Evidence Authentication and Admission: Top Mistakes to Avoid

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Evidence Authentication and Admission: Top Mistakes to Avoid

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Presenters

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LAURA A. DANIELSON is NightOwl Discovery's director of client services & trial support, and has substantial experience working in all areas of litigation, specializing in consulting, best practices in litigation technology and support, and trial advocacy for corporations and law firms. She brings over two decades of experience to the litigation support technology arena. Ms. Danielson is a published author, a frequent speaker and instructor, and is considered an industry expert on litigation technology and support. She is a former litigation paralegal and project manager. She has participated in over 100 trials in federal and state courts nationally, and has been on numerous winning trial teams, with her work focused in the areas of intellectual property, product liability, toxic tort, and complex litigation. In addition, she has worked on mock trials, focus groups, arbitrations, and assisted counsel in preparation for mediations. She has done project management work on over 100 projects involving complex litigation, including a JDG consisting of 179 members. She also has a wealth of experience with large scale document review, with her largest case involving over 19 million pages, which involved online review and multistate productions. She holds a bachelor's degree in political science, an associate's degree in paralegal studies, and is a certified records manager through ARMA. Ms. Danielson is a member of the Minnesota Paralegal Association (MPA), Minnesota Association of Litigation Support Professionals (MALSP) Chapter in Minneapolis, ARMA, and Women In E-Discovery (WIE) - Twin Cities Chapter. In addition, she is one of the founding members of the Twin Cities Chapter of Women In E-Discovery (WIE), and has served in various positions on the Chapter Board and National Board of Directors for WIE over the past few years.

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Presenters (Cont.)

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Failure to Properly Authenticate Social Media, Email, Website Content, and Other ESI

Submitted by Laura A. Danielson

Failure To Properly Authenticate Social Media, Email, Website Content, and Other ESI

Laura A. Danielson

"Evidence Authentication and Admission"

Identification of Potential Data Sources

- **Aim:** In the identification phase the legal team develops and executes a plan to identify and validate potentially relevant ESI sources including people and systems.
  - Develop the identification and strategy plan
  - Establish the Identification Team
  - Identify Potentially Relevant ESI Sources
  - Certify potentially Relevant ESI Sources

Key: Documentation for a defensible audit trail
- Quality Control and Validate Audit Trail
- Authentication

Identification of Potential Data Sources

- **Aim:** Learning the location of potentially discoverable data is necessary to issue an effective legal hold. Identification should be as thorough and comprehensive as possible.

Potential Sources:

- Business Units / Departments
- Records Management
- People
- IT systems
- Paper files
- Websites
- Cloud – 3rd Party Providers
- Social Media

Identification of Potential Data Sources

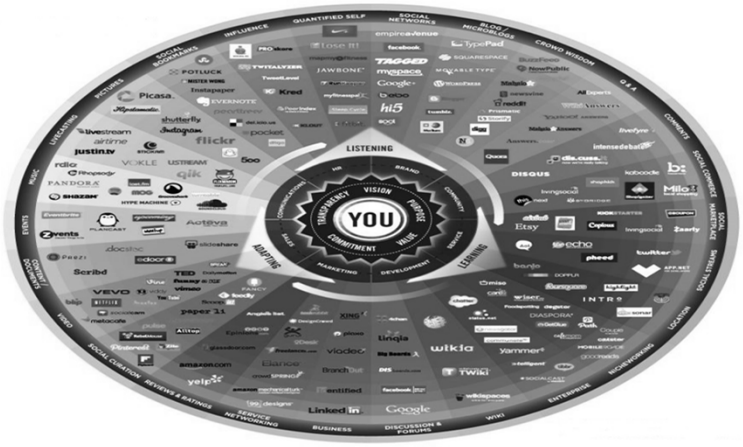
- Learning the location of potentially discoverable data is necessary to issue an effective legal hold. I
- Identification should be as thorough and comprehensive as possible.
- Conduct interviews with key players to identify what type of records they have that may be relevant.
- Interviews with IT and records management personnel may be used to identify how and where the relevant data is stored, retention policies, inaccessible data and what tools are available to assist in the identification process.

How: Custodial Interviews for Key Players , IT are essential.

A. Social Networking Data, Facebook, Twitter, etc.

- What is Social Media?
  - Social media is the collective of online communications channels dedicated to community-based input, interaction, content-sharing and collaboration.
  - Social media has become an integral part of life online as social websites and applications proliferate.
    - Most traditional online media includes social components, such as comment fields for users.
    - In business, social media is used to market products, promote brands, connect to current customers and foster new business.

A. Social Networking Data, Facebook, Twitter, etc.



A. Social Networking Data, Facebook, Twitter, etc.

A. Social Networking Data, Facebook, Twitter, etc.

- **What is Social Media?**
  - Over 25 different types of social media categories, with most commonly used being:

- Social Networks
- Blog / Microblog
- Video
- Music
- Pictures
- Social Bookmarks
- Discussion / Forums

A. Social Networking Data, Facebook, Twitter, etc.

- **What is Social Media?**
  - Over 25 different types of social media categories, with most commonly used being:

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- Discussion / Forums

A. Social Networking Data, Facebook, Twitter, etc.

- **Failures:**
- Brown v. State, (Ga: Supreme Court, January 23, 2017). In this case, the prosecution presented key evidence from a variety of social media sources, including a "cropped screenshot" from a YouTube video, several incriminating Facebook postings and a copy of a photograph downloaded from a Twitter account. The items were admitted into evidence and the defendant was convicted on all counts. However, a motion for new trial was brought on the basis of challenging the authenticity of the social media evidence introduced as screen shots. The court overturned the conviction on one of the counts (count of criminal gang activity). The Georgia Supreme Court upheld that ruling but determined that improper authentication was a harmless error as to the remaining counts that Defendant was also convicted on.

A. Social Networking Data, Facebook, Twitter, etc.

- **Failures:**
- ZAMUDIO-SOTO v. BAYER HEALTHCARE PHARMACEUTICALS INC. (US Dist. Ct, ND California, January 27, 2017). In this matter, a major product liability claim was barred on statute of limitation grounds based exclusively on the Plaintiff's comments on her Facebook post. Plaintiff's Facebook comments drew a connection to her injury and the alleged defective product in question, and was posted on May 26, 2011, more than two years prior to her filing suit against Bayer. The court determined that Plaintiff's Facebook post started the clock for her to bring her claim within the two year statute of limitations period. However, as she did not file her suit until January 2015, the court ultimately barred her action.

A. Social Networking Data, Facebook, Twitter, etc.

- No Reasonable Expectation of Privacy
  - Remember…. the very purpose of social media – **"share content with others"** precludes the finding of an objectively reasonable expectation that content will remain "private."
  - Discoverability of social media is governed by the standard analysis and is not subject to any "social media" or "privacy" privilege.

A. Social Networking Data, Facebook, Twitter, etc.

- **Failures:**
- Johnson v. ABF Freight System, Inc. US Dist. Court, MD Florida, January 27, 2017. This opinion is based upon a motion to compel discovery of the Plaintiff's Facebook account. The Defendant asserted that Plaintiff's Facebook account would be relevant to his damages claims arising out of a serious personal injury claim. The Court granted the motion to compel, but limited the production of the Facebook account to a certain date range and also only information that related to his employment and business activities and efforts to gain employment.

B. Website Content

- Examples of Website Content:
  - Website
  - Website Pages
  - Information / Pictures Retrieved from a Website
- Collection Methods:
  - Specific Third Party Third Party Companies
  - Use someone with experience – Affidavits – may want to use expert in court to identify process of how collected.

B. Website Content

- **Failures:**
- United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000) (proponent failed to authenticate exhibits taken from an organization's website)
- St. Luke's Cataract & Laser Inst., P.A. v. Sanderson, 2006 WL 1320242 at **3-4 (M.D. Fla. May 12, 2006) (excluding exhibits because affidavits used to authenticate exhibits showing content of web pages were factually inaccurate and affiants lacked personal knowledge of facts)
- Wady v. Provident Life & Accident Ins. Co. of America, 216 F. Supp. 2d 1060 (C.D. Cal. 2002) (sustaining an objection to affidavit of witness offered to authenticate exhibits that contained documents taken from defendant's website because affiant lacked personal knowledge)

ESI Protocols

- ESI Agreements:
  - Scope
    - ✓ Search Terms Methodology
    - ✓ Sampling
    - ✓ Data Filtering
    - ✓ Analytics / TAR / Predictive Coding
    - ✓ Meta data
    - ✓ Native
    - ✓ Images
    - ✓ Delivery Format
- https://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf

C. Email Messages, Chains, Attachments

KEY: Courts and trial attorneys should address upfront the accuracy and reliability of computerized evidence, including any necessary discovery during pretrial proceedings so that challenges to the evidence are not made for the first time at trial.

- Voluminous evidence - may be necessary to verify the evidence by sampling the data and, if errors are made, by stipulating or agreeing to the effect of the observed errors on the entire compilation. Statistical methods may also be used to determine the range and probability of error.

C. Email Messages, Chains, Attachments

- Computer evidence generated by a standard publicly available software may be more easily admitted than evidence generated by customer proprietary software.
- Simply put, an attorney must make reasonable pretrial inquiries into the validity and source of digital information prior to attempting to use that information in court.
- In order to ensure ESI is actually admitted at trial requires the trial attorney to focus in pretrial proceedings to satisfy basic evidentiary concerns such as foundation and authenticity. This process is complicated by the fact that ESI comes in "multiple evidentiary flavors."

C. Email Messages, Chains, Attachments

- Authenticating ESI poses many of the same issues as authenticating other evidence.
- The degree of foundation required to authenticate ESI depends on the following:
  - completeness and quality of the data input,
  - the complexity of the computer processing,
  - how routine the computer operation is, and;
  - the ability to test and verify results of the computer processing.

C. Email Messages, Chains, Attachments

- Under the Federal Rules authenticity or identification as a condition precedent to admissibility is generally satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
- The requirement ensures the evidence is trustworthy which can be especially important when a hearsay objection is raised.

C. Email Messages, Chains, Attachments

- **Failures:**
- Spoliation at collection time – can affect meta data
- Accuracy can be compromised by incomplete data entry
- Errors in output instructions
- Programming Errors
- Damage / contamination to storage media
- Power Outages / Equipment Malfunctions
- Data Integrity can be impaired in course f discovery by improper search and retrieval techniques, data conversion or mishandling

This has led some courts to mandate more stringent authenticity requirements for ESI.

C. Email Messages, Chains, Attachments

- **Failure**:
- In re Vee Vinhnee, supra (proponent failed properly to authenticate exhibits of electronically stored business records)
- Uncle Henry's, Inc. v. Plaut Consulting, Inc.; 240 F. Supp. 2d 63, 71-72 (D. Me. 2003), aff'd 399 F.3d 33 (1st Cir. 2005) (failure to authenticate e-mails)
- Rambus, Inc. v. Infineon Tech. AG, 348 F. Supp. 2d 698 (E.D. Va. 2004) (proponent failed to authenticate computer-generated business records)

Fed. R. Evid. 901 (b)(1)-(10)

Fed. R. Evid. 901(b)(1)-(10) provides many examples of how authentication may be accomplished and should be consulted and used as ESI is being gathered in discovery.

- Rule 901(b)(1) - Testimony by a Witness with Personal Knowledge – Custodian of Records
- Rule 901(b)(3) - Comparison by Trier of Fact or Expert Witness – to other ESI already authenticated.
- Rule 901(b)(4) - Evidence Containing Distinctive Characteristics – Email authentication

D. Audio and Video

Video:

- Files on Websites
- Video Files – Internal Videos
- Social Media Videos
- Video Format Types

Audio:

- Voice Mail
- Recordings
- Audio Format Types

E. Text Messages, Voice Mail, Etc.

- Cell Phones
- Voice Mail Systems
- O365
- Collection Methods:
  - Specific Third Party Third Party Companies
  - Use someone with experience – Affidavits – may want to use expert in court to identify process of how collected.

F. Digital Photographs

- **Most Common Formats:**
  - ***JPEG***
  - ***.PNG***
  - ***GIF***
  - **Displaying them in their native format for presentation**

Other ESI Types

- G. Animations / Simulations
- H. Databases
- I. PowerPoint Spreadsheets, Etc.
- J. Metadata and Other Electronic Evidence

Poorly Crafted Questions That Prevent Entry of Electronic Information into Evidence – and How to Fix Them

Submitted by Laura A. Danielson

Poorly Crafted Questions That Prevent Entry of Electronic Information Into Evidence – How To Fix Them

Laura A. Danielson

"Evidence Authentication and Admission"

Potential Issues - Questions

- Authentication
- Knowledge – Witness
- Statute of Limitations
- Specific Date Range
- Disclose during discovery

Admission of Electronic Evidence

"It is important to remember that there is nothing 'magical' about the admission of electronic evidence. The prevalence of electronic evidence has required no substantial changes to the Federal Rules of Evidence.

In analyzing the admissibility of such evidence, it is often best to treat it as originating from the most similar, non-electronic source as thoughtful application of traditional evidentiary principles will nearly always lead to the correct result.

Thus, while electronic evidence may present some unique challenges to admissibility and complicate matters of establishing authenticity and foundation, it does not require the proponent to discard his knowledge of traditional evidentiary principles or learn anything truly new."

Frieden & Murray, The Admissibility of Electronic Evidence Under the Federal Rules of Evidence, Richmond Journal of Law and Technology, Vol. XVII, Issue 2.

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How: Custodial Interviews for Key Players , IT are essential.

ESI Protocols

- Begin with the ESI Protocol Agreement:
  - Metadata
  - Extracted Text
  - Native Files
  - Image / Extracted Text
  - OCR
  - Coding
  - Processed Data
  - Technology Platform Requirements

Key Mistakes That Endanger the Admissibility of ESI

Submitted by Laura A. Danielson

Key Mistakes That Endanger the Admissibility of ESI

Laura A. Danielson

"Evidence Authentication and Admission: Top Mistakes To Avoid"

A. Failure To Preserve / Legal Holds

- A **legal hold is** a process that an organization uses to preserve all forms of relevant information when litigation **is** reasonably anticipated.
- A **legal hold will** be issued as a result of current or anticipated litigation, audit, government investigation or other such matter to avoid evidence spoliation.
- **Trigger:** Receipt of "litigation hold letter" or notice, also called a "stop destruction" or "preservation" letter, which is a written document that informs a party directly of an impending legal action.

A. Failure To Preserve / Legal Holds

- **Purpose:** The purpose of litigation holds is to preserve evidence for potential litigation, and the penalties for noncompliance can be severe, both procedurally and financially.

- Because of these possibilities and to ensure a fair judicial process, it is crucial to have procedures in place to handle potentially relevant information when litigation is reasonably anticipated and to make sure that all employees understand the importance of compliance.

A. Failure To Preserve / Legal Holds

- **Outcome**: Anticipation of litigation arises when an organization is on notice of a credible possibility that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

- **Failure:** If a party fails to take reasonable precautions to comply with litigation hold, a judge could impose stiff penalties for noncompliance.

