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Pennsylvania's BUI/DUI Joint Task Force Pilot Program

An Innovative Enforcement Partnership Approach

By GEORGE C. GEISLER, Jr.



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While conducting a river boat patrol on a hot summer evening, two waterways conservation officers (WCOs) encountered a boat speeding toward several young swimmers. The officers directed the female operating the boat to slow down, but she ignored them. The officers turned their craft around, ran it alongside the female's boat, and turned on their emergency lights and siren. The woman continued to ignore the officers' approach. At that point, the WCOs physically took control of her boat and stopped it, still with no reaction from the subject. The smell of alcohol was evident, and

the woman appeared to be in a stupor. When the officers placed her under arrest for boating under the influence (BUI), she immediately became combative, kicking, flailing her arms, and screaming obscenities. The officers managed to get the woman onto their boat and escorted her to the shore where they called for a local police transport to the WCOs' patrol car. As the officers attempted to get her off of their boat, she again became physically and verbally combative. Tests showed that the woman's blood alcohol content was four times over the legal limit, and a check of her criminal history revealed that she

had a previous DUI conviction. She later pled guilty to BUI and simple assault charges.

THE PROBLEM

Each year, BUIs account for deaths, injuries, and property loss on waterways, many of which go unreported. Often, boaters do not realize that they face the same criminal punishment for a BUI as a DUI (driving under the influence). But, BUI enforcement is *not* limited to the state's waterways. For example, most boaters drive vehicles to and from their place of boating. Therefore, when boat operators consume alcoholic beverages or



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Waterways Conservation Officer Manager Geisler serves as the assistant to the director, Bureau of Law Enforcement, Pennsylvania Fish and Boat Commission Headquarters, in Harrisburg, Pennsylvania.

controlled substances while boating and then get into their motor vehicles to drive home, the BUI becomes a DUI.¹

Alcoholic beverage manufacturers often market their products as a leisure activity related to fishing and boating. As a result, many people view consumption of alcoholic beverages as a routine activity while fishing or boating. Moreover, while DUI is not socially acceptable, some people do not perceive impaired boating to be of any serious consequence. The increased availability and use of controlled substances often occur during fishing or boating events due to the perception that individuals are unlikely to encounter law enforcement officers in, upon, or along waterways.

ONE AGENCY’S RESPONSE

The Pennsylvania Fish and Boat Commission, an independent state agency, is funded solely by fishing license and boat registration revenue, and it employs approximately 100 WCOs, who actually are

the “state police of the waterways.” These officers protect public safety on Pennsylvania’s waterways, which includes 83,261 miles of rivers and streams, over 205,000 acres of impoundments and lakes, as well as more than 63 miles of Lake Erie shoreline and 56 miles of the Delaware River. Presently, more than 350,000 of the registered boats in Pennsylvania, along with out-of-state registered boats, use these waterways.

Similar to Pennsylvania municipal police officers, WCOs are certified graduates of police academies. They attend the Fish and Boat Academy, which includes a 40-hour block of comprehensive BUI training, from the classroom to the water, and, finally, into mock trials with actual DUI defense attorneys and judges. This compares to an average of 6 hours of DUI training for municipal police officers. WCOs train for 1 year from their date of appointment, and experienced officers receive annual BUI update training.

Under the Pennsylvania Fish and Boat Code, BUI is a criminal offense almost identical to the DUI section of the Pennsylvania motor vehicle code. A major part of the BUI law enforcement effort includes detecting, apprehending, and prosecuting boaters operating under the influence of alcohol and other drugs. Similar to the DUI section of this code, individuals convicted of BUI for the first time face a misdemeanor charge, which includes a fine of between \$500 to \$7,500, a jail sentence of at least 48 hours to 2 years, and a 1-year suspension of their boating privileges. To date, however, a BUI conviction does not affect a vehicle operator’s license validity.

Funding Issues

Unlike most state agencies, the Pennsylvania Fish and Boat Commission receives no general fund money for its operating budget. For the past several years, the commission has partnered with Mothers Against Drunk Driving (MADD), the Pennsylvania DUI Association, the National Safe Boating Council, the Pennsylvania Trauma Society, the Pennsylvania Traffic Institute for Police Services, and the Pennsylvania State Police to acquire more training and enforcement tools for WCOs. As their limited funding allows, MADD and the Pennsylvania DUI Association have provided prearrest breath-testing devices and video cameras to several officers. WCOs use video cameras on their patrol boats for BUI, as well as other, enforcement initiatives. The ability of WCOs to present videotape evidence of such

dangerous boat operation significantly impacts the number of impaired boaters convicted for their crimes.

The Task Force

With the help of the Pennsylvania DUI Association, the Pennsylvania Fish and Boat Commission's Bureau of Law Enforcement established a joint BUI/DUI task force pilot program. Task force members include the Pennsylvania Fish and Boat Commission's Bureau of Law Enforcement, the Pennsylvania Department of Transportation's (PDOT) Bureau of Highway Safety and Traffic Engineering, various county DUI program coordinators, the Pennsylvania Liquor Control Board, the Bureau of Alcohol Education, and the Pennsylvania DUI Association. This cooperative, interagency, simultaneous, intensified patrol enforcement initiative on both land and water constituted the first of its kind on this scale in Pennsylvania. BUI enforcement is limited because of the small number of WCOs; they simply cannot detect all of the boaters under the influence. However, the joint task force concept (combining the concurrent under-the-influence enforcement of both land- and water-based officers) proposed to increase prosecutions for BUI and other related crimes. The task force has several objectives, such as—

- reducing the number and severity of DUI- and BUI-related crashes by maximizing law enforcement contacts with vehicle and boat operators at times and locations where a specific need for impaired operator enforcement emphasis has been identified;

- encouraging voluntary compliance with DUI, BUI, and other traffic- and boating-related laws by creating a perception of constant enforcement using roving patrols, safety blitzes, and sobriety checkpoints;
- maximizing the use of public information and news media coverage of scheduled enforcement activities, as well as the use of public safety messages on billboards, television, and radio;
- creating public and vehicle/boat operators' awareness and concern for highway and waterway safety; and
- establishing and maintaining a cooperative effort between all law enforcement agencies and the Pennsylvania Fish and Boat Commission's WCOs toward safer driving and boating.

During the 2001 boating season, the task force, funded primarily

by federal highway safety grant monies, worked simultaneously on both the major boating pools of the Lower Susquehanna River and adjacent roadways to these areas to enhance BUI and DUI enforcement and, hopefully, to prevent BUI- and DUI-related crashes, injuries, and deaths. To announce its initiative at the start of the major boating season (just before the Memorial Day holiday weekend), the task force used the news media. For example, press releases about these joint enforcement patrols and their objectives preceded each event and, in some cases, subsequently announced the enforcement results in later releases.

WCOs received an under-the-influence classroom training session to bring them up-to-date on the latest case law and enforcement techniques. During this time, the task force invited television media to its command post locations, where administrators provided on-camera interviews and ensured that



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**Pennsylvania Fish and Boat Commission
Bureau of Law Enforcement**

Boating Under the Influence Statistics, 1990-2002

Year	Number of Cases
2002	70
2001	54
2000	36
1999	39
1998	38
1997	46
1996	41
1995	50
1994	31
1993	25
1992	15
1991	34
1990	22

the river and, accordingly, incidents of BUI and boating accidents are quite high. A bar also exists on this pool where boaters can pull up and get alcoholic beverages. PDOT statistics from 1995 to 1999 list this township (Londonderry) ninth in the county with 45 vehicle accidents involving impaired drivers. The roadway used to access this pool on the east shore had 43 impaired driver vehicle crashes, or 3.092 crashes per mile, according to other PDOT statistics for the same time period. The township on the west shore of that pool ranked seventh in its county for impaired driver vehicle crashes with a total of 95. Five people were killed and 96 injured. The roadways leading to these boating waters consistently generate the highest under-the-influence crash-related deaths and injuries compared with other roadways in their respective townships and counties.

reporters acquired footage on the water from patrol boats to include with their news reports. In the future, the task force plans to have billboards that feature a picture of the local WCOs with the caption "We Hunt Drunk Boaters for a Living" strategically located next to roadways leading to major boating pools.

Results

Statistical data from PDOT's database from 1995 to 2002 illustrates that BUI is directly related to DUI vehicle crashes resulting in death or injury. This data clearly shows that the highest number of DUI crashes occur in municipalities that include major boating destination points and the roadways motorists use to drive to and from these points.

On the Harrisburg pool of the river, boaters can pull up to bars, acquire or consume alcoholic beverages, get back on their boats, and operate them while impaired. The popularity of this boating pool has grown as the recent addition of a second marina on City Island's east shore proves. PDOT statistics for Harrisburg show that from 1995 to 1999, 300 vehicle accidents occurred involving impaired drivers. During this time frame, three people were killed and 298 were injured, the highest numbers in the county.

The Goldsboro pool (home to the Three Mile Island nuclear power plant) has over 800 cottages located on its islands and shorelines, which constitutes a unique boating area. Alcoholic beverage and controlled substance consumption is prevalent on this section of

Much planning and coordination within the Pennsylvania Fish and Boat Commission and between agencies must take place to ensure that these joint intensified roving patrols prove effective. For example, departments must schedule appropriate personnel, bring equipment, and maintain contact with the media.

Despite the best laid plans, boating law enforcement remains at the mercy of the weather and other limiting factors. For example, the commission canceled and rescheduled several details due to inclement weather. Of seven joint patrols ultimately executed, five took place on days when the weather simply was not prime boating weather (e.g., overcast, scorchingly hot, too

chilly, or showers occurred at sunset, which is the best boating safety enforcement time of the day). Many boaters run without lights, which presents not only a serious safety violation and, therefore, excellent probable cause to conduct a boarding but also a prime time to detect and apprehend impaired operators.

Word of the increased presence of law enforcement spread quickly throughout the boating community. Many boaters used cell phones, VHF radios, and CB radio networks to warn other boaters. As a result, many would-be impaired boaters stayed on shore or anchored at a party hangout. All this notwithstanding, a deterrence factor exists that cannot be measured statistically.

The final results of seven details were impressive overall despite the limiting factors. The task force averaged 23 boardings per detail, totaling 162. Verbal warnings issued were almost the same—an average of 23 per detail with a total of 161. Written warnings averaged 2.25 per detail for a total of 16. The task force issued a total of 52 citations, an average of 7.4 per detail, tested seven impaired operators, and arrested two with blood alcohol content well over the legal limit. Police officers who participated in the roving patrols on nearby highways made arrests ranging from traffic summary violations to DUIs, underage drinking, and furnishing alcoholic beverages to minors.

The overall cooperation of the police and DUI coordinators with the WCOs proved successful. All personnel worked together to get a better understanding of what everyone does and how jobs dealing with

impaired operation enforcement of both vehicles and watercraft overlap. For example, while on patrol boats, land-based police officers experienced the challenges to law enforcement on the water. Similarly, WCOs got exposure to the experience of seasoned police officers of ranks from patrolman to sergeants, and they learned how county DUI coordinators execute details.



