Criminal Law Seminar

March 27 & 28, 2002

Discovery and Evidence Management

10:45-11:15 a.m. (March 27)

Presentation by:

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Iowa Code of Professional Responsibility, DR 6-101(A) provides:

A lawyer shall not:

(1) Handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
(2) Handle a legal matter without *preparation adequate* in the circumstances.

In the average case, the minimum steps a lawyer must perform to insure competent representation are:

1. Opening the file and conducting initial research into the case. This initial research will entail reading the pertinent statute,[1] reviewing the jury instructions,[2] looking at definitional cases regarding the charge,[3] and reviewing the applicable sentencing statutes.[4] The attorney should also determine the date[5] and location of the offense,[6] the arrest date,[7] and date of the next appearance.[8] The attorney should also review the probable cause statement contained in the preliminary complaint.[9]
2. Conducting an initial interview of the client-background and history. If the client is in custody, the interview should initially focus on client's eligibility for bond.[10] The initial interview should include inquiries into the client's history and background for a variety of reasons. First, to begin to establish an attorney client relationship.[11] Second, to determine the client's ability to articulate and evaluate the client's appearance.[12] Third, to develop facts about the client's history that will assist in the assessment of the client's credibility.[13] Fourth, in the event of a conviction or plea, discovery of history that will effect the client in sentencing proceedings.[14]
3. Conducting and initial interview of the client-facts of the case. First, did the client make any statement regarding the offense and to whom did he or she make the statements?[15] Second, who arrested the client and the circumstances surrounding the arrest?[16] Third, did law enforcement officials make any statements to the client and the circumstances surrounding those statements?[17] Were other individuals arrested?[18] Does the client know of witnesses who may shed light on

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[1] *See generally* IOWA CODE (1997).

[2] Iowa State Bar Association, IOWA CRIMINAL JURY INSTRUCTIONS, Volume I & II (1998).

[3] IOWA CODE ANN. (West 1997).

[4] *See generally* Iowa Code Chapters 901 et seq.; RONALD L. CARLSON & ROBERT R.RIGG, CRIMINAL LAW AND PROCEDURE, (Supp. 1998). (hereinafter CARLSON)

[5] *See generally* Statute of limitations, Iowa Code Chapter 802; *See also* CARLSON, CRIMINAL LAW AND PROCEDURE, Ch. 52 (Supp.1998); Robert R. Rigg, CRIMINAL DEFENSE PROGRAM MANUAL, Drake Law School Legal Clinic, 6.11.(1998).

[6] *See generally* Venue, IOWA CODE Chapter 803; See Carlson, Iowa Practice, CRIMINAL LAW AND PROCEDURE, Volume 4, Chapter 53.

[7] *See generally* Speedy Trial Issues. Iowa Rule of Criminal Procedure, Rule 27; *See also* CARLSON Section 1242-43.

[8] *See generally* Speedy Trial Issues. Iowa Rule of Criminal Procedure, Rule 27; *See also* CARLSON, Section 1242-43.

[9] *See generally* Issues of Arrest, Search, and Seizure, Iowa Code Chapter 804, 805, 808; *See also* CARLSON, Ch. 54, 55, 58.

[10] *See generally* IOWA CODE Ch. 811 (1997).

[11] *See generally*, Robert R. Rigg, CRIMINAL DEFENSE PROGRAM MANUAL, Drake Law School Legal Clinic, Ch. II (1998).

[12] *See Id.*

[13] *See id.*

[14] *See id.* Ch. XII. Sentencing.

[15] *See* CARLSON, 1061.

[16] *See id.*

[17] *See id.*

[18] *See* Iowa Rules of Criminal Procedure, Rule 6; *See also* CARLSON, Ch. 63 Section 1001.

the allegations?[19] Was the client searched, and if so, under what circumstances?[20] Is the client aware of any items of physical evidence in the possession of the authorities?[21]

4. Conducting an initial interview with the client-the clients version of the events. The ABA Standards for Criminal Justice provide a standard for the client interview:

> As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.[22]
>
> Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing such facts.[23]

5. Conducting an evaluation of the state's case. The attorney should review summaries of witness testimony[24], interview or depose the state's witnesses,[25] examine physical evidence,[26] and conduct any additional investigation and discovery that may be warranted by the case.[27]
6. Conducting secondary research on issues arising from preliminary research, interviews, and investigation and to develop alternate courses of action with an estimate of risk, if possible.[28]
7. Conducting plea negotiations with the county attorney.[29]
8. Planning and conducting a second interview, advising the client of issues and alternative courses of action.[30]

Although the above list is not inclusive of every step an attorney must take, it does provide the initial inquiries an attorney must make to protect the client.

[19] *See generally* Robert R. Rigg, CRIMINAL DEFENSE PROGRAM MANUAL, Drake Law School Legal Clinic, Chapter II (1998).

[20] *See generally* Iowa Code Ch. 808; Iowa Rules of Criminal Procedure, Rule 11.

[21] Robert R. Rigg, CRIMINAL DEFENSE PROGRAM MANUAL, Drake Law School Legal Clinic, Chapter II (1998) *(citing* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, (3d 1993)). Defense Function Stnd. 4-4.6 provides:

> (a)Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).
> (b)Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.
> (c)Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; reasonable fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.
> (d)If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.
> (e)If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests. *Id.*

[22] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Defense Function Stnd. 4-3.2(a) (3d 1993).

[23] *Id.* 4-3.2 (b). *See* Robert R. Rigg, CRIMINAL DEFENSE PROGRAM MANUAL, Drake Law School Legal Clinic, Ch. II section 2.2 (1998). Discussion of Nix v. Whiteside, 475 U.S. 157 (1986).

[24] Robert R. Rigg, CRIMINAL DEFENSE PROGRAM MANUAL, Drake Law School Legal Clinic, Ch. 16, Investigation and Discovery (1998). *See also* Iowa Rule of Criminal Procedure, Rule 4(6). Providing for minutes of testimony in criminal cases.

[25] *Id. See* Iowa Rule of Criminal Procedure, Rule 12. Providing for depositions by a defendant.

[26] *Id. See* Iowa Rule of Criminal Procedure, Rule 13. Providing for discovery by a defendant.

[27] *Id.*

[28] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Defense Function Stnd. 4-5.1 (3d 1993).

[29] *See id.* Defense Function Stnd. 4-6.1 (3rd ed. 1993).

[30] *See id.* Defense Function Stnd. 4-6.2 (3rd ed. 1993).

§ 5.2 CRIMINAL DEFENSE TIMELINE[10]

Day	Event
0	Day of Arrest. Iowa Code § 804 & 805 (1997).
1	Initial Appearance before a magistrate. Iowa R. Crim. P. (2)(1).
10	Preliminary Hearing (in custody). Iowa R. Crim. P. (2)(4).
20	Preliminary Hearing (out of custody). Iowa R. Crim. P. (2)(4).
45	Trial Information or Indictment filed from day of Arrest. Iowa R. Crim. P. 27(2)(a).
	Arraignment of the defendant as soon as practicable. Iowa R. Crim. P. 8(1).
10	Motion for a Bill of Particulars. Iowa R. Crim. P. 10(5).
30	Deposition must be taken within 30 days after arraignment. Iowa R. Crim. P. 12(6).
40	Motions must be filed within 40 days after arraignment. Iowa R. Crim. P. 10(4).

a. Defenses and objections based on defects of the institution of the prosecution. Iowa R. Crim. P. 10(2)(a).
b. Defenses and objections based on defects of the indictment or information. Iowa R. Crim P. 10(2)(b).
c. Motions to Dismiss. Iowa R. Crim. P. 10(1), (6).
d. Motions to Suppress. Iowa R. Crim. P. 11.
e. Requests for discovery. Iowa R. Crim. P. 13.
f. Motions to sever counts or defendants. Iowa R. Crim. P. 10(e).
g. Motions for change of venue or change of judge. Iowa R. Crim. P. 10(9), (10).

[10] Iowa Code § 4.1(34) provides for the calculation of time. The first day excluded and the last day included.

h. Motions in limine. Iowa R. Crim. P. 10(2)(g).
i. Motions for adjudication of law points. Iowa R. Civ. P. 105.
j. Notice of defenses-Alibi, Insanity, Diminished Responsibility, Intoxication, Entrapment, Self-Defense. Iowa R. Crim. P. 10(11).

	Pretrial conference- Held between arraignment and trial. Iowa R. Crim. P. 15; Iowa R. Civ. P. 136.
10	days prior to trial. The prosecuting attorney must file notice of additional witnesses or supplement minutes of testimony. Iowa R. Crim. P. 18(2),(3).
9	days prior to trial. (Motion in Limine is due.) Iowa R. Crim. P. 10(4).
135	Trial must commence within 90 days after the Trial Information or Indictment is filed. Iowa R. Crim. P. 27(2)(b).

CHAPTER 6
INVESTIGATION AND DISCOVERY

§ 6.1 INTRODUCTION

The purpose of conducting an investigation is to discover information pertinent to the client's case. It makes little difference if the information is disclosed by the applicable rules of discovery, by the use of an investigator or any other means. Information may be divided into three areas: (1) information in the possession of the state; (2) information in possession of the defendant; and (3) information that may be developed through independent sources. The purpose of this chapter is to explore the information in the possession of the state and its discovery.

The use of pre-trial motions, depositions, and other tools filed pursuant the rules of criminal procedure in discovering potential evidence is characterized as formal discovery. Any other device used is designated as informal discovery.

The American Bar Association's defense function standards provide that:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.[1]

[1] ABA, Standards for Criminal Justice, Prosecution Function and Defense Function, (3rd Edition 1993) 4-4.1(a).

> Defense counsel should not seek to acquire possession of physical evidence personally or through an investigator where defense counsel's sole purpose is to obstruct access to such evidence.[2]

§ 6.2 INFORMATION IN THE POSSESSION OF THE STATE - THE IOWA CRIMINAL DISCOVERY SYSTEM

The policy behind the current discovery system in Iowa was set forth in *State v. Eads*.[3] During a murder prosecution, defense counsel filed a motion to produce the following evidence: (1) written statements secured by the police, (2) copies of F.B.I. reports analyzing certain physical evidence, (3) photographs of the deceased, (4) physical evidence in the possession of the state, (5) autopsy reports, and (6) all exculpatory evidence.[4] The trial judge granted the motion with the exception of the paragraph requesting "exculpatory evidence," and the state appealed the ruling.[5] The Iowa Supreme Court found the trial court has the inherent authority to "compel disclosure of evidence by the State when necessary in the interests of justice."[6] The Court noted the arguments against pretrial disclosure by the state as follows: (1) it would increase the likelihood of fabricated or perjured testimony; (2) witnesses may be intimidated or bribed; (3) it would give the defense an unfair advantage; and (4) defense attorneys may receive the information from other sources.[7]

In answering the state's objections, the Court described as one of its goals the elimination "guile and surprise" from criminal trials.[8] Attempting to develop safeguards to achieve this goal and provide the defendant with a fair trial, the Court stated:

> We must recognize, however, the circumstances under which a defendant is afforded these safeguards. He is frequently in custody; more often than not he is without funds; and seldom has he any opportunity to

[2] Id. 4-4.1(b).
[3] 166 N.W.2d 766 (Iowa 1969).
[4] Id. at 767.
[5] Id. at 768.
[6] Id. at 769.
[7] Id.
[8] Id.

make an investigation or to engage in the fact-finding process so vital to his later defense. Meanwhile the State, with unlimited manpower and resources, has already completed its investigation, sometimes even before a formal charge is filed. If perchance the defendant should be able to conduct his own investigation, the trail is often cold when he starts after his evidence and ordinary sources of information have dried up. The argument has been made he already knows most of these things, and this is true if he is guilty. *But at this point he is presumed to be innocent.*

If this presumption is anything other than a meaningless maximum, we are obligated to afford a person charged with commission of a crime a fair chance to defend himself. We must admit, for instance, a lawyer is of little help if he has none of the trial tools with which to work. He cannot adequately defend if he is denied access to the facts. The State cannot discharge its duty to give defendant a fair trial simply by extending 'safeguards' with one hand and withdrawing them with the other....

