule violations are too specific to endanger the juror's Reptile. "A coal-mining company is not allowed to turn off the lights while workers are in the mine" applies only to the Reptiles of miners. But it becomes useful when positioned as a special case of a more general rule, such as, "A company must not needlessly endanger its employees" or "A company is never allowed to remove a necessary safety measure." That connects it to everyone with a job.

Why Rules?
When you were very young – before your cognitive brain was much developed – you saw that some rules protect you. But not all. "Don't snitch your kid sister's food" is nonsense to your Reptile. The Reptile wants your kid sister's food. But "No one is allowed to steal your food" is a Reptilian survival rule. That's why when you were a kid, if you stole a french fry from another kid's plate, his "immature" rage was probably out of proportion to one french fry.

Like Peter Pan, this "immature" human characteristic won't grow up, though it may learn to express itself differently. As you get older, your Reptile gets better at making you protect yourself against anyone (except maybe your own kids) who steals your food or breaks any other kind of safety rule your Reptile relies on.

Your Reptile does not care when you break a rule that protects others. But when someone else breaks a safety rule that protects you, your Reptile takes over – usually by infuriating you at the rule-breaker, trying to impel you to do something about it. This

is why you'll curse at a passing speeder (80 mph) on the highway, even when you're speeding at 70 in that 55 mph zone.

For Reptilian purposes, a safety rule has six characteristics:

1. It must prevent danger.

2. It must protect people in a wide variety of situations, not just someone who was in your client's position. If a rule is too specific to accomplish that, then it must be a special case of a more general rule that does. You'll see below how to accomplish that.

3. It must be in clear English. Reptiles recoil from legalese and technical jargon. Unclear = unsafe.

4. It must explicitly state what a person [or whatever] must or must not do. "Speeding is dangerous" merely implies a rule. "Drivers must drive at a safe speed" is a rule.

5. The rule must be practical and easy for someone in the defendant's position to have followed. E.g., "It's easy for a physician to follow the steps of a differential diagnosis."

6. The rule must be one the Defendant has to agree with – or reveal himself as stupid, careless, or dishonest for disagreeing with. "You agree that truck drivers are not allowed to needlessly endanger the public?" The defendant can't answer, "We can if we want." He'd instantly be a confessed menace to the Reptile. (NB: The defendant need not admit he violated the rule; you just need him to agree that it's a rule.)

The book Rules of the Road will teach you how to find rules in a wide variety of places: industry standards, law, standards of care, professional ethics, governmental and other regulations, company policy, common sense, religious scripture (see Chapter Fourteen), etc.

Accident Versus Rule.
Since no one can prevent inadvertence (mistakes, error, accidents, misjudgments), the Reptile ignores it. So never refer to Defendant conduct as accidental, a mistake, a misjudgment, or inadvertent. Be strict about this with yourself and your witnesses.

The opposite of inadvertence is choosing to violate a safety rule. The car crash might have been "accidental," but it happened because someone chose to violate a safety rule – such as "A driver has to watch where he's going and see what's there to be seen." Unlike inadvertence, a safety-rule violation is something the Reptile can prevent people from doing in the future.

Jurors who won't allow much money for medical mistake (a kind of inadvertence) will want to yank the license of a doctor who violated patient-safety rules – and sometimes, as our research astonishingly showed, even put the doctor in jail!

A defendant might say, “No, I didn’t break any rule – I just wasn’t paying as much attention as I should have – it was a momentary lapse.” But it’s still a rule violation: “A driver has to pay attention at all times. If she allows her attention to wander, and as a result she hurts someone, she’s responsible for the harm.” Attention cannot decide to wander away unless you let it. The individual is in charge: If you want to pay attention you can – unless, say, you are on medications or very tired, which are other kinds of rule violations.

So remember: Every wrongful defendant act derives from a choice to violate a safety rule.

Reptiles ignore: “The physician mistakenly diagnosed infection instead of cancer.” Reptiles get involved when they hear, “The physician violated the patient-safety rule requiring him to rule out cancer.”

Loser: “The trucker missed the light.” Winner: “The trucker violated the public-safety rule to watch where he was going.”

How Do You Deploy Each Rule?

1. In paper and oral discovery, and then in trial, get the other side to agree with each rule, as explained below.

2. Show how the rule decides a verdict issue.

3. Show that violating the rule is related to violations that endanger everyone, not just someone in your client’s situation.

4. Show that the more dangerous a violation can be, the more careful the defendant had to be to follow the rule. To do this, go beyond the level of harm in this case. The defendant only broke your client’s arm, but the same violation could have killed someone. That’s the measure by which jurors must determine if the defendant acted carefully enough.

   Even when there’s no harm, ordinary care remains what a “prudent” person would do in the face of the worst dangers of the violation – i.e., she would follow the safety rule. (See p. ____ –April, search “maximum harm”.)

5. Show that the defendant, by trying to escape responsibility for choosing to violate a public-safety rule, is further endangering the community, and showing others that they too can get away with it.

The "Umbrella Rule."
Every case needs an umbrella rule. The umbrella rule is the widest general rule the defendant violated – wide enough to encompass every juror's Reptile. Here's the umbrella rule for almost every plaintiff's – even commercial – case:

A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients].

If you omit "needlessly," the defendant can escape, because there are almost always unavoidable risks: risk of surgery, act of God, unavoidable event, etc. The defendant is at fault only for creating or allowing danger beyond that.

Broaden. In shaping the rule, go beyond your specific kind of defendant. Instead of "A lawyer is never allowed to needlessly endanger a client's interests," go wider: "Any professional hired to give advice – such as a doctor, a lawyer, or an accounting firm – is never allowed to needlessly endanger whoever hired him." This broadened version touches more people.

CROSS Q: Mr. Accountant, a professional, such as a doctor, or a lawyer, or an accountant, is not allowed to needlessly endanger the person who hired him, correct?

A: I can only talk about accountants.

But jurors now know it applies to everyone.

Q: And you can talk about accountants with authority.

A: Yes.

A: So an accountant is not allowed to needlessly endanger a client's interests.

A: (Waffle waffle waffle, but soon): Correct.

Q: Tell us why not.

Med mal:

Q: Dr. Defendant [or Dr. IME], a professional, such as a doctor, or a lawyer, or an accountant, is not allowed to needlessly endanger the person who hired him, right?

A: I can only talk about doctors.

Note how even that tiny waffle helps you: The jury knows that no one is allowed to needlessly endanger anyone, and expects the witness knows that. So the answer is disingenuous.

Q: So a doctor is allowed to needlessly endanger patients?

A: [If he's stupid he will waffle. Otherwise:] No.

Q: In any circumstances?

A: (Waffle waffle waffle, but soon): No.

Q: Why not?

Or in a taxi wreck:

Q: A company is not allowed to needlessly endanger the public?

A: I have a taxi company; I can't answer for other kinds.

Q: Okay, then is a taxi company allowed to needlessly endanger the public?

Etc. And eventually:

Q: How often does your taxi company expose the public to needless danger?

A defense objection will imply there's something to hide.

Case-Specific Rules (Under the Umbrella).
Once you have established the umbrella rule (no needless danger), go on to case-specific rules. "A car maker must make seat-belts that hold people in place." (Because otherwise the car maker would be needlessly endangering the public.)

"A surgeon must see and identify what he's cutting before he cuts." (Or he's needlessly endangering patients.)

"A commercial-truck driver must have his brakes inspected every 24 hours." (Otherwise the driver is needlessly endangering the public.)

So the case-specific safety rule is a sub-set of the umbrella rule that protects us all, not just someone in the position your client was in.

Spreading the tentacles of danger.
Case: Obstetrician violates differential diagnosis requirement to rule out or treat a possible dangerous cause of non-reassuring fetal heart monitor reading during labor. Juror #3 is a 65-year-old male with no children, wants none, contemplates having none, knows no one planning to have any, hates babies, thinks humanity should skip two generations of babies. He might feel a little sorry for the grieving parents, but a little

sorrow does not win cases. He has no way to identify with the danger of the obstetrician's violation. So his (Reptile's) verdict can be controlled by tort-"reform"-induced worries about the harm big verdicts do to him and his community.

Have your expert explain the dangers of the obstetrician's violation by analogies to other differential diagnosis situations. "So for example, if a 65-year-old man walks into an emergency room with chest pains, or if a doctor sees a lump in someone's breast, or if a doctor sees a high PSA on a blood test...."

Analogizing to familiar situations gets past the narrow circumstance of this case, clarifies the rule, and shows how dangerous the violation is to everyone in the community, not just some stranger's baby. During discovery, get the defense to agree with your expert's analogies, and agree that violation is dangerous in those other situations. And make the defense explain why those violations are dangerous in those analogous situations.

That renders the general danger uncontested. Hello, Reptile.

Your own expert can say, "Doctors [or whoever] who ignore this particular rule in any branch of medicine [or whatever] play Russian Roulette with their patients' [or whoever's] lives." So you can say it in opening. And what is the defense going to say when you ask, for example, "Doctor Defendant, would you agree that a doctor [or whoever] who violates the safety rules of Differential Diagnosis is playing Russian Roulette with his patients' lives?"

Ask the defendant who else he has violated those rules with. "Did you provide John the same level of care as your other patients?" (Ask this kind of question in all cases, not just medical. "Did you use the same level of care in John's apartment as in your other rented houses?" "Do you drive as carefully at other times as you were driving when you hit John?") If the defendant says yes, a juror who decides the defendant was negligent in this case now sees him as a general danger. And if the defendant says no, he's admitting he needlessly endangered John. If he answers, "I don't know," you can get both benefits.

So the fetal heart monitor case is no longer merely about babies being born. It's now about everyone who ever has to see a doctor or send their kids to one. Broadening further, it is about anyone having to trust that any hired professional will follow the safety rules. This helps jurors personally understand the importance of full compensation, as opposed to a verdict diminished by a dishonest tort-"reform" movement that has undermined the honor and authority of the civil justice system, including its judges.

Link to the Reptile.
Here's how to link your most case-specific rules back to the umbrella rule:

Case: Your client skied into a rock wall at the edge of the trail. Specific rule: "A ski resort must not allow dangerous obstacles at the edge of a trail." Juror #6's reptile doesn't care because juror #6 does not ski. Non-skiing jurors will mutter "assumed risk" or "two broken legs aren't bad, he can still use a computer," etc. So either you lose the case or win and get little money.

Now's the time for the generalized umbrella rule: "No public facility – such as a sports facility, or a school or library or bank, or a shopping mall – is allowed to needlessly endanger the public." That's Reptilian to everyone. Then work step-by-step from your general umbrella rule down to the specific rules: "Ski resort must not allow dangerous obstacles at trail's edge."

So:

1. [Very general = Reptilian]: "No public facility – such as a sports facility, or a school or library or bank, or a shopping mall – is allowed to needlessly endanger the public."

Now move step-by-step towards the specific:

2. A public facility must remove any needless dangers.

3. If the danger can't be removed, the facility must warn. (Not warning creates a needless danger.)

4. When a danger cannot be removed, even with a warning the public facility must, when possible, make the danger visible enough for people to see it in time to avoid it.

5. A ski facility must follow the same rules as every other public facility.

6. So a ski facility is never allowed to endanger the public that uses the facility.

7. So to prevent needless danger, a ski facility must not allow anything dangerous at trail's edge.

8. If there is a needless danger at trail's edge, the ski facility must remove it or move the trail.

9. Until that is done, the ski facility must warn skiers in time to avoid it.

Etc.

The step-down process is always the same, such as, "No one is allowed to needlessly endanger the public" down to "Truck drivers must be on duty no more than 14 hours at a stretch."

With multiple specific violations (such as "no test" and "no medication"), you'll have multiple parallel links. They make for great, Reptile-alerting visual exhibits.

Backwards.
In closing, work backwards from most specific (few if any Reptiles) to most general (all Reptiles).

Here's a medical "backwards" example:

1. To prevent unnecessary danger, when an obstetrician sees there's a possible urgent danger that a baby might not be getting enough oxygen, the doctor is required to get the baby out before any lack of oxygen could possibly harm her.

2. That's because the obstetrician is never allowed to ignore signs of a lack of any possible urgent danger.

3. That's because every kind of doctor is required to rule out or treat a possible urgent danger soon enough to keep it from harming the patient.

4. That's because every kind of doctor is required to follow the differential diagnosis rules.

5. That's because violating the differential diagnosis rules needlessly endangers the patient, and ("Umbrella Rule"): No physician of any kind is allowed to needlessly endanger any patient.

The Reptile and the Standard of Care.
Read this even if you don't do standard-of-care cases. You'll see why.

The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows – demands! – only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, no matter how many "experts" say it's okay, always violates the legal standard of care. Here's how:

1. A doctor [or whatever] is never allowed to needlessly endanger a patient [or whoever]. In other words, a "prudent" [or careful, depending on the instruction] doctor does not needlessly endanger a patient.

2. When there's more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to select a way that carries more danger than the other. That would allow unnecessary danger, which doctors are not allowed to do.

3. So a "prudent" doctor must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger.

The law demands no less, because no prudent person or company chooses to expose anyone to unnecessary danger. So second-safest is always negligent. In medicine, the medical risk-benefit requirement formally prohibits doctors from choosing a second-safest available choice.

This applies to any situation in which there are multiple ways to accomplish the same level of benefit.

Outside of medicine, the law still prohibits the second safest choice: “Ordinary care” does not mean average care; it means that which a prudent person would do in the same situation. Anyone who needlessly endangers is not prudent. So standard of care as well as negligence laws in general require the safest available choice. No second-safest.

The standard of care is not what other doctors do. It is – exclusively – what prudent doctors do. It makes no difference if the defendant met other standards of care. In medicine, every choice must meet the risk/benefit requirement: "No unnecessary risk," meaning “safest available choice.” That’s all the Reptile demands from anyone. And she really demands it, once you show her that the violation can hurt her and that she can do something to prevent it from happening to her.

The defense has to admit (or be a danger to the Reptile) that prudent doctors (or whatever) don't expose anyone to unnecessary danger.

This can be worded in many ways. Examples:

There is no such thing as a standard of care that allows a doctor to needlessly endanger his patients.

To achieve a desired benefit, a doctor must expose a patient to no more danger than necessary.

If there's a safer way available, the doctor must choose it.

All else being equal, the doctor must select the available choice that puts the patient in the least danger.

They all come down to this:

The only allowable choice is the safest available choice.

From jury voir dire through closing, show how this Reptilian rule applies not just to this specific case (obstetric or whatever), but to every kind of medicine.