A. Failure To Preserve / Legal Holds

- **What are the costs of failing to comply with a litigation hold?**
- Penalties can go beyond financial sanctions.
- Compel discovery during the discovery phase.
- Issue adverse jury instructions as sanctions
- Penalties during trial phase.
- Enter a judgement for opposing party.

B. Improper / Unlawful Search and Retrieval

- Criminal Cases
  - Seizure of devices – subpoena – search warrant
  - Discussion

- Civil Cases
  - Investigations
  - Discussion

C. Data Conversion and Storage Mistakes

- **Data conversion** is the **conversion** of computer **data** from one format to another. Throughout a computer environment, **data** is encoded in a variety of ways. For example, computer hardware is built on the basis of certain standards, which requires that **data** contains, for example, parity bit checks.

- During processing process:
  - Extract Metadata
  - Deduplication
  - DeNIST
  - Extract the text
  - Convert data to a readable format - native / tiff
  - Quality Control / Verification

C. Data Conversion and Storage Mistakes

- **Data Conversion Failures:**
  - Process incorrectly due to lack of process
  - Corrupt Meta data extraction – spoliator data
  - Technology bugs / errors
  - Programming errors
  - Extraction Errors
  - Export errors

C. Data Conversion and Storage Mistakes

- **Data storage** is the recording (storing) of information (data) in a secure / encrypted **storage medium**. During storage process:
  - Servers / Shares
  - Databases
  - Original Data
  - Security
  - Access by Role
  - Read Access
  - Backups
  - Hot Sites for Backup
  - Data Redundancy Plan

C. Data Conversion and Storage Mistakes

- **Data Storage Failures:**
  - Data Loss
  - No backup process
  - Server Failure
  - Data Breach
  - Read / Write access
  - Security Access

D. Mishandling

- **Goal**: Defensibility of handling data from collection / data intake to the end of matter.
  - Collecting data forensically sound – bit by bit
  - Assigning a unique Evidence ID to each piece of data that is collected; i.e. Custodian – Laptop, Cell Phone, Tablet, Share Files, etc.
  - or processed via intake
  - Copying data during data intake using a Write-Blocker to avoid spoliation of data.
  - Working off a copy – store the original data away in a secure, fire-proof safe.
  - Data Backups of data copies

D. Mishandling

- Defensibility of handling data from collection to production
  - Tracking the data from collection / intake to end of matter.
  - Security certification such as, SOC II, ISO27001
  - Written process / procedures that are thoroughly documented throughout process for:
    - Collection
    - Data Intake
    - Processing
    - Review
    - Production
    - Data Disposition – End of Matter

D. Mishandling

- **Failures:**

- Data Loss
- Data Deletion
- Data Breach
- Spoliation of Data
- Device Loss

E. Detecting / Tampering / Alteration of Electronic Evidence

- **Changing / Deleting / Modifying ESI or Evidence**
- **Failures:**

- Data Loss through Access
- Data Deletion through Access
- Spoliation of Data
- Read / Write Access allowed
- Security Access
- Audit Monitoring

F. Other Spoliation Issues

- **Spoliation: I**s the destruction or alteration of evidence during on-going litigation or during an investigation or when either might occur sometime in the future. Failure to preserve data that may become evidence is also spoliation.
- Some jurisdictions also define it as a failure to preserve information that may become evidence.
- The intentional alteration or destruction of a relevant document or documents.
- In e-discovery cases the focus has been on the intentional nature of the act, which can include deletion, partial destruction or alteration, generally by a party to the action or someone under their control.

F. Other Spoliation Issues

- Spoliation is the destruction or change to records which may be relevant to ongoing or anticipated litigation, government investigation or audit. Courts differ in their interpretation of the level of intent required before sanctions may be warranted.
- The intentional, negligent, or reckless, loss, destruction, alteration or obstruction of relevant evidence.

Failures:

- Collection issue – not using proper collection technology
- Copy data with no Write Block
- Intentionally change document resulting in fraudulent meta data
- Deletion of data

Hearsay: Top Problems and Pitfalls

Submitted by David M. Potteiger

HEARSAY:

TOP PROBLEMS AND PITFALLS

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HEARSAY DEFINED

Hearsay is an out of court statement made to prove the truth of the matter asserted in the statement.

HEARSAY DEFINED

A statement is a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion. FRE 801(a)

Questions or Conduct

HEARSAY DEFINED

Was the evidence offered to prove the truth of the matter asserted?

Verbal Acts or Legal Effects

HEARSAY EXCLUSIONS

PRIOR CONSISTENT STATEMENTS

HEARSAY EXCLUSIONS

PRIOR INCONSISTENT STATEMENTS

HEARSAY EXCLUSIONS

STATEMENTS BY OPPONENTS

1. Offered against opposing party
2. Made by a party
3. Adopted or believed to be true by the party
4. Made by a party authorized to speak
5. Made by a co-conspirator

COMMON MISTAKES

1. Testifying witness as declarant
2. Availability as declarant
3. When to bring motion *in limine*
4. Failure to sequester witnesses

OBJECTIONS

1. Legally correct?
2. Tactically correct?
3. Specific?

EXCEPTIONS

FEDERAL LAW
V.
STATE LAW

1. Minor technical and verbal variations in terminology;
2. Traditional state practice;
3. Taking sides on controversial provisions; and
4. Breaking new ground.

HEARSAY: TOP PROBLEMS AND PITFALLS

DAVID M. POTTEIGER

A. Commonly overlooked threshold issues:

1. Hearsay is an out of court *statement* made to *prove the truth of the matter asserted* in the statement.

    a. A statement is a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion. FRE 801(a)

        1. Question posed by non-testifying co-defendant to arresting officer following apprehension of co-defendant, defendant, and others, asking how the police found them so fast, was an "assertion," under the hearsay rule; question was an inculpatory assertion of defendant's participation in the crime, and was not designed to elicit a response. *U.S. v. Summers*, 414 F.3d 1287 (10th Cir. 2005).

        2. Testimony about an individual's pointing to list was not outside hearsay rule merely because such individual used no words since the pointing was as much a "communication" as a statement would have been. *U.S. v. Ross*, 321 F.2d 61 (2d Cir. 1963).

    b. Nonassertive conduct is admissible whether it is verbal or nonverbal. *U.S. v. Perez*, 658 F.2d 654 (9th Cir. 1981).

        1. Evidence that declarant asked "Is this Kenny?" when police officer called telephone number displayed on pager recovered from stolen car was not hearsay in carjacking prosecution; declarant's question could not reasonably be construed to be an intended assertion, either express or implied. *U.S. v. Jackson*, 88 F.3d 845 (10th Cir. 1996).

2. Markings on map which purportedly traced course of shrimping vessel allegedly involved in marijuana smuggling conspiracy were not inadmissible hearsay in that they were not assertions. *U. S. v. Groce*, 682 F.2d 1359 (11th Cir. 1982).

c. Offered to prove the truth of the matter asserted

1. If significance of out-of-court statement lies solely in fact that it was made, rather than in veracity of out-of-court declarant's assertion, statement is not hearsay because it is not offered to prove truth of matter asserted. *U.S. v. Cantu*, 876 F.2d 1134 (5th Cir. 1989).
2. The significance of the words was that they were said (i.e., that a "verbal act" occurred) and how they affected McCoy, not the truth-value of what was said. *United States v. Robinzine*, 80 F.3d 246 (7th Cir. 1996).
3. A statement offering to sell a product at a particular price is a verbal act, not hearsay, because the statement itself has legal effect. *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Bd.*, 298 F.3d 201 (3d Cir. 2002).

d. Exclusions from Hearsay

1. On cross-examination
    a. Prior inconsistent statements given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition
    b. Prior consistent statement offered to rebut an express or implied charge of recent fabrication or improper influence/motive
    c. Identifies a person as someone previously perceived

1. Statement made by a party opponent
    a. Offered against an "opposing" party

1. The distinctions between “confessions” and “admissions” are subtle and questionable and admissions should receive the same cautious treatment accorded confessions. *U.S. v. Robinson*, 459 F.2d 1164 (Fed. Cir. 1972).
2. Defendant's confession to police officer, “I know I did it. I know I got to go down. I hit her in the head with an ax. I didn't mean to hit her in the head with an ax. I meant to hit [another] in the head with an ax,” was admissible under exception to hearsay rule for admissions by party opponent. *U.S. v. Penass*, 997 F.2d 1227 (7th Cir. 1993).

b. Made by a party in an individual or representative capacity

c. Party adopted or believed to be true

1. A statement is attributable to a person, for purposes of admission of out-of-court statements as nonhearsay admissions by party opponent, when he or she stands silent in the face of its utterance if the natural response would be to deny it if untrue. *Rahn v. Hawkins,* 464 F.3d 813 (8th Cir. 2006).

a. Made by a person authorized to make a statement on the subject

1. In many instances, out-of-court statement of an agent of a party will be admissible as a vicarious or representative admission of his principal. *U. S. v. Pena*, 527 F.2d 1356 (5th Cir. 1976).
2. Fact of agency may not be proved by alleged agent's extrajudicial statements. *U.S. v. Jones*, 766 F.2d 412 (9th Cir. 1985).
3. Proponent of admission by party opponent must establish declarant's competence; office or plant gossip does not become admissible simply

because it is put into mouth of someone whose statements are not subject to hearsay objection. *Morisseau v. DLA Piper*, 532 F.Supp.2d 595 (S.D.N.Y.2008).

e. Was made by a co-conspirator in furtherance of a conspiracy

B. Common mistakes attorneys make with respect to hearsay:

1. Testifying Witness as Declarant

a. Prior statement of a testifying witness, when offered for the truth, is hearsay. *United States v. Check,* 582 F.2d 668 (2d Cir. 1978).

b. When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. . . . The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is now under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part." Edmund Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192-94 (1948).

2. Whether declarant is available/unavailable

a. Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

1. is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

2. refuses to testify about the subject matter despite a court order to do so;
3. testifies to not remembering the subject matter;
4. cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
5. is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
    a. the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
    b. the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

b. But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

3. When to bring a motion *in limine*
    a. Motions *in limine* are common vehicles for preliminary rulings on anticipated hearsay objections.
    b. *Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc.*, 867 F. Supp. 686, 31 Fed. R. Serv. 3d 244 (N.D. Ill. 1994)(denying motion in limine to exclude hearsay remarks in age discrimination suit because issue of whether remarks qualify as a party admission "can only be resolved based upon consideration of the evidence presented at trial").
4. Failure to sequester witnesses

C. Objecting to Hearsay:

1. Should you object? Hearsay usually is weaker than live testimony, and defendants may prefer the hearsay version rather than making an objection that would compel the prosecution to produce a stronger witness. *United States v. Moon*, 512 F.3d 359, 361 (7th Cir. 2008).

2. Are your objections specific? The Rules do not require that an objection be presented with a pinpoint citation to the Rules or reference to a relevant precedent. *United States v. David*, 96 F3d 1477, 1480 (D.C. Cir. 1996); United States v. Whitaker, 127 F3d 595, 601 (7th Cir. 1997). An objection must state the specific grounds on which is based. *United States v. Swan*, 486 F3d 260, 264 (7th Cir. 2007) (objection "hearsay" was insufficient to alert the court to the claim that the speaker was not an agent of defendant).

3. Should I object at sidebar? "The side-bar conference was held off the record. Therefore, if defense counsel did object, this court would have no way of knowing it." *United States v. Reed*, 227 F3d 763, 769 n.5 (7th Cir. 2000).

D. Providing foundation for exemptions, exceptions, and exclusions

1. Exemptions

   a. Prior statements of witnesses

   b. Admissions of party opponents

2. Exceptions when regardless of declarant's availability - Fed. R. Evid. 803

   (1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
   (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice--unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

3. Exceptions when declarant is unavailable – Fed R. Evid. 804

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

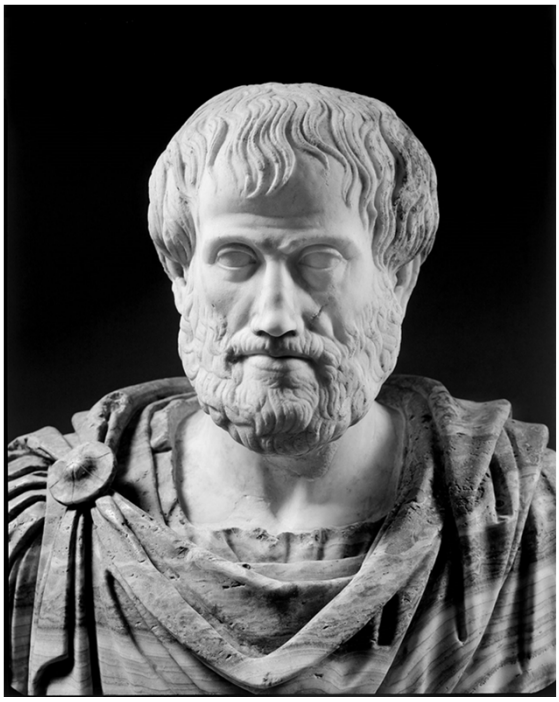
4. Reasons why state hearsay rules may differ from federal rules:
    1. Minor technical and verbal variations in terminology;
    2. Traditional state practice;
    3. Taking sides on controversial provisions; and
    4. Breaking new ground.

