Ave Maria School *of* Law
Moot Court Board Journal

THE GAVEL

Fall 2016
Volume 8,
Issue 1

Criminal Trials and Evidentiary Tribulations

FEATURING:
Eugene R. Milhizer
Dean Emeritus and Professor

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Ave Maria School of Law
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MOOT COURT BOARD PRESIDENT'S MESSAGE

Being the President of the Ave Maria Moot Court Board this year is a great honor. I'm proud to be at the head of such a talented and exceptional group of individuals. Each member of the Board brings a unique set of skills and experiences to share with all of us. The Moot Court Board represents a remarkable opportunity for all of us to grow and become better versions of ourselves. I personally joined the Board for the chance to practice and hone my skills as a future litigator. I also encourage each member of the Board to use the opportunities presented before them to gain as much experience as possible.

Each year the Moot Court Board hosts two internal competitions amongst the students at Ave Maria. This October we will host the Robert Bork Internal Appellate Competition, where teams of two will argue constitutional issues involving the Fourth Amendment. Alumni, attorneys, and judges from the area judge the teams, and I couldn't be more proud of the teams our school will be showcasing.

This summer the Ave Maria Moot Court Board had a strong showing at the Robert Orseck Memorial Competition for the second year in a row. I had the privilege of competing with Antonette Hornsby and Nicole Staller and taking our team to the Semi-Final Round of the competition. I couldn't be more proud of our team, and I know our success is just the beginning of the many accomplishments to come this year.

Additionally, each year the Board sends teams of two or three students to compete in external competitions all over the country. This November we have two teams that will travel to compete in the New York City Bar National Appellate Competition and the 1st Annual Notre Dame National Appellate Advocacy Tournament. I know the teams will represent Ave Maria well and will make the Moot Court Board very proud.

In addition to competing in external and internal competitions, the members of the Board are also afforded the opportunity to publish their articles in this publication. The Gavel is published in the fall and spring semesters each year and students write on a wide variety of topics. I hope that you enjoy the articles that have been included in this volume of the Ave Maria Moot Court Board Gavel.

Finally, I would like to offer a huge thanks to my Executive Board. Without each of them, this Board would not be able to accomplish everything that we do. Thank you to Nicole Staller, Alex Scarselli, Antonette Hornsby, Aimee Schnecker, and Megan Strayhorn. I couldn't have asked for a better group of people to have the opportunity to work with. These five people are some of the most dedicated, hard-working, and talented individuals I have ever had the pleasure of working with.

The Ave Maria Moot Court Board looks forward to a year of success and thanks you for all of your support.

Sincerely,

Brittney Davis
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MIRANDA V. ARIZONA: Two Famous Winners and One Ironic Loser

By Eugene R. Milhizer
Dean Emeritus and Professor

June 13, 2016 marks the fiftieth anniversary of the Supreme Court's landmark decision in *Miranda v. Arizona*.[1] *Miranda* is among the rare cases that has transcended the legal profession and become a fixture in popular culture. *Time Magazine* ranked *Miranda* as the third most controversial Supreme Court case in United States history[2], and the rights warnings required by the decision have become common fare for movies and television shows [3]. Indeed, *Miranda* may be the only criminal case to have morphed into a verb – to "Mirandize [4]."

While legal practitioners and law students are conversant with *Miranda*'s holding and present-day requirements, many are not as familiar with its divisive and controversial past. Like any transformative event, the *Miranda* decision has influenced the lives of countless persons and left in its wake a litany of winners and losers. This article will briefly recount the story of two famous winners and one ironic and unexpected loser.

A. PRESIDENT RICHARD NIXON – WINNER

When *Miranda* was first decided, the overwhelming public reaction was loud, swift, and highly critical. For example, Jacob Fuchsberg, a former president of the American Trial Lawyers Association, feared that "[t]he Supreme Court's decision in *Miranda* v. Arizona virtually puts an end to the effective use of confessions[5]." Professor Fred Inbau shared "a concern on the part of law enforcement officers – and an understandable concern – that whatever they say to a suspect by way of *Miranda* requirements might later be considered inadequate by a judge or appellate court[6]." Professor Ed Quevedo recalled that the *Miranda* decision seemed to mark "the end of the world as we know it if you were reading the papers...People thought it would lead to lawlessness, police would be handcuffed; we wouldn't be able to investigate crimes, we couldn't punish perpetrators[7]."

Public attitudes toward *Miranda* are vividly reflected in the contemporary polling data. "[A] Harris poll conducted a few months after the [*Miranda*] opinion found that 57 percent of respondents thought it was 'wrong,' with only 30 percent calling it 'right[8].'" A 1968 Gallup Poll taken shortly after the *Miranda* revealed that 63% of the public felt that courts were too soft on criminals[9]. These results stood in stark contrast to a Gallup Poll that preceded *Miranda*, which indicated that only 48% of Americans believed that courts had been too lenient[10]. The burgeoning anti-*Miranda* sentiments was further bolstered by crime statistics, which purportedly indicated that in the years immediately preceding *Miranda* the population of the United States had grown about 10 percent while crime had risen a staggering 88 percent[11].

It was against this backdrop that Richard Nixon ran as the Republican nominee for President in 1968. According to historian Rick Perlstein, "Nixon reestablished himself as a figure of destiny by speaking to people's craving for order[12]." Targeting the Warren Court and its *Miranda* decision, Nixon tapped into public anger and fear by making "law and order" a central platform in his run for the White House. Liva Baker, who wrote perhaps the defining book about the *Miranda* case and its relation to politics and crime, explained that "[t]he centerpiece of [Nixon's] law and order campaign ... was the American judiciary and in particular the justices of the United States Supreme Court[13]. Nixon promised voters during his acceptance speech of his party's nomination for president at the Republican national convention, "We shall reestablish freedom from fear in America so that America can take the lead of reestablishing freedom from fear in the world[14]." Nixon continued,

> And tonight, it is time for some honest talk about the problem of order in the United States. Let us always respect, as I do, our courts and those who serve on them. But let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country and we must act to restore that balance.[15]

Candidate Nixon later took aim at *Miranda* by name in a position paper on crime entitled *Toward Freedom from Fear*.[16] In the paper, Nixon urged Congress to pass legislation overturning *Miranda* and restoring the voluntariness test as a way to "redress the imbalance" caused by such decisions and respond to the harm suffered by "the peace forces in our society."[17] Nixon argued that "[a]mong the contributing factors [to a sharp increase in street crime] … are the decisions of a majority of one of the United States Supreme Court."[18] He contended,

> The *Miranda* … [decision has] had the effect of seriously ham stringing [sic] the peace forces in our society and strengthening the criminal forces.
>
> From the point of view of the peace forces, the [impact] … has been to very nearly rule out the "confession" as an effective and major tool in prosecution and law enforcement.
>
> From the point of view of the criminal forces, the cumulative impact … has been to set free patently guilty individuals on the basis of legal technicalities.
>
> The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community.[19]

To help accomplish his objective of restoring law and order and correcting the extravagances of the Warren Court, Nixon pledged to appoint strict constructionists to the Court if he was elected President. With regard to judicial appointments, Nixon explained in his position paper,

> [I] think [the Warren Court's criminal procedure decisions] point up a genuine need-a need for future Presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land.[20]

Nixon's law and order message resonated with voters. He carried 32 states and garnered over 300 electoral votes in the three-way 1968 presidential election.[21] Historians agree that Nixon's withering criticism of *Miranda*, and his pledge to reverse its detrimental impact through judicial appointments and other policy initiatives, was a major factor in his successful campaign for the Presidency.

B. CHIEF JUSTICE WARREN BURGER – WINNER

When Chief Justice Warren (the author judge of the *Miranda* decision) retired from the Court in 1969, Nixon had the opportunity to make good on his campaign promises and satisfy *Miranda*'s many opponents and appoint a law and order conservative. Nixon found his ideal candidate for Chief Justice in Warren Burger, who was himself an outspoken critic of *Miranda*.

Before his appointment to the Supreme Court, Burger was a frequent lecturer at law schools and bar associations, where he routinely criticized exclusionary rules in general and *Miranda* in particular. In a now famous commencement speech delivered at Ripon College in 1967, Burger said,

> [Other countries] do not consider it necessary to use a device like our Fifth Amendment, under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty. No nation on earth goes to such lengths or takes such pains to provide safeguards as we do, once an accused person is called before the bar of justice and until his case is completed.[22]

Burger's approach to criminal justice, and in particular his objections to *Miranda* and exclusionary rules, found favor with presidential candidate Nixon.

> [I]n August 1967, Nixon had read in U.S. News & World Report excerpts from Warren Burger's commencement speech given at Ripon College …. He had been impressed with what Burger said about the administration of American criminal justice. His adaptation of the jurist's ideas to his own speeches for the 1968 presidential campaign held significance, of course, for the immediate future; it was also the beginning of a deeper association between the two men … [23]

President Nixon was inaugurated the 37th President of the United States on January 20, 1969.[24] In March of that year, Burger, now on the United States Court of Appeals for the District of Columbia, wrote a stinging dissent in *Frazier v. United States*.[25] In *Frazier*, the majority of a three-judge panel of the Fourth Circuit Court of Appeals, citing *Miranda*, returned the case to the district court below to determine unanswered questions about the voluntariness of the defendant's confession.[26] Burger vehemently disagreed, complaining that

> The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated

lawyers and judges are taxed to follow. Each time judges add nuances to these "rules" we make it less likely that any police officer will be able to follow the guidelines we lay down. We are approaching the predicament of the centipede on the flypaper - each time one leg is placed to give support for relief of a leg already "stuck", another becomes captive and soon all are securely immobilized. Like the hapless centipede on the flypaper, our efforts to extricate ourselves from this self-imposed dilemma will, if we keep it up, soon have all of us immobilized. We are well on our way to forbidding any utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application.[27]

The *Frazier* decision, as Liva Baker noted, "was reported in the local press, which was received in quantity at the White House and in which attention was focused not on the details of either the case or the decision but on Judge Burger's rousing dissent."[28]

On June 3, 1969, Nixon nominated Burger to serve as Chief Justice of the United States Supreme Court.[29] Six days later, following a three-hour debate, the Senate confirmed Burger by a vote of 74 to 3.[30] If not for the *Miranda* decision and Burger's outspoken and consistent criticism of it and similar cases, it is highly doubtful that Burger would have ever ascended to the Supreme Court.

