Advocating for the rights of citizens

The LegalSpin

Summer 2016

www.spinella-law.com

A Connecticut law firm, practicing in the area of Civil Rights, Criminal Defense & Individual Damage Claims

The Law Office of Spinella & Associates is located on One Lewis Street, an historic Hartford address on Bushnell Park in downtown Hartford.

What's *Inside:*

Why I Write This Newsletter

This newsletter is intended to serve two purposes: to communicate to the community of clients, lawyers, and others I have come to know in the practice of law; and, perhaps more importantly to explain to others (and perhaps to myself) why the practice of law is important and what it means.

Our federal and state constitutions do a terrific job of ensuring rights. However, rights are not self-executing - they lay on the ground like kindling which must be gathered and turned to fuel. Article 125 of the Constitution of the U.S.S.R. issued in 1936 by Stalin provided that "the citizens are guaranteed by law (a) freedom of speech, (b) freedom of the press, (c) freedom of assembly including the holding of mass meetings and (d) freedom of street prosecutions and demonstrations". But these rights mean nothing because Stalin did not provide for independent attorneys allowed to vigorously advocate for the exercise of these rights. In a free society, lawyers are assigned the crucial power to transform rights into real protections. The Soviet Union does not have our powerful Sixth Amendment which allows the accused to "enjoy the assistance of counsel for his defense". Constitutional rights without a professional class of advocates dedicated to their enforcement makes these rights useless.

Criminal law and litigation on behalf of Plaintiffs who have suffered the violation of their civil rights or other grievous injury are the most demanding branches of the legal profession. A criminal defendant faces all the power of the state - police officers, federal and state law enforcement agencies, crime labs, investigators - with nothing other than a defense lawyer at his side. Similarly, a citizen who has been injured by the negligence of a powerful corporation or an agent of the government can achieve a just damage award only with the assistance of a lawyer who is willing and able to champion his cause. Our system is structured so that two opposing forces battle it out in a courtroom; when a criminal defendant or a plaintiff is not represented well a failure of justice is the result. Every day of my practice involves a battle on behalf of a criminal accused or a plaintiff who has suffered injury. This is what the great trial lawyer Edward Bennett Williams called the "real stuff", something I never doubt no matter what the burden of righteous courtroom battles lost after great travail and toil.

In the course of my years of practice I have met many amazing clients. This newsletter represents my effort to maintain these relationships and to make new friends. My goal is to publish on my website a minimum of four times a year addressing the following three topics. First, new developments in the law will be reviewed - since my practice involves nearly every area of trial practice where criminal and civil issues pertain to individual citizens, a wide range of issues will be addressed. The newsletter will also note interesting cases of our own either concluded or in progress that stand for issues of interest to all or at least some of our readership. Finally, we will attempt to include one legal tip or recommendation which could prove useful to the average citizen.

We welcome all feedback and hope you will share your comments - good or bad - by calling 860-728-4900 or sending us an email at attorneys@spinella-law.com.

Thank you and I look forward to hearing from you.

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Lawsuit Lenders: Borrowing Money Secured by Potential Settlements and Verdicts is a Bad Idea.

Litigating plaintiff's cases on behalf of someone who has suffered injury - whether at the hands of a citizen, corporation, or government representative - is a very difficult enterprise. In addition to defense lawyers who are paid by the hour and will do anything to prolong a case, plaintiffs are often confronted by hostile trial judges, appellate courts, and even juries who are seemingly quick to categorize all plaintiffs as freeloaders looking for a free pay day.

This is especially true in Connecticut, the "insurance state," where state statutes and rules of procedure are famously crafted to favor insurance companies and prevent high jury verdicts. Facing down these opponents is hard enough for a victim who is further burdened by financial loss and the inability to earn income because of the injuries suffered. The last thing such plaintiff's need is to be further victimized by a new breed of shark circling the waters in the form of "litigation funding companies" also known as "LFCS." This business was infamously founded by a Nevada predator known as Perry Walton. He is known to have threatened defaulting customers by telling them that "he worked for loan sharks" and that anyone "who screwed with these people would end up in the desert, dead." In 1997 he was convicted of extortionate debt collection and was sentenced to 18 months of probation.