The defendant, of course, has the right to cross-examine the witnesses who testify regarding the manner in which such evidence incriminates him. How can he adequately do so without pre-trial preparation? How does he meet that testimony, usually from an expert witness, by a spur-of-the-moment cross-examination?[9]

The court upheld the trial judge's order to disclose with the exceptions of the requested police reports and statements made by other witness who were intended to be called at trial.[10] *Eads* expresses the rationale for the current system of expanded discovery. The Iowa system allows for pretrial motions and inspection of evidence,[11] as well as depositions of the state's witnesses.[12] Armed with these tools, an attorney can develop an investigative and formal discovery strategy to minimize surprise and

[9] Id. at 771.
[10] Id. at 773.
[11] Iowa R. Crim. P. 13.
[12] Iowa R. Crim. P. 12(1) By Defendant. A defendant in a criminal case may depose all witnesses listed by the state on the indictment or information or notice of additional witnesses in the same manner and with like effect and with the same limitation as in civil actions except as otherwise provided by statute and these rules....

effectively meet and rebut any potential evidence offered by the state. The importance of the policy pronounced in *Eads* will become apparent later in this chapter.

Although the Iowa Rules of Criminal Procedure allow for expanded discovery, the practitioner should be aware of other rules and their implications before conducting formal discovery. One such rule, used for confining the state's evidence, is the rule regarding the minutes of testimony.[13]

§ 6.3 Minutes of Testimony

Attached to the trial information/indictment the state must file minutes of testimony. The minute of testimony is a notice in writing of the witness' name, address, and occupation, as well as a "full and fair" statement of the witness' expected testimony.[14] It should be noted that a minute of testimony is usually a summary of the witness testimony, not sworn testimony.[15] The county attorney gathers the relevant information and drafts the minute of testimony for each witness. In some cases the county attorney will attach the police reports to the statement in lieu of, or in addition to, the minute. The purpose of the rule regarding minutes is "to eliminate claims of foul play and provide an accused meaningful information from which a defense may be prepared."[16]

A careful review of the minutes of testimony is critical to the defense's preparation. The minutes of testimony define the limits of the states case.[17] The term "full and fair" imposes an obligation on the prosecution to adequately alert defense counsel to the nature and source of the testimony, as well as to give notice of the need for further investigation of the testimony.[18] In some cases, if the trial information is deficient, counsel may wish to forgo any formal discovery. This tactic, however, is fraught with hazards. The most notable being the state may not be bound by the witnesses' testimony. The trial court has a great deal of discretion in imposing sanctions on the state for untimely disclosure of additional testimony or additional witnesses. The

[13] Iowa R.Crim. P. 4(6).
[14] Iowa R.Crim. P. 5(3).
[15] State v. Bishop, 387 N.W.2d 847, 851 (Iowa App. 1982). Defense counsel attempted to impeach a witness using the minutes of testimony. Since the minute was not sworn testimony the court did not allow the minute as impeachment.
[16] State v. Wells, 522 N.W.2d 304 (Iowa App.1994); State v. Walker, 281 N.W.2d 612 (Iowa 1979).
[17] State v. Olsen, 293 N.W.2d 216 (Iowa 1980); State v. Walker 281 N.W.2d 612 (Iowa 1979).
[18] State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983).

court does not have to exclude testimony that exceeds the scope of the minute or bar testimony offered by an unlisted witness.[19]

The term "full and fair" does noy require the state to use "precision" in composing the anticipated testimony. In *State v. Ellis*,[20] a minute of testimony consisted of the following:

> ...[S]he saw the defendant walk away from the Smith (victim's) home, . . . ; that she saw what appeared to be a paper sack under the defendant's shirt; that the defendant came to her residence from across the street and asked her to get him out of the neighborhood; that she drove him to . . . where he met with a man called Chip; that the defendant told her that he had gotten "some really valuable stuff this time" and . . . ; that the defendant gave Chip some merchandise to sell for him.[21]

Ellis illustrates two issues confronting defense counsel: (1) the addition of testimony not contained in the minute; and (2) the addition of a new witness. The court resolved both issues in favor of the admission of the testimony.

§ 6.4 Additional Testimony

At the defendant's trial for burglary in *Ellis*, a witness for the state testified, over defendant's objection, the defendant's right hand had been bleeding when he returned from the victim's house.[22] That information was clearly not in the minute. The Iowa Supreme Court held that although the minute did not specifically detail the evidence, the challenged testimony was consistent with the overall nature of the minutes of testimony.[23] The court premised its holding on the general descriptive terminology of the minute and found the "condition of his general appearance and hands could be expected from the minutes " to be part of the witness' testimony.[24]

[19] Iowa R.Crim. P. 4(8) & 18(3).
[20] 350 N.W.2d 178 (Iowa 1984).
[21] Id. at 181-182.
[22] Id. at 182.
[23] Id. at 182 citing State v. Ristau, 340 N.W.2d 273, 274-75 (Iowa 1983).
[24] Id. at 182.

§ 6.5 Adding a New Witness

A more remarkable turn of events occurred in *Ellis* after the defense counsel had established the latent fingerprints found at the crime scene had not been compared to the defendant's fingerprints.[25] The state wished to call an officer not listed to testify about the fingerprints. The defense counsel objected because the state had not complied with Iowa Rule of Criminal Procedure 18(3)[26] providing that the state should provide notice of all prosecution witnesses ten days prior to trial.[27] The trial court admitted the officer's testimony but allowed defense counsel to depose the officer prior to him taking the stand.[28] Defense counsel was fortunate, the testimony offered was exculpatory – the latent fingerprints could not be identified as those of the defendant.[29]

The *Ellis* decision highlights the importance of pre-trial investigation and discovery. The conclusion reached by the appellate court gives trial courts extensive latitude in admitting evidence not specifically referred to in the minute of testimony, as well as adding a new witness. The difficulty cross-examining a witness on very short notice can be unnerving at best, and reek havoc on trial strategy. As noted in *Eads*, expert witnesses pose a greater danger to the defendant's case.[30]

§ 6.6 Full and Fair-Expert Testimony

In *State v. Bennett*,[31] the minute summarizing the medical examiners testimony stated he would testify regarding the victim's "external appearance and then internal appearance during the course of the autopsy." The minute was held sufficient to alert defense counsel of not only the descriptive narrative of injuries, but also of the examiner's opinion and conclusion that the injuries may have been caused by sexual activity.[32] In a

[25] Id. at182.
[26] Id. at 182.
[27] Iowa R. Crim. P. 18(3) provides for discovery of witnesses, grant a continuance, enter any other order including exclusion in order to avoid undue prejudice.
[28] State v. Ellis, 350 N.W.2d 178, 182 (Iowa 1984).
[29] Id. at 183; State v. Braun, 495 N.W.2d 735, 741 (Iowa 1993) citing State v. Smith, 282 N.W.2d 138 140-41 (Iowa 1979); State v. Hebinger, 412 N.W.2d 180,191 (Iowa App.1987).
[30] State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969).
[31] 503 N.W.2d 42 (Iowa App. 1993).
[32] Id at 46-47.

homicide case, such a change in testimony may generate a new theory of homicide-sexual abuse felony murder.[33]

In *State v. Nebinger*,[34] a police officer was listed as a witness who would testify as to his investigation. The investigation included taking a footwear impression from the victim's bathroom.[35] The footwear impression was sent off for comparison to the department of criminal investigation.[36] The result of the comparison was not made available until after the trial had begun.[37] The trial court allowed the officer to testify as to the result.[38] The Iowa Court of Appeals held because the officer was previously listed as a witness Iowa Rule of Criminal Procedure 18(3) did not apply.[39] The court further found that the testimony did not exceed the scope of the minutes and that it was non prejudicial.[40] The court did note the absence of a motion to produce "scientific tests" which would place a greater burden on the state to produce the results prior to trial.[41]

What made the police officer's testimony in *Nebinger* so devastating was defense counsel's opening statement. Counsel claimed the defendant was not at the crime scene and the state had no evidence to prove otherwise.[42] The testimony of the officer clearly contradicted the defendant's claim, thereby calling into question the entire defense strategy. It is unclear from the opinion whether the court was sanctioning this type of activity by the state, but if the purpose behind a minute of testimony is to alert counsel of the evidence against the accused *prior to trial*, this type of conduct must surely violate that policy consideration.

The Iowa Court of Appeals has held that the "state is not bound to the original minutes of testimony."[43] The trial court may allow the state to amend the minutes both

[33] Iowa Code §707.2(2).
[34] 412 N.W.2d 180 (Iowa 1987).
[35] Id. at 190-91.
[36] Id.
[37] Id.
[38] Id.
[39] Id. Iowa R. Crim. P. 18(2)&(3) applies to additional witnesses who will be called by the state not to additional information added to the minutes of existing witnesses.
[40] Id.
[41] Id. at 191.
[42] Id. at 191.
[43] State v. Wells, 522 N.W.2d 304,307 (Iowa App. 1994).

before and during trial.[44] The articulated test is whether substantial rights of the defendant would be prejudiced, or whether a wholly new and different offense is charged.[45] The application of the test produces results that are at odds with the stated policy behind the rule "to eliminate claims of foul play and provide an accused meaningful information from which a defense may be prepared." Whether the state is adding witnesses and their minutes of testimony[46] or supplementing existing minutes,[47] defense counsel should be wary of relying on objections based on the scope of the minutes. The investigation of the case and use of formal discovery should proceed balancing the risk of an adverse ruling on a scope of minutes objection at trial such a ruling will necessitate a recess, conducting additional discovery, and potential restructuring of the defense's strategy.

§ 6.7 DISCOVERY OR NOT

In light of the discussion of what minutes of testimony can and cannot do, counsel is confronted with two questions: (1) what information does the state potentially possess, and (2) should formal discovery be conducted?

Every year, changes in investigative techniques and science increase the number and nature of sources of information. Each case is different and the nature and sources of information will obviously change. What may be a focus of investigation in an operating while intoxicated case will vary from the focus of investigation in a tax fraud case. With the expanding use of computers, discs, hard drives, and tapes, technology has impacted the courtroom in a dramatic fashion. Drafting motions and conducting depositions necessitate the defense lawyer to take command of a new vocabulary for each case. Even the term document is no longer as accurate as it once was with the use of computer diskettes to store information. The need for the lawyer to expand his or her knowledge of an area to be investigated is as basic as the understanding of the rules of evidence. Knowing one without the other can be lethal to the representation of the client. There are also time constraints placed on the attorney to make decisions very soon after receiving a case, making the attorney's investigation all the more arduous.

[44] Id.
[45] Iowa R. Crim. P. 4(8)(a) & (e). State v. Braun, 495 N.W.2d 735, 741 (Iowa 1993).
[46] Iowa R. Crim. P. 18(2)(a)&(3).
[47] Iowa R. Crim. P. 4(8)(a) & (e).

The county attorney has forty-five days to file the trial information after the defendant's arrest.[48] The defendant's arraignment usually takes place shortly after the trial information is filed.[49] After the arraignment, defense counsel must take depositions within thirty days[50] and file motions within forty days.[51] In the usual case, defense counsel will have little time to make decisions regarding discovery. It is vital to quickly develop an investigative strategy in order to take advantage of Iowa's expanded discovery. This may be accomplished by making a list of information that *may* be available to the state.

