

IN THE IOWA DISTRICT COURT FOR SAC COUNTY

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STATE OF IOWA, : CVCV019540  
Plaintiff, :  
vs. :  
XCENTRIC VENTURES LLC. : BRIEF IN SUPPORT OF MOTION TO  
(DBA WWW.RIPOFFREPORT.COM), : DISQUALIFY COUNTY ATTORNEY  
Defendant. :

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Xcentric Ventures, LLC (“Xcentric”) respectfully requests the Court disqualify SAC County Attorney, Benjamin John Smith (“Smith”), from representing the State of Iowa in this matter due to his conflict of interest pursuant to Rule 32:1.7 of the Iowa Rules of Professional Conduct.

**I. INTRODUCTION**

Smith has placed his own personal interests ahead of the ethics rules, the law, and the interests of the people of the State of Iowa. Smith instituted this action to seek an injunction to silence those who have criticized his performance as a public official.

Defendant is doing business as RipoffReport.com, a consumer protection website famous for defending free speech on the internet. Darren Meade (“Meade”) posted several articles on Ripoff Report accusing Smith of obtaining the glory of a conviction in the controversial Tracey Richter (“Richter”) murder trial by allowing misleading or false testimony from corrupt witnesses, while knowingly or recklessly disregarding the truth. Meade accused Smith of suborning perjury to manufacture material evidence. Meade even implied a criminal conspiracy with Richter’s ex-husband to frame her for the murder and to take her money and her children. If Meade is correct, Smith is not a triumphant public crime fighter, but instead has been fooled by a killer into convicting an innocent woman.

The Richter trial brought national and international media attention to Smith, and the Meade articles have brought him national criticism. In response, Smith has used the resources of the State of Iowa to seek the destruction of Xcentric Ventures, a company that has no offices or agents in Iowa and no contacts with Iowa. Smith seeks a mandatory injunction ordering removal of critical details from the Meade articles. On September 2, 2014, Smith filed a ten count Trial Information against Meade. Additionally, Smith has abused official processes to obtain confidential personal and business information about Defendant, and its founder, Ed Magedson, and then leaked it to hostile bloggers, including Michael Roberts (“Roberts”) and John F. Brewington (“Brewington”), to undermine Defendant’s business operations and revenues. Smith also leaked “official” information about his intention to charge Meade.

Smith’s conflict cannot be masked by his contention that he is protecting witnesses from the same criticism that touches him personally. Counsel for Defendant brought the ethical conflict to Smith’s attention in an Ethics Letter served upon him on August 12, 2014 and in follow up email (Exhibit 1, Ethics Letter; Exhibit 2, email follow-up of August 15). The Ethics Letter referenced the libelous unsupported criminal allegations Smith publicized in an unsealed 120 page Affidavit to support a search warrant (Exhibit 3, Search Warrant Affidavit of CA Smith, July 7). Smith’s response made it clear that he was determined to use his prosecutorial powers to suppress criticism of his prosecutorial functions (See Exhibit 2 CA Smith Response of August 18).

### **CHRONOLOGY OF CERTAIN EVENTS**

- December 13, 2001:** Dustin Wehde (“Wehde”) was shot by Richter in her and Roberts’ house in Early, Iowa.
- February 13, 2002:** Roberts failed a polygraph about arranging for Wehde to be in the house where he was shot, allegedly as an intruder.
- January 2011:** Smith was sworn in as Sac County Attorney.

- July 25, 2011:** Smith charged Richter (now ex-wife of Roberts) with the murder of Wehde.
- Late 2011:** Richter was found guilty of first degree murder and sentenced to life in prison.
- 2012 (undated):** Smith provided an affidavit in support of Roberts in child custody matters, and testified in Roberts' behalf at the Robert – Richter custody hearing.)
- February 7, 2012:** Smith contacted the Australian Consulate on behalf of Roberts to allow removal of Richter and Robert's children to Australia.
- September 9, 2012:** Meade posted criticism of Smith, and the trial, on the RipoffReport.com website, alleging that Smith allowed false testimony, suborned perjury, leaked and compromised evidence, and knowingly relied on a biased investigation to obtain an unfair conviction.
- November 2012:** Smith told 60 Minutes Australia that the criticism against him was emotionally "difficult" for him and almost "broke" him. (Exhibit 4, Video Interview, to be filed in video file format). <https://www.youtube.com/watch?v=HhtbM1M5Rdo>
- 2012 to 2014:** Smith admitted he spent 1,500 hours further investigating Richter, Meade, and others for posting criticisms about the Richter investigation and trial, issuing "over 100 Rule 2.5 (6) County Attorney Investigatory Subpoenas Duces Tecum . . ." reviewing "thousands of documents" and listening to "hundreds of hours of recorded phone conversations" (Exhibit 3, Search Warrant Affidavit p. 2)
- April 2012:** The District Court quashed Smith's subpoena for financial records of Richter's trial attorney.
- July 7, 2014:** Smith filed an *unsealed* Search Warrant Application to seize computers from Anna Richter ("A. Richter" who is Tracey Richter's mother). The Application was a 120 page affidavit from Smith, full of defamatory accusations against Defendant and RipoffReport.com founder Ed Magedson ("Magedson"). Smith disseminated this uncustomarily unsealed Search

Warrant Affidavit (despite there being a significant “ongoing investigation”) to hostile bloggers including Roberts and Brewington, who immediately used it in an ongoing publicity campaign to harass and subvert the Defendant’s business, and to personally attack Magedson (Exhibit 3, Search Warrant Affidavit).

