# The Attorney's Legal Obligations When Coming into Inadvertent Possession of or Access to Child Pornography

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## Introduction

With this Comment, I hope to provide practitioners with the applicable law and procedure for situations in which attorneys or their agents (including experts) may inadvertently come into possession of child pornography (hereinafter, "Contraband"). At the outset, I want to make a distinction between the unwitting acquisition of contraband as opposed to willful or reckless acquisition.

## Willful or Reckless Production or Acquisition

The following two examples are of willful or reckless acquisition by lawyers, each with very different outcomes that are instructive.

The first example is Attorney Dean Boland of Ohio. Boland established himself as a defense expert in the subject matter of contraband, and championed the novel theory that "it is now impossible for any individual to know from a mere viewing of digital images on a computer whether or not those images portray actual children." [1] In support of his thesis, Boland testified in April 2004 as an expert witness on behalf of a defendant charged with actual or attempted possession of contraband.[2] He presented "before" photographs of children that he had obtained as stock images, and followed by photographs which he altered ("morphed") to depict the same children engaging in sexually explicit conduct with adults. Boland's defense theory was that if he could fabricate contraband so easily, then there should be reasonable doubt that the alleged contraband with which defendant was charged might also have been fabricated.

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[1] United States v. Shreck, N.D. Oklahoma No. 03-CR-0043-CVE, 2006 WL 7067888 (May 23, 2006).
[2] *Ibid.*

At the conclusion of that hearing, the prosecution asserted that Boland's "after" exhibits were contraband. The judge pointed out the exhibits were prepared "at court order," but instructed Boland to delete them. Instead, Boland called the US Attorney's office in his hometown, Cleveland, for an opinion as to whether these exhibits were contraband. Boland did not receive a return call, and he proceeding to ship his computer from Oklahoma to Ohio. He continued to use the exhibits in testimony in Ohio cases.

The following month, the Federal Bureau of Investigation ("FBI") began investigating Boland's conduct related to the contraband images he had fabricated. The FBI obtained a search warrant for Boland's home and seized devices containing electronic files. The U.S. Attorney's Office asserted that Boland's prepared exhibits were contraband under 18 U.S.C. § 2256(8)(C), which defines as "child pornography" any image which is morphed to make it appear that an identifiable minor is engaging in sexually explicit conduct. To avoid prosecution, Boland executed on April 5, 2007, a pre-trial diversion agreement in which he admitted he violated federal law 18 U.S.C. § 2252A(a)(5)(B) by morphing the images of identifiable children into contraband.

Federal prosecutors identified two children in the stock photos and contraband and informed the children's parents. On September 14, 2007, they sued Boland in the United States District Court for the Northern District of Ohio, Eastern Division under 18 U.S.C. § 2255, the civil-remedy provision of the federal child pornography statute, which provides statutory minimum damages of $150,000 to victims of child pornographers. After an appeal to and remand from the United States Court of Appeals for the Sixth Circuit, judgment was entered against Boland for $300,000. Boland was also ordered to pay plaintiffs $43,214.11 in attorney fees. In partial satisfaction of those judgments, plaintiffs garnished a $70,000 payment Boland was owed by the state of Ohio.

In January 2016, Boland filed a bankruptcy petition in the Bankruptcy Court for the Northern District of Ohio, seeking to discharge the civil judgments entered against him. On appeal, the Bankruptcy Appellate Panel of the Sixth Circuit concluded that Boland's actions in using the images of the children were "malicious" and that the judgments therefore could not be discharged in bankruptcy.[3]

[3] In re Boland, 596 B.R. 532 (6th Cir. BAP 2019).

The destruction of Boland's life and career —certainly financially and perhaps otherwise— due to his carelessness cannot be understated. Seemingly in an effort to reinvent himself, he legally changed his name to Jack Boland in 2016. When that proved ineffective, he legally changed it again in 2019 to John Taylor,[4] also demanded that Google remove indexing of court opinions, newspaper articles, and blog posts about him, including from Above The Law, Jonathan Turley, PopeHat, SimpleJustice, TechDirt, Reuters, Bloomberg, L.A. Times, Cleveland Plain Dealer, and many others. Boland attempted a new career as a physician assistant.

When Boland attempted to renew his physician-assistant license pursuant to one of his name changes, he was questioned by the State Medical Board of Ohio about the rationale for the name change history. The Board launched an investigation and found that Boland had submitted false answers in his original license application. In January, 2022, Boland consented to a permanent surrender of his physician-assistant license.