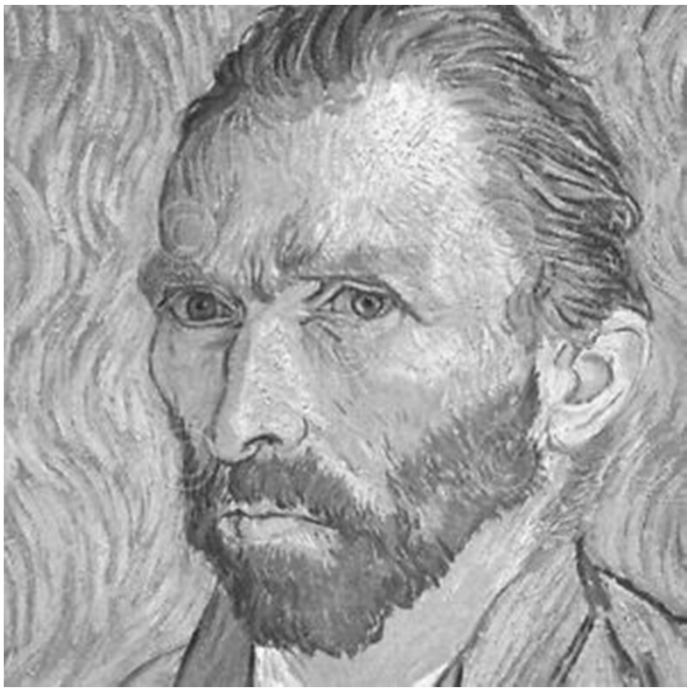
Mistakes That Jeopardize the Admissibility of Witness Testimony, Opinions and Reports
&
What NOT to Do When Laying a Foundation for Specific Types of Evidence – Real-Life Examples

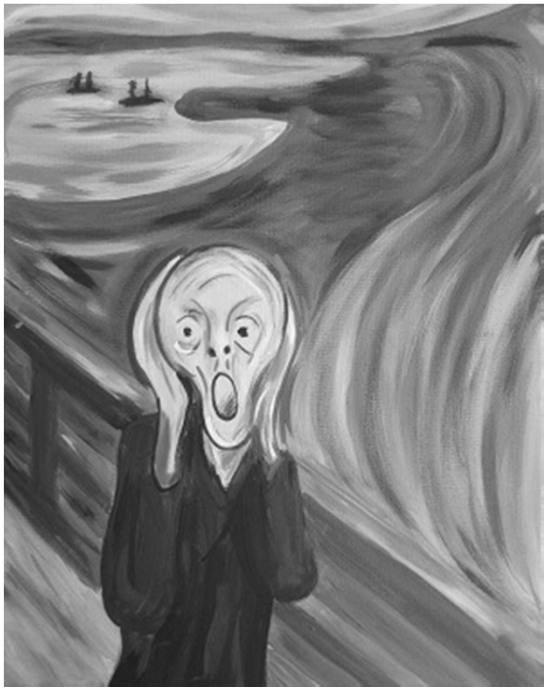
Submitted by Thomas M. Gagne

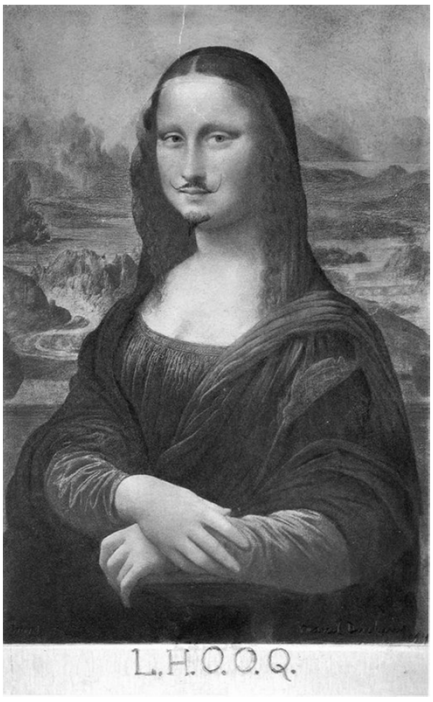
Savior, Jezebel, Zombiecat:

The Three Faces Of Evidence.





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DANGER
VOLTAGE
THE LITTLE GUY THAT LIVES IN-SIDE MY BRAIN
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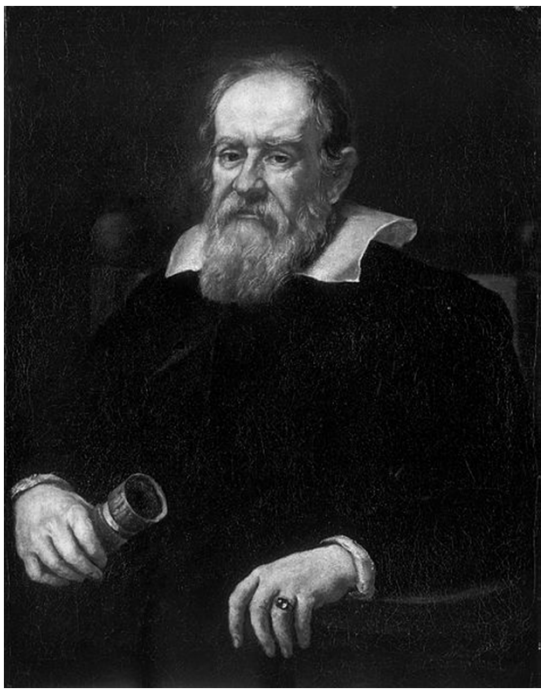

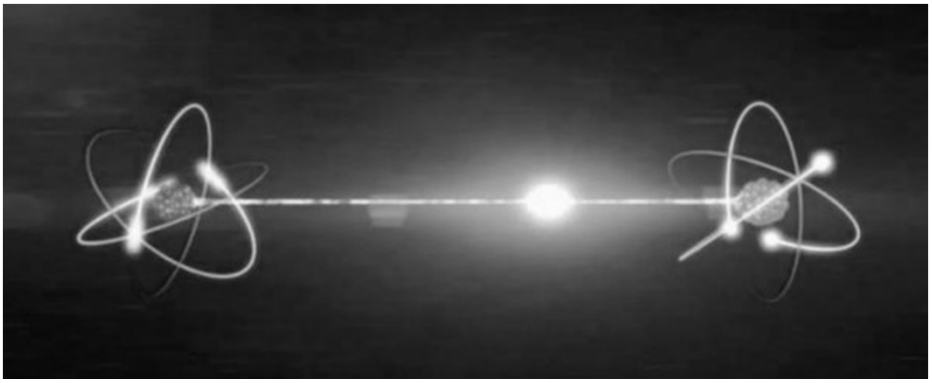

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Savior, Jezebel, Zombiecat: The Three Faces of Evidence

For

NBI

By

Thomas Gagne, Esq.

“If the doors of perception were cleansed, then everything would appear as it is, Infinite. For Man has closed himself up, ‘til he sees all things through the narrow chinks of his own cavern.”

— William Blake

From: *The Marriage of Heaven and Hell* (1793)

Ladies and Gentlemen:

Good morning. I'm attorney Thomas Gagne and I'd like to tee off this talk on evidence with an uncomfortable but instructive actual case history of mine when I was still a novice JAG prosecutor. Of course I have changed the names of those involved.

Private Alan Etrim was having a pretty good run. He had bounced twenty - five checks totaling about twelve thousand dollars by the time Army investigators and local police suspected a serial check bouncer was at large at Fort Jackson and Columbia, South Carolina.

After a bit more investigation the Criminal Investigation Division (CID) finally identified Etrim as the culprit, but, unfortunately for me, as you'll see, only after the Army had transferred him to South Korea.

CID notified their South Korean counterparts. MP's arrested him, charged him with larceny and several other offenses under the Uniform Code of Military Justice (UCMJ), and placed him in pre-trial detention following a probable cause hearing. Pursuant to custodial interrogation, Etrim confessed to the offenses.

Due to considerations of venue, Etrim was shipped back to Fort Jackson for prosecution. The JAG assigned me the case. It was to be my first court martial, my first felony prosecution, and I couldn't have been more excited, or more anxious. I naturally wanted to begin my legal career on a propitious note, so I prepared assiduously. I created a witness plan, direct exams, crosses, an exhibit schedule, a strength/weakness analysis of both the prosecution and defense case, a sentencing argument, as well as a detailed outline of all the issues likely to arise, replete with arguments and counter-arguments down to the finest detail I could anticipate. I aimed to shut the defense down. I recall daydreaming how, after I had won the case, my boss would discretely nod his approval, how my girlfriend and parents would be so proud of me.

The case appeared to be a "slam dunk" thanks to the confession. All the other lawyers in the shop told me as much, which only added to my anxiety. Nevertheless, a confession requires factual corroboration, however slim, so I wanted plenty of independent evidence to prove liability.

Two military investigators had interrogated the suspect in South Korea. I thought I'd save the Army some money by flying only one to testify at Fort Jackson, as if anyone in the Defense Department would even notice.

In retrospect, this was a ludicrous decision. I can only shake my head and patiently excuse the naïveté of the young lieutenant. I was still thinking, and acting, like a poor student, which I had been all my life (and still was, basically) counting pennies, instead of realizing I represented the most well - financed and powerful organization the world has ever seen. I had made my first significant error as a litigator, and combatant — I

didn't know who I was. As a lifelong student of philosophy, I can't help but recall, Sun Tsu's admonition in *The Art of War: If you know your opponent and you know yourself, you need not fear the result of a hundred battles.*

For young attorneys out there, you must be conscious of who and what you are now. Your position has changed — intellectually, occupationally, economically. A naturally laid - back person who avoids confrontation, but who chooses to litigate as a career, may initially be adverse to issuing subpeoenas, or aggressive interrogations, or pestering stonewalling witnesses for information, fearful of alienating someone.

Often our nature changes faster than our consciousness of that change, or what our moral sense will allow. Complicating matters, our understanding of who we are is muddled by previous versions of our self - image, as well as sheer inertia. It's odd how we readily admit the world is subject to change without realizing that we are also subject to change, often significant change. Sometimes we may not be comfortable with the change; for instance, if you insist on becoming a litigator, you will become more aggressive, if only through the process of positive reinforcement. How well you constructively handle these changes is the question.

Anyway, trial time came, and as you can imagine, the defense objected to the admission of the confession into evidence, based not on *Miranda*, but on *Jackson v. Denno,* which essentially holds that the government cannot coerce a confession from a suspect. No phone books or car batteries allowed.

I mistakenly thought one officer would be enough to meet my *Denno* burden. The court did not agree. The judge suppressed the confession, and the remaining evidence wasn't enough to convince the jury. I was devastated. Prosecutors are not supposed to lose. If I had been in state court, I daresay the result would have been different, as I think military justice has a tendency to overcompensate for the historical perception of its compromising the constitutional rights of defendants.

But I learned an important lesson that I have never forgotten. There are two basic types of evidence — discretionary and non-discretionary. Omitting non- discretionary evidence — i.e., evidence so embedded in the facts of the case that it demands treatment — will likely kill your case, and the more important the issue the evidence addresses, the more potentially lethal its omission is. My omitting the other officer raises the spectre that I was hiding something (which I wasn't), and it denied the defendant his right to face an accuser, surely, but more fundamental than that, the second officer was a major player in the play — *United States vs. Private Anthony Etrim,* and I hadn't invited him to the production.

For better or worse, his testimony was non-discretionary. In preparing your case, list all the evidence, the good, the bad and the ugly, don't worry about its quality at this point or whether its admissible or not, just build the entire evidentiary picture of the case as it

conform as to your legal and factual theories, especially the *dramatis personae.* In other words — be thorough.

Evidence is the language of litigation. It is the heartbeat of a trial. Evidence is the language of "truth." Evidence, its nature, procurement, evaluation, admissibility, deployment, challenges and its privileged place in the quest for the truth – these are the themes I invite you to explore with me today. Let's back up from foundational considerations to an inquiry into the nature of evidence itself to hopefully give us a feeling how to use it in the first place, before we incorporate it into the tapestry of legal and factual theories.

Ill mention right off that the best guide to foundations is Imwrinklwreids *Evidentiary Foundations*. This has never steered me wrong and I cannot remember ever having lost a piece of evidence if I flowed his suggestions. Meeting the foundational requirements of evidence is not difficult. The challenge lies in its deployment. The question of evidence is a tactical and strategic one before it is a "technical" one.

Now, at least since the Renaissance, the rule that a claim must be supported by evidence has held a privileged place in modern thought, although any fourth century BCE Athenian attorney could tell you that a claim unsupported by evidence is forensically worthless. I'm sure that an unwritten essay or book exists in the ether about the disconnect between legal and "scientific" method in the evolution of western thought. I'm convinced the law is the first discipline to engage and develop rigorous analysis, simply due to its urgent and dialectical nature. Ordinary people can live without knowing the true definition of piety, but a dispute over who actually owns a prize winning pig most likely the true father of the "scientific" method, litigants deploying evidence to answer questions of import.

I ask myself: why didn't "natural philosophers", as they were termed, expropriate the idea of using evidence to answer questions sooner, given the clear fact that western jurisprudence certainly relied on evidence at least 2500 years before scientists like Galileo challenged the unscientific dogma of Aristotle (Ex. 1 Aristotle) via experimental evidence.

One reason may have been that philosophers viewed their efforts as a quest for truth. A lawyers' job, on the other hand, was to advocate a position, her client's, and if it did not strictly correspond with "the truth," well, that was a problem for the fact-finders. Forensic models of analysis, of truth-finding, may have been seen as too pedestrian and distasteful to be taken seriously.

Classical thought leaders viewed lawyers, and by extension, the law, with suspicion, deeming them and it second-rate because of their perceived indifference to the pursuit of "truth." To someone like Plato, lawyers were mere "sophists," which, coming from him, is ludicrously disingenuous since Socratic questioning wasn't some objective inquiry as Plato marketed it, but a carefully crafted series of cross examination predicates with clear

goals, surreptitiously leading interlocutors to predetermined conclusions. More significantly, Plato's name calling discloses a class bias (Plato was born into a politically prominent Athenian family). Lawyers and sophists, on the other hand, belonged more or less to the merchant class.

This "Socratic" model is more significant than an exercise in clever lines of inquiry. I believe it is the model for legal argumentation in general. Legal opinions are *geometric* in their form. Legal opinions are essentially predicate (major premise or postulate) fact or evidence (the given) and conclusion (deductive result). The conclusion then rests as Q.E.D. or serves as a predicate for a further lines of syllogistic argument. Surely, judges and lawyers discuss what postulates to employ, ruminate their meaning, their application to a given set of facts, and their relation to other predicates or other set of facts. Legal practitioners engage in analogistic analysis (precedents), consider the quality and quantity of evidence, consider policy repercussions, burdens of proof, play with statutory construction, devise hypos, the whole litany of legal concepts — but the general form remains syllogistic, deductive, Socratic, Aristotelian.

My point here is that within putatively formal, "logical" frameworks, which on their face promise truth if faithfully adhered to, there exists plenty of room for artistry and artifice. Conclusions based upon evidence, whether in the law or in other disciplines, are not objectively determined by appeal to the use of disinterested methodology. One can go on and on about double blind process, but the analyst cannot escape his her own subjectivity. No one seriously defends formalism as a legitimate method of analyzing legal thought. For better or worse, we have entered the era of post-modernism, where all gods, even the concept of man, are subject to the Nietschean guillotine.

But I think we have merely returned to the good sense of Kant (Ex. 2 Kant), albeit in a different costume. According to Immanuel Kant, the world "out there" is mediated by the limitations of our mind. But he was clear this did not mean that results based upon evidence, observation and cause and effect were useless. To the contrary, we build bridges and perform open heart surgeries based on previous analyses of evidence.

What Kant means is that despite the fact that evidentiary results are often useful, we can never know for certain what he termed "the thing in itself," *why* things work, because method and the application of method are human constructs limited by our capacity to perceive the outside world.

Kant's signature work, and the greatest work of modern philosophy, after Descartes' *Second Meditation,* is *The Critique of Pure Reason*. It is still hailed as "Philosophy's Copernican Revolution." Kant's *Critique* is, essentially, an eighteenth century mediation on Plato's famous cave analogy, i.e., we never actually perceive the objects of this world *as they exist*; we only perceive their shadows. We only perceive what our perceptive capacities permit us to perceive. One may call his thinking on this issue "subjectivism."

Kant theorized that our minds are cognitively structured. On the most basic level, these structures include concepts of time, space and causality. These, shall we say, *cognitive determinants*, filter reality into conceptually manageable forms. Kant sees this as good, and necessary for our very survival as a species. Understanding the nature of these structures is our true intellectual project. Considered in this light, Kantian subjectivism then becomes a sort of consolation prize. We can never really know the "the world", but *at least* we can know ourselves.

The downside is that we can never "get out of ourselves" to verify what's really going on. We are forever constrained to our own "inwardness," to our "interiority," what the German Idealists termed *Innerlichkeit*. Additionally, Kant believes these structures are innate, or, in the language of philosophy, *a priori,* prior to experience — a critique of the Lockean concept that the newborn mind is a *tabula rasa*.

As opposed to nature, or the supernatural, Kant postulated that the *human mind* was the seat, the source and the inspiration of all knowledge. Kant revises the *object of inquiry.* He shifts our focus from the outside to the inside, from contemplating the object, to the contemplating the subject. In the history of thought, this shift is seismic, siring the great intellectual movements of the next three centuries: English Romanticism, German Idealism, American Transcendentalism, Psychoanalysis and psychology in general, Existentialism, even Postmodernism, to name a few. Under his influence the arts gradually abandoned "objective" representation of external reality (mimesis) in favor of art reflecting the artists' inner states: Impressionism (Ex. 3), Expressionism (Ex. 4), Surrealism (Ex. 5), Cubism (Ex. 6), Dada (Ex. 7), Futurism (ex. 8), Minimalism (Ex. 9) etc.

To get a better grip on Kant's philosophy of mind, let's consider the thought experiment called "The Humunculous Problem." Suppose a person says she can objectively understand herself because she has the ability to imagine a little person (a humunculous) in her head who assumes the task of objectively evaluating her actions — a third eye if you will. The problem is that the humunculous is limited by *its* perception, so we create a second humunculous, to objectively observe the first, but that version of the self is still labors under the same problem of perception, and so forth to an infinity of humunculi (Ex. 10)

A more down – to- earth example is psychoanalysis. Psychoanalysis may be thought of a radical expression of the Kantian project — studying how the human mind works in order to understand its cognitive determinants (how we process and perceive the world). Sadly, this project falls prey to the critique that subjectivism degenerates into mere anecdotal introspection. Critics complain that psychoanalysis, for all its benefits, ultimately reflects Freud's personal psychology — his obsessions, neuroses and stressors. However, one can easily level this critique at *any* model of the mind as representing a personal expression of the author's peccadillos rather than a general description of the architecture of human comprehension.

What does all this have to do with evidence? It's important to note that Kant's view of the mind is currently the dominant model among linguists, psychologists and educational theorists. We can only know what our mental structures allow us to perceive. Our sense of reality is but a function of inherently flawed faculties of perception, which, in addition to the basic structures I've already mentioned, includes all manner of things like unconscious neuroses, bias and experiential influences, and last but not least — emotion. It is precisely these "perceptual influencers," if you will, which concern us as litigators. The question for lawyers then is how much *can* we account for this these "influencers" even as we attempt to disinfect our evidence?

The frustrating upshot of all this is that evaluating evidence is compromised by powerful internal forces ironically beyond our control — personal bias, unconscious prejudiices, cultural bias, the infirmities of our senses. We've also learned that the very parameters of experiment as well as we as observers affects the nature evidentiary results.

The lesson to be learned here is: don't get too excited if you think you find a fat, juicy piece of evidence. Finding it is but the first step. Shuffling off the coils of your initial impressions is the real challenge. How? Hone your x-ray powers of observation. Pinpoint the essence of the evidence to see if it smells good. Deploy your extra sensory perception. Anticipate how your opponent may attack its reliability it. You may find your golden apple is worm-ridden.

In the late nineties a group of Israeli particle physicists attempted to test the reliability of what we observe on a microscopic level by actually constructing an artificial humunculous. It has long been theorized that a human observer, *by her very observation*, can alter experimental data. This is called, naturally enough, "The Observer Effect." These scientists devised an experiment to test the effect.

They began by examining a flow of electrons and other subatomic particles.
As they attempted to observe the flow of these particles, the flow curved, when, according to the law of physics it had absolutely no reason to curve. So they fabricated a robotic eye to observe the flow — a sort of automated humunculous. Lo and behold, this "eye" recorded no curvature in the flow. What the heck was going on?

No one can explain this phenomenon, although there's no shortage of theories. Does the presence of a biological organism alter the quantum field which surrounds everything? Or is it the presence of a *conscious* biological organism? Could a lower biological organism also affect the flow? Who knows? My point is that we tend to lionize the very concept of quality evidence, yet even "quality evidence" is questionable. Hone your skepticism toward the belief that evidence is a panacea in the search for knowledge and truth and carefully, so carefully, separate the wheat from chaff, especially when you plan to use it to persuade another party.

Law is particularly vulnerable to the problem of subjectivity. Law is based on policy, and policy is ultimately subjective, no matter how many "objective" criteria we can dream up

to justify it. Criterion such as the utilitarian's invocation of "the greatest good for the greatest number", or Chicago's economic school of legal analysis, – any result applying these criterion may be derived by the manipulation of predicates and evidence the source of which is our subjectivity and bias. Conclusions regarding abstract concepts such as "fairness" are foregone. As such, I cannot help but conclude that opinions are ultimately a reflection of the writers/speaker's predilections and perspective. This is perhaps why they are called "opinions."

Legal concepts are just language, worse, they're abstract language, devoid of intrinsic meaning and slippery in their meaning even within context. Language assumes meaning only when it's deployed in context, by a writer or speaker who is a prisoner of her perspective. As the language of litigation, evidence exhibits the same strength and weakness as language. It assumes meaning only in context, it is subject to multiple interpretations, and it is colored by bias. Back to our examples.

In 1995, I had graduated my JAG Corps internship and taken a job with the Fifth Circuit Solicitor's office in Columbia as an Assistant Solicitor. I was eager to prove my mettle as a litigator but found myself, once again, prosecuting DUI's and DUS's and other traffic - related offenses. Now, there is nothing wrong with traffic but having already tried hundreds of these cases as a Special Assistant United States Attorney, a post I held at Fort Jackson, I was naturally looking to further develop my litigation skills. So when I was offered to prosecute a crack possession, I jumped at it.

The defendant was a thirty-year-old crack addict who was caught with a couple grams at a well-known "shooting gallery" in Columbia — a place where junkies congregate to do their thing. Prior to taking the case, I should have inspected the *corpus delecti* — the actual crack I was to admit into evidence. Testing had consumed most of the drug; only a few sad streaks of white dust still clung to the side of the vial. Well, in for a penny, in for a pound. I was determined to give it the old college try.

The defense was the drugs weren't his. The defendant was on probation for a prior drug offense and would have to do fifteen if I succeeded in convicting him. Unbelievably, he took the stand in his defense and opened the door to his priors. I was elated. If the amount of crack was insufficient to convict, I would still able to get his prior drug conviction into evidence.

But — my tactic backfired. Instead of viewing the prior as evidence of his guilt, the jury took pity on him and acquitted him. I surmised there just wasn't enough drugs to send this guy away for a long term. Would I have gotten a conviction had I left the prior alone, who knows? Probably not, given the make-up of the jury.

But the takeaway is that evidence does not exist in a vacuum. Before parading your discoveries, think about how the evidence will play out in the big picture. The clever litigator unearths all the relevant and reliable evidence, the wise litigator knows how to

use it, and perhaps more importantly, the discipline and the long-range view not to use it, if possible.

I also learned from my "crack case" that evidence is highly malleable in its *effect*, ultimately subjective, beauty in the eye of the beholder. If the crack case were to be decided on the basis of logic alone, his prior would have overcome his claim that he didn't do it. But logic is not our only mistress.

This case also illustrates that the reader/ listener/factfinder colors evidence with *her own* meaning derived from *her* perspective of reality. If the factfinder' s experience is one that views authority as oppressive, she will treat the same piece of evidence differently than say a child of a law endorsement officer.

In our quest to use evidence to describe reality, or even more ambitiously, advocate a moral agenda, the best lawyers and judges can do is create and evaluate competing rhetorical models of "justice", recognizing that no particular model can wholly lay claim to "the truth." We must exercise humility in this regard and preserve the dialectical process as an asymptotic effort to realize truth.

The careful evaluation of evidence plays a central role in this quest. But the real work lies in uncovering the unconscious biases which fuel rhetoric. A common critique of Freud is that his entire program was a reflection of his own neuroses and psychology. Clearing away the underbrush of bias and other psychologically induced impediments may be the best we can ever do for language, for a clear understanding of what a particular piece of evidence means within a particular context.

Now, to widen our lens a bit again. There are some views, mostly 19th century, which hold that Plato introduced the scientific method to Western thought. See Grote, for example. This claim, with all due respect to Mr. Grote's erudition, is hogwash. Nowhere in the dialogues does anyone conduct an experiment – the hallmark of the scientific method.

So where did the evidence based inquiry originate? We cannot definitively say that the law introduced the scientific method, although some aspects of the law approximates aspects of the scientific method, such as cross examination. But it certainly introduced the idea that claims must be supported by evidence.

Up until the time of Bacon and Galileo, western thought was essentially speculative and rationalistic, *a la* Descartes and Augustine. Thinkers thought in terms of theory and logic based upon deduction and induction. They established "self-evident" assumptions, created new major premises based upon these assumptions and developed conclusions so far removed from reality as to be laughable. Medieval philosophers seriously debated how many angels can fit on the head of a pin.

In contrast to speculation, empiricism viewed evidence as the royal road to truth. We can see this notion articulated in the incursions science has made into the legal process where expert testimony plays an ever - increasingly central role. But no matter how great evidence is, and don't get me wrong, I think it is a wonderful discovery, we have to be mindful of the fact it is not necessarily benign. Evidence can be an extremely dangerous tool, especially for the person(s) exercising it, and for the persons over whom it is exercised.

Intellectual devotion to evidence can be pricey. Results which are a product of evidentiary analysis are often counterintuitive, even disturbingly so, and the analyst often risks his professional reputation, even life and limb, if the results are politically dynamite.

Evidence can pose, and often does pose, an existential challenge to the dominant power structures and their interests (their main interest being, of course, the retention of power) by attacking their core beliefs. See, for example, the current conflict between the evidence of global warming and the oil industry. Darwin's discoveries also come to mind.

The prototypical example of this is Galileo's Pisa experiment (Ex. 11 Galileo). You will recall that Aristotle asserted in his *Physics* that heavier objects fall faster than lighter objects. At first blush this makes sense, right? It took almost two millennia before someone (Galileo) had the bright, and courageous, idea of challenging this titan of natural philosophy as ensconced in Catholic intellectual dogma by simply testing the proposition.

His famous experiment of dropping two balls of differing mass from the top of the Tower of Pisa conclusively proved Aristotle wrong. Objects of different mass fall at precisely the same rate. This simple experiment which used evidence as the criterion of truth was incredibly far reaching in its implications. The Church fathers surely weren't happy with Galileo attacking their fair-haired child Aristotle, whom they had bought lock, stock, and barrel at least as far as "science" was concerned, regardless of the fact if he was a pagan.

More disturbing to the Vatican was the fact it implicitly championed the idea that the dominant power structure does not have a monopoly. Might did not make right. Worse the church's cornerstone doctrine of its infallibility as expressed in the infallibility of the of the pontiff as the direst spiritual descendant of Peter was shown to be a utter falsehood, which, by the way, could not have come at a worse time for the Church. Northern European Protestantism challenged their political and spiritual hegemony.

True, Galileo exhibited the highest of Enlightenment virtues before the Enlightenment proper occurred a century later, but he was simply following the evidence as any conscientious thinker would do, regardless of where the evidence leads, regardless of how counter-intuitive the results may be, and regardless of how the establishment will perceive and/or react to it. Of course, in Galileo's case, this led to his martyrdom. We have to ask ourselves, then, despite Galileo's courage and integrity, was he wise in sharing his experimental results, especially the later ones related to heliocentrism. To

return to my overarching theme, its fine and dandy to unearth evidence, the decision to use it is another matter.

It is an axiom of enlightened thinking that evidence rescued us from the dark. And on a certain level I believe this to be true. But it can also lead us into some challenging paradoxes and thorny contradictions. Take for example the thought experiment called "Schrodinger's Cat." Schrodinger was a famous German quantum theorist of the last century who developed a set of equations which described subatomic particle energy states, appropriately called the Schrodinger Equations. (Ex. 12 - Schrodinger) These equations were hugely influential and postulating that the only way we can predict the behavior of subatomic particles is to picture them mathematically as placed in "probability clouds." The famous thought experiment in his name illustrates the Alice in Wonderland quality of his discoveries, and of quantum theory in general.

Imagine a lump of radioactive material in a box attached to a trigger which releases cyanide gas when the material decays enough to activate the trigger. The experimenter places a live cat in the box which of course will die once enough radiation is released to trigger the reals of the cyanide.

Quantum mathematics tells the experimenter that the subatomic particles releasing this radiation will drop in their "orbits" as the radiation is released. But the math can only give us a probability that these particles will occupying a certain position at a certain point in time, a position that will trigger the release of the gas and kill they cat. In other words, the experimenter cannot say for sure when the material has decayed to the point where it triggers the release of the gas, thus signaling that the cat is dead.

At one point the math says that the probability that the cat is dead equals the probability that the cat is still alive. According to the math, which is the only way we can understand this stuff, as we do not have the technology to observe particles at this level, the cat is both dead and alive which, of course, is impossible. The only way to tell is to open the box to see if, indeed, the cat is dead or alive. It cannot be both, and no matter the state of the cat if we were to peak into the box, it would contradict the math which is impossible. The point is that our friend, experimental evidence, combined with quantum mathematics has led us to the "zombie cat" (Ex. 13). We are left scratching our heads and asking: what do we really know?

Now, before we bid adieu to evidentiary conundrums and paradoxes, we have to discuss that nightmare creature of the scientific imagination --Quantum Entanglement. Quantum Entanglement, or Q.E., is a quantum phenomenon in which two subatomic quantum particles, such as electrons, react identically to the same stimulus regardless of the distance separating them (Ex.14).

One of the particles could be on Earth, the other in the Andromeda galaxy. Big Science does not question the evidence that Quantum Entanglement exists, even as it does not understand its nature, although of course there is no paucity of speculation. Let me add

here that Science does not question the veracity of quantum physics at all — it has made some astounding predictions, predictions which have been verified as accurate. Q.M's latest victory has been the discovery of the Higgs Boson Particle, which up until it was proved to exist using Switzerland CERN supercollider, was only a mathematical ghost.

Q.E. is akin to those tried and true medications doctors use of which they have no idea how they work. Regardless, Q.E. is the cornerstone of quantum computing, heralding not a new chapter in the evolution of computing, but a completely new era in the science of computing, and in science generally.

The idea of Quantum Entanglement is not new. Several decades ago, particle physicists were doing what they do today – playing with the various permutations of quantum formulae. When this curious mathematical anomaly popped up, the radical nature of its theoretical implications flew in the face of so much accepted "classical" physics (if that term can even be applied after 1905) that no less a personage than Albert Einstein regarded Q.E. as just another mathematical ghost, dismissing its appearance as "spooky action at a distance." Spooky indeed. I wonder if Einstein really understood just how spooky it was.

