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Top Ten Evidentiary Issues in Public Entity Cases

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I. Introduction

Mastering the Federal Rules of Evidence is a tall order for defense counsel in governmental tort claims and civil rights cases brought under 42 U.S.C. §1983. An effective advocate grasps how the rules interact and how they are applied in real time.

Some evidentiary problems can torpedo a case without adequate preparation and analysis, but this is not a high wire act without a safety net. Time, advance preparation and speed can be one's friends in a federal courtroom, but only if one understands there are two kinds of trial lawyers, "the quick and the dead." 1 Stephen A. Salzborg, Michael M. Martin and Daniel J. Capra, Federal Rules of Evidence Manual xi (11th ed. 2015).

Knowledge of the Federal Rules of Evidence and their interrelationship in cases involving public entities is essential, but thankfully there are quite a number of rules of evidence that will rarely be confronted. That said, our focus here will be on the evidentiary rules most often encountered.

A. Know the Rules: Before, During and After Trial

Evidentiary issues and the rules of evidence through which we resolve them may surface long before the case is set for trial.

They may also arise during trial, post-trial and on appeal. Counsel representing a public entity client in an Article III court must be nimble in satisfying Rule 16's increasing demands. This includes being aware of when and how to file – or respond to – a motion *in limine* addressing the admissibility of expert testimony, a motion for summary judgment that seeks dismissal of a necessarily fact-intensive excessive force claim, or tailoring the proof to the final pretrial order in which specific evidentiary issues relating to a *Graham* objective reasonableness inquiry are laid out for the district judge.

During trial, counsel must know how to most effectively deal with immediate objections and the rigors of the contemporaneous objection rule, motions to strike and offers of proof.

The common denominator for all of these stages of the case is one thing: is the evidence admissible?

B. Codification of the Rules of Evidence

Codification of the Federal Rules of Evidence can be traced back to a suggestion in 1938 by then-Attorney General William D. Mitchel that “an advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court.” *Proceedings of the Cleveland Institute on Federal Rules* 186 (ABA 1938).

Formation of a uniform set of federal evidentiary rules helped persuade many states to assimilate their practice and procedure to that of the federal courts and other states. The day was coming when most trial lawyers and trial judges would concede the superiority of the federal system and its uniform evidentiary rules over the hodgepodge of state systems and see it as a reliable model to pattern after on the state level.

We are nearer to that goal almost eighty years after it was first envisioned in 1938, but work remains to be done. Elmo Hunter, *One Year of Our Federal Rules*, 5 Mo. L. Rev. 1, 22 (1940). Let's take a brisk walk through history to see why.

C. Formulation of the Uniform Rules

After the ABA House of Delegates recommended formulation of uniform rules of evidence in 1958 and the Judicial Conference created a special committee to recommend the feasibility of creating uniform rules of evidence for federal courts, that committee's 1962 report concluded that the rules of evidence applied

in federal courts should be improved and uniform throughout the federal court system.

D. Sources of Governing Evidentiary Law

This was a giant step. Up to that point, the governing evidentiary law in civil cases in Article III courts came from federal statutes, federal case law, or state evidence law. The law of evidence was in a state of disrepair and had to be clarified and simplified. The hearsay rule with its exceptions was a crazy quilt of patches cut from a collection of paintings by “cubists, futurists and surrealists.” Edmund Morgan, *Practical Difficulties Impeding Reforms in the Law of Evidence*, 14 Vand. L. Rev. 725 (1961).

E. Watergate Delay

Fast forward to late 1972. The draft rules of evidence were ready to submit to Congress, and in 1973 were submitted as proposed rules by the Supreme Court. The Senate Select Committee on Watergate had other plans, however, and enactment of the rules was delayed for two years, during which time both the House and the Senate held hearings and made changes to the submitted draft. See 409 U.S. 1132 (1973); 119 Cong. Rec. 3247 (Feb. 5, 1973) (Exec. Comm. 359); H. Doc. 93-46; *See also* 18 U.S.C. §§ 3402, 3771, and 3772; 28 U.S.C. §§ 2072 and 2075; Act of Mar. 30, 1973, Pub. Law No. 93-12, 87 Stat. 9 (1973) (stating that the proposed rules “shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress”).

The Federal Rules of Evidence were finally signed into law by President Gerald Ford on January 2, 1975, with an effective date of July 1, 1975. Act of Jan. 2, 1975, Pub. Law No. 93-595, 88 Stat. 1926 (1975). *History of the Federal Rules of Evidence* (Spring 2010 ABA Section of Litigation) at https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html.

F. Changes based on Flexibility and Discretion

Over the years, substantive changes were made to a number of the rules, including Rule 403, a much-needed provision grounded on flexibility in which federal trial judges were explicitly granted the discretion to exclude relevant evidence based on a balancing judgment if its probative value was outweighed by unfair prejudice, confusion of issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence; Rule 807, the residual exception to the hearsay rule, conferring discretion on courts to admit hearsay not coming within the listed exceptions if it had equivalent circumstantial guarantees of trustworthiness; Rule 502, embodying the attorney-client privilege and work product protection; and Rule 702, governing the admissibility of expert testimony.

G. Tech Tools on the Horizon

As law practice moved byte by byte into the digital age and trial lawyers become more reliant on technology, the Federal Rules of Evidence and the formative case law from federal courts throughout the Nation have kept pace through amendments to the rules. The *Daubert*-based gatekeeper function now embodied in amended Rule 702 is regularly invoked with respect to novel scientific evidence and cutting-edge specialized testimony. Body cam technology is already here, and we are just a few years away from the time when 3-D printing technology will be employed to demonstrate evidentiary facts, Google Glass 2 will be used to enhance the delivery of real-time evidence at the scene of an occurrence, and wearable technology like Fitbit will be available to provide a first-hand perspective on human interaction, movement and experiences at issue in a trial. Marc Lamber, *Tech Tools Most Lawyers Aren't Using Today – But Will in Five Years (or Less)*, 26 Experience at 11-13 (ABA No. 2, Sept. 2016).

II. Evidentiary Issues in §1983 and Other Public Entity Litigation

A. Motions *in Limine*: Pretrial Attack on Admissibility for Any Purpose

The first evidentiary issue deals with a trial court's rulings on objections to evidence made on a motion *in limine*. A motion *in limine* can aid the trial process by “enabling the court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.” *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996). The purpose of such a motion is to eliminate “evidence that is clearly inadmissible for any purpose” before trial. *Ind. Ins. Co. v. GE*, 326 F.Supp.2d 844, 846 (N.D. Ohio 2004). By permitting the trial court to rule on the relevance and admissibility of evidence before it is offered at trial, motion *in limine* practice aids the trial process by facilitating the trial judge's expeditious and even-handed management of the trial. See *Luce v. United States*, 469 U.S. 38, 41, n.4 (1984) (“although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials”).

When an order limiting expert testimony is the subject of a definitive motion *in limine*, counsel for the party on whose behalf the expert is testifying is not required to make an offer of proof at trial to preserve a claim of error on appeal. *Lawrey v. Good Samaritan Hospital*, 751 F.3d 947, 952 (8th Cir. 2014). That is the black letter law of Rule 103(b).

1. Exercise of Discretion as the Case Unfolds

A motion *in limine* can save the parties time, effort, and cost in preparing and presenting their cases, avoiding potential, prejudicial evidence being paraded in front of the jury. However, at times it may be better practice for a trial judge to defer ruling on certain objections until trial, especially when the admissibility of

the challenged evidence depends on facts which may be more fully developed at trial when the judge can better estimate the impact of the challenged evidence on the jury. *Jonasson v. Lutheran Child and Family Services*, 115 F.3d 436, 440 (7th Cir. 1997); *Brodit v. Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003).

Only evidence that is “clearly inadmissible on all potential grounds,” should be excluded on a motion *in limine*. *United States v. Paredes*, 176 F. Supp. 2d 179, 181 (S.D.N.Y. 2001). Since the trial judge does not have the benefit of viewing the proposed evidence in real time and in the context of trial, moreover, an *in limine* ruling may be “subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant[s]’ proffer.” *Id.* at 181.

A court in the exercise of its sound discretion may alter an *in limine* ruling based on developments at the trial, *Luce*, 469 U.S. at 41, but the denial of a motion *in limine* does not necessarily mean that all evidence addressed in the motion will be admitted at trial. *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp. 1398, 1401 (N.D. Ill. 1993). *In limine* rulings are “subject to change when the case unfolds” at trial, *Luce*, 469 U.S. at 41, and the trial court can and often does exercise its discretion to alter a previous *in limine* ruling based on factual development at trial. *Id.*

2. Deferral of Motions *in Limine*

The breadth of this discretion was underscored in *Morgan v. City of Chicago*, 822 F.3d 317 (7th Cir. 2016). After being charged with possession of crack cocaine and resisting arrest, an arrestee brought a §1983 excessive force action against three officers and the City of Chicago, alleging they had conspired to violate his civil rights during the course of the arrest. Following a defense verdict, the arrestee contended that he was denied a fair trial because the district court failed to hold a pretrial conference or to rule on several dozen motions *in limine*, but instead chose to rule on the motions “during the course of the trial ... as they are made.” *Id.* at 338.

The Seventh Circuit rejected the arrestee’s argument that this “created the expectation in the parties that its subsequent failure to address resulted in prejudice,” reasoning that the trial court’s deferral of its *in limine* rulings until trial did not create an atmosphere of “trial by surprise,” and that the trial court had continuing discretion throughout the proceedings to alter earlier rulings even when it ruled on motions *in limine* before trial, and here the trial court’s resolution of these pretrial issues fit comfortably within its broad discretion on such matters and did not render the trial unfair. *Id.* at 338.

3. Exclusion of Broad Categories of Evidence

Courts generally frown on motions *in limine* that seek to exclude broad categories of evidence, as in *Reeder v. County of Wayne*, 2016 WL 3548217 (E.D. Mich. 2016), where an aggrieved county employee alleged that the sole reason for his termination was his refusal to work overtime. The employee filed a motion *in limine* to exclude from evidence the “number of disciplines” he received while working for the county, since his disciplinary history was to be destroyed or removed after twenty-four months of satisfactory service. The district court declined to issue a blanket ruling to exclude all disciplines, since that evidence had not been fully identified and arguments not fully developed, making any assessment of the likely relevancy or prejudice of such evidence problematic:

Although Plaintiff’s personnel records, for example, may include extraneous, irrelevant, or unduly prejudicial information, the Court is not in a position to rule on the admissibility of any such evidence, or related testimony, without reviewing the materials in context. There are many types of discipline to which an officer may be subject—including disciplines for dishonesty, unapproved sick leaves, failure to report for duty—and it would be improper for the Court to make a blanket ruling that all disciplines are excluded.

Id. at *3.

4. Employment of the Relevancy Arsenal for *in Limine* Rulings

In the context of motions *in limine* filed in excessive force cases, the courts have looked to Rules 401, 402, and 403 of the Federal Rules of Evidence when determining whether contested evidence is admissible at trial.

Only relevant evidence is admissible under Rule 402. Under Rule 401, evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence . . . and the fact is of consequence in determining the action.” Relevant evidence may nonetheless be excluded by the trial court under Rule 403 “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Rule 403 gives the trial court “broad discretion to balance probative value against possible prejudice” under Rule 403. *United States v. Bermudez*, 529 F.3d 158, 161 (2d Cir. 2008).

5. Evidence of Prior Uses of Force

The relevancy rules along with Rule 404(b) on character evidence were employed in *Jackson v. City of White Plains*, 2016 WL 234855 (S.D. N.Y. 2016), involving a claim that an officer punched the plaintiff in the face. The district

court granted the defendant officer's motion *in limine* in which the officer sought to exclude evidence of the officer's prior uses of force while serving as an officer for the city police department.

Holding the plaintiff was precluded from seeking to introduce evidence of the officer's prior uses of force under Rule 404(b), the district court rejected each attempt to circumvent the rule.

First, the plaintiff wrestled with the text of Rule 404(a), which with certain exceptions precludes the admission of “[e]vidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character or trait,” as well as “[e]vidence of a crime, wrong, or other act. . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”

Second, while Rule 404(b)(2) allows a party to offer evidence of prior uses of force for certain limited purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident,” the court rejected the plaintiff's attempt to offer such evidence to show intent, absence of mistake, lack of accident, and *modus operandi*. Intent was irrelevant to the claim of excessive force and inadmissible under Rule 404(b). Since excessive force claims are analyzed using an objective standard, not a subjective one, the burden was on the plaintiff to “show only that the force purposely or knowingly used against him was objectively unreasonable.” *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). This analysis conducted is “without regard to . . . underlying intent or motivation.” *Maxwell v. City of New York*, 380 F.3d 106, 108 (2d Cir. 2004) supplemented, 108 F. App'x 10 (2d Cir. 2004) (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

Third, the court found that evidence of accident or mistake was irrelevant, since this case did not involve a contention by the defendant officer that he punched the plaintiff by accident or mistake, but rather, the officer denied that he punched the plaintiff at all. “Where, as here, a defendant does not assert that his conduct was the result of an accident or mistake, the admission of evidence to show absence of mistake or lack of accident is irrelevant and therefore inadmissible.” *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996) (finding that because plaintiff denied kicking the defendant at all, admission of plaintiff's prison disciplinary record to show intent or accident was inappropriate.)

Fourth, the district court found that pattern evidence was irrelevant. While the plaintiff sought to introduce evidence of the officer's prior uses of force to show his *modus operandi* or pattern of conduct, the proper purpose of pattern evidence is primarily to show the identity of the perpetrator or the absence of accident or mistake. Here there was no question of identity, as the plaintiff clearly identified the defendant as the officer who allegedly punched him in the face.

B. *Daubert* Challenges: The Utility of Rules 104(a), 401, and 702

Daubert teaches us that “the trial judge must determine at the outset, pursuant to Rule 104(a)” whether a proffered expert will testify to scientific knowledge that will assist the trier of fact to understand or determine a factual issue. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591 (1993). There are distinct advantages to filing a Rule 104(a) motion.

First, there is a relaxed evidentiary environment that enables the trial judge proceed without being bound by the Federal Rules of Evidence, except as to privileges. This means the judge can accept signed expert reports without risking reversal for considering hearsay, and can conceivably accept exhibits not formally identified or authenticated under the rules. However, conventional wisdom seems to dictate that a party proffering exhibits provide a sponsor, authenticate the exhibits, and exercise due diligence in providing the judge with a competent documentary record to the extent feasible. That is good advocacy. Any seasoned jurist can tell when a lawyer cares about her case, and when it is evident that she doesn't.

Second, a 104(a) motion gives the party challenging expert evidence the necessary time and opportunity to make a formal request for judicial notice pursuant to Rule 202.

Third, if the expert's opinion is of a type contemplated by Rule 702, so that its reliability of his opinion is basically a deductive analysis, “judicial notice is an excellent way by which the court can be made acquainted with the applicable principles.” D. Patterson, *The Rule 104(a) Motion as a Necessary and Useful Tool*, For the Defense, at 27-28 (Jan. 2005).

1. Rule 104(a)'s Parameters and Alternatives

The circuits have fleshed out the parameters of Rule 104(a) and when adequate alternatives for a *Daubert* determination may be available. For example, in *Kirstein v. Parks Corp.*, 159 F. 3d 1065 (7th Cir. 1998), a summary judgment discovery record was held an adequate alternative to a Rule 104(a). The Seventh Circuit found in *Kirstein* that this gave the trial judge an opportunity to consider reliability and relevance prior to the time the judge was under the pressure of a jury trial.

However, a trial court ruling that a Rule 104(a) hearing was not required was reversed by the Sixth Circuit in *Jahn v. Equine Services, Inc.*, 233 F.3d 382 (6th Cir. 2000), since the record was not complete enough to determine that the expert's opinion was admissible. But where the trial court was found to have had an adequate pretrial opportunity to determine the reliability of the expert's opinion testimony within the relevant field of knowledge, a Rule 104(a) hearing was not required in *Oddi v. Ford Motor Co.*, 234 F. 3d 136 (3rd. Cir 2000)

While a hearing might not necessarily be required, the trial court must make a meaningful determination of reliability prior to trial by some means when a challenge to the admissibility of expert testimony is made, otherwise its admission of expert testimony without a Rule 104(a) hearing may be reversed. *Mukhtar v. Cal State University*, 299 F. 3d 1053 (9th Cir. 2002).

Finally, the trial court has the discretion to determine the manner in which it conducts its *Daubert* analysis of reliability and relevance, but it has no discretion to forego actually performing its gatekeeping function, as in *Dodge v. Cotter Corp.*, 328 F. 3d 1212 (10th Cir. 2003), where the defendant repeatedly requested a Rule 104(a) hearing and the trial court responded by imposing severe restrictions on the length of briefs and the amount of time for the hearing itself, resulting in the Tenth Circuit reversing and remanding for a new trial.

2. Rule 104(a) and Integral Functions of Rules 701, 702, 703, and 403

When a district court undertakes a *Daubert* analysis, whether in a Rule 104(a) hearing or on the briefs and submissions of the parties, it should keep in mind the other applicable rules, including as Rules 702, 703 and 403 of the Federal Rules of Evidence.

The same reasons that lead a trial judge to exclude expert testimony under Rule 702 may contribute to its decision to exclude that same testimony under Rule 403 based on a finding that its probative value is outweighed by the danger of unfair prejudice or confusion of issues. S. Goode & O. Wellborn, *Courtroom Handbook on Federal Evidence* 366 (Thomson West 2005). In this context, Rule 104 allocates responsibility between the judge and jury for deciding preliminary questions of fact on which the admissibility of evidence may depend.

3. 2000 Amendment to Rule 702

Rule 702 is the starting point for assessing whether a scientific or technical expert may testify at trial, and district courts are the gatekeepers of expert evidence. They are the ones who must make an initial determination whether the expert is qualified and whether her testimony is both relevant and reliable.

Rule 702 of the Federal Rules of Evidence was amended in 2000 in response to *Daubert* to provide that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;

- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

The 2000 amendment to Rule 702 greatly assisted the bench and bar by clarifying and synthesizing the Supreme Court's post-*Daubert/Kumho* case law and laying out the requirements that all expert testimony must meet. 3 S. Saltzburg, M. Martin & D. Capra, Federal Rules of Evidence Manual §702.02[10], at 702-49 (2002). Amended Rule 702 makes it clear that reliable application of a method to the facts of a case is just as important as determining that the expert has used a reliable method.

4. Renewed Post-trial *Daubert* Challenges: Rules 702 and 403

Katt v. City of New York, 151 F. Supp. 2d 313 (S.D.N.Y. 2001) provides a good illustration of the interplay between Rule 702 and Rule 403. It was decided shortly after the effective date of the amendment to Rule 702 and illustrates the dynamic of *Daubert* challenges that are made during trial and renewed post-trial. Expert testimony was the central focus of a female civilian police administrative aide's claim against the City of New York and a lieutenant whom she alleged had sexually harassed her and subjected her to a sexually hostile work environment.

Following a jury verdict awarding \$400,000.00 in compensatory damages, the district court rejected the defendants' post-trial challenges to the testimony of an expert in the culture of police departments in general and the NYPD in particular. The expert was a veteran police officer with a combination of "insider" experience and academic training as a sociologist with three academic degrees and a specialty observing police organizations, had published two books on police culture in peer-reviewed university presses, held a Ph.D. in Sociology and Criminology from NYU, served as a decorated member of the NYPD for 23 years in five different precincts in capacities ranging from patrol officer, detective, lieutenant and commanding officer, was an associate professor of sociology and criminal justice at Manhattan College, and in his capacity as an advisor/mentor to police officers seeking college degrees from Empire State College, interviewed hundreds of police officers about their experiences working in the NYPD and other paramilitary organizations.

The expert's extensive academic study and knowledge of, as well as personal experience with, the special pressures inherent in police work, and the fears of retaliation that might exist within police organizations, were sufficient to qualify him as an expert witness pursuant to Rule 702. The district court held that the defendants' challenges that tended to impugn the expert's skill and knowledge went to the weight and credibility of his testimony, not its admissibility.

According to the court, claims of error with regard to the admission or exclusion of evidence under Rule 403 and Rule 702 “are prime candidates for application of the harmless error rule... Therefore, even if the defendants can demonstrate trial error under Rule 702 or Rule 403, the proceeding will not be disturbed, on post-trial motion in the district court or on appeal, unless any error of the court was truly harmful.” *Id.* at 354.

In its Rule 403 balancing analysis, the court concluded that “[a]ny potential for prejudice from the challenged testimony, in short, stems from its tendency to demonstrate that there are bad cops, and that bad cops sometimes do very bad things to fellow officers who report their misconduct,” *Id.* at 362, and that to the extent the expert’s testimony appeared unduly partisan in any respect, that appearance went not to the admissibility of his testimony, but to the determination of its ultimate weight and credibility, a subject that falls squarely within the jury’s prerogative, and to the extent the trial court found the testimony in certain respects weak or unpersuasive, that did not give it grounds to strike it pursuant to Rule 403. *Id.* at 363.

5. Expert Testimony about police procedures

Expert testimony about police procedures was challenged in *Champion v. Outlook Nashville, Inc.*, 380 F. 3d 893 (6th Cir. 2004), a §1983 wrongful death action based on claims of excessive force and failure to render medical assistance to a 32-year old autistic arrestee. The Sixth Circuit held that the district court did not abuse its discretion in admitting the expert testimony of plaintiffs’ expert regarding police procedures, finding that the testimony was reliable. It also upheld the admissibility of the expert testimony of plaintiffs’ criminology expert, who was allowed to testify about excessive force despite a lack of any specialized knowledge that was reliable or of any assistance to the jury.