C. ERNESTO ARTURO MIRANDA – LOSER

Ernesto Miranda was not freed from prison when the Court reversed his conviction. Rather, he remained confined on other charges while prosecutors considered whether to retry him without the benefit of his suppressed confession to police. Ultimately, the unwed mother of Miranda's child approached authorities and claimed that Miranda had once confessed to the same crimes to her. Armed with this new evidence, prosecutors decided to retry Miranda. As in his first trial, Miranda was convicted and received an identical sentence.[31] As Ernesto Miranda had learned, the Miranda warnings requirement applies only to confessions obtained by government agents and not to those proffered by scorned ex-lovers fighting for child custody.

But Miranda's retrial and conviction is not why he counted here among the decision's greatest losers. Rather, the final irony in the personal story of Ernesto Miranda, which cast him in this unenviable role, occurred several years later. After Miranda was released on parole for the last of his criminal convictions, he frequented a seedy area of Phoenix known as the Deuce section. In a bar there on the evening of January 31, 1976, Miranda was involved in a dispute about cheating during a card game. The argument turned violent and ended when one of the card players stabbed Miranda to death.[32]

Although the perpetrator of the homicide evaded the police, his alleged accomplice was arrested at the scene and taken to the stationhouse to be interrogated. As was now required by the Supreme Court, the officers were careful to first advise the suspect of his *Miranda* warnings before commencing questioning.[33] The suspect declined to waive his rights and answer questions, however, and so he was ultimately released because of a lack of evidence. Without the accomplice's cooperation, the perpetrator was likewise never tried for his crime. It is thus perhaps the greatest irony of all that those responsible for Miranda's death likely avoided conviction because of the protections afforded to them by the rights warning and waiver protections bearing their victim's name. O

References:

Dean Emeritus and Professor of Law, Ave Maria School of Law. This article is largely comprised of excerpts from the author's article, Miranda's Near Death Experience: Reflections on the Occasion of Miranda's Fiftieth Anniversary, 66 CATHOLIC UNIVERSITY LAW REVIEW __ (2016). (publication forthcoming). The author would like to thank Ms. Emily Dhanens for her outstanding work as a research assistant.

1 See Miranda v. Arizona, 384 U.S. 436 (1966).

2 See Alexandra Silver, Top 10 Controversial Supreme Court Cases, TIME (Dec. 13, 2010), http://content.time.com/time/specials/packages/article/0,28804,2036448_2036452_2036453,00.html (lists Miranda v. Arizona as the third most controversial Supreme Court case of all time).

3 A recent example of a comedic treatment of the Miranda warnings can be found in the movie "21 Jump Street," available at https://www.youtube.com/watch?v=T45aF1NLMyMMor (last visited May 19, 2016).

4 See Mirandize, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/Mirandize (last visited Apr. 22, 2016) (defining "Mirandize" is a transitive verb meaning "to recite the Miranda warnings to (a person under arrest))." The only somewhat similar example that comes to mind is how Judge Robert Bork's last name became a verb, as in "he was 'Borked.'" See Borked, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/Bork (last visited Apr. 22, 2016) (defining "Borked" as "to attack or defeat (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification").

5 See Miranda Decision Said to End the Effective Use of Confessions, N.Y. Times (Aug. 21, 1966), http://76307797.weebly.com/public-reaction.html. In his dissenting opinion in Miranda, Justice Harlan similarly warned, "[t]he court is taking a real risk with society's welfare in imposing its new regime on the country." See Miranda, 384 U.S. at 517.

6 See Fred E. Inbau, Over-Reaction – The Mischief of Miranda v. Arizona, 73 JOURNAL OF LAW AND CRIMINOLOGY 797, 799 (1982).

7 See Ed Quevedo, Mills College on the Public Reaction Following Miranda Ruling, http://76307797.weebly.com/public-reaction.html (last visited Apr. 16, 2016).

8 Bruce Peabody, Fifty years later, the Miranda decision hasn't accomplished what the Supreme Court intended, THE WASHINGTON POST, June 13, 2016, available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?wpisrc=nl_politics&wpmm=1.

9 See Kenneth C. Stephan, Comment, Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics, 48 NEB. L. REV. 193, 217 (1968) (citing N.Y. Times, April 28, 1968, § E, at 12).

10 Id.

11 See Yale Kamisar, Can (Did) Congress Overrule Miranda?, 85

CORNELL. L. REV. 883, 899 (2000) (citing Freedom from Fear, a position paper on crime by presidential candidate Richard Nixon, dated May 8, 1968. The text of the position paper is set forth at 114 CONG. REC. 12,936-39).

[12] See Stephen Smith & Kate Ellis, Campaign '68 AMERICAN PUBLIC MEDIA, http://americanradioworks.publicradio.org/features/campaign68/b1.html (last visited Apr. 17, 2016).

[13] See LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 245 (Athenaeum 1983) (alteration in original).

[14] See Richard Nixon, Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida, THE AMERICAN PRESIDENCY PROJECT (Aug. 8, 1968), http://www.presidency.ucsb.edu/ws/?pid=25968.

[15] Id.

[16] See 114 CONG. REC. 12,936-39 (May 8, 1968).

[17] Id. at 12,937.

[18] Id. at 12,937.

[19] Id. at 12,936-8.

[20] Id. at 12,938.

[21] See Election of 1968, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=1968 (last visited Apr. 1, 2016). Hubert Humphrey, the Democratic candidate, received 191 electoral votes, and George Wallace, a third-party candidate, received 46 electoral votes). Id.

[22] See Warren Burger THE CHIEF JUSTICES: THE SUPREME COURT, http://www.edu.aceswebworld.com/warren_burger.html (last visited Mar. 29, 2016) (alteration in original).

[23] See BAKER, supra note 13, at 245; see also Lee Huebner, The Checkers Speech After 50 Years, THE ATLANTIC (September 22, 2012), http://www.theatlantic.com/politics/archive/2012/09/the-checkers-speech-after-60-years/262172/ (observing that Burger likely first came to Nixon's attention when he sent a letter of support to Nixon during the 1952 Fund crisis).

[24] Chief Justice Warren administered the oath of office.

[25] See Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969), overruling 136 U.S. App. D.C. 180 (1968).

[26] Id. at 1169.

[27] Id. at 1176 (Burger, J., dissenting) (emphasis in original).

[28] See BAKER, supra note 13, at 275–76.

[29] Id. at 284.

[30] Id. at 276. It has been reported that Nixon also considered Associate Justice Potter Stewart, also a Miranda dissenter, for appointment as Chief Justice. See BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 16 (Simon & Shuster 1979).

[31] See BAKER, supra note 13, at 191-94.

[32] See id. at 408–409.

[33] See id.

MOSAIC THEORY:

BECAUSE THE WHOLE OF YOUR LIFE IS NOT JUST THE SUM OF ITS PARTS

By Elizabeth Humann (Class of 2016)

Let's look at four scenarios:

1. A deputy at your local elementary school waves at you as you enter the car line to pick up your son. Is there a Fourth Amendment issue?

Of course not. You are in a public place and have no reasonable expectation of privacy.

2. The same deputy thinks you might have been drinking earlier in the day, so he decides to follow you for a mile or so to see if your driving is impaired. Is there a Fourth Amendment issue?

Of course not. You are in a public place and have no reasonable expectation of privacy.

3. The deputy thinks you are probably drunk every day when you pick up your son from school. He and another deputy take turns following you from the time you leave the house in the morning until you bring your son home from school in the afternoon. They do this for a month.

Is there a Fourth Amendment issue now? No, right? After all, you are in a public place. But weren't you more hesitant to answer this time?

4. The two deputies are going on a three week vacation. They use a drone with video capabilities to record all of your public movements while they are in the Bahamas.

How about now? Is it getting creepy yet? Your recorded activities are still occurring in a public place, but we are far more likely to see a potential Fourth Amendment problem with this last scenario. Why?

The answer can be found in the mosaic theory. The mosaic theory espouses the concept that while people may not have a reasonable expectation of privacy in the individual public activities in which they participate, they do have a reasonable expectation of privacy in the aggregate of these activities. It holds that people have a reasonable expectation

that the government will not create a picture of their lives by following them to where they live, eat, attend school, work, and worship. In short, it adds a time component to "reasonable expectation of privacy."

In *United States v. Jones*, a number of Supreme Court Justices expressed support for a mosaic theory type of analysis.[1] In Jones, law enforcement placed a GPS tracker on a suspect's vehicle and used it to monitor his movements on public roadways. While the majority found this to be a search because there was a physical trespass upon the vehicle, Justices Alito, Ginsberg, Breyer, Kagan wrote in their concurring opinion that "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.For such offenses, society's expectation has been that law enforcement agents and others would not…secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving."[2] Justice Sotomayor wrote her own concurring opinion, also advocating for the mosaic theory.

The problem with the *Jones* case, of course, is that because it was decided on a trespass theory, it left several questions unanswered. Is SCOTUS shifting towards a mosaic theory of the Fourth Amendment? If so, will it apply only to technological advances such as GPS tracking and drones, or to all government surveillance? How is law enforcement expected to determine when surveillance of a suspect's public activities has transformed into a search?

