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2015 Criminal Law Seminar

Friday, April 17
ISBA Headquarters

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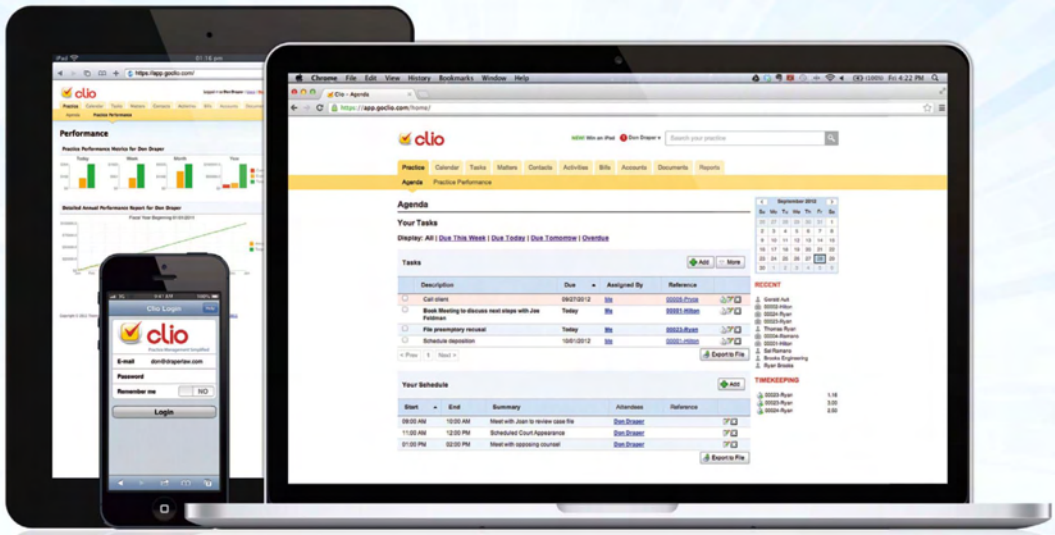

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2015 Criminal Law Seminar

SCHEDULE - FRIDAY, APRIL 17
8:00 - 8:30 AM - Registration
8:30 - 9:30 - 2015 Legislative Update
Speaker: Joe McEniry, Legislative Service Agency
9:30 - 10:30 - Depression and Substance Abuse (ethics)
Speaker: Hugh Grady, Iowa Lawyers Assistance Program
10:30 -10:45 - Break
10:45 - 11:45 - DNA 101 - Know the Code
Speaker: Norah Rudin PHD., Forensic DNA
11:45 - 12:15 - Lunch
12:15 - 1:15 - Drug Courts - Purpose & Functionality
Speaker: Pamela Summers, Drug Court Attorney; Hon. Eliza Ovrom, District Court Judge District 5C; Justin Allen, Assistant Polk County Attorney/Drug Court Representative; and Dean Olson, Black Hawk County Drug Court Representative
1:15 - 2:15 -Criminal Law Case Update
Speaker: Hon. Mary Tabor, Iowa Court of Appeals
2:15 - 3:15 - Evidence Update
Speaker: Prof. Laurie Dore, Drake Law School
3:15 - 3:30 - Break
3:30 - 4:30 - Using Expert Witness in a Criminal Trial
Moderator: Pamela Summers
Panel: Sue Flander, Chief Public Defender; Gerald Feuerhelm, Feuerhelm Law Office PC; Jason Dunn, Office of the State Public Defender; Norah Rudin PHD., Forensic DNA and Mike Rehberg

2015 Legislative Update

8:30 a.m.-9:30 a.m.

Presented by
Joseph McEniry
Legal Counsel
Legal Services Division
Iowa Legislative Services Agency
Phone: (515) 281-3189

Friday, April 17, 2015

2015 Criminal Law Legislative Update

By Joe McEniry

Senior Legal Counsel, Legislative Services Agency

The following bill has been enacted:

Senate File 150--Escape from custody by sexually violent predator

Under current law, a sexually violent predator who is civilly committed pursuant to Code chapter 229A, or a person who is detained pending a determination of whether the person is a sexually violent predator, and who escapes or attempts to escape from custody pursuant to Code section 229A.5B commits a simple misdemeanor or may be subject to punishment for contempt. This bill provides that such a violation is a serious misdemeanor or may be punishable as contempt.

The following bills have passed both the Senate and the House of Representatives but have not been signed by the Governor as of April 16, 2015:

Senate File 448--Juvenile Class "A" felons.

This bill relates to the commission of a class "A" felony by a person under 18 years of age, and provides penalties.

Current Iowa statutory law provides that a person under 18 years of age who commits a class "A" felony, other than murder in the first degree, shall be eligible for parole after serving a minimum term of confinement of 25 years. Also, under current Iowa statutory law, a person under 18 years of age who commits murder in the first degree must serve a life sentence without the possibility of parole which equals the sentences of other class "A" felons. However, the United States Supreme Court in Miller v. Alabama, 132 S. Ct. 2455 (2012), has ruled that a mandatory life sentence without the possibility of parole for a person under 18 years of age who commits murder is unconstitutional. In addition, the Iowa Supreme Court in State v. Lyle, 854 N.W.2d 378 (Iowa 2014), ruled that the Iowa Constitution forbids a mandatory minimum sentencing schema for juvenile offenders that deprives the district court of the discretion to consider youth and its attendant circumstances as mitigating factors.

The bill provides that a person who commits murder in the

first degree and who was under the age of 18 at the time the offense was committed shall be sentenced to serve one of three sentencing options. The first option provides that the court sentence the person to confinement for the rest of the person's life with no possibility of parole unless the governor commutes the sentence to a term of years. The second option provides that the court sentence the person to confinement for the rest of the person's life with the possibility of parole after serving a minimum term of confinement as determined by the court. Under the third option, the court sentences the person to confinement for the rest of the person's life with the possibility of parole.

The bill lists numerous circumstances for the court to consider prior to sentencing a person who commits murder in the first degree and who was under the age of 18 at the time the offense was committed.

The bill provides that a person who commits a class "A" felony, other than murder in the first degree, and who was under the age of 18 at the time the offense was committed shall be sentenced to serve one of two sentencing options. The first option provides that the court sentence the person to confinement for the rest of the person's life with the possibility of parole after serving a minimum term of confinement as determined by the court. Under the second option, the court sentences the person to confinement for the rest of the person's life with the possibility of parole.

The bill lists numerous circumstances for the court to consider prior to sentencing a person who commits a class "A" felony, other than murder in the first degree, and who was under the age of 18 at the time the offense was committed. This list of circumstances is similar to the list of circumstances the court must consider for a person under the age of 18 who commits murder in the first degree.

A person paroled pursuant to the bill is subject to the same set of procedures set out in Code chapters 901B, 905, 906, and 908, and rules adopted under those Code chapters for persons on parole.

The bill prohibits earned time from reducing any mandatory minimum sentence imposed under Code section 902.1.

The bill takes effect upon enactment and applies to a person who was convicted of a class "A" felony prior to, on, or after the effective date of the bill and who was under the age of 18 at the time the offense was committed.

Senate File 385--Expungement

This bill relates to the expungement of not-guilty verdicts and dismissed criminal-charge records.

The bill provides that upon application, the court shall expunge the record of a criminal case containing one or more criminal charges in which an acquittal was entered for all criminal charges or all criminal charges were otherwise dismissed in the case unless certain factors have been established.

Prior to expungement, the bill requires that all court costs, fees, and other financial obligations must have been paid and an minimum of 180 days have passed since entry of the judgement or dismissal unless the person was a victim of identity theft or mistaken identity in which case the 180 day requirement does not apply. The bill requires that the case was not dismissed due to the defendant being found not guilty by reason of insanity or being found incompetent to stand trial in the case.

The bill does not apply to dismissals related to a deferred judgment under Code section 907.9 but does apply to all public offenses.

The bill defines “expunged” to mean a criminal record has been segregated in a secure area or database which is exempted from public access. The bill also specifies that an expunged record is a confidential record but shall be made available by the clerk of the district court to an agency or person granted access to the deferred judgment docket under Code section 907.4(2).

The bill would take effect on January 1, 2016.

House File 146--Prohibited gambling game activities

This bill concerns prohibited activities and penalties relative to gambling games on excursion gambling boats and gambling structures.

Code section 99F.15(4)(d) is amended to provide that cheating at a gambling game includes committing any act which alters the outcome of the game. A violation of cheating at a gambling game is a class “D” felony.

Code section 99F.15(4)(h) currently provides that a person who places a bet after acquiring knowledge, not available to all players, of the outcome of the gambling game which is the subject of the bet commits a class “D” felony regardless of the amount of the bet and is barred for life from excursion gambling boats and gambling structures after a single offense. The bill strikes this provision and creates new subsection 5A concerning the offense of unlawful betting. The bill provides that a person

who places, removes, increases, or decreases a bet after acquiring knowledge of the outcome of the gambling game which is the subject of the bet commits the offense of unlawful betting. The bill then provides that a person is guilty of a class “D” felony if the potential winnings from the unlawful bet exceed $1,000 in value, an aggravated misdemeanor if the potential winnings from the unlawful bet exceed $500 in value but do not exceed $1,000 in value, a serious misdemeanor if the potential winnings from the unlawful bet exceed $200 in value but do not exceed $500 in value, or a simple misdemeanor if the potential winnings from the unlawful bet do not exceed $200 in value. The bill further provides that two convictions of the offense of unlawful betting shall result in the person being barred for life from excursion gambling boats and gambling structures.

House File 258--Sexual misconduct with offenders and juveniles

This bill relates to sexual misconduct with offenders and juveniles.

The bill specifies that a peace officer shall not engage in a sex act with an individual committed to the custody of the department of corrections or a judicial district department of correctional services.

The bill specifies that a peace officer shall not engage in a sex act with a juvenile placed at a juvenile placement facility.

The bill further specifies that a peace officer shall not engage in a sex act with a prisoner incarcerated in a county jail.

A peace officer who violates the bill commits an aggravated misdemeanor.

Senate File 292--Juvenile records

The bill relates to the confidentiality of certain juvenile court records.

The bill specifies that juvenile court records containing a dismissal of a complaint or an informal adjustment of a complaint when no petition is filed relating to the complaint, shall not be available to the public and may only be inspected by or disclosed to the following: the judge or professional court staff, including juvenile court officers the child’s counsel or guardian ad litem, the county attorney, the superintendent of a school district or the authorities in charge of an accredited nonpublic school, a member of the armed forces conducting a background investigation, the statistical analysis

center, or the state public defender.

The amendment to Code section 232.149 relates to the records and files of a defendant transferred to juvenile court from adult court under Code section 803.6. The bill specifies that the records and files of the defendant transferred from adult court to juvenile court are public records except that criminal history data as defined in Code section 692.1(5), intelligence data as defined in Code section 692.1(14), and law enforcement investigatory files are subject to the confidentiality provisions of Code section 22.7 and Code chapter 692. The amendment to Code section 232.149 further specifies that juvenile court social records, as defined in Code section 232.2(31), shall be deemed confidential criminal identification files under Code section 22.7(9). The amendment to Code section 232.149 also specifies that the records of a defendant transferred to juvenile court may be sealed under Code section 232.150.

House File 227--Strip searches at jails

This bill relates to strip searches of persons arrested for scheduled violations or simple misdemeanors.

Current law provides that a person arrested for a scheduled violation or simple misdemeanor shall not be subject to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband.

The bill provides that a person arrested for a scheduled violation or a simple misdemeanor who is housed in the general population of a jail or municipal holding facility may be subject to a visual strip search. The bill provides that such a person may be subject to a strip search if there is probable cause to believe that the person is concealing a weapon or contraband and written authorization of the supervisor is obtained.

The bill provides that a person arrested for a simple misdemeanor who is not housed in the general population of a jail or municipal holding facility shall not be subject to either a strip search or visual strip search unless there is probable cause to believe the person is concealing a weapon or contraband and written authorization of the supervisor on duty is obtained.

The bill provides that a person arrested for a scheduled violation who is not housed in the general population of a jail or municipal holding facility shall not be subject to either a strip search or visual strip search unless there is probable cause to believe the person is concealing a weapon or contraband and a search warrant is obtained.

The bill specifies that any person arrested for a scheduled violation or simple misdemeanor may be subjected to a search probing the mouth, ears, or nose.

The bill defines “visual strip search” to mean removing or arranging some or all of the person’s clothing so as to permit a visual inspection of the genitalia, buttocks, anus, female breasts, or undergarments of the person.

As of April 13, 2105, the following bills have received considerable attention but have not been enacted and are not law:

Senate File 391--Use of electronic devices while driving

This bill eliminates a provision prohibiting a peace officer from stopping or detaining a person solely for a violation of Code section 321.276, which relates to texting while driving.

The scheduled fine for a violation of Code section 321.276 remains $30. Under current law, the offense is not a moving violation, and therefore cannot be considered for purposes of administrative suspension of a driver’s license or to establish habitual offender status. However, if the violation causes a serious injury, a court could impose an additional fine of $500 or suspend the person’s driver’s license for not more than 90 days, or both. If the violation causes a death, a court could impose an additional fine of $1,000 or suspend the person’s driver’s license for not more than 180 days, or both.

House File 6--Sexual exploitation by school employee.

This bill expands the Code provision that establishes the criminal offense of sexual exploitation by a school employee to include an individual employed by a school district, including a full-time, part-time, or substitute. “School employee” also includes a contract employee or volunteer for a school district if the contract employee or volunteer has significant contact with students. Currently, a school employee is defined to include any practitioner or coach who is licensed or authorized by the board of educational examiners. The current definition does not limit regulated school employees to a public school employees.

For purposes of this bill, a school employee does not include a student enrolled in a school district or a person who is less than four years older than the student with whom the person engages in prohibited conduct with and the person is not

in a position of direct authority over the student.

A person who commits sexual exploitation by a school employee in violation of Code section 709.15(3) commits either an aggravated misdemeanor or a class “D” felony.

House File 3--Invasion of privacy

This bill creates the criminal offense of invasion of privacy by trespassing and modifies the criminal offense of invasion of privacy

INVASION OF PRIVACY BY TRESPASSING. Under the bill, a person commits invasion of privacy by trespassing when the person intentionally views, photographs, or films another person through the window or any other aperture of a dwelling, without legitimate purpose, while present on the real property upon which the dwelling is located, if the person being viewed, photographed, or filmed has a reasonable expectation of privacy, and if the person being viewed, photographed, or filmed does not consent or cannot consent to being viewed, photographed, or filmed.

A person who commits invasion of privacy by trespassing commits a serious misdemeanor.

INVASION OF PRIVACY. The bill also modifies the criminal offense of invasion of privacy by providing that a person who knowingly views, photographs, or films a victim, for the purpose of arousing or gratifying the sexual desire of any person, commits invasion of privacy if all of the following apply: the victim does not consent or is unable to consent to being viewed, photographed, or filmed; the victim is in a state of full or partial nudity; and the victim has a reasonable expectation of privacy while in a state of full or partial nudity.

Under the bill, the victim may have knowledge that the perpetrator is viewing, photographing, or filming the victim. Current law requires the victim to have no knowledge the perpetrator is viewing, photographing, or filming the victim.

The bill also changes the punishment for invasion of privacy from a serious misdemeanor to an aggravated misdemeanor.

Senate File 336--Civil protective orders in sexual abuse cases.

This bill relates to civil protective orders in sexual abuse cases, and makes penalties applicable.

Under current law, a defendant accused of sexual abuse must be arrested for sexual abuse before a victim can apply for a

criminal no-contact order against the defendant (Code section 664A.3) or the victim can apply for a criminal no-contact order against a defendant upon the defendant's release from jail or prison (Code section 709.19).

The bill creates new Code chapter 236A, the sexual abuse Act, allowing a victim of sexual abuse to seek relief from sexual abuse by filing a petition in district court for a sexual abuse civil protective order (emergency, temporary, and permanent) prior to the arrest of the defendant in such a situation affording the victim and the victim's family members, whose welfare may be affected by the sexual abuse situation, the same civil protections as victims of domestic abuse under Code chapter 236. The bill defines sexual abuse as the commission of a crime defined in Code chapter 709 (sexual abuse) and Code sections 726.2 (incest) and 728.12 (sexual exploitation of a minor), and to include sexual abuse crimes in other jurisdictions under statutes that are substantially similar to the aforementioned statutes.

Under the bill, upon a finding by the court, by a preponderance of the evidence, that a defendant has engaged in sexual abuse against the plaintiff, the court may order the defendant to cease the abuse, and order the defendant to stay away from the plaintiff's residence, school, or place of employment. In seeking a protective order, a victim has the right to seek help from the court with or without the assistance of an attorney and without the payment of court costs.

The bill requires criminal or juvenile justice agencies to collect and maintain information on incidents involving sexual abuse and to provide the information to the department of public safety.

The bill makes conforming changes to Code provisions relating to the issuance of and violations of civil protective orders, the duties of the departments of justice and public health, delinquency detention, insurance practices, court operating costs, and peace officer arrests.

SF 427-Suppressors and firearms--as amended by the House.

This bill relates to the manufacture, acquisition, sale, and use of firearms and suppressors.

FIREARM SUPPRESSORS. Current Iowa law provides that a mechanical device specifically constructed and designed so that when attached to a firearm it silences, muffles, or suppresses the sound when fired is an offensive weapon. Under Code section 724.3, any person who knowingly possesses an offensive weapon commits a class "D" felony, punishable by confinement for no more than five years and a fine of at least $750 but not more

than $7,500.

The bill strikes a provision in Code section 724.1(1)(h) that classifies a firearm suppressor as an offensive weapon. By striking this provision, a firearm suppressor is legal to possess in the state. This provision takes effect upon enactment.

The bill also creates in new Code section 724.1A, a process whereby a person may apply to the chief law enforcement officer of the jurisdiction where the person resides or maintains an address of record for a certification to make or transfer a firearm suppressor. The bill defines "firearm suppressor" to mean a mechanical device specifically constructed and designed so that when attached to a firearm silences, muffles, or suppresses the sound when fired that is considered a "firearm silencer" or "firearm muffler" as defined in 18 U.S.C. §921.

The bill specifies that a chief law enforcement officer shall not refuse to provide certification, based on a generalized objection, to an applicant making or transferring a firearm suppressor. If a person applies for certification to make or transfer a firearm suppressor with the chief law enforcement officer, the bill requires the chief law enforcement officer to issue the certification within 30 days of receiving such an application unless the applicant is prohibited by law from making or transferring a firearm suppressor or the applicant is the subject of a proceeding that could result in the applicant being prohibited by law from making or transferring a firearm suppressor. If the chief law enforcement officer does not issue a certification under the bill, the chief law enforcement officer shall provide the applicant a written notification of the denial and the reason for the denial. If the certification has been approved by the chief law enforcement officer under the bill, the applicant has the authority to make or transfer a firearm suppressor as provided by state and federal law.

If the applicant's request for certification is denied, the bill specifies that the applicant may appeal the decision to the district court for the county in which the applicant resides or maintains an address of record. The bill specifies that the court shall review the decision of the chief law enforcement officer to deny the certification de novo. If the court finds that the applicant is not prohibited by law from making or transferring a firearm suppressor, the bill requires the court to order the chief law enforcement officer to issue the certification and award court costs and reasonable attorney fees to the applicant. If the court determines the applicant is not eligible to be issued a certification, the bill requires the court to award court costs and reasonable attorney fees to the political subdivision of the state representing the chief law

enforcement officer.

In making a determination about whether to issue a certification under the bill, a chief law enforcement officer may conduct a criminal background check, but shall only require the applicant to provide as much information as is necessary to identify the applicant for this purpose or to determine the disposition of an arrest or proceeding relevant to the eligibility of the applicant to lawfully make or transfer a firearm suppressor. The bill prohibits a chief law enforcement officer from requiring access to any private premises as a condition of providing a certification under this Code section.

A chief law enforcement officer and employees of the chief law enforcement officer who act in good faith are immune from liability arising from any act or omission in making a certification under the bill.

The bill provides that a person shall not possess a firearm suppressor in this state if such possession is knowingly in violation of federal law commits a class "D" felony.

The provisions relating to making or transferring a firearm suppressor would take effect upon enactment.

CARRYING WEAPONS. The bill provides that a person does not commit the criminal offense of carrying weapons in violation of Code section 724.4 if the person has in the person's immediate possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit. The bill specifies that a peace officer shall verify through electronic means, if possible, the validity of the person's permit to carry weapons. Current law does not require the permit to be in the person's immediate possession only that the permit be in the person's possession. If a person, who possesses a valid permit to carry weapons under the bill, fails to carry such a permit in the immediate possession of the person or fails to display the permit to a peace officer on demand, a person commits a simple misdemeanor punishable by a $10 scheduled fine.

CARRYING WEAPONS ON SCHOOL GROUNDS. The bill provides that a certified peace officer who possesses a professional permit to carry weapons does not commit the criminal violation of unlawfully carrying weapons on school grounds under Code section 724.4B. Under current law, a peace officer while acting within the official duties of the officer may possess a weapon on school grounds. A person who commits the offense of unlawfully carrying weapons on school grounds commits a class "D" felony.

DUTY TO POSSESS PERMIT TO CARRY WEAPONS. The bill under Code section 724.5 makes it a simple misdemeanor punishable by a $10 scheduled fine if a person armed with a revolver, pistol, or pocket billy concealed upon the person does not possess the

permit to carry weapons in the immediate possession of the person, and fails to produce such permit for inspection upon the request of a peace officer. The bill specifies that a peace officer shall verify through electronic means, if possible, the validity of the person's permit to carry weapons. Current law provides that if a person commits such a violation the person commits a simple misdemeanor.

INITIAL PERMIT TO CARRY WEAPONS (LANGUAGE FROM HF 527) —— TRAINING. The bill specifies in Code section 724.11 that the training program requirements in Code section 724.9(1) do not apply to an applicant who is able to demonstrate completion of small arms training as specified in Code section 724.9(1)(d). For all other applicants the training program requirements in Code section 724.9(1) must be satisfied within the 24-month period prior to the date of the application for the issuance of a permit. Current law specifies that the training program requirements under Code section 724.9(1) must be satisfied within the 12-month period prior to the application. A corresponding amendment is made to Code section 724.7.

ISSUANCE OF PERMIT TO CARRY OR RENEWAL (FROM HF 527). Prior to issuing any renewal of a permit to carry weapons, the sheriff or commissioner under Code section 724.11 shall determine if the requirements of Code sections 724.6, 724.7, 724.8, and 724.10 have been met. The bill provides for additional requirements under certain circumstances.

The bill provides that beginning with the first renewal of a permit issued after the calendar year 2010, and alternating renewals thereafter, if a renewal applicant applies within 30 days prior to the expiration of the permit or within 30 days after expiration of the permit, the training requirements of Code section 724.9(1) do not apply.

The bill provides that beginning with the second renewal of a permit issued after the calendar year 2010, and alternating renewals thereafter, if a renewal applicant applies within 30 days prior to the expiration of the permit or within 30 days after expiration of the permit, a renewal applicant shall qualify by taking an online training course certified by the national rifle association or the Iowa law enforcement academy, and the training program requirements of Code section 724.9(1) do not apply.

If any renewal applicant applies more than 30 days after the expiration of the permit, the bill specifies the training program requirements in Code section 724.9(1) do apply to the applicant. However, the bill specifies that the training program requirements in Code section 724.9(1) do not apply to a renewal applicant who is able to demonstrate completion of small arms training as specified in Code section 724.9(1)(d). For all other

renewal applicants who have applied more than 30 days after the expiration of the permit, the bill allows, in lieu of the training program requirements in Code section 724.9(1), the renewal applicant to choose to qualify on a firing range under the supervision of an instructor certified by the national rifle association or the department of public safety or another state's department of public safety, state police department, or similar certifying body. If a renewal applicant applies more than 30 days after the expiration of the permit, the bill specifies that any subsequent renewal shall be considered a first renewal of the permit.

As an alternative, a renewal applicant, under the bill, may choose to qualify at any renewal, under the training program requirements in Code section 724.9(1), or the renewal applicant may choose to qualify on a firing range under the supervision of an instructor certified by the national rifle association or the department of public safety or another state's department of public safety, state police department, or similar certifying body. Such training or qualification must occur within the 24-month period prior to the expiration of the applicant's current permit, except that the 24-month time period limitation to complete the training or qualification does not apply to an applicant who is able to demonstrate completion of small arms training as specified in Code section 724.9(1)(d).

The bill specifies that the initial or renewal permit shall have a uniform appearance, size, and content prescribed and published by the commissioner of public safety. The bill further specifies that the permit shall contain the name of the permittee and the effective date of the permit, but shall not contain the permittee's social security number. The bill prohibits such a permit to be issued for a particular weapon or to contain information about a particular weapon including the make, model, or serial number of the weapon, or any ammunition used in that weapon.

The bill does not increase or decrease the fee for a renewal of a permit to carry weapons but does allow a renewal applicant to pay the $25 renewal application fee if the renewal applicant applies within 30 days prior to the expiration of the permit or within 30 days after such expiration. Current law requires that in order to be assessed the $25 renewal application fee, the renewal applicant must apply at least 30 days prior to the expiration of the permit to carry weapons.

PERMITS TO ACQUIRE. The bill extends the time period a permit to acquire a weapon from one year to five years. An applicant who is a United States citizen is only required to provide certain basic identifying documentation. An applicant who is not a United States citizen must provide additional

information and is subject to an immigration alien query through a database maintained by the United States immigration and customs enforcement. All applicants are subject to a criminal history background check.

DENIAL, SUSPENSION, OR REVOCATION —— PERMIT TO CARRY WEAPONS AND PERMIT TO ACQUIRE FIREARMS. If an applicant under Code section 724.21A appeals the decision by the sheriff or commissioner to deny an application, or suspend or revoke a permit to carry weapons or a permit to acquire firearms, and it is later determined the applicant is eligible to be issued or possess such a permit, the bill provides that the applicant shall be awarded any costs related to the administrative hearing and reasonable attorney fees if applicable. However, if the decision of the sheriff or commissioner to deny the application, or suspend or revoke the permit is upheld on appeal, the political subdivision of the state representing the sheriff or the commissioner shall be awarded court costs and reasonable attorney fees if applicable.

POSSESSION OF PISTOL, REVOLVER, OR AMMUNITION BY PERSONS UNDER 14 YEARS OF AGE. Under the bill in Code section 724.22(5), a parent or guardian or spouse who is 21 years of age or older, or an instructor 21 years of age or older with the consent of the parent or guardian or spouse, may allow a minor of any age to possess a pistol or revolver or the ammunition therefor, which then may be lawfully used. Current law prohibits a parent or guardian or spouse who is 21 years of age or older from allowing a minor under 14 years of age from possessing a pistol, revolver, or the ammunition. This provision would take effect upon enactment.

Except for the circumstances under Code section 724.22(4) (security personnel) or Code section 724.22(5), under current law, a person who sells, loans, gives, or makes available a pistol or revolver or ammunition for a pistol or revolver to a person below the age of 21 commits a serious misdemeanor for a first offense and a class “D” felony for second and subsequent offenses.

PERMIT TO CARRY AND PERMIT TO ACQUIRE RECORDS —— CONFIDENTIALITY. Current law requires the commissioner of public safety to maintain a permanent record of all valid permits to carry weapons and of current permit revocations.

The bill provides in Code section 724.23 that, notwithstanding any other law or rule to the contrary, the commissioner of public safety and any issuing officer (county sheriff) shall keep confidential personally identifiable information of holders of permits to carry weapons and permits to acquire firearms. The release of any confidential information, except as otherwise provided in the bill, requires

a court order or the consent of the person whose personally identifiable information is the subject of the information request. The bill does not prohibit release of statistical information relating to the issuance, denial, revocation, or administration of nonprofessional permits to carry weapons and permits to acquire firearms if such information does not reveal the identity of any individual permit holder, the release of information to a law enforcement agency investigating a violation of law or where probable cause exists, the release for purposes of conducting a background check, or the release of information relating to the validity of a professional permit to carry weapons to an employer who requires an employee or an agent of the employer to possess a professional permit to carry weapons as part of the duties of the employee or agent. The bill also does not prohibit the release of confidential information to a member of the public if the person, in writing or in person, requests whether another person has a professional or nonprofessional permit to carry weapons or to acquire.

This provision applies to holders of nonprofessional permits to carry weapons and permits to acquire and to applicants for nonprofessional permits to carry weapons and permits to acquire on or after the effective date of the bill. This provision would take effect upon enactment.

FRAUDULENT PURCHASE OF FIREARMS OR AMMUNITION. The bill provides that a person who knowingly solicits, persuades, encourages, or entices a licensed firearms dealer or private seller of firearms or ammunition to transfer a firearm or ammunition under circumstances that the person knows would violate the laws of this state or of the United States commits a class "D" felony. A person who knowingly provides materially false information to a licensed firearms dealer or private seller of firearms or ammunition with the intent to deceive the firearms dealer or seller about the legality of a transfer of a firearm or ammunition commits a class "D" felony. Any person who willfully procures another to engage in conduct prohibited by this Code section shall be held accountable as a principal.

The Code section does not apply to a law enforcement officer acting in the officer's official capacity or to a person acting at the direction of such law enforcement officer.

This new Code section would take effect upon enactment.

RULES. The bill specifies that the department of public safety shall adopt rules pursuant to Code chapter 17A to administer Code chapter 724.

Senate File 219--Small amounts of marijuana.

The bill provides that a person who possesses five grams or

less of marijuana commits a simple misdemeanor for a first offense. A simple misdemeanor is punishable by confinement for no more than 30 days or a fine of at least $65 but not more than $625 or by both.

Current law provides that a person who commits first offense possession of marijuana commits a serious misdemeanor punishable by confinement for not more than six months or by a fine of not more than $1,000 or by both. The bill does not modify the penalty for second offense possession of marijuana which is punishable by confinement for no more than one year and a fine of at least $315 but not more than $1,875. The bill also does not modify the penalty for a third or subsequent possession of marijuana offense which is punishable by confinement for no more than two years and a fine of at least $625 but not more than $6,250.

Senate File 377--Definition of sex act

This bill changes the name of “assault with intent to commit sexual abuse” to “assault with sexual intent” and makes related changes.

The bill provides that a person who commits an assault as defined in Code section 708.1, by touching the breast of another, whether or not the touching was through the clothing or other covering, with the intent to arouse or gratify the sexual desires of either party, or for purposes of sexually degrading or humiliating the other person, commits assault with sexual intent.

Under the bill, a person who commits assault with sexual intent commits a class “C” felony if the person causes serious injury to any person, a class “D” felony if the person causes bodily injury, and an aggravated misdemeanor if no injury results. A person who commits an assault with sexual intent under the bill must register as a sex offender and is subject to a special sentence under Code section 903B.1 or 903B.2 depending on the severity of the offense.

If a person touches the breast of another and commits an assault as defined in Code section 708.1, whether or not the touching was through the clothing or other covering, and the touching is without the intent to arouse or gratify the sexual desires of either party and not for the purpose of sexually degrading or humiliating the other person, the person commits a serious misdemeanor.

The bill also makes numerous conforming changes in Code chapter 692A.

House File 567--Imitation controlled substances and other controlled substances

This bill relates to controlled substances, including by enhancing the penalties for imitation controlled substances, modifying the controlled substances listed in schedules I, III, IV, and temporarily designating substances as controlled substances.

TEMPORARY CONTROLLED SUBSTANCE DESIGNATION. Under current law and in the bill, the board of pharmacy may designate a new substance as a controlled substance, by administrative rule, without the general assembly amending Code chapter 124, only if the substance is designated as a controlled substance under federal law.

If the board of pharmacy designates a substance as controlled, the bill specifies that the temporary designation is considered a temporary amendment to the schedules of controlled substances in Code chapter 124, and if the general assembly does not amend Code chapter 124 to enact the temporary amendment and make the enactment effective within two years from the date the temporary amendment first became effective, the temporary amendment is repealed by operation of law two years from the effective date of the temporary amendment. A temporary amendment repealed by operation of law is subject to Code section 4.13 relating to the construction of statutes and the application of a general savings provision.

Current law provides that if within 60 days after the next general assembly convenes the general assembly has not made the corresponding changes in Code chapter 124, the temporary designation that the substance is a controlled substance is nullified.

IMITATION CONTROLLED SUBSTANCES. Under current law imitation controlled substances are regulated under Code chapter 124A. The bill repeals Code chapter 124A and transfers the regulation of imitation controlled substances to Code chapter 124. The definition and designation of an imitation controlled substance in Code chapter 124 remains identical to the definition and designation of an imitation controlled substance under current law in Code chapter 124A.

Under the bill and in current law, an imitation controlled substance means a substance which is not a controlled substance but by color, shape, size, markings, and other aspects of dosage unit appearance, and packaging or other factors, appears to be or resembles a controlled substance. The board of pharmacy may designate a substance as an imitation controlled substance pursuant to the board’s rulemaking authority and in accordance with Code chapter 17A.

In addition, under current law and in the bill, if a substance has not been designated as an imitation controlled substance by the board of pharmacy and when dosage unit appearance alone does not establish that a substance is an imitation controlled substance, the following factors may be considered in determining whether the substance is an imitation controlled substance: the substance is represented as having the effect of a controlled substance; the substance is represented as a controlled substance or as a substitute for a controlled substance because of its nature or appearance; or a person receives money or other property having a value substantially greater than the actual value of the substance when sold.

Under the bill, if a person unlawfully manufactures, delivers, or possesses with the intent to deliver an imitation controlled substance containing any detectable amount of those substances identified in Code section 124.204(9), or unlawfully acts with, enters into a common scheme or design with, or conspires with one or more persons to manufacture, deliver, or possess such imitation controlled substances, the person commits the following offense: a class "B" felony punishable by confinement of no more than 50 years and a fine of not more than $1 million if the imitation controlled substance is more than 10 kilograms; a class "B" felony punishable by confinement of no more than 25 years and a fine of not less than $5,000 but not more than $100,000 if the imitation controlled substance is more than five kilograms but not more than 10 kilograms; a class "C" felony punishable by a fine of not less than $1,000 but not more than $50,000 if the imitation controlled substance is five kilograms or less; or an aggravated misdemeanor if the imitation controlled substance is classified in schedule IV or V. Current law in Code section 124A.4 provides that if a person unlawfully manufactures, delivers, or possesses with intent to deliver an imitation controlled substance, the person commits an aggravated misdemeanor, or if the person delivers to a person under 18 years of age who is at least three years younger than the violator, the person commits a class "D" felony. In addition, under current law, if a person unlawfully and knowingly publishes an advertisement or distributes in a public place a promotion for an imitation controlled substance the person commits a serious misdemeanor.

The bill enhances the criminal penalties for controlled substances classified in Code sections 124.204(4)(ai) and 124.204(6)(i) from an aggravated misdemeanor to a class "C" felony punishable pursuant to Code section 124.401(1)(c)(8). This change equalizes the criminal penalties with violations involving other schedule I controlled substances.

The bill provides that if the same person commits two or more

acts which are in violation of Code section 124.401(1) and the acts occur in the same location or time period so the acts are attributable to a single scheme, the acts may be considered a single violation and the weights of the imitation controlled substance may be combined for purposes of charging the offender.

The amendment to Code section 124.401A provides that a person who is 18 years of age or older who unlawfully manufactures with the intent to distribute, distributes, or possesses with the intent to distribute an imitation controlled substance to another person 18 years of age or older within 1,000 feet of the real property comprising a public or nonpublic school, may be sentenced up to an additional term of confinement of five years in addition to any other penalty.

The amendment to Code section 124.401B provides that a person who unlawfully possesses an imitation controlled substance within 1,000 feet of the real property comprising a school, public park, public pool, public recreation center, or marked school bus may be sentenced up to 100 hours of community service.

The amendments to Code section 124.406 relate to the distribution or possession with the intent to distribute an imitation controlled substance to a person under 18 years of age. A person who distributes or possesses with the intent to distribute an imitation controlled substance, represented to be a substance listed in schedule I or schedule II, to a person under 18 years of age commits a class “B” felony. The required penalty for such a violation is a minimum term of confinement of 10 years if the substance was distributed within 1,000 feet of the real property comprising a public or nonpublic school, public park, public pool, or public recreation center. A person who distributes or possesses with the intent to distribute an imitation controlled substance, represented to be a substance listed in schedule III, to a person under 18 years of age, who is at least three years younger than the violator, commits a class “C” felony. A person who distributes or possesses with the intent to distribute an imitation controlled substance, represented to be a substance listed in schedule IV or schedule V, to a person under 18 years of age, who is at least three years younger than the violator, commits an aggravated misdemeanor.