In 1999 Walton started "Future Settlement Funding Corporation" which provided money to plaintiffs in lawsuits at astronomical rates. To get around state laws he characterized the transaction as an "advance" on future proceeds rather than a loan. Once the lawsuit settled his company would get paid a typically enormous sum oftentimes in excess of the settlement or verdict. Walton went on to train hundreds of people in well-paid seminars about how to run these schemes on unwitting plaintiffs.

Incredibly, litigation funding contracts can run as high as 120 percent with 60 percent the annual average. These rates are typically justified on the grounds of being "high risk" according to one industry trade group, although this same group admits that default rates are less than 4 percent, a very low rate for unsecured lending. In many cases even when the consumer wins or settles the case, the entire amount of the award or settlement is used to pay the lender after the attorney is paid according to the U.S. Chamber or Commerce.

This issue is discussed in a very insightful way in Attorney John Barylick's excellent book "Killer Show" about the Rhode Island Station Night Club fire. In addition to the above, he also points out that the dirty secret of these operations is that attorneys are involved in them as case enforcers and evaluators and perhaps even as silent

investors. Since lawyers are barred by ethical rules from lending money to clients for their personal use, enabling lending of usurious rates to powerless litigants violates the spirit of the ethical rule. As Barylick and other critics further point out, these companies need to be regulated so that usury laws are brought to bear thereby capping interest rates and creating transparency.

These groups are easy to find: they are all over the television and on the internet with attractive ads. I have had direct experience with this industry in a case I handled a few years ago. I strongly advised my client to have nothing to do with several groups who were chasing him down in a major personal injury case. Against my advice he signed a contract for a limited "advance" which by the time the case had resolved had incurred nearly 75% in interest charges. Since the time of that case I do everything possible to discourage client involvement with these groups.

The fact that this barely legal business is allowed to exist as an unregulated body is due to great lobbying influence. The time has come to either abolish these groups or strictly regulate them. As stated by Matt Fullenbaum, director of legislation for the American Tort Reform Association, a conservative outfit, "the lenders acknowledge that litigation funding is meant for the desperate, which necessarily means that this industry is designed to prey on the most vulnerable."


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Connecticut Prosecutors Are Gone Baby Gone.

For the past several decades nearly all criminal prosecutions of consequence in Connecticut have been brought by federal prosecutors who have successfully pursued a succession of spectacular cases involving municipalities, high level politicians (including a sitting governor), police departments, and other significant cases. During this time Connecticut prosecutors, and the grand juries which act as their powerful investigative arm, have stood idly by, demonstrating little activity or interest in bringing sophisticated prosecutions of their own.

In these post Ferguson days - where the quality of criminal justice is a matter of needed public debate - it is time in Connecticut that someone acknowledges the elephant in the room; namely, where have all of Connecticut's prosecutors gone? And in addressing this question, who is it that decides whether someone should be charged with a crime anyway?

In its modern form the so-called charging decision - the decision to initiate criminal prosecution - is an executive branch responsibility invested in the hands of a public prosecutor who, in Connecticut, is appointed in secret by a Commission appointed by the Governor (unlike most states where the prosecutor is elected rather than appointed).

Historically, the charging function had its start with the grand jury, originally transported to America from England by the early colonists; the grand jury played its greatest role in the 17th and 18th centuries as a "shield" or "buffer" against unfounded or unjust prosecutors in a series of celebrated cases by refusing to "true bill" or approve unpopular political prosecutions by royal officials. In this capacity the grand jury ignored technical guilt, refusing to indict in the numerous cases (as was common in that period), where capital punishment was imposed for relatively minor offenses. Beginning in 1784, however, the Connecticut Superior Court was authorized for the first time to compel a grand jury of 18 citizens "to enquire after and present" criminal offenses, thereby affording the grand jury's modern day investigatory powers. No longer a shield, the so-called "common law" grand jury eventually evolved into its modern accusatory form distinguished by secrecy and domination by a public prosecutor. These grand juries were used to great effect through the middle of the last century in numerous celebrated cases where they returned indictments in complex financial / political crimes involving multiple defendants, such as the prosecution of the infamous "Hayes-ring" involving machine politics and graft in the City of Waterbury in the 1930's.

