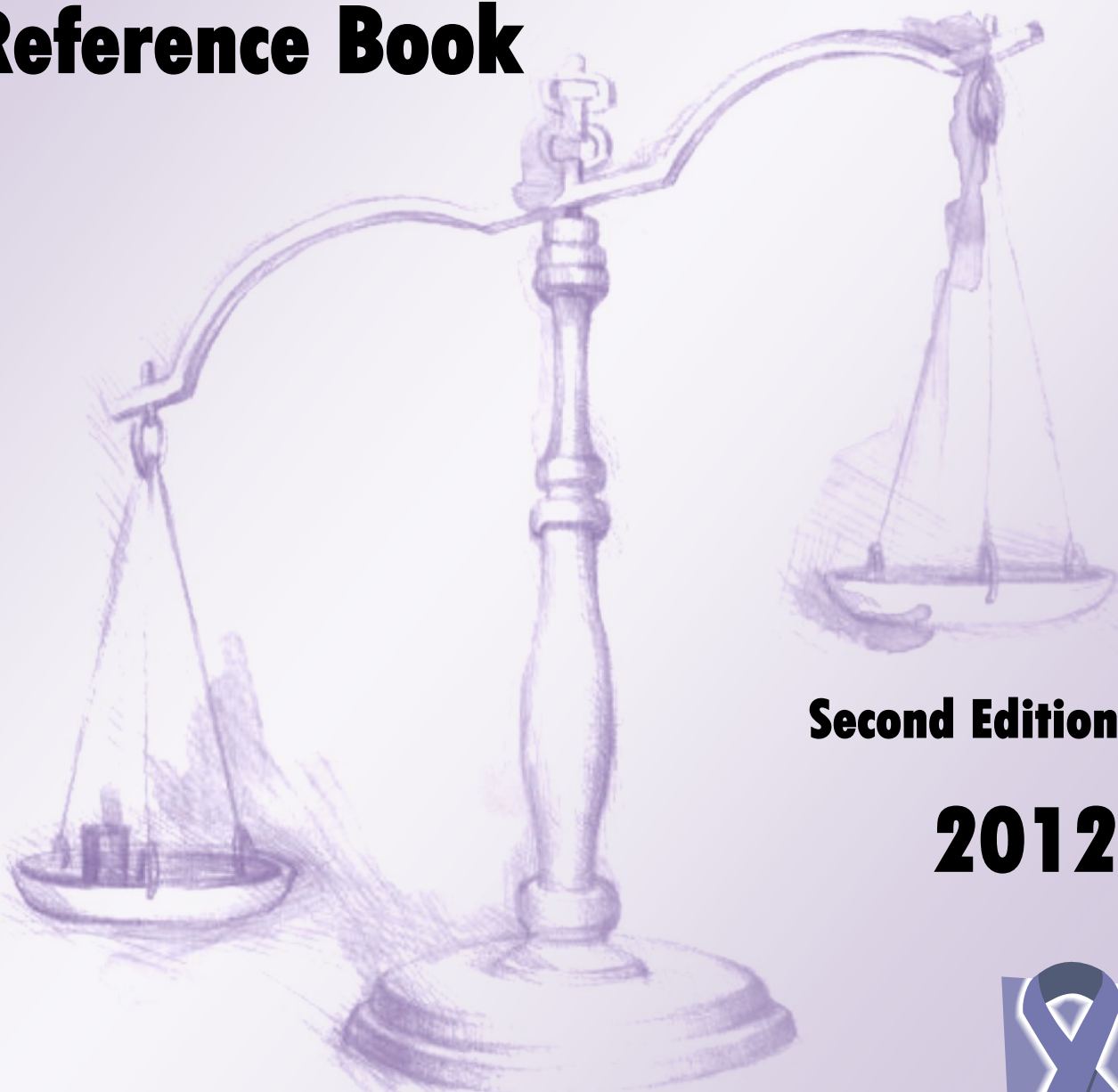


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Wisconsin Prosecutor's Domestic Abuse Reference Book



Second Edition

2012

Wisconsin District Attorneys Association



The Wisconsin Prosecutor's Domestic Abuse Reference Book was developed by the Wisconsin District Attorneys Association (WDAA) and published by the Wisconsin Office of Justice Assistance (OJA). The project revised the original Wisconsin Domestic Violence Prosecution Manual, published in 2004. Please refer questions and comments to:

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As a "living document," this reference book reflects current best practices in the prosecution of domestic abuse. Readers may contact OJA and WDAA to recommend and share information on emerging practices that will contribute to the continued development of this reference book.

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The Wisconsin District Attorneys Association (WDAA) thanks the Wisconsin Office of Justice Assistance (OJA) for the Specialized Prosecution Manual Grant through the Violence Against Women Act and the American Recovery and Reinvestment Act. The WDAA offers a special thanks to Karen Barber and Kittie Smith at OJA for initiating this project. The support of OJA provided the WDAA with the opportunity to revise the original Wisconsin Domestic Violence Prosecution Manual (2004) into the Wisconsin Prosecutor's Domestic Abuse Reference Book (2012).

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Former Milwaukee County District Attorney E. Michael McCann opened the original manual reminding all prosecutors to seek justice in the prosecution of domestic abuse cases. United States Supreme Court Justice Sutherland similarly explained that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones" because a prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). This reference book provides prosecutors with guidance in successfully prosecuting crimes of domestic abuse while respecting the rights of the accused.

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The WDAA thanks all the professionals who worked on the original manual and the revised reference book. Former Domestic Violence Unit Director Paul Dedinsky from the Milwaukee County District Attorney's Office explained that the original manual involved many attorneys and advocates completing the work on their own time in evenings and on weekends. The revision similarly required many professionals to work tirelessly on the project for little or no financial compensation. Despite ever increasing caseload demands, these professionals rose to serve crime victims and survivors of domestic abuse in pursuit of justice.

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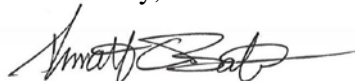
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Wisconsin Prosecutor's Domestic Abuse Reference Book

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1. Victim Communication in Domestic Abuse Cases

1. Introduction
2. Goals of Victim Communication
3. Method of Communication
4. Benefits and Specific Example Cases
5. Conclusion

1. Introduction

Learning how to communicate with victims of domestic abuse is one of the most basic and important lessons a prosecutor has to learn. Unlike any other type of crime victim a prosecutor encounters, a domestic abuse victim usually has a close personal relationship with the offender. That relationship often lends itself to high levels of victim intimidation. But beyond that, for a variety of reasons the victim may not be interested in prosecution, or may not want to further complicate a dangerous situation by cooperating with the prosecution.

The bottom line is that in domestic abuse cases, relationships directly impact the effectiveness of the prosecution. Prosecutors must work to establish a relationship of trust with victims. Many victims may have their first interaction with the prosecutor during the “honeymoon” period that typically follows an abusive incident. A victim may also feel that the prosecutor’s ability to protect him or her is not as strong as the abuser’s desire to hurt him or her. Keep in mind that on this point, the victim may be right. Without that relationship of trust, the victim’s relationship with the offender will often dictate the victim’s actions and may prevent the prosecutor from holding the offender accountable.

2. Goals of Victim Communication

When developing the skills necessary to effectively communicate with victims of domestic abuse, it is essential to remember the prosecutor’s goals. In many situations, prosecutors correctly focus first on “holding the offender accountable.” This is of course a worthy goal in any prosecution, but in domestic cases it should not be the first thought in the prosecutor’s mind. Everything the prosecutor does should be designed to first make the victim safer. Usually, this is done by holding the offender accountable and either incarcerating or monitoring the offender, but if the first focus is not on making the victim safer, then the prosecutor can easily miss opportunities to hear and address the victim’s concerns.

If the victim feels that the prosecutor is only interested in accountability for the offender, then the victim hears that the prosecutor is only interested in how the victim can help the case. This is a terrible impression to give a person who is most likely already concerned about what will happen to the offender. Again, changing the focus from offender accountability to victim safety may not change any of the actions taken by the prosecutor, but it will change how the prosecutor interacts with the victim, and that is the point.

Prosecutors should also keep in mind that victims of domestic abuse may not be willing to cooperate with the prosecution the first time they come through the system. For many victims, there is a long history of abuse between the parties before there is ever a report, and a similar pattern of police contact before the victim decides to cooperate with the prosecution. Regardless of the victim's actions or statements, the message from the prosecutor should be consistent: We are ready to prosecute the offender when they are.

Again, victims often feel powerless, manipulated and scared. If the prosecutor chooses to use the coercive power of the State to force the victim to testify, then the prosecutor is just another overpowering force in the victim's life. Though this may work to secure a conviction and may even be necessary in extreme cases, it is not by any means a preferred method and can make the whole experience so horrible for the victim that it may discourage further reporting of abuse. If that happens, then the victim is in an even more dangerous position than before he or she encountered the prosecutor. For that reason, the message from the prosecutor should be that they are interested and willing to prosecute, but that the victim's safety is the primary focus and concern.

If the prosecutor is successful in conveying these goals of victim safety and a readiness to prosecute when the victim is on board, then the final goal of holding the offender accountable becomes much easier. To be clear, nothing said in this section should be understood to contradict the requirement in WIS. STAT. § 968.075(7)(a)(2) that a charging decision cannot be based solely on the victim's wishes. A case that is provable without the victim's testimony should almost always be zealously pursued. However, when communicating with victims, the accountability of the offender cannot be the first thought.

3. Method of Communication

Every time a prosecutor has contact with a victim, information is conveyed. Whether the information is conveyed intentionally or not, victims pick up on the way the prosecutor talks to them and make judgments about the prosecutor's motives. Victims are used to manipulation; if they feel like the prosecutor is "using" them, it can cause huge problems down the road. Thinking about the situation from the victim's perspective can help prevent this from happening.

Typically, even if victims have been through the system many times, they are still unsure of the way things work and the different roles of the individuals they meet. A victim may have talked to police, advocates, child welfare workers, social workers, hospital staff, probation agents and many other individuals about the events of the case before they ever meet the prosecutor. Even

after a case is filed and the process is under way, victims can often be unclear about how all these people relate to the case.

Every time a prosecutor interacts with a victim the prosecutor should ideally do the following:

- Introduce yourself by name and explain that you are the prosecutor assigned to the case.
- Explain the purpose of the hearing or communication, whether it is a charging conference, preliminary hearing, trial, etc.
- Inquire whether the victim understands the situation and ask whether he or she has any questions.
- Listen to what the victim says or asks and respond in a way that lets the victim know that you heard. Even if you cannot do what the victim wants, explain why.

If the prosecutor follows this template every time there is an opportunity to communicate with the victim, the victim will be better prepared for what happens during the case and the prosecutor will have established an essential level of trust, regardless of the outcome of that particular case.

4. Benefits and Specific Example Cases

Victim safety is of course the primary benefit of approaching domestic abuse victims using this method. However there are other benefits that improve both the quality of the prosecution and the potential outcomes for the victim, regardless of the end result of the case.

First, in terms of the quality of the prosecution, the prosecutor has the opportunity to gain additional insight into the case and the context of the victim's situation. Do not assume there is a "credibility issue" just because there are slight factual disparities between a victim's statement to you and the narrative in the police report. If you learn of additional information that requires police investigation or supplemental reports, you should request follow-up.

Second, another benefit of meeting with the victim is that he or she will likely disclose additional or new contact information. Particularly when dealing with victims who are transient either because of lifestyle or because the offender is living in the couple's residence during the case, current contact information is essential. By establishing good communication and asking for updated information, the prosecutor increases the likelihood that the victim can be subpoenaed for trial. As a side note, if the prosecutor has gained the victim's trust enough that he or she is willing to give the prosecutor the name of the school his or her children attend, that can be a very solid way to reestablish contact; few children switch schools even if their home address changes.

Even in situations where the prosecutor decides not to issue charges or the case is closed without a conviction, one overall benefit may be improved safety for the victim. First, every communication is an opportunity for victim education. In addition, referrals may be made to advocacy groups for safety planning and other services. Even if the justice system cannot force a

change in the victim's situation, simply by communicating effectively with victims, the prosecutor can still have a positive impact on the ultimate outcome.

Finally, even the most frustrating interaction with a victim can be used to advance the goals of victim safety and offender accountability. Anyone who has prosecuted even a handful of domestic cases has experienced the recanting victim. But before the victim ever gets on the stand, a recant gives the prosecutor the ability to demonstrate that he or she is truly interested in the victim's safety. The key is to remember that the victim knows he or she is not telling the truth. If the prosecutor respectfully and gently tells the victim that the prosecutor knows that he or she is not being truthful and then informs the victim that the prosecutor is willing to go forward with the case when the victim is ready, the victim will remember that. Whether the case is tried with or without the recant, whether there is a conviction or not, the victim will remember that the prosecutor did not use the victim's deception as an excuse to become angry with him or her and that the prosecutor did not waver from the goal of working to make the victim safer. It may not change the victim's mind about recanting, but at the very least it will send the message that the prosecutor understands the situation and will not abandon the goal regardless of the actions of the victim.

5. Conclusion

Communicating with victims of domestic abuse can be challenging and frustrating for a prosecutor. Most prosecutors do not have personal experience with the dynamics of an abusive relationship. From the outside, the actions of victims can seem difficult to understand and even appear to be the exact opposite of what a "normal" person would do in a similar situation. By following the method outlined in this section, prosecutors can have confidence that they have done everything within their power to improve the safety of the victim and hold the offender accountable.

2. Introduction: The Philosophy Guiding Domestic Abuse Prosecution Policies and Procedures in Wisconsin

1. Prosecution Policy by Statute
2. Prosecution Strategies for Domestic Abuse
3. The Purpose of Evidence-based Prosecution
4. Written Protocols
5. Sample Domestic Abuse Prosecution Protocol
6. Conclusion and Suggested Readings

1. Prosecution Policy by Statute

Defendants who engage in domestic abuse believe they are entitled to assert power and control over their victims. Historically, this belief was reinforced by law enforcement practices that treated domestic abuse as a family matter which is meant to stay in the privacy of a home. Wisconsin changed its laws in recognition of the notion that family violence impacts the entire community and must be treated as seriously as any other crime which places a person's safety in jeopardy. The law also recognizes that the defendant will continue to exert coercion over the victim during the pendency of the criminal action, placing pressure on the victim to get the charges "dropped." Thus the law explicitly states that neither law enforcement nor prosecutors may make their decisions about arrest or prosecution based on the victim's wishes. To take the onus off the victim and perhaps reduce the defendant's ability to pressure the victim when the case is underway, it is good practice to inform the defendant the State is in charge.

When the Wisconsin Legislature adopted WIS. STAT. § 968.075, it established a "pro prosecution" stance in cases of domestic abuse:

WIS. STAT. § 968.075(7) PROSECUTION POLICIES.

Each district attorney's office shall develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses. The policies shall include, but not be limited to, the following:

- (a) A policy indicating that a prosecutor's decision not to prosecute a domestic abuse incident should not be based:

1. Solely upon the absence of visible indications of injury or impairment;
 2. Upon the victim's consent to any subsequent prosecution of the other person involved in the incident; or
 3. Upon the relationship of the persons involved in the incident.
- (b) A policy indicating that when any domestic abuse incident is reported to the district attorney's office, including a report made under sub. (4) [where no arrest occurred], a charging decision by the district attorney should, absent extraordinary circumstances, be made not later than 2 weeks after the district attorney has received notice of the incident.

2. Prosecution Strategies for Domestic Abuse

Many prosecutors believe that WIS. STAT. § 968.075 encourages us to pursue domestic abuse cases even without the cooperation of victims and proceed with the case solely on the remaining evidence, instead of relying exclusively upon the testimony of the victim(s). This is called "evidence-based prosecution." Many prosecutors' offices across the state do have such a policy in place.

In practice, to effectuate such a policy, we must ask ourselves a simple question: How can I prove this case without the participation of the victim? We must anticipate that the victim may recant, minimize the facts, refuse to testify, or disappear altogether.

If this policy of pursuing cases without victims is going to succeed, then the police who gather evidence in domestic cases must be trained similarly to ask themselves: How can we investigate the case and gather the corroborative evidence necessary to prove the facts in court, even without the victim?

For more information on evidence-based prosecution, see Casey Gwinn, *Prosecuting Domestic Violence Cases Without the Victim's Participation or Evidence-Based Prosecution*, National College of District Attorneys Annual Domestic Violence Conference (2001).

3. The Purpose of Evidence-based Prosecution

a. Homicide prevention

One theory argues that the prosecution of domestic abuse is actually a form of homicide prevention. There is research to support this theory. Effective prosecutorial policies and approaches have drastically reduced the rate of intimate partner homicide. Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 303-04 (1993). If we truly believe prosecuting domestic abuse is, in effect, homicide prevention, then compliance with WIS. STAT. § 968.075 makes sense.

b. Prevent escalation of violence

Misdemeanor domestic abuse cases are very important! Behind many, if not most, domestic homicides exists a history of domestic abuse cases. Over time, violence can escalate. The relationships often become more dangerous, especially among older individuals. We want to prevent any further escalation of violence.

c. Prevent future abuse

If we think about domestic abuse prosecution as being a way to prevent future abuse, the need for more “evidence-based” prosecutions without victim testimony increases. Statistics tell us that children who grow up with domestic abuse are six times more likely to commit suicide; they are also substantially more likely to become abusers themselves. Howard Davidson, Director, ABA Center on Children and the Law, *The Impact of Domestic Violence on Children: A Report to the American Bar Association* (Oct. 1994) (pamphlet, on file with author). Thus, it stands to reason that an effective break in the cycle of violence may prevent future abuse from occurring in that individual family.

d. Focus on children and families

If we believe that children, in large part, develop their morals, core values and guiding beliefs from their families, then it makes sense to keep violence out of family settings. Studies show that that 85% of incarcerated individuals nationwide grew up in violent homes. *Id.*

Violence is a learned behavior. A child learns most early behaviors from parents or parental figures. When a police officer responds to a home and tells a child that violence is not okay, that child receives a new message, perhaps a competing message. The presence of law enforcement officers can meaningfully and positively impact a family’s cycle of violence.

If the main goals of domestic abuse prosecution are to keep victims safe, hold abusers accountable, and reduce recidivism, then we must strive to effectively prosecute domestic cases in Wisconsin. We must train and prepare law enforcement to adopt similar strategies, with the goal of collecting corroborating evidence for use at trial. Every law enforcement officer that responds to a scene must be trained to gather the evidence that prosecutors need in order to prove domestic abuse cases at trial without the participation of the victim.

Note that we do not seek to dissuade victims from participating in the court process. We merely intend to be prepared for the worst-case scenario, should the victim decide not to cooperate, or is otherwise unable to participate, in the prosecution of a case.

4. Written Protocols

Many jurisdictions across the United States, in addition to Wisconsin, have pledged to not drop cases merely because the victims refuse to cooperate in the prosecution of their abusers. If

enough evidence exists to issue charges in good faith, many jurisdictions file complaints and proceed. To that end, prosecutors need to develop, adopt and implement written policies and protocols encouraging vigorous evidence-based prosecution.

Wisconsin law requires that each district attorney's office in the state have its own written protocol outlining how that office intends to address domestic cases. The protocol does not need to be particularly specific, but it does need to be written, and it does need to address – at least in general terms – the manner in which your office will approach these cases.

Your office may thrive on detailed policy statements. Some of you desire more generalized policies and protocols. Either way, some items should be (or must be) included in your office's domestic abuse protocol, such as information pertaining to your office's handling of victims, your office's charging practices, whether charges rely upon the participation of the victim, vertical vs. horizontal prosecution, and plea agreement practices.

As you put together an office protocol for domestic abuse cases, you may want to address potential aggravating factors (also known as "lethality factors"). Aggravating factors help you link research to practical reality in your efforts to curb family violence. Factors such as the use of weapons, ownership of guns, history of abuse, AODA issues, prior criminal record, homicidal or suicidal threats, and the nature and seriousness of the present offense are all things you can and should consider during all phases of a domestic abuse case.

5. Sample Domestic Abuse Prosecution Protocol

The Milwaukee County District Attorney's Office philosophy guiding domestic abuse procedures appears below. This statement can be used as a guideline, or simply as an example of one way to approach the requirement of a written office policy.

The Philosophy Guiding the Domestic Abuse Unit's Policies and Procedures

Domestic abuse is a crime against the State of Wisconsin, not a private "family matter." In recognition thereof, the policies and procedures for the Domestic Abuse Unit encourage the vigorous prosecution of domestic abuse offenses and emphasize prevention through increased public awareness, education, and early intervention.

All victims and witnesses will be treated with dignity, respect, courtesy and sensitivity. The victim's wishes are important and should be heard, considered and communicated to judges or commissioners, even if those wishes differ from the wishes of the State. Prosecution or diversion will depend upon the ability of the State to prove the case to the requisite "beyond a reasonable doubt" standard, and not upon the willingness of the victim to testify or upon the relationship of the parties involved in the incident. Each case should be reviewed and prosecuted fairly and impartially without regard to race, gender or sexual preference of the parties.

It is the intent of this policy to deter future acts of domestic abuse by holding the physical aggressor accountable for his or her actions taken against the laws of the State of Wisconsin and to protect the rights of victims and citizens to be free from physical abuse or injury. Further, it is the intent of this policy to hold aggressors accountable while at the same time keeping the victims informed of the progress of the case at all times.

Finally, it is the policy of this office to coordinate its efforts against domestic abuse with those of the surrounding community, including law enforcement, community-based organizations, shelters, health care providers, probation and parole, churches and schools. Only through such coordination of community efforts can the underlying causes of domestic abuse truly be addressed in a meaningful way.

Appendix 1 includes the complete Dane County District Attorney's Office protocol as another sample protocol for your review.

6. Conclusion and Suggested Readings

As stated above, Wisconsin statutes mandate that each prosecutor's office have a written policy on handling of domestic abuse cases. Policies must include statements that a prosecutor's decision not to prosecute a domestic abuse incident should not be based solely upon the absence of visible indications of injury or impairment, upon the victim's consent to prosecution of the other person involved in the incident, or upon the relationship of the persons involved in the incident. In addition, policies should note that absent extraordinary circumstances, including a report made where no arrest occurred, a charging decision by the district attorney should be made not later than two weeks after the district attorney's office has received notice of the incident.

Prosecutors can expect and predict that victims will engage in survivor behaviors which may include, but are not limited to: recantation, minimization, denial, failure to recall incident(s), and attendance at criminal proceedings with the defendant or the defendant's attorney. Evidence-based prosecution addresses these victim dynamics. Prosecutors need to train police officers to treat every domestic abuse incident as a homicide; officers must be trained to presume that they may have no access to the victim after the initial investigation and must collect all evidence immediately. Further, studies and experience demonstrate that effective prosecution of domestic abuse cases, with or without the victim's assistance, saves lives of victims and holds the abuser accountable. Finally, children receive the message that violence in the home is not acceptable and will be dealt with swiftly, thus helping to break the intergenerational transmission of domestic abuse.

Throughout this manual, we relied upon the good ideas and experiences of many professionals working to combat domestic abuse across the country. Some of those individuals are listed below. We thank them for their contributions to this manual and to their commitment to ending

family violence. For more ideas about what you can include in your office protocol, or to learn more about lethality factors, you may refer to these suggested readings:

Michelle Madden Dempsey, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS*, Oxford Univ. Press (2009).

Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 *GEO. J. GENDER & L.* 127 (1999-2000).

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3. A Brief History of Domestic Abuse in Wisconsin

1. Historical Perspective
2. Domestic Abuse Law Enforcement Response: Mediate or Separate
3. Criminal Justice System Response
4. Time for Change
5. The Beginning of Collaboration
6. State of Wisconsin Domestic Abuse Law
7. Initial Reaction to the Legislative Changes
8. Power and Control Wheel

1. Historical Perspective

In the past few decades, police departments and prosecutors have proactively responded to domestic abuse. The law enforcement response to domestic abuse incidents has become increasingly more aggressive. This improved response to domestic abuse victims and children indicates a willingness to change. That is fortuitous, because improvements can always be made.

Implementation of the mandatory arrest law exposed both the severity of the domestic abuse problem and its roots. After its passage, the number of arrests for domestic abuse incidents skyrocketed and remained steady through the years. While the number of domestic homicides against victims have decreased somewhat, the numbers of domestic homicides against perpetrators have drastically reduced. Because victims now believe they can receive criminal justice assistance, fewer victims fight back and kill in self defense. However, in recent years, the numbers of domestic homicides are again dramatically increasing as defendants now more and more often kill the victim, their child(ren) and themselves. This dynamic speaks to the thinking pattern of domestic abuse defendants: “You (the victim) are my property. If I cannot control you and get all of my needs met by you, I will not allow you to live without me. I will punish you by taking the children’s lives. Further, I refuse to take responsibility for my actions or be held accountable – I will die before I will own or change my behavior.” Defendants are best served if arrested early in their abuse cycle, before this pattern of thinking is reinforced. Defendants whose behaviors become nonabusive do so because they choose to change their thinking pattern. This can happen via batterers’ treatment (not anger management), which incorporates use of cognitive restructuring and examination of power and control tactics. Changing thought patterns can change the behavior.

For centuries men were allowed to resort to violence for the sake of controlling their families. These actions were sanctioned both legally and socially. The term “rule of thumb” is said to have been born from domestic abuse: a man supposedly could legally strike his wife with a tree branch, provided that it was no thicker than his thumb. Supposedly, a North Carolina court first used the phrase in 1874 in the case *State v. Oliver*, where a man was found guilty of assault and battery and fined \$10 for beating his wife with a stick thicker than his thumb. Jack C. Straton, *North Carolina—Violence Women*, UNIVERSITY STUDIES PORTLAND STATE UNIVERSITY, PORTLAND, OR, 1, available at http://www.europofem.org/contri/2_04_en/en-viol/28en_vio.htm.

The culture of “family control” continued into the 1960s, when the police response began to focus on the *social* aspects of domestic abuse. However, in large part, the *criminal* aspects of domestic abuse were still ignored . . . a woman beaten by a stranger would be treated as the victim of a crime, and a woman beaten by her husband would be treated quite differently by the court system.

2. Domestic Abuse Law Enforcement Response: Mediate or Separate

Prior to the 1970s, the truth was plain. It was socially acceptable for a man to physically control his wife as long as he did so in private, and so long as the injuries were relatively minor. Few domestic abuse arrests were ever made. Laws required police to either witness the crime themselves or to obtain a warrant in order to make an arrest. The typical police response was to either mediate or separate. See American Prosecutors Research Institute (APRI), National District Attorney’s Association, “Evolution of Domestic Violence Law Reform,” Rural Domestic Violence Issues 13 (2000) (unpublished conference materials).

Domestic matters received a low police priority. “Take it off the street” was an accepted police response during this time. Compounding these problems was the lingering social belief that domestic abuse was better dealt with as a private family matter. See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. AND MARY L. REV. 1505, 1508 (1998).

The practice of separating the combatants was considered a proper police response. This practice involved first talking to the abuser and victim for a few moments and then convincing the abuser that it would be better to find another place to stay for a night or two. Once that was accomplished, the matter usually ended there. Criminal investigations were seldom initiated.

Many police departments had clear non-arrest policies and issued officers training manuals urging them to dissuade victims from pressing charges by emphasizing the undesirability of getting involved in the criminal justice system. See Joan Zorza, *1970-90*, 83 J. CRIM. L. & CRIMINOLOGY 46, 48-50 (1992). One old instructor’s manual from Michigan’s Police Training Academy directs officers to avoid making arrests by using the following methods: appealing to the complainant’s vanity, explaining the lengthy and complicated process of obtaining an arrest

warrant, emphasizing the loss of time as well as the cost to both parties, explaining that attitudes about the incident will change over time, and recommending the postponement of legal action because court is either not in session or a judge is unavailable.

3. Criminal Justice System Response

During this time, the entire criminal justice system was effectively blind to the issue of spousal abuse. Prosecutors would commonly seek dismissal of their own charges later if the batterer adhered to conditions instituted by the prosecutor and no additional incidents occurred. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1664 (2004).

Compare this approach with the prosecution of any other type of crime. Did prosecutors care that an armed robber had not held up a convenience store between the time of the issuance of charges and the trial date? Did prosecutors care when a repeat drunk driver had not picked up a new OWI? This rationale seemed to apply only to domestic cases. Clearly, prosecutors were not treating domestic abuse as a crime.

Judges also imposed their own barriers to the prosecution of domestic abuse, often dismissing domestic cases as being beyond the scope of matters in which the court should interfere. *Id.* at 1689.

4. Time for Change

Things started to change starting in the 1960s. Social scientists became involved in domestic abuse issues, pushing for the creation and implementation of police mediation and crisis intervention units. Still, the criminal aspects of domestic abuse received little emphasis.

Victims' rights groups formed in the 1970s, emphasizing the criminal nature of domestic abuse. These groups advocated for a change in the commonly-held perception that domestic abuse was a private matter. Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 628 (2000). The victims' stories began to take center stage. Beginning in the mid-1970s, grassroots groups opened many shelters for battered women and their children across the country. The first such shelter in Wisconsin opened in 1978. *Our History*, Sojourner Family Peace Center, available at <http://www.familypeacecenter.org/about-us/our-history.htm>.

Many of the victims' and women's rights groups believed that arrest should be the police response in every domestic abuse case.

In 1981, Dr. Lawrence W. Sherman and Richard A. Beck, working under a grant from the U.S. Department of Justice, began an experiment to attempt to determine the ideal police response to domestic abuse. To do so, they evaluated 304 misdemeanor domestic abuse cases in Minneapolis, Minnesota. In a report published in 1984, Sherman and Beck concluded that arrest for domestic incidents had a significant impact in reducing recurring violence. The researchers

cautioned, however, that their study needed replication to verify its results. Although later studies did not completely support the original findings, Sherman and Beck's initial study did impact law enforcement agencies across the nation. Lawrence W. Sherman & Richard A. Beck, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AMER. SOCIOLOGICAL R. 261, 261-72 (Apr. 1984).

At about the same time, another incident sent shock waves throughout the law enforcement community. In a 1984 court decision, the City of Torrington, Connecticut, was found to be financially liable for the actions of two Torrington police officers, who had failed to render aid to Tracy Thurman. *Thurman v. City of Torrington*, 595 F.Supp. 1521, 1531 (D. Conn. 1984). Ms. Thurman had suffered a savage attack from her husband, Buck Thurman. *Thurman*, 595 F.Supp. at 1525. The police were called, but the two officers merely stood by, never making any attempt to halt the attack or take the abuser into custody. *Id.* at 1526. Tracy Thurman was awarded two million dollars in damages, to be paid by the City. This important decision made the law enforcement community sit up and take notice.

After the Sherman and Beck study, the research community clamored for additional studies to validate the results. To address this concern, the National Institute of Justice funded similar studies in five locations: Dade County, Florida; Atlanta, Georgia; Charlotte, North Carolina; Colorado Springs, Colorado; and Milwaukee, Wisconsin. VIOLENCE & VICTIMIZATION RESEARCH DIVISION'S COMPENDIUM OF RESEARCH ON VIOLENCE AGAINST WOMEN, NATIONAL INSTITUTE OF JUSTICE OFFICE OF RESEARCH AND EVALUATION (Leora N. Rosen & Jocelyn Fontaine, eds., 2009).

For more information on the history of domestic abuse, *see* American Prosecutors Research Institute (APRI), National District Attorney's Association, "Evolution of Domestic Violence Law Reform", Rural Domestic Violence Issues conference materials, 11-22 (2000).

5. The Beginning of Collaboration

In the early 1980s in Wisconsin, the law enforcement community began to meet with victims' rights groups and women's groups to jointly craft a modern response to domestic incidents. This was the beginning of a now long-standing collaborative effort to combat domestic abuse.

In 1986, the Milwaukee Police Department issued a departmental order requiring mandatory arrest for all domestic battery incidents. Paul Galloway, *In Milwaukee, Police Are Quicker to Handcuff Domestic Violence*, CHI. TRIBUNE, May 18, 1986. Later, mandatory arrest would become the law when the arresting officer had probable cause to believe that a crime had been committed. WIS. STAT. § 968.075(2). For the first time in Wisconsin's history, domestic abuse issues were being consistently treated as a criminal matter instead of a social problem.

6. State of Wisconsin Domestic Abuse Law

The Milwaukee study was still ongoing when a controversial domestic abuse bill, 1987 Wisconsin Act 346, was introduced to state legislators. The bill contained mandatory arrest policies and procedural changes for a wide variety of domestic abuse offenses.

It is an understatement to say this bill contained sweeping changes. The entire scope of domestic abuse investigation and prosecutorial procedures significantly changed upon passage of this bill, codified in the 1989 version of WIS. STAT. § 968.075.

The new law:

- Defined domestic abuse offenses;
- Mandated arrest for all probable cause domestic abuse cases;
- Required reporting guidelines;
- Contained a pro-prosecution mandate for district attorneys' offices; and
- Mandated the use of community groups with expertise in domestic abuse to train law enforcement officers.

1987 Wisconsin Act 346 clearly stated its purpose to create law as follows:

SECTION 1. Legislative intent and purpose.

- (1) The legislature finds that societal attitudes have been reflected in policies and practices of law enforcement agencies, prosecutors and courts. Under these policies and practices, the treatment of a crime may vary widely depending on the relationship between the criminal offender and the victim of the crime. Only recently has public perception of the serious consequences of domestic violence to society and to individual victims led to the recognition of the necessity for early intervention by the criminal justice system.
- (2) The legislature intends, by passage of this act, that:
 - (a) The official response to cases of domestic violence stress the enforcement of the laws, protect the victim and communicate the attitude that violent behavior is neither excused nor tolerated.
 - (b) Criminal laws be enforced without regard to the relationship of the persons involved.
 - (c) District attorneys document the extent of domestic violence incidents requiring the intervention of law enforcement agencies.
 - (d) Law enforcement agencies be encouraged to provide adequate training to officers handling domestic violence incidents.

- (3) The purpose of this act is to recognize domestic violence as involving serious criminal offenses and to provide increased protection for the victims of domestic violence.

7. Initial Reaction to the Legislative Changes

After passage of 1987 Wisconsin Act 346, arrests skyrocketed literally overnight. As a result, the resources of many law enforcement agencies were severely taxed. For instance, during March of 1989, the Milwaukee Police Department processed 884 domestic cases. During the first month of the new law in April of 1989, the Milwaukee Police Department processed 1,254 domestic cases. The numbers ranged between 1,200 and 1,500 cases for the months that followed (please note that those figures only include the city of Milwaukee, not even the entire county). Police overtime expenditures soared. Adele Harrell, Megan Schaffer, Christine DeStefano & Jennifer Castro, *THE EVALUATION OF MILWAUKEE'S JUDICIAL OVERSIGHT DEMONSTRATION*, 14 (Urban Institute Justice Policy Center, 2006).

Police officers complained that their discretion had vanished. However, despite the mandates and strict verbiage contained in the 1989 version of WIS. STAT. § 968.075, the concept of “probable cause” never changed under the law.

One incident illustrates the ramifications of the 1989 version of WIS. STAT. § 968.075: An 84-year-old mother who used a walker became involved in an argument in her home with her 64-year-old son. The investigation revealed that the son had used profanity, which upset his mother. The mother then threw a peanut butter sandwich at her son. The police were called, and the mother was arrested. Police defined throwing the peanut butter sandwich as an “act of violence” under the law.

Clearly, the police feared personal liability if they failed to make arrests in domestic abuse situations. Practical changes were needed. Police agencies, victims' rights groups, women's groups and legislators collaborated to modify WIS. STAT. § 968.075 to add provisions for “officer immunity” for arrest and non-arrest decisions made in good faith. A 28-day time-frame was established between the incident and the date of arrest.

The results of this statutory amendment were immediate and lasting. In the City of Milwaukee alone, arrests dropped from 1,307 in May of 1990 to an average of 1,000 cases per month. Overtime expenditures and other operational problems reduced significantly. The theory of “quality over quantity” prevailed. The collaboration of people from throughout the criminal justice system with members of the community and lawmakers worked to establish a practical and workable law for responding to incidents of domestic abuse.

8. Power and Control Wheel

The Power and Control Wheel is a key ingredient for increased understanding of domestic abuse. The pervasive nature of domestic abuse can be keenly grasped through the use of this tool.

Victims benefit. Professionals in the criminal justice system also benefit from the understanding the Wheel provides.

Originally designed by the Domestic Abuse Intervention Project of Duluth, Minnesota, the Power and Control Wheel is a useful investigative tool for law enforcement officers and prosecutors. The Wheel helps to describe the dynamics of a domestic abuse relationship. The prosecutor's theme at trial may very well develop into "power and control"; the Wheel can assist prosecutors in developing this argument.

Typically, a police officer gathers the evidence pertaining to certain elements of a given offense. In many circumstances, unless the information directly supports an element, a law enforcement officer may not gather evidence of other abusive acts, including intimidation, isolation tactics, emotional abuse, economic abuse, the use of coercion and threats, the use of minimizing and blaming tactics, using the children as pawns, and the use of male privilege. However, when police officers are trained to understand how the information contained in the Power and Control Wheel will help support a prosecutor's case theory and theme, the officers more regularly seek out this additional information. This leads to enhanced victim safety and increased offender accountability.

Abusive behavior can be thought of as a wheel with many interworking spokes that allow an abuser to maintain power and control over his or her partner. At the heart of the wheel is power and control – the major motivation behind abusive behaviors. On the outside of the wheel are physical and sexual abuse. This is the behavior that most people mistakenly understand as "the problem." Physical abuse is the easiest to identify and is often the only form of abuse that is found to be illegal. In between the heart of the wheel and physical abuse, in the hub of wheel, lie a variety of behaviors or tactics that an abuser uses to gain and maintain control of a victim. These tactics and behaviors include: coercion and threats, intimidation, emotional abuse, isolation, minimizing/denying/blaming, perpetrator privilege, economic abuse, and using children against the victim. Not all of these forms of abuse are used in every relationship, and the abuser may switch tactics often to keep the victim on the defensive. These tactics cause the victim to give up control of important aspects of his or her life in an effort to keep peace with the abuser. Eventually, however, attempting to keep the peace causes the victim to give up on life, hopes, dreams, and pleasures. Some victims surrender control over all aspects of their lives in order to please the abuser.

A depiction of The Power and Control Wheel containing statutes under which a police officer might arrest and/or a prosecutor might charge is available in Appendix 2.

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4. Mandatory Arrest and Predominant Aggressor

1. Mandatory Arrest
2. Police Department Guidelines Regarding Mandatory Arrest
3. The Best and the Brightest Police Departments
4. Predominant Aggressor and Self Defense
5. The Law of the Predominant Aggressor
6. Predominant Aggressor Factors
7. Additional Resources

1. Mandatory Arrest

Wisconsin first implemented its mandatory arrest law for domestic abuse crimes on April 1, 1989. That law, codified as WIS. STAT. § 968.075(2), set forth specific circumstances requiring that law enforcement officers make an arrest in domestic crimes.

Per WIS. STAT. § 968.075(1), “domestic abuse” is defined as any of the following:

- Intentional infliction of physical pain, physical injury or illness;
- Intentional impairment of physical condition;
- Sexual assault (1st, 2nd or 3rd degree); or
- A physical act that may cause the other person to reasonably fear imminent engagement in the conduct described above.

Note that “attempt” as defined in WIS. STAT. § 939.32(1) does apply to all felony offenses as well as misdemeanor battery offenses included in WIS. STAT. §§ 940.19 and 940.195.

Those subject to mandatory arrest, according to WIS. STAT. § 968.075(1)(a), include adult persons (17 years of age or older) who commit domestic offenses against the following:

- His or her spouse;
- His or her former spouse;
- An adult (18 years of age or older) or adult relative with whom the person resides or formerly resided; or
- An adult with whom the person has a child in common.

2. Police Department Guidelines Regarding Mandatory Arrest

Most police officers understand the basic concept of “probable cause” to arrest. Probable cause to arrest generally refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is more than a hunch or suspicion, but less than the evidence required to convict at trial.

The law states that in a domestic abuse situation, law enforcement must arrest a person following the below requirements:

WIS. STAT. § 968.075(2) CIRCUMSTANCES REQUIRING ARREST; PRESUMPTION AGAINST CERTAIN ARRESTS.

- (a) . . . [A] law enforcement officer shall arrest and take a person into custody if:
1. The officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person’s actions constitute the commission of a crime; and
 2. Any of the following apply:
 - a. The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely.
 - b. There is evidence of physical injury to the alleged victim.
 - c. The person is the predominant aggressor.

Police departments can benefit from including probable cause policy statements in their standard operating procedures (or at least an elucidation of some factors which may constitute probable cause). As prosecutors who desire improved police investigations for evidence-based prosecutions, we must encourage law enforcement to make wise mandatory arrest determinations as well as predominant aggressor determinations.

According to WIS. STAT. § 968.075(1)(a)4., police need to determine if probable cause exists for any crime as a result of a physical act that may cause the other person reasonably to fear imminent engagement in a battery or sexual assault (e.g., disorderly conduct, § 947.01; threats to injure, § 943.30; intimidation of a witness, §§ 940.42 and 940.43, or intimidation of a victim, §§ 940.44 and 940.45; endangering safety by use of a dangerous weapon, § 941.20; etc.).

The following is a list of some types of evidence as well as some probable cause factors that police departments may want to include in their analysis for the purposes of the mandatory arrest of domestic offenders:

- Bodily harm or pain to the victim. Note that visible injury is NOT required for arrest, according to WIS. STAT. §§ 939.22(4) and 968.075(2)(a)2. It is merely one possible factor that could lead to an arrest;

- Sexual contact or sexual intercourse as defined in WIS. STAT. § 940.225(5);
- Statements of the victim, including non-consent to the offense. Encourage law enforcement agencies to record statements via tape or video;
- Statements of family members, including children;
- Statements of friends or neighbors;
- Statements of the suspect;
- Excited utterances (*res gestae*) of the suspect or victim;
- Officers' observations of the scene and the victim;
- Abuse history: Previous calls to the same location or involving the same parties;
- Prior abuse: Previous threats or offenses against the victim by the suspect;
- A valid temporary restraining order or injunction order served on the suspect;
- Self defense;
- Physical evidence. The following are some types of evidence an officer may encounter at the scene of a domestic abuse crime:
 - Torn or ripped clothing;
 - Weapons used, including bats, knives, guns, blunt objects, furniture legs, etc.;
 - Blood-stained items;
 - Disarray of residence, including the furniture and other items left by the suspect;
 - Broken telephones and telephone wires;
 - Property damage, such as phones, furniture, walls, windows, smashed dishes, etc.;
 - Blood splattered on walls, disarray of the residence; or
 - Evidence of physical damage to the victim such as hair or fingernails torn out.

In addition, police departments are required by statute to develop, adopt and implement written policies for the arrest of the predominant aggressor. WIS. STAT. § 968.075(3). Those policies must include, at minimum:

- A statement emphasizing that in most circumstances[,] . . . a law enforcement officer should arrest and take a person into custody if the officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime.
- A policy reflecting the requirements of subs. (2) and (2m) [which outline, respectively, the circumstances in which an arrest is required, how to identify the predominant aggressor, and disallowing the release of a person so arrested until bail is set].

- A statement emphasizing that a law enforcement officer's decision as to whether or not to arrest under this section may not be based on the consent of the victim to any subsequent prosecution or on the relationship of the parties.
- A statement emphasizing that a law enforcement officer's decision not to arrest under this section may not be based solely upon the absence of visible indications of injury or impairment.
- A statement discouraging, but not prohibiting, the arrest of more than one party.
- A statement emphasizing that a law enforcement officer, in determining whether to arrest a party, should consider whether he or she acted in self-defense or in defense of another person.

WIS. STAT. § 968.075(3)(a)1.

In developing these individualized written policies, “law enforcement agencies are encouraged to consult with community organizations and other law enforcement agencies with expertise in the recognition and handling of domestic abuse incidents.” WIS. STAT. § 968.075(3)(b). These community organizations include the Wisconsin Coalition Against Domestic Violence, the Wisconsin Coalition Against Sexual Assault, and other local agencies and affiliates. Victim-witness specialists may also be consulted, and, of course, law enforcement agencies can consult with one another.

Law enforcement agencies may include in their written policies a requirement that officers must arrest people under certain additional circumstances along with those described in the statute, however that policy may not conflict with the statutory presumption that if the predominant aggressor is identified, it is generally not appropriate for police to arrest any other person. WIS. STAT. § 968.075(3)(c).

In addition, law enforcement officers are “immune from civil and criminal liability arising out of a decision by the officer to arrest or not arrest an alleged offender, if the decision is made in a good faith effort to comply” with the law. WIS. STAT. § 968.075(6m). This section is required to protect officers who make the best decisions they can in the heat of the moment.

3. The Best and the Brightest Police Departments

While not defined in WIS. STAT. § 968.075, the most proficient police departments will be wise to train officers to be aware of the following factors that may define many domestic abuse relationships. Although much of this behavior will not always lead to criminal charges, dedicated police officers and prosecutors will come to understand the below behavior to often be representative of abuse.

a. Financial abuse or control

Some examples include refusing to give someone enough money to live, taking all of the money out of a joint bank account, or refusing to support a child or children in common. The victim

may not be permitted to go to school or to work. If the victim is employed, the abuser often controls the money.

b. Emotional and verbal abuse

Some examples include name-calling, lying, and demeaning the other person privately and/or publicly with derogatory remarks, as well as manipulation.

c. Isolation from support network

Some examples include forcing someone to stop talking to friends and relatives (or at least eavesdropping on phone conversations), intercepting the mail, cutting off access to transportation, hiding car keys, or disabling telephones to prevent contact with friends and family. Abusers often express intense jealousy and possessiveness.

d. Power and control

Some examples include threatening to take children away, using the children as pawns, threatening to report the victim to Child Protective Services, breaking things valued by the victim, taking away items that have sentimental value to the victim, threatening suicide, threatening homicide to the victim, verbal threats, and even looking at the victim in an intimidating manner. Some abusers demand to know “up to the minute” reports on the victim’s whereabouts and seek to control what the victim will wear, eat or read.

The Wisconsin Statutes require that law enforcement receive specific training in domestic abuse, and that they know to protect the victim. “Any education and training by the law enforcement agency relating to the handling of domestic abuse complaints shall stress enforcement of criminal laws in domestic abuse incidents and protection of the alleged victim.” WIS. STAT. § 968.075(8). In addition, the law requires that “law enforcement agencies and community organizations with expertise in the recognition and handling of domestic abuse incidents shall cooperate in all aspects of the training.” *Id.*

This statutory emphasis on communication between agencies and collaboration with community organizations makes it clear that domestic abuse is a community-wide problem, one that everyone can and should work together to combat effectively. The best and the brightest police departments will make good use of the resources available to them in training officers and responding to and investigating domestic abuse.

4. Predominant Aggressor and Self Defense

As prosecutors, we have a stake in the police officer’s arrest decision. Per our desire for the protection of the community, we certainly do not want victims to be arrested. Domestic abuse victims have the right to defend themselves, just like anyone else. We do not want law enforcement officers to re-victimize a victim of domestic abuse through an ill-advised arrest.

When evidence exists that both parties used violence, WIS. STAT. § 968.075(3) gives police officers the authority to determine the “predominant” aggressor. Police have the discretion to arrest only the predominant aggressor, rather than arresting both parties.

“Predominant aggressor” is defined by statute as “the most significant, but not necessarily the first, aggressor in a domestic abuse incident.” WIS. STAT. § 968.075(1)(c).

The word “predominant” is preferred to the term “primary,” which is the word that was previously used to describe the person who must – and should – be arrested in these situations. Use of the term “primary” mistakenly gives the impression that the first individual to land a punch should always be the one who gets arrested. Quite frankly, however, sometimes the first individual that strikes out physically does so in self defense. In fact, most law enforcement officers receive training on the topic of defensive fighting, including preemptive strikes.

After an in-depth investigation and analysis of self defense, keep in mind that the person who ends up with the most serious injuries may be the predominant aggressor. Depending upon the facts of the case, it is not beyond the scope of the imagination that a person found dead at the scene of a crime could have been the predominant aggressor.

Unfortunately, we see too many “dual arrests” where victims of domestic abuse are wrongfully arrested. While police officers sometimes face factually difficult circumstances, officers should look to the law as a guideline to help ensure that they make thoughtful arrest decisions.

5. The Law of the Predominant Aggressor

WIS. STAT. § 968.075 DOMESTIC ABUSE INCIDENTS; ARREST AND PROSECUTION.

(2) CIRCUMSTANCES REQUIRING ARREST; PRESUMPTION AGAINST CERTAIN ARRESTS.

(a) [A] law enforcement officer shall arrest and take a person into custody if:

1. The officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person’s actions constitute the commission of a crime; and
2. Any of the following apply:
 - a. The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely.
 - b. There is evidence of physical injury to the alleged victim.
 - c. The person is the predominant aggressor.

- (am) [U]nless the person's arrest is required under [statute], if a law enforcement officer identifies the predominant aggressor, it is generally not appropriate for a law enforcement officer to arrest anyone under par. (a) other than the predominant aggressor.
- (ar) In order to protect victims from continuing domestic abuse, a law enforcement officer shall consider all of the following in identifying the predominant aggressor:
1. The history of domestic abuse between the parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history.
 2. Statements made by witnesses.
 3. The relative degree of injury inflicted on the parties.
 4. The extent to which each person present appears to fear any party.
 5. Whether any party is threatening or has threatened future harm against another party or another family or household member.
 6. Whether either party acted in self-defense or in defense of any other person under the circumstances described in s. 939.48.
- (b) If the officer's reasonable grounds for belief under par. (a) 1. are based on a report of an alleged domestic abuse incident, the officer is required to make an arrest under par. (a) only if the report is received, within 28 days after the day the incident is alleged to have occurred, by the officer or the law enforcement agency that employs the officer.
- (2m) IMMEDIATE RELEASE PROHIBITED. Unless s. 968.08 applies, a law enforcement officer may not release a person whose arrest was required under sub. (2) until the person posts bail under s. 969.07 or appears before a judge under s. 970.01 (1).

6. Predominant Aggressor Factors

If probable cause exists that a domestic offense occurred, as determined by the totality of the circumstances, the suspect must be arrested and taken into custody for a criminal charge even if the victim does not wish to "press charges."

When the officer has probable cause to believe that two parties have committed domestic abuse offenses against each other, the officer is not required to arrest both persons, but should arrest the person whom the officer believes to be the predominant aggressor.

Questions by an officer prior to an arrest, in an attempt to determine which spouse was the predominant aggressor under WIS. STAT. § 968.075(3)(a)1.b., are considered investigatory in nature. *Miranda* warnings are not required, so long as the defendant is not deprived of freedom

or questioned in a coercive environment. *See State v. Leprich*, 160 Wis. 2d 472, 465 N.W.2d 844 (Ct. App. 1991).

In determining the predominant aggressor, officers should consider the intent of the State to protect victims of domestic abuse, the relative degree of injury or fear inflicted on the persons involved, and any abusive history between these persons, if that history can reasonably be ascertained. WIS. STAT. § 968.075(3)(a)1.b.

The following is a list of some types of evidence and factors that police departments may use to assist them in determining the predominant aggressor:

- Relative age, height and weight of the parties;
- Strength and skill of each party;
- Criminal history;
- Whether one party is on probation, parole or extended supervision;
- Seriousness of the injuries (including the investigation of offensive vs. defensive wounds);
- Motive to lie and credibility of each party;
- Corroboration of statements;
- Presence of fear or other emotions (such as anger, sadness, grief, fear, hurt or shame);
- Use of alcohol and/or illegal or prescription drugs and intoxication level of each party;
- Identity of 911 reporting party, as well as the timing of any cross-complaint;
- Existing temporary restraining order, injunction, no-contact order, or foreign protection order;
- Admissions or consciousness of guilt, as well as the details of each statement;
- Presence of power and controlling behavior;
- Consideration of legal defenses: self defense, defense of others or property, ejection of trespasser, mistake, accident, etc.

NOTE: The lack of visible injuries or the victim's unwillingness to prosecute, by themselves, are not legal grounds upon which an officer may refuse to make a mandatory arrest. *See* WIS. STAT. §§ 968.075(3)(a)1.c.; 968.075(3)(a)1.d.

7. Additional Resources

Stop Violence Against Women, A Project of the Advocates for Human Rights, *Determining the Predominant Aggressor*, available at www.stopvaw.org/determining_the_predominant_aggressor.html.

National Institute of Justice, Office of Justice Programs, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, June 2009, Ch. 2, “Reporting and Arrests”, available at <http://www.nij.gov/nij/topics/crime/intimate-partner-violence/practical-implications-research/ch2/welcome.htm>.

White, James G., et al., *Testifying about Self-defense and Predominant Aggressors*, Southwest Center for Law and Policy & Office on Violence Against Women, U.S. Department of Justice (2005), available at <http://www.vaw.umn.edu/documents/predominantaggressor/predominantaggressor.pdf>.

Battered Women’s Justice Project, *Primary Aggressor Statutes*, available at http://www.bwjp.org/files/bwjp/articles/Primary_Aggressor_Chart_Final.pdf (this is a chart of how all 50 states statutorily address the issue of the primary or predominant aggressor in domestic abuse cases).

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5. Common Domestic Abuse Charges

1. Battery, WIS. STAT. § 940.19
2. Criminal Damage to Property, WIS. STAT. § 943.01(1)
3. Disorderly Conduct, WIS. STAT. § 947.01
4. Intimidation of Witnesses, WIS. STAT. §§ 940.42 and 940.43
5. Intimidation of Victims, WIS. STAT. §§ 940.44 and 940.45

1. Battery, WIS. STAT. § 940.19

WIS. STAT. § 940.19 BATTERY; SUBSTANTIAL BATTERY; AGGRAVATED BATTERY.

- (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.
- (2) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.
- (4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony.
- (5) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.
- (6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises: (a) If the person harmed is 62 years of age or older; or (b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.

The following chart summarizes subsections (1), (2), (4) and (5) (but not (6)):

Offense Class	Intent	Harm Caused
Class E felony	Intent to Cause Great Bodily Harm	Great Bodily Harm
Class H felony	Intent to Cause Bodily Harm	Great Bodily Harm
Class I felony	Intent to Cause Bodily Harm	Substantial Bodily Harm
Class A misdemeanor	Intent to Cause Bodily Harm	Bodily Harm

a. Lesser included crimes of battery

Where a defendant has been acquitted of a felony battery charge, he or she may also be convicted of a misdemeanor battery charge based on the same act. *State v. Vassos*, 218 Wis. 2d 330, 332-33, 579 N.W.2d 35, 36 (Wis. 1998).

In *Vassos*, the defendant was charged with substantial battery. Both parties requested that the trial court include both the substantial battery jury instruction and the simple battery instruction. The trial court denied the request and did not include the simple battery instructions, stating that different elements exist between the two battery statutes and that misdemeanor battery is not a lesser included offense of felony battery. *Vassos*, 218 Wis. 2d at 333. The defendant was acquitted on the felony battery charge and the State subsequently charged the defendant with misdemeanor battery based on the same incident upon which the felony battery prosecution had been premised. The defendant moved to dismiss the misdemeanor battery charge based on double jeopardy grounds, and the trial court granted the motion. The State then appealed.

The Wisconsin Supreme Court reversed and remanded the case back to the trial court, holding that the misdemeanor battery charge did not violate the Wisconsin Statutes, existing case law, or the Double Jeopardy clauses of the United States and Wisconsin Constitutions. *Vassos*, 218 Wis. 2d at 344-45. The Court further stated:

We hold that the prosecution for misdemeanor battery following the defendant's acquittal of felony battery is not barred by Wis. Stats. [sic] §§ 939.71 and 939.66(2m) (1995-96). We further hold that the prosecution for misdemeanor battery following the defendant's acquittal of felony battery is not barred by the constitutional same-elements test set forth in *Blockberger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932).

Finally, we reverse the circuit court order and remand the cause to the circuit court to determine whether the prosecution for misdemeanor battery is barred under the constitutional collateral estoppel doctrine established in *Ashe v. Swenson*, 397 U.S. 436, 444, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970).

Vassos, 218 Wis. 2d at 344-45.

Like the defendant in *Vassos*, a domestic abuse defendant may commit a battery, the degree of which is in question. That is, the battery may or may not rise to the level of aggravated, substantial or simple battery. In *Vassos* the trial court erred when it did not allow the jury instructions for simple battery to be read to the jury at the same time as the instruction for the higher offense. Even though simple battery is a lesser-included offense of felony battery, the elements of battery (most notably the issue of consent) are different from that of felony battery.

b. Battery: Common statutory definitions

WIS. STAT. § 939.22(4).

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.

WIS. STAT. § 939.22(38).

“Substantial bodily harm” means bodily injury that causes a laceration that requires stitches, staples or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

WIS. STAT. § 939.22(14).

“Great bodily harm” means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

WIS. STAT. § 939.22(48).

“Without consent” means no consent in fact or that consent is given for one of the following reasons:

- (a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on the victim, or on a person in the victim’s presence, or on a member of the victim’s immediate family; or
- (b) Because the actor purports to be acting under legal authority; or

- (c) Because the victim does not understand the nature of the thing to which the victim consents, either by reason of ignorance or mistake of fact or of law other than criminal law or by reason of youth or defective mental condition, whether permanent or temporary.

WIS. STAT. § 939.23 CRIMINAL INTENT.

- (1) When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term “intentionally”, the phrase “with intent to”, the phrase “with intent that”, or some form of the verbs “know” or “believe.”
- (2) “Know” requires only that the actor believe that the specified fact exists.
- (3) “Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word “intentionally.”
- (4) “With intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.
- (5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section.
- (6) Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.

2. Criminal Damage to Property, WIS. STAT. § 943.01(1)

WIS. STAT. § 943.01 DAMAGE TO PROPERTY.

- (1) Whoever intentionally causes damage to any physical property of another without the person’s consent is guilty of a Class A misdemeanor.

See also Wisconsin Jury Instructions-Criminal 1400, Criminal Damage to Property.

A spouse can be convicted of criminal damage to property of his or her own marital property, because his or her spouse has an ownership interest in the property. *State v. Sevelin*, 204 Wis. 2d 127, 129, 554 N.W.2d 521, 522 (Wis. Ct. App. 1996).

In *Sevelin*, the defendant threatened his family with a knife and damaged several rooms in his home. *Sevelin*, 204 Wis. 2d at 130. The defendant was convicted of battery to a law

enforcement officer, obstructing an officer, disorderly conduct, and criminal damage to property. *Id.* The defendant argued that he could not be convicted of criminal damage to property because the property damaged was his own home, and that he jointly owned all the property therein with his wife. *Id.*

In addressing the issue of jointly owned property (marital property in Wisconsin), the Court of Appeals upheld the conviction:

[WIS. STAT. § 939.22(28)] defines “property of another” for purposes of chs. 939 and 948 and 951, Stats., as “property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.” This section unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest.

Sevelin, 204 Wis. 2d at 131.

The State, therefore, is not precluded from charging criminal damage to property simply because the defendant has an ownership interest in property he or she destroyed.

While a misdemeanor charge requires no finding of reduction in value, note that varying amounts of monetary damages are associated with felony classifications. If the total property damaged is reduced in value by more than \$2,500, for example, the violation will merit a Class I felony charge, in violation of WIS. STAT. § 943.01(2)(d). For the purposes of ascertaining monetary value, the property is “reduced in value” by the amount it would cost either to repair or replace the item, whichever is less.

Where more than one item of property is damaged under a single intent and design, the damage to all the property may be prosecuted as a single forfeiture offense or crime. WIS. STAT. § 943.01(3).

For additional analysis and critical development of this issue, *see* Wisconsin Jury Instructions-Criminal 1400, note 8.

As a practical matter in domestic abuse cases, you may want to closely analyze the damaged property in order to ascertain whether the property had a special significance or sentimental value to the victim. Frequently, an abuser will target items of value, not from a monetary standpoint, but for the item’s symbolic or sentimental value.

Particularly relevant to domestic cases is WIS. STAT. § 943.011, which states that it is a Class I felony to intentionally cause damage or threaten to cause damage to any physical property owned by a person who is or was a witness, or any property owned by a person who is a family member of a witness or a person sharing a common domicile with a witness.

In a domestic prosecution without a victim present, keep in mind that non-consent may be proven through circumstantial evidence. *See generally State v. Lund*, 99 Wis. 2d 152, 160, 298 N.W.2d 533, 537 (Wis. 1980).

3. Disorderly Conduct, WIS. STAT. § 947.01

WIS. STAT. § 947.01 DISORDERLY CONDUCT.

Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

See also Wisconsin Jury Instructions-Criminal 1900, Disorderly Conduct.

Disorderly conduct charges are commonly utilized in domestic abuse cases, in accordance with WIS. STAT. § 968.075(1)(a)4., referring to physical acts that may cause the other person reasonably to fear imminent engagement in: (1) the intentional infliction of physical pain, injury or illness; (2) the intentional impairment of physical condition; or (3) a first, second or third degree sexual assault.

The law states that there need not be a stated victim for a disorderly conduct charge to be issued and prosecuted. However, the reality for domestic abuse cases is that a victim will still exist. *See State v. Vinje*, 201 Wis. 2d 98, 548 N.W.2d 118 (Wis. Ct. App. 1996).

Prosecutors do not have to list facts that support every type of conduct listed in the statute in order to submit an acceptable complaint. The State need only mention the type of conduct found under the specific facts of the case before them. *See State v. Maker*, 48 Wis. 2d 612, 180 N.W.2d 707 (Wis. 1970).

It is the combination of conduct and circumstances that is crucial in applying the disorderly conduct statute to a particular situation. *See State v. Schwebke*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. A reading of the statute, in combination with a reading of the complaint, will create the inference that such conduct does, in fact, fall under the criminal disorderly conduct statute.

Speech alone can be the basis for a disorderly conduct charge under appropriate circumstances. *See In the Interest of A.S.*, 2001 WI 48, 243 Wis. 2d 173, 626 N.W.2d 712, for a discussion of speech utterly devoid of social value. Written speech constitutes disorderly conduct if it is constitutionally unprotected “abusive” conduct, meaning that it is injurious, improper, hurtful, offensive or reproachful – including true threats. *See In the Interest of Douglas D.*, 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725.

A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as

distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threats.

State v. Perkins, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762.

Because disorderly conduct is a common charge, be aware that a question may later arise as to whether a disorderly conduct conviction in a domestic abuse case leads to a firearm prohibition for the defendant. Title 18, U.S. Code, § 922(d)(9) prohibits those convicted of a “misdemeanor crime of domestic violence” from possessing firearms or ammunition. The law defines “misdemeanor crime of domestic violence” as a misdemeanor under federal or state law which has:

[A]s an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 922(d)(9).

A State disorderly conduct conviction is viewed as a “misdemeanor crime of domestic violence” if the conviction had “as an element” the use or attempted use of force, or threat with a deadly weapon AND the victim of the conduct was a spouse, former spouse, or other protected individual. However, the nature of the relationship between the defendant and the victim need not be an element of the actual law violated.

In determining whether the underlying conviction qualifies as a “misdemeanor crime of domestic violence,” make clear in the charging document what elements the prosecutor is required to prove in order to obtain a conviction. To determine whether a disorderly conduct conviction will be considered a “misdemeanor crime of domestic violence” for purposes of a firearm prohibition, it will often be necessary to examine the entire record, including the transcript of any plea or sentencing hearing. A large number of disorderly conduct complaints contain the catch-all phrase “otherwise disorderly conduct.” Convictions under this part of the statute will almost never meet the requirements of 18 U.S.C. § 921(a)(33) because there is no requirement that the prosecutor prove that the defendant used force. In a rare number of situations, these convictions *may* count because the fact section of the complaint alleges only use of force or, at a plea hearing, the defendant agrees that there was use of force, or the judge acknowledges use of force as an element the prosecutor must prove.

Thus, if there is a firearm concern in a domestic abuse case where disorderly conduct is charged, you will need to ensure that sufficient facts proving force are obvious in the complaint.

4. Intimidation of Witnesses, WIS. STAT. §§ 940.42 and 940.43

WIS. STAT. § 940.42 INTIMIDATION OF WITNESSES.

Except as provided in s. 940.43, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor.

WIS. STAT. § 940.43 INTIMIDATION OF WITNESSES.

Whoever violates s. 940.42 under any of the following circumstances is guilty of a Class G felony:

- (1) Where the act is accompanied by force or violence or attempted force or violence upon the witness, or the spouse, child, stepchild, foster child, parent, sibling, or grandchild of the witness, or any person sharing a common domicile with the witness.
- (2) Where the act is accompanied by injury or damage to the real or personal property of any person covered under sub. (1).
- (3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2).
- (4) Where the act is in furtherance of any conspiracy.
- (5) Where the act is committed by any person who has suffered any prior conviction for any violation under s. 943.30, 1979 stats., ss. 940.42 to 940.45, or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under ss. 940.42 to 940.45.
- (6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.
- (7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony.

In a case where a mother and child were to testify against the defendant and the defendant sent letters to the mother urging that she and the child not testify, the court found that regardless of whether the letters were addressed to the child or the child was aware of the letter's contents, the defendant attempted to dissuade the child through her mother. As the mother of the minor child had the parental responsibility and practical authority to monitor communications by third parties with the child, and to influence whether the child cooperated with the court proceedings, there

was sufficient evidence to convict. *State v. Moore*, 2006 WI App 61, 292 Wis. 2d 101, 713 N.W.2d 131.

Felony intimidation of a witness supports charging a person with a separate count for each letter sent, and each other act performed for the purpose of attempting to dissuade any witness from attending or giving testimony at a court proceeding or trial. *See Moore*, 2006 WI App 61.

Conspiracy to intimidate a witness is included under WIS. STAT. § 940.43(4). *See also State v. Seibert*, 141 Wis. 2d 753, 416 N.W.2d 900 (Ct. App. 1987).

5. Intimidation of Victims, WIS. STAT. §§ 940.44 and 940.45

WIS. STAT. § 940.44 INTIMIDATION OF VICTIMS.

