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Alexander L. Paskay Memorial Bankruptcy Seminar

Evidence: Empower, Excellence, Enjoy

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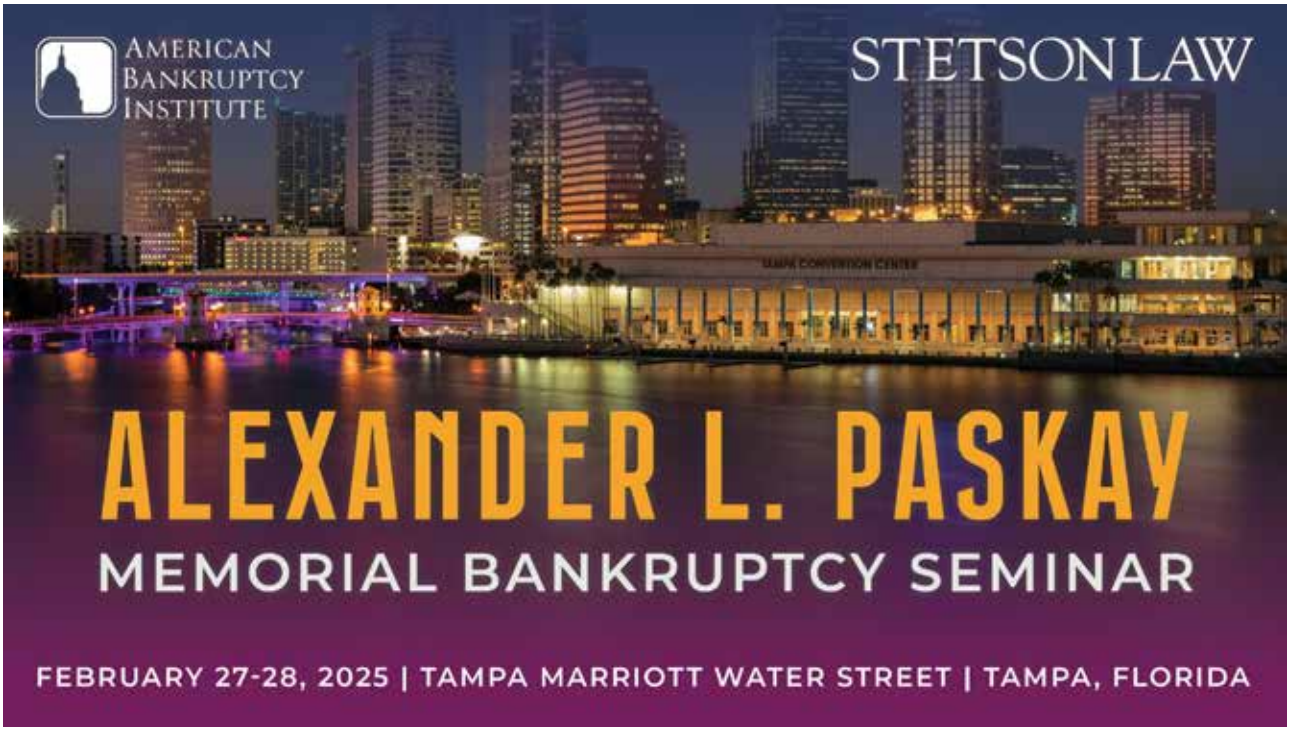
Clark Partington Hart Larry Bond & Stackhouse, P.A. | Pensacola

Hon. Roberta A. Colton
U.S. Bankruptcy Court (M.D. Fla.) | Tampa

Prof. Justin T. Sevier
Florida State University College of Law | Tallahassee

2025



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Presumptions & Burdens of Proof in Bankruptcy

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Presumptions

A **presumption** is generally defined as an assumption of fact that the law requires to be made from another fact or group of facts established in an action.

> **Fed. R. Evid. 301. Presumptions in Civil Cases Generally**
> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Presumptions

A **presumption** is generally defined as an assumption of fact that the law requires to be made from another fact or group of facts established in an action.

Fed. R. Evid. 302. Applying State Law to Presumptions in Civil Cases
In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Presumptions in the Code & Rules

§ 523(a)(2)(C) – Non-Dischargeability of Certain Consumer Debts & Cash Advances

§ 547(f) & § 553(c) – Insolvency within 90 days prior to filing

§ 707(b)(2) – Existence of Abuse of Chapter 7 if Debtor Fails Means Test

§ 362(c)(3)(C) – Later Case Not Filed in Good Faith

§ 362(c)(4)(C) – Most Recent Case Not Filed in Good Faith

Fed. R. Bankr. P. 3001(f) – Prima Facie Validity of Properly filed Claim

Conclusive Presumptions in the Code & Rules

A **conclusive presumption** is a substantive rule of law.

§ 1126(f) – Unimpaired Classes Accept the Plan & No Solicitation is Required

Fed. R. Bankr. P. 2002(g)(4) – Agreed Upon Address for Notice is Proper

Fed. R. Bankr. P. 5003(e) – Governmental Unit's Address in Register is Proper

Burden of Proof

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The burden of production:
to come forward with evidence to support a claim

The burden of persuasion:
to convince the trier of fact as to the truth of a proposition

Burdens of Proof in the Code & Rules

On a motion for relief from the stay under § 362(d) or (e) . . .

§ 362(g)(1) – movant has burden on issue of debtor's equity in property

§ 362(g)(2) – opposing party has the burden on all other issues

At any hearing under § 363 . . .

§ 363(p)(1) – the trustee has the burden on issue of adequate protection

§ 363(p)(2) – an entity asserting an interest in property has the burden on the validity, priority, or extent of that interest

Burdens of Proof in the Code & Rules

§ 364(d)(2) – At any hearing under § 364(d) to obtain a priming lien, the trustee has the burden on issue of adequate protection.