**July 14, 2014:** Smith released media statements to publicize his actions to suppress criticisms about the Richter case, including statements to bring suspicion and public condemnation of Defendant and Magedson (Exhibit 5, Media Statement, Podcast of July 14, 2014 (to be filed in audio file format).

**August 6, 2014:** Smith filed this 915 proceeding seeking injunction to force redaction of names from Meade’s articles.

**August 11, 2014:** Smith filed a resistance to A. Richter’s motions, wherein Smith publically disclosed and referred to confidential attorney-client communication of Defendant. (Exhibit 6, State’s Response to Motion for Protective Order . . . and Response to Motion to Expunge Search Warrant, Case No. SWSW000222)

**August 12 and 15, 2014:** Smith received an ethics letter from Defendant’s Attorney, pointing out the conflict of interest, and requesting Smith refer all matters to the Iowa Attorney General or other Independent Counsel (Exhibit 1), and an email citing the rule against extrajudicial comment to heighten public condemnation (32:3.8 (f)). (Exhibit 1)

**August 18, 2014:** Smith responded to the ethics letter with an email stating “Your client(s)’ decision to publish stories about me on its website . . . will not cause me to withdraw from this matter . . .” and Smith announced his intention to subpoena Defendant’s employees, including in-house counsel, which has the appearance of retaliation. (Exhibit 2)

**September 3, 2014:** Smith filed a ten count Trial Information against Meade, including counts based on allegations of actions that took place only in California and Arizona; relating only to people in California and Arizona, and actually citing California law, with no connection to Iowa. Smith then requested a nationwide arrest warrant for Meade. (Exhibit 7, Trial Information)

## II. FACTS

Defendant has devoted 16 years and millions of dollars to protect freedom of expression on the internet. Others, including Roberts and Brewington, have devoted years to suppressing criticism about themselves on the internet. Smith has aligned with the suppressors.

The individuals involved are:

1. **Ed Magedson**, founder of the Ripoff Report and manager of Xcentric Ventures.
2. **John Brewington**, a private investigator in Arizona who has a criminal record and a vendetta against Magedson.
3. **Michael Roberts**, an Australian citizen who performs online reputation work (typically meaning hiding complaints about a client business) and campaigns to shut down Ripoff Report.
4. **Tracey Richter**, the ex-wife of Roberts, who was prosecuted for murder by Smith.
5. **Darren Meade**, a former business partner of Roberts, who blogged against the fairness of the Richter murder trial, and who was just charged in a ten count Trial Information by Smith, for allegedly violating California law, and allegedly attempting to intimidate witnesses subsequent to the Richter murder trial.
6. **Ben Smith**, Sac County Attorney.

Each individual's background and role as it relates to Smith' conflict of interest will be addressed in turn.

### 1. Ed Magedson

In 1997, Magedson was tired of big companies ripping off consumers. In response, he founded the Ripoff Report website. Now operated by Xcentric, the Ripoff Report website has grown to become one of the most popular consumer reporting websites; containing almost two million posts, giving consumers a voice; saving countless consumers from scams; positively impacting the business practices of legitimate businesses; and assisting government agencies and law enforcement personnel

across the United States, including the FBI, FTC, SEC, Homeland Security, U.S. Postal Inspectors, U.S. Customs and Border Patrol, and federal and local prosecutors to identify scams and find witnesses to stop frauds.

Currently, Magedson is the manager of Xcentric, which is an Arizona limited liability company. The Ripoff Report website is a forum primarily for consumers to post about their personal experiences with businesses. Registering for, and posting to the Ripoff Report website, is free. These posts are authored and published by third-party readers and users of the Ripoff Report website, not by people employed by Xcentric.

## **2. John Brewington**

Brewington is a private investigator and operator of Paladin Investigations and the website PaladinPI.com. Brewington is licensed in Xcentric's home state of Arizona. He is directly affiliated with Smith, and appears to have assisted in the execution of investigative subpoenas. In his "investigative capacity", and with "inside information" provided by Smith, he publicly furthered his and Smith's personal goals by viciously attacking and causing harm to the Defendant and Magedson. In March 2006, Brewington anonymously posted a physical threat on the Ripoff Report website against the principal of a company by the name of Federated Financial. He made this posting to fuel the public controversy between Ripoff Report and Federated Financial, which was suing Xcentric at that time.

Later in 2006 Brewington and Magedson clashed, when Brewington attempted to obtain information from Magedson for one of Brewington's private investigations. Brewington cryptically implied that he was law enforcement, or working with law enforcement. Magedson accused Brewington of lying. That began Brewington's nine-year long obsession to put Xcentric and the Ripoff Report website out of business.