Except as provided in s. 940.45, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade, another person who has been the victim of any crime or who is acting on behalf of the victim from doing any of the following is guilty of a Class A misdemeanor:

- (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
- (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof.
- (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

WIS. STAT. § 940.45 INTIMIDATION OF VICTIMS.

Whoever violates s. 940.44 under any of the following circumstances is guilty of a Class G felony:

- (1) Where the act is accompanied by force or violence or attempted force or violence upon the victim, or the spouse, child, stepchild, foster child, parent, sibling, or grandchild of the victim, or any person sharing a common domicile with the victim.
- (2) Where the act is accompanied by injury or damage to the real or personal property of any person covered under sub. (1).
- (3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2).
- (4) Where the act is in furtherance of any conspiracy.

- (5) Where the act is committed by any person who has suffered any prior conviction for any violation under s. 943.30, 1979 stats., ss. 940.42 to 940.45, or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under ss. 940.42 to 940.45.
- (6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.

Misdemeanor intimidation of a victim is a common charge in a domestic case where the defendant grabs the phone from an alleged victim who is about to call the police.

It is important to note that the offense of intimidation of a victim does not stand alone. To prove intimidation of a victim under WIS. STAT. § 940.44, the State must first prove that the alleged victim was the victim of a crime and that the defendant acted knowingly and maliciously.

A jury instruction for a violation of WIS. STAT. § 940.44 should specify the underlying crime and should also spell out that the defendant cannot be found guilty of intimidating a victim of a crime unless the elements of the underlying crime are proved beyond a reasonable doubt. *State v. Thomas*, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991).

Acquittal on the underlying charge does not require acquittal on a charge under WIS. STAT. § 940.44, as the jury may have exercised its right to return a not guilty verdict irrespective of evidence on the underlying charge. *State v. Thomas*, 161 Wis. 2d 616, 468 N.W.2d 729 (Ct. App. 1991).

The disorderly conduct statute, WIS. STAT. § 947.01, does not require a victim, but when the disorderly conduct is directed at a person, that person is the victim for the purpose of prosecuting the perpetrator for intimidating a victim under this section. *State v. Vinje*, 201 Wis. 2d 98, 548 N.W.2d 118 (Ct. App. 1996).

In the phrase “causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof” as written in WIS. STAT. § 940.45(2), the word “and” is read in the disjunctive. This section includes alleged acts of intimidation that occur after a victim has caused a complaint to be sought and applies to all acts of intimidation that attempt to prevent or dissuade a crime victim from providing any one or more of the following forms of assistance to prosecutors: 1) causing a complaint, indictment or information to be sought; 2) causing a complaint to be prosecuted; or, more generally, 3) assisting in a prosecution. *State v. Freer*, 2010 WI App 9, 323 Wis. 2d 29, 779 N.W.2d 12.

6. Intimidation of Victims: Using the Abuser Tactics of Manipulation and Control against the Defendant at Trial

1. Introduction
2. The Dynamics of Post-arrest Abuse
3. The Need for Evidence of the Defendant's Manipulation
4. Finding Evidence from the Cycle of Violence
5. Opportunity to Break the Cycle of Violence
6. Charges for Various Post-domestic Abuse Offenses
7. Court Orders, WIS. STAT. § 940.47
8. Conclusion

1. Introduction

There are several crimes that domestic abusers commit following the issuance of criminal domestic charges. Bail jumping charges comprise the majority of these offenses, due to repeated violations of non-monetary bail conditions such as no-contact orders.

Taped recordings of defendants' phone calls from jail can serve as the evidentiary basis for many new charges. Jail and prison facilities record all outgoing calls. The contents of these recordings demonstrate the great lengths to which many offenders will go to attempt to thwart the criminal prosecution.

Charges may include:

- Intimidation of victims and witnesses (WIS. STAT. §§ 940.42-940.45)
- Solicitation to commit perjury (WIS. STAT. § 946.31)
- Solicitation to commit false swearing (WIS. STAT. § 946.32)
- Bribery of witnesses (WIS. STAT. § 946.61)
- Bail jumping (WIS. STAT. § 946.49(1))

Prosecutors and victim-witness specialists can also educate victims to recognize evidence. For instance, victims can learn to turn over apology letters or letters of intimidation. Mechanisms to communicate this information help to streamline the process of getting this important evidence into the hands of prosecutors.

In victim or witness-intensive cases, such as domestic abuse and sexual assault cases, many defendants will attempt to intimidate key witnesses, influence their testimony, further a conspiracy, or commit additional crimes in order to avoid being held accountable by the community for their behavior.

2. The Dynamics of Post-arrest Abuse

As advocates of our community, we are becoming increasingly more competent in our recognition of what occurs during the pendency of criminal prosecutions in terms of physical abuse, threats and emotional abuse between domestic abuse defendants and victims. Many different types of manipulation and intimidation of victims occur regularly from inside our jail and prison facilities.

Defendants will go to great lengths in order to undermine police investigations and to thwart prosecution efforts.

They may engage in any of the following behavior:

- Begging victims not to attend court;
- Threatening victims not to appear in court;
- Paying victims not to attend court;
- Dictating to victims, word for word, their “notarized affidavits to recant”;
- Asking friends to tell the victim how much the defendant loves the victim;
- Dictating the lies the victim is to testify to upon appearance in court;
- Soliciting other people to injure the victim; or
- Even solicitations to murder the victim.

3. The Need for Evidence of the Defendant’s Manipulation

If you have been working in this field for any great length of time, then an abuser’s manipulation tactics are nothing new. But, you need evidence in order to prove them in court.

Imagine yourself listening in on the defendant’s schemes. Imagine watching them unfold. Imagine uncovering the truth about the manipulation and power and control exerted upon victims . . . all of which is designed to prevent the victim from appearing in court. To actually have the defendant’s conversations from your jail on tape is powerful evidence. If you are not obtaining this evidence, we suggest that you begin.

4. Finding Evidence from the Cycle of Violence

Following the charge of a criminal domestic abuse case, remember that the community has stepped squarely into the middle of a personal relationship. Often, it is an unhealthy relationship. Often, the relationship will be fraught with episodes of repeated abuse. The pattern of abuse may

result in a repetitious cycle of violence. No matter how unhealthy, that relationship is not necessarily going to end with the issuance of criminal charges.

You already understand the dynamics of domestic abuse. Following a tension-building phase in the relationship, when anger escalates, and the anger release, resulting in physical abuse, a “honeymoon period” sets in. During that stage, the abuser will apologize and make promises. The abuser expresses shame. The abuser seeks forgiveness. It is vitally important to realize that the honeymoon period is part of the cycle of violence and a facet of power and control dynamics.

Even if the court puts a no-contact order in place, the defendant will likely violate that condition in order to actively participate in the honeymoon period of that relationship’s cycle. Because the defendant so desires to be in control, he or she often feels compelled to contact the victim. It is part of the cycle of violence in which this abuser has engaged time and time again. The abuser feels a strong need to express shame and sorrow, to make promises, and, ultimately, to obtain forgiveness.

The result of this process means that you can obtain valuable evidence against the defendant during the honeymoon period of the relationship. You may be able to obtain “abuser mail,” complete with apologies and promises. You may be able to obtain receipts for the flowers or candy given to the victim by the defendant. The defendant may send flowers to apologize. An apology is an acknowledgement that the defendant believes he has done something wrong; it is evidence of an abuser’s consciousness of guilt.

Most jails and prisons across the nation record all out-going phone calls. Listening to inmate phone calls (other than properly placed calls to attorneys) may reveal apologies and other statements wherein the defendant acknowledges guilt.

After you charge a defendant with physical abuse, take an inventory of all the different types of evidence that might be generated during that relationship’s honeymoon period. Enlist the support of the victim, if possible. You may be able to gather damaging evidence to assist you. Simply put, prosecutors can turn the tables on the defendant and use abusers’ manipulative tactics against them at trial.

5. Opportunity to Break the Cycle of Violence

The community’s entry into the relationship’s cycle of violence often begins with a call for help. Each time a 911 call is made by a victim, that victim reaches out. Even if only momentarily, in calling for help, the victim steps outside that pattern of the cycle of violence. When a victim of abuse calls 911, the community has an opportunity to help the victim put a “crack” in that cycle of violence.

If the community fails to recognize its opportunity to intervene, the abuser will most likely pull the victim back into the cycle of violence. As stewards of community safety, we must strive to educate victims who have suffered repeated abuse to recognize apologies for their potentially manipulative effects as well as their evidentiary value. From an evidentiary standpoint, “I’m

sorry” usually equals “I confess.” Educating victims that “I’m sorry” can be an aspect of the abuse, rather than a genuine sincere request for forgiveness, empowers victims to recognize, report and preserve such evidence.

6. Charges for Various Post-domestic Abuse Offenses

Jail recordings can be quite relevant to ongoing criminal prosecutions. Sometimes, statements will be inculpatory: the defendant will admit the assaultive behavior to the victim. Often, the offender’s intent is commonly associated with intimidation. Therefore, keep the following crimes in mind:

WIS. STAT. § 940.42 INTIMIDATION OF WITNESSES; MISDEMEANOR.

Except as provided in s. 940.43, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceedings or inquiry authorized by law is guilty of a Class A misdemeanor.

This statute should be used when the defendant (or a third party) contacts a witness and attempts to dissuade the witness from appearing in court to testify.

WIS. STAT. § 940.44 INTIMIDATION OF VICTIMS; MISDEMEANOR.

Except as provided in s. 940.45, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade, another person who has been the victim of any crime or who is acting on behalf of the victim from doing any of the following is guilty of a Class A misdemeanor:

- (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency or to any judge;
- (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof;
- (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

This statute should be used when the defendant (or a third party) contacts the victim and attempts to dissuade the victim from appearing in court to testify.

Note that an “attempt” satisfies. Intimidation can be charged whether or not the victim or witness was dissuaded. A mere verbal attempt to dissuade the victim or witness violates the statute. The fact that the victim or witness was not intimidated does not prevent prosecution.

WIS. STAT. § 940.46 ATTEMPT PROSECUTED AS COMPLETED ACT.

Whoever attempts the commission of any act prohibited under §§ 940.42 to 940.45 is guilty of the offense attempted without regard to the success or failure of the attempt. The fact that no person was injured physically or in fact intimidated is not a defense against any prosecution under §§ 940.42 to 940.45.

WIS. STAT. § 940.43 INTIMIDATION OF WITNESSES; FELONY.

Whoever violates § 940.42 under any of the following circumstances is guilty of a Class G felony:

- (1) Where the act is accompanied by force or violence or attempted force or violence, upon the witness, or the spouse, child, stepchild, foster child, treatment foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness;
- (2) Where the act is accompanied by injury or damage to the real or personal property of any person covered in sub. (1);
- (3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2);
- (4) Where the act is in furtherance of any conspiracy;
- (5) Where the act is committed by any person who has suffered any prior conviction for any violation under §§ 940.42 to 940.45, § 943.30, 1979 stats., or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under §§ 940.42 to 940.45;
- (6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.
- (7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony.

These statutes should be used when the offender attempts to dissuade a witness or victim from reporting a crime, testifying in court or cooperating with prosecution and this attempt is accompanied by threats, or promises of something, or is part of a conspiracy.

In Wisconsin, any offender that commits the offense of intimidation, and the offender has a previous conviction for either felony or misdemeanor intimidation of a victim or witness, can be charged with *felony* intimidation. A previous conviction raises the penalty to the felony level even if the actions of the offender would otherwise support a misdemeanor charge.

Wis. Stat. § 940.45 INTIMIDATION OF VICTIMS; FELONY.

Whoever violates § 940.44 under any of the following circumstances is guilty of a Class G felony:

- (1) Where the act is accompanied by force or violence or attempted force or violence, upon the victim, or the spouse, child, stepchild, foster child, treatment foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness;
- (2) Where the act is accompanied by injury or damage to the real or personal property of any person covered in sub. (1);
- (3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2);
- (4) Where the act is in furtherance of any conspiracy;
- (5) Where the act is committed by any person who has suffered any prior conviction for any violation under §§ 940.42 to 940.45, § 943.30, 1979 stats., or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under §§ 940.42 to 940.45;
- (6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.

Where the offender asks the victim or witness to lie in court, through an affidavit, or other matter the offender has violated the following:

Wis. Stat. § 939.30 SOLICITATION TO COMMIT A FELONY.

- (1) Except as provided in sub. (2) and § 961.455 (using a child for illegal drug distribution or manufacture purposes), whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class H felony.
- (2) For a solicitation to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class F felony. For solicitation to commit a Class I felony, the actor is guilty of a Class I felony.

WIS. STAT. § 946.31 PERJURY.

Whoever, under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceedings, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class H felony:

- (a) A court;
- (b) A magistrate;
- (c) A judge, referee or court commissioner;
- (d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
- (e) A notary public while taking testimony for use in an action or proceeding pending in court;
- (f) An officer authorized to conduct inquests of the dead;
- (g) A grand jury;
- (h) A legislative body or committee;

WIS. STAT. § 946.32 FALSE SWEARING.

(1) Whoever does either of the following is guilty of a Class H felony:

- (a) Under oath or affirmation makes or subscribes a false statement which he or she does not believe is true, when such oath or affirmation is authorized or required by law or is required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action;
- (b) Makes or subscribes two inconsistent statements under oath or affirmation in regard to any matter respecting which an oath or affirmation is, in each case, authorized or required by law or required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action, under circumstances which demonstrate that the witness or subscriber knew at least one of the statements to be false when made. The period of limitations within which prosecution may be commenced runs from the time of the first statement.

(2) Whoever under oath or affirmation makes or subscribes a false statement which the person does not believe is true is guilty of a Class A misdemeanor.

7. Court Orders, WIS. STAT. § 940.47

Once you charge a case, occasionally victims will contact you and report that defendants are “abusing” them from jail. Should a defendant fail to post bond during the pendency of the case, you can approach the court to request an order pursuant to WIS. STAT. § 940.47.

WIS. STAT. § 940.47 COURT ORDERS.

Any court with jurisdiction over any criminal matter, upon substantial evidence, which may include hearsay or the declaration of the prosecutor, that knowing and malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, may issue orders including but not limited to any of the following:

- (1) An order that a defendant not violate §§ 940.42 to 940.45;
- (2) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, not violate §§ 940.42 to 940.45;
- (3) An order that any person described in sub. (1) or (2) maintain a prescribed geographic distance from any specified witness or victim;
- (4) An order that any person described in sub. (1) or (2) have no communication with any specified witness or any victim, except through an attorney under such reasonable restrictions as the court may impose.

8. Conclusion

With annual domestic abuse cases numbering in the thousands, there are many challenges for prosecutors. It is no wonder that prosecutors have wholeheartedly embraced the philosophy of “evidence-based” or “victimless” prosecution. Creative tools are needed to hold abusers accountable.

However, many victims still fail to appear for trial. Absent an alternative theory of prosecution (such as the use of an excited utterance at trial), cases can get dismissed. Predictably, many abusers will face new allegations of abuse within six months to a year.

By understanding the pressures placed upon domestic abuse victims, you may use the abuser’s tactics against the defendant at trial through additional charges for intimidation.

7. Bail Jumping Charges

1. Introduction
2. Bail Jumping for Failure to Appear in Court
3. Why Issue Bail Jumping for Failing to Appear in Court?
4. No-contact Orders when the Defendant is in Jail
5. The Prosecutor's Sentence Recommendations

1. Introduction

Violations of court-ordered conditions of bail will result in bail jumping charges. In domestic abuse cases, these charges will often come from violations of no-contact orders. However, increasingly, jurisdictions nationwide are recognizing the importance of charging offenders with bail jumping for failing to appear in court.

WIS. STAT. § 946.49(1) BAIL JUMPING.

- (1) Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:
 - (a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.
 - (b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

2. Bail Jumping for Failure to Appear in Court

Failing to appear for scheduled criminal court appearances violates the law; it is a crime. Especially in domestic abuse cases, bail jumping is often charged because of the impact a defendant's failure to appear in court can have on the State's ability to prosecute the offender.

In domestic abuse cases, the negative impact of significant delays can be profound. Sometimes, the testimony of victims forms the entire basis for the State's case. Repeat abusers – and their attorneys – are savvy to the direct correlation of the State's ability to prove its case and the willingness of the victim to appear for trial. Besides victim cooperation, time can deteriorate memory and erode the State's ability to locate witnesses and victims.

Particularly in domestic abuse cases, defendants' manipulation and control of victims is omnipresent. The longer a case lingers in the system, the greater the potential for victims to be

additionally controlled or manipulated, resulting in increased risks and threats to victim safety. These same victims have often suffered egregious emotional and physical abuse. Delay can be potentially very dangerous.

It is imperative to aggressively prosecute all defendants who fail to appear for scheduled jury trials. The community demands both the protection of its members and the preservation of the criminal justice system. However, in so doing, a prosecutor must evaluate a multitude of important factors prior to charging the offense.

3. Why Issue Bail Jumping for Failing to Appear in Court?

In addition to charging bail jumping when the defendant fails to appear in court, every violation of the defendant's conditions of bond is a potential bail jumping charge.

Proper use of appropriate conditions not only helps protect the victim and the public, and help guide the defendant to the path of rehabilitation, but also provides a valuable opportunity for bail jumping charges when the defendant violates them. While victims may recant or be reluctant to testify, the bail jumping charge itself may provide a rock-solid opportunity to obtain a conviction. At sentencing on the bail jumping conviction, the prosecutor may argue for a sentence consistent with the underlying domestic crime.

Typical violations that can be charged without the cooperation of the victim include violations of a "no-drink" provision; failure to comply with Day Report Center or other programming provisions; or commission of any crime, even disorderly conduct, while out on bond. These types of violations often involve State-friendly witnesses such as police officers or Day Report Center workers. Evidence of violations may come from traffic stops or public disturbances involving the defendant. Train police officers to check on bond conditions or ask dispatch to check on people with whom they have contact. These situations make for fairly straightforward cases; for example, for a violation of a "no-drink" order, the proof often simply involves an officer testifying to an odor, slurred speech, glassy eyes, and a breath or blood test of the defendant.

Every time a defendant is charged with bail jumping the court is educated as to his or her character and willingness to disregard court orders. These charges not only expose the defendant to additional penalties, but also give the prosecutor additional leverage to arrive at a just plea agreement and sentence.

4. No-contact Orders when the Defendant is in Jail

After a case has been charged, occasionally victims will contact the District Attorney's office and report that a defendant is "abusing" them from jail. Should a defendant fail to post bond during the pendency of the case, you can approach the court to request a no-contact order pursuant to WIS. STAT. § 940.47, which states:

WIS. STAT. § 940.47 COURT ORDERS.

Any court with jurisdiction over any criminal matter, upon substantial evidence, which may include hearsay or the declaration of the prosecutor, that knowing and malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, may issue orders including but not limited to any of the following:

- (1) An order that a defendant not violate §§ 940.42 to 940.45.
- (2) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, not violate §§ 940.42 to 940.45.
- (3) An order that any person described in sub. (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.
- (4) An order that any person described in sub. (1) or (2) have no communication with any specified witness or any victim, except through an attorney under such reasonable restrictions as the court may impose.

Note that if a defendant remains in jail after a bail hearing, or is returned to jail after failing to comply with the conditions of his or her bond, bail conditions do not apply. Any no-contact order must be put in place by the judge or court commissioner under this section.

5. The Prosecutor's Sentence Recommendations

The goals of prosecuting domestic abuse cases should reflect your values as a prosecutor, namely:

- Increasing victim safety.
- Holding abusers accountable.
- Reducing recidivism.

Let's say that your prosecution for an underlying offense of domestic battery fails. However, your prosecution for the offense of bail jumping succeeds. Upon conviction of an offense of bail jumping (when the underlying facts allege the failure of the offender to appear in court), the judge may feel reluctant to sentence the offender to a typical domestic abuse type of sentence including completion of a domestic abuse treatment program. If the violations have facts in common, however, do not hesitate to point them out. For example, if alcohol was involved in each violation, you can argue that the defendant has a clear rehabilitative need. This is especially true if the defendant also violated a no-drink condition of bond; you can point out at sentencing that he or she specifically chose to disobey the court and refused to follow a simple bond condition.

Do not allow the judge's reluctance to limit your recommendations. Do recommend typical domestic abuse sentences, including treatment and rehabilitation as well as punishment. It is legal and quite permissible to do so. Argue your position as fervently as you like, in keeping with the three above-stated goals.

Keep in mind that at sentencing, courts may freely consider prior convictions, pending cases, "no processed" cases, uncharged offenses, and even charges where a jury has returned a verdict of not guilty. The Wisconsin Supreme Court has held that the responsibility of the sentencing court is to acquire full knowledge of the character and behavior of the convicted defendant before sentence is imposed. *See McClearly v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512, 519 (1971). Other offenses – even unproven offenses – can be considered as evidence of a pattern of behavior which is an index of the defendant's character.

Of course, the character of the offender is a critical factor at sentencing. Evidence of other offenses may show the court a great deal about the character of a defendant. Manipulative behavior such as "playing the court system," for example, may reveal much about the tendencies of a defendant to similarly manipulate and control a victim. The standard of proof for a trial court at a sentencing hearing is that of judicial discretion. *See Elias v. State*, 93 Wis. 2d 278, 286 N.W.2d 559 (1980); *State v. Bobbitt*, 178 Wis. 2d 11, 503 N.W.2d 11 (Ct. App. 1993); *State v. Hubert*, 181 Wis. 2d 333, 510 N.W.2d 799 (Ct. App. 1993); *U.S. v. Watts*, 117 S.Ct. 633; *MacMillan v. Pennsylvania*, 106 S.Ct. 2411.

In sum, remember that even dismissed domestic cases are relevant to the trial court's sentencing decision. Consequently, as a prosecutor, feel free to argue for a full range of domestic abuse sentencing options, even in "mere" bail jumping cases.

8. Strangulation and Suffocation

1. Introduction
2. Reason for the Statute
3. Identifying Strangulation and Suffocation
4. Investigation and Evaluation
5. Prosecuting a Case
6. Conclusion

1. Introduction

In March 2008, the State of Wisconsin enacted legislation to create a specific felony offense for strangulation and suffocation. *See* 2007 Wisconsin Act 127, available at <https://docs.legis.wisconsin.gov/2007/related/acts/127.pdf>. This statute reads as follows:

WIS. STAT. § 940.235 STRANGULATION AND SUFFOCATION.

- (1) Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.

The legislation included a provision enhancing the penalty to a Class G felony when the defendant has a previous conviction for a violent crime. WIS. STAT. § 940.235(2).

In addition to creating a new felony crime, the new law amended the definition of “dangerous weapon” to include “any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood.” WIS. STAT. § 939.22(10). The legislation also added “petechiae” to the definition of “substantial bodily harm” and defined the term within the statutes. *See id.* *See also* WIS. STAT. §§ 939.22(23); 939.22(38). This legislation applies to crimes that occurred on or after April 4, 2008. Memorandum from Ronald Sklansky, Senior Staff Attorney, Wisconsin Legislative Council (April 1, 2008) (on file with Wisconsin Legislative Council), available at http://www.legis.state.wi.us/2007/data/lc_act/act127-sb260.pdf.

2. Reason for the Statute

In 2001, *The Journal of Emergency Medicine* published a series of articles on the prevalence and seriousness of non-lethal intimate partner strangulation. One of the articles reported the findings from a survey of 62 women involved in abusive relationships. Lee Wilbur, M.D., et al., *Survey Results of Women Who Have Been Strangled while in an Abusive Relationship*, 21 J. EMERGENCY MEDICINE 297 (2001). The study concluded that 42 (68 percent) of the women reported a history of being strangled. *Id.* Thirty-three (87 percent) of the batterers threatened the strangled women with death; 28 (70 percent) of the women who were threatened actually believed that they were going to die. *Id.* The study also reported that, on average, batterers began strangling the women 5.2 years into a relationship and 3.1 years after the onset of abuse. The women reported that they were strangled an average of 5.3 times. *Id.*

Another article within the journal examined 300 domestic abuse cases involving attempted strangulation submitted for prosecution. Gael B. Strack, J.D., et al., *A Review of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues*, 21 J. EMERGENCY MEDICINE 303 (2001). The case review occurred following the death of two teenage girls at the hands of their former boyfriends. *Id.* This article reported that there was a history of prior domestic abuse in 89 percent of the cases. *Id.* A third article reported that “[o]nly minimal pressure placed upon the neck is required to cause potentially serious injury” with the victim losing “consciousness by any one or a combination of the following: blocking of the carotid arteries, blocking of the jugular veins, or closing off the airway.” George E. McClane, M.D., et al., *A Review of 300 Attempted Strangulation Cases, Part II: Clinical Evaluation of the Surviving Victim*, 21 J. EMERGENCY MEDICINE 311, 311, 313 (2001). This article concluded: “Patients who return to the same abuser probably will be strangled again, as abusers tend to perpetrate the same type of violence over and over, often with ever-increasing rage and worsening injury toward the victim.” *Id.* at 315.

Despite the frequency and gravity of strangulation, *The Journal of Emergency Medicine* articles found that people commonly failed to recognize the medical risks associated with strangulation. One of the articles explained that the problem began with the misuse of terminology because “it is important, if not critical, to clearly distinguish ‘strangulation’ from ‘choking.’” *Id.* at 311. The authors explained that strangulation “is defined as ‘a form of asphyxia characterized by closure of the blood vessels or air passages of the neck as a result of external pressure on the neck.’” *Id.* In contrast, choking can refer to “aspirating an object, such as a piece of candy or a small toy.” *Id.* The authors concluded that properly referring to violent acts by an intimate partner as “strangulation” is critical to distinguishing the acts from the more ambiguous “choking.” A related article found that victims generally reported being “choked.” Strack, *supra*, at 305. This failure to recognize the seriousness of the conduct resulted in only 29 percent of victims seeking medical assistance and only five percent requiring hospitalization following a strangulation assault. Wilbur, *supra*, at 300-01. Even those victims who obtained medical treatment “frequently receive[d] only a cursory history and physical examination” and were “often under-evaluated and frequently dismissed as only being drunk, hysterical, or hyperventilating.” McClane, *supra*, at 312.

Several articles in this special issue of *The Journal of Emergency Medicine* concluded that the criminal justice system failed to appreciate the gravity of strangulation. Part of the problem occurred due to difficulties with documenting and corroborating a report of strangulation. One study found that no visible injuries existed in half of the cases and injuries were often described as “too minor to photograph,” resulting in only fifteen percent of the cases having a photograph of sufficient quality for use in court. Strack, *supra*, at 305-06. In a majority of cases, no one witnessed the strangulation other than the batterer and victim. Wilbur, *supra*, at 300. Victims of strangulation also reported no symptoms of strangulation in the majority of cases reviewed in one study, with recantation by victims also occurring in some cases. Strack, *supra*, at 305, 307. Despite the difficulties associated with investigating and prosecuting acts of strangulation, one study challenged that “[b]y understanding what signs and symptoms to look for, what questions to ask, where to look for injuries, and how to take better close-up photographs, cases previously thought to be inadequate to prosecute can be prosecuted as misdemeanors and cases previously thought to be misdemeanors can and should be prosecuted as felonies.” *Id.* at 308.

3. Identifying Strangulation and Suffocation

Strangulation has been identified in recent years as one of the most lethal forms of domestic abuse. Strangulation accounts for ten percent of all violent deaths annually in the United States.

There are four different types of strangulation:

1. **Manual** (also called “throttling”), which involves the use of bare hands;
2. **Chokehold** (also called “sleeper hold”), which involves an elbow bend compression;
3. **Ligature** (also known as “garroting”), which involves the use of a cordlike object (rope, belt, chain, pantyhose, tie, etc.); and
4. **Hangings** (self-inflicted); this type of strangulation is not used in domestic abuse cases.

Only eleven pounds of pressure placed on both carotid arteries for ten seconds is necessary to cause unconsciousness. To completely close the trachea and impede normal breathing and circulation of the blood, thirty-three pounds of pressure must be exerted. If strangulation persists, brain death will occur in four to five minutes.

Strangulation can result in a variety of symptoms, although many survivors have no or minimal visible external symptoms and, yet, because of brain damage caused by the strangulation, victims sometimes die several weeks later. Some symptoms, such as memory loss, will only be able to be identified upon further examination. Many strangulation victims do not remember being strangled, or will not offer that information unless they are specifically asked.

Common strangulation symptoms can include: neck pain, neck swelling, difficulty breathing, difficulty swallowing, pain when swallowing, nausea and vomiting, lightheadedness, loss of memory, loss of control of urine, loss of control of bowels, fainting or loss of consciousness,

voice changes (raspy, hoarse, unable to speak), red eyes, sore throat, headache, coughing, red spots (petechiae), miscarriage, and weakness or numbness in the arms or legs.

Often in strangulation and suffocation cases, there are claims of mutual combat or self-inflicted injuries. Because victims fear for their lives, they may protect themselves by trying to get perpetrators to release their holds by either pushing them back, biting them, scratching their faces, or pulling their hair. Depending on the method of strangulation being used, the suspect may be the only individual with visible injuries. If both parties claim self-defense, prosecutors need to teach officers to avoid the temptation just to arrest the person who is perceived to have won the fight, or the person with no injuries. Special care must be taken to identify the predominant aggressor. Gael B. Strack & Dr. George McClane, *How to Improve Your Investigation and Prosecution in Strangulation Cases* (Updated May 1999).

For more information about improving investigation and prosecution in strangulation and suffocation cases, see http://www.ncdsv.org/images/strangulation_article.pdf.

4. Investigation and Evaluation

Building a strangulation case for prosecution begins with developing a coordinated law enforcement and medical community response. This provides an opportunity to train police officers to ensure the use of correct terminology in reports. A police report must accurately quote the phrase used by the victim, so it is appropriate for them to use the term “choke” in that limited context. However, the police report also must demonstrate that the officer understands that there is a distinction between “choking” and “strangulation” and use appropriate terminology in the report. Coordination also provides an opportunity for prosecutors and law enforcement to interact with medical professionals in the community. A prosecutor should not assume that all medical facilities have professionals specifically trained to treat and document strangulation victims. Meeting with medical professionals presents an opportunity to develop a forensic nurse program within a facility that presently lacks such a valuable resource. See Wisconsin Chapter for the International Association of Forensic Nurses (WI-IAFN), available at <http://www.wi-iafn.org>.

A strangulation investigation begins similar to any other police investigation, with interviews of the parties present at the scene. The majority of non-lethal intimate partner strangulation cases do not have any witnesses to the assault besides the batterer and the victim. Therefore, a typical investigation may begin with competing statements by the two parties present at the scene.

Once the officer receives a report of strangulation, the officer should ask for a thorough description of the assault and memorialize the description in the police narrative. The officer may ask questions about any symptoms the victim experienced during or after the assault, such as shortness of breath, light-headedness, or a raspy voice. The officer also may ask for an explanation about anything said by the parties during the assault as well as what stopped or ended the assault.

The investigation requires a thorough documentation that includes evidence to corroborate the statements by the parties. Although the majority of cases historically did not include usable photographs as part of an investigation, improved training coupled with technological improvements in digital photography suggests a greater opportunity to visually document evidence of strangulation. A police officer returning to meet with the victim several hours or a day after the initial investigation should photograph injuries that were not visible at the time of the initial investigation. In a domestic abuse investigation, the officer also must inquire and document prior instances of abuse. *See* WIS. STAT. § 968.075(2)(ar)1. (“a law enforcement officer shall consider . . . [t]he history of domestic abuse between the parties”).

The investigating officer must ensure that victims of strangulation have access to a medical evaluation because “victims may have no visible injuries whatsoever, with relatively mild symptoms, and yet may die up to days or even several weeks later because of progressive, irreversible encephalopathy.” McClane, *supra*, at 313. Although an officer may not force medical care upon a victim, the officer must offer the care and document a proper refusal for treatment. An officer should ensure that a victim understands that “[m]edical providers are a significant community resource with the responsibility to provide expert information to patients and other systems working with survivors of strangulation.” Maureen Funk, B.S., and Julie Schuppel, R.N., *Strangulation Injuries*, 102 WIS. MEDICAL J. 41, 41 (2003), available at http://www.wisconsinmedicalsociety.org/WMS/publications/wmj/issues/wmj_v102n3/funk.pdf.

The criminal investigation improves with such treatment because “[m]edical evaluation and documentation (including photographs) are powerful ways to substantiate the survivor’s account of the incident,” particularly when conducted with the assistance of a forensic nurse examiner. *Id.* at 44-45. For example, a medical diagnosis and documentation of petechiae may provide the officer with a basis to refer the charge of substantial battery. *See* WIS. STAT. § 939.22(23) (“‘Petechia’ [plural ‘petechiae’] means a minute colored spot that appears on the skin, eye, eyelid, or mucous membrane of a person as a result of localized hemorrhage or rupture to a blood vessel or capillary”). Incorporating a medical evaluation as a standard component to a strangulation investigation provides the victim with access to critical medical care, while also improving the underlying criminal investigation by compiling a more thorough record.

5. Prosecuting a Case

The strangulation statute provides prosecutors with a charging option, but the statute does not prevent prosecutors from pursuing other criminal charges. *See* Letter from J.B. Van Hollen, Attorney General, to Assembly Committee on Judiciary and Ethics, Wisconsin State Assembly (Sept. 18, 2007) (cautioning that “this legislation is intended to supplement prosecutorial discretion, not supplant it” so “prosecutors retain the option of charging first-degree reckless endangerment for activity that could be charged as strangulation or suffocation”). This letter is referred to in a Wisconsin Department of Justice Press Release, *Attorney General Van Hollen Applauds Assembly Judiciary and Ethics Committee Approval of Strangulation and Suffocation Legislation*, available at http://www.doj.state.wi.us/absolutenm/templates/template_share.aspx?articleid=930&zoneid=5.

In the most serious non-lethal strangulation assaults, prosecutors may charge attempted homicide. Alternatively, a prosecutor may pursue a misdemeanor charge when deemed appropriate by the facts of the case. Prosecutors retain wide discretion regarding what to charge in strangulation assaults, making the charging decision one of the most important stages in the prosecution.

When a prosecutor decides to issue a criminal charge for strangulation or suffocation under the felony statute, the prosecutor still has many additional considerations before completing the final charging decision. The prosecutor must decide whether to include additional felony charges, including possible multiple counts of strangulation.

The jury instruction for strangulation includes the following language regarding the elements of the crime:

1. The defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of . . . [the] victim.
2. The defendant did so intentionally.

Wisconsin Jury Instructions-Criminal 1255.

Suppose, for example, that a victim reported that the batterer put his hands around her throat and she lost consciousness temporarily. The victim further advised that she regained consciousness and the batterer then put a pillow against her face, which also restrained the victim. Assume that the investigating officer noted in the police report that the victim had petechiae around both eyes. Under this scenario, a prosecutor may decide to charge one count of strangulation for the defendant applying pressure on the throat or neck of the victim and a second count of strangulation for the defendant blocking the nose or mouth of the victim, with the second count including the dangerous weapon enhancer based upon the defendant's use of a pillow to impede breathing. *See* WIS. STAT. § 939.22(10) (“‘Dangerous weapon’ means . . . any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood”).

The prosecutor also must decide whether to charge substantial battery for the loss of consciousness to the victim as well as for the petechial hemorrhage; these could serve as the basis for two distinct counts. *See* WIS. STAT. § 939.22(38) (“‘Substantial bodily harm’ means bodily injury that causes . . . a petechia[] [or] a temporary loss of consciousness, sight or hearing”). Additionally, the prosecutor must consider whether the batterer's action of restraining the victim during the assault supports a charge for false imprisonment. *See* WIS. STAT. § 940.30 (“Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony”).

The prosecutor also may consider whether other felony and misdemeanor charges apply to the case. Finally, the defendant's prior record may serve as the basis for a bail jumping charge or an increased penalty for habitual criminality. In addition to the general repeater enhancer applicable

to most criminal charges, the strangulation statute includes a specific enhancer when a defendant has a prior conviction for a violent crime. WIS. STAT. § 940.235(2). This example does not recommend how many or what specific charges a prosecutor should issue; instead, the exercise demonstrates the complexity of the charging decision confronting a prosecutor in a typical strangulation and suffocation case.

The prosecutor must proactively pursue strangulation cases from the initial appearance to the sentencing hearing, to overcome the low felony conviction rates observed following the passage of the strangulation statute. Improved investigation and medical evaluation starts the process for increasing conviction rates, but the prosecutor should not rely solely upon the materials included within the original law enforcement referral. For example, the prosecutor should request any 911 recordings and recorded telephone calls made by the defendant from the jail following his or her arrest. The prosecutor also may request police reports and court records from other cases involving the defendant to determine whether the materials support a motion for other acts evidence. When a strangulation case proceeds to jury trial, the prosecutor may request the testimony of an expert witness from within the medical profession to assist the jury in understanding strangulation. Similarly, the prosecutor may request the testimony of an expert witness to address any subsequent recantation by the victim. Pursuing such a proactive strategy increases the likelihood for a felony conviction with an improved outcome at the sentence hearing.

6. Conclusion

The successful prosecution of a strangulation case requires the prosecutor to develop a victim-centered and offender-focused strategy. In addition to the information presented in this section, please review the materials included in Appendix 4 of this manual. This appendix provides a template for a complete domestic abuse packet, including a two-page strangulation and suffocation worksheet designed to assist law enforcement with obtaining information relevant for a strangulation investigation. By utilizing this worksheet and the information contained within this section, prosecutors will enhance victim safety and maximize offender accountability.

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9. The Nightmare of Stalking: Crime of Obsession

1. Introduction
2. Prior Law
3. Wisconsin's Stalking Law Today
4. Investigation of Stalking
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6. Special Sentencing Considerations for Stalkers
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1. Introduction

Stalking is a violent crime that incites terror in countless people across the nation each year. In recent years, the awareness of stalking has improved. Researchers actively study stalkers and their behavior. Several popular movies have depicted graphic examples of the horror of stalking. More and more, the public is recognizing the grave dangers of stalking behavior.

The Wisconsin Legislature codifies “stalking” as a separate crime in WIS. STAT. § 940.32. There is enormous value in pursuing stalking charges. A great social stigma attaches to stalking. It sends a message to offenders that other available domestic abuse charges do not. In addition, the vigorous prosecution of those who engage in stalking behavior is an aggressive step towards preventing homicides.

2. Prior Law

Quite frankly, before the recent legislative changes in Wisconsin's stalking statute, most prosecutors assumed that the large quantum of evidence necessitated for a stalking prosecution was simply not worth the trouble, especially when other available charges netted the same penalties as that Class A misdemeanor. However, the crime of stalking now carries more felony options.

Under the previous law, a person committed the offense of stalking if:

- That person engages in a course of conduct directed at another person (the victim) that would cause a reasonable person to fear bodily injury to or death of him- or

herself or a member of his or her immediate family (the “reasonableness of the fear” element);

- The stalker knows or should know that the victim will reasonably fear bodily injury to or death of him- or herself or a member of his or her immediate family (the “knowledge” element); and
- The stalker’s acts induce such fear in the victim.

Prior law defined “course of conduct” to mean maintaining, on two or more calendar days, a visual or physical proximity to a person.

In addition, prior law defined “immediate family” to mean a spouse, parent, child, sibling, or any other person who regularly resides in the household, or who regularly resided in the household within the prior six months.

In *State v. Ruesch*, 214 Wis. 2d 548, 571 N.W.2d 898 (Ct. App. 1997), the Court of Appeals clarified the prosecutor’s role (under prior law) in establishing the following:

- That the defendant engaged in intentional, repetitive conduct directed at a specific person;
- That the conduct is of a type that would objectively (under the reasonable person standard) induce a fear of personal harm in the victim or for a member of the victim’s family;
- The State must also prove that the defendant had knowledge, actual or imputed, that such fear would result from the defendant’s conduct, and that the conduct did produce such fear.

Wisconsin law stated that a first-time offender was guilty of a Class A misdemeanor. The offense, however, increased to a Class E felony (under TIS I) if the act resulted in bodily harm to the victim or if the actor had a previous conviction under the stalking or harassment statutes. A Class D felony resulted if the stalker intentionally gained access to personal records of the victim, such as photos, tapes, or computer records in effectuating the Class E felony.

3. Wisconsin’s Stalking Law Today

Wisconsin’s new stalking law went into effect on July 30, 2002, and was amended in 2003 and again in 2005. The “new” law modified the elements of the offense of stalking and established a new penalty structure. Wisconsin Jury Instructions-Criminal 1284-1284B.

The basic elements for a Class I felony stalking charge include:

- Defendant intentionally engaged in a course of conduct directed at a specific person (victim) that would cause a reasonable person under the same circumstances to fear bodily injury or death to themselves or a member of their family, or to suffer serious emotional distress.

- Defendant knows or should know that at least one of the acts that constitute the course of conduct will place the victim in reasonable fear of bodily injury or death to themselves or a member of their family or household, or will cause the victim to suffer serious emotional distress.
- The actor's acts cause the victim to suffer serious emotional distress or induce fear in the victim of bodily injury or death to themselves or a member of their family or household.

a. “Course of conduct”

According to WIS. STAT. § 940.32(1)(a), “course of conduct” means a series of two or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:

- 1) Maintaining a visual or physical proximity to the victim;
- 2) Approaching or confronting the victim;
- 3) Appearing at the victim's workplace or contacting the victim's employer or coworkers;
- 4) Appearing at the victim's home or contacting the victim's neighbors;
- 5) Entering property owned, leased, or occupied by the victim;
- 6) Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues;
- 7) Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs;
- 8) Sending material by any means to the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim for the purpose of obtaining information about, disseminating information about, or communicating with the victim;
- 9) Placing an object on or delivering an object to property owned, leased, or occupied by the victim;
- 10) Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim;

11) Causing a person to engage in any of the acts described in 1) to 10) above.

An entire catalogue of all sixty-four possible courses of conduct is included in Appendix 5 and is also available on WILENET.

b. Date of the offense

Stalking occurs over a time period, however short or long. The prosecutor determines the time period and must be certain that the correct time period is set forth in the charging document in the charging paragraph. This is the individual prosecutor's responsibility; PROTECT cannot be relied upon to accurately input this time period.

For an example on how not doing this can raise enormous problems at trial and on appeal. *See State v. Conner*, 2011 WI 8, 331 Wis. 2d 352. The fact that the State prevailed in *Conner* does not make a "single date" stalking allegation proper unless all the stalking activity happened on that one day. If that is not the case, you should properly note the range of dates over which the entire course of conduct occurred. This period of stalking ends with an arrest and bail conditions, a TRO or injunction, or simply a significant break in time. Separate stalking charges may be issued for each separate time period; each specific period must be specifically stated in each charging paragraph.

c. "Reasonableness of the fear" element

The updated stalking legislation revises the "reasonableness of the fear" element described above, to include "suffers serious emotional distress." In determining whether fear or suffering serious emotional distress resulting from the course of conduct is reasonable, the key consideration is whether the course of conduct would induce fear or serious emotional distress not just in a reasonable person, but in a reasonable person under the same circumstances as the victim. WIS. STAT. § 940.32(2)(a).

The level of fear or serious emotional distress induced in a stalking victim is a crucial element of any stalking prosecution. *State v. Eichorn*, 2010 WI App 70, 325 Wis. 2d 241; *State v. Warbelton*, 2009 WI 6, 315 Wis. 2d 253.

Therefore, "reasonable fear" or "serious emotional distress" will receive scrutiny under the following standard: "What a person of ordinary intelligence and prudence would have believed in the position of the victim under the circumstances that existed at the time of the alleged offense." Wisconsin Jury Instructions-Criminal 1284.

The circumstances that existed at the time of the stalking course of conduct include any and all previous history of abuse or violence in the relationship.

d. Knowledge vs. intent

Today's stalking law retains the "knowledge" element of the original statute. In order for a course of conduct to constitute stalking, it must only be proved that the actor knew or should have known that at least one of the acts that constitute the course of conduct would place the victim in reasonable fear of bodily injury or death to him or herself or a member of his or her family or household, or cause the victim to suffer serious emotional distress.

Again, proof of the actor's knowledge is often found in the very nature of the relationship, past interactions between the actor and the victim, and the consequences.

e. The actor's acts

The actor's acts, as found in the third element of the crime of stalking, are not the equivalent of the "course of conduct." There must be proof that the actor's acts caused the victim's fear, but those acts need not be part of the course of conduct. For example, the acts may have preceded the actual course of stalking conduct by years. *See State v. Sveum*, 220 Wis. 2d 399 (Ct. App. 1998). *See also* Wisconsin Jury Instructions-Criminal 1284, Comment 8.

f. New definitions for relationships

The revised stalking law replaces the term "immediate family" with separate definitions for "member of a family" and "member of a household."

"Member of a family" is defined as "a spouse, parent, child, sibling, or any person who is related by blood or adoption to another." WIS. STAT. § 940.32(1)(cb).

"Member of a household" is defined as "any person who regularly resides in the household of another or who within the prior six months regularly resided in the household of another." WIS. STAT. § 940.32(1)(cd).

Further, the definition of "domestic abuse" for the purposes of stalking has the same meaning as WIS. STAT. § 813.12(1)(am) (the domestic abuse injunction section), rather than the meaning in WIS. STAT. § 968.075 (the domestic abuse statute). WIS. STAT. § 940.32(1)(am). Wisconsin Statutes § 813.12(1)(am) sought to broaden such definitions as "dating" relationships in order to make Wisconsin law consistent with the Federal Violence Against Women Act (VAWA). Even adult caregivers of the elderly or of persons with disabilities are included in its purview.

g. "Suffer serious emotional distress"

Even if the victim is unwilling to say that he or she personally feared bodily injury or death as a result of the defendant's actions, that person is still the victim of stalking as long as he or she is willing to say that under the circumstances he or she was terrified, tormented, intimidated,

harassed, or felt threatened. *State v. Sveum*, 220 Wis. 2d 399 (Ct. App. 1998), makes it clear that no actual verbal or physical threat is required, only that the victim felt threatened.

In addition, the prosecutor need not show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress. WIS. STAT. § 940.32(3m).

h. Enhancements

As stated above, two or more acts in the “course of conduct” can constitute a Class I felony stalking offense.

However, pursuant to WIS. STAT. § 940.32(2e), a Class I felony stalking offense can be alleged for a single act in the “course of conduct” if all of the following apply:

- 1) The defendant was previously convicted of sexual assault or found to have committed an act of domestic abuse;
- 2) The individual at whom the current act is directed was the victim of the sexual assault or the act of domestic abuse;
- 3) The defendant knows or should know that the act will place the victim in reasonable fear of bodily injury to or death of himself or herself or a member of his or her family or household or cause the victim to suffer serious emotional distress; and
- 4) The person’s acts induce such fear or serious emotional distress in the victim.

A Class H felony stalking offense can be charged if the defendant has a prior conviction for a violent offense as listed in WIS. STAT. § 939.632(1)(e)1. (this section includes crimes such as homicide, felony battery, felony sexual assault, sexual assault of a child, mayhem, kidnapping, arson, endangering safety by use of a dangerous weapon, etc.), or a prior conviction for stalking or harassment under WIS. STAT. §§ 947.013(1r), (1t), (1v) or (1x). *See also* WIS. STAT. § 940.32(2m)(a). The prior conviction is an element of the crime and is therefore subject to determination by the jury. *State v. Warbleton*, 2009 WI 6, 315 Wis. 2d 253.

A Class H felony stalking may be charged if the defendant has a prior conviction for any crime in the last seven years and the victim of the prior conviction is the same victim as the one in the present stalking. WIS. STAT. § 940.32(2m)(b).

Within the last seven years, if the defendant has a prior conviction for a violent offense, criminal harassment or stalking, and the prior conviction involved the same victim as in the present case, then a Class F felony stalking may be charged. WIS. STAT. § 940.32(3)(b). Only the final act need be proved to have been within the seven-year window; the other acts in the course of conduct are not restricted by time. *State v. Conner*, 2011 WI 8, 331 Wis. 2d 352.

A Class H felony stalking may be charged if the defendant gains access (or causes another person to gain access) to a record in electronic format that contains personally identifiable information regarding the victim in order to facilitate the stalking violation. WIS. STAT. § 940.32(2m)(c).

If the victim is a child or if the wiretapping laws were violated through the act of stalking, a Class H felony may be charged. WIS. STAT. §§ 940.32(2m)(d)-(e).

A Class F felony may be charged if the stalking results in bodily harm to the victim or a member of the victim's family or household. WIS. STAT. § 940.32(3)(a).

If the defendant uses a dangerous weapon in carrying out any of the acts comprising the "course of conduct," then a Class F felony may be charged. WIS. STAT. § 940.32(3)(c).

i. Venue

"Two or more acts", as described in the statute, means that so long as ONE is in your county, that is enough to give jurisdiction to your county. Even one end of telephone or other electronic communication is enough to give jurisdiction at either end of that conversation or communication. *See* WIS. STAT. § 971.19(2), where a crime which requires two or more acts to commit can be prosecuted in any county in which one of the acts occurred, or through which a car used passed.

j. Other crimes to charge

Where the behaviors that constitute the course of conduct, or precede the course of conduct, are in and of themselves a crime, they should all be charged at the same time as the stalking. If there are already pending charges that relate to the stalking, they should be joined, consolidated or dismissed and reissued as part of the stalking charging document. They are NOT lesser included offenses. *See, e.g., State v. West*, 181 Wis. 2d 792 (Ct. App. 1993).

Examples include, but are not limited to:

- Telephone or computer harassment;
- Identity theft;
- Criminal damage to property;
- Burglary, with the intent to commit the felony crime of stalking;
- Battery;
- Disorderly conduct;
- Invasion of privacy, et seq. (WIS. STAT. §§ 942.08; 942.09);
- Eavesdropping (WIS. STAT. § 968.31(1));
- Recklessly endangering safety;
- Theft;
- Violations of a TRO, restraining order, or injunction; and/or

- Violation of bail conditions.

4. Investigation of Stalking

Law enforcement is usually the entry point for stalking victims to the criminal justice system. Timely and aggressive intervention by law enforcement and prosecutors will not only serve to better protect the victim, but also facilitate a more effective prosecution.

It is common for a different officer to respond to each complaint filed by a victim. Sometimes officers may come from different agencies. Each incident, by itself, may seem minor or benign. The stalker thrives on stealth. Many stalkers become fairly expert at clandestine operations. For these reasons, many stalkers are not discovered until the victim's safety is seriously compromised.

The first hurdle in ensuring that stalking is properly investigated is for law enforcement and/or the prosecutor to identify a stalking case. Most officers are trained to inquire as to whether there is a past relationship or history of domestic abuse between the actor and the victim; this is the beginning of any stalking investigation. A solid understanding of all aspects of the underlying relationship, whether it is over for the stalking victim or not, is an absolute prerequisite to a quality stalking investigation.

Although stalking can occur during a relationship, typically, an actor's stalking behavior begins or is exacerbated when the relationship with the victim ends. This concept has been coined "separation violence." It is the time with the highest potential lethality to the victim. Studies show that up to 80% of domestic violence victims whose partners or former partners kill or attempt to kill them STALKED those victims before they killed them or attempted to kill them.

Because a victim may not immediately recognize that he or she is being stalked, prosecutors and law enforcement should keep a keen eye out for signs of stalking behavior.

To do this, prosecutors and law enforcement should inquire about several of the following areas:

- Since the relationship ended, how many times has the actor contacted the victim by phone, electronic means, or in writing?
- Has the victim had any recent unusual encounters with the actor, such as the actor showing up uninvited to an event, a "coincidental" meeting at the grocery store, or the actor being observed driving near or behind the victim?
- Has the victim been receiving any unusual phone calls (i.e. hang-up calls)?
- Has the victim noticed any unusual computer activity?
- Has the victim noticed any unexplained property damage?

The investigating officer should detail these encounters or contacts in a report and begin to seek out evidence to corroborate each reported incident. Even if there are no witnesses to the activity other than the victim, that should not be a bar to prosecution.

One powerful tool in the stalking investigator's arsenal is the "stalking warning letter." This letter should be served upon the stalker in person by law enforcement. At the same time, a report should be written noting the time, date, and place of service, as well as anything the stalker said or did upon receiving the letter. A copy of the letter should be included with the report. These letters are effective in many instances in stopping the stalking behavior, and are an important tool in cases where the police and prosecutor don't yet feel they have all the elements of a felony stalking charge. The letters also serve the important purpose of being undeniable proof of the knowledge element when the stalking behavior continues after the stalking warning letter is ignored. Appendices 4 and 5 contain sample stalking warning letters.

Stalking cases necessitate a great deal of time, patience and police investigative resources to build a strong case against the offender. It takes collaboration between the prosecutor, law enforcement and the victim to collect the evidence necessary to effectively prosecute a stalking case. When probable cause is established, search warrants must be executed on any and all property owned or otherwise used by the defendant to locate and collect all evidence regarding the victim, including trophies, altars, journals, logs, calendars, and any and all records of the stalker's activities in regards to the victim.

Prosecutors should encourage victims to keep a detailed diary or log of each contact that the victim knows or believes to be initiated by the actor. The victim, in turn, must work with law enforcement to seek out additional evidence to substantiate these contacts.

In the interim, to best ensure the victim's safety, and if the victim believes that they can do so safely, the victim can be encouraged to obtain a domestic abuse or harassment injunction. Further, the prosecutor can and should issue any charges stemming from the violation of these orders even if the stalking charge is not yet chargeable. Of course, both the prosecutor and law enforcement should refer the victim to community advocates who can work with that person to properly address the creation of a safety plan.

5. Challenges Facing a Stalking Investigation

The individual behaviors of the stalker may seem insignificant. However, collectively, some examples of these behaviors can become intimidating and scary:

- Petty vandalism;
- Annoying phone calls or e-mails;
- Sending unwanted letters, cards or gifts;
- Showing up at the victim's work, home or school;
- Following the victim around;
- Installing spyware on the victim's computer;

- Secretly installing a GPS in the victim's vehicle or on personal items;
- Spying on the victim;
- Tapping a victim's phone;
- Reporting a victim to Child Protective Services or reporting the victim to authorities for crimes that did not occur;
- Intercepting mail;
- Disabling the victim's car;
- Making copies of the victim's keys to car or residence;
- Entering the victim's home when the victim is not there;
- Attempting to obtain information about the victim from neighbors or friends;
- Repeatedly litigating family court matters in a harassing manner;
- Taking unwanted photographs of the victim;
- Suicidal or homicidal threats;
- Violating TROs or injunctions;
- Actual assaults.

a. Law enforcement communication

Acts occur in multiple jurisdictions and at varying times, involving different police agencies and different investigators. Someone must head up a stalking investigation. Reports from all jurisdictions and from all times during the relationship and after it ended, if it has ended, need to be obtained and compiled by that person. Copies of all petitions for injunctions or TROs, and copies of the issued court orders, need to be kept and compiled.

These investigations can take time; stalking behavior can last for years.

Arrest and prosecution may aggravate the stalker and exacerbate the situation, thereby increasing the law enforcement time and resources required to keep the victim safe.

b. Investigations involve crucial functions

Assessment and evaluation: Typically, a stalker has a particular method of operation. Interview the victim. Gauge the victim's level of fear. Find out about relationship history, history of violence, past threats, any mental health history of the stalker, substance abuse issues, criminal history, any prior relationships and what happened to those, and any examples of the above-listed behaviors.

Corroboration: Gather evidence to corroborate the victim's statements, such as taped phone messages, letters, cards, gifts, items sent to the victim, and statements of neighbors and other witnesses, as well as any surveillance equipment. Consider obtaining search warrants for the stalker's auto and home. During the execution of these warrants, remain alert for evidence such as photos of the victim, diagrams of the victim's home or workplace, diaries written by the stalker, personal items belonging to the victim, surveillance footage, keys to the victim's car or home, etc. All cell phones, computers, and potential data storage devices need to be seized and

searched. All telephone, cell phone and text message records should be obtained with subpoenas for documents.

Collaboration: Work with other law enforcement agencies to gather evidence and develop safety plans for victims.

Safety planning for victims: Law enforcement should refer the victim to an advocacy agency to create a safety plan.

While no stalker is exactly like another and not all victims can rearrange their lives accordingly, generally it is sound advice for victims to attempt one or more of the following:

- Cease all communication with stalkers;
- Seek to obtain a TRO or injunction;
- Keep a diary of the stalking behavior;
- Collect and save letters and phone messages from the stalker;
- Alter work times if possible and routes to and from work;
- Advise co-workers, friends, neighbors and relatives;
- Move;
- Obtain an unlisted phone number;
- Arrange for a phone tap;
- Arrange for 3rd party visitation if there are children in common.

Consider installing a GPS on the stalker's vehicle(s) during the investigation, if regular surveillance isn't possible. A search warrant is required in order to do this. *See U.S. v. Jones*, 132 S.Ct. 945 (2012); *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369.

6. Special Sentencing Considerations for Stalkers

We sometimes forget that a special hammer exists for sentencing a stalker or a person who violates a TRO or injunction. Property, especially vehicles, used in the commission of these offenses may be subject to seizure and forfeiture.

WIS. STAT. § 973.075 FORFEITURE OF PROPERTY DERIVED FROM CRIME AND CERTAIN VEHICLES.

(1) The following are subject to seizure and forfeiture under §§ 973.075 to 973.077:

- (a) All property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime.
- (b) 1m. (A) All vehicles, as defined in § 939.22(44), which are used in any of the following ways:

- a. To transport any property or weapon used or to be used or received in the commission of any felony.
- f. In the commission of a crime under §§ 813.12(8) (domestic abuse TROs and injunctions), 813.122(11) (child abuse TROs and injunctions), 813.123(10) (vulnerable adult TROs and injunctions), 813.125(7) (harassment TROs and injunctions), 813.128(2) (foreign protection orders) or 940.32 (stalking).

According to WIS. STAT. § 973.076(2)(a), the district attorney must begin the forfeiture action within thirty days of the seizure of the property or date of conviction.

The State has the burden of satisfying or convincing the court to a reasonable degree of certainty by the greater weight of the credible evidence that the property is subject to forfeiture under §§ 973.075 to 973.077. WIS. STAT. § 973.076(3).

Under WIS. STAT. § 973.077(1), it is not necessary for the State to negate any exemption or exception regarding any crime in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under § 973.076. The burden of proof of any exemption or exception is upon the person claiming it. WIS. STAT. § 973.077(1).

Also, there is no liability encumbered by a law enforcement officer or employee engaged in the lawful performance of forfeiture duties, according to WIS. STAT. § 973.077(3).

7. Understanding Stalkers through Stalker Typology

By categorizing different types of stalking behavior, many researchers have devised “typologies” based on different stalker characteristics and the relationship between stalkers and victims.

There is no evidence favoring any one typology over another. While there are numerous “typologies” in existence, two classification systems are mentioned here: “Zona et al” and “Mullen et al”.

“Zona et al” devised a four-category system in 1993:

- 1) Simple obsessional;
- 2) Love obsessional;
- 3) Erotomaniac; and
- 4) False victimization.

Michael A. Zona, K.K. Sharma & J. Lane, *A Comparative Study of Erotomaniac and Obsessional Subjects in a Forensic Sample*, 38 J. FORENSIC SCI. 894-903 (1993).

In 1999, “Mullen et al” categorized stalkers as being:

- 1) Rejected;
- 2) Intimacy seeking;

- 3) Incompetent;
- 4) Resentful; and
- 5) Predatory.

P.E. Mullen, M. Pathé, R. Purcell & G.W. Stuart, *Study of Stalkers*, 156 AM J. PSYCHIATRY 1244-49 (1999).

The following summary originates from several sources, including: Paul E. Mullen & Michele Pathé, *Stalkers and Their Victims*, 28 PSYCHIATRIC TIMES (April 2001); P. Kropp, *The Dynamics of Ex-Intimate Partner Stalking*, BC INSTITUTE AGAINST FAMILY VIOLENCE NEWSLETTER (Summer 2000).

a. The rejected stalker

(Corresponds to Zona's "simple obsessional" stalker)

The rejected stalker begins to stalk after his partner (intimate or close friend) has ended the relationship or indicates a plan to end the relationship. The stalking behavior often begins while the relationship is still intact. The stalker's motivation may be to continue or rekindle the relationship, or to seek revenge.

Rejected stalkers often suffer from borderline personality disorder and narcissistic personality disorder. Rejected stalkers usually have poor social skills. They experience feelings of humiliation and extreme dependency. Rejected stalkers may feel an intense fear of abandonment, experience wild mood fluctuations, and develop explosive anger or rage.

Wild mood fluctuations can become very dangerous. For instance, many rejected stalkers put their victim on a pedestal. Then suddenly, due to even the smallest perceived slight, the rejected stalker may switch to intense anger and devaluation of the victim.

Narcissistic rejected stalkers require constant reassurance in the form of compliments and validation to substantiate their sense of self-worth. When their partner leaves, the rejected stalker may be left with feelings of emptiness and worthlessness, many saying that they felt as if they had lost a part of their own body, like an arm or a leg. This can explain the desperate nature and quality of the rejected stalker's behavior.

The rejected stalker is often the most persistent and intrusive type of stalker. A history of domestic abuse with the victim is not uncommon. The rejected stalker frequently employs intimidation and assault in pursuit of the victim. Simply put, rejected stalkers employ stalking as a way to control the victim after a relationship has ended.

Often, an attitude of "entitlement" or "ownership" is present – a significant risk factor for lethal violence. Studies show that the aspect of a relationship most associated with lethality to the victim is whether the victim and the stalker were sexual partners. Having "had" the victim gives the stalker a sense of ownership or entitlement. Rejected stalkers typically are the most resistant

to efforts aimed at ending their stalking behavior. However, many do curb their behavior with the threat of judicial intervention.

b. The intimacy seeker

(Corresponds to Zona's "erotomania" and "love obsessional" stalkers)

An intimacy seeker wants to establish an intimate relationship with another person, often a stranger or acquaintance. Intimacy seekers imagine that the stranger or acquaintance already loves them. They are prone to interpret any response from their victim, either positive or negative, as encouragement.

Intimacy seekers are often shy, isolated people who experience great difficulty with intimate relationships. Commonly, intimacy seeking stalkers have mental health problems, such as schizophrenia, erotomania, or narcissistic personality disorder.

An intimacy seeker is one of the most persistent types of stalkers, harassing longer than any other type, except for perhaps rejected stalkers. Intimacy seekers will often begin by calling the victim, writing letters, and sending gifts. Intimacy seekers often become jealous of any relationship the victim has with another person. If intimacy seekers recognize that they are being rejected, their behavior can become threatening or violent.

This type of stalker is usually unresponsive to legal sanctions, viewing such sanctions as "challenges to be overcome" in order to demonstrate an undying love for the victim. Psychiatric intervention and treatment are often needed to extinguish the stalking behavior.

c. The incompetent stalker

The incompetent stalker wants to become romantically involved with the victim, but lacks the social skills to do so appropriately. This type of stalker usually has trouble with empathy and will often ask for dates repeatedly. The incompetent stalker, after being turned down, will constantly call a victim, and may even try to kiss or hold hands with the victim.

Compared to other typologies, the incompetent stalker stalks for the shortest time period and often stalks many people. The incompetent stalker is the most likely to quickly stop after being confronted with legal action, such as a stalking warning letter, or after seeking counseling.

d. The resentful stalker

Resentful stalkers want to settle a score with someone who has upset them. Resentful stalkers may view themselves as victims striking back against an oppressor. Resentful stalkers typically want to frighten and distress their victims. They are often irrationally paranoid. Resentful stalkers will stalk either strangers or acquaintances. Resentful stalkers will likely verbally threaten victims, but they are not likely to physically assault a victim.

Resentful stalkers are likely to stop if confronted with legal sanctions early on. However, the longer the stalking continues, the less effective legal sanctions seem to become. Resentful stalkers rarely benefit from mandated treatment, since they are both self-pitying and self-righteous.

e. The predatory stalker

The predatory stalker is motivated by feelings of power over a victim as well as the promise of sexual gratification. Predatory stalkers stalk their victims as part of a plan to attack that person, usually sexually.

Predatory stalkers are usually sexual deviants. They have poor self esteem. Predatory stalkers will stalk either someone they know or a complete stranger.

Predatory stalkers are different from the other stalker typologies, in that they do not usually attempt to contact their victims while in the midst of stalking them. There is usually no warning of their attack. Predatory stalkers have a high likelihood of committing a sexual assault. Predatory stalkers usually have prior convictions. Management of the predatory stalker's sexual deviance is central to stopping the stalking behavior.

Research must continue to study stalking behavior and stalkers themselves. Characterizing an offender within a particular typology will aid in the determination of the most effective treatment options. Familiarizing yourself with the different typologies will help you to become a more effective strategist in terms of developing your case theory and courtroom presentation, as well as developing an effective safety plan for a victim of stalking.

8. Additional Resources

J. Reid Meloy, *Stalking, Threatening, and Attacking Public Figures* (2008), abstract available at <http://www.specializedtraining.com/p-53-stalking-threatening-and-attacking-public-figures.aspx>.

J. Reid Meloy, *The Psychology of Stalking: Clinical and Forensic Perspectives* (1998), abstract available at <http://www.specializedtraining.com/p-55-the-psychology-of-stalking-clinical-and-forensic-perspectives.aspx>.

The National Center for Victims of Crime, Stalking Resource Center website, www.ncvc.org/src.

United States Department of Justice Office of Justice Programs, Bureau of Justice Statistics Special Report, *Stalking Victimization in the United States*, January 2009, available at <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=45862>.

United States Department of Justice Office of Justice Programs, Stalking web page, <http://www.nij.gov/topics/crime/stalking/welcome.htm>.

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10. Battery to Pregnant Women: Fetal Homicide

1. Introduction
2. Fetal Homicide
3. Proof of Intent
4. Proof of Causation
5. Immunity
6. *Cornelius*, aka the “Born Alive” Rule
7. Pregnant Victims, Miscarriages and Great Bodily Harm
8. Additional Resources

1. Introduction

The pregnancy of any victim ought to receive careful consideration during a domestic abuse prosecution, whether or not the abuser knew of that pregnancy. To make an analogy, striking a woman who “turns out” to be pregnant is similar to punching a guy who “turns out” to have an aneurysm and dies. It can be argued that ignorance of the existence of an “invisible victim” in utero is no different than shooting into a house without knowing how many occupants are inside.

