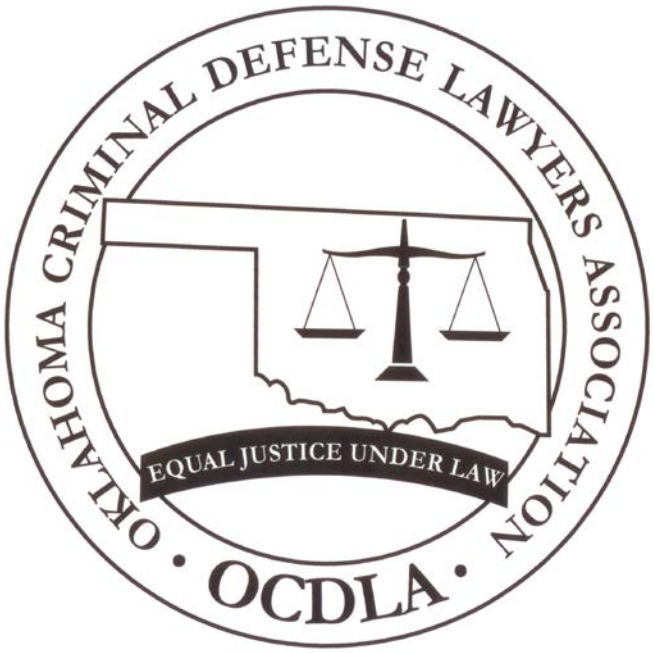
THE GAUNTLET

The Law Journal of the

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION



WINTER 2018

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THE GAUNTLET

To confront: (1) To throw down the Gauntlet; (2) To take up the Gauntlet

JACQUELYN FORD
Editor-in-Chief

Associate Editor
MIKE WILDS, *Broken Arrow*

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The *Oklahoma Criminal Defense Lawyers Association* (OCDLA) distributes over five hundred (500) copies of *The Gauntlet* to OCDLA members, law schools, law libraries and law professors. OCDLA and its members provide over seventy (70) hours of Continuing Legal Education (CLE) each year and publish *My Little Green Book*. *The Gauntlet* is a peer-reviewed journal. All articles are reviewed by members of the OCDLA prior to publication; however, the articles do not necessarily reflect the views of the OCDLA. Please send any comments regarding *The Gauntlet* to **ocdla @ bdp@for-the-defense.com.**

The President's Page

Katrina Conrad-Legler,
President OCDLA

Fellow OCDLA Members:

I am happy to present the Fall 2018 edition of *The Gauntlet*. Many thanks to Jacqui Ford, Brandon Pointer, and our contributing writers and editors who made this issue possible. I really appreciate all of their hard work in getting this issue out and ensuring that *The Gauntlet* remains relevant and maintains the high standards our members have come to expect.

The CLE committee has been hard at work this Fall. As a result, I would like for you to Save-the-Date on several upcoming events. First, we will be presenting the Cindy Foley Criminal Defense Seminar on January 25, 2019, at the Oklahoma City downtown library. This is the perfect opportunity for our newly admitted and other young attorneys to gain some insight and perspective from practitioners on how to prepare a case, as well as an opportunity for the more seasoned attorneys to brush up on motions and trial techniques. Secondly, the 2019 Patrick A. Williams Criminal Defense Institute will be here before you know it. We are going back to River Wind in Tulsa on June 27th and 28th. We are excited to announce that the board has decided to add a new component to the CLE on Friday afternoon. For those who are interested, the CDI will provide an afternoon of sessions on practical tips for such things as marketing, social media, and insurance for solo and small firm practitioners.

Finally, the OCDLA will be hosting a holiday party after work on December 14th at the Belle Isle Brewery. We would like to celebrate each other and the holidays, as well as use it as an opportunity to give back to the less fortunate in our community. We are asking for those attending to bring an item for donation, such as toys, coats, or even cash. We will be sending the collected donations to the Red Andrews Christmas Dinner.

I have only been president of this great organization for a few months and I have some very big shoes from past presidents to fill. Each president has chosen a worthy cause to focus on, whether it be *My Little Green Book*, growing membership, or providing the list-serve to our membership.

I would like to focus on improving our reputations as criminal defense attorneys in our communities. We are a great group of attorneys who care deeply about our clients, their families, and the criminal justice system. Unfortunately, this often gets lost in the heat of battle as we represent our clients. I would encourage every member to consider including some *pro bono* work for the members of their communities. It could be something as simple as filing a will or representing a past client at a Rule 8 hearing upon his or her release from prison.

Thank you for your continued support of this incredible organization. I look forward to serving as your president.

Katrina Conrad-Legler

President, OCDLA

A View from the Dock

As we close out 2018 and look forward to 2019, there are many things to consider and prepare for in the coming days. For the first time in our lives, we have an administration that is openly hostile to the judiciary. As this is being written there is an acting attorney general of the United States who has publicly stated the judicial branch is supposed to be the weak branch of government, inferior to the legislative and executive. Not since Andrew Jackson publicly fought with John Marshall have we seen such denigration of the courts.

We as criminal defense lawyers occupy a special place in the legal system of this country. We are the only lawyers specifically provided for in the U.S. Constitution. There are no references to civil lawyers or to prosecutors. As stated in Art. VI of the Bill of Rights states, "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense."

In the daily humdrum of our practices, we can easily succumb to the practicalities of our endeavors. The melee of prosecutors, witnesses, law enforcement officers and judges provide a din which deafens us to the greater calling of our practice.

We, as criminal defense lawyers, are constitutionally ordained. No other legal group can make such claim; nor carry such burden as we have voluntarily chosen to shoulder.

There are many who have ascribed the moniker criminal defense to their publicity or advertising but have not assumed the mantle of the office. Members of this association have taken that extra step, as a demonstration of their commitment to the defense of the accused citizen. These members attend association MCLE seminars during the year and the Patrick A. Williams Criminal Defense Institute to better themselves in the defense of their fellow citizen.

Weaving the three threads together, we are going to need to be ever more vigilant in the performance of our constitutionally mandated duty in the coming days. We

will need to scrutinize the filings of the government, whether state or federal, ever more closely and be ready to repel any attempt to vitiate our client's rights. We must become pillars of legal knowledge ready to spring forth in their defense.

