

## EVIDENCE - TIPS AND TACTICS FOR THE TRIAL LAWYER

Thomas M. Loeb, Esq.

Thomas M. Loeb, Farmington Hills

### I. WHERE TO FIND IT.

- a. Your client - talk to your client at the first meeting about evidence. Explain to him just how important it is that he not write on any documents, whatsoever. For some reason our clients have an urge to underline or write in the margin of various documents they may have. They do not always appreciate the importance of these items.
- b. If they have an urge to write, introduce them to post-it notes and a yellow highlighter. These two items are truly god's gift to trial lawyers.
- c. Your client's friends and family - discuss with your client that they may have items as well.
- d. Digital cameras - does your client have one? If not, urge him to borrow one or get one for himself. The price is minimal and the effect can be monumental. Or, visit the scene and use your own.
- e. Do not overlook the computer.

A useful and inexpensive resource for improving your internet skills at finding out what is available is a book called "The Cybersleuth's Guide to the Internet, 9<sup>th</sup> ed., by Levitt and Rouch". This is a book with lawyers in mind, and one of the authors is a practicing attorney. You can find it at:

<http://www.netforlawyers.com/prod01.htm>

1. <http://www.google.com/> - google everybody! I mean absolutely everybody, including yourself. You would be amazed what is out there. Know also that your jurors are doing this, whether you like it or not.
2. <http://www.myspace.com/> - It is astounding what people

post about themselves. Consider this article, and imagine that you had this police officer in one of your case:

“KEY WEST, FLORIDA - Interim Key West Police Chief Donie Lee fired an officer Thursday after risque photographs she allegedly posted on the social networking Web site MySpace.com surfaced. Lee said he fired Patti Child after Dennis Reeves Cooper, publisher of Key West the Newspaper, told police about the photographs. Cooper ran the photos in Friday’s edition of his paper. Child was let go for failure to meet probationary standards.

Child told the Keynoter in a prepared statement late Friday that “it was an honor to have worked with the members of the Key West Police Department. I took my position of authority very seriously, and believe myself to have been a fair and just officer. I appreciate the outpouring of support from my family, friends, business owners, and the citizens of Key West. I will continue to enjoy my community, and walk with my head high.” Child’s MySpace page was locked to outside viewers Friday morning, but under her “mood” disclosure, she wrote, “pissed off.” MySpace Web pages can block people other than friends from viewing details of the user’s profile. Her profile says, “Wishing people would pay more attention to their own lives, and less to mine!”? It says she’s 38 years old.

The photos show Child pulling up her skirt from behind, groping women and being groped by women and men. “My understanding is that she said she felt that [the photos] were locked,” Lee said. “I’ve known her since high school. This is the difficult part of this job, and it’s unfortunate, but doing the right thing is not always the easy thing to do. It’s unfortunate but necessary.”

Child was hired as a full-time officer in November. She also was a full-time officer from 1998 to 2000, and a part-time officer from 2000 to 2006. She was still in her year-long probationary period, an initial phase of employment to ensure the officer meets

expectations and qualifications. Other city staff members go through six-month probationary periods.



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“Veteran Key West Florida Police Officer Patti Child Fired After Her Slutty Fat-Butt MySpace Photos Surface And Appear In Newspaper - Groped Women And Being Groped By Women And Men”, <http://www.notinkokomo.com>, Jelsoft Enterprises Ltd., 07-20-2008.

<http://www.notinkokomo.com/cms/f108/veteran-key-west-florida-police-officer-patti-child-fired-after-her-slutty-myspace-ph-31940/>

Also see:

<http://cbs4.com/local/patti.child.police.2.775333.html>

3. <http://www.facebook.com/>

4. The National Consortium for Justice Information and Statistics (called SEARCH) maintains an ISP list for law law enforcement use, and lists addresses and contact information for internet providers across the country. This is a good place to begin your preparation to serve subpoenas or court orders for records:<http://www.search.org/programs/hightech/isp/>

## II. STANDARD DISCOVERY - GET IT EARLY.

- a. MCR 6.201 - the precise contours of MCR 6.201 is beyond the scope of this CAP session. Having said that, the Rule is important, and should be reviewed frequently. Portions of this Rule deserve special comment:
  1. MCR 6.201(A)(1) requires not only names but addresses, and allows either side to amend without leave of the court no later than (28) days before trial.
  2. MCR 6.201(A)(2) requires either party to provide the other with written or recorded statements made by a lay witness. What exactly is a “statement”? See *People v Holtzman*, 234 Mich. App. 166 (1999), the seminal case on this subject.
  3. **Brady Material.** MCR 6.201(B)(1) requires that, upon request, that prosecuting attorney must provided to each defendant any exculpatory information or evidence known to the prosecuting attorney. At this writing, a proposed amendment to this rule has been circulated for comment by the Michigan Supreme Court. This rule if passed would eliminate the language “upon request”, thereby putting in a court rule what the constitution

currently requires. See *Brady v Maryland*, 373 U.S. 83 (1963). Comments on this proposed rule were overwhelmingly positive by both the judges and the criminal defense bar. Not surprisingly, prosecutors opposed the change. The comments are most enlightening, and can be found here:

<http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#C06>

- b. **Michigan's Freedom of Information Act.** This is a valuable tool to be used in obtaining evidence is the Freedom of Information Act, MCL 15.231 et seq. Early in your case, you should consider sending out FOIA letters to make sure evidence is preserved. This is especially critical when you are attempting to get a police department's in-car video or audio recording. A FOIA release authorization form should be included. Sometimes you will need a medical release form also. See attachment #1.
- c. **Supplemental orders for discovery.** Consider supplemental orders for discovery tailored to the specific facts of your case. Time is of the essence for some of these. For example, if you want the police officer's in-car video to be preserved, act quickly. Many departments will tape over or purge the video in as little as (30) or (60) days from the event. An example of a proposed discovery order drafted by Dennis Shrewsbury is included. See attachment #2.