It is not unusual for pregnant victims, at any stage of pregnancy, to have very strong feelings of loss if their baby dies. The victim may very well express a strong desire for separate punishment in vindication of a miscarriage or stillbirth caused by criminal conduct.

2. Fetal Homicide

In 1997, the Wisconsin legislature essentially created parallel crimes, with identical penalties, for causing the death of an unborn child, at any stage of gestational development for:

- 1) The most common types of homicide, except felony murder. *See* WIS. STAT. §§ 940.01(1)(b), 940.02(1m), 940.05(2g); 940.05(2h); 940.06(2); 940.09(1)(c, d or e) and (1g)(c or d); 940.10(2).
- 2) Reckless injury, contrary to WIS. STAT. §§ 940.23(1)(b) and (2)(b).
- 3) Battery to an unborn child, substantial and aggravated battery to an unborn child. *See* WIS. STAT. § 940.195.

When charging any of the above crimes, simply substitute the words “an unborn child” for “a human being” in the charging document. Listing a name, if one was given by either the family or the medical examiner, is appropriate but not legally necessary.

3. Proof of Intent

Because the fetal homicide law establishes “transferred intent” between the unborn child, the mother, or another person, that means that the unborn child need not be the intended target in any intentional attack. For instance, an attacker who intends to kill a pregnant woman is also guilty of attempted fetal homicide even if the attacker is unaware that the victim is pregnant.

4. Proof of Causation

In theory, fetal homicide applies throughout the entire pregnancy, even in the earliest stages. In practice, however, the medical examiner will typically be able to determine “cause of death” to a reasonable degree of medical certainty only in the later stages of pregnancy. Generally, the medical examiner has the best opportunity for establishing cause of death in the last trimester.

Proving causation will often be an insurmountable hurdle in the earliest stages of pregnancy, before the “quickening,” that period of time when the mother can feel fetal movement. Prior to quickening, the likelihood of spontaneous miscarriage is high enough to create reasonable doubt, in and of itself.

For those reasons, successful prosecution of a completed fetal homicide in the first trimester would be exceedingly unlikely. However, if there is evidence that the attacker intended to cause death or felony injury to an unborn child, even in the earliest stages of pregnancy, then “attempted feticide” or “attempted battery to an unborn child” may well be appropriate and quite provable.

5. Immunity

WIS. STAT. § 939.75(2)(b)(3) grants categorical immunity to the mother. Because this statute creates this immunity by excepting cases in which the mother is an active participant in causing the death of her unborn child, accomplices who actively assist a mother in killing the unborn child probably also cannot be prosecuted. (WIS. STAT. § 940.15(5) does, however, potentially apply to any non-physician who causes the death of an unborn child even with the mother’s consent.)

6. *Cornelius*, aka the “Born Alive” Rule

Under *State v. Cornelius*, 152 Wis. 2d 272 (Ct. App. 1989), an attacker can be prosecuted for any level of homicide if his conduct caused the death of a child – viable or not – who was born alive. In other words, if a baby (whether the intended victim or not) is born alive and survives even for a few minutes, the appropriate charge is homicide (not feticide), as that victim became,

statutorily, a “human being” at the moment of birth under the law in Wisconsin. *See generally Cornelius*, 152 Wis. 2d 272; WIS. STAT. § 939.22(16).

7. Pregnant Victims, Miscarriages and Great Bodily Harm

Some attacks on pregnant victims may not rise to the level of fetal homicide or attempted fetal homicide because the attacker is either unaware of the victim’s pregnancy or completely indifferent to it. In such circumstances, two possible felony theories might apply:

a. Recklessly endangering safety (of the mother)

Depending upon the context, circumstances and severity of the attack, criminal recklessness may exist, and even an utter disregard for human life, when the attacker either knows, or should know that the victim is pregnant. This theory applies whether or not the victim miscarries after the attack and whether or not the unborn child is injured.

Example:

An attacker beats his girlfriend, who is six months pregnant, and kicks her in the stomach area without causing felony-level injury to her or the unborn child. Keep in mind that the more advanced the pregnancy, the greater the medical risk to the mother from blunt force trauma. This is a case where first- or second-degree recklessly endangering safety are possible charges.

b. Aggravated battery

In cases where a miscarriage immediately follows an attack, it might be argued that the miscarriage constitutes “great bodily harm” to the mother. Thus, an attacker could be charged with aggravated battery under WIS. STAT. §§ 940.19(4), (5) or (6). Note that statutorily, a miscarriage cannot be “substantial bodily harm.” *See* WIS. STAT. § 939.22(38).

WIS. STAT. § 939.22(14) defines “great bodily harm”:

“Great bodily harm” means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

In *LaBarge v. State*, 74 Wis. 2d 327 (1976), the “other serious bodily injury” language from WIS. STAT. § 939.22(14) was found to broaden the scope of the statute rather than limit it, leaving it up to the jury to decide whether or not a particular injury constituted “serious bodily injury.”

In very early stages of pregnancy, proof of causation will remain problematic. However, it is possible that a medical examiner may have more medical certainty that a beating caused the

miscarriage which immediately followed the beating, than that the beating caused the death of the unborn child. In other words, this theory would not require the State to prove that the unborn child was alive at the time of the beating, but only that the miscarriage was triggered by the beating.

Example:

An attacker beats a woman he does not know is ten weeks pregnant and she miscarries immediately, requiring hospitalization and surgery to complete the miscarriage. In such a case, the prosecutor should consider charging an aggravated battery.

8. Additional Resources

American Pregnancy Association, Statistics, *available at* <http://www.americanpregnancy.org/main/statistics.html>.

AOLNews.com, *Bucs' Lionel Gates Charged with Battery on Pregnant Woman*, *available at* <http://www.aolnews.com/2007/03/30/bucs-lionel-gates-charged-with-battery-on-pregnant-woman/>.

11. Charging the Domestic Abuse Case

1. Introduction
2. What Constitutes a Domestic Abuse Charge
3. Requirement of Written Charging Policies
4. Information to be Collected by Responding Officers
5. The Decision to Commence Prosecution
6. The Decision to Decline Charges
7. Ethical Standards for the Charging Decision
8. Considerations in Making the Charging Decision
9. Dual Arrest Situations
10. Penalty Enhancers
11. Alternatives to Prosecution
12. Resources Regarding the Importance of Domestic Abuse Prosecution

1. Introduction

Batterers often do not believe they are responsible for the criminal behavior in which they engage. Thus, they will try to coerce the victim (in negative and positive ways) to “drop the charge(s).” Victims who initially worked with the police and prosecutor may now start to backtrack as they receive pressure from the defendant and defendant’s family and friends. In addition, because domestic abuse is generally kept secret and the victim is often isolated, those who might offer support to the victim – such as the victim’s family, friends and spiritual or professional community – may now come forward to say they never saw signs of abuse. They may even side with the defendant. All of these outside pressures – in addition to such factors as fear, desire to keep the family intact and economic concerns – may contribute to the victim begging to have the charges dropped and stating that he or she is responsible for whatever occurred.

Victims engage in an ongoing and shifting analysis as to what is the safest course of action. Under mounting pressure, the victim may attempt to appease the defendant. Even if the victim understands he or she does not control the charging decision, the victim must demonstrate to the defendant that he or she attempted to “get the charges dropped” as commanded by the defendant. The victim is more afraid of the defendant than the prosecutor’s displeasure with the victim. With no guarantee the defendant will be found guilty or that a successful prosecution will end the

abuse, the victim will do what he or she believes will minimize harm to both victim and child(ren) after the criminal case concludes. The victim may well have to continue contact with the defendant, especially if they have children in common. Family court will almost certainly force some type of contact. The victim is influenced by both internal and external pressures to “make it all better” for the defendant, and motivated to stay alive.

Whether or not a person will face criminal prosecution is perhaps the most powerful decision prosecutors make. A criminal charge can carry a social stigma that may change a defendant’s life forever. In addition, whether or not charges are brought can have enormous ramifications for a domestic abuse victim’s safety. As ministers of justice we must always respect the enormous power and influence of each charging decision. The goal of this chapter is to offer a broad overview of some best practices for making charging decisions.

2. What Constitutes a Domestic Abuse Charge

WIS. STAT. § 968.075(1)(a) states that a possible defendant in a domestic abuse case may be:

An adult (17+) committing an act against his/her:

- Spouse;
- Former spouse;
- Adult (18+) with whom the person resides;
- Adult (18+) with whom the person formerly resided; or
- Adult (18+) with whom the person has a child in common.

Note that “adult” is defined in WIS. STAT. § 54.950(1) as an individual who is at least 18 years of age. However, an adult for purposes of commission of a crime is a person 17 years of age or older.

WIS. STAT. § 968.075(1)(a) defines acts that constitute “domestic abuse” as follows:

- Intentional infliction of physical pain, physical injury, or illness; or
- Intentional infliction of impairment of physical condition; or
- First-, second-, or third-degree sexual assault as described in WIS. STAT. § 940.225; or
- A physical act that may cause the victim reasonably to fear imminent engagement in the conduct described above.

3. Requirement of Written Charging Policies

Each district attorney’s office shall develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses. WIS. STAT. § 968.075(7).

Such policies must include the following:

- Decisions not to issue charges should not be based:
 - Solely upon the absence of visible indications of injury or impairment;
 - Upon the victim's consent to any subsequent prosecution of the other person involved in the incident; or
 - Upon the relationship of the persons involved in the incident.
- A charging decision should, absent extraordinary circumstances, be made not later than two weeks after the district attorney has received notice of the incident.

4. Information to be Collected by Responding Officers

Domestic Abuse Arrest/Incident Report Writing Checklist:

- Times (incident, arrival, statement);
- Parties present;
- Emotional state of the victim, the suspect, and anyone else present;
- Injury to victim and suspect;
- Obtain non-consent statement from victim, if appropriate;
- Describe the scene;
- Relationship between the victim and the suspect.
- Background of the relationship: for example, where parties have lived in the past seven years;
- Whether children were present, witnessed the incident, or were involved (describe);
- Pictures taken of victim and suspect and condition of home or location of incident;
- Evidence collected: for example, phone, torn clothing, weapons, etc;
- Medical attention sought by any party, where that attention was sought, and whether a medical release form was signed. Police should get a release right away, as they may not have access to the victim at a later time;
- Note when any of the following are present: TRO, injunction, probation, intoxication of any party;
- Include any statements and excited utterances from the parties;
- Witnesses' names, addresses, phone numbers, workplaces;
- How police can reach the victim during the next 24 hours. Police should get the names, addresses, and telephone numbers of any person who knows how to reach the victim;
- Notes for narrative: victim statement, suspect statement, witness statement, probable cause for each arrested party;
- Make a request to save the 911 tape, if one exists.

5. The Decision to Commence Prosecution

The State obtains jurisdiction over a person by the filing of a criminal complaint. In most situations prosecutors issue the criminal complaint after considering the facts of the case.

There are other means by which a defendant can be charged with a crime in Wisconsin. A John Doe proceeding under WIS. STAT. § 968.26 can lead to the issuance of a criminal complaint by a prosecutor or a judge. A judge can issue a complaint if a prosecutor refuses to do so or is unavailable, pursuant to WIS. STAT. § 968.02(2). A judge can also issue a complaint following a John Doe proceeding if a prosecutor refuses to do so. In theory, a defendant could be indicted by a grand jury pursuant to WIS. STAT. §§ 968.40-968.53. John Doe proceedings can be a useful tool in domestic abuse investigations but are beyond the scope of this section. They, as well as the other means of commencing a prosecution noted here, are very rarely, if ever, used.

The criminal complaint must be a written document, which must provide or answer all of the following:

- The defendant's name and date of birth.
- A clear statement that the defendant is charged with a crime.
- What is the crime?
- What is the penalty for the crime?
- When and where did the offense allegedly take place?
- Why is the accused believed to have committed the crime?
- Who is the source of this information?
- Enough underlying facts to permit the reasonable inference that the sources of information are probably truthful.

State ex rel. Evanow v. Seraphim, 40 Wis. 2d 223, 230, 161 N.W.2d 369, 372-73 (Wis. 1968).

These factors must be sufficient to a standard of probable cause. *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 442, 173, N.W.2d 175, 179 (Wis. 1970). That standard will be met, provided that the complaint sets forth facts sufficient to permit an impartial and reasonable judicial officer to make the judgment that the charges are not capricious and are sufficiently supported to justify a criminal case. *Jaben v. United States*, 281 U.S. 214, 224 (1965).

In domestic abuse cases the criminal complaint is frequently based on hearsay. In a typical case, a police officer will swear to the complaint based upon statements that officers obtained from the victim and/or witnesses. *Evanow*, 40 Wis. 2d at 228, 161 N.W.2d at 371. This is sufficient for purposes of a preliminary hearing, so long as there are enough underlying facts to permit the reasonable inference that the sources of the information are probably truthful. *Id.*

Although the legal requirements for a criminal complaint are minimal, it is important to keep in mind that the complaint may be the only document in the court file that outlines the charges. If it

is important to give the court ready access to more information, you may want to provide the court with the relationship of the parties, some brief background and some facts to assist with a bail argument. For instance, if you are seeking an “absolute sobriety” order as a bond condition, it would be useful to include in the complaint some observations of the suspect’s intoxication level at the time of the arrest.

It is best to make a charging decision as soon as possible after the referral comes into your office. A prompt decision on whether or not to issue charges serves the interest of both the victim and of justice. The time immediately after a domestic abuse incident can be a very dangerous one for the victim. If a criminal charge is issued, the victim may be able to have the protection of a court’s no-contact order. The victim will also have access to the resources of the DA’s office’s victim services unit.

An expeditious decision *not* to issue charges also serves the interests of justice. Because of the lack of discretion given to law enforcement under the mandatory arrest law, many domestic abuse cases cannot be proven at trial or otherwise lack merit. Knowing that many domestic abuse cases will never be charged, it is incumbent upon prosecutors to make a decision as soon as reasonably possible.

It should be every prosecutor’s goal to make a charging decision on domestic abuse allegations while the defendant remains in custody. In all cases, a charging decision should be made within two weeks. WIS. STAT. § 968.075(7)(b). Exceeding two weeks is acceptable only if there are “extraordinary circumstances.” Whether or not you decide to issue charges, you should notify the victim of your decision as soon as practicable.

6. The Decision to Decline Charges

As stated above, many domestic abuse referrals will not result in the issuance of criminal charges. If you decline to issue a criminal charge, you should notify the victim. This is particularly important when your decision to decline charges will mean that the suspect will be getting released from custody. Victims need to be given as much opportunity as possible to protect their safety.

In appropriate cases you may wish to inform the suspect that the statute of limitations allows you to reverse your decision.

It is imperative that you carefully document your reasons for declining charges. If the victim is re-victimized, you may need to defend your prior decision.

The prosecutor’s discretion to decline charges is limited by statute.

As noted above, charges may not be declined based:

- Solely upon the absence of visible indications of injury or impairment;

- Upon the victim's consent to any subsequent prosecution of the other person involved in the incident; or
- Upon the relationship of the persons involved in the incident.

Furthermore, unless there are extraordinary circumstances, a decision not to bring charges must be made within two weeks of the prosecutor receiving the case.

7. Ethical Standards for the Charging Decision

SCR 20:3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR.

- (a) A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.

SCR 40.15 ATTORNEY'S OATH.

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust

8. Considerations in Making the Charging Decision

a. Review the police reports

The first step in making a charging decision is to read the police reports thoroughly. As you read the reports, be mindful of the following:

- Why were the police called to the incident? Is what they encountered the same as the call? If there is a difference it is important to determine why. If a victim called 911 to complain that her boyfriend was threatening her with a gun and the police recover no firearm, you may have an inconsistency that will harm the credibility of the victim.
- Note the location and appearance of the victim and suspect at their first encounter with the police. Who answered the door? Is anyone yelling? Crying? Intoxicated?
- Were any witnesses noted in the report? What did they observe? What relationship do they have to victim and suspect? Note that a family member such as the victim's sister may be perceived as biased toward the victim. A neighbor may be perceived as more neutral.
- Were any children present? Domestic abuse in the presence of children is always an aggravating factor. Children may be witnesses. Even if they are not going to testify, their demeanor and appearance can be important at trial. A police officer's testimony that a child was crying and hiding under a table can be powerful evidence.

- What is the condition of the crime scene? Is there broken furniture? Blood? Evidence of alcohol or drug use? Weapons?
- What were the injuries to the suspect and victim? Do any of those injuries appear to be defensive? Some examples of defensive injuries include: injuries to the victim's hand as he/she tried to disarm the attacker or injuries to the victim's forearms as he/she tried to block punches. Bite and scratch marks on an attacker can also be as a result of the victim defending him- or herself. Remember that WIS. STAT. § 968.075(7) mandates that the lack of visible injuries cannot be the determining factor in a prosecutor's decision to decline charges.
- Review the statement made to the police by the victim. Does it make sense in light of the physical evidence? What is the victim's demeanor? Calm? Scared? Crying? Was he/she intoxicated? The victim's credibility will be attacked if he/she was under the influence of drugs or alcohol at the time of the attack or the report.
- Review any statement made by the suspect. Is his/her statement consistent with the physical evidence? What is his/her demeanor? Angry? Calm? Was he/she intoxicated?
- Review the "unimportant material" in the police report. What is the height and weight of the defendant? How does that compare to the victim? What sort of work does he/she do? Is he/she right- or left-handed? A right-handed punch or stab will typically land on the left side of a victim if the victim is facing the suspect.
- Consider whether to request that the officer conduct additional investigation.

b. Review other materials

- What is the prior criminal history of the defendant?
- What is the prior criminal history of the victim?
- Order and review recordings of 911 calls (non-emergency calls to police may also be recorded).
- Photographs taken by the police, hospital or others. It is also common for a victim to take pictures of his/her own injuries or have a friend do so.
- Reports from the fire department or ambulance service.
- Medical records.
- Records of prior domestic abuse incidents involving the defendant.
- Records of any restraining orders against the suspect or victim.
- Text messages, voicemails, emails, blog entries, etc.

c. Interview the victim

It is good practice to speak with the alleged victim of domestic abuse before making a final decision regarding charging. Even the best police report will not give you the understanding of an incident that you can get from a conversation with the victim.

The best practice is to speak with any witness in person, if possible. However, the reality in many offices is that a telephone call is the closest prosecutors will be able to get.

Avoid becoming a witness yourself: If the victim tells you something that tends to negate the guilt of the suspect or mitigates the offense, you will have to disclose this information to the defense. If you are the only person who has spoken with the victim you may well be called as a witness for the defense.

You can avoid the risk of becoming a witness by having a police officer or your office's investigator present when you speak with the victim. Obviously, this is more difficult when you are speaking with a witness by telephone. If possible, use a speakerphone and have a police officer present while you speak with the victim. If the victim discloses something that must be turned over to the defense, ask the officer to prepare a supplementary report of the disclosure. Even if the victim does not disclose anything that requires disclosure it is often a good idea to ask the officer to prepare a report.

If you are speaking to a victim over the telephone without an officer present and the victim divulges to you some new information that you must disclose, you must prepare a memo and turn it over to the defense. In addition, ask a police officer to speak with the victim about this new information and prepare a report as soon as possible. You'll still be a witness, but you won't be the only witness to this piece of information. With some luck, this will keep you from being called as a witness by the defense.

Speak to only one witness at a time: Do not allow the victim to speak with you in the presence of any person other than the law enforcement official or office staff member you designate. It will only hamper the interview if you allow the victim to have his or her mother or friend in the room as you try to speak with him or her. It may seem reasonable for a victim to have another person present for moral support. However, if you have to ask some tough questions to get to the truth of the story, the victim may be reluctant to disclose matters that may be embarrassing. Under no circumstances should the defendant and victim be interviewed together.

Avoid repeated interviews with the victim: The more you speak with the victim, the easier it will be for the victim to speak about what happened. Unfortunately for your case, however, this may also have the effect of blunting the emotional impact of his or her testimony when you get to trial. Be organized and thoughtful in your first interview so you can learn whatever you need to know at that time.

Consider victim credibility: When speaking with the victim you should also be considering his or her credibility.

A good guide to credibility is Wisconsin Jury Instruction 300 (Credibility of Witnesses), which includes the following considerations for determining credibility:

- Stake in the outcome: whether the witness has an interest or lack of interest in the result of the case;

- Anticipate how a jury might judge the conduct, appearance and demeanor of the victim during trial;
- Victim's memory: the clarity or lack of clarity of the witness' recollections;
- Opportunity the witness had for observing and for knowing the matters the witness testified about;
- Reasonableness of the witness' testimony;
- The apparent intelligence of the witness;
- Bias or prejudice, if any has been shown;
- Possible motives for falsifying testimony;
- All other facts and circumstances during the trial which tend to either support or discredit the testimony.

Consider the victim's record: For example, if the case is based solely on the victim's word and the victim has a theft by fraud or perjury conviction, you will face certain credibility hurdles at trial. Should the victim have a record of past domestic abuse arrests against the suspect and the suspect is claiming self-defense, you may have additional concerns. Finally, if prior arrests or charges exist, look into those cases to determine credibility issues that might have previously arisen.

Ideas for the interview: When speaking to a victim you should be specific and direct and speak in a matter-of-fact tone of voice. Be patient.

One example of some interview questions with which to start:

- Can you tell me what happened?
- Has this person ever hit you before?
- What did the person hit you with? Open or closed hand?
- Where on your body were you hit?
- How many times were you hit?
- Was any instrument used? A gun? A knife? A telephone? A fist?
- Were any threats made against you?
- Are there any weapons in the house?
- Ask the victim about the suspect's past.
- Ask about the victim's injuries. Some injuries such as bruises may be far more visible at the interview than they were immediately following the crime. Additional photographs should be ordered if necessary; it is a good idea to ask police to re-contact the victim a few days after the event to re-photograph injuries.
- Ask if the victim sought medical treatment. The victim may have declined conveyance to the hospital only to decide the next day that he/she needed to see the doctor. If necessary, arrange to have medical release forms signed.
- Ask if the defendant has tried to contact the victim since the crime.
- Explain to the victim that the defendant will probably try to contact him/her and that such contact should be reported to you or to the police. Apology letters, texts, emails, and voicemails are often great evidence at trial.

- Ask if there were any witnesses to the incident.

Avoid questions that may be perceived as hostile, ambiguous or rhetorical. Do not terminate the interview because the witness is crying, yelling or being otherwise difficult. To address these situations tell the victim to slow down, lower her voice or explain that you cannot understand. Allow the victim the time he or she needs to tell the story.

The need for a safety plan: When meeting with victims of domestic abuse, make sure to address the victim's concerns regarding his or her personal safety. If possible, work with victim advocates to assist you. Be sure to discuss the benefits of a civil temporary restraining order (TRO) or domestic abuse injunction. These orders can provide protection to a victim even if a charge is issued and a "no-contact order" is included as a bond condition. First, a TRO or injunction deters the suspect from contacting the victim before he or she is released from custody. Second, a domestic abuse injunction can last up to four years, well past the final disposition of most domestic abuse cases. In addition, an immediate arrest can be made for violation of a civil restraining order rather than filing a report with the prosecutor's office and waiting for a decision on whether to charge. Finally, a civil order provides the prosecutor with two possible criminal charges (bail jumping and violation of a TRO or injunction) if the abuser contacts the victim in spite of the order.

Inform the victim of your decision: The decision-making burden of prosecuting the case is upon you, not the victim. When you base your charging decision on evidence rather than pressure from a victim, you take the ultimate decision-making responsibility upon yourself. Theoretically, the victim is safer because any manipulation by the defendant of the victim will be pointless. The abuser has little need to further harass the victim regarding the case because YOU are in control, not the victim. In fact, the victim may have recanted, and the defendant must still face the reality of criminal charges, even with the victim seemingly "on his side."

What to do when the charging decision is at odds with the victim's wishes: If you are making a charging decision that is contrary to what the victim wants, explain to the victim that you mean no disrespect; your role is that of law enforcement. When you believe that the law has been broken, you must prosecute based upon the evidence. In the same vein, when a victim desires prosecution and the facts and evidence fail to support a criminal charge, you must decline. In either circumstance, your explanation serves to relieve the victim of the burden of "pressing charges." Regardless of whether you decide to charge, safety planning is critical. Remind the victim of your concern for his or her safety and encourage that person to speak with either the victim-witness personnel in your office or a local domestic abuse program about safety planning. Remind the victim that the period of time following the report of an incident can be a volatile time for a person who does not wish exposure of his or her behaviors in the home.

A word of caution: Recall your understanding of how "power and control" affects the typical domestic abuse relationship. As a prosecutor, it can be frustrating when a victim does not cooperate with your case. You may feel drawn to exert whatever means at your disposal to force cooperation upon the victim. In these circumstances, tread carefully. Ask yourself whether you are also using power and control tactics to gain a victim's cooperation with your case.

Keep in mind that you need to be respectful of the victim throughout the process, even if he or she does not cooperate with your prosecution. Continue to support her progress towards leaving an abusive relationship. While prosecution may or may not be available in the future, emotional support and victim advocacy is always available to victims.

d. Interview third-party witnesses

Third-party witnesses can be extraordinarily important in domestic abuse cases. They can turn a “he said-she said” matter into a solid case. Furthermore, by providing corroboration for the victim’s story, other witnesses can diminish the value of a defendant’s attempts to intimate a victim into changing the story or not appearing in court.

Due to their importance at trial, you should make every effort to interview eyewitnesses yourself. This will give you an idea of how they will present before a jury. As with any other witness, do not conduct the interview without a police officer present unless you have no other options.

In many cases, eyewitnesses will have a close relationship to either the suspect or the victim or both. This may leave these witnesses vulnerable to allegations of bias or pressure to change their statements. It is crucial that the police obtain a detailed statement from any eyewitness at the time of the original investigation to minimize these risks. Ask for police follow-up if eyewitness statements are inadequate.

e. Interview the suspect

It can be valuable to speak with a suspect about a domestic abuse accusation. The suspect may make a confession or partial admission. The statement may restrict a theory of defense. For example, the suspect may put him- or herself on the scene to claim self defense, which will later preclude a false alibi defense.

On the other hand, the suspect may be more credible than the victim. A suspect may provide you with a legitimate defense. After talking to the suspect, you may decide that charges are inappropriate.

Although speaking with a suspect can be as valuable as speaking with a victim, the rules of speaking with a suspect are a substantial hindrance to doing so in every case.

The rules of speaking with a suspect:

- Determine if the suspect is represented by an attorney or wishes to speak with a lawyer before talking with you. If the suspect wants to confer with a lawyer or has retained a lawyer you must cease all further discussions.
- If the suspect wants to proceed without counsel he/she must be advised of the Fifth and Sixth Amendment *Miranda* rights. The waiver must be “knowing, voluntary and intelligent.”

- Never advise a defendant on the advisability of waiving procedural or constitutional rights.
- Never give advice to an unrepresented defendant on how best to proceed.
- Never ever meet with a defendant one-on-one! Always have a police officer present.
- If the person is suspected of committing a felony, you must make at least an audio recording of the conversation. This is required by WIS. STAT. § 968.073(2). If possible you should make a video recording. If the person is suspected of committing a misdemeanor it is not required by law that the interview be recorded. However, a recording of the defendant's statement is far more persuasive in court than a written statement. It also will save you the hassle of taking copious notes during the interview. At a bare minimum, a defendant's statement should be reduced to writing, reviewed by the suspect and each paragraph signed by the defendant.
- After the suspect is officially charged, you may not speak with him/her.

Ideas for the Interview:

- Speak with the suspect after you have reviewed all the other evidence and spoken with the victim and other witnesses.
- Spend some time building rapport with the suspect. This can be done by asking some general non-controversial questions about his/her background. Once you have the person talking, he/she is likely to keep going. Furthermore, this will let you see the suspect's normal demeanor.
- Allow the suspect to tell his/her version of the incident before confronting him/her with contradictory information.
- Ask questions that call for a narrative response. A narrative gives more information and may reveal inconsistencies. For example, "tell me what happened" Avoid questions that call for a "yes" or "no" answer. Later in the interview, ask more specific questions.
- No matter how horrible the crime, avoid speeches, judgmental statements and anger. Your self-control and patience will motivate the suspect to talk.
- Don't worry about pauses in the interview. The suspect may feel uncomfortable with the silence and keep talking.
- Repetition can be an effective technique to uncover lies.
- Tell the suspect that it is you, the prosecutor, who makes the decision to charge or not to charge. It is not the victim's choice whether to press charges. If the suspect believes the victim controls the charging decision he/she may attempt to put pressure on the victim.

f. Plan for the victim to refuse to cooperate

Victims often refuse to cooperate with the prosecution in domestic abuse cases. This may come in the form of a recantation, or it may be a refusal to appear in court. Keep this in mind when

considering charges and always be thinking of ways you may be able to prove your case without the cooperation of the victim. Keep in mind that WIS. STAT. § 968.075(7) states that you may not decline charges based upon the victim's lack of consent to prosecute the individual, or based on the nature of the relationship of the parties.

9. Dual Arrest Situations

WIS. STAT. § 968.075 requires officers to identify and arrest only the predominant aggressor. The "predominant aggressor" is the most significant, but not necessarily the first, aggressor in a domestic abuse incident. WIS. STAT. § 968.075(1)(d). Nevertheless, you will occasionally encounter cases in which both parties were arrested. Unless the person's arrest is required due to a violation of a protection order or a no-contact order, if a law enforcement officer identifies the predominant aggressor, it is generally not appropriate for the officer to arrest anyone other than that person. WIS. STAT. § 968.075(2)(am).

Officers shall consider all of the following in determining the predominant aggressor:

- History of domestic abuse between the parties, if it can be easily ascertained by the officer, and any information provided by witnesses regarding that history;
- Witness statements;
- Relative degree of injury inflicted on the parties;
- The extent to which each person present appears to fear any party;
- Whether any party is threatening or has threatened future harm against another party, family member, or household member;
- Whether either party acted in self defense or in defense of any other person under the circumstances set forth in WIS. STAT. § 939.48.

WIS. STAT. § 968.075(2)(ar).

If it appears that both parties deserve charges, you are faced with a nearly impossible prosecution. You will be asking a person you have charged in one case to testify as a victim in another case. The victim may well assert that his or her right against self-incrimination prevents him or her from testifying. The only way out of this dilemma is the availability of other witnesses to allow you to prove the case without relying on either of the combatants. This means you will need to prove your case through avenues such as witnesses, evidence of past violence, the 911 tape, medical records or proof of injury if appropriate, pictures of the parties taken by law enforcement at the time of investigation, and any pictures or descriptions of the scene.

10. Penalty Enhancers

a. Dangerous weapons

Penalty enhancers should be included in the criminal complaint. In order for the dangerous weapon enhancer to apply, WIS. STAT. § 939.63 requires the crime be committed “while possessing, using or threatening to use a dangerous weapon.”

Wisconsin Jury Instruction-Criminal 910 defines a “dangerous weapon” as:

- Any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder;
- Any device designed as a weapon and capable of producing death or great bodily harm;
- Any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm; or
- Any electric weapon.

Possession encompasses both actual and constructive possession. The State must prove that the suspect possessed the weapon under the law to facilitate the predicate offense. *State v. Peete*, 185 Wis. 2d 4, 9, 517 N.W.2d 149, 150 (Wis. 1994).

b. Habitual criminality

WIS. STAT. § 939.62 governs the habitual criminality penalty enhancer. The defendant is a repeater if:

[T]he actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor is presently being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain unreversed and of record.

Time spent in confinement serving a sentence is not computed in this five-year time period. The requirement that the actor be convicted of three misdemeanors on three separate occasions only requires that there be separate misdemeanor convictions, not separate cases or court dates. *State v. Wittcock*, 199 Wis. 2d 664, 674, 350 N.W.2d 647, 653 (Wis. 1984).

c. Domestic abuse repeater

In 2012, the Wisconsin Legislature created a “domestic abuse repeater” enhancement. *See* 2011 Wisconsin Act 276. The repeater enhancement increases the maximum term of imprisonment by two years. WIS. STAT. § 939.621(2). The use of this enhancement “changes the status of a misdemeanor to a felony.” *Id.*

This repeater enhancement may be applied in the following situations:

***i.* Prior domestic abuse offense within 72 hours**

Even before the recent statutory change, you could charge the defendant with a two-year enhanced penalty when he or she committed an act of domestic abuse with 72 hours following an arrest for a previous domestic abuse incident. The 72-hour period applies whether or not the victim waived the no-contact provision. The victim of the second act need not be the same as the victim of the prior act.

***ii.* Prior domestic abuse convictions within ten years**

When the change in law went into effect, you may charge the defendant as a “domestic abuse repeater” when he or she has two or more prior domestic abuse convictions within the previous ten years. WIS. STAT. § 939.621(1)(b). A prior domestic abuse conviction includes crimes where “a court imposed a domestic abuse surcharge . . . or waived a domestic abuse surcharged defendant” pursuant to the surcharge statute. *See* WIS. STAT. § 973.055. The ten-year period may be extended by excluding “time that the person spent in actual confinement serving a criminal sentence.” WIS. STAT. § 939.621(1)(b). The victim of the current act that is the subject of the enhancer need not be the same victim(s) as in the prior acts.

11. Alternatives to Prosecution

In some situations it may not be in the interest of justice to pursue a criminal prosecution even though there is evidence to establish each of the elements of an offense. It may be that the actions of the victim are so distasteful that you could never picture yourself presenting the case to a jury. It may be that the harm that was done is so slight that criminal prosecution is not appropriate. Although criminal prosecution may not be appropriate, it may not be right to just decline the case. In such cases it is worthwhile to look at alternatives to prosecution.

a. Municipal prosecutions

Historically, municipal tickets or citations were often given to those who engaged in intimate partner abuse or family abuse. Today, when citations are used in lieu of criminally prosecuting domestic abuse, the practice is appropriately condemned. Remember that WIS. STAT. § 968.075(7) requires that prosecutors’ offices “develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses.”

In addition, the law prohibits the use of a municipal citation when a state charge could be made. *See* WIS. STAT. § 968.085(8): “A law enforcement officer may not issue a citation to a person

for an offense if the officer is required to arrest the person for that offense under WIS. STAT. § 968.075(2).”

In circumstances in which an ordinance is an appropriate decision and legally allowed, a citation may offer some strategic advantages. For instance, the burden of proof in an ordinance prosecution is that of “clear and convincing evidence.” In addition, the defendant can be called adversely as a witness at trial.

At other times a municipal or county citation may properly reflect the minor nature of the offense. It may also provide the low level of punishment appropriate for the offender. It is always appropriate to keep in mind that in many cases a fine assessed against the offender equally punishes the victim because the two may be drawing money out of the same budget.

b. Diversions

A diversion agreement is a contract between the suspect and the prosecutor that is entered into before the case is charged. The terms of the contract typically include counseling and other conditions appropriate to the offender. Upon successful completion of the agreement, the prosecutor declines the case and agrees never to bring charges based upon the incident.

A diversion agreement can be a substantial benefit for an offender because that person avoids a criminal charge. On the other hand, a diversion agreement can be a substantial headache for the prosecutor. Since the case is “diverted” before charges are brought, the burden of policing the agreement falls entirely on the prosecutor’s office. Some offices have a diversion coordinator that can make these agreements easier to coordinate and monitor.

The consequence for failing to meet the requirements of a diversion agreement is the issuance of charges. Unfortunately, it is often difficult to resurrect a domestic abuse case six months to a year later, if the offender has failed to abide by the conditions of the agreement. For this reason, diversion agreements are generally disfavored by prosecutors. However, they can be appropriate in unique cases.

c. Deferred prosecution agreements

Deferred prosecution agreements (DPAs) are specifically authorized by WIS. STAT. § 971.37. A deferred prosecution agreement is a contract entered into between the defendant and the prosecutor after the case is charged.

When using such an agreement:

- It is best to defer a case after the court has accepted the defendant’s plea of guilty but before entry of judgment. If the DPA is entered into at this stage of the proceedings, the case will proceed directly to sentencing if the defendant fails to successfully complete the terms.

- Successful completion of a DPA can result in dismissal of the charges, or reduction of the charges to a lesser criminal charge or a non-criminal charge or citation.
- DPAs should include the sentencing recommendation the State will make to the court in the event the defendant fails and the case proceeds to sentencing.
- A DPA can be extended with the agreement of the parties and approval of the court. Extensions should be in writing.
- DPAs are only appropriate for defendants who make an unequivocal admission of their guilt and take responsibility for their actions.
- Never use a DPA as a way to resolve a bad case.
- Monthly compliance reports must be filed with the prosecutor. *See* WIS. STAT. § 971.37(1)(b).
- Periodic reviews by the court can be useful.

12. Resources Regarding the Importance of Domestic Abuse Prosecution

Gene L. Durham, *Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL L. REV. 643 (1997-98).

Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297 (1992-93).

Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 194 (2007-08).

Deborah Tuerkheimer, *Recognizing and Remediating the Harm to Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 975 (2003-04).

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12. Ethical Issues Facing the Domestic Abuse Prosecutor

1. Introduction
2. The Prosecutor's Goal is Justice
3. Special Responsibilities of the Prosecutor
4. ABA Standards for Criminal Justice: Prosecution and Defense Function
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8. Adding Charges to an Ongoing Prosecution
9. Plea Bargain Breaches
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11. Candor toward the Tribunal

1. Introduction

Financial dependence, family or childcare needs, fear, social customs and mores, love, and many other factors often prompt victims to reconcile with their abusers and recant statements they made previously to the police. When victims recant, prosecutors face an ethical dilemma.

We may learn of recantations through telephone conversations, letters from victims, through family and friends of the victim, law enforcement officials, victim-witness specialists, or other advocates who work with domestic abuse victims in the community.

Because this information falls under the umbrella of “potentially exculpatory evidence,” prosecutors are required to disclose recantations and any related tangible evidence to the defense. Violations of criminal procedure discovery rules and/or SCR 20:3.8 can result in a new trial for the defendant and disciplinary sanctions against the prosecutor.

The policy for your office should be straightforward: All evidence of an exculpatory or impeaching nature in the possession of the prosecution and/or police must be provided to the defense as soon as reasonably possible. Investigations should not be limited for fear that pursuit of evidence will lead to exculpatory or impeaching information.

Attorney General Robert H. Jackson, in a ringing summons to a 1940 United States Attorneys' conference, captured how truly professional the prosecuting attorney's role is:

The prosecutor has more control over life, liberty, and reputation than any other person in America. . . . The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

John Jay Douglass, *Ethical Issues in Prosecution* 9, 15 [National College of District Attorneys, 1988].

2. The Prosecutor's Goal is Justice

The district attorney is a quasi-judicial officer. *State v. Russell*, 83 Wis. 330, 338, 53 N. W. 441 (1892); *State v. Kaufmann*, 22 S.D. 433, 118 N.W. 337, 338 (1908); *Comm. v. Nicely*, 130 Pa. 261, 18 A. 737, 738 (1889). In the trial of a criminal case, "the code of ethics of the district attorney in all such matters cannot too closely follow the ethics of the bench." *Coon v. Metzler*, 161 Wis. 328, 334, 154 N.W. 377, 379 (1915). "A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case." *Hillen v. People*, 59 Colo. 280, 287, 149 P. 250, 253 (1915). "His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in a particular case, yet justice so attained is unjust and dangerous to the whole community." *Hurd v. People*, 25 Mich. 406, 416 (1872).

3. Special Responsibilities of the Prosecutor

SCR 20:3.8 The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and give the accused a reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all

- unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees 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 under Rule 3.6 (Trial Publicity).

4. ABA Standards for Criminal Justice: Prosecution and Defense Function

The ABA Standards for Criminal Justice indicates that:

- (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
- (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
- (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

A.B.A., STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.11 Disclosure of Evidence by the Prosecutor, *available* at http://www.americanbar.org/publications/criminal_justice_section_archive/.

5. National District Attorney's Association: National Prosecution Standards

2-8.4 Disclosure of Exculpatory Evidence. The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.

4-9.1 Prosecutorial Responsibility. A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross examination, expedite trials, and meet the requirements of due process. To further these objectives, the prosecutor should pursue the discovery of material information, and fully and promptly comply with lawful discovery requests from defense counsel.

4-9.2 Continuing Duty. If at any point in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information.

4-9.3 Access to Evidence Not To Be Impeded. Unless permitted by law or court order, a prosecutor should not impede opposing counsel's investigation or preparation of the case.

4-9.4 Deception as to Identity. Except as permitted by law or court order, a prosecutor should not deceive the defendant or a witness as to his or her identity or affiliation.

4-9.5 Redacting Evidence. When portions of certain materials are discoverable and other portions are not, a prosecutor should make good faith efforts to redact the non-discoverable portions in a way that does not cause confusion or prejudice the accused.

4-9.6 Reciprocal Discovery. A prosecutor should take steps to ensure that the defense complies with any obligation to provide discovery to the prosecution.

6. Relevant Discovery Statutes

What a district attorney must disclose to a defendant: Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:

WIS. STAT. § 971.23(1)(d): A list of all witnesses and their addresses whom the district attorney intends to call at trial (not including rebuttal witnesses or those called for impeachment only);

WIS. STAT. § 971.23(1)(e): Any relevant written or recorded statements of a witness named on a list under par. (d);

WIS. STAT. § 971.23(1)(h): Any exculpatory evidence.

7. Key Cases Relating to Exculpatory Evidence

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963):

If the prosecution suppresses material evidence favorable to the accused upon request, this violates due process, regardless of the good or bad faith of the prosecution. Defendants are entitled to a new trial when the prosecutor fails to disclose evidence in its possession both favorable and material to the defense. *Brady* involved failure to disclose evidence specifically requested by the defense. The Court ruled the nondisclosure as unconstitutional since the evidence would "tend to exculpate" the defendant. *Brady*, 373 U.S. at 88.

United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976):

The Court determined that even in the absence of a request, the prosecutor must volunteer all exculpatory evidence to the defense.

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985):

The Court determined that impeachment evidence, as well as exculpatory evidence, falls under the *Brady* rule.

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995):

The Court ruled that the prosecutor's ignorance of material in possession of the police is no excuse for failing to meet the requirements of *Brady*, and that the prosecutor has a "duty to learn of any favorable evidence known to others acting on the government's behalf . . . including the police." *Kyles v. Whitley*, 514 U.S. at 437.

In *Kyles*, the United States Supreme Court addressed the relationship between the prosecutor's constitutional duty to disclose exculpatory evidence and the duty to disclose evidence under the ethical rules:

[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380 and n.7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3rd ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d)(1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense").

Kyles, 514 U.S. at 436-37.

Wood v. Bartholomew, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995):

The Court determined that even evidence that is inadmissible at trial may be subject to the requirement of production by the prosecution under *Brady*.

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972):

The Court held in this case that the government must disclose any deal reached with a witness testifying for the prosecution.

Jackson v. State, 770 A.2d 506, 516 (Del. Supr. 2001):

In *Jackson v. State*, in a refinement of *Giglio*, the court ruled:

The jury may well have been troubled, as are we, by an acknowledged and disingenuous prosecutorial practice of implicitly suggesting future possible leniency

while maintaining that no actual promise of leniency had been made in order to avoid tainting a witness' credibility because of self-interest. The jury might well expect that, given their own life experiences with human nature, the "implicit" promise might enhance the propensity of a witness, hopeful of leniency if his testimony meets with the prosecutor's approval, to embellish his testimony in order to increase the likelihood of favorable treatment. The insidious nature of the practice would be obvious to all but the most gullible of jurors.

Jackson, 770 A.2d at 516.

Delgado v. State, 194 Wis. 2d 737, 535 N.W.2d 450 (Ct. App. 1995):

The Wisconsin Court of Appeals ruled that defense counsel provided incompetent representation in failing to aggressively uncover a witness' alleged arrangement with the State for testifying. The court noted:

Although we do not reach Delgado's additional argument that he was denied due process by the trial prosecutor's failure to reveal or correct McGee's false testimony, see *Napue v. Illinois*, 360 U.S. 264, 269-272 (1959) (defendant denied due process when prosecutor obtains conviction with aid of evidence prosecutor knew or should have known to be false and new trial required when there is a reasonable likelihood that false testimony affected verdict), we recognize that our analysis of this appeal exposes the failure not only of Delgado's trial attorney, but of the trial prosecutor as well.

As the declaration from McGee's attorney at the preliminary hearing exemplified, attorneys are court officers who share the continuing responsibility to prevent misrepresentations from misleading a court. Thus, in this case, although our analysis focuses on the ineffective assistance of Delgado's trial attorney, we also acknowledge a prosecutor's responsibility for protecting a trial from misrepresentations that may require reversal.

Despite our critical comments regarding the performance of both trial attorneys in this case, we also note that, in other respects, the record shows their litigation to have been intelligent and thorough. The trial record suggests that this was a challenging case for both sides due, in part, to the difficulties that may attend cases involving gang violence. Our opportunity to study the record affords us the chance to scrutinize counsels' conduct, as indeed we must. In this case, however, we appreciate that what is clear on appeal may have seemed obscure to the attorneys in the midst of trial.

Delgado, 194 Wis. 2d at 756, n. 5.

In the Matter of State ex rel. Lynch v. County Court, Branch III, 82 Wis. 2d 454, 262 N.W.2d 773 (1978):

The Court determined that absent a demonstrated "particularized need," the prosecutor need not provide exculpatory evidence before the preliminary hearing.

State v. Randall, 197 Wis. 2d 29, 539 N.W.2d 708 (Ct. App. 1995):

The court determined that the State must reveal to the defense a prosecution witness' criminal record and any criminal charges pending against that witness. This ongoing obligation to learn and reveal any pending cases against a State's witness is exculpatory and must be given to the defendant. The State essentially has an ongoing obligation to a defendant to disclose inculpatory and exculpatory information, including evidence that applies only to the credibility of a witness. The State has a continuing duty "to comb" the public records because to require the defendant to look himself up would be an "intolerable burden."

State v. Nelson, 59 Wis. 2d 474, 208 N.W.2d 410 (1973):

The Court held that a prosecutor has an ongoing duty to disclose exculpatory and inculpatory evidence that the State has in its possession, including material whose impact is only upon the credibility of a witness for the State.

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999):

The Court faulted a state proceeding in which the district attorney's office maintained an "open file" policy but failed to provide from the police file serious impeaching, but still inculpatory, evidence on a State's witness and noted "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. at 281.

Other cases dealing with exculpatory evidence and discovery issues in criminal cases are listed below. These cases may be used as a starting point, not a substitute, for independent research.

- *State v. Harris*, 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397
- *State v. DelReal*, 225 Wis. 2d 565, 593 N.W.2d 461 (Ct. App. 1999)
- *State v. Gibas*, 184 Wis. 2d 355, 516 N.W.2d 785 (Ct. App. 1994)
- *State v. Mechtel*, 176 Wis. 2d 87, 499 N.W.2d 662 (Ct. App. 1993)
- *State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992)
- *State v. Ray*, 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992)
- *State v. Garrity*, 161 Wis. 2d 842, 469 N.W.2d 219 (Ct. App. 1991)
- *State v. Larsen*, 141 Wis. 2d 412, 415 N.W.2d 535 (Ct. App. 1987)
- *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (Ct. App. 1987)
- *State v. Ruiz*, 118 Wis. 2d 177, 347 N.W.2d 352 (1984)
- *State v. Calhoun*, 67 Wis. 2d 204, 226 N.W.2d 504 (1975)
- *Wold v. State*, 57 Wis. 2d 344, 204 N.W.2d 482 (1973)

8. Adding Charges to an Ongoing Prosecution

"Vindictive prosecution" is a term of art with a precise and limited meaning. It refers to a situation where the State acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. In the pre-trial context, there is no presumption of

vindictiveness. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 (1978); *State v. Edwardsen*, 146 Wis. 2d 198, 430 N.W.2d 604 (Ct. App. 1988).

In the post-trial context, the law sometimes presumes that any adverse action taken by the State is retaliatory. Suppose a defendant takes a case to trial. After trial, the prosecutor takes an action adverse to a defendant, such as adding charges to a different case. In this situation, the burden will shift to the prosecution to prove that the decision was unrelated to the exercise of a protected right. *State v. Edwardsen*, 146 Wis. 2d 198, 430 N.W.2d 604 (Ct. App. 1988). *See also State v. Hayes Johnson*, 232 Wis. 2d 679, 605 N.W.2d 846 (2000), where the Wisconsin Supreme Court allowed the prosecutor to add charges after a mistrial, finding no presumption of vindictiveness, nor any actual vindictiveness, based on the facts in the case.

9. Plea Bargain Breaches

Where a guilty plea that rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257 (1971). *Santobello* proscribes not only explicit repudiations of plea agreements, but also “end-runs around them.” *State v. Ferguson*, 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991). Once a defendant has relied upon a prosecutorial promise in any way, the promise is held enforceable against the State. *State v. Bond*, 139 Wis. 2d 179, 407 N.W.2d 277 (Ct. App. 1987).

A prosecutor may not render a less than neutral recitation of the plea agreement. *State v. Poole*, 131 Wis. 2d 359, 389 N.W.2d 40 (Ct. App. 1986). It is not advisable to “stand silent” as to the recommendation, for example, and then sandbag the defense when arguing the facts of your sentencing argument.

While a full recitation of all the legal precedent relating to plea bargain breaches is beyond the scope of this manual, please take note of the following additional cases:

State v. Howland, 2003 WI App 104, 264 Wis. 2d 279, 663 N.W.2d 340:

In this case, the prosecutor agreed to make no specific recommendation. However, the Wisconsin Court of Appeals found that the prosecution materially breached the plea agreement by contacting the probation and parole office to complain about its PSI recommendation for probation, instead of incarceration. This resulted in an amended PSI that changed its recommendation to incarceration. The Court of Appeals found that the final PSI recommendation was the product of the prosecutor’s intervention, and that by challenging the Department of Corrections’ PSI recommendation, the prosecution did an “end run” around the plea agreement.

State v. Williams, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733:

The Wisconsin Supreme Court found that the prosecution covertly implied to the sentencing court that the additional information available from the PSI and from a conversation with the defendant’s ex-wife raised doubts regarding the wisdom of the terms of the plea agreement. The Supreme Court stated that the prosecution could not cast doubt on or distance itself from its own

sentence recommendation. The prosecution could not imply that if it had known more about the defendant, the State would not have entered into the plea agreement.

State v. Scott, 230 Wis. 2d 643, 602 N.W.2d 296 (Ct. App. 1999):

In this case, the prosecutor recommended a consecutive sentence when the plea negotiation was for a concurrent sentence. In this case, defense counsel's failure to seek enforcement of the plea agreement (by objecting to the State's blunder) was sufficient to establish ineffective assistance of counsel.

State v. Howard, 2001 WI App 137, 246 Wis. 2d 475, 630 N.W.2d 244:

Here, the prosecutor materially breached the plea agreement by recommending a consecutive, instead of a concurrent, sentence in violation of the plea agreement. The Court of Appeals remanded the case, instructing that should the trial court find that defense counsel performed deficiently (presumably because of a failure to object), then it is presumed that the defendant was prejudiced by that deficiency.

The United States Supreme Court has noted that once a plea has been entered in accordance with a negotiated plea agreement, a criminal defendant has a constitutional right to enforcement of the agreement. *See Mabry v. Johnson*, 467 U.S. 504, 507-08, 81 L.Ed.2d 437, 104 S.Ct. 2543 (1984); *accord State v. Smith*, 207 Wis. 2d 258, 271, 588 N.W.2d 379, 385 (1997).

Once the defendant has given up his or her bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled. Principles of due process are implicated by and inherent in the process of enforcing a plea agreement. *State v. Wills*, 187 Wis. 2d 529, 537, 523 N.W.2d 569, 572 (Ct. App. 1994), *affirmed*, 193 Wis. 2d 273, 533 N.W.2d 165 (1995). *See also State v. Rivest*, 106 Wis. 2d 406, 413, 316 N.W.2d 395, 399 (1982).

State v. Williams, 2003 WI App 116, 265 Wis. 2d 229, 666 N.W.2d 58:

In this case, on the morning of trial, the trial judge invited the defendant, his attorney, and the prosecutor to "have a little chat in chambers." Following the unrecorded conference in chambers, the parties returned to the courtroom. The trial judge announced that, "with the urging of the trial court, a compromise had been reached between the State and the defendant." The Court of Appeals ruled that the plea was presumptively involuntary because there is an absolute prohibition of judicial involvement in plea negotiations.

State v. Deilke, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945:

The Wisconsin Supreme Court ruled that the defendant's successful collateral attack of previous OWI convictions constituted a material and substantial breach of the plea agreements on which those convictions were based. The State was entitled to move to vacate the previous agreements and reinstate the charges. In its reasoning, the court noted that "part of [the defendant's] punishment was the effect of the statutory scheme regarding drunken driving penalties . . . , which envisions progressive punishment as a central component of convictions." *Deilke*, 2004 WI 104, ¶ 20.

10. Access to Witnesses

It's no secret that victims in domestic abuse cases often recant, minimize or simply fail to appear in court on the day of trial. Sometimes, it can be frustrating. Under these circumstances, it can be tempting to affirmatively advise victims NOT to talk to defense attorneys or defense investigators.

Wisconsin's Crime Victims Bill of Rights states that a crime victim has the right "[t]o not be compelled to submit to a pretrial interview or deposition by a defendant or his or her attorney" WIS. STAT. § 950.04(1v)(er). Moreover, the district attorney's office has an obligation to provide victims with information about the rights of crime victims, including the right to choose not to submit to a pretrial interview, and how to exercise these rights. WIS. STAT. § 950.08(2r).

However, a defendant's attorney has the right to interview prosecution witnesses who voluntarily submit to an interview before trial. *See Lunde v. State*, 85 Wis. 2d 80, 92, 270 N.W.2d 180, 186 (1978); *State v. Lenarchick*, 74 Wis. 2d 425, 453, 247 N.W.2d 80, 95 (1976); *State v. Simmons*, 57 Wis. 2d 285, 292, 203 N.W.2d 887, 892 (1973).

While prosecutors should advise witnesses of their right to choose not to submit to a defense interview, prosecutors should not discourage witnesses from doing so. In *State v. Eugenio*, 210 Wis. 2d 347, 565 N.W.2d 798 (Ct. App. 1997), a defense investigator arranged to meet and interview a six-year-old sexual assault victim at the district attorney's office. The child's mother became concerned that the information gained from the interview would be used to "mess up" her daughter at trial. The interview of the child was not productive. On appeal, the defense maintained that the prosecutor (who was present at the interview) should have done something to encourage the victim to cooperate. The Court of Appeals held that Wisconsin law does not impose upon prosecutors a duty to encourage a victim to cooperate with the defense, but said the following:

As the representative of the State, prosecutors are in a unique position to influence witnesses. Allowing prosecutors to discourage witnesses from communicating with the defense and from cooperating in the resolution of criminal matters would impede the efficient administration of justice in this state. Prosecutors are in the business of justice, not in the business of convictions.

Eugenio, 219 Wis. 2d at 415-16.

ABA Standards Relating to the Prosecution Function, 3.1(c) states: "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. . . . It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give the defense information which he has the right to give."

The Court in *State v. Simmons*, 57 Wis. 2d 285, 203 N.W.2d 887 (1973), did adopt Standard 3.1(c) as a guide to future conduct by prosecutors. The Court also adopted Standard 4.3(c) of the Defense Function, which imposes a similar duty upon defense attorneys.

The commentary to Standard 3.1(c) provides, in pertinent part: “[T]he witness should be informed that there is no legal obligation to submit to an interview. It is proper, however, and may be the duty of both counsel in certain cases to interview all persons. . . .” Note, however, that the *Simmons* Court did not specifically adopt this commentary as a guide to future conduct by prosecutors.

11. Candor toward the Tribunal

SCR 20:3.3 states:

- (a) A lawyer shall not knowingly:
 - (1) Make a false statement of fact or law to a tribunal;
 - (2) Fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Section (c) above notes that “a lawyer may refuse to offer evidence that the lawyer reasonably believes is false.” In practice, as a prosecutor, you should expressly refuse to offer evidence that you believe is false.

In interpreting the obligation under Section (a)(4) above, *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), dealt with a situation where a State’s witness falsely denied that he had been offered a benefit to testify by the assistant district attorney. The Court ruled:

It is of no consequence that the falsehood bore upon the witness’ credibility rather than directly upon defendant’s guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney’s silence was not the result of guile or a desire to prejudice matters little for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 269-70.

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13. Discovery of Medical Records of Victims and Witnesses: *Shiffra-Green* and Related Cases

1. Introduction
2. Wisconsin Statutes
3. *Shiffra-Green* Materiality Test
4. Considerations under the Materiality Test
5. Conclusion

1. Introduction

This chapter focuses on the statutory and case law that comes into play when a defendant seeks discovery of the privileged records of a victim or a witness when the records are not in the State's possession. Despite not being in the State's possession, such confidential records may nonetheless be discoverable. The law concerning discovery and release of such records is intricate; this chapter focuses on the situation when a defendant seeks to obtain those confidential medical records. Please note that different policy and legal issues arise when dealing with other types of confidential records or records already in the State's possession.

2. Wisconsin Statutes

To understand the case law governing the discovery of confidential records of victims and witnesses, it is necessary to recognize that the Wisconsin Statutes have multiple rules governing the disclosure of a patient's privileged records. The statutes begin with a general rule that a patient has the right to refuse to disclose records related to his or her diagnosis or treatment. WIS. STAT. § 905.04(2). *See also* WIS. STAT. § 146.82(1) ("All patient health care records shall remain confidential"). In contrast, a criminal defendant has a right to due process, which includes the right to a meaningful opportunity to present a complete defense. *See State v. Green*, 2002 WI 68, ¶ 23, 253 Wis. 2d 356, 646 N.W.2d 19. Therefore, the State "must disclose to a defendant . . . any exculpatory evidence." WIS. STAT. § 971.23(1)(h).

The general rule of privilege states that a patient has the right to refuse to disclose and to prevent any other person from disclosing confidential communications related to diagnosis or treatment, but the rule also permits a judge to review the confidential records under certain circumstances. Although the statute refers to this as a privilege given to a patient, courts commonly refer to this as a privilege given to a victim because the motions for disclosure often arise when a defendant seeks to obtain confidential treatment records from the victim in a criminal case. Therefore, the

terms “patient” and “victim” often are used interchangeably. The relevant statutory provisions read as follows:

WIS. STAT. § 905.04 PHYSICIAN-PATIENT, REGISTERED NURSE-PATIENT, CHIROPRACTOR-PATIENT, PSYCHOLOGIST-PATIENT, SOCIAL WORKER-PATIENT, MARRIAGE AND FAMILY THERAPIST-PATIENT, PODIATRIST-PATIENT AND PROFESSIONAL COUNSELOR-PATIENT PRIVILEGE.

- (2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient’s physical, mental or emotional condition, among the patient, the patient’s physician, the patient’s registered nurse, the patient’s chiropractor, the patient’s psychologist, the patient’s social worker, the patient’s marriage and family therapist, the patient’s professional counselor or persons, including members of the patient’s family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.
- (3) Who may claim the privilege. The privilege may be claimed by the patient, by the patient’s guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.
- (4) Exceptions.
 - (b) Examination by order of judge. If the judge orders an examination of the physical, mental or emotional condition of the patient, or evaluation of the patient for purposes of guardianship, protective services or protective placement, communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

Another statute relevant to the discovery of confidential records relates to the prosecutor’s duty to disclose any exculpatory evidence, that is to say, any evidence tending to establish that a defendant may be innocent. The relevant statutory provision reads as follows:

WIS. STAT. § 971.23 DISCOVERY AND INSPECTION.

- (1) What a district attorney must disclose to a defendant. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and

copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:

(h) Any exculpatory evidence.

The duty to disclose exculpatory evidence applies not only to evidence directly within the district attorney's office; the rule also applies to some material not stored or maintained by the prosecutor. *See, e.g., State v. DeLao*, 2002 WI 49, ¶ 21, 252 Wis. 2d 289, 643 N.W.2d 480 (“Under § 971.23, the State's discovery obligations may extend to information in the possession of law enforcement agencies but not personally known to the prosecutor”).

3. *Shiffra-Green* Materiality Test

In considering the disclosure of confidential records, the Wisconsin Supreme Court “conclud[ed] that the standard to obtain an *in camera* review [of a victim or witness' patient records] requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant.” *Green*, 2002 WI 68 at ¶ 19. The defendant may not “engag[e] in what can be characterized as a ‘fishing expedition’” because “[m]ere speculation or conjecture as to what information is in the records is not sufficient.” *State v. Robertson*, 2003 WI App 84, ¶¶ 23, 26, 263 Wis. 2d 349, 661 N.W.2d 105 (Ct. App. 2003). Therefore, “the test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense.” *Green*, 2002 WI 68 at ¶ 34.

This test generally followed the rule discussed in an earlier Court of Appeals decision, but the Supreme Court heightened the defendant's “threshold showing requirement.” *Id.* at ¶ 33. The prior leading case, *State v. Shiffra*, applied a similar rule where “the defendant's burden should be to make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence.” *Shiffra*, 175 Wis. 2d 600, 608, 499 N.W.2d 719, 723 (Ct. App. 1993). The Wisconsin Supreme Court adopted most of the requirements from *Shiffra* but concluded that “a slightly higher standard is required before the court must conduct an *in camera* review of privileged counseling records . . . [i]n light of the strong public policy favoring protection of the counseling records.” *Green*, 2002 WI 68 at ¶ 32.

A request by a defendant to review a victim's confidential records requires the defendant to overcome a four-step materiality test, discussed by the Wisconsin Supreme Court in *Green* and the Wisconsin Court of Appeals in *Shiffra*, along with other related decisions. *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19; *Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719. The test begins with the defendant having the burden to show that “there is a reasonable likelihood that the evidence is relevant and necessary to a determination of guilt or innocence.” *Robertson*, 2003 WI App 84 at ¶ 17. Once “the defendant satisfies this standard, the trial court reviews the records only if the victim consents to the review.” *Johnson v. Rogers Mem'l Hosp., Inc.*, 2005 WI 114, ¶ 73, 283 Wis. 2d 384, 700 N.W.2d 27. Assuming that the victim consents, the circuit court conducts an *in camera* inspection of the records and then determines “whether disclosure

of the information is necessary based on the competing interests involved in such cases.” *Green*, 2002 WI 68 at ¶ 35. As a final protection to the victim, the court only discloses the relevant records to the defendant if the victim consents to the final disclosure. *Johnson*, 2005 WI 114 at ¶ 73. Each of these four steps is explained in more detail below.

a. Defendant’s offer of proof and burden

The process begins with a defendant presenting a written offer of proof in a motion that “describ[es] as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense.” *Green*, 2002 WI 68 at ¶ 33. The test “place[s] the burden on the defendant to reasonably investigate information related to the victim before setting forth an offer of proof and to clearly articulate how the information sought corresponds to his or her theory of defense.” *Id.* at ¶ 35. Therefore, the defendant’s offer of proof should allege “material facts . . . [that] list what records actually exist . . . [and] explain[] why any such records may be relevant.” *State v. Allen*, 2004 WI 106, ¶ 33, 274 Wis. 2d 568, 682 N.W.2d 433. Additionally, the defendant bears the burden to demonstrate that the sought-after records are “not merely cumulative to other evidence available to the defendant.” *Id.* at ¶ 31, quoting *Green*, 2002 WI 68 at ¶ 34.

An offer of proof that provides only the defendant’s opinion or provides only a bare-bones conclusionary statement may be denied without a hearing. *State v. Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481, ¶¶ 16-17 (holding that an evidentiary hearing was required in this particular case because the allegations were sufficient to merit a hearing). See also *Smith v. State*, 60 Wis. 2d 373, 380, 210 N.W.2d 678, 682 (criticizing the defendant’s “bare-bones allegation . . . that is no more than a ‘conclusionary allegation’”). Even assuming the written offer of proof entitles the defendant to a hearing, the defendant still must overcome his or her burden to “show a ‘reasonable likelihood’ that the records will be necessary to a determination of guilt or innocence,” particularly “[i]n light of the strong public policy favoring protection of the counseling records. *Green*, 2002 WI 68 at ¶ 32.

b. Victim’s consent to an *in camera* inspection

Once the defendant overcomes his or her burden, “the trial court reviews the records only if the victim consents to the review.” *Johnson*, 2005 WI 114 at ¶ 73. The privilege belongs solely to the patient, not the prosecutor, so only the patient (often the victim in a criminal case) may waive the privilege to permit an *in camera* review by the circuit court. See WIS. STAT. § 905.04(3). The Wisconsin Supreme Court held that the best practice for determining consent “is to have the circuit court interview the victim on the record and thereby make a determination of the victim’s voluntary consent.” *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775, ¶ 19, n. 6 (1997). A less desirable alternative would be for the victim to sign a written release. *Id.*

A complication arises when the patient is a minor child, which may require the court to appoint a guardian *ad litem* or counsel for the victim to resolve the question of whether he or she consents to the release of the records. See *In re Jessica J.L.*, 223 Wis. 2d 622, 630, 589 N.W.2d 660, 664, n. 3 (Ct. App. 1998) (citing *State v. Speese*, 199 Wis. 2d 597, 607-08, 545 N.W.2d 510, 515

(1996)). The victim is not obligated to waive the confidentiality of the records, but when “the victim does not consent, there is no *in camera* review and the victim is barred from testifying.” *Johnson*, 2005 WI 114 at ¶ 73. The Wisconsin Supreme Court noted that preventing the victim from testifying is necessary to protect the defendant’s right to present a defense. *Speese*, 199 Wis. 2d at 610, 545 N.W.2d at 516, n. 12.

c. The court’s *in camera* inspection

In *Green*, the Wisconsin Supreme Court stated that it had “confidence in the circuit courts to . . . make a proper determination as to whether disclosure of the information is necessary based on the competing interests involved in such cases.” *Green*, 2002 WI 68 at ¶ 35, *citing Shiffra*, 175 Wis. 2d at 611, 499 N.W.2d at 724. The *Shiffra* court explained, “It is the duty of the trial court to determine whether the records have any independent probative value after an *in camera* inspection of the records.” *Shiffra*, 175 Wis. 2d at 611, 499 N.W.2d at 724.

