

ALR 5th

Alert

Route to:

- _____
- _____
- _____
- _____
- _____
- _____

From the editor

Several issues relevant to matters of criminal law are covered in volumes 124 and 125 of A.L.R.5th, including the denial of an accused's request for initial contact with an attorney resulting in inculpatory statements by the accused, in cases involving offenses other than drunk driving [124 A.L.R.5th 1], the admissibility of ion scan evidence to prove the presence of minute quantities of illegal drugs [124 A.L.R.5th 691], and the admissibility of hearsay statements made to a 911 operator [125 A.L.R.5th]. In addition, annotations discussing the characterization of DNA evidence as "newly discovered evidence" warranting a new trial in a criminal case [125 A.L.R.5th], statutes governing the offense of identity theft [125 A.L.R.5th], and the judicial expunction of a convicted adult's criminal record [125 A.L.R.5th] are included. Also explored in volume 124 of A.L.R.5th are civil litigation topics, including the appropriateness of a "hindsight" charge in a medical malpractice action [124 A.L.R.5th 623], and the application of judicial or equitable estoppel to bar a party from claiming or defending against an award of attorney's or other court-ordered fees [124 A.L.R.5th 575].

Jill M. Marks, J.D.

Highlights

CRIMINAL LAW

Denial of accused's request for initial contact with attorney—inculpatory statements

A defendant's Sixth Amendment right to counsel does not depend upon a request for counsel, and no express or formal request by the accused for such appointment is necessary, especially where the accused does not know of the right to appointed counsel. When an accused requests the assistance of counsel, it is presumed that the accused is requesting such assistance at every critical stage of the prosecution, including the right to communicate effectively with counsel in the preparation of one's defense. Thus, law enforcement officials generally may not prevent communication between an accused and



the lawyer without some justification. This annotation collects and analyzes the state and federal cases involving offenses other than drunk driving in which the courts have discussed an alleged denial by law enforcement officers of an accused's request for initial contact with an attorney, and the impact of that alleged denial on the admissibility of an inculpatory statement made by the defendant. [124 A.L.R.5th 1](#)

ESTOPPEL AND WAIVER

Estoppel from asserting or defending against award of attorney's fees or costs

Judicial estoppel arises when a party attempts to assert, in a judicial or quasi-judicial proceeding, a

position contrary to that taken in a prior judicial or quasi-judicial proceeding, in order to protect the integrity of the courts and to prevent parties from playing fast and loose with the judicial system. The issue arises as to when is a party judicially or equitably estopped from asserting a claim for, or defense to, an award of attorney's or other court ordered fees. This annotation collects and discusses the cases that have considered when is a party judicially or equitably estopped from asserting a claim for, or defense to, an award of attorney's or other court ordered fees. [124 A.L.R.5th 575](#)

EVIDENCE

Admissibility of ion scan evidence

In recent years, devices, such as the Ionscan, incorporating the scientific technique of ion mobility spectrometry, have been used to detect and isolate the location of minute quantities of illegal drugs. The issue of the admissibility of evidence obtained from ion tracking devices may arise in a civil or criminal

context. This annotation collects and summarizes those state and federal cases in which courts have determined the admissibility of ion scan evidence. [124 A.L.R.5th 691](#)

MALPRACTICE BY MEDICAL OR HEALTH PROFESSIONS

Appropriateness of "Hindsight" Charge in medical malpractice cases

Whether a physician being sued for alleged medical malpractice exercised reasonable judgment must be considered in relation to the facts as they existed at the time the physician made the judgment, and not in light of what hindsight may have revealed. A "hindsight" instruction is one declaring that liability in a medical malpractice action cannot be based on hindsight, and this annotation collects and analyzes all the federal and state cases discussing whether, in general or under the particular circumstances, a hindsight instruction to the jury is proper in a civil action to recover for medical malpractice. [124 A.L.R.5th 623](#)

Coming Soon

Listed below are a few of the topics scheduled to be published in volume 125 of A.L.R.5th in December 2004. Some of the annotations listed may be rescheduled.



CRIMINAL LAW

Judicial expunction of criminal record of a convicted adult

Generally, the expunction of an arrest record of a person who has been acquitted is proper only where the acquittal is consistent with a finding of innocence and is not the result of legal technicalities unrelated to the question of guilt or innocence. Expungement of a criminal record typically requires physical destruction of the record by whomever and in whatever depository the record is maintained, such that all traces of the criminal process relating to that offense are destroyed. The issue arises as to the right of a criminal defendant to have his or her record expunged pursuant to either the court's inherent power to grant such relief or pursuant to explicit statutory authority. This annotation collects and analyzes the state and federal cases in which the courts have determined the right of a convicted adult to have his or her criminal record expunged. [125 A.L.R.5th](#)

