

Assigned Counsel Division Newsletter

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SPD Welcomes Three New Immigration Practice Group Coordinators

The SPD now has three new Immigration Practice Coordinators. They are [Mindy Nolan](#) from the Racine office, [Melissa Nepomiachi](#) from the Milwaukee Trial office and [Kara Rolf](#) from the Baraboo office. Each coordinator has the skill set necessary to help attorneys understand the immigration consequences of clients' criminal charges.

Mindy will work with attorneys in the Fond du Lac, Green Bay, Racine and Stevens Point regions, Melissa will advise attorneys in the Milwaukee Trial, Milwaukee Juvenile, Waukesha and Janesville regions, and Kara will help attorneys in the Eau Claire, La Crosse, Madison and Superior regions. (Please note that assignments may change based upon conflicts). Mindy, Melissa and Kara encourage you to contact them with all your immigration questions. They are currently developing a form to gather information to assist with requests.

A host of information and resources to help criminal law attorneys assess immigration consequences is available on the [SPD website](#) on the **Legal Resources** page under the **Specialty Practices** tab or by following the link below.

<http://wispd.org/index.php/legal-resources/specialty-practices/immigration-practice>

Special points of interest:

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ACD Billing Tip: Web Browser Compatibility and Your Online Billing Page

Having trouble submitting a case expense request? Maybe you are getting an error message that you have not received before?

When you are working in the SPD billing system, EOPD, use Firefox or Internet Explorer as your web browser. These two web browsers are most compatible with EOPD.

If you are having issues that are not so easily solved, please contact [ACD](#) or call (608) 261-0632 for assistance.

What do I do?

The State Objected, under Shifra/Green, to the Defense's Attempt to Review School Records

Below is a sample letter that Attorney Andrew Martinez sent in response to the State's objection. Andy has given permission for the text to be shared. The issue in his case has not yet been resolved. Please tune in at the SPD conference in November where Andy will provide an update and strategy for defense review of records in general.

On February 28, 2017, I filed a Motion for in Camera Review of Pupil Records under section 118.125(2)(f). In compliance with the statutory procedure, I served subpoenas for XXX's pupil records on several schools I know she's attended. It's my understanding that these schools complied with my subpoenas and provided records to the court for its review.

On April 12, 2017, I received a brief from the state requesting that the court require preliminary showings of relevance and materiality before performing the in camera review. The state's request is unsupported by any legal authority and in direct contravention of the statutory language. It must accordingly be denied without further hearing.

The state claims that the language of section 118.125(2)(f) is "unclear" and "ambiguous." It is not. Under the relevant subsection:

Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency.

This language has one clear, unambiguous meaning; it simply cannot be read to contain any ambiguity or lack of clarity which would justify imposing a completely unstated requirement that the requesting party make a preliminary showing.

The state also argues that the subpoena-issuing process is unclear. Again, the state is incorrect. The statutory language clearly gives the parties subpoena authority: "Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection." *Id.* The Court of Appeals confirmed this reading of the statute in *State v. Echols*, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768. In that case, defense counsel apparently didn't follow the procedure in section 118.125(2)(f): "[r]ather than subpoena the records and have them sent to the trial court for an in camera inspection, it appears from our review of the record that Echols' attorney obtained them directly from the school via facsimile, and then later sought the court's permission to admit them at trial." *Id.* ¶ 22. The Court of Appeals clearly construed section 118.125(2)(f) as giving defense counsel the authority to subpoena pupil records for delivery to the court for in camera inspection. The Echols court also held that, having received the records from defense counsel, the circuit court "should have . . . conducted the in camera inspection required by the statute." *Id.* The Court of Appeals had no trouble interpreting the statute, and found no reason to believe that it was ambiguous or unclear or that any sort of preliminary showing was necessary. To the contrary, the Court of Appeals clearly took an in camera inspection to be mandatory by indicating that it's "required by statute."

In discussing the subpoena issue, the state refers to section 968.135. This is unhelpful to their position for two reasons. First, that section provides subpoena authority only to the attorney general or district attorney for use in an investigation of someone suspected of criminal behavior. As such, the requirement that the subpoena be supported by probable cause is not a matter of legislative prerogative, but of constitutional mandate. See U.S. Const. amend IV (prohibiting searches of a person's papers and effects unless authorized by a warrant supported by probable cause). XXX is not suspected of a crime in this case, her pupil records are not protected by the fourth amendment and, in any event, they aren't hers. There is therefore no requirement that a subpoena for those records be supported by probable cause, and neither the fourth amendment nor sections 968.135 or 118.125(2) say otherwise. Second, section 968.135 specifically disclaims the notion that it could be used in an argument to limit other subpoena rights: "[t]his section does not limit or affect any other subpoena authority provided by law." Wis. Stat. § 968.135.

What to do continued....

The state's brief repeatedly invokes the statutorily mandated confidentiality of pupil records and insists that section 118.125(2)(f) "should be read in conjunction with the entirety of section 118.125(2)." Undoubtedly it should, but doing so doesn't help the state. Confidentiality under section 118.125(2) is not absolute. The statute provides that "[a]ll pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (q) and sub. (2m)." My request is made pursuant to one of these enumerated exceptions, contained in paragraph (f). The state is apparently confused by the fact that section (2) creates a general rule which is then followed by exceptions to that rule. There is nothing confusing, unclear, or ambiguous about this statutory scheme. In fact, this precise form of drafting—announcing a general rule which is then followed by enumerated exceptions—is one with which the state should be extremely familiar. Presumably the state understands that, under sections 904.04(1)(a), (b), and (c), character evidence is admissible despite the general rule in section 904.04(1) that character evidence is not admissible; that, under section 908.03, hearsay is admissible despite the general rule in section 908.02 that hearsay is not admissible; and that, under section 905.04(4)(a), patient communications made in commitment proceedings are not privileged despite the general rule in section 905.04(2) that patient communications are privileged.

