NCDD Journal
National College for DUI Defense
Editor: Paul Burglin
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NCDD & NACDL DOUBLE DOWN FOR VEGAS SEMINAR!

In the desert oasis of pools, spas, world class dining, and a headline act by Sir Elton John, NCDD returns to the glitz of Caesars Palace in Las Vegas on October 18-20, 2012, for its 16th Annual "DUI Means Defend With Ingenuity" three-day seminar.

This year's theme is "Getting The Not-Guilty Vote" with legendary trial attorney F. Lee Bailey "Taking Control Of the Courtroom," Jimmie Valentine providing invaluable gas chromatography tips ("what you need to know and why"), and William "Bubba" Head on "Winning the Unwinnable Case."

The Vegas seminar is jointly hosted by NCDD and the National Association of Defense Lawyers (NACDL), and is the largest annual gathering of criminal defense attorneys in the country. Following the featured speakers on Day 1 (which will also include NCDD Dean W. Troy McKinney), Day 2 will have split tracks (allowing attendees to pick several areas of focus), and Day 3 will have elective workshops for concentrated learning in specific areas.

NCDD Fellow (and former Dean) Steve Oberman has been organizing and moderating this seminar since its inception in 1997 at Harrah's Hotel & Casino. With John Henry Hingson (NCDD founder and former President of NACDL) and James A. H. Bell (former three-term parliamentarian of NACDL), Oberman helped persuade NACDL to join forces with the American Bar Association to sponsor the event. When NCDD became the leading organization for DUI defense, NACDL joined up with it to co-sponsor the seminar.

Oberman works with Gerald Lippert and his team from NACDL each year to select speakers, review the venue, approve vendors, and plan for contingencies. Speakers are reviewed by committee based on their knowledge of the subject matter, presentation abilities, and their drawing power to a national audience. This year's theme was selected by longtime committee member and NCDD Regent Mike Hawkins.

A reception for attendees is slated for the first evening of the seminar so that attendees have a better opportunity to share ideas about defense strategies and business practices. "The overall goal of the seminar," says Oberman, "is to better educate lawyers so that they may defend their clients to the best of their ability." In furtherance of this goal, the small workshops on Day 3 are designed to hone trial skills of lawyers in specific areas. "Our workshop leaders have undergone special training to critique and provide suggestions," notes Oberman.

The Vegas seminar remains an ideal venue for combining education, entertainment, and relaxation. Hotel rates have been kept competitive with long-term contracts, and a complimentary lunch is now provided to attendees on Day 2 (Friday). For those on a tight budget, extremely low hotel rates are offered at places such as the Imperial Palace located across the street from Caesars Palace. Over the years, the Vegas seminar has been held at Harrah's, New York New York, the Venetian, the Luxor, and most recently at Caesars Palace.

"The committee believes the seminar provides great value to the attendees," asserts Oberman. "Still, we are always looking to improve the seminar and we invite NCDD members to make suggestions to Executive Director Rhea Kirk either in person or to rhea@ncdd.com."

DEAN'S MESSAGE

[This is a condensed version of the address given at the 2012 Summer Session]

I am proud to report that The National College for DUI Defense is now, at its core, as it was formed to be and has always been, first and foremost, better and more effective than ever before at educating criminal defense lawyers in the special art and science of excellence in DWI Defense. I am also proud to report that NCDD is larger and stronger than it has ever been. It is as it should be and all is right with the College. You all should be proud in what you have helped to form, nurture and grow.

It is the signal of striving for excellence that makes us special and unique. Just as the Olympics are special to sport, we are special to the excellence of DWI Education. Everything else is noise. Our mutual desires to teach and to learn are our missions, it is our core, and it is what brings us all together in furtherance of these lofty goals, which many said could not be done.

I am proud to see the 50 new faces at this Summer Session. It confirms that we continue to succeed in fulfilling our special mission. The quantity and quality of new and diverse faces is no accident. It is the fulfillment of the original goals of our Founders and remains our goal to ensure that each Summer Session includes a significant portion of first time attendees. Hopefully, the experience here with the College will motivate you, as well as those who have attended on multiple occasions, including the 10 who have been here 10 or more years, to continue to strive to better educate and prepare

Continued on Page 7

E.D.'S CORNER

We have a fantastic lineup of speakers for the upcoming NACDL/NCDD Vegas Seminar October 18-20, 2012. It's not too late to make your plans to attend.

What a great year Dean Troy McKinney has planned, including a fantastic Winter Session! Dean McKinney has chosen the *Hyatt Regency Scottsdale Resort and Spa at Gainey Ranch* in Scottsdale, Arizona for our 2013 Winter Session! That is a big name for a GREAT resort!! The golf is great and the pools are beautiful. The seminar will be held January 17–18, 2013 in a sunny, beautiful climate compared to the cold winter winds in other parts of the country.

We are working diligently on the NCDD website to make it even more helpful to you! Keep watching for updates on our progress. If you have any suggestions on ways to make it even better, please contact the Website Chairman, Bill Kirk, with your ideas.

Looking forward to Vegas and seeing you soon!

