

5th Amendment Rights WAIVER

- A waiver of Fifth Amendment rights must be made **voluntarily, knowingly and intelligently** based on a totality of the circumstances, and not a result of intimidation, coercion or deception.
- Need not be in writing, but recommended.
- Burden is on the investigator to prove waiver of *Miranda* rights is voluntary, knowing & intelligently given.



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Violation of *Miranda* Impeachment Exception

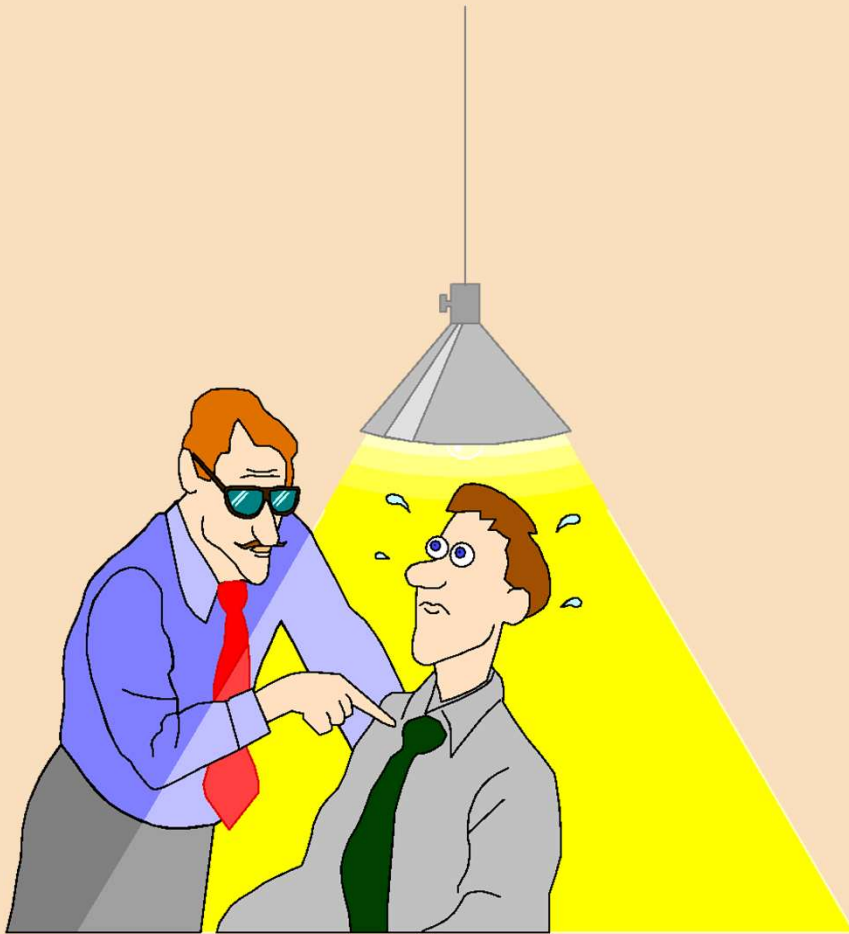
- Generally, any statement taken in violation of a person's *Miranda* rights is inadmissible in a criminal trial.
- However, a statement taken in violation of *Miranda* can be used to impeach the defendant in a criminal trial, as long as the statement was made **voluntarily**.



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Administrative Investigations



Constitutional Rights and Administrative Interviews (Kalkines & Garrity)



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Federal Employees

Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)

Facts:

- Kalkines, a federal employee, came under investigation for accepting improper payments (bribes).
- His agency conducted an internal investigation at the same time that federal prosecutors conducted a criminal investigation.
- Although Kalkines was not indicted, he was aware of the criminal investigation during the internal investigation.



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Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)

- During the internal investigation, he refused to answer certain questions related to the payments, his finances, and his job performance. He was not given any advice or warnings relating to his constitutional rights.
- He was fired for his refusal to answer. The agency affirmed his dismissal, as did the Civil Service Commission.



