



MINNESOTA JUDICIAL TRAINING UPDATE

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URINE DRUG TESTING: THE RISK OF FALSE POSITIVES WHAT JUDGES NEED TO KNOW



THE LEGAL IMPORTANCE OF URINE DRUG SCREENING (UDS) TESTS

Judges rely on urine drug screening (UDS) tests in a myriad of criminal and civil settings. In criminal cases, defendants are often ordered by the court not to use or possess alcohol or mood altering chemicals as a condition of their pretrial release or probation. Many defendants must submit to random UDS testing. In family court cases, parents are often ordered to undergo UDS as part of a court-ordered child custody evaluation. The results of the UDS can have tremendous adverse consequences for defendants (incarceration or loss of privileges) or for divorcing parents (loss of custody or parenting time). The potential for false-positive urine drug screen (UDS) results presents a due process dilemma for the presiding judge. When and under what circumstances can a judge feel comfortable relying on the results of a urine drug screening test without a secondary confirmation test?

WHAT YOU NEED TO KNOW ABOUT (UDS) AND FALSE POSITIVE RESULTS

Two different testing methods are commonly available for urine drug testing.

- 1. Urine drug Screening Test:** The most commonly used UDS tests are immunoassays, as they allow large-scale screenings with rapid detection at minimal expense. The disadvantage of immunoassays is the risk of false-positive results. A false-positive result for individuals with court-ordered or work-related screening can lead to legal interventions, workplace disruptions, or questions of honesty. Although reports of false-positive results using the immunoassay test are infrequent, the potential for a false positive result presents a due process dilemma for the presiding judge.
 
- 2. Confirmation Test:** Gas chromatography in combination with mass spectrometry (GC-MS) is a more expensive and time-consuming test, but is the gold standard for confirming a positive result on immunoassay. By definition, all positive results on GC-MS are true positives.
 

ALTHOUGH RARE - WHAT COMMON SUBSTANCES CAN CAUSE FALSE POSITIVES ON URINE SCREENS FOR DRUGS OF ABUSE?

Although reports of false-positive results are rare, when they do occur they have been identified with the following medication classes: antihistamines, antidepressants, antibiotics, analgesics, antipsychotics, and nonprescription agents such as poppy seeds and nasal inhalers (Vicks inhaler). Examples of specific medications with false-positive reports can be found at: <http://www.askdocweb.com/falsepositives.html>

MEDICAL AND SCIENTIFIC COMMUNITY RECOMMENDATIONS

With the increased availability of onsite drug testing and the variety of products associated with reports of false-positive results, the prevailing view within the medical and scientific community is that confirmation of test results is needed. The US Department of Health and Human Services requires confirmation of positive immunoassay results by GC-MS for drug testing in the workplace. The College of American Pathologists, the principal organization of board-certified pathologists states: "Confirmation testing, a standard of practice in forensic toxicology should be performed in clinical toxicology whenever possible."

WHAT SHOULD JUDGES DO?

Within the court system there is no standard state-wide judicial protocol on drug testing. The use or non-use of confirmation drug testing in criminal and child custody cases vary from county to county. Failure to require confirmation tests to determine if a false-positive may have occurred could result in unnecessary adverse consequences for a defendant (incarceration or loss of privileges) or a divorcing parent (loss of custody or parenting time).

- As a general rule, in cases where there is "no corroborating evidence" of drug use, confirmation testing should always be used.
- However, whether the facts and circumstances of a particular case establish the use of illegal drugs (based on whatever burden of proof standard applies for that particular hearing) the need for confirmation testing is a matter best left to the discretion of the presiding judge. For example, in many cases the defendant or divorcing parent may admit to the suspected drug use without the need for expensive confirmation testing.
- But in order to properly exercise that discretion the court MUST, at a minimum, be advised by whoever is offering the test results (prosecution, corrections, child custody evaluator, etc.) whether the results come from an initial urine drug screening test (immunoassay) or a secondary confirmation test (GC-MS). This is one area where judges need to be proactive.

SPECIAL CONCERN – CHILD CUSTODY EVALUATIONS

The biggest disadvantage to the gold standard GC-MS confirmation testing is the high cost associated with it. According to the state Guardian Ad Litem program, some recommendations contained in custody evaluation reports rely on positive urine drug testing results that come from initial immunoassay tests. Many of those test results have NOT been subjected to confirmation testing (GC-MS) to determine if a false positive may have occurred. Some custody reports refer to the urine drug test results but do NOT include language advising the judge whether the test results are from initial screening tests (immunoassay) or confirmed drug tests (GC-MS). In order to properly weigh the strength of that evidence judges need to know the status of the test results (confirmed or not confirmed).



URBAN MYTH – FALSE POSITIVES BASED ON SECOND-HAND SMOKE

QUESTION: Can you fail a urine drug test because of secondhand marijuana smoke or cocaine vapor? For example, a defendant or parent claims he/she was at a party or in a car and everyone nearby was smoking marijuana.



ANSWER: NO! Except for the most extreme circumstances. In one study, 6 volunteers in an 8x8x7-ft enclosed room were exposed to 200 mg freebase cocaine vapor; none of their urine samples exceeded the federal GC-MS threshold. In a similar study of 3 non-smokers exposed to 8 marijuana smokers (smoking 32 joints) in a 10x10x8-ft enclosed room, no samples from the nonsmokers exceeded the federal GC-MS threshold. The likelihood of testing positive for marijuana (THC) from secondhand smoke is extremely slim. A person would have to be in a small, unventilated space with lots of smoke for an extended period of time, a clambake if you will, to have enough THC in their system to flunk a urine drug test.

RESOURCES: Minnesota Monitoring, Inc. 2300 Nevada Ave N Ste 100, Golden Valley, MN 55427, (763) 253-5401; "Commonly Prescribed Medications and Potential False Drug Screens, Am J Health Syst Pharm. 2010: 67 (16): 1344-1350, <http://medwscope.com/viewarticle/726897>; "Family Physicians Network, www.ifponline.com, Vol 55, No 10, October 2006; Dylan Warkentin, Director of Court Services, Anoka County.