- Rhea

CANADIAN ADMISSIBILITY REMAINS HURDLE DESPITE NEW POLICY

By Marisa Feil

The Canadian government announced a new policy last March regarding Temporary Resident Permits (TRP) for persons seeking entry into Canada who have a criminal record. The rule change does not, however, alter the rules for admissibility. It simply allows individuals who have been convicted of a DUI/DWI/OWAI (or certain other minor offences) to obtain a fee-exempt TRP (i.e., avoid the $200 processing fee) on a one-time basis, and only if they have a single conviction for which no jail time was imposed.

Before travelling to Canada, individuals with a criminal history should verify whether their entry might be prohibited. A foreign national is inadmissible on the grounds of criminality if convicted outside of Canada of an offence that, if committed in Canada, would constitute an ***indictable*** offence under an Act of Parliament. Canadian Immigration and Refugee Protection Act § 36.

Canadian immigration law does not distinguish between misdemeanor and felony offences. Instead, offences are considered either summary or indictable, and if the offense can be treated as either (a "hybrid offense"), it is considered indictable for Canadian immigration purposes.

A foreign conviction, for which there is an equivalent offence in the Canadian Criminal Code, is deemed an indictable offence. With some convictions, it is possible to argue non-equivalence, or equivalence to a summary offense, in order to circumvent the inadmissibility regulations and allow the individual to enter without applying for permission.

"Operation While Impaired" is an indictable offence or an offense punishable on summary conviction. The statute reads as follows:

Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Canadian Criminal Code § 253.

Canadian immigration generally considers any drug/alcohol related driving offence to be equivalent to this statute, no matter how it is treated in the state where it occurred. Furthermore, most foreign statutes for reckless driving offences are equivalent to Canada's "Dangerous Operation of Motor Vehicles" statute (Canadian Criminal Code § 249). Therefore, individuals who plead their cases down from a DUI/DWI/OWAI to some other alcohol related offence, or a reckless driving offence, usually still find themselves inadmissible to Canada.

Criminal inadmissibility can be overcome permanently by Criminal Rehabilitation, or temporarily with a Temporary Resident Permit (TRP). An individual may also be rehabilitated by the passage of time (more than 10 years have passed since the completion of all of the conditions of their sentence, including the term of probation, provided they have only one conviction on their record).

Applicants may apply for a TRP at a Canadian visa office or at a port of entry. The Canadian government encourages individuals to apply well in advance if they know they must enter Canada and are inadmissible. The main requirement for obtaining a TRP is to demonstrate a significant reason to be in Canada. Usually the government is looking for a reason related to one's work, or family, or an emergency situation. A TRP is required until such time as criminal inadmissibility has been removed.

Individuals who are eligible for criminal rehabilitation, but who have not yet applied for it, should not only apply for a TRP but for criminal rehabilitation as well. Criminal rehabilitation is a permanent solution to criminal inadmissibility, while a TRP is a temporary pass for it. In order to be eligible for criminal rehabilitation, five years must have passed since all sentencing terms have been completed (including the term of probation). It is therefore advisable to seek as short a term of probation as possible.

If less than ten years have elapsed since the completion of your client's sentence and/or they have more than one offence on their record, they will have to apply for criminal rehabilitation to overcome their inadmissibility. If ten years have passed from the date that they completed their sentence and there is only one conviction on their record, then they are likely to be deemed rehabilitated by the passage of time. Individuals with more than one conviction or who have been convicted of a serious offence (DUI causing bodily injury or death for example), will never be deemed rehabilitated by the passage of time.

Only a lawyer certified by one of the provincial bar associations, or a certified immigration consultant, is authorized to represent an individual in their Canadian immigration applications to the Canadian government, including Criminal Rehabilitation and Temporary Resident Permit (TRP) applications.

Attorney Marisa Feil is a member of the Canadian Bar Association and the Barreau du Quebec. She specializes in Canadian immigration issues for FWCanada, Inc., and may be reached at (514) 316-3555 ext. 204 or marisa@fwcanada.com.

CASE LAW ROUNDUP

Case Highlights from Illinois
Attorney Donald Ramsell

Exclusionary Rule Inapplicable In Administrative Suspension Action

***Miller v. Toler* (2012) W.Va Supreme Court of Appeals (No. 11-0352)**

The exclusionary rule is inapplicable in administrative license suspension hearings, and thus an unconstitutional check point stop is not a basis to exclude chemical test evidence.

"This Court agrees that if the exclusionary rule is extended to civil license revocation or suspension proceedings there would be minimal likelihood of deterring police misconduct because the real punishment to law enforcement for misconduct is derived by excluding unlawfully seized evidence in the criminal proceeding. When this minimal deterrent benefit is compared to the societal cost of applying the exclusionary rule in a civil, administrative driver's license revocation or suspension proceeding that was designed to protect innocent persons, the cost to society outweighs any benefit of extending the exclusionary rule to the civil proceeding," the court said.

Editor's Note: Although evidence obtained after an unconstitutional detention or arrest may be admissible in an administrative hearing, many states require proof of a "lawful arrest" in license suspension actions and the legality of the detention may be relevant to that issue. See, e.g., *Anagnos* case below.

