PROGRAM

7:45 a.m. to 8:00 a.m.	**Registration**
8:00 a.m. to 8:15 a.m.	**Odds and Ends** *Nick Drees*, Federal Public Defender
8:15 a.m. to 9:00 a.m.	**Supreme Court & Eighth Circuit Update** ***John Messina, Research & Writing Attorney***
9:00 a.m. to 10:00 a.m.	**Police Interrogations & Tactics** *Laurie Shertz,* Attorney at Law
10:00 a.m. to 10:15 a.m.	**Break**
10:15 a.m. to 11:15 a.m.	**Child Pornography & Photo Morphing** *Jay Clark*, Attorney at Law
11:15 a.m. to 12:30 p.m.	**Lunch (On your own)**
12:30 p.m. to 2:00 p.m.	**Mental Health & the Criminal Defendant** *Dr. Luis Rosell* Psychologist
2:00 p.m. to 2:30 p.m.	**Panel Discussion** Mental Health Issues *Dr. Luis Rosell, Nick Drees, Jane Kelly, John Messina & James Whalen*
2:30 p.m. to 2:45 p.m.	**Break**
2:45 p.m. to 3:45 p.m.	**Ethics** *Wendell Harms* Attorney, Board of Professional Ethics & Conduct

NICK DREES

EDUCATION: J.D., University of Chicago Law School (1989); B.A., Harvard College (1985)

PROFESSIONAL: Federal Public Defender, Northern and Southern Districts of Iowa (1999-Present); Assistant Federal Public Defender, Southern District of Iowa (1994-1999); Assistant Public Defender, Polk County Public Defender's Office (1991-1994); Law Clerk for the Honorable Donald E. O'Brien, U.S. District Court for Northern Iowa (1989-1991)

JOHN MESSINA

EDUCATION: J.D., Drake University Law School (1979); B.A., Drake University (1975)

PROFESSIONAL: Research and Writing Attorney, Federal Public Defender's Office, Southern District of Iowa (2001-Present); Assistant State Appellate Defender, Iowa State Appellate's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984)

LAURIE SHERTZ

EDUCATION: J.D., Seattle University School of Law (1995); B.A., University of Washington (1992)

PROFESSIONAL: Private Practice, Portland, OR (2001 - Present); Oregon Criminal Defense Lawyers Association (1998 - 2004); Metropolitan Public Defenders, Hillsboro, OR (1996 - 2001); Nielsen & Acosta, Criminal Appellate Attorney, Seattle, WA (1995 - 1996).

JAY CLARK

EDUCATION: J.D., University of Cincinnati, College of Law (1989).

PROFESSIONAL: Private Practice, Cincinnati, OH; Adjunct faculty member of the University of Cincinnati College of Law - teaching criminal defense and investigation & forensic science; Member of Board of Directors of the Ohio Association of Criminal Defense Lawyers, serving as chair of the CLE and Strike Force Committees; Obtained acquittals in cases including a rape case involving eye witness and "expert" hair comparison evidence, manslaughter case involving his client's "confession", and recently an acquittal on 18 of 20 counts of possession of child pornography where images were recovered from the client's hard drive.

DR. LUIS ROSELL

EDUCATION: Doctorate of Psychology (1998)

PROFESSIONAL: Mental health professional for past 17 years; spent 10 years working in corrections, three and a half years as mental health expert witness, and 16 years treating and assessing sex offenders. Dr. Rosell has conducted mental health evaluations in six different states.

JANE KELLY

EDUCATION: J.D., Harvard Law School (1991); A.B., Duke University, (1987)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (1994-Present); Visiting Instructor, University of Illinois College of Law (1993-1994); Law Clerk to the Honorable David R. Hansen, U.S. Circuit Judge, Eighth Circuit Court of Appeals (1992-1993); Law Clerk to the Honorable Donald J. Porter, U.S. District Judge, District of South Dakota (1991-1992)

JIM WHALEN

EDUCATION: : J.D., University of Iowa (1978); B.A., University of Iowa (1974)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (1994-Present); Polk County Public Defender's Office (1989-1994); State Appellate Defender's Office (1987-1989); Private Practice, Waterloo, Iowa (1978-1986)

WENDELL HARMS

EDUCATION: J.D., University of Iowa (1976); B.A., Drake University (1973).

PROFESSIONAL: Assistant Ethics Counsel (2004 - Present); Private practice (1984 - 2004); Office of the Staff Judge Advocate Military District of Washington (1982 - 1984); Legal Aid Society of Topeka (1976 - 1981).

CLERK OF COURT'S TIPS FOR FEDERAL COURT CRIMINAL PRACTITIONERS
SOUTHERN DISTRICT OF IOWA

1. Motion for over length brief vs. requirement that brief be attached to motions: over length brief rule trumps the attachment rule. Attach the over length brief to the motion for over length brief, but DO NOT attach the motion for over length brief to the motion to which the brief relates.

2. When attaching documents to motions, please give a description! An attachment can be labeled via the drop down menu or in the empty box to the right of the drop down box, which lets you add your own description.

3. When filing sealed/expedited relief motion, please contact chambers.

4. Signatures are still required: either in digital format or /s/ format.

5. Documents which are provided in paper: please e-file a cover sheet or description, indicating the hard documents have been separately filed with the Clerk.

6. PRINT your documents to .pdf format, DO NOT PUBLISH.

7. BE AWARE OF THE DOCUMENT REDACTION REQUIREMENTS – review attachments for personal data identifiers and either request leave to file under seal or obtain a protective order.

8. Pick the right case – the system remembers the last case in which you filed. Check the number. And for criminal case filers, once a defendant has been indicted, please make all subsequent filing in the criminal case, not in the magistrate case!

9. CJA Vouchers – double check your math, we often find simple math errors. Checking and correcting vouchers is very labor intensive and ultimately delays payment.

10. CJA Vouchers – when listing copies, always list the amount <u>per copy</u> that you charge (which cannot be over 25¢ per page), and not the total amount, such as "copies, $3.25".

11. CJA Vouchers – "Time Spent Performing the Service" must be reported in <u>tenths</u> of an hour, so you cannot use .25, .75, etc. in this column.

12. CJA Vouchers – a receipt must be submitted for any expense you list that is $50 or over.

13. CJA Vouchers – you are now paid 48.5¢ per mile for gas, at least until 12/31/05.

14. CJA Vouchers – the biggest cause of delay in payments is when vouchers are submitted with incomplete or inaccurate information. Vouchers prepared thoroughly and double-checked for accuracy take less time to review and help get your check back to you much sooner. The <u>Guide for CJA Voucher Preparation</u> is available at <u>www.iasd.uscourts.gov</u> , under Law Practice, then CJA Voucher Guidelines.

LAURIE
SHERTZ
L L C
ATTORNEY AT LAW

Reading the Reid Technique[1]: Challenging Coercive Police Interrogations

"A good interrogator is a good actor." Bill Schrieber, Instructor, The Reid Technique.

In many respects, similar deceptive tactics are used during courtroom procedures when attorneys manipulate the jurors' perceptions of evidence or testimony through implication and innuendo, as is evidenced by the very manner in which they question a witness. A closing argument represents a monologue relying heavily on histrionics and emotional appeals very similar to the moral justification statements made during an interrogation theme. Anthology at 439.

Sending police out into the world with 3 days of Reid training is like sending a herd of 6-year old boys out at a birthday party with b-b-guns. Is anyone surprised the bird, the neighbor, or the boys get shot?

Background

John Reid was a poligrapher who began to study whether evaluating a defendant's behavior during an interview you could begin to attribute guilty/deceptive behaviors and truthful behaviors to certain acts.

Reid's trademark "Behavior Analysis Interview" began in 1953 when Reid and one of his associates published data from a five year study of the behaviors of polygraph subjects, and included 809 such subjects. Reid's *The Investigator Anthology*, admits the initial studies "interpreted [data] impressionalistically." Brian C. Jaume & Joseph P. Buckley, published by John E. Reid and Associates, © 1999, at 66. Nonetheless, Reid's current methods draw on this original, flawed data, and trains investigators based on the behavioral interpretations suggested by this study.

The Basic Formulation

Reid Technique is divided into two phases: the interview and the interrogation. The purpose of the interview is to determine the suspect's attitude, and to develop a baseline for their behavior so that changes during the interrogation phase can be noted.

[1] The writer/speaker is in no way endorsing the legitimacy of the Reid Technique© but is giving you a taste of how they develop confessions for the purpose of cross examining police witnesses who appear to have relied on Reid.

121 SW SALMON 11TH FLOOR · PORTLAND, OR 97204
tel: 503-471-1332 · fax: 503-296-5669 · e: laurie@lshertzlaw.com

Reid teaches it is "incumbent upon the investigator to outwit a suspect to convince them to confess."

The key elements that define the Reid Technique, and differentiate it from other interrogations are:

(1) a non-accusatory interview is conducted first, which lasts from 30-45 minutes and includes investigatory questions along with behavior provoking questions.
(2) The interview is in a controlled environment, preferably the police station
(3) The interview and interrogation are distinctly different procedures and are separated by 5-10 minutes
(4) The theme developed by the investigator is persuasive to the suspect because it provides justification for the crime.
(5) The suspect will first make admissions when asked the alternative question. (The "false choice" question)
(6) Once the suspect accepts the alternative proposed, the interrogation becomes non-leading to elicit facts.

Interviews

An interview is a non-accusatory conversation to gather information, and to make behavior assessments of the suspect at the beginning stages of an investigation. Reid recommends taking notes on both verbal and non-verbal behaviors. Reid teaches investigators they should be "able to determine guilt or innocence in about 20 minutes."

A successful interviewer will appear nonjudgmental, not opinionated, will have relaxed posture, and give a feeling that they are 'just doing their job.'

The interview has several purposes, one of the chief of which is to begin assessing the suspect to determine their baseline behavioral characteristics during easy, non-confrontational questions which they obviously know the answer to. It is also to assess the suspect's "attitude." Reid cautions not to ambush someone – give them notice of the interview because an ambush makes even an innocent person hostile (which presumably affects the behaviors).

The last question of the interview should be a "bait question."

Baiting Technique

"Is there any reason a witness would say they saw you in the area of the murder?"
"Is there any reason your fingerprints are going to be on the knife we found in her neck?"
"Is there any reasons why if we canvassed the area that your DNA would be found?"

Reid recommends gaining commitments from the suspect as to their alibi, whererabouts, relationships etc, and then switching to the baiting question. This is an area for creativity on the part of the investigator. Imply all the things science can do & all the evidence that could be found. Remind the suspect that there are ATM cameras everywhere & that is how suspects have been located & identified; Google now has satellite maps, indicate they're updated daily and caught a critical part of the crime; dental records & bite mark analysis; handwriting; ballistics; textile fingerprints; new technology identifying the elements in glass & how a piece can be matched to the window it came from; the case of the DNA of tree seed pods in Arizona.

The question should be phrased as a hypothetical, to see how the suspect reacts. Guilty subjects will delay before they respond, because they have a lot of sorting out to do: is the investigator telling the truth, should I say yes or no, what are the consequences, etc. A truthful subject will make an immediate denial. If they begin to change their story, they will confess during the interrogation. Give the suspect face savers, "I'm not saying you were involved, but maybe you stopped by earlier in the day. . ."

The bait should be limited to one question, only during the interview phase, but when interrogating, make reference to the bait. It should be asked casually, like "oh, I forgot I have just one more question. . ."

Interrogations

An interrogation is accusatory, where the investigator "dominates" the conversation, does not let the suspect talk. The interrogation should not be used unless "guilt is reasonably certain." The investigator should insinuate to the suspect that there is overwhelming evidence to suggest the defendant is guilty, including using the case file as a prop, and others. Dominate means talk non-stop, and Reid brags that their investigators can talk for hours to cut off any denials made by the suspect, as well as convince the suspect of the overwhelming evidence the investigation has obtained.

The Reid Technique recommends leaving the room between the interview and interrogation phases, and suggests the investigator return with a case file (or what appears to be a case file but is in fact just a file with blank pages), and perhaps an unmarked videotape if the crime could have been captured on a surveillance camera. When the investigator returns, the interrogation begins with a direct confrontation: "Sam, We know you did this robbery, and our investigation will clearly show you took that woman's purse."

Following direct confrontation, Reid recommends the investigator change tacts, and appear sympathetic or understanding, "Now I know you probably did this because you hadn't eaten in days, you're living in your car, and that woman was flaunting how much money she had." Reid claims this transforms the interrogation from discovering whether

the suspect committed the crime to WHY they committed the crime, thereby necessarily confessing to it. *Caveat:* Reid tells interrogators never to *ask* a suspect why they did it, because each time they deny involvement, it increases their confidence in their denials.

An interrogation does not have a limited time to it – in fact, investigators should make it obvious to the defendant they will continue the interrogation until the defendant confesses, that the interrogator has nothing but time. The investigator should never take notes during the interrogation phase, because it reminds the suspect of consequences.

There are 9 steps to an interrogation, only 5 of which are key:

1. Direct positive confrontation – tell the suspect you know they did it & flat out accuse them. Reid recommends standing while doing this – evaluate how the suspect reacts.
2. Theme development – assist the suspect in shifting blame to someone/thing else so they can save face. Give the suspect a choice which forces them down a path toward a confession.
3. Handle denials – engage in a monologue, interrupt the suspect to stop denials.
4. Overcome objections – suspect offers objections or excuses because their denials aren't working.
5. Presenting an alternative question: Are you sorry, you overreacted, or are you a cold blooded killer & you just don't care? Give the defendant a choice, even if it is a false choice because one choice implies a lesser punishment, or mistake, and the other implies moral turpitude, despicable character, and/or harsh punishment.

Reducing the Suspect's Resistance, or reducing them to a puddle

In addition to theme development, Reid recommends using 6 steps to "reduce the suspect's resistance to telling the truth:"

(1) State the purpose of the interrogation is not to determine <u>whether</u> the suspect committed the crime, but <u>why</u> they did so
(2) Express high confidence in the suspect's guilt
(3) Discourage the suspect from raising denials by maintaining a monologue and urging the suspect to listen to the investigator
(4) Sympathize with the suspect's position and express understanding as to why they committed the crime
(5) Falsely tell the suspect about possible evidence implicating him
(6) Move physically closer to the suspect to maintain attention and interest.

Investigator's Anthology, at 415.

There is a dichotomy in Reid's discussion of the denial phase of the interrogation: An investigator should not begin an interrogation until "guilt is reasonably certain" but at the

same time, "in most situations, the investigator does not know for sure whether the person he is interrogating is innocent or guilty." *Anthology* at 438. Further, "Interrogation represents an effort to persuade a person who is believed to be lying to tell the truth." *Id* at 464.

Behavior Analysis

The Behavior analysis interview is a bit like FST's – if you can't sit up straight, not fidget, or pick lint off of clothing while looking the investigator in the eye, you are going to have problems. Reid asserts that 80% of communication is non-verbal, that the non-verbal is more spontaneous, and therefore more indicative of what really occurred than verbal communication.

During the course of the interrogation, guilty suspects, realizing evidence against them could exist, become more and more passive, whilst innocent suspects become more vehement in their denials, knowing full well no such evidence could exist.

CLUES according to Reid:

- People looking to the left are recalling information, those looking to the right are confabulating/lying.
- People who are deceptive routinely can't remember details the investigator feels someone should, "only guilty people have bad memories."
- Truthful people have open posture, answer questions without delay/hesitation, show a sincere interest in the investigation, and will to do whatever is necessary to clear their name including polygraphs, DNA, blood, lineups, etc, (wholesale abdication of their rights), use their hands to demonstrate "illustrators"; WHEREAS, guilty people stutter, stammer, give smart alec answers, are guarded, shift in their chairs a lot, rationalize the crime, or are "Eddy Haskel" about the whole thing, barriered posture (arms or legs crossed in front of them), bite nails, link pick, thread pull, straighten hair, adjust clothing, hide mouth with hand.

Verbal Analysis

Truthfulness and deception can also be gauged by the suspect's verbal answers: for instance, Using broad language, "I didn't steal a penny" or "I didn't rape anyone" are indicators of truthfulness.

Also deceptive: answers questions by response to prior answer (I already told Officer Soandso, ask him), failure to answer the question actually asked or failure to provide a definitive answer, game playing (no, I didn't sell any drugs on *Saturday* night), use of qualifying phrases (to the best of my recollection, as far as I know), or bolstering (swear

to god, struck by lightening, to tell the truth, as crazy as this may sound). Deceptive suspects will either make early responses, interrupting the investigator, or delayed responses because they are trying to think of an answer; they will also make the investigator repeat the question, ask that it be clarified, or they will repeat the investigator's question themselves.

Use of contractions: A truthful subject will initially make denials using a contraction (No, I didn't) but as they get angry from being falsely accused, they will switch to the formal (No, I did not). A deceptive subject however, will begin by using the formal (No I did not) and then switch to contractions as their will to deny is worn down. *The Reid Technique of Interviewing and Interrogation,at* 34 & 64 [I kid you not, they teach this].

Danger Areas for Use of Reid

Reid recommends proceeding with caution in an interrogation of a juvenile, someone with emotional problems, those with low IQ's or low functioning, and those who are under the influence` of drugs & alcohol, or who have medical conditions. Reid also acknowledges that there are cultural differences, and that lack of eye contact during an interrogation, so long as consistent with that during the interview is not necessarily indicative of deception, it may be respect/embarrassment.

Reid does use their technique on witnesses, victims, suspects. They would *say* that an investigator should only interview those folks, but their course has an example of using an interrogation to catch a woman lying about having her car stolen after she had in fact caused an accident.

Bull fighting: Invoking your rights

Refusing a polygraph is, not surprisingly, a big red flag, and invoking an attorney is "an excuse," not a constitutional right that should be exercised.

CASE # 05-1003
RAPE I/SEX ABUSE I

1. Case Number 05-1003	WASHINGTON COUNTY DEPARTMENT OF PUBLIC SAFETY SPECIAL REPORT	Accompanying ☐Evidence ☐Accident	Reports ☐Custody ☐DUII	Page 1 of 5
2. Offense	RAPE I/SEX ABUSE I	3. Original D/T:	01-01-05	
4. Name:	DOE, JOHN	5. This D/T	08-01-05	
6. DOB 01-01-80	7. Address: 1212 SW Main St. Hillsboro, OR	97123	8. Phone (503) 555-1212	
Copies ☐D/C ☒Detectives ☒DA - ☐Adm	☐Juvenille ☐Comm Educ ☐Crime Analysis ☒SC&F	Computer Entry ☒Persons ☐Crime	☐Vehicle ☐Property	

SUMMARY:
This report details the arrest and confession of suspect John Alvin Doe on 08-01-05.

MENTIONED:

V: Jane Rae Doe, DOB 01-02-92

INFORMATION:

Preferably invite in to talk & arrest on another day - warrant reminds of punishment

On 08-01-05, a Washington County Grand Jury considered this case and indicted John Alvin Doe for one count of Rape in the First Degree and one count of Sexual Abuse in the First Degree.

On 08-01-01, at approximately 10:30 a.m. Deputy Joe, Detective Jack and I went to the Doe residence at 121 SW Main Street in Hillsboro. There, we contacted John Doe. He identified himself verbally as John and later gave us a driver's license. I advised him that I had a warrant for his arrest and I gave him a copy of the warrant to read. We took him into custody and Deputy John transported him to the Washington County Sheriff's Office Detective Offices.

Interview room - 2 chairs and table, no distraction, closed, controlled environment

I re-contacted Deputy Joe and John Doe at approximately 11:00 a.m. We went to the Detective Division and Deputy Joe and John Doe waited for me in an interview room. I asked Mr. Doe if he wanted anything.

I re-contacted them at approximately 11:05 A.M. Deputy Joe left the room. I read John Doe his Miranda Rights and he said that he did understand his rights. I asked him to paraphrase the right, "You have the right to remain silent". He said that he didn't have to talk to me; that he could chose to talk to me or he could chose not to talk to me. I told him that was correct.

CASE # 05-1003
RAPE I/SEX ABUSE I

Setting base line for the remainder of the interview, assess intelligence, other accuracy indicators

I spent some time conducting a cognitive assessment of John Doe. He told me that he was eighteen and told me that he had attended eleven grades at High School. He said that he was not married. I asked him if he was employed. He said he used to work at the gas station. He said that he's been applying to get on at the mini-market. I asked him if he had any goals. He told me that he would like to get in the construction trade. I asked John Doe if he was under doctor's care for any reason. He said no. I asked him if he was taking any medication. He said no. I asked him how he felt. He said that he felt fine. I asked him how much sleep he had had. He said that he had nine hours. I asked him if he had any alcohol or drugs yesterday. He said that he had one "hit" off of a marijuana cigarette.

Begin to lock in details that can later contradict, begin searching for themes

I asked John Doe to tell me about his relationship with Jane. He said that he never did anything to Jane. I asked him to tell me about Jane, who she was. John Doe said that Jane is a pretty good girl. He said that she is hard headed like her Mom and Dad. John Doe said that Jane and her brothers love it when he visits them. He said that nothing could have happened between he and Jane because her brothers were always with her. He said they were either in her dad's room watching TV or playing video games or they were around their property someplace. He said that he was never alone with Jane. He said that there was also never a time when either her mother or father were not home.

Shut down all denials - the more they deny, the more entrenched & then no confession

I asked John Doe to tell me more about Jane. He said that she was pretty smart. I asked him if she ever lied. He said, "All kids lie." I asked him if Jane lied about big things. He said that she had lied before. I asked him for an example. He said that one time, she got into some cabinets that she wasn't supposed to get into. He said that he told Pauline about it and Jan e denied it. I asked him if there was anything else that he could think of that Jane lied about. He thought about it for a while, then he couldn't think of anything else. I asked him if Jane ever lied to get him in trouble. He said once, she accused him of kicking a cat. He said that she had actually kicked the cat and then told her Mom that he (John) had kicked it.

Acknowledge punishment - harsh = truthful

I asked John Doe if he knew why people would touch little girls in an inappropriate way. He said that he had no idea. I asked him if he thought that it actually happened to little girls sometimes. He said that he was pretty sure, that he had seen it on TV and read about it in newspapers. I asked him what should happen to someone that would touch a little girl in an inappropriate way. He said that they should be "drug out in the street and beat." I asked Mr. Doe if he would be willing to take a polygraph if it became necessary. He said no, that he had talked to an attorney and the attorney told him not to take the polygraph. I asked him if he had hired an attorney or just talked to him on the phone. I clarified with him that he was not represented by an attorney.

Refusal to take polygraph = deceptive, Invoke attorney = deceptive

CASE # 05-1003
RAPE I/SEX ABUSE I

Baiting technique - imply evidence

I told John Doe that it was important for me to understand why this happened. He said that nothing had happened. I informed him that the doctors had found physical evidence that something had happened. I told him that we were beyond *did* it happen, that it was important to understand *why* it happened. I asked John Doe if he wanted to put Jane through a trial. I told him that he already been indicted, and the process was started. At that point, he leaned back in his chair and said, "Okay, I'll tell you whatever you want."

Direct Confrontation - Step 1. General terms, create impression of evidence

Implied Alternative question: planned or just happened

I asked John Doe if this was planned. He said it was not planned. I asked him how many times it occurred. He said that it was only once. I asked him where it happened. He said it happened in their house. I asked him where it happened in the house. He sat for a few minutes, he shrugged his shoulders, and then he said, "Let's say it happened in the living room."

Should frame in terms of "has this happened several times or just this once?"

I told John Doe that he needed to tell me the truth. He said that he was. I asked him if he was telling me that this really happened. He told me that he was telling me what I wanted to hear. I told him that I wanted to hear the truth. He told me to go ahead and ask him more questions.

Referencing other statements = deceptive behavior

I asked him what happened. He told me that I already knew what happened. I told him that I needed to hear it from his voice. Then he said, "Finger, let's say that" and he held up his index finger. I asked him what his finger had touched. He paused, then he said, "Her private." I asked him if he was talking about her vagina. He nodded his head. I asked how far his finger went in and he said, "A little." I took a piece of paper and sketched around his hand. I asked him to draw a line across the finger that went inside Jane. He drew a line across his index finger.

I asked John Doe if this was the truth. He said yes. I asked him if he was telling me this because he actually did it. He said no, that he was just telling me what I wanted to know. I told him that I only wanted to know the truth. I told him that we were prepared to go to court. At that point, his eyes started to tear up. He asked me if he would go to prison if he told me that he did it. I said that he probably would. He asked me if he would go to prison if he told me that he did not do it. I said that would be up to a judge or jury. At that point, he said that it sounded like he was going to jail whether he told me he did it or not. I told him that it was not up to me. I told him that there would be a question of how long he would go to jail, but I could not make him any promises or guarantee. I said that would be up to the District Attorney, his attorney and the court.

"Never tell suspect what will happen to them, don't lie, just say you don't decide"

At that point, John Doe began to cry. He told me that everything that he just told me was the truth. I asked him if it was true that he put his finger inside Jane's private. He said that was true.

I asked him if he was telling me the truth when he said that he didn't take Jane's clothes off. He said that he was telling the truth. I asked him if it only happened one time. He said that was the truth. I told him that Jane agreed with that, but there were other things that she didn't agree with. He asked me what. I told him that I could not tell him at this point. I asked him if it was possible that he had forgotten some of the details. He said no.

I asked John Doe what Jane was wearing. He said he thinks she was wearing her nightie. I asked him if she was wearing anything under her nightie. He said no. He said, "That's due to her Mom."

I asked John Doe if this was something that he planned to do. He said no, "it just happened."

Get apology from suspect - confirms confession

I asked John Doe what he did after this happened. He said that he called his Mom and had her pick him up. I asked what he did then. He said he sat in his room for eight hours. I asked him how he felt. He said, "Like shit." He said that he was thinking that if he even thought about doing something like that again, he would slit his wrists.

I asked John Doe if what he was telling me now was the truth. He said that it was. I asked him if he was glad to get it out. He said, "I guess." He paused for a while, then said, "I wish they would have come to me first- they never asked me."

Tape record and notes only after confession or reminds suspect of consequences & inhibits confession

I asked John Doe why he changed his mind about telling me. He said, "So I could get out of here." I asked him what he meant. He said he wanted to get out of the room then he said, "I feel like shit." I asked him why he decided to tell the truth. He said he wanted to "get it out."

I left the room for a few minutes and I returned with a tape recorder. I told John Doe that I would like to make a tape-recorded statement with him. He said that he would rather talk to an attorney before making a tape-recorded statement.

Confirm confession in writing, have witnessed by another detective

I asked John Doe if I could take a few minutes and write down the high points of his statement. He said that I could do that. I left the room at approximately 12:00 p.m. I had some (of) a summary of his statement typed out. I returned to the interview room with Detective Jack. First, I asked John Doe, "Did I threaten you, coerce you or make any promises that caused you to confess?" He said no. I then reviewed the statement with him. He objected to one point of the statement, so I changed that to wording he liked. I asked him if he wanted me to add what he told me regarding his feelings. He said he did. I made the corrections he requested and he

CASE # 05-1003
RAPE I/SEX ABUSE I
initialed all the lines and all the corrections. At approximately 12:10 p.m. he signed it. Detective Jack and I signed the statement as witnesses.

I asked John Doe if he recalled whether he was erect at the time that he was touching Jane. He said that he wasn't erect at all.

After making copies of the reports, I lodged John Doe in the Washington County Jail. I contacted the warrants section and signed off the warrant.

DISPOSITION:

This case is cleared by the arrest of John Doe

Cranovsky.

TESTIMONY OF RICHARD LEO
IN THE CASE OF THE ACQUITTED CLIENT[1]

Q: Lisa Maxfield, Attorney at Law, Portland Oregon
A: Richard Leo, PhD, Associate Professor Univ. California Irvine
X: District Attorney

Q: Can you spell your name for the record?

A: My name is Richard Angelo Leo

Q: How are you employed?

A: I am Associate Professor at University of California, in Irvin, Southern California.

Q: How long have you been there?

A: I have been there since 1997, so 7 years, my primary appointment is in the department of criminology and I am also a professor in the department of psychology.

Q: Did you teach?

A: Yes, every year I typically teach undergraduate courses and graduate courses. The undergraduate courses are on my area of research, police interrogation and false confessions. So one of the courses I teach is called: Interrogations/Confessions of the law. Another course that I teach is called: Miscarriage of justice is about how and why innocent people sometimes get convicted in the criminal justice system, what reform or polices could prevent that. I also teach graduate courses for graduates who unlike the undergraduates are going on to getthe research degree so they too can become professors or researchers.

Q: Can you tell the jury a little about your background?

A: I have a Bachelors degree and a Masters degree in Sociology and I have two post graduate degrees, I have a law degree I received from the University of Berkeley, I don't practice

[1] *With apologies to both Ms. Maxfield and Dr. Leo for the poor quality of this unofficial transcript: Oregon chooses no longer to utilize court reporters, so we audio tape our trials with expected results. This transcript has also been redacted to allow for reasonable reproduction of materials for educational purposes*

law. I just got that degree; I have a PHD which is a research degree that is required to become a professor. I received both of those degrees, the law degree and the PHD in 1994.

Q: With the PHD did you have to do research?

A: Yes, PHD is a research degree and after one takes courses and exams, the center piece of the PHD degree is what they call a doctoral dissertation usually a very extensive research project that takes several years, where you go out and collect data, study it extensively, then write up a massive document in my case it was almost 500 pages and that doctoral dissertation of course has to be approved and then you get the PHD. Sometimes you take an examination after wards as well.

My doctoral dissertation was on the subject American Police Interrogation practices, how American police interrogate and I did extensive field research for that doctoral dissertation.

Q: Can you tell the jury a little more about that?

A: The first, there were many parts to it, but briefly the first part involves sitting in live interrogations. The Oakland police department, in the city of Oakland close to Berkley permitted me to sit in on their interrogations in the Criminal Investigation division, so I spent 9 months inside the Oakland Police Department sitting in on live interrogation in the back of the room, a neutral observer, um that was 122 integrations total. Two other local police departments in the Bay area provided me video tapes and they gave me 60, so I had 182, 122 live 60 taped interrogations that I observed. I was also able to sit in on Interrogation training courses, not only at the Oakland Police Department but also training courses in other parts of the county, as well as private firms that trained, as well as Federal Government Interrogation courses. I was also able to.....

Q: Let me stop you for a minute, you said you've taken training courses from the police?

Unofficial

A: Well yes and no, I am sorry, not general training, police officers receive but the kind of training once an officer promotes from patrol to detective they receive. Interrogation training courses. Since my dissertation was on interrogation I was only interested in that slice of their training. How they are trained to interview and interrogate, and I took courses that were introductory and advanced, local, vs national on interviewing and interrogation. In those courses, even thought I was a gradate student at UC Berkley collecting data for my doctoral dissertation I participated as if I were a police officer. So, I took notes, participated in role playing, I ended up getting the certification that they receive and in addition to that observing interrogation I was also able to interview, police integrators, police trainers, police managers who supervise them, ah, I was also interested in the criminal justice system and how integrations/ confessions worked in that. So, I was able to interview prosecutors, defense attorneys, and then I did some other research historical research and documentary research for that doctoral dissertation.

Q: And you have taken courses from the federal government?

A: Yes, so there was a, there is a very big training center in Glencoe, Georgia called the um, ah, let's see, The Federal Law Enforcement Training Center, the FLETC is the acronym, and they train all Federal police, with the exception of the FBI, or at least they did at the time. And I was invited exactly and I spent a week there, taking advanced interrogation training courses.

Q: And some of the training you took with the police officers was privately provided?

A: Yes, the um, there is a training firm in Chicago, Chicago called Reid & Associates, and Reid and Associates goes around the county and puts on introduction and advanced interrogation training courses, and I took the three day introductory and the two advanced course.

Q: Were you provided a copy of Detective. Mike Boyd's training records. Det. Boyd's records indicate a basic Reid method as well as an advanced course is that right?

A: Yes,

Q: Would that be similar to the training you took?

A: Yes, ah, if he took, Reid and Associates, they put on seminars, with the three day introductory and advanced course all across the county. He might of taken a three day course and that would be identical I took, and the two day advanced same exact course. Sometimes what happens is there are other training firms that teach the Reid method, so it's not Reid and Associates, that firm but another firm that teaches the same exact method and it probably would have been very similar to what I've taken. I've taken other courses that essentially regurgitate the Reid method in one form or another.

Q: Have you had during your career the opportunity to review training manuals regarding the Reid technique?