The State of Florida appears to already have shifted to a mosaic analysis, at least in the context of GPS and real-time cell phone tracking. In *Tracey v. State*, the Florida Supreme Court held that use of real-time cell phone tracking of a suspect was a search that required a warrant, extensively quoting Justice Sotomayor's concurrence in *Jones*.[3] It has also passed statutory restrictions on the law enforcement use of GPS tracking and unmanned aerial vehicles. But unless you live in a state that has addressed these new technological developments head on, you are still at risk of constant government surveillance of your public actions- so keep an eye out for those drones! O

References:

1 United States v. Jones, 132 S. Ct. 945 (2012).
2 Id.
3 Tracey v. State, 152 So. 3d 504 (2014).

OVERCOMING THE ATTORNEY-CLIENT PRIVILEGE WHEN YOUR CLIENT GOES ROGUE

By Antonette Hornsby

The attorney-client privilege is one of the most highly regarded evidentiary rules in Florida. Unless one of the narrow exceptions applies, an attorney is required to maintain his client's confidentiality at all times. This means that except in limited circumstances, such confidential communications made to an attorney are inadmissible in criminal trials. Florida's Evidence Code states:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.[1]

The underlying purpose behind the privilege "is to encourage clients to make full disclosures to their attorneys."[2] Additionally, the privilege should promote justice and put clients in the best position "to receive fully informed legal advice without the fear that his statements may later be used against him." [3] However, an issue arises when the client attempts to abuse the privilege.

Florida case law supports the finding that a threatening communication made by a client to his attorney *about a third party* is not privileged. In *Hodgson Russ, LLP v. Trube*,[4] the attorney was actively representing his client in an estate dispute with the client's sister. The client told his attorney that he would kill his sister if the dispute was not resolved in his favor, and he later followed through with his threat. In the subsequent wrongful death suit, the 4th DCA held that the threatening communications were not privileged[5] because they were "not intended as a disclosure by the client necessary or incident to obtaining informed legal advice."[6]

However, how would a Florida criminal court rule *when a client threatens his attorney* while in the process of receiving legal advice from that attorney? No Florida court has issued an opinion on such a situation, and the existing crime-fraud exception would be inapplicable because the client would not be seeking the attorney's service to conduct *a future*

crime.[7] Still, federal case law is instructive on how a Florida court should deal with the rogue client in this situation.

For example, in *United States v. Alexander*,[8] the client threatened his attorney and witnesses via email and phone. The client was then charged with five counts of making an interstate communication of threats to injure others. The attorney testified to the threats and disclosed his files relating to the threats. The court held that the threats were not protected by the attorney-client privilege because the privilege only extended to communications made "in order to obtain legal advice."[9] While it was "undisputed"[10] that the attorney was representing the defendant when the defendant used the mail and phone to communicate his threats, the defendant "failed to demonstrate [ ] the privileged nature of the threats during his communication with his attorney."[11] The attorney-client privilege is limited to those communications made in order to obtain legal advice so as "'to prevent abuse and assure the availability of relevant evidence to the prosecutor.'"[12]

Similarly, in *United States v. Jason*,[13] the defendant wrote a threatening letter to his attorney. Upon receiving the letter, the attorney withdrew as counsel and the defendant was indicted for mailing threatening communications. There, the court held that the letter was admissible and not subject to protection under the attorney-client privilege and that "[n]ot every communication made to an attorney is privileged."[14] Instead, the privilege "extends only to confidential communications made for the purpose of facilitating the rendition of legal services to the client."[15]

Therefore, while Florida law provides no clear case law or evidentiary exception for the situation in which a client threatens his attorney, the reasoning found in these cases supports the conclusion that such communications should not be privileged. The underlying purpose of the privilege is to promote full disclosure in order to obtain legal advice. Arguably, when a client makes a threatening statement toward his attorney, there is no legal advice being sought. This should still be the case even if the attorney is actively representing the client. The privilege is "not absolute and must be strictly limited to the purpose for which it exists."[16] Protecting threatening communications that are directed at one's attorney does nothing to further the purpose of the privilege. Instead, protecting such communication allows clients to use the attorney-client privilege as a weapon against their attorneys.

The privilege is not designed to act as a sword and such use is inconsistent with Florida law. For example, attorneys in breach of duty and post-conviction cases are allowed to disclose privileged communications to protect themselves when the client accuses them of either malpractice or ineffective counsel. Under the shield and sword doctrine "a party who raises a claim that will necessarily require proof by way of a privileged communication cannot insist that the communication is privileged."[17] In other words, "the attorney client privilege cannot be used as both a shield and a sword."[18] However, if a Florida court protects a threatening communication against one's attorney, the court would be allowing the client to use his attorney-client privilege to commit a crime while shielding the evidence of the crime under the attorney-client privilege. This abuse of the privilege contravenes policies underlying the attorney-client privilege by failing to "promote[ ] the administration of justice."[19]

In sum, while the attorney-client privilege is a widely respected rule of evidence, it has its limits. One of those limits should be where a client seeks to abuse the privilege and use it to protect threats made and directed toward his attorney. In such circumstances, Florida courts should find that the attorney-client communication is not privileged and evidence of the communication should be admissible. Moreover, the attorney should be free to disclose the communication to prosecutors with the State Attorney's Office if the communication itself constitutes a crime in which the attorney is a victim.

References:

1 Fla. Stat. Ann. § 90.502 (West).
2 Fisher v. United States, 425 U.S. 391, 403 (1976).
3 Owen v. State, 773 So. 2d 510, 514 (Fla. 2000) (citing Brookings v. State, 495 So.2d 135, 139 (Fla. 1986)).
4 See Hodgson Russ, LLP v. Trube, 867 So. 2d 1246 (Fla. 4th DCA 2004).
5 This is not in conflict with Kleinfeld v. State, 568 So.2d 937 (Fla. 4th DCA 1990) (In Kleinfeld, the defendant communicated to his attorney that he knew that the police "had him" on a past murder charge and then suggested to the attorney that maybe he should go ahead and kill the attorney. Later, the attorney was asked to disclose the contents of the phone call for the purpose of proving that the defendant committed the past murder because he stated that the police "had him." The Kleinfeld court held that the communication was privileged because it was being used for the specific purpose of being an admission relating to a past murder. However, the Hodgson court distinguished Kleinfeld because the Kleinfeld communication was not being sought to prove the threat to the attorney, but instead, as an admission for the past murder crime.)
6 Hodgson Russ, 867 So. 2d at 1247; see also Fisher, 425 U.S. at 403.
7 Florida's crime-fraud exception is found in Section 90.502(4) of Florida's Evidence Code and states that there is no lawyer-client privilege where the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud. The purpose of the crime-fraud exception is to ensure that attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." United States v. Zolin, 491 U.S. 554, 563, (1989).
8 See United States v. Alexander, 287 F.3d 811, 816 (9th Cir. 2002).
9 Id.
10 Id.
11 Id.
12 Id. (citing In re Grand Jury Investigation, 974 F.2d 1068, 1070

(9th Cir. 1992) (see also Fisher, 425 U.S. at 403).
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DNA AND FINGERPRINTS: IMPERFECT EVIDENCE

By Brian Cordero

With the media's constant depiction of crime and trials, the public's view of trials and evidence becomes skewed. This skewed understanding of how evidence and trials work can affect the expectations that potential jurors have when sitting for a trial. Unrealistic expectations have been the subject of psychological studies, and such studies have produced theories such as the CSI effect, which mostly focuses on jurors wanting to see DNA evidence during trials. However, a juror's unrealistic expectation to see DNA evidence is not the only misconception that can negatively impact a criminal trial.

Instead, a juror's *understanding* of DNA evidence and its accuracy (or lack thereof) can also negatively affect a trial. For instance, the general public views DNA evidence as watertight and trustworthy. However, DNA evidence has, on occasion, pointed to innocent people. In fact, DNA evidence can be especially unreliable because an innocent person's DNA can easily be transferred to places that the person has never before visited. Consider the everyday handshake. A transfer of DNA can easily occur through something as innocent as the handshake. That is, a handshake may lead to a "secondary transfer." A secondary transfer effectively occurs when a person's DNA is carried by someone else and is eventually transferred to an object that the person has never been in contact with.[1]

Still, there tends to be disagreement over whether DNA collected from a secondary transfer provides enough of a sample for genetic testing.[2] Supporters of genetic testing based on secondary transfers argue that the advances made in DNA testing have shown that even the smallest sample can provide a full genetic profile. For example, in a study on secondary transfers, the examiners had two people shake hands and then had one person hold a knife afterwards.[3] They then tested the knife for the second person's DNA.[4] The results of the study showed that 85% of the time the second person, the person who never even touched the knife, had their DNA on the knife.[5] This study suggests that while the public should not fear their DNA showing up at random crime scenes, they should at least be aware that the presence of DNA is not necessarily indicative of guilt. Secondary transfers do occur, and the public should consider the possibility that the defendant was never there.

Similar to DNA evidence, jurors often view fingerprint evidence as infallible. However, lawyers have challenged this misconception across the United States and many have been successful in arguing that fingerprint evidence is "junk science." Although TV shows frequently portray perfect fingerprints being lifted from the crime scene, in the real world fingerprints are often incomplete or smudged. Moreover, one study found that 1 in 5 fingerprint examiners made a false positive.[6] Still, the biggest issue tends to be the difference in training methods and standards. Many small departments are not able to train to the same standards as bigger departments or the FBI.[7] These studies and the differences in training methods do not suggest that fingerprint evidence is *always unusable*; however, they do suggest that fingerprints are imperfect.