I am reminded of the scene from "A Man for All Seasons" (written by Robert Bolt) in which Thomas More discusses the importance of the law with Roper:

William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

We must be the keeper of the law, and we must hold the government accountable to that same law. We can do this in our motion practice, in our oral arguments, and in our discussions with our neighbors. Be vocal about injustice and over-reaching by the prosecution. Volunteer to discuss the criminal justice system with your church or civic groups to give them a view which is not colored by television script writers' mis-impressions and expressions. Strive to be a better lawyer and a better defender. When the journey becomes too arduous, call another defense lawyer and get a renewal. When people ask what do you do, look them directly in the eye and say with all the pride you can muster, "I am a criminal defense lawyer. I represent accused citizens."

Bill Campbell

OCDLA Sustaining Member

Can you get a DUI on a Lime or Bird scooter?

With the introduction of self-propelled scooters in Oklahoma City, the question now is "Can you get a DUI on one"? Although we have not seen a case in Oklahoma yet, we examine state law for an answer.

To be convicted of a DUI in Oklahoma, the State must show that you were:

1. Driving
2. With blood alcohol level of .08 or more **or** under the influence of alcohol
3. A motor vehicle
4. On a public road/street/highway/turnpike/place)/(private road/street/alley/lane which provides access to one or more single or multi-family dwellings

(OUJI-CR 6-18-Fifth element not included as not relevant for purposes of this discussion)

Looking at the first element of driving, it is generally construed as operating. This is an interesting element as Oklahoma also has a charge of Actual Physical Control of a motor vehicle while under the influence of alcohol (APC). APC is generally defined as the ability to operate the vehicle which leaves a lot open for interpretation of when you actually have the ability to operate the scooter. Is it when you activate the app? The Oklahoma Appellate courts have not given us any clear definition of what actual physical control is or isn't.

The second element of having a BAC over .08 is pretty clear. However, Oklahoma has a lesser crime of Driving While Impaired which is operating a motor vehicle with a BAC of .06 or .07 and having impairment.

The third and fourth elements are the elements most relevant to whether you can get a DUI or APC on a scooter. Oklahoma has a statutory definition of motorized scooter. Looking at 47 O.S. 1-133.3, a motorized scooter is defined as a vehicle

not having more than three wheels, must have handle bars and a foot support or seat, have a power source capable of propelling the vehicle not more than 25 mph, and if the power source is electric…the power output is not more than 1000 watts.

Looking at available online specs for Lime and Bird scooters, they have 2 tandem wheels (wheels in a line) and have handlebars and foot support. Although Lime doesn't share its scooter specs, it appears that both companies' scooters are unable to exceed 25 mph. The wattage of the Bird scooter is 500 watts and I am speculating that the Lime scooter is in the same power range.

Clearly these are motorized scooters as defined by Oklahoma law. Are they also considered a motor vehicle under Oklahoma statutes? A motor vehicle is defined in 47 O.S. 1-134 as "any vehicle" which is self-propelled but does not include "implements of husbandry", "electric personal assistive mobility devices" or "motorized wheelchairs".

Implements of husbandry are devices used exclusively for farming and livestock raising operations. (47 O.S. 1-125) A motorized scooter would not fall under this definition. Electric personal assistive mobility devices are devices that are self-balancing and have two nontandem wheels designed to transport one person. (47 O.S. 1-114A) This would be similar to a Segway. Lime and Bird scooters don't fall under this definition as the wheels are one in front of the other which is tandem. A motorized wheelchair is a self-propelled vehicle designed for and used by a person with a disability and cannot go faster than 8 mph. (47 O.S. 1-136.3) The Lime and Bird scooters are capable of exceeding 8 mph and thus, would not fall under this exception.

Thus, under Oklahoma DUI law, the Lime and Bird scooters would be considered a motor vehicle under Oklahoma law. The last issue to consider is where the scooters are operated. If the scooters are operated on the public roadway or public street, then it seems clear that is included under the statute. The question becomes

whether operating the scooter on the sidewalk or in the parking lot of a business qualifies under 47 O.S. 11-902 for a DUI.

The short answer is yes. If you are operating upon any "public roads, highways, streets, turnpikes, other public places or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwelling". The sidewalk would be considered a public place under Oklahoma statutory and case law.

John Hunsucker
Hunsucker Legal Group
www.OKDUI.com

SAVE THE DATE-SEMINAR ANNOUNCMENT*

Litigating Juvenile Life Without Parole And Death Penalty Cases

(Oklahoma Miller v. AL and Capital Defense Training)

February 20-21, 2019

Osage Casino & Hotel Tulsa, OK

Agenda & registration will be available on www.ocdlaoklahoma after January 1, 2019.

COME JOIN US

OCDLA

Holiday Party

In appreciation of another successful year, the OCDLA invites you for dinner, drinks, and holiday cheer.

WHEN

Friday December 14, 2018

6:00pm – 9:00pm

WHERE

Belle Isle Brewery-50 Penn Place

1900 NW Expressway, OKC, OK 73118

Party on 2nd Floor of Brewery-Park & Enter From West Side Parking Lot (Off Penn Ave.)

The OCDLA will be collecting new, unwrapped toys & new or used(not abused) coats for donation @ Red Andrews Christmas Dinner. Please bring your item to the party or drop off at Belle Isle Brewery anytime after December 1st. Call 405-361-0989 for more info.

Christopher Baker

LEGAL NOTE & COMMENTARY

LOOKING THROUGH THE LENS OF A LIAR:

TESTI-LYING, POLICE WITNESSES, AND PROVING THE LIE.

Christopher Baker [1 a]

Footnotes included

Contribution to the Oklahoma Bar Association, Canadian County Bar Association, Oklahoma Fraternal Order of Police, American Bar Association Journal on Criminal and Civil Commitment, & The Defense Research Institute ™ Chicago IL.

