2022 SPRING/SUMMER

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SCIENCE & TECHNOLOGY

DNA EVIDENCE IS....

STATE VS. DUBOSE, WHAT COMES NEXT?

BOOK REVIEW "JUNK SCIENCE AND THE AMERICAN CRIMINAL JUSTICE SYSTEM"

IS THE FOX GUARDING THE HENHOUSE?

THE QUAGMIRE OF INTRODUCING SOCIAL MEDIA AT TRIAL

AMICUS REPORT

TECHNOLOGY REPORT

CONTENTS

Letter From The President 3

Letter From The President-Elect 4

Director's Dialogue 5

Executive Committee 6

Committee Chairs 6

Board of Directors 6

Welcome New Members 7

Past Presidents 7

AMICUS REPORT 8

DNA Evidence Is 12

State vs. DuBose, What comes Next? 14

Book Review: "Junk Science And The American Criminal Justice System" 17

Is The Fox Guarding The Henhouse? 19

The Quagmire Of Introducing Social Media At Trial 26

Technology Report 30

CLE Chair Update 31

2022 CLE Schedule 31

MISSION STATEMENT

- To defend the rights secured by law of persons accused of the commission of a criminal offense;
- To educate and promote research in the field of criminal defense law and the related areas;
- To instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities; to promote the advancement of knowledge of the law as it relates to the protection of the rights of persons accused of criminal conduct;
- To foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited continuing legal education programs;
- To educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the bill of rights and individual liberties;
- To provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

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

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

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

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

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

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

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

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

LETTER FROM THE PRESIDENT

JERRY SIMMONS

President, OACDL

The following pages contain articles and information of professional interest to our membership and to other interested parties (e.g., Judges among them). Taken together with our very popular and vital Listserve, our developing brief bank, our popular substantive seminars and available congeniality with each other, the Vindicator has remained an important part of OACDL's ongoing efforts to develop and enhance the professional skills and tools that make us all better lawyers. Better lawyers contribute to better outcomes for our clients. That is what we are all about as an organization. Many thanks to Publications Chair Alonda Bush and her committee for providing all of us with quality criminal law scholarship.

Over the coming months we will be losing to retirement our unofficial leader, the person who, for almost three decades, has been the glue holding this organization together. Susan Carr is retiring! Her unfailing dedication to OACDL and its goals, as set out in our Mission Statement, has been of more value to this group than all of our Presidents put together. We owe her a deep debt of gratitude for a superlative job as our Executive Director.

We knew we were getting a good one back in 1993, and she has easily exceeded what any reasonable employer could expect. Also, as Steve Carr, Susan's husband, is also retiring as Executive Director of the Central Ohio Association Of Criminal Defense Attorneys, please thank them both when you get a chance. We will, of course, continue on as the voice of Ohio's criminal defense bar, and we will always be indebted to Susan for her leadership, and value the friendships she has developed with all of us for the last 29 years.

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LETTER FROM THE PRESIDENT-ELECT

DAN J. SABOL

President-Elect, OACDL

When our calling comes up in conversation, outsiders pose one of two inevitable questions: Why do you defend criminals? How can you defend criminals? Why is simple; How is a bit more complicated.

Why? How about the preservation of our collective freedom? Our presence so critical that our very existence is enshrined within the Constitution. We know what the general citizenry takes for granted—left unchecked, law enforcement would suffer little consternation in trampling our rights. Enjoy freedom? Thank a criminal defense lawyer.

For those who cannot fathom an officer intentionally doing wrong, they should praise us: no academy can possibly train an officer as well as a pointed cross examination. We are the last line of quality control for police. Any well-intentioned officer will leave court better for the experience: perhaps one case lost on that pesky technicality that is the Constitution, but hundreds of future investigations will be properly conducted. The Ohio Associations of Chiefs of Police should give us medals.

There's also that small matter of keeping innocent people out of a cage. Yet our impact extends way beyond exonerating the innocent: assisting in recovery, preventing unjust sentences, keeping families together, and the simple act of putting a defendant's mind at ease as they navigate a foreign and daunting process are services we provide regularly. Few professions allow for such a profound and significant impact on others' lives.

Finally, competition is fun. In what other profession does the job compel you to stand up to and fight the government? To stand in lockstep with your client against the full weight of the government and say "no"? Defense work is tailor made for those of us who grew up stubborn and rebellious.

The How is a bit trickier. Many of the alluring qualities discussed above are inexorably linked to the angst and insecurity inherent in bearing the weight of your client's hopes and freedom. Losses are gutting, internalized, and never forgotten—we always speculate as to what we could have done differently, even in the face of extraordinarily difficult cases. Wins bring more relief than joy, and are quickly cast aside as we eye the next battle. We stand alone in combat against a host of prosecutors, a legion of officers, and, sometimes, the bench. Our job is tough.

This is why OACDL exists—a group of sisters and brothers sharing their accumulated knowledge and experience for the collective good. Have a unique question you haven't seen before? Throw it on the Listserv to a collective mind of hundreds of colleagues. Appearing in an unfamiliar court and unsure of procedure? No sweat—we've got people there. Prosecutors or judges exceeding their authority? Strikeforce. Updates on constantly evolving law and forensic standards? Illuminating CLEs. Need a template for a constitutional challenge? You're covered. The list goes on.

And perhaps most importantly, who can understand our plight better than us? Who appreciates that when a new client sincerely proclaims, "I'm innocent; this will be an easy case," you just picked up one of the toughest cases on your docket? Who else can understand a post-trial adrenaline dump so significant that you break down regardless of whether you win or lose? Sharing war stories, making some room for joy after a win, picking up after a loss, and simply having someone to understand. That is us.

Why? When April's off to court and our twins ask where she's off to, I get to say Momma is going to help people—and really mean it. How? With a little help from my friends.

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DIRECTOR'S DIALOGUE

SUSAN CARR

EXECUTIVE DIRECTOR, OACDL

Don't cry because it's over, smile because it happened!

Thank you. Thank you all so much for the last 29 years. In my last Director's Dialogue column, I wanted to share some memories. They started flooding in - like when I first started and missed my first board meeting. To be fair, I didn't know I was hired. I think the quote was "Crap, did I forget to tell you we hired you?" The priorities in those early days changed daily (actually, some days hourly). From - no one could tell me how many members we had, to what our mission statement was. It was chaos. There was so much to learn. I literally did not know Quash from Squash! We contracted to get an Association Management System so we could tell who our members were, and we found the mission statement – all three pages of it! We have come a very long way. Back then, there was no internet, no website, no email; only snail mail, phone calls and faxes. In 1993, I had three young children. Now, I have teenage grandchildren! When I first came on board, everyone treated me like the younger sister; then the sister, then the older sister, then the aunt, and now the mom. I have loved all of those rolls, but I need to leave before I am everyone's grandma.

The last 29 years have flown by. I still can't believe it's time to say Goodbye. There are so many memories, so many great people I have come to know and care about, so many good times, and so many wonderful people who, unfortunately, are no longer with us.

I wanted to thank people in this, my last column. I can't. There are simply too many of you! I wanted to tell some funny stories about the early days of seminars. I can't. There are way too many (and some too inappropriate for actually writing down!)

I wanted to list the people that have meant so much to not only me, but this organization, who are no longer with us. I can't. There are, sadly, too many who are gone.

But I do want to thank you - all of you. Please know that I adore you. I respect what you do, and why you do it. I admire you. Your dedication and devotion to the cause is heartwarming. I am so very proud of the work we have done together. There is so much more to do, but I know this association will continue fighting the good fight.

But I DO need to thank my husband, Steve Carr. I could not have done this job for all these years without his support. He has been by my side for 42 years. Thank you also to our children - Michelle, Maggie and Kevin. They have assisted with envelope stuffing, name badges, and so much more over the years. I hope to be able to spend more time with you and our grandchildren soon!

Dan Sabol has graciously agreed to allow me to attend his Superstar Seminar party on Thursday, October 13 at the Ivory Room, 1 Miranova Building, Columbus. The annual membership meeting begins at 5:00, with the party beginning at 6:30. I will be there to celebrate OACDL! I hope to see you!

Susan

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AMICUS REPORT

RUSSELL BENSING
AMICUS COMMITTEE CHAIR, OACDL

Can the prosecutor have the victim sit at the trial table with him? Can a judge consider racial bias in determining the credibility of a police officer's explanation of the reasons for traffic stop? Can a defendant be penalized for exercising his Fifth Amendment rights at sentencing?

Well, we're going to find out. The OACDL has filed amicus briefs in those and some other pending cases. Let's take a look.

State v. Montgomery, Sup.Ct. No. 2020-0312. The explanation of why the trial and appellate courts found no problem with having the alleged victim of a sexual assault sit at the prosecutor's table during the entire trial was a bit muddled. The prosecutor had offered that she was permitted to do so "as a state representative pursuant to Ohio Rules of Evidence 615(B)(3) and (4)." The trial and appellate courts held this was permissible under Marsy's law.