CRIMINAL LAW

Identify theft as offense under state statutes

Theft and misuse of personal identifying information is an increasing phenomenon, and many states have enacted laws specifically prohibiting identity theft. Identity theft offenses sometimes overlap with, and are prosecuted under, statutes criminalizing other offenses, such as false personation, theft, and forgery. Regardless of the statutes under which they are charged, identity theft cases challenge courts to define statutory terms and apply them to varying facts. This annotation collects and analyzes state court cases construing and applying state statutes relevant to identity theft, or determining the validity of such statutes. [125 A.L.R.5th](#)

EVIDENCE

Admissibility of hearsay statement made to 911 operator

The present sense impression exception to the hearsay rule, Uniform Rules of Evidence 803(1), allows into evidence statements describing or explaining an event or condition, made while the declarant was perceiving the event or condition, or immediately thereafter. This exception has been applied to recorded 911 calls, which may be crucial evidence, especially where the declarant is unavailable at time of trial or refuses to cooperate with the police. This

annotation discusses the cases in which courts have ruled on the admissibility of 911 telephone calls, based on the present sense impression exception to the hearsay rule. [125 A.L.R.5th](#)

NEWLY DISCOVERED EVIDENCE

DNA evidence as “newly discovered” warranting new trial in criminal case

DNA identification evidence—expressly or impliedly including statistical calculations of band pattern frequency in the population—is ordinarily admissible

to aid in determining the perpetrator’s identity, on grounds that the technique has been scientifically accepted as reliable, or that the proof is at least as probative as prejudicial. Courts have determined whether, upon a motion by the defendant, DNA testing, a new trial, or other postconviction relief should be granted. This annotation collects and summarizes those state and federal cases in which courts have considered whether a new trial or other postconviction relief would be granted in a criminal case based on DNA evidence and/or whether DNA testing of particular evidence would be allowed. [125 A.L.R.5th](#)

Index

The following is a complete list, arranged alphabetically by topic, of annotations contained in the current volume [124](#) or scheduled for publication in volume [125](#) of [A.L.R.5th](#). Some of the annotations listed may be rescheduled.



AIRPORTS

Validity of Airport Security Measures. [125 A.L.R.5th](#)

AGRICULTURE

Validity, Construction, and Application of State Constitutional and Statutory Provisions Regarding Corporate Farming. [125 A.L.R.5th](#)

CUSTODY AND SUPPORT OF CHILDREN

Religion as Factor in Child Custody Cases. [124 A.L.R.5th 203](#)

Right to Credit on Child Support Arrearages for Gifts to Child. [124 A.L.R.5th 441](#)

CRIMINAL LAW

Denial of Accused’s Request for Initial Contact with Attorney in Cases Involving Offenses Other than Drunk Driving—Cases Focusing on Presence of Inculpatory Statements. [124 A.L.R.5th 1](#)

Dog as Deadly or Dangerous Weapon for Purposes of Statutes Aggravating Offenses Such as Assault and Robbery. [124 A.L.R.5th 657](#)

Judicial Expunction of Criminal Record of Convicted Adult. [125 A.L.R.5th](#)

Validity, Construction, and Application of State Statutes Relating to Offense of Identity Theft. [125 A.L.R.5th](#)

DAMAGES

“Total Cost Method (or Approach)” and “Modified Total Cost Method (or Approach)” to Proving Damages in State Contract Cases. [124 A.L.R.5th 375](#)

DIVORCE AND SEPARATION

Division of Lottery Proceeds in Divorce Proceedings. [124 A.L.R.5th 537](#)

ESTOPPEL AND WAIVER

When Is Party Judicially or Equitably Estopped from Asserting Claim for, or Defense to, Award of Attorney’s or Other Court Ordered Fees. [124 A.L.R.5th 575](#)

EVIDENCE

Admissibility of Ion Scan Evidence. [124 A.L.R.5th 691](#)

When is Hearsay Statement Made to 911 Operator Admissible as “Present Sense Impression” Under Uniform Rules of Evidence 803(1) or Similar State Rule. [125 A.L.R.5th](#)

FINES, PENALTIES AND FORFEITURES

When Does Forfeiture of Real Property Violate Excessive Fines Clause of Eighth Amendment or State Constitutions—State Cases. [124 A.L.R.5th 509](#)

JOINT DEFENDANTS

Application of State Offer of Judgment Rule—Apportionment Issues in Multiple Party Setting. [125 A.L.R.5th](#)

LABOR AND EMPLOYMENT

Liability of Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress—Failure to Provide Pension or Disability Benefits. **125 A.L.R.5th**

MALPRACTICE BY MEDICAL OR HEALTH PROFESSIONS

Liability of Dentist for Extraction of Teeth — Lack of Consent. **125 A.L.R.5th**

Propriety of “Hindsight” Charge in Medical Malpractice Actions. **124 A.L.R.5th 623**

NEWLY DISCOVERED EVIDENCE

DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial In Criminal Case. **125 A.L.R.5th**

TORTS

Liability of Parent or Person In Loco Parentis for Personal Tort Against Minor Child—Sexual Abuse. **125 A.L.R.5th**

Have questions or need help? Please call customer support at 1-800-225-7488, or e-mail at alr@westgroup.com.



West, a Thomson business has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. West is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.