

Criminal Law Section F

The Importance of Fact Checking

Robert Rehkemper

Gourley, Rehkemper & Lindholm, PLC
440 Fairway Dr., Ste. 210
West Des Moines, IA
rgrehkemper@grllaw.com

Matthew Lindholm

Gourley, Rehkemper & Lindholm, PLC
440 Fairway Dr., Ste. 210
West Des Moines, IA
mtlindholm@grllaw.com



The following information, in printed and electronic form, can ONLY be used by the individual specifically registered with IAJ to attend IAJ's Criminal Defense & Family Law Trial Lawyer Conference or an individual member of IAJ, and SHALL NOT be disseminated, either orally or in writing, to any other individual or entity without the express written permission of IAJ.

Finding the Buried Treasure- You Can Dig It!

I. Your Duty to Dig

A. Generally Speaking- Iowa Rules of Professional Conduct- Preamble

- “a lawyer zealously asserts the client’s position under the rule of the adversary system”
- “a lawyer acts by examining a client’s legal affairs and reporting about them to the client or others.”
- “a lawyer should be competent, prompt, and diligent”

B. Competence- Iowa R. of Prof’l Conduct 32:1.1

- “competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation

C. Diligence- Iowa R. of Prof’l Conduct 32:1.3

- “a lawyer shall act with reasonable diligence and promptness in representing a client.”
- “perhaps no professional shortcoming is more widely resented than procrastination.” Comment 3.

D. Ineffective Assistance

- Counsel is required to conduct a reasonable investigation or make reasonable decisions that make an investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

II. Your Tools for Digging

A. Formal Discovery

- Review it personally – ALL OF IT!
 - o Videos
 - o Audio
 - o Cell phone dumps and data
 - o Witness Statements

B. Private Investigator

- Talking to witnesses
- Obtaining video footage
- Taking photos

- Looking at the scene

C. Expert Witness

- Forensic analysis
- Identification
- Relapsed memories
- PTSD
- Addiction

D. Use of Public Funds

- *English v. Missildine*, 311 N.W.2d 292, 293-94 (Iowa 1981)- State funds may be used for investigation and defense when a need is shown.
- Iowa Code Section 815.7
- *State v. Dahl*, 874 N.W.2d 348 (Iowa 2016)- a hearing for public funds for investigation and defense should be held ex parte so that trial defense strategy is not exposed to the prosecution.

E. 3rd Party/Ex Parte Subpoenas

- *State v. Russell*, 897 N.W.2d 717 (Iowa 2017)
- If you intend on issuing a third-party subpoena, you must file notice with the court of your intent to do so and the State has an opportunity to object.
- There is an exceptional circumstances exception to this rule

F. Health Records

- Iowa Code Section 622.10(4)- need one of the following
 - a. Consent by the privilege holder
 - b. A motion demonstrating a need and that they cannot be obtained by any other source

NOTE THIS MUST BE FILED WITHIN 40 DAYS
OF ARRAIGNMENT OR GOOD CAUSE

- c. If the defendant meets (b) then there is an in-camera review by the court to determine exculpatory evidence
 - d. If it is exculpatory the court balances the need for disclosure against the privacy interest
 - e. If court finds the need for disclosure outweighs the privacy interest then it is disclosed but cannot be re-disseminated
- *See also State v. Thompson*, 836 N.W.2d 470 (Iowa 2013)- upholding the constitutionality of the above statute.

G. YOU AND YOUR AWESOME INGENUITY

III. Do It Yourself Digging – Not your investigator, not your expert, not your assistant, not your law clerk, not your associate – YOU!

- A. Your Client – Clients have access to evidence if you simply ask.
 - a. Listen!
 - b. Phone
 - c. Emails
 - d. Medical Records
 - e. Work Records
 - f. Bank Records
 - g. School records

- B. Scene Review
 - a. See it for yourself
 - b. Experience it for yourself

- C. The Google Machine
 - a. Search names
 - b. Search locations
 - c. Search maps
 - d. Search articles

- D. Social Media
 - a. Not everyone understands the difference between public and private profiles.
 - b. Complaining witnesses, fact witnesses, police officers, prosecutors, judges.
 - c. Get in the head of your witnesses - It is not just about finding that smoking gun – any information about what is important to a witness is useful.