A: Yes, um the Reid firm in Chicago publishes interrogation training manuals, it is now quite big it goes through many additions, I have all their manuals going back to 1942. I've not only read, but I've also written papers about them and discussed them in my public lectures. There are other firms with their own manuals, deviations, and I've got those too. There are materials I've acquired that are hand outs, training materials of local firms in a particular part of the county that train police officers on how to interrogate that draw on the Reid method.

Q: Now you've mentioned, have you ever taught courses on confessions?

A: Yes, um, because of my research on interrogation and confession I sometimes get contacted by police departments to give lectures, so I've given some lectures on interrogation and confession to police departments not only in America, but exactly in other counties too. But

Unofficial

I believe it was in the summer of 2000 or around then, I was asked to put on a training course in Louisiana police on how to understand um, the techniques of interrogation better so they would not use techniques with regards are coerced um, they would not get false confession or unreliable confessions. I did another one of those subsequently in Texas, to a large group of police, but in that year again 2000, then in 2002, the summer of 2002 I put on a three, one day training sessions for the Brower County Sheriff, in Brower County, Florida. They had a problem with false confessions, several of the confessions they had gotten in high profile cases in the past decade had been relieved to be false, because of DNA testing. So they called me in to give lectures to their investigators about false confessions and how to avoid them and that was in the summer of 2002. I did another full day training sessions about a year ago, February 2003, to the Miami Beach Police department, in South Florida as well.

Q: Now you have written extensively on the subject of interrogation techniques and false confession, have you not?

A: Yes, as a professor and researcher at the University that is my primary job, so I've conducted and published a fair amount of research in the last decade.

Q: That research is peer reviewed?

A: The published research yes, I have unpublished papers that are in process of being published as well a couple books that I'm working on that will eventually be published and be put on the CV.

Q: Have you been called as an expert witness before?

A: Yes,

Q: How many times?

A: To date I have testified 96 times in pre-trial motions or jury trial and a few post conviction proceedings, I believe about 60 of those times I have been in jury trials. I have testified in 17 different states, primarily in my home state of California, also in Oregon, also in Federal Court as well as military courts.

Q: Have you ever been part of the prosecution?

A: Yes, there is a case in California right now, the State Attorney's General's office called me to testify last year, last February in preliminary hearing, and my understanding is I will be testifying next month or the month after in the current trial of that same case.

///

Q: I would also ask that Dr. Leo be qualified expert witness at this time?

X: I have no cross examination on that issue.

Q: You testified that you teach courses sometimes with both undergraduates and sometimes graduate students?

A: Correct.

Q: What are the most common misconception juries have regarding confessions?

A: The idea that if somebody confesses it must necessarily be true. Particularly in the modern age, the old days police were rough, the old days of the third degree people could understand why somebody might confess falsely if their roughed up like that. Theses days that doesn't happen, the third degree, so the most common misperception is that the psychological methods that the police use couldn't, or wouldn't cause somebody to make false confession, and yet we know from the research that, that happens, that has happened many times. There are numerous instances of demonstrably false confessions. So that, that the common misperception and I think that a lot of the reason why people become interested in taking that course, because it

Unofficial

so counter intuitive, people want to know how and why that can occur and of course most people don't have any experience with police interrogation, since they aren't the subject of it.

Q: Is there any real dispute within the scientific community that false confession occur?

A: No, the community of researcher and social sciences there is no dispute; it's generally accepted well documented. The questioned is not whether it occurs; it is why do people sometimes make false confessions in response to police interrogation.

Q: Can a researcher like you, can they set up a laboratory experiment to try to figure out how this happens?

A: Well, that is a problem, the problem the answer is not really, because as a University Professor I have to follow guidelines that the University like all intuitions as it's own rules and the University takes money from the Federal Government in terms of grants, and so the University must comply with Federal guidelines and there are what are called human subjects requirements, we can not in our laboratories do harm to human subjects and we need to have their consent to do research on them. The problem with trying to get a laboratory setting to make a subject to falsely confess is that you recreate the conditions of interrogations, police interrogations inside the laboratory, you would have to stress, possible coerces the person in the laboratory to get them to admit something they didn't do and that would be considered unethical. University's, before you do the research you have to write up a protocol to get the approval of the University to do the research. The University would never let us do that. They would never let us do interrogation of a subjects that are like the interrogation the police do, so one can't do that in a laboratory and you would have to get both innocent people, and guilty people and have control conditions that would be unethical, so in the laboratory one can't recreate false confessions.

//

A: You would never, you would never say a confession is false just because someone is saying the confession is false. There are four categories or four ways you could know that a confession is certainly if not all most certainly false.

The first of the four would be if you can show the crime didn't occur. The classic example of that is when confesses to murder and then the murder victim shows up alive, well then you know that the murder didn't occur, therefore the confession is false.

The second, way would be if you could show it was physically impossible for the person to have committed the crime. I live in a small town called Laguna Beach in Southern California before I moved there, there was a big fire the town burned down the police had, got somebody in custody confessed to that, very serious fire. Well, it turned out the person, they subsequently learned that person was in Mexico in jail at the time the fire occurred. So, we know from that example that it was physically impossible for that person to have committed the fire, he was in jail, in Mexico and that was well documented.

The third way or category would be if scientific evidence emerges that shows the person didn't commit the crime and there are many examples of that but, the most common one these days is when we read in the paper about DNA, people released from prison, because the DNA showed that they didn't commit the crime it must have been someone else frequently the DNA will lead them to that someone else.

And then finally, the fourth category which also happens not in frequently is when the true perpetrator is identified, sometimes the perpetrator will come forward or more commonly maybe evidence will lead the police to the person and realize is the person who committed the

Unofficial

crime. And so then you know that the previously person who confessed, had confessed falsely, because this other persons involved and they weren't.

So, in those four, in those there is usually an agreement the police, the prosecutors, everybody else realizes that it was a false confession. Those are four ways you could know that a confession is false with certainty and many of the cases we studied fall in to one of those four categories.

//

A: Well, there is a number of questions researchers are interested in, one set of questions has to do with Why? Why would somebody falsely confess? What are the physiological processes where the reasons, how did the confessions come about, and within that, what sort of variations do you see having to do with the techniques and the individuals and there interaction. Another set of questions have to do with not why did the person falsely confessed, but how do we, what are the characteristic or indicators of a false confession, so a part from the methods the police use looking at these cases, what are the common pattern, that you see proven in false confession cases? And then there is a series of academic, more specific questions around that issue as well.

A: I am wondering when you are looking at this body of false confessions if you are able to correlate Reid technique methodology?

Q: Yes, some interrogations are video taped or audio taped and in those cases which are ideal you have a full record of what occurred, so you can simply go through and see what techniques were used, ways in which they were used, and the extent the Reid technique or other method was used and looking broadly across cases, what patterns are the correlations. In other cases when there isn't a recording there maybe testimony from the various participants in the

interrogation or other documentary materials that researchers rely on to make determinations, or analysis of what likely occurred.

A: Is it difficult to identify the Reid Technique methods?

Q: Well it wouldn't be difficult if they're there, sometimes police reports are written in ways, that hide that, but other times the information is there. I mean I am very familiar with the Reid method and so if I read a police report and there are ear marks of it or direct references to it or statements that suggest that it was used, then I'll pick up on them.

Q: So, is it correct that the Reid technique has been used in a high number of false confessions?

A: Yes, some of the techniques advocated by the Reid school or Reid method have been used in a high number of false confession cases and that has been demonstrated by numerous researchers in numerous different studies.

///

A: Yes, the Reid method and other police interrogations and training firms make the distinction, there's interviewing, and there is interrogation. Interviewing, both ways of soliciting information. Interviewing applies to witness, victims, and potential suspects and in an interview, the idea is the detective will ask opened questions in a non-accusatory manner and will let the subject who is being questioned do most of the talking. So, the idea is the detective does not suggest or accuse, they ask open-ended questions and they're trying to get information to figure out the truth; to develop theories, leads to point them in particular directions.

That is very different from an interrogation; interrogation is directed only toward suspects, not toward victims, witnesses, or potential suspects. Only toward suspects, whom the detective has determined in their mind is, or must be, guilty of a particular crime. Interrogation

Unofficial

is very accusatory it involves psychological techniques of deception, and confrontation, and manipulation. The purpose of an interrogation is not necessarily to get the truth, but to get the suspect to incriminate him or herself, to get the suspect to say things the prosecution can use to convict them. The idea in the interrogation is that unlike an interview where you let the subject of the interview do most of the talking, in the interrogation, the interrogator is supposed to dominate and not always let the suspect talk or at least not let them deny. Again the purpose is to get the suspect to say "I did it" or to agree to an account that would confirm the detective's theory that they committed the crime. So, they are very different in terms of their purposes, they are very different in terms of content, and the strategy, and the approach of what's going on and who they apply too.

Q: In a Reid interrogation, you interrogate someone you believe guilty?

A: Yes, the interrogators, the detectives are trained in that if your trying to figure out in your own mind as a detective who committed the crime then don't interrogate because you're still in the investigation phase, but you only interrogate people who you believe to be guilty and so when I say there is a presumption of guilt the detective when she or he decides to interrogate, they have made up their mind this person is guilty and they are not suppose if they're following their training, they're not suppose figure out in the moment of interrogation whether or not the person is innocent or guilty, they've already decided that this person is guilty and they're going full steam ahead with the goal of getting the person to say "I did it" to make incriminating statement or a full confession. So, the presumption of guilt is at the very heart of what it means to interrogate as opposed to interview. You would never interrogate somebody if you're following your training unless you absolutely, believe that they were in fact guilty even if you're completely wrong you move forward with that belief.

///

It is possible that they may do what's called behavioral interview or behavioral analysis interview and this is where you ask these questions to look at somebody's body language, their body language goes one way then, and if you follow the Reid training it would suggest that they're probably lying. If their body language goes another way, they're probably telling the truth. This is just the Reid training and what the Reid training says, so a detective might do one of these behavioral analysis interviews and then try to read the body language and then decide, "Okay now for sure I think the person is guilty and I'm going to interrogate." So, there might be that before the interrogation, but most of the cases I've seen they just plow forward; it's the first time they've talked to the suspect.

Q: So, in this situation would they be asking more general, history questions or less confrontational questions,

A: Correct,

Q: then subsequently looking at the behavioral

A: Correct,

Q: have you looked at these supposed behavioral interviews?

A: Yes, I and others have studied this and it tends to be things like, they say in their training. If you're slouching in your chair it means you're lying, if your sitting up straight that means your telling the truth; if your eye contact is one way it means your lying, if your eye contact is other way your telling the truth; if your running your hand through your hair, picking lint off your jacket, that indicates your lying. The whole set of body language behaviors is supposedly indicative of whether you're lying or telling the truth. There's been a number of studies in the academic literature to evaluate whether or not what the Reid method and other

Unofficial

police interrogation trainers are saying is true, and none of the studies have confirmed people can't read into body language, police can't read into somebody's body language whether or not if they're acting nervously there source of nervousness is they're being interrogated by a police officer about a major crime or they're source of nervousness is that they are in fact guilty and different people behave differently. Somebody may be guilty and calm, somebody may be innocent and be a nervous wreck.

Q: There is no scientific validity to the behavior analysis?

A: Correct, it's just a bunch of folk lore that police teach each other and they may believe, and sometimes they say it's scientific, but in the world of social scientist who really, do real research, independent research, there's nothing corroborating that, somehow after three days of an interrogation training course a police officer can turn into a human lie detector. It just doesn't work that way.

Q: So what's wrong with that?

A: Well, the risk is, and this has happened in a number of the false confessions that we studied, the risk is that if the detective thinks a particular kind of behavior, let's say somebody blushes at a particular questions or somebody doesn't demonstrate a lot of emotions and the detective for example thinks that is a sign of guilt, the detective may then decide, Okay now, I've decided this person is guilty and I'm going to go full force ahead with the interrogation. Interrogations are very powerful social situations and can produce false confessions, so the risk of the behavioral analysis method is that it causes the detective to think that they know the person is now guilty. To make a mistake and actually get an innocent person in the interrogation room and then have a physiologically powerful interrogator that might cause that innocent person to make a false statement.

Q: Are all police interrogations coercive?

A: Not necessarily, police interrogation, like everything in life there are varieties and forms. I've seen some physiological interrogations where the interrogator is very animated, stands, raises his hands, raise his voice, hits the table, sticks their arm out. I've seen other interrogations that are forceful and in a very different way: calm, very no threatening in terms of their size but nevertheless uses the very same techniques that are meant to break down the suspect resist's, causing them to say "I did it". So there are varieties of ways in which a physiological interrogation can be very forceful.

///

The purpose is to get the confession or the "I did it" statement. So, when they say we're here to get both sides of the story that's just to disarm the suspect, and have the suspect think that by talking to the police, they're going to help themselves, police are aware or are trained to know that suspects don't have to talk or might chose not to talk. So, that's just a technique, once the detective has decided to interrogate they're only interested in confirming their belief that the suspect is guilty, and not interested in both sides of what might have happened. Presumably they have already made their evaluations prior to the interrogation.

Interrogators presume that everybody's going to deny their guilt when their confronted and accused when the interrogation begins and so the reason way the police go off on these three or five day training course and have to read the manuals is to teach them all these psychological methods that are meant to, at their very most basic, to move somebody from denial to, to get them from stop saying "I didn't do it" to start saying "I did do it".

///

Unofficial

A: Researchers have talked about two phases of this type of interrogation, trying to understand, how an interrogation has to work. There are usually two steps. The first step involves confronting the suspect and training to break down their denials or resistance by making them feel it's pointless, there's no way out, the situation is hopeless, no matter what you do or say the interrogator is not going to believe your account. Sometimes interrogators will not only accuse a suspect, but keep accusing them and try to cut off their denials, some interrogators will comfort them, use evidence, that may not even be true evidence, they just lie and make up the evidence. So all of that plus other techniques is the first phases of interrogation are meant to cause the suspect to think there's no way out, they're trapped, powerless, the situation is hopeless, no matter what they do or say the case is going to go forward and they will probably get convicted.

The second step of interrogation or phase of interrogation has to do with convincing the suspect it is in their best interest to make a omission or confession, so police trainers and police interrogators believe that people will think that making an admission is not as bad so they got come up with different reasons why the suspect will be better off if they make this admission and in this second stage or phase in the interrogation they use what researchers called inducement, or appeals, reasons why the suspects are better off.

There are three categories of these appeals or inducement that researches like myself talk about in categorizing interrogations. One category has to do with Moral Appeals, and these appeals have to do with get it off your chest, do the right thing, be a man, stand up and tell the truth, using a religious or moral value of telling the truth.

Another of the three categories the second set of appeals has to with references, sometimes the judge and jury in the criminal justice system, the fact that the suspect is got up in

this criminal justice system and how they behave in the interrogation room, whether they show remorse, make an omission, or continue to deny, don't show remorse is going to influence the way the police behave, what they can do to help the suspect, how the prosecutor behaves, the judge might do, what a jury might do. There are a number of examples of police might make references to themselves, prosecutors, judges and juries being able to help the suspect will confess.

And then the final or the third category, we sometimes call that coerce, inducements, because we arrange things on a continuum. We sometimes think of the moral one at the low end and the coerces one at the high end, and this category is where the interrogator implies maybe there's a deal or that there is different ways to explain what occurred and that if the suspect confesses or agrees with the interrogators account the suspect might get less punishment or no punishment. If they don't, they might get a higher charge or more punishment and sometimes in this category there are what is called "themes."

Themes is where you invent different scenarios, the interrogator will say "could it have been" for example in a murder case "self-defense, the victim came right at you? or was it premeditated first degree cold blooded murder?" The interrogator will harp on these two different scenarios and communicate them as self defense, self defense we all have the legal right to defend our selves in case of aggression, the suspect can come to think admitting self-defense is not admitting to the crime and the interrogator following their training will try to lead the suspect to believe that if you don't do this self-defense right now then everyone, including the judge, and the jury, they might imply that it was first degree premeditated cold blooded murder, which of course carries a high charge worst form of murder and the harshest possible punishment and these, this sort of two choice technique, is high end coercion. Police are trained to do this

Unofficial

every single time, so in their manuals they will have different scenarios or choices murder, self-defense, first degree murder, for robbery, theme scenarios in two choices for sexual assault, theft. The interrogators are trained in those techniques again to get the suspect to go with the lesser one, it minimizes the crime or redefines it's not a crime so they'd be better off; and it answers the interrogator's accusation for confessing and because that makes sense because they're not even confessing to a crime.

///

A: Yes, and the example I gave them of murder, often times is not self-defense but is accident, this was just an accident, everybody understands that the gun just went off or was it first degree murder and the reason why accident is a common theme or inducement in the Reid method with often times what the interrogator is trying to do is create an scenario that the suspect didn't intend to commit the crime, or it was a mistake, or an accident, unintentional, to convince the suspect that there's nothing wrong, it was understandable. In this two choice technique, contrasting one choice could result in the worst outcome or one that does not that is very common.

///

A: Somebody like that would be more venerable the problem with creating scenarios where he admits to a innocent mistake or misunderstanding is it not a really big deal and the suspect comes to think their not even admitting to a crime, so some misunderstanding occurred verses you don't admit it what's going to happen is, it's going to be portrayed in a different way or the implication will be the worst possible thing. Could somebody falsely admit, particularly if they're not really told what the interrogation is about. They could falsely admit to doing something they don't even think their admitting to a crime, and then it gets cast as an confession,

and then of course get arrested and prosecuted and sometimes convicted, and they didn't commit the crime and didn't realize they were confessing this whole time; either way the interrogator portrays unintentional, accidental, mistake and especially to answer your question is yes they're confused.

///

Q: Do they advocate recording interrogations to avoid later allegations of coerced confessions?

A: They do not always record their interrogations by audio or video tape. In other places like Alaska and Minnesota police have to record by law, but the Reid method does not advocate good record keeping and that is a real problem because if you have two different accounts of what occurred in an interrogation. How do you know who to believe? All the police have to do is get a five dollar recorder and a two dollar tape and click it on and you've got an objective record of what occurred and everybody has to evaluate or make very important decisions about the freedom of that individual is to look at that record, there is no he said/she said swearing contest of what did or did not occur.

Q: Changing topics to focus on this case specifically, you have had the chance to review the police reports regarding the interrogation of my client?

A: From his own description, the interrogator describes accusing Mr. Smith. Challenging his denials, telling Mr. Smith that he knew what Mr. Smith had done, suggesting themes. There were twists or tricks in his themes: the innocent massage, you didn't start with the intention to do anything wrong and then crossing the line. That would be inducement, the implication that it would be innocent or unintentional or accidental, there's no intent, there's no crime an equivalent to a mistake.

Unofficial

Q: Are the police trained on how to deal with discussions of the Reid technique in court?

A: They're not, I don't recall any specific training where they're trained to deny it. They're not trained not to say anything in court, to deny they used the Reid method necessarily, but they are trained when they use the Reid method. They're trained to try not to have the suspect think that their purpose of the questioning is to get an confession; they're trained to sort of hide what's really going on because the idea is the suspect thinks all you're trying to do is to get a confession. The suspect will see you differently and realize that is it not in their interest to corporate with you, whereas the suspect is mislead to believe the purpose of the questions is to help the suspect out or for some other purpose that won't harm the suspect, the suspect is more likely to corporate and also be more likely to give statements that police and prosecutor to use against the suspect to convict the suspect who the interrogator thinks is guilty.

CROSS EXAMINATION BY DISTRICT ATTORNEY

X: You are a primarily a social scientist, correct?

A: Correct

X: And the actual department that you work in is the department of Criminology, Law and Society.

///

X: is the teaching that you do, if I'm correct by your curriculum vj, you specialize in the area of false confessions?

A: that is one area that I teach classes about, parts of classes about.

X: you've testified that your specialty was false confessions and police interrogations, right?

e: laurie@lshertzlaw.com
Iowa Federal Defender / CJA training
November, 2005

A: correct, correct that is my research specialty, what I meant in my previous answer is that the entire course, I teach a class called Interrogation, Confession of the Law, only about two or three weeks of that is on false confessions and the rest of it is on other aspects of interrogations.

Note: please review Dr. Leo's CV for a much shorter, and less painful version of his experience than wasting your time reading the prosecutor's poor cross-examination. You can also ask him about his fees, yearly income, and shoe size should you choose to hire him rather than reading eight pages of transcript about it.

X: Are there any folks in that faculty that teach a course in True Confessions?

A: There's, first of all a course I teach that's about both True and False Confessions, but I am the only one who teaches that course Interrogation/ Confession of the Law. It's called Interrogation Confession of the Law and we do in that class both True and False Confession the idea is that at the end of the 10 week term, the students have a complete of understanding the legal and social physiological, and criminological research on the entire subject of the interrogation confession of the law which includes both true and false confessions

X: From the benefit of the web, we've been able to down load some of your testimony on other cases and articles. Isn't it true that you have written most people who are accused do the crime and are interrogated by the police are guilty of the crime?

A: I don't know if those are my exact words, but true confessions are more common than false confessions, yes.

X: Much more.

e: laurie@lshertzlaw.com
Iowa Federal Defender / CJA training
November, 2005

Unofficial

A: Well, we don't know. We don't have exact statistics because the government doesn't collect them, the police departments don't collect them, but it is the belief that yes, false confessions are the exception, true confessions are the norm.

X: That would be important to bring some perspective to your testimony, would it not?

A: I am not sure exactly what you mean. What's important in what sense, but yeah sure if police, I think what is really important is whether or not the police make the right judgment in who gets the interrogation, police making the right judgments and they're interrogating the guilty as they're trained to do, then they're going to get a low percentage of false confessions. If however they're making a mistake in judgments or acting on bad information and using coercive techniques then they're going to get a higher percentage of false confessions.

X: I understand your basic message; your basic message is coercive techniques can create false confessions. Correct?

A: I think it is a little more then that but I agree with that statement.

///

X: Okay, so in the cases you've testified in I assume since your testimony previously was that almost all officers deploy some techniques of the Reid method, but every one of those cases involved officers using the Reid method.

A: Or typically some kind of questioning that comes out of or bears resemblances to the Reid method.

///

X: You have looked at a three page police report?

A: I have looked at a three page police report that is one of the materials that I have looked at, correct.

X: And you made sure to let the jury know that it was only three pages?

A: I wasn't thinking that at the time, but it was brief, it's not like I've looked at a stack of reports which sometimes happens in other cases.

X: And you have not interviewed the victim in this case, (the child)?

A: Correct.

X: And you've not reviewed her statement which was videotaped?

A: Correct.

X: So you have not seen the corroboration of the confession in that video tape?

A: I have not seen the video tape; I don't know whether it contains or fails to contain corroboration or what's developed since that videotape.

///

A: No, I think that is completely misleading, I think you have misstated the testimony or misunderstood it. No. First of all, we all heard the direct testimony. But what I was talking about the Reid method, what the techniques are, and how interrogation works. I didn't say just because you've got the Reid method the interrogation is necessarily coercive. I did not say just because police use the Reid method they necessarily get false confessions, you might get non-coercive interrogations, you might get true confessions, I was trying to explain how this phenomenon of false confessions comes about.

X: Do you know that you're one of four experts on the Reid website?

A: I was aware that I am on their website; I did not know how many other social science experts are on their website.

X: Would it surprise you they're all people you've co-authored with?

A: Yeah, it would surprise me actually

Unofficial

///

A: You've have to ask the Reid people why I'm on their website, but I was aware I am on their website and they've interpreted some of my comments or my writings crucial to their methods.

///

A: Very briefly there are aspects of the Reid method that I spoke about that are involved in cases often when you get a false confession, I'm not painting with a broad brush that your question implies.

X: When you said is there are the four categories of cases and you went through and those are the only ones that you went through, certain that are false and the facts of this case do not fit into any of those categories.

A: Correct, the facts to this case don't fit into those four categories

///

X: Except you said roughly 100% of all police interrogations employ some elements of the Reid model?

A: Most of the interrogations do, correct not necessarily all the elements are present.

X: Isn't it true that you also said that the bulk of all confessions are true?

A: Researchers believe that the majority of confessions are true. Correct.

X: Therefore, intuitively wouldn't it be true that officers using the Reid method, applying it correctly have obtained valid confessions?

A: In many cases that's true, as I also said false confessions are counter intuitive,

X: I understand

A: Right, but the Reid method even if aspects of the Reid method are involved producing true confessions in the majority where there are confessions that's not inconsistent with the Reid method also being involved in the vast majority of false confessions and there different aspects of the Reid method as well.

///

X: So do you concede that maybe be common for individuals questioned about child sexual abuse to deny those allegations?

A: Yes

X: Are you testifying police officers should take the first response and leave it at that?

A: No, that was not my testimony

X: You're not an advocate for ineffective police interviews are you?

A: No, the whole reason I get contacted to give talks was to make police more effective and do higher quality work, and that's one of the reasons why I do research and publish in this area.

X: So, is it possible in the area of child sex abuse, that someone was talking about they're not comfortable with, something taboo that an officer may have to press harder then he would on others?

A: Yes, the interrogation involves some level of pressure the question is whether it's proper, coercive and whether they got the right person in the first place, whether it's ultimately true or false confession.

X: Do you find 90 minute interviews apparently coercive length of time?

A: 90 minutes of interrogation is not by itself inherently coercive, no.

Unofficial

X: Do you find if the defendant arrived at the police station on their own free will that, that is a factor you would consider?

A: Well, I think one has to consider the totality of the interrogation I wouldn't put a lot of weight on that factor, but yes that's a factor involved in accessing what went on in the interrogation.

X: You are acknowledging that in order to determine whether the confession is valid you need to consider the totality of the circumstance or interrogation?

A: Correct, it's not clear what you mean by valid, you may mean whether it's coerced, you may mean whether it's reliable, but in evaluating an interrogation, ideally one wants to know as much about what occurred during that interrogation as possible which is why it's so crucial to record an interrogation.

//

REDIRECT, MS. MAXFIELD

Q: The prosecutor asked you about confessions being admitted in court. Are false confessions sometimes admitted at court?

A: The majority of cases, they were admitted in court, and the majority of cases people were convicted and released after their confessions were discovered to be false. That changed somewhat in the DNA cases now that DNA used tested before people get prosecuted and convicted so that slice of the cases we're seeing involves a lot more pre-conviction dismissals.

///

///

Unofficial

e: laurie@lshertzlaw.com

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	Case No. B0411815 Judge Helmick
Plaintiff,	:	
v.	:	
ROBERT J. ANDREWS a/k/a Rob Andrews,	:	
Defendant.	:	

COPY FILED
COMMON PLEAS COURT
HAMILTON COUNTY
COST DESK
SEP 02 2005
GREGORY HARTMANN
CLERK OF COURTS

DEFENDANT'S MOTION FOR ADDITIONAL DISCOVERY AND PROTECTIVE ORDER

Comes now Defendant, Robert J. Andrews, by and through counsel, and respectfully moves this Court for additional discovery pursuant to Ohio Rule of Criminal Procedure 16. Specifically, the Defendant requests the production of mirror-images of the computer hard drives seized from his home for examination by an independent forensic computer expert. Additionally, the Defendant requests a Protective Order, barring prosecution of his expert, attorneys, and their employees for possessing or viewing of any materials gained through this Motion throughout the course of any analysis, trial preparation, trial, and appeal.

A Memorandum in support of this Motion and a Proposed Order are attached.

Respectfully submitted,

SIRKIN, PINALES & SCHWARTZ LLP

H. LOUIS SIRKIN (Ohio Bar No. 0024573)
JENNIFER M. KINSLEY (Ohio Bar No. 0071629)
CANDACE C. CROUSE (Ohio Bar No. 00724505)
105 West Fourth Street, Suite 920
Cincinnati, Ohio 45202-2776
Telephone: (513) 721-4876

-and-

Clayton G. Napier(Ohio Bar No. 0000474)
29 North D Street
Hamilton, Ohio 45013-3128
Telephone: (513) 868-8229

Attorneys for Defendant, Robert J. Andrews

MEMORANDUM

I. Introduction And Statement Of Facts.

On December 16, 2004, Defendant, Robert J. Andrews, was indicted on five counts, in violation of R.C. §§ 2907.322 (A)(1), 2907.322 (A)(5), 2907.323(A)(3), 2921.12(A)(1), and 2923.02(A). These charges arose from certain internet "chats" that Mr. Andrews allegedly conducted with what turned out to be a computer vigilante associated with a group that calls itself "Perverted Justice." He was released on bond and awaits trial on September 19, 2005.

Pursuant to normal discovery under Rule 16 of the Ohio Rules of Criminal Procedure, the State delivered certain documents to Mr. Andrews' counsel. Among other things, that discovery included a four-page Forensic Summary prepared by Officer John P. Ruebusch of the Regional Electronic Computer Investigation Section of the Hamilton County Sheriff's Office ("RECI"). That report purported to be an "initial analysis" of the computer hard drives of a Dell tower and Dell laptop seized from Mr. Andrews' home and indicated that "[a]nalysis continues on this case." Undersigned counsel spoke to Prosecutor Kevin Hardman via telephone to request a full report or a report of any continued analysis on the hard drives, but was assured that this summary reflected the totality of the State's investigation thus far.

Since all of the charges against Mr. Andrews involve the use of a computer, analysis such as that contained in the Forensic Summary prepared for the State is crucial to this case. As such, a necessary step in forming Mr. Andrew's defense requires his own analysis of the two involved computer hard drives. Therefore, Mr. Andrews requests permission from the Court for a mirror-image copy of the hard drives seized and analyzed by the State to be remitted to his expert, Mark Vassel of Midwest Data Group in Berea, Ohio. Additionally, a Protective Order is necessary, not

only to shield Mr. Andrews' expert, attorneys, and their employees from liability associated with their possession of any possible contraband stored on those hard drives during the course of the analysis, but also to protect the public from further dissemination of any prohibited materials.

For the following reasons, the Defendant's Motion for Additional Discovery and Protective Order should be Granted.

II. Mr. Andrews Should Be Permitted Mirror-Image Copies Of The Computer Hard Drives Associated With This Case Because They May Contain Information Crucial To His Defense.

Ohio Rule of Criminal Procedure 16(B)(1)(c) requires that:

> Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

Nothing in this Rule or the child pornography statutes was intended to prevent a defendant from presenting his or her defense. Additionally, the State's child pornography statutes make criminal the illegal use of child pornography. They do not make criminal the right to effective counsel or the right to defend oneself. In fact, R.C. § 2907.322 (B)(1) contains an exception that reads,

> This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

See R.C. § 2907.322 (B)(1). Section 2907.323 (A)(3)(a) includes an almost identical exception. *See* R.C. § 2907.323 (A)(3)(a).

Moreover, Ohio's criminal discovery rules are compulsory and only provide exceptions from the duty of production for confidential and work product information. Thus, the burden of proving good cause for refusal to furnish a complete copy of all computer hard drives involved in a case falls on the government. *See Cervantes v. Cates* (2003), 206 Ariz. 178, 183, 76 P.3d 449.

In, *Cervantes*, a case involving child pornography, the Arizona Court of Appeals held that "where there is no evidence that the defense attorney or defendant will use or distribute the material other than in preparation for and at trial . . ., the court should order the materials requested to be reproduced." *Id.* at 186. There, the court construed Arizona criminal rules of procedure that are based on the Federal Rules and very similar to Ohio's Criminal Rules. *Id.* at 183. The court found that possessing copies of the alleged contraband in child pornography cases is essential to defending against such charges. *Id.* at 185. Mere inspection is not enough because requiring the defense to memorize numerous images and defend based on those memories alone unreasonably impinges upon the defendant's right to effective assistance of counsel. *Id.*, citing *Westerfield v. Superior Court* (2002), 99 Cal. App. 4th 994, 121 Cal. Rptr. 2d 402. The court held that the trial court should impose a protective order requiring

> sufficient safeguards such as limiting the copies for use to defend the case, requiring the materials not be recopied without further permission of the court, prohibiting the defendant from viewing the material other than for assisting defense counsel, and other restrictions to minimize any chance the copies could be used other than for defending the case.

Id. at 186. These measures would protect against dissemination and illegal use of the materials while still permitting the defendant a defense.

Similarly, in *United States v. Frabizio* (October 27, 2004), 341 F.Supp.2d 47 (D. Mass.), the United States District Court for the District of Massachusetts held that under Federal Criminal Rule 16, if the government does not furnish copies of all contraband to defendants defending against child pornography charges, those defendants will be severely prejudiced. The court affirmed *United States v. Hill*, finding that *United States v. Kimbrough* and its progeny, where courts held that mere inspection of child pornography satisfied Rule 16, do not preclude the requirement of reproduction under Rule 16. *Id.* at 49-50 citing, 322 F.Supp.2d 1081, 1091 (C.D. Cal.2004). Those cases merely found that the lower courts did not abuse their discretion in allowing for inspection where the defendants had requested nothing more. *Id.* at 50.

