

## **THE “MILLER” TEST**

The required guidelines for determining obscenity are set out in the United States Supreme Court’s decisions in *Miller v. California*, 413 U.S. 15, 2425 (1973), *Smith v. United States*, 431 U.S. 291, 301-02, 309 (1977), and *Pope v. Illinois*, 481 U.S. 497, 50001 (1987), comprising the following three-prong test.

Whether the average person, applying contemporary adult community standards, would find that the work, taken as a whole, appeals to the prurient interest (i.e., an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); AND Whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (i.e.: ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse); AND Whether a reasonable person should find that the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

**NOTE:** (“hard-core sexual conduct” vs. “hard-core pornography”) In *Miller*, the Supreme Court stated that any material which depicts or describes “hard-core sexual conduct” were set out in *Miller* (413 U.S. at 25) as “ultimate sexual acts, normal or perverted, actual or simulated”, and “masturbation, excretory functions, and lewd exhibitions of the genitals”. In a legal sense, therefore, “hard-core pornography” can be either simulated sex or it can be actual, explicit sex or either type can be found obscene in any given community. However, the term “hard-core pornography” is used in the pornography industry for films and magazines which show penetration clearly visible. This explicit type of “hard-core pornography” has been held by the courts as material which clearly fits within the definition of obscenity and lacks First Amendment protection. (See: Taylor, “Hard-Core Pornography: A Proposal for A per Se Rule”, 21 U. Mich. J.L. Ref 255 (1988).