

## Evidence Blocking: A better way to analyze the facts of your case

Presented by Beau Rudder and Greg Spore,  
but stolen from Jon Rapping and  
Gideon's Promise

If a tree falls in the forest, and no one is there to hear it, does it make a sound?

- We may be able to answer with a confident “yes”
- However, we cannot know with certainty what it sounded like
- A trial is the same way
- Many people believe a trial is a search for the “truth”

### The “Truth”

- A trial is an attempt to recreate historical events through witnesses who have biases, imperfect recollections, and perceptions that can be inaccurate
- The “truth” is something we almost certainly will never know, and more importantly, will not be accurately represented by the evidence that is admitted at trial

### The Good Defense Attorney

- Understands that the picture painted for the judge or jury at trial is central to the lawyers ability to be an effective advocate
- It is helpful to think of facts in two categories:
  - Facts of the World
  - Facts of the Case

### Facts of the World

vs

### Facts of the Case

- Facts of the world are those facts that actually occurred surrounding the event. We will never know with certainty what those are.
- Facts of the case are those facts presented at trial.

### Facts of the Case

- By understanding that the outcome of the trial is a function of the facts of the case, defense attorneys have a huge advantage over the prosecution
- Prosecutors tend to believe they know the “truth”
  - This belief hinders the prosecution from being able to objectively evaluate facts, and to adjust to facts that may not fit their version of the “truth”

### Example of the Young Lawyer

- They often begin their analysis by reading a police report and accepting what is in the report as givens: assertions are accepted as true or real, basic facts or assumptions
  - What officer claims to have seen
  - The statement of a supposed unbiased witness
  - Conclusion of a fingerprint analysis

### Example of the Young Lawyer

- Conversely, they will now gloss over a potentially helpful statement the client made to the lawyer or an account of events given by client's family member
- He automatically assumes his client's statements are self serving or that information from the client's family is unreliable and dismisses it off-hand

### Example of the Young Lawyer

- This practice risks limiting his ability to consider alternative theories
- This is the same thing prosecutors do
- DO NOT mistake a police report for the "truth" and DO NOT assume a client's mother is lying for her son

### Evidence Blocking

- How to keep the bad facts out and get the good facts in
- Basic Tenet: Any fact the state would like to use to build their case against our client is a fact we would not have in the case

### Step 1: Fact Gathering

- Write down every fact that could potentially be a fact of the case and part of the trial.
- The most important aspect of fact gathering is to do so without having a bias for or against any source of the information.

### What are the Sources of Information?

- Client
- Client's Family
- Discovery
- Our Investigation
- Court Records
- Testimony at Pretrial Hearings
- Etc, etc, etc.....

## Step 2: Disregard Assumptions of Admissibility

- We often convince ourselves that a fact is useful to us after we have already accepted it will be part of the case and in turn rationalized how it might be turned to our advantage
- In order to do the exercise of Evidence Blocking we must first not assume that any of the facts we have gathered are admissible or inadmissible

## Step 3: Evaluate each Fact

- Look at the case with and without each fact and then conclude whether the fact is harmful or helpful

## Step 4: Strategize

- Consider how to fend off prosecution challenges to helpful facts and how to exclude harmful facts

## Exclude Bad Facts

- Unless you are confident the fact is one you want the judge to hear at trial, consider all possible ways to keep it out such as suppression motions, evidentiary challenges, and violations of statutes or rules

## Exclude Bad Facts

- Consider asking these questions:
  - Was the evidence a product of an illegal search or seizure?
  - Was the statement involuntary or a product of a Miranda violation?
  - Was the identification a product of a constitutional violation or otherwise unreliable?
  - Is the evidence relevant? Is it hearsay?
  - Is it more prejudicial than probative?
  - Any privilege pertaining to the witness?

## Flip-Side of the Coin

- Consider objections the State might make to evidence we want admitted
- Think about how you will respond to these objections

## Step 5: Incorporate Bad Facts

- If we determine there are harmful facts outside of our control then consider how to incorporate those into your theory of the case

## Evidence Blocking in 5 Acts

- I. Gather Facts
- II. Don't Assume Admissibility or Inadmissibility
- III. Evaluate Each Fact and Conclude that it is Helpful or Harmful to your Case
- IV. Strategize how to fend off prosecution challenges to helpful facts and how to exclude harmful facts
- V. Incorporate Facts Beyond Change (aka bad but admissible facts) into the theory of defense