While these are only a few examples of public misconceptions regarding criminal evidence and trials, there are likely more misconceptions that could negatively impact future trials. Jurors should be as unbiased as possible and should have a clear understanding that no piece of evidence is perfect. Evidence shown on TV always seems infallible, but in the real world that same evidence may be imperfect. O

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HOW TRIAL ATTORNEYS DEAL WITH THE "CSI EFFECT" ON JURORS

By Cameron Colledge

"This isn't a CSI case," said Assistant Prosecutor Elizabeth Geraghty as she started her opening statement in the murder trial of Keywan Conner.[1] As she continued, she told the jury that they do not need CSI evidence because of the other evidence they would present, including eye-witness testimony. The Prosecutor finalized her comments by explaining to the jury that the totality of the evidence, can only lead to one logical conclusion: a verdict of guilty.[2] After the Prosecution was done, Defense Attorney Larry Thomas got up and explained that the lack of a CSI case is exactly what this trial is about. "There is no physical evidence whatsoever to tie Keywan Conner to this homicide," he told jurors. "Nothing."[3] This is just an example of what prosecutors and defense attorneys have to deal with during trials because of the CSI Effect.

The "CSI Effect" is defined in Black's Law Dictionary as the "supposed influence of the television show CSI: Crime Scene Investigation in leading jurors to expect quick and definitive analysis and resolution of all crime scene issues."[4] These television dramas focus on high-tech, forensic science, which foster unrealistic expectations for jurors across this nation. According to forensic pathologist Dr. Cyril Wecht, television shows "tend to embellish and exaggerate the science, ignore actual time lines for testing and raise expectations of the general public, law enforcement, and the judicial system to an extremely absurd and totally unrealistic level."[5] One of the CSI Effect's major problems is that jurors expect to see non-existent technology during a trial. Nonetheless, television series need to keep viewers interested, and solving crimes through awesome technological advances makes that happen, even when in reality, this technology may not be available. Another problem manifests itself because even if the technology does exist, it may not be available due to high costs, especially when dealing with the typical police department's thin budget. Finally, even if the technology exists and is affordable, the technology may not be admissible evidence.[6]

In order for scientific evidence to be admissible it must meet the standards of the Federal Rules of Evidence 702, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if: a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; b) the testimony is based on sufficient facts or data; c) the testimony is the product of reliable principles and methods; and d) the expert has reliably applied the principles and methods to the facts of the case.[7]

One of the major problems is that not every scientific test that makes the final cut of the CSI television dramas is admissible under FRE 702. Many of the evidence shown on CSI would not even come close to being admitted under this standard. This all leaves the average juror who watches CSI wondering: where is the high tech forensic evidence?

Due to shows like CSI, a portion of American society assumes three broad statements about the forensic science

community: "(1) crime labs are pristine scientific sanctuaries, which always have the most up-to-date forensic technology; (2) crime labs only employ the most skilled and imaginative 'scientists' who make few, if any, errors; and (3) forensic scientists are actually practicing and engaging in legitimate science" and the investigation of crime from the time the police are called until the defendant is found guilty.[8] However distorted these ideas may be, they are easily explained based on Hollywood's portrayal in CSI and other forensic shows. As the CSI television series portrays greater scientific breakthroughs, the reality for a trial attorney becomes combatting juror misperceptions. As a result, trial attorneys must prepare to manage juror expectations by employing certain lines of questioning during *voir dire*, customizing opening and closing statements, tailoring the questioning of witnesses, educating jurors through expert testimony, introducing CSI Effect data to curtail juror's expectations, and lastly, but maybe most importantly, using permissible jury instructions regarding the absence/presence of certain types of scientific evidence.[9]

Although there is some controversy in the criminal justice system as to whether the CSI Effect actually exists; trial attorneys must be ready, just in case they encounter it. Regardless of whether or not attorneys believe this is a problem, they must constantly strive to improve their trial tactics and trial advocacy skills. This will help them manage and overcome unrealistic expectations of jurors as a result of the CSI Effect. Trial attorneys must "ensure that the cornerstone of deductive reasoning in our legal system is not buried by potentially inadmissible evidence and/or lost to fallible science and technology."[10]

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TRIAL DYNAMICS AND FEDERAL RULE 403

By David Jones

Rule 403, deemed the "cornerstone" of the Federal Rules,[1] provides the court with broad discretionary power to "exclude relevant evidence if its probative value is substantially outweighed by a danger of [inter alia] . . . unfair prejudice."[2] More narrowly, evidence, although relevant, is unfairly prejudicial when it promotes the "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[3] To further illustrate this principle, the United States Supreme Court in *Old Chief v. U.S.* defines it as "the capacity . . . to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."[4] It is argued, however, that a bright-line test is needed to properly delineate exactly when unfair prejudice begins to outweigh probative value. In the absence of a bright-line rule, judges are left to determine, generally on an ad hoc basis, if evidence is unfairly prejudicial without endeavoring into a broad analysis of the issues,[5] preferring instead the "I know it when I see it"[6] approach.

To bring the issue into perspective, we must consider the context in which evidentiary decisions are rendered; that being in the midst of opposing councils' persuasive battle to win their case. Persuasion, as a major component of legal proceedings, is of paramount importance to the attorney as he "zealously asserts the client's position under the rules of the adversary system."[7] Persuasion is that "intangible"[8] leading edge that exists in pretrial motions, sidebar

conferences, and presentations to the jury. As a result, the probative value of evidence vacillates alongside the highs and lows of persuasive reasoning. The probative worth of relevant evidence may be substantially outweighed by unfair prejudice depending on the emotional or factual state of the trial. Consider the following scenario: a plaintiff's seasoned trial attorney completely consumes the jury with eloquent speech and persuasive storytelling. The plaintiff's attorney now seeks to put his emotionally distraught client on the stand to testify for the jury the details regarding what the defendant has done to her. At this point, the defense council realizes they are at a supreme disadvantage and probably would not survive the scrutiny of the jury if victim testimony is added to the mountain of emotional evidence already stacked against them. A sidebar conference is the opportunity for defense to assert their Rule 403 objection and persuade the judge that, in light of the current state of the trial, a distraught witness' testimony would be unfairly prejudicial if admitted. The judge then appropriately conducts "on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant."[9] This "on-the-spot" balancing is influenced, and rightly so, by persuasive lawyering. If the facts change, the outcome of the sidebar may change as well. Specifically, what if defense council swept the jury away with a beautiful story of his client? Would victim testimony still be unfairly prejudicial to the defendant?

An argument against a bright-line test for weighing the prejudicial value of evidence simply recognizes that trial dynamics cannot be contained within a single metric or series of metrics. It takes a living and breathing person, like a judge, to "assess the admissibility of the evidence in the context of the particular case before . . . [him]."[10] It is against this backdrop that the nature and scope of prejudicial evidence lies.

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THE DOMESTIC VIOLENCE VICTIM: TOO SCARED TO TESTIFY

By Holly Paar

At 6:30 on a September morning, the Honolulu Police Department received a phone call about female screams coming from a condominium complex.[1] Law enforcement arrived to find a woman, Diana Clark, bleeding from her chest. Diana claimed that her husband stabbed her with their kitchen knife after consuming a significant amount of alcohol and injecting cocaine because he believed she was being unfaithful to him. Diana's husband was subsequently charged with attempted second-degree murder. Diana gave a detailed description of what happened to the responding law enforcement officers, the emergency room personnel, and a later tape-recorded interview with police. During her husband's trial, however, Diana's testimony was markedly different and exculpated her husband. On the stand she claimed that her original story was "a total lie" and after a fit of self-destruction *she stabbed herself* in the chest.

Unfortunately, Diana's recantation is not uncommon. Even more distressing is the inadequate job the criminal justice system has done in handling situations like Diana's. With more than two million women assaulted by spouses or boyfriends every year, this has become a problem of mass victimization causing a cycle of violence.[2] Although in the last several years there have been efforts to improve the substantive and evidentiary laws in domestic violence cases, prosecutors are usually presented with evidentiary troubles when victims change or completely recant their story to exculpate their abuser. The prosecution most commonly faces hearsay and Sixth Amendment challenges with an uncooperative domestic violence victim.

HEARSAY

Overcoming the victim's repudiation is to bypass the victim's in-court testimony and introduce the victim's prior inconsistent statements.[3] However, a victim's out-of-court statements regarding domestic violence are inadmissible as proof of abuse, unless they fit within a hearsay exception.[4]

A prosecutor is occasionally able to rebut a hearsay objection

by citing the "excited utterance" exception to the hearsay rule. To successfully use this exception, the statement must relate to a startling event and the statement must be made under the stress of the excitement from that event.[5] What hinders the prosecution is that the statement must be made in response to the startling event or soon thereafter. There is no bright line rule as to the time frame and it is jurisdiction specific, but statements made the following day or at a time thereafter are typically barred from admission.[6] Other exceptions to the hearsay rule include the "state of mind," "prior testimony," and "medical diagnosis" exceptions. Regrettably, unless a prosecutor can fit a disobliging domestic violence victim's statements into one of these hearsay exceptions or is able to use a court reporter in preliminary hearings to make a record of her testimony for later, her in-court testimony may allow her abuser to go free.

CRAWFORD AND THE CONFRONTATION CLAUSE

In *Crawford v. Washington*, the United States Supreme Court held that, in criminal cases, the admission of testimonial hearsay statements of unavailable witnesses require cross-examination under the Confrontation Clause of the Sixth Amendment.[7] Statements made in domestic violence cases are often 9-1-1 calls, made to police officers just arriving on the scene, or treating physicians, and do not amount to the "testimonial statements" that the Crawford Court has been construed to mean. Some hearsay statements sought to be introduced will not be impacted by the scope of *Crawford*. However, if a statement is not almost immediately and spontaneously made to law enforcement upon arrival and requires a police officer to ask "What happened?" or "What is going on?" it may be deemed interrogatory and will be subjected to *Crawford*'s confrontation requirement. If the court determines that the statement is a product of interrogation for *Crawford* purposes, the batterer-defendant has the right to confront and subject his battered victim to cross-examination. Once again, the batterer may go free.