The amendment to Code section 124.415 requires that a peace officer make a reasonable effort to identify a person under 18 years of age discovered to be in possession of an imitation controlled substance, and if the person is not referred to juvenile court, the peace officer shall make a reasonable effort to notify the person’s custodial parent of the possession unless the officer has reasonable grounds to believe such notification

is not in the best interests of the person. The bill specifies that if the person is taken into custody the juvenile court officer shall make a reasonable effort to identify the school of attendance and to notify the school or nonpublic school of the taking into custody of the person.

The bill creates Code section 124.417, which is similar to Code section 124A.5 repealed by the bill. A person registered under Code section 124.302 does not violate the bill if the person manufactures, delivers, possesses, or possesses with the intent to manufacture or deliver, or acts with others to do such activities, if the person uses the imitation controlled substance for use as a placebo by a registered practitioner in the court of professional practice or research.

SCHEDULE I, III, AND IV CONTROLLED SUBSTANCES. The bill transfers numerous substances classified as "hallucinogenic substances" under schedule I and reclassifies the substances as "other substances" under schedule I. By transferring the substances to "other substances", a person commits a class "C" felony under Code section 124.401(1)(c)(8) if the violation involves such a substance. Under current law, a person commits an aggravated misdemeanor under Code section 124.401(1)(d) when committing such violations.

The bill adds new substances as "hallucinogenic substances" under schedule I. A person commits a class "C" felony under Code section 124.401(1)(c)(8) if the violation involves the new hallucinogenic substances.

The bill adds new substances as "stimulants" under schedule I. A person commits a class "C" felony under Code section 124.401(1)(c)(8) if the violation involves the new stimulant substances.

The bill also adds new substances to the classification of "other substances" under schedule I. A person commits a class "C" felony under Code section 124.401(1)(c)(8) for a violation involving the new substances.

The bill strikes one substance classified as a "hallucinogenic substance" under schedule I and reclassifies the substance as a "stimulant" containing a synthetic cathinone under schedule I. The transfer of the substance within schedule I also changes the criminal penalty for a violation involving the substance from a class "C" felony under Code section 124.401(1)(c)(8) to an aggravated misdemeanor under Code section 124.401(1)(d). The bill also strikes a substance in Code section 124.204(6)(i)(3) from schedule I and does not reclassify the substance in any other substance schedule.

The bill also removes numerous substances from schedule I which are currently classified as "stimulants" in Code section 124.204(6)(i).

The bill also strikes two narcotic substances from schedule III and adds three substances to schedule IV. A violation involving a schedule IV controlled substance is punishable as an aggravated misdemeanor in Code section 124.401(1)(d).

Senate File 484--Medical cannabis

This bill creates the medical cannabis Act and provides for civil and criminal penalties and fees.

OVERVIEW. The bill allows a patient with a debilitating medical condition who receives written certification from the patient's health care practitioner that the patient has a debilitating medical condition and who submits the written certification along with an application to the department of public health (department) for a medical cannabis registration card to allow for the lawful use of medical cannabis to treat the patient's debilitating medical condition. A patient who is issued a medical cannabis registration card will be able to receive medical cannabis directly from a licensed medical cannabis dispensary in this state.

DEFINITIONS. The bill provides the following definitions:

"Debilitating medical condition" means cancer; multiple sclerosis; epilepsy; AIDS or HIV; glaucoma; hepatitis C; Crohn's disease or ulcerative colitis; amyotrophic lateral sclerosis; Ehlers-danlos syndrome; post-traumatic stress disorder; severe, chronic pain caused by an underlying medical condition that is not responsive to conventional treatment or conventional treatment that produces debilitating side effects; and any other chronic or debilitating disease or medical condition or its medical treatment approved by the department by rule.

"Health care practitioner" means an individual licensed under Code chapter 148 to practice medicine and surgery or osteopathic medicine and surgery, a physician assistant licensed under Code chapter 148C, or an advanced registered nurse practitioner licensed pursuant to Code chapter 152 or 152E.

"Medical cannabis" means any species of the genus cannabis plant, or any mixture or preparation of them, including whole plant extracts and resins.

"Medical cannabis dispensary" means an entity licensed under the bill that acquires medical cannabis from a medical cannabis manufacturer in this state for the purpose of dispensing medical cannabis in this state pursuant to the provisions of the bill.

"Medical cannabis manufacturer" means an entity licensed by the department to manufacture and to possess, cultivate, transport, or supply medical cannabis pursuant to the provisions of the bill.

"Primary caregiver" means a person, at least 18 years of age,

who has been designated by a patient's health care practitioner or a person having custody of a patient, as a necessary caretaker taking responsibility for managing the well-being of the patient with respect to the use of medical cannabis pursuant to the bill.

"Written certification" means a document signed by a health care practitioner, with whom the patient has established a patient-provider relationship, which states that the patient has a debilitating medical condition and provides any other relevant information.

HEALTH CARE PRACTITIONER CERTIFICATION. The bill provides that prior to a patient's submission of an application for a medical cannabis registration card, if a health care practitioner determines that the patient whom the health care practitioner has examined and treated suffers from a debilitating medical condition, the health care practitioner may provide the patient with a written certification of that diagnosis. If the health care practitioner provides the written certification, the practitioner must also provide explanatory information to the patient about the therapeutic use of medical cannabis, and if the patient continues to suffer from a debilitating medical condition, issue the patient a new certification of that diagnosis on an annual basis.

MEDICAL CANNABIS REGISTRATION CARD —— PATIENT AND PRIMARY CAREGIVER. The department may approve the issuance of a medical cannabis registration card by the department of transportation to a patient who is at least 18 years of age and is a permanent resident of this state, who submits a written certification by the patient's health care practitioner to the department, who submits an application to the department of public health with certain information, and who submits a registration card fee to the department. The department of public health may also approve the issuance of a medical cannabis registration card by the department of transportation to a primary caregiver who is at least 18 years of age, who submits a written certification by the patient's health care practitioner to the department on behalf of the patient, and submits an application to the department with certain information. A medical cannabis registration card expires one year after the date of issuance and may be renewed.

MEDICAL ADVISORY BOARD. The director of public health is directed to establish a medical advisory board, no later than August 15, 2015, to consist of eight practitioners representing the fields of neurology, pain management, gastroenterology, oncology, psychiatry, infectious disease, family medicine, and pharmacy, and three patients with valid medical cannabis registration cards. The practitioners shall be nationally board-

certified in their area of specialty and knowledgeable about the use of medical cannabis. The duties of the board include reviewing and recommending to the department for approval additional chronic or debilitating diseases or medical conditions or their treatments as debilitating medical conditions that qualify for the use of medical cannabis under the bill, accepting and reviewing petitions to add chronic or debilitating diseases or medical conditions or their treatments to the list of debilitating medical conditions that qualify for the use of medical cannabis under the bill, and advising the department regarding the location of medical cannabis dispensaries, the form and quantity of allowable medical cannabis to be dispensed to a patient or primary caregiver, and the general oversight of medical cannabis manufacturers and medical cannabis dispensaries.

MEDICAL CANNABIS MANUFACTURER LICENSURE. The bill requires the department to license four medical cannabis manufacturers for the manufacture of medical cannabis within this state by December 1, 2015, and to license new medical cannabis manufacturers or relicense existing medical cannabis manufacturers by December 1 of each year. Information submitted during the application process is confidential until the medical cannabis manufacturer is licensed by the department unless otherwise protected from disclosure under state or federal law. As a condition for licensure, a medical cannabis manufacturer must agree to begin supplying medical cannabis to medical cannabis dispensaries in this state by July 1, 2016. The department is directed to consider several factors in determining whether to license a medical cannabis manufacturer including technical expertise, employee qualifications, financial stability, security measures, and production needs and capacity. Each medical cannabis manufacturer is required to contract with the state hygienic laboratory at the university of Iowa to test the medical cannabis produced by the manufacturer and to report testing results to the medical cannabis manufacturer. Each entity submitting an application for licensure shall pay a nonrefundable application fee of $7,500.

MEDICAL CANNABIS MANUFACTURERS. The bill provides that operating documents of a medical cannabis manufacturer shall include procedures for oversight and recordkeeping activities of the medical cannabis manufacturer and security measures undertaken by the medical cannabis manufacturer. A medical cannabis manufacturer is prohibited from sharing office space with, referring patients to, or having a financial relationship with a health care practitioner; permitting any person to consume medical cannabis on the property of the medical cannabis manufacturer; employing a person who is under 18 years of age or

who has been convicted of a disqualifying felony offense; and from operating in any location, whether for dispensing or for manufacturing, cultivating, harvesting, packaging, and processing, within 1,000 feet of a public or private school existing before the date of the medical cannabis manufacturer's licensure. A medical cannabis manufacturer shall be subject to reasonable inspection and shall be subject to reasonable restrictions relating to signage, marketing, display, and advertising of the medical cannabis.

A medical cannabis manufacturer is required to provide a reliable and ongoing supply of medical cannabis to medical cannabis dispensaries pursuant to the provisions of the bill, and all manufacturing, cultivating, harvesting, packaging, and processing of medical cannabis is required to take place in an enclosed, locked facility at a physical address provided to the department during the licensure process.

MEDICAL CANNABIS DISPENSARIES. The bill requires the department to license by April 1, 2016, 12 medical cannabis dispensaries to dispense medical cannabis within this state consistent with the provisions of the bill. The department is required to license new medical cannabis dispensaries or relicense the existing medical cannabis manufacturers by December 1 of each year. Information submitted during the application process shall be confidential until the medical cannabis dispensary is licensed by the department unless otherwise protected from disclosure under state or federal law. As a condition for licensure, a medical cannabis dispensary must agree to begin supplying medical cannabis to patients by July 1, 2016.

The department is directed to consider several factors in determining whether to license a medical cannabis dispensary including technical expertise, employee qualifications, financial stability, security measures, and the projection and ongoing assessment of fees for the purchase of medical cannabis on patients with debilitating medical conditions. Each entity submitting an application for licensure shall pay a nonrefundable application fee of five thousand dollars to the department.

The bill provides that medical cannabis dispensaries shall be located based on geographical need throughout the state to improve patient access. A medical cannabis dispensary may dispense medical cannabis pursuant to the provisions of this chapter but shall not dispense any medical cannabis in a form or quantity other than the form or quantity allowed by the department pursuant to rule. The operating documents of a medical cannabis dispensary shall include procedures for the oversight and record keeping activities of the medical cannabis

dispensary and security measures undertaken by the medical cannabis dispensary to deter and prevent the theft of medical cannabis and unauthorized entrance into areas containing medical cannabis. A medical cannabis dispensary is prohibited from sharing office space with, referring patients to, or having any financial relationship with a health care practitioner; permitting any person to consume medical cannabis on the property of the medical cannabis dispensary; employing a person who is under eighteen years of age or who has been convicted of a disqualifying felony offense; and from operating in any location within 1,000 feet of a public or private school existing before the date of the medical cannabis dispensary's licensure by the department. A medical cannabis dispensary shall be subject to reasonable inspection and to reasonable restrictions set by the department relating to signage, marketing, display, and advertising of medical cannabis.

Prior to dispensing of any medical cannabis, a medical cannabis dispensary is required to verify that the medical cannabis dispensary has received a valid medical cannabis registration card from a patient or a patient's primary caregiver, if applicable, assign a tracking number to any medical cannabis dispensed from the medical cannabis dispensary and follow proper packaging procedures in compliance with federal law.

FEES. Medical cannabis registration card fees and medical cannabis manufacturer and medical cannabis dispensary application and annual fees collected by the department pursuant to this chapter shall be retained by the department, shall be considered repayment receipts as defined in Code section 8.2, and shall be used for the purpose of regulating medical cannabis manufacturers and medical cannabis dispensaries and for other expenses necessary for the administration of this Code chapter.

CONFIDENTIALITY. The department is required to maintain a confidential file of the names of each patient and primary caregiver issued a medical cannabis registration card. Individual names contained in the file shall be confidential and shall not be subject to disclosure, except that information in the confidential file may be released on an individual basis to authorized employees or agents of the department, the department of transportation, and a medical cannabis dispensary as necessary to perform their duties and to authorized employees of state or local law enforcement agencies for the purpose of verifying that a person is lawfully in possession of a medical cannabis registration card. Release of information must also be consistent with federal Health Insurance Portability and Accountability Act regulations.

ADDITIONAL DEPARTMENT DUTIES —— RULES. The bill requires the

department to adopt rules relating to the manner in which the department shall consider applications for new and renewal medical cannabis registration cards, identify criteria and set forth procedures for including additional chronic or debilitating diseases or medical conditions or their medical treatments on the list of debilitating medical conditions, establish the form and quantity of medical cannabis allowed to be dispensed to a patient or primary caregiver in the form and quantity appropriate to serve the medical needs of the patient with the debilitating medical condition, establish requirements for the licensure of medical cannabis manufacturers and medical cannabis dispensaries, develop a dispensing system for medical cannabis within this state that follows certain requirements, establish and collect annual fees from medical cannabis manufacturers and medical cannabis dispensaries to cover the costs associated with regulating and inspecting medical cannabis manufacturers and medical cannabis dispensaries, and specify and implement procedures that address public safety including security procedures and product quality, safety, and labeling.

RECIPROCITY. The bill provides that a valid medical cannabis registration card, or its equivalent, issued under the laws of another state that allows an out-of-state patient to possess or use medical cannabis in the jurisdiction of issuance shall have the same force and effect as a valid medical cannabis card issued under the bill, except that an out-of-state patient in this state shall not obtain medical cannabis from a medical cannabis dispensary in this state.

USE OF MEDICAL CANNABIS —— SMOKING PROHIBITED. The bill provides that a patient shall not consume the medical cannabis by smoking the medical cannabis.

USE OF MEDICAL CANNABIS —— AFFIRMATIVE DEFENSES. The bill provides prosecution immunity for a health care practitioner, a medical cannabis manufacturer, and a medical cannabis dispensary, including any authorized agents or employees of the health care practitioner, medical cannabis manufacturer, and medical cannabis dispensary, for activities undertaken by the health care practitioner, medical cannabis manufacturer, and medical cannabis dispensary pursuant to the provisions of the bill.

The bill provides that in a prosecution for the unlawful possession of marijuana under the laws of this state, including but not limited to Code chapters 124 (controlled substances) and 453B (excise tax on unlawful dealing in certain substances), it is an affirmative and complete defense to the prosecution that the patient has been diagnosed with a debilitating medical condition, used or possessed medical cannabis pursuant to a certification by a health care practitioner, and, for a patient

age 18 or older, is in possession of a valid medical cannabis registration card. The bill provides a similar affirmative defense for a primary caretaker of a patient who has been diagnosed with a debilitating medical condition who is in possession of a valid medical cannabis registration card, and where the primary caregiver's possession of the medical cannabis is on behalf of the patient and for the patient's use only.

The bill amends Code section 124.401, relating to prohibited acts involving controlled substances, to provide that it is lawful for a person to knowingly or intentionally recommend, possess, use, dispense, deliver, transport, or administer medical cannabis if the recommendation, possession, use, dispensing, delivery, transporting, or administering is in accordance with the provisions of the bill.

The bill provides that an agency of this state or a political subdivision thereof, including any law enforcement agency, shall not remove or initiate proceedings to remove a patient under the age of 18 from the home of a parent based solely upon the parent's or patient's possession or use of medical cannabis as authorized under the bill.

PENALTIES. The bill provides that a person who knowingly or intentionally possesses or uses medical cannabis in violation of the requirements of the bill is subject to the penalties provided under Code chapters 124 and 453B. In addition, a medical cannabis manufacturer or a medical cannabis dispensary shall be assessed a civil penalty of up to $1,000 per violation for any violation of the bill in addition to any other applicable penalties.

EMERGENCY RULES. The bill provides that the department may adopt emergency rules and the rules shall be effective immediately upon filing unless a later date is specified in the rules.

TRANSITION PROVISIONS. The bill provides that a medical cannabis registration card issued under Code chapter 124D (medical cannabidiol Act) prior to July 1, 2015, shall remain effective and continues in effect as issued for the 12-month period following its issuance.

REPORTS. The bill requires the university of Iowa Carver college of medicine and college of pharmacy to, on or before July 1 of each year, beginning July 1, 2016, submit a report detailing the scientific literature, studies, and clinical trials regarding the use of medical cannabis on patients diagnosed with debilitating medical conditions as defined in the bill to the department of public health and the general assembly.

REPEAL. The bill repeals Code chapter 124D, the medical cannabidiol Act.

Lawyers in Need of Assistance: The Impact on the Person, Ethics and the Profession *(Ethics)*

9:30 a.m. - 10:30 a.m.

Presented by
Hugh Grady
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Iowa Lawyers Assistance Program
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Friday, April 17, 2015

Lawyers In Need of Assistance: The Impact on the Person, Ethics and the Profession

Hugh Grady
ILAP Executive Director

Today's Outline

- Some facts about the profession
- What exactly is an impaired lawyer?
- Correlations between lawyer impairment and disciplinary chaos
- Balance – some materials provided by Linda Albert of WISLAP
- Golden Rules

Scope of The Impairment Problem

Impact on the Person

Some Data

(International Journal of Law and Psychiatry)

1990 Sample of Washington Lawyers

- 19% suffered from depression compared to 3%-9% nationally
- 18% were problem drinkers, nearly double the national rate
- 26% reported cocaine use at some point in their lives
- Similar to results found in previous Arizona study

SIGNS AND SYMPTOMS OF IMPAIRMENT

Lawyering: An "At Risk Profession"- Seems to imply that "it's hard"

- 1990 Johns Hopkins study ranked lawyers first in experiencing depression
- 44% of lawyers feel they don't have enough time with families
- 54 % feel they don't have enough time for themselves
- 1990 study illustrated job dissatisfaction data doubled from 1984 data

Attendance

- Routinely arrives late or leaves early
- Regularly returns late from or fails to return from lunch
- Fails to keep scheduled appointments
- Fails to appear at depositions or court hearings
- Decreased productivity
- Has frequent sick days and unexplained absences

Job Performance

- Procrastinates, pattern of missed deadlines
- Neglects prompt processing of mail or timely return of calls
- Decline of productivity
- Quality of work declines
- Overreacts to criticism, shifts blame to others, withdraws
- Smells of ETOH in office or during court appearances
- Client complaints
- Co-mingles or "borrows" client funds

Personal Behavior

- Gradual deterioration of personal appearance/hygiene/health
- Loses control at social gatherings or where professional decorum is expected
- Distorts the truth, is dishonest
- OMVI, public intoxication arrest or possession of illegal drug
- Poor time management, failure to timely file tax payments
- Pattern of family crisis
- Pattern of mood swings

IMPAIRMENT AND DISCIPLINE

Rule 32:1.3 Diligence

- A lawyers work must be controlled so that each matter can be handled competently.
- Perhaps no professional shortcoming is more widely resented than procrastination.

Rule 32:3.2 Expediting Litigation

- Reasonable efforts to expedite litigation
- Consistent with interests of client
- Dilatory practices bring the administration of justice into disrepute
- Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client

Rule 32:3.3: Candor Toward The Tribunal

- A lawyer shall not knowingly make a false statement of fact or law to a tribunal.
- Or fail to correct a false statement of material fact or law previously made.

Rule 32:5.1Responsibilities of Partners,Managers, and Supervisory Lawyers

- Reasonable efforts to ensure compliance with Rules of Professional Conduct
- Knowledge and ratification of specific conduct
- Failure to take remedial action

Rule 32:8.3 Reporting Professional Misconduct

- Knowledge requires reporting when one lawyer has knowledge of another
- Judges
- Iowa Lawyers Assistance Program exception
- Confidentiality

Yes, lawyers do need balance.

Balance is Worthwhile Work

LAWYERS ARE HUMAN BEINGS TOO

SDT = Three Basic Human Needs for Well-Being

- Competence (What I do I do well)
- Good interpersonal relationships
- Autonomy (I have control over what I do)

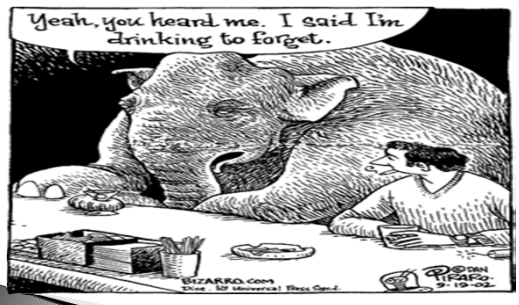
- Ryan and Deci, 2000

Influence of the Work Environment on Quality of Life

- Workload?
- Balance of demands?
- Responsibility versus authority?
- Financial balance?
- Is it "never enough"?
- Civility versus adversarial?

Look/Feel Familiar?

Feeling out of control?



WHAT DID YOU EXPECT?

- Are you doing what you expected to be doing at this time in your life?
- Is your work as an attorney what you thought it would be? Are you satisfied?
- Is your marriage/partnership what you assumed it would be? Satisfied? Happy?
- Are your children happy, healthy individuals making a contribution to society?

..

How Does that Translate?

- Law School: I will achieve and do well
- Later: I will find a job that I excel at and enjoy (intrinsic)
- I will make a good living and have good things due to my achievements (extrinsic)
- I will be a good partner and have a good relationship/family
- Children will enrich my life

Hum…Law School–the Other Bar

(after first semester grades come out)

Your Partnership/Family

Desperate for Balance

Working Towards Acceptance

Acceptance doesn't mean I like it, it means "I get it" and I move to put a plan in place for survival and even to thrive

What Hurts More than Helps?

- Alcohol or Drug abuse or dependence
- Gambling or other addictions
- Depression or other mental illness
- General sense of imbalance which decreases intrinsic motivation–may lead to the above
- Lack of purpose or connectedness

Impact of Stress=Imbalance

- Georgetown Journal of Legal Ethics 2001 cited depression as a significant factor in lawyer discipline
- Louisiana study found 80% of their Client Protection Fund cases involved addictions including gambling.

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Lawyer Know Thyself

- "It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change".
- Charles Darwin

Balance is Hard but Worthwhile Work

The 20 Golden Rules

Richard S. Massington, Miami Fl.

1. Behave yourself
2. Answer the phone
3. Return your phone calls
4. Pay your bills
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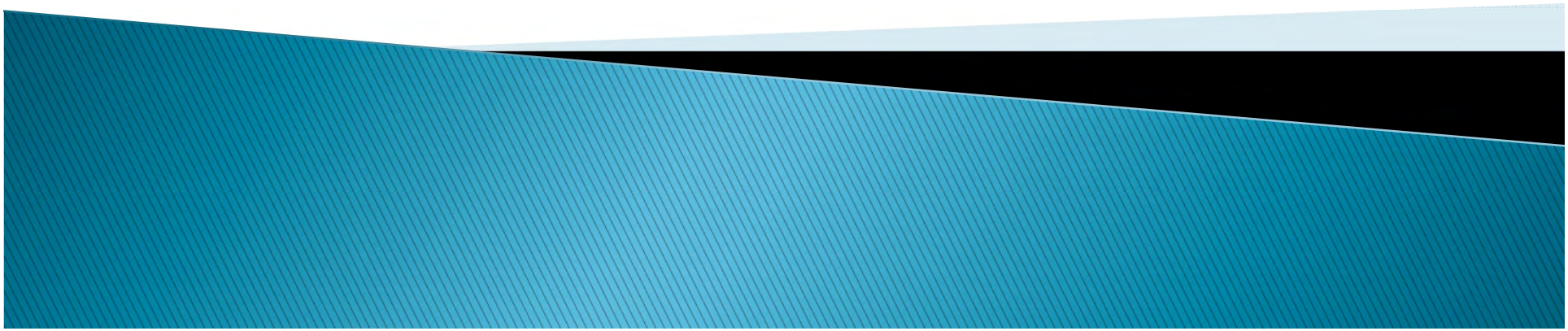
6. Tell the truth
7. Admit ignorance
8. Be honorable
9. Defend the honor of your fellow attorneys
10. Be gracious and thoughtful
11. Value the time of your fellow attorneys
12. Give straight answers
13. Avoid the need to go to court
14. Think first
15. Define your goals
16. There is no such thing as billing 3000 hours a year
17. Tell your clients how to behave
18. Solve problems – don't become one
19. Have ideals you believe in
20. Call your mother

Lawyers In Need of Assistance: The Impact on the Person, Ethics and the Profession

Hugh Grady
ILAP Executive Director

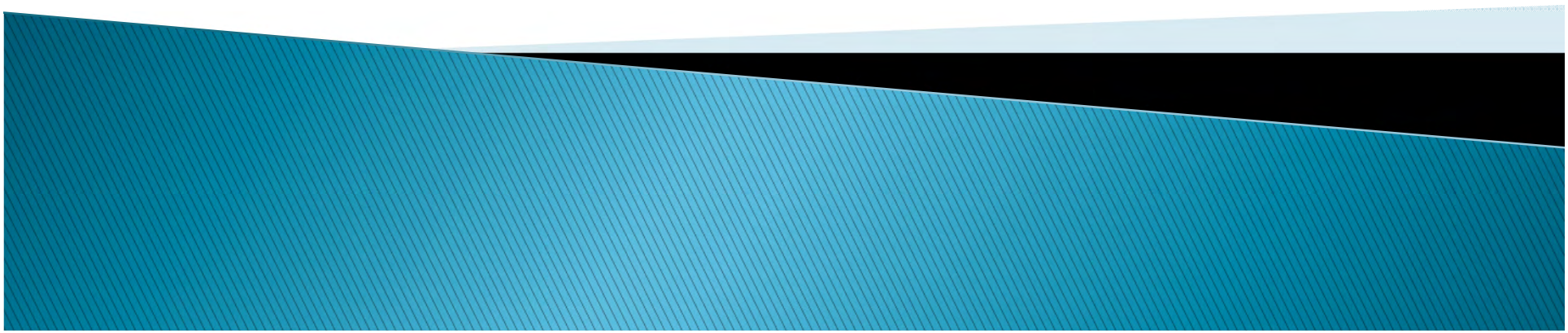


Today's Outline

- Some facts about the profession
- What exactly is an impaired lawyer?
- Correlations between lawyer impairment and disciplinary chaos
- Balance – some materials provided by Linda Albert of WISLAP
- Golden Rules

Scope of The Impairment Problem

Impact on the Person

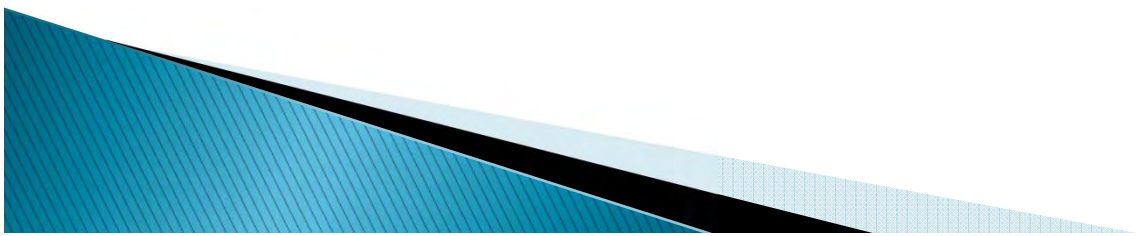


Some Data

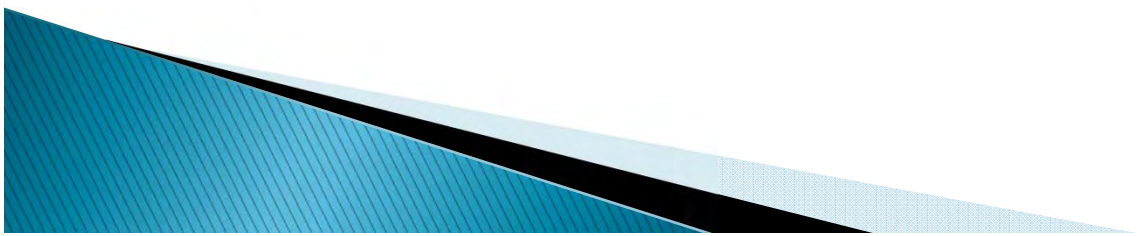
(International Journal of Law and Psychiatry)

1990 Sample of Washington Lawyers

- 19% suffered from depression compared to 3%-9% nationally
- 18% were problem drinkers, nearly double the national rate
- 26% reported cocaine use at some point in their lives
- Similar to results found in previous Arizona study



SIGNS AND SYMPTOMS OF IMPAIRMENT

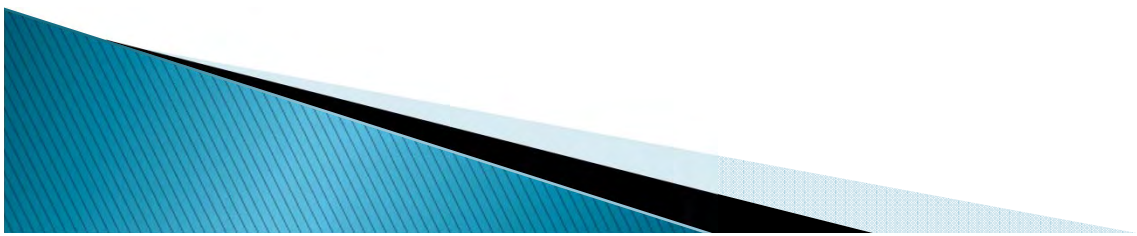


Lawyering: An "At Risk Profession"– Seems to imply that "it's hard"

- 1990 Johns Hopkins study ranked lawyers first in experiencing depression
- 44% of lawyers feel they don't have enough time with families
- 54 % feel they don't have enough time for themselves
- 1990 study illustrated job dissatisfaction data doubled from 1984 data

Attendance

- Routinely arrives late or leaves early
- Regularly returns late from or fails to return from lunch
- Fails to keep scheduled appointments
- Fails to appear at depositions or court hearings
- Decreased productivity
- Has frequent sick days and unexplained absences

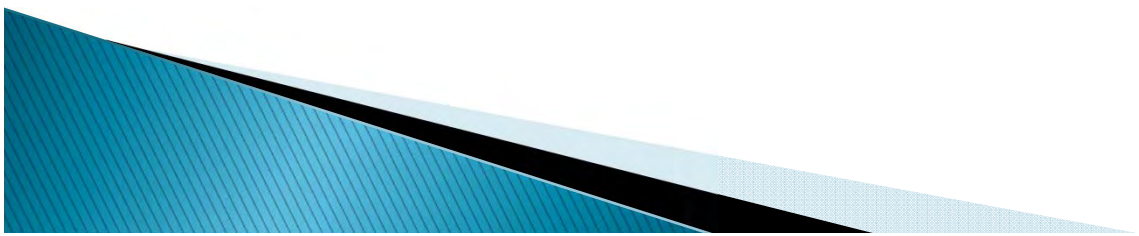


Job Performance

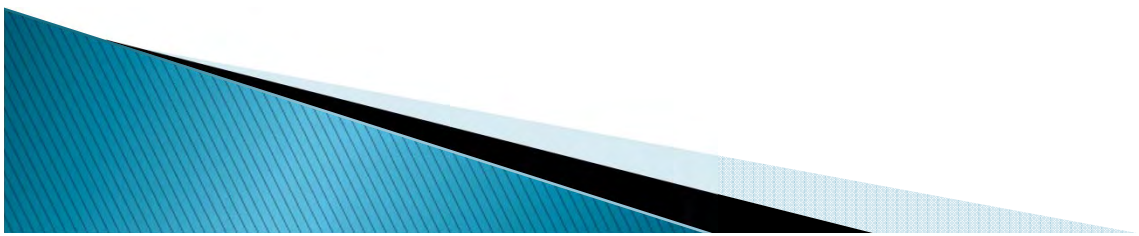
- Procrastinates, pattern of missed deadlines
- Neglects prompt processing of mail or timely return of calls
- Decline of productivity
- Quality of work declines
- Overreacts to criticism, shifts blame to others, withdraws
- Smells of ETOH in office or during court appearances
- Client complaints
- Co-mingles or “borrows” client funds

Personal Behavior

- Gradual deterioration of personal appearance/hygiene/health
- Loses control at social gatherings or where professional decorum is expected
- Distorts the truth, is dishonest
- OMVI, public intoxication arrest or possession of illegal drug
- Poor time management, failure to timely file tax payments
- Pattern of family crisis
- Pattern of mood swings

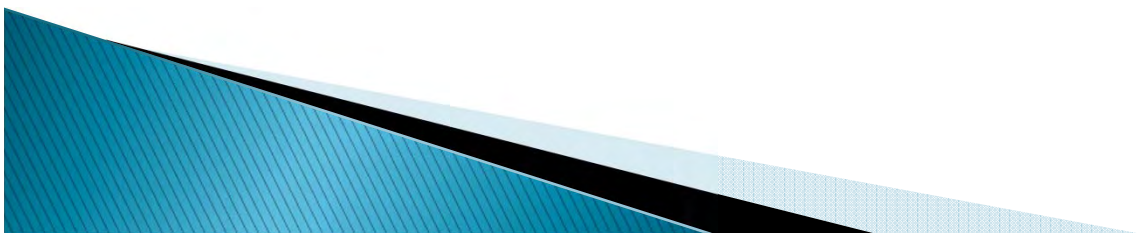


IMPAIRMENT AND DISCIPLINE



Rule 32:1.3 Diligence

- A lawyers work must be controlled so that each matter can be handled competently.
- Perhaps no professional shortcoming is more widely resented than procrastination.

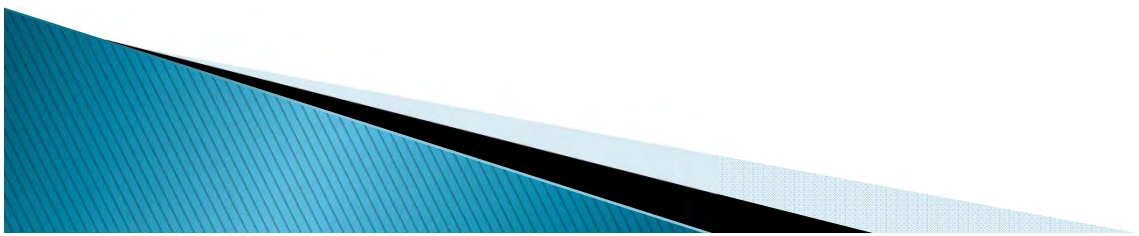


Rule 32:3.2 Expediting Litigation

- Reasonable efforts to expedite litigation
- Consistent with interests of client
- Dilatory practices bring the administration of justice into disrepute
- Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client

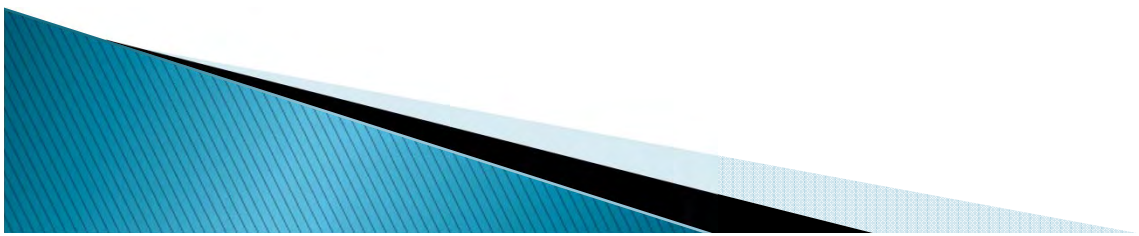
Rule 32:3.3: Candor Toward The Tribunal

- A lawyer shall not knowingly make a false statement of fact or law to a tribunal.
- Or fail to correct a false statement of material fact or law previously made.



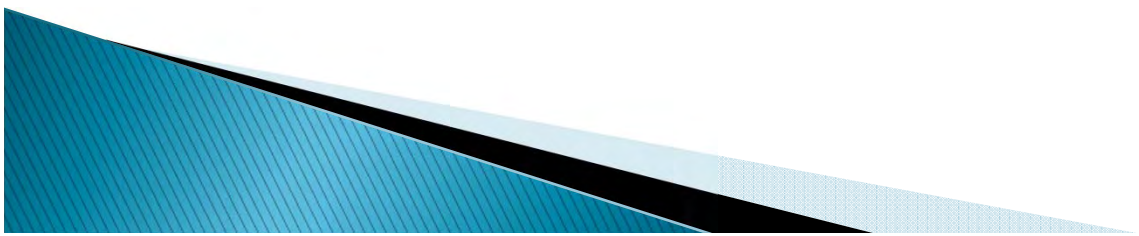
Rule 32:5.1Responsibilities of Partners,Managers, and Supervisory Lawyers

- Reasonable efforts to ensure compliance with Rules of Professional Conduct
- Knowledge and ratification of specific conduct
- Failure to take remedial action

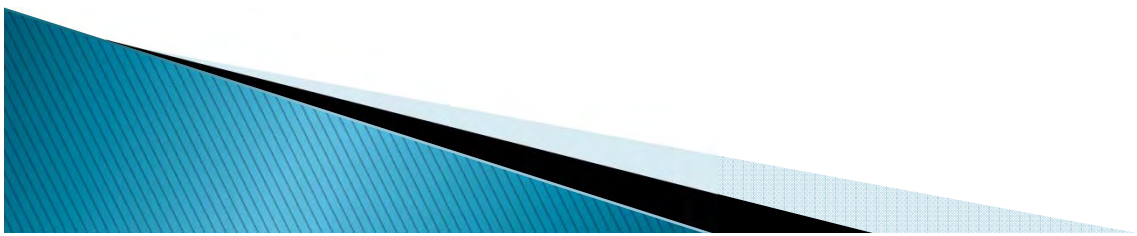


Rule 32:8.3 Reporting Professional Misconduct

- Knowledge requires reporting when one lawyer has knowledge of another
- Judges
- Iowa Lawyers Assistance Program exception
- Confidentiality



Yes, lawyers do need balance.