2018

Christopher Baker

ABSTRACT:

THE FABRIC OF A LYING POLICE OFFICER

A lying police officer more than likely believes the Fourth Amendent, the laws of search and seizure, and the internal regulations and administration of police conduct are unreasonable and decidely wrong-headed, and (in his mind) the product of liberal political and social agenda. He believes with certainty that the defendant he has arrested is a person deserving of conviction and punishment, whose defense (whether procedural or substantive) is, by his definition, corrupt. That is, the defense posture of the defendant is necessarily an attempt to escape proper punishment, and is therefore, by his definition, immoral. His contempt for the system that (in his mind) unreasonably impedes law enforcement and wrongfully protects even the most dangerous and violent offenders, and his greater contempt for the defendant seeking to foil justice by mounting a proper and justified defense, justifies *his* deception. This attitude undoubtedly subverts justice and reflects poorly on the adversary system. However, in his mind, the lies serve the greater good.

I. INTRODUCTION

Our court system is supposed to be a structured process for the determination of the credibility of strangers, many of whom will, for one reason or another, try to deceive those who rely upon their word. Our faith in the adversary system—still a significant element in the determination of guilt—depends in large measure on our confidence that, assisted by courtroom rules, our jurors and judges will usually return a verdict consistent with the historical fact.[1] Police lying is not best described as a "dirty little secret." [2] For instance, police lying is not "dirtier" than the prosecutor's encouragement or conscious use of tailored testimony or knowingly suppressing Brady material; [3] it is no more hypocritical than the

wink and nod of judges who regularly pass on incredible police testimony, and no more insincere than the conservative politicians who decry criminality and trumpet public saftey in our communities, but refuse legislate or even vote to implement independent monitoring of police wrongdoing. [4]

Police lying is no *little* secret either. Juries, particularly in our progressive urban criminal courts, are thoroughly capable of discounting police testimony as unbelievable, unreliable, and even mendacious.[5] Judges, prosecutors, and defense attorneys often report that police perjury is commonplace, [6] and even police officers themselves concede that lying is a regular feature of the life of a cop. [7] Scandals involving police misconduct, corruption, criminality—are regularly featured in daily newspapers, and periodic investigation reports and blue-ribbon commissions come up with the same conclusions: police scandals are cyclical; police misconduct, corruption, brutality, and criminality are endemic; and necessarily, so is police lying to disguise and deny it.[8] The Fourth Amendment's proscription against unreasonable searches and seizures and the issues of police credibility have been closely linked for (40) years of academic discussion and study. At least from the period following *Mapp vs. Ohio 367 U.S. 643 (1961)* up to the most recent scholarship and cases on point, there has been fierce controversy on how procedural requirements placed on police conduct encourage police lying and duplicity in order to tailor the facts to these legal requisites. [9] Specifically, scholars, judges, legal pundits, and law enforcement professionals argue back and forth on whether or not the exclusion of illegally obtained evidence actually deters police misconduct, or rather encourages police perjury and "scamming" while rewarding certain underserving defendants.

This Legal Note and Commentary proposes a wider scope for a somewhat timeworn discussion—specifically, that police untruthfulness and the need to deter this sort of misconduct goes to the very heart of our criminal justice system and the need for trust in government and its processes, of which search and seizure law and practice is only a small part. It seems to be, being a much larger systemic and

societal problem, tinkering with search and seizure law and process alone will not heighten the police witness' respect for the oath. Police officer can be expected to omit, redact, and even lie on thier police reports and sworn affidavits; they will conceal or misrepresent to cover up corruption and brutality; [10] they are trained to deceive citizens during investigations as part of good police work; they will obscure facts, and even lie, to cover up the misconduct of fellow officers.[11] Bleeding blue seems to equate into lying about lying. Additionally, command practice and policy gives officers every incentive to lie to cover for lack of productivity or to aggrandize themselves for recognition and promotion. And yes, police officers will absolutely commit perjury in our courts of law.

However, lies under oath, while often involving the tailoring of testimony to meet constitutional requirements, run a much wider gamut. For example, perjury will occur to avoid criminal conviction or civil liability when the police officer is accused of wrongdoing. Police will commit perjury to further the prosecution of a citizen by adding inculpatory "evidence" to better secure a conviction, to gild the lily of police conduct, or merely sanitize the record of uncomfortable facts. Put more broadly, as long as a police officer's use of power and fulfillment of responsibilities is reviewed, whether by courts, governments agencies, or supervisors, and as long as such reviews are deemed by the officer as creating legal impediments to hamper defenses, to more immediate goals, he will have an incentive to lie. [12]

None of the incentives and pressures for police officers to lie can be properly distinguished from the reasons many other citizens have to falsify. Police stand here in the august company of politicians, legal professionals, public figures, business executives, and other persons of responsibility, all whom have strong incentives to conceal uncomfortable circumstances, inflate favorable ones, and invent if necessary where no happy facts exist. What distinguishes police officers is their unique power—to use force, to summarily deprive a citizen of freedom, to even use deadly force, if necessary—and their commensurately unique responsibilities—to be the living embodiment of the "law" in our communities,

as applied fairly to every member. All of that said, as some legal scholars propose, eliminating the exclusionary rule for illegally obtained evidence or changing the manner in which we hold suppression hearings, would be largely ineffectual in combating the problem of police dishonesty. The scope of the problem of police dishonesty, its causes, and our attempts to remedy it far exceed the compass of the Fourth Amendment. On the other hand, we do have tools available to fight, or at least reveal, lying in the courtroom, and some of the causal falsehoods that lead up to it. These tools should be familiar to defense lawyers and judges—constitutionally compelled, statutorily required, and judicially ordered discovery; a real opportunity for thorough cross-examination; and the elevation of the issue of witness credibility to the prominence it truly deserves, especially when the witness is an overzealous cop. In other words, upon sufficient offer of proof, criminal court judges should permit full-dress litigation of police credibility. Judges should encourage deeper exploration of the issue of police credibility than is presently taking place.