If you are lucky, the defense will be stupid enough to claim that doctors are allowed to make needlessly dangerous choices. That will horrify the Reptile. No prudent doctor allows unnecessary danger. No prudent taxi-driver. No prudent anybody or anything.

Sample for defendant and his "experts" (deposition and trial):

Q: Physicians are not allowed to needlessly endanger patients?

A: ["blah," but sooner or later:] Correct.

Q: That's standard of care?

A: [blah but eventually]: Yes.

Q: When diagnosing or treating, do doctors make choices?

A: Yes.

Q: Often, several available choices can achieve the same benefit?

A: Yes.

Q: Sometimes some of those are more dangerous than others?

A: Yes.

Q: So you have to avoid selecting one of those more dangerous ones.

A: Correct.

Q: Because that's what a prudent doctor would do.

A: [Blahblahandblah – objection! shaddup! Blah and:] Yes.

Q: Because when the benefit is the same, the extra danger is not allowed.

A: Yes.

Q: The standard of care does not allow extra danger unless it might work better or increase the odds of success.

A: Yes.

Q: So needless extra danger violates the standard of care?

A: [yakketyyakomigodyakblah but finally:] Yes.

Q: And there's no such thing as a standard of care that allows you to needlessly endanger a patient.

Obviously, real cross-exam is not so neat and clean. But if you practice this in advance with a friend who can wriggle out of anything, you will be able to render the real witness unable to escape without threatening the Reptile.

Along the way, make the defendant and his opinion witnesses explain how risk-benefit analysis works – and its purpose: to prevent needless risk. In medical cases, the defense cannot attack risk-benefit analysis without countenancing needless endangerment. To the Reptile: "Case closed!"

Without Standard of Care.
The method and result are similar: "A taxi driver must not needlessly endanger the public." The driver and his company have to agree. The defense attorney has to agree. The judge has to agree. The defendant's mother has to agree. A prudent person does not needlessly endanger others. If you needlessly endanger, you are negligent.

So the law and the Reptile are 100% in harmony.

Level of danger defines required level of care.
Another negligence characteristic the Reptile loves:

The more dangerous something is, the more careful a _____ [e.g. driver, doctor, products manufacturer] must be.

When you don't explain this, jurors think 18-wheeler drivers need be no more careful than car drivers. But trucks are immeasurably more dangerous, so truck drivers must be immeasurably more careful. Or they are not prudent, and therefore they are negligent.

So to decide the necessary level of required care, jurors need to know all the dangers of trucks (can't stop or maneuver as well as a car, cause more harm when they hit someone, they go off track when turning, etc.). Hello, Reptile!

When showing jurors how dangerous something is (such as a truck, or diagnosing a patient, or manufacturing a product, or glancing away from the road long enough to hit someone in front of you at 12 mph), explain why you are showing it: for jurors to have the necessary information to see how dangerous a violation is. Jurors rarely understand this from jury instructions, so it's up to you: The greater the danger, the higher the required level of care. Ask about this concept in jury voir dire. "So, Mr. Juror, because your job can cause more harm than others, you have to be more careful ...?" It's part of your opening. It peppers direct and cross: "So, Expert Smith, because this can hurt so many people, it has to be done more carefully than, say, _____?"

And it's plain old common sense.

In closing if not earlier, explain that everyone – including Mr. Defense Attorney – agrees that the greater the danger, the greater the required care.

Connect this to the jury instruction on negligence: "Because no prudent person chooses to needlessly endanger anyone, he uses enough care to match the danger level. At a minimum that means following the safety rules. And just following the safety rules would have made him careful enough not to hurt anyone."

Memorable analogy: "If I carry a dead rattlesnake through a crowd, it's not dangerous, so I need not be careful. A live rattlesnake in a box could get loose, so I have to be pretty careful. A live rattlesnake in my hands is extremely dangerous, so I must be extremely careful."

Ordinary care.
Many lawyers –and even some judges – think "ordinary care" means average. This misconception leaks to the jurors, who then deny negligence on the grounds that what the defendant did seemed "average" – meaning lots of people do it. By this logic, going 77 in a 65 mph zone is not negligent because the average person does it. But 77 in a 65 zone unnecessarily endangers the public, no matter how many people do it. It's negligent. (Remember that we allow ourselves, but not others, to break a safety rules. See p. _____search – "70"_____.)

Contract.
Anyone who does something careless that hurts anyone else is responsible for the harm. That is our social contract with each other, and it is the law – so it is a real contract. Explain it. Explain that when a driver [or whoever] gets behind the wheel [or does whatever], she implicitly agrees – in advance – to be responsible for any harm she does if she violates any safety rules. And no matter what other companies do, a car maker implicitly agrees in advance to be responsible for any harm it does by violating any safety rules.

Otherwise the community has to foot the bill.

Violating that agreement and getting away with it leaves people free to violate more safety rules. The Reptile forbids that. So when a car maker has a practical way to make the car safer, chooses not to, and creates or allows unnecessary danger, he has long ago contracted in advance to be responsible for whatever harm his violation does. The Reptile will demand enforcement of that contract so that the community will be safer.

Similarly, no matter what every other doctor does, when a doctor guesses instead of rules out, or cuts without identifying what he's cutting, he has agreed in advance to be responsible for any harm his needlessly risky choices cause.

And no matter what other drivers do, when a driver violates the safety rule requiring her to keep her mind on her driving well enough to always pay attention to where she's going, she has agreed in advance to accept responsibility for any harm she does. That includes the pain and suffering.

So the umbrella rule – "no needless danger" – is society's (thus the Reptile's) most important safety rule. It's really two rules:

1. No matter what anyone else does, you must be careful enough not to cause or allow foreseeable danger.

2. When you violate #1, you have agreed in advance to pay for care, lost income, suffering, pain, disability, etc. "When someone gets away with breaking the agreement, they and others have less reason to be careful in the future. So the community is endangered. And the community has to spend dollars needed for its own care to take care of this person instead." (These arguments are effective mainly within the context of violated safety rules.)

Constitutional Guarantee.
Consider for your closing, "When someone is injured or killed by negligence, the Seventh Amendment to the United States Constitution gives every American a promissory note: a promise to repay for the injury through the judicial system. The heart of the judicial system is the jury. So the plaintiff is here today calling for payment on their promissory note guaranteed by the Constitution. By your verdict, you order it to be paid."

"But All the Other Kids Do It!"
In closing, say:

What is Ford saying when they show charts that Chevies roll over as often as Fords? That every company can get away with endangering the public? That Ford knows what it's doing is dangerous but they don't care, as long as others do it too? We don't raise our kids that way and the law does not allow companies to act that way. Ordinary care does not mean menacing the public, no matter how many companies do it. If it did, we'd become a nation of vehicles rolling over and killing folks, based on the perilous excuse that it's okay because "they all roll."

Explain that that's why "all the other kids" who do it are watching this case: To see if they can escape paying when they go on needlessly endangering the public. "Nobody gets to carelessly carry live rattlesnakes through crowds just because all the other snake handlers do it too."

Rule: "A company is not allowed to endanger the public just because some other companies do too."

Use Rule A to Prove Rule B.
Use the rule the defense accepts to prove the more specific rule the defense rejects. Often the defense will agree with your general rules but not the specific ones. For example, the defense will agree that a doctor must never needlessly endanger patients, but disagree that she had to have gotten to the hospital room in 15 minutes. Simply show how taking longer than 15 minutes needlessly (and therefore impermissibly) endangered patients, so was not allowed.

Punitive Damages.
The usual precursor to punitive damages is that the defendant knew that what he was doing endangered others yet he did it anyway (reckless, wanton), or knew what he was doing violated a safety rule or law yet he did it anyway (reckless, willful). So once the defendant agrees to a safety rule and admits he knew it at the time, you can be in punitive damages territory. Consider early whether a punitive approach might be practical and desirable. The answer is not always yes, but if it is, the Reptile may be a good friend.

"It Never Hurt Anyone Before!"
Or, "It's been used millions of times and caused only a handful of injuries!" In products liability, premises liability, and similar cases, jurors often feel that nothing made by humans can be perfect, so the plaintiff is demanding too much. To deal with this common attitude, your safety expert (or you) should say,

We all use thousands of things. Companies manufacture thousands of things – things that hurt people only once in a while, or maybe haven't hurt anyone yet. When the dangerous design of one of those things hurts someone, even though the company knew there was danger, they say, "But it never hurt anyone before," or "It hardly ever hurts anyone!" The safety rule and the law say that whether it ever hurt anyone or not, if the manufacturer [or whoever] knew it could injure, the company was required to fix it. Why? Because if you add up all the people who are hurt by all the different products that "hardly ever hurt anyone," they add up to a major danger every day to every member of the public.

Give examples. Then:

Saying, "It never hurt anyone before" is like a reckless driver saying he's never hurt anyone before. Result? Thousands of highways deaths every year – almost all caused by reckless drivers who never hurt anyone before.

Sooner or later, every danger claims a victim. Add them up and it's one of America's biggest single causes of needless serious injury and death. That's why the law does not care how many times it happened before. The law just asks if the company knew in advance there was a danger.

Which Verdict Will Make Them Safer?
The juror's decision rests on the Reptilian question of which verdict will make her safer. Collision at 10 mph; your client is badly hurt. The juror is confronted with two possible dangers: a) people driving carelessly, and b) tort-"reform" harms.

If you do not show that 10-mph collisions are a public menace that has badly hurt many people, then the Reptile has no way of knowing that a verdict for your side will help make her safer. So she'll default to a small or zero verdict to help protect her from the harm lawyers do to the community. To do that, jurors give themselves the mental excuse of believing – unsupportably – that 10 mph collisions don't cause harm. So you must show that the greater and more immediate danger lies in giving a pass to – and thus encouraging – people who do this kind of harm.

Rule/Theme.
Raleigh, NC attorney Donald H. Beskind points out that a rule is really a theme transformed into a behavior imperative. For example, "Profits over safety" becomes "A company is not allowed to sacrifice safety to profits." This makes all the difference in the world – including, among many other benefits, the fact that the defense that would never agree with the theme has to agree with the same concept expressed as a rule.

And of course, safety rules ("... not allowed to cause needless danger"), unlike almost all themes ("...didn't have to happen"), are Reptilian.

In other words: Themes are intellectual; rules are Reptilian.

Don't forget the major axiom: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

Contributory and Comparative Negligence.
Of course the same rules apply to your client – but with a huge difference. In most contrib or comparative situations, your client hurt only himself. The Reptile does not care when other people hurt themselves, because it's almost never a danger to the Reptile. So she has little or no motive to react. But when people break rules that endanger others, "others" means the community, which always includes the Reptile. So she has a substantial motive to react.

This does not mean you will win every contrib or comparative issue. But with Reptilian trial advocacy, your chances are much greater.

INDIGENT DEFENSE UPDATE

2015-16 OFFICE ACCOMPLISHMENTS

SUCCESS FOR CLIENTS

Trial victories

Durham APDs **Matt Cook** and **Allyn Sharp** won a first degree murder trial where one of the witnesses testified to seeing the client shoot the victim. The team succeeded in getting excluded the testimony of a jailhouse snitch and the identification of the client as the driver of the car.

Gaston APDs **Rocky Lutz**, **Stuart Higdon**, and **Holden Clark** got not guilty verdicts in a month-long non-capital first degree murder and first degree arson trial where the client was accused of killing his mother. The client could have spent the rest of his life in prison, but after 10 hours of deliberation the jury set him free. In addition to working hard to clear their client's name, the office spent a lot of time trying to secure resources for the client upon his release, and we're told the defense team and the client celebrated with a dinner at Cracker Barrel.

Lead Counsel Rocky Lutz and co-counsel Holden Clark (second from left) and Stuart Higdon (far right) are pictured with their acquitted client.
http://www.gastongazette.com/20150608/man-found-not-guilty-of-mothers-death/306089952?tc=cr

Buncombe ACD **Vicki Jayne** recently got not guilty verdicts in a noncapital first degree murder and felony child abuse trial in Gaston County. The case involved a three-month-old with a skull fracture, chronic and acute injuries, burns, and bruises. Despite some tough evidence against the client, thanks to Vicki's hard work on the case, including preparing the client for a day and a half of testifying, the assistance of defense experts, and a great jury, the client is now home and working in Sanford after three years in jail.

New Hanover APD **Thomas "Bud" Woodrum** achieved a not guilty verdict in a week-long attempted first degree murder trial.

ACDs **Steve Freedman** and **Robert Singagliese** won not guilty verdicts in a retrial in Anson County on first degree murder and robbery with a dangerous weapon charges. After his release, their client gave thanks to God for his defense team, the "two great vessels to work through."

Chatham APD **Ken Richardson** tried a first degree murder, AWDWISI, and simple assault case where the jury convicted just on AWDWISI and simple assault and the client got a probationary sentence.

Carteret Chief PD **Jim Wallace** went to trial on four counts of exploitation of a minor and one count of indecent liberties. The client was facing significant time (35 years), and had spent 26 months in pretrial confinement. The State offered a plea where the client would be released from jail (no probation) but would have to register as a sex offender, but the client refused the offer. The jury was out 35 minutes and found the client not guilty on all counts.

Forsyth APD **Andrew Keever** got not guilty verdicts on nine counts of rape of a child by an adult offender by convincing the jury that the complaining witness was lying to avoid having her mother move the family to Mexico, where they would join the client, who was being deported to Mexico.

Forsyth Chief PD **Paul James** recently finished a six-day trial on a first degree sex offense by an adult offender carrying a minimum sentence of 25 years to LWOP. The client turned down a last-minute plea offer of one B1 sex offense at the bottom of the mitigated range, 144 months. The jury returned a verdict of not guilty on all counts.

New Hanover APD **Emily Zvejnieks** represented a client involved a motor vehicle accident. The DA declared the decedent a homicide victim and placed the decedent's photo on their office victim wall. The jury decided the resulting death was accidental and the defendant was found not guilty.

Including the win with Matt Cook, Durham APD **Allyn Sharp** was 'batting 1,000" in her three trials in 2015. One of the other cases involved charges of second degree kidnapping, two counts of assault by strangulation, and assault on a female. A misdemeanor plea offer was tendered the Friday before the week of trial, and the client was willing to accept the offer; however, when Allyn went to court to enter the plea, the ADA informed her that the plea offer was off the table. Luckily, Allyn had prepped the case at Trial School. After four days of testimony and an hour and a half of jury deliberations, Allyn's client was acquitted of all charges. In her other trial, Allyn's client was charged with AWDWISI and assault on a female. Allyn's client was a visa holder who almost certainly would have been deported if found guilty of the felony, and Allyn and the client were willing to enter a guilty plea to a misdemeanor. Two witnesses testified that they witnessed the assault and had to pull the client off of the victim. Allyn's client testified persuasively, and Allyn informed the jury of the potential collateral consequences the client faced, resulting in not guilty verdicts.