Legality of Enforcement Stop Relevant To Lawful Arrest Issue in License Suspension Hearing

***Wisconsin v. Anagnos* (2012)**
Wisconsin Supreme Court (No. 2010 AP19812)
___ N.W.2d ___ (2012 WL 2378548)

Wisconsin's refusal hearing statute allows a licensee to contest whether he was lawfully arrested. As part of this challenge, he may properly contend that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion.

***Nolo Contendere* Plea Not A Criminal Conviction For Purposes of Triggering Summary Non-Commercial License Suspension Without Hearing**

***Miller v. Wood* and *Miller v. Thompson* (2012) (consolidated cases)**
W.Va Supreme Court of Appeals (No. 11-0815 and 11-0891)
___ S.E. ___ (2012 WL 23689 (W.Va.)

The West Virginia Dept. of Motor Vehicles suspended petitioner's license based on a reported conviction in that state. Because W. Va.Code § 17C–5A–1a (2010) provides, in pertinent part, that "a plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial driver's license or operates a commercial vehicle," the Court held there was no valid conviction for license revocation purposes.

Editor's Note: Where an out-of-state conviction is used to trigger a license suspension in a licensee's home state, a "nolo" plea may prevent use of it where there is a similar statute in either state.

Failure to Stay In Lane of Travel

***People v. Hackett* (2012)**
Illinois Supreme Court (No. 111781)
___ N.E.2d ___ (2012 WL 2628066)

Defendant's vehicle slightly crossed over the lane line twice to purportedly avoid potholes. The trial court and appellate court said these momentary crossings were not illegal, as they had not been performed unsafely and were momentary.

As with other States, the Illinois Vehicle Code mandates that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Held: The distance a motorist travels while violating this statute is not a dispositive factor---even a momentary deviation from the lane of travel can constitute a violation unless it is impracticable for the driver to remain in his proper lane. The dictionary defines "practicable" as "possible to practice or perform." Webster's Third New International Dictionary 1780 (1976). The statute requires a fact-specific inquiry into the particular circumstances present during the incident to determine whether factors such as weather, obstacles, or road conditions might have necessitated defendant's lane deviation. Because no affirmative evidence was offered by the defense concerning the presence of potholes, and in light of the officer's testimony that he "did not recall" any potholes, the enforcement stop was ruled constitutional on the basis that it was objectively reasonable for him to believe there was a violation of the statute.

Addendum: Though it sided with the dissenting appellate justice in its ultimate ruling, the Court included the following passage in its published opinion:

"While not necessary to our analysis and disposition, we note that the tone taken by the dissenting appellate justice in this case adds nothing to his analysis. Unfortunately, that tone invited a footnote in the majority opinion which, again, added nothing to its analysis, but merely highlighted the tone of the dissent in this and other cases. While forceful argument in support of a position is to be expected, and can contribute to the deliberative process, disparaging exchanges on a personal level contribute nothing to that process. Sound reasoning stands on its own. Personal disparagement diminishes the force of the argument, the stature of the author and the process of appellate review itself."

Editor's Note: It is extremely rare for a state's high court to chastise lower appellate court justices for taking shots at each other in its published opinion. That this Court went out of its way to do so shows its disdain for lawyers and judges engaging in ad hominem attacks against each other.

Separation of Powers And Limitation On Judicial Deference To DMV Interpretations of Vehicle Code

***Matteo v. California State DMV* (2012)**
___ Cal.App.4th ___ (First Dist. Court of Appeal, Div. 3 – No. A130542)

The California DMV denied an Ignition Interlock Device (IID)-restricted license to petitioner because his offense date preceded the effective date of an amended law shortening the period for eligibility from one year to 90 days.

Affirming the trial court's grant of a petition for writ of mandamus, the appellate court rejected the notion that the DMV (as an administrative agency) is entitled to judicial deference with regard to its interpretation of vehicle code statutes, particularly absent compliance with the Administrative Procedures Act (which requires notice and an opportunity for public comment).

The Court further concluded that since the conviction-triggering suspension period was not altered by the amendment---but only the manner in which the suspension is to be served---that retroactivity was not an issue and the procedural rule change applies to all offenders. Had the Court determined that the amendment was a substantive change, it appears that it would have found it applicable to petitioner since a decrease in punishment is a legislative indication that the previous punishment was too punitive and that the statute should apply retroactively (citing *In re Estrada* (1965) 63 Cal.2d 740 and *People v. Durbin* (1966) 64 Cal.2d 474). This is a deviation from the general rule that statutes apply prospectively only.*

* Not all state courts will depart from this general rule even where a statute decreases punishment. See, e.g., *State v. Reese* (2012) (Court of Appeals Kansas, No. 106703) (2012 WL 3243993), ___ P.3d ___ , in which NCDD member Jay Norton argued that a legislative amendment shortening the "look back" period for prior DUI convictions should apply to offenses committed prior to the amendment's effective date. The Court refused to apply the amendment retroactively, even though logically there would be no reason for the Legislature to have intended otherwise.