The expert’s testimony was based on his particularized knowledge about the area, according to the Sixth Circuit, and his credentials were more extensive and substantial than those of experts in other cases where they were shown to have limited experience, held law enforcement positions that required almost no qualifications, lacked formal training or experience, and gave ungrounded or methodologically flawed testimony.

The expert in *Champion* was employed by a university’s criminology department, taught classes on police procedures and practices, had been involved with federal research funded by the Justice Department evaluating the use of force by officers, trained officers in the use of force, worked with police departments to create use-of-force policies, had testified before Congress and state legislatures about police policies, wrote forty to fifty articles on the subject of police procedures, many in peer-reviewed journals, and testified here about the proper

actions of individual officers in one discrete situation rather than testifying about the impact of police policies on a large group of officers.

6. *Daubert* Rulings in Public Entity, Law Enforcement and Governmental Litigation

a. Valuation Opinion

Sparse support for an expert's valuation opinion led to its exclusion under Rule 702 in *U.S.A. ex rel T.V.A v. 1.72 Acres of Land in Tennessee*. 821 F.3d 742 (6th Cir. 2016). This was a landowner's appeal from the district court's award in a condemnation action brought by the Tennessee Valley Authority (TVA) in which the TVA acquired a permanent easement for a power line. The landowner failed to meet his burden of proof in showing any higher value than the TVA's valuation of the condemned land, which was zoned for agricultural use. His expert witness was expected to opine that because of the power line, the property was no longer feasible for hotel development. TVA moved to exclude the proposed expert testimony as inadmissible under Rule 702 because of reliability defects.

The trial court properly excluded this proposed expert testimony because it was speculative, gave no basis for the jury to conclude that there was any reasonable probability that the property could be rezoned for commercial purposes or that there was a market for a hotel, and offered no assessment of the property's before and after value. The Sixth Circuit affirmed the exclusion of the expert's testimony, noting its support was sufficiently sparse to justify holding that it did not meet Rule 702's standards or the standards for admissibility in the context of condemnation proceedings.

b. Spoliation Opinion

The court in *Van Buren v. Crawford County*, 2014 WL 2217016 (E.D. Mich. 2016) was focused on the sufficiency of expert testimony under Rule 702 with respect to spoliation of a recording. In granting summary judgment to the county defendants in a fatal shooting case, the court withheld entry of judgment pending an evidentiary hearing to determine whether the defendants spoliated evidence. The plaintiffs' expert witness was called to testify whether there was evidence that the defendants tampered with the recordings allegedly created by the shooting officer's equipment. Their expert was found to have "sufficient knowledge, skill, experience, training, [and] education" to testify under Rule 702, including extensive experience with audio authentication and audio engineering, founding a company offering audio and video enhancement, authentication, and transcription services, conducting hundreds of audio forensic investigations, and holding membership in several relevant professional associations, including the Audio Engineering Society and the American College of Forensic Examiners. He testified in numerous legal cases regarding whether audio recordings were

authentic or had been tampered with, and was retained in this case to analyze whether the inoperable compact disc provided by the county defendants to the plaintiff had been tampered with or was subject to misconduct.

The expert, who had significant experience interpreting metadata and had investigated the compact disc provided by the defendants, was allowed to opine about whether there was evidence that the integrity of the recording was compromised in this case, and was allowed to give expert testimony that the metadata he recovered from the compact disc indicated where the recordings originated, basing his conclusion that the recordings were intentionally deleted on evidence he reviewed and his own expertise.

The relevance of social media evidence under Rule 401 in the context of a spoliation claim was at issue in *Thurmond v. Bowman*, 2016 WL 1295957 (W.D. N.Y. 2016), where defendants sought to enjoin the plaintiff from “accessing” her social media accounts during the pendency of the action, and filed related motions for sanctions based on spoliation, claiming that the plaintiff engaged in spoliation of her Facebook postings. The court concluded that the three posts defendants had proved were deleted from her Facebook page were deleted inadvertently and were not relevant to this litigation.

Most the posts remained accessible on the plaintiff’s account, had not been deleted, but were simply hidden from defendants' view due to an apparent modification of her security settings. The plaintiff’s Facebook account was publicly accessible until the date when she adjusted the privacy settings to make the account accessible only to her Facebook “friends,” an adjustment that removed postings from public view but did not delete them.

The defendants in *Thurmond* failed to establish widespread deletion of Facebook posts, and the trial court rejected their broad assertions that the plaintiff’s entire Facebook account was relevant to refute her claim for emotional distress damages and that some of her posts might be relevant to her claims of “homeless[ness]” and separation from one or both of her children. The court disagreed that the entirety of a plaintiff’s account was per se relevant to any claim for emotional distress damages, and that “[a] plaintiff’s entire social networking account is not necessarily relevant simply because he or she is seeking emotional distress damages,” citing *Giacchetto v. Patchogue–Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 115 (S.D.N.Y. 2013).

Since social networking websites are not, as a general matter, relevant to claims for emotional distress damages, nor are such communications likely to lead to the discovery of admissible evidence regarding the same, many courts decline to order wholesale production of a litigant’s social media accounts.

c. Gender Stereotyping

Stromberg Childers v. Trustees of University of Pennsylvania, 2016 WL 1086670 (E.D. Pa. 2016) was a gender discrimination claim brought by an assistant professor of history who was twice denied tenure. The university filed a *Daubert* motion to exclude the assistant professor's expert witness on gender stereotyping and social framework analysis, characterizing the expert's report as general observations coupled with unfounded speculation regarding the existence of bias in this case, entailing only review of documents and deposition testimony selected by plaintiff's counsel.

The university successfully argued for the exclusion of this expert testimony and report because the expert (1) did not opine whether the assistant professor's gender and family status influenced the tenure decision, (2) did not rely on any particular methodology in setting forth her opinion, and (3) did not survey the attitudes of the individuals involved in the tenure decision to see if any bias was present. In granting the university's *Daubert* motion, the trial court found that while the courts are divided about whether this type of social stereotyping testimony is admissible, the courts that exclude it tend to reason that general testimony on stereotyping does not "fit" the case closely enough and that laboratory findings about unconscious stereotyping are too far removed from carefully considered employment decisions to be helpful to juries.

The expert's methodology of sifting through evidence to find passages that support the assistant professor's case theory did not meet Rule 702's reliability requirement, and the expert's analysis of the university's tenure process was beyond her expertise. These flaws, coupled with the fact that stereotypes of women in the workplace are well within a layperson's common knowledge, led the trial court to conclude that the plaintiff's expert's testimony would not help the trier of fact, and may even cause confusion, given how speculative her conclusions about the tenure process.

d. Historical Cell-Site Analysis

The admissibility of historical cell-site analysis through expert testimony of an FBI agent was upheld in *U.S. v. Hill*, 818 F. 3d 289 (7th Cir. 2016), over Rule 702 and Rule 403 objections. Historical cell-site analysis uses cell phone records and cell tower locations to determine a cell phone's location at a particular time, within a certain range of error. As described by the court, a cell phone is basically a two-way radio that uses a cellular network to communicate, and each cell tower covers a certain geographic area that in turn depends on the number of antennas operating on the cell site, the height of the antennas, topography of the surrounding land, and natural and manmade obstructions.

Finding that the expert testimony from the FBI agent was properly admitted under Rule 702 and the *Daubert* framework, the Seventh Circuit noted

that some courts consider testimony about historical cell-site analysis as expert testimony, while other circuits have treated certain kinds of historical cell-site analysis as lay testimony. See, e.g., *United States v. Graham*, 796 F.3d 332, 364 (4th Cir. 2015) (finding no abuse of discretion in admitting Sprint/Nextel employee's lay testimony regarding cell phone connectivity and cell tower range, a law enforcement officer's lay testimony, and maps regarding the defendant's location based on cell phone records and cell sites); *United States v. Henderson*, 564 Fed. Appx. 352, 364 (10th Cir. 2014) (nonprecedential) (law enforcement agent's plotting of the defendant's locations through historical cell-site analysis was proper lay testimony so long as the agent did not testify about how cell towers operate), reh'g en banc granted, 624 Fed.Appx. 75 (4th Cir. 2015).

The expert testimony of the FBI agent in *Hill* included statements about how cell phone towers operate, and in the Seventh Circuit's view, "this fits easily into the category of expert testimony, such that Rule 702 governs its admission." See *Graham*, 796 F.3d at 364 (holding historical cell-site analysis testimony about how cell phones and towers connect "clearly 'based on scientific, technical, or specialized knowledge within the scope of Rule 702.'")

Affirming the admission of this expert testimony, the Seventh Circuit in *Hill* found that while no federal court of appeals had yet said authoritatively that historical cell-site analysis was admissible to prove the location of a cell phone user, and while limitations of historical cell-site analysis were well known by experts in the law enforcement and academic communities, it considered the testimony relevant and probative, and therefore "somewhat helpful to the trier of fact — even if not that helpful", and it was not an abuse of the district court's discretion under either Rule 702 or Rule 403.

e. Criminal Conduct by Fellow Members of Tactical Squad

In *Pittman v. Unified Government of Wyandotte County and Kansas City, Kansas*, 2016 WL 3521980 (D. Kan. 2016), several motions *in limine* were filed before a trial involving a sting operation in which the police department sought to determine whether officers on its tactical squad were engaging in theft during the execution of search warrants. One of the members of the tactical squad who was arrested following the sting operation brought federal civil-rights claims and state common-law claims for assault, battery, unlawful arrest and detention, and failure to train and supervise. At issue was evidence and testimony regarding criminal conduct of other members of the tactical squad of which plaintiff was a member.

The trial court denied the plaintiff's motion *in limine* that sought to preclude introduction of evidence of criminal conduct allegedly committed by members of the tactical squad, holding that such evidence was relevant under Rule 401, and was not unduly prejudicial under Rule 403.

Under the Rule 401 relevancy standard, evidence of the tactical squad's alleged criminal and the investigation into that conduct could shed light on facts material to the outcome of the litigation. The police department's investigation of criminal conduct by members was relevant to the question of whether defendants had probable cause and/or reasonable suspicion to detain plaintiff. The trial court rejected the plaintiff's argument that this evidence would unfairly cast him in a poor light or confuse the jury because (1) there was no evidence indicating he participated in or was aware of the criminal conduct, (2) the jury would be able to distinguish plaintiff's actions from those of others, and (3) the danger of potential unfair prejudice or confusion was low. Given the high probative value of this evidence, the court found under Rule 403 that if it later determined that the plaintiff may suffer potential prejudice, it would likely give a limiting instruction that restricted the use for which the evidence may be considered.

f. Legal Conclusions

Borgognoni v. City of Hattiesburg, 2016 WL 3951163 (S.D. Miss. 2016) centered on a defense motion to exclude testimony of plaintiff's police experts in an excessive force action because their opinions were inadmissible legal conclusions. The district court noted that while Rule 701(a) does permit expert opinion testimony to embrace an ultimate issue, it "does not allow a witness to give legal conclusions." Both experts in their reports gave opinions as to the reasonableness of the force used by the officers, which the court held to be inadmissible legal conclusions and not relevant under Rule 702 since the testimony would not assist the trier of fact to understand the evidence or to determine a fact in issue. The issue of reasonableness is not a question of fact for the trier of fact to decide, but a question of law to be ruled on by the court, hence portions of the reports dealing with these opinions and any testimony related to them were excluded as inadmissible evidence; however, portions of the reports that did not deal with these inadmissible legal conclusions were not excluded.

g. Blue Code

Seifert v. Unified Government of Wyandotte County and Kansas City, Kansas, 2016 WL 107932 (D. Kan. 2016) involved a purported expert who was to testify on the "blue code" or code of silence. This was before the court on a defense motion to exclude expert witness testimony under Rule 702 because the expert was not qualified to render opinions about the credibility of witnesses and testimony about a "blue code" and the fact that the defendants' actions were consistent with the operation of the "blue code" or code of silence because this was purely speculative and without foundation under *Daubert*. The trial court sustained the *Daubert* motion and rejected the plaintiff's attempt to use expert testimony to establish a "blue code" as to excessive force claims, citing *Obrycka v. City of Chicago*, 2012 WL 601810, *7 (N.D. Ill. 2012), in which the district court allowed the testimony of two experts as to a code of silence in the Chicago

Police Department, one a statistician who described the very small rate at which excessive force claims against the department were sustained, and the other a police veteran with “vast experience and knowledge of law enforcement in general and the Chicago Police Department in particular.”

In contrast, the court in *Seifert* found that (1) the plaintiff provided no support for his expert’s proposed expert testimony as to a “blue code” as it may exist at police department or sheriff’s department, (2) his opinion did not rest on any particular methodology, (3) he cited no articles or learned treatises, (4) he conducted no tests to determine the existence of a “blue code” among the defendants, and (5) he had done nothing to assure the reasonable reliability of the proposed expert testimony.

h. Excited Delirium

Estate of Barnwell v. Roane County, 2016 WL 1457928 (E.D. Tn. 2016) was a *Daubert* challenge to the defendant’s expert testimony that the cause of death of plaintiff’s decedent was excited delirium. The trial court overruled the challenge since it was essentially an attack on credibility more appropriately reserved for cross-examination. The court rejected the plaintiff’s argument that the doctrine of excited delirium could not meet *Daubert* standards, noting that several professional publications recognize excited delirium as a real syndrome, and while there may be multiple etiologies for excited delirium, this alone was not sufficient to exclude any mention of the diagnosis. The defendant’s expert testified that excited delirium is an accepted diagnosis in the “forensic pathology community because we’re the ones who see it.” He was certified by the American Board of Pathology in anatomic, clinical, and forensic pathology, and he had performed over 5,000 autopsies. The court found that his testimony regarding excited delirium was reliable.

i. Police Practices, Credibility Determinations, and Legal Conclusions

Sanders v. City of Chicago Heights (Sanders I), 2016 WL 1730608 (N.D. Ill. 2016) was a civil action for damages based on alleged wrongful conviction for murder, where the City moved to exclude the testimony of the plaintiff’s police practices expert under Rule 702 and *Daubert*. The trial court granted the City’s *Daubert* motion to exclude the expert’s legal conclusions that the officers’ or City’s conduct amounted to deliberate indifference, but held that the expert may testify to the relevant professional standards and identify departures from the standards, including that the City’s customs or practices led to violations of generally accepted police standards and procedures. This decision provides a sobering framework for analyzing the nature, scope, and efficacy of *Daubert* challenges to experts who testify against governmental defendants on pivotal

issues like police practices and opine about deliberate indifference and other key aspects of §1983 liability.

The expert's opinions set forth in his report included opinions that the actions of police administrators constituted a failure to train police detectives employed by the city; there was a failure to supervise police detectives, leading detectives to believe they could act with impunity; the city had a defective policy on photo arrays, lineup procedures and confidential informants; and defendants' violation of the collective standards and police practices rose to the level of deliberate indifference and was the direct cause of harm to the plaintiff. Applying the *Daubert* standard to this expert testimony, the court agreed with the city's argument that the expert's opinions did not fulfill the *Daubert* standard for reliability, while other opinions were not helpful or relevant.

The city also argued that the expert had offered impermissible legal conclusions in his expert report. The trial court disagreed, noting that generally an expert cannot offer legal opinions or conclusions and that expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible, but in this case (1) under Rule 704(a), an opinion is not objectionable just because it embraces an ultimate issue, (2) while Rules 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case, there is a difference between stating a legal conclusion and providing concrete information against which to measure abstract legal concepts.

The court also rejected the city's argument that the expert's use of the term "deliberate indifference" was an impermissible legal conclusion. The expert in his report had opined that the violation of the collective standards and police practices by the defendants rose to the level of deliberate indifference and was the direct cause of harm to the plaintiff. Per the court, these expert opinions regarding "deliberate indifference" did not necessarily relate to "purely legal matters" and were not "made up solely of legal conclusions," but the expert's attempts to distinguish his definition of deliberate indifference from its constitutional meaning would not be helpful to and could even confuse the jury.

j. Eyewitness Perception and Selective Attention

The City's second *Daubert* motion was before the court in *Sanders v. City of Chicago Heights (Sanders II)*, 2016 WL 4417257 (N.D. Ill. 2016), again concerning the same expert witness for the plaintiff. The court denied the motion since the plaintiff had met his burden of demonstrating that the expert testimony satisfied the standards for admissibility under *Daubert* and the Federal Rules of Evidence.

The city argued that under *Daubert*'s relevancy requirement, almost all the expert's opinions as to what affected an officer's eyewitness perception were common sense observations. The city represented to the court that there was a

general trend that expert testimony on the reliability of witness identification should be precluded on the ground that it invades the province of the jury as a trier of fact, but the court found no such “general trend” under Seventh Circuit case law, not any case law support for the defense argument that expert identification testimony is only necessary in "special situations."

In its Rule 403 balancing analysis, the trial court held that this expert testimony was admissible and that the city had not explained how the expert’s probative expert testimony was substantially outweighed by the danger of unfair prejudice or juror confusion, even though the trial court had to make evidentiary determinations in light of Rule 403. In the court’s view, the city oversimplified the expert’s opinion by arguing that it was not beyond the ken of the average juror that poor lighting and having a gun pointed at you is distracting.

In denying this aspect of the city’s *Daubert* motion, the court held that the plaintiff’s expert testimony on eyewitness identification would assist the trier of fact and was not unfairly prejudicial. The plaintiff’s expert based his opinions on reliable data and a multitude of studies generated by scientific professionals in eyewitness identification field, as well as his own experimental work and professional studies in human perception and memory over the last 40 years, as cited throughout his report and at his deposition, including the standard in the eyewitness identification field. Defendants were free at trial to challenge the accuracy of the underlying data by cross-examination and confronting him with contrary evidence.

k. Police Policies and Professional Practices

In *Davies v. The City of Lakewood*, 2016 WL 614434 (D. Colo. 2016), a police officer was shot and killed by a fellow officer during an attempt by numerous agents to clear a residence where gunshots had been reported. In his widow’s suit against the shooting officer, city, and two supervising sergeants, the trial court addressed the admissibility of the plaintiff’s expert testimony under Rule 702.

The expert was a retired police chief whose opinions were that the actions of the supervising officers and the shooting officer were not in concert with professional police practices or several policies, procedures and rules of the police department, the discipline administered with regard to the shooting officer was not in concert with professional police practices, the post-incident investigations raised questions about the propriety of certain police department practices that may have contributed to the death of the decedent, and the police department’s failure to train the shooting officer contributed to the death of the decedent.

In finding relevance under Rule 702, the trial court in *Davies* focused on whether these opinions would help the jury understand the evidence and found that it was beyond dispute that a lay juror is unlikely to have more than a vague

notion of the standards applicable to police officers without the testimony of a qualified expert. The court rejected the defendants' argument that the expert's comparison of the officers' conduct to "professional police practices" was irrelevant because "professional police practices" amounted to the expert's personal standard and was designed to establish liability. According to the court, it was evident from this expert's report and testimony at the *Daubert* hearing that what he called "professional police standards" is simply his way of describing what he believes to be the standard of care applicable to police officers.

With regard to proposed expert testimony on selective attention and inattentive blindness, however, the court found that these terms are the same or similar as tunnel vision or tunnel hearing, relating to matters of attention, perception and memory, and that applied to what the shooting officer might have heard on the radio as he drove to the scene, what he plausibly might not have heard, and what he might have seen and focused on when he confronted the individual who turned out to be the decedent, these experts in the court's judgment did not have qualifications to render reliable opinions on these subjects.

l. *Daubert*-Worthy Grounds

George v. Louisiana Department of Public Safety and Corrections, 2016 WL 3455378 (M.D. La. 2016) involved a *Daubert* motion to exclude plaintiff's expert from testifying pursuant to Rules 403 and 703. The court rejected the defendants' challenge based on the alleged failure of the expert, a board-certified expert in general and forensic psychiatry, to use an accepted methodology and her opinion's lack of an adequate factual foundation. The defense attacked the reliability of the expert's conclusions, charged that she ignored the plaintiff's medical records, and did no testing, but the court found this charge to be plainly and factually incorrect "to put it more mildly than perhaps it should be."

The trial court concluded that upon looking carefully at the defendants' allegations, "it is clear that they simply disagree with the conclusions of this expert, not on *Daubert*-worthy grounds but rather, for reasons that are most appropriately tested by the traditional means of cross examination and ultimately left to the sound judgment of the jury. As the *Daubert* court itself noted, "[v]igorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

m. Implicit Bias

A *Daubert* challenge to expert testimony in an age discrimination action on the subject of implicit bias was upheld in *Karlo v. Pittsburgh Glass Works*, 2015 WL 5156913 (W.D. Pa. 2015). The plaintiff had retained an expert to provide opinion testimony "in the area of social psychological research on attitudes, prejudices, and stereotypes," which included the topic of implicit bias, a lay

designation for “mental processes that function outside of conscious awareness.” The expert had authored an expert report in which he used the term “implicit bias” as “an informal reference to the relevant scientific work on attitudes and stereotypes.” Plaintiffs argued that such opinion testimony was needed to provide a framework that can aid a judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether the plaintiffs’ ages substantially motivated the defendants’ actions.

The defendant sought to bar the expert’s opinions on implicit bias because they lacked any relation to the facts and the methodology was unreliable. The court had previously excluded this same expert in another Title VII disparate impact suit in which the expert was to “explain the scientific principles demonstrating a phenomenon many do not understand: people who are not overtly racist (and even many African-Americans) subconsciously consider race in decision-making to the detriment of African-Americans, particularly when subjective criteria are involved.”

