



AALS Evidence Section Newsletter

Winter 2016-17

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Message from the Chair - Ann Murphy

Greetings!

I hope this finds you all done with grading for the fall semester. In one week, we will meet in San Francisco for the AALS 2017 Annual Meeting (January 3 – 7, 2017). We hope to see as many of you as possible. Our Evidence Section panel will be a joint panel together with the Law and the Humanities Section. It will take place on Friday, January 6th, from 10:30 a.m. – 12:15 pm in Continental Parlor 8, on the Ballroom Level at the Hilton Union Square. The panel is entitled *Narrating Evidence* and the following is the description of the program:

In the past year, crime documentaries like *Serial* and *Making a Murderer* have been spectacularly successful. These programs and others like them have pushed many boundaries, including the boundaries between truth and justice, advocacy and art, and law and fiction. In so doing the diverse programs have suggested a role for critical interventions that interrogate where boundaries collapse and offer analyses of the interrelation between domains. One particularly rich area of inquiry in this context concerns witnessing, confession, and narrative. How do these legal and personal stories get translated from law into media? And how do humanistic devices help us better understand the complications of these narratives as they exist within the legal system. This panel will address the question of evidence, as it exists between the worlds of law and cultural representation, and in particular the ways in which questions about evidence are embedded in related questions about narrative design.

Our business meeting will occur just before the program begins.

We will also be joining the Criminal Justice Section for a joint "Criminal Justice and Evidence" luncheon on Thursday, January 5th from noon -1:30 pm (ticket required) in Yosemite C on the Ballroom Level at the Hilton.

We are delighted to announce that Professor D. Michael Risinger will receive the John Henry Wigmore Award for Lifetime Achievement in the Areas of the Law of Evidence and the Process of Proof. The award will be given during the luncheon. Because Professor Risinger will be unable to

attend, Professor Ed Cheng will accept the award in his honor.

Our panel features the following speakers:

Moderators:

Ann M. Murphy, Gonzaga University School of Law, and
Allison Tait, The University of Richmond School of Law

Panelists:

Speakers:

Alan Jackson, Partner, Werksman, Jackson, Hathaway & Quinn, LLP

Tal Kastner, New York University School of Law
Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit

Speakers from a Call for Papers:

Jonathan D. Glater, University of California, Irvine School of Law
Julia Simon-Kerr, University of Connecticut School of Law

The Evidence Section speakers are the Honorable Alex Kozinski (who has been described as the “most controversial 9th Circuit Judge” see Emily Bazelon, *The Big Kozinski*, *Legal Affairs*, Jan-Feb 2004)), and attorney Alan Jackson, who was Assistant Head Deputy for the Major Crimes Division at the Los Angeles County District Attorney's Office and is now in private practice in Los Angeles.

I look forward to seeing as many of you as possible at the luncheon and the our Section Program. Take care and I hope your spring semester is soon off to a good start.

Best,

Ann M. Murphy, Professor

Gonzaga University School of Law

AALS Panel on False Confessions

The AALS Criminal Law Section will be sponsoring a panel entitled "False Confessions in Context" at the 2017 Annual Meeting. The panel will be on Saturday, January 7 from 10:30 AM to 12:15 PM, and was selected through a call for proposals.

The panel will cover some of the latest developments regarding false confessions and false confession expert testimony. Debbie Davis (Nevada Reno, Psychology) will present an overview of the current psychological literature regarding false confessions and how they occur. Valena Beety (West Virginia) will provide a litigator's perspective on these cases, and Richard Leo (San Francisco) will present the results of a new empirical study of 200 proven false confessions. Larry

Rosenthal (Chapman) will offer a skeptical counter-perspective on false confession experts, asking whether the science is sufficiently reliable for Daubert purposes and whether the benefits of reforming interrogation techniques are worth the costs. Finally, Ed Cheng (Vanderbilt) will offer some evidence that the available case law does not accurately depict how courts have received false confession expert testimony, and will present a new statistical method that detects and corrects for this publication bias.