A circuit court essentially examines the records to determine whether they contain any relevant evidence. *See* WIS. STAT. § 904.01. The circuit court also should recognize that this situation involves competing public interests between protecting confidential privilege and the right to put on a defense. *Shiffra*, 175 Wis. 2d at 611-12, 499 N.W.2d at 724. Therefore, the court should not turn over all evidence simply on the grounds that the evidence is relevant; instead, the court should only authorize the release of relevant evidence that is “material to the defense of the accused.” *Solberg*, 211 Wis. 2d 372 at ¶ 22 (internal quotation and citation omitted).

The court also has the authority to prevent the use of relevant evidence when the “probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of . . . needless presentation of cumulative evidence.” WIS. STAT. § 904.03. *See also Green*, 2002 WI 68 at ¶ 19 (noting that the records should not be “merely cumulative to other evidence available to the defendant”); *but cf. Navarro*, 2001 WI App 225 at ¶ 18 (disagreeing with the argument “that, where information can be obtained from non-confidential sources, the court should not compel disclosure of confidential information”).

The court ultimately must balance the competing policy interests and then determine whether to rule in favor of disclosing any portion of the confidential records. *Johnson*, 2005 WI 114 at ¶ 76.

d. Victim’s consent for release to the defendant

The Wisconsin Supreme Court provided the victim with a second and final opportunity to decide whether to consent to the release of patient records before the court turns any such records over to the defendant. *See Johnson*, 2005 WI 114 at ¶ 73 (“If after the *in camera* review, the circuit court determines that the records contain relevant evidence, it should be disclosed to the defendant if the patient again consents”).

This second opportunity on the part of the victim recognizes that that person alone has the privilege against the release of treatment records. *See* WIS. STAT. § 905.04(2). There are circumstances or situations where a victim may not object to the general disclosure to the court

for an *in camera* inspection, but the victim does object to the release of specific treatment records to the defendant. The court should employ the same method for determining consent as it employed during the second step in the examination. *See Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775, ¶ 19, n. 6 (recommending that the consent be stated by the victim on the record); *Speese*, 199 Wis. 2d at 607-08, 545 N.W.2d at 515 (recognizing the need for the court to appoint a guardian *ad litem* or counsel for a victim in special circumstances).

Once again, the victim is not required to consent to the disclosure, but the victim is barred from testifying when the victim does not consent. *Johnson*, 2005 WI 114 at ¶ 73. It is only upon consent by the victim at this stage in the proceeding that the court turns over the relevant portion of the confidential records to the parties. *See id.*

When reviewing an order by the circuit court, the appellate court applies different standards of review depending upon which step in the materiality test is challenged. For challenges to the first step of the test, the appellate court applies a *de novo* standard of review to determine whether the circuit court erred. *See Green*, 2002 WI 68 at ¶ 19. When addressing challenges to the other three steps of the test, the appellate court reviews the matter under the clearly erroneous standard to determine whether the circuit court improperly exercised its discretion. *See Solberg*, 211 Wis. 2d 372 at ¶ 20.

4. Considerations under the Materiality Test

In the context of domestic abuse, the materiality test provides defendants with a mechanism to exert power and control over the victim and the legal process. A defendant charged with a crime generally characterized as domestic abuse inherently knows more about the victim than a defendant who had no contact with the victim beyond the crime itself. The defendant may know about embarrassing information contained within the victim's medical records. The materiality test provides defendants with unparalleled control over the prosecution of a case in a situation where the victim's lack of consent prevents the victim from testifying and the victim's testimony is critical to the presentation of the State's case. *See generally Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) (limiting the use of testimonial hearsay). Barring a victim from testifying provides the defendant with a windfall through the dismissal of the case, thereby allowing the defendant to escape conviction without an acquittal by a jury. *Johnson*, 2005 WI 114 at ¶ 73.

To ensure that a defendant does not unduly embarrass or harass a victim, the State must ensure that the court holds the defendant to the burden required under the first step in the materiality test. If the defendant's allegations would not require the disclosure of the confidential records even if true, then the motion does not satisfy the basic pleading standards. *See In re Jessica J.L.*, 223 Wis. 2d at 634, 589 N.W.2d at 665 ("the same standards apply to a *Shiffra* motion, as were applied by the Supreme Court in *Bentley*"). *See generally State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996) (a motion must raise sufficient facts, which, if true, would entitle the defendant to relief).

If the defendant's offer of proof relies upon facts already known by or available to the defendant, then the State may argue against the *in camera* inspection because the information sought from the records is merely cumulative to other available evidence. *See Green*, 2002 WI 68 at ¶ 34. *See also* WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence").

When the defendant's allegations are sufficient but inaccurate, then the State may respond with its own offer of proof. Prosecutors must proceed cautiously in this regard, however, because relying upon statements from the victim may inadvertently waive the privilege by disclosing too much about confidential communications. *See* WIS. STAT. § 905.11 ("A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the matter or communication"). The State must ensure that the court only proceeds to the second step in the materiality test when the defendant clearly overcomes the burden under the first step to protect "the strong public policy favoring protection of the counseling records." *Green*, 2002 WI 68 at ¶ 32.

When a defendant properly overcomes the first step in the materiality test and the victim does not consent to disclosure, dismissal of the case may not be the only available option. The Wisconsin Supreme Court already noted "problems regarding . . . whether a person's refusal to waive the privilege should preclude that person from testifying at trial," but the Court declined to address the issue given that it found "any such error was harmless" in that case. *See Speese*, 199 Wis. 2d at 614, 545 N.W.2d at 517.

The Delaware Supreme Court recognized that "the trial court must balance the defendant's Confrontation Clause rights against the witness' privilege," but later explained "[t]hat privilege is not an absolute bar to the disclosure of a witness' communication with her therapist . . . [when] the privilege is invoked to bar discovery of potentially relevant evidence in a criminal proceeding." *Burns v. State*, 968 A.2d 1012, 1024 (Del. 2009).

The Wisconsin Supreme Court already noted that the defendant's constitutional right to present a defense may render a statute unconstitutional in a particular case. *See State v. Pulizzano*, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325, 331 (1990).

The Kentucky Supreme Court viewed the requirement of consent by the victim as "unworkable or unwieldy," adopting a simplified approach where the "defendant's constitutional right to compulsory process prevails over a witness's statutory claim of privilege." *Commonwealth v. Barroso*, 122 S.W.3d 554, 565 (Ky. 2003) (*citing Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19; *Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719).

The Wisconsin Supreme Court may find the *Barroso* decision persuasive when considering the materiality test in a future case. Courts may find that the Wisconsin Statutes already provide that "patient health care records shall be released upon request without informed consent . . . [u]nder a lawful order of a court of record." WIS. STAT. § 146.82(2)(a)4. Such an approach protects the defendant's constitutional right to present a defense and protects the victim's statutory privilege

against an inadvertent waiver. *Compare* WIS. STAT. § 905.11 (“A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the matter or communication”), *with Barroso*, 122 S.W.3d at 565 (“[A] witness whose privileged information is compelled by court order has not disclosed it voluntarily. Thus, the privilege remains intact for purposes other than the criminal proceeding in which it was compelled”). This approach also “obviates the need to further complicate the procedure by placing the fate of the prosecution in the hands of a witness.” *Barroso*, 122 S.W.3d at 565.

5. Conclusion

When a prosecutor receives a motion from a defendant for the release of confidential records of a victim or witness, the prosecutor should demand that the court hold the defendant to his or her burden under the first step in the materiality test. *See generally Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19. The prosecutor also should ensure that the court’s process protects a victim’s or witness’ right to refuse the release of such records, which may require the court to appoint a guardian *ad litem* or counsel for a victim because the prosecutor does not represent the victim and cannot counsel the victim on the question of consent. *See Speese*, 199 Wis. 2d at 607-08, 545 N.W.2d at 515. When appropriate, the prosecutor may consider whether dismissal of the case is truly the only available option when the victim does not consent to disclosure.

The prosecutor must adhere to the governing precedent, but may rely on persuasive authority to illustrate potential pitfalls with the materiality test in its present form. As a cautionary warning, much of the supporting case law associated with these motions predates the governing decision in *Green*. Therefore, prosecutors should review both the pre- and post-*Green* case law to determine whether it applies to the specific facts and circumstances in a given case. A prosecutor must conduct his or her own in-depth legal research to ensure a thorough and proper understanding of the statutory and case law governing each particular case.

14. Other Acts and Character Evidence in Domestic Abuse Cases

1. Character Evidence Generally
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1. Character Evidence Generally

In certain cases, a defendant will introduce favorable character evidence in an attempt to convince the trier of fact that he or she, the defendant, based on character, is not the “type” of person who would commit a domestic abuse offense. The rules for introducing this evidence, and rebuttal evidence refuting the assertion, are limited.

WIS. STAT. § 904.04 (1) CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(1) CHARACTER EVIDENCE GENERALLY. Evidence of a person’s character or a trait of the person’s character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

- (a) Character of accused. Evidence of a pertinent trait of the accused’s character offered by an accused, or by the prosecution to rebut the same;

- (b) Character of victim. Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
- (c) Character of witness. Evidence of the character of a witness, as provided in §§ 906.07, 906.08 and 906.09.

The general rule is that character evidence is not admissible to show that a person acted in conformity with a particular character trait on a particular occasion. However, there are exceptions.

The accused may offer evidence of a pertinent character trait to attempt to persuade the trier of fact that he or she would not have committed the charged offense. On rebuttal, the prosecutor may then introduce character evidence to counter the defense's assertions. The rule is stringent; only if the defendant first introduces evidence of good character may the prosecutor introduce evidence of the defendant's bad character. If the defendant does not introduce evidence of good behavior, the prosecutor is prohibited from introducing evidence of the defendant's bad behavior.

Character evidence may be introduced by the defendant, and rebutted by the prosecution, to prove that it would not be in the defendant's character to commit the crime charged. *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

In *Whitty*, the defendant was charged with and convicted of taking indecent liberties with a child. The defendant appealed, claiming among other things that the trial court erred when it allowed the victim to testify to rebut the defendant's alibi testimony. The Wisconsin Supreme Court affirmed in part and reversed in part, stating:

It is a maxim in our jurisprudence that all facts having rational or logical probative value are admissible in evidence unless excluded by some specific rule. 1 WIGMORE, EVIDENCE (3d ed.), p. 293, § 10. Likewise, the "character rule" is universally established that evidence of prior crimes is not admitted in evidence for the purpose of proving general character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged.

. . . . Under the multiple-admissibility rule, evidence inadmissible for one purpose may be admissible as probative for another purpose. As well established as the complex exclusionary rule concerning evidence of prior offenses is the rule that evidence of prior crimes is admissible when such evidence is particularly probative in showing elements of the specific crime charged, intent, identity, system of criminal activity, to impeach credibility, and to show character in cases where character is put in issue by the defendant. The admission of evidence of

prior crimes for such purposes is not forbidden because such evidence would not be admissible under the general character rule.

Whitty, 34 Wis. 2d at 291-92, 149 N.W.2d at 563.

2. Other Acts Evidence Generally

WIS. STAT. § 904.04 (2(a) CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(2)(a) OTHER CRIMES, WRONGS, OR ACTS. . . . [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The prosecutor does not have unlimited discretion when introducing other acts evidence. Such evidence should only be used when necessary. The Wisconsin Supreme Court made this point in *Whitty* by stating:

Evidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonably necessary. Piling on such evidence as a final “kick at the cat” when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant’s right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence. The use of such evidence under the adopted rule will normally be a calculated risk.

Whitty, 34 Wis. 2d at 297, 149 N.W.2d at 565-66.

This ruling ensures that the defendant, if convicted, will be convicted solely on the merits of the charged crime, and not because the defendant is a “bad” person. The fear is that the jury may make that latter conclusion based on the defendant’s previous wrongdoing.

In *Whitty*, the Wisconsin Supreme Court gave further guidance to trial courts:

We think the admissibility of prior-crime evidence does not depend upon admission or conviction for prior criminal conduct but upon its probative value which depends in part upon its nearness in time, place and circumstances to the alleged crime or element sought to be proved.

Whitty, 34 Wis. 2d at 294, 149 N.W.2d at 564.

As noted above, the probative value of prior criminal conduct depends in part upon its nearness in time, place and circumstances to the alleged charged crime or element sought to be proven. Other acts based on convictions which are old in time (the Federal rule is that in order to be relevant, crimes must have occurred within the past ten years), or occurred in a different place, or are different in form (circumstances) from the charged crime, should generally not be admitted. This is a rule of degree and comparison, not simply a bright-line test. Subjective factors inevitably creep into the analysis of whether other acts evidence should be admitted. Therefore, expect a great number of cases in which this evidence is admitted by the trial court to be appealed by the defense.

3. The Importance of Limiting Instructions

Where the State attempts to introduce other acts evidence, and fails to specify which exception the other acts evidence falls into, such evidence will not be admissible. *State v. Spraggin*, 77 Wis. 2d 89, 252 N.W.2d 94 (1977).

In *Spraggin*, the defendant was charged and convicted of intentionally aiding and abetting in the delivery of a controlled substance, namely, heroin. *Spraggin*, 77 Wis. 2d at 93. During a search of the defendant's house, two bags of marijuana were found. *Id.* At trial, the State introduced the two bags of marijuana, and also weapons and stolen goods recovered from the search. *Id.* at 96. The State did not indicate the purpose (motive, intent, opportunity, identity, knowledge, plan or scheme, absence of mistake or accident, etc.) for the proffered evidence. *Id.* The trial judge did not read a limiting instruction to the jury. *Id.* The Wisconsin Supreme Court reversed and remanded the conviction, saying:

We are not persuaded that the possession of marijuana is probative of intentionally aiding and abetting the delivery of heroin. The evidence was not limited by the judge to this question of intent as an element of aiding and abetting, and the judge did not instruct the jury to consider this evidence only for determining whether the aiding and abetting was intentional. The evidence went in; the jury heard the testimony; and the jury could handle the bags in the jury room during deliberations.

Spraggin, 77 Wis. 2d at 97.

The Court continued:

No specific connection was shown between this evidence and the defendant's alleged criminal acts. Weapons and stolen goods may constitute the protection and currency necessary in the realm of heroin trafficking, but the State did not demonstrate in any manner that this particular evidence was so employed.

Id. at 100.

If you are seeking to introduce other acts evidence, you must clearly specify the purpose for the evidence by establishing a connection between the evidence and the crime charged. Further, it is good practice to request that the trial court read a limiting instruction regarding the purpose of the other acts evidence to the jury.

4. Probative Value vs. Potential Prejudice

Proffered other acts evidence must first be relevant and admissible, before the trial court is obligated to engage in the balancing test of weighing the probative value of the evidence against the potential prejudice to the defendant. If the evidence is not relevant, it certainly should not be admissible and the balancing test becomes a moot point.

The State attempts to save this evidence by saying that the trial court appraised the possible prejudice to the defendant and balanced it against the probative value of the evidence. This balancing under § 904.03, Wis. Rules of Evidence, does not come into play until the court first determines that the evidence is offered for a valid purpose, e.g., intent, plan, etc. § 904.04(2), Wis. Rules of Evidence. Since the evidence here could not properly be pigeonholed into any of the exceptions of § 904.04(2), Wis. Rules of Evidence, the balancing test should not have been reached. Even if we were willing to hold that the admission of the evidence was proper and that the judge could admit the evidence under § 904.03, there was no admonition or curative or limiting instruction cautioning the jury that the evidence was not proof of guilt but proof of intentionally aiding or abetting the crime or proof of a plan or design.

Spraggin, 77 Wis. 2d at 100-01, 252 N.W.2d at 99.

The “probative value vs. potential prejudice” prong of the test is based on WIS. STAT. § 904.03.

WIS. STAT. § 904.03 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence of specific instances of conduct may be introduced by the prosecution to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident – as long as this evidence is probative and not substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This requires the interaction of WIS. STAT. §§ 904.03 and 904.04(2). Regardless of relevance, however, if the evidence is unfairly prejudicial the trial court judge will prohibit its introduction.

5. *Sullivan* and the Three-step Analytical Framework

Where other acts evidence is proffered by the State, a three-step analysis must be made to determine whether the evidence should be admitted. *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (Wis. 1998).

In *Sullivan*, the defendant was charged with domestic battery, false imprisonment, intimidation of a witness and disorderly conduct arising from an altercation with his live-in girlfriend. The State introduced evidence of other wrongs at trial, including a verbal argument between the defendant and the defendant's ex-wife. The jury convicted the defendant of battery and disorderly conduct. The defendant appealed, and the Court of Appeals affirmed the conviction. The Wisconsin Supreme Court reversed and remanded, ruling that the other wrongs evidence should not have been admitted. According to a three-step analysis, the Supreme Court decided that the evidence was unfairly prejudicial:

The three-step analytical framework is as follows:

- 1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
- 2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
- 3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § 904.03.

Sullivan, 216 Wis. 2d at 772.

At trial, the State introduced testimony by the defendant's ex-wife and a neighbor indicating that two years earlier, the defendant had verbally abused his ex-wife. The State argued for the exceptions of intent or absence of mistake. The Wisconsin Supreme Court held that the proffered evidence was dissimilar enough from the charged offense that it was not probative on the issue of intent or absence of mistake:

- 1) The other acts evidence in this case was proffered to establish the defendant's intent or absence of accident under WIS. STAT. § 904.02(2).
- 2) With regard to relevance, the other acts evidence relates to a consequential fact in this case, namely the defendant's intent or absence of accident. The other acts evidence is dissimilar enough from the incident upon which the charged offenses were based that the evidence is not probative of the defendant's intent or absence of accident.
- 3) Even if the other acts evidence had probative value with regard to the defendant's intent or absence of accident, the probative value of the other acts evidence is substantially outweighed by the prejudicial effect to the defendant.
- 4) The admission of the other acts evidence in this case is reversible error.

Sullivan, 216 Wis. 2d at 773.

The proffered other acts evidence in *Sullivan* consisted of acts occurring two years earlier (which was deemed not timely) and a verbal assault (which is factually dissimilar from a physical battery). According to the Wisconsin Supreme Court, these differences were enough to render the other acts evidence as non-probative or irrelevant with respect to the crime charged. The Court found the evidence to be unfairly prejudicial.

Although the prosecutor, the proponent of the evidence, and the circuit court referred to the three-step framework described above, they failed to relate the specific facts of the case to the analytical framework. The prosecutor and the circuit court did not carefully probe the permissible purposes for the admission of the other acts evidence; they did not carefully articulate whether the other acts evidence relates to a consequential fact or proposition in criminal prosecution; they did not carefully explore the probative value of the other acts evidence; and they did not carefully articulate the balance of the probative value and unfair prejudice.

The proponent and the opponent of the other acts evidence must clearly articulate their reasoning for seeking admission or exclusion of the evidence and must apply the facts of the case to the analytical framework. The circuit court must similarly articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework. . . . The proponent of the evidence, in this case, the State, bears the burden of persuading the circuit court that the three-step inquiry is satisfied.

Sullivan, 216 Wis. 2d at 773-74.

The Wisconsin Supreme Court explained the term “unfair prejudice”:

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *See State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citing *Lease Am. Corp. v. Insurance Co. of N. Am.*, 88 Wis. 2d 395, 401, 276 N.W.2d 767 (1979)). In this case the danger of unfair prejudice was that the jurors would be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man. “The legal prejudice of which we speak here is the potential harm in a jury’s concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged.” *State v. Fishnick*, 127 Wis. 2d 247, 261-62, 378 N.W.2d 272 (1985) (citing *State v. Tarrell*, 74 Wis. 2d 647, 657, 247 N.W.2d 696 (1976)).

Sullivan, 216 Wis. 2d at 789-90.

In many cases there is a very fine line between probative other acts evidence and unfairly prejudicial other acts evidence. Review with the trial court the proffered other acts evidence, in specific detail, in accordance with the three-step analysis outlined in *Sullivan*.

6. Other Acts Evidence to Prove “Plan”

Where other acts evidence indicates a “plan,” as listed in the exceptions of WIS. STAT. § 904.04(2), this evidence will be admitted at trial. *State v. Pharr*, 115 Wis. 2d 334, 340 N.W.2d 498 (1983).

In *Pharr*, the defendant was charged and convicted of attempted first-degree homicide. The defendant objected to the introduction of evidence of a related shooting incident. The trial court allowed this evidence to be admitted into evidence at trial and the defendant appealed. The Wisconsin Supreme Court affirmed:

We have held that trial courts must apply a two-prong test in determining whether other crimes evidence is admissible. *See State v. Spraggin*, 77 Wis. 2d 89, 95, 252 N.W.2d 94 (1994); *Hammen*, 87 Wis. 2d at 798. The first prong requires the trial court to determine whether the evidence fits within one of the exceptions set forth in § 904.02(2), Stats. The second prong requires the trial court to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Alsteen*, 108 Wis. 2d at 729. We have recognized that “[I]mplicit within our two prong analysis is the requirement that other crimes evidence be relevant to an issue in the case.”

Pharr, 115 Wis. 2d at 343-44 (internal citations omitted).

In *Pharr*, the Supreme Court of Wisconsin also found that the evidence of the related shooting was probative and outweighed any unfair prejudice. *Id.* at 347.

Courts have examined “plan” and the other exceptions repeatedly since *Pharr*. When preparing a motion or an argument in support of admitting other acts evidence under this exception, you will need to research the case law in depth.

7. Other Acts Evidence to Prove “Knowledge”

The “knowledge” exception to the general rule against admitting character evidence is the awareness of the defendant that a particular behavior constitutes a crime. *State v. Evers*, 139 Wis. 2d 424, 407 N.W.2d 256 (1987).

In *Evers*, the defendant was charged and convicted of misdemeanor theft of a vehicle. At trial, the prosecutor introduced evidence indicating that the defendant had previously been convicted of a theft charge occurring four years earlier. The defendant objected to the introduction of this evidence. Both the trial court and the Court of Appeals agreed that the evidence was admissible to prove intent and knowledge. The Wisconsin Supreme Court disagreed. Nonetheless, it upheld the conviction because they said the admission of the evidence constituted harmless error.

As for the knowledge exception, Weinstein and Berger observe that the evidentiary justification here is similar to the justification for allowing other acts evidence to show intent. It is unlikely that repeated instances of behavior, even if originally innocent, will not have resulted in a defendant having the requisite state of knowledge (i.e., awareness that a particular behavior constitutes a criminal act) by the time of the charged crime. Weinstein & Berger, *Weinstein’s Evidence*, sec. 404[13], p. 404-100 (1985). They observe that, in the case of an attempt to introduce other acts evidence on the issue of knowledge, “a detailed analysis is needed to see if the [other acts] evidence affects the probability of the defendant’s having the requisite knowledge.” *Id.* at 404-05. Otherwise there is a risk that the evidence will establish no more than the defendant’s propensity to commit crimes.

Evers, 139 Wis. 2d at 440, 407 N.W.2d at 264.

For the knowledge exception to come into play, the prosecution must show that the circumstances surrounding the prior crimes indicate that the defendant acquired certain knowledge (or a state of knowledge) that is inconsistent with the defendant’s innocence in the charged offense. . . . The knowledge must clearly be more than the knowledge that one should not steal or that it is wrong to commit crimes.

Evers, 139 Wis. 2d at 443-44, 407 N.W.2d at 265.

The “knowledge” exception allows evidence to prove that the defendant has acquired a certain knowledge, other than general knowledge, to conclude that he knew his actions constituted a criminal act. For example, in *Evers*, the defendant attempted to show that the automobile that he took was abandoned property. The State was forced to show that the car was not abandoned and that the car did indeed belong to somebody else and was not available for the defendant to take. The other acts evidence showed it to be unreasonable for the defendant to believe that the automobile was abandoned.

8. Other Acts Evidence to Prove “Intent”

Evidence indicating an “intent” by the defendant to commit a crime may be introduced by the State at trial as an exception to the general prohibition against character evidence. *State v. Roberson*, 157 Wis. 2d 447, 459 N.W.2d 611 (Ct. App. 1990).

In *Roberson*, the defendant was charged and convicted of concealing stolen property. The trial court allowed other acts evidence (possession of a stolen vehicle) on the theory that it was probative of the defendant’s “plan.” The State asserted that the evidence should be admissible under the “knowledge” exception of WIS. STAT. § 904.04(2). The Court of Appeals disagreed with both of the theories of the trial court and the State. Instead, the Court of Appeals held that the other acts evidence was admissible on a different theory, and upheld the conviction. The Court of Appeals defined the difference between “plan,” “knowledge,” and “intent.”

Our Supreme Court has defined “plan” under Wis. Stat. § 904.04(2) to mean “a design or scheme formed to accomplish some particular purpose.” *State v. Spraggin*, 77 Wis. 2d 89, 99, 252 N.W.2d 94, 98 (1977). “Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged.” *Id.* While the charged offense and the other acts evidence in this case are similar in that they involve Roberson in the possession of stolen motor vehicle property, the evidence fails to show the necessary “linkage” between the two events which permits the conclusion that the latter act “led to the commission of the offense charged.” Wisconsin Jury Instructions-Criminal 275.

The State argues that the evidence in question was relevant to the issue of Roberson’s knowledge. Although closely related and many times overlapping, knowledge and intent are separate concepts. *State v. Evers*, 139 Wis. 2d 424, 436, n.9, 407 N.W.2d 256, 262, n.8 (1987).

The knowledge principle requires that the former possession [of stolen goods] be likely to have led to a knowledge or a warning of the stolen character of those goods, and that such warning would have naturally warned the defendant also of the stolen character of the goods in question. 2 Wigmore, Evidence § 324, at 286 (Chadbourn ed. 1979) (citation omitted). Evidence of other similar acts, even if originally innocent, makes it unlikely that the defendant did not have the requisite state of knowledge as to the criminal character of his acts by the time of the charged crime. *Evers*, 139 Wis. 2d at 440, 407 N.W.2d at 263.

Because “knowledge” is based on the theory that the defendant was put on notice of the criminal nature of the charged act by virtue of his other, similar activities, it follows that the alleged other acts must have occurred prior to the charged act.

Roberson, 157 Wis. 2d at 453-54, 459 N.W.2d at 612-13.

In *Roberson*, the State attempted to introduce other acts evidence occurring after the current charge in an attempt to show that the defendant possessed the requisite knowledge. The Court of Appeals logically dismissed this theory because knowledge that a particular action is wrong must come before the particular action is taken. It is the *previous* other acts that gave knowledge to the defendant that the actions were wrong; knowledge cannot be acquired or imputed by subsequent other acts.

The Court of Appeals instead ruled that the other acts evidence was properly admitted under the “intent” exception to character evidence. Intent can be found where a number of similar previous other acts have occurred.

The reasoning of this argument is that the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent. Accordingly, the argument here is that the oftener A is found in possession of stolen goods, the less likely it is that his possession on the occasion charged was innocent. It is not a question of specifically proving knowledge; it is merely a question of the improbability of an innocent intent. 2 Wigmore, Evidence sec. 325, at 287 (Chadbourn ed. 1979). It is the multiplication of criminal occurrences, not their timing, that is important – provided that the time is not so distant as to be accountable for on the theory of chance acquisition. *Id.* Therefore, it is immaterial whether the acts occurred before or after the charged event. *Id.* *Roberson*’s other act of possession of a stolen vehicle can, therefore, be relevant to his claim of innocent possession and concealment. Wigmore notes that since the force of the argument behind the intent principle lies in the multiplication of instances, a single instance has little or no weight. 2 Wigmore, Evidence, sec. 325, at 287-88 (Chadbourn ed. 1979). However, Wigmore does not contend that a single instance is per se inadmissible.

Roberson, 157 Wis. 2d at 455, 459 N.W.2d at 613.

Intent can be inferred from the number of times that a defendant engaged in the same repeated behavior. This includes incidents that occurred both before and after the charged offense.

9. Other Acts Evidence to Prove “Identity”

Where proposed to prove the identity of the defendant, the “other acts” evidence must be so similar as to bear the “imprint” of the defendant. *State v. Fishnick*, 127 Wis. 2d 247, 378 N.W.2d 272 (1985).

In *Fishnick*, the defendant was convicted of first degree sexual assault of a child. The State introduced other acts evidence, including evidence that the defendant had previously allegedly enticed a thirteen-year-old girl to show him her vaginal area, to show motive by and identity of the defendant. The Court of Appeals affirmed the defendant's conviction and held that the other acts evidence was relevant to show the defendant's motive, but was not admissible to show identity. The Wisconsin Supreme Court affirmed and held that the "other acts" evidence was relevant to show both motive and identity.

Where other acts evidence is used for identity purposes, similarities must exist between the "other act" and the offense for which the defendant is being tried. *Sanford v. State*, 76 Wis. 2d 72, 80, 250 N.W.2d 348 (1977); Wis. J.I.-Criminal 275. Similarities which tend to identify the defendant as the proponent of an act also tend to ensure a high level of probativeness in the other acts evidence. These similarities may be established, for example, where there is a discernible method of operation from one act to the next, *State v. Rutchik*, 116 Wis. 2d 61, 68, 341 N.W.2d 639 (1984), or where the other act and the crime charged and their surrounding circumstances are so similar that the incidents and circumstances bear the imprint of the defendant. *Id.* at 88 (Abrahamson, J., dissenting). In order for other acts evidence to be admitted for purposes of identity, there should be such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant.

Fishnick, 127 Wis. 2d at 263-64, 378 N.W.2d at 280-81.

The proffered evidence, then, must bear the defendant's fingerprint, or signature, in some way. Remember that the courts have a more restrictive standard when deciding whether to admit other acts evidence on the issue of identity than on the other exceptions. Therefore, the more similar the other acts evidence is to the charged crime, the more probative it becomes and the less likely it is that the defendant will be unfairly prejudiced by its admission.

In *Whitty*, the Wisconsin Supreme Court gave guidance to trial courts when facing the identity exception of WIS. STAT. § 904.04(2):

We think the standards of relevancy should be stricter when prior-crime evidence is used to prove identity or the doing of the act charged than when the evidence is offered on the issue of knowledge, intent or other state of mind. McCormick, Evidence (hornbook series), p. 331, sec. 157. In identity cases the prejudice is apt to be relatively greater than the probative value. However, we cannot say that all evidence admitted under the multi-admissibility rule to prove identity, intent, knowledge or other element of the crime is per se so prejudicial on the issue of guilt or innocence as to require its exclusion.

Whitty, 34 Wis. 2d at 294, 149 N.W.2d at 564.

In domestic abuse cases, usually the identity of the abuser is not at issue because the parties are not strangers to one another. Nonetheless, keep in mind that a stricter standard of scrutiny applies to the admission of other acts evidence to prove identity than when it is admitted to prove knowledge, intent, or other states of mind.

10. Other Acts Evidence to Prove “Method of Operation”

Evidence showing a defendant’s “method of operation” will not be allowed into evidence unless it fits into one of the exceptions listed in WIS. STAT. § 904.04(2). *State v. Harris*, 123 Wis. 2d 231, 365 N.W.2d 922 (Ct. App. 1985).

In *Harris*, the defendant, a former Madison police officer, was charged with two counts of misconduct in office: 1) by offering to let a woman avoid a shoplifting charge in exchange for sexual favors, and 2) by paying the same woman for sexual intercourse while the defendant was on duty. The State sought to introduce evidence showing a history of offering favorable police treatment in exchange for sexual favors. The State asserted that this evidence would show a definite method of operation, relying on the holding in *State v. Rutchik*, 116 Wis. 2d 61, 68, 341 N.W.2d 639, 643 (1984). In that case the Supreme Court of Wisconsin held that other crimes evidence establishing a method of operation was admissible to show preparation, plan, identity and intent.

The defendant objected to the State’s attempt to introduce prior acts evidence into trial; the trial court agreed with the defense. The Court of Appeals affirmed the exclusion:

Rutchik does not hold that evidence of a method of operation is per se admissible. Such evidence may be admissible only if it fits a § 904.04(2), Stats., exception and if it is relevant to an issue in the case. Evidence of a method of operation was admissible in *Rutchik* because it tended to prove intent and because intent was an issue, not merely because it established a method of operation.

Harris, 123 Wis. 2d at 235, 365 N.W.2d at 925.

Standing alone, specific incidents to show a method of operation will not be admissible at trial. In order to be admissible, a method of operation must incorporate one of the other exceptions listed in WIS. STAT. § 904.04(2) such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State in *Harris* asserted that the other wrongs evidence should be admissible to prove identity. The trial court rejected this argument, noting that the victim had positively identified the defendant at the preliminary hearing. The Court of Appeals agreed, stating:

Other wrongs evidence is not automatically admissible. It should be excluded if the motive, opportunity, intent, etc., is not substantially disputed or if the undue prejudice outweighs probative value. Judicial Council Committee’s Note [to §

904.04(2), Stats.], 59 Wis. 2d R79 (1973). It is not favored and ought not be used if other proof is available.

Harris, 123 Wis. 2d at 236, 365 N.W.2d at 925.

The procedure for determining admissibility depends on the grounds on which the Government offers the evidence. If the evidence is offered to prove that the defendant committed the act charged in the indictment, for example, by proving identity or common scheme, the evidence may be offered during the prosecution's case-in-chief, unless the defendant's commission of the act is not a disputed issue. On the other hand, if the evidence is offered to prove the defendant's knowledge or intent, the offer of similar acts evidence should await the conclusion of the defendant's case and should be aimed at a specifically identified issue. This enables the trial judge to determine whether the issue sought to be proved by the evidence is really in dispute and, if so, to assess the probative worth of the evidence on this issue against its prejudicial effect. *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980).

Harris, 123 Wis. 2d at 238, 365 N.W.2d at 926, quoting *United States v. Benedetto*, 571 F.2d 1246, 1249 n.2 (2d Cir. 1978).

11. Other Acts Evidence in a Domestic Abuse Case

In *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, the Court of Appeals reviewed the use of other acts evidence to prove an abuser's intent to injure, as well as to show an absence of mistake or accident.

Volk was charged with aggravated battery and disorderly conduct as a repeat offender for hitting his girlfriend in the face, pushing her to the floor and sticking his fingers down her throat, causing her to spit blood and causing damage to her tongue and throat. The defendant claimed that the victim was trying to frame him. The defendant maintained that the victim attacked him and bit her own lip. The State offered other acts testimony of the defendant's former wife who related six prior incidents of domestic abuse perpetrated by the defendant.

Following the close of the evidence, the trial court instructed the jury that the former wife's testimony should only be considered for the issues of intent and absence of mistake or accident, not to show that the defendant is a "bad person." The jury found the defendant guilty of both counts.

On appeal, Volk challenged the second aspect of the second prong of *Sullivan* – the probative value of the evidence. The Court of Appeals responded: "The probative value of evidence is determined by whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Volk*, 2002 WI App 274, 258 Wis. 2d 584, 596, 654 N.W.2d 24, 29-30.

Volk argued that because his former wife's testimony did not describe any incident wherein the defendant put his fingers down her throat, that ultimately, the other acts evidence did not tend to make a consequential fact more or less probable than it would have been without the former wife's testimony. The Court of Appeals did not agree.

The Court of Appeals held that *Sullivan* does not require the prior conduct to be exactly similar to the alleged offense. *Volk*, 2002 WI App 274, 258 Wis. 2d at 596, 654 N.W.2d at 30. Rather, *Sullivan*'s focus is the strength of the similarity. Thus, a series of prior incidents of domestic abuse can help refute the defendant's claim that the victim injured herself and can help prove the defendant's intent to injure. Lastly, the Court of Appeals upheld the trial court's finding that the probative value of the evidence outweighed the danger of unfair prejudice.

While *State v. Volk* serves as an example of a well-reasoned Court of Appeals analysis of other acts evidence in a domestic abuse case, it is important to note that *Volk* is very fact-specific. The other acts evidence in *Volk* fits nicely into the greater factual framework of that case.

As some practical advice and observation, when seeking to introduce other acts evidence, keep in mind the following:

- Do not overreach.
- Anticipate all of your evidence.
- Anticipate defenses.
- Link the other acts evidence to the facts of your case as closely as possible.
- Choose the purpose for the other acts evidence wisely and apply the facts to that purpose with specificity.
- Make certain the trial court reads a limiting instruction to the jury.

12. Other Acts Evidence Introduced by the Defense

Other acts evidence of a witness may be introduced by the accused to assist the defendant in his or her defense. *State v. Johnson*, 184 Wis. 2d 324, 516 N.W.2d 463 (Ct. App. 1994).

In *Johnson*, the defendant was convicted of battery and second degree reckless endangerment as a repeater. Johnson attempted to introduce evidence that the victim made false accusations in an effort to obtain personal property owned by the defendant. The defendant sought to introduce evidence that the victim, during a previous marriage, fabricated a similar story to have her ex-husband incarcerated, so that she could obtain his property. Additionally, the defendant wanted to introduce evidence that within hours or days after he was arrested, the victim attempted to obtain keys to his trailer in order to obtain his property.

The trial court ruled that the other acts evidence was impermissible character evidence. The Court of Appeals reversed and remanded the case to the trial court, ruling that the proffered evidence of the victim's attempts to gain possession of the defendant's property was appropriate other acts evidence indicating motive on the part of the victim.

The general policy of § 904.04(2), Stats., is one of exclusion; the rule precludes proof of other crimes, acts or wrongs for purposes of showing that a person acted in conformity with a particular disposition on the occasion in question. *State v. Rutchik*, 116 Wis. 2d 61, 67-68, 341 N.W.2d 639, 642 (1984). The rule is not limited solely to a defendant's acts; it is applicable to any "person." *State v. Kimpel*, 153 Wis. 2d 697, 703-04, 451 N.W.2d 790, 793 (Ct. App. 1989). However, other acts evidence is admissible if its relevance hinges on something other than the forbidden character inference proscribed by s. 904.04(2) and the proponent of the evidence uses it for that purpose. *See Rutchik*, 116 Wis. 2d at 67-68, 341 N.W.2d at 642-43.

Johnson, 184 Wis. 2d at 336-67, 516 N.W.2d at 466-67.

In *Johnson*, the defendant sought to admit other acts evidence against the victim, to show that the victim had a motive to lie. Credibility of witnesses is an issue for the trier of fact. The Court of Appeals held that the other acts evidence was probative on the issue of motive, which is one of the exceptions listed in WIS. STAT. § 904.04(2). Quoting from *Fishnick*, the Court of Appeals defined "motive" as the reason which leads the mind to desire the result of an act. *Fishnick*, 127 Wis.2d at 260, 378 N.W.2d at 279. *See also Johnson*, 184 Wis. 2d 324, 516 N.W.2d 463.

Other acts evidence may be introduced against any witness at trial, not just the defendant. This is another reason to thoroughly probe your case prior to charging, to determine whether the victim or other State's witnesses are vulnerable to attack.

13. When the Defense is Self Defense: *McMorris* Evidence

When a defendant asserts self-defense in a battery or other bodily harm case, he or she may use evidence of "specific instances" of aggression on the part of the victim in order to bolster an argument that the victim was the aggressor. *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

In *McMorris*, the defendant was charged and convicted of stabbing a fellow participant during a card game. The defendant attempted to introduce "specific instances" evidence at trial to bolster the defense that the victim was the aggressor and therefore, the defendant acted in self defense.

The *McMorris* trial court rejected the defendant's attempts to introduce personal knowledge of specific instances of the victim's conduct. The trial court ruled that the only acceptable character evidence would be the general reputation of the victim in the community in which the victim lives. The Court of Appeals reversed and remanded, stating:

When the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and

violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident.

McMorris, 58 Wis. 2d at 152, 205 N.W.2d at 563.

This ruling departed from the traditional requirement that bad character evidence of the victim be proven by reputation or opinion evidence only, and not with specific instances of conduct.

WIS. STAT. § 904.05 METHODS OF PROVING CHARACTER.

- (1) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

As the statute above states, the general rule is that character evidence may be proven by reputation or opinion evidence. However, where self defense is asserted by the defendant, the defendant may introduce specific instances of the victim's past conduct:

The past conduct of a person markedly affects what others may reasonably expect from him in the future. When the accused maintains self-defense, he should be permitted to show he knew of specific prior instances of violence on the part of the victim. It enlightens the jury on the state of his mind at the time of the affray, and thereby assists them in deciding whether he acted as a reasonably prudent person would under similar beliefs and circumstances. In *State v. Gordon*, (1935), 37 Del. 219, 222–223, 181 Atl. 361, the court stated: “The question here is whether the accused may testify to specific instances, either known to him personally, or by hearsay, of an affray in which the deceased was the aggressor and had used a knife. The state of mind of the accused is material. The jury is to pass upon his belief, that the deceased was about to attack him. Without doubt, the reputation of the deceased for violence, known to the accused, is admissible; and there seems to be no substantial reason why the belief of the prisoner should not be evidenced by knowledge of specific acts of violence, as well as by knowledge of general reputation for violence, subject, of course, to exclusion in a proper case for remoteness.”

McMorris, 58 Wis. 2d at 151, 205 N.W.2d at 562-63.

McMorris evidence may be used only where the defendant asserts the defense of self defense against a charge of either homicide or battery. *McMorris* evidence is comprised of specific

incidents of prior violent or aggressive behavior committed by the victim, which are known to the defendant at the time the defendant allegedly acted in self defense.

McMorris evidence relates to the reasonableness of the defendant's conduct and the defendant's state of mind. This is in contrast to character/propensity evidence, which focuses on the character of the victim to support an inference that the victim acted in conformity with a particular character trait. The logic of the *McMorris* inference is thus: Prior specific violent or aggressive acts, committed by the victim and known to the defendant, are responded to by the defendant as he or she acted in fear of the victim to defend him- or herself because the defendant was aware of the victim's prior violent acts.

Finally, it is important to note that, in *State v. McClaren*, 2009 WI 69, 318 Wis. 2d 739, the Wisconsin Supreme Court held that a trial court has the inherent authority to order the defendant to provide a summary of *McMorris* evidence of prior violent acts by the victim supporting a self-defense claim prior to trial, so that admissibility determinations could be made. The Court held that the Constitution does not guarantee a criminal defendant the right to surprise the prosecutor. *McClaren*, 318 Wis. 2d at 745. The Court further held that requiring disclosure in advance of trial does not violate the defendant's right against self-incrimination or his right to due process. *Id.* at 758-62.

This ruling has obvious implications for domestic abuse cases. A defendant may assert the defense of self defense and attempt to introduce character evidence, in the form of specific instances of the victim's conduct, in an attempt to show that the victim was the aggressor.

Therefore, it is of critical importance for prosecutors to know the history of the relationship between the defendant and the victim. If the victim has been a past aggressor in the relationship, a jury may have sympathy for the accused, and acquit the defendant.

A sample response to a defendant's motion for *McMorris* evidence is provided in Appendix 6.

14. A Summary: The Case of *State v. Gray*

Other acts evidence may be admitted as an exception to the general prohibition of character evidence in order to show identity, plan, motive, intent, or absence of mistake. *State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918 (1999).

In *Gray*, the defendant was convicted of attempting to obtain a controlled substance by misrepresentation. The State introduced other acts evidence, including a 1990 conviction for obtaining a controlled substance by misrepresentation and several uncharged forged prescriptions, to show identity, plan, motive, scheme, and potentially absence of mistake. The Court of Appeals affirmed the conviction and the Wisconsin Supreme Court also affirmed.

Using the three-step analytical framework set forth in *Sullivan*, the Court found that the other acts evidence was relevant, probative and not unduly prejudicial. *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30. Not only did the other acts evidence fit into the identity exception, it also fit into the

motive, absence of mistake, intent, and plan and scheme exceptions to the general character rule. This case presents a comprehensive review of many of the different exceptions to the general rule prohibiting the admission of character evidence.

To summarize the criteria that trial courts should employ when determining whether other acts evidence fits into a specific exception, the Wisconsin Supreme Court elucidated the following in *State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918 (1999):

Identity:

Other acts evidence is admissible to show identity if the other acts evidence has “such a concurrence of common features and so many points of similarity with the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant.” *State v. Kuntz*, 160 Wis. 2d 722, 746, 467 N.W.2d 531 (1991) (*quoting State v. Fishnick*, 127 Wis. 2d 247, 263-64, 378 N.W.2d 272 (1985)). The threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. Whether there is a concurrence of common features is generally left to the sound discretion of the trial courts.” *Kuntz*, 160 Wis. 2d at 746-47 (*citing Fishnick*, 127 Wis. 2d at 264 n.7). *See also State v. Speer*, 176 Wis. 2d 1011, 1117, 501 N.W.2d 429 (1993).

Gray, 225 Wis. 2d at 51, 590 N.W.2d at 926.

Motive: “Motive has been defined as the reason which leads the mind to desire the result of an act.” *Gray*, 225 Wis. 2d at 54-55, *citing Fishnick*, 127 Wis. 2d at 260.

Intent: “Intent involves knowledge, hostile feeling, or the absence of accident, inadvertence, or causing a varying state of mind, which is the contrary of an innocent state of mind.” *Gray*, 225 Wis. 2d at 56, *citing Evers*, 139 Wis. 2d 424, 443, 407 N.W.2d 256 (1987).

Plan or scheme:

The word “plan” in Wis. Stats. § 904.04(2) means a design or scheme formed to accomplish some particular purpose. . . . Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged There must be “such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations.”

Gray, 225 Wis. 2d at 53, *citing State v. Spraggin*, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977) (*citing 2 Wigmore*, Evidence § 304 (3d ed. 1940)).

Absence of mistake:

Other acts evidence is properly admitted to show absence of mistake if it tends to undermine a defendant's innocent explanation for his or her behavior. *Evers*, 139 Wis. 2d 424, 437, 407 N.W.2d 256 (1987) (*referring to Weinstein & Berger, Weinstein's Evidence*, p. 404-84 (1985)). The oftener a like act has been done, the less probable it is that it could have been done innocently. *Evers*, 139 Wis. 2d 424, 437, 407 N.W.2d 256 (1987) (*quoting Weinstein & Berger, Weinstein's Evidence*, p. 404-84 - 404-87).

Gray, 225 Wis. 2d at 56.

Knowledge:

"The knowledge principle requires that the former possession [of stolen goods] be likely to have led to a knowledge or a warning of the stolen character of those goods, and that such warning would have naturally warned the defendant also of the stolen character of the goods in question." 2 Wigmore, Evidence sec. 324 at 286 (Chadbourn ed. 1979). (emphasis added) (citation omitted). Evidence of other similar acts, even if originally innocent, makes it unlikely that the defendant did not have the requisite state of knowledge as to the criminal character of his acts by the time of the charged crime.

Evers, 139 Wis. 2d at 440, 407 N.W.2d at 263; *State v. Roberson*, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990). *See also State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918.

Opportunity: "The fact that the alleged doer of an act was present at the time and place of the act." Black's Law Dictionary (7th Ed., 1979).

Preparation: "The act or process of devising the means necessary to commit a crime." *Cf.* "attempt." Black's Law Dictionary (7th Ed., 1979).

Keep in mind that the exceptions listed in WIS. STAT. § 904.04(2) are illustrative and not all-inclusive. Other exceptions, while not specifically listed in the statute, nonetheless may apply.

15. Bail Hearings: An Opportunity to Educate the Court

1. The Law
2. Preparation for a Bail Hearing
3. Non-monetary Conditions of Bond
4. General Statistics of Domestic Abuse
5. Guns and Domestic Abuse
6. The Potential Effect of Domestic Abuse on Children
7. Stalking
8. The Phenomenon of Separation Abuse
9. Effects of Domestic Abuse on the Workplace
10. Abuse of Victims with Disabilities

1. The Law

Article VIII of the United States Constitution states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article I, Section 6 of the Wisconsin Constitution states:

Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted.

Article I, Sections 8(1) and (2) of the Wisconsin Constitution state:

No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses.

Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court. The legislature may authorize, by law, courts to revoke a person's release for a violation of a condition of release.

WIS. STAT. § 969.01 ELIGIBILITY FOR RELEASE.

- (1) **BEFORE CONVICTION.** Before conviction, except as provided in §§ 969.035 and 971.14(1), a defendant arrested for a criminal offense is eligible for release under reasonable conditions designed to assure his or her appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Bail may be imposed at or after the initial appearance only upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court. In determining whether any conditions of release are appropriate, the judge shall first consider the likelihood of the defendant appearing for trial if released on his or her own recognizance.

- (4) **CONSIDERATIONS IN SETTING CONDITIONS OF RELEASE.** If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant. Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses. Proper considerations in determining whether to release the defendant without bail, fixing a reasonable amount of bail or imposing other reasonable conditions of release are: the ability of the arrested person to give bail, the nature, number and gravity of the offenses and potential penalty the defendant faces, whether the alleged acts were violent in nature, the defendant's prior criminal record, if any, the character, health, residence and reputation of the defendant, the character and strength of the evidence which has been presented to the judge, whether the defendant is currently on probation or parole, whether the defendant is already on bail or subject to other release conditions in other pending cases, whether the defendant has been bound over for trial after a preliminary examination, whether the defendant has in the past forfeited bail or violated a condition of release or was a fugitive from justice at the time of arrest, and the policy against unnecessary detention of the defendant's pending trial.

WIS. STAT. § 969.02 RELEASE OF DEFENDANTS CHARGED WITH MISDEMEANORS.

- (1) A judge may release a defendant charged with a misdemeanor without bail or may permit the defendant to execute an unsecured appearance bond in an amount specified by the judge.

- (2) In lieu of release pursuant to sub. (1), the judge may require the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

- (3) In addition to or in lieu of the alternatives under subs. (1) and (2), the judge may:
- (a) Place the person in the custody of a designated person or organization agreeing to supervise him or her.
 - (b) Place restrictions on the travel, association or place of abode of the defendant during the period of release.
 - (c) Prohibit the defendant from possessing any dangerous weapon.
 - (d) Impose any other condition deemed reasonably necessary to assure appearance as required or any non-monetary condition deemed reasonably necessary to protect members of the community from serious bodily harm or prevent intimidation of witnesses, including a condition that the defendant return to custody after specified hours. The charges authorized by § 303.08(4) and (5) shall not apply under this section.
- (4) As a condition of release in all cases, a person released under this section shall not commit any crime.
- (4m) Any person who is charged with a misdemeanor and released under this section shall comply with § 940.49. The person shall be given written notice of this requirement.
- (8) In all misdemeanors, bail shall not exceed the maximum fine provided for the offense.

2. Preparation for a Bail Hearing

To be effective at a bond hearing you must know your defendant and the basic facts of the case. This is never so true as in domestic abuse and sexual assault cases. The initial bond hearing gives you an early opportunity to educate the court as to this specific defendant and the danger he or she represents to the victim and to society.

Be prepared to advise the court of the defendant's prior offenses and arrests, even if some of these priors resulted in no prosecution because of lack of victim cooperation (or for other reasons). Advise the court if those offenses involve the same victim or similar facts to the case that is currently before the court. Domestic offenders often have a common *modus operandi* that follows through with all their other offenses. If you can show the court that the pattern is increasing in violence, that information can be helpful as well. List those facts that support your request for both monetary and non-monetary conditions of bond. For example, if the defendant was intoxicated at the time of the offense, explain to the court how intoxication also affected the defendant's past offenses to support a request for a no-drink provision. If the defendant has violated this condition in the past, you will be more likely to get a cash bond ordered, as an inability to follow the conditions of bond makes that defendant a greater risk to fail to appear at future court appearances.

It is also important to research the defendant's failure to appear in court in the past. The defendant's past failure to appear can often be found in your department's records or CCAP

records under the “Court Record Events” tab. The defendant’s delay tactics can have a devastating effect on both the victim and the process. Failure to appear and prior warrants increase the chances of getting a cash bond ordered at a higher level.

If your bond appearance is before the judge who is handling the case, he or she will then be made aware of the defendant’s past practices. This knowledge may subtly affect how the judge views the defendant at subsequent hearings, and may perhaps make the judge more understanding of the issues involving a recanting victim.

3. Non-monetary Conditions of Bond

You can request non-monetary conditions at the bail hearing as well. These conditions are designed not only to protect the victim, but also the public, and help the defendant on his or her way to rehabilitation. This is only a partial list; you may request any condition reasonably necessary to assure the defendant’s appearance in court or to protect the members of the community from serious bodily harm or prevent intimidation of witnesses. *See* WIS. STAT. §§ 969.02(3)(d); 969.03(1)(e).

Alcohol: Neither possess nor consume alcohol, or be on premises where alcohol is served or sold, except within the scope of your employment.

Drugs: Neither use nor possess controlled substances without a valid prescription. Do not possess any drug paraphernalia. Do not associate with any persons possessing or consuming controlled substances.

No contact: Do not have any contact, either direct or indirect, with the following persons/places: (in this section list all victims, their residences and places of employment as well as any appropriate witnesses, etc.). Appendix 7 provides a sample no-contact order for your consideration.

Exception:

Some courts are reluctant to order blanket no-contact orders and therefore may add something akin to the following: “. . . unless a written request is filed with the District Attorney’s Office and the Clerk of Courts’ Office, and a safety plan is developed through the local Family Crisis Center.”

When it appears that the defendant may not be released from custody, the prosecutor should at this time consider a no-contact order under WIS. STAT. § 940.47. This section allows the court to prohibit contact with victims and witnesses and prescribe geographic locations from which the defendant must stay away, provided there is some substantial evidence that the person will knowingly and maliciously try to intimidate the victim or witnesses. This “substantial evidence” may be given through hearsay. These conditions are often seen in cases where the defendant threatens harm if the victim calls the police.

It may be useful to request such a no-contact order when it is likely that the defendant will remain in jail. Prosecutors may also ask the court to make a rule that if the defendant attempts to make contact with the victim or witnesses, that defendant will then be charged with criminal contempt under Chapter 785.

Day Report Center: Report alcohol and drug free to the Day Report Center no less than X times per week.

Firearms: Do not possess any firearms or other dangerous weapons.

Booking: Submit to photographs and fingerprinting by the arresting agency or to the law enforcement agency named in the criminal complaint.

This is especially important if the law enforcement agency did not arrest the defendant and he or she received a summons to appear in court. Note that if the defendant does not submit to the booking process, the conviction will never be reported on CIB.

Residence: Notify the Clerk of Courts of any change of residence no later than 4:00 p.m. or the next business day after any such change.

This section is important in order to keep tabs on the defendant and to be able to notify the victim of any change in residence or location.

Curfew: Be in your residence between the hours of X and Y.

Travel: Do not leave the County of _____ or the State of Wisconsin.

Pretrial supervision: If your county has a Pretrial Supervision Program, Bail Monitoring Program, or Assessment Program, you may wish to include a provision ordering the defendant to enter and comply with these programs.

Mental health: If the defendant has mental health issues you may wish to include an order that the defendant be required to follow his or her current treatment plan and take medications as prescribed.

Other: Any other appropriate non-monetary conditions.

4. General Statistics of Domestic Abuse

As prosecutors, it sometimes falls upon our shoulders to educate the courts as well as the community. Domestic abuse is not a new phenomenon. Domestic abuse looms as a national problem, one that so permeates American culture that it occurs with high levels of frequency in all racial, ethnic and socioeconomic groups. *See* Linda Offner, *Power and Control – Dispelling the Myths Surrounding Domestic Violence*, 34 APR ARIZ. ATT'S 16, 19 (1998); Donna Willis,

Domestic Violence: The Case for Aggressive Prosecution, 7 UCLA WOMEN'S L. J. 173, 176 (1997).

Family violence statistics can be cited during bail hearings to argue for non-monetary conditions of release. There are several benefits: 1) Educate the trial court; 2) educate any members of the public present in the courtroom; 3) persuade the court, with research and statistical data, to adopt the measures you seek as conditions of the defendant's release.

Without a commitment to changing behavior, research tells us that abusers are likely to abuse again. We want defendants to get into court and stop violent behaviors as soon as possible. Ultimately, we want to protect victims from future harm. Consider adopting a policy of arguing for no-contact orders in every domestic abuse prosecution.

Defense attorneys may attempt to persuade courts that the monetary and non-monetary conditions of bail should be reduced and modified without any change in lifestyle or commitment to counseling and change. You may hear arguments pertaining to the victim's reliance upon the abuser for financial support and child-rearing duties. Many statistics – especially those relating to workplace violence and the effects of domestic abuse upon children – will be directly relevant to your courtroom arguments.

Statistics to Use in Court:

An estimated 4 million women are physically abused annually by their partners. *See* Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence*, 273 J. AM. MED. ASS'N, 1781 (1995); FAMILY VIOLENCE PREVENTION FUND, GENERAL STATISTICS (reporting that almost four million American women were physically abused by husbands or boyfriends in 1997); VIOLENCE AGAINST WOMEN IN THE UNITED STATES, NATIONAL ORGANIZATION FOR WOMEN, *available at* <http://now.org/issues/violence/stats.html> (reporting that conservative estimates indicate two to four million women are battered in the United States each year).

Estimates range from 960,000 incidents of violence against a spouse or former spouse, boyfriend or girlfriend, to 3.9 million women who are physically abused by their husbands or live-in partners each year. *See* U.S. DEPARTMENT OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS AND GIRLFRIENDS (March 1998); THE COMMONWEALTH FUND, FIRST COMPREHENSIVE NATIONAL HEALTH SURVEY OF AMERICAN WOMEN (July 1993).

The most conservative estimates indicate that, on average, approximately one million women are murdered, raped, or beaten by their spouses or intimate partners in the United States in any given year. *See* BUREAU OF JUSTICE STATISTICS FACTBOOK, LAWRENCE A. GREENFELD ET AL., VIOLENCE BY INTIMATES 37 (March 1998) (noting that in 1996, 840,000 women were victims of non-lethal violence at the hands of an intimate while another 1,326 were murdered by an intimate. This rate is down from a high of 1.1 million incidents of non-lethal domestic abuse and 1,581 murders in 1993).

In 2001, of the 127 homicides in the City of Milwaukee, 24 were related to family violence, with 16 female victims, three male victims and five children. Statistics reported by Milwaukee Police Department Deputy Chief Ray, *Establishment of the MPD Family Violence Unit lecture* (2002).

The Wisconsin Coalition Against Domestic Violence (WCADV) publishes an annual Wisconsin Domestic Violence Homicide Report, which includes statistics about domestic abuse homicides in the state. A recent copy of the report can be found at <http://www.wcadv.org/2010-wisconsin-domestic-violence-homicide-report>.

5. Guns and Domestic Abuse

It should come as no surprise to prosecutors that guns increase the risk of death in families with histories of domestic abuse. See Arthur L. Kellerman, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 N.E. J. MED., 1084 (1993).

Even when a gun is neither fired nor brandished, it can exacerbate domestic abuse problems in a family. As one scholar has noted: “Victim advocates, health professionals, law enforcement and judges are all too familiar with cases of batterers playing Russian roulette, shooting the family pet as a warning, cleaning a handgun during an argument, and sleeping with a gun under the pillow.” Judith Bonderman, *Firearms and Domestic Violence: Exploring the Links*, HELP Network, Chicago (1997).

Ample evidence and common sense support the argument that firearms in the hands of those who physically abuse their own families can escalate danger in those families. George B. Stevenson, *Federal Anti-violence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLIAMETTE L.REV. 847, 861-62 (noting that removing offenders’ firearms reduces injury and prevents offenders from shooting in haste or while under the influence of alcohol or drugs).

Below are some statistics that give you ammunition as a prosecutor to request “no firearms or other weapons” as a condition of release on bail.

- Households with guns are 7.8 times more likely to experience a firearm homicide at the hands of a family member than homes without guns. Arthur L. Kellerman, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 N.E. J. MED., 1084 (1993).
- When one family member shoots another, the assault is twelve times more likely to be fatal than an assault with a weapon other than a gun. Linda E. Saltzman, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AM. MED. ASS’N, 3043, 3046 (1992) (contending that the reason firearm assaults are more deadly is that the weapons themselves are more lethal, and rejecting the hypothesis that batterers who use a gun are more intent on killing their spouses).

- Approximately 65% of women murdered by intimate partners have been killed with guns in recent years. Lawrence A. Greenfeld, et al., BUREAU OF JUSTICE STATISTICS FACTBOOK, VIOLENCE BY INTIMATES 42 (Mar. 1998).
- In 1996, four times as many female victims were killed by an intimate partner with a gun than were murdered by male strangers using all other weapons combined. *When Men Murder Women: An Analysis of 1996 Homicide Data*, VIOLENCE POLICY CENTER, available at <http://vpc.org/studies/dvkey.htm>.
- Nearly 30% of all inmates in state prisons who are incarcerated for victimizing an intimate partner report that they were armed with a firearm at the time of the incident. Lawrence A. Greenfeld, et al., BUREAU OF JUSTICE STATISTICS FACTBOOK, VIOLENCE BY INTIMATES 23 (Mar. 1998).
- In 1996, 398 women were shot and killed by a spouse or intimate partner during the course of an argument. *When Men Murder Women: An Analysis of 1996 Homicide Data*, VIOLENCE POLICY CENTER, available at <http://vpc.org/studies/dvkey.htm>.
- When there are one or more guns in the home, the risk of suicide among women increases nearly five times and the risk of homicide increases nearly three times. James Bailey, M.D. et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES OF INTERNAL MEDICINE 777-82 (Apr. 14, 1997).

In 2011, the Wisconsin legislature enacted a licensing process allowing people who apply for and receive special licenses to carry a concealed weapon. *See* 2011 Wisconsin Act 35. The law prohibits the issuance of such a license when a “court has prohibited the individual from possessing a dangerous weapon” as a condition of release. WIS. STAT. §§ 175.60(3)(d)-(e). When the defendant already has a license to carry concealed weapons, that license shall be suspended when the court prohibits the possession of a dangerous weapon as a condition of release. WIS. STAT. § 175.60(14)(am). The law provides that the court shall transmit information about the defendant’s weapon prohibition to the department overseeing the license. WIS. STAT. § 175.60(11)(a)2. Prosecutors should educate the court about the transmittal process and ensure that the court informs the defendant that the condition of release trumps a concealed weapon license.

6. The Potential Effect of Domestic Abuse on Children

Consider the potential effects violence renders upon children. Ask courts to demand concrete change from a defendant before allowing contact with children, especially those who have actually observed violence or its after-effects. Encourage the judge to ask the defendant what steps he or she has taken to obtain treatment and counseling for abusive behavior.

Prosecutors should object when defense counsel wants a no-contact order modified to allow contact with a child. Defense attorneys (and even some judges) may criticize this position, saying that you are trying to keep this family apart from one another. There is a strong connection between violence and the negative impact upon children. Remain firm and steadfast in your desire to break the cycle of family violence.

Below are some additional statistics regarding children and family violence:

- In a national survey of more than 2,000 American families, approximately fifty percent of the men who frequently assaulted their wives also frequently abused their children. MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (1990).
- If a child is exposed to abuse in the home and is the victim of parental abuse, he or she is quite likely – as much as 1,000 times more likely than a child raised in a nonviolent home – to grow up to abuse a child or spouse. R. GELLES, *FAMILY VIOLENCE* 142 (1979).
- Children who are raised in homes where domestic abuse occurs are physically abused or neglected at a rate of fifteen times the national average. S. Ford, *Domestic Violence: The Great American Spectator Sport*, OKLAHOMA COALITION ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, 3.
- Children who witness domestic abuse are six times more likely to kill themselves than the national suicide rate. S.M. Buel, *The dynamics of domestic violence cases in the United States of America: An overview in defending battered women in criminal cases*, DEFENDING BATTERED WOMEN IN CRIMINAL CASES, AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE (1992).
- 63% of youthful offenders (ages 11-20) who commit murder do so to kill the abusers of their mothers. The Violence Against Women Act 1990: Hearings on S2754, Senate Committee on the Judiciary Reports, 101-545, 101st Congress 2d Sess. 37, 1990.
- Each year, an estimated 3.3 million children are exposed to abuse by family members against their mothers or female caretakers. AMERICAN PSYCHOLOGY ASSOCIATION, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY*, 11 (1996).
- Children who witness domestic abuse face a fifty percent chance of being physically abused themselves. These children learn violent anti-social behavior by watching, and they often repeat the cycle of violence in their intimate relationships, thus triggering a response by an already overburdened criminal justice system. Dr. John D. Burrington, *We Learn What We Live: The Effects of Domestic Violence on Children*, 28 THE COLORADO LAWYER (SPECIAL ISSUE) 1 (Oct. 1999).
- Witnessing domestic abuse increases drug and alcohol abuse, as well as teenage pregnancies. Children are present in between 41% and 55% of homes where police are called to investigate domestic abuse. Children in homes where domestic abuse occurs may experience cognitive or language problems, developmental delays, stress-related physical ailments (such as headaches, ulcers, rashes, etc.), and hearing and speech problems. DEPARTMENT OF COMMUNITY AFFAIRS. *DOMESTIC VIOLENCE: A GUIDE FOR HEALTH PROFESSIONALS*, STATE OF NEW JERSEY (Mar. 1990).

7. Stalking

- 78% of stalking victims are women. Women are significantly more likely than men (60% and 30%, respectively) to be stalked by intimate partners. CENTER FOR POLICY RESEARCH, *STALKING IN AMERICA* (July 1997).
- Eighty percent of women who are stalked by former husbands are physically assaulted by that person; thirty percent of those are sexually assaulted by that person. *Id.*

8. The Phenomenon of Separation Abuse

“Separation abuse” (or “separation violence”) is the term used for an increase in violent or abusive behavior toward a partner who threatens to leave the relationship, or who has left the relationship.