§ 6.8 Listing Sources of Information

Developing a list of information that may be available in each case gives structure and focus to fact investigation and discovery. The following are examples of information which may be available and potentially admissible:

a. Audio and video surveillance;[52]
b. Logs of the audio and video surveillance;[53]
c. Agency reports including applications, authorizations, affidavits, orders, interim reports and final reports;[54]
d. All search and seizure warrant applications, affidavits, warrants, returns and inventories from any searches, as well as any evidence seized;[55]
e. Evidence of other crimes;[56]

[48] Iow a R. Crim. P. 27(2)(a).
[49] Iowa R. Crim. P. 8(1).
[50] Iowa R. Crim. P. 12(6).
[51] Iowa R. Crim. P. 10(4).
[52] Iowa R.Crim. P. 13(2)(b)(1). Allows the court to enter an order based on discretionary discovery of (1) items seized (2) items which are material to the preparation of the defense (3) items intended to be used at trial or (4) items that were obtained from or belong to the defendant.
[53] Id.
[54] Id.
[55] Iowa R.Crim. P. 13(2)(b)(1) provides for the discretionary discovery of "items seized by the state in connection with the alleged crime".
[56] State v. Howell, 557 N.W.2d 908, 911-13 (Iowa App. 1996) Witness testimony that defendant had previously sexually assaulted her was admissible pursuant to Iowa R. Evid. 404(b) and probative value was not outweighed by prejudice; State v. Ariciva, 495 N.W.2d 364, 367-68 (Iowa App. 1992) Introduction of evidence of other crimes was reversible error. Evidence which has no relevancy except show the defendant is more likely to have committed the crime because he is a bad person is inadmissible;State v. Plaster, 424 N.W.2d 226, 228 (Iowa 1988) Rule 404(b) list of purposes-motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident- are not exclusive; State v. Zeliadt, 541 N.W.2d 558,

f. Audio recording taken during conversations between law enforcement personnel and any witness;[57]
g. Emergency (911) calls to any agency;[58]
h. Dispatch tapes to any agency;[59]
i. Criminal histories of the state's witnesses;[60]
j. Reports of interviews with defendant;[61]
k. Grand Jury testimony of the defendant;[62]
l. Reports of interviews with co-defendants, accomplices, or accessories listed as witnesses;[63]
m. Reports of interviews with witnesses;[64]
n. Items taken from the defendant;[65]
o. Books, papers, or documents;[66]
p. Photographs;[67] and
q. Lineup procedures and photographic arrays;[68]
r. Expert witness credentials and the basis for their opinion.[69]

560-61 (Iowa App. 1995) Before admitting evidence of other crimes the court must determine the evidence is (1) relevant and, (2) clear proof the defendant committed the prior acts.
[57] Iowa R. Crim. P. 13(2)(b)(1). Discretionary discovery of statements within the possession of the state which are material to preparation of the defense or are intended to be used as evidence at the trial.
[58] Id.
[59] Id.
[60] Id.
[61] Iowa R. Crim. P. 13(2)(a)(1). State v. Alspach, 524 N.W.2d 665 (Iowa 1994) Defendant's statement made to his brother, who also was a member of a clergy was not protected by any privilege.
[62] Iowa R. Crim. P. 13(2)(a)(1).
[63] Iowa R. Crim. P. 13(2)(a)(2) Limits the discovery of codefendant statements to those that will be offered at trial but the disclosure is mandatory upon request.
[64] Iowa R. Crim. P. 13(2)(b)(1) allows for the discretionary discovery of statements which are material to the preparation of the defense, or are intended for use by the state as evidence at the trial.
[65] Iowa R. Crim. P. 13(2)(b)(1) items obtained from the defendant.
[66] Iowa R.Crim. P 13(2)(b)(1).
[67] Iowa R. Crim. P. 13(2)(b)(1).State v. Aswegan, 331 N.W.2d 93 (Iowa 1983).
[68] State v. Nagel, 458 N.W.2d 10,12-13 (Iowa App.1990) Photographic array was not impermissibly suggestive; State v. Rawlings, 402 N.W.2d 406, 407 (Iowa 1987) Photographic array displayed a "reasonable effort to harmonize photographs."; State v. Neal, 353 N.W.2d 83, 86-89 (Iowa 1984) Use of both photographic array and lineup was not impermissibly suggestive; State v. Newman, 326 N.W.2d 788, 784 (Iowa 1982); State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1979); State v. Haskins, 316 N.W.2d 679, 681 (Iowa 1982) One on one show up was not impermissibly suggestive; Manson v. Brathwaite, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140, 155 (1977) Test is "very substantial likelihood of irreparable misidentification."; Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972) The factors to be used to determine suggestiveness include: The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness" prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

s. Laboratory reports including:

1. Fingerprint analysis.[70]
2. Handwriting analysis.[71]
3. Footwear comparisons and analysis.[72]
4. Voice comparisons and analysis.[73]
5. Blood component analysis.[74]
6. Blood splatter analysis.[75]
7. Saliva analysis.[76]
8. Hair comparisons.[77]

[69] Iowa R. Crim. P. 13(2)(b)(2) Upon motion of a defendant the court may order the attorney for the state to permit the defendant to inspect and copy or photograph Any results or reports of physical or mental examination, an of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state. See also Iowa R. Civ.P.125 (a)(1) A party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial, as well as, require the subject matter of the testimony; the experts qualifications; and mental impressions and conclusions.

[70] State v. Steffen, 230 N.W. 536 (Iowa 1930).

[71] State v. Hancock, 164 N.W.2d 330 (Iowa 1969) Defense counsel is entitled to expert witness for handwriting. Nelson v. Nelson, 87 N.W.2d 767, 768-69 (Iowa 1958); State v. Entsminger, 160 N.W.2d 480, 484-85 (Iowa 1968) taking a handwriting exemplar from a defendant does not violate defendant's Fifth Amendment privilege against self incrimination.; See also Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; State v. Kneer, 426 N.W.2d 654, 655-57 (Iowa App. 1988) State's use of handwriting analysis of prospective jurors disapproved.

[72] State v. Bedwell, 417 N.W.2d 66,69 (Iowa 1987) Footwear impressions left at crime scene compared to abandoned sandals held to be a useful comparison for the jury to consider. State v. Nebinger, 412 N.W.2d 180, 190-91 (Iowa App. 1987); State v. Mark, 286 N.W.2d 396, 407-10 (Iowa 1979).

[73] State v. Ripperger, 514 N.W.2d 740, 744 (Iowa App. 1994) Voice identification procedure used was not impermissibly suggestive causing a likelihood of irreparable misidentification in violation of the defendant's right to due process;State v. Walton, 424 N.W.2d 444, 446-47 (Iowa 1988) Having suspect call 911 for voice identification was not impermissibly suggestive;Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206 (1967) The test for violation of due process is set forth.

[74] State v. Dulaney, 493 N.W.2d 787, 790-93 (Iowa 1992) States destruction of a blood sample frustrating defendant's ability for a independent test did not violated due process. State v. Hall, 297 N.W.2d 80, 85-87 (Iowa 1980); State v. Mark, 286 N.W.2d 396 (Iowa 1979).State v. Peterson, 219 N.W.2d 665, 669-70 (Iowa 1974)Admission of defendants blood type introduced in the states case in chief under the theory of anticipatory impeachment violated due process.

[75] Knox v. State, 532 N.W.2d 149, 153-56 (Iowa App. 1995) State had duty to turn over expert opinion regard a bloody print pursuant to the defense request for forensic examinations; State v. Klindt, 389 N.W.2d 670, 671-73 (Iowa 1986) Forensic serology identification process based on the genetic makeup of blood and tissues admitted. State v. Phams, 342 N.W.2d 792, 795 (Iowa 1983) Expert testimony regarding blood patterns found on a chair at a crime scene; AFSCME v. Dept. of Public Safety, 434 N.W.2d 401, 403 (Iowa 1988) Lab reports regarding blood are investigative reports in connection with a sexual abuse investigation and are therefor not subject to public disclosure pursuant to Iowa Code § 22.7;State v. Lamp, 322 N.W.2d 48,58-59 (Iowa 1982) Foundation for the admission of blood samples. State v. Hall, 297 N.W.2d 80, 87-88 (Iowa 1980).

[76] State v. Olgivie, 310 N.W.2d 192, 196 (Iowa 1981);State v. Mark, 286 N.W.2d 396,411-13 (Iowa 1980).

[77] State v. Howell, 557 N.W.2d 908 (Iowa App.1996) Defendant was not denied effective assistance of counsel for allowing state expert to testify regarding similarity of pubic hair found on victim to the defendant; State v. Liggins, 557 N.W.2d 263, 270 (Iowa 1996) Defendant offered evidence that state expert spent one month examining the defendants vehicle and found no hair or fibers connecting the vehicle with

9. Fiber analysis and fiber impression examination.[78]
10. Urine analysis.[79]
11. Breath test and analysis. [80]
12. Dental examination and bite mark comparisons.[81]
13. Sexual assault protocol examination and analysis.[82]
14. Semen analysis.[83]
15. Clothing examination and analysis.[84]
16. Polygraph examinations.[85]
17. DNA analysis.[86]

the victim; Winchester v. Strottman, 535 N.W.2d 480, 481 (Iowa App. 1995); State v. Post, 123 N.W.2d 11, 17 (Iowa 1963) Testimony that hair clippings were not dissimilar to the defendant was admitted.

[78] State v. Liggins, 557 N.W.2d 263, 270 (Iowa 1996) Absence of fiber evidence introduced by the defendant to show victim was not in the defendant's car; State v. Harris, 436 N.W.2d 364, 366 (Iowa 1989) Vacuum sweepings from defendant's vehicle produced fibers of the same diameter and color as those taken from crime scene;State v. Hall, 297 N.W.2d 80, 87-88 (1980) Alteration of fibers for purpose of microscopic examination did not prevent the defendant from examination of evidence by an independent laboratory; State v. Post, 123 N.W.2d 11, 17 (Iowa 1963) FBI testimony regarding paint, wood, and dyed rabbit hair from the defendant's jacket were "similar" to those found at the crime scene.

[79] Waterman v. State, 387 N.W.2d 776 (Iowa App. 1986) States failure to give petitioner a copy of urine analysis prior to prison disciplinary hearing did not violate due process;State v. Prouty, 219 N.W.2d 675,677(Iowa 1974) Urine test admissible even though other tests could have been used that were more accurate. Evidence goes to weight not admissibility.

[80] State v. Krebs, ___ N.W.2d ___ (Iowa 1997); State v . Henneberry, 558 N.W.2d 708 (Iowa 1997); State v. Lindeman, 555 N.W.2d 693 (Iowa 1996); State v. Palmer, 554 N.W.2d 859 (1996); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) There is no duty on the state to preserve breath samples.

[81] State v. Bennett, 503 N.W.2d 42, 47 (Iowa 1993); State v. Hall, 297 N.W.2d 80, 86 (Iowa 1980); State v. Chatterson, 259 N.W.2d 766, 768-69 (Iowa 1977).

[82] State v. Howell, 557 N.W.2d 908, 913-14 (Iowa App. 1996);State v. Knox, 536 N.W.2d 735, 737-41 (Iowa 1995) Defendants attempt to introduce evidence the complainant in a sexual abuse case had chlamydia was unsuccessful. Evidence sought to be introduced was exculpatory because defendant had not contracted the disease.

[83] State v. Howell, 557 N.W.2d 908, 913 (Iowa App. 1996) DNA test on semen sample recovered from the victim; State v. Taylor, 538 N.W.2d 314, 315 (Iowa App. 1995) Blood and semen found at the defendant's apartment identified victim and defendant;

[84] State v. Lamp, 322 N.W.2d 48,59-60 (Iowa 1982) Foundation for the admission of clothing.

[85] In interest of S.J.M., 539 N.W.2d 496, 499-500 (Iowa App. 1995) Polygraph examination not admissible absence a stipulation of both parties; State v. Marti, 290 N.W.2d 570 (Iowa 1980).

[86] State v. Howell, 557 N.W.2d 908, 913 (Iowa App. 1996) Admission of DNA testimony regarding semen sample recovered from the victim;State v. McCurry, 544 N.W.2d 444 (Iowa 1996); Whitsel v. State, 525 N.W.2d 860 (Iowa 1994); State v. Ripperger, 514 N.W.2d 740 (Iowa App.1994); State v. Aricivia, 495 N.W.2d 364 (1992) Defendant filed a motion to produce blood and semen samples which was done. The defense contracted with a company to perform DNA testing on the samples. The State was advised the report was not going to be voluntarily disclosed. The prosecuting attorney called the company advised them she had not seen the report and asked the company to fax a copy of the report. The company did so. The Iowa Court of Appeals held the conduct of the prosecutor amounted to "prosecutorial misconduct."; Thompson v. State, 492 N.W.2d 410 (Iowa 1992). State v. Brown, 470 N.W.2d 30 (1991) DNA evidence and statistical information held to be admissible.