The *Frabizio* court went on to echo the *Hill* court, holding that if the defendant's expert and attorneys did not have copies of the alleged child pornography, she would suffer severe prejudice. *Id.* citing, *Hill*, 322 F.Supp.2d at 1091. Permitting the defense copies was the only method of ensuring against prejudice. *Id.* The court noted that unlike the fairly straightforward, one-time event that is an analysis of a narcotics sample, "a thorough examination of the thousands of images . . . will take hours, even days, of careful inspection and will require the ability to refer back to the images as the need arises." *Id.* at 50 n. 4 quoting, *Hill*, 322 F.Supp.2d at 1091 (internal quotations omitted). Because the experts in both cases contemplated extensive, in-depth analysis and were located in another state, both courts found that requiring multiple visits to a government laboratory was "unreasonably burdensome." *Id.* at 50. Additionally, both courts found that any analysis at a government laboratory would be "inadequate" because "[t]he defense expert needs to use his own tools in his own lab." *Id.* (citations omitted). In some cases government laboratories may not even be equipped with the tools and/or software that the independent forensic computer expert needs.

Additionally, in *United States v. Alexander*, No. 04-20005-BC, 2004WL2095701 *9 (E.D. Mich.), the court permitted the transmission of the mirror-image of the hard drive of a computer containing alleged images of child pornography to the defense's expert because of the materiality of that evidence to the defense. "Access to the hard drive on which the alleged obscene images are stored is important to the defense in order to determine when, how, and under what circumstances those images were downloaded onto the defendant's computer, if such a determination can be made." *Id.* The court conditioned the release of the hard drive on a protective order that, among other things, protected the defense expert and counsel from pornography charges associated with their actions taken in preparation of the defense. *Id.* at *10.

Therefore, in order to safeguard the defendant's trial rights, Ohio Criminal Rule 16 mandates that a mirror-image of any and all computer hard drives relating to charges involving child pornography should be remitted to the defense expert or counsel. This exchange should necessarily occur where the government has not met its burden of proving that the defense expert or counsel would further distribute the contraband. A protective order, limiting the use of the materials to the defense of the case, should protect the public from further dissemination of child pornography and the expert, attorneys, and their employees from exposure to criminal liability for their efforts to afford a defendant his or her rights to effective assistance of counsel and the right to defend his or her case.

Here, the charges against Mr. Andrews involve allegations of the presence of child pornography and alleged evidence of an internet "chat" on one computer. Access to all computer-related evidence is essential to preparing a defense. *See United States v. Albert* (2002), 195 F. Supp. 2d 267, 283 (D. Mass.) (court granted indigent defendant funding for an independent computer

analysis because "such analysis is necessary in order to prepare an adequate defense"); *Minnesota v. Kandel* (2004), No. A04-266, 2004WL1774781 (Minn.App.) (court upheld suppression of all computer-related evidence and a resulting dismissal after state initially refused to produce copies of child pornography evidence and later provided poor copies near the time of trial). Thus, in order for Mr. Andrews to defend himself, extensive and in-depth analysis of the two computer hard drives is absolutely necessary. The nature of this material, when it originated on the computers, from where, and how it was stored are all issues material to his defense. Without access to a copy of the computer hard drives obtained from his home he will have no way of knowing what evidence he is defending himself against, and thus no ability to formulate a defense. Mr. Andrews cannot receive competent representation if his counsel and his expert do not have ready access to the materials that will be at the heart of the government's case. *See* Affidavit of Mark T. Vassel, Attached as Ex.1.

Moreover, mere access for inspection is insufficient. Performing the necessary analysis on just one computer hard drive alone can take days and requires the use of highly-technical tools. Defendant's expert estimates it will take 40-50 hours to complete his examination. Mere access to these materials for a short period of time will not afford an expert ample time to perform the proper testing. Moreover, requiring an expert to travel long distances (in this case 4 ½ hours from the Cleveland area) multiple times or for an extended period of time is highly costly and "unnecessarily burdensome." Such a requirement would additionally hinder the analysis by foreclosing the forensic computer expert's ability to use his or her own tools, and in some instances the necessary tools and/or software may not even be available to at the government laboratory provided for the independent forensic analysis.

Providing only access to the hard drives, without allowing the defense copies, requires

defense counsel to try a case relying only on information committed to memory during one brief encounter with the computer hard drives. This task of memorizing all of the images, chat information, and data associated with both would be humanly impossibly. Meanwhile, the government will enjoy complete and unfettered access to the hard drives. Surely if Ohio's child pornography statutes contemplate an exception for librarians to view and possess child pornography, Mr. Andrews' attorneys and expert can do so under the "proper interest" in defending him against criminal charges. *See* R.C. §§ 2907.322 (B)(1) and 2907.323 (A)(3)(a). Mr. Andrews' attorneys need repeated access to the evidence in order to adequately prepare for trial. Anything less will severely prejudice Mr. Andrews.

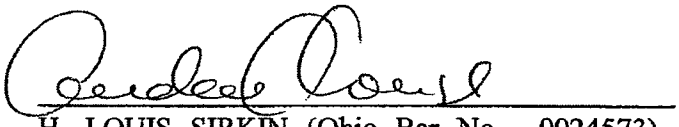
Any concern that contraband that may be contained on the hard drives would be disseminated by defense experts, counsel, or their employees can be sufficiently assuaged by a protective order limiting access to use for trial and appeal preparation only. *See Cervantes*, 206 Ariz. at 185; *See also, State v. Butler* (March 30, 2005), No. E2004-00359-CCA-R9-CD, 2005WL735080 (Tenn. Crim. App.) ("the possession, copying, or distribution of child pornographic materials does not constitute a violation of Tennessee's sexual exploitation of a minor statutes so long as it occurs in the context of the prosecution or defense of a case under the statute) (Ex. 2); *State of Ohio v. Dennis Gene Haddox*, Court of Common Pleas, Stark County, Ohio, Case No. 2005CR0476 (Ex.3). Therefore, this Court should grant the Defendant's Motion, permitting his expert and counsel access to mirror-images of the computer hard drives seized from his home.

III. Conclusion.

For the foregoing reasons, this Court should grant the Defendant's Motion For Additional

Discovery and Protective Order. Ohio Criminal Rule 16 mandates that the mirror-image of all computer hard drives material to criminal charges be provided to the Defendant. Any concern that the transmission would lead to the dissemination of contraband can be sufficiently safeguarded against with the imposition of a Protective Order.

Respectfully submitted,



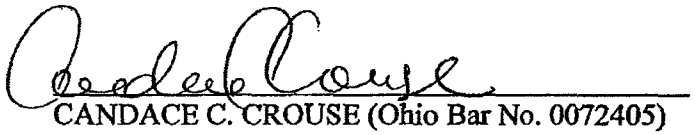
H. LOUIS SIRKIN (Ohio Bar No. 0024573)
JENNIFER M. KINSLEY (Ohio Bar No. 0071629)
CANDACE C. CROUSE (Ohio Bar No. 0072405)
Sirkin, Pinales & Schwartz LLP
105 West Fourth Street, Suite 920
Cincinnati, Ohio 45202
Telephone (513) 721-4876

and

Clayton Napier (Ohio Bar No. 0000474)
29 North D Street
Hamilton, Ohio 45013
Telephone (513) 868-8229

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served through the Clerk's Office to Kevin Hardman, Esq., Hamilton County Prosecutors Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 21st day of September, 2005.



CANDACE C. CROUSE (Ohio Bar No. 0072405)

Attorney for Defendant, Robert J. Andrews

Ravert J. Clark
Reg. No. 042027
for the Defendant

COURT OF COMMON PLEAS
CRIMINAL DIVISION
CLERMONT COUNTY, OHIO

2005 OCT 12 AM 10: 22
BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH
FILED

STATE OF OHIO	:	Case No: 04-CR-00379
Plaintiff	:	Judge Walker
vs.	:	**ENTRY GRANTING MOTION TO COMPEL AND PROTECTIVE ORDER**
JEFFERY D. BEAM	:	
Defendant	:	

Coming before the Court *on Defendant's Motion to Compel or in the Alternative Produce Evidence*, following an evidentiary hearing, the Court being fully informed, finds the Motion to be well taken and is hereby granted. The Court orders the State of Ohio, pursuant to Crim. R. 16(B)(1)(c), to make available to counsel for the Defendant and Defendant's Forensic Computer Expert, Midwest Data Group, LLC, (MDG) 398 Bagley Road, Suite 206, Berea, Ohio, 44017, the following:

1. A forensic copy of original source drive recovered and analyzed by the state with the Acquisition and Verification Hash of 9ACEF20E038C7C718D84422FA99E40D2. Also known as a "mirror image" of the source hard drive.

2. Copy of EnCase Case File created by the State's use of EnCase Version 3.20 to conduct a forensic analysis of the hard drive recovered allegedly containing the contraband forming the basis of the charges in this case. The file for each use of EnCase on the subject hard drive must be produced.

Pursuant to Crim. R. 16(E), as some of the items ordered produced may depict minors, the Court finds a protective order is necessary and appropriate. The Court orders discovery of these items shall be governed by the following terms and conditions, agreed to by the parties, in order to

protect the confidentiality and identity of any such minors.

1. The identified items shall be used for the sole purposes of prosecuting and defending this case.

2. Any tangible items which may depict a minor shall not be disclosed to, discussed with, or used by anyone except:

- The parties to this action, the defendant with counsel present.
- Attorneys of record for the parties to this action, including the prosecuting attorney(s) and partners and associates in any law firm appearing of record in this action;
- Employees of the prosecutor's office and any law firm appearing of record in this action, including paralegals, clerks, and secretaries who are actively engaged in this litigation;
- The following employees of MDG shall be permitted to access the data and information contained in the items:

  A. Mark T. Vassel
  B. Sherri A. Lippus
  C. Charlie Parker
  D. Jerod Alexander

3. The items shall only be delivered, via hand delivery, to and from an identified employee of MDG, defense counsel, prosecuting attorney, or appropriate police officer. Under no circumstance shall the items be transmitted via common carrier, United Postal Service, or similar service. It is the Court's intention transfer of the items shall only be made in a hand-to-hand manner.

4. While in the custody of MDG, the items shall be maintained in accordance with established MDG evidence control procedures, including:

- An evidence log beginning when MDG obtains custody and control of the items;
- When not in use, the items shall be secured in an appropriate safe, vault or similar

device;

- If available, a security alarm shall be utilized.

5. No image file containing sexually explicit material, or material which may be reasonably construed as sexually explicit, may be copied or duplicated in whole or in part, onto any external media including, but not limited to, paper, floppy disk, CD ROM, DAT tape, zip disk, or other media.

6. A copy of this order shall be kept with the imaged drive at all times.

7. Upon termination of this matter the parties shall meet, agree upon, and execute procedures which will result in the non-recoverable destruction, as best as possible, without damage to the hardware, of all data on the imaged drive, and on all computers and computer components. Once the data has been removed, the hard drive shall remain the property of Defendant's counsel or MDG. Any dispute as to the appropriate data destruction procedures shall be resolved by the Court.

8. Following termination of this matter and the destruction of the data, the parties shall file a Notice with the Court specifying the terms of this Order have been complied with and the required data destruction has occurred.

9. Defendant's counsel and MDG are permitted to transport the items set forth in this Order: to and from Court proceedings, MDG's office, and defense counsel's office for review, analysis, or other related purpose.

10. Should any party to this action and Order seek to file with the Court as an exhibit or otherwise, any material obtained from an identified item which contains any image of a minor or an individual which could reasonably be considered a minor, the filing shall be made in a sealed envelope bearing the caption of this action and containing the following notice: "Confidential,

Sealed by Protective Order." Any such filings shall be available for inspection only by the Court, the Court of Appeals or other tribunal, or other appropriate persons pursuant to the terms of this Order or this Order as modified by the Court.

IT IS SO ORDERED

J. Walker

Anthony Brock
Kevin Miles
Ass't Prosecuting Attorney
123 N. Third Street
Batavia, OH 45103
513-732-7313
Fax: 513-732-7592
tbrock@co.clermont.oh.us

Ravert J. Clark (042027)
For the Defendant
114 E. 8th Street
Suite 400
Cincinnati, OH 45202
513-587-2887
Fax: 513-621-2525
Notguilty14@aol.com

C:\Documents and Settings\Jay Clark\My Documents\Word Perfect Documents\Criminal\Beam Protective Order.wpd

The National Center for Missing & Exploited Children is a national clearinghouse that gathers information about missing and sexually exploited children for law enforcement use. NCMEC neither investigates nor vouches for the accuracy of the information reported to itself. NCMEC forwards all information unedited to law enforcement for investigation and disposition pursuant to its congressional mandate to act as a clearinghouse.

ECU Technical Assistance Request

Request Information

Report ID:	6565
Request Date:	9/13/2004 11:36:33
External Request?	Yes

Requestor Information

Requestor Name:	Detective David A. Ausdenmoore
Agency	Hamilton County Sheriff's Office
Phone:	513-946-6688
Extension:	
Fax:	
Email Address:	dausdenmoore@sheriff.hamilton-co.org
Address:	1000 Sycramore Street, Room 110
City:	Cincinnati
State:	OH
Zip:	45202

Searches

CyberTip Search	No
Public Records Search	No
Identified Series Request	Yes
Internet Searches?	No
Internet Search Notes:	

Other Searches:

Additional Case Details:
USPIS Inspector Lear received one (1) CD-Rom from the submitting agency. A formal request was made that the images be reviewed for any known child victims that were identified by law enforcement in past investigations.
-case # : 2004-046
-target name : Huffman

The following information was gathered by ECU Staff as a result of additional analysis and searches.

NCMEC Supplemental Information

ECU Staff:	Jennifer Lee
Date Processed:	9/13/2004 11:34:00
Case Status:	Closed
Attachment On File?	Yes
Total Minutes Spent:	0

NCMEC Notes

Note Date: 9/13/2004 11:40:03
Note: #1
ECU-jcl 09/13/2004 11:33

The submitted images were compared with NCMEC's Child Recognition & Identification System (CRIS). There were several images that appear to contain child victims who have been identified by law enforcement.

The following 'Child Identification Report' will list the specific file names, the corresponding series name and the law enforcement point of contact who is providing age verification for the children.

The following series appear to be found in the reviewed files:
Cindy
Gavin
Heather
Helen
Marion
Missy
Sabban

At this time, I will send an electronic copy of the 'Child Identification Report' to Detective Ausdenmoore.

In addition, USPIS Inspector Lear will return the submitted media.

NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Cindy
Agency:	Peoria Police Department (IL)
Investigator	Detective Vern Warr
Phone:	309-494-8300
Preferred Method of Contact:	Phone
Case #:	03-12886
Files found:	
[illegible]	/2_1_360.jpg

Mark Vassil
440-891-0750
440-[illegible]-382-4273

www.ojp.usdoj.gov/nij "Forensic" NCT-199408

Bench Notes: RECE, Encase

U.S.v. Smith 2005 Lexis 4521
2005 Tenn. Crim. App. Lexis 302

9-10-87 = 29
9-10-97 = 39
9-10-07 = 49
9-10-05 = 47

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Gavin
Agency:	National Crime Squad (UK)
Investigator	Detective Constable Sharon Girling
Phone:	+44 208 339 5726
Email:	cathedral@ncs.police.uk
Preferred Method of Contact:	Email
Case #:	Operation Cathedral
Files found:	

/331G.jpg

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Heather
Agency:	Texas Rangers
Investigator	Sergeant Matt Cawthon
Phone:	254-754-2303
Email:	matt.cawthon@txdps.state.tx.us
Preferred Method of Contact:	Email
Case #:	RF 2000: 00334
Files found:	

/3_5_360.jpg - 11
/a_01.jpg - 27

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Helen
Agency:	National Crime Squad (UK)
Investigator	Detective Constable Sharon Girling
Phone:	+44 208 339 5726
Email:	cathedral@ncs.police.uk
Preferred Method of Contact:	Email
Case #:	Operation Cathedral
Files found:	

/2_4_360.jpg
/a_pre4.jpg
/rcp.jpg(Leftmost image)

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Marion
Agency:	BKA - German Federal Criminal Police
Investigator	Detective Inspector Holger Kind
Phone:	49 611 55 16345
Email:	holger.kind@bka.bund.de
Preferred Method of Contact:	Email
Files found:	

/4_4_360.jpg

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Missy
Agency:	FDLE
Investigator	SA Susan Koteen
Phone:	407-245-0801
Email:	susankoteen@fdle.state.fl.us
Preferred Method of Contact:	Phone
Case #:	OR-97-20-0013
Files found:	

/a_welcome.jpg

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	6565
Series:	Sabban
Agency:	Brazilian Federal Police
Investigator	Dr. Helio Sant' Anna
Phone:	011-5548-281-6599
Email:	santanna.hssj@dpf.gov.br
Preferred Method of Contact:	Phone
Case #:	1999.35.00.010582-0
Files found:	

/5.jpg
/sab08.jpg
/sab26.jpg

Copyright 2002. National Center for Missing & Exploited Children. All rights reserved.
Do not reproduce without express written permission from NCMEC.

JURISDICTION	CODE SECTION(S) REGARDING MINORS IN SEXUALLY EXPLICIT MATERIALS
Federal	18 U.S.C.A. §§1462, 1465, 2252A 19 U.S.C.A. § 2251 47 U.S.C.A. §§223, 231 47 U.S.C.A. § 230(f)(2) 18 USSG § 2G3.1
Alabama	Ala.Code 1975 §§13A-12-192, 3A-12-200.1, 13A-12-200.5
Alaska	Alaska Statutes § 11.41.455
Arizona	A.R.S. §§13-3501, 13-3553
Arkansas	A.C.A. §§5-68-203, 5-68-302(4)(B), 5-68-303(b), 5-68-308, 5-27- 401, 5-27-403
California	West's Ann.Cal.Penal Code §§311, 311.1
Colorado	C.R.S.A. §§18-6-403(3)(b), 18-7-101, 18-7-102
Connecticut	C.G.S.A. §§53a-193(10), 53a-194, 53a-196, 53a-196a
Delaware	11 Del. C §§1108, 1361, 1362, 1364(2), 1365
Washington D.C.	District of Columbia Code §§22-2001, 22-2011(3), (5), 22-2012, 22-2014 (1981)
Florida	Florida Statutes §§847.001(3), (7), 847.012, 847.011, 827.071
Georgia	Ga Code §§16-12-80, 16-12-100, 16-12-102(1), 16-12-103
Hawaii	Hawaii Revised Statutes §§707-750, 707-751, 712-1210(3), (6), (7), 712-1215
Idaho	Idaho Code §§18-1514(6), (7), 18-1515, 18-4101(A), 18-4102(B), 18-4103
Illinois	720 ILCS 5/11-20, 5/11-20.1
Indiana	Indiana Code §§35-49-1-9(4), (5), 35-49-2-1, 35-49-1-3, 35-49-2-2, 35-49-

	3-1, 35-49-3-3, 35-49-3-4
Iowa	I.C.A. §§728.1, 728.2, 728.4, 728.7, 728.12
	Kansas Statutes §§21-3516, 21-4301, 21-4301a
Kentucky	KRS §§531.010(2)-(4), 531.020, 531.030, 531.070, 531.300-531.370
Louisiana	LSA-R.S. 14:81.1, 14:91.11, 14:106
Maine	17 Maine Revised Statutes §§2911, 2913, 2921(5), 2922
Maryland	Code 1957, Art. 27 §§416A, 416B, 418-419A
Massachusetts	Massachusetts General Laws Ch 272 §§29, 29B, 31
Michigan	Michigan Compiled Laws Annotated §§750.142, 750.145c, 752.362, 752.365, 752.367
Minnesota	Minn Stats Ann, §§617.241, 617.246, 617.247, 617.292, subd. 7(3), 617.293
Mississippi	Mississippi Code §§97-5-33, 97-29-101, 97-29-103(1), 97-29-107
Missouri	Missouri Statutes §§568.060, 573.010, 573.020, 573.025, 573.040
Montana	Montana Code §§45-5-620, 45-5-625, 45-8-201, 45-8-205
Nebraska	Nebraska Revised Statutes §§28-807(6), (7), (10)(a), 28-808, 28-809, 28-813, 28-815(1), 28-1463.03
Nevada	N.R.S. 200.275, 200.700, 200.710, 200.730, 201.235(1), (4), (8), 201.253
New Hampshire	N.H. Rev. Stat. 650:1, 650:2
New Jersey	N.J.S.A. 2C:34-2-2C:34-4
New Mexico	New Mexico Statutes §§30-6A-2(B)(2), 30-6A-3, 30-37-1(F)(3), 30-37-3, 30-38-1 (1978)
New York	New York Penal Law §§235.00, 235.05, 263.05, 263.10, 263.15, 263.16

North Carolina	N.C.G.S.A. §§14-190.1, 14-190.7, 14-190.13(1), 14-190.16, 14- 190.17
North Dakota	NDCC, 12.1-27.1-01-12.1-27.1-03.2, 12.1-27.2-04.1
Ohio	R.C. §§2907.31, 2907.323(A)(3)
Oklahoma	21 Oklahoma Statutes §§1021.1, 1021.2, 1024.1(B), 1024.2
Oregon	Oregon Revised Statutes §§163.670, 167.065, 167.085(2), 167.087 18 Pennsylvania Consolidated Statutes §§5903(b), 6312
Rhode Island	R.I. Gen.Laws 1956, §§11-9-1.1, 11-31-1, 11-31-10
South Carolina	S.C. Code 1976 §§16-15-305, 16-15-345, 16-15-375(2), 16-15-385(C)
South Dakota	SDCL §§22-24-22, 22-24-24, 22-24-27, 22-24-28, 22-24-31
Tennessee	T.C.A. §§39-17-901(2), (6), (10), (14), 39-17-902, 39-17-911, 39- 17-914, 39-17-1004
Texas	Texas Penal Code §§43.21(a), 43.22, 43.23(g), 43.24, 43.25
Utah	U.C.A. 1953 §§76-5a-2(3), 76-5a-3, 76-10-1201(7), (11), (12), 76- 10-1203(1)(b), 76-10-1204, 76-10-1206, 76-10-1208
Vermont	13 V.S.A. §§2801(6), 2802, 2805, 2827
Virginia	Virginia Code § 18.2-372 (1950)
Washington	Washington Revised Code §§7.48.040, 7.48.050(2), 7.48.070
West Virginia	West Virginia Code §§7-1-4, 61-8C-2
Wisconsin	Wisconsin Statutes §§944.21, 948.05
Wyoming	W.S. §§6-4-301(a), 6-4-302, 27-6-114 (1977)

Cross examination notes for State's image expert.

Repeatedly says he does not "believe" the files have been altered.

This helps underline the constitutional argument.

1. Establish the number of years he's been an officer

2. number of cases involving images that "appeared to be" child porn. (We want to emphasize that because that's our point. He has not been involved in any cases that involved, just, child porn. That would assume he could distinguish real from virtual with his eyes and he cannot.)

3. Did he view the images in this case?

4. Virtual child pornography images exist, correct? (He'll have to say yes the only way he could say "no" is to argue he has analyzed every digital image that exists.)

5. You don't dispute that there are virtual child pornography digital images on the Internet somewhere? (If he disputes this see a. below)
   a. In 1996, Congress passed the CPPA that included the "appears to be" language that the Supreme Court eventually struck down. You're aware of that case.
   b. You would agree congress passed that statute out of concern over the creation of digital images which they called virtual child pornography.
   c. 1996 was 8 years ago.
   d. Now, it's your testimony that since that time, among the millions upon millions of people accessing the internet and the billions of digital images present there, not one of them is a virtual child porn image? (He can't say yes, that is just ridiculous)

6. So, people exist who can create images that appear to be child porn, but actually do not involve the sexual abuse of a minor? (Yes., he has to say yes here).

7. Those people would be able to create a digital image that is indistinguishable from what you would call real child pornography? (Yes.)

8. Do you know where they are? (No.)

9. Do you know what they depict? (No.)

10. Do you know how many there are? (No.)

11. Do you know the age of the minors depicted in those virtual child porn images? (No.)

12. What software is available to the public that can distinguish visual depictions in digital images to determine if they contain actual minors? (None.)

13. What hardware is available to the public that can distinguish visual depictions in digital images to determine if they contain actual minors? (None.)

14. Is there a database or clearinghouse available to the *public* to compare downloaded images and determine if they contain actual minors? (No.)

15. If a citizen contacted you after having downloaded 10 images of what he thought was virtual child porn, and asked you how he could be sure that what he had downloaded were digital images he was permitted to possess, what instructions would you give him to figure that out? (His answer here will be either, "I don't know" or "Don't download anything, just to be safe." Either answer is right down main street of our argument. The citizen cannot know what he has is illegal and, just to avoid indictment, he'll not download anything).

16. (If he says, "don't download anything"). So, he ought not download anything that even appears to be child pornography to avoid prosecution? (Yes.)

17. So, at least in your jurisdiction, people downloading digital images of what appears to be child porn are risking prosecution if they guess wrong and later turn out to have real child porn? (Yes. Again, this establishes the overbreadth)

18. What tools does the government provide so this defendant could have known if these images were visual depictions using actual minors? (None).

Case Specific Questions:

The 21 images in this case.

1. You have analyzed the 21 image files in this case. (Yes)

2. They are all digital images? (Yes.)

3. In analyzing these images, you attempted to detect alterations to the image? (yes.)

4. In fact, in some images, you did detect alterations? (Yes.)

Let's talk about your method for making those detections.

5. Of your five senses, which ones do you use to detect alterations in digital images? (Obviously, he says, only his eyes).

6. So, basically, you look at the image and see if your eye tells you there is an alteration? (Yes.)

7. How many alterations can be made to a digital image? (The number here is infinite or at least he'll concede the number is very high given the variety of interactions of software types, tools and techniques for editing digital images).

8. Is your eye capable of identifying all those possible alterations? (No.)

9. Well, how many can your eye detect out of (_____number he gave before)?

10. What is the name of your method? (Doesn't have a name.)

11. How many articles have you written about your method of detecting alterations in digital images? (None)

12. How many articles can you cite to me that discuss your method of detecting alterations in digital images? (None)

13. Have you ever been tested using your method of detecting alterations in images? (No.)

14. You don't know your personal error rate then? (No.)

15. Well, what is the error rate, generally, for the use of your method? (I don't know.)

16. So, your error rate could be 50%? or higher? (He'll fight this one, but your point is made)

17. Fact is, you don't know, sitting here right now, if you have missed alterations in these 21 images or, in fact, found artifacts in the images that are not alterations. (Doesn't matter what he says here, the point is made by the question).

18. Have you ever taught a seminar demonstrating and instructing on your method? (I doubt he'll say yes to this one since his method is subjective)

19. Is this method the standard method used by others in your area of digital image analysis? (He has to say "no" here because there is no such standard)

20. If I asked you to detect alterations in 100 digital images, how often would you be wrong? i.e. not detect alterations in an image that had been altered? (He'll be making this up at this point)

Let's discuss the effect of alterations

21. If you detect an alteration in an image, does that mean that the image is fake?
    a. Yes.
        i. So an original unretouched digital image with a smudge inserted into the corner, is now a fake image? (yes.)
        ii. The formerly real objects or people are now transformed into fake objects and people as a result of a smudge in the corner of the digital image? (Obviously, he'll have to say "no" here but he'll be talking in circles).
        iii. So, an altered image is not always a fake. (Yes.)
    b. No.

22. So, a digital image that, to your eye, does not contain any alterations, may still be fake? (Yes. He has to say yes unless he is going to pass himself off as infallible).

23. So, what your method does is tell us whether, in your opinion, the digital image has or has not been altered? (Yes.)

24. For example, if you saw an image with a smudge spot in the middle of the image, would that indicate an alteration? (Yes.)

25. How would you differentiate that alteration in the digital image from a drop of moisture on the camera lens at the time the image was captured? (His answer here is really irrelevant since there is no way to distinguish between an image smudged in photoshop and an image captured using a lens with a drop of moisture on it causing a smeared result in the image).

The definition of altered

26. When you say "altered" or "alteration" in your report, what was the digital image altered from? (He may be confused here, but if not, hope he says, "altered from the original.")

27. (If he balks at the question) Well, if I alter my house by painting it, you would only know that if you saw the original paintjob right? (Yes.)

28. I cannot just ask you to look at my house, having never seen it before, and admire the alterations? (Yes.)

29. Your response to that would be "what did it look like originally?"
30. So, if I show you an image that you have never seen before, you cannot tell me that it is an original? (Correct).

31. You have never seen the originals of these 21 images have you? (Yes or no. If yes, then we'll get to that below.)

32. For some of the 21 images, you indicate that you identified alterations because you had seen the image before in another case? (Yes.)

33. In those other cases, did you see the original of that particular image? (This will be an interesting answer)
    a. Yes.
        i. How did you know it was an original?
            1. did you capture the image? (No.)
            2. were you present when the image was captured? (No.)
            3. do you know the person who captured the image? (No.)
        ii. Let's talk about those originals themselves
        iii. Was a digital camera used to capture those originals (I don't know).
        iv. Was a 35mm camera used to capture those originals (I don't know).
        v. Was a large format camera used to capture those originals? (I don't know).
        vi. Was a film camera used to capture those originals (I don't know).
        vii. Were the originals scanned in prints? (I don't know).
        viii. Were the originals merely prints that were laid on a table and captured by a digital camera? (I don't know).
        ix. Was a flash used when capturing the originals? (I don't know).
        x. Was more than one light source used when capturing the originals? (I don't know).
        xi. I could go on and on here, but for the sake of time, it is safe to say you know absolutely nothing about how the original of this image was created? (He has to say yes).
        xii. Therefore, you have no way to determine if the image found on the defendant's computer is, in fact, altered at all, having no knowledge regarding the composition of the original? (Answer irrelevant, point made.)

Let's discuss the charges in this case.

34. Mr. Huffman is charged with possessing digital images that contain actual minors?

35. Using your technique, were you able to determine whether these images contain actual minors?
    a. Yes.
        i. Okay, who are they?

ii. How old are they?
iii. What year were these images captured?
iv. Where were the images captured?
v. How long did this actual minor look this way? For how many years?
vi. You are certain that all the heads in these images belong to all the bodies that they are sitting on? (Yes.)
vii. Have you met all these minors? (no.)
viii. Have you met any of them? (No.)
ix. Yet, you can say that their heads and bodies all go together? (yes.)
x. You are aware that heads can be switched using digital image technology? (yes.)
xi. But, your still sticking with the answer that these unknown minors, of unknown age, you have never met, are actual minors in unretouched images, unchanged from originals that you have never seen? (The question is the point).

At this point, we can have him look at some exhibits and begin to use his technique to tell us which pictures are fake and which contain actual minors.

Ravert J. Clark
Reg. No.042027
for the Defendant

COURT OF COMMON PLEAS
CRIMINAL DIVISION
CLERMONT COUNTY, OHIO

STATE OF OHIO	}	Case No. 04-CR-00379
	}	
Plaintiff,	}	Judge Walker
	}	
-vs-	}	**DEFENDANTS MOTION TO EXCLUDE TESTIMONY OF STATE COMPUTER ANALYSTS**
JEFFERY D. BEAM	}	
	}	
Defendant.	}	(Hearing Requested)

The Defendant, Jeffery Beam, pursuant to Evidence R. 104, 403, 702, and *Miller v. Bike Athletic Company, et al.*,[1] moves this Court for an order prohibiting any testimony by the State's Computer Analysts and the introduction of any physical evidence recovered, by this individual. The grounds for said motion are set forth in the accompanying memorandum.

MEMORANDUM

In Discovery provided by the State, and from discussions with the Assistant Prosecutors, defense counsel has learned the State intends to introduce evidence regarding the analysis performed on a computer hard drive and related peripherals by David Ausdenmoore, of the Regional Electronics Computer Investigations section of the Hamilton County Sheriff's Department.

Three requirements must be satisfied prior to the admission of testimony by an "expert".[2] Based upon a preliminary review of the report prepared by Ausdenmoore in this case by a expert retained by the Mr. Beam, Ausdenmoore and the State's evidence does not satisfy the requirements of Evid R. 702(B) and (C). Based upon the method apparently used by

---

[1] *Miller v. Bike Athletic Company*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998).