Balance is Worthwhile Work

LAWYERS ARE HUMAN BEINGS TOO

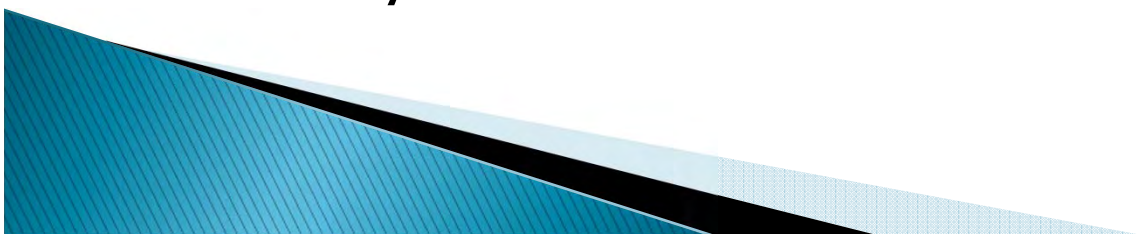
SDT = Three Basic Human Needs for Well-Being

- Competence (What I do I do well)
- Good interpersonal relationships
- Autonomy (I have control over what I do)

- Ryan and Deci, 2000

Influence of the Work Environment on Quality of Life

- Workload?
- Balance of demands?
- Responsibility versus authority?
- Financial balance?
- Is it “never enough”?
- Civility versus adversarial?



Look/Feel Familiar?

Feeling out of control?

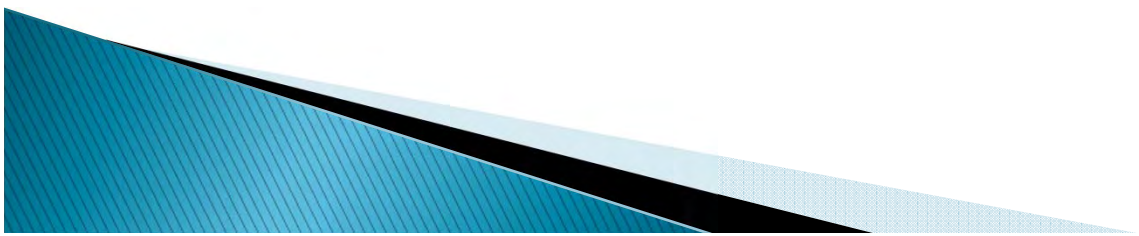
WHAT DID YOU EXPECT?

- Are you doing what you expected to be doing at this time in your life?
- Is your work as an attorney what you thought it would be? Are you satisfied?
- Is your marriage/partnership what you assumed it would be? Satisfied? Happy?
- Are your children happy, healthy individuals making a contribution to society?

..

How Does that Translate?

- Law School: I will achieve and do well
- Later: I will find a job that I excel at and enjoy (intrinsic)
- I will make a good living and have good things due to my achievements (extrinsic)
- I will be a good partner and have a good relationship/family
- Children will enrich my life



Hum…Law School–the Other Bar
(after first semester grades come out)

“They didn’t teach us in law school that people are crazy!”

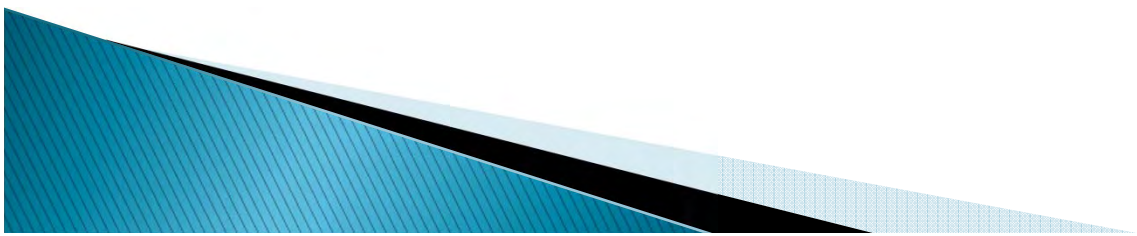
Your Partnership/Family

Desperate for Balance

"If I follow your advice and give up smoking, drinking, and men, will I really live longer, or will it just seem longer?"

Working Towards Acceptance

Acceptance doesn't mean I like it, it means "I get it" and I move to put a plan in place for survival and even to thrive

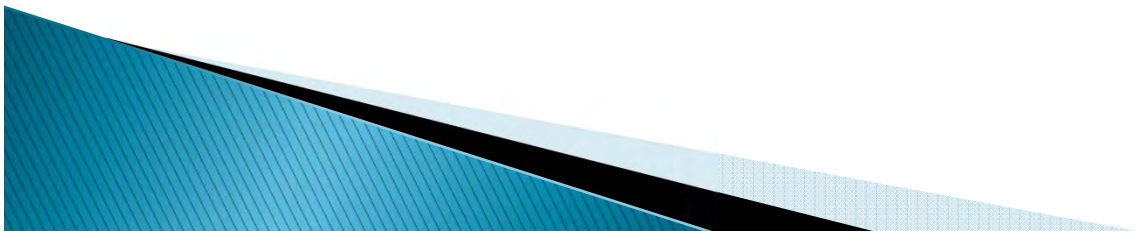


What Hurts More than Helps?

- Alcohol or Drug abuse or dependence
- Gambling or other addictions
- Depression or other mental illness
- General sense of imbalance which decreases intrinsic motivation-may lead to the above
- Lack of purpose or connectedness

Impact of Stress=Imbalance

- Georgetown Journal of Legal Ethics 2001 cited depression as a significant factor in lawyer discipline
- Louisiana study found 80% of their Client Protection Fund cases involved addictions including gambling.



A DOG'S LIFE

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DNA 101 – Know the Code

10:45 a.m. - 11:45 a.m.

Presented by
Norah Rudin Ph.D.
Forensic DNA
650 Castro St.
Suite 120-404
Mountain View, CA 94041

Friday, April 17, 2015

Forensic DNA 101

Demystifying DNA for Attorneys

Iowa State Bar Association
Criminal Law Seminar
2015

Know the Code

The mysterious language of Forensic Science

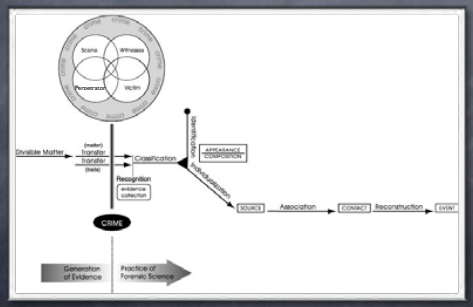
Forensic Science

- The application of Science to the Law
- Inherent tension between Science and the Law
  - The Law ultimately requires an absolute determination of fact
  - There is no such thing as Scientific Certainty, reasonable or otherwise
  - All Science can do is attempt to quantify uncertainty

What is the Question?

If you don't ask the right question,
You won't get the right answer,
Regardless of the brilliance of your analysis

The Forensic Paradigm



DNA Demystified

Overview

- DNA - advantages and limitations
- DNA is biological evidence - What is it?
- DNA typing systems
- DNA and Forensic Science - Transfer
- Current Issues
- Reading a report - Know the code
- What can my expert do for me?

Why DNA?

- Stability
- Sensitivity
- Power of discrimination
- Privacy (not anymore)
  - Phenotype tests (HIRIS - hair, eye color)
  - Y-STR typing (surname)
  - Familial searches
  - Arrestee samples

Capabilities of DNA

- Comparison to crime scene samples
- Exclusion of innocent suspects
- Exoneration of the falsely convicted
- Identification of missing persons
- Identification of war dead
  - mass graves, human rights
- Non-forensic applications
  - human evolution, migration, anthropology
  - wildlife forensics, endangered species
  - clinical testing

Limitations of DNA

- Interpretation of ambiguous profiles
  - complex and/or low quantity samples
- Interpreting DNA evidence in the context of the case
- Ability of analysts to communicate complex scientific evidence
- Ability of juries to understand complex scientific evidence

DNA is biological evidence

- Direct connection between evidence and source (person)
  - Answer the "who" question
- Visible evidence may be left at scenes of:
  - violent crimes, sexual assaults
- Invisible evidence may be left anywhere, anytime (touch DNA)
  - relevance?

Genetic profile same among body parts

- All body fluids and parts have the same genetic profile
  - Exceptions
    - germline
    - somatic mutation
    - non-nuclear (mtDNA)

Source determination

- Source determination,
  Absolute Individualization, Identification
- Scientifically unsupportable
- Even for complete, single source sample, the possibility exists, however remote, of a coincidental match
- Source may not be the relevant question

Types of Biological Evidence

- Fluids and Tissues
  - Blood, semen, saliva etc.
- Hairs
  - Transferred easily (significance, relevance)
- Contact DNA
  - Physiological origin (acellular?)
  - Habitual wearer
  - Contact / touch DNA
  - Analysis (low template / low copy number)
  - Interpretation (drop-out)

Workflow

Evidence Sample

↓

Forensic Evaluation

↓

DNA extraction / Differential extraction

↓

Purification

↓

Determine Quantity / Quality

↓

Amplification (PCR)

↓

Typing / Detection

↓

Interpretation

What is it?

- Tests for physiological fluids
  - What is it?
    - Blood, semen, saliva
      - Urine, feces, vomit, tears …
  - What species is it?
    - Human or other

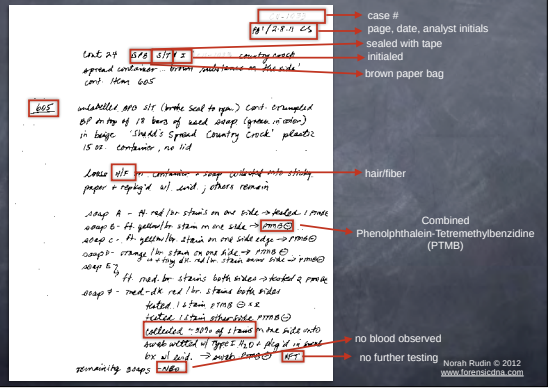
Tests for physiological fluids

- "Presumptive" tests
  - Chemical
- "Confirmatory" tests
  - Immunological
  - Microscopic

Get the Lab Notes

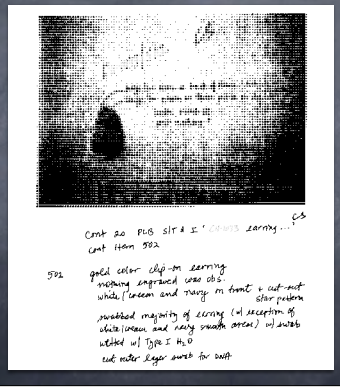
- Laboratory notes or bench notes
- Documentation of the evidence
  - derivatives
- Examination of the evidence
  - what does it look like?
- Preliminary testing of the evidence
  - what is it?

Lab notes

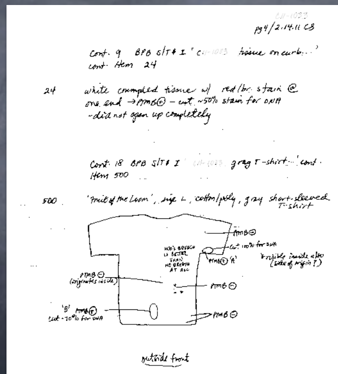


case #
page, date, analyst initials
sealed with tape
initialed
brown paper bag
hair/fiber
Combined Phenolphthalein-Tetremethylbenzidine (PTMB)
no blood observed
no further testing

Lab notes



Lab notes



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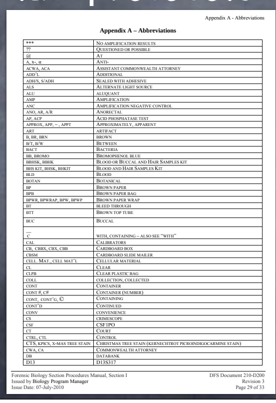
www.forensicdna.com

lab protocols



Appendix A - Abbreviations

Appendix A – Abbreviations

***	NO AMPLIFICATION RESULTS
??	QUESTIONED OR POSSIBLE
@	AT
A, X-, α	ANTI-
ACWA, ACA	ASSISTANT COMMONWEALTH ATTORNEY
ADD'L	ADDITIONAL
ADH/S, S/ADH	SEALED WITH ADHESIVE
ALS	ALTERNATE LIGHT SOURCE
ALU	ALUQUANT
AMP	AMPLIFICATION
ANC	AMPLIFICATION NEGATIVE CONTROL
ANO, AR, A/R	ANORECTAL
AP, ACP	ACID PHOSPHATASE TEST
APPROX, APP, ~ , APPT	APPROXIMATELY, APPARENT
ART	ARTIFACT
B, BR, BRN	BROWN
B/T, B/W	BETWEEN
BACT	BACTERIA
BB, BROMO	BROMOPHENOL BLUE
BBHSK, BBHK	BLOOD OR BUCCAL AND HAIR SAMPLES KIT
BHS KIT, BHSK, BHKIT	BLOOD AND HAIR SAMPLES KIT
BLD	BLOOD
BOTAN	BOTANICAL
BP	BROWN PAPER
BPB	BROWN PAPER BAG
BPWR, BPWRAP, BPW, BPWP	BROWN PAPER WRAP
BT	BLEED THROUGH
BTT	BROWN TOP TUBE
BUC	BUCCAL
$\bar{C}$	WITH, CONTAINING – ALSO SEE "WITH"
CAL	CALIBRATORS
CB, CBBX, CBX, CBB	CARDBOARD BOX
CBSM	CARDBOARD SLIDE MAILER
CELL. MAT., CELL MAT'L	CELLULAR MATERIAL
CL	CLEAR
CLPB	CLEAR PLASTIC BAG
COLL	COLLECTION, COLLECTED
CONT	CONTAINER
CONT #, C#	CONTAINER (NUMBER)
CONT, CONT'G, ©	CONTAINING
CONT'D	CONTINUED
CONV	CONVENIENCE
CS	CRIMESCOPE
CSF	CSF1PO
CT	COURT
CTRL, CTL	CONTROL
CTS, KPICS, X-MAS TREE STAIN	CHRISTMAS TREE STAIN (KERNECHTROT PICROINDIGOCARMINE STAIN)
CWA, CA	COMMONWEALTH ATTORNEY
DB	DATABANK
D13	D13S317

Forensic Biology Section Procedures Manual, Section I
Issued by Biology Program Manager
Issue Date: 07-July-2010

DFS Document 210-D200
Revision 3
Page 29 of 33

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Forensic DNA Typing

Whose is it?

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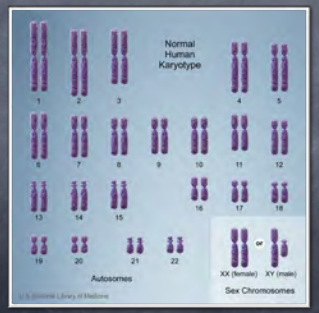
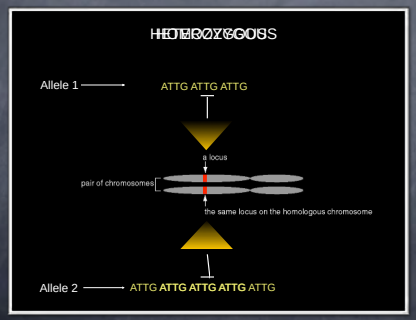
Human Chromosomes



Terminology

- Locus
  - 1 Locus (**loh**-kuhs);
    2 or more Loci (**loh**-sahy)
  - physical location
- Allele (uh-**leel**)
  - genetic variant

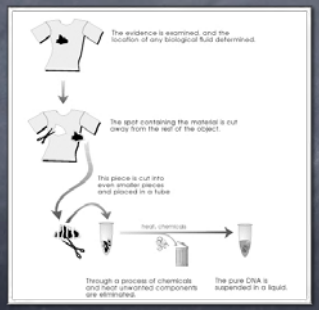
Loci and Alleles



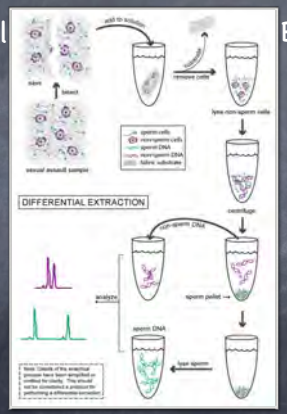
DNA extraction

- Extraction
  - isolation of DNA from the rest of the cellular material
- Differential extraction
  - separation of sperm cells (spermatozoa) from non-sperm cells before DNA extraction

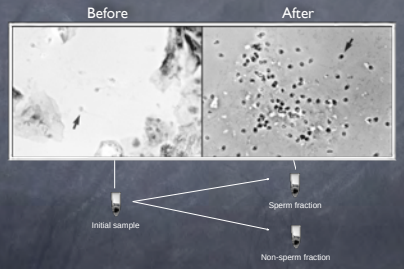
DNA extraction



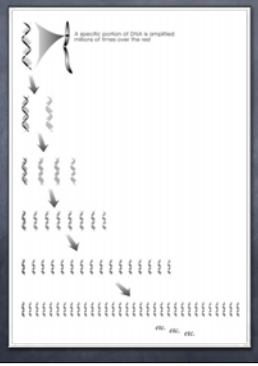
Differential Extraction



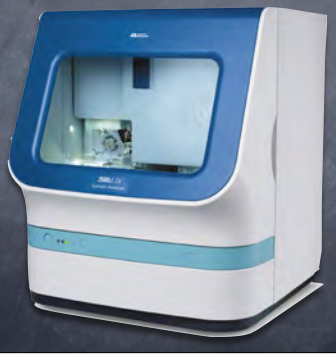
Differential Extraction



Polymerase Chain Reaction



Genetic Analyzer



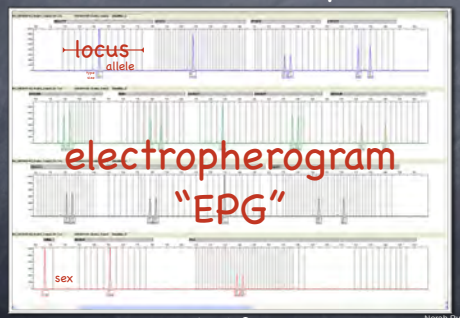
Forensic Typing Systems

Nuclear STRs

Autosomal STRs	Y-STRs	mtDNA
Autosomes Gender ID not STR Linear molecule Length polymorphism Biparental inheritance Both male and female Multiple loci 2 copies / cell	Y chromosome Linear molecule Length polymorphism Paternal inheritance Male DNA type only 1 copy / cell Genetically linked loci effectively one locus haplotype	Mitochondrion Small circular molecule Sequence polymorphism Maternal inheritance Both male and female 1 locus (Multiple copies/cell) Genetically linked loci effectively one locus haplotype

Mini-STRs
subset of autosomal
smaller amplicons
overcome inhibition

STRs
Short Tandem Repeats



Identifiler

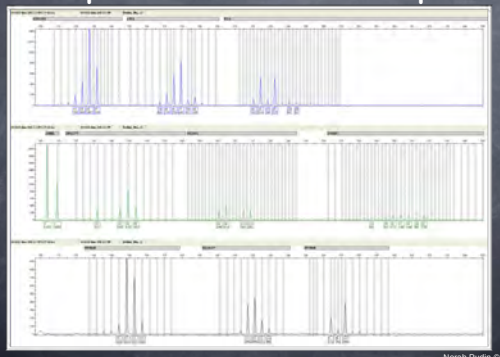
Interpretation

Interpretation

Simple samples

- For many/most complete single source samples, source is not an issue
- However - Possible issues
  - cold hits from the felon database (CODIS)
  - contamination
  - sample switch
  - fraud

Complex/low-level samples



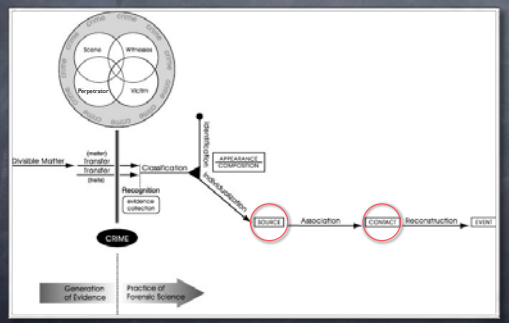
Complex Samples

- Mixtures
  - number of contributors
  - which alleles can be paired
  - calculations
- Low-level samples
  - low-template (LT) ; ~~low copy number~~ (LCN)
  - missing information / alleles (drop-out)
  - calculations

What is the Question?

If you don't ask the right question,
You won't get the right answer,
Regardless of the brilliance of your analysis

Biological Evidence as Transfer Evidence



What can my expert do for me?

- Expert review
  - human error - anyone can make a mistake
  - (almost) every case has a weakness
- Reanalysis
  - same sample
  - different sample
- Source may not be the issue
- Cross-examination questions
- Court testimony observation

Discovery

- Reports
- Notes (bench notes)
- Data (raw data, electronic data)
- Protocols, abbreviations
- Photos
- Communications
- Proficiency tests
- Unexpected results

www.forensicdna.com

.fsa files

.hid files

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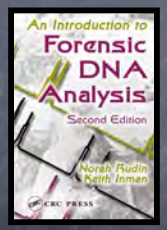

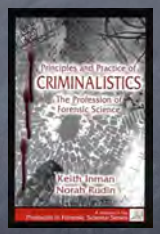

norah@forensicdna.com
650 605-3411

www.scieg.org

Drug Courts- Purpose and Functionality

12:15 p.m. - 1:15 p.m.

Presented by

Pamela Summers
Attorney
Intensive Supervision Drug Court
Phone: 515-330-0013

Hon. Eliza Ovrom
District Court Judge District 5C
Polk County Courthouse
500 Mulberry Street
Des Moines, IA 50309

Justin Allen
Assistant Polk County
Attorney/Drug Court
Representative
Polk County Attorney's Office
222 Fifth Avenue
Des Moines, IA 50309

Dean Olson
Black Hawk County Drug Court Representative
312 E. 6th Street
Waterloo, IA 50703
Phone: 319-830-4323

Friday, April 17, 2015

Polk County Attorney / Fifth Judicial District
ISP Drug Court Screening Request

By completing this form, the Defendant and his/her attorney are requesting the Drug Court team begin the screening process to determine the Defendant's eligibility for the program. Submission of this form does not constitute enrollment in the program or indicate in any way that the Defendant qualifies for enrollment. Upon receipt of this form, the Drug Court Team will begin the screening process and notify the Defendant of their decision within a reasonable time.

Name:_____ DOB: _____ Phone:_____

Defendant's Current Address:_____
_____
_____

Defendant's Attorney: _____

Defendant In jail: Y/N*

***IMPORTANT: If you are not in custody, you must contact Shirley Pontious at 242-6985 or 250-6558 to schedule an interview after you return this form. *Please wait two days before calling*. If you are in custody, you will be interviewed at the Polk County Jail on a Tuesday or Wednesday. Corrections will only interview two people each week so please allow up to two months for a decision.**

Present Charges:
_____
_____

Are you currently on probation or parole? **Y/N** If so, list the charges, County, and case number:_____
_____

Do you have charges pending in any other County or State? **Y/N** If so, list the charges, County, and case number (if you know)_____
_____
_____

Prior prison sentences, if any, list charge and County_____
_____
_____

Drugs of choice: _____

Alcohol use **Y/N**, How often?_____

Other drug use: _____

Past Substance Abuse Treatment(s): _____
_____
_____
_____

Have you ever received a mental health evaluation? **Y/N** Diagnosis:_____
_____
_____

List any medications currently prescribed: _____
_____
Are you taking them as prescribed? **Y/N**

What is your education level?_____

When and where was your last steady employment?
_____
_____

Parents' names:_____

Spouse/significant other: _____

Children (age):_____
_____
_____

Siblings: _____
_____

Whom do you know currently in the Drug Court Program?
_____

Why do you want to be screened for Drug Court?_____
_____
_____

FOR DRUG COURT USE ONLY:
County Attorney assigned to pending charges:_____

County Attorney: Y/N If no, explain:_____

RETURN COMPLETED FORM TO CATHERINE DEWITZ
BY FAX 515-323-5254
EMAIL Catherine.dewitz@polkcountyiowa.gov
Or in person at the Polk County Attorney's office.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,	)	**Criminal No. (Pre-Plea)**
Plaintiff,	)	
v.	)	**INTENSIVE SUPERVISION COURT PLEA AGREEMENT**
	)	
Defendant.	)	
	)	

COMES NOW the State and Defendant and hereby agree to the following Intensive Supervision Court (**Drug Court**) terms.

1. The Defendant has been charged with the crimes of:

2. Defendant agrees to comply with and complete **all** of the following terms and conditions of **Drug Court**.

A. Sign a Waiver of Speedy Indictment, Speedy Trial, Minutes of Testimony, and Motions to Suppress and Confession. Defendant's confession will include the names of any other persons involved in the crime(s) and will truthfully and completely explain those persons involvement in the crime(s). Defendant will testify completely and truthfully against any of those persons involved who, now or later, are charged with involvement in the crime(s) at issue. Defendant understands and agrees that the Confession will be valid evidence against defendant if defendant violates any terms of this agreement.

B. Sign a Release Agreement. Defendant agrees to be released to the custody of the Department of Correctional Services and to sign a Release Agreement. Defendant agrees to electronic monitoring if required as a condition of release. Defendant agrees and understands that violations of Drug Court rules may result in immediate arrest. Serious violations that do not result in Defendant being removed from the program may result in short term jail stays as a penalty for breaking the rules. Defendant agrees and understands that if s/he chooses to post bond after being placed in jail on contempt for Program violations, that action will be considered a request that Defendant be removed from Drug Court and probation revocation proceedings commenced or a return of the case(s) to the general trial docket for prosecution.

C. Defendant agrees to obey all laws, including traffic. Defendant agrees and understands if s/he posts bond after being placed in jail for a violation of any law, including traffic, that action will be considered a request to be removed from Drug Court and revocation or sentencing proceedings commenced.

D. Complete a Substance Abuse Evaluation. Defendant agrees to cooperate with and complete a substance abuse evaluation. Upon completion of the evaluation; Defendant agrees to cooperate with and successfully complete any recommended treatment, including any and all aftercare requirements and halfway house residency.

E. Complete an Education Intake Evaluation. Absent exigent circumstances, Defendant must have a GED or high school diploma prior to graduation from Drug Court.

F. 75 hours of Individual Community Service. Defendant must complete at least 50 hours of community service work through the DOC Community Service Placement Office. The remaining 25 hours and any other hours performed may be performed at any location approved by program staff. Community Service hours may be subtracted for special projects and/or speaking engagements performed by Defendant; hours may be added as a penalty for program violations that do not warrant removal from the program. Defendant and defendant's attorney agree that changes may be made to the number of community service hours at the discretion of Staff and with notice to Defendant. These hours are in addition to any other hours Defendant may have already had assigned under prior sentences.

G. Comply with Curfew as established by the Drug Court staff.

H. Defendant **agrees not to** possess, inject, ingest or otherwise **use any alcohol or non-prescribed drug. Defendant agrees to not take any medication, including vitamins or supplements, prescribed or over the counter, without prior approval of staff.** Defendant agrees to **comply with any prescription ordered** by a Dr. Failure to take medication as prescribed may be considered a violation of Drug Court rules**.**

I. Defendant **agrees not to possess any dangerous weapon including but not limited to any handgun or knife with a blade exceeding 5 inches in length.**

J. Defendant agrees to not visit, frequent, or otherwise attend any **gambling, betting, or gaming facility.**

K. Defendant agrees to participate in a VORP (**Victim-Offender Reconciliation Program**) wherein Defendant and victim meet to discuss the crime, the effect of same on victim and enter into a restitution plan if applicable.

L. Defendant **agrees to submit to breathalyzer, urinalysis, or other authorized tests for drugs or intoxicants** immediately upon the request of any staff. All Defendants shall submit to random urinalysis testing while in Drug Court.

M. Defendant agrees to allow the Department of Correctional Services full access to his/her home or automobile upon request.

N. Defendant agrees to **authorize a release of information**. Defendant understands that said authorization will result in the exchange of information among Drug Court staff. Defendant realizes this is necessary to allow cross-reporting as to the Defendant's compliance with Drug Court conditions.

O. Defendant agrees to **appear in Court** as required and to dress appropriately while in attendance.

P. Mentor/Sponsor: Defendant may be required to have daily contact with a chosen **mentor/ sponsor** while participating in the program.

Q. Defendant agrees to obtain staff approval prior to making any change in address or employment.

R. Defendant understands the minimum length of Drug Court is sixteen months; however, this time may be extended by the Court to allow Defendant additional time to complete necessary requirements.

S. Defendant agrees to attend programming deemed appropriate by staff, this may include a Cognitive Thinking class, CALM class, or other program offered through the Department of Corrections. Defendant also agrees to attend **Recovery One Through Twelve class**, addressing the twelve steps of AA.

T. Defendant agrees if he/she has children or is expecting children any time during the course of Drug Court, he/she will be required to participate in an approved parenting class.

U. Defendant understands s/he will be required to attend at least one AA/NA retreat before the Defendant will be allowed to progress to graduation of the program.

V. **Defendant agrees if and upon revocation from Drug Court, Defendant will be sentenced to prison upon conviction and/or probation revocation**.

W. Defendant understands that the Drug Court staff may make exceptions to any or all of the above conditions upon a showing of exceptional circumstances.

3. **Performance rewards**: If the staff determines Defendant is making satisfactory progress in goals and treatment the following may occur:
   a. Early release from probation and/or Drug Court;
   b. Credit towards community service hours;
   c. Curfew hour raised and/or eliminated;
   d. Reduction in number of urinalysis;
   e. Elimination of one of requirements set forth above;
   f. Certificates of achievements;
   g. Program advancements as shown through phase changes.

4. **Sanctions**: If the staff determines the Defendant has violated the terms and conditions of Drug Court or is not making satisfactory progress, the following may occur:
   a. Electronic monitoring;
   b. Immediate arrest and period of incarceration;
   c. Increase number of Community Service hours;
   d. Alteration or imposition of curfew hours;
   e. Increased reporting to staff;
   f. Increased urinalysis;
   g. Extension of time on Drug Court;
   h. Reduction in Phase;
   i. Discharge from Drug Court and institution of probation revocation and/or reinstatement of original charges.

5. Upon graduation from Drug Court, Defendant's probation may be assigned to general supervision probation for up to two additional years. Plea agreement upon successful completion of Drug Court is: _____. Plea agreement upon unsuccessful discharge is: _____.

6. Defendant agrees that if he/she violates any term or condition of Drug Court, including an arrest for a new offense, Defendant may be discharged from Drug Court; the final decision will be made by the staff. Defendant's failure to provide urinalysis upon request, providing a positive urinalysis, failure to successfully complete treatment, or any other failure to comply with the terms and conditions of Drug Court may result in program sanctions, revocation of release, or termination from Drug Court. **Defendant's revocation from Drug Court will result in the State and Department of Corrections initiating probation revocation proceedings or return this matter to the trial docket for prosecution.**

This agreement is approved as to form and content and entered into on the _____ day of _____, 200_.

_____	_____	_____
Assistant Polk County Attorney:	Attorney for Defendant:	Defendant:

Address:_____ Phone: _____

Height: _____ Weight:_____ Hair:_____ Eyes: _____

Approved by: _____
Judge, Fifth Judicial District

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,	)	**Criminal No.**
Plaintiff,	)	
v.	)	**INTENSIVE SUPERVISION COURT CONTRACT**
Jr,	)	
Defendant.	)	

I agree to enter Intensive Supervision Court (Drug Court), and, by so doing, I understand I will have certain obligations and responsibilities. I will have to follow the orders given my by the judge, my probation officer, TASC, Drug Court staff and/or other persons involved in Drug Court.

CLIENT RESPONSIBILITIES

I understand my responsibilities are:

1. I must tell the truth;
2. I am giving up my right to a speedy trial during the time I am in Drug Court;
3. I must attend all court sessions as required;
4. I must follow the treatment plan developed by the treatment coordinator or provider;
5. I must obey all laws; if I engage in any criminal act, probation revocation proceedings may be initiated;
6. I may not move or change employment without prior staff approval;
7. I must have written permission of staff before I leave Polk County;
10. I must submit to urine samples for testing upon request;
11. I must follow the directives given me; if I fail to do so, sanctions may be imposed upon me which include, but are not limited to:
    a. community service;
    b. increased urinalysis;
    c. electronic monitoring;
    d. increased reporting to staff;
    e. alteration or imposition of curfew hours;
    f. termination from Drug Court;
    g. period of incarceration as determined by the judge.
12. I must remain drug free and my failure to do so may result in increased treatment; increased meeting attendance; increased group sessions; increased individual sessions, including any specialized mental or physical health programs I may be involved in and required to attend; incarceration; termination from Drug Court.
13. I must attend all scheduled meetings with my Probation Officer and treatment coordinator.
14. I must pay a fee of $300.00 and participate in the program for at least sixteen (16) months;
15. I must attend all schedule Court appearances.
16. **Failure to comply with any point of this contract may result in a warrant being issued for my immediate arrest.**

CLIENT RIGHTS AND BENEFITS

I understand:

1. If I successfully complete Drug Court, my probation will be assigned to general supervision probation under the Department of Corrections, unless the Court determines otherwise.
2. I may talk to my lawyer at anytime.
3. The Public Defender is appointed to represent and give me advice on Drug Court only and the case(s) under this agreement.
4. I may quit Drug Court at any time; if I do so, the original charge will be reinstated and/or probation revocation proceedings initiated.
5. The staffings and proceedings of Drug Court are not confidential but paperwork and information cannot be shared without my written consent.

I UNDERSTAND AND AGREE IF I AM TERMINATED FROM DRUG COURT, I WILL BE SENTENCED TO PRISON IF AND UPON CONVICTION AND/OR PROBATION REVOCATION

DATED: _____

_____

_____ _____

ISP Probation Officer Judge, Fifth Judicial District

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,	)	**Criminal No.**
Plaintiff,	)	
v.	)	**INTENSIVE SUPERVISION COURT RELEASE**
	)	**AGREEMENT AND ORDER**
Defendant.	)	

1. Defendant has been charged with the crime(s) of:, &

Defendant agrees to the following:

1. I will appear for all scheduled court appearances. I will maintain contact with the Intensive Supervision Court (Drug Court) and my attorney. I will keep my attorney and Drug Court staff advised of my whereabouts and my phone number at all times. Notice to my attorney for the time and place of any hearings is notice to me.

2. I will not leave Polk County, Iowa without written permission from the staff or Court. I will obey all laws. I understand that if I am arrested for any reason, this release order may be revoked. I will actively cooperate, participate and comply with all requirements of Drug Court.

3. I understand that the State will recommend I be released on any pending matters into Drug Court without bond. If I have already been released on bond, I understand that if this agreement is adopted by the Court, my previously posted bond will be released. I also understand if I violate any term of this agreement, the release order could be immediately revoked or suspended at the option of Drug Court. If that happens, I could be arrested and placed in jail immediately. I could request a new bond be set when I appear before a judge, usually within 24 hours. I also understand Drug Court uses jail as a penalty for program violations and that a short jail stay is less serious than being removed from Drug Court. I understand that if I bond out after being arrested for any reason, I am refusing to submit to drug court sanctions and I subject myself to revocation from Drug Court.

4. I further understand I could be held in contempt of Court for violating any terms of this agreement and if I was found in contempt I could be sentenced to serve six months in jail for each violation, fined up to $500 or both, even if I am found not guilty of the original charge or even if the original charge is dismissed.

5. I understand that if I am unsuccessfully discharged from probation, even after graduation from Drug Court, I will be sentenced to prison if and upon conviction for the original offense and/or upon revocation of my probation.

6. **I understand that if I am in custody, I will not be released until and at the request of the Department of Corrections. I may be required to participate in residential treatment prior to release, or I may be released to reside at a halfway house.**

I understand this agreement and I enter into it voluntarily.