The power of the grand jury as a prosecutorial investigatory tool was expanded once again, this time in the middle of the last century with the institution by statute of the so-called judicial inquiry. This statute permits the Chief State's Attorney and regional State's Attorneys to apply directly for the convening of a grand jury consisting of one or more judges of the Superior Court and to compel the attendance of virtually any person or object deemed relevant to the investigation while retaining complete control over the charging decision, since grand jurors conducting a judicial inquiry are without authority to make formal accusations.

In the hands of an ardent prosecutor the judicial inquiry is a powerful sword; for this reason it has been hailed by the law enforcement establishment as an important, even necessary tool for the investigation of sophisticated complex criminal schemes when there is good reason for believing that a crime has been committed, but no apparent demonstration that it has.

Use of the judicial inquiry came to full flower in the 1970's with the creation of the Office of the Chief State's Attorney and the appointment by the Chief Justice of attorney Austin McGuigan. McGuigan was a young gun, able as well as eager to make use of this enormous prosecutorial tool. Under his watch the judicial inquiry was employed in multiple investigations, bringing about convictions in complex cases such as corruption in the New Britain Police Department involving a pay for advancement scheme and a protection racket involving mob gambling.

McGuigan's term came to a sudden end, however, with the creation of a Commission whose members were appointed by the governor, with the sole authority to hire and fire the Chief State's Attorney, previously a judicial function. With McGuigan gone a number of potentially sensational political investigations met a similar demise, such as a pending pay to play scheme involving the Department of Transportation. Since then there has been few state grand jury investigations of real significance. Instead, this job has fallen almost entirely to the federal government, where the Connecticut U.S. Attorney's Office has compiled a remarkable record of convictions in a wide range of cases - particularly prosecutions of political figures - by use of a federal grand jury with powers similar to the now dormant Connecticut grand jury.

The importance of all this is that we now have a justice system in Connecticut where there are no state prosecutors - neither the Chief State's Attorney nor the regional county State's Attorneys - initiating prosecutions of sophisticated criminal enterprises and high public figures. As a result the prosecution of offenses of this importance and difficulty has been left to the federal government. Nearly all other prosecutions of lesser importance are initiated not by prosecutors, but by local municipal police departments in connection with an arrest in the field, or by warrant after presentment to a local State's Attorney.

Why should we care about this state of affairs? The simple response is that a vast reservoir of criminal conduct of enormous pubic consequence remains untouched. The federal government is restricted in the cases it can or will prosecute, either by jurisdictional issues limiting federal ability to prosecute certain state crimes, by structural conflicts of interest such as where the offender is a federal law enforcement official, or for political reasons as in the failure to prosecute any banking institutions in the wake of the recent Wall Street crash.

Similarly, police departments are also restricted in the type of cases they can prosecute: they are unable to investigate and bring charges in sophisticated crimes due to a lack of expert staff and legal expertise, and the lack of access to a grand jury to compel testimony and evidence. More importantly, police departments have not and will

not bring charges of corruption against themselves because of the inherent conflict of interest. Finally, police departments are parochial bodies that operate in their self- interest or at the behest of local municipal political powers. They also work closely with the local States Attorneys office, often on a daily basis, which relies on them to make cases in less sophisticated crimes, such as street and drug crimes; as a result prosecutors are loath to antagonize their crime-fighting partners by charging them with criminal conduct.

In short, the absence in Connecticut of vigorous prosecutors employing the investigative power of a grand jury has created a default system where police departments, with all their obvious limitations, are left to assume the charging responsibility. If there is any doubt about the deficiency of such a system look to Enfield, Connecticut, where a large group of plaintiffs, that I represent, have recently brought claims alleging that a cohort of police officers have been trampling civil rights over a period of years while the Police Department turned a blind eye despite increasingly vocal critics, including officers within the department itself. When an arrest warrant application was finally submitted for one these officers, who alone was responsible for one-third of all civilian complaints, the State's Attorney for Hartford County, Gail Hardy, refused prosecution; thereby predictably declining the difficult step of taking on a local police department with close ties to her office.