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Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)

- The court held that because Kalkines was not advised of his options and the consequences of his choice, his discharge was invalid.
- "[T]he public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case." *Id.* at 1393.



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Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)

- A warning known as a "***Kalkines Warning***" is now administered to federal employees and contractors prior to questioning in internal investigations. 2 parts to warning:
 - Employee must answer the questions truthfully or face disciplinary action.
 - Employee's answers cannot be used against the employee in subsequent criminal proceedings.



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Kalkines Warning Example

- You are being questioned as part of an internal and/or administrative investigation. You will be asked a number of specific questions concerning your official duties, and you must answer these questions to the best of your ability. **Failure to answer completely and truthfully may result in disciplinary action, including dismissal. Your answers and any information derived from them may be used against you in administrative proceedings. However, neither your answers nor any information derived from them may be used against you in criminal proceedings,** except if you knowingly and willfully make false statements.



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State, County, Local Government Employees

Garrity v. New Jersey, 385 U.S. 493 (1967)

Facts

- State investigation into “ticket fixing” by police.
- Police employees interviewed by state AG were advised before their interviews that:
 - Anything they said might be used in a criminal proceeding;
 - They had the privilege to refuse to answer if the answer would tend to be self-incriminatory; AND
 - Refusal to answer would be cause for removal from office.



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Garrity v. New Jersey, 385 U.S. 493 (1967)

- Each employee gave statements, which were used in subsequent prosecutions, resulting in convictions for conspiracy to obstruct justice.
- The employees appealed, arguing that their statements were coerced and violated the 5th and 14th Amendments.
- The New Jersey Supreme Court upheld the convictions, but



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Garrity v. New Jersey, 385 U.S. 493 (1967)

- The U.S. Supreme Court reversed.
- **Public employees cannot be compelled to incriminate themselves during investigatory interview by employer, then have those statements used against them in subsequent criminal proceedings.**
- “The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent....”



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Garrity Warnings

- Agencies use different kinds of *Garrity* warnings.
 - Some *Garrity* warnings inform subjects that they must answer questions or face disciplinary action, but their answers will not be used against them in any subsequent criminal proceedings.
 - Other *Garrity* warnings inform subjects that the interview is voluntary, that no disciplinary action will be taken if they do not answer, and that any statements may be used against them criminally.



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Garrity Warnings

- Be sure to discuss any warnings you use with your supervisor.
- You don't want to inadvertently immunize a target from criminal prosecution!
- The following is one example of a *Garrity* warning used by an agency in Florida.



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Garrity Warning Example

SUBJECT EMPLOYEE INTERVIEW: ADMINISTRATIVE

This is an interview of _____, who is the subject of this administrative investigation, which is being conducted at (LOCATION). The date is () and the time is ().

My name is (NAME and RANK) OR I am an Investigator with the Internal Affairs Unit, (NAME of AGENCY). I am in charge of this investigation and will be conducting this interview.

At this time I would like to inform you that this interview is being recorded.

Persons present during this interview are: _____.

As I have already stated, you are the subject of this investigation. The nature of the complaint is: (DESCRIBE ALLEGATIONS).

The complaining party in this investigation is _____.

Have you read and do you understand the nature of the complaint that has been filed against you?



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5th AMENDMENT Rights of Public Employees

- Public Employees protected against SELF-INCRIMINATION.
- COMPELLED statement CANNOT be used in criminal case. (IMMUNITY)
- COMPELLED statement CAN be used in administrative case or for perjury/false statement.
- Failure to provide compelled statement can lead to insubordination.



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Criminal vs. Administrative Statements

ADMINISTRATIVE

Statement may be Compelled.

Threat of Job Loss

Not Admissible in Criminal Case,
but Admissible in Administrative Case

No *Miranda* Warnings

Read Administrative Warnings (*i.e.*, statute,
contract, dept. manual).

CRIMINAL

No Threat of Job Loss

Statement must be Voluntary.

Admissible in Criminal Case or
Administrative Case

Read *Miranda*, if applicable (*i.e.*, custody,
statutory, contract, etc.).