Boland's conduct with the Medical Board was called to the attention of Ohio's Board of Professional Conduct. At his disciplinary hearing, rather than concede that he provided false answers on the application, Boland blamed the Medical Board for using ambiguous language and punctuation in the application. The Board of Professional Conduct rejected Boland's explanations, finding that the questions on the application were plainly stated and that Taylor's answers were false. The Ohio Supreme Court found that Boland violated Rule 8.4(c) (prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and suspended him from the practice of law for six months.[5]

Our second example is a seemingly more sophisticated defendant, South Dakota attorney Raymond Flynn. He was indicted on one count of possession of child contraband and two counts of distribution in connection with visiting Web sites or using file sharing software that his client had allegedly visited or used so that he could understand what the client was doing. Flynn asserted that he was a "criminal defense attorney who specializes in representing persons accused of pedophilia and other sex crimes against children."

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[4] Boland has offered the explanation that the name changes were necessary because he was a victim of domestic violence.

[5] Disciplinary Counsel v. Taylor, 2024 Ohio 1082.

In his Motion to Dismiss, Flynn argued that, in the course of his law practice, some of his clients sought advice about whether particular websites contained material that constituted child pornography, and that in order to properly advise those clients, he would access the website on his office computer and "analyze the website's contents and render an opinion about whether the particular website contained pornography." Flynn argued that he was allowed under South Dakota law to access and view child pornography in his capacity as a criminal defense attorney representing persons who are charged or who may be charged under the child pornography statutes. Attorney Flynn relied upon S.D.C.L. § 22-24A-19:

> The provisions of [the state's child pornography and child sexual exploitation laws] do not apply to the performance of official duties by any law enforcement officer, court employee attorney, licensed physician, psychologist, social worker, or any person acting at the direction of a licensed physician, psychologist, or social worker in the course of a bona fide treatment or professional education program.

Flynn sought to assert the state law as an affirmative defense with the jury instruction, ". . . that it is a defense to a child pornography charge if the purpose of Leo Flynn in viewing child pornography was to render legal advice to a client. If such facts exist, they create a defense to the charge of possession of child pornography."

After litigating the issue of whether South Dakota's law was preempted by Federal law, Flynn was allowed to assert the affirmative defense.[6] He was acquitted of all charges.

One wonders whether this same approach might've worked for Dean Boland, who, in 2010, tried a different approach by bringing suit for declaratory and injunctive relief against the Attorney General of the United States, seeking to enjoin the United States from enforcing any of the child pornography statutes against Ohio criminal defense attorneys or defense experts, based on a similar state statute and lack of Federal preemption.[7] He was not successful.

I am aware of only one instance in which a non-attorney computer forensics examiner requested and was granted permission to remove contraband to his lab, after an analysis of preemption issues by the state district court in Minnesota.[8]

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[6] U.S. v. Flynn, 709 F. Supp. 2d 737 (D.S.D. 2010)
[7] Boland v. Holder, Case No.: 1:09 CV 1614 (N.D. Ohio Sep. 30, 2010).
[8] Order granting Motion to Compel Discovery, Third Judicial District Court, No. 81-CR-09-1180, State of Minnesota v. Carney-Blount

**Unwitting Acquisition**

The unwitting acquisition of contraband is, for the defense attorney, a significant risk. In my digital forensics practice, I have been a witness to and affected party on three different occasions, described below. To guard against this risk, I include the following language in my boiler-plate services agreement, a copy of which I provide to counsel with the invitation to read and, if any proposed revisions are desired, to turn on *Tracked Changes* and send back for my review:[9]

> If a forensic examination in a setting **outside of a law enforcement facility (during a defense examination)** reveals the existence of possible child pornography on the examined media, ADAMANT will immediately cease its examination and advise CLIENT and appropriate law enforcement authorities of the nature of the materials found. ADAMANT will not actively search for child pornography unless instructed to do so by CLIENT or CLIENT's counsel, however, it is possible that ADAMANT may inadvertently come across contraband images. Reporting and activities incident thereto constitute "Professional services" for purposes of this Agreement.

In one case, I was sent an alleged victim's mobile device. The alleged victim was a minor child. The attorney who provided the phone had not inspected the phone, but had read my services agreement and knew there was a possibility of nude photos created on the phone by its owner, if for no other reason that this is perceived to be behavior ubiquitous among teenagers. We discussed the protocol. Unfortunately, I did encounter such photos. I contacted him first as a courtesy and then contacted my local law enforcement agency to take possession of the device. I completed a secure wipe of my processing computer's hard drive to render any data forensically unrecoverable, in accord with law enforcement's verbal instructions.