***State v. Turner* (2012) (No. 20100714-CA)**
2012 UT App. 189, ___ P.3d ___ (2012 WL 2849299) (Utah App.)

Utah Code Ann. § 41–6a–515 provides that the Commissioner of the Department of Public Safety "shall establish standards for the administration and interpretation of chemical analysis of a person's breath," and if those standards are met, "there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary."

Acting on this legislative delegation of authority, the Commissioner promulgated standards for the administration and interpretation of Intoxilyzer test results by rule.

On behalf of his client, NCDD member Jason Schatz attacked the admissibility of Intoxilyzer results, contending that (1) the rules of admissibility created by the Department of Public Safety violated the separation of powers clause, which gives the judiciary sole control over the rules of evidence; and (2) that the process of certifying the machines and testing individuals was unreliable under Evidence Rule 702, by not requiring duplicate testing and not requiring on-site certification/calibration.

The Court avoided the unlawful delegation of authority argument by simply concluding that the trial court did not rely upon the purported presumption of admissibility---it found the test results sufficiently reliable for admissibility based on a reasonable exercise of discretionary authority. The evidence relied upon by the trial court was testimony from a State Trooper on the reliability of a single test result from the Intoxilyzer (including an assertion that a belch during the test would not contaminate the result). The Court did not determine whether this testimony is "correct or the most credible," but only that it was sufficient for the trial court to rule the test result admissible.

Editor's Note: The interpretation of a statute is a question of law and reviewed *de novo*. However, Courts are frequently asked by administrative agencies to give "judicial deference" to its interpretation. As noted in *Matteo*, judicial deference to an agency's interpretation is more appropriate where the subject is a regulation adopted by it as part of a legislative grant of power, and much less persuasive where an agency is simply interpreting a statute. In *Turner*, there was a legislative delegation of authority to the agency, though attorney Schatz made a compelling argument that the regulation adopted by the agency impermissibly encroached upon the judicial branch's authority to determine the admissibility of evidence.

Chemical Test Refusals

***McKay v. Director of Revenue* (2012)**
Missouri Court of Appeals, Western District (No. 74458)
___ S.W.3d ___, 2012 WL 3168732

A breath test refusal, followed by an officer's decision to proceed with blood testing and no physical resistance, does not constitute a "refusal" in a license suspension action because the purpose of the implied consent law is fulfilled.

Partition Ratio Evidence Admissible On Impairment Charge

***State v. Cooperman* (2012)**
Arizona Court of Appeals – Div. 2 (2 CA-CV 2011-0197)

A permissive and rebuttable inference of intoxication is statutorily triggered in Arizona prosecutions for driving under the influence (DUI) whenever a .08 percent or higher alcohol test result is admitted into evidence and the sample was obtained within two hours of driving.

The State made a pretrial motion to preclude the defense from introducing partition ratio variability evidence by agreeing to (1) not argue the inference; and (2) not request the jury instruction on it. (Prior case law holds that such evidence is inadmissible on the .08 or higher charge.). Additionally, the State contended that if such evidence is allowed, that it should be limited to evidence of the defendant's individual variability as opposed to averages in the general population. Lastly, the State sought to exclude expert testimony concerning other physiological variables that can cause inaccurate breath-alcohol test results.

The Court held that since the permissive inference is triggered with the admission into evidence of the test result by either side, a trial court's duty to instruct on the general principle of law relating to the charge is not excused by an agreement to not argue the point of law. As to the nature of the partition ratio variability evidence, the Court followed *State v. Hanks* (Vt. 2001) 772 A.2d 1087 and *People v. McNeal* (2009) 46 Cal. 4th 1183 (2009) and held that evidence of variance in either the individual or the general population is relevant and admissible. Finally, the Court held that evidence concerning other physiological variables (e.g., breath and body temperature, hematocrit, and breathing patterns) was admissible as having a tendency in reason to disprove the accuracy of the test results.

Editor's Note: This is a helpful precedent for the DUI/DWI defense bar, as it may be persuasively cited in sister-state actions when prosecutors attempt to exclude partition ratio variability evidence by agreeing to not argue the impairment presumption/inference. Congratulations to NCDD Regent James Nesci and his partner/ NCDD member Joe St. Louis on this stellar victory, as well as NCDD member Stephen Barnard who submitted an amicus brief in the case.

Retrograde Extrapolation Properly Excluded In Single Test Result Case

***State v. Eighth Judicial District Court of Nevada* (2011)**
Supreme Court of Nevada (No. 55918)
127 Nev. Adv. Op. 84, 267 P.3d 777

Retrograde extrapolation evidence was determined relevant to both driving under the influence and driving in violation of the per se limit, but the relevance was deemed substantially outweighed by the danger of prejudice in this single alcohol test result case.

Citing *Mata v. State*, 46 S.W.3d 902, 915–16 (Tex.Crim.App. 2001), overruled on other grounds by *Bagheri v. State*, 87 S.W.3d 657, 660–61 (Tex.App.2002), the Court noted that "[a]chieving a reliable retrograde extrapolation calculation requires consideration of a variety of factors [such as]: (1) gender, (2) weight, (3) age, (4) height, (5) mental state, (6) the type and amount of food in the stomach, (7) type and amount of alcohol consumed, (8) when the last alcoholic drink was consumed, (9) drinking pattern at the relevant time, (10) elapsed time between the first and last drink consumed, (11) time elapsed between the last drink consumed and the blood draw, (12) the number of samples taken, (13) the length of time between the offense and the blood draws, (14) the average alcohol absorption rate, and (15) the average elimination rate."