[This is only one example; my office is routinely asked to investigate death cases involving alleged wrongful police shootings) (presently two in the City of Bridgeport) none of which undergo grand jury investigation. Indeed, in the last 30 years there have been only two indictments of police officers for homicide related charges, one of which was the result of an active lobbying campaign on my part before former Waterbury State's Attorney John Connelly bravely agreed to call up a judicial inquiry).

The State's Attorney's decision in the Enfield matter is troubling, in particular because this is a case which cries out for a grand jury run by a vigorous prosecutor: a police department without transparency, allegedly involved in the cover up of police misconduct to the extent of making use of a particular police officer previously disciplined for writing false reports. Only a grand jury is equipped in these circumstances to compel the production of repressed testimony and hidden evidence necessary to establish whether probable cause exists before a crime has been committed.

As this case clearly indicates, we have a prosecutorial system that does not function, beginning with a grand jury that acts as neither a sword nor a shield. Instead of a vigorous prosecutor bravely taking on a confederacy of wrong doing we have a great vacuum with no prosecutorial warrior to fill the void.

How do we fix this? **We can start by acknowledging an old legal truism: that prosecutors are the gatekeepers of the criminal justice system. We need to restore the integrity of this gate-keeping function by insisting that our public prosecutors resume their rightful authority over the charging function and make police accountable for wrongful conduct.**

This is a problem with a number of solutions - here are three:

1. General elections of prosecutors: In place of secretly appointed prosecutors by a committee of the governor's cronies, prosecutors should be elected as is the case in most states. This would promote pubic debate of important law enforcement issues, as well as allowing public scrutiny of a prosecutor's track record in prosecuting difficult, important cases involving sophisticated, powerful wrongdoers;

2. Special prosecutors: A special prosecutor's office should be established with an investigative staff and a mission to prosecute criminal police misconduct of all kinds and combinations. To protect the integrity of the special prosecutor's office and ensure an arms length relationship with the police appointment should be made outside the prosecutor's office, such as by the Governor or Attorney General.

3. Attorney General concurrent jurisdiction: Another idea, borrowed from New York and Massachusetts, is to invest the Attorney General's office with the power to prosecute criminal offenses and conduct grand jury investigations, particularly in cases involving conflicts among States Attorneys, or allegations involving the criminal justice system or police corruption.

While none of these suggestions are silver-bullets, they would go a long way to achieving a necessary goal: that of getting Connecticut's prosecutors and investigative grand juries working again.

A vigorous, effective State's Attorneys office with a grand jury at its side is a necessary hallmark of a vibrant democracy.

A. Paul Spinella is a Hartford based civil rights and criminal defense attorney. He is the author of Connecticut Criminal Procedure. This article appeared in the Hartford Courant editorial page in shortened form.

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Mother Sues Hartford Schools

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The mother of a 13-year-old girl who police say received sexual text messages from a longtime Hartford school administrator is suing the school system, top school officials and the city of Hartford over alleged negligence in the case.

A state marshal was serving the defendants with a civil complaint Thursday, said the woman's attorney, A. Paul Spinella of Hartford, who expected the lawsuit to be filed in court in the coming days.

Eduardo "Eddie" Genao, 57, who is listed as a defendant and accused of inflicting "emotional distress" and trauma on the girl, resigned as the city schools' executive director of compliance after police confronted him at work over the text messages. He was arrested April 13 on a felony charge of risk of injury or impairing the morals of a child, and has not yet entered a plea in the criminal case.

A major allegation in the complaint is that the city and the school system allowed Genao, a career educator who worked for the district since 2005, to prey on the girl despite years-old claims that he sent inappropriate electronic messages to a female student and an employee when he was principal of Sport and Medical Sciences Academy.

"The city knew or should have known that they had a very dangerous person in their mix," Spinella said Thursday. "They didn't red flag him, they promoted him."