Conferences and Calls for Papers

10thTH INTERNATIONAL CONFERENCE ON FORENSIC INFERENCE AND STATISTICS. The 10th International Conference on Forensic Inference and Statistics will be sponsored by South Dakota State University and take place on **September 8, 2017 at the University of St. Thomas**, in Minneapolis, Minnesota. The aim of the conference - ICFIS2017 – is to bring together the diverse scientific communities involved in the various aspects of forensic interpretation and statistics. Developments in forensic disciplines are fast and have an increasing impact on law enforcement and the justice system. Evidence can only be a value when it is gathered, analyzed, evaluated, and communicated. For this to happen, there needs to be sound statistical and logical inference methods, and good communication between scientists, lawyers, judges and other stakeholders of the criminal justice system. ICFIA was first held in 1990 at the University of Edinburgh in Edinburgh Scotland. The conference regularly alternates between Europe and the U.S. every 3 years. Most recently the conference took place in Leiden, the Netherlands in 2014. For more information about the 2017 conference in the U.S., see: <http://www.event.com/events/icfis-2017-international-conference-on-forensic-inference-and-statistics/event-summary-6d357a9583224144866d64f44de367a2.aspx>

2017 NEW VOICES WORKSHOP CALL FOR PAPERS. Vanderbilt Law School's Branstetter Litigation & Dispute Resolution Program invites submissions for its annual New Voices in Civil Justice Scholarship Workshop, to be held May 9-10, 2017 at Vanderbilt Law School. Junior scholars will be selected via a blind review process to present at the New Voices Workshop. The New Voices format maximizes collegial interaction and feedback. Paper authors do not deliver prepared "presentations." Rather, all participants read the selected papers prior to the session, and at each workshop, a senior faculty member provides a brief overview and commentary on the paper. Open and interactive discussion immediately follows.

Submitted papers should address an aspect of civil justice, broadly defined. Subject areas may include, but are not limited to, civil procedure, complex litigation, **evidence**, federal courts, judicial decision-making, alternative dispute resolution, remedies, and conflict of laws. In keeping with the intellectual breadth of the Branstetter Program faculty, the Workshop welcomes all scholarly methodologies, from traditional doctrinal analysis to quantitative or experimental approaches. Submissions must be received at **Branstetter.Program@vanderbilt.edu** no later than **January 1, 2016**. Participants selected will have reasonable travel and accommodations covered. Other requirements and more details about the workshop can be found at <http://law.vanderbilt.edu/newvoices>.

Members' Awards, Podcasts, Books, Law Review Articles, and Presentations

D. Michael Risinger (Seton Hall)

The 2017 John Henry Wigmore Award for Lifetime Achievement in the Areas of the Law of Evidence and the Process of Proof recipient

Professor D. Michael Risinger is the John J. Gibbons Professor of Law at Seton Hall Law School. Professor Risinger holds a B.A., magna cum laude, from Yale University, and a J.D., cum laude, from Harvard Law School. He clerked for the Honorable Clarence C. Newcomer of the United States District Court for the Eastern District of Pennsylvania. He is a past chair of both the AALS Sections on Civil Procedure and Evidence, and a life member of the American Law Institute. He was also a member of the New Jersey Supreme Court Committee on Evidence for 25 years, which was responsible for the current version of the New Jersey Rules of Evidence. Professor Risinger began teaching at Seton Hall Law School in 1973. He served as a visiting senior fellow on the law faculty of the National University of Singapore from 1985-1986. Professor Risinger has published in the areas of evidence and civil procedure. He is the co-author of *Trial Evidence, A Continuing Legal Education Casebook* and is the author of two chapters in *Faigman, Kaye, Saks and Sanders, Modern Scientific Evidence* ("Handwriting Identification" and "A Proposed Taxonomy of Expertise"). Professor Risinger was selected as one of Seton Hall's two inaugural Dean's Research Fellows (2002-2004) and was named the John J. Gibbons Professor of Law in May 2008. His scholarship has recently concentrated on wrongful convictions as well as expert evidence issues.