18. Tool mark analysis.[87]
19. Soil examination and analysis.[88]
20. Ballistic examination and analysis.[89]
21. Accident reconstruction investigation and analysis.[90]
22. Autopsy reports.[91]
23. Physicians notes and reports.[92]
24. Psychiatric reports.[93]
25. Nursing notes and reports.[94]

[87] State v. Wessling, 150 N.W.2d 301, 304 (Iowa 1967) Tool mark impressions testified about by FBI expert in tool mark identification; State v. Lampson, 149 N.W.2d 116, 117 (Iowa 1967) Tool mark analysis revealed impressions made at crime scene were made by tools found in the defendant's automobile.

[88] Christenson v. Iowa Dist. Court for Polk Co., 557 N.W.2d 259 (Iowa 1996) City of Des Moines entered on private property to obtain soil sample by use of an administrative warrant held imroper; Gerst v. Marshall, 549 N.W.2d 810 (Iowa 1996); Kosmacek v. Farm Service Co-op. of Persia, 485 N.W.2d 99 (Iowa App. 1992); State v. Wessling, 150 N.W.2d 301, 304 (Iowa 1967) Soil sample too small to provide analysis.

[89] State v. Lewis, 514 N.W.2d 63,66 (Iowa 1994) Gunpowder tests performed on weapons that were inclusive; State v. Evans, 495 N.W.2d 760, 761-62 (Iowa 1993) Ballistic test showed .357 firearm recently purchased by the defendant was murder weapon; State v.Vincik, 436 N.W.2d 350, 354 (Iowa 1989) Weapon and shirt are admissible under theory of "inevitable discovery. "Erroneous admission of slugs recovered and ballistic tests were cumulative and therefore did not require reversal; State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983) Defense expert had ample time to perform examination for ballistic examination testimony; Fryer v. State, 325 N.W.2d 400, 405 (Iowa 1982) The fact that ballistic evidence failed to connect the defendant did not warrant a new trial; State v. Peeples, 250 N.W.2d 390, 394-95 (Iowa 1977) Testimony regarding "trigger pull" held to be admissible; State v. Mark, 286 N.W.2d 396, 413-414 (Iowa 1980) Neutron activation analysis of bullets admitted in homicide trial.

[90] State v. Wissing, 528 N.W.2d 561, 563 (Iowa 1995) Use of accident reconstruction estimated speed at the time of impact in vehicular homicide prosecution; Kirk v. Union Pacific R.R., 514 N.W.2d 734, 738-40 (Iowa App. 1994) Trial court excluded the defense accident reconstruction expert based on the foundational failure of the evidence to *assist* the trier of facts in *accurately* determining facts at issue; State v. Van Scoyoc, 511 N.W.2d 628,629-31 (Iowa App. 1993) Defendant was entitled to accident reconstruction expert in vehicular homicide case. Nichols v. Sweitzer, 472 N.W.2d 266, 275-76 (Iowa 1991) Trial court did not err in disallowing officers testimony with regard to whether vehicle was moving. The officers testimony was based on statements he took from other witnesses not on any special training, experience, or knowledge.

[91] State v. Weaver, 554 N.W.2d 240, 249-50 (Iowa 1996) New trial granted to defendant based on expert review of new evidence and autopsy report; State v. Eads, 166 N.W.2d 766, 768-74 (Iowa 1969) State appealed pretrial order of trial court directing the state produce, statements, reports, physical evidence and photographs prior to homicide trial.

[92] State v. Knox, 536 N.W.2d 735, 741 (Iowa 1995) Physician opinion testimony regarding sexual assault; Malloy v. State, 530 N.W.2d 72, 75-77 (Iowa App. 1994) Physician testimony regarding physical examination of 13 year old and whether there was evidence of sexual penetration.

[93] State v. Gabrielson, 464 N.W.2d 434, 436-38 (Iowa 1990) Defendant may not receive order for the victim in a sexual abuse case to undergo psychiatric examination for credibility purposes. The court does not address the issue of competency. See also State v. Tharp, 372 N.W.2d 280, 284 (Iowa App. 1985).

[94] Iowa R.Crim. P. 13(2)(b)(1) refers to items seized by the state or are within the possession, custody, or control of the state. State v. Stratton, 519 N.W.2d 403 (Iowa 1994) Defendant filed a motion to produce for a victims medical records the trial court overruled the motion because the patient had not waived his privilege. The state may not unilaterally waive privilege. Defendant's failure to object to testimony that would have called for issues subject to the motion to produce waived argument.

26. Staffing notes and reports.[95]
27. Hospital admission notes, reports and summaries.[96]
28. Hospital discharge notes, reports and summaries.[97]
29. X-rays and their analysis.[98]
30. Copies of diagrams, charts, or graphs.[99]

§ 6.9 CONSIDERATIONS REGARDING EXPERT TESTIMONY RELEVANCE AND RELIABILITY

The standard for the admissibility of expert testimony is provided in Iowa Rule of Evidence 702.[100] After discovering the identity of the state's expert(s) and basis for their opinions, reviewing the information presented may provide for an objection to the admission of the evidence entirely, or the possibility to narrow the expert's testimony. In *Daubert v. Merrill Dow Pharmaceuticals*,[101] the United States Supreme Court addressed the issue of admissibility of expert testimony. The Court found that evidence must be both scientifically reliable and relevant.[102]

The trial court must determine if the opinion of the expert is reliable. In making that determination the court may consider: (1) whether the theory or technique has been or can be tested; (2) whether the theory or technique has been proven by the peer review process or published within the scientific community; (3) what is the known rate of error, or the potential rate of error, or (4) whether standards exist in the particular field or science the expertise comes from; and (5) whether the theory or technique that is the subject of the opinion or testimony has been generally accepted by the particular scientific community.[103]

[95] State v. Stratton, 519 N.W.2d 403 (Iowa 1994).
[96] State v. Stratton, 519 N.W.2d 403 (Iowa 1994).
[97] State v. Stratton, 519 N.W.2d 403 (Iowa 1994).
[98] State v. Stratton, 519 N.W.2d 403 (Iowa 1994).
[99] State v. Stratton, 519 N.W.2d 403 (Iowa 1994).
[100] Rule 702 If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue , a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.
[101] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
[102] Id. 587-89.
[103] Id. 591-95.

The question of relevancy is the same as that presented in regard to any evidence offered – it requires a linkage.[104] In *Daubert*, the Court held there must be some kind of logical connection between the evidence offered and the issue in controversy.[105] The court concluded that "Federal Rules of Evidence . . . do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy both those demands."[106]

The Iowa rule regarding expert witness testimony is currently the same as the federal rule. In *Hutchison v. American Family Mutual Insurance Company*,[107] the Iowa Supreme Court adopted both the rationale stated in *Daubert* and Federal Rule of Evidence 702.[108] In*Hutchison*, a trial court's decision to allow a clinical psychologist to testify about matters for which he was not board certified was argued.[109] The court held the lack of certification went to the weight and credibility of the testimony not its admissibility.[110] The court also addressed the plaintiff's arguments regarding the expert's reliance on hearsay evidence. An expert is allowed to use any fact or data if it is reasonably relied upon by experts in the particular field.[111] Of particular interest is the

[104] Iowa R. Evidence 401 "Relevant evidence" means evidence having any tendency make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[105] Daubert at 591 "The consideration has been aptly described by Judge Becker as on of "fit." Ibid. "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other unrelated purposes. (cite omitted) The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

[106] Id. at 597.

[107] 514 N.W.2d 882 (Iowa 1994).

[108] Id. at 885-86 Rule 702 thus codified Iowa's existing "liberal rule on the admission of opinion testimony." (cite omitted). The United States Supreme Court recently reaffirmed this approach in Daubert v. Merrell Dow Pharmaceuticals, Inc., (cite omitted). In Daubert, the Court rejected the Frye test of admissibility, which required the expert opinion to be based on a scientific technique that is "generally accepted" as reliable in the relevant scientific community. (cites omitted) The Court stated that "the Rules of Evidence -especially Rule 702-do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."

[109] Id. at 886-89.

[110] Id. at 886. Although Dr. Moore lacked board certification in neuropsychology, we believe this fact went to the weight of his testimony, not its admissibility.

[111] Id. at 889. See also Iowa Rule of Evidence 703 The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial

court's approval of the trial court's decision in disallowing a computer-generated film depicting a closed head injury.[112] The court found the film lacked sufficient foundation regarding the specific accident at issue: speed, weight, and distances of the vehicles involved to authenticate it as a genuine representation of the injury.[113] The court found a link or "fit" was lacking between the film and the specific issues the jury was to address.

The Iowa Supreme Court noted a concern that expert testimony may fall within the realm of conjecture, speculation, and surmise.[114] The United States Supreme Court in *Daubert* also noted a fear that the standard enunciated for admissibility may "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions."[115] Both courts regarded these concerns as minimal relying on the adversarial process to point out deficiencies in expert testimony by "vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof."[116]

§ 6.10 THE STATE'S PANACEA: SYNDROME, SYNDROME, WHO DOESN'T HAVE A SYNDROME?

In 1986, an article was published in the Journal of Criminal Law and Criminology titled "Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence."[117] In this article, Professor McCord points to four ways which prosecutors have used expert testimony: (1) to diagnosis to prove sexual abuse occurred, (2) to vouch for the complainant's credibility, (3) to enhance the credibility by explaining "unusual" behavior highlighted by the defendant, and (4) to enhance the credibility of complainant by explaining the capabilities of children.[118] Although, prior to *Daubert*[119] and

or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[112] Id. at 890.

[113] Id. at 890.

[114] Id. at 888.

[115] Daubert at 595.

[116] Id. at 596.

[117] David McCord, 77 J.Crim. L. & Criminology 1 (1986).

[118] McCord, at 5.

[119] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Hutchinson,[120] Professor McCord's article reads like blueprint for the admission of "syndrome" testimony in Iowa.[121]

State v.Seevanhsa presents a case where a child protective worker was called to testify about Child Sexual Abuse Accommodation Syndrome.[122] After the defense attorney cross examined the complainant, the worker was called to testify about the characteristics of the syndrome. The court notes she did not testify she "believed the complainant, the complainant was credible, or that a sexual assault had occurred. She limited her discussion to an explanation of the symptoms common to children who have been sexually abused."[123] The defendant pointed out the factors included in the expert testimony happened to coincide with many of the specifics of the complainant's testimony.[124] Because the expert did not express a direct opinion as to the credibility of the complainant, the court found any indirect effect on credibility as "not problematic."[125] The court's logic seems to consume its own premise of admissibility: If the evidence is relevant it must show that some fact in issue is more or less likely – there must be a "fit" between the evidence and the issues presented to the jury. If on the other hand, it is general information not specific to the case, it lacks foundation and is not relevant.[126] The "fit" or logical connection to the case is broken by the general nature of the testimony.[127] It invites the jury to speculate as to whether the complainant's symptoms fit the general characteristics described by the expert. Jurors are thereby invited to become witnesses.

Seevanhsa's origins occurred at the same time Professor McCord's article appeared in the Journal. In *State v. Myers*, the Iowa Supreme Court addressed the issue of an expert's opinion as to the veracity of a complainants testimony.[128] Myers was tried for indecent contact with a minor.[129] The state called the complainant, an eight year old girl, her sister, and two other corroborating witnesses to testify about the incident.[130]

[120] 514 N.W.2d 882 (Iowa 1994).
[121] McCord, 10-17.
[122] 495 N.W.2d 354, 355 (Iowa App. 1992).
[123] Id. at 357.
[124] Id. at 355.
[125] Id. at 357.
[126] Hutchison, supra at 890. Admission of film disallowed because of lack of foundation.
[127] See f/n 86.
[128] 382 N.W.2d 91 (Iowa 1986).
[129] Id. at 91.
[130] Id. at 92.