Along with Genao, the complaint names Superintendent Beth Schiavino-Narvaez; her chief of staff, Gislaine Ngounou; Hartford Public Schools' chief labor and legal officer, Jill Cutler-Hodgman; the board of education; board Chairman Richard Wareing; and the city of Hartford.

Wareing, who said he was served Thursday, declined to comment. A city spokesman said the city does not comment on pending litigation, and school officials did not have an immediate response.

Genao's defense attorney, Hugh F. Keefe of New Haven, said Thursday that he had not yet read the civil complaint and could not comment.

The civil allegations outline the basics of the criminal case, beginning with how Genao met the 13-year-old at a district-sponsored symposium on race and equity at Hartford's Bulkeley High School in March. The girl's mother told police that Genao was sitting next to her daughter as she took cellphone photos of a professor's slideshow on institutional racism. Genao introduced himself as "Eddie" and asked the ninth-grader to text him the photos.

Soon after the March 19 event, Genao initiated a text message conversation with the girl that started out friendly, such as confirming that she lived in New York state, police said. The messages eventually turned "sexually explicit" — Genao requested that the girl send "daring" photos of herself and asked whether she had ever "done it" or been sexually aroused, according to the arrest warrant. Police said Genao also texted a photo that showed a man's bare upper thigh region.

Genao, whose educational career in New York City and Hartford spanned more than three decades, abruptly resigned his $176,274-a-year central office job after internal affairs investigators with the Hartford Police Department seized his personal cellphone on April 5. He has been out on bail since his arrest and is expected to appear in court July 13.

Spinella sent letters to city and school officials last month requesting Genao's personnel file, any complaints against Genao, and all records connected to internal investigations of Genao. He also asked that they not destroy any evidence.

One of the records in Genao's personnel file is a January 2008 written reprimand from while he was Sport and Medical Sciences' principal for behavior that district officials at the time had deemed "inappropriate and unacceptable."

The district found after an investigation that Genao used "exceedingly poor judgment in engaging in social interactions with a student electronically," the reprimand states, and that he "engaged in the same conduct with a former student who became an employee; again, you exhibited poor decision-making."

Citing concerns for student privacy, the city's corporation counsel initially rejected The Courant's request for records from that investigation and has since been slow to the release them.

Among the heavily redacted documents that the city has released are two statements that Genao gave in the presence of a union representative and a worker with the state Department of Children and Families in late 2007. Genao, a church-going, married father of four, said in the interviews that his online chats were "innocent," that he "never meant anything of a sexual nature" and that his "career and family are on the line."

His online screen name was "Nolocreo5a," according to the records. In Spanish, "no lo creo" translates to "I don't believe it."

"I do not have any idea of what I meant when I asked during the chat session if she was talking to Mr. G. or Eddie," Genao said during one of the interviews. "[Redacted] has never given me any cause to feel I was making her uncomfortable. I did tell her to erase the conversation. It is always a good thing to erase all conversations. I may have asked if she could be online later that night. To my knowledge no student has complained to me about being kissed on the cheek, hugged or intertwining my fingers with theirs."

The same day he accepted the reprimand, Genao requested a job transfer within the school system. He became executive director of Hartford's adult education center in the summer of 2008 and advanced to several other central office roles, including his promotion in 2012, under former Superintendent Christina Kishimoto, to assistant superintendent for early literacy and parent engagement.

The civil complaint served Thursday alludes to the earlier claims, saying that Hartford officials "knew or should have known that Genao had engaged in inappropriate behavior with minor children."

Narvaez demoted Genao during a central office reorganization in late 2014, several months into her tenure. But Genao, whose most recent job involved handling compliance issues with expulsions and adult education, remained one of the district's highest-paid employees.

The 13-year-old girl's mother lambasted school leaders at a Hartford school board hearing in May, painting the district as lax toward Genao's alleged misbehavior. While the mother has identified herself publicly, The Courant is not reporting her name to protect the identity of the alleged victim.

"I brought my daughter to what I thought was a safe environment," the woman said of the March 19 symposium. "They're talking about equity in education and I thought this is where education was going to meet justice. As a 24-year veteran in the educational system and a newly admitted attorney, I really thought I was going to come away with something."