Moreover, judges who have been giving the wink and nod to questionable police testimony, who have been working with an improper (and frankly illegal) presumption in favor of police witness credibility, must change both practice and perspective to remain a respected pillar in the community. [13] To no surprise, one of the strongest reasons that police lie in court is the simple fact that judges allow them to get away with it. The wink and nod conveys many messages—wither the judge is politically in danger or hamstrung by somebody and can't afford to confront the lie, or that the judge defers to the police witness, knowing that confronting the lies aids the defense; or more disturbingly, that the judge actually approves of the lie. In any event, nothing less than an utter change in judicial conduct and point of view, free from political pressure to be "tough on crime" will more than likely result in the most effective deterrent to police lying. Nevertheless, as part of a larger and institutional reformation, the judiciary can begin to change its own practice of giving a wide berth to police dishonesty as a first step

in solving a fundamental problem in our justice system and police culture. The judges can stop winking and nodding, and instead subject police witnesses to the same tests of proof that other witnesses are subjected to when they swear to tell the truth.

II. JUDICIAL WEIGHING OF POLICE CREDIBILITY

For a factfinder in any legal posture, the issue of credibility—the believability and reliability of testimonial evidence—is absolutely paramount. A factfinder must:

> Scrutinize the testimony given and the circumstances under which each witness has testified....[c]onsider each witness' intelligence, his or her motives, state of mind, his or her demeanor and manner while on the witness stand.... All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any-attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with case. [14]

There is nothing expressly stated in the law that this enterprise of scrutinizing testimony is any less important for a judge than for a jury. However, the legal posture in which criminal court judges normally find facts serve to relieve judges from taking the weighing of witness credibility as seriously as would otherwise be indicated. First of all, judges (unlike juries) know that determination of credibility are reviewable on appeal only for abuse of discretion. The crediting or discrediting of testimony is almost never "clear error." To that extent, judges do not experience the same fear of committing reversible error when weighing the accuracy and believability of testimony, as opposed to when making the correct ruling on a matter of law. In addition, judges in criminal cases are cast in the role of factfinders during pre-trial suppression hearings. The standard of proof in a hearing not subject to an evidence code, regarding probable cause to search or the potential taint of an identification procedure is the civil standard of a "preponderance of credible evidence," rather than the standard for criminal trials

of "beyond a reasonable doubt." Therefore, even if a question of credibility is raised during a pre-trial suppression hearing, the prosecution must show only that its version of the facts is more likely than not, a standard that invites, at best, mild judicial scrutiny.

Furthermore, this relaxation of the rules of witness credibility for fact-finding judges applies not only during suppression hearings, but in other kinds of evidentiary rulings as well. For example, error may not be predicated upon a ruling which admits or excludes any evidence unless a subtantial right of the party is effected. Appellate courts have come to interpret this to mean that "garden variety" evidentiary rulings are presumptively non-reviewable, or at worst, harmeless error.

III. DIMINISHED SERIOUSNESS OF WEIGHING POLICE TESTIMONY

As an institutional and political matter, this lack of scrutiny of police witness credibility by judges is compounded when the officer is tenured in his job. In criminal cases, much evidence is premised on police testimony. In pre-trial suppression hearings in particular, evidence is comprised largely of police accounts, specifically the police officer or informant who hears of or observes facts that would constitute grounds for police intrusion or seizure, the police officer who actually commits the instrusion or the seizure, the interrogating police officer, or the officer who witnesses a defendant's statement, or the police officer who witnesses or conducts an identification procedure. In cases of searches or arrests pursuant to a warrant, there may be additional witnessess, including the officer who heard certain information from an informant and the officer who actually authored the warrant affidavit. Many times this is the same officer.

When a judge suppresses evidence because of a constitutional violation by police, there are a number of consequences. The primary one is that inculpatory proof is excluded from the trial or the case altogether. In most cases this will require the dismissal of some, if not all charges against the defendant.

In those same cases, this will entitle an otherwise guilty and dangerous defendants to go free or face a sharply reduced sentence. As a result of such suppression, the judge is necessarily ruling on the conduct of the police officers, on their credibility at times and on the performance and competence of the prosecution. The judge or the Appellate court can couch this ruling in a number of ways—that police conduct was an intentional if not flagrant violation of criminal procedure of a constitutional dimension, or that police testimony describing such conduct was unworthy of belief. However, a scathing opinion impugning the motives, honesty, or competency of police is rarely found in trial court opinions. One must turn to the Appellate and Federal Circuit Courts for those reports. State trial judges even when finding against the prosecution, will characterize the police conduct as a negligent, if not merely technical, violation that the judge is constrained to find in breach, rather than scold police for deliberate conduct. Therfore, it should be no surprise that the criminal court judge will much more likely find for the prosecution in a suppression hearing and admit the State's evidence. That strong tendency to find favor of the police conduct under review is a result of confirmation biases, and a strong tendency to accredit police testimony. As already discussed, there are evidentiary and procedural reasons why a judge's review of any witness' testimony during a suppression hearing is a less serious enterprise.

Emory University Law Professor Morgan Cloud has listed five additional reasons why the judge's review of police witness credibility is bound to be less scrutinizing during pre-trial suppression hearings. Secifically, "[j]udges accept perjured testimony from police officers" regarding search and seizure because: [15]

1) "It can be very difficult to determine whether a witness is lying, especially if the judge works under the principle that police officers are presumptively trustworthy; amd additionally, police officer are often experienced witnesses who can frame their narratives to confrom to constitutional requirements;"
2) "Judges dislike excluding probative evidence;"

3) "Judges are often predisposed to believe that the defendant is guilty and suffer from confirmation bias;"
4) "Assuming a swearing contest between the defendant and the police officer, judges are likely to disbelieve the defendant;" (not the swearing one may think)
5) "Judges do not like to call police officers liars."