Below are some statistics regarding separation abuse:

- Domestic abuse generally escalates when the abusive partner discovers or believes that the victim is about to leave or has left the relationship. LENORE WALKER, *THE BATTERED WOMEN*, 25-26 (Harper and Row, 1979).
- A 1973 FBI study shows that “one fourth of all murders occurred within the family, and one-half of these were husband-wife killings.” D. MARTIN, *BATTERED WIVES* 14 (1976).
- Thirty to fifty percent of female homicide victims were killed by intimates, either current or former. CAROLINE WOLF HARLOW, *FEMALE VICTIMS AND VIOLENT CRIME REPORT* 5 (1991).
- Thirty percent of females with violence related injuries seen in emergency rooms are there because of domestic abuse. *Id.*
- The number one cause of death of women in the workplace is homicide, usually stemming from domestic abuse. *Id.*
- Although divorced and separated women make up only 10% of all women in the United States, they account for 75% of all battered women. Divorced and separated women report being physically abused fourteen times as often as women still living with their partners. *Id.*
- Women are more likely to be victims of domestic homicide when they separate from their husbands. According to a 1997 study, 65% of intimate-partner homicide victims had physically separated from the perpetrator prior to their death. FLORIDA’S GOVERNOR’S TASK FORCE ON DOMESTIC AND SEXUAL VIOLENCE, *FLORIDA MORTALITY REVIEW PROJECT* 47 (1997).

9. Effects of Domestic Abuse on the Workplace

Domestic abuse costs employers at least \$3 to \$5 billion a year in lost workdays and reduced productivity. COLORADO DOMESTIC VIOLENCE COALITION, DOMESTIC VIOLENCE FOR HEALTH CARE PROVIDERS, 3d ed. (1991). *See also* AMERICAN PROSECUTORS RESEARCH INSTITUTE, DOMESTIC VIOLENCE: PROSECUTORS TAKE THE LEAD 1 (1997).

10. Abuse of Victims with Disabilities

The following data was collected from the National Resource Center on Domestic Violence, a cooperative project of the Violence Against Women Office of the U.S. Department of Justice and the Minnesota Center Against Violence and Abuse at the University of Minnesota:

- 62% of a national sample of women with physical disabilities reported having experienced emotional, physical, or sexual abuse. The same percentage of a comparison group of women without disabilities reported abuse, but the women with disabilities had experienced abuse for longer periods of time.
- The most common perpetrators of abuse were husbands and parents, for both women with and without disabilities. Women with disabilities, however, were significantly more likely to experience emotional and sexual abuse by attendants and health care workers.
- In addition to the types of abuse experienced by all women, women with physical disabilities are sometimes abused by withholding needed orthopedic equipment (wheelchairs, braces, etc.), medications, transportation, or essential assistance with personal tasks, such as dressing or getting out of bed.
- Sexual abuse was reported by 25% of adolescent girls with mental retardation, 31% of those with congenital physical disabilities, 36% of multi-handicapped children admitted to a psychiatric hospital, and 50% of women blind from birth. NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE WEBSITE, *available at* <http://www.nrcdv.org/>.

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16. Preliminary Hearings

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1. Introduction

The preliminary hearing in a domestic abuse case is a good time to start impressing upon the defendant that he or she is no longer in control and that the defendant will be held accountable for his or her actions. It is an opportunity to impress upon the defendant that no matter how talented defense counsel is, the prosecutor will confidently and assuredly hold the defendant responsible for his or her actions. We are advocates at this point and everything we do needs to be done with an eye towards assuring that justice is done and that the defendant will be held accountable. It is imperative that the prosecutor be well prepared for the preliminary hearing. The rules for preliminary hearings are favorable for the prosecution going ahead with the case without much room for the defendant or defense counsel to cause problems or present testimony on extraneous matters.

The preliminary hearing is also a time at which the prosecutor can provide some confidence and assurance to the domestic abuse victim that the State knows what it is doing in the prosecution and that the State believes the assault occurred and is on the victim's side. The preliminary hearing is a point where the defendant begins to realize that he or she can no longer control the victim. Obviously the goal of the preliminary hearing is, after the State presents its facts to support probable cause, to have a "neutral and detached magistrate" look directly at the defendant and declare that the court finds that it is probable that a crime was committed, that the crime was a felony and that the defendant probably committed it.

Preliminary hearings can be particularly rewarding when you have a judge who understands the evidentiary rules and issues that apply to preliminary hearings. If the judge does not understand these rules then the judge must be gently educated; in this way you can best protect the victim as your case starts on the road to trial.

While it is easiest for the prosecutor if the defendant waives the right to a preliminary hearing, this will not happen with regularity until defense attorneys realize and understand that there is nothing for them to gain by making the State go through a preliminary hearing. That said, the prosecutor must also understand that the defendant has an absolute right to a preliminary hearing and should show no distain or repercussions should the defendant avail him- or herself of that right. The best thing the prosecutor can do is make the defendant regret forcing the exercise. The prosecutor should not offer, as defense counsel often asks, to amend the charge to misdemeanors if the defendant waives; for if this is the case, why bother bringing the felony charge in the first place?

With regard to victims, obviously, if you can get past the preliminary hearing without the victim having to testify, great, but there may be situations when you still call the victim as a witness. When this occurs it is the prosecutor's job to make the process as short and painless as possible. Again, the laws involving preliminary hearings are particularly helpful in this endeavor, as will be discussed below. The preliminary hearing can assist the victim in getting over the initial fear of testimony and hopefully relieve some of the anxiety about testifying before the jury at trial. Testifying at this preliminary stage, where victim exposure can be limited by the rules of evidence, may provide the victim with an initial taste of testifying without becoming the feast of the attack dog, defense counsel.

Preliminary hearings in domestic abuse cases can be a bit challenging, however, when the victim "recants" or chooses to testify differently than what he or she initially reported to law enforcement. This is, of course, not uncommon. It is therefore important to familiarize yourself with victim dynamics so you understand and accept where your victim is coming from. It does no good to get angry with the victim, so we need to find ways to deal with the legal matter at hand.

2. Evidentiary Rules to Limit the Need for Victim Testimony at Preliminary Hearings

The Wisconsin Rules of Evidence provide a variety of rules to accomplish this task. You may use some of the following evidentiary rules to avoid or lessen the need to call the victim to the stand at the preliminary hearing. If you do need to call the victim, you may be able to limit the testimony to any remaining elements of the offense to be proven.

Some of the rules that allow you to cover the elements of the offense traditionally given through the victim, or rules that allow you to get the victim statements in through third parties, include:

a. WIS. STAT. § 908.01(4)(b) Defendant's admissions or admission by party opponent

Defendants often give us the best opportunity to avoid putting the victim on the stand. Short of outright denial or refusal to talk, the defendant's statement to law enforcement can often be the

primary evidence presented at the preliminary hearing in domestic cases. In addition to providing the date of the offense, jurisdiction and defendant identification, defendants often admit to assaulting the victim, which is helpful to prosecutors even if they claim some form of self defense. The defendant may admit, for example, to putting his or her hands on the victim's throat but say the victim did not pass out. Defendants often admit to hitting the victim and deny intending to knock them out or give them the substantial injury.

The defendant may give you many, if not all, the elements you need to prove before you ever put the victim on the stand. (On occasion, a side benefit is looking over at the defense attorney staring at his or her client in shocked disbelief that the client admitted everything to the police when an hour earlier the client denied everything to the attorney.) If the defendant has given you the opportunity to use his or her own words against the defendant for some of the elements of the offense, you have less to put the victim through at the preliminary hearing and will effectively limit what could be a wide ranging cross examination of the victim by the defense attorney.

b. WIS. STAT. § 908.03(2) Excited utterance

An “excited utterance” is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. This exception is the one you may use most often. While this rule is easiest to use when the assault is immediately reported, it covers any statement made by the victim while the victim was “under the stress of excitement caused by the event or condition,” which can be prolonged, depending on the brutality of the crime or emotional or fearful state of the victim.

This exception can also be used by witnesses such as the 911 dispatch operator, the responding officer, or family friends or neighbors to whom the victim spoke while still under the stress of excitement caused by the assault. Be sure to lay the requisite foundation for admission of these statements, including, as the exception indicates, the excited state of the victim. The advantage of using this exception over a related exception (present sense impression) is that you have a longer time period after the event for which it may apply. In the above case, you can use the recipient of the excited utterance to testify that the victim called, frantic and upset, stating she had just been assaulted by the defendant. The responding officer can testify to the tearful, upset victim describing the abuse that had occurred.

c. WIS. STAT. § 908.03(1) Present sense impression and then existing mental, emotional, or physical condition

Present sense impression: “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

WIS. STAT. § 908.03(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health,

but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

These exceptions are similar to the excited utterance exception, however are more limited in the applicable time period. They can be used to bolster the excited utterance or provide an alternative method of admission. The victim's statements can be used in any number of ways, including inferring lack of consent, physical injury, and impaired ability to breathe in strangulation cases.

d. WIS. STAT. § 908.03(4) Statements for purposes of medical diagnosis or treatment

Statements for purposes of medical diagnosis or treatment are defined as “statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” WIS. STAT. § 908.03(4).

This exception is particularly helpful when the victim has received a medical examination relating to the assault. Most diagnosis protocols include getting the patient's version of the events that led to the seeking of the examination, in order for the medical personnel to properly diagnose and treat the patient. Medical personnel such as EMTs, emergency room nurses or doctors completing the examination may testify to what the victim described about the assault. Therefore the examiner may testify under this exception to the facts of the assault described by the patient.

e. WIS. STAT. §§ 908.08 and 970.03(14)(b) Child witnesses; audiovisual recordings of statements of children

When a child under the age of sixteen is a witness, an essential tool to prevent putting the child on the stand is WIS. STAT. § 908.08, regarding audiovisual recordings of statements of children. This statute allows the prosecutor to present audiovisual recordings of an oral statement of a child under the age of sixteen in any criminal trial or hearing, juvenile fact-finding hearing or revocation hearing.

With the exception of a preliminary hearing, the child must be available to testify. However, at a preliminary hearing, if the recorded statement is shown and the party who offers the statement does not call the child to testify, the court may NOT order that the child be produced for cross examination. *See* WIS. STAT. §§ 908.08(5)(b); 970.03(14)(b).

While this statute is invaluable to the prosecutor in cases where the child is a necessary witness, it takes planning and preparation – especially if your county doesn't have a child advocacy center available or if your law enforcement and social services agencies are not properly trained. We strongly recommend that you work with your local Child Advocacy Center or Multi

Disciplinary Team (MDT) to set up the proper protocols and facilities to make use of opportunities presented by this statute to protect our community's children.

In addition to the procedural steps that law enforcement must follow in recording the child's statement, there are procedural steps that must be taken by the prosecutor in order for the recording to be admitted, such as providing a written notice to the court ten days prior to the hearing. Therefore, you may wish to serve a motion to admit the statement with the service of the summons and complaint or, even better, at the initial appearance – if you are fairly confident the court will grant a lesser notice period if the defendant objects and the preliminary hearing is scheduled to be held within the ten-day period. If all the procedural requirements are met, and the court makes the required findings under WIS. STAT. § 908.08(3), then the recording shall be admitted. Under WIS. STAT. § 908.08(3)(a)1., if the child is under the age of twelve, the court does not need to make a finding that the admission of the statement is in the “interests of justice.” One of the most protective provisions of this statute is that at unlike at trial, once the recording is admitted at the preliminary hearing, the court may not order that the child be produced for cross examination. *See* WIS. STAT. § 908.08(5)(b).

f. WIS. STAT. § 970.038 Preliminary examination; hearsay exception

In 2012, the Wisconsin legislature enacted a new statute permitting broad use of hearsay at the preliminary examination. *See* 2011 Wisconsin Act 285. The statute states that “hearsay is admissible in a preliminary examination,” and a “court may base its finding of probable cause . . . in whole or in part on hearsay.” WIS. STAT. § 970.038. If the defense objects, you should argue to the court that the statute allows a police officer or other witness to introduce the victim's prior statements without the victim testifying in person at the hearing.

Be aware that the defendant's attorney may attempt to subpoena a recanting victim to testify at the preliminary hearing, given the increased reliance upon hearsay by the prosecution. You may move the court to quash the subpoena given the limited scope of the preliminary examination. *See State v. Schaefer*, 2008 WI 25, ¶¶ 32-40, 308 Wis. 2d 279, 746 N.W.2d 457 (*citing State v. Knudson*, 51 Wis. 2d 270, 187 N.W.2d 321 (1971)).

Even with the enactment of this new statute, you may rely upon the other evidentiary rules discussed above. You also may still want to call the victim as a witness at the preliminary hearing. The remainder of this chapter assumes the victim is a necessary witness for the preliminary examination, but you may rely upon this new statute to proceed without the victim as appropriate.

3. Dealing with the Recanting Victim

Impeaching the Victim with a Prior Inconsistent Statement: One of the most common problems a domestic abuse prosecutor has is the recanting victim. Again, while it is important to understand why the victim recants and why the victim often returns home with the defendant after the hearing, the prosecutor must be prepared to deal with the victim's recantation at the

preliminary hearing. The practice of impeaching the victim with his or her prior inconsistent statement provides one way to deal with this problem. WIS. STAT. § 908.01(4)(a)1.

Assuming your victim reported the abuse at the outset, if the victim changes his or her version of the events during testimony at the preliminary hearing, in addition to the approaches described above, you can call the investigating officer or other witnesses the victim spoke to previously in order to impeach the victim through his or her prior inconsistent statement(s).

WIS. STAT. § 906.13 allows the use of a witness' prior inconsistent statements to impeach the witness. WIS. STAT. § 908.01(4)(a)1. provides the hearsay exception to allow the testimony. *State v. Beauchamp*, 2011 WI 27 at ¶ 40, and *Robinson v. State*, 102 Wis. 2d 343, 349, 306 N.W.2d 668 (1981), allow the use of the prior inconsistent statement to be used as substantive evidence provided the declarant is "present and subject to cross examination."

WIS. STAT. § 906.13 allows the use of extrinsic evidence of the prior inconsistent statement if any of the following is applicable:

- (1) The witness was so examined while testifying as to give the witness an opportunity to explain or deny the statement.
- (2) The witness has not been excused from giving further testimony in the action.
- (3) The interests of justice otherwise require.

While some courts may require you to confront the witness with the prior inconsistent statement and be given the opportunity to explain before allowing the officer to testify to what the witness originally said, a careful reading of WIS. STAT. § 906.13 reveals that this confrontation is not required so long as subsection (2) or (3) above is met. *See also State v. Smith*, 2002 WI App 118, 254 Wis. 2d 654, 648 N.W.2d 15 (A prior inconsistent statement is admissible under sub. (2) without first confronting the witness with that statement. Under subs. (2)(a)2. and 3., extrinsic evidence of prior inconsistent statements is admissible if the witness has not been excused from giving further testimony in the case or if the interest of justice otherwise requires its admission).

Whatever approach you take regarding prior inconsistent statements, you will need to put the witness on the stand to testify. No prior inconsistent statement can be used if it no testimony is received inconsistent with it.

4. Charging and Filing of the Information

Preparation for your preliminary hearing begins at the time of charging, if not before. "Once it is determined that the defendant should be bound over for trial on at least one count, the purpose of the preliminary has been satisfied and the prosecutor may, in his discretion, allege such other offenses," in the information, subject to certain limitations. *State v. Burke*, 153 Wis. 2d 445, 453, 451 N.W.2d 739 (1990).

Wis. STAT. § 971.01(1) states, “The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03(10), shall file an information according to the evidence on such examination.” Wis. STAT. § 970.03(10) “does not prohibit a prosecutor from including in the information . . . charges in addition to those advanced at the preliminary hearing.” *Burke*, 153 Wis. 2d at 453 (citing *Bailey v. State*, 65 Wis. 2d 331, 341, 222 N.W.2d 871 (1974)).

The Wisconsin Supreme Court has also stated that “a prosecutor may bring additional charges in the information so long as the charges are not wholly unrelated to the transactions or facts considered or testified to at the preliminary examination, irrespective of whether direct evidence concerning the charges had been produced at the preliminary hearing.” *Burke*, 153 Wis. 2d at 457. The following factors determine the relatedness of charges: the parties, witnesses, geographical proximity, time, physical evidence, motive, and intent. *Id.* at 457-58.

In *Burke*, a prosecutor was allowed to show probable cause at a preliminary hearing on one count of sexual assault and then later add four related counts in the information. *Id.* Probable cause at the preliminary hearing was shown through statements the defendant made to the police. Additional counts were then allowed in the information because they were not wholly unrelated to the single count which served as the basis for binding the defendant over. *Id.* The prosecutor did this in order to spare the victim from having to testify at the preliminary hearing. *Id.*

If a prosecutor chooses to file a single complaint that includes multiple counts, probable cause needs to be shown for only one felony count within the family of “transactionally related” charges. *State v. Williams*, 198 Wis. 2d 479, 483, 544 N.W.2d 400, 401 (1996). The State does not have to show probable cause for every felony count contained in a complaint. *Id.* Absent defense counsel’s waiver of the preliminary hearing, there are two ways a felony count can be included in the information. First, probable cause was shown to exist at a preliminary hearing for that specific count. Second, the count is transactionally related to another felony that survived the preliminary hearing examination for probable cause. Using this theory, sometimes the prosecutor can spare the victim from having to testify at the preliminary hearing. However, as stated above, it may be beneficial to have some victims and other witnesses testify at preliminary hearings. They will gain experience as witnesses, their performance can be evaluated for strengths and weaknesses and improved accordingly, and their testimony may cause the defendant to more readily accept a plea offer.

One caveat to this is approach: know your local judges and court practices. If you believe that your judge will not bind the defendant over on all charged counts if you only prove one at the preliminary hearing, then only allege the offense(s) you plan to prove at the preliminary hearing.

NOTE: This does not preclude the prosecutor from alleging all the facts that will make up the other counts you anticipate filing with the Information.

In fact, it puts the defendant on notice about what he or she is facing, and provides the court both with the context and seriousness of the count charged and the dangerousness of the defendant. Alleging facts that support your other anticipated counts also helps with any arguments later that the “new” counts are not related or fairly charged. Some jurisdictions recognize that only one felony must be proven and have had no problem binding over on a multi-felony complaint in which only one count was arguably proven. As always, be familiar with your local practice.

5. Questioning the Victim

Imagine what it must be like to be a victim of domestic abuse, being asked to come to an open hearing, having to describe in detail how you were abused by a loved one, a person upon whom you may rely for support and one with whom you will, in many cases, return home. Adequately preparing the victim to testify is the best way to allay the victim’s fears and address the victim’s concerns. Preparing the victim is also essential to preventing defense counsel from laying the foundation for a painful cross examination later.

Once you have chosen the felony you will prove at the preliminary hearing, limit your questioning to that one felony (if local court practice allows this); this will preclude the defense attorney from getting into the facts of the other anticipated counts. Carefully craft questions for the victim, and when you prepare the victim explain why you’ve crafted the questions the way you have and encourage the victim not to go astray.

This is not the trial. The preliminary hearing need not provide all the facts that will be addressed at trial. Simply get to the point, cover the necessary elements for bindover and sit down. The less you ask, the less opportunity defense counsel will have to go on an exploratory expedition. Many defense attorneys want to use the preliminary hearing for “discovery.” However, that is precisely what preliminary hearings *cannot* be used for. *State v. Knudson*, 51 Wis. 2d 270, 187 N.W.2d 321 (1971).

Preparing Your Witnesses: All witnesses must be prepared to provide testimony. From the ordinary citizen who has never testified before, to the seasoned officer, they all take the stand with certain trepidation and concern. You should meet with each witness ahead of time to discuss the scope and nature of the testimony. The witnesses should generally be aware of what they will be asked and why. Some witnesses need to know each question they will be asked. This simple exercise will often help ease the fears of the most timid of witnesses. It is an opportunity for you to show you care about the case and are confident in what you are doing.

Preparation also lets witness know you will cover everything that needs to be said so the witness doesn’t have to worry about cramming it all into their response to your first question. When going over the testimony with your witnesses, be sure and listen to what they tell you. You will get valuable information from your witnesses that is not reflected in any report.

With law enforcement, witness prep is an opportunity to refresh their memory of the facts of this one of many cases they handle. Ask the officer to review the complaint prior to testimony rather than the report. This avoids the inevitable questions by defense counsel, such as “Did you

review your reports prior to testifying here today? You did? Please produce them for me to review . . .” and the long review and line-by-line questioning on the report by counsel. If the officer’s review of the complaint is enough to refresh his or her memory, the inquiry ends.

6. Cross Examination by Defendant

Prosecutors should be prepared for the defendant’s cross examination of the victim and other witnesses. The goal is to provide as little discovery to the defendant as possible during the preliminary hearing. Ideally, the preliminary hearing gives the defendant less information than what was provided in the complaint.

Remember that the purpose of the preliminary hearing is to prove that a probable felony crime was committed, and that the defendant probably committed the felony while in the jurisdiction of the court. Recall what information you provided the court through your witnesses, and limit the defendant’s questioning to those presented facts. Anything else is discovery or not relevant to the purpose of the preliminary hearing. For a good discussion on the purposes and limited nature of the preliminary hearing, as well as the legal basis for many of the objections available to the prosecutor, see *Preliminary Hearing – General Law* by Robert Donohoo, available on WILENET.

Despite the statutes and case law, defense attorneys can’t resist trying to use the preliminary hearings for discovery, impeachment or in some cases to intimidate or scare the victim. The prosecutor must be on guard to prevent this misuse of the process.

Common Objections: There are a number of common objections that can be used to counter attempts made by the defense to solicit discovery, impeachment or to intimidate the victim:

- **Not relevant for the purpose of the preliminary hearing:** If the question does not go to any of the facts presented by the State, then the question is not relevant and an objection should be made. This is true even if it goes to a count in the complaint that was not addressed at the preliminary hearing. This could also include other acts evidence.
- **Discovery is not allowed at the preliminary hearing:** This objection is a subset of a relevance objection. *State v. Knudson*, 51 Wis. 2d 270, 187 N.W.2d 321 (1971).
- **Credibility is not at issue at the preliminary hearing:** The defendant often wants to try to damage the credibility of the witness before the court. This is not appropriate at the preliminary hearing. At this hearing, the court can only determine the *plausibility* of the witness’ testimony. If the witness provides testimony from which a reasonable inference may be made to support probable cause the court must accept that testimony, weight or credibility of the testimony is for a jury to decide.
- **Evidence of character and conduct of witness:** Reference to other acts of the victim is absolutely improper, for reasons stated above.

The court is to look at the present case for probable cause. Did the witness testify to facts that could support probable cause? If so, bindover must be granted. The defendant cannot go into other matters. *See State v. Schafer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457.

Defense has no right to compel reports or nonprivileged materials by subpoena prior to the preliminary examination. This is an improper inquiry in a preliminary hearing.

7. Conclusion

If the victim must testify, it is not the end of the world. You may choose, for strategic or other reasons, to ask the victim to testify at a preliminary hearing in a domestic abuse case. Some victims relish the opportunity, some are scared to death, and some use the opportunity to fervently recant what they reported at the time of the offense. Whatever the case, be prepared to protect the victim and your case at the preliminary hearing by arming yourself with all the evidentiary rules and case law at your disposal.

17. *Miranda/Goodchild* Hearings

1. *Miranda/Goodchild* Generally
2. Necessity of a Hearing: WIS. STAT. §§ 971.31(3) and 901.04(3)
3. Burdens, Procedures, Policy & Standard of Review
4. Voluntariness
5. Predicate Questions
6. Results of Adverse Findings of Fact and Conclusions of Law

1. *Miranda/Goodchild* Generally

This chapter provides only general information. A full analysis of the entire body of interrogation law is beyond the scope of this manual. A good resource for research purposes is the *Miranda Primer Revised* found on WILENET at the SPET Resource Page.

A custodial statement is admissible at trial only if a court finds by a preponderance of the evidence that *Miranda* rights were provided and the statement was made voluntarily. The *Miranda* obligation arises only when both “custody” and “interrogation” are present. However, in order for a court to find a statement admissible, the court must find that the statement was voluntary, whether or not any custodial interrogation is present. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

The Wisconsin Supreme Court requires a judge to make the proper determination at a pretrial hearing on the issue on voluntariness of statements. *See generally State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244 (1965).

a. Custody

In *Miranda*, the United States Supreme Court determined that a person is in custody when he or she is “deprived of his/her freedom of action in any significant way.” *Miranda*, 384 U.S. at 444, 477. “Custody” is determined by whether there is a formal arrest or a restraint on freedom of movement to a degree associated with a formal arrest. *Thomas v. Keohane*, 516 U.S. 99 (1995); *State v. Leprich*, 160 Wis. 2d 472 (Ct. App. 1991).

The determination of whether a person is in custody is made by applying a “totality of the circumstances” test. The test is whether a reasonable person in the suspect’s position would have considered him- or herself to be in custody, given the degree of restraint under the circumstances. *State v. Gruen*, 218 Wis. 2d 581, 593, 582 N.W.2d 728, 732 (Ct. App. 1998).

This determination depends on the objective circumstances, not on the subjective opinions of the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 323 (1994). Consequently, the unarticulated intentions of the officers are irrelevant. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

In *State v. Gruen*, 218 Wis. 2d 581 (Ct. App. 1998), the Wisconsin Court of Appeals set forth the following relevant factors that courts are to look at when evaluating the objective circumstances described above:

- 1) Whether the person had the freedom to leave;
- 2) The purpose, place and length of interrogation; and
- 3) The degree of restraint.

In assessing the degree of restraint, those factors are:

- Was the suspect handcuffed?
- Were guns drawn?
- Was a frisk performed?
- What was the manner of restraint?
- Was the suspect moved?
- Was the person questioned in a police vehicle, police station or neutral location?
- How many police officers were involved?

Gruen, 218 Wis. 2d at 593.

Other cases with good discussions of what may constitute “custody” include: *State v. Koput*, 142 Wis. 2d 370 (1988); *State v. Mosher*, 221 Wis. 2d 203 (Ct. App. 1998); *State v. Armstrong*, 223 Wis. 2d 331, 588 N.W.2d 606 (1999). See also Bob Donohoo’s outline on WILENET.

b. Interrogation

Simply put, “custodial interrogation” is questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda*, 384 U.S. at 444. Custodial interrogation also includes its “functional equivalent.” This means “any words or actions on the part of the police (other than those normally attendant to arrest and custody – such as most routine booking questions) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *State v. Cunningham*, 144 Wis. 2d 272, 278-79, 423 N.W.2d 862 (1988).

Courts are required to employ an objective test to determine whether questioning by law enforcement in any given circumstance is actually interrogation. The question is “whether an objective observer could foresee the officer’s conduct or words would elicit an incriminating response.” *State v. Mitchell*, 167 Wis. 2d 672, 687, 482 N.W.2d 364, 370 (1992).

Additionally, an officer's actual awareness of a suspect's unusual susceptibility to a particular form of persuasion is also relevant to whether "interrogation" or its "functional equivalent" occurred. *Rhode Island v. Innis*, 446 U.S. 291 (1980). This evidence, if it exists, is a subjective component of the objective determination.

2. Necessity of a Hearing: WIS. STAT. §§ 971.31(3) and 901.04(3)

Wisconsin Statutes § 971.31(3) provides as follows: "The admissibility of any statement of the defendant shall be determined at the trial, by the court, at an evidentiary hearing, out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial."

Similarly, WIS. STAT. § 901.04(1) provides:

QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the judge, subject to (2) [relevancy conditioned on fact] and § 971.31(11) [sexually motivated crimes and rape shield]; and § 972.11(2) [rape shield evidence].

The practice pointer here is that any determination regarding compliance with *Miranda* or voluntariness standards should be determined in a pre-trial motion whenever possible. Why wait until jeopardy has attached to learn that none or only part of the statement is admissible? If the defense does not bring a motion challenging the admissibility of statements you intend to use, then the prosecutor should bring a motion before trial to determine, at minimum, the voluntariness of any statement you intend to use at trial. Support in determining this matter before trial can be found in *State v. McClaren*, 2008 WI App 118, 313 Wis. 2d 398, 756 N.W.2d 802.

3. Burdens, Procedures, Policy & Standard of Review

At a suppression hearing the State must show that:

- The defendant received and understood *Miranda* warnings;
- The defendant knowingly and intelligently waived *Miranda* rights;
- Warnings were sufficient in substance;
- The statements were voluntary; and
- All of the above must be established by a preponderance of the evidence.

State v. Jiles, 2003 WI 66, ¶ 26, 262 Wis. 2d 457, 663 N.W.2d 798.

A defendant is deprived of due process if his or her conviction is founded, in whole or in part, upon an involuntary confession. *Jiles*, 2003 WI 6 at ¶ 27. A defendant objecting to a statement is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of

the statement are actually and reliably determined. *Id.* Where pure factors are important, a full and reliable determination of voluntariness is required. *Id.* Notwithstanding WIS. STAT. § 901.04(1), it will be a rare case in which the State is able to meet its burden of proof at a *Miranda/Goodchild* hearing by relying exclusively on an unsworn police report.

In Wisconsin, trial court determinations are reviewed *de novo*. *State v. Santiago*, 206 Wis. 2d 3, 18, 556 N.W.2d 687 (1996). Whether the State has proved the defendant's statements were voluntary is a determination reviewed without deference as well. *Id.* The application of the constitutional standard to historical facts is a question of law. *State v. Agnello*, 2004 WI App 2, ¶ 8, 269 Wis. 2d 260, 674 N.W.2d 594. A trial court's findings of historical or evidentiary fact will be upheld unless they are clearly erroneous. *State v. Henderson*, 2001 WI 97, ¶ 16, 245 Wis. 2d 345, 629 N.W.2d 613.

4. Voluntariness

A defendant's statement is never admissible at trial if the statement was made involuntarily, regardless of its accuracy or truthfulness or its compliance with *Miranda* and/or the Sixth Amendment right to counsel. *State v. Agnello*, 226 Wis. 2d 164, 593 N.W.2d 427 (1999). The constitutional underpinning for the requirement of voluntariness is found in the Fifth Amendment right to due process (*Rogers v. Richmond*, 365 U.S. 534 (1961)), which is explicable to the States through the Fourteenth Amendment (*Malloy v. Hogan*, 378 U.S. 1 (1964)).

The seminal case for current law on voluntariness is *Colorado v. Connelly*, 479 U.S. 157 (1986). In *Connelly*, the United States Supreme Court held that coercive police activity is a necessary prerequisite to finding a confession is not "voluntary" within the meaning of the due process clause. *Connelly*, 479 U.S. at 158. The State bears the burden of proof in a motion to suppress a statement allegedly obtained in violation of *Miranda*. The State need only prove voluntariness by preponderance of the evidence. *Connelly*, 479 U.S. at 167-71. In *Connelly*, the Supreme Court ended the concept that "free will" has a place in this area of constitutional law. *Id.*

The test for determining whether a defendant's statements are voluntary depends on examining the totality of the circumstances. *State v. Hoppe*, 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407. The totality of the circumstances test requires balancing a defendant's personal characteristics against police pressure used to induce statements. *Hoppe*, 2003 WI 43; *State v. Clappes*, 136 Wis. 2d 222, 401 N.W.2d 759 (1987). However, there is no need for "balancing" if there is no police coercion. *State v. Arroyo*, 166 Wis. 2d 74, 479 N.W.2d 549 (Ct. App. 1991). Unless, psychologically, the police tactics equate to coercion. *Hoppe*, 2003 WI 43. The voluntariness of a defendant's statement is ultimately a question of law. See *Miller v. Fenton*, 474 U.S. 104 (1985).

Although there is case law that holds that a trial court is not required to have a hearing on voluntariness (see *State v. Coulthard*, 171 Wis. 2d 573, 492 N.W. 2d 329 (Ct. App. 1992)), it is strongly recommended that the State bring the motion before trial to officially determine voluntariness unless there is a stipulation. If there is an issue regarding the voluntariness of the statement, it will certainly appear in a future claim of ineffective assistance of counsel.

5. Predicate Questions

These questions are intended to be exemplary only. Each case must be assessed on its own facts. Consequently, questions must be asked to establish compliance based on the totality of circumstances presented. Each case is somewhat different and therefore the actual topics, the questions and/or sequence of questions must be modified in accordance with the circumstances presented.

a. Questions for law enforcement officer

- Name?
- Occupation?
- What agency are you employed by?
- How long employed?
- Present duties?
- Prior experience?
- Directing your attention to (date of interrogation) do you recall that date?
- Were you working on that date?
- Did you assist in the investigation of this case?
- When did you become involved?
- What involvement did you have?

b. Identification of the defendant

- During the course of your investigation, did you have contact with the defendant?
- Please describe the circumstances in which you had contact with Mr. X.
- Would you recognize Mr. X if you saw him again?
- Is Mr. X in the courtroom today?
- Please point to the person, if he or she is present, and describe that person's location and clothing for the benefit of the court (once identification has occurred, ask that the record reflects the identification).

c. Questions regarding the arrest or custody

- What was the date of the arrest/detention/custody?
- What was the time of the arrest/detention/custody?
- Where did this occur?
- What were the circumstances?
- Why was the defendant arrested/detained/placed in custody (if relevant)?
- When did the interview/interrogation occur and where did it occur?
- What time did it begin?
- What time did it end?

- Who was present during the course of the interview?
- Please describe the room/layout of the place where the questioning occurred.
- If relevant to your policies and procedures, was this interview recorded? How was that accomplished?
- Was the defendant advised of the recording or monitoring?
- Before proceeding with the questioning did you advise the defendant of his/her *Miranda* rights? How was that done?
- The best practice is to have an officer read from a standard *Miranda* card or form; asking officers to recite from memory is generally not advisable. The officer should read into the record the rights provided to the defendant prior to the interview.
- Establish that the rights were provided, understood and waived.
- How was the defendant advised of his/her *Miranda* rights? Did you read those rights to him/her, or did he/she read them himself/herself?
- Did the defendant ask any questions about the *Miranda* rights? If so, explain.
- How do you know the defendant understood his/her rights?
- Explore English language capability, language used by the defendant, his/her appearance and demeanor, etc.
- In the officer's opinion, did the defendant appear to understand the rights? How do you know the defendant understood his/her rights?
- What was the defendant's demeanor?
- Were the defendant's responses appropriate to the questions you asked?
- Did the defendant appear to be listening?
- Was the defendant coherent?
- If relevant, did officers ask the defendant about prior law enforcement contacts?
- How did the defendant waive his/her rights? Orally or in writing? Describe the process, establishing voluntary waiver and voluntariness of the statement.
- During the process did the defendant request the assistance of an attorney?
- Did the defendant request the presence of any other person?
- At any point did the defendant invoke his right to remain silent?
- At any point did the defendant refuse to answer any question? If yes, please explain and discern whether it was a selective invocation regarding a particular question.
- Were any threats or promises made to the defendant?
- How long did the questioning occur?
- What were the circumstances?
- Did the defendant ask for any food, water, sleep, medication, etc.?
- Even though the defendant did not ask, was he/she offered food, water, sleep, medication, etc.?
- Did the defendant appear to be under the influence of any intoxicating drug? If the answer is yes, please explain and elaborate on the context.
- Were any psychological pressures applied to induce a statement?
- If breaks were given, describe the length and circumstances.

- Did the defendant volunteer information not in response to a question?

d. Introduction of statement at motion hearing

If the statement was written, have a copy of the statement produced, marked for identification and shown to the officer, asking the officer to identify it. If the statement is not in writing, but is instead on a CD or DVD, mark that as an exhibit and provide it to the court. The best practice is to provide both the court and defense counsel a copy in advance of the hearing, to allow them ample time to view the video. Lay the foundation for the exhibit and have the circumstances surrounding the taking of the statement described to the court. Move the exhibit/statement into evidence.

Always, always, always ask the trial court to make specific findings of fact and conclusions of law regarding the admissibility of the statement.

The court should make specific determinations on the following, to a preponderance of the evidence:

- 1) Whether the questioning was custodial;
- 2) Whether the questioning constituted interrogation;
- 3) Whether *Miranda* warnings were adequately provided;
- 4) That the *Miranda* warning was understood by the defendant;
- 5) That the defendant voluntarily waived the *Miranda* rights; and
- 6) That the statement was voluntarily obtained.

6. Results of Adverse Findings of Fact and Conclusions of Law

A defendant's statement obtained in violation of *Miranda* is not admissible at trial during the prosecution's case in chief. *Michigan v. Harvey*, 494 U.S. 344 (1990). However, statements obtained in violation of *Miranda* are admissible to impeach a testifying defendant, as long as the statements are otherwise voluntary. *Withrow v. Williams*, 507 U.S. 680 (1993); *State v. Camacho*, 170 Wis. 2d 53, 487 N.W.2d 67 (Ct. App. 1992); *State v. Motts*, 156 Wis. 2d 74, 457 N.W.2d 299 (1990).

However, a statement which is found to be involuntary is inadmissible for any and all purposes against the defendant, including impeachment. *Michigan v. Harvey*, 494 U.S. 344 (1990); *State v. Motts*, 156 Wis. 2d 74, 457 N.W.2d 299 (1990).

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18. *Voir Dire*

1. Introduction
2. General Law of Jury Selection
3. Strikes for Cause
4. Peremptory Challenges
5. How to Get Jurors to Talk
6. Questions Regarding Domestic Abuse in General
7. Questions about Problem Elements
8. Questions about Evidence (and Lack Thereof)
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13. Questions about Domestic Abuse and Divorce
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1. Introduction

Domestic abuse cases can often be won at the *voir dire* stage. Through effective questioning, jurors can be probed for any stereotypes and biases they may have about domestic abuse, and can also be educated about related issues that may arise during the trial.

Most courts will limit the time available for *voir dire*, so make every question count. Prepare a list of topics that include standard, routine matters (such as expectations as jurors, can they follow instructions, etc.), as well as a second column of case-specific matters (such as domestic abuse issues, transferred intent, credibility of witness issues, party to the crime doctrine, etc.).

The key to effective *voir dire* is to ask yourself: “What is my objective?” and to answer that question before you begin. Prosecutors should draw out the loose cannons during *voir dire*, while protecting the jurors that are good for the State.

Some wise advice for prosecutors: *Remember, you are not picking a jury. Rather, you are striking the jurors who will not follow the law or will not, for whatever reason, vote to convict.*

2. General Law of Jury Selection

Voir dire must be done on the record. SCR 71.01.

WIS. STAT. § 805.08(1) [jurors] provides that:

QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

Legal attack to jury pool: Be aware of a possible Sixth Amendment “fair cross-section requirement” challenge to the jury array (or jury “pool”) from which the twelve jurors are chosen. This is a case law challenge. There is no express statutory provision that authorizes this challenge.

Relevant cases include *State v. Pruitt*, 95 Wis. 2d 69, 289 N.W.2d 343 (Ct. App. 1980); *Wilson v. State*, 59 Wis. 2d 269, 208 N.W.2d 134 (1973); *Brown v. State*, 58 Wis. 2d 158, 205 N.W.2d 566 (1973). See also *United States v. Raszkievicz*, 169 F.3d 459 (7th Cir. 1999).

Statutory selection procedures challenge: A challenge that the statutory provisions which address the selection of the jury array from which the jurors for a specific case are chosen were not followed. *State v. Coble*, 100 Wis. 2d 179, 301 N.W.2d 221 (1981).

The law requires an anonymous jury. *State v. Britt*, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1996).

Numbers: The number of selection jurors depends on such things as the number of peremptory challenges, the complexity and anticipated length of the case, number of additional jurors, etc. See WIS. STAT. § 972.04. In misdemeanor cases, the normal practice is to have thirty selection jurors.

The number of jurors who hear the case can be greater than twelve because of additional or alternate jurors. WIS. STAT. § 972.04(1). In both misdemeanor and felony cases twelve jurors must decide the case unless the parties and the court agree to a number less than twelve.

Swearing of the jury after the selection of the jury and prior to trial: The jurors must be sworn prior to trial. WIS. STAT. § 756.08(1). Jeopardy attaches as soon as the selection of the jury has been completed and the jury is sworn. WIS. STAT. § 972.07. If you have witness availability issues, hold off as long as possible before the jury is sworn.

3. Strikes for Cause

Wisconsin law provides that a juror who is not indifferent must be excluded from a jury panel. WIS. STAT. § 805.08(1). The law presumes all prospective jurors to be unbiased. *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999).

The party raising the strike for cause bears the burden of proving bias. *State v. Louis*, 156 Wis. 2d 470, 457 N.W.2d 484 (1990). Whether the juror should be struck for cause is ultimately up to the discretion of the trial court. *State v. Ramos*, 211 Wis. 2d 12, 564 N.W.2d 328 (1997).

A mistake by the court can be fatal to the State's case. In *State v. Ramos*, the Wisconsin Supreme Court adopted the automatic-reversal rule, requiring reversal whenever a trial court erroneously fails to remove a prospective juror for cause, even though the defendant was able to remove the biased juror with a peremptory challenge, and the jury that was actually impaneled was determined to be impartial. *Ramos*, 211 Wis. 2d 12.

In *State v. Saucher*, the Supreme Court, in an effort at clarification, coined three terms when referring to possible juror bias: "statutory," "subjective," and "objective." *Saucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999).

- **Statutory bias:** This is the least common type of juror bias. A prospective juror is statutorily biased if he or she falls into one of the statutorily recognized groups in WIS. STAT. § 805.08, i.e. persons with a financial interest in the case, or who are related to a party or attorney appearing in the case. Statutorily biased jurors are ineligible to serve as jurors regardless of their ability to be impartial.
- **Subjective bias:** A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Subjective bias is revealed through the words and the demeanor of the prospective juror's state of mind.
- **Objective bias:** Objective bias exists when the prospective juror's relationship to the case is such that no reasonable person in the same position could possibly be impartial even though he or she desires to set aside any bias. Objective bias can be detected from the facts and circumstances surrounding the juror's answers notwithstanding a juror's statements that he or she can and will be impartial.

Practice points:

- Jurors who have been victims of domestic abuse are often targets of strikes for cause. However, if it is elicited that the juror may have difficulty setting aside his or her past experiences or could "try" to be fair and impartial, the

prosecutor should make an effort to rehabilitate that juror by explaining to the juror that they must focus their decision only upon the evidence that they hear at trial.

- If, however, it becomes apparent that the juror will be biased (or even appear to be biased), it is the prosecutor's responsibility to not oppose a motion to strike. If the defense does not move to strike that juror, the prosecutor should then protect the record and raise this issue to the court. You do not want to repeat the trial years later after an appeal of this issue.

4. Peremptory Challenges

WIS. STAT. § 972.03 PEREMPTORY CHALLENGES.

Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section. When the crime charged is punishable by life imprisonment the state is entitled to 6 peremptory challenges and the defendant is entitled to 6 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment, the total peremptory challenges allowed the defense shall not exceed 12 if there are only 2 defendants and 18 if there are more than 2 defendants; in other cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2. Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under § 972.04(1).

In single-defendant misdemeanor cases, each side gets four peremptory challenges. However, the last sentence of WIS. STAT. § 972.03 provides that “[e]ach side shall be allowed one additional peremptory challenge if additional jurors are to be selected under s. 972.04(1).”

WIS. STAT. § 972.04 sets out the exercise of challenges, including the practice of alternating strikes, starting with the State.

It is a well-established principle that a defendant is denied his or her equal protection rights when a member of a distinctive group is purposefully excluded from a jury. Distinctive groups can be based upon gender or race, among other things. *See State v. Jagodinsky*, 209 Wis. 2d 577, 563 N.W.2d 188 (Ct. App. 1997). In domestic cases, prosecutors may be tempted to exclude men from a jury in a trial against a male defendant. The same holds true in cases involving multi-racial couples; prosecutors may attempt to eliminate jurors of the same race as the defendant. Wisconsin law expressly prohibits such purposeful strikes without any acceptable reason.

If the defense believes members of the jury are being struck improperly, a *Batson* challenge may be raised. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986). This challenge must be made prior to the swearing of the jury. In order to raise a *Batson* challenge, the defense must make a *prima facie* showing of purposeful discrimination in the prosecution's use of peremptory challenges in jury selection. If that *prima facie* showing is made, then the burden

shifts to the prosecutor to articulate a neutral explanation for striking the specific juror. *State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990). It is good practice to anticipate a *Batson* challenge whenever a member of a distinctive class is removed from the jury. In such cases, even if the challenge may appear to lack merit, it is imperative that the prosecutor is able to provide the court with a reasonable explanation as to why that juror was struck. Consistent note-taking (e.g. age, job, marital status, contacts with the system) for each juror helps provide a comparative explanation as to why those jurors should be struck.

5. How to Get Jurors to Talk

It is imperative that the prosecutor recognizes and strikes jurors who will be fatal to the State's case. The key is to engage the jurors in a conversation. The easy part is talking to the jurors. The challenge, though, is to get the jurors to talk to you.

At this stage, the jurors have not yet taken an oath to follow the law. They have, however, taken an oath to tell the truth. Remind them of this. Explain the oath and make them aware that it is okay to disagree with the law, as long as they tell you about it.

Experts note the phenomenon that the "quiet" jurors sometimes end up on the jury. Many jurors sitting on the jury panel may not want to serve on the jury due to employment, family responsibilities, etc. As much as possible, you need to develop skills to engage the jury.

Practice points:

- If you want jurors to be responsive, ask questions that have appealing answers. Try open-ended questions or statements that invoke a response. You have very little time to assess several strangers.
- Ask questions that begin with "How many of you . . . ?" rather than "Do any of you . . . ?" This also elicits more responses, which in turn gives the prosecutor a door to ask specific and pointed questions to those jurors.
- Ask: "I know people who would say that this law does not make much sense. How many of you would tend to agree with those people?" rather than "Do any of you disagree with the law?"
- Repeat "good" answers. Pursue points invoking a "bad" answer. Then repeat the "good" answer. An effective technique: If it's an important point, ask a few other jurors to confirm that they heard the "good" answer and whether they agree with the "good" answer.
- Examine the jury instructions for legal and/or factual matters to address. Use everyday experiences to draw analogies to question prospective jurors about complex or unusual concepts or terms.
- When a prospective juror is an obvious strike for either side, consider getting something out of that person. For example, if the wife of a police officer announces that she is predisposed to believe a police witness, follow up with a question to show that such a position is sound, reasonable and

objective. Ask, for example: “Are you aware of the extensive training that police officers have? Is that an important factor in why you report that you expect police witnesses to be accurate?”

6. Questions Regarding Domestic Abuse in General

The law is no different for domestic cases. Make sure the jury understands this. Sample questions include the following:

- How many of you believe that a different standard applies to domestic abuse cases?
- How many of you believe that a crime that takes place in a home or between two people in a relationship should not be prosecuted?
- How many of you feel it is wrong for the State to get involved in violence in the home?
- How many of you feel domestic abuse victims deserve less protection than victims of crimes committed by strangers?
- How many of you believe that family violence cases belong in family court rather than criminal court?

Practice points:

- During this line of questioning, it is a good idea to remind the jurors that it is okay to disagree with the law. They just have to tell the truth in their answers to questions.
- If a juror answers any of the above questions affirmatively, the prosecutor should try to rehabilitate and educate them. If the person sticks to his/her position, he/she is now eligible to be struck for cause.

7. Questions about Problem Elements

If the prosecutor’s case will be especially weak in proving a particular element of an offense (e.g. bodily injury with no visible injury, consent with no victim, etc.), it is imperative that the prosecutor address those “problem” areas immediately with the jury. If the prosecutor does not address these issues during *voir dire* and weed out any preconceived notions, the prosecutor must wait until closing arguments to explain why the evidence presented does not fit into those preconceived ideas. By then, it is too late.

a. Bodily injury with no visible injuries

Start by defining “bodily injury.”

- “Bodily injury” is nothing more than a fancy way to say “pain.” In this case, the State must prove that the victim suffered pain.

- I know people who might say, “How can you prove someone was injured if there are no marks?” How many of you agree with that idea or have similar concerns?
- Does pain always leave a mark?
- I know people who will assume that if someone is hurt, they will always go to a doctor. How many of you will expect the victim to have seen a doctor? How many of you will want to see medical records?
- Who here has ever decided not to go to a doctor when they were hurt, for any reason?

Practice points:

- If a juror demands some medical records, some physical manifestation of an injury, or some objective proof of injury, and if that juror is unable to be rehabilitated, that juror may be struck for cause.
- On the flip side of this coin, if the victim sustained substantial visible injuries, consider the following example. Suppose the prosecutor gets the jury thinking about a very minor level of injury required to prove the “bodily injury” element. Later, the prosecutor presents overwhelming evidence of injury through lacerations, bruises, pictures, etc. The prosecutor can address the injury element with a little flair: “The State doesn’t even have to prove any visible injury in order for you to find the defendant guilty, but there is clear evidence in this case that the victim suffered cuts, bruises, and lacerations!”

b. Non-consent with no victim

When trying a case with witnesses but without a victim present, consent will be at issue. This situation, however, is not fatal to the State’s case. First, a jury may not recognize that consent is even an element. Furthermore, you generally do not have victims actually saying to the defendant, “I do not give you consent to do this to me.” Therefore, while consent is still an element and must be proven, the case is not, practically speaking, losing anything without the victim testifying. Non-consent can be inferred from a victim’s actions.

Possible *voir dire* questions to address this issue include:

- In order to prove the crime of battery, the State must prove to you that the victim did not consent to being battered. Is there a way to show someone that you do not consent to being battered aside from saying, “I do not consent to this?”
- Are there physical motions that you can look for to determine whether someone is consenting to a beating?

c. Court orders

In cases involving violations of domestic abuse injunctions and no-contact orders, a prosecutor may encounter a juror who does not believe that a court should, or even that the court has the authority to, prohibit a person from having contact with another. The prosecutor must identify these jurors and strike them (usually for cause).

Possible *voir dire* questions to address this issue include:

- How many of you believe that a court does not have the right to prohibit a person from going someplace or seeing someone?
- How many of you think that even though a court might have that right, that the court still should not exercise that right?

Practice points:

- Find a juror who has had a restraining order against someone else.
- Why did you get that injunction?
- Did you feel like it protected you? Why or why not?
- Did you ever have to have the injunction enforced by the police?

d. Motive not an element

Equally important as identifying problem elements is identifying what elements are not required in a criminal case. One of the most common “non-elements” expected by the jury is motive.

Possible *voir dire* questions to address this issue include:

- Will anyone require the State to prove that the defendant had a motive?
- If the State does not prove that the defendant had a motive to _____ the victim, will any of you find the defendant not guilty because of that?

Practice points:

- If any juror answers these questions with a “yes,” and cannot be rehabilitated, that person should be struck for cause.

e. Disorderly conduct

The State needs to prove that the defendant engaged in a specific type of conduct which tended to cause a disturbance. The State does NOT have to prove that there was any physical harm done or that any injury occurred. That means that a loud argument could amount to disorderly conduct. How many of you disagree with this law?

If any jurors indicate that they do disagree with the law: If the judge were to instruct you regarding this crime and the State proved the elements beyond a reasonable doubt, would you be able to find the defendant guilty, even though you do not agree with the law?

How many of you believe that a crime that does not result in any physical harm should not be prosecuted?

8. Questions about Evidence (and Lack Thereof)

Because domestic cases usually occur in the home in the absence of any outside witnesses, the bulk of the prosecutor's case will involve the testimony of only a limited number of witnesses – often without any physical evidence.

Battery charges often involve allegations of punching, strangling, or slapping with hands and fists rather than the use of weapons. It is not uncommon for there to be no visible injuries. Furthermore, police officers usually do not witness the incident and can only testify to the observations they made after the crime occurred. For these reasons, you are often left with little or no physical evidence or witnesses when proving a domestic case.

It is imperative that the jury understands the case limitations. Jurors must have lower evidentiary expectations, if that's the situation. Television programs sometimes raise jurors' expectations of a parade of witnesses, pictures, weapons, and bloody gloves.

Possible *voir dire* questions to address this issue include:

- How many of you have read John Grisham books, or watch “Law & Order” or other courtroom dramas on TV? I imagine you all have seen fingerprint evidence, DNA samples, surveillance tapes, etc. Do you all consider this evidence? Do you also consider testimony to be evidence? Well, it is.
- How many of you will require the State to present something in addition to testimony in order to find someone guilty? Do any of you feel that testimony alone is not enough to convict?
- The law does not require that the State bring a particular number of witnesses. In fact, the State may only call one witness in this case. If that one witness testifies to all the elements and you believe that witness beyond a reasonable doubt, the law requires you to find the defendant guilty. How many of you disagree with the law? How many of you would require more than one witness to verify the facts in order to find the defendant guilty?

Practice points:

- Jurors might not understand that testimony is evidence. The prosecutor might want the judge to explain, using the standard Jury Instruction 103, that the sworn testimony of witnesses is evidence.

- If a juror refuses to believe this and instead makes it clear that he or she will require the prosecutor to prove the case with physical evidence, the prosecutor should strike that juror for cause.
- The defendant chooses where to commit the crime and will not generally batter the victim in front of a lot of independent witnesses. Raise this point with the jury when you may have only one witness – the victim – testifying at trial.

9. Questions about Credibility

Because domestic cases often boil down to a “he said, she said” situation, the prosecutor must address the issue of credibility of witnesses with the jury as soon as possible. Your goal might be to get jurors to start thinking about some of the factors for consideration listed in the credibility jury instruction (Wisconsin Jury Instructions-Criminal 300).

Practice points:

- Select a juror who might be prone to common assessments pertaining to the credibility of others. Good jurors to select for this discussion include police officers, parents, and teachers.
- To a parent or teacher juror: Has there ever been a situation where something broke in the house/classroom and two of your children/students blamed the other? What type of things do you look for to determine who is telling the truth?
- To an officer juror: When you arrive at the scene of a crime and you have multiple witnesses telling you different versions of events, what types of things do you look for to determine which witness is being truthful to you? What type of things do you look for in a witness’ demeanor?
 - Be careful with an officer. You may not want the officer answering: “Well, I look for corroborating injuries” if you do not have any corroborating injuries in your case.
- Conflict in testimony: “It is unlikely that the State’s witnesses and the defense witness will agree on the facts. In fact, if they did, we would not need all of you for a trial. How many of you believe that a conflict in testimony is automatically reasonable doubt? Does anyone believe they cannot judge the credibility of another?”

10. Questions about Uncooperative Victims

In a case with a “less than cooperative victim” or a case where no victim testifies, most jurors will need direction. Jurors may not understand why a victim would testify on behalf of the defendant, or choose not to testify at all. When confronted with one of these scenarios, educating the jury will be perhaps the most important part of your *voir dire*. An effective *voir dire* in a recantation case can pave the road to conviction.

a. Recanting victim

Possible *voir dire* questions to address this issue include:

- How many of you think that the State has a responsibility to prosecute people who commit domestic abuse crimes even when the victim does not want it to?
- How many of you think it is possible for victims to still have strong feelings toward their abusers?
- Can any of you think of reasons why the victim might testify on behalf of the defendant?
- If the State proves this case beyond a reasonable doubt, how many of you would vote “not guilty” solely because the victim, for whatever reason, testified on behalf of the defendant?

Practice points:

- If a juror is unable to evaluate the evidence independent of the fact that the victim recanted, there may be cause to strike.
- If jurors do not respond to your questions, start calling on individual jurors. The prosecutor has to get a discussion going about this topic. It is more likely than not that someone on the jury will have personal experience with this very situation, and that person can then be used to “educate” the rest of the jury.
- For example, if an actual victim is on the jury, the prosecutor could ask:
 - In your experience, were there times when you did not report abuse to the police?
 - Were you reluctant to discuss the abuse with your family or friends?
 - After you reported the abuse to your family and friends, did you have regrets about turning your abuser in? Did you feel ashamed or embarrassed?
 - Did you depend on your abuser for help with finances or child care?
- If a juror has known someone who has been a reluctant or recanting victim, you can ask similar questions of that person. Often, a person on the outside of a violent relationship will prove most useful in educating the rest of the jury.

b. Excited utterance trials: When the victim is not present

Possible *voir dire* questions to address this issue include:

- Can any of you think of reasons why a victim might not be at the trial to testify against his/her abuser?

- How many of you think it is possible for victims to still have strong feelings toward their abusers?
- Will any of you be thinking in the back of your mind, “Gee, I really wonder why the victim is not testifying?”
- Do all of you promise to set aside those thoughts (as speculation) and base your decision in this case solely upon the evidence presented at trial?
- If the State proves this case beyond a reasonable doubt, how many of you would vote “not guilty” simply because the victim, for whatever reason, did not testify?

Just because the victim does not testify, does that mean to you that the State cannot prove a battery occurred? Does it mean that a battery didn’t happen? What about a homicide case, in which the victim is dead and cannot testify? The State can still prove that case through other evidence, right?

Practice points:

- If a juror insists upon hearing the testimony of the victim, there is cause to strike.
- Just as with a recanting victim, the same technique can be used to single out an individual juror who may have some personal experience with domestic abuse.

11. Questions about Same-Sex Relationships

Jurors are often uncomfortable talking about domestic abuse. Jurors are also often uncomfortable talking about homosexuality. When the two are combined, the prosecutor will have to be sensitive to the jurors’ potential discomfort. Yet, you still must convince the jury that victims of same-sex domestic abuse deserve the same level of protection as any other crime victim in the community.

Possible *voir dire* questions to address this issue include:

- Do all of you agree that this community has one courthouse for criminal trials? One courthouse for all of us – even those who might hold different views than you?
- Domestic abuse, as it is defined in the Wisconsin Statutes, includes abuse that occurs in same-sex relationships. How many of you disagree with this law or think that different laws should apply to same-sex relationships?
- Do any of you feel that a batterer in a same-sex relationship should be treated more leniently (or more harshly) than a batterer in a traditional relationship?
- If the State is able to prove this case to you beyond a reasonable doubt, how many of you would still find the defendant “not guilty” just because the defendant is in a same-sex relationship with the victim?

Practice points:

- Strike for cause anyone who does not agree with the equality ideas expressed in the Fourteenth Amendment.

12. Questions about Victims with Criminal Convictions

If the victim's testimony is introduced at trial either directly or indirectly, Wisconsin law provides that the victim can be impeached by prior convictions. WIS. STAT. § 906.09(1). The importance of *voir dire* in this regard is convincing a jury that a person who has committed a crime can still be a victim of domestic abuse.

Possible *voir dire* questions to address this issue include:

- Do all of you agree that this community has one courthouse for criminal trials? One courthouse for all of us – even those who might have, at some point in their lives, been convicted of crimes?
- If the victim makes life decisions that might be different than your own, are you going to hold that against the victim when you evaluate the evidence in this case? Will you decide this case solely upon the evidence you hear?

Practice points:

- Be sure that the victim's testimony will be introduced in the trial before putting the prior convictions in the minds of the jurors.
- Strike jurors for cause if they disagree with these ideas and cannot be rehabilitated.

13. Questions about Domestic Abuse and Divorce

The defense attorney will often attempt to attack the victim's credibility when the victim and the defendant had a divorce pending at the time of the incident. While the State never has to prove motive, this is a situation in which the defense may attempt to establish the victim's motive to lie. Although the relevance of the divorce should be addressed through motions *in limine*, the prosecutor can dispel any notions of vindictiveness during *voir dire*.

Possible *voir dire* questions to address this issue include:

- This criminal trial is focused entirely on the incident that occurred on (date). This trial is not about child custody, splitting of assets, maintenance, or divorce. How many of you will be thinking about those issues when deciding on the guilt of the defendant? Will you promise to set aside those issues and focus entirely upon the evidence presented at trial?

- If the State proves this case to you beyond a reasonable doubt, how many of you would find the defendant “not guilty” just because the victim and the defendant were going through a divorce?
- Does anyone here believe that when two people are going through a divorce, they have the right to do whatever they want to each other?

Practice points:

- Objectivity is best in this circumstance. The prosecutor should (and must) focus the case on the evidence and the facts of the incident. That approach begins in *voir dire*. Be honest and up-front about the relationship between the victim and the defendant, but do not dwell on it. If the defense attorney (who will often be the divorce attorney, too) begins to sling arrows, object on relevance grounds.

14. Strategies in Dealing with Affirmative Defenses

You want the jurors to consider your point of view first. You do not want to pollute your “offense” with too much “defense.” You also need to be careful, since the defendant is under no obligation to present a defense. Still, there is a rule of litigation strategy: “Get the explanation out before the accusation.” Balancing these strategic considerations in order to steer an effective course through affirmative defenses poses significant challenges.

Each affirmative defense has two parts, just like the State’s burden of proof: (1) production; (2) persuasion. Any reference we make to the defense verifies its existence, and potentially, lends credence to its merit. It is very difficult to state that “the defendant will tell you that he acted in self-defense . . . here’s why you shouldn’t believe him”

The best theory: Instead of creating a platform from which the defendant’s affirmative defense can be launched, build a wall that the defendant has to scale.

How to build that wall:

- First, identify the defendant’s basis for an affirmative defense. Look to facts, arguments from motion hearings, negotiations, prior experience, study, and common sense.
- Second, distill your thoughts and beliefs as to why you believe that other affirmative defenses do not apply.
- Third, ask yourself why you refuse to dismiss or amend the charge based upon the affirmative defense. The answer to this question is the key or core concept to be addressed in *voir dire* (and throughout the trial).

Example:

A defendant initiated a confrontation which resulted in his being charged with battery. The defendant now claims self-defense. The key is the *provocateur* doctrine. See WIS. STAT. § 939.48(2). Question jurors on their commitment to the rules of law that govern all of us, about their awareness that someone can “start something” and not be insulated from punishment for the results obtained, and on the fact that there is a difference between defense of self (factual) and self defense (legal).

15. Conclusion

- Anything impacting your analysis pertaining to guilt or innocence may be relevant and appropriate to address in *voir dire*. If something “bothers” you about your case, it will probably bother a juror, too! Find out.
- Keep things moving. Give the jurors the impression that you won’t waste their time.
- Always ensure that prospective jurors decide the case on the evidence that is available, not on some pop culture notion of what the evidence *should* be.
- Because you go first, you have the opportunity to ask the “defense questions” first . . . but you can do it from *your* perspective.
- Let the jury know that you do not fear your burden.
- Be a trustful “source” of information for the jurors. As much as possible, teach and explain.
- The jurors make appropriate commitments when they take their oath. Most jurors will keep those commitments, at least for the pendency of the case. However, if need be, have the twelve selected persons agree not to view your victim or witness differently solely because of race or education, or other factors. Perhaps those same individuals would find it difficult to set aside biases in a different setting. However, jurors can, and do, make the exception, if you ask them to do so. Don’t assume that they will set aside their biases on their own.

Voir dire is one of the most critical aspects of prosecuting a domestic case. There are several themes common to all domestic abuse cases, such as power and control, reluctant victims, dependence, etc. During *voir dire*, the prosecutor can and should take the opportunity to educate the jury panel about these themes. Courts will, of course, differ in the latitude that they allow attorneys during the *voir dire* process; however, you should not shy away from this chance to educate the more open-minded jurors on your panel and to eliminate the others.

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19. Opening Statements

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1. Developing a Theory and Theme through Case Analysis

The goal of a trial is to persuade the fact-finder that your version of the facts is the true version of the facts. Primarily, we reach our goal through persuasive storytelling.

A persuasive story:

- Is about people who have reasons for the way they act.
- Accounts for and explains all the undeniable facts.
- Comes via the testimony of credible witnesses.
- Is supported by the details.
- Makes sense and is plausible.
- Is organized, so that each succeeding fact makes the story more likely.

Your case is a persuasive story when you have developed a case theory that accomplishes these things. A case theory is the crux of your case, reduced to a paragraph. It matches the facts with the law. Your theory must be logical, complete, simple, and believable.

Your theory becomes more persuasive, and morally compelling, when you have a theme. The theme of your case springs from the facts. It is the reason why the fact-finder gets invested in your case and believes it to be justified. This theme can be expressed in a sentence or a phrase.

A theme helps tie your case together. A strong case has an appeal to the humanity of the jury; that appeal begins with the theme.

Often, in the context of a domestic abuse case, your theory and theme will revolve around the type of abuse that is seen in the facts and relationship history. For instance, if a battery charge involves a defendant's intense jealousy erupting in violence, "power and control" might be the theme of your case. Your theory might revolve around the defendant's inability to control his or her emotions, requiring police protection to ensure the safety of the victim and any children that might be involved.

2. Components of an Opening Statement

a. The *attention step*: Presentation of the case theme

This is the beginning of your opening. If you can, start with a dramatic statement to immediately capture the jury's attention. If you start out with a statement that captures your theme and intrigues the jury at the same time, they will pay closer attention, believe more in your case, and remember the facts later – as you presented them. This is often called the concept of "primacy," and it applies to the first thing the jury hears from you.

Your theme also becomes stronger through repetition. You don't need to overdo it, but a little drama and repetition of phrases to catch the jury's attention won't hurt at the beginning of your opening statement.

Examples:

- Power and control. Power . . . and control. That's what was in the defendant's mind
- Seven. That's how many times the defendant hit the victim in the face. Seven.
- He looked at her cell phone . . . and he snapped.

b. The *fact narration*: Presentation of your case theory

This is the "meat" of your opening, where you tell the jury the story of what happened . . . in *your* words. When preparing your opening, take into account the concepts expressed in the "Adults as Learners" section below. Recite the facts clearly, without argument. Here you can tell the jury what you expect they will hear from each witness; this is a way to introduce all the key players in your case. There is no need for you to spend any time addressing the defense in your opening (if you know what the defense is going to be).

Note that this section of your opening is meant to be persuasive as well, even though you are forbidden to "argue." This doesn't mean that you should make your case sound stronger than it is, however. If you over-sell in the opening and fail to deliver during the trial, the jury will notice.

c. The *exit line*

You should end your opening by bringing it back to your theme. This is called the “concept of recency” – people remember best the things they hear first (“primacy”) and last. You want to end your opening on a high note, bringing it back to the theme. This helps the jury get emotionally involved in the story, and will, ideally, leave them feeling like they are ready to convict after your opening statement, no matter what the defense has to say.

Many prosecutors end by telling the jury what the prosecutor will ask them to do at the end of the trial, taking care to ensure that the last word the jury hears at the end of the opening statement is the word “guilty.” The more emphasis you place on that word, the more it will ring out through the courtroom and linger in the air, even after you leave the podium.