Holding that the expert did not meet the requirements of Rule 702, the court found that his opinions on implicit bias were not based on sufficient facts or data, were not the product of reliable methods, and would not assist the factfinder in resolving an issue in this case. As in the prior Title VII case, the expert had not visited the defendant’s plant or speak to any current or former employees, did not interview managers who took part in the RIF that triggered this suit, and did not subject any of these individuals to his “self-invented” test to measure or detect implicit bias, nor did the expert perform any independent, objective analysis on whether implicit biases played any role in the decisions to terminate the remaining plaintiffs. The court concluded that the expert’s methodology was unreliable, and his opinion did not fit, but floundered on a substantial disconnect between the abstract principle from which his general principle of implicit bias was derived and the facts of this case, which was fatal to his opinion. The court stated that it doubted that the expert’s testimony regarding implicit bias was even relevant in deciding ADEA disparate impact or disparate treatment claims, which are analytically distinct from each other, and found that the expert’s opinion did not meet the requirements of Rule 702, and therefore, his testimony was barred at the trial of this action.

7. *Daubert* Challenges in Election and Voting Rights Litigation

a. 1% Requirement for Ballot Access

A *Daubert* challenge to testimony and evidence submitted by a ballot access expert was rejected in *Green Party of Georgia v. Kemp*, 171 F.Supp.3d

1340 (N.D. Ga. 2016). Plaintiffs, the Green Party of Georgia and another minor party, challenged and sought injunctive and declaratory relief with respect to Georgia's 1% requirement against presidential candidates, which required a political party candidate seeking inclusion on a ballot for an office voted upon statewide to obtain signatures in a nominating petition from at least 1% of the registered voters eligible to vote in the last election. Plaintiffs claimed the 1% provision unconstitutionally burdened their rights under the First and Fourteenth Amendments.

Following an initial denial of the plaintiffs' summary judgment motion, the trial court was presented with a more robust evidentiary record that gave it evidence to engage in the required intensely practical and fact-oriented analysis to decide this election case in which plaintiffs alleged they were unconstitutionally barred from accessing the ballot by the operation of Georgia's laws.

b. Ballot Access Expert Testimony

In support of their renewed motion for summary judgment, plaintiffs in *Kemp* submitted an affidavit by a ballot access expert that discussed Georgia's ballot access requirements in the context of other states' restrictions, providing an appendix of historical voting data in support of his assertions in his affidavit and opining that "if a state requires even slightly more than 5,000 signatures for an independent presidential candidate, or the presidential candidate of an unqualified party, to get on the ballot, it will never have a crowded presidential general election ballot." The submitted data showed that of the 401 instances in which a state required independent candidates or candidates of an unqualified party to collect more than 5,000 signatures, no candidate could access the ballot 33% of the time, once candidate could access the ballot 20% of the time, two candidates, 20%, three candidates, 13%, four candidates, 8%, five candidates, 4%, and six candidates could qualify only 4% of the time.

c. Reliability of Same Expert in Other Cases

The expert statistical analysis in *Kemp* represented that states that impose a signature requirement greater than 5,000 signatures will not have a crowded ballot. The district court rejected the defendant's *Daubert* challenge to this ballot access expert opinion as based on an incorrect legal standard and incomplete data, finding that it had considered this expert's testimony in many other cases and considered him a reliable witness on whom the court primarily had relied as a gatherer of data, without any suggestion that the data was inaccurate. Focusing on the number of petition signatures required by the Georgia law, the court found that the best way to address the statute's infirmity was by a reduction in the number required, and it ordered as an interim measure that an independent candidate for President or a candidate for President representing a "political body" may qualify pursuant to the Georgia law by submitting a nomination petition

signed by 7,500 voters, to expire when the Georgia General Assembly enacts a permanent provision. The court permanently enjoined the Georgia Secretary of State from enforcing the 1% signature requirement against presidential candidates, with all other facets of Georgia's election scheme to remain in place, thereby preserving a healthy federalism by making no more findings and decrees than necessary in this area of conflict between federal law and state action.

d. Evidence of Legislative Intent

The Northeast Ohio Coalition for the Homeless v. Husted, 2016 WL 1047130 (S.D. Ohio 2016) was an equal protection challenge to Ohio's recent enactments concerning voter identification for same-day, absentee, and provisional ballots in which the district court denied a defense motion *in limine* to exclude certain evidence and expert testimony.

The defendants sought to exclude documentary, testimonial, and video evidence that plaintiffs may proffer to prove legislative intent, including excerpts of legislative proceedings reflecting isolated statements of individual legislators, statements and testimony submitted to the Ohio General Assembly; and public statements about Ohio law made by nonmembers of the Assembly not affiliated in any way with the defendants in this case. The district court rejected their argument that evidence of legislative intent was irrelevant because plaintiffs did not claim the challenged statutes are ambiguous, the categories of evidence were not probative of legislative intent, prejudicial, and prohibited hearsay, and Ohio law precludes using Government Channel Videos ("GCVs") in judicial proceedings.

e. Relevance of Racially Discriminatory Intent

The district court in *Husted* found that while courts may not look to legislative intent in statutory construction when it is the meaning of an unambiguous statute that is at issue, the crux in this case was whether the Ohio legislature passed the bills with discriminatory intent, and for the plaintiffs to prove their claims under the Equal Protection Clause of the Fourteenth Amendment, they had the burden of demonstrating proof of racially discriminatory intent or purpose. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "To that end, nothing is more relevant than evidence that the legislature did in fact act with such intent."

f. Primacy of Federal Evidentiary Law

The district court in *Husted* then addressed the defense argument that Ohio law prohibited the court from considering the videos from the GVCs that plaintiffs planned to proffer, noting that state evidentiary law cannot be binding in federal question cases unless "an issue governed by State substantive law is the object of evidence," citing Fed.R.Evid. 501 advisory comm. nn. and *Baldwin v.*

Rice, 144 F.R.D. 102, 106 (E.D. Cal. 1992) ("There can be no doubt, however, that a state legislature cannot purport to make binding pronouncements of law concerning what evidence may be privileged or otherwise inadmissible in a federal court action involving claims based on federal law."). The district court reasoned that its role was to determine whether plaintiffs successfully proved the challenged provisions of the state laws passed federal statutory and constitutional muster, and that "[a]ny effect that the Court might have on Ohio law in fulfilling that role is tangential to the task at hand."

g. *Daubert* Gatekeeper Relevance in Bench Trial

The district court then turned to the defendants' *Daubert* motion to exclude the testimony of plaintiffs' expert, Professor Jeffrey Timberlake, and to strike his expert reports, because his experience was removed from the controversy at issue, his data was unreliable, his methodology was shaky, and his testimony was self-contradictory. The court found that the defendants had not met their high burden to show that this expert's testimony was clearly inadmissible, noting that *Daubert*, its progeny, and the court's role as gatekeeper were largely irrelevant in the context of a bench trial, and that the court would exercise its discretion to consider what amount of weight to give whatever expert opinion, citing *Deal v. Hamilton Cnty. Bd. Of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004) ("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial," and the Sixth Circuit "is not in the business of dictating to district courts the amount of weight" to give expert opinions). The district court found that the defendants "simply have not met their high burden of showing that Professor Timberlake's testimony is clearly inadmissible.

h. Minority Political Cohesion Testimony

The Ninth Circuit upheld the admissibility of expert testimony showing minority political cohesion in *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), an action brought by the United States against a county under Section 2 of Voting Rights Act. The United States alleged that the county's at-large election system impermissibly diluted the voting strength of Native Americans. To show racially cohesive voting by Native Americans in the county, the United States proffered the expert testimony of Dr. Theodore Arrington, who testified over the county's objection that in all fourteen countywide elections he examined, Native American voters exceeded 67% cohesion.

The district court found a Section 2 violation and ruled for the United States, enjoining the county from holding elections under its at-large electoral system. The Ninth Circuit upheld the admissibility of the challenged expert testimony, rejecting the county's argument that the district court did not rule on its objections to experts' testimony.

The Ninth Circuit affirmed, finding that the district court evaluated the reliability of Dr. Arrington's testimony. It rejected the county's argument that the testimony was unreliable, because he relied on race-identified registration lists, but the county's own expert testified that such reliance is customary and appropriate, and Dr. Arrington's and the county expert's bivariate ecological regression analysis and homogenous precinct analysis yielded similar results.

i. Exclusion of Expert Testimony on Race-Identified Registration Lists Not Harmless Error

The county challenged Dr. Arrington's use of race-identified registration lists, but both he and the defendant's expert testified that race-identified registration lists are commonly used and acceptable tools for examining racial voting patterns. Race-identified registration lists are arguably superior to the alternatives, such as the use of census data, because they make no assumptions about registration rates in particular communities. The idea that Dr. Arrington's analysis was methodologically flawed was belied by the fact that both experts' bivariate ecological regression analyses and homogenous precinct analyses yielded similar results. The Ninth Circuit also cited with approval an Eleventh Circuit case upholding the admissibility of expert opinion testimony as to voting age population and approving the use of voter registration data as the basis for measuring VAP were upheld in *Johnson v. DeSoto Board of County Commissioners*, 204 F.3d 1335 (11th Cir. 2000), rejecting the argument that voter registration data are inherently unreliable as a measure of voting age population and cannot be used to contradict census figures.

j. Voting Machine Down-Time

The Third Circuit addressed expert testimony about voting machine down-time in the context of malfunctioning electronic voting machines in *Montgomery County v. Microvote Corp.*, 320 F.3d 440 (3d Cir. 2003). The county recovered monetary damages in a suit against the seller/principal and its surety based on malfunctions of electronic voting machines purchased by the county. At trial the defendants proffered videotape deposition testimony of an expert who was admittedly qualified to testify that the voting machines met Federal Election Commission standards, but relied in part on a "reverse guesstimate" of the machines' down time set forth in a document prepared by the defendant seller's sales director. The expert did not know what this down-time document was, who created it or how it was created, nor did he measure actual election use data. The trial court's exclusion of this expert evidence was upheld by the Third Circuit, which concluded that the data underlying the expert's opinion was not based on sound data and was unreliable.

8. Preliminary Injunction Stage and Relaxed Evidentiary Standard

The Fourth Circuit and other circuits apply a less strict evidentiary standard for admissible evidence and reliance upon hearsay at the preliminary injunction stage, demonstrated recently in *GG ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 714-15 (4th Cir. 2016), application to recall and stay the mandate of the Fourth Circuit granted, 136 S. Ct. 2442 (August 3, 2016), cert. granted, 2016 WL 4565643 (October 28, 2016). The primary issue in this appeal was whether Title IX required schools to provide transgender students access to restrooms congruent with their gender identity. The Fourth Circuit held that a school board violated Title IX by segregating transgender students from their peers based on the students' "biological sex," and that the district court had used the wrong evidentiary standard in its denial of a preliminary injunction.

In the district court's analysis of the multiple factors applicable to consideration of a request for a preliminary injunction, it analyzed the request in this case only regarding the third factor — the balance of hardships — and found that the balance of hardships did not weigh in the plaintiff's favor. Two declarations had been submitted in support of the plaintiff's complaint, one from himself and one from a medical expert, to explain what harms the plaintiff will suffer because of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions."

In doing so, per the Fourth Circuit, the district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." As the Fourth Circuit made clear, however, preliminary injunctions are governed by less strict rules of evidence.

To compound the district court's error, the district court excluded some of the plaintiff's proffered evidence on hearsay grounds, an approach rejected by the Fourth Circuit and seven sister circuits that have considered the admissibility of hearsay in preliminary injunction proceedings. Those courts decided that the nature of hearsay evidence goes to "weight, not preclusion" and permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir.2010); See also *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir.2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir.1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir.1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations

omitted)); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir.1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir.1986); *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.1984). The Fourth Circuit saw "no reason for a different rule to govern in" that Circuit, because "preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted."

Because the district court evaluated the plaintiff's proffered evidence against a stricter evidentiary standard than was warranted in preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, it was "guided by erroneous legal principles," per the Fourth Circuit, and was found to have abused its discretion by denying the plaintiff's preliminary injunction request without considering his proffered evidence.

9. Preparing for a *Daubert* Challenge: Practical Suggestions

No checklist can cover every aspect of expert opinion testimony, but the following suggestions will provide a helpful starting point. These can be supplemented by additional inquiries and factors tailored to the unique facts, field of expertise, issues and subject matter of the particular case, but with a caveat: This is not a bean-counting exercise. Counsel must be supremely aware of the potential application of Rules 701, 702, 703, and 403. For counsel raising the *Daubert* challenge, it should be approached as an effort to persuade the trial judge to rule favorably when a *Daubert*-based objection to admissibility is raised.

Conversely, to the extent that the opposing expert cannot be satisfactorily responsive to these suggested areas of inquiry, his or her expert testimony will have a correspondingly lesser likelihood of being admitted:

- (a) Is the expert qualified in the specific field of expertise involved? Confirm a "fit" between the expert's opinion and the field involved.
- (b) Is there a generally accepted body of learning, study and experience in that field?
- (c) Is the expert's testimony grounded in that body of learning, study and experience?
- (d) Can the expert explain how his conclusion is so grounded?
- (e) Explain the principles of the specific field.
- (f) Explain the expert's methodology and steps involved in that methodology to be taken to solve the particular issue or problem.
- (g) Has the principle, theory or technique been objectively tested, or can it be?

- (h) Has the principle, theory or technique been subjected to peer review or publication?
- (i) Does the principle, theory, technique or method have a low potential rate of error?
- (j) Has the principle, theory, technique or method been generally accepted by the relevant industry as proper to be used in matters of this sort?
- (k) Has the principle, theory, technique or method been used outside the litigation in which the expert's opinion or conclusion is being offered?
- (l) For the expert's field of expertise, can he show that an appropriate specific method, theory or technique was used, tested and subjected to peer and publication; identify the known or potential rate of error with respect to the technique; and show that standards controlling the technique's operations are reasonable?
- (m) If the expert is relying solely or primarily on experience, can he explain and show how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts?
- (n) Have all the data, items, materials involved in the case have been inspected or reviewed?
- (o) If an on-site investigation or experience is appropriate, has the expert interviewed appropriate persons and inspected the appropriate site?
- (p) Has the expert read the appropriate learned treatises, articles or materials in the field of his expertise?
- (q) Can the expert identify the studies in the field relied upon, including published studies, and are those studies reliable?
- (r) Can the expert explain why the methodology, rates of error, and results of these studies are reasonably relied on by experts in his field?
- (s) If the expert is relying on experience as the basis for his opinion, can he explain what his experience consists of and how that experience leads to the opinion and conclusion he reached?
- (t) Can the expert show and explain that the rate of error in his method, technique or conclusion is low?
- (u) Can the expert show how he applied his knowledge and experience in evaluating and handling the data, articles, and technical literature and making his analysis?
- (v) If causation is the subject of the expert's testimony, has he ruled out other plausible alternative causes of the event, injury or condition in question?
- (w) Is there a logical connection and no analytical gap between the data and the expert's opinion or conclusion, and can the expert explain how that data has been bridged to the opinion or conclusion by sound inductive or deductive reasoning?

- (x) Was the expert's opinion or conclusion reached outside the arena of litigation?

C. Admissibility of Social Media Evidence

Social media evidence has found its way into federal and state courtrooms. It can be powerful evidence when properly authenticated and relevant in a given case. Per Facebook founder Mark Zuckerberg and current user data, social media networks provide 1.7 billion people with "a way to say what they're thinking and have their voice heard." Elizabeth A. Flanagan, # *Guilty? Sublet v. State and the Authentication of Social Media Evidence in Criminal Proceedings*, 61 Vill. L. Rev. 287 (2016), available at <http://digitalcommons.law.villanova.edu/vlr/vol61/iss2/3>.

Social networking websites have been described as "sophisticated tools of communication where the user voluntarily provides information that the user wants to share with others," *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 424 n. 3, 966 A.2d 432, 438 n. 3 (2009). Social networking websites like MySpace enable members "to create online 'profiles,' which are individual web pages on which members [can] post photographs, videos, and information about their lives and interests." *Doe v. MySpace, Inc.*, 474 F.Supp.2d 843, 845 (W.D.Tex.2007).

The ABA Advisory Committee on Evidence has prepared and hopefully will continue to update a draft list of relevant factors for authenticating e-mails, text messages, chatroom and other social media conversations, and websites, integrating the factors with the current evidentiary rules used for authentication. See *Report on Best Practices Manual for Authentication of Certain Electronic Evidence*, at 127-155 (2015), contained in Advisory Committee on Evidence Rules, Meeting & Symposium, Chicago, IL (October 9, 2015), accessible at file:///C:/Users/BEN~1.GRI/AppData/Local/Temp/2015-10-evidence-agenda_book_0.pdf

While the list does not assign weight to the factors, the importance of any one of which will depend upon the specific facts of each case, and while there is no suggestion that all of the factors be proven before the authenticity of an e-mail or other cybercommunication can be established, the list is a helpful guide for trial counsel and can be found at 5 Stephen A. Salzburg, Michael M. Martin, and Daniel J. Capra, *Federal Rules of Evidence Manual* 901-22 to 901-30 (11th Ed. 2015).

For example, with respect to Rule 901(b)(1)'s application when the sponsoring witness has personal knowledge, one of these three possible approaches are suggested:

- (1) The author of the e-mail in question testifies to its authenticity;

- (2) A witness testifies that he or she saw the e-mail in question being authored by the declarant; or
- (3) The custodian of records of a regularly conducted activity certifies, in accordance with Rule 902(11) or (12) that the e-mail satisfies the criteria of Rule 803(6).

Id. at 901-22.

With respect to cases in which circumstantial evidence is introduced to authenticate an e-mail purportedly sent by a particular person, this multifactor approach is suggested:

- (1) The inclusion of some or all the following in an e-mail can be sufficient to authenticate the e-mail as having been sent by a particular person:
 - (a) The purported author's known e-mail address,
 - (b) The author's electronic signature,
 - (c) The author's name,
 - (d) The author's nickname,
 - (e) The author's screen name,
 - (f) The author's initials,
 - (g) The author's moniker,
 - (h) The author's customary use of emoji or emoticons,
 - (i) The author's use of the same e-mail address elsewhere.
- (2) The content of the e-mail suggests the purported author created the document, including but not limited to:
 - (a) A writing style similar or identical to the purported author's manner of writing.
 - (b) Reference to facts only the purported author or a small subset of individuals including the purported author would know.
 - (c) Reference to facts uniquely tied to author such as contact information for relatives or loved ones, photos of the author or items or importance to the author such as a car or pet, the author's personal information, such as his or her cell phone number.
- (3) A witness testifies that the author told him to expect an e-mail prior to its arrival.
- (4) The purported sender acts in accordance with and in response to an e-mail exchange with the witness.
- (5) An e-mail's hash values may be used to authenticate (hash value is a unique numerical identifier that can be assigned to a file, group of files, or portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. Hashing is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of Bates-stamping used in paper document production.

- (6) A forensic witness testifies that an e-mail issued from a particular device at a particular time.
- (7) The author orally repeats the contents soon after the e-mail is sent.
- (8) The author discussed the contents of the e-mail with a third party.
- (9) The author leaves a voicemail with substantially the same content.
- (10) The author produces in discovery an e-mail purportedly authored by the author and the e-mail is offered against the author.
- (11) An adversary produces in discovery a third party's e-mail received by the producing party in the ordinary course of business and the e-mail is offered against the adversary.

Id. at 901-23 to 901-25.

A similar multi-factor approach is suggested for authentication of text messages, *id.* at 901-26 to 901-28, chatroom and other social media conversations, *id.* at 901-28 to 901-29, and internet websites, *id.* at 901-29 to 901-30. See generally Gregory P. Joseph, *Modern Visual Evidence* (Law Journal Press 2005) (in-depth analysis of questions on authentication of electronic evidence).

From an evidentiary standpoint, social media evidence in a given case may be required to satisfy Rule 401's relevancy requirement, pass Rule 403's balancing test, comply with the hearsay rule and its exceptions where applicable, Rule 901's requirement of authentication, whereby the proponent must lay a specific foundation to show that the evidence is what it purports to be, satisfy requirements for self-authentication under Rule 902, satisfy Rule 902(5)'s requirements for self-authentication of publications issued by public authority, and comply with the requirements for judicial notice under Rule 201.

1. Authentication of Social Media Posts, Text Messages, Websites, and E-Mail

The most likely and most frequently encountered rule of evidence that counsel will need to address with respect to social media evidence and e-mail is authentication.

As far as authentication is concerned, the Federal Rules of Evidence provide simply that, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Rule 901 provides several examples of proper authentication methods, including testimony of a witness with knowledge, expert or trier of fact comparisons, distinctive characteristics, and evidence about public records; the Rules acknowledge that the list is not complete. Fed. R. Evid. 901(b). "Rule 901 requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence." *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997).

Additionally, Rule 902 notes that certain evidence, including but not limited to certified copies of public records, official publications, newspapers and periodicals, commercial paper, and certified domestic records of a regularly conducted activity, is self-authenticating and requires no extrinsic evidence of authenticity to be admitted. Fed. R. Evid. 902.

2. Implicit Authentication and other means of Authentication

The Seventh Circuit has noted that "[a]uthentication relates only to whether the documents originated from [their purported source]; it is not synonymous to vouching for the accuracy of the information contained in those records," and the "very act of production [i]s implicit authentication." *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982); see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F.Supp.2d 941, 948 (W.D. Wis. 2008) (rejecting authenticity challenge at summary judgment as disingenuous where the challenged e-mails "were documents produced by defendant during discovery"); *Fenje v. Feld*, 301 F.Supp.2d 781, 809 (N.D. Ill. 2003) ("[d]ocuments produced by an opponent during discovery may be treated as authentic."); *In re Greenwood Air Crash*, 924 F.Supp. 1511, 1514 (S.D. Ind. 1995) ("Production of a document by a party constitutes an implicit authentication of that document.").