Wake APD **Michael Weiss** won one trial and then got a dismissal at the close of the State's evidence in another because there was no evidence of intent for felony assault charges.

Durham APD **Wendy Lindberg** was also on a roll, getting not guilty verdicts in two trials. One was a carrying concealed firearm case where the client legally owned and had registered the gun and had attended the carry concealed class and had applied for a concealed weapon permit since being charged. Wendy introduced the receipt for purchase of the gun and successfully argued that the client had no intent to conceal, and that but for the gun slipping out of his hand when he tried to put it on the car dashboard when he was pulled over, it would have been in plain view. The other not guilty verdict was in a DWI case where her client was passed out at the wheel. Wendy contended there was a 1½ hour timeline instead of the State's 2½ hour timeline, leading Paul Glover to say he would "retrograde extrapolate" a .07 BAC based on her timeline. Wendy also got a dismissal at trial of an assault on a female DV case thanks to the appearance of a third-party witness, saving the client from being fired from his job even with a deferral.

Guilford APD **Rami Madan**, in a period of two weeks this March, had three not guilty verdicts in jury trials. The first was a four-year-old indecent liberties case where his client was an LGBT person confined to a wheel chair who had allegedly fondled a fourteen-year-old athlete. The prosecuting witness was 18 at the time of trial. The second case was a DWI where Rami's client was by a motor bike on the side of the road. The client made statements indicating he had been driving and blew .28, but there was evidence that he might have consumed after getting off the bike. The last case involved felony drug charges and a one-pound-short-of-trafficking amount of marijuana. It had been delivered to the house where Rami's client answered the door but said it was not his package, which was addressed to someone else. Later, the police claimed that the client confessed, but nothing was written down. The client was convicted of class 3 marijuana for a small amount of marijuana in his car.

Guilford APDs **Molly Hilburn-Holte** and **Brennan Aberle** took two complicated felonies, an armed robbery and a drug trafficking, to Trial School where they crafted defenses and learned trial skills that got them both not guilty verdicts at trial.

Wake APD **Carrah Franke** got not guilty verdicts in a B&E and larceny trial where the client had been charged with Habitual B&E and Habitual Felon. A jury had been picked twice in the case, and the ADA had both times then handed over additional discovery.

Hoke APD **Jim Hedgepeth** got a client acquitted at trial of RWDW. Through DNA testing, a chunk of Jim's client's dreadlock and the client's blood were confirmed as being in the victim's taxi. Even so, with Ron Ostrowski's assistance, Jim showed that the SBI Lab had no way of knowing when the client's hair and blood were left in the taxi. Jim argued that an altercation or horse play between the client and other customers, rather than the robbery, could explain the presence of the client's hair and blood. The jury asked during deliberations if it could find the client guilty of a lesser charge of common law robbery, but the DA opposed it and the court found no basis for an instruction, and thereafter the jury found the client not guilty.

Chatham APD **Tamzin Kinnett** tried three marijuana DWIs and got not guilty verdicts in all three.

Wake APD **Jackie Willingham** got a not guilty verdict on a DWI charge in superior court, as well as having multiple successes along with **Sam Hamadani** as part of the office's new DWI unit.

Orange APD **Mani Dexter** obtained a misdemeanor verdict in a trial involving obtaining property by false pretenses and felony larceny.

Wake APD **Tad Dardess** obtained a not guilty verdict on a common law robbery with a brother of the assistant DA on the jury!

Appellate victories

Vindicating Wake APD Celia Visser and now-retired investigator Bernie Clarke, AAD **Nick Woomer-Deters** won in *State v. Jordan*, COA14-1070 (August 4, 2015), in which the Court of Appeals held that the trial court erred in denying the defendant's motion to suppress in a case involving drug and child abuse charges

On January 19th, New Hanover APD **Brendon O'Donnell** got the NC Court of Appeals to vacate a conviction for attempted first-degree rape of a child and to order resentencing on an indecent liberties in *State v. Barnett*, COA15-200, and also to reverse lifetime SBM, to reverse and remand lifetime sex offender registry, and to vacate and remand a permanent no-contact order in *State v. Barnett*, COA15-200.

Good outcomes

New Hanover Chief PD **Jennifer Harjo**, with the help of Administrative Assistant **Kim Whitehouse**, represented a young man charged with stabbing and killing his father. The young man was an astounding athlete, musician and student though most of high school and then began suffering symptoms of schizophrenia. Jennifer and Kim were able to get family and friends, church preachers, college acquaintances, a courtroom full of people to describe the client's change in behavior which convinced the judge to rule that the client was NGRI.

Wake APD **Sam Hamadani** achieved success for a client who was on an ICE hold and who was arrested on a second DWI. The client was present for the video first appearance, but it was unclear whether he was ever advised of his right to counsel, and counsel was not appointed. The office got the case after a subsequent court appearance where the client was not advised of his rights, during which time he had spent almost 90 days in custody. Sam won a written motion to dismiss for violation of the client's 6th Amendment rights with no argument.

In March, Guilford APD **John Davis** had a hung jury, 7-5, in a habitual felon drug case that involved two hand-to-hand sales by law enforcement officers with pictures of the client. After the hung jury, the case was settled for non-habitual time, and the client got a 20-month sentence.

Buncombe Chief PD **LeAnn Melton** got misdemeanors and probation for an uncertified midwife accused of the murder of an unborn child:
http://www.citizen-times.com/story/news/local/2015/09/08/uncertified-midwife-charged-murder-pleads-lesser-charges/71887772/

New Hanover APD **Ken Hatcher**, with the assistance of investigator Jose Vega and investigator/attorney Tracy Wilkinson, convinced on the day of trial a client who was subject to deportation and initially charged with four counts of indecent liberties, first degree rape, and first degree sex offense of a child to enter a plea and to an active sentence of 100 months. This was an outstanding outcome given the horrific facts and an aggravating factor that would have made the defendant eligible for the minimum 300 months active.

A Wake defendant had a 2009 DWI dismissed and was recharged the next day, but no one ever let the defendant or his attorney know that he was recharged. The office was appointed in September 2015, almost six years later, after the warrant was finally served, and APD **Sam Hamadani** won on a motion to dismiss for violation of speedy trial.

New Hanover APD **Alexis Perkins** was able to keep her client out of prison after he had absconded from probation for almost seven years. He was 18 when he was convicted of involuntary manslaughter, but he had no money and was unable to pay costs associated with probation, so he fled. Alexis successfully proved her client's life changes, including recognition for his work with at risk youth.

ACDs **Jonathan Broun** and **Phoebe Dee**, with the assistance of investigator **Beth Winston** and paralegal **Katelin Rey**, convinced a Wake County jury, after less than an hour of sentencing deliberations, to impose LWOP in a first degree murder trial involving a violent beating and stabbing where the victim's body was discovered by her 8-year-old daughter. The elected DA noted afterward that, given the lack of death verdicts in the last six capital trials in the district, her office may need to reconsider seeking the death penalty.

Jonathan Broun (far right) and Phoebe Dee (second from right)

With the tenacity and encouragement of New Hanover APD **Lyana Hunter** and her Legal Assistant, **Lori Inman**, many children were reunified with their parents, in one case after an eight-year battle through the courts.

The **Wake PD Office social work interns** are reported to be doing a "fantastic job," and the office has had a lot of success for many clients as the fruits of their efforts. As just one example, **Charis Link** and the social work interns helped a Free the People Court client suffering from dementia to obtain services and to reunite him with his daughter, who had been looking for him for three years.

New Hanover APD **Bud Woodrum** recently worked out a plea agreement for a client charged with statutory rape for the bottom end of the mitigated sentence for record level 1.

Hoke APD **Ian Bloom** had a client facing five felony charges from two separate incidents involving theft of water meters and generators from the client's employer. The DA demanded that the client plead to multiple felonies and be sentenced to three years' probation and to pay over $30,000 in restitution. Ian indicated he'd go to trial instead, filed a motion *in limine,* and let the DA know some of the weaknesses in the State's case. On the cusp of trial the DA settled for a plea to a misdemeanor and $1,420 restitution, even despite the fact that the client had confessed in writing to stealing cash from the employer on a previous occasion.

Wake APDs **Mike Howell** and **Christine Malumphy** got an extremely favorable immigration result for a client charged with second-degree kidnapping by getting the jury to convict only on misdemeanors.

New Hanover APD **Max Ashworth**'s client was able to retain his green card and remain in the country with his family and friends after Max uncovered inconsistencies in the accusations against his client, who was charged with assault on a female, assault on an unborn child, and communicating threats.

Wake APD **Ricky Elmore** was successful on a motion to suppress in an animal cruelty case, which resulted in the charges being dismissed.

Pitt APD **Jason DeHoog**'s client was required to pay a civil fine in advance of criminal charges of animal cruelty. Jason argued in superior court that it would violate double jeopardy to subject the client to additional punishment, and Judge W.R. ("Rusty") Duke agreed and dismissed the charges.

Wake APD **Caroline Elliot** got a failure to register as a sex offender charge dismissed for a client who had no prior violations in nine and half years.

Going the extra mile

Through a lot of legwork and persistence, Durham APD **Allyn Sharp** was able to convince judges to grant PJCs in two significant cases. One client had a charge of failure to report change of address – sex offender. The client was on his way home from the DOC after registering his sister's address as his residence when the sheriff's department called saying he could not stay there because a daycare was 973 feet from the house. Allyn researched the issue and determined that the supposed daycare did not meet the statutory definition. Allyn scheduled a bond hearing to get the client released, but in the meantime the sheriff's department advised the daycare on how to become a statutory daycare and to do so quickly in order to prevent a registered sex offender from moving into the neighborhood. Allyn then found a rooming house willing to take

her client, and rather than accept a felony plea with an active sentence, Allyn pled the case to the judge and convinced the judge to grant a PJC. The other client had a two-year-old PWIMSD Schedule II charge and had gotten clean, attended treatment, and gotten public housing through the VA. The client refused a felony probationary plea out of fear he would be evicted. To prevent the client from losing his housing, Allyn contacted an attorney with the Durham Housing Authority and found out what would help her client keep his home and again pled the case to the judge and got a PJC for her client. In fact, the judge issued a recommendation from the senior resident superior court judge that the case not be the sole basis for evicting the client.

Although the jury ultimately recommended death for his client, ACD **Phil Lane** deserves credit for dealing with overwhelming challenges in a Pitt County case involving triple homicides of convenience store clerks where his client disrupted court had to be removed several times. (Somehow these outbursts did not convince the jury of Phil's client's mental illness.)

Guilford APD **Richard Wells** worked for two years representing a client who is a Jarai, which is part of the Montganard tribes of Vietnam who fought with the United States as an ally during the Vietnam War. Greensboro has a very large Montganard population. Richard's 25-year-old client and the client's 14-year-old girlfriend were very excited about the birth of their first child until the client was charged with B1 statutory rape and the girl's parents were charged with B1 felony aiding and abetting. Richard first had to fight the State just to get the correct language interpreter and special permission for the client's sister to interpret at the jail. The situation got aggravated by local Montganard activists' contacting the DA. Richard ultimately called a meeting of Montganard community activists, and they worked together to create a settlement brochure showing the client was a good guy and explaining cultural norms and interpretation issues of the Jarai community, which helped to achieve the result of supervised probation that was tolled after a sex offender evaluation. The client and the girlfriend got married, the family is all together, and Richard was able to educate the Montganard community about American age of consent laws.

Orange/Chatham investigator **LaRhonda Wright** pounded the pavement for several weeks to track down witnesses in a serious case, which led to a dismissal.

Janet Adams, OCD mitigation investigator, persuaded a triple homicide client to accept LWOPs on the day of trial, thanks to her relationship with the client.

New Hanover APD **Katie Corpening** successfully fought to keep her heroin-addicted client out of jail, even though he had been arrested multiple times for DWI. She located appropriate treatment after he was denied admission into the drug court program, and she has encouraged his new clean and sober lifestyle.

New Hanover attorney/investigator **Tracy Wilkinson** spent many hours needed to encourage a mentally challenged client that he would be able to withstand questioning during a preliminary innocence inquiry claim. DNA recovered from the child victim proved not to be the client's, but the client's mental instability made it difficult for him to participate in the hearing. The initial panel ruled in favor of the client, and Tracy was even able to get the DA to concede the impropriety of the conviction.

The Scotland Office helped in September 2015 when **Edward McInnis** was exonerated of a rape charge as the result of an Innocence Inquiry Commission investigation after he had spent 28 years in prison.

District 29B Chief PD **Paul Welch** was provisional counsel and then briefly appointed in a fratricide case. Paul investigated the client's self-defense claim and agreed to have detectives interview his client. The DA sent the case to the grand jury as second degree murder, and the grand jury found no true bill. According to Paul, the Capital Defender's comment was, "I did not know that [the No True Bill] box was still on the indictment form."

Wake APD **Ashleigh Seiber** got an older client's charges dismissed because the client was the victim of identity theft. Not content to rest on her laurels, Ashleigh took the client to the bus station and coordinated with the client's family to get the client a bus ticket home to Alabama.

Pitt APD **Ann Kirby** represented a client under sentence for an armed robbery charge who was charged with an unrelated murder. Over the years, the client has bounced between Dix, Cherry, and Central Regional Hospitals and the Pitt County Detention Center. Kirby filed a motion to dismiss under G.S. 15A-1008, relating to detention and capacity to proceed, and, after a hearing on her motion, Judge Rusty Duke dismissed the criminal charges and, thanks to Kirby's efforts and the cooperation of the DA, the jail, the AG, and Cherry Hospital, the client was immediately returned to Cherry under a civil involuntary commitment order for continued treatment and permanent placement.

COLLABORATION

A *pro se* father out of Wake County filed a notice of appeal on his adjudication and disposition that his children were abused, dependent, or neglected. The judge appointed OAD, but because the father had been *pro se* on the underlying case, it was unclear whether he wanted to proceed *pro se* on appeal. The Office of Parent Representation emailed 1st/2nd District Chief PD Tommy Routten and asked if someone from his office could visit the client in the Martin-Bertie Detention Center, where the father was being held, to determine whether the father wanted to have counsel. APD **Brandon Belcher** quickly visited the father and reported that the father wanted to appeal and wanted representation, saving OPR much time and effort.

