



BY SEAN L. HARRINGTON

As I See It:

# Continuing Discussion: Wisconsin View on Lawyers' Handling of Child Pornography

**The view that criminal laws prohibiting possession of contraband – in this case, child pornography – are inapplicable to lawyers is not a use case that Wisconsin lawyers should test, the author argues.**

I write in response to the February feature, “As I See It: The Challenge of Handling Pornography and Other Incriminating Evidence in Wisconsin,” which was published in the February 2026 issue of *Wisconsin Lawyer* and written by my esteemed colleagues, Professor Rodney J. Uphoff and Professor Peter A. Joy, adding to the relatively circumscribed body of knowledge on the subject of lawyers’ handling of child pornography (hereinafter “contraband”).

The professors were writing in response to my article on the subject that appeared in the June 2025 issue of *Wisconsin Lawyer*.<sup>1</sup> My essay was aptly titled, “Attorneys’ Legal Obligations When Coming into Inadvertent Possession of or Access to Child Pornography” because I focused on situations in which a lawyer or a lawyer’s agent (for example, a digital forensics expert witness) comes into unwitting (“inadvertent”) possession of contraband and then must decide what to do.

Conversely, the professors’ missive would have been more accurately titled, “Advice on How to Avoid Handling Digital Contraband in Wisconsin,” if only because they focus primarily on use cases involving whether to take possession of digital contraband when there is knowledge of the content and character of the evidence. Indeed, the professors observed, “Except for the lawyer in *Olsen*, none of the lawyers who took possession of incriminating physical evidence in the cases cited in this article did so with a strategically valid, good reason for doing so. Rather, most of them erroneously thought they had an ethical obligation to take possession of incriminating evidence.”

Although the cases cited by the professors concerned lawyers who had some choice in whether to receive “incriminating evidence,” and whereas the use cases cited in my essay concerned the more common scenario of unwitting or inadvertent

possession of child pornography, I sincerely appreciate the professors’ perspective and guidance, because – as a practicing lawyer – I would rather avoid the problem altogether than be in the position of needing to resolve it.

I note also that many of the authorities cited in the professors’ article dealt with rather generic “incriminating evidence” of a crime, which most readers might imagine to be items such as a murder weapon, controlled substances, or drug paraphernalia. These analogous examples are certainly worth analyzing in relation to the lawyer’s ethical obligations. The distinction here – as the professors correctly acknowledge – is that the knowing or intentional possession, transportation, and replication of child pornography is prohibited by law.

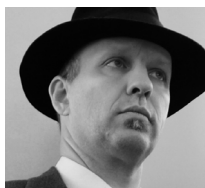
While joining scholars Stephen Gillers<sup>2</sup> and Greg Sisk<sup>3</sup> in renouncing the *Restatement (Third) of the Law Governing Lawyers* section 119, the professors nevertheless asserted that my analysis “may have overlooked comment b to section 119,” which provides that “[a] lawyer has the same privilege as prosecutors to possess and examine such material for the lawful purpose of assisting in the trial of criminal cases ... So long as the lawyer’s possession is for that purpose, criminal laws that generally prohibit possession of contraband or other evidence of crimes are inapplicable to the lawyer.”

Although the wisdom of Section 119 may be up for debate, I respectfully submit that even suggesting that criminal laws that prohibit possession of contraband – in this case, child pornography – are inapplicable to lawyers is misguided if not reckless and is not a use case that I would advise any of my Wisconsin colleagues to test. In fact, the *United States v. Russell* case, cited by the professors,<sup>4</sup> in which the attorney was charged with two counts of obstruction of justice for destroying a client’s laptop that allegedly contained child

pornography, demonstrates the extent to which prosecutors will go to enforce these laws.

Nevertheless, the professors urged, "If we are confident that the authorities are not looking for the phone, that the phone is not relevant to the pending case, and that an investigation for child pornography is not imminent, ABA Standard 4-4.7(ii) would allow us to advise the client that we were going to destroy the phone."