Brewington has a personal blog which he has devoted to negative criticism about the Ripoff Report. Using his blog, emails and social media, Brewington has made *many*

public statements menacing or harassing Xcentric's employees, attorneys, agents and service providers, including but not limited to the following:

- June 27, 2011: "Recipe for catching a shark. Study and profile the Shark. Throw insurance chum into the water. When the Shark comes in to feed, throw in dynamite. The Shark being a Shark will come back to feed on insurance chum. Throw in more dynamite."
- July 13, 2011: "Send the family to safety. Burn everything around you so there is nothing to be had by the enemy. Strap on a social suicide vest and invite them in. Blow everyone to hell."
- August 26, 2011: Brewington posted that he was filing a bar complaint against Ripoff Report lawyers. The post has a bizarre photograph of the bar complaint, a painting, and a feather duster. The painting includes a private investigator, a chalk outline of a dead body, and a blood stained document.
- November 27, 2011: "I have a special plan for lawyers and chicken shit nut balls. Got Indians doing the same thing. I like the Rip Off Revenge."
- June 26, 2014: "I have said it before. If you are standing under the Ed Magedson/Ripoff Report tree, you will be struck by lightning. The storm is coming."
- July 10, 2014: (one day after Smith filed the Search Warrant Affidavit accusing Xcentric of crimes) Brewington Tweeted "The storm is here."

In addition to personally menacing Xcentric, Brewington regularly incites others to harm Xcentric by litigation and other methods. He offers those litigants and misfeasors information, documents and assistance. As only one of dozens of examples, in 2013, the Arizona Court of Appeals found that there was evidence that Brewington had assisted notorious spammer William Stanley (who has since been indicted by a federal grand jury for transmitting threats and extortion) in a campaign to harass the service providers of

Xcentric and threaten those companies in an effort to induce them to discontinue providing services to the Ripoff Report website. (Exhibit 8, AZ Court of Appeals Finding regarding Brewington).

Most recently, Brewington was hired by Roberts. Brewington and Roberts have been working closely with Smith in their collective efforts to damage Xcentric, Ripoff Report, and Magedson.

### 3. Michael Roberts

Roberts began his internet career in the reputation management industry, meaning that he was paid by companies to hide negative information about their business practices. He continues to advertise those services to this day through his various online companies, including “Rexxfield.” See, e.g., [www.rexxfield.com](http://www.rexxfield.com), (Exhibit 9). Roberts has an extensive history of conflict and hostility towards Ripoff Report, and Magedson.

On December 13<sup>th</sup>, 2001, in Roberts’, Early Iowa home, Roberts’ (then) wife, Richter shot Dustin Wehde. Wehde was a troubled young man who lived nearby, who had been “mentored” by Roberts, and whose mother had worked for Roberts.

As part of the homicide investigation, officers learned that Roberts was the beneficiary of life insurance on his wife’s life. On February 13, 2002, as part of a law enforcement polygraph examination, Michael Roberts, was asked:

“Did you arrange for DUSTIN to be in your house last December 13<sup>th</sup>?”;

“Did you plan in advance for DUSTIN to be in your home last December 13<sup>th</sup>?”;

and

“Do you know the name of the second intruder in your home last December 13<sup>th</sup>?”

To each question Roberts answered: “No.”

The lie-detector result indicated that Roberts was 99% deceptive. The diagnostic evaluation read: “After careful analysis of the MICHAEL Roberts’ polygrams, and based on the case facts available, it is the examiner’s opinion that Roberts’ truthfulness could

not be verified and he could not be cleared in this matter.” (Exhibit 10, Polygraph Report on Michael Roberts, February 13, 2002)

Xcentric first encountered Roberts in 2009 by hiring his service. Xcentric had no knowledge of the homicide, much less Roberts’ failing lie detector test results. At that time, Roberts’ target was the website [www.complaintsboard.com](http://www.complaintsboard.com), a direct competitor of the Ripoff Report website that got its start by copying tens of thousands of pages of content from Ripoff Report. Xcentric was adverse to ComplaintsBoard in a copyright infringement lawsuit. *See Xcentric Ventures v. Elizabeth Arden*, United States District Court for the District of Arizona, Case No. CV2008-2299. An attorney introduced Xcentric to Roberts, who had extensive knowledge about ComplaintsBoard, and Xcentric hired Roberts to provide information about the ownership of the ComplaintsBoard website.

In March of 2011, Roberts contacted Xcentric’s attorney, at first anonymously, then openly. Roberts informed her that someone had injected code into the Ripoff Report website that caused posts to disappear or lose rankings in search engine results. He referred to this code as a “hack.” Roberts offered information about countermeasures and about persons who had installed the code in exchange for €105,000 (approximately \$150,000 U.S.), and requested that Xcentric grant immunity to the code writer and to Roberts *himself*. Roberts followed up with an email stating that if Xcentric signed the attached draft agreement, “We’ll get this hole plugged before sun up tomorrow.” (Exhibit 11, Email from Roberts to Speth regarding Hack of RipoffReport.com). The draft agreement attached to Roberts’ email stated that Roberts possessed information about a “system or method including source code and documentation to cause web pages on the website [ripoffreport.com](http://ripoffreport.com) to be pushed down or reduced in ranking to position 256 or lower in Google search engine results.” (Parentheticals omitted). (Exhibit 12, Draft Agreement, Robert’s Proposal Regarding Hack of RipoffReport.com).