Special Counsel **Becky Zogry** collaborated with Wake APD **Emily Mistr**, who helped to resolve pending criminal charges in Wake Co. and to find out whether Becky's client would be picked up in another county for a monetary obligation. Becky's client was relieved to not have to worry about being picked up after being released from the hospital and decided to go ahead with the involuntary commitment process and ultimately to be released.

Another of **Becky Zogry**'s clients had a criminal charge for which he had waived counsel due to limitations caused by his mental disabilities and also had several unserved warrants. The client had negative connotations of the criminal justice system because of his brother's involvement in the system. Wake APD **Jackie Willingham** got a judge to agree to put Becky's client on pretrial release. Becky worked with Wake County ReEntry, which runs the PreTrial Release program, and got the client transported to the magistrate's office for processing, service, and placement on client pretrial release. Now Jackie has been appointed to represent the client on all his charges.

Becky relates that the client had been very guarded and suspicious, but after he was served and released, he thanked everyone in the room.

Guilford APDs **Brennan Aberle**, **Dave Clark**, **Bill Davis**, **Richard Wells**, **Kate Shamansky**, and **Marcus Shields** all presented CLEs, seminars, and/or law school classes at UNC Law, Elon Law, UNC School of Government, NCAJ, NC-CRED, and NAPD. Dave has been prominent in NAPD in educating defenders around the country on the subject of costs and fees, including being a presenter in a webinar and developing a series of *Trial* Briefs articles on the topic. Marcus, Kate, and Brennan served as adjunct professors at Elon Law School's initial criminal law lab. They each taught a section from 5:30 to 6:30 p.m. once a week for ten weeks tracking a case from start to finish.

In October, the **Mecklenburg office** hosted a free CLE called "Dead Man Talking" featuring a presentation by the Mecklenburg County Chief Medical Examiner. APD **Anthony Monaghan** has coordinated a continuing CLE series for the office and the local bar.

Scotland APD **Lisa Freedman** coordinated, planned, and hosted a well-attended portion of a local CLE on DSS issues and updates.

Forensic Resource Counsel **Sarah Olson** has been busy this year continuing to foster the North Carolina Forensic Consulting Network (NCFCN) in PD offices and developing interesting and useful training for the consultants, as part of SOG trainings such as New Felony Defender and Evenings at the School of Government, speaking to local bars on forensic issues, coordinating tours of the State Crime Lab and the Medical Examiner's office, and other events such as Whiskey in the Courtroom and regional trainings for contractors and others. She is also working with NCAJ on a Forensic Webinar Series for this fall and is planning training on blood testing in DWI drug cases for this summer.

The Southern Juvenile Defender Center (SJDC) is having its Annual Regional Summit in Charlotte this summer, and Juvenile Defender **Eric Zogry and his office** have been instrumental in landing and organizing the event, which will celebrate the 5th anniversary of the Supreme Court's decision in *J.D.B. v. North Carolina*.

And in what has been called the "singular Guilford County PD accomplishment that may stand out above all others," APD **Brennan Aberle** somehow convinced APD **Johanna Hernon** to marry him!

SERVICE TO THE COMMUNITY

The **District 29B office** participated in a local United Way Day of Caring. They volunteered as a group to complete a project requested by local groups in need, and ended up painting the dental clinic at a low-income health services facility. The office reports that it was a great opportunity to give back to their local community together outside of their work in court, and they hope to make a tradition of it.


Henderson PD Office Day of Caring participants

Guilford APDs **Dave Clark** and **Bill Davis** participated in a Veteran Stand Down last fall that had about 1,000 veterans come to a local church for help in many different matters, including legal consultation.

Orange APDs **Natasha Adams** and **Mani Dexter** volunteered with Project Homeless Connect, an event that coordinates services to Orange County's homeless population.
Durham APD Phylicia Powers is the Vice Chair of the NCAJ Juvenile Defense Section Executive Committee.

Wake APD **Deonté Thomas** is a member of the NCAJ Board of Governors. Forsyth APD **Kerri Sigler** is the Communications Chair of the NCAJ Juvenile Defense Section Executive Committee. Mecklenburg APDs serving on the NCAJ Criminal Defense Section Executive Committee include **Dean Loven** as a CLE Co-chair, **Toussaint Romain** as a Membership Co-chair, and **Emily Wallwork** as the New Lawyers Division Section Liaison for the,. Toussaint is also the Secretary and CLE Co-chair for the New Lawyers Division Executive Committee. New Hanover APD **Lyana Hunter** is a CLE Co-chair of the NCAJ Juvenile Defense Section Executive Committee, and she was recognized in the November NCAJ spotlight: https://www.ncaj.com/index.cfm?pg=Member_Spotlight_Archive#LYANA

Gaston APD **Matt Hawkins** is actively involved in his community. He recently stared as the lead actor in the musical *Footloose* and is currently directing the musical *Joseph and the Amazing Technicolor Dreamcoat*. According to his colleagues, Matt always puts forth great effort in his performances on stage and in the courtroom!

Matt Hawkins plays Ren, the lead character in Dilworth United Methodist Church's production of "Footloose." His acting is a tribute to his late father.

Matt Hawkins (center) leads rehearsal as Ren in Dilworth United Methodist Church's musical "Footloose."

New Hanover APD **Emily Zvejnieks** took her yoga training on the road and gave a well-received presentation to the NC Trial Court Administrators doing their conference.

Gaston APD **Chip Harrison** (left) owns and operates The Southern Dance Academy. The group of students pictured above were recently in LA auditioning. When not in the courtroom, Chip travels across the country teaching workshops and doing choreography. Chip has appeared as a Semi-finalist on America's Got Talent, co-starred on the TLC show Down South Dance, and made regular appearances on the ABC show Kids World. Chip is also an ordained minister, and his colleagues relate that they are "blessed" that he is part of their office.

Robeson Investigator and Pembroke Councilwoman **Theresa Locklear** is running for mayor: http://robesonian.com/news/81188/pembroke-to-get-new-mayor

Mecklenburg APD **Tracy Hewett**, Orange APD **Sherri Murrell**, Pitt APD **Wendy Hazelton**, and Guilford APDs **Tonia Cutchin**, **Bill Davis,** and **Miranda Reavis** are all running for district court judge seats

IMPROVING THE SYSTEM

An inside source relates that Cumberland APD **Cindy Black** is doing a "great job" on behalf of veterans referred to the Cumberland Veterans Treatment Court. This new specialized court accepts veterans with substance abuse, mental health, and/or PTSD issues pursuant to conditional discharge or pre-sentencing arrangements in their criminal cases.

Gaston APD **James Richardson** is assigned to handle truancy court each month. James, along with the judge and other support staff, are typically the same familiar faces in this particular courtroom each month. Having the same people each month seems to help improve student

attendance in a nurturing manner that builds relationships between students, families, schools, and the community. This court offers parents and students the opportunity to examine the root causes of attendance problems and to resolve the issues that create barriers to regular school attendance.

Mecklenburg APD **Bob Ward** is helping to form a task force to issue safety recommendations for involuntary commitment hearings:

Bob Ward, assistant Mecklenburg County public defender, is bringing attention to security gaps during involuntary commitment hearings after a client attacked a deputy and nearly got her gun during an involuntary commitment hearing. **T. Ortega Gaines** - ogaines@charlotteobserver.com

http://www.charlotteobserver.com/news/local/article43230861.html

Orange APD **Natasha Adams**, in cooperation with an ADA, has initiated a project to create a re-entry council.

Gaston APD **Holden Clark** is assigned to handle voluntary and involuntary commitments for adults and adolescents each week. He is currently working with UNC-Charlotte in setting up a social work exchange program that will provide clients with access to resources that may be unknown or unused.

Orange APD **Carter Thompson** is helping to make changes to Orange County's Drug Treatment Court operations.

The **District 15B office** participated in the development of a new misdemeanor diversion program in Orange County, which officially launched April 15th. APD **Dana Graves** is currently representing the office in this effort.

Wake APD **Jackie Willingham** has spearheaded with the DA office a mental health diversion program that is just starting out.

Orange APD **Mani Dexter** participates in the Jail Mental Health Alternatives Work Group to address mental health issues of detained clients.

District 15B Chief PD **James Williams** continued efforts to address racial and ethnic disparities in and resulting from the criminal justice system, including advocating for local policy changes regarding drug charges and public housing, helping to organize a successful Mass Incarceration Symposium, chairing NC PDCORE, pushing for written consent for searches, beginning the effort for a misdemeanor diversion program.

The **Durham PD Office** is involved in working on the local jail isolation problem: http://www.newsobserver.com/news/local/community/durham-news/article18810063.html

The **New Hanover office** was asked to investigate claims that Wilmington Police Dept uses StingRay to snoop on cell phones: http://www.wwaytv3.com/2014/06/19/investigation-claims-wpd-uses-spy-gear-to-snoop-citizens/

RECOGNITION AND CELEBRATION

Buncombe APDs **Yolanda Fair** and **Martin Moore** were honored as Laureates of the Year by OpenDoors of Asheville for their work as advocates for indigent juveniles:

http://mountainx.com/blogwire/local-public-defender-attorney-duo-named-opendoors-laureate-of-the-year-recipients/

New Hanover Chief PD **Jennifer Harjo** was nominated by Lawyers Weekly as a Leader in the Law Lawyer of the Year.

Guilford APD **Brennan Aberle** was the subject of two letters of appreciation from grateful parents of his clients. Here are excerpts from the letters extolling his work:

Mr. A. Brennan Aberle, Assistant Public Defender represented her during her court appearance. This letter is to inform you of how well he represented her but more important his recognition of her fragile condition and provided both legal and personal support. I personally had several conversations with him during the time that he represented my daughter and was impressed by how supportive he was. We are most thankful to Mr. Aberle and your office for your successful resolution of this matter.

Brennan does a great job of bringing a good name of professionalism and hard work to the Public Defender's office. Please let him know how much we have appreciated all he has done for our son and our family.

Robeson investigator **Theresa Locklear** has completed the process to be a licensed clinical social worker.

Stalwart AADs are moving on to other pastures after successful careers. **Barbara Blackman** retired in February, and **Ben Dowling-Sendor** is retiring in May 2016.

OCD Mitigation Investigator **Janet Adams** is retiring after 30 years of state work.

The first Chief Public Defender in Robeson County, **Angus Thompson**, retired in January: http://robesonian.com/news/83312/angus-thompson-the-defense-rests

. . . and longtime APD **Ronald Foxworth** was appointed to fill out the remainder of Angus's term:
http://robesonian.com/news/83247/foxworth-appointed-public-defender

The **Wake office** had a Spirt Week with different cooking competitions, and small prizes were awarded to the winners.

On March 18th, the **Guilford office** participated in a celebration of National Public Defense Day. That afternoon, a local TV station covered the event. APD **Bill Davis** spoke, as did Senior Resident Judge Lindsay Davis and Federal Public Defender Louis Allen. The station had this as one of the lead stories on the six o'clock news.

The Guilford PD Office commemorating National Public Defense Day

SOCIAL MEDIA

Social Media

Twitter, Texting, and Instagram… Oh My!

UNC SCHOOL OF GOVERNMENT

www.sog.unc.edu

Shannon Tufts
tufts@unc.edu

Got Tweet?
A Lil' Mash-up?
Do You Check-in?

RU ReD 4 gNR8N c

How Social R U?

facebook

Instagram

Pinterest

Meetup

flickr

LinkedIn

YouTube

tumblr.

Google+

Fastest growing demographic: 55-64 year olds

(79% growth since 2012)

facebook

Fastest growing demographic: 45-54 year olds

(46% & 56% growth)

Google+

Texting Video

Self-Destructing Secret

Dating Meeting

meet me

GRINDR

SKOUT™

DOWN

omegle

~200 Million FB users are mobile only!

YouTube reaches more 18-34 yr olds than any cable network

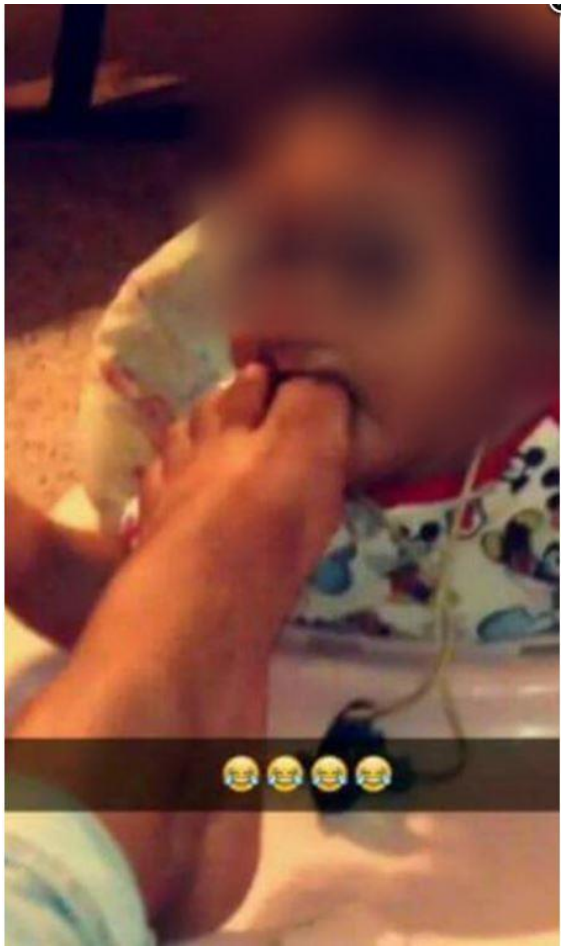
Social Media Use is #1 now!

Hw *Social*

DY wan2B ?

A Little Facebook Story

Do You Know This One?



SYPHILIS CASES SPIKE IN WAKE COUNTY, DATING APPS MAY BE TO BLAME

(MAY 20, 2015)

Social Media Investigative Tools

Get To Know These Tools!

* socialmention.com
* social-searcher.com
* Google's reverse image search
* Facebook's graph search
* Spokeo
* Knowem.com (i.e. ladykilla96)

Get To Know These Tools!

* Google Advanced Search

site:www.facebook.com inurl:<name you are looking for>

* UVRX.com
* Google's reverse image search
* Facebook's graph search
* Epocrates for pill ID
* Urban Dictionary for terms
* RaidsOnline

It’s Getting Complicated

Social Media, Investigations, & Evidence

Burning Issues

1. Access to Non-Public Sites
    1. Stored Communications Act Issues
2. Authenticity of Account; Hijacked Account (Hacked Account)
3. Veracity of Screen Capture
4. Preservation/Storage of Deleted or Old Material/Postings
    - TweetDeck
    - Download feature
    - POP method

Compliance with Subpoenas, etc

Stored Communications Act (18 U.S.C. §2701) is SM sites' primary defense

(a) Offense.— Except as provided in subsection (c) of this section whoever—

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(b) Punishment.— The punishment for an offense under subsection (a) of this section is—

(1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State—

(A) a fine under this title or imprisonment for not more than 5 years, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than 10 years, or both, for any subsequent offense under this subparagraph; and

(2) in any other case—

(A) a fine under this title or imprisonment for not more than 1 year or both, in the case of a first offense under this paragraph; and

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under this subparagraph that occurs after a conviction of another offense under this section.