3. Adults as Learners: Enhance Your Presentation Style

a. Primacy and recency: First and last impressions are meaningful

As discussed above, people remember best the things they hear first and last. You have the opportunity to make these your most persuasive and compelling statements. Of course, these statements should reflect your theme.

b. Repetition: The “Rule of Six”

Adults need to hear something at least six times in order to remember it accurately and completely. Plan your trial with this in mind, making certain that the jury heard the important facts several times. Burns, *Proven Practice* 6:2, pp. 148-50 (2005).

c. Attention span

Adults have a short attention span – especially in this age of sound bites, Twitter, and the internet. Even with a compelling beginning to your opening, most adults’ minds will wander around the seven-minute mark. This is why it is so important to start and end strong.

d. Visual aids: Adults hear better with their eyes than their ears

Many people are, at least in part, visual learners. If you *show* the jury something as you also *tell* them something, chances are that it will stick in their minds better. For example, you can show the jury a photo of the victim’s bruised face as you repeat the words, “power and control.”

4. Content

THOU SHALT:

- Express your case theme
- Communicate your case theory
- Address the legal issues
- Explain why your facts are important
- Use the evidence
- Use details (big ideas supported by details)
- Weave in witness identities and credibility
- Highlight your strongest evidence
- Introduce weaknesses (but don't call them that)
- Involve the defendant as soon as possible

THOU SHALT NOT:

- Argue
- Instruct on the law
- Testify
- Refer to unprovable facts
- Comment on defendant's right to remain silent
- Comment on the defendant's failure to testify
- Comment on the defendant's bad character
- Comment on anticipated defenses
- Overstate your case
- Disclose unnecessary details
- Either attack or praise the opposing counsel
- Go on and on . . . and on

5. The Law Pertaining to Opening Statements

Wisconsin Jury Instructions 101 OPENING STATEMENTS.

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during trial. I must caution you, however, that the opening statements are not evidence.

According to *United States v. Dinitz*, 424 U.S. 600 (1976) (Burger, J., concurring), the purpose and boundaries for an opening statement are quite limited:

An Opening Statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

Dinitz, 424 U.S. at 612.

ABA STANDARD 3-5.5 OPENING STATEMENT.

The prosecutor’s opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

WISCONSIN SCR 20:3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not:

...

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. . . .

Never express your personal belief as to the truth or falsity of any testimony or evidence. Personal beliefs about the defendant’s guilt have no place in trial. Guilt must be tied to evidence, not personal opinions.

Neither should any reference be made in the prosecutor’s opening statement to what the defense will prove or attempt to prove. *See Beavers v. State*, 63 Wis. 2d 597, 217 N.W. 2d 307 (Wis. 1974). Be careful about branding the defendant with labels. For example, in *State v. Fawcett*, 145 Wis. 2d 244, 256, 426 N.W.2d 91, 96 (Wis. Ct. App. 1988), the court frowned upon the prosecutor’s reference to the defendant as a “classic child molester.”

Promise only what you can deliver! Most claims of error based on the content of the prosecutor’s opening statement are claims that the prosecution did not present, or even attempt to present, evidence that was promised in the opening statement. *See State v. Tew*, 54 Wis. 2d 361, 195 N.W.2d 615 (Wis. 1972); *State v. Laabs*, 40 Wis. 2d 162, 161 N.W.2d 249 (Wis. 1968) (denying claims of error in both cases).

6. The Strategy of Advocacy**a. Organize content to maximize impact**

Remember to start strong and end strong (primacy and recency again). Do not waste time on a needless introduction; get directly to the theme. Drop unnecessary language such as: “the evidence will show . . .” or “what I say is not evidence . . .” or “this is a roadmap/puzzle/outline.”

Make sure that the information is organized in a logical way, with a chronological method, a topical or issue-driven focus, or witness summaries (the latter is disfavored among many prosecutors, however).

b. Utilize language to your advantage

Speak in the active voice, providing vivid descriptions and highlighting key facts. Pay attention to word choice; be conversational instead of using legalese. Use transitions to help the jury understand and differentiate between various focal points throughout the statement.

Speak forcefully, clearly and with confidence. Be yourself. Do not try to imitate any other attorney, or any person at all, if it does not fit your personality. Use simple and direct language. Avoid phrases and words such as: as it pertains to this case, quintessential, hopefully, probably, it seems, story, perhaps, alleged, essentially, I think, we expect, and we believe. No Shakespeare! Speak forcefully, using strong words, especially verbs, such as: beat, stabbed, kicked, punched, raped, strangled, murdered, and bludgeoned.

c. Preparation

Like a Boy or Girl Scout, the prosecutor should always be prepared. You cannot be persuasive if you don't know what you're talking about. Condense your opening statement to a series of points upon which you can expand to the jury. However, do not *read* your opening statement. Use your body to help keep the jury enthralled – move or gesture when highlighting a transition to a new topic or emphasizing significant points. Pace your delivery with the appropriate mood and tone. Eliminate personal habits like coin jingling, hair fussing, etc.; those may be annoying or distracting to the jury. Always be sincere.

Know the elements of the crime(s). Review the substantive jury instruction(s). Know the facts, dates, times, names and addresses involved. Resolve pretrial issues so that you will know what evidence will be admissible when presenting the opening statement. Prepare the opening statement last – after you have outlined your case-in-chief and direct examinations. Make a list of things you want to include in your opening while you're preparing your case.

Make absolutely certain that everything you mention in your opening will be supported by the evidence that is adduced at trial.

Test your opening statement:

- Does it tell jury what happened?
- Does it tell the jurors why they should find the defendant guilty?
- Does it make the jurors want to return a guilty verdict?
- Does it have a structure that is clear and simple?
- Is it interesting and free from weaknesses?

- Is it consistent with what will be proved and with what will be argued in final argument?

d. Give the jury something to look at (besides you)

If you are able to, use a visual aid or other demonstrative evidence in your opening to bring your presentation to life. Think about the admissible evidence that will be presented at trial and use those things (gun, knife, 911 tape, blow-ups of confessions, fingerprints, handwriting exemplars, forged documents, maps, floor plans, etc.).

Demonstrative evidence will keep your presentation alive, interesting and memorable. When faced with complex cases, charts, diagrams, lists, timelines, and the like will help the jury to understand the case as it unfolds. Remove visual aids after you complete your opening to avoid any possible error.

7. Additional Points for Consideration

- Your credibility is at issue, even though you are not a witness. People often don't trust lawyers, so you have to make them trust you, if you can. Be honest, respectful, and competent. Pay attention to your professional appearance in dress and in demeanor. Make sure there is no mistake in the mind of the jury that you represent "the people of the State of Wisconsin."
- Remember that emotions always prevail over bald reason in decision-making.
- Personalize the victim. Let the jury know who he or she is.
- Opening statements must be transcribed into a verbatim record. SCR 71.01.
- Do not comment on defense counsel's decision to wait to present its opening statement. *State v. Sarinske*, 91 Wis. 2d 14, 38, 280 N.W.2d 725, 736 (Wis. 1979). The defense can reserve the right to present its opening statement until after the presentation of the State's case-in-chief.
- Be careful if the defense reserves its opening statement and then does not present any evidence. If this occurs, be conscious of ineffective assistance of counsel and take appropriate steps.
- The defendant may give his or her own opening statement. *See State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Wis. Ct. App. 1984).
- Dress conservatively. The jury should be impressed with what you have to say, not with what you are wearing. According to Milwaukee County Circuit Court Rule 237 I, "All lawyers . . . shall wear appropriate attire while in attendance upon the court, provided judicial discretion may be exercised otherwise in extreme situations." Court rules in other counties may be similar.
- Even in a court trial, always give an opening statement (unless the judge frowns upon it) because you want to show the court you care. Plus, the judge needs a guide through the case and to know what the issues are, especially because courts often get interrupted during court trials. A court trial gives you the option of filing a written opening. This allows you to narrow the issues and provide an

outline of how every element of the crime will be proven by your evidence. While some judges will not want to hear your opening, you may be able to convince the judge with a statement such as: “Your Honor, I would just like to make a few introductory remarks.” Obviously, for the court, tone down the drama.

- Seldom should you commit a citizen witness to specific testimony. Consider giving yourself a little wiggle room by being somewhat vague, just in case. If there is a deviation by the witness, you will not lose your credibility. You may want to warn the jurors that things may not always come out in court exactly as you say, but that you are telling them what you anticipate the evidence will show.
- Never apologize for prosecuting the defendant. The jury should have no doubt that you know the defendant is guilty. If you are not sure the defendant is guilty, do not take the case to trial!
- Never tell the jury that what you are about to say is not evidence. The judge highlights this very point for the jurors, and you do not want to undermine the importance of what you have to say.

8. A Good Beginning

Below is one example of a strong beginning to an opening statement:

This is a case about violence, fear, and love.

Today you will hear the story of (victim), who called the police after her boyfriend – the defendant – struck her, twice, in the face, with his fist. He broke her nose when he did that. For her, that was the last straw. Earlier that night, he had broken her phone when she tried to talk to a friend – a male friend. And he told her that *he* was going to be the only man in her life

9. A Powerful Ending

Throughout an opening, you must exude confidence. From the start, tell the jury you embrace the burden of proof, and then explain how you will prove the case. At the end of the opening statement, throw down the gauntlet. Tell the jury that you will prove the defendant guilty of the charge beyond a reasonable doubt.

The following are some examples of strong finishes for opening statements:

- Those are the facts and I intend to prove every fact to you beyond any reasonable doubt.
- At the conclusion of the evidence in this case, I will ask you to return a verdict of guilty.

- [Re-state theme in one sentence.] Ladies and gentlemen, it is your job in this case to take care of justice, to listen to the evidence, and to render a fair verdict in this case. Thank you very much.
- I am confident that when you hear the testimony in this case that you will be convinced beyond a reasonable doubt that the defendant committed these crimes and that he/she is guilty.

10. The Defense's Opening Statement

Use motions *in limine* to prevent defense counsel from presenting doubtful or inadmissible evidence in their opening statements. If a decision is questionable, you may be able to convince the judge to postpone ruling and forbid mention during openings. Object during the defense's opening if counsel refers to evidence that will not be admissible at trial.

Ensure that all defense witnesses are out of the courtroom during the openings to avoid educating them.

This will be the first time you will get a clear picture of the defense. Take notes. Write down everything you can, including direct quotes. You can then point out in closing: "What did counsel for the defense promise in his opening? I didn't want to misquote him, so I wrote down his words as he said them. He said"

You also want to listen closely because the defense may open the door to otherwise inadmissible evidence in the opening statement.

Observe the jury's reaction to the defendant's opening statement. Object during the opening if defense counsel argues. Ask yourself: "Is this evidence the defense is going to present?" Discussing the very heavy burden that is placed on the prosecutor and the State, or what the framers of the Constitution had in mind, is not evidence that the defense attorney is going to present. Object very politely: "Your Honor, I have to object; opening statement is restricted to what evidence the jury should expect to hear during this trial, not argument."

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20. Direct Examination and the Practical Use of Physical Evidence

1. What You Must Prove in Your Case-in-Chief
2. Preparing Witnesses for Testifying
3. Organize Your Direct Examination
4. The Direct Examination
5. Using Exhibits
6. When the Witness Forgets

1. What You Must Prove in Your Case-in-Chief

Keep in mind that the State, at a jury trial, must introduce evidence to prove the following:

- Date: when the acts occurred.
- Elements (sufficiency of the evidence): that certain acts, which satisfy the elements of the applicable criminal statute(s) from a sufficiency of the evidence / quantum of evidence standpoint, occurred. This includes both physical acts and statements.
- Elements (statutory construction): that these certain acts satisfy the elements of the applicable statute(s) from a statutory construction / interpretation standpoint.
- Venue: that the acts occurred in the proper venue (i.e., your county and the State of Wisconsin).
- Identification of the defendant: that the acts, either directly or pursuant to some other theory of liability, are attributable to the defendant. This includes the in-court identification of the defendant.

2. Preparing Witnesses for Testifying

Below are some practice pointers to assist you as you prepare witnesses to take the stand.

- Always meet with the witness – in person, if possible – before asking that person to take the stand.
- Never meet with a witness alone. Always have a police officer or victim-witness specialist present with you.
- The four rules of testifying; tell these rules to every witness:

- Listen carefully to every question, no matter who asks it – the prosecutor, or defense counsel, or the judge.
- Pause to make sure you have the question in mind.
- Answer the question straightforwardly and honestly.
- If the question is not clear just say, “I’m sorry, I don’t understand what you’re asking.”
- Explain the logistics of getting to court on trial day.
- Advise the witness to dress neatly, as if for church, but not too fancy.
- The jury should remember what you said, not what you wore. Do not chew gum or wear sunglasses.
- Tell the witness what time you would like them to arrive, where to park, and where they should meet you (courtroom, waiting room, your office, etc.).
- Make sure the witness is prepared to wait.
- Explain what will happen in court.
- Explain how to take the stand and take the oath. Draw a diagram of the courtroom, or take the witness to see it.
- If this is an issue in your county, determine whether the witness will affirm rather than swear, so you can advise the clerk and avoid the awkward scene of the clerk fumbling around for the affirmation oath.
- Advise the witness, when taking the oath, to hold his/her hand high and answer “I do” loudly and clearly.
- Tell the witness to keep his/her hands away from the face and mouth. In the lap is the best place for them.
- Tell the witness to look at the person who is asking the question. “Just like your mom always told you: ‘Look at me when I’m talking to you.’”
- Tell the witness to use the microphone and speak up so the jury can hear them.
- Tell the witness not to be afraid to say he/she discussed this case with the prosecutor.
- Explain objections: If one of the attorneys objects, just stop talking until the judge overrules or sustains. If the objection is sustained, do not answer, if it is overruled, go ahead and answer. If that is too confusing, don’t worry, the judge will let you know how to proceed.
- Explain to the witness that he/she should try not to get upset or frustrated with the defense attorney, even if it seems like the attorney is trying to upset them. When we get upset, we can get confused and then we make mistakes. People don’t like angry people. Defense counsel may try to make you seem angry so the jury doesn’t like you as much.
- Discuss what to do if the attorney or investigator for the defendant wants to speak with the witness: The attorney for the defendant has a right to ask to talk to you, or to ask an investigator to get in touch with you. You are not required to speak with them. It is up to you whether or not you talk to them before trial.
- Do not show the witness your notes, or you might make them discoverable as something used by the witness in preparing her testimony or as an adoptive statement. *See WIS. STAT. § 906.12.*

3. Organize Your Direct Examination

a. Witness order

In most domestic abuse cases the verdict will depend upon on the testimony of the victim. However, this is not a fact that will escape the defense. Therefore, it is often best to start with a strong witness who will present little ammunition for cross. This could be a police officer or impartial eyewitness who will provides context for the victim's testimony. If your first witness is strong it will set the stage for the victim to be more likely to be believed.

Remember the rules of "primacy" and "recency" – jurors will remember best the words they hear first and last. Just as you should start with a strong witness, you should also end with a strong witness.

b. Themes

Organize your questioning into an outline of the information you need to get from each witness. Do not write out specific questions; you risk getting bogged down by the questions and not listening to the witness. Think of writing out *answers* that you need to hear, not questions.

Develop the first topic with the witness, then transition into the second topic, and so on.

Listen to the answer the witness gives to your questions. Be prepared to think on your feet and switch topics; be sure you go back to get all the information you need from the witness, if necessary.

c. Outline

Write out the outline you will use in court in a large enough font that your head isn't constantly down, buried in your notes.

d. Exhibits

Identify which exhibits you will need to introduce with each witness and where in the testimony the exhibits should be introduced.

e. Organize exhibits based on the witnesses

If allowed by the court, pre-mark your exhibits. This can streamline the process and avoid the perception that you are wasting the jury's time.

Prepare a list of exhibits that allows you to check off when exhibits are offered and admitted into evidence.

f. Anticipate objections

If you suspect that there may be an objection to a certain piece of information, come prepared to argue your position.

Consider writing a one-page memorandum of law addressing the point. Provide it to the judge after the objection: “Your Honor, I anticipated this might be an issue so I prepared this memorandum of law explaining why this evidence is admissible.”

Consider seeking a pre-trial order admitting the evidence. Judges often want to deal with potential issues before bringing in the jury, so the trial can go as smoothly as possible. If something is potentially objectionable, a motion *in limine* might be the best way to address it.

g. Prepare police witnesses

Police officers should testify in full, formal uniform.

Make sure they review their reports thoroughly.

Go through their testimony with them before trial, if you have time. Remind them of things they will not be allowed to say in front of the jury, if any, and make sure they are prepared to answer any questions you have regarding facts or issues that are not in the report.

h. Know the court’s pre-trial rulings

Remember not to mention anything that was forbidden by the court before trial; likewise remain vigilant that the defense does the same.

4. The Direct Examination

a. Introduce the witness

Using basic questions such as occupation, age, residence, etc., will help the witness relax and get used to answering questions. These questions will also let the jury know something about the witness so they can identify with him or her.

If done correctly, this introduction should provide a basis for the jury to allow themselves to trust – and believe – the witness.

b. Emphasize key points

Use repetition. Repeat the witness’ answer in the next question.

PROSECUTOR: What happened next?

WITNESS: The defendant punched me in the nose.

PROSECUTOR: What happened after the defendant punched you in the nose?

c. Ask questions that call for narrow detail

For example:

PROSECUTOR: What happened next?

WITNESS: The defendant punched me in the nose.

PROSECUTOR: Which hand did the defendant use to punch you?

WITNESS: His right.

PROSECUTOR: When you say “punched” do you mean his hand was closed?

WITNESS: Yes, in a fist.

Continue with further details until the jury will not forget this punch to the nose.

d. Visual aids

Use visual aids to emphasize the key points of your case. For example, you can have the witness draw a diagram of the scene and have him or her go through the testimony again. Here are some good visual aids:

- Physical evidence: weapon, broken property, text messages
- Photographs
- Demonstrations: act out the crime
- Diagrams: map of the room

e. Transitions

This is a way of alerting the jury and the witness to the next area of inquiry. For example: “Ms. Johnson, now I’m going to move on from what the defendant did inside the apartment to what happened after he left.”

Other examples:

- “Now I’d like to ask you some questions about”
- “Now let’s now focus on”
- “Why don’t we shift gears and talk about”

f. Appropriate demeanor

- Be natural and relaxed. Never let yourself look surprised, beaten or embarrassed by the witness' answer. If you look calm, maybe the jurors will think they misread the importance of the statement.
- Remember, gestures don't show up on the record.
- Don't sound like a lawyer! Avoid words and phrases like: observe, prior, subsequently, previous, relate, what if anything, with respect to, and strike that.

g. When your witness turns against you

The law allows you to ask leading questions or impeach your own witness. Legal authority for this:

WIS. STAT. § 906.07 WHO MAY IMPEACH.

The credibility of a witness may be attacked by any party, including the party calling the witness.

WIS. STAT. § 906.11(3) LEADING QUESTIONS.

Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness's testimony* (emphasis added).

WIS. STAT. § 972.09 HOSTILE WITNESS IN CRIMINAL CASES.

Where testimony of a witness at any preliminary examination, hearing or trial in a criminal action is inconsistent with a statement previously made by the witness, the witness may be regarded as a hostile witness and examined as an adverse witness, and the party producing the witness may impeach the witness by evidence of such prior contradictory statement.

You should now impeach your witness:

PROSECUTOR: Did the defendant punch you in the nose?

WITNESS: I don't remember (or just "no").

PROSECUTOR: Isn't it true that that on May 11, 2011, you told Officer X that the defendant punched you in the nose? (You should be reading directly from the police report as you ask this question.)

The witness' answer to this question is not important since you'll be calling or recalling Officer X to put in what the witness told him or her.

Don't try to refresh the witness' recollection. Inexperienced attorneys frequently make the mistake of trying to refresh the witness' recollection or show the witness a copy of the police

report. This is confusing to the jury (and, possibly, the witness), dilutes the point and is legally unnecessary.

WIS. STAT. § 906.13(1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination.

h. Deal with your witness' problems in direct examination

Why is it a good strategy to deal with your witness' problems in direct?

- You take this away from the defense on cross.
- You appear to be up-front and honest with the jury by not trying to hide your witness' shortcomings.
- By taking care of this on direct you can present this evidence in its best possible light.
- It gives you a chance to place the issue in context and explain it.

How should you deal with your witness' problems?

- Prepare the witness so the witness is not surprised when you ask questions exposing a weakness in the witness or in your case.
- Bury the bad stuff late in your direct exam.
- Remember to begin and end the direct exam on a strong note.

A prosecutor has the legal authority to impeach his or her own witness.

WIS. STAT. § 906.07 WHO MAY IMPEACH.

The credibility of a witness may be attacked by any party, including the party calling the witness.

i. "Constable-blundered"

If there was no attempt to lift fingerprints or obtain DNA, have the officer explain why, even if you think it's obvious. Juries can easily be tainted by the "CSI effect."

If the police screwed up, force the officer to admit it on the stand. Admitting a mistake is better than the jury assuming the real reason to be sinister.

5. Using Exhibits

a. Laying foundation

Lay a simple and direct foundation. The general legal requirements include:

WIS. STAT. § 909.01 GENERAL PROVISIONS.

The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Here is an example of effectively laying foundation for general evidence:

PROSECUTOR: I am now showing you what has been marked as Exhibit 1. Can you identify what this is?

WITNESS: Yes.

PROSECUTOR: What is it?

WITNESS: [Brief description of exhibit.]

PROSECUTOR: I offer Exhibit 1 into evidence.

b. Laying the foundation for photographs and videotapes

It is not necessary for the person who actually took the photos or the video to be called as a witness. It is sufficient for a witness with personal knowledge of how the depiction looked at the time the photo or video was taken to testify that the photo or video is a truthful and accurate reproduction. *State v. Peterson*, 222 Wis. 2d 449, 455, 588 N.W.2d 84, 87 (Wis. Ct. App. 1998).

PROSECUTOR: I am showing you what has been marked as Exhibit 1. Can you identify this?

WITNESS: Yes.

PROSECUTOR: What is it?

WITNESS: It is a photograph of my car.

PROSECUTOR: Is this photograph a fair and accurate depiction of the way your car looked on May 9, 2011?

c. Laying the foundation for audio recordings

Audio recordings are properly identified and authenticated when one of the parties to the recorded conversation identifies the voices and testifies that the recording accurately depicts the conversation. *State v. Curtis*, 218 Wis. 2d 550, 555, 582 N.W.2d 409, 410 (Wis. Ct. App. 1998).

PROSECUTOR: Did you receive a telephone call on May 9, 2011?

WITNESS: Yes.

PROSECUTOR: I show you what has been marked as Exhibit 1. Have you listed to this CD (or other recording)?

WITNESS: Yes.

PROSECUTOR: Is it a fair and accurate recording of the telephone call which you yourself participated in on May 9, 2011?

d. Showing the exhibits to the jury

After the evidence is admitted you may wish to show it (or “publish” it) to the jury. To do so you must ask the court, “Your Honor, may I publish this to the jury?” It is always wise to determine the court’s expected practices before trial.

Here are a few different ways you can show the exhibit to the jury:

- Read the document to the jury or ask the witness to read it.
- Use an ELMO or other projector.
- Use an enlargement on an easel.
- Pass the exhibit around the jury box.
- Make copies for each juror.

6. When the Witness Forgets

a. Refreshing recollection defined

When your witness has forgotten something, your first (and sometimes only) step is to try to refresh the witness’ recollection. Refreshing recollection is only used where the witness cannot recall something he or she once knew. The only goal of refreshing recollection is to restore the witness’ memory. It is not a method of impeachment, nor can it be used to highlight an inconsistency.

Begin by asking a leading question. The trial court has broad discretion to determine whether or not a question is truly leading, and leading questions are allowed to refresh recollection. *Jordan v. State*, 93 Wis. 2d 449, 472, 287 N.W.2d 509, 519 (Wis. 1980).

If a leading question does not refresh the witness’ memory, use something to refresh his or her memory.

b. Refreshing recollection procedure

Foundation: The words “I don’t remember” must always precede an attempt to refresh recollection. Here are three steps to laying foundation for refreshing recollection:

- Witness does not presently recall a particular fact (“I don’t remember”);
- At some point in the past the witness did know that fact; and

- That there is a particular thing that, if presented to the witness, might jog the witness' memory.

Mark as an Exhibit: Mark the thing that will be used to refresh recollection as an exhibit.

Anything can be used to refresh recollection: a document, a picture, a physical item, etc. *See* WIS. STAT. § 906.12. Recollection may be refreshed by an item that has already been received as evidence (the item need not be marked again).

Presentation: Present the thing to the witness. Simultaneously present a copy of the thing to defense counsel (or allow opposing counsel to inspect the thing before giving it to the witness). Use of a privileged document to refresh recollection waives the privilege.

Witness Reads: Allow the witness to read/hear/see the thing. Be very clear that the witness is to read the document (or look at the thing, listen etc.) silently, and should let you know when he or she is finished.

Retrieve the Exhibit: Retrieve the thing from the witness before resuming questioning. If you do not retrieve the document before asking questions the witness is not testifying from a refreshed recollection, but rather from the exhibit; this will probably draw a hearsay objection. The item used to refresh recollection is not offered into evidence, nor is it read aloud by either the witness or the attorney.

Memory Refreshed?: Ask if the witness' memory has been refreshed. If so, proceed with questioning.

c. Past recollection recorded, defined

If your attempts to refresh your witness' recollection fail, your last resort is the hearsay exception of past recollection recorded under WIS. STAT. § 908.03(5).

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) RECORDED RECOLLECTION.

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

d. Procedure

Personal Knowledge: Ask the witness if she had personal knowledge of the information at one time. For example: “Did you know the license plate number at one time?”

Recorded: Ask the witness if she recorded that information. For example:

PROSECUTOR: Did you write that license plate number down?

OFFICER: Yes, I wrote it down in my memo book.

Note: Cooperative reports should be admissible. For example, Police Officer A tells her partner, Police Officer B, the license plate number and B writes the number down in her memo book. In order to get around a hearsay objection, Officer A would have to testify that she accurately related her observations to Officer B. Officer B would then have to testify that he accurately recorded the statement made by Officer A.

Memory Fresh When Recorded: Establish that the information was still fresh in the witness’ mind when he or she recorded the information.

Accuracy: Ask the witness if the information he or she wrote down is accurate.

Steps Taken: Have the witness explain the steps taken to make sure the information was accurately written down.

Memory Cannot Be Refreshed: Show that the witness cannot completely and accurately recall the license plate even after looking at the statement (i.e., the witness’ memory can’t be refreshed).

Evidence: Move the document into evidence. Once the document is received into evidence, you can have the witness read the information aloud, or the record itself may be published to the jury.

Note: Under the Federal Rules of Evidence § 803(5), the information may be read to the jury but the record is not itself admissible. The Wisconsin rule is worded differently so the record is admissible in Wisconsin.

Last Resort: Use past recollection recorded as a last resort.

The best use of past recollection recorded is for a witness who has forgotten a detail such as a license plate number, a date or time, a make or model of a car, an address, a name, the route of travel, etc.

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21. 911 Calls and Caller ID as Evidence at Trial

1. Introduction
2. Defense Objections and Challenges to 911 Call Evidence
3. The Admissibility of Caller ID Evidence

1. Introduction

911 calls often play an enormous role in helping to corroborate the State's case. Many 911 calls give prosecutors the artillery to ensure victory in almost any "evidence-based" domestic abuse prosecution.

Photographs, medical records, and eyewitness testimony all provide great corroboration. However, in many cases, 911 audio recordings are literally cries for help. More than one prosecutor's case strategy and theme have been successfully built around 911 call evidence.

Tapes of 911 calls can be pretty harrowing, full of screams and yelling and cursing and sounds of household items being broken. Because of this, not many defense attorneys will want to stipulate to your introduction of the 911 call at trial.

2. Defense Objections and Challenges to 911 Call Evidence

This section assumes that the 911 call is non-testimonial. You should begin any argument by asking the court to find that the call is non-testimonial. *But see State v. Rodriguez*, 2006 WI App 163, ¶22, 295 Wis. 2d 801, 722 N.W.2d 136 (presenting counter-arguments to the testimonial and non-testimonial nature of 911 calls). When the court finds that the 911 call is testimonial and the caller is unavailable as a witness, then you will need to argue for the admission of the call under one of the limited Confrontation Clause exceptions. The method for introducing testimonial statements is beyond the scope of this section and it is discussed more thoroughly in a subsequent chapter of this reference book. For non-testimonial 911 calls, you may overcome the defense objections and challenges as follows:

a. The law of 911 call evidence

Defense objections typically challenge the introduction of the 911 call recording through a two-fold hearsay analysis. These defense objections are easily overcome.

State v. Ballos, 230 Wis. 2d 495, 602 N.W.2d 117 (Wis. Ct. App. 1999) is the seminal case for a prosecutor's use of 911 call evidence at trial. The *Ballos* court analyzed 911 call recordings in a two-fold hearsay application.

b. First level of 911 call admissibility

As to the first level of hearsay, 911 call evidence (even with anonymous callers!) is admissible at trial for any one of three hearsay exceptions:

i. WIS. STAT. § 908.03(1) PRESENT SENSE IMPRESSION.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

See also U.S. v. Bradley, 145 F.3d 889, 892-94 (7th Cir. 1998).

The *Ballos* court analyzed this hearsay exception by citing *Bradly*, which affirmed the admission of 911 calls as both a present sense impression and an excited utterance. *Ballos*, 230 Wis. 2d at 505. *See also Bradley*, 145 F.2d at 892-94; *U.S. v. Hawkins*, 59 F.3d 723, 730 (8th Cir. 1995); *Hawkins v. U.S.*, 516 U.S. 1168, 116 S.Ct. 1257, 134 L.E.2d 206 (1996) (vacated *U.S. v. Hawkins* on unrelated grounds).

ii. WIS. STAT. § 908.03(2) EXCITED UTTERANCE.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This is satisfied when the 911 caller is “promptly” reporting a startling event or condition, and the report is made while the declarant is under the stress of excitement caused by the event or condition. *Ballos*, 230 Wis. 2d at 506.

iii. WIS. STAT. § 908.045(2) STATEMENT OF RECENT PERCEPTION.

A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

This hearsay exception applies when a declarant is unavailable, such as in the case of an anonymous 911 call. It is satisfied when the 911 call meets the specifications of the statute.

As to the “good faith” requirement, the *Ballos* court cites *State v. Williams*, 225 Wis. 2d 159, 176, 591 N.W.2d 823, 831 (Wis. 1999), which held that “an anonymous caller’s use of a [911] emergency telephone system to report a current and ongoing crime provides . . . sufficient . . . reason to believe that the caller is honest.” *Ballos*, 230 Wis. 2d at 507.

c. Second level of 911 call admissibility

The *Ballos* court held that the evidence may be offered as a record of regularly conducted activity under WIS. STAT. § 908.03(6). Hence, the “business records” hearsay exception may include 911 calls. *See Ballos*, 230 Wis. 2d at 508, *citing State v. Gilles*, 173 Wis. 2d 101, 113-14, 496 N.W.2d 133, 138 (Wis. Ct. App. 1992). *See also Abdel v. United States*, 670 F.2d 73, 75 n.3 (7th Cir. 1982) (holding that business records completed by government employees for the purpose of investigation could be admissible under the business record hearsay exception).

d. Practical application

In practice, while well-situated to testify for the purpose of establishing foundation, the 911 operator is not required to testify in order to lay a foundation for the call, even when the call is anonymous. A review of the *Ballos* trial record demonstrates that the 911 operator who received the calls did not testify. Rather, the State called a supervisor from the Police Department Communications Division and also a police detective. Among other things, the witnesses testified as to the accuracy of the transcripts after comparing the transcripts with the tapes.

When victims of domestic abuse recant, minimize, or fail to appear for trial, a prosecutor can use 911 call evidence to corroborate the commission of a crime. 911 calls can be compelling, since they bring the jury inside the residence as the crime is occurring, or moments thereafter. The anonymous eyewitness that calls to report a “man beating a woman in the face” is equally compelling . . . once the police arrive on scene to find injuries consistent with the report.

3. The Admissibility of Caller ID Evidence

a. The law of caller ID evidence

In the prosecution of violations of domestic abuse injunctions, violations of “no-contact orders” (bail jumping charges), stalking cases, or in unlawful use of telephone prosecutions, it is not infrequent that a victim will tell the police that the defendant’s phone number and name appeared on the victim’s telephone “caller ID” display unit.

To date, no Wisconsin appellate case has dealt with the issue of admissibility of caller ID evidence. However, the state of Kansas has dealt directly with the issue. In *State v. Schuette*, 273 Kan. 593, 44 P.3d 459 (Kan. 2002), the defendant was charged and convicted of one count of criminal threat and one count of harassment by telephone. The defendant claimed, on appeal, that the caller ID evidence was improperly admitted.

State v. Schuette is instructive because the defendant contended that (1) there was not a sufficient foundation laid, (2) the caller ID evidence was inadmissible hearsay, and (3) admission of testimony concerning the caller ID information violated the best evidence rule.

In terms of his “foundation” argument, the defendant proposed that testimony must first establish (1) the scientific or technical principles employed by the caller ID unit, (2) that the device was working properly and reliably on the date in question, and (3) that the operator of the caller ID unit was sufficiently qualified to use the device. *Schuette*, 44 P.3d at 462.

b. Caller ID evidence defined

In *Schuette*, the Supreme Court of Kansas looked to the case of *State v. Estill*, 13 Kan. App. 2d 111, 764 P.2d 455 (1988), *rev. denied* 244 Kan. 739 (1989), for direction in analogizing the caller ID system to a computer-generated “phone trap” record. *Schuette*, 44 P.3d at 462-63.

The court explained that a phone trap is where “a telephone company computer traces all calls made to [the requesting customer’s] number and records and stores the numbers of the phones from which the calls originated.” *Schuette*, 44 P.3d at 462.

Pertaining to the “phone trap” or “call tracer” system, *State v. Estill* concluded as follows:

We are of the opinion the trial court properly admitted the evidence as a business record. The question of reliability goes to the weight of the evidence and not to its admissibility. The evidence here concerns the method used to employ the trap. A corresponding log attests to the accuracy and trustworthiness of the computer, and the fact that harassing calls were traced to two separate numbers, both tied to the defendant, adds to the information’s reliability and trustworthiness.

Estill, 13 Kan. App. 2d at 116.

The *Estill* court relied upon two additional cases: *People v. Holowko*, 109 Ill. 2d 187, 191, 486 N.E.2d 877 (Ill. 1985); and *State v. Armstead*, 432 So.2d 837 (La. 1983), which “both agreed that computer-generated data (data which is reflective of the internal operations of a computer system), as opposed to computer-stored data (data which is placed into a computer by an out-of-court declarant), should be treated as nonhearsay.” *Schuette*, 44 P.3d at 462.

State v. Schuette further quoted the *Estill* court’s analysis of *Armstead* for the following explanation of the computer-generated data system:

The evidence is generated instantaneously as the telephone call is placed, without the assistance, observations, or reports from or by a human declarant. The printouts of such data are merely the tangible result of the computer’s internal operations.

The court in *Armstead* noted that the underlying rationale of the hearsay rule is that out-of-court statements are made without an oath and their truth cannot be tested by cross-examination. “With a machine, however, there is no possibility of a conscious misrepresentation, and the possibility of inaccurate or misleading data only materializes if the machine is not functioning properly.” [*Armstead*,] 432 So.2d at 840.

Since the computer was programmed to record its activities when it made the telephone connections, the printout simply represents a self-generated record of its operations, much like a seismograph can produce a record of geophysical occurrences, a flight recorder can produce a record of physical conditions onboard an aircraft, and an electron microscope can produce a micrograph, which is a photograph of things too small to be viewed by the human eye. [*Armstead*,] 432 So.2d at 840. *Estill*, 13 Kan. App. 2d at 114.

Schuette, 44 P.3d at 462-63.

c. Precedent for the use of caller ID evidence

In *Schuette*, the Supreme Court of Kansas quoted several sources as persuasive precedent:

Caller ID is a device that displays for the recipient of a telephone call the number of the telephone from which the call was made. While caller ID information may be admitted to prove the source of the call, a foundation is necessary to establish the proper functioning of that device. 31 Wright and Gold, Federal Practice and Procedure: Evidence § 7110 n.42 (2000). . . .

In *Tatum* [*v. Commonwealth*, 17 Va.App. 585, 588-89, 440 S.E.2d 133 (1994)], the Virginia court considered as a matter of first impression the admissibility of caller ID evidence. After first holding that caller ID evidence is not hearsay because it is computer-generated information, with no out-of-court declarant, the court analyzed the issue of reliability. The court noted the recipient of the call had received other calls from this particular individual in the past, of which he was able to recall at least one specific instance, and the same number registered on the caller ID. The court found that this was sufficient to show the caller ID device attached to the witness’ phone was reliable.

In *Culbreath* [*v. State*, 667 So.2d 156, 162 (Ala.Crim. App. 1995)], caller ID evidence was introduced against the defendant. On appeal, he argued the evidence was hearsay, the witness who introduced the reading was not an expert, and the *Frye* standards were not met. The court rejected all of the defendant’s arguments, finding the only prerequisite to admission of caller ID evidence was a showing of reliability of the device used. In so holding, the court relied on *Tatum*. The court noted that reliability of the particular caller ID device was shown through the victim’s testimony, specifically that each time she received the

harassing phone calls she would activate her caller ID and the same number would appear for each call.

Schuetz, 44 P.3d at 463.

The *Schuetz* court also cited several other cases that utilized caller ID evidence:

[W]hile only a few courts have squarely addressed the issue of admissibility of caller ID evidence, the evidence has been used in several criminal cases. *See United States v. Marshall*, 132 F.3d 63, 66 (D.C. Cir. 1998); *State v. Gordon*, 234 Ga. App. 551, 507 S.E.2d 269 (1998); *State v. Ware*, 795 So.2d 695, 501 (La. App. 2001); *State v. Harris*, 145 N.C. App. 570, 581, 551 S.E.2d 499 (N.C. 2001).

Schuetz, 44 P.3d at 464.

d. Expert witness unnecessary to establish foundation.

In Kansas, an expert witness was not necessary to establish foundation for caller ID evidence to be admitted at trial. The operation of a caller ID display unit demands only the pressing of arrow buttons. There is no advanced training required for the unit's operation. At this point, caller ID units are very familiar to many people, as is the caller ID function on a cell phone. *Schuetz*, 44 P.3d at 463.

e. Caller ID evidence is not inadmissible hearsay

The *Schuetz* court held that caller ID displays are "merely computer generated read outs and not hearsay statements of persons or electronically regenerated hearsay statements." *Schuetz*, 44 P.3d at 463, *citing Bowe v. State*, 785 So.2d 531, 532 (Fla. Dist. App. 2001). *See also Inglett v. State*, 239 Ga. App. 524, 526, 521 S.E.2d 241 (1999).

f. Admission of caller ID evidence does not violate the best evidence rule

In *Schuetz*, the defense argued that the only proper method of introducing the evidence would be to introduce the caller ID display unit itself. In rejecting this argument, the court found that:

Caller ID displays by their nature are not "recordings upon any tangible thing." The results cannot be printed out or saved on an electronic medium. As the prosecutor noted during arguments prior to trial, "when we unplug it, it's gone." *Schuetz*'s argument is akin to contending that a clock must be produced before a witness can testify as to the time he or she observed an accident.

Schuetz, 44 P.3d at 464.

22. Digital Photography as Evidence at Trial

1. Introduction
2. Police Standards for Photography and Crime Scene Condition
3. The Digital Image
4. Additional Resources

1. Introduction

If done well, photography can be a powerful ally for the presentation of the State's case. Pictures document injuries suffered during domestic abuse. Follow-up photographs taken days after the original event help to document the changing colors and shapes of bruising.

Pictures can also help document the long-term wounds that some victims suffer, such as scars that will never disappear.

Photographs have many other utilitarian purposes. Crime scene photos help to bring the descriptions of police reports to life. Photographs of the suspect may later help to stave off illegitimate claims of self-defense. Photographs can also help police and prosecutors to discern who is the predominant physical aggressor.

2. Police Standards for Photography and Crime Scene Condition

Hopefully, the police agencies in your county have begun to move towards improved investigations in domestic abuse cases. Police agencies should develop guidelines to establish the minimum expectations for their officers; you can work with them to develop best practices. As prosecutors, we get our evidence from the police; therefore, we have a vested interest in their success.

Encourage your officers to incorporate or adopt, at minimum, the following guidelines for photographs and collection of physical evidence:

- Photograph the disarray of furniture, broken windows, damaged walls and other property items on scene. Ideally, evidence such as damaged property, damaged or broken items inside the house, broken telephones, and torn or damaged telephone cords and wires should be photographed at the scene and then taken into evidence and inventoried.

- Photograph the injuries of the victim on the scene whenever there is visible evidence of abuse or injury. Return to re-photograph the victim 24, 48, and even 72 hours later if necessary to document the color and size changes of bruises.
- Photograph and then collect physical evidence such as blood splattered on walls, hair pulled out, fingernails torn out, etc.
- Collect, impound and inventory any item alleged to have been used as a weapon after photographing it at the crime scene.
- Photograph, collect and inventory any phone cords torn out of walls to show evidence of the abuser's attempts to cut off the victim's access and opportunity to seek assistance. Do the same for the telephones.
- Photograph the suspect. A picture may help to establish identity. The picture may thwart a suspect's claim of self-defense. Note that a suspect's appearance at the scene may look different than his/her appearance at trial six months (or more) later.
- Photographs of children present at the scene can help put a face to a voice on a 911 tape or to an excited utterance of "Daddy beat up Mommy."

See generally Casey Gwinn, Prosecuting Domestic Violence Cases without the Victim's Participation or Evidence-based Prosecution (2001) (unpublished conference paper) (on file with National College of District Attorneys).

3. The Digital Image

a. "Digital image" defined

Below are five things to know about digital images and photo technology:

- A digital image is nothing more than a collection of on/off switches, recorded numerically as a series of binary digits (also called "bits"), each digit being either a one or a zero.
- An electronic sensor (in a digital camera or scanner, for example) typically captures the image by means of many light-sensitive picture elements, or pixels, which are individually turned on or off in order to produce a representation of the subject which may be read by a computer, but not directly by humans.
- Thus, the visual information is recorded directly as digital data, without creating an analog representation of the image.
- The resulting array of data may be intended to represent a picture or a written document.
- The digital image may be stored in the short-term memory of a computer, or it may be saved using a flash drive.

b. The digital image: A legal definition

Although the printed data or image may take the form of a photograph, Wisconsin law does not necessarily define it as such. Most likely, a digital “photograph” will be defined as a “writing” or “recording.”

WIS. STAT. § 910.01(1) WRITINGS AND RECORDINGS.

“Writings” and “recordings” consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

WIS. STAT. § 910.01(2) PHOTOGRAPHS.

“Photographs” include still photographs, x-ray films, and motion pictures.

Since a digital “photograph” is nothing more than binary data compiled in a fashion which produces an image recognizable to human beings, it appears to fall within the definition of a “writing” or “recording.”

c. “Originals” vs. “duplicates”

A large reason for the debate surrounding digital photography is because there is no “original” of the image that is comparable, for example, to a negative of a conventional photograph. The argument about digital images relates to their trustworthiness. Any data that is collected can be altered and manipulated, leaving very little indication that the image was, in fact, altered since it was first captured. WIS. STAT. § 910.01(3) appears to address this issue.

WIS. STAT. § 910.01(3) ORIGINAL.

An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

The statute clearly contemplates the use of digital photographs as evidence in criminal and civil cases. Prosecutors should also pay attention to the law regarding duplicates.

WIS. STAT. § 910.01(4) DUPLICATE.

A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

For foundational purposes, make sure that your witness testifies that the photograph or writing or recording is a true and accurate depiction of what that witness personally observed on the date in question. Though the statutory definitions contemplate the admission of digital photographs as “original” “writings” and/or “recordings,” judges are vested with wide discretion and many have their own idiosyncratic formula for admissibility.

As such, every prosecutor should have a working knowledge of the steps taken and equipment necessary to generate, process, store, and reproduce a digital image. A prosecutor equipped with this knowledge will be prepared to provide a basic legal foundation for the image’s admissibility, and should be adequately prepared to survive a defense attorney’s attack upon the reliability of the image.

d. Challenges: Tampering vs. enhancements

Prosecutors also need to be able to differentiate between “tampering” with digital image evidence and “enhancements” made to digital images. Any tampering of digital images to alter WHAT is seen in an image should be strictly forbidden.

Any enhancements of digital images to alter HOW an image is viewed, while not impermissible, should be approached very carefully. This is something that happens regularly, however; for example, we enhance photocopies on a copy machine all the time to make them lighter or darker.

With digital images so easily accessible on computers, enhancements are literally at your fingertips. While minor enhancements may not be technically forbidden, fairness and candor dictate that all enhancements should be carefully noted for courts, juries and the defense. Major enhancements may change the essence of the image and will lead to accusations of tampering with evidence. Get into the habit of relaying information of all digitized enhancements – major or minor – to all of the parties, or, if possible, refrain from making any enhancements in the first place.

Although there are no published Wisconsin cases which discuss the admissibility of digital photographs, a Georgia opinion held there is no difference in foundation between film photographs and digital photographs. *See Almond v. State*, 353 S.E. 2d 803 (Ga. 2001). However, it is suggested that law enforcement maintain a “chain of custody” of the digital photos to eliminate the tampering argument.

4. Additional Resources

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23. Jail Recordings as Evidence at Trial

1. Introduction
2. The Law of Admitting Inmate Jail or Prisoner Recordings into Evidence
3. Legal Challenges and Objections
4. Conclusion

1. Introduction

Jail recordings provide invaluable evidence for prosecutors in domestic abuse cases. The recordings may serve as the basis for a new criminal charge, such as intimidation of a witness, or may contain admissions of guilt by the defendant. The recordings may offer evidence needed to establish forfeiture by wrongdoing to admit testimonial hearsay. For all of these reasons, jail recordings strengthen a domestic abuse prosecution. This chapter provides information on how to admit these recordings as evidence at trial.

2. The Law of Admitting Inmate Jail or Prisoner Recordings into Evidence

Generally speaking, federal law prohibits the “interception” of telephone calls without a particularized court order. 18 U.S.C. § 2510. What is prohibited is the interception of wire communications. An intercept includes acquisition of the contents of a wire communication (or telephone call) through the use of “any electronic, mechanical or other device.” WIS. STAT. § 968.27(9). “Interception” encompasses both the monitoring and recording of telephone calls.

Telephones used by law enforcement in the ordinary course of their duties and where telephone users consent to the recordings, however, are exceptions to the general prohibition.

a. Law enforcement ordinary course of policies and duties

An “interception” is predicated upon the use of an “electronic, mechanical or other device.”

The general rule: Since a phone system used by a law enforcement agency in the ordinary course of its duties does not constitute an “electronic, mechanical or other device,” an “interception” does not occur when the agency or its employees use it to intercept telephone calls on the agency’s telephone lines. *See In re State Police Litigation*, 888 F. Supp. 1235, 1265 (D. Conn. 1995), *aff’d*, 88 F.3d 111 (2d Cir. 1996) (noting that the recording equipment need not be an integral part of the telephone equipment as long as it is permanently attached to the telephone lines and are designed to operate automatically).

Federal courts have interpreted the 18 U.S.C.S. § 2510(5)(a)(ii) prohibition against the unauthorized interception of communications to be inapplicable to law enforcement's interception of inmate calls at correctional institutions in the ordinary course of their duties.

In *Amati v. City of Woodstock*, 176 F.3d 952 (7th Cir. 1999), employees of a municipal police department, along with their friends and families, sued supervisors and the municipality for recording phone calls with the department phone system. The Seventh Circuit held that the recording and monitoring of telephone calls utilizing this phone system fell within the ordinary course of law enforcement exception. *Amati*, 176 F.3d at 955-56. The court reached this conclusion despite the fact that in *Amati*, the police chief had begun monitoring and recording telephone calls on a line that had previously been designated as an unrecorded or unmonitored phone line. *Id.* at 956.

Other state courts have agreed. For instance, the Wisconsin Supreme Court has identified several legitimate reasons that justify a law enforcement agency's decision to record and monitor telephone calls:

Police departments routinely record all incoming and outgoing calls in order to make sure their dispatches are accurate, to verify information, and to keep a log of emergency and non-emergency calls, and this practice is not considered illegal interception or electronic surveillance. . . .

The police have a legitimate need to keep records of calls, and to retain them long enough to log the calls, make notes, and to do whatever else is necessary to preserve important information and to serve the public. . . . The processing of such information is important because, among other things, it tells the department where and how to allocate scarce resources with which to serve and protect the public.

State v. Rewolinski, 159 Wis. 2d 1, at 25 n.9, 464 N.W.2d 401 (1990) (emphasis added; citations omitted). *See also Amati*, 176 F.3d at 954 (recordings may be vital evidence leading to other evidence and also assist law enforcement in evaluating the speed and adequacy of the response of the police to tips, complaints, and calls for both emergency and non-emergency assistance).

The Seventh Circuit's *Amati* decision is consistent with earlier decisions, which upheld the monitoring of inmate telephone calls by prison authorities when they are conducted as part of an institutionalized, ongoing policy at the prison. *See United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989). *See also United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989); FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, § 2:40 (2d ed. 1995); *In the Interest of J.A.L.*, 162 Wis. 2d 940, 971 n.8, 471 N.W.2d 493 (1991) (dictum) (noting case law in other jurisdictions that upheld monitoring of telephone calls in the jail setting).

Of particular note in this regard is the opinion in *Feekes*, wherein the Seventh Circuit, after expressing “apprehension” over the “implied consent” reasoning in *Amen*, nonetheless found that the 18 U.S.C. § 2510(5)(a)(ii) exception was “clearly satisfied.” *Feekes*, 879 F.2d at 1565. In so doing, the court placed emphasis on the fact that the monitoring was a “routine procedure” at the prison. *Id.* at 1566. The court in *Crooker* also stressed that fact, finding in that case that “there is no evidence in the record . . . that the monitoring of calls is anything but routine and random and for the sole purpose of ensuring the security and orderly management of the institution.” *Crooker v. U.S. Dept. of Justice*, 497 F.Supp. 500, 503 (D. Conn. 1980).

Monitoring of inmate calls at jail and prison facilities will presumably be carried out in a systematic, ongoing, consistent fashion, pursuant to published rules or policies and procedures that have been communicated to the inmates. As a result, the monitoring of inmate telephone calls should not be prohibited by either federal or state law governing electronic surveillance.

b. Consent

i. State law

In *State v. Riley*, 2005 WI App 203, 287 Wis. 2d 244, 704 N.W.2d 244, the Wisconsin Court of Appeals reviewed a motion to suppress electronic surveillance evidence consisting of recordings of outgoing telephone calls that the defendant placed from jail. Typically, one-party consent recordings are legally recorded by the consenting party based upon WIS. STAT. § 968.31(2)(c), which states the following:

It is not unlawful under sections 968.28 to 968.37 . . . for a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the constitution or laws of the United States or of any state or for purposes of committing any other injurious act.

WIS. STAT. § 968.31(2)(c).

In reviewing the applicability of the Wisconsin Electronic Surveillance Control Law (WESCL) to in-custody jail calls, the court in *Riley* held that the inmate consented to the monitoring and recording of his outgoing telephone calls, and thus the interception of the inmate’s communications was lawful under the one-party consent exception in the WESCL. *Riley*, 287 Wis. 2d at 255.

ii. Federal law

The federal wiretap statute provides that “it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given

prior consent to such interception.” 18 U.S.C. § 2511(2)(c) (1970). Wisconsin’s electronic surveillance statute contains, in pertinent part, virtually identical language. WIS. STAT. § 968.31(2)(b).

The second exception to the general prohibition is the interception of telephone calls where one of the parties to the conversation consents to the interception. Federal courts that have considered this question have reached varying results. The greater weight of the authorities, however, indicate that those inmates at correctional facilities who use the telephones after the notification procedures (described below) are implemented will be found to have implicitly consented to the monitoring and taping of their telephone calls.

The general rule in the federal courts appears to be that “consent to interception of a telephone call may be inferred from knowledge that the call is being monitored.” *U.S. v. Gomez*, 900 F.2d 43, 44 (5th Cir. 1990). This reasoning has been applied in a variety of situations. For instance, in *Griggs-Ryan v. Smith*, 904 F.2d 112 (1st Cir. 1990), the court inferred that the defendant knowingly agreed to the tape recording of his telephone call based upon evidence that he had repeatedly been advised that all incoming telephone calls were recorded. In the words of the court, “his consent, albeit not explicit, was manifest. No more was required.” *Id.* at 118.

In *U.S. v. Amen*, 831 F.2d 373 (2d Cir. 1987), the court addressed the issue within the context of the monitoring of prison inmates’ telephone calls. In *Amen*, the court found that inmates did give their implied consent to the monitoring and taping of their telephone calls.

In so doing, the court relied upon the following facts:

- Notice of the monitoring policy was published in the Code of Federal Regulations;
- Upon first arriving at the penitentiary, and after absences of nine or more months, all inmates had to attend a lecture in which the monitoring and taping policy was discussed;
- Every inmate received a handbook which explained the monitoring and taping procedures;
- Every telephone had placed on it, in English and Spanish, a notice of the monitoring and taping procedures.

Based upon these circumstances, the court found that the inmates “had notice of the interception system and that their use of the telephones therefore constituted implied consent to the monitoring.” *Amen*, 831 F.2d at 379.

The notification procedures relied upon in *Amen* are virtually identical to Milwaukee County Correctional Facility policies and procedures. If anything, the Milwaukee procedures appear to go further than those in *Amen* in that they require that each inmate be asked to sign a written notice form that explains the monitoring procedures. (Note that whether or not the inmate actually signs the form would be irrelevant to the *Amen* court, for even a refusal to sign it

provides further evidence that the inmate is aware of the monitoring procedures. *Id.*) You should, of course, familiarize yourself with the notification procedures at the jail in your county.

The decision in *Amen* has been applied to several other cases involving the interception of inmate telephone calls. *See, e.g., U.S. v. Montgomery*, 675 F. Supp. 164 (S.D.N.Y. 1987); *U.S. v. Willoughby*, 860 F.2d 15 (2d Cir. 1988).

Nevertheless, some courts adopt a stricter definition of “consent.” Most notable among these is the Seventh Circuit, which, in *U.S. v. Feekes*, found the ruling in *Amen* “troubling.” *Feekes*, 879 F.2d at 1565. While not reaching the issue of whether consent actually occurred in *Feekes*, the court nonetheless expressed “apprehension” over the broadly defined concept of implied consent exhibited in *Amen*. *Id.*

This apprehension was articulated by another federal court in *Crooker v. U.S. Dept. of Justice*, 497 F. Supp. 500 (D. Conn. 1980). In *Crooker*, the court held that prisoner consent to the monitoring of telephone calls could not be implied despite the fact that all prisoners received a copy of the monitoring policy and that all telephones carried stickers notifying inmates of the monitoring and advising them that “use of the institutional telephones constitutes consent to this monitoring.” *Crooker*, 497 F. Supp. at 502. The *Crooker* court apparently rejected the idea of implied consent, arguing that even if the inmates had actual knowledge of the monitoring, their consent could not be inferred. *Id.* at 503.

Thus, the federal courts are somewhat divided over the issue of what constitutes “consent” under 18 U.S.C. § 2511(2)(c). It is, therefore, impossible to predict with complete certainty how future courts will deal with the prisoner notification procedures. The general view tends to support the belief that prisoners using the telephones under these circumstances will be found to have consented to the monitoring. The Seventh Circuit’s dicta in *Feekes*, however, suggests that each individual case of “implied consent” will be closely scrutinized. *Feekes*, 879 F.2d at 1565.

In contrast to the relatively uncertain state of the “one-party consent” exception, the second relevant exception to the state and federal wiretap statutes seems to clearly apply in this situation. 18 U.S.C. § 2510(5)(a)(ii) exempts from the wiretap statute “any telephone or telegraph instrument, equipment or facility, or any component thereof . . . used . . . by an investigative or law enforcement officer in the ordinary course of his duties.” WIS. STAT. § 968.27(10) defines “[i]nvestigative or law enforcement officer” to mean “any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses enumerated in ss. 968.28 to 968.37.” *See also* 18 U.S.C. § 2510(7). The warden and correctional staff acting under the warden’s direction would fall within this definition. *See* WIS. STAT. § 302.07; 68 Op. Att’y Gen. 352 (1979); 46 Op. Att’y Gen. 280 (1957).

Wisconsin’s electronic surveillance statute contains a virtually identical provision. WIS. STAT. § 968.27(7)(a)(2). The published cases appear to be unanimous in holding that the systematic interception and recording of inmate telephone calls, provided that it is done pursuant to an institutionalized, ongoing policy at the prison, fall under the 18 U.S.C. § 2510(5)(a)(ii)

exception. *See, e.g., U.S. v. Sababu*, 891 F.2d 1308 (7th Cir. 1989); *Crooker v. U.S. Dept. of Justice*, 497 F. Supp. 500; *U.S. v. Feekes*, 879 F.2d 1562. *See also In the Interest of J.A.L.*, 162 Wis. 2d 940, 471 N.W.2d 260 (noting that monitoring of an in-person conversation between a juvenile prisoner and a visitor at a juvenile detention facility (secure custody facility) might not violate WIS. STAT. §§ 968.27-.31 because the institution's need for security and safety sometimes outweighs an individual's right to privacy).

A new study uses – for the first time – recorded jailhouse telephone conversations between men charged with felony domestic abuse and their victims to help reveal why some victims decide not to follow through on the charges. The analysis of these conversations may fundamentally change how victim advocates and prosecutors work with domestic violence victims to prosecute abusers, according to the researchers. The results of this study show how emotion-based techniques of abusers may make it difficult for some victims to disentangle themselves from violent relationships. The Ohio State University, RESEARCH, *available at* <http://researchnews.osu.edu/archive/vicrecant.htm>.

3. Legal Challenges and Objections

a. Law enforcement agencies are not required to provide an unmonitored and unrecorded telephone for the general public and persons who are in custody.

Neither the Omnibus Crime Control Act of 1968 nor Wisconsin's electronic surveillance laws require a law enforcement agency to provide an unmonitored line for the use of its employees, the general public, or persons in custody. The Seventh Circuit has previously rejected this argument. *See generally Massey v. Wheeler*, 221 F.3d 1030 (7th Cir. 2000).

In *Amati*, the employees and members of the public whose calls had been recorded had previously been told that the line on which their conversations were recorded would in fact not be subject to monitoring or recording. Unbeknownst to those telephone users, the police chose to activate the recording equipment on that line. Despite the lack of notice, the Seventh Circuit held that the recording of all conversations on the previously unmonitored line fell within the ordinary course of law enforcement exception to Title III. *Amati*, 176 F.3d at 955-56. Title III of the Omnibus Crime Control and Safe Streets Act, or the "Wiretap Act," establishes the procedures necessary to obtain warrants that authorize wiretapping by government officials. 18 U.S.C. §§ 2510-22.

b. Law enforcement agencies are not required to provide notice of any specific time when calls will be monitored or recorded in the ordinary performance of their duties.

While a law enforcement agency has no obligation to notify telephone users that agency telephones are subject to monitoring, it may be a good practice for the agency to notify employees of the telephone system's monitoring capabilities.

For example, suppose a health care provider contacts an agency employee to discuss sensitive health-related information with the employee. Information concerning an employee's physical or mental well-being under these circumstances is privileged. By advising employees that telephone calls on agency telephones are subject to interception, employees can make informed decisions about whether to engage in potentially privileged conversations on agency telephones.

Similarly, a citizen visiting a law enforcement agency may request to use a telephone to consult with an attorney. The conversation between the attorney and the citizen is privileged. By alerting citizens that agency telephones are subject to interception, the citizen may take appropriate steps to avoid discussing privileged matters with his or her attorney. *But see In re State Police Litigation*, 888 F. Supp. at 1266 (suggesting liability where no notice is given and privileged or private telephone calls are recorded).

c. Courts recognize a separate and distinct exception to the wiretap laws where a party to a conversation has notice that the conversations may be recorded.

When the recording of a conversation between at least one person who has notice of a recording occurs, such monitoring may constitute implied consent and is a separate exception to the general prohibition against intercepting telephone calls under both state and federal law. *See* §§ 968.31(2)(b); (c). *See also* 18 U.S.C.S. § 2511(2)(c); *Amati*, 176 F.3d at 955. *But see Subabu*, 891 F.2d at 1329 (questioning the applicability of the implied consent theory to the monitoring of prison phone calls).

d. Equal protection claims

Inmates may attempt to bring equal protection claims. Because there are no constitutionally protected classes or fundamental rights involved, a law enforcement agency must only have a "rational reason" for monitoring telephone calls at jail or prison facilities.

Equal protection of the law is denied only when government officials make irrational classifications. There must be a reasonable basis which justifies the differences in rights afforded. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

Whether the monitoring protocol is established as a rule or as an institutional policy, that document should explain why telephone monitoring is necessary at the facility. In Wisconsin, Wis. Admin. Code § DOC 309.60 recognizes that different institutions may require different telephone procedures, because "each institution has unique physical structure, resources, security concerns, and staffing patterns."

e. Attorney phone calls

As a practical matter there may be problems with screening out attorney calls and ensuring that they are not monitored or taped. It may be difficult to determine whether the caller or the recipient of a call is truly an attorney. Careful attention should be directed to procedures for screening attorney calls which keep controversies to a minimum and which do not include initial monitoring of the telephone calls to determine if they are legal in nature. *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991), says that prison authorities may not monitor a prisoner's telephone conversations with an attorney if it would substantially interfere with the prisoner's right to counsel.

f. Constitutional rights challenges

Additional constitutional challenges to telephone monitoring could be raised. The courts, however, seem virtually unanimous in their holding that the interception of telephone calls does not infringe on inmates' constitutional rights.

While inmates have raised both Fifth and Sixth Amendment challenges (all dismissed), the most often recurring challenge is that the Fourth Amendment's protection against unreasonable search and seizure is violated by such monitoring. Without launching into exhaustive detail, it can be said with confidence that courts have uniformly rejected such claims. *See, e.g., United States v. White*, 401 U.S. 745 (1971); *United States v. Proctor*, 526 F. Supp. 1198 (D. Hawaii 1981); *U.S. v. Willoughby*, 860 F.2d 15 (2d Cir. 1988); *U.S. v. Montgomery*, 675 F. Supp. 164 (S.D.N.Y. 1987).

g. Differences between felony and misdemeanor cases in some jurisdictions

In some states, such as Wisconsin, communications intercepted lawfully but without a court order, pursuant to WIS. STAT. § 968.30, are not admissible in criminal court except in a proceeding where a person is accused of a felony under chapter 961 (controlled substances violations). *See* WIS. STAT. § 968.29. *See also State ex rel. Arnold v. County Court*, 51 Wis. 2d 434, 187 N.W.2d 354 (1971); *State v. Smith*, 72 Wis. 2d 711, 242 N.W.2d 184 (1976); *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W.2d 147 (1978). However, if the exception under WIS. STAT. § 968.27(7)(a)(2) applies, as discussed above, then the monitoring is not an interception under WIS. STAT. § 968.27(9) and this prohibition against admissibility may not apply.

4. Conclusion

This chapter provides the legal analysis that you need to admit jail recordings into evidence. The greatest practical difficulty is not admitting the recording; instead, the problem is combing through hours of recordings to locate the few minutes needed to strengthen the prosecution. You should work with your county jail and local law enforcement departments to develop a plan to

review jail recordings as often as possible given scarce resources. Although listening to recordings in every case may not be feasible, you should consider preserving the recordings in all cases. The investigating officer – or sometimes you as the prosecutor – then has the evidence preserved to review prior to trial. Listening to these recordings increases your chances of success at trial and may even save you time because many formerly defiant defendants plead guilty after learning that you intend to introduce evidence of his or her admission to the crime on a jail recording.

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24. Charts and Demonstrative Evidence at Trial

1. The Law Governing the Use of Charts in Trial
2. *State v. Olson*, 217 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998)
3. Demonstrative Evidence

1. The Law Governing the Use of Charts in Trial

a. WIS. STAT. § 910.06 Summaries

WIS. STAT. § 910.06 states that the contents of “voluminous writings,” recordings, or photographs, which cannot be conveniently examined in court, may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court. *See City of Menomonie v. Evensen Dodge, Inc.*, 163 Wis. 2d 226, 237-38, 471 N.W.2d 513, 517-18 (Wis. Ct. App. 1991).

b. WIS. STAT. § 906.11(1) Mode and order of interrogation and presentation

WIS. STAT. § 906.11(1) CONTROL BY JUDGE.

The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

- a. Make the interrogation and presentation effective for the ascertainment of the truth.
- b. Avoid needless consumption of time.
- c. Protect witnesses from harassment or undue embarrassment.

As described above, both the statutes and the case law support the judge’s discretion in admitting summaries or charts in court. *See Evensen Dodge, Inc.*, 163 Wis. 2d at 237-38, 471 N.W.2d at 517-18.

2. *State v. Olson*, 217 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998)

In *State v. Olson*, 217 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998), the Wisconsin Court of Appeals grappled with the issue of the admissibility of charts. In that case, two defendants were

charged with multiple counts of sexual assault. The Court of Appeals set out the standard of review as follows:

Whether to admit or exclude evidence is within the trial court's sound discretion. *State v. Clark*, 179 Wis. 2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We will affirm the trial court's decision to admit evidence if the decision has a reasonable basis and was made in accordance with the facts of record and accepted legal standards. *Id.* These standards apply to a trial court's discretionary decision to admit a summary chart, whether under § 910.06, Stats. (see *United States v. Winn*, 948 F.2d 145, 157-59 (5th Cir. 1991) (stating standard of review regarding admission of chart under Fed. R. Evid. 1006), or under § 906.11(1), Stats. (see *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (stating standard of review regarding admission of chart under Fed. R. Evid. 611(a)(1))).

“Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling.” *Clark*, 179 Wis. 2d at 490, 507 N.W.2d at 174. If the trial court reaches the right result in admitting evidence but articulates the wrong legal rationale for doing so, we must affirm the admission of evidence. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

Olson, 217 Wis. 2d at 737.

a. “Summary evidence” under Wisconsin Statute § 904.06 or “pedagogical devices”

In *Olson*, the Court of Appeals also discussed the differences between summary exhibits and pedagogical devices:

[A]lthough the chart in this case was not a summary exhibit constituting evidence under § 910.06, Stats., it qualified as a “pedagogical device” summarizing and organizing admitted evidence, under § 906.11(1), Stats. See 6 Jack B. Weinstein and Margaret A. Berger, Weinstein's Federal Evidence, § 1006.08[4] (1997).

Courts and commentators have differed over whether such “pedagogical devices,” in addition to being appropriate for use by counsel during trial, are also admissible. Compare *Winn*, 948 F.2d at 158-59, with *United States v. Johnson*, 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995). Even experienced litigators could disagree. Some, perhaps, might argue that the better approach is to admit such exhibits lest a jury be confused by the legalistic distinction between admitted and unadmitted exhibits used throughout a trial. Others, however, might maintain that the distinction between admitted and unadmitted exhibits can be important, and that the significance of that distinction is not lost on a jury

properly instructed by a judge. Most probably would agree, however, that in most cases whether such charts ultimately are admitted usually is far less important than the manner in which they are prepared, the care with which the trial court monitors their use, the accuracy of jury instructions regarding their content, and the fairness of any decision allowing their submission to the jury.

We conclude that no “hard and fast” rule controls whether pedagogical devices are admissible. Indeed, the split in the federal circuits suggests that strong reasoning supports the arguments on both sides and, not surprisingly, the district court decisions often seem to turn on the facts of each case. Thus, we conclude that the admissibility of pedagogical devices, under § 906.11(1), Stats., remains within the trial court’s discretion. In this case, concluding that it was “arguably essential to the jurors in sorting things out,” the trial court reasonably exercised discretion in admitting the chart.

Olson, 217 Wis. 2d at 739-40.

In footnote three of the opinion, the Wisconsin Court of Appeals suggested further information could be obtained from the following source: Emilia A. Quesada, Comment, *Summarizing Prior Witness Testimony: Admissible Evidence, Pedagogical Device; Violation of the Federal Rules of Evidence*, 24 FLA. ST. U.L. REV. 161 (1996). *Olson*, 217 Wis. 2d at 745, fn. 3.

b. Defense’s opportunity to use summary evidence and pedagogical devices

Again in the *Olson* case, the Court of Appeals discussed the ability of defense counsel to also add to, subtract, delete, correct, and otherwise edit the submission of the summary exhibit or pedagogical device introduced by the State at trial:

Olson argues, however, that “[o]nce the marks were placed by the prosecutor, effective cross-examination was eliminated. . . . There was simply no way for defense counsel to cross-examine any witness on the check marks, because the check marks were not the testimony of the witness.” We disagree. Counsel could cross-examine each witness. Indeed, if cross-examination gained a concession or recantation from a witness, counsel could have crossed out a check mark or added some other mark to the chart to so indicate. See [*United States v.*] *Johnson*, 54 F.3d [1150, 1160 (4th Cir. 1997)] (“Appellants asked numerous specific questions about the credibility of the underlying testimony summarized in the chart and were allowed to make marks on the chart where they thought a portion of the chart reflected a credibility issue.”).

Olson, 217 Wis. 2d at 741.

c. The interplay of Wisconsin Statutes §§ 910.06 and 906.11

In its conclusions in the *Olson* decision, the Wisconsin Court of Appeals reiterated its conclusion that the trial court has discretion to admit summary exhibits under WIS. STAT. § 910.06 and pedagogical devices under WIS. STAT. § 906.11:

[W]e conclude that the admission of the chart was within the trial court's "exercise [of] reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth," under § 906.11(1), Stats. This becomes all the more apparent when we consider the trial court's cautionary jury instruction. See *Winn*, 948 F.2d at 158 (harmful effect of potentially prejudicial summary chart evidence neutralized by proper cautionary instruction).

Olson, 217 Wis. 2d at 742.

d. Jury instructions

The Court of Appeals discussed the cautionary instruction given by the trial court with approval, stating:

Juries are presumed to follow proper, cautionary instructions. See *State v. Leach*, 124 Wis. 2d 648, 673, 370 N.W.2d 240, 253-54 (1985). Whether a jury instruction is an accurate statement of the law presents a question of law we review *de novo*. See *State v. Neumann*, 179 Wis.2d 687, 699, 508 N.W.2d 54, 59 (Ct. App. 1993). "[T]he proper standard for Wisconsin courts to apply when a defendant contends that the interplay of legally correct instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution." *State v. Lohmeier*, 205 Wis. 2d 183, 193, 556 N.W.2d 90, 93 (1996). As noted, the trial court instructed the jury, in part:

You observed the manner and way in which the State proceeded with the use of this exhibit, but it is the evidence that controls, and it is your recollection of the evidence that controls, and you should only rely on any summary to the extent that it's consistent with your recollection and to the extent that you feel it accurately and properly summarizes or reflects evidence that you have heard in the case.

Olson offers no authority that this instruction is legally inaccurate in any way and, indeed, the trial court's instruction is similar to those which courts have approved in cases involving comparable charts. See *Winn*, 948 F.2d at 157-58 n.30; see also *Johnson*, 54 F.3d at 1160. We conclude that it is a clear and accurate instruction.

Olson, 217 Wis. 2d at 742-44.

In footnote four of the opinion the Court of Appeals cited *United States v. Johnson*, 54 F.3d 1150, 1159 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995):

[T]he concern is not so much with the formal admission as it is with the manner in which the district court instructs the jury to consider the chart. Whether or not the chart is technically admitted into evidence, we are more concerned that the district court ensure the jury is not relying on that chart as “independent” evidence but rather is taking a close look at the evidence upon which that chart is based.

Olson, 217 Wis. 2d at 745, fn. 4.

In footnote six of the opinion, the Court of Appeals suggested that trial courts give limiting instructions to jurors who are asked to consider summary evidence and/or pedagogical devices in their deliberations:

See United States v. Howard, 774 F.2d 838, 844 n.4 (7th Cir. 1985) (“[W]hen a trial court authorizes the use of such charts as a teaching device rather than as substantive evidence under Rule 1006, the preferred practice would be for the court to give a limiting instruction regarding this purpose.”). *See also United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (“With due regard for the possibility that the jury would accept such summaries [admitted under Fed. R. Evid. 611(a)(1)] as documentary fact, the trial court repeatedly reminded the jurors of their responsibility to determine whether the charts accurately reflected the evidence presented,” and the trial court did not err in allowing “the properly admitted summary charts into the jury room during deliberations.”).

Olson, 217 Wis. 2d at 745, fn. 6.

3. Demonstrative Evidence

Demonstrative evidence may be used if the exhibit will assist in explaining the testimony of the witness by visual augmentation. WIS. STAT. § 906(11)(1)(a). It may be admissible if it would help the jury understand the witness’ testimony. *State v. Gribble*, 248 Wis. 2d 409, 636 N.W. 2d 488 (Ct. App. 2001.)

In *Roy v. St. Luke’s Medical Center*, 2007 WI App 218, 305 Wis. 2d 658, 741 N.W.2d 256, the Wisconsin Court of Appeals allowed an expert to use a computer-generated animation to illustrate his opinion.

However, in *State v. Denton*, 319 Wis. 2d 718, 768 N.W.2d 250 (Ct. App. 2009), the Court of Appeals reversed a conviction because of a lack of notice and foundation. The court stated that with the proper foundation, the computer-generated animation could have been introduced by the lay witness “just as any diagram or photo.” *Denton*, 319 Wis. 2d at 736.

Furthermore, *Denton* also said that, like any other evidence, the probative value of computer-generated animation must not be substantially outweighed by its prejudice to the defendant if the evidence is to be admitted. *Id.* at 259.

25. Reluctant Victims: Strategies to Effectively Prosecute and Win the “Recanting Victim” Trial

1. Introduction
2. The Recanting Victim
3. Framework for Pursuing the Recanting Victim Case
4. *Voir Dire*
5. Direct Examination of the Victim
6. Additional Applicable Rules of Evidence
7. Recanting Themes
8. Post-incident Actions of the Victim
9. Legal Challenges and Expert Witnesses
10. The Prosecutor’s Demeanor

1. Introduction

The phenomenon of the “recanting victim” frustrates every domestic abuse prosecutor. If you are new to domestic abuse cases, it will not be long before you encounter a victim who insists that he or she was not actually abused and that the statements attributed to that person in the police reports are incorrect, inaccurate or simply “lies.”

As prosecutors, we regularly handle cases where we rely on a victim as our key witness. Such cases present us with a pretty straightforward strategy: 1) elicit testimony from the victim; 2) introduce any and all corroboration, if it exists; and 3) argue credibility, truthfulness and reliability.

However, when a victim of domestic abuse recants, that strategy is turned upside-down. The prosecution’s key witness now appears to be the key witness for the defendant.

Domestic abuse is the only area of criminal law where, with some degree of regularity, the witness’ statement suddenly changes after the police complete their investigation. While frustrating, it is a reality that repeats itself with some frequency.

2. The Recanting Victim

How do prosecutors deal with this challenging situation? A conscientious prosecutor must first consider the possibility that the victim's new version is the truth. If the victim's new version is supported by the facts (or even by common sense), a motion to dismiss the case should follow.

However, more often than not, the victim's new version is not the truth. Usually, a victim has other reasons for recanting. For instance, perhaps the victim relies on the defendant for financial support or childcare. The defendant may have threatened, as one example, to "cut off the money" unless the victim "drops the charges."

Worse yet, the defendant may have threatened to harm the victim, his or her children, or other family members.

As a matter of sound public policy, we should not – and cannot – allow our prosecutorial decisions to be manipulated by defendants preying upon a vulnerable victim. A prosecutor interested in increased offender accountability and protection of the public should never move to dismiss a criminal case simply because a victim recants.

In fact, we can easily conclude that dismissal under manipulative circumstances actually encourages abusers to continue to intimidate their victims in the future. A dismissal may perpetuate abuse.

3. Framework for Pursuing the Recanting Victim Case

Choosing to continue the prosecution of a domestic abuse case with a recanting victim requires courage. You may face criticism from the judge, the defense attorney, law enforcement, the victim, and even, sadly enough, from some of your colleagues.

As prosecutors, we are interested in curbing future manipulative and criminal behavior. Some critics might argue that, given limited office resources, a prosecutor should not take a case to trial where the only witness to the incident now claims that no crime occurred. However, take a moment to view the situation from a different angle.

In a typical case, prosecutors present testimony from the victim. Then testimony from other witnesses or other evidence that corroborates and supports the victim's testimony is presented. Prosecutors must link all of the evidence together, build a case that is strong enough to withstand strikes from opposing counsel, and meet the "beyond a reasonable doubt" standard of proof. Opposing counsel may vigorously cross examine or present evidence to attempt to poke holes in or destroy the State's case.

Yet, perhaps somewhat surprisingly, prosecutors frequently succeed in building the recanting victim case. Why? Usually these cases succeed because sufficient evidence to build the case exists, and because the case has arisen from the truth. Prosecutors frequently prevail at recanting

victim trials because they have sufficient evidence to build a case that withstands all attempts to knock it down.

Remember that the recanting stories given by victims do not usually arise from the truth. Rarely does any corroboration exist to support the recantation. Recantations usually lack any firm foundation in fact, and they typically tumble like a house of cards when subjected to attack.

When a victim's recantation collapses, the fact that the victim felt the need to create a story at all will go a long way in convincing a jury that the original allegations are true. In effect, the State's case is built atop the rubble left behind by the story put forth by the victim at trial.

Trials involving recanting victims are particularly unique at two stages: *voir dire* and direct examination of the victim. This chapter will address each of these stages and provide tools for prosecutors to use during these stages to maximize their chances of prevailing at trial.

4. *Voir Dire*

Voir dire is an opportunity to educate the jury about domestic abuse in general.

Prosecutors must not simply view *voir dire* as the stage of the trial during which they can locate potential jurors who should be stricken. *Voir dire* is the time when the jurors who will ultimately decide the case first begin to formulate ideas about the case they are about to hear.

Prosecutors must seize this opportunity to educate the jury from the perspective of the prosecution. This is especially true in cases involving recanting victims, where twelve people are about to hear a criminal case in which the primary witness is going to testify that no crime occurred.

As a prosecutor, you do not want to address a recantation for the first time in your opening statement. If you do, it's too late. A recantation must be addressed at the earliest possible point in the trial, i.e. during *voir dire*.

Sample Questions: During *voir dire* in recanting victim cases, probe the opinions of potential jurors. Below are some suggestions.

- Does everyone understand that the State of Wisconsin is bringing this case against the defendant for violating the laws of the State of Wisconsin? That this is not a civil case where one person files a case against another for the purpose of obtaining a monetary judgment?
- How many of you believe that the State has a responsibility to prosecute people who commit domestic abuse crimes, even when the victim does not want the State to prosecute?
- How many people here think that if a domestic abuse victim asks that the charges be dropped, the State should automatically drop the charges without considering the safety of the victim or the kids in the relationship?

- How many people here think it is possible for a victim to still care for an abuser even after he/she has abused him/her?
- How many people here think that a victim might feel that he/she cannot testify against the abuser out of loyalty? How about out of fear? Out of love?
- How many people here think that it is possible for an abused victim to believe that he/she did something to deserve being battered?
- If the evidence in this case demonstrates in your mind, beyond a reasonable doubt, that the defendant committed the crime he/she has been charged with, is there anybody here who will vote “not guilty” solely because the victim testifies in support of the defendant?

5. Direct Examination of the Victim

During direct exam of a recanting victim, prosecutors are placed in the uncomfortable position of cross-examining their primary witness.

a. The law

Testimony from a recanting victim during the State’s case-in-chief is useless unless the original statements the victim made to the investigating officers are admitted into evidence. A prosecutor can negotiate through this obstacle with knowledge of only one statute and two Wisconsin Supreme Court cases.

WIS. STAT. § 908.01(4)(a)1. governs the use of prior inconsistent statements:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant’s testimony.

According to the Wisconsin Supreme Court, a prior inconsistent statement is admissible as substantive evidence so long as the witness is available for cross examination. *See Vogel v. State*, 87 Wis. 2d 541, 548-49, 275 N.W.2d 180, 184 (Ct. App. 1979) (citing *Gelhaar v. State*, 41 Wis. 2d 230, 242, 163 N.W.2d 609, 615 (1969)). Thus, once the victim makes a statement that is different from one he or she made previously, the prior statement can be introduced as substantive evidence of guilt.

An obvious potential loophole to this rule is for a victim to simply state that he or she does not recall the events in question. In *State v. Lenarchick*, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), the Wisconsin Supreme Court held that “where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement’s admission into evidence.” *Lenarchik*, 74 Wis. 2d at 436.

Caution: A defendant may or may not have a valid Sixth Amendment confrontation objection if the witness is forgetful, whether such forgetfulness is legitimate or not. *See Crawford v. Washington*, 541 U.S. 36 (2004). However, the prosecutor should argue that the statements are nevertheless admissible. The prosecutor has a good faith basis to proceed if the court allows the prior statement into evidence; this issue has yet to be decided by a higher court in Wisconsin.

Often, the circumstances surrounding many domestic abuse relationships – i.e., power and control – are enough for the prosecution to expose a “feigned” lack of memory. Consider that the victim may have called the police or, at the very least, spoken with police officers. If a trial is held within a few months of the incident, it is implausible that the victim would have no recollection of the event. To the contrary, the events leading up to an explosive episode of domestic abuse are not frequently forgotten by most victims.

Under different circumstances, where a credible claim of intoxication or some other factor causing lack of recollection exists, the fact that this recollection is feigned may be established by demonstrating “selective” memory on the part of the victim. If the victim is seeking to thwart the prosecution, he or she will likely testify regarding portions of the incident that support the defendant’s innocence. Should the victim remember only the exculpatory portions of the case while failing to recall the inculpatory facts, a strong argument can be made that his or her lack of memory is feigned.

Obtain any statements written by the victim and submitted to the court in support of a petition for a temporary restraining order. The statements may be prior consistent statements admissible pursuant to WIS. STAT. § 908.01(4)(a)2., or prior inconsistent statements admissible pursuant to WIS. STAT. § 908.01(2)(a)1.

Use any statements written by the victim during the investigation. Many police agencies use a domestic abuse worksheet to aid the victim in making a report. This document often proves invaluable to impeach a recanting victim at trial. Encourage law enforcement officers to have victims fill out the worksheets themselves whenever possible to avoid the claim of “the officer got it wrong” or “the officer lied.” Appendix 4 provides a sample worksheet.

b. Sample direct examination questions for recanting victim

Remember your purpose: Laying a foundation for argument of the recanting themes.

The following is a list of questions for use with recanting or reluctant victims. These questions were compiled from, or based upon, a published list from John W. Witt, Susan M. Heath, Gael B. Straek, Kathleen P. Finley, and Claudia Gacitua Silva, “Cross Examination Questions for a Recanting, Minimizing and/or Reluctant Victim,” San Diego City Attorney’s Office / Domestic Violence Unit (April 7, 1995). *See also* Charles G. Reynard, *The Violence Stops Here* (Jan. 1999). Both works are excellent outside resources.

Establish the relationship:

- The person seated at the table in front of you is your husband? Boyfriend? Father of your child? (Etc.)
- When did you get married?
- How long have you known the defendant?

Establishing the familial relationships and identifying family pressure:

- Are you close with members of the defendant's family?
- Do you respect them? Get along with his/her mother? Father?
- Have you discussed this case with any members of his/her family?
- Have any of them told you that you should "drop the charges"?
- How did you get to court today?
- Are (the people in court or the people sitting with victim in the hallway) the defendant's family or friends?
- Did you all come together to court today?
- How will you get home from court today?

Identifying potential pressure from the defendant:

- You live with the defendant? At the time of the incident were you living with the defendant?
- Have you spoken to the defendant since the incident?
- Did you separate from the defendant since the incident or have you been living continuously with the defendant since this incident?

Children and their relationship with the defendant:

- Do you have children? Any children with the defendant?
- What are their names? Ages?
- Do they miss [the defendant]? Love [the defendant]?

Levels of financial dependence:

- Are you currently working outside of the home?
- When is the last time you were employed outside of the home?
- What was the nature of that employment?
- Do you feel you could support your family with that type of employment today?
- (If working at time of the beginning of relationship) Did the defendant ask you to quit work and stay home?
- Is the defendant employed?
- Does he/she make more money than you do?
- Are you worried he/she might lose his/her job if convicted?

- Do you have a mortgage payment each month?
- Who is responsible for making the mortgage/rent payment? Who pays for the groceries? Utilities?
- Does the defendant's family help with any financial assistance to pay the bills?

Determine dominance in the relationship through decision-making:

- How do you and the defendant share responsibilities in the home?
- Who takes care of the children and the house?
- Who takes care of the finances? The defendant?
- Does the defendant make the bank deposits and withdrawals?
- Do you have a credit card in your name? Checking account in your name? A way to make withdrawals from a joint account?
- Does the defendant decide how money will be spent?
- Does the defendant decide how the children will be disciplined?
- Does the defendant typically decide when the family will go out for social events?
- Does the defendant complain that you spend too much time with your friends and/or relatives?
- Does the defendant have the last word about making decisions about the household/your relationship?
- Is it fair to say that the defendant is the "man of the house"?
- Is it fair to say that the defendant is the dominant one in the relationship?

Prior history of arguments (be mindful of WIS. STATS. § 904.04(2) OTHER ACTS):

- Have the two of you had arguments or disagreements in the past?
- What are these arguments normally about?
- Does the defendant yell at you (or call you names) during these arguments?
- Does the defendant raise his/her voice? Throw things? Break things? Get really angry? Scare you?
- What usually happens after an argument? How long after an argument do you normally make up?
- Does the defendant apologize? Does he/she sometimes blame you for starting the fight?
- Does the defendant have a hard time saying he/she is sorry?
- Does the defendant admit when he/she is wrong?

The incident:

- You had an argument with the defendant on (date)? That occurred at (location) (venue)?
- Who was present during this argument?
- Were any kids present?

- Was the defendant intoxicated? Were you intoxicated? What were the two of you drinking?
- Was he/she angry? How could you tell?
- Did the defendant raise his/her voice?
- And he/she got so upset that at one point he/she (describe battery: hit, punched, pushed, strangled, kicked, etc.) you?
- Ask for additional detail about this part of the event: i.e., he/she hit you in what part of your body? Right or left side? With what part of the defendant's body did he/she hit you? Open or closed hand? Etc.

Police intervention – the 911 call:

- The police were called?
- Play 911 tape.
- That is (you) (son or daughter) (neighbor) on the 911 tape?
- (You) (Child) (Neighbor) know(s) that 911 is only for emergencies?
- Officers responded within X minutes of the call?
- Do you respect police officers? You know that they are there to help you and your family?
- You wanted the police to come to your home that night, right? Otherwise, you wouldn't have called 911?
- You needed help, right? And that's why you called 911?
- You called immediately after the defendant hit you?
- Where was the defendant while you were on the phone with the 911 operator?
- Could he/she see or hear you call the police?
- You asked for police officers to come to your residence, right?
- Sometimes a victim will deny calling 911. If so, ask him/her if it would refresh his/her recollection to hear the 911 tape. Then play the tape.

Police investigation:

- Knowing that they were there to help you, when the officers arrived, you told them (repeat statement)?
- The defendant was in another room with another officer when you told the police what had happened?
- You knew that the police were going to write down what you told them, right?
- You told the police that you had pain to your (body part)?
- You were also injured on your (describe body part)?
- You showed the officer your injuries.
- You had just received those injuries from the defendant, right?
- The police took photographs?
 - If there are photos, show the photos to the victim: do you recognize these photos?
 - They were taken by Officer X on (date)?

- Is this how you looked on (date)?
- Do you remember telling the police officer that you received those injuries from the defendant?
- So your testimony now is (that you don't remember) (that you never said that and the officer is lying) (that you lied to the officer) (that you received the injuries prior to that time)?

If the victim says he/she lied to police, explore further:

- Did you ever tell the police officer that (you started the fight) (you hit the defendant first)?
- Did you ever tell the police not to arrest the defendant that day?
- Did you ever tell the police that they had the wrong person in handcuffs?
- You wanted the defendant arrested so that he/she wouldn't hurt you anymore, didn't you?
- You signed the (police arrest report) (supplementary report) (victim statement form) (72-hour no contact) (etc.)?
- You asked for information about Temporary Restraining Orders and Injunction Orders?
- You told the police where they could find the defendant?

Diagrams of the crime scene: Occasionally, police officers ask victims to draw sketches of the apartment or residence where the incident occurred. If you are fortunate enough to have evidence of this nature from your police investigation, use it! Examine the witness thoroughly about where the police officer, or even the victim, marked the diagram.

Many jurisdictions currently do not receive diagrams during domestic abuse investigations. Train your officers to start using diagrams with regularity. The sketches need not be drawn to scale. Police officers are used to drawing diagrams for car crash investigations; there is no reason why domestic abuse incidents cannot receive the same attention.

Train police officers to have victims mark "rough" drawings/sketches of the layout of the residence. If the victim tells the officer about three different rooms in the residence where she was battered, the officer should draw a rough sketch – or have the victim draw a rough sketch – of the residence. Then, the victim can mark the place on the diagram where she was punched (e.g. the bedroom). Next, the victim can mark the second room on the diagram, where he or she was kicked (e.g. the kitchen). Finally, the victim can mark the third room on the diagram, where he or she was strangled (e.g. the living room).

During direct examination of the recanting victim, ask him or her to explain the differences between the testimony and the rough drawing of the crime scene. The diagram is itself a statement, which may be a prior consistent or inconsistent statement. *See* WIS. STAT. § 908.01(4).

Prior consistent statements:

- You spoke with a victim-witness specialist from the district attorney's office _____ days after the incident?
- You told him/her what happened?
- You told him/her about your injuries?
- Do you remember telling him/her (quote)?
- And that was while the defendant was still in jail after being arrested? (Note: tread carefully regarding confinement issues.)
- Did you ever tell the victim-witness specialist that you started the fight? Or that you lied to the police? Or that you lied to the 911 call operator?
- When you talked to the victim-witness specialist, did you ever ask to have the case dropped?

Recantation to the victim-witness specialist:

- And that was the first time you ever told anyone at the district attorney's office that you started the fight? Or that you lied?
- Did you ever call the police officers to tell them you lied?
- Even though the defendant had been arrested?
- Even though the defendant had already been sitting in jail for X days?
OR:
- And the phone conversation (recantation) to the victim-witness specialist occurred after the defendant was released from jail and returned home? The two of you were living together again when you made that call?
- Was the defendant at home with you while you were talking on the phone?
- Did he/she listen to make sure that you told them that you wanted the charges dropped? Or that you started the fight?

Current status of relationship with the defendant:

- You testified that you are now back together with the defendant?
- But you initially left him/her?
- You took the defendant back?
- Did he/she intimidate you?
- Did he/she harass you?
- Did he/she promise you that he/she would change?
- Was that before or after he/she learned of the pending charges?
- Did the defendant call you from jail? When? How many times?
- Was the defendant angry at you? Did he/she apologize?
- Did the defendant tell you to drop the charges? Did he/she ask you to get him/her out of jail?
- Did the defendant tell you to say that you started the fight? Did he/she tell you to say that you hit him/her first?

- So you are telling us today that the defendant wrongly sat in jail for something you now say he/she did not really do, but he/she never called you from jail?
- The defendant never got angry with you?
- He/she never told you to get the police or prosecutor to drop these “false” charges?

Questions relating to the pending charges:

- On the same night as the incident, the defendant was arrested for battering you, correct?
- You knew that the defendant was charged with battery?
- When did you find out about the charges? How? Did you post bail for the defendant?
- You received a letter from the district attorney’s office (or victim-witness specialist) on (date)?
- That letter contains the telephone number of a victim-witness specialist at the district attorney’s office?
- Certainly when you got that letter, you knew the defendant had been charged with battering you?
- Yet isn’t it true that you never called the district attorney’s office or the police to let them know what you are testifying to today – that apparently an innocent person was charged?
- In fact, the first contact you had with anybody from the district attorney’s office was on (date) when a victim-witness specialist contacted you? And that was X days/weeks/months after you knew that this supposed innocent person was charged?
- Today you’ve testified that _____. Do you recall speaking with (name) on (date)? Do you recall telling that person (describe any different recanting versions that may have been given to victim-witness specialists, police officers, or others)?

Testifying for the defense:

- When was the first time you talked about this case with the defendant?
- When was the first time you talked about this case with the defendant’s family and friends?
- Were they angry with you that the defendant was in jail?
- Did you first talk to the defendant about the case while he/she was in jail?
- When he/she came home from jail, what did the defendant say to you?
- Did the defendant blame you? Apologize to you? Admit that he/she was wrong?
- Have you spoken with the defendant’s defense attorney?
- Did he or she tell you what to say in court today?
- Did the defense attorney tell you what questions may be asked of you today in court?
- Did you speak with an investigator from the defense attorney’s office?

- What did you talk about?
- Did the investigator try to remind you about what happened?
- Are you trying to forget that this incident ever happened?
- Would you prefer that everyone just left your personal relationship with the defendant alone?
- How many times since the defendant was arrested have you talked about the case with him/her?

Attitudes and feelings about testifying:

- Are you reluctant to testify today?
- Why? Are you comfortable with the court process?
- Has the defendant threatened you or intimidated you in any way?
- Have the defendant's family or friends threatened or intimidated you?
- Did the defendant/his family/his friends tell you what to say today?
- Did you tell the defendant what you were going to say today?
- Do you understand that it is the District Attorney's office that is prosecuting the defendant today, not you?
- Do you understand that you cannot make the decision to drop charges against the defendant? Do you understand why?
- Are you concerned that if you say the wrong thing here today the defendant may be angry with you?
- Do you still love the defendant?
- Do you want the defendant to help raise your children with you?
- You don't want anything bad to happen to the defendant? But you want him/her to learn to control his/her anger? To stop hurting you?

6. Additional Applicable Rules of Evidence

a. Impeachment

The credibility of a witness may be attacked by any party, including the party calling the witness.

WIS. STAT. § 906.07.

b. Leading questions

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

WIS. STAT. § 906.11(3).

Consider requesting the permission of the court to use leading questions for a witness who has been deemed "hostile."

c. Prior statements of witnesses

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination.

WIS. STAT. § 906.13(1).

7. Recanting Themes

To effectively prosecute these cases, prosecutors must first learn to recognize the reasons why victims of domestic abuse often recant. Next, develop those reasons into a theory, or theories. Use these theories to develop your case strategy and theme. Next, analyze the facts of your case.

Know the facts and circumstances of the case. Ask yourself why the victim is "protecting" the abuser. Use the facts to enhance your theory. Develop case strategy and theme. Prepare yourself to present your case to a jury.

Sample themes applicable to many recanting victim cases:

- **Marriage or relationship:** The victim may feel that it is his/her duty or responsibility to keep the relationship together by trying harder to please the abuser. Pressure to maintain loyalty to the relationship may come from within or from outside influences, perhaps even immediate family members or the victim's own "support" system. For many victims, avoiding the potential humiliation and embarrassment of a failed relationship motivates them towards loyalty for even an especially violent and abusive partner.
- **Children:** The victim may feel that he/she must stay with the defendant for the benefit of their children. Moreover, children themselves may put pressure on a victim through questions about when they will be able to see the defendant again. Childcare – and paying for childcare – can be a serious issue.

- **Financial dependence:** Many abusers support the family financially. When the victim and defendant have been together for a significant period of time and the victim has not worked outside of the home, the victim may feel helpless to support him- or herself financially. The victim may fear that he/she lacks the necessary job skills to support him- or herself. Moreover, even if the victim stays with the defendant, he/she may fear that the defendant may lose his/her job if convicted of a crime.
- **Safety:** Though counterintuitive, a victim may have made the determination that it is safer for her to stay with the abuser. “Separation violence” is the phenomenon where some victims experience the most danger from their abusers when they have left or are about to leave the relationship. The victim may be more comfortable in the relationship due to a belief that the victim can sense when the abuser will become violent. The victim then reasons that this “knowing” can help protect him/her and the children. The victim may also fear retaliation if he/she leaves or testifies against the abuser. This fear may even be the result of veiled or overt threats made by the defendant.

Plenty of other themes exist to support the reasons why a victim would change the story of what occurred between the incident and the trial. Incorporate these and any other applicable themes into your direct examination and closing argument.

8. Post-incident Actions of the Victim

Because some victims will attempt to recant, prosecutors and victim-witness specialists generally will not want to discuss case facts with the victim. Instead, the specialist should direct the victim to recant to law enforcement. If a victim does recant to a victim-witness specialist, however, that person must document that recantation. The prosecutor must then disclose the recantation to the defense, as it is exculpatory evidence.

The victim-witness specialist may be called as a witness later. Should that occur, you may be able to turn your specialist into your expert witness and ask that person to explain why recantations so often occur in domestic abuse cases. Remember to give notice of expert testimony if you are planning to call the victim-witness specialist in the State’s case in chief. *See* WIS. STAT. § 971.23(1)(e). Also, remember that we are now a *Daubert* state for expert testimony rules.

If a victim gives inconsistent recantations, expose the differing versions. For instance, a victim may blame his or her injury on a “fall in the shower” when talking to your victim-witness specialist, while testifying later that he or she “slipped on the ice.” *See* WIS. STAT. §907.02(1).

9. Legal Challenges and Expert Witnesses

When the alleged victim of a domestic dispute recants his or her story on the stand, it is up to the trier of fact to assess the credibility of the victim and determine the truth. *State v. Pulcine*,

unpublished, 169 Wis. 2d 466, 487 N.W.2d 660 (Ct. App. 1992). In *Pulcine*, the defendant was arrested for disorderly conduct and resisting. The victim recanted and minimized her earlier statements to police. The police officers testified that the defendant resisted arrest. In a court trial, the defendant was convicted of disorderly conduct and resisting.

The defendant appealed, arguing that because the testimony by all of the witnesses was conflicting, the trial court could not find the defendant guilty beyond a reasonable doubt. The Court of Appeals upheld the conviction, stating:

This is a credibility case. “The credibility of the witnesses, including the defendant’s, and the weight of the evidence, is exclusively for the trier of fact.” *State v. Wyss*, 124 Wis. 2d 681, 694, 370 N.W.2d 745, 751(1985). “The court must sustain the trier of fact’s verdict or judgment unless it appears that the trier of fact relied on evidence ‘intrinsically improbable and almost incredible.’” *Donovan v. State*, 140 Wis. 2d 570, 571, 122 N.W.2d 1022, 1022 (1909). This court concludes that the testimony of the state’s witnesses was not patently incredible; therefore, the evidence produced at trial and considered by the court was sufficient to sustain the trial court’s judgment. *Thomas v. State*, 92 Wis. 2d 372, 384, 284 N.W.2d 917, 924 (1979).

Pulcine, 169 Wis. 2d 466.

THE RULE: Weight and credibility of evidence are exclusively decided by the trier of fact. Higher courts will show deference to the trier of fact unless the verdict reached is completely without merit.

In another unpublished opinion, *State v. Marshall*, 204 Wis. 2d 279, 554 N.W.2d 685 (1996), the Wisconsin Court of Appeals reversed the defendant’s guilty verdict. In that case, the prosecutor argued to the jury that the victim’s recantation of her accusations occurred because she was a victim of domestic abuse . . . without any supporting evidence in the record.

In *State v. Bednarz*, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993), the court allowed an expert to testify on the cycle of violence:

- 1) “**Tension-building stage**” in which the victim seeks to please the perpetrator;
- 2) “**Explosion stage**” when the physical violence occurs;
- 3) “**Honeymoon stage**” when the victim, feeling guilty and at fault for what happened, may change his or her story in an attempt to exonerate the abuser.

Bednarz, 179 Wis. 2d at 463-64, 506 N.W.2d at 170.

We are now in a new era of expert testimony rules. The legislature modified Wis. STAT. § 907.02 to conform with the Federal Rules of Evidence, thus making Wisconsin a “*Daubert*” state. A subsequent chapter addresses in more detail expert witnesses under new statute in Wisconsin.

10. The Prosecutor's Demeanor

It is important to remember to remain calm and collected when questioning a recanting victim. If you appear to be frustrated or upset, for even an instant, you may lose credibility with the jury. Remain calm. Be prepared to address the victim's inconsistent statements. Lay the foundation of inconsistent statements by asking the victim if he or she made each statement. If he or she admits to making the prior inconsistent statement, move on to the next prior inconsistent statement and ask about that one. If the victim denies any of the prior inconsistent statements, be ready to call the police officer or other witness to testify that the prior inconsistent statements were actually made. Throughout the whole examination, act like this was expected behavior and not a surprise to you. Because recanting is such a common occurrence, you will not have to pretend.

The most effective response is to express understanding.

Remember, you are attempting to persuade the jury that the victim is involved in a "power and control" domestic abuse relationship. Let the jury understand that you know what these relationships are like. You *expect* recanting from victims of domestic abuse. It happens all the time in domestic cases. You don't like it, of course, but you understand. You sympathize with the victim, but you move forward with your case because the law has been broken, and the defendant needs to be held accountable.

26. Introducing a Victim's Statement when the Victim Does Not Testify

1. Introduction
2. Distinguishing Testimonial and Non-testimonial Statements
3. Admissibility of Testimonial Statements
4. Admissibility of Non-testimonial Statements
5. Conclusion

1. Introduction

This chapter focuses on the prosecutor's ability to introduce a victim's statement when the victim does not testify. Although the title of this chapter uses the term "victim," the legal term more broadly applied to this situation is "declarant." The victim is the most common unavailable declarant in a domestic abuse prosecution, but the legal analysis provided in this chapter applies to any witness statement. Therefore, this chapter uses the terms "declarant," "victim," and "witness" as appropriate for the situation being discussed.

This chapter begins with a short discussion and analysis of the defendant's right to confrontation under the United States and Wisconsin Constitutions. The chapter then examines the distinction between testimonial and non-testimonial statements along with providing the different legal bases available to introduce each type of statement. The chapter concludes that, in limited circumstances, a prosecutor may introduce a victim's statement even when the victim does not testify. This chapter is limited in scope to statements offered to prove the truth of the matter asserted. See WIS. STAT. § 908.01(3); *Tennessee v. Street*, 471 U.S. 409, 414 (1985) (noting that no Confrontation Clause concerns arise when a statement is not offered for the truth of the matter asserted).

2. Distinguishing Testimonial and Non-testimonial Statements

Under the United States Constitution, criminal defendants are entitled to confront their accusers: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI. The same right is guaranteed by the Wisconsin Constitution. Wis. Const. art 1, § 7 ("In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face").

Despite the defendant's constitutional right to confront witnesses, the United States Supreme Court and the Wisconsin Supreme Court have both found that there are certain statements made

by a declarant which may be admissible regardless of whether that person testifies at the criminal trial. In other words, a witness' statement may be admissible as hearsay through testimony by another person. It is imperative that the prosecutor know what types of statements may be admissible at trial without a victim or witness testifying, especially given that one of the challenges of domestic abuse prosecutions is that the victim may not appear or may be otherwise unavailable to testify at trial through explicit or implicit intimidation by the defendant. A prosecutor seeking to introduce a victim's statement when the victim does not testify requires the prosecutor to begin by assessing whether the statement is testimonial or non-testimonial.

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the United States Supreme Court held that a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial, if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68. The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" but concluded that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* As for non-testimonial statements, the Court "afford[ed] the States [with] flexibility in their development of hearsay law" to decide when to admit such statements. *Id.*

The Supreme Court elaborated on the distinction between testimonial and non-testimonial statements in *Davis v. Washington*, 547 U.S. 813 (2006). The Court stated:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

Based upon the primary purpose standard, the Court concluded in *Davis* that statements in a 911 recording were non-testimonial. *Id.* at 829. The Court noted the 911 caller was describing events as they were happening in a domestic assault, not merely past events, and "any reasonable listener would recognize that [the caller] was facing an ongoing emergency." *Id.* at 827. In *Hammon v. Indiana*, the Court had previously reached the opposite conclusion and found that a domestic abuse victim's statements to an officer were testimonial. *Id.* at 834. The Court reconciled these decisions by finding that the statements in *Davis* were taken when the victim was alone and within the immediate danger of her assailant, whereas, in *Hammon*, the victim was protected by police and describing an event from the recent past. *Id.* at 831-32.

In *State v. Rodriguez*, 2006 WI App 163, 295 Wis. 2d 801, the Wisconsin Court of Appeals discussed the *Davis* decision, noting that "[i]nsofar as a victim's excited utterances to a responding law enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve

societal goals other than adducing evidence for later use at trial.” *Rodriguez*, 2006 WI App 163 at ¶ 23. The Court of Appeals stated that an out-of-court declaration must be evaluated to determine whether it is, on one hand, overtly or covertly intended by the speaker to implicate the accused at a later judicial proceeding, or, on the other hand, if it is a burst of stress-generated words whose main purpose is to get help and succor, or to secure safety, and are thus devoid of the “possibility of fabrication, coaching, or confabulation.” *Id.* at ¶ 26 (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)). On remand, the court did not decide whether the victim’s statements to the police were testimonial because the court admitted the statements on another legal ground. *State v. Rodriguez*, 2007 WI App 252, ¶ 20, 306 Wis. 2d 129.

In *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, the Wisconsin Supreme Court considered a variety of incriminating statements made by a murder victim against her husband. Prior to the victim’s death, she wrote a letter and gave it to a neighbor and told him to give it to the police should anything happen to her. *Id.* at ¶ 5. The victim also made statements to an officer, the neighbor, and her son’s teacher. *Id.* at ¶ 1. The Court held that the victim’s letter and statements to the officer were testimonial, whereas her statements to the neighbor and teacher were non-testimonial. *Id.* at ¶ 2, *superseded on other grounds by Giles v. California*, 128 S. Ct. 2678 (2008).

The United States Supreme Court reaffirmed and further developed the “primary purpose of the interrogation” standard to assess situations when a victim’s statement to a police officer may be non-testimonial. *Michigan v. Bryant*, 131 S.Ct. 1143, 1162 (2011). Under this standard, the court “objectively evaluat[es] the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occur[red].” *Id.* The Court reasoned that “statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.” *Id.* Justice Scalia authored a strong dissent criticizing the Court for looking “to the purposes of both the police and the declarant” and “fretting that a domestic-violence victim may want her abuser briefly arrested – presumably to teach him a lesson – but not desire prosecution.” *Id.* at 1169 (Scalia, J., dissenting). In *Bryant*, the majority of the court held that a victim’s “identification and description of the shooter and the location of the shooting were not testimonial.” *Id.* at 1150.

Although domestic abuse prosecution commonly focuses on the victim’s statements to police, additional United States Supreme Court decisions in this same vein may also be relevant, depending on the facts of a case. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2530, 2542 (2009), the Court held that affidavits from a forensic analyst reporting that a substance was cocaine were testimonial.

The Court reached a similar conclusion in *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2710 (2011), where the Court held that “surrogate testimony” cannot be used for the testimonial statements from an analyst who performed an analysis of blood for the presence of alcohol. A prosecutor seeking to introduce statements by a victim to a medical provider may distinguish such statements from these recent Supreme Court decisions and argue that the statements are non-testimonial because the victim made the statements in anticipation of receiving medical treatment – not in preparation for a future prosecution. *See Bryant*, 131 S.Ct. at 1157, n.9

(noting that “[a]n ongoing emergency . . . focus[es] an individual’s attention on responding to the emergency,” similar to how “certain statements are, by their nature, made for a purpose other than use in a prosecution,” such as “statements for purposes of medical diagnosis or treatment”). *See also State v. Miller*, 264 P.3d 461, 477-82 (Kan. 2011) (providing an in-depth analysis before concluding that “generally where there is a clear medical purpose to the examination – often evidenced by the treating physician’s or nurse’s testimony that the question of ‘what happened’ was necessary for treatment of medical issues – the statements are non-testimonial even if there is a secondary purpose of preserving evidence”).

3. Admissibility of Testimonial Statements

In *Crawford*, the United States Supreme Court generally prohibited the introduction of “testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 53-54. The Court acknowledged exceptions to this prohibition found in “two forms of testimonial statements [that] were admitted at common law even though they were unopposed.” *Giles v. California*, 554 U.S. 353, 358 (2008) (citing *Crawford*, 541 U.S. at 56, n.6, 62). The first, dying declarations, is a “general rule of criminal hearsay law [that] cannot be disputed.” *Crawford*, 541 U.S. at 56, n.6. The second, forfeiture by wrongdoing, “extinguishes confrontation claims on essentially equitable grounds.” *Crawford*, 541 U.S. at 62. In addition to these two exceptions, testimonial statements may be admitted when the defendant had the prior opportunity to cross examine the unavailable declarant. *See id.* at 53-54. The following three subsections address each of these methods for admitting testimonial statements.

a. Prior opportunity to cross examine the witness

There is no Confrontation Clause violation when the defendant had a prior opportunity to cross-examine the unavailable declarant. *State v. Stuart*, 2005 WI 47, ¶ 29, 279 Wis. 2d 659 (citing *Crawford*, 541 U.S. at 68). Prior testimony at a preliminary hearing generally is “insufficient to satisfy [the] right to confrontation” because “the scope of that cross-examination is limited.” *Stuart*, 2005 WI 47, ¶¶ 29-30, 279 Wis. 2d 659. Therefore, prior preliminary examination testimony is generally inadmissible as testimonial hearsay. *See id.*

When “it appears that a prospective witness may be unable to attend or [is] prevented from attending a criminal trial or hearing,” then a prosecutor may request that “the prospective witness’ testimony be taken by deposition.” WIS. STAT. § 967.04(1). Proceeding under the deposition statute after the defendant has legal representation and discovery creates a greater likelihood for admissibility of the deposed testimony as compared to the preliminary hearing testimony. Before admitting the testimony, however, the declarant must be unavailable and the proponent must make “a good-faith effort to obtain [the witness’] presence at trial.” *Sheehan v. State*, 65 Wis. 2d 757, 765 (1974). *See also* WIS. STAT. § 967.04(5)(a)4. The use of such testimonial statements at trial requires the prosecutor to anticipate the declarant’s unavailability and properly preserve testimony subject to cross examination that strictly adheres to the constitutional and statutory requirements to ensure its admissibility. *See* WIS. STAT. § 908.045(1).

b. Dying declarations

The United States Supreme Court has not decided whether testimonial dying declarations are an exception to the Sixth Amendment confrontation right. *Michigan v. Bryant*, 131 S.Ct. 1143, 1151, n.1 (2011) (quoting *Crawford*, 541 U.S. at 56, n.6). However, the Wisconsin Supreme Court has found that testimonial dying declarations are admissible under the Sixth Amendment and the Wisconsin Constitution's confrontation clause until the United States Supreme Court holds otherwise. *State v. Beauchamp*, 2011 WI 27, ¶ 5, 333 Wis. 2d 1. Where dying declarations are admitted, the defendant remains free to aggressively impeach the "dying declaration on any grounds that may be relevant in a particular case." *Id.* But the defendant cannot challenge admissibility on grounds the statement is unreliable because "[t]he reliability of evidence is an issue for the trier of fact." *Id.*

In Wisconsin, the dying declaration hearsay exception is codified within the statutes. *Id.* at ¶ 21 (citing WIS. STAT. § 908.045(3) (exempting a "statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death" from the hearsay rule)), *but cf.* Fed. R. Evid. § 804(b)(2) (limiting a dying declaration exception to a homicide prosecution and civil cases).

c. Forfeiture by wrongdoing

Prosecutors should be aware that there are circumstances in which the defendant, by his or her actions, forfeits the right to confront a witness against him or her at a criminal trial. If the defendant engages in such behavior, the prosecutor must understand the legal standard and process by which a witness' statements may be admitted based upon the doctrine of forfeiture by wrongdoing. This subsection addresses the doctrine as applied to testimonial statements.

The United States Supreme Court recently reaffirmed the forfeiture by wrongdoing doctrine. The Court previously explained that this doctrine "extinguishes confrontation claims on essentially equitable grounds." *Giles v. California*, 554 U.S. 353, 357-58 (2008) (explaining that the common-law doctrine permits "testimonial statements . . . even though they were unfronted"); *Crawford v. Washington*, 541 U.S. 36, 62 (2004). The Supreme Court's affirmation continues the bedrock principle that if a defendant "keeps the witnesses away, [the defendant] cannot insist on his privilege" to confront witnesses at trial. *Reynolds v. U.S.*, 98 U.S. 145, 158 (1878).

The recognition that the defendant may forfeit the right of confrontation through his or her own wrongdoing "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Id.* at 159. Congress ultimately codified the "doctrine as an exception to the hearsay rules by permitting the admission of hearsay statements 'offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'" *U.S. v. Dhinsa*, 243 F.3d 635, 652 (2d Cir. 2001) (quoting Fed. R. Evid. 804(b)(6)). *See also Giles*, 554 U.S. at 366.

The Wisconsin Supreme Court formally recognized the forfeiture by wrongdoing doctrine in *State v. Jensen*, 2007 WI 26, ¶ 32, 299 Wis. 2d 267, 289-90. *Jensen* placed the burden upon the State to prove the application of the doctrine by a preponderance of the evidence. *Id.* at ¶ 56. *Giles* superseded *Jensen* in that *Giles* held that forfeiture by wrongdoing applies only when the defendant acted with the intent to prevent the witness from testifying. *See Giles*, 554 U.S. at 358 (requiring proof that the “defendant engaged in conduct designed to prevent the witness from testifying”). This narrower application of forfeiture by wrongdoing, which *Giles* found was codified in Rule 804(b)(6) of the Federal Rules of Evidence, now governs Wisconsin. *See generally State v. Baldwin*, 330 Wis. 2d 500, 517-23 (Ct. App. 2010) (citing 554 U.S. at 357-78; Fed. R. Evid. 804(b)(6)). Federal cases interpreting Rule 804(b)(6) are therefore persuasive in interpreting the forfeiture by wrongdoing doctrine under the Confrontation Clause. *See, e.g., State v. Boettcher*, 144 Wis. 2d 86, 96-97 (1988) (finding federal cases persuasive with interpreting a state rule); *State v. Evans*, 238 Wis. 2d 411, 415, n.2 (Ct. App. 2000) (“where a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority”).

To establish forfeiture by wrongdoing, the State must prove at a motion hearing by a preponderance of the evidence that the defendant forfeited his right to confrontation because: (1) the defendant engaged or acquiesced in wrongdoing, (2) the defendant intended to procure the declarant's unavailability, and (3) the defendant's wrongdoing did procure the declarant's unavailability. *See U.S. v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *U.S. v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *Dhinsa*, 243 F.3d at 653-54; *U.S. v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996).

A defendant forfeits confrontation protections not only on direct procurement but also upon “involvement in a conspiracy, one of the members of which wrongfully procured a witness's unavailability.” *U.S. v. Cherry*, 217 F.3d 811, 815, 820 (10th Cir. 2000). Moreover, “[t]he government need not . . . show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant ‘was motivated in part by a desire to silence the witness.’” *Dhinsa*, 243 F.3d at 654 (quoting *Houlihan*, 92 F.3d at 1279).

Once the defendant engages in misconduct designed to prevent a declarant from testifying, any of the missing declarant's statements are admissible against the defendant “without regard to the nature of the charges at the trial in which the declarant's statements are offered” because the rule does not limit the subject matter of admissible statements only to “the events at issue in the trial in which the statements are offered.” *Gray*, 405 F.3d at 241. The rule requires expansive admissibility of the missing declarant's statements on equitable grounds because the “admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct.” *U.S. v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997).

The following subsections provide specific analysis for each of the three elements considered under the forfeiture by wrongdoing doctrine.

i. The defendant engaged or acquiesced in wrongdoing

Courts have ruled that a defendant engaged or acquiesced in wrongdoing when the defendant, acting alone or in conspiracy with others, employs an action to silence a witness. *See Houlihan*, 92 F.3d at 1279 (citing several cases where courts found misconduct by the defendant). The most evident form of misconduct occurs when the defendant murders the declarant, but misconduct also includes the use of threats and violence. *White*, 116 F.3d at 911. Wrongdoing also occurs in more subtle ways, such as when the defendant refuses to disclose the whereabouts of a witness. *Houlihan*, 92 F.3d at 1279 (citing *Reynolds*, 98 U.S. at 158). *See also Commonwealth v. Szerlong*, 933 N.E.2d 633, 640 (Mass. 2010) (“the wrongdoing that may justify forfeiture need not be criminal”).

An appellate court has properly noted that “a defendant need only tacitly assent to wrongdoing in order to trigger the Rule’s applicability,” so the actions of others may be attributed to the defendant when the defendant either engaged in conduct with co-conspirators or acquiesced to the conduct of others. *U.S. v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005). The United States Supreme Court also properly recognized that “domestic violence . . . is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” *Davis v. Washington*, 547 U.S. 813, 831-32 (2006). *See also Georgia v. Randolph*, 547 U.S. 102, 137-38 (2006) (Roberts, J., dissenting) (criticizing the majority opinion on a Fourth Amendment question because the decision failed to recognize the unique nature of domestic abuse situations). Courts have already recognized that defendants involved in domestic abuse have greater opportunity for misconduct than defendants in other types of criminal cases. *See Giles*, 554 U.S. at 358.

Wrongdoing committed by a domestic abuse defendant is often more aggravated and more clearly documented than actions by defendants in previous cases where courts have found misconduct. *See, e.g., Steele v. Taylor*, 684 F.2d 1193, 1199, 1202 (6th Cir. 1982) (upholding the district court’s finding that the witness was “under the control of the defendants who had procured her refusal to testify” despite no finding that the defendants threatened her); *U.S. v. Carlson*, 547 F.2d 1346, 1353, 1359 (8th Cir. 1976) (finding misconduct on the part of the defendant despite having only general information about the defendant’s threats, described simply as “highly suggestive of threats and intimidating overtures directed toward [the declarant] by [the defendant]”). *See also U.S. v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982) (“Bare knowledge of a plot to kill [the victim] and a failure to give warning to appropriate authorities is sufficient”).

ii. The defendant intended to procure the declarant’s unavailability

Courts have ruled that a defendant intended to procure the declarant’s unavailability when “the evildoer was motivated in part by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor’s sole motivation.” *Houlihan*, 92 F.3d at 1279. *See also Dhinsa*, 243 F.3d at 654; *Szerlong*, 933 N.E.2d at 641 (a court does “not need to find that making her unavailable as a witness was the defendant’s sole or primary purpose . . . it is sufficient that it was a purpose”). A court must discern intent “from the defendant’s acts, words,

and statements, if any, and from all the facts and circumstances in this case bearing upon intent.” Wisconsin Jury Instructions-Criminal 1292 (intimidation of a witness); Wisconsin Jury Instructions-Criminal 1296 (intimidation of a victim).

On a question of intent, the proponent of a forfeiture by wrongdoing motion may rely upon circumstantial evidence as the defendant rarely provides an explanation for his or her purpose. Such reliance on circumstantial evidence does not diminish the strength of the proponent's position because this element “may be based in whole or in part upon circumstantial evidence.” See *State v. Koller*, 87 Wis. 2d 253, 266 (1979) (holding that a conviction may rely entirely upon circumstantial evidence); *People v. Banos*, 100 Cal. Rptr. 3d 476, 492 (Cal. Ct. App. 2009) (permitting a court to “reasonably . . . infer[]” intent through “implied findings”). Therefore, the prosecution need only demonstrate, either directly or circumstantially, that the defendant's wrongdoing was intended, in part, to silence a potential witness against him or her.

Courts have also found the requisite intent where the defendant's wrongdoing only represents part of the reason for the declarant's absence. See *Szerlong*, 933 N.E.2d at 641 (finding that “[e]ven if the idea to marry originated with the victim, the defendant agreed to marry, and the victim's spousal privilege existed only because of his agreement” so the court found “that the defendant intended to make her unavailable to testify by agreeing to marry her”). Moreover, courts have found forfeiture by wrongdoing even though the link between the intent and the wrongdoing may be attenuated. See, e.g., *U.S. v. Aguiar*, 975 F.2d 45, 46-47 (2d Cir. 1992) (holding that the defendant forfeited confrontation by sending letters reminding a witness that the defendant could expose criminal conduct committed by the witness without directly threatening the witness in the letters).

iii. The defendant's wrongdoing did procure the declarant's unavailability

In addressing unavailability, the circuit court must answer the following two questions: (1) Is the witness unavailable; and (2) Did the wrongdoing procure the unavailability? See WIS. STAT. § 908.04(1); *Scott*, 284 F.3d at 762. In answering either of these questions, the court may consider hearsay statements in the form of testimony or affidavit. See WIS. STAT. §§ 901.04(1); 911.01(4)(a); *State v. Baker*, 169 Wis. 2d 49, 55-56, 58-59 (1992) (permitting a party to introduce an affidavit at a motion hearing).

As to the first question, the court must determine whether the declarant is unavailable and whether the State exercised due diligence and good faith in attempting to secure the witness' presence. *Baldwin*, 330 Wis. 2d at 523-25.

For the second question, the court must determine whether the defendant's wrongdoing procured the unavailability of the declarant. In considering this question, “a trial court need only determine that the defendant's actions were a cause of the witness' absence; defendant's conduct need not be the only cause.” *State v. Rodriguez*, 306 Wis. 2d 129, 138 (Ct. App. 2007) (citing Wis. JI-Criminal 901 (2004)). The court must consider whether the defendant succeeded in procuring the unavailability of the declarant based upon his or her absence, coupled with the

nexus between the wrongdoing and unavailability. *See Giles*, 554 U.S. at 377 (“Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions”). In some situations, the nexus is self-evident, such as in a case where the defendant kills a witness because the defendant fears the witness may incriminate the defendant. *U.S. v. Johnson*, 219 F.3d 349, 355-56 (4th Cir. 2000); *U.S. v. Miller*, 116 F.3d 641, 669 (2d Cir. 1997).

Courts also have found the defendant's wrongdoing responsible for the declarant's unavailability in less dramatic situations; for example, a defendant allegedly threatened a witness prior to the defendant's incarceration and the witness later moved to an unknown out-of-state location with no direct information presented to show the witness moved because of the defendant's threats. *State v. Frambs*, 157 Wis. 2d 700, 702-03, 706-07 (Ct. App. 1990) (examining the situation where a witness is unavailable because of misconduct by the proponent seeking to introduce the hearsay). Similarly, another court found that the defendant's alleged wrongdoing resulted in the declarant's unavailability, despite the declarant claiming that his refusal to testify “was totally his own decision . . . [and] that he would refuse to testify even if the defendant wanted him to testify.” *State v. Hallum*, 606 N.W.2d 351, 353-54, 358 (Iowa 2000) (*cited in State v. Hale*, 2005 WI 7, ¶ 95, 277 Wis. 2d 593, 621 (Prosser, J., concurring)).

Based upon the forfeiture by wrongdoing doctrine, the State may ask the court to find by a preponderance of the evidence that the defendant forfeited his or her right to confrontation when he or she engaged in wrongdoing intended to procure the declarant's unavailability, thereby permitting the introduction of hearsay statements of the declarant. When a court grants a motion under the doctrine, the declarant's statement may be admitted subject to the statement not containing additional inadmissible hearsay within the admissible hearsay statement. *See* WIS. STAT. § 908.05 (hearsay within hearsay). Appendix 9 has a template for a motion and brief to admit testimonial statements under the doctrine of forfeiture by wrongdoing.

4. Admissibility of Non-testimonial Statements

A determination that an out-of-court statement is non-testimonial does not end the inquiry regarding a statement's admissibility. With respect to non-testimonial statements, the *Crawford* Court did not decide the form and substance of the constitutional analysis to be applied; instead, it expressly left that decision to the states, indicating that the states may continue to apply the pre-*Crawford* constitutional analysis. In *Whorton v. Bockting*, 549 U.S. 406, 413-14 (2007), the Court clarified that the Confrontation Clause restrictions do not govern non-testimonial hearsay. *Cf. State v. Manuel*, 2005 WI 75, ¶ 3, 281 Wis. 2d 554 (scrutinizing non-testimonial statements under the Confrontation Clause and Article I, Section 7 of the Wisconsin Constitution).

A prosecutor seeking to introduce a non-testimonial statement may use the methods presented in the previous section of this chapter related to testimonial statements, but the prosecutor also has additional options to introduce such statements. Appendix 10 has a sample notice and memorandum for admitting non-testimonial statements. The following three subsections provide additional methods for admitting non-testimonial statements.

a. Indicia of reliability

In *Manuel*, 2005 WI 75, 281 Wis. 2d 554, the Wisconsin Supreme Court applied the *Roberts* standard for determining the admissibility of non-testimonial statements. *Manuel*, 2005 WI 75 at ¶ 3 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)). In *Crawford*, the United States Supreme Court abrogated the *Roberts* standard for testimonial statements, but “afford[ed] the States [with] flexibility in their development of hearsay law – as does *Roberts*” – when considering non-testimonial statements. *Crawford*, 541 U.S. at 68. Therefore, prosecutors may continue to rely upon *Roberts* when the statement is non-testimonial. *But see State v. Jensen*, 2011 WI App 3, ¶¶ 24-26, 331 Wis. 2d 440 (calling into doubt the holding of *Manuel*, 2005 WI 75, 281 Wis. 2d 554).

Roberts established the following two-part test to determine the admissibility of out-of-court statements, which remains applicable to non-testimonial statements under the Wisconsin Constitution's confrontation clause:

First, the witness must be “unavailable” at trial. Second, the statement of the unavailable witness must bear adequate “indicia of reliability.” This second prong could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception or upon a showing of “particularized guarantees of trustworthiness.”

State v. Hale, 2005 WI 7, ¶ 45, 277 Wis. 2d 593, ¶ 45 (citing *Roberts*, 448 U.S. at 66).

When a prosecutor attempts to admit statements under this test, there is obviously no issue as to *Roberts*' first step because it is typically assumed that the victim or witness failed to appear, and therefore will not be available to testify. Therefore, the argument generally focuses on the second step; that is to say, whether the statements bear adequate indicia of reliability.

In *Manuel*, the lower court relied upon pre-*Crawford* precedent from the Wisconsin Supreme Court in discussing what constitutes a particularized guarantee of trustworthiness:

In evaluating whether a statement evinces particularized guarantees of trustworthiness, we consider the “totality of the circumstances, but . . . the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” Some factors that have been considered in assessing the reliability of a statement include spontaneity, consistency, mental state, and a lack of motive to fabricate. We look to see “if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility” In other words, we examine whether the statement is “so trustworthy that adversarial testing would add little to its reliability.”

Manuel, 2004 WI App 111, ¶ 26, 275 Wis. 2d 146 (quoting *State v. Weed*, 2003 WI 85, ¶ 25, 263 Wis. 2d 434 (internal citations omitted)).

The “trustworthiness” analysis is arguably circular, in that it requires the court to consider many of the statutory hearsay exceptions discussed in the next section. *Id.* at ¶ 27.

Manuel remains valid precedent in Wisconsin with respect to the state constitution so a prosecutor seeking to introduce non-testimonial statements should read and understand the decision, but its precedential value has been subsequently questioned. *See Beauchamp*, 2011 WI 27, ¶ 59, n.43, 333 Wis. 2d 1 (Abrahamson, J., concurring) (suggesting that non-testimonial statements are governed solely by the rules of evidence); *Jensen*, 2011 WI App 3, ¶¶ 24-26, 331 Wis. 2d 440 (calling into doubt *Manuel*, 2005 WI 75, 281 Wis. 2d 554).

b. Hearsay exceptions

In *Beauchamp*, Justice Abrahamson suggested that non-testimonial statements may be admissible under the Wisconsin Rules of Evidence, without requiring an indicia of reliability assessment as long as they satisfy a hearsay exception. *Beauchamp*, 2011 WI 27, ¶ 59. Under this simplified approach, a prosecutor may move to admit any non-testimonial statement permitted by statute, such as present sense impressions, excited utterances, statements of a then existing mental condition, statements made for purposes of medical diagnosis or treatment, and statements contained within records of regularly conducted activity. *See* WIS. STAT. §§ 908.03(1)-(4); 908.03(6); 908.03(24). The aforementioned hearsay exceptions will allow for the admissibility of non-testimonial statements when the prosecutor lays the appropriate foundation.

i. Present sense impression

Wisconsin law allows the introduction of statements made as the declarant perceived an event or immediately thereafter. As present sense impressions, a victim or witness' statements can be found by the court, without further analysis, to be presumptively reliable under the *Roberts* Confrontation Clause analysis, and therefore admissible. *See Hale*, 277 Wis. 2d 593, ¶ 45 (*citing Roberts*, 448 U.S. at 66). The statute reads:

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

An example of a present sense impression may include a police officer responding to the scene of a reported domestic disturbance where the officer approached the door to the residence and

overheard a female talking to a male (saying, for example, "You can't throw things around whenever we disagree about something"). Upon entry, the officer may observe a male and female with nobody else present and items thrown about and broken in the residence. The prosecutor reasonably could argue that the victim's statement is a non-testimonial statement admissible as a present sense impression. *See* WIS. STAT. § 908.03(1).

ii. Excited utterance

Wisconsin law allows for the admissibility of statements made while the declarant is relating a startling event or condition. Generally, an excited utterance by its very nature is non-testimonial, but a prosecutor should properly begin by asking the court to formally find that the statement is non-testimonial. Once the court makes that finding, then the prosecutor may rely on the following statute to admit the excited utterance, regardless of whether the declarant is available as a witness:

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Non-testimonial statements that qualify as excited utterances are presumptively reliable because the excited utterance is a firmly rooted hearsay exception. *See State v. Ballos*, 230 Wis. 2d 495 (1999) (citing *White v. Illinois*, 502 U.S. 346, 356 (1992)); *Manuel*, 275 Wis. 2d 146, 164 (citing *White v. Illinois*, 502 U.S. at 357). Appendix 11 contains a primer on prosecuting a domestic abuse case without the victim via the excited utterance.

iii. Statement of then existing mental, emotional or physical condition

Wisconsin law allows for the admissibility of the statements of the declarant's then existing state of mind:

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical

condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In *State v. Jackson*, 187 Wis. 2d 431 (Ct. App. 1994), the Court of Appeals permitted testimony under this hearsay exception in a prosecution for the crime of first-degree reckless homicide. Shortly before the victim's death, she saw her husband (Jackson) near her vehicle so she "called a friend" and said "she was afraid of Jackson and related several incidents of recent marital difficulties." *Id.* at 434. Witnesses testified that a high-speed vehicle chase occurred, during which the victim crashed her vehicle as she tried to get away from the defendant's vehicle. *Id.* The court stated that testimony by the friend regarding the victim's statement shortly before her death "clearly falls into the category of state of mind evidence, admissible as an exception to the hearsay rule." *Id.* at 436 (citing WIS. STAT. § 908.03(3)).

iv. Statement for purposes of medical diagnosis or treatment

Wisconsin law allows for the admissibility of statements made for purposes of medical diagnosis or treatment. Before relying upon this hearsay exception, the prosecutor must establish that such a statement was non-testimonial. *See State v. Miller*, 264 P.3d 461, 477-82 (Kan. 2011) (providing an in-depth analysis before concluding that "generally where there is a clear medical purpose to the examination – often evidenced by the treating physician's or nurse's testimony that the question of 'what happened' was necessary for treatment of medical issues – the statements are nontestimonial even if there is a secondary purpose of preserving evidence").