The Seventh Circuit has acknowledged that e-mails may be authenticated via circumstantial evidence such as viewing the content of the email in light of the factual background of the rest of the case and identifying the sender and/or recipient by unique email address. *United States v. Fluker*, 698 F.3d 988, 999-1000 (7th Cir. 2012); See also *Fenje*, 301 F.Supp.2d at 809 ("E-mail communications may be authenticated as being from the purported author based on an affidavit of the recipient; the e-mail address from which it originated; comparison of the content to other evidence; and/or statements or other communications from the purported author acknowledging the e-mail communication that is being authenticated."). See *Atrium Companies, Inc. v. ESR Associates, Inc.*, Civ. A. No. H-11-1288, 2012 WL 5355754, at *6 (S.D. Tex. Oct. 29, 2012) ("Ordinarily, a party that seeks to introduce an email made by an employee about a business matter under [the business records hearsay exception in Rule 803(6)] must show that the employer imposed a business duty to make and maintain such a record.") (citing *Cantxx Gas Storage, Ltd. v. Silverhawk Capital Partners, LLC*, 2008 WL 1999234, at *12 (S.D. Tex. May 8, 2008) ("Courts examine whether it was the business duty of an employee to make and maintain emails as part of his job duties and whether the employee routinely sent or received and maintained the emails.")).

One court from the Fifth Circuit, however, has admitted e-mail that was prepared 'during the course of ordinary business,' without addressing whether the employer was under a duty to make and maintain those communications. *Pierre v. RBC Liberty Life Ins.*, 2007 WL 2071829, at *2 (M.D. La. 2007) ("[C]onsidering

the emails at issue were prepared by [Defendant's] employees during the ordinary course of business, the Court finds that the emails fall within the exception to the hearsay rule provided in Fed. R. Evid. 803(6).") If the emails do not qualify as business records, they can be admitted at trial when accompanied by an affidavit or testimony from a person with knowledge about their origin.

a. Authenticity of Facebook and Text Messages Sent by Defendant

In *United States v. Barnes*, 803 F. 3d 209 (5th Cir. 2015), the Fifth Circuit held that the government laid a proper foundation to establish the authenticity of Facebook and text messages sent by the defendant, a quadriplegic. The recipient of the messages testified that she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating, leading the Court to conclude that conclusive proof of authenticity is not required for the admission of disputed evidence, and in any event, any potential error in admitting the text message and Facebook messages was harmless, stating at 218: "The text and Facebook messages at issue were about drug transactions, and were, therefore, relevant to all of the charged counts. However, the content of the messages was largely duplicative of what Holsen and numerous other witnesses testified to directly. Improperly admitting evidence that is duplicative of testimony at trial does not warrant reversal under harmless error review."

b. Business Records Exception to Hearsay Rule

The business records exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(A), states that "documents produced in response to discovery requests are admissible because they are self-authenticating and constitute the admissions of a party opponent under Rule 801(d)(2)(A)." *Hannon v. Kiwi Services*, 2011 WL 7052795, at *2 (N.D. Tex. Dec. 30, 2011; *Telewizja Polska USA v. Echostar Satellite Corp.*, 2004 WL 2367740, at *5 (N.D. Ill, Oct. 15, 2004) ("[C]ontents of [a party's] website may be considered an admission of a party-opponent, and are not barred by the hearsay rule."); *Van Westrienen v. Americontinental Collection Corp.*, 94 F. Supp. 2d 1087, 1109 (D. Or. 2000)("[R]epresentations made by defendants on the website are admissible as admissions of the party-opponent under FRE 801(d)(2)(A).").

c. *Griffin v. State*: Authentication of MySpace screenshot

A leading state court case on authentication of social media evidence is *Griffin v. State*, 19 A.3d 415 (Md. 2011), in which the Maryland Supreme Court found that state's version of Rule 901 applicable to authentication of pages printed from a social networking site. The Court addressed the admissibility of a MySpace page screenshot and the authentication of screenshots of messages allegedly sent over social media, finding that merely identifying the date of birth

and a face in a photograph on a social media web site that purports to reflect the creator and author of the post is insufficient. Because electronically-stored information is easily susceptible to abuse and manipulation it required "greater scrutiny of 'the foundational requirements' than letters or other paper records, to bolster reliability." *Id.* at 423.

Griffin had appealed from his conviction based on evidence in the form of printouts from a MySpace website, and the appellate court focused on determining the appropriate way to authenticate, for evidentiary purposes, electronically stored information printed from the social networking website. The MySpace profile of Griffin's girlfriend was introduced at trial to demonstrate that before the trial the girlfriend had allegedly threatened another witness called by the State. The Maryland Supreme Court faced the issue of whether the MySpace printout represented what it purported to be, not only a MySpace profile created by the girlfriend, but also upon which she had posted "JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!." The court held that pages allegedly printed from Griffin's girlfriend's MySpace profile were not properly authenticated under Maryland's version of Rule 901.

Reversing and remanding for a new trial, the court concluded that the trial judge abused his discretion in admitting the MySpace evidence pursuant to Rule 901(b)(4), reasoning that greater scrutiny is needed because of the heightened possibility for abuse and manipulation of a social networking site by someone other than the true user or poster.

d. *Tienda v. State*: Authentication of Social Media posts

Authentication of social media posts was at issue in *Tienda v. State*, 358 S.W.3d 633, 639 (Tex. Crim. App. 2012), where the Texas court equated the authentication of social media posts with that of the authentication of email, text messages, or chat room communications. Electronic evidence was admissible in those instances "when found to be sufficiently linked to the author so as to justify submission to the jury for its ultimate determination of authenticity." *Id.* Per the court, "[t]he preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic." *Id.* at 638. It distinguished *Griffin*, noting that even though *Griffin* recognized at least three methods by which social media posts may be authenticated, the Maryland court did not use any of those methods, nor did it enunciate a standard for authenticating evidence. In contrast to *Griffin*, the court in *Tienda* considered the circumstantial evidence including the distinctive characteristics of the posts themselves as well as the contents of the messages, *id.* at 642-45, and found that the social media posts in its case presented "far more circumstantial indicia of authenticity" than *Griffin*. *Id.* at 647.

The possibility for user abuse on MySpace was also addressed in *United States v. Drew*, 259 F.R.D. 449, 452 (D.C.D.Cal. 2009), where a mother was convicted under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, for creating a MySpace profile for a fictitious 16 year-old male named "Josh Evans," used the Josh Evans pseudonym to contact her daughter's former friend through the MySpace network, began to "flirt with her over a number of days", and then had the fictitious Josh inform the former friend that he no longer "liked her" and that "the world would be a better place without her in it," after which the former friend killed herself. *Id. Drew* demonstrated the relative ease with which any person can create fictional personas and gain unauthorized access to the profile of another user, in this case with deadly consequences.

e. *Sublet v. State: Evidence Derived from Online Social Networking Services*

Finally, in *Sublet v. State*, 113 A. 3d 695 (Md. App. 2015), the Maryland appellate court culled the various state and federal cases since *Griffin*, to set forth Maryland's standard for authenticating evidence derived from online social networking services. It considered the challenges of authentication and admissibility of evidence from social media, including communications between its users through online posts, addressing the authentication of Twitter and Facebook messages. *Id.* at 697. The *Sublet* court recognized that authentication of digital evidence, particularly social media, poses significant problems "because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password." *Id.* at 713 (quoting *Griffin*, 19 A.3d at 421). Despite the relatively low burden of proof for authentication of evidence, it held that the mere fact that digital evidence exists on social media does not, by itself, lead to the conclusion that it was created by the defendant or on his behalf, *Id.* at 713-17, and that the appropriate standard is whether there is "proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Id.* at 722.

The court in *Sublet* recognized three common and acceptable ways of authenticating social media postings:

- (1) The first and most obvious method for authentication ...would be to ask the purported creator if she indeed created the profile and also if she added the posting in question.
- (2) The second approach ...[is] to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question.
- (3) The third of the non-exhaustive means of authentication ...[is] to obtain information directly from the social networking website, which would link

together the profile and the entry to the person, or persons, who had created them.

Id. at 713.

f. *Lorraine v. Markel*: Authentication of ESI

A leading decision in civil litigation dealing with authentication in this context is *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 544 (D. Md. 2007), in which the court outlined issues regarding authentication of electronically stored information, in e-mail, websites, digital photographs, computer-generated documents, and internet postings with respect to Rule 901. *Lorraine* is considered an excellent primer on admissibility of electronically stored information as evidence, whether at trial or in summary judgment. The *Lorraine* court identified several potential evidentiary hurdles for such evidence: first, the proponent must show that the evidence is relevant under Rule 401, then authentic under Rule 901(a), which provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

A significant part of the *Lorraine* decision is the court recognition that electronic message metadata, including e-mail metadata, can reveal when, where, and by whom the message was authored, hence it could be used to successfully authenticate a document under Rule 901(b)(4). *Lorraine*, 241 F.R.D. at 547-48.

Extrinsic evidence is not always necessary, and under established precedent there are many instances in which "authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence. . . because practical considerations reduce the possibility of unauthenticity to a very small dimension." Fed.R.Evid. 902, Advisory Committee's note to the 1972 proposed rules. The court in *Lorraine* recognized that authenticating electronically stored information presented a myriad of concerns because "technology changes so rapidly" and is "often new to many judges," and the complexity and novelty of electronically stored information, with potential for manipulation, required greater scrutiny of the foundational requirements for such evidence to bolster its reliability, as compared to letters or other paper records. *Id.* at 543-44, quoting Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 900.06[3] (Joseph M. McLaughlin ed., Matthew Bender 2d ed.1997).

3. Student Speech Issues and *Tinker* in Cyberspace

The ubiquitous Internet has ushered in a new set of student speech issues. A significant portion of those issues arose in the context of First Amendment challenges to school educators and administrators tasked with maintaining a learning environment free from harassment and disruption, while students engage in online expressive conduct via Facebook, MySpace, Twitter, LinkedIn,

Snapchat, Instagram, and blogs. As the above discussion makes clear, authentication of social media evidence is not a mysterious process, and Rule 901(b)(4) is a frequently used means to authenticate electronic data.

First Amendment litigation in many of the circuits has centered on the applicability of the *Tinker* standard to online communications by students via Facebook, YouTube, and other social media that originate off campus but have a potentially disruptive impact on the school's educational mission.

While the courts are still undecided about what legal test will ultimately be applied with respect to disciplinary action directed toward off-campus student social media speech, most of the circuits have been consistent in engaging in a circumstance-specific inquiry to determine whether a school permissibly can discipline a student for off-campus speech.

a. *Wynar v. Douglas County*

The Ninth Circuit considered whether a public school may regulate a student's off-campus speech in *Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) and concluded that the school's regulation was permissible. The student in *Wynar* was expelled for threatening to commit a school shooting in a series of MySpace messages sent to friends. *Id.* at 1065-66. The messages were written and sent from the student's home computer after school hours, and the Ninth Circuit concluded that the school did not violate the student's First Amendment rights when it suspended him, holding that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech..." *Id.* at 1069.

Wynar identified two tests used by sister circuits to determine when a school may regulate off-campus speech. The Fourth Circuit applied a "nexus" test in *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), asking whether a student's off-campus speech was tied closely enough to the school to permit its regulation. *Id.* at 573. The Eighth Circuit in *S.J.W. v. Lee's Summit R-7 School District*, 696 F.3d 771 (8th Cir. 2012), applied a test asking whether it was "reasonably foreseeable" that off-campus speech would reach the school. *Id.* at 777. The Ninth Circuit was reluctant to "try and craft a one-size fits all approach," and declined to choose between these tests, holding that both were satisfied in the case of a threatened school shooting. *Wynar*, 728 F.3d at 1069.

b. *Bell v. Itawamba County School Board*

More recently, the Fifth Circuit held that schools may sometimes discipline students for off-campus speech. In *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (*en banc*), a high school student was disciplined for uploading a rap video at home containing vulgar and arguably threatening lyrics to Facebook and YouTube. *Id.* at 383. The Fifth Circuit, in an *en banc* decision,

concluded that the school permissibly regulated the student's speech, *id.* at 400, but declined "to adopt or reject approaches advocated by other circuits," holding that a school may regulate students' off-campus speech "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher..." *Id.* at 396.

A closer look at the Fifth Circuit's decision in *Bell* and the fact-intensive nature of social media evidence in a case with substantial First Amendment implications is instructive. As noted, Bell, an eighteen-year-old aspiring rapper and high school student, had recorded a rap song off campus and posted it on his Facebook page, containing statements directed at two coaches who, according to his classmates, had engaged in inappropriate behavior. Bell did not report his classmates' complaints to school authorities, but believed that if he wrote and sang about these incidents, others would listen to his music and that might help remedy what he saw as a problem of teacher-on-student sexual harassment. Included in Bell's lyrics posted to his Facebook page was the following:

*I'm going to hit you with my rueger . . .
Going to get a pistol down your mouth/Pow ...
Middle fingers up if you want to cap that nigga ...
Middle finger up / he get no mercy nigga*

As soon as school officials found out about Bell's threats, they convened a disciplinary hearing and suspended him. Bell countered with a federal civil action in which he alleged that his First Amendment right to freedom of speech had been violated. The district court denied Bell's motion of preliminary injunctive relief and ultimately granted summary judgment in the school board's favor, *Bell v. Itawamba County Sch. Bd.*, 859 F. Supp. 834 (N.D. Miss. 2012) ("In terms of foreseeable material or substantial disruption, it is reasonably foreseeable that a public high school student's song (1) that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language and (2) is published on Facebook.com to at least 1,300 friends, many of whom are fellow students, and the unlimited Internet audience on YouTube.com, would cause a material and substantial disruption at school.")

Bell then appealed to the Fifth Circuit. Following a 2-1 panel decision adverse to the school board, *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280 (5th Cir. 2014), the Fifth Circuit granted the school board's petition for rehearing *en banc*. The *en banc* Fifth Circuit held that Bell's social media communication was not protected speech under the First Amendment since it had a foreseeably disruptive effect on the school within the meaning of the "substantial disruption" standard first enunciated in *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969). *Bell v. Itawamba Cnty. Sch. Bd.*, 782 F.3d 712 (5th Cir. 2015). See generally Margaret Anne Malloy, *Bell v. Itawamba County School Board: Testing the Limits of First Amendment Protection of Off-Campus Student Speech*

(April 6, 2016), available at <https://ssrn.com/abstract=2771344> or <http://dx.doi.org/10.2139/ssrn.2771344>; Jeff D. McAlpin, *A Substantial Disruption of Public Concern: Tinker, Bell v. Itawamba, and Internet Speech for High School Students* (January 1, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723555.

As the Ninth Circuit put it in *Wynar*, “[w]ith the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result.”

4. Cyberspeech at the College and University Level

Additional considerations are factored into the student cyberspeech dynamic at the college and university level. In *Keefe v. Adams*, 2016 WL 6246869 (8th Cir. 2016), the plaintiff, a nursing student, was removed from the college’s Associate Degree nursing program for behavior unbecoming the profession and transgression of professional boundaries following student complaints about posts on plaintiff’s public Facebook page.

The plaintiff initially claimed his Facebook page had been hacked and that his comments were intended as jokes, but confirmed that he had written posts that included the following:

Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger.

Doesnt anyone know or have heard of mechanical pencils. Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax 3 with it before to long. I might need some anger management.

LMAO [a classmate], you keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch And quite creeping on my page. Your not a friend of mine for a reason. If you don't like what I have to say than don't come and ask me, thats basically what creeping is isn't it. Stay off my page...

Id. at *2.

Affirming summary judgment in favor of the college on the student’s First Amendment claim, the 8th Circuit stated:

A serious question raised by Keefe in this case is whether the First Amendment protected his unprofessional speech from academic disadvantage because it was made in on-line, off-campus Facebook postings. On appeal, Keefe framed this contention categorically, arguing that a college student may not be punished for off-campus speech unless it is speech that is unprotected by the First Amendment, such as obscenity. We reject this categorical contention. A student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct. . . . Therefore, college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Id. at *5.

5. Ballot Selfies and First Amendment Implications

a. *Rideout v. Gardner*

As the First Circuit recently observed, “a picture is worth a thousand words.” *Rideout v. Gardner*, *infra*. In *Rideout*, the court addressed the constitutionality of New Hampshire’s recently adopted law that made it unlawful for voters to take and disclose digital or photographic copies of their completed ballots to let others know how they have voted. The law was challenged on First Amendment grounds by three voters who were under investigation because they posted images of their ballots on social media sites. The trial court held that the new law was invalid because it was a content-based restriction on speech that could not survive strict scrutiny. 123 F. Supp. 3d 218 (D. N.H. 2015). The First Circuit affirmed on the narrow ground that the statute failed to meet the test for intermediate scrutiny under the First Amendment and that its purposes could not justify the restrictions it imposed on speech. While the New Hampshire Secretary of State argued that the statute was justified as a prophylactic measure to prevent new technology from facilitating future vote buying and voter coercion, the First Circuit concluded that even under intermediate scrutiny, the statute was facially unconstitutional, particularly since the restriction affected voters who are engaged in core political speech, an area highly protected by the First Amendment. Further, the First Circuit noted there is an increased use of social media and ballot selfies as a form of political speech.

Per Snapchat, "younger voters participate in the political process and make their voices heard" using ballot selfies. *Rideout v. Gardner*, 2016 WL 5403593 at *7 n.9 (1st Cir. Sept. 28, 2016). With the demise of New Hampshire’s selfie prohibition, it is interesting to note that The Pew Research Center’s data from the

2012 election revealed that "22% of registered voters have let others know how they voted on a social networking site such as Facebook or Twitter," "30% of registered voters [were] encouraged to vote for [a particular candidate] by family and friends via posts on social media such as Facebook and Twitter," and "20% of registered voters have encouraged others to vote by posting on a social networking site." Lee Raine, Pew Research Center, Social Media and Voting (Nov. 6, 2012), <http://www.pewinternet.org/2012/11/06/social-media-and-voting/>; *Rideout v. Gardner*, supra n 9.

b. *Crookston v. Johnson*

Ballot-selfies were banned by a controversial Michigan statute requiring ballots to be rejected for “exposure”, but the ban was recently the subject of a preliminary injunction in *Crookston v. Johnson*, <http://lawprofessors.typepad.com/files/crookston-v-johnson-pi-order.pdf> (W.D. Mich. 2016), motion for stay pending appeal granted, 2016 WL 6311623 (6th Cir. October 28, 2016).

The district court in *Crookston* relied on the First Circuit’s decision in *Rideout* that invalidated New Hampshire's similar prohibition of the ballot-selfie as an unwarranted, broad prophylactic prohibition, reasoning that even if it were possible that ballot selfies would make vote buying and voter coercion easier by providing proof of how the voter actually voted, the New Hampshire statute still failed for lack of narrow tailoring.

The district court’s short-lived holding in *Crookston* was that the Michigan statutory ban was a content-based prohibition of speech about marked ballots, and there did not appear to be a sufficient basis to support a relationship between ballot-selfies and coercion and vote-buying, the governmental interests the state sought to advance, and the protection of the rights of other voters in exercising their right to vote by causing intimidation, disruption, and long lines at the polls. Faced with an imminent election, the state of Michigan filed an emergency motion to stay the preliminary injunction pending appeal, which was granted by the Sixth Circuit on October 28, 2016.

Whether or not the trend is moving toward extending First Amendment protection for ballot-selfies, the Sixth Circuit is not ready to follow that trend and reached its decision very quickly, considering the proximity of the November 8, 2016 election, the length of time the challenged statute had been in effect, and the need for time to consider this matter before reaching a decision. It reasoned that

[t]iming is everything. Crookston's motion and complaint raise interesting First Amendment issues, and he will have an opportunity to litigate them in full—after this election. With just ten days before the November 2016 election, however, we will not accept his invitation to suddenly alter Michigan's venerable voting protocols, especially when he could have filed this lawsuit long

ago. For these reasons and those below, we grant the Secretary of State's motion to stay the district court's preliminary injunction.

2016 WL 6311623 at *1.

6. Social Media Privilege: Civil vis-à-vis Criminal Proceedings

The few courts that have addressed the concept of a “Social Media Privilege” have concluded that no privilege exists in the context of civil litigation. In *TB v. Montana State Fund*, 2015 MTWCC 18 (Mont. Workers' Comp. Court 2015), the Montana Supreme Court has not yet had the opportunity to rule on the parameters of discovery into social networking. Having reviewed other cases involving social networking discovery, the court agreed that no "social media privilege" exists and that private Facebook posts are discoverable.

a. *State v. Windham*: Subjective Expectation of Privacy in Facebook page

The existence of a defense in criminal proceedings predicated on a criminal defendant's subjective expectation of privacy in his private Facebook page has been recognized, however, and may provide the functional equivalent of a social media privilege. In *State v. Windham*, Cause No. DC-13-118C, (Montana 18th Jud. Dist. Ct., Gallatin Cnty. 2015), a detective posed as a 16-year-old girl via a fictitious Facebook account to investigate sexual crimes involving children. The defendant, who had set his Facebook account to the highest privacy setting, became Facebook "friends" with the "girl," which gave the detective access to his Facebook page, and began communicating with the "girl" via private chatting. The communications became sexual in nature, culminating in the defendant attempting to meet the "girl" in person. Instead, the defendant was met by law enforcement officers and charged with attempted sexual abuse of children, pursuant to § 45-5-625, MCA. Windham then moved to suppress evidence and dismiss his case, arguing that he was the subject of an illegal search.

