

# Legal Considerations

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*Forensic - Pertaining to matters at issue before a court of law.*

*Photography - Literally, painting with light.*

*Forensic Photography - Photographs intended to be used as evidence in a civil or criminal trial.*

## Demonstrative versus Substantive Evidence

**Demonstrative evidence** like photographs, models, charts and visual aids are generally presented to help a witness explain what he or she saw at the scene when the scene was in original, as found, condition.

Substantive evidence is physical evidence collected at the scene and brought into the courtroom where the item itself can be shown to the jury. A photo can become substantive evidence when the physical evidence cannot be brought into the courtroom for one reason or another.

Demonstrative or substantive, the prosecutor must lay a foundation before photos can be admitted into evidence. Before the photos can be shown to the jury, the defense has an opportunity to challenge their **authenticity**, relevance and probative value. The judge must decide whether the photo is relevant to the matter at issue and not unduly prejudicial before it can be shown to the jury.

## Fair and Accurate

A photograph can be challenged on the grounds that it is not a fair and accurate representation of the thing or place that it is supposed to represent. See <http://www.crime-scene-investigator.net/swgit-section17.pdf> for a list of all the issues that can enter into arguments concerning "fair and accurate."

## **Adversarial System**

A smart attorney never asks a question unless he or she already knows the answer. There are some fairly dumb attorneys but that's another story.

The prosecutor is an advocate for the victim, asking questions in a manner calculated to convince the jury that the defendant did the dirty deed and was caught fair and square.

The defense attorney is an advocate for the accused. It's his job to ask questions calculated to create an element of doubt, often by suggesting that the arrest was based on incompetence, stupidity, malfeasance and chicanery. The defense is entitled to a list of prosecution witnesses and copies of their reports and any photos that they might have taken.

Police officers, crime scene investigators, evidence technicians and medical personnel are supposed to be impartial witnesses without any interest in the proceedings beyond relating what they have seen and what has been related to them by credible individuals with first-hand knowledge.

Horrible miscarriages of justice have occurred when police and prosecutors ignore exculpatory evidence or rely on questionable identifications, often for reasons that defy rational explanation.

## **Prejudicial and Inflammatory**

A judge will exclude photos likely to upset jurors. Dr. Patrick Besant-Matthews has hundreds of slides retrieved from morgue garbage cans so disgusting that they could not possibly be used in court.

My favorite was the head of a murder victim minus the top of his skull, exposing the brain. The top of the skull was placed haphazardly near the head. The autopsy table was drenched in blood and littered with blood-soaked towels, a blood-smeared Stryker saw and assorted surgical implements. Bram Stoker would have loved it.

## **Irrelevant and Immaterial**

Doctor B's catalog of photographic ineptitude included photos of a gurney near the body of the victim who, being deceased, was not going anywhere and was no longer in need of medical attention. The gurney was

not part of the original scene and contributed nothing to the jury's understanding of the circumstances surrounding the victim's death.

## **Best Evidence**

A prosecutor will try to present the best available evidence. In some cases, this will be eye witness testimony. In other cases, this might be testimony supported by photos and visual aids. Photos that cannot be admitted because the photographer failed to do his job properly are worthless, regardless of their technical merit.

## **Fair and Accurate**

A photograph should be a fair and accurate representation of the scene as it appeared to the person taking the photograph and others who were present at the time.

Well, make that somewhat fair and reasonably accurate. A photo is a two-dimensional representation of a three-dimensional scene.

## **Separation in Time from Event**

If no photos were taken at the time of an event, lawyers may dispatch photographers to get what they can. Their photos might be a fair and accurate representation at the time the photos were taken, but the original scene may have looked altogether different.

The light might be different. Objects present at the time of the event may be long gone. New objects may have taken their place. Old buildings may have been repaired or demolished. New buildings may have been erected. Trees in full bloom during the summer months may shed their leaves during the winter months.

Investigators who specialize in reconstructing crime and accident scenes take pains to interview witnesses, study the available reports, collect old photographs, verify weather conditions, determine the height of the sun and the phase of the moon, etc.

## **Nothing to Show**

Some photos are taken to show that there is nothing to show. This might include photos taken upon admission to a jail to show that the subject

arrived in good condition, photos taken at an accident scene to show that there were no skid marks and so forth.

## **Cause, Mechanism and Manner of Death**

A coroner or medical examiner is responsible for determining the cause, mechanism and manner of death. These are concepts that might not be clearly understood by laymen, or even by physicians who do not have the post-doctoral training required to qualify as a forensic pathologist.

The cause of death is the event or agency that ultimately caused the deceased to depart from this vale of tears. Heart failure is not a cause of death. Eventually, we will all die from heart failure brought about from some other condition that is the proximate cause.

A gunshot wound to the chest might be the cause. The mechanism is how the bullet brought about the victim's demise. It could be through loss of blood, damage to internal organs, infection, etc.

The manner of death can be classified as natural, accidental, murder, suicide or undetermined. A gunshot death might be classified as undermined until subsequent investigation shows that it was inflicted accidentally or during the course of a homicide or suicide.

## **Post Mortem Interval**

It's good to know how the deceased came to be deceased. It's just as important to know when the victim met his end. Obviously, establishing an approximate time of death will aid in identifying persons who had an opportunity while excluding those who did not.

Less obviously, who predeceased whom can determine who inherits a substantial sum of money and who ends up selling pencils on a street corner.

## **Chain of Custody**

The chain of custody is a system that accounts for each piece of evidence to include photographs from the time they are taken or collected until they are presented in court.

This chain is maintained by a series of signatures as the evidence passes from hand to hand until it reaches a designated custodian. This should

be spelled out in standard operating procedures known to every member of the department and the prosecutor's office.

## **Standard Operating Procedure (SOP)**

Every department needs protocols that cover every aspect of the photographic process from the time a photo is taken until it is delivered to a custodian for processing and archiving and, ultimately, to investigators, prosecutors and attorneys. The fact that you followed your department's SOP is your first line of defense if your photos are challenged in court.

Attorneys? A Colorado Springs judge recently declared a mistrial because the prosecution failed to furnish the defense with certain reports. This ensures that the prosecution and the defense are playing on a level field.

## **Accidental Association**

Accidental association describes something that may have found its way into a crime scene before it became a crime scene. Unfortunately, there is no way to tell whether something is relevant or irrelevant during the initial stages of an investigation. Shoot everything.

## **Warrants, the Photographer and the Exclusionary Rule**

The Fourth Amendment states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

**Probable cause** can be defined as a legally sufficient reason but, as usual, the devil is in the details which can vary by jurisdiction.

The **exclusionary rule** keeps everyone honest. In simple terms, evidence collected illegally cannot be used in court and this applies to photographs as well as fingerprints, firearms and the like. The solution is simple. If in doubt, get a warrant or a valid consent to search before processing your scene. Click [HERE](#) for case-specific examples from [interfire.org](http://interfire.org).

## **The Expert Witness**

Do not allow yourself to be qualified as an expert unless you possess genuine expertise based on training and experience and have the fortitude required to stand up under rigorous cross-examination.

While an individual qualified as an expert witness can offer opinion testimony, the defense can hire their own experts. If the defendant's pockets are deep enough and the stakes are high enough, the defense can always find someone with impressive credentials to offer a contrary opinion, notwithstanding facts that should be obvious to anyone with an IQ above room temperature.

## **Persistent Evidence**

An article at [http://expertpages.com/news/photographic\\_evidence.htm](http://expertpages.com/news/photographic_evidence.htm) suggests that photographs are persistent evidence available to jurors from the moment the photos are admitted into evidence until they reach their verdict.

Oral testimony is likely to go in one ear and out the other if the witness is somewhat less than eloquent. Critical testimony can be drowned in an ocean of drivel if a trial drags on for weeks.

## **Record Retention**

Every state has record retention laws. Many such laws require that evidence to include DNA, fingerprints, photographs and trace evidence collected in connection with major crimes must be preserved for decades. You need to know the laws applicable to your jurisdiction and the record-retention methods employed by your department.

[This article](#) by Jana K. McCown in the Williamson County, Texas, District Attorney's Office explaining the issues involved with cases that have already been adjudicated.

Click [HERE](#) for a well-illustrated article by Tim Stelloh that clearly demonstrates the problems associated with working cold cases. There is no statute of limitations on homicide. An investigator's ability to solve a cold case and a prosecutor's ability to bring the culprit to trial depends on your ability to find relevant photos and reports decades, after the original offense.