Two witness were called to testify as "experts."[131] The first was the principal of the elementary school attended by the complainant. The principal was allowed to testify that statistically children do not lie about sexual abuse complaints, and in her experience as a principal in an elementary school for three years, "there has not been a child who has lied about something like this. So I do believe children."[132] The second "expert" witness was a child abuse investigator who worked for the Department of Human Services.[133] The investigator was called by the defense to testify about prior inconsistent statements made to her by the complainant.[134] During cross examination the investigator opined, "In all the years I've worked, which is sixteen, I have only had one child that lied to me about sexual abuse, and it is my opinion that it is very rare for a child to lie about this subject."[135]

The Iowa Supreme Court focused on the substance of the testimony not on the qualifications of the experts.[136] The court examined a number of cases that allowed expert testimony on the after effects of a sexual assault, such as emotional and psychological trauma. [137] After a discussion of case law,[138] the court concluded:

> The ultimate determination of the credibility or truthfulness of a witness is not a 'fact in issue' but a matter to be generally determined solely by the jury....Consequently, we conclude that expert opines as to the truthfulness of a witness is not admissible pursuant to rule 702. As we indicated, the effect of the expert opinions in this case was the same as directly opining on the truthfulness of the complaining witness.[139]

In *State v. Gettier*, the Iowa Supreme Court revisited the admissibility of expert testimony in sexual abuse cases.[140] A psychologist was allowed to testify that individuals who suffered from post-traumatic stress disorder displayed a fear of staying alone, sleep

[131] Id.
[132] Id.
[133] Id.
[134] Id.
[135] Id.
[136] Id. at 93 "The qualifications of these two witnesses is not in issue; the subject matter of their expert opinion is our focus."
[137] Id at 96-97. Citing People v. Bledsoe, 36 Cal.3d 236, 203 Cal.Rep 450, 681 P.2d 291(1984); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); State v. Meyers, 359 N.W.2d 604 (Minn. 1984).
[138] Id. 93-97.
[139] Id. at 97.
[140] 438 N.W.2d 1, 4-6 (Iowa 1989).

disturbances, social and sexual impairment and hyper alertness.[141] The court noted the term "rape trauma syndrome" was not specifically referred to in the trial.[142] The court found the admission of general testimony regarding symptoms within the trial court's discretion.[143]

In *State v. Pansegrau*, however, the Iowa Court of Appeals reversed a conviction for sexual abuse on the erroneous admission of expert testimony.[144] The issue before the court was the admission of a doctor's testimony that the complainant had delayed reporting a sexual assault because of rape trauma syndrome.[145] The court found an abuse of discretion admitting the testimony. The evidence was not of a general symptom but of a personalized opinion and conclusion.[146] The Iowa courts previously held the testimony of the experts regarding general symptoms are proper,[147] while testimony that is specific is not allowed.[148]

More recently in *State v. Griffin*, the Iowa Supreme Court found the admission of a social worker's testimony regarding "battered women's syndrome" was proper. In*Griffin*,[149] the complainant initially stated the defendant had sexually assaulted her but then later recanted.[150] The court noted the complainant's credibility as a central issue of the case.[151] In order to bolster the testimony of the complainant, the state called a social worker to answer, "If she ever runs into victims who refused to testify against their batterer?"[152] The social worker replied:

> Well, based on the battered women's syndrome, it is the battered woman's perception, reasonable perception that another beating is inevitable. And that all of our assistance, meaning the criminal justice system, counselors, our assistance will not be effective in stopping the violence. It hasn't been in the past for her, and so it is her reasonable belief that to testify against the batterer and not-versus showing him loyalty, being a wonderful actress in making sure that he believes she won't testify, that she will lie for him, she will do whatever it takes, is a life-saving coping skill for her.
>
> I hear law enforcement officers tell me all the time, battered women, they lie and they're great actresses. And my response is always, "they better be great actresses. Their life may depend on it.[153]

The inflammatory nature of the social worker's testimony is obvious as it asserts: (1) the complainant is more credible if she recants or gives inconsistent testimony, (2) the criminal justice system has failed the complainant in the past, and (3) the defendant will repeat the conduct and kill the complainant. Arguably, the testimony does not assist the jurors as much as it is designed as a charge to the jurors to act to save the complainant's life before the defendant strikes again.

The Iowa Courts hold that expert testimony regarding general symptoms is proper,[154] while testimony that is specific is not allowed.[155] The distinction drawn by the court is superfluous to defense counsel who is confronted by an expert who graphically describes the "general symptoms" of a syndrome, inferentially telling the jury what and whom to believe.

The expert test of whether someone has been the victim of sexual abuse becomes:

1. Does the individual have a fear of being alone?
2. Does the individual have difficulty sleeping?
3. Does the individual have difficulty with social interaction?
4. Does the individual suffer from some sexual dysfunction?
5. Is the individual hyper alert?

141 Id.
142 Id.
143 Id.
144 524 N.W.2d 207 (Iowa App. 1994).
145 Id. at 211.
146 Id. at 211.
147 State v. Gettier, 438 N.W.2d 1, 6 (Iowa 1989).
148 State v. Myers, 382 N.W.2d 91,93 (Iowa 1986). Expert testimony that children almost never lie about sexual abuse is improper.
149 ___N.W.2d ___, (Iowa Filed May 21, 1997).
150 Id. at ___.
151 Id. at ___.
152 Id. at ___.
153 Id. at ___.
154 State v. Gettier, 438 N.W.2d 1, 6 (Iowa 1989).
155 State v. Myers, 382 N.W.2d 91,93 (Iowa 1986). Expert testimony that children almost never lie about sexual abuse is improper.

The expert test of whether someone is credible is: whether the person has recanted or given prior inconsistent statements. If so, the individual is suffering from battered woman's syndrome and the criminal justice system has failed to protect her from the assailant.

The expert witness becomes the thirteenth "super" juror advising the juors how to discern who is telling the truth and what verdict should be returned. The expert provides the list of criteria. A juror need only apply the criteria to the evidence. If the answer to a number of the questions is "yes," the complainant is considered a victim of sexual abuse or a battered woman. It would be interesting to apply the above criteria to students in a professional school – law or medicine. Would affirmative answers indicate those students are victims of sexual abuse or battered woman, or are they merely reacting to the pressure of the school? Is the expert testimony based on science or psuedoscience? Have the courts given prosecutors a method to assist jurors in assessing testimony or a means to resolve questionable testimony in favor of the state?

The limitation that the expert cannot say they believe a complainant is a distinction without difference. To the jury, it is nod by the expert to believe the complainant. Therefore, it is imperative a full investigation of the expert, their credentials, and the basis of their opinion be conducted by counsel in order to protect the client. It is certain that *Daubert*[156] and its progeny will drive expert opinion to its full fruition for some, and to "absurd and irrational pseudoscientific assertions"[157] for others. depending on who's side the testimony is offered against.

The previous discussion of expert testimony is not an exclusive or extensive list. The term "expert" may be applied to almost any witness assuming certain foundation requirements are met. The list of areas of expertise are ever expanding.[158] Regardless of opinions regarding the scope of expert testimony, its power cannot be underestimated. It must be met by counsel.

156 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
157 Id. at 596.
158 Woodroffe v. Hasenclever, 540 N.W.2d 45 (Iowa 1995) Repressed memory claim o f sexual abuse was barred by statute of limitations; Geringer v. Iowa Dept. of Human Services, 521 N.W.2d 730 (Iowa 1994) Munchhausen Syndrome by Proxy finding in a department of human services report appealed to district court. The syndrome is a form of child abuse in which a parent repeatedly presents their child for unnecessary medical treatments by simulating or producing symptoms in the child.

§ 6.11 The Need For a Defense Expert

During the course of factual investigation of expert testimony, it will become obvious that an attorney's limited familiarity with material will only provide a superficial understanding of the subject matter. Contacting an expert will be necessary before investigation and discovery of the state's experts are completed. If the defenses of insanity, diminished responsibility, or intoxication are to be adequately raised and presented, the retention of an expert is vital. The Iowa Rules of Criminal Procedure provides for the retention of expert witnesses at state expense,[159] as does the Iowa Code.[160] The ability to retain an expert, however, is not absolute. A preliminary showing must be made to invoke the rule. Notwithstanding the Iowa Rules, the United States Supreme Court has addressed the need of defense counsel to have access to expert witnesses.

§ 6.12 A Matter of Due Process

In *Ake v. Oklahoma*,[161] the United States Supreme Court addressed a due process challenge to a state courts' failure to appoint a defense expert. Mr. Ake was arrested and charged with two counts of murder in the first degree and attempted murder.[162] During Mr. Ake's arraignment, his behavior was so unusual that the judge ordered a psychiatric examination sua sponte.[163] The initial finding of the psychiatrist was that Ake was suffering from delusions and a paranoid schizophrenic.[164] The court ordered a further psychiatric examination which resulted in testimony at a competency hearing portraying Ake as a psychotic-paranoid schizophrenic suffering from delusions who should be hospitalized.[165] The court ordered Ake committed. Six weeks later after receiving anti-

159 Iowa R.Crim. P. 19 (4) Witnesses for Indigents. Counsel for a defendant who because of indigency is financially unable to obtain expert or other witnesses necessary to an adequate defense of the case may request in a written application that the necessary witnesses be secured at public expense. Upon finding, after appropriate inquiry, that the services are necessary and that the defendant is financially unable to provide counsel to obtain the witnesses on behalf of the defendant. the court shall determine reasonable compensation and direct payment pursuant to Iowa Code chapter 815.
160 Iowa Code § 815.4 & 5.
161 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).
162 Id. 70-71.
163 Id. at 71.
164 Id.
165 Id.

psychotic drugs, the chief forensic psychiatrist of the state hospital advised the court that Ake was competent to stand trial,[166] and the state proceeded with the charges.

Ake had never been examined for his mental status at the time of the commission of the offense. Defense counsel requested the court have the defendant examined or provide funds so defense counsel could have the defendant examined.[167] The court denied the request. Ake proceeded to trial raising the defense of insanity. Although defense counsel called the experts who examined Ake, they could not testify about his mental capacity at the time of the offense because they had not examined him for that purpose.[168] The state made a point of inquiring as to whether any expert had seen any results of an examination of Ake diagnosing his mental status at the time of the offense. Of course, each responded they had not.[169] The trial court instructed the jury the defendant was presumed sane at the time of the offense and that defendant had the burden of presenting evidence sufficient to raise a reasonable doubt as to his sanity.[170] Ake was convicted and sentenced to be executed.

In addressing the trial court's refusal to appoint an expert, the United States Supreme Court found a due process violation:

> When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of psychiatric testimony is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success . . .
>
> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[171]

[166] Id.
[167] Id. at 72.
[168] Id.
[169] Id.
[170] Id. at 73.
[171] Id. at 82-83.

§ 6.13 THE IOWA STATUTES AND IOWA RULES OF CRIMINAL PROCEDURE

Iowa has had a long standing commitment of allowing defendants to apply for and receive expert assistance. In 1965, the Iowa legislature passed Iowa Code section 775.5 providing that:

> An attorney appointed by the court to defend any person charged with a crime in this state shall be entitled to a reasonable compensation to be decided in each case by the court, including such sum or sums as the court may determine are necessary *for investigation in the interests of justice. . .*

The Iowa Supreme Court interpreted section 775.5 in *State v. Hancock.*[172] Hancock was charged with the crime of forgery. The state had listed and called an expert witness to testify the defendant had authorized the check in question.[173] Prior to trial, the defendant had applied for funds to retain an expert to examine the check.[174] The trial court overruled the request on the basis the state's case was not entirely dependent on the expert's testimony and the defendant did not challenge the reliability of the expert's opinion.[175] The Iowa Supreme Court reversed the conviction finding:

> Initially we note it should be extremely difficult, if not impossible in most cases, for a party unschooled in the subject of handwriting expertise to effectively challenge the reliability of an expert without the aid of his own expert....
>
> An independent analysis of defendant's handwriting conducted by an expert of her own choosing could well have resulted in a conclusion diametrically opposed to that reached by Barton. (The state's expert) In denying her request the court effectively prevented defendant from even the possibility of obtaining evidence which may have been highly relevant and material to a meaningful defense. Such an opportunity could not have

[172] 164 N.W.2d 330 (Iowa 1969).
[173] Id. at 332.
[174] Id.
[175] Id. at 333.

been denied a defendant of means. Defendant's indigency should not be permitted to stand as a barrier to such vital evidence....

