AALS Evidence Section Newsletter

Fall 2018

Message from the Chair – Tamara Lawson

I am pleased to announce that the AALS Evidence Section will be hosting three events during the upcoming AALS Annual Meeting.

First, the annual Evidence Section luncheon will take place Friday, January 4, 2019 from 12:15 to 1:30pm. We hope to see you there!

Second, our first Evidence panel (co-sponsored with the *Minority Groups* section) on *"Bias in the Courtroom"* will take place on Saturday, January 5, 2019 from 10:30 am to 12:30 pm:

> The presence of bias in the courtroom has the potential to undermine public faith in the adversarial process, distort trial outcomes, and obfuscate the search for justice. In *Pena-Rodriguez v. Colorado*, the United States Supreme Court recently held for the first time that the Sixth Amendment required post-verdict judicial inquiry in criminal cases where racial bias clearly served as a "significant motivating factor" in juror decision-making. This panel will examine the manner in which identity bias seeps into civil and criminal trials in the United States, the extent to which such bias impacts jury and judicial decision-making, and the adequacy of evidentiary rules and constitutional doctrine to ensure just trial outcomes. Post-Foster v. Chapman, the panel will consider how prosecutors are being trained to ensure Batson requirements prohibiting racial bias does not play a role in selecting the jury.

The panel will be moderated by Tamara Lawson (St. Thomas), and panelists include Chris Chambers Goodman (Pepperdine), David Harris (Pittsburgh), and Colin Miller (South Carolina). We will have a Business Meeting at the end of the program, during which a vote on amended bylaws will take place.

And finally, our second Evidence panel on *"Problems of Proof: #MeToo and 'Who Me?'"* will take place on Sunday, January 6, 2019 from 8:30 to 10:15 am:

> The #MeToo movement has galvanized women and women's groups to call out, respond to, and challenge pervasive sexual harassment across industries and workplaces. Criminal charges and civil lawsuits are being filed. But what will happen if and when these cases go to trial? Sexual harassment cases are notoriously "he said, she said," situations subject to the interpretations of the "reasonable" or "objective" person. The success of these cases is also contingent on evolving social standards and mores, which makes the promise of justice elusive. Meanwhile, critics assert that the movement has blurred the lines between actionable wrongs, poor judgment, and bad manners. This panel will examine the evidentiary basis for sexual harassment claims, problems of proof that surround the evaluation of credibility, the evidentiary standards of civil and criminal cases, and challenges and opportunities faced by litigants in the courtroom.

The panel will be moderated by Chris Chambers Goodman (Pepperdine), and panelists include Catherine MacKinnon (Michigan), Deborah Tuerkheimer (Northwestern), Maggie Wittlin (Nebraska), Ava Gruber (Colorado), Charles Gibbs (Partner at McGonagle Perri McHugh Mischak Davis), Julia Simon-Kerr (Connecticut), and Sandra Munoz (Law Offices of Sandra Munoz).

Conferences and Calls for Papers

United States Conferences

The 13th Annual Conference on Empirical Legal Studies will take place November 9-10th at the University of Michigan Law School. Registration for the conference, which focuses broadly on empirical analyses of law (including evidence law) is available here: https://events.law.umich.edu/cels2018/.

International Conferences

The *7th International Conference on Evidence Law and Forensic Science* (ICELFS) will be held at the Max Planck Institute in Freiburg, Germany next

summer from July 31 to August 2, 2019. The organizing committee is accepting submissions to participate in the conference, which will focus broadly on comparative issues of evidence law and forensic science. More information about this conference, including how to submit a proposal, may be found here: http://icelfs.mpicc.de/en/.

Individual Achievements

Bennet Capers (Brooklyn Law School)

Bennet Capers has an article, *Evidence Without Rules,* forthcoming in the (94) NOTRE DAME LAW REVIEW (2019).

Chris Chambers Goodman (Pepperdine)

Chris Chambers Goodman, of Pepperdine University School of Law, is working on revised the textbook written by her Evidence professor, Miguel A Mendez, who passed away last year. She is co-authoring the upcoming Seventh Edition with Mario Mainero, Professor of Academic Achievement and Executive Director of Bar Preparation and Academic Achievement, Chapman University, Fowler School of Law. The editions will be published by West Academic Press and available in the Spring of 2019 for summer and fall adoption.

Andrew Jurs (Drake Law)

Andrew Jurs has submitted a manuscript for a new textbook in the area of scientific and expert evidence, EXPERT EVIDENCE, which will be published by Carolina Academic press in early 2019. The book is intended for a two-four credit stand-alone class on experts, and includes a series of writing

exercises for students to practice their assessment of common pleadings (disclosures, motions in limine, etc...).

Andrew also entered a new role at Drake as its Associate Dean for Academic Affairs this past summer. He dryly notes that his expertise on the student code of conduct, faculty handbook, scheduling of classes and graduations requirements have increased exponentially since that time.

Laird Kirkpatrick (George Washington Law)

Laird Kirkpatrick recently published the Sixth edition of the one-volume treatise EVIDENCE (with Mueller & Rickter) (Wolters Kluwer). The treatise analyzes each of the Federal Rules of Evidence in order and discusses the leading cases interpreting each rule. The treatise, which is published in both softbound and hardback editions, is intended to be a recommended reference for students taking evidence and can be used as a supplement to any evidence coursebook. It is also designed to be a book that students can take into practice with them. The treatise has been cited by numerous appellate courts, including the United States Supreme Court. Complimentary copies of the treatise are available to professors teaching evidence. Laird notes that you should submit your request to legaledu@wolterskluwer.com and indicate whether you would prefer the softbound or hardback version.