The court ruled that Windham was subjected to an illegal search because he had a subjective expectation of privacy in his private Facebook page and chats society recognizes as reasonable, and the government neither obtained a warrant supported by probable cause nor provided adequate justification for its failure to do so. Thus, the court suppressed all evidence from the defendant's Facebook account, which was all the evidence, and dismissed the case.

b. *Giacchetto v. Patchogue-Medford*: Admissibility of Social Media Postings

Giacchetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112, 115 (E.D.N.Y. 2013) is a leading case on the discoverability and admissibility of social media postings and evidence from an individual's social network account. Plaintiff was a public-school teacher who claimed to have been diagnosed with

adult Attention Deficit Hyperactivity Disorder (ADHD). She brought an ADA action against the school district alleging discrimination based on her ADHD, retaliation for filing a complaint and failing to accommodate her ADHD.

The district moved to compel the teacher to provide authorizations for the release of all records from teacher's social networking accounts, limited to three categories of information: (1) postings about the teacher's emotional and psychological well-being; (2) postings about the teacher's physical damages; and (3) any accounts of the events alleged in the teacher's pleadings. The district sought this evidence on the basis that information from her social networking accounts was relevant to her claims of physical and emotional damages because it reflected her levels of social interaction, daily functioning, and her emotional and psychological state. The teacher objected because the request was based on pure speculation and a fishing expedition designed to harass her and unnecessarily impinge on her privacy.

“The fact that Defendant is seeking social networking information as opposed to traditional discovery materials does not change the Court's analysis. *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D.Ind.2010) (“Discovery of [social networking postings] requires the application of basic discovery principles in a novel context.”); accord *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D.Cal.2012). The Court also notes that the “fact that the information [Defendant] seeks is in an electronic file as opposed to a file cabinet does not give [it] the right to rummage through the entire file.” *Howell v. Buckeye Ranch, Inc.*, 2012 WL 5265170, at *1 (S.D. Ohio Oct. 1, 2012).”

Regarding the plaintiff's demand for emotional distress damages, the court noted that other courts reached varying conclusions regarding the relevance of social networking postings in claims for emotional distress damages. Some courts have held that such information is relevant. See *Reid v. Ingerman Smith LLP*, 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012) (“statements regarding plaintiff's social activities may be relevant to plaintiff's claims of emotional distress and loss of enjoyment of life”); *Robinson v. Jones Lang LaSalle Ams., Inc.*, 2012 WL 3763545, at * 1 (D. Or. Aug. 29, 2012) (finding it “reasonable to expect severe emotional or mental injury to manifest itself in some social media content”); *Sourdoff v. Texas Roadhouse Holdings, LLC*, 2011 WL 7560647, at *1 (N.D.N.Y. Oct. 24, 2011) (directing plaintiff to produce social networking information related in any way to her emotional or mental state).

Other courts have questioned the probative value of social media evidence in this context. *Holter v. Wells Fargo and Co.*, 281 F.R.D. 340, 344 (D.Minn. 2011) (“While everything that is posted on a social media website is arguably reflective of a person's emotional state [the court] would not allow depositions of every friend and acquaintance to inquire about every conversation and interaction with plaintiff.”).

The court in *Giacchetto* agreed with the latter approach and noted that the fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is suffering emotional distress. If it allowed broad discovery of plaintiff's social networking postings as part of the emotional distress inquiry, there would be no principled reason to prevent discovery into every other personal communication the plaintiff had or sent since alleged incident. See *Rozell v. Ross-Holst*, 2006 WL 163143, at *3 (S.D.N.Y. Jan. 20, 2006) (The court noted "anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing or, indeed, the deposition of everyone she might have talked to.")

The *Giacchetto* court concluded that Plaintiff's routine status updates and/or communications on social networking websites were not, as a general matter, relevant to her claim for emotional distress damages, nor are such communications likely to lead to the discovery of admissible evidence regarding the same. The court also found that certain limited social networking postings should be produced, including any specific references to the emotional distress plaintiff claims she suffered or treatment received in connection with the incidents underlying her Amended Complaint (e.g., references to a diagnosable condition or visits to medical professionals). In seeking emotional distress damages, plaintiff opened the door to discovery into other potential sources/causes of that distress, hence any social networking posts that refer to an alternative potential stressor must also be produced. See generally Clinton T. Magill, *Discovering Snapchat: How Will Snapchat and Similar Self-Destructing Social Media Applications Affect Relevance and Spoliation under the Federal Rules of Civil Procedure*, 9 Charleston L. Rev. 365 (Fall 2015)

Melissa G. v. N. Babylon Sch., 48 Misc. 3d 389, 6 N.Y.S.3d 445, 2015 NY Slip Op 25113 (NY Sup. Ct. 2015) provides a helpful analysis of how to approach disclosure and admission of social media website evidence. The plaintiff's public Facebook pages contained photographs of her engaged in a variety of recreational activities that were probative to her damage claims, and the court found that it was reasonable to believe that other portions of her Facebook pages may contain further evidence relevant to the defense.

Notwithstanding defendants' request for the disclosure of "the complete, unedited account data" for plaintiff's Facebook accounts, the trial court in *Melissa G.* was mindful that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress", citing *Giacchetto v Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 115 (E.D. N. Y. 2013).

Not all of plaintiff's personal communications to others were subject to scrutiny in connection with her claims, and there is a reasonable expectation of privacy attached to the one-on-one messaging option that is available through Facebook accounts, hence private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense.

Moore v. Wayne Smith Trucking, Inc., 2015 WL 6438913 (E.D. La. 2015) dealt with a tailored method of production of Facebook account information. The court declined to require the defendant to share his log-in or password information with plaintiffs, but followed the guidance of *Giachetto v. Patchogue-Medford Union Free School District*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013) and directed that defendant's postings be made available to and reviewed by his counsel — not the defendant himself — to determine whether they fit into a category of relevant evidence. The defendant's Facebook page had been hacked and subsequently closed by defendant, so he was directed to communicate with Facebook to reestablish it and request entries covering the time period relevant to this case.

c. No Unfettered Access to Facebook Account

Lewis v. Bellows Falls Congregations of Jehovah's Witnesses, 2016 WL 589867 (D. Vt. 2016) entailed a balancing of a congregation's need for access to Facebook information against the privacy concerns raised by the plaintiff in her claim that included allegations of emotional distress. The court found that it would be unfair for the plaintiff to make allegations of emotional distress and then deny defendants access to circumstantial evidence offering a reasonable prospect of corroborating or undermining her claims. The plaintiff's damage claims included her emotional distress, loss of enjoyment of life, and prevention from performing daily activities. While the court found that discovery of information within the plaintiff's Facebook account did have a bearing on these claims and that the congregation's defense of them was proportional to the needs of the case, discovery of information within the plaintiff's Facebook account was not beyond the scope of Rule 26(b)(1).

The court in *Lewis* declined to allow the congregation unfettered access to the plaintiff's Facebook account simply because she had a claim for emotional distress damages and found that “[n]ot every message, post, or photo is relevant to her claims or defendants' defenses,” hence the congregation's request for complete disclosure of the plaintiff's Facebook profile, posts, and photos was denied.

D. Use and Abuse of Lay Opinion Testimony

Rule 701 permits a lay witness—not an expert—to testify "in the form of an opinion" if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the

determination of a fact in issue." As amended in 2000, Rule 701(c) also imposes a limitation that the lay opinion not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

An example of when lay opinion was found to be helpful and not a legal conclusion that should be excluded from evidence can be found in the Ninth Circuit's decision involving the appeal by two officers convicted of depriving Rodney King of his rights as an arrestee, *United States v. Koon*, 34 F. 3d 1416, 1431 (9th Cir. 1994). Testimony in the state court trial, which ended with a mistrial on one count and acquittal on all other counts, was sought to be admitted in the subsequent federal action. Both officers objected to the admission of the testimony of an officer Briseno, who was at the scene of King's beating. Briseno testified that one of the defendant officers in the federal action was "out of control" during the beating incident. The defendant officers argued that such testimony was tantamount to saying excessive force was employed, the very question the jury in the federal action was to decide. The Ninth Circuit disagreed, holding that the ultimate issue was not whether the two officers were out of control, but whether they willfully used unreasonable force, and that the observation of the officer at the scene was helpful to the jury and rationally based on the officer's personal perception of the beating. *Id.* at 1430. The Ninth Circuit concluded that it was not error to admit the videotape record of this lay testimony:

Appellants are wrong that Briseno's statements are no more than conclusory assertions about ultimate issues. The ultimate issue in the case was not whether the defendants were out of control, but whether they willfully used unreasonable force. The fact that Powell may have been out of control could have helped the jury resolve that issue; at the same time, it certainly did not settle the issue in and of itself. Briseno's statement thus was not "testimony which merely tells [the jury] what result to reach." 3 Weinstein's Evidence ¶ 701[02], at 701-25.

Id. at 1430.

The district court erroneously permitted lay opinion testimony in *Village of Freeport v. Barrella*, 814 F. 3d 594 (2d Cir. 2016), an employment discrimination action in which the plaintiff, a white Italian-American, brought a Section 1981 and Title VII suit against the Village and its former mayor, alleging that the mayor had not appointed him chief of police because the mayor appointed a less-qualified Hispanic. The Village argued that the district court abused its discretion in allowing the jury to consider unsupported lay opinion testimony regarding the Mayor's reasons for promoting the Hispanic applicant and that it was error to permit lay opinion testimony that speculated as to the mayor's reasons for not appointing the plaintiff, in violation of Rule 701(b).

The Second Circuit held that lay opinion testimony regarding the mayor's reasons for promoting the Hispanic applicant was grounded on impermissible speculation as to the mayor's motives for various personnel decisions, in violation of Rule 701(b). Rule 701(b) protects "against the admission of opinions which would merely tell the jury what result to reach" and barred lay opinion testimony that amounted to a naked speculation concerning the motivation for a defendant's adverse employment decision.

The Second Circuit concluded that the trial court erred in permitting these witnesses to testify that the mayor had recommended individuals for promotion based on their race, despite those witnesses' admissions that they had no personal knowledge of the mayor's selection process and only the vaguest idea of the relevant candidates' qualifications. Such testimony was not helpful to the jury in the sense required by Rule 701(b), and the trial court's decision to allow the jury to consider it was an "abuse of discretion."

1. Expert Witness in the Guise of a Layperson

Several courts have expressed concern over attempts to evade the Rule 702 reliability requirements applicable to expert testimony by calling an expert in the guise of a lay witness capable of giving lay opinion testimony under Rule 701. In *Asplundh Mfg. Div. v. Benton Harbor Engineering*, 57 F. 3d 1190, 1202 (3d Cir. 1995), a purported lay witness testified that an accident was caused by a defective design in a mechanical lift. The lay witness based his testimony on his extensive experience in the maintenance and operation of machinery like that used in the accident in question. The trial court found that "under Rule 701 the trial judge must play some gatekeeping role so as to ensure that the rationally derived and helpfulness requirements of the rule are met." If the witness testifies about technical or highly specialized subject matter, the proponent of that testimony cannot evade *Daubert's* gatekeeping requirements by the simple expedient of labeling the witness as a lay witness instead of an expert witness.

2. Post-Asplundh: Revised Rule 701

Following *Asplundh*, Rule 701 was revised on recommendation of the Advisory Committee on the Federal Rules of Evidence and now provides that testimony is not admissible under Rule 701 if it is based on scientific, technical or other specialized knowledge within the scope of Rule 702. The intent of this amended language, according to the Committee Note, is to "eliminate the risk that the reliability requirements of Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing" and to ensure "a party will not evade the expert witness disclosure requirements" of Rule 26 "by simply calling an expert witness in the guise of a layperson." 3 Stephen A. Salzburg, Michael M. Martin, and Daniel J. Capra, *Federal Rules of Evidence Manual* 701-21 (11th ed. 2015). See generally Edward J. Imwinkelried, *Distinguishing Lay*

From Expert Opinion: The Need to Focus on the Epistemological Differences Between the Reasoning Processes Used by Lay and Expert Witnesses, 68 S.M.U. L. Rev. 73, 104 (2015) (“the judge should focus on the reasoning processes underlying the two types of opinions. In both cases, the witness makes a comparative judgment, employing a generalization to evaluate a case-specific fact or facts. ... While lay witnesses form their generalizations primarily through firsthand knowledge, out of necessity experts rely on other, hearsay sources of information.”) See *Asplundh*, 57 F.3d at 1202 n. 16 (“[T]he ability to answer hypothetical questions is ‘[t]he essential difference’ between expert and lay witnesses.”)

E. Video Cam Evidence: Gaps, Glitches, and Turned-Off Recorders

The national debate about the exercise of lethal force in police encounters with citizens has taken a dramatic turn post-Ferguson. With the ready availability of iPhones and similar hand-held devices, videos of police officers taken by civilians have been commonplace and frequently end up on the evening news, blogs, YouTube, and social media. Courts are divided, however, on whether there is a First Amendment right to record the police and whether such a right is clearly established for purposes of qualified immunity.

The First, Seventh, Ninth, and Eleventh Circuits have recognized a First Amendment right to record police, see generally *ACLU of Illinois v. Alvarez*, 679 F. 3d 583, 608 (7th Cir. 2012) (note that Judge Posner in a strong dissent argued that there should be no First Amendment right to record the police in public); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding there is a First Amendment interest in videotaping government officials performing their duties in public places); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Adkins v. Limtiaco*, 537 F. App’x 721, 722 (9th Cir. 2013) (per curiam) (First Amendment right to take photos of police). The Third Circuit in *Kelly v. Borough of Carlisle*, 622 F. 3d 248, 262 (3d Cir. 2010), however, found no clearly established right to record traffic stops exists and has expressed doubt about whether the right exists at all considering the dangerousness presented by traffic stops.

Moreover, district courts within at least five different circuits have held that there is no clearly established First Amendment right to record police activity in public, resulting in qualified immunity for police officers accused of violating that right. See generally *Lawson v. Hilderbrand*, 88 F. Supp. 3d 84, 100 (D. Conn. 2015); *Garcia v. Montgomery County*, 2015 WL 6773715 (D. Md. 2015); *Pluma v. City of New York*, 2015 WL 1623828 (S.D.N.Y. 2015) (no clearly established right to record police activity); *Montgomery v. Killingsworth*, 2015 WL 289934 (E.D. Pa. 2015); *Williams v. Boggs*, 2014 WL 585373 (E.D. Ky. 2014); *Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002 (D.N.M. 2014), aff’d on other grds, 2015 WL 9298662 (10th Cir. 2015); *Ortiz v. City of New York*, 2013 WL 5339156

(S.D.N.Y. 2013); *True Blue Auctions v. Foster*, 528 F. App'x 190, 193 (3d Cir. 2013) (right to record police on public sidewalk not clearly established); *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009)(per curiam); *Fields v. City of Philadelphia*, 2016 WL U.S. Dist. LEXIS 20840, at *3 (E.D. Pa. 2016) (held that there is no First Amendment right based solely on observing and recording without expressive conduct, appeal to the Third Circuit is pending).

In *Gericke v. Begin*, 753 F. 3d 1,8 (1st Cir. 2014), the First Circuit said filming police can only be constitutionally prohibited after a lawful order from a police officer when filming interfered with police work. In *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015), the district court found a clearly established right for a non-participant in a police encounter to film the police and held that the right to record the police was clearly established as to journalists who are filming at a distance and unconnected to the events recorded.

Distilling most of the case law and circuit split on this issue, several conclusions can be reached:

First, a traffic stop is a police duty carried out in public.

Second, a traffic stop does not extinguish an individual's right to film.

Third, an individual's exercise of the right to film a traffic stop can be limited, particularly in light of the fact that, at least in Fourth Amendment cases, traffic stops may be “especially fraught with danger to police officers” and thus justify more invasive police action than would be permitted in other settings. *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009).

Fourth, reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them, including reasonable time, place, and manner restrictions, and reasonable orders to maintain safety and control, which have incidental effects on an individual's exercise of the First Amendment right to record, may be permissible.

Fifth, legitimate safety reasons may justify the police during a traffic stop to command bystanders to disperse, and such an order may be directed at a person who is filming, when the detained individual is armed and the circumstances justify a safety measure that would incidentally impact an individual's exercise of the First Amendment right to film the police in action.

Sixth, a police order specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.

Seventh, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights in our democratic society,

and the same restraint demanded of police officers in the face of ‘provocative and challenging’ speech, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.

Eighth, an individual's exercise of his or her First Amendment right to film police activity carried out in public, including a traffic stop, necessarily remains unfettered unless and until a reasonable restriction is imposed or in place, which can take the form of a reasonable, contemporaneous order from a police officer, or a preexisting statute, ordinance, regulation, or other published restriction with a legitimate governmental purpose.

1. Video Evidence at Trial and on Appeal

a. *Scott v. Harris*: “The Videotape Tells Quite a Different Story”

Video evidence can play a dispositive role in a trial court’s or appellate court’s decision in high speed pursuit cases, as the late Justice Antonin Scalia observed in *Scott v. Harris*, 550 U.S. 372 (2007), a landmark decision in which DRI’s own Philip Savrin participated as lead counsel in oral argument.

The Court in *Scott* considered a claim that a law enforcement officer violated the Fourth Amendment when he terminated a high-speed car chase by using a PIT (Precision Intervention Technique) maneuver, a technique that placed a "fleeing motorist at risk of serious injury or death." 550 U.S. at 386. The record included a videotape of the chase, and the Court found that the recorded events justified the officer's conduct, noting that "[a]lthough there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." 550 U.S. at 383-384.

In addressing the threshold issue of whether deputy Scott’s actions violated the Fourth Amendment, Justice Scalia revealed how video evidence could play a dispositive role in the Court’s decision. Indeed, it was video evidence that provided the basis for the Court to hold that a law enforcement official, consistent with the Fourth Amendment, could attempt to stop a fleeing motorist by employing a PIT maneuver to stop the motorist’s flight from endangering the lives of innocent bystanders, even if the officer’s actions led to the motorist’s vehicle leaving the roadway, crashing, and rendering the motorist a quadriplegic.

Scott was decided on summary judgment, hence there were no factual findings by a judge or jury. Faced with two different versions of the events as told by the opposing parties, the trial court denied deputy Scott’s motion for summary judgment based on qualified immunity, and the Eleventh Circuit Court of Appeals affirmed on interlocutory appeal. Both the trial court and Court of Appeals

adopted the fleeing motorist's version of the facts, viewing those facts and draw reasonable inferences in a light most favorable to the nonmovant motorist.

As Justice Scalia put it, there was "an added wrinkle in this case" in the form of a videotape that captured the events in question.

There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals. For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F.3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test.

...

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

550 U.S. at 378-79.

Writing for the majority in *Scott*, Justice Scalia laid the groundwork for judicial reliance on video evidence when confronting two different stories told by opposing parties, "one of which is blatantly contradicted by the record, so that no reasonable jury could believe it." *Id.* at 380. With the case in that posture on summary judgment, "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

The video tape made it clear that deputy Scott did not violate the Fourth Amendment. The fact issue of whether the fleeing motorist was driving in such a fashion as to endanger human life could only be decided based on record evidence

that “utterly discredited” the motorist’s version of the events, such that “no reasonable jury could have believed him.” The Court chastised the Eleventh Circuit Court of Appeals for relying “on such visible fiction” and found that it “should have viewed the facts in the light depicted by the videotape.” *Id.*

The Eleventh Circuit has interpreted *Scott* as reaffirming its understanding of the summary judgment standard, see, e.g., *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) (“Thus, where an accurate video recording completely and clearly contradicts a party's testimony, that testimony becomes incredible.”). In *Morton*, the Eleventh Circuit affirmed the district court's denial of summary judgment in the absence of a video recording, where the defense offered “forensic evidence that does not so utterly discredit [the plaintiff's] testimony that no reasonable jury could believe it.” *Id.*

The evidentiary standard enunciated in *Scott* for videotape evidence has been applied in a number of contexts:

- (1) As the basis for granting an officer’s motion for summary judgment in a §1983 action for false arrest, excessive force, and failure to protect in violation of the Fourth Amendment in *Williams v. Brooks*, 809 F. 3d 936 (7th Cir. 2016) (“A twist on the usual standard of review is at play here: When the evidence includes a videotape of the relevant events, the Court should not adopt the nonmoving party's version of the events when that version is blatantly contradicted by the videotape. *Scott v. Harris*, 550 U.S. 372, 379-80, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Accordingly, we rely primarily on the video from the dashboard camera of Officer Brooks' vehicle.”)
- (2) As the basis for denying an officer’s summary judgment motion in a §1983 action for failure to intervene and prevent another officer from infringing the constitutional rights of citizens if that officer had reason to know excessive force was being used and the officer had a realistic opportunity to intervene to prevent the harm from occurring. *Johnson v. City of Loves Park*, 2016 WL 851988 (N.D. Ill. 2016) (“[w]hen the evidence includes a videotape of the relevant events,” the court should “rely primarily on the video from the dashboard camera of [the officer's] vehicle”)
- (3) As the basis for granting summary judgment on an ADEA claim and upholding a school board’s decision to terminate a special needs LPN whose actions were captured on a school bus video camera: *Bailey v. Baldwin County Board of Education*, 2016 WL 80662 (S.D. Ala. 2016) (despite the plaintiff’s “protests that the video is not what it seems to be,” it was not unreasonable for the board to find that such compelling video

evidence warranted the termination of the plaintiff's employment as depicting her complicity in a student assault.)

2. Destroyed Videotaped Evidence

In *Joassin v. Murphy*, 2016 WL 4150899 (11th Cir. 2016), videotape evidence was again at issue in a pro se state inmate's § 1983 claims against five prison officers for excessive force and deliberate indifference in violation of the Eighth Amendment. A videotape of the events was later destroyed, but a Department of Corrections investigator relayed what he had seen on the videotape, contradicting the inmate's account that included allegations that the officers had slammed him to the ground three times without provocation while he was restrained, grabbed and squeezed his testicles and spit in his face.