This list is not exhaustive, however, for judges' non-critical acceptance of police testimony is many state trial judges' specific distaste for the exclusionary rule as it applies in a criminal procedure context. Historically, some judges have no problem excluding evidence under other evidentiary rules for example, hearsay, cumulativeness, inflammatory nature of evidence, more prejudicial effect that probative value, among others. Conversely, some judges have a big problem with the exclusionary rule under the Fourth, Fifth, and Sixth Amendments, specifically because exclusion by definition aids the defense, and more specifically rewards guilty defendants. [16] Number #5 of Professor Cloud's list may be the most disturbing and corrosive to the rule of law. The criminal procedure law premits police deceit in numerous contexts, and police training and standard practice encourages it. Much of this is popularly described and accepted as the "reality of the streets." It is the way police conduct their business, and its no wonder these tactics find there way into the courtroom. Accordingly, judges may believe that police oficer work in a grey zone of morality. Those particular judges are less likely to be sticklers on proper police conduct, and are thereby less likely to scrutinize police testimony regarding such conduct. Of course, such a belief and practices by these particular judges place them in a similar grey moral (if not legal) universe. [17] To be sure, there is nothing worse for a judge, ever mindful of the political future, than having his or her name on the front page of a city tabloid, with the headline decrying a pro-defendant ruling on a violent crime. However, the rule of law is the rule of law, and judges should not

act as the willful accomplice trangressing such laws to keep a person in jail. Even life tenured federal judges—presumably insulated from such political pressure— are not above these concerns. [18]

IV. SCHOLARLY APPROACHES TO POLICE LYING

The main purpose for this commentary is judicial reform, not institutional or political change. Although legal pundits Jerome Skolnick and James Fyfe proposes institutional change, [19] though a laudible proposal, only addresses a portion of the problem with police dishonesty—the false arrest and the constitutional tailoring of testimony. Whereas false arrest is a significant problem, dishonesty in the form of cover charges and added falsifications to help the district attorney secure a conviction or harsh penalty are probably more prevelant and equally disturbing in state courts. These sorts of falsehoods aren't made to comply with quota requirements—"overcharging" occurs because of more fundamental incentives and constraints inherent to policing and police culture. For example, police officers will urge the prosecutor to "overcharge" people to aggrandize themselves, to anticipate the reduction of charges during plea negotiations, or an adversarial act against the person the police officer presumes guilty, despite the lack of sufficient evidence. [20] Police officers also invent cover charges when a suspect is injured in the course of arrest. The officer will attest that the injuries were a result of the person assaulting the police officer having resisted apprehension. [21] This senario also begs the question of the responsibility of the procesutor to explain to the police the requisites of lawful policing. The role and duty of the prosecutor is to make sure police know the law that governs their conduct. The only problem, is who is there to monitor the prosecutors? Because, he is at least as invested in the conviction of a defendant as the investigating or arresting officer, [22] the only problem is there seems to be a shortage of virtuous prosecutors. Prosecutors must always assure police officers that they are on the officer's side. A prosecutor who is too demanding of police officers, too judgmental, too "by the book," is often

despised. [23] The consequence of being despised by the police is that the prosecutor gets very little cooperation. All of these aspects of the prosecutorial role and the relationship between prosecutors and police officers makes the prosecutor a questionable choice for the role of monitoring and deterring police officer dishonesty.

V. THE FOURTH AMENDMENT: THE EXCLUSIONARY RULE, POLICE, AND TESTI-LYING

Important for this discussion, many critics of the Fourth Amendment argue that unreasonable or inflexible rules of police/citizen engagement combined with the threatened sanction of evidentiary exclusion forces police officers to choose between 1) compliance with inefficient and impracticable procedures that run counter to effective law enforcement, and 2) disregard of such procedures in order to be more effective, and then lying about it subsequently, to avoid evidentiary exclusion, more widely called "testi-lying." [24] Some legal analysts call this " 'intrumental adjustment,' meaning... [an] alteration in the facts to accommodate an unwiedly constitutional contraint and still obtain a just result." [25] It is well understood that the exclusionary rule is used to deter police misconduct and the court made rule was created to blunt the incentive to lie and manufacture evidence, or illegally obtain such evidence. Many critics of the exclusionary rule such as University of Colorado Law Professor Christopher Slobogin advocates liquidated civil damages as a rememdy to police misconduct. He also advocates for the abolishment of the exclusionary rule and argues that many if not all incentives for police officers to lie would be eliminated if the civil remedies substituted for the exclusionary rule. [26] Since Professor Slobogin's writings in 1996, in 2004 the U. S. Supreme Court decided *Groh vs. Ramirez*, in which the Court stated that an affiant officer, who drafts a deficient search warrant, and then executes such warrant, is not entitled to qualified immunity, thus subject to civil liability, in addition to the criminal court applying the exclusionary rule and negating the good faith exception to that rule.[27] In addition,

there have been less radical arguments to doing away with the exclusionary rule such as a partial limitation on exclusion based on a "comparative reprehensibility" approach: that a court should balance the seriousness of the officer's error against the gravity of the defendant's crime and only exclude evidence when, if ever, the reprehensibility of the officer's illegality is greater than the defendant's. [28] This approach has never captured much judicial or scholarly support.

Unfortunately, the fact that police "testi-lying" only became a problem after *Mapp vs.Ohio* begs the question of whether police witnessess lied under oath before *Mapp*, but that such false testimony wasn't considered a problem (legal or otherwise) at the time. Certainly, many categories of police dishonesty pre-dated *Mapp*- such as cover charges, lies to hide corruption, lies to hide brutality, false or trumped up charges to meet quotas, deceptions as part of the run-of-the-mill police investigations procedures, among others. Further, it seems there is no evidence that such judicial accommodation to the needs of law enforcement has reduced the amount of testi-lying or addressed the threat that police lying poses for the criminal justice system. Therefore, eliminating the exclusionary rule as a sanction for constitutional breaches is only supportable if another remedy is in place to effectively deter police misconduct. Even if a lying police officer is charged in a civil or administrative action with unconstitutional conduct, and facing suspension, dismissal, fines or damages, he would still have every incentive to lie in such a proceeding. In order to create a strong dis-incentive to police lying in breaches of the Fourth Amendment, a civil or administrative process would have to promise strong medicine against the offender and the department itself. Another question would be is would prosecutors and judges be more vigilant about police lying to the court? Probably not, since many of the reasons why judges wink and nod is the reluctance to call the officer a liar. The problems of the scholarly proposal by some legal analysts to eliminate the exclusionary rule to combat lying by police officers are many, while its virtues are few.

VI. FULL DRESS EXAMINATION OF POLICE WITNESSES

When police are suspected of lying or misrepresenting the facts, which is commonplace, without some proof of the lie itself, a motive to lie is not probative; at best, it is much more prejudicial than probative. Particularly when the motive to lie comes from a generalized characterization of police culture, therefore courts are going to want to see more than the defendant's offer of proof of such code of silence exists, or even that it is prevelant, and that therefore this police witness is not credible. In that sense, perfecting impeachment by proof of motive to lie is the last step in the full dress litigation of the credibility of a police witness. A foundation must first be laid, and that foundation can only be built on proof of prior inconsistency, contradiction, or some other challenge to the reliability of the police witness.