§ 502(k)(2) – On motion by debtor under § 502(k)(1) to reduce a claim of an unsecured creditor who unreasonably refused a prepetition alternative repayment schedule, debtor has the burden to show–by clear and convincing evidence:

"(A) the creditor unreasonably refused to consider the debtor's proposal; and
(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period [prior to the filing of the petition]."

Burdens of Proof in the Code & Rules

§ 547(g) – In an action pursuant to § 547 to avoid a preference, the trustee has the burden of proving the avoidability of the alleged preferential transfer under § 547(b), and the creditor or party in interest against whom the action is brought has the burden of proving the non-avoidability of the alleged preferential transfer under § 547(c).

§ 1129(d) – When a governmental unit objects to confirmation of a Chapter 11 plan alleging that "the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933[,]" the governmental unit has the burden on the issue of avoidance.

Burdens of Proof in the Code & Rules

§ 562(c) – When there is a dispute as to the timing of the measurement of damages in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements, a party that invokes § 562(b) by asserting that there were no commercially reasonable determinants of value as of the date or dates of either the trustee's rejection or the other party's liquidation, termination, or acceleration has the burden on that issue should the other party object to the invocation of § 562(b).

Burdens of Proof in the Code & Rules

Fed. R. Bankr. P. 4003(c) – In any hearing on an objection to a debtor's claim of exemption, the objecting party has the burden to show the challenged exemptions are not "properly claimed."

Fed. R. Bankr. P. 4005 – At a trial on a complaint objecting to a discharge, the plaintiff has the burden to prove the objection.

Fed. R. Bankr. P. 6001 – Any party claiming the validity of a post-petition transfer subject to avoidance under § 549 has the burden on that issue.

Summaries to Prove Content

Fed. R. Evid. 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Dealing with "Fake Evidence"

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Fact or Fake? – *Which Image is Real?*

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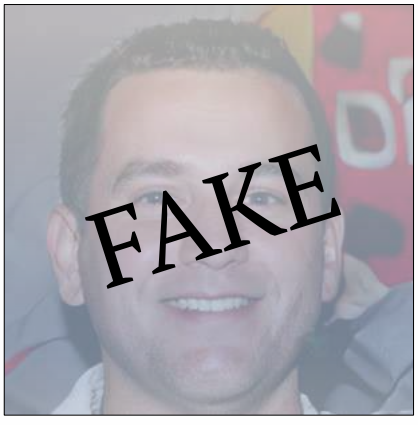
Fact or Fake? – *Which Image is Real?*



https://whichfaceisreal.com/results.php?r=0&p=0&i1=image-2019-02-17_231116.jpeg&i2=22881.jpeg

Fact or Fake?

Want to Keep Playing? Visit:

- https://britannicaeducation.com/blog/quiz-real-or-ai/
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Privileges

Privileges in Federal Court

Evidentiary privileges in federal courts are governed by **Federal Rule of Evidence 501**, which provides:

> 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.

Important Privileges in Bankruptcy

- Attorney-Client Privilege
- Common Interest Doctrine
- Work Product Doctrine (Fed. R. Civ. P. 26(b)(3))
- Waiver
  - Fed. R. Evid. 502
  - Ch 7 Trustee / Business Case - *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985)

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Important Privileges in Bankruptcy

- Accountant-Client (available only in an adversary based on state law)
- Marital Privileges
  - *Marital Communications*
  - *Spousal Testimonial*
- Fifth Amendment/Self-Incrimination
- Mediation
  - Florida's Mediation Confidentiality and Privilege Act ("FMCPA"): Fla. Stat. §§ 44.401-44.406
  - FMCPA vs. Fed. R. Evid. 408

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Valuing Assets on the Cheap

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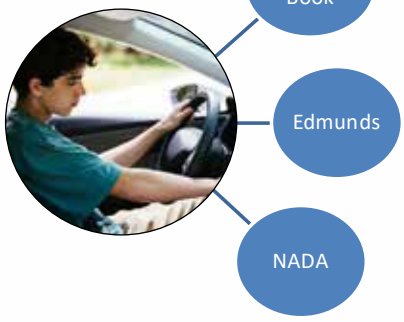
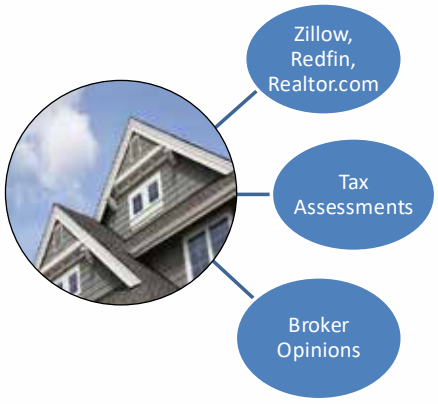
Valuing Cars & Real Estate





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Testimony of the Owner / Debtor

- Business Enterprise Value: Owner Testimony?
  - *See Taxinet Corp. v. Leon*, 114 F.4th 1212, 1225–26 (11 Cir. 2024).
- Statements of the Debtor
  - *Bankruptcy Schedules*
  - *§ 341 Meeting*
  - *Fed. R. Bankr. P. 2004 Examinations*

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Thank you!

Enjoy the Seminar!

"Evidence: Empower, Excellence, Enjoy"

February 27, 2025 – 8:45 a.m. (90 minutes)

Presumptions & Burdens of Proof in Bankruptcy

Deana Z. Alegi, Esq.