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Future Goals

What is the future of this type of initiative? The answer depends on whether agencies receive grant monies to help fund the impaired boating aspect of this joint program.

The Pennsylvania Fish and Boat Commission hopes to gradually expand the joint enforcement concept between land- and water-based law enforcement agencies throughout the state. Resistance to this concept may be based on the belief that the Revised Highway Safety Act of 1996 does not include waterways in the definition of highways. To the contrary, waterways were the first highways, and transportation and commerce take place on them.

CONCLUSION

Individuals who operate their boats while impaired with alcohol and other drugs present a serious public safety concern. The Pennsylvania Fish and Boat Commission has developed an effective program to help detect, apprehend, and prosecute BUI offenders. Agencies can use the joint task force concept to help create intensified patrol enforcement on both water and land.

Agencies should try to convince their state and federal legislators that BUI and DUI are closely related, as statistical figures and common sense show. Law enforcement departments should request that Congress revise the Highway Safety Act to include watercraft to ensure the continuation of these joint efforts and to help fund these projects with highway safety grant monies. Intensified DUI roving patrols and checkpoints already have proven successful. Implementing them on roadways near major boating pools during peak boating season as boaters depart while waterways conservation officers conduct intensified roving patrols have resulted in an innovative and enhanced approach to under-the-influence enforcement. WCOs face different challenges than officers who patrol on land. But, cooperation between law enforcement agencies can reduce BUIs on water and DUIs on land. ♦

Endnotes

¹ The author based this article on his 20 years of experience with the Pennsylvania Fish and Boat Commission's Bureau of Law Enforcement.

The Faces of Air Rage

By Harry A. Kern, M.Ed.

Two in-flight incidents occurred aboard a domestic cross-country commercial airline flight that demanded law enforcement attention upon arrival at the destination. One involved a belligerent, intoxicated female adult passenger who assaulted a female flight attendant when asked to assume a seated position with her seat belt fastened during encountered air turbulence. The flight attendant received minor personal injury, which interfered with her ability to perform as a crew member for the remainder of the flight, potentially affecting passenger safety. The second incident involved an adult male passenger who sexually assaulted a 13-year-old unaccompanied female passenger. She promptly reported the incident to a flight attendant. Which of these incidents is considered “air rage”?¹

Unruly behavior aboard commercial airliners is not new. One of the first reported cases, in 1947, involved an intoxicated and unruly male passenger on a flight from Havana, Cuba, to Miami, Florida, who physically assaulted a fellow passenger, causing injury.² Recently, reported incidents have been wide ranging, involving both males and females of all ages, income levels, and occupations. Statistically, the Federal Aviation Administration (FAA) has reported an overall increase in the number of incidents attributed to unruly passengers in recent years.³

News media coined the term *air rage* in the 1990s; although opinions vary as to its causes and what it encompasses, popular culture uses the term often in describing various incidents that occur during air travel. Multidisciplinary research (examining psychological, sociological, physiological, and related human factors) coupled with more thorough collection of information on incidents of passenger misconduct can add focus and help in the recognition, assessment, and control of air rage.

Problems in Defining Air Rage

The lack of a specific description of air rage and what it encompasses has made recognizing it difficult. An examination of the words *air* and *rage* provides

some idea of its definition. The word *rage* originates from the Latin word *rabia* (from which the English word *rabies* is derived) and denotes a presence of madness, violent and uncontrolled anger, a fit of violent wrath, violent action, or an intense feeling.⁴ The word *air* preceding it identifies these behaviors as occurring during air travel. However, in further defining air rage, research has revealed different opinions concerning which behaviors may comprise it.

Some terms generally used to describe air rage have included air rage,⁵ sky rage, disruptive passenger syndrome,⁶ passenger interference,⁷ unruly passengers and in-flight disruption, violence to crew members and passengers,⁸ and extreme misbehavior by unruly passengers.⁹ These terms, particularly when considered collectively, seem to imply that *any* misbehavior or criminal activity by an airline passenger aboard an aircraft or within an airport may represent air rage.

Behaviors Comprising Air Rage

While further research is needed, it seems logical that *some*, not all, criminal behavior during air travel may characterize air rage, specifically violent or disruptive behavior affecting the flight crew or

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passengers.¹⁰ This includes such behavior as mere noncompliance with safety directives or other airline rules; verbal outbursts, such as shouting, belligerence, and the use of profanity; physical displays of aggression, such as threatening gestures or intended harm to others; and assaultive behavior that results in property damage, injury, or death. These incidents occur in a variety of areas, both in airports and aboard aircraft, between the offender and airline employees or other passengers. Often, they seem unprovoked, such as when an airline employee asks a passenger simply to return a seat to an upright position or to extinguish a cigarette.

Recognizing and potentially controlling air rage require an understanding of the factors surrounding these incidents. These may include substance abuse, logistical problems and the resulting stress and frustration, questionable mental capacity, and the lack of training of airline personnel and the traveling public.

Alcohol or other drug impairment fuels some air rage incidents. While existing airline regulations forbid the boarding of intoxicated passengers, controversy surrounds the issue of commercial airlines restricting the onboard consumption of alcohol by passengers. Additionally, some airline employees cite the difficulty of enforcing an alcohol service policy, particularly when circumstances and better judgment dictate otherwise. Illegal or prescription drugs, perhaps in addition to alcohol, also frequently influence passenger behavior.

Passenger stress, frustration, and lack of coping skills, which also may facilitate air rage incidents, can stem from various logistical problems that often accompany air travel. These problems have increased over the years with the availability of low fares; airline personnel process increasing numbers of passengers, now representing most socioeconomic levels, often without ample time to assess their relative purpose, emotional state, and physical condition. Long lines at various points during air travel, such as those at security screening check

points subsequent to the September 11, 2001, terrorist attacks; flight delays, particularly when communication from the airline company is lacking; and, sometimes, a lack of space, comfort, or basic physical needs, such as when passengers report poor air quality, all can frustrate passengers. Aggressive industry marketing helps drive not only many of the delays and incidents of overcrowding but also high customer expectations. These high expectations, and the disappointment when those expectations go unmet, further can fuel passenger misconduct.

Air rage incidents also may stem from the basic mental state of some passengers. For example, a passenger may suffer from a form of mental illness, such as dementia, or some type of phobia, such as claustrophobia, that may cause them to behave in a manner perceived as disruptive or, perhaps, dangerous. Often, it is difficult to recognize and effectively deal with such individuals.

Lack of training, both of airline personnel and the general public, also may help cause incidents of air rage. The lack of training of airline personnel may impede their ability not only to diffuse potentially disruptive or dangerous situations involving passengers but also to recognize, before boarding, passengers who could pose a threat. In

addition, the lack of training of the traveling public about expectations, regulations, unacceptable behavior, and the consequences thereof may help facilitate many incidents of air rage. Such training would promote better understanding for everyone and logically lead to a safer, more enjoyable traveling experience.

Problems in Assessment

Gathering and assessing information concerning air rage incidents can prove difficult. Not only do reporting practices vary between governmental agencies and airline companies, but the reporting mechanisms used often contain only some essential information, omitting many details concerning the factors surrounding these incidents. This may result in



incomplete (as pertinent details surrounding these incidents may be omitted), as well as inconsistent and conflicting reporting (as many of these incidents may be mislabeled as air rage). Additionally, the records of many governmental agencies and airline companies prove difficult to obtain.

Airline company policies differ as to when air rage incidents are reported, or not, and when to leave the decision to employee discretion. Inadequate communications, worker shortages, time pressures, employee fear, and staff-performance measurement systems that may encourage conflict avoidance versus resolution, all may contribute to potential offenders' boarding of airplanes.¹¹ Differing policies of, and representation by, unions, such as those representing pilots, flight attendants, and other industry personnel, add to the overall mix of describing, reporting, and subsequent actions taken, or not taken, in response to the problem of air rage.

Also, judicial, sentencing, and other records may serve as an informational source as to what legal actions occur as a result of air rage incidents. Whether these reports contain the necessary detailed information to determine specific offenders' behaviors on a consistent basis to support research is another matter. Incidents of air rage potentially are handled at the federal, state, or local level, and the level of detail in the reporting may vary accordingly.

Issues for Law Enforcement

Various laws govern passenger conduct aboard aircraft and around domestic airports; when violating them, offenders may face verbal or written warnings, arrest, criminal prosecution, administrative hearings,

and civil actions. Law enforcement officers, prosecutors, and judicial personnel must know and consistently enforce these laws, tempering their actions with the spirit of the law to assure order maintenance and passenger and crew safety during air travel. Federal, state, and local officials, working with an understanding of respective jurisdictions and prosecutive guidelines, will better address these incidents when they occur. Adequate training can ensure law enforcement personnel meet the varied and complex duties associated with airport policing.¹² As a possible future consideration, law enforcement

agencies could benefit from using the Uniform Crime Reporting system to track air rage incidents.

Additionally, the creation of the Department of Homeland Security should benefit the security of air travel. For example, the education of, and communication with, the traveling public on topics, such as expected passenger conduct during air travel, the need for heightened awareness for out-of-the-ordinary situations, safety procedures, and travel tips, may improve; this could

help in reducing delays, anxiety, and frustration when traveling aboard aircraft. Also, the assumed presence of more federal air marshals could result in fewer air rage incidents aboard commercial aircraft.

Conclusion

Until more fully defined, air rage only can function as a popular term, not a legal one. Greater comprehensive research and more complete data can help in the recognition, assessment, and control of air rage incidents.

Law enforcement agencies can enforce various laws governing passenger behavior; these largely

Incidents of Passenger Misconduct 1995-2002

1995	146
1996	188
1997	321
1998	282
1999	310
2000	321
2001	321
2002	216*

*as of December 12

Source: *Federal Aviation Administration*

depend on the cooperation of airline personnel, passengers, and, potentially, different jurisdictions. Enforcing them effectively will help keep order in airports and aboard aircraft by deterring passenger misbehavior.

The topic of air rage strikes fear into much of the traveling public, as well as many who work in or around the airline industry. A more complete understanding of this problem would help achieve the ultimate goal—to ensure the safety and pleasure of air travel. ♦

Endnotes

¹ In this article, the author emphasizes the need for a standard definition of air rage. The author uses the term throughout the article for purposes of discussion.

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⁶ Supra note 2.

⁷ Testimony of Captain Stephen Luckey, Chairman, National Security Committee, Airline Pilots Association, before the Subcommittee on Aviation, Committee on Transportation and Infrastructure, U.S. House of Representatives, 06/11/98; retrieved on March 3, 2003, from <http://cf.alpa.org/internet/tm/sum61198.htm>.

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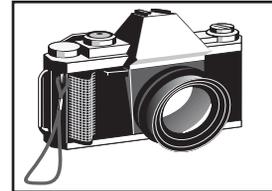
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¹⁰ William P. Schwabb, "Air Rage: Screaming for International Uniformity," *The Transnational Lawyer* 14 (2001); retrieved on March 3, 2003, from <http://www.skyrage.org/pdf/academic/bschwab.pdf>.