Scholarship and legal studies have came to somewhat consistent conclusions: police officers will lie on police reports (for instance in overstating the evidence of an accused's guilt;) More often than they lie affirmatively, police officers will omit facts from their reports. [29] There are any number of reasons police officers both misrepresent and tactically omit facts on their reports, only some of which directly relate to the tailoring of testimony to meet constitutional requirements. However, judges rarely see police reports in criminal cases until those cases reach the pre-trial stage or trial itself. Therefore, the most direct effect that criminal court judges can have on the truthfulness of police report lies in the manner in which those judges treat such reports at latter stages of litigation. A more scrutinizing approach to police reports by judges at hearings prior to trial could serve to deter the practices both of falsification and the strategic omission of facts from reports in the field. This responsibility falls squarely on the shoulders of the criminal court judges, as the civil court judges are limited in their ability to effect the format, use and preservation of police documents (and the training and supervision of officers regarding those documents.) first, by the absence of Brady obligations on the police, and

second, by the legal doctrine of separation of powers.[30] Historically, no question civil courts have been reluctant to interfere with the processes of police administration.

Furthermore, the main function of the police report is to recite those basic facts obtained or observed which constitute probable cause to support an arrest or to issue a warrant. To that extent, such reports, if inaccurate or misleading—will feed directly into perjurious testimony at a probable cause hearing and later at trial. Police reports are necessarily tied to the officer's testimony at a suppression hearing and a tenured police officer knows this. Such reports are discoverable by the defense, so the failure of the officer to testify consistently with the facts recited in his reports provides a golden opportunity for defense impeachment based on prior inconsistent statements. Lest there be any doubt, police officers who will lie on the stand to tailor the facts of the arrest to constitutional requisites, or who alter the facts to reflect false cover charges, or to reflect higher counts than the facts would otherwise justify, will generally have police reports that will allow them to do that. The reports will occassionally contain false and detailed resucitation of facts that neatly meet constitutional standards, a rendition which police witnesses will recite faithfully during testimony—tailored reports producing tailored testimony. More likely however, the reports will have a minimal resucitation of the facts, so skeletal that the report permits the police officer to testify untruthfully, but not inconsistently with the reports' bare bones account of the case. [31] The only potential problem the police officer will have when testifying based on such a sketchy report is convincing the judge that he has independent recollections of the events testified to. However, a reasonably well-prepared and experienced police witness will have no problem convincing the judge of the adequacy of his memory and the veracity of his story. As stated before, judges tend to accredit police testimony as a matter of course, and generally for the wrong reason. When the defense uses the impeachment strategy, as impeachment by omission, rarely persuades the judge as factfinder, precisely because such impeachment requires for its foundation that the material fact now

testified to must be of such quality that it would have been naturally mentioned in the prior statement. [32] In other words, only if the new fact should have been present in the police report does its omission have any impeachment value. Thus, a department wide practice and policy to record minimal factual accounts in police reports can convince the judge that such factual detail, however material, would not naturally be mentioned in a police report, and therefore have very little impeachment value against a police witness. As a consequence, a police department practice and policy of minimal reporting to afford testifying officers the freedom to prevaricate (lie) on the stand also protects them from impeachment based on inconsistency.

Judges have a great deal of power in this connection, if they wish to use it. If police dishonesty in the courtroom is as serious a matter as legal commentators contend, then judges must use that power. Some people may argue that such change in judicial attitude and evidentiary approach to mininalist police reports would just give the police officers more incentive to falsify details on reports, rather than omit them. The flip side of that argument is however, that wholesale falsification would be a highly unlikely response to this change in judicial practice. Police gain only information from certain categories of sources—citizens witnesses, brother officers, radio transmisisons, the suspect's own words, and the officer's own observations. Anything short of an organized conspiracy of falsification from the very start of the investigation, there are inherent checks on an officer's ability to fabricate factual details from the start. At the time when a police officer prepares documents shortly after arresting a suspect, he cannot be sure whether another set of facts, witnesses, or reports, will come to light describing the same incident that he is misrepresenting in his report. In addition, if the police officer lies regarding his own observations or fabricates evidence or a suspect's inculpatory statements, without corroboration and without witness, his account will carry little, if any weight. Moreover, proof of out-and-out falsification

of police documents can cost the officer his job, his pension, and might subject him to both criminal and civil prosecution.

VII. EXPANDED DISCOVERY AND EXPANSION OF CROSS-EXAMINATION

Upon sufficient offer of proof, judges can permit discovery of other reports that would not be ordinarily discoverable under prevailing statutes and case law. Expanding discovery and cross-examination regarding police reports and prior testimonies would serve to eliminate much of the silent presumption of reliability police officers enjoy. Expanded discovery would make it much easier for a judge to determine whether a witness was lying, and particularly the experienced police officer who has deceptively mastered the art of testimonial demeanor.

Expanded discovery and cross-examination would put the police witness on a more level playing field with other witnesses. Although a defendant can have his own credibility challenged in the broadest possible terms by the prosecution—as showing at minimum that the defendant will place his own interests above that of society's. [33] A judge as factfinder who subscribes to this broad theory of relevance will no doubt evaluate the defendant's history, regardless of the judge's confident pronouncements to the contrary. If there are interested witnesses in the fray, which in this day and age is common, that does not necessarily render all testimony unworthy of belief, however it undoubtedly creates a tacit presumption of unreliability, particularly set against the credibility of a police witness, who enjoys a *de facto* silent presumption of reliability. Expanding the scope of discovery and cross examination to include past police reports, testimony, and permitting a thorough litigation of minimalist police documents may reveal a pattern of police misconduct or false reporting that could show that a police witness will place his own interest (or the interest of making an arrest) above that of society's (or at least above the law). A deeper scrutiny of police testimony and conduct might establish and

demonstrate that a police witness is an interested witness. This may be as a result to meet a quota or earn recognition, promotion, overtime pay, or some other reward such as reprisal, and a pattern of misconduct and deceit might prove that a police witness is self-interested in the arrest, prosecution, and conviction of this (or any) defendant.[34] At the very least, such a pattern could prove that the police witness is partial in his testimony, and therefore such bias serves to rebut any unstated presumption of credibility. [35]