Similarly, depending upon your case, you will want to receive and review medical or EMS records of the complainant; the Coroner's records and reports, of the like. Often, the APA will stipulate to the entry of the order. If not, file your motion. See attachments # 3, 4, 5, 6 and 7.

### III. INTRODUCING EVIDENCE

- a. Statutes to utilize:
  - 1. MCL 600.2103 - Judicial records of other states and countries.

2. MCL 600.2104 - Judicial records of foreign countries; copies as evidence.
3. MCL 600.2106 - Court Order, Judgment, Decree of Court of Record of this State; certified copy as evidence.
4. MCL 600.2107 - Public records; certified transcript as evidence.
5. MCL 600.2109 - Recorded conveyances and instruments; certified copies.
6. MCL 600.2116 - Municipal ordinances and regulations as evidence.
7. MCL 600.2118(a) - Evidence of official records and laws.
8. MCL 600.2124 - Certified copies as evidence; US Weather record.
9. MCL 600.2144 - Signature or handwriting; proof.
10. MCL 768.25 - Evidence; proof of signature in a criminal case.
11. MCL 600.2145 - Open account or account stated; proof, counterclaim.
12. MCL 600.2146 - Record made in regular course of business.
13. MCL 600.2147 - Business records; use of reproduction as evidence.
14. MCL 600.2154 - Witness; obligation to answer though revealing civil liability.
15. MCL 600.2156 - Minister, Priest, Christian Science

Practitioner not to disclose confessions.

16. MCL 600.2157 - Physician - Patient Privilege; waiver.
17. MCL 600.2161 - Cross-examination of opposite party or agent (adverse witness rule).
18. MCL 600.2162 - Husband or wife as witness for or against the other.
19. MCL 600.2163(a) - Prosecutions in proceedings in certain criminal cases; child or developmentally disabled alleged victim as witness; video taping of testimony.
20. MCL 600.2164 - Expert witnesses.
21. MCL 600.2165 - School teachers and employees; disclosure of student's records.
22. MCL 600.2167 - Department of State Police concerned with forensic science; technicians report of findings; preliminary examination or grand jury proceedings.

b. Foundations.

1. *Introducing Evidence at Trial*, 3<sup>rd</sup> ed., Lawson, Lang and Longhfer, ICLE 2007.
2. *Trial Technique Predicate Questions*, National District Attorneys Association.

<http://www.ndaa.org/publications/ndaa/index.html>

- c. Motions in Limine - as most of you know, Motions in Limine can be used to both exclude or include evidence. With respect to expert testimony, and for all things daubert related, you must look at:

<http://www.daubertontheweb.com/>

Also Judge Giovan's handout from last years CAP program, expert scientific/technical testimony in criminal cases, is already on the CAP website and can be found here:

[http://www.capwayne.org/handouts/2007/2007-10-05\\_outline.pdf](http://www.capwayne.org/handouts/2007/2007-10-05_outline.pdf)

Another excellent resource is *Michigan Motions in Limine* (2008 ed.) Boggess and Finley (West Publishing). See attachment # 8

#### **IV. THE RIGHT TO PRESENT A DEFENSE.**

The right to present a defense is based upon the constitutional rights of due process of law, the effective the assistance of counsel, and the right to confront your client's accusers.

##### **Finding your defense.**

- a. Finding the passion of your case.

In presenting your defense, try and put your finger on the pulse of the passion of your case. You will find it when considering the story you want to show. Consider for example, the seven deadly sins:

lust; gluttony; greed; sloth; wrath; envy; and pride.

or the seven heavenly virtues:

chastity; tempering; charity; diligence; patience; kindness; and humility.

Classical Greek philosophers considered prudence, temperance, courage, and justice as the four most important virtues.

- b. Then, find your theme of the case. A theme of the case is a short end version or "headline" of what you've maintained the case is about. While it may be refined as the case develops, you can often find your case theme early on. Here are a few examples:

“Caught in a lie, she had no choice but to continue and falsely claim that the sex was coerced. Otherwise her boyfriend would leave her.”

“It was easier for Officer Smith to put the blame on George than to run down leads and investigate his case.”

“He was a bully with a badge, and when he saw how badly George was injured, the only thing he could think of was to claim that George was the aggressor and charge him with assaulting a police officer.”

### **Getting your defense into evidence.**

c. Relevance and materiality.

“The proper standard of materiality must reflect our overwriting concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt 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.” *United States v Agurs*, 427 U.S. 97, 112-113 (1976).

In other words if the evidence “could...in any reasonable likelihood have effected the judgment of the jury” a sufficient showing of materiality has been made under our constitution. *Giglio v United States*, 405 U.S. 150, 154 (1972).

In *People v Brooks*, 453 Mich. 511(1996) the Michigan Supreme Court reversed a felony murder conviction because the trial judge precluded the jury from hearing that cocaine was found in the decedent’s blood. Defendant’s theory at trial was that someone else and not he had murdered Ms. Kurtz. Christine Kurtz lived alone on a farm. After her friends reported her missing, her farm had signs that things were stolen, and her animals were left unfed. Her body was found about a month later, hidden under bales of hay in the barn.

The defendant admitted to committing a series of break-ins, but admittedly denied that he was the murderer. When he was

arrested in Mississippi, the defendant had about a half pound cocaine with him and stated that he stole the cocaine from Ms. Kurtz's home, where she also had other drug paraphernalia.

At trial, Brook's lawyer tried to argue that the murder had likely had been committed by someone else and that person or persons knew that she kept drugs in her home.

The trial court precluded evidence that Ms. Kurtz had cocaine in her blood, and the court of appeals agreed stating that "the fact that Kurtz had cocaine in her blood does not make it more probable or less probable that someone other than the defendant shot Kurtz." Noting that "the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material", the court held that the disputed evidence was relevant, material and should have been allowed."

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants " a meaningful opportunity to present a complete defense". *Crane v Kentucky*, 476 U.S. 683, 690 (1986)(citations omitted).

"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of the fair trial largely through the several provisions of the Sixth Amendment". *Strickland v Washington*, 466 U.S. 668,684-685 (1984).