(c) Exceptions.— Subsection (a) of this section does not apply with respect to conduct authorized—

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

Legal Steps to Access Non-Public Data

- Consent of the user
- E-discovery demand to user
- Informal request to social network
- Subpoena to social network
- Search warrant for law enforcement
- Find the data in an alternative, public location

Informal Request

- Smaller service providers may cooperate with requests from government
- Fugitive plays World of Warcraft
- Howard County, Indiana, Sheriff sends polite letter to operator of game
- Service provider reveals IP address, which leads to fugitive in Canada

Civil Subpoenas for Content

- Big service providers tend to resist

- *Crispin v. Christian Audigier, Inc.*
  - Civil subpoena to FB and Myspace quashed
  - Content protected under Stored Communications Act
  - May be difference between private messages and wall postings

Alternative Locations for Evidence

- Notices and copies to email or phone SMS (text)
- Replication at other sites (FB, Twitter, LinkedIn, Instgram, etc)
- Sharing by friends
- Cache on computer

Authenticate Myspace?

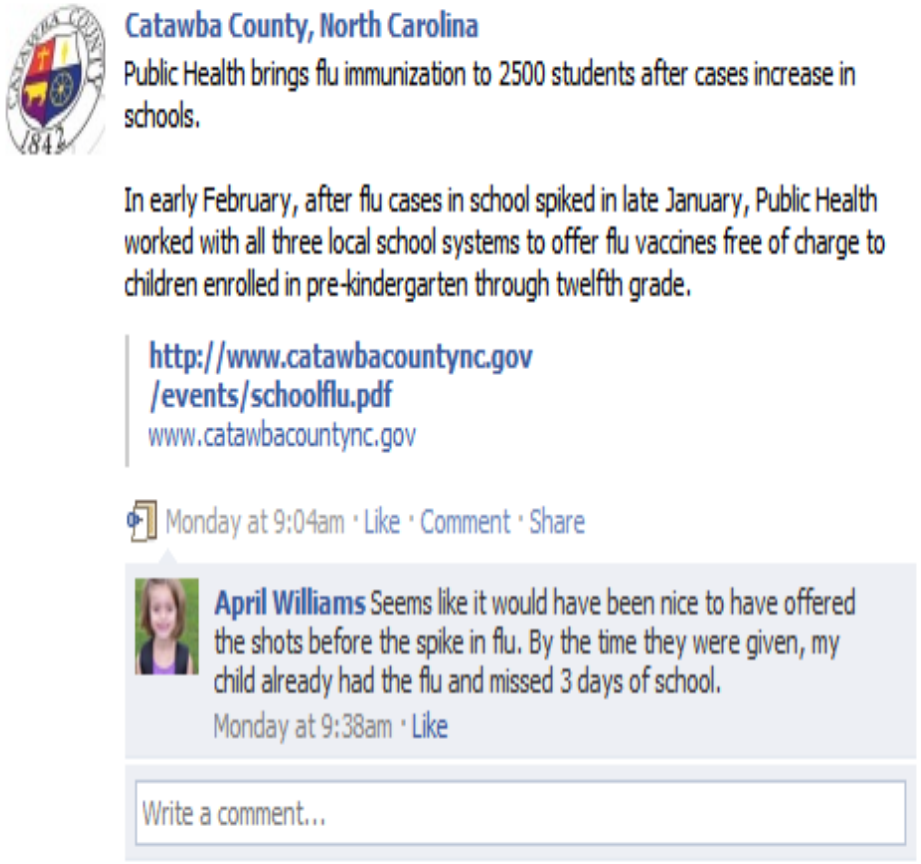
- *Griffin v. Maryland*, No. 74 (Maryland; Apr. 28, 2011) - In murder trial, questions arise why a witness gives conflicting testimony. Prosecution tries to show defendant's girlfriend threatened witness through Myspace.

- Court: Myspace evidence insufficiently authenticated. An imposter could have posted the message.

Addressing the Authentication Issue

- Search Warrants: Can collect details from the service provider like IP address, time, application, mobile carrier and more
- Interact with the user (if permitted)
- Gather corroborating detail about user statements, activities and timeline
- Corroborating details can be collected from multiple sources (Facebook, Twitter, special interest forums, games, phone, witnesses and so on)

Veracity of Screen Capture?



Useful Resources

- *http://www.iacpsocialmedia.org/*
- *IACP Social Media Investigations Guides*

C.A.R.E INTERVIEWING SYSTEM

Charles E. Williams - Biography

President & CEO of HDI Investigation

Charles Williams is the founder, President and CEO of HDI Investigation, Inc. His investigative career encompasses more than 34 years of investigative experience. Twenty-three of those years he worked as a FBI Special Agent. Upon retiring Charles founded HDI Investigation, Inc. and added another 9 years of investigative experience as a private investigator, He has built a reputation as an exceptional and highly sought after criminal investigator working primarily criminal defense investigations, to include rape/serial rape, gang related murders, baby murders, triple and double homicides and more than 60 murder cases… and unfortunately still counting. Charles has worked both federal and states criminal defense cases and has had the opportunity to work on both sides of the courtroom as a member of law enforcement and currently as part of criminal defense teams.

Charles is a graduate of Temple University; he received a Bachelor's degree in Business Administration and earned a football scholarship while at Temple University. In 1983 Charles became a Special Agent with the Federal Bureau of Investigation (FBI). After graduating from the FBI Academy Charles was eventually assigned to the New York office where he worked for more than twenty-one years. During that time he gained invaluable investigative experience in the investigative areas of violent crimes, fugitive task force, foreign counter intelligence, national security and civil rights.

Charles was also an FBI Certified Assessor, Street Survival Agent, General Police Instructor, Community Outreach Specialist and reserve team member of the FBI New York Crisis Negotiation Team and a participant in the FBI two week uncover school. Throughout his career Charles has worked on numerous Top Ten Fugitive Investigations, to include the Crown Heights investigation, the 1998 United States Embassy bombing investigation in Tanzania, and the World Trade Center bombings in 1993 and 2001.

Charles has earned the respect of his colleagues through his embodiment of the FBI's motto: **F**idelity, **B**ravery and **I**ntegrity and for his many accomplishments throughout his career. Charles received a letter of commendation from the United States Attorney General as well as recognition from the United States Attorney's Office for the Eastern District of New York. Charles also received numerous letters of commendation from the Director of the FBI. He also received letters of recognition from

the District Attorney of Kings County, Brooklyn, NY, Monmouth County's Prosecutor Office of NJ, and the U.S. Army's Criminal Investigation Division (CID).

Charles is a consummate professional known for his high moral character, spirituality, motivation and dedication to his family and the youth in his community. He was a youth track coach and a football coach for sixteen years as well as the president of his community Pop Warner football and cheerleading program. Charles has always been active in his church at one time serving as the head of the Men's Ministry. He is also a member of Omega Psi Phi Fraternity, Inc. His hobbies include chess, track, writing, public speaking and exercise. He holds a second degree Black Belt in Judo.

As a successful and highly regarded FBI Agent, Charles decided to retired early from the FBI in 2006 to pursue a dream and a challenge to use his faith and his wealth of experience to start his own investigation agency and to write and publish. To date he has written and published two books titled "CA.R.E. – An Investigative Way of Life" and "Without Deadly force." He has lectured about his interviewing system on a national internet radio talk show called "PI Declassified" as well as the FBI Academy. It is his fervent wish that his example, as an FBI agent, private investigator, entrepreneur, author and publisher, reinforces in others that they too can achieve their dreams!

Commendations/ Special Awards For Exemplary Service:

Office of the Director of the FBI, Unlawful Flight to Avoid Prosecution, Washington, D.C., 1988, 1990, 1991, 1994, 1996

Director of the FBI, Unlawful Flight to Avoid Prosecution, Washington, D.C., 1996

Office of the County Prosecutor, County of Monmouth, Freehold, NJ, 1990, 1991

Office of the Director of the FBI, Cash Award, Washington, D.C., 1990

Office of the Director of the FBI, Government Reservation Investigation Washington, D.C., 1991

San Juan Office, St. Thomas Virgin Islands, Guadeloupe, French West Indies, 1992

Office of the Director of the FBI, World Trade Center, New York, NY, 1993

Office of the Director of the FBI, Tenth Anniversary, Washington, D.C., 1993

Office of the Director of the FBI, Twentieth Anniversary, Washington, DC, 2003

Office of the Director of the FBI, Federal Plaza, New York, NY, 1994

District Attorney of Kings County, Municipal Building, Brooklyn, NY, 1995

District Attorney of Kings County, Robert Burke Case, Brooklyn, NY, 1998

Office of the Director of the FBI, Fugitive Task Force, Washington, D.C., 1995

Office of the Director of the FBI, Bank Robbery Investigation, Washington, D.C., 1995

Office of the Director of the FBI, Crown Heights/Lemrick Nelson Case, Washington, D.C., 1995

Office of the Director of the FBI, United States Attorney, Washington, D.C., 1997

District Attorney of Kings County, Law Enforcement Community, Brooklyn, NY, 1997

Office of the Director of the FBI, Crown Heights/Lemrick Nelson Case, Washington, D.C., 1997

U.S. Attorney Commendation

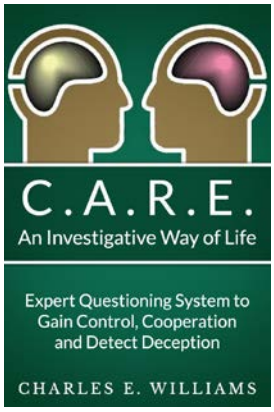
U.S. Attorney General Janet Reno, Successful Prosecution, Washington, D.C., 1997

U.S. Attorney's Office Eastern District of New York, Recognition award, 2003

U.S. Attorney's Office District of Columbia, letter of Commendation, 1997

C.A.R.E. - An Investigative Way of Life
Expert Interviewing system to gain control, cooperation and detect deception
By Charles E. Williams, HDI Investigations

Reviewed by Grace Elting Castle, Editor PI Magazine



"*When an interviewer does something in an interview, there should be a clear corresponding expectation and reason for doing it."*

That quote from the 43rd page of Charles E. Williams' 325 pages is the core underlying concept of the C.A.R.E. (Control, Assessment, Reciprocity, Exit) system. Everything one learns in this hefty tome comes back to that one sentence, as it should, to meet his goal of teaching the importance of developing solid interviewing skills.

At first glance, this book may be overwhelming. You might think, as I did, "How could that much be written about the simple word interviewing?" But any practicing investigator in any part of the legal system, has experienced those moments of panic as he or she is about to knock on a door, or enter a room, wondering how that interview will evolve. Williams promises to teach you how to conquer that fear, that uncertainty, with his C.A.R.E. system.

He created the C.A.R.E. interviewing system from knowledge developed and utilized during two decades as an FBI Special Agent with assignments ranging from both World Trade Center bombings to "Top Fugitives" and an additional eight years as a PI specializing in murder cases. Throughout the book "research" and "prepare" are among the most important skills detailed.

If you're serious about your investigative work, you will want this book. Even if you can't imagine what you could possibly learn about interviewing skills that you don't already know---you will learn. You will have some "Ah hah" moments and probably some "Oh no!" ones, too as former tough interviews come to mind. Just when you think you've learned it all, you come to Page 274 to begin absorbing Williams' five case studies.

This would be an excellent textbook for a group study, but just as useful for personal study. It is not an "easy read" because the subject is tough---and so very important. There are no forms, tests, or website lists---just page after page of useful information.
A good book review usually contains both pros and cons. It is a rare book for which I struggle to find at least one con. This is a rare book!

C.A.R.E. INTERVIEWING SYSTEM

How to Change Lives

FBI/NYC FUGITIVE TASK FORCE

THE 2 GIRLS IN THE WINDOW

- C - CONTROL
- A – ASSESSMENT
- R – RELATIONSHIP
- E - EXIT

*A HOPELESS INTERVIEW *

It is Simply a Matter of Manipulating the interview process

- By utilizing a systematic approach to each stage of the interview:
- Preparation Stage, Introduction Stage
- The Assumption of Denial Stage
- Assessing how & where control can be increased Stage
- Relations building Stage
- Interviewing Tools:
- Caring, Feelings, Intuition, Mirroring, Reciprocity
- Relying on an active mindset

The Active Mindset is Divided into 8 Pillars

- 1. Purpose
- 2. Focus
- 3. Curiosity
- 4. Open Mind
- 5. Imagination
- 6. Mental Archive
- 7. Responsiveness
- 8. Discipline

CONTROL

- What is control?
  - First, let me tell you what it is not…

Why it is not control

- 1. Because you are GIVING up Control
- 2. It limits your OPTIONS
- 3. It limits your DEVELOPMENT as an interviewer
- 4. It doesn't produce or promote real CHANGE

Control in the CARE System comes from learning how to:

1. ENGAGE with a PURPOSE within a SYSTEM
2. View the interview as a DIALOGUE
3. View the interview process as a search for ANCHORS & INTRINSIC power
4. View yourself and the interviewee as EQUAL parts in the equation of a successful interview

Everything you do is all about gaining and maintaining control

- It begins with learning how to control yourself
- Creating a non-threatening environment
- Setting boundaries & assuming the dominant role
- Compelling one to think rather than defend

REMEMBER

"Your perception, application and execution of control will either Limit or Expand what you can and cannot do in the interview room."

The 7 Assessments

1. Assess - The Situation
2. Assess - The Interviewee
3. Assess - The Dynamics of the Interview
4. Assess - The Story
5. Assess – Information/facts
6. Re-assess – Your assessment
7. Assess – Yourself – Why?

Why an assessment of yourself

- **First, because we are human beings and therefore we are not perfect!**

- *The Strangest Confession Ever*

Relationship
Crown Heights

- The strength of the relationship is the basis for what YOU can and cannot do in an interview
- Remember the relationship is not about **YOU**
- It's all about Reciprocity & Control
- The quality and type of relationship is always determined by **YOU** & not the interviewee
- So, take your ***TIME*** building it… ***RIGHT!***

EXIT
Abraham

The exit is the time to put everything together:

1. And ask for what you want in exchange for what has been given

- 2. Understand that asking for what you want is key and is akin to telling a joke… it is all about: The set-up &Timing
  - *Transitional Path & Transitional Time*

WHAT MAKES C.A.R.E. SPECIAL?