Neither the evidentiary rules nor Marsy's law have anything to do with who sits at the prosecutor's table; they deal with who can sit in the courtroom. Traditionally, police officers and other agents of the State have been allowed to sit at the trial table as a "state's representative" under Evid.R. 615(B)(2), but that requires the person to be an officer or employee of the State, and the complainant certainly didn't qualify there.

The novelty of this situation did not go unnoticed; both defense counsel and the trial court commented that they'd "never seen anything like this." There is exactly one case in Ohio which even addresses this point, but the defense never objected to it, and the court never addressed it.

In our amicus brief, we provided several cases from around the country, however, which have recognized the prejudicial impact of having an alleged victim sitting at the trial table. That prejudice should be self-evident, especially in cases of sexual assault, which frequently boil down to credibility disputes.

One of the things I like to make sure of in our amicus briefs is that we don't simply parrot what the appellant's brief says. We took a harder line on the prejudice angle, for example, claiming that this was structural error, which doesn't require a showing of prejudice. I don't know if we'll win that argument, but it makes it easier for the court to adopt the appellant's position, which was that it met the constitutional requirement that the State prove beyond a reasonable doubt that the error was harmless.

This will be the first significant Supreme court case on Marsy's law since it was passed five years ago, and the fact that it passed with 82% of the vote might have something to do with the court's reticence to decide it; it's been fifteen months since oral argument was held. The fear is that the court will simply decide that Montgomery hasn't shown prejudice and uphold the lower court rulings. Unfortunately, prosecutors will take that as a green light to do it and leave the appellate courts to wade into the murky issue of prejudice. Given that Marsy's law gives the family of a victim the same status as the victim, defense lawyers could be presented with the mother of a murder victim not only sitting in the courtroom, but at the trial table.

One interesting factoid about Montgomery: the court took it in on a pro se memorandum asking the court to hear it. Who needs lawyers, right?

State v. Hansard, Sup.Ct. No. 2021-0019. We all know that, however regrettably, a police officer's ulterior motive in making a traffic stop is irrelevant: as long as he has probable cause to believe that a traffic violation was committed, the stop is legal. But can a judge consider the officer's racial bias in determining his credibility as to whether there actually was a violation?

That's subtle distinction, but it's a key one. Our brief to the Supreme Court provided well-known data as to the increased frequency by which black drivers are stopped by the police, and more frequently searched, despite the fact that police are less likely to find contraband on an African-American suspect. That certainly seemed to be the case here: Hansard, a black man, was stopped for a marked lane violation in Gallia County, which has a black population of about 2%. The officer who stopped him wasn't engaged in traffic enforcement; he was engaged in drug interdiction. He testified that over 50% of his arrests were of black people.

The oral argument took place a couple months ago, and it's hard to see what the result will be. To an extent, the argument bogged down into a question of whether the officer was being truthful in observing a marked lane violation. Against, it's a subtle distinction: the real question is whether the trial court could take potential racial bias into consideration in determining whether the officer's account was credible.

And a necessary one: in the court of appeals, the State argued, "Is it possible that people of color are more likely to be involved in drug offenses than other races? Is it more possible that, for whatever reasons, African-Americans who were involved in committing drug offenses are more likely to commit minor traffic violations than whites who were involved in committing drug offenses?"

State v. Brunson, Sup.Ct. No. 2021-1504. This case presents two issues. The first is sentencing. Brunson was convicted of a particularly brutal murder and sentenced to life without parole.

While a defendant does have a 5th Amendment right at sentencing, a defendant's remorse – or the lack of it – has always been a factor for courts to consider in fashioning a sentence. The judge's comments here clearly referenced Brunson's silence, noting specifically his refusal to make a statement to his probation officer and not allocuting at sentencing.

Brunson argued that the statements of the trial judge indicated she'd penalized him for invocating his right to silence. We took a slightly different tack. It makes some sense to treat a failure to allocute at sentencing as lack of remorse if the defendant has already pled guilty, but where, as here, a defendant has protested his innocence from arraignment through trial, it made little sense to demand that he admit his guilt at sentencing. In fact, as a practical matter, doing so can jeopardize post-trial remedies. Regardless of the merits of assigned errors on appeal, the appellate court still has to engage in a harmful error analysis, and it is difficult to imagine that that analysis would not be affected by the defendant's admission at sentencing that he actually committed the crime.

We found numerous cases from around the country which made that distinction, and proposed a narrow rule. Whatever the problems in distinguishing between the failure of the defendant to express remorse and the exercise of his 5th Amendment rights, there is no need to address that distinction where the defendant has maintained his innocence through trial. A defendant who has done that has a 5th Amendment right not to concede guilt at sentencing, and he cannot be penalized with a harsher sentence for doing so.

We didn't find many cases at all on the second issue, because it's pretty much a novelty. During a proffer by one of the co-defendants in the case, he'd ask to consult with his lawyer, and the detectives stepped out of the room. Nobody had thought to turn off the tape machine, and it kept recording. The whole tape was then turned over to Brunson's attorneys, who found that the co-defendant made several exculpatory statements while talking with his lawyer in private during the proffer. The judge ruled that they could not use those statements in impeaching the co-defendant.

There are few things more sacrosanct than the attorney-client privilege, but some courts have ruled that it has to give way to a defendant's 6th Amendment right to confront witnesses against him. After all, the defendant's right is a constitutional one, while the attorney-client privilege isn't. On the other hand, the right of confrontation isn't unlimited – think rape-shield laws – and allowing a defendant to inquire of a co-defendant's attorney what his client told him obviously raises severe

problems.

While Brunson argued that the defendant's right should always overcome the privilege, once again, we proposed a narrower rule than Brunson. We argued that the two should be balanced, and that here, the defendant's right should clearly prevail. First, this wasn't a situation where Brunson was trying to get access to confidential material; it had already been provided to defense counsel. Second, the privilege is also tied in with the right against self-incrimination, and the State already had access to the information, and had no intention of prosecuting the co-defendant for it. (In fact, given that the State was responsible for allowing the disclosure through its incompetence in managing the taping system, it's pretty clear that they couldn't prosecute the co-defendant for any statements he made.)

Brunson was argued in January.

We'll be working on an additional case that the court just accepted jurisdiction on, State v. Ali, which involves harmless error in 404(B) cases dealing with sexual assault and was also accepted on a pro se basis. The case is welcome because there have been some truly horrible cases involving that issue. In two recent cases from separate districts, the panels essentially held that the victim's own testimony could constitute "overwhelming evidence" sufficient to render any error harmless. Stay tuned for more exciting updates from our Amicus Committee!

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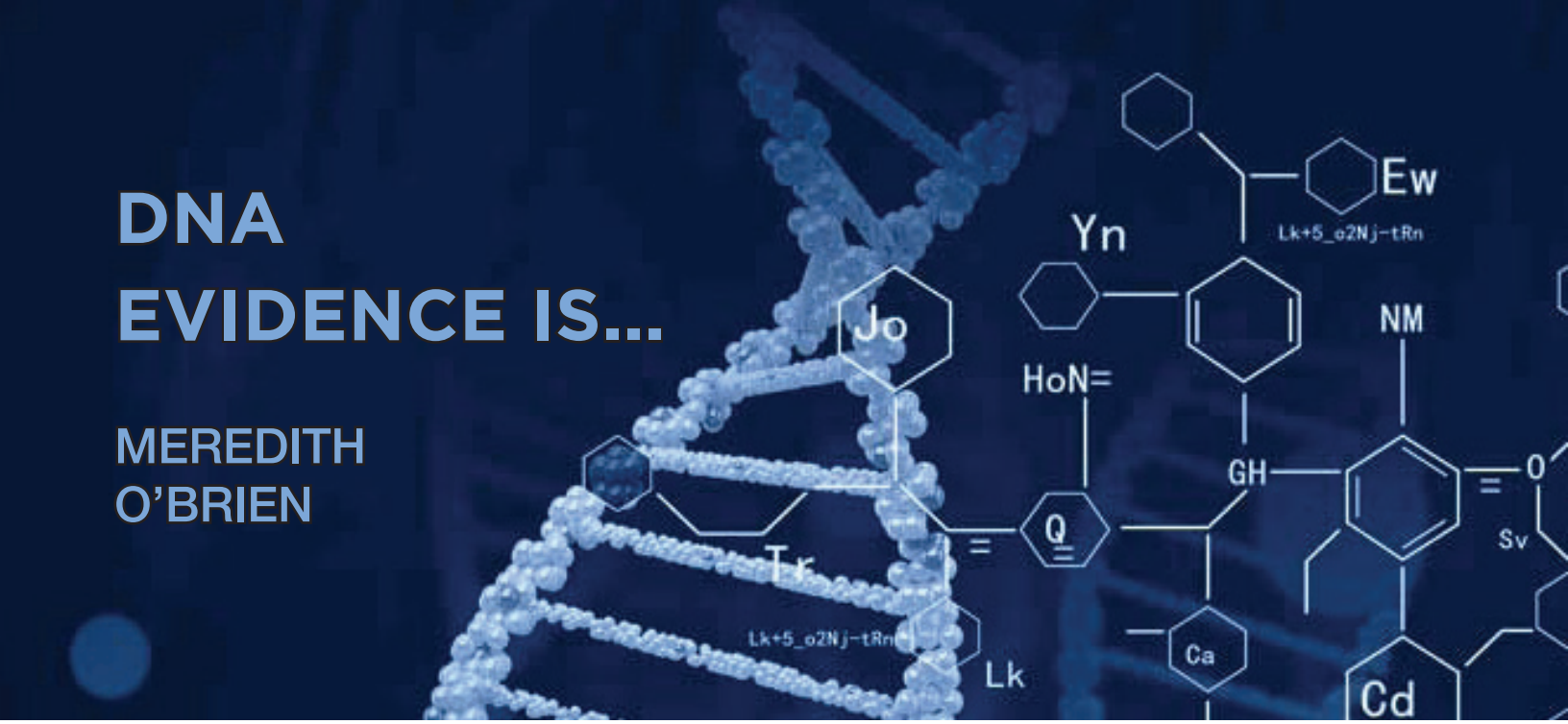

"The DNA evidence in this case is overwhelming!"

"The DNA evidence in this case WILL show..."

"DNA evidence, ladies and gentlemen, is science... it will give you proof beyond a reasonable doubt..."

Proof beyond a reasonable doubt of what? That there's a method? A principle? And an accepted procedure? None of that means DNA evidence or conclusions cannot be challenged by virtue of admissibility, weight, or relevance.

Each of us have elements of deoxyribonucleic acid in our chromosomes that make us unique. DNA (deoxyribonucleic acid) is the most commonly used tool to link persons to crime scenes or to crimes, making crime scene preservation integrity critical, and law enforcement protocol and collection performance uniquely significant. Invisible to the naked eye, DNA can be gathered from almost any tangible object – and today only a few cells can be sufficient. Today DNA is extracted from almost anything, including bone, chewing gum, cigarette butts, clothing, envelope flaps, hair, soft tissue, teeth, and even toothbrushes. Our DNA is present in everything: blood, saliva, sweat, skin, semen, mucus, and even ear wax.

Epithelial cell DNA (or, "touch/contact trace DNA") is a genetic profile recovered from a person's skin cells that are left behind when/if a person touches an item. Touch DNA results are produced to and against defendants in the same genemapper formats as semen, blood, or saliva results offering conclusions and statistics based on analytical data synthesized by crime labs qualified in the scientific measurement of gene patterns.

The reliability of epithelial cell touch DNA significantly differs from the aforementioned blood and semen types due to its ease of transfer. Humans shed between 350,000-600,000 skin cells per day and as the scientists testify, it is easily transferable. This can result in an individual's DNA being present in places he or she never was and/or present on items he or she never actually touched.

Keep this in mind as you evaluate your case, especially with respect to the collection, chain of custody, handling, and preservation of the items or materials alleged to contain genetic profiles/DNA evidence. Developing reasonable explanations for the presence or lackthereof of DNA evidence will be important as you present evidence to a jury.

Crime labs such as the Ohio Bureau of Criminal Investigation (BCI) exist to assist local law enforcement around the state in the prosecution of crimes. Dave Yost has publicly adopted policies regarding all biological and/or DNA submissions and analytical protocol which can be found at www.ohio.bci.gov.

Begin with your lab's evidence submission policy and determine whether standards memorialized within the policy have been met. Request supplemental discovery in the form of credentials of persons handling; documentation of items received by lab persons, including proper packaging requirements, laboratory request details, and evidence item acceptance or non-acceptance.

Attacking DNA evidence admissibility, weight, or both is ideally done with the assistance of defense experts, but self study is vital even when experts are utilized. The State will typically pres-

ent expert's of their own, usually well seasoned, well trained, expert testifyers on the stand talking about loci, alleles, chromosomes, stutter, and other things like nucleotides and mitochrontrial DNA testing, for which they apply statistics, ratios, and likelihoods to persuade fact-finders.

In attacking weight or admissibility, remember that DNA testing and technology is always advancing, particularly in the last ten years. Mixtures (samples with containing DNA from several people), touch DNA, and Y-STR (genetic profiles attributable within a male line), for example, all deserve weight challenge considerations as technology has advanced in sensitivity, the analysis of relevance, undue prejudice, and/or confusion becomes significantly more critical. How many individuals are attributed to the sample? How much DNA did each individual contribute? What are the baseline standards by the lab used for its interpretations of this data/evidence? Basically, can you reasonably explain the presence of your client's DNA and/or can you argue that another's DNA could or should be present or attributable to any given sample?

Then ask yourself whether the evidence as presented tends to prove or disprove a fact in your case and more importantly, is the evidence as it is presented, reliable. Is the witness anticipated to testify qualified and is the scientific method/principle she utilized accepted? The ultimate question is whether the evidence and/or testimony proponed has true probative value that outweighs time-consuptrion, cumulative presentation, and/or unfair prejudice. Does the evidence threaten to confuse the jury? Your client, by and through you, has the right to know these opinions offered in your professional capacity in order to determine how to proceed with his or her case. You have a right to seek to and to obtain all the information necessary by and through the discovery process in order to render this advice, and you must because DNA evidence is powerful. It's the CSI effect prosecutors love and sometimes hate to deal with. DNA is impressive but it is not infallible and while professional experts will testify, the analysts at BCI will and do admit to the known weaknesses in any given methodology and will concede to the limitations of their conclusions when confronted. You just have to come in prepared.

If you seek exclusion of DNA evidence and challenge admissibility at trial, consider requesting the court to appoint its own expert(s) to report and rely on to explain the general acceptance or sound methodology requirements of DNA testing and procedure as well as its reliability and standard methods of practice in criminal prosecutions - particularly in newly or newer developed technology associated with CODIS and genealogical testing in cold cases.

Challenging/attacking the weight of DNA evidence requires full and complete information and understanding of 1) the chain of custody of the evidence/items; 2) the credibility of the analyist rendering his or her opinion as to the data and conclusions related to the item/evidence; 3) the manner in which the analyist applied the method of technology or science to render her or his conclusions; and, sometimes 4) the specific facts known to and/or the specific data analyzed by the witness in order to come to an opinion.

Could any of the items containing your client's DNA been subject to cross contamination and is there any record of such a thing to have occurred at the lab analyzing his or her evidence? How about with that specific analyst? Are there so many profiles contained in the sample derived from a scene or item that some genetic profiles cannot be determined? How much larger of a sample would have needed to be collected in order for the analyst to tell the jury who else was there? Or held the gun? Is it convenience, luck, or something else when the lab's base standards or thresholds are such that a genetic profile so similar to your client's could be determined when her sister, who was allegedly also present at the crime scene and drank out of the same water cup, cannot be excluded?

The most important idea to keep in mind is DNA evidence is defensible; it's determining how and when to attack it that is most complex. There's no getting around its potential power and influence in the courtroom and therefore it is our duty to understand its methodology, principals, and history to the best of our abilities. DNA science is just like any other – it has and continues to develop over time and it is vulnerable to interpretation. Don't be surprised when true perseverance in understanding how and why genetic profile conclusions are rendered not only offers you the unique ability to utilize both the discipline's fortes and its limitations in advocation of your client's innocence but will also lead you to the reasonable, practical and, sometimes undisputed doubt you seek in ultimately arguing against the government's offer of proof. DNA evidence is… just like any other scientific discipline: worthy of respect and vulnerable to interpretation.

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State vs. DuBose What Comes Next?

ROBERT B. McCALEB

Big changes to pretrial detention practice in State v. DuBose, but what comes next?

In January, the Ohio Supreme Court decided *DuBose v. McGuffey,* 2022-Ohio-8. If you absorb one thing from this piece, or from DuBose itself, let it be this: *"public safety is not a consideration with respect to the financial conditions of bail."*

What happened in *DuBose*?

DuBose was charged in Hamilton County with two counts of murder, one count of aggravated robbery, and one count of aggravated burglary. He was arrested in Las Vegas and extradited to Ohio. After going back in forth on bail in several hearings, the trial court eventually settled on $1.5 million. It based its decision on three things: the seriousness of the charges, an unsworn statement that DuBose had used a fake ID when arrested in Las Vegas, and unsworn, vague statements from the alleged victim's family that they feared DuBose. The trial court placed especial weight on the alleged victim's family's claimed fears. In effect the trial court imposed a high bail precisely so that Dubose *couldn't* pay it and therefore couldn't be released pretrial.

DuBose was indeed not remotely able to pay the set amount, so he filed a habeas petition in the First District. The appellate court granted the writ on the grounds that the government had not disputed DuBose's inability to pay, adding that "DuBose's high bail was effectively a denial of bail, without the trial judge making any of the required statutory findings" set out in R.C. 2937.222, which deals with the denial of bail. DuBose's bail was reduced by the appellate court to $500,000 with several additional non-financial conditions imposed to address public safety.

The government appealed to the Ohio Supreme Court, raising two propositions of law, the first having to do the standard of review; the second - the more consequential one and the subject of this piece - concerning the import of the alleged victim's family's safety concerns on the appropriate bail amount.

The Supreme Court (in a 4-3 decision with one majority opinion, one concurrence by Justice Donnelly, and one dissent each by Justices Kennedy, Fischer, and DeWine) held that the financial condition of bail set by the trial court was unconstitutionally excessive because it was more than the amount reasonably necessary to ensure Dubose's appearance in court, the relevant factor in setting the financial conditions of pretrial release. In reaching this conclusion, the Court considered the facts that (1) the trial court expressly set bail at an amount that ensured Dubose could not be released pretrial, and (2) the trial court's asserted reasons did not provide an adequate legal basis for the bail amount because the alleged victim's family's safety concerns were irrelevant to determining what bail amount was necessary to reasonably assure Dubose's appearance in court.

The Court began its analysis by noting that, "[i]n the exercise of its discretion" under Rule 46, "a trial

court may not impose bail that violates the constitutional prohibition against bail in an amount higher than an amount reasonably calculated to ensure the accused's presence in court." But while Rule 46 generally authorizes courts to impose "any . . . constitutional condition considered reasonably necessary to ensure appearance or public safety," the rule's 2020 amendments affected which kinds of conditions can be imposed to ensure appearance and which can be imposed to ensure public safety.

Under new Rule 46, a court "shall release the defendant on the least restrictive conditions" that will "reasonably assure" public safety and the defendant's appearance. But—and this is the key to *DuBose* - "[i]f the court orders financial conditions of release, those financial conditions shall be related to the defendant's risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant." This final clause of Rule 46(B) led the Court to conclude that "public safety is not a consideration with respect to the financial conditions of bail" and that "public safety concerns [instead must] be addressed by imposing non-financial conditions" like day reporting, drug testing, and no-contact orders.

So, what is the current state of the law after DuBose and the recent Rule 46 amendments?

First of all, it must be borne in mind that Rule 46 *does* tell trial courts to consider the severity of the offense when setting even financial conditions, despite the fact that financial conditions are not to be used to protect the public. Although the law in this area is still developing, this probably means a trial court can consider the severity of the offense in terms of its encouraging flight—after all, one is much more likely to flee the jurisdiction to avoid an aggravated murder charge than an aggravated disorderly conduct.

Today, then, the basic rules for determining the conditions of pretrial release are as follows:

There is a presumption of pretrial release on some set of conditions, and this presumption can only be rebutted in accordance with R.C. 2937.222.

When a summons has been issued and the defendant has appeared pursuant to that summons, release on personal recognizance is presumed. Otherwise, the court may impose a mix of financial and non-financial conditions of pretrial release as set forth in Crim.R. 46(B). These "shall" be the "least restrictive conditions" that will "reasonably assure" that the defendant appears and that the community is safe.

Concerns about public safety/alleged victim safety can only be addressed through non-financial conditions of release (as non-exhaustively set forth in Crim.R. 46(B)(2)(a)-(i)). Financial conditions, on the other hand, must be related to the risk of non-appearance and "shall be in an amount least costly to the defendant" while still geared to "reasonably assure" appearance.

Although *DuBose* is one of the first major cases in this area since the 2020 Rule 46 amendments, there is actually not much new here. Rule 46 already tied bail explicitly to appearance and separated it from public safety; Article I, section 9, of the Ohio Constitution already required courts to set bail at a level geared to release, not detention; R.C. 2937.222 already set out the only available legal process for preventative pretrial detention in Ohio. And yet we all know that courts throughout the state have ignored, misinterpreted, or even flouted these rules and laws. What *DuBose* does, more than anything else, is make those rules and laws crystal clear. But just in case, I'll quote it again: "public safety is not a consideration with respect to the financial conditions of bond."

What will happen now?

Obviously, *DuBose* is a victory for criminal defendants and a vindication of a right that has been protected in Ohio's Constitution since 1803. It also leaves the law in a state of flux and it's unclear how things will unfold from here.

Will we see more R.C. 2937.222 hearings?

Because *DuBose* is pretty clear that high bonds can, without proper support, operate as de facto no-bonds, the government will have a harder time than before keeping our clients locked up pretrial. But *DuBose* also made clear that there is an avenue for indefinite pretrial detention: the no-bond hearings contemplated by R.C. 2937.222 for certain felony offenses.

We have already had one in Cuyahoga County (in

State v. Roarty-Nugent; no-bond denied), and there has been at least one in Lucas County (*State v. Blackshear*; no-bond granted). There will probably be more, although they're designed to be difficult for the government to pull off and the statute provides for an immediate expedited appeal if bail is denied.

Will we hear even more boilerplate in bail hearings?

The Supreme Court provided a fairly clear roadmap for how to obtain a constitutionally high bond. It is reasonable to expect that prosecutors, certain judges, and other bail-hostile actors such as bondsmen will use the available mechanisms to keep as many accused detained pretrial as possible.

Be on the lookout for incantations like "serious offense" or "long criminal record," and especially "risk of flight" (particularly if your jurisdiction uses automated PSAs) and be ready to explain how non-financial conditions, especially day reporting and ankle monitors, can mitigate against the risk of flight.

Will we see a ton more habeas practice?

DuBose made clear that the proper remedy for an unconstitutionally high bond—even one so high as to be essentially a no-bond—is a habeas action. The Eighth District's decision in *Palmer-Tesema v. Pinkney* (pre-*DuBose*) is a good place to familiarize yourself with a winning argument. So is the Ohio Supreme Court's decision in *Mohamed v. Eckleberry*, 2020-Ohio-4585, where the Court granted Mohamed's petition for a writ of habeas corpus and lowered his bail bond. But habeas work is extraordinarily technical and easy to foul up, so be prepared to expand your knowledge in this area or hone it, because *DuBose* has given us a great starting point to win bond habeases, and the cases should start piling up over the next few years.

Will Ohio House Republicans actually try to amend the Constitution over DuBose?

Ohio House Republicans have introduced a proposed constitutional amendment, H.B. 607 and Joint Resolution 2, that would require judges to consider public safety when setting the financial conditions of pretrial release. If passed, it would head to the ballot in November. The resolution would add to the Ohio Constitution the following very bad sentence: *"When determining the amount of bail, the court shall consider public safety, a person's criminal record, the likelihood a person will return to court, and the seriousness of a person's offense."* This would, of course, take us right back to the bad old days before *DuBose*.

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Book Review: "JUNK SCIENCE AND THE AMERICAN CRIMINAL JUSTICE SYSTEM"

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We've all heard the testimony, read the transcripts. It's absolutely certain, the witness says, 100%. That fingerprint in the smeared blood by the light switch. Or maybe the scratches on the shell casing or the shoeprint in the flower bed or the tire track in the mud. Maybe it's the pubic hair from the rape kit or a bite mark on the breast. The expert compares it with something from the defendant, maybe with the naked eye, maybe with a comparison microscope. And then tell the jury,

"Yup. It's a match. You can trust me. I can't be wrong about this." It's not just those Sesame-Street experts who look at one thing and say it looks like another. It's arson investigators and SANE nurses and the folks who can always recognize shaken baby syndrome and . . . . It's the whole gamut of "expert" witnesses, proud, credentialed members of one or another impressive-sounding organization. They point to their training and experience, their years of study. Maybe there's even a *Daubert* hearing. But the judge lets them testify to whatever because . . . . Well, because judges always let it in. And the jury eats it up. And your client is guilty.

That's legally guilty. Because, of course, maybe he didn't do it.

Oh, we know about the 2009 NAS report[1] and the 2016 PCAST report.[2] But those reports are dry, fusty, all sciencey and academic, lifeless. We need some familiarity with them; we need to cite them in motions and briefs and to demand that so-called experts respond to them on cross. But they rarely move judges to grant our *Daubert* motions, and cross-examination on them too often leaves jurors cold.

What moves jurors and judges is what also helps us internalize and fully grasp the message isn't the data and scientific analysis. What moves them, and us, is the story. As trial and appellate lawyers, we know that. We're storytellers ourselves. And we know, especially, the power of the wrongly convicted actually innocent. So does M. Chris Fabricant, the Innocence Project's Director of Strategic Litigation and author of the terrific new book *Junk Science and the American Criminal Justice System*.

Fabricant is a story teller. He frames his book around the cases of three innocent men, one each from Virginia, Texas, and Mississippi. All were convicted of capital murder based on bite mark evidence, the junkiest of junk science.[3] But if his focus is on those cases and on bite marks, his scope is far wider. Along with those stories, he interweaves much of the rest of the junk science universe: hair comparison, arson, shaken baby syndrome, blood spatter, comparative bullet-lead analysis, and ballistics.[4] He tells how those so-called sciences were admitted into courtrooms across the country, how they led to convictions, and sometimes executions, of factually innocent people.

Most importantly, Fabricant shows how the junk science has been undermined. And he goes to the hearings and seminars and symposiums where the undermining has mostly been viciously fought

against and then downplayed by the self-interested forensic community, and by the prosecutors and the courts. Even worse, when it finally conceded that hair comparison and comparative bullet-lead analysis were junk, the government made virtually no effort to undo the damage. After all, those folks were convicted. Finality trumps innocence.

Keith Harward, Steve Chaney, and Eddie Howard, those innocent victims of bite-mark nonsense were each, after decades in prison, exonerated. But as Fabricant makes sadly clear, those exonerations were the exceptions, not the norm. It took years, but mostly it took luck – attracting the attention of the right lawyers (including Fabricant and the Innocence Project), the good fortune that the exonerating evidence still existed, and prosecutors and courts willing, ultimately if grudgingly, to allow and then accept the results of testing and investigation. Feel-good results, sure. But these aren't examples of the system's working, they're examples of its failures.