The draft agreement, which was authored by Roberts, also stated that Roberts knew how to make this malicious code (the “Ripoff Report Hack”) “100% ineffective” ; that he knew who the creator was; and that he knew who was exploiting the method to charge individuals and businesses money to have their respective Ripoff Report complaints “buried” in Google search engine results. The draft agreement provided that Xcentric would wire €105,000 to Roberts’ agent and hold the creator *and Roberts* harmless for their involvement. Xcentric rejected the proposal. Instead, it independently located and removed the malicious code from its website, and publicized Roberts’ failed attempt at extortion. Subsequently, other negative reports about Roberts were posted to the Ripoff Report website.

In 2013, Roberts began a campaign to shut down the Ripoff Report website. Beginning in or around September 2013, Roberts created the website AuthorizedStatements.org (the “Authorized Statements site”). Utilizing it, Roberts sent statements to businesses that serve advertisements to Xcentric. In his “Authorized Statements,” Roberts accused Magedson of being a terrorist, and declared that any entity that funds or supports Magedson’s activities (such as advertisers and customers) are terrorist organizations and “will come under our intense scrutiny.” He announced, “Be warned, if your ads appear on [Ripoff Report], we will boycott you too.” Through his Authorized Statements site, Roberts even threatened to attack the clients of any advertisers.

Because of Robert’s threats to harm third parties, Xcentric filed a lawsuit against Roberts because of his ongoing online attacks against Xcentric’s business relationships. (Exhibit 13, Complaint against Michael Roberts, Superior Court of Arizona, Maricopa County, Case No. CV2013-012936). That matter is currently pending.

In response to the Arizona lawsuit, Roberts announced on the internet his “Single minded focus on shutting down RipOffReport.com and gagging its owner Ed Magedson.”

(Exhibit 14). He also bragged that, “we are about to launch a major legal assault to shut the website down.”

On or around January 24, 2014, Roberts filed his own lawsuit against Xcentric in Polk County, Iowa. *See Roberts v. Richter, et al.*, Case No. 05771 LACL129566. That lawsuit deals with [presumably] the identical reports on the Ripoff Report website which are at issue in the Application for a Civil Injunction to Restrain Harassment or Intimidation of Victims or Witnesses (the “Application”) herein. While Roberts’ social media efforts to shut down the Ripoff Report website and gag Ed Magedson continue today, his efforts are unjust and have so far failed.

#### 4. Tracey Richter

Richter was married to Michael Roberts when she shot Wehde in their Early, Iowa, home on December 13<sup>th</sup>, 2001. The County Attorney at the time accepted that Tracey shot in defense of herself and her children, and did not charge a crime.

A few years later, Roberts and Richter were going through a divorce. Roberts tried to convince county officials that Richter was a murderer, and Richter expressed suspicion that Roberts sent Wehde into their home to kill her on December 13, 2001.

After becoming the Sac County Attorney in January 2011, Smith put Richter on trial for shooting Wehde in July 2011, and convicted her of murder. Richter is currently serving a life sentence in prison, but has initiated post-conviction relief proceedings.

Roberts and Richter had two children together. When Richter was sentenced to prison, custody of the children was placed with Richter’s mother because Roberts is an Australian citizen and wanted to take the children with him to Australia. There have been multiple contentious legal battles relating to the custody of Roberts and Richter’s children. Smith has supported Roberts in these battles, including providing affidavits, testimony and letters as described above.

5. Darren Meade

Meade was once Roberts' business partner in the enterprise to capitalize on the Ripoff Report hack. The business model was simple – they charged companies thousands of dollars to hide negative information about that company on the internet and they used the Ripoff Report Hack to cause search engines to not show results about their customers. At some point, for an unknown reason, Meade and Roberts parted ways and became enemies.

In mid-to-late 2011, Meade contacted Magedson and told him he had information about Roberts and the Ripoff Report hack. Unlike Roberts' extortion attempt, Meade offered information without compensation. He provided information about the Ripoff Report Hack and other attempts to attack the Ripoff Report website, and eventually they became friends. When they first met, Magedson became aware that Meade had a badly injured leg, and needed financial help with the surgery. Meade said he was also on the verge of being evicted, so Magedson helped him financially.

Meade posted that Richter was an innocent mother, set up by Roberts, and the victim of prosecutorial misconduct. Believing this was an important issue of public concern, Magedson allowed prominent placement on the website. Meade thought the featured posts on the front page of the website would raise awareness for the plight of an innocent woman. Apart from what Meade told Magedson about Roberts, Richter and Smith, Magedson had no independent knowledge of the relationship between those three. Meade also convinced Magedson to compensate him for information about the Ripoff Report Hack and for services in helping to promote an unrelated video over the Internet. Although Meade posted articles on Ripoff Report about Smith and Roberts and matters related to the Richter investigation and trial, at no time did Magedson write any of them nor did he direct Meade to do so. No research was performed by Magedson about the content of those reports. Internet law does not require Magedson to verify third party

postings on the webpage; rather, the law protects those who provide webpages as forums for free speech and they cannot be treated as authors or publishers of third party content.

6. Ben Smith

Smith has formed a relationship with both Roberts and Brewington. Smith testified on behalf of Roberts during a custody proceeding with Richter in 2012. That testimony related to the actions of Meade and Richter, and expressed Smith's personal support for Roberts, which Smith personally expressed. (Exhibit 15, Smith Transcript, Testimony in support of Custody for Michael Roberts).