"As the *Mata* court recognized, the significance of personal factors is influenced by the number of blood alcohol tests. `[A] single test conducted some time after the offense could result in a reliable extrapolation only if the expert had knowledge of many personal characteristics and behaviors of the defendant.'" *Id*. at 916.

The absence of any information concerning the amount of food in the defendant's stomach, coupled with there being just a single alcohol test result, was sufficient grounds for the trial court to properly exclude retrograde extrapolation testimony.

Blood Sample Challenges

Failure To Show Substantial Compliance With Blood Regulations
Results in Exclusion of Test Result

***State v. Ragle* (2012) (No. 25706)**
Court of Appeals of Ohio – Ninth District, Summit County
2012 WL 4100424

Failure of State to demonstrate substantial compliance with requirement that blood was drawn "with a sterile dry needle" and placed "into a vacuum container with a solid anticoagulant" is grounds to exclude blood-alcohol test result at trial.

The State produced no evidence that the needle used was dry and sterile, or that anyone observed a powdery substance in the vial. The nurse said she had no idea what was in the vial.

State Not Required To Prove Level Of Preservative In Blood Sample,
Though It Must Show Presence Of It

***State v. Olson* (No. 66201-5-I) (Unpublished)**
Court of Appeals of Washington – Div. 1

Washington State requires prosecutors to prove the presence of an anti-coagulant and preservative in blood samples used for alcohol testing in DUI prosecutions. *State v. Garrett* (1996) 80 Wn.App. 651, 910 P.2d 552 (vacation of conviction affirmed where State conceded there was no anti-coagulant used); *State v. Bosio* (2001) 107 Wn.App. 259, 27 P.3d 636 and *State v. Hultenschmidt* (2004) 125 Wn.App. 259, 102 P.3d 192 (failure to show presence of preservative results in conviction reversal).

Relying upon several scientific treatises, Appellant claimed the State was further obligated to prove there was at least 10mg/ml of preservative in the blood sample used to convict him. The Court rejected this additional requirement, noting that nothing in the statute or regulations requires a specific quantity.

The presence of the chemicals was found sufficiently established by the visibility of white powdery substances in the gray-top vial.

Confrontation Cases

Both Intoxilyzer and FST Results Inadmissible Absent Officer/Operator Testifying

***People v. Umpierre* (2012) (No. 2010BX071571)**
___ N.Y.S.2d ___, 2012 WL 4232589 (N.Y.Sup.)

The officer who administered field sobriety tests and an Intoxilyzer test retired out of state and was purportedly unavailable to testify. The prosecution sought to admit the results via his partner. The partner was close by during the testing but could not hear everything being said.

Though certified to administer both tests, the results were held inadmissible because the partner could not convey what the reporting analyst knew or observed, or expose any lapses or inaccuracies on his part. The Court distinguished several cases on the basis that law enforcement conducted the testing here.

Proof of Service From Motor Vehicles Agency Non-Testimonial

***People v. Nunley* (2012) (No. 144036)**
Supreme Court of Michigan
___ N.W.2d ___ (2012 WL 2865486)

A certificate of mailing by the Michigan Department of State (DOS) was deemed admissible over a "confrontation" objection on the basis that said certificates are not prepared in anticipation of litigation and are therefore "non-testimonial."

The certificate here was used to prove notice of a suspended driving privilege, but its creation "is [merely] a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose" held the Court.

TRIAL TIP TREASURE

By James Nesci

One question too many. How do we avoid it? You're on a roll. The cop has forgotten facts and is just trying to avoid more embarrassment, and then you ask it. You know you're screwed before you finish the last word, but it's too late. You can feel your heart skip.

To avoid it, you must alter your basic understanding of cross-examination. Cross should be forty minutes of you testifying and the cop agreeing with you. It's a four-part formula: Combine one part McCarthy-Look-Good-Cross, one part *Pozner and Dodd* Chapter Method, one part Guerilla Tactics and leave out the fourth part---your impulse to ask that final nail-in-the-coffin question. What you don't ask is every bit as important as what you do ask. Formulate your cross to lay traps to ensnare your witness. Cross should leave you with just enough facts to form logical (or seemingly logical) inferences for closing argument. Closing is where you pose the open-ended questions that are answered when there is no one on the stand to fight back.

Cross-exam questions should be asked in trilogies. Chapters are composed of trilogies and should flow chronologically with the DUI investigation. With exception for the first and last chapters, each chapter must have a logical relationship to both a previous and subsequent chapter. Relevance to your theory of the case must be self-evident. No juror should have to search for the theory. Follow this formula and no juror will have to search very far for the words "Not Guilty."

Editor's Note: This edition's trial tip treasure comes from Arizona attorney James Nesci. Jim is an NCDD Regent and is Board Certified in DUI Defense. He is presently working on an appeal pending before the Arizona Supreme Court concerning a prosecutorial attempt to exclude from evidence in DUI trials a host of variables involving breath-alcohol testing. Jim prevailed for his client at both the trial court and Court of Appeal levels (*see State v. Cooperman* in Case Law Round at p. 4), and his expertise in this area is unparalleled.