But, an ABA Standard provides no safe harbor from prosecution, and we can seldom be certain that a device containing contraband is not part of an investigation. As those of us who defend contraband charges know, most phases of the investigation are secret. Most commence with a confidential cybertip to the CyberTipline of the National Center for Missing & Exploited Children pursuant to 18 U.S.C. § 2258A. From there, the case is secretly delegated to the state crime lab. The state crime lab then issues an administrative subpoena for subscriber information, which is done under secrecy pursuant to Wis. Stat. section 968.375(10). Once the subscriber is identified, law enforcement applies for a search warrant for that person's office or home and to seize all electronic devices. The time from the cybertip



**Sean L. Harrington**, Taft Law School 2014, is the proprietor of Adamant Digital Forensics in Prescott, Wis., a company he originally founded in Minnesota in 2007. He is admitted to the state bars of Wisconsin and California. He serves as a volunteer investigator for both an ethics committee of the Minnesota Office of Lawyers Professional Responsibility and the Wisconsin Supreme Court's Special Investigative Panel (Office of Lawyer Regulation). He holds numerous certifications in network engineering, digital forensics, ethical hacking, governance and compliance, and privacy. Access the digital article at [www.wisbar.org/wl](http://www.wisbar.org/wl).  
[sean@seanharringtonlaw.com](mailto:sean@seanharringtonlaw.com)

until the warrant is executed upon the person's abode is usually months, and the process is entirely secret. Therefore, for an attorney to presuppose that contraband evidence on a phone, computer, or cloud account is not part of an investigation is pure folly.

Likewise, the professors call attention to the *ABA Standards for Criminal Justice: Defense Functions* section 4-4.7 and Gillers' treatise for the proposition that lawyers "should not fear taking possession of physical evidence if counsel has a legitimate reason to do so," and that, "[a]bsent an independent reason to retain the item or document, it should then be returned to its source."

Aside from my arguments as to why lawyers and their agents can't retain the contraband, there are two "independent reasons" that immediately come to mind for why contraband shouldn't be returned to its source: federal law, 18 U.S.C. § 2252(a)(1), which criminalizes the transport of contraband; and Wisconsin law, Wis. Stat. § 948.05(1m), which prohibits the "distribution" of contraband. The professors, I think, acknowledge the predicament, reluctantly conceding, "It is unclear whether the Wisconsin Supreme Court or disciplinary authorities would penalize a lawyer who acted pursuant to ABA Standard 4-4.7 and destroyed the phone or returned it to the client when the contents of the phone were not the subject of any investigation or charged offense. ... Admittedly, ... a Wisconsin lawyer faces more risk than lawyers in most other jurisdictions." Professional discipline is not the only risk. Prosecution, as in *Russell* or the cases cited in my essay, is the substantial risk.

Nevertheless, citing *The Law of Lawyering*, the professors urged that, "Merely looking at the images in order to provide our client a legal opinion does not constitute taking possession of that laptop." They continued, "If that were the law, then lawyers in a host of situations, by merely examining documents, emails, or texts on a cellphone, would be obligated to turn over that evidence to state or federal authorities if counsel's review of that evidence indicated that it was contraband or incriminating."

But, those examples – examining documents, emails, or texts on a cell phone – are false equivalencies. Like it or not, the law in Wisconsin does criminalize "[w]hoever possesses, or accesses in any way with intent to view, ..." contraband. Wis. Stat. § 948.12(1m) (emphasis added). Unlike in a few other states, including the *Flynn* case cited in my article,<sup>5</sup> there is no exception under Wisconsin law (or federal law) for lawyers representing criminal defense clients.

Neither the *Restatement of the Law Governing Lawyers* nor *The Law of Lawyering* nor the ABA Standards nor learned treatises provide any safe harbor from the unambiguous language of the law. While I respect that arguing for what the law should be is within the province of law professors, scholars, and the drafters of committee comments – few of whom assume any of the risks of real-world practice – I exhort my law-practicing colleagues to consult state and federal laws to determine how they apply to the lawyer's and the lawyer's agent's possession of contraband. **WL**

#### ENDNOTES

<sup>1</sup>Sean L. Harrington, *Attorneys' Legal Obligations When Coming into Inadvertent Possession of or Access to Child Pornography*, 98 Wis. Law. 28 (June 2025).

<sup>2</sup>Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 Stan. L. Rev. 813 (2011).

<sup>3</sup>Gregory C. Sisk, *The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives Under the Stairs*, 89 Wash. L. Rev. 819, 819, 822 (2014).

<sup>4</sup>639 F. Supp. 2d 226 (D. Conn. 2007).

<sup>5</sup>*United States v. Flynn*, 709 F. Supp. 2d 737 (D.S.D. 2010). **WL**