- It is a system that Works
- It is a Complete system
- It is a system that utilizes Natural principles
- It is a Defined methodology

IDENTIFICATION AND TREATMENT OF STRESS RELATED MENTAL HEALTH CONDITIONS

Adult Stress—Frequently Asked Questions

How it affects your health and what you can do about it

NATIONAL INSTITUTE OF MENTAL HEALTH National Institutes of Health *NIH...Turning Discovery Into Health*

Stress—just the word may be enough to set your nerves on edge. Everyone feels stressed from time to time. Some people may cope with stress more effectively or recover from stressful events quicker than others. It's important to know your limits when it comes to stress to avoid more serious health effects.

What is stress?

Stress can be defined as the brain's response to any demand. Many things can trigger this response, including change. Changes can be positive or negative, as well as real or perceived. They may be recurring, short-term, or long-term and may include things like commuting to and from school or work every day, traveling for a yearly vacation, or moving to another home. Changes can be mild and relatively harmless, such as winning a race, watching a scary movie, or riding a rollercoaster. Some changes are major, such as marriage or divorce, serious illness, or a car accident. Other changes are extreme, such as exposure to violence, and can lead to traumatic stress reactions.

How does stress affect the body?

Not all stress is bad. All animals have a stress response, which can be life-saving in some situations. The nerve chemicals and hormones released during such stressful times, prepares the animal to face a threat or flee to safety. When you face a dangerous situation, your pulse quickens, you breathe faster, your muscles tense, your brain uses more oxygen and increases activity—all functions aimed at survival. In the short term, it can even boost your immune system.

However, with chronic stress, those same nerve chemicals that are life-saving in short bursts can suppress functions that aren't needed for immediate survival. Your immunity is lowered and your digestive, excretory, and reproductive systems stop working normally. Once the threat has passed, other body systems act to restore normal functioning. Problems occur if the stress response goes on too long, such as when the source of stress is constant, or if the response continues after the danger has subsided.

How does stress affect your overall health?

There are at least three different types of stress, all of which carry physical and mental health risks:

- Routine stress related to the pressures of work, family, and other daily responsibilities.
- Stress brought about by a sudden negative change, such as losing a job, divorce, or illness.
- Traumatic stress, experienced in an event like a major accident, war, assault, or a natural disaster where one may be seriously hurt or in danger of being killed.

The body responds to each type of stress in similar ways. Different people may feel it in different ways. For example, some people experience mainly digestive symptoms, while others may have headaches, sleeplessness, depressed mood, anger, and irritability. People under chronic stress are prone to more frequent and severe viral infections, such as the flu or common cold, and vaccines, such as the flu shot, are less effective for them.

U.S. Department of Health and Human Services
National Institutes of Health

NIMH
National Institute of Mental Health

Of all the types of stress, changes in health from routine stress may be hardest to notice at first. Because the source of stress tends to be more constant than in cases of acute or traumatic stress, the body gets no clear signal to return to normal functioning. Over time, continued strain on your body from routine stress may lead to serious health problems, such as heart disease, high blood pressure, diabetes, depression, anxiety disorder, and other illnesses.

How can I cope with stress?

The effects of stress tend to build up over time. Taking practical steps to maintain your health and outlook can reduce or prevent these effects. The following are some tips that may help you to cope with stress:

- Seek help from a qualified mental health care provider if you are overwhelmed, feel you cannot cope, have suicidal thoughts, or are using drugs or alcohol to cope.
- Get proper health care for existing or new health problems.
- Stay in touch with people who can provide emotional and other support. Ask for help from friends, family, and community or religious organizations to reduce stress due to work burdens or family issues, such as caring for a loved one.
- Recognize signs of your body's response to stress, such as difficulty sleeping, increased alcohol and other substance use, being easily angered, feeling depressed, and having low energy.
- Set priorities—decide what must get done and what can wait, and learn to say no to new tasks if they are putting you into overload.
- Note what you have accomplished at the end of the day, not what you have been unable to do.
- Avoid dwelling on problems. If you can't do this on your own, seek help from a qualified mental health professional who can guide you.
- Exercise regularly—just 30 minutes per day of gentle walking can help boost mood and reduce stress.
- Schedule regular times for healthy and relaxing activities.
- Explore stress coping programs, which may incorporate meditation, yoga, tai chi, or other gentle exercises.

If you or someone you know is overwhelmed by stress, ask for help from a health professional. If you or someone close to you is in crisis, call the toll-free, 24-hour National Suicide Prevention Lifeline at 1-800-273-TALK (1-800-273-8255).

Where can I find more information about stress?

Visit the National Library of Medicine's MedlinePlus at **http://medlineplus.gov**

En Español, **http://medlineplus.gov/spanish**

For information on clinical trials:

NIMH supported clinical trials
http://www.nimh.nih.gov/health/trials/index.shtml

National Library of Medicine Clinical Trials Database
http://www.clinicaltrials.gov

Clinical trials at NIMH in Bethesda, MD
http://patientinfo.nimh.nih.gov

Information from NIMH is available in multiple formats. You can browse online, download documents in PDF, and order materials through the mail. Check the NIMH website at **http://www.nimh.nih.gov** for the latest information on this topic and to order publications. If you do not have Internet access, please contact the NIMH Information Resource Center at the numbers listed below.

National Institute of Mental Health
Science Writing, Press, and Dissemination Branch
6001 Executive Boulevard
Room 8184, MSC 9663
Bethesda, MD 20892-9663
Phone: 301-443-4513 or
1-866-615-NIMH (6464) toll-free
TTY: 301-443-8431 or
1-866-415-8051 toll-free
Fax: 301-443-4279
E-mail: **nimhinfo@nih.gov**
Website: **http://www.nimh.nih.gov**

U.S. Department of Health and Human Services
National Institutes of Health

NIMH
National Institute of Mental Health

The photo in this publication is of a model and is used for illustrative purposes only.

Alcohol Alert

Number 85

The Link Between Stress and Alcohol

Today, more and more servicemen and women are leaving active duty and returning to civilian life. That transition can be difficult. The stresses associated with military service are not easily shed. But dealing with stress is not limited to recent Veterans. A new job, a death in the family, moving across the country, a breakup, or getting married—all are situations that can result in psychological and physical symptoms collectively known as "stress."

One way that people may choose to cope with stress is by turning to alcohol. Drinking may lead to positive feelings and relaxation, at least in the short term. Problems arise, however, when stress is ongoing and people continue to try and deal with its effects by drinking alcohol. Instead of "calming your nerves," long-term, heavy drinking can actually work against you, leading to a host of medical and psychological problems and increasing the risk for alcohol dependence.

This *Alert* explores the relationship between alcohol and stress, including identifying some common sources of stress, examining how the body responds to stressful situations, and the role that alcohol plays—both in alleviating and perpetuating stress.

Common Types of Stress

Most causes of stress can be grouped into four categories: general-life stress, catastrophic events, childhood stress, and racial/ethnic minority stress (see figure 1).[1,2] Each of these factors vary or are influenced in a number of ways by severity, duration, whether the stress is expected or not, the type of threat (emotional or physical), and the individual's mental health status (For example, does the person suffer from anxiety, co-occurring mental health disorders, or alcoholism?).[3] Examples of some of the most common stressors are provided below and summarized in figure 1.

General-Life Stressors

General-life stressors include getting married or divorced, moving, or starting a new job. Problems at home or work, a death in the family, or an illness also can lead to stress. People with an alcohol use disorder (AUD) may be at particular risk for these types of stresses. For example, drinking may cause problems at work, in personal relationships, or trouble with police.

Catastrophic Events

Studies consistently show that alcohol consumption increases in the first year after a disaster, including both manmade and natural events.[1] As time passes, that relationship is dampened. However, much of this research focuses on drinking only and not on the prevalence of AUDs. In the studies that looked specifically at the development of AUDs, the results are less consistent. In some cases, studies have

found no increases in AUDs among survivors after events such as the Oklahoma City bombing, September 11, Hurricane Andrew, or jet crashes. However, other studies of September 11 survivors have found that AUDs increased. This trend was similar in studies of Hurricane Katrina, the Mount St. Helens volcano eruption, and other events. Most of these studies included only adults. Additional studies are needed to better understand how adolescents and young people respond to disasters and whether there is a link to alcohol use.

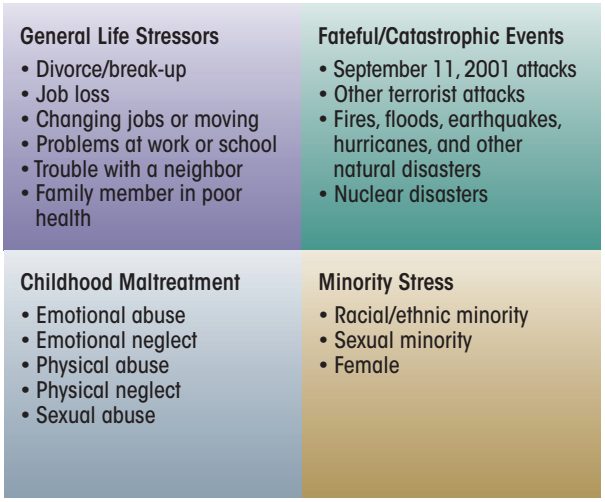


Figure 1 The four categories of stress.

Childhood Stress

Maltreatment in childhood includes exposure to emotional, sexual, and/or physical abuse or neglect during the first 18 years of life. Although they occur during childhood, these stressors have long-lasting effects, accounting for a significant proportion of all adult psychopathology.[4,5] Studies typically show that maltreatment in childhood increases the risk for both adolescent and adult alcohol consumption[1] as well as increased adult AUDs.[6] However, childhood maltreatment is more likely to occur among children of alcoholics, who often use poor parenting practices and who also pass along genes to their offspring that increase the risk of AUDs. Additional research is needed to learn exactly how the stresses of childhood neglect and abuse relate to alcohol use.[1]

Racial and Ethnic Minority Stress

Stress also can arise as a result of a person's minority status, especially as it pertains to prejudice and discrimination. Such stress may range from mild (e.g., hassles such as being followed in a store) to severe (e.g., being the victim of a violent crime). The stress may be emotional (e.g., workplace harassment) or physical (e.g., hate crimes). The relationship of these stress factors to alcohol use is complicated by other risk factors as well, such as drinking patterns and individual differences in how the body breaks down (or metabolizes) alcohol.[1]

Coping With Stress

The ability to cope with stress (known as resilience) reflects how well someone is able to adapt to the psychological and physiological responses involved in the stress response.[7]

When challenged by stressful events, the body responds rapidly, shifting normal metabolic processes into high gear. To make this rapid response possible, the body relies on an intricate system—the hypothalamic–pituitary–adrenal (HPA) axis—that involves the brain and key changes in the levels of hormonal messengers in the body. The system targets specific organs, preparing the body either to fight the stress factor (stressor) or to flee from it (i.e., the fight-or-flight response).[8,9]

The hormone cortisol has a key role in the body's response to stress. One of cortisol's primary effects is to increase available energy by increasing blood sugar (i.e., glucose) levels and mobilizing fat and protein metabolism to increase nutrient supplies to the muscles, preparing the body to respond quickly and efficiently. A healthy stress response is characterized by an initial spike in cortisol levels followed by a rapid fall in those levels as soon as the threat is over.

People are most resilient when they are able to respond quickly to stress, ramping up the HPA axis and then quickly shutting it down once the threat or stress has passed.[7] (See figure 2.)

Personality, heredity, and lifestyle all can dictate how well someone handles stress. People who tend to focus on the positive, remain optimistic, and use problem solving and planning to cope with problems are more resilient to stress and its related disorders, including AUDs.[10,11]

The personality characteristics of resilience are in sharp contrast to the ones associated with an increased risk for substance use disorders (e.g., impulsivity, novelty seeking, negative emotionality, and anxiety).[3,7] A person with a history of alcoholism in his or her family may have more difficulty dealing with the stress factors that can lead to alcohol use problems.[8,12,13] Likewise, having a mother who drank alcohol during pregnancy, experiencing childhood neglect or abuse, and the existence of other mental health issues such as depression can add to that risk.[6,14–16]

What Is Stress?

Stress is a part of everyday life, brought on by less-than-ideal situations or perceived threats that foster feelings of anxiety, anger, fear, excitement, or sadness. Physiologically, stress is considered to be anything that challenges the body's ability to function in its usual fashion. The body has developed remarkably complex and interrelated responses that are designed to ward off harmful or dangerous situations brought on by stress and to keep it in physiological balance.[8] Introducing alcohol into this mix throws off a person's physiological balance (see figure 2), compounding the problem and putting the body at even greater risk for harm.

Ongoing stress, or chronic, heavy alcohol use, may impair the body's ability to return to its initial balance point.[26–28] Instead, the body seeks to achieve a new set point (a process known as allostasis) of physiological functioning.[26] This is important because establishing the new balance point places a cost on the body in terms of wear and tear, and may increase the risk of serious disease, including alcohol use disorders.[8]

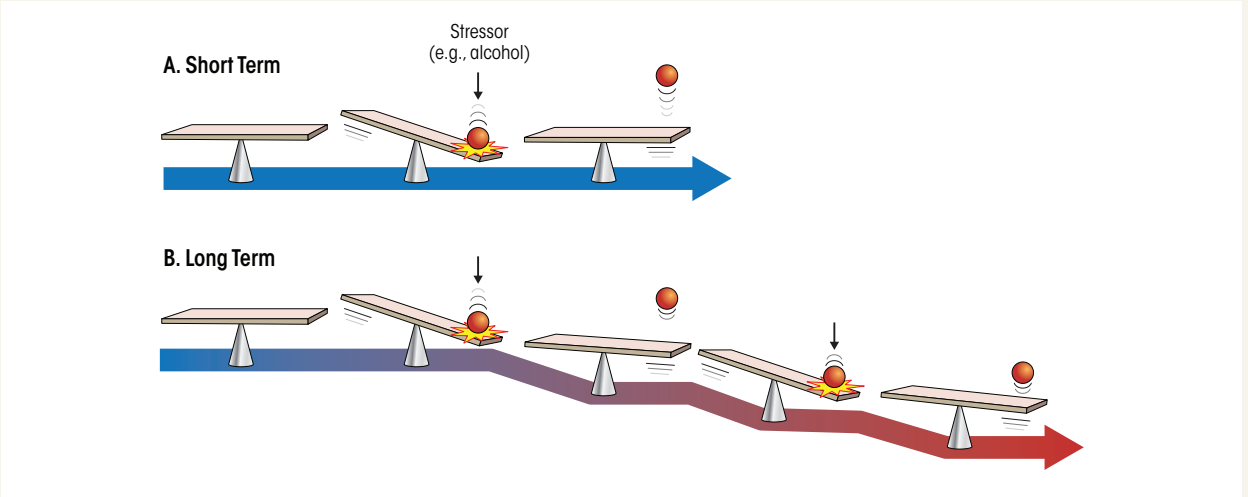


Figure 2 In the short term A), when faced with a stressful situation (such as a night of heavy drinking), the body's normal physiological balance is altered but quickly recovers once the stressor is removed. If the stressor continues over time (such as long-term heavy drinking) B), the demands on the body's systems are increased, making it harder for the body to regain its physiological balance. In response, the body simply "resets" its balance point, to a less optimal level of functioning.