[2] Evid. R. 702.

Ausdenmoore, he does not qualify as an expert in the subject matter of the testimony.[3] In addition Ausdenmoore's testimony *is not* based on reliable scientific information.[4] The procedures used by Ausdenmoore fail to satisfy all three requirements of 702(C)(1), (2), and (3).

In addition, the anticipated testimony and evidence is not admissible under the rule set forth in *Miller v. Bike Athletic Company, et al.*[5] The role of the trial court in determining the admissibility of expert testimony focuses, in part, on whether the opinion is based upon scientifically valid principles.[6] The *Miller* Court adopted the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceutical, Inc*[7]. "The focus is solely on principles and methodology, not on the conclusions that they generate."[8]

After reviewing Ausdenmoore's report, Dr. Larry Leibrock of eForensics affirmed,

> "...the Regional Electronic Computer Investigation section did not provide the detailed protocol or bench notes for this investigation and I have questions about the forensics protocol, use of unvalidated forensics recovery instruments and the lack of calibration documentation normally expected in such investigative notes."[9]

The June 17, 2005 affidavit of Dr. Leibrock and his credentials are attached hereto. Dr. Leibrocks affidavit raises serious questions about Ausdenmoore's evidence meeting the requirements imposed buy Evid. R. 702 and the applicable caselaw.

---

[3] Evid. R. 702(B).

[4] Evid. R. 702(C).

[5] 80 Ohio St.3d 607, 687 N.E.2d 735.

[6] *Miller v. Bike Athletic Company, et al.*, 80 Ohio St.3d at 607, 687 N.E.2d 736, syllabus, paragraph one.

[7] 509 U.S. 579, 113 S.Ct. 2786 (1993).

[8] *Id.*, at 595, 113 S.Ct. at 2797.

[9] June 17, 2005 Affidavit of Larry Leibrock, Ph.D., ¶6.

Criminal charges based upon the "forensic" analysis of a hard drive is very recent development and subject to the ever changing technology inherent in computer systems today. Due process requires this Court take steps to insure any evidence admitted is reliable and in compliance with the standards for admissibility. The rules of evidence and case law impose a burden on the State, as the proponent of the evidence, to establish the reliability of the evidence as a predicate to admissibility. If Dr. Leibrock is correct, the State will not be able to satisfy this burden. Due process requires this Court conduct a hearing to determine if the State can sustain this burden.

For these reasons, Mr. Beam requests this Court to exclude the testimony of Ausdenmoore including the results of any analysis he performed on the subject hard drive and related peripherals as well as the items themselves. In the alternative, Mr. Beam request the Court conduct a pre-trial hearing pursuant to *Daubert* and *Bike Athletic*, to determine the admissibility of the Ausdenmoore evidence

Respectfully submitted,

Ravert J. Clark
Reg. No. 042027
for the Defendant
114 E. 8th Street
Suite 400
Cincinnati, Ohio 45202
513-587-2887

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Motion was served upon the Clermont County Prosecuting Attorney this_____day of_____, 2005.

_____
Ravert J. Clark

P:\AEducation\2005\Portland\Portland Written Materials\Jay Clark_Lisa Ludwig\Daubert Motion.wpd
7/12/05

Ravert J. Clark
Reg. No. 042027
for the Defendant

COURT OF COMMON PLEAS
CRIMINAL DIVISION
CLERMONT COUNTY OHIO

STATE OF OHIO	}	Case No. 04-CR-00379
	}	
Plaintiff,	}	Judge Walker
	}	
-vs-	}	**MOTION TO DISMISS**
	}	
JEFFREY D. BEAM	}	
	}	
Defendant	}	

Now comes the Defendant, by and through counsel, pursuant to the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 11 and 16 of the Constitution of the State of Ohio, and moves this Court for an order dismissing the instant. The grounds for said Motion are set forth in the accompanying memorandum.

MEMORANDUM

R.C. §2907.321(A)(1) is unconstitutional as applied to Mr. Beam because he is unable to determine whether the digital images seized from his computer contain an actual minor. All ten counts of the indictment allege a violation of R.C. §2907.321(A)(1) which reads in pertinent part:

> (A) No person, with **knowledge of the character** of the material or performance involved, shall do any of the following:
> (1) Create, reproduce, or publish any obscene material that has **a minor** as one of its participants or portrayed observers;.... (Emphasis added).

Section 2907.322(A)(1), virtually identical in its language to section 2907.321(A)(1), prohibits [the creating, recording, photographing, filming, developing, reproducing, or publishing of] images depicting **actual** children." State v. Anderson, 151 Ohio App.3d 422, 784 N.E.2d 196, 2003-Ohio-429 (2003). (Emphasis added).

The First Amendment to the U.S. Constitution protects the possession of digital images

that appear to be minors engaging in sexually explicit conduct provided the digital images do not contain actual minors engaging in sexually explicit conduct. Ashcroft v. Free Speech Coalition 535 U.S. 234, 122 S.Ct. 1389, 2002 U.S. Lexis 2789 (2002). (Emphasis added).

There is no software, hardware, tool or method by which Mr. Beam could have determined the seized digital images contained actual minors. Mr. Beam cannot distinguish between protected digital images (those merely appearing to contain actual minors) and proscribed digital images (those containing actual minors). The government has conceded this point in similar cases. U.S. v. Fox, 248 F.3d 394, 403 (5th Cir.2001) (Government's computer expert conceded there is no way to know whether a person depicted in a digital image actually exists); U.S. v. Ellyson, 326 F.3d 522, 532 (4th Cir.2003) (Government's agent testified he did not know whether some of the digital images possessed by the Defendant and introduced into evidence were created using actual minors or not); State v. May, 362 N.J.Super. 572, 829 A.2d 1106, 1111 (N.J.Super.Ct.App.Div.2003) (State's expert conceded his inability to distinguish between an actual minor in a digital image and a digital image of a minor created or manipulated using a computer).

Vagueness

Since Mr. Beam cannot distinguish between protected and proscribed digital images, the statute is unconstitutionally vague on its face and as applied to him. The United States Supreme Court has long held vague laws violate due process in three distinct ways.

First, vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99 (1972). In failing to provide "fair

warning," vague laws may trap the innocent persons who would otherwise obey the law. Id. at 108, 92 S.Ct. at 2299; see also, Jordan v. DeGeorge, 341 U.S. 223, 231-32, 71 S.Ct. 703, 78 (1951).

Second, vague laws encourage arbitrary and discriminatory enforcement by not providing explicit standards for those who apply them. Specifically, "a vague law impermissibly delegates basic policy matters to policemen, judges, and juries, for resolution on an ad hoc and **subjective** basis. Grayned v. City of Rockford, 408 U.S. at 109, 92 S.Ct. at 2299.(Emphasis added). "Without express standards by which to measure an official's actions, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 758, 108 S.Ct. 3\2138, 2145 (1988). "Laws which confer discretion to government officials as to whether to permit or deny expressive activity are unconstitutionally vague." Suttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969).

Third, in cases involving First Amendment freedoms, vague laws inhibit the exercise of those freedoms. "Uncertain meanings lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked." Grayned v. City of Rockford, 408 U.S. at 109, 92 S.Ct. at 2299. In order to prevent this chilling effect on constitutionally protected expression, a greater degree of specificity is required in order for any law that impinges on protected expression to survive a vagueness challenge. Smith v. Goguen, , 415 U.S. 566, 573, 94 S.Ct. 1242, 1247 (1974), Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1957).

Section 2907.321(A)(1) is unconstitutionally vague because it fails to provide Mr. Beam the means by which he can conform his conduct to the law. With no allegation Mr. Beam produced any of the seized images, he cannot know whether the visual depictions were created using an **actual** minor. At best, Mr. Beam is left to guess or speculate, which the law does not require.

Digital images are easier to manipulate than traditional photographs and digital manipulation is more difficult to detect. 10 Wash. U.J.L. & Pol'y 267 (2002).

> Digital images are highly susceptible to manipulation. Manipulation, as distinct from enhancement, consists of changing the elements of a photograph or image by changing the colors, moving items from place to place on the image, or otherwise altering the original image. Individuals without training or specialized equipment may easily manipulate digital images. In fact, users do not even need specialized software to manipulate images; the same programs that allow users to view images or adjust contrast also allow users to cut and paste items with a click of the mouse. * * * The electronic nature of the image file makes undetectable manipulation of a digital image easy, in part because no traditional 'original image' is made. * * * Thus, it is impossible to determine which image is a first generation image and is therefore the 'original'. The lack of an 'original' for comparison with the offered image reduces the opportunity to verify that the image has not been altered or has only been altered in an acceptable manner, thereby increasing the likelihood that changes will not be discovered unless the proponent of the image reveals them. Id.]

"Congress found that computers and computer imaging technology can be used to "[1] produce...visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct...[2] alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible...to determine if the offending material was produced using children...." United States v. Fox, 248 F. 3d 394, (2001), citing, S.Rep. No. 104-358, at 2 (1996). There is no software, hardware or other tool or

method which enables Mr. Beam to determine if the seized images were protected or proscribed.

At the moment a citizen chooses to exercise his First Amendment right to possess protected images of child pornography in light of Ashcroft he is faced with the prospect of prosecution if he guesses wrong. The word 'guess' is appropriate as Mr. Beam had no way to verify or know the character of the seized digital images. He has no database of digital images to compare them to. He does not know who created these digital images. He does not know if the material he possesses involves the use of an actual minor or merely appears to involve a minor, but actually does not. And, the government explicitly recognizes his inability to make this distinction. This statute does not provide, and the government cannot offer any way Mr. Beam could have known if these images were visual depictions using actual minors. The fact no method exists by which he could have known the character of the seized digital images establishes the statute's vagueness.

Overbreadth

The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter...The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be muted." Ashcroft v. Free Speech Coalition, 535 U.S. at 255, 122 S.Ct. at 1404. Section 2907.321(A)(1) is unconstitutionally overbroad on its face and as applied to Mr. Beam, as it presents the situation contemplated in Ashcroft.

When the danger to chilling protected speech is evident, the government may not draft or

seek to enforce statutes which present citizen's the Hobson's choice of foregoing their free speech rights or risking prosecution. "We must be careful to ensure that, in regulating unprotected speech, Congress does not also chill speech that is protected." See, Bose Corp. v. Consumers Union of the United States, Inc. , 466 U.S. 485 (1984).

Pornography depicting **actual** children can be proscribed, while the same material depicting computer generated, altered, or morphed, images may not be prohibited. New York v. Ferber, 458 U.S. 747, 758, 102 S.Ct. 3348 (1982). (Emphasis added). "[W]here a statute's reach contemplates a number of both constitutional and unconstitutional applications, the law's sanctions may deter individuals from challenging the law's validity by engaging in constitutionally protected speech that may nonetheless be proscribed by the law. Without an overbreadth doctrine, 'the contours of regulation would have to be hammered out case by case and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation.'" American Library Association, Inc. v. United States, et al. (2002), 201 F.Supp.2d 401.

Despite the distinction between protected and proscribed images emphasized in Ashcroft, prosecution of Mr Beam for violating §2907.321(A)(1) has the practical, impermissible, result of chilling protected speech. Such a prosecution sends a message to the community telling citizens "do not attempt to exercise your first amendment rights, because if the government does not like your manner of expression, you will be prosecuted." In this case the protected speech does not merely "resemble the latter [proscribed speech]," but, as the government has conceded in similar cases, the proscribed images are indistinguishable from the protected ones. This precisely describes the unconstitutional nature of this statute.

The virtual impossibility of establishing whether an image contains an actual minor was addressed in Ashcroft. In Ashcroft, Justice Thomas, never confused as a friend of the criminally accused, acknowledged, "it may become impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children." Ashcroft v. Free Speech Coalition, 535 U.S. at ___, 122 S.Ct. at 1406. "Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor." Id. "[I]t [is] virtually impossible... to determine if the offending material was produced using children...." Id.

The situation confronting this Court is one where technology has out paced the law. In affirming a preliminary injunction against the enforcement of the Child Online Protection Act (COPA), the United States Supreme Court acknowledged the "technology of the internet evolves at a rapid pace." Ashcroft v. American Civil Liberties Union, 524 U.S. ____, 2004 U.S. Lexis 4762, 28 (June 29, 2004.)

Other Issues

In State v. Anderson (2003), 151 Ohio App.3d 422, 2003-Ohio-429, the court held, inlight of Ashcroft, the language of §2907.322(A)(5) only prohibits the images depicting **actual** children. (Emphasis added). By analogy, this "actual minor" requirement applies, per Ashcroft, to §2907.321(A)(1). The Supreme Court of Ohio, in State v. Meadows (1986), 28 Ohio St.3d 43, 503 N.E.2d 697, has held this statute "does not violate the First Amendment of the United States Constitution." (Emphasis added). The constitutional challenge in Anderson is distinguished from Mr. Beams' constitutional challenge. In Anderson, Anderson claimed R.C. §2907.323

prohibited the possession of virtual child pornography, a provision of the analogous federal statute struck down in Ashcroft. Mr. Beam is not making the same argument.

Mr. Beams' argument rests in the inability of any citizen to determine the nature and character of a digital images they did not create. In this context §2907.321 is unconstitutional as applied to Mr. Beam because the law provides no method by which he, or any other citizen, can conform their conduct to the statute. When a digital image pops up on a citizen's computer which "appears to be" child pornography, the citizen can only guess if the digital image is protected or proscribed. A citizen cannot constitutionally be punished for the mere act of guessing incorrectly when the government recognizes the protected images and proscribed images are indistinguishable and provides no guidance in the statute as to how to distinguish them. "The starch in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 830, 120 S.Ct. 1878, 1895 (2000).

Filenames as evidence of the content of digital images.

When it comes to digital images, the logic in State v. Eichorn, Morrow App. No. 02 CA 953, 2003-Ohio-3415 suggests an inference can be made from a digital image's title or text is also technologically incorrect.

Digital images have no title other than the name of the electronic file which holds the digital information behind the image. Filenames are arbitrary and can be changed at will by the creator of the digital image or any subsequent possessor of the image. The name of a file containing an image is not even circumstantial evidence as to the nature and character of the image as the filename is completely arbitrary and does not have to associate in any way with the

content of the file. A digital image can just as easily be named "picnic.jpg" as it can be named, "illegal-nuclear-secrets.jpg." Neither name indicates the actual content of the file. "Inferring" from filenames the file contains an actual minor is the functional equivalent to an unconstitutional coin flip.

Deriving information about the content of digital images from websites.

It is accepted as fact; a web site's name does not necessarily have any connection to its content. "For example, a child searching for 'Little Women" by Lousia May Alcott may retrieve x-rated websites. Even a mistakenly typed web address may direct an innocent user seeking information on the White House to a pornographic site." State v. Maxwell, 95 Ohio St.3d 254, 262, 767 N.E.2d 242, 249, Justice Lundberg Stratton, Dissenting, (2002).

The number one auction site on the internet is not 'auctions.com', it's 'ebay.com'. The term "e-bay" is not an English word and has no connection to the content of the site which is auctions. Additional examples of website addresses which by the address appear to convey information about the content of the site, but in reality do not, include:

Web site address	Actual theme or content
www.amazon.com	Largest online retailer of books, music and other products
www.google.com	Largest online search engine service provider
www.brucespringsteen.com	Fan web site not operated or affiliated by the singer, Bruce Springsteen
www.irs.com	Operated by tax advice provider H&R Block

Web site addresses do not add to a person's knowledge as to whether they're viewing or downloading an image containing an actual minor. The address simply does not provide any information about the contents of the web site.

Even assuming the government is able to identify specific web sites from which the

seized images were downloaded, this does not establish Mr. Beam's knowledge the digital images contained **actual** minors. While such language in a web site address may provide some indication as to the nature of the site's content, it does not change the fact Mr. Beam could not have known what he was looking at contained actual minors or not.

Conclusion

Section 2907.321 proscribes conduct which is indistinguishable from conduct protected by the First Amendment. In attempting to regulate unprotected speech, §2907.321 chills protected speech. Therefore, this Court should hold §2907.321 unconstitutional on its face and as applied to Mr. Beam because it is both vague and overbroad.

Such a decision by this Court will provide much-needed guidance to law enforcement, by requiring them to focus their time, resources, and attention to eliminate actual child pornography by stopping it at its source, those few who victimize real children by producing actual child pornography.

For these reasons the Court must dismiss the instant indictment.

Respectfully submitted,

Ravert J. Clark
Reg. No. 042027
for the Defendant
114 E. 8th Street
Suite 400
Cincinnati, OH 45202
513-587-2887

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Motion was served on the Clermont County

Prosecuting Attorney this _____ day of July, 2004.

_____
Ravert J. Clark

P:\AEducation\2005\Portland\Portland Written Materials\Jay Clark_Lisa Ludwig\Jeff Beam Motion to Dismiss.wpd
7/12/05

Ravert J. Clark
Reg. No.042027
for the Defendant

COURT OF COMMON PLEAS
CRIMINAL DIVISION
CLERMONT COUNTY, OHIO

STATE OF OHIO	}	Case No. 04-CR-00379
	}	
Plaintiff,	}	Judge Walker
	}	
-vs-	}	**MOTION FOR FUNDS TO OBTAIN EXPERT ASSISTANCE**
	}	
JEFFREY D. BEAM	}	
	}	
Defendant.	}	

Now comes the Defendant, by and through counsel, and hereby moves this Court to authorize the expenditure of funds for expert assistance in the preparation of the defense in this matter. The grounds for said motion are set forth in the accompanying memorandum.

MEMORANDUM

Pursuant to the authority of Ake v. Oklahoma, 470 U.S. 68 (1985), and the cases which follow, an indigent defendant is entitled to the assistance of experts at the public's expense. This is true even in situations in which outside sources have retained counsel to represent an indigent accused. State ex rel., Rojas v. Wilkes, 455 S.E.2d 575 (W. Va. 1995). Mr. Beam is currently indigent and without the funds necessary to secure the services of an expert in digital imaging which is essential to his preparation of a defense to the charges against him. See affidavit of Jeffrey Beam attached hereto as Exhibit A.

Pursuant to the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution, defense counsel is obligated to zealously and effectively represent and assist his client. In order to provide this effective representation, counsel must explore every avenue in order to establish the existence of a defense. The ability of counsel to provide effective assistance is highly dependent upon the availability of expert assistance."An indigent criminal defendant's right to effective assistance of counsel pursuant to the Sixth

Amendment of the United States Constitution and Section 10, Article 10 of the Ohio Constitution may be construed to require compensation for an expert witness found necessary to present a defense." State v. Buckner, unreported, No. 1112 (4th Dist. Ct. App., Ross, 7-24-85). See also, State v. Williams, 61 Ohio App.3d 594 (1988); State v. Scott, 41 Ohio App.3d 313 (1987).

Equal protection also requires expert assistance be provided in this case. In Britt v. North Carolina, 404 U.S. 226 (1971), the Supreme Court reaffirmed the principle established in Griffin v. Illinois, 351 U.S. 12 (1956), that:

> ... the State must, as a matter of equal protection, provide indigent prisoners with the basic tool of an adequate defense or appeal, when those tools are available for a price to other prisoners. Britt at 227.

In Williams v. Martin, 618 F.2d 1021 (C.A.4, 1980) the standard for determining whether expert assistance is constitutionally required by the equal protection or right to counsel clauses was stated to be:

> ... whether a substantial question requiring expert testimony arose ... and whether (Defendant's) defense could be fully developed without professional assistance. Id. at 1026.

An issue involved in the determination of the charges against Mr Beam will be the "authenticity" of the digital images forming the basis of all ten counts against Mr. Beam. The images were apparently recovered from a computer taken from the possession of Mr. Beam's estranged wife some six months after Mr. Beam last had access to the computer.

Counsel has contacted Mr. Dean Boland, from Cleveland, Ohio, an expert in digital imaging. Attached as Exhibit B is the CV of Mr. Boland. Typically, Mr. Boland requires an initial retainer of $3000.00, with a billable rate of $250.00 per hour. From the discussions with Mr. Boland, Mr. Boland has expressed his willingness to forego the "retainer" in cases where he

is appointed by the Court. It is the understanding of counsel from his discussions with Mr. Boland, the amount of the retainer should be sufficient to cover necessary pre-trial preparations. Any fees beyond the initial retainer relating to potential appearances in court and testifying will be addressed by at the appropriate time by further motion to this Court..

Respectfully submitted,

_____

Ravert J. Clark
Reg. No. 042027
for the Defendant
114 E. 8th Street
Suite 400
Cincinnati, OH 45202
513-587-2887

CERTIFICATE OF SERVICE

I hereby certify a true and ex act copy of the forgoing Motion was served upon the Clermont County Prosecuting Attorney by ordinary U.S. Mail this _____ of July,. 2004.

_____

Ravert J. Clark

P:\AEducation\2005\Portland\Portland Written Materials\Jay Clark_Lisa Ludwig\Motion For Funds To Obtain Expert- Retained.wpd
July 12, 2005

Ravert J. Clark
Reg. No. 042027
for the Defendant

COURT OF COMMON PLEAS
CRIMINAL DIVISION
CLERMONT COUNTY OHIO

STATE OF OHIO	}	Case No. 04-CR-00379
	}	
Plaintiff,	}	Judge Walker
	}	
-vs-	}	**AFFIDAVIT IN SUPPORT OF**
	}	**MOTION FOR APPOINTMENT**
JEFFREY D. BEAM	}	**EXPERT**
	}	
Defendant	}	

STATE OF OHIO :
:ss.
COUNTY OF HAMILTON :

Now comes the affiant, Jeffrey D. Beam, after being duly sworn and cautioned, and states:

1. He is indigent at this time and unable to pay for the services of an expert my attorney has stated is necessary to my defense.

2. He is not currently employed and living with a friend, who assists in day-today living expenses.

3. He has received financial assistance from family members in order to retain the services of his attorney, Jay Clark.

Further affiant sayeth naught.

_____

On this _____ day of July, 2004 , personally appeared before me, a notary republic in and for said county and state, the above named Jeffrey D. Beam and signed the above as his own free act and deed. Sworn to and subscribed in my presence this _____ day of _____ , 2004.

_____
Notary Public

Ravert J. Clark
Reg. No. 042027
for the Defendant

COURT OF COMMON PLEAS
CRIMINAL DIVISION
CLERMONT COUNTY OHIO

STATE OF OHIO	}	Case No. 04-CR-00379
	}	
Plaintiff,	}	Judge Walker
	}	
-vs-	}	**DEFENDANT'S**
	}	**MOTION TO DISMISS**
	}	**COUNTS 4, 5, 6, 7, AND 10**
JEFFREY D. BEAM	}	
	}	
Defendant	}	

Now comes the Defendant, by and through counsel, pursuant to the Fifth, and Fourteenth Amendments to the Constitution of the United States, and Article I, §§ 10 and 16 of the Ohio Constitution, and moves this Court for an order dismissing counts 4, 5, 6, 7, and 10. The grounds for said Motion are set forth in the accompanying memorandum.

MEMORANDUM

"No person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury."[1] To the extent this Ohio Constitutional provision is violated, the Due Process guarantees in Art. I, § 16, and the Fifth Amendment of the United States Constitution are implicated. An essential element of the offenses alleged is the content of the images. Based upon information available to counsel, the images allegedly forming the basis of counts 4, 5, 6, 7, and 10 *were not* presented to the grand jury. This forces Mr. Beam to answer for charges in these five counts which were never presented to the grand jury, in violation of Art. I, § 10 of the Ohio Constitution.

Assistant prosecuting attorneys, on more than one occasion, have made representations indicating the only physical evidence submitted to the grand jury was the report prepared by the

---

[1] Ohio Const. Art. I, § 10.

state's computer expert, David Ausdenmoore. Due to the contents of the images contained in the report it is not attached as an exhibit to this Motion. It has been previously marked as an exhibit and placed of record with this court. In the event the Court would like a copy, counsel can provide one underseal. This report contains twenty-two images allegedly recovered from Mr. Beams' computer.

In response to numerous defense requests and the orders of this Court, the State, by letter of May 11, 2005, has identified the 10 images forming he basis of the 10 counts. Exhibit A attached. Only five of these images were contained in the Ausdenmoore report and presented to the grand jury. The presented five images relate to counts 1, 2, 3, 8, and 9. The images identified by the State as the basis of counts 4, 5, 6, 7, and 10 *are not* contained in Ausdenmoore's report, and, based on prior representations by the State, never presented to the grand jury.

While Ohio law does not recognize a motion to dismiss for a lack of probable cause, that is not the situation presented in this motion.[2] Counsel can find no case law to support the proposition an indictment can be returned when no evidence to support the charge was presented to the grand jury. There is however authority indirectly addressing the issue before this Court.

An excellent analysis of a very similar situation was made by the Ohio Supreme Court in *State v. Childs*.[3] The *Childs* Court found an indictment serves several purposes, including compelling the government to "aver all material facts constituting the essential elements of an

---

[2] *Cincinnati v. Contemporary Arts Center*, 57 Ohio Misc.2d 9, 566 N.E.2d 207 (1990).

[3] *State v. Childs*, 88 Ohio St.3d 194, 724 N.E.2d 781, 2000 Ohio 298.

offense, thus affording the accused adequate notice and an opportunity to defend."[4] In *Childs*, the State contented adequate notice was provided by the Bill of Particulars.[5] In dismissing this argument by the State, the Court stated:

> However, the bill of particulars is not signed by the grand jury foreman, and there is no evidence that the material contained in the bill of particulars was ever presented to the grand jury.
>
> The material and essential facts constituting an offense are found by presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted for the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict on an indictment essentially different from that found by the grand jury.[6]

Application of *Childs* to the instant facts compels this Court to dismiss the counts where the related images were not presented to the grand jury.

There is also statutory support for dismissal of the five counts. R.C. § 2941.08 provides certain defects in an indictment do not render an indictment invalid. The applicable sub-section states "defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."[7] It is difficult to conceive of more prejudice than being forced to answer an indictment when no evidence was presented to the grand jury to support the charges contained in the indictment. This argument is analogous to the line of authority prohibiting an amendment to an indictment which changes the name or identity of an offense, or adds a

---

[4] *Childs*, 88 Ohio St.3d at 198.

[5] *Id.*

[6] *Id.*

[7] R.C. § 2941.08(K).

necessary element.[8]

In considering whether a court can amend an indictment to add a specification pursuant to § 2941.143, the Ohio Supreme Court held the State may not amend an indictment to include a specification without first presenting the specification to the grand jury.[9]

Mr. Beam is not arguing the lack of probable cause in counts 4, 5, 6, 7, and 10, but rather a complete failure to present any evidence on these counts in violation of Art. I, §10 of the Ohio Constitution. This argument is similar to the "weight versus admissibility" argument frequently heard regarding a given piece of evidence. Had any evidence of the images in Counts 4, 5, 6, 7, and 10 been presented , Mr. Beam would not have any argument. But when no evidence is presented, the Ohio Constitutional guarantee of some evidence being presented to the grand jury has been violated.

CONCLUSION

The images allegedly recovered from Mr. Beam's computer are the res gestae of the pandering charges. The grand jury must be permitted to view the images to determine if the images probably violate Ohio law. Since the five images relating to counts 4, 5, 6, 7, and 10 were not presented to the grand jury, Mr. Beam is forced to answer for a crime, as alleged in these five counts, without the presentment of the offense to the grand jury. As a result this court must dismiss Counts 4, 5, 6, 7 and 10.

---

[8] *Middletown v. Blevins*, 35 Ohio App.3d 65, 519 N.E.2d 846 (1987).

[9] *State v. Dilly*, 47 Ohio St.3d 20, 546 N.E2d 937 (1989).

Respectfully submitted,

_____

Ravert J. Clark
Reg. No. 042027
for the Defendant
114 E. 8th Street
Suite 400
Cincinnati, Ohio 45202
513-587-2887

P:\AEducation\2005\Portland\Portland Written Materials\Jay Clark_Lisa Ludwig\Motion to Dismiss Count 4,5,6,7,and10.wpd

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing pleading was delivered to the office of the Clermont County Prosecuting Attorney, by ordinary U.S. mail, this____day of _____, 2005.

_____

Ravert J. Clark

Subj: **Tanner Scale creator criticizes its use to estimate age from images**
Date: 12/17/04 10:58:47 AM Eastern Standard Time
From: dean@bolandconsulting.com
To: tdurkin@durkinroberts.com, pgilman@durkinroberts.com, Slymanatlaw@aol.com, amsmallw@swbell.net, jstrong@jonesgivens.com, Notguilty14@aol.com, Jmack49168@aol.com
Sent from the Internet (Details)

Below is a letter and citation regarding the regular improper use of the Tanner Scale to estimate the age of individuals in photographs and digital images. May be of some use so I have forwarded it on.

From: Peter_Fleury@fd.org [mailto:Peter_Fleury@fd.org]
Sent: Friday, December 17, 2004 9:27 AM
To: dean@bolandconsulting.com
Subject: Re:RE: RE: RE: Debeaux

Misuse of Tanner Scale

PEDIATRICS Vol. 102 No. 6 December 1998, pp. 1494
Misuse of Tanner Puberty Stages to Estimate Chronological Age

To the Editor;
One of us has been involved as an expert in several US federal cases of possession of alleged child pornography, in which seized materials (videos, photographs, computer downloads) were used as evidence against individuals identified in "sting" operations, wherein government agents take over pornographic businesses. In these cases the staging of sexual maturation (Tanner stage) has been used not to stage maturation, but to estimate probable chronological age. This is a wholly illegitimate use of Tanner staging: no equations exist estimating age from stage, and even if they did, the degree of unreliability in the staging the independent variable would introduce large errors into the estimation of age, the dependent variable. Furthermore, the unreliability of the stage rating is increased to an unknown degree by improperly performed staging, that is, not at a clinical examination but through nonstadardized and, thus, unsuitable photographs.
Therefore, we wish to caution pediatricians and other physicians to refrain from providing "expert" testimony as to chronological age based on Tanner staging, which was designed for estimating development or physiologic age for medical, educational, and sports purposes, in other words, identifying early and late maturers. The method is appropriate for this, provided chronologic age is known. It is not designed for estimating chronologic age and, therefore, not properly used for this purpose.

Arlan L. Rosenbloom, MD
Department of Pediatrics

University of Florida College of Medicine
Gainsville, FL 32610-0296

James Tanner, MD, PhD
University of London
London, England

Pediatrics (ISSN 0031 4005).Copyright) 1998 by the American Academy of Pediatrics
Reprint (PDF) Version of this Article

Detective McLaughlin wrote this letter in response to the above letter;

December 16, 1998

Dr. Arlan Rosenbloom
University of Florida College of Medicine
Department of Pediatrics
Gainsville, Florida 32610-0296

Dear Dr. Rosenbloom,

I saw your letter in Pediatrics (Dec./98) about the use of the Tanner Scale. I am a police detective that works on cases of child pornography on the Internet. If I understand your letter, you state that the Tanner Scale should not be referenced when a pediatrician testifies regarding the age of a subject in a photograph(s). I assume this does not interfere with a pediatrician forming an opinion regarding the age of the subject in a photograph, relying on their experience of examining children. The New Hampshire Rules of Evidence allow for an expert to give an opinion based on his □knowledge, skill, experience, training, or education.□ If I understand your letter, this ability to do so would not be interfered with. You want this expert not to form an opinion based using the Tanner Scale, but on other factors such as their clinical experience.

All of this might not even be necessary given that a lay person can testify about such things as speed, height and age without being qualified as an expert. A lay witness can testify to his opinion based on inferences which are rationally based on perceptions, such as the age of an individual. Expert testimony is generally only needed, and/or permissible when scientific, technical, or when other specialized knowledge will assist the jury, or Judge in some instances, to understand evidence or make a fact determination. Many investigators show child pornographic images to pediatricians when developing probable cause, a procedure I have always questioned and felt unnecessary. It seems to me that a panel of jurors might also be able to make an age determination without expert testimony.

Sincerely,

James F. McLaughlin
Detective

Detective McLaughlin received this reply from Dr. Rosenbloom;

January 21, 1999

James F. McLaughlin
Detective
Keene Police Department
11 Washington St.
Keene, NH 03431

Dear Detective McLaughlin;

Thank you for your very thoughtful letter regarding our communication in Pediatrics regarding the misuse of the Tanner scale. This letter has generated a number of calls from pediatricians who provide expert testimony about child pornography and consider the Tanner staging to be important in their judgment. My response is essentially what you have so lucidly stated, that one does not need the Tanner staging to determine whether one is dealing with a child or a sexually mature individual, and given sexual maturity, that it is extremely difficult to assign chronologic age from the available material. There is a great variability in the timing of various stages, and pubic hair, which forms an important part of Tanner staging, is unreliable for staging Asians and is frequently trimmed or shaved completely in pornography. Pornographers may also prefer to use individuals who appear quite young for their greater prurient interest.