I. Presumptions

A presumption is generally defined as an assumption of fact that the law requires to be made from another fact or group of facts established in an action.[1] Most courts hold that a presumption is rebutted and has no further effect once evidence is introduced sufficient to raise a substantial doubt in the mind of the trier of fact as to the existence of the presumed fact.[2] In other words, "the presumption simply disappears from the case," however "the underlying evidence remains in the case."[3]

> **Fed. R. Evid. 301. Presumptions in Civil Cases Generally**
>
> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

> **Fed. R. Evid. 302. Applying State Law to Presumptions in Civil Cases**
>
> In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Outlined in the chart below are the presumptions that generally arise in civil cases, the Bankruptcy Code, and the Bankruptcy Rules.[4]

§ 523(a)(2)(C) - Dischargeability of Consumer Debt	"[C]onsumer debts owed to a single creditor and aggregating more than $675 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable;" and "cash advances aggregating more than $950 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable . . . ." 11 U.S.C. § 523(a)(2)(C).

[1] Hon. Barry Russel, *Bankruptcy Evidence Manual* § 301:1 (2022-2023 ed.).
[2] Alane A. Becket, Edward J. Coleman, III, Cynthia A. Norton & James P. Smith, *Evidence Issues in Bankruptcy: Beyond the Federal Rules*, SOUTHEASTERN BANKRUPTCY LAW INSTITUTE, 13 (March 21-23, 2019). https://www.sbli-inc.org/archive/2019/documents/I_Object_Evidence_in_Bankruptcy_Court.pdf (citing *In re Ran*, 390 B.R. 257, 300-01 (Bankr. S.D. Tex. 2008), aff'd, 406 B.R. 277 (S.D. Tex. 2009)).
[3] *Id.*
[4] This chart encompasses the presumptions listed in the Bankruptcy Code and Rules as listed in Judge Barry Russell's *Bankruptcy Evidence Manual* and discussed in *Evidence Issues in Bankruptcy: Beyond the Federal Rules.*

§ 547(f) - Preferences and § 553(c) - Setoff	"[T]he debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." 11 U.S.C. § 547(f) & § 553(c).
§ 707(b)(2) - Presumption of Abuse	Under § 707(b)(2), "[a]fter notice and a hearing, the court … may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts … if it finds that the granting of relief would be an abuse of the provision of this chapter." 11 U.S.C. § 707(b)(1). "In considering … whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists" if the debtor fails the means test. 11 U.S.C. § 707(b)(2).
§ 362(c)(3)(C) - Case Presumptively Filed Not in Good Faith	Where the debtor filed a previous case under Chapter 7, 11, or 13 that was dismissed within the preceding one-year period, a party in interest may file a motion to extend the automatic stay based upon a showing that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(3)(B). Under certain circumstances, a case is presumptively filed not in good faith, although this presumption may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C).
§ 362(c)(4)(D) - Case Presumptively Filed Not in Good Faith	Where the debtor filed 2 or more cases under Chapter 7, 11, or 13 that were dismissed within the preceding one-year period, a party in interest may file a motion to impose the automatic stay based upon a showing that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B). Under certain circumstances, a case is presumptively filed not in good faith, although this presumption may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(4)(D).
Fed. R. Bank. P. 3001(f)	Under Rule 3001(f), a properly filed proof of claim is prima facie evidence of the validity of the claim.

The following are conclusive presumptions. A conclusive presumption is a substantive rule of law

§ 1126(f)	Notwithstanding any other provision of this section, a class that is not impaired under a plan and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
Fed. R. Bank. P. 2002(g)(4)	An entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice.
Fed. R. Bank. P. 5003(e)	The mailing address in the register is conclusively presumed to be a proper address for a governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

II. Burdens of Proof

Burdens of proof become relevant as factual disputes arise in bankruptcy cases. There are two types of burdens of proof: the burden of production and the burden of persuasion.

The burden of production is a lesser standard than the burden of persuasion, and it refers to "a party's obligation to come forward with evidence to support its claim."[5] It "asks simply whether sufficient evidence has been put forth to sustain a peremptory challenge [i.e. a motion to dismiss or motion for directed verdict] on any issue material to the disposition of the case."[6] On the other hand, the burden of persuasion refers to a party's obligation to "convinc[e] the trier of-fact as to the overall truth of the proposition…."[7] If the evidence is in equilibrium, then the party that bears the burden of proof must lose.[8]

Listed in the chart below are burdens of proof that appear within the Bankruptcy Code and Rules.[9]

§ 362(g)(1) - Automatic stay	"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section, the party requesting such relief has the burden of proof on the issue of the debtor's equity in property."
§ 362(g)(2) - Automatic stay	"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section, the party opposing such relief has the burden of proof on all other issues."
§ 363(p)(1) - Use, sale, or lease of property	"In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection."
§ 363(p)(2) - Use, sale, or lease of property	"In any hearing under this section, the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest."
§ 364(d)(2) - Obtaining credit	"In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection."
§ 502(k)(2) - Allowance of claims or interests	"The debtor shall have the burden of proving, by clear and convincing evidence, that: (A) the creditor unreasonably refused to consider the debtor's proposal; and (B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i)."