For an excellent and free resource on the internet, see "*The Right to Present a Defense*" by Mark J. Mahoney, an excellent criminal defense lawyer practicing in Buffalo, New York. The monograph is at 136 pages (and growing) and is very well indexed, covering federal and state courts throughout the country. It can be found here:

<http://www.harringtonmahoney.com/publications/Rtpad2008-02.pdf>

- d. The right of confrontation - the importance of bias.

A witness's bias motive, or interest is a conscious or unconscious predisposition to favor one party over another for reasons often unrelated to the merits of the case, and to shade his testimony accordingly. Bias often grows out of a financial or personal interest in the litigation.

The law of evidence is long recognized the appropriateness of impeachment by bias. In the *United States v Abel*, 469 U.S. 45 (1984), the United States Supreme Court unanimously held that the Federal Rules of Evidence allow for impeaching the credibility of a witness by showing that witness's bias, even though it is not otherwise expressly allowed. Because bias is a vital method of impeachment, the impeaching party need not "take the answer of the witness" and may show that the witness is being less than candid through astringent evidence.

A limitation on cross examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of the witness might be inferred is a denial of the constitutional right of confrontation. *People v Cunningham*, 215 Mich. App. 652 (1996).

An excellent example of using the right of confrontation to show bias and an ulterior motive is found in the case of *People v Wayne Douglas Dabb*, unpublished opinion of the Court of Appeals, decided 12/4/07 (No. 271566):

"Defendant sought to introduce evidence of the male complainant's prior sexual conduct for the express purpose of showing bias and an ulterior motive for making the charge. Specifically, defendant sought to introduce evidence that the male complainant was caught with his pants off while molesting his three-year-old cousin, and that it was following this incident that the male complainant first made an accusation against defendant of sexual abuse. Such evidence falls within the constitutional exception to the statute as outlined in *Hackett*. Testimony was admitted that both complainants had a tendency to try to blame others when they got into trouble. The male complainant admitted that when accused of doing something bad, he has in the past indicated that someone else was responsible. Being caught committing sexual assault on a

three-year-old child provides a very strong ulterior motive for making a false charge, i.e., to deflect blame for the assault the male complainant had committed. Given the nature of this case, any evidence relating to the bias of either complainant is significant. Moreover, the prosecutor argued in closing to the jury that “there’s been no evidence to suggest that these children avoided some kind of trouble by disclosing the sexual abuse, or that it benefitted them in any way whatsoever.” Under these circumstances, reversal and remand for a new trial is required. *Carines, supra* at 774. Further, evidence regarding the sexual activity between the complainants and the molestation of the female complainant by her biological father may also be relevant for similar reasons. Arguably, the male complainant’s testimony that he obtained knowledge about sex from defendant opened the door to evidence that he obtained this information from a different source, i.e., through sexual relations with his sister who had been the subject of her father’s abuse.”

Michigan has a statute, MCL 600.2158, which states in part:

“interest...[or] relationship may be shown through the purpose of drawing in the question the credibility of a witness.”

Under Michigan law the credibility of a witness is always an appropriate subject for the jury to consider. Evidence of a witness’ bias or interest in a case is highly relevant to credibility. See *People v Mumford*, 183 Mich. App. 149,152 (1990); CJI2d 3.6(3). Because the primary interest secured by the right of confrontation is the right of cross examination, and the credibility of a witness is an issue of the utmost importance in every case, defendants are guaranteed a reasonable opportunity to test the truth of a witness’ testimony. *People v Adamski*, 198 Mich. App. 133, 138 (1993). A witness’ motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced that witness’ testimony. *Mumford, supra.*, at 152; *People v Minor*, 213 Mich. App. 682 (1995).

In *Geary v People*, 22 Mich.220 (1871) the court noted...

“It is true that where a witness is cross-examined on matters

purely collateral, the cross-examiner cannot inquire of other witnesses whether the answers are truthful, because the inquiry would open irrelevant issues. But the interest of bias of a witness has never been regarded as irrelevant. It goes directly to his credit, and must determine what the jury how far facts depending on his evidence are to be regarded as proven. A party cannot be compelled to put up with the statements of a witness concerning his own interests or personal relation to the case and parties, where it becomes necessary to know his position...The administration of justice would be very defective if every witness could, without contradiction, make himself out impartial and disinterested, and run no risk of exposure.” *Geary, supra*, at 222-223

- e. The right of confrontation - keeping it out.

In the landmark case of *Crawford v Washington*, 541 U.S. 36 (2004) the United States Supreme Court “rewrote” the rules for trial lawyers. In *Crawford, supra*, the court barred admission of testimonial statements against the defendant where the declarant was unavailable as a witness at trial and the defendant had no prior opportunity to cross examine him. The testimonial statement of a non-testifying witness was precluded even if it otherwise fell within a hearsay exception. In *Crawford, supra*, the decision in *Ohio v Roberts*, 448 U.S. 56 (1980) was overruled.

A detailed discussion of *Crawford v Washington* is beyond the scope of this presentation. However, a few comments are in order.

Firstly, defense counsel should know (or argue) that the following statements are testimonial:

1. Police interrogation;
2. Prior testimony ;
3. Letters or e-mails to government officials accusing others of crime;

4. Police lab reports, coroner's reports and the like;
5. Child hearsay statements to police, doctors, and social workers;
6. Statements by confidential informants to police.

Statements that likely are not testimonial include:

1. Dying declaration;
2. Statements to undercover officers or informants;
3. Statements to friends, family, acquaintances, or accomplices.

Moreover, if defense counsel had an adequate opportunity to cross examine or the declarant is available to testify, then the right of confrontation is not implicated.

For an excellent discussion of how prosecutors cross the line by introducing alleged "confidential informants' statements" against the defendant, under the guides of providing "background information" to the jury, see *United States v Hearn*, 500 F3d 479(6th Cir. 2007). In *Hearn, supra*, the government claimed that the reason why the information was provided to the jury was simply to "explain why the government commenced the investigation". But rather than simply stating that we had reports from confidential informants of "some illegal activity", one officer testified that he stopped defendant because he had learned from a confidential informant "that Mr. Hearn had large amounts of Ecstasy and Marijuana and was going to be leaving to take the narcotics to a rave party in Nashville".