In short, if the legislature had intended that a defendant make a preliminary showing before receiving an in camera inspection under section 118.125(2)(f), it could have required such a showing in the statutory language. The legislature included no such language, and so no such showing is required.

The state cites *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, and *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), but concedes—as it must—that “no court has applied the reasoning” of the Shiffra-Green line of cases to requests under section 118.125(2)(f). In fact, no court could apply Shiffra-Green to the question of pupil records because Shiffra-Green is a court-made rule crafted specifically to address situations in which a defendant has a legitimate need to access records that are confidential under some statute that, unlike the pupil-records statute, does not contain any relevant exception.

In Shiffra, the defendant sought examination of medical and psychiatric records which were “absolutely privileged under section 905.04.” Shiffra, 175 Wis. 2d at 604, 499 N.W.2d at 721. Unlike pupil-record confidentiality under section 118.125(2), the privilege created under section 905.04(2) does not contain an exception for in camera review on the request of a party to a legal proceeding. In fact, none of the enumerated exceptions cover a situation where, as in Shiffra, a criminal defendant has a legitimate interest in access to otherwise privileged records. The Shiffra court, seeing this “absolute” privilege but also recognizing that a criminal defendant has the right to “a meaningful opportunity to present a complete defense,” balanced the interests by adopting the in camera review procedure from the United States Supreme Court decision in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Shiffra, 175 Wis. 2d at 605, 499 N.W.2d at 721. Green involved a defense request for counseling records which would also be privileged under section 905.04(2). See *Green*, 2002 WI 68, ¶9 (describing trial counsel's oral motion for a subpoena of the alleged victim's counseling records).

To review: Shiffra and Green involve situations in which defendants request an in camera review of materials to which they have no access under any statutory exception. Defense counsel's request in this case, in contrast, is made pursuant to an explicit exception to confidentiality in the statute that creates confidentiality. While the privilege in Shiffra-Green situations is absolute, the confidentiality of pupil records is explicitly and unquestionably not. Moreover, the absolute nature of the privilege under section 905.04(2) demonstrates that the legislature is capable of creating absolute privilege or confidentiality when it determines such a strong protection to be appropriate. The fact that the legislature could have provided absolute confidentiality to pupil records but chose not to do so means that it did not intend pupil-record confidentiality to be as difficult to overcome as privilege under 905.04(2). This reading of legislative intent is, of course, consistent with the fact that the legislature created an explicit exception to pupil-records confidentiality: section 118.125(2)(f), the section under which the defense has made its request. The Shiffra-Green line of cases has no relevance at all to litigation over a request under section 118.125(2)(f); the state's request that the court adopt their reasoning completely ignores the drastically different statutory provisions at issue and is therefore completely inappropriate. Properly understood, Shiffra-Green clearly weighs against the state's request, not in favor.

Appellate Q and A

Q: How do I preserve my client's right to appeal?

A: The [SPD Appellate Division](#) webpage has resources available to help attorneys with questions about a client's right to appeal and the Wisconsin appeal process.

[Perfecting Appeals in WI Public Defender Cases](#): This summary provides trial level attorneys with the information necessary to perfect appeals in the types of cases handled by the SPD.

[SPD Appellate Handbook](#): This handbook is a general information guide for appellate practice in Wisconsin Public Defender cases.

Q: I have been appointed as appellate counsel. After consulting with the client, I filed a No Merit Report. As requested, I have provided to the client a copy of the trial court record and transcripts. The client now wants a copy of all of the discovery material I have obtained from trial counsel. The vast majority of this material is on CDs. The discovery consists of the normal paper reports, videos of witness interviews, recorded jail phone calls, etc. There are a dozen CDs. I am not sure that I have the software or technology to copy these materials. What is the SPD's policy about producing these materials for the client?

A: If the case has concluded, then the file belongs to the client and should be surrendered to the client. The SPD does not have the funding to pay for attorneys to make a copy of the file to keep for their own records, but will reimburse the cost to [send the file](#). Also, please keep in mind that while counsel has an obligation to send the client the file, CDs and all, the attorney should not send anything that might be considered contraband (i.e. CDs w/ pornography on them) or is confidential (i.e. the PSI). In addition, SPD will not pay to print copies of everything contained on the CDs. Rather, the CDs from the file should be sent.

If you have further questions, please contact the SPD [Appellate Division](#).

New Legal Resources on [WISPD. Org](#)

SPD E-Filing Resources

Questions on e-filing for an SPD appointed client?

Check out our complete guide to e-filing and available templates on the SPD [Legal Resources](#) webpage.

New Collateral Consequences Resource Center Research Tool

The Collateral Consequences Resource Center (CCRC) has created a new research tool for attorneys. This new database provides research assistance in the area of Wisconsin and federal collateral consequences. You can research the database by general topic (such as business license or child care) and/or by keywords, using drop-down menus. The search results are citations to statutes and administrative rules, with links to the texts of those statutes/rules.

Follow the link below for access to the database:

<http://wisconsin.ccreourcecenter.org/consequence/?narrow=444>

Upcoming SPD Training

Events...

Working as a Team: An Institute for Attorneys and Investigators

September 18-22

Delavan WI

Visit the [Training Division](#) webpage for up-to-date training schedules, agendas, and materials.