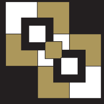

NCDD Journal

National College for DUI Defense

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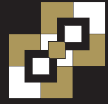
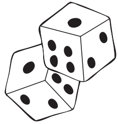
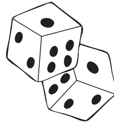


NCDD WELCOMES YOU TO LAS VEGAS





The Bellagio Hotel

October 11-13

Golden State Warriors vs. Los Angeles Lakers

October 10 at 7:30 p.m.

T-Mobile Arena

Lionel Ritchie

John Fogerty

Reba, Brooks & Dunn

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E.D.'S Corner

Rhea Kirk

It's hard to believe that summer is just about over, and it is time for FOOTBALL! We had such a great Summer Session in Cambridge and are now looking forward to being back in Las Vegas at the Bellagio, Oct 11-13, with the NACDL/ NCDD seminar: "Grand Slam Defenses!"

Our upcoming seminars:

- 2019 Winter Session: "To Live and DRE in LA!" Hollywood, CA January 18-19, 2019
- Mastering Scientific Evidence (MSE) - New Orleans April 4 & 5, 2019
- Serious Science-Drugs - Arlington, TX June 14-19, 2019
- Summer Session - Cambridge, MA July 18-20, 2019 Mark your calendars now and please visit the NCDD Website www.ncdd.com for more details for our upcoming events or call the NCDD Office 334-264-1950 for more information.

I hope you all enjoy a beautiful Fall and gear up for the holidays!

I look forward to seeing you at one of our NCDD seminars soon!

--- Rhea

Dean's Message

William Kirk

It is with great pleasure that I have the honor of being the 24th Dean for the National College for DUI Defense. Our motto is Justice Through Knowledge and no other organization provides the DUI defense attorney with more educational opportunities to sharpen their skills and further the cause of justice than NCDD. However, as members of this College I would remind all of us that with our membership comes great responsibility. We can never allow our thirst for knowledge to diminish but why we all have the obligation to continue to advance in our practice, it is equally our duty to educate the defense bar, the prosecution and the bench. For only then will justice truly be served.

Our home has always been Austin Hall and our Summer Session continues to be our flagship program. I want to congratulate Michael Hawkins on an extremely successful 2018 Summer Session. By taking this program back to its basics and focusing exclusively on trial skills, coupled with the intensive hands on small classroom training, our Summer Session will continue to be the premier program for the development of effective trial skills. No other organization provides the DUI practitioner with a more comprehensive DUI defense trials skills curriculum than the National College.

In October, NCDD will once again partner with the National Association of Criminal Defense Lawyers to host the nation's largest DUI Defense CLE in Las Vegas. This year, our program "Grand Slam Defenses" will again be held at the Bellagio. The program's format will provide the attendee with a wide array of programs catered to

Continued on Page 2

Roger and Matthew Dodd shared their crossexamination skills at the 2018 NCDD Summer Session in Cambridge, MA

(Continued from cover - “Dean’s Message”)

practitioners of every level. Because our two organizations exist for the same purpose, NCDD is proud that our relationship with NACDL is a strong one and will continue for many, many years.

I am equally as excited about our upcoming Winter Session. This coming year, NCDD will go to Hollywood for the first time. “To Live and DRE in LA” will focus exclusively on defending those accused of prescription drug DUIs. National statistics show that in many jurisdictions prescription drug DUIs now exceed alcohol-related DUI’s so this program will come at a vital time for our profession. The addition of three simultaneous live DRE examinations on dosed subjects will give attendees an invaluable hands-on experience rarely made available to DUI/DWI defense lawyers.

For those who cannot make the trip to Hollywood we will broadcast the Winter Session live via internet simulcast. This will not only provide our members with another amazing educational opportunity, but this will further one of this College’s most noble causes, educating Public Defenders nationwide. If you know of any public defense agency that needs assistance in connecting to our seminar, please contact the College and let us know.