The kinds of judgments that can be made, as you note, can generally be made by lay persons. An experienced pediatrician, however, will have a professional perspective on the range of normality in terms of development for age. The physicians I have talked to are, in fact, circumspect in their use of the Tanner stage, to the point that they really don't need the Tanner stage! Tanner staging is useful for notations in medical records and standardizing observations among physicians and for clinical research. The kinds of judgments that need to be made, however, were made before we had Tanner stages, with no less expertise or accuracy.

Once again, thank you for sharing your perspective. We may need to write a clarifying letter, and your input will be helpful in that effort.

Sincerely;

Arlan L. Rosenbloom, MD
Distinguished Service Professor Emeritus

C: James F. Tanner, MD, PhD

Reprinted by permission of Detective James F. McLaughlin, October 4, 1999.

The Internet Crimes Against Children **website is maintained by the Keene Police Department Web Team. Send comments or questions to:** mailto:sbeckta@ci.keene.nh.us

Mental Health Issues in Court

Luis Rosell, Psy.D.
LBR Psychological Consultants
114 E. Monroe St. #109
Mt. Pleasant, IA
52641
319-385-8868 Office
319-537-1015 Cell
lrosell@mchsi.com

Outline

- **Competence**
- **History**
- **Case Law**
- **Iowa Case law/Statute**
- **Research/Psychosis/MR**
- **Predictor Variables**
- **Assessment**
- **Competency To Confess/Plead Insanity**
- **Juvenile Competence**
- **Diminished Capacity/NGRI**
- **Testing information**

Competence

- Most frequently addressed psychological issue
- Fundamental principle: Criminal proceedings should not continue against a person who is not able to understand their nature and purpose
- Basis for a fair trial
- Integrity and dignity of the process is undermined by the trial of an incompetent defendant
- Objectives of punishment are not served by sentencing a defendant who fails to comprehend the punishment and the reasons for imposing it

Competence

- **Can be raised at any point in the CJ process**
- **Involves**
  1) **determining what functional abilities are necessary**
  2) **Assessing the context in which these abilities must be demonstrated**
  3) **Evaluating the implications of any deficiencies in the abilities that are required**
  4) **Deciding whether the deficiencies warrant a conclusion of incompetence**
- **Descriptive and Predictive**
  - **Describe current ability to assist attorney**
  - **Predict how they will fare during the trial**

Competence to Stand Trial

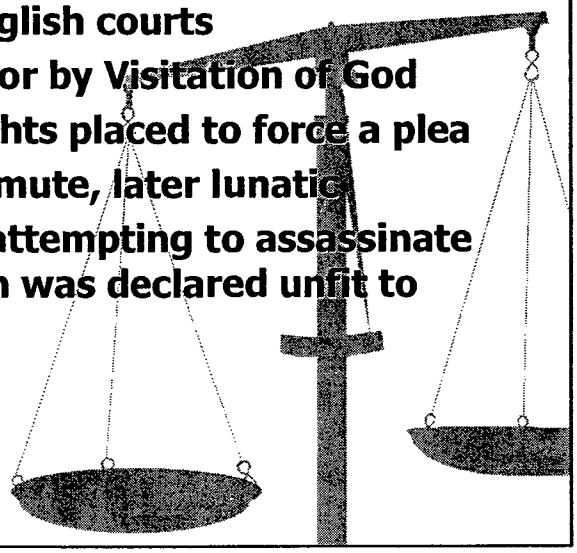
- 1978 - 25,000 defendants evaluated for CST and 6500 found IST
- 1992 – pretrial competence evaluations sought in 2-8% of all felony cases
- 1995 – Found as legitimate issue in 5% of criminal cases although only 2/3 of these individuals are actually referred for formal competency evaluations
- 2000 – approximately 60,000 competency evaluations conducted annually.

Competence

- Rooted in English Common Law
- Four Major legal rationales
  - Accuracy of proceedings demands assistance of defendant in acquiring the facts of the case
  - Due process depends upon the defendant's ability to exercise their rights
    - Choose and assist legal counsel
    - Confront accuser
    - Testify on own behalf

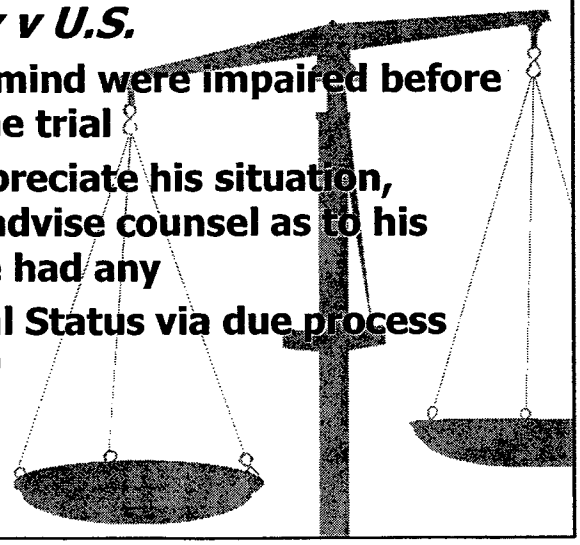
History

- 17th Century English courts
- Mute by Malice or by Visitation of God
  - Former- weights placed to force a plea
  - Latter- deaf, mute, later lunatic
- 1835 – person attempting to assassinate Andrew Jackson was declared unfit to stand trial



History

- 1899 *Youtsey v U.S.*
  - Memory and mind were impaired before and during the trial
  - Could not appreciate his situation, intelligently advise counsel as to his defense, if he had any
  - Constitutional Status via due process clause of 14th



Dusky Standard

- ***Dusky v. U.S.,*** **362 U.S. 402 (1960)**
  - **Present ability to consult with his lawyer with a reasonable degree of understanding**
  - **and whether they have the factual understanding of the proceedings against them**
- ***Dusky*** **problems**
  - **Does not specify how the evaluator judges the sufficiency or rational understanding, ability to consult, or factual understanding when making a competency decision**
- **Several courts and mental health groups have tried to list criteria related to competency**

Factual and Rational

- **Factual**
  - **Simple recall of over-learned material**
- **Rational**
  - **Complex cognitive process that involve analysis, integration of data and complicated decisions**

Dusky Standard

- **Florida Rules of Criminal Procedures**
  - **Appreciate charges and range of penalty**
  - **Understand adversarial nature**
  - **Disclose pertinent facts**
  - **Relate to attorney**
  - **Assist in planning defense**
  - **Capacity to challenge witnesses**
  - **Manifest appropriate courtroom behavior**
  - **Testify relevantly**
  - **Motivation to help self in process**
  - **Capacity to cope with incarceration prior to trial**

Other Case Law

- *Jackson v. Indiana,* 406 U.S. 715 (1972)
- MR, deaf-mute – not likely restorable
- Two robberies: Total $9
- Four years in a hospital
- Deprived equal protection and resulted in a longer incarceration than if criminally convicted.

Other Cases

- ***Drope v. Missouri*, 410 U.S. 162 (1975)**
  - **Accused of raping wife with others**
  - **Shot self during trial**
  - **Not present during trial**
  - **Must be competent throughout their trials**
  - **Irrational behavior, demeanor during trial must be addressed**
- ***Ford v.Wainwright*, 477 U.S. 399 (1986)**
  - **Competent through ALL proceedings**

Moore v. Campbell (2004)

- **344 F. 3rd 1313 (C.A. 11-Ala. 2003)**
- **Defendant's actions as forfeiting right to be competent**
- **Denying certiorari**
  - **USSC has let stand 11th Circuit Ct.**
  - **Capital murder defendant forfeited due process right to be competent by causing his own incompetency**
  - **He failed to eat and drink in a calculated and concerted effort to disrupt the trial**

Godinez v. Moran

- 509 U.S. 389 (1993)
  - Competence to plead guilty or waive the right to counsel, silence, jury trial, confront accuser, need not be measured by a standard that is higher or different from Dusky
  - Decision set low standard for competency
  - Competency not tied to specific functions to be performed, but is situation-based
  - U.S. Constitution does not require such distinctions re: variety of competencies, but noted that states are allowed to make such distinctions if they want

Godinez v. Moran

- Justice Thomas
  - Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel....[While States are free to adopt competency standards that are more elaborate than the Dusky formulation, the Due Process Clause does not impose these additional requirements. (p. 334)
- What, exactly, <u>and concretely</u>, is this minimum standard for competency (to stand trial, plead guilty, or waive the right to be represented by counsel)?

Godinez v. Moran

- Did not equate the ability to make or articulate a choice, or to provide some reasons for that choice (no matter how delusional), with "rational understanding".
- Under *Godinez*, as long as a defendant realistically appreciates the likely consequences and disadvantages of their choices (e.g., to forego an insanity defense, plead guilty, or waive counsel) there need be no further inquiry into the motives (or reasons) for those choices in order to deem the defendant competent to make them.

Chapter 812 – IOWA

- **812.3 Mental Incompetence of accused**
- **If at any stage of criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question.**

Chapter 812 – IOWA

- **812.4 Cessation of criminal prosecution**
  - **If incompetent, accused's capacity must be restored.**
  - **If a danger, must be ordered for treatment to DHS or DOC at IMCC.**
- **812.5 Effect of restoration of mental capacity**
  - **Within six months of commitment court upon hearing review will determine substantial probability if restoration will occur**
  - **If not civil commitment proceedings**

Senate File 2272
July - 2004

- **812.3 – applicant has burden to establish probable cause**
- **Court may schedule a hearing if defendant/attorney failed or refused to apply**
- **Defendant not compelled to testify**
- **Any testimony inadmissable regarding issue of guilt**
- **If evaluation is conducted within 30 days of probable cause finding, court is not required to order a new evaluation**

Senate File 2272
July - 2004

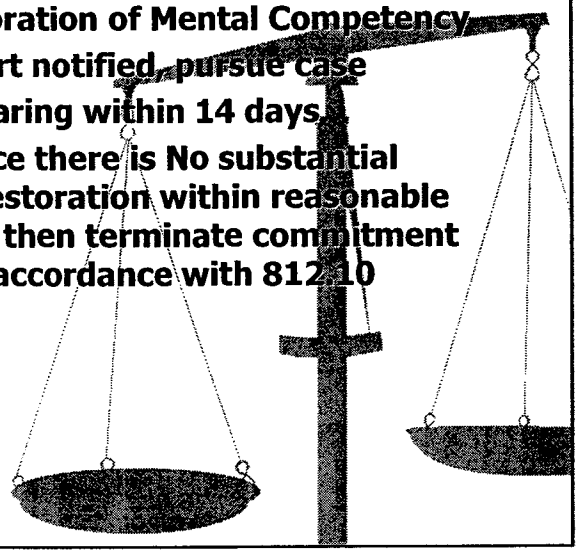
- 812.4 Hearing
- Held within 14 days of filing order
- Or 5 days of the court's motion, if the defendant has had an evaluation within 30 days of PC finding upon which the court will rely.
- No further proceedings at this point

Senate File 2272
July - 2004

- **812.6 (new section) Placement and Treatment**
  - **If clear and convincing evidence poses danger/refuses to cooperate w/ Tx then they will be committed**
  - **May refuse Tx – but will be forced medicated to restore competence by director or designee**
- **812.8 (new) Mental Status Reports**
  - **Within 30 days of placement**
  - **Assess reasonable amount of time for restoring**
  - **Progress reports every 60 days or less until restoration**

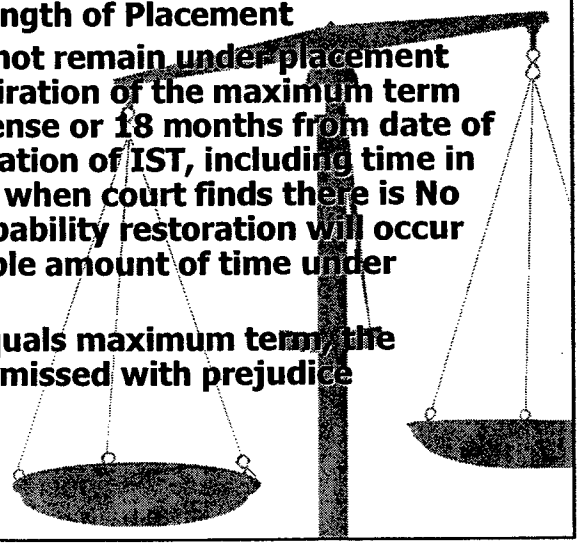
Senate File 2272
July - 2004

- **812.9 (new) Restoration of Mental Competency**
  - **If restored, court notified, pursue case**
  - **If not likely, hearing within 14 days**
  - **If preponderance there is No substantial probability of restoration within reasonable amount of time then terminate commitment under 812.6 in accordance with 812.10**



Senate File 2272
July - 2004

- **812.10 (new) – Length of Placement**
  - **Defendant will not remain under placement beyond the expiration of the maximum term for criminal offense or 18 months from date of original adjudication of IST, including time in jail, or the time when court finds there is No substantial probability restoration will occur within reasonable amount of time under section 812.9**
  - **If placement equals maximum term, the complaint is dismissed with prejudice**



Senate File 2272
July - 2004

- **If commitment equals 18 months, court schedules hearing to determine if CST.**
  - **If IST – commence civil commitment proceedings**
  - **If eventually CST, state may make application to reinstate the prosecution of the defendant.**

In Re Detention of Cubbage

- **I. The SVPA is civil in nature, not criminal, and Iowa Code section 812.3 (2001) does not provide Cubbage with a statutory right to be competent during the SVPA proceedings.**
- **II. *Cubbage* does not have a fundamental right to be competent during the SVPA proceedings and he has suffered no deprivation of any constitutional due process rights related to competency by operation of the SVPA.**

Evaluation

- Examine whether there is any relation between the existing, baseline symptoms and the court-related issues, capacities and behaviors.
- Are than any delusions about the persons in court?
- Does he acknowledge the authority of the court over him (e.g., sometimes grandiose delusions interfere with this)?
- Does he have a self-protective motivation (e.g., depression may interfere with this, as would grandiose delusions that give him the false belief that is case will be taken care of for him

Evaluation

- If he hallucinates, do the voices interfere with his attention and concentration?
- Can he differentiate between the voices and the people speaking around him?
- Does he actively respond to the voices when in group settings?
- Does he have delusions that create for him a defense that is not reality-based?
  - That is, does he plan to defend himself by asserting his actions were part of his role as a policeman or some other person

Evaluation

IF THE DEFENDANT

- **1) has the court-related knowledge;**
- **2) can reason about the case;**
- **3) only has symptoms that are compartmentalized from the court case;**
- **4) has the ability to manage himself in the courtroom during a hearing (attention, motivation, normal behavior, etc.);**
- **5) can communicate about the case rationally with you (and likely then his attorney and in testimony);**
- **6) is not delusional about why he is being prosecuted or how he can defend himself, then he is likely competent.**
- **If he has problems in one or more of these areas as a result of the illness, he may be incompetent for that/those reasons.**

Research

- **Defendants with primary psychotic disorders are at risk of legal impairment in comparison to non-psychotic defendants.**
- **In general, this was true across legal abilities**
- **Defendants with psychotic disorders were significantly more likely to be impaired in their**
  - **understanding of the nature**
  - **object of the proceedings**
  - **the possible consequences of the proceedings,**
  - **the ability to communicate with counsel**
  - **and were more likely to be judged unfit by clinicians and the court.**

Reality Based

- Factual understanding must be reality based.
- If delusion about the judge undermines the general understanding of the role of a judge, then the understanding is not reality based.
- They might know how court works, but do not believe that the system applies to them because of delusions of grandeur then it is irrational and likely incompetent.
- Also, decision may be poorly formed, not irrational, then it is bad, but competent.
- If the same decision is due to an inability to appreciate reality such as MR client thinks every lawyer and policeman will help them because that is what they do, then it may be an incompetent decision.

Psychosis

- In and of itself does not guarantee IST
- Delusions
  - may appear rational and factual understanding and can consult
  - *State v. Champagne*, NHSC (1985)
    - Can answer yes/no
    - Understood roles, charges, etc still not CST
    - Thorough evaluation is crucial

Predictor Variables

- Alabama study (Cooper and Zapf, 2003)
- Clinical Variables
  - More likely incompetent
    - 5x more if Dx with psychotic disorder
    - 6x more if non-psychotic major disorder (dep,ptsd)
    - Taken psychotropic medication
  - Less likely incompetent
    - Dx with current nonpsychoitc minor disorder (Adj)
    - Alcohol or drug use disorder

Predictor Variables

- Criminological Variables
  - More likely IST
    - Not charged with a violent crime
    - 2x more likely If most serious charge is miscellaneous charge
  - More likely Not IST
    - Charged with violent crime
  - Unassociated with competency decisions
    - Criminal history, previous incarceration

Predictor Variables

- Sociodemographic Variables
  - More likely IST
    - Older defendants
    - African-American defendants had higher rate
    - 2x more likely if not married
    - Unemployed (only 2% of IST were employed)
  - Gender and education were unassociated with competency status
- Conclusion
  - Psychotic Disorder, Nonpsychotic MD and employment were strongest predictors.

Mental Retardation

- MR defendants make up 2-7 % of
- Competence evaluation referrals
  - However, about 50% of MR defendants are not referred for these evaluations
  - One study found more than half of 35 MR defendants were found IST
  - Ho, (1999) found defendant's IQ score was correlated with competency determination.
- What can you do?
  - Do not ask yes-no questions
  - Use confrontational questioning to assess ability to withstand cross-examination
  - Observe them closely, can they handle stress
  - Can they recall simple legal concepts once explained

Research (gender/racial)

- Woman who displayed psychotic symptomatology were substantially more likely to be found IST than men
- May be more related to psychotic symptoms than being female *per se*
- Woman significantly more likely to express persecutory delusions than men
- Diagnostic mechanisms in determining CST with MR defendants was not racially discriminative. (Ho, 1999).

Assessment Tools

- Competency Tests
  - MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)
  - Competency Assessment Instrument (CAI)
  - Fitness Interview Test (FIT)
  - Evaluation of Competency to Stand Trial-Revised (ECST-R)
  - Comprehension of Miranda Rights (CMR)
- Intelligence Test
  - Wechsler Adult Intelligence Scale-III (WAIS-III)

Assessment Tools

- **Personality Tests**
  - **Minnesota Multiphasic Personality Inventory-2 (MMPI-2)**
- **Malingering Tools**
  - **Structured Interview of Reported Symptoms (SIRS)**
  - **Miller Functional Assessment of Symptoms Test (MFAST)**
  - **Validity Indicator Protocol (VIP)**
  - **Test of Memory Malingering (TOMM)**

Competency Decisions

- **Zapf et al. (2004)**
- **Mental health professionals' decisions about competence to stand trial were compared to the courts' determinations**
- **Agreement occurred in 327 of 328 cases (274 agreements of competence; 53 agreements of incompetence; 1 incongruent decision).**
- **Judges indicated their belief that MHP are more qualified (through their specific training) to answer the question of competency than are judges or other legal professionals.**

Restoration

- Length of Stay
- California: Md = 4.5 months
- Colorado: Mn = 3.8 months
- Florida: < 1 month: 32%
- < 6 months: 78%
- Michigan: Mn = 9.6 months
- Oklahoma: Mn =2.3 months (5% > 1 year)

Capacity to Confess

- *Crane v. Kentucky*, 106 S. Ct. Rptr. 2142 (1986)
  - Permits testimony bearing on the credibility of the defendant's confession
  - Considered the physical and psychological environment of where confession took place
- Why confess
  - *Munsterberg* (1908)
    - Weak mind, threats, promises, social motives, fatigue, passive yielding, fear, dissociation, depression and suggestibility
    - Research has validated his hypotheses

Totality of Circumstances

- Knowing, intelligently and voluntary
- *Fare v. Michael C.* 442 U.S. 707 (1979)
- This approach disallows the presumption that any particular fact, characteristic of suspects or circumstance is sufficient to decide the validity or invalidity of waivers across all cases.
- Idiographic approach

Evaluation

- Accurate perception
  - of words and phrases in Miranda warning
  - of nature of interrogation
  - of the attorney-client relationship
  - of irrevocable protection from self-incrimination
- Capacity to reason about consequences
- How was Miranda presented
  - Time frame, conditions, police demeanor

Pleading Insanity

- Massachusetts Appeals Court ruled that such a defendant should be considered incompetent to stand trial and that an insanity defense should not be imposed. *Commonwealth v. Simpson* (1998). 689 N.E.2d 824. *Commonwealth v. Simpson* (1999). 428 Mass. 646; 704 N.E.2d 1131.
- New York appellate court ruled that such a defendant is competent to stand trial and that an insanity defense should not be imposed. *People v. Morton* (1991). 173 A.D.2d 1081; 570 N.Y.S.2d 846.
- Colorado Supreme Court ruled that such a defendant may be considered to be competent to stand trial and that an insanity defense may be imposed. *Hendricks v. People* (2000). 10 P.3d 1231

Pleading Insanity

1. The defendant refuses an insanity defense against the advice of counsel.
2. The defendant insists on maintaining a defense that is based on a delusion or another diagnosable mental impairment (e.g. severe developmental disability) that interferes with rational understanding.
3. The defense the defendant wishes to maintain has no realistic chance to succeed.
4. There is overwhelming evidence that the defendant committed the act(s) charged.
5. The defendant is charged with a serious crime (or serious crimes) that would entail a very significant sentence upon conviction.
6. The defendant has a viable insanity defense.

Juvenile Competency

- MacArthur Juvenile Adjudicative Competence Study N=1400 (11-24)
  - www.mac-adoldev-juvjustice.org
  - 11-13 more than 3x likely as 18-24 to be seriously impaired
  - 14-15 were 2x as 18-24 to be seriously impaired
  - 15 and younger differ with young adults in terms of legal decision making
    - Younger do not see risk in choices or LT consequences (ie., more likely confess than remain silent)
    - More likely to accept plea
    - More compliant with authority

Juvenile Competency

- Significant predictors
  - Age and intelligence were only predictors on evaluation of abilities relevant to CST
- Not significant predictors
  - Gender, ethnicity, SES, prior experience with legal system, symptoms of MH problems
  - Caveat: Mental illness was not addressed in this study
- Conclusion
  - States need to rethink waiving 14-15 and under to adult court

Juvenile Competency

- **Unanswered questions**
  - **Are the standards the same?**
  - **How is age and immaturity to be considered?**
  - **What is proper disposition of IST?**
    - **What if caused by immaturity**
    - **If age, how long to wait until they grow up?**

Attorneys views and practices

- **122 PD's interviewed**
  - **15% of cases they believed that competency was an issue**
  - **Only referred about half of these**
  - **Chose not to refer**
    - **Unlikely to be considered IST**
    - **Limited resources**
    - **IST might not be best interest for the client**

References

- Cooper, V. G. & Zapf, P. (2003). Predictor variables in competency to stand trial decisions. *Law and Human Behavior, 27, 423-436.*
- Grisso, T. (2003). *Evaluating Competencies: Forensic Assessments and Instruments (2nd Edition).* Kluwer: London
- Grisso, T. and 8 others (2003). Juvenile's competence to stand trial: A comparison of adolescents' and adults' capacitites as trial defendants. *Law and Human Behavior, 27, 333-363.*

References

- Ho, T. (1999). Examination of racial disparity, incompetency to stand trial between White and African-American retarded defendants. *Journal of Black Studies*, 29, 771-789
- Viljoen, J. L., Zapf, P. A., & Roesch, R. (2003). Diagnosis, current symptomatology, and the ability to stand trial. *Journal of Forensic Psychology Practice, 3,* 23-37.
- Zapf, P. et. al., (2004). Have the courts abdicated their responsibility for determination of competency to stand trial to clinicians. *Journal of Forensic Psychology Practice (In Press)*

NGRI

- Retrospective evaluation
- Investigation
- History of Mental Illness
- Prior Mental Health Evals
- Dx, MHI, Tx
- Medication
- Disability
- Collateral info: Friends/Family
- Observations

Evaluation

- Moral Responsibility
- Retrospective in Nature
- Unlike Clinical Evaluations
- Cognitive and Volitional Aspects
- RCRAS: Rogers Criminal Responsbility Assessment Scale 25 areas
- Malingering (see prior slides)

McNaughten Standard

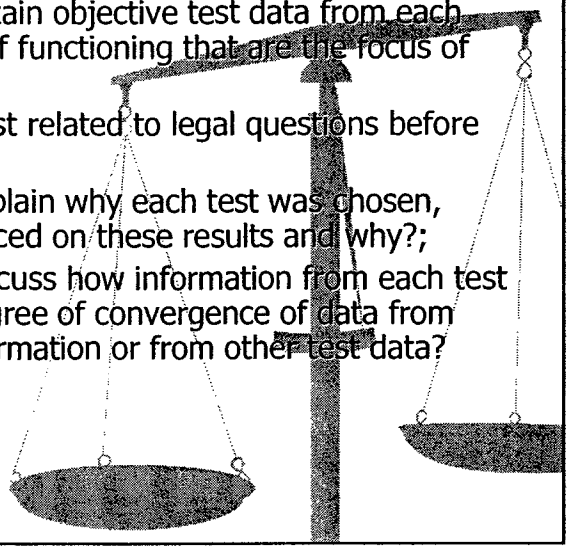
- Defendant is laboring under such a defect of reason, or disease of the disease of the mind as to not know the nature and quality of the act he was doing or, if they did know, they did not know what they were doing was wrong.
- Requires Interpretation
- Clear Cases Are Rare

Diagnoses

- Mental Retardation
- Schizophrenia
- Delusional Disorder
- Major Depression w/ Psychosis
- Other Mood Disorders
- Dissociative Disorders

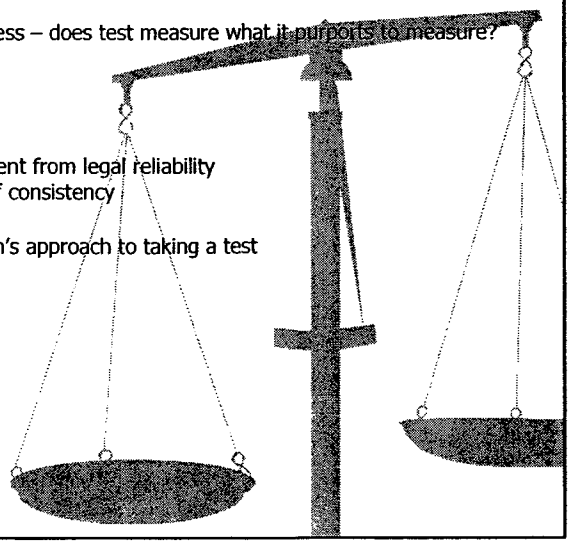
Psychological tests

- Did the evaluator obtain objective test data from each parent about areas of functioning that are the focus of the court's concern?;
- Was the choice of test related to legal questions before the court?;
- Did the evaluator explain why each test was chosen, what weight was placed on these results and why?;
- Did the evaluator discuss how information from each test was analyzed for degree of convergence of data from other sources of information or from other test data?



Terms to Know about Psychological Test Use

- Validity
  - Generally refers to usefulness – does test measure what it purports to measure?
- Normative data
  - Context specific
  - Gender norms
- Reliability
  - Scientific reliability is different from legal reliability
  - Generally refers to types of consistency
- Validity scales
  - Information about a person's approach to taking a test
    - Fake good v. fake bad
- Basic scale scores
- Supplementary scale scores
- T-scores
  - Average or mean score
  - Standard deviation score

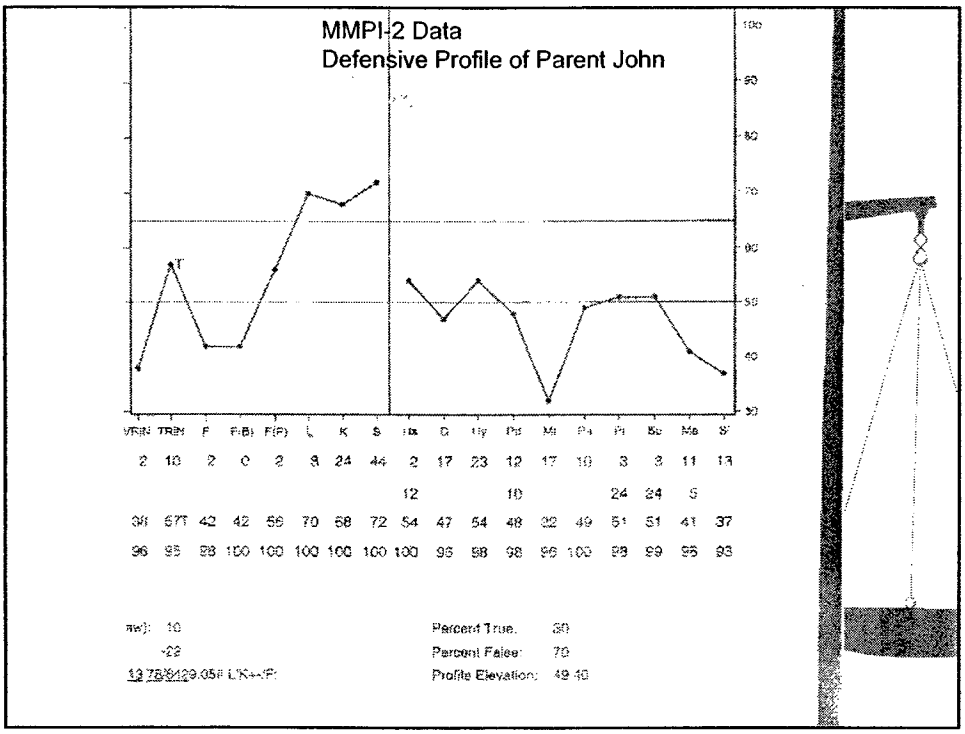


What are Validity Scales

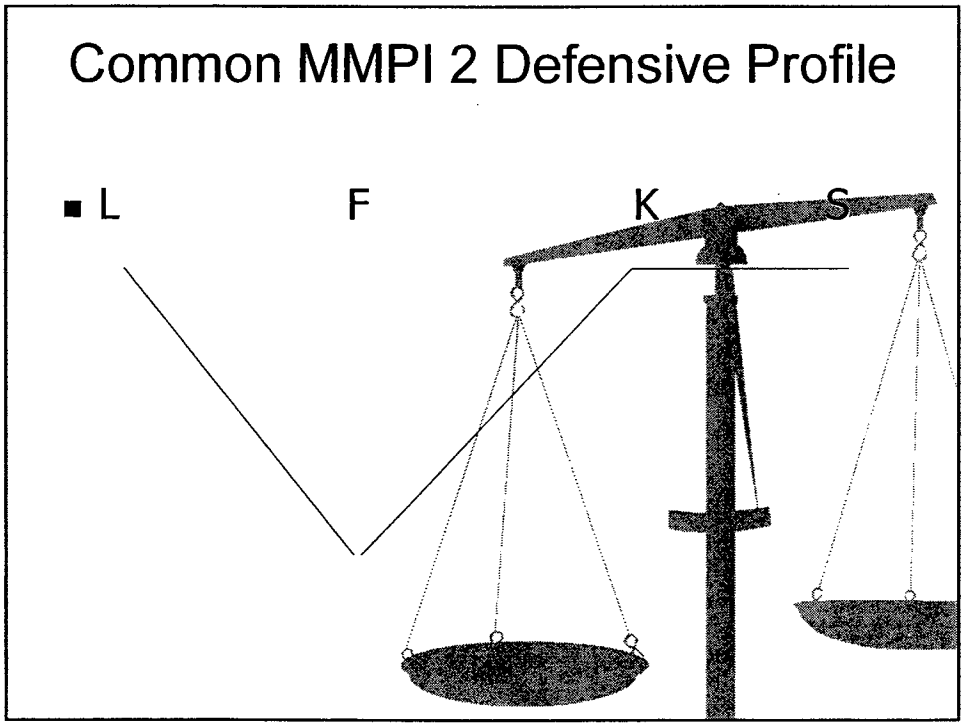
- Validity scales assess malingering, deception, general test-taking attitude, and/or fake good/fake bad attempts
- Understanding the meaning of validity scale scores increases the certainty with which an evaluator may provide a reasonably accurate interpretation of test data.