Editor's Message: Contributions to the NCDD Journal are welcome. Articles should be about 1200-1500 words and relate to DUI/DWI defense. Trial Tips should be 200-300 words. Please prepare in Word and submit as an attachment to burglin@msn.com. The NCDD reserves the right to edit or decline publication. Thank you.

NCDD Foundation Benefactors Recognized

Following a very successful Summer Session and Dean McKinney's announcement of the creation of endowment classifications, the NCDD Foundation gives its most sincere thanks and deep appreciation to the following individuals:

- Members **Justin McShane** and **Josh Lee** have committed $10,000.00 in honor of and named the *"J. Gary Trichter Endowed Scholarship."*

- Regent **Steve Jones** has committed $10,000.00 to be named in honor of his mother, *Dolores A. Jones.*

- Fellow **George Bianchi** and **Regent Jim Nesci** have joined together for an endowment to be named in memory of Fellow *Victor Pellegrino.*

- Members **Harley Wagner, Marcos Garza, Ryan Russman** and **Jamie Balagia** have joined together to create a $10,000.00 endowment to be named in honor of NCDD Executive Director *Rhea Kirk.*

In addition to these endowments, the following individuals have made financial gifts to the Foundation this year:

Douglas Andrews	Robert Ianuario	Jackie Patterson
Timothy Bussey	David Katz	Scott Pejic
Paul Cannarella, Sr.	Tommy & Rhea Kirk	James Phillips
Ronnie Cole	Richard Koch	Jonathan Rands
Paul Cramm	Kathryn Lippert	Sonja Porter
Jackson Q. Crum	Domenic Lucarelli	Fred Slone
Steven Dowding	Neil Madden	Joanna M. Spilbor
Willard Hall	Joseph McGrath	Steven Tomeo
Steven Hanna	Travis Noble, Jr.	John Webb
Randolph Hough	Ann Parman	Norman Williams

The Foundation is deeply appreciative of these generous gifts. It is hard to imagine the ripple effect to be funded by these endowments. All members should remember to thank these individuals for their contributions.

We expect many of the "up and coming" future DUI. defense attorneys will look back upon their first Cambridge experience as being made possible by foundation scholarship funds.

--- *NCDD Foundation Officers:* Tommy Kirk, Flem Whited & Jess Paul

SCOTUS RADAR

The U.S. Supreme Court has granted a petition for writ of certiorari to determine "whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream."

Missouri v. McNeely (No. 11-1425)
Lower Ct: Supreme Court of Missouri (SC91850)

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JANUARY 17-18

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In Memoriam

Phil Stauffer

1972-2012

Known affectionally to his friends and colleagues as "The Dog", NCDD member Phil Stauffer passed away on October 1, 2012. Phil was a staunch defender of those accused of DWI in San Antonio, Texas, and according to his close friend and NCDD member Jamie Balagia, Phil's last words were, "Our clients need us, we are all they have". Rest in peace Phil.

yourselves to defend the citizen accused from the most politically motivated criminal allegations this nation has ever seen: the crimes alleged against normal law abiding citizens that arise from drinking and driving.

Our continuing commitment to teaching and learning so that lawyers may better defend against these often false and wrongful allegations is all that stands in the way of governments' and special interest groups' goals to further jail and imprison our neighbors.

This is a unique moment in College history as I am the first Dean who was not a Founding member, though it was not for a lack of trying. In 1994, when the College was formed, Gary Trichter asked me to be a Founding Member in the new entity that was being formed with 100 lawyers from across the country. A few months later, I sent in my $1000 check, expecting to be one of the Founding members, though I really had no idea what it would really mean.

Much to my shock and surprise, however, my check was returned along with a letter informing me that they were already full. Full? They did not want my money? I came to a very quick decision: if they did not want me or my money, I did not want them either. As Gary and others annually asked me to attend the annual seminars in attractive destinations, my reaction remained steadfast: only when Hell freezes over.

Finally, a few years later, Gary asked me to speak at the Summer Session, and to join as a Sustaining Member, not for the original $1000, but now for $2500. Though I agreed to speak, I told him that it was highly unlikely I would be putting up $2500. As best I could tell, Hell had still not frozen over.

That Summer Session came and I attended, I taught and I learned. Most importantly, I became a believer. This was a group that was head and shoulders above anything else in the country. It was a group that not just talked the talk of learning to be better, but actually walked the walk. There was commitment to education, dedication to the craft, and fellowship among peers. Most importantly, I got over myself and my stubbornness. I made new friends and rediscovered respect for old friends. Hell, it seems, had indeed, frozen over. I also ponied up my hard earned $2500 to become a Sustaining Member.

I tell you this story because the qualities I saw in others that summer, which continue to this day, were special. The Regents who ran the College were all not only pioneers in the field, but were the best of the best in teaching and practicing DWI Defense. I discovered then what close to 2000 more have discovered since then: this group is special. It is not just about quality, but about excellence. We continue today to seek to attain that same excellence.