Professor Risinger is well known in our Evidence community and has been kind to and generous with new Evidence teachers and scholars. He is a clear leader in our field and it gives us great pleasure in honoring him with this award.

Professor Cheng (Vanderbilt)

Excited Utterance: The Evidence and Proof Podcast. Ed Cheng is hosting a new podcast, *Excited Utterance*, focusing on scholarship in the law of evidence and proof. The podcast features interviews with authors of new works, and hopes to provide a virtual evidence workshop to our scholarly community each week throughout the academic year.

Excited Utterance is available on iTunes, Google Play, or directly from its website, www.excitedutterancepodcast.com.

Professor Rothstein (Georgetown)

ROTHSTEIN, *FEDERAL RULES OF EVIDENCE 3D* (2017 EDITION, THOMSON-REUTERS CO.).

ROTHSTEIN & S. CRUMP, *FEDERAL TESTIMONIAL PRIVILEGES 2D* (2016-17 EDITION, THOMSON-REUTERS CO.).

Professor Parness (Northern Illinois)

Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, South Methodist University Science and Technology Review (2017)(forthcoming), article available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849559

Abstract:

In 2006, Federal Rule of Civil Procedure (FRCP) 37(e) came into effect, declaring that lost electronically stored information (esi) could not prompt “sanctions ... on a party” absent “exceptional circumstances.” Sanctions were limited to losses resulting from “the routine, good-faith operation of an electronic information system.” Effective December, 2015, Rule 37(e) now contemplates limited “measures ... to cure the prejudice” caused by lost and irreplaceable esi due to a party’s failure “to take reasonable steps to preserve,” as well as sanctions for more culpable conduct.

The rule was amended in 2015 because the 2006 norm had “not adequately addressed the serious problems resulting from the continued exponential growth in the volume” of esi and because it had prompted in the federal circuits “significantly different standards for imposing sanctions or curative measures on parties who fail to preserve” esi. The 2015 rule incorporated only some of the 2013 recommended amendments to FRCP 37(e), which included comparable guidelines for esi and nonesi discovery.

This article first reviews the basic features of the old and new FRCP 37(e), as well as their place amongst other FRCP and judicial precedents on information preservation in anticipation of and during litigation. It then comments on the challenges posed under the new federal rule, including issues on choice of law; irreplaceability; culpability; burden of proof; party identification; and, state spoliation torts.

Jennifer A. Brobst (Southern Illinois)

JENNIFER A. BROBST, *ADMISSIBILITY OF EVIDENCE IN NORTH CAROLINA (PRINT)*, STATE PRACTICE SERIES, THOMSON REUTERS ((PRINT AND DIGITAL) 2016-2017).

Jennifer A. Brobst, *Miranda in Mental Health: Court Ordered Confessions and Therapeutic Injustice for Young Offenders*, 40 Nova L. Rev. 387-423 (2016) [also drafted a related problem/bench brief as the subject of the National Health Law Moot Court Competition (November 2016) at Southern Illinois University School of Law]

A Few Interesting Cases From The Past Year - Useful For Class by Professor Ann Murphy, Gonzaga University School of Law

There are of course many cases with evidentiary issues from the past year that may be helpful for class. I chose just a few that members of our Section might find interesting.

U.S. v. Rasmieh Yousef Odeh, 815 F. 3d 968 (6th Cir. 2016)

Expert Testimony- Sixth Circuit (with one judge dissenting) held that the District Court erred when it categorically denied the defendant’s proposed expert witness testimony on post-traumatic stress disorder. Defendant was convicted for violating 18 U.S.C. 1425(a) (knowingly procuring naturalization contrary to law). The defendant indicated on her naturalization application that she had never been arrested, convicted, or imprisoned despite the fact she had in fact been arrested, convicted, and imprisoned in Israel in 1969-1970 for her role in the bombing of a supermarket. The

Appellate Court ruled that there needed to be a hearing on the admissibility of the evidence.