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Administrative Statement



- Advise that statement is administrative.
- Advise work-related nature of investigation.
- Advise he/she must answer questions.
- Advise refusal can subject employee to dismissal.
- Advise responses or evidence derived from the statement cannot be used in subsequent criminal proceeding, EXCEPT FALSE STATEMENT or PERJURY.
- Read applicable rights (statutory, contract, dept. manual).



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Types of Immunity

- **Use Immunity** - prohibits the use of a witness's compelled testimony and any evidence derived from such statement in any manner in connection with criminal prosecution. The defendant can still be prosecuted, but the government cannot use the immunized testimony.
- **Transactional Immunity** - gives a witness immunity from prosecution regarding offenses for which the witness compelled testimony relates. (See ***New York Grand Jury requirements.***) The witness may not be prosecuted at all.



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Types of Immunity (cont.)

- **Garrity** only requires **use** immunity. However, state law may be more protective of defendants' rights here (e.g., *Carney* in MA requires transactional immunity).
- A prosecutor's formal grant of immunity is not required for the public employer to grant the immunity necessary to properly compel a statement.
 - But see Massachusetts and California Court of Appeals (2007).



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Criminal Statement Warnings



1. Advise investigation is criminal.
2. Advise the nature of the allegations.
3. Advise he can refuse to answer questions.
4. Advise he will not be punished for refusal.
5. Advise that any statements made can be used against him in criminal proceeding.
6. Read *Miranda*, if applicable.

PURPOSE is to prove VOLUNTARINESS!



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IMPLIED *GARRITY*

Situations arise during which it is unclear whether criminal violation may be involved.

Examples include:

- ❖ Incidents that initially seem administrative
- ❖ Audits (*i.e.*, possible theft)
- ❖ Use of Force
- ❖ In-Custody Deaths
- ❖ Officer Involved Shootings



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UNITED STATES vs. COMACHO, 739 F. Supp. 1504 (S.D. Fla. 1990)

- Police officers charged with civil rights violation after the death of a person in their custody.
- Officers claimed that statements they made were coerced and involuntary because they were made under threat of termination.
- They sought to suppress these statements under *Garrity*.



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UNITED STATES vs. COMACHO, 739 F. Supp. 1504 (S.D. Fla. 1990)

- The officers were not directly threatened with termination, but they were aware of an ordinance providing that city employees who invoked their 5th Amendment privilege would be fired.
- One officer told investigators that he was only making a statement because he feared losing his job. Investigators did NOT inform him that his job was not at risk.



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UNITED STATES vs. COMACHO, 739 F. Supp. 1504 (S.D. Fla. 1990)



- The judge suppressed some of the officers' statements based on *Garrity*.
- Legal standard:
 - Officers must subjectively believe that they are compelled to give a statement under threat of job loss; AND
 - This belief must be objectively reasonable at the time of the statement based on government's conduct (e.g., prosecutors, investigators, etc.).



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WITNESS EMPLOYEE (CRIMINAL INVESTIGATION)

- **GARRITY** does not apply to “true” witness (as opposed to target/defendant).
- No right to refuse to give statement.
- No right to counsel (5th or 6th Amendment).
- No right to union representation.
- **HOWEVER**, provide if no adverse impact to investigation.