In the second case, a prosecutor had provided voluminous discovery to defense counsel (my client). Digital photographs were among them. My client made these available to me via Dropbox. At least one of the photographs had some variation of the words "child pornography" as part of the file name. I paid no attention to file names when I was reviewing the discovery,

[9] This is my polite way of saying, "Read the contract!"

and so was shocked to discover an image of —you guessed it— child pornography on my screen. Again, I followed my protocol. First, I placed a courtesy call to my client, who was not in the office. Then I called the FBI field office local to me. I was instructed by the special agent to delete the image, and he referenced the safe harbor provision of 18 U.S.C. § 2252(c). My client, (defense counsel) was extremely displeased with me, and informed me the county attorney insisted that none of the images were contraband notwithstanding the file name, and that I must be mistaken. Defense counsel was most concerned about her own liability, asking me, "Is the FBI coming to my office? What am I supposed to do?" She has never called on me for services again.

In the third case, an attorney had provided her client's phone to me via courier. She had read my contract and raised no concerns. The phone, she said, had already been in the custody of law enforcement, so neither of us had even considered the possibility of contraband. I performed an extraction and returned the device via Fedex overnight. A few days later, when I began examining the phone, I encountered what I believed to be contraband. Again, I followed my protocol (a courtesy call first to the client, followed by a call to law enforcement). In this instance, my local ICAC liaison consulted with our local FBI field office, and requested a copy of the extraction, and instructed me to delete the original.

My client in this last example initially and strongly believed that I was not required to contact law enforcement and did not believe she needed to notify law enforcement about the device that was now in her office. Citing to Ethics 8/76B,[10] concerning whether a lawyer has an obligation to reveal a client whereabouts when they are a fugitive, she believed she had an obligation to keep the phone privileged. She also cited E-85-10, believing she should keep the phone privileged, because it was possible evidence of a past crime, not an ongoing or future crime. She believed these perceived obligations transcended to me, as her agent. I exhorted her to call our ethics hotline for advice. I had already called, and was assured that my protocol was correct, as applied to these circumstances.

[10] "If the attorney is required to reveal the client's whereabout by court order so that DR 4-101(c)(2) applies, but the attorney's knowledge qualifies as privileged, s/he could still resist disclosure under Wis. Stat. sec. 905.03(3)."

Likewise, another client did read my contract and objected. He wrote, "As a contractor working for me on behalf of the client, you become part of our circle of attorney/client confidentiality. If you discover something illegal on my client's device, I can't have you making a report to the police. The same as if I know that my client did something illegal, I'm not allowed to report them to the authorities." I did not strike the clause in the agreement, and will not accept work if a client were to insist.

Respectfully, I submit that the foregoing arguments in support of not contacting law enforcement by the attorney or his or her agent (*e.g.,* digital forensics expert) are mistaken. These arguments misconstrue the law, by failing to distinguish between knowledge of a client's past crime and the committing of a crime by the attorney or agent in possessing, producing, or transporting contraband.[11]

Section 119 of the Restatement Third, The Law Governing Lawyers, provides that a lawyer must notify prosecuting authorities of the lawyer's possession of the physical evidence of a client crime:

> With respect to physical evidence of a client crime, a lawyer: (1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but (2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer's possession of the evidence or turn the evidence over to them.[12]

During my research, I have found very little on the subject of an attorney's obligations in these circumstances. As noted with the ***Flynn*** case, *supra,* some states create a privilege for certain persons to possess contraband and, because the Adam Walsh Act is construed as applying to

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[11] As for the fugitive client analog offered by one of the attorneys, *supra*, that fails for the same reason in that it doesn't distinguish between knowledge of a fugitive client's location and the crime of providing aid and harboring a fugitive by the attorney.

[12] *See also* ABA Standards for Criminal Justice: Defense Functions §4-4.6, which advises that counsel can receive an item which constitutes contraband "for a reasonable period of time" if counsel, *inter alia*: "reasonably fears that return of the item to the source will result in the destruction of the item"; "intends to test, examine, inspect or use the item in any way as part of defense counsel's representation of the client"; or the item cannot be returned to its source."

Federal judicial proceedings with regard to the handling of contraband by the defense, state law is not preempted.

I did, however, find an interesting *Above the Law* blog post, in which the author construed 18 U.S.C. § 2252, which criminalizes anyone who "knowingly possesses" contraband, as a strict liability offense for attorneys, subject to the safe harbor provision of three or less images § 2252(c).[13] The author wrote, "At the moment when your computer — or a computer in your custody or control — has child pornography on it, you knowingly possess it." He continued, "There's no 'I didn't possess it for a creepy reason' defense in the statute . . . So assuming you have more than three images, what are your options?"

