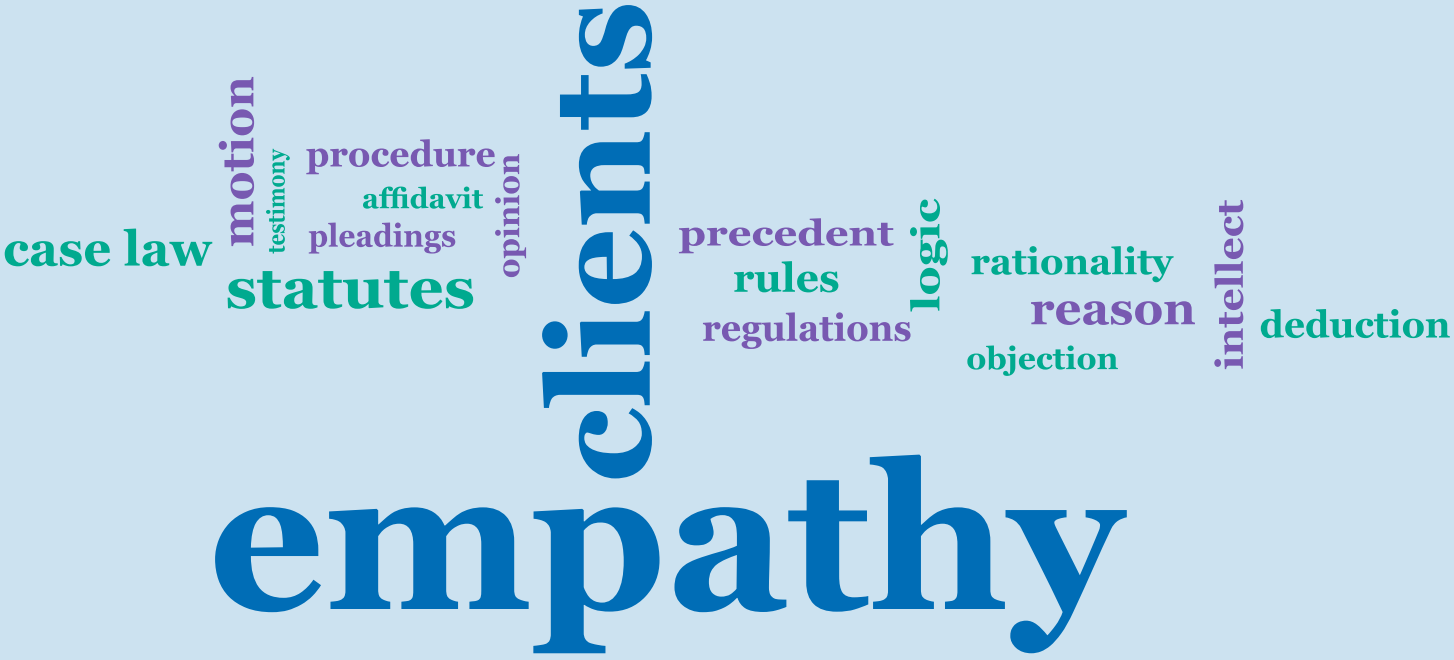
OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

2018 SPRING

VINDICATOR



A Radical Idea About Winning That Just Might Be True

plus

- Establishing Reliability
- Field Sobriety Tests
- Fourth Amendment And Electronic Devices
- Discovery And Public Records
- Your Honor I Cannot And Will Not Proceed
- Marsy's Law A Big Step Backward

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MISSION STATEMENT

• To defend the rights secured by law of persons accused of the commission of a criminal offense;

• To educate and promote research in the field of criminal defense law and the related areas;

• To instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities; to promote the advancement of knowledge of the law as it relates to the protection of the rights of persons accused of criminal conduct;

• To foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited continuing legal education programs;

• To educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the bill of rights and individual liberties;

• To provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

BENEFITS OF THE OACDL

LISTSERV - The OACDL listserv is our most popular member benefit. This on-line forum joins over 500 members from around the state. If you have a question, post it on the listserv and usually within minutes you have responses from some of the most experienced legal minds in Ohio.

AMICUS BRIEF - OACDL members provide amicus support for criminal cases.

CLE SEMINARS - The most up-to-date topics presented by nationally-recognized experts are available at incredible savings to OACDL members - including the annual Death Penalty and Superstar Seminars.

STRIKE FORCE - With OACDL, you never stand alone. OACDL members are here to aid.

LOBBYING - The OACDL actively lobbies state government by providing testimony on pending bills and working with other organizations with similar interests.

LEGISLATION - The OACDL monitors pending legislation and government activities that affect the criminal defense profession.

MENTOR AND RESEARCH PROGRAMS - OACDL offers a mentor program for new attorneys and resource telephone access for the assistance of all members.

NETWORKING - Networking functions allow current OACDL members and prospective members to interact. These functions are not only entertaining, but very valuable for old and new members alike.

Letter from the **PRESIDENT**

KENNETH R. BAILEY

President

As you turn the pages of this issue, I hope you find materials that aide your clients and inspiration that encourages you in your courtroom battles.

I have met criminal defense practitioners throughout my life who work nights and work weekends, because they are true believers. While the public may incorrectly believe those late nights and long hours are only invested by private practitioners, those of us engaged in the practice know it to be true of our unsung heroes in the public defender offices.

I am always looking to identify the leaders of our bar, and I increasingly find the speakers at our seminars, the innovators of new defenses, and the champions who are trying cases – the men and women fighting in the trenches – to be public defenders … they are the heroes I admire.

As I began the practice of law, I already had a life's full of advice having been reared in this organization by my father, a local legend in criminal defense. However, I also had help in every courtroom I walked into … the attorneys who were there every week handling the lion's share of criminal defense work … the attorneys who knew the Judge's idiosyncrasies, hot buttons, and preferences … the attorneys who knew the nuances in the law and could provide a new practitioner advice to help his client for once again, no compensation … the attorneys of the public defender offices.

I dedicate this issue (I assume I have the authority to do so) to the men and women of the public defender offices who never allow their fixed salary to determine their level of compassion for their fellow man.

To my friends in private practice, may you be inspired by their passion and may you each continue to protect the name of public defenders, as they are the true knights in our realm, and without their numbers, we would surely lose many more battles.

Letter from the PRESIDENT ELECT

MICHAEL STRENG

President Elect

As criminal defense lawyers we are trusted advisors and advocates of people who are going through a difficult -if not the most difficult- time in their lives. We have many hats to wear in this role. A patient listener. A shoulder to cry on. A teacher. An advocate. The deliverer of both good and bad news. In some cases, we are a person our clients hope will help them put their life back together.

In addition to these different roles we have with our clients, our profession is adversarial as we advocate and negotiate on our client's behalf.

Due to all of the demands of our profession, saying our role can be stressful is an understatement. Through it all, you are there doing your best work for each of your clients. Even the most resolute warrior needs a tribe to look to from time to time for support. The OACDL is here for you. OACDL membership has many benefits, a significant one being the opportunity for community and comradery. The opportunities for community and comradery are present in:

- the listserve where questions about the law, procedure, legislation and concerns that face defense lawyers are discussed;
- attending OACDL sponsored CLEs;
- the receptions and networking opportunities that arise with CLEs and partipating in the OACDL subcommittees;
- the retreat to Myrtle Beach in May;
- the mentorship program;
- the strike force to call upon, if needed; and
- the general ability to quickly get to know many other great people doing the same type of work you are doing and facing the same challenges and concerns.

At the end of 2017 our membership exceeded 760 members and is wide spread throughout the State. There is a good chance that if you are facing a unique issue, one of our members may have seen it before or be able to help brainstorm a proper course of action.

I encourage you to take advantage of these opportunities and be involved. Maybe even take another step forward and volunteer for a committee or consider becoming a board member.

I am proud to be a member of the Ohio Association of Criminal Defense Lawyers. I hope you are as well! I look forward to seeing you at the next CLE, retreat or perhaps the next board meeting.

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2018 CLE SEMINAR SCHEDULE

May 18-20, 2018
CLE and Retreat, Myrtle Beach, South Carolina

June 8, 2018
Trial Attorney With an OVI Case? Here's All Your Need to Know
Cleveland Metropolitan Bar Association

August 24, 2018
Advanced Sex Crimes Seminar
Quest Business Center, Columbus

September 14, 2018
Tools for the Criminal Defense Toolbox
University of Toledo Law School

October 11, 2018
Annual OACDL Membership Meeting

October 12, 2018
Superstar Seminar, OCLC Conference Center, Dublin

November 14-16, 2018
Advanced Death Penalty Seminar
Sheraton Hotel, Columbus

December TBA, 2018
Hot Topics in Criminal Law with 2.5 hours of Professional Conduct Columbus

The above are the annual seminars sponsored by YOUR association. Other seminars are being scheduled around the state. Brochures will be mailed 6-8 weeks prior to each seminar. All seminar information is posted on our website, www.oacdl.org.
The OACDL Seminars are organized by volunteers of the association. They want to make sure you have the most up-to-date, cutting-edge, informative seminars BY defense attorneys FOR defense attorneys in the state. The OACDL thanks you for your support of our continuing education seminars.

PAST PRESIDENTS OF THE OACDL

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1992-93	**William F. Kluge**, Lima	2007-08	**Donald Schumacher** (deceased), Columbus
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2001-02	**Jefferson E. Liston**, Columbus	2016-17	**Jon J. Saia**, Columbus

DIRECTOR'S DIALOGUE

Susan Carr
Executive Director

Your association is very busy right now. At the time of this writing, we are planning the inaugural Professionalism Luncheon with the Ohio Supreme Court Commission on Professionalism, which includes judges and prosecutors from Franklin County. Jay Milano has an article on the success of this. More lunches are being planned around the state. Please consider going if you receive an invitation. If you are interested in attending, let me know. I will add you to the invitee list.

Ohio Public Defender Tim Young has developed a workgroup to stop the worst parts of Marsy's Law from having a negative impact on your clients. There are a number of OACDL members on the group. Much of the work will rely on being aware of what is going on with the implementation of the law across the state. To that end, if you have a concern or an issue, please drop me a note to pass along. We will keep you updated through the listserv.

We are dedicated to keeping you informed. The CLE Committee has been hard at work developing the most up-to-date educational seminars for you. The evaluation forms at every seminar ask what topics/speakers you would like to see us offer. The committee looks at those suggestions. We are following up on as many as we can. Check out the upcoming CLE's in this magazine – or go to our website at www.oacdl.org and click on the seminar tab.