Smith also submitted an affidavit in support of Roberts gaining custody of Richter's children, attesting to reviewing the documents from the Roberts' "knotted custodial matters." Smith stated that Roberts is "completely and unabashedly honest," and that his mother in law would poison his children against him with her obsessive efforts to publically blame and demonize Roberts for the murder of Wehde. (Exhibit 16, Smith Affidavit (Child Custody))

Smith also wrote to the Australian Consulate requesting "emergency action" to allow Roberts' children to leave the United States, claiming that their lives were in danger from their mother, as well as his own life.

Despite Richter's incarceration, it is my strong belief that, so long as she draws breath, Richter poses a danger to the lives of her ex-husband, Michael Roberts, and their children, [Redacted] and [Redacted] Roberts, as well as many others, *including myself* and others responsible for her life imprisonment [ . . . ]

(Exhibit 17, Smith Letter to Australian Consulate for Michael Roberts)(emphasis added) Smith goes on to explain that he received a death threat that he believes came from a Richter family member. Id.

After Richter was convicted and sentenced, Smith spent more than 1,500 hours investigating her, Meade, and others for posting criticisms about the Richter investigation and trial, issuing "over 100 Rule 2.5 (6) County Attorney Investigatory Subpoenas Duces

Tecum . . .” reviewing “thousands of documents” and listening to “hundreds of hours of recorded phone conversations” (Exhibit 3, Search Warrant Affidavit, p. 2.)

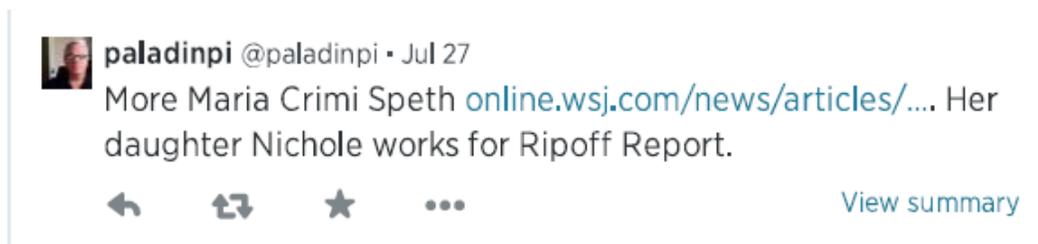
Using in part information provided to him by Brewington and Roberts, Smith created the 120-page Search Warrant Affidavit, alleging there is probable cause to believe that Magedson and Xcentric are involved in a conspiracy with Meade to engage in witness tampering and other related crimes specified in detail therein (Exhibit 3). Smith then made the Search Warrant Affidavit public, which is abnormal and practically unheard of during an “ongoing investigation.” As a direct result, Smith’s detailed, unsubstantiated, and libelous allegations were widely circulated on the internet by Roberts, Brewington, and their known associates. Smith made media appearances touting “ongoing investigation” calculated to cast suspicion and public condemnation on his critics. (See, e.g. Exhibit 4, Interview of Smith 60 Minutes Australia November 2011, Excerpt, and Exhibit 5, Media Statement, Podcast of July 14, 2014). This information has also been widely publicized and reported by widely followed organizations such as the Huffington Post. (Exhibit 18).

The Search Warrant Affidavit includes an admission by Smith on page one that the document could contain “factual inaccuracies,” and contains extensive assertions of “fact”, of which Smith could not possibly have had any personal knowledge, including the childishly disparaging assertion that Meade is Magedson’s “BFF.” Indeed, the Search Warrant Affidavit appears to have been written at least in part by or with the assistance of Roberts. For example, the Search Warrant Affidavit refers to details about the Ripoff Report Hack that closely tracks the story that Roberts told Xcentric and others (See e.g., Exhibit 3, pp. 15 – 24.) However, the Search Warrant Affidavit fails to disclose that Roberts was involved in the Ripoff Report Hack himself, and that he attempted to sell information about it to Xcentric.

Smith has also been working with Brewington. On June 26, 2014, Brewington posted, “I have said it before. If you are standing under the Ed Magedson/Ripoff Report

tree, you will be struck by lightning. The storm is coming.” On July 10, 2014 (one day after Smith publicly filed the Search Warrant Affidavit accusing Xcentric, and Magedson of crimes), Brewington Tweeted “The storm is here.”<sup>1</sup> Smith has been releasing information from inside his “investigation” so that Brewington and others can use the information to bring suspicion and public condemnation on Xcentric and Magedson.