This coming March, NCDD will once again be proud to partner with the Texas Criminal Defense Lawyers Association to present “Mastering Scientific Evidence.” Now in its 26th year, MSE is the nation’s premier DUI forensic evidence seminar. Offering some of the most recognized experts in this field, along with top flight trial lawyers, MSE will once again provide the attendee with a rare mix of forensic evidence training and trial skills application. Our mock trial, using many of the concepts discussed at MSE, gives our members not only the knowledge necessary, but the skills required to ensure that justice is served.

Finally, for those of you that are truly committed to taking your practice to the highest level possible, “Serious Science for Serious Lawyers” is the most comprehensive and intensive DUI defense training anywhere. Six full days of hands on lab experience followed by intensive trial skills workshops taught by some of this nation’s premier trial lawyers, *Serious Science* is a program like no other.

In addition to these amazing programs, NCDD is proud of our work as *Amicus Curiae* on numerous United States Supreme Court and State Supreme Court cases. In recent years, NCDD has authored briefs in both *Bullcoming v. New Mexico* and *Birchfield v. North Dakota*, both with DUI issues before the United States Supreme Court. This is the just the latest in a long list of cases in which NCDD has participated as *amicus curiae*. We encourage any member who is aware of an issue of great importance before your State Supreme Courts, to contact the College for assistance.

Our Virtual Forensic Library is the largest depository of forensic science journals, briefs, transcripts, motions and studies with DUI legal defenses in mind. Membership does have its privilege and access to our 3,500+ scholarly journal library is just one of the many benefits of joining us in our quest for “Justice Through Knowledge.” If you have not spent time in our VFL you are depriving yourself of a valuable asset.

Our College’s crown jewel remains our Board Certification, as recognized by the American Bar Association (ABA). It is the only ABA approved Board Certification Exam in the area of DUI Defense. While the process is challenging, the benefits of obtaining Board Certification cannot be overstated. I hope that all of you one day will choose to pursue the highest personal achievement in our field.

NCDD is a College where we both educate and learn through the collective wisdom of over 1,600 members. Our sole purpose is education, but over the next year I ask each of us to re-focus our attention to some other equally important matters.

As attorneys we fight very hard for the Constitution, justice, freedom and our clients. But I ask that we dedicate the same energy and compassion in fighting for each other. Our profession has been under attack for years. Junk science, bad laws, a naïve judiciary and an ever-increasing hostile public has taken a toll on all of us both personally and professionally. That coupled with the fact that ride-sharing, increased public awareness and significant cuts in law enforcement budgets, and the ability to make a living defending impaired drivers is more difficult than ever. What is naturally a very stressful profession has been exacerbated in recent years by significant changes in our industry. Consequently, we all find ourselves under ever-increasing pressure to perform. That is why we need to start fighting for each other with the same passion and zeal as we do for our clients.

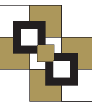
The stress of the job coupled with the responsibilities of defending someone accused of impaired driving takes a toll on us. Collectively, the legal profession continues to do a wonderful job of taking care of our clients, but we are doing a terrible job of taking care of ourselves. The divorce rate, suicide rate and chemical dependency rate amongst our profession is alarming. We either are attracting these individuals to our profession, or the more likely answer, is that we are allowing our profession to do this to us.

Let us reach out to our colleagues with compassion and empathy in the sincere desire to assist anyone in need. Let us work as hard to find the same balance in our personal life as we have in our professional life. Let us all spend a little more time looking inward then we do outward. Let us all spend less time thinking with our head and more time thinking with our hearts.

Let us all start fighting for each other. This is a lonely industry. No one is rooting for us. No one understands us. Everyone hates us until the day they need us. So let us remember, that in this industry, “we” are all we have, but “we” are all we ever need.

I look forward to a fun and amazing year and I promise that I will work hard for your College.