Alcohol's Role In Stress

To better understand how alcohol interacts with stress, researchers looked at the number of stressors occurring in the past year in a group of men and women in the general population and how those stressors related to alcohol use.[1] They found that both men and women who reported higher levels of stress tended to drink more. Moreover, men tended to turn to alcohol as a means for dealing with stress more often than did women. For example, for those who reported at least six stressful incidents, the percentage of men binge drinking was about 1.5 times that of women, and AUDs among men were 2.5 times higher than women.[1]

Veterans who have been in active combat are especially likely to turn to alcohol as a means of relieving stress.[1] Posttraumatic stress disorder (PTSD), which has been found in 14 to 22 percent of Veterans returning from recent wars in Afghanistan and Iraq,[17,18] has been linked to increased risk for alcohol abuse and dependence.[2]

Stress and Alcoholism Recovery

The impact of stress does not cease once a patient stops drinking. Newly sober patients often relapse to drinking to alleviate the symptoms of withdrawal, such as alcohol craving, feelings of anxiety, and difficulty sleeping.[19] Many of these symptoms of withdrawal can be traced to the HPA axis, the system at the core of the stress response.[20]

As shown in figure 2, long-term, heavy drinking can actually alter the brain's chemistry, re-setting what is "normal." It causes the release of higher amounts of cortisol and adrenocorticotropic hormone. When this hormonal balance is shifted, it impacts the way the body perceives stress and how it responds to it.[21,22] For example, a long-term heavy drinker may experience higher levels of anxiety when faced with a stressful situation than someone who never drank or who drank only moderately.

In addition to being associated with negative or unpleasant feelings, cortisol also interacts with the brain's reward or "pleasure" systems. Researchers believe this may contribute to alcohol's reinforcing effects, motivating the drinker to consume higher levels of alcohol in an effort to achieve the same effects.

Cortisol also has a role in cognition, including learning and memory. In particular, it has been found to promote habit-based learning, which fosters the development of habitual drinking and increases the risk of relapse.[23] Cortisol also has been linked to the development of psychiatric disorders (such as depression) and metabolic disorders.

These findings have significant implications for clinical practice. By identifying those patients most at risk of alcohol relapse during early recovery from alcoholism, clinicians can help patients to better address how stress affects their motivation to drink.

Early screening also is vital. For example, Veterans who turn to alcohol to deal with military stress and who have a history of drinking prior to service are especially at risk for developing problems.[24] Screening for a history of alcohol misuse before military personnel are exposed to military trauma may help identify those at risk for developing increasingly severe PTSD symptoms.

Interventions then can be designed to target both the symptoms of PTSD and alcohol dependence.[25] Such interventions include cognitive–behavioral therapies, such as exposure-based therapies, in which the patient confronts the cues that cause feelings of stress but without the risk of danger. Patients then can learn to recognize those cues and to manage the resulting stress. Researchers recommend treating PTSD and alcohol use disorders simultaneously[25] rather than waiting until after patients have been abstinent from alcohol or drugs for a sustained period (e.g., 3 months).

Medications also are currently being investigated for alcoholism that work to stabilize the body's response to stress. Some scientists believe that restoring balance to the stress-response system may

help alleviate the problems associated with withdrawal and, in turn, aid in recovery. More work is needed to determine the effectiveness of these medications.[19]

Conclusion

Although the link between stress and alcohol use has been recognized for some time, it has become particularly relevant in recent years as combat Veterans, many with PTSD, strive to return to civilian lifestyles. In doing so, some turn to alcohol as a way of coping.

Unfortunately, alcohol use itself exacts a psychological and physiological toll on the body and may actually compound the effects of stress. More research is needed to better understand how alcohol alters the brain and the various circuits involved with the HPA axis. Powerful genetic models and brain-imaging techniques, as well as an improved understanding of how to translate research using animals to the treatment of humans, should help researchers to further define the complex relationship between stress and alcohol.[26]

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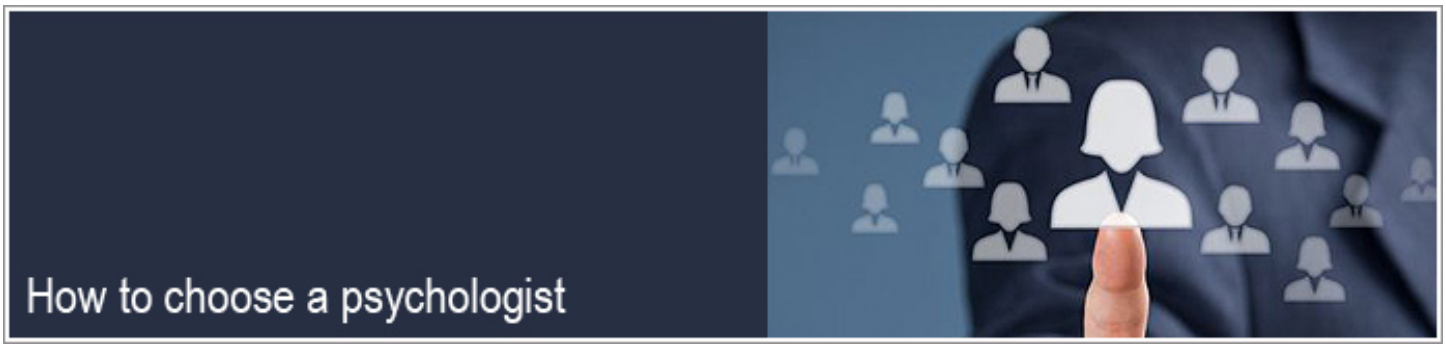
Resources

Source material for this *Alcohol Alert* originally appeared in *Alcohol Research: Current Reviews,* 2012, Volume 34, Number 4.

Alcohol Research: Current Reviews, 2012, 34(4) summarizes the latest findings on the link between stress and alcohol. Articles examine different sources of stress, such as childhood abuse and trauma, post-traumatic stress disorder, and comorbidity. Other topics explore how stress influences the development of alcohol abuse and dependence, and the impact this has on treatment and recovery. The issue concludes by looking at the role of genetics, epigenetics, and the environment in the stress response.

For more information on the latest advances in alcohol research, visit NIAAA's Web site, **www.niaaa.nih.gov**

AMERICAN PSYCHOLOGICAL ASSOCIATION



At some time in our lives, each of us may feel overwhelmed and may need help dealing with our problems. According to the National Institute of Mental Health, more than 30 million Americans need help dealing with feelings and problems that seem beyond their control — problems with a marriage or relationship, a family situation or dealing with losing a job, the death of a loved one, depression, stress, burnout or substance abuse. Those losses and stresses of daily living can at times be significantly debilitating. Sometimes we need outside help from a trained, licensed professional in order to work through these problems. Through therapy, psychologists help millions of Americans of all ages live healthier, more productive lives.

Consider therapy if...

- You feel an overwhelming and prolonged sense of helplessness and sadness, and your problems do not seem to get better despite your efforts and help from family and friends.
- You are finding it difficult to carry out everyday activities: for example, you are unable to concentrate on assignments at work, and your job performance is suffering as a result.
- You worry excessively, expect the worst or are constantly on edge.
- Your actions are harmful to yourself or to others: for instance, you are drinking too much alcohol, abusing drugs or becoming overly argumentative and aggressive.

What is a psychologist and what is psychotherapy?

Psychologists who specialize in psychotherapy and other forms of psychological treatment are highly trained professionals with expertise in the areas of human behavior, mental health assessment, diagnosis and treatment, and behavior change. Psychologists work with patients to change their feelings and attitudes and help them develop healthier, more effective patterns of behavior.

Psychologists apply scientifically validated procedures to help people change their thoughts, emotions and behaviors. Psychotherapy is a collaborative effort between an individual and a psychologist. It provides a supportive environment to talk openly and confidentially about concerns and feelings. Psychologists consider maintaining your confidentiality extremely important and will answer your questions regarding those rare circumstances when confidential information must be shared.

How do I find a psychologist?

To find a psychologist, ask your physician or another health professional. Call your local or state psychological association. Consult a local university or college department of psychology. Ask family and friends. Contact your area community mental health center. Inquire at your church or synagogue. Or, use APA's Psychologist Locator (http://locator.apa.org/) service.

What to consider when making the choice

Psychologists and clients work together. The right match is important. Most psychologists agree that an important factor in determining whether or not to work with a particular psychologist, once that psychologist's credentials and competence are established, is your level of personal comfort with that psychologist. A good rapport with your psychologist is critical. Choose one with whom you feel comfortable and at ease.

Questions to ask

- Are you a licensed psychologist? How many years have you been practicing psychology?
- I have been feeling (anxious, tense, depressed, etc.) and I'm having problems (with my job, my marriage, eating, sleeping, etc.). What experience do you have helping people with these types of problems?
- What are your areas of expertise — for example, working with children and families?
- What kinds of treatments do you use, and have they been proven effective for dealing with my kind of problem or issue?
- What are your fees? (Fees are usually based on a 45-minute to 50-minute session.) Do you have a sliding-scale fee policy?
- What types of insurance do you accept? Will you accept direct billing to or payment from my insurance company? Are you affiliated with any managed care organizations? Do you accept Medicare or Medicaid insurance?

Finances

Many insurance companies provide coverage for mental health services. If you have private health insurance coverage (typically through an employer), check with your insurance company to see if mental health services are covered and, if so, how you may obtain these benefits. This also applies to persons enrolled in HMOs and other types of managed care plans. Find out how much the insurance company will reimburse for mental health services and what limitations on the use of benefits may apply.

If you are not covered by a private health insurance plan or employee assistance program, you may decide to pay for psychological services out-of-pocket. Some psychologists operate on a sliding-scale fee policy, where the amount you pay depends on your income.

Another potential source of mental health services involves government-sponsored health care programs — including Medicare for individuals age 65 or older, as well as health insurance plans for government employees, military personnel and their dependents. Community mental health centers throughout the country are another possible alternative for receiving mental health services. State Medicaid programs may also provide for mental health services from psychologists.

Credentials to look for

After graduation from college, psychologists spend an average of seven years in graduate education training and research before receiving a doctoral degree. As part of their professional training, they must complete a supervised clinical internship in a hospital or organized health setting and at least one year of post-doctoral supervised experience before they can practice independently in any health care arena. It's this combination of doctoral-level training and a clinical internship that distinguishes psychologists from many other mental health care providers.

Psychologists must be licensed by the state or jurisdiction in which they practice. Licensure laws are intended to protect the public by limiting licensure to those persons qualified to practice psychology as defined by state law. In most states, renewal of this license depends upon the demonstration of continued competence and requires continuing education. In addition, APA members adhere to a strict code of professional ethics.

Will seeing a psychologist help me?

According to a research summary from the Stanford University School of Medicine, some forms of psychotherapy can effectively decrease patients' depression, anxiety and related symptoms such as pain, fatigue and nausea. Research increasingly supports the idea that emotional and physical health are closely linked and that seeing a psychologist can improve a person's overall health.

There is convincing evidence that most people who have at least several sessions with a psychologist are far better off than individuals with emotional difficulties who are untreated. One major study showed that 50 percent of patients noticeably improved after eight sessions, while 75 percent of individuals in therapy improved by the end of six months.

How will I know if therapy is working?

As you begin therapy, you should establish clear goals with your psychologist. You might be trying to overcome feelings of hopelessness associated with depression or control a fear that is disrupting your daily life. Remember, certain goals require more time to reach than others. You and your psychologist should decide at what point you may expect to begin to see progress.

It is a good sign if you begin to feel a sense of relief, and a sense of hope. People often feel a wide variety of emotions during therapy. Some qualms about therapy that people may have result from their having difficulty discussing painful and troubling experiences. When you begin to feel relief or hope, it can be a positive sign indicating that you are starting to explore your thoughts and behavior.

Examples of the types of problems which bring people to seek help from psychologists are provided below:

A man in his late 20s has just been put on probation at work because of inappropriate behavior towards his staff and other employees. He has been drinking heavily and is getting into more arguments with his wife.

Once the contributing factors that may have led to the man's increase in stress have been examined, the psychologist and the man will design a treatment that addresses the identified problems and issues. The psychologist will help the client evaluate how he coped with, and what he learned from, any earlier experiences he had with a similar problem that might be useful for dealing with the current situation.

Functioning as a trained, experienced and impartial third party, the psychologist will help this client take advantage of available resources (his own as well as other resources) to deal with the problem. The psychologist also will assist this client with developing new skills and problem-solving strategies for confronting the problem he faces.

Crying spells, insomnia, lack of appetite and feelings of hopelessness are some of the symptoms a woman in her early 40s is experiencing. She has stopped going to her weekly social activities and has a hard time getting up to go to work. She feels like she lives in a black cloud and can't see an end to the way she feels.

The symptoms of depression are extremely difficult to deal with, and the causes may not be immediately apparent. Significant life changes — such as the death of a loved one, the loss of a job or a child's leaving home for college — may contribute to depression. Psychologists have a proven track record in helping people deal with and overcome depressive disorders.

A psychologist will approach the problems this woman presents by addressing why she is reacting the way she is reacting now. Does she have a history or pattern of such feelings, and, if so, under what circumstances? What was helpful to her before when she dealt with similar feelings, and what is she doing now to cope with her feelings?

The psychologist will work to help the client see a more positive future and reduce the negative thinking that tends to accompany depression. The psychologist also will assist the client in problem-solving around any major life changes that have occurred. And the psychologist may help facilitate the process of grieving if her depression resulted from a loss.

Medical problems may contribute to the symptoms the woman is experiencing. In such cases, medical and psychological interventions are called for to help individuals overcome their depression.