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¹² Robert T. Raffel, "Airport Policing: Training Issues and Options," *FBI Law Enforcement Bulletin*, September 2001, 26-29.

Wanted: Photographs



The *Bulletin* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in the magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

We can use either black-and-white glossy or color prints or slides, although we prefer prints (5x7 or 8x10). We will give appropriate credit to photographers when their work appears in the magazine. Contributors should send duplicate, not original, prints as we do not accept responsibility for damaged or lost prints. Send photographs to:

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Telecommunications Carriers Electronic Surveillance Contacts



The Communications Assistance for Law Enforcement Act (CALEA), Section 105, and various rulings of the Federal Communications Commission (FCC) require telecommunications carriers to submit company compliance manuals regarding their respective “systems security and integrity” policies and procedures. One important aspect of those policies and

procedures is the identification of telecommunications carrier-designated points of contact (POCs) responsible for liaison with the law enforcement community to facilitate lawfully-authorized electronic surveillance on their networks.

To assist the law enforcement community with conducting lawfully-authorized electronic surveillance, an on-line database containing this information is currently available. The FBI’s Electronic Surveillance Technology Section (ESTS) has developed a carrier contacts database to provide this information to the law enforcement community. The carrier contacts database contains telecommunications carrier-designated POCs that are: 1) submitted to the FCC by telecommunications carriers in their respective CALEA Security Compliance Manuals, 2) given directly to the ESTS by telecommunications carriers, or 3) received from the law enforcement community.

The carrier contacts database is available on-line via the AskCALEA.net Web site. Follow the link from the home page to the AskCALEA Law Enforcement Forum (<https://sw.askcalea.net>). If not already registered, take a few minutes to request on-line access to nearly 1,500 telecommunications carrier contacts. Please contact the ESTS with any questions or updates to contact information. ♦

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Handling the Stress of the Electronic World

By JAMES D. SEWELL, Ph.D.



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America is in the middle of a technological explosion. Research shows that the number of cellular telephone subscribers has grown from 340,000 in 1985 to over 130 million today.¹ The percentage of American households with at least one personal computer has increased from 46.8 percent to 55.9 percent in just the last 4 years.²

The number of e-mail messages sent from businesses in North America has risen from 40 billion in 1995 to an estimated 1.4 trillion in 2001, and an estimated 25 million workers throughout the United States are connected by e-mail

networks.³ According to one study, executives spend at least 2 hours a day using e-mail, and employees send an average of 20 e-mails and receive about 30 e-mails a day. Worldwide, about 4 trillion e-mails are sent each year, an increase of more than 600 percent in 6 years.⁴

In law enforcement, communications systems between and among agencies have become equally dependent upon technology. Over 29 percent of local police agencies, employing 73 percent of all officers in the United States, use in-field computers, an increase from 13 percent in just 4 years (1993-1997).⁵

In Florida, the number of messages transmitted over the Florida Crime Information Center telecommunications system has grown from over 72 million in 1980 to 433 million in 2000, and the number of terminals connected rose from 1,701 in 1980 to 26,822 in 2000. Much of the latter growth results from the proliferation of mobile digital terminals and personal computers in police vehicles.

Enhanced information systems, driven by increased personal computer support, have led to improved statistical analyses of law enforcement issues and performance, best exemplified by programs, such as the New York Police Department's COMPSTAT (Computerized Analysis of Crime Statistics) program.⁶

For many police agencies, the technology boom is best characterized by the expansion in linkages of personal computers and the reliance on e-mail as one of the most common means of communication within the department. For many administrators, staff, and line personnel, the avalanche of e-mails has both positive and negative consequences. On the one hand, it offers a real-time, expeditious method of communication, especially over a distance, and can ensure that all of the recipients receive the same written message. On the other hand, in a number of agencies, it has replaced direct personal communication, can become a crutch for managers and supervisors, and often forces administrators to be tied to their desks, impacting hands-on leadership and the practice of "management by walking around."

This high-tech world is a significant stressor on law enforcement personnel, especially those in leadership and management positions. How can they best deal with it? How can they best prepare individuals and their agencies to handle the stress of high-tech communications? How can they best balance “high tech, high touch?”⁷

PERSONAL TACTICS

The stress caused by the volume and frequency of e-mails and the expected turnaround on responses necessitates the development of stress-mitigation practices. Individual managers can take certain steps to ensure that they efficiently handle e-mails that they receive and send.

Dealing with the “Ding”

Many computers announce incoming mail with the “ding” of a bell, and users frequently stop what they are doing and turn to the screen. The interruption can pull

managers away from necessary work, distract from telephone conversations, or interrupt them from personal interactions with their subordinates. The “ding” easily can become a major irritant, reduce efficiency, and affect attention to other details.

Yet, with other office appliances, especially the telephone, people quickly learn to control interference, assuring uninterrupted meetings and conversation. In the interest of effective time management, people even learn to return calls only during specific time periods. E-mail offers managers an enhanced ability to apply the same time-management principles by allowing a response in a time frame that they, not the computer, decide.

Handling E-mail Overload

For many managers in the electronic world, communication via e-mail virtually ensures information overload. Memoranda that administrative assistants historically have

screened now come directly to managers who become part of a myriad of mail lists, frequently without their request or permission, to keep everyone informed.

Yet, similar to paper memoranda, not every piece of electronic communication demands a manager’s personal attention. While requiring effort, managers should remove themselves from generic mailing lists that have little or no direct relevance to their current position; wean subordinates, and even bosses, from including nonaffected personnel on mailing lists or as a “cc”; and, even upon initial scanning, delete unimportant e-mails.

Overloading Others with E-mail

The admonition “screen your mail” applies not only to what people receive but to what they send. The strength of e-mail correspondence lies in its immediacy and brevity. Short messages, especially when read on the screen, can better keep the attention of the reader and allow for the expeditious communication that e-mail offers. Further, before sending an e-mail, especially one with copies to multiple receivers, individuals should question whether it is something the recipient really needs to spend time reading and whether the sender would want to receive it in a similar situation.

Treating E-mails with Etiquette

One of the strengths of electronic communication also is one of its most significant drawbacks—it allows people to immediately respond to a sender’s message. For this reason, managers never should



Dr. Sewell serves as assistant commissioner of the Florida Department of Law Enforcement.

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Agencies should continue to emphasize the importance of effective interpersonal, nonelectronic communication between managers, supervisors, and employees.
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send an e-mail message or response when angry or upset. Once they hit the send icon, it is virtually impossible to retrieve that message.

The etiquette of social and business interaction applies even to electronic communications. *How* a person says something in e-mail language, as in face-to-face communication, is just as important as *what* they say. While the computer affords an easy medium through which to vent emotions, executives and managers cannot afford to vent and send.

When individuals compose and send documents or messages without performing the same review appropriate for it in paper form, they risk leaving typographical errors, grammatical mistakes, or information presented poorly or unclearly. Not only should managers reread electronic mail before sending it, but they should print and read it aloud to reduce both errors and embarrassment.

Ensuring E-mail Efficiency

Time-management courses regularly encourage managers to streamline their process of handling written correspondence and, as a result, improve their efficiency. To this end, managers are encouraged to handle paper only once, write notes with assignments directly on the memorandum or document, and keep their inbox at a manageable level.

Some of the same advice can apply to electronic correspondence. To be most effective, managers in the electronic world should avoid handling an e-mail more than once. They should open it, respond to the

sender or refer/forward it to a more appropriate respondent or staff member, or, if necessary, defer action, pending a more appropriate time or further information, and let the original sender know immediately and electronically the action that they have taken. Managers also should avoid letting the electronic inbox build to a level higher than that accepted or tolerated for a paper inbox. Unless the electronic inbox is used as a "tickler system," it serves as a temporary holding device, not a permanent means of storage.

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...organizations should provide adequate training in computer use and etiquette for managers, as well as for line personnel.

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Avoiding Computer Stress at Home

The ease of accessing agency electronic systems via laptop computers, the volume of e-mails received at all hours by many managers, and the expectations of upper-level executives encourage managers to take their computers home on a regular basis. For many, it is far easier to work on electronic correspondence and projects at home than to face the electronic inbox everyday.

Yet, from a stress management perspective, while the practice of taking a laptop home may alleviate some short-term stressors, it actually can compound job stress when done on a regular basis. One of the most effective methods to alleviate stress is to assure a proper break from work issues and to get appropriate, and necessary, relaxation. Working in an office for 10 to 12 hours per day, as many managers do, and handling office work at home for an additional several hours fail to provide that necessary break. With a family at home, this type of behavior fosters even more stress.

Hiding Behind the Computer

Although e-mail has many benefits, drawbacks also exist. For example, it allows managers who lack interpersonal skills or dislike dealing with subordinates to hide behind the computer screen. Impersonal messages frequently can take the place of direct personal contact and, rather than looking a subordinate in the eye to convey bad news, the manager has the option of communicating screen-to-screen. The electronic medium easily can become a crutch to replace effective interaction and communication with personnel or colleagues. Electronic communications should enhance, expedite, and expand management responsibilities, but it should not replace interpersonal management and leadership skills.

When dealing with issues and, particularly, bad news affecting an individual subordinate, hiding behind the computer proves both ineffective and morale-breaking. As

10 Tips for Successful E-mail Business Correspondence

- Maintain professionalism in e-mail correspondence as in any other business correspondence; business etiquette does not change when a message is digitized.
- Respond to e-mail promptly, even if only to acknowledge initial receipt and that a more detailed response will follow.
- Check e-mail frequently, but do not allow it to interrupt other scheduled tasks.
- Read and reread e-mails for quality, tone, grammar, spelling, and punctuation before sending them. Do not rely solely on spell check to catch errors.
- Remember that e-mail is not private correspondence and easily can become public without intent or consent. And, it is a permanent record of written communication.
- Do not use business e-mail for jokes or frivolous messages.
- Deal with personal or sensitive issues in person, not through an impersonal electronic medium.
- Use business e-mail as a means to get information to a number of people in an expeditious fashion and to quickly involve others, but do not send e-mails to persons who do not have a need to receive it.
- Use caution when responding to e-mails. How something is said in e-mail language is just as important as what is said. No matter how emotional the issue or the contents of the e-mail received and the resultant need to verbalize emotions, do not vent and send.
- Treat an e-mail inbox similar to a paper one: review the document, act upon it, and move on.

one retired executive cautioned, “personnel issues are personal” and the impersonal electronic communication tool should rarely, if ever, be used. Performance reviews and disciplinary actions cannot be effectively administered by a “virtual reality supervisor” through an exclusively electronic medium. Such personnel issues require interaction, personal communication, and sensitivity, and the use of computer messages in such circumstances impedes, rather than encourages, appropriate and effective dialogue. Managers can better handle many issues in a face-to-face meeting, often resolving matters

more expeditiously and with less stress on participants than the back-and-forth banter of e-mail.