This is far from an exhaustive list of challenges the prosecutor faces in domestic violence cases. For example, four states have not amended their spousal privilege statutes to make an exception for domestic violence victims.[8] Therefore, an abused victim may choose whether or not she will testify about her husband's abuse upon her, and the state cannot compel her to testify.[9] In one of these jurisdictions, the prosecution's only opportunity for the victim to have a voice against her batterer is the admission of her hearsay statements because she is too terrified to testify against him at his trial.

Situations like Diana's and every other battered woman call for efforts to make major strides in strengthening domestic violence abuse laws both substantively and evidentiary. With physical abuse by an intimate partner occurring at a rate of nearly 20 people per minute,[10] it is imperative that the criminal justice system protects the domestic violence victim that is too scared to testify. O

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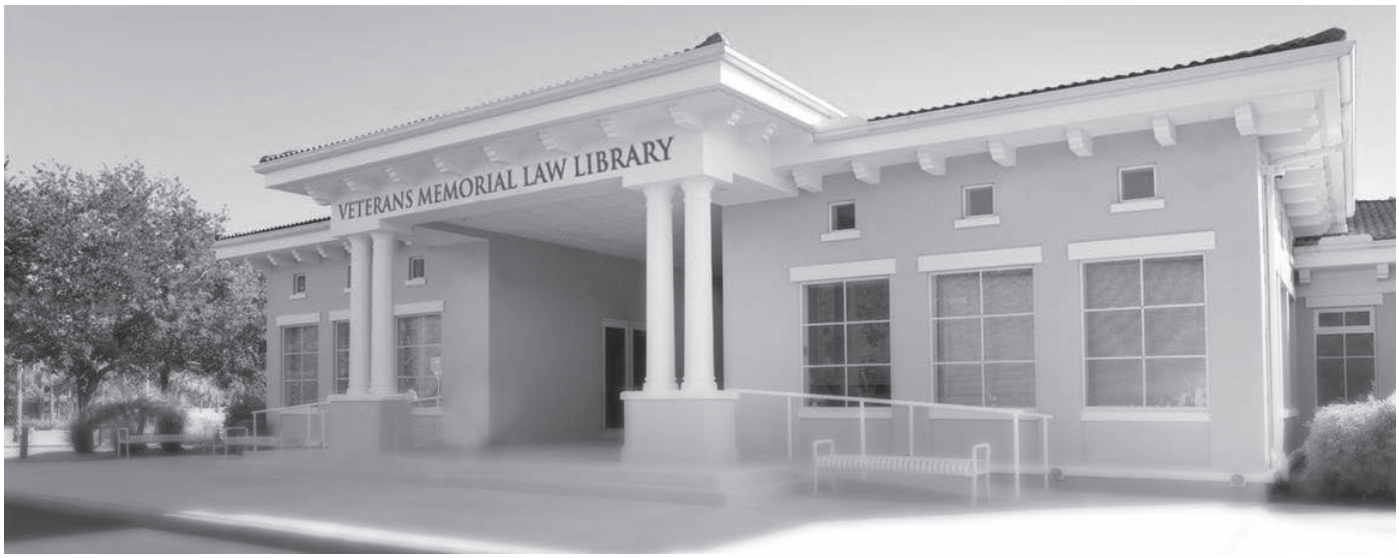

DON'T PRICK ME BRO:
FOURTH AMENDMENT AND WARRANTLESS BLOOD DRAWS FROM UNCONSCIOUS DRIVERS IN DUI INVESTIGATIONS

By Megan Strayhorn

Under the Fourth Amendment, any warrantless search or seizure is presumed unreasonable unless an exception applies.[1] Courts have long regarded blood alcohol tests as a search and seizure for Fourth Amendment purposes.[2] While law enforcement officers can administer a warrantless breath test of a driver suspected of driving under the influence, the Fourth Amendment prohibits warrantless blood tests as a search incident to a lawful arrest.[3] However, the Fourth Amendment permits an officer to administer a warrantless blood test if an exigent circumstance exists or the driver consents.[4] Since an unconscious driver cannot freely and voluntarily consent to a blood test, the Fourth Amendment requires a warrant before an officer can draw blood from an unconscious driver.

In an attempt to prevent drunk-driving related incidents, all fifty states have adopted implied consent laws that require a driver to submit to a breath test upon arrest for driving under the influence.[5] Under Florida law, among other states, an officer is required to order a blood draw from a driver arrested for driving under the influence and causing death or serious bodily injury.[6] However, these implied consent laws potentially conflict with recent Supreme Court jurisprudence.

Recently, in *Birchfield v. North Dakota*, the Court further clarified the constitutional boundaries of warrantless blood tests, ruling that the Fourth Amendment permits warrantless breath tests incident to a lawful arrest, but prohibits warrantless blood tests.[7] The Court specifically addressed blood tests administered incident to a lawful arrest for driving under the influence. Florida law, on the other hand, applies only to cases involving death or serious bodily injury. In *Missouri v. McNeely*, the U.S. Supreme Court ruled that the natural dissipation of alcohol in the blood does not qualify as a per se exigent circumstance; however, a death or serious bodily injury could.[8] Under *McNeely* and *Birchfield*, law enforcement cannot rely solely on implied consent statutes to administer a warrantless blood draw. Rather, officers must establish that an exception to the warrant requirement applies. In a case involving an unconscious driver, law enforcement officers must show that an exigent circumstance exists.

While states cannot unduly punish a driver for refusing a blood test, the Supreme Court declined to abrogate states' implied consent laws.[9] Additionally, the 5th DCA ruled that Florida's implied consent laws can coincide with McNeely. In *State v. Liles*, the court found McNeely to apply to Florida's implied consent laws, thereby requiring officers to establish an exigent circumstance in order to administer a warrantless blood test.[10] Furthermore, the court ruled that statutory implied consent does not qualify as a valid consent under the Fourth Amendment.[11] In order for consent to be valid under the Fourth Amendment, it must be freely and voluntarily given.[12] Since an unconscious driver cannot freely and voluntarily consent to a breath or blood test, officers are precluded from relying on statutory implied consent.

Courts recognize that breath tests are far less intrusive than drawing blood samples to determine blood alcohol content. Moreover, in the context of unconscious drivers, the necessity of a quick test is diminished because there is no fear that the driver will escape, since they are under hospital care. The Supreme Court acknowledged that modern technological advances allow officers to obtain a warrant faster than in previous decades. With the adoption of telephone warrants, officers can obtain a warrant to draw blood within a few minutes in many jurisdictions. Nonetheless, even without a warrant to draw blood, officers can request the medical personnel and the driver to consent to disclose medical records, which includes a medical blood draw. While a medical blood draw is different from a legal blood sample, prosecutors can still use it to support a conviction for driving under the influence. Therefore, since we have technology at our fingertips, officers should be required to obtain a warrant prior to administering a blood test from an unconscious driver. ○

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THE CONSTITUTIONALITY OF RAPE SHIELD LAWS

By Meredith McBride

Traditionally, in a criminal sex offense case[1] a defendant was allowed to introduce evidence of a complainant's prior sexual behavior as a means of attacking the alleged victim's character, and in turn, his or her credibility.[2] This commonly used defense tactic resulted in the alleged victim's humiliation and subjected them to further trauma which naturally discouraged victims from reporting these types of crimes in the first place.[3] To combat this undesirable effect, beginning in the late 1970s and into the 1980s, the federal government and most state legislatures enacted what became known as "rape shield laws" as a means of protecting alleged victims of sex crimes during criminal[4] proceedings.[5] The Federal Rules of Evidence address the admissibility of such evidence in criminal cases as follows:

> (a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> (1) evidence offered to prove that a victim engaged in other sexual behavior; or
>
> (2) evidence offered to prove a victim's sexual predisposition.
>
> (b) Exceptions.
>
> (1) Criminal Cases. The court may admit the following evidence in a criminal case:
>
> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
>
> (C) evidence whose exclusion would violate the defendant's constitutional rights.

Following the enactment of this and similar state legislation, defendants began to challenge these statutes as unconstitutional.[7] They have been challenged as unconstitutional due to vagueness, a violation of a defendant's constitutional right to confront one's accuser, due process or equal protection, or on an array of other grounds.[8] Courts have consistently and correctly upheld the constitutionality of these rape shield statutes reasoning that any relevance or probative value of the evidence is outweighed by its unfair prejudice and/or the government's interest in barring it.[9] Given the multitude of arguments that defendants have presented as constitutional challenges to these laws, this article will focus on claims of a rape shield statute's violation of the Equal Protection Clause of the Fourteenth Amendment.