However, I think he has misconstrued the statute, which, owing to a judicial precedent, is subject to a more reaonable construction. In United States v. X-Citement Video, Inc.,[14] the Supreme Court considered subsections (1) and (2) of the same statute, and inferred a scienter element, such that a defendant should not be liable without wrongful intent. The high Court relied on Staples v. United States, for the proposition that the standard presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.[15]

Another commentator to consider the issue in the context of representing a minor victim wrote, "[T]here is no codified safe harbor for the possession or receipt of sexually explicit images by counsel . . . At a minimum, counsel . . . should report the sexually explicit images . . . to the Cyber Tipline of the National Center for Missing and Exploited Children referenced in 18 U.S.C. §2258 and report the images to federal law enforcement. Further, if law enforcement

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[13] Matt Kaiser, A Child Pornography Puzzle, Above the Law (Nov. 12, 2015), last retrieved March 01, 2025 from https://abovethelaw.com/2015/11/a-child-pornography-puzzle/
[14] 513 U.S. 64 (1994)
[15] 511 U. S. 600, 619

declines to prosecute, counsel should ask the Court to escrow the images upon initiating a civil legal action."[16]

There are few examples in the criminal law where a statute applies in such a way that creates an affirmative obligation to act. I have not come across any cases that have explored this academic facet of the Federal possession prohibition, but I would contend that, once a person becomes aware that he or she is in possession of contraband, an affirmative duty to dispossess himself or herself of the contraband is triggered. Other commentators have come to similar conclusions.[17] While the law does not prescribe the period of time that must past when scienter attaches, I would expect courts to apply a reasonableness standard.

I should clarify here that, while an attorney (and his or her agent) is required to dispossess himself or herself of the contraband, the lawyer is still bound to protect the client's confidence. This may be futile, insofar as law enforcement may be able to independently identify the owner of the computer or phone, and prosecutors may even threaten charges against the attorney for failing to provide information about whence the contraband came. But, even as an attorney is required to protect the client's confidence, neither the attorney nor his or her agent should continue to possess, reproduce, transport, or tamper with the contraband (except to the extent that 18 U.S.C. § 2252 authorizes destruction of three or fewer images).

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[16] Russell Bogard, *Representing Teen Victims of Online Pornographic Postings: Litigation Challenges and Strategies,* 18 NYLitigator 1, New York State Bar Ass'n, 2013, last retrieve 01 March 2025 from https://nysba.org/NYSBA/Publications/Section%20Publications/Commercial%20and%20Federal%20Litigation/NY%20Litigator/PastIssues2000present/Summer%202013/NYLitSum13.pdf#page11

[17] *See, e.g.*, Matthew L. Mitchell, "What to do when your client discovers child pornography on workplace computers?" 56 Boston Bar Ass'n 3, 2012, last retrieved March 5, 2025 from https://bostonbar.org/journal/what-to-do-when-your-client-discovers-child-pornography-on-workplace-computers/; see also H. Michael Steinberg, *Defending Against Sex Crimes — Understanding Your Rights During the Investigation Phase,* ("One principle emerges clearly from the case law: When the lawyer takes physical possession of incriminating evidence, he has an affirmative duty to give the incriminating evidence to the proper authorities."), last retrieved March 05, 2025 from https://www.colorado-sex-crimes-lawyer.com/the-sex-crimes-investigation-phase-issues-and-tactics/colorado-criminal-law-defending-against-sex-crimes-investigations-understanding-your-rights-during-the-investigation-phase

## CONCLUSION

An attorney or his agent, who, comes into possession of contraband, is not privileged to hold on to the evidence, and must turn it over to law enforcement after a reasonable period of non-destructive inspection. The moment that knowledge is attained, scienter attaches for the willful failure to execute this affirmative duty. Knowledge of a client's past crime must be distinguished from the present crime of possession. Likewise, the attorney cannot expect his agent (*e.g.*, digital forensics examiner, private investigator, or paralegal) to commit the crime of possessing, reproducing, or transporting contraband in violation of Federal law.

As a best practice, discuss with your client whether contraband may exist on a device before you retain a digital forensics examiner to perform work on it. Likewise, discuss what protocol your examiner will use if it is encountered in any case, whether civil or criminal. If you are working with an examiner who does not have a protocol, find another examiner.