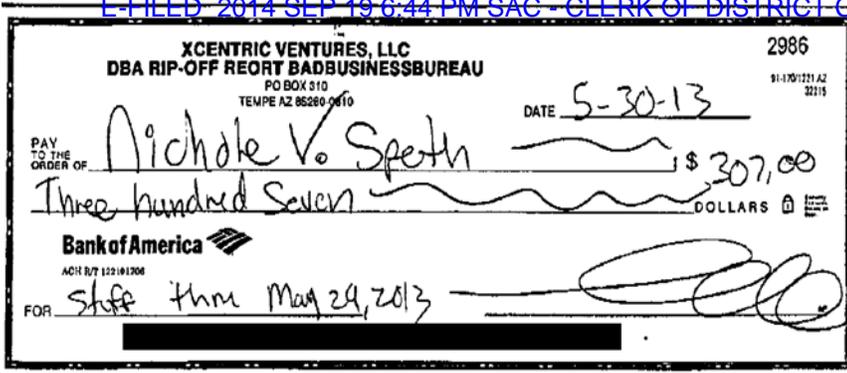
The Search Warrant Affidavit contains numerous references to the banking records of Xcentric, and to Magedson’s personal and business email correspondence, including his emails to and from his attorneys. Smith apparently subpoenaed these records or obtained warrants, then intentionally and unnecessarily made information public by releasing the Search Warrant Affidavit. Even more disturbingly, Smith appears to have released Xcentric’s banking records and private emails directly to Brewington, including emails clearly protected by attorney client privilege, knowing that information would be disseminated. Brewington then posted references on the internet to canceled checks payable to independent contractors hired by Xcentric:



Brewington could only have obtained this information from confidential banking records. The correct spelling of Nicole Speth is without an “h” in Nicole. Yet, Brewington spells the name “Nichole”, which is the same misspelling that is on the checks.

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<sup>1</sup> Brewington has since deleted those postings, but not before they were captured in screen shots.

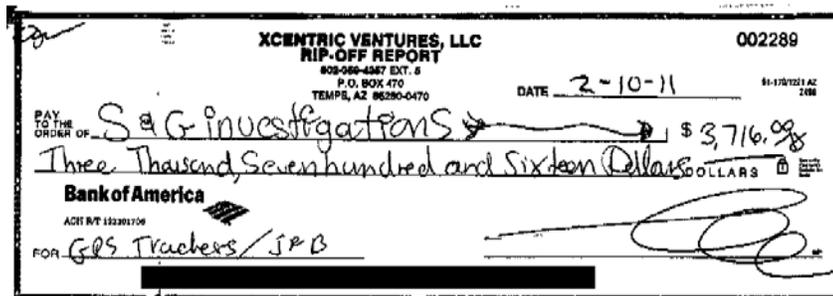


This spelling error, Nichole with an “h” is much less-typical than the standard spelling of the name “Nicole”, indicating that Brewington copied from the check image.

Similarly, Brewington posted the following reference:



The reference is to the memo section of this check which states, “GPS Trackers /JFB”:



Again, there is no way for Brewington to have known about the contents of the check without having access to the check itself. It appears that Smith misused his subpoena power and violated ethical prohibitions against releasing information to bring public suspicion and condemnation, in order to retaliate against his critics.

Smith improperly read attorney client privilege communications and referred to them in a pleading. On August 11, 2014, Smith filed a response to A. Richter's Motion to Expunge Warrant, which was the warrant that relied on the Warrant Affidavit. (Exhibit 6). In that opposition pleading, Smith said that Xcentric internally referred to a post about Brewington as a "hit piece." A thorough search of the records of Xcentric revealed that its attorney had, indeed, referred to the post as a "hit piece," and that reference only exists in a highly confidential electronic communication between counsel for Xcentric and Magedson. (Exhibit 19, Attorney-Client Communication Read and Referenced by CA Smith in a Pleading, redacted to protect further dissemination of privileged communication). That privileged email was the sole reference to the Brewington post as being a hit piece. Smith will be unable to demonstrate that the "hit piece" reference was ever in the public domain. This serious violation of attorney-client privilege is an ethical breach by itself.

### **III. DISQUALIFICATION IS APPROPRIATE WHEN THERE IS A CONFLICT OF INTEREST**

The starting point "in evaluating a claim that an attorney should be disqualified from representing a party is the ethical principles outlined in the Iowa Rules of Professional Conduct." *Bottoms v. Stapleton*, 706 N.W.2d 411, 415 (Iowa 2005). The Rules apply to prosecutors and those representing the State. *See* ICA Rule 32:1.11. Smith, as the Sac County Prosecutor and a licensed attorney, is bound by those Rules.

Rule 32:1.7 of the Iowa Rules of Professional Conduct provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest and that a concurrent conflict of interest exists if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. "[A] conflict exists when an attorney is placed in a situation conducive to divided loyalties." *State v. Watson*, 620 N.W.2d 233, 239 (Iowa 2000) (quoting *Smith v.*

*Lockhart*, 923 F.2d 1314, 1320 (8th Cir.1991)). A conflict of interest exists in the prosecution of a criminal case whenever the circumstances of the case evidence a reasonable possibility that the prosecutor's office may not exercise its discretionary function in an evenhanded manner. *State v. Cope*, 30 Kan. App. 2d 893, 895-96, 50 P.3d 513, 515-16 (2002).

The burden to prove a conflict of interest is not complex. "[A] conflict of interest claim only requires the defendant to make a showing whereby we can presume prejudice." *State v. Smitherman*, 733 N.W.2d 341, 346 (Iowa 2007). That proof is readily available here.