- William Kirk



Case Law Roundup

Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

ADMISSIBILITY OF BREATH-ALCOHOL TEST RESULTS

State v. Jasa
297 Neb. 822 (2017) (Supreme Court of Nebraska)

The foundational elements which must be established for admissibility of a breath test in a Nebraska DUI prosecution are: (1) the testing device was working properly at the time of the testing; (2) the person administering the test was qualified and held a valid permit; (3) the test was properly conducted under the methods stated by the Department of Health and Human Services; and (4) all other statutes were satisfied. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

Defendant contended the third foundational element was not satisfied because (a) the officer administering the breath test did not personally perform a minimum 15-minute observation and instead relied on another officer having done so; and (b) the other officer did not discuss the 15-minute observation with her before the testing was administered.

The Court held the results were properly admitted since the method does not require the officer administering the test to be the one doing the 15-minute observation. It therefore declined to address the lower court's additional conclusion that the 15-minute observation is merely a "technique" as opposed to a "method," and that any failure to adhere to it goes to the weight of the evidence and not the admissibility of it.

Commonwealth v. Leary
92 Mass.App.Ct. 332 (2017) (Appeals Court of Massachusetts)

Defendant claimed error in the admissibility of breath-alcohol test results based on the breath test operator not having personally observed him for 15 minutes as required by 501 Code Mass. Regs § 2.13(3) (2010).

Defendant was in the presence of one or more officers, in a relatively small booking area, for more than fifteen minutes. The booking video confirmed the testimony of one of the officers, who was with the defendant for "most" of the twenty-eight minutes, and who testified that he did not observe the defendant vomit, hiccough, burp, or place anything in his mouth.

The Court agreed with the trial judge that "whatever deviation there was from `meticulous compliance' goes to the weight, not the admissibility, of the results.

ADMISSIBILITY OF FIELD SOBRIETY TEST PERFORMANCE AND OPINION TESTIMONY ON IT

State v. Cosme
2018 WL 1659472 (2018) Unpublished (Superior Court of Connecticut)

Defendant was arrested and charged with driving under the influence of marijuana as opposed to alcohol. He sought to exclude evidence of his performance on the HGN, Walk & Turn, One Leg Stand tests, and/or any opinion testimony offered by the State on what his performance indicated in relationship to drug impairment. He also sought exclusion of his urine test refusal, contending a urine sample would have provided no substantive evidence on whether he was under the influence of marijuana.

The Court ruled the field sobriety tests performance was admissible but "[i]n view of the dearth of evidence in this case and the divided state of the case law on the issue of whether the FSTs involve "scientific evidence" and, if so, whether they are reliable indicators of drug intoxication, the court [precluded] lay or expert opinion from the arresting officer on whether the defendant passed or failed the FSTs or whether the defendant's performance reveals that he was under the influence of drugs.

As for the urine test refusal, the Court held it was admissible as mandated by statute but the Defendant was free "to introduce evidence that his refusal did not stem form consciousness of guilt."

PROLONGED DETENTION

People v. Paddy
2017 Il App (2d) 160395 (2017) (Appellate Court of Illinois, Second Dist.)

Officer stopped vehicle in Illinois for purportedly following too closely and having unlawfully tinted windows. The vehicle was registered in Minnesota and Illinois law does not require a vehicle registered in another state to comply with Illinois's liability-insurance requirements. Since the officer knew the vehicle was not registered in Illinois he should have known that the liability-insurance requirements did not apply. He therefore acted without proper authority when he returned to the vehicle to speak with the driver about liability insurance. This constituted an unconstitutionally prolonged detention resulting in the suppression of evidence.

A dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment (*Rodriquez v. United States*, 575 U.S. ___, ___, 135 S.Ct. 1609, 1612 [cite], unless the traffic stop exceeds the time needed to handle the matter for which the stop was made. *Ibid.*

"[T]he critical question is not whether the dog sniff occurs before or after the officer issues the ticket, but whether conducting the dog sniff prolonged the stop." [citing *Rodriguez* at 1616].