Case law is still developing and the full contours of the right of confrontation under *Crawford, supra*, have not been written. It is important for all of us to keep ourselves informed of these cases as they are decided.

## INDEX

1. FOIA Letter, FOIA Authorization and Medical Authorization forms.
2. Discovery Order for in-car Video.
3. Motion To Compel Discovery - Medical and EMS Records of Complainant.
4. Letter to the Director of Medical Records and the Order for Supplemental Discovery - Medical Records.
5. Order for Supplemental Discovery - County Medical Examiner's Records, Reports and Photographs.
6. Order for the Appointment of Ballistics Expert at County Expense.
7. Motion to Allow Inspection of Tangible Physical Evidence - Polaroid Pictures and Video Surveillance.
8. Motion in Limine - To Preclude Evidence, Argument, or Testimony of Other Weapons, Ammunition, and Things Seized from Defendant's Place of Business.
9. Subpoena, Notice of Taking Deposition Duces Tecum and Proof of Service.

September 2, 2008

**VIA CERTIFIED MAIL ARTICLE  
NO. 7004 0750 0000 2032 4073**

\*\*\*\*\* Police Department  
Attn: FOIA Administrator  
Address  
City, State Zip

**Re: My Client: Johnny Defendant**  
**Date of Incident: \*\*\*\*\***  
**Location of Incident: \*\*\*\*\***  
**Arresting Officer: \*\*\*\*\***

Dear Sir or Madam:

Please consider this letter a request pursuant to Michigan's Freedom of Information Act, MCL 15.231, et. seq., as amended. Please send to my attention at the above address a copy of all records concerning my client, Johnny Defendant, listed below. I enclose for your attention a Freedom of Information Act release authorization form. I trust you will find this sufficient.

Mr. Defendant was stopped, detained, administered field sobriety and PBT testing, arrested, and transported to your lockup by Officer \*\*\*\*\*, badge number \*\*. Once at your lockup, Mr. Defendant was booked and administered a breathalyzer test.

Please send me copies of the following:

1. Copies of audio recordings, video recordings, or both, if any, from Officer Michael Wittrock's scout car showing Mr. Defendant's car being followed, stopped, or detained.
2. Copies of audio recordings, video recordings, or both, if any, from Officer \*\*\*\*\*scout car showing Mr. Defendant being administered the field sobriety and PBT tests, and being arrested at the scene.
3. Copies of audio recordings, video recordings, or both, if any, from Officer \*\*\*\*\*scout car while transporting Mr. Defendant to the \*\*\*\*\*

\*\*\*\*\* Police Department  
Attn: FOIA Administrator  
September 2, 2008  
page 2

Police Department lockup, including any conversations between Mr. Defendant and Officer \*\*\*\*\*.

4. Copies of any audio or visual tapes of Mr. Defendant while at the lockup and proceeding through the booking process.
5. Copies of any audio or visual tapes of Mr. Defendant being administered the breathalyzer test at the \*\*\*\*\* Police Department lockup.

As provided by §5(2) of the Act, I hope to receive these documents as soon as possible. Please therefore send copies of these tapes and documents to me within the time constraint allowed by that subsection. If you are unable to fulfil this request in that time limitation, please contact me at the above address in writing and inform me as to when I may expect to receive these requested items. If, however, you decide to deny this request in whole or in part, I expect to receive a written notification of this decision as provided in §5(4)(a) through §5(4)(d). If you charge a fee for this request, please advise and I will be happy to pay it.

If, however, you decline any part of this request, please ensure that you **PRESERVE ANY DOCUMENT, AUDIO OR VISUAL RECORDING, OR ANYTHING ELSE THAT YOU WITHHOLD**. Similarly, pursuant to *People v Rosborough*, 387 Mich 183 (1973), *People v Petrella*, 124 Mich App 745 (1983) and *Arizona v Youngblood*, 488 US 51 (1988), I am requesting that you preserve any and all audio or video recordings, or both, (either fragmentary or complete) generated in this case.

As always, if you have questions regarding this or anything else, please do not hesitate in contacting me.

Very truly yours,

Thomas M. Loeb  
TML/mb  
*Enclosure*

cc: Johnny Defendant (w/o enclosure)

## FREEDOM OF INFORMATION ACT AUTHORIZATION

TO:

You and any person associated with you are hereby authorized and requested to furnish to this office or any representative of its office, with any and all information contained in my records and files that they may request. Photostatic copy of this authorization may serve in its stead.

\_\_\_\_\_  
Client

\_\_\_\_\_  
Date

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ .

\_\_\_\_\_  
Notary Public, \_\_\_\_\_ County, MI.  
My commission expires: \_\_\_\_\_

**AUTHORIZATION TO COPY MEDICAL RECORDS**

TO:

Re:       **Name of Patient:** \_\_\_\_\_  
              **Date of Birth:** \_\_\_\_\_ **SS#:** \_\_\_\_\_  
              **Date of Treatment:** \_\_\_\_\_

I, the undersigned, hereby authorize any physician or nurse who attended me, or any hospital at which I have been confined and designated above, to furnish attorney **Thomas M. Loeb, 32000 Northwestern Hwy, Ste 170, Farmington Hills, Michigan, 48334-1507**, with any and all information which may be requested regarding my past or present physical condition and treatment rendered, including but not limited to my consumption of alcohol or use of drugs, if applicable, and to allow them or any physician appointed by them to examine or copy any and all records or x-rays which you may have regarding my condition or treatment, including billings.

Photostatic copy of this Authorization shall serve in its stead.

\_\_\_\_\_

PATIENT'S SIGNATURE

Subscribed and sworn to before me,  
this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_

Notary Public, \_\_\_\_\_ County, MI  
My Commission Expires: \_\_\_\_\_



**IT IS FURTHER ORDERED** that the police activity logs and run sheets be preserved from the traffic stop on or about \_\_\_\_\_ at or about \_\_\_\_\_ on or near \_\_\_\_\_ (District: \_\_\_\_\_, Police Officers: \_\_\_\_\_ Squad Car: \_\_\_\_\_) and that the Officer in Charge of this unit or precinct provide defense counsel with a copy of the logs and run sheets.