Courts recognize that when a prosecutor in a case is personally a victim of the alleged crime, there is a conflict of interest. "It is true that a targeted victim of a crime would be personally and emotionally vested in the outcome of the crime charged. The key in deciding whether a prosecutor should be disqualified is whether the prosecutor has a significant personal interest in the litigation which would impair the prosecutor's obligation to act impartially toward both the State and the accused." *State v. Cope*, 30 Kan. App. 2d at 897, 50 P.3d at 516. The Court stated that a conflict of interest warrants recusal if the conflict is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings. *Id.*

The key in deciding whether a prosecutor should be disqualified is whether the prosecutor has a significant personal interest in the litigation which would impair the prosecutor's obligation to act impartially toward both the State and the accused." *State v. Rivera*, 48 Kan. App. 2d 417, 435, 291 P.3d 512, 526 (2012).

Moreover, disqualification is warranted where, as here, there is a strong appearance of impropriety. See. *Doe v. Perry Cmt. Sch. District*, 650 N.W.2d 594 (Iowa 2002). The Supreme Court in *Doe* held that "[o]ur rules of professional responsibility allow us to consider the appearance of impropriety as one factor in an attorney disqualification analysis." *Id.* "Public confidence in law and lawyers may be eroded by

irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laypersons to be unethical. EC 9-2. Every lawyer owes a solemn duty ... to strive to avoid not only professional impropriety but also the appearance of impropriety. EC 9-6. *Id.*

Here, Smith's personal interest in the outcome of the Application, and in particular, in the removal of content from the Ripoff Report website, creates an unavoidable conflict, and the strong appearance of impropriety.

**IV. SMITH HAS A CONFLICT OF INTEREST BECAUSE THERE IS A SIGNIFICANT RISK THAT HIS REPRESENTATION OF THE STATE WILL BE MATERIALLY LIMITED BY HIS PERSONAL INTEREST**

Without question, Smith's prosecution of this case creates a serious issue of divided loyalties. It was brought by Smith on behalf of the State of Iowa seeking an injunction ordering the redaction of the names of "State's witnesses" from posts on Ripoff Report. The focus of the posts, however, is Smith. The most significant post complained of was written by Meade and is entitled:

Ben Smith Sac County Iowa Attorney prosecutorial misconduct, improper relationship with star witnesses, allowing witnesses to knowingly lie, seeking fame not justice, Sac county Iowa corruption. Tracey Richter falsely convicted evidence leads to overwhelming evidence to estranged husband Michael Roberts, Rexxfield failed polygraph, witness intimidation, evidence tampering, Prosecutors improper relationship with witnesses & Michael Roberts. Roberts witness protection sham. Exaggerated, misleading information to Dateline NBC. Sac City, Iowa.

Whether Meade's statements are true or false, they create a significant risk that Smith will be unable to put aside his personal interests in punishing the forum that is being used to criticize him. Smith's parenthetical afterthought in the Application that he

is not seeking the removal of his own name and image does not cure the conflict.<sup>2</sup> Smith still has a conflict of interest and his actions create a strong appearance impropriety because of his personal interest in retaliating against Xcentric.

Further, Smith has repeatedly demonstrated that he has a personal interest in continuing to help Roberts. He testified for Roberts at Roberts' custody hearing and stated that he had had "tons" of phone calls with Roberts, sometimes many in a day. (Exhibit 15) He vouched for Roberts' credibility in an affidavit submitted to Buena Vista County in Roberts' custody proceeding, calling him "completely and unabashedly honest" (Exhibit 16) despite that Roberts was found by a special agent in the murder investigation to be "99% deceptive on the relevant questions." (Exhibit 10). Smith also pleaded with the Australian Consulate to take action to allow Roberts to leave the United States with his children. (Exhibit 17).

Moreover, Smith's conflict becomes even clearer based on his own words. According to Smith, he "has spent well over 1,500 hours investigating/working on this case." (See Exhibit 3, Search Warrant Affidavit) In addition, Smith was interviewed by 60 Minutes Australia and admitted the extent of his personal interest in this matter. He said, among other things:

- "It's fair to say, if you look on the internet, I've been lumped in with all these things. . . . It sucks to see these things. . . It is just utter utter garbage, utter nonsense."
- "They attack not the facts, but the people that are presenting the facts: ME; the agents; the Sherriff; the witnesses."

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<sup>2</sup> It should be noted that when Smith submitted the Application, he had already been notified by counsel for Xcentric that Xcentric intended to raise the conflict of interest issue if Smith did not voluntarily turn the matter over to independent counsel. Instead of removing himself from the conflict, Smith attempted to avoid the conflict by modifying his requested relief. (Ethics letter, exhibit )

- “It’s difficult, you know, for me, and I keep saying ‘it’s difficult.’ But, this, this was my life for a year. Probably more than a year, every day, 20 hours a day for a year.”
- “I don’t know how [Roberts] was able to do it for as long as he has, because after a year of it, had that gone on longer than a year I don’t where I would be right now.”
- Q: “Would it have broken you by now?”  
A: “Yeah, and it almost did.”

(Exhibit 4, Interview of CA Smith 60 Minutes Australia November 2011, Excerpt)( <https://www.youtube.com/watch?v=HhtbM1M5Rdo> ). Note that when Smith lists the people that “they” attack, he lists himself first and the witnesses last.