WARRANTLESS ENTRY IN HOT PURSUIT

City of Bismarck v. Brekhus
908 N.W.2d 715 (2018) (Supreme Court of North Dakota)

Officer observed Defendant's failure to negotiate turn and slide into a snowbank, back out and fishtail vehicle down the street at unsafe speed. Officer followed and activated overhead lights and siren but Defendant refused to pull over and kept going before ultimately stopping in front of a garage door, waiting for it to open, and then driving inside it. The garage was detached from the home and the door did not close before the officer entered it and made contact with Defendant. She was ultimately arrested for DUI.

Noting the pursuit was immediate and continuous, and the purpose of the entry and contact limited to removing Defendant from her vehicle and garage to complete investigation of the traffic offenses and evasion of a peace officer, the Court held the "hot pursuit" exception to the warrant requirement was applicable and the entry reasonable.

Editor's Note: The opinion contains a good discussion on applicability of the "hot pursuit" exception to not only felonies but jailable misdemeanor offenses as well.

State v. Markus
211 So.3d 894 (2017) (Supreme Court of Florida)

Officer responded to a residential disturbance report and approached Defendant on a public street outside the home. He claimed Defendant was drinking beer and smoking a joint. Defendant fled inside the home against the officer's order. The officer entered

the home and ultimately arrested him on possession of marijuana and being a felon in possession of a firearm (the gun having been discovered inside the home).

The Court concluded that the exigency of "hot pursuit" does not justify the warrantless entry into the home to investigate a non-violent misdemeanor.

WARRANTLESS ENTRY OF CURTILAGE

Collins v. Virginia
584 U.S. ___ (2018)

Officer determined from photographs posted on a suspect's Facebook profile that a stolen motorcycle involved in two traffic incidents was parked his driveway. He drove to the residence and observed what appeared to be the motorcycle under a white tarp parked in the same location as the motorcycle in the photographs. (Note: it was parked inside a partially enclosed top portion of the driveway that abutted the house).

Without a search warrant, the officer walked to the top of the driveway, removed the tarp, confirmed that the motorcycle was stolen by running a check on the license plate and vehicle identification number.

The trial court denied a motion to suppress evidence, and both the appellate court and Virginia State Supreme Court affirmed. The SCOTUS, however, reversed and held the automobile exception is not a categorical exception to the Fourth Amendment that allows entry into the curtilage of the home. J. Alito dissented, opining that whether or not the motorcycle was within the curtilage was irrelevant since it was in plain view. J. Thomas concurred, but opined that the State of Virginia should not be bound by the federal exclusionary rule.

OFFICER MUST AT LEAST ATTEMPT TO GIVE CHEMICAL TEST ADMONITION TO COMBATIVE MOTORIST

Munro v. Dept. of Motor Vehicles
___ Cal.5th ___ (Calif. Sixth Dist. Court of Appeal)

When Defendant was arrested on suspicion of DUI and placed in the patrol car, he "quickly pulled his knees toward his chest" and "simultaneously pulled his handcuffed wrists to the back of his knees in an attempt to bring his hands to the front of his body." He then physically resisted the officer when taken out of the car and he handcuffs placed back behind his back. As the officer started to drive Defendant to jail, he "saw [him] slide onto his back and slip the handcuffs from behind his back, under his legs, and to the front of his body." Defendant then started kicking the rear window of the patrol car while trying to slip his hands out of the handcuffs. The officer removed Munro from the car again and, with the help of two other officers, placed Munro into a "WRAP" restraint device. Munro "violently resisted officers by kicking his legs and attempting to 'buck' officers off of him" as they restrained him. No one was injured during that process.

The officer stated in his report that he was unable to read the chemical test admonition to Defendant based on his combative state.