**IT IS FURTHER ORDERED** due to the indigency of the Defendant, all costs associated with this order be paid by the County of Wayne.

**HONORABLE** \_\_\_\_\_

Approved for entry:

\_\_\_\_\_  
Wayne County Prosecutor

\_\_\_\_\_  
Attorney for Defendant

Dated: \_\_\_\_\_

STATE OF MICHIGAN  
IN THE \*\*\*\*\* COUNTY CIRCUIT COURT  
CRIMINAL DIVISION

State of Michigan Case No. 08-\*\*\*\*\*  
Plaintiff, Judge \*\*\*\*\*  
v  
Johnny Defendant,  
Defendant,

\*\*\*\*\* County Prosecutor's Office  
APA \*\*\*\*\* (P\*\*\*\*\*)  
Attorney for Plaintiff  
Address  
City, State Zip  
(\*\*\*) \*\*\*\_\*\*\*\*\*

Thomas M. Loeb (P25913)  
Attorney for Defendant  
32000 Northwestern Hwy.  
Ste. 170  
Farmington Hills, MI 48334  
(248) 851-2020

MOTION TO COMPEL DISCOVERY -  
MEDICAL AND EMS RECORDS OF COMPLAINANT

Defendant, by his attorney Thomas M. Loeb, moves this Honorable Court for an Order allowing supplemental discovery of the complainant's medical and EMS records, and in support, states as follows:

1. That he is presently charged by way of information with the offenses of assault with intent to commit murder and possession of a firearm during the commission of a felony, contrary to MCL 750.83 and MCL 750.227b, respectively.
2. That a preliminary examination was held in this case in the \*\*\*\*\* Court on \*\*\*\*\*.
3. That at the time of the preliminary examination, the complainant, \*\*\*\*\*, testified that he was taken by an ambulance to \*\*\*\*\*, where he received medical treatment.
4. On a copy of the \*\*\*\*\* Police Department's investigator's

report provided to defense counsel, the complainant's \*\*\*\*\*  
medical records and chart number are listed and, upon information  
and belief, these records are intended to be used as evidence  
against Defendant.

5. That, at the preliminary examination, the complainant also testified that he used drugs, or alcohol, or both, on the day of the alleged offense.
6. That the information contained within the complainant's hospital and EMS records and sought by this discovery request is necessary for Defendant's attorney to properly prepare his defense and furthers the interest of a fair trial.
7. That unless the requested information is provided, defense counsel will be unable to effectively, competently, and properly represent his client in this case, contrary to his Defendant's rights under the state and federal constitutions. **See US Const, Am VI; Const 1963, art 1, § 20.**
8. That suppression of the information requested would violate defendant's due process rights under both the federal and state constitutions. **See US Const, Am XIV; Const 1963, art 1, § 17.**
9. That the physician patient privilege (MCL 600.2157) is inapplicable in this case, as the complainant has waived the privilege by providing the prosecutor with the information referred to in paragraph four above, and by testifying in detail to his treatment while at \*\*\*\*\* during the preliminary examination.
10. Alternatively, if the privilege does apply, Defendant's need for the medical and EMS records outweighs the privilege and as such, the

material ought to be provided.

**THEREFORE** for all the above reasons we move this Honorable Court to grant Defendant's motion and allow his attorney to obtain the complainant's EMS and medical records.

Respectfully Submitted,

Thomas M. Loeb (P-25913)  
Attorney for Defendant  
32000 Northwestern Hwy  
Ste. 170  
Farmington Hills, MI 48334-1507  
248/851-2020

Dated:

#### **MEMORANDUM IN SUPPORT**

Defendant relies upon MCR 6.201, and the discretion of this court. As to the relevance of the requested material, it can hardly be argued that it is unimportant. Indeed, the officers investigating this case saw fit to list the complainant's doctor and chart number in the investigator's report. In this writer's experience the prosecution often obtains these records for its own purposes. Presumably, the prosecution will introduce some or all of these records in its case in chief.

As previously mentioned, Defendant is charged with assault with intent to commit murder, contrary to MCL 750.83. In instructing the jury this court will no doubt advise that jurors may consider the injury in determining whether there was an assault, and, if so, to what degree. **See CJI 2d 17.3 and 17.16.** In anticipation that the government may claim that the records requested are privileged, this writer would first like to point out that he has been unable to

find a statutory privilege that would govern the EMS or ambulance records. If the government asserts such a privilege as to those records, defense counsel respectfully request that it provide a statutory cite. In any event, the Defendant submits that medical-patient privilege was waived by the complainant's testimony concerning his medical treatment at the preliminary hearing, as well as by providing the information to the police. **People v Sayles, 200 Mich App 594 (1993); Cf Landelius v Sackellares, 453 Mich 470 (1996).**

It is important that this court understand what the Defendant is NOT requesting. This writer is not asking the prosecutor to do anything other than to aid in providing sufficient information to allow Defendant to obtain the EMS records. With respect to the medical records, if this court signs the Defendant's proposed order, this writer will execute it himself as the information is clearly relevant, necessary for proper cross examination, and for pursuing Defendant's defense, this writer can frankly see no reason why the records should not be provided.

If, however, this court feels that some or all of the records are privileged, then defendant requests that this court review the records in camera, pursuant to the procedure outlined in MCR 6.201 (C)(2). Defendant submits that the records will demonstrate that at the time of the complainant's transportation to the hospital and during the subsequent treatment, he was under the influence of alcohol, drugs or both.