Additionally, even for effective managers, an agency’s heavy emphasis on electronic communication may drive managers into their offices. Because their own bosses expect an immediate response to e-mails, managers actually may decrease their own tendency to communicate directly and personally with subordinates and to engage in management by walking around. In this era of technology, managers should avoid becoming such slaves to “high tech” that they cannot engage in “high touch.” Yet, within

some agencies, the open doors of managers are closing with the emphasis on technological exchange.

Managers also cannot allow their employees to use computers to avoid interpersonal contact with peers or even their own bosses. The lore of electronic communication regularly emphasizes cases where an employee sends an e-mail message to another individual in the very next workspace or across the hall, rather than walking a few feet and discussing an issue. In such instances, it is the responsibility of the manager to ensure employee discourse and interaction.

Recognizing the Permanency of E-mails

The ease and informality of electronic communication cause many managers to forget that it produces a permanent record of a written correspondence. In many states, the e-mail of law enforcement officers on their departmental computer is, in fact, considered public record and becomes accessible to both the media and the general public. As a result, what people send is neither anonymous nor private. The content, comments, and tone of e-mail messages, no matter where they are sent, become available for a wider variety of readers than most people anticipate.

For example, an e-mail sent from the office of one chief executive officer directly to his 400 company managers ended up being sent indirectly to his 3,100 employees worldwide. While he stated that his intent was motivational, the substance of his message was so direct and its tone so negative and angry that it had the opposite effect. Not only did it incense employees, the impact affected the value of the company stock, which dropped 25 percent over 3 days.⁸

Further, in an audit of 4 million e-mail messages on its internal information system, one police department identified 900,000 as containing objectionable, vulgar, racist, sexist, or homophobic language. Some even documented criminal conduct by officers, including illegal stops or searches and buying illegal drugs.⁹ As one commission similarly found when it analyzed mobile digital terminal messages in another police

department, officers apparently assumed that their inappropriate electronic transmissions were not available for review by supervisors or that the substance of their messages was not permanently maintained in that "great computer in the sky."¹⁰

ORGANIZATIONAL STRATEGIES

What can an organization do to control the stress caused by a rapidly changing electronic world? First, it is important to recognize that stress management often begins with, and is frequently caused

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...managers can take certain steps to ensure that they efficiently handle e-mails that they receive and send.

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by, management expectations and administrative practices. An agency's upper-level managers set the tone for both expected business practices and acceptable stress-management techniques. By their overt actions, e-mail habits, and, sometimes even more telling, their unvoiced but transparent attitudes, they iterate accepted uses of e-mail communication, established business protocols, and an expected level of reliance upon and response to electronic communication within the organization.

These executives also define the ways in which employees may successfully deal with the stress of the electronic organization. In agencies that view e-mail as one highly advanced tool to get the job done but one clearly secondary to effective interpersonal skills and a balanced personal/professional life, the stress on employees may be less pronounced. In other agencies where employees throughout the organization are expected to have an office-connected computer at home because the highest-level executives may send messages at any time of the day or night, a different message, one more personally intrusive and with potentially more stress damage, is clear.

Further, organizations should provide adequate training in computer use and etiquette for managers, as well as for line personnel. Managers often assume that employees, particularly younger persons, possess a strong working knowledge of personal computers and programs. Yet, while many colleges expect a certain level of computer literacy, many noncollege-educated, entry-level employees may lack the expected or desired minimum computer skills. Even higher-level managers who developed in their jobs prior to the consistent use of computers may lack more than basic computer and e-mail skills due to the commitments of their current jobs and demands as they rose in the organization.

Proper training, then, becomes the issue. As part of the new employee orientation process, managers should assess the recruits' computer skills. They should build

Bottom Lines of E-mail Stress

- Do not continually respond to the computer's ongoing messages.
- Screen e-mails that you receive.
- Screen e-mails that you send.
- Think, read, and reread before you send.
- Treat e-mails as you would any other correspondence.
- Leave your computer at the office.
- Avoid hiding behind your computer.
- Remember that your e-mails can come back to haunt you.

agency training around the basic needs for each position. This approach avoids boring new employees with a regurgitation of lessons they already have learned and demonstrated and ensures a minimum level of computer skills for all personnel.

Additionally, as employees advance into and through management ranks, an organization should identify and reward expected computer competencies. Agencies should ensure that ranking officers also have professionally adequate computer skills, just as they establish minimum qualification levels for personnel in other areas, such as firearms and fitness.

Finally, the organization should clearly define accepted e-mail practices and electronic etiquette. Employees should understand the rules of computer use within their agency and be held accountable for complying with those rules. A variety of Web sites offer helpful advice and practical guidelines for enhancing electronic communication.

CONCLUSION

Agencies should continue to emphasize the importance of effective interpersonal, nonelectronic communication between managers, supervisors, and employees. Many agency administrators have allowed the computer to replace good management communications skills. Yet, to place this tool in the proper perspective, the agency has to make its position on interpersonal communication clear: interpersonal communication is an issue on which managers are held responsible, rewarded, and, if inadequate or inappropriate, disciplined. In personnel issues, and particularly in matters of discipline, evaluation, and job performance, agencies expect to communicate personally with their employees, who, in turn, are expected to communicate issues of a personal nature one-on-one with their managers.

The backbone of any organization remains its effective employees who are made more productive, but not supplanted,

by an up-to-date electronic and technological infrastructure.

Tremendous strides in technology significantly have impacted the way organizations, including law enforcement agencies, function and communicate. The rapid expansion and use of e-mail have enhanced an organization's ability to communicate effectively and expeditiously. At the same time, an over-reliance on e-mail as a primary means of communication can hurt interpersonal communication within an agency and magnify the stress of its employees. Proper individual and organizational efforts can ensure the effectiveness of electronic communication while minimizing its harm. ♦

Endnotes

¹ "Getting the Message, Loud and Clear," *St. Petersburg Times*, April 1, 2002, sec. E, p. 9.

² International Data Corporation, retrieved on March 5, 2002, from <http://www.idc.com>.

³ "Drowning in E-mail," *St. Petersburg Times*, February 18, 2002, sec. E, p. 11.

⁴ "Get a Handle on the Technology Overload," *St. Petersburg Times*, October 28, 2001, sec. G, p. 1.

⁵ B. A. Reaves and A. L. Goldberg, U. S. Department of Justice, Office of Justice Programs, *Local Police Departments 1997* (Washington, DC, 2000), iv.

⁶ For more information on COMPSTAT, see James Larsen, "STOP CRIME: Systematic Tracking Operation Program Community Reporting Incidents More Effectively," *FBI Law Enforcement Bulletin*, November 2002, 6-8.

⁷ John Naisbitt, *Megatrends* (New York, NY: Warner Books, 1982), 39.

⁸ "CEO Stung by E-mail Criticism," *St. Petersburg Times*, April 6, 2001, sec. E, pp. 1 and 6.

⁹ "You've Got Hate Mail," *Law Enforcement News*, March 31, 2001, p. 5.

¹⁰ Report of the Independent Commission on the Los Angeles, California, Police Department (Christopher Commission), July 9, 1991.

ViCAP Alert

Attention: Homicide and Sex Crimes Units



1965 (Age 26)



1965 (Age 26)



1987 (Age 49)



2002 (Age 64)

Clyde Carl Wilkerson

On October 29, 2002, Clyde Carl Wilkerson was arrested at his home in Benton, Arkansas, based on a warrant for two murders in El Cajon, California, that occurred in 1965. Additionally, a murder charge is pending for a 1975 murder of a 27-year-old white female in Tulsa, Oklahoma. Clyde Carl Wilkerson has been linked to these three murders through DNA processing. On April 15, 2003, after pleading guilty to the homicide of an elderly man and the sexual assault of the man's wife, both of which occurred 37 years earlier, Clyde Carl Wilkerson was sentenced to an indeterminate life sentence with the possibility of parole in 7 years.

The Crimes

On June 6, 1965, the naked body of a 19-year-old white female was found in the bedroom of her apartment, laying on her back across the foot of the bed, with her feet on the floor and her legs spread apart. The victim's face was covered with an undergarment not belonging to her. A cord cut from a living room window was wrapped several times around her neck. A candle was inserted in the victim's vagina and left at the apartment. Last-rite candles were left to burn next to the victim's body. During the sexual assault/homicide, the victim's 2-year-old son was in the apartment and was unharmed. The apartment was ransacked, but there were no signs of a struggle. The content of the victim's purse was dumped onto the living room floor, but cash and jewelry were not taken. The only items taken were a camera and a crucifix. The official cause of death was manual strangulation. Evidence recovered from the crime scene revealed that the victim had been sexually assaulted and that evidence provided a DNA profile of the offender.

On June 24, 1965, neighbors heard a woman yelling for help from her apartment. The first victim found was a 62-year-old white male, deceased, laying on his back on the floor between the bed and the wall. An autopsy disclosed that the victim was struck more than 20 times on his head, which caused his death. The weapon was a socket wrench recovered from the apartment. The second victim, the first victim's wife, was a 57-year-old white female found laying on her back on the floor several feet from the bed. Her legs were doubled underneath her with the heels of her feet resting on her buttocks and her legs spread apart. An opened jar of hand cream was next to her, and cream was smeared in and around her vagina. The female victim had been sexually assaulted. The only items taken were the victims' wallets and the female victim's purse. Evidence recovered from the crime scene provided a DNA profile of the offender.

On February 5, 1975, a 27-year-old white female was last seen leaving her college class in downtown Tulsa, Oklahoma. On February 24, 1975, the victim's body was recovered from a small closet inside an



Vital Statistics

FBI #: 315067D

DOB: 11-10-1938 (Current Age – 65)
(Original Assault Charge Age – 26)

Place of Birth: Willows, California

Assault: Height: 5'8" - 5'9"

Weight: 150 - 165

Current: Height: 5'8"

Weight: 230

Assault: Hair - Brown Eyes - Blue

Current: Hair - Gray Eyes - Blue

SSN: 571-50-2506

Used: 262-50-2342

Driver's License:

California: DLN

Arkansas: DLN 571502506

Scars/Marks/Tattoos:

Mole on left check

Wilkerson walked with a limp.

(Noted in the 1975 incident)

Vehicle:

1963 Black Rambler, 4 door sedan

(used in 1976 incident)

Evidence:

Knife, with black plastic handle

(seized in 1976 incident)

Knife, with wooden handle

(seized in 1976 incident)

apartment building undergoing renovation near the college. An autopsy disclosed that the victim had sustained numerous injuries to her face from blunt force in addition to post mortem amputation of both her areolas and nipples. One areola and nipple had been inserted into the victim's vagina and was recovered. The other areola and nipple never were found. Furthermore, the autopsy showed penetration to the victim's vagina and anus. The victim's clothes, jewelry, purse, checkbook, and other identification were stolen. On February 6, 1975, the day after the victim was missing, a white male cashed a check taken from the victim's checkbook and attempted to use her credit cards in businesses in the Tulsa area. The official cause of death was ligature strangulation.

Evidence seized from the crime scene provided a DNA profile of the offender.

