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Litigation Track

Strategies For Success In Litigation: Mediation, Discover, Evidence, Expert Witnesses and Current Trends

Monday, July 8, 2024 - Wednesday, July 10, 2024
8:15 AM - 12:30 PM (each day)

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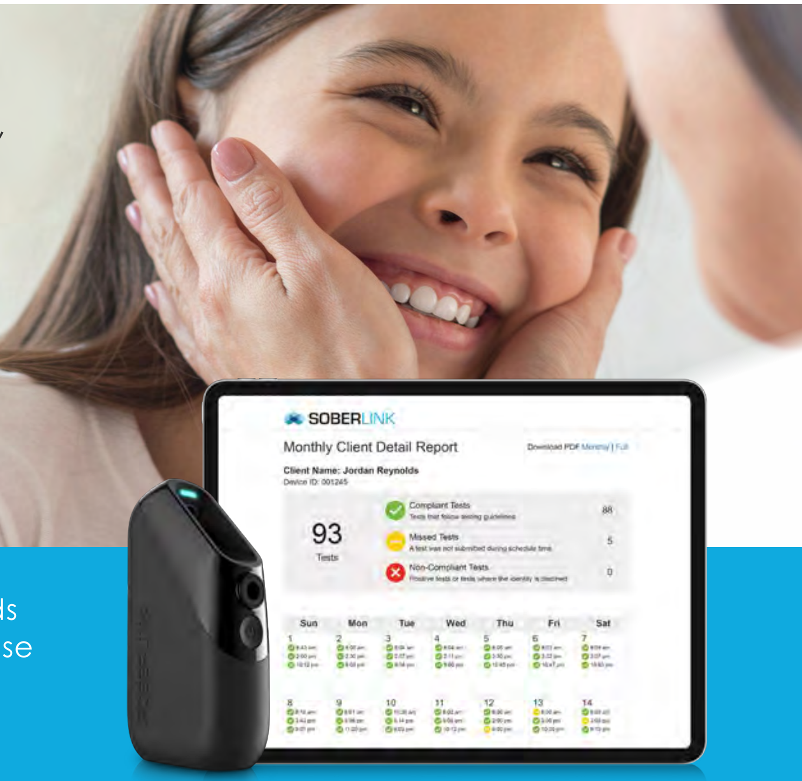

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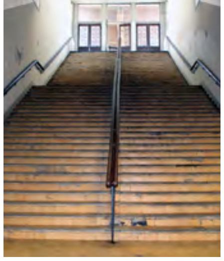
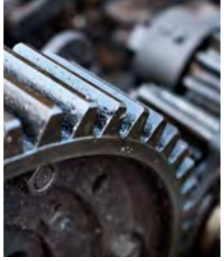


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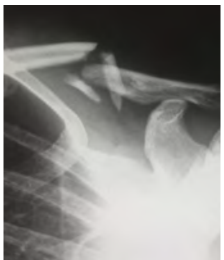

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2024 CLE by the Sea
Litigation Track
July 8 – 10, 2024

Table of Contents

2024 CLE by the Sea - Litigation Track
Strategies for Success in Litigation: Mediation, Discovery, Evidence, Expert Witnesses and Current Trends

Monday, July 8, 2024

8:15 am	Effective Strategies and Techniques for Successful Mediations *Moderator: Joe Kelly* *Panelists: Larry Cohen, Paul McGoldrick, Wendi Sorensen, and Ana Sambold*
10:15 am	Break
10:30 am	Mediation Panel (cont.)
11:30 am	Practical Use of AI in a Litigation Practice *Pratik Shah, Panish | Shea |Ravipudi LLP*
12:30 pm	Adjourn

Tuesday, July 9, 2024

8:15 am	Digital Evidence, Cyber Threat Awareness, and Creative Strategies for Managing Risk *Mark Lanterman, Chief Technology Officer, Computer Forensic Services*
10:15 am	Break
10:30 am	Leveraging Expert Witness Testimony to Benefit Your Case *Moderator: Tim Agan* *Panel: Honorable Sara Agne, Honorable Andrew Jacobs, Honorable Doug Metcalf, Honorable John Napper, Larry Cohen, Paul Kular, Mark Lanterman*
12:30 pm	Adjourn

Wednesday, July 10, 2024

8:15 am	Evidence and Case Update *Honorable Sara Agne, Honorable Andrew Jacobs, Honorable John Napper, Honorable Doug Metcalf, Prof. Jessica Berch, Mikel Steinfeld*
10:15 am	Break
10:30 am	Judicial Panel with Q & A *Moderator: Wendi Sorensen* *Panel: Honorable Sara Agne, Honorable Andrew Jacobs, Honorable John Napper, Honorable Doug Metcalf*
12:30 pm	Adjourn

2024 CLE by the Sea: Litigation Track

July 8-10, 2024

Faculty Biographies

TIMOTHY J. AGAN is an attorney with the Maricopa County Office of Legal Advocate (OLA) Capital PCR Unit, handling State Post-Conviction litigation in death penalty cases. Tim has previously worked with the Arizona Justice Project and as a trial attorney at both OLA and the Maricopa County Public Defender's Office. Tim was the Deputy Director of OLA from 2007 until 2017. Tim has substantial experience in forensic science issues, death penalty litigation and trial practice. Tim has been active in Continuing Legal Education having presented seminars for numerous organizations that include the National Institute of Justice, the Arizona Supreme Court, the Maricopa County Superior Court, the Arizona State Bar, The Arizona Public Defender's Association, The Arizona Attorneys for Criminal Justice, the Arizona Prosecuting Attorney's Advisory Council, the Colorado State Public Defender's Office, the National Innocence Network and the National Clearinghouse for Science, Technology. Tim has also served as adjunct faculty at the Sandra Day O'Connor school of Law. He has also done numerous community presentations on legal and criminal justice issues for law school, college, high school and community groups. Tim has served on several Arizona Supreme Court commissions and committees, along with the Arizona Attorney General's Forensic Advisory Commission and Forensic Science Academy Board. Tim is a 1985 graduate of the University of Iowa College of Law. Tim may be reached at tim.agan@maricopa.gov or at 602.506.1295.

HONORABLE SARA J. AGNE was appointed to the Maricopa County Superior Court on December 13, 2017, and took the bench in early 2018. Judge Agne serves as the Arizona Tax Court Presiding Judge, and has a calendar that includes Commercial Court cases, while generally presiding over cases for the Civil Department of the Court. After graduation from the University of Michigan Law School, Judge Agne was a lawyer with Snell & Wilmer L.L.P., first as an Associate and then as a Partner in its Special Litigation and Compliance Group. Judge Agne co-chairs the Arizona Supreme Court's Advisory Committee on the Rules of Evidence and has served for nine years on the State Bar of Arizona Civil Practice and Procedure Committee. The judge is a veteran petitioner of several court rules cycles for a variety of rule sets and chaired the Ariz. R. Civ. P. 5.4 Working Group in 2018 and 2019. During the pandemic, Judge Agne chaired the Task Force on Conducting Juvenile Court Proceedings Safely in a Community Experiencing the Spread of an Infectious Disease, earning recognition as a "Presiding Judge's COVID Hero" for that work. A former journalist, Judge Agne earned a B.A. in Journalism from Arizona State University, serving as Editor in Chief of the University's morning daily, The State Press, as a college senior.

JESSICA BERCH — Dean's Fellow for Teaching Excellence and Associate Teaching Professor at the Sandra Day O'Connor College of Law at Arizona State University. Jessica's teaching and writing interests principally revolve around civil litigation and federalism, and she has taught Civil Procedure I and Advanced Civil Procedure, Conflict of Laws, Evidence, and Federal Courts, among other classes. She has published numerous articles, most recently in the *Wake Forest Law Review*, *UC Davis Law Review*, *Utah Law Review, Nevada Law Journal*, and *Boston College Law Review*. Jessica is also a co-author of the *Federal Rules of Evidence Manual* (with Stephen A. Saltzburg, Michael M. Martin, and Daniel J. Capra), *Criminal Procedure: Constitutional Constraints Upon*

Investigation and Proof (with James J. Tomkovicz, forthcoming), and *Introduction to Legal Method and Process* (with Amy Langenfeld). Jessica has served as a member on the Arizona Supreme Court's Advisory Committee on Rules of Evidence since 2018 and was a member of the State Bar Civil Practice and Procedure Committee from 2018 to 2021. Before entering academia, Jessica clerked for the Honorable Mary M. Schroeder of the United States Court of Appeals for the Ninth Circuit and worked at the Phoenix office of Perkins Coie LLP, where her practice centered on complex civil litigation and appeals. Jessica graduated with top honors from Columbia Law School.

LARRY J. COHEN, is a certified specialist in injury and wrongful death litigation who has focused in his more than thirty-three years of law practice on serious medical injury and emotional damages cases, including especially brain injury claims. He received his J.D. from Northwestern University in 1985, and has been admitted to practice in Arizona since 1985. Mr. Cohen also has a Master's degree and a Ph.D. from Syracuse University and has participated in a post-doctoral program in clinical neuropsychology. He continues as a member of the adjunct faculty at the Sandra Day O'Connor College of Law at Arizona State University where he has taught courses in professional responsibility, pretrial practice and professional liability. He taught and did research at the University Michigan School of Law and at the University of Illinois-Chicago, and taught on the adjunct faculties of the Arizona Summit School of Law, the Arizona School of Professional Psychology, thereafter Argosy University, Midwestern University, and Norwich University. Mr. Cohen speaks nationally to groups of lawyers, other professionals, insurance companies, governmental entities, risk managers and other interest groups about litigation and trial practice matters, legal ethics, alternative dispute resolution, and issues in brain damage, law and medicine and law and psychology. He has received awards from the Maricopa County Bar Association, the State Bar of Arizona and the State Bar of New Mexico for excellence in continuing legal education. He also received a President's Award from the State Bar of Arizona for contributions in continuing legal education. He has for many years been listed by Southwest Super Lawyers and Arizona's Finest Lawyers as among the best lawyers in Arizona and has been was recognized by the National Association of Distinguished Counsel as among the top one percent of lawyers in the United States. Mr. Cohen may be reached at the following addresses: Larry J. Cohen, Esq. Cohen's Counsel P.O. Box 465 Bethel, Vermont 05032 602-405-4022 802-234-6984 ljc@cohenscounsel.com ljc@ljcohen.com

JOSEPH S. KELLY, JR., received a Bachelor of Arts from University of Iowa and Juris Doctorate, with honors, from Drake University Law School. He is admitted to practice in Iowa and Arizona. Joe was an attorney for the state of Iowa Attorney General's Office, Tort Claim Division 1974-1977; Admitted to practice 1978 in Arizona; U-Haul International/Amerco, Inc. Litigation Counsel to General Counsel 1977 to 1986; Susemihl, Davis, & Kelly partner 1986 to 1991; State Farm Insurance, staff litigation counsel 1991 to September, 2014. AV Preeminent peer review rating through Martindale-Hubbell. The American Registry has named Joe as one "America's Most Honored Lawyers". Joe was elected into ABOTA (American Board of Trial Advocates) at the Advocate level. Joe is also an elected member of NADN (National Association of Distinguished Neutrals). Joe has been serving as a private mediator and arbitrator since 2014 when he "re-wired" from State Farm. Joe has been a Judge Pro Tempore for the Maricopa County Superior Court for over 20 years, volunteering his time to cover judge's calendars, mediating cases, presiding over trials and performing wedding ceremonies. Joe has tried numerous cases since 1974 involving personal injury and wrongful death. Joe has given seminars for the Maricopa County Bar Association, the State Bar of Arizona, A.B.O.T.A. Arizona Trial Lawyers Association ,Arizona

Trial College, and in-house seminars for State Farm Insurance on topics ranging from Alternative Dispute Resolution, Bicycle Accidents and Ethics. Joe is currently "semi-retired" doing private arbitrations/mediations and case consultations. Joe has conducted hundreds of mediations and arbitrations while in practice and since retirement with over a 95% success rate. Joe was appointed as an adjunct professor of law at Arizona Summit Law School in 2014, 2015, and 2016. Email: jskellylaw7@gmail.com Phone: (480) 250 0118

HONORABLE ANDREW M. JACOBS was appointed to the Arizona Court of Appeals by Governor Katie Hobbs on February 21, 2023. He studied history at the University of Illinois, and graduated Harvard Law School magna cum laude in 1992, where he was a research assistant to Professor Laurence Tribe. He was a partner at Jenner & Block in Chicago and Snell & Wilmer in Tucson and Phoenix, and led Snell's appellate practice for thirteen years. The Arizona Supreme Court has appointed Andrew to six bodies: Judicial Performance Review, the Task Force on the Arizona Rules of Civil Procedure, the Committee for Civil Justice Reform, the Judicial Ethics Advisory Committee, the Task Force on Jury Data Collection, Practices, and Procedures, and the Task Force on the Rules of Procedure for Special Actions. Andrew has served on the Arizona State Bar's Civil Practice and Procedure Committee for fifteen years and was its Chair from 2014-18. He served in the Arizona State Bar Batson Working Group. Andrew was a principal initial drafter of Ariz. R. Civ. P. 26.2 (tiering), and has contributed to many more court rules. He served in the Ninth Circuit's Advisory Committee on Rules and Civil Practice. He co-founded the District of Arizona's pro bono program in 2006 and coordinated it for five years. He was the lawyer coordinator for the Ninth Circuit's pro bono program from 2007-23 for Arizona and Nevada, and for the Arizona Court of Appeals for Division Two from 2014-23. He placed over 220 pro bono cases in these roles. Andrew was admitted to practice in Illinois, Arizona, and Nevada, joining their bars, the ABA, and the Arizona LGBT Bar. He is also a member of AWLA, Los Abogados, and AAABA, and mentors in the Latina Mentoring Project. He re-founded the Arizona Lawyer Chapter of the American Constitution Society and was its President for many years. Andrew argued sixty civil appeals among three federal circuits and six states. He took two cases to the U.S. Supreme Court as counsel of record. He is a Fellow of the American Academy of Appellate Lawyers, a Member of the American Law Institute, a co-editor of the Arizona Appellate Handbook, and was an Arizona State Bar Member of the Year in 2016.

PAUL S. KULAR has a blended caseload and serves as counsel for both plaintiffs and defendants over various practice areas including personal injury, construction defect, contracts, and coverage. He has several jury trials, more than 50 arbitrations, and countless mediations during his twenty-year career. He is a member of the Maricopa County Bar Association and serves as a board member on the Arizona Association of Defense Counsel. In 2022 and 2023 he was recognized as a top lawyer in the areas of product liability and insurance coverage by Phoenix Magazine and has also been recognized by Best Lawyers in America. Paul was recently appointed as a judge pro tempore for the upcoming year in Maricopa County Superior Court.

MARK LANTERMAN is the Chief Technology Officer of Computer Forensic Services. Before entering the private sector, Mark was a member of the U.S. Secret Service Electronic Crimes Taskforce. Mark has over 30 years of security and forensic experience and has testified in over 2000 cases. Mark is faculty for the Federal Judicial Center in Washington, D.C., the National Judicial College in Reno, Nevada, and the University of Minnesota. Mark is a professor in the cybersecurity program at the St. Thomas School of Law in Minneapolis, Minnesota. Mark has provided training in digital evidence, computer forensics and cybersecurity to the United States Supreme Court. He has also presented to the 8th and 11th Circuit Federal Judicial Conferences as well as numerous State and Federal Judicial Conferences across the United States. Mark completed his postgrad studies in cybersecurity at Harvard University and is certified as a Seized Computer Evidence Recovery Specialist (SCERS) by the Department of Homeland Security.

PAUL J. MCGOLDRICK is Partner at Shorall McGoldrick Brickmann. Paul chairs the firm's litigation practice group along with Tom Shorall. Paul focuses his practice on personal injury and insurance cases. He also has experience as lead counsel in complex business disputes. Paul routinely represents clients in nearly every locale of Arizona, and has represented both plaintiffs and defendants, both in tort cases and in the context of commercial and professional liability suits. Paul is a Fellow in the American College of Trial Lawyers. He is the former State Chair for the 2019-2021 term. The American Board of Trial Advocates has elected Paul an associate based upon his many jury trials and peer review. He was the Phoenix Chapter President in 2015. In addition to his litigation practice, Paul is a frequent mediator and arbitrator. He draws upon his broad experience as a trial lawyer in helping to reach resolutions to lawsuits short of more expensive jury trials. Paul is a member of the National Academy of Distinguished Neutrals. Phoenix Magazine recognized Paul as a Top Lawyer in 2022 in the category of Arbitration and Mediation. Before entering private practice in Phoenix, Paul was a law clerk to the Honorable Frank X. Gordon, Jr., the then Vice Chief Justice of the Supreme Court of Arizona. Since that time, Paul has been appointed a judge pro tempore of the Maricopa County Superior Court (2002-2015). The State Bar has certified Paul as a Specialist in Personal Injury and Wrongful Death Litigation since 1997. He is currently on the State Bar Personal Injury and Wrongful Death Advisory Commission. Martindale-Hubbell, the directory of American law firms, has consistently given Paul its highest "AV" rating since 1995, based upon the reviews of his fellow Arizona attorneys. Paul has been included in Southwest Super Lawyers every year since 2007 and for 2017, 2018, 2019, 2020, 2021and 2022 is listed among Super Lawyers "Top 50" Arizona attorneys. Paul has been selected for inclusion in Arizona's Finest Lawyers and The Best Lawyers in America for Insurance Law, Insurance Litigation and Personal Injury Litigation. Best Lawyers has selected Paul as the Lawyer of the Year (Phoenix) for Personal Injury Litigation - Defense (2023). He has been listed in Top 100 Lawyers in Arizona - AZ Business Magazine, 2018, 2019, 2020, 2021 and 2022.

HONORABLE D. DOUGLAS METCALF, Judge Pima County Superior Court, 2013 to present. At the time he was appointed to the bench, Judge Metcalf was a partner in law firm of Lewis and Roca, LLP. He started his career as a law clerk for the United States Tax Court and then served as a federal prosecutor for the United States Department of Justice in the tax division. He received his law degree from Drake University and his undergraduate degree from the University of Iowa. He remains a proud Hawkeye.

HONORABLE JOHN D. NAPPER was the Yavapai County Public Defender from May of 2014 to December 2016. There he directed an office of 17 attorneys and 15 staff along with approximately 20 contract lawyers. He was in private practice prior to his appointment as the Public Defender. As an attorney he handled civil, criminal, and appellate cases. He graduated with honors from the John Marshall Law School in Chicago Illinois in 2002. Judge Napper was appointed by Chief Justice Brutinel to serve as the Presiding Judge of Yavapai County, effective August 1st, 2020.

ANA SAMBOLD, Esq., is an internationally recognized mediator, arbitrator, and leader in the field of conflict resolution. She is the Principal and Founder of Sambold Law & ADR, a California firm dedicated to providing mediation, arbitration, and dispute resolution services throughout the U.S. and Internationally. Ms. Sambold has facilitated the resolution of more than 1,000 cases across a broad spectrum of commercial and civil litigation matters. Her practice largely focused on business, labor, civil rights, banking, insurance coverage, consumer, real estate, trusts, succession, torts, mass claims, and cases involving multinational and multilingual parties. She serves as a neutral independently and through the selected ADR panels of the American Arbitration Association (AAA), ADR Services, Inc., the International Institute for Conflict Prevention and Resolution (CPR), several U.S. courts, and federal and state agencies. Ms. Sambold has been recognized as meeting the highest independent standards for neutrals established by the National Academy of Distinguished Neutrals (NADN), the International Mediation Institute (IMI), and the National Conflict Resolution Center (NCRC). She is an International ArbitralWomen, a Chartered Institute of Arbitrators member, an Academy of Court Appointed Neutral (ACAN), and a Fellow of the American Bar Foundation, a global honorary society of attorneys, judges, and legal scholars whose membership is limited to one percent of lawyers licensed to practice in each jurisdiction. In addition to her active practice, Ms. Sambold is a Negotiation Professor and the Coach of the Mediation Team at the University of San Diego School of Law. She has also served as an Adjunct Professor of Law at California Western Law School International LLM program and has taught extensively in conflict resolution, negotiation, Artificial Intelligence (AI), and ADR around the world.. Ms. Sambold is a highly sought-after speaker and presenter on these topics across the US, Asia, Europe, and the Americas. Her articles have been featured in the LA Daily Journal, California Litigation magazine, San Diego Daily Transcript, and ABA's Just Resolutions Magazine. As a dedicated and influential leader in the ADR and legal field, she has tirelessly advocated for the advancement of mediation and ADR. She currently serves as the Chair for the 2023-2024 term in the ABA Section of Dispute Resolution, the largest association of dispute resolution professionals worldwide. She has also served as the San Diego County Bar Association (SDCBA) ADR Section Chair, California Lawyers Association ADR Committee Co-Chair, San Diego Law Library Foundation President, and on the Board of Directors of the Southern California Mediation Association (SCMA) and the Chartered Institute of Arbitrators North America branch (CIArb). Ms. Sambold is a dually qualified attorney in the U.S. (California, U.S. Federal Court Southern District, and Colombia). She is fully bilingual (English-Spanish), regularly conducting mediation sessions and teaching in both languages with proficiency. She received her Master of Laws from the University of San Diego School of Law (USD) and her training and credentials in dispute resolution from Harvard Law School, Pepperdine University School of Law - Straus Institute for Dispute Resolution, and Columbia Law School, among many other organizations. For more information about her practice, visit http://www.sambold-law.com/. She can be reached at sambold@sambold-law.com. Feel free to connect with Ms. Sambold on LinkedIn at https://www.linkedin.com/in/ana-sambold-esq/

PRATIK H. SHAH is the Associate Director of Litigation at Panish | Shea | Ravipudi LLP, working alongside the firm's Director of Litigation on trial strategies, as well as with referral lawyers to ensure a smooth transition of cases brought to the firm by outside counsel. A Southern California native, Mr. Shah began his legal career as a Deputy District Attorney with the County of Sacramento where he worked on the trial team. He led numerous trials to verdict in Sacramento County before returning to Southern California to open a solo practice with a focus on criminal defense and personal injury. Prior to joining Panish | Shea | Ravipudi LLP, Mr. Shah served as Co-Founder and Partner at Shah D'Egidio APC Injury Lawyers, a civil litigation law firm in San Diego focused on personal injury, bad faith insurance, and civil rights. He also Co-Founded the legal technology platform, EsquireTek, and continues to serve as the Chief Executive Officer of the software company. In 2021, Mr. Shah was named one of the Top 15 Attorneys Disrupting the Legal Industry and he has been consistently recognized by Super Lawyers® as a Southern California Rising Star since 2016. He is a member of Consumer Attorneys of California, Consumer Attorneys Association of Los Angeles, and the American Association of Justice. Mr. Shah is a past President of the South Asian Bar Association of San Diego, an active member of both the Consumer Attorneys of San Diego and the San Diego County Bar Association, and a committee member for the Brain Injury Association of California. A member of the State Bar of California, Mr. Shah received his law degree from Thomas Jefferson School of Law and is admitted to practice before all courts of the State of California as well as the U.S. District Court for the Central District of California.

WENDI A. SORENSEN is a full-time mediator and arbitrator, providing effective and compassionate alternative dispute resolution to attorneys and their clients. She draws upon her broad experience as a trial lawyer on both the plaintiff and defense side of the courtroom, with nearly four decades of practice focused on significant injury cases. She is a member of the prestigious National Academy of Distinguished Neutrals. Wendi served as Chair of the State Bar of Arizona's Board of Legal Specialization, the committee responsible for setting standards and vetting potential certified specialists in Arizona. She has been honored repeatedly by Phoenix Magazine as a Top Mediator, by Southwest Super Lawyers as one of the Top 25 Women Attorneys in Arizona, and by Best Lawyers in America.

MIKEL P. STEINFELD supervises the Appeals Unit at the Maricopa County Public Defender's Office. A career-long public defender, Mikel's handled cases spanning from misdemeanor DUIs in local justice courts to capital cases before the Supreme Court of the United States. And he has a host of strong opinions on everything from legal writing and evidence rules to romance novels and Dungeons and Dragons.

2024 CLE by the Sea: Litigation Track - Monday

July 8, 2024

8:15 AM - 12:30 PM

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EFFECTIVE STRATEGIES AND TECHNIQUES FOR SUCCESFUL MEDIATIONS

MODERATOR, JOE KELLY

Introductions of PANEL MEMBERS: LARRY COHEN, Paul mcgoldrick, ana sambold, and wendi sorensen

1

WHEN ARE CASES RIPE FOR MEDIATION?

- PRE-LITIGATION
  - Most depositions, discovery and disclosures are done.
  - Parties have not spent a fortune on experts.
  - Plaintiff's counsel has obtained sufficient records and bills and shared them with defense counsel.
  - Defense counsel has analyzed Plaintiff's case and communicated the analysis with claims personnel.
  - Plaintiff's counsel has met with client to discuss value and strategies.
  - A reasonable demand and offer have been exchanged.

2

WHEN ARE CASES RIPE FOR MEDIATION?

- CLIENT'S UNDERSTANDING
  - Counsel must make sure the client understands the mediation process:
    - Explain reasonable expectations and results.
    - Be to honest and realistic as to expected outcome at mediation and then trial.
    - Explain expected costs to prove their case or defense.
  - Both sides must present their case or defense in a non-hostile professional manner to promote compromise.
  - Mediation is not a win/lose situation.

3

COURT APPOINTED JUDGE PRO TEM JUDGE VS. PRIVATE MEDIATION?

- Pros of having a pro tem judge
  - Cost - there is no charge for conducting conference.
  - Many of the private mediators are pro tem judges, so you may end up with someone you would normally pay.
  - The settlement conference has mandatory requirements of good faith participation by both sides. Sanctions can happen to an offending party.

In 2022-2023 court sessions, 54% of the 824 cases that went to the ADR Department were fully resolved. In the 2021-2022 session 60.4% of the 854 were fully resolved. "ADR Statistical Reports"

4

COURT APPOINTED JUDGE PRO TEM JUDGE VS. PRIVATE MEDIATION?

- Cons of having a Pro Tem Judge
  - You may get a judge you don't agree with.
  - Sanctions.
  - Client disappointment and anger at you and opposing side.
  - Client digs in their heels in retaliation.
  - A waste of your time and your client's

5

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Wendi Sorensen, Esq.
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6

3. SELECTION OF MEDIATORS: A STRATEGIC DECISION

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What does your client need in a mediator?

- Personality
- Knowledge base/gravitas
- Evoke trust

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What do you need in a mediator?

- Someone who will satisfy your client's needs
- Someone who will get to the last dollar of agreement
- Someone who will be persistent

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9

Mediation Methods

Paul McGoldrick

10

ZOOM ETC VS. IN PERSON MEDIATIONS

- Since March 2022, I have conducted a couple hundred mediations and have learned the following:
  - The outcome is general identical to my former in-person mediation.
  - With the proper set up of cameras and mediation room you can easily detect facial expressions and body language
- In my practice I am conducting mediations out of state and out of the United States which saves the hassle of traveling to Arizona.

11

ZOOM ETC VS. IN PERSON MEDIATIONS

- The Arizona Supreme Court recent survey for continuing remote video hearing or other online court service had the following responses:

Definitely Support	Probably would Support	Probably would Oppose	Definitely would Oppose
41.0%	27.6%	19%	7%

  - 95% agreed that the benefit of time and travel was a plus.
  - 82% agreed that it was more efficient, productive, and convenient.
  - 75 % agreed that it saved money and costs. Id.

"Post-Pandemic Video Conferencing" Article in December 2023 Arizona Attorney

12

Set up for mediations via Zoom

- Best Practices
  - Make sure you client dresses appropriately to impress the opposing side and adjuster.
  - Dress appropriately and professionally to impress the opposing side and adjuster.
  - Have an office set up or background photographs/graphics that display a professional atmosphere; not waving palm trees or space shuttle.
  - For Plaintiffs I would suggest a practice session so they can make a good impression on the mediator.

13

Pre-mediation

LARRY COHEN

14

Preparing the Client and Oneself for the Mediation

- LARRY COHEN

15

Pre-Mediation Activities

- Procedural Matters – who what where when and how
- Substantive – planning to complete mediation statement and preparing clients

16

Prepare the Clients for the Mediation

- Schedule multiple meetings to address evolution in client's expectations
  - Meet in person where possible
  - Go over process
  - Define roles
  - Address client involvement in communications
  - Discuss mediator characteristics
  - Discuss opposing party, especially the decision maker

17

Establishing Reasonable Expectations

- Review evolution of client expectations
  - Identify client expectations, whatever they are
  - Discuss scope of likely outcomes
  - Focus on process
    - The Dance
    - The singular importance of the last position taken by other side

18

Lien Holders

- Plaintiff – communications and pre-mediation negotiations
- Defendant – identify the applicable lien holders
  - Inquire of status from plaintiff – who, what done, when decision

19

Learning the Mediator's Method

- Draw on own past experience
- Communicate with others familiar with mediator
  - Directly
  - Digitally
- Determine extent to which mediator available for pre-mediation ex parte communications

20

Learning the Mediator's Method

- Determine practice
  - Joint sessions
  - Caucuses
- Address confidentiality
- How does this mediator bridge gaps
- Mediator's preference for mediation statement and materials

21

Seek Ex Parte Pre-Mediation

- Identify players and likely impact on outcome
- Talk about process
  - Mediator's method
    - Generally
    - Bridging gaps
  - Extent to which you will rely on mediator

22

Seek Ex Parte Pre-Mediation

- Identify and discuss strengths and weaknesses of respective positions
- Identify and discuss concerns about process
  - People
  - Issues
  - Expectations
- Identify what the mediator wants in the ay of information and materials

23

Mediation Statements and Breakout Sessions – Ana Sambold

24

7. MEDIATION DAY

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25

Foundational work: plaintiff's side

- Two Roles – Plaintiff attorney and mediator
- Explaining the process
- Explaining the jury's process
- Explaining the pros and cons of the case, BOP, costs
- Explaining the evaluation process
- Explaining the settlement process - collaboration

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Foundational work: defense side

- Two roles – defense attorney and mediator
- Emphasizing realities of liability
- Emphasizing realities of damages
- Getting commitments for the minimum they will pay (“best day”)
- Emphasizing collaboration

27

Determining initial offers/counteroffers

- The policy limits demand
- Whose turn is it?
- Fresh realistic demands or offers
- Reminding participants: the effect of their offer

28

Getting closer

- Keeping the numbers moving, and fair
- Continuing to explain the benefits of resolution
- Keeping the numbers moving to avoid big gaps at the end
- Managing emotions – “winning” / amount of movement / uneven moves
- And above all keep moving – the smaller the gap, more likely settlement

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Do you let the mediator know…

- What you have to offer?
- Your costs and liens?
- The minimum you’ll accept?

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Breaking through impasse and Bracketing - Sambold

31

How to seal the deal!

- When you reach an agreement with the parties, how do you make it stick:
  - Prepared email to both counsel that confirms the matter is settled for $$, in exchange for complete release of all claims, dismissal with prejudice of the lawsuit, each side bears their own costs and fees, plaintiff is responsible for any valid medical liens.
    - Tell counsel to hit reply all and indicate you were given permission by your clients to accept the above terms.
  - Docu-Sign or other electronic signature program
  - Record the Zoom mediation

32

How to seal the deal!

- When you reach an agreement with the parties, how do you make it stick:
  - Arrange ahead of time with assigned judge to have parties make conference call to the court and have court reporter available to hear the agreement made and confirming by the parties and counsel on the record.
  - Consider having the defense send a blank release that they will want to use to finalize the settlement and terms ahead of time to eliminate delays and arguments later.

33

Getting Past Failure - Sambold

34

Trial v. Appellate Level Mediation and Ethical Issues for Lawyers and Mediators

- Larry Cohen

35

Trial Level Mediation versus Appellate Level Mediation

- Trial Level
  - Primary Focus on Uncertainty
- Appellate Level
  - Primary Focus on Closure

36

Ethical Issues

- For Lawyers
  - Conflict – Lawyer's Interest vs. Client Interest in Outcome
- For Mediator
  - Conflict – Business Development/Maintenance Imperative

37

Questions?

38

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Mediation Outline

3. SELECTION OF MEDIATORS – A STRATEGIC DECISION

What does your client need in a mediator?
- Personality
- Knowledge base/gravitas
- Evoke trust

What do you need in mediator?
- Someone who will satisfy your client's needs
- Someone who will get to the last dollar of agreement
- Someone who will be persistent

7. MEDIATION DAY

Foundational work: plaintiff side
- Two roles – plaintiff attorney and mediator
- Explaining the process
- Explaining the jury's process
- Explaining the pros and cons of the case, BOP, costs
- Explaining the evaluation process
- Explaining the settlement process -- collaboration

Foundational work: defense side
- Two roles – defense attorney and mediator
- Emphasizing realities of liability
- Emphasizing realities of damages
- Getting commitments for the minimum they will pay/"best day"
- Emphasizing collaboration

Determining initial offers and counteroffers
- The policy limits demand
- Whose turn is it?
- Fresh realistic demand or offer
- Reminding participants: the effect of their offers

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Getting closer

- Keeping the numbers moving and fair
- Continuing to explain the benefits of resolution
- Keeping the numbers moving to avoid big gaps at the end
- Managing emotions – “winning” / amount of movement / uneven moves
- And above all keep moving – the smaller the gap, more likely settlement

Do you let the mediator know …

- What you have to offer?
- Your costs and liens?
- The minimum you’ll accept?

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CLE by the Sea - July, 2024

MEDIATION and "AVOIDING THE USUAL MISTAKES"

Mediation is here to stay in our legal system. The following outline will assist in making sure your mediations or settlement conferences are successful and productive. I would go so far as to say that mediation is the public policy of the Court system. Rules 16(a),16(c)(3)(I) and 16.1, Arizona Rules of Civil Procedure require that parties, at a minimum, discuss and consider ADR. Try getting a trial date without going to a mediation or settlement conference.

1. A successful mediation requires adequate information exchange. This is the key to getting a case settled.

    a. I recommend exchange of memos well in advance of the mediation so your client and the claims adjuster can read them. If there is confidential information you want the mediator to have, send a separate confidential letter to address those items.

    b. Make a pre-mediation demand well in advance of the mediation. Nothing spells disaster when there is no pre-mediation demand. Solicit offers before the mediation, as well. I recommend that Defendant make an offer before the mediation.

    c. Plaintiff's counsel needs to understand case reserves and the reporting requirements that insurance carriers need. Every claim has to have a corresponding reserve set by the adjuster. Defense counsel should solicit the information needed to properly evaluate the claim – let plaintiff's counsel know that the information is necessary in order to obtain proper authority in advance of the mediation.

    d. You want the reserve to be appropriate or commensurate with the value of your claim. Additionally, defense lawyers and adjusters need to have appropriate settlement authority in advance of the mediation. This requires reporting. If you want to settle your case, make sure defense counsel and the adjuster have your medical bills, lien documentation, and any other special damage item. Do not dump this on defense counsel at the mediation and expect to get commensurate value.

2. Make sure decision makers are present. Decision makers are not always the parties themselves. If there are lien holders, medical, worker's comp or otherwise, invite them to participate telephonically and make sure they are informed of the issues in the case. Tell them to expect a call from the mediator, particularly with work comp liens.

    a. Discuss with defense counsel telephonic appearance. If the adjuster is by phone or zoom, make sure he/she is available the entire time and actually participates.
    b. Remember – lawyers exercise their worst judgment on the value of cases when money is tight. Fairly value the case at hand for your client regardless of the financial pressures at your law firm.

3. Make a realistic demand. An unrealistic demand signals to defense counsel and the adjuster that you don't know what you're doing. Defendants or Insurance companies will not overpay your claim simply because you demand $200,000 on a claim worth $30,000. You are more than likely to get a punitively low series of offers if your demands are unrealistic. Unrealistically high demands and correspondingly low offers make the plaintiffs angry, frustrated, unsure of the process, and unsure of their counsel. Defendants should make realistic offers and stay the course – if your offers are fair the mediator will advocate for resolution in your ball park.

4. Make sure your client understands the role of the mediator. I am a lawyer, but I'm not your lawyer. My role is to facilitate a resolution of a dispute. Make sure your client knows in advance the good and the bad issues in the case.

    a. Comparative fault
    b. Alleged overtreatment
    c. Non- parties at fault
    d. Causation issues

5. Punitive damages – threats of punitive damages are not particularly helpful. Most claims of punitive damages are not covered by liability policies. If you really think you have a claim of punitive damages discuss it with defense counsel in advance of the mediation, determine if the individual defendant or company representatives needs to be present with personal counsel. Defense counsel need to be realistic and make sure client understands role of personal counsel and coverage issues.

6. Good decision making. Most cases can be successfully mediated in a single session taking no more than 3-4 hours maximum. If you need all day, let your mediator know well in advance. Often times the sure way to drag out the process and frustrate your client is to request an all- day mediation. If participants are prepared and serious (and assuming there are not multiple parties) virtually any case can be mediated in a single morning or afternoon session. If you tell a defense lawyer you will need all day, they will take all day. Plaintiffs should not settle their case simply because they are worn down and tired. They do not understand the process as well as defendants.

7. Settle this case and not future cases. Your reputation matters. You are mediating this case for this client. Do not NOT settle your case because your fear that it will impact other

cases you may mediate with this defense lawyer or adjuster. The same holds true – defense counsel should focus on the case at hand- remember the average client wants out. Remember, if you steal a case, do not brag about it as you will not steal another, particularly with the same opponent.

8. Don't be afraid to try a case. Not every case settles and many deserve to be tried. One of the key bases for establishing value is what cases command at the court house. If you and your client believe the final offer is insufficient or the final demand is unreasonable, develop the reputation that you will try the case. This will assist you and the bar in general. However, cases try when one side or another is unreasonable – reasonable people can usually settle their dispute. Try not to be the unreasonable party.

9. Personalities – mediators have different personalities and styles. Some plaintiffs need a very direct mediator, some need a touchy feely, and some need a man or a woman. Some defendants, claims professionals and lawyers respond to personalities. Some mediators are evaluative and some intentionally refuse to take a position. Try and get a good fit and your level of success will greatly improve.

10. Don't keep the mediator in the dark on your claim value and authority. If you inform the mediator of the authority or range you may have an early ally. Don't be afraid of the "Mediator's Proposal" – we were hired for a reason. We can deliver the bad news to each room and sometimes both sides need to reassess their positions.

11. The parties may decide to utilize a judge pro tem to conduct a settlement conference. This is a cost- effective method and the pro tem is appointed by the Superior Court. The procedure is cloaked with judicial authority and at the conclusion of the session the pro tem reports whether the matter resolved and if the parties participated in good faith. Failing to do so exposes the offending participant to sanctions. See Rules 16(h), 16.1(g) and Maricopa County Local Rule 3.11 (e). Typically, the parties do not have the ability to select the pro tem and he/she may not have the expertise in a particular area in dispute. A Superior Court Judge may conduct a settlement conference and it may proceed before the judge assigned to the case or may be transferred to another judicial officer. Local Rule 3.11(d). There may be time when proceeding before a judge is most effective depending on the personality of one or more parties. A party may need reality therapy from the Court as opposed to a private mediator.

12. Myths – it's not just a dance of symmetry. The process does not require a certain number of steps. I can't always get more money by threatening to call the claims manager. Liens can't always be satisfied for ten cents on the dollar. Its not always about the money (but it is usually always about the money).

13. What makes a good mediator? That he or she is a good lawyer who knows the law, is an experienced practitioner, has tried multiple cases, is a good communicator, is innovative and most important, is a GREAT LISTENER. It is difficult to help people solve a problem unless you give them the opportunity to tell their story. Be part of the solution, not part of the problem.

14. Mediation Statutes and Rules - Mediations in Arizona are governed by state statute and court rules. A.R.S. §12-2238 is the statutory authority which governs participation and the mediation privilege. If you have not reviewed the statute, I advise you to do so. This statute confirms that the mediation process is confidential. Communications made and materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless a statutory exception applies. The exceptions to confidentiality are:

    1. All of the parties to the mediation agree to the disclosure.
    2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of the breach of a legal obligation owed by the mediator to the party.
    3. The disclosure is required by statute.
    4. The disclosure is necessary to enforce an agreement to mediate.
    5. The disclosure is made in a report to law enforcement by a court-appointed mediator who reasonably believes that a minor or vulnerable adult is or has been a victim of abuse, neglect, exploitation, physical injury or reportable offense.

    A mediator is not subject to civil liability except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of injury to the rights of others.

    When necessary to enforce or obtain approval of an agreement that was reached by the parties at mediation, the terms of the agreement that is evidenced by a record that is signed by the parties are not confidential. The agreement may be introduced in any proceeding to obtain court approval of the agreement, where required by law or to enforce the agreement.

    ER1.12 and 2.4 address a lawyer serving as a third party neutral and former judges acting as mediators or arbitrators.

    Cases:

    Grubaugh v. Blommo, 238 Ariz. 264, 359 P.3d 1008 (2015) ("broad screen of protection that renders confidential all communications…made as part of the mediation process". The privilege is meant to "encourage candor with the mediator throughout the mediation proceedings by alleviating parties' fears that what they disclose in mediation may be used against them in the future".)

    Donahoe v. Wilson, 872 F.Supp.2d 900 (2012) (mediation privilege statute did not bar County Manager from testifying that he authorized mediator to offer and receive binding settlement where communications occurred after private settlement discussions and case now in formal contract formation.)

    Shufeldt v. Baker Donelson Bermon Caldwell & Berkowitz, PC, 2022 WL 80470 (2022) (Discusses how mediation privilege applies to subpoena for documents. Responsive documents created for mediation protected from disclosure.)

Country Mutual Ins. Co. v. Martinez, 2019 WL 1787313 (The mediation privilege must end at some point. Parties who participate in a mediation cannot draw a permanent cloak of privilege around all of their subsequent communications. Negotiations after a mediation are not protected by the mediation privilege.)

Rule 80(a), Ariz.R.Civ.P. – Agreement or Consent of counsel or Parties. If disputed, no agreement or consent between parties or attorneys in any matter is binding, unless:

(1) it is in writing; or
(2) it is made orally in open court and entered in the minutes; or
(3) it is made before a mediator or judicial officer, is memorialized either before a certified reporter or in an audio or video recording, and, in the case of a mediated agreement, the parties state that the terms of the agreement may be disclosed, as necessary, to gain court approval of the agreement or to enforce the agreement.

Rule 408, Ariz.R.Evd. – Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party- either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
    (1) Furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
    (2) Conduct or a statement made during compromise negotiations about the claim.
(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

CLE By The Sea
Mediation Program Outline
Larry Cohen

5. Preparing the Client and Oneself for the Mediation

- Pre-Mediation Activities
  - Procedural Matters – who what where when and how
  - Substantive – planning to complete mediation statement and preparing clients
- Prepare the Clients for the Mediation
  - Schedule multiple meeting to address evolution in client's expectations
  - Meet in person where possible
  - Go over process
  - Define roles
  - Address client involvement in communications
  - Discuss mediator characteristics
  - Discuss opposing party, especially the decision maker
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  - Issues
  - Expectations
- Identify what the mediator wants in the ay of information and materials

10. Distinction between trial level mediation and appellate level mediation

Trial level mediation
- Focus on dealing with uncertainty
- Focus on expenses and resources

Appellate level mediation
- Focus on impact of previous outcome
  - Containing further loss
  - Consolidating previous gain
- Focus on risk of creating adverse precedent – for repeat players
- Focus on finality – especially for one time players
- Focus on consequences of adverse outcome for continuing future expenses

11. Ethical Issues Presented

Mediator – inherent conflict of interest
- Neutrality vs. business development imperative

Lawyer – inherent conflict of interest
- Lawyer interest in outcome vs. client interest in outcome

TIPS FOR EFFECTIVE MEDIATION ADVOCACY

By Ana M. Sambold, Esq.

Pre-Mediation:

- **Before the client agrees to mediation,** provide a written disclosure form containing the mediation confidentiality restrictions and obtain the client's signature confirming he understands them. (New California Evidence Code section 1129, and new paragraph 1122 (a)(3) effective January 1, 2019).

- **Select the appropriate mediator based on** the type of case, subject matter expertise, mediator's style, philosophy, and your client's personality. Consider cultural and language factors. Find the best match for each particular case and client.

- **Time the mediation correctly:** When you have enough information about the case, factual and legal issues are clear, and the strengths and weaknesses of the case have been carefully analyzed and before spending too much on discovery, fees, and costs. Engage in mediation before the dispute takes too much of an emotional and financial toll on your client.

- **Prepare your Game Plan:** Use the most persuasive law and facts to argue the best case. Review CACI jury instructions. They set out the elements of causes of action and provide citations to legal authorities with excerpts from cases. Understand your client's interests and needs. Conduct a realistic and neutral assessment of your case. Consider yours and their BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement). Accordingly, design a strategic game plan. Anticipate counterarguments. Be ready to change your game plan.

- **Prepare an accurate and organized Mediation Brief** addressing all the critical factual and legal issues. Start with the chronology of events. It is helpful to provide controlling precedents and governing laws. It is beneficial to mention verdicts in similar cases (particularly in the courthouse where your case will be tried). Attach all the important exhibits. Submit the brief early to the mediator for careful consideration. Exchanging briefs with opposing counsel saves time explaining your case to the opposing side through the mediator during the mediation. Provide confidential information separately to the mediator (make sure the mediator knows it's confidential).

- **Prepare your Client:** Explain the mediation process, the role of the mediator, negotiation strategies, and possible outcomes. Set realistic expectations. Make him aware of the weaknesses of the case, realistic assessment, and potential counterarguments. Foster a mediation-ready mindset in your client. Explain the tangible and intangible benefits of resolving the case in mediation. Discuss options and costs if the case doesn't get settled.

- **Contact the Mediator**: In a pre-mediation phone call, talk over the important facts, legal issues, strengths, and weaknesses of your case. Focus on what is really driving the dispute. Help the mediator understand the case as you see it. Help the mediator help you. Prepare him for your client's personality. Make him aware of circumstances that can hinder or facilitate resolution.

- **Get the Right Parties**: Arrange for the decision-makers and parties with the authority to settle to be present at the mediation (or at least be available on the phone). Determine if the presence of expert witnesses, insurance carrier, family members/support persons may be helpful. Be sure everyone allows enough time for the mediation.

- **Bring Important Documents** to the Mediation: Critical exhibits, key depositions, expert witness reports, and a draft of the Settlement Agreement. Highlight important aspects of the exhibits to your mediator.

At the Mediation:

- **Be polite and professional**. Set the right tone in the beginning by meeting and greeting opposing counsel. Introduce yourself and your client (humanize your client).

- **Keep an open mind and a problem-solving attitude**. Be curious. Determine parties' underlying interests and needs and how they can be satisfied. Remind yourself continuously of the goal of the mediation.

- **Carefully consider your Opening Demand:** Opening demands are not just a number. They convey an important message. They can encourage negotiation or can lead to antagonize the other side. Determine your opening demand after considering your BATNA. Deliver the number with an explanation or a breakdown/make them explain their opening demand thoroughly.

- **Negotiate strategically**. Mediation is a negotiation of a claim that requires time, strategy, and patience. Touch on ALL the terms early (payment terms, releases, confidentiality). Determine who is driving the negotiation. Find out the context and justification of their offers. Keep in mind the parties' underlying interests and needs. Actively engage in attentive listening and asking the appropriate questions.

- **To handle Difficult parties:** If you're losing your patience, step aside and take a break. Change your approach. Try to find something you agree with, move on to the next issue, and follow up on the problematic issue later. Don't take things personally.

- **To break the impasse**: Brainstorm with your mediator and opposing counsel. Get different perspectives. Ask for Mediator's Proposals, Brackets or consider 998 Offers.

- **Consider non-monetary settlement options**. If there is not enough money in the pot, be creative. Propose out-of-the-box options. Never underestimate the power of an apology.

- **When Drafting Settlement Agreement:** Use the settlement draft you prepared before the mediation. It will remind you of all the essential terms that must be included in the agreement. Be sure to bring all the critical deal points previously discussed. Include CCP 664.6

- **If the case doesn't settle:** Don't give up. Keep the mediator engaged until the matter is resolved. Follow up with the mediator and prompt her to call the other side. Keep exploring different options to get the case settled. Persistence is the key.

**Ana Sambold is a California attorney, mediator, and arbitrator, providing neutral services both throughout the U.S. and internationally. She has successfully facilitated the resolution of more than 1,000 cases in the areas of business, banking, insurance, financing, employment, torts, consumer, trusts, succession, real estate, torts, and mass claims. Currently, she chairs the ABA Dispute Resolution Section for 2023-2024, leading the largest association of dispute resolution professionals in the world. She can be reached at sambold@sambold-law.com*

EFFECTIVE STRATEGIES AND TECHNIQUES FOR SUCCESFUL MEDIATIONS

By ANA SAMBOLD, Esq.

CLE by the Sea
July 8, 2024

STATE BAR OF ARIZONA

1

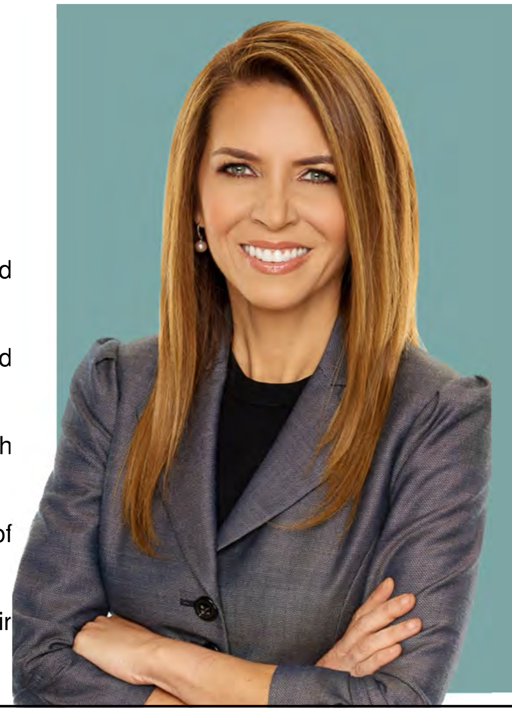
OVERVIEW

- The Mediation Statement / Mediation briefs
- Breakout sessions
- Practical Strategies for Overcoming Impasse during Mediation– Mediator Techniques
- Exploring Emerging Technology Issues: AI and Mediation

2

Meet your Speaker
Ana M. Sambold, Esq.

- California-based Attorney, Mediator & Arbitrator
- Provide neutral services throughout the U.S. and internationally.
- Has served as a neutral in +1,000 cases: commercial and civil litigation matters
- Conducts mediations, negotiations and trainings in English and Spanish -in-person, online & hybrid
- Negotiation Professor at University of San Diego School of Law (USD)
- Chair of the ABA Dispute Resolution Section and Vice-Chair of the SDCBA ADR Section



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MEDIATION STATEMENTS/BRIEFS

- **Purpose:**
  - Inform and prepare the mediator
  - Set the stage for negotiation
  - Persuade the opposing party and Insurance representative
  - Focus the mediation
- **Timing**
- **Tone**

4

MEDIATION BRIEFS
To exchange or not to exchange?

Benefits of sharing briefs

- Evaluation tool
- Set authority range
- Early anchor
- Protect confidential information with a side brief for the mediator

5

MEDIATION STATEMENTS/BRIEFS
Structure and Content

1. Summary of Key Facts and Issues

2. Legal Analysis

3. Procedural History and Settlement Discussions

4. Risk Analysis and Potential Solutions

6

MEDIATION STATEMENTS/BRIEFS

- Exhibits:
  - Full depositions vs highlighting summaries
  - Expert reports
  - Videos, photographs, etc.

- What not to include

  - Confidential Information (for mediator only)

- Length and Presentation

7

MEDIATION BRIEFS
To exchange or not to exchange?

Benefits of sharing briefs

- Evaluation tool
- Set authority range
- Early anchor
- Protect confidential information with a side brief for the mediator

1

MEDIATION STATEMENTS/BRIEFS
Structure and Content

1. Summary of Key Facts and Issues
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2

MEDIATION STATEMENTS/BRIEFS

- Exhibits:
  - Full depositions vs highlighting summaries
  - Expert reports
  - Videos, photographs, etc.

- What not to include

  - Confidential Information (for mediator only)

- Length and Presentation

3

BREAKOUT SESSIONS
(Caucuses or private sessions)

- Who do you start with and why?

- Using Private Sessions Effectively

- Confidentiality and Trust Building

4

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE

5

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE

- Understanding the cause of the Impasse
- Common Causes:
  - Unrealistic expectations
  - Emotional barriers or entrenched positions
  - Lack of preparation/info
  - Difficult personalities
  - Lack of authority to settle
  - Disparate case evaluations

6

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE

Other Common Causes:

- Emotional barriers or entrenched positions
- Misunderstandings
- Difficult personalities
- Lack of authority to settle
- Cultural differences
- Overconfidence, reactive devaluation, confirmation bias
- Time constraints

7

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE

Changing the Mediation Process

- Give everyone a break or recess to allow tensions to cool down
- "Go to the balcony"
- Switch between private caucuses and joint sessions
- Schedule another session
- Others

8

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
Bracketing

- Definition and Purpose
- How it works:

$1M ________________ $100K

$800K ⟷ $300K

$700K ⟷ $150K

9

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
Bracketing

Key Aspects:

- Timing
- Midpoints

$800K ⟷ $300K = (800,000 + 300,000) ÷ 2 = 1.000,000 ÷ 2 = $500,000

$700K ⟷ $150K= (700, 000 + 150,000) ÷ 2 = 850,000 ÷ 2 = $425,000

10

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
Bracketing

Benefits:
- Breaks stalemates and changes the negotiation dynamic
- Eliminates fear of negotiation moves: Allows parties to signal settlement positions without revealing bottom lines
- Can speed up negotiations by making larger moves
- Keeps parties engaged in the process

11

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
Mediator’s Proposal

Definition

Key features:
- Usually a dollar figure
- "Double-blind" process
- The case settles only if all parties accept

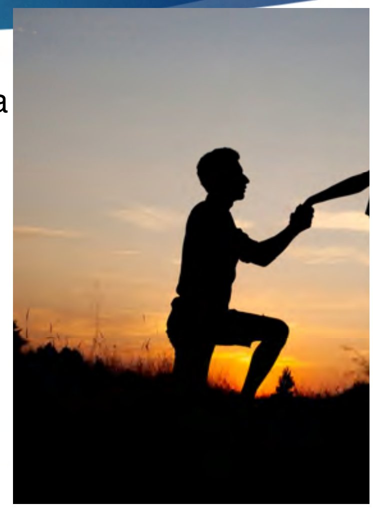
When it's used:
- Typically at the end of the mediation process; used as a last resort to break deadlock: timing is key

12

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
Mediator's Proposal

How it works:

- The mediator asks parties if they're willing to consider a MP
- If agreed, the mediator formulates a proposal.
- The proposal is communicated to all parties, often in writing.
- Parties are given a deadline to respond (accept or reject) confidentially to the mediator.
- If all accept, the case settles. If any party rejects, the mediator only announces that there's no agreement



13

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
Mediator's Proposal

Benefits:

- Gives parties "cover" for accepting a settlement they might otherwise resist.
- Allows parties to accept without compromising their negotiating position if rejected.
- Can break through final barriers to settlement when parties are close but can't bridge the gap.

14

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE

Single Draft Agreement

- Common if bussiness contract disputes
- Parties jointly engaged In a single draft agreement
- Mediator circulates changes In private sessions
- Valuable with multiple variables
- More time invested Increases probability of settlement

15

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE BATNA - WATNA

- Help the parties assess their BATNA and WATNA:
- BATNA (Best Alternative to a Negotiated Agreement)
- WATNA (Worst Alternative to a Negotiated Agreement)

16

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE
What else?

- Stress empowerment: client is “in control”: What do they propose? Encourage brainstorming and emphasize parties control over settlement structure
- Focusing on the future: Avoid getting stuck in the past
- Problem-solving mindset: what are the options and alternatives now?
- What will the future look like under each alternative?

17

PRACTICAL STRATEGIES FOR OVERCOMING IMPASSE

- Are there any other options that haven’t been considered? Challenge parties think outside of the box
- Consider Non-monetary settlement options
- DON'T GIVE UP!
- Follow up with the mediator
- Keep exploring different options

18

Exploring Emerging Technology Issues:
AI and Mediation

19

Overview

a. Understanding all the terminology

b. Potential Uses of LLMs in Mediation

c. Capabilities and limitations of LLMs

d. Ethical Considerations

e. Future Trends and Possibilities

20

UNDERSTANDING ALL THE TERMINOLOGY

Artificial Intelligence

Generative AI

Large Language Models (LLMs)

ChatGPT

21

The Famous ChatGPT

- Advanced Large Language Model (LLM) developed by OpenAI
- GPT is the acronym for Generative Pre-trained Transformer can "generate" unique, novel, and higher quality output, faster.
- It is trained on a vast amount of data from the web to learn patterns, understand, process, and respond to human language
- ChatGPT 3.5 (Nov, 2022), ChatGPT 4 (March 2023), ChatGPT 4o (May 2024)

22

GPT- 4o (May 13, 2024

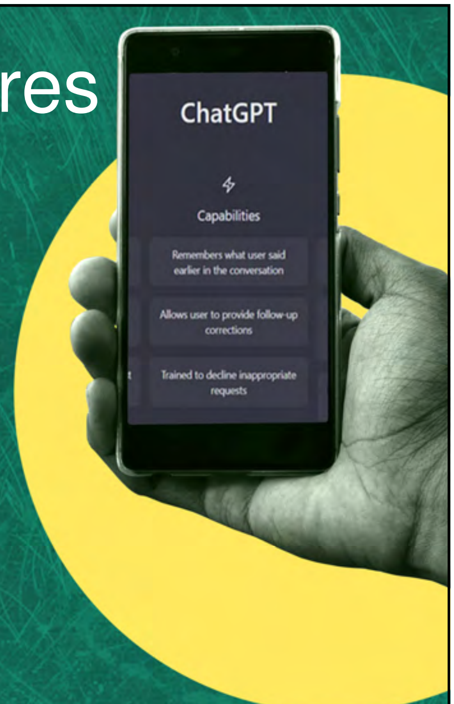
- “O” for “Omni” Is a step towards more natural human-computer Interaction
- New Model that can reason across audio, vision, and text in real time
- Supports more than 50 languages

23

GPT-4o Features

When using GPT-4o, ChatGPT Free users will now have access to features such as:

- Get responses(opens in a new window) from both the model and the web
- Streamlining your workflow in the new desktop app for macOS
- Upload files(opens in a new window) for assistance summarizing, writing or analyzing
- Analyze data(opens in a new window) and create charts
- Sign up or log in at chatgpt.com.



24

Other Popular LLMs

- Gemini (former Bard)/Google, BingAI/Microsoft, LaMA,/Meta, Claude/Anthropic / Grok/Elon Musk

25

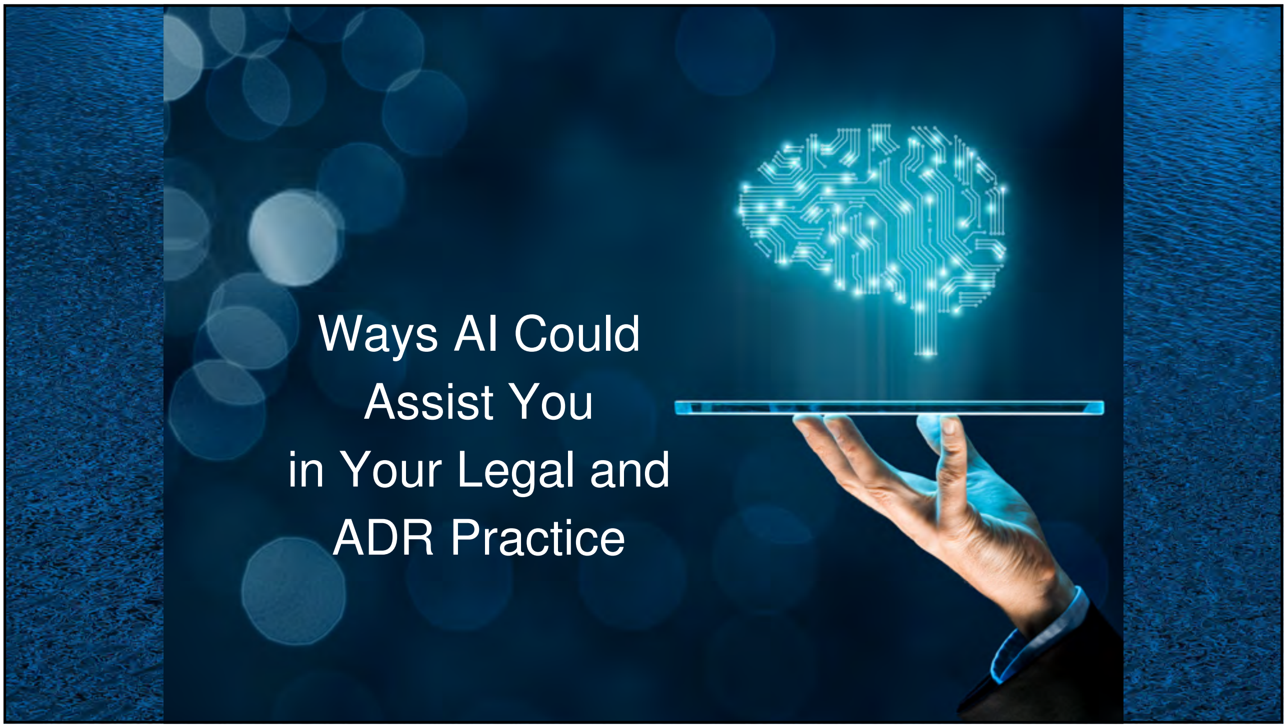
New LLM (April 24, 2024)

OpenELM, Apple

Apple has released a family of open-source large language models. Called OpenELM, Apple describes these as: a family of Open-source Efficient Language Models.

In its testing, Apple says that OpenELM offers similar performance to other open language models, but with less training data.

26



1

Ask me anything

Teach me to negotiate	Help me train for a half marathon	Explain why popcorn pops
Quiz me on vocabulary	Translate this recipe into Greek	Plan an itinerary for teens in Hong Kong
Plan a surf trip to Costa Rica	Rank dog breeds for a small apartment	Design a database schema
Draft a thank-you note	Help me plan a fun dinner party	Recommend an easy potluck dish
Explain this code	Draft a social media content calendar	Help me build a budget
Critique my short story	Write a polite rejection email	Explain nostalgia to a kindergartener
Find gentle lower back stretches	Generate fantasy football team names	Help brainstorm interview questions
Make this recipe vegetarian	Explain airplane turbulence	Summarize my meeting notes
Explain options trading like I'm 5	Write a spreadsheet formula	Write a Python script
Help me pick a halloween costume	Brainstorm domain names	Plan a college tour
Suggest rainy day activities	Write a thank-you note	Suggest photo shoot locations
Write a SQL Query	Help me debug this code	Teach me Mahjong for beginners
Help me with gift ideas for my dad	Create a mobility training workout	Draft a checklist for a dog-sitter
Draft an email for a repair quote	Brainstorm podcast episode ideas	Help me improve this job description
Troubleshoot my printer set-up	Review my argument for a debate	Rank e-bikes for daily commuting

2

- Drafting and Summarizing Documents
- Providing background research and analysisCommunication Assistance
- Customizable Tools and Templates
- Generating potential settlement options
- Training and Education

3

LLM Limitations

4

BE AWARE

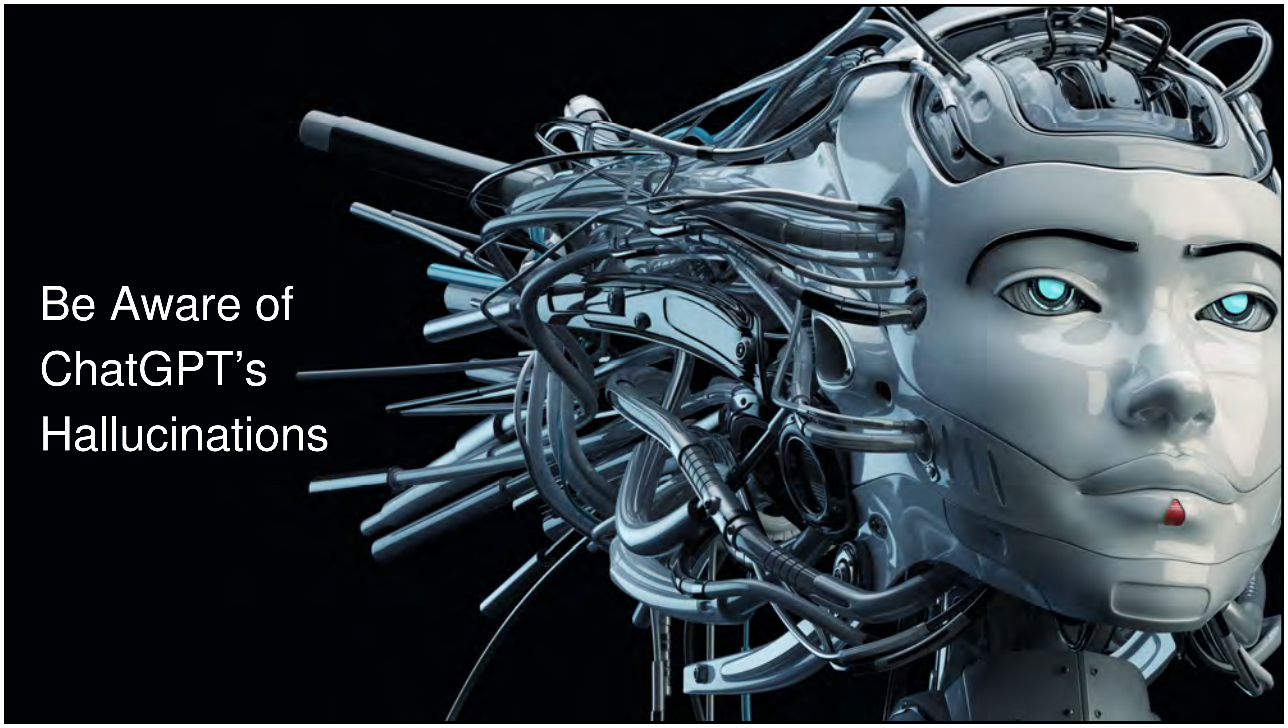
#1.May occasionally generate Incorrect Information

5

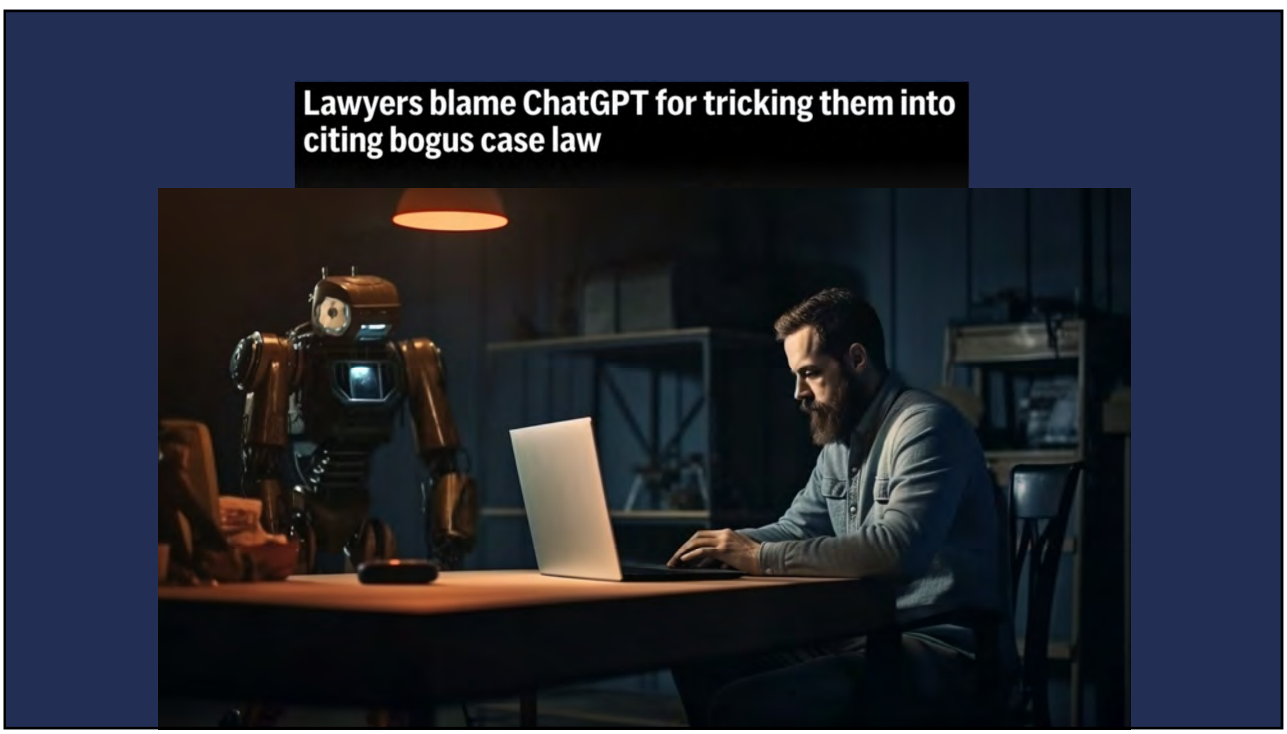
OpenAI openly warns about relying on ChatGPT's output:

- "ChatGPT may produce inaccurate information about people, places, or facts."
- Relies on publicly available Info through September 2021, including "untruths, hate speech, and other garbage" (NYT)
- Plagiarism

6


Be Aware of
ChatGPT's
Hallucinations

7


Lawyers blame ChatGPT for tricking them into citing bogus case law

8

"The ChatGPT Lawyers" (Mata v. Avianca)

- In June 2023, U.S. District Judge P. Kevin Castel of the Second Circuit imposed a $5,000 penalty on plaintiff's lawyers Steven Schwartz and Peter LoDuca (aka the "ChatGPT lawyers)
- The legal brief contained 'bogus' cases and citations generated by ChatGPT
- "An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system." Mata v. Avianca, Inc. (S.D.N.Y. 2023).

9

AI is a powerful tool for lawyers that in no way replaces the lawyer or supplants their professional and ethical obligations.

Every lawyer is always responsible for their work, regardless of the tools they use to help them create that work

10

REMEMBER

- Maintain Human Involvement and Decision Making
- Trust but Verify
- Confidentiality and data privacy
- Potential Biases and AI limitations

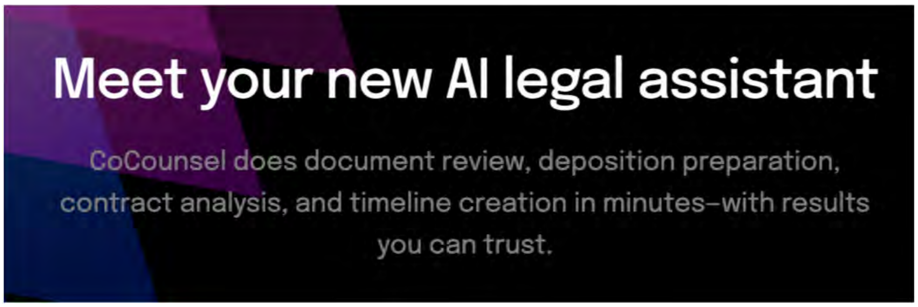
11

Other cutting-edge tools and software designed to revolutionize the ADR landscape

- Jus Mundi (AI-Powered Search for International Law and Arbitration)
  - Fourth Party
  - ADR Notable
- NextLevel Mediation
- TransPerfect
- Clio
- vLex
- CaseShield by AAA-ICDR
- FasterLaw
- …and more

12

CoCounsel
Casetext part of Thomson Reuters



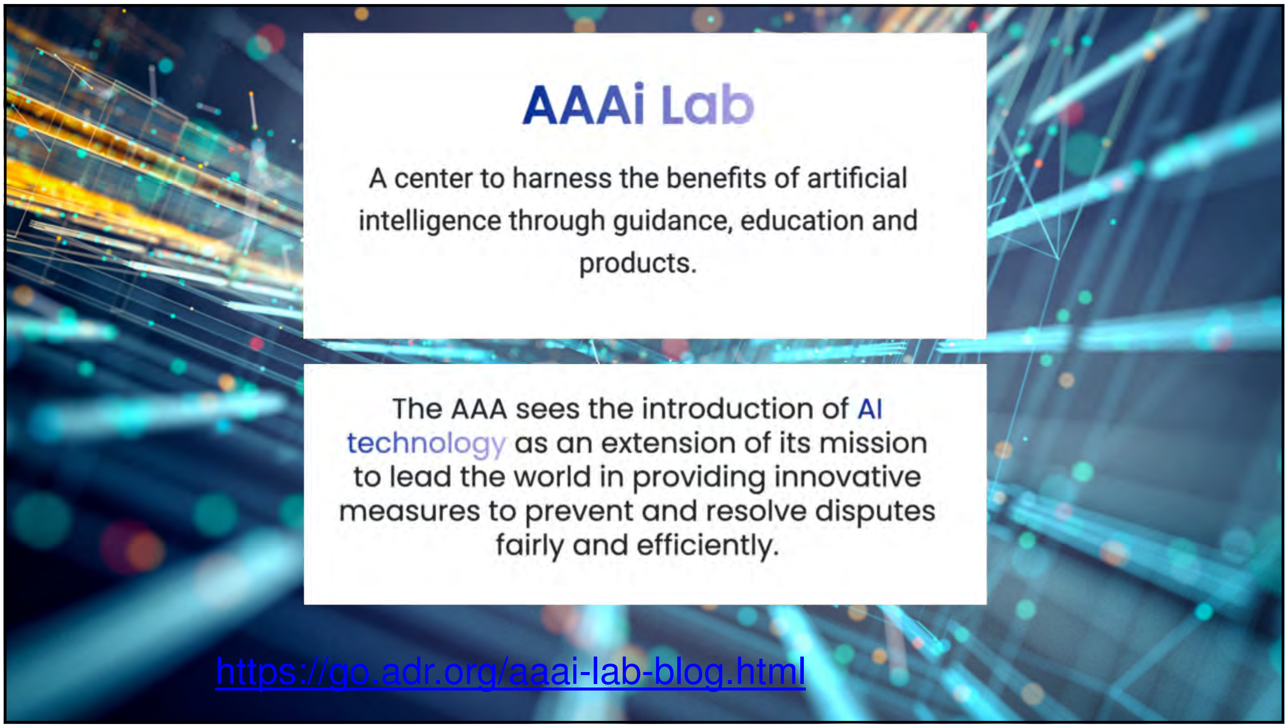
Trained on a specific knowledge base that includes a database of current case law, statutes, and regulations

13

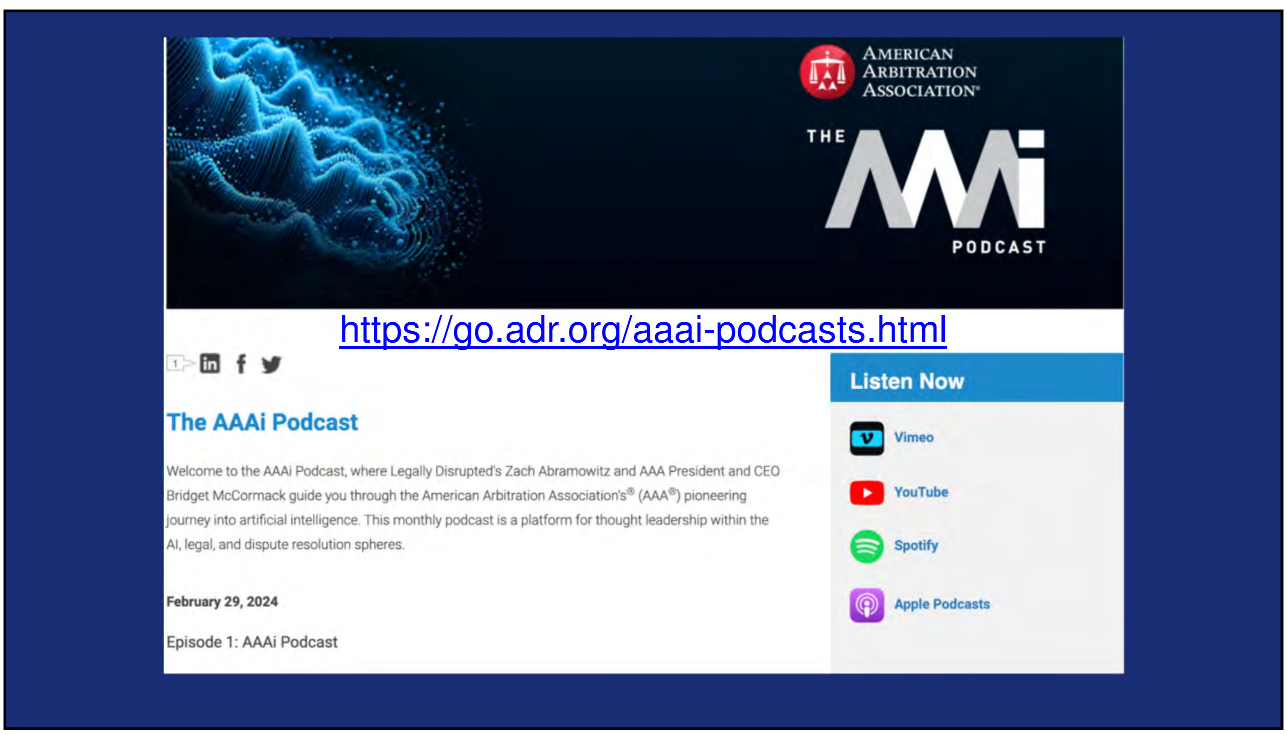
What can CoCounsel do?

- Search a database and find the right template, precedent, previous work product or Internal know-how
- Timeline: chose files and receive an organized chronology
- Summarize: interpret and condense critical inf from dense contracts and lengthy opinions
- Contract Analysis and Policy Compliance and Extract Contract Data
- Draft correspondence, Prepare for a Depo

14


AAAi Lab
A center to harness the benefits of artificial intelligence through guidance, education and products.
The AAA sees the introduction of AI technology as an extension of its mission to lead the world in providing innovative measures to prevent and resolve disputes fairly and efficiently.
https://go.adr.org/aaai-lab-blog.html

15


American Arbitration Association
THE AAAi PODCAST
https://go.adr.org/aaai-podcasts.html
The AAAi Podcast
Welcome to the AAAi Podcast, where Legally Disrupted's Zach Abramowitz and AAA President and CEO Bridget McCormack guide you through the American Arbitration Association's® (AAA®) pioneering journey into artificial intelligence. This monthly podcast is a platform for thought leadership within the AI, legal, and dispute resolution spheres.
February 29, 2024
Episode 1: AAAi Podcast
Listen Now
Vimeo
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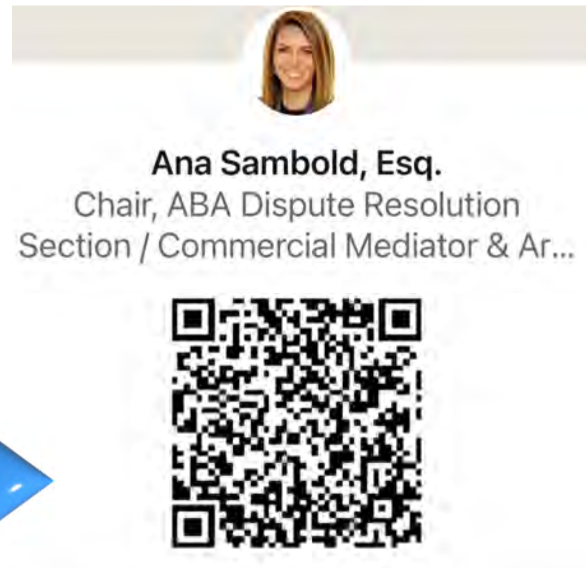
Apple Podcasts

16

Questions?

Ana M. Sambold
Mediator -Arbitrator
San Diego, California
sambold@sambold-law.com

Connect on LinkedIn



17

CLE by the Sea

LEGAL TECH & AI:

Integrating Tech and A.I. into
Your Law Firm Practice

ESQUIRETEK

1

Meet the Presenter

Pratik Shah

- Co-Founder & CEO, EsquireTek
- Head of AI & Associate Director of Litigation, Panish | Shea | Ravipudi LLP

Email: pshah@esquiretek.com

ESQUIRETEK

2

1

What is Artificial Intelligence?

ESQUIRETEK

3

> . . . the ability to solve problems and to perform tasks that would otherwise require human intelligence.
>
> - FJC Report

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4

AI is Here To Stay

Big investments are being made in the field of AI.

AI is not a passing trend.

We are early!

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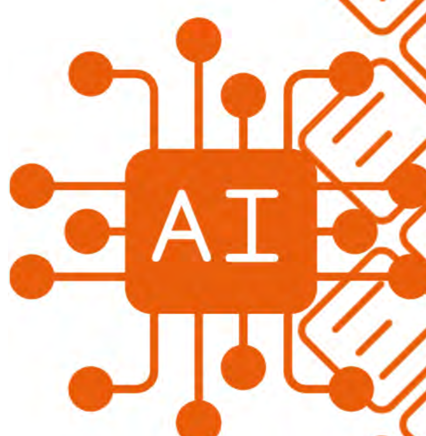
5

Key Things to Know

- AI is gaining popularity for many reasons
- "Traditional" AI v. Generative AI
- Technology is here to stay
- NLP v. Generative AI
- What is an LLM?
- Why all this AI talk now?
- Do I need to know it?



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6

Building on AI

- AI is a blank canvas
- Large Language Models (LLMs) like OpenAI provide the underlying technology
- New AI companies refine prompts and build user-friendly interfaces
- Think of it like mobile app development
- This makes AI accessible for your unique needs without deep technical knowledge.

7

The Truth About AI

AI Can

- Enhance Human Capabilities
- Process Information Rapidly
- Recognize Patterns
- Learn Adaptively
- Automate Manual Taskes
- Increase Speed & Efficiency

AI Can NOT

- Replace Human Judgement
- Operate Perfectly without Errors
- Be Conscious or Sentient
- Understand Human Context
- Possess General Intelligence
- Operate Without Human Input

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8

Adapt with New & Emerging Technology

As technology continues to evolve, you have options:

Learn how to leverage new technology

Hire people that can leverage new technology

Get left behind

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9

What is Generative AI?

Generative AI is a type of artificial intelligence that **creates new content**, such as text, images, or music, **by learning** patterns and structures from existing data and using them to generate original outputs.

EXAMPLES

ChatGPT
Google Gemini
CoCounsel by CaseText
ClaudeAI by Anthropic
LexisNexis AI
DepoDirect (CoCounsel.ai)
CanvaAI

10

2

What are the Pitfalls?

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11

AI Considerations

ETHICS Confidentiality, tech competence, supervision	**BIAS** Facial recognition, Twitter chatbot, ChatGPT
Hallucinations, inaccuracies, plagiarism **ACCURACY**	Bugs, lack of adoption, data limits **INFANCY**

E B
A I

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12

What Are The Court's Concerns?

- Doubts about AI-Originated Submissions
- Confusion over Terminology
- Work-Product Privilege Concerns
- Education on Generative AI
- Incorrect analysis/citations
- Text Formatting concerns
- Bias and Fairness
- Transparency & Accountability

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13

What You Need to Learn

Rule 1.1

Effective March 22, 2021

Competence

Comment [1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology

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14

State Bar of California

PRACTICAL GUIDANCE FOR THE USE OF GEN AI IN LAW

Citing the following rules:

- Duty of Confidentiality - BusProf Code 6068 subd(e); Rule 1.6 / 1.8.2
- Duties of Competence and Diligence - Rule 1.1 / 1.3
- Duty to Comply with the Law - Bus.Prof. Code 6068(a) Rule 8.4/1.2.1
- Duty to Supervise both Lawyers and Nonlawyers - Rule 5.1/5.2/5.3
- Commun. regarding Gen AI use - Rule 1.4/1.2
- Charging for Work Produced by Gen AI - Rule 1.5 / Bus.Prof. Code 6147-6148
- Candor to the Tribunal - Rule 3.1/3.3

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State Bar of California

PRACTICAL GUIDANCE FOR THE USE OF GEN AI IN LAW

Citing the following rules:

- Prohibition on Discrimination/Harassment/Retaliation - Rule 8.4.1
- Professional Responsibilities Owed to Other Jurisdictions - Rule 8.5

EVERYONE should read this guidance and distribute within your firm.

Official Title: THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

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Source: https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf

16

3

Practical Applications & Best Practices

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17

Popular Use Cases for Legal AI

Research & Analysis
Conduct due diligence and research with tools designed for legal.

Writing Assistance
Draft, rewrote, edit and improve documents, emails, and letters.

Language Models
Utilize small vs. large language models for various legal applications.

Automation
Automate manual tasks including data entry and creating discovery shells.

Ideation
Generate new creative ways to think outside of the box

Machine Learning
Enhance predictive analytics, risk assessment, and client insights.

18

Other Ways Lawyers Use AI

- Litigation Analytics
- Discovery
- Document Management
- Medical Chronology
- Contract Analysis
- Metrics Reporting
- Sorting & Organizing
- Forecasting
- Contract Management
- Automation

19

4

How to Pick the Right Tech

20

Select the Right Tech for Your Firm

What to consider:

1. The vision for your firm
2. Your business & operational goals
3. Potential bottlenecks
4. Internal buy-in & implementation
5. Commitment to growth & adoption
6. Identifying the right tasks to automate

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What to Avoid

- Shelf-ware - buying software and not using it
- Implementing too much at once
- Not getting the internal buy-in of your team
- Not including the team in your decision making
- Purchasing without a plan
- Buying blindly based on recommendations

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22

Bring Everyone On Board

"An inclusive approach will make employees feel in control of the adoption process, reduce aversion to the technology

- Harvard Business Review
For Success with AI, Bring Everyone On Board
May/June 2024

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Source: https://hbr.org/2024/05/for-success-with-ai-bring-everyone-on-board

23

Keeping Up with the Latest Tech

- G2.com
- Review site for software
- G2 Quadrant

- Capterra.com
- Review Software
- Discovery categories

Capterra

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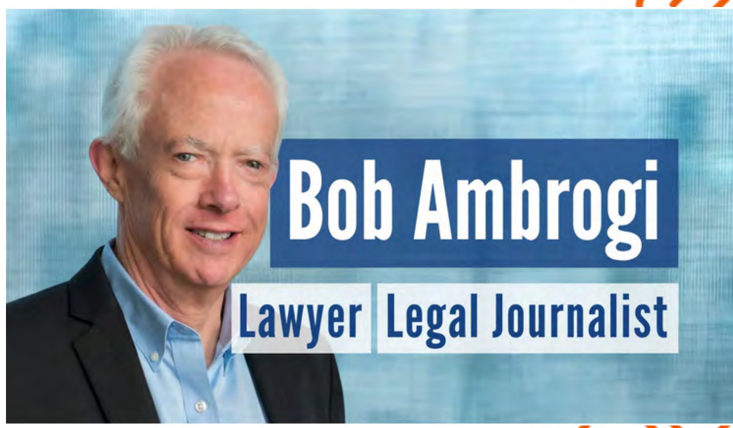
Keeping Up with the Latest Tech

- Lawnext.com
- Blogs on Legal Tech
- Podcast
- 25+ years
- Newsletter



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Keeping Up with the Latest Tech

- Lawyerist.com
- Deep dives on products
- Some are paid
- Newsletter

Lawyerist
Guiding Healthier Small Law Firms

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26

Thank you!

Any questions?

pshah@esquirertek.com

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32

27

CLE by the SEA 2024

2024 CLE by the Sea: Litigation Track - Tuesday

July 9, 2024

8:15 AM - 12:30 PM

Coronado Island Marriott Resort & Spa
Coronado, CA

AZCLE®
from the State Bar of Arizona

OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXV NUMBER II
FEBRUARY 2018
www.mnbar.org

Bench & Bar OF MINNESOTA

More implications of the new Minnesota LLC law

Trends in legal office space

The creation of the Client Security Board

Preparing the Witness to Win the Deposition Battle

By Mark Lanterman

Is the Internet of Things spying on you?

So is your phone spying on you? Yes, it's possible.

A few months ago, Computer Forensic Services analyst Sean Lanterman spoke to KARE 11 News about a topic that makes a lot of people nervous. "Is my phone spying on me?" may have seemed like a paranoid question at one point, but it now seems like a perfectly plausible notion. Given the vast amounts of data created, stored, and transmitted by the average person's phone, it's actually a question we should all be asking. Sean pointed out the very real fact that our phones are basically snitches in our pockets, and it's not impossible that advertisers would take advantage of this fact. After all, what better source of information is there than our phones when it comes to gathering intel about our preferences, shopping trends, and habits?

So is your phone spying on you? Yes, it's possible. Your smartphone's capabilities allow for the kind of spying that many suspect; your phone may communicate information about you to advertisers, and from there, personalize ads to match what has been gathered. This information can be gathered in pretty sneaky ways, too—for instance, by using your phone's microphone to capture your conversations without your awareness. The question can grow still more complicated when you apply it to your other internet-connected devices. Smartphones are probably the biggest storehouses of our personal information that we utilize on a daily basis, and for that reason, they are probably the devices that transmit the most data about us as well. But now, internet-connected devices can include everything from your thermostat to your car to your refrigerator.

These devices often feature a large range of multimedia capabilities that extend far beyond their technical use. Microphones and cameras are common elements of some of our internet-connected devices, not to mention other more advanced technologies such as GPS and voice recognition. To further confuse things, the average consumer may not know which devices have which features, especially since something as simple as a washing machine may now be equipped with exceedingly advanced technology. How do we manage all of these devices and ensure the best possible security practices?

Keeping a tally of all the internet-connected devices in your home may be more difficult than you think. Smartphones, watches, laptops, computers, entertainment systems, security cameras, TVs, cars, and the types of home appliances mentioned earlier may come to mind. But there are also trickier sources of internet-connection lurking in your home, like your kids' toys. And at the community level, everything from water plants to the power grid are connected by the internet. Can we effectively manage the risks to our privacy and security when so many of the devices we now rely on store and communicate our personal information? And what do we do when this information is compromised or our devices are taken over by cybercrime? Many of us are familiar with company and organizational policies relating to cybersecurity best practices. But when it comes to our own homes, many are less equipped and less eager to train themselves and their families in cybersecurity.

First, taking stock of which devices could potentially be spying on you, besides your phone, is important. Understanding what you buy is critical to maximizing effective use of the product and minimizing the potential risks. This is especially important when privacy concerns come into play. Knowledge of your devices includes a basic understanding of what kinds of data they collect, how this data is stored, and why and how it is communicated. If a microphone is suspected of being the culprit in leaking information, navigate settings to figure out a way to turn it off. Ideally, this kind of research is done beforehand, but proper device setup and knowledge of an item's security features can be critical in mitigating risk. Ultimately, you may decide that an internet-connected thermostat or fire detector isn't worth the hassle.

Second, once you've decided which devices are worth keeping around, take stock of the potential threats against your privacy and security. You may not be completely aware of the devices that create, save, and communicate sensitive information about you. Even though many people click the "I agree" button, most are not fully aware of what their consent implies, or means for the companies that profit from this kind of mass data sharing. A compromised device can also be used to execute greater attacks. It should be noted that hackers don't discriminate. An internet-connected device is always a target, regardless of whether it's a toy, a phone, or a computer.

If one or more devices are spying on you, it's difficult to pinpoint who or what is doing it. As Sean explained on KARE 11, there are no individuals at the receiving end, but rather an automated process comprising advanced algorithms to decipher the data being sent. Knowing how best to configure the settings on your internet-connected devices, and being aware of how many devices may pose security and privacy risks, are two keys to a proactive approach to minimizing the potential of digital spying. ▲

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/forensic experience and has testified in over 2,000 trials. He is a member of the MN Lawyers Professional Responsibility Board.

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Bench&Bar OF MINNESOTA

THE TROUBLE WITH EYEWITNESS TESTIMONY

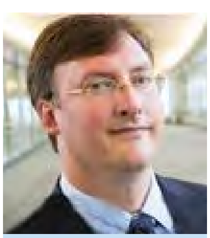
TOWARD A MODEL JURY INSTRUCTION ON WITNESS ACCOUNTS

Beyond compliance: Effective security training

The importance of education and training in striving for the best possible cybersecurity outcomes can't be overestimated. Within organizations, management looks to these initiatives as a way to inform employees about an ever-evolving cyberthreat landscape replete with risks and the potential for losses. Regularly scheduled training also provides a method for documenting employee compliance and a "checked box" for security efforts.

But staying compliant with regulations, laws, and internal policies is not a guarantee of perfect security. I often think that we'd all like to believe that completing that 15-minute module three weeks ago on how to spot an email scam (the one that really only took five minutes to finish) is enough to ensure our organization's security. Everyone who was assigned the training has completed it—that's enough, right? This false sense of security frequently weakens the culture of security that training and education are supposed to support.

In 2013, Target fell victim to a massive breach that left millions of customers' data vulnerable to hackers. The attack continues to cost Target even now, as the organization has decided to pursue legal action against its insurer for $74 million, alleging that it was not reimbursed for issuing new payment cards to customers.[1] Substantial reputational and financial damages ensued as a result of the breach, and clearly, Target is not completely out of the woods. The scary thing? As a recent journal article pointed out, "In 2013, Target was certified PCI DSS compliant weeks before hackers installed malware on the retailer's network."[2]



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Compliance with Payment Card Industry (PCI) standards would have had upper management feeling pretty good about their security. While the Payment Card Industry Security Standards Council has set forth these standards as a minimum baseline by which an organization should abide, I think it's fair to say that a large majority of PCI-compliant organizations take a passing audit as an A+ for security, "set it and forget it" until the next audit, and pat themselves on the back when they pass again. The fact is, Target's compliance meant little in providing an overall view of its security posture; PCI compliance could not predict that when technical controls alerted Target to an intrusion, they would be ignored.

Compliance with technical control standards can never override the human element of security. In Target's case, compliance with PCI standards did not have any impact on day-to-day security practices. Organizations can support security, budget appropriately, pursue compliance, assure customers and clients of their attention to latest requirements and best practices—and still be insecure. Accounting for the human element requires interactive, regular training that considers each employee's unique role in contributing to an organization's security culture. While every employee is responsible for security, different roles and responsibilities require personalized education. Additionally, training for new technologies—as well as an organization's incorporation of the Internet of Things—should always be provided across departments.

Attorneys are held to an especially high standard when it comes to the information they protect. According to the American Bar Association's Formal Opinion 477R, "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."[3] The reasonable efforts required by the legal community to prevent data breaches necessitate thorough education that takes the firm's specific needs, and types of data, into account. Compliance with policy is only worthwhile when upheld by a culture of security that acknowledges the unpredictability of a changing threat landscape. ▲

Notes

1 *http://www.startribune.com/target-sues-insurer-for-at-least-74-million-in-2013-data-breach-costs/565169292/*

2 *https://www.csiac.org/journal-article/compliant-but-not-secure-why-pci-certified-companies-are-being-breached/*

3 *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf*

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Bench & Bar OF MINNESOTA

The case of the accidental landlord

Why Minnesota's eviction moratorium needs fixing

Considerations in cloud security

Recently, the CIA awarded a diversified contract for cloud computing, including the housing of top-secret data, to Amazon Web Services, Microsoft, Google, Oracle, and IBM. "Under the C2E contract vehicle," reports an article at Nextgov, "the companies will compete for specific task orders issued by the CIA on behalf of itself and the 16 other agencies that comprise the intelligence community."[1] This is a huge contract for the companies awarded, and it underscores a movement toward cloud computing even in matters involving the utmost in secrecy. For law firms, the question of whether to use the cloud is especially critical given the unparalleled importance of protecting client confidentiality.

In our digital age, organizations, companies, and firms are constantly creating, gathering, and storing mass amounts of data—data that can be compromised by cybercriminals. Due to the costs associated with managing data, cloud computing has become the norm and will continue to be an important resource.

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Cloud computing is essentially an infrastructure that allows for on-demand access to organizational assets, especially data, over the internet, typically through commercial providers via a public cloud. Many organizations use multiple clouds and a layered approach, meaning that they use several public cloud options, or a combination of public and private options. This would describe the CIA's approach to cloud computing, opting for several service providers to better allow for customization.

Cloud computing is easily adaptable. As organizations grow in number of employees and physical locations, the cloud allows for easy access to data without the need for physical proximity. With a growing number of devices, and an ever-increasing need for data storage and computing abilities, the cloud is a sensible option for its flexibility, cost, and ease of use.

Staying secure

From a security perspective, it is important that organizations consider their risk appetites in migrating data to the cloud. Like any technology, cloud computing is neither perfectly secure nor fail-proof. Consider exactly what service, or type of infrastructure, is being used. Understand how your private, public, or hybrid plan is set up to ensure cloud security. How does the vendor protect your data? What are the practices for data encryption? How are data backups conducted? What are the policies and procedures for reporting a data breach, and how will you be notified? What is the vendor's history with data breaches and breach response? There are many questions to consider when assessing and selecting a cloud service provider. Apart from the cybersecurity issues, law firms should also review how the vendor responds to subpoenas or other third-party requests.

Not all cloud providers are going to be the right fit for your organization, and it may be more appropriate to use several different options. Deciding to trust a third party with your data requires ample research and abiding management. Data access control policies should be regularly reviewed and updated, and employees should be trained in their individual roles and responsibilities in securely accessing the cloud.

Your data, your responsibility

Ultimately, many organizations and firms find that moving to the cloud is necessary and that cloud service providers are often in a better position to protect data than an organization relying completely on its own resources and abilities. But don't forget that no matter where your data is being stored and by whom, you are ultimately responsibly for keeping it secure. When constructing your cloud infrastructure, accept the fact that paying more now for increased security is better than paying much more later in the event of a breach.

The cloud is a convenient and efficient tool. It can help simplify data management and for many organizations it's become a necessity. But balancing the benefits of cloud technology with its risks requires careful research, planning, and management. In the words of the 2019 ABA Tech Report, "If you take only one thing from this… it should be to up your game on cloud security, for your sake and, even more so, for the sake of your clients."[2] Identifying options, researching vendors, and staying apprised of best practices is critical in making the best choice for your organization and your data. ▲

Notes

1 *https://www.nextgov.com/it-modernization/2020/11/exclusive-cia-awards-secret-multi-billion-dollar-cloud-contract/170227/*

2 *https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/cloudcomputing2019/*

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Bench&Bar OF MINNESOTA

ABA Formal Opinion No. 483, data breaches, and you

Substantial completion and liquidated damages

An interview with Justice Paul Thissen of the Minnesota Supreme Court

The Music Modernization Act, explained

Third-party vendors and risk management

It's always scary to think that sometimes data breaches aren't the result of "hacking" so much as user error. Rubrik, a security and cloud management firm, recently learned this the hard way, when a misconfigured server exposed data belonging to major clients.[1] As organizations use increasingly complex technology to handle increasingly vast amounts of client data, it is becoming more and more difficult to keep up with security demands.

As Rubrik was recently reminded, security demands include proper configuration and hardware setup as well as more advanced security measures of the sort I have mentioned in previous articles. Many organizations overlook the fact that third-party vendors can cause just as much damage in the event of a breach as an internal cybersecurity event. Reputationally, operationally, and financially, where the breach originated doesn't matter as much as who the breach is going to impact most. If the answer is an organization's major clients, I am willing to bet those clients won't care either.

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Managing third parties

Most organizations have some degree of third-party involvement in managing internal systems and cloud services, or in helping conduct some operational function. When entering into agreements for these services, it's advisable to have a designated person who is responsible for overseeing the agreement process and guiding the management and review of third-party risk. All third-party vendor relationships come with a degree of risk, regardless of the service they are providing. In the massive Target data breach of 2013, it was a third-party that compromised Target's data, affecting millions of its customers. Keep in mind that this third party provided HVAC and refrigeration services.[2] It goes to show that regardless of the company, third-party involvement always comes with dangers and requires continuing oversight past the initial stages of the agreement. Cyber risk management calls for separate ownership of different levels of risk, including third-party relationships.

Once a responsible person or group is designated for the management and overview of third-party relationships, one key task is to keep track of where organizational data resides. Record where the data is being stored, what type of data it is (especially if it's highly confidential or protected), and how the data is being protected by each vendor. Try to limit which vendors have access to sensitive data and incorporate ongoing reviews and audits as part of continued due diligence. Prior to entering into any new agreements, thoroughly research the prospective party's stance on cybersecurity issues and how they have handled any past incidents. What controls are used for sensitive data and who has access to systems? Do they audit their third-party subcontractors? Do they have an incident response plan? Is it readily available for review? Does it comply with the standards of the internal response plan in place? Asking the right questions can help determine whether the value of a third-party agreement is worth the risk from the outset.

Assessing risk

Service-level agreements should be created in compliance with the same security protocols and policies that regulate internal operations. When an organization trusts an outside source with its data or allows it access to the organization's networks, that source is now an element of its risk profile. If that vendor is vulnerable, so are you. If that vendor has a weak security posture, so do you, no matter how stringent your internal policies are. In addition to the reputational, financial, and operational risks that may be incurred from a third-party security incident, legal risks must also be taken into account—especially in light of HIPAA and GDPR regulations. Transparency about reporting data breaches is critical when it comes to working with third-party vendors; immediate notification of cyber events should be a stipulation of any agreement. Contractual considerations should include access requirements, reputation of the third party, liability, audit procedures, and termination of access to data when the agreement is cancelled or expires.

It is impossible to ensure perfect security, but organizations can take measures to mitigate the risks associated with advanced technology systems and growing volumes of data. Whether it's ensuring proper configuration of systems or controlling access, third-party vendor agreements introduce another element of risk to your organization that may be difficult to fully account for or control. Considering each level of risk, including legal obligations, and promoting regular audits under the supervision of a single responsible individual within the organization can assist in identifying and mitigating the risks associated with third-party involvement. That also includes trying to ensure that the third party has the same dedication to developing cultures of security that your organization does. ▲

Notes

1 Kelly Sheridan, "Rubrik data leak is another cloud misconfiguration horror story," Dark Reading (1/30/2019). *https://www.darkreading.com/cloud/rubrik-data-leak-is-another-cloud-misconfiguration-horror-story/d/d-id/1333767*

2 Brian Krebs, "Target hackers broke in via HVAC company," Krebs on Security (2/14/2014). *https://krebsonsecurity.com/2014/02/target-hackers-broke-in-via-hvac-company/*

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Bench&Bar OF MINNESOTA

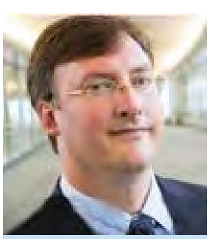
Thinking Outside the Black Box

Reimagining attorney compensation for the 21st Century

Doxxing made easy: social media

In a recent article, I wrote about doxxing and the potentially unsolvable problems associated with trying to remove all of one's personal information from the worldwide web. In the digital space we live in, where instant communication and the ability to share information within seconds is an ingrained reality, controlling our personal data online is difficult if not impossible. Even if someone were to go through the trouble of carefully combing through 50 sites' (often confusing) opt-out pages and removing their information, there is no guarantee that another reseller website won't pop up the next day with the same information—or that those 50 websites won't simply repopulate within a few months' time. Though we often forget—or deliberately ignore—the fact, anonymity on the internet simply does not exist. But perhaps more troubling is that anonymity in our "real" lives is greatly diminished as well as a result of what can be found online.

We do have a measure of control in one of the digital realms of greatest risk—our own social media accounts. A simple adage comes to mind: Think before you post. It's often easier said than done. After all, some of our wittiest commentaries or observations beg to be shared quickly. Even though most people would likely admit to their lack of anonymity in the social media space, it is also true that many people post and forget. Or they believe that their social media presence is entirely distinct from their professional lives. Many job candidates are horrified to learn that their Facebook posts are up for review just as much as their painstakingly polished resumes.



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Those seeking positions with security clearances are even more at risk of having their social media presence factor into their assessment as job candidates. For up and coming generations that have used social media for the majority of their lives, it's often a tough truth to accept that once something is "out there," it's never truly gone and might affect their real lives.

Poor social media habits can spawn a wide variety of risks—and for lawyers, these risks can be especially damaging given the high standards to which they are held regarding confidentiality and privacy for clients.

Within the legal community, a poorly worded post or an inappropriate picture can cost a firm in more than one way. A damaged reputation can cost a firm clients, and oversharing online can facilitate cyberattacks, as I have discussed in a previous article, "Social media and managing reputational risk." Doxxing, the process by which personal information is gathered online—often with the intent to maliciously disseminate it—can start with a cybercriminal reviewing a target's social media pages. A seemingly innocent post about going on vacation can be invaluable in personalizing a phishing attack or strengthening a social engineering scheme. Anything shared online can potentially be used to harm a firm financially, operationally, or reputationally. I frequently advise people to not post anything online that they wouldn't want their moms to read. It might be better to also advise people not to post anything that they wouldn't want a cybercriminal to read.

Being mindful of our social media activities can seem overbearing and perhaps a bit paranoid. Surely, a little Tweet can't be that big of a deal, right? Who cares? And maybe the majority of the time, nobody will care. But taking responsibility for the security of our organizations and firms requires an acknowledgement of the risks and threats that our digital lives present. With social media, people often end up their own worst enemies thanks to what they choose to share. Doxxing isn't always a complicated treasure hunt that requires carefully surveying multiple reseller websites. It can also be a quick trip to the potential victim's Facebook page. ▲

"Doxxing isn't always a complicated treasure hunt that requires carefully surveying multiple reseller websites. It can also be a quick trip to the potential victim's Facebook page."

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NESOTA

MSBA President 2020-21

DYAN EBERT

Steady as she goes

The big question: Back to the office?

The business interruption pandemic

Ethics wake-up calls for supervisory responsibilities

Child safety first: Reporting child abuse and neglect

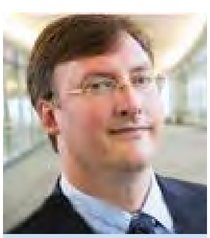
Minnesota legislative session recap

Cyber riots and hacktivism

As the calendar turned to June and the nation continued to cope with the aftermath of the killing of George Floyd, the Minnesota Senate allegedly fell victim to the international hacktivist group Anonymous. On June 2, the Senate's servers were breached and passwords used by senators and staff were accessed, resulting in web pages going down. As noted in the Pioneer Press, "In a tweet, the hacking movement Anonymous highlighted the hack, which appears to have included a defacement of a Senate web page showing an Anonymous calling card and saying 'Justice for George Floyd.'"[1] While it cannot be definitively determined whether this was really an Anonymous attack, it comes in the midst of a number of distributed denial of service (DDoS) attacks against Minnesota government web pages. Even as rioting recedes in the streets of Minneapolis and throughout the nation, cyber rioting and hacktivism will continue to be of concern.

'Hacktivism' can be defined as acts of cybercrime motivated by political or social causes. Anonymous is an international, decentralized hacktivist group that is being reenergized by the recent protests.[2] Since there is no clear leader to this group, new factions can be created very quickly and work together to enact largescale attacks. The social upheaval and widespread anger washing over our world fuels this group and makes it attractive to those who want to protest and riot from a distance, "anonymously."

Threat actors tend to have financial gain as their primary motivator. Ransomware and phishing attacks are typically examples of money-driven cybercrime. Hacktivism is more personal, and the mindset of a hacker with a social or political agenda may have an impact on how an attack is conducted. Apart from the team effort that groups like Anonymous are able to marshal, hacktivist attacks may be more tenacious than your average cybercrime venture, and government entities may be particularly targeted.



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The risks of a hacktivist attack are largely operational, as is evident by the recent attacks perpetrated in Minnesota. DDoS attacks seek to make a system or network unusable for a period of time by disrupting services to users. Government websites and data will most likely continue to be threatened by hacktivist groups, in addition to law enforcement agencies. Companies and organizations with government clients or contracts and individuals related to those involved in the tragic death of George Floyd may also encounter a greater number of cyber events.

As we continue to struggle with the ongoing limitations spawned by the coronavirus pandemic and compounded by the recent events calling for social reform and justice, it is important to consider how our clients and colleagues may be affected digitally as well as in "real time." Staying apprised of best cybersecurity practices and keeping up with the current cyber landscape is important to ensuring the safety and efficiency of our digital spaces, especially as many of us continue to work remotely.

In closing, a lesson from the Minnesota Senate hacking: It is always wise to avoid having a "Passwords File." Passwords stored in text files on network-connected devices contributed to the scope and severity of this breach. Regular backup policies, VPNS, avoiding public WiFi, and the general advice to "slow down" online in an effort to reduce the risk of falling prey to phishing attacks are all simple ways to mitigate cyberthreats. ▲

[1] *https://www.twincities.com/2020/06/02/minnesota-senate-computers-hacked-passwords-file-accessed-web-pages-down/*

[2] *https://www.reuters.com/article/us-minneapolis-protests-anonymous/hackers-and-hucksters-reinvigorate-anonymous-brand-amid-protests-idUSKBN23A06I*

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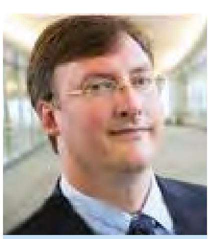
The ghost of water wars future

The Great Lakes Compact and the coming freshwater crisis

Security is a team game

Last month I discussed the impact of President Biden's recent executive order on national cybersecurity. The order comes at a particularly critical time for the United States, in light of recent data breaches affecting several critical sectors. Apart from the federal government, it is evident that standardization, awareness, and investment in new technologies are key components of keeping up with the security demands of an ever-changing landscape.

In 2020, remote work environments and the cyber threats that proliferated throughout the pandemic greatly changed business operations for many organizations. Even as many businesses resume "normal" in-person work, many adjustments made during the past year may have lasting effects. Work-from-home policies and the challenges brought about by covid-19 required many organizations to review and improve their cybersecurity postures. Even so, according to a recent study, "Nearly 80 percent of senior IT and IT security leaders believe their organizations lack sufficient protection against cyberattacks despite increased IT security investments made in 2020 to deal with distributed IT and work-from-home challenges."[1] This discrepancy underscores the fact that increased financial investment does not necessarily correct already-existing problems in an organization's security culture. Nor does it automatically increase internal confidence in an organization's security posture.



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Despite the rise in cybercrime and an increasingly complex web of cyber risks, many organizations are delegating a job that rightfully belongs to dedicated security teams to technical support staff who are already busy with other work and less experienced with respect to security threats. Even though cybersecurity professionals are greatly in demand, positions are often filled for the sake of the title, and not for the successful planning, execution, and maintenance of strong cybersecurity plans. This practice often occurs in organizations that equate compliance with security—essentially it involves filling a position without providing the necessary support and resources for security initiatives. Or organizations may arbitrarily assign cybersecurity titles to existing employees within the IT department for the purpose of satisfying compliance requirements.

Dedicated security teams have several critical responsibilities, including: oversight of implementing best practices; management of projects affecting cybersecurity objectives; facilitating communication; minimizing siloes in the organization; conducting documentation; and establishing change control processes, among others. This is a mission distinct from many aspects of day-to-day operations. In the hustle and bustle of working to manage the "convenience" side of the technologies on which we rely, IT departments may not always have the resources required to manage the many demands of a healthy security posture.

A recently discovered breach illustrates the importance of oversight in maintaining strong cybersecurity. A large web host provider, DreamHost, "was left open online earlier this year, leaking names, usernames and email addresses… The data appeared to date back at least three years to 2018, though it's unclear how long the database was openly accessible."[2] Equipped with this kind of information, spear-phishing attacks or other social engineering campaigns are easy enough to execute. Using some of the stolen information, a cybercriminal can tailor a phishing email to gain access to more data.

Though DreamHost was quick to secure the database once it was alerted, it would seem that improving oversight and communication regarding cybersecurity practices would help to mitigate the possibility of future events. In addition to government entities, attacks on key sectors and critical infrastructure may also yield catastrophic results. For all organizations, cyber risks may have an immense negative impact on business operations and may cause long-term damage that includes reputational and financial harm.

Cybersecurity is often relegated to the IT department, though cyber threats and risks are cross-organizational concerns. Dedicated teams are often instrumental in managing incident response, but they are equally essential in providing critical leadership through proactive measures and securing top-down management support for cybersecurity initiatives. Depending on the size of the organization or firm, outsourcing this work may be a beneficial alternative. From helping to ensure proper database configurations to keeping key stakeholders informed of new IT projects, cybersecurity teams can help take an organization from a laissez-faire culture to a strong and actively supported security culture that better minimizes cyber risk. ▲

Notes

1 *https://www.forbes.com/sites/chuckbrooks/2021/03/02/alarming-cybersecurity-stats-------what-you-need-to-know-for-2021/?sh=1ea696ba58d3*

2 *https://www.forbes.com/sites/thomasbrewster/2021/06/24/one-of-the-biggest-hosting-companies-in-the-world-leaks-815-million-records-of-website-data/?sh=75dad660110d*

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Bench&Bar OF MINNESOTA

Covid-19 liability legislation

Force majeure *Hitz* home, excuses rent obligation

***Bostock v. Clayton County* and the future of the MHRA**

One Size Does Not Fit All

Estate planning for blended and nontraditional families

The Twitter breach and the dangers of social engineering

This past July, Twitter fell victim to a wide-scale cyberattack that compromised the accounts of some of its highest-profile users. It was soon determined that the attack was largely orchestrated by a 17-year-old boy, who apparently had a history of online scams—including some perpetrated on Minecraft—that amassed him a huge bitcoin fortune.[1] Twitter posted details about the attack on its blog: "The social engineering that occurred on July 15, 2020, targeted a small number of employees through a phone spear phishing attack… Not all of the employees that were initially targeted had permissions to use account management tools, but the attacks used their credentials to access our internal systems and gain information about our processes."[2] The post goes on to say that the attack focused on exploiting the human vulnerabilities that contributed to its success.

This episode underlines a simple truth that most cybersecurity experts acknowledge: The human element is what ultimately determines the strength of an organization's security posture. No degree of compliance or security budgeting can eliminate the potential for an attack on employees or staff themselves. As in the case of Twitter, once credentials were willingly offered up, the cybercriminals were able to access critical assets and compromise accounts.

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Human vulnerabilities are always going to be much easier to hack than technology. In this instance, a 17-year-old boy was able to trick a number of employees at one of the largest tech companies in the world. And the scary thing about it is that it was relatively easy to do. So how do we mitigate some of this continuing, inescapable human risk?

One step that Twitter is taking is to more carefully manage access controls. Twitter has pledged that the company will be improving its procedures and policies to better monitor and restrict access to internal assets. Access controls are a critical piece of an organization's overall security posture. Limiting access to critical data, systems, and networks is a surefire way to mitigate some of the potential risk. The more an employee is able to access, the greater the liability that employee poses in the event of a compromise. Restricting and auditing access controls do not make employees immune to spear phishing attacks, but these measures definitely limit the damage if and when employees become victims.

Second, training and education are always going to strengthen organizational security, but in particular, employees should be reminded that avoiding hastiness is always important when dealing with digital communications. The Twitter hackers conducted their social engineering attack via phone, by convincing an employee that they were calling from the technology department and required their credentials to access a customer service portal.[3] It is important to communicate to employees how personal information will be requested, and to establish that following up in person is encouraged (or required) when a request for personal information has been received. While email is the standard phishing method, it is important to remember that phone calls and texting can also be used to gather information. If anything appears suspect or out of the ordinary, make sure that reporting procedures are in place and that all employees know the designated communication channels. Taking a moment to slow down before acting on a request may make all the difference.

Like all high-profile breaches and cyber events, the Twitter breach should inspire organizations, firms, and companies to take a closer look at their own security postures and implement positive change. Security cultures thrive with top-down management support and a company-wide awareness that security is everyone's responsibility. ▲

Notes

1 *https://www.businessinsider.com/twitter-hacker-florida-teen-past-minecraft-bitcoin-scams-2020-8*

2 *https://blog.twitter.com/en_us/topics/company/2020/an-update-on-our-security-incident.html*

3 *https://www.nytimes.com/2020/07/31/technology/twitter-hack-arrest.html*

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DEFINING PARENTHOOD

Changing families, the law, and the element of intent

Interview with MN Supreme Court Justice G. Barry Anderson

What it takes to flunk Minnesota's CLE standards

Attorney's liens in Minnesota

Don’t forget the inside threat

The more access a disgruntled employee has, the more successful their attack is going to be.

Judging by the types of breaches we regularly hear about in the news, from the recent Facebook hack to China’s secret implantation of spy chips inside motherboards (which I’ll be discussing in my next article), it would seem that the biggest threats to our digital security are primarily external. Social engineering attacks such as phishing scams are especially prevalent and tend to stem from outside perpetrators with financial or political motives. Considering our near-constant exposure to these types of attacks, it may be hard to believe that the greatest cybersecurity risk an organization faces originates internally.

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The fact is, the state actors and nefarious basement-dwelling hackers we typically visualize are a less likely threat than the human risks to security that exist within our own organizations. Employees, partners, and third-party vendors introduce two very distinct, though equally damaging, types of threats to your firm’s cybersecurity posture: unintentional and malicious. Unintentional threats may include an employee falling prey to a phishing scam, a browser exploit, or some other kind of hack that compromises the data to which they have access. Wi-Fi attacks and the possibility of having a device stolen are also very dangerous and common, especially as people spend a greater amount of time working remotely.

I once had a frantic phone call from a young attorney who had left their laptop in their car overnight. The next morning it was gone. Luckily, the laptop had been encrypted, so the potential for damage was somewhat minimized. However, it is clear that unintentional threats pose great risk and can be very costly to a firm financially, reputationally, and operationally. Typically, diligent employee education programs and regular training (especially following regularly scheduled security assessments) can improve defense strategies and establish reliable reporting mechanisms when unintentional security issues arise. Communication within organizations is key when it comes to responding to these instances head on.

Insider attacks

Conversely, malicious insider threats are impervious to training efforts and may actually prove more severe if an employee has extensive IT knowledge. A fairly consistent trend I have observed in conducting routine organizational security assessments is that management issues with access controls are fairly common. When too many people have too much on-demand access to too much information, there is more room for things to go wrong (and more seriously wrong). The more access a disgruntled employee has, the more successful their attack is going to be.

In one unfortunate instance, a concerned firm contacted me with the suspicion that a former employee was continuing to access their systems remotely. Furthermore, it was suggested that perhaps this employee had also been sending confidential information to a private email account in the months leading up to their departure, with the intent to begin a competing firm. The person was also suspected of downloading data beyond the scope of their own active cases to a USB device. Upon reviewing the details of the case, it turned out that this firm had not collected the employee’s devices upon their termination, and that the employee had continued access to the firm's confidential client and case information. In spite of unusual network activity leading up to the former employee's departure, nothing was done to discover what was being downloaded *en masse*, and the employee's access controls remained the same even after they had announced their intention to leave the firm.

Internal oversight is critical

This lack of oversight and clear termination protocols opened the firm up to a host of security issues that upper management had not anticipated. Client data was compromised and the firm's reputation was marred by the incident. In instances of malicious insider threats, no amount of firewall protection or penetration testing can safeguard a firm from attacks that require no hacking at all. Unregulated access controls, lack of network monitoring, and weak termination policies work together to create a prime space for these threats to flourish—and often it's too late once the damage is noticed.

From accidentally clicking a link in a phishing email to purposefully stealing confidential data, the insider threat is the most dangerous security issue your firm faces. While these attacks can be very severe in and of themselves, the relative ease with which these threats can be brought to fruition makes them especially scary. For unintentional threats, as I've noted in previous articles, education is key. Knowing what a scam email looks like, knowing to whom information can safely be given, and recognizing the typical threats are critical to mitigating the risk. Employees who are unaware of recent cybersecurity trends are not well-equipped to handle them when they arise. But malicious threats require diligence on the part of IT departments and upper management. Having appropriate protocols in place for potentially disgruntled employees, termination practices, and access controls are all important elements of protecting key data and assets. Acknowledging the insider threat is may be even more important than staying apprised of external threats to your firm. ▲

MINNESOTA STATE BAR ASSOCIATION

MAY/JUNE 2023

BENCH + BAR of Minnesota

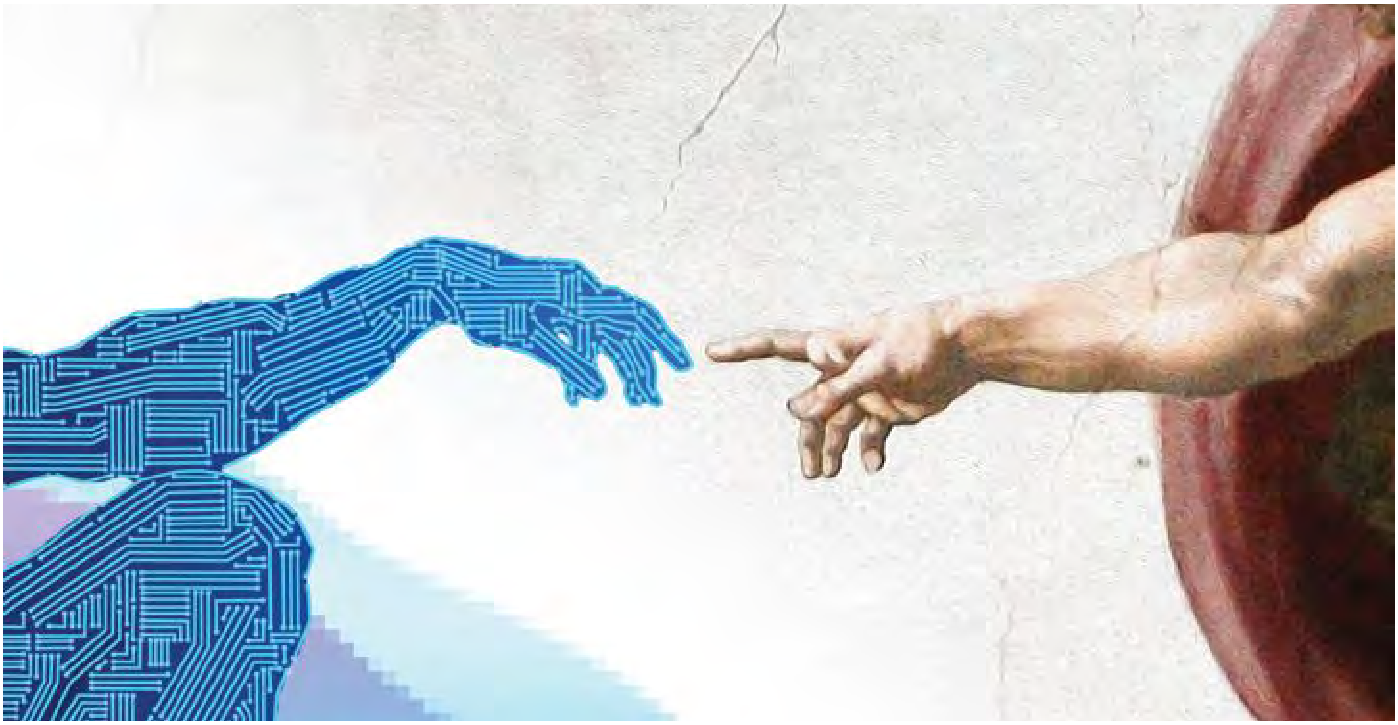
We need to talk about ChatGPT

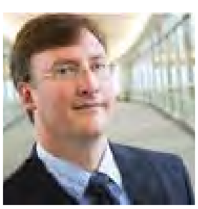
A lawyer's introduction to the exploding field of AI and large language models

THIS ARTICLE IS HUMAN-WRITTEN

ChatGPT and navigating AI

BY MARK LANTERMAN mlanterman@compforensics.com





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Since its release in November 2022, ChatGPT has been met with a wide variety of responses. It's been praised for passing the bar exam.[1] It's been feared for its potential to replace certain jobs. It's been banned in Italy (at least temporarily). Its inherent security and privacy risks have been acknowledged, along with its potential for improving cybersecurity postures. AI has been a much-discussed topic in recent months, and with good reason.

In an open letter titled "Pause Giant AI Experiments" from the Future of Life Institute, signed by the likes of Elon Musk and Steve Wozniak, the question is posed: "*Should* we develop nonhuman minds that might eventually outnumber, outsmart, obsolete and replace us?... Powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable."[2] The letter asks for a six-month pause on training for "AI systems more powerful than GPT-4," and calls for increased governance, safety protocols, and improvements in accuracy and transparency. The letter was recently referenced by a group of European Union members requesting a global summit on AI to establish governance for its "development, control, and deployment." In an open letter from these EU lawmakers, responsibility and internal cooperation are highlighted as necessary components in ensuring that progress in AI remains "human-centric, safe, and trustworthy."[3]

The utilization of new technology always comes with a caveat—namely, that gains in convenience result in losses to security. AI, and the ubiquity of ChatGPT more specifically, have presented an especially complex and multifaceted conundrum for individuals, organizations, firms, governments, and security professionals, to name a few. The potential benefits seem overwhelming—reduced time spent on simple tasks, improved efficiency in problem-solving, and limited costs to clients being prime examples. In the words of a recent ABA Journal column, "Despite its current shortcomings, ChatGPT has the potential to significantly enhance efficiency in the delivery of legal services... It can be a tremendous time-saver and is a great place to start your research on just about any topic. But whether you use ChatGPT for personal or professional reasons, you'll need to have a full understanding of the issue at hand and should thoroughly review, edit and supplement any results or draft language it provides you."[4]

First drafts, letters, and correspondence with clients could all be supported with the use of AI.

But actually using the information generated by AI tools requires a great deal of discretion and careful review. As of right now, inaccuracies, false information, and misleading statements abound. The time required to fact check, and the efforts required to mitigate any problems resulting from an error slipping through the cracks, may diminish or even negate the convenience factor. Furthermore, many observers are acknowledging the possible negative impact on new lawyers, with AI taking away opportunities for valuable experience. This reality is of great concern outside the legal community as well, as AI may begin to replace the skillsets of human beings. Additionally, ethical questions have arisen as to what can be legally used from a chatbot conversation, since it may contain trademarked, copyrighted, or simply false information.[5]

The double-edged nature of AI is similarly challenging from a cybersecurity perspective. The benefits may include an improved ability to automate security measures, including those needed for monitoring and detection.[6] But it can also be utilized by cybercriminals to assist in the creation of malware or more convincing phishing attacks. Notably, ChatGPT suffered its own data breach in March, which resulted in the leak of users' personal information and conversation content.[7]

The all-too-critical human element of security especially comes into play when analyzing the risks and benefits of this tool. When any new technology is incorporated into an organization, it is important to fully map out how that technology will be used, and then communicate that information clearly to employees. While ChatGPT urges users to avoid entering sensitive information into conversations,[8] confidential data and personal identifiable information are being entered nonetheless; in some instances, employees themselves are entering confidential company information, constituting a data breach. The tool itself is trained on vast amounts of data gathered from the internet, further blurring an important question—is it ethical to use ChatGPT, given the way it was, and continues to be, trained? If yes, what parameters should be created to regulate its use? If no, how will future AI projects be regulated?

At the time of this writing, Italy has banned ChatGPT, citing violations against the European General Data Protection Regulation (GDPR): "OpenAI doesn't have age controls to stop people under the age of 13 from using the text generation system; it can provide information about people that isn't accurate; and people haven't been told their data was collected. Perhaps most importantly, its fourth argument claims there is 'no legal basis' for collecting people's personal information in the massive swells of data used to train ChatGPT."[9] In spite of this list, it may be reinstated by the time you read this should OpenAI comply with a set of hard and fast rules required by the Italian Data Protection Authority. Regardless of the outcome, overarching concerns surely remain.

For a lot of us, the recent conversations surrounding chatbots and AI may feel like a sci-fi movie, with robots overpowering humans and taking over the world. What happens when technology gets *too* smart, if the conveniences afforded by technology become *too* convenient, literally replacing the very human beings who created it and allowed it to flourish? It's certainly an interesting (if scary!) thought, and while not everyone concurs with such an alarming viewpoint, the rapid development of AI certainly requires political attention, careful planning in its applications, and a complete-as-possible assessment of its extensive societal impact.

For the legal community, the question of how to best implement AI will likely be complicated as these issues unfold. While it seems safe to say that many, if not most, organizations will soon be using AI at least in some capacity, law firms are always held to a higher standard in managing client data and ensuring a strong security posture. Though the immediate benefits of a quickly written draft or assistance in correspondence may be tempting, be sure to bide your time in approaching AI and establishing how it will be incorporated into your firm. Specify what data can be entered into conversations, train employees in appropriate use, and establish guidelines for how your firm will use the tool in the most productive and secure way possible. ▲

NOTES

1 *https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile*

2 *https://futureoflife.org/open-letter/pause-giant-ai-experiments/*

3 *https://www.cnbc.com/2023/04/17/eu-lawmakers-call-for-rules-for-general-purpose-ai-tools-like-chatgpt.html*

4 *https://www.abajournal.com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai*

5 *https://news.bloomberglaw.com/us-law-week/employers-should-consider-these-risks-when-employees-use-chatgpt*

6 *https://www.forbes.com/sites/forbestechcouncil/2023/03/15/how-ai-is-disrupting-and-transforming-the-cybersecurity-landscape/?sh=2c41fff34683*

7 *https://openai.com/blog/march-20-chatgpt-outage*

8 *https://help.openai.com/en/articles/6783457-what-is-chatgpt*

9 *https://www.wired.com/story/italy-ban-chatgpt-privacy-gdpr/*

MINNESOTA STATE BAR ASSOCIATION
JULY 2023

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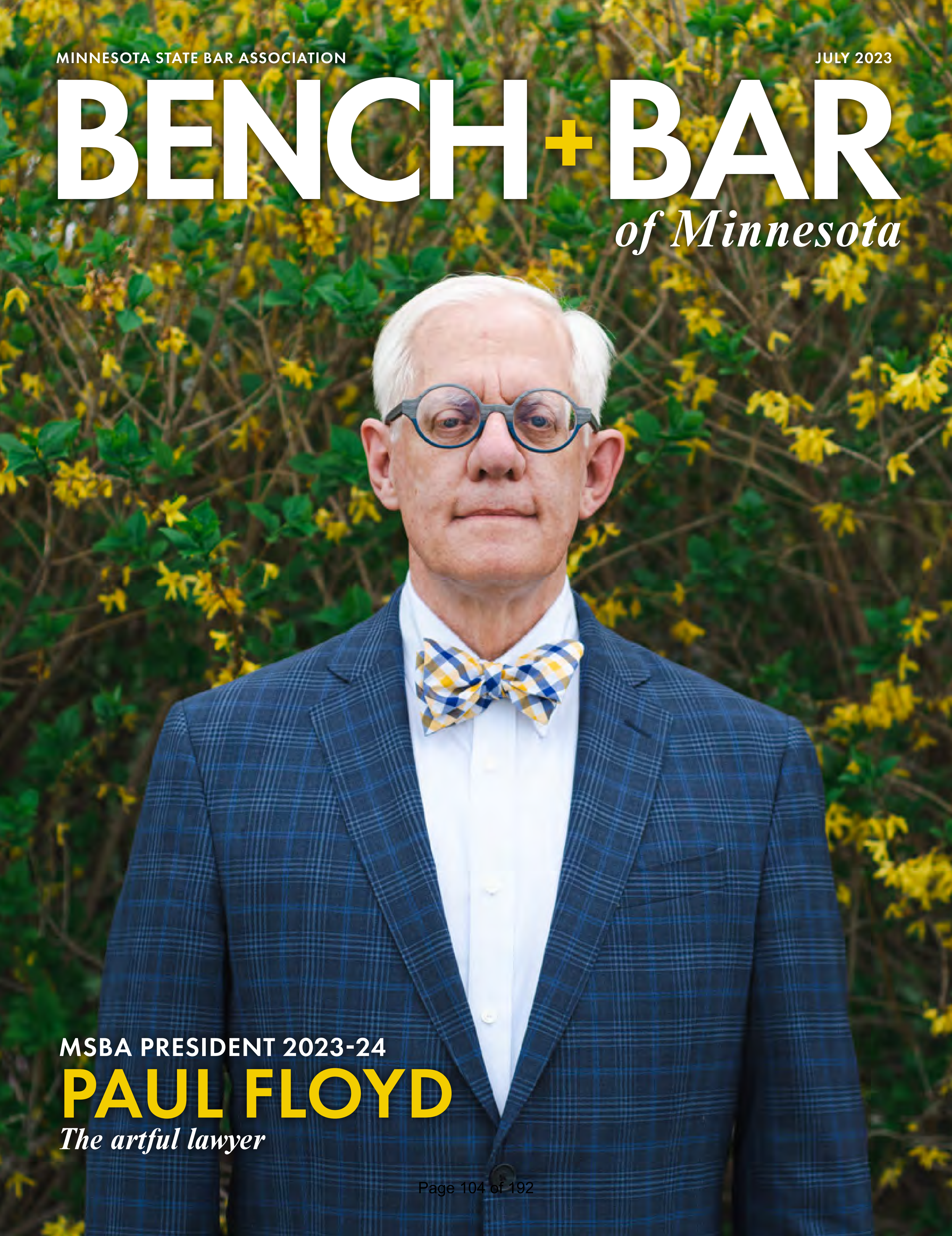

MSBA PRESIDENT 2023-24

PAUL FLOYD

The artful lawyer

ChatGPT: *The human element*

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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ChatGPT is continuing to make headlines. It seems like the talk surrounding AI is continuing to evolve as well. Sam Altman, the CEO of OpenAI, admits that even he is a little afraid of the possibilities.[1] On May 16, Altman told a Senate Judiciary subcommittee that "regulatory intervention by governments will be critical to mitigate the risks of increasingly powerful models."[2] During this hearing, Altman highlighted the double-edged nature of AI—the potential loss of jobs, but likewise the potential creation of new jobs; the risk of voter fraud and misinformation, but also the ways in which AI can be used to counter these issues.

The May 16 hearing is being seen by many commentators as what one called "the beginning of what will likely be a long, but broadly bipartisan, process regulating the use of AI and its amazing promise.... [A] regulatory roadmap is beginning to coalesce."[3] Altman proposed strict adherence to safety requirements and extensive testing processes in AI development, all within the structure of federal regulation and oversight. Acknowledging the great potential for worldwide harm as a result of misused or unrestrained AI technologies, Altman emphasized the need for government and industry collaboration and transparency.

Last month I wrote that ChatGPT was still banned in Italy owing to numerous privacy concerns ("This article is human-written: ChatGPT and navigating AI," May/June Bench & Bar). Since then, it's been reinstated after adding certain disclosures and controls.[4] This episode illustrates the tweaks to AI's functioning that will likely continue to be made. In the meantime, however, some of the previously hypothetical crises have indeed come to fruition.

In May, a New York City attorney was found to have used ChatGPT to find case citations for court documents.[5] When these citations were found to be fake, he admitted to using ChatGPT in conducting his research. In a sworn affidavit, he stated that he has "never utilized Chat GPT as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that its content could be false."[6] As with any new technology that an organization may plan on incorporating, it is critical to conduct research and create a plan for how it will be best implemented. A quick Google search easily reveals that ChatGPT is rather notorious for giving misleading or even completely false information in conversations. In this case, the consequences for not knowing ChatGPT's weaknesses have been steep.

Partly in response to this event, restrictions are being adopted to manage AI in the courtroom. U.S. District Judge Brantley Starr of the Northern District of Texas, for example, "has ordered attorneys to attest that they will not use ChatGPT or other generative artificial intelligence technology to write legal briefs because the AI tool can invent facts."[7] Though Judge Starr acknowledged some possible uses of the technology that could be appropriate in other situations, he banned using AI alone for legal briefing given its unreliability. Regardless of its application, verifying the authenticity and accuracy of what ChatGPT produces is the user's responsibility, especially within the legal community.

In addition to the ethical issues on display in this particular case, ChatGPT is even being viewed by some as a harbinger of the end—human extinction. What will happen when jobs are replaced by AI? What if life as we know it is taken over by "minds" more powerful than ours? This alarmist view is tempered by the idea that this is a tool that can be used carefully and efficiently to improve human life, not tear it asunder.

Within the cybersecurity field, many experts believe that AI holds the key in combatting the ever-growing number and variety of cyberattacks that are perpetrated daily. If AI can be used to develop sophisticated phishing campaigns, maybe AI is the best resource we have to combat those types of attacks. As far as detection and mitigation goes, ever-evolving AI could be a deal breaker in how organizations scan and respond to cyberattacks. But some take it even a step further. Could AI possibly be the foolproof cybersecurity solution we've been hoping for all along?

Maybe not. In his recently published book, *Fancy Bear Goes Phishing: The Dark History of the Information Age in Five Extraordinary Hacks,*[8] Yale Professor Scott J. Shapiro describes the dangers of solutionism, especially within the realm of cybersecurity. He explains that cybersecurity technology tools are often touted as the best of the best, with AI frequently being the deciding factor as to what makes one product better than any other. But Shapiro goes on to point out that technological fixes are not always what's needed to correct cybersecurity problems. "Cybersecurity is not a primarily technological problem that requires a primarily engineering solution," he writes. "It is a human problem that requires an understanding of human behavior." Similarly, though ChatGPT "passed" the bar,[9] it is not bound to the same standards required of an actual attorney, who must be qualified to deal with "human problems." Judge Starr further highlights this disqualifying feature of AI in his ban: "Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle."[10]

Though I frequently discuss the "human element" of cybersecurity, I think the prevalence of AI and the fears surrounding its ascent are making us all question the "human element" in other industries. For one, AI poses a data security risk—consider an employee who inputs confidential data into a conversation. Or a breach that compromises chat history. But AI may also pose a greater "security" risk as many see it—the risk to human beings' way of life. Within the legal community, it's been challenging to weigh the risks and benefits, as both seem abundant. Ethical guidelines and governance rules will undoubtedly continue to be created to manage the strengths of AI in relation to its pitfalls. In the meantime, it is important to keep an eye on how AI is being used today. Establishing firm requirements for its use and setting clear expectations can help mitigate risk. ▲

NOTES

1 *https://www.cnbc.com/2023/03/20/openai-ceo-sam-altman-says-hes-a-little-bit-scared-of-ai.html*

2 *https://www.cnn.com/2023/05/16/tech/sam-altman-openai-congress/index.html*

3 *https://www.forbes.com/sites/michaelperegrine/2023/05/17/sam-altman-sends-a-message-to-corporate-leaders-on-ai-risk-management/?sh=42ab1e96dbef*

4 *https://www.bbc.com/news/technology-65431914#*

5 *https://www.forbes.com/sites/mattnovak/2023/05/27/lawyer-uses-chatgpt-in-federal-court-and-it-goes-horribly-wrong/?sh=4a4c089d3494*

6 *https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.32.1_1.pdf*

7 *https://www.cbsnews.com/news/texas-judge-bans-chatgpt-court-filing/*

8 Shapiro, Scott. J. *Fancy Bear Goes Phishing: The Dark History of the Information Age, in Five Extraordinary Hacks,"* Farrar, Straus and Giroux, 2023.

9 *https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile*

10 *https://www.txnd.uscourts.gov/judge/judge-brantley-starr*

2024 CLE by the Sea: Litigation Track - Wednesday

July 10, 2024

8:15 AM - 12:30 PM

Coronado Island Marriott Resort & Spa
Coronado, CA

Evidence Case Law Update[1]
(Selected Cases: 2020-2024)

United States Supreme Court

1. *Smith v. Arizona*, 602 U.S. ---, --- S. Ct. ---, 2024 WL 3074423 (2024)—In this case, the State charged Smith with possessing methamphetamine for sale (Count One); possessing marijuana for sale (Count Two); possessing cannabis wax for sale (Count Three); and two counts of possessing drug paraphernalia (Counts Four and Five). At trial, the State called Department of Public Safety ("DPS") forensic scientist Greggory Longoni, who testified that the seized substances were methamphetamine, marijuana, and cannabis. Although Longoni offered his independent opinions, he reached his conclusions based on his review of testing conducted by former DPS forensic scientist Elizabeth Rast, who did not testify. The State did not offer Rast's opinions or reports as evidence and Smith did not subpoena Rast as a witness. The jury found Smith guilty as charged on Counts Two, Four, and Five and guilty of the lesser-included offenses of simple possession on counts One and Three. After granting the State's motion to dismiss Count Four, the superior court sentenced Smith to an aggregate term of four years' imprisonment on the remaining counts. Smith appealed and the court of appeals affirmed in a memorandum decision. *State v. Smith*, 2022 WL 2734269 (Ct. App. Div. 1 2022). The court of appeals affirmed, rejecting Smith's Confrontation Clause argument based on its earlier opinion in *State ex rel. Montgomery v. Karp*, 236 Ariz. 120 (App. 2014). The court observed that:

> Here, as in *Karp*, Longoni presented his independent expert opinions permissibly based on his review of Rast's work, and he was subject to Smith's full cross-examination. Longoni thus did not act as a "mere conduit" for her conclusions. *See also Karp* at 124, ¶ 13 (finding no hearsay violation when an expert testifies "to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion"). Nor did the State introduce Rast's opinions or any of her work-product documents into evidence. Had Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to do so. *See Williams v. Illinois*, 567 U.S. 50, 58–59 (2012) (A defendant "who really wishes to probe the reliability of the . . . testing done in a particular case" may subpoena those involved in the testing process and question them at trial.).

Smith, ¶ 19. The Arizona Supreme Court denied review.

On Writ of Certiorari to the Arizona Court of Appeals, Division One, the U.S. Supreme Court vacated and remanded. At the Supreme Court, the parties agreed that Smith's confrontation claim could succeed only if Rast's statements came into evidence for their truth. Smith argued that this condition was satisfied because her statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen. The State contends that Rast's statements came into evidence not for their truth, but to "show the basis" of Longoni's independent opinion. The Court held that when an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, then the statements come into

[1] Prepared by Hon. Mark Armstrong (Ret.), as well as the members and leadership of the Arizona Supreme Court's Advisory Committee on Rules of Evidence.

evidence for their truth. Pp. 11-22. And in this case, the Court found that Rast's statements came in for their truth because they were admitted to show the basis of Longoni's expert opinions, all of which were predicated on the truth of Rast's factual statements. And, if the out-of-court statements were also testimonial, an issue not yet decided, their admission violated the Confrontation Clause. P. 19. Thus, the Court remanded for the State court to decide whether the out-of-court statements Longoni conveyed (i.e., notes and/or report) were testimonial, an issue that focuses on the "primary purpose" of the statement, i.e., whether it has "a focus on court." P. 21. Finally, the Court concluded that "[a] State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. *See Crawford*, 541 U. S., at 68; *Melendez-Diaz*, 557 U. S., at 311. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. *See Bullcoming*, 564 U. S., at 663. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion." P. 21. **[Rule 703; U.S. Const. Amend. VI, Confrontation Clause]**

2. *Diaz v. United States*, 602 U.S. ----, 144 S. Ct. 1727, 2024 WL 3056012 (2024)—In this case, Diaz was charged with importing methamphetamine in violation of 21 U. S. C. §§ 952 and 960, charges that required the Government to prove that Diaz "knowingly" transported drugs. In her defense, Diaz claimed not to know that the drugs were hidden in the car. To rebut Diaz's claim, the Government planned to call Homeland Security Investigations Special Agent Andrew Flood as an expert witness to testify that drug traffickers generally do not entrust large quantities of drugs to people who are unaware they are transporting them. Diaz objected in a pretrial motion under Rule 704(b), which provides that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." The court ruled that Agent Flood could not testify in absolute terms about whether all couriers knowingly transport drugs but could testify that most couriers know they are transporting drugs. At trial, Agent Flood testified that most couriers know that they are transporting drugs. The jury found Diaz guilty, and Diaz appealed, challenging Agent Flood's testimony under Rule 704(b). The Court of Appeals held that because Agent Flood did not explicitly opine that Diaz knowingly transported methamphetamine, his testimony did not violate Rule 704(b). The Supreme Court affirmed, holding that expert testimony that "most people" in a group have a particular mental state is not an opinion about "the defendant" and thus does not violate Rule 704(b). The Court observed that Rule 704(a) sets out a general rule that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704(b) is an exception to that general rule.

   In a spirited dissent, Justice Gorsuch argued that "[t]he government comes away with a powerful new tool in its pocket. Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what 'most' people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like 'most' people and convict. What authority exists for allowing that kind of charade in federal criminal trials is anybody's guess, but certainly it cannot be found in Rule 704." **[Rules 704(a) and (b)]**

3. *Samia v. United States*, 599 U.S. 635, 143 S. Ct. 2004 (2023)—In a 6-3 opinion authored by Justice Thomas, the Supreme Court held that the admission of a non-testifying codefendant's confession at a joint trial did not violate the defendant's Sixth Amendment rights because the confession had been modified to replace the defendant's name with placeholders like "somebody else" and the "other person." The redactions were "not akin to an obvious blank or the word deleted" and, thus, the confession did not directly implicate the defendant. Moreover, the jury was instructed to use the confession against the confessing codefendant only. The three dissenters pointed out that prosecutors can now "always circumvent *Bruton*'s [*Bruton v. United States*, 391 U.S. 123 (1968)] protections." **[U.S. Const. Amend. VI; *Bruton*]**

4. *Shoop v. Cunningham*, 598 U.S. __, 143 S. Ct. 37 (2022) (Thomas, J., dissenting from denial of certiorari)—Cunningham had been convicted of capital murder and sentenced to death. In an interview during state post-conviction proceedings, a juror told Cunningham's investigator that "some social workers worked with [Cunningham] in the past and were afraid of him." The foreperson worked at a county children services office. From this, Cunningham alleged the foreperson had received extraneous prejudicial information about Cunningham. The state courts rejected Cunningham's claim. Cunningham filed a federal habeas petition and reasserted the claim. The federal court allowed Cunningham to interview the foreperson and remaining jurors. Two jurors revealed that the foreperson said she knew the families and would "have to go back and see them. These families are my clients." The foreperson said she never spoke to her colleagues about Cunningham before or during the trial. She did, however, look through Cunningham's files after the trial and sentencing were over. The District Court dismissed all of Cunningham's claims. A divided panel of the Sixth Circuit reversed and ordered the District Court to conduct an evidentiary hearing on the juror bias claims. Justice Thomas--joined by Justices Alito and Gorsuch--would have granted certiorari, in part because of how Cunningham's claims interacted with Federal Rule of Evidence 606(b). Rule 606(b) prohibits any juror from testifying "about a statement made or incident that occurred during the jury's deliberations." Under this Rule, Justice Thomas would have concluded that the comments made by the foreperson were "unquestionably barred from judicial consideration." There is a longstanding rule that jury testimony cannot be used to impeach a verdict. And Rule 606(b) embodies that principle. "And, once those comments are disregarded, Cunningham's claim amounts to no more than a bare, unspecified, and unsubstantiated allegation that the foreperson had some sort of relationship with some victims or their families and that it prejudiced him in some way." **[Rule 606(b)]**

5. *Shinn v. Ramirez*, 596 U.S. 366, 142 S. Ct. 1718 (2022)—Justice Thomas writing for the Court held that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel. Under a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a prisoner has failed to develop the factual basis of a claim in state court proceedings, a federal habeas court is barred from

considering new evidence to assess cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), unless one of the exceptions in 28 U.S.C. § 2254(e)(2) applies. Those exceptions include a new rule of constitutional law or a newly discovered factual predicate that could not have been discovered prior with due diligence; they were not applicable in these cases. As there is no constitutional right to counsel in state postconviction proceedings, a prisoner bears the risk in federal habeas court for all attorney errors made during the proceedings, including when state postconviction counsel is negligent. The court declined to extend *Martinez* to excuse a prisoner's failure to develop the state court record under the AEDPA and reasoned that "unlike judge-made exceptions to procedural default, [AEDPA] is a statute, and thus, this court has no power to redefine when a prisoner has failed to develop the factual basis of a claim in State court proceedings." The dissenting justices, for whom Justice Sotomayor wrote, would have found that text and precedent instruct that in states that limit review of trial-ineffectiveness claims to postconviction proceedings, as is the case here, habeas petitioners who receive ineffective assistance of postconviction counsel are not responsible for any failure to develop evidence in support of a trial ineffectiveness claim under the AEDPA. **[U.S. Const. Amend. VI]**

6. *United States v. Tsarnaev,* 595 U.S. 302, 142 S.Ct. 1024 (2022)—Justice Thomas, writing for the majority, held the trial court did not err when it excluded allegedly mitigating evidence in a capital trial. Dshokhar Tsarnaev was convicted of 30 federal offenses and sentenced to death for his role in the Boston Marathon bombings and its aftermath. Tsarnaev's theory in mitigation was that his brother, Tamerlan Tsarnaev, masterminded the bombing and pressured Dshokhar to participate. To support this, Dshokhar sought to introduce evidence that, years earlier, Tamerlan participated in a triple homicide in Waltham, Massachusetts. The government objected on the grounds that the proffered evidence lacked relevance, lacked probative value, and would likely confuse the jury. District Court excluded the evidence. Supreme Court ruled that the District Court did not abuse its discretion. The proposed evidence didn't make clear Tamerlan's role in the Waltham murders. The evidence also risked a mini-trial where the only witnesses who knew the truth were dead. Further concluded such limitation did not violate the Eighth Amendment because it fell within the traditional authority to set reasonable limits upon the evidence a capital defendant can submit and control the manner in which it is submitted. **[U.S. Const. Amend. VIII]**

7. *Hemphill v. New York*, 595 U.S. 140, 142 S. Ct. 681 (2022)—Justice Sotomayor, writing for an 8-justice majority, reversed the defendant's murder conviction and held that the admission of an absent declarant's plea allocution violated the defendant's Sixth Amendment Confrontation Clause rights. At trial, the defendant blamed Nicholas Morris for the shooting. To rebut the defendant's theory, the government introduced an earlier plea allocution from Morris—for possession of a .357 magnum revolver (which was not the type of weapon used in the murder)—under *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012). *Reid* permitted the government to introduce this evidence, which was otherwise inadmissible under the Confrontation Clause, because the defendant presented "misleading" evidence in his defense and thus opened the door. The Supreme Court noted that the Sixth Amendment affords States some flexibility to adopt reasonable procedural

rules to govern a defendant's right to confrontation, but held that *Reid* was a substantive rule, and thus not permissible. The Court reiterated that the Confrontation Clause demands that the reliability of evidence be assessed through cross-examination, and held that "[t]he trial court here violated this principle by admitting unconfronted, testimonial hearsay against [the defendant] simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." **[U.S. Const. Amend. VI]**

8. *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113, 141 S. Ct. 1951 (2021)—Justice Barrett, writing for the majority, held that once plaintiffs in securities fraud class actions make a *prima facie* showing of fraud on the marketplace under *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the burden of persuasion shifts to the defendants to prove price impact by a preponderance of the evidence. The Court explained that its precedent—both *Basic* and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) ("*Halliburton II*")—placed this burden on defendants. Although Federal Rule of Evidence 301 would not shift the burden of persuasion, *Basic* and *Halliburton II* required that the "defendant must 'in fact' 'seve[r] the link' between a misrepresentation and the price paid by the plaintiff—and a defendant's mere production of *some* evidence relevant to price impact would rarely accomplish that feat." **[Fed. R. Evid. 301]**

9. *Jones v. Mississippi*, 593 U.S. 98, 141 S. Ct. 1307 (2021)—Justice Kavanaugh, writing for the majority, held that a sentencer in a criminal case is not required to make a separate factual finding of permanent incorrigibility before imposing a discretionary sentence of life without parole on a juvenile homicide offender, abrogating lower-court decisions that held otherwise. The majority further held that a sentencer is not required to provide an on-the-record sentencing explanation with an implicit finding of the offender's permanent incorrigibility. Rather, it is enough—constitutionally necessary and constitutionally sufficient—under *Miller v. Alabama*, 567 U.S. 460 (2012), that the sentencer has discretion to consider the mitigating qualities of youth and impose a lesser sentence. Justice Thomas concurred, while Justice Sotomayor, joined by Justices Breyer and Kagan, dissented. **[U.S. Const. Amend. VIII]**

10. *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020)—Justice Gorsuch writing for the Court held that the Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. The majority opinion abrogated prior case law, as well as the practices in Louisiana and Oregon to convict and punish based on 10-2 verdicts (non-unanimous juries). **[U.S. Const. Amend. VI]**

11. *McKinney v. Arizona*, 589 U.S. 139, 140 S. Ct. 702 (2020)—A jury resentencing was not required after the Ninth Circuit Court of Appeals, on federal habeas corpus review, reversed a defendant's death sentences for failure to properly consider his PTSD as mitigating evidence. Instead, the 5-4 majority of the U.S. Supreme Court upheld the Arizona Supreme Court's procedure of itself reviewing the evidence in the record and reweighing the aggravating and mitigating circumstances, including defendant's

PTSD. While, under *Ring v. Arizona*, 536 U.S. 584 (2002), juries are required to find aggravating circumstances that make a defendant *eligible* for the death penalty, a jury need not reweigh aggravating and mitigating circumstances in a harmless-error-review-type situation such as that here. The dissenting justices, for whom Justice Ginsburg wrote, would have found the Arizona Supreme Court to have engaged in a reopened direct, rather than just a collateral, review procedure, meaning that post-*Ring*, a jury would need to find the aggravators making McKinney death-eligible. **[U.S. Const. Amend. VI]**

Federal Courts

1. *United States v. Blackshire*, ___ F.4th ___, 2024 WL 1689201 (9th Cir. 2024)—Affirming convictions and sentences for various offenses arising out of an assault on the defendant's girlfriend, the appellate court found that, after the government could not locate the girlfriend to testify at trial, the district court properly admitted statements she gave to police officers and a nurse. Applying the forfeiture by wrongdoing rule, codified in Fed. R. Evid. 804(b)(6), which is identical to Ariz. R. Evid. 804(b)(6), the government proved by a preponderance of the evidence that appellant intentionally and wrongfully caused his girlfriend's unavailability. In so holding, the court noted that "the government need not show that [defendant] engaged in *criminal* wrongdoing that caused C.S.'s unavailability." *Blackshire*, *3. Defendant's recorded statements can reasonably be interpreted as evidencing efforts to coerce, unduly influence, or pressure her into not showing up in court. **[Fed. R. Evid. 804(b)(6)]**

2. *Porter v. Martinez*, 68 F.4th 429 (9th Cir. 2023)—Porter brought a First Amendment challenge to a California law prohibiting driver initiated horn use when reasonably necessary to ensure the safe operation of vehicles on a public roadway. To show the statute furthered a substantial government interest (traffic safety), the State relied on testimony from a California Highway Patrol sergeant. The sergeant opined that the regulation of horn use did further traffic safety. Porter argued that the sergeant's testimony was not admissible under Rule 702 because it was speculative and did not meet the requirements of Rule 702.

   The Court of Appeals found that the trial court properly admitted Sargent Beck's testimony under Federal Rule of Evidence 702. The Court reasoned that Rule 702 is flexible and that trial courts should be given leeway in determining reliability. The Court also noted that when an expert offers nonscientific testimony, reliability depends heavily on knowledge and experience rather than methodology or theory behind testimony, and that reliability becomes more important when experience-based opinion is not subject to testing, error rate or peer review.

   The dissent opined that the trial court abused its discretion in allowing the testimony. The dissent found the opinions speculative because the sergeant failed to show how his experience in law enforcement supported his specific opinions. The dissent believed that when relying on experience, Rule 702 requires a witness to explain how his experience leads to the conclusions reached, how the experience forms a sufficient basis for the opinion, and how the experience has been applied to the facts. **[Fed. R. Evid. 702]**

3. *Radu v. Shon*, 62 F.4th 1165 (9th Cir. 2023)— While her family was living in Germany, Shon took her children to the United States. Radu applied for an order requiring the children be returned to Germany, citing the Hague Convention. The Court held an evidentiary hearing on whether a grave risk that the child's return would expose the child to physical or psychological harm existed. The court ordered the children returned. After the district court's first return order was appealed, the district court held a second hearing. Prior to the second return order, the district court also contacted the State Department, Office of Children's Issues for Germany, and obtained information about German law and the estimated time it would take to resolve the custody dispute in Germany. The district court entered a second order ordering the children returned to Germany. The district court's second order was appealed and remanded again in light of new relevant caselaw.

   On remand, the district court did not hold a third evidentiary hearing, and instead relied on the previous record. On appeal, Radu argued the Court abused its discretion in not holding a new hearing, and that the district court's conversations with the State Department were *ex parte* and resulted in hearsay evidence which violated Shon's due process rights.

   The Ninth Circuit Court of Appeals held that whether to hold an evidentiary hearing was discretionary with the Court. The court also found no impropriety connected to the Court's contacting the State Department, noting that Radu took no issue with the Court's conclusion on foreign law, but instead challenged the methods the court used to arrive at its conclusions. The appellate court held contacting the State Department was permissible, noting that Rule 44.1 of the Federal Rules of Evidence allows the Court to rely on *any relevant material or source, whether or not submitted by a party*. **[Fed. R. Evid. 44.1]**

4. *United States v. Williams*, 663 F.Supp.3d 1085 (D. Ariz. 2023)—The government was not seeking to admit gangsta rap videos and songs featuring the defendants and others for impermissible purposes in violation of defendants' First Amendment rights. However, the danger of unfair prejudice resulting from admission of that evidence substantially outweighed its probative value. The video and songs contained imagery related to drugs, gun crime, violence and misogyny and included lyrics filled with profanity and a racial slur, and were so inflammatory that they could cause the jury to convict defendants on impermissible grounds. Moreover, the evidence had the potential to confuse or mislead the jury. The court further found the probative value of the evidence to be minimal as it was cumulative of other substantial evidence of guilt, the author of the lyrics was unknown, some of the lyrics were indecipherable and the lyrics did not mirror or exhibit an unmistakable connection to the facts of the charged offenses. **[U.S. Const. Amend. I; Fed. R. Evid. 403]**

5. *United States v. Alahmedalabdaloklah*, 94 F.4th 782 (9th Cir. 2024)—Alahmedalabdaloklah (Oklah) was a member of an Iraqi insurgent group that planted IEDs, damaged U.S. military property, and killed or injured American troops. Oklah specifically designed or created remote detonator switches for the IEDs. He did this both in Iraq and later in China. At trial, the court allowed the government to present a deposition of Al-Dhari, an alleged co-conspirator. In one of the admitted statements, Al-Dhari repeated

statements made by a third person, also a member of the insurgent group. This included a statement that Oklah manufactured IEDs. Oklah argued the government did not prove the statements were made in furtherance of a conspiracy. Under Federal Evidence Rule 801(d)(2)(E), a statement is not hearsay if it "was made by the party's coconspirator during and in furtherance of the conspiracy." Oklah argued the third person's statements to Al-Dhari could not have met the standard because Al-Dhari said he was not a member of the insurgent group. The Court found that "the Government presented ample evidence that he in fact was" a member of the insurgent group "who took numerous steps to further the group's goals …." But even assuming Al-Dhari was not a member of the group, Rule 801(d)(2)(E) does not require the statement be made to another member of the conspiracy. Oklah also argued the third person's claim that Oklah manufactured IEDs was general conversation and could not have been made to further the conspiracy. The Court concluded they were "statements made to keep a coconspirator abreast of the ongoing conspiracy's activities or were made to further" the insurgent group's goals. The statements thus fell within Rule 801(d)(2)(E). **[Rule 801(d)(2)(E)]**

6. *Le v. State Farm*, 676 F.Supp.3d 760 (D. Ariz. June 8, 2023)—A fire damaged Le's rental property. State Farm paid $63,300 on the claim. Believing State Farm inadequately valued the loss, Le demanded an appraisal under the policy's terms. The appraisal panel's award assessed "replacement cost" at $193,509 and "actual cash value" at $177,399. State Farm objected to the award and did not pay the full award. Le filed suit claiming breach of contract and breach of the duty of good faith, and seeking compensatory general and punitive damages. Le's expert's opinions included "State Farm's actions nationwide and in Arizona are evidence of a pattern and practice to intentionally frustrate the intended purpose of the appraisal clause". The expert supported his opinion with 10 unrelated cases in which claimants received offers they believed were unreasonably low, then obtained much bigger appraisal damage valuations, and State Farm failed to pay the appraised damages. During discovery, State Farm moved to preclude use of the 10 unrelated claims, arguing the evidence was irrelevant and inadmissible to prove State Farm breached the Le contract or acted unreasonably in handling Le's claim.

   An insurer acts in bad faith when it unreasonably investigates, evaluates or processes a claim (an objective test), and either knows it is acting unreasonably or acts with such reckless disregard that such knowledge may be imputed to it (a subjective test). To recover punitive damages, a plaintiff must show something more than the conduct necessary to establish the tort of bad faith. Whether the defendant intended to injure the plaintiff or consciously disregarded the plaintiff's rights may be suggested by a pattern of similar unfair practices. State Farm's handling of other claims could be relevant to show State Farm intentionally injured Le or consciously pursued a course of conduct knowing it created a substantial risk of considerable harm to Le. Rule 404(b)(2) allows evidence of prior harmful acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Le could offer evidence of State Farm's handling of other cases to show a pattern or practice of acting adverse to insureds and that State Farm's actions were not mistake or accident. While the other claims would not be sufficient by themselves to support the expert's opinion, they may constitute facts and data the expert relies upon to support his opinion. The court rejected State Farm's arguments that permitting evidence of unrelated claims would result in burdensome discovery disproportionate to the needs of the case, and that evidence of unrelated claims would violate Rule 403 as confusing, misleading, or unfairly prejudicial. **[Rules 403 and 404(b)(2)]**

7. *United States v. Allen*, 34 F.4th 789 (9th Cir. 2022)—The district court's order prohibiting members of the public from attending the defendant's suppression hearing and trial and allowing audio-streaming, but not video-streaming of the proceedings due to the COVID-19 pandemic violated the defendant's Sixth Amendment right to a public trial. The order, which effected a total closure, was not narrowly tailored to serve the overriding interest in slowing the spread of COVID-19. Courts throughout the country used less restrictive COVID-19 protocols that allowed some sort of visual access and adopted a range of measures to minimize health risks. That other jurisdictions could address the pandemic using more targeted means suggests that the district court here had "too readily foregone options that could serve its interests just as well, without substantially burdening" the defendant's public trial right under *McCullen v. Coakley*, 573 U.S. 464, 490 (2014). Further, the district court did not state a unique reason as to why it could not use video-streaming or other alternatives. Accordingly, the court of appeals vacated defendant's conviction and the district court's denial of the motion to suppress and required remand. **[U.S. Const. Amend. VI]**

8. *Elosu v. Middlefork Ranch, Inc.*, 26 F.4th 1017 (9th Cir. 2022)—The district court abused its discretion in excluding the testimony of the plaintiffs' expert fire investigator concerning the cause of a cabin fire. The parties stipulated to the expert's qualifications and methodology. The district court, however, granted a motion to exclude, taking issue with the "ultimate conclusions" and finding the opinion speculative, uncertain and contradicted by eyewitness accounts. The court of appeals reversed, stating the district court assumed fact finding role in its analysis. Under *Daubert*, the district court is a gatekeeper, not a fact finder. The concerns the district court noted were matters for impeachment, not foundation. The expert was qualified, and applied broadly accepted scientific principles and professional standards to conduct his analysis and reach his conclusions. Accordingly, "the gate could not be closed to this relevant opinion offered with sufficient foundation by one qualified to give it." **[Rule 702]**

9. *United States v. Litwin*, 972 F.3d 1155 (9th Cir. 2020)—There was a reasonable possibility that a juror was dismissed from the jury simply based on her views of the merits of the government's case, in violation of the Sixth Amendment. The district court was not itself permitted to submit additional declarations regarding the juror on appeal, given the serious due process concerns those would raise and given that this was not a situation in which Federal Rule of Appellate Procedure 10(e) allows a district court to correct or modify a record on appeal. The trial court has two options when faced with a juror who will not agree with others on the jury about the strength of the government's case: (1) declare a mistrial, or (2) send the juror back and instruct the jury as a whole to continue trying to reach agreement. **[U.S. Const. Amend. VI]**

10. *United States v. Valencia-Lopez*, 971 F.3d 891 (9th Cir. 2020)—The federal trial court abused its discretion by qualifying an Immigration and Customs Enforcement (ICE)

Supervisory Special Agent as an expert without explicitly finding reliability of that proffered expert's testimony. The agent testified that there was almost no likelihood drug cartels would coerce a truck driver at gunpoint to carry illegal drugs across the border, as defendant claimed in his defense. The court's dismissal of an objection as going to the weight of the evidence and not the admissibility was not a reliability determination, and the trial court denied the defendant's requests for voir dire of the proposed expert—even though the court had offered that in place of a *Daubert* hearing. An implicit reliability finding is not sufficient to satisfy the trial court's gatekeeping function. **[Fed. R. Evid. 702]**

11. *Grodzitsky v. Honda*, 957 F.3d 979 (9th Cir. 2020)—The majority of the panel found that expert testimony may be and was properly excluded as unreliable under the *Daubert* standard when testimony regarding motor vehicle window regulator-part stated standard as "shouldn't fail ever," when expert's methodology was flawed due to overly expansive theory, when application was flawed by small sample size of only 26 versus 400,000 overall in existence, and when—among other things—expert stated no scientific basis for the observations. **[Fed. R. Evid. 702]**

12. *United States v. Aragon*, 796 Fed. Appx. 409 (Mem) (9th Cir. 2020)—The district court did not abuse its discretion in admitting an arresting officer's identification of the defendant's voice on recorded telephone calls, as the officer had heard defendant speak after his arrest. Federal Rule of Evidence 901(b)(5) has a 'low threshold for voice identifications,' wherein it states: "An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker," is sufficient to satisfy the requirement of authenticating evidence. **[Rule 901(b)(5)]**

Arizona Supreme Court

1. *Roaf v. Stephen S. Rebuck Consulting, LLC, et al*, ___ Ariz. ___, 2023 WL 5036929 (2024)—In this personal injury case arising out of a rear-end collision between plaintiff and defendant's employee, the defendant admitted both direct and vicarious liability for its employee's actions. Nonetheless, the superior court admitted evidence of the employee's personnel record and driving history in a damages-only trial and submitted separate claims of negligent hiring and vicarious liability, in addition to the claim for the employee's negligence. The jury found plaintiff's full damages to be $4.625 million, and allocated 40% fault to the driver and 60% to his employer. The court of appeals affirmed and the supreme granted review to address whether prejudicial error occurred when the superior court allowed the plaintiff to introduce evidence based on separate claims of negligent hiring and vicarious liability when the employer admitted liability for both claims and there was no claim for punitive damages. The supreme court reversed and remanded, concluding that the superior court should have precluded the personnel record and driving history because evidence relating to the negligent hiring claim was not relevant to the sole jury issue, the amount of compensatory damages. *See* Ariz. R. Evid. 402. **[Rule 402]**

2. *Windhurst v. Ariz. Dep't of Corrections et al.*, 256 Ariz. 186, 536 P.3d 764 (2023)—In a medical malpractice and wrongful death suit against the Arizona Department of Corrections and Corizon Health, the court held that A.R.S. § 12-2604(A) is inapplicable to claims based on a theory of institutional liability. An institution cannot be a licensed health professional because an institution cannot be a natural person. Thus, in a suit against a medical institution, it would be impossible for a plaintiff to produce an expert in the "same health profession as the defendant." Similarly, it would be impossible for a plaintiff to present an expert under § 12-2604(A)'s requirements because an institution, by definition, cannot be a "specialist" or "general practitioner." Because § 12-2604(A) is not applicable to a claim for institutional negligence, an expert on this issue need only satisfy Ariz. R. Evid. 702, which requires that the witness have "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue" – which appellant did. The Court also held that a registered nurse may testify about the cause of death in a medical malpractice case if Rule 702's requirements are met. **[Rule 702]**

3. *Naranjo v. Hon. Sukenic ex rel. Maricopa Cty.*, 254 Ariz. 467, ¶23 (2023)—The Arizona Supreme Court affirmed a trial court's ruling that granted the State's motion to compel disclosure of a defendant's trial counsel's notes and records from interviews of defendant's family members in preparation for an evidentiary hearing on defendant's ineffective assistance of counsel claim. In so holding, the court rejected the defendant's contention on appeal that the phrase "evidence material to the claim" in Ariz. R. Crim. P. 32.6(b)(2) meant something more than relevant evidence or meant evidence of especially high probative value. Instead, "[m]ateriality is captured in Rule 401"—in subsection (b)—"by requiring, in order to [show] relevance, that the fact sought to be proved be 'of consequence to the determination of the action.' " *Id.* (*citing* Shirley J. McAuliffe, *Arizona Practice Law of Evidence* § 401:2 (4th ed. 2022); *see also Evidence*, Black's Law Dictionary (11th ed. 2019) (defining "material evidence" as "[e]vidence having some logical connection with the facts of the case or the legal issues presented").) "Accordingly," the Supreme Court held, "'materiality' is not a stricter principle than relevancy, nor does it mean something of especially high probative value." *Id.* **[Rule 401]**

4. *Cruz v. Hon. Michael Blair/State of Arizona*, 255 Ariz. 335, 532 P.3d 327 (2023)— The Arizona Supreme Court accepted special action jurisdiction to determine whether the trial court properly precluded expert and lay witnesses testimony regarding defendant's intellectual disability. Defendant was charged with multiple counts of child abuse, kidnapping, and first-degree felony murder for the death of his daughter in the course of committing child abuse in violation of A.R.S. §13-3623. At trial, defendant sought to admit the testimony of an evaluating psychologist who concluded that defendant was of below average intelligence and met the criterial for being intellectually disabled. In addition, defendant wished to call 11 lay witnesses to provide evidence of defendant's inability to read, write, speak English, text, email, handle money, operate a GPS, or find an address. Defendant offered this testimony "not to negate *mens rea*, but to rebut the *actus reus* of the offense by showing he is so disabled he could not physically perform the acts necessary to be guilty of failing to take steps to protect his daughter." The State

argued, and the trial court concurred, that the expert testimony was irrelevant because it amounted to improper diminished capacity evidence. The court further found the evidence to be excludable under Arizona Rules of Evidence 403 as unnecessarily confusing.

The Court began by reiterating that it is settled law that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." The Court rejected defendant's position that his apparent inability to carry out basic functions constitutes a "voluntary act" or an "omission" such that the evidence is relevant to rebut the minimum requirement for criminal liability based on conduct which a person is physically capable of performing. The Court noted that defendant did not argue that his actions were involuntary or that he was physically unable to perform the actions he claims he is not able to complete. To the extent the evidence may have touched on whether defendant knew how to do certain things for his daughter or whether he should have taken certain steps, pertains more to the issue of *mens rea* and is therefore inadmissible. The Court further held that because the evidence is irrelevant, any probative value is outweighed by the danger of confusing the issues pursuant to Rule 403. With respect to the remaining witnesses, although there is no prohibition to proffer "observation or behavioral tendency evidence," it is cumulative and equally confusing to permit 11 individuals to testify to similar observations. The trial court did not therefore, violate due process when it limited defendant to two lay witnesses. **[Rule 403]**

5. *State v. Allen*, 253 Ariz. 306 (2022)—Before admitting other act evidence, in addition to "concluding that a prior act is shown by clear and convincing evidence, the trial court must also '(1) find that the act is offered for a proper purpose under Rule 404(b); (2) find that the prior act is relevant to prove that purpose; (3) find that any probative value is not substantially outweighed by unfair prejudice; and (4) give upon request an appropriate limiting instruction.' Proper purposes include evidence admitted to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" **[Rule 404(b)]**

6. *State v. Robinson*, 253 Ariz. 151 (2022)—The Arizona Supreme Court held that a prosecutor's improper leading and demonstrative questioning of an expert witness did not deny the defendant a fair trial, where the prosecutor did not direct the jury's attention to matters outside the record, the prosecutor asked two of the three leading questions at issue in response to an issue raised by the defense on cross-examination, and it was not unfounded for the prosecutor to suggest an inference about that issue. The Supreme Court further held that the trial court did not clearly err in denying four *Batson* challenges, explaining that the State offered race-neutral explanations for the peremptory strike of the minority jurors, and the defendant did not meet his burden of proving a discriminatory purpose. The fact that other minority jurors that could have potentially been challenged for cause were accepted by the State and ultimately selected for the panel indicated a nondiscriminatory motive. *State v. Gallardo*, 225 Ariz. 560, 565. (The jury trial from which this Arizona Supreme Court decision arose took place in 2018—prior to the abolition of all peremptory strikes on January 1, 2022.) **[Batson v. Kentucky, 476 U.S. 79 (1986); Rule 611(c)]**

7. *State v. Hon. Adleman/Beasley*, 252 Ariz. 356 (2022)—The Arizona Supreme Court held that Beasley—held at the Maricopa County jail during the relevant time period—failed to meet his burden of establishing a *prima facie* case under *Clements v. Bernini ex rel. Pima Cty.*, 249 Ariz. 434 (2020), as necessary for attorney-client privilege to attach to each, separate contested communication made on a jailhouse tablet to family, friends, and members of his defense team. When a party makes a *prima facie* showing of privilege, the next step requires that the opposing party demonstrate a good faith basis that an *in camera* review would show waiver or establish an applicable exception. Here, the first *Clements* element—an attorney-client relationship with the defense team—was uncontested, but the remaining three (communication made to secure legal advice, made in confidence, and treated as confidential) were not. **[Rule 501]**

8. *State v. Porter*, 251 Ariz. 293 (2021)—The Arizona Supreme Court considered whether, when a *Batson* challenge is raised, a trial court must make express findings on the credibility of a demeanor-based justification for a peremptory strike. The Arizona Supreme Court reviewed the history of *Batson* and considered whether *Snyder v. Louisiana*, 552 U.S. 472 (2008), requires trial courts to make express findings on the credibility of a demeanor-based justification when responding to a *Batson* challenge. The Arizona Supreme Court concluded that *Snyder's* express-finding requirement is not applicable when a lawyer offers a demeanor-based and a non-demeanor-based justification and neither is clearly pretextual. The Supreme Court further rejected a requirement that trial courts are always required to make explicit findings but encouraged trial courts to make them as they will bolster rulings and facilitate review on appeal. At trial, the prosecutor used two peremptory strikes to remove the only Black venire members. Defendant raised a *Batson* challenge as to both jurors. The trial court denied the challenge. The Court of Appeals found that the lack of any findings regarding a prospective juror's demeanor precluded it from determining whether a prosecutor's peremptory strike was a pretext for racial discrimination and required remand. The majority opinion counseled that a trial court confronted with a pattern of strikes against minority jurors must determine expressly that the racially disproportionate impact is justified by genuine—and not pretextual—race-neutral reasons. The dissent did not find clear error in the trial court's failure to find that the striking party was motivated in substantial part by discriminatory intent and found that the trial court had followed Arizona's current *Batson* jurisprudence as it stood. The dissenting judge also urged Arizona's court-rulemaking process as a better forum for the Arizona Supreme Court to review and change the overall approach to *Batson* issues. The Supreme Court found the trial court did not clearly err in denying the *Batson* challenge. The Arizona Supreme Court eliminated the use of peremptory strikes in civil and criminal trials as of January 1, 2022. **[*Batson v. Kentucky*, 476 U.S. 79 (1986); *Snyder v. Louisiana*, 552 U.S. 472 (2008); U.S. Const. Amend. XIV.; Ariz. Sup. Ct. Or. No. No. R-21-0020 (Aug. 30, 2021) (removing peremptory challenges from the Rules of Civil and Criminal Procedure).]**

9. *Crime Victims R.S. & S.E. v. Hon. Thompson ex rel. Maricopa Cty.,* 251 Ariz. 111 (2021)—The Arizona Supreme Court resolved differing Arizona Court of Appeals opinions and held: "[W]hen a criminal defendant's due process right to present a complete defense

conflicts with a victim's state constitutional or statutory rights governing privileged mental health records, the victim may be compelled to produce such documents for in-camera review if the defendant shows a reasonable possibility that the information sought includes evidence that would be material to the defense or necessary to cross-examine a witness." The Arizona Supreme Court rejected a more stringent "substantial probability" test that had been adopted by the Arizona Court of Appeals below. That test had required that there be (1) a substantial probability that the protected records contain information that is trustworthy and critical to an element of the charge or defense, or (2) a showing that their unavailability would result in a fundamentally unfair trial. **[Rule 501]**

10. *State v. Murray*, 250 Ariz. 543 (2021) (consol.)—Justice Lopez writing for a unanimous Court held that a prosecutor's single misstatement of the beyond-a-reasonable-doubt standard during a rebuttal argument constituted fundamental, prejudicial error, as it went to the foundation of the case and deprived defendants of an essential right. On the record before the Arizona Supreme Court, neither the trial court's jury instructions, nor the usual presumption that the jury follows the instructions, cured the prejudice. In rebuttal closing, the prosecutor delivered the following:

    > So here is how to think when you might hear somebody say back there, well, I think one or both defendants might be guilty but I'm not sure it's beyond a reasonable doubt. Now, stop and ask yourself another question at that point. Why did I just say that? Why did I just say that I think the defendants might be guilty? You are a fair and impartial juror. If you are thinking that, if you are saying that, is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt? Because why else would you say that were you not convinced by the State's evidence? So when you hear yourself say that, ask yourself the second question why, why do I think he is guilty? Because he is guilty because you have been convinced by the State's case beyond a reasonable doubt. That's why you think as you do being fair and impartial.

    Defense counsel did not object, and the trial court did not comment on or correct that particular point of rebuttal. The jury convicted the defendants of aggravated assault, and the defendants were sentenced to five years' in prison. The Arizona Supreme Court found that the rebuttal was prosecutorial misconduct; the prosecutor's invitation for the jury to conclude that its belief that defendants "might be guilty" was a determination of guilt beyond a reasonable doubt impermissibly circumvented the due process requirement that a jury be firmly convinced of a defendant's guilt. The Court found that defendants were prejudiced, reversed their convictions, sentences, and the Court of Appeals' affirmances of them, and remanded the cases for new trials. **[(Rule 611(a)); Ariz. Const. amends V, VI]**

11. *State v. Gomez*, 250 Ariz. 518 (2021)—Justice Bolick writing for a unanimous Court held that DNA evidence that was scientifically insufficient to establish identity was still properly admitted to demonstrate that a man other than the victim's husband had touched her genitals. An Uber passenger was convicted for sexual assault of his driver after the trial court overruled arguments that the DNA profile evidence was inadmissible under

Ariz. R. Evid. 401 and 702 and admitted the evidence while precluding the State from arguing that the evidence established that Defendant's DNA was present. The Arizona Supreme Court found that given "the careful presentation of the testimony, the opportunity for cross-examination, and the State's characterization of the testimony during closing argument, the evidence was neither unfairly prejudicial to Gomez nor confusing to the jury." It vacated a Court of Appeals memorandum decision that held otherwise and remanded to the Court of Appeals for it to resolve the issue of whether a detective's response to a question at trial constituted fundamental error. **[Rules 401, 403, and 702]**

12. *France v. Industrial Comm'n*, 250 Ariz. 487 (2021)—Courts apply an objective, reasonable person standard in determining whether the evidence shows the stress placed on an employee by a work-related incident is "unexpected, unusual or extraordinary," to be compensable under the Workers' Compensation Act as it is applied to mental injuries. The court's focus should be on the stress imposed on the worker, rather than how the worker himself or herself experienced it. **[Standard under A.R.S. § 23-1043.01(B)]**

13. *State v. Mixton*, 250 Ariz. 282 (2021)—Defendant had no reasonable expectation of privacy in his internet protocol address and subscriber information he voluntarily provided to an internet service provider, under private affairs clause of State Constitution, which the majority found should be interpreted, in this situation still, as having the same general purpose and effect as the Fourth Amendment. A dissent by Justice Bolick, joined by Justices Brutinel and Timmer, disagreed that the private affairs clause of the State Constitution should be interpreted so in lockstep with the Fourth Amendment. The dissent's analysis of the private affairs clause revealed it "was clearly intended to provide additional and forceful protections to Arizonans against government intrusions into their private affairs." **[U.S. Const. Amend. IV; Ariz. Const. art. 2, § 8]**

14. *State v. Smith*, 250 Ariz. 69 (2020)—The good faith exception to exclusionary rule applied to a defendant's Cell Site Location Information (CSLI) that a detective obtained through order issued through Initial Appearance Court, as the detective reasonably relied on then-existing law. Two years after the reliance, in June 2018, the Supreme Court decided *Carpenter v. United States. See* —– U.S. ——, 138 S. Ct. 2206 (2018). Additionally, while it would have been better practice for the trial court to view a CSLI-related video in its entirety before admitting it, the court had seen substantially the same information in a PowerPoint, and any alleged inaccuracies were appropriately clarified through a detective's testimony about its limitations. **[U.S. Const. Amend. IV]**

15. *State v. Hernandez*, 250 Ariz. 28 (2020)—As a matter of first impression, evidence is "obviously material," in context of whether a *Willits* instruction is needed, when the State relies on the evidence or knows the defendant will use the evidence for his defense—*at the time the State encounters the evidence during its investigation*. Trial court did not abuse its discretion in concluding—based on facts known to State at the time of its investigation—that it was reasonable for the State not to collect fingerprint and DNA evidence from interior of a vehicle. **[*Willits* instruction]**

16. *Clements v. Hon. Bernini ex rel. Pima Cty.*, 249 Ariz. 434 (2020)—A trial court may not invade the attorney-client privilege—even *in camera* via use of a special master—to determine its existence, and inmate—through counsel—had to be allowed to review recorded jail phone calls to determine whether he could validly assert the privilege regarding them. **[Rule 501; A.R.S. § 13-4062(2)]**

17. *State v. Trujillo*, 248 Ariz. 473 (2020)—In this criminal sexual abuse case, the Arizona Supreme Court majority held that a jury need not find the facts necessary to impose sex offender registration—like a victim's age—as Arizona's sex offender registration laws comprise a civil regulatory scheme that is not so punitive so as to implicate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A trial court judge may properly make that finding of fact, pursuant to A.R.S. § 13-3821(A)(3). **[U.S. Const. Amend. VI]**

18. *State v. Riley*, 248 Ariz. 154 (2020)—The Arizona Supreme Court held, among other things in this capital case, that evidence that the victim had been in protective custody and had been targeted by a prison gang was relevant to motive, the proper foundation was laid for its admission, and there was no Rule 403 violation as the evidence was not unfairly prejudicial. Because the defendant never admitted he killed the victim at all, however, let alone in self-defense, evidence of the victim's peaceable character as a model inmate was irrelevant, but its admission was harmless error in light of the all the admissible evidence pointing to defendant's guilt. Defendant also knowingly, intelligently, and voluntarily waived his right to present mitigation evidence during the penalty phase; multiple colloquies with the trial court supported this finding, as did the results of the competency evaluation requested by defense counsel. **[Rules 401 and 403]**

Arizona Court of Appeals

1. *State of Arizona v. Trinidad*, ___ Ariz. ___, 2024 WL 276336 (Ct. App. Div. 1 2024)—In this domestic violence/aggravated assault case, the defendant struck and broke his girlfriend's nose. At trial, the girlfriend testified as well as a hospital physician's assistant ("PA") who testified based on his physical examination and the radiologist's report. On appeal, the defendant argued his Sixth Amendment right to confrontation was violated when the hospital radiologist did not testify at his criminal trial because (1) the radiology report was testimonial, and (2) the hospital PA acted as a conduit for the radiologist who created the radiology report. He further argued that the mandatory reporting statute—A.R.S. § 13-3806—rendered the radiologist's report testimonial. The test for testimonial evidence is whether it was created for the primary purpose of creating an out-of-court substitute for trial testimony. *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Applying this test, the court of appeals held the report was not testimonial because it was created primarily to provide medical care to the victim. *State v. Hill*, 236 Ariz. 162, 167, ¶ 22 (App. 2014). The court further held that criminal defendants do not have a Sixth Amendment right to confront hospital workers who report injuries under the mandatory reporting statute. That statute ensures that evidence is collected from hospital workers and preserved if a criminal prosecution transpires, but it does not compel hospital workers to investigate the injury or determine its source. **[Sixth Amendment Confrontation Clause]**

2. *Fong v. City of Phoenix, et al.*,___ Ariz. ___, 2024 WL 2855191 (Ct. App. Div. 1 2024)—In this negligence case, the court of appeals distinguished between the admissibility and necessity of expert testimony in holding that expert testimony was not necessary under the facts of this case to establish the standard of care for a municipality or its agent in a negligence action arising out of injuries sustained as a result of allegedly inadequate traffic control devices and warning signs placed around the site of ongoing road repairs. The court observed that whether expert testimony is necessary is a question of law. The court concluded the trial court erred in granting summary judgment on plaintiff's negligence claim based on her failure to present expert testimony on the applicable standard of care and breach thereof. Although admissibility of expert testimony turned out not to be an issue in this case, the court of appeals reminded that "the admissibility of expert testimony is generally a fact-bound inquiry that focuses on whether the proffered expert has sufficient knowledge, skill, experience, or education to 'provide the jurors with useful information outside their common understanding or experience.' *State v. Moran*, 151 Ariz. 378, 381 (1986); *see also* Ariz. R. Evid. 702(a)." *Fong*, ¶13. **[Rule 702]**

3. *State of Arizona v. Haywood*, ___ Ariz. ___, 2024 WL 2119341 (vacated on reconsideration at 2024 WL 3161482) (Ct. App. Div. 2 2024)—In this case, the defendant was convicted of second-degree murder for the shooting of a co-worker. At trial, the defendant admitting shooting and killing the victim but claimed he did so in self-defense. He also was willing to stipulate that the gun found in his bathroom was the gun used in the shooting. However, during the trial, the court admitted over defendant's objection evidence that defendant had in his home a gun safe, guns, ammunition, and weapons accessories in addition to the gun used in the shooting. The court also admitted a note on top of the safe indicating the safe might be booby trapped as well as testimony that this required the bomb squad to inspect the safe before opening it. And, although the trial court may have misperceived that the gun used in the shooting was in the safe, in fact it was found in the bathroom. The trial court admitted this evidence to show that the defendant was not a reasonable person because he had claimed self-defense. On appeal, the court of appeals reversed and remanded, holding that the note and evidence unconnected to the alleged crime were irrelevant, unduly prejudicial, and improperly admitted, citing Rules 401 and 403. The court further held that the state did not meet its burden to show that the error was harmless. The court did, however, reject defendant's argument that the prosecutor had improperly led a witness, noting that the subject question did not appear unduly suggestive and that trial courts generally have discretion to permit leading questions, citing Rule 611(c).

   On reconsideration, the court of appeals vacated its original opinion and added paragraphs 35 and 36 to its opinion. Otherwise, the opinion on reconsideration is identical to the original opinion and reaches the same result. In the new paragraphs, the court addressed defendant's motion for judgment of acquittal, concluding that "[t]he state presented substantial evidence that contradicted Haywood's justification theory. Viewing the evidence in the light most favorable to the prosecution, the trier of fact could have found that Haywood's use of deadly force was not justified. *See West*, 226 Ariz. 559, ¶

16; see also § 13-405(A)(2)." *Haywood on reconsideration,* ¶ 36. **[Rules 401, 403, and 611(c)]**

4. *State of Arizona v. Duncan*, ___ Ariz. ___, 2024 WL 1688084 (Ct. App. Div. 2 2024)—In this case, the defendant was alleged to have placed a hidden camera in a bathroom to record on an SD card teen foster children in various stages of undress. The court of appeals held that the evidence was sufficient for the superior court to submit the charges of attempted and completed sexual exploitation of a minor to the jury. In addition, A.R.S. §§ 13-3551(5) and 13-3553(A)(1)-(2), prohibiting the sexual exploitation of a minor involving exploitive exhibition, are not unconstitutionally overbroad as applied to the facts of this case, and they do not constrain protected expression, even though the videos and images underlying the sexual exploitation charges contain no sexual conduct or lewd exhibition. However, the superior court abused its discretion in denying defendant's motion to suppress the evidence gathered through the warrantless search of an electronic device removed from his home by a foster child, searched without warrant by a police detective, and the evidence gathered through the subsequent execution of a search warrant for his home.

   The court of appeals reviewed the superior court's denial of defendant's motion to suppress for harmless error. The court observed that in the superior court, the state took the position that the erroneously admitted evidence was relevant and probative as to all counts. It provided pretrial notice, pursuant Rules 404(b) and (c), of its intent to present other acts evidence. This included videos and images on various devices that were not the subject of the charged offenses. Most importantly, the state sought a ruling that uncharged videos on the SD card were admissible against under Rule 404(b) and (c). The superior court agreed, admitting the entire contents of the SD card. It found the evidence relevant to show "*modis operandi*, intent, and absence of mistake" under Rule 404(b). And, it found the evidence admissible under 404(c) to show "propensity for sexual aberration, specifically Voyeurism." The court of appeals concluded that although the remaining information was sufficient to justify the issuance of the search warrant, the state failed to make any argument that the erroneous admission of the SD card evidence would be harmless as to any count, and therefore appellant's convictions and sentences were reversed, and the case remanded for a new trial. **[Rule 404(b) and (c); Unlawful Warrantless Search; Fruit of the Poisonous Tree]**

5. *Perez v. Circle K*, ___ Ariz. ___, 2024 WL 1521249 (Ct. App. Div. 1 2024)—In this personal injury case, the plaintiff tripped over a case of water at the end of an aisle ("end cap") at a Circle K store. She sustained significant injuries and alleged that the store was negligent. The superior court granted summary judgment in favor of Circle K, finding that the end cap was open and obvious and did not create an "unreasonably dangerous" condition. The court of appeals affirmed, holding that plaintiff failed to establish that an "unreasonably dangerous" condition existed to support a duty under law. In so holding, the court acknowledged that the superior court erred in ruling that statements of Circle K employees to plaintiff were inadmissible hearsay, *see* Rule 801(d)(2)(D) (an opposing party's statement is not hearsay), but held that such statements did not go to the issue of duty. In a spirited concurrence, Judge Howe took issue with the majority's duty analysis, which "intermixes the issues of duty and the breach of that duty" by considering factual

issues that go to breach rather than duty. Thus, Judge Howe believes the majority's analysis runs afoul of the supreme court's opinion in *Markowitz v. Ariz. Parks Bd*., 146 Ariz. 352 (1985). Nonetheless, Judge Howe concurred in the judgment on the basis that plaintiff failed to establish a breach of duty. **[Rule 801(D)(2)(D)]**

6. *State v. Kelly*, ___ Ariz. ___, 2024 WL 717229 (Ct. App. Div. 1 2024)—In this vehicular aggravated assault case, the defendant argued, *inter alia*, that the superior court erred in admitting expert testimony from the investigating officer on the cause of the collision and defendant's speed. The court of appeals rejected defendant's arguments and affirmed his convictions and sentences. The officer had testified at pretrial hearing that defendant rear-ended the victim's vehicle while driving 80 miles per hour. The officer had previously investigated at least 100 collisions of similar seriousness and, while not conducting a full accident reconstruction in the case at hand, based his opinions on factors including vehicle damage, distances, debris, and tire marks. The court of appeals found no abuse of discretion and observed that "Rule 702's 'overall purpose . . . is simply to ensure that a factfinder is presented with reliable and relevant evidence, not flawless evidence.'" *Kelly*, ¶ 24, quoting *State v. Bernstein*, 237 Ariz. 226, 229, ¶ 14 (2015). **[Rule 702; Double Jeopardy]**

7. *State v. Jimenez*, 255 Ariz. 550 (Ct. App. Div. 2 2023). The trial court acted within in its discretion in denying a motion to strike a juror who served as an FBI agent with experience in interrogating suspected pedophiles. The State charged Defendant with continuous sexual abuse of a nine-year-old over 18 months. Voir dire occurred only nine days after the elimination of peremptory strikes. Defendant challenged whether the former FBI agent juror could be fair and impartial. Defendant relied on two exchanges. First, defense counsel asked whether the juror could "evaluate the credibility of a witness without employing those techniques used in an interrogation room." The juror responded, "I won't be saying anything, so yes." Later, defense counsel inquired whether the juror believed Defendant was a pedophile, the juror replied, "I have no idea." The juror also stated that each case "is individual and stands on its own" and he had worked on "a number of cases" in which he had concluded that a suspect was not guilty. The juror further affirmed that he would be guided by the evidence. The Court of Appeals affirmed based on the broad discretion afforded to the trial court in excusing or retaining jurors challenged for cause and found the trial court acted within in its discretion in retaining the juror. **U.S. Const amends. VI, XIV; Ariz. Const. Art. 2, § 24; Ariz. R. Crim. P. 18.4(b); 18.5(h); Ariz. R. Civ. P. 47(d)(3).** When a criminal defendant introduces evidence of a character trait to show action in conformity therewith, the State is entitled to rebut the claim. Trial court did not abuse its discretion by conditioning Defendant's ability to present expert testimony regarding sexual normalcy on Defendant participating in a second evaluation by the State's expert. **Rule 404(a)(1)**

8. *State of Arizona v. Hon. Fink/Kelly*, 256 Ariz. 356, 539 P.3d 543 (Ct. App. Div. 2 2023)— On January 30, 2023, real party in interest, George Kelly, allegedly fired his rifle at a purported group of migrants on his ranch, killing one of them. Later that day, Kelly's wife made statements to detectives about the incident. The state charged Kelly with second-degree murder and aggravated assault. In this special action brought by the state,

the court of appeals held the respondent judge erred by concluding the anti-marital fact privilege codified in A.R.S. § 13-4062(1)(a) applied to post-arrest conversations despite the spouse's pre-arrest voluntary statements to detectives. The statute does not contemplate that the privilege may again become applicable based on later events, including a defendant's arrest. To the contrary, it expressly provides that the privilege does not apply, and a spouse may thus be called to testify "in a prosecution," based on a statement to law enforcement made "during an investigation." The court therefore vacated the respondent judge's order denying the state's motion to complete spouse's deposition. **[Rule 501; A.R.S. § 13-4062(1)(a); A.R.S. § 13-706(F)(1)(b)]**

9. *State v. Sanchez,* 256 Ariz. 273, 537 P.3d 794 (Ct. App. Div. 2 2023) (J. Eckerstrom, concurring in part and dissenting in part on an unrelated issue of the appealability of denial of a motion for new trial)—Affirming Sanchez's conviction and sentence for aggravated domestic violence, the court rejected Sanchez's argument that admission of police body camera video of the victim recorded 30 minutes after the incident was irrelevant, too remote, and too prejudicial. The court held the victim's "emotional state following Sanchez's attack was probative of whether her peace was disturbed by the attack, an element of the charged offense. And evidence of her emotional state captured by the video was relevant. *See* A.R.S. §§ 13-3601(A), 13-2904(A)(1)." *Sanchez,* ¶ 26. The court also held that remoteness generally goes to the weight of evidence not its admissibility. Finally, the court concluded there was no abuse of discretion by the trial court in admitting the video evidence under Rules 401, 402, and 403. **[Rules 401, 402, 403, and 404]**

10. *Estrada v. Nguyen*, 2023 WL 2034250 (Mem) (Ct. App. Div. 1 2023)—Samayra Estrada appealed the trial court's summary judgment entered in favor of NFP Insurance Services, Inc. ("NFP"). Ms. Estrada was injured while a pedestrian, when she was struck by a driver who was on her way to her dinner shift at Thai Basil, a restaurant in which the driver also owned a minority interest. As part of a settlement with the driver and the restaurant, Ms. Estrada later sued NFP, Thai Basil's insurance broker, alleging NFP had negligently failed to secure auto insurance coverage for the restaurant. To contest summary judgment, Ms. Estrada submitted a letter, an affidavit, and the settlement agreement between herself, the driver, and the driver's businesses, including Thai Basil. Ms. Estrada asserted these documents evinced prior inconsistent statements of the driver, rendering them admissible under Rule 801(d)(1)(A). NFP objected on hearsay grounds. Additionally, NFP claimed that under Rule 613(b), Estrada needed to give the witness the opportunity to explain the inconsistent statement for it to be admissible—something not generally possible in summary judgment proceedings. The trial court erred in refusing to consider the statements in the affidavit and the Thomas letter. The affidavit was prior sworn testimony, not hearsay, and was a first-person inconsistent statement that the trial court should have considered. The Court of Appeals also found that Rule 613(b)'s explain-or-deny requirement is one regarding credibility challenges made at trial—not applicable in the limited context of summary judgment proceedings. In dissent, the appellate panel's presiding judge agreed with the majority that prior inconsistent statements are admissible as substantive evidence. However, he disagreed with the majority's decision to reverse the trial court's finding, writing that the majority never

addressed whether these documents are in fact inconsistent statements. **[Rules 613(b) and 801(d)(1)(A)]**

11. *State ex rel. Mitchell v. Hon. Wein (Acosta)*, 255 Ariz. 313 (Ct. App. Div. 1 2023)—The Arizona Court of Appeals accepted jurisdiction but denied relief when the State of Arizona sought special action review of a superior court order denying the State's motion to compel Defendant Fernando Acosta to submit to a mental-health examination by a State-selected expert. Acosta stood accused of attacking and killing his girlfriend, and the State noticed its intent to seek the death penalty. After arrest, Acosta tested positive for methamphetamine, amphetamine, THC, midazolam (a depressant medication), and haloperidol (an anti-psychotic medication). Acosta had offered three penalty-phase non-expert mitigation witnesses; he disclosed his sister, maternal grandmother, and maternal cousin. These non-experts would testify on Acosta's relationship with his mother, history of low self-esteem, history of addiction, drug rehabilitation efforts, history of relationship with the victim, his "erratic" and "paranoid" behavior, and lack of sleep shortly before the incident. However, the State contested the testimonies of the sister and cousin for two reasons and argued that the Defendant's proffer of those witnesses' testimonies meant he should be compelled to submit to a mental-health examination. First, the sister wrote notes from medical professionals and may have used them to bolster her testimony with expert-type claims. Second, the cousin worked at an opioid addiction clinic as a nurse, suggesting experience that may enhance her credibility when testifying on her opinion of Acosta's drug abuse.

    The court stated the general rule, though, is that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle v. Smith*, 451 U.S. 454, 468 (1981). The State cited multiple cases in other jurisdictions that allow non-expert testimony to initiate a state-selected expert examination. Nevertheless, those cases involved guilt-phase and mental-status defenses, not penalty-phase mitigation. *See, e.g.*, *State v. Fair*, 496 A.2d 461 (Conn. 1985); *People v. Diaz*, 62 A.D.3d 157 (N.Y. App. Div. 2009); *Porter v. State*, 492 So.2d 970 (Miss. 1986). Penalty-phase analysis looks for mitigating factors "relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character." A.R.S. § 13-751. Furthermore, evidence of a defendant's mental health adduced under § 13-751(G)(1), the mitigating-circumstances statute, may not be enough to implicate a specific mental-health condition. Therefore, it does not automatically allow for a court-ordered mental health examination. For the State to be able to compel a mental-health evaluation, a defendant must offer a specific mental-health diagnosis or their own expert testimony. The court also found that a non-expert witness cannot give testimony about a defendant's mental-health diagnosis, current or past. **[Rules 701, 702, *generally*]**

12. *State of Arizona v. Rix*, 256 Ariz. 125 (Ct. App. Div. 1 2023)—In this case, Rix appealed his convictions and sentences for two counts of attempted sexual exploitation of a minor. The court of appeals held that when the superior court admits and causes the jury to view voluminous other-act evidence that is inherently shocking, offensive and highly dissimilar in content from images of exploitive exhibition a defendant is charged with

seeking, the evidentiary value of the other-act evidence is substantially outweighed by the danger of unfair prejudice under Rule 404(c)(1)(C), requiring reversal of the defendant's conviction. The appeals court concluded that the superior court's admission of copious other-act evidence, consisting mostly of 50 highly inflammatory images removed from and significantly more disturbing and graphic than those the defendant sought from an undercover officer, was error. **[Rules 403 and 404(c)(1)(C)]**

13. *State v. Fournier*, 256 Ariz. 33 (Ct. App. Div. 2 2023), *depublished in part* by 2024 WL 1003709 (March 5, 2024, Order denying petition for review)—In this second-degree murder case, Fournier asserts the trial court abused its discretion by, inter alia, admitting into evidence a handwritten confession that Fournier had given to a fellow jail inmate and by failing to sua sponte instruct the jury regarding the voluntariness of that confession. He also argues the court erred by precluding him under Rule 403 from presenting evidence of a prior legitimate check that J.H. had made out to him four months earlier. Rejecting Fournier’s arguments, the court of appeals held that Fournier’s confession was voluntary (the Arizona Supreme Court subsequently depublished the portion of the opinion addressing the voluntariness finding) and that his hearsay and confrontation clause arguments had not been raised below. The court concluded that the trial court had not erred fundamentally or otherwise. “Hearsay is generally admissible in a suppression hearing. *See State v. Keener*, 110 Ariz. 462, 465 (1974); *see also State v. Riley*, 196 Ariz. 40, ¶¶ 6-7 (App. 1999) (holding that confrontation rights do not apply to the same extent at a pretrial suppression hearing as they do at trial); Ariz. R. Evid. 104(a) (stating a court is not bound by rules of evidence in preliminarily determining the admissibility of evidence). Fournier cites no authority to suggest a trial court has a duty to sua sponte bar the admission of any alleged hearsay absent an objection. *See* Ariz. R. Crim. P. 31.10(a)(7)(A).” *Fournier*, ¶ 23. With respect to Fournier’s Rule 403 challenge, the court of appeals held “[t]he trial court is in the best position to balance the probative value of evidence against dangers such as unfair prejudice, confusion, wasting time, or presenting cumulative evidence. *State v. Togar*, 248 Ariz. 567, ¶ 23 (App. 2020); see Ariz. R. Evid. 403.” *Fournier*, ¶ 38. **[Rules 104(a) and 403]**

14. *McGlothlin v. Hon. Astrowsky, et al*, 255 Ariz. 449 (Ct. App. Div. 1 2023)—In a legal malpractice action arising from a parental rights severance action, Defendant McGlothlin, former attorney of Father (Rizik), subpoenaed Rizik’s replacement counsel seeking the production of replacement counsel’s entire file for the severance matter. Rizik objected based on the attorney-client privilege. McGlothlin argued that the attorney-client privilege was waived by the filing of the malpractice action. The trial court suggested (and counsel did not object to) an *in camera* review of the file. The trial court concluded that there was nothing discoverable in the file. McGlothlin filed a special action with the Court of Appeals. The Court of Appeals held that the *in camera* review of the file was error, but affirmed the finding that the privilege was not waived. When determining whether an *in camera* review is appropriate, the court must follow a three-step process: “(1) determine whether the party asserting the privilege has made a *prima facie* showing of privilege; (2) if so, determine whether the party challenging the privilege has made a *prima facie* showing of an exception to the privilege; and (3) if so, determine whether an *in camera* review of particular documents is necessary and appropriate to resolve the

dispute. If so, then an *in camera* review is permitted." The Court of Appeals determined that the trial court had failed to reach step 2 of the analysis and had prematurely conducted the *in camera* review. The Court of Appeals held, however, that the trial court had correctly ruled that the attorney-client privilege was not waived by simply filing suit, rather "the party claiming the privilege must affirmatively interject the issue of advice of counsel into the litigation." Since Rizik had not done so, no waiver occurred. **[Rules 104(a), 501, and 1101(c)]**

15. *State v. Conley*, 254 Ariz. 371 (Ct. App. Div. 2 2023)—A majority found that a defendant should have been granted separate trials on his motions to sever four sexual assault cases, from acts in 1992, 1995, 1999, and 2004, but that the error was harmless. In two of the cases, DNA tied defendant to the offenses. The trial court had found cross-admissibility of all of the evidence in the cases under Rule 404(b)(2)'s exception for knowledge, identity, or motive. The majority disagreed with this approach, and found that a Rule 404(c) showing and findings were also not made. Nonetheless, the trial record, to the two-judge majority, evinced only harmless error. Dissenting Judge Cattani would have reversed the two convictions in which the cases bore no DNA evidence, finding the evidence in the record to be "precisely the type of propensity evidence that is inadmissible under Rule 404(b)[.]" **[Rule 404(b)]**

16. *State v. Hon. LaBianca ex rel. Maricopa County*, 254 Ariz. 206 (Ct. App. Div. 1 2022)—As a matter of first impression, for a hearing to determine the admissibility of other act evidence in a sexual misconduct case, if the trial court allows the defendant's expert to testify about the defendant's mental health, based on that expert's examination of the defendant, the trial court, to ensure that the State has a meaningful opportunity for rebuttal, must allow the State's expert to examine the defendant before the hearing. **[Rules 104(c) and 404(c)]**

17. *State v. Castaneda*, 254 Ariz. 9 (Ct. App. Div. 1 2022)—Trial court did not abuse its discretion in finding five-year-old competent to testify: "In any criminal trial every person is competent to be a witness." A.R.S. § 13-4061; *see also* Ariz. R. Evid. 601 ("[e]very person is competent to be a witness unless these rules or an applicable statute provides otherwise"); A.R.S. § 12-2201.A ("[e]very person . . . may testify in any civil or criminal proceeding . . . except as otherwise expressly provided by law"); . . . "In instances of extreme youth, to find a lack of competency, the [superior court] must be convinced that no trier of fact could reasonably believe that the prospective witness could have observed, communicated, remembered . . . ." **[Rule 601]**

18. *State v. Teran*, 253 Ariz. 165 (Ct. App. Div. 1 2022)—The trial court did not abuse its discretion in deferring resolution of Defendant's motion *in limine* regarding the State's toxicologist's ability to opine on Defendant's sobriety. Ariz. R. Evid. 702 permits but does not require a pretrial evidentiary hearing. But the toxicologist should not have testified to impairment as they were not a drug recognition expert; in light of other evidence of impairment in the record however, the error was harmless. Finally, Defendant had also failed to object. **[Rule 702]**

19. *State v. Copeland*, 253 Ariz. 104 (Ct. App. Div. 2 2022)—The Arizona Court of Appeals vacated a child molestation defendant's guilty verdicts and remanded for a new trial. At a trial where the victim's credibility was a central issue because there was little corroborating evidence, the State admitted, over defendant's objections, hearsay statements by the victim to several school employees detailing alleged sexual abuse by the defendant. The State argued the statements fell under a hearsay exception to explain their effect on the listener, i.e. to explain why the school employees reported the abuse to the authorities. The statements were admitted without a limiting instruction, and were relied upon by the State in opening and closing statements and repeatedly during the trial to bolster the victim's credibility and to identify the defendant. The COA held that since the school employees were mandated reporters, their reasons for coming forward were not an issue in the case, and therefore the admission and use of the hearsay statements as a central component of the State's case to bolster the victim's credibility, particularly without a limiting instruction, was error. **[Rule 801(c)(2)]**

    The COA also addressed an issue involving the State's use of a prior statement to impeach its witness. At trial, the defendant's brother claimed the defendant had "simply told [him] that he believed he didn't do it." After the prosecutor refreshed his recollection with a transcript, the brother acknowledged the defendant had said: "[I]f I did do it, then, yeah, I deserve to go away." The brother finished testifying, and several days later, the State admitted, over objection, the recorded portion of the brother's pre-trial statement to the police that the defendant had said "Did I really do something? If I did, boom, then you know what? I deserve to go away." The COA held this was a proper use of a prior inconsistent statement to impeach the brother's testimony, and determined the defendant had the opportunity to cross-examine the brother about the statement, and was free to recall the brother. [**Rules 613(b) and 801(d)(1)(A)**]