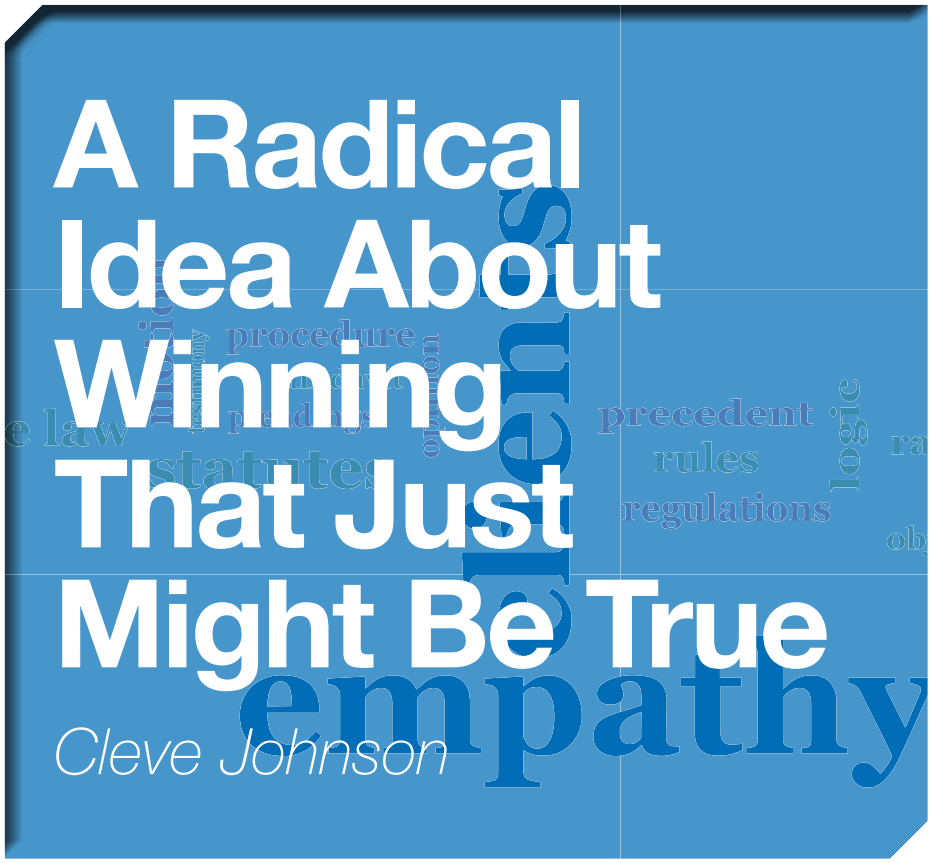
But most of all - if you have a chance to join us for our Myrtle Beach trip, please consider doing so! We had so much fun last year. The Hilton at Kingston Resorts (kingstonresorts.com) is our host. The online reservation link is on our website. The dates are Friday/Saturday, May 18-19 for the CLE. Room rates are $165.00/night. The hotel is allowing that rate for 3 days before the 18th and 3 days after the 19th. On Thursday, May 17, OACDL will host a welcome reception, early enough so that people can go out to dinner. Friday from 9:00 – noon is the CLE. The rest of the day is yours to enjoy! Friday evening is a cookout. Saturday, 9:00 – noon, finish the CLE, then play golf, visit the pool, beach – whatever you like. Cost for the 6 hour seminar is $95.00 for OACDL members and that includes the cookout. Cost for adult guests at the cookout is $30.00; children over 5-years-old $10.00 (5 and under free). Myrtle Beach is a 10-hour drive from Columbus, so doable in a day. Airlines that serve Myrtle Beach (MYO) from Ohio include Allegiant and Spirit.
As always, if there is anything I can do for you, please let me know!

Susan

NEW MEMBERSHIPS AND RENEWALS CAN BE MADE AT OACDL.ORG

A Radical Idea About Winning That Just Might Be True

Cleve Johnson



The subtext of the law

Anyone who has practiced criminal law for any significant period of time knows that there is often a big disconnect between the theories the law espouses and what actually happens in court. How do we bridge the gap between the text and the subtext of the law? In that regard, there's a mistake lawyers make over and over again: "Never react to what people say. React to what they mean. Remember people hardly ever say what they mean." --From: Verbal Judo by police officer George Thompson, Ph.D. talking about street encounters between cops and civilians. The subtext---that's what this article is about. Here is something they don't teach us in law school. The law is about people dealing with people. If there were no people there would still be geology but there would be no law. So we're all psychologists whether we want to be or not. The question is whether we're going to be good ones or bad ones.

At the 2017 OACDL Superstar seminar, Professor Dana Cole suggested juries don't like the defense that says basically OK my guy did it but you can't prove it. This essentially says jurors don't like the reasonable doubt defense. I get that it is defense lawyer heresy to suggest this. I also get that jurors often say that they went our way because of reasonable doubt. Studying modern psychology and neuroscience has left me skeptical about whether jurors actually know why they decide the way they do regardless of what they say. It took me a long time to understand that most jury and judge decisions are subconscious and inaccessible to the individual juror or judge. That doesn't keep them from coming up with reasons for what they do. It just keeps the reasons from being correct. "...[W]e are predisposed to believe that everything we do is conscious and deliberate even when the reality is otherwise" –Shankar Vedantam

I would theorize that the reason it is heresy to say that jurors don't believe in reasonable doubt is because we have convinced ourselves that that is the way we win cases. Saying reasonable doubt doesn't work is perceived as taking away our strongest tool and saying we can't win. It also means we have been doing things the wrong way. Most people would rather continue being wrong than admit a mistake. President Trump has taught us that a lot of the conventional wisdom we thought was true about politics wasn't true after all. Maybe this is also the case in fields other than politics.

If we can't rely on reasonable doubt, what can we rely on? After almost 40 years in practice I am coming to believe it can be said in one word. The word's not plastics, it's empathy. This, by the way, is something I would've rejected out of hand when I was younger. Now, I just think it's true whether I like it or not. So what does that mean, exactly. The basic idea is that we have to convince the fact finder to want to rule our way. They either have to have positive empathy for our clients or negative empathy for the equivalent on the other side.

There is a difference between stating the facts and conveying emotion. Emotion is what motivates people. As David Hume said reason is the slave of the passions. An appeal to reason is an appeal to the emotions (wanting to be rational is itself an emotional desire). The two are inseparably linked. If we want to motivate judges and juries we need to be able to make them feel from our clients perspective rather than just think or understand. They understand well enough that our clients don't want to go to jail. What we need to do is to make them feel that it would be a bad thing for our clients to go to jail. But how do you make the other person feel rather than just making them understand? That is what we have to discover.

Some time ago I was listening to Rob Calesaric recount what happened in a recent victory. As he went through it, I started to think OK I think I see why he won but I bet the real reason he won is different than the reasons he is telling us about. I frequently have that suspicion when I'm reading caselaw too. In controversial or emotion-laden cases, the stated reason for a decision is often not the real reason. It is very hard for most lawyers to appreciate that the real art of being a lawyer involves not being misled by stated reasons and instead figuring out how to fashion the argument to speak to the subconscious, the true decision-maker.

Winning the difficult case

So this is all very abstract. How does this work in the real world? Rob's case provided an example of this. He did a superb job of using empathy. Rob showed me part of the video. The video looked pretty bad. His client ran over the curb on video and twirled around on foot and came to a rest leaning against the car twice. If you just looked at the video, you wouldn't have thought it was winnable. The prosecutor offered a deal but the judge rejected it so Rob tried it.

Tactically it was impressive. His client had a medical issue but couldn't afford to bring the doctor in and the court wouldn't let the diagnosis from the records in. Rob figured out a work around. While this was good lawyering, so far there isn't much empathy. Rob did two things that I am increasingly coming to believe are key. First, he got his theory of the case across in opening using an impactful and undeniable picture. Second, and perhaps more importantly, he created empathy for his client. One of the cops was a major jerk and the prosecutor didn't even bring him in. Brilliantly, Rob forced one of the other cops to admit that various things the officer did were unprofessional. He showed that his client had a serious medical problem and the cop was being mean to her. Normally jurors empathize with the cop and have little sympathy for the defendant. Rob turned this around--and won--in a difficult court. Only a jerk is mean to someone with a medical problem. People have empathy for those who are mistreated for something that is not their fault and they have negative empathy for the person doing it. The legal maneuvering might have allowed him to get what he needed before the jury but I suspect it was shifting empathy from the cops to the defendant that won the case.

Something Rob told me about another case of his bears on the point about the text and the subtext of the law as well. Rob had a marijuana case he did down in Cincinnati where the judge disallowed something so they did a proffer. The judge became increasingly interested during the proffer and found a way to rule in their favor on other grounds. In other words, what the judge said he wasn't going to listen to ended it up being what convinced him. In a nutshell, this is how things often work in court. We get distracted by the law and what people say and forget that we're dealing with people who often don't understand their motivations themselves. We act on the textual level and ignore the usually more powerful subtextual one.

Mike Streng told me about a lawyer who by all accounts is an excellent lawyer and wins lots of cases. The lawyer is well known for lecturing about the presumption of innocence in voir dire. He indicated that he had never been all that taken with the lawyer's approach and that was my impression as well. It always seemed like saying you have to be on my side because the law says so. The law may say that but jurors generally don't care. They care about their gut instinct sense of right and wrong.

But here is what was interesting. Mike said he read some of the lawyer's transcripts and saw what was actually happening. The lawyer essentially asked questions that made jurors put themselves in the defendant's place. The lawyer asked jurors if they'd ever been accused of something they didn't do. The lawyer would ask whether they've ever gone out and had a drink or two with dinner and driven home and whether they thought they were breaking the law at that point.

Now up until then I thought all this was doing was getting across the idea that zero tolerance is not the law but I was missing the point. The point is empathy, making the jury feel that they're just like the defendant, putting them in his shoes. I'm thinking the presumption of innocence stuff that the lawyer pushes distracts from what is really going on. She's creating empathy between the defendant and the jurors whether she knows it or not. I also remember her talking about a story about going to court after wiping off

smelly baby vomit off her clothes; although, I can't remember the specifics. Here again empathy. I'm like you. I'm a mom. I suspect what she is really doing is far more effective than what she may think she is doing. She's creating empathy rather than relying on the presumption of innocence

Good lawyers may know what they do and that it works but they may not know why it works or they may not know that parts of what they do don't work at all. It could be like the old saw about the advertising industry. The advertising buyer says he knows that half of his advertising budget is wasted. He just doesn't know which half. When I was younger, the older trial lawyers would tell me that the good trial lawyers just don't want to give away their secrets. There may be some truth to that but what I've learned is that usually lawyers who are good at something are quite willing to show off a bit and tell you how they did it. Marketing is usually kept secret but legal knowledge isn't seen the same way. What I think is more likely is that many often don't know themselves. They may think it sounds better to maintain an aura of mystery rather than admit that they are baffled themselves about what's going on. Others will give you an answer that they may even believe themselves except that it's just not the right answer. Unlike many others, I think Jo Low and Gerry Spence do have a pretty good idea what they're doing and why it works. They're also not reluctant to share. Their tribe building theory is a type of empathy creation. When a theory like empathy explains the success of a number of diverse approaches, if might be a good idea for us to pay attention to it.

Contrast the empathy approach with the approach taken by many lawyers of lecturing the jury about the law and trying to extract promises that they will follow it. It does nothing for empathy unless we count creating negative empathy towards counsel for boring them to death and lecturing them about their duty under the law in what is probably perceived as a condescending manner. The smartest kid in the room is generally not well liked. Finding the perfect analogy for reasonable doubt may seem like a good thing from our perspective but it may simply be perceived as asserting the my guy did it but you can't prove it defense. Now if an analogy about reasonable doubt also serves to build empathy and put the jury in the defendant's place, analogies about reasonable doubt are just fine as long as we know the difference.

Empathy the movie

Empathy is not a new concept in the courtroom. Most criminal lawyers think of it mainly in the context of sentencing. In that regard, the video in the following link is well worth looking at:
https://goo.gl/g47Kjp
It's a video about creating empathy through the use of sentencing mitigation videos. So it's a video about videos. While those producing the video lampoon the concept and approach it from a critical perspective, enough of the underlying content gets through to demonstrate how powerful this concept could be. "Our job is not to go for sympathy, that never gets us anywhere. Our job is to go for empathy." This is a quote from the video that I think gets to the heart of what we need to do in our approach to empathy. The video finishes by saying that the technique they describe is about telling the emotional truth in the case. A perceptive prosecutor once told me that this is what is truly important in court, the emotional truth. When we say a drunk driving defendant or an accused child molester is legally innocent and the prosecution says they are guilty, who does the jury think is telling the emotional truth? They may say they believe in the presumption of innocence but they think our client is guilty. So if we want to persuade them, we have to do it by telling the emotional truth not by lecturing them and telling them they have to believe an emotional lie.

These matters are discussed in detail in a University of Pennsylvania Law Review article that can be found at the following link: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427328 Just try googling "sentencing mitigation videos". There's lots of stuff out there.

So the radical notion here is that what we need to pay attention is not the law or the facts or even what people say but rather how we can create positive or negative empathy. Now I'm not asking you to take this on faith. What I am asking is for you to search your memory to see whether this analysis might be true. In particular I would be interested if anybody could remember a case where the defendant was contemptible and the cop was likable but the jury found him not guilty. That can happen from time to time, without regard to empathy, for example in an alibi case where the alibi is ironclad and not dependent upon the word of the contemptible defendant. Please contact me at cj@clevejohnson.com if you can think of any cases what is a jury found for the contemptible defender rather than the likable cop. I would be interested in your theory as to why you won. We tend to latch onto the first explanation that is familiar to us and fits with our preconceptions and then stop thinking. I am trying to go a bit beyond that.

Do you find yourself cross-examining jurors?

So how do you make criminals, child molesters, and drunk drivers empathetic? How do you actually use this empathy method? I do not claim to have a complete answer to this question and am still studying the issue. I have

learned a thing or two though that I can pass along. The oversimplified answer is that you have to make them not be criminals, child molesters, or drunk drivers. Lots of lawyers do something that is worthless or perhaps worse than worthless, something that causes positive harm. They lecture the jury or cross-examine them. Juror X you understand that the defendant has a right not to testify? And can you promise not to hold this against him in any way if he should chose to exercise this right? This mainly makes counsel look like a condescending know-it-all who's acting like they're so stupid they never heard of the fifth amendment. Anybody who's ever watched a cop show knows about that. Probably all this does is generate negative empathy for counsel on the part of the jury. Jurors don't change their attitudes because the law says they are supposed to. They already know about the constitutional right to take the 5th. You're not teaching them anything. They just think only guilty people take the 5th.
Contrast this with the empathy approach suggested by Jon Rion at the 2016 Superstar Seminar: Juror X, how would feel if you had to testify in court. You're being cross-examined by an experienced lawyer. Would you be nervous? Scared? Embarrassed? Does anyone think they couldn't do it? Would anyone choose not to do it if they had a choice? Juror Y, some people may not be as strong as you. Do you have any sympathy for those not as strong as you? If you testified would anyone worry that people would think you're guilty and just lying to get off? If you didn't testify would anyone worry that people might think you have something to hide so you must be guilty? So either way people would be suspicious of you. If you don't testify they think you are hiding things and if you do testify they think you may be lying to get off. Would this be embarrassing to know whatever you do people will be suspicious? How would you deal with this?

See how this approach tends to put the juror in the defendant's shoes while the first approach just makes the jurors dislike the lawyer and makes the judge want to cut them off and say it's the court's function to explain the law. Jon suggests that even taking notes during voir dire can come off as judging the jurors and it can make them dislike counsel. The idea isn't really to get information so you don't need notes. The idea is to get the jurors to identify with the defendant. We are taught that the purpose of voir dire is to select the jury. This is not entirely false but the real purpose of voir dire should be to persuade the jury. That process starts by getting them to empathize with the defendant. If you remember nothing else from this article, I suggest you commit the following paraphrased sequence of Jon Rion voir dire questions to memory: Juror X, do you think first impressions are important? If you get off on the wrong foot with someone, it can be hard to correct? Are first impressions always right? How would you feel if the first impression someone had of you was as a defendant in a criminal case? By the way, my apologies to Jon to the extent that I have oversimplified his approach.

"It's true. I saw it on TV."—From the movie Wag the Dog. The idea is that once something becomes commonly accepted, it is true in the perception is reality sense regardless of the actual facts of the matter. The FST's are like that. People see videos of drunks at roadside doing the fst's and they take that as proof of intoxication.

The law geek approach to the fst's is to learn them better than the officer and nit pick everything he does. What would the empathy approach be? Maybe something like this: Mrs. Juror, let's say a police officer is trying to test your normal abilities to balance. Instead of doing something normal, he asked you to stand in an unstable position and not make any of the normal movements to balance yourself. What would you think about a test like that? Would you feel that was a fair test of your normal ability to balance? Could you ever see yourself refusing to take a test like that?

On cross examination if your approach is to show the jury what a master cross examiner you are and to demonstrate how you can destroy the officer with your knowledge of the subject and mastery of the facts, you may win the battle but lose the war. The jurors are much more likely to identify with the officer. After all, they already had to sit there and answer lawyer's questions just like the officer. They've already been in the officer's shoes. If you destroy him they may identify with him and dislike you. Contrast this with Dan Sabol's cross of the officer in a drunk driving case where he basically gets the officer to admit that he treated the defendant unfairly. He first leads the officer into admitting that he does everything he can to be fair to the defendant. He then gets him to admit that one way to be fair is to follow his manual and training and do the stuff he's trained to do the right way. He then sympathetically gets the officer to acknowledge all the ways he failed to do this all the while looping the unfairness issue. He ends by getting the officer to say that he wasn't fair to the defendant, wasn't fair to the court, and wasn't fair when he didn't point these mistakes out earlier, etc. This way the officer does himself in. His empathy with the jury goes down instead of up the way it would have with the kill the witness approach. The witness is deader this way but it's a bit different than the way screenwriters and directors tell us we're supposed to try cases.

Would everyone come to Rick's if they knew this?

This is not to say we can't learn from the movies. On closing, how you tell the story has a lot to do with empathy. In the classic movie Casablanca, the main character Rick Blaine comes off as empathetic. So does his sidekick, the likeable but corrupt Captain Renault. One might think that simply reciting the facts is enough to accomplish this. It's not true. How the facts are recited is extremely important. The following is an example of how the story could have been told.

Rick Blaine is the owner of a corrupt nightclub where all kinds of illegal activities are taking place including gunplay. His friend, Captain Renault, is a corrupt police captain who collaborates with the Nazis and uses his position to compel women into unwanted sexual liaisons. In addition to befriending such a person, our alleged hero bribes the police captain regularly through the artifice of an illegal backroom gambling casino inside the club where he has a rigged roulette wheel. He lets the police captain win thereby cheating the other customers. In a casual conversation, he admits to him that there is some truth to him fleeing America because of a criminal background including theft and murder.

He had an affair with a married woman while her husband was being detained in a concentration camp by the Nazis. Later, after the woman breaks off the affair, the woman and her husband reappear in his nightclub and he schemes to have the husband jailed so that he can run off with his wife. The movie ends with him shooting a man, abandoning the woman, and making plans with the corrupt police chief to get out of the country to avoid responsibility for his crimes.

Watch the movie to learn the way to make Rick look empathetic. I cannot do better than that. A classic example of how to create negative and positive empathy in the same character is Dickens' Christmas Carol. Scrooge is the archetypical unempathetic character at the beginning of the novel and Dickens transforms him to a likeable one at the end. While we may not be able to create our own facts, we can cherry pick them and frame them in ways that come closer to this than one might think.

Empathy isn't only important in jury trials and sentencing. It's important for judges too. Anytime a judge has to make a decision empathy is important--even in motion hearings. The big problem with motion hearings is that again we're not telling the emotional truth. We are usually perceived as making a pitch similar to the my guy did it but you can't prove it one. At motion hearings our emotional argument is my guy did it but we want you to let him go anyhow judge. It is a mistake to assume that the judge will apply the law like a robot in such situations, even if the law is on our side. This, however, is a mistake defense lawyers make over and over again even when they know it's a mistake as they're making it. The trick is not to figure out a way to cram this down the judge's throat (it's the law you have to judge). That sometimes works but it's usually a formula for failure.

The trick is to frame your case another way so that you're not asking the judge to make an emotionally difficult decision. So one approach for example might be to try to show that the officer did such a bad job on the fst's in an OVI case that the defendant might not actually be guilty after all. Doing this relieves the judge of the burden of making an emotionally untrue decision. My experience is that I win more motion hearings when my client has a CDL. Even if the judge thinks the defendant is guilty, many also think that it was unduly harsh of congress and the legislature to deprive a man and of his livelihood and punish his whole family for a single mistake that may not have involved a commercial vehicle at all. Even guilty people get empathy if they are being treated in a harsh and unfair manner.

Now one might say there's just nothing empathetic about my client I can't think of a single thing that would make the fact finder identify with him. This is a difficult business. If it was easy this method would've been discovered long ago and all defense attorneys would win. The idea is that in most cases you either figure out how to do this or you lose. It should also be kept in mind that I can't think of a way doesn't necessarily equal there is no way. The other thing to keep in mind is that it's not exclusively a function of the client. So in an OVI case for example if you can't make the client empathetic the other side of the equation is to make the officer look unempathetic. The idea is that if we at least understand what we need to do we'll have a better chance of success than if our message is give me a case that tells them they have to deny the emotional truth and go my way even if they don't want to because the law says so.

The subject of empathy and how to use it is still pretty new to me at least as a conscious effort. This is not intended to be an exhaustive coverage. At this point I would not know enough about the subject to do that even if I tried. If I have learned anything it is this. Don't ask for a case or a statute that says they have to do things your way. They don't. Authority is generally disregarded if it is not liked. Analogizing to the old Watergate rule of ignore what they say, watch what they do, and follow the money; here is a better rule for us. As to what is written in the law and what people in the law say, take the text with a grain of salt and look to the subtext. Look at the empathy of the case and follow that. I suspect we will meet with much success if we can make our side empathetic and their side unempathetic.

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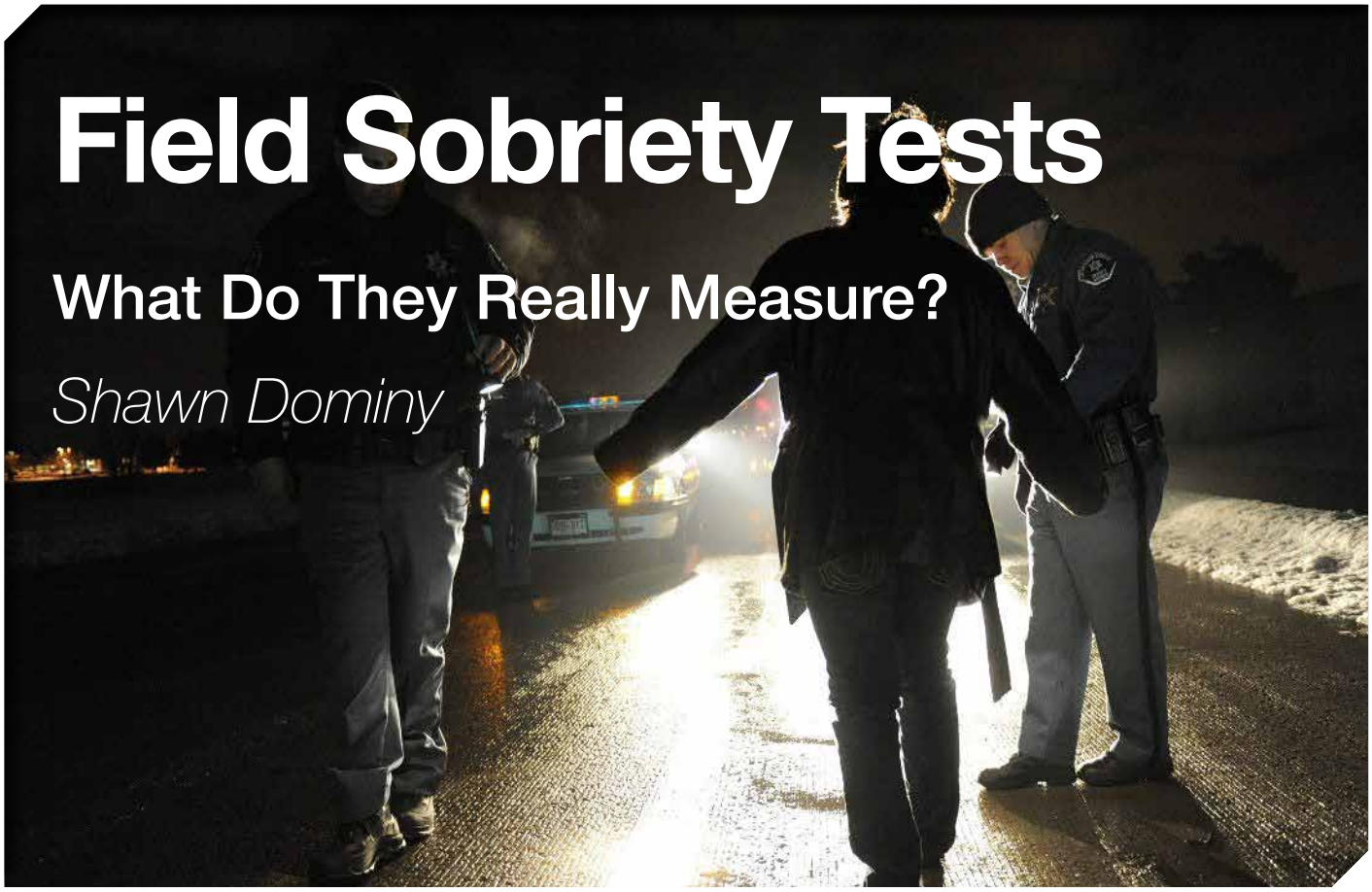
Field Sobriety Tests

What Do They Really Measure?

Shawn Dominy



During a recent OVI jury trial, the judge and I disagreed about the function of standardized field sobriety tests (SFSTs). During a sidebar, I argued the tests do not measure driving impairment; they predict blood alcohol concentration (BAC). The judge's opinion was SFSTs measure impairment of driving ability. The judge's opinion prevailed, despite being inconsistent with conclusions of the National Highway Traffic Safety Administration, because the judge's view always prevails during a trial in the judge's courtroom. This particular judge is intelligent, well-intentioned, and better educated on DUI/OVI issues than most members of the bench and bar. If this judge misunderstands the purpose of SFSTs, it's a topic worth addressing.

A Very Brief History Of Standardized Field Sobriety Testing

Before the introduction of SFSTs, law enforcement officers used a variety of non-standardized tests to help them decide whether to arrest a person for drunk driving. Beginning in 1975, the National Highway Traffic Safety Administration (NHTSA) sponsored research to develop a standardized battery of tests which could be used by officers to assist them in making the correct arrest decision.

The research was conducted by the Southern California Research Institute (SCRI). The director of SCRI was Marcelline Burns, Ph.D. Dr. Burns and the team at SCRI submitted a first report to NHTSA in 1977 and a second report in 1981. Based on those reports, NHSTA produced a training manual: DWI Detection And Standardized Field Sobriety Testing, commonly referred to as "the NHTSA manual".

Since the original publication of the manual, NHTSA sponsored multiple validation studies. Those studies evaluated the SFSTs in various environments and examined multiple factors affecting the tests. The reports from the studies are clear: what's being evaluated is the effectiveness of the SFSTs to predict BAC, not driving impairment.

The San Diego Study Makes It Crystal Clear

One of the most recent validation studies was conducted in San Diego in 1998. The San Diego study examined the validity of SFSTs for predicting BACs below .10. The report from that study clarifies the impairment-measuring misconception on pages 27-28:

Many individuals, including some judges, believe that

the purpose of a field sobriety test is to measure driving impairment. For this reason, they tend to expect tests to possess "face validity," that is, tests that appear to be related to actual driving tasks. Tests of physical and cognitive abilities, such as balance, reaction time, and information processing, have face validity, to varying degrees, based on the involvement of these abilities in driving tasks; that is, the tests seem to be relevant "on the face of it." Horizontal gaze nystagmus lacks face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the incorrect assumption that field sobriety tests are designed to measure driving impairment.

Despite The Clarity, The Misconception Continues

Just like the well-intentioned judge in my recent trial, many criminal justice professionals misunderstand the designed purpose of SFSTs. Many lawyers and judges have read (at least parts of) the NHTSA manuals but have not read the NHTSA studies: only 'DUI dorks' sit around and read the actual studies!

The problem is the NHTSA manuals contain sloppy writing. In various parts of the NHTSA manuals, the writers use "impairment" as though it is synonymous with a BAC over .08. The two are not synonymous. In some places, the manuals contain conspicuous implications the SFSTs measure driving impairment. This is inaccurate writing on the part of the manuals' authors, but it's apparently good enough for government work.

The Misconception Matters

Picture a trial in which the defendant is accused of operating a vehicle 'under the influence' (impaired ability to operate the vehicle). In the trial, the government witnesses and the government lawyer tell the jurors the defendant's inability to stand on one leg has been proven by studies to indicate the defendant had an impaired ability to operate a vehicle. This statement is completely untrue and highly prejudicial to the defendant. A judge should not permit the jurors to be misled in this way.

I don't blame judges and lawyers for misunderstanding the true function of SFSTs. I blame the writers of the NHTSA manual. Hopefully, as more lawyers and judges learn SFSTs do not measure impairment, jurors will not be misled about SFSTs, and OVI trials will be more fair.

ABOUT THE AUTHOR

Shawn Dominy is a criminal defense lawyer with a practice focused on O.V.I. defense. He is the Secretary of the O.A.C.D.L. and co-chair of the O.A.C.D.L. O.V.I. Seminar Committee. He is also a member of the National College for DUI Defense and a founding member of the DUI Defense Lawyers Association. Dominy authored the book 'I Was Charged With DUI/OVI – Now What?!' and frequently writes on OVI topics in his blog: www.columbusoviattorneyblog.com.

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Shawn Dominy

Thanks the members of the seminar committee who made the OVI seminar a success:

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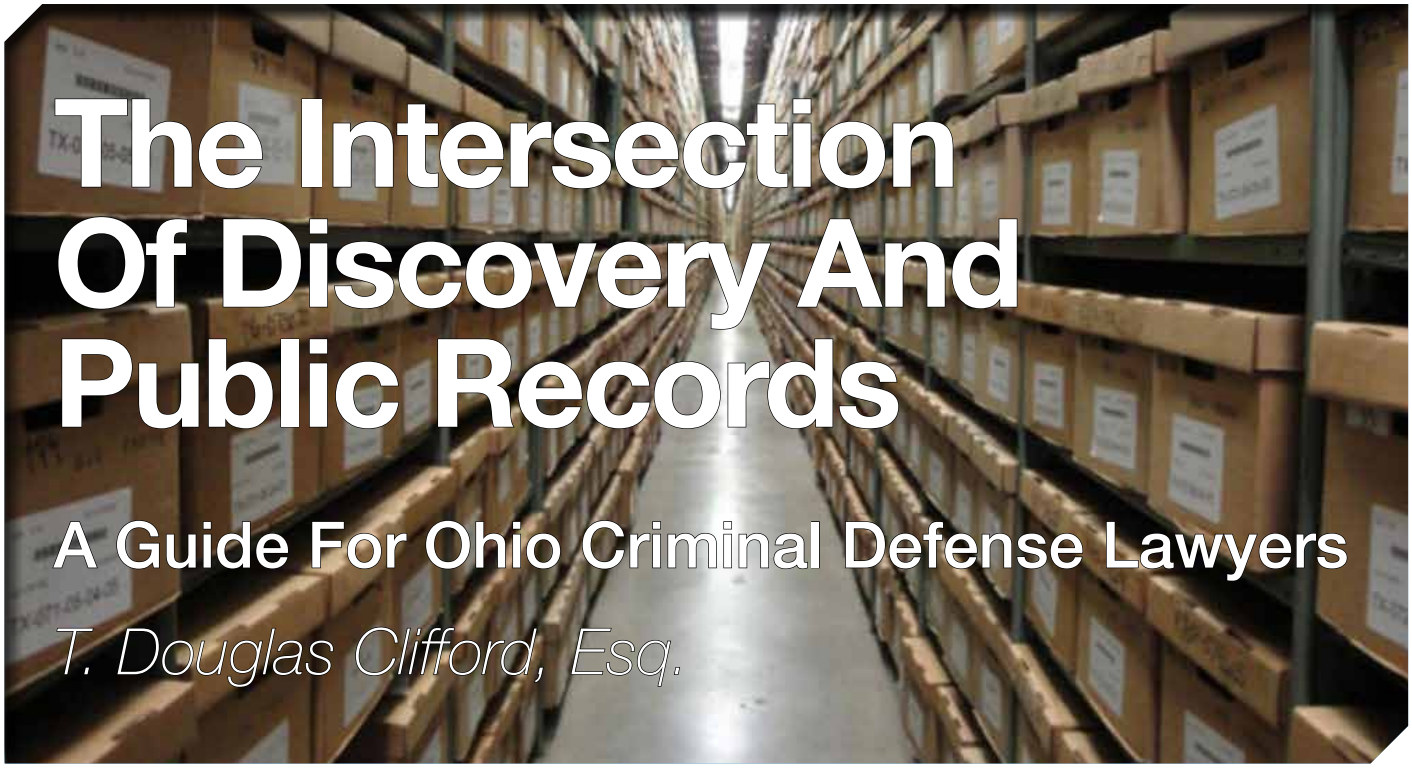


The Intersection Of Discovery And Public Records

A Guide For Ohio Criminal Defense Lawyers

T. Douglas Clifford, Esq.

A complete history of the Ohio Public Records Act (ORC 149.43) would be a tome which could easily fill a book. The annotations of case law for the Ohio Public Records Act ("OPRA") are currently over 150 pages long, and are replete with judicial modifications, as the courts felt pressure to create a stable framework for the Act. The purpose of this article is to give criminal defense practitioners guidance on how to use the OPRA as a supplement to the usual Criminal Rule 16 Discovery process ("CR 16").

To understand the significant evolution of the OPRA, it is necessary to analyze the somewhat drastic changes to CR 16 discovery which occurred in 2010. Before 2010, a huge problem with CR 16 discovery was that, technically under the rule, defense counsel was not entitled to written statements by witnesses/victims until after they had testified at trial. Many jurisdictions, however, had not subscribed to this narrow "gotcha-style" discovery tactic. This caused dramatic disparity among differing jurisdictions regarding what discovery defendants received, depending on local practice. Defense attorneys, frustrated by not receiving meaningful discovery until after trial began, started to use OPRA to obtain more evidence. This, in turn, led to ancillary mandamus actions to compel public records and OPRA fights in criminal actions, causing significant delays in those cases.

The frustration of the courts related to these deficits of CR 16 was noted by the Ohio Supreme Court in State ex rel. Steckman v. Jackson (1994). The Court stated, "we recognize that there are those among us who believe that 'open file' discovery should be the rule." Steckman noted that courts struggled with enforcing OPRA in the context of criminal cases because of the "anomalous result that any person (individual citizen, newspaper, designee) could get the records pertaining to a criminal charge against a defendant when that defendant could not, himself or herself, obtain the very same records by mandamus." Consequently, the Steckman Court announced, "in a criminal proceeding itself, a defendant may only use Crim. R. 16 to obtain discovery." The Court further clarified what the definition of the "work product exception" meant. This holding inevitably made evidence materially relevant to a defense less likely to be subject to disclosure "while a criminal case is pending."

The "Confidential Law Enforcement Investigator Record" exception to Public Records

ORC 149.43 defines a "public record" as "records kept by any public office…" "Public record" does not mean… (among many other exceptions) "Confidential law enforcement investigatory records" (ORC 149.43(A)(1)(h)). "Confidential law enforcement investigator records" are further defined in

ORC 149.43(A)(2) as:

> *any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:*
> *(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;*
> *(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;*
> *(c) Specific confidential investigatory techniques or procedures or specific investigator work product;*
> *(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.*

The issue of confidential informants and victim/witness identity issues are beyond the scope of this article, it is sufficient to say that this information is not a "public record." The much more significant subsection for the criminal practitioner is subsection (c) "specific investigator work product."

In Steckman the Ohio Supreme Court specifically held "except as required by Crim. R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding, by the work product exception found in R.C. 149.43(A)(2)(c), [is] excepted from required release as the information is compiled in anticipation of litigation." This would suggest that while a case is pending or being investigated, such information is excepted from disclosure. However, the Court went on to say that "the work product exception does not include ongoing routine offense and incident reports." While these two statements appear at odds with one another, the "anticipation of litigation" language provides some guidance as to the difference between work product and routine offense/incident reports. The courts have rationalized that "routine" offense and incident reports are created in every case, sometimes in cases that are never charged, and they do not emanate from the police officer's "deliberative and subjective analysis, his interpretation of the facts, his theory of the case, and his investigative plans." Thus, even though offense/incident reports are made during the investigation what controls is… the content of the record.

An example can be found in a garden variety OVI case where an investigation is captured on a dash cam recording. While much of the recording would be considered "routine" or may not be "investigatory" at all, the administration of standardized field sobriety tests (arguably a "confidential law enforcement technique," but certainly a "specific investigatory work product") would not be eligible for release under the OPRA.

An attorney who attempts to use the OPRA to request dash cam video in a pending case could find a redacted video which shows a traffic violation, perhaps initial contact with the driver, but not communication between the driver and the officer (part of the investigation work product) or field sobriety testing (also investigatory work product). This was the result in a 12th District decision in State ex rel. Miller v. Ohio State Highway Patrol (2014) where the court ruled "the cruiser camera video recorded the investigation of a specific alleged violation of Ohio law… [and] was generated by… investigation." Certainly, it is arguable that the video only shows objective facts of how the interaction occurred, but if there is an active pending criminal action, it could be construed as investigatory work product. An "Impaired Driver Report" listing field sobriety test clues would definitely be held as work product based on "subjective analysis and interpretation of the facts."

When is a "criminal proceeding" pending?

One tragedy from the Steckman case is the story of Ronald Larkin: one of the defendants whose case was addressed in the Steckman decision. Larkin was attempting to use the OPRA to assist in his post-conviction appeal. The Steckman court specifically held that Larkin (or any defendant) could not avail himself of ORC 149.43 to support a petition for post-conviction relief. Essentially, the "work product exception" extends until all appeals are exhausted. Some agencies took this to mean that if a defendant was being held for life without parole, the work product exception held until the death of the defendant (see generally State ex rel. Caster v. City of Columbus (2016-Ohio-8394).

But Larkin's story does not end there. Another person had filed a public records request for the records Larkin sought, and "only through an act of bureaucratic grace. Or a bureaucratic mistake" the other individual was able to obtain the records Larkin sought, and Larkin received the documents that he had been seeking for over a decade. He was able to file a motion for new trial based on withheld exculpatory evidence,

and his case was ultimately dismissed by the trial court (see State v. Larkin, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, as quoted in State ex rel. Caster v. City of Columbus (Ohio Supreme Court), 2016-Ohio 8394).

The overarching tragedy of the Steckman ruling is that it took from 1994 to 2010, 16 years, for CR 16 to be altered to allow for fair information sharing between the State and Defendant. We've come along way since the "gamesmanship" of the CR 16 before 2010.

The Ohio Supreme Court seems to recognize that much of the tension between CR 16 and the OPRA had dissolved based on the CR 16 amendments in 2010. In 2013, the Court concluded a criminal defendant is permitted to use the OPRA to obtain discoverable evidence, but then a defendant has a duty to reciprocate discovery if he/she obtained information on the pending criminal charge, whether through CR. 16 or the OPRA. State v. Athon (2013), 136 Ohio St. 3d 43.

Subsequently, a significant aspect of the Steckman holding was overruled in State ex rel. Caster v. City of Columbus (2016). In Caster, the Ohio Supreme Court noted that CR 16 and the OPRA are much more in harmony. In Caster, the Ohio Innocence Project ("OIP") was seeking law enforcement records related to a convicted murder who was convicted in 2007. The court noted that there was no pending litigation regarding the individual, that the OIP does not intervene in every case it reviews, and its efforts have led to exonerations in many cases. Furthermore, neither OIP nor any of its members had any attorney-client relationship with the individual whose records they were seeking.

The Court in Caster analyzed the significant 2010 amendments to CR. 16. It discussed the impact of the Larkin case proving the prior withholding of exculpatory material. It further discussed its holding in Athon that reciprocal discovery is required by the defendant for using the OPRA in a pending criminal action. The Caster court held:

because the PRA should be construed liberally to provide broad access, because the revisions to Crim. R. 16 have leveled the disparity between information available through the PRA and through Crim. R. 16 discovery, and in the interest of justice we hold that the specific-investigatory-work- product exception of R.C. 149.43(A)(2)(c) does not extend beyond the completion of the trial for which the information was gathered. To the extent that they hold otherwise, State ex rel. Steckman v. Jackson… [is] overruled.

Those seeking postconviction relief are not out of the woods quite yet

Even though there is now a bright line rule that government agencies can only claim specific investigatory work product through trial, those who would seek to use the OPRA for post-conviction relief are unlikely to find relief under the Act. This is because ORC 149.43(B)(8) states:

a public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction … to inspect or obtain a copy of any public record concerning a criminal investigation or prosecution… unless the request to inspect or obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence … finds the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

An incarcerated individual wishing to use OPRA to support their postconviction appeal requires a "sign off" from the sentencing judge (or his/her successor) in order to be allowed to use ORC 149.43. Those seeking documents through the OPRA for purposes of appeal still face many of the same monumental hurdles faced in the past.

What does all this mean for the trial practitioner – Practical advice Please!!!

As a criminal trial lawyer, this author has used the OPRA on a regular basis for a variety of supplemental materials that are often not "held in the prosecutor's file" or considered "traditional CR 16 discovery." While it is on very rare occasion that this author has requested material from a prosecutor and heard a response like "it's not in my file, so therefore I don't need to go get it for you" or words to that effect, I am aware that some defense lawyers in the state are not so fortunate to have such a civil and meaningful discovery process.

A caveat… The Supreme Court was very clear in Athon that ORC 149.43 is not a substitute for traditional discovery. Every reader should take that warning to heart. Furthermore, a public records request which obtains information a defense lawyer may want to use at trial triggers reciprocal discovery under CR 16(H). That said, many things which could be valuable at trial that can be obtained from a public records request, include the following:

(1) Disciplinary and training records of law enforcement officers involved in the case (sometimes referred to as the officer's "jacket");
(2) prior criminal convictions of witnesses or victim(s) (often time can be located online without a records request at all, however, obtaining certified copies of convictions for crimes of dishonesty or felonies within the last 10 years for impeachment purposes may be requested orally or in writing);
(3) police reports of prior history between the parties can be particularly meaningful in domestic violence, telecommunications harassment, assault, and criminal damaging cases. Once these cases are disposed of, they are no longer considered investigatory work product. It helps to have in the request name(s), dates of birth, known address or previous addresses, etc. to narrow down the request (making it easier for the government employee who actually has to do the work in fulfilling your request is a good thing);
(4) in OVI cases when the report contains dissociated facts or pronouns used (i.e.- referring to a male driver as "she," or talking about a red sports car and then talking about the same vehicle as a brown minivan, or any misstatements that suggest that perhaps the field sobriety test portion of the report is a "cut and paste" job) ask for all of the officer's narrative OVI reports for a 3-6 month period, don't worry about redaction of identifying information, you're looking for verbatim language in the report;
(5) in cases of resisting arrest, or when the client suggests overuse of force was used by the officer request "use of force incident reports." If no record exists, request the policy of the department in documenting use of force incidents;
(6) 911 tapes, radio traffic logs, and vehicle GPS logs of where officer(s) were on a shift that is relevant to the case;

There are undoubtedly many more uses for the OPRA statute for the criminal defense practitioner than just those listed above. These examples are some of the common uses which can supplement or provide context to the original reports.

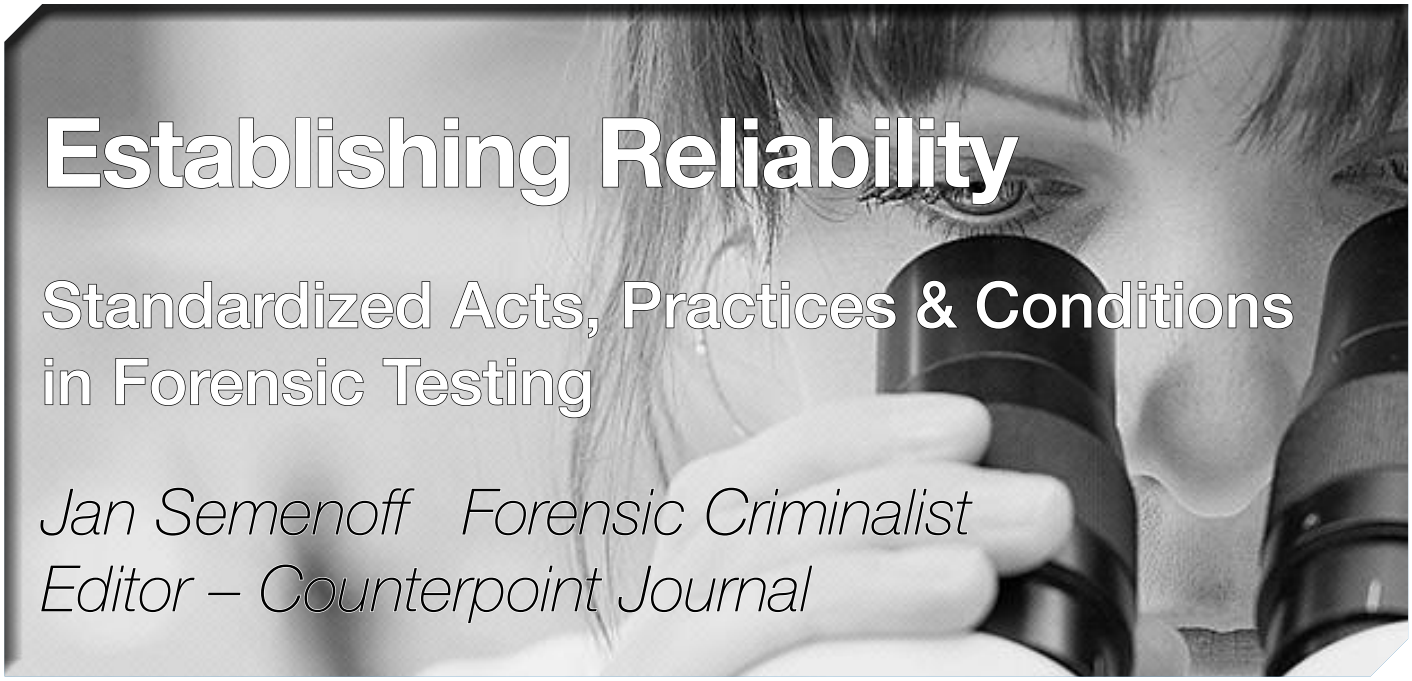
My, How The Times Have Certainly Changed

There has been significant metamorphosis in both the permitted use of the OPRA and the considerable amendments to CR. 16 to "take out the gamesmanship" out of the discovery process. Therefore, it should come as little surprise that, as of March 23, 2018, defense counsel will finally be able to "be provided" a copy of the defendant's own traffic and criminal record from prosecutors. Furthermore, we, "defendant's counsel may disclose, copy, and provide the defendant any information about the defendant's own traffic or criminal record obtained by discovery from the law enforcement automated data system" ("LEADS"). And, in a common-sense approach, prosecutors and other individuals legitimately using LEADS cannot be prosecuted for providing such records to defense counsel or the defendant. (See SB 33, creating ORC 5503.101, effective date 03/23/2018).

The creation of ORC 5503.101 is consistent with the evolution of the OPRA and CR 16 discovery. The overall tone of the developments is one of openness, which seems appropriate for information in "the people's records".

About The Author

Attorney T. Douglas Clifford is a private attorney maintaining his principal office in Norwalk, Ohio. He also serves as a part-time assistant Public Defender for Huron County. He currently serves on the OACDL Board of Directors as a CLE co-chair, is a general member of the National College of DUI Defense, a founding member of the DUI Defense Lawyers Association, an associate member of the American Academy of Forensic Sciences and a member of the American Chemical Society Chemistry and the Law division. Attorney Clifford recently obtained the designation of "lawyer-scientist" through the American Chemical Society's Chemistry and the Law division. Doug is always willing to assist other OACDL members and can be reached at doug@norwalkohiolaw.com



Establishing Reliability

Standardized Acts, Practices & Conditions in Forensic Testing

Jan Semenoff Forensic Criminalist
Editor – Counterpoint Journal

This article is more than a purely academic exercise. Using the framework presented, you will be able to identify and establish whether or not a reading presented is reliable, whatever that reading may be. Conversely, you will be able to raise doubts concerning the reliability of a reading when one has been appropriately identified…

What is Reliability?

In Volume 1, Issue 1 of Counterpoint, we introduced the notions of Accuracy, Precision and Reliability in the article of the same name. In another Counterpoint article, we discussed issues with Specificity in the article Window on a Molecule. These are all scientific concepts that are not only useful, but critical to understand. Now, I want to deal with the concept of reliability using a different framework. This approach may be more accessible to many of you.

When we say something is reliable, what do we mean? The other articles referenced above talk about reliability as hitting the right target, on the bull's eye, time and again with consistent and repeated results. The concept of reliability refers to a system that produces consistent results under similar conditions. Reliability is a systems concept. In other words, it is the system itself that is reliable, not necessarily the individual measurements produced. Think of reliability as the degree to which an assessment tool produces stable and consistent results, repeatedly.

Establishing Reliability

I said earlier that I wanted to deal with the concept of reliability using a different framework. Remember that reliability refers to a system of measurement. If you need to establish that a reading is reliable, you need to examine the system that produced the reading. In other words, you need to examine the way the reading was produced, and under what conditions the reading was produced. Enter the concept of Acts, Practices and Conditions.

A system is used to produce a reading – any reading, no matter what it is. The system consists of two broad components: The infrastructure and policies surrounding the system (or, the way the measurement was produced by the system – the individual acts and established practices), and; The conditions under which the reading was obtained.

I focus professionally as a breath alcohol specialist, so I will use that system as an example. A Breath Alcohol Concentration (BrAC) reading is produced in our hypothetical jurisdiction using breath test device X. We need to examine the BrAC readings produced by device X to determine whether or not they are reliable. We do that by looking at by looking in three main areas: Acts, Practices and Conditions

Standard Acts, Practices and Conditions

Infrastructure, Policies, Acts and Practices

The system, in this a case a Breath Alcohol System, is used to produce a BrAC reading. It is helpful to look at the system as a whole to establish reliability. This brings us to our first issue – Infrastructure.

Infrastructure in breath alcohol testing refers to the standards and policy surrounding the use of the device. How are they to be maintained? What training is required to use the device? How often are they to be calibrated? What are the minimum testing requirements? What are the Standard Operating Procedures to be conducted during each test? In short, what are

the agency's policies and procedures required in the use of the devices?

It is helpful to think of these theoretical police requirements as individual ACTS. Instead of looking at the concept of "calibration," take a look at the individual actions that must be accomplished during a device's annual calibration. Were the acts performed? Was a standard for performance attached to the act? Similarly, what actions must be performed during calibration? During operation?

These actions can be broken down into two categories: Practices that are standardized and required, and individual acts – those actions that become the de facto way of operating a device. Sometimes there are compelling reasons why local acts or actions should take precedence over suggested practices. These must be judged on their individual merits and circumstances.

The automated nature of modern breath alcohol testing devices has taken over the control of many acts and practices in breath alcohol testing. Often, Qualified Technicians will testify in court along the lines of, "I don't know about that. I'm trained to push a button...." regarding a specific operation of the device.

But, there are certain procedures (practices) that are established in your local breath alcohol testing protocols. As an example, disposable mouthpieces may be required to be changed for each test. The Qualified Technician might be required to inspect each mouthpiece prior to use. Certain jurisdictions may require mouthpieces to be seized in the case of a refusal to provide a breath sample, to prove that there were no obstructions in the mouthpiece that created an inability to provide a breath sample. If these practices were carried out properly, the reliability of a reading is enhanced. If these practices were NOT carried out, or carried out improperly, the reliability of the reading obtained is in doubt.

Similarly, in many jurisdictions, Calibration Checks must be performed. In some jurisdictions, these checks are performed with EACH breath test, or breath test sequence. In other jurisdictions, the checks are performed at some period of time – often quite far apart. Some jurisdictions do not perform Calibration Checks at all and rely upon the annual maintenance of the breath testing device to discern any discrepancies in testing (by then, of course, it is too late.) Again, if these practices were carried out properly, the reliability of a reading is enhanced. If these practices were NOT carried out, or carried out improperly, the reliability of the reading obtained is in doubt. A Qualified Technician, minimally trained only to "push the button" may not identify and recognize that sub-standard acts and practices exist or have occurred.

Testing Conditions

One thing to keep in mind with breath alcohol testing is that the breath test system assumes that certain conditions will be present for testing to occur. As an example, the ambient temperature of the testing room cannot be too hot or too cold. There cannot be fumes in the room emanating from a recent paint job, or from the use of harsh cleansers, disinfectants, or fumigants. There cannot be radio frequency interference from police radios or cellular phones, including transmitter arrays for the communications system. Electrical outlets should be dedicated, grounded and isolated. The list goes on and on.

Then there are issues with the test subject's themselves. Certain assumptions are made about people, as a whole, that individuals must meet, in order for testing to be correct. The blood to breath ratio of the person must be 2100:1 for reliable readings. The person's exhaled breath temperature is expected to be a certain temperature (34.0°C) for reliable readings. The test subject cannot have endogenous[1] Volatile Organic Compounds (VOCs) on their breath for reliable readings. The test subject must have a minimal lung volume, be able to deliver a minimum breath sample volume, and be free from any medical conditions that make them a poor candidate for breath alcohol testing.

As with acts and practices, when these conditions are met, the reliability of the reading is enhanced. If these conditions are not met, the reliability of a reading is in doubt. Sub-standard conditions can and do affect breath test results. Again, a Qualified Technician, trained only to "push the button" may not identify and recognize that sub-standard conditions exist or have occurred.

The Concept of Measurable Standards

When looking at overall reliability, it is helpful to look at the standards required for the testing process. What acts, practices and conditions are required, and under what standards are they measured? We can't really look at results of a breath test and say for certain that they are reliable or unreliable without looking at the acts, practices and conditions under which the testing occurred.

Why a measurable standard? It is difficult, if not impossible, to examine a test and say it was done "correctly" or "incorrectly". How do we decide upon correct versus incorrect? We can, on the other hand, attach performance standards, or measurable objectives to individual components of the testing process, then assess whether or not these performance stan-

dards or measurable objectives were met. From this notion we get standards such as:

- A minimum exhaled breath volume of 1.1 liters
- A simulator temperature of 34.0°C
- Two sample within 0.02 grams/100mL (20 milligrams/100mL) of one another
- Two samples taken within 3 minutes
- Two samples taken no sooner than 15 minutes apart
- A Calibration Check within +/- 10 milligrams/100mL (+/-0.10 grams/100mL) of the standard solution

**Endogenous refers to naturally occurring compounds on a person's breath.*

If the individual acts, practices and conditions were performed correctly according to the measurable standards, the reliability of a reading can be established. Reliable readings can be considered scientifically valid.

If, on the other hand, the acts, practices and conditions under which a reading was obtained were performed incorrectly, or they did not meet the established measureable standards, then the results must be considered inherently unreliable. Unreliable readings cannot be considered scientifically valid and should be disregarded.

The Last Word

This has not been intended to be a philosophical discussion about nuance, but rather, an exercise intended to provide you with a valuable assessments tool. Remember, the reliability of a reading is based on the examination of the system that created the reading to begin with, holistically.

When looking at the reliability of a reading, whatever that reading may be, examine the individual acts, standards and conditions under which the reading came to be. If the examination indicates that the measured standards have been met, then the reliability of the reading is enhanced. Reliable readings are considered scientifically valid.

On the other hand, if sub-standard acts, practices and conditions are identified, then, by definition, the results are also sub-standard. Sub-standard results must be considered inherently unreliable, scientifically invalid, and should be discarded.

Examples

INHERENTLY RELIABLE	***INHERENTLY UNRELIABLE***
STANDARD PRACTICE	**SUB-STANDARD PRACTICE**
Routine maintenance procedures performed annually according to the jurisdiction's or manufacturer's instructions or recommendations	Maintenance not performed at required intervals, not performed altogether, or not performed according to the jurisdiction's or manufacturer's instructions or recommendations
Simulator solution changed according to requirements, using traceable standard	Simulator solution not changed in a timely manner, or not performed using traceable standard
STANDARD ACT	**SUB-STANDARD ACT**
Instrument diagnostics performed and passed at routine intervals	Instrument diagnostics not performed, or performed at sub-standard intervals, or instrument does not pass but left in service
Calibration and maintenance records retained for external review	Calibration and maintenance records not retained, or not available for external review
STANDARD CONDITION	**SUB-STANDARD CONDITION**
Test subject free from medical conditions that make them unsuitable candidates for testing	Test subject has medical conditions that make them unsuitable candidates for testing
Testing environment free from contaminants or sub-standard conditions	Testing environment that contains contaminants or sub-standard testing conditions

ETHICS

Jay Milano

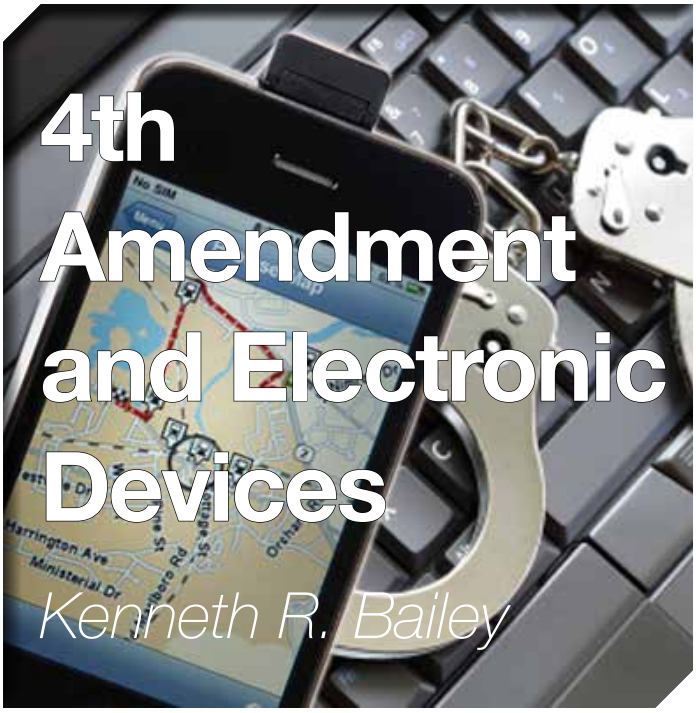
"The Supreme Court of Ohio Commission on Professionalism, in partnership with the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Attorneys, cordially invites you to a lunch discussion on Promoting Professionalism in the Criminal Justice System."

So, on February 21, 2018 in Columbus, Ohio there was held the first Professionalism Lunch discussion. In attendance were 9 or 10 Judges, and about 30 defense attorneys and prosecutors. The discussion was open and frank and without rancor. Issues were identified and solutions examined. Judge Richard L. Collins Jr., Chair of the Commission, presided.

And now we go on the road. The lunches will move around the state, about 4 times a year. They will provide a forum and an opportunity for discussion, Defense Lawyers and Prosecutors and Judges, over lunch (a long-lost art).

This is an OACDL initiative. It took a while, but should be a valuable effort into the future. When it comes around to your town- you need to show up.

I will keep you apprised. Call me if you need me.



4th Amendment and Electronic Devices

Kenneth R. Bailey

Technology issues remain the front line of the fight for Fourth Amendment protections. Courts are looking to traditional concepts of privacy in physical property and the expectation of privacy when determining whether to and what extent to protect those new technologies.

For example, the Fourth Amendment protects the content of the modern day letter, the e-mail. United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010).