The trial court committed reversible error in denying defendant's application.[176]

In *State v. Williams*, the Iowa Supreme Court defined the specificity needed for a request for expert services.[177] William's lawyer filed an application requesting that the court provide funds to retain an investigator to find and interview defense witnesses.[178] The trial court overruled counsel's request finding it, "vague and indefinite as to the area to be investigated, the individuals to be employed for such investigation, their number, the cost or rate of pay of said investigators . .. "[179] The Supreme Court agreed with the trial court – the application was lacking in its specificity:

> We do not read the court's ruling as requiring defendant to inform the court and prosecutor of the names and addresses of the persons he wanted to investigate. It did suggest that the application was inadequate in not advising the court as to the number of investigators to be employed, the area to be investigated and probable cost or rate of pay . . .
>
> When counsel requests court authority for the employment of an investigator or experts, he should point out with specificity the reasons such services are necessary . . .[180]

The court noted that defense counsel ignored the trial courts suggestion that a more detailed application would have been granted.[181]

In *State v. McGhee*, the Iowa Court further refined the test showing that a defense request is reasonable.[182] Defense counsel filed an application to retain an expert to

[176] Id.
[177] 207 N.W.2d 98 (Iowa 1973).
[178] Id. at103.
[179] Id.
[180] Id at 105.
[181] Id.
[182] 220 N.W.2d 908 (Iowa 1974).

explore the feasibility of an insanity defense.[183] The defendant had previously been examined for competency and the findings indicated the defendant had a severe antisocial personality.[184] The trial court denied the request, and the Iowa Supreme Court affirmed the decision:

> [D]efense counsel in seeking psychiatric advise...must make timely request for the same, therein setting forth the specific reasons upon which counsel concludes (1) those services are reasonably needed or necessary, and (2) such services would other wise be justifiably obtained were defendant financially able. The trial court (1) shall accord considerable weight to the application so made but is not thereby bound, and (2) in determining whether an insanity defense is reasonably warranted or psychiatric services are otherwise needed in defending the accused, shall effect an objective evaluation of such application, taking into consideration all relevant factors, including but not limited to any mental or emotional instability, (b) his past conduct, and (c) defendant's mental state and demeanor as observed by the trial judge.... If trial court, focusing upon needs of defense counsel, finds the application is reasonable it should be granted, but if found to be frivolous, unreasonable or without underlying factual support then a denial is in order. In either event the trial judge shall make and enter appropriated findings of fact and conclusions of law with attendant order.[185]

§ 6.14 Due Process, Compulsory Process, and Effective Assistance of Counsel

English v. Missildine[186] involved an indigent defendant[187] whose mother had retained private counsel. The attorney filed an application to retain a handwriting expert and to take depositions at public expense.[188] The trial court denied the application, and the defense counsel petitioned the Iowa Supreme Court to review the trial court's

[183] Id at 909.
[184] Id at 913.
[185] Id.
[186] 311 N.W.2d 292 (Iowa 1981).
[187] Id at 294.
[188] Id at293.

denial.[189] After reviewing both the code section[190] and the appropriate rules of criminal procedure,[191] the court found the authority for the services requested in the Sixth Amendment's right to effective assistance of counsel.[192] The court held:

> For Indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services. (cites omitted)The Constitution does not limit this right to defendants represented by appointed or assigned counsel. The determinative question is the defendants indigency. When his indigent status is established the 'defendant is constitutionally entitled to those defense service for which he demonstrates a need.'
>
> Sections 815.7 and rule 19(4) partially implement this constitutional right. Although those provisions do not apply in the present situation, the Constitution independently mandates judicial recognition of an indigent's right to necessary investigative services.[193]

The court reaffirmed this reasoning in *State v. Coker*.[194] Coker, charged with Robbery in the First Degree, raised the defense of intoxication, and applied for a court appointed expert to assist in the preparation of the defense.[195] In support of his application, Coker's attorney made professional statements revealing: "After Mr. Coker's arrest he suffered grand mal seizures which required hospitalization and the seizures were associated with withdrawal from abuse of substances."[196] The court denied the request finding that counsel "failed to show how the appointment of an expert witness would, in this case, assist in his defense of intoxication."[197] Defense counsel moved to continue the trial and offered to waive the statutory right to speedy trial so that funds raised by the defendant's family could be used to employ an expert.[198] The trial court found that

[189] Id.
[190] Iowa Code § 815.7.
[191] Iowa Rule of Criminal Procedure, 19(4).
[192] English v. Missildine, 311 N.W.2d 292 (Iowa 1981).
[193] Id at 294.
[194] 412 N.W.2d 589 (Iowa 1987).
[195] Id at 590.
[196] Id.
[197] Id.
[198] Id.

defense counsel did not show "good cause" as to why the trial should be continued.[199] At trial, the defense offered testimony regarding intoxication including an expert who had examined Coker after his arrest. The expert indicated he did not have an opinion regarding Coker's intent at the time of the offense, and that the formulation of such an opinion would require further examination of the defendant.[200] Coker was convicted and appealed the trial courts decision dening him access to an expert.[201]

The Iowa Supreme Court found the trial court had abused its discretion in not appointing an expert and remanded the case.[202] In reversing the conviction, the court found that Rule 19(4)[203] "protects the indigent defendant's sixth amendment right to compulsory process as well as his or her fourteenth amendment due process right to prepare and present an adequate defense."[204]

In *State v. Van Scoyoc*,[205] the defendant was charged with vehicular homicide and wished to retain an accident reconstruction expert to analyze "the physical evidence including the road condition and terrain over which the vehicle traveled, and the statements of the witnesses in order to establish what happened."[206] The court initially authorized $2,500.00 of a $3,000.00 proposed study. The expert indicated that additional funds were needed, and defense counsel applied for and received the additional money.[207] As the trial approached, counsel applied for more funds to obtain the expert's testimony at trial.[208] The trial court denied the request, and Mr. Van Scoyoc was convicted of the charge. In denying the funds, the trial court "indicated displeasure" with (1) the cost of the initial study; (2) the expert witness rate of $120 per hour, however, the state expert was charging $110 per hour; and (3) county officials concern over the expenditures of public funds.[209]

[199] Id.
[200] Id at 590-91.
[201] Id.
[202] Id at 593. We reverse Coker's convictions and remand for new trial. On remand, trial court should appoint a competent expert, preferably but not necessarily of Coker's choosing, to examine Coker and assist him in the evaluation, preparation, and presentation of his intoxication defense.
[203] Iowa Rule of Criminal Procedure, 19(4).
[204] State v. Coker, 412 N.W.2d 589, 591 (Iowa 1987).
[205] 511 N.W.2d 628 (Iowa App. 1993).
[206] Id. at 629.
[207] Id. at 630.
[208] Id.
[209] Id at 631.

The Iowa Court of Appeals did not address the trial courts economic concerns, but did find:

> Without the ability to offer expert testimony in opposition to the State's expert testimony, the defendant was unable to contest the opinion regarding the speed of the van as related by the deputy sheriff who testified concerning the study made by the State's expert. The inability to do so unquestionably prejudiced Van Scoyoc's defense. Consequently, the denial of Van Scoyoc's ability to offer expert testimony in his trial denied him a fair trial.[210]

The message to defense lawyers is threefold: (1) there is statutory as well as constitutional support for supplying indigent defendants with expert witnesses; (2) an application for expert testimony is more likely to be granted if the request specifically outlines the need and factual support; and (3) Iowa Appellate Courts will find abuse of discretion and reverse convictions when the need for the expert is clearly supported by the record.

With the state's increasing reliance on expert testimony, defense counsel must use fact investigation and discovery in combination with defense experts to blunt, contradict, or attack the state's case. Defense counsel's reliance on the time tested art of cross examination is not sufficient to cope with states current arsenal of experts. Counsel's duty to investigate must include an obligation to explore, understand, and present expert testimony.

§ 6.15 THE SEARCH FOR EXCULPATORY INFORMATION – AN ETHICAL OBLIGATION TO DISCLOSE

The Iowa Code of Professional Responsibility provides:

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if unrepresented by counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.[211]

In *Gordon v. State*, the defendant was charged with murder.[212] Gordon raised the defense of diminished responsibility due to alcohol and drug intoxication.[213] His attorney desired to call a codefendant to testify about his drug and alcohol use prior to and during the homicide.[214] The codefendant, however, raised her fifth amendment privilege against self incrimination.[215] She was not called as a witness, and Gordon was convicted. One month after Gordon's sentencing, the murder charges against the codefendant were dismissed.[216] After Gordon's conviction was affirmed,[217] he brought a post conviction action alleging prosecutorial misconduct based on a claim of calculated delay of the codefendants dismissal.[218]

The crux of Gordon's argument is the state intentionally waited until after Gordon's sentence to dismiss the case against the codefendant in order to deprive him of a witness' exculpatory testimony.[219] The Iowa Court of Appeals found the defendant must show that by a preponderance of the evidence (1) the prosecutor is guilty of misconduct and (2) the defendant suffered actual prejudice.[220] The court affirmed the trial court's finding that no prosecutorial misconduct occurred.[221] The court, however, did observe that although Gordon claimed the testimony of the codefendant was critical, he did not present the codefendant nor any reason why did not call her at the post conviction

[210] Id at 631.

[211] DR 7-103(B). PERFORMING THE DUTY OF A PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER.

[212] 480 N.W.2d 265 (Iowa App. 1991).

[213] Id. at 266.

[214] Id.

[215] Id.

[216] Id.

[217] State v. Gordon, 354 N.W.2d 783 (Iowa 1984).

[218] Gordon v. State, supra at 266.

[219] Id. at 266. The first argument presented by the state was that Gordon had waived the issue by not raising it on direct appeal. The court of appeals rejected the argument finding that the dismissal was not part of the record in the direct appeal and the dismissal occured after time had expired for the filing of the notice of appeal. Iowa R. App. P. 101. It would seem that the state by making this argument reinforces the defendant's contention that dismissal was made in order to deny him access to a witness.

[220] Id. at 268. He must prove more than a mere possibility of prejudice. He must show that the misconduct "worked to his... actual and substantial disadvantage." (citing Polly v. State, 355 N.W.2d 849,855 (Iowa 1984)).

[221] Id. at 268.

proceedings.[222] This failure undercut his argument and left the court to speculate about the effect of the proposed testimony. Needless to say, the court declined the invitation.[223]

Gordon's argument goes beyond traditional nondisclosure by a prosecutor. Gordon's central point is the prosecutor took an active role to frustrate the defense's attempts to secure favorable testimony. In order to establish the proposition, the state must admit its ill motive or the codefendant must testify. It is unlikely that a prosecutor would admit the state intentionally maintained a frivolous charge against someone in order to deprive the defendant of a witness. The defense is left with the second option of calling the former codefendant to testify. However, there are at least two practical problems in presenting testimony by the codefendant at a post conviction hearing: (1) The homicide case occurred in 1982 and the post conviction proceeding took place considerably later – the codefendant may not be available, and (2) assuming the codefendant is available, her testimony may implicate her in other criminal activity and cause the state to refocus on her part in the homicide. Although there are hurdles defense counsel must overcome, the Iowa Supreme Court has acted when it has been shown that a prosecutor has not disclosed exculpatory evidence.

In the case of *Committee on Professional Ethics v. Ramey,* the Iowa Supreme Court suspended a prosecutor's license for nondisclosure of exculpatory evidence.[224] Defense counsel filed a motion to produce "all exculpatory evidence" which was sustained by the court.[225] The prosecutor received police reports and an interview from a witnesses who claimed the theft was committed by a third party, not the defendant.[226] The information was not disclosed to the defendant. The ethics commission found the failure to disclose a violation of the cannons.[227] The prosecutor argued the information was governed by the materiality standard in *Brady v. Maryland.*[228] If the information was not material then it need not be disclosed.[229] The Iowa Supreme Court rejecting the argument found that "[The] statement was material and the defense was entitled to it.