[5] Becket et al., *supra* note 2, at 4 (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)).
[6] Becket et al., *supra* note 2, at 4 (*citing Baker v. Reed* (*In re Reed*), 310 B.R. 363, 369 (Bankr. N.D. Ohio 2004).
[7] Becket et al., *supra* note 2, at 4 (citing *In re Reed*, 310 B.R. at 369).
[8] Becket et al., *supra* note 2, at 5 (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. at 272).
[9] This chart encompasses the burdens of proof listed in the Bankruptcy Code and Rules as listed in Judge Barry Russell's *Bankruptcy Evidence Manual*, and discussed in *Evidence Issues in Bankruptcy: Beyond the Federal Rules.*

§ 547(g) - Preferences	"For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section." Sections 562(c)(1) and (c)(2). [provisions regarding swap agreements reference a "burden of proving that there were no commercially reasonable determinants of value"] Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements.
§ 562(c)(1) - Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements	For the purposes of subsection (b), if damages are not measured as of the date or dates of rejection, liquidation, termination, or acceleration, and the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant or the trustee objects to the timing of the measurement of damages—(1) the trustee, in the case of an objection by a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant; has the burden of proving that there were no commercially reasonable determinants of value as of such date or dates.
§ 562(c)(1) - Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements	For the purposes of subsection (b), if damages are not measured as of the date or dates of rejection, liquidation, termination, or acceleration, and the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant or the trustee objects to the timing of the measurement of damages—**(2)** the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant, in the case of an objection by the trustee, has the burden of proving that there were no commercially reasonable determinants of value as of such date or dates.
§ 1129(d) - Confirmation of plan	"Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 [15 U.S.C.A. § 77e]. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance."
Rule 4003(c) - Exemptions	"In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections."
Rule 4005 - Burden of Proof in Objecting to Discharge	At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection."
Rule 6001 - Burden of Proof as to Validity of Postpetition Transfer	"Any entity asserting the validity of a transfer under ' 549 of the Code shall have the burden of proof."

Digital Dilemmas: Navigating Authentication
Challenges of Electronic Evidence in a "Deepfake" World

By Deana Z. Alegi, Esq.[1]

I. Proposed Amendment to Federal Rule of Evidence 901

Two amendments to Rule 901 were recently taken under consideration by the Advisory Committee on Evidence for the Federal Rules of Evidence. The Grimm-Grossman Proposal, so named for its co-authors, former Judge Paul W. Grimm and Professor Maura Grossman, sought to amend the rules on authentication to address the challenges arising from evidence generated from artificial intelligence including so-called "deepfakes."[2]

The first proposed amendment would change the language in 901(b)(9), replacing "accurate" with "valid and reliable" and providing an additional requirement when the proponent "concedes" the item was created by AI. The proposed rule would have read:

> (9) **Evidence about a Process or System**. For an item generated by a process or system:
>
> (A) evidence describing it and showing that it produces a valid and reliable result; and
> (B) if the proponent concedes that the item was generated by artificial intelligence, additional evidence that:
> (i) describes the software or program that was used; and
> (ii) shows that it produced valid and reliable results in this instance.

The second proposed amendment would add a new subsection to the rule, Rule 901(c), to address deepfakes. The proposed text of Rule 901(c) was as follows:

> **Potentially Fabricated or Altered Electronic Evidence**. If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

[1] Temporary Law Clerk, U.S. Bankruptcy Court for the Middle District of Florida. Admitted to the Florida Bar.; J.D., Stetson University College of Law.
[2] Advisory Committee on Evidence Rules, Agenda for Committee Meeting, April 19, 2024, https://www.uscourts.gov/sites/default/files/2024-04_agenda_book_for_evidence_rules_meeting_final.pdf.

However, the amendments were rejected by the Committee, which expressed:

> [I]t would seem that resolving the argument about the necessity of the rule should probably be delayed until courts actually start dealing on a regular basis with deepfakes. Only then can it be determined how necessary a rule amendment really is. Moreover, the possible prevalence of deepfakes might be countered in court by the use of watermarks and hash fingerprints that will assure authenticity.[3]

Following the rejection, a revised proposal to the rules was submitted.[4] Within the revision, the proposed amendment uses the word "acknowledges" rather than "concedes" in Rule 901(b)(9)(B). Additionally, the proposed Rule 901(c) now reads as follows:

> If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court ~~that it is more likely than not either fabricated, or altered~~ that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, using artificial intelligence, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

II. Video and Social Media Evidence

Various courts have raised concerns regarding the increased availability of artificial intelligence and its potential impact on video or social media evidence in the courtroom. However, the Supreme Court of Maryland recently concluded that at this time, such evidence can be authenticated through existing methods. Specifically, the court said:

> Video footage, like social media evidence, is susceptible to alteration, and the increased availability of new technology, particularly the advent of image-generating artificial intelligence, may present unique challenges in authenticating videos and photographs. As we have noted, photographic manipulation, alterations and fabrications are nothing new, nor are such changes unique to digital imaging, although it might be easier in this digital age. Nonetheless, at this time, video footage can be authenticated through vigilant application of existing methods for authentication of evidence. Like other evidence, video footage can be authenticated by circumstantial evidence sufficient for a reasonable juror to

[3] Advisory Committee on Evidence Rules, *Reporter's Comment on the Grimm/Grossman Proposal*, 21 (Apr. 19, 2024), https://www.uscourts.gov/sites/default/files/2024-04_agenda_book_for_evidence_rules_meeting_final_updated_5-8-2024.pdf.

[4] Paul W. Grimm & Maura R. Grossman, *REVISED Proposed Modification of Current Fed. R. Evid. 901(b)(9) for AI Evidence and Proposed New Fed. R. Evid. 901(c) for Alleged "Deepfake" Evidence*, https://e-discoveryteam.com/wp-content/uploads/2024/09/DeepFake-AI-FINAL-091024.pdf.