All of which is well and fine, but on its face is the inescapable implication:
Q.E. challenges our traditional notions of time and space, the basic categories of Kant postulated structures our perception. In other words, time, space, and causality, as physics has understood these concepts, is an illusion created by our minds — *precisely Kant's theory*. Everything physics has postulated for millennia, theories which depend on space-time as a fundamental assumption, theories which have worked just fine in their applications and which constitute the bedrock of our civilization – are just bunk. Can it be said, time and space are dead? We have dutifully followed where the evidence has taken us, like good little Enlightenment boys and girls, and it has led us to the abyss.

Forgive the melodrama, but the surreal nature of Q.E. *is* vexing. Some day we might be able to reconcile its properties with a more intuitive understanding of the world. But as things stand, we are like Aristotle, clutching to our breast a beat up basket of ideas, waiting for our Galileo to make sense of it all again. But let us, as lawyers, pick up the gauntlet that rationality's paradoxes has so rudely tossed at our feet, employ out imagination, and do battle.

I was several years into my personal injury practice when I encountered my first severe brain injury worker's compensation case – we'll call the client Alan. Alan was a linesman who fell from a 30-foot telephone pole in the course of his employment. He unfortunately landed on his head, fracturing his skull and several facial bones, severely lacerating his face and breaking his left upper extremity. At the time he was only 23, but he was a smart kid who had already shown a flair for leadership by his recent promotion to crew supervisor.

When I first met him, Alan was lucid, his mood good. But he soon deteriorated because of a severe brain injury. He became violent towards his family, began using illicit drugs and finally hit bottom when he was arrested for burglary in an attempt to get more drug money.

He caught a break when the solicitor *nolle prossed* the burglary due to lack of evidence, but the writing was on the wall – Alan would have to struggle with a diminished mental capacity for the rest of his life. Both the authorized and the unauthorized doctor agreed on this point as well as the fact that the fall proximately caused his brain injury.

I had a sticky evidentiary problem with this case. In order to qualify for lifetime benefits under the statute Alan's brain injury had to be severe – whatever that means. If your jurisdiction makes this a requirement, make sure your expert uses the word "severe" in his/her medical evaluation.

As I prepared for the hearing, it occurred to me that Alan could torpedo his own case by testifying – first because in order to testify at all he has to be competent, and if he is competent, did that not undermine theory of a severe brain injury case? It wasn't a settled question, but I didn't want to run the risk.

Secondly, if he did testify, I would run the risk that his mental state would somehow ruin his case, by way of a faulty memory, or his inability to relate a correct narrative or because of any number of other scenarios related to his impaired mental state. But unlike the problem physicists face with the zombie cat and Q.E., I was able to wriggle out of my dilemma by having his wife testify to the evidence my case required while Alan sat mute. Imagination in this arena goes a long way.

Ok. Let's widen our lens again. If we accept Kant's position that ultimate knowledge of the world, the "thing-in-itself," is impossible due to the inherent limits of, and problems posed by, human perception, then evidence, as the plum of perception, is sour fruit, liable to betray you in the end. The paradox arises, however, that by and large, evidence *works*, and has been responsible for human progress. Bridges get built. Medicines get fabricated. Men walk on the moon. Moreover, we have not come up with anything better than good old evidence to test our theories of reality. As attorneys, the question then becomes: how can we best use evidence, problematic as it is, to our greatest advantage.

The check case illustrated the importance of having enough evidence, other cases illustrated the importance of having the right evidence. If this is true, what is the relation between the quality and quantity of evidence? Is it better to have one over the other? My own humble opinion is that evidence can be so problematic when it gets in the hands of a skillful opponent, i.e., a lawyer who really knows cross examination, there's a better than even chance it will seriously handle your case. So know your opponent as well as yourself, and remember that your case is only as strong as its weakest piece of evidence — so deploy the highest quality evidence you can.

OK. Let's see if we what the math says. For those of you who are arithmaphobic, don't worry, it's the result that matters.

Now, suppose you are a prosecuting attorney seeking to admit some evidence. The basic equation evidentiary is clear enough:

Q1 x Q2 >= BOP (Ex.15) (This exhibit is the final equation, so bear with me.)

Where Q1 is the quantity of evidence and Q2 is the quality of evidence. This equation states that, in a given case, their product must be greater than or equal to the burden of proof. The BOP here is beyond a reasonable doubt.

Now Q1 is a nice solid variable. It means what it says. It's easily defined. Say, a hammer with blood on it and a Dear Jan letter = 2.

Q2, the quality of evidence, is another matter. The question here becomes: what affects the value of this variable. You are of course invited to speculate what variables should come into play here.

First, the quality of the evidence is enhanced by the talent of the attorney deploying it:

Or "Ta."

Just so, it is circumscribed by the talent of opposing counsel attempting to suppress it or minimize its impact:

Or "Toc."

Q2 is also circumscribed by the probability of error of the judge in suppressing or limiting it :

Or "Pej."

As well as by the probability of error of the fact-finder in interpreting it:

Or "Pef."

And by the probability of error of the prosecutor herself:

Or "Pea."

And last but not least by the probability of witness error:

Or "Pew."

Therefore the equation becomes:

Q1(Ta)/Toc x Pej x Pea x Pef x Pew >= BOP

In previous modules, I've expressed my opinion that witnesses are, to put it bluntly, trouble. That, regardless of how well you prepare them, there exists a high probability that they will say something in direct or cross that damages your case. Which is why my first rule in woodshedding is keep answers short and to the point. Do not ramble.

The quality of your evidence — or what you believe to be the quality of your evidence — is beset from all sides. First, if you manage to spot 85% the negatives of your evidence, you're doing very well, but a talented opponent will usually find some Achilles heel haven't prepared for.

This is why I would rather have one or two pieces of very high quality evidence than 5 or 6 mixed bag pieces. That's assuming of course you have a choice as some evidence will come in no matter what, the good, the bad and the ugly. Recall form my check case that major pieces of evidence will pop up during discovery which must be addressed as they most assuredly will come out at trial. This evidence is non-discretionary, evidence so embedded with the facts of the case as to be unavoidable. When I speak of cutting evidence, I mean discretionary evidence, evidence that you really don't need in order to meet your burden. What we call "stocking-stuffers." Give me enough of these and I'm on my way to sinking my opponent's case.

But *this equation* tells us that the *quantity* of evidence and the talent of the attorney are the critical variables in winning the evidence game. Both variables can certainly be enhanced by hard work. But my instinct still tells me that less is more. Ultimately all I can offer is that this is a tough tactical and strategic decision one has to make on her own, given the posture of the case in Toto. Be careful though, the nature of "quality evidence" can change over time.

Some of you may be acquainted with my "bite mark" case, in which I prosecuted a defendant charged with strong arm robbery. The defense was identification. The responding officer testified that he identified the defendant based upon a bite mark on his arm. When opposing counsel asked him how he knew it was a bite mark, the officer stated he was familiar with them as his toddler was in the habit of biting him.

Now there was no medical evidence that the defendant had a bite mark on his arm at the time of the original identification. Even if he did bear a mark that could have been teeth indentations, no medical opinion was proffered that indeed it was a bite mark, human or otherwise.

To my surprise and I will admit delight I suppose, the court admitted the testimony and the jury bought it -- lock, stock and barrel. In the end the jury convicted him of strong-arm robbery. The bite testimony *may* have tipped the scales against him. Why? I think the

bite mark testimony moved them because they equated his being a father close enough to toddler for her to bite him with being “a good guy” in general who wouldn’t lie -- something along those lines — “loving father credibility.”

The evidence was appealing on an emotional, even sentimental level, not because it was especially probative. And people love to justify their judgements with the “gut feeling” argument, which, in my opinion, is bosh. Recall that Ted Bundy was convicted on bite mark evidence, but at least in that case a dentist established a foundation for its admission.

In the comfort of my study, all these years later, can I say would the judge have allowed it? Probably. I can’t say for sure. Suffice it to say that today, bite mark evidence is considered junk.

I’ve beaten up on the concept of evidence today, but consider this, the more we know we don’t know, the closer we are to actually knowing something real. Descartes taught us the first moral and intellectual imperative — question, not necessarily to destroy but to test — question, question others, question authority, question convention, question the rules, question yourself, question everything and then, and only then, when the field is properly cleared and graded, the underbrush of nonsense burned and buried, can we begin to build something we dare hope is real and true.

I wish you luck in all your future trials. Tread carefully.

Thank you for your kind attention.

Legal Ethics Oversights That Can Lead to Discipline and Legal Malpractice

Submitted by Jennifer R. Coates

Legal Ethics Oversights That Can Lead to Discipline and Legal Malpractice

Jennifer R. Coates
Partner
Bowman and Brooke LLP

Discussion Topics

- **Abusive Litigation Practices and their Remedies;**
- **Client Dishonesty;**
- **Keeping Clients in the Dark;**
- **Ignoring Time Constraints and Court Dates;**
- **Duty of Technology Competence and ESI;**
- **Attorney as Witness;**
- **Social Media Issues; and**
- **Questions.**

Abusive Litigation Practices and Their Remedies

Abusive Litigation Practices and their Remedies

Rule 3.1: Meritorious Claims and Contentions

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…."

Abusive Litigation Practices and their Remedies

Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

- Destroy or falsify evidence;
- Disobey an obligation under the rules of a tribunal;
- Make frivolous discovery requests;
- In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence; or
- Request a person other than a client to refrain from voluntarily giving relevant information to another party.

Abusive Litigation Practices and Their Remedies: Additional Guidance/Rules

28 U.S.C. § 1927: Counsel's liability for excessive costs

"Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

Abusive Litigation Practices and their Remedies

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- Violate the Rules of Professional Conduct;
- Engage in conduct involving dishonesty, fraud, deceit or misrepresentation or prejudices of the administration of justice;
- State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; and,
- Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

Abusive Litigation Practices and their Remedies

Relevant Cases

- *Cadorna v. City and County of Denver*, 245 F.R.D. 490 (D. Colo. 2007)
- *Attorney Grievance Commission Of Maryland V. Darlene M. Cocco, Misc. Docket AG No. 1, Sept. Term, 2014.*
- *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007)

What to do when your Client is Dishonest

What to do when your Client is Dishonest: Confidentiality

- Without a client's informed consent, lawyers are prohibited from revealing information related to the representation of a client (limited exceptions)
  - Rule 1.6(a)

What to do when your Client is Dishonest: Confidentiality

- Confidentiality includes information not only communicated by the client, but all information related to the representation regardless of the source.
  - ABA Model Rules Of Professional Conduct r. 1.6 cmt. 3 (1983).
- Even announcing daily work on a case on Social Media could violate confidentiality.
  - Example LinkedIn Post: I am working on an MSJ for Papa Smurf in the *Gargamel v. Smurf Village* matter.
- Lawyers are NEVER off-duty when it comes to their ethical obligations regarding client confidentiality.

What to do when your Client is Dishonest: Confidentiality

Rule 4.1: Truthfulness in Statements to Others

- "In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Keeping Clients in the Dark

Keeping Clients in the Dark

Number One Client Complaint is Failure to Communicate with Clients:

- Minnesota: In 2005, of the seventy-six files opened in 2005, neglect and noncommunication accounted for sixty-two complaints.
- Washington: In Washington, the failure to communicate is such a problem that a non-communication mediation program was established and in 2004, dealt with close to 450 complaints.
- California: Thirty-seven percent of complaints received involved a failure to communicate.

Keeping Clients in the Dark

Rule 1.4: Communication

A lawyer shall:

- Promptly inform the client of any decision or circumstance;
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- Keep the client reasonably informed;
- Promptly comply with reasonable requests for information; and
- Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Keeping Clients in the Dark

- *In re: Petition for Disciplinary Action Agst. C.M.R.,* a Minnesota Attorney, Registration No. 28788X
- *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lickiss*, 786 N.W.2d 860 (Iowa 2010)
- *In re Secrist*, 881 P.2d 1155, 1157 (Ariz. 1994)

Ignoring Time Constraints and Court Dates

Ignoring Time Constraints and Court Dates

Rule 1.3: Diligence

"A lawyer shall act with reasonable diligence and promptness in representing a client."

Comment 1: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

In re Hollis, 201 So.3d 891 (La. 2016) (lawyer was found to have violated Rule 1.3 by neglecting a legal matter and allowing the client's claim prescribe).

Duty of Technology Competence and ESI

Duty of Technology Competence and ESI

- Model Rule of Professional Conduct 1.1
- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
- Comment 8
- "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Attorney Duty of Technology Competence and ESI: Relevant Cases

- ***In re Joel B. Eisenstein***, Case No. SC95331, slip op. (Mo. Apr. 5, 2016) (attorney discipline)
- ***Rodman v. Safeway,*** 2016 WL 5791210 (N.D. Cal. October 4, 2016)
- ***Arrowhead Capital Fin. v. Seven Arts Ent***., No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545 (S.D.N.Y. Sept. 16, 2016)

Attorneys as Witnesses: What NOT to Do

Attorneys as Witnesses: What NOT to Do

- Rule 3.7: Lawyer as Witness

a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Attorneys as Witnesses: What NOT to Do

- *Harris & Hilton, P.A. v. Rassette,* Court of Appeals of North Carolina January 31, 2017, Filed No. COA16-809 Reporter 798 S.E.2d 154 *; 2017 N.C. App. LEXIS 185 **; 2017 WL 1056225
- *State v. Silva-Gonzales*, (*2015 WL 3618620 Wn. App. June 9, 2015 – unpublished*)
- *Curran v. Aetna Life Ins. Co.*, No. 13-CV-00289 (NSR), 2016 WL 3843085, at *8 (S.D.N.Y. July 11, 2016)

#SocialMedia

Attorney Use of Social Media

- 76 % of Lawyers Maintain a LinkedIn Presence
- 34% of Lawyers use Facebook for Professional Purposes
- 26% of Lawyers use Twitter for Professional Purposes
- 12% Attorneys Maintain a Legal Blog
  - 76% Lawyers Maintain a Blog for Client Development
- 56% Use of Social Networking for Client Development
- 21% Use Social Media for Case Investigation
- 27% of Lawyers Report Being Retained by a Client because of Social Networking Sites

Source: ABA 2017 Legal Technology Survey Report

Social Media and Advertising

Social Media and Advertising

- **Rule 7.2 provides:**

"Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, **including public media**."

Social Media and Advertising

- Legal Advertising may not contain false or misleading statements about the lawyer or the lawyer's services.
  - Rule 7.1, ABA Formal Opinion 10-457
- Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted.
  - Rule 7.3
  - No "Real Time" Communications

Social Media and Advertising

- Social Media Websites Should Accurately Reflect Your Practice
- Understand How Social Media Works
  - e.g. LinkedIn Capability of Designating User as an Expert.
    - Rule 7.4: Lawyers generally prohibited from claiming to be a specialist.
- Vet Endorsements, Keep Profiles Updated and Accurate

Social Media and Juror Research

Social Media and Juror Research

- Lawyers may view public areas of a Juror's social media content.
  - *See* ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466 *Lawyer Reviewing Jurors' Internet Presence* in April 2014.