[222] Id.
[223] Id. at 268-69.
[224] 512 N.W.2d 569 (Iowa 1994).
[225] Id. at 572.
[226] Id.
[227] Id.
[228] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
[229] Commission on Professional Ethics v. Ramey, 512 N.W.2d at 572.

The duty to disclose exculpatory evidence cannot be ignored because a prosecutor's private belief that it is beside the point."[230]

The importance of the *Ramey* decision is the Iowa Courts' clear statement that it considers nondisclosure an ethical violation. This decision should assist defense counsel in motions to insure pretrial disclosure of information by the prosecution. The consequence of nondisclosure, in Ramey's case suspension of his license, should give prosecutor's every incentive to disclose. Defense counsel must file a pretrial request for disclosure. Its necessity becomes clear in reviewing the applicable case law.

§ 6.16 A Due Process Obligation to Disclose

In 1963 the United States Supreme Court reversed a murder conviction for nondisclosure of exculpatory information.[231] In *Brady v. Maryland,*[232] a codefendant had made a pretrial statement that he had committed the murder in question.[233] In spite of a pretrial request made by Brady's attorney to examine any statements made by the codefendant, the statement was not disclosed until "after he had been tried, convicted, and sentenced and after his conviction had been affirmed."[234] Brady's trial strategy was to concede the murder, but to claim the codefendant had actually committed the murder, thus minimizing Brady's involvement.[235] This strategy, if successful, would assure a conviction for murder, but avoided the death penalty.[236] The Maryland Court of Appeals remanded the case for retrial only on the issue of the imposition of the death penalty.[237] The United States Supreme Court in affirming the Maryland court stated: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[238]

[230] Id.
[231] Brady v Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
[232] Id.
[233] Id. at 84.
[234] Id.
[235] Id.
[236] Id. at 85.
[237] Id. at 83.
[238] Id. at 87.

As a precondition to a due process violation for nondisclosure, a request for the exculpatory evidence must be filed. Defense counsel who does not file such a request does so at their client's peril. This was the case in *United States v. Agurs*.[239]

Linda Agurs was convicted of second degree murder for the stabbing death of James Sewell.[240] The defense raised the issue of self defense and claimed the prosecutor's failure to disclose background information of the victim warranted reversal of the conviction.[241] The prosecution argued the defense counsel did not request the information and absent such a request the government was not obligated to disclose the victim's criminal record.[242] The D.C. circuit agreed with the defense that the nondisclosure violated the defendant's right to due process.[243] In reversing the D.C. circuit, the United State Supreme Court found the government had not violated the defendant's right.[244]

The Court in *Agurs* attempted to define three areas of nondisclosure: (1) perjured testimony,[245] (2) information specifically requested,[246] and (3) information where no request or a general request has been filed.[247] In elaborating on the three categories, the Court found in a case of perjured testimony:

> [T]he undisclosed evidence demonstrates that the prosecutions case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. In a series of subsequent cases the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of jury.[248]

[239] 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).
[240] Id. at 98.
[241] Id. at 100 FN3. The victim had been convicted of assault and two separate incidents of carrying a deadly weapon.
[242] Id. at 101.
[243] Id. at 97.
[244] Id.
[245] Id. at 103. citing Mooney v. Holohan, 294 U.S.103, 55 S.Ct. 340, 79 L.Ed. 791.
[246] Id. at 104. citing Brady v. Maryland, supra.
[247] Id. at 107.
[248] Id.at 103.

In a case such as *Brady*[249] where a specific request was made, the Court noted:

> In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When a prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.[250]

In the third category of cases either no request is made or a general request for all "exculpatory information" or "Brady material" is made.[251] The Court found that a general request gives the prosecutor no better notice than if no request is made.[252] In such cases, the nondisclosure will not warrant a new trial unless a "constitutional" standard of materiality is violated. The Court stated:

> The proper standard for materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilty beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[253]

[249] 373 U.S. 83 (1963).
[250] United States v. Agurs, 427 U.S. at 106.
[251] Id. at 106-07.
[252] Id.
[253] Id. at 112-13.

The Court found the district court had applied the correct standard to the facts presented in *Agurs*, and appropriately overruled defendant's motion for a new trial as no constitutional standard of materiality was violated[254] The Court refined the language used to define materiality in *United States v. Bagley*.[255]

In *Bagley*, two government witnesses had entered contracts with the government to provide information in exchange for a lump sum payment.[256] This information was not supplied to the defendant even though defense counsel had filed a motion to produce any "deals, promises, or inducements" between the government and its witnesses.[257] In a motion for a new trial the District court found, "beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during the trial, the disclosure would have no effect upon its finding that the Government had proved beyond a reasonable doubt that the (defendant) was guilty of the offenses for which he had been convicted."[258] The District Court had applied the *Agurs* standard.

The Supreme Court in setting a new standard of materiality relied on *Strickland v. Washington*.[259] In *Strickland*, the Court set the standard for granting a new trial based on ineffective assistance of counsel stating, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[260] A reasonable probability is a "probability sufficient to undermine confidence in the outcome."[261] The Court concluded:

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request cases of prosecutorial failure to disclose evidence available to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.[262]

[254] Id. at 113-14.
[255] 105 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).
[256] Id. at 671.
[257] Id. at 670
[258] Id. at 673.
[259] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
[260] United States v. Bagley, 473 U.S. at 682 citing Strickland v. Washington, 466 U.S. at 694.
[261] Id.

In view of the language adopted by the Court, why file a specific request for discovery? The test for materiality does not distinguish between cases where no request is filed, a specific request is filed or general request is filed. The Court addressed the question:

> We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from its nondisclosure that the evidence does not exist, and make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality . . The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.[263]

Bagley was remanded to the district court for further findings using the Court's newly enunciated standard of materiality.[264] Although not determinative, the importance of nondisclosure in a given case is emphasized by a specific request. It is clearly to counsel's advantage to file a pre-trial motion for specific information to preserve the issue for further review, generate a heightened scrutiny in the event of nondisclosure, and put the prosecutor on notice.

In order to file a specific request, it would appear that counsel would have to know what is in the prosecutor's file. This provokes the classic defense response, "If I knew the information existed, I wouldn't have to ask for it." Each case is different. The case itself will dictate an investigative strategy. The attorney must begin by asking what type of information is or could be available to the prosecution? Who are the witnesses?

[262] Id.
[263] Id. at 683.
[264] Id. at 684.

Once this has been determined, formulating specific requests tailored to the case becomes a more manageable task.

In *United States v. Kime* the defendant was charged with multiple counts of drug distribution, conspiracy and firearm violations.[265] The prosecution based its case on wiretaps, video surveillance, codefendant testimony, and information from confidential informants.[266] Based on the information known to defense counsel, an investigative strategy was outlined. In keeping with the distinctions drawn by the Court in *Agurs* and *Bagley*, a motion for production of exculpatory information was filed. The following is a portion of the motion filed in *Kime*, as well as supporting case law located in the footnotes.[267]

Specific Requests For Production of Exculpatory Evidence

All of the evidentiary items and sources listed below likely contain material and exculpatory information.[268]

a. "Negative exculpatory statements" - any statement made by a participant or informed witness which failed to mention the defendant.[269]

b. Any failure by an eyewitness to identify the defendant as an actor in a transaction in which the government contends he personally participated.

c. The local and FBI arrest and conviction record of every prospective government witness, including the docket number and jurisdiction of all pending cases.[270]

[265] 99 F.3d 870, 876 (8th Cir. 1996).

[266] Id.

[267] Filed as U.S. 9452 Southern District of Iowa. See also S.D.Ia. LR 14.

[268] Brady v Maryland, 373 U.S. 83 (1963); United States v Agurs, 427 U.S. 97 (1976); Giglio v United States, 404 U.S. 150 (1972), *see e.g.*, McDowell v Dixon, 858 F. 2d 945, 947-948 (4th Cir.. 1988) Nondisclosure will violate the defendant's right to due process of law, as well as the defendant's sixth amendment Compulsory Process Clause right to discover the identity of favorable witnesses and the existence of exculpatory evidence, *see* United States v Nixon, 418 U.S. 683, 709 (1974).

[269] Jones v Jago, 575 F.2d 1164, 1168 (6th Cir. 1978).

[270] United States v Perdomo, 929 F.2d 967m 970-971 (3d Cir. 1991) (check of NCIC records did not satisfy obligation to reveal conviction record of government witnesses - all information available to

d. The local and FBI criminal records of all declarants whose out-of-court statements the government will seek to introduce as an exception to the hearsay rule.[271]

e. A copy of any federal or state probation or pre-sentence report of any prospective government witness which is in the possession or control of the Government.[272]

f. The oral and/or written results of any polygraph test administered to any prospective government witness.[273]

g. Any express or implicit promise, understanding, offer of immunity, or of past, present, or future compensation, or any other kind of agreement or understanding between any prospective government witness and the government (federal, state and local), including any implicit understanding relating to criminal income tax liability.[274]

i. this request includes any implicit suggestion or inducement that the government may advance a "substantial assistance" motion on behalf of any prospective government witness.[275]

ii. This request includes the payment, promised payment or reimbursement, or any money or reward, including:

A. living expenses;

B. medical treatment;

C. transportation expenses;

D. entry into witness protection program;

E. favorable disposition at any proceeding, or delay to gain favorable disposition of any proceeding.[276]

prosecutors and agencies working with prosecutor must be disclosed.) United States v. Stroller,851 F.2d 1197, 1202 (9th Cir. 1988) (Criminal records of witnesses must be disclosed).

[271] Fed.R.Evid. 608.

[272] United States v Figurski, 545 F.2d 389, 392 (4th Cir. 1976); United States v Anderson, 724 F.2d 596, 598 (7th Cir. 1984) (pre-sentence report contents that impeach witness' credibility are discoverable; interpreting Figurski; Strifler, 851 F.2d at 1201. It is suggested that the criminal and employment histories be produced, and that the remaining reports be reviewed *in camera* for a determination by the Court whether any other impeachment evidence exists within the report.

[273] Houston v Lock hart, 982 F.2d 1246, 1253 (Cir. 1993); Carter v Rafferty, 826 F.2d 1299, 1306-09 (3d. Cir. 1987).

[274] United States v. Hoelscher, 914 F.2d 1527, 1536 (8th Cir. 1990).

[275] Hoelscher, 914 F.2d at 1536; United States v Risken, 788 F.2d 1361, 1375 (8th Cir. 1986) (implied contingent fees); United States v Shaffer, 789 F.2d 682, 689 (9th Cir. 1986) (All benefits and promises, including tax benefits).

h. Any discussion with a prospective witness about, or advice concerning, any contemplated prosecution, or any possible plea bargain, even if no bargain was made, or the advice was not followed.[277] This request includes any express or implicit threat by a government agent against a prospective witness for that witness' refusal to testify.[278]

i. Any promises or aid given to any witness in connection with that witness' dealings with any governmental administrative agency including, but not limited to, the Internal Revenue Service, the Federal Reserve Bank, and the Federal Deposit Insurance Commission.[279]

j. Any promises of relief in any civil or criminal forfeiture proceeding.

k. Any evidence that any prospective government witness is or has been under investigation by federal, state or local authorities for any criminal conduct unrelated to the instant indictment.[280]

l. Any evidence that any prospective government witness has ever made any false statement to authorities, whether or not under oath or under penalty of perjury.[281]

m. Any evidence that any prospective government witness has a bad community reputation for honesty, truthfulness, or veracity.[282]

n. Any evidence that any prospective government witness is biased, prejudiced or has a motive to be biased or prejudiced against the defendant for any reason.[283]

276 United States v Librach, 520 F.2d 550, 553-554 (8th Cir. 1975); Reutter v Solem, 888 F.2d 578, 581-582 (8th Cir. 1989).