> find by a preponderance of the evidence that the video is what it purports to be. As with social media evidence, the proponent of the evidence need not rule out all possibilities that are inconsistent with authenticity, or prove beyond any doubt that the evidence is what it purports to be. What matters is that there is sufficient evidence for a reasonable juror to find that more likely than not the video footage is what it is claimed to be.[5]

The Supreme Court of Vermont recently held that the authentication of social media accounts should be assessed under the same standard as any other evidence, *i.e.*, a threshold determination of whether sufficient evidence exists to support a finding that the matter in question is what its proponent claims it to be.[6] The Supreme Court of New Mexico followed suit, finding that "traditional" authentication standards should apply.[7] The New Mexico court explained that the authentication challenges that arise from the use of social media evidence are not so different from the challenges courts have previously faced when authenticating conventional writings.[8]

The majority view seems to be that the traditional authentication standards are sufficient for social media evidence. However, the Maryland court of appeals previously had applied a heightened scrutiny to social media evidence because of the increased possibility for manipulation by other than the true user or poster.[9] The court suggested that the party proffering the evidence of a profile from social media would be well advised to (1) ask the purported creator if she indeed created the profile and also if she added the posting in question; (2) search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question; or (3) obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.[10]

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[5] *Mooney v. State*, 487 Md. 701, 734 (Md. 2024) (internal citations omitted) (holding that a video from a camera mounted on an exterior wall of residence near site of shooting, which depicted shooting, was properly authenticated as there was sufficient evidence for a reasonable juror to find that the video footage was what it claimed to be).
[6] *State v. Allcock*, 212 Vt. 526 (Vt. 2020).
[7] *State v. Jesenya O.*, 514 P.3d 445 (N.M. 2022).
[8] *Id.* at 449.
[9] *See Griffin v. State*, 419 Md. 343, 363 (Md. 2011).
[10] *Id.*

III. Text Messages and Emails

The U.S. District Court for the Eastern District of Washington encountered issues with fake text messages and emails that were attached to an affidavit.[11] And while it did not seem that artificial intelligence was used to produce the fakes, this case offers a great example of how easy it can be to alter such evidence. The court looked at a screenshot of a text message that was cropped to exclude the top and bottom of the message details, and a fake email chain that consisted of emails nearly a year apart with different recipients that were all strung together. The text message was cropped in such a manner to mischaracterize the sender of the message, and the attorney claimed that the emails were strung together because he was working late and did not have the time to organize them correctly. In response to the fake evidence, the court struck the offending affidavit and ultimately dismissed the action due the attorney's behavior.[12]

IV. Deepfake Evidentiary Issues

In a recent article, Judge Herbert B. Dixon Jr. discussed a real-world event that made national news when an audio recording went viral with the voice of a high school principal making racist and antisemitic comments about students and faculty at the school.[13] It turned out that the audio recording was manipulated with AI, and this was only discovered due to the work of two forensic analysts that the police consulted. Judge Dixon discussed that such evidence could be introduced in a courtroom, and it is very possible that neither party will have an expert witness to testify whether the evidence is real or fake.[14] Further, if a judge has sworn testimony from both sides, it is likely that such evidence would be admitted and the decision of whether it is real of fake would be left for the fact finder based on the credibility of the witness.

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[11] *Gergawy v. United States Bakery, Inc*., 2022 WL 395308 (E.D. Wash. 2022).
[12] *Id.*
[13] Judge Herbert B. Dixon Jr., *The "Deepfake Defense": An Evidentiary Conundrum*, AMERICAN BAR ASSOCIATION (Dec. 26, 2024, 1:00 PM), https://www.americanbar.org/groups/judicial/publications/judges_journal/2024/spring/deepfake-defense-evidentiary-conundrum/.
[14] *Id.*

As previously discussed, there have been proposed rules to address the evidentiary problems created by deepfakes. In addition to the Grimm/Grossman proposal, Judge Dixon discussed two other proposals by Professor Rebecca Delfino and John P. LaMonaga. Professor Delfino proposed that a new Federal Rule of Evidence should be created to expand the court's gatekeeping function by assigning the responsibility of deciding authenticity issues solely to the judge. LaMonaga proposed a higher standard to prove authenticity than merely a witness with knowledge testifying that the exhibit fairly and accurately portrays the events or scene at issue. LaMonaga explained that traditional means of authentication will not work with deepfakes because a witness cannot reliably testify that the video accurately represents reality.

Judge Dixon concluded that in the absence of a uniform approach to the admission of possibly fake audio or video evidence, the default position will likely be to let the jury or factfinder decide, which may not provide the correct result given the complexity of artificial intelligence.[15]

In a short blog, Judge Scott Schlegel discussed two hypothetical scenarios that illustrate the dangers of deepfakes in legal proceedings.[16] The first scenario involves a fabricated voicemail in a divorce and child custody case. In this scenario, a woman provides her attorney with a fake voicemail that proves her husband is abusive, and her attorney immediately files the necessary proceedings after hearing the voicemail. Judge Schlegel used this scenario to highlight how easily accessible such technology is and how it could be weaponized in personal disputes. With our current evidentiary process, the voicemail would be played in court and the wife would be asked to identify the voice and confirm whether the voicemail has been modified, and the court would likely admit the evidence. The second scenario involves printed photos of the scene of a car accident that were edited on a smartphone and provided to an attorney. Judge Schlegel explains how easily clients can manipulate digital evidence, and the inadequacy of relying solely on printed photographs without looking at the metadata of a photo. While not mentioned in the blog post, the ease of manipulating digital evidence has only increased as users of the newer generations of iPhones may have

[15] *Id.*
[16] Judge Scott Schlegel, *Deepfakes in Court: Real-World Scenarios and Evidentiary Challenges* (Dec. 26, 2024, 2:00 PM), https://judgeschlegel.com/blog/deepfakes-in-court-real-world-scenarios-and-evidentiary-challenges.