Social Media and Juror Research

- No Overtures (i.e. "Friend Requests") to access Juror's Social media
  - Ex Parte Communication is Prohibited
    - Model Rule 3.5(b)
- No Pretend Profiles
  - Use of Deception to Access Juror's Social Media barred by Rules 4.1(a) and 8.4)

Thank You

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Keeping Evidence Out – Top Missed Opportunities

Submitted by David M. Potteiger

KEEPING EVIDENCE OUT:

TOP MISSED OPPORTUNITIES

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RELEVANCE DEFINED

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.

1. Materiality
2. Probability

AUTHENTICITY

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

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BEST EVIDENCE

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

"When it is the purpose of a party to establish the terms of a writing, production of the documentary original is required unless such production is not feasible." *U.S. v. Holley*, 463 F.2d 634 (5th Cir. 1972).

1. Rule 1006 Summaries

2. Rule 611(a) Summaries

Privilege

In federal question cases governed by federal law, common law applies unless the United States Constitution, federal statute or rules prescribed by the Supreme Court provide otherwise.

"Federal courts have 'the flexibility to develop rules of privilege on a case-by-case basis.'" *Trammel v. United States,* 445 U.S. 40, 47 (1980).

BEST PRACTICES

1. Label documents prepared or disclosed in litigation with confidential markings.

2. Segregate records that contain privileged information in separate files or password protect.

3. Require attorney oversight in producing documents.

4. Establish policies and procedures to limit disclosure.

5. Enter into a protective order with a clawback agreement as opposed to requiring FRE 502(d) motions.

MOTIONS IN LIMINE

KEEPING EVIDENCE OUT - TOP MISSED OPPORTUNITIES

DAVID M. POTTEIGER

A. Arguing Relevancy and Exclusion of Relevant Evidence

1. Evidence is relevant if it has any tendency to make a fact *of consequence* more or less *probable* than it would be without the evidence. – FRE 401

   a. Materiality, i.e. of consequence

      1. Implicit in definition of relevant evidence are requirements that evidence be probative of proposition it is offered to prove and that proposition to be proved be one that is of consequence to determination of action. *U.S. v. Hall*, 653 F.2d 1002 (5th Cir. 1981).

      2. "As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

      3. Evidence is "material" where it goes to substantial matters in dispute or has a legitimate or effective bearing on the decision thereof. *U.S. v. De Lucia*, 256 F.2d 487 (7th Cir. 1958).

      4. Materiality of testimony turns on its potential for affecting the course of the inquiry. *U.S. v. Fiorillo*, 376 F.2d 180 (2d Cir. 1967).

      5. Evidence of a witness' bias is always material. *U.S. v. Harvey*, 547 F.2d 720 (2d Cir. 1976).

   b. "Probability"

      1. "Bayesian Reasoning" Model

         a. "The Bayesian model presumes that before receiving the evidence, a fact-finder—tasked with determining whether a factual proposition is true or false—has some belief about how probable it is that the fact is true.... The fact-finder

then uses the new evidence to update this subjective probability estimate. Bayes's Rule, an equation derived from basic formulas in probability theory, dictates how the fact-finder should perform this updating to achieve maximum accuracy." Wittlin, Maggie, *Hindsight Evidence*, 116 Col. L. Rev., 1323, 1334 (2015).

b. "Evidence is relevant under this model to the extent that it is more consistent with one factual proposition than it is with the negation of that proposition." *Id.* at 1333.

c. "Actual jurors are far from perfect Bayesians: They do not perform difficult mathematical updating, they judge using heuristics and biases that subject them to cognitive traps, and they use evidence to construct narratives rather than evaluate the evidence piecemeal." *Id.* at 1340.

2. "Inference" Model

a. "Jurors find facts by choosing the best explanation for the evidence presented at trial." *Id.* at 1333.

b. "Evidence is relevant to the extent that it 'is explained by, and hence justifies' the narrative offered by the party introducing the evidence." *Id.* at 1333. It aligns with the empirically supported 'story telling model' of juror decision making… And it mirrors how trials proceed in practice: The two sides vie for the jury's verdict by presenting competing accounts of what happened, each insisting that the evidence supports its own story better than the other side's." *Id.* at 1341-2.

B. Arguing Against Authenticity

1. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. – FRE 901

   a. First the proponent asserts that a proffered item is relevant to prove (or disprove) a fact of consequence in the case. This assertion of relevance then determines what it is the proponent claims an offered item to be for purposes of authentication, typically that it is connected to a specific person or to one of the litigated events in the case. For example, in a prosecution for possession of an illegal substance, if a plastic bag of white powder is offered into evidence, the government would assert that the bag is relevant both because the defendant possessed the bag and because its contents are illegal. The requirement of authentication would be satisfied by evidence sufficient to support a finding that it is the very bag that was seized from the possession of the defendant. It is this "connection" to a person that is commonly proved to identify or authenticate the exhibit. Other facts beyond the scope of Rule 901, such as the illegal contents of the bag, may also be necessary to make an item relevant." 2 McCormick on Evidence, note 11 § 212 (Kenneth S. Broun ed., 6th ed. 2006).

      1. "The treatise is positively mistaken when it asserts that 'the illegal contents of the bag' is a fact 'beyond the scope of Rule 901.' Holding up a bag of white powder and having the witness testify 'this was found on the defendant's person' does not establish that the substance was cocaine as opposed to, say, baking powder. Having a forensic chemist testify that 'the white powder in the bag is cocaine' does not establish that it has anything to do with the defendant. Both are required to complete

the foundation under FRE 901, but no treatise provides an account of foundation that tells us why. The explanation that seems to have eluded commentators is this: a complete foundation requires evidence of all facts that, if true, make the exhibit relevant under the offering party's theory of the case." Schwartz, David S., *A Foundation Theory of Evidence*, 100 Georgetown L. Rev., 95, 103 (2011).

2. "Every fact needed to identify the evidence—to make an assertive claim about what the evidence is—is a fact on which relevance depends and which must be established by evidence sufficient to support a finding of its probable truth." *Id.* at 110.

b. "Authentication thus serves to enhance the accuracy of the factfinding process by screening out evidence that might be false or otherwise unreliable, whether as the result of fraud or innocent mistake." Mueller & Kirkpatrick, *supra* note 1, § 9.1, at 1065.

c. "The use of the word 'authentication' together with several of the examples listed in FRE 901(b)24 reinforce the widespread misimpression that FRE 901 deals with exhibits only, and that it is concerned with 'genuineness,' which is itself typically misinterpreted to mean preempting concerns about forgery and fraud in their production and presentation. It is worth noting that neither the title of FRE 901('Requirement of Authentication or Identification') nor its text in subsection (a) mention the word 'exhibit.' The evocative phrase "matter in question" is broad enough to encompass any form of evidence, including testimony." Schwartz, David S., *A Foundation Theory of Evidence*, 100 Georgetown L. Rev., 95, 104 (2011).

C. Best Evidence Rule - Proper Applications

1. "An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." - FRE 1002

    a. "When it is the purpose of a party to establish the terms of a writing, production of the documentary original is required unless such production is not feasible." *U.S. v. Holley*, 463 F.2d 634 (5th Cir. 1972).

2. "The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court." - FRE 1006

3. Consider also pedagogical summaries. FRE 611(a)

D. Preventing Waiver of Privilege

1. "Federal courts have 'the flexibility to develop rules of privilege on a case-by-case basis.'" *Trammel v. United States*, 445 U.S. 40, 47 (1980).

    a. In federal question cases governed by federal law, common law applies unless the United States Constitution, federal statute or rules prescribed by the Supreme Court provide otherwise. - FRE 501.

    b. In diversity suits, state law on privilege applies.

2. Examples:

    a. Privilege against self-incrimination

    b. Attorney-client privilege

    c. Work product immunity

d. Doctor-patient privilege

e. Psychotherapist-patient privilege

f. Confessional privilege

g. Spousal privilege

h. Banker-client privilege

i. Journalist privilege

j. Executive privilege

k. Government privileges protecting confidential informants

3. Best Practices for Avoiding Inadvertent Disclosure or Waiver of Privilege:

a. Label documents prepared or disclosed in litigation with confidential markings.

b. Segregate records that contain privileged information in separate files or password protect.

c. Require attorney oversight in producing documents.

d. Establish policies and procedures to limit disclosure.

e. Enter into a protective order with a clawback agreement as opposed to requiring FRE 502(d) motions.

E. Other Objections Commonly Overlooked or Misused

1. Examples:

a. Vague/Ambiguous

b. Compound

c. Argumentative/Harassment

d. Asked and answered

e. Assumes facts not in evidence/Lacks foundation

f. Improper opinion

g. Calls for narrative

h. Completeness

i. Improper/Incomplete Hypothetical

j. Beyond the Scope

F. Using Motions *in Limine* and Motions to Exclude

1. A motion in limine is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984).

   a. Black's Law Dictionary defines a motion in limine as "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial." *Black's Law Dictionary* (10th 2014).

   b. "Because we conclude that it was procedurally improper for the court to dispose of [defendant's] inequitable conduct defense on a motion in limine, we reverse the court's decision and remand for further proceedings." *Meyer Intellectual Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1378 (Fed. Cir. 2012); *see also Mid–America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir.1996) (finding that argument regarding the sufficiency of evidence "might be a proper argument for summary judgment or judgment as a matter of law, it is not a proper basis for a motion to exclude evidence prior to trial").

2. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege. – FRE 104(a)

a. “Under Rule 104(a) preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court.” Linn, C. and Beck, M. *The Strategic and Tactical Uses of Motions in Limine in Federal Criminal Trials.* 46 Criminal Law Bulletin 285, 291 (2010).

b. “[E]vidence concerning a witness’s character for truthfulness (or lack thereof) or previous conviction is often the subject of pretrial motion.” *Id.; see also* Fed. R. Evid. 608 and 609.

c. “404(b) [prior crimes, wrongs or acts] objections are among the most common objections raised by motion *in limine*.” *Id.*

Presenting Evidence in the Courtroom – What Doesn't Work

Submitted by David M. Potteiger

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Wisconsin's Employment Law Firm™

PRESENTING EVIDENCE:
WHAT DOESN'T WORK

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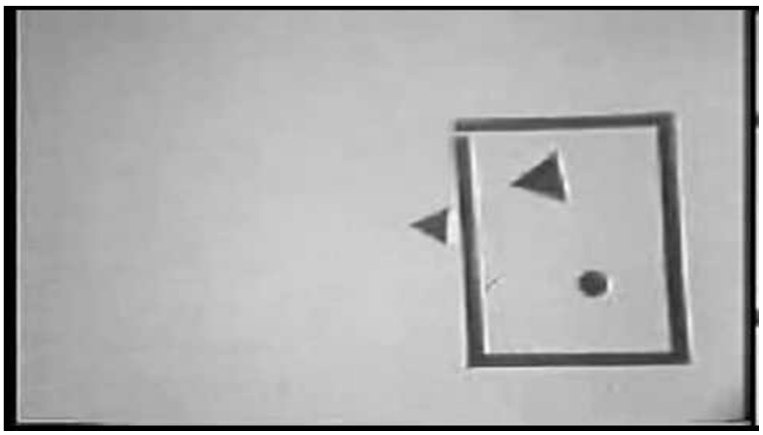
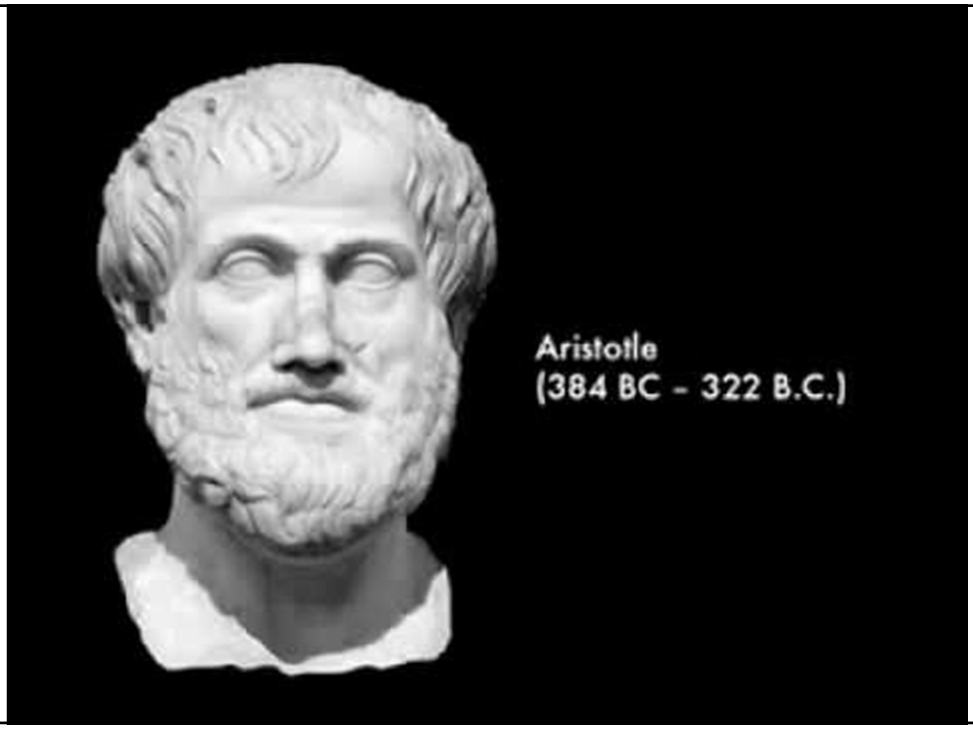
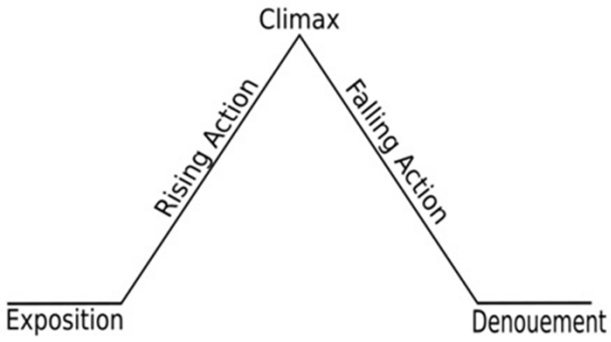
HEIDER AND SIMMEL
AN EXPERIMENTAL STUDY OF APPARENT BEHAVIOR




Aristotle
(384 BC - 322 B.C.)