MMPI 2 Validity Scales

- L scale measures simple defensiveness. It may also measure rigidness and/or highly unusual experiences;
- F scale measures readiness for treatment, openness, low defensiveness;
- K scale measures complex defensiveness;
- S scale measures complex defensiveness

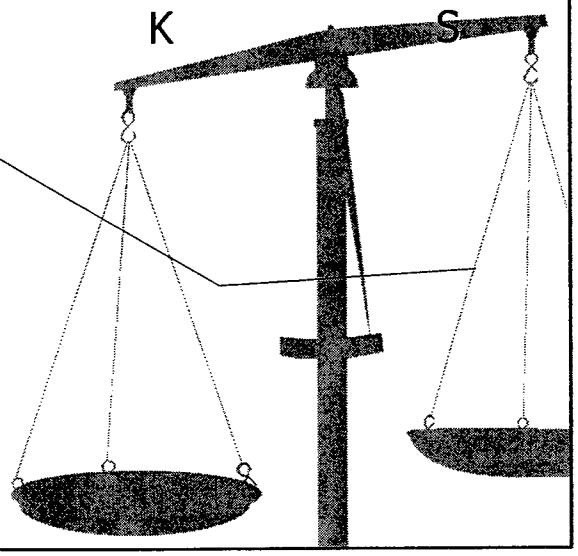


Common MMPI 2 Defensive Profile



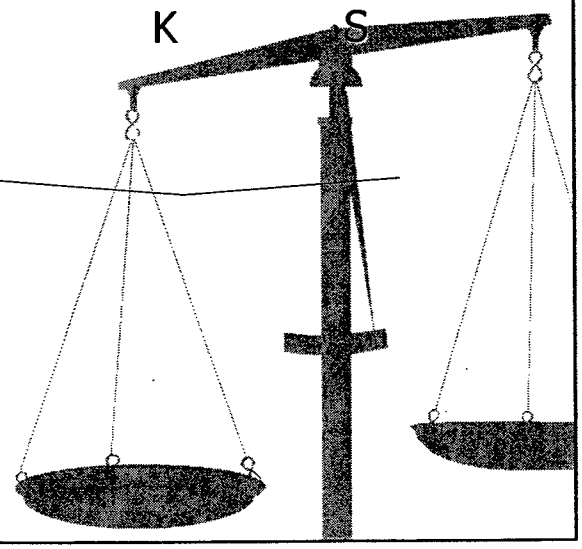
MMPI 2 Validity Scale: Possible Exaggeration

- L F K S



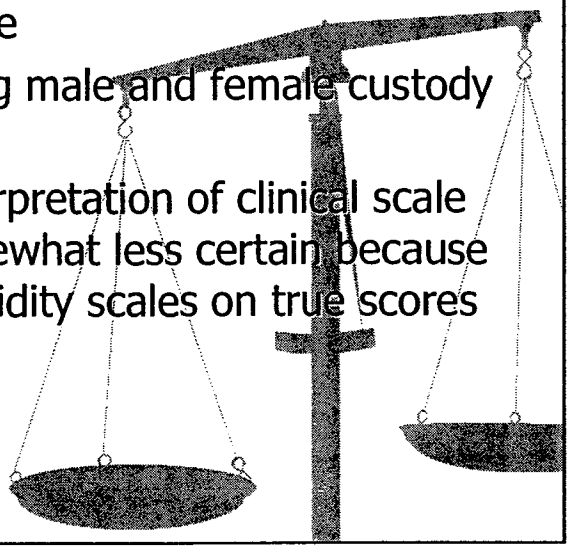
Non-Defensive Validity Scale Profile

- L F K S



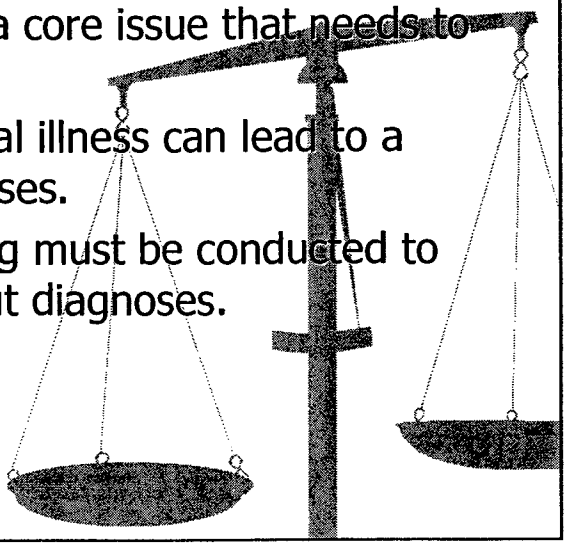
Interpretations

- Defensive profile
- Common among male and female custody litigants
- Evaluator's interpretation of clinical scale scores are somewhat less certain because of effects of validity scales on true scores



Summary

- Competency is a core issue that needs to be addressed.
- History of mental illness can lead to a variety of defenses.
- Adequate testing must be conducted to verify or rule-out diagnoses.



In Re Newchurch, 807 F2d 404, 410 (5th Cir 1986)

(outpatient, local examination preferred to sending defendant to BOP facility because "in the absence of some evidence that commitment is necessary, a district court should not exact such a deprivation of liberty").

Sell v US, 539 US 166 (2003)

(Due Process Clause permits government to administer antipsychotic drugs to render defendant competent for trial but only if treatment is medically appropriate, is substantially unlikely to have side effects that may undermine fairness of trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal No.
Plaintiff,	)	
	)	
vs.	)	MOTION FOR MENTAL
	)	EVALUATION OF DEFENDANT
	)	
	)	**FILE UNDER SEAL**
Defendant.	)	

Defendant, by counsel, requests that the court order a mental examination of him/her pursuant to 18 U.S.C. §§ 4241(a) and (b). In support of this motion, counsel states to the court as follows:

1. On [date], an indictment was filed charging defendant with [charges] in violation of [ ] U.S.C. § [ ].

2. Based upon observations of the defendant, defense counsel believes that a competency determination is in order and is required in this case. [Provide reasons for needing evaluation, for example: Defendant has a history of _____. or During recent conversations with defense counsel, defendant has been substantially distracted and has been unable to focus on what is being discussed.]

Defense counsel respectfully requests pursuant to 18 U.S.C. § 4241(a) and (b) a judicial determination of defendant's competency. Defense counsel requests that the court order a mental examination of defendant at a federal medical facility by at least one qualified psychiatrist or psychologist who shall prepare and submit a written report to the court concerning the

defendant's mental ability to understand the proceedings pending against him/her and to properly assist counsel in his/her own defense.

FEDERAL PUBLIC DEFENDER'S OFFICE
400 Locust, Suite 340
Des Moines, Iowa 50309
PHONE: (515) 309-9610
FAX: (515) 309-9625

By:_____

ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal No.
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER ON MOTION FOR
	)	MENTAL EVALUATION
	)	
Defendant.	)	

Counsel for defendant [ ] has filed a motion, pursuant to 18 USC §§ 4241(a) and (b), for a judicial determination of the defendant's mental competency. The motion seeks an order committing defendant for an examination to determine whether the defendant may presently be suffering from a mental disease or defect rendering him/her mentally incompetent to understand the nature and consequences of the proceedings against him/her or to assist properly in his/her defense.

The court finds from the motion that the defendant might presently be suffering from a mental disease or defect rendering him/her mentally incompetent to [understand the proceedings pending against [him/her] [or] to] properly assist counsel in his/her own defense. The court further finds that prior to conducting a hearing in respect to the defendant's mental competency to stand trial, the defendant should undergo an examination.

Accordingly, IT IS ORDERED:

1. Defendant [ ] shall be committed to the custody of the Attorney General for placement in a suitable facility, [preferably FMC Rochester,] pursuant to 18 USC § 4247(b), to

undergo an examination, pursuant to 18 USC § 4241(b), to be conducted by a licensed or certified psychiatrist or psychologist employed by that institution to determine whether the defendant is presently suffering from a mental disease or defect rendering the defendant mentally incompetent to the extent that he/she is unable to understand the nature and consequences of the proceedings against him/her or to assist properly in his/her defense.

2. The commitment shall not exceed 30 days unless that time is extended for an additional period of time not to exceed 15 days upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

3. Upon completion of the examination, the examining psychiatrist or psychologist shall prepare and file a report in accordance with the provisions of 18 U.S.C. § 4247(b) and (c).

4. No statement made by the defendant in the course of the examination provided for in this order, no testimony by medical or other institution personnel based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

5. The United States Marshal for the Southern District of Iowa shall forthwith transport the defendant to location selected by the Attorney General, preferably FMC Rochester.

6. Upon completion of the examination, the defendant shall promptly be returned before the court for a hearing to determine whether he/she presently suffers from a mental disease or defect which renders the defendant mentally incompetent to the extent that he/she is unable to understand the nature and consequences of the proceedings against him/her or to assist properly in his/her defense.

7. The United States Probation Office for the Southern District of Iowa shall (a) prepare a written social history of the defendant, (b) obtain a copy of the indictment filed in this case, (c) obtain a copy of defendant's medical records, and (d) provide the social history, indictment, and the medical records to the medical center for use in conducting the examination.

Date: _____

_____
Judge, United States District Court

Citation
18 USCA S 4241
18 U.S.C.A. § 4241
▷

Found Document

Rank 1 of 1

Database
USCA

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 313--OFFENDERS WITH MENTAL DISEASE OR DEFECT
§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.--When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.--A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 855; Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 18, U.S.C., 1940 ed., § 876 (May 13, 1930, c. 254, § 6, 46 Stat. 271).

Changes were made in phraseology and surplusage omitted. 80th Congress House Report No. 304.

1984 Acts. House Report No. 98-1030 and House Conference Report No. 98- 1159, see 1984 U.S. Code Cong. and Adm. News, p. 3182.

Amendments

1984 Amendments. Pub.L. 98-473 completely revised provisions by substituting in the section catchline "Determination of mental competency to stand trial" for "Examination and transfer to hospital", and substituted provisions relating to motion, report, hearing, etc., for determination of competency of defendant, for provisions relating to boards of examiners for examination of inmates of Federal penal and correctional institutions and transfer of such inmates to hospitals.

Short Title

1984 Acts. Section 401 of Pub.L. 98-473 provided that: "This chapter [amending this chapter, section 3006A of this title, rule 12.2 of the Federal Rules of Criminal Procedure and rule 704 of the Federal Rules of Evidence] may be sited [sic] as the 'Insanity Defense Reform Act of 1984'."

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Effective: [See Notes]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 313--OFFENDERS WITH MENTAL DISEASE OR DEFECT
§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

(a) Institution of proceeding.--If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until--

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge.--When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that--

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall--

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.--The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to state of certain other persons.--If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(h) Definition.--As used in this chapter the term "State" includes the District of Columbia.

CREDIT(S)

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 687, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2062; Nov. 29, 1990, Pub.L. 101-647, Title XXXV, § 3599D, 104 Stat. 4932; Aug. 5, 1997, Pub.L. 105-33, Title XI, § 11204(1), 111 Stat. 739.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Effective: [See Notes]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 313--OFFENDERS WITH MENTAL DISEASE OR DEFECT
§ 4247. General provisions for chapter

(a) Definitions.--As used in this chapter--

(1) "rehabilitation program" includes--

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant; and

(3) "State" includes the District of Columbia.

(b) Psychiatric or psychological examination.--A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.--At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.--(1) The director of the facility in which a person is hospitalized pursuant to--

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.--Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.--Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.--Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, or 4246, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's hospitalization,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.--The Attorney General--

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

CREDIT(S)

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 687, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2065; Nov. 18, 1988, Pub.L. 100-690, Title VII, §§ 7044, 7047(a), 102 Stat. 4400, 4401; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330003(d), 108 Stat. 2141; Aug. 5, 1997, Pub.L. 105-33, Title XI, § 11204(2), (3), 111 Stat. 739.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. House Report No. 1319, see 1949 U.S. Code Cong. Service, p. 1928.

1984 Acts. House Report No. 98-1030 and House Conference Report No. 98- 1159, see 1984 U.S. Code Cong. and Adm. News, p. 3182.

1988 Acts. For Related Reports, see 1988 U.S. Code Cong. and Adm. News, p. 5937.

1994 Acts. House Report Nos. 103-324 and 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

1997 Acts. House Report No. 105-149, House Conference Report No. 105-217, and Statement by President, see 1997 U.S. Code Cong. and Adm. News, p. 176.

Amendments

1997 Amendments. Subsec. (a). Pub.L. 105-33, § 11204(2), added subsec. (3), in par. (1)(D), struck out "and"

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

NEW PROCEDURES FOR ATTORNEY DISCIPLINE

FEDERAL CRIMINAL LAW AND PROCEDURE

November 30, 2005
Des Moines, Iowa

Federal Public Defender's Office and Iowa Association of Criminal Defense Lawyers

Wendell J. Harms
Assistant Ethics Counsel
Iowa Supreme Court
Attorney Disciplinary Board
1111 East Court Avenue
Des Moines, Iowa 50319
Telephone: (515) 725-8011
Facsimile: (515) 7525-8013
E-mail: Wendell.Harms@jb.state.ia.us

NEW PROCEDURES FOR ATTORNEY DISCIPLINE:
HOW THE IOWA DISCIPLINE SYSTEM WORKS

CHAPTER 34: RULES OF PROCEDURE OF THE IOWA ATTORNEY DISCIPLINARY BOARD

RULE	PRIOR	PRESENT
34.1 Complaints	Complaints forms are available to the public.	Complaints are accepted from any person, firm or entity. The Attorney Disciplinary Board (ADB) may initiate its own investigation or disciplinary action.
34.2 Form of complaint	Complaints are accepted from any person, firm or entity.	Complaint forms are available to the public.
34.2(1)	Unless filed by a court officer, complaints must be sworn to.	Unless filed by a court officer, complaints must be certified under penalty of perjury; complainant may also submit exhibits with the complaint.
34.2(2)	Complaints may include exhibits.	Omitted.
34.2(3)	Complaints shall be filed without charge.	Omitted.
34.2(4)	The Board of Professional Ethics and Conduct (now known as the Attorney Disciplinary Board (ADB)) may initiate its own investigation or disciplinary action.	Omitted.
34.3 Filing	Complaint may be filed with the local bar association, the Board of Professional Ethics and Conduct, or the Prosecutorial Standards and Conduct Committee.	Complaint shall be filed, without charge, with the ADB.
35.2 Iowa Supreme Court Attorney Disciplinary Board (1)	The ADB is composed of 7 lawyers and 2 laypersons.	The ADB is composed of 9 lawyers and 3 laypersons.
35.2(1)	The Iowa State Bar Association nominates lawyers, including nonmembers, to serve on the ADB.	Bar associations that maintain an Iowa office or any Iowa lawyer nominate lawyers to serve on the ADB.
35.2(1)	ADB members may serve no more than 2 3-year terms.	Same.
35.2(1)	The ADB can investigate Iowa lawyers for alleged violations of the Code of Professional Responsibility for Lawyers, now the Rules of Professional Conduct, laws of the U.S. or the state of Iowa. The ADB can investigate	Same.

RULE	PRIOR	PRESENT
	non-Iowa lawyers that practice in Iowa for alleged violations of the Code of Professional Responsibility, now the Rules of Professional Conduct. Following investigation of the complaint, the ADB shall dismiss the complaint, admonish or reprimand the lawyer, or file and prosecute the complaint before the Grievance Commission (GC).	
35.2(2)	An ADB member shall not represent any lawyer against whom a complaint has been filed at any stage of the proceeding. An ADB member should not represent a lawyer in any malpractice, criminal or other matter when it appears reasonably likely that a complaint will be filed.	Same, except the practice prohibitions extend to lawyers in the ADB member's firm.
34.4 Procedure (1)	The ADB shall create and maintain a record of the complaint and associated details, including the final disposition of the matter.	Same.
34.4(2)	The ADB shall keep all files in a permanent form and confidential, unless otherwise directed by the ADB chair, the chair's designee or by supreme court rule. Pursuant to Court Rules Chapter 39, all files may be examined and reproduced by the Client Security and Attorney Disciplinary Commission. Except for ADB work product, any file shall be open to the lawyer's inspection.	Same, except the lawyer's file shall be provided to the lawyer within a reasonable time of the lawyer's request, and "work product" is defined to exclude a written statement signed or otherwise adopted or approved by the person making it or a contemporaneous and substantially verbatim transcript or recording of a person's oral statement.
COPE v. Hurd, 360 N.W.2d 96 (Iowa 1985)	The Supreme Court upheld the "work product" privilege created by this rule, and rejected Hurd's due process challenge. *Id.* 100-101. "Confidentiality provisions of this kind promote the public interest by assuring a free flow of information for complaint and investigative purposes. (citation omitted)." *Id.*	
34.5 Board procedure	The ADB shall notify the complainant in writing that the complaint has been received and will be acted upon.	Same.
34.6(1) Notification of respondent – response	The ADB shall send a copy of the complaint to the lawyer by restricted delivery certified mail, marked "confidential," or by personal service, along with the pertinent rules, and request a response.	The ADB shall send a copy of the complaint to the lawyer along with a copy of the pertinent rules.

RULE	PRIOR	PRESENT
34.6(2)	None.	The ADB may deliver the complaint by restricted delivery certified mail, marked "confidential," or by personal service.
34.6(3)	None.	If service cannot be obtained pursuant to 34.6(2), the ADB may serve the lawyer's agent designated by Rule of Professional Conduct 32:8.5 comment 1, the supreme court clerk.
34.6(4)	None.	The lawyer shall make a written response within 20 days of receipt of the complaint.
34.7 Failure to respond – notice—effect (1) Failure to respond—separate ethical violation	If the lawyer does not respond within 20 days, the ADB shall notify the lawyer that if no response is received within 10 days from receipt of the second notice, the ADB may add a failure to respond count to its complaint to be filed with the GC.	Same.
34.7(2) Enlargement of time to respond	None.	For good cause shown, the ADB may grant the lawyer additional time to respond.
34.7(3)Failure to respond—temporary suspension	None.	If no timely response from the lawyer is received, the ADB shall certify the lawyer's failure to respond to the supreme court clerk. a. The clerk shall issue a notice of temporary suspension of license unless the lawyer causes the ADB to file a withdrawal of its certificate of no response within 20 days of the clerk's notice. b. If the lawyer responds, the ADB shall withdraw its certificate, and no suspension will occur. c. If the ADB does not withdraw its certificate, the supreme court shall enter a temporary suspension order. d. If the lawyer responds after the temporary suspension order, the ADB shall, within 5 days, either withdraw its certificate or file a report stating why the temporary suspension should be continued. e. If the ADB seeks continuation of the temporary suspension, the supreme court shall enter an appropriate order. f. If the ADB files a withdrawal of its certificate, the supreme court shall immediately reinstate the lawyer if the lawyer is

RULE	PRIOR	PRESENT
		eligible for reinstatement. g. During the first 30 days of the temporary suspension, the lawyer shall notify those clients whose interests may be adversely affected by the suspension. (See Rule 35.21). h. When the temporary suspension exceeds 30 days, the lawyer shall notify all clients. (See Rule 35.21).
34.8 Board actions upon receipt of response (1)	The ADB's alternatives after receiving the lawyer's response are: a. Dismiss the complaint with notice to the complainant and the lawyer; b. Schedule the matter on the ADB docket; or c. Initiate investigation of the matter by a member of the young lawyers section of the Iowa State Bar Association, by ADB counsel or by another designated individual.	The ADB's alternatives after receiving the lawyer's response are: a. Same; b. Same; or c. Initiate investigation of the matter by ADB counsel or by the local bar association. (1) The ADB shall direct and supervise the investigation when someone other than the ADB conducts it. (2) The investigation conclusion and recommendation is sent to the ADB for final action.
34.8(2)	The ADB or other entity has subpoena power during its investigation.	Same.
34.8(3)	The ADB chair or other member in the chair's absence has authority to issue subpoenas.	Same.
34.8(4)	The district court for the county of the investigation has jurisdiction over subpoena disputes, including contempt power.	Same.
34.8(5)	ADB counsel or any person authorized to administer oaths shall have authority to administer oaths or affirmations.	Same.
34.9 Board action upon report and recommendation of investigator	When the investigation is complete, the ADB shall: 1. Dismiss the complaint and notify the complainant and the lawyer; or 2. Schedule it on the ADB docket.	Same.
34.10 Prior notice of witnesses	The ADB or other entity can receive evidence at its meeting, but must give the witness at least 7 days' written notice.	Same.

RULE	PRIOR	PRESENT
34.11 Hearing-meetings	ADB meetings are held quarterly. A majority of the ADB shall constitute a quorum. After considering the matter at its meeting, the ADB shall: 1. Continue the matter; 2. Dismiss the complaint; 3. Admonish the lawyer; the written notice to the lawyer shall advise the lawyer of the right to file exception to the admonishment within 30 days of the receipt of the notice. If an exception is received, the ADB then shall reconsider the matter and either dismiss the complaint, reaffirm the admonishment or direct the matter be filed with the GC; 4. Reprimand the lawyer; 5. File a complaint with the GC.	Same, except the meetings may be held by telephone. If the complaint is dismissed, the ADB must notify the complainant and the lawyer. If the ADB issues an admonition, the ADB shall notify the complainant of its opinion and its communication with the lawyer. In the case of a reprimand, the ADB shall file it with the supreme court. If a complaint is filed with the GC, the ADB is to prosecute it to final determination.
COPE v. Michelson, 345 N.W.2d 112 (Iowa 1984)	The Supreme Court rejected Michelson's due process argument that the COPE and the rules failed "to give him adequate notice that contesting the [COPE's] decision to reprimand him could lead to pursuit of a formal disciplinary charge resulting in a greater punishment…." *Id.* at 115. The Court compared this situation to "an offer by a prosecutor allowing a defendant to plead guilty to a lesser offense. In the event the offer is refused, the prosecutor may proceed to prosecute a higher offense without a due process violation unless the raising of the charge is based on vindictiveness of the prosecutor. (citation omitted). …. We conclude the [COPE] did not violate [Michelson's] due process rights by issuing a complaint, when its only choice was to let the matter stand unprosecuted or file a complaint." *Id.* at 116.	
COPE v. Liles, 430 N.W.2d 111 (Iowa 1988)	The Supreme Court "employ[s] professional admonitions not so much by way of criticism as to instruct the bar. [The Court] view[s] admonitions as considerably less severe than reprimands, and consider[s] them to be something less than actual discipline. (citation omitted)." *Id.* at 113.	

RULE	PRIOR	PRESENT
COPE v. Wunschel, 461 N.W.2d 840 (Iowa 1990)	The Supreme Court rejected Wunschel's laches argument that this proceeding should be barred because the alleged offenses occurred 10 years earlier, and 7 years had lapsed before the complaint was filed with the COPE. *Id.* at 845-846. The Court wrote: "[l]aches is an 'equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another.' (citation omitted). To establish the affirmative defense of laches, prejudice must be shown. (citation omitted). Prejudice 'cannot be inferred merely from the passage of time.' (citation omitted). The party asserting the defense carries the burden of establishing the essential elements by clear, convincing, and satisfactory evidence. (citation omitted)." *Id.* at 846. The Court concluded that the evidence unavailable to Wunschel would not have made any difference in the case's outcome. *Id.* at 846.	
COPE v. Zimmermann, 522 N.W.2d 619 (Iowa 1994)	The Supreme Court admonished lawyer Zimmermann under these circumstances: 1. "No disciplinary rule expressly address[ed] an attorney's responsibilities under the circumstances…[;]" 2. "[N]o decision spell[ed an attorney's responsibilities] out[;]" 3. The Court was "favorably impressed by Zimmermann's candor and sincerity…[;]" and 4. Zimmermann "was relatively new in the practice." *Id.* at 621.	
BOPE v. Mulford, 625 N.W.2d 672 (Iowa 2001)	The Supreme Court rejected Mulford's estoppel argument that this proceeding should be barred because his license had been restored to active status. *Id.* at 680. Since the licensing officials did not know of Mulford's criminal contempt conviction, he "cannot claim that the reactivation of his license constituted a representation that his criminal conviction was not a barrier to licensure, or	

RULE	PRIOR	PRESENT
	that the licensing authorities concealed the fact that his criminal conduct might subject him to disciplinary action." *Id.* Mulford could not demonstrate a "fundamental element" of an estoppel claim, "a false representation or concealment of a material fact." *Id.*	
34.12 Lawyer advertising	Deleted.	
34.13 Denial of application—effect	Deleted.	
34.14 Grant of application—effect	Deleted.	
34.15 Notification of decision—appeal	Deleted.	
34.16 Submission of exceptions	Deleted.	
34.17 Court approval of expansion required	Deleted.	
34.18 Board findings—exception taken	Deleted.	
34.19 Formal advisory opinion to exceptions	Deleted.	
34.20 Formal advisory opinions—discretionary	Deleted.	
34.21 Exceptions to advisory opinions	Deleted.	
34.22 Advisory opinions availability	Deleted.	
34.12 Order for mental or physical examination or		(1) Order requiring examination or treatment. A licensed Iowa lawyer, as a condition of licensure, is under a duty to submit to a mental or physical examination or subsequent

RULE	PRIOR	PRESENT
treatment		treatment as ordered by the ADB. The ADB may order the examination or treatment upon a showing of probable cause to believe the lawyer is suffering from a condition that currently impairs the lawyer's ability to discharge professional duties. The ADB may order the examination or treatment be done at the lawyer's expense. (2) Show cause hearing. Before entering any examination or treatment order, the ADB shall schedule a show cause hearing to permit the lawyer to show cause why the examination or treatment order should not be entered. At least 3 ADB members shall participate. The ADB staff counsel shall first present evidence of the probable cause supporting the need for evaluation or treatment. The lawyer may then respond and rebut the claim that evaluation or treatment is necessary. The hearing shall be informal, and the evidence rules shall not be strictly applied. By majority vote, the ADB shall either dismiss the matter or enter an order requiring the examination or treatment. (3) Content of order. The ADB order for mental or physical examination or treatment shall include all of the following: (a) A description of the type of examination or treatment to which the lawyer must submit; (b) The name and address of the examiner or treatment facility that will perform the examination or provide the treatment; (c) The time in which the lawyer must schedule the examination or enter treatment; (d) The amount of time in which the lawyer is required to complete the examination or treatment; (e) The lawyer shall cause a report(s) of the examination or treatment to be provided to the ADB within a specified period; (f) The lawyer shall communicate with the ADB regarding the status of the examination or treatment;

RULE	PRIOR	PRESENT
		and (g) The lawyer may request additional time to schedule or complete the examination or request approval of an alternative examiner or treatment facility. The ADB shall rule on such requests. (4) Review. The lawyer may seek review of the ADB order from the supreme court. The lawyer may do so by filing a petition for review (9 copies) with the supreme court clerk (and 1 service copy on the ADB) within 7 days of receipt of the ADB order. The ADB shall have 7 days to respond. The court shall promptly set the matter for hearing before 1 or more justices. The filing of a petition for review stays the ADB order. (5) Hearing. At the supreme court hearing on the lawyer's petition for review, the ADB shall present evidence of probable cause supporting its order and the necessity of the evaluation or treatment. The lawyer may then respond and rebut the ADB's claim that the evaluation or treatment is necessary. The hearing shall be informal, and evidence rules shall not be strictly applied. The court may affirm, vacate or modify the ADB's order or may enter such other order as the circumstances warrant. (6) Failure to submit. The lawyer's failure to comply with ADB order may be grounds for discipline. (7) "Condition." "Condition" means any physiological, mental or psychological condition, impairment or disorder, including drug or alcohol addiction or abuse. (8) Confidentiality. All records, papers, proceedings, meetings and hearings filed or conducted shall be confidential, unless otherwise ordered by the supreme court.
34.13 Deferral of further proceedings		1. Deferral. With the agreement of the ADB administrator and the lawyer, the ADB may defer further proceedings pending the lawyer's compliance with conditions imposed by the ADB for supervision of the lawyer for a specified

RULE	PRIOR	PRESENT
		period not to exceed 1 year, unless extended by the ADB. Proceedings may not be deferred if: (a) The lawyer's conduct involves misappropriation of funds or property; (b) The lawyer's conduct involves a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; (c) The lawyer's conduct resulted in or is likely to result in actual prejudice, unless restitution is made a deferral condition; (d) The lawyer has previously been disciplined or had a complaint "deferred;" or (e) The lawyer has failed to respond to the complaint. 2. Conditions. In imposing conditions, the ADB shall consider the nature and circumstances of the lawyer's conduct and the history, character and condition of the lawyer. The conditions may include, but are not limited to: (a) Periodic reports to the diversion coordinator and the ADB's administrator; (b) Supervision of the lawyer's practice or accounting procedures; (c) Satisfactory completion of a course of study; (d) Successful completion of the multistage professional responsibility exam; (e) Compliance with the Iowa rules of professional conduct; (f) Restitution; (g) Psychological counseling or treatment; (h) Substance abuse or addiction counseling or treatment; (i) Abstinence fr om alcohol or drugs; (j) Cooperation with the Iowa Lawyers Assistance Program; or (k) Fee arbitration.

RULE	PRIOR	PRESENT
		3. Affidavit. Prior to the ADB's deferral of the complaint, the lawyer shall execute an affidavit stating: (a) An admission of the conduct under investigation; (b) The conditions to be imposed for supervision, including the supervision period; (c) The lawyer's agreement to the conditions; (d) The lawyer's acknowledgement that the lawyer's failure to comply with the conditions may result in the filing of a complaint with the GC, both for the original matter and for the lawyer's failure to comply with the supervisory conditions; (e) The lawyer's acknowledgment that the lawyer's admissions with respect to the lawyer's conduct may be introduced in evidence in proceedings before the GC; and (f) The lawyer's acknowledgement that the lawyer joins in the ADB's deferral determination freely and voluntarily and understands the nature and consequences of the action. 4. Supervision. The diversion coordinator shall be responsible for monitoring the lawyer's compliance with the ADB's conditions. The coordinator may recommend modifications of the conditions and shall report the lawyer's failure to comply with the conditions or to cooperate with the coordinator to the ADB. 5. Compliance. Upon the lawyer's successful compliance with the ADB conditions, the ADB shall dismiss or close the case. The lawyer will not be considered to have been disciplined, but the lawyer's admission of misconduct may be considered in a subsequent disciplinary matter not arising out of the same conduct.
34.14 Additional board duties		(1) The ADB may authorize participation in directory listing by lawyers in an organization or association of lawyers engaged in a particular area of practice, as provided

RULE	PRIOR	PRESENT
		in Rule of Professional Conduct 32:7.7(c)(2), and may revoke such authorization. Authorization shall not be granted unless all of the following has been established: a. All Iowa participants have complied with Rule of Professional Conduct 32:7.4; b. Participation is based upon meeting stated high standards of professionalism and competence; c. The organization or association regularly conducts training or professional learning and exchange; and d. Neither the organization or association nor anyone other than the lawyer has any part in or share in the conduct or practice of law and does not participate in any way in fees charged by the lawyer. (2) The ADB shall approve the reporting form for legal services plans developed pursuant to Rule of Professional Conduct 32:7.7(d)(4)(x). The plan shall report the terms of its plan, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its activities. If it appears from the annual report that the plan is not operating in accordance with pertinent rules, the ADB shall report this to the supreme court. (3) The ADB may approve organizations through which lawyers can be certified as specialists. (4) The ADB shall retain copies of written solicitations and direct or e-mail communications that lawyers are required to file with it pursuant to Rule of Professional Conduct 32:7.3.

CHAPTER 35: ATTORNEY DISCIPLINE, DISABILITY, AND REINSTATEMENT

RULE	PRIOR	PRESENT
35.1 Grievance Commission of	The GC is composed of 5 lawyers from each judicial district and is appointed by the supreme court.	Same, except 10 lawyers shall come from judicial district 5C.