access to a newly introduced "Clean Up" feature powered by Apple Intelligence within their photos app that allows them to easily remove unwanted objects from a photograph within minutes.[17] Current evidentiary practices rely heavily on the testimony of the person providing the evidence, which is insufficient in the growing age of deepfakes and digital manipulation.[18] Based on the growing gap between our evidentiary practices and technological reality, Judge Schlegel proposes a shift from relying solely on human testimony to incorporating technological solutions and expert analysis in the authentication process.[19]

[17] *Requirements to use Clean Up in Photos*, APPLE (Oct. 28, 2024), https://support.apple.com/en-us/121429.
[18] Schlegel, *supra* note 14.
[19] *Id.*

Privileges Chart

Florida Law v. Federal Common Law / Federal Rules

Preliminary Note on the application of privileges in Federal Courts:

Evidentiary privileges in federal courts are governed by Federal Rule of Evidence 501, which provides:

> 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.

1) Attorney-Client Privilege

Florida Law	Federal Common Law	Federal Rules
Fla. Stat. § 90.502 & § 90.503 For the attorney-client privilege to apply in Florida, a communication between the lawyer and client must have been made during the actual rendition of legal services to the client and be "confidential," meaning "it is not intended to be disclosed to third persons" except as provided in the Evidence Code. "The privilege protects only communications to and from a lawyer; it does not protect facts known by the client independent of any communication with the lawyer, even if the client later tells the fact to the lawyer[.]" *Coffey-Garcia v. South Miami Hosp., Inc.*, 194 So.3d 533, 537 (2016). This means that "[a]lthough the communication between the attorney and client is privileged, the underlying	"The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). Exceptions: 1. Crime Fraud Exception: The lawyer client privilege does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime. *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987). 2. Co-client Exception: "[W]here a lawyer represents two clients in the same case, communications between the lawyer and one client are not confidential as to the	Fed. R. Evid. 502 - The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection. (a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and

Attorney-Client Privilege (continued)

Florida Law	Federal Common Law	Federal Rules
facts are discoverable." *Carnival Corp. v. Romero*, 710 So.2d 690, 694 (Fla. 5th DCA 1998). Exceptions: 1. Crime Fraud Exception - §90.502(4)(a): When a client seeks or obtains a lawyer to aid in the commission of a crime or in the planning of future criminal activity, the privilege does not exist. 2. Testamentary: The privilege is not recognized pursuant to section 90.502(4)(b) when the communication between a client and an attorney is relevant to an issue between two or more parties who claim through the same deceased client. 3. Breach of duty: When an issue relates to a breach of the duties the lawyer owes his or her client, § 90.502(4)(c) recognizes that the privilege will not apply. 4. Lawyer as Attesting Witness: § 90.502(4)(d) provides that when a lawyer acts as a witness to a legal document for a client, the attorney-client privilege is not applicable if an issue arises concerning the intention or competence of the client who executed the document.	other client", and the "exception applies regardless of whether both parties are present when the communication is made." *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (Bankr. M.D. Fla. 2013). Waiver in Bankruptcy: In *Commodity Futures Trading Comm'n v. Weintraub*, the United States Supreme Court held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prepetition communications. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985).	(3) they ought in fairness to be considered together. (b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B). (c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred.

Chart compiled by Deana Z. Alegi, Esq.

2) Common Interest Doctrine

Florida Law	Federal Common Law	Federal Rules
Exception to the Attorney-Client Privilege under Fla. Stat. § 90.502. Section 90.502(4)(e) provides that if a lawyer acts as an attorney for two or more persons who have a common interest, neither of those clients may assert the privilege relating to communications with the lawyer in a subsequent action in which the clients are adverse parties. Waiver: When a member of the common-interest group discloses the privileged information to a nonmember, a waiver of the privilege occurs. *AG Beaumont I, LLC v. Wells Fargo Bank, N.A.*, 160 So. 3d 510 (Fla. 2d DCA 2015); *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437 (Fla. 3d DCA 1987).	The party asserting that communications fall within the common interest privilege, as an aspect of the attorney-client and work product privileges, must show (1) an agreement, though not necessarily in writing, to cooperate through a common enterprise towards an identical legal strategy; (2) the communications were given in confidence, and the client reasonably understood this; (3) the joint strategy was more than merely the impression of one side. *Westchester Surplus Lines Ins. Co. v. Portofino Masters Homeowners Assoc., Inc.*, 347 F.R.D. 228 (N.D. Fla. 2024).	

Chart compiled by Deana Z. Alegi, Esq.

3) Work Product Doctrine

Florida Law	Federal Common Law	Federal Rules
The work product doctrine protects documents and papers of an attorney or a party prepared in anticipation of litigation regardless of whether they pertain to confidential conversations between attorney and client. *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994). Florida Rule of Civil Procedure 1.280(b)(4) provides a limited privilege for fact work product (factual information pertaining to the client's case and prepared or gathered in connection therewith), if the party, the party's representative or attorney prepares or directs the preparation of the documents or materials in preparation for litigation or for trial. "Two types of work product exist. Fact work product protects information related to the case that is gathered in anticipation of litigation. Opinion work product primarily safeguards "mental impressions, conclusions, opinions, and theories." A party seeking production of work product materials must first show it needs them for the preparation of its case, and that it cannot otherwise obtain them without undue hardship. Even then, trial courts "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Walt Disney Parks & Resorts U.S., Inc. v. Alesi*, 351 So. 3d 642 (Fla. 5th DCA 2022) (internal citations omitted).	The work product doctrine is intended to "shelter the mental process of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *U.S. v. Nobles*, 422 U.S. 225, 238 (1975). The doctrine protects items such as "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal belief." *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S. Ct. 385, 393, 91 L. Ed. 451, 1947 A.M.C 1 (1947). The burden rests on the party asserting the work product doctrine to prove that the documents were prepared in anticipation of litigation. *In re Mongelluzzi*, 566 B.R. 261 (Bankr. M.D. Fla. 2017). The burden then shifts to the party seeking discovery to show just cause to invade the adversary's work product. *Id.*	Federal Rule of Civil Procedure 26(b)(3) codifies the work product doctrine.