Thomas M. Loeb (P-25913)  
Attorney for Defendant  
32000 Northwestern Hwy  
Ste. 170  
Farmington Hills, MI 48334-1507  
248/851-2020

Dated:

ORDER GRANTING SUPPLEMENTAL  
DISCOVERY - MEDICAL RECORDS

At a session of said court, held in the  
City of \*, \* County,  
Michigan on \_\_\_\_\_

PRESENT: \_\_\_\_\_  
Circuit Court Judge

Argument having been heard, and the court being fully advised;

**IT IS ORDERED** that photocopies of \*'s medical records, (D.O.B. \*; \*Hospital case  
no. \*) be provided to defense counsel or his agent.

**IT IS FURTHER ORDERED** that this information be provided on or before  
\_\_\_\_\_.

\_\_\_\_\_  
CIRCUIT COURT JUDGE

Notice & hearing on entry of  
the above order is waived.

Approved as to form:

\_\_\_\_\_  
\* County Assistant  
Prosecuting Attorney

**THOMAS M. LOEB**  
ATTORNEY AND COUNSELOR AT LAW

32000 NORTHWESTERN HWY • STE 170 • FARMINGTON HILLS, MI • 48334-1507  
(248) 851-2020 Office  
(248) 851-2525 Fax  
E-mail: [tmloeb@mich.com](mailto:tmloeb@mich.com)  
Website: [www.loebslaw.com](http://www.loebslaw.com)

Date

Name of Hospital  
\* Director, Medical Records Department  
Address  
City, State Zip

**VIA CERTIFIED MAIL ARTICLE NO. \*\*\*\*\***

**Re: People v \***  
**Case No: \***  
**Order for Supplemental Discovery - Medical Records**

Dear \*:

Please be advised that I represent \* with respect to the above case. I am enclosing for your review and execution an order for supplemental discovery - medical records, requiring that you produce photocopies of \*'s medical records to me at your earliest convenience.

For your convenience, kindly treat this order as a subpoena pursuant to Michigan's Court Rules (MCR 2.506(I)) and provide your standard sworn certificate verifying that you are sending me a complete and accurate reproduction of the original record. \*(use this sentence only if we are not retained) Please note that these records are to be produced at county expense as the defendant is indigent.

I trust this meets with your approval. As always, if you have questions regarding this or anything else, please do not hesitate in contacting me.

Very truly yours,

Thomas M. Loeb  
TML/mb  
*Enclosures*

ORDER FOR SUPPLEMENTAL  
DISCOVERY--MEDICAL RECORDS

At a session of said court, held in the \*, on

PRESENT: \_\_\_\_\_  
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that photocopies of \*'s medical records, (D.O.B. \*; \*Hospital case no. \*) be provided to defense counsel or his agent.

IT IS FURTHER ORDERED that this information be provided to defense counsel at county expense, as defendant is indigent.

\_\_\_\_\_  
CIRCUIT COURT JUDGE

Notice & hearing on entry of  
the above order is waived.

Approved as to form:

\_\_\_\_\_  
\* County Assistant  
Prosecuting Attorney

***ORDER FOR SUPPLEMENTAL DISCOVERY--  
\* COUNTY MEDICAL EXAMINER'S RECORDS,  
REPORTS, AND PHOTOGRAPHS***

At a session of said Court, held in  
the \*, \* County,  
Michigan on \_\_\_\_\_

PRESENT: \_\_\_\_\_  
Circuit Court Judge

Argument having been heard, and the court being fully advised, **IT IS ORDERED** that photocopies of the \* County Medical Examiner's records, reports, and photographs concerning Autopsy Case No. \* of decedent \* be provided to defense counsel or his agent.

IT IS FURTHER ORDERED that this information be provided to defense counsel at county expense, as defendant is indigent.

\_\_\_\_\_  
Circuit Court Judge

**Approved as to form.  
Notice of entry waived.**

\_\_\_\_\_  
Attorney for

ORDER FOR THE APPOINTMENT OF  
BALLISTICS EXPERT AT COUNTY EXPENSE

At a session of said court, held in the  
\*\*\*\*\* , on

\_\_\_\_\_

PRESENT: \_\_\_\_\_  
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that the following person shall be appointed as defendant's independent ballistics expert at county expense as defendant is indigent:

\*\*\*

IT IS FURTHER ORDERED that \* shall have an opportunity to examine the handgun presently held by the \*\*\*\*\* Police Department on \*\*\*\*\* and if he so desires, the bullets and fragments held on \*\*\*\*\* and \*\*\*\*\*.

\_\_\_\_\_  
CIRCUIT COURT JUDGE

Notice & hearing on entry of the above order is waived.

Approved as to form:

\_\_\_\_\_

Attorney for

STATE OF MICHIGAN  
IN THE WAYNE COUNTY CIRCUIT COURT  
CRIMINAL DIVISION

People of the State of Michigan  
Plaintiff,

Case No.  
Judge

v

\*\*\*\*\* ,

Defendant,

\_\_\_\_\_ /

\* County Prosecutor's Office  
APA \*(P\*\*\*\*\*)  
Attorney for Plaintiff  
Address  
City, State Zip  
(313) 224-5777

Thomas M. Loeb (P25913)  
Attorney for Defendant  
32000 Northwestern Hwy., Ste. 170  
Farmington Hills, MI 48334-1507  
(248) 851-2020

\_\_\_\_\_ /

**MOTION TO ALLOW INSPECTION OF TANGIBLE PHYSICAL  
EVIDENCE -POLAROID PICTURES AND VIDEO SURVEILLANCE**

Defendant, by his attorney Thomas M. Loeb, moves this Honorable Court for an Order allowing him to examine tangible physical evidence, and in support, states as follows:

1. That he is presently charged by way of information with the offenses of assault with intent to commit murder and possession of a firearm during the commission of a felony, contrary to MCL 750.83 and MCL 750.227b, respectively.
2. That, according to the investigator's report and supplement in this case, among the items taken into evidence are \* Polaroid pictures (\*) and a

video surveillance cassette (\*).

3. In order to properly represent his client, defense counsel needs an opportunity to examine this evidence in advance of trial.

**THEREFORE**, for all the above reasons we move this Honorable Court to issue an order allowing Defendant's attorney to examine the evidence in the government's possession.