Fabricant's is an important book. Even better, it's well written and engaging. My one quibble is that it needs an index. Quibble aside, read it. Give it to young lawyers to read. Give it to prosecutors. Give it to judges.

1. "Strengthening Forensic Science in the United States: A Path Forward," https://nap.nationalacademies.org/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward
2. "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf
3. Fabricant mentions, more than once, that In 1999, a member of the American Board of Forensic Odontology conducted a study and concluded that when a forensic odontologist identified the person who caused a bite mark on a victim the identification was wrong 63 percent of the time. He doesn't add, and doesn't need to, that if the study's report is valid, when they say the defendant is guilty because he caused the bite mark, it's probably good evidence that the defendant is innocent.
4. Fingerprints should be on this list, but they're not. Fabricant points out problems with them, but he's inclined, as I suspect most of us are, as insufficiently validated rather than inherently unreliable.

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IS THE FOX GUARDING THE HENHOUSE?

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The Fox is Guarding the Henhouse - Is There an Ongoing Abuse of Discretion by the Director of the Ohio Department of Health in Issuing and/or Renewing BAC DataMaster Operator and Senior Operator Permits?

Introduction:

A critical issue exists, statewide, regarding the current practice and procedure of the Ohio Department of Health (ODH) of conducting "proficiency examinations" on BAC DataMaster permit holders without using alcohol simulation solutions with known target values, despite the fact that the Ohio Administrative Code (OAC) requires the use of "samples" during proficiency examinations.

The ODH currently renews BAC DataMaster operator and senior operator permits by, in relevant part, permitting permit holders to test their own breath by blowing into a BAC DataMaster. As long as this self-administered test produces a result – any result – the ODH renews the permit. This custom and practice is scientifically unreliable and, amazingly, has been ongoing since approximately 2009.

The absurdity of this practice can best be exemplified by a February 28, 2020 proficiency examination during which a senior operator, testing his own breath, produced a BAC result of .037 g/210L! Incredibly, a representative of ODH marked this proficiency examination result as a pass and renewed the senior operator's permit! The State of Ohio's explanation for this only served to highlight the ludicrousness of this practice:

> ...the evidence will show that this particular officer, who had been off duty the night before, had indulged himself in a night of drinking. When he came in the next day for the proficiency exam, there was residual amounts of alcohol still on his breath. . . . This officer did receive a renewal permit from ODH even despite the high test because he administered the test sufficiently to document his proficiency.

This is the current – and longstanding – custom and practice of the ODH and is simply inexcusable.

Compounding an already clearly deficient process, on March 16, 2020 the ODH "temporarily" suspended BAC DataMaster training classes and in-person operator and senior operator renewal testing due to COVID-19. Since that time, the ODH has renewed BAC DataMaster operator and senior operator permits based on nothing more than the permit holders' submission of their own self-administered and unsupervised BAC DataMaster test results of their own breath. As we have already seen, it makes no difference to the ODH what test result is reported – all that is necessary is that some test result is produced.

Dr. Alfred E. Staubus[1] has recently opined that the ODH's "proficiency examination" practice and procedure is ***scientifically invalid*** and fails to meet the regulations set forth in the Ohio Administrative Code

(OAC) § 3701-53-08(C)(2) and OAC § 3701-53-08(E).

The issue remains as to whether the ODH has unfettered discretion to renew BAC DataMaster operator and senior operator permits without requiring scientifically valid proficiency examinations? Here, the fox is clearly guarding the henhouse.

ODH Regulations are Subject to an Abuse of Discretion Attack:

It is well-known that the Supreme Court of Ohio has held that "an accused may not make a general attack upon the reliability and validity" of approved breath testing instruments. See, State v. Vega, 12 Ohio St.3d 185, at 190. This is so, the Supreme Court has told us, because the General Assembly has legislated that the "bodily substance" withdrawn pursuant to R.C. 4511.19(D)(1)(b) (which includes "the defendant's . . . breath") "shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code". See, R.C. 4511.19(D)(1)(b).

-R.C. 3701.143 empowers the director of the ODH to "determine, or cause to be determined, techniques or methods for chemically analyzing a person's . . . breath . . . in order to ascertain the amount of alcohol . . . in the person's . . . breath" and mandates that the director "shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses".

-The techniques, methods and regulations for collecting, handling, and testing blood, urine, breath, or other bodily substances, as well as the "qualifications of individuals to conduct" such analyses, are set forth in the OAC, specifically, OAC Chapter 3701-53.

But does the above-described legislative empowerment of the Director of Health grant the Director unfettered discretion in issuing and renewing BAC DataMaster operator and senior operator permits?

The Supreme Court of Ohio has apparently answered this question in the negative. In *Sterling Drugs, Inc. v. Wickham* (1980), 63 Ohio St. 2d 16, the Ohio Supreme Court addressed a declaratory judgment action challenging the State Board of Pharmacy's listing of pentazocine as a Schedule II controlled substance. In its decision, the Supreme Court noted that "[a] rule adopted by an administrative agency may be invalid by being unreasonable or unlawful for various reasons". Illustrative "reasons" cited by the Court included: "Ohio courts have . . . invalidated agency rules for the reason that the rule promulgated exceeded the rule making authority delegated by the General Assembly"; "the agency failed to comply with the procedural requirements set forth in R.C. Chapter 199 respecting adoption of rules"; and "the rule is otherwise unreasonable" (specifically citing Stouffer Corp. v. Bd. of Liquor Control (1956), 165 Ohio St. 96).

In *Sterling, supra*, the Court went on to cite Zangerle v. Evatt, 139 Ohio St. 563, 41 N.E.2d 369 (1942) for the proposition that "[c]ourts will not aid in making or revising rules of administrative officers, boards, or commissions, being confined to deciding whether such rules are reasonable and lawful as applied to the facts of a particular justiciable case." Id., at 22.

Thus, while the *Sterling* Court maintained the general rule of judicial deference to agency determinations, the Court would not go so far as to sanction blanket judicial approval of agency actions that were neither in accordance with the law, nor supported by substantial, probative, and reliable evidence, i.e., scientifically acceptable practices.

Specifically, in relation to OVI cases, the Supreme Court of Ohio left open an Accused's ability to challenge the director of health's promulgation of regulations by asserting an abuse of discretion. In *State v. Vega* (1984), 12 Ohio St.3d 185, 465 N.E.2d 1303, the Supreme Court stated that "R.C. 3701.143 authorizes the Director of Health to determine suitable methods for breath alcohol analysis. By virtue of Ohio Adm. Code 3701-53-02(B)(2) the intoxilyzer has been approved as one of several breath testing instruments". This quote included a footnote which stated: "It is noted that there has been no assertion that there was an abuse of discretion by the Director of Health in promulgating these rules". Id., at 187, footnote 2.

Most recently, in *Cincinnati v. Ilg*, 141 Ohio St.3d 22, 21 N.E.3d 278, 2014-Ohio-4258, 21 N.E.3d 278, the Supreme Court of Ohio affirmed the First District Court of Appeals' decision affirming the trial court's

order excluding an Intoxilyzer 8000 breath test result as a sanction for a failure to comply with a discovery order directing the ODH to provide its computerized online breath archives data (COBRA data). In its decision, the Supreme Court cited the holding in Vega, supra, for the proposition that the General Assembly had "legislatively resolved the questions of the reliability and relevancy of intoxilzyer tests" and that "[b]ecause the legislature provided for the admissibility of intoxilyzer tests if analyzed in accordance with methods approved by the director of ODH, an accused may not present expert testimony attacking the general scientific reliability of approved test instruments". The Supreme Court noted, though, that "Vega did not assert any claim of abuse of discretion by the director of ODH". Id., at ¶23.

Accordingly, the Supreme Court of Ohio has recognized that the regulations promulgated by the director of the ODH relative to breath, blood and urine testing are subject to an abuse of discretion attack.

ODH Qualifications for Operator and Senior Operator Permits:

BAC DataMaster "senior operators" are "responsible for the care, maintenance and instrument checks" of such breath testing instruments. See, OAC § 3701-53-07(C). Little more than being a law enforcement or corrections officer with a pulse is required to be qualified to be a BAC DataMaster "senior operator". The "qualifications" are, generally:

> (1) Being a high school graduate or having passed a GED test;
>
> (2) Being a certified law enforcement officer "sworn to enforce sections 4511.109 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration, or a certified corrections officer"; and
>
> (3) Demonstrating the ability to "properly care for, maintain, perform instrument checks upon and operate the evidential breath testing instrument by having successfully completed a basic senior operator, upgrade or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit".

See, OAC 3701-53-07(D).

To be qualified to be a BAC DataMaster "operator", the qualifications are, not surprisingly, even simpler:

> (1) Being a high school graduate or having passed a GED test;
>
> (2) Being a certified law enforcement officer "sworn to enforce sections 4511.109 and/or 1547.11 of the Revised Code, or any other equivalent statute or local ordinance prescribing a defined or prohibited breath alcohol concentration, or a certified corrections officer"; and
>
> (3) Demonstrating the ability to "properly operate the evidential breath testing instrument by having successfully completed a basic operator or conversion training course for the type of approved evidential breath testing instrument for which he or she seeks a permit".