The lack of merit in the Application is further evidence of the conflict of interest and appearance of impropriety. There is no evidence that Xcentric is guilty of anything except compassion for Meade and Richter. Even Smith admits in the Affidavit that when Meade was “broke and bereft of any employment” and “desperate for a source of income” he “saw an opportunity to forge a relationship with Ed Magedson...by providing Ed Magedson with information about the ongoing report removal attacks...” (Exhibit 3, p.23)

Anyone can post on Ripoff Report and Meade availed himself of the opportunity to use its popularity as his pulpit. Meade persuaded Magedson to feature his post on the front page of the website. That is the extent of Magedson’s or Xcentric’s involvement in any action relating to the Richter prosecution. Xcentric and Meade are the targets of this Application and Smith’s criminal investigation because the true motive of Smith, Brewington and Roberts is to shut down Ripoff Report and/or silence Meade.

Smith’s personal interest, his provision of confidential information to Brewington and Roberts, and his allegiance to them is so blatant, that he violated various portions of

Rule 32:3.8 of the Iowa Rules of Professional Conduct, including the provision which prohibits a prosecutor in a criminal case from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. Smith published, for public consumption, the Search Warrant Affidavit, which contains absurd allegations against Magedson and Xcentric. He not only made extrajudicial comments, but he invited and encouraged public condemnation of Magedson and Xcentric.

Rule 32:3.8 also requires a prosecutor to exercise reasonable care to prevent investigators or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making. Yet, Smith released privileged, private, and confidential information to Brewington and Roberts even though he knew, or should have known that they would post the information on the Internet.

The comments to Rule 32:3.8 explain the importance of this provision. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” The comments further explain:

Paragraph (f) supplements rule 32:3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.

Smith’s actions with respect to Xcentric and Magedson have been deliberate and manipulative. He has utilized third party allies outside his office – Roberts and Brewington – to disseminate statements intended to cause public condemnation of Xcentric. In fact, the Application was used as an additional publicity stunt by Roberts whose Twitter handle is “RipOffReport Victims”:

Tweets Tweets & replies

 RipOffReport Victims @RipOffReportVic · 4h

State of Iowa vs. @Ripoffreport(Civil RICO action)  
It is a beautiful thing.... #EdMagedson  
#Ripoffreport

**That Court Case Details**

[Summary] [Parties] [Long Title] [Filings] [Property/Lis Pendens] [Criminal Charges/Disposition] [Judgment]

**Filings**  
 Title: **STATE OF IA VS. XCENTRIC VENTURES LLC (ASSIGNED JUDGE BICE)**  
 Case: 02811 CVCV019540 (SAC)  
 Citation Number:

ORDER SETTING HEARING	WILKE KURT L.	08/07/2014	08/07/2014	08/07/2014
<i>Comments:</i> 9-30-14 9:00 AM				
OTHER APPLICATION	SMITH BENJAMIN JOHN	08/06/2014	08/06/2014	08/06/2014
<i>Comments:</i> APPLICATION FOR CIVIL INJUNCTION TO RESTRAIN TO RESTRAIN HARASSMENT OR INTIMIDATION OF VICTIMS OR WITNESSES				

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In addition to the conflict, Smith’s actions have a prejudicial effect on the administration of justice. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 373 (Iowa 2005). Although “there is no typical form of conduct that prejudices the administration of justice. *See Iowa Supreme Court Attorney Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 373 (Iowa 2005). Although “there is no typical form of conduct that prejudices the administration of justice,” actions that have commonly been held to violate this disciplinary rule have hampered “the efficient and proper operation of the courts or of ancillary systems upon which the courts rely.” *Iowa Supreme Ct. Bd. of Prof’l Ethics & Conduct v. Steffes*, 588 N.W.2d 121, 123 (Iowa 1999). A treatise

considering the ethical problems presented by conflicts of interest has noted that some conflict-of-interest rules protect not only the rights of clients, but also “the integrity of the legal system.” 1 *The Law of Lawyering* § 10.2, at 10-7; see also *id.* § 11.19, at 11-59 (discussing interests of tribunal and public that are adversely affected by conflicted representation in litigation). As this treatise explains, “the tribunal has an interest in basing its decision making on a full and vigorous presentation of the competing positions.” *Id.* § 11.19, at 11-59. Similarly, “society as a whole has a right to expect that the system not be tainted by resort to hidden and conflicting agendas.” *Id.* § 10.2, at 10-7 to 10-8; see *Comm. on Prof'l Ethics & Conduct v. Oehler*, 350 N.W.2d 195, 199 (Iowa 1984) (noting conflict-of-interest rules set out in DR 5-105 “are plainly in the public interest”). Smith’s agenda is not very well hidden, but it plainly prejudices the administration of justice to permit him to continue to represent the State against Xcentric in this matter.

## V. CONCLUSION

Smith has a clear, unmistakable, actual conflict of interest in making a motion to redact details from reports critical of his public service. Also the appearance of impropriety will undermine the integrity of the court system, and damage the faith of citizens in the courts and the administration of justice, which the rules of ethics are designed to protect. The nature of these circumstances are nearly overwhelming. All lawyers know to avoid conflict of interest and its appearance, that is basic to the practice of law. The proper remedy for a conflict of interest is attorney disqualification from the representation. See *Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009). Smith must be removed from any further involvement as the State’s attorney in this case.

DATED this \_19th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014, I electronically filed this document with the Clerk of Court using the Electronic Filing system which will serve it on the appropriate parties.

Signature: /s/Maria Crimi Speth