Respectfully Submitted,

---

Thomas M. Loeb (P-25913)  
Attorney for Defendant  
32000 Northwestern Hwy, Ste. 170  
Farmington Hills, MI 48334-1507  
248/851-2020

Dated:

## MEMORANDUM IN SUPPORT

Defendant relies upon MCR 6.201(A)(6). The request made by this motion is, according to the court rule subject to mandatory disclosure upon request.

**THEREFORE**, for all the above reasons, we move this Honorable Court to grant Defendant's motion and to allow his attorney to examine the photographs and video

cassette tape placed in evidence in this case.

Respectfully Submitted,

---

Thomas M. Loeb (P-25913)  
Attorney for Defendant  
32000 Northwestern Hwy, Ste. 170  
Farmington Hills, MI 48334-1507  
248/851-2020

Dated:

STATE OF MICHIGAN  
IN THE WAYNE COUNTY CIRCUIT COURT  
CRIMINAL DIVISION

People of the State of Michigan

Plaintiff,

v

\*\*\*\*\*,

Defendant,

Case No.

Judge

\* County Prosecutor's Office  
APA \*\*\*\*\* (P\*\*\*\*\*)  
Attorney for Plaintiff  
1441 St. Antoine, Room 1200  
Detroit, MI 48226  
(313) 224-5777

Thomas M. Loeb (P25913)  
Attorney for Defendant  
32000 Northwestern Hwy., Ste. 170  
Farmington Hills, MI 48334-1507  
(248) 851-2020

**MOTION IN LIMINE -TO PRECLUDE EVIDENCE, ARGUMENT,  
OR TESTIMONY OF OTHER WEAPONS, AMMUNITION, AND  
THINGS SEIZED FROM DEFENDANT'S PLACE OF BUSINESS**

Defendant, by his attorney Thomas M. Loeb, moves this Honorable Court in limine for an Order precluding the government from introducing evidence, argument, or testimony of other items seized from Defendant's place of business and in support states as follows:

1. That the government's theory in this case is that Defendant used a shot gun to shoot complainant without legal justification or excuse.
2. That a preliminary examination was held in this case was held in the \* Court on \*
3. That an examination of the investigator's report supplement,

provided to this attorney as part of the government's basic discovery, demonstrates that, among other things, the following items were seized:

\*\*\*\*\*

4. That, except for arguably the shotgun and spent shells, the other items listed are irrelevant, immaterial, and if introduced against Defendant in this case, unfairly prejudicial.

**THEREFORE**, for all the above reasons, we move this Honorable Court to grant Defendant's motion in limine and preclude the government from introducing evidence, argument, or testimony surrounding the above-listed items seized from Defendant's place of business.

Dated:

Respectfully submitted,

---

Thomas M. Loeb (P-25913)  
Attorney for Defendant  
32000 Northwestern Hwy, Ste. 170  
Farmington Hills, MI 48334-1507  
248-851-2020

## MEMORANDUM IN SUPPORT

Defendant brings this motion pursuant to MRE 103(c) which states:

**"(c) Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

Defendant submits that MRE 401, 402, and 403, require that evidence, argument or testimony concerning these items be excluded from trial. Nowhere

in the facts of this case is it even suggested that the Defendant, or anyone else, used these additional items (except the shotgun and spent shells) items illegally, improperly, or against the complainant. MRE 401 defines "relevant evidence" as ...

"evidence having any tendency to 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."

MRE 402 states, in pertinent part that...

"Evidence which is not relevant is not admissible."

As the additional items seized were not used by anyone in general, or Defendant in particular, their introduction into evidence or argument and testimony concerning these items would be improper

MRE 403 states...

" Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

If the government somehow comes up with an argument that can convince this court that the introduction of these additional items is relevant to this case, then Defendant submits that introduction of these additional weapons found in Defendant's store is substantially outweighed by the unfair prejudice it would create.

**THEREFORE**, for all the above reasons we move this Honorable Court to grant Defendant's motion in limine and preclude the government from introducing evidence, argument, or testimony of concerning the existence of

these additional weapons and other items found in his store.

Dated:

Respectfully submitted,

---

Thomas M. Loeb (P-25913)  
Attorney for Defendant  
32000 Northwestern Hwy, Ste. 170  
Farmington Hills, MI 48334-1507  
248-851-2020

Approved, SCAO

<b>STATE OF MICHIGAN</b> <b>JUDICIAL DISTRICT</b> 3rd <b>JUDICIAL CIRCUIT</b> <b>COUNTY PROBATE</b>	<b>SUBPOENA</b> <b>Order to Appear and/or Produce</b>	<b>CASE NO.</b>  08-12345-DM
--	--	------------------------------------

Police Report No. (if applicable) \_\_\_\_\_ Court Address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

Plaintiff(s) Petitioner(s) <input checked="" type="checkbox"/> People of the State of Michigan <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> Civil <input checked="" type="checkbox"/> Criminal <input type="checkbox"/> Probate    In the matter of _____	<b>V</b>	Defendant(s) Respondent(s)  Your client  Charge _____
--	----------	---

In the Name of the People of the State of Michigan. TO: Sprint United Management Company  
c/o Corporation Service Co.  
601 Abbott Road  
East Lansing, MI 48823 (888) 690-2882

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

**YOU ARE ORDERED:**

<input checked="" type="checkbox"/> 1. to appear personally at the time and place stated below: You may be required to appear from time to time and day to day until excused. <input type="checkbox"/> The court address above <input checked="" type="checkbox"/> Other: <u>32000 Northwestern Hwy, Ste. 170, Farmington Hills, MI 48334-1507</u>		
Day Sunday	Date September 28, 2008	Time 9:00 a.m.

- 2. Testify at trial / examination / hearing.
- 3. Produce/permit inspection or copying of the following items: Any and all records, including but not limited to telephone call records, for the account containing telephone number (248) 555-5555, from January 01, 2008 to the present.

---

- 4. Testify as to your assets, and bring with you the items listed in line 3 above.
- 5. Testify at deposition.
- 6. MCL 600.6104(2), 600.6116, or 600.6119 prohibition against transferring or disposing of property attached.
- 7. Other: The deposition is solely for producing documents, and the undersigned does not intend to examine deponent.