20. *State v. Reaves*, 252 Ariz. 553 (Ct. App. Div. 2 2022)—The Arizona Court of Appeals remanded the case for the trial court to hear argument and then more thoroughly explain its decision regarding a *Batson* challenge raised by the defendant. Faced with the *Batson* challenge, the trial court, rather than the State, was the first to provide the non-discriminatory basis for the strike, the trial court did not conduct further inquiry or analysis into the State's failure to use a peremptory strike for a similarly situated Caucasian potential juror, the trial court did not address the juror comparison problem presented by the defendant, and the trial court made a gratuitous, offhand remark about the stricken potential juror in stating its decision. The Court of Appeals did not find that the defendant had proved actual discrimination, but instead that the record was insufficient to support the trial court's decision that the peremptory strike was not pretextual, and further argument and analysis was necessary. **[*Batson v. Kentucky*, 476 U.S. 79 (1986); U.S. Const. amend. XIV]**

21. *Hansen v. Hon. Chon-Lopez ex rel. Pima Cty*, 252 Ariz. 250 (Ct. App. Div. 2 2021)—The Arizona Court of Appeals decided as a matter of first impression in a special action that polygraph evidence is *per se* inadmissible in grand jury proceedings. While the rules of evidence—other than those pertaining to privilege—do not apply to grand jury proceedings, and the grand jury is entitled to hear all relevant, non-protected evidence

that has a bearing on a given case, polygraph evidence is unreliable and the trier of fact has a tendency to treat it as conclusive. **[Rule 702]**

22. *E.L. v. Hon. Carman ex rel. Leota*, 252 Ariz. 173 (Ct. App. Div. 1 2021)—Division One of the Arizona Court of Appeals held that an order compelling a crime victim, with use immunity, to appear for a deposition by the prosecution did not violate his Fifth Amendment privilege against self-incrimination nor did it violate the Arizona Victims' Bill of Rights in the state constitution. The victim requested transactional immunity, which the court held as being broader than the protections against self-incrimination in either the Fifth Amendment or the "coextensive" protections offered by Arizona's relevant immunity statute, A.R.S. § 13-4064. The Court held the victim's rights were not violated by not being granted the broader protections. The court also held that the Victims' Bill of Rights does not give the victim a constitutional right to refuse to testify at the request of the prosecution; he could only refuse to appear if the request came from the defendant or an agent of the defendant. **[U.S. Const. Amend. V; A.R.S. § 13-4064; Ariz. Const. art. 2 § 2.1]**

23. *State v. Huante*, 252 Ariz. 191 (Ct. App. Div. 2 2021)—When considering whether a prior conviction qualifies as "historical," the Court looks to the date of the Defendant's conduct, not the date of results that exposed the defendant to prosecution. Defendant was convicted of negligent homicide. The defendant struck the victim with a cement block and the victim died four days later. The prosecution alleged two prior convictions. One of the convictions—possession of drug paraphernalia—could only be alleged as a "historical prior" (and thus be used to enhance the sentence) for five years. But this deadline could be extended for any time the defendant spent incarcerated. The conviction occurred five years, and 216 days, before the date the defendant struck the victim with the cement block. The trial court found the defendant had previously spent 216 days in custody. The drug paraphernalia conviction thus precisely met the 5 year cut-off and qualified as a historical prior. On appeal, the defendant argued the operative date was the date the victim died four days later. In a fundamental error review, the Court of Appeals concluded the operative date was when the defendant engaged in the conduct. The date of an offense is assessed by the defendant's conduct, not the date of the consequences. Regardless of when the victim died, the defendant's conduct occurred when the defendant struck the victim with a cement block. **[Evidence of historical prior felony convictions for purposes of applying sentencing enhancements.]**

24. *State v. Mora*, 252 Ariz. 122 (Ct. App. Div. 1 2021)—The Court of Appeals held that offenses committed in other jurisdictions can serve as predicate felonies for sentencing enhancement for dangerous crimes against children under A.R.S. § 13-705(I), provided they fall under one of the enumerated categories of predicate felony in A.R.S. § 13-705(Q)(2). The court also rejected Mora's claim that the question of whether his Texas convictions were "sexual offenses" qualifying as predicate felonies was a question of fact for the jury, concluding that the issue was one of law for the trial judge. However, the trial court fundamentally erred in finding, based upon documents confirming the Texas convictions and the testimony of the Texas victims under Ariz. R. Evid. 404(c), that Mora's convictions were predicate "sexual offenses" under § 13-705(Q)(2). For a foreign

conviction to qualify as a predicate felony, it must be analogous to an Arizona felony, such that the foreign statute includes every element that would be required to prove an Arizona felony. The State conceded, and the Court of Appeals agreed, that there is no Arizona statute strictly analogous to the Texas statute at issue, mandating resentencing. **[Rule 404(c)]**

25. *Benedict v. Total Transit Inc., et al.*, 252 Ariz. 151 (Ct. App. Div. 1 2021)—The case included claims brought on behalf of multiple—one deceased and one severely injured—victims of a vehicle/pedestrian accident involving a taxicab driver. The superior court did not abuse its discretion in permitting testimony of a plaintiff's expert regarding medical causation and reasonableness of medical bills—even though he had not specifically been disclosed as a causation and/or medical billing expert—because opposing parties had an opportunity to defend against the testimony, and its admission did not exceed the bounds of reason of the expert's anticipated testimony based on disclosures. On appeal, the issue is not whether appellate judges would have made the same ruling on the disclosure issue, but whether in light of the law and circumstances, one could have reasonably made the same ruling. The court further rejected challenges to given and omitted jury instructions finding that the instructions as a whole included the correct law to permit the jury to reach the verdicts rendered, and defendants could not establish prejudice. At trial, the superior court consolidated two separate suits arising from the same incident and a different group of six jurors returned verdicts finding defendant negligent, but apportioned different percentages of fault to the two victims. The court determined that this result was neither inconsistent or irreconcilable because a minimum of 6 jurors returned each verdict pursuant to A.R.S. §21-102(C) and based on the evidence presented at trial, it was reasonable to apportion different degrees of fault to the two victims. **[Ariz. R. Civ. P. Rule 37(c); expert evidence, jury instructions]**

26. *Coleman v. Amon*, 252 Ariz. 107 (Ct. App. Div. 1 2021)—In a birth-injury medical malpractice case, the trial court precluded evidence offered by plaintiffs that the defendant physician had allegedly made certain statements that could be construed as admitting fault and apologized to them for the unfortunate outcome suffered by plaintiffs' child. The trial court excluded the doctor's statements pursuant to A.R.S. § 12-2605, which precludes admission of "any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider" for purposes of proving liability. Plaintiffs argued on appeal that § 12-2605 violates separation of powers, is a special law in violation of art. IV, pt. 2, § 19 of the Arizona Constitution, and violates Arizona's Privileges and Immunities Clause (art. II, § 13). The Arizona Court of Appeals affirmed, holding that the law is a valid exercise of legislative authority, is not a special law, and does not violate the Privileges and Immunities Clause since it satisfies rational basis review. The court went on to state that the doctor's statements could be used for impeachment if the doctor "opened the door" to such evidence. **[Apology evidence preclusion law]**

27. *Aspen Biotech Corp. v. Wakefield*, 2021 WL 3503399 (Mem) (Ariz. Ct. App. Div. 1 2021)—The trial court did not abuse its discretion in excluding a damages expert witness

who would have testified a one-third equity owner suffered $15 million in economic damages based on valuing the company at over $45 million, but who conceded he had "not applied any method of accepted business valuation" in valuing the company as a whole. Rule 702 and *Daubert* require an expert's testimony be based on reliable principles and methods, and the court properly exercised its gatekeeping function. The trial court allowed an owner to testify as to the company's value under the well-settled principle an owner or prospective owner of property can testify to its value. But, as a lay witness rather than a disclosed and qualified expert, the owner could not buoy his testimony by introducing financial records outside his personal knowledge. Analyzing financial records requires expert testimony, and under these facts allowing the owner to do so himself would exceed the boundaries of permissible owner-opinion testimony under Rule 701. The trial court properly precluded using a pre-litigation proposed term sheet to establish damages. The term sheet was part of an offer to settle a dispute, and under Rule 408 and *Phillips v. O'Neil*, 243 Ariz. 299, 301 ¶ 8 (2017) the dollar amounts were inadmissible even though the offer occurred before filing the lawsuit. **[Rules 408, 602, 701 and 702]**

28. *State v. Fristoe,* 251 Ariz. 255 (Ct. App. Div. 2 2021)—When a federal statute requires a private party to report illegal activities in its servers to a government agent, the private party is not deemed to be a state actor even if the private party was motivated to assist law enforcement to some extent. This is because this mutuality of purpose does not convert the private party into a state actor. The private party is not required to *search* illegal activities in its servers nor did law enforcement know or acquiesce the private party's searches. In addition, even though Arizona's Private Affairs Clause does not include the word "reasonable," it stays within the Fourth Amendment reach except for warrantless home entry cases. This is because the clause does not mean that Arizona courts ignore the reasonableness of citizens' expectations of privacy. The private search doctrine consequently applies under Arizona's Private Affairs Clause.

29. *State v. Turner*, 251 Ariz. 217 (Ct. App. Div. 2 2021)—While on scene of a murder investigation, three officers muted their body cams as to audio and video at various times. Defendant moved to dismiss alleging his due process rights were violated as the officers violated department policy procedures and therefore failed to preserve potentially useful evidence. Failure to preserve potentially useful evidence amounts to a due process violation if the defendant can prove the officers acted in bad faith or that the evidence possessed obvious exculpatory value that is such a nature that the defendant would not be able to obtain comparable evidence by other means. The facts of this case showed that although the officers may have made minor mistakes they substantially complied with official policies and procedures and even if arising to mere neglect it did not rise to bad faith. Further, defendant may not speculate as to the missing footage containing exculpatory value, exculpatory value must be apparent and obvious. Additionally, where defendant did not raise the issue of self-defense or justification, court did not improperly exclude evidence as to victim owning a gun as it did not go to defendant's state of mind at the time of the murder in support of a claim of self-defense or justification.

30. *Wisniewski v. Dolecka*, 251 Ariz. 240 (Ct. App. Div. 1 2021)—As a matter of first impression in Arizona, the burden of proof for a claim of fraud justifying an annulment under A.R.S. § 25-301 is clear and convincing evidence, not a preponderance of the evidence.

31. *State v. Loos*, 2021 WL 1110909 (Mem) (Ariz. Ct. App. Div. 1 2021)—Fundamental error did occur where a prosecutor made multiple assertions to the jury that the defendant had committed perjury while testifying in his own defense. Pre-trial, the State had filed an Ariz. R. Evid. 609(a)(2) notice of its intent to use the defendant's misdemeanor conviction for false reporting to law enforcement for impeachment purposes, but never sought admission of other misdemeanor convictions of the defendant—presumably because the elements of those crimes did not require proof of a dishonest act or false statement to satisfy Rule 609(a)(2). Instead, the prosecutor accused the defendant at least four times of perjuring himself when his answers at trial referenced only "a misdemeanor" conviction. With this case being one without physical evidence and so turning on credibility of the defendant and victim, the appellate court found that the prosecution's unfounded and unchallenged accusations created a reasonable likelihood of unfairly prejudicing jurors against the defendant. **[Rule 609]**

32. *State v. Hood*, 251 Ariz. 57 (Ct. App. Div. 1 as amended Mar. 22, 2021)—The superior court was not required to *sua sponte* bifurcate a case agent witness's testimony into fact-witness and expert portions. While courts have expressed concerns (unmerited credibility, juror confusion, inhibited cross-examination, etc.) when a witness testifies as both a fact witness and expert, no fundamental error occurred here. The record reflected that the case agent's expert testimony was significantly distinct from her factual testimony. The prosecutor also marked the conclusion of expert testimony by the case agent by noting that the general testimony about trafficking was ending and that she would begin to answer questions about "this particular case." **[Rules 602 and 703]**

33. *State v. Ross*, 2021 WL 915760 (Mem) (Ct. App. Div. 2 2021)—Evidence of injuries presented at a bench trial, without testimony of any medical expert, was sufficient for a reasonable person to find substantial evidence present to convict of aggravated assault. Under Ariz. R. Evid. 702(a), expert testimony is permitted to help the trier of fact understand the evidence, but where—as here—the evidence can be understood by a reasonable factfinder, medical testimony is not necessary, even if helpful. See also State v. Roberts, 139 Ariz. 117, 122 (App. 1983). **[Rule 702]**

34. *Cavallo v. Phoenix Health Plans, Inc.*, 250 Ariz. 525 (Ct. App. Div. 1 2021), *vacated in other part by* 254 Ariz. 99 (2022)—The superior court did not abuse its discretion in excluding multiple versions of telephone call logs and an Account Resource Guide ("ARG"). The proponents did not lay an adequate foundation for the call logs, as proffered witnesses did not have personal knowledge of whether the listed calls concerned the claims at issue. And the ARG was both irrelevant (as it had to do with another, later-in-time version of a health plan other than the one at issue) and cumulative of undisputed testimonial evidence. **[Rules 104, 403, 602, and 901(a)]**

35. *State v. King*, 250 Ariz. 433 (Ct. App. Div. 1 2021)—While an appellate court defers to the post-conviction relief ("PCR") court's credibility evaluations of witnesses who testified in proceedings before it, a medical diagnosis is not new evidence under Ariz. R. Crim. P. 32.1(e) merely because it was not introduced at a defendant's trial. The testimony of a new expert whose conclusions differed from those appointed for trial did not warrant the post-conviction relief of a new trial. Judge Brown dissented, noting that the State did not offer any evidentiary challenges to the PCR court's decisions at a four-day evidentiary hearing. Judge Brown, dissenting, would have found that the PCR court properly exercised its discretion in weighing the testimony and in making evidentiary findings supported by sufficient facts.

36. *State v. Olaoye*, 2020 WL 7828769 (Mem) (Ct. App. Div. 1 as amended Jan. 22, 2021)—Prosecutorial misconduct, including improper questions to a lay witness eliciting opinion testimony on the ultimate issue and references to evidence (a baggie of rosemary) outside the record during closing argument, had a cumulative effect that deprived the defendant of a fair trial, requiring remand for retrial. **[Rules 403 and 701]**

37. *State v. Cabrera*, 250 Ariz. 356 (Ct. App. Div. 2 2021)—Excited utterance hearsay exception "is premised on the assumption that the excitement of certain startling events stills the reflective faculties. A spontaneous utterance occurring at the time of or under the stress of the 'startling event' is therefore thought to be reliable." While a defendant's statements he purported to be excited utterances were not inadmissible merely because they were self-serving, the trial court did not abuse its discretion in finding that no startling event occurred sufficient to allow defendant's statements denying knowledge of criminal activity and asserting that he merely took a car for detailing to be admissible as excited utterances. **[Rule 803(2)]**

38. *State ex rel. Adel v. Hon. Hannah*, 250 Ariz. 426 (Ct. App. Div. 1 2020)—"The type and extent of testing an expert performs while forming an opinion generally is an issue for the expert, not a judge. If otherwise qualified experts, providing otherwise admissible evidence, disagree on the extent or nature of required testing, they should explain their reasoning to the jury, not the court." Trial court orders granting motion to limit scope of State's expert's psychological evaluation of defendant would be vacated. **[Gatekeeping function, expert evidence, Rule 702]**

39. *Solorzano v. Jensen*, 250 Ariz. 348 (Ct. App. Div. 1 2020)—While a party who has agreed to proceed by avowal cannot later challenge the sufficiency of evidence on appeal, a trial court may not assess the credibility of witnesses based on briefs, affidavits, and documentary evidence alone. Due process required an evidentiary hearing, where testimony could be seen and heard, before credibility assessments could be factored into a child support determination. The appellate court noted that a virtual hearing where testimony was seen and heard live would suffice as much as a physical in-person one.

40. *State v. Kleinman*, 250 Ariz. 362 (Ct. App. Div. 1 2020)—It was undisputed that a jury should not have heard Rule 404(b) evidence for an improper purpose, but there was no reasonable probability the verdict would have been different, particularly because the

references were brief, without context or detail, and quickly stricken, and the jury was instructed to disregard them. The trial court did not abuse its discretion in denying a motion for mistrial. **[Rule 404(b)]**

41. *McDaniel v. Payson Healthcare Management, Inc.*, 250 Ariz. 199 (Ct. App. Div. 2 2020)—Treating physicians' testimony violated the one-expert-per-side rule in the manner in which it was elicited, requiring remand for new trial. Undisclosed expert opinions were also admitted into evidence at trial, causing prejudice. **[Ariz. R. Civ. P. 26(b)(4)(F); 26.1; 37(c)(1)]**

42. *State v. Brown*, 250 Ariz. 121 (Ct. App. Div. 2 2020)—A trial court's admission of evidence during a probation revocation hearing is reviewed for an abuse of discretion, and the trial court did not abuse its discretion in admitting the probationer's urinalysis test results over his objections as to their reliability. The Court of Appeals held that the Arizona Code of Judicial Administration § 6-110, on which probationer based his objections, does not determine the admissibility of probationer urinalysis test results, which are admissible if they are deemed reliable. **[Ariz. R. Crim. P. 27.8(b)(3)]**

43. *Perdue v. La Rue*, 250 Ariz. 34 (Ct. App. Div. 1 2020)—The Court of Appeals held that the sham affidavit doctrine applies to testimony in litigation. The trial court properly disregarded a declaration that squarely contradicted earlier divorce deposition testimony by the same person in a separate proceeding. A party cannot defeat summary judgment by submitting an affidavit that contradicts the party's prior sworn testimony—an attempt to do so is considered a sham and may be properly disregarded. **[*See* Ariz. R. Civ. P. 56]**

44. *In re: MH2019-004895*, 249 Ariz. 283 (Ct. App. Div. 1 2020)—The trial court's order for involuntary treatment was vacated where an outpatient clinical liaison was permitted to testify about confidential information in violation of the behavioral health professional-client privilege. **[Rule 501; A.R.S. § 32-3283]**

45. *State v. Zaid*, 249 Ariz. 154 (Ct. App. Div. 2 2020)—In a case turning on evidentiary offerings about a victim, the trial court rulings were reversed and remanded in part. Even though there was not a formal offer of proof under Rule 103(a), Ariz. R. Evid., the Court of Appeals found that the substance of the proffered evidence was apparent from the context, including the State's own acknowledgement that witnesses had said the victim had a violent reputation. The trial court properly excluded evidence of the victim's prior violent acts as offered to corroborate defendant's self-defense claim, where the probative value was substantially outweighed by a danger of unfair prejudice. The defendant did not establish a specific reason that the violent-acts-of-victim evidence would have been particularly probative, and the evidence carried the risk that jurors would surmise that the victim was a bad man who had gotten what he deserved. The trial court committed a not-harmless error, however, in precluding reputation and opinion evidence of the victim's violent character, as Rule 404(a)(2) expressly permits its use for that purpose and there was doubt present as to who was the first aggressor in the fatal confrontation. **[Rules 103, 404, and 405]**

46. *State v. Hamilton*, 249 Ariz. 303 (Ct. App. Div. 1 2020)—Defendant appealed from his convictions and sentences for various sexual conduct offenses, arguing the trial court erred when it ruled that three witnesses who testified about other acts evidence, pursuant to Rule 404(c), were considered victims under Arizona law and therefore entitled to (1) refuse pretrial interviews and (2) remain present in the courtroom during trial even though Defendant had invoked the rule of exclusion of witnesses. The Court of Appeals held the trial court properly declined to allow pretrial interviews of the three witnesses. The witnesses were entitled to assert their rights as victims because their anticipated testimony stemmed from an earlier prosecution against Defendant. Although Defendant was no longer on probation from this prior prosecution, the Court found that the witnesses retained their victims' rights because Defendant's charges had not reached a final disposition; he had an ongoing duty to register as a sex offender. The Court of Appeals found the trial court erred in allowing the witnesses to hear the testimony of other witnesses at trial. The Court held that victims of a prior offense cannot exercise every right available to victims under the Victim Bill of Rights. Although the witnesses testifying under Rule 404(c) had the right to refuse pretrial interviews, that right did not extend so far as to allow them to remain in the courtroom during Defendant's trial when other witnesses were testifying, after the invocation of Rule 615. However, the Court found the error did not result in prejudice, as there was no evidence that the witnesses altered their stories or were influenced in their testimony. Defendant's convictions were affirmed. **[Rules 404(c) and 615]**

47. *State v. Gasbarri*, 248 Ariz. 619 (Ct. App. Div. 2 2020)—The trial court erred in granting a motion to suppress evidence seized from a cell phone—even though the prosecution had failed to respond to the motion—because the defendant had not met his burden to allege specific circumstances to establish a prima facie case supporting suppression of the evidence at issue. Ariz. R. Crim. P. 16.2(b)(2). The defendant had merely alleged the lack of a warrant, but the Court of Appeals did refer the prosecution to the State Bar for its failure to respond in timely or any writing to the motion to suppress, even after obtaining an extension of time in which to do so. **[U.S. Const. Amend. IV; Ariz. R. Crim. P. 16.2(b)(2)]**

48. *State v. Togar*, 248 Ariz. 567 (Ct. App. Div. 2 2020)—Evidence of prior thefts from a 97-year-old senior-living facility resident's wallet was not impermissible other-acts evidence, was relevant, and was admissible—given that probative value was not substantially outweighed by the danger of unfair prejudice. The evidence was presented in such a way at trial that it was not stated or even implied that those thefts were attributable to defendant's conduct. The defendant was further not entitled to a *Willits* (96 Ariz. 184 (1964)) instruction regarding missing surveillance video pieces, as witnesses who had seen and heard the full video credibly testified that the missing parts did not tend to exonerate defendant, and speculation, without more, cannot support a *Willits* instruction that the jury should have presumed the missing evidence would tend to exonerate the defendant. **[Rules 401, 402, 403, and 404]**

49. *State v. Arias*, 248 Ariz. 546, 562–63 (Ct. App. Div. 1 2020)—In the appeal of a verdict resulting from a trial that garnered an incredible amount of media attention and also

resulted in findings of prosecutorial misconduct, the Arizona Court of Appeals found, in part, that the prosecutor's conduct did not mean certain evidence was used for impermissible propensity purposes. The trial court instructed the jury to consider any other-acts evidence—like the fact that the defendant took a piece of the victim's jewelry—only to "establish the defendant's motive, intent, preparation or plan," and not to "determine the defendant's character or character trait or to determine that the defendant acted in conformity with the defendant's character or character traits and therefore committed the charged offense." **[Rule 404]**

50. *State v. Jaramillo*, 248 Ariz. 329 (Ct. App. Div. 2 2020)—While joint trials are favored in the interests of judicial economy, *State v. Murray*, 184 Ariz. 9, 25 (1995), a trial court abused its discretion where the defendants' defenses were each so wholly inconsistent that they were antagonistic and mutually exclusive sufficient to require severance of the trials. Joinder is appropriate if "each defendant is charged with each alleged offense, or if the alleged offenses are part of an alleged common conspiracy, scheme, or plan, or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others." Ariz. R. Crim. P. 13.3(b). The Arizona Supreme Court has identified four circumstances that might require severance based upon potential prejudice to one or more defendants:

    (1) Evidence admitted against one defendant is facially incriminating to the other defendant,

    (2) Evidence admitted against one defendant has a harmful rub-off effect on the other defendant,

    (3) There is significant disparity in the amount of evidence introduced against the defendants, or

    (4) Co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

    Murray, 184 Ariz. at 25. Here, the core of Defendant's defense was that he was a struggling shopkeeper who rented the back room of a store to his co-defendant, Islas, without knowing that Islas was warehousing and dealing drugs. The core of Islas's defense, though, was that he was nothing more than a delivery driver for Defendant with no knowledge that he was delivering Defendant's drugs. These defenses were wholly inconsistent, and the Court of Appeals found the case to fall under the fourth *Murray* scenario above. The appellate panel rejected the State's argument that a limiting instruction cured the error by directing jurors to consider the evidence separately as to each co-defendant. This instruction may reduce prejudicial effect in the evidence-based categories of severance cases, but it did not prevent prejudice when the primary harm results from failure to sever antagonistic defenses, and the State did not prove the error harmless on appeal. The case was reversed and remanded for a new trial. **[(Rule 105); Ariz. R. Crim. P. 13.3(b)]**

51. *Brown, et al. v. Dembow*, 248 Ariz. 374 (Ct. App. Div. 1 2020)—The trial court did not err in excluding a civil defendant's prior conviction from being used for impeachment purposes under Arizona Rule of Evidence 609(a)(1)(A), as the defendant was not a felon when she testified at trial. Instead, after the incident giving rise to the civil case, but before she testified at the civil trial, a court had designated the civil defendant's Class 6

undesignated felony conviction as a misdemeanor, at the request of her probation officer. The appellate court also denied a motion to strike, taking judicial notice pursuant to Arizona Rule of Evidence 201, of certain documents in the superior court's file that the appellants submitted that were related to the civil defendant's prior criminal case. The appellate panel also noted that the Arizona common law rules were aligned with its decision here—felons were deemed incompetent to testify at common law, while misdemeanor convictions could not even be used for impeachment. **[Rule 609(a)(1)(A)]**

52. *State v. Ibeabuchi*, 248 Ariz. 412 (Ct. App. Div. 1 2020)—Division One affirmed the superior court's appointment of counsel for a competent Defendant who lacked the mental capacity to conduct a trial himself. Reasonable evidence supported the superior court's ruling regarding this "gray-area defendant." Such persons are competent to stand trial in that they can assist their attorney with a reasonable degree of rational understanding, but they lack the mental capacity to minimally participate in the process as an advocate. When a person qualifies as a gray-area defendant, the superior court may, within its discretion, deny them the right of self-representation. Defendant failed to respond appropriately to the Court's questions, made statements at odds with the record, spent one year filing repeated objections to the withdrawal of a prior attorney, did not understand the applicable law, and failed to comply with Court orders, including those that he be transported to his own hearings. By denying Defendant's motion, the Court ensured that he received a fair probation violation proceeding and helped to maintain the proceeding's integrity. **[U.S. Const. Amend. VI, XIV; Ariz. Const. art. 2, sec. 24]**

SCENARIOS

Rules 107/1006

In a civil case in early 2025, lawyer Jolie, who represents a Plaintiff suing over one-half of a lucrative social equity marijuana dispensary license, asks to share her screen at a summary judgment oral argument to show the court a PowerPoint presentation opposing Defendant's summary judgment motion. Jolie did not—before argument—disclose to the other side the contents of the PowerPoint, but offers it as an illustrative aid to the court via Court Connect.

Jolie offers a similar PowerPoint illustrative aid in opening statement at the jury trial that ensues after Defendant's motion is denied. Jolie also did not disclose the contents of the opening statement PowerPoint to Defendant's counsel in advance, despite the Court's pretrial order requiring disclosure of the contents of all illustrative aids three days in advance of trial.

Additionally, Plaintiff had pleaded that the Defendant, Shiloh, injured Plaintiff by remitting only the proceeds from the sale of low-quality (trim) marijuana products. Jolie disclosed timely under Rule 26.1 and repeated in the joint pretrial statement that she would bring a pound bag of trim product and a pound bag of bud product to trial and seek to admit them as demonstrative exhibits.

Finally, any proceeds to Plaintiff were remitted in cash, so the receipts were created on carbon-copy triplicate forms weekly since January 2022. There are about 150 forms containing roughly 4,500 transactions altogether, and Jolie seeks to have an Excel spreadsheet admitted as a summary to prove the contents of those forms to aid development of her client's testimony at trial.

If your birthday falls in the months of January through April, you (Jolie) are trying to use the illustrative aids and demonstrative evidence and summary to prove content at the summary judgment oral argument, in opening statement, and during witness testimony at trial.

If your birthday falls in the months of May through August, you represent Shiloh and object to all of these uses/proffers.

If your birthday falls in the months of September through December, you are the judge who rules on (all) the objections.

Rule 412

In a civil case in late 2025, Viktor has sued Peter, alleging pervasive sexual harassment in the workplace, including via unwelcome email memes featuring images from HBO's shows, Game of Thrones, and House of the Dragon, paired with heavy-handed sexual innuendoes.

In his complaint, Viktor pleaded that Peter damaged his reputation by CC'ing him and others on emails containing the memes, essentially tagging Viktor as someone who liked to receive such content.

Peter moves *in limine* before trial for a ruling that the following are admissible under the recently adopted Ariz. R. Evid. 412(b): (1) photos of Viktor in scanty Westeros-esque attire on multiple past Halloweens; (2) an Instagram story video of Viktor kissing a man, his husband, at a House of the Dragon-themed drag brunch; and (3) a program from the event, which was entitled a Bottomless Watch Party.

If your birthday falls in the months of January through April, you represent Viktor and object to the evidence proffered.

If your birthday falls in the months of May through August, you are the judge who rules on the objections.

If your birthday falls in the months of September through December, you represent Peter and proffer this evidence to prove Viktor's sexual predisposition and reputation for the same.

Rules 702/704 Scenario

In a criminal case being tried in October 2024, Lou Fleming is charged with two counts—both 'knowing' violations of A.R.S. § 13-2910(A)(2) — 'Intentionally, **knowingly** or recklessly failing to provide medical attention necessary to prevent protracted suffering to any animal under the person's custody or control.'

Lou's family owns a horse farm on a county island (e.g., unincorporated land fully surrounded by a city) within Phoenix. One of the horses, Minnie, had a protracted labor with her colt, Boo, over a Fourth of July weekend. Minnie's pelvis was eventually broken during the birth, and Boo was deprived of oxygen for a prolonged period of time.

An animal crimes veterinary prosecution expert testifies there were signs early on in Minnie's labor that Boo's placenta had prematurely separated from the uterus, requiring immediate C-section delivery instead of continued labor.

Lou's defense includes that she didn't know medical attention was necessary for Minnie and Boo, as the problems with foaling weren't evident until after birth.

The State wants to also offer a 'cold' expert – who won't opine on the facts of Lou's case, but who can testify that most horse farm owners on county island property in the state have an unwritten rule that they will not call an equine veterinarian unless a labor lasts more than eight hours. (Normal equine labor does not proceed past four hours.)

If your birthday falls in the months of January through April, you are the judge who rules on the objections.

If your birthday falls in the months of May through August, you proffer this 'cold' expert and their opinions.

If your birthday falls in the months of September through December, you object to the proffer of the 'cold' expert and their opinions.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)
	) Arizona Supreme Court No. R-24-____
ARIZONA RULES OF	)
EVIDENCE 107 AND 1006	) **PETITION TO ADD ARIZONA**
	) **RULE OF EVIDENCE 107 AND**
	) **AMEND ARIZONA RULE OF**
	) **EVIDENCE 1006**
______________________________	)

PETITION TO ADD RULE 107 TO THE ARIZONA RULES OF EVIDENCE AND AMEND ARIZONA RULE OF EVIDENCE 1006

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, the Honorable Sara Agne and the Honorable Maria Elena Cruz ("our committee"), petitions the Court to add a new rule of evidence, designated as Rule 107, concerning illustrative aids, and to amend Rule 1006, concerning summaries of voluminous materials, effective January 1, 2025.

I. INTRODUCTION AND BACKGROUND

This Court first adopted the Arizona Rules of Evidence in September 1977, basing them on the Federal Rules of Evidence, adopted in 1975. In the more than forty-six years since this Court adopted the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

In June 2012, the Arizona Supreme Court established our committee with the purpose to:

> [P]eriodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Ariz. Sup. Ct. Admin. Order 2012-43 (June 11, 2012).

II. FEDERAL ACTION TO ADD RULE 107 AND AMEND RULE 1006

A. Procedural History

At its April 28, 2023 meeting, and after publishing notice in the federal register and receiving comments, the federal Advisory Committee on Evidence Rules voted to propose both a new rule of evidence, designated as Rule 107, to address the use of illustrative aids at trial, and to amend Rule 1006, concerning summaries of voluminous materials. The Committee on the Rules of Practice and Procedure of the U.S. Judicial Conference met on June 6, 2023, approved the Advisory Committee's proposed amendments, and forwarded its recommendation to the U.S. Judicial Conference, which in turn, approved the amendments at its September 12, 2023, session and transmitted the proposed amendments to the U.S. Supreme Court in October 2023. If the Court approves the amendments, it must transmit them to Congress by May 1, 2024. Congress then has seven months to act on the proposed amendments. If Congress does not enact legislation to reject, modify, or defer the amendments, they will become effective on December 1, 2024.

B. Federal Advisory Committee on Evidence Rules Recommended Adding Federal Rule of Evidence 107, Amending Federal Rule of Evidence 1006

The federal Advisory Committee on Evidence Rules recommended adding a new rule of evidence to address the use of illustrative aids at trial. The original proposal would have designated the new rule as Rule 611(d). However, after receiving feedback during the comment period, the federal committee decided to designate the new rule as Rule 107. Also, as originally proposed, the rule included a notice provision. Because the comments to the notice provision were overwhelmingly negative, the federal committee dropped it from the final proposed rule.

The federal committee also proposed amending Rule 1006 to better distinguish a summary of voluminous material, which Rule 1006 governs—and which is itself admissible—from an illustrative aid, which is designed to help the trier of fact understand argument or admissible evidence, but is not itself evidence.

The federal committee explained the need for proposed Rule 107 as follows:

> The Committee unanimously approved a proposal to add a new rule to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. Similar confusion exists in distinguishing a summary of voluminous evidence, covered by Rule 1006, and a summary that is not evidence but rather presented to assist the trier of fact in understanding evidence. In addition, the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards.

The federal committee also explained the amendment to Rule 1006 as follows:

> Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and much of the problem is that some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). Some courts have stated that summaries admissible under Rule 1006 are "not evidence," which is incorrect. Other courts have stated that all of the underlying evidence must be admitted before the summary can be admitted; that, too, is

incorrect. Still other courts state that the summary is inadmissible if any of the underlying evidence has been admitted; that is also wrong. After extensive research and discussion, the Committee unanimously approved an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposal to amend Rule 1006 dovetails with the proposal to establish a rule on illustrative aids, discussed above. These two rules serve to distinguish a summary of voluminous evidence (which is itself evidence and governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

C. Text of Proposed Federal Rule of Evidence 107

Proposed Federal Rule of Evidence 107 is as follows:

Rule 107. Illustrative Aids

(a) Permitted Uses*. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.*

(b) Use in Jury Deliberations*. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:*

> *(1) all parties consent; or*
>
> *(2) the court, for good cause, orders otherwise.*

(c) ***Record****. When practicable, an illustrative aid used at trial must be entered into the record.*

(d) Summaries of Voluminous Materials Admitted as Evidence*. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.*

Proposed Federal Rule of Evidence 107 includes a lengthy committee note, which is discussed below.

D. Text of Proposed Amendment to Federal Rule of Evidence 1006

The proposed amendment to Federal Rule of Evidence 1006 is as follows, with deletions shown as ~~strikethroughs~~ and additions shown as <u>underlined</u>.