_____	_____	_____
Defendant	Attorney for Defendant	Date

The State moves the Court approve the above Agreement and enter the following order:

_____
Assistant Polk County Attorney

ORDER

The above agreement is approved. Defendant is ordered to appear for all scheduled Court appearances and abide by all terms of the agreement. Defendant is released to the custody of the Department of Corrections/ Intensive Supervision Court, subject to the terms of the above agreement. If Defendant has posted bond, same is released.

Date: _____

Judge: _____
Fifth Judicial District

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,	)	**Criminal No.**
Plaintiff,	)	
v.	)	**WAIVER OF RIGHTS**
	)	
Defendant.	)	

COMES NOW, the Defendant and states:

1. I am the Defendant in this case and I understand that I have the following rights:

a. I have the right to have formal charges (an indictment or information) filed against me within 45 days of the day I was arrested, I understand that this right is called the right to speedy indictment. I waive and give up my right to speedy indictment.

b. I have the right to be brought to trial within 90 days of the day the formal charges are/were filed. I also have the right to be brought to trial within one year after I received the preliminary charges against me. I understand that these rights are called the right to speedy trial. I waive and give up my rights to speedy trial.

c. I have the right to have a list of the witnesses who the State expects to call to testify if this case goes to trial and I have a right to an outline of the expected testimony of each of these witnesses. I understand that this right is called the right to receive Minutes of Testimony. I waive and give up my right to Minutes of Testimony.

d. I have the right to ask the Court to exclude or to order the State not to mention any evidence that was collected illegally. I understand that if a judge decided that I was stopped, or searched, or questioned illegally that, at my request, any evidence recovered as a result could not be used as evidence against me. I understand that my right to ask the judge to exclude evidence is called the right to file a Motion to Suppress Evidence. I waive and give up my right to file a Motion to Suppress Evidence.

2. I give up each of these rights knowingly, voluntarily, and intelligently, and with a full understanding of the meaning of these rights and this form. I have discussed this decision with my lawyer.

3. I fully understand I may eventually be brought to trial on the charge(s) contained in the original preliminary complaint, and if such trial occurs, I give up any claim that the rights mentioned above were violated in any way.

4. I understand that by entering into this agreement, I am agreeing that if and upon revocation from Drug Court, I will be sentenced to prison upon conviction of the original charges and/or probation revocation.

Dated: _____

Signed: _____
Defendant

Signed: _____
Attorney for Defendant

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,	)	**Criminal No.**
Plaintiff,	)	**INTENSIVE SUPERVISION COURT ORDER**
v.	)	
	)	
	)	
Defendant.		

Defendant has entered the Intensive Supervision Court (Drug Court). Therefore, all pending matters are continued until further order of the Court. Any probations Defendant may be on are extended to the fullest time allowable under the law to allow Defendant to comply with and complete Intensive Supervision Court.

If in custody, Defendant is to remain in custody until such time as the Department of Corrections appears and requests Defendant's release or until further order of the Court.

SO ORDERED this _____ day of _____, 2014.

_____
JUDGE, FIFTH JUDICIAL DISTRICT

cc: County Attorney - Justin Allen
Defense - Pamela Summers
Secretary - Cheyanne Wallace
DCS-Shirley Pontious
Defendant
PCJ
Court Admin: Diane Cox

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,	)	
Plaintiff,	)	**Criminal No.**
v.,	)	**CONFESSION**
Defendant.	)	
	)	

I make this confession with the knowledge and understanding that if I am revoked from Drug Court, this confession will be used against me in the prosecution of the original charge.

I did the following act(s) to commit the crime(s) of**,** as charged in the above-referenced case(s):

____

____

____

____

____

____

____

____

____

____

____

____

____

____

____

____

____

, Defendant

I find this confession was made knowingly, voluntarily and intelligently.

____

Judge, Fifth Judicial District

5th Judicial District Intensive Supervision Probation
Drug Court Program

Drug Court is a prison diversion program in Polk County designed to aid and support offenders to overcome substance abuse problems. The objective is to return these same clients to the community as working, productive, responsible citizens.

The ISP Drug Court Program is a 16-month minimum (5-phase) program comprised of a team of representatives from the Fifth Judicial District System, Community Corrections and the Treatment Community. The team concentrates on substance abuse problems which can lead to criminal behavior; criminal behavior can be eliminated if substance abuse is reduced or stopped, which in turn decreases the need for prison space. The evidence shows Drug Courts do work.

Some exclusions do apply:

No history of violence
No prior forcible felony conviction
No parole only cases
No gang involvement or affiliation
No sex offenders
No out of state charges
No significant history of mental illness

Drug court clients are required to participate in a treatment program (usually in-patient) followed by placement at a halfway house. In Phase III or IV, clients may be allowed to move into a Freedom House or Recovery in Action, residences maintained for those in recovery. Eventually clients are allowed to move into their own homes or apartments. Prior to entering Drug Court, clients are given a set of rules which they must follow while in the program. Honesty and Recovery are first. After acceptance by the prosecutor, probation and treatment liaison, defense counsel for Drug Court goes over the paperwork and plea agreement with the client. Once the client has read, reviewed and agreed to the terms, he/she comes into Court and is formally admitted into the program.

Each phase has certain criteria which must be met prior to moving up to the next phase. Traditionally, a phase movement occurs after 3 months, although the current team has agreed on flexibility regarding movement.

Phase I begins after treatment is completed
-Must obtain a sponsor, begin working on the required 75 hours of community service
-Must attend meetings at three times a week, obtain employment

Phase II
-Continue with meetings, employment
-Work on recovery; meet with sponsor at least once a week
-Begin or continue step work (AA steps)

5th Judicial District Intensive Supervision Probation
Drug Court Program

Phase III

-Maintain employment, continue working on community service
-Step work continues as does out-patient recovery
-Maintain sponsor contact
-Communications class

Phase IV

-Must have completed 75 hours of community service to enter Phase IV
-Must have paid DOC probation supervision fee
-Continue with sponsor, meetings, employment

Phase V

-Must be in Phase V for three months and attend a graduation before YOUR graduation

Graduation

-Probation for 6 months
-Continue with all above requirements

Clients continue to participate in out-patient therapy throughout the program. They are required to attend AA/NA meetings thrice weekly, have a mentor (higher phase client in the program) and a sponsor through AA/NA. UA's are performed on a random basis at the DOC on Washington in Des Moines. Clients are offered mental health therapy, medical and dental assessments through Broadlawns, rental assistance and food stamps if they qualify. All clients are required to work at least 32 hours per week. Clients need to inform prospective employers of their criminal history as well as their Drug Court involvement. Clients with back due child support are encouraged to participate in REACH through Iowa's Child Support Recovery or the Father's Initiative at the GRUBB YMCA.

Drug Court proceedings take place every Friday morning at the Courthouse in Polk County at 8:15 am. Participants appear in court based on their phase. For example, Faze 1-every week, Phase 2-every other week, Phase 3-every third week and so on. During the proceeding, each client takes a turn in the "hot seat" and recaps their week including ups and downs. Recovery progress is the first and foremost consideration. Clients discuss work and work problems, parenting and family issues, health concerns and therapy matters. Each week, Drug Court staff is provided an update on client's progress in therapy. Each team member is encouraged to comment on a particular client's behavior of the past week.

Sanctions and Rewards

Sanctions are imposed upon clients for unsatisfactory performance, lying, out of place of assignment, etc. These include house arrest, a paper on the appropriate topic or jail.

5th Judicial District Intensive Supervision Probation
Drug Court Program

Clients are rewarded by drawing from a recovery basket which includes small gift items, candy and gift cards. Rewards are granted for small or large achievements: successful completion of a GED; providing guidance to a new client; getting no write-ups at treatment or half-way house.

Relapses do happen with clients in drug court. These clients are encouraged to re-enter the program on a "relapse basis" which involves a reassessment of treatment needs and living situation. In order to enter the relapse section of the program, the client must be honest and admit the usage. Relapses are discussed with clients during the final phases of the program. Absconding from the program after relapse does not allow for re-entry.

Several years ago, Drug Court graduates created an alumni group which meets monthly. All current clients are required to attend. The purpose of the group is to encourage peer support, provide connection and organize sober social activities. The most popular activity is the summer picnic usually held at Easter Lake.

Drug Court may appear difficult; it is meant to be hard. Most, if not all, graduates would tell you how much they derived from the program and the opportunities it offered them.

Drug Court
Referral Packet

03-06-06 DC-3F

Black Hawk County Drug Court Referral Form

Date _____ Referral Source: _____ Phone _____

Name _____ DOB _____

Address _____ How long: _____ Phone _____

With _____ Anyone in the home using drugs alcohol? _____

SS# _____ ICON # SDD: LSI-R: _____ Jesness : _____

Current Probation Offense(s) & Cause #'s Currently in Custody: Yes / No

_____

_____

_____

Sentence(s) _____

_____

_____

Pending Charge(s) & Cause #'s _____

_____

_____

Prior Offense(s) _____

_____

Probation Officer _____ Phone _____

Defense Attorney _____ Phone: _____

Substance Abuse History Drug of choice: _____ Frequency of Use: _____

First began using: _____ Prior treatment: _____

Mental Illness: _____ Medications: _____

Other Agency Involvement: _____

Employment: _____

Education: _____

_____

Other Referral Information: _____

_____

Accepted by the Court/Oversight Committee? Yes No

Disqualifying Factors: _____

_____

_____

_____

Qualifying Criteria: Defendants will be eligible for Drug Court participation based on the following criteria:

- Drug addicted offenders who can be effectively monitored through urinalysis testing.
- Drug addiction is a major contributing factor to their criminal activity as indicated by stipulation or plea
- New non-violent Felony or Aggravated Misdemeanor Offense or has a pending Probation revocation hearing
- Likely going to prison without Drug Court participation
- Resident of Black Hawk County
- Primary supervision case from Black Hawk County with at least 18 months of supervision remaining at time of acceptance into program.
- Non-violent offender, excluding simple assaults and domestic violence arrests
- Adult offender or juvenile waived to adult court

Disqualifying Criteria: Defendants will be automatically ineligible for Drug Court participation based on the following criteria:

- Current offense of Manufacturing/Delivering arrest
- Current offense is a simple or serious misdemeanor
- Alcohol is the only substance of addiction
- Violent offender; arrest for Felony w/weapon
- Current or history of a sex offense
- Confidential informants
- Pending charges from other jurisdiction

BLACK HAWK COUNTY DRUG COURT

Consent for the Release of Confidential Information

I, _____ authorize the Black Hawk County Adult Drug Court Team and:

☐ _____
(Agency)

☐ _____
(Employer)

☐ _____
(Family Members)

to communicate with and disclose to one another the following information (nature and amount of the information as limited as possible):

- my diagnosis, urinalysis results, information about my attendance or lack of attendance at treatment sessions, my cooperation with the treatment program, prognosis, and any other pertinent information regarding my involvement.

The purpose of the disclosure is to inform the person(s) listed above of my attendance and progress in treatment.

- I understand that my alcohol and/or drug treatment records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2, and the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"), 45 C.F.R. Pts. 160 & 164. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows:

_____ there has been a formal and effective termination or revocation of my release from confinement, probation, or parole, or other proceeding under which I was mandated into treatment, or

_____ _____
(Specify other time when consent can be revoked and/or expires)

I have been provided a copy of this form.

Dated: _____ _____
Signature of client

_____
Witness

Criminal Case Law Update

1:15 p.m. - 2:15 p.m.

Presented by
Hon. Mary Tabor
Iowa Court of Appeals
Iowa Judicial Branch Building
1111 East Court Avenue
Des Moines, IA 50319

Friday, April 17, 2015

Criminal Law Seminar
Case Law Update
May 2014 through April 2015

I. Constitutional Law

A. Search and Seizure
Fourth Amendment & Article I, Section 8

1. Traffic stops

a. Citizen tips

Navarette v. California, 134 S. Ct. 1683 (2014) -- Court held an anonymous 911 call "bore adequate indicia of reliability for the officer to credit the caller's account" and constituted a reliable tip. Court relied upon fact that a 911 call has "some features that allow for identifying and tracing callers, and thus provides some safeguards against making false reports with immunity," such as the fact that calls are recorded, incoming phone numbers are displayed to 911 dispatchers, and 911 systems can locate a caller's geographic location. [Iowa generally follows this principle, *see State v. Walshire*, 634 N.W.2d 625 (Iowa 2001) but not if the caller does not relay a personal observation of erratic driving. *State v. Kooima*, 833 N.W.2d 2020 (Iowa 2013).]

b. Mistake of law

Heien v. North Carolina, 135 S. Ct. 530 (2014) -- A police officer's reasonable mistake of law (here that state law required two working brake lights) may give rise to reasonable suspicion that justifies a traffic stop under the Fourth Amendment. [Iowa Supreme Court decided a mistake of law (concerning legality of tinted license plate cover) did not provide probable cause for a traffic stop under article 1, section 8 of the Iowa Constitution. *See State v. Tyler*, 830 N.W.2d 288 (Iowa 2013).]

c. Minor violations

State v. Harrison, 846 N.W.2d 362 (Iowa 2014) – Court held police officers had reasonable suspicion for traffic stop based on violation of Iowa Code section 321.37(3) which requires a frame placed around the registration plate to permit "full view of all numerals and letters printed" on the plate. In this case, the majority held that a frame that covered up the county name violated this statute and provided grounds for a traffic stop. The majority rejected Harrison's position that the legislature only intended to prohibit covering up the characters in the license plate number—deciding that "all" meant "all."

Two dissenting justices accepted Harrison's interpretation of the statute and further opined: "a countervailing policy and a larger story in this case that

should not be overlooked." Justices Appel and Hecht bemoaned the fact the defendant did not ask for the Iowa Supreme Court to depart from *Whren v. United States*, 517 U.S. 806 (1996) which allows pretexual stops under the Fourth Amendment.

2. Search incident to arrest

Riley v. California, 134 S. Ct. 2473 (2014) – The Court held the search incident to arrest exception to the warrant requirement did not apply to the contents of an arrestee's cell phone. Chief Justice Thomas wrote for a unanimous court: "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." This exception is intended to protect officer safety and to preserve evidence, neither of which was at issue in the search of the digital data within the cell phone. The Court characterized cell phones as minicomputers filled with massive amounts of private information, which distinguished them from the traditional items that can be seized from an arrestee's person, such as a wallet. The Court also held that information accessible via the phone but stored using "cloud computing" is not even "on the arrestee's person."

> *"A cell phone search would typically expose to the government far more than the most exhaustive search of a house."*
>
> *Chief Justice Roberts*

3. Expectation of privacy

State v. Lomax, 852 N.W.2d 502 (Iowa Ct. App. 2014) – Court held that the defendant/driver who was involved in a fatal car accident and receiving treatment in the hospital emergency room did not have a reasonable expectation of privacy that supported suppression of a peace officer's observations that he smelled of alcohol. A defendant has a reasonable expectation of privacy in personal belongings that are brought to the hospital, but does not have the same privacy interest in a trauma center locale which is under the exclusive control of the hospital staff.

4. Search of probationers

State v. Short, 851 N.W.2d 474 (Iowa 2014) – Court held the search of a probationer's apartment by law enforcement officers without a valid warrant violated article I, section 8 of the Iowa Constitution. Police were investigating a burglary and obtained a warrant to search the suspect's residence. The officers found missing items related to the burglary and obtained a confession from the

defendant. Later, the warrant was found to be invalid for a lack of specificity as to the place to be searched. But the officers learned the defendant was on probation for unrelated offenses. Although probation officials were contacted in connection with the burglary investigation, they did not participate in the search. The search was not a probationary search. Citing *In re Ralph*, 1 Morris 1 (Iowa 1839) and *Dred Scott*, 15 L.Ed. 644 (1856), the majority emphasized the importance of taking an independent approach under the state constitution. The majority rejected the U.S. Supreme Court's analysis in *U.S. v. Knights*, 534 U.S. 112 (2001). The majority instead revisited the holding in *State v. Cullison,* 173 N.W.2d 533 (Iowa 1970) which invalidated a warrantless search of the home of a parolee and decides it applies with equal force to probationers—under the rubric of the Iowa Constitution.

Chief Justice Cady concurred specially, also emphasizing the importance of developing a separate jurisprudence of the state constitution.

Three justices (Waterman, Mansfield and Zager) dissented, saying they would following the unanimous U.S. Supreme Court decision in *Knights* and disagree with the path being taken by the majority when it comes to expanding reliance on the state constitution. They also disagreed that *Cullison* was actually decided on state constitutional grounds, noting article I, section 8 is not mentioned anywhere in that decision.

B. Confrontation Clause Sixth Amendment & Article I, Section 10

1. Certified driving records

State v. Kennedy, 846 N.W.2d 517 (Iowa 2014) – In an appeal from a conviction for driving while revoked, Court held that certified abstracts of the defendant's driving record were not testimonial under the interpretation of the confrontation clause in *Crawford v. Washington,* 541 U.S. 36 (2004). Court rejected Kennedy's invitation to overrule *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008) in light of U.S. Supreme Court's holdings in *Melendez–Diaz v. Massachusetts,* 557 U.S. 305 (2009) and *Bullcoming v. New Mexico,* 131 S. Ct. 2075 (2011). The laboratory reports in those cases differed from the driving records in *Shipley* and the instant case. "A certified abstract of a driving record encompasses the information contained in the IDOT records. That information existed well before the alleged criminal act. The compiling of the record does not require a scientist or technician to do any tests in order to report what already exists in the IDOT records."

Court did hold that the affidavits of mailing attached to certified abstracts *were* testimonial, but their admission was considered harmless error.

2. Two-way video testimony

State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) – In serious injury by vehicle case, Court held that substituting two-way video testimony for face-to-face confrontation violated the Sixth Amendment. In reaching its conclusion,

Court found test for one-way video conferencing under *Maryland v. Craig*, 497 U.S. 836 (1990) also applies to two-way conferencing. The court observed: "Our founders presumably believed that accusers would be more reluctant to make false accusations when they were in the personal presence of the accused." Because the State did not establish a necessity for circumventing the in-person testimony requirement, for either the injured witnesses or the lab technicians, Court granted a new trial.

Justice Hecht specially concurred, disagreeing with his colleagues that video technology was inadequate and could not accomplish the objectives of confrontation, but agreeing the State failed to prove a necessity under *Craig*.

3. Statements in domestic violence prosecution

State v. Tompkins, 859 N.W.2d 631 (Iowa 2015) -- Court rejected defendant's argument that counsel was ineffective for not raising a confrontation clause objection to police officer's relaying of alleged victim's out-of-court statements reporting domestic violence. Victim recanted version of the events before trial, and defendant filed motion in limine seeking to exclude her testimony under *State v. Turecek*, 456 N.W. 219 (Iowa 1990). The State successfully moved to offer her testimony for the limited purpose of establishing the element of a domestic relationship. The State then offered her report of the assault through the officer as an excited utterance. Court found no confrontation violation based on the choice posed to defense counsel between limited cross examination of victim or recalling her in its case in chief.

C. Right to Counsel

1. Conflict of interest

***State v. Vaughan*,** 859 N.W.2d 492 (Iowa 2015) -- Court held no new trial was required when conflicted defense counsel was replaced with conflict-free defense counsel more than three months before trial and defendant did not make a showing that previous conflict adversely affected his representation on an ongoing basis. In an arson prosecution, an assistant public defender was appointed to represent Vaughan. The attorney also represented George Cline on unrelated charges. Cline told the attorney he wanted to talk to the prosecutor about Vaughan and the attorney relayed the request. Cline told authorities Vaughan had previously asked him to help set a fire for insurance fraud. The conflicted attorney participated in depositions of the fire investigator and did not withdraw from representing Vaughan until Cline was listed as a State's witness.

"[T]he absence of a Watson hearing seems beside the point when the defendant received Watson relief."

Justice Mansfield

Court reviewed relevant federal and state precedents on conflicted counsel, and noted that in *State v. Smitherman*, 733 N.W.2d 341 (Iowa 2007), it had acknowledged its holding in *State v. Watson*, 620 N.W.2d 233 (Iowa 2000) under the Sixth Amendment was impacted by U.S. Supreme Court holding in *Mickens v. Taylor*, 535 U.S. 162 (2002) but left to another day whether it survived on state constitutional grounds. Here, Court decided the appointment of new counsel remedied any potential or actual conflict and lack of formal*Watson* hearing did not require new trial.

Two justices, Appel and Hecht, filed a special concurrence discussing the duty of loyalty, stating: "it is astonishing that a lawyer representing an accused in a criminal matter would facilitate the discovery of evidence by the prosecution adverse to his or her client. "

2. Ineffective assistance of counsel

a. Absence from proceedings

Woods v. Donald, 575 U.S. ___ (2015) – In federal habeas case, Court held trial attorney was not per se ineffective under *United States v. Cronic*, 446 U.S. 648 (1984) when he was absent during ten minutes of testimony concerning other defendants. *Cronic* applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."

b. Misadvice about plea offer

Dempsey v. State, ___ N.W.2d ___ (Iowa 2015) – Court held petitioner was not prejudiced by counsel providing him inaccurate information that he faced up to seventeen years in prison, when he really only faced sixteen years. Defendants are entitled to effective assistance of counsel during plea bargaining stage. To demonstrate prejudice during the plea bargaining process, the defendant must show the outcome of the process would have been different with competent advice. "A significant disparity between the actual sentencing exposure faced by a defendant and the sentencing exposure counsel represents to the defendant is a factor we must consider. However, we cannot conclude counsel's errors in this respect, standing alone, objectively demonstrate a reasonable probability Dempsey would have accepted the first plea offer absent these deficiencies."

c. Abandoning *Strickland* under Iowa Constitution?

State v. Halverson, 857 N.W.2d 632 (Iowa 2015) – Defendant was convicted of possessing marijuana at a residential facility in violation of Iowa Code section 719.7(3). Court held trial counsel was ineffective for not asserting lack of evidence to show community-based residential facility was under the management of the Department of Corrections. In doing so, Court referred to other state courts which have not utilized the standard under *Strickland v.*

Washington, 466 U.S. 668 (1984), but noted defendant did not ask for a different interpretation under the Iowa Constitution.

Two justices (Mansfield and Waterman) filed a special concurrence to express concern Court was "laying groundwork for adopting, sua sponte, a new doctrine of ineffective assistance under the Iowa Constitution." The concurrence opined: "our court should only be deciding the case before it, not planting a flag for possible future decisions."

3. Misdemeanor pleas/enhancement

State v. Young, ___ N.W.2d ___ (Iowa 2015) – Court held that a misdemeanor conviction pursuant to a guilty plea by an indigent defendant who was incarcerated and who did not have the assistance of counsel could not serve as the predicate offense for a later enhancement of a theft offense. Court looked to two separate Iowa constitutional provisions: article I, section 10 (involving the right to counsel) and article I, section 9 (addressing due process). Court reasoned: "If the failure to provide appointed counsel to a poor person in a misdemeanor case violates the right to counsel in article I, section 10, it would be fundamentally unfair under the due process clause of article I, section 9 to use that conviction to enhance a later crime." Court then overruled *State v. Allen*, 690 N.W.2d 684 (Iowa 2005) in which Justice Streit had written for a unanimous court that the Iowa Constitution did not forbid use of prior uncounseled misdemeanor conviction for enhancement for later conviction so long as defendant was not incarcerated for prior conviction.

"[P]oor people cannot afford lawyers. And lawyers can be important, even in misdemeanor cases."

Justice Appel

Three justices (Waterman, Mansfield and Zager) concurred in the result only. Justice Mansfield filed a special concurrence, asserting the Court could have reached the same result relying on Iowa Rule of Criminal Procedure 2.61(2) and did not need to decide the case on state constitutional grounds. Justice Zager also concurred specially to say he was confident the district court made proper inquiries regarding the waiver of counsel in the earlier case, but Court had no record of this.

D. Cruel and Unusual Punishment
Article I, Section 17

State v. Lyle, 854 N.W.2d 378 (Iowa 2014) – A four-justice majority of the Court decided the cruel-and-unusual punishment provision of the Iowa Constitution was violated by all mandatory minimum sentences of imprisonment for defendants who were juveniles when they committed their crimes. The remedy for the unconstitutional sentences was a remand for resentencing so that trial court could consider other sentencing options.

The majority provided a history of juvenile sentencing and discussed recent federal and state case law finding life without parole sentences for juveniles to be unconstitutional. It then reasoned that the principles in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *State v. Null*, 836 N.W.2d 41 (2013) applied to even a short sentence that deprived the district court of discretion in crafting a punishment that best served the interest of the child and society. The majority held "a mandatory minimum sentencing schema, like the one contained in section 902.12, violates article I, section 17 of the Iowa Constitution when applied in cases involving conduct committed by youthful offenders." The majority further said: "Even if the resentencing does not alter the sentence for most juveniles, or any juvenile, the action taken by our district judges in each case will honor the decency and humanity embedded within article I, section 17 of the Iowa Constitution and, in turn, within every Iowan."

"On remand, judges will do what they have taken an oath to do. They will apply the law fairly and impartially, without fear. They will sentence those juvenile offenders to the maximum sentence if warranted and to a lesser sentence providing for parole if warranted."

Chief Justice Cady

The majority explained its holding had no application to adult offenders because "lines are drawn in our law." The majority also declined to reach the question whether a trial court may impose a sentence that denies a juvenile the opportunity for parole in the absence of a statute requiring such a result.

Both Justice Waterman and Justice Zager filed dissents which were joined by Justice Mansfield. They expressed the opinion that Iowa's elected representatives, and not members of the Court, were "best equipped to decide values are embedded within every Iowan." They also opined that the majority's position "has no constitutional support in federal jurisprudence or our own jurisprudence."

II. Evidentiary Issues

A. Expert Testimony – Impermissible Vouching

Iowa Rule of Evidence 5.702 permits expert opinion testimony "if ... specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

State v. Dudley, 856 N.W.2d 668 (Iowa 2014) – Court reiterated principles of *State v. Myers*, 382 N.W.2d 91 (Iowa 1986): expert witness may express opinions on matters that explain relevant mental and psychological symptoms present in abuse victims, but may not either directly or indirectly render an opinion on the truthfulness of a witness. In this case, therapist testified that child's physical manifestations and symptoms were "consistent with a child dealing with and suffering from sexual abuse trauma." Court held that testimony "crossed the line" into impermissible indirect vouching. Court also held some statements by forensic interviewer were inadmissible. For example, interviewer's statement that she recommended therapy for the child crossed the line because it meant the interviewer believed the child was sexually abused and therefore indirectly vouched for her credibility.

> *"To put it another way, the expert is saying these symptoms mean the child suffered a sexual abuse trauma; therefore, the child must be telling the truth when he or she relates his or her story to the jury. It is the jury's function to determine if the victim is telling the truth, not the expert witness's."*
>
> *Justice Wiggins*

Two other cases, ***State v. Brown***, 856 N.W.2d 685 (Iowa 2014) and ***State v. Jaquez***, 856 N.W.2d 663 (Iowa 2014), were released the same day and presented similar issues of impermissible vouching.

B. Prior Bad Acts

Iowa Rule of Evidence 5.404(b) prohibits admission of prior bad acts evidence for purposes of proving character, but allows the evidence for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1. Possession of child pornography

State v. Putman, 848 N.W.2d 1 (Iowa 2014) – A four-justice majority held the district court did not abuse its discretion in admitting evidence defendant possessed two videos with titles describing pornography involving very young children. The victim in this case was two years old. As far as relevance, the majority found there was an "undeniable similarity between the two videos and the act for which Putman was on trial." As far as balancing, the majority

found limited nature of the testimony about the videos muted their prejudicial impact. The majority cautioned "not all evidence that a defendant possesses child pornography is admissible as prior-bad-acts evidence" in child sexual abuse cases.

Justices Wiggins, Appel, and Hecht dissented. Justice Wiggins suggested the majority's holding would allow the State to use "a person's reading of the book *Lolita* to convict that person of underage sexual abuse." Justice Hecht opined that based on available social science, possession of child pornography was not strong evidence supporting the identity of the rapist.

2. Gang affiliations

State v. Caples, 857 N.W.2d 641 (Iowa Ct. App. 2014) -- The Court decided the evidence of the rival gang affiliations of the defendant and murder victim was not admissible as an exception to the character evidence rule under the doctrine of evidence inextricably intertwined with the story of the crime. While the gang affiliations held some explanatory power, the exclusion of the evidence would not have left the story unintelligible, incomprehensible, confusing or misleading. But the evidence was relevant to the motive for the murder and its probative value was not outweighed by unfair prejudice. Limited evidence was offered and did not emphasize violence or gang activities. The trial court's delicate balancing was not an abuse of discretion.

Moreover, the State offered overwhelming evidence of guilt, so the gang affiliation testimony could be considered harmless.

C. Authentication and Foundation

Iowa Rule of Evidence 5.901 requires authentication or identification of documents as a condition precedent to their admissibility.

State v. Burgdorf, ___ N.W.2d ___ (Iowa Ct. App. 2014) -- Court found the State failed to establish a foundation for the admission of electronic pseudoephedrine tracking records otherwise known as NPLEx (National Precursor Log Exchange System) exhibits when the only witnesses called to testify about the records were a special agent and a police sergeant, who admitted lacking knowledge of how the system operates. To lay foundation, the State would have had to call someone who entered the data from which the logs were compiled (like a pharmacist or retailer) or a custodian of the records from the Governor's Office of Drug Control Policy.

III. Jury Instructions

A. Intoxication instruction

State v. Guerrero Cordero, ___ N.W.2d ___ (Iowa 2015) – Court held district court did not abuse its discretion in declining to give intoxication instruction in first-degree murder and attempted murder prosecution. The shootings occurred on July 4th. The defendant had been drinking beer with

friends at two car repair shops throughout the day. But several witnesses testified he did not seem intoxicated. Police found unopened and opened beer cans in his truck after he shot and killed one person and seriously injured another. Only one witness testified that the defendant was "probably" intoxicated at the time of the confrontations, and that witness admitted that he himself was intoxicated. Court explained that it has traditionally required a high level of intoxication to support the finding of no specific intent and a jury question is presented only if the degree of intoxication would negate the formation of specific intent.

B. Superfluous jury instructions

State v. Thorndike, ___ N.W.2d ___ (Iowa 2015) – In an appeal challenging a conviction for lascivious acts with a child, Court held defendant did not show he was prejudiced by counsel's failure to object to the inclusion of two alternative theories in the marshalling instruction, only one of which was supported by the evidence. (Two theories were that defendant fondled or touched victims' genitals or defendant permitted victims to fondle or touch his genitals). Court held "even if counsel had objected to the superfluous alternative offered in the lascivious-acts jury instruction 1(a), we are not convinced on this record there is a reasonable probability the outcome of the proceeding would have been different." Court did not discuss or even cite *Griffin v. United States*, 502 U.S. 46 (1991), which Court of Appeals decision said was controlling case. [In *Griffin*, US Supreme Court held a general verdict need not be set aside "because one of the possible bases of conviction was ... unsupported by sufficient evidence."]

C. Order of jury instructions

State v. Ambrose, ___ N.W.2d ___ (Iowa 2015) – Court upheld murder conviction over challenges to the sequence of the homicide instructions and several inference-of-malice instructions. Court found error was not preserved by objections at trial, so analysis was under ineffective-assistance rubric. Challenge on appeal was to instruction which told the jurors to consider lesser include offenses only if they unanimously decided defendant was not guilty of offense charged. Court did not decide correctness of acquittal-first instruction. But given strength of the evidence that defendant went armed to the residence, intending to do "extreme violence" and the weakness of the provocation evidence, Court found no prejudice. Court also expressed concern about repetitious nature of inference-of-malice instructions, but found no prejudice under these facts.

The real fight came in the special concurrences. Justice Wiggins, joined by Justice Appel, disagreed with the majority's statement that the Court was "slow to disapprove of uniform jury instructions. " They further explained: "A committee of the Iowa State Bar Association writes the instructions. The president of the bar association appoints the committee members. We do not have any oversight over the process. Second, we never intended the bar association's instructions to have a presumption of correctness." Justice

Waterman specially concurred separately "to respond to the special concurrence that gratuitously denigrates the long-standing reliance by the bench and bar on the uniform jury instructions promulgated by the Iowa State Bar Association (ISBA)."

IV. Specific Offenses

A. Burglary

Iowa Code § 713.6A

State v. Alexander, 853 N.W.2d 295 (Iowa 2014) – Court of Appeals held that defendant's entry into motor home when no one was present constituted a burglary involving an unoccupied motor vehicle, and thus should have been classified as an aggravated misdemeanor rather than a felony. Court noted section 713.6A(2) concerns the burglary of an "unoccupied occupied structure." Because "an unoccupied occupied structure is self-contradictory in a plain-language sense" the court found the statute ambiguous, and engaged in statutory construction. Court looked to public policy underlying burglary statute, and determined legislature meant to punish more dangerous situation of entering when someone was present more harshly than entering when no one was inside the mobile home.

B. Criminal Transmission of HIV

Iowa Code § 709C.1 [repealed effective May 30, 2014]

Rhoades v. State, 848 N.W.2d 22 (Iowa 2014) -- Court held record did not establish a factual basis for defendant's guilty plea to criminal transmission of HIV. Court held it was not able to take judicial notice that an individual infected with HIV could transmit the virus by engaging in protected anal sex or unprotected oral sex, regardless of the infected person's viral load.

Justice Mansfield specially concurred to say that he found no fault in the performance of Rhoade's defense counsel. He explained: "In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa." Justice Zager dissented; he believed a factual basis existed for the guilty plea.

C. Felon in Possession

Iowa Code § 724.26

State v. Olsen, 848 N.W.2d 363 – A four member majority of the Court held defendant's no-contest plea and deferred judgment received in Wisconsin prosecution constituted a felony under Iowa law and triggered the prohibitions of the felon-in-possession statute. Majority applied the principles of *State v. Deng Kon Tong*, 805 N.W.2d 599 (Iowa 2011) which held a person subject to probation for an Iowa deferred judgment could not possess a firearm.

Three dissenting justices (Hecht, Wiggins and Waterman) did not believe Olsen was a felon in Iowa. They faulted the majority for looking beyond the

Wisconsin court's declaration that no conviction resulted from the no-contest proceeding.

D. Harassment

Iowa Code § 708.7

In re D.S., 856 N.W.2d 348 – In juvenile delinquency appeal, Court held State presented insufficient evidence of harassment. Court found the evidence did not prove D.S. purposefully or intentionally made personal contact with a classmate with the specific intent to threaten, intimidate or alarm. The alleged victim, T.S., testified at the adjudication hearing that D.S. called her a "bitch" and a "fat skank" and told her she could "go die in a hole." T.S. said she went home and cried after the incident. T.S. also testified D.S. bullied her in the past. Court said that while it did not condone the behavior, it could not conclude D.S. had the specific intent necessary under the harassment statute.

E. Kidnapping

Iowa Code § 710.1

State v. Robinson, 859 N.W.2d 464 (Iowa 2015) – Court explored the history of kidnapping laws and reiterates the three-prong test for confinement and removal articulated in *State v. Rich*, 305 N.W.2d 739 (Iowa 1981): "Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse . . . . Such confinement or removal may exist because it *substantially* increases the risk of harm to the victim, *significantly* lessens the risk of detection, or *significantly* facilitates escape following the consummation of the offense." In this case, Robinson tossed the victim's cell phone behind a chair, locked the apartment door, covered her mouth, moved her down the hall and into the bedroom, and locked the bedroom door before forcing the victim to engage in sex acts. Court found those actions did not meet the *Rich* test and thus did not provide a sufficient basis to allow the jury to regard the case as presenting more than sexual abuse nor did the actions justify the substantially harsher penalties associated with kidnapping.

> *"It's hard to say the few extra seconds of confinement within the apartment significantly increased the risk of harm to the victim."*
>
> *Justice Appel*

Justice Wiggins filed special concurrence finding defendant's pro se brief preserved claim of ineffective assistance of counsel for not objecting to jury instructions. The concurrence advised trial courts to reformulate the ISBA's uniform instruction on kidnapping to conform with the holding in this case and

include the concept that the confinement of the victim must *substantially* increase the risk of harm, *significantly* lessen the risk of detection, or *significantly* facilitated the risk of escape.

F. Operating While Intoxicated

Iowa Code § 321J.2

1. Independent breath test

State v. Lukins, 846 N.W.2d 902 (Iowa 2014) – Four-justice majority of the Court held defendant implicated his right to an independent chemical test under Iowa Code section 321J.11 by repeatedly asking officers if he could "get a re-check" on his breath test. The breath test at the county jail registered a .207 BAC. Lukins told the police chief that seemed "really fucking high" for having drank a six pack. The majority likened the request for an independent test to the right to a phone call under Iowa Code section 804.20. The police do not need to tell the detainee of the right to an independent test, but must honor an invocation of that right. The majority stated: "we see no reason why a detainee should be required to string together a precise formulation of words mirroring the statutory language in order to invoke his or her statutory right to an independent chemical test."