On January 25, 1976, a 32-year-old white female used a telephone booth at a gas station in Judsonia, Arkansas. As she talked on the telephone, a dark-colored car pulled up, stopped at the phone booth, and waited. The victim completed her call and began to walk back to her car. A man got out of the other car, approached her with a knife, and said, "If you scream, I will kill you." The offender took her by the arm and put her in his car. He told the victim to take off her clothes. When the victim attempted to talk to the offender, he stated, "If you don't take your clothes off, I will tear them off." He told the victim that if she did as he said, he would not hurt her. The offender

raped the victim in the front seat of his car. Afterward, the victim and the offender put their clothes back on and the victim was released.

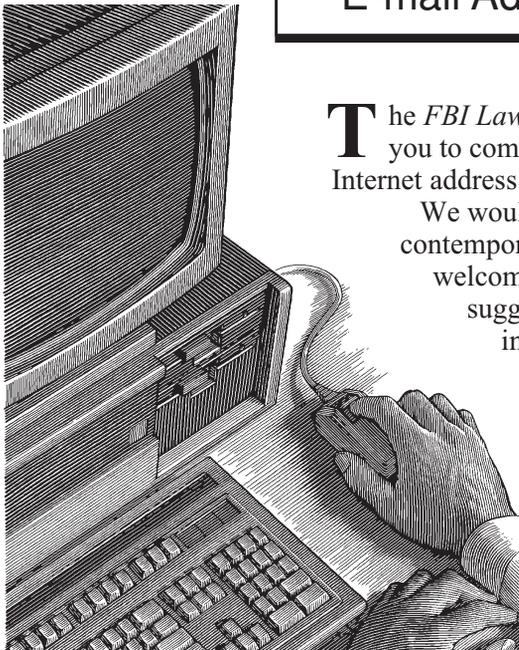
In addition to these sexual assaults and homicides, Clyde Carl Wilkerson was convicted of a sexual assault in California in 1965. When committing such acts, Wilkerson approached his victims in their homes or on the street. He targeted strangers of any age. If he encountered a male with a female he would beat the male unconscious with a weapon that he acquired from the location. He then would beat the female, sometimes with his fists, manually choke her to unconsciousness, and then rape her. If he encountered the female on the street, he gained control of his victim by brandishing a knife and threatening her life. He occasionally used hand cream as a lubricant, spreading it around and in the victim's vaginal area. In some cases, he strangled the women with either their own curtain or telephone cord. Clyde Carl Wilkerson ransacked homes, rummaged through victims' wallets or purses, and took property belonging to the victims. He used victims' credit cards and

forged their checks. Clyde Carl Wilkerson was a truck driver and had been in every state in the continental United States.

Alert to Law Enforcement

Law enforcement agencies should bring this information to the attention of all crime analysis personnel and officers investigating crimes against persons and sexual assault crimes. Also, they should review documents for any criminal misconduct records including traffic infractions and field interviews to establish a time line. Any agency with similar crimes should contact FBI Special Agent Mathew "Matt" Brown, of the FBI's San Diego, California, office at 858-499-7765 or Crime Analyst Glen W. Wildey, Jr., of the FBI's Violent Criminal Apprehension Program (ViCAP) at 703-632-4166. Please contact CA Wildey at gwildeyj@leo.gov to obtain an electronic transmission containing the official Clyde Carl Wilkerson's time line and additional photographs. A DNA profile is obtainable through Special Agent Brown. ♦

The *Bulletin's* E-mail Address



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Munchausen Syndrome by Proxy

The Importance of Behavioral Artifacts

By DEBORAH CHICZEWSKI, M.A., and MICHAEL KELLY, M.A.

In the 1990s, two unrelated mothers living in different parts of the United States had a lot in common. Both cared for children with significantly complex medical problems. One woman's daughter suffered from constant intestinal problems, and the other woman's two foster daughters experienced a multitude of ailments that left them weak and emaciated. In addition, both women spent most of their time escorting their sickly girls from doctor to doctor. The daughter of the first mother was eventually hospitalized 200 times, and all three children had to undergo surgery to place feeding tubes into their stomachs. Furthermore, both parents received national praise for their motherly care and devotion to their young girls. Prosecutors maintain that both women shared one more feature, a dark secret eventually exposed to television and newspapers around the world. They were accused of exhibiting symptoms of a bizarre psychiatric ailment called Munchausen syndrome by proxy (MSBP) that led them to fabricate the girls' illnesses to fulfill their own needs for attention and sympathy¹.

Doctors, emergency medical services (EMS) personnel, members of protective service agencies, and law enforcement officers may unwittingly participate in MSBP when they fail to recognize MSBP behavior, treat the offender, and



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create a favorable outcome for the child. Protecting America's children is immeasurably important; therefore, law enforcement personnel and EMS providers need to know the significance of behavioral artifacts in the recognition, investigation, and prosecution of MSBP offenders.

HISTORY

Munchausen syndrome was named after an 18th century dignitary named Baron von Munchausen who was known for telling exaggerated stories. Individuals who exhibit the characteristics of Munchausen syndrome fabricate or exaggerate illness or sickness,

usually for the purpose of attracting attention to themselves. Munchausen syndrome *by proxy* is the practice of fabricating or exaggerating illness or sickness onto another person, usually a child. MSBP is a form of child abuse and can prove fatal. Children subjected to this form of abuse may be hospitalized repeatedly and undergo numerous surgeries.

Researchers first began to recognize this pattern of abuse in the 1970s. Sudden infant death syndrome (SIDS) became the default judgement when no cause of death could be identified. Further, several cases where multiple children from the same family perished were attributed to SIDS because of no apparent causes of death. As research on SIDS progressed, the likelihood of a family experiencing multiple infant deaths due to SIDS became unlikely. On the eve of this realization in the 1970s, MSBP became a routinely published topic highlighting its terrible effects on children. Law enforcement personnel have become important players in the fight against MSBP because their position enables them to recognize the affliction in its earliest stages.

RECOGNITION

Law enforcement personnel should remember that MSBP is not a diagnosis.² Instead, investigators should recognize it as a form of abuse. In short, MSBP is not what someone *has*, but what someone *does*. The majority of people associated with MSBP are women. Often, investigators, along with friends, family, and neighbors, view these women as very caring and

loving parents who try to do everything they can for children afflicted with devastating illnesses. Offenders usually exhibit knowledge of diseases and medical procedures beyond what most parents may know. They typically have a medical background or have been around the medical profession in some capacity. A family history of frequent moves and lengthy visits to multiple health care professionals also may exist. MSBP offenders are not associated with any specific ethnic group or level of economic status. Some researchers believe that the behavior of MSBP perpetrators is a character disorder; it does not follow social norms. The satisfaction sought from misleading caregivers at the expense of their children is thought to be the sole reason for committing the abuse.

The methods that offenders use to exaggerate or fabricate illness are

quite extensive and designed to deceive health care professionals. MSBP perpetrators convincingly fabricate and lie even when confronted with contrary information. Offenders need attention, and they often seek it through their actions with health care professionals. To feign illness, perpetrators go to great lengths, such as suffocating to mimic apnea, tainting urine with blood, poisoning to resemble gastric complications, inducing vomiting with ipecac to look like reflux problems, and producing unexplainable rashes with chemical irritants.

INVESTIGATION

Often, the first contact with a patient/victim of MSBP occurs in the prehospital arena. Law enforcement and EMS personnel need to not only understand the characteristics of MSBP perpetrators and



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Deputy Chief Kelly serves with the Hinsdale, Illinois, Fire Department.

victims but also realize that this determination is made over time, not just a single occurrence. In the event of an infant or child illness, police and EMS personnel should request information about the history of the illnesses from the parents. Generally, they view parents as individuals who want the best for their children, an assumption that perfectly suits MSBP offenders. Further, police and EMS personnel see parents as knowledgeable, caring individuals extremely attentive to their children's needs and illnesses, which stands in direct opposition to what law enforcement personnel learn as the characteristics of child abusers. As mandated reporters of child abuse, however, police and EMS personnel must understand the differences in behaviors and characteristics found in MSBP as opposed to other forms of abuse.

Police and EMS personnel not only must remain aware of offenders' characteristics but also must be observant of MSBP signs at a child abuse or illness scene. MSBP often goes unrecognized because many law enforcement officers have never encountered, or are unfamiliar with, the disorder. Thus, when dealing with a suspected case of MSBP, law enforcement personnel must alert colleagues of the abuse to ensure correct management of the investigation. They also can employ certain guidelines to help in determining a case of MSBP, including—

- a described medical problem that does not respond to the normal course of treatment;
- multiple responses to the same location for the same patient

with similar complaints or a variety of illnesses;

- a family history of similar incidents with siblings, including multiple SIDS within the family;
- signs and symptoms disappear upon the child's removal from the parent; and
- attempts by a caregiver to convince others of illness even in the absence of signs and symptoms.

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Distinguishing between MSBP and other forms of child abuse remains extremely difficult...

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These guidelines, along with understanding the behavioral artifacts that may exist, are critical to the recognition of MSBP. Artifacts can be both behavioral characteristics and linguistics exhibited by those who fall under MSBP. Because MSBP often leads to the victim's death, recognizing its existence often occurs only after the death of a child and a review of the case.

PROTECTION

MSBP makes child protection very difficult. An interview with a previous director of social services at a children's hospital in Chicago revealed that once hospital

personnel became aware of MSBP in the late 1980s they began to take steps to protect children. High risk of injury or death exists while a child remains in the care of the perpetrator; therefore, incidents where the child already has been hospitalized contain less risk.

Based on the existing laws in Illinois,³ video surveillance in a child's hospital room may be permissible for various reasons, such as security of the child, constant monitoring/assistance in diagnosis and treatment, or protection of the facility and employees from allegations of negligence. For years, discussions about videotaping suspected MSBP offenders finally led to placing a camera in a room at the aforementioned children's hospital in Chicago. In this particular case, a 14-month-old girl was hospitalized for apnea. While in her hospital room, the child periodically would stop breathing for no apparent reason. She remained hospitalized for 30 days, and medical personnel could not uncover anything medically wrong with her. However, hospital personnel did make a connection between the mother's presence and the child exhibiting symptoms of apnea. The hospital decided to videotape the child's room and place a heart monitor on the child. After another episode of apnea, a review of the videotape revealed that the child's mother had put a pillow over the child's face to induce the symptoms. The physician immediately took protective custody of the child. After being removed from her mother, the girl exhibited no more symptoms of apnea. Prosecutors eventually charged the mother with endangering the

life and health of a child, a minor misdemeanor. The videotape became the proof beyond a reasonable doubt along with the fact that the child did not show any symptoms of apnea when removed from the mother's supervision.