The district court in *Joassin* granted summary judgment in favor of the officers, but the Eleventh Circuit reversed, finding that the summary judgment evidence presented competing witness testimony. The Court of Appeals reasoned that while the inmate's self-serving testimony was contradicted by the self-serving testimony of the prison officials who were either defendants or colleagues of the defendants, it was error for the district court to conclude that the inmate's testimony was "blatantly contradicted" by the record, where that record included a Department of Corrections investigator's declaration about what he saw on the "now-destroyed videotape" was not so inherently credible as to blatantly contradict or utterly discredit the inmate's testimony. See *Scott*, 550 U.S. at 380. Further, the Court stated that "even if we treated the two declarations as sacrosanct, neither declaration contradicts enough of Joassin's testimony to warrant judgment as a matter of law."

Though based on an observation of a videotape, the investigator's declaration was not videotape evidence. Because the videotape was destroyed, neither the district court nor the Eleventh Circuit had the benefit of an irrefutable videotape that "completely and clearly contradicts" Joassin. See *Morton*, 707 F.3d at 1284. Rather, "the investigator's declaration presents just another interested witness's recitation of what he claims to have observed. Furthermore, the investigator's declaration, if credited, refutes Joassin's allegations with respect to only the portion of the incident that took place in or near the shower. The investigator concedes that he observed no videotape evidence of the portion of the incident that took place in the vestibule while prison officers led Joassin to the infirmary. Therefore, even if we discredited Joassin's testimony to the extent the investigator testifies otherwise, there would remain a genuine issue of fact as to whether the prison officers squeezed Joassin's genitals and twice unnecessarily slammed Joassin to the ground."

3. Top of the Evidentiary Food Chain: But Existing Videotape Not Introduced

The Fifth Circuit observed in *U.S. v. Jimison*, 825 F.3d 260, 2016 WL 3199735 (5th Cir. 2016) that “a video recording ordinarily is at the top of the evidentiary food chain,” *id.* at 264, and adhered to *Scott* for the proposition that although courts must view evidence in the light most favorable to the nonmoving party at summary judgment, when the nonmovant’s version is clearly contradicted by videotape evidence, the court instead views the facts “in the light depicted by the videotape”, *Id.* at 264 n.3, citing *Scott*, 550 U.S. at 378-81.

In *Jimison*, a supervised release revocation proceeding was held and evidence was introduced regarding several drug transactions. The evidence was presented through a special agent’s testimony that Jimison sold drugs to a confidential informant. The agent did not personally witness the drug deals, but “said that he had seen a video recording, and had been involved with the investigation.” *Id.* at 262.

At no point in his testimony did the agent state that he identified Jimison from the video, and the crucial fact of Jimison's identity was based entirely on hearsay. No audio or video recording was presented to the court or made available to Jimison, the video itself was not introduced, the agent had not viewed the video in over a year, and he had only a hazy recollection about what the video showed.

On this record, the Fifth Circuit in a panel opinion by Judge Costa held in *Jimison* that the district court violated Jimison’s due process right to confrontation in the revocation proceeding based in part on inherently unreliable hearsay identification from a confidential informant and the lack of record evidence on the government's interest in foregoing confrontation, noting that on remand, the government “could introduce the video evidence, which may be conclusive.”

4. Bodycam Evidence and its Civilizing Effect

The technology for bodycams has developed significantly during the past several years and features devices about the size of a Bluetooth earpiece, smaller, lighter and more effective than the dashboard-mounted audio and video recording systems that have been installed and used for decades on thousands of service vehicles. David A. Harris, Picture This: Body Worn Video Devices (“Head Cams”) As Tools for Ensuring Fourth Amendment Compliance by Police, 43 *Tex. Tech L. Rev.* 357 (April 2010), Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1596901>.

Generally, the benefits and positive impacts of police use of cameras include enhanced officer safety, increased officer accountability, increased professionalism, enhanced performance in following agency protocols, and reduced law enforcement-related liability. International Associations of Chiefs of Police, Impact of Video Enhancement on Modern Policing (2003), NCJ 208525, <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=208525>.

5. Post-Ferguson Efforts to Require Body Cams

Following the Michael Brown shooting in Ferguson, the push intensified throughout the country to require police departments to require bodycams.

Very shortly after the April 4, 2015 fatal shooting of Walter Scott, an unarmed black man, by a Michael Slager, a white North Charleston police officer, it was revealed that a bystander's cellphone video had captured the officer's shooting the black man in the back while the black man was running away (<https://www.youtube.com/watch?v=Q6-jFQPu-yo>, video provided by Post & Courier). A dashboard video camera had also captured what appeared to be a routine traffic stop over a broken tail light minutes before the shooting, but did not indicate what led Scott to flee from his vehicle and did not reveal the shooting itself. J. Collins and M. Biesecker, Associated Press, Gap remains in video record of fatal SC police shooting (April 11, 2015), <http://news.yahoo.com/gap-remainsvideo-record-fatal-sc-police-shooting-094732182.html>.

With the bystander's cellphone video and the results of a SLED investigation into the shooting, the Mayor of North Charleston proactively announced that the police officer in question had been charged with murder, noting that the video was very demonstrative of exactly what had happened.

6. State Legislative Action

Moreover, some state legislatures began pressing for legislation to require the use of bodycams on officers. Manny Fernandez, North Charleston Police Shooting Not Justified, Experts Say (New York Times, April 9, 2015) <http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-notjustified-experts-say.html> ("Law professors, former prosecutors and police officers who watched the North Charleston video said it did not appear to them that the circumstances of the shooting met any of those legal parameters, and they said that based on what they saw in the video, the officer was not legally justified in opening fire."); see also M. Miller, L. Bever and S. Kaplan, How a cellphone video led to murder charges against a cop in North Charleston, S.C., (Washington Post April 8, 2015), <http://www.washingtonpost.com/news/morningmix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-copin-north-charleston-s-c/> ("But the way police ultimately handled it, charging the officer with murder, gives hope to some. 'I am surprisingly and gratifyingly shocked because to the best of my memory, I cannot think of another occasion in which a law enforcement officer was actually prosecuted for something like this in South Carolina,' said the Rev. Joseph Darby, first vice president of Charleston's NAACP branch. 'My initial thought was, 'Here we go again. This will be another time where there will be a cursory investigation. It will be the word of law enforcement versus those who are colored as vile perpetrators. People will get

very mad, but at the end of the day nothing will change.’ This kind of changed the game,’ Darby said of the video and Slager’s arrest.”).

7. Public Records Access to Bodycam Recordings

Ironically, just three days before the North Charleston shooting incident, a report was published by the Reporters Committee for Freedom of the Press highlighting efforts by several state legislatures to shield bodycam recordings from public disclosure and access under state public records acts. See Rebecca Brown, Fiscal Note, *Nearly all states considered police body cameras in 2015, few enacted laws* (August 6, 2015), accessible at <https://www.fiscalnote.com/2015/08/06/nearly-all-states-considered-police-body-cameras-in-2015-few-enacted-laws/> (“This year, 46 states introduced legislation or resolutions addressing body cameras. By the summer of 2015, four states – California, South Carolina, Nevada, and New Jersey* – enacted laws requiring certain officers to wear them. Five additional states (AZ, CO, LA, MD, VT) passed legislation requiring a study on the issue. The Alaska, Maine, West Virginia, and Wyoming legislatures have delegated the issue to local municipalities and police departments.”)

The Urban Institute has published online at state-by-state breakdown entitled *Police Body-Worn Cameras: Where Your State Stands*, accessible at <http://apps.urban.org/features/body-camera/>

8. PERF/COPS Recommendations

A 2014 report by the Police Executive Research Forum (PERF) and the Department of Justice's Community Oriented Policing Services (COPS) lists 33 specific recommendations (http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf), the most significant of which are the following:

- (1) Download, training, and storage policies;
- (2) different camera placements;
- (3) discouraging privately owned body-worn cameras;
- (4) recording protocols, such as noting the existence of the recording in official incident report and articulating on camera or in writing the officer’s reasoning if he or she fails to record an activity that is required by department policy;
- (5) clear definitions of what is included in “law enforcement-related encounters and activities that occur while the officer is on duty” when a bodycam should be used, such as traffic stops, arrests, searches, interrogations or interviews, and pursuits;
- (6) discretionary choice not to record informal, non-law enforcement-related interactions with members of the community, such as casual

- conversations with people seen on patrol, so as not to inhibit the informal relationships that are critical to community policing efforts;
- (7) discretionary choice to keep cameras turned off during conversations with crime witnesses and members of the community who wish to report or discuss criminal activity in their neighborhood;
 - (8) obtaining consent and informing subjects when they are being recorded unless impractical to do so;
 - (9) prohibiting recording of conversations with confidential informants and undercover officers to protect confidentiality and officer safety; specifying places where a reasonable expectation of privacy exists (e.g., bathrooms or locker rooms, strip searches, and conversations with other agency personnel that involve case tactics or strategy);
 - (10) specific measures to prevent data tampering, deleting, and copying, such as using data storage systems with built-in audit trails;
 - (11) requiring the supervisor to physically take custody of the officer's bodycam at the scene of a shooting or serious incident in which the officer was involved and to assume responsibility for downloading the data;
 - (12) conducting forensic reviews of the camera equipment when questions arise if an officer claims that he or she failed to record an incident because the camera malfunctioned;
 - (13) proper categorizing, classifying, reviewing, labelling and tagging of recorded data as evidentiary, non-evidentiary, or non-event;
 - (14) retention policies for recorded data, accounting for departmental policies governing retention of other types of electronic records, openness of the state's public disclosure laws, the need to preserve footage to promote transparency and investigate citizen complaints, and capacity for data storage;
 - (15) determining bodycam equipment storage location depending on security concerns, reliable methods for backing up data, chain-of-custody issues, and capacity for data storage; and
 - (16) proactively releasing bodycam footage to share what the officer's camera showed regarding controversial incidents, such as where the video may support a contention that an officer was in compliance with the law, taking into account whether the footage will be used in a criminal court case and the potential effects that releasing the data might have on the case. The PERF/COPS report also enumerates the benefits as well as concerns of bodycams as an important tool in enhancing police accountability and transparency and improving police-community relations.

9. Outcome-Determinative Impact of Video Evidence

Just as videotape evidence can be an outcome determinative factor in an excessive force case, as in *Scott v. Harris*, supra, the absence of videotape evidence due to an officer's decision not to turn on his camera, can have a devastating effect on an analysis of liability based on excessive force, as in the Sixth Circuit's recent decision in *Goodwin v. City of Painesville*, infra.

In some cases video evidence may be so limited as to have no effect on an inquiry into objective reasonableness from the perspective of an officer on the ground, as was the case with video footage from news helicopter in *Aipperspach v. McInerney*, 766 F. 3d 803 (8th Cir. 2014). In *Aipperspach*, an officer's use of deadly force was held to be objectively reasonable when the responding officers were confronted with a suspect who held what appeared to be a handgun, refused repeated commands to drop the gun, pointed it once at one of the officers, and then waved it in the direction of officers deployed along the ridge line in an action they perceived as menacing. In these circumstances, objectively reasonable officers had probable cause to believe that the decedent posed a threat of serious physical harm to the officers.

The suspect's representative argued on appeal that the district court erroneously disregarded video footage taken from the news helicopter that would permit a reasonable jury to find that the suspect's raising his hands above his head in response to the commands of the officers was an attempt to surrender. The suspect's representative likened this video to the police cruiser video of a high-speed car chase in *Scott*, in which the video "blatantly contradicted" the nonmoving party's version of the incident on which the Court of Appeals had relied in denying summary judgment. 550 U.S. at 380.

The Eighth Circuit in *Aipperspach* rejected this argument, holding the district court did not ignore the news helicopter video, but viewed the video and concluded that it provided only the aerial perspective of the person who recorded it and could not answer the issue of objective reasonableness from the perspective of an officer on the ground. The video did nothing to controvert the testimony of numerous officers who believed the suspect pointed a real firearm at officers, endangering their lives. Unlike *Scott*, where a video "blatantly contradicted" one party's version of the incident, here the video confirmed the officers' description of the sequence of events. The Eighth Circuit found that the possible inferences that the decedent may have intended to surrender, despite refusing repeated prior demands to drop the gun, or that he may have waved the gun above his head to regain his balance, rather than to threaten the police officers were not germane to the issue of Fourth Amendment objective reasonableness and emphasized that the inquiry was not into the decedent's state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, the shooting officer reasonably feared for his life or the lives of his fellow officers.

The video taken from high above the scene in *Aipperspach* shed no material light on that question. The suspect's representative presented no evidence contradicting the testimony that many officers at the scene of this "tense, uncertain, and rapidly evolving situation" perceived that the suspect's actions posed an immediate threat of serious physical harm to the officers. The Eighth Circuit in affirming summary judgment concluded that the fact issues raised by the suspect's representative were not material, and it declined to second-guess the split-second judgment of the officer.

10. Excessive Force in Non-Criminal Protective Custody Context

a. Hospital Surveillance Footage

In *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), cert. granted, judgment vacated, and case remanded for further consideration in light of *Mullenix v. Luna*, 577 U.S. —, 136 S.Ct. 305, —L.Ed.2d — (2015) (per curiam), a Fourth Amendment excessive force claim arose out of a confrontation between officers and a non-violent, non-threatening individual held in protective custody for which probable cause was shown based upon his mental incompetence and the threat he posed to his own health. The individual had not committed a serious crime but exhibited passive resistance. The individual died after an altercation with several officers in a hospital where he was being treated for pneumonia. The district court denied summary judgment on the ensuing excessive force claim on grounds of qualified immunity, holding that there were numerous fact issues regarding the reasonableness of the officers' conduct and the degree of resistance exhibited by the decedent that prevented summary judgment.

Hospital surveillance footage of the encounter between the decedent and the officers showed the decedent simply walking away from the officers, who contended that the decedent began acting more aggressively after he moved out of the frame of the video. Per the district court, a gap in the recording resulted in failure to have an objective view of what transpired after the decedent walked away, and up until the point where the officers were seen apprehending the decedent after he had already been tased and grabbed by the officers.

b. Critical gap in video

The district court found the officers' testimony was inconsistent as to the nature of the decedent's aggressive behavior during this critical gap in the video, leading it to conclude that there was a material dispute of fact as to the nature and degree of the decedent's resistance to the officers' attempts to seize him. The district court also found the record was in dispute as to the threat the decedent allegedly posed to the officers or the public, since he was an unarmed hospital patient and, while there was an allegation that he was using his blood as a weapon, there was no evidence that his blood was spattered on any of the officers. Finally, the district court found a material dispute as to officers' knowledge of the

decedent's serious medical condition and their efforts to obtain information about his condition before attempting to use any degree of force on him.

On interlocutory appeal, the Tenth Circuit in *Aldaba* held that the decedent's representative could show a violation of clearly established law sufficient to defeat the officers' request for qualified immunity and they were thus not entitled to summary judgment on the excessive force claim.

The Tenth Circuit noted the three objective reasonableness factors described in *Graham* in determining whether an officer's use of force was excessive were not intended to be exclusive, especially in a Fourth Amendment excessive force claim arising out of a protective custody seizure rather than a criminal arrest. The *Graham* factors are unlikely to cover all of the pertinent circumstances in a protective custody case, and protective custody seizures may implicate an additional governmental interest in preventing a mentally disturbed individual from harming himself.

A higher level of force may be reasonable to seize an individual for protective custody purposes if he poses a severe and immediate threat to himself, the Court reasoned. Further, two more additional factors may also be pertinent in determining the reasonableness of the force used for a seizure, particularly in the protective custody context: (1) a detainee's mental health must be taken into account when considering the officers' use of force under *Graham*, and (2) the reasonableness of a particular use of force depends in part on whether the law enforcement officers knew or should have known that the individual had special characteristics making him more susceptible to harm from this particular use of force, a factor that is particularly pertinent when the reason for seizing an individual is to ensure he receives necessary medical treatments for his compromised physical condition. In such cases, law enforcement officers should be especially sensitive to the likelihood that a use of force may do more harm than good, and the use of tasers and similar electronic control devices may be counterproductive, at best, to the goal of ensuring that a mentally and medically compromised individual is restored to health.

c. *Thomas v. Cornelius*: Intense Scrutiny of Video and Audio Evidence

Intense scrutiny of video and audio evidence was the key to summary judgment in *Thomas v. Cornelius*, 2016 WL 1241051 (M.D. Ga. 2016). Two patrol cars at the scene where the plaintiff's vehicle had nearly collided with one of the officer's vehicles were equipped with dash cams that recorded much of the underlying events. The plaintiff claimed that one of the officers struck him in the face while he was handcuffed in the backseat of the patrol car. An officer's dash cam video had a built-in audio that was not operating correctly, so that officer

used a small digital dictaphone recorder in his shirt pocket to record audio, and the audio and video were merged with no objection from any party.

Neither the video nor the audio evidence showed any officer striking plaintiff, and the trial court found that based on the video and audio evidence, no reasonable juror could find that the officer struck the plaintiff during this time. Given the video and audio evidence, plaintiff's testimony could not create a genuine issue of material as to whether the officer struck him.

Upon watching the video, according to the court, it was unbelievable that the officer struck the plaintiff. Much of the video showed the officer leaning into the car through the open back passenger door with his right arm outside the vehicle on top of the open door frame and his left arm resting on the roof of the car most of the time. There was a total of nine seconds that the viewer could not see the officer's left arm, which were the only conceivable times the officer could have struck the plaintiff. The officer's body, however, made no motion indicating he swung at or struck the plaintiff, on the contrary, his body indicated he made no such motion, as he remained leaned over through the car door.

The trial court found absolutely no audio indication that the plaintiff was struck, and in fact the audio confirmed he was not struck. The officer and the plaintiff could be heard having a conversation the entire time about how plaintiff is "on hard times." The plaintiff did not yell, grunt, call out, or make any other indication he was struck. To the trial court, it was simply wholly unbelievable Plaintiff would make no audible indication after allegedly being struck across the face with an object that caused severe bruising to his eyes and face and contusions to his head. The court found the video and audio conclusively establish the officer did not strike plaintiff, and thus, defendants were entitled to summary judgment. See also *Pennington v. Terry*, 644 Fed.Appx. 533, 2016 WL 1127774 (6th Cir. 2016) ("The video 'blatantly contradict[s]' Pennington's story that Sergeant Harris tased him. As a result, we must view the facts 'in the light depicted by the videotape' rather than in the light most favorable to Pennington. Because the video shows that no tasing occurred, it dissolves any benefit of the doubt we would otherwise be obliged to give Pennington's assertions. In other words, the existence of a videotape contradicting Pennington's assertion that he was tased simultaneously precludes this court from accepting his version of events and dispels the only evidence Pennington offers in support of his claim.") (internal citations omitted).

d. *Goodwin v. City of Painesville*: Failure to Activate Bodycam

An officer's failure to activate a bodycam during a confrontation was factored into the *Graham* analysis by the district court and the Sixth Circuit in *Goodwin v. City of Painesville*, 781 F.3d 314, 2015 WL 1245400 (6th Cir. Mar. 19, 2015). In this excessive force/qualified immunity decision, the lower court

had before it testimony of the tasing officer who failed to activate his recording device during a confrontation with an intoxicated apartment resident, a failure that violated the city police department policy of recording citizen encounters. The tasing officer was previously warned about his failure to use a recording device during another citizen encounter, indicating an apparent pattern of avoiding documentation of his actions, facts undercutting his credibility when the trial court engaged in a fact-intensive analysis of the *Graham* factors in determining whether the officer's actions were objectively reasonable.

The lower court noted during its summary judgment analysis of objective reasonableness of the tasing officer's conduct under *Graham* that:

- (1) the tasing officer "failed to activate his recording device during the incident, in violation of the Painesville Police Department policy of recording citizen encounters" and that "[t]his was not the first time."
- (2) The officer "had already been warned about his failure to use a recording device during an earlier citizen encounter.
- (3) The jury could weigh the tasing officer's "apparent pattern of avoiding documentation of his actions against his credibility."

The Sixth Circuit concluded that there was sufficient evidence under which the jury could reasonably find that the tasing officer violated the host's Fourth Amendment right to be free from excessive force, since the prolonged tasing of the host was severe, the officer's training indicated that it lasted well into the risky period, and the taser probes were in a position that could cause breathing problems during extended application.

F. Admissibility of Federal, State, or Local Investigatory Reports

Considered one of the more complex Federal Rules of Evidence, Rule 803(8) is a special hearsay exception that governs the admissibility of public records. Rule 803(8)(A)(iii) contemplates the admissibility of investigative reports resulting from an investigation made pursuant to authority granted by law and applies in both civil and criminal cases. The Supreme Court has held that Rule 803(8) does not "draw some inevitably arbitrary line between the various *shades of fact/opinion that invariably will be present in investigatory reports.*" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); rather, reports setting forth factual findings are admissible, including those portions of the reports containing opinions rather than facts. *Id.*

Following their arrest after a baseball game at Yankee Stadium, the plaintiffs brought a §1983 action arising from the arrest, in *Ricciuti v. New York City Transit Authority*, 754 F. Supp. 980 (S.D.N.Y. 1990), vacated on other grounds, 941 F. 2d 119 (2d Cir. 1991). A small management analysis group commissioned by the Transit Authority to investigate illegal arrests by transit police conducted a study, in direct response to widespread allegations that a

number of Transit officers assigned to Decoy Patrol Units were making scores of illegal arrests. The trustworthiness of a public report and its consequent admissibility turn upon the timeliness of the investigation; the special skill or experience of the officials conducting the investigation; the procedures covering any hearings; the existence of motivation problems on the part of either the investigators or other sources of information; and the finality of the findings made in the report. Here, the report was inadmissible under Rule 803(8) since the group was not a public office or agency and its findings did not result from an investigation made pursuant to authority granted by law. Since the report was inadmissible, it could not form a legitimate basis for inferring municipal liability at the pleading stage.