As a remedy, the majority decided to suppress the results of the breath test. The majority also rejected the State's harmless error argument, noting the court's verdict following a bench trial on the minutes of evidence did not include any findings of fact.

Justice Waterman wrote a dissent, joined by Chief Justice Cady and Justice Mansfield. The dissenters believed the majority "erroneously requires suppression of a perfectly valid breath test that showed Lukins's blood alcohol level was more than two and one-half times the legal limit."

2. Statutory right to counsel

State v. Hellstern, 856 N.W.2d 355 (Iowa 2014) – Court held obligation of arresting officer under Iowa Code section 804.20 to facilitate communication between an attorney and person arrested for OWI includes the requirement of private, in-person consultation—once the defendant makes that request. In this case, during the phone call with his attorney, the defendant asked the officer: "Can I have a moment with my attorney?" Section 804.20 expressly provides a right to a confidential consultation between an attorney and client at the jail to be conducted "alone and in private." Court held that defendant adequately invoked that right to private consultation, triggering the officer's duty to inform him that the attorney must come to the jail for a confidential conference. Court remanded for a new trial.

Chief Justice Cady, joined by Justice Zager, wrote separately to express the view that peace officers should be required to advise an arrested person of the statutory right to counsel.

3. Implied consent law

State v. McIver, 858 N.W.2d 699 (Iowa 2015) Court held that implied consent law, Iowa Code section 321J.6(2), required drivers to submit to multiple testing request when they are suspected to be under the influence of drugs other than alcohol. In this case, the arresting officer asked for a breath test, and the defendant asked for a blood test because she was taking a prescription drug. The officer told her she could have a blood test after submitting to the breath test. She declined to take a breath test. Court concluded officer was not required to request blood or urine under these circumstances.

Three justices, Wiggins, Hecht and Zager, dissented on the implied consent testing issue. The dissent agreed the defendant's refusal to take a breath test should be admissible, but believed that she could only be convicted under the OWI alcohol alternative.

G. Possession of Drugs with Intent to Deliver

Iowa Code § 124.401

State v. Thomas, 847 N.W.2d 438 (Iowa 2014) – A four-person majority of the Court held the State presented sufficient evidence to support convictions for possession with intent to deliver marijuana and crack cocaine. The record showed the police entered an apartment occupied by several individuals, including the defendant. Defendant and a companion ran into the bedroom and held the door shut so police could not enter. After police pushed through, they found packages of marijuana and crack cocaine where the defendant had been standing. Defendant gave a false name and lied about having a warrant out for his arrest. Others in the apartment denied possession of the drugs. The majority reviewed constructive possession cases and cases finding circumstantial evidence to support actual possession of contraband. The majority decided these facts fit "comfortably among our precedents where we have found evidence sufficient to sustain a finding of guilt."

The majority also rejected a *Batson* challenge by the defendant, who was African American, finding the State provided a race-neutral reason for striking the only minority member of the jury panel. The reason was the potential jury "was very emphatic in shaking his head" when asked about police officers' credibility.

Justice Hecht wrote a dissent, joined by Justices Wiggins and Appel. The dissenters did not believe that the evidence supported constructive possession or circumstantial evidence of actual possession under state precedents. The dissent then opined that "it was prudent to note that as of mid-year 2013, there were approximately 1860 individuals incarcerated in Iowa prisons for drug offenses as their most serious offense." The dissent described constructive possession as a court-made doctrine and expressed the desire to be "careful gatekeepers" of the doctrine to help prevent overcrowding the prisons with drug offenders, who were disproportionally African American.

H. Sexual Exploitation by Counselor or Therapist

Iowa Code § 709.15

State v. Edouard, 854 N.W.2d 421 (Iowa 2014) – A fractured court found sufficient evidence to sustain pastor's convictions on four counts of sexual exploitation by a counselor or therapist. Court concluded that a counselor or therapist within the meaning of the statute did not limit defendant's counseling as a pastor to modern psychological principles and methods. Court held the emotionally troubled female parishioners with whom the defendant initiated sexual relations were "patients or clients" within the meaning of the statute. Court reasoned that "[e]ven if the theological community were in agreement that Edouard's actions did not amount to pastoral counseling, that would not resolve whether Edouard's actions fit within the statutory definition of mental health services.

> *"'Counseling' is certainly a word of ordinary usage. Thus, it did not need to be specially defined for the jury unless the legislature meant to use it in a technical way in section 709.15 or viewed it as a legal term of art We do not believe the legislature had such a view of 'counseling.'"*
>
> *Justice Mansfield*

The defendant also raised constitutional challenges, alleging the prosecution violated his "fundamental right to enter into sexual relationships" and due process. Court rejected those claims applying the same analysis to both the state and federal provisions.

Justice Appel concurred specially (joined by Cady, Wiggins and Hecht) to discuss the state constitutional claims. They reiterated: "Where a party raises issues under the Iowa Constitution and the Federal Constitution, but does not suggest a different standard be applied under the Iowa Constitution, we generally apply the federal standard. This comes, however, with an important and indeed critical caveat, namely, that we reserve the right to apply that standard differently than its federal counterpart." Justice Hecht (joined by Wiggins) dissented in part, opining that proposed expert testimony on pastoral counseling should have been admitted.

V. Guilty pleas and sentencing

A. Record of reasons for sentencing

State v. Thompson, 856 N.W.2d 915 (Iowa 2014) – Court interpreted Iowa Rule of Criminal Procedure 2.23(3)(d) to require the judge in a sentencing order to include in his or her sentencing order the reason for the sentence when the defendant waives the reporting of the sentencing hearing. Court reasoned: "In this age of word processing, judges can use forms, such as the one available in

this case, to check the boxes indicating the reasons why a judge is imposing a certain sentence. If the choices in the order need further explanation, the judge can do so by writing on the order or adding to the order using a word processing program. If the sentencing order does not have boxes similar to the ones in this case, the judge can use his or her word processor to insert the reasons for a particular sentence." Court overruled *State v. Mudra,* 532 N.W.2d 765 (Iowa 1995) and *State v. Alloway,* 707 N.W.2d 582 (Iowa 2006) which required defendant to provide a record of the sentencing errors on appeal.

B. Reasons for Resentencing and Need to Update PSI

***State v. Hopkins*, ___ N.W.2d ___ (Iowa 2015)** -- In an appeal from resentencing following the reversal of one of six drug convictions, Defendant claimed the district court abused its discretion because her new sentence was the same as her original sentence. She argued the court did not give proper weight to her postconviction rehabilitation efforts, citing *Pepper v. United States*, 131 S. Ct. 1229 (2011). Court distinguished *Pepper* because it dealt with the federal sentencing guidelines and because it simply *permitted* and did not require postsentence rehabilitation to result in a downward variance.

Court also preserved for postconviction relief proceedings a claim that counsel was ineffective for not requesting an updated presentence investigation report.

C. Authority to Suspend Sentence

State v. Rouse, 858 N.W.2d 23 (Iowa Ct. App. 2014) – Court of Appeals held district court lacked authority to suspend defendant's sentence for serious injury by vehicle under Iowa Code section 707.6A(7) because his crime "involved" the operation of a motor vehicle while intoxicated. Court also rejected his equal protection challenge.

D. Sex Offender Registration

In re A.J.M., 847 N.W.2d 601 (Iowa 2014) – Court held juvenile court's failure to make specific finding that juvenile was not likely to reoffend when granting waiver of the sex offender registration requirements required a remand. Iowa Code section 692A.103(1) requires juveniles sex offenders to register. The requirement can be waived for juvenile offenders if they were less than fourteen years of age at the time of the offense or were not adjudicated for a sex offense "committed by force or the threat of serious violence, by rendering the victim unconscious, or by involuntarily drugging the victim." Court opined that the legal standard for waiver is guided by public protection.

Justice Zager filed a dissent, joined by Justice Waterman. They would find the district court abused its discretion in waiving the registration requirement and do not believe a remand is necessary.

E. Merger issues under Iowa Code § 701.9

State v. Stewart, 858 N.W.2d 17 (Iowa 2015) -- Court held offense of possession of controlled substance under Iowa Code section 124.401(5) did not merge with offense of introduction of a controlled substance into a detention facility under Iowa Code section 719.8. Court held it was not legally impossible to commit the greater crime charged without committing the lesser crime charged.

State v. Love, 858 N.W.2d 721 (Iowa 2015) – Court merged convictions for willful injury and assault with intent to commit serious injury. Although the evidence offered at trial was sufficient to support multiple criminal acts under *State v. Velez*, 829 N.W.2d 572 (Iowa 2013) and its progeny, the jury was not instructed that there were two or more separate and distinct acts.

Justice Mansfield concurred specially, setting out how the court's multiplicity cases should be interpreted. He noted that if the State wants to avoid merger, "it must ensure the defendant is charged and the jury is instructed in a way that requires a finding of separate conduct for each conviction."

Evidence Update

2:15 p.m. - 3:15 p.m.

Presented by
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Evidence Update
2015 Criminal Law Seminar
Iowa State Bar Association

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April 17, 2015

I. Introduction

This Update covers evidentiary developments during the past five years (2010-2015). Part II describes evidence decisions rendered by the Iowa Supreme Court during that time period that are relevant to criminal practice. Part III briefly reviews U.S. Supreme Court and Iowa precedent concerning Confrontation Clause limits on the admission of hearsay evidence against a criminal defendant. Part IV examines a very recent decision of the U.S. Supreme Court and Eighth Circuit concerning juror dishonesty during voir dire. Finally, Part V outlines recent amendments to state and federal evidence rules.

II. Iowa Supreme Court Evidence Decisions: 2010-Present

A. Motions *In Limine* and Failure to Preserve Error—Rule 5.103

1. State v. Derby, 800 N.W.2d 52 (Iowa 2011)—Prior Convictions.

In *Derby*, the Iowa Supreme Court was asked to depart from the requirement that a defendant testify in order to preserve error to challenge the use of a prior conviction for impeachment. Although the Court recognized that this requirement presents criminal defendants with "a Hobson's choice between remaining silent or testifying in [their] own defense at the price of opening the door to impeachment evidence informing the jury of [their] prior crimes," the Court found "no persuasive reason to depart from stare decisis" and the approach followed by a majority of the states and the federal courts under *Luce v. U.S.*, 469 U.S. 38 (1984). According to *Derby*, three reasons support its decision: "(1) to hold otherwise permits the accused to plant reversible error merely by not testifying, (2) the defendant's harm—the admission of the evidence—is entirely speculative absent the defendant's testimony, and (3) without the defendant's testimony there is not an adequate record to perform a harmless-error analysis." Id. at 54-55. Thus, a defendant must testify and confront the prior conviction evidence at trial in order to preserve error regarding a trial court's Rule 5.609 decisions.

2. State v. Harrington, 800 N.W.2d 46 (Iowa 2011)—Prior Convictions.

In *Harrington*, the Court held that a defendant may preserve error regarding a district court's *in limine* ruling by disclosing his prior conviction on direct examination. Id. at 48. That is, a criminal defendant does not waive his objection to the court's ruling on his motion *in limine*, seeking to exclude evidence of a prior conviction for impeachment purposes, by preemptively acknowledging that conviction in his case in chief. In that regard, Iowa practice differs from the

federal approach taken in *Ohler v. U.S.*, 529 U.S. 753, 759 (2000) (concluding that "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error").

3. Quad City Bank & Trust v. Jim Kircher & Assocs., 804 N.W.2d 83 (Iowa 2011).

In *Quad City Bank*, the Court elaborated on the steps a party must take to preserve error after the trial court has sustained a motion *in limine* excluding evidence. The Court noted the general rule that "error claimed in a court's ruling on a motion *in limine* is waived unless a timely objection is made when the evidence is offered at trial." Id. at 89. In contrast, the general rule is not applied where the trial court's *in limin*e ruling definitively determines the underlying admissibility issue.

The Court in *Quad City* applied both the general rule and its exception to an *in limine* ruling concerning testimony of a certified fraud examiner offered by a bank in its accounting malpractice suit. In that case, the defendant auditors moved to exclude the expert's testimony concerning two related issues: (1) whether the defendants breached generally accepted CPA auditing standards and (2) whether the accountant's work papers contained inconsistencies and inaccuracies. In granting the motion *in limine* as to the first issue, the trial court "did not equivocate or state it would reconsider its ruling at trial." Id. at 90-91. Because that ruling was "definitive and reached the ultimate issue of admissibility," the bank had preserved error without needing to renew its request to present the expert's testimony. Id. at 91. On the second issue, however, the trial court appeared to "equivocate" concerning the scope of its *in limine* ruling and thus "left open" the question of whether the bank could offer the expert's testimony concerning the work papers. Id. Because the general rule applied to that second issue, the bank was required to make an offer of proof at trial, offer the expert's testimony on the work paper issue, and obtain a definitive trial court ruling on its admissibility. Although the bank had made an offer of proof, it failed to offer the testimony contained in that offer or obtain a trial court ruling on its admissibility and thus had failed to preserve error on the work paper issue. Id. at 92.

4. State v. Elliott, 806 N.W.2d 660, 669 (Iowa 2011).

The *Elliott* Court discussed the appellate standard for assessing whether the admission of cumulative hearsay evidence constitutes prejudicial error. The Court noted that hearsay rulings merit a different standard of review than other evidentiary rulings "because admission of hearsay evidence is prejudicial to the non-offering party unless the contrary is shown." Id. at 667.

B. Judicial Notice—Rule 5.201

1. Rhoades v. State, 848 N.W.2d 22 (Iowa 2014).

In *Rhoades*, the Iowa Supreme Court discussed whether judicial notice could be used to establish the factual basis for a guilty plea to the crime of criminal transmission of the human immunodeficiency virus (HIV). The defendant Rhoades argued that his trial counsel had provided ineffective assistance of counsel by allowing him to plead guilty to that crime because the factual record failed to demonstrate that Rhoades intentionally exposed the victim to his bodily fluid in a manner that could reasonably result in the transmission of HIV. The case turned

on whether judicial notice of this "adjudicative fact" could supply the necessary record support for the plea.

In three prior cases, the Iowa Supreme Court had already taken judicial notice that "HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus." *See* State v. Stevens, 719 N.W.2d 547, 550-51 (Iowa 2006); State v. Musser, 721 N.W.2d 734, 747 (Iowa 2006); State v. Keene, 629 N.W.2d 360, 365-66 (Iowa 2001). In *Rhoades*, however, the Court limited judicial notice of adjudicative facts (i.e., facts that concern the immediate parties) to the particular proceeding in which it is taken. Accordingly, "judicial notice of an adjudicative fact in one proceeding does not automatically apply to a future proceeding." Rhoades, 848 N.W.2d at 31. Instead, the same principles that supported judicial notice in the earlier proceedings must continue to support judicial notice of the same fact in the present case. Id.

The Court noted that judicial notice under rule 5.201 requires a "high degree of indisputability." Id. It further recognized the "great strides in the treatment and the prevention of the spread of HIV" that had occurred since its prior decisions in 2006 and 2001. Id. at 32. Those medical advances generated a reasonable dispute regarding whether "it was medically true a person with a nondetectable viral load [like Rhoades] could transmit HIV through contact with the person's blood, semen or vaginal fluid or whether transmission was merely theoretical." Id. at 33. Thus, because the essential causal link was no longer indisputable, judicial notice could not provide a factual basis for Rhoades' guilty plea. Id. The Court reversed the judgment and set aside Rhoades' sentence. It remanded the case so that the district court could enter judgment finding Rhoades' trial counsel ineffective and afford the State another opportunity to establish the factual basis for Rhoades' guilty plea. Id. at 33.

C. Relevance; Undue Prejudice—Rules 5.401, 5.402, 5.403

1. Cumulative Evidence: State v. Ross, 845 N.W.2d 692 (Iowa 2014) (adopting as its final decision, State v. Ross, 837 N.W.2d 680 (Table), 2013 WL 3456971, at *4-5 (Iowa Ct. App. July 10, 2013).

In *Ross*, a defendant accused of first degree murder sought to support his justification defense by offering photographs that showed a number of prior gunshot wounds on his body. The trial court excluded the photos, but permitted the defendant to testify in some detail about the number and location of his prior wounds. In affirming the trial court on this ground, the Court of Appeals, in an opinion later adopted by the Iowa Supreme Court, held that the trial court had discretion to exclude the photos under rule 5.403 because the photos were cumulative of the defendant's testimony. Ross, 2013 WL 3456971, at 5 (adopted by State v. Ross, 845 N.W.2d 692, 697 (Iowa 2014)).

2. Administrative Findings:

In both *State v. Huston*, 825 N.W.2d 531 (Iowa 2013) and *In re Detention of Stenzel*, 827 N.W.2d 690 (Iowa 2013), the Iowa Supreme Court addressed the undue prejudice that can result from evidence that a purportedly unbiased government agency has previously made findings or determinations relevant to the case at hand.

a. State v. Huston, 825 N.W.2d 531 (Iowa 2013).

The defendant in *Huston* was one of several adult caregivers for a severely malnourished five-year-old girl. At the urging of the child's doctor, the Iowa Department of Human Services (DHS) removed the child from the defendant's home and began an abuse investigation. The defendant and her husband were eventually charged with child endangerment. Over defendant's objection, a DHS caseworker testified that the child abuse report against defendant was "founded" and then went on to describe the process for appealing an administrative finding of child abuse. The defendant was convicted of child endangerment causing serious injury. The Iowa Supreme Court reversed defendant's conviction, holding that the DHS caseworker should not have been permitted to testify that the DHS child abuse report was "founded."

In so holding, the Court reiterated the two-step test for determining whether to exclude relevant evidence under Iowa Rule of Evidence 5.403. That analysis requires that a trial court balance (1) the probative value or force of the challenged evidence against (2) the danger of its prejudicial or wrongful effect on the trier of fact. *Huston*, 825 N.W.2d at 537.

As to probative value, the State had argued that the caseworker's testimony explained why the DHS had removed the child from the defendant's home. The Court noted, however, that the child had been removed from the defendant's home before the DHS had determined that the allegations of abuse were founded. The caseworker thus could have provided the necessary context to DHS' actions without telling the jury that the agency eventually verified the report. Accordingly, the Court ascribed "no probative value to the DHS determination the abuse report against [defendant] . . . was founded." *Id.*

Moreover, the evidence of the "founded" child abuse report was unfairly prejudicial because of the risk that the jury would substitute the DHS determination for its own finding of guilt or that it would give the DHS report, which had the imprimatur of an unbiased government agency, undue weight. *Id.* at 539. The Court supported its holding with numerous federal authorities (including one from the Eighth Circuit Court of Appeals) that acknowledge the danger that a jury will be unfairly influenced by the findings or determinations of an administrative agency. *Id.* at 538–39 (citing, among other authorities, Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309–10 (8th Cir. 1984)). This prejudice was exacerbated in *Huston* by the caseworker's testimony describing the right to appeal DHS determinations. According to the Court, the jury could have inferred Huston's guilt by the absence of a successful appeal reversing the agency determination. *Id.*

Finally, the *Huston* court noted that the prejudice resulting from the testimony of the DHS caseworker was not adequately mitigated by evidence regarding the lower burden of proof for agency determinations. *Id.* Nor would a limiting instruction, if given, have adequately cured the unfair prejudice. *Id.* (rejecting holding of some courts that have allowed testimony regarding administrative determinations if accompanied by a curative instruction). After concluding that the trial court's error was not harmless, the Court reversed and granted Huston a new trial.

b. In re Detention of Stenzel, 827 N.W.2d 690 (Iowa 2013).

The Court reached a similar holding in *In re Detention of Stenzel*. In that case, a sexually violent predator (SVP) civil commitment proceeding, the district court permitted the State's expert to testify how the State exercises its prosecutorial discretion to select persons against whom it will commence SVP proceedings. The Court held that the evidence that defendant had been selected to be one of a few candidates for SVP status after a lengthy selection process that included representatives from inside and outside of the department of corrections presented "a 'real danger that the jury would be unfairly influenced' by a purportedly unbiased 'imprimatur.'" *Id.* at 707 (quoting *Huston*). Again, the Court held that the trial court's limiting instruction was insufficient to mitigate the prejudice. *Id.* at 708.

3. Day-In-The-Life Videos: State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013).

As with photographs, courts are frequently asked to evaluate whether the probative value of video evidence outweighs its prejudicial effect. In *Neiderbach*, a child endangerment prosecution, the defendant was accused of inflicting serious physical and permanent brain injuries on his infant son when the child was less than seven weeks old. The State introduced a photograph and a day-in-the life video that was made eighteen months later that depicted the child's current condition, the ongoing care he needed, and the long-term effects of defendant's alleged abuse. The Iowa Supreme Court held that the trial court did not abuse its discretion in admitting the video evidence. In so holding, the Court recognized that "[v]ideo evidence is highly effective," and acknowledged that day-in-the-life videos can exert a powerful influence on a jury." As noted by the Court, however, the impact of that type of evidence often results from the nature of the victim's condition, rather than any unfair prejudice. *Id.* at 203.

The Court noted that the day-in-the-life video admitted in *Neiderbach* was probative of the serious nature of the child's injuries (which the defendant had not conceded), as well as the long-term consequences of those injuries. *Id.* at 201–03. Although other evidence, including expert testimony (see *infra*), described the child's injuries, the video accurately depicted the victim's condition and communicated the seriousness of the child's injuries in a "non-technical way that [was] capable of being easily understood by laymen." *Id.* at 203 (citation omitted). Moreover, the video reflected nothing more than what the jury would have seen if the child had been present in court. *Id.* Under *Neiderbach*, then, a trial court has discretion to admit a day-in-the life video if it fairly depicts the victim's condition and is not misleading or deceptive, notwithstanding the existence of other evidence documenting a victim's injuries.

D. Other Crimes, Wrongs, Acts—Rule 5.404.

1. State v. Putman, 848 N.W.2d 1 (Iowa 2014).

In *Putman*, a divided (4-3) Iowa Supreme Court addressed whether and when possession of child pornography is admissible to prove motive or intent in a child sex abuse case. In that case, the defendant Putman was accused of sexually assaulting the two-year old daughter of a family friend. Putman denied the charge, claiming that the child's father, whom the defendant was visiting the night of the assault, was the actual perpetrator. Thousands of images and numerous videos depicting child pornography were found on the defendant's computers, but the trial court

was careful to limit the prosecution's evidence to the titles of two videos that were "strikingly similar" to the sexual assault at issue. The DCI investigator was only permitted to mention the titles of the two videos—"Two YO [year old] getting raped" and "Two YO girl getting raped during diaper change"— and to confirm that that those titles matched their content by depicting adult men sexually assaulting 2- to 3-year old girls. No images were shown to the jury.

A majority of four Justices affirmed the trial court's admission of this testimony for the non-character purpose of proving identity. In so holding, the Court clarified the three-step prior bad acts analysis under rule 5.404(b), elaborated upon the non-character purposes of motive and identity, and discussed the balancing of probative value against prejudice associated with prior bad act evidence.

Three-Step Prior Bad Acts Analysis:

In *Putman*, the Iowa Supreme Court amended the procedure for admitting other act evidence for a non-character purpose under rule 5.404(b). Prior to *Putman*, Iowa case law frequently described the procedure for admitting other act evidence as a two-step inquiry. *See* State v. Richards, 809 N.W.2d 80, 92 (Iowa 2012); State v. Elliott, 806 N.W.2d 660, 675 (Iowa 2011); State v. Nelson, 791 N.W.2d 414, 425 (Iowa 2010). In *Putman*, however, the Court added "clear proof" as a separate and independent component of the "other acts" analysis. Putman, 848 N.W.2d at 8.

In a lengthy footnote, the Court acknowledged the "confusion" in its case law regarding whether "clear proof" is an independent component of the prior bad acts analysis or, instead, merely one factor in the prejudice versus probative value balancing. Id. at n. 2 at 7-9. After examining how federal and other state courts address this issue, the Court confirmed that "clear proof" that the defendant committed the other bad acts is a separate and independent step in the rule 5.404(b) analysis. Id. at n. 2. Thus, no balancing of prejudice takes place without clear proof that the defendant committed the prior bad act(s). Only then, will the court engage in rule 5.403 balancing, where clear proof remains one of multiple factors examined by the court. Id. at 14. ("For purposes of clarity and consistency, whether clear proof exists should remain a part of the balancing process, in addition to being analyzed as an independent analytical step.").

After *Putman*, then, admissibility of other act evidence under rule 5.404(b) is governed by a three-step analysis. Id. First, is the prior bad act evidence relevant to a legitimate, disputed non-character purpose? Second, is there clear proof that the party against whom the evidence is offered committed the other bad act or crime? And, finally, does the danger of unfair prejudice from the bad act evidence substantially outweigh the probative value of that evidence? Id.

Relevance to a Disputed Non-Character Purpose: Motive and Identity

The majority in *Putman* then applied the three-prong analysis to the trial court's decision to admit evidence of the titles of the two pornographic videos found on Putman's computers. The trial court had ruled those titles relevant to two non-character purposes—motive and identity. Although the majority upheld the decision with respect to identity, all members of the Court agreed that the trial court erred in admitting the evidence to prove motive. Id. at 10.

Motive

The Court defined motive as "the impetus that supplies the reason for a person to commit a criminal act." Id., *quoting* 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 404.22[3], at 404-119 to 404-120 (Joseph M. McLaughlin 2d.ed. 2014)). In *Putman*, however, the Court held that Putman's motive in sexually abusing the toddler was not in dispute because Putman's state of mind was not an element of the crime nor otherwise in issue. Id. at 10.

The Court may have been too quick to dismiss motive as a legitimate non-character issue in the case. As the Court pointed out, motive merely provides an explanation for why a defendant may have committed the offense. If the defendant says he did not do the act, his motive for doing so helps to establish that he, in fact, did. That is, motive would seem to be "in issue" in any case in which a person claims that he or she did not commit the alleged offense.

The question in *Putman*, then, was not whether motive was in issue, but whether the evidence used to establish motive was improper character evidence – that Putman likely molested the two-year old victim because he was an immoral or depraved person. That is a much more difficult question that the Court avoided. Although possession of pornography in general might not provide a specific enough motive to engage in the charged sexual abuse, the testimony admitted in *Putman* was narrower than general character evidence. That Putman was sexually aroused by pornography depicting adult men sexually molesting 2- to 3-year old girls gave him an unusual (to say the least) motive—a taste for or compulsion regarding this particular type of sexual abuse. As noted by Judge Posner in U.S. v. Cunningham, 103 F.3d 553 (7th Cir. 1996), motive and propensity

> overlap when the crime is motivated by a taste for engaging in that crime or a compulsion to engage in it (an 'addiction'), rather than by a desire for pecuniary gain or for some other advantage to which the crime is instrumental in the sense that it would not be committed if the advantage could be obtained as easily by a lawful route. Sex crimes provide a particularly clear example. Most people do not have a taste for sexually molesting children.

Id. at 556. Thus, contrary to the Court's holding, the evidence does appear to be at least arguably relevant to the disputed issue of motive.

Identity

The *Putnam* Court split 4-3 on whether the videos were admissible to prove identity. Identity was certainly in dispute because the defendant pointed the finger at the victim's father. Id. at 10-11. Identity, however, is not an automatic ticket to the admission of other crimes evidence. The evidence must support identity through an inference narrower than general propensity. That explains why Iowa courts impose "a more demanding test than the general relevance test" when prior bad acts are offered to show identity. One of the most common ways of proving identity with prior wrongs is arguing that the other acts and the current charge are sufficiently similar and unique to mark the prior act and the alleged offense as the "signature" or "handiwork" of the accused. This modus operandi argument, however, did not neatly fit the

facts in *Putman* given that Putman's prior offense involved *possession* of child pornography, while the charged offense involved the arguably dissimilar act of child molestation. The majority, however, correctly refused to strictly apply the similarity requirement. Id at 11. Instead, the majority indicated that a court must look not only at the similarity between the two acts committed by the defendant, but also to the "similarities between the contents of materials possessed by the defendant and acts committed by the defendant." Id. The Court distinguished cases where there were "only general similarities" between the materials possessed and the act for which the defendant is being tried (usually inadmissible) and cases where the acts are "strikingly similar." Id. at 12. Striking similarity, according the Court, "requires drawing out and comparing the peculiar circumstances of the acts." Id. The two admitted video titles demonstrated much more than a "general preoccupation with child pornography," which the Court suggested may well be inadmissible in a sex abuse case. Id. Instead, out of the mass of pornography found on Putman's computer, the trial court only admitted "evidence of child pornography bearing a striking similarity to the crime for which Putman was on trial"—that is, adult men violently molesting 2- to 3-year old children. Id. Thus, according to the majority, the evidence helped establish that Putman, rather than the victim's father, was the perpetrator of the abuse and was "prima facie admissible, even though it illustrate[ed] the accused's bad character." Id. at 13.

Putman seems to assume that modus operandi is the only permissible way of establishing identity with other act evidence. However, there are other methods of proving identity with uncharged conduct that do not rely upon an improper character inference. Indeed, identity is frequently established through one of the other non-character purposes specified in rule 5.404(b). Motive or opportunity, for instance, can also help identify the perpetrator of an offense. Neither of those non-propensity purposes would necessarily require the striking similarity and unique circumstances needed for signature evidence. *See* U.S. v. Tyerman, 701 F.3d 552, 563 (8th Cir. 2012), cert. denied, 133 S. Ct. 1849, 185 L. Ed. 2d 852 (2013) (noting "the similar-in-kind requirement is less important when the evidence is used to establish motive").

The dissenters in *Putman* contended that "caselaw does not allow a court to use the mere fact of possession of pornography to establish identity, no matter how similar the pornography is to Putman's alleged act." Id. at 16 (Wiggins, J., dissenting). However, the argument in favor of admitting the evidence to prove motive also supports its admission for purposes of identity. Putman's fascination with pornography showing men sexually assaulting 2- to 3-year old girls clearly makes it more likely that Putman, rather than the girl's father, molested this two-year old victim. That is, a jury could properly surmise that as between Putman and the girl's father, it could not be a coincidence that only one of them was a devotee of pornography showing this precise type of child rape.

Clear Proof

As noted above, the *Putman* Court clarified that "clear proof" is a separate analytical step under rule 5.404(b). *See* Id. at 9 n.2. Putman argued that the State had failed to provide clear proof that he was responsible for downloading the videos on his computers. Id. at 13. However, as noted in *Putman*, clear proof does not require corroboration or proof beyond a reasonable doubt. Id. at 9. "[P]roof of prior bad acts is clear if it prevents the jury from speculating or

inferring from mere suspicion." Id. at 13. The testimony of credible witnesses can satisfy this standard. Id. at 9. Clear proof existed in this case because the evidence tying Putman to the two videos found on his computer was sufficient to permit the jury to find that Putman possessed the videos "without speculating or inferring from suspicion." Id. at 13.

Notably, *Putman* appears to adopt a fairly minimal threshold for "clear proof," suggesting that clear proof exists so long as the evidence connecting an actor to the prior acts rests on more than mere suspicion or speculation. This would seem to be even lower than the federal standard that requires the trial court to determine whether a reasonable jury could find it more likely than not that the defendant committed the prior act before admitting it into evidence. *See* Huddleston v. U.S., 485 U.S. 681 (1988). Moreover, such a low burden of proof would seem inconsistent with the Court's rationale for making "clear proof" a separate, analytical element – to protect the defendant from unduly prejudicial bad act evidence and to make it "easier for trial courts and juries to apply." Id. at 9 n. 2. Moreover, the Court did not definitively resolve whether the question of clear proof is one of conditional relevance under rule 5.104(b), asking only whether a reasonable jury could find the actor committed the prior act using non-speculative evidence, or a preliminary question of admissibility under rule 5.104(a), requiring the trial court to find by clear proof that the defendant committed the prior bad act. The Court suggests, however, that like the Federal rules, the admissibility of prior bad acts is a question of conditional relevance. *See* Id. at 13 (approving the trial court's jury instruction that prior acts be shown by clear proof).

403 Balancing of Probative Value Against Prejudice

Finally, the *Putman* majority addressed the third step of the "other acts" analysis, determining that the likely prejudice from the pornographic video titles did not substantially outweigh their high probative value in proving identity. Id. at 16. In so holding, the Court outlined the factors that a trial court should consider in weighing the probative value of prior bad acts against their unfair prejudice. Although clear proof is now a separate prong of the prior acts analysis, it remains relevant to the third balancing step. Id. at 14. Thus, in evaluating the probative value of the evidence, a court should consider the existence and strength of the proof connecting the defendant to the other crime or bad act. In addition, the court should evaluate the need for the bad act evidence in light of evidentiary alternatives, the "strength or weakness of the evidence" in proving a relevant non-character purpose, and the tendency of the evidence to provoke the jury to decide the case on an emotional or otherwise improper basis. Id. at *13. *See also* Id. at 9-10. The trial court is given "a great deal of leeway" in making this "judgment call." Id. at 10

In applying these factors to the facts in *Putman*, the majority noted that the prosecution had a great need for the evidence given that identity was the principal issue in the case and that no forensic or eyewitness evidence linked Putman to the charged abuse. Id. at 14. Indeed, the majority characterized the two videos as the "most probative" evidence of identity given the similarity between the alleged crime and the abuse depicted in the videos. Id. The majority acknowledged the prejudicial nature of the evidence, noting that even the titles of the two pornographic videos had a "strong tendency to produce intense disgust." Id. at 14-15 (*quoting* U.S. v. Loughry, 660 F.3d 965, 974 (7th Cir. 2011)). However, the trial court mitigated the possible prejudice by culling the mass of pornography found on Putman's computers, restricting the admitted testimony, and giving a limiting instruction that, except in extreme cases, acted as

"an antidote for the danger of prejudice." Id. at 15. The trial court thus did not abuse its discretion in admitting the prior act evidence under rule 5.404(b). Id. at 16.

2. State v. Richards, 809 N.W.2d 80 (Iowa 2012).

In *Richards*, the Court evaluated whether evidence of a defendant's prior use of alcohol and his acts of domestic violence against the victim were properly admitted to prove motive and intent. The defendant Richards had denied that he was the perpetrator who strangled his ex-wife. Even though the murderer's intent was not disputed, the Court held that the defendant's prior acts of domestic violence toward his ex-wife demonstrated that he had a malevolent intent toward her and possessed a motive for murdering her. By proving both intent and motive, the defendant's prior acts of abuse thus established his identity as the murderer. Id. at 93-95. In addition, the Court held that evidence of defendant's drinking and his ex-wife's opposition to it were relevant to motive since the conflict over defendant's alcohol use may have provided a reason why defendant would have killed his ex-wife to whom he had recently become re-engaged. Id. at 92.

3. State v. Elliott, 806 N.W.2d 660 (Iowa 2011).

In *Elliott*, the defendant was convicted of willful injury causing serious injury and child endangerment resulting in death. The trial court had prevented Elliott from introducing evidence of a prior child abuse investigation involving the victim's uncle who lived in the same house as both the victim and Elliott. The Court remanded for a new trial and directed the trial court to analyze this evidence under Rule 5.404(b). Id. at 675. The Court's ruling that Rule 5.404(b) applies to persons other than the defendant is arguably inconsistent with its prior precedent. Additionally, the Court suggested that trial courts make explicit, on-the-record findings under that framework's balancing approach.

4. State v. Nelson, 791 N.W.2d 414 (Iowa 2010)–the Inextricably Intertwined Doctrine.

Rule 5.404(b) only applies to "extrinsic" evidence of *"other"* crimes, wrongs, or acts. Its restrictions thus do not apply to "intrinsic" evidence of crimes, wrongs, or acts that, while technically uncharged, are inseparable from and "inextricably intertwined" with the charged crime. In *Nelson*, the Iowa Supreme Court delineated the limited scope and applicability of the inextricably intertwined doctrine under which prior bad acts are admitted to complete the story of a charged crime.

Nelson was charged with first degree murder after he allegedly shot the victim who was attempting to purchase drugs from the defendant. In order to complete the story of the crime, the State offered evidence of plastic bags, an empty digital scale box, and testimony linking these items found in the defendant's home and car with crack drug dealing.

The *Nelson* Court noted that although it had never referred to this use of other act evidence by the inextricably intertwined nomenclature, Iowa courts have admitted this type of intrinsic evidence under the varying rubrics of "inseparable crime," "res gestae," or "complete

the story." Id. at 422. The Court criticized those vague and amorphous concepts and stated that the inextricably intertwined doctrine "should be used infrequently and as a narrow exception to the general rule against admitting evidence of other crimes, wrongs, or acts." To further prevent abuse, the Court limited the scope of the inextricably intertwined doctrine:

> [W]e will only allow such evidence to complete the story of what happened when the other crimes, wrongs, or acts evidence is so closely related in time and place and so intimately connected to the crime charged that it forms a continuous transaction. Thus, the charged and uncharged crimes, wrongs, or acts must form a continuous transaction. Moreover, we will only allow the admission of other crimes, wrongs, or acts evidence to complete the story of the charged crime when a court cannot sever this evidence from the narrative of the charged crime without leaving the narrative unintelligible, incomprehensible, confusing, or misleading. In this way, we can be sure rule 5.404(b) remains the standard for the admission of evidence of other crimes, wrongs, or acts and the inextricably intertwined doctrine is construed as a narrow and limited exception to rule 5.404(b).