The provision in the Fourteenth Amendment referred to as the Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10] When faced with a challenge to a law's constitutionality, the court applies varying levels of review based on "suspect, quasi-suspect, or non-suspect classifications."[11] Laws that discriminate against a suspect class are given strict scrutiny, while ones that discriminate against a quasi-suspect class are given intermediate scrutiny and discrimination against a non-suspect class must pass a rational basis standard of review.[12] Defendants have challenged the constitutionality of rape shield laws claiming both gender discrimination and discrimination against rape defendants as a specific sub-class,[13] which the courts have deemed quasi-suspect and non-suspect classes respectively.[14]

A defendant's claim of gender discrimination challenges rape shield statutes as a violation of the Equal Protection Clause because they affect men more than women.[15] While a defendant may argue that gender is a quasi-suspect classification requiring intermediate scrutiny upon review,[16] rape shield laws are not discriminatory on their face or in their purpose,[17] and any argument of discriminatory effects alone is not enough to trigger a heightened standard of review. Therefore, the standard of review drops down to a rational basis test which requires only that the government have a legitimate purpose and the statute be rationally related to the accomplishment of that purpose. When presented with this argument, the court in *Roberts v State* properly upheld a rape shield statute finding that it was no more discriminatory than laws prohibiting rape itself and "a rational attempt by our legislature to protect a prosecutrix from [ ] baseless, irrelevant, and grotesque harassments."[18]

The other argument that rape shield statutes violate the Equal Protection Clause purports that the statutes discriminate against rape defendants.[19] Rape defendants are not a suspect or a quasi-suspect class and therefore, as a non-suspect classification, the Equal Protection Clause again only requires a rational basis standard of review.[20] When this challenge was asserted by the defendant in *Finney v State*, the court relied on the reasoning from *Roberts*.

The court expanded upon the government's legitimate purpose, reasoning that the rape shield statute "will aid in crime prevention because victims, knowing that the statute protects them from the embarrassment of introduction of evidence of previous sexual activity, will be encouraged to report rape offenses."[21]

In conclusion, while the constitutionality of rape shield laws may be challenged on a variety of grounds, a closer look at what our constitution requires and the protections it affords clearly supports the enactment and enforcement of these laws. A much stronger argument lies in the expansion of these laws to accomplish their purpose of protecting an alleged rape victim's privacy. While alleged rape victims are afforded the protection of this shield inside the courtroom, they, as well as their accused rapists, are left exposed outside of the courtroom to media publicity. An alleged victim's or accused rapist's privacy would appear to hold no weight against the media's First Amendment right to freedom of speech. In order to accomplish their purpose, and provide a balanced protection for the accused, rape shield laws should be expanded to protect the identity of both parties at least until the conclusion of the case.

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JUSTICE AT WHAT COST? BRADY AND CRIMINAL CONTEMPT CHARGES

By Molly McCann

Can you imagine being falsely accused of a major crime? Being tried and found guilty for something you never did? Even worse, what if you were imprisoned for life or even sentenced to death because your trial was not fair due to perjured testimony or crucial evidence that was suppressed? We don't know how many people are serving time for crimes they never committed, but some research shows it is a shockingly high number. For those paying attention to these stories of wasted lives, it is understandably maddening. Many want to hold prosecutors personally accountable for these injustices. The *Brady* rule has found its way into the crosshairs of this debate, since some have advocated that courts should pursue criminal contempt charges against prosecutors who violate *Brady*. Although the goal to promote fair trials and punish those who deliberately pervert the justice system is a noble one, to suggest that courts have the authority to instigate criminal contempt charges for *Brady* violations is unconstitutional and if allowed, would damage the balance of the very structure that has afforded Americans unparalleled freedom and justice for two centuries.

In the 1969 case *Brady v. Maryland*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment…"[1] The Court recognized this duty to disclose certain evidence as a right owed to all Americans under the 14th Amendment. *Brady* is quite narrow, covering only

exculpatory or impeaching evidence, and the Supreme Court only considers a violation to have taken place when it is "reasonably probabl[e] that the evidence suppressed would have produced a different verdict."[2] It is not necessary for a court to issue a specific *Brady* order, because *Brady*'s force flows directly from the Constitution.

Brady has become a tool by which some have tried to pressure prosecutors into more transparent discovery. In the prominent United States v. Sen. Ted Stevens case in 2008, Sen. Stevens was tried and convicted of ethics violations, but the verdict was set aside when an FBI agent alleged that *Brady* material had been improperly withheld from the defense. As a result, the *Stevens* court initiated an investigation of undefined scope with the goal of finding grounds for criminal contempt proceedings against the prosecutors. The ins and outs of the *Stevens* case, and the myriad of legal problems the investigation whisked up, are far too lengthy to address here, but the fundamental action of the court in pursuing criminal contempt charges based upon a *Brady* violation was a key misstep of that court and could have damaging repercussions.

Professor Mark Bonner argues that in *Stevens*, the court overstepped its authority because "the power to punish the prosecutors for a *Brady* violation by means of criminal contempt is not available to the court . . . neither the constitution nor congress has given the court that authority."[3] U.S.C.A. §401 and Rule 42, Fed. R. Crim. P. are the laws that govern criminal contempt. U.S.C.A. §401 contains language that limits the discretion to just those instances outlined in the statute, and Rule 42 grants courts authority to punish direct criminal contempt and limits all other forms of contempt to those that follow after full due process has been observed, i.e., initiated via other channels of authority.[4]

Not all agree that the court's authority is limited under *Brady*. Justice Alex Kozinski of the 9th Circuit has lamented the inability of the court to punish the prosecutors in *Stevens* using *Brady*, and he has suggested that "the solution to this problem is for judges to routinely enter *Brady* compliance orders . . . Entering such an order holds prosecutors personally responsible to the court." As argued by Professor Bonner and explained above, *Brady* disclosure is a constitutional mandate and active whether the court has issued a compliance order or not. Indeed, if the court were to issue a compliance order for the purpose of holding prosecutors criminally responsible in the future, that would "constitute[] an unlawful maneuver by a trial court to accrete power to itself."[5]

The late Antonin Scalia was clear about the scope of the court's authority in these instances, saying, the "'[p]rosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of 'the judicial power of the United States.'" He rejected the theory that criminal contempt charges are an exception (because without that power, the courts would be left impotent) and instead readily admits that the power of the judiciary in this area is weak, and is so by design. Turning to a key paragraph from The Federalist, Scalia quotes:

> "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The Federalist No. 78, pp. 522-523 (J. Cooke ed. 1961) (A. Hamilton) (emphasis added).[6]

It is crucial that justice warriors not to be blinded when looking for ways to improve the integrity of the criminal process. When drafting the Constitution of the United States, the framers considered all the great governments the world had known in an effort to fashion a system best able to "secure the blessings of liberty" for themselves, their children, and for posterity. The separation of powers was key to this scheme, and has enabled the United States to make "the 5,000 year leap" to lead the world in human achievement.

Allowing the court to seek criminal contempt charges for a *Brady* violation—no matter the good intentions of those who advocate for such action—would weaken and break yet another defense against consolidation of power, eroding our system and suffocating our unique form of liberty. Left to the vagaries of every well-intentioned lawyer's personal opinion, the system of justice would soon be tattered and corrupt,

devoid of the very uniformity, predictability, and balance of power that promote the parity we claim to champion.

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WILL WE "RE-FRYE" OUR STANDARD OR WILL WE REMAIN *DAUBERT*?

By Nicholas Bocci

Recently, rumors of a possible reversion back to the Frye standard from the currently studied and used *Daubert* standard have been whispered throughout the legal community.[1] With this possibility lingering, the question arises - how will this affect both the current legal professionals and those who aspire to become one? As a third year law student, not a day goes by where I don't hear the question: "Does this mean I need to know both for the bar?"[2] More importantly, how will this affect those charged with criminal offenses?

HISTORICAL CONTEXT:

On June 28, 1993, the United State Supreme Court in *Daubert v. Merrell Dow Pharms.*,[3] came to a decision that the long-standing standard of *Frye v. United States*,[4] was inconsistent with the Federal Rules of Evidence. On July 1, 2013, the state of Florida adopted the new widely accepted Daubert standard into its own statute which reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.[5]

The previous *Frye* standard only required that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[6] However, if the opinion that was given was based off of new theories, then it would be tested under pure opinion analysis, which was supported by the experts own opinion and based on his training.[7]

IS FRYE SO BAD AFTER ALL?

The largest problem with *Frye* was its pure opinion exception, which allowed expert testimony to be admissible without having any scrutiny or reliability tests conducted on it.[8] The pure opinion exception allowed any testimony given by the expert to be admitted into evidence, as long as the expert was basing that testimony on his own personal training and experience.[9]

This "let it all in" exception led to a costly battle of the experts who could charge up to $1,000 an hour for their services and testimony. What began happening was that one expert would testify that his personal training and knowledge was finding a favorable case for one party and the other expert would testify that his training and knowledge led to a contrary finding.[10] This made it a costly and expensive "battle" of the experts. The *Frye* standard had become an increasingly confusing and outdated standard of the admissibility of expert testimony, which led to its ultimate end in 2013.[11]

ADOPTION OF DAUBERT MET WITH OPPOSITION:

In 2013, the Florida legislature saw fit that the Frye standard had seen its last days in courtrooms across the state. However, the Florida Bar has had a very different opinion as to how the state should handle its expert testimony. In mid-October, the Florida Bar's Code & Rules of Evidence Subcommittee voted 16-14 to decline the adoption of the *Daubert* standard.[12] While the Florida Bar seems to still be very split, the Bar's board of governors met with a majority vote of 33-9 against changing the standard to *Daubert*.[13] The board set their decision not to change and presented this opinion to the Florida Supreme Court in February of last year. The Supreme Court has not yet made its decision, but even if accepted, it would not take effect until January 1st of next year.[14]

HOW WILL THIS AFFECT CRIMINAL CASES?

Although it is apparent that the change to *Daubert* has had far more implications in civil cases than criminal, there is no argument that it has impacted the criminal side of law as well.[15] The *Daubert* standard has allowed for the reexamination of some vulnerable areas of research such as, handwriting, fingerprints, firearm examinations, and most importantly, intoxication testing.[16] However, has this change to *Daubert* affected the criminal trial? Some courts still believe that the *Frye* standard offers greater protection for defendants than *Daubert*.[17] In *Ramirez v. State*, the Florida

Supreme Court rejected the testimony of five experts claiming general acceptance in a murder trial as to matching the knife to the wounds received by the victim.[18] In applying the *Frye* standard, the Court further went on to state that because the procedure had not been tested, a meaningful peer review was lacking, and therefore the testimony was inadmissible when applying the *Frye* standard.[19] This case is a good example of how the *Frye* standard can still be beneficial to a criminal defendant when their case relies on the admissibility of non peer reviewed evidence.