See, OAC 3701-53-07(E).

Clearly with respect to the qualification requirement of "[d]emonstrating the ability to "properly care for, maintain, perform instrument checks upon and operate" and/or "properly operate" the BAC DataMaster, OAC 3701-53-08(C) requires "[individuals desiring to function as senior operators and operators" to be "subject to surveys and proficiency examinations conducted at the director's discretion".

"Surveys" are defined by OAC 3701-53-08(C)(1) as follows:

> (1) A survey shall consist of a review of the permit holder's or applicant's compliance with the requirements of this chapter.

"Proficiency examinations" are defined by OAC 3701-53-08(C)(2) as follows:

> (2) A proficiency examination shall consist of an evaluation of the permit holder's or applicant's ability to test samples using the evidential breath testing instrument for which the permit is held or sought.

OAC 3701-53-08(E) further elaborates on what is required to occur during proficiency examinations:

(E) *During proficiency examinations, senior operators, operators and applicants shall accept samples, perform tests and report all results to a representative of the director or the proficiency examination administered by a national program for proficiency testing. During surveys and proficiency examinations, permit holders, applicants and laboratories shall grant the director's representatives access to all portions of the facility where the permit is used or is intended to be used, and to all records relevant to compliance with the requirements of this chapter.*
(Emphasis added).

Accordingly, OAC 3701-53-08(E) requires that, during "proficiency examinations", "senior operators", "operators", and "applicants" must:

(a) "accept samples"; and

(b) "perform tests and report all results to a:

(i) representative of the director (of ODH); or

(ii) the proficiency examination administered by a national program of proficiency testing; and

(c) "grant the director's representatives access to all portions of the facility where the permit is used or is intended to be used, and to all records relevant to compliance with the requirements" of OAC 3701-53.

BAC DataMaster "senior operator" and "operator" permits "expire one year from the effective date" (unless revoked or surrendered) and, accordingly, permit holders must seek renewal of their issued permits "by filing an application with the director no sooner than six months before the expiration date of the current permit". See, OAC 3701-53-09(C).

Renewal of Operator and Senior Operator Permits:

Qualifications for renewal of operator and senior operator permits are set forth in OAC 3701-53-09(F), which states, in relevant part:

(F) *To qualify for renewal of a permit under paragraph (A) or (B) of this rule:*

(1) A permit holder shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the applicable provisions of rule 3701-53-07 of the Administrative Code for issuance of the type of permit sought.

As the "qualifications established by the applicable provisions of rule 3701-53-07" of the OAC for BAC DataMasters include demonstrating "that he or she can properly care for, maintain, perform instrument checks upon and operate" BAC DataMasters (for senior operators) and demonstrating "that he or she can properly operate" BAC DataMasters (for operators), and as OAC 3701-53-08(C) requires applicants, senior operators and operators to be subject to surveys and proficiency examinations, it is apparent that "surveys" and proficiency examinations are required by the OAC as part of the renewal of senior operator and operator permits. Indeed, in practice, the ODH does subject senior operators and operators to "surveys" (in the form of a test) and "proficiency examinations" (in the form of requiring senior operators and operators to conduct a BAC DataMaster test).

What are "*proficiency examinations*"?

Recently, the authors of this article successfully attacked the ODH's custom and practice of conducting proficiency examinations without using alcohol simulation solutions with known target values in an aggravated vehicular homicide prosecution[2] involving a BAC DataMaster test result. In that case, Dr. Alfred Staubus opined that the ODH proficiency examination practice and procedure is ***scientifically invalid*** and fails to meet the regulations set forth in the Ohio OAC § 3701-53-08(C)(2) and OAC § 3701-53-08(E).

In reaching this conclusion, Dr. Staubus defined "proficiency examinations" as follows:

Proficiency testing can be defined as the evaluation of practitioner performance against pre-established criteria. In breath-alcohol testing, the practitioner is the officer who operates the evidential breath testing (EBT) instrument to measure a subject's breath-alcohol concentration. The pre-established criteria for proficiency testing in a breath-alcohol testing program is normally a proficiency test result by the breath-alcohol testing officer within plus or minus (+/-) 0.005 g/210 L of the target value for an alcohol simulation solution that is not from the same batch/lot of alcohol simulation solutions used to perform the calibration checks of the EBT instrument.

Further, Dr. Staubus opined that a "comprehensive quality assurance (QA) program for evidential breath-alcohol testing is needed to safeguard the breath-alcohol testing procedure and validate its results" and that a comprehensive QA program includes "proficiency testing, inspections, and evaluations". Dr. Staubus's definition of a "proficiency examination" requires the use of a test sample with a known target value.

The current OAC arguably recognizes the need for, and requires, the use of a test sample with a known target value as part of the required proficiency examinations. In the two separate locations within OAC 3701-53-08 wherein proficiency examinations are defined and described, the word "sample" is used: "[a] proficiency examination shall consist of an evaluation of the permit holder's or applicant's ability to test samples" (OAC 3701-53-08(C)(1)); "[d]uring proficiency examinations, senior operators, operators and applicants shall accept samples, perform tests" (OAC 3701-53-08(E)).

The use of the word "samples" within OAC 3701-53-08 raises the issue of what constitutes a "sample" for purposes of proficiency examinations, if not an alcohol simulation solution with a known target value? As noted by Dr. Staubus, a proper proficiency examination would require the use of a sample with a known target value.

Further, historically – and prior to January 8, 2009 – the custom and practice of the ODH was to subject BAC DataMaster operators and senior operators to proficiency examinations by using a sample with a known target value. Passage of such proficiency examinations required the permit holders to use the BAC DataMaster to test the sample to within +/- 0.005 g/210 L of the target value.

Indeed, OAC 3701-53-08 – as it existed prior to January 8, 2009 – more fully described what was meant by the word "sample" in the context of proficiency examinations:

> (C) * * *
>
> (2) A proficiency examination shall consist of an evaluation of the permit holder's or applicant's ability to test samples provided by a representative of the director using the evidential breath testing instrument for which the permit is held or sought. Proficiency samples are presented to the permit holder or applicant in person by representatives of the director.

This previous version of OAC 3701-53-08 made it clear that "samples" were not synonymous with a permit holder's own breath. Rather, "[p]roficiency samples" were "provided by a representative of the director" and "presented to the permit holder or applicant in person" for purposes of testing. Thus, as it was clear that a representative of the director would provide and present a sample to the permit holder or applicant, it was equally clear that the "sample" would be a testing sample, i.e., an alcohol simulation solution with a known target value.

On January 8, 2009, the OAC was revised due to inclusion of the "Intoxilyzer model 8000 (OH-5)" as an approved evidential breath testing instrument. At that time, OAC 3701-53-08(C)(2) was also revised by, in relevant part, removing language relating to proficiency "samples" being "provided by a representative of the director", as well as by deleting the sentence "[p]roficiency samples are presented to the permit holder or applicant in person by representatives of the director". However, despite this revision, OAC 3701-53-08(C)(2) and (E) still retains the requirement that permit holders "test samples" and "accept samples" as part of proficiency examinations.

Dr. Staubus has opined that the use of the word "samples" within OAC 3701-53-08(C)(2) and (E) can only mean samples with known target values – and not a permit holder's own breath:

> It is important to note that the use of the word "samples" within OAC 3701-53-08 refers to an alcohol simulation with a known target value, and not to a permit holder's own breath – which would constitute an "unknown", i.e., would have no known target value (having only a zero target value without other non-zero target values does not permit quantitative evaluation of the proficiency testing procedure). Indeed . . . historically, the word "sample" within OAC 3701-53-08 has always been used to refer to a "sample" (an alcohol simulation solution) with a known target value. Although the OAC was revised in or about 2009, the word "sample", as used within OAC 3701-53-08 to describe and define proficiency examinations, was retained. Further, "sample", when used to describe and de-

fine a proficiency examination, in the context of breath-alcohol testing, clearly refers to the use of a "sample" (an alcohol simulation solution) with a known target value, because an alcohol simulation solution with a known target value is needed to properly administer and conduct a proficiency examination.

It is further important to note that the terms "to test samples" and "accept samples" under OAC § 3701-53-08 are significant and essential to conducting a scientifically valid proficiency test wherein the senior operators' and/or operators' and/or applicants' "proficiency" to correctly operate a breath-test instrument, can actually be evaluated. In the field of forensic breath-alcohol testing, the terms "to test samples" and "accept samples" means that during proficiency examinations, "senior operators, operators and applicants" must be provided with alcohol simulation solutions having known target values in order to evaluate their proficiency test results.

Clearly the ODH has not been using alcohol simulation solutions with known target values when conducting "proficiency examinations" – and has not been doing so for quite some time. Therefore, the ODH has been issuing permits and renewing operator and senior operator permits without conducting scientifically valid "proficiency examinations". Further, arguably OAC 3701-53-08(C)(2) and (E) still require the use of a "sample" with known target values when conducting BAC DataMaster proficiency examinations.