Id. at 423-24. Thus, if the uncharged misconduct is so closely intertwined or inseparable from the charged crime that it cannot be severed from the record without muddling or confusing the story of the crime, the court may admit the intrinsic evidence, subject only to "the same general admissibility requirements as other evidence that is used to provide the fact finder with a complete picture of the charged crime." Id.

The *Nelson* Court held that that the evidence of crack drug dealing offered in that case was not admissible under the inextricably intertwined doctrine because it was not sufficiently intertwined, in time or place, to form a continuous transaction with the charged murder and because it failed to fill any "gaping holes" in the narrative of the shooting. Id. at 424. The Court did, however, sustain the admission of that evidence as relevant to Nelson's motive and intent under Rule 5.404(b). Id. at 425-26.

5. State v. Barnes, 791 N.W.2d 817 (Iowa 2010).

In *Barnes*, the Court discussed the admission of other crimes, wrongs, and acts under Rule 5.404(b) for the non-character purpose of demonstrating motive. In that case, the Court held that evidence of the defendant's threats to burn down his sister's house were probative of his anger toward his sister and his motive to steal his sister's lawn mower.

6. State v. Cox, 781 N.W.2d 757 (Iowa 2010)—Other Acts of Sex Abuse.

IOWA CODE § 701.11 authorizes the admission of evidence that a defendant committed other acts of "sexual abuse" for any relevant purpose in a criminal prosecution for another sexual abuse offense. In *State v. Reyes*, 744 N.W.2d 95 (Iowa 2008), the Court upheld the constitutionality of § 701.11 with respect to evidence of a defendant's other acts of sexual abuse with the same victim. In the 2010 case of *State v. Cox*, however, the Court held that IOWA CODE § 701.11 violates the Due Process clause of the Iowa Constitution to the extent that it permits the admission of evidence of similar sexual abuse offenses with different victims.

The defendant Cox had been convicted of sexually abusing his younger cousin. The trial court had permitted the State to introduce, under § 701.11, evidence of Cox's prior sexual abuse of two other cousins who testified about their abuse by Cox at their grandmother's house when they were children or young adults. Id. at 759-60. Relying on Iowa's historical rejection of propensity evidence based on "fundamental conceptions of fairness" and the presumption of innocence, the Court held that § 701.11 violates the due process clause of the Iowa Constitution as applied . . . because it permits admission of prior bad acts against an individual other than the victim in the case to demonstrate general propensity." Id. at 761-62. As recognized by *Cox,* this holding runs contrary to the majority of federal and state courts that have upheld the constitutionality of Federal Rule 413—the provision upon which Iowa Code § 701.11 was patterned. Id. at 763.

Significantly, the Court in *Cox* did not hold that evidence of sexual abuse with different victims is never constitutionally admissible. Indeed sexual offenses toward persons other than the particular victim may still be admitted if relevant to a legitimate, non-propensity purpose such as opportunity, preparation, common scheme or plan, and modus operandi. Id. at 770.

E. Rape Shield Rule—Rule 5.412: State v. Edouard, 854 N.W.2d 421 (Iowa 2014).

In *Edouard*, the defendant Edouard was convicted of sexual exploitation by a counselor or a therapist of four women who were all members of a religious congregation of which Edouard was the pastor. The defendant admitted to engaging in sexual conduct with the women, but claimed that he was not their "counselor" as required by the statute. Edouard sought to admit evidence that one of the women had had an extramarital affair with a man other than Edouard after her sexual relationship with the defendant had ended, but before making allegations against Edouard. The Court affirmed the trial court's exclusion of that evidence because it fell within the scope and the protection of the rape shield rule. Id. at 449. The Court found it "highly questionable" whether the woman's sexual liaisons with others were relevant to the existence of a counseling relationship with Edouard. Id. Moreover, whatever marginal relevance that evidence had was outweighed by its "clear prejudicial effect." Id.

F. Privileges:

1. Physician-Patient Privilege and the *Cashen* Protocol Governing Disclosure of Mental Health Records in Criminal Cases

In *State v. Cashen*, 789 N.W.2d 400 (Iowa 2010), the Iowa Supreme Court adopted a balancing approach to guide trial courts in weighing a patient's right to privacy in his or her mental health records against a criminal accused's right to present exculpatory evidence. In response to *Cashen,* the Iowa legislature amended the testimonial privilege statute, Iowa Code § 622.10, to restrict the circumstances under which privileged mental health records could be disclosed "to a defendant in a criminal case." *See* Iowa Code § 622.10(4) (effective 2011). Under that statutory protocol, a criminal defendant who seeks access to privileged records must demonstrate "a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need

for the defendant to present a defense in the case." Iowa Code § 622.10(4)(a)(2)(a). A number of recent cases since *Cashen* address this statutory protocol.

a. **State v. Edouard, 854 N.W.2d 421 (Iowa 2014).**

In *Edouard*, the defendant was convicted of sexual exploitation by a counselor or a therapist of four women who were all members of a religious congregation of which Edouard was the pastor. The sexual exploitation statute made it a crime for any person, including a clergyman, who provides "mental health services" to a "patient or client" to engage in sexual conduct with that person while the mental health services are being provided and for one year thereafter. Iowa Code §§ 709.15(1)(a), (2)(c). The statute further defined "mental health services" to include the "counseling of another person for a cognitive, behavioral, emotional, mental, or social dysfunction, including an intrapersonal or interpersonal dysfunction." Id. § 709.15(1)(d). The fighting issue in the case was whether Edouard, who admitted to engaging in sexual conduct with the women, provided the type of "counseling" required by the statute.

One of the women had undergone marriage counseling with her husband during the time she was seeing Edouard and shortly thereafter. Edouard sought access to those records under the post-*Cashen* statutory protocol. The trial court denied Edouard's request without ever conducting an *in camera* review of the counseling records. In reversing and remanding that issue to the trial court, the *Edouard* Court distinguished this case from *State v. Thompson*, 836 N.W.2d 470 (Iowa 2013), where the accused had failed to demonstrate any nexus between the victim's mental health records and any issue for trial. In contrast, the sexual exploitation statute required the State to prove that Edouard counseled the victim for an "emotional . . . or social 'dysfunction,'" including "an intrapersonal or interpersonal dysfunction." The fact that the victim in *Edouard* was seeing a marriage counselor during the time that she was seeing Edouard and shortly thereafter could potentially cast light on whether she was suffering from such a dysfunction during the relevant time period. Edouard, 854 N.W.2d at 442. The Court thus reversed and remanded the case as to this one victim so that the trial court could conduct an *in camera* review of her marriage counseling records. On remand, the trial court was to determine whether the records contained any exculpatory evidence and, if they did, decide whether Edouard should receive a new trial. Id. at 442-43.

b. State v. Thompson, 836 N.W.2d 470 (Iowa 2013).

In *Thompson*, a defendant convicted of the murder of his live-in girlfriend, contended that the trial court had erroneously declined his request to obtain and review the deceased victim's mental health records for exculpatory information. Thompson contended that the statutory protocol in Iowa Code § 622.10(4) violated the fair trial and due process provisions of the Iowa Constitution to the extent that the statute makes it more difficult for a criminal defendant to obtain exculpatory evidence from a victim's mental health records than under the constitutional floor set forth in *Cashen*. *Thompson*, 836 N.W.2d at 482. The Iowa Supreme Court extensively discussed the three key differences between § 622.10(4) and the *Cashen* protocol: (1) the statute's threshold requirement that a defendant demonstrate a "reasonable probability" that mental health records contain exculpatory information. . . for which there is a compelling need for the defendant to present a defense. . ., *id.* at 483–85, (2) its provision for *in camera* review of

those records by the court, rather than defense counsel, *id.* at 485–88, and (3) its requirement that the information sought in the privileged records not be available from any other source. *Id.* at 488–90. The Court held that despite these differences, "section 622.10 is constitutional on its face and supersedes the *Cashen* protocol." *Id.* at 490. Whether the statute "is constitutional as applied must be determined on a case-by-case basis." *Id.* at 489. As applied in *Thompson*, the Court indicated that the defendant had failed to offer any evidence linking the victim's mental health treatment to any of the issues raised at trial. The trial court thus correctly determined that Thompson had failed to meet the threshold requirements necessary to obtain the deceased victim's mental health records. *Id.* at 490-91.

c. State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013).

The Court again rejected a constitutional challenge to § 622.10(4) in *Neiderbach*. In that case, a defendant accused of abusing his infant son sought to compel production of the mental health records of the child's mother—a co-defendant in the alleged abuse. Although *Neiderbach* involved an attempt to obtain the records of a co-defendant, rather than a victim—as was the case in both *Cashen* and *Thompson*—the Court upheld the statute's constitutionality for the same reasons it gave in *Thompson. Thompson*, 837 N.W.2d at 195. Moreover, because the statutory amendment merely changed the procedure for seeking records that were privileged under § 622.10, the statutory protocol in § 622.10(4) applied retroactively. *Id.* at 196.

After a de novo review of the factual record, however, the Iowa Supreme Court held that the trial court had abused its discretion in applying § 622.10(4). The trial court had denied Neiderbach's motion to compel production of the mother's mental health records because the defendant had failed to depose the child's mother and thus had not shown that the information was not available from any other source. The Court noted, however, that self-serving statements made in an adversarial interrogation of a hostile witness charged with endangering the same victim are likely to differ from those made to a neutral therapist or mental health counselor. Neiderbach was thus not required to depose the mother before attempting to obtain her mental health records. The mother's credibility was central to the case and the defendant had demonstrated a good faith reasonable probability that her records contained exculpatory evidence. The trial court accordingly abused its discretion in failing to conduct an *in camera* review of the mother's mental health records. The Court remanded with directions for the district court to conduct that *in camera* review in order to determine whether the records contained exculpatory information that would entitle Neiderbach to a new trial. *Id.* at 196–98.

2. Patient Litigant Exception to Physician-Patient Privilege: Ashenfelter v. Mulligan, 792 N.W.2d 665 (Iowa 2010).

In *Ashenfelter*, the Court held that medical and mental health records fall within the statutory physician-patient privilege and clarified that the patient-litigant exception to that privilege applies only when the conduct of the patient claiming the privilege is an element or factor in the claim or defense of the patient herself.

G. Impeachment

1. Impeachment with Prior Inconsistent Statement

a. Rule 5.607: State v. Tompkins, __ N.W.2d __, 2015 WL 630203 (Feb. 13, 2015).

Although a party can impeach even its own witnesses, rule 5.607, the State cannot call a witness that it expects to give unfavorable testimony for the sole purpose of impeaching that witness with an otherwise inadmissible prior inconsistent statement. *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). In *Tompkins*, however, the Court held that the State does not violate this rule by impeaching a witness with a prior inconsistent statement that falls within a hearsay exception and that can thus be admitted for its truth, as well as for impeachment. Tompkins, 2015 WL 630203, at *12-13.

b. State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013).

In addition to the issues relating to undue prejudice (see *supra*), expert testimony and hearsay (see *infra*), the *Neiderbach* Court also briefly addressed the issue of impeaching a witness with her own prior inconsistent statement. The trial court had refused to allow the defendant to impeach the mother of the infant victim with a prior inconsistent statement that she had made concerning whether she had received medical or psychological treatment while in jail. The Supreme Court upheld the trial court's restriction on the defense cross-examination, rea-affirming that the "subject of the inconsistent statement . . . must be material and not collateral to the facts of the case." *Neiderbach*, 837 N.W.2d at 207.

2. Impeachment with Prior Convictions—Rule 5.609

Iowa R. Evid. 5.609 governs impeachment of a witness with a prior conviction. That Rule differentiates between a prior conviction that is more than ten years old, Iowa R. 5.609(b), a prior conviction involving a crime of dishonesty or false statement (regardless of punishment), Iowa R. Evid. 5.609(a)(2), and a prior conviction for any other type of crime that constitutes a felony. Iowa R. Evid. 5.609(a)(1). The Iowa Supreme Court has issued opinions addressing each of these forms of impeachment.

a. Impeachment with Felony Conviction—Rule 5.609(a)(1): State v. Redmond, 803 N.W.2d 112 (Iowa 2011).

Prior to 2011, courts used a "generic analysis" to analyze impeachment with convictions involving crimes punishable by death or imprisonment. *See* State v. Martin, 217 N.W.2d 536 (Iowa 1974) (identifying four non-exclusive factors that a trial court should consider in determining whether the danger of unfair prejudice outweighs the impeachment value of an accused's prior conviction). In the 2011 case of *State v. Redmond*, the Iowa Court replaced this ad hoc approach with a "comprehensive" framework built on the language of Rule 5.609(a)(1) that now governs impeachment with a prior felony conviction.

Under Rule 5.609(a)(1), trial judges have discretion to admit or exclude for impeachment purposes crimes with penalties more severe than one year in jail. *Redmond* confirms that the exercise of this discretion will differ depending on whether the witness being impeached is the accused himself or a non-accused witness. For witnesses other than an accused, Rule 5.609(a)(1) "operates as a rule of admission"—permitting impeachment with the prior felony conviction unless the party opposing its admission can demonstrate that unfair prejudice substantially outweighs the conviction's probative value. Id. at 12. In contrast, the Rule "acts as a rule of exclusion as to the defendant-witness's prior convictions"—with the prosecution bearing the burden of demonstrating that the conviction's probative value outweighs its prejudicial effect to the accused. Id. at 122. *Redmond* concerned the latter situation: impeaching an accused witness with a prior felony conviction.

In *Redmond*, the Court mandated that trial courts exercise their discretion and hold the prosecution to its burden of demonstrating that "prior conviction evidence has probative value which exceeds its prejudicial effect to the accused." Id. at 125. Although both "probative value" and "prejudicial effect" are vague and undefined concepts that vary with the circumstances of each case, the Court in *Redmond* provided guidance concerning the content of those crucial terms.

Probative Value

Rule 5.609 requires that prior convictions be offered "[f]or the purpose of attacking the credibility of a witness." The probative value of a prior conviction will thus vary depending upon the degree to which it undermines a witness's "testimonial credibility" While all convictions that fall within the scope of Rule 5.609(a)(1) "meet the minimum probative threshold to be admitted, dependent on their prejudicial effect," convictions may differ as to their bearing upon a witness's testimonial truthfulness. Id. at 122-23. In ascertaining the relative probative value of a prior conviction, a court should look to the non-exhaustive list of circumstances identified by the *Redmond* Court.

Nature of the Conviction and Its Underlying Conduct.

The *Redmond* Court noted that some crimes have greater bearing on a witness's testimonial truthfulness than others. For example, crimes that involve dishonesty, stealth, premeditation, and planning have more impeachment value than crimes of violence, impulse, carelessness, or disorderly conduct. Id. at 123. A trial court thus may consider the nature of the offense in ascertaining its relationship to testimonial credibility even if the crime is not by its elements a crime of dishonesty or false statement.

Need for Prior Conviction Evidence.

The *Redmond* Court also noted that the need for the prior conviction evidence may also affect the probative value of prior conviction evidence:

> Cumulative evidence, for example, may carry less probative value. By contrast, where the witness has boasted of his credibility, impeachment with a prior conviction may be necessary to ensure the jury does not overvalue the defendant's credibility. The substance of the defendant's testimony could affect a prior conviction's probative value as the

testimony itself may be inconsequential, noncredible, or conclusively shown credible by other evidence.

Id. at 123-24. Thus, probative value may vary depending on the centrality of the credibility issue.

Age of the Conviction and Defendant's Subsequent History.

Convictions older than 10 years are subject to the separate analysis set out in Rule 5.609(b). Even if a conviction is less than 10 years old, however, its age remains a factor in the trial court's balancing. In *Redmond*, the Court reaffirmed that "a defendant's behavior or conduct since the conviction may show changed or unchanged character which could affect a conviction's probative value." Id. at 124.

Prejudicial Effect

The *Redmond* Court defined "prejudicial effect" as used in Rule 5.609(a)(1) as "the extent of the risk that the jury may misuse the prior conviction evidence to decide the case on an improper basis." Id. at 124. The jury could misuse an accused's prior conviction in three possible ways. First, the jury might impermissibly use the prior conviction to draw an improper propensity inference. That is, the jury might reason that because the defendant committed a crime in the past, it is more likely that the defendant acted in conformity with his "criminal" character and committed the crime with which he is currently charged. Second, the prior conviction might suggest that the defendant is a bad person and thus motivate the jury to convict the defendant regardless of whether he committed the current offense. Rule 5.404 prohibits both of these potential uses of prior conviction evidence. Finally, a jury could overvalue the impeachment value of the prior conviction. Id.

As with probative value, every conviction that is serious and recent enough to fall within Rule 5.609(a)(1) creates some prejudice when used to impeach a criminal defendant. The human jury may have difficulty compartmentalizing the proper (impeachment) and improper (character) uses of prior conviction evidence. In order to evaluate prejudicial effect under Rule 5.609(a)(1), however, the trial court must assess the relative probability or likelihood that the jury will misuse the prior conviction evidence. Id. at 125. To aid in that determination, *Redmond* indicates that several non-exhaustive factors may be relevant.

Nature of Prior Conviction.

The nature of an accused's prior conviction has dual relevance in the Rule 5.609(a) balancing. On one hand, as previously discussed, the conduct underlying a prior conviction affects its probative value for impeachment. On the other hand, the nature of the conviction can also bear on the likelihood that it will improperly influence the factfinder. For example, conviction of a violent or heinous crime carries greater potential for a jury to convict a defendant because he is a bad person without regard for whether he is guilty of the current charge. Id. at 124.

Similarity of Prior and Charged Offenses.

The *Redmond* Court reaffirmed prior caselaw that cautions against admitting prior convictions that are similar to the current charge. Disclosure of a conviction or convictions for the same crime for which a defendant is presently on trial may suggest to jurors that if the defendant committed the same offense before he probably did so again. Id. at 124-25.

Number of Prior Convictions.

In evaluating prejudice, Iowa courts have considered an accused's criminal record and the incremental adverse impact of introducing numerous impeaching convictions. In *Redmond*, the Court similarly recognized that admitting multiple prior convictions can increase the risk of prejudice. Id. at 125.

Centrality of Credibility Issue and Need for Defendant's Testimony.

In *Redmond*, the Court indicated that a jury is more likely to misuse prior conviction evidence "in cases with weak evidence or cases that are he-said-she-said swearing matches." Id. That is, in cases involving uncorroborated swearing contests a defendant's prior conviction could "tip the balance" in favor of conviction because the jury may infer guilt through propensity "as a way to resolve the irreconcilable, uncorroborated evidentiary dispute." Such was the case in *Redmond* which involved a swearing match between the defendant and the victim as to whether the defendant had committed indecent exposure. There were no other witnesses and no corroborating evidence. The Court held that there was a substantial risk that the jury would misuse the defendant's prior conviction of harassment and resolve the credibility contest through improper character or propensity inferences. Id.

Balancing Probative Value and Prejudicial Effect

According to *Redmond*, a trial court must "hold the prosecution to its burden" under Rule 5.609(a)(1) of showing that "defendant's prior conviction evidence is more probative to the defendant's testimonial credibility than prejudicial to the defendant." A meaningful exercise of discretion requires that the trial court identify and quantify both the impeachment value of the prior conviction and the specific prejudice likely to be realized. "The greater the probability of prejudice, the less likely the prosecution can meet its burden." Id. at 125.

Moreover, the trial court should make explicit on-the-record findings as to the balancing of probative value and prejudice required by Rule 5.609(a). As stated by the *Redmond* Court:

> The district court should undertake to make explicit finding concerning the balancing test articulated in rule 5.609(a)(1). Such findings guide courts in making principled admissibility determinations in accord with the language of rule 5.609(a)(1). Explicit findings also provide appellate courts assurance the district court properly exercised its discretion. Absent such finding, it may be difficult for the appellate courts to determine if the district court properly utilized its discretion of applied the proper framework. The absence of explicit findings, however, is not a per se abuse of discretion. Instead, appellate courts are then required to perform their own de novo review to determine

whether the district court invoked any meaningful discretion and whether the record supports the district court's decision to admit the prior conviction.

Id. at 118-19.

b. Crimes of Dishonesty or False Statement—Rule 5.609(a)(2): State v. Harrington, 800 N.W.2d 46 (Iowa 2011).

In *State v. Harrington*, the Court held that prior convictions involving crimes of dishonesty or false statement are automatically admissible under Rule 5.609(a)(2). In so holding, the Court overruled its prior decision in *State v. Axiotis*, 569 N.W.2d 813 (Iowa 1997) to the extent that *Axiotis* suggested that a trial court has discretion to exclude convictions that involve dishonesty or false statement. Like its federal counterpart, Iowa Rule 5.609(a) (2) now makes convictions that qualify as crimes of dishonesty or false statement automatically admissible for impeachment purposes and not subject to any balancing of prejudice against probative value. Id. at 51.

Harrington also raised, but failed to decide, whether crimes of theft involve "dishonesty or false statement" under Iowa Rule 5.609(a)(2). Iowa courts have long construed the term "dishonesty" to include theft. Presumably, that is why Harrington, charged with theft and burglary offenses, failed to argue that his prior convictions for theft and burglary were not crimes of dishonesty or false statement. The Court thus assumed, without deciding, that theft fell within the scope of Rule 5.609(a)(2). The *Harrington* Court suggested, however, that it may be inclined to revisit the question of whether crimes of theft and burglary are crimes that per se involve dishonesty or false statement. The Court noted that Iowa's approach diverged from the federal rule on which Iowa's Rule is patterned and approvingly quoted the federal advisory committee note that described 609(a)(2) qualifying convictions as those involving

> crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

Id. at 49. If the Court decides to follow the federal approach in a future case in which the question is properly argued, crimes of theft would no longer be per se admissible to impeach a witness. Instead, such convictions would need to qualify for admission under the court's discretionary authority in Rule 5.609(a)(1).

c. Impeachment with Conviction of Crime of Dishonesty or False Statement Over Ten Years Old—Rule 5.609(b): State v. Dudley, 856 N.W.2d 668 (Iowa 2014).

In *Dudley*, a defendant attempted to impeach a government witness with a 20-year old conviction for theft. The Court states, without discussing *Harrington's* dicta, that "theft is a crime of dishonesty" that would otherwise be admissible. Because the conviction was older than ten-years-old, however, it was not admissible unless the probative value substantially

outweighed its prejudice. The Court remanded to allow the trial court to conduct this necessary balancing.

3. Rehabilitation with Prior Consistent Statement: Amendment of Federal Rule

Effective December 1, 2014, Fed. R. Evid. 801(d)(1)(B) was amended to permit substantive use of prior consistent statements "to rehabilitate the declarant's credibility as a witness" for reasons other than recent fabrication or improper motive or influence. Iowa's evidence rules have not been similarly amended. See *infra* for a discussion of federal and state rule amendments.

H. Lay Opinion Testimony—Rule 5.701

1. Whitley v. C.R. Pharmacy Service, Inc., 816 N.W.2d 378 (Iowa 2012).

In *Whitley*, the Court discussed the proper factual foundation for the admission of lay opinion testimony under Rule 5.701. In that case, the defendant in a pharmacy malpractice case called the pharmacy manager to testify about the meaning of a strike through of a name that was written on the pharmacy's delivery log. The plaintiff argued that the manager's testimony was too speculative because the person who had made the line-through did not testify. The Court disagreed, noting that the pharmacy had established that the manager had personal knowledge of the delivery log procedures and had conducted an investigation into the logs and receipts in this case before arriving at his conclusion. Thus, a proper factual foundation had been laid for the manager's opinion that the prescription at issue had been picked up at the pharmacy (rather than being delivered) after the plaintiff's eye surgery had taken place. In so holding, the Court noted: "[t]o properly admit a lay witness's testimony, a sufficient factual foundation must be established showing the witness's opinion is based on firsthand knowledge of facts to which the observed facts are being compared." Id. at 390.

I. Expert Testimony—Rules 5.702-5.706

1. Improper Bolstering Regarding Witness Credibility—Rule 5.702: State v. Dudley, 856 N.W. 668 (Iowa 2014); State v. Brown, 856 N.W.2d 685 (Iowa 2014); State v. Jaquez, 856 N.W.2d 663 (Iowa 2014).

In three cases issued the same day, the Court clarified the "very thin line" between permissible expert testimony regarding the general symptoms or behaviors exhibited by victims of sexual abuse and impermissible expert testimony that a particular victim manifests symptoms of sexual abuse or exhibits behaviors "consistent with" sexual abuse trauma. The Court stated:

> Although we are committed to the liberal view on the admission of psychological evidence, we continue to hold expert testimony is not admissible merely to bolster credibility. Our system of justice vests the jury with the function of evaluating a witness's credibility. The reason for not allowing this testimony is that a witness's credibility is not a fact in issue subject to expert opinion. Such opinions not only replace the jury's function in determining credibility, but the jury can employ this type of testimony as a direct comment on defendant's guilt or innocence. Moreover, when an expert comments,

> directly or indirectly, on a witness's credibility, the expert is giving his or her scientific certainty stamp of approval on the testimony even though an expert cannot accurately opine when a witness is telling the truth. In our system of justice, it is the jury's function to determine the credibility of a witness. An abuse of discretion occurs when a court allows such testimony.
>
> We again reaffirm that we are committed to the legal principle that an expert witness cannot give testimony that directly or indirectly comments on the child's credibility. We recognize there is a very thin line between testimony that assists the jury in reaching its verdict and testimony that conveys to the jury that the child's out-of-court statements and testimony are credible.

State v. Dudley. 856 N.W.2d 685, 689 (Iowa 2014). Under these principles, an expert can testify about the physical and psychological symptoms displayed by victims of child sexual abuse. An expert crosses the line, however, if she opines that a child is truthful, displayed symptoms of sexual abuse trauma, or had symptoms consistent with child abuse. Id. at 676.

Thus, in *Dudley*, the Court held that the trial court abused its discretion in permitting a child's therapist to testify that the child's physical manifestations and symptoms were "consistent with a child dealing with sexual abuse trauma." Such "consistent with" expert testimony, according to the Court, improperly bolsters the credibility of the victim and comments on the guilt or innocence of the defendant. Dudley, 856 N.W.2d at 676-78. See also Id. at 678 (holding that trial court also erred in allowing forensic interviewer to testify that she recommended that child receive therapy and stay away from defendant); State v. Jaquez, 856 N.W.2d 663, 665-666 (Iowa 2014) (holding that expert testimony by forensic interviewer that child's demeanor was "completely consistent with a child who has been traumatized, particularly multiple times," impermissibly vouched for the credibility of the child and improperly commented on defendant's guilt or innocence); State v. Brown, 856 N.W.2d 685, 688-89 (Iowa 2014) (parsing expert's report concerning examination of alleged victim of child sexual abuse; report stating that child gave examiner a clear and consistent history permissibly recounted factual description of child's behavior during interview; portion of report finding child's disclosure "significant and that an investigation was warranted," however, was an improper indirect comment that child was telling truth about alleged abuse).

The Court left open the question whether otherwise improper "consistent with" expert testimony may be admitted for rebuttal purposes. If the defendant opens the door by claiming that the victim's behavior was inconsistent with that of an abused child or sex abuse victim, "consistent with" expert opinions may be admissible to rehabilitate the victim. See Dudley, 856 N.W.2d at 683-684 (Waterman, J., concurring) (stating that expert testimony may be admitted to rehabilitate victim whose credibility has been attacked by the defendant).

2. Expert Testimony that Improperly Defines Crime: State v. Edouard, 854 N.W.2d 421 (Iowa 2014).

Edouard also concerned the admissibility of expert testimony that purports to define a crime in a specialized manner that does not comport with the statutory definition of the crime. As discussed above, the disputed issue in the case concerned whether the defendant pastor

provided the type of "counseling" required by the sexual exploitation statute. Edouard sought to introduce expert testimony by a forensic psychiatrist who would explain the difference between "pastoral care" and "pastoral counseling" and who would opine that Edouard merely provided pastoral care, not counseling, to the women congregants. The trial court excluded the expert's testimony on the ground that it improperly usurped the court's duty to instruct the jury on the law applicable to the case and the jury's duty to determine whether Edouard's conduct fell within the statutory definition of mental health services. Edouard, 854 N.W.2d at 436.

The *Edouard* majority noted that Edouard's expert sought to testify about the specialized meaning of counseling within the theological community. However, even if Edouard had not provided "pastoral counseling" under the expert's specialized definition, his actions could still fall within the legislature's definition of mental health services under the statute. Id. at 436-37. The expert, in the words of the Court, improperly sought "to provide the defendant's own definition of the crime, and then to explain the defendant had not committed it." Id. at 436. The sexual exploitation statute itself defined mental health services in a broad and non-technical manner that differed from the narrow and specialized definition of pastoral counseling provided by the expert. Id. at 437. Thus, the expert did not "add something to the jury's determination of whether Edouard's actions fell within the legal definition of mental health services," and thus did not assist the jury in determining a fact in issue. Id. The Iowa Supreme Court thus held that the trial court did not abuse its discretion in excluding the expert's testimony. Id.

3. Expert Gate-Keeping—Rule 5.702

a. Taft v. Iowa Dist. Court, 828 N.W.2d 309 (Iowa 2013).

In *Taft*, the Iowa Supreme Court addressed the process for determining the reliability of expert testimony under rule 5.702. Although the rules of evidence did not apply to the annual review of a civilly committed sex offender at issue in *Taft*, the Court nevertheless distinguished cases where expansive scrutiny of expert testimony is required from those where conventional "ad hoc" analysis will suffice. In determining the level of scrutiny to accord expert testimony, Iowa courts should distinguish between difficult, novel, or complex scientific matters and nonnovel, less complex matters. *Taft*, 828 N.W.2d at 319. In **"**difficult scientific cases,**"** a "more expansive judicial" assessment of reliability is justified and *Daubert*'s heightened scrutiny applies. *Id.* (*quoting* Ranes v. Adams Labs., Inc., 778 N.W.2d 677, 686–87 (Iowa 2010)). In less complex scientific and non-scientific cases, "conventional" rule 5.702 analysis applies and the foundation necessary to show reliability is accordingly lower. *Id.* Applying that analysis to the expert testimony at issue, the *Taft* court held that the testimony of a clinical psychologist that Taft was ready for discharge and/or transitional release should have been evaluated for reliability under conventional rule 5.702 analysis. *Id.* at 321.

b. Quad City Bank & Trust v. Jim Kircher & Assocs., 804 N.W.2d 83 (Iowa 2011).

In *Quad City Bank*, the Court analyzed Rule 5.702's requirement that an expert be qualified by "knowledge, skill, experience, training, or education." Notwithstanding its liberal view toward the admission of expert testimony, the Court affirmed the exclusion of plaintiff's

expert in an accounting malpractice lawsuit. Although the Court did not per se disqualify the IRS agent because he was not a CPA, the agent did not have an accounting degree, was not a CPA, and had never performed a certified audit. The Court thus held that he lacked the knowledge, skill, experience, training, or education to otherwise qualify him to testify about generally accepted accounting principles. Id. at 93-94.

c. Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677 (Iowa 2010).

In *Ranes v. Adams Laboratories, Inc*., the Iowa Supreme Court discussed the gate-keeping responsibility of trial courts in assessing the reliability of expert scientific testimony. Although the existing ad hoc approach to reliability continues to apply to most expert testimony, the *Ranes* Court directed trial courts to use the non-exclusive *Daubert* factors in evaluating the reliability of novel or complex scientific evidence.

Like *Daubert*, *Ranes* was a toxic tort case hinging on causation evidence. The Court held that the trial court properly applied the *Daubert* principles in assessing the reliability of plaintiff's expert physician/toxicologist's testimony that ingestion of prescription medication allegedly containing phenylpropanolamine was capable of causing and, in fact, did cause, the plaintiff's brain injury. According to the Court, the evidence in *Ranes* was not general medical evidence based on practical experience and acquired knowledge. Rather, the evidence regarding the potential biological effect of the drug on the human body and on the plaintiff involved complex medical issues and the ''somewhat novel scientific procedure'' of differential diagnosis. Id. at 687. Thus, the trial court appropriately applied *Daubert's* relevant considerations in performing the gatekeeping function. Id. In applying those principles to the expert testimony at issue, the Court upheld the trial court's decision to exclude the expert's opinion as unreliable. Id. The expert had based his opinion on an irrelevant study and case reports that were substantively different than plaintiff's case. Id. at 693.

d. State v. Hicks, 792 N.W.2d 89 (Iowa 2010).

In *State v. Hicks*, the Court re-affirmed its prior holding regarding the admissibility of testimony by a police officer with respect to the administration and results of a horizontal gaze nystagmus test. The Court held that "testimony by a properly trained police officer with respect to the administration and results of the horizontal gaze nystagmus test is admissible without need for further scientific evidence." Id. at 98, quoting State v. Murphy, 451 N.W.2d 154 (Iowa 1990).

4. Reasonable Reliance under Rule 5.703

a. In re Detention of Stenzel, 827 N.W.2d 690 (Iowa 2013).

In *Stenzel*, the Iowa Supreme Court construed the "reasonable reliance" requirement of rule 5.703, which permits experts to base their opinions upon otherwise inadmissible evidence so long as it is of the type reasonably relied upon by other experts in their field. *Stenzel* involved a sex offender civil commitment proceeding in which the State offered the expert testimony of a forensic psychologist to prove that Stenzel was a sexually violent predator. The psychologist's opinion was based, in part, on the winnowing process used by the State for selecting persons for

SVP status—a process in which the doctor himself had participated. *Id.* at 706. The Court held that the trial court should not have permitted the psychologist to testify about the SVP selection process. In so holding, the Court noted that rule 5.703 permits experts to base their opinions on evidence that is otherwise inadmissible in order "to give experts appropriate latitude to conduct their work, not to shoehorn otherwise inadmissible evidence into the case." *Id.* at 705.

The Court indicated that the State had not established that psychologists *generally* rely upon the existence of a government-run screening process in making a diagnosis of sexual deviancy. The "particular field" referenced in rule 5.703 "means the group of people who possess the relevant 'scientific, technical, or other specialized knowledge'" under rule 5.702, "not the more narrow category of people who regularly testify for a given side as experts in a given kind of case." *Id.* at 705.

Moreover, demonstrating that the testifying expert himself customarily relies upon the particular material is not, in itself, sufficient to satisfy the reasonable reliance requirement. Rule 5.703 does not permit "experts to self-bolster their own opinions," and "an expert's own testimony regarding reasonable reliance is not conclusive, 'being only one factor in the consideration.'" *Id.* at 706 (citations omitted).

Finally, rule 5.403 can override rule 5.703. An expert should not be permitted to testify regarding the otherwise inadmissible basis of his opinion if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* As discussed above, evidence that a purportedly unbiased government agency has previously made findings or determinations relevant to the case at hand is unduly prejudicial. *Id.* at 706–708.

The Court additionally questioned whether the forensic psychologist should have been permitted to rely upon (and disclose) the trial information and minutes of testimony from Stenzel's criminal records. The Court stated:

> [W]e question the basic fairness of the State's using materials that it generated exclusively to prosecute Stenzel criminally as a factual ground for committing him as an SVP at the conclusion of his sentence. We believe a prophylactic rule against expert testimony on these matters is an appropriate interpretation of our rules of evidence.

Id. at 710. *Stenzel* thus emphasizes that courts should be vigilant in policing experts who purport to rely upon otherwise inadmissible facts or data in forming their opinions.

b. State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013).

The *Neiderbach* court cited *Stenzel* in discussing expert testimony that relies upon published reports or case studies. In *Neiderbach*, a prosecution involving shaken baby syndrome, the State's experts testified that case studies published in the journal *Pediatrics* established that shaking alone can cause traumatic brain injuries in an infant. The Court held that the trial court erred in admitting this testimony because the State had failed to establish that the facts and data in the case studies referred to by the experts were of a type reasonably relied upon by experts in the field as required by rule 5.703. *Neiderbach* held that to be admissible under Iowa rule 5.703, the facts and data in the studies themselves, not merely the journal in

which the studies have been published, must be of a type reasonably relied upon by experts in the field. *Neiderbach*, 837 N.W.2d at 203–07. *See also id.* at 239–43 (Appel, J., concurring) (noting that it is insufficient to prove that article is published in a good medical journal; the specific article in the journal must be authoritative and of a type ordinarily relied upon by experts in field). The experts thus should not have been permitted to relay the hearsay contained in the published studies concerning shaken baby syndrome. *Id.* at 205. The Court found this error to be harmless, however, because the expert's testimony concerning the studies was brief and because ample, admissible evidence supported the claim that brain injury can occur in shaken babies without physical impact. *Id.* at 206–07.