To compare, the *Daubert* standard goes through a three-step process which includes evaluating whether: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.[20] On the other hand, the *Frye* standard requires only that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[21] Therefore, the only difference is that in *Frye*, the testimony given must be generally accepted by the particular field in which it belongs.[22] This seems to be the only major difference between the two standards.

CONCLUSION:

No matter how it is looked at, both standards have pros and cons to each of them. It is very clear now how there can be a split in which standard Florida should use. What it ultimately comes down to is how will one standard affect a particular class of claimants or defendants. Perhaps, the Florida Bar should have just considered a proposed revision to *Daubert* by simply adding additional provisions for Florida. This approach may have been more prudent rather than clogging the Supreme Court's docket and arguing a complete reversion back to *Frye*, which itself has faults. The fate of the rule of evidence in Florida hangs in the balance. Until the Florida Supreme Court makes a decision, an argument can be made for both sides. Until that decision is made, we must do our best as current and aspiring attorneys to ensure that our client's rights are not taken advantage of by a split evidentiary process. Furthermore, once the highest court comes to a conclusion, we must all make efforts to see that it remains that way for the sake of judicial economy.

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FLORIDA'S FOUL UP: JUVENILE DIRECT FILE LAW UNDERMINES THE BASIC PURPOSE OF THE JUVENILE JUSTICE SYSTEM

By Nicole Staller

Our modern system of law finds its roots in the common law of England. Under the common law of England, and during America's infancy, all children over the age of fourteen, and many children over the age of seven, were treated as adults within the criminal justice system.[1] Children were criminally liable as if they were adults and

subject to the same punishments up to and including death.[2] Society has come to realize, however, that children are not just small adults. An increased understanding that children are developmentally different from adults, the necessity of procedural safeguards designed to protect minors, and differing penological goals have all led to the development of a juvenile justice system separate from the adult justice system.[3]

Most states, including Florida, provide some type of process for transferring juvenile offenders into adult courts.[4] Florida's direct file statute provides the framework in which juvenile offenders are directly placed within the adult court system on either a discretionary or mandatory basis.[5] The discretion to direct file juveniles is left to the prosecutor,[6] and Florida transfers more children into adult court proceedings than any other state.[7] Florida's direct file statute undermines the underlying principles of the juvenile justice system, rehabilitation and protective procedural safeguards, by facilitating the transfer of too many juveniles into an adult system that fails to further those underlying principles.

Florida's juvenile justice system provides for a core penological goal of rehabilitation.[8] The primary aim is to reintegrate the juvenile back into society as a normally functioning individual.[9] In an effort to achieve this goal, individuals prosecuted within the juvenile justice system are typically afforded a variety of alternative sentencing options which often forego incarceration.[10] This is in direct conflict with the adult criminal justice system. The primary goals of the adult criminal justice system are retribution and deterrence.[11] In the adult system, deterrence is most successfully achieved through offense appropriate punishment which is typically incarceration.[12] Additionally, Florida's Criminal Punishment Code requires offenders sentenced in adult court to serve at least 85% of the sentence imposed[13] and a number of offenses impose mandatory minimum sentences.[14] Oftentimes, offense appropriate punishments have little regard for a goal of rehabilitation and require lengthy periods of incarceration that directly conflict with a goal of reintegration of the juvenile back into society.

Additionally, there are fundamental procedural differences in the adult and juvenile justice systems. Generally, in the adult criminal justice system individuals have a right to bail, a right to open criminal records and court proceedings, and a right to a jury trial.[15] Conversely, in the juvenile justice system offenders may be subject to preventative detention with no bail, their records and court proceedings may be closed to the public, and juveniles lack the right to a jury trial.[16] While at first glance it may appear that adult court proceedings provide more due process and procedural safeguards than juvenile court proceedings, this does not hold true when examined in light of the penological goals of the juvenile justice system.

Once in adult court, Florida juveniles lose basic procedural safeguards meant to further the penological goal of rehabilitation. In adult court proceedings, the Sixth Amendment guarantees the right to a jury trial in criminal prosecutions.[17] While this right does not extend to juvenile court proceedings,[18] the right to a jury trial does nothing to further the rehabilitative goal of the juvenile justice system. Rehabilitation is better achieved in the delinquency proceedings of the juvenile system. In Florida, juvenile offenders undergo an adjudication hearing with a judge deciding the disposition of the case.[19] Judges in juvenile proceedings may choose a disposition and sanctions that they deem appropriate for the particular case they are hearing.[20] Juvenile dispositions and resulting sanctions can be tailored to achieve rehabilitation in a way that adult courts are unable to provide due to stricter sentencing requirements.[21] Additionally, recidivism rates are lower for juvenile offenders retained within the juvenile justice system as opposed to those transferred to adult courts,[22] suggesting that rehabilitation is better achieved within the juvenile system.

Children are not just small adults. Developmental differences have led to the establishment of a separate criminal justice system that accommodates the inherent differences between children and adults. Additionally, an understanding of those differences have led to a primary goal of rehabilitation for juvenile offenders. Florida's direct file statute transfers too many juveniles into an adult system that is ill-equipped to further the basic goal of rehabilitation for juvenile offenders, and as such needs to be reevaluated. ○

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[14] Fla. Stat. § 921.00265(3). Under Florida law departures may be allowed from mandatory minimum sentences. Which offenses require mandatory minimum sentences, and what the statutory minimum is, can be determined by consulting Chapters 775-896 of the Florida Statutes.

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[16] Id. See also McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (court held that juveniles are not entitled to jury trial).

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THE CONFLICT OF KATZ IN A MODERN TECHNOLOGY ERA

By Nolan Tyler

Concerned with overreaching warrants and unreasonable and oppressive searches, the framers of the Constitution "sought to confine" the "issuance and execution" of warrants "in line with . . . stringent requirements . . ."[1] The Fourth Amendment continues to act as a check and a balance of government authority but has been subject to many interpretations and changes. Since its passage, it has served to exclude wrongfully obtained evidence and protects the rights and liberties of all Americans. In contrast, the Fourth Amendment has become a topic of criticism, as the U.S. government has justified unconstitutional searches in the name of safety. This article will discuss the lengths and justification government uses to protect citizens, the implications it created, and any alternative means that exist.

Professor Amar, of the Yale School of Law, described the Fourth Amendment as an "embarrassment", and stated that:

> Modern Fourth Amendment case law [is] hard to support . . warrants are not required – unless they are. All searches and seizures must be grounded in probable cause – but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes says so. . . .The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free while honest citizens are intruded upon in outrageous ways with little or no remedy.[2]

Prior to the tragic events of September 11, 2001 ("9/11"), airports acted independently to secure themselves and travelers.[3] Following 9/11, the President, with Congress rushed to protect Americans from the threat of terror. Within two months, Congress passed the Aviation and Transportation Security Act ("Act").[4] The Act created the Transportation Security Administration ("TSA").[5] Additionally, the Act expressly approved the implementation of draconian screening measures for travel by air.[6] Since 9/11, Congress has passed forty-eight related bills, including the Patriot Act, which granted law enforcement officials broad monitoring power.[7]

Among the many measures taken to prevent terrorism, airport imaging machines were introduced in many airports. Also known as backscatter machines, they function by detecting radiation emitted from the body and create an image that can be viewed by security officials.[8] While these devices are effective in locating hidden objects, they also create a full nude image of the person being examined.[9] Similarly, other devices such as millimeter wave machines accomplish the same task, but through radio waves.[10]

Exactly ninety days before 9/11, the Supreme Court held that devices (infrared cameras) used by the Government to "explore details of the home that would previously have been unknowable without physical intrusion" was "unreasonable."[11] The court ruled that the device was unreasonable because its use was not available to the "general public" and therefore constituted an unlawful search.[12] However, within five months of this ruling, Congress and government officials would implement the most invasive search procedures. These procedures were in direct conflict with the standard set in *Kyllo* and *Katz*.

The implementation of imaging machines created enormous privacy concerns among the general public. In November of 2010, *The Washington Post* reported that 32% of Americans opposed full body scanners and 50% of Americans felt that "enhanced pat-downs" were not justified.[13] As expected, many citizens filed lawsuits to protect their privacy. Historically, courts have sided with Congress' intent on the matter and held that warrantless inspections within airports are reasonable because airports are "closely regulated" by the government.[14] Additionally, the third circuit in *Hartwell* ruled that warrantless searches are permitted because it is an "administrative search."[15]

As established by the Supreme Court in *New York v. Burger*, 482 U.S. 691, (1987), the Court held that warrantless inspections will remain constitutional as long as three criteria are met: (1) there exists a substantial government interest; (2) that is necessary to further the regulatory scheme; and (3) the statute's inspection program must be an adequate substitute for a warrant.[16] Limits on administrative searches prevent the government from using a warrantless administrative search to gather criminal evidence.[17] In searches seeking criminal evidence, a search warrant based on probable cause must be obtained.[18]

The test laid out in *Burger* is not disputed because the government has a substantial interest in protecting its citizens; it furthers the interests of interstate travel, and the search is pursuant to previously passed legislation.[19] The issue to be addressed is whether the use of imaging machines directly conflicts with the limits on administrative searches. In the affirmative, this precedent directly conflicts with the standards set forth in the Aviation and Transportation Security Act. For example, section 109(a)(5) of the "Enhanced Security Measures" gives private or public law enforcement the authority to use technology to screen passengers who may be threats.[20] This example infers that TSA officials are justified in using imaging devices to conduct searches with the intent of identifying criminal evidence. Therefore, the government has not met the burden of conducting an administrative search, and a warrant is required because they are searching individuals for criminal evidence.