Six Elements of Theatre

1. Plot
2. Character
3. Theme
4. Diction
5. Chorus
6. Spectacle



CHARACTERS

1. Protagonist & Antagonist
2. Anti-Hero
3. Stock v. Dynamic Character

THEME

DICTION

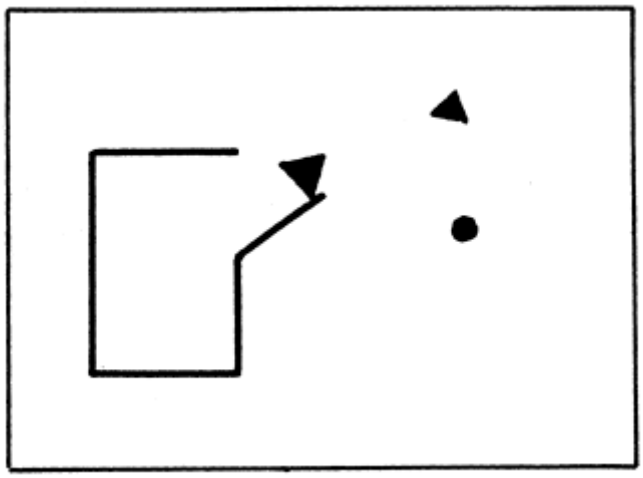
CHORUS

PRESENTING EVIDENCE IN THE COURTROOM - WHAT DOESN'T WORK

DAVID M. POTTEIGER

I. INTRODUCTION: THE SCIENCE OF STORYTELLING

In 1944, experimental psychologists Fritz Heider and Marianne Simmel published a number of experiments. Heider, F. & Simmel, M. "An Experimental Study of Apparent Behavior." American Journal of Psychology 57 (1944): 243-259. Heider and Simmel showed a series of subjects an 84 second animation featuring three geometrical figures: a large triangle, a small triangle and a disc. The only other figure was a rectangle with a portion which appeared to open and close as if it were a door.



These shapes moved about the screen at various rates and in various directions. Heider and Simmel described the video in the following way:

> "The large triangle is referred to by T, the small triangle by t, the disc by c (circle) and the rectangle by 'house.'
>
> 1. T moves toward the house, opens door, moves into the house and closes door.
> 2. t and c appear and move around near the door.
> 3. T moves out of the house toward t.
> 4. T and t fight, T wins: during the fight, c moves into the house.
> 5. T moves into the house and shuts door.
> 6. T chases c within the house: t moves along the outside of the house toward the door.
> 7. t opens the door and c moves out of the house and t and c close the door.

8. T seems to try to get out of the house but does not succeed in opening the door: t and c move in circles around outside of the house and touch each other several times.
9. T opens the door and comes out of the house.
10. T chases t and c twice around the house.
11. t and c leave the field.
12. T hits the walls of the house several times: the walls break." *Id.* at 245.

The first experiment consisted of a group of 34 subjects who were instructed simply to "write down what happened in the picture." Of the 34 subjects, only one described the film almost entirely in geometrical terms. The rest spoke in terms of animated beings.[1] The study revealed a variation in the plot and themes recounted, but a majority of the subjects discussed what they had seen as having feelings and motivations.

Human beings assemble relatively innocuous movements of geometrical shapes into narratives, because "[h]umans are creatures of story." Gottschall, Jonathan. The Storytelling Animal: How Stories make us Human. Boston: Mariner Books, 2012: 15. While awake, we are engulfed in a wave of stories: from literature to movies, sporting events, gossip, make believe and even daydreams. Then, we fall asleep and we dream of even more stories.

Stories are "central to our essential cognitive activities, to historical thinking, psychological analysis and practice, to political critique and praxis." Nash, C. Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy, and Literature. London: Routledge, 2005: xi. Narratives provide organization and bring context and meaning to the chaos of the world by "integrating cognition and emotion … across all sense." Gregory, E. & Rutledge, P. Exploring Positive Psychology: The Science of Happiness and Well-Being. Santa Barbara: Greenwood, 2016: 155.

1. Interestingly, even Heider and Simmel described their own experiment not in "purely geometric terms" but with "a few 'anthropomorphic' words" because describing the video in any other fashion "would be too complicated and too difficult to understand." *Id.*

In fact, "our brains are not hard-wired to understand logic or retain facts for very long," says Jennifer Aaker, author of The Dragon Fly Effect: Quick, Effective, and Powerful Ways to Use Social Media to Drive Social Change. Hoboken: Wiley, 2010. "Our brains are wired to understand and retain stories."

That our brains are geared to remember allegory rather than random data is evidenced by narrative chaining, an effective method of memory recall. Bower, G., & Clark, M. "Narrative Stories as Mediators for Serial Learning." Psychonomic Science. 14 (1969): 181-182. Studies show that when subjects organize lists of words into a story, their ability to recall those words is significantly increased over control subjects.

Our brains function this way as a result of evolutionary biology. We adapt shortcuts into our neurological framework to accelerate our mental processing.

> "An experience makes us more familiar with situations, we can respond to them in ways that require less of the effortful processing of conscious attention operating within working memory. With increasing familiarity, situations can be processed in older, more posterior regions of the brain in faster, parallel, and less effortful ways, leaving more room in working memory to handle real novelty … this is one function of storytelling: that it makes us more expert in social situations, speeding up our capacity to process patterns of social information, to make inferences from other minds and from situations fraught with difficult or subtle choices or to run complex scenarios." Boyd, B. On the Origin of Stories: Evolution, Cognition, and Fiction. Belknap Press: Cambridge (2009): 49.

Dr. Anthony Jack, an experimental psychologist at Case Western Reserve University, uses fMRI to study how stories affect our brain chemistry.

> According to Jack: "Neuroscience shows us that there's a fight between two types of reason … that are aimed at different types of truth. On the one hand there's cold, detached, logical, analytic reason. On the other hand, there's a warmer, fuzzier type of social and emotional reason…. To put it another way there's a tension between scientific truth and social narrative truth…. The brain is actually organized in such a way to keep these two types of thinking separate and we naturally oscillate between them."

When Jack and his colleagues gave subjects scientific puzzles, activity increased in the analytical areas of the brain. Conversely, when Jack's team presented subjects with social narratives, the empathetic areas of the brain ramped up activity. Most importantly, when one area awoke the others became dormant. Jack, A., et al. "fMRI Reveals Reciprocal Inhibition between Social and Physical Cognitive Domains." NeuroImage 1 February, 2012: 385-401. Jack is essentially describing what Aristotle termed *mythos* and *logos* - story and logic.

Stories literally change our physiology. In one study, subjects watched several videos depicting heroic and compassionate acts. Researchers took scans of their subjects' heart rate, respiratory rate, sinus arrhythmia and fMRI scans of medial prefrontal cortex activity which is associated with higher-level cognitive process, such as empathy.

The results showed changes in the body chemistry of their subjects as if the subjects were living the videos in front of them. Not only did body chemistry change, but so did feelings. Researchers posited that observing another's suffering alleviated through an altruistic act, caused the audience to want to act altruistically. Piper, W., et al. "Autonomic and Prefrontal Events during Moral Elevation." Biological Psychology., 23 March, 2015.

This phenomenon is why watching movies like *It's a Wonderful Life* gives us a deep sense of hope, but also why we scream in terror, hide our eyes, and ball up to protect our vital organs, when Freddie Krueger jumps out of nowhere on the big screen. We literally *live* the stories we see.

So, if stories change us physiologically and emotionally, if we learn through narrative, recall information better through narrative, and are persuaded to act through narrative, why is so little attention paid to presenting evidence in this way?

Most law schools utilize an iteration of the formulaic IRAC approach to legal writing. IRAC stands for issue, rule, analysis/argument, and conclusion. The IRAC approach requires spotting the issue, identifying the appropriate rule of law, applying the law to the facts of the case, and proclaiming a conclusion. While the IRAC approach may form the basis for traditional lawyering, the rigid style makes for poor storytelling.

In addition, there is resistance to storytelling in the legal profession. Some assume that literary theory does not translate to civil procedure. "Lawyers present fragmented or broken narratives. Competing stories introduced by the other party interrupt plots. Procedural rules and trial structures fracture narrative into evidentiary pieces that must be reassembled by fact-finders in their deliberations—and narrative instructions are not included with instructions of law. Evidence is admitted piecemeal, and cross-examinations interrupt narrative flow, or profluence." Meyer, P. "How Lawyers Can Craft a Case Narrative to Spark Jurists' and Jurors' Interest." ABA Journal. 1 January, 2015.

To be better lawyers, we must learn how to present evidence more effectively as storytellers. We need to reconsider traditional notions of legal practice, and we need to study the fundamentals of storytelling. In his *Poetics*, Aristotle sets forth his six elements of theatre: plot, character, theme, diction, chorus, and spectacle. By studying the six elements of theatre, we can present evidence at trial in more meaningful ways.

II. PLOT

According to Aristotle, a story's plot is "the combination of incidents, or things done in the story." Aristotle wrote that drama "is essentially an imitation not of persons but of action and life, of happiness and misery. All human happiness or misery takes the form of action; the end for which we live is a certain kind of activity, not a quality."

"Plot, then, is conceived to be the outline or armature of the story, that which supports and organizes the rest." Brooks, Peter. Reading for the Plot: Design and Intention in Narrative. Knopf Books: New York (1984).

Plot typically "involves agents pursuing some goal," says Patrick Colm Hogan, professor of English and comparative literature at the University of Connecticut. "The standard goals are partially a result of how our emotion systems are set up." Hsu, J., Scientific American Mind. "The Secrets of Storytelling: Why We Love a Good Yarn our Love for Telling Tales Reveals the Workings of the Mind." 18 September, 2008.

Dramatists have the ability to craft entire plots from beginning to end. Lawyers do not share that luxury. At the initial client interview, your client will provide you with the plot outline. Therefore, during a client intake, attorneys should identify what plot structure is appropriate in order to tell the most compelling story.

There are a variety of different plot structures. Aristotle viewed plot in three acts: the prologue, episode and exode or *protasis, epitasis* and *catastrophe*. In the *protasis* the characters and subject of the drama are introduced. The main action develops in the *epitasis*. The *catastrophe* is the point at which the central motivation is achieved. In 1863, Gustav Freytag published *Die Technik des Dramas*, in which he described a five part plot structure known as Freytag's Pyramid. Freytag's Pyramid is the traditional story arch taught in secondary schools. It consists of exposition, rising action, a climax, falling action and a denouement. John Truby is a Hollywood story consultant. He has worked on films such as *Sleepless in Seattle, Scream,* and *Shrek.* Truby favors a seven step story structure, featuring: weakness/need, desire, opponent, plan, battle, self-revelation, and new equilibrium.

> "From the very beginning of the story, your hero has one or more weaknesses that are holding him back…. Desire is what your hero wants in the story, his particular

> goal…. An opponent not only wants to prevent the hero from achieving his desire but is competing with the hero for the same goal…. The plan is the set of guidelines, or strategies, the hero will use to overcome the opponent and reach the goal…. Throughout the middle of the story, the hero and opponent engage in a punch-counterpunch confrontation as each tries to win the goal…. This crucible of battle causes the hero to have a major revelation about who he really is…. At the new equilibrium, everything returns to normal, and all desire is gone. Except there is now one major difference. The hero has moved to a higher or lower level as a result of going through his crucible." Truby, J. The Anatomy of Story: 22 Steps to Becoming a Master Storyteller. Faber and Faber, Inc.: New York (2007): 40-53.

In 2010, Nigel Watts proposed his "Eight-Point Story Arc." Watts, N. Write a Novel and get it Published. New York: Mcgraw-Hill (2010). The eight points consist of stasis, trigger, the quest, surprise, critical choice, climax, reversal and resolution. Stasis provides the setting for which the story takes place. The trigger is a happening which is out of the protagonist's control and which ignites the protagonist's journey. The quest is the journey undertaken by the protagonist either pleasant or unpleasant. A surprise involves unexpected but plausible obstacles or conflict the protagonist must overcome during the quest. The critical choice is the protagonists defining moment where his or her true character is revealed. Climax consists of peak tension. The reversal is known is the natural consequence of the climax which alters the status quo. Finally, resolution is a return to a new stasis.

Most plot lines are linear, told chronologically. However, there are numerous non-traditional plot lines. A meandering plot is episodic such as in the movie *Big Fish.* A spiral story is one in which the theme is analyzed repetitiously, deeper and deeper at each level such as *Memento* or *Mulholland Drive*. A branching story advances multiple plot lines. Examples of a branching story are movies such as *Love Actually, Pulp Fiction,* or *Crash.*

As noted above, your client will provide the plot outline, but it is only an outline. The client is entirely dependent upon their attorney to determine what structure best captures the

dramatic action. How the outline is filled with additional information to enrich the dramatization is purely the attorney's province.

But, while selecting the appropriate plot structure is important, more crucial is capturing the essence of any good plot. The core component of a plot is the concept of *catharsis.* *Catharsis* involves "some kind of restoration of order and a renewal or enhancement of our positive feelings for the hero." Levin, R. Looking for an Argument: Critical Encounters with the New Approaches to the Criticism of Shakespeare and His Contemporaries. Rosemont Publishing: Danvers (2003): 42.

According to Georg Wilhelm Friedrich Hegel (1770-1831) *catharsis* involves a triad between a *thesis,* its degeneration to *antithesis,* and the reconciliation of the two states called *synthesis.* This triad is mirrored in Aristotle's three act structure.

Catharsis is often central to our principles of justice and morality. "Since all that is unjust is foreseen in the laws, the impurity which the tragic process is destined to destroy is therefore something directed against the laws…. We can conclude, therefore, that when man fails in his actions - in his virtuous behavior as he searches for happiness through the maximum virtue, which is obedience to the laws- the art of tragedy intervenes to correct that failure." Boal, A. Theatre of the Oppressed. New York: Theatre Communications Group (1993).

Attorneys are not the arbiters of justice. Attorneys are limited to telling the best story to in order to persuade a jury to do what is just. Moving a jury or judge to a cathartic state is essential to storytelling and essential to offering justice for your client.

III. CHARACTER

The agents of the plot are characters who provide the vehicle for the conflict. According to Aristotle, actors "do not act in order to portray the Characters; they include the Characters for

the sake of the action." Thus, the purpose of characters is to create a more vibrant and rich story for the sake of driving the action.

It is important to understand that to your audience, *i.e.* the jury or judge, the parties are characters, the witnesses are characters, and even we attorneys are characters. So, it is important to recognize the varying types of characters and how they fulfill different roles.

To help develop characters, one should consider the Stanislavski System. Constatin Stanislavski is the father of modern method acting. He developed his system to assist actors to portray believable characters. Stanislavski posed seven questions to assist actors on this quest. 1.) Who am I? 2.) Where am I? 3.) What time is it? 4.) What do I want? 5.) Why do I want it? 6.) How will I get what I want? 7.) What must I overcome to get what I want? These are questions that must be answered during discovery.

As attorneys, we usually answer these questions, consciously or unconsciously, with our own clients and often even the opposing party, but what about the supporting cast? How much attention is paid to minor witnesses, second chairing associates, or even ourselves? One reason why *To Kill a Mockingbird* is considered one of the great American novels is, in part, because of its character development. Of the top 100 fictional characters of the past century, Atticus Finch, Scout Finch, and Boo Radley all make the list. "100 Best Fictional Characters in Fiction Since 1900." Book. March/April 2002.