William, a successful businessman, has been laid off from work. Instead of looking for a job, he has gone on endless shopping sprees. He has gotten himself into thousands of dollars of debt, but he keeps spending money.

What can be more perplexing than someone who does the opposite of what appears to be reasonable? William's friends and family members will likely be confused by his behavior. Yet, such behavior is not unfamiliar to psychologists who understand bipolar disorders. Of course, any psychologist would have to do a thorough evaluation to be able to understand the apparently contradictory behavior William exhibits. Following an evaluation, the psychologist might conclude that the behavior actually is a symptom of a depressive or some other form of mood disorder.

Typically, the best results for such a condition have come from treatment that combines medication and therapy. Although psychologists do not provide medication, they maintain relationships with physicians who are able to assess a patient's need for appropriate medication. The psychologist offers understanding of human behavior and psychotherapeutic techniques that can be effective in helping William deal with his disorder.

Scott, a teenager, has just moved across town with his family and has been forced to transfer to a new high school. Once an excellent student, he is now skipping classes and getting very poor grades. He has had trouble making friends at this new school.

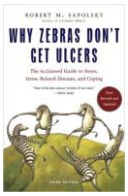
For most teenagers, "fitting in" is a critical part of adolescence. Scott is attempting to make a major life transition under difficult circumstances. He has been separated from the network of friends which made up his social structure and allowed him to feel "part of the group."

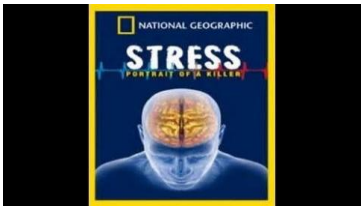
Young people often respond to troubling circumstances with marked changes in behavior. Thus, an excellent student's starting to get poor grades, a social youngster's becoming a loner or a leader in school affairs losing interest in those activities would not be unusual. A psychologist, knowing that adolescents tend to "test" first and trust second, will likely initially spend time focusing on developing a relationship with Scott. Next, the psychologist will work with Scott to find better ways to help him adjust to his new environment.

Find this article at:
http://www.apa.org/helpcenter/choose-therapist.aspx

- Stress is a serious problem
- Symptoms and warning signs
- How to get help

The Science of Stress





https://www.youtube.com/watch?v=ZyBsy5SQxqU

Stress

- **What is stress?**

  A physical and mental response to a challenging or threatening situation

  A physical condition or psychological feeling that is experienced when a person perceives that demands exceed the personal and social resources that the person is able to mobilize.

- **What are stressors?**

  An event or situation that an individual perceives as a threat that causes him or her to either adapt or initiate the stress response

- **A Stressor is an Event, Stress is a Response**

Job Stress

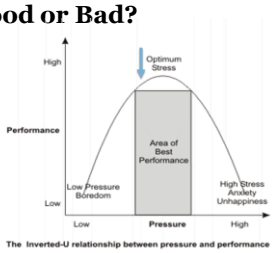
- **Job stress can cause considerable damage to your physical and mental health**
  - Sense of control is critical!
  - If not managed, it can cause burnout – emotional exhaustion & negative attitudes toward yourself & others
- **Some experiences you might have as a public defender**
  - High stakes when working w/clients
  - Difficult, disturbing content matter
  - Societal condemnation
  - Minimal gratitude from others

Extreme & unrelenting stress from a job devoted to helping others

Is Stress Good or Bad?

Yerkes-Dodson Principle

- To a certain point, stress is healthy, useful and beneficial
- When stress exceeds ability to cope then diminished performance, inefficiency and/or health problems may result



The Inverted-U relationship between pressure and performance

Short-Term Effects of Stress

Physical

- Muscle Tension
- Headaches
- Teeth grinding
- Fatigue
- Insomnia
- Neck and Back aches
- Stomach problems
- Frequent Colds & Illness

Intellectual and Cognitive

- Forgetfulness
- Poor concentration
- Low productivity
- Negative Attitudes
- Confusion
- No new ideas

Social

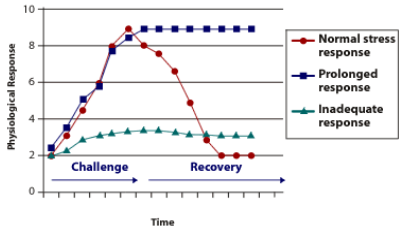
- Isolation
- Lashing out
- Clamming up
- Lowered sex drive
- Nagging
- Fewer friends
- Using people

Short-Term Effects of Stress

Emotional
- Anxiety
- Frustration
- Nervousness
- Worrying
- Tension
- Mood swings
- Easily discouraged
- Crying spells
- Irritability

Spiritual
- Lack of meaning
- Lack of purpose
- Loneliness
- Sadness
- Low self esteem
- Loss of self worth
- Feeling abandoned
- Inability to love

Normal and Abnormal Stress Response



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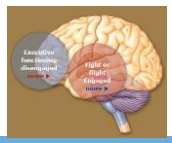
Effects of Stress on the Brain

- Atrophy of neurons in the hippocampus and medial prefrontal cortex
  - Decreased learning, memory, and executive function
- Hypertrophy of neurons in the amygdala
  - Increases anxiety, aggression



Long-Term Consequences of Stress

Cardiovascular Problems
- Heart disease, high blood pressure, heart attacks

Gastrointestinal Problems
- GERD, gastritis, ulcerative colitis, ulcers, irritable bowel syndrome, Crohn's disease

Weight Difficulties
- Eating disorders, obesity

Mental Health Disorders
- Major Depressive Disorder
- Anxiety Disorders
- Substance Use Disorder

Pain
- Tension headaches, muscular & joint pain

Sexual & Reproductive
- Premenstrual syndrome, pregnancy complications, menopause, erectile dysfunction

Skin & Hair Problems
- Acne, psoriasis, eczema, hair loss

What is Depression?

Five of the following symptoms nearly every day for the past two weeks

- Depressed mood most of the day (e.g., sadness, emptiness, or hopelessness)
- Markedly diminished interest or pleasure in all or almost all activities
- Significant weight loss when not dieting or weight gain
- Inability to sleep or oversleeping
- Psychomotor agitation or retardation

- Fatigue or loss of energy
- Feelings of worthlessness or excessive or inappropriate guilt
- Diminished ability to think or concentrate, or indecisiveness
- Recurrent thoughts of death (not just fear of dying) or recurrent suicidal ideation with or without a specific plan

Depression

- **Depression is the "common cold" of psychopathology**
  - **13-20% of us will suffer a major depression at some point in our lives.**
- **Depression results and is maintained as a result of environmental situations**
  - **Reduction in pleasant events and positive reinforcers**
  - **Increase in the intensity and frequency of aversive events and consequences**

Life is no longer rewarding!

Anxiety Disorders

Persistent, excessive fear or worry in situations that are not threatening

- **Generalized Anxiety Disorder (GAD)**
- **Post-Traumatic Stress Disorder (PTSD)**
- **Panic Disorder**
- **Obsessive-Compulsive Disorder (OCD)**

Generalized Anxiety Disorder (GAD)

What is it?

- Anxious about just getting through the day
- Afraid that everything will always go badly
- Excessive worry about everyday things for months (e.g., health, money, family) ***even when there is little or no reason to worry about them***

Signs

- Restlessness or feeling wound-up or on edge
- Being easily fatigued
- Difficulty concentrating and your mind go blank
- Irritability
- Muscle tension
- Difficulty controlling the worry
- Sleep problems

Post-Traumatic Stress Disorder (PTSD)

What is it?

- After experiencing or witnessing a traumatic (shocking, scary, or dangerous)
  - E.g., Death of a loved one, war/combat, car accidents, natural disasters, violent crimes
- Persistent symptoms beyond an initial reaction and recovery from a traumatic event

Signs

- Nightmares
- Feeling on edge
- Sleeping too little or too much
- Frequent angry outbursts and/or fighting w/loved ones
- Avoiding places and things that remind you of what happened
- Feeling worried, guilty, sad
- Flashbacks
- Experiencing scary thoughts you feel like you can't control

Panic Disorder

What is it?

- Sudden and repeated panic attacks
  - *Fear of disaster & losing control* ***when there is no real danger***
  - *Pounding/racing heart, sweating, hyperventilation, dizziness, chest pain, stomach pain, feeling hot or having the chills*
- Impairment (e.g., work, traveling, socializing)

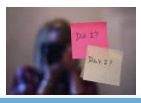
Signs

- Sudden & repeated attacks of fear
- Feeling of being out of control during a panic attack
- Intense worry about having another panic attack
- Fear and/or avoidance of places where panic attacks have occurred

Obsessive-Compulsive Disorder (OCD)

What is it?

- Repetitive checking of things, specific unwanted thoughts, and/or performance of routines over & over
- Cause distress & interfere with daily life
  - Obsessions – frequent upsetting thoughts
  - Compulsions – rituals/behaviors to try to control obsessions



Signs

- Repeated thoughts or images (e.g., germs, hurting loved ones, sexual acts, conflicts w/religious beliefs)
- Can't control unwanted thoughts & behaviors that cause impairment
- Perform same rituals over and over (e.g., washing hands, locking doors, counting, keeping unneeded things, repeating steps)
- Get brief relief from anxiety, but not pleasure after performing rituals

Addiction

Substance Classes

- Alcohol
- Caffeine
- Cannabis
- Opioids
- Sedatives, hypnotics, and anxiolytics
- Stimulants
- Tobacco
- Hallucinogens
- Inhalants

Non-Substance Classes

- Gambling
- Internet
- Sex
- Compulsive buying
- Computer/video game playing

Substance Use Disorders

Two or more of the following symptoms

- Substance taken in larger amounts or over a longer period than intended
- Persistent desire/unsuccessful efforts to cut down or control use
- Great deal of time spent in activities to obtain, use, recover from the substance
- Failure to fulfill role obligations at work, school, home
- Tolerance
- Withdrawal
- Recurrent use in situations in which it is physically hazardous
- Important activities given up or reduced
- Continued use despite persistent physical or psychological problems likely caused or exacerbated by use
- Craving or a strong desire or urge

What is driving substance use?

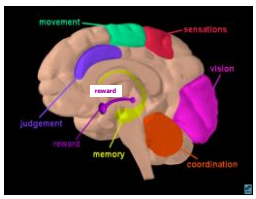
- **To Feel Good**
- **To Feel Better**

Continued and chronic use often occurs in situations involving stress and other forms of negative affect

"That is not one of the seven habits of highly effective people."

Substance Use Hijack's the Brain's Reward Circuitry

- Immediate effect of drug use is an increase in dopamine
- Continued use of drugs reduces the brain's dopamine production.
- Because dopamine is part of the reward system, the brain is "fooled" that the drug has survival value for the organism.
- The reward system responds with "drug seeking behaviors"
- Craving occurs and, eventually, dependence.



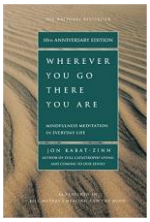
Questions about Addiction

- What is an addiction?
  - http://www.hbo.com/addiction/thefilm/supplemental/6212_what_is_addiction.html
- Do addictions co-occur?
  - http://www.hbo.com/addiction/thefilm/supplemental/621_kathleen_brady.html
- What are the causes of addiction?
- Why is an addiction hard to stop?
  - http://www.hbo.com/addiction/thefilm/centerpiece/614_segment_3.html
- How does addiction affect others?
- Do people change, and if so, how?
- Are addictions with and without a substance different?
- What resources are there for those with an addiction?
  - http://www.hbo.com/addiction/thefilm/supplemental/627_search_for_treatment.html
- What can a concerned person do to help one with an addiction?
  - http://www.hbo.com/addiction/thefilm/centerpiece/613_segment_2.html

How to Find Help

- **Self Help**
  - **Mindfulness Meditation**
  - **Exercise**
  - **Self Care**
- **Professional Help**

Mindfulness



"Awareness that emerges through paying attention on purpose, in the present moment, and non-judgmentally to the unfolding of experience moment by moment"

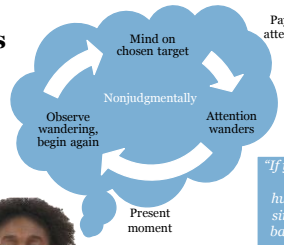
(Kabat-Zinn, 2003)

What is mindfulness?

https://www.youtube.com/watch?v=HmEo6RI4Wvs

Mindfulness Exercise

Mindfulness of the Breath (10:38)



"If your attention wanders a hundred times, simply bring it back a hundred times."

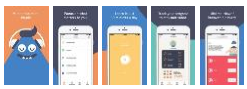
Resources

Mindfulness Apps

The Mindfulness Training App

Calm – Meditate, Sleep, Relax App

Stop, Breathe, & Think : Meditation Tailored to Your Emotions



Headspace – Meditation Techniques for Mindfulness, Stress Relief, & Peace of Mind App

Self-Care

"Rest and self-care are so important. When you take time to replenish your spirit, it allows you to serve others from the overflow. You cannot serve from an empty vessel."

– Eleanor Brownn

Religious/Spiritual
List 5 things you're grateful for, pray, write in a journal, spend time in nature

Sensory
Listen to music, take a hot shower or warm bath, practice deep breathing, burn a scented candle…

Pleasure
Watch a movie, garden, do an art project, play with your pet…

Mental/Mastery
Try a new activity, read something on a topic you don't know well…

Emotional
Acknowledge & accept your feelings, cry when you need to, practice self-compassion…

Physical
Stretch, go for a run, take a nap, try yoga, dance…

Social
Call a friend on the phone, join a volunteer club/organization, join a support group…

How to Find a Psychologist

- **American Psychological Association's (APA) Psychologist Locator**
  - http://locator.apa.org/
- **Association for Behavioral and Cognitive Therapies' (ABCT) Find a CBT Therapist**
  - http://www.findcbt.org/xFAT/
- **Insurance Provider**
  - E.g., on BlueCross BlueShield's website, "Find a Doctor"

Search by geographical location, area of specialization, gender, insurance, languages spoken, sexual orientation, & cultural sensitivity

Questions to Ask

- Are you a licensed psychologist? How many years have you been practicing psychology?
- I have been feeling (anxious, tense, depressed, etc.) and I'm having problems (with my job, my marriage, eating, sleeping, etc.). What experience do you have helping people with these types of problems?
- What are your areas of expertise?
- What kinds of treatments do you use, and have they been proven effective for dealing with my kind of problem or issue?
- What are your fees? Do you have a sliding-scale fee policy?
  - Fees are usually based on a 45-minute to 50-minute session.
- What types of insurance do you accept?

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http://www.apa.org/helpcenter/choose-therapist.aspx

THANK YOU

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