Individuals are increasingly storing their private information (correspondence, names and contact information of associates, e-mails, videos, health records, financial information, and photographs) online in applications and storage devices rented from companies. These offsite storage platforms are generically referred to as "the cloud". Meanwhile, much of the individuals' private data may also or alternatively be stored directly on the user's own device.

Accordingly, as we identify new technologies, data stored in the cloud, and other adaptations of the traditional "papers" identified in the Fourth Amendment, we must evaluate privacy by paralleling the new information to traditional protections, and then identify the expectation of privacy by the person and society in general.

Courts have and should recognize a greater need for protection of the electronic device, because of the high expectation of privacy in the device, locked behind a password or biometric security, which provides the gateway into a device with banking, passwords, private communications, thoughts, photographs, and location history.

While Fourth Amendment proponents identify those passwords as the digital equivalent of a locked door, opponents propose a concept called virtual opacity likening the digital realm to a having only a sheer protecting such digital data.

1.00. Preserve your objections as we await the Supreme Court's ruling on mobile phone locations.

This year, the U.S. Supreme Court will rule on Carpenter v. U.S., addressing whether and when a probable cause warrant is required to access an individuals mobile phone location history. This author anticipates the Court may outline of a new rubric for searches touching upon whether an individual may entrust her privacy in the hands of a third party.

The Sixth Circuit Court of Appeals ruling in Carpenter stated individuals did not have such a reasonable expectation of privacy in mobile phone location history, and it is for Congress to proscribe such protection, if it so desires. (Notably, between 2005 and 2012, the Sixth Circuit was the most reversed circuit court of appeals, reversed in 31 out of 38 cases. See Walsh, Mark, "A Sixth Sense: 6th circuit has Surpassed 9th as the Most Reversed Appeals Court", ABA Journal, December, 2012.

The Court's decision in Carpenter will likely give guidance as to how future cases are handled with respect to cloud storage and search warrants. The decision will likely influence the safety of attorney-client information being stored in these locations, as well.

2.00. Anticipate more traditional concepts being extended to cover new technology.

The Fourth Amendment protects all areas in which a person has a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347 (1967). Further, electronic as well as physical intrusions into a private place may constitute a violation. Id.

Privacy exists where (1) the individual has exhibited an actual (subjective) expectation of privacy, and (2) society is prepared to recognize that this expectation is (objectively) reasonable. Smith v. Maryland, 442 U.S. 735 (1979).

As the U.S. Supreme Court looks to consider the rental of digital real estate for the storage of information behind passwords, it's reasonable to expect they will provide an extension of the traditional privacy protections of a rental of a hotel room for the storage of one's papers. See, Hoffa v. United States, 385 U.S. 293, 301 (1966) (4th Amendment applies to hotel rooms); United States v. Domemenech, 623 F.3d 325, 330 (6th Cir. 2011) (privacy recognized even if hotel is reserved under an alias).

2.01. Cell Phones.

Police must obtain a search warrant prior to searching data stored in a cell phone seized incident to a lawful arrest, unless the search is necessary for an officer's safety or due to exigent circumstances. State

of Ohio v. Smith, 124 Ohio St.3d 163, 2009-Ohio-6426. The United States Supreme Court agrees. Riley v. California, 134 S. Ct. 2473 (2014).

Interestingly, in Smith, the Ohio Supreme Court distinguished cell phones from the traditional concepts of closed containers, recognizing a much higher expectation of privacy in the contents of their cell phone. Id. The next step will be to see whether the data on the phone is more easily accessed through a third-party, because the information on the phone is stored with the service provider. Consider looking for GPS location of a vehicle, if officers are unable to attach a device to a vehicle and or search the phone's content for history, can the GPS information simply be obtained from a provider.

It seems the holdings that will be issued in the future will parse into two categories information from third-party vendors (a) the transactional business records of the service provider with their customer, and (b) the customer's private data which the service provider is renting space to the customer to store.

2.02. GPS vehicle tracking devices.

Police must obtain a search warrant prior to placing a GPS tracking device on a vehicle, because such monitoring of the vehicle constitutes a search. United States v. Jones, 565 U.S. 400 (2012). Admittedly, the Jones opinion seems to have left room for a case wherein the device it attached for a shorter period of time, likely looking to analogize the tracking to merely following the vehicle.
2.03. E-mails.

As stated above, the Fourth Amendment protects the content of the modern day letter, the e-mail. United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010). However, the internet analogue of the envelope markings, the metadata, has not been protected, yet.

3.00. Client Advice.

Just as you would advise your clients to embrace their right to remain silent, you should advise your clients as to their right to protect their privacy.

3.01. Lock your devices.

Encourage clients to have a pass code for entry into their cell phone or other device. While such a lock is not axiomatic of privacy, if your client engages such protection, it will bolster and assist in making analogous arguments as to the expectation of privacy behind a locked door. Further, this will assist in protecting against claims of voluntary abandonment where the device is not seized from the person but found after being lost, mislaid, or abandoned. See, State of Ohio v. Moten, 2012-Ohio-6046 (search warrant unnecessary in spite of Smith's holding, because phone was abandoned not seized).

3.02. Maintain local storage.

Where the option is available, encourage your clients to maintain storage on a locked device. If that device can be maintained unattached to the internet, or if the data is stored locally rather than with a third-party provider, all the better to maintain privacy from governmental intrusion.

3.03. Turn-off location sharing.

Encourage your clients to turn off their location sharing. Many cell phones will ask if you want to turn-off or turn-on location sharing, meanwhile encouraging sharing under the guise of an emergency 911 service; however, these default settings may provide a dangerous foothold for the government to claim there was no subjective expectation of privacy.

3.04. Read User Agreements.

While it is unlikely your clients are going to start reading all the user agreements for their cloud storage, we may have to sooner than later. Consider the fact IT companies may provide in their standard user agreement of their taking ownership of data stored on their devices. Based upon the above predictions, avoiding such companies may become a practical consideration.

About The Author
Ken Bailey is the current President of the OACDL, its youngest President in its history, and he is the chair of the Technology Committee. Prior to becoming an attorney, Bailey worked as an IT consultant for Merck and Johnson & Johnson, and he worked for a company building renewable energy power stations. At age 17, Bailey campaigned as a candidate for State Representative.

Marsy's Law: Sounded Good But a Step Backward For Ohio's Criminal Justice System

Ian Friedman

Background

On November 7, 2017, Ohio voters overwhelmingly voted in favor of amending the Ohio Constitution to include added protections for victims of crime. Marsy's Law went into effect on February 5, 2018.[1] It is entirely understandable that Ohio citizens would embrace such a lofty and well-intentioned amendment. After all, who could ever argue in good conscious conscience that greater protection for a victim is anything but appropriate? Certainly, no reasonable person would want to see a victim endure greater hardship while navigating through the criminal justice process.

The goal should always be to treat defendants, accusers, victims, attorneys, jurors, staff, and judges with respect. Was a change needed to better the treatment of actual victims? Perhaps. Was Marsy's Law the mechanism to accomplish this goal? Absolutely not. Voters, and true victims themselves, may not have realized that the amendment may actually jeopardize their own cases. All of the provisions of Marsy's Law were already provided for in the Ohio Revised Code. The only entirely new right is that affording an accuser the right to withhold evidence. The litigation that is sure to commence, will be costly to taxpayers and will make the law's future uncertain. It is this provision that is the focus of this article.[2]

Threat to Justice

The reason a defendant is called a "defendant" is because he or she stands accused of a crime and must defend one's self. For this, the United States and Ohio Constitutions guarantee a defendant certain rights to be afforded a fair trial and reduce the chance of wrongful convictions. The problem with cloaking a victim with constitutional rights is that it presupposes that an accuser is actually a victim. Thanks to DNA and other advances in forensic sciences, it is now widely accepted that many innocent people are wrongfully convicted throughout this country. Some of these unfortunate people serve decades in a small cell away from their families for something they did not do. Moreover, the true culprit remains on the street able to reoffend. As we all preach in the courtrooms, being accused, or even charged, with a crime does not automatically equate to guilt.

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1. After his sister's murder, Henry Nicholas went on to co-found a semiconductor company that was eventually acquired for $37 billion. That fortune allowed Nicholas to become one of the foremost victims' rights activists in the country. He has pumped tens of millions of dollars into campaigns to convince voters around the country to amend their states' constitutions to include Marsy's Law, a set of guarantees that looks to put victim and defendant on equal footing. This financial backing made it unfeasible to contest the Ohio proposed amendment. Opponents of Marsy's Law in other states face similar difficulty.

2. To date, additional reported problematic instances include victims objecting to bonds, delayed bond hearings, objections to agreed plea negotiations and demands for particular sentences. The weight to be afforded to such mandates is unknown and requires guidance.

Our legal system presumes innocence until guilt is proven and for good reason. We must strive to minimize the chances of wrongful and destructive convictions. In 2010, Ohio citizens rallied behind the effort toward "open discovery" across the state. This allowed for defendants to view all the evidence for and against them. Prior to the passage of the discovery reform, defendants often proceeded to trial with limited information, only to hear it for the first time from the witness stand. This "trial by ambush" promulgated gamesmanship from both sides of the aisle, undermined public confidence, and led to unjust results. People who voted for Marsy's Law are to be commended for their support of the noble ideal of protecting victims. It is likely that the provision which threatens the more transparent system of justice post-2010, was either missed or misunderstood by the voters. It reads:

The amendment would provide victims with the right . . . except as authorized by Section 10 of Article I of this Constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.

As a practical matter, we have already learned that, in a number of criminal cases, victims are opting to exercise their right under the new amendment by not sharing needed information with the prosecutor and defendant. So far, this has included computer data evidence, treatment records, and cellular records. While proponents of Marsy's Law proudly announced that the law had the support of hundreds of law makers and advocacy groups, they glossed over the fact that the Ohio Prosecuting Attorney's Association, as a whole, was opposed to its passage. It is rare that the prosecutors and defense bar are in agreement when it comes to criminal justice developments. Here, they are.

Those that who work in the courts daily can anticipate the realistic consequences of Marsy's Law. While prosecutor's offices are debating how to handle refusals by accusers to turn over evidence, common themes of concern are the undermining of the Confrontation and Due Process Clauses that were originally instituted to achieve the most reliable system possible. The unanticipated harm to actual victims is the dismissal of their cases when prosecutors are unable to ethically meet their disclosure obligations and afford defendants a fair process. If an appellate court were to find that the withholding of evidence led to an unfair trial, a new trial could be ordered, causing a victim to endure the entire process again. Certainly, this wasn't the vision that voters had when they went to the polls.

One may take the position that the Ohio Constitution, Article 1, Section 10, is sufficient to ensure a defendant's rights. It is the same argument that was made for decades prior to 2010. It is the same argument that was made while innocent people were incarcerated and guilty individuals were freed. Turning back to yesterday's gamesmanship, will, once again, likely lead to more unfair and inaccurate results. The deprivation of defendants' rights was not the answer to improving the treatment of victims. Better enforcement of existing victims' rights was. Now, the issue will clog state courts at every level until direction is given from a higher court.

Legal Strategy

It is expected that a number of organizations including the Office of the Ohio Public Defender (OPD), the American Civil Liberties Union and various law firms will mount constitutional challenges as case issues arise. When faced with the imminent obstacles of Marsy's Law, one must ensure that an objection is placed upon the record. While all parties, including judges, are figuring out the correct response to this amendment, a pre-trial written brief may be useful as an educational tool. In cases where the victim opts to withhold evidence from the defendant or their attorney, the prosecutor may be of little help. After all, they would not be in possession and/or control of the sought-after evidence and would therefore, not be able to comply with the discovery demand. In that case, a subpoena duces tecum served upon the victim is appropriate as is a motion to compel/show cause if the victim refuses to comply. Depending on a court's determination, a motion to dismiss the charges and/or indictment may be needed. Notifying the OPD of the troublesome case will service practitioners and their clients statewide as all injustices must be memorialized and considered for challenge. This amendment is a credible threat to fundamental fairness within the criminal justice system. Working in a unified and cohesive manner to confront Marsy's Law will be most beneficial to those that are presumed innocent throughout Ohio.