Chart compiled by Deana Z. Alegi, Esq.

4) Marital Communication Privilege

Florida Law	Federal Common Law
Pursuant to Fla. Stat. § 90.504, a spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were married. The privilege is not confined to mere statements by one spouse to the other, but embraces all knowledge on the part of either, obtained by reason of the marriage relation, and that, but for the confidence growing out of it, would not have been known. *Jackson v. State*, 603 So. 2d 670 (Fla. 4th DCA 1992). Duration: The privilege survives the end of the marriage. *Pagan v. State*, 29 So. 3d 938 (Fla. 2009). Waiver: The privilege may be waived by a spouse's failure to timely object to testimony containing privileged communication. *Woodel v. State*, 804 So. 2d 316 (Fla. 2001). Waiver also occurs where the holder of the privilege consents to the disclosure of protected communications. *Id.*	There are two recognized marital privileges. *United States v. Singleton*, 260 F.3d 1295 (11th Cir. 2001). (a) Marital Communications Privilege: The marital communication privilege "can be asserted by a defendant to prevent his or her spouse from testifying concerning the [marital] communication and to exclude related evidence." *Singleton*, 260 F.3d at 1298 n.2. (b) Spousal Testimonial Privilege: The spousal testimonial privilege, which is vested solely in the witness-spouse, provides him or her "a privilege to refuse to testify adversely" against the defendant-spouse; "the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel v. United States*, 445 U.S. 40, 53 (1980). Exceptions: In a civil proceeding, ordinary business communications do not fall within the common law marital privilege because they are not intended to be confidential. *Veracities PBC v. Strand*, 602 F.Supp.3D 1354, 1359 (2022); *In re Southern Air Transport, Inc.*, 255 B.R. 706 (2000); *see also Hanger Orthopedic Group, Inc. v. McMurray*, 181 F.R.D. 525 (1998) (holding that communications between a husband and wife, who was incorporator, initial director, present director, majority shareholder, and president of corporation, regarding formation of corporation were not protected by Florida's marital privilege). Bankruptcy: While bankruptcy courts have recognized the marital privilege, the privilege is restricted to use in criminal cases, leaving courts free to exercise discretion under § 105. *In re Davis*, 109 B.R. 442, 444 (Bankr. D. Kan. 1990). The marital privilege may not be raised in a civil proceeding to protect against the "mere prospect of potential criminal liability." *In re Shur*, 225 B.R. 295, 300 (1998). Further, there is a presumption that a debtor's spouse may not avoid discovery in a bankruptcy matter by relying on his or her non-party status. *In re Shur* at 298; *Cohen v. Doyaga*, 2001 WL 257828, *3 (E.D. N.Y. 2001). Applicable Privilege in Federal Court: Where a case contains a pendent state law claim and the privileged material at issue is only relevant to that state law claim, federal courts apply the state privilege law. *In re Carmean*, 153 B.R. 985 (Bankr. S.D. Ohio 1993).

Chart compiled by Deana Z. Alegi, Esq.

5) Mediation Privilege

Florida Law	Federal Common Law	Federal Rules
Florida has adopted the Mediation Confidentiality and Privilege Act (MCPA). Fla. Stat. §§ 44.401 to 44.406. Pursuant to Florida Statute § 44.405, all mediation communications shall be confidential, and participants shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel.	The mediation privilege operates to protect only those communications made to the mediator, between the parties during the mediation, or in preparation for the mediation; the mediation privilege does not apply to shelter from disclosure documents prepared prior to the mediation, merely because those documents were presented to the mediator during the course of the mediation. *In re RDM Sports Group, Inc.*, 277 B.R. 415 (Bankr. N.D. Ga. 2002).	

6) Accountant-Client Privilege

Florida Law	Federal Common Law	Federal Rules
Fla. Stat. § 90.5055 protects the client's right to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purposes of rendering the accounting advice. Waiver: The privilege can be waived by a party if it injects into a case an issue that requires an examination of otherwise protected communications. *See First S. Baptist Church of Mandarin, Fla., Inc. v. First Nat'l Bank of Amarillo*, 610 So.2d 452 (Fla. 1st DCA 1992).	The Supreme Court has held that the accountant-client privilege does not exist under federal law. *See Couch v. U.S.*, 409 U.S. 322, 335 (1973). Courts have expressly declined to recognize the accountant-client privilege in bankruptcy proceedings, because the "[r]ecognition of the accountant-client privilege in bankruptcy proceedings would substantially thwart an important federal interest." *Matter of International Horizons, Inc.*, 689 F.2d 996 (1982). Specifically, the privilege would undermine the federal interest in assuring that the bankruptcy court and creditors are supplied complete and accurate information regarding the debtor's financial condition. *Id.*	

Chart compiled by Deana Z. Alegi, Esq.