While finding the driver's conduct "totally unacceptable" and "[creating] unnecessary risks for his own safety and that of the officers involved," the Court nevertheless reversed the license suspension order by concluding the arresting officer was required to at least *attempt* to admonish him of the consequences of refusing a chemical test.

THE UNCONSCIOUS DRIVER

There remains a significant split of authority on whether law enforcement officers may procure warrantless blood samples from unconscious DUI suspects, based solely on "implied consent" statutes.

I. States Holding Implied Consent Statute Constitutes Fourth Amendment Consent For Unconscious Suspect

McGraw v. State
245 So.3d 760 (2018) (Florida Court of Appeal, Fourth Dist.)

Blood sample drawn by nurse from unconscious defendant at direction of police officer following solo accident, without a warrant.

Florida's implied consent statute contains the following provision:

"Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such [blood] test."

In its analysis, the *McGraw* Court initially quoted the following passage from *Birchfield*:

"It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be."

Nevertheless, it found no Fourth Amendment violation on the basis that "*Birchfield* actually reaffirmed the constitutionality of implied consent laws" so long as there is no criminal penalty for refusing. Exigent circumstances were not relied upon for this finding.

Editor's Note: Neither *McNeely* nor *Birchfield* held or suggested that unconscious persons may be deemed to have consented to a blood draw. In fact, the passage in *Birchfield* noted above indicates the opposite (absent exigent circumstances police must get a warrant before drawing blood from an unconscious person). That implied consent laws have been generally approved by the U.S. Supreme Court does not mean this particular portion in many of them are constitutional.

State v. Mitchell
914 N.W.2d 151 (2018) (Supreme Court of Wisconsin)

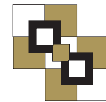
The Court overrules *State v. Padley*, 354 Wis.2d 545, 849 N.W.2d 867 (2014), which held that "implied consent" is different than "actual consent." Though the Court recognizes the right of motorists to withdraw "implied consent," it holds that unconscious persons are deemed to have not withdrawn the statutory consent to a blood draw when breath testing is unavailable.

Editor's Note: The opinion contains this interesting observation: "[F]or many unconscious drivers, it may be that they have taken no steps to demonstrate unequivocal intent to withdraw consent previously given." Would the result have been different if Defendant had attached a note to his driver's license expressly withdrawing his "implied consent" to a blood draw?

II. States Holding Implied Consent Not Fourth Amendment Consent For Unconscious Suspect

State v. Ruiz
545 S.W.3d 687 (2018) (Court of Appeals, Texas)

A Texas statute specifies that if a DUI suspect is unconscious he is considered not to have withdrawn his implied consent to a blood draw. In reliance on the statute, the officer directed a nurse to draw a sample of blood from an unconscious suspect who had been in a car



accident.

The Court held the State did not meet its burden to establish the reasonableness of drawing Defendant's blood without a warrant since he lacked the ability to withdraw implied consent which he had the constitutional right to do. The Court further found that the State failed to meet the burden of establishing exigent circumstances as an independent exception to the warrant requirement.

Commonwealth v. Myers
640 Pa. 653 (2017) (Supreme Court of Pennsylvania)

Pennsylvania's implied consent law specifies that "[i]f any person placed under arrest for [DUI] is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted." The statute and case law also require that the subject be told about the consequences of refusing so that he understands there is a choice on whether or not to submit.

Defendant was arrested on suspicion of DUI and taken to a hospital due to his extreme level of intoxication. He was administered the antipsychotic drug Haldol which rendered him unconscious to the point that he could not understand or respond to the officer's implied consent admonishment. The officer directed a nurse to draw a blood sample from him.
Though observing *Birchfield's* approval of implied consent statutes, the Court concluded that "*Birchfield* in no way suggests that the existence of a statutory implied consent provision obviates the constitutional necessity that consent to a search must be voluntarily given, `and not the result of duress or coercion, express or implied.' (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973)). The Court determined that an unconscious person cannot be deemed to have consented under the implied consent statute because the statute does not constitute an independent exception to the Fourth Amendment.