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MEMOS or INCIDENT REPORTS

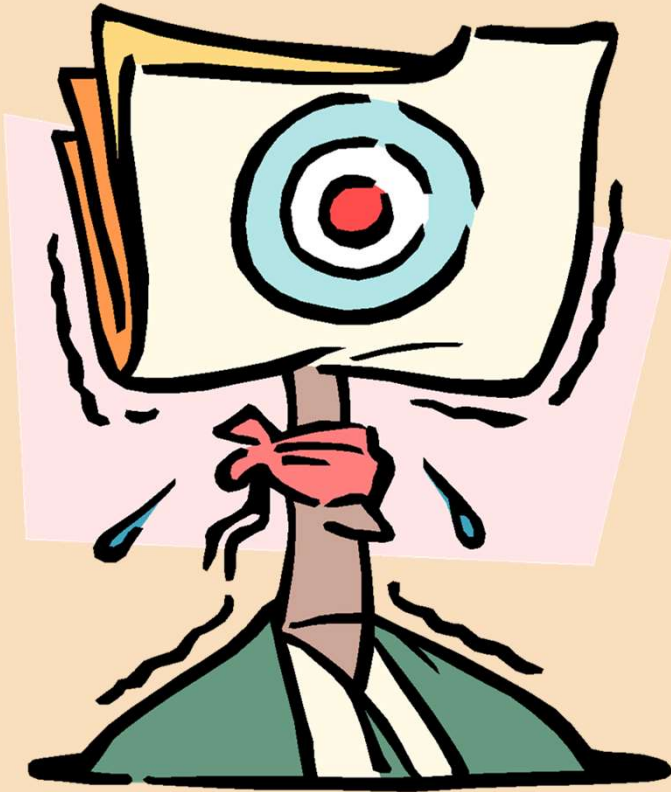
- **Mere rule requiring reports or cooperation with investigation is insufficient to create compelled atmosphere. HOWEVER, situation can create implied *Garrity*:**
- Direct supervisor compulsion
- Supervisor/management compulsion unknown by investigators
- Not completed as part of routine duty
- Supervisor is conducting “preliminary investigation”
- Completed after the subject employee objects
- Employee documents the order in the report/memo



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PROSECUTORS AND ADMINISTRATIVE INTERVIEWS



- In a subsequent criminal prosecution, the prosecution has **the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony.**



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Right to Representation



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Right to Representation

- No 6th Amendment right to legal counsel during criminal investigation (*Miranda* ?).
- No 6th Amendment right to legal counsel during administrative investigation.
- Right to legal counsel or representation may be derived from statute, contract, dept. manual, etc.
- Right to union representation in administrative investigations (*Weingarten*).



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NLRB v. WEINGARTEN, **420 U.S. 251 (1975)**

- **Right to Union Representation during administrative investigation when:**
 - **1. Employee believes that supervisor questioning could lead to disciplinary action.**
 - **2. Employee is represented by certified collective bargaining unit.**
 - **3. Employee initiates the request for a rep. HOWEVER, employee entitled to a UNION rep. not legal counsel. Employee cannot “hand pick” the rep.**
 - **4. Investigator not required to advise employee of right.**
 - **5. Employer should be “REASONABLE” in time allowed to obtain rep.**



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Federal IGs and *Weingarten*

- Does the right to union representation apply to federal employees in IG investigations?
- *NASA v. Federal Labor Relations Authority*, 527 U.S. 229 (1999).
 - NASA employee threatening co-workers.
 - NASA-OIG conducted investigation.
 - Target asked for union rep, but NASA-OIG refused to allow union rep at interview.



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Federal IGs and *Weingarten*

- U.S. Supreme Court analyzed the Inspector General Act (IGA).
- Concluded that federal OIG investigators work for and report to the head of their agency.
- This makes them a “representative” of the agency for *Weingarten* purposes.
- Right to union representation applied.



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Federal IGs and *Weingarten*

- What about criminal federal investigations?
 - See *U.S. Dep't of Justice v. Fed. Labor Relations Auth.*, 266 F.3d 1228 (D.C. Cir. 2001)
 - DOJ-OIG argued that criminal investigations should be treated differently than administrative investigations because the OIG is required to report criminal activity to the Attorney General.
 - Court rejected this argument.
 - Therefore, the right to union representation applies even in criminal cases



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Role of the Union Representative

- Advise employee of contractual rights.
- Suggest other potential witnesses.
- Ensure that employee's rights are honored.
- No right to answer for employee.
- No right to obstruct or interfere. NOT AN ADVERSARIAL PROCEEDING – IT'S ONLY THE INVESTIGATIVE STAGE.
- No right to question the employee as long opportunity is given to present favorable facts given.
- Policy Manuals may provide other employee rights.



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Right to Union Representation

- No representation by co-worker for non-union employee. (*See IBM Corp.*, 341 NLRB 148 (2004), *overruling Epilepsy Foundation of Northeast Ohio*, 331 NLRB 92 (2000), *enfd. in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied* 536 U.S. 904 (2002)).
- Public employees have no right to lie or make general denials during employer interviews.
 - *LaChance v. Erickson*, 522 U.S. 262 (1998).
 - Lying may lead to discipline if appropriate personnel rules exist.



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Evidence

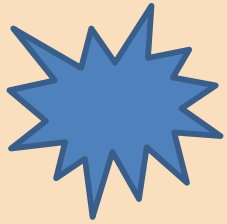
- EVIDENCE IS ALL THAT MATTERS!
- Doesn't matter what actually happened.
- Doesn't matter that the suspect is a really bad person.
- Only thing that matters is what we can prove at trial – and that is evidence.

- EVIDENCE MUST BE:
 - Clear
 - Consistent
 - Compelling
 - Complete

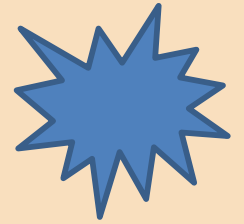


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Burden of Proof



■ Criminal Case

Requires proof beyond a reasonable doubt

• Administrative Case

- Generally requires proof by a preponderance of the evidence
- Some arbitrators or hearing officers may require competent and substantial evidence.
- Some arbitrators have required “clear and convincing” evidence in a dismissal case.



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Different Kinds of Evidence

- Direct Evidence
- Circumstantial Evidence
- Secondary Evidence
- Exculpatory Evidence



Direct Evidence

- Evidence which, if believed, proves the existence of the fact in issue without inference or presumption.
- Non-Exclusive Examples:
 - Eyewitness testimony.
 - Videotape.
 - Audiotape.
 - Confession by Defendant.



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Circumstantial Evidence

- Evidence which, if believed, establishes a fact that allows the fact finder to infer the existence of another fact in issue.
- Example: Someone carrying a dripping umbrella is circumstantial evidence that it is raining outside.
- Remember that most jurisdictions have an elevated standard of proof with regard to circumstantial evidence. In Louisiana, circumstantial evidence has to exclude “every reasonable hypothesis” of innocence.
- Can be very powerful evidence: See Scott Peterson and Timothy McVeigh cases.



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Secondary Evidence

- A reproduction of, or substitute for, an original document or item of proof that is offered to establish a particular issue in a legal action.



- “Best Evidence Rule”

Most codes of evidence allow secondary evidence to be admitted as long as there is no genuine question raised as to its authenticity. In other words, does the copy or substitute accurately portray the original or “primary” evidence?



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Evidence in the Post CSI World

■ Handwriting expert

- May not be necessary in all cases, but be prepared if handwriting is an issue to address with prosecutor – if there is alternative suspect, make sure you ask if it is his or her writing and avoid surprises at trial.

- Fingerprints
- DNA
- VIDEOS – They are everywhere!
- Smart phones & cell phones
- Email, TEXTS
- Social Media
- Document relevant evidence that you tried to obtain.
- Anticipate and seal off defenses!



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Relevance and Admissibility

- Is the evidence relevant, *i.e.*, does it have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence? Does it help you prove a fact that matters?
- Is the evidence admissible?
 - Legally and constitutionally obtained?
 - Barred by privilege?
 - Does probative value outweigh prejudice to defendant? Good evidence is extremely prejudicial to the defendant. The test is whether it relates to a key fact in the case.



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What is Exculpatory Evidence?

- Exculpatory evidence is **evidence that is favorable to the defendant in a criminal trial.**
- It exonerates or tends to exonerate the defendant of guilt.
- It includes evidence that bears on the credibility of witnesses.
- Opposite of inculpatory evidence, which tends to prove the defendant's guilt.



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BRADY v. MARYLAND, 373 U.S. 83 (1963)

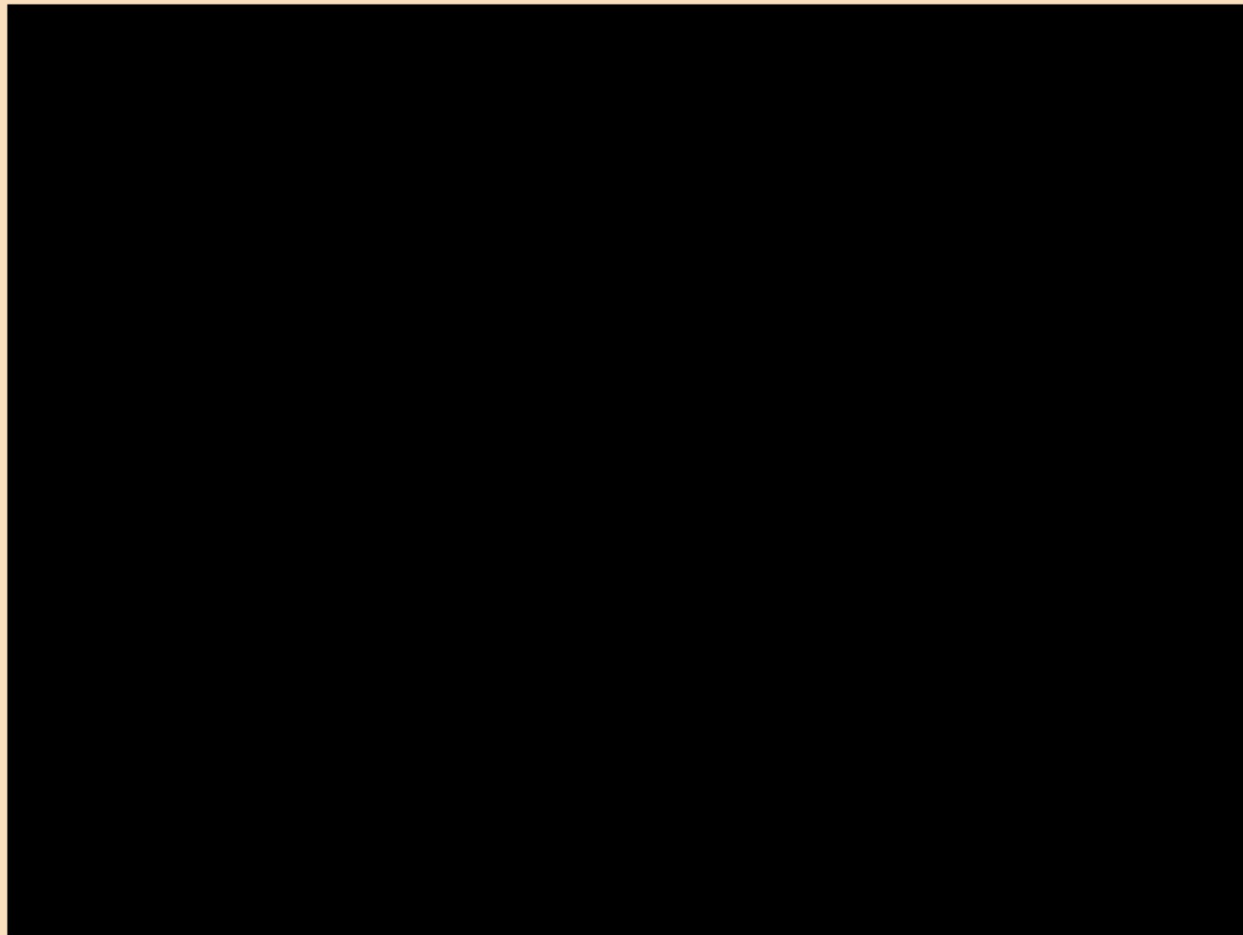
- Prosecutors have a DUTY to turn exculpatory evidence over to the defense, so make sure you include it in your investigation package. **They will be held responsible even if you don't give it to them.**
- Don't ignore exculpatory evidence even though you are convinced the target is guilty.
- You may want to tailor your investigation toward sealing off those avenues of escape.
- Some states, like Louisiana and Massachusetts, place an affirmative burden on prosecutors to seek out and disclose exculpatory evidence.
- "Rush to judgment" is one of the favorite catch phrases of defense lawyers. Be thorough and avoid this.