While some within the general public appreciate these measures, they conflict with established Supreme Court precedent and the Fourth Amendment of the Constitution. Recently, the Court of Appeals for the District of Columbia ruled in favor of privacy, requiring the Department of Homeland Security ("DHS") to institute notice and comment rules.[21] This would require DHS to post the rules of usage of airport imaging machines within a federal registry, allowing the general public the ability to comment on and view the rules.[22]

While the ruling is a proper starting point for Fourth Amendment protections, other actions need to be considered. For example, it would be both reasonable and prudent to return to the *Katz* standard of recognizing a subjective privacy interest among travelers. Next, because the screening procedures often involve a search for criminal activity, the courts could require a probable cause standard before subjecting travelers to imaging machines. Probable cause could be created through the use of metal detectors, air compression devices that expose loose items on a person's body, and basic "stop and frisk" searches based upon reasonable suspicion.

In conclusion, safety is vital to travelers, but the interests of safety need to be balanced with privacy. This is not to say that all security measures should be banned or eliminated, but that proper measures should be taken to justify the use of the most infringing kinds. The use of airport imaging machines should be used after there is probable cause to believe that a person is a threat to themselves and other passengers. Through this approach, the Fourth Amendment can be balanced with safety.

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SHOULD SOCIAL MEDIA CHANGE EVIDENTIARY PRACTICES?

By Stephen Ewers

We live in a time where a person cannot go anywhere without hearing about Facebook, Twitter, and Instagram. Today is the age of social media.[1] As of 2014, 74% of all adult internet users were using social media. With ever changing technology, social media continues to grow. More and more often, videos posted to social media sites depict live crimes. How does the legal world encounter such evidence, and should it make exceptions in the Rules of Evidence when evidence comes from social media?

When evidence is introduced at the discovery stage, courts have largely treated social media in the same manner as any other evidence, and so far this "equal treatment" is considered the proper way of handling it. That being said, many litigants have argued that there should be a heightened expectation of privacy. However, courts have soundly denied this argument by saying, "the very purpose of social media – to share content with others – precludes the finding of an objectively reasonable expectation that content will remain private."[2] As a result, relevancy becomes the focus for discovering electronically stored information ("ESI"). In *Romano v. Steelcase, Inc.*, the court noted that in order to determine if the social media evidence would be allowed, it depended on whether the content was material and necessary to prove the case.[3] Without information being directly relevant to furthering a party's case, courts will not allow ESI in.

One issue with introducing relevant ESI is authenticating that the ESI is, in fact, legitimate. "[A] piece of paper or electronically stored information, without any indication of its creator, source, or custodian may not be authenticated under Federal Rule of Evidence 901."[4] Social media provides a unique situation in terms of accurately authenticating information. Authenticating ESI involves, at a minimum, how, when, and where the evidence was collected, the types of evidence collected, and who handled the evidence before it was collected. This seems simple, but even then social media can cause problems.

The current authentication process for social media evidence is rather rudimentary. Authentication of internet printouts requires a witness declaration and a document's circumstantial indicia of authenticity. Without either one, authentication will fail.[5] Social media evidence raises some interesting questions. Is a printout of a social media page actually from where it is supposed to be from? Does the printout accurately reflect the page exactly as it appears on the purported social media website? Did the post even come from the particular person it is claimed to have come from? Today, there are some accounts where multiple individuals know the password or a friend plays a joke on another friend when they leave a social media site open by posting something embarrassing. There are even instances of people hacking into accounts. It would be difficult to definitively prove that a social media post came directly from the purported source. This could create a hiccup in litigation. In an attempt to resolve authentication issues, courts should allow attorneys to delve into where the messages were posted with the help from companies that store data and can trace message origins. Another possible remedy would be to have a computer forensics expert search the hard drive of the person in question and authenticate that the post was made directly from that computer (not a perfect solution but it would hold weight as proof).[6]

Unfair prejudice and the probative value of social media evidence are potentially also big issues. Rule 403 from the Rules of Evidence states that courts can throw out evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[7] Courts have thus far tried to treat social media evidence in a manner similar to traditional evidence when it comes to prejudice. Since the things people tend to post on their social media accounts, especially Facebook, could very negatively impact their credibility and their character, social media evidence could be even more destructive than typical evidence. Jokes,

memes, gifs,[8] and other things that are shared on Facebook could be very easily taken out of context or used to smear one's character.

Despite an ever-changing shift in technology, social media evidence is one area where no exceptions should be granted in the Rules of Evidence, as typical discovery methods suffice. Evidence needs to be absolutely relevant to the case at hand; otherwise, because of the nature of social media posts, things can be very easily taken out of context. There are many issues that arise when discussing social media authenticity. The ways mentioned above are just a couple of ways to try and alleviate authenticity issues. Whether or not authenticity is satisfied will vary from court to court. However, there is no need to adopt additional rules to check authenticity because the current standards can suffice as long as courts make a pointed effort to monitor relevancy and authenticity. As long as courts continue to treat social media as they treat traditional forms of evidence, then fewer issues will arise.

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THE "LEARNED TREATISE" EXCEPTION
NOT SO LEARNED

By Alexander Scarselli

The Federal Rules of Evidence aren't perfect. Ultimately, judges are the "gatekeeper" and a lot of discretion is given to them in that role. Nevertheless, a good lawyer will learn them, utilize them, and defend with them. The Federal Rules of Evidence can be a lawyer's best friend, or worst enemy. All evidence for federal court that a lawyer hopes to present to a jury, or judge in a bench trial, must comply with these rules. It is certainly possible to win an entire case just by knowing these rules and using them to your advantage. A key piece of evidence—a foundation of your case—could be excluded from trial should it fall out of compliance with these rules. The Federal Rules of Evidence generally govern civil and criminal proceedings in the courts of the United States and proceedings before U.S. bankruptcy judges and U.S. magistrates, to the extent and with the exceptions stated in the rules.[1] It is particularly important to know the rules well, because some can be more helpful to the defense or prosecution.

There are 67 Federal Rules of Evidence split into 11 articles. Arguably, the hardest article to fully understand and remember is Article 8—Hearsay. There is much to this rule and there are many exceptions. I will address only a specific part of Hearsay: The Learned Treatises. This exception is governed by the Federal Rules of Evidence 803(18)(A) and (B).[2] It states that any information from a treatise, periodical, or pamphlet is admissible into evidence if it is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.[3]

This rule seems pretty straight forward. It is basically saying that a treatise, e.g. *Handbook for Psychology*, that is commonly used in the field and recognized by experts may be used as reference by experts to state an opinion as a truth of the matter asserted. So the hearsay in a treatise

may be admitted by experts in a case and used even though it is hearsay. Secondly, the rule states that a treatise can be used to impeach a witness. So, what could be lurking that could throw the case in one direction or another? In my opinion, one of the beauties of law is that there are always issues; few things are ever entirely simple. There are several wrinkles in this exception.

I will first address multiple admissions, which strongly favors the party offering the evidence. Generally, hearsay evidence is admitted if you can fit it into one of the exceptions. However, a learned treatise can be offered under several exceptions at the same time.[4] Having multiple avenues of admissibility is great if you are the one offering the evidence, but what if you are opposing counsel and need to keep that evidence out? Suppose the treatise isn't that related to the case, but will provide more than enough information to sway a jury against your client? The proponent then offers to admit the evidence under 803(8), 803(17), or 803(24), as well as 803(18). What recourse do you have against that? This is an issue with the Learned Treatise, and because of this you should be ready to stand your ground and know the rules better than your opponent. You need to be able to use the issues in the Rules of Evidence, specifically "Learned Treatise" and use the issues to your advantage. It is a very powerful tool for the party presenting and a very hard rule to defeat if you are opposing the offered evidence.

Let's take a look at another issue with the Learned Treatise: impeachment. A learned treatise can be used to impeach only, rather than utilize its contents as a hearsay exception. But wait, does it have to first be admitted as reliable and comport with 803(18)? Well, as is typical in law, the matter is unsettled. Two cases both express different views. In *Meschino v. North American Drager, Inc.* the First Circuit Court made it seem that if a learned treatise is to be used only for impeachment purposes it must first qualify under 803(18). However, in *Maggipinto v. Reichman* the Third Circuit didn't require establishment.[5] So what as future attorneys, or even as practicing attorneys, does that mean? It means you should know how your jurisdiction handles these things.

Yes, if a judge makes a mistake in a ruling of evidence it can be appealed. However, the majority of the appeals leave a significant amount of discretion to the judge when it comes to rules of evidence. Further clarification from the Supreme Court of the United States is unlikely, which leaves much of this to the judge's discretion.

These are just two issues with "Learned Treatise" that you will need to navigate should you encounter FRE 803(18). Are these issues insurmountable? No, not at all. These issues just enhance what it is to be a lawyer. It is a fact that not all laws are perfect. There is no argument for or against that. Especially when it comes to introducing evidence and, as mentioned above, deference is given to the "gatekeeper." Having one piece of evidence excluded can mean a conviction. On the other hand, one piece of evidence being included could mean acquittal. The "problem" is the lack of uniformity in enforcement. All Federal Rules of Evidence are uniform; however, their enforcement is left to the determination of the judge.

But this article doesn't focus on those issues. Instead, this article is meant to make you aware of two major issues within the rules and as a future attorney to inform you as to how you could use those issues to your advantage and how they can be used against you as well. Simply put, be aware of your jurisdiction and know that this tiny rule of evidence has two major issues in it that can be of a great help to you or can be of a great detriment to you. If you expect to have a case that will make use of treatises, keep this article in the back of your mind.

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