1. Rules Violation Report Admissibility

In a state prisoner's § 1983/Eighth Amendment action against a prison official for failure to protect him during a prison riot, *Serrano v. Lucas*, <http://www.leagle.com/decision/In%20FDCO%2020160308789/SERRANO%20v.%20LUCAS> (E.D. Cal. 2016), the admissibility of a Rules Violations Report (RVR) sought to be introduced as evidence that the prisoner orchestrated fighting with other inmates on the yard was at issue. The defendant argued that the RVR was excepted from the hearsay rule as public records under Rule 803(8), but the court found that the relevant part of the RVR did not contain factual findings but contained opinions about the cause of the riot. Under Rule 701, moreover, the conclusions were inadmissible opinions as to the cause of the riot by someone who was not an expert witness. The court further found that the RVRs were more prejudicial than probative under Rule 403, noting that there was substantial risk that presenting the opinion of the prison about the cause of the riot would be more prejudicial than probative. There would be substantial presentation of evidence to the jury during the trial to allow them to form their own opinion as the application of the facts to the law, and the jury would likely be inclined to side with the conclusions in the RVR, and abandon their independent view of the evidence and the law, if such conclusions were admitted. Such a result would deprive the plaintiff of his right to a trial on the evidence presented to the jury.

2. EEOC Determination Exclusion

EEOC determinations were excluded from evidence in the district court's ruling on the city's summary judgment motion on claims that employees were denied promotions and demoted based on race, national origin, and gender, in *Estate of Hamilton v. City of New York*, 627 F. 3d 50, 54 (2nd Cir. 2010). The Second Circuit found that the lower court had "carefully explained its decision to exclude the EEOC's determinations on the grounds that these findings (a) were conclusory, and (b) failed to address the defendants' strongest evidence regarding plaintiffs' inferior performance evaluations." *Id.*

3. SIC Report Admissibility

In *Janetka v. Dabe*, 892 F.2d 187 (2d Cir.1989), the plaintiff in a civil rights action against a police officer and the county for malicious prosecution sought to support his claim of the county's deliberate indifference to police misconduct with an investigative report prepared by the State Investigation Commission (SIC report). The SIC report broadly criticized county police conduct, the county's supervision, and its failure to investigate, discipline or prosecute instances of official misconduct. The trial judge held that the report was inadmissible, and the Second Circuit affirmed, stating that "[a]bsent a showing that [the individual officer] knew of and relied upon the County's policy or practice, the report was not relevant to the case." 892 F.2d at 191.

The same SIC report was at issue in *Gentile v. County of Suffolk*, 926 F. 2d 142 (2d Cir. 1991), where the district court deferred a trustworthiness hearing until the post-trial stage and engaged in a detailed analysis of multiple evidentiary rules applicable to an investigative report that was introduced during the trial of a §1983 claim for malicious prosecution, where the county and police officers were named defendants. The suit arose from an early morning confrontation at a diner between rowdy patrons and county policemen who were not in uniform. At trial the plaintiffs sought to introduce a report "An Investigation of the Suffolk County District Attorney's Office and Police Department" (the SIC Report), which concluded that the County District Attorney's office and the Police Department systematically mismanaged their offices, tolerated and ratified employee misconduct, and failed to investigate or punish such conduct. The trial court made a preliminary determination of the Report's trustworthiness under Rule 803(b), but deferred a final ruling on admissibility until after a post-trial hearing.

Prior to trial in the *Gentile* case, plaintiffs had made clear their intention to offer this evidence, but the defendants did not request an evidentiary hearing on the trustworthiness of the SIC Report until the third day of the trial, when plaintiffs sought to read portions of it to the jury. In the post-trial hearing on the trustworthiness of the SIC Report, District Judge Weinstein reviewed five separate factors, including (1) timeliness of the investigation, (2) special skill or experience of the investigating officials, (3) procedures governing any hearings, (4) existence of motivation problems, and (5) finality of the findings, and found that the Report was trustworthy and thus admissible. On appeal, the defendants claimed, apart from the issues of the timing and conduct of the trustworthiness hearing, that the district court erred in finding that selected excerpts from the SIC Report were admissible, alleging that the selected portions of the SIC Report admitted by the district court were irrelevant, untrustworthy, and prejudicial in violation of Rules 402, 403 and 803(8)(C).

The Second Circuit held in *Gentile* that it was within the discretion of the district court to admit carefully selected excerpts from the SIC Report and defer a

full hearing on trustworthiness until after the completion of trial, a decision justified on grounds of trial management and judicial economy and by the court's concern about balancing the danger of prejudice posed by unedited admission of the SIC Report against its probative value in supporting plaintiffs' *Monell* claim. The district court's decision to grant defendants a post-trial hearing on trustworthiness afforded them greater procedural protection than they were legally entitled to, and reflected its desire to avoid the possible prejudice resulting from defendants' own failure to file a timely motion for such a hearing. Considering the thoroughness of the trial judge's treatment of the relevant issues and the persuasiveness of his conclusion that the SIC Report was admissible, the Second Circuit applied the appellate standard that vests in the trial court broad discretion to determine whether evidence should be admitted, and that evidence with substantial probative value should not be excluded absent a significant showing of unfair prejudice. On this basis, it upheld Judge Weinstein's evidentiary ruling and rejected the defense argument that the trial court abused its discretion.

4. Trustworthiness Determination under Rule 803(8)

The need for a trustworthiness determination was central in the 803(8)-evidentiary ruling in *Montiel v. City of Los Angeles*, 2 F. 3d 335 (9th Cir. 1993). In a civil rights action alleging excessive force by police, the trial judge excluded portions of the Christopher Commission Report, a report by an independent commission on the LAPD. The city raised concerns regarding the trustworthiness of the report, arguing that the ad hoc nature of the Christopher Commission raised the question of whether ad hoc reports are included within the scope of Rule 803(8), and raised due process concerns, since there were no provisions for witnesses either to have counsel or to be cross-examined, nor were there provisions for the authentication of documents or the application of the state or federal rules of evidence. The Ninth Circuit was more concerned with the trial judge's cursory denial of the plaintiff's Rule 803(8)(C) motion, and held that the trial judge should have presumed the report was trustworthy and shifted the burden to the city of establishing its untrustworthiness. The Ninth Circuit reversed a JMOL for the city, finding that the exclusion of this report was improper.

5. *Miller v. Field*: State Police Reports

Most of the statements contained in state police reports that were admitted into evidence by the trial court did not fall into any of the recognized exceptions to the hearsay rule in *Miller v. Field*, 35 F.3d 1088 (6th Cir. 1994), in which the Sixth Circuit found that the lower court should not have allowed the reports to be presented as evidence. Rather, only those portions of the reports that constituted factual findings resulting from the firsthand knowledge of the report's preparer or opinions and conclusions derived from those facts should have been admitted into evidence. The error in admitting the reports was not harmless. The only reason for seeking to introduce the reports was to convince the jury that the plaintiff's sexual

assault claim was fabricated. The record contained no other evidence of such fabrication, and the extrajudicial declarants were not called as witnesses at trial. The jury's determination that officials knew of threats against the plaintiff and that he was assaulted—but not raped—make it virtually impossible to conclude that the error in question was harmless.

6. Legal Opinion Included in Audit Report

In *U.S. v. De La Cruz*, 469 F. 3d 1064 (7th Cir. 2006), involving a prosecution of city workers for misappropriating public funds, the government introduced evidence that the state had audited the city's finances, found violations and requested each member of the Board of Works reimburse the city for money spent in violation of the law. The defendants then sought to introduce the city's legal opinion in response, which was appended to the audit report. The trial court held that the city's legal opinion was not a public record, even though it was included in one, since the city's response to the audit did not have the indicia of reliability supporting the public records exception. The Rule 803(8) hearsay exception focuses on the activities of a public office and on the observations and investigations made under authority of law, hence a legal opinion in response to an audit is not a public record, despite its inclusion in one. The public records exception is justified on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. Adv. Cmte. Note to Rule 803(8) (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir.1952); *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919)).

7. Internal Investigation Report

In *English v. District of Columbia*, 651 F. 3d 1 (D.C. Cir. 2011), a civil rights action was brought on behalf of a shooting victim. During the trial, the court excluded from evidence a report from an internal police department investigation that concluded the first shot fired by the officer was in response to a potentially deadly attack, but the second and third shots, while perhaps "objectively reasonable", violated police department policy. The Use of Force Review Board declined to adopt the findings and found all three shots were justified. Also excluded was a letter from the Director of the police department's Disciplinary Review Board recommending termination of the officer because of his policy violation. The D.C. Circuit held that the report was admissible against the officer under Rule 803(8)(A)(iii) because it was a final report by the investigator, its factual basis was sufficiently reliable under the rule, and, although it was "based on double, triple hearsay and stale hearsay at that," it did not "tell any different story than the evidence we're going to hear in this courtroom about exactly what happened." The letter was not admissible under the same rule, according to the D.C. Circuit, because it was not the result of an investigation. Regarding the lower court's evidentiary decisions, the key question at trial was

whether the officer's shooting was objectively reasonable, not whether it violated department policy, and the report in any event was cumulative of live witness testimony, hence the trial judge could reasonably conclude that the risk of confusion substantially outweighed the probative value of this evidence.

In *John v. Hamilton County, Ohio*, 2015 WL 5697475 (S.D. Ohio 2015), the district court considered admissible portions of a police investigation report on motion for summary judgment in §1983/Fourth Amendment action. The suit was brought following plaintiff's altercation with officers while he was suffering from a diabetic low blood sugar episode. The court stated that "police investigation reports generally can be admitted as evidence pursuant to the public records exception to the hearsay rule" set forth in Rule 803(8), if they set out "the office's activities in a matter observed while under a legal duty to report, or in a civil case factual findings from a legally authorized investigation" where there is no showing of circumstances indicating a lack of trustworthiness.

Under Sixth Circuit precedent, police investigation reports are admissible pursuant to Rule 803(8) even when based on witness interviews, rather than the investigator's personal knowledge. *Combs v. Wilkinson*, 315 F.3d 548, 554–56 (6th Cir. 2002). Portions of a police investigation reports, including investigators' conclusions, were previously admitted pursuant to Rule 803(8), but portions of reports summarizing witness statements to investigators were excluded as hearsay. *Nowell v. City of Cincinnati*, 2006 WL 2619846, at *5, 7 (S.D. Ohio Sept. 12, 2006). Based on this precedent, the district court considered the admissible portions of the investigation report for purposes of summary judgment.

8. DOJ Report Admissibility

The admissibility of a DOJ Report was at issue in *Harris v. City of Philadelphia* 171 F.Supp.3d 395 (E.D. Pa. 2016), where the plaintiff alleged that his injuries were a result of use of force policies, including the use of batons and electronic weapons. The plaintiff also referenced in his complaint the DOJ Report that found numerous deficiencies in the defendant's policies, addressing and making recommendations for deficiencies in defendant's training and supervision regarding the use of force, including the use of batons and electronic weapons. The district court agreed that the plaintiff sufficiently pleaded causation at this early stage in the case. The court also noted that the DOJ Report did not address just the use of deadly force, but found deficiencies in defendant's training programs and policies regarding the use of batons and electronic control weapons, cited by plaintiff as proof of defendant's knowledge of its training deficiencies.

The DOJ Report at issue in *Harris* was initiated after the Philadelphia Police Commissioner requested technical assistance from the DOJ Office of Community Oriented Policing Services ("COPS Office") through the Collaborative Reform Initiative. This request was in response to several fatal officer involved shootings within Philadelphia's Police Department. The resulting

DOJ Report was a technical report on the current and future states of deadly force policy, training, investigations, and practice in the PPD. An interdisciplinary team of researchers, analysts, and subject matter experts conducted the assessment over a 12-month period, and the report provided the PPD with findings and recommendations to help the department improve with respect to use of force.

9. DOJ Report as Summary Judgment Evidence

Valdez v. City of Philadelphia, 2016 WL 2646667 (E.D. Pa. 2016) was a §1983 failure to train/excessive force action in which the court held the DOJ Report "Collaborative Reform Initiative's Assessment of Deadly Force in the Philadelphia Police Department," was admissible summary judgment evidence, justifying denial of summary judgment:

- (1) *Rule 401 relevance*: Under Rule 401, evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." The Report reviewed the training offered to PPD members and satisfied the requirements of Rule 401. Its conclusions and recommendations bear directly on the probability that the Department had insufficient training programs, which is clearly a fact of consequence in this Monell Action. The court in *Valdez* declined to exclude the Report on this basis.
- (2) *Rule 803(8)(C) hearsay exception*: "Hearsay—an out of court statement offered for the truth of the matter asserted—is only admissible as evidence in certain circumstances." "Rule 803 permits the admission of hearsay that consists of "a record or statement of a public office if it sets out [. . .] in a civil case [. . .], factual findings from a legally authorized investigation and the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness." Rule 803(8)(A)(iii)-(B). The court in *Valdez* found that the Report at issue satisfied all the relevant portions of 803(8), based on the lack of challenge to the legality of the investigation or its qualification as a "public statement" within the meaning of the Rule, and the objecting party's lack of any evidence that would indicate a lack of trustworthiness.
- (3) *Rule 702 expert testimony*: "Rule 702 provides the framework by which a district court evaluates the admissibility of expert testimony. Under the Rule, a witness, qualified 'by knowledge, skill, experience, training or education,' may testify if her testimony is the 'product of reliable principles and methods and she has 'reliably applied the principles and methods to the facts.'" The defendant asserted that the Report should be excluded because it did not have the opportunity to challenge the qualifications of the Report's authors, question the reliability of the authors' methodology, or cross examine the Report's findings themselves. The court in *Valdez* disagreed, finding that the report was admissible as the product of officers charged with a legal duty to conduct the

investigation, and was presumed admissible under 803(8)(C), including its opinions, conclusions and recommendations, unless the defendants demonstrate its untrustworthiness. Admission of the report pursuant to 803(8)(C) did not require that the one undertaking the investigation and authoring the report to be qualified as expert before the report became admissible, and to make a challenge to qualifications, a party challenging a report must come forward with some evidence which would impugn [the report's] trustworthiness. Here, the objecting party failed to offer any evidence that would impugn the impartiality, reliability, or trustworthiness of the investigation. Defendant pointed to no evidence that the Report's authors did anything that would raise suspicions about the veracity of the Report.

- (4) *Rule 407*: The Report was not excluded under Rule 407 as a subsequent remedial measure. “Rule 407 prohibits the introduction of a subsequent remedial measure to prove negligence or culpable conduct.” The parties' dispute on this issue boiled down to the characterization of the Report. On one hand, defendant asserted that the Report was part of a larger program of remedial measures, and properly excluded under Rule 407. Plaintiff, on the other hand, asserted that the findings represented merely an evaluation of the Police Department's practices between 2007 and 2013, and that any findings are not actually remedial. The court found that the Report itself did not contain any measures that would have made the alleged violation any less likely to occur; only the PPD's decisions to implement those recommendations would have done so. Instead, the Report was more appropriately viewed as a sort of "step zero" providing facts, data, and conclusions that would guide future policy decisions, but not the policy decisions themselves. The court in *Valdez* found that the Report did not consist of any subsequent remedial measures prohibiting its introduction into evidence under Rule 407.

G. Admissibility of Evidence of Bias During Jury Deliberations

1. *Pena-Rodriguez v. State of Colorado*

Currently pending before the U.S. Supreme Court is a case challenging the rules prohibiting juror impeachment when a juror comes forward with evidence of racially or ethnically biased statements made during jury deliberations about a criminal defendant's guilt. It squarely implicates the Rule 606(b) evidentiary ban and its counterpart in most states. The case is *Pena-Rodriguez v. State of Colorado*, 350 P. 3d 287 (Colo. 2015), cert. granted sub nom. *Pena-Rodriguez v. Colorado*, No. 15-606, 2016 WL 1278620 (U.S. Apr. 4, 2016).

Rule 606 is entitled “Juror's competency as a Witness,” and Rule 606(b) deals with inquiries into the validity of a verdict or indictment:

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

In *Pena-Rodriguez*, the Colorado Supreme Court addressed the interplay between protection of jury deliberations and a defendant's constitutional right to an impartial jury, finding that the ban on post-trial evidence of jury deliberations did not trump the Sixth Amendment. Regarding allowing investigation into jurors' racial bias, the Colorado Supreme Court reasoned that it would cause lawyers to harass jurors to uncover such information, that courts would be unable to discern a dividing line between different types of juror bias or between racially biased comments of varying severity, and such inquiries would shatter public confidence in the judicial system.

These are the facts: following a guilty verdict, defense counsel obtained affidavits from jurors suggesting that a juror exhibited racial bias against the defendant during deliberations, which the trial court found inadmissible based on Rule 606(b). The Colorado Supreme Court affirmed, and the Supreme Court granted certiorari, taking on a long-standing circuit split over the privacy of jury deliberations and agreeing to decide whether jurors can be questioned post-trial about one of their fellow juror's support for a guilty verdict based on the defendant's racial or ethnic identity. While most states, as well as federal courts in most of the circuits, have rules that bar questioning jurors about claims that one of the members of the jury panel engaged in misconduct during deliberations, this case questions whether enforcement of that evidentiary ban interferes with the Sixth Amendment right to an impartial jury.

The defendant, *Pena-Rodriguez*, was found guilty of three charges of sexual harassment of two teen-aged girls. Following the trial, two jurors told defense counsel that one of the jurors had made racist comments about Mexicans during jury deliberations, stating that the defendant committed the crime because he was Mexican, that "Mexican men take whatever they want, have a "bravado that caused them to believe they could do whatever they wanted with women" and were "physically controlling of women," and that one of the defense witnesses

was not worthy of belief because he was an “illegal.” Lyle Denniston, *Court to Rule on Challenge to Juror Bias* (SCOTUSblog, April 4, 2016), at <http://www.scotusblog.com/2016/04/court-to-rule-on-challenge-to-juror-bias/>

Federal and state courts are split on when this prohibition against post-trial questioning of jurors after a trial must give way to permit an inquiry into claims of alleged racial bias during jury deliberations.

As noted in 2 Stephen A. Salzberg, Michael M. Martin, and Daniel J. Capra, *Federal Rules of Evidence Manual* 606-15 (11th Ed. 2015), some courts have been hesitant to apply Rule 606(b) dogmatically considering the Sixth Amendment’s guarantee of a fair and impartial jury. See *Wright v. United States*, 559 F. Supp. 1139 (E.D. N.Y. 1983), *aff’d*, 732 F. 2d 1048 (2d Cir. 1984) (no sufficient showing of prejudice to warrant a hearing where juror used a racial epithet in referring to the defendant); *United States v. Hayat*, 710 F. 3d 875 (9th Cir. 2013) (found no clear error in the determination that the statements made in the jury room did not indicate actual racial, ethnic or religious bias, where claim that jury foreperson was biased against Pakistanis and Muslims and defendant was convicted for providing material support for terrorists); cf. *Shillcutt v. Gagnon*, 827 F. 2d 1155 (7th Cir. 1987) (“The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process”, where testimony indicated that a racial slur had been made during deliberations, but there was no substantial probability the slur made a difference in the outcome of the trial); *Smith v. Brewer*, 444 F. Supp. 482 (S.D. Iowa 1978), *aff’d* 577 F. 2d 466 (8th Cir. 1978) (racial bias evident in the jury room held not a proper subject of inquiry under Rule 606(b), although indicating that fundamental fairness in some cases may require such an inquiry).

2. Applicability of Rule 606(b) in Civil Litigation

The potential impact of a pro-admissibility ruling on civil litigation is not yet clear, but Rule 606(b) has been applied in civil cases. In *Carson v. Polley*, 689 F. 2d 562 (5th Cir. 1982), an excessive force action against deputy sheriffs, the district court granted a civil rights plaintiff’s motion for new trial when a knife that had been ruled inadmissible as an exhibit was mistakenly taken to the jury room. During deliberations, the foreman of the jury sent a letter to the trial judge that revealed the foreman’s mental processes and concerned his views of the evidence in the case. Per the Fifth Circuit, “some of the views [the foreman] expressed would not constitute proper matter for jury deliberation nor for a juror to rely upon in reaching a verdict. Nevertheless, they fall precisely into the category of “possible subjective prejudices or improper motives of individual jurors” which are beyond the scope of inquiry through a motion for a new trial for jury misconduct.” The Fifth Circuit held that these “internal mental reflections of a juror” could not serve as the basis to impeach the jury’s verdict, and declined to permit impeachment of the jury verdict.

In affirming the trial court's decision not to grant a new trial based on juror misconduct, the Fifth Circuit reasoned in *Carson*:

The refusal of courts to lift the veil that covers a juror's thought processes is grounded on sound policy... 'Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives the secret thought of one the power to disturb the expressed conclusions of twelve.' While jurors may reach a verdict because of secret beliefs that have little to do with the law or the facts, such matters are not the proper subject of inquiry after verdict. ...

If courts were permitted to retry such verdicts, the result would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave. This would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees.

In an appropriate case, a letter from a juror to the court may reveal such a magnitude of prejudice as to move the court to grant a new trial rather than suffer an obvious default of justice.

H. Evidence of Less Intrusive Alternative as *Graham* Reasonableness Factor

The Ninth Circuit has set itself apart from other circuits in its application of a heightened standard for deadly force cases that sets the bar too high for law enforcement officers. By enhancing that standard for officers to require evidence of alternative courses of action as part of objective reasonableness inquiry under *Graham*, the stage has been set for a circuit split that must be resolved by the U.S. Supreme Court. Contrary precedent primarily from the 7th and 8th Circuits provide the more predictable, more consistently applied and more responsible rule consonant with prevailing excessive force precedent.