VIII. POLICE WITNESS AS EXPERT OR *DE FACTO* WITNESS

When the prosecution seeks to use police witnesses to convey specialized knowledge, or testify as an expert, judges should nevertheless permit expanded discovery and cross-examination of police witnesses as if he were an expert. This would protect against the police witness who injects unsubstantiated or highly prejudicial characterizations into criminal proceedings. Such characterizations and conclusions are at times not intentional falsehoods, *per se*, but may not prove to be reliable testimony unless subject to the rigors of pre-trial disclosure and effective cross-examination. Yet even when a police officers are not experts, which most of the time they are not, they are almost always testifying as a "professional," that is, someone deemed to be a trained observer, a trained investigator, trained in the law, trained in enforcement techniques, even trained in testifying. Even though a police witness is not an expert under the law, he testifies as a *de facto* witness with the force of his testimony as presumptively believed as an expert. Police officers more often than not testify without such qualification of an expert from the court, describing events which they have personally observed presented in the form of a lay opinion. Moreover, regarding a lay police witness who has personal observations to relate, the defense cannot ordinarily challenge the witness' qualifications to testify. Secondly, a lay police witness can easily inject characterizations and opinion into personal observation testimony. Such characterizations are part of the

everyday police culture—for example, calling the subject of an arrest a "perpetrator," describing the complaintant as the "victim," a third party as an "accomplice," and so forth. Many times these lables of people prove to be very prejudicial to the accused and in the end may prove to be unreliable. Nevertheless, courts will generally permit such testimony under the Federal Rules of Evidence 701 as being a practical necessity in order to convey admissible personal observations. [36] Police officers are trained to testify in this manner, injecting prejudicial opinion that does significant damage to the defense. Lastly, the limits and scope of all testimony rest in the sound discretion of the court. Therefore, a judge is relatively free to premit the injection of such opinion, conclusions, and even hearsay into lay opinion testimony, subject to reversal only on appeal for an abuse of discretion, so the judges know what they are doing, which should degrade the public esteem for the judiciary. More importantly, a judge who is predisposed to accredit police testimony is likely to give police witnesses a great deal of lattitude here. Rarely does that enlarged testimonial scope result in reversal of a conviction based soley on the police testimony alone.

IX. CONCLUSION

In closing, a factfinding judge who knowingly harbors a presumption in favor of police testimony, and who views defendant testimony as inherently tainted by self-interest and the propensity for legal wrongdoing will always find facts, nearly everytime, favoring the prosecution. In other words, a judge who purposefully weighs facts with his or her thumb on the scale will never be a fair arbiter of the facts. However, a judge who unintentionally but characteristically avoids confronting the issue of police lying can remedy some of the problem by expanding the scope of discovery, cross-examination, and consideration. By that, the judge can raise the issue of police credibility to its proper position of importance. An important consequence of the expansion of discovery is the politcal cover that it would

provide judges. If past police reports or testimony show a pattern of deceit or impropriety, the judge can rule unfavorably for the prosecution and shift the blame squarely to the police officer. Although it shouldn't make any difference, but by doing so, the judge avoids the most politically damaging allegations—that he or she is "soft on crime," that he or she let a dangerous and violent defendant off on a technicality, or that he or she allowed a runaway jury to deliver a wrongheaded verdict. To be sure, a judge who is unaccepting of police perjury cannot be deemed soft on crime, just even-handed as to which crime he or she will not tolerate. Niether is the inadmissibility of dishonesty, and particularly lying under oath,.... a technicality.

A fair justice system worthy of respect is premised on credible testimonial evidence subject to the test of truth. A judge who finds, based on the evidence that a police witness is in part, or on the whole, unworthy of belief, or instructs a jury to properly weigh the credibility of a police witness based on an expanded record, will not be politcally vulnerable. That being said, *some* proper balance and integrity will be restored to the system, and that surely will stand the test of time.

Submitted by: Christopher Baker

Footnotes:

[1a] Christopher Baker attended the DePaul University School for New Learning (SNL) and College of Law. (2005-2009)

[1] H. Richard Ulviller, Credence, Character, and the Rules of Evidence: "Seeing Through the Liar's Tale" 42 Duke Univ. L.J. 776 (1993)

[2] Morgan Cloud, The Dirty Little Secret, 43 Emory Law Journal. 1311 (1994) (Emphasis added)

[3] Marty Rosenbaum, Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988 18 N.Y.U. L. Rev. & Soc. Change 807 (2004)

[4] Leonard Levitt, Police Actions Speak Volumes, Newsday Oct 17th 1994 "Mayor Vetoes Bill Creating a Panel to Monitor Police." NY Times Dec 24th 1994

[5] Christopher Slobogin, Testilying: Police Perjury and What to Do About It, 67 Univ. Colorado L. Rev. 1037 (1996)

[6] See *supra* footnote 3.

[7] Mollen Comm'n Rep. *infra* footnote 8. (Revealing that 76% of police in author's study acknowledge that police witnesses tailor testimony to prove probable cause to arrest); Jonathan Rubinstein, City Police 386-88 (1973) **(drafting of false police affidavits for search warrants is commonplace.)**

[8] The Mollen Commission and Beyond, 40 N.Y.L. School Rev. 5, 5-6 (1995) "Police Corruption and the Need for Oversight."

[9] Harry M. Caldwell & Carol A. Chase, The Unruly Exclusionary Rule: "Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About It's Effects Outside the Courtroom." Marquette Univ. L.Rev. 45, 52-53 (1994); Ronald Bacigal, Putting the People Back Into the Fourth Amendment 62 Geo Wash L.Rev. 359 (1994)

[10] Chin & Wells (1997) *supra* footnote 6, (dicussing effects of "blue wall of silence" covering up police misconduct.) Marty Rosenbaum .

[11] Debra Young, Uneccessary Evil: Police Lying in Interrogations 28 Univ. Conn L. Rev. 425 (1996)

[12] Jerome Skolnick, "Deception by Police" 1 Crim .Just. Ethics. 40, 43 (1982)

[13] See *supra* footnote 2.