Therefore, arguably the ODH has not been substantially complying with its own regulations as set forth in OAC 3701-53-08(C)(2) and (E) in issuing and/or renewing BAC DataMaster operator and senior operator permits. Alternatively, the director of the ODH has either abused his discretion in revising OAC 3701-53-08 to exclude language clarifying that "samples" must be produced by a representative of the ODH and provided to permit holders and/or applicants, or has abused his discretion in failing to require the use of alcohol simulation solutions with known target values during proficiency examinations.

Since March 16, 2020, the ODH renewed BAC DataMaster operator and senior operator permits ***without*** *even monitoring their already deficient proficiency examinations.*

Compounding an already significant deficiency in the ODH proficiency examination process, on March 16, 2020, the ODH "temporarily" suspended BAC DataMaster training classes and in-person, monitored, operator and senior operator proficiency testing due to the COVID-19 pandemic. This "Breath Permit Renewal Contingency Plan" stated, in relevant part:

For Breath Test Operators and Senior Operators who have a permit with an expiration date prior to July 1, 2020 AND who have not completed a renewal test, follow these instructions to apply for renewals:

1) Perform a proficiency test, including the proficiency test form
a. Subject name is TEST, TEST
b. Operator name and Permit Number use YOUR INFORMATION
c. Provide breath sample when prompted
d. Refusals or exceptions will not be acceptable to document proficiency
2) Print your name and permit number on the subject test form and test ticket
3) Scan and email the proficiency test form and test ticket to BADT@odh.ohio.gov
a. Email subject line RENEWAL REQUEST, Name and Permit number
b. Include your name, agency, permit number, expiration date and contact information

ADT will evaluate the proficiency test form and test ticket to document proficiency and renew permits for operators and senior operators who successfully demonstrate proficiency.

To be clear, even prior to March 16, 2020, the ODH was renewing operator and senior operator permits based solely on permit holders conducting a BAC DataMaster test on their own breath. After March 16, 2020, the ODH was renewing operator and senior operator permits based solely on permit holders' submission of their own, self-administered and unmonitored, BAC DataMaster tests of their own breath.

Neither process is scientifically valid in the opinion of Dr. Alfred Staubus, as failing to use an alcohol simulation solution with a known target value during proficiency examinations does "not meet the requirements needed in a QA program for breath-alcohol testing". Dr. Staubus has further opined that

this process and practice does not meet the requirements of the Ohio Administrative Code, specifically, OAC 3701-53-08.

Dr. Staubus has concluded:

Simply put, the ODH's current (and temporarily modified) "proficiency examination" practice and procedure are scientifically invalid and fail to meet the regulations set forth in the Ohio Administrative Code § 3701-53-08(C)(2) and OAC § 3701-53-08(E).

Conclusion:

The Ohio legislature has empowered the Ohio Department of Health to determine and approve satisfactory techniques or methods to analyze a person's breath to determine alcohol content and to ascertain the qualifications of individuals permitted to conduct such analyses. For far too long, instead of focusing on accuracy and reliability of results, the ODH has "dumbed down" and neutered the OAC regulations relating to breath-alcohol testing, resulting in a process where it is virtually impossible for a law enforcement or correction officer with a high school diploma (or a passed GED test) to fail to obtain, and renew, a BAC DataMaster permit.

It is well past time that the defense bar calls out the ODH and their abuse of discretion in issuing and renewing BAC DataMaster operator and senior operator permits based on scientifically invalid proficiency examinations.

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1. Dr. Alfred E. Staubus is the President of A & A Consultants, Inc. and since 2004 has been an Associate Professor Emeritus in the College of Pharmacy (Pharmaceutics) at The Ohio State University. Dr. Staubus is a member of numerous professional and scientific societies, including the American Academy of Forensic Sciences, Toxicology Section, Society for Scientific Detection of Crime (Past President), and the American Chemical Society. Dr. Staubus has been published in numerous peer-reviewed publications and has testified nationwide in numerous courts as a qualified expert witness in the fields of toxicology and alcohol breath-testing.

2. The State of Ohio subsequently dismissed all alcohol related offenses in this prosecution.

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THE QUAGMIRE OF INTRODUCING SOCIAL MEDIA AT TRIAL

JUDGE FRANK G. FORCHIONE

It is obvious that the world has changed. People no longer appear interested in communicating in person or talking on the phone. Instead, the majority of Americans now live their lives and express their views openly through social media outlets such as Facebook, Instagram, Twitter, and by texting. An increasing number of individuals use social media web pages to offer their thoughts, opinions, rebukes, and a host of personal information to cultivate friendships, cure loneliness, impress others or to improve their self-esteem. Unfortunately, these new technological mechanisms provide incriminating and damaging messages, posts, pictures and videos, which if discovered, could be critical evidence used to bolster lawyers' cases at trial.

One of the biggest obstacles lawyers face is how to obtain social media information. The Federal Stored Communication Act (SCA), 18 USC, Section 2701(et) seq governs the circumstances under which electronic data service and storage providers may disclose a customer's substantive electronic data. The SCA generally prohibits an electronically communicative service (Facebook, LinkedIn, Myspace, etc.) or a company providing remote computing services (Google, Yahoo, etc.) from knowingly divulging to any person or entity the contents of any communications maintained or carried by the service provider. See 18. U.S.C. Section 2702(a). For example, the SCA prohibits Facebook from disclosing the contents of a user's Facebook account to any non-governmental entity, even pursuant to a valid subpoena or court order.

The use of social media and networking has exploded. According to statistics published by Statista Research Development Data, November 3, 2021, 82 percent of the population in the United States has a social networking profile. As a result, social media has now become a powerful discovery tool in which lawyers desperately search for the golden nugget to destroy their opponent's case. However, once this information is discovered, by whatever means, the next major obstacle is whether this evidence is admissible, and if so, how is it introduced into evidence? Depending on the circumstances, the content of social media outlets may be brought forth through several avenues.

Relevance

First, the court must decide whether the social media exhibit is even relevant. At trial, evidence is only admissible if it is relevant to a fact at issue in a case. Ohio Evid. R. 401 defines "relevant evidence" as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." If that hoop is cleared, Evid. R. 403 requires the court to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). Prejudice alone is insufficient; unfair prejudice is required. *United States v. Bailleaux*, 685 F.2d 1105. This point was emphasized in *United States v. Pierce*, 785 F.3d 832 (2nd Cir. 2015), where the court admitted a rap video and images of tattoos posted on the defendant's Facebook page because the evidence was relative to the motive to participate in charged conduct, and demonstrated animosity toward a rival group and loyalty to other gang members, and its probative value was not outweighed by the danger of unfair prejudice.

Courts, though, must also view social media under a close microscope. These platforms are inherently dangerous and lend themselves to exaggeration, braggadocio, foul language, racial bating, and implied threats which could bring forth an improper presumption of guilt. They also include pictures, videos, jokes and comments that could be interpreted in different ways, and may be irrelevant or prejudicial in violation to a defendant's right to a fair trial under the Sixth Amendment.

Authentication

Another factor the court must consider before admitting the proposed evidence is authentication. For example, in Facebook, a user can create a fictitious account under another person's name or gain access to another account by obtaining their username or password. In turn, the courts are seeing more and more fabrication and tampering with social media accounts.

The Ohio Sixth District Court of Appeals outlined two different approaches in the leading Ohio case of *State v. Gibson*, 6th Dist. Lucas Nos. L-13-1223, L-13-1222, 2015 WL 1962850 (May 1, 2015), addressing authentication from social media networking:

> 1) Some courts do not admit the social media evidence unless the court definitely determines the evidence is authenticated;

2) Other courts admit the social media evidence if there is sufficient evidence of authenticity for a reasonable jury to conclude the evidence is authenticated.

Ohio Evid. R. 901 governs the authentication of demonstrative evidence and the threshold is very low. Evid. R. 901 provides a liberal standard for authorization of evidence. *State v. Pruitt*, 8th Dist., Cuyahoga No. 98080, 2012-Ohio-5418. The proponent needs only to submit "evidence sufficient to support a finding that the matter in question is what the proponent claims." Evid. R. 901(A); *State v. Vermillion*, 4th Dist. Athens No. 15CA17, 2016-Ohio-1295. "The hurdle the proponent of the document must overcome in order to authenticate a document is not great***. Thus, the purpose behind authentication is to connect the particular piece of evidence sought to be introduced to the facts in the case by giving some indication the evidence is relevant and reliable. The ultimate decision on the weight to be given to that piece of evidence is left to trier of fact." *State v. Brown*, 151 Ohio App.3d 36, 2002-Ohio-5207, 783 N.E.2d 539, (7th Dist.).

With such a low standard, the 8th Appellate District in *State v. Roseberry*, 197 Ohio App.3d 256, 2011-Ohio-5921, 967 N.E.2d 233 (8th Dist.), reasoned that, "[i]n most cases involving electronic print media, i.e., texts, instant messages, email and photographs taken out of the conversation are authenticated, introduced and received into evidence through the testimony of the recipient of the messages." This finding is exemplified in *State v. Huge*, 1st Dist. Hamilton No. C-120388, 2013-Ohio 2160, where the court found that the witness' testimony that texting was her normal means of communication with the defendant, and that the text messages had been sent from the defendant and saved to her phone, was sufficient to authenticate the message under Evid. R. 901.