J. Hearsay

1. Definition of Hearsay—Rule 5.801: State v. Elliott, 806 N.W.2d 660 (Iowa 2011).

When an out-of-court statement is not offered for its truth, but to explain the responsive conduct of a third party, it is not hearsay. In *Elliott*, the Court restricted this non-hearsay use of out-of-court statements offered to explain the responsive conduct of a police detective. In that case, the Court reversed the defendant's conviction concerning the death of an infant because the trial court erroneously allowed a detective to relate what a seven-year old child had told him during interviews concerning what had happened the night the infant suffered fatal injuries. The State had proffered the detective's testimony for the purpose of explaining why the detective shifted the focus of his investigation from the baby's mother to the defendant. The Court held, however, that the State could explain that the investigation changed in focus because of inconsistencies between the child's statement and those given by other witnesses. The detective did not need to relate the substance of the child's statement in order to explain his conduct to the jury. The trial court thus should have limited the detective to testifying about the fact that inconsistencies existed and should not have permitted him to disclose the content of the child's interview. Id. at 667-669.

2. Excited Utterances—Rule 5.803(2):

a. State v. Dudley, 856 N.W.2d 668 (Iowa 2014).

In *Dudley*, the Court held that the trial court abused its discretion in admitting as an excited utterance a child's description of sexual abuse that the child gave to her neighbor 36 hours after the abuse in response to the neighbor's repetitive and prompting questions. Id. at 679-80. In so holding, the Court reiterated the factors a court should consider in determining whether a statement qualifies as an excited utterance:

> "(1) the time lapse between the event and the statement, (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement."

Id. at 679, *quoting* State v. Harper, 770 N.W.2d 316, 219 (Iowa 2009); State v. Atwood, 602 N.W.2d 775, 782 (Iowa 1999).

b. State v. Richards, 809 N.W.2d 80 (Iowa 2012)(holding that a victim's statements to her daughter that the defendant had put a cane to her neck qualified as excited utterance when record demonstrated that victim had just come down stairs, "was upset and crying," and her "neck was red").

3. Statement of Then Existing Mental or Physical Condition—Rule 5.803(3)

a. Pitts v. Farm Bureau Life Ins. Co., 818 N.W.2d 91 (Iowa 2012).

In *Pitts*, the wife of a deceased insured sued an insurance agent for negligent failure to change the primary beneficiary of her husband's life insurance. The plaintiff sought to admit several statements that her husband had made regarding the life insurance coverage. The Court refused to expand Rule 5.803(3)'s exception for backward-looking statements of memory relating to "the execution, revocation, identification, or terms of [a] declarant's will" to include statements regarding the intended beneficiary of a life insurance policy. Thus, statements of the defendant insurance agent that were relayed by the insured to his wife constituted inadmissible statements of memory as to what the agent had said. Id. at 109. In contrast, the insured's statement that he wanted the wife to be the sole beneficiary of the policy qualified as a statement of the husband's then existing intent that was relevant to prove that the husband took steps to remove his daughter as primary beneficiary once his support obligation to his daughter had ended. Id. at 108-09.

b. State v. Richards, 809 N.W.2d 80 (Iowa 2012)(holding that ex-wife's statements that she feared the defendant and wanted to find somewhere else to live fell within exception for then existing state of mind).

4. Statements for Purposes of Medical Diagnosis or Treatment—Rule 5.803(4)

a. State v. Dudley, 856 N.W.2d 668 (Iowa 2014).

In *Dudley*, a prosecution for child sex abuse, the Court recognized that a child's statements regarding alleged sexual abuse made to a "trained professional for the purposes of diagnosis or treatment" may be admissible under the medical diagnosis hearsay exception in rule 5.803(4). The Court cautioned, however, that the expert relating the child's statements should not couple the testimony "with a professional opinion as to whether the child was truthful, had symptoms of sexual abuse trauma, or whether the symptoms of the child were consistent with child abuse." Id. at 676. See *supra* (discussing improper expert testimony that bolsters the credibility of the witness).

b. State v. Hanes, 790 N.W.2d 545 (Iowa 2010).

In *State v. Hanes*, the Court discussed the foundation required for the hearsay exception for statements made for purpose of medical diagnosis or treatment under Rule 5.803(4). In that case, the trial court refused to allow a nurse practitioner who treated defendant's injuries to testify regarding defendant's statements because they were exculpatory. Although the Iowa Supreme Court reversed on other grounds, it noted that "[w]hether testimony is exculpatory or inculpatory is not a factor for courts to consider in determining the admissibility of statements

made for purposes of medical diagnosis." Id. at 553. The Court reiterated the two part test applicable to Rule 5.803(4) statements: "(1) the declarant's motive in making the statement is consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." Id.

5. Past Recollection Recorded—Rule 5.803(5): State v. Elliott, 806 N.W.2d 660, 673 (Iowa 2011) (noting that under the past recollection recorded exception "the witness must state under oath that the prior statement was accurate and the witness should be subject to cross-examination on that point").

6. Learned Treatises—Rule 5.803(18): State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013).

In *Neiderbach*, a prosecution involving shaken baby syndrome, the State's experts testified that case studies published in the prestigious journal *Pediatrics* established that shaking alone can cause traumatic brain injuries in an infant. As discussed above, the Court held that the trial court erred in admitting this testimony because the State had failed to establish that the facts and data in the case studies referred to by the experts were of a type reasonably relied upon by experts in the field. See *supra*. The Court did not, however, address whether the case studies themselves were independently admissible under the learned treatise hearsay exception in rule 5.803(18) because the State never raised that argument. *Neiderbach*, 837 N.W.2d at 205. That hearsay exception admits "statements contained in published treatises, . . . *established as a reliable authority* by the testimony or admission of the [expert] witness. . . ." (emphasis added). In his concurring opinion in *Neiderbach*, Justice Appel suggested that that foundation could not be satisfied merely by demonstrating that *Pediatrics* was a reputable or prestigious journal. Instead, to qualify for admission under rule 5.803(18), the State would have needed to demonstrate the authoritativeness of the specific case studies discussed by its experts. *Id.* at 243 (Appel, J., concurring). The *Neiderbach* concurrence indicates that it might be more difficult to lay the foundation required by rule 5.803(18) when the "reliable authority" relied upon by an expert is an article or study that has itself been published in a professional journal or other periodical.

7. Dying Declarations—Rule 5.80-4(b)(2): State v. Harper, 770 N.W.2d 316, 320 (Iowa 2009).

Although it is outside the temporal scope of this Update, the 2009 decision of *State v. Harper,* addresses Iowa's hearsay exception for dying declarations.

8. Statements Against Interest—Rule 5.804(b)(3): State v. Paredes, 775 N.W.2d 554 (Iowa 2009).

The Iowa Supreme Court extensively discussed the hearsay exception for statements against penal interest in *State v. Paredes*, 775 N.W.2d 554 (Iowa 2009). Again, that decision falls outside the scope of this Update.

III. The Confrontation Clause

Starting with its 2004 decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court has dramatically transformed the Confrontation Clause restrictions on the admission of hearsay against a criminal accused. That Court has issued major Sixth Amendment decisions addressing this issue in 2004, 2006, 2007, 2008, 2009, 2011, and 2012. Another potentially significant Confrontation Clause case involving a child's description of child abuse was argued this Term on March 2, 2015. Time and space constraints prevent extended discussion of those decisions. The following is a brief recap of major Confrontation Clause decisions by the United States and Iowa Supreme Courts.

A. United States Supreme Court Confrontation Clause Decisions

1. New Test for "Testimonial" Hearsay: Crawford v. Washington, 541 U.S. 36 (2004).

In *Crawford*, the Supreme Court rejected the multi-factored reliability approach of *Ohio v. Roberts* and reformulated the appropriate constitutional inquiry. Under *Crawford*, the Confrontation Clause bars the admission of "TESTIMONIAL" hearsay against a criminal accused UNLESS (1) The declarant is made available for cross-examination OR (2) The declarant was "UNAVAILABLE" at trial AND the defendant had an earlier "OPPORTUNITY TO CROSS-EXAMINE" the declarant about the statement. The Confrontation Clause only applies to "testimonial" hearsay. Non-testimonial hearsay, although still subject to exclusion under hearsay and other evidence rules, is exempt from Confrontation Clause analysis. See Davis v. Washington, 547 U.S. 813, 823-24 (2006); Whorton v. Bockting, 549 U.S. 406, 418-421 (2007).

2. Statements Made in Response to Police Questioning: Ongoing Emergencies and the "Primary Purpose" Test

Crawford implied that statements made in response to police interrogation are "testimonial." In subsequent cases, the Supreme Court qualified that suggestion and established a "primary purpose" test to delineate when statements made in the presence of government officers will qualify as testimonial.

a. Davis v. Washington, 547 U.S. 813 (2006).

Davis actually involved two domestic abuse cases that were consolidated for appeal before the Supreme Court. In admitting most of the 911 call (*Davis*), but excluding the statements made on the scene to responding officers (*Hammon*), the *Davis* court examined the "primary purpose" of the police questioning:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273-74 (2006).

b. Michigan v. Bryant, 131 S.Ct. 1143 (2011).

Bryant addressed the "primary purpose" inquiry in a non-domestic violence case involving statements made by a mortally wounded gunshot victim in response to police questioning. The Court held that the victim's statements to police at the scene were non-testimonial because their "primary purpose" was to enable police assistance to meet an ongoing emergency. Michigan v. Bryant, 131 S.Ct. 1143, 1167 (2011). The *Bryant* Court cautioned that in a non-domestic violence case, a court should not assume that an emergency terminates once the threat to the first victim is neutralized since the threat to police, first responders, and the public may continue. Id. at 1158. In reaching this holding, the Court elaborated on the primary purpose test. The existence of an ongoing emergency, which is a highly context-dependent determination, is a very significant (though not dispositive) factor in determining primary purpose. In determining the existence, duration, and scope of an emergency, a court should objectively assess (from the perspective of a "reasonable participant") a number of factors, including the actions and statements of all parties, the condition of the declarant, the existence and nature of weapons, if any, used, the nature of the case, and the formality of the encounter and questioning.

3. Business Records, Public Records, Forensic Reports and Analyses.

Although the Court in *Crawford* suggested that business records are not testimonial, that decision left open the question of whether business or public records created in connection with a criminal prosecution are testimonial. The Court began answering this question in three subsequent cases that have significant consequences for a wide variety of records routinely admitted in criminal cases.

a. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (holding that a certified lab report from state crime lab regarding the composition and weight of drugs seized from the accused were "testimonial" because the analysts' statements were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial").

b. Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011) (holding that the Sixth Amendment prohibited the prosecution from introducing the testimonial Report of Blood Alcohol Contents through "surrogate" testimony of analyst who did not sign the certification or perform or observe the lab test).

c. Williams v. Illinois, 132 S. Ct. 2221 (2012) (fractured 5-4 decision with no majority opinion permitting prosecution expert in bench trial to rely upon a pre-arrest, untargeted, non-accusatory DNA report prepared by an accredited laboratory and testify that profile in unadmitted DNA report matched profile previously taken from accused).

4. Child Hearsay

On March 2, 2015, the Court heard argument in **Ohio v. Clark**, a case involving the following certified question:

> **Issue**: (1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

State v. Clark, 137 Ohio St.3d 346, 999 N.E.2d 592 (Ohio 2013), *cert. granted*, Ohio v. Clark, 135 S.Ct. 43 (U.S. No. 1352). This will be the Court's first opportunity to decide whether the Confrontation Clause bars child hearsay made to mandatory reporters such as teachers, day care providers, and physicians.

5. Forfeiture by Wrongdoing

a. Giles v. California, 554 U.S. 353 (2008) (holding that an accused can forfeit his right of confrontation only if the prosecution establishes, by a preponderance of the evidence, that the accused engaged in conduct *designed* to prevent the witness from testifying).

b. Cf. Fed. R. Evid. 804(b)(6) (providing that person forfeits hearsay objection only if he "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."); Iowa R. Evid. 5.804(b)(6).

6. Declarant "Unavailable:" Hardy v. Cross, 132 S.Ct. 490 (U.S. 2011) (holding that a witness is "unavailable" under the Confrontation Clause only if the prosecution can demonstrate that it has made reasonable, good-faith efforts to obtain the witness's presence at trial).

B. Iowa Supreme Court Confrontation Clause Cases.

1. **State v. Tompkins, __ N.W.2d. __, 2015 WL 630203 (Iowa Feb. 13, 2015)** (holding that domestic abuse victim was "subject to cross-examination" for purposes of the Confrontation Clause even though State only questioned her about domestic relationship with defendant and not about assault; defendant could have cross-examined her during her initial testimony or later called her as a witness).

2. **State v. Kennedy, 846 N.W.2d 517 (Iowa 2014)** (holding, in prosecution for driving while revoked, that a certified abstract of the defendant's driving records was NOT TESTIMONIAL, but that the affidavit of mailing of suspension notices WAS TESTIMONIAL (but ultimately harmless error)).

3. **State v. Rainsong, 807 N.W.2d 283 (Iowa 2011)** (holding that a defendant did not waive the right of confrontation by refusing to participate in an unauthorized deposition to perpetuate a witness's testimony).

4. **State v. Harper, 770 N.W.2d 316 (Iowa 2009)** (holding that a murder victim's statements made in response to questioning by emergency medical personnel satisfied the hearsay exceptions for excited utterances and dying declarations and were "nontestimonial" for purposes of the Confrontation Clause).

5. **State v. Shipley, 757 N.W.2d 228 (Iowa 2008)** (upholding admission of a certified abstract of a defendant's driving record in a prosecution for driving under revocation).

6. **State v. Schaer, 757 N.W.2d 630 (Iowa 2008)** (holding that a victim's incident-describing statements made to her stepsister and medical personnel were nontestimonial for Confrontation Clause purposes).

7. **State v. Bentley, 739 N.W.2d 296 (Iowa 2007)** (ruling that deceased child's statements to a child protection center counselor describing sexual abuse by defendant were testimonial and inadmissible because of the lack of confrontation).

IV. U.S. Supreme Court/Eighth Circuit Case of Interest

A. Impeachment of Jury Verdict—Fed. R. Evid. 606(b): Warger v. Shaurers, 135 S.Ct. 521 (2014), *affirming* 722 F.3d 606, 610-12 (8th Cir. 2013).

In *Warger v. Shaurers*, the U.S. Supreme Court affirmed an Eighth Circuit decision that refused to permit a party to attack a jury verdict with evidence of statements made during jury deliberations that tended to show that a juror had lied during voir dire. The plaintiff in that case, who had lost his leg in a motorcycle – truck accident, sought a new trial contending that the jury forewoman had lied during voir dire about her ability to remain impartial and to award damages. The plaintiff supported the motion for new trial with another juror's affidavit describing statements that the forewoman had made during jury deliberations disclosing that the forewoman's own daughter had wrongfully caused a fatal vehicle accident and admitting that a lawsuit would have "ruined" her daughter's life. Warger, 135 S.Ct. at 524-25.

The trial court denied the new trial motion, ruling that Fed. R. Evid. 606(b) prevented the plaintiff from attacking the validity of the defense verdict with the juror's affidavit. Both the Eighth Circuit and the United States Supreme Court agreed.

The Court first held that a hearing to determine whether a juror lied during voir dire was "an inquiry into the validity of the verdict" that is generally barred by rule 606(b)(1). The Court stated:

> We hold that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire. In doing so, we simply accord Rule 606(b)'s terms their plain meaning. The Rule, after all applies '[d]uring an inquiry into the validity of a verdict.' A post verdict motion for new trial on the ground of voir dire dishonesty plainly entails 'an inquiry into the validity of [the] verdict': If a juror was dishonest during voir dire and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated.

Id. at 525 (citations omitted).

The Court next considered whether a juror's dishonesty concerning her own personal bias fell within the exception in Rule 606(b) that permits a party to impeach a jury verdict with

evidence that "extraneous prejudicial information . . . was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). The Court held that it did not, explaining:

> Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room.

Warger, 135 S.Ct. at 529 (citations omitted). Although the jury forewoman may have held personal views about negligence liability for car crashes because of her daughter's accident, she brought no specific knowledge about the litigated collision into the jury room. Therefore, the juror's personal bias fell "on the 'internal' side of the line." Id.

The Court did leave open the question of whether Rule 606(b) applies in cases of more extreme racial, ethnic, or religious juror bias. The Court suggested that

> There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process. We need not consider the question, however, for those facts are not presented here.

Id. at 529 n.3. This open door may well be relevant in future criminal cases.

V. Federal and Iowa Rule Amendments.

A. Federal Rules of Evidence Amendments.

1. 2011 Restyling of Federal Rules of Evidence.

Effective December 1, 2011, the Federal Rules of Evidence underwent a comprehensive "style" revision that re-wrote every Federal Rule of Evidence. According to the Advisory Committee Note that accompanies each restyled federal rule, the revisions are intended to make the rules "more easily understood and to make style and terminology consistent throughout the rule." The changes are stylistic only and are not intended "to change any result in any ruling on evidence admissibility."

Many of the Iowa Rules of Evidence were patterned on the Federal Rules of Evidence and, when promulgated in 1983, were identical in wording and substance to their federal counterparts. After the 2011 federal restyling, the Iowa Rules of Evidence now differ in text and format from the Federal Rules. Because the substance of the Federal Rules has not been changed, however, those Iowa Rules that replicate the pre-restyled version of the Federal Rules should continue to share the same substantive meaning. Moreover, the federal restyling should not affect the Iowa courts' reliance on federal precedent as persuasive authority for interpreting substantively similar Iowa Rules.

2. Fed. R. Evid. 801(d)(1)(B): Prior Consistent Statements

Effective December 1, 2014, Fed. R. Evid. 801(d)(1)(B) permits broader use of prior consistent statements "to rehabilitate the declarant's credibility as a witness." This amendment deems certain prior consistent statements non-hearsay if the declarant-witness testifies at trial and is subject to cross-examination about the statement and the prior consistent statement is offered:

> "(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; , . ."

Fed. R. Evid. 801(d)(1)(B) 2014 amendment (underlined).

The amendment allows substantive use of prior consistent statements that rebut attacks on a witness's credibility for reasons other than recent fabrication or improper motive or influence. For example, the amendment would admit prior consistent statements to explain an apparent inconsistency in the witness's testimony or to rebut a charge of faulty memory. Before this amendment, such prior consistent statements were only admissible for the limited purpose of rehabilitating the witness. The amendment makes those prior consistent statements substantively admissible as well. *See* Fed. R. Evid. 801(d)(1)(B) advisory committee note to 2014 proposed amendment.

3. Fed. R. Evid. 803(6) Business Records; 803(7) Absence of a Record of a Regularly Conducted Activity; and 803(8) Public Records

The December 1, 2014 amendment to the federal business records hearsay exception, Fed. R. Evid. 803(6), clarifies who bears the burden with respect to the trustworthiness of the record. Under that amendment, a business record will be admissible provided that the requirements of the rules are met and "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." That is, once the proponent of the record establishes the foundation requirements for the exception, the burden is on the opponent to show a lack of trustworthiness.

Similar amendments have been made to Fed. R. Evid. 803(7) (absence of a record of a regularly conducted activity) and Fed. R. 803(8) (public records enumerated in the rule are admissible if "opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness").

4. Fed. R. Evid. 803(10): Absence of Public Record

In 2013, in order to address the potential Confrontation Clause problems posed by Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), Fed. R. Evid. 803(10)—the federal hearsay exception concerning the absence of a public record—was amended to provide:

803(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice—unless the court sets a different time for the notice or the objection.

Fed. R. Evid. 803(10)(B) (effective Dec. 1, 2013). Under this "notice and object" procedure, the prosecution can avoid Confrontation Clause problems by providing the accused written notice of its intent to offer a certification of no record at least 14 days before trial. The defendant would then have 7 days to object. Presumably, if the defendant does not object, he will be deemed to have waived his right to confront the person who searched the public records and signed the CNR.

5. Fed. R. Evid. 804(b)(3): Statements Against Penal Interest.

This Federal Rule was amended on December 1, 2010 to require corroboration of all statements against penal interest offered in criminal cases. Formerly, the Rule required only the accused to corroborate exculpatory statements against penal interest. Now, prosecutors must also offer "corroborating circumstances that clearly indicate [the] trustworthiness" of all statements that tend to expose any declarant to criminal liability.

B. Iowa Rules of Evidence.

The most recent amendments to the Iowa Rules of Evidence occurred in 2009. Thus, although many of the Iowa Rules of Evidence were patterned on the Federal Rules of Evidence, the Iowa Rules have not been similarly restyled and do not include the federal amendments made after 2009. The 2009 Iowa amendments, which conformed the Iowa Rules to several (although not all) prior federal amendments, included:

1. Inadvertent Waiver of Attorney-Client Privilege and Work Product: Iowa R. Evid. 5.502. New Iowa Rule of Evidence 5.502 provides protection against the waiver of the attorney-client privilege or work product protection that may result from the disclosure of such information in a court or agency proceeding.

2. Exclusion of Witnesses: Iowa Evid. R. 5.615(4): The Rule governing exclusion of witnesses was amended to explicitly provide an exception pertaining to persons authorized by statute to be present in court.

3. Certification of Business Records: Iowa R. Evid. 5.803(6) and 5.902(11) & (12).

In May 2009, the hearsay exception for business records was amended to permit its foundation to be laid without the time-consuming and expensive need for foundation witnesses to testify at trial. Now, in addition to "testimony of the custodian or other qualified witness," both the Iowa and the federal business records exceptions can be satisfied by certification that complies with the rule governing self-authentication or a statute permitting certification. See Iowa R. Evid. 5.803(6). A corresponding amendment to Iowa Rule of Evidence 5.902 adds new sections 5.902(11) [certified domestic records of regularly conducted activity] and 5.902(12) [certified foreign records of regularly conducted activity] that set forth the procedures by which parties can self-authenticate business records without the testimony of a foundation witness.

4. Residual Hearsay Clause: Iowa R. Evid. R. 5.807.

The residual or catch-all hearsay exceptions formerly contained in the separate Iowa Rules of Evidence 5.803(24) and 5.804(b)(5) were combined and transferred to a new Rule 5.807. This parallels the consolidation of the federal catch-all exception in Fed. R. Evid. 807.

5. Forfeiture of Hearsay Objections by Wrongdoing: Iowa R. Evid. 5.804(b)(6).

Iowa R. Evid. 5.804(b) was amended to add a new provision, 5.804(b)(6), governing forfeiture of hearsay objections by wrongdoing. That exception, which requires the "unavailability" of the hearsay declarant, provides:

> (6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Iowa R. Evid. 5.804(b)(6).

Using Expert Witnesses in a Criminal Trial

3:30 p.m. - 4:30 p.m.

Presented by

Moderator:
Pamela Summers
Attorney
Intensive Supervision Drug Court
Phone: 515-330-0013

Sue Flander
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Public Defender's Office
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1916 Elm Circle
West Des Moines, IA 50265
Phone: 515-223-7825

Friday, April 17, 2015

Public Defender Meeting Expert Witness Panel Outline

"The Care and feeding of the Expert Witness"

M. L. "Mike" Rehberg BS, MS and F-ABFT

1. Give them all you have regarding their specialty!
2. Rehberg is a Forensic Toxicologist, with Associates!
3. What is a Forensic Toxicologist?
4. Keep them posted on changes and case information.
5. Tell the expert if the case settles and/or dates change!
6. Save money/time by working up precise of case!
7. Save money and time by marking and highlighting Depo's!
7. Make me a timeline of events in the case!
8. Hire them sooner rather than later!
9. They should know what they do and do not know!

Attachments:

CV, Fee Schedule, Some Old Cases Listed, Rehberg Library

CURRICULUM VITAE
FOR
MICHAEL L. REHBERG

MICHAEL L. REHBERG BS, MS and F-ABFT
1916 Elm Circle
West Des Moines, Iowa 50265
Telephone and Message: 515-223-7825
Fax: 515/223-0075
DOB: 08/28/39
E-mail: acejaxtox@aol.com

EDUCATION AND/OR TRAINING

1.	Elgin High School Elgin, Illinois	Diploma	1958	Science
2.	Elgin Community College	Diploma	1960	Science
3.	University of Wisconsin	BS	1962	Chemistry
4.	University of Wisconsin	MS	1968	Physiological Chemistry
5.	University of Wisconsin	7 credits	1968-69	Analytical Chemistry and Geology
6.	University of Iowa	3 credits	1974	Criminal Investigation*
7.	Iowa State University	12 credits	1975	Vocational Education*
8.	University of Iowa	0.30 credits	1999	Response to Bio-terrorism In Iowa, What Clinical Laboratories Need to Know

*LEAA funding

HONORS

- Tuition scholarship 1961 and 1962 - University of Wisconsin.
- Distinguish Graduate Award, 1977, Elgin Community College, Elgin, Illinois.
- Midwest Association of Forensic Scientists "Dedicated Service Award" – Presidency 1979.
- The Commissioner of the Iowa Department of Public Safety "Certificate of Recognition" – "Crash of United Flight 232" – September 1, 1989.
- Governor's Alliance on Substance Abuse, Drug Control and System Improvement Grant, Award for Highest Scoring Applicant, July 18, 1991.
- IACT – Appreciation Award for I.A.C.T. – D.O.T. Alcohol Study, April 4, 1995.
- 25 year Service Award, State of Iowa, February 15, 1996.
- Iowa Commissioner of Public Safety "Special Award for Traffic Safety", March 26, 1998.
- Named one of Elgin Community College's (ECC) "Fabulous 50 Former Students" January 10, 1999. 50th Anniversary of ECC.
- Received the Kipton Hayward Award on March 22, 2001 for providing exemplary services to customers in his community, and for efforts in furthering compliance with OWI/impaired driving laws and reducing traffic-related deaths and injuries.

- ❖ Outstanding Volunteer Award on November 6-8, 2002 from the Occupational Safety and Health Advisory Council @ the 31st Annual Governor's Safety Conference.

- ❖ DRE Ambassador Award, Awarded by the International Association of Chiefs of Police (IACP), Drug recognition Expert section, Awarded on 29 July 2014.

TEACHING APPOINTMENTS AND SPEAKING HONORS

- Student research coordinator worked with Drake University and Wartburg College

- Current research in forensic toxicology and toxicology includes natural product drugs and traffic safety toxicology.

- Certified instructor, Iowa Law Enforcement Academy (1975-2000).

Guest lecturer – Iowa Prosecution Attorneys' Training Council, Iowa Trial Lawyers' Association, Iowa Public Defenders' Association, Iowa Judicial Training Council, Forensic Science and Forensic Toxicology at Drake University, University of Northern Iowa, Iowa State University, University of Iowa Medical School, and Wartburg College. In the private sector for John Deere Company and the Principal Financial Group.

International Criminal Intelligence Training Assistance Program, FBI consultancy to the Policia Nationale Commission (PNC) Crime Laboratory, San Salvador, El Salvador, January, 1995.

PROFESSIONAL EXPERIENCE

- Retired – Consulting Forensic Toxicologist (January 2001 to present).
- Administrator, Iowa Criminalistics Laboratory (February 1971 – December 2000).
- Chief Chemist, Wisconsin State Crime Laboratory (4 years).
- Research Assistant, J.P. Kennedy, Jr. Memorial Laboratory (5 years).
- Research Assistant, Central Wisconsin Colony (1 year).
- Lab Aide, Wisconsin Agriculture Laboratory (6 months).

MAJOR RESEARCH INTEREST AND SUPPORT

1. Toxicology - metabolism of naturally occurring drug substances.
2. Natural products – cannabis, substituted amphetamines and naturally occurring stimulants.
3. Biochemistry of mental retardation (amino acids).
4. Evidential breath testing and alcohol metabolism.
5. Demographics of drug abuse in Iowa and drug recognition expert (DRE or DRT) programs.
6. Clandestine Drug Laboratories and the "Nazi" methamphetamine synthesis.
7. The use of blood alcohol graphs for data storage and courtroom purposes.

LICENSURES AND PRIVILEGES

- Certified Instructor at Iowa Law Enforcement Academy (1971-2000).
- Certifying authority for breath testing program in the state of Iowa (1975-2000).

- Teaching certificate - State of Iowa (August 1976-2000).
- Diplomat American Board of Forensic Toxicology (D-ABFT) (May 1978, #87 – present).
- Member, Plymouth Church, Des Moines, Iowa (1972–2001).
- Member, Central Presbyterian Church, Des Moines, Iowa (2001- present).

SCIENTIFIC AND PROFESSIONAL SOCIETIES

- Fellow, American Academy of Forensic Science (AAFS) (1972 – present).
- Criminalistics Section Historian, 1982. AAFS Member (1972 to present).
- Mid-West Association of Forensic Science (MAFS), Newsletter Editor, 1972 - 1978 and 1980 - 1981; Executive Board, 1975-1978; President, 1979. Member 1972 - present (charter member).
- Diplomat of the American Board of Forensic Toxicology (D.A.B.F.T.) certification #78– (May, 1978 – present).
- American Society of Crime Laboratory Directors (ASCLD), Executive Board Member, 1980 - 1983, charter member (1972 – 2009).
- Member, International Association for Chemical Testing (1988 – present).
- Member, Society for the Preservation and Encouragement of Barbershop Quartet Singing in America, Incorporated, SPEBSQSA (1957 – present).
- Member, The National Safety Congress, Committee on Alcohol and Other Drugs (CAOD) (1989 – present). Executive Board Member (1993–1996) (1998).
- Member, Iowa Traffic Control and Safety Association (1987-2000).
- Member, American Association for Advancement of Science (2000 – 2007).
- Member, Society of Forensic Toxicologists (2001 – present).

PUBLICATIONS

1. Gerritsen, Theo and Rehberg, M.L., Procedures for Screening Tests on Urine and Blood for the Detection of Metabolic Defects in Mentally Retarded Children as used in the Joseph P. Kennedy Laboratory, Department of Pediatrics, University of Wisconsin Medical Center, Madison, Wisconsin (1965).

2. Gerritsen, Theo, Rehberg, M.L., and Waisman, H.A., Analytical Biochem. II 460-466 (1965).

3. Rehberg, Michael L., and Gerritsen, T., Abs. 115, of the 152nd meeting of the American Chemistry Society (1966).

4. Rehberg, Michael L., and Gerritsen, T., In Vivo Metabolism of 14 C-Glycine and 14 C-Glyoxalate in the Rat, Biochemical Abstracts of the Annual Meeting of the Federated Association of Societies for Experimental Biology (FASEB).

5. Rehberg, Michael L., In Vitro Isotope Dilution Assay for Sarcosine Dehydrogenase, Master of Science Thesis, Department of Psychological Chemistry, University of Wisconsin (1968).

6. Rehberg, Michael L., and Gerritsen, T., Sacrosine Metabolism in the Rat, Archives of Biochemistry and Bio-Physics, 127, 661-665 (1968).

7. The Criminal Investigation and Physical Evidence handbook, staff of the Crime Laboratory Division of the Wisconsin State Department of Justice (1968).

8. Drug Abuse; Symptoms and Identification (1968), Wisconsin Crime Laboratory.

9. Rehberg, Michael L., and Dolejsi, F.C., Marijuana (Cannabis sativa L.) and its preparations, and educational aid (1968), Wisconsin Crime Laboratory.

10. Drug Abuse: Symptoms and Identification (1969), a revised and more complete treatment, Wisconsin Crime Laboratory.

11. Spoke to the Western Conference on Criminal and Civil Problems, 1972, Crime Laboratory Services to Law Enforcement.

12. Iowa Administrative Code: Sections on Criminalistics Laboratory, Breath, Blood and Urine Alcohol Testing and Iowa Criminalistics Laboratory Administrative Rules. ARC Firearms Confiscation rules - 1993.

13. ISME Newsletter, Vol. 1, No. 2, April 1984, Overview of Direct Breath Testing for Blood Alcohol Concentration in the State of Iowa Utilizing the Intoxilyzer 4011A.

14. Rehberg, M.L.; S.C.; Monserrate, R.; An interesting OWI Case in Iowa, MAFS Newsletter, Vol. 13, No. 1, January 1984, pg. 44.

15. Rehberg, M.L.; Observations on the Use of Congealed Blood and Forensic Alcohol Determinations, MAFS Newsletter, Vol. 16, No. 2, April 1987, pg. 30-32.

16. Rehberg, M.L.; Observations of the Homogeneity of Frozen Urine and its Analysis for Alcohol for Forensic Purposes, MAFS Newsletter, Vol. 16, No. 3, July 1987, pg. 44-47.

17. Rehberg, M.L.; The Criminalistics Laboratory - Its Role in the Iowa Criminal Justice System, International Association for Identification - Iowa Division Newsletter, Vol. VI, No. 1, August 1987, pg. 5-34.

18. Rehberg, M.L., and Eck, S.C.; Urine Analyses in OWI Arrests Iowa, MAFS Poster Presentation, Indianapolis, IN, October 1990.

19. Rehberg, M.L., and Eck, S.C.; A Study of Urine Analyses in OWI Arrests in Iowa. AAFS Poster Presentation, Anaheim, CA, February 1991.

20. Rehberg, M.L., and Eck, S.C.; A Study of Urine Analyses in OWI Arrests in Iowa. ITCSA Meeting, Ames, Iowa, April 1991.

21. Rehberg, M.L., Monserrate, R., and Rayburn, C.; Blood and Breath Testing of Subject Exposed to Various Organic Solvents. International Association for Chemical Testing Newsletter, July 1995.

SOCIETY OF FORENSIC TOXICOLOGISTS

Annual meetings attended: 2001; 2002; 2003; 2004 combined with The International Association for Forensic Toxicology (TIAFT) and The FBI Symposium on Forensic Toxicology; 2005; 2006 (Austin, TX); 2007 [Raleigh-Durham, NC]; 2008 [Phoenix, AZ]; 2010 [Richmond, VA]; 2013 [Orlando, FL].

INTERNATIONAL ASSOCIATION FOR CHEMICAL TESTING

Annual meetings attended: 2004; 2005; 2008; 2010 Dallas, Texas 18-22 April.

AMERICAN ACADEMY OF FORENSIC SCIENCES ACTIVITY AND CONTINUING EDUCATION

Annual meetings attended: 1968, 1969, 1971, 1972, 1973, 1974, 1975, 1977, 1979, 1980, 1983, 1984, 1985, 1986, 1987, 1989, 1991, 1992, 1994, 1995, 2002, 2003, 2005, 2006, 2008, and 2011

FBI CRIME LABORATORY SYMPOSIUM AND AMERICAN SOCIETY CRIME LABORATORY DIRECTORS MEETING

Annual meetings attended: 1972 (first meeting), 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1998.

More than 300 symposia, training sessions, meetings and workshops on: chromatography, chemistry, toxicology, forensic toxicology, forensic science and traffic safety.

INTERNATIONAL CHIEFS OF POLICE (I.A.C.P.) DRUG RECOGNITION EXPERT (DRE) SYMPOSIA

1994 Annapolis, Maryland (Toxicologists)
1995 Phoenix, Arizona
1996 Aspen, Colorado
1997 Buffalo, New York
1998 Portland, Oregon

Attended "Laboratory Aspects of Forensic Drug Testing" November 7-9, 1990; The Center for Human Toxicology, University of Utah; Symposium regarding Human Workplace Drug Testing.

TESTIFIED IN EXCESS OF 1,325 TIMES IN 5 STATES AND U.S. FEDERAL COURT.

HIRED AS A CONSULTANT BY THE CITY OF PHOENIX, AZ. ACTED AS A CONSULTANT TO INSPECT THE CITY OF PHOENIX, POLICE DEPARTMENT, CRIME LABORATORY TOXICOLOGY AND EVIDENTIAL BREATH TESTING UNIT. REPORTED ON THE OPERATION OF THE TOXICOLOGY SECTION. THIS TOOK PLACE IN JANUARY-APRIL, 2004.

WORK EXPERIENCE

December 29, 2000 – Present

Retired – Consulting Forensic Toxicologist & Forensic Science Consultant

February 15, 1971 – December 29, 2000
Iowa Division of Criminal Investigation Laboratory Administrator and Forensic Toxicologist, Division of Criminal Investigation Laboratory, Wallace State Office Building, Des Moines, Iowa 50319.

December 1967 - February 14, 1971
Chemist, Chief Chemist and Analyst IV at Wisconsin State Crime Laboratory, 4206 University Avenue, Madison, Wisconsin 53205.

July 1963 - January 1968
Research Assistant, Joseph P. Kennedy Jr. Memorial Laboratory, University of Wisconsin Medical School, University of Wisconsin, Madison, Wisconsin

January 1963 - July 1963
Research Assistant, Central Colony Research Unit, Madison, Wisconsin.