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BRADY v. MARYLAND, 373 U.S. 83 (1963)



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Think like a defense lawyer ...



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Think like a defense lawyer ...



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Think like a defense lawyer ...

■ What exculpatory evidence is there?

■ Main defenses?

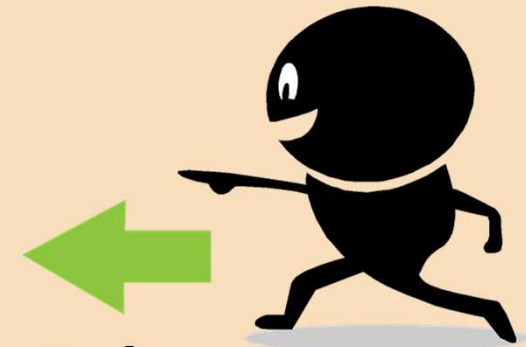
● SODDI (Some Other Dude Did It).

● IDK (I Didn't Know, a.k.a, The Three Stooges Defense).

● BRK (Bad Record Keeper).

● IACC (It's a Civil Case, *i.e.*, not Criminal).

● Following legal advice?



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Privileges

- Certain communications between a defendant in a criminal trial and another person are NOT ADMISSIBLE nor can they be subject to subpoena or deposition. Examples include:

- Attorney/Client



- Accountant/Client?



- Clergy



- Spousal



- Sexual Assault Victim/Counselor

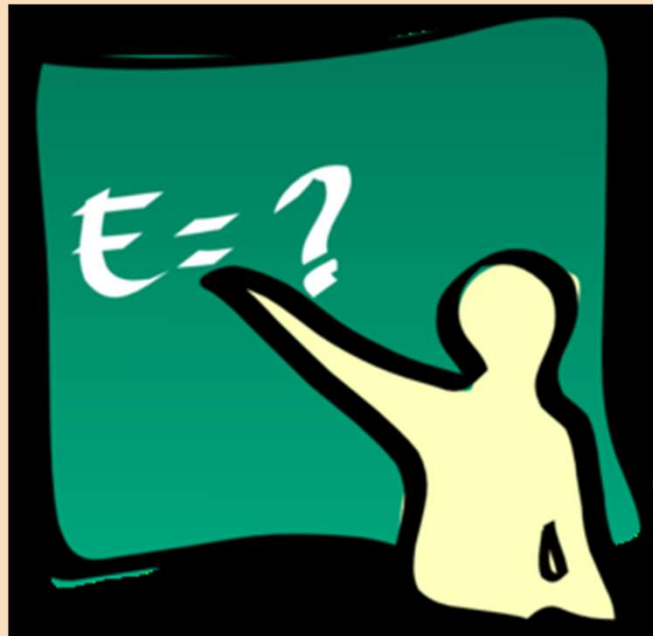
- Doctor/Patient



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PLEASE!!!



■ MAKE IT SIMPLE FOR THE PROSECUTOR!!!



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THINK GRAPHICALLY

PROVERBS WHICH HIGHLIGHT THE IMPORTANCE OF MULTIPLE LEVELS OF COMMUNICATION:

“Tell me, I forget. Show me, I remember. Involve me, I understand.”
(Ancient Chinese Proverb)

“Seeing is believing.”

“What is the use of a book,” thought Alice, “without pictures or conversations?” (Lewis Carroll, *Alice in Wonderland*)



Source: *Effective Use of Exhibits and Sensory Aids*, Lecture by Gregory F. Long, Chief Deputy District Attorney --
2nd Judicial District, Denver, Colorado.

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Questions & Answers



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THANK YOU!!

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