RULE	PRIOR	PRESENT
the Supreme Court of Iowa (1)		
35.1(1)	The Iowa State Bar Association nominates lawyers, including nonmembers, to serve on the GC.	Bar associations that maintain an office in Iowa or any Iowa lawyer nominate lawyers to serve on the GC
35.1(1)	5 to 26 laypersons shall also serve on the GC.	5 to 28 laypersons shall also serve on the GC.
35.1(1)	Commissioners may serve no more than 2 3-year terms.	Same, except a member whose term expires shall continue to serve until the member's duties are concluded.
35.1(2)	The GC or a division thereof shall hold hearings and receive evidence regarding alleged violations by an Iowa lawyer of the Code of Professional Responsibility for Lawyers, now the Rules of Professional Conduct, U.S. laws or state laws.	Same.
35.1(2)	The GC or a division thereof shall hold hearings and receive evidence regarding alleged violations by a non-Iowa lawyer of the Code of Professional Responsibility for Lawyers, now the Rules of Professional Conduct.	Same.
In Re Frerichs, 238 N.W.2d 764 (Iowa 1976)	The Court rejected Frerichs' contention "the due process clause of Amendment 14, United States Constitution requires that any cited lawyer be given a public hearing before an adjudicatory body 'who would clearly not be under any persuasion or pressure from the Iowa Supreme Court by reason of their status being under the supervisory control of the Iowa Supreme Court.'" *Id.* at 768.	
35.1(3)	None.	A GC member shall not represent a lawyer against whom a complaint has been filed at any stage of the proceedings. A GC member may represent a lawyer in a malpractice, criminal or other matter. These prohibitions extend to other lawyers in a firm with a GC member.
35.3 Reprimand	If the ADB reprimands a lawyer, the lawyer has 30 days to file an exception to the reprimand. If no exception is filed, then the reprimand becomes a supreme court public record.	Same, except the supreme court may refuse to accept the reprimand and may send the matter back to the ADB for further consideration, including directing the matter be filed with the GC.
35.3	If the lawyer files an exception, no report of it is made to the supreme court, and the ADB may direct the matter be filed with the GC. The reprimand is not admissible evidence in the GC hearing.	Same.

RULE	PRIOR	PRESENT
35.4 Interim suspension for threat of harm (1)	The ADB can seek an interim license suspension from the supreme court upon receipt of evidence demonstrating probable cause that a lawyer has violated a provision of the Code of Professional Responsibility for Lawyers, now the Rules of Professional Conduct, that poses a substantial threat of serious harm to the public. The ADB shall: a. Send the evidence along with a verified petition for interim suspension pending formal proceedings to the supreme court. The petition shall state the rules alleged to have been violated and the exact nature of the public threat; and b. Promptly notify the lawyer and serve the lawyer with the petition.	Same.
35.4(2)	The ADB's burden of proof is a convincing preponderance of the evidence. If the burden is met, the supreme court may enter an immediate, temporary suspension order. The order may provide that disciplinary proceedings be expedited. If a suspension order is entered, the court may direct appointment of a Rule 35.17 trustee.	Same.
35.4(3)	If the interim license suspension is granted, the lawyer may seek a dissolution or modification of the suspension; the lawyer has the burden of proof on this petition.	Same.
35.5 Complaints	The GC complaint is to be verified by the ADB chair, filed with the GC clerk and served on the lawyer. The complaint is to be sufficiently clear and specific to inform the lawyer reasonably of the misconduct alleged.	Same.
Goodrich v. South Dakota, 511 F.2d 316 (8th Cir. 1975)	In affirming the district court's denial of lawyer Goodrich's request in a §1983 action to temporarily enjoin a disbarment proceeding, the Court of Appeals, citing *Younger v. Harris,* 401 U.S. 37, 46, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), applied "principles of federal-state comity. Before exercising its equitable power to enjoin the state proceeding, the District Court must find [Goodrich] threatened with great and immediate irreparable injury that cannot be eliminated by his	

RULE	PRIOR	PRESENT
	defense in the state proceeding. (citation omitted.)" *Id.* at 317.	
35.6 Discovery	Discovery, including depositions and testimony perpetuation, pursuant to the Rules of Civil Procedure is permitted. The GC has authority to enforce discovery or to authorize perpetuation of evidence.	Same, except discovery specifically includes the lawyer's right to obtain a copy of the ADB file pursuant to Rule 34.4(2).
35.6	In addition to the restriction of R. Civ. P. 1.503(1), the lawyer is not required to answer a question if the answer would be self-incriminating.	Same.
Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L.Ed.2d 574 (1967)	The Supreme Court concluded "the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." 385 U.S. at 514, 87 S.Ct. at 627.	
COPE v. Horn, 379 N.W.2d 6 (Iowa 1985)	While recognizing the *Spevack* holding, the Supreme Court concluded Horn had "an obligation to respond to the [COPE's] request even if it is only to announce that he is exercising his fifth amendment rights." *Id.* at 9.	
COPE v. Nadler, 445 N.W.2d 358 (Iowa 1989)	The Supreme Court concluded Nadler's failure to invoke his right against self-incrimination, by failing to respond to the COPE's requests for admission, waived the right, and the COPE could establish its case against him by the matters deemed admitted pursuant to Rule 35.6.	
35.6	Discovery must be commenced within 30 days after service of the complaint.	Same.
35.6	Complaint amendments may be permitted to conform to the proof.	Same.
35.6	Complaint amendments may raise new matters as long as the lawyer has notice and a reasonable time to prepare a defense.	Same.
In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117	The Supreme Court concluded the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [Ruffalo] of procedural due process." 390 U.S. at 552, 88 S.Ct. at 1226.	

RULE	PRIOR	PRESENT
(1968)		
COPE v. Wenger, 454 N.W.2d 367 (Iowa 1990)	The Supreme Court agreed with Wenger's argument that the GC's acceptance of the COPE's complaint amendment at the close of the evidence violated due process. "Neither surprise nor chagrin, however, justifies suspension of the statutory and constitutional rights of due process to which Wenger was entitled." *Id.* at 369. The Court allowed the COPE to pursue additional counts against Wenger, if it chose, in subsequent proceedings. *Id.* at 370.	
35.7 Hearing (1)	A conference call with the division members and the parties and their counsel is held 30 days after service of the complaint; the purpose of this call is to schedule the hearing.	Same.
COPE v. Michelson, 345 N.W.2d 112 (Iowa 1984)	The Supreme Court concluded, "dismissal for time violations is only necessary when the lawyer can show that [the lawyer] suffered prejudice by the delay. (citation omitted)." *Id.* at 117. While not condoning delay, the Court concluded, "[a]ny inconvience to [Michelson] by the delay is far outweighed by the rights of the public to have this matter adjudicated." *Id.*	
35.7(1)	Notice of the hearing must be given at least 10 days before the hearing.	Same.
35.7(1)	The hearing is to be held not less than 60 days nor more than 90 days after service of the complaint.	Same.
35.7(1)	Written requests for a continuance, supported by an affidavit, may be granted.	Same.
35.7(1)	GC proceedings and documents are confidential.	Same, except for disclosure pursuant to Rule 36.18.
State v. Baker, 293 N.W.2d 568 (Iowa 1980)	The confidentiality rule, Ct. R. 35.7(1), was "designed to strike a proper balance between an attorney's protection from defamation and the public's protection from unethical conduct. (citations omitted)." *Id.* at 576. Court Rules 35.7 and .22 "were not intended to place evidence of a lawyer's criminal conduct beyond the reach of legal process emanating from a criminal proceeding." *Id.*	
35.7(2)	Evidence of prior public reprimands, suspensions, revocations and disbarments shall be admitted at the hearing, without the	Same.

RULE	PRIOR	PRESENT
	necessity of a bifurcated hearing. This evidence is relevant to the issue of the lawyer's fitness to practice law.	
COPE v. Bromwell, 389 N.W.2d 854 (Iowa 1986)	The Supreme Court upheld the validity of this rule. *Id.* at 857. Bromwell challenged the GC's consideration of his prior discipline "because it [did] not provide him the same protections afforded criminal defendants under the Iowa Rules of Evidence." *Id.* The Court noted that disciplinary proceedings are not criminal and expressed concern that Bromwell's approach "might frustrate the goals of the disciplinary inquiry: to determine a lawyer's fitness to practice law and appropriate disciplinary action." *Id.*	
35.7(3)	Either party may use issue preclusion if all of the following conditions exist: a. The issue has been resolved in a civil proceeding with a final judgment or in a criminal proceeding with a finding of guilt; b. The burden of proof was greater than a mere preponderance of evidence; and c. The party seeking preclusive effect has given written notice not less than 10 days prior to the hearing of the party's intention to use issue preclusion.	Same.
BOPE v. D.J.I., 545 N.W.2d 866 (Iowa 1996)	The Supreme Court approved the offensive use of issue preclusion if the following elements exist: (i.e., a stranger to the judgment can use it to prove the essential elements of the second case) a. The issue sought to be precluded in the second case must be identical to the issue litigated in the prior action; b. The issue must have been raised and litigated in the prior action; c. The issue must have been material and relevant to the disposition of the prior action; and d. The determination of the issue in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 874-875.	

RULE	PRIOR	PRESENT
Fischer v. Sioux City, 654 N.W.2d 544 (Iowa 2002)	The Supreme Court added 2 more requirements for offensive use of issue preclusion: e. The opposing party in the prior action must have been afforded a full and fair opportunity to litigate the issues; and f. No other circumstances are present that would justify granting the opposing party the occasion to relitigate the issues. *Id.* at 547.	
COPE v. Wright, 178 N.W.2d 749 (Iowa 1970)	If the lawyer was a party to a prior civil action, the certified transcript of the prior hearing may be admitted into evidence at the disciplinary hearing. The result in the prior civil case is not binding or conclusive in the disciplinary case. *Id.* at 750.	
35.8 Subpoenas	The GC has subpoena power. Any GC member is authorized to administer oaths or affirmations. Testimony shall be reported by a court reporter. The GC shall report any failure or refusal to comply with a subpoena to the supreme court.	Same.
In Re Charges of Unprofessional Conduct Against 99-37, 249 F.3d 821 (8th Cir. 2001)	Bankruptcy Trustee Stuart sent documents from 2 cases to the Minnesota disciplinary board. *Id.* at 822-823. The board filed unprofessional conduct charges against the lawyer who handled these 2 cases. *Id.* at 823. The lawyer attempted to depose Stuart and subpoenaed her to testify in the lawyer's disciplinary case. *Id.* When Stuart declined to appear, the lawyer brought a motion to compel and for civil contempt in state court. *Id.* Stuart removed the compel/contempt case to federal district court. *Id.* The district court quashed the subpoena and dismissed the lawyer's case. *Id.* "Congress has provided that the head of a federal executive department may regulate the use of department records, papers, and property. (citation omitted). Under this statute the Department of Justice promulgated 28 C.F.R. section 16.21 et seq. (the *Touhy* regulations). These regulations require an employee to have department permission before testifying in a state proceeding." *Id.* A Stuart staff attorney, Fagg, who was the most knowledgeable about these 2 cases, was permitted by DOJ to be deposed. *Id.* "Sovereign immunity protects a federal officer from being compelled to	

RULE	PRIOR	PRESENT
	testify when instructed not to do so by her department. (citations omitted)." *Id.* at 825. The Court of Appeals concluded that neither DOJ not Stuart waived her immunity from state process. *Id.* The Court found no deprivation of due process and affirmed the district court order. *Id.* at 825-826.	
35.9 Decision	The GC may allow post-hearing briefs and arguments. The alternatives available to the GC are: a. Issue a admonition; b. Recommend a reprimand; c. Recommend suspension; or d. Recommend revocation. The GC can also recommend additional sanctions, e.g. restitution, costs, practice limitations, appointment of a trustee or receiver, passage of a bar exam or the multistate professional responsibility exam or attendance at CLE courses.	Same.
35.9	The GC has 30 days to issue its report after submission of the case.	Same.
COPE v. Behnke, 276 N.W.2d 838 (Iowa 1979), *appeal dismissed,* 444 U.S. 805 (1979)	While not condoning "delays in processing disciplinary proceedings [, since] [t]he attorney and the public both deserve speedy disposition of such charges[,]" the Court concluded, "[t]he thirty-day filing requirement 'is not essential to accomplishing the principal purpose of (our ethics rules) but is designed to assure order and promptness in the proceeding.' (citation omitted)." *Id.* at 842. In Rule 35.9 the word "shall" is directory, not mandatory, and "[v]iolation of a directory obligation ordinarily does not invalidate subsequent proceedings unless prejudice is shown. (citation omitted)." *Id.*	
35.9	A majority of the commissioners must approve the report.	Same.
35.9	If the GC dismisses the case or issues an admonition, no report of the case is made to the supreme court.	Same.
35.9	The ADB has 10 days to apply for permission to appeal.	Same.
35.9	A GC report that recommends a reprimand, suspension or revocation is filed with the supreme court; it is a public document.	Same.

RULE	PRIOR	PRESENT
35.10 Disposition by the supreme court (1)	The supreme court reviews the case *de novo* even if no appeal is taken.	Same.
35.10(1)	The supreme court may impose a greater or lesser sanction.	Same.
35.10(2)	The supreme court may suspend or revoke a license upon any of the following grounds: 1. Felony conviction; 2. Misdemeanor involving moral turpitude conviction; 3. Violation of the Code of Professional Responsibility for Lawyers, now the Rules of Professional Conduct; or 4. Any cause provided by statute or these rules.	Same.
Iowa Code § 602.10122	The supreme court may suspend or revoke a license upon any of the following grounds: 1. Felony conviction; 2. Willful disobedience or violation of a court order that requires a lawyer to do or forbear an act; 3. Willful violation of any of a lawyer's statutory duties; or 4. Directly or indirectly soliciting legal business.	Same.
35.11 Appeal (1)	A lawyer has 10 days to appeal the GC report. The notice of appeal must be filed with the GC clerk, with a copy to the ADB counsel and the clerk of the supreme court.	Same.
35.11(2)	The ADB may apply for permission to appeal within 10 days. (similar to an interlocutory appeal in a civil case.) The ADB can request waiver of the filing and docket fees.	Same.
35.11(2)	The ADB's appeal of a dismissal or an admonition remains confidential, and the ADB shall use the lawyer's initials in supreme court filings. If the supreme court reverses or modifies the GC report, such order shall become a public record.	Same.
35.11(3)	Iowa R. App. P. 6.17, cases involving expedited times for filing, applies.	Same.
35.11(3)	Extensions of deadlines are not favored and must be based on a verified showing of the most unusual and compelling circumstances.	Same.

RULE	PRIOR	PRESENT
Jones v. Hulse, 391 F.2d 198 (8th Cir. 1968), *cert. denied*, 393 U.S. 889 (1968)	The Court of Appeals affirmed the dismissal of lawyer Jones' federal lawsuit challenging the 3-year suspension imposed by the Missouri Supreme Court. Jones brought this lawsuit in the district court following the U.S. Supreme Court's denial of his writ of certiorari. The Court's "analysis of the cited authorities leads [the Court] to the conclusion that state disbarment or suspension proceedings under exceptional circumstances may be reviewed by the Supreme Court of the United States on petition for certiorari or in a proceeding to remove the disbarred attorney as a member of the bar of the Supreme Court of the United States or of an inferior federal court. We have found no authority authorizing a federal court to entertain an original proceeding designed to set aside and vacate a disciplinary judgment of a state court, particularly where, as here, the attorney has exhaustively presented all of his constitutional arguments to the state court and to the Supreme Court by petition for certiorari." *Id.* at 202. Citing *Selling v. Radford*, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917) the Court identified "[t]he limited circumstances under which a federal court can scrutinize a state disbarment proceeding…[:]" "'1. That the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2. [T]hat there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on [the court's] part that [it] could not, consistently with [its] duty, accept as final the conclusion on that subject; or 3. [T]hat some other grave reason existed which should convince [the court] that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon [the court] not to disbar except upon the conviction that, under the principles of right and justice, [the court was] constrained so to do.' 243 U.S. at 50-51, 37 S. Ct. at 378-379." *Id.* at 200.	

RULE	PRIOR	PRESENT
Ethics Opinion 05-02[1] Employment of revoked attorney	This September 2004 opinion recognizes that the disbarred lawyer is no longer subject to the BOPE's jurisdiction, but the lawyer who considers hiring a disbarred lawyer is. The opinion references the applicability of DR 1-102(A) (5) and (6), DR 3-101(A), DR 3-102(A) and DR 3-104(A) through (E) and EC 3-6, EC 9-2 and EC 9-6 to this situation. The BOPE concluded that in the context of a law practice, legal advice includes tax advice. The BOPE concluded that employment of the former partner in the offices where the lawyer practiced and where the lawyer committed felonies in which the victims were clients would create the appearance of impropriety and would be prejudicial to the administration of justice and reflect adversely on the lawyer's fitness to practice law. The lawyer's continued employment of the disbarred lawyer will violate the rules identified in the opinion.	
35.12 Suspension (1)	If the lawyer is suspended, the suspension continues for the minimum time ordered and until the supreme court approves the written reinstatement application. The suspension order may require reasonable conditions for reinstatement, including passing the multistate professional responsibility examination.	Same.
35.12(2)	Unless the ADB objects, a suspension of 60 days or less ends automatically; if the ADB objects, the automatic reinstatement is stayed and the matter is set for hearing. All costs must be paid before the automatic reinstatement will be ordered.	Same.
35.12(3)	A suspended lawyer shall refrain from all facets of the practice of law. A suspended lawyer may act as a fiduciary of any person or estate related to the lawyer within the second degree of sanguinity.	Same.
COPE v. Toomey, 253 N.W.2d 573 (Iowa 1977)	The COPE filed a rule to show cause proceeding against Toomey alleging he practiced law while suspended and commingled client funds. *Id.* at 753. The Supreme Court revoked Toomey's license, even though Toomey claimed "he	

[1] As of July 1, 2005, the ADB is no longer authorized to issue formal advisory opinions. The Iowa State Bar Association will now issue advisory opinions and practice guidelines.

RULE	PRIOR	PRESENT
	neither received a mailed copy of our prior opinion nor read it in the North Western Reporter." *Id.* at 574. The Court "[held Toomey] had constructive, if not actual, knowledge of the terms of our court order he knew existed but elected not to read. *Id.*	
Ethics Opinion 99-16[2] Guidelines for Iowa lawyers who have been suspended	This June 2000 opinion advises lawyers to comply with Rule 118.18, now Rule 35.21, with the lawyer's suspension order and to not practice law or hold oneself out as a lawyer. The opinion identifies these sources to determine what is the practice of law: a. Rule 121(i)(4), now 39.7. Rule 39.7, certificate of exemption - required statement, provides, in part, "[t]he practice of law… includes the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns as well as the representation of others in any Iowa courts, the right to represent others in any Iowa courts, or to regularly prepare legal instruments, secure legal rights, advise others as to their legal rights or the effect of contemplated actions upon their legal rights, or to hold oneself out to so do; or to be one who instructs others in legal rights; or to be a judge or one who rules upon the legal rights of others unless neither the state nor federal law requires the person so judging or ruling to hold a license to practice law[;]" b. Rule 123.7, now 41.7; and c. *Bump v. District Court,* 232 Iowa 623, 5 N.W.2d 914 (1942). In *Bump*, the Supreme Court wrote, "[t]here is no question that the preparation of pleadings, management of litigation for clients, advice to clients of their legal rights and all actions taken by them connected with the	Same.

[2] As of July 1, 2005, the ADB is no longer authorized to issue formal advisory opinions. The Iowa State Bar Association will now issue advisory opinions and practice guidelines.

RULE	PRIOR	PRESENT
	law… constitutes the… practice of law." 232 Iowa at 631, 5 N.W.2d at 918. Continuing, the Court wrote, "the larger meaning [of the practice of law]… includes legal advise and counsel, the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court, … it includes conveyances, the preparation of legal instruments of all kinds, and in general, all advice to clients and all actions taken for them in matters connected with the law." 232 Iowa at 637, 5 N.W.2d at 921. The suspended lawyer should stay away from the office, remove the lawyer's name from signs if the suspension is more than 3 months long, and not reorder publications holding out oneself as a lawyer and avoid appearances that the lawyer is continuing to practice law. The opinion cites these cases: a. *COPE v. Toomey,* 236 N.W.2d 39 (Iowa 1975). The *Toomey* Court ordered Toomey to "refrain from all facets of his law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of deeds, buy and sell agreements, contracts, wills and tax returns as well as any court appearance or counseling clients with regard to the same." *Id.* at 40. b. *COPE v. Gartin,* 272 N.W.2d 485 (Iowa 1978). The *Gartin* Court revoked Gartin's license for committing the crime of perjury and for violating the terms of his suspension order. The Court found Gartin "in contempt of the suspension order of this court for (1) preparing and certifying abstracts of title; (2) continuing use of his letterhead stationery, statements and envelopes which identify him as an attorney-at-law; (3) maintaining an extensive pro se file with corresponding	

RULE	PRIOR	PRESENT
	court activity; and (4) preparing documents of incorporation during his period of suspension…." *Id.* at 492. c. *COPE v. Mahoney,* 402 N.W.2d 434 (Iowa 1987). In *Mahoney,* the Supreme Court had issued a "severe reprimand" and placed Mahoney on probation for 2 years. *Id.* at 435. Mahoney was required to file quarterly reports of his practice activities with the COPE while on probation. *Id.* Mahoney stopped sending probation reports after one that reported he had "retired from the general practice of law and [had] withdrawn from the firm…." *Id.* Mahoney continued to perform services though his corporation, ConsulCorp. *Id.* at 436. He prepared tax returns, acted as a labor negotiator, rendered business and investment advice, prepared real estate documents, contracts and a will and appeared in court 1 time pro bono. *Id.* "Doing tax preparation and labor negotiation is not necessarily the practice of law and properly may be done by nonlawyers. When these tasks are done by a licensed lawyer, however, they constitute the practice of law. (citation omitted)." *Id.* d. *COPE v. Rauch,* 508 N.W.2d 628 (Iowa 1993). The *Rauch* case is discussed at page 37 of this outline. While *pro se* activity appears to be prohibited, the suspended lawyer may do paralegal work pursuant to Rule 118.12, now Rule 35.12(4).	
35.12(4)	A suspended lawyer may be employed to perform such services that may be performed by a layperson, under these conditions: a. Notice of employment and a full job description is provided to the ADB before employment begins; b. Quarterly informational reports, verified by the employer and employee, are submitted to the ADB; these reports must certify that no aspect of the suspended lawyer's work involved the unauthorized practice of law; and	Same.

RULE	PRIOR	PRESENT
	c. The suspended lawyer shall have no direct or personal association with any client and shall not handle or disburse funds or property of a client.	
35.13 Procedure on application for reinstatement (1)	A written application for reinstatement may be filed not more than 60 days prior to expiration of the suspension. The verified application must state that the lawyer has complied fully with the suspension order. The suspended lawyer must submit proof that he or she is of good moral character and worthy of the right to practice law. Recommendations from 3 reputable lawyers (not judges or magistrates) from the same judicial district must be included.	Same.
35.13(2)	The supreme court clerk shall give notice of the application and recommendations to: a. The attorney general; b. The local county attorney(s); c. The chair of the board of law examiners; d. The ADB administrator; e. Each judge of the local district; f. The local bar association president(s); and g. The Iowa State Bar Association president.	Same.
35.13(3)	The notified persons may submit written statements of fact and comments regarding the current fitness of the suspended lawyer to practice law. The clerk's notice shall include the hearing date, which shall not be less than 60 days from the filing of the reinstatement application.	Same.
35.13(4)	At least 14 days before the hearing, the suspended lawyer and the ADB shall exchange witness and exhibit lists and exchange exhibits; these shall also be filed with the supreme court. At least 7 days before the hearing, the parties shall exchange rebuttal witness and exhibit lists.	Same.
35.13(5)	At the hearing, the suspended lawyer has the burden to demonstrate that he or she is of good moral character, is fit to practice law and has fully complied with the suspension order. The hearing is public, unless the court grants either party's	Same.

RULE	PRIOR	PRESENT
	motion to close the hearing. The hearing is informal, the strict rules of evidence shall not apply and the court may set reasonable time limits.	
35.13(6)	In its decision, the court may impose reasonable conditions on reinstatement.	Same.
35.13(7)	A suspended lawyer who fails to comply with a support order may be denied reinstatement. Rule 35.19 procedures apply. Notwithstanding the confidentiality of records requirements, the supreme court clerk is authorized to share information with the child support recovery unit to identify lawyers subject to enforcement pursuant to Iowa Code Chapters 252J or 598.	Same.
35.13(8)	A suspended lawyer who defaults on an obligation owed to or collected by the college student aid commission may be denied reinstatement. Rule 35.20 procedures apply.	Same.
COPE v. Wilson, 290 N.W.2d 17 (Iowa 1980)	The Supreme Court described this burden of proof: "[t]he strength of proof necessary for reinstatement is affected by the nature of the misconduct which resulted in the suspension. (citations omitted)." *Id.* at 23. The Court continued: "[t]he ultimate question is whether the applicant has demonstrated such good moral character as to justify being recommended to the public as a trustworthy person fit to be consulted in matters of confidence. (citations omitted)." *Id.* "[V]iolations of a suspension order may bar reinstatement[,] (citation omitted)[,] and they are "additional [bases] for discipline." *Id.*	
COPE v. Baker, 492 N.W.2d 695 (Iowa 1992)	"[P]rofessional judgment lies at the core of the practice of law." *Id.* at 701.	
Commission on Unauthorized Practice of Law v. Sturgeon, 635 N.W.2d 679 (Iowa 2001)	The Supreme Court affirmed the district court's injunction prohibiting disbarred lawyer Sturgeon, *inter alia,* from preparing bankruptcy documents, preparing documents for others in judicial proceedings, preparing or approving "instruments by which legal rights of others are either obtained, secured, or transferred[,]" or giving legal advice to others. *Id.* at 686.	

RULE	PRIOR	PRESENT
In Re Posthumous Readmission of Howard, 512 N.W.2d 300 (Iowa 1994)	The rules do not provide for posthumous admission or readmission. *Id.* at 301. The Supreme Court refused to suspend the rules, acknowledged that Howard's actions warranted disbarment and denied the application. *Id.* at 303.	
35.14 Conviction of a crime	Conviction of a crime may result in a temporary license suspension; the lawyer can request a hearing.	Same.
35.15 Disbarment on consent (1)	A lawyer subject to investigation or a pending proceeding may acquiesce to disbarment, but only after delivering to the GC an affidavit stating the lawyer consents to disbarment and indicating: a. The consent is given freely and voluntarily, absent any coercion or duress, with full recognition of all attendant implications; b. The lawyer is aware of a pending investigation or proceeding, the nature of which shall be described specifically; c. The lawyer acknowledges the alleged material facts are true; d. The lawyer could not successfully defend against the pending or planned proceeding; and e. The admitted facts would probably result in license revocation.	Same.
35.15(2)	The ADB shall file a response, indicating whether it believes the misconduct admitted by the lawyer would probably result in license revocation and citing supporting legal authorities.	Same.
35.15(3)	The GC shall file the affidavit and response with the supreme court clerk. The supreme court shall enter an order revoking the lawyer's license on consent, unless it determines the admitted misconduct is insufficient to support a license revocation. If the affidavit is insufficient, the court may enter either an order allowing the parties to supplement the affidavit or an order declining to accept the affidavit. A declination order shall not bar further proceedings nor shall it preclude the court from imposing any warranted sanction.	Same.

RULE	PRIOR	PRESENT
35.15(4)	Any order disbarring a lawyer on consent shall be a public record, but the lawyer's affidavit and the ADB's response shall not be publicly disclosed or made available except upon supreme court order.	Same.
BOPE v. Bisbee, 601 N.W.2d 88 (Iowa 1999)	The Supreme Court concluded that Bisbee's request to the BOPE to "remove my name from the list of licensed attorneys in the State of Iowa[]" failed to comply with Rule 35.15. *Id.* at 91.	
35.16 Disability suspension (1)	At any time a lawyer shall be adjudicated a mentally incapacitated person, an alcoholic or a drug addict, or shall be committed to any institution or hospital, the district court clerk in which any such adjudication or commitment is ordered shall, within 10 days, certify the same to the supreme court clerk.	Same.
35.16(2)	Upon: a. The filing of this certificate; b. The filing of a like certificate from another jurisdiction; or c. Determination by the supreme court, pursuant to a sworn application on behalf of a local bar association or the ADB, that a lawyer is not discharging professional responsibilities due to disability, incapacity, abandonment of practice or disappearance the supreme court may enter an order suspending the lawyer's license. At least 20 days before the suspension becomes effective, the lawyer or the lawyer's guardian and the director of the institution or hospital in which the lawyer has been committed, if any, shall be given notice by restricted delivery certified mail that the lawyer has a right to appear at a specified time and place before one or more supreme court justices to show cause why such suspension should not be imposed. Upon a showing of exigent circumstances, the 20-day notice period may be reduced or waived. The hearing shall be informal and the strict rules of evidence shall not apply. Any suspension order entered shall be delivered to the suspended lawyer or the	Same.

RULE	PRIOR	PRESENT
	suspended lawyer's guardian and the director of the institution or hospital to which the suspended lawyer is committed, if any, by restricted delivery certified mail or personal service.	
35.16(3)	Any lawyer suspended pursuant to this rule shall refrain from all facets of the ordinary law practice. The suspended lawyer may act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended lawyer within the second degree of affinity or consanguinity.	Same.
35.16(4)	A lawyer suspended under this rule may not engage in the practice of law in Iowa until reinstated by supreme court order.	Same.
35.16(5)	Upon being notified of the disability suspension, the chief judge of the judicial district in which the lawyer practiced shall appoint a lawyer to serve as trustee to inventory the files, sequester client funds and take any other appropriate action to protect the client's and other affected persons' interests. This appointment shall be subject to supreme court confirmation. The trustee shall serve as a special member of the ADB and as a commissioner of the supreme court for purposes of the appointment. While acting as trustee, the lawyer shall not serve as a lawyer for the clients of the lawyer and other affected persons. The trustee shall not examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee shall protect the privacy interests of the suspended lawyer's clients by prompt recusal or employment refusal. The trustee may seek reasonable fees and reimbursement of trust costs from the suspended lawyer. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a payment claim to the Clients' Security Trust Fund. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of fund payment. When the suspended lawyer is reinstated or all	Same.

RULE	PRIOR	PRESENT
	pending representation of clients has been completed, or the purposes of the trust have been accomplished, the trustee may apply to the chief judge for an order terminating the trust.	
35.16(6)	A lawyer suspended pursuant to this rule shall be entitled to apply for reinstatement once each year or at such shorter intervals as the supreme court may provide in the suspension order. A lawyer suspended due to disability may be reinstated upon a showing, by clear and convincing evidence, that the lawyer's disability has been removed and the lawyer is fully qualified to resume law practice. Upon receipt of the lawyer's reinstatement application, the supreme court may take or direct any action deemed necessary or proper to determine whether the lawyer's disability has been removed, including an examination by qualified medical experts. The supreme court may direct the lawyer pay the expenses of this examination.	Same, except now the supreme court can set the timing and frequency of reinstatement applications in subsequent orders.
35.16(7)	Filing a reinstatement application shall constitute a waiver of any doctor-patient privilege with regard to treatment provided during the disability period. The reinstatement application shall identify every psychiatrist, psychologist, physician, hospital or any other institution in which the lawyer has been examined or treated since the suspension. The lawyer shall furnish written consent that any such identified person or entity may divulge any information and records requested by the supreme court or its medical experts.	Same.
35.16(8)	When a lawyer has been judicially held to be competent or cured, the supreme court may dispense with further evidence and may order reinstatement upon such terms as are deemed reasonable.	Same.
35.17 Death or suspension of practicing attorney	Upon the sworn application of a local bar association or the ADB showing that a lawyer has died or been suspended or disbarred, and a reasonable necessity exists, the chief judge of the judicial district in which the lawyer practiced shall appoint a lawyer to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the	Same.

RULE	PRIOR	PRESENT
	interests of the clients and other affected persons. The lawyer shall serve as a special member of the ADB and as supreme court commissioner. While acting as trustee, the trustee shall not serve as a lawyer for these clients and other affected persons. The trustee shall not examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee shall protect the privacy interest of these clients by prompt recusal or employment refusal. The lawyer may seek reasonable fees and cost reimbursement from the lawyer or the lawyer's estate. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a fees and costs claim to the Clients' Security Trust Fund. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the claim's merits and the amount of any fund payment. When all pending representation of clients has been completed or the trust's purposes have been accomplished, the trustee may apply to the chief judge for an order terminating the trust.	
35.18 Reciprocal discipline(1)	A lawyer should report promptly in writing discipline the lawyer receives in another jurisdiction or federal court to the ADB. The ADB shall obtain a certified copy of the discipline order and file it with the supreme court clerk.	Same.
35.18(2)	The supreme court shall provide notice thereof promptly by restricted delivery certified mail or personal service to the lawyer with a copy of the foreign disciplinary order and an order directing the lawyer file, within 30 days of receipt of the notice, any objection, with specific reasons, that imposition of identical discipline in this state would be too severe or otherwise unwarranted. By ordinary mail, like notice shall be sent to the ADB. The ADB shall have the right to object on the ground that imposition of identical discipline would be too lenient or otherwise unwarranted. If either party so objects, the	Same.