PROSECUTION

An interview with a Cook County, Illinois, State's Attorney revealed that the Illinois Department of Children and Family Services (IDCFS) initiates MSBP cases in juvenile court for the purpose of custody hearings. However, IDCFS receives very few allegations of MSBP because most suspected cases cannot even be called into the child abuse hotline due to a lack of evidence. When doctors do report MSBP cases to the hotline, they normally already have taken protective custody of the child. In these cases, doctors are positive of MSBP, and they generally have some means of proving it. In many cases, though, only a hunch exists, which does not provide a preponderance of evidence.⁴

Preponderance of Evidence

A supervisor at the IDCFS disclosed that very few MSBP cases advance to court for custody hearings because the IDCFS frequently does not have enough evidence. Varying greatly from a criminal court of law, IDCFS custody hearings can convict with only a preponderance of evidence. However, with cases of suspected MSBP, a preponderance of evidence remains difficult to prove, and, in Illinois, a preponderance of evidence must exist to remove a child from the home. Three reasons for removal include—

- 1) neglect, which is an environment injurious to the welfare of the child;
- 2) abuse, which entails inflicted injuries or substantial risk of injury other than by accidental means; and
- 3) dependent, which denotes a mental disability of a parent.



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Evidence for Trial

Law enforcement personnel also incur the burden of obtaining evidence for trials against MSBP perpetrators because officers generally have initial contact with victims and parents involved in child abuse. Therefore, investigators must remain cognizant of behaviors typical of MSBP. For example, officers must document how many times they have visited homes for child-related problems and how many times they have accompanied parents and children to the hospital. An abnormal number of visits coupled with indicators of MSBP behavior can help tip off investigators and prompt them to begin watching suspects more closely for

evidence. The evidence presented in a custody hearing originates in four ways.

- 1) Statements made by the suspect as to the condition of the child
- 2) Statements made by the child
- 3) Hospital records
- 4) Testimony of hospital personnel

Criminal Intent

For criminal prosecution, Illinois prosecutors must prove criminal intent, which means knowingly, intentionally, or recklessly committing the act. Prosecutors also must show that the reason the perpetrator committed the act was criminal. Working against prosecutors, though, is the high standard of proof carried by a criminal act. The suspect overtly must have done an act or consciously omitted an act, and the act must be provable beyond a reasonable doubt. MSBP remains difficult to prove because perpetrators generally do not make statements about the abuse. A witness to the abuse remains the only proof beyond a reasonable doubt, and witnesses to MSBP are rare. Law enforcement personnel can be very helpful in this stage of prosecution, however, because they may have had contact with the child or the perpetrator and heard them discuss illnesses or behavior.

CONCLUSION

Law enforcement officers and EMS personnel may inadvertently become involved in a case of MSBP. Therefore, they need to be able to recognize behavior related

to MSBP so that they can investigate the abuse, help rehabilitate the offender, and couple a prosecution of the offender with a favorable outcome for the child.

Distinguishing between MSBP and other forms of child abuse remains extremely difficult because parents can deceive law enforcement officers by creating the illusion of true caregivers. In addition to uncovering parents living the lie of MSBP, officers and EMS personnel have a second burden of providing support in the prosecution of MSBP offenders. Police and EMS providers have contact with victims and perpetrators prior to reaching the hospital and when the child is hospitalized, the two crucial times for recognition of MSBP. By identifying behavioral artifacts, law enforcement and EMS personnel can detect MSBP at an early stage and can help remove the child from the dangerous environment of abusive parents. ♦

Endnotes

¹ Marc D. Feldman, M.D., "A Parenthood Betrayal: The Dilemma of MSBP," *Self Help Magazine*, March 28, 1998. For more information on MSBP, see Kathryn A. Hanon, "Child Abuse: Munchausen's Syndrome by Proxy," *FBI Law Enforcement Bulletin*, December 1991, 8-11, and Kathryn A. Artingstall, "Munchausen Syndrome by Proxy," *FBI Law Enforcement Bulletin*, August 1995, 5-11.

² This conclusion is based on the authors' experience and research regarding MSBP.

³ Law enforcement officers in other states should be aware of their states' laws regarding video surveillance and all issues related to child abuse and MSBP.

⁴ Preponderance of evidence is comparable to the phrase "beyond a reasonable doubt" in a criminal case.

Wanted: Notable Speeches

The *FBI Law Enforcement Bulletin* seeks transcripts of presentations made by criminal justice professionals for its Notable Speech department. Anyone who has delivered a speech recently and would like to share the information with a wider audience may submit a transcript of the presentation to the *Bulletin* for consideration.

As with article submissions, the *Bulletin* staff will edit the speech for length and clarity, but, realizing that the information was presented orally, maintain as much of the original flavor as possible. Presenters should submit their transcripts typed and double-spaced on 8 1/2- by 11-inch white paper with all pages numbered. When possible, an electronic version of the transcript saved on computer disk should accompany the document. Send the material to:

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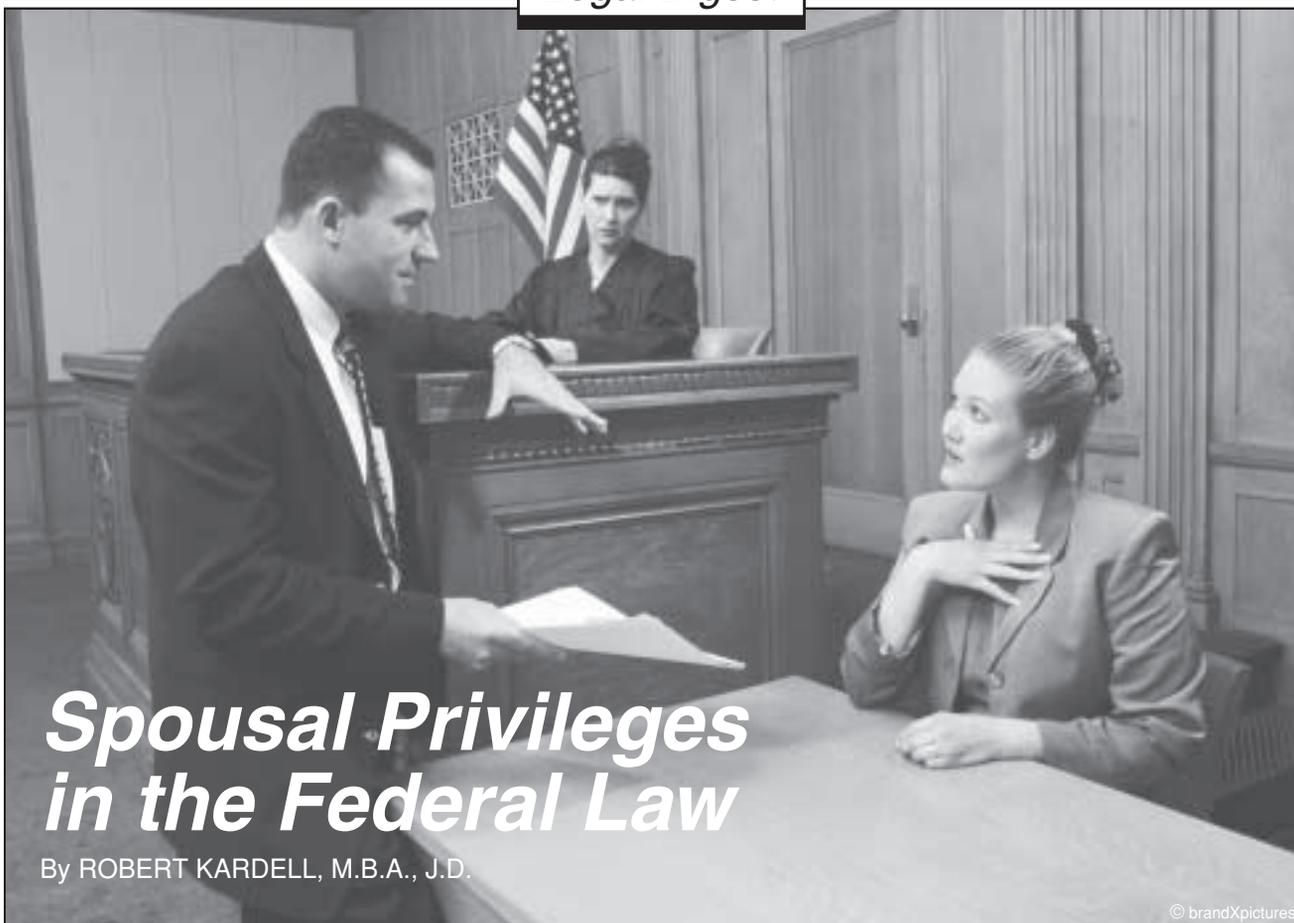
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What You Need to Know About Drug Testing in Schools offers perspectives on the multifaceted and sometimes controversial topic of testing children for illegal drugs in school. This booklet, presented by the Office of National Drug Control Policy (ONDCP), provides those considering drug testing programs in their communities with an understanding of the issue and solid information on which to base a decision. It answers questions about the process and explains what drug testing is, who pays for it, who does the testing, and what it tells and cannot tell about an individual's drug use. It also describes what services should be in place to effectively deal with students who test positive for drug use and offers case histories of how schools have used drug testing to address their drug issues. This booklet can be ordered by contacting the National Criminal Justice Reference Service (NCJRS) at 800-851-3420; it can be accessed electronically at http://www.whitehousedrugpolicy.gov/pdf/drug_testing.pdf.

Crime Prevention

Problem-Solving Tips: A Guide to Reducing Crime and Disorder Through Problem-Solving Partnerships serves as a reference for those implementing a problem-solving approach to reduce crime and disorder through partnerships. A proactive, problem-solving approach, such as community policing, attempts to determine the root cause of a problem to prevent it from happening again. This guide, presented by the Office of Community Oriented Policing Services (COPS), contains insights into every stage of the process, most of which draw from the experiences of law enforcement officers. Information is based on the SARA (scanning, analyzing, responding, and assessing) model, an approach that analyzes related incidents of a specific crime problem so that comprehensive, tailored strategies can be developed to deflect offenders, protect likely victims, and make crime locations less conducive to problem behaviors. This guide can be accessed electronically at <http://www.cops.usdoj.gov>; the U.S. Department of Justice Response Center provides availability and ordering information at 800-421-6770.

Bulletin Reports is an edited collection of criminal justice studies, reports, and project findings. Send your material for consideration to: *FBI Law Enforcement Bulletin*, Room 209, Madison Building, FBI Academy, Quantico, VA 22135. (NOTE: The material in this section is intended to be strictly an information source and should not be considered an endorsement by the FBI for any product or service.)



Spousal Privileges in the Federal Law

By ROBERT KARDELL, M.B.A., J.D.

In one of my recent cases, I received a large amount of information from the former spouse of the main subject. The issue quickly arose as to what type of information the spouse could provide to me and for what purposes I could use the information. To determine the answers to these questions, I began to research the issue of spousal privileges¹ to ensure that the information obtained or evidence gathered would not be suppressed in future court proceedings. The following is a summary of the information I uncovered. This research is based on federal common law; state and local law enforcement should review their applicable laws.

COMMON LAW PRIVILEGES

The original draft of the Federal Rules of Evidence (FRE) by the Judicial Conference Advisory Committee in 1974 included rules that recognized nine separate common law privileges. The individual rules dealing with privileges, however, were dropped in favor of a single rule incorporating all common law rules of privilege.² The FRE rule regarding privileges is as follows:

*Articles V. Privileges
Rule 501. General Rule*

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules

prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.