<input checked="" type="checkbox"/> 8.	Person requesting subpoena Thomas M. Loeb, Esq.	Telephone no. (248) 851-2020
	Address 32000 Northwestern Hwy, Ste. 170	
	City Farmington Hills	State                      Zip MI                              48334-1507



**NOTE:** If requesting a debtor's examination under MCL 600.6110, or an injunction under item 6. this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

**FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.**

Court use only	
<input type="checkbox"/> Served	<input type="checkbox"/> Not Served

Date \_\_\_\_\_ Judge/Clerk/Attorney \_\_\_\_\_ Bar no. \_\_\_\_\_

**PROOF OF SERVICE**

**TO PROCESS SERVER:** You must make and file your return with the court clerk. If you are unable to complete service, you must return this original and all copies to the court clerk.

**CERTIFICATE / AFFIDAVIT OF SERVICE / NON-SERVICE**

<input type="checkbox"/> <b>OFFICER CERTIFICATE</b> I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party [MCR 2.104(A)(2)], and that: (notary not required)	OR	<input type="checkbox"/> <b>AFFIDAVIT OF PROCESS SERVER</b> Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notary required)
--	----	---

I served a copy of the subpoena, together with \_\_\_\_\_ Attachment \_\_\_\_\_

personal service   
  registered or certified mail (copy of return receipt attached)   
 on:

Name(s)	Complete address(es) of service	Day, date, time

I have personally attempted to serve the subpoena and required fees, if any, together with \_\_\_\_\_ Attachment \_\_\_\_\_

on the following person and have been unable to complete service.

Name(s)	Complete address(es) of service	Day, date, time

Service fee	Miles Traveled	Mileage fee	Total fee	Signature
\$		\$	\$	

Title \_\_\_\_\_

Subscribed and sworn to before me on \_\_\_\_\_, \_\_\_\_\_ County, Michigan.  
 Date \_\_\_\_\_

My commission expires: \_\_\_\_\_ Date \_\_\_\_\_ Signature: \_\_\_\_\_  
 Deputy court clerk/Notary public

Notary public, State of Michigan, County of \_\_\_\_\_

**ACKNOWLEDGMENT OF SERVICE**

I acknowledge that I have received service of the subpoena and required fees, if any, together with: \_\_\_\_\_ Attachment \_\_\_\_\_

\_\_\_\_\_ on \_\_\_\_\_  
 Day, date, time

\_\_\_\_\_ on behalf of \_\_\_\_\_

Signature \_\_\_\_\_

**AFFIDAVIT FOR JUDGMENT DEBTOR EXAMINATION**

I request that the court issue a subpoena which orders the party named on this form to be examined under oath before a judge concerning the money or property of:  
 for the following reasons:

\_\_\_\_\_

\_\_\_\_\_ Date \_\_\_\_\_ Signature \_\_\_\_\_

Subscribed and sworn to before me on \_\_\_\_\_, \_\_\_\_\_ County, Michigan.

My commission expires: \_\_\_\_\_ Date \_\_\_\_\_ Signature: \_\_\_\_\_  
 Deputy court clerk/Notary public

Notary public, State of Michigan, County of \_\_\_\_\_

**STATE OF MICHIGAN  
IN THE WAYNE COUNTY CIRCUIT COURT  
CRIMINAL DIVISION**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Case No.:  
Judge

YOUR CLIENT,

Defendant.

\_\_\_\_\_ /

County Prosecuting Attorney, Esq. (P00000)  
Attorney for Plaintiff  
12345 Anywhere Street, Ste. 6  
Detroit, MI 48226  
(313) 555-1212

Thomas M. Loeb, Esq. (P25913)  
Attorney for Defendant  
32000 Northwestern Hwy, Ste. 170  
Farmington Hills, MI 48334-1507  
(248) 851-2020

\_\_\_\_\_ /

**NOTICE OF TAKING DEPOSITION DUCES TECUM**

PLEASE TAKE NOTICE that Defendant , Your Client, will take the deposition duces tecum of the Keeper of Records, Sprint United Management Company, c/o Corporation Service Company, pursuant to MCR 2.305, on (day), (date), at (time) at the offices of Thomas M. Loeb, 32000 Northwestern Hwy, Ste. 170, Farmington Hills, MI 48334-1507. This deposition is solely for producing documents, and the undersigned does not intend to examine the deponent.

Respectfully submitted,

\_\_\_\_\_  
Thomas M. Loeb (P-25913)  
Attorney for Defendant

Dated:

**STATE OF MICHIGAN  
IN THE WAYNE COUNTY CIRCUIT COURT  
CRIMINAL DIVISION**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Case No.: 08-12345-DM

Hon. Judge Jones

YOUR CLIENT,

Defendant.

\_\_\_\_\_ /

County Prosecuting Attorney, Esq. (P00000)  
Attorney for Plaintiff  
12345 Anywhere Street, Ste. 6  
Detroit, MI 48226  
(313) 555-1212

Thomas M. Loeb, Esq. (P25913)  
Attorney for Defendant  
32000 Northwestern Hwy, Ste. 170  
Farmington Hills, MI 48334-1507  
(248) 851-2020

\_\_\_\_\_ /

**PROOF OF SERVICE**

STATE OF MICHIGAN     )  
                                  )SS  
COUNTY OF WAYNE     )

TOM'S PARALEGAL, being first duly sworn, deposes and states that on Some Date, 2008, he/she did mail a postage paid envelope a true and correct copy of the Notice of Taking Deposition Duces Tecum and Subpoena (Sprint United Management Company) upon: County Prosecuting Attorney, Esq., 12345 Anywhere Street, Detroit, MI 48226

\_\_\_\_\_  
TOM'S PARALEGAL

Subscribed and sworn to before me  
this \_\_\_ day of \_\_\_\_\_, 2008

\_\_\_\_\_  
Ms. Public Notary, Notary Public  
Oakland County, Michigan  
My commission expires: