

ORDER OF THE
DEPARTMENT OF CORRECTIONS
AMENDING AND CREATING RULES

The Wisconsin department of corrections proposes an order to amend ss. DOC 309.02 (14) and 309.02 (16), and create ss. DOC 309.02 (7m) and 309.02 (16)(b) and (c), relating to resources for inmates.

Statutory authority: ss. 301.02, 301.03 (1) and (2), and 227.11 (2), Stats.
Statutes interpreted: ss. 46.07, and 302.32 (1), Stats.

Analysis prepared by the Department of Corrections

Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule, adopted February 23, 2001, was necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

This order:

- Revises the present rules restricting inmates' access to sexually explicit material by prohibiting access to published material that depicts nudity on a routine or regular basis or promotes itself based on nudity in the case of individual one-time issues.
- Revises the present rules by prohibiting access to written material when it meets the legal definition of obscenity.

SECTION 1. DOC 309.02 (7m) is created to read:

DOC 309.02 (7m) "Features" means the publication contains depictions of nudity on a routine or regular basis or promotes itself based upon depictions of nudity in the case of individual one-time issues. The department will not prohibit a publication solely because it contains nudity that has a medical, educational or anthropological purpose.

SECTION 2. DOC 309.02(14) is amended to read:

DOC 309.02 (14) "Nudity" for commercially published material means the showing of ~~the~~ human male or female genitals, ~~or~~ pubic area ~~or buttocks~~ with less than a ~~full~~ fully opaque covering, or the showing of the female breast with less than a fully opaque covering of ~~any portion below the top of~~ the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state. "Nudity" for purposes of a personal photograph means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.

SECTION 3. DOC 309.02(16) is amended to read:

DOC 309.02 (16) "Pornography " means any of the following:

~~any (a) Any material, whether written, visual, video, or audio representation or reproduction, other than written material,~~ that depicts any of the following:

~~(a)~~ 1. Human sexual behavior.

~~(b)~~ 2. Sadomasochistic abuse, including but not limited to flagellation, bondage, brutality to or mutilation or physical torture of a human being.

~~(c)~~ 3. Unnatural preoccupation with human excretion.

~~(d)~~ Nudity which appeals to the prurient interest in sex.

~~(e)~~ 4. Nudity which is not part of any published photograph or printed material, such as a personal nude photograph.

~~(f)~~ 5. Nudity of any person who has not attained the age of 18.

SECTION 4. DOC 309.02(16) (b) and (c) are created to read:

DOC 309.02(16) (b) A publication that features nudity.

(c) Written material which the average person, applying state contemporary community standards, would find, when taken as a whole does all of the following:

1. Appeals to the prurient interest.
2. Describes human sexual behavior in a patently offensive way.
3. Lacks serious literary, artistic, political, educational, or scientific value.

SECTION 5. DOC 309.04(4)(c)8.a. is amended to read:

- a. Is ~~in whole or in part~~ pornography.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2) (intro.), Stats.

Wisconsin Department of Corrections

Date: _____

By _____

Jon E. Litscher
Secretary

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