The passage of this rule has created a debate as to what authority the courts have to modify the privilege rules. One view is that Congress intended to freeze the common law privileges as they were recognized at the time, restricting changes to those made by Congress. The prevailing view, however, has been that Congress ceded to the courts the authority to determine the scope and nature of privileges and the freedom to develop and modify the privileges as needed through common law.³

The courts have taken this authority and modified the spousal privilege rules over the years through common law. As the privileges are rooted in common law, a review of the spousal privileges in common law follows.⁴

History

The common law has recognized spousal privileges since medieval times.⁵ The privileges have evolved and taken different forms over the years. The current form of spousal privileges grew out of three distinct privileges: 1) incompetency, 2) anti-marital facts, and 3) marital confidentiality.⁶

The number of privileges changed when the Court in *Funk v. United States*⁷ overturned prior court decisions and ruled that the spouse of the defendant voluntarily could testify on the defendant's behalf. Prior to this decision, courts did not allow the spouse of the defendant to testify, even if the spouse volunteered to testify on behalf of the defendant. This absolute rule against spousal testimony was based on incompetency.⁸ *Funk* effectively abolished incompetency as one of the spousal privileges.

The two remaining spousal privileges that continue to be recognized are anti-marital facts, now commonly known as adverse spousal testimony, and marital confidentiality, now referred to as marital communications. Spousal privileges are a type of evidentiary privilege. They are rooted in common law and recognized by the FRE. Other types of evidentiary privileges are attorney-client, doctor-patient, and priest-penitent. Because these privileges are rooted in common law and not in the Constitution, courts have construed them very narrowly. In *Trammel*, the Court stated that “[t]estimonial exclusionary rules and privileges contravene the fundamental principle that “the public...has a right to every man's evidence.” As such, they must be strictly construed and accepted “only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means

for ascertaining the truth.”⁹ Judges, then, have the ability and duty to weigh the necessity of the privilege against other factors in the case. The narrow interpretation of the privileges, and ability of the judge to force disclosure of otherwise privileged information, indicate that the following rules are guidelines to be used by the court in their decision-making process.

Marital Communications Privilege

The privilege of marital communications has evolved from the same basic notions that underlie the privilege of adverse spousal testimony. This privilege is related more directly to other privileges such as attorney-client, priest-penitent, and doctor-patient, in that the testimony of the witness is not barred, but rather, communications that were intended to be private are considered privileged. However, the marital communications privilege, unlike the spousal testimonial privilege, survives

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Spousal privileges are a type of evidentiary privilege.

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death and divorce.¹⁰ The courts have ruled that private communications made during marriage are presumed to be confidential.¹¹ This is a rebuttable presumption; however, the burden of which rests with the government.¹²

For the marital communications privilege to apply, there are three prerequisites. First, the communication must have been in words or acts intended to be communicative¹³ or intended to convey a message.¹⁴ “Though this privilege has been expanded to encompass more than mere conversations and writings, invocation of the privilege requires the presence of at least a gesture that is communicative or intended by one spouse to convey a message to another.”¹⁵ Observations of the witness spouse, generally, are not communications and therefore cannot be barred.¹⁶

Second, the communication must be made during a valid marriage.¹⁷ Although this prerequisite would seem to be self-explanatory, the issue of what constitutes a valid marriage has been argued quite extensively. If a couple is separated, the court will have to determine whether the separation is permanent or only temporary. This prerequisite is not met if the communication takes place while the couple is permanently separated.¹⁸ There are a number of other factors that courts have considered in determining the validity of the marriage. These factors include the filing for a divorce, the conduct of the parties, the stability of the marriage, or any other statements or actions by the parties that may show their intent.¹⁹

Third, the communication has to have been intended to be private.

If the communication was made in the presence of third parties²⁰ or with the intention of being communicated to a third party,²¹ then the communication is not privileged. The presence of a third party may include a child of the marriage if the child is old enough to understand.²² The courts have been reluctant to extend the communications privilege to family members other than the husband and wife.

There are two exceptions to the marital communications privilege.

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...private communications made during marriage are presumed to be confidential.

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First, the privilege does not apply in cases of crimes against the spouse or children.²³ In such cases, courts have held that the societal interests far outweigh the interest of the marriage and therefore should not apply. In *United States v. Martinez*,²⁴ the court stated “[c]hildren, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy.”²⁵

Second, the privilege does not apply in cases of spouses conspiring to commit a crime, communicating

about past criminal acts, or communicating about future criminal activity.²⁶ However, there is a split among the Circuits with regard to this issue. The Sixth and the Eighth Circuits have ruled that the conspiracy exception is limited to “communications regarding ‘patently illegal activity.’”²⁷

The marital communications privilege can be waived. Courts also have held that disclosure, even if inadvertent or unintended, can serve to waive the privilege. If no objections to the disclosure of the information are expressed, the court can find that the privilege has been effectively waived. In *United States v. Brown*,²⁸ the parties agreed to hear the testimony of the spouse without the jury at the suggestion of the judge to determine whether the marital communications privilege applied. The testimony of the spouse was offered by the defendant to prove the statements of the defendant were marital communications. But, the court held, by allowing the testimony of the spouse, the defendant had, instead, waived the privilege. In *United States v. Lavin*,²⁹ the court stated “the holder must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure.”³⁰

Adverse Spousal Testimony

Until *Funk*, the rules regarding spousal privileges had remained unchanged for hundreds of years. After the Court in *Funk* abolished incompetency as a spousal privilege, scholars and other legal institutions began to question the necessity of the adverse spousal testimony privilege. In *Hawkins v.*

United States,³¹ the Supreme Court was asked to reconsider the adverse spousal testimony privilege. After much debate, the Court held that one spouse couldn't be compelled to testify against the other. The Court ruled that both the defendant and the witness spouse held the privilege, thereby requiring the consent of both parties before one spouse could testify against the other. The Court, in *Hawkins*, left the privilege unchanged and reiterated the foundation and reasoning that had justified the privilege for so many years.

The ruling by the Court in *Hawkins* endured until the Court in *Trammel* revisited the adverse spousal testimony privilege issue. In *Trammel*, the Supreme Court was asked to reconsider whether a defendant can invoke the privilege to exclude voluntary testimony of a spouse.³² The Court again reviewed the history of the privilege and the changes that it had undergone throughout the years. The Court noted that a number of states had changed their rules or laws regarding adverse spousal testimony since *Funk*. At the time of the decision in *Trammel*, 26 states either had abolished the privilege in criminal cases or vested the privilege in the witness spouse.³³

The decision in *Hawkins* also had received substantial criticism from various legal institutions. In *Trammel*, the Court took notice of an expanding list of exceptions to the adverse spousal testimony privilege. Over the years, the courts had recognized exceptions for crimes committed by one spouse against another,³⁴ crimes against

spouse's property,³⁵ and crimes against children.³⁶ The exceptions to the privilege had expanded as the criticism of the rule increased.

The Court also took notice that no other privilege, attorney-client, priest-penitent, or doctor-patient, goes so far as to exclude all adverse testimony of potential witnesses. The Court opined that this difference was based on anachronistic notions of women not being considered as separate legal entities.³⁷



The Court also considered the argument that a change in the rules would force government between a husband and a wife. The Court discussed that one of the original arguments for the privilege is the idea that forcing one spouse to testify against the other would disrupt the marital harmony. In *Trammel*, the Court reasoned, however, that if one spouse is willing to testify against the other, "there is probably little in the way of marital harmony for the privilege to preserve."³⁸

The Court in *Trammel* concluded that "the existing rule should

be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege in the witness-spouse—further the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."³⁹

There is one requirement for the adverse spousal testimony privilege. There has to be a valid marriage between the individuals. The standards for determining the existence of a valid marriage are the same as the marital communications requirement discussed previously. It is also important to note that this privilege, unlike the marital communications privilege, does not survive the termination of the marriage either through death or divorce.⁴⁰

The adverse spousal testimony privilege is limited to courtroom testimony. In *United States v. James*,⁴¹ the court considered whether or not to allow testimony from a law enforcement officer as to information related by the defendant's wife at the time of the defendant's arrest. The court noted that five other Circuits have considered the issue and decided to allow such testimony.⁴² The court noted that the Court in *Trammel* stated, "It is only the spouse's testimony in the courtroom that is prohibited."⁴³

The previous summaries involved issues of spousal privileges raised at the time of trial. There are times, however, when spousal privileges become an issue during the investigative stages of a case.

ISSUES DURING INVESTIGATIVE STAGES

Grand Jury Proceedings

Often subpoenas are issued for witnesses to testify in a grand jury. These subpoenas compel the testimony of the witness. If the witness is a spouse of the target of the grand jury proceedings, the federal district court may be asked to consider whether the privileges of adverse spousal testimony or marital communications apply in the context of grand jury proceedings.⁴⁴ In the case of *Grand Jury Investigation of Hugle*,⁴⁵ the U.S. Court of Appeals for the Ninth Circuit ruled that the marital communications privilege is applicable in grand jury proceedings.⁴⁶ The court also determined that the defendant spouse has standing to assert the privilege in grand jury proceedings.⁴⁷

The courts have ruled in several cases that the adverse spousal testimony privilege applies in grand jury proceedings. In *United States v. Calandra*,⁴⁸ the Court stated that a grand jury, “may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.”⁴⁹ The application of the adverse spousal testimony privilege in grand jury proceedings has been upheld in several cases.⁵⁰

As the privileges apply, so do the exceptions. If the government can meet its burden to rebut the presumption of confidential communications, it can compel the testimony of one spouse against another. Furthermore, the government can overcome spousal privileges if the prosecutor promises not to use the information obtained against the

other spouse. Courts have ruled that “a spouse asserting the adverse spousal testimony privilege or the marital communications privilege may be compelled to testify if the prosecutor gives an adequate promise that the information will not be used against the other spouse.”⁵¹

Search Warrants, Affidavits, or Other Court Orders

Another common practice among federal investigators is the use of search warrants and other

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Observations of the witness spouse, generally, are not communications and therefore cannot be barred.

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court orders. The applications for search warrants or other court orders, such as telephone intercepts, are normally supported by affidavits of the investigating agent or prosecutor. If privileged communications become part of an affidavit, what effect, if any, will this have on the evidence collected as a result of this court order?

The court in *United States v. Squillacote* considered just such a case. The appellant in *Squillacote* argued that evidence gained from a warrant based on privileged information should be suppressed. The privilege at issue in *Squillacote* was

the therapist-patient privilege, but the court noted that privileges such as therapist-patient and marital communications are testimonial or evidentiary and not grounded in the Constitution. The court in *Squillacote* ruled that privileges that are not rooted in the Constitution are not afforded the ‘tainted fruits’ analysis. Therefore, suppression of evidence is not the proper remedy for evidence collected from the execution of a warrant based on privileged information. The court in *Squillacote* concluded “we do not believe that suppression of any evidence derived from the privileged conversations would be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based.”⁵²

Limits on Investigations

What limitations do the marital privileges place on the investigator? The adverse spousal testimony privilege does not apply in cases where there is no courtroom testimony. Thus, for investigators, evidence and leads obtained through interviewing or otherwise asking questions of a spouse will not run afoul adverse spousal testimony privilege. Interviews of a widow or an ex-spouse will not violate this privilege because, as pointed out above, the privilege does not survive death or divorce.