State v. Romano
369 N.C. 678 (2017) (Supreme Court of North Carolina)

North Carolina's implied consent statute contains the following provision:

"**Unconscious Person May Be Tested**.—If a law enforcement officer has reasonable grounds to believe that a person has committed an **implied-consent** offense, and the person is **unconscious** or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a **blood** sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary."

Defendant was arrested on suspicion of DUI and taken to a hospital due to his extreme level of intoxication. Before any advisements were given to him, he was involuntarily rendered unconscious by medication. The arresting officer told a nurse that a blood sample would be needed for law enforcement purposes and one was drawn.

The Court held this portion of North Carolina's implied consent statute unconstitutional as applied to Defendant.

People v. Arredondo
245 Cal.App.4th 186 (2016), ***review granted*** **(Calif. Supreme Court – Docket No. S233582)**

Petitions for Review to the California Supreme Court in *Arredondo* were granted in 2016 but the Court has yet to issue a ruling. The Court of Appeal held California's implied consent statute does not impute Fourth Amendment consent to a blood draw from an unconscious DUI suspect, but found the good faith exception to the exclusionary rule controlling based on the officer's reliance on the statute's express language.

The issues to be considered by the California Supreme Court are as follows:

1. Did law enforcement violate the Fourth Amendment by taking a warrantless blood sample from defendant while he was unconscious, or was the search and seizure valid because defendant expressly consented to chemical testing when he applied for a driver's license or because defendant was "deemed to have given his consent" under California's implied consent law?
2. Did the People forfeit their claim that defendant expressly consented?
3. If the warrantless blood sample was unreasonable, does the good faith exception to the exclusionary rule apply because law enforcement reasonably relied on the implied consent statute on in securing the sample?

Drunk Driving Politics - *Military Veterans vs. MADD*

Since 1980 *Mothers Against Drunk Driving* has been a formidable force in getting legislators across the country to enact new and tougher laws against charged with driving under the influence.

More recently, however, MADD has encountered a political force of equal clout---military veterans dealing with PTSD, alcoholism, and drug addiction. Legislatures are now enacting laws to help these veterans avoid the stigma of criminal convictions and get them treatment.

By way of example, California Penal Code §1001.80 which offers military diversion from criminal prosecution for all misdemeanor DUI offenses. Eligibility is included for all past and current veterans, whether they were in combat or not, provided there is a showing that they may be, as a result of their service, be suffering sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service.

No medical diagnosis is even required, as the threshold for eligibility is simply a finding that the person "may" be suffering from one or more of these conditions as a result of their service.

Not surprisingly, may prosecutors have argued that drunk driving offenses should not be included in California's military diversion statute, and they initially pointed to another statute which appeared to bar diversion for such offenses. This led to a split of opinion between two appellate courts, with one of them encouraging the Legislature to clarify the matter. It did, and this resulted in the following provision be added to the statute last year:

"Notwithstanding any other law, including Section 23640 of the Vehicle Code, a misdemeanor offense for which a defendant may be placed in a pretrial diversion program in accordance with this section includes a misdemeanor violation of Section 23152 or 23153 of the Vehicle Code. However, this section does not limit the authority of the Department of Motor Vehicles to take administrative action concerning the driving privileges of a person arrested for a violation of Section 23152 or 23153 of the Vehicle Code."

We can reasonably anticipate that more states will be enacting these types of law to our help military veterans.

Scotus Radar

The SCOTUS has granted certiorari in *Garza v. Idaho* (Docket No. 17-1026) to determine the following issue: Whether the "presumption of prejudice" recognized in Roe v. Flores-Ortega applies when a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

Defendant pled guilty to charges of assault and possession of a controlled substance with a plea agreement specifying that the right to appeal was waived. His attorney declined his request to file an appeal.

Oral argument is slated for October 30, 2018.