In related cases, Ohio courts have addressed the issue as to the admissibility of evidence from social media content, including Facebook, under the authentication requirements of Evid. R. 901. See e.g., *State v. Caslon*, 10th Dist. No. 17AP-613, 2018-Ohio-5362, (trial court did not err in admitting screenshot of Facebook page where witness "had knowledge that the screenshot of the Facebook page was what it purported to be", and there was no evidence to support inference that screenshot photographs were contrived or altered); *Gibson,* supra, 2015 WL 1962850, at 49 (combination of both personal knowledge of the appearance and substances of the public Facebook profile pages, taken in conjunction with *** direct and circumstantial evidence was sufficient to meet threshold admissibility requirement of Evid. R. 901(B)(1)); State v. Ross, 10th Dist. No. 17 AP-141, 2018-Ohio-3027 (testimony by witness that she was Facebook friends with defendant and that the defendant responded to message posted by a witness sufficient for purposes of authentication under Evid. R. 901.).

Hearsay

Courts may also admit social media posts as a hearsay exemption. Ohio Evid. R. 801 defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, Evid. R. 801(D)(2), states that admission by a party opponent creates an exception if "the statement is offered against the party and is (a) the party's own statement, in either an individual or representative capacity." The Court in *State v. Stapleton*, 4th Dist. Pickaway No. 19CA7, 2020-Ohio-4479, allowed this exception when the court found that the cellphone and Facebook records that contained the appellant's own statements are not hearsay under Evid. R. 801(D)(2).

In addition, the court in *State v. Inkton,* 2016-Ohio-693, 60 N.E.3d 616 (8th Dist.) found that the defendant's incriminating post on his Facebook page was an admissible statement by a party opponent. The Inkton court held, "there has been testimony sufficient to support, if believed, that it is what it purports to be." Id. at ¶73. The detective and co-defendant testified there "were numerous pictures on appellant's Facebook page and they were able to determine that the appellant was in fact the person in the pictures, thus properly authenticating them." Id at ¶78. However, the opposite occurred in *State v. Gordon*, 2018-Ohio-2292, 114 N.E.3d 345 (8th Dist.), where the court held that the state failed to identify a photograph allegedly from a Facebook page using the name "Ynko Bullin", while the defendant's cellphone had the name "Ynko" on it. The court found there was no evidence linking the photograph or social media account to the defendant, no evidence who retrieved the photo from Facebook, and no evidence the defendant was one of the people in the photographs. As you can see, the admissibility of a statement by a party opponent must be determined solely by the facts on a case-by-case basis.

Other hearsay exceptions that may qualify are: 1) present sense impression, Evid. R. 803(1); excited utterance, Evid. R. 803(2); and, existing mental, emotional or physical condition, Evid. R. 803(3). Present sense impression permits a hearsay statement that describes or explains the event immediately after perceiving the event. Twitter and Facebook are great examples of people immediately expressing their thoughts and impressions on impulse, often without giving much thought to their comments or feelings. An excited utterance is a statement concerning a startling event made by someone still under stress from it. In *U.S. v. Henry,* 81 M.J. 91 (2021), the court held that a military judge's admission of text messages sent after a sexual assault were admitted as an excited utterance. Lastly, *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) found that "Rule 803(3) is particularly useful when trying to admit email, a medium of communication that seems prone to candid, perhaps too candid, statements of the declarant's state of mind, feelings, emotions and motives." Id. at 570.

Business Record Exceptions

Courts have found on one or more occasions that a cellular telephone record containing text messages may fall within the Business Record Exemption under Ohio Evid. R. 803(B). See *State v. Thomas*, 12 Dist. Warren No. CA 2010-10-099, 2012-Ohio-2430. To qualify as an admission under Evid. R.803, a business record must manifest four essential elements:

1) The record must be one regularly recorded and regularly conducted activity;

2) It must have been entered by a person with knowledge of the act, event or condition;

3) It must have been recorded at or near the time of the transaction; and

4) A foundation must be laid by the "custodian of the records or some other qualified witness".

In order to properly authenticate business records, a witness such as an employee of the company must testify as to the regularity and reliability of the business activity involved in the creation of the record. While firsthand knowledge is not required by the witness providing the foundation, the witness must be familiar with the operation of the business and the "circumstances of the record's preparation, maintenance and retrieval, and that they can reasonably testify on the basis of his knowledge that the record is what it purports to be and that it was made in the ordinary course of business consistent with the elements of Evid. R. 803(B)." State v. Verona, 47 Ohio App.3d 145, 547 N.E.2d 1189 (9th Dist. 1988).

Two cases in support of this proposition are *State v. Blake*, 2012-Ohio-3124, 974 N.E.2d 730 (12th Dist.), where the court held that text messages sent and received by the defendant's cellular phone were properly authenticated as to render them admissible under the Business Records Exception to the Hearsay Rule, and *State v. Glenn*, 2009-Ohio-6549 (12th Dist.), holding that the testimony of a manager for the telephone company provided proper foundation, and the court could admit cellular text messages. See also State v. Norris, 2016-Ohio-5729, 76 N.E.3d 405 (2d Dist.).

Conclusion

A lawyer's use of social media outlets and posts in presenting evidence is now the norm. The trial court may only admit relevant evidence, and the requirement of authentication is a condition precedent. It is also critical to be familiar with the hearsay and business records exceptions as a possible means to convince the court of the evidence's admissibility. Keep in mind, social media can contain helpful information but also a wealth of information that is false, misleading and borderline slanderous. Therefore, it will be up to the trial court to make the difficult decision as to whether information is admissible or not. As the volume of social media use and platforms increase, it will continue to create a quagmire in the courtroom.

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TECHNOLOGY REPORT

JOE HADA
BRAD WOLFE

Over the last two years, the Ohio Association Of Criminal Defense Lawyers has drastically increased its technological presence. Attending a virtual CLE produced by the OACDL is truly a one-of-a-kind experience. This is due to the implementation of green-screen equipment that makes both the speaker and the presentation more visible, improved audio features for in-person and remote speakers, broadcasting software, and even a convenient countdown clock on breaks. Our virtual CLE's also feature submitted questions from the audience appearing on-screen with live mixing and editing by OACDL Secretary and Tech Co-Chair Joe Hada. Presenters are provided with wireless microphones, a presentation remote with pass-through digital highlighting visible to the people attending in-person and virtually, a dedicated monitor to preview their PowerPoint, and soon a touchscreen monitor on the podium for controlling media. The Technology Committee is always looking to improve our product, and we take pride in offering one of the best virtual CLE experiences in the country.

Even as the pandemic (hopefully) continues to conclude, OACDL member feedback indicates that most prefer having a hybrid option to attend CLE's in-person or virtually. Virtual attendance numbers also continue to match or exceed in-person events historically. The Technology Committee appreciates the practicality and long-term use of virtual CLE's and will continue to prioritize and compliment in-person programming with simultaneous online viewing.

In addition to facilitating live, virtual CLE's, the Technology Committee maintains its focus on increasing the OACDL's online database of On-Demand content for CLE credit. We are also working to grow the library of complimentary, non-CLE content for Members to view educationally. Members are always encouraged to consider creating and donating relevant presentations to the OACDL's online database. Members can make filming arrangements utilizing the Technology Committee's studio in Cleveland, and content can also be captured remotely and provided via DropBox or a similar service. To further inquire on either option or provide feedback or suggestions, don't hesitate to contact Joe Hada or Brad Wolfe.

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CLE CHAIR UPDATE

The Year of the Trial

Our CLE committee recognizes that our members are swamped with trials, and so we are working hard to make you a better trial lawyer.

Sex in the Spring is set for May 13th and will feature topics unique to handling a sex case in the trial court.

We hope you take some time off this summer for fun in the sun, but also, please plug into a couple of our 1 year virtual CLE's.

This summer we will bring you a one hour crash course on the Confrontation Clause, and another on Social Media Evidentiary issues (just HOW do you get those snap chat records??)

In June we will also have our beginner/intermediate six hour OVI seminar (it'll be a great refresher for anyone!!)

The end of the summer will culminate with a Felony Trial skills workshop in September.

Let's get to sharpening those trial skills!

2022 CLE SCHEDULE

January 17, 2022
Current Issues in Criminal Law
Virtual

February 18, 2022
Nursing License and DUI
Virtual

March 10 - 12, 2022
Advanced DUI Seminar
Hybrid

May 13, 2022
Sex in the Spring Seminar
Hybrid

June 17, 2022
Beginner/Intermediate DUI Seminar
Virtual

Summer 2022 (July & August, TBD)
Confrontation Clause
Social Media Evidentiary Issues
Virtual

September 2022
Felony Trial Workshop
TBD

October 13 & 14, 2022
Annual Membership Meeting & Seminar
Hybrid

November 17 – 18, 2022
Death Penalty Seminar
Nationwide Conference Center, Lewis Center, OH
Hybrid

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