RULE	PRIOR	PRESENT
	matter shall be set for hearing before 3 or more justices and the parties notified by restricted delivery certified mail at least 10 days prior to the hearing. At such hearing, a certified copy of the testimony, transcripts, exhibits, affidavits and other matters shall be admitted into evidence as well as any findings of fact, conclusions of law, decisions and orders. Any such fact-findings shall be conclusive and not subject to readjudication. The supreme court shall enter such findings, conclusions and orders that it deems appropriate.	
35.18(3)	If neither party objects within 30 days from service of the notice, the supreme court may impose identical discipline, unless the court finds that on the record's face upon which the discipline is predicated it appears clearly that any of the following exist: a. There was a due process deprivation; b. The proof does not establish misconduct and the supreme court could not, conscientiously, accept the subject's conclusion; or c. The established misconduct warrants substantially different discipline.	Same.
35.18(4)	If the supreme court determines any such factors exist, it may enter an appropriate order. Rule 35.13, procedure on application for reinstatement, shall apply.	
COPE v. Qualley, 487 N.W.2d 327 (Iowa 1992)	The Supreme Court rejected Qualley's argument that Iowa's only recourse was reciprocal discipline when another state had already completed its disciplinary proceeding regarding the same matter. *Id.* at 330. The Court concluded a sufficient Iowa nexus existed because the other state's proceeding had not considered the disciplinary rule violations alleged in Iowa and the alleged transaction occurred in Iowa and involved an Iowa bank. *Id.*	
35.19 Suspension of attorney's	A lawyer may be suspended for failure to pay court ordered child support.	Same.

RULE	PRIOR	PRESENT
license for failure to comply with a support order.		
35.19(1) Procedure	The Child Support Recovery Unit (CSRU) shall file a certificate of noncompliance with the supreme court clerk. The clerk shall send notice to the lawyer that shall recite: a. The lawyer's license shall be suspended unless the lawyer causes the CSRU to file a withdrawal of certificate of noncompliance within 30 days; b. The lawyer may challenge the supreme court's action only by filing a hearing application with the district court where the support order is filed; c. The application must be filed within 30 days of the notice, with copies to the CSRU and the supreme court clerk; d. The application filing shall automatically stay the supreme court's action; and e. This rule's provisions shall prevail over any other conflicting statute or rule.	Same.
35.19(2) District court hearing	a. The district court clerk shall schedule a hearing on the lawyer's application within 30 days. The clerk shall give notice of the hearing to the lawyer, the CSRU and the supreme court clerk. b. The district court shall receive a certified copy of the CSRU's written decision and noncompliance certificate from the CSRU and a certified copy of the supreme court clerk's notice from the clerk before the hearing. c. If the lawyer fails to appear at the scheduled hearing, the supreme court's automatic stay shall be lifted. d. The district court's scope of review shall be limited to determining if there has been a mistake of fact relating to the lawyer's support delinquency. The court shall not consider custody or visitation issues and shall not modify	Same.

RULE	PRIOR	PRESENT
	the support order. e. If the district court concludes the CSRU erred, it shall order the CSRU to file a withdrawal of the noncompliance certificate with the supreme court clerk.	
35.19(3) Noncompliance certificate withdrawn	If a withdrawal of the noncompliance certificate is filed, the supreme court shall curtail any proceeding pursuant to this rule, or, if necessary, immediately reinstate the lawyer's license if the lawyer is otherwise eligible.	Same.
35.19(4) Sharing information	Notwithstanding any confidentiality of records rules or statutes, the supreme court clerk is authorized to share information with the CSRU for the sole purpose of allowing the CSRU to identify lawyers subject to Iowa Code Chapters 252J or 598.	Same.
35.20 Suspension of attorney's license for failure to comply with an obligation owed to or collected by the College Student Aid Commission.	A lawyer may be suspended for failure to comply the College Student Aid Commission (CSAC).	Same.
35.20(1) Procedure	The CSAC shall file a certificate of noncompliance with the supreme court clerk. The clerk shall issue a notice to the lawyer that recites the following: a. The lawyer's license shall be suspended unless the lawyer causes the CSAC to file a withdrawal of the noncompliance certificate within 30 days; b. The lawyer must contact the CSAC to schedule a conference or to obtain a withdrawal of the noncompliance certificate; c. The lawyer may challenge the supreme court's action	Same.

RULE	PRIOR	PRESENT
	only by filing a hearing application with the lawyer's local district court; d. The hearing application must be filed with the district court within 30 days of the notice with copies provided to the CSAC and the supreme court clerk; e. The application's filing shall automatically stay the supreme court's action; and f. This rule's provisions shall prevail over conflicting statutes or rules.	
35.20(2) District court hearing	a. The district court clerk shall schedule a hearing within 30 days of the hearing application. The clerk shall give notice of the hearing to the lawyer, the CSAC and the supreme court clerk. b. The district court shall receive a certified copy of the CSAC's written decision and noncompliance certificate for the CSAC and a certified copy of the clerk's notice from the supreme court clerk. c. If the lawyer fails to appear for the hearing, the supreme court's automatic stay shall be lifted. d. The district court's scope of review shall be limited to determining if there has been a mistake of fact related to the lawyer's delinquency. e. If the district court concludes the CSAC erred in issuing the noncompliance certificate or in refusing to withdraw it, the court shall order the CSAC to file a withdrawal of the noncompliance certificate with the supreme court clerk.	Same.
35.20(3)Non-compliance certificate withdrawn	If a withdrawal of the noncompliance certificate is filed, the supreme court shall curtail any proceedings pursuant to this rule, or, if necessary, immediately reinstate the lawyer's license if the lawyer is otherwise eligible.	Same.
35.21 Notification of clients and counsel (1)	When a lawyer is suspended or disbarred, the lawyer shall do all of the following: a. Within 15 days, notify in writing the lawyer's clients in all pending matters to seek legal advice elsewhere, calling	Same.

RULE	PRIOR	PRESENT
	attention to any urgency in substituting another lawyer; b. Within 15 days, deliver to all clients with pending matters any papers or other property to which they are entitled or notify them and co-counsel of a suitable time and place where these items may be obtained, calling attention to any urgency; c. Within 30 days, refund any unearned fees paid in advance; d. Within 15 days, notify opposing counsel or adverse parties in pending litigation of the lawyer's suspension or disbarment and the lawyer's disqualification to act as a lawyer; e. Within 15 days, file with the court, agency or tribunal a copy of the notice sent to opposing counsel or adverse parties; f. Maintain records of accomplishing steps a. through e; and g. Within 30 days, file with the ADB copies of the notices sent pursuant to this rule and proof of complete performance of steps a. through e. This filing shall be a condition for reinstatement.	
35.21(2)	The time limits for Rule 35.21(1) (c) and (g) shall be 15 days if the lawyer is exempt from filing a reinstatement application pursuant to Rule 35.12.	Same.
COPE v. McDermott, 405 N.W.2d 824 (Iowa 1987)	The Supreme Court rejected the GC's recommendation that McDermott's 15-month suspension be imposed retroactively to the date McDermott voluntarily ceased to practice law. *Id.* at 824. The Court imposed the suspension as of its opinion date so that the Rule 35.21 requirements could be accomplished and verified. *Id.*	
COPE v. Rauch, 508 N.W.2d 628 (Iowa 1993)	Because Rauch failed to comply with Rule 35.21, the Supreme Court extended his 1-year suspension by 3 months. *Id.* at 629.	

RULE	PRIOR	PRESENT
35.22 Immunity (1)	Complaints submitted to the GC or ADB or testimony with respect thereto shall be privileged and no lawsuit predicated thereon may be instituted.	Same.
35.22(2)	GC members, ADB members and their respective staffs shall be immune from suit for any conduct in the course of their duties.	Same.
State v. Baker, 293 N.W.2d 568 (Iowa 1980)	The Supreme Court addressed the scope of Iowa Ct. R. 35.7 and .22 in affirming lawyer Baker's conviction for being a party to a fraudulent conveyance. Baker argued that the district court erred in admitting the transcript from his grievance commission hearing because this evidence "was protected by the immunity provision…" of Iowa Ct. R. 35.22. *Id.* at 575. Baker had counsel at the hearing and was advised that because of the possibility of criminal proceedings he was not required to say anything and anything he said "could be used against [him]." *Id.* at 576. The district court admitted the transcript into evidence, overruling Baker's objections of "privilege and denial of due process and fifth amendment rights…." *Id.* In holding the district court was correct in admitting the transcript, the Supreme Court described the intent and purpose of Rule 35.22 "is to protect complainants, witnesses, members of the grievance commission, members of the committee on professional ethics and conduct and their respective staffs from retaliatory litigation by investigated lawyers, not to protect lawyers from prosecution for criminal offenses. In the interest of protecting the public from unethical practices, persons should not be dissuaded from filing complaints by threats of defamation suits or other litigation. (citation omitted)." *Id.*	
Schreiber v. Bastemeyer, 644 N.W.2d 296 (Iowa 2002)	Schreiber sued Bastemeyer, the BOPE administrator, after the BOPE dismissed his complaint against his former lawyer. The Supreme Court affirmed the district court's dismissal of Schreiber's lawsuit. *Id.* at 299. Schreiber sought judicial review of the BOPE's action under Iowa Code Chapter 17A; this chapter excludes from the definition of "agency" "the judicial branch or any of its components. (citation omitted)."	

RULE	PRIOR	PRESENT
	Id. at 298. The Court concluded that Bastemeyer and the BOPE were part of the judicial branch and not subject to Chapter 17A. *Id.* at 299. Additionally, the Court recognized the immunity granted by Rule 35.22 *Id.*	
35.22(3)	A true copy of any complaint against a GC member or an ADB member involving alleged violations of an attorney's oath, of the Code of Professional Responsibility for Lawyers, now the Rules of Professional Conduct, and of the laws of the United States or Iowa shall be promptly sent to the supreme court chief justice.	Same.
35.23 Reports	The GC chair and the ADB chair shall submit an annual statistical report to the supreme court on August 1.	Same.
35.24 Effective dates	These rules shall have prospective and retrospective application to all alleged violations, complaints, hearing and dispositions thereof on which a hearing has not actually been commenced prior to the effective date of these rules.	Same.
35.25 Costs (1)	If the sanction is a reprimand, suspension or revocation, costs of the proceeding are assessed to the lawyer. Costs shall include those normally taxed pursuant to Iowa Code Chapter 625.	Same.
35.25(2)	Within 30 days of the GC report, the ADB shall serve the lawyer with a bill of costs and file the same with the supreme court clerk. The lawyer shall have 10 days to file written objections with the supreme court. The supreme court shall consider any objections in conjunction with disposition of the case pursuant to Rule 35.10 or 35.11. The clerk shall tax the associated appeal costs as in other civil actions.	Same.
35.25(3)	In the supreme court's final decision, it shall order the lawyer to pay such costs as the court may approve. A lawyer may not file a reinstatement or readmission application until the costs assessed under this rule have been paid or waived by the supreme court.	Same.
35.26 Rules	The GC and the ADB shall each adopt reasonable rules, subject to supreme court approval, prescribing its procedures.	Same.

CHAPTER 36: RULES OF THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA

RULE	PRIOR	PRESENT
36.1 Grievance commission – clerk	The assistant court administrator for the disciplinary system shall serve as GC clerk. In the absence of the GC chair, the vice chair shall perform all duties of the chair.	Same.
36.2 Grievance commission – divisions	Each GC division is composed of 5 members. The GC chair shall select each division and shall appoint one member to serve as division president. One additional member shall serve as an alternate.	Same.
36.3 Complaints – Iowa Supreme Court Attorney Disciplinary Board	ADB complaints shall be filed in the name of the ADB and against the named lawyer. The ADB shall prosecute the complaint.	Same.
36.4 Complaints – filing – docketing	The GC clerk shall maintain a file in substantially the same manner as district court civil action records.	Same.
36.5 Report of filing	The GC clerk shall report each complaint filing to the GC chair who shall direct by written order the complaint to be heard by the GC as a whole or by a specified division.	Same.
36.6 Notice (1)	The GC clerk shall serve a written notice with a copy of the complaint and copies of chapters 35 and 36 upon the lawyer by personal service or by restricted delivery certified mail. The notice shall notify the lawyer to file a written answer within 20 days after service. A written return of service shall be made. In the event service is made by mail, service shall be deemed complete on the date the lawyer refused to accept delivery.	The GC clerk shall serve a written notice with a copy of the complaint and copies of chapters 35 and 36 upon the lawyer.
36.6 (2)		The GC clerk may serve notice by personal service or by restricted delivery certified mail. The notice shall notify the lawyer to file a written answer within 20 days after service. A written return of service shall be made. In the event service is made by mail, service shall be deemed complete on the date the

RULE	PRIOR	PRESENT
		lawyer refused to accept delivery.
36.6(3)		If service cannot be obtained pursuant to rule 36.6(2), the GC clerk may serve notice of the complaint on the supreme court clerk, who is appointed to accept service on behalf of lawyers. (Iowa R Prof'l Conduct 32:8:5 cmt. [1]. The GC clerk shall file with the supreme court clerk an affidavit attesting that notice was sent to the lawyer by restricted delivery certified mail.
36.7 Answer	The lawyer has 20 days to file a written answer to the complaint. For good cause shown upon written application, the GC may extend the time to answer. If the lawyer defaults, the complaint allegations are deemed admitted, and the matter shall proceed to hearing on the appropriate sanction issue.	Same.
36.8 Hearing	The GC hearing is to be held within a reasonable time in the county of the lawyer's residence or, at the GC chair's discretion, within in any other judicial district as shall most nearly serve the parties' convenience. The GC clerk shall mail a copy of the hearing order to all parties and lawyers at least 10 days before the hearing. If the lawyer files written objections to hearing the complaint in the lawyer's home county, the hearing shall be held at such other place, as the GC chair or GC division president shall direct.	Same.
36.9 Continuances	Hearing continuances may be granted for good cause. Except in an emergency, a continuance motion shall be filed at least 7 days before the hearing. Continuance objections shall be filed promptly.	Same.
36.10 Subpoenas - oaths	The GC chair, any GC division member or the respondent lawyer has subpoena power. The district court clerk of the county in which the hearing will be held shall issue the same. Any GC member is empowered to administer oaths to all witnesses. Hearing testimony shall be reported by a court reporter.	Same, except the GC members are also empowered to administer affirmations.
36.11 Filing of documents	Documents filed with the GC clerk must be in duplicate. The clerk mails copies of the filed documents to the GC chair, if	Same.

RULE	PRIOR	PRESENT
	sitting as a whole, or to the GC division president. On or after the hearing date, filings may be made with the GC chair or division president, with a copy filed with the GC clerk.	
36.12 Request for hearing – preliminary matters	Hearings shall be held on written motions filed by either party. Both parties must comply with the terms and conditions of the written ruling by the GC chair or division president on the motion.	Same.
COPE v. Behnke, 276 N.W.2d 838 (Iowa 1979), *appeal dismissed,* 444 U.S. 805 (1979)	While Rule 36.12 and 36.15 "indicate questions of law ordinarily should be preserved by raising them before the Commission, we are not persuaded traditional concepts of error preservation must always be imposed in attorney disciplinary proceedings." *Id.* at 841. The Supreme Court concluded, "[a] distinction must be drawn between basic concepts of ethics policy and relatively routine issues of procedure or evidence. Where it is apparent that raising the legal issue before the Commission would not have changed the record made there, nor the course of the proceedings before that body, we will not automatically apply the error preservation principles closely linked to the adversary nature of a lawsuit. We have the ultimate responsibility to determine [Behnke's] fitness to practice law. We would not always discharge that responsibility if we invariably rejected either party's law issues on error preservation grounds." *Id.*	
36.13 Challenge regarding impartiality – four member divisions	A lawyer may challenge by motion the impartiality of a member of the GC or division, but the challenge must be made within 20 days of service of the notice of complaint. If the challenge is sustained, the vacancy shall be filled pursuant to rule 36.16. With the parties' consent, a GC division may consist of 4 members. If the 4-member division is evenly divided between a recommendation of sanction and dismissal, the division shall enter a dismissal pursuant to rule 35.9. The ADB may apply for permission to appeal pursuant to rule 35.11.	Same.

RULE	PRIOR	PRESENT
COPE v. Wright, 178 N.W.2d 749 (Iowa 1970)	The Court rejected Wright's argument the GC members should be subject to voir dire similar to the process in selecting a trial jury. The provisions of Rule 36.13 are sufficient. *Id.* at 752.	
36.14 Conduct of hearing (1)	The hearing is private, unless the lawyer asks for a public hearing.	The hearing shall not be open to the public.
36.14(2)	The lawyer may present character evidence by affidavit, which shall be filed with the lawyer's exhibits. The affidavit will be admitted into evidence unless the ADB indicates at least 3 days prior to the hearing that it intends to cross-examine the affiant. If this indication is given, the affidavit will not be admitted into evidence and the affiant must testify. The lawyer may offer the character evidence of a judge by affidavit, subject to the same constraints if the ADB indicates timely its intention to cross-examine the judge. All other witnesses shall testify after administration of an oath. The procedural and evidentiary rules governing a bench trial shall be adhered to as nearly as possible.	Same, except the witnesses may now testify after administration of an oath or affirmation. The reference to procedural and evidentiary rules is omitted.
36.14(3)		The lawyer may defend and shall have the right to participate in the hearing in person and by counsel, to cross-examine, to be confronted by witnesses and to present evidence pursuant to the rules of civil procedure and evidence.
36.14(4)		The evidence presentation shall conform to the rules of civil procedure and evidence. The GC chair or division president shall determine all procedural questions, including evidentiary rulings.
36.15 Action upon complaint – report of decision	The GC commissioners are empowered to dismiss the complaint, issue a private admonition, or recommend that the supreme court reprimand the lawyer or suspend or revoke the lawyer's license. The commissioners shall file their report within 30 days after the case is submitted. The commissioners may recommend additional or alternative sanctions, such as restitution, passage of a bar examination or the multistate professional responsibility examination, continuing legal education course attendance or other consistent measures. The	Same.

RULE	PRIOR	PRESENT
	commissioners' report shall be served upon the lawyer pursuant to Iowa R. App. P. 6.31. Any commissioner has the right to file a dissent from the majority report. The dissent shall also be served on the lawyer. If the commissioners dismiss the complaint, no publicity shall be given the proceedings, except at the lawyer's request. At least 3 division members, all of whom have been present throughout the proceedings, shall concur in the report.	
36.16 Substitutions and vacancies	In the case of the absence or disability of the GC chair and vice chair, while the GC is sitting as a whole, the GC may designate another GC member to perform the chair's duties. In the case of the absence or disability of the division president, the division may designate another division member to perform the president's duties.	Same.
36.17 Harmless error – substantial prejudice test	No omission, irregularity or other defect in procedure shall render void any act of the GC, GC division or GC member, unless substantial prejudice is shown to have resulted.	Same.
36.18 Confidentiality (1)		All records, papers, proceedings, meetings and hearings of the GC shall be confidential, unless the GC recommends that the supreme court reprimand, suspend or revoke the lawyer's license.
Littlefield v. Fort Dodge Messenger, 614 F.2d 581, (8th Cir. 1980), *cert. denied,* 445 U.S. 945 (1980)	The Court of Appeals concluded the confidentiality restriction of the disciplinary process "governs only the actions of the Iowa bar. It does not purport to govern the actions of the press. If so, it would constitute a constitutionally suspect prior restraint on publication." *Id.* at 585.	
36.18(2)		A GC report that recommends that the supreme court reprimand, suspend or revoke the lawyer's license shall be a public document upon its filing with the supreme court clerk The ADB complaint shall become a public document also.
36.18(3)		Any other records and papers of the GC shall remain privileged and confidential and are not subject to discovery, subpoena or

RULE	PRIOR	PRESENT
		other means of legally compulsory release to someone other than the parties and their lawyers. The lawyer and the lawyer's lawyers and agents shall not disclose any records and papers in the proceeding to any third parties unless disclosure is required in the prosecution or defense of disciplinary charges. The confidential books and papers shall not be admissible in evidence in a judicial or administrative proceeding.
36.18(4)		Witnesses shall swear or affirm to tell the truth and not to disclose the existence of the proceedings or the identity of the lawyer until the proceeding is no longer confidential.
36.18(5)		All communications, papers and materials concerning any complaint that come into the GC member's hands shall remain confidential and the member shall keep the same in a safe and secure place.
36.18(6)		The GC clerk, the GC chair or a GC member designated as chair may issue 1 or more clarifying announcements when the complaint subject matter is of broad public interest and failure to supply information could threaten public confidence in justice administration. No other GC member shall make any public statement concerning any matter before the GC without prior GC approval.
36.18(7)		Nothing in this chapter shall prohibit the GC from releasing information regarding possible criminal violations to law enforcement, to attorney disciplinary and bar admission authorities or any information regarding possible violations of the code of judicial conduct to the Judicial Qualifications Commission.

IOWA RULES OF APPELLATE PROCEDURE

RULE	PRIOR	PRESENT
Iowa R. App. P. 6.17	The prescribed times for serving and filing briefs, other than reply briefs, pursuant to Iowa R. App. P. 6.13 and the prescribed times for determining the appendix pursuant to Iowa	Same

RULE	PRIOR	PRESENT
	R. App. P. 6.15(2) shall be reduced by one-half in lawyer disciplinary matters. Each case subject to this rule shall be given the highest priority at all stages of the appellate process and the litigants shall not be given time extensions except upon a verified showing of the most unusual and compelling circumstances. Court reporters shall give priority to proceedings transcription in these cases over other civil transcripts. These appeals shall be accorded submission precedence over other civil cases.	

IOWA CODE

RULE	PRIOR	PRESENT
Iowa Code sections 602.10123 through 602.10136	These sections create a separate disciplinary system to suspend or disbar a lawyer that is prosecuted by the attorney general and heard by a panel of 3 district judges appointed by the supreme court. Appeal of a removal or suspension order is to the supreme court, but a judgment of acquittal by a court of record is final.	Same.
State v. Tracy, 115 Iowa 71, 87 N.W. 727 (1901)	A lawyer prosecuted under these sections cannot be reprimanded, only acquitted, suspended or revoked. 87 N.W. at 728.	
In Re Cloud, 217 Iowa 3, 250 N.W. 160 (1933)	The finding and judgment of a majority of the panel "is a finding and judgment of a court of record." 250 N.W. at 163.	
In Re Bishop, 320 N.W.2d 47 (Iowa 1982)	In proceedings initiated pursuant to these Code sections, the Supreme Court allowed Bishop to surrender his license pursuant to Rule 35.15, disbarment by consent. *Id.* at 48.	

PROCEDURES FOR ATTORNEY DISCIPLINE:
HOW THE FEDERAL DISCIPLINE SYSTEM WORKS

RULE	PRESENT
Local Rule 83.2, Northern and Southern Districts of Iowa, Attorneys	(g) Rules of Conduct and Disciplinary Procedures (1) Applicability of Iowa Rules of Conduct. The Iowa Rules of Professional Conduct apply, even to pro hac vice admissions. (2) Attorney Discipline. For good cause shown, after an opportunity to be heard, any lawyer, including those admitted pro hac vice, may be disbarred, suspended for a definite or indefinite time, reprimanded or subjected to other proper discipline. (3) Disciplinary Proceedings. When alleged misconduct comes to the attention of a judge, the judge may initiate informal or formal disciplinary proceedings. (A) Informal Disciplinary Proceedings. A judge may initiate and conduct informal disciplinary proceedings in any appropriate manner, including entering orders, conducting hearings and imposing sanctions. Neither disbarment nor suspension will result from informal proceedings. (B) Formal Disciplinary Proceedings. Formal proceedings are initiated by requesting the chief judge of the district where the alleged misconduct arose to order the appointment of a "special counsel" to investigate and report to the chief judge on the allegations. The chief judge may appoint a "special counsel" or defer acting and await the results of another disciplinary proceeding. The order appointing the "special counsel" may specify any special authority given to the "counsel." This authority may include subpoena power and the power to require the lawyer under investigation to answer written interrogatories. (1) Investigation and Report. The "counsel's" report must include the following: (a) a history and factual background; (b) a recommendation of whether there is probable cause to support the allegations; and (c) the reasons for the recommendation. "Counsel" may also recommend a disposition of the allegations. (2) Determination by Chief Judge. After reviewing "counsel's" report the chief judge will determine whether formal proceedings should continue. If the decision is to discontinue formal proceedings, the lawyer under investigation will be notified. If formal proceedings are to continue, the chief judge will issue a show cause order notifying the lawyer under investigation of the alleged misconduct and the probable cause finding of the "special counsel." The order will also direct the lawyer to show cause within 30 days why the lawyer should not be disciplined. (3) Service. The court clerk will have the show cause order served personally or by certified mail. (4) Default. If the lawyer fails to appear, the chief judge may order any appropriate discipline. (5) Proceedings after Answer. If the lawyer answers and raises an issue of fact or requests to be heard, the chief judge will set the matter for hearing before a panel of 3 judges appointed by the chief judge. The panel will not include any judge before whom the alleged misconduct occurred. The panel will prescribe necessary procedures. The panel will issue a final order. If misconduct is found, the order will provide for imposition of discipline. (6) Delegation by Chief Judge. The chief judge may delegate any function to another judge.

RULE	PRESENT
	(4) Sealing of Documents. A final order in a formal proceeding that finds misconduct will be filed in the public record, unless the panel unanimously orders that it be filed under seal. Any other document filed in connection with a formal proceeding will be under seal, and will remain sealed until one of the panel judges enters an unsealing order. (5) Felony Conviction: Suspension or Disbarment in Another Court. If a bar member or a lawyer admitted pro hac vice is convicted of a felony or is suspended or disbarred from practicing in any federal or state court, the lawyer must notify the court clerk immediately. The lawyer will be suspended or disbarred before the district court unless the lawyer, within 10 days after notice, shows good cause why such action should not be taken. Any person who exercises any of the privileges of a bar member or who pretends to be entitled to do so, while not authorized to do so, is guilty of contempt and is subject to appropriate punishment. The (g)(3) rules do not apply to matters arising under this subsection. (h) Dereliction of Counsel. When a case has been dismissed because of inexcusable neglect or other dereliction of the lawyer, the court may impose appropriate sanctions, including those provided in section (g).
In Re Rhodes, 370 F.2d. 411 (8th Cir. 1967), *cert. denied,* 386 U.S. 999 (1967)	In affirming the district court's disbarment of lawyer Rhodes, the Court of Appeals wrote: "[t]he federal courts do not have jurisdiction to review an order of a state court disbarring an attorney for personal and professional misconduct. (citation omitted). Nor does disbarment by federal courts automatically follow disbarment by state courts. (citations omitted). The principles enunciated in *Selling v. Radford*... govern the federal courts in this regard." *Id.* at 413.
In Re Randall, 640 F.2d 898 (8th Cir. 1981), *cert. denied,* 454 U.S. 880 (1981)	The Court of Appeals affirmed the disbarment orders entered by the Northern and Southern Districts of Iowa, affirmed the dismissal of Randall's § 1983 action against the Iowa Supreme Court justices and disbarred Randall from its bar. The Court of Appeals wrote: "[t]he licensing of attorneys is primarily a state function.... The federal courts, except in limited circumstances, recognize and give effect to the findings of disciplinary proceedings in the state courts." *Id.* at 901. While the Court has no "jurisdiction to review a state judgment of disbarment[,] (citations omitted)," "[w]ith regard to Randall's potential disbarment from this court," the Court has "jurisdiction to review the findings of the Supreme Court of Iowa." *Id.* The Court rejected Randall's attempt to shift the focus of the disciplinary proceedings from "an inquiry into [his] professional conduct[,]" into a trial of "the [Grievance] Commission and the Iowa Supreme Court. These tactics are impermissible, contrary to an orderly system of justice, and present no justiciable issue...." *Id.* at 902.
In Re Olkon, 795 F.2d 1379 (8th Cir. 1986)	The Court of Appeals affirmed the district court's denial of lawyer Olkon's reinstatement petition. Both the Minnesota Supreme Court and the U.S. District for the District of Minnesota suspended Olkon following his conviction of 2 counts of attempted theft. Minnesota reinstated Olkon following his successful completion of his criminal probation. The district court concluded "Olkon failed to establish sufficient rehabilitation to practice in federal court ... (citation omitted)." *Id.* at 1381. At the time it suspended Olkon, the district court had not independently investigated his conduct; it based its suspension on the state court's suspension. Olkon argued the district court could not "look beyond the events triggering the state court suspension in deciding whether to reinstate him." *Id.* at 1383. The Court of Appeals rejected this argument because "the Supreme Court has recognized that federal

RULE	PRESENT
	courts have power independent of state courts to discipline attorneys admitted to practice before the federal branch. (citations and footnote omitted). Thus, the district court had the authority to consider any evidence relevant to the petition for reinstatement." *Id.* Since the district court's fact-findings were not "clearly erroneous," the Court affirmed the reinstatement denial. *Id.* at 1384.
Adduono v. World Hockey Ass'n, 824 F.2d 617 (8th Cir. 1987)	The Court of Appeals agreed "[i]t is generally recognized that a district court also has the inherent authority to discipline attorneys practicing before it. (citations omitted)." *Id.* at 622.
In Re Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996)	The Court of Appeals summarized the approach to be taken following state court lawyer discipline: "a district court, when determining whether to discipline a member of its bar consistent with a state disciplinary adjudication, may impose reciprocal discipline unless, after an independent consideration of the record, the court finds (1) a deprivation of due process; (2) a lack of adequate proof establishing misconduct; or (3) that the imposition of reciprocal discipline would result in grave injustice. (citations omitted)." *Id.* at 1087-1088.
In Re Hoare, 155 F.3d 937 (8th Cir. 1998)	In affirming lawyer Hoare's disbarment, following his conviction for aggravated reckless homicide, citing both the *Attorney Disciplinary Matter* and *Olkon* cases, the Court of Appeals described its standard of review as one of an "abuse of discretion.... (citations omitted)." *Id.* at 940. Following disbarment by the Missouri Supreme Court, the U.S. District Court for Eastern District of Missouri disbarred Hoare also. The Court of Appeals concluded that the district court did not abuse "its discretion in concluding that discipline substantially different from disbarment was not warranted in his case." *Id.* Further, the Court concluded that the district court did not abuse its discretion "in concluding that the reciprocal discipline of disbarment would not 'result in grave injustice.' (citation omitted)" Id. at 941.
In Re Caranchini, 160 F.3d 420 (8th Cir. 1998)	Following a series of Rule 11 sanctions in federal court, the Missouri Supreme Court disbarred Caranchini. *Id.* at 422-423. On appeal of the district court's subsequent disbarment, the Court of Appeals rejected Caranchini's argument that the district court's action violated the Double Jeopardy Clause. *Id.* at 423.
In Re Fletcher, 424 F.3d. 783 (8th Cir. 2005)	The Court of Appeals rejected these due process arguments from lawyer Fletcher: 1. The scope of appointed counsel's investigation should have been limited to matters known to the court prior to counsel's appointment; 2. The complaining judges should have recused themselves from the court's en banc order that adopted the report and recommendation of the 3-judge panel that conducted Fletcher's hearing. (The Court added that if the complaining judges should have recused themselves from the en banc order, their failure to do so would have been harmless error.); and 3. The pre-hearing discovery limitations were unreasonable. *Id.* at 793-795. In affirming a 3-year suspension, the Court utilized an abuse of discretion standard. *Id.* at 795.
Federal Rule of Appellate	(b) Suspension or Disbarment. (1) Standard. A bar member is subject to suspension or disbarment if the member has been suspended or disbarred from

RULE	PRESENT
Procedure 46, Attorneys	practice in any other court or if the member is guilty of conduct unbecoming a bar member. (2) Procedure. The member must be given an opportunity to show cause, within a prescribed time, why the member should not be suspended or disbarred. (3) Order. The court must enter an appropriate order after the member responds and a requested hearing is held or after no response is made within the prescribed time. (c) Discipline. The court may discipline a bar member for conduct unbecoming a bar member or for failure to comply with a court rule. Before doing so, the court must afford the member reasonable notice, an opportunity to show cause to the contrary and if requested, a hearing.