U.S. v. Michael Gluk and Michael Baker, No. 14-51012, United States Court of Appeals for the Fifth Circuit, filed August 4, 2016

Rules 403, 404, 803(8), and Harmless Error – The U.S. Court of Appeals overturned the convictions of the former CEO and former CFO of surgical device maker ArthroCare. Baker and Gluk were serving respective prison terms of 20 years and 10 years following their June 2014 convictions for wire fraud, securities fraud, and conspiracy. Baker was also convicted of making false statements. The government maintained that ArthroCare engaged in “channel stuffing” with a related entity, DiscoCare.

There was an internal investigation authorized by the Board of Directors of ArthroCare and completed by the law firm Latham & Watkins. There was also an SEC investigation. Gluk and Baker wished to introduce these reports into evidence, but the District Court excluded them as being more prejudicial than probative. The District Court also allowed the government’s submitted evidence of “uncharged misconduct” that allegedly took place at DiscoCare. The Appellate Court found that both evidentiary rulings were incorrect, and that the error (the inadmissible ruling on the reports) was not harmless.

Estate of Manuel Diaz v. City of Anaheim, No. 14-55644, United States District Court for the Ninth Circuit, filed August 24, 2016

Rules 401, 403, Expert Testimony, and Limiting Instructions- Jury ruled in favor of a police officer and the City of Anaheim in an excessive force case. The trial judge allowed into evidence the plaintiff’s drug use and gang affiliation, and allowed in expert testimony about gangs, despite the plaintiff’s offer to stipulate that Diaz had been a gang member. The Ninth Circuit reversed the judgment. There were a number of motions in limine (see p. 7 and 8 of the opinion). The District Court issued a ruling that excluded evidence of Diaz’s use of methamphetamines and photos of gang activity, but allowed his gang affiliation (with respect to the damages issue) and expert testimony about gangs (again, only for purposes of damages). Later the trial judge allowed photographs of Diaz’s tattoos, his throwing gang signs, and gang moniker clothing and association. The District Judge also later allowed toxicology evidence. The Ninth Circuit found that this case should have been bifurcated. It stated that this was a “runaway case” and the jury heard considerable and inflammatory evidence.

John Clint Draper v. D. Rosario, Officer; E. Rogers, Lieutenant, No. 14-16340, United States Court of Appeals for the Ninth Circuit, filed September 7, 2016

Rule 807 and Closing Argument – California State prisoner brought a 42 U.S.C. Section 1983 (Civil Action for Deprivation of Rights) action against prison officers. The District Court Judge ruled that testimony from inmate Doe was inadmissible under Rule 807, The Ninth Circuit held that the Judge did not abuse his discretion. The Plaintiff also argued that Defense counsel made statements during closing argument that made his trial fundamentally unfair. Defense counsel told the jury that the inmates who testified had nothing to lose because they were already in prison, but that the officers had everything to lose because a conviction for perjury would end their careers. The Defendant argued this was improper “vouching” for the correctional officers. Plaintiff’s counsel did not

objected to the statements. The Ninth Circuit, although it found these statements were improper vouching, found no plain error.

U.S. v. Joseph Brent Loftis, No. 15-302262, United States Court of Appeals for the Ninth Circuit, Decided December 9, 2016.

Rule 404(b) - This is a ruling on an interlocutory appeal of a District Court order granting in part a motion in limine to exclude evidence of uncharged offenses in a wire fraud case. The Appellate Court opinion is a bit difficult to decipher because it affirmed the part of the District Court order that allowed the uncharged offenses (a finding for the government and against the Defendant), but also indicated that Rule 404 was not at issue at all because the uncharged transactions (against people other than those named in the indictment in this case) were not evidence of other crimes or acts because they are all evidence of the overall scheme to defraud.

Joining the Evidence Listserv

To subscribe to the Evidence Listserv send an e-mail message to Distinguished Professor of Law and James Edgar Hervey Chair in Litigation **Roger Park** (Hastings) at parkr@uchastings.edu. Please include your faculty position and school.

AALS Section on Evidence (2016)

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