2018 Summer Session Award Winners

The following lawyers were bestowed special recognition by the NCDD at its 2018 Summer Session reception dinner held annually at the Charles Hotel in Cambridge, MA:

- **Joseph D. Bernard (Springfield, MA) -** ***Trial Advocacy Award***
- **Thomas E. Workman, Jr. (Taunton MA) -** ***Trial Advocacy Award***
- **Carl M. Ward (Washington, MO) -** ***Leadership Award***
- **Amanda K. Riek (Portage, WI) -** ***Public Defender of the Year***
- **Brian K. Morton (Oklahoma City, OK) -** ***Appellate Advocacy Award***
- **Sonja R. Porter (Oklahoma City, OK) -** ***Appellate Advocacy Award***

The Long View -

Making A Record And Winning the Right To Appeal

Criminal defense attorneys who regularly try cases understand the reality of losing and the importance of making a record for appeal. An objection not voiced is generally deemed waived, as are motions not made and jury instructions not requested.

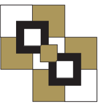
Preparing for appellate issues and filing appeals after guilty verdicts not only gives the accused another bite out of the apple, but it provides side benefits for the lawyer's other clients. Trial courts are more easily kept in check by attorneys who make a record with objections and motions. Prosecutors who see files grow thick with motions and appeals are more inclined to offer better settlements to defense attorneys who make them work.

Perseverance is essential, and if you believe that just two or three trials for the same case and client makes you a warrior in a class by yourself, consider the case of Curtis Flowers. Flowers was charged 22 years ago with murdering four employees of a furniture store in Mississippi in a robbery. There was no gun, fingerprints, eye witness testimony, or DNA evidence. He was convicted in his first three trials, but the Mississippi Supreme Court (MSC) reversed each of them. The first two reversals were based on prosecutorial misconduct, and the third reversal was based on the prosecutor's improper exclusion of African-Americans from sitting as jurors (Flowers is African-American). The fourth and fifth trials ended with hung juries. He was convicted again in the sixth trial in 2010 and presently sits on death row.

The composition of the MSC became more conservative in the intervening years and his conviction was affirmed by it in 2014. However, the United States Supreme Court (SCOTUS) vacated the conviction in 2016 and remanded the case back to the Mississippi Supreme Court with an order that it reconsider its ruling in light of *Foster v. Chatman*, 578 U.S. ___ (2016) (peremptory strikes on the basis of race are unconstitutional and federal courts have jurisdiction to review the issue). On remand, the MSC affirmed the conviction again.

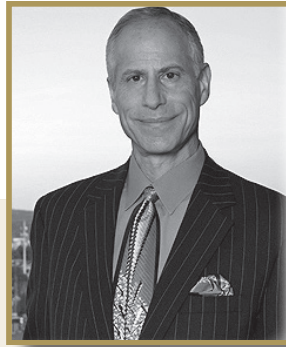
Last June, lawyers for Flowers filed a new petition for writ of certiorari to the SCOTUS, contending, *inter alia*, that the prosecutor's systematic history of striking African Americans from juries is grounds for reversal (they learned after trial that the prosecutor has historically stricken African-American jurors 4.4 times as often as white jurors). A post-conviction appeal is also pending for Flowers, with his lawyers citing multiple grounds for relief relating to trial testimony and *Brady* violations.

Six trials, four convictions, and multiple appeals with at least two of them still pending. 22 years.



NCDD Lawyers Mentoring Overseas

STEVE OBERMAN



Steve Oberman

For the first time in two decades, former Dean and NCDD Fellow Steve Oberman was absent from our annual Summer Session at Harvard Law School this year. He was preparing (as Steve is always doing!) for a future sabbatical of teaching at the University of Latvia Law School in Riga, Latvia.

With backing by the University of Tennessee College of Law where he has been an adjunct professor since 1996, Oberman was awarded a Fulbright Scholarship for this latest teaching venture. He plans to lecture on DUI laws and American trial techniques.