"Supporting characters should be developed with depth in mind, rather than just thrown in as talking 'fillers' for scenes. They should be developed with their own histories, motives, goals, and journey endings. Doing such effort on their behalf will pay off in enhancing the viewers' experience of your film. It will also enhance the impact of your film's theme. So, whatever you

do, give your supporting characters *life!"* *Fernandez, S.* "The Value of Interesting Support Characters." The Story Department. 20 November, 2012.

Thus, it is important to remember that each great character, even characters in the supporting cast, shares certain characteristics. They exude strength while being flawed. They are centered but motivated. In other words, great characters are complex. Bowersock, M. "What Makes a Great Character." Indies Unlimited. 14 July, 2015.

A character's complexity can often be overlooked. We not only must explore the depths of each individual witness, but we must also search for witnesses that are not immediately known to our clients or to us. The purpose, of course, is to advance the action in the most compelling narrative available.

IV. THEME

As noted by author John Steinbeck, "in every bit of honest writing in the world, there is a base theme." Therefore, it is unsurprising that there are hundreds if not thousands of law review articles, books, white papers, and blogs written on trial themes; however, many substitute taglines or catch-phrases as themes.

Ask most to recall the defense's theme during the O.J. Simpson murder trial, and many will say "if it doesn't fit, you must acquit." However, this catch-phrase, uttered just four times during the trial, was *not* the theme of the defense. "Cochran's narrative theme, as is often the case in criminal trials, is based upon a complex betrayal story—about conspiracy and a defendant betrayed by powerful state actors: corrupt cops and a racist police department. It is a story that goes far back into historical time and will go forward into the future unless the jurors act heroically in their deliberations to put an end to it." Meyer, P. "How Lawyers Can Craft a Case Narrative to Spark Jurists' and Jurors' Interest." ABA Journal. 1 January, 2015.

Themes are not catch-phrases. Themes are universal *beliefs* that become social and cultural truths. A theme is "an idea, concept, or lesson that appears repeatedly throughout a story, reflects the character's internal journey through the external plot, and resonates with the reader." Letourneau, S. "What is Theme, and Why is it Important." DIY MFA. 17 November, 2014.

Anthropologist Morris Opler (1945) observed that cultural systems comprise sets of interrelated themes. The importance of any theme, he said, is related to (1) how often it appears, (2) how pervasive it is across different types of cultural ideas and practices, (3) how people react when the theme is violated, and (4) the degree to which the number, force, and variety of a theme's expression is controlled by specific contexts.

Put another way, a theme explains why a story is important, that is, why an audience ought to care what they are being told. Themes are persuasive narrative because "[when] a belief becomes incorporated into our personal or social identity … it's much harder to change." Kaplan, J., et al. "Neural Correlates of Maintaining one's Political Beliefs in the Face of Counterevidence." Scientific Reports. 24 February, 2016. It is for this reason that a theme must connect to a juror's fundamental belief system.

An important practice point is to determine the theme early in case development. Discovery may cause us to tweak our theme as the full facts unfold, but the discovery phase is too late to begin considering the case from a thematic standpoint.

V. LANGUAGE

In his *Poetics*, Aristotle wrote that it is rhetoric which includes "every effect which has to be produced by speech, the subdivisions being: proof and refutation; the excitation of the feelings, such as pity, fear, anger, and the like; the suggestion of importance or its opposite."

Consider the phrase "that's just a matter of semantics." Semantics is a branch of linguistics and logic concerned with meaning. As lawyers, *almost everything* is a matter of semantics. Constitutional, statutory or contractual construction is all a *matter of semantics*. In short, words matter. Word choice matters.

As Aristotle wrote, "the vehicle of expression is language." And, language has been described a one of the "four basic attributes of humanness." Poirier, F. and McKee, J. Understanding Human Evolution. Prentice Hall: Upper Saddle River (4th Ed. 1999): 344.

"People talk not only to communicate propositional content but also to reflect upon and express attitudes and emotions. Idioms, metaphors, and many fixed expressions reflect social norms and beliefs. To learn a culture's idioms and other fixed expressions is to immerse oneself in that culture…. The phrasal lexicon that people use to describe abstract concepts, such as idea or time, and emotions such as love or anger, is replete with metaphoric expressions." Glucksberg, S. Understanding Figurative Language: From Metaphors to Idioms. Oxford University Press: Oxford (2001): 87-90.

In a 2006 study published in the journal NeuroImage, subjects were shown Spanish words for 'perfume' and 'coffee.' When that occurred, "their primary olfactory cortex lit up; when they saw the words that mean 'chair' and 'key,' this region remained dark." Paul, A. "The Neuroscience of Your Brain on Fiction." New York Times. 18 March, 2012: SR6.

"A team of researchers from Emory University reported in Brain & Language that when subjects in their laboratory read a metaphor involving texture, the sensory cortex, responsible for perceiving texture through touch, became active. Metaphors like 'the singer had a velvet voice' and 'he had leathery hands' roused the sensory cortex, while phrases matched for meaning, like 'The singer had a pleasing voice' and 'He had strong hands,' did not." *Id.*

"In a study led by the cognitive scientist Véronique Boulenger, of the Laboratory of Language Dynamics in France, the brains of participants were scanned as they read sentences like "John grasped the object" and "Pablo kicked the ball." The scans revealed activity in the motor cortex, which coordinates the body's movements. What's more, this activity was concentrated in one part of the motor cortex when the movement described was arm-related and in another part when the movement concerned the leg." *Id.*

"[T]he fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of the testimony is not, so far as the lawyer knows or ought to know, false or misleading." The District of Columbia Bar Legal Ethics Committee, Opinion No. 79, (Dec. 18, 1979). Advising a witness on how to phrase testimony becomes ethically questionable only if the variance in phrasing is "so significant as to make one version misleading while another is not." Id. The D.C. Bar concluded that it would not be difficult "for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it." Id.

Observational lay witnesses are tasked with articulating the sensations of the moments they observe. That is, they must describe how it felt, how it smelled, how it looked, how it tasted, and what it sounded like in a way which will allow jurors' brains to react as if they are living the moment with the witness. As lawyers, we are charged with giving a witness this assistance.

As Janice Schuetz writes, "witnesses supply parts of the narrative content by reporting their versions of the dispute using familiar characters and story lines…. Attorneys participate directly in the construction of witnesses' narratives." Schuetz, Janice E. *Communicating the Law: Lessons*

from Landmark Legal Cases. Waveland, 2007, p. 20. "Attorneys frame witnesses' stories so they fit a common theme." *Id.* at 19.

Helping a witness craft more dynamic testimony does not violate rules of professional conduct. Provided that the change does not "modify the substantive meaning of a witness's statement in a way that produces false or misleading testimony," the attorney should is likely within ethical bounds. 1 Geo. J. *Legal Ethics,* 389, 402 (1987).

One important consideration when assisting a witness is to remain authentic. Jurors will easily detect when a witness's testimony seems alien. Meet with or converse with witnesses multiple times in advance of trial preparation sessions in order to determine their speaking style and vocabulary. Then, choose vivid language that fits their normal speaking style.

Another practice point is to consider that witnesses are engaged in a dialogue while on the stand. In this regard, theatre provides terrific examples of the use of language in dialogue. There is the range musicality, pacing, and cadence of films like T*he Departed, My Cousin Vinney, Juno* or *The Big Lebowski*; the word play, verbal trickery, and linguistic aerobics of *Lucky Number Sleven* and *Rosencrantz and Guildenstern are Dead*; the subtext and underlying truth of *The Godfather*, *Inglorious Bastards* and *Pulp Fiction*; the verbal conflict of *The Lion in Winter, Doubt, Social Network,* and *Steve Jobs*; the honesty and vulnerability of *The Big Chill*, *Coffee and Cigarettes,* and *My Dinner with Andre*; dialogue which is true to life, as in *Drinking Buddies, Super Bad*, and *Manchester by the Sea*; the banter of *Annie Hall*, *Kiss Kiss Bang Bang*, and the dark, despicable cleverness, and humanness of *In Bruge* or *Snatch.*

Lay witnesses are fact identifiers. That is, lay witnesses identify observational facts. If it cannot be seen, smelled, heard, tasted or touched, the lay witness is unqualified to testify. Attorneys should present evidence through witnesses to not only have compelling testimony, but

add to the overall drama of the trial. Obviously, attorneys are the authors of a great deal of soliloquy during the trial, but our repartee with witnesses is as important if not more so.

VI. CHORUS

"The chorus functions as a storytelling device by serving as a link between the audience and the piece itself, highlighting important aspects of the scene and projecting and emphasizing the current emotional state of the piece. The chorus achieves this either through direct narration and explanation, or through analytical commentary or conversation about the events and characters of the play." Delycare, C. "The Greek Chorus Dynamic in Ancient and Contemporary Theatre." Web. 21 March, 2014. Available at htpp://www.sonoma.edu/theatreanddance/_docs/badpenny_chorus.pdf

An expert witness is a fact interpreter. An expert makes use of specialized knowledge acquired through education, training, or experience in order to give context and meaning to observable facts through direct analytical commentary.

"Despite the obvious advantages of communicating clearly, scientists are often resistant to the suggestion that their articles should be comprehensible to readers outside their own field. For one thing, there is a tendency to equate plain language with over-simplification. As science becomes more complex, the argument goes, an ever-increasing amount of specialist jargon is required to describe it precisely. Even if this is true, however, technical terminology can be explained, and it need not present an insurmountable problem to the scientifically literate reader." Ed. Board. "How Experts Communicate." *Nature Neuroscience* (Feb. 2000, Vol. 3, No. 2).

As a result, it is a "trial attorney's task is to retain something of the expert aura in the testimony and to ensure the expert communicates the meaning as well." Malone, D. and Zwier, P. "Effective Expert Testimony." National Institute for Trial Advocacy (2014). "A technical expert

can capitalize on his or her natural teaching skills to educate the jury, foster credibility, and capture the advantage." Montiel, D. "Effective Communication in Expert Testimony." American Bar Association: 5 March, 2013.

"The most effective way to translate data into communication is to follow a tried-and-true process: storyboarding. Develop an outline for the expert's presentation that walks through the communication steps needed for clear understanding." Montiel, D. "Effective Communication in Expert Testimony." 2013.

While scientific or technical language can be an impediment to the story, proper technique will enhance the audience's understanding of the story in ways others cannot. In this way, the choric commentary of a great drama is similar in many ways to well-designed expert testimony. Both must moderate between the characters and the audience. They each comment on the characters, the plot, and the theme, without which, much of the meaning of these theatrical elements are lost. Likewise, both act as a guide to bring significance to our emotions and assist further understanding and revelation.

VII. SPECTACLE

From *Gone with the Wind* in 1939, to *Mary Poppins* in 1964, *Star Wars* in 1977, *The Matrix* in 1999, or *Inception* in 2010, the history of engineering, sound and visual effects in modern cinema has advanced at a rapid pace along with other technological progresses.

In 1975, one of the most dramatic and visually stunning movies hit theaters, *Jaws.* Steven Spielberg's shocking depiction of the great white shark literally caused audiences to "stay out of the water." Audiences today, however, expect far more. It doesn't get much better than 2016's *Rogue One: A Star Wars Story,* which brought the late Peter Cushing back from the dead.

Like theatre, the spectacle of effective courtroom optics have changed as well. Jurors are no longer content with whiteboards and easels. Consider for a moment the world in which we live. Even the most mundane of experiences has changed considerably through the advancement of technology.

Example: purchasing a pizza. Popularized in the United States following World War II, if you wanted a pizza in 1958 you traveled to a local restaurant. In the 1960s, Dominos Pizza began commercial delivery service. One simply placed an order via landline telephone. 50 years later, Dominos launched its iPhone app, allowing pizza to be ordered at the tap of a touch screen. But even the iPhone, which will turn ten years old on June 29th, is old news. Why pick up a smart phone when you can ask Alexa to order for you?

We demand instantaneous information and immediate gratification through intuitive and visually pleasing applications. Why then would a juror accept anything less from a trial lawyer? Why would our client?

Cinema and technology is not only changing the method of presentation, but also changing type of evidence necessary to succeed in litigation. In one study testing the so-called "CSI Effect" in 2008, researchers found that "46% of jurors expected to see some kind of scientific evidence … 36% expected to see fingerprint evidence [and] 32% expected to see ballistic evidence or other firearm laboratory evidence in *every* criminal case." Shelton, D. "The 'CSI Effect': Does It Really Exist?" *NIJ Journal.* March, 2008.

Until recently, the study of juror bias was limited in large part to a juror's implicit or explicit biases with respect to demographics such as race, class, or gender. This began to change in the 1970s when Amos Tversky and Daniel Kahneman introduced the concept of cognitive biases.

Cognitive biases are psychological tendencies or “mental shortcuts” in the human brain which cause systematic distortions in objectively rational thought processes. As Tversky and Kahneman put it, “people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”

There are four basic categories: decision-making biases, memory biases, probability biases, and social biases.

It is imperative for trial attorneys to consider these biases when crafting their case presentations. We must both eliminate those biases which adversely affect our clients and exploit those which are advantageous to a favorable result.

While the spectacle of modern trials is evolving to include courtroom technology, there are many facets that have remained relatively unchanged by technology. Costuming and blocking are two such examples.

One of the few places in which formal dress is required without exception is the courtroom. Jurors expect attorneys to wear professional attire. However, there is truth to the saying that “clothes make the man.” “Enclothed cognition” changes the subjects view of themselves based upon their dress. It “gives scientific proof to the idea that you should dress not how you feel, but how you want to feel.” Kane, L. “What Your Clothes Say about You.” *Forbes.* 3 April, 2012. Similarly, inappropriate dress creates negative influences in the mind of others. “The worst clothing is the kind that tries to undo, ignore or hide where or who you are, or the kind that shows you didn't pay attention to your body/age/situation." *Id.*

Last, blocking refers to the location and movement of characters on stage or on set. Every movement of a play or movie has been choreographed. Each and every movement must be made

with purpose, and no movement ought to be wasted. Likewise, each movement of the trial should be choreographed.

Body language is a critical component of every social interaction, but many mistakenly equate body language with facial expressions. This is not so. "This is not saying that bodily context helps interpret an expression of emotion — it is saying that bodily context is the expression of emotion. And the face reveals a general intensity of feeling but doesn't communicate what the person is feeling exactly. The body is where the valid information comes from during intense feelings." "Don't Read my Lips! Body Language Trumps the Face for Conveying Intense Emotions," Morgan Kelly (Princeton.edu, Jan. 2013). As such, every movement ought to be orchestrated to have the most utility in the trial process.

VIII. CONCLUSION

Attorneys are storytellers. Yet, classic legal training has failed to prepare lawyers in this regard. With greater attention placed on the Aristotelian elements of drama, the bar at large can maximize our skills and better serve our clients.

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