Paul Rothstein (Georgetown Law)

Paul Rothstein recently published new editions of two of his books: FEDERAL RULES OF EVIDENCE (Thomson Reuters (West)) (2018-19) and FEDERAL TESTIMONIAL PRIVILEGES (Thomson Reuters (West)) (2018-19). The new editions are available both in hard copy and on Westlaw.

Paul's latest article, *Demystifying Burdens of Proof and the Effect of Rebuttable Evidentiary Presumptions in Civil and Criminal Trials,* is available for download on SSRN at:

. This article recently made SSRN's "Top Ten Downloaded" list.

David M. Siegel (New England)

David M. Siegel recently published an article, *Recording Routine Forensic Mental Health Evaluations Should be a Standard of Practice in the 21st Century,* in the interdisciplinary journal BEHAVIORAL SCIENCES & THE LAW (2018). David argues in this article that the standard of practice applied during forensic interviews in criminal and delinquency cases should incorporate a digital recording requirement. You may view the abstract and article at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3170683.

Christian B. Sundquist (Albany Law)

Christian B. Sundquist has an article, *The Science of Identifying Juror Racial Bias,* forthcoming in the DENVER LAW REVIEW (2019). An abstract of the article, which is already being cited in *Pena-Rodriguez* motion papers in a Fourth Circuit case (*United States v. Birchette),* is available on SSRN at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237628.

Newsletter Articles

Forensics- A Valuable Experiential Tool in Teaching Evidence
by William S. Bailey, University of Washington School of Law

As we all know, Evidence provides both the basic language and conceptual framework of the law, cutting across all areas of practice. But the continuous, rapid growth of science and technology has made our field much more challenging.

Forensic evidence is no longer confined to criminal cases. It is now necessary for all judges and lawyers to rely on experts in assessing the foundation, reliability and impact of the increasing volume of unfamiliar technical information wrapped up in the evidence of a case.

Multiple comprehensive research studies by the Rand Institute, PricewaterhouseCoopers and others have confirmed the critical role of *Daubert* motions play in most cases. Concurrently, the National Academy of Sciences released a report in 2009 that was highly critical of many forms of commonly used forensic evidence as unreliable, as well as the seeming inability of lawyers to properly navigate it.

What implications does all this have for how we teach Evidence? And how can we make our classrooms more experiential, challenging and relevant under the new ABA Standards? One highly promising tool is adding either a component of forensic evidence to the Evidence curriculum or adding a stand-alone Forensic Evidence course.

I took up this challenge in 2009, designing and launching a new Forensics course, covering both the civil and criminal aspects. The core idea was to make this totally real, adding clinical elements to the doctrinal classroom, bringing in experts, judges and lawyers. The biggest curriculum challenge was to identify real-life cases to create appropriate micro-environments of forensic evidence experience. To that end, I consulted with a broad cross-section of professors, judges, practitioners and law enforcement, then vetting the files of the most promising cases. I ended up with eight, each focusing on forensic evidence of the greatest use and importance: DNA, fingerprints, psychiatric assessments, computer forensics, economic analysis of damages, medical malpractice, vocational assessment and biomechanical assessment.

In my Forensics course, we talk about the doctrinal aspects of this evidence in class for weeks. Then I assign small groups of students to a case and turn them loose to meet with a real expert, who they will present "live" in class. In addition to writing an in-depth paper on the experience, focusing on the Rules of Evidence, the challenges presented by the technical and scientific material and their case strategy, the students also must do detailed critiques of the work of the other groups.

Not surprisingly, given the great attention paid to forensic evidence in the media, in films and on television, the student interest in and response to this course has been phenomenal. The course evaluations confirm that it is widely seen as a capstone experience prior to going into practice. Graduates routinely report how the course gave them a solid foundation, leading to the confident and competent handling of these forms of evidence. Moreover, the panel of participating experts have enjoyed and benefitted from their experience, signing up for repeat engagements year after year.

Having tested this concept out thoroughly with hundreds of students, I then set about to create authoritative, effective and fun to use course materials. This ended up as a two-volume set published by the Carolina Academic Press entitled *Law, Science and Experts*. The first volume, co-authored with forensic laboratory scientist Terence J. McAdam, focuses on the scientific method, the differences between the law and science and the transformation in forensic evidence that *Daubert* launched. The second volume is a workbook containing the case materials, summaries of the various technical fields involved and evidentiary presentation strategies. As a special bonus feature, the second volume also includes the background materials in a product liability crashworthiness case as the basis of a classic *Daubert* motion to strike an opposing expert. These books can be

used either together or separately, in either an Advanced Evidence course or a stand-alone one on Civil and Criminal Forensics.

The early critical reception to these books has been highly positive. Professor George Fisher of Stanford Law School describes them as "pathbreaking and hugely useful." Professor Philip T. Hoffman of California Institute of Technology calls them "the model of effective teaching in scientific and statistical evidence" and Professor Steven Lubet at Northwestern Pritzker School of Law says that the books are "the best preparation for a twenty-first century law practice focusing on forensic and scientific evidence."

AALS Section on Evidence (2018-2019)

Chair – Tamara F. Lawson, Acting Dean and Professor, St. Thomas University School of Law

Chair-Elect– Chris Chambers Goodman, Professor, Pepperdine University School of Law

Secretary— Christian B. Sundquist, Director of Research and Professor, Albany Law School