September 1962 - January 1963
Glassware washer - Wisconsin Agriculture Department, Madison, Wisconsin.

1955 - 1962
High School student, Junior College Student, College student, student, golf caddie, golf course starter and ranger, bus boy, assistant chef, factory worker, advertising paste-up man, milkman, dairy worker, waiter, bartender, cook, dish washer.

Symposia, Workshops, Conferences, Scientific Meetings attended since retirement in 2000:

1. Society of Forensic Toxicologists Meeting (SOFT); New Orleans, LA, October, 2001.
2. Urine Testing and Human Performance; 2001, SOFT Workshop.
3. Herbal Medicine; 2001, SOFT Workshop.
4. Cannabinoids and Metabolites; 2001, SOFT Workshop.
5. Urine Concentration and Metabolites: Relationship between Excretion and Time of Use; 2001, SOFT Workshop.
6. Alko'hl: A Forensic Symposium; 2001, Soft Workshop.
7. The Smell of an Alcoholic Beverage; 2001, SOFT Workshop.
8. Pharmacology of Alcohol; 2001, SOFT Workshop.
9. Pharmacokinetics of Alcohol in Blood, Breath Urine and Saliva; 2001, SOFT Workshop.
10. Breath Alcohol Testing Quality Assurance; 2001, SOFT Workshop.
11. Materia Medica of Herbal Preparation; 2001, SOFT Workshop.
12. Alternative Therapies: When Natural Products and Traditional Medicines Meet; 2001, SOFT Workshop.
13. American Academy of Forensic Scientists Meeting (AAFS); Atlanta, GA, February, 2002.
14. Gammahydroxybutyric Acid (GHB) Old Substance New Problem; 2002, AAFS Workshop.
15. Is This Driver Impaired by Drugs: Can Drug Concentrations and a DRE Evaluation Answer This Question? ; 2002, AAFS Workshop.
16. SOFT Meeting; Dearborn, MI, October 2002.
17. AAFS Meeting; Chicago, IL, February, 2003.
18. Murder by Poison and Poison throughout History; 2003, AAFS Workshop.
19. Clinical Chemistry and Forensic Toxicology-A Symbiotic Relationship in Death; 2003, AAFS Workshop.
20. SOFT Meeting; Portland, OR, October 2003.
21. Chemical, Biological and Nuclear Threat, Challenges for the Forensic Toxicologist; 2003, SOFT Workshop.
22. Forensic Toxicology of Metals; 2003, SOFT Workshop.

23. Feeling Blue? Antidepressant Workshop! ; 2003, SOFT Workshop.
24. Forensic Toxicology of Methadone; 2003, SOFT Workshop.
25. Developments in Federally Regulated Drug Testing; 2003, SOFT Workshop.
26. Toxicology in the Emergency Room-Ante Mortem Savvy for the Toxicologist; 2003, SOFT Workshop.
27. International Association for Chemical Testing (IACT) Meeting; Little Rock, AR, April 2003.
28. The FBI Symposium on Forensic Toxicology; Washington, DC, August, 2004.
29. Joint SOFT & the International Association of Forensic Toxicologists (TIAFT) Meeting; Washington, DC, September, 2004.
30. AAFS Meting; New Orleans, LA, February 2005.
31. Ethanol Testing in the Clinical Setting (Hospital, Clinic, etc.); Committee on Alcohol and Other Drugs (CAOD) of the National Safety Congress (NSC) Workshop; 2005, AAFS.
32. Anatomical, Pathological and Physiological Foundation of Toxicity; 2005, AAFS Workshop.
33. Human Factors, Performance and Transportation Safety- The Rest of the Story: Beyond Alcohol and Other Drug Impairment; 2005, AAFS Workshop.
34. Evidence Based Forensic Science: Interpreting Postmortem Toxicology in the Light of Pathological Findings; 2005, AAFS Workshop.
35. IACT Meeting; Madison, WI. April, 2005.
36. SOFT Meeting; Nashville, TN, October, 2005.
37. Day 1: Case Studies in DUID: Numbers, Signs, Symptoms and Beyond; 2005, SOFT Workshop.
38. Day 2: Case Studies in DUID: Numbers, Signs, Symptoms and Beyond; 2005, SOFT Workshop.
39. Blood Alcohol Concentration Extrapolation; 2005, SOFT Workshop.
40. AAFS Meeting; Seattle, WA, February, 2006.
41. Interpretation of Toxicological Analysis in the Elderly; 2006, AAFS Workshop.
42. Forensic Toxicology-The World Outside of Drugs; 2006, AAFS Workshop.
43. The Medico-Legal Investigation of a Recreational Diving Fatality; 2006, AAFS Workshop.
44. SOFT Meeting, Austin, TX, October, 2006.
45. Standardized Field Sobriety Tests-Principles and Practice; 2006, SOFT Workshop.
46. Opioids: Pharmacology Review; 2006, SOFT Workshop.
47. Pharmacokinetics in Forensic Toxicology---The Good, the Bad and the Ugly; 2006, SOFT Workshop.
48. Addiction and Pain Management for Forensic Toxicologists- Update on Drug Therapy, Clinical and Forensic Toxicology and the Emerging Role of Pharmacogenomics, 2006, SOFT Workshop.
49. The Application of Hair as an Alternative Matrix for Forensic Applications; 2006, SOFT Workshop.
50. SOFT Meeting; Raleigh-Durham, NC, October, 2007.
51. Beyond Herbals: The Toxicology of Plants; 2007, SOFT Workshop.
52. Toxicological Analysis of Drug-Facilitated Crimes for Dummies...And Smarties Too; 2007, SOFT Workshop.
53. Benzodiazepines...The Basics and Beyond-Soft Continuing Education Committee workshop; 2007, SOFT Workshop.
54. Toxicology Jeopardy-A Practical Approach DUID Testing OR "What are the Solutions to Your Problems!" ; 2007, SOFT Workshop.
55. Clinical or Forensic Case-A Crossroad for Interpretations-SOFT Continuing Education Committee Workshop; 2007, SOFT Workshop.
56. AAFS Meeting; Washington, DC, February, 2008.
57. Forensic Toxicology: A Historical Perspective; 2008, AAFS Workshop.
58. Angst of Ethics: Consulting/Expert Witness Compensation; 2008, AAFS Workshop.
59. Postmortem Toxicology: Interpretation of Drug Concentrations in Hair; 2008, AAFS Workshop.

60. The Impact of Confirmational Bias and Context Effect on Report Writhing in the Forensic Science Laboratory; 2008, AAFS Workshop.
61. Marijuana Induced Psychosis; 2008, AAFS Workshop.
62. Midwest Association of Forensic Scientists Meeting (MAFS); Des Moines, IA, October, 2008.
63. Pharmacodynamics for Forensic Toxicologists; 2008, MAFS Workshop.
64. Courtroom Testimony Techniques, "Success Instead of Survival"; 2008, MAFS Workshop.
65. Integrity, Character & Ethics in Forensic Sciences; 2008, MAFS Workshop.
66. SOFT Meeting; Phoenix, AZ, October, 2008.
67. Effects of Drugs on Human Performance and Behavior-A Borkenstein Sampler; 2008, SOFT Workshop.
68. Overview and Review of Forensic Toxicology; 2008, SOFT Workshop.
69. Overview of Biomarkers of Alcohol Testing; 2008, SOFT Workshop.
70. Critical Flicker Fusion Confusion; 2008, SOFT Workshop.
71. Interpretive DUID Workshop, May 12-13, 2009, sponsored by SOFT in Houston, Texas, at the Harris County, Medical Examiner, Laboratory.
72. American College of Medical Technology (ACMT); 1st Forensic Course: Ethanol and Marijuana, November 18 & 19, 2009; Sheraton Inner Harbor Hotel, Baltimore, MD.
73. International Association for Chemical Testing (IACT), 23rd Annual Meeting, Dallas, TX, April 18-22, 2010.
74. SOFT Meeting; Richmond, VA, October 18-22, 2010.
75. Marijuana Pharmacology-Practical Applications for the Forensic Toxicologist; 2010, SOFT Workshop #1.
76. DFSA Applications and Interpretations; 2010, SOFT Workshop #5.
77. A Stroll through the Cannabinoid Field: Pharmacology, Therapeutics and Untoward Effects; 2010, SOFT Workshop #7.
78. Piperazines, Designer Amphetamines and Tryptamines; 2010, SOFT Workshop # 11.
79. AAFS Meeting, 63rd Annual Meeting, Chicago, IL; 21-26 February 2011.
80. COAD Meeting, Chicago, IL; 21 February 2011.
81. Tips and Tricks to Improve the Interpretive Value of Postmortem Toxicology; 2011 AAFS Workshop # 1, 21 February 2011, Chicago, IL.
82. Identifying and Managing Errors in Case Analysis: Introduction to Human Error Analysis; 2011 AAFS Workshop # 2, 21 February 2011, Chicago, IL.
83. Blood Alcohol Concentration (BAC) Evidence: Extrapolation, Interpretation, and Testimony in the Post-NAS Era; 2011 AAFS Workshop # 21, 22 February 2011, Chicago, IL.
84. Introduction to Expert Witness Testimony; 2011 AAFS Workshop # 22, 22 February 2011, Chicago, IL.
85. Midwest Association of Forensic Scientists 40th Anniversary Meeting, Lombard, IL; September 21-23, 2011 (past President 1978-1979; Newsletter Editor, 1971-1978).
86. Midwest Association of Forensic Scientists (MAFS) 41st Annual Meeting, Milwaukee, WI; September 23-26, 2012.
87. "Leadership is Not Management," MAFS Workshop; September 24, 2012; Milwaukee, WI.
88. "Scientific Writing for Dummies...and Smarties Too! Increasing Your Chances for Success," MAFS Workshop; September 24, 2012; Milwaukee, WI.
89. "Pharmacology of Synthetic Cannabinoids," MAFS Workshop; September 26, 2012; Milwaukee, WI.
90. "Reconciling the Forensic Scientist, the Criminal Defense Attorney and the Criminal Justice System," MAFS Workshop; September 26, 2012; Milwaukee, WI.
91. SOFT Meeting; Orlando, FL, October 28 thru November 02, 2013.
92. "Overview and Review of Forensic Toxicology-Part 1," SOFT Workshop #1, 28 October 2013.
93. "Ethanol Facilitated Sexual Assault," SOFT Workshop #4, 28 October 2013.
94. "Overview and Review of Forensic Toxicology-Part 2," SOFT Workshop # 7, 29 October 2013.

95. Marijuana: Old Drug, New Data; SOFT Workshop #12, 29 October 2013.
96. SOFT Meeting: Grand Rapids, MI, October 19 thru 23, 2014.
97. "Oral Fluid Testing: Basic Science and Practical Applications," SOFT Workshop #2, 20 October 2014.
98. "A Pharmacogenomics Primer with Applications to Forensic Toxicology," SOFT Workshop #9, 21 October 2014.
99. "Rapid Urine Testing by Mass Spectrometry," SOFT Workshop #12, 21 October 2014.

Recent Public information Speeches & Presentations; Subsequent to Retirement:
1. Iowa Trial Lawyers Association, 20th Annual Criminal Law Seminar, Forensics, Toxicology and Drug Recognition Issues; September 15th 2006, Iowa City Iowa, Sheraton Iowa City Hotel, Iowa City, Iowa 1000-1100 hours.
2. ASIS International; formerly, American Society for Industrial Security, November 10th 2009, Forensic Toxicology and Forensic Science in the Private Sector, EMC Building, Des Moines, IA 1200-1330 hours.
3. Forensic Toxicology and the Crime Laboratory, A Laboratory Director's Perspective; The Des Moines, Iowa "Golden Key" Kiwanis Club; August 12th 2010.

Other Miscellaneous Training and classes:

Attended "Laboratory Aspects of Forensic Urine Drug Testing" at the Center for Human Toxicology, University of Utah, November 7-9, 1990; Salt Lake city, Utah.

Attended three day (24 hour) FPIA, Abbott Diagnostic Training Center, ADx Operators Course, Dallas Texas, August 1-3, 1988.

Attended The MAFS sponsored course, "Forensic Applications of the Toxi-Lab Drug Detection System, Workshop and Training, Des Moines, Iowa, 05 October 1988.

Attended The Drug Enforcement Administration Forensic Chemists Class in Drug Identification, March 1968, Washington D.C., at the DEA Special Testing and Research Laboratory.

During the course of my career I have had cases in: Iowa, Wisconsin, Minnesota, Illinois, Missouri, North Dakota, South Dakota, Nebraska, and Kansas (9 states).

Fee Schedule for Forensic *Consulting*
Michael "Mike" L. Rehberg B.S., M.S. and D-A.B.F.T.
Effective as of January 01, 2014
(TIN) tax number (SSN) 349-32-5164

$1000.00 Retainer (non-refundable) provides for initiation of case work (first hour of case work and review included), covers first communications and consultation, use of the CV, use of reputation, file generation and miscellaneous activities, not applicable to subsequent case work or testimony.

$180.00 *Hourly* rate for consultation and case work, including: research, literature search, verbal and written communications, FAX communication, laboratory inspection, transcript review, interrogatory work, report preparation, travel and waiting time, medical record review, police report review, DOT report review, pretrial conferences, chemical/scientific analysis, referrals to other specialists, consultation, and other special projects or work as requested.

Hourly rate for testimony, up to $900.00 for the first hour or portion thereof. This applies to depositions, trials at the bench, trials by jury, DOT hearings, administrative hearings, workman's compensation hearings, and other proceedings as appropriate. Subsequent time (longer than 1 hour) for testimony will be billed up to $600.00 per hour or portion thereof. It is the responsibility of the attorney hiring this Forensic Toxicologist, to assure that opposing council will pay deposition fees and other appropriate expenses incurred by the deposing attorney.

Charges may also include, reasonable expenses incurred for: Lodging, meals, travel expenses, mileage, airfare (cheaper of business or first class), charts, graphs, court and/or report preparation costs, FAX, telephone charges, postage, copy costs, and/or miscellaneous administrative costs incurred.

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Court Appearances 2004-present

Michael I. Rehberg BS, MS, DABFT

1258-13 January 2004
Lunstad vs. McGee's Tavern, Jury Trial
Dram Shop case, Pottawattamie County, Iowa
Attorney Michael Reilly, plaintiff (2004-#1)

#1259-05 February 2004
Gabbard vs. Burbridge, Jury Trial
Personal Injury case, Blackhawk County, Iowa
Attorney Samuel Anderson, defendant (2004-#2)

#1260-20 April 2004
Hazen vs. Hilltop Tap, Jury Trial
Personal Injury case, Muscatine County, Iowa
Attorney David L. Scieszinski, plaintiff (2004-#3)

#1261-25 May 2004
Conrad vs. Seedorf Masonry, Inc., Deposition
Personal Injury case, Linn County, Iowa
Attorney Charles Cutler, defendant (2004-#4)

#1262-03 June 2004
Vaughn vs. Theo's Pub, Jury Trial
Personal Injury/Dram Shop case, Woodbury County, Iowa
Attorney Alan Fredregill, plaintiff (2004-#5)

#1263-23 June 2004
Springer/Bauer vs. Elm's Club, Deposition
Dram Shop case, Union County, Iowa
Attorney Robert Reynoldson, plaintiff (2004-#6)

#1264-04 August 2004
State of Iowa vs. Troy Thomas Lee, Deposition
Homicide Prosecution, Webster County, Iowa
Attorney Ward A. Rouse, defendant (2004-#7)

#1265-12 August 2004
Walter vs. Gentz, Jury Trial
Personal Injury case, Cerro Gordo County, Iowa
Attorney Rustin T. Davenport, defendant (2004-#8)

#1266-27 August 2004
State of Iowa vs. Troy Thomas Lee, Jury trial
Homicide Prosecution, Webster County, Iowa
Attorney Ward A. Rouse, defendant (2004-#9)

#1267- 07 September 2004
State of Iowa DOT vs. Harlan Wayne Kies, Administrative Hearing
OWI Prosecution and Implied Consent Hearing, Buena Vista County, Iowa
Attorney Joseph G. Bertogli, defendant (2004-#10)

#1268-06 December 2004
State of Iowa DOT vs. Kies (second hearing) Administrative Hearing
OWI Prosecution and Implied Consent Hearing, Buena Vista County, Iowa
Attorney Joseph G. Bertogli, defendant (2004-#11)

#1269-29 March 2005
Giddings vs. State Farm Mutual Automobile Insurance Company, Deposition
Civil Personal Injury, Wrongful Death Case, Humboldt County, Iowa
Attorney Michael A. Carmoney, defendant (2005 #1)

#1270-05 April 2005
State of Iowa vs. Harlan Wayne Kies
OWI Prosecution, Buena Vista County, Iowa
Attorney Joseph G. Bertogli, defendant (2005-#2)

#1271-12 April 2005
State of Iowa vs. Bruce E. Johnson, Esq.
OWI Prosecution and Implied Consent Hearing, Polk County, Iowa
Attorney Bruce E. Johnson and Ronald Wheeler, defendant (2005-#3)

#1272-19 May 2005
Lettington vs. "Ruby's" Waltz Inn, Inc.
Civil, Dram Shop Case, Deposition, Guthrie County, Iowa
Attorney Mark Sherinian, Plaintiff (2005-#4)

#1273-29 June 2005
Archer vs. McCarroll and KA-Boo's
Civil, Dram Shop and Personal Injury, Blackhawk County, Iowa
Attorneys Thomas Henderson and David Roth (2005-#5)

#1274-02 September 2005
Wemett vs. Old Dutch Foods Company
Civil, Workman's Compensation Case, Dubuque County, Iowa
Attorneys Stephanie Glenn-Techau and Nick Avgerinos, Chicago (2005-#6)

#1275-07 October 2005
Etringer vs. Walmart Corporation
Civil, Workman's Compensation Case, Blackhawk County, Iowa
Attorneys Peter Sand and Cheryl Weber (2005-#7)

#1276-14 October 2005
Williams vs. City of Davenport
Civil, Personal Injury, Vicarious Liability Case, Scott County, Iowa
Attorneys Craig Levien & Mary Thee and Ned Wehr (2005-#8)

#1277-13 December 2005
State vs. Wiebbeke
Criminal, OWI, Criminal Mischief, others; Vinton County, Iowa
County Attorney David C. Thompson (2005-#9)

#1278-04 January 2006
Puetz vs. Utesch
Civil, Dram Shop,
Attorney Daniel Gildemeister and Rosalyn Koob (2006-#1)

#1279-07 February 2006
State vs. Branko Vajda
Criminal OWI, Johnson County, Iowa
Attorney David Brown (2006-#2)

#1280-09 February 2006
State vs. Visser
Criminal, Sexual Assault; Drug Facilitated Sexual Assault (DFSA) Sioux County, Iowa
Attorney Francis Lee Goodwin (2006-#3)

#1281- 02 March 2006
Grimm vs. Muscatine County Fair Board
Civil, Personal Injury, Johnson County, Iowa
Attorneys Megan Antenucci & Gretchen Kreamer (2006-#4)

#1282-29 March 2006
Shafer vs. Shafer
Civil, Personal Injury, Wrongful Death, Wayne County, Iowa
Attorneys Eric Loney, John Vasey and Andrew Hall (2006-#5)

#1283-05 April 2006
State vs. Ricardo Lee McGlothlin
Criminal, Post Conviction Relief (PCR), Homicide, Davis County, Iowa
Attorneys Justin Swaim and Rick Lynch ((2006-#6)

#1284-06 April 2006
State of Iowa vs. James Bauer
Criminal, Sexual Assault (DFSA), Johnson County, Iowa
Attorneys Victoria Coles and Leon Spies (2006-#6)

#1285-01 June 2006
State of Iowa vs. Brian Lynn Walsh
Criminal, OWI, Buena Vista County, Iowa
Attorney Joe Bertogli and Iowa DOT Hearing (2006-#7)

#1286- 06 June 2006
Watters vs. Yarnes
Criminal, Personal Injury-Diving, Dickinson County, Iowa
Attorneys Dan DeKoter and Ned Stockdale (2006-#8)

#1287- 27 June 2006
State of Iowa vs. Bauer
Criminal, Sexual Assault, Drug Facilitated Sexual Assault (DFSA) Johnson County, Iowa
Attorneys Victoria Cole and Leon Spies (2006-#9)

#1288- 16 August 2006
Amber Shafer vs. Estate of William Everett Shafer
Civil, Personal Injury, Wrongful Death in a Vehicle Crash, Wayne County, Iowa
Attorneys Eric Loney and John Vasey (2006-#10)

#1289- 18 August 2006
Mendenhall vs. Cedar Valley Apartments
Civil, Personal Injury- Fall in residential area, Linn County, Iowa
Attorneys Pete Leehey and Kim Hardemann (2006-#11)

#1290-26 September 2006
State of Iowa vs. Kyle L. Stone
Criminal, OWI breath test information, Blackhawk County, Iowa
Attorneys Craig Ament and J. Dean Keegan (2006-#12)

#1291- 01 November 2006
Wollesen vs. Danbom and Wolfswinkel
Civil, personal injury and death, Dickinson County, Iowa
Attorneys David J. Stein, Jr., John C. Gray, and John D. Mayne (2006-#13)

#1292- 09 November 2006
Criminal, OWI, State of Iowa vs. Kyle L. Stone
Same as #1290- but now Kimberly Griffith, Blackhawk County Deputy CA (2006-#14)

#1293-06 December 2006
Burks vs. Decker Trucking, Civil, Personal Injury, Marijuana
Attorneys "Jerry" Spaeth and George LaMarca,
Johnson County, Iowa (2006-#15)

#1294-05 February 2007
State of Iowa vs. Garrido, criminal OWI, hypothetical EtOH questions
Asst. CA Kim Griffith and Robert Thompson
Blackhawk County, Iowa (2007-# 1)

#1295-20 February 2007
Schlegel vs. Brickman, Civil, Personal Injury, motor vehicle-pedestrian,
Alcohol, Marijuana and Cocaine
Attorney Sharon Soorholtz Greer
Polk County, Iowa (2007-#2)

#1296-27 March 2007
State of Iowa vs. Bruce G. Leitz, Criminal, OWI
Alcohol, Rehberg Calculation Case Error, alcohol proof is 2X concentration
John Hines and Brent Hereen, Tama County Attorney
Tama County, Iowa (2007-#3)

#1297- 06 April 2007
State of Iowa vs. Dan Stockdale, Criminal, OWI
Alcohol and type II diabetes
David Johnson and Randall Tilton, Hardin County Attorney
Hardin County, Iowa (2007-# 4)

#1298- 09 July 2007
Kessel vs. End Zone and The Fort aka My Place, personal injury;
Death and dram Shop, Alcohol and Theoretical BAC calculations, recognition of alcohol symptoms and human alcohol metabolism and effects
Martin Diaz, Guy Cook, and Chad M. Von Kampen, Deposition, Plaintiff
Washington County, Iowa (2007-#5)

#1299-21 August 2007
State of Iowa vs. Patrick Bowers,
Sweat Patch Testing, Pros and Cons, PHARMCHEM Company, Child Custody Hearing,
Dan McClean, Dubuque County Attorneys Office, Trial, Defendant
Dubuque County, Iowa, telephone (2007-#6)

1300- 29 August 2007
Melsha vs. Flanagan's
Dram Shop Litigation, Civil, Plaintiff, Deposition, Plaintiff, Deposition
Hugh Albrecht and M. Scott Gemberling
Johnson County, Iowa, done in Des Moines @ Steve Lawyer office (2007-#7)

1301-03 December 2007
State of Iowa vs. Jeremiah John Burke
OWI, Criminal, Trial
Eric Tindal & David Tiffany and Judge Potterfield
Johnson County, Iowa (2007-#8)

1302-25 February 2008
State vs. Marty Lee Osmundson
OWI, Criminal, Suppression Hearing
Zane Blessum, Polk County, Iowa (2008-#1)

1303-18 April 2008
DeLong vs. City of Des Moines, Iowa
Personal Injury, Fall Injury, Deposition
Mike Figenshaw and Marty Spellman
Polk County, Iowa, Steve Lussier (2008-#2)

1304-28 April 2008
State of Iowa vs. Marcus Deshawn Cosby
Arson Case, Criminal, Deposition
James Metcalf and Charity Sullivan
Blackhawk County, Iowa (2008-#3)

1305-05 May 2008
State of Iowa vs. Marcus Deshawn Cosby
Arson Case Trial, see #1304
Blackhawk County, Iowa (2008-#4)

1306-02 June 2008
State of Iowa vs. Brian Gall
Linnea Nicol PD and Allan Vander Hart CA
Public Intoxication- Juvenile Hearing
Buchanan County, Iowa (2008-#5)

1307-10 July 2008
State of Iowa vs. Lisa Hall
Joseph Pavelich and Meredith Rich-Chappel, Asst.CA
OWI-Deposition, Telephone
Johnson County, Iowa (2008-#6)

1308- 02 October 2008
Pavelick vs. Seven Oakes
Civil personal Injury and Death by Drowning, Negative Alcohol
Robb Tully and John McHale, at the Tully Firm, Plaintiff
Polk County, Iowa (2008-#7)

1308-17 October 2008
Dooley vs. City of Cedar Rapids Iowa
Civil, death case, high speed automobile crash, CRPD
Liz Jacobi, Mohammed Sheronick and Kenneth Nix,
At CR City Hall Office by phone
Linn County, Iowa, Defendant (2008-#8)

1309- 24 October 2008
Schamp vs. K-Town Legends, TV Deposition for use in Trial
Civil, Personal Injury and Dram Shop, Bar Fight
Tom Henderson and Zane Blessum
At Whitfield and Eddy Office in West Des Moines, Iowa
Ringgold County, Iowa, Plaintiff (2008-#9)

1310-18 November 2008
Pavelick vs. Seven Oaks, same as # 1308
Henry C. Nipper, PhD fiasco of the low- negative test
McHale and Tully, Boone County, Plaintiff (2008- #10)

Rehberg Forensic Toxicology Library & Citation List

1. Analytical Toxicology of Benzodiazepines, Reprints of Selected Articles from the journal of Analytical Toxicology, Compiled by Robert C. Meatherall, Preston Publications, a Division of Preston Industries, Inc., P.O.Box 48312, 6600 Touhy Ave., Niles, IL 60714, USA (2003).

2. Analytical Toxicology of Cannabinoids, Reprints of Selected Articles from the Journal of Analytical Toxicology, Compiled by Joseph R. Monforte, PhD., Preston Publications, a Division of Preston Industries, Inc., P.O.Box 48312, Niles, IL 60714, USA (1993).

3. Criminal Poisoning, Investigational Guide for Law Enforcement, Toxicologists, Forensic Scientists and Attorneys, John Harris Trestrail III; Humana Press, Inc., 999 Riverview Drive, Suite 208, Totowa, New Jersey 07512.

4. Disposition of Toxic Drugs and Chemicals in Man, Eighth Edition (2008), Edited by Randall C. Baselt, PhD., The Chemical Toxicology Institute, P.O.Box 8299, Foster City, California 94044.

5. Driver Characteristics and Impairment at Various BACs, Moskowitz, H., et.al. United States Department of Transportation NHTSA), Form DOT F 1700.7 (8-72) August 2000.

6. Drug Abuse Handbook, First Edition (1998), Edited by Steven B. Karch, M.D., CRC Press, Washington D.C., USA.

7. Effects of Low Doses of Alcohol on Driving-Related Skills: A Review of the Evidence, Literature Review, Moskowitz, H. and Robinson, C.D., United States Department of Transportation (NHTSA), DOT HS 807 280, July 1988.

8. Encyclopedia of Clinical Toxicology, A Comprehensive Guide and Reference to the Toxicology of Prescription and OTC Drugs, Chemicals, Herbals, Plants, Fungi, Marine Life, Reptiles and Insect Venoms, Food Ingredients, Clothing and Environmental Toxins; First Edition (2002), Irving S. Rossoff DVM, FACVPT, The Parthenon Publishing Group, Washington, D.C.

9. Drug Effects on Psychomotor Performance, First Edition (2001), Randall C. Baselt, PhD, The Chemical Toxicology Institute, and P.O. Box 8299, Foster City, California, 94404.

10. Forensic Aspects of Driver Perception and Response, Second Edition (2003), Paul L. Olson and Eugene Farber, Lawyers and Judges Publishing Company, Inc., P.O.Box 30040, Tucson, AZ 85751-0040.

11. Forensic Aspects of Vision and Highway Safety, revised and updated, First Edition, Merrill J. Allen, O.D., PhD., Bernard S. Abrams, O.D., Arthur P. Ginsburg, PhD., Leslie Weinttraub, O.D., Lawyers and Publishers Publishing Company, Inc

12. Hair Analysis: Drugs of Abuse, Therapeutic Drugs and Steroids; Compiled by Bruce Goldberger, Preston Publications; Ibid. above (2001).

13. Handbook of Drug interactions, A Clinical and Forensic Guide (2004); Ashraf Mozayani, PharmD, PhD., and Lionel P. Raymon, PharmD, PhD., Humana Press, Inc., 999 Riverview Drive, Suite 208, Totowa, New Jersey 07512.

14. Marijuana and Cannabinoid Research, Methods and Protocols, (2006) Edited by Emmanuel S. Onaivi, PhD., Humana Press, Inc., 999 Riverview Drive, Suite 208, Totowa, New Jersey 07512.

15. Marijuana and the Cannabinoids Edited by Mahmoud A. ElSohly, PhD., (2007) Humana Press, Inc., 999 Riverview Drive, Suite 208, Totowa, New Jersey 07512.

16. Mass Fatality Accidents: A Guide for Human Forensic Identification, Special NIJ Report, U. S. Department of Justice, Technical Working Group for Mass Fatality Forensic Identification, June 2005.

17. Medical-Legal Aspects of Abused Substances, Old and New-Licit and Illicit, (2005) Marcelline Burns PhD., and Thomas E. Page, M.A., Lawyers and Judges Publishing Company, Inc., P.O.Box 30040, Tucson, AZ 85751-0040.

18. Medical-Legal Aspects of Alcohol, Fourth Edition (2003), Edited by James C. Garriott, PhD., Lawyers and Judges Publishing Company, Inc., P.O.Box 30040, Tucson, AZ 85751-0040.

19. Medical Legal Aspects of Alcohol, Fifth Edition (2009), Edited by James C. Garriott, PhD., Lawyers and Judges Publishing Company, Inc., Ibid.

20. Medical Legal Aspects of Drugs, Fourth Edition (2003) Edited by Marcelline Burns, PhD., Lawyers and Judges Publishing Company, Inc.

21. Methamphetamine-Effects on Human Performance and Behavior, Copyright © 2002 Central Police Press; B.K.Logan, Forensic Laboratory Services Bureau, Washington State Patrol; Seattle, Washington; USA; Forensic Science Review, volume 14, Number one/two, January 2002.

22. Monographs on the Effects of Drugs on Human Performance and Behavior published in Forensic Science Review (FSR) 2002 and 2003. Drugs reviewed include: Carisoprodol, 3,4-methylenedioxymethamphetamine, Opiods, Phencyclidine, Benzodiazepines, Cannabis, Cocaine, gama-Hydroxybutyrate, Ketamine, and Methamphetamine. Central Police University Press, 2002 and 2003.

23. Pathology of Drug Abuse, Third Edition, Steven B. Karch, M.D., 2002, CRC Press LLC, 2000 Corporate Boulevard N.W., Boca Raton, Florida 33431.

24. On Site Drug Testing, Edited by Amanda J. Jenkins and Bruce A. Goldberger, Copyright 2002, Humana Press, Inc., 999 Riverside Drive, Suite 208, Totowa, New Jersey 07512.

25. Poisoning and Toxicology Handbook, Fourth Edition (2007), Edited by Jerrold B. Leiken, MD & Frank P.Paloucek, PharmD, CRC Press, Taylor & Francis Group, 6000 Broken Sound Parkway NW, Suite 300, Boca Raton, FL 33487-2742.

26. Proceedings of the FBI Laboratory Symposium on Forensic Toxicology, August 29-30, 2004, Washington D. C.

27. Toxicology and Clinical Pharmacology of Herbal Products, First Edition (2000), Edited by Melanie Johns Cupp, PharmD, BCPS; Humana Press, Totowa, New Jersey 07512.

28. Uncertainty Analysis for Forensic Science, Raymond M. Brach and Patrick F. Dunn (2004) Lawyers and Judges Publishing Company, Inc., P.O.Box 30040, Tucson, Arizona 85751-0040.

29. Effects of Drugs on Performance Behavior in DUID Cases, The SOFT Continuing Education Committee and SOFT/AAFS Drugs & Driving Committee Seminar, session presented at the Harris County Medical Examiners Office & Laboratory, Houston, TX; 12-13 May 2009.

30. The American Heritage Science Dictionary, Copyright 2005 by Houghton Mifflin Company, 222 Berkley Street, Boston MA 02116.

31. Proceedings of "Effects of Drugs on Performance Behavior in DUID Cases," Sponsored by the SOFT Continuing Education Committee and SOFT/AAFS Drugs and Driving Committee Seminar Group, at the Harrison county Medical Examiners Office, Houston TX, 12-13 May 2009 (disc format only).

32. Proceedings of "ACMT First Forensic Course on Ethanol and Marijuana," American College of Medical Technology (ACMT), Baltimore MD, 18-19 November 2009 (disc format only).

33. DOT Technical Report, Driver Characteristics and Impairment at Various BACs; Moskowitz, Burns, Fiorentino, Smiley & Zador; US DOT, NHTSA, DOT Grant report for Grant DTNH-22-95-C-05000.

34. Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent, Shuster & Burns, Final Report, US DOT, NHTSA, DOT HS 808 839, August 1998.

35. A Review of the Literature on the Effects of Low Doses of Alcohol on Driving Related Skills, Moskowitz & Fiorentino, Final Report, US DOT, NHTSA, DOT HS 807 280, July 1988.

36. Effects of Low Doses of Alcohol on Driving-related Skills: A Review of the Evidence, US DOT, NHTSA, DOT HS 807 280, July 1988.

37. Forensic Vision: With Application to Highway Safety, Third Edition, Green, Allen, Abrams & Weintraub, Lawyers and Judges Publishing Company, Inc., P.O.Box 30040-KB, Tucson, AZ 85751-0040.

38. Manual of Overdoses and Poisonings, Linden, Rippe & Irwin, Lippencott, Williams & Wilson (2006), 530 Walnut Street, Philadelphia, PA 19106, USA.

39. Explosives and Chemical Weapons Identification, James B. Crippen (2006), Forensic Science Techniques Series, CRC Press, Taylor & Francis Group, 6000 Broken Sound Parkway NW, Suite 300,Boca Raton, FL 33487-2742.

40. Handbook of Forensic Toxicology for Medical Examiners (2010), D.K. Molina, MD, Practical Aspects of Criminal and Forensic Investigation Series, CRC Press, Ibid.

41. Drug Abuse Handbook, Second Edition (2007), Edited by Steven B. Karch, MD, CRC Press, Ibid. (see number 6 above).

42. Workplace Drug Testing (2008), Edited by Steven B. Karch, MD, CRC Press, Ibid.

43. Addiction and the Medical Complications of Drug Abuse (2008), Edited by Steven B. Karch, MD, CRC Press, Ibid.

44. Marijuana and Actual Driving Performance, DOT HS 808 078, Final Report, November 1993.

45. Gulp, Adventures on the Alimentary Canal, Mary Roach, W.W. Norton & Company, Inc.500 Fifth Avenue New York, New York, 10110; 2013, ISBN 978-0-393-08157-2.

46. Premier BAC Blood Alcohol Calculation Software, David N. Dresser, Lawyers and Judges Publishing Company, Inc., Product # 5605, P.O. Box 30040, Tucson, AZ 85751-0040.

47. Legal Aspects of Dilution of Blood Collected for Medico-Legal Analysis by Intravenous Fluids, Riley, D., Wigmore, J.G., and Yun, B. J. Anal. Tox., Vol. 20, pp. 330-331.

48. Concentration Time Profiles of Ethanol in Intravenous and Arterial Blood and End Expired Breath During Intravenous Infusion, Jones, A.W., Nordberg A., and Hahn, R.G., J. Forensic Sci., 42:1089-1092, 1997a.

49. AMA (Medical Sciences) Report 14 of the Council on Scientific Affairs (A-97). Drivers Impaired by Alcohol, Alcohol is a Sedative Drug (30 June 1999).

50. Low Blood Alcohol Concentrations and Driving Impairment, A review of experimental studies and international legislation, Ferrara, S.D., Zancanar, S., and Georgetti, R., Int. J. Leg. Med. (1994) 106: 169-177.

51. Absorption, Distribution and Elimination of Alcohol: Highway safety Aspects: Dubowski, Kurt, M., Ph.D., Journal of studies on Alcohol, Supplement Number 10, July 1985.