A couple of years later I was elected a Regent and embarked on the 11 year journey that has culminated in my selection as Dean as your Dean. My journey has not been my own. While it was guided by the great lawyers that preceded me, I could not be here without the special contributions of many others.

First, my parents, Ralph and Carol McKinney, who taught me commitment, gave me a work ethic and business sense, and sent me out into this world with the foundation that if I worked hard enough, I could achieve anything and that anything worth doing was worth doing right or not at all. I commend the same attributes they sought to teach me to each of you and to all of the present and future members of the College, There are special opportunities that membership in this group presents for those willing to commit and work hard enough to achieve it.

Second, a special tribute to my wife of 29 years, Kathy McKinney. She deserves special credit not just for putting up with me, but for giving up all of the thousands of hours of time on weekdays, on weekends, and on working vacations, over all of the years so that I could have this opportunity. She, too, has committed to the College and I thank her for it.

Third, special thanks to Gary Trichter, as good a mentor as anyone could ever hope to have. He is as committed today to making us better lawyers as he was when the College was formed. As you saw yesterday, he continues to seek to blaze new approaches to this endeavor of excellence. He continues to fulfill in all of us that which he long ago achieved for himself and contributed to the College -- excellence.

Fourth, and finally, to Rhea Kirk, our Executive Director, extraordinaire. Rhea has become, in all of the best ways possible, the public face of the College. She has changed the course of the College and contributed greatly to its growth and success. Extraordinary does not begin to describe her special daily contributions to all that the College does and will continue to do. We could not do it without her and even if we could, we would not want to do so.

Back to why we are here. First and foremost, this College is about excellence. It is what we strive for, it is what we were founded for, and it is what we must continue to seek. The College has come a long ways since 1994, yet we still have a long ways to go. We have done some great things, we have had some great battles, and we have stubbed our toes, but it has all been in the quest to make us better, stronger, and more excellent.

We now need to look forward. We are by nature a rogue group, as different as we are similar. We must embrace our differences as much as our similarities in our continuing quest to help ourselves and others to be more excellent in our calling. In this respect, we continue to strive to be more inclusive and to involve more of our members in the functions and activities of the College. We will continue to do so and more over the next year. It is my commitment to you and to all of our members.

One year ago in his Dean's address, George Stein publically committed to continuing the mission to make the College more diverse. I am proud to report that we have made great progress in that endeavor. In 2010, 27 out of 170 (15.8%) new members were female. In 2011, 33 out of 189 (17.5%) new members were female. In 2012, so far, and as Dean Stein committed to you a year ago to do, 40 of the 128 new members (31.3%) are female. Three of the last eight new Regents (37.5%) have been female. As it has been for the last three years, a majority of the scholarship recipients to this Summer Session are female.

We have been making and continue to make progress -- not because we have been challenged externally to do so, but because we embarked on the mission on our own, several years ago. This progress has not been by accident, but because the Board has been and remains committed to increasing diversity.

Nonetheless, our membership remains predominantly male and white. Though that dynamic is a handicap that every local, state, and national voluntary bar association in this country faces and has historically faced, we must strive to make our group better by being more inclusive and diverse. We can, if we set our minds to it, be just as successful in being more inclusive and diverse as we have been in teaching and learning excellence in DWI Defense.

To continue to further our goals, we are forming a Diversity Committee. It will be composed not just of Regents and Fellows but also of members. This committee will develop a comprehensive inclusiveness and diversity strategy, which with the assistance and commitment of the Board, will be implemented. Achievement of our diversity goals will not happen overnight or even in a single year, but we can and must continue to take positive steps towards achieving them.

The State Delegate Program is more diverse and active than it has ever been. We are enlisting each of these members to aid us in recruiting more women and minorities into the College. The College was formed in the grass-roots and it is time for us to go back to those grass roots to be more inclusive and diverse. The State Delegates will be at the forefront of this effort.

The work of making the College more diverse also falls upon you, the members. We need you to work to recruit not just more white males, but members of all genders, races and ethnicities.

Founding and Sustaining membership dues are the life blood of the NCDD Foundation. The income from all Founding and Sustaining membership dues is dedicated to the Foundation, whose mission it is to provide financial assistance to those who need it to get the teaching we offer. The one time Sustaining membership dues are $2500 (half of

what NACDL charges for Life members).

The NCDD Fellows (former Dean's) comprise the NCDD Foundation. It is a 401(c) (3) entity which means that all donations are fully tax deductible as charitable contributions. The Foundation has embarked on a fund raising campaign to ensure the availability of permanent funds for future financial assistance to NCDD members. Those donating at least $10,000 are recognized as Foundation Endowments and may name a scholarship from the endowed funds. Those donating at least $5000 to the Foundation are recognized as Foundation Underwriters. Those donating at least $2500 are recognized as Foundation Benefactors. Those donating at least $1000 are recognized as Foundation Patrons. Those donating at least $500 are recognized as Foundation Friends. These contributions may be made as a one-time lump sum or paid out over five years. The designations last for five years.