1. *Gonzalez v. City of Anaheim*

The Ninth Circuit's special rule for deadly force cases was set forth most recently in *Gonzalez v. City of Anaheim*, 747 F3d 789 (9th Cir. 2014) (en banc), cert. denied, 135 S.Ct. 676 (2014), prior proceedings, 715 F3d 766 (9th Cir. 2013). In the *Gonzalez* en banc opinion, the Ninth Circuit declared that the availability of lesser means of force or a discrepancy in the officer's testimony as to estimates of speed and distance were "material" facts, precluding summary judgment when disputed.

2. Less Intrusive Alternatives

In reversing summary judgment for the officer in *Gonzalez*, the Ninth Circuit invoked the circuit's well-established principle that summary judgment must be granted sparingly in deadly force cases, particularly cases involving use of deadly force where the victim does not survive and the court is left with only an officer's account of what transpired, i.e., where there are no witnesses.

This special rule started as an outgrowth of the ordinary principles governing summary judgment, specifically that a court is required to draw all inferences in favor of the opposing party, even if such inferences are based upon circumstantial evidence. As *Gonzalez* illustrates, the principle is now being regularly invoked to justify denial of summary judgment based not upon the need of the jury to resolve disputed issues of fact, but on the notion that it is up to the jury to determine whether given a particular set of facts the use of deadly force was justified, most specifically in light of less intrusive alternatives.

Officers often have to make split-second decisions whether a suspect is attempting to shoot them and their fellow police officers. When an officer decides that the suspect poses an immediate threat, and shoots to protect himself and his fellow officers, the reasonableness of the officer's actions should not be judged with the 20/20 vision of hindsight. "[The] Officer ... did what he reasonably believed he had to do at the time. The Fourth Amendment requires nothing more." *Villegas v. City of Anaheim*, supra, 998 F.Supp. 2d at 908, reversed, *C.V. by and through Villegas v. City of Anaheim* (9th Cir. 2106) 823 F3d 1252.

In *Gonzalez*, the decedent in a traffic stop chose not to cooperate with the police and instead stomped on his van's accelerator, igniting a dangerous chase. An officer trapped in the decedent's van yelled at the decedent to stop, tried without success to disable the vehicle, and ended the decedent's violent attempt to escape by shooting him. A dissenting judge concluded that the officer's act in self-defense was objectively reasonable. *Gonzalez*, supra 747 F3d at 798.

In another dissent in *Gonzalez*, Chief Judge Kozinski observed that is was without dispute that:

at the time he fired the fatal shot, [the] Officer ... was trapped inside a moving vehicle driven by a man who had resisted the verbal commands, physical restraints, lethal threats and bodily force of two uniformed officers. How fast the van was moving and how far it had traveled are beside the point. What matters is that [the] Officer ... was prisoner in a vehicle controlled by someone who had already committed several dangerous felonies. No sane officer in [his] situation would have acted any differently, and no reasonable jury will hold him liable." *Gonzalez*, supra, 747 F.3d at 814.

See *C. V. by & through Villegas v. City of Anaheim*, 823 F.3d 1252, 1256 (9th Cir. 2016), prior proceedings, *Villegas v. City of Anaheim*, 998 F.Supp. 2d 903 (C.D. Cal. 2014) (Villegas was ordered to put his hands up, and as he was complying, the officers ordered him to drop his [shot]gun; ... without providing a warning or sufficient time to comply, or observing Villegas pointing the long gun toward the officers or making any move toward the trigger, Bennalack resorted to deadly force.... [which] was not objectively reasonable.... Our court has rejected summary judgment in cases involving similar degrees of apparent danger, and we must do the same here.").

The D.C. Circuit appeared to follow a similarly stringent approach to summary judgment in deadly force cases, but the unique facts of the case do not necessarily put it in the same camp as the Ninth Circuit. The D.C. Circuit addressed the evidentiary standard for assessing objective reasonableness where the law enforcement officer has killed the only other potential eyewitness to a shooting incident in *Flythe v. District of Columbia*, 791 F.3d 13 (D.C. Cir. 2015). There the Court held that an officer who shot and killed a suspect based on contradicted assertions that the suspect charged the officer with a knife was not entitled to summary judgment. This was a unique factual scenario in which the court was faced with egregious circumstances. The Court based its analysis in part on the observation that “every circuit to have confronted [the] question” of “where the police officer killed the only other witness to the incident” has found a need to engage in “a fairly critical assessment of the forensic evidence ... to decide whether the officer's testimony could reasonably be rejected at a trial.” *Flythe*, 791 F.3d at 19 (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994)). Based on multiple contradictory witness reports and evidence that the officer who fired the fatal shots had tested positive for meth just “four days after the killing” and that the police department had “fired him after concluding that he lied about using illegal methamphetamines,” the D.C. Circuit found that there were sufficiently material factual disputes about the reliability of the officer's testimony so that the case should proceed to a jury. *Id.* at 21.

Rejection of requirement to use least intrusive alternatives: The Seventh and Eighth Circuits have rejected consideration of less intrusive means in evaluating the reasonableness of force under the Fourth Amendment. In *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), the court noted that “[t]he Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable.” *Id.* at 1149, citing *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976). The Seventh Circuit rejected the contention that prior case law suggested that the availability of less intrusive levels of force had to be factored into the *Graham* objective reasonableness inquiry: “[D]id we hold that this

imposes a constitutional duty to use (or at least consider) the use of all alternatives? The answer is no.” *Id.* at 1149.

In *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995), the Eighth Circuit held that less intrusive alternatives were irrelevant to the use of force inquiry: “The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively ‘reasonable’ under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry.” *Id.* at 649. “Accepting [plaintiff]’s argument would require us to undertake the type of ‘Monday morning quarterbacking’ that is prohibited under the Fourth Amendment. *Id.* “If the officers’ conduct falls within that permissible range of reasonableness, it is not our role to hinder or interfere with the difficult tasks and emotionally-charged situations that officers face in their daily job.” *Shade v. City of Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002).

By its incorporation of a less intrusive means standard into the *Graham* factors, the *Gonzalez* en banc majority has held that it is for a jury to determine whether the officer could reasonably use deadly force, because a jury is entitled to evaluate whether the officer could have used less intrusive alternatives - everything from attempting to pull his baton, using pepper spray, deploying his taser, or chancing a shot at Gonzalez’s hand, leg, or foot and “hope for the best.” *Gonzalez*, 747 F.3d at 797. It appears that no other circuit follows this Ninth Circuit’s practice of injecting a less intrusive means test into the *Graham* factors.

I. Rule 404(a), Rule 406, and Habit, Custom, and Character Evidence

Rule 404(a)’s prohibition on admission of character evidence has been applied in several contexts, most recently to show a party’s hot-headed and aggressive character and to show gang affiliation evidence.

1. *Bryant v. City of Memphis*

In *Bryant v. City of Memphis*, 644 Fed.Appx. 381, 2016 WL 683241 (6th Cir. 2016), a §1983 plaintiff sought to admit testimony about an officer’s hot-headed and aggressive character, contending that the officer’s character was evidence of habit—admissible under Rule 406—because the officer “has a habit of putting his hands on others when he feels his authority has been challenged,” and also sought to admit this evidence of the officer’s aggressive character since it directly bears on the plaintiff’s burden of proving imminent fear from harm. The officer invoked Rules 401, 402, 403, and 404 as barring admission, arguing that “[a]ny such character evidence is not relevant to the issues in the instant case” and “is unduly prejudicial.”

The district court in *Bryant* excluded the evidence as squarely within Rule 404(a)'s prohibition of the admission of character evidence. Testifying at trial, the plaintiff asserted that he had "known [the officer] to have an angry temperament" and the district court sustained an objection to that statement. Abandoning the Rule 406 habit argument on appeal, the plaintiff insisted that the district court's exclusion of the evidence for the imminent-fear purpose merited a new trial.

a. Erroneous Exclusion of Character Evidence under Rule 404(a)

The Sixth Circuit in *Bryant* agreed with the plaintiff that the district court erred in excluding—under Rule 404(a)—any testimony by the plaintiff regarding his view that the officer had an angry temperament. One reason Bryant sought to introduce the character evidence was to prove that he reasonably feared imminent bodily injury—an element of assault. Rule 404(a) would allow admission for that limited purpose.

b. Character Evidence Inadmissible under Rule 403

The Sixth Circuit held that the district court's error demands a new trial because the evidence was inadmissible under Rule 403, and that even though the district court failed to address the officer's 403 argument—because it excluded the evidence under Rule 404—the Court of Appeals was free to conduct an independent Rule 403 analysis.

c. Probative Value

Evidence of the officer's "angry temperament" was of marginal probative value to the underlying assault claim, which the plaintiff could have proved in one of three ways, and the jury found the officer not liable on all three assault variants.

Bryant's imminent fear of bodily injury related only to one element of the last assault variant, and he could prove his fear of imminent bodily injury in a variety of ways, the most probative of which was describing the altercation itself. He made no offers of proof about past instances of violent conduct to support his claimed knowledge of Forrest's aggressive character, despite his opportunity to do so in response to Forrest's motion in limine. The probative value of this character evidence was slight given the facts of this case.

d. Danger of Unfair Prejudice, Confusing the Issues, and Misleading the Jury

Under its Rule 403 balancing analysis, the court in *Bryant* found that the evidence's low probative value was "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [and] misleading the jury." Fed. R. Evid. 403. At the preliminary hearing on the motions in limine, Bryant suggested that another purpose for admitting the evidence was to show that Forrest attacked

Bryant out of anger, and not out of any safety concern. The court found that this would ask the jury to draw a propensity inference prohibited by Rule 404— that Forrest acted in accordance with his angry tendencies on the day in question. Though evidence may be admissible for one purpose and not another, the character evidence here posed a danger of the jury impermissibly inferring propensity and bad character while distracting it from the issues at hand. Rule 403 balancing weighed in favor of exclusion.

2. Gang Membership Evidence

An approach to gang membership evidence similar to that taken in *Bryant* was followed in *United States v. Owen*, 2016 WL 5867062 (N.D. Miss. 2016) (Davidson, J.) (“Under Rule 104(b), photographic evidence of the tattoos purportedly showing gang membership is relevant to the case. Furthermore, in applying the Rule 403 balancing test, the Court finds that any prejudice resulting from the admission of the photographs is outweighed by their substantial probative value. The photographs are admissible to show gang membership. However, in accordance with Rule 404(b), the photographs are not admissible as evidence of prior bad acts or crimes other than those charged in the superseding indictment.”)

In *Estate of Diaz v. City of Anaheim*, 2016 WL 4446114 (9th Cir. 2016) (en banc), an excessive force action, evidence admitted at trial related to the plaintiff’s gang membership, with wide-ranging testimony from the City’s gang expert, as well as photographs featuring the plaintiff’s tattoos and him posing with guns and throwing gang signs, none of which the shooting officer knew about or had seen when he shot the plaintiff.

In ruling on the motions *in limine*, the district court in *Estate of Diaz* held that evidence of Diaz’s gang affiliation was relevant only to damages, because the officer did not know he was a gang member. The court also specifically excluded evidence of Diaz’s gang tattoos themselves, such as photographs, because such evidence was unnecessary to establish the fact that he was a gang member. The court later recognized generally that “[p]hotographs have the potential for both relevant evidence and gratuitous provocation of the jury.”

J. Heck Bar based on Admissibility of Co-felon’s Conviction or Nolo Contendere Plea

Following Roy Heck’s conviction and sentencing after a state court found him guilty of murdering his wife, he appealed his sentence in state court and also brought a pro se action in federal district court alleging that law enforcement officers knowingly destroyed evidence in violation of his constitutional rights, entitling him to compensatory and punitive damages. Heck did not seek release from prison. The district court dismissed his §1983 claim because it directly implicated the validity of his state court conviction. While the district court

decision was pending appeal to the Seventh Circuit, the state supreme court affirmed Heck's conviction, and Heck sought and was denied a writ of habeas corpus in federal court. The Seventh Circuit then affirmed the dismissal of Heck's §1983 claim on the ground that, even though he did not challenge directly the validity of his sentence, success on his §1983 claim would obligate the state to release him based on a violation related to his confinement. The case moved up the appellate ladder to the U.S. Supreme Court.

In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Supreme Court held that the federal district court was barred from hearing the convicted state prisoner's §1983 claim for damages based on an alleged violation of federal constitutional or statutory rights if doing so would necessarily imply the invalidity of the prisoner's conviction or confinement, unless the prisoner could first show that the conviction was overturned. Writing for the majority, Justice Antonin Scalia's approach to what would become known as the *Heck* bar. The *Heck* decision was at the intersection of §1983 and the habeas statute, 28 U.S.C. § 2254, and that when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction, a federal court should not recognize the §1983 claim for damages that questions the validity of the state prisoner's conviction or confinement.

The *Heck* bar was intended to preserve comity between federal and state courts by precluding a federal cause of action that would jeopardize the basis of a state conviction. Incorporated into the *Heck* bar was a favorable termination requirement that would assure that a federal district court would not entertain a §1983 action without the plaintiff first proving that the conviction with which his claim coincided was reversed, thereby avoiding a collision at the intersection of §1983 and habeas relief. The favorable termination requirement, as articulated by Justice Scalia, precluded a collateral attack on the conviction through a §1983 civil action, *Heck*, 512 U.S. at 484, leading to this formulation of the *Heck* bar:

When a convicted state prisoner seeks damages in a §1983 civil action, the court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487.

If the success of the plaintiff's §1983 civil action would not "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." *Heck*, 512 U.S. at 487.

The federal court could not entertain Heck's §1983 claim since the action for damages would functionally challenge the legality of his conviction, resembling the habeas corpus exhaustion requirement. A successful civil claim under §1983, in other words, would prove that his conviction violated his

constitutional rights and would undermine the state court's affirmance of his conviction. *Heck*, 512 U.S. at 490.

As the Court clarified in footnote 6 of the *Heck* decision, when a plaintiff does not seek damages directly attributable to a conviction or confinement, but the successful prosecution of which would necessarily imply that the plaintiff's criminal conviction was wrongful, the §1983 claim cannot be brought if the plaintiff would "have to negate an element of the offense of which he has been convicted." *Heck*, 512 U.S. at 486 n.6.

Heck thus stood for what appeared to be a bright-line rule that a plaintiff seeking §1983 relief must first show favorable termination of his conviction if success in the §1983 civil action would necessarily imply the invalidity of the conviction. Stated this way, the *Heck* bar applied only to current prisoners who were within the intersection of habeas relief and §1983, providing a means for avoiding jurisdictional collisions.

Four years later, the Supreme Court held in *Spencer v. Kemna*, 523 U.S. 1, 6-7 (1998), that the *Heck* bar precluded a plaintiff who was no longer in custody from bringing a §1983 claim related to his parole revocation. The plaintiff's habeas corpus decision was moot, but it was not required that a §1983 action for damages always be available. Justice Souter in a concurring opinion argued that *Heck* should be limited to subjecting only inmates seeking §1983 damages for unconstitutional conviction or confined to the favorable termination requirement to avoid unjustifiable limiting the breadth of §1983 at the expense of persons not in custody. *Spencer*, 523 U.S. at 20. Souter feared that if a plaintiff who did not fall under the habeas statute because he was not in custody were to be barred from bringing a §1983 action, it would create a patent anomaly that would keep out plaintiffs with viable §1983 claims even if they had no remedy under the habeas corpus statute.

1. Plaintiffs No Longer in Custody

The circuits are split on whether the *Heck* bar applies to plaintiffs not in custody. The Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have held that when a plaintiff is not incarcerated and federal habeas corpus is not available to address constitutional concerns, *Heck* does not bar §1983 claims because the intersection of habeas relief and §1983 is not present. *Huang v. Johnson*, 251 F. 3d 65 (2d Cir. 2001); *Leather v. Eyck*, 180 F. 3d 420, 424 (2d Cir. 1999); *Wilson v. Johnson*, 535 F. 3d 262, 267-68 (4th Cir. 2008); *Carr v. O'Leary*, 167 F. 3d 1124, 1127 (7th Cir. 1999); *Guerrero v. Gates*, 442 F. 3d 697, 704-05 (9th Cir. 2006); *Nonnette v. Small*, 316 F. 3d 872, 876 (9th Cir. 2002); *Cohen v. Longshore*, 621 F.3d 1311, 1326-17 (10th Cir. 2010); *Harden v. Pataki*, 320 F. 3d 1289, 1298 (11th Cir. 2003);

The First, Third, Fifth, Sixth, and Eighth Circuits have found *Heck* applicable as much to prisoners in custody - a prerequisite for habeas - as to persons no longer in custody, and adhere to the position that where favorable termination cannot be shown, a plaintiff is barred under *Heck* regardless of whether a habeas remedy is or ever was available. *White v. Gittens*, 121 F. 3d 803, 806 (1st Cir. 1997); *Williams v. Consovoy*, 453 F. 3d 173, 177-78 (3d Cir. 2006); *Giles v. Davis*, 427 F. 3d 197, 209-10 (3d Cir. 2005); *Randall v. Johnson*, 227 F. 3d 300, 301 (5th Cir. 2000); *Schilling v. White*, 58 F. 3d 1081, 1086 (6th Cir. 1995); *Powers v. Hamilton*, 501 F. 3d 592, 601 (6th Cir. 2007); *Entzi v. Redmann*, 485 F. 3d 998, 1003 (8th Cir. 2007); See also Lyndon Bradshaw, *The Heck Conundrum: Why Federal Courts Should Not Overextend the Heck v. Humphrey Preclusion Doctrine*, 2014 B.Y.U. L. Rev. 185, 186-95 (2014), <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2914&context=lawreview>.

In *Beets v. County of Los Angeles*, 669 F. 3d 1038, 1040 (9th Cir. 2012), two fleeing felons rammed a police car barricade that was blocking their escape from officers in pursuit, and one of the felons backed the truck in the direction where one of the officers stood, in response to which the officer raised his gun and fired at the driver, who died from the injuries. The other felon was arrested and convicted of assault on a police officer with a deadly weapon. The parents of a deceased felon brought a §1983 action against the shooting officers and the county alleging that excessive force was used in the attempt to arrest the felon. The Ninth Circuit upheld the district court's holding that *Heck* barred the parents from seeking relief in the federal forum, rejecting their argument that *Heck* was inapplicable because neither they nor their deceased son were convicted of any crime that the §1983 claim might undermine. The Ninth Circuit reasoned that because the deceased's co-conspirator had been convicted in relation to the same occurrence, any remedy the parents might have under §1983 would necessarily imply the invalidity of her conviction, hence no federal forum was available to hear the parents' federal claim. *Beets* focused on a question left unanswered by *Heck*, namely, whether individuals are precluded from seeking §1983 relief if success in the §1983 action would be inconsistent with a co-felon's conviction or confinement.

Years before *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988), consensus existed among courts that "collateral estoppel applies when §1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings." *Allen v. McCurry*, 449 U.S. 90, 102 (1980). In this sense, §1983 actions by plaintiffs previously convicted upon nolo contendere pleas are precluded based on their prior convictions, so *Schaeffer's* holding regarding the admissibility of their pleas is irrelevant because collateral estoppel applies regardless of whether their pleas are admissible.

2. Admissibility of Nolo Contendere Pleas

Finally, the Court in *Heck* clarified §1983 jurisprudence in a way that made the issue of the admissibility of nolo contendere pleas relevant in a significant subset of §1983 cases. In *Curry v. Yachera*, 2016 WL 4547188 (3d Cir. 2016), the plaintiff entered a nolo contendere plea for charges of theft by deception and conspiracy, and per the court, under applicable state law that plea must be treated the same as a conviction under *Heck*. Even though state law did not treat a nolo contendere as an admission of guilt, it was "equivalent to a plea of guilty" and the defendant "consents to being punished as if he were guilty." Per the Third Circuit, "[a] nolo contendere plea "cannot be used against the defendant as an admission in any civil suit for the same act," but the judgment of conviction still follows from it, just like a plea of guilty. *Id.* "We have noted that even where the prosecution moves to dismiss criminal charges, there is no favorable termination if the dismissal was the result of a compromise, because this would not indicate "that the accused is actually innocent of the crimes charged." *Hilferty v. Shipman*, 91 F.3d 573, 580 (3d Cir. 1996); See *Havens v. Johnson*, 783 F.3d 776, 784 (10th Cir. 2015) ("[T]he *Heck* doctrine derives from the existence of a valid conviction, not the mechanism by which the conviction was obtained (such as admissions by the defendant), so it is irrelevant that Havens entered an Alford plea [maintaining his innocence.]); *Ballard v. Burton*, 444 F.3d 391, 397 (5th Cir. 2006) ("[W]e hold that a conviction based on an Alford plea can be used to impose *Heck's* favorable termination rule."). For purposes of *Heck*, Curry was convicted of the charges brought by Yachera. *Id.* at *4.

The plaintiff's constitutional claims in *Curry v. Yachera* were "precluded by *Heck* because their success would imply that his conviction was invalid. See *Heck*, 512 U.S. at 486-87. Curry did not allege that his conviction was invalidated to satisfy the favorable termination rule, and the district court properly dismissed his constitutional claim of malicious prosecution against Yachera, and by extension, all other defendants.

In summary, the *Heck* bar is grounded on concerns for finality and consistency as well as "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to §1983 damages actions," *Heck*, 512 U.S. at 486. Under *Heck's* "favorable termination rule," a §1983 action for damages must be dismissed without prejudice unless there was no conviction or sentence or "the plaintiff can demonstrate that [a] conviction or sentence has already been invalidated," *Heck*, 512 U.S. at 487. A conviction based on a nolo contendere plea will likely be deemed a conviction for purposes of the favorable termination rule and the *Heck* bar. If an action will not demonstrate the invalidity of the criminal judgment, it should proceed. *Id.*

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