- E. Public Records – True Public Records, not talking about investigative reports here.
 - a. Dispatch summaries
 - b. Calls for service
 - c. Standard operating procedures

- F. Iowa Courts Online
 - a. Dig beyond entries – Look at the actual filed documents.
 - 1. Prior sworn affidavits in dissolution or custody disputes

- G. Witness Interviews – Break the ice yourself
- a. Emergency Medical Services
 - i. Fire
 - ii. Ambulance
 - b. Fact witnesses
 - i. Listed and unlisted
 - c. Ex's of complaining witnesses
 - d. Neighbors
 - e. Bartenders
 - f. Anyone with useful information

IV. PUTTING YOUR INFORMATION TO USE

A. Constitutional Right to Present a Defense - “The right to present a defense is so fundamental and essential to a fair trial that it is accorded the status of an incorporated right through the Fourteenth Amendment’s Due Process Clause.” *State v. Clark*, 814 N.W.2d 551, 561 (Iowa, 2012).

- “The right to offer the testimony of witnesses, and to compel their attendance, if necessary is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecutions’ witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

B. Cross Examination - “[N]o one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in trial of a criminal case.” *Pointer v. Texas*, 380 U.S. 400, 404 (1965). (citing 5 Wigmore, Evidence § 1367 (3d ed. 1940)).

- a. Credibility and bias of witness are always fair game - “Exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *United States v. Klauer*, 856 F.2d 1147, 1149 (8th Cir. 1988).
- b. Prior impeachable convictions – Ia.R.Evid. 5.609
- c. Prior inconsistent statement - “Laying the proper foundation for a prior inconsistent statement requires that the witness must be

afforded an opportunity to explain or deny the statement and that the opposing party must be afforded an opportunity to interrogate the witness concerning the statements.” *U.S. v. Dennis*, 625 F.2d 782, 796 (8th Cir. 1980). “Where a witness denies or cannot recall a prior inconsistent statement, that statement may be read to the jury for impeachment.” *Id.*

- d. Refreshing Recollection – “The necessary foundation for establishing the admissibility of a writing to refresh a witness’s recollection is that the witness’s recollection be exhausted, that the movant identify the time, place, and person to whom the statement is given, the court is satisfied the writing accurately reflects the witness’s statements or the witness acknowledges the accuracy of the writing, and the court is satisfied the document will help in refreshing the person’s memory.” *State v. Winemiller*, 411 N.W.2d 719, 721 (Ia. App. 1987).
 1. Still not allowed to read from it for the jury unless it qualifies as a prior inconsistent statement.

C. Pertinent Trait

- a. **Complaining Witness** – “Subject to the limitations in rule 5.412 [rape shield], a defendant *may* offer evidence of the victim’s pertinent trait ...” Iowa Rule of Evidence 4.404(2)(A)(ii)
- b. **Defendant** - “When a person’s character or character trait is an essential element of a charge, claim, *or defense*, the character or trait may also be proved by *relevant specific instances of the person’s conduct*.” (emphasis and extra emphasis added). Iowa R. Evid. 5.405(b).

D. Photographs of Videos – Videos and photographs are treated the same.

- a. Witness to the event or one who has observed the scene depicted in the photograph simply needs to testify that the film or photograph accurately portrays what it depicts. *State v. Deering*, 291 N.W.2d 38, (Iowa 1980).
 - i. Identify what the photograph or video depicts. Can you identify what Exhibit A is a picture of?
 - ii. Have you had a chance to personally observe what is shown in that exhibit?
 - iii. Is it a fair and accurate depiction?
 - iv. Offer.

E. Audio Recordings

- a. Authenticate – Must provide evidence of an individual who can identify the other person’s voice. See Ia.R.Evid. 5.901(b)(5) & (6)
- b. Foundation – Truthful and accurate depiction of conversation. “The test in Iowa for recorded conversations is whether evidence established that it is accurate and trustworthy.” *State v. Klindt*, 389 N.W.2d 670, 674 (Iowa 1986).

F. Public Records

- a. Authenticate
 - i. Testimony of a witness with knowledge
 - ii. Self-authenticating – Ia.R.Evid. 5.902 – example- Domestic public documents that are sealed and signed.

G. Business Records – Ia.R.Evid. 5.803(6). A party seeking to admit a record containing hearsay into evidence under business records exception must establish the following foundational elements:

- a. That it is a business record
- b. That it was made at or near the time of an act
- c. That it was made by, or from information transmitted by, a person with knowledge
- d. That it was kept in the course of a regularly conducted business activity;
- e. That it was the regular practice of that business activity to make such a business record.

State v. Reynolds, 746 N.W.2d 837, 841 (Iowa 2008).