Those of us here are fortunate enough or committed enough to have the resources to attend this and other College functions. Not all of our sisters and brothers are as fortunate. Just as we seek to teach to and learn from those who can afford it, we need to reach out to those who seek to learn, but need financial help in doing so and in taking their practices to the next level of quality.

The College is involved in much more than just four annual seminars. We have committees for Rules and Parliamentarian, Finance, Long Range Planning, Membership, Listserver, Website, Amicus/Research, Curriculum, Board Certification, the NCDD Journal, State Delegates, Public Defender Education, Webinars, and Diversity. Several committees bear special mention.

The NCDD web site, largely through the work of Fellow Barry Simons and more recently Regent Bill Kirk, is more dynamic and content rich than ever before. We have a catalogue of over 1500 scientific and academic articles related to DWI defense issues. It is in for far more over the next year. It will be updated and will include many new features that will make it more user friendly and interactive, with an emphasis on making it mobile device friendly.

Our Long Range Planning committee is talking the Herculean task of finding ways to get members more opportunities to be involved in the ongoing activities of the College. It will evaluate and consider a variety of suggestions and options and we expect to announce new initiatives in this regard over the next year.

Our Listserver, almost exclusively regulated by me for the past decade and perhaps our most visible function on a day-to-day basis, is passing to the able hands of Regent Virginia Landry. I know that she will continue to maintain the quality and integrity that has made it useful, if not essential, to many of our members.

Our Board Certification committee, headed by Mile Hawkins, continues to seek members who wish to become Board Certified specialists in DWI Defense. Of significant note, Regent Virginian Landry has become Board Certified. She joins Mimi Coffey, our newest Regent, is this distinction of excellence. Board Certification is a difficult to achieve because it seeks excellence. It would not mean much if it was easy. Many fine lawyers, including some Regents, do not pass the exam it the first time, but it would mean far less it everyone could pass at a whim.

Our Public Defender Education Committee, headed by Peter Gerstenzang, has over the last two years, put on, at no cost to them, over a dozen seminars for PD offices in Texas, Georgia, New York, Kansas, and New Mexico. We want to do more. In many jurisdictions, these lawyers are the first line of defense in DWI cases. Many of them are a significant part of the future of DWI defense and we are committed to educating them as government budgets continue to shrink.

As with any family, the College family has had and continues to have our differences, struggles, and challenges. For the vast majority, the goals have been the same and the differences, struggles, and challenges have come from honest, albeit sometime heated, differences in opinion in how to achieve the same goals.

I commend those who have sought to seek to make the College family stronger through constructive ideas and actions. To those who seek to divide and damage the College, I say only that you are misguided. You will fail because change and progress occur only through being constructive. Even if we disagree, we are always receptive to considering constructive ideas. We will, as we must, however, reject ideas and actions that seek solely to divide and are born of personal desires and goals rather than progress for the greater good of the College.

We are committed to excellence in all we do and, read my lips, so long as I have anything to say or do about it, nothing and no one will deflect us from that goal.

We all have a special responsibility, not just to learn, but to teach. Each of you here this week will learn something new and useful. Your obligation is to take it back to your communities and teach it to someone else – even if it is a prosecutor or a judge. As you make yourself better, so can and do you make others better. As you make others better, so will you make yourself better and better be able to defend your clients with excellence.

You should strive to regularly do a good legal deed. Help another lawyer with something, just as you hope they would help you. Share what you have learned. There is no cause to be stingy with our knowledge. The effort you expend in that small way will pay a multitude of dividends to you and to others.

You will never find the nuggets if you never pan for gold. You will never win the big cases if you never try the big cases. You will never pull the rabbit out the hat if you always think the hat is empty. Be innovative and strive not just to do an adequate job but to achieve excellence. It takes more time, effort, and energy, but also pays far greater dividends, both personally and professionally.

As we move forward from this day, let us all recommit ourselves to advancing the goals and causes that led us to choose this profession and to join this group in the first place to educate, to learn, to achieve excellence, and to protect the citizens of this country from an ever encroaching government, driven not by the greater good, but by political goals that serve little real purpose other than to make more of our citizens criminals.

We do what we do to protect the innocent from an increasingly overreaching government as well as to protect the guilty from consequences of their actions that far exceed the gravity of their transgressions and that are driven much too frequently by political dogma rather than by any real benefit for society.

We cannot solve all of the country's problems, and do not purport to do so. We can, however, in courthouses throughout this county, on a daily basis, and in each case, do our dead level best to ensure that individual citizens get the most excellent defense available when charged by the government with crimes involving drinking or drugs and driving. It is our small, but essential and critical, piece of and contribution to freedom.

Thus, we end where we began -- with a plan and a mission to better ourselves professionally, to improve and advance this organization, and to maximize our efforts at effectively providing our clients not just minimal representation, but superb quality and excellence in our skills and efforts. We do it through teaching, learning, and advocacy in the courtroom and to society. We do it by putting others before ourselves. We do it by being constructive, not destructive. And, we do it by seeking to include as many others as we can in our mission and to share all that we have been fortunate to learn from others and with others.

I look forward to the honor of being your Dean for the next year, wish you all good verdicts, and most of all, seek to make as many of you as possible new or reacquainted friends.

--- Troy McKinney

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