7) Privilege Against Self Incrimination

Florida Law	Federal Common Law	Federal Rules
The privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution is extended, by virtue of the Due Process Clause of the 14th Amendment, to action by the states.	The privilege can be claimed in any proceeding in which the witness reasonably believes that the information sought, or discoverable as a result of his or her testimony, could be used in a subsequent state or federal criminal proceeding. *U.S. v. Balsys*, 524 U.S. 666, 118 S. Ct. 2218, 141 L. Ed. 2d 575, 49 Fed. R. Evid. Serv. 371 (1998). Invocation of the privilege must be upheld unless it is "perfectly clear from a careful consideration of all circumstances of the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to discriminate." *Id.*	"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

8) Florida's Motor Vehicle Crash Report Privilege

Florida Law
Florida law compels the driver of an automobile involved in a crash to provide potentially self-incriminating testimony as to the circumstances surrounding the crash, but the law also immunizes the testimony from subsequent use in any civil trial against the driver arising out of the crash. *Department of Highway Safety and Motor Vehicles v. Corbin*, 527 So. 2d 868 (Fla. 1st DCA 1988). Therefore, except as specified by statute, each crash report made by a person involved in an automobile crash and any statement made by such person to a law-enforcement officer for completing a required crash report shall be without prejudice to the individual. Such report or statement may not be used as evidence in any trial. Fla. Stat. § 316.066(4).

Chart compiled by Deana Z. Alegi, Esq.

9) Trade Secret Privilege

Florida Law	Federal Common Law	Federal Rules
Fla. Stat. § 90.506 provides that a person or corporation has a privilege to refuse to disclose trade secrets when the lack of disclosure does not tend to conceal fraud or otherwise work an injustice. *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804, 807–09 (Fla. 3d DCA 2014). This privilege prohibits an individual from using the obligation of a witness to testify in order to obtain a valuable trade secret when the lack of disclosure will not jeopardize a more important interest.	While there is no absolute protection of trade secrets, federal courts exercise their discretion to avoid the unnecessary disclosure of such information. *Vision Power, LLC v. Midnight Express Power Boats, Inc.*, 2019 WL 13236349 (S.D. Fla. 2019). Additionally, "Federal Rule of Civil Procedure 26 permits the Court to issue a protective order that prevents the public disclosure of discovery information for 'good cause.'" *Id.* (citing *Tillman v. C.R. Bard, Inc.*, 297 F.R.D. 660, 663 (M.D. Fla. 2014)). To determine good cause, courts consider whether: "1) the party asserting the protection consistently treated the information as closely guarded secrets; 2) the information represented substantial value to that party; 3) the information would be valuable to the party's competitors; and 4) the information derived its value by virtue of the effort of its creation and lack of dissemination." *Id.*	

Faculty

Douglas A. Bates is a shareholder with Clark Partington Hart Larry Bond & Stackhouse, P.A. in Pensacola, Fla., and chairs its Commercial Litigation section. He has handled insolvency matters, distressed business situations and special-asset cases across the State of Florida and the U.S., and across a wide range of industries including airline, hospitality, manufacturing, retail and financial services. He serves as a trusted advisor to local, regional and national clients and maintains his focus on commercial and real estate litigation, as well as bankruptcy and creditors' rights matters. Mr. Bates is listed in *Chambers USA* and is an active member of the Business Law Section of The Florida Bar, serving on the Section's Executive Council. He also is a Fellow in the American College of Bankruptcy and is active in numerous other local, statewide and national organizations, including The Florida Bar Standing Committee on Student Education and Bar Admissions. Mr. Bates received his B.S.B.A. *summa cum laude* from Birmingham Southern College and his J.D. *cum laude* from the University of Florida College of Law.

Hon. Roberta A. Colton is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed in December 2017. Contemporaneously, she was appointed as a member of the judicial mediation team involved in the Puerto Rico PROMESA cases and served in that capacity until January 2022. Prior to taking the bench, Judge Colton practiced at Trenam Law in Tampa, Fla., where she was a shareholder and a member of the firm's Management Committee. Prior to joining Trenam, she served as a judicial law clerk for Hon. James C. Hill of the U.S. Court of Appeals for the Eleventh Circuit. During her more than 30 years in practice, Judge Colton was active in service to the legal profession and has been recognized for her accomplishments. Among others, she was listed in *The Best Lawyers in America* for Bankruptcy & Creditor/Debtor Rights from 1995-2016 and named one of the top 10 *Super Lawyers* in Florida from 2011-16. Judge Colton served as Eleventh Circuit Regent for the American College of Bankruptcy and as chair of the Grievance Committee of the U.S. District Court for the Middle District of Florida. She also is the former chair of the Florida Bar Business Law Section' Bankruptcy/UCC Committee, as well as the Tampa Bay Bankruptcy Bar Association. Judge Colton received her B.A. in commerce with distinction from the University of Virginia in 1979 and her J.D. from William & Mary Law School in 1982, where she served on its law review and was a national moot court finalist.

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Policy and Law. Prof. Sevier serves frequently as an ad hoc referee for peer-reviewed journals at the intersection of social science and the legal system. He is currently a member of the editorial board of Law and Human Behavior and Law and Social Inquiry. Prof. Sevier previously practiced litigation at Wachtell, Lipton, Rosen & Katz in New York City, where he specialized in shareholder derivative actions and corporate governance matters. He also practiced litigation at Sullivan & Cromwell LLP, where he focused on complex commercial torts. Prof. Sevier is a member of the New York State Bar and clerked for Hon. Carlos T. Bea of the U.S. Court of Appeals for the Ninth Circuit. He has three times received (and was the inaugural recipient of) the Law School's Open Door Faculty Teaching Award, which is awarded to one professor at the College of Law annually. He is also the recipient of a University Outstanding Graduate Teaching Award, awarded to eight professors across the university, and the prestigious University Distinguished Teaching Award, which is awarded to one professor at Florida State University each year. Prof. Sevier received his M.S. and M.Phil. from Yale University, and his J.D. *magna cum laude* from Harvard Law School.