277 Brown v Dugger, 831 F.2d 1547, 1558 (11th Cir. 1987) (evidence that witness sought plea bargain is to be disclosed, even if no deal was struck); Haber v Wainwright, 756 F.2d 1520, 1523-24 (11th Cir. 1985) (government must disclose its "advice" to witness regarding possible prosecution for crimes).

278 United States v Sutton, 542 F.2d 1239, 1243 (4th Cir. 1976).

279 United States v Hoelscher, 914 F.2d 1527, 1536 (8th Cir. 1990); United States v Wolfson, 437 F.2d 862 (2d Cir. 1970).

280 United States v Chitty, 760 F.2d 425, 428 (2d Cir.) *cert. denied* 474 U.S. 945 (1985) (government is under affirmative duty to disclose fact that government witness is under investigation.)

281 United States v Strifler,851 F.2d at 1202 (evidence that witness previously lied must be disclosed).

282 Fed.R.Evid. 608.

283 Johnson v Brewer, 521 F.2d 556, 561 (8th Cir., 1975); United States v Strifler, 851 F.2d at 1202 (motive for witness to inform is discoverable); United States v Sperling, 726 F.2d 69, 72-73 (2d Cir. 1984).

o. Any evidence that any prospective government witness has made a contradictory or inconsistent statement with regard to this case.[284]

p. Any evidence that any prospective government witness has ever engaged in any activity that involves deceit, fraud, or false statements whether or not the activity resulted in charge or conviction.[285]

q. Any evidence that any prospective witness has consumed alcohol, controlled substances, or prescription medication, at any time proximate to the events concerning which they will testify or his statements to authorities.[286]

r. Any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective government witness' ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic.[287]

s. The Government has indicated that it intends to call two informants in this case. Both were compensated by law enforcement for their efforts. In this situation, a copy of the informant's personnel of "C.I." file maintained by the law enforcement agency (which would include all financial inducements and transactions made, all conduct not charged as a result of the cooperation agreement, the coop[cooperation agreement itself, and any false statements ever made to law enforcement personnel) must be produced.[288]

t. Any evidence that someone other than the defendant committed, or was ever suspected of committing the crimes charged; or of

284 United States v Hibler, 463 F.2d 455, 460 (9th Cir. 1972) (reversible error not to disclose statement of police officer casting doubt on the story of the witness); Hudson v Blackburn, 601 F.2d 785 789 (5th Cir. 1979) (duty to disclose police officer's evidence refuting witness' statement that he identified defendant at lineup.)

285 United States v Strifler, 8511 F.2d at 1202 (false statements to authorities); Fed.R.Evid. 608(b).

286 King v Ponte, 717 F.2d 635, 640-641 (1st Cir. 1983).

287 Chavis v North Carolina, 637 F.2d 213, 2244 (4th Cir. 1980) (government must produce psychiatric or other reports reflecting on the competency or credibility of a government witness) and United States v Society of Independent Gasoline Marketers of America, 624 F.2d 461, 467-469 (4th Cir. 1980).

288 United States v Garrett, 5422 F.2d 23, 26 (6th Cir. 1976); United States v Austin, 492 F. Supp. 502 505-506 (N.D.Ill. 1980).

performing the role in the offense which the prosecution intends to prove was performed by the defendant.[289]

u. For the informants who were compensated and will testify in this case, the informant's state and federal tax returns for the past two years.[290]

v. The names and addresses of witnesses to the offenses allegedly committed by the defendant whom the government does not intend to call at trial.[291]

w. The defendant requests as part of the disposition of this motion that the Court order the United States Attorney to make specific inquiry of each government agent connected to this case for each of the above-listed items.[292]

STANDARD FOR MATERIALITY

The defendant requests as part of the disposition of this motion that the Court direct the government that it may not measure its disclosure obligation by the appellate standard of materiality announced in *United States v Bagley*, 473 U.S. 667(1985). The *Bagley* standard is a standard of review to be used by appellate courts in considering whether a conviction should be reversed because the government violated its duty to disclose exculpatory evidence. The Fourth Circuit in *McDowell v Dixon*, stated that "*Bagley* . . . considered the standard of materiality to be applied in

[289] Miller v Angliker, 848 F.2d 1312, 1321-23 (2d Cir. 1988) (reversible error not to disclose that person other than defendant committed murders); Bowen v Maynard, 799 F.2d 593, 613 (10th Cir. 1986) (reversible error not to disclose existence of suspect who resembled defendant); James v Jago, 575 F.2d 1164m 1168 (6th Cir. 1978) (error not to disclose statement of witness not mentioning defendant); Sellers v Estelle, 651 F.2d 1074, 1076 (5th Cir. 1981) (reversible error not to disclose police reports indicating guilt of another).

[290] 26 U.S.C. §6103(i)(1) & (2); United States v Wigoda, 521 F.2d 1221, 1225-1226 (7th Cir. 1975) (in camera inspection). this evidence is necessary to show whether such compensation was in fact reported as income, as well as to verify the amount of the payments alleged to have been made by law enforcement.

[291] United States v Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984) (defendant entitled to discovery of non testifying witnesses because it is logical to infer that a person who witnessed a criminal act whom the government does not intend to call at trial reasonably would provide testimony favorable to the defendant).

[292] United States v Jackson, 780 F.2d 1305, 1308 n.22 (6th Cir. 1986) (FBI's knowledge is attributable to prosecutor.); United States v Bailleux, 685 F.2d 1105, 1113 (9th Cir. 1982) (Tape in custody of FBI is deemed to be in custody of United States Attorney.); United States v Auten, 632 F.2d 478, 481 (5th Cir. 1980) (Information in files of federal agency is deemed to be in possession of prosecution.); Martinez v Wainwright, 621 F.2d 184, 186 (5th Cir. 1980) (Rap sheet in medical examiner's file is deemed in custody of prosecution.); United States v Butler, 567 F.2d 885, 889 (9th Cir. 1978) (Prosecutor is responsible for promise made by agent to witness even if prosecutor did not know.).

determining whether a conviction should be reversed because the prosecution failed to disclose requested evidence that could have been used to impeach prosecution witnesses." 858 F.2d at 948. Thus, if the government has any doubt as to the propriety of disclosure, its duty is to submit the matter to the Court for an *in camera* determination.[293]

Kime presents an interesting twist. The prosecution discovered a "romantic entanglement" between several of its incarcerated witnesses and their female jailers.[294] The witnesses received expanded visiting privileges, catered food, access to otherwise off limits areas inside the jail, areas outside the jail, computer records, and sexual contact with the female jailers.[295] This information was provided to the district court prior to trial. It was not, however, disclosed to defense counsel until two of the three offending witnesses had testified and the third was being cross examined.[296] The Eighth Circuit found no *Brady* violation. It reasoned counsel was advised of the information, cross examined one witness extensively and called one of the female guards to divulge the details of the romantic involvement. The court held that "Brady does not require pretrial disclosure as long as the ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence."[297]

The court does not address nor does the record disclose why the trial court waited to make the disclosure. This presents a dilemma for defense counsel. After filing an extensive motion for exculpatory evidence concerning the prosecution witnesses, counsel is given the information after two of the three witnesses had testified. It must have been information that concerned the prosecution enough to make a pretrial disclosure to the court. Why the court did not disclose the information to counsel pretrial is curious at best. It also highlights defense counsel's common concern that even the most carefully crafted motion to disclose cannot anticipate every contingency. What is clear is the importance of preparing and filing the motion. Without the motion the information may never have surfaced. If it did, without the heightened scrutiny provided by the motion, it is doubtful the court would grant a new trial. Although unclear from the record, it can be

[293] Pennsylvania v Ritchie, 480 U.S. 339, 59-61 (1987) (requiring trial court to evaluate materiality of requested confidential documents); United States v Lehman, 756 F.2d 725, 729 (9th Cir. 1985); United States v Gaston, 608 F.2d 607 (5th Cir. 1979); United States v Harris, 524 F.2d 421 (D.C. Cir 1975).

[294] United States v. Kime, 99 F.3d 870, 881(8th Cir. 1996).

[295] Id.

[296] Id.

[297] Id. at 882. citing Nassar v. Sissel, 792 F.2d 119, 121 (8th Cir. 1986).

inferred the motion caused the pretrial disclosure to the court. Albeit the information was given to defense counsel under less than ideal conditions, it was disclosed and counsel had an opportunity to use the information.

Given the litigation spurred by *Brady* and *Agurs* and the ethical obligation to disclose[298], it would be assumed that prosecutors would divulge any information that would be remotely classified as exculpatory. After all, if the information is helpful to the prosecutor, disclosure may mean an early settlement. Moreover, if it is not helpful, why risk the possibility of a new trial if it meets the *Bagley* standard of materiality. It would appear that nondisclosure serves no legitimate prosecutorial goal, assuming that goal is to serve justice and not merely to seek convictions.[299] Unfortunately such aspirational goals are often treated as musings and simply not adhered to in practice. The pressure to maintain a high conviction rate for political purposes is the driving force in most, if not all, prosecution offices. In cases of reversals, it is politically more desirable to blame "liberal courts" for retrials than accept responsibility for nondisclosure.

In *Kyles v. Whitley*, the Court again returned to the subject of prosecutorial nondisclosure.[300] After a second trial, Mr. Kyles was convicted of first degree murder and sentenced to death.[301] Prior to trial, defense counsel filed a "lengthy motion for disclosure by the state of any exculpatory or impeachment evidence."[302] In the first trial, the state offered four eyewitnesses who were present at the crime scene to identify Kyles as the assailant.[303] Kyles offered an alibi; he was picking his children up from school at the time of the homicide, and he was being framed by another individual by the name of Beanie.[304] Beanie, an informant, contacted the police and focused the investigation on Kyles.[305] During the investigation, Beanie gave three internally inconsistent and contradictory statements as well as expressed concern about being a suspect in the

[298] ABA Standards for Criminal Justice, Prosecution Standard 3-3.11(3rd Edition 1993).
[299] ABA Standards for Criminal Justice, Prosecution Standard 3-1.2(c) (3rd Edition 1993).
[300] 514 U.S. 419, 131 L.Ed.2d 490 (1995).
[301] Id. at 1560 Mr. Kyles first trial ended in a hung jury.
[302] Id. at 1563.
[303] Id.
[304] Id.
[305] Id. at 1561. "A few hours later, the informant met New Orleans detective John Miller, who was wired with a hidden body microphone, through which the ensuing conversation was recorded See App. 221-257 (transcript). The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace."

homicide.[306] These statements were not disclosed to the defense. After the first trial, the chief prosecutor interviewed Beanie and again Beanie changed significant aspects of his account.[307] Although Kyles became the focus of the investigation because of Beanie's statements, and Kyles had claimed Beanie was trying to frame him, Beanie was never called to testify.[308] Beanie's only appearance was during rebuttal of the second trial where he was brought into the courtroom to stand beside Kyles so the eyewitness could testify the assailant was Kyles, not Beanie.[309] Beanie subsequently received $1,600 in reward money.[310] In subsequent proceedings, the State conceded that, "Beanie was essential to the investigation and, indeed, "made the case" against Kyles.[311]

Also unknown to Kyles' attorney were statements given by the eyewitnesses which contradicted their trial testimony.[312] The Court noted, "Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed."[313]

Another item of evidence not disclosed to the defense was a list of vehicles located in a parking lot after the murder.[314] It was the State's contention that the killer drove to the lot and left his vehicle there during the investigation.[315] The list compiled by the police did not reveal Kyles' vehicle.[316]

The Court found that the collective effect of the items of evidence suppressed by the state undermined the confidence in the verdict and reversed the conviction. The Court commented:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a

[306] Id. 1561-63.
[307] Id. 1563-64.
[308] Id. at 1564.
[309] Id. at 1564.
[310] Id.
[311] Id. at 1571.
[312] Id. at 1569.
[313] Id.
[314] Id. at1573.
[315] Id.
[316] Id. at 1574.

degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.[317]

[317] Id. at 1567.