About The Author

Ian N. Friedman is a partner at Friedman & Nemecek, based in Cleveland, Ohio. He is the current President of the American Board of Criminal Lawyers, Vice-President of the Cleveland Metropolitan Bar Association and former President of the Ohio Association of Criminal Defense Lawyers. He teaches Cybercrime as an adjunct Professor at the Cleveland-Marshall College of Law. For More Information About Ian Friedman, Please Visit: www.iannfriedman.com

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Your Honor... I Cannot And Will Not Proceed

Kate Pruchnicki

The "Trustee Pod" at the Erie County Jail is for the non-violent, low risk inmates.

Of the around-140 total inmates in the jail in December of 2017, fifteen of them were housed in the Trustee Pod. One of those fifteen was Attorney K. Ronald Bailey, a criminal defense attorney from Sandusky, Ohio, who spent thirty days in the county jail after being held in contempt of court by Judge Roger Binette.

Bailey represented Richard Mick. Mick was a pastor at a Baptist church in Sandusky. Mick was accused of molesting two minor children affiliated with the church. He was indicted in May of 2014, and Bailey entered the case in October of 2015.

"Finally, the guy comes to see me to see if I'll take [the case]," Bailey recalled. "I realize he can't pay much, but I thought, 'I don't think he did this.'"

According to Bailey, the case did not begin with the two allegations that gave rise to the indictment. Rather, after Mick's wife had filed for divorce, their daughter came forward and claimed to remember having been molested by her father when she was a young girl. After the allegation, Bailey said the state hired an expert who interviewed Mick's daughter and formed an opinion that the abuse never happened. The case was washed out.

But then, two other kids came forward, said Bailey. They claimed to remember that, years prior, Mick had sexually molested them.

Mick was indicted. Shortly after Bailey took over the case, he advised Mick to undergo a polygraph examination with an experienced polygraphist with whom Bailey had worked in the past. Mick submitted to two examinations. He passed them both.

Before Bailey got involved, the court granted a motion allowing Mick to retain an expert witness on "repressed memories" at the state's expense. This witness passed away during the pendency of the case, but Bailey's multiple requests for a substitute expert witness were denied, as were his motions to continue the trial (then scheduled for May 31, 2016) on this basis.

About two weeks before trial, the state filed a Motion in Limine – on dispositive issues – which was set for a hearing three days before the trial date. Bailey moved for a continuance of trial on this basis, and the court granted the motion and rescheduled the trial for October 4, 2016.

About a week after the court reset the trial for October 4, Bailey filed a motion to continue. His son's wedding, scheduled to take place in Las Vegas, was scheduled for October 1. Bailey knew that, at 70 years old, he would be suffering from jet lag – and thus not at his physical or mental best – returning from Las Vegas just a day-and-a-half before trial. The court denied the motion.

Bailey then filed a motion requesting the court schedule the trial for an earlier date – with the exception of one day, he proposed any date during the month of September. The court denied the motion.

A couple months before the October 4, 2016 trial date, the state notified Bailey of a new allegation

against Mick. The court would allow the newly-emerged complainant to testify against Mick at trial – but Bailey did not receive the individual's psych records until about two weeks prior to the trial date. Bailey requested a continuance, asking for additional time to retain an investigator. The court denied his request.

October 4, 2016. Bailey said he knew he did not have what he needed to represent Mick effectively. He appeared for the trial as scheduled, and vehemently reiterated his concerns. The court held its ground. For better or worse, so did Bailey.

The trial went forward. "Each time he'd call on me to do something, I'd say, 'your honor, as I have explained, I cannot and will not proceed,'" Bailey recalled.

"It was difficult. Knowing this judge, I knew he would find me in contempt," Bailey explained. "But I figured it was better for me to spend a few days in jail than my client spending a year or more in prison waiting for an appeal on a case that shouldn't have gone to trial."

But then it went forward. The prosecution presented their case against Mick, but Bailey's position did not change: "your honor, as I have explained, I cannot and will not proceed."

Bailey called it a "one-sided trial." Mick was found guilty of all charges and sentenced to two concurrent life sentences. Bailey was held in contempt of court and sentenced to thirty days in county jail.

He spent just over a day in the Erie County Jail before the Sixth District Court of Appeals stayed the sentence pending his appeal. But over a year later, on December 8, 2017, the appellate court affirmed, and on December 10, Bailey turned himself back in.

Being in the Trustee Pod meant Bailey was one of the 15 inmates allowed to drink hot coffee and work in the kitchen each day. He said it made the time go by a bit faster. But for a 70-year-old with chronic neck and shoulder pain, the work was not always easy.

The inmates ate off of thick plastic trays. Bailey's job was to smack the trays together above a garbage can to knock off the excess food before they were put in the dishwasher. With about 140 inmates – and so 140 trays – the daily repetition took a toll on Bailey physically.

The bed Bailey slept in did not help his condition. The frame was plastic, and stood about a foot-and-a-half off the ground. The mattress was about two or three inches thick and covered in vinyl. Pillows were not allowed.

"One day the pain, on a scale of one to ten… it was a nine," Bailey said. He asked to go to a hospital, but the guards told him he would just be given Percocet that he would not be allowed to bring back in with him. So, his options were Tylenol and ice – he was given ice every few days or so when he was able to see the nurse. He wondered why, when he was given a bag of ice, it was coated in flour. He was told, "the reason we have to put flour on it is [because] you're not allowed to give [it] to other inmates to cool their drinks."

But despite the hardships, Bailey found a unique solace during the time he spent inside those walls. "I'm 70 years old, so by the time I [was] put in the cell, my first thought [was], 'God, why am I here?' he said. "But it didn't take long [for me] to find out why."

Bailey holds an unwavering faith in God. Every Thursday evening the jail held a church service, and he recalled one evening during service a fellow inmate pointing at him and sharing, "I'm glad this guy is here."

"It was a time for me to talk to various guys about the Lord," Bailey said. "I actually led two inmates to the Lord."

One of Bailey's fellow inmates was bipolar and schizophrenic. In the middle of the night, when he believed everyone was asleep, Bailey overheard him mumble to himself, "Nobody cares about me but my parents and grandparents."

The next morning, Bailey told him he had heard what he said. The man apologized, and said he did not mean to be a bother. Bailey responded, "you don't have to apologize. You were being honest. But you should know what you said is not necessarily true." Bailey told him he cared, and that Jesus cared, too.

The same man wanted to get his GED when he got out of jail, so Bailey asked his son, Ken, to bring a GED guidebook when he came for his next visit. "[I was] just trying to find ways to encourage people that, 'this is not the end for you,'" Bailey said. "[That it was] maybe just a way of finding another path." The man told Bailey he wanted to join him for church when he got out.

Another one of Bailey's fellow inmates took to teaching this man from the GED guidebook. "So, I said to the guy teaching him – he knows I used to be an old drag racer – 'you want to make sure he understands how many feet there are in a quarter mile? There are 1,320," Bailey told him. "There are 1,320 feet in a quarter mile. The address of my church is 1320 East Strub Road, so that'll help him remember where he needs to go when he joins me for church.'"

Another guy Bailey met had lost his wife and a lucrative job as a result of his conviction. "When you get out, if you don't have a place to stay, you can come stay at my house for a while," Bailey told him. "It will be okay." In remembering the details of his time in county, Bailey emphasized how making an impact on others had a profound impact on him.

Some nights the jail served something made out of soy but meant to look like meat. Bailey and some of the other inmates noticed one of the guys was allergic to it – he would violently throw up on the nights it was served. The jail's medical staff told him he either had the flu or acid reflux, but each night sent him back to his bed

untreated. Bailey said he bought him about 30 packages of Ramen noodles to eat at night. "It was just sad because here's a guy that is getting sick because of an allergy, and they can't fix it," he said.

The court granted Bailey furlough so he could spend Christmas with his family. He was released for three days – though they did not count toward his sentence – and he returned with 15 Gideon's New Testaments with the hope of handing them out to his neighbors in the Trustee Pod. It took about a week for Bailey to gain approval.

"When they brought them to me to hand out, the [guard] that brought them said, 'well, can I have one?'" Bailey remembered. "I said, 'sure,' and started to hand him one, and he said, 'oh, I already took one, but if you said 'no' I would just give it back to you.'" He laughed. "It's funny… there were 15 guys in there, but I was one of the 15, so it wasn't like I was going to be short one."

Bailey recalled that every guy he handed a Testament to thanked him. "One guy… a couple times I would wake up in the middle of the night and I'd see him lying in his bed reading it," he said. "So that was one of the things that helped me see how, even in a situation like that, you can do something to help others. It was one of the highlights."

Bailey said being in jail became an opportunity for him to get to know others who are not always treated as "individuals."

"I found that each of them had a talent, but they didn't necessarily know what it was, or how to develop it, and they really needed someone to come alongside them and work with them to recognize what that talent was and then help them to build on it so they could have a good life," he said. "I think a lot of times in the system, what happens is, 'oh, you're one of those? This is how we treat one of those,' instead of looking at the individual and treating them as an individual."

Bailey was released from jail at 4:30 a.m. in mid-January of 2018. The Erie County Jail releases its inmates at that time, but any cash they came with is returned to them in the form of a check. Bailey wondered how fellow released inmates are able to cash a check at 4:30 a.m. to pay a taxi, or to get something to eat. "Fortunately, when I got out I had a car, but most people don't," he said.

Bailey said he has learned there are not enough people going to jails – to prisons – to help people in the quantity there should be, or in the ways these inmates need help. He said that, after he was released, he read a book that describes the word "justice" as what it meant when the Bible was written – "it meant 'restoration,' not 'retribution,'" he explained. Bailey said he wants to devote more of his time to fixing parts of the system he now knows are broken.

As for the trial, Bailey said he is not sure whether he would do anything differently given the chance. "I don't see how I could have gone forward in trial and thought, 'well, I gave him the effective assistance of counsel,'" he said. "And I think, coupled with the ability to help the guys that were in jail with me – to help them spiritually – in my scales, there isn't anything better you can do in life."

Still yet, Bailey said it was difficult to see the appellate court affirm the contempt judgment. "To have that many people think contrary to what you think, and people you've thought, 'these are some of the brightest in the business…,'" he said. "It's easy to look at and go, 'okay, maybe I'm not who I think I am. Maybe I got it wrong.'"

Nevertheless, Bailey maintains that his decisions – and requests for continuances – were made with genuine purpose.

He said his dream during high school was to live in France and race at Le Mans. Speeding around the curves of a track, he said, calms him down. "It's gotta be what a dancer feels like when they get every move right," he said. "Now, I'm not a good dancer, so I can't really say what it's like… [but] when I'm in trial, there's nothing else I can think about. I need to be totally there. That's gotta be what it feels like going down The Mulsanne Straight in a V12 Ferrari going 220 miles per hour."

Bailey's point, he said, is that unless a person has lived through a certain experience or made certain decisions, they do not truly understand what the experience is like or why the decisions were made.

Bailey said that for Mick, the sentence was life, and he was truly attempting to do things the right way. "The reality is, if you cannot give the effective assistance of counsel that you took an oath to [give], what are you going to do?" he asked. "You're going to go forward?"

Mick's son visited Bailey's office in mid-February 2018. He said his dad has lost at least 120 pounds while incarcerated as a result of various medical issues. Bailey said he thinks Mick's conviction will be reversed on appeal and he will be retried. "I can't see a justifiable way of saying, 'oh no, he got a fair trial and everything is fine," Bailey said. "He didn't."

After Mick was convicted, he was again indicted as a result of the allegation made against him before his 2016 trial. Judge Binette recused himself from that case in December of 2017.

On March 16, 2018, the Sixth District Court of Appeals reversed Mick's conviction and remanded the case for a new trial.

About The Author

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