Steve will still be with us in Las Vegas for Grand Slam Defenses at the Bellagio Hotel (October 11-13), so be sure to wish him and his wife Evelyn well!

MIMI COFFEY, BRUCE EDGE, AND BELL ISLAND

Mimi Coffey

NCDD Regents Mimi Coffey, Bruce Edge, and Bell Island each spent two weeks in Ukraine this past year teaching law as part of the Leavitt Institute. They mentored students at 13 different universities and law schools in both Kiev and Kharkiv, and followed it up with teaching stints at two police academies.

“We easily could have been engaged with future world leaders,” said Edge. “It was a life enriching experience and I would return on a moment’s notice. The students were like sponges---so receptive and anxious to learn.”

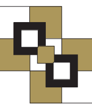
Bruce Edge

With the help of a letter of recommendation by Coffey, one of her students recently received a scholarship to pursue her LLM in Lithuania. One of Island’s students received a full scholarship including room/board in Lithuania to a top law school, as did one of Edge’s students.

“The students were bright, open minded and eager to learn the American way of justice,” said Coffey. “I had never been to eastern Europe before and I just fell in love with the people, their culture, rich history and food. The friendships I made there are so special.”

Island was equally enthusiastic about the teaching experience. “They were insightful and full of questions about how our system works in both a legal sense and a political sense. They were inquisitive of how politics impacts our legal system and the outcome of trials.”

Bell Island



Lawyer Advertising & The ABA's Aspirational Goals

No one specializing in DUI/DWI defense today is unaware of the vast amount of advertising used by lawyers and marketing entities to garner business. With it comes a swath of misrepresentations in many forms: (a) bogus plaques and badges; (b) false and misleading claims regarding wins and dismissals; (c) phony reviews posted by non-clients; (d) defamatory reviews posted by competitors; and (e) misleading statements regarding fees.

With these and other issues impacting the legal profession, State Bar Associations are amending their rules of professional conduct to rein in some of this conduct. The American Bar Association is also undertaking a modification of its rules with the following "aspirational goals" in mind:

1. Lawyer advertising should encourage and support the public's confidence in the individual lawyer's competence and integrity as well as the commitment of the legal profession to serve the public's legal needs in the tradition of the law as a learned profession.

2. Since advertising may be the only contact many people have with lawyers, advertising by lawyers should help the public understand its legal rights and the judicial process and should uphold the dignity of the legal profession.

3. While "dignity" and "good taste" are terms open to subjective interpretation, lawyers should consider that advertising which reflects the ideals stated in these Aspirational Goals is likely to be dignified and suitable to the profession.

4. Since advertising must be truthful and accurate, and not false or misleading, lawyers should realize that ambiguous or confusing advertising can be misleading.

5. Particular care should be taken in describing fees and costs in advertisements. If an advertisement states a specific fee for a particular service, it should make clear whether or not all problems of that type can be handled for that specific fee. Similar care should be taken in describing the lawyer's areas of practice.

6. Lawyers should consider that the use of inappropriately dramatic music, unseemly slogans, hawkish spokespersons, premium offers, slapstick routines or outlandish settings in advertising does not instill confidence in the lawyer or the legal profession and undermines the serious purpose of legal services and the judicial system.

7. Advertising developed with a clear identification of its potential audience is more likely to be understandable, respectful and appropriate to that audience, and, therefore, more effective. Lawyers should consider using advertising and marketing professionals to assist in identifying and reaching an appropriate audience.

8. How advertising conveys its message is as important as the message itself. Again, lawyers should consider using professional consultants to help them develop and present a clear message to the audience in an effective and appropriate way.

9. Lawyers should design their advertising to attract legal matters which they are competent to handle.

10. Lawyers should be concerned with making legal services more affordable to the public. Lawyer advertising may be designed to build up client bases so that efficiencies of scale may be achieved that will translate into more affordable legal services.

https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/abaaspirationalgoals.html

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