The marital communications privilege has undergone a similar analysis with regard to introducing evidence derived from privileged information. In *United States v. Cleveland*,⁵³ the defendant sought to suppress all evidence and leads produced from interviews of his

wife. The court denied the request and in its opinion stated, “we find no authority for the broad exclusionary rule advocated by defendant.”⁵⁴ The reluctance of courts to exclude evidence obtained from disclosure of marital communications is based on the fact that the privilege is derived from common law evidentiary privileges and is not rooted in the Constitution. Only constitutional rights are afforded “tainted fruits” analysis, as discussed above.⁵⁵

The Fifth Circuit has denied the admissibility of privileged statements by a third party on two occasions, however. In *Ivey v. United States*,⁵⁶ the court stated that allowing an out-of-court statement would circumvent the reasons for the privilege. In reversing the District Court’s decision to allow the testimony of the defendant’s wife through third parties, the court stated, “[s]he might as well be permitted to testify against her husband in open court as to permit the introduction of a statement she had made against him out of court.”⁵⁷ And in *United States v. Williams*,⁵⁸ the Fifth Circuit reiterated its ruling in *Ivey* and held the introduction of a privileged communication by a third party, in these cases law enforcement officers, is reversible error.

It is important to keep the rules and limitations of spousal privileges in mind when considering the consequences of using privileged information. If a communication meets all of the requirements of a privileged communication, then there are four things that an investigator should consider. First, if the

information falls within one of the exceptions to the privilege, no further analysis may be necessary. For instance, if it is determined that the husband and wife are co-conspirators in a crime, the rules of marital communications privilege will not apply and therefore neither can prevent the information from being introduced in court or being testified to by third parties.



Second, even the Fifth Circuit has not gone so far as to exclude all evidence derived from leads and other information gleaned from privileged communications. As stated earlier, exclusion of evidence is not the proper remedy for evidence derived from privileged communication. Third, the information derived from privileged communications still can be used in affidavits and other court orders. And, fourth, the communications that are privileged have to be aggressively protected by the spouse who is seeking to keep them private. If privileged information is disclosed and no attempt is made to protect it, the courts may consider the privilege waived.

CONCLUSION

Marital privileges have been part of common law for hundreds of years. These privileges have been incorporated into the FRE through Rule 501. Congress has ceded to the federal courts the ability to review and modify the privileges as necessary. Congress did this by leaving the privileges rooted in common law and not codifying them in the FRE. Currently there are two marital privileges, adverse spousal testimony and marital communications. Since *Hawkins*, the spousal privilege rules have been narrowed and limited by the courts. The privileges are always narrowly construed because they are an impediment to the truth-finding process.

The adverse spousal testimony privilege is vested in the witness spouse alone. The defendant cannot bar a spouse from testifying. The privilege is limited to married individuals and thus is terminated by divorce or death. The marital communications privilege has three prerequisites. First, that there was an intent to communicate message. Second, there was a valid marriage. Third, the communication was intended to be confidential. The spousal privilege rules apply in grand jury testimony as they do in trial.

The privileges can be overcome with a promise from the prosecutor not to use the information gathered against the other spouse. The spousal privileges are evidentiary privileges and are not constitutionally based. Because they are not constitutionally based, information gathered from the use of such information is not subject to suppression by the courts. ♦

Endnotes

¹ There are two spousal privileges recognized in common law, the adverse spousal testimony and the marital communications privileges. These collectively will be referred to as spousal privileges.

² See PL 93-595 (HR 5463), January 2, 1975.

³ *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 911 (1980).

⁴ FRE Rule 501 refers to both federal common law in criminal cases and state law in civil cases. As this summary was prepared to aid in the investigation of a federal criminal case, the review of common law will be limited to federal common law.

⁵ *Supra* note 3 at 43 and 909.

⁶ *United States v. Redstone*, 488 F.2d 300, 304 (8th Cir. 1973).

⁷ 290 U.S. 371, 54 S. Ct. 212 (1933).

⁸ Incompetency, under common law in cases of spousal privilege, means disqualification because of a spouse's vested interest in the outcome of the trial.

⁹ *Supra* note 3 at 51 and 912, quoting *United States v. Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 730 (1950) and *Elkins v. United States*, 364 U.S. 206, 234, 80 S. Ct. 1437, 1454 (1960).

¹⁰ *Pereira v. United States*, 347 U.S. 1, 6, 74 S. Ct. 358, 361 (1954).

¹¹ *Wolfe v. United States*, 291 U.S. 7, 14, 54 S. Ct. 279, 280 (1934).

¹² *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983).

¹³ *Supra* note 9 at 6 and 361 (1954).

¹⁴ See *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977); see also *United States v. Espino*, 317 F.3d 788 (8th Cir. 2003).

¹⁵ *Supra* note 13 (*Espino*) at 795.

¹⁶ *United States v. Lefkowitz*, 618 F.2d 1313, 1318 (9th Cir. 1980).

¹⁷ *United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990).

¹⁸ *United States v. Roberson*, 859 F.2d 1376, 1379 (9th Cir. 1988).

¹⁹ *Id.* at 1381.

²⁰ *Supra* note 15 at 1318.

²¹ *Supra* note 10 at 280.

²² *Supra* note 10 at 16 and 281.

²³ *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997), cert. denied, 523 U.S. 1033, 118 S. Ct. 1327 (1998).

²⁴ *United States v. Martinez*, 44 F.Supp.2d 835, 836 (W.D. Tex. 1999).

²⁵ *Id.* at 837.

²⁶ *Supra* note 16 at 730. But see *United States v. Westmoreland*, 312 F.3d 302 (7th Cir.

2002) (the joint crime exception to the marital communications privilege does not apply to communications before the spouse becomes a joint participant).

²⁷ *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992) cert. denied 506 U.S. 988, 113 S. Ct. 502 (1992) quoting *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985) cert. denied 473 U.S. 907, 105 S. Ct. 3533 (1985).

²⁸ 634 F.2d 819 (5th Cir. 1981).

²⁹ 111 F.3d 921, 324 U.S.App.D.C. 162 (1997).

³⁰ *Id.* at 929 and 170.

³¹ 358 U.S. 74, 79 S. Ct. 136 (1958).

³² *Supra* note 3 at 41 and 908.

³³ *Supra* note 3 at 48 and 911, endnote 9.

³⁴ *Wyatt v. United States*, 362 U.S. 525, 527, 80 S. Ct. 901, 904 (1960).

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If the communication was made in the presence of third parties or with the intention of being communicated to a third party, then the communication is not privileged.

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³⁵ *Herman v. United States*, 220 F.2d 219, 226 (CA4 1955).

³⁶ See generally *United States v. Allery*, 526 F.2d 1362 (CA8 1975).

³⁷ *Supra* note 3 at 52 and 913.

³⁸ *Supra* note at 52 and 913.

³⁹ *Supra* note at 53 and 914.

⁴⁰ *United States v. Bolzer*, 556 F.2d 948, at 951 (9th Cir. 1977).

⁴¹ 128 F.Supp.2d 291 (United States District Court, D. Maryland, Southern Division, 2001)

⁴² *United States v. Archer*, 733 F.2d 354 (5th Cir. 1984) (court limited adverse spousal testimony to in court testimony); *United States v. Chapman*, 866 F.2d 1326 (11th Cir. 1989) (out-of-court statements cannot be excluded by

the adverse spousal testimony privilege); *United States v. Mackiewicz*, 401 F.2d 219 (2nd Cir. 1968), cert. denied, 393 U.S. 923, 89 S. Ct. 253, (1968) (spouse's out-of-court statements can be testified to by third party); *United States v. Doughty*, 460 F.2d 1360 (7th Cir. 1972) (estate tax return of spouse was admissible because spouse did not testify against defendant); *United States v. Cleveland*, 477 F.2d 310 (7th Cir. 1973) (defendant sought to suppress any statements or investigative leads procured from his wife by a government agent but court held that statements and leads are admissible); *United States v. Tsinnijinnie*, 601 F.2d 1035 (9th Cir. 1979) cert. denied, 445 U.S. 966, 100 S. Ct. 1657, (1980) (court admitted excited utterance of spouse); *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir. 1980) (court allowed information supplied by spouse for use in search warrant).

⁴³ *Supra* note 3 at 53 and 914, *supra* note 9.

⁴⁴ See generally FRE 1101(d)(2).

⁴⁵ 754 F.2d 863 (9th Cir. 1985).

⁴⁶ *Id.* at 864.

⁴⁷ *Id.* at 864.

⁴⁸ 414 U.S. 338, 94 S. Ct. 613 (1974).

⁴⁹ *Id.* at 346, at 619.

⁵⁰ *Appeal of Witness Malfitano*, 633 F.2d 276 (3rd Cir. 1980), and *In re Gary Snoonian*, 502 F.2d 110 (1st Cir. 1974).

⁵¹ *United States v. Squillacote*, 221 F.3d 542, 559 (4th Cir. 2000).

⁵² *Id.* at 560.

⁵³ *Supra* note 41 (Cleveland).

⁵⁴ A note of caution should be added here, however. The closer a privilege begins to resemble constitutional rights, taint analysis may be applied. See *United States v. Danielson*, 325 F.3d 1054 (9th Cir. 2003) (infringing on the attorney-client privilege can invoke Sixth Amendment taint analysis by the court).

⁵⁵ *Id.* at 313.

⁵⁶ 344 F.2d 770 (5th Cir. 1965).

⁵⁷ *Id.* at 772.

⁵⁸ 447 F.2d 894 (5th Cir. 1971).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.



Officer Wilkins



Lieutenant Williams

While searching for prison escapees early one morning, Officers Eric Wilkins and Eric Williams of the Fort Smith, Arkansas, Police Department noticed smoke coming from a residential area. They rushed to the scene and found a residence engulfed in flames. The officers quickly alerted the occupants, who ran from the house. Within seconds, the officers learned that a 6-year-old boy still was inside. They were told the location of the child's room, but smoke and flames prevented them from going inside the home. Instead, the officers removed an air conditioning unit from a window, reached inside, and safely removed the disoriented child. The quick actions of Officers Wilkins and Williams saved the child's life.



Officer Reyna



Officer Hoegner

Officers Pablo Reyna and Gary Hoegner of the Moline, Illinois, Police Department were dispatched to a one-vehicle crash in which the driver had smashed his car into the side of a gas station. When Officer Reyna arrived at the scene, he observed that the driver in the vehicle was not breathing. Officer Reyna removed the driver from the vehicle and placed him on the ground. Officer Hoegner and Officer Reyna immediately began CPR, and the victim soon began to breath on his own. It was later learned that the victim had suffered a heart attack just prior to the crash. Moline Fire Department paramedics advised that without Officers Hoegner's and Officer Reyna's decisive actions, the outcome of the heart attack and crash would have been fatal.

Nominations for the *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