Rule 1006. Summaries to Prove Content

<u>(a) Summaries of Voluminous Materials Admissible as Evidence.</u> *The ~~proponent~~ <u>court</u> may <u>admit as evidence</u> ~~use~~ a summary, chart, or calculation <u>offered</u> to prove the content of voluminous <u>admissible</u> writings, recordings, or photographs that cannot be conveniently examined in court<u>, whether or not they have been introduced into evidence</u>.*

<u>(b) Procedures.</u> *The proponent must make the <u>underlying</u> originals or duplicates available for examination or copying, or both, by other* *parties at a reasonable time and place. And the court may order the proponent to produce them in court.*

(c) Illustrative Aids Not Covered. *A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.*

Like proposed Federal Rule of Evidence 107, the amendment to Rule 1006 includes a lengthy committee note. That committee note is also discussed below.

III. PETITIONER RECOMMENDS ADOPTING A RULE OF EVIDENCE 107 AND ADOPTING IN ARIZONA'S RULE 1006 THE EXPECTED AMENDMENT TO FEDERAL RULE 1006

Our committee met several times, including on December 1, 2023, to discuss adding Federal Rule 107 to the Arizona rules and amending Arizona Rule of Evidence 1006 to conform to the proposed federal rule changes. Arizona's current Rule 1006 is identical to the current federal rule. And as previously mentioned, there is no current Arizona or federal rule that addresses illustrative aids.

Litigants use illustrative aids in nearly every trial. Sketches of an intersection, a layout of rooms in a house, or an easel-displayed computation of damages handwritten in marker are a few examples of commonly used illustrative aids.

Demonstrative exhibits are commonly admitted at trial and may include the weapon used to commit a crime, a photograph of a crime scene, or a surveyor's map showing the location of an easement on a parcel of property.

Examples of a summary of voluminous materials offered as an exhibit at trial include a spreadsheet of checks payable to a party, location data from a cellular telephone download, or a document with relevant text messages or emails copied and pasted into it in chronological order.

Yet, despite the fact that illustrative aids and demonstrative exhibits are used during nearly every trial, no rule of evidence addresses those uses. Likewise, it can be hard to distinguish an illustrative aid from a demonstrative exhibit, and either of those from a summary of voluminous materials exhibit.

The *Arizona Law of Evidence* treatise, which both lawyers and judges turn to when analyzing evidentiary issues, does address this topic, albeit generally. The treatise explains that "[d]emonstrative evidence is divided between real evidence, the actual thing in issue, and illustrative evidence, things used only to illustrate the testimony of a witness." 1 *Ariz. Prac., Law Of Evidence*, § 402:3 (4th ed.). It gives a knife used in an assault as an example of admissible demonstrative evidence. *Id*. As to illustrative aids, the treatise explains:

> The trial court has discretion, routinely favorably exercised, where it will assist the jury to understand the testimony to permit witnesses to illustrate their testimony by use of sketches or diagrams. These need not be to scale or precisely accurate so long as they are helpful. Witnesses may also use for these purposes models, photographs, physical objects, skeletons, and the like. Such testimonial aids are not necessarily admissible as exhibits in the case.

Id.

The *Arizona Law of Evidence* treatise briefly discusses Rule 1006, but does not do so in depth or compare and contrast its ambit to demonstrative exhibits or illustrative aids.

Because demonstrative evidence, illustrative aids, and summary exhibits are commonly used at trial, and the boundaries of each are not clearly defined in the current rules of evidence, with two being admissible while the other is not, our committee recommends the Supreme Court adopt both Rule 107 (as amended in the discussion below) (included as Appendix A) and the amendment to Rule 1006 (included as Appendix B), to provide much needed guidance to litigants and judges.

IV. BOTH PROPOSED FEDERAL RULES CONTAIN LENGTHY COMMITTEE NOTES THAT ARE NOT NECESSARY TO ARIZONA'S RULES

A. Rule 107 Committee Note

The committee note to proposed Federal Rule of Evidence 107 is four pages long.[1] This is much longer than most comments to the Arizona Rules of Evidence. Its purpose is to explain the difference between a demonstrative exhibit and an illustrative aid. Our committee believes that most of a comment can be eliminated if the definition of illustrative aid is moved from the committee note to the rule itself as a new subsection (e). This Petition proposes to do that, along with retaining a

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[1] The proposed committee note is *available at* https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at pages 01065 to 01068.

compressed, edited version of the committee note that explains the difference between an illustrative aid and a demonstrative exhibit.

To that end, our committee proposes moving the definition of "illustrative aid" from the committee note to the rule as subsection (e), which is shown here with an <u>underline</u>, and then shortening and editing the committee note, which is also shown with an <u>underline</u>:

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

<u>**(e) Definition of Illustrative Aid.** An "illustrative aid" is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument.</u>

Comment to 2025 Amendment

<u>The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. An illustrative aid is to be distinguished</u>

from “demonstrative evidence,” which is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact. Usually, the jury is permitted to take demonstrative evidence to the jury room during deliberations and use it to help determine the disputed facts. The category covered by this rule is information offered for the narrow purpose of helping the trier of fact understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations.

B. Rule 1006 Committee Note

The proposed committee note to Federal Rule 1006, which is also quite lengthy, explains why the rule is being amended.[2] However, the rule, as amended, is clear, and does not need an explanation as to its terms. Therefore, our committee recommends not including it.

CONCLUSION

Our committee, as Petitioner, respectfully request that the Court consider this Petition and proposed rule changes at its earliest convenience. We additionally request that the Court circulate the petition for public comment until May 1, 2024, and then adopt the proposed rules as presented, or as modified in light of comments received from the public, with an effective date of January 1, 2025.

DATED this _____9th______ day of ___January___, 2024__.

______*/s/ Sara J. Agne*__________

[2] That proposed committee note is *available at* https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at pages 01077 to 01079.

Sara J. Agne
Co-Chair, Advisory Committee on Rules of Evidence

____*/s/ Maria Elena Cruz w/ permission*_______
Maria Elena Cruz
Co-Chair, Advisory Committee on Rules of Evidence

Appendix A

Proposed Arizona Rule of Evidence 107

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

(e) Definition of Illustrative Aid. An "illustrative aid" is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument.

Comment to 2025 Amendment

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. An illustrative aid is to be distinguished from "demonstrative evidence," which is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact. Usually, the jury is permitted to take demonstrative evidence to the jury room during deliberations and use it to help determine the disputed facts. The category covered by this rule is information offered for the narrow purpose of helping the trier of fact understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations.

Appendix B[3]

Proposed Amendment to Arizona Rule of Evidence 1006

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, photographs, or videos that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

[3] Additions to rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	Arizona Supreme Court No. R-24-____
ARIZONA RULE OF EVIDENCE 412	PETITION TO AMEND ARIZONA RULE OF EVIDENCE 412

PETITION TO AMEND ARIZONA RULE OF EVIDENCE 412

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Advisory Committee on Rules of Evidence (the "Committee"), by and through its Co-Chairs, the Honorable Sara Agne and the Honorable Maria Elena Cruz, petitions the Court to adopt Arizona Rule of Evidence 412, as reflected in the Attachment to this Petition, effective January 1, 2025.

I. INTRODUCTION AND BACKGROUND

This Court first adopted the Arizona Rules of Evidence in September 1977. They are based on the Federal Rules of Evidence, adopted in 1975. In the decades since, the Federal Rules of Evidence have been amended on several occasions, and many—but not all—of these amendments have become part of the Arizona Rules of Evidence. This Committee evaluates proposed federal changes consistent with its June 2012 chartering administrative order:

> The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

Congress originally enacted Federal Rule of Evidence 412—colloquially known as the "rape-shield rule"—as part of the Privacy Protection for Rape Victims Act of 1978. The original rule applied in criminal cases only. Twenty years later, in 1998, the Arizona legislature passed a similar rape-shield statute, A.R.S. § 13-1421, governing criminal cases.

In 2012, this Committee did not adopt a rape-shield *rule* because Arizona already had a rape-shield *statute*. Arizona Rule of Evidence 412 contains the following comment from 2012: "Federal Rule of Evidence 412 has not been adopted. *See* A.R.S. § 13-1421 (Evidence relating to victim's chastity; pretrial hearing)."

By 2012, Federal Rule of Evidence 412 included more than criminal rape-shield protections. In 1994, Congress amended Federal Rule 412 to apply in all *civil* and criminal cases involving alleged sexual misconduct. In civil cases, Federal Rule 412(b)(2) allows admission of "evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy." FED. R. EVID. 412(b)(2).

As noted above, the Committee did not adopt civil rape-shield protections in 2012. Instead, the Committee believed that Arizona's criminal statute sufficiently covered the field. A review of records and discussions with former Committee members suggests that not considering a *civil* rape-shield rule at the time was simply an oversight.

The Committee would like to rectify this oversight, and therefore as Petitioner unanimously recommends that Arizona adopt a non-criminal rape-shield rule in Rule 412 that substantially mirrors the federal civil rape-shield rule.

II. SPECIFICS OF FEDERAL RULE OF EVIDENCE 412(b)(2)

Federal Rule of Evidence 412 (titled "Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition") prohibits evidence of an alleged victim's past "sexual behavior" and "sexual predisposition" "in a civil or criminal proceeding involving alleged sexual misconduct." FED. R. EVID. 412(a). In civil cases, Federal Rule 412(b)(2) permits introduction of "evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." FED. R. EVID. 412(b)(2). This implements a reverse-Rule 403 balancing test because the probative value of the evidence must be substantially greater than its harm and prejudice. *Compare* FED. R. EVID. 403 (exclusion permitted when the probative value of the evidence is substantially outweighed by its unfair prejudice, among other reasons).

This reverse standard in Federal Rule of Evidence 412 is intentionally a difficult standard to meet. In addition, the federal rule also requires the danger of harm to any victim (such as humiliation) to be weighed on the prejudicial side of the equation, making it more likely that the evidence remains inadmissible. The final sentence of Federal Rule 412(b)(2) provides that "evidence of a victim's reputation" is admissible "only if the victim has placed it in controversy." *Id.*

The federal civil rape-shield rule has been effective for nearly thirty years, and the Committee is not aware of any difficulties or problems with the rule in federal court practice. To the contrary, the rule helps ensure that embarrassing and distracting information is kept from the factfinder.

III. SPECIFICS OF PROPOSED CHANGES TO ARIZ. R. EVID. 412

Roughly eleven states have laws that largely mirror the federal civil rape-shield rule. *See, e.g.*, CONN. R. EVID. 4-12; IND. R. EVID. 412; KY. REV. STAT. § 412; ME. R. EVID. 412; NEB. REV. STAT. ANN. § 27-412; N.D. R. EVID. 412; OR. REV. STAT. ANN. § 40.211; S.D. CODIFIED LAWS § 19-19-412; WA. R. REV. ER 412; W. VA. R. EVID 412. Eight additional states have other varieties of civil rape-shield protections. *See, e.g.*, CAL. EVID. CODE § 1106; COLO. REV. STAT. § 13-25-138; HAW. REV. STAT. 412; 735 ILL. COMP. STAT. ANN. 5/8-2801; LA. CODE EVID. ANN. art. 412; Ma. R. Evid. § 412; N.C. GEN. STAT. ANN. 8C-1, 412 & *In re K.W.*, 666 S.E.2d 490, 493 (N.C. Ct. App. 2008) ("[T]his Court has found the rule to be applicable in civil cases."); WIS. STAT. ANN. § 901.08; *cf. Bumpus v. New York City Transit Auth.*, No. 3512/07, 2009 WL 1141401, at *3 (N.Y. Supr. Ct. Apr. 28, 2009) (adopting civil rape-shield protections in a protective order ruling).

Arizona should join the federal courts and these numerous states and adopt a civil rape-shield rule. Without these protections, victims may have to answer intrusive questions about their sexual lives and orientations, fantasies, and even their clothing choices. *See* Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1926 (enacting the federal criminal rape-shield rule) (effective July 1, 1975); *see also Meritor Sav. Bank, FSB* *v. Vinson*, 477 U.S. 57, 69 (1986) ("[I]t does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."). There is no reason for the Arizona Rules of Evidence to remain out of step with the Federal Rules of Evidence in this area.

Thus, the Committee unanimously proposes that Arizona adopt a civil rape-shield rule in Rule 412, which currently contains no rule text and instead refers to A.R.S. § 13-1421 in a comment to the 2012 amendments.

We propose the following:

Rule 412. The Victim's Sexual Behavior or Predisposition in Non-Criminal Cases

(a) Prohibited Uses. In proceedings involving alleged sexual misconduct where A.R.S. § 13-1421 does not apply, the following evidence is not admissible:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

The proposed rule follows the substantive provisions of the Federal Rule of Evidence 412, but includes a couple of differences that are worth highlighting:

- Arizona's title and scope differs from the Federal Rule because Arizona has a criminal rape-shield statute, so the Arizona Rule need not, and should not, cover criminal proceedings.
- More specifically, the Arizona Rule is designed to apply in cases where the criminal statute, A.R.S. § 13-1421, does not apply. That certainly means civil cases. But there may be other proceedings, such as non-delinquency juvenile proceedings, where the criminal statute does not apply and, thus, the Arizona rule should fill in the gap. Thus, we do not use the more restrictive "civil proceedings" language from the Federal Rule and instead remind the reader that A.R.S. § 13-1421 will apply in criminal cases, and Arizona Rule 412 applies in the remainder.
- Arizona's subsection lettering and numbering differ in minor ways from the Federal Rules, largely because proposed Arizona Rule 412 does not cover criminal cases.
- Finally, Arizona's rule does not include the procedures to determine admissibility. *See* Fed. R. Evid. 412(c) (subtitled, "Procedure to Determine Admissibility"). These sorts of timing and notification issues may be set by individual judges in consultation with parties, and this Committee tends to consistently recommend that procedural rules not be melded into the evidentiary rules absent compelling reason.

Unanimously, the Committee also recommends the following brief comment to the 2025 amendment: "Rule 412 was adopted effective January 1, 2025, to conform to Federal Rule of Evidence 412 in cases where A.R.S. § 13-1421 (Evidence relating to victim's chastity; pretrial hearing) does not apply."

CONCLUSION

The federal rules have had a civil rape-shield rule for thirty years. It is time for Arizona to adopt those protections, too. The Committee respectfully requests that the Court consider this Petition and its proposed rule changes at its earliest convenience. The Committee additionally requests that the Petition be circulated for public comment until May 1, 2024, and that the Court adopt the proposed rule as presented, or as modified in light of comments received from the public and any replies, with an effective date of January 1, 2025.

DATED this 9th day of January, 2024.

_*/s/ Sara J. Agne*_______________
Sara J. Agne, Co-Chair

_*/s/ Maria Elena Cruz w/ permission*______
Maria Elena Cruz
Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT

<u>Proposed Arizona Rule of Evidence 412</u>

~~**Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition**~~

~~<Not adopted.>~~

Rule 412. The Victim's Sexual Behavior or Predisposition in Non-Criminal Cases

(a) Prohibited Uses. In proceedings involving alleged sexual misconduct where A.R.S. § 13-1421 does not apply, the following evidence is not admissible:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

COMMENT TO 2025 AMENDMENT

Rule 412 was adopted effective January 1, 2025, to conform to Federal Rule of Evidence 412 in cases where A.R.S. § 13-1421 (Evidence relating to victim's chastity; pretrial hearing) does not apply.

Evidence & Case Law Update

8:15 AM to 10:15 AM, July 10, 2024

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1

The Panel

Hon. Sara J. Agne–**Arizona Tax Court**

Prof. Jessica Berch–**ASU SDO College of Law**

Hon. Andrew M. Jacobs–**Arizona Court of Appeals**

Hon. D. Douglas Metcalf–**Pima County Superior Court**

Hon. John Napper–**Yavapai County Superior Court**

Mikel Steinfeld–**Maricopa County Public Defender's Office**

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2

The Rules (adopted & proposed)

Rule 106–**Rule of Completeness** ☑
Rule 615–**Rule of Exclusion** ☑
Rule 702–**Rule on Experts** ☑
Rule 107/1006–**Illustratives; Summaries to Prove Content** ☐
Rule 412–**Victim's Sexual Behavior/Predisposition–Non-Criminal Cases** ☐
Rule 613–**'Prior Presentation' for Past Inconsistent Statements** ☐
Rule 801/804–**Derivative Liability; Statements Against Interest** ☐

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3

Arizona Supreme Court No. R-23-0002
Page 3 of 3

ATTACHMENT[1]

ARIZONA RULES OF EVIDENCE

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

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4

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded from the courtroom and prohibited from receiving trial testimony through any means, so that they cannot hear or review other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) [No change]

(b) ~~an~~ one officer or employee of a party that is not a natural person~~, after being~~ if that officer or employee has been designated as the party's representative by its attorney;

(c) ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense;

(d)-(e) [No change]

Comment to 2024 Amendment

The rule does not limit the court's discretion to allow an entity-party to substitute its representative during trial under appropriate circumstances. If an entity seeks to have more than one witness-representative protected from exclusion, it is free to try to show under (c) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (c).

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5

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a)-(c) [No change]

(d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Comment to 2024 Amendment

Rule 702 was amended effective January 1, 2024, to conform to the changes made to Federal Rule of Evidence 702 that took effect on December 1, 2023. These changes are intended to clarify the standard of proof that the proponent of expert testimony must satisfy as well as to address the issue of expert overstatement. Rule 702 permits "cold" experts to offer general, educative testimony to help the trier of fact understand evidence or resolve fact issues. *State v. Salazar-Mercado*, 234 Ariz. 590, 592 ¶ 6 (2014).

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Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

(e) Definition of Illustrative Aid. An "illustrative aid" is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument.

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Comment to 2025 Amendment

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. An illustrative aid is to be distinguished from "demonstrative evidence," which is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact. Usually, the jury is permitted to take demonstrative evidence to the jury room during deliberations and use it to help determine the disputed facts. The category covered by this rule is information offered for the narrow purpose of helping the trier of fact understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations.

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Proposed Amendment to Arizona Rule of Evidence 1006

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, photographs, or videos that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

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Proposed Arizona Rule of Evidence 412

~~**Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition**~~

~~<Not adopted.>~~

Rule 412. The Victim's Sexual Behavior or Predisposition in Non-Criminal Cases

(a) Prohibited Uses. In proceedings involving alleged sexual misconduct where A.R.S. § 13-1421 does not apply, the following evidence is not admissible:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

COMMENT TO 2025 AMENDMENT

Rule 412 was adopted effective January 1, 2025, to conform to Federal Rule of Evidence 412 in cases where A.R.S. § 13-1421 (Evidence relating to victim's chastity; pretrial hearing) does not apply.

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10

ARIZONA RULE OF EVIDENCE 613

Rule 613. Witness's Prior Statement

(a) no change

(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Unless the court orders otherwise, ~~E~~extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it~~, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

11

ATTACHMENT[4]

ARIZONA RULE OF EVIDENCE 801

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a)-(c) [No change]

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay.

(1) [No change]

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

existence of the conspiracy or participation in it under (E).

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Comment to 2025 Amendment

Subsection (d)(2) was amended by adding the last sentence to conform to the 2024 amendment to Federal Rule of Evidence 801(d)(2). The federal Committee Note to the 2024 amendment includes examples that may be helpful to understanding the amendment.

12

ARIZONA RULE OF EVIDENCE 804

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

(a) [No change]

(b) **The Exceptions.** [No change to text in (b)]

(1)-(2) [No change]

(3) **Statement Against Interest.** A statement that:

(A) [No change]

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness~~, if offered in a criminal case as one that tends to expose the declarant to criminal liability—~~after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

(4)-(6) [No change]

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13

You Be the Judge One

Defendant is on trial for the shooting death of Victim. Defendant claims **self-defense**. The state would like to introduce evidence of guns and ammunition found in the defendant's home, but which were not the specific weapons or ammunition used in the shooting. Defendant objects to the introduction of this evidence, citing Rules 401 and 403. The state counters that the evidence shows the defendant's paranoid and unreasonable **state of mind** and will help the jury assess **what Defendant believed was happening** during the altercation with Victim that led to the shooting.

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14

You Be the Judge One

Answer Choices

A) Admit because the evidence is relevant.

B) Admit because the evidence is relevant, and even if there is some unfair prejudice to the evidence, the unfair prejudice does not substantially outweigh the probative value.

C) Exclude.

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State v. Haywood, __ P.3d __, 2024 WL 2119341 (Ariz. App. 2024)

- **Background facts:** Defendant, SH (Driver), and BO (Victim) were in a car when Defendant & BO began fighting. Defendant claims BO threatened him and choked him so hard he couldn't see–at which point Defendant shot BO 4 times, killing him.
- **Evidence facts:** Officers found the murder weapon in Defendant's bathroom, and they found **other weapons and ammunition** throughout his home. Officers also found a safe with a **threatening note** indicating the presence of a deadly booby trap (though there was no such trap).
- **Procedure:** Trial court **admitted** the evidence, including dozens of photographs depicting guns, weapon accessories, ammunition, the safe, and security systems and cameras. Defendant convicted.

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16

State v. Haywood, __ P.3d __, 2024 WL 2119341 (Ariz. App. 2024)

- **Background Criminal Law:** Self-defense permits the use of deadly force "when and to the degree a **reasonable person** would believe that deadly force is immediately necessary." A.R.S. 13-405(A)(2).
- **Holding:** The evidence was *irrelevant* to a claim of self-defense because self-defense relies on **objective standards**, not on the defendant's subjective beliefs.

"[T]he weapons and security measures found in Haywood's home bore no connection to whether a reasonable person in Haywood's circumstances would have believed deadly force was immediately necessary at the time of the shooting."

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17

You Be the Judge Two

Defendant is on trial for the shooting death of Victim. Defendant had previously spent time at Victim's home and knew that Victim owned more than a dozen legal handguns and other weapons. Defendant claims he acted in **self-defense** because Victim reached into his cargo pants pocket to grab something during the altercation just prior to when Defendant shot Victim. To support his self-defense theory, Defendant would like to introduce evidence of the weapons found in Victim's home, though admittedly none of these items were used during Defendant's altercation with Victim. No weapons were recovered from Victim, though he did have a cell phone in his pocket. The state objects to the evidence, citing Rules 401 and 403.

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18

You Be the Judge Two

Answer Choices

A) Admit because the evidence is relevant.

B) Admit because the evidence is relevant, and even if there is some unfair prejudice to the evidence, the unfair prejudice does not substantially outweigh the probative value.

C) Exclude.

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19

State of Arizona v. Duncan, 548 P.3d 1128 (Ariz. App. 2024).

BACKGROUND: A foster child found and removed an SD card from a device the defendant foster parent had placed in the children's bathroom to secretly record her and the other foster children. A police detective reviewed the videos recorded on the SD car without a search warrant. The police used that information to obtain a search warrant for devices in the house, which led to a cell phone Defendant used to store inappropriate images of the foster children. The defendant was charged with crimes as to both contents of the SD card and cell phone. The Court denied a motion to suppress and admitted the contents of both the SD card and cellphone at trial. The Court of Appeals reversed as to the search of the SD card, finding it illegal. It upheld the search of the cell phone.

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20

State of Arizona v. Duncan, 548 P.3d 1128 (Ariz. App. 2024).

<u>EVIDENTIARY ISSUE AND HOLDING</u>: The trial court had admitted the entire contents of the SD card under 404(b) and (c). Given that the evidence was inadmissible as violative of the Fourth Amendment, even if admissible as 404(b) and (c) evidence, the charges pertaining to the cell phone images had to be remanded for a new trial because the SD card videos had been admitted as 404(b) and (c) in support of the charges related to the cell phone images.

<u>TAKEAWAY</u>: While uncharged images of inappropriate behavior may be admissible under 404(b) to show modis operandi, intent, and absence of mistake and/or under 404(c) as propensity for sexual aberration, specifically voyeurism, illegally obtained information may not be admitted and must be excised from search warrant affidavits.

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21

You be the Judge Three

The police obtain a warrant to search the defendant's computer for inappropriate images. While executing the warrant, the police discover paper photographs of inappropriate images that were stacked next to the computer in the defendant's residence. The Court denied a motion to suppress the photographs on the ground they were in plain sight.

The State seeks to admit the photographs under A.R.E. 404(b) on the ground modis operandi, intent, and absence of mistake and/or under 404(c) as propensity for sexual aberration.

Defendant objects on the ground that the photographs were found in a common area of house that was shared among several individuals. No fingerprint or DNA analysis was done on the photos.

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22

You be the Judge Three

<u>Answer Choices</u>:

A. Admit the photographs because they are offered for a proper purpose under A.R.E. 404(b) and/or (c).

B. Admit the photographs because the search that uncovered them was lawfully executed.

C. Exclude the photographs because the State has not shown that the defendant possessed them.

You be the Judge Four

In a prosecution for possessing inappropriate images, the State, in order to show the defendant downloaded the images intentionally, seeks to introduce evidence that the defendant used his computer every Saturday for two years to visit a website on the dark web that was a source for those type of images.

You be the Judge Four

Answer Choices:

A. Admit the search history information under A.R.E. 404(b) because it shows modis operandi, intent, and absence of mistake and/or 404(c) as propensity for sexual aberration.

B. Admit the search history information under A.R.E. 406 as evidence of habit, routine and practice.

C. Exclude the search information as not relevant under A.R.E. 401 because it is not limited to the searches for the images charged in the indictment.

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25

You Be the Judge Five

Defendant Bob Bobbers admitted that several seized electronic devices belonged to him; these were revealed to contain more than “3,000 sexually exploitive images and videos of children.” But he denied knowingly possessing sexually exploitive material. Defendant was charged with two counts of Attempted Sexual Exploitation of a Minor, due to online conversations he had with a person he thought to be a 13-year-old girl, requesting pictures of her genitalia. The State moves to admit at trial at least 23 of the images from the devices, which include sexually exploitive images of a toddler, a young girl engaged in bestiality, and a preponderance of prepubescent children. Defendant objects.

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26

You Be the Judge Five

Answer Choices

Do you:

A) Allow admission of the 23 images and testimony about the rest–as proper other-acts evidence.

B) Allow admission of the 23 images on the basis that they evince a reasonable basis to infer that Bobbers had a character trait “giving rise to an aberrant sexual propensity to commit the crime charged.” Ariz. R. Evid. 404(c)(1)(B).

C) Deny admission, as the evidentiary value of proof of the other acts is substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

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27

State v. Rix, 256 Ariz. 125 (App. 2023)

- **Background:** First published Rule 404(c) decision on photographic evidence in more than a decade.
- **Holding:** Prejudice from admission of sexually exploitive material in Defendant’s possession at arrest substantially outweighed its probative value, thus, admission was abuse of discretion; error was not harmless.
- **Separately:** Potential for revictimization of both victims and jurors with unnecessary display was high.

“[A]dmitting a large number of other-act images that are significantly different from, and even more disturbing than, those the defendant was charged with seeking subverts the jury’s decisionmaking process.”

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28

You Be the Judge Six

Defendant Abe Abbers admitted that several hundred seized compact discs belonged to him; these were revealed to contain more than 3,000 pornographic images and videos of adults. Abbers is on trial for Sexual Exploitation of a Minor, related to six among the compact discs that contained sexually exploitive videos of children. The State moves to admit at trial the images and videos of adults from the discs, to show Abbers' intent, knowledge of what was on the discs, and the opportunity to use a computer to put such materials there. Defendant objects, citing Rule 404(b).

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29

You Be the Judge Six

Answer Choices

Do you:

A) Allow admission for the reasons offered by the State.

B) Allow admission if the evidence of adult pornography was intertwined with the sexually exploitive videos of children.

C) Deny admission, due to the risk that the jury might conclude that someone who downloads adult pornography has a character trait that may also predispose them to download sexually exploitive videos of children.

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30

You Be the Judge Seven

During the pandemic, a city work crew was installing additional flexible ballards in protected, green-painted bike lanes. One worker monitored the jobsite during lunch, Facetiming his wife as he did. No signs or barricades indicated the bike lane was closed. The project required one-foot-deep trench holes every two feet. As Ellen Belpedio approached on her bike, the worker called out from behind his mask, “Ma’am, there are open trench holes . . . .” Ellen gave no indication she heard him and suffered severe injuries when her front tire lodged deep in a trench hole, launching her off her bike. Ellen brought a negligence claim but disclosed no standard-of-care expert. The city moved for summary judgment, arguing one was required.

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31

You Be the Judge Seven

Answer Choices

Do you:

A) Grant summary judgment–Rule 702 requires an expert whose opinion reflects a reliable application of their principles and methods to the facts of this case.

B) Deny summary judgment; whether a public roadway has been maintained in a condition that renders it unsafe for travelers is generally within the ken of a lay jury.

C) Grant summary judgment; A.R.S. § 12-2602 requires an expert here.

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32

Fong v. City of Phoenix, --- P.3d ----, 2024 WL 2855191 (Ariz. App. 2024).

- **Background**: Eight-by-eight-foot, four-foot-deep excavation encroached into bike lane on West Washington Street, nine months into pandemic. Uncovered, unbarricaded, and obscured by the shadow of a nearby backhoe. Most of the work crew was on lunch break. The one left behind to "protect the job site" was talking to his wife on the phone, wasn't really paying attention, and rather weakly called out "Ma'am, there's a hole right here." . . .
- **Holding:** Summary judgment granted in error in favor of City and independent contractor; expert testimony not required to show standard of care or breach thereof.

"But whether a public roadway has been maintained in a condition that renders it unsafe for travelers is not a matter beyond the ken of a lay jury, and so a claim for negligent roadway maintenance would not ordinarily require expert testimony."

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33

Smith v. Arizona, 602 U.S. ---, 2024 WL 3074423 (SCOTUS 6/21/2024).

- **Background:** A technician at the state crime lab was requested to test items for trial to prove they were contraband. The tech's written report was the substances were illegal drugs. A different lab technician was called to testify at trial. During the trial, the expert testified to the prior tech's report and, relying on that information, gave an opinion that the substances were contraband. Defendant objected on Confrontation Clause grounds.
- **Holding:** If an expert for the prosecution conveys an out of court statement in support of his opinion, and the statement supports that opinion only if true, then the statement is being offered for the truth of what it asserts, and the Confrontation Clause bar applies.

Court seems to suggest using hypotheticals would be a work around: "If or assuming some out of court statements were true, what would follow from it?"

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34

Smith v. Arizona, 602 U.S. ---, 2024 WL 3074423 (SCOTUS 6/21/2024).

- If the first tech had lied about everything in the original report, then the second expert's "opinion would have counted for nothing, and the jury would have been in no position to convict." Meaning the "the truth of the statements on which its expert relied—propped up its whole case."
- What's left: Were the out-of-court statements testimonial, meaning what was their primary purpose? Answer: Punt . . . Not raised before the court. However, court graciously offers "a few thoughts."
  1) Lab records are kept to comply with laboratory accreditation, internal review. And quality control.
  2) Notes made a reminder to self
  - Neither of these have "a focus on court."

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35

State of Arizona v. Trinidad, --- P.3d ----, 2024 WL 2763363 (Ariz. App. 2024).

In this domestic violence/aggravated assault case, defendant struck and broke his girlfriend's nose. At trial, the girlfriend testified, as did a hospital physician's assistant ("PA") who testified based on his physical examination and the radiologist's report. On appeal, the defendant argued his Sixth Amendment right to confrontation was violated because (1) the radiology report was testimonial, and (2) the hospital PA acted as a conduit for the nontestifying radiologist. He further argued that the mandatory reporting statute—A.R.S. § 13-3806—rendered the radiologist's report testimonial.

The test for testimonial evidence is whether it was created for the primary purpose of creating an out-of-court substitute for trial testimony. Applying this test, the court of appeals held the report was not testimonial because it was created primarily to provide medical care to the victim. The court further held that criminal defendants do not have a Sixth Amendment right to confront hospital workers who report injuries under the mandatory reporting statute.

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36

You Be the Judge Eight

Needing his Slurpee fix, Omar Knedlik went to 7-11. After filling his Slurpee, taking a sip, and getting a minor brain freeze, Omar stepped backward, tripped over a case of water, and broke his hand. The case was at an end cap, and Omar would've seen it had he been looking. The clerk ran over and apologized. "I'm so sorry. We normally keep these displays at waist height so this doesn't happen."

Omar sues 7-11. 7-11 moves for summary judgment. During the hearing, Omar wants to admit the clerk's statement. 7-11 objects—the statement is hearsay.

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37

You Be the Judge Eight

Answer Choices

You …

A) Preclude the evidence because it is hearsay.
B) Admit the evidence because it is not hearsay.
C) Admit the evidence because, although hearsay, an exception applies.

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38

Perez v. Circle K Convenience Stores, Inc., 547 P.3d 390 (Ariz. App. 2024).

- **Background:** Plaintiff trips over a case of water on the endcap of a Circle K and suffers several injuries. During litigation on motion for summary judgment, Plaintiff wanted to admit evidence that the Circle K employee apologized and said the display was usually stacked at waist-height. Judge precluded the statement as hearsay.
- **Holding:** The trial court erred. But the error did not affect the ruling because the statement didn't go to the threshold question of duty.

"The evidence was admissible and should have been considered. An opposing party's statement offered against an opposing party is admissible and is not hearsay."

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39

You Be the Judge Nine

Calvin Fischoeder owned the Wonder Wharf–home of the Scream-I-Cane roller coaster. Mickey, who runs the Scream-I-Cane, told Mr. Fischoeder that there have been some problems with the safety belts. "Of course there are problems," Fischoeder said. "It's old and beat down. But I'm not going to pay for updates. Just run the roller coaster."

One week later, a safety belt failed. Louise Belcher was tossed from the coaster and suffered serious injuries. Louise sues Mr. Fischoeder. But Calvin dies, passing his estate to his brother Felix.

At trial in 2025, Louise (representing herself) calls Mickey to testify about Calvin's statement. Louise explains the statement was an admission by a party opponent. Felix objects–Calvin's no longer a party opponent.

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40

You Be the Judge Nine

Answer Choices

You …

A) Preclude the evidence–a fourth grader can't be right on the law.
B) Preclude the evidence because Calvin is no longer a party opponent.
C) Admit the evidence because you don't want to get on Louise's bad side.
D) Admit the evidence because the statement is admissible even against Calvin's successor.

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41

Evidence is out there . . . .

- Three scenarios
- Divided by birth month generally
- You Be the . . .
  - Proferror, Objector, or Judge.
  - Group work encouraged!

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42

Thank you!

Questions? Petitions for Review?

Next Up: Judicial Panel with Q&A

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43

Judicial Panel

Hon. Sara J. Agne
Hon. John Napper
Hon. D. Douglas Metcalf
Hon. Andrew M. Jacobs

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1

I. ADR/Mediations

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II. Artificial Intelligence

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3

III. Digital vs. “normal” evidence

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4

IV. Expert witnesses

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5

V. Verdict Observations

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VI. Peremptory challenges

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7

Other items/issues

- Court reporters/recording

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8