[14] Myron W. Orfield Jr., The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officer, 54 Univ. Chicago Law. Rev. 1016, 1023, (1987)

[15] See *supra* footnote 1.

[16] See *supra* footnote 10. (An account of this refusal to notice police perjury is provided by Alan Dershowitz: ("I have seen trial judges pretend to believe officers whose testimony is contradicted by common sense, documentary evidence and even unambigous tape recordings. .. some judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness, and muteness that guides the vast majority of judges and prosecutors.")

[17] *U.S. vs. Ross 456 U.S. 798 (1982)* Cf. Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 William & Mary Law. Rev. 197 (1993)

[18] e.g. *U.S. vs. Bayless(I) 913 F. Supp. 232 (S.D.N.Y. 1996); U.S. vs. Bayless (II) 921 F.Supp. 211 (S.D.N.Y. 1996)*

[19] See *supra* footnote 12. Jerome Skolnick & James Fyfe, Above the Law: Police and the Excessive Use of Force (1993)

[20] *Id.*

[21] *Id. supra* footnote 19.

[22] Stanley Z. Fisher, In Search of the Virtous Prosecutor: A Conceptual Network 15 Am J. Crim Law. 197 (1988)

[23] McIntyre, Impediments to Effective Police Prosecutor Relationships, 13 Am Crim L.Rev. 201 (1975)

[24] See *supra* footnote 5.

[25] H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City's Police 116 (1988) (stating police perjury is "prevelan[t]." It is difficult to measure the amount of lying that occurs.) (We almost know nothing about the testi-lying rate, its various across and within police departments, its changes over time, or its etiology. We cannot say what percentage of testi-lies are serious (e.g. the invention of an informant, the wholesale manufacture of pobable cause) and what proportion are minor, compared with many other offenses, the crime of testi-lying has been poorly measured, and we should be suspicious of claims that its incidence is known or its causes understood.")

[26] See *supra* footnote 5.

[27] *Groh vs. Ramirez 540 U.S. 551 (2004)*

[28] Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 Michigan L.Rev. 1, 2-3 (1987) (Kamisar decribes the theory set forth by John Kaplan)

[29] See *supra* footnote 12.

[30] *Brady vs. Maryland 373 U.S. 83 (1963)*

[31] See *supra* footnote 23.

[32] See *supra* footnote 1.

[33] See *supra* footnote 5.

[34] Michael Grahm, Expert Witness Testimony and Federal Rules of Evidence: Issuing Adequate Assurance of Trustworthiness. (1998) Fed Rules of Evidence Rule 28 U.S.C.A. Rule 801(c)

[35] See *supra* footnote 12. Skolnick, (the policeman lies because lying becomes a routine way of managing legal impediments.)

[36] 28 U.S.C.A Rule 701

Mental Illness Issues and the
Law Governing Mental Health Professionals
By
Kathy Karmid
Investigator, OIDS-Non Capital Trial Division

Mental health and the law have long been both partners and adversaries, depending on how they interact. It has been my observation, through several years of experience, that neither understands th other(nor do they want to at times) nor is versed in the particulars of their respective disciplines

That being stated, this article is meant to be only a brief discussion. It is not intended for use as a resource other than review for certain questions that may arise as a result of reading this article.

I am frequently asked to identify those with mental illness. Yes, I am licensed and can diagnose, but diagnosing an individual is complex and entails many aspects.

First, in order to accurately diagnose someone, one must consult, and be familiar with the DSM-V Diagnostic and Statistical Manual of Mental Health Disorders. With that being identified, we must be aware of certain traits that we see in someone and "automatically" want to apply to our client's behavior.

One comment that I hear most often is, "I think he/she is Bipolar" by observation, without mental health history or a clear understanding of what is happening in their lives. First of all, this is unfair because everyone has mood swings, but that does not make someone Bipolar.

There are specific symptoms and circumstances that validate this diagnosis. There is Bipolar I and Bipolar II. I won't go into the specifics of each, but remember this is a serious diagnosis to drop on someone. Behavior can change from day-to-day so it is imperative the history is explored. Please note that these diagnoses also come along with "specifiers."

This is certainly not a lesson in psychology, but a small tool to identify when "something just isn't right" about your client that comes to your office seeking legal assistance for a matter in which they find themselves embroiled.

For instance, I hear others say things like; he was acting "psychotic." Unless someone is trained in observing, it is not appropriate to label him or her 'psychotic." There are medical conditions, specifically "delirium", that can be induced by multiple medical issues, including medication and other medical conditions.

Familiarity with the DSM-V is essential for this determination, not just observation of behavior. It is also notable to explain that those who are actually psychotic know everything that is going on and can carry on a conversation without the other person being aware of the condition.

If an attorney is retained to represent a client and believes the person is "mentally ill", just ask about their mental health history, so there are no surprises awaiting you. Clients lie to their attorneys just as they lie to their therapists. This can be for a multitude of reasons.

Now, the subject of malingering will be addressed. It is complex. According to Phillip J. Resnick, MD and James Knoll, Md, both psychiatrists, in their article entitled Faking it: How to detect malingered psychosis, 2005 November 4(11):12-25, there are three categories of malingering:

1) pure malingering (feigning a nonexistent disorder);
2) partial malingering (consciously exaggerating real symptoms); and
3) false imputation (ascribing real symptoms to a cause the individual knows is unrelated to the symptoms).

There is another disorder that is imperative of which attorneys must be aware. According to the Mayo Clinic, "Factitious disorder is a serious mental disorder in which someone deceives others by appearing sick, by purposely getting sick or by self-injury. Factitious disorder also can happen when family members or caregivers present others, such as children, as being ill, injured or impaired."

To the readers of this article, please be cognizant that it is not meant to reveal what some of you already know. It is just a "word of caution" when your client appears with alleged mental illness.

There are definitely many people who suffer with mental illness. They are NOT responsible for some of their actions. However, please be cautious when considering this as a defense. There are many licensed therapists and psychiatrists whose skills can be utilized and consulted with. I believe this should be a simple professional courtesy between the two disciplines, without cost involved.

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