Once the statement is deemed by the court to be non-testimonial, then the prosecutor may rely upon this hearsay exception, which reads:

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Non-testimonial statements that qualify under this hearsay exception bear adequate indicia of reliability because a statement made for purposes of medical diagnosis or treatment is a firmly rooted hearsay exception. *State v. Huntington*, 216 Wis. 2d 671, 693 (1998) (citing *State v. Wyss*, 124 Wis. 2d 681, 710 (1985)).

v. Statement within regularly conducted activity

Wisconsin law allows for the admissibility of statements contained in records of regularly conducted activity. It provides the following hearsay exception:

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (6) Records of regular conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Domestic abuse commonly continues and even intensifies when the victim ends the relationship. For example, when an ex-boyfriend cannot exert physical power and control over his former girlfriend, he may access her bank, e-mail, or social networking accounts in an attempt to harass or otherwise interfere with her life. Such account information generally is not testimonial and, therefore, admissible under this hearsay exception. *See State v. Doss*, 2008 WI 93, ¶ 56, 312 Wis. 2d 570 (2008) (holding that even the “affidavits from record custodians authenticating the non-testimonial bank records in compliance with WIS. STAT. § 891.24 . . . are not testimonial”).

vi. Residual exception

The Wisconsin Statutes contain a “residual” hearsay exception available regardless of the declarant’s availability, which reads:

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

The Wisconsin Supreme Court observed that this exception is identically worded to another “residual” hearsay exception and the “Wisconsin case law treats the two residuals as equivalents

and recognizes there is no substantive difference between them.” *State v. Anderson*, 2005 WI 54, ¶ 56, 280 Wis. 2d 104. The companion statute reads:

WIS. STAT. § 908.045 HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

The only distinction between these statutes is that “Section 908.03(24) applies if the declarant is available to testify whereas § 908.045(6) applies if the declarant is unavailable.” *Anderson*, 2005 WI 54, ¶ 56, 280 Wis. 2d 104. Before a prosecutor relies upon either residual hearsay exception, the prosecutor must demonstrate that the statement is non-testimonial. The prosecutor also must “demonstrate a trustworthiness consistent with that required under other specifically stated exceptions.” *See id.* at ¶ 56, n.9 (*quoting State v. Sorenson*, 143 Wis. 2d 226, 242-43 (1988)).

c. Forfeiture by wrongdoing

For non-testimonial statements, a broad application of the forfeiture by wrongdoing doctrine exists in contrast to the narrow application applied to testimonial statements. *State v. Jensen*, 2011 WI App 3, ¶ 23, 331 Wis. 2d 440. The previous section of this chapter provided an in-depth review of the doctrine as applied to testimonial statements; there is no need to repeat that analysis in this subsection. The critical distinction between the broad and narrow application of the doctrine relates to whether the proponent needs to establish that the defendant intended to procure the declarant's unavailability. *Id.* Such a requirement exists for testimonial statements, but does not exist for non-testimonial statements. *Id.* Therefore, the proponent need only establish the following for non-testimonial statements: (1) The defendant engaged or acquiesced in wrongdoing; and (2) the defendant's wrongdoing did procure the declarant's unavailability. *Id.* The other aspects of the doctrine remain the same for testimonial and non-testimonial statements. *Id.* A prosecutor has a greater opportunity to introduce non-testimonial statements under the doctrine based upon the removal of the element related to the defendant's intent. *Id.* Therefore, it is imperative that prosecutors clearly distinguish and properly classify whether a statement is testimonial or non-testimonial before arguing for its admission under this doctrine.

5. Conclusion

The tools in this section are not meant for beginners. They are advanced pretrial motion and trial techniques that may allow the State to prove the defendant's conduct without the victim's testimony. Prosecutors applying these tools must understand the limits of their legal authority. The aforementioned discussion and analysis provide a general overview relating to introducing testimonial and non-testimonial statements without the declarant testifying. Given that these are developing areas of law, be sure to check the most recent case law and don't hesitate to consult

an appellate prosecutor when considering a motion to admit statements, particularly when it requires a court to review an issue of first impression. The appellate attorney(s) ultimately will need to be comfortable making the argument if the defendant is convicted at trial and appeals the trial court's decision.

27. Establishing Identity . . . Creatively

1. Introduction
2. Police Investigations of Identity
3. Police Training
4. Establishing Identification through a Booking Photo
5. Predicate Questions for Officers: Establishing Identity through the Booking Photo

1. Introduction

Along with proof of the elements of the crime, proof of venue, and proof of the date that the crime occurred, you must also prove IDENTITY.

When the defendant is on the scene, identity is explicit. Often, the defendant identifies him- or herself to the police and provides an explanation of what happened. Even if the defendant's rendition of the facts completely contradicts the victim's version, the defendant may still admit to the date, time, place and parties involved in the incident.

However, when the suspect has fled the scene prior to the arrival of the police, investigators only hear one side of the story. While police officers may diligently capture facts to support the elements of a crime, venue, and the date and time of the incident, their collection of identity evidence may fall short of proof beyond a reasonable doubt.

If a domestic abuse victim fails to appear later in court, you may be able to proceed with your case on an alternative theory, such as utilizing forfeiture by wrongdoing for testimonial statements or an excited utterance as a hearsay exception for non-testimonial statements.

However, if the defendant was not present during the investigation, police officers and other witnesses may not be able to identify that specific person as being the perpetrator of the offense. This chapter was designed to help you face the situation where you are forced to prove identity at trial creatively, and specifically through the use of the defendant's booking photograph.

2. Police Investigations of Identity

Police are trained to elicit facts as to identity during their investigations. Most officers obtain detailed information regarding the identity of the suspect/abuser, including:

- Name;
- Date of birth;

- Relationship to the victim;
- Home address and phone number;
- Work address and phone number; and/or
- Physical description, including race, build, height, weight, sex, etc.

This information serves as the basis for the issuance of warrants and other documents such as extradition requests. Police officers commonly use the above information to locate and arrest suspects.

The information elicited above will serve to identify a suspect for probable cause purposes on most occasions, but is this information alone enough to support identity beyond a reasonable doubt at a trial? The best case scenario to prove identity at trial is when the victim points to the defendant in open court and says, "That's him. He's the one who beat me up!" However, when a domestic abuse victim fails to appear in court, and the defendant was not on the scene to be identified to the police officer, you need additional proof of identity in order to prevail at trial.

3. Police Training

a. Photograph of suspect

Your first strategy is preventive maintenance. Get the police in your jurisdiction to do more. Teach police officers the following:

- If the suspect is not on scene, ask the victim to provide a photograph of the suspect during the course of the investigation.
- A recent photograph is best. A wedding photograph will suffice. A photograph of the abuser and the victim together can be helpful, especially if you can contrast what the victim looked like in the "family" photo versus what he or she looks like with bruises all over his or her face.
- Later at trial, as the officer testifies regarding the victim's statement, you can present the "family" photo(s) of the person who the victim identified as being the abuser to the police officer.

b. Abuser mail

Your next strategy is to train police officers to do the following:

- Ask the victim to give police the letters and cards that the suspect has given him or her after past abusive events.
- While not proof positive, "apology" letters and cards can help you to establish identity and/or the existence of a relationship. "Abuser mail" may help to establish a history of domestic abuse in the relationship. "Abuser mail" may also help you to establish a foundation for the use of an expert to testify as to the cycle of violence with examples of "abuser apologies" and "promises to change."

- Though a court may strictly limit the use of “abuser mail” during trial, you can always use it at sentencing.

c. Corroboration

Train police officers to obtain corroboration. You never know if a random “passerby” will be the key to establishing identity or another important aspect of your case. Train police to interview neighbors, friends and relatives separately.

d. Additional resource

For more information about investigative strategies, see Casey Gwinn, *Prosecuting Domestic Violence Cases without the Victim’s Participation or Evidence-Based Prosecution*, NATIONAL COLLEGE OF DISTRICT ATTORNEYS CONFERENCE (2001).

4. Establishing Identification through a Booking Photo

Many offenders flee the scene once the police have been called. Should you decide to issue the case through the use of a warrant, the defendant will be “booked” following arrest. On scene, each question asked of the victim to provide police with an accurate physical and background description of the abuser is simultaneously asked of the defendant him- or herself, once he or she has been arrested and booked.

During the booking process, the defendant will be queried regarding basic identifying details. Questions commonly asked by law enforcement officers during the booking process include:

- Name, sex, race, date of birth;
- Address;
- Social Security number and driver’s license number;
- Home phone number;
- Whether the person has any scars, marks, or tattoos;
- Emergency contact person, with phone number and address;
- Height, weight, build;
- Eye color, hair color and whether the person uses glasses;
- Complexion;
- Whether the person has facial hair;
- Whether the person is right- or left handed;
- Marital status;
- Occupation and name of employer;
- Number of years completed in school;
- Whether the person has ever been in the military, and if so, which branch; and
- Birthplace and country of citizenship.

It is not uncommon for defendants to provide information during the booking process that may help you establish identity later at trial. For instance, defendants often give the address of the offense as their place of residence. Sometimes, the “emergency contact person” will be listed as the complaining victim!

Booking questions are not subject to *Miranda/Goodchild* protection. See *State v. Stevens*, 181 Wis. 2d 410, 511 N.W.2d 591 (1994). See also *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528, 58 USLW 4817 (1990).

To ensure that the individual answering the booking questions is the same person arraigned for court, police officers take a photo of the person who has been arrested. The booking photo is typically taken simultaneously as questions are asked of the defendant. Officers can later testify that the information provided to them during the booking process came from the same person who appears in the booking photo.

After this verbal process of identifying the defendant is complete, you can ask to publish the booking photo to the jury. At this point, the jury will be able to see that the booking photo matches the defendant. This is how you can successfully prove identity through the evidence provided by the booking process.

Because the on-scene answers that victims provide to the police during their investigation mirror the responses of the defendant during the booking process, the defendant effectively admits identity. Booking is a procedure utilized in every criminal arrest. As long as the photo is not found to be impermissibly suggestive, or otherwise unreliable, which booking photos are designed to avoid, such evidence used is acceptable to effectively establish the identity of an offender.

For some support, see *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Powell v. State*, 86 Wis. 2d 51, 63-65, 271 N.W.2d 610, 616-617 (1978); *State v. Mosley*, 102 Wis. 2d 636, 654-55, 307 N.W.2d 200, 210-211 (1981); *State v. Haynes*, 118 Wis. 2d 21, 345 N.W.2d 892 (Ct. App. 1984).

5. Predicate Questions for Officers: Establishing Identity through the Booking Photo

Presuming that you have already elicited the victim’s statements, including the identification information provided to the on-scene investigating officer, you are now ready to call the law enforcement officer who booked the defendant. Alternatively, you may call a law enforcement officer who is an expert in the booking process for that specific law enforcement agency. A supervisor in your jail’s booking process can easily be qualified as an expert, based upon training and experience.

a. General predicate questions for the law enforcement officer:

- Name?
- Occupation?
- What law enforcement agency?
- How long have you been so employed?
- Previous law enforcement experience?
- Present duties? (i.e., supervisor of booking/identification/records process for county jail or police department, or, in general, booking defendants into the jail, etc.)

b. Specific training and experience questions:

- What does it mean for a criminal defendant to be “booked” into the jail? (Note: Have your witness actually explain the history and meaning of where the term originated. FYI: The booking process existed well before computers. Law enforcement agencies inscribed every defendant’s name, address, date of birth, Social Security number, fingerprint, etc. in the same large “book;” hence the name.)
- Explain your duties in the supervision of the booking and identification processes for the county jail or your police department.
- Why is it important for every arrested person to be booked and identified?
- Have you ever booked an arrested individual using an official booking process or procedure?
- Can you estimate how many arrested individuals you have booked? Do you use the same process/procedure each time?

If your witness is a supervisor of booking, a records custodian, or other identification process supervisor in your county jail or law enforcement agency, ask foundational questions to further qualify the witness:

- Are you a records custodian for your department or jail facility?
- Are you the supervisor of the booking process for your department or jail facility?
- Is the booking process your specialty?
- For how long have you worked in this capacity?
- Other experience that prepared you to be the supervisor?
- Have you ever arrested persons and taken them through the booking process in this jurisdiction? Or taken suspects arrested by other people through the process? If so, approximately how many times?
- As the supervisor, how many suspects/defendants have you actually taken through booking?

- In your capacity as a supervisor, can you estimate how many times you have observed arrested individuals being booked? Do you use the same process/procedure each time?

c. Explanation of the mechanics of the booking process:

Have the witness actually walk the jurors through the booking process, highlighting each step along the way. Make sure the witness explains the reason and importance of each step in the process, so that the jury understands those things (e.g., questioning, property inventory, searching, fingerprinting, photographing, etc.).

For example:

- How does the booking process work?
- Is each person processed the same exact way, as a part of a normal, regularly conducted activity or process?

WIS. STAT. § 908.03(6), the “records of regularly conducted activity” hearsay exception, states that:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with regular knowledge, all in the course or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Examples of questions to use with this witness include:

- How long has the Sheriff’s department (or police department) used this same procedure?
- Why does your department use a specific procedure?
- What are the specific duties, responsibilities and procedures?
- Where does the booking process occur?
- For jails: Do police reports from the arresting law enforcement agency accompany each defendant as he enters the booking process, after first being transported to the jail?

In some jails or jurisdictions, a copy of an “Arrest Detention Report” is kept with the defendant or an ID bracelet is placed upon the defendant.

- Is the suspect’s name identified on the police reports or ID bracelet?

d. Establishing foundation for admission of booking photo and authenticated copy of an inmate's biographical identification printout:

- How is a booking photo taken? How is the information stored? How is the information retrieved?
- How is the booking photo linked with the identification information supplied by the suspect during the process?
- After the defendant is photographed in a booking photo, does he/she receive a corresponding number?
- Is the booking identification number marked on the booking photo?
- At any time, are questions asked of the suspect regarding any biographical or identification information?
- What types of questions are asked of the suspect (i.e., name, age, address, height, weight, date of birth, race, sex, emergency contact information, etc.)?
- Is the suspect usually providing the biographical information simultaneously as he/she is being photographed?
- What is done with the biographical information/data (i.e, entered in computer database)?
- Once the information is entered into the computer, is a document produced (biographical booking printout – certified copy)?
- Is a booking identification number marked as well on the biographical information printout?
- What steps does your department take to ensure that the booking information provided by the defendant is not confused with other arrestees?

e. Introduce booking photo and biographical booking identification information printout:

- Prior to your testimony here today, were you asked in your role as a supervisor for (department) assigned to the booking room of the jail, to run a check to see if (defendant) was booked into the jail?
- Did you run this search? How?
- Did you determine whether or not this person was ever arrested and booked in conjunction with Case # _____ in _____ County for the charge(s) of _____?
- What were the results of your search?
- And your search returned a booking photo and biographical booking identification printout?
- Did you bring this booking photo and the biographical booking identification printout to court with you today?

- What information is contained in these exhibits with regard to the individual by the name of (defendant) that you testified was booked into the jail on (date)?

NOTE: The questions posed to the prior witness regarding the victim's description should mirror those asked of this witness. For example: 1) name, 2) date of birth, 3) home address, etc. . . . thereby establishing a mirroring list of identity evidence.

- All of this information was obtained directly from the individual named (defendant)?
- Does the information obtained correspond to a booking photo?
- Was this photo retained by your department in the manner with which you previously testified?
- Do you see the photo before you marked Exhibit #___?
- Based on your experience as a Booking and Identification Supervisor and/or Records Custodian, can you offer an opinion as to whether the person pictured in this booking photo provided the identification information on the biographical booking printout?

f. Identify the defendant:

NOTE: Some courts will not allow your witness to identify the defendant as the person pictured in the booking photo, preferring the jury to infer identity based upon the evidence, instead. However, if the court allows you to, feel free to have the witness identify the defendant.

- Do you see the person memorialized in this photo in court today?
- Can you point to him/her and describe what he/she is wearing?

Let the record reflect the witness has identified the defendant as the person pictured in the booking photo from Exhibit # ____.

Move the exhibit into evidence. Publish it to the jury.

28. Expert Witnesses

1. Introduction
2. The Importance of Explaining Victim Behavior
3. Deciding Whether to Use an Expert Witness
4. Determining Admissibility: Statutes, Case Law and the *Daubert* Standard
5. Practical Considerations
6. Additional Resources

1. Introduction

Domestic abuse prosecutions present unique challenges. Unlike most drug prosecutions, for example, domestic abuse cases are not based on a critical piece of physical evidence that can be produced and tested, or upon the testimony of an undercover officer who witnesses the crime. Domestic abuse occurs most often in areas we think of as “private,” with no security camera or witnesses around to provide evidence of the crime. Given these realities, the prosecutor preparing for a domestic abuse trial must plan to build the case relying not upon outside witnesses or physical evidence, but upon the testimony of one main witness: the victim.

The prosecutor’s heavy reliance on the testimony of this one witness inevitably signals the defense to spend the majority of the trial systematically challenging the victim’s credibility. The prosecutor will in turn work to confirm the victim’s credibility while simultaneously attacking the credibility of the defendant’s statements or (if the defendant chooses not to testify) the defense’s version of events. This is a scenario that plays out over and over again in domestic abuse trials, and it is why these trials are sometimes called “he-said, she-said” trials or “swearing contests.”

Juries will respond to these trial strategies by spending much of their energy evaluating the credibility of the State’s main witness and weighing that credibility against the defense’s version of events to determine whether the defendant is guilty beyond a reasonable doubt. Therefore, anything a prosecutor can do during the course of the trial to help the jury fully understand the experience, thought processes, and ultimate decisions made by the victim will be of critical importance. The right expert witness testimony can help provide this information to the jury. This chapter explores how to determine the right information a prosecutor needs to present during a trial to help jurors understand the choices made by a victim of domestic abuse, and helps prosecutors decide whether an expert witness can best deliver the necessary information.

2. The Importance of Explaining Victim Behavior

a. Great expectations: How domestic abuse myths undermine victim credibility

The dynamics of domestic abuse relationships are not well understood by the general public. Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 741 (2003). Examples of the myths and incorrect assumptions routinely made by lay people about domestic abuse include: domestic abuse is caused by alcohol or drugs; domestic abuse is caused by stress; victims provoke abuse; domestic abuse is “out-of-control” behavior; victims of domestic abuse can and should leave their abusers without delay. Judith A. Wolfer, *Top 10 Myths About Domestic Violence*, 42 MD. B. J. 38, 38, 40 (2009). In addition, many “lay” people believe that if a victim later “recants,” or changes his or her story, or decides not to cooperate with prosecutors, it must mean that the victim lied in the first place. Jurors will compare the behavior of the victim in a domestic abuse prosecution with these inaccurate expectations, creating a very real risk that the victim’s behavior will appear irrational at best and unreliable or dishonest at worst.

Common victim behaviors are often incomprehensible to lay people. Lay people, therefore, often rely on myths or substitute their own wrong judgments. Further, “[m]any jurors evaluate a victim’s actions as if she had a wide range of options and support resources available to her, and tend to blame her for staying in abusive relationships [or for her assault.]” Jurors often regard a victim’s behavior as evidence that she is unreliable. For example, one case notes, “[to] the average juror untutored in psychological dynamics of domestic violence, the victim’s vacillating behavior towards the defendant – in particular her back and forth attempts to end the relationship – might have seemed counterintuitive and might have even suggested her version of events was inherently unreliable and unworthy of belief.”

J.G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association 8 (2007) (internal citations omitted).

The prosecutor must therefore develop specific strategies to help the jury understand domestic abuse dynamics and why victims of domestic abuse often act in ways that run counter to a lay person’s expectations.

b. Using “Battered Woman’s Syndrome” or “domestic abuse dynamics” to combat myths

There are many strategies the prosecutor can and should employ to address jurors’ commonly held beliefs about domestic abuse. From *voir dire* to the rebuttal argument, the prosecutor should endeavor to consciously educate the jury about how relationships involving domestic abuse differ from other relationships. This includes a discussion of power and control dynamics

(as set forth on the Power and Control Wheel, which is included in Appendix 2) (Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging The Case But Divorcing The Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 209-11 (2008)), the limited choices victims have to escape the violence, and the reasons that victims might recant, be unwilling to participate in the prosecution and/or go back to their abusers (see Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999)).

Traditionally, lawyers have introduced this information as “Battered Woman’s Syndrome.” Battered Woman’s Syndrome, or “BWS”, is a construct first admitted in court to explain the actions of a domestic abuse victim accused of killing her abuser. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J. L. ETHICS & PUB. POL’Y. 321, 321 (1992). BWS is an attempt to describe the psychological impact of continuing domestic abuse. *Id.* at 326. Using BWS, experts explain why a victim of domestic abuse may become depressed and/or may be unable to take independent actions that would allow him or her to escape the abuse. *Id.* at 328. Outlining the escalating tactics batterers use to isolate and humiliate a victim, BWS aims to describe the reasons abused people often do not seek assistance from others, fight back, or leave the abusive situation. *Id.* at 330. See also Lenore E.A. Walker, *Battered Woman Syndrome: Empirical Findings*, 1087 ANN. N.Y. ACAD. SCI. 142, 145-46 (2006). BWS provides a framework that details the power and control abusers exercise in relationships with victims, including the use of tactics such as isolation, financial control, threats of consequences and physical violence. An expert can use these described power and control tactics to explain to lay people the reasons victims often do not report abuse, recant statements and/or refuse to participate in prosecution. *People v. Gadlin*, 92 Cal.Rptr.2d 890, 894-96 (Cal. App. 2000).

Battered Woman’s Syndrome is sometimes described in terms of Post-Traumatic Stress Disorder (PTSD). Michelle Michelson, *The Admissibility of Expert Testimony on Battering and Its Effects After Kumho Tire*, 79 WASH. U. L. Q. 367, 374-75 (2001). It is not technically referred to in the DSM manuals, however, and the BWS moniker reflects the trend in previous decades to label a group of common psychological reactions as “syndromes” in order to explain criminal behavior in a way that courts of the time were willing to accept. In short, the phrase “Battered Woman’s Syndrome” is no longer considered state of the art in the domestic abuse field, which has now moved toward describing the general components of BWS as either “battering and its effects” or the “dynamics” of domestic abuse. J.G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association 14-15 (2007) (internal citations omitted). Unfortunately, because there is a large history of case law in which courts across the country have specifically ruled that BWS is an acceptable area for expert testimony, we continue to have to use the terminology when applying to the court for admissibility.

3. Deciding Whether to Use an Expert Witness

The prosecutor who knows that the defense will spend the majority of a domestic abuse trial attacking the victim’s credibility cannot afford to allow jurors’ preconceived expectations to undermine that same victim’s credibility. The question becomes not whether to combat these misguided domestic abuse myths, but how to most effectively deconstruct them with the jury.

One of the best ways to identify and explain victim behavior is by using an expert witness. It is not the only way to raise the issues at trial, however, and prior to trial a prosecutor can utilize the following process to identify the issues that may cause juror confusion and formulate a strategy to introduce and explain domestic abuse dynamics. This step-by-step evaluation process is adapted from J.G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association 17-35 (2007).

Step 1: Identify the victim behavior that runs counter to juror expectations:

- Assess how the victim will appear to the jurors by examining the initial statement made to police officers, any subsequent statements, and the anticipated testimony of the victim at trial.
- Look at the surrounding context and history of the relationship to identify domestic abuse dynamics and their impact on the victim's actions and statements.

Common Domestic Abuse Victim Behaviors That Run Counter to Juror Expectations

Initial investigation:

- Victim may appear angry at those attempting to help
- Victim is withdrawn or quiet instead of emotional and crying
- Victim recants at the scene or refuses to talk to police
- Delay in reporting abuse or refusal to report abuse (where neighbor or third party makes report)

Recantations in- or out of court, after the initial report but before trial, may include:

- Recantation at preliminary hearing or other proceeding (petition to lift the no-contact order, restraining order hearing, etc.) at which the victim made an in-court statement
- Recantation to any other witness or law enforcement representative
- Request to "drop" charges
- Statements made about still loving defendant
- Self-blaming statements

Anticipated testimony at trial:

- Will the victim recant his or her previous statements?
- Will he or she partially recant or change some key elements?
- Perhaps he or she will express frustration and tell the jury that the case is proceeding against his or her wishes?

Contextual background of the relationship:

- Has the defendant exercised control over the victim in ways other than through the use of physical violence?
- Has the victim been reluctant to ask for help in the past?
- Is the victim convinced that this is somehow his or her fault?
- Will the jury question why the victim hasn't left the relationship? Or why the victim repeatedly returns to the abuser?

Step 2: Decide who can best introduce domestic abuse dynamics at trial

- Can the victim testify about the dynamics of domestic abuse?

As Jennifer Long points out, “[j]ust because expert testimony on victim behavior is admissible does not mean that prosecutors should introduce it. First, prosecutors should decide whether expert testimony is the most effective method of explaining a victim’s behavior in a particular case. In some cases, the victim will be able to best articulate the reasons for her behavior.” J.G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association 33 (2007). The prosecutor can ask the victim outright why he or she did not want to report the crime to the police or why he or she is recanting.

- Is there a lay witness with first-hand observations?

For example, the victim’s mother may be able to describe the systematic isolation of the victim by testifying that he or she was not allowed to attend family events, not allowed to talk on the phone to parents, or similar information. The police officer who responded to the scene may be able to testify to observations about the domestic abuse dynamics present when he or she investigated the charged crime. These witnesses won’t be able to testify about the actual domestic abuse dynamics, but based on their testimony the prosecutor can make the right arguments to the jury to explain the victim’s behavior. *See* WIS. STAT. § 907.01 (lay opinion testimony).

- Can you access an expert witness?

Practical considerations play a role in the decision, such as geographic availability of an expert or financial constraints such as lack of budget to pay an hourly witness fee.

Step 3: If the decision is made to use an expert witness, determine what kind of expert is best

There are essentially two kinds of expert witnesses:

- “Traditional” experts: Including licensed psychologists, counselors, degreed professionals in social work and academic experts who write, teach or conduct studies about domestic abuse.

- “Non-traditional” experts or “experiential” experts: Examples include victim advocates from a battered women’s shelter, victim-witness specialists, shelter directors or state coalition employees, emergency room doctors, and Sexual Assault Nurse Examiners (SANE), all of whom have been qualified as experts in various state courts because their expertise stems from observing the behavior of many victims over the course of their employment experience.

4. Determining Admissibility: Statutes, Case Law and the *Daubert* Standard

a. Statutes

Opinion testimony is governed by WIS. STAT. §§ 907.01, 907.02 and 907.03. In 2011, these statutory sections were amended to reflect the addition of a “reliability test.” See 2011 WI Act 2, codified in WIS. STAT. §§ 907.01; 907.02(1). The revised statutes were written to mirror the Federal Rules of Evidence 701 and 702. In creating this revision, Wisconsin joined the long list of states governed by the *Daubert* standard for admission of expert testimony. See generally *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The new language for each section appears below in italics.

WIS. STAT. § 907.01 OPINION TESTIMONY BY LAY WITNESSES.

If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:

- (1) Rationally based on the perception of the witness.
- (2) Helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.
- (3) *Not based on scientific, technical, or other specialized knowledge within the scope of a witness under 907.02(1).*

WIS. STAT. § 907.02(1) TESTIMONY BY EXPERTS.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.*

WIS. STAT. § 907.03 BASES OF OPINION TESTIMONY BY EXPERTS.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence *in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.*

If the decision has been made to enter evidence of domestic abuse dynamics using a witness who is not an expert in domestic abuse, make sure to examine WIS. STAT. § 907.01, which governs opinion testimony by lay witnesses. The best way to enter such evidence is to become familiar with the dynamics of domestic abuse and then have witnesses, such as the victim, testify to the actual things that occurred in this particular case in accordance with those dynamics.

In other words, do not ask the victim about domestic abuse dynamics in general, or about Battered Woman's Syndrome, but instead ask him or her to identify the reasons they want the charges dropped, or the reasons they lied to the police. Then, make the arguments that explain domestic abuse dynamics by using these facts (without using the technical terms) in closing argument. The victim may testify that the last time he or she tried to leave the defendant, the defendant appeared at the victim's place of employment requesting to see him or her and causing a scene. The prosecutor can use this information to help the jury understand why a victim of domestic abuse might not leave the abuser (out of fear of losing his or her job, for example); you can do this without ever uttering the phrases "Battered Woman's Syndrome" or "domestic abuse dynamics."

It is unclear at the time of publication what effect these recent legislative changes will have on the testimony of witnesses such as police officers, who previously could testify to their experiences with domestic abuse victims (regarding how common recantation is, for example) without having to be qualified as experts by the court. It appears that such witnesses will have to meet either the definitions set forth in WIS. STAT § 907.01, thereby limiting their ability to talk about domestic abuse dynamics or other "specialized knowledge," or they may need to be declared experiential experts, akin to domestic abuse advocates, under WIS. STAT. § 907.02.

If the decision is made to call an expert witness who is not also a factual witness but instead is an expert on the effects of battering, Battered Woman's Syndrome or domestic abuse dynamics, then that expert will have to meet the standards as set forth in WIS. STAT. § 907.02.

b. Case law for the first three elements of WIS. STAT. § 907.02(1)

The first three requirements in WIS. STAT. § 907.02(1) remain unchanged from the previous iteration of the statute. It is likely that Wisconsin case law that was developed prior to the adoption of the *Daubert* standard will therefore continue to apply to these requirements.

Wisconsin courts have long held that the dynamics of a domestic abuse relationship are beyond the knowledge of an average juror and are not commonly understood by lay persons, thus satisfying the first element of WIS. STAT. § 907.02(1).

In *State v. Bednarz*, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993), the court held that the State could introduce the testimony of an expert to assist the jury in understanding why a victim of domestic abuse might recant. *Bednarz*, 179 Wis. 2d at 466. The court explained that “[a]n untrained lay person does not know that recantation can be suggestive of post-traumatic stress in the form of the battered woman’s syndrome. The expert opinion was thus permissible to enlighten the jury and allow it to intelligently consider the syndrome as one possible explanation for [the victim’s] behavior.” *Id.* at 467.

In addition, at least twenty-seven states have admitted or discussed with favor prosecutors’ use of expert testimony on the dynamics of domestic abuse or Battered Woman’s Syndrome in order to assist fact-finders in understanding the decisions or actions of battered women. H. Morley Swingle, Angel M. Woodruff & Julie A. Hunter, *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MISSOURI BAR 220, 225 (2002). See also Paula Finley Mangrum, *Reconceptualizing Battered Women Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593 (1999); Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENER. L. 67 (1998).

Federal courts have also admitted such testimony to explain the common misconceptions often held by lay people regarding the behaviors of domestic abuse victims, as in *United States v. Young*, 316 F.3d 649 (7th Cir. 2002), in which a nurse explained to the jury that the alleged victim’s behavior in recanting her previous statements alleging that her boyfriend/defendant had kidnapped her at gunpoint and caused her numerous physical injuries was not uncommon. *Young*, 316 F.3d at 655. She further testified that victims of such abuse have a “limited ability to perceive means of escape” and discussed the victim’s behavior as fitting the “pattern” of behavior commonly observed among domestic abuse victims. *Id.*

The second element under WIS. STAT. § 907.02(1) requires a showing that the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. This must be done by identifying the ways in which testimony regarding domestic abuse dynamics will help a jury understand the facts of the particular case at hand.

The third element under WIS. STAT. § 907.02(1) requires that the proponent of the expert testimony show that the expert is qualified to testify “by knowledge, skill, experience, training, or education.” WIS. STAT. § 907.02(1). Individuals with varying backgrounds have been qualified as experts in domestic abuse dynamics or Battered Woman’s Syndrome. Witnesses with psychology and counseling degrees and numerous years of experience in the field of domestic abuse have been qualified. See *Arcoren v. United States*, 929 F.2d 1235, 1239-41 (8th Cir. 1991) (witness with degree in psychology and over ten years of experience working with battered women was qualified by the court as an expert). Witnesses who serve as victim

advocates in the area of domestic abuse have been qualified as experts based on their experience and training in the field. *See State v. Schaller*, 544 N.W. 2d 247, 251-53 (Ct. App. 1995).

The Wisconsin Court of Appeals upheld the lower court's qualification of a victim-witness specialist with a degree in social work who served as a liaison between prosecutors and victims for a long period of time as an expert. *Id.* The victim-witness specialist testified on general domestic abuse behaviors and stated that it was common for victims to minimize or recant an earlier assault accusation. *Id.* at 251. In Iowa, the executive director of the Iowa Coalition Against Domestic Violence was qualified as an expert witness based on her degree in social work, training, employment, and counseling experience with over 2,000 battered women, despite the fact that she had not officially published any works on the subject. *State v. Griffin*, 564 N.W. 2d 370, 374 (Iowa 1997).

c. The *Daubert* standard

The amended WIS. STAT. § 907.02(1) adopts a fourth standard for determining the reliability of the facts and methods underlying expert witness testimony as originally articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the *Daubert* decision itself grew out of litigation involving the so-called “hard” sciences, the *Daubert* analysis was applied to experience-based expert testimony that was not strictly based in “hard” science in *Kumho Tire Company, Ltd., v. Carmichael*, 526 U.S. 137, 147 (1999). *Daubert* and *Kumho Tire* both make it clear that the judge is the ultimate arbiter of whether an expert's testimony is reliable. The judge acts as gatekeeper to determine whether the proffered evidence meets the standard of admissibility and to ensure the reliability and relevance of the expert testimony. *Kumho Tire*, 526 U.S. at 152. There is no specific checklist or test that must be applied, and although *Daubert* and *Kumho Tire* include analyses of various reliability factors such as “rate of error” and “general acceptance in the scientific community,” the trial court is free to apply the factors it believes best assess reliability. *Kumho Tire*, 526 U.S. at 151-52. The factors that apply to a case involving scientific testimony do not necessarily apply to a case involving testimony based on other types of expertise, or when the testimony offered does not purport to be “science.” *United States v. Glynn*, 578 F.Supp.2d 567, 570 (S.D. N.Y. 2008) (citing *Kumho Tire*, 526 U.S. at 151-52).

The majority of states with expert testimony admissibility standards based on *Daubert* have allowed testimony on domestic abuse dynamics and/or Battered Woman's Syndrome. At the end of this chapter there is a representative list of some of the major cases under which evidence on domestic abuse dynamics and/or BWS has been allowed in *Daubert* states.

Federal courts governed by FRE 702 likewise have found expert testimony on domestic abuse dynamics and/or BWS to be reliable and admissible. In *United States v. Young*, described above, a nurse testified that the alleged victim's behavior was consistent with patterns of behavior commonly observed among victims of domestic abuse. *Young*, 316 F.3d at 655. The Seventh Circuit found the expert testimony to be based on concepts “generally accepted in the mental health profession,” and that the expert's methodology was reliable under the *Daubert* analysis. *Id.* at 658-59. In *United States v. Alzanki*, the First Circuit held that the district court acted

properly as gatekeeper under Rule 702 in admitting expert testimony that the victim's "behavioral response" to abuse by the defendant was consistent with the behavior of abuse victims generally. *United States v. Alzanki*, 54 F.3d 994, 1005-06 (1st Cir. 1995). The *Alzanki* court specifically cited *Daubert* and rejected the defendant's argument that "allowing an expert to testify to her empirical findings on the behavioral reactions of abuse victims impermissibly suggests to the jury that the putative victim's allegations of abuse should be believed". *Id.* at 1006.

The *Daubert* Court characterized Rule 702 as a liberal standard of admissibility. *Daubert*, 509 U.S. at 588. The comments to Federal Rule of Evidence 702 make clear that the standard is not intended to replace the adversary system, is not intended to operate as an automatic challenge to the testimony of every expert, and should not result in unnecessary "reliability" proceedings:

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "sea change over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

FRE 702, Advisory Committee Notes, 2000 Amendments.

These comments make clear that there is no "automatic" challenge to the testimony of every expert. What this means in practice is that the defense attorney in a domestic abuse case should not be able to orally request a *Daubert* hearing upon learning that the prosecutor may call an expert witness. The prosecutor should insist that a written motion be filed by the defense setting forth with particularity the grounds for a reliability challenge to a given expert witness. It is not enough to merely invoke the *Daubert* case name, and the court should set a briefing schedule so that the prosecution may respond with a written brief citing pertinent statutory interpretation and case law. The prosecution should also suggest that the court may decide the issue without an actual hearing at which the State produces the expert, especially in light of the *Daubert* states that have admitted expert testimony on domestic abuse dynamics.

5. Practical Considerations

Given the favorable state of case law on the admissibility of expert testimony in other *Daubert* states, expert witness testimony on the topic of domestic abuse dynamics has a very good chance of being admitted. What follows are some practical tips for use after you decide to call this type of expert at trial.

a. Finding an expert

The first and most practical preliminary matter is how to go about finding a domestic abuse expert. Despite numerous ongoing efforts to increase the potential pool of expert witnesses, it is often difficult to find an expert who is geographically close, has not worked with the victim or family, and will testify for little or no pay. This is not to suggest that expert testimony is not very valuable and worth paying for, but reflects the sad reality about county and state budgets (or lack thereof) available to cover such costs. The State of Wisconsin Department of Justice keeps a state-wide list of potential domestic abuse experts that is updated periodically. In addition, domestic abuse and sexual assault coalitions or local coordinated community response (CCR) teams also keep lists of people who are willing and qualified to testify.

Prosecutors can also call local domestic abuse non-profit service providers who may have someone on their staff who is able to testify, or may have an agreement with another program close by in the event they are conflicted out due to service provision to the victim or family. Some prosecutors have taken to asking local SANE nurses who may be trained in responding to victims of domestic abuse and may have enough on-the-job experience with these victims to be qualified by the court as experts.

b. Preparing the expert

Once an expert witness is located, the prosecutor should set aside a time before the trial to meet with the expert to prepare. Although the expert should not be someone who has provided direct services to the victim, the expert can and should be familiar with the police reports and/or complaint before he or she testifies. The expert should also have or be provided with a bibliography of basic articles and studies on domestic abuse dynamics in order to prepare for any *Daubert* hearing that may arise. The expert should provide you with a CV or resume. If the person is an “experiential” expert, the CV should include the number of domestic abuse victims the expert has worked with in the past.

You should provide the expert with a brief list of questions that you will ask of him or her while on the stand, beginning with qualifying questions about the expert’s background and history, then working through the substantive questions. Include any exhibits you intend to introduce through that person, such as the Power and Control Wheel. Many experts are fearful of cross examination, or that something they say might “hurt” the case. Make it clear to the expert that his or her job is only to testify meaningfully and truthfully. The prosecutor’s job is to put all the testimony together and convince the jury.

Preparation tips for prosecutors using domestic abuse experts:

- Find an expert by asking local providers, coordinated community response teams (CCR), coalitions, SANE nurses, and other local resources.
- Prepare with the expert before trial by giving them reports, a bibliography, sample questions and any exhibits that will be used.
- Obtain a CV or resume, including the number of domestic abuse victims with whom that particular expert has worked.
- Meaningful and truthful testimony is all that is required; the prosecutor will put the “puzzle pieces” together for the jury.

c. *Daubert* motions

As stated above, wait for the defense to file a brief challenging your expert. Do not agree to hold a hearing without a briefing schedule. Argue the elements of WIS. STAT. § 907.02 in your brief, and recommend to the court that a decision be made based upon the briefs and oral argument alone, without an actual testimonial hearing. Only if the court denies this request should the prosecutor prepare and hold a full-blown *Daubert* hearing with the expert present. Continue to argue that the majority of *Daubert* states and the federal government have allowed expert testimony about BWS and domestic abuse dynamics to be heard by juries, therefore it is not an unfounded scientific concept without general acceptance.

d. Possible pitfalls

- Avoid using an expert who has treated or worked directly with the victim. It is best to steer clear of anyone who has provided direct services to the victim, as it may expose your expert to accusations of bias, and may give the defense grounds to explore the victim’s history with the expert.
- Avoid impermissible character evidence: “evidence of a person’s character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion.” WIS. STAT. § 906.08. *See also* J.G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association 39 (2007). This applies equally to defendants and victims.
- Avoid eliciting testimony from the expert on the “ultimate” issue(s). An expert cannot give an opinion as to the ultimate issue of guilt or innocence, or as to whether the victim is in fact a victim of domestic abuse. In addition, experts should never testify as to whether they believe someone is telling the truth. “[C]ourts do not allow experts to testify to the ‘ultimate issue’ of whether the victim is telling the truth. . . . Such testimony is likely to result in a mistrial or reversal of a conviction on appeal.” K.A. Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault*, Minnesota Center Against Violence and Abuse, Violence Against Women Online Resources 9-10 (2005). Avoid asking

the expert to make statements that offer ultimate conclusions, offender profiling, or improper bolstering.

6. Additional Resources

Given the recent statutory change on expert witnesses, be sure to check the most recent case law and don't hesitate to consult an attorney at the Wisconsin Department of Justice when considering a motion to admit or deny admission of an expert witness, particularly when it requires a court to review an issue of first impression.

***Daubert* State Cases Allowing Domestic Abuse Expert Testimony:**

Alaska: *Russell v. State*, 934 P.2d 1335, 1343 (Alaska Ct. App. 1997).

Colorado: *People v. Lafferty*, 9 P.3d 1132, 1135 (Colo. Ct. App. 1999)

Connecticut: *State v. Yusuf*, 70 Conn. App. 594, 800 A.2d 590 (2002)

Georgia: *Parrish v. State*, 237 Ga. App. 274, 514 S.E.2d 458, 463 (1999)

Hawaii: *State v. Clark*, 926 P.2d 194, 203 (Haw. 1996)

Idaho: *State v. Varie*, 135 Idaho 848, 26 P.3d 31 (2001)

Indiana: *Odom v. State*, 711 N.E.2d 71 (Ind. Ct. App. 1999)

Iowa: *State v. Rodriguez*, 636 N.W.2d 234 (Iowa 2001)

Louisiana: *State v. Vidaurri*, 919 So.2d 803 (La. Ct. App. 2005)

Massachusetts: *Commonwealth v. Goetzendanner*, 679 N.E.2d 240 (Mass. Ct. App. 1997)

Montana: *State v. Bonamarte*, 2009 MT 243 (Mont. 2009)

Nevada: *Boykins v. State*, 116 Nev. 171 (Nev. 2000)

New Hampshire: *State v. Searles*, 680 A.2d 612 (N.H. 1996)

New Jersey: *State v. Townsend*, 897 A.2d 316 (N.J. 2006)

Ohio: *State v. Haines*, 112 Ohio St. 3d 393 (Ohio 2006)

Oklahoma: *Bechtel v. State*, 840 P.2d 1 (1992); *Paine v. Massie*, 339 F.3d 1194 (10th Cir. Okla. 2003)

South Dakota: *State v. Weaver*, 2002 SD 76 (S.D. 2002)

Texas: *Dixon v. State*, 244 S.W.3d 472 (Tex. App. Houston 14th Dist. 2007)

Wyoming: *Dean v. State*, 2008 WY 124 (Wyo. 2008)

Statutory acceptance: In California, a state where expert testimony is subject to the arguably more restrictive *Frye* standard, such evidence is considered reliable by statute, with

specifically enacted legislation establishing that “expert opinion testimony on battered woman’s syndrome shall not be considered a new scientific technique whose reliability is unproven.” Cal. Evid. Code § 1107 (a)-(b).

29. Cross Examination Techniques

1. Introduction
2. Statutory Authority
3. The Purpose of Cross Examination
4. Attacking the Credibility of a Witness Eight Different Ways
5. Miscellaneous Cross Examination Issues
6. Practical Strategies for Cross Examination

1. Introduction

You know your job at trial. At a minimum, prosecutors must prove the date of the offense (when?), the venue (where?), the elements (what happened?) and the identity of the perpetrator (who did it?). When you answer these questions with the evidence presented during your case in chief, you will meet your legal burden to withstand a motion to dismiss, but you want to do more than that. Your goal is to persuade the jury to find the defendant guilty beyond a reasonable doubt.

What about the defense? Sometimes you can easily anticipate what the defense will present. On the other hand, sometimes you cannot begin to imagine what the defense will present, perhaps because there is (in your mind) no meaningful defense. In other cases, a defense attorney has mapped out an aggressive strategy to attack one or more of the elements of the charge. Sometimes, it appears that the defense is simply hoping to capitalize on your (anticipated) fumble.

Whatever the case may be, one thing is for certain: the defense will be trying to convince the jury that a “reasonable doubt” exists.

Successful cross examination gives you the capacity to expose the defense. You can use it to set up your final argument to the jury. You want to demonstrate that while the defense may have posited a “doubt,” it is certainly not a “reasonable” one.

When you prepare your cross examination in anticipation of the defense’s case theory, you gain an advantage. You give yourself a head start towards a compelling closing argument.

2. Statutory Authority

The scope of cross examination is governed by WIS. STAT. § 906.11, which states:

WIS. STAT. § 906.11 MODE AND ORDER OF INTERROGATION AND PRESENTATION.

- (1) **CONTROL BY JUDGE.** The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.
- (2) **SCOPE OF CROSS-EXAMINATION.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.
- (3) **LEADING QUESTIONS.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

3. The Purpose of Cross Examination

The purposes of cross examination include the following:

- 1) Attacking the credibility of witnesses.
- 2) Reinforcing the proof of an element (or more than one element) of your case.
- 3) Re-emphasizing the proof that lends credibility to your witnesses and your case theory.

Limit yourself to these three purposes. Absent extraordinary circumstances, resist the temptation to dig further. The best cross examinations are typically short. They focus either on points inconsistent with the evidence or enhancements to your case in chief.

Don't unnecessarily compromise your case with an unstructured cross examination lacking any direction or purpose. Don't casually go fishing. Don't cross a witness recklessly because you feel you have to ask something. It will usually result in costly error.

Prepare your cross exam ahead of time. Know that witness' prior statements. Have those statements ready for the purpose of impeachment, if it becomes necessary. Rapid-fire your questions so the witness doesn't have time to think about the answers. Often, your points will be

drawn out more by inference than direct confrontation. In fact, belligerent or hostile treatment of a witness usually backfires.

4. Attacking the Credibility of a Witness Eight Different Ways

a. Prior inconsistent statements

i. Form

Prior inconsistent statements may be oral, written, testimonial or even non-verbal.

ii. Foundation

As stated in *Bullock v. State*, 53 Wis. 2d 809, 193 N.W.2d 889 (1972), you must lay a foundation.

Bullock articulates the foundational requirements for impeachment of a prior inconsistent statement:

- Asking the witness if he or she made the prior contradictory statement, noting the date and time of the statement and the person to whom the statement was made.
- Allowing the defense attorney to view the statement, if in writing, at the completion of that part of the examination, according to WIS. STAT. § 906.13(1). Mark the written statement as an exhibit and enter it into evidence.
- Fairness requires allowing an opportunity for the witness to explain the prior statement.

iii. Impeachment

According to WIS. STAT. § 906.07, the credibility of a witness may be attacked by any party, including the party that called the witness. *State v. Lenarchik*, 74 Wis. 2d 425, 247 N.W.2d 80 (1976). Make sure the impeachment is with a prior *inconsistent* statement. A prior consistent statement is hearsay unless it is used to rebut an inference of recent fabrication or improper influence or motive. WIS. STAT. § 908.01(4)(a)2.

In *State v. Echols*, 175 Wis. 2d 653, 499 N.W.2d 631 (1993), the defense attorney did not have the transcript of the police officer who testified at the suppression hearing. The court prohibited the defense attorney from trying to impeach the detective on his testimony at the suppression hearing, since no transcript was available to determine the accuracy of the impeachment. Note that this occurred even in light of WIS. STAT. § 906.13(1), which says that the statement does not have to be shown to the witness on the stand.

Failure to impeach is not *per se* ineffective assistance of counsel. *State v. Teynor*, 141 Wis. 2d 187, 414 N.W.2d 76 (Ct. App. 1987).

b. Bias, interest, prejudice or corruption

i. Relationships

Examine the witness' relationship with the victim or defendant. *Olden v. Kentucky*, 109 S.Ct. 480, 488 U.S. 277, 102 L.Ed. 513 (1988), held that it was reversible error to prohibit the defense from examining the victim about her relationship with a man of another race to show the woman's reason for falsifying a rape claim. The trial judge stated that the prejudice of revealing the victim's relationship with a man of another race would outweigh any relevancy of the defendant's claim that she participated in consensual sex and claimed rape to conceal that fact from her boyfriend.

In another case, the defendant wanted to call witnesses to show that the defendant did not get along with the victim's family. The judge prohibited this testimony, concluding that these allegations were unsubstantiated and vague and that the victim's family members were not the parties involved. The court was upheld in prohibiting this type of bias testimony. *In the Interest of Michael R.B.*, 175 Wis. 2d 713, 499 N.W.2d 641 (1993).

To show bias, the State in another case cross examined a witness about his brother's fear of the defendant in order to establish why the witness was testifying on the defendant's behalf. The defendant objected. The court ruled that this line of questioning was proper. *State v. Williamson*, 84 Wis. 2d 370, 267 N.W.2d 337 (1978).

ii. Testimony in exchange for something of value: A deal given to testify or a benefit derived from testifying

In one case, the defense attorney was prohibited from examining a witness about prior plea bargains he received from the State. The court held that since there was sufficient testimony as to the plea bargain he received in the instant case, other plea agreements he received in the past from the State were irrelevant. *Genova v. State*, 912 Wis. 2d 595, 283 N.W.2d 483 (1979).

In another case, the Wisconsin Court of Appeals held it was reversible error for the trial court to prohibit the defense from cross examining the State's psychiatrist on the truthfulness of possible criminal charges being issued against him, and the possibility he was testifying for the State to curry favor. The Wisconsin Supreme Court reversed, holding that the questioning was immaterial. *State v. Lindh*, 156 Wis. 2d 768, 457 N.W.2d 564 (Ct. App. 1990), *reversed by* 161 Wis. 2d 324, 468 N.W.2d 168 (1991).

iii. Rape shield: WIS. STAT. § 972.11(2)

Evidence of past sexual conduct of the victim is prohibited by WIS. STAT. §§ 940.225; 948.02; 948.025; 948.05; and/or 948.06, except:

- Evidence of the complaining witness' past conduct with the defendant.
- Evidence of specific instance(s) of sexual conduct showing the source or origin of semen, pregnancy, or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
- Evidence of prior untruthful allegations of sexual assault made by the complaining witness. *See also State v. Rogrud*, 156 Wis. 2d 783, 457 N.W.2d 573 (Ct. App. 1990); *State v. Olson*, 179 Wis. 2d 715, 508 N.W.2d 616 (Ct. App. 1993). This is limited to cross exam. The rule in *Olson* indicates that if the complaining witness answers "no," it is collateral impeachment to introduce specific instances of false accusations and thus prohibited.

iv. Bias

Examine a defense witness for the following areas of bias:

- Anti-police attitude.
- Financial interest: Are you being paid and how much?
- Member of a group sympathetic to defendant (e.g. battered women group for battered women's syndrome defense).
- Dislike of victim.

v. Corruption

Be wary of a "professional" witness or a "bought off" witness. You can impeach even with collateral impeachment to show a corrupt testimonial intent. An example is the subornation of perjury. *State v. Amos*, 153 Wis. 2d 257, 450 N.W.2d 503 (1989).

vi. Alibi

If an alibi is used at trial, explore with the witness (NOT the defendant) why the story is just now coming out and why the witness did not go to the police earlier to clear the defendant. Why wait until the day of trial? Why allow an innocent person to continue to be unfairly prosecuted?

Exercise extreme caution when you do this, especially where *Miranda* rights are involved. See the following relevant examples:

- *State v. McLemore*, 87 Wis. 2d 739, 275 N.W.2d 692 (1978). You can question an alibi witness as to why he or she did not bring out the alibi story earlier. Again, use extreme caution when questioning the defendant after arrest and *Miranda* rights have been given.
- *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). You cannot mention the defendant's right to silence at any time after the *Miranda* rights are given. You can mention the defendant's "failure to explain" or silence prior to the reading of the *Miranda* rights.

- *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1970). Post-*Miranda* silence cannot be mentioned at all. It is a due process violation (although it may be non-substantial and not require reversal).
- *State v. Rogers*, 93 Wis. 2d 682, 287 N.W.2d 774 (1980). The witness in *Rogers* failed to appear twice to testify in other proceedings in the case. The court prohibited the defense attorney from cross examining the witness about this topic, ruling that it is not a matter bearing on credibility.

c. Attacking character

i. Character as a means to uncover bias

You can explore character to find bias. Ordinarily, character evidence is limited to opinion and reputation evidence to attack credibility (i.e. as to truthfulness or untruthfulness), pursuant to WIS. STAT. § 906.08(1).

ii. Prohibition on collateral evidence to impeach

You cannot use collateral evidence to impeach. Whatever the witness or defendant says, however, you are stuck with the answer. WIS. STAT. § 906.08(2). See *State v. Sonnenberg*, 117 Wis. 2d 159, 344 N.W.2d 95 (1983).

iii. Collateral evidence as other acts evidence

See the following cases for examples regarding the use of collateral evidence as other acts evidence:

- *State v. Simpson*, 83 Wis. 2d 494, 266 N.W.2d 270 (1978). The court allowed the defendant to be cross examined on an incident that occurred four months prior to the charged incident, where the defendant had threatened to kill the victim. If the defendant answered that the incident did not occur, the court could still allow other acts evidence to show intent, per WIS. STAT. § 904.04(2).
- *State v. Rutchik*, 116 Wis. 2d 61, 341 N.W.2d 639 (1983). Evidence of other crimes is admissible on cross-examination to rebut the defendant's testimony regarding intent. Collateral evidence is admissible not only to question credibility, but also to show a WIS. STAT. § 904.04(2) exception during cross-examination.

iv. Impeaching the defendant

You can impeach a defendant with statements made at a prior suppression hearing. You can even impeach defendants with suppressed statements or evidence that resulted from *Miranda* violations, but not from *Goodchild* voluntariness violations. *State v. Schultz*, 148 Wis. 2d 370,

435 N.W.2d 305 (1988); *Wold v. State*, 57 Wis. 2d 344, 204 N.W.2d 402 (1973); *Harris v. N.Y.*, 401 U.S. 222 (1971).

v. Self defense

The victim of a crime is subject to attack on specific instances of bad character if it pertains to an issue of self defense. *State v. McMorris*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973); *State v. Boykins*, 119 Wis. 2d 272, 350 N.W.2d 710 (1984); *State v. McAllister*, 74 Wis. 2d 246, 246 N.W.2d 511 (1976).

The proper foundation must be laid by the defendant before self defense evidence is admissible. There are two ways the defense can lay the foundation:

- Through the testimony of the defendant, stating that he or she acted because of certain facts he or she knew about the victim; or
- If the State introduces the defendant's statement and it contains specific elements of self defense.

vi. Corroborative witnesses

State v. Daniels, 160 Wis. 2d 85, 465 N.W.2d 633 (1991), states that the defense can introduce evidence on specific instances of conduct with corroborative witnesses to prove the allegations of why the defendant acted the way he or she did.

The State may counter characterizations of the victim as "violent" by showing evidence of the peacefulness of the victim. WIS. STAT. § 904.04(1). The State can also rebut allegations of the victim being the first aggressor by putting on evidence of the defendant's violent past, if the defendant tries to show or infer his or her peaceful character. WIS. STAT. §§ 904.04(1)(a) and (b).

vii. Remoteness standard

The only control over the defense's presentation of *McMorris* prior specific instances of the victim's bad character is the remoteness standard described in *State v. Daniels*, 160 Wis. 2d 85, 465 N.W.2d 633 (1991). *Daniels* says that if the incident of violence by the victim is too remote to affect the defendant's actions at the time of the crime, it can be prohibited.

viii. Motion *in limine* to object to self defense evidence

Make a motion *in limine* to keep this evidence from coming in at trial. You can also claim lack of notice if you have not been made aware of the victim's alleged *McMorris* prior bad acts.

d. Perception and recollection problems of a witness

Impeachment through perception and recollection problems of a witness may come in many forms:

i. Physical problems

Impeach a witness through existing physical problems such as sight disabilities, hearing disabilities, etc.

ii. Impeachment through impossibility

Impeach through impossibility by highlighting the witness' inability to see or hear the thing testified to. Wisconsin courts have limited the use of defense experts to testify on mental capacity under pressure of eyewitness testimony. *State v. Hampton*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979); *State v. Wilson*, 179 Wis. 2d 660, 508 N.W.2d 44 (1993); *State v. Blair*, 164 Wis. 2d 64, 473 N.W.2d 566 (1992). Note that this type of testimony is almost always prohibited in Wisconsin. In lieu of this type of evidence, you may rely upon the Identification Jury Instruction.

Effective use of proven impeachment strategies can be vital to impeachment success. As a practical suggestion, always stop and move on to something else after you get the answer you want. Don't make the mistake of asking one too many questions.

As an example, the below examination occurred with a defense alibi witness in a homicide case:

Q: You saw the defendant at your hotel at the time of the murder that happened across town?

A: Yes.

Q: How long have you worked at the hotel?

A: Nine years.

Q: How many people have you waited on in those nine years?

A: Thousands, perhaps one hundred a day.

Q: Now in dealing with those thousands of people, how can you be sure the defendant was at your hotel at the time of the murder?

A: Because he stuck a gun in my face and robbed me.

When seeking to impeach a witness' ability to recollect, focus on the passage of time, i.e., the time between the event and the testimony,

If there is a difference between a statement made at the time of the incident and testimony in court, ask the witness if it is true that his or her recollection at the time of the incident would have been more accurate and fresher than his or her recollection today. Invariably the answer will be that the recollection was more accurate when the incident occurred.

iii. Mental afflictions / competency to testify

Competency is described in Chapter 906 of the Wisconsin Statutes. If there is a possibility that a witness has a mental issue, the court can appoint a psychiatrist to examine the witness to determine whether that person is competent to testify. If the witness refuses to submit to an examination, the court can exclude the witness. *Scheiss v. State*, 71 Wis. 2d 733, 293 N.W.2d 68 (1976).

iv. Alcohol or drug use

Evidence of alcohol or drug use is relevant if not remote in time from the incident. *Desjarlois v. State*, 73 Wis. 2d 480, 243 N.W.2d 453 (1976).

e. The witness being contradictory to others at trial

Witnesses are normally sequestered and have no idea what others have testified to on the witness stand. Either *sua sponte* or upon a motion by one of the parties to the action, the judge must order that the witnesses are excluded so that they cannot hear the testimony of other witnesses, according to WIS. STAT. § 906.15. If the witness testifies contrary to a number of witnesses or to a particularly believable witness, exploit that inconsistency in cross examination. Ask the testifying witness if he or she knows why Mr. X would testify to something different from their story.

f. The witness contradicts him- or herself on the witness stand

At times a witness will testify differently on cross exam than he or she did on direct. When this occurs, bring it to the jury's attention in closing argument, and if possible, get a transcript of the contradictions.

You can cross examine a defendant regarding statements he or she made at a plea hearing, providing it is stipulated that those statements can be used in subsequent proceedings. Look at the case of *State v. Gustafson*, 112 Wis. 2d 369, 332 N.W.2d 848 (Ct. App. 1983), where the allegations concerned a father and son jointly participating in a rape. The son, who had already pled "no contest" to the charge, testified at the father's trial that neither he nor his father had anything to do with the rape. The prosecutor was permitted to ask the son about his "no contest" plea to the same sexual assault charge in juvenile court. Despite protections regarding juvenile proceedings, WIS. STAT. § 906.13 treats a "no contest" plea in a juvenile matter as a prior statement; it is therefore admissible.

g. Impeachment through prior convictions

WIS. STAT. § 906.09 states that a witness can be impeached by his or her prior record of adult criminal convictions or juvenile adjudications.

You may ask two questions:

- Have you ever been convicted of a crime?
- (If yes) How many times?

Before asking these questions you must have a hearing outside the presence of the jury to establish the number of convictions and their relevancy. *See* WIS. STAT. §§ 906.09(2); 904.03; 901.04.

If the witness gives the wrong answer as to the number of convictions you can ask about specific convictions and the year and county in which they occurred. For example: “Mr. Jones, weren’t you convicted of burglary in Polk County on (date)?” If the witness refuses to answer, you can impeach him or her with certified copies of the judgment of conviction.

If the witness answers correctly as to whether he was convicted of a crime and how many times on direct exam, you are prohibited from asking it again on cross. *State v. Adams*, 257 Wis. 433, 43 N.W.2d 446 (1950).

Be careful; if a prosecutor makes a mistake as to the number of convictions a witness has, the court can declare a mistrial. Since the mistake was the State’s fault, under those circumstances there is a possibility that you may not be allowed to retry the case. *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L.Ed.2d 425 (1973).

See the below examples of cases involving improper impeachment:

- *State v. Bowie*, 92 Wis. 2d 192, 284 N.W.2d 613 (1979). The prosecutor impeached the defendant with four convictions when he really only had one conviction. The court ruled that the prosecutor’s mistake was harmless error, reasoning that the same instruction is given on the weight of prior conviction impeachment no matter how many convictions the defendant had accumulated.
- *State v. McClelland*, 84 Wis. 2d 145, 267 N.W.2d 843 (1978). The defendant testified on direct examination that he had not been involved in criminal activity since 1972. On cross exam the prosecutor asked the defendant if he had broken into a home while armed in 1975. The court held that WIS. STAT. § 906.08 permits the use of specific incidents of conduct of a witness to attack his credibility on cross. But under WIS. STAT. § 906.09 you are stuck with whatever answer the witness gives. Extrinsic evidence can not be utilized.
- *State v. Bashka*, 173 Wis. 2d 387, 496 N.W.2d 627 (Ct. App. 1992). The court ruled that the defendant had been convicted of five crimes. The prosecutor impeached the defendant with five crimes. Later it became clear that the defendant had been convicted of armed robbery while masked and the judge counted it as two separate convictions rather than one. Thus, the defendant had been convicted of four crimes, not five. The court ruled that this was harmless error and would only be reversible error if it contributed to the conviction.

- Moore v. State, 83 Wis. 2d 285, 265 N.W.2d 540 (1978). After the defense witness testified as to the number of convictions he had on his record, the prosecutor asked the witness how many of those convictions occurred with the defendant. The court found this was improper impeachment, but harmless error.

As a practical suggestion, try to get a stipulation as to the number of convictions. If there is a doubt about a conviction, don't use it. Also, fairness dictates that convictions may not be used for impeachment when the person was not represented by counsel or the conviction was later reversed. See Lewis v. U.S., 100 S. Ct. 915 (1980). Note, too, that many judges may choose to follow the federal standard of only counting convictions that occurred within the past ten years.

h. Supporting your theme in the domestic abuse context

i. When your case theme is: “Exertion of power and control in a domestic abuse relationship”

You must strategize your cross examination to point out the improbabilities of the defendant's version of the facts. At the same time, you must develop your case theme through cross examination of the defendant.

Prosecutors are taught to choose a case theme when arguing to a jury. A convincing theme can powerfully persuade the jury. The best case theme actually summarizes the gist of your case in a brief statement or phrase.

Depending upon the facts and nature of the abusive relationship in your case, you may choose some form of a “power and control” theme. The Domestic Abuse Intervention Project from Duluth, Minnesota created the “Power and Control Wheel,” highlighting many forms of abuse that will support this theme (this Wheel is included as Appendix 2). When you cross examine the defendant about one or more of the following types of abuse, you will be supporting your case theme.

Eight separate forms of abuse are listed on the Power and Control Wheel:

- 1) **Emotional abuse**: Putting the victim down, making the victim feel bad about him- or herself, mind games, ridicule and demeaning name-calling, making the victim feel crazy.
- 2) **Economic abuse**: Attempting to prevent the victim from working or keeping a job, making the victim ask for money, giving the victim an “allowance,” taking the money and controlling it.
- 3) **Sexual abuse**: Making the victim do sexual things against his or her will, physically attacking the sexual parts of the victim's body, treating the victim like a sexual object.
- 4) **Using children**: Treating the children like pawns, using the children to give messages, using visitation as a way to harass, making the victim feel guilty about the children, insulting the victim's parenting skills, abuse of children, overuse of physical punishment of children.

- 5) **Threats**: Threats to take away the children or report the victim to Child Protective Services agencies; threats to kill or commit suicide; making or carrying out threats to injure or harm the victim, children, family members, or even pets or the victim's property.
- 6) **Using male privilege**: Treating the victim like a servant while acting like the "master" or "king of the castle," making all the "big" decisions, treating members of the opposite sex as stupid or inferior beings.
- 7) **Intimidation**: Using fear; causing the victim to be afraid by using looks, gestures, actions, loud voice, breaking or smashing things, hurting the family pets, destroying the victim's sentimental property, etc.
- 8) **Isolation**: Controlling what the victim does, who the victim sees or talks to, where the victim goes, what the victim wears and how the victim is allowed to act in front of other people.

***ii.* When the defendant testifies: Some practical ideas and suggestions**

When a defendant testifies in a domestic abuse case, typically that person will appear much differently than they did at the time of the incident. Chances are that the defendant will wear nicer clothing to court. The defendant will usually be sober in the courtroom as well.

Consider introducing the booking photo of the defendant, especially in a self defense case. If the defendant lacks any visible injuries, have the booking photo enlarged for the jury. If the defendant was clearly intoxicated, with red, bloodshot eyes and an unkempt appearance on the date of the incident, again, have the booking photo enlarged for the jury. Cross examine the defendant fully on the differences between how he appeared on the night of the incident versus his appearance in court. Differentiate the two.

If the defendant denies or minimizes any portion of the physical assault, then proceed (detail for detail) through the victim's injuries, painstakingly pointing out each little mark, bruise, scratch, etc. Be careful not to allow the defendant to explain how each mark, bruise or scratch occurred, unless the explanation will show the extent to which the defendant's rendition of the facts is improbable. Make effective use of photographs. Describe the disarray in the residence and ask the defendant whether he or she agrees with your depiction.

Go through the victim's statement, line by line if necessary. Have the defendant deny (with only a "yes" or "no" response to your leading questions) each and every little allegation made by the victim and contained in the police report. Similarly, go through details of the victim's testimony. Again, make the defendant answer either "yes" or "no" as to whether he or she agrees with each and every allegation. Occasionally, you will encounter a defendant who will show annoyance, frustration and anger at your questions. If you are in control of the witness, consider asking whether the frustration he or she is displaying in the courtroom is anger.

As you gain more confidence through experience, you will develop many of your own effective tools for cross examining defendants. Make sure you treat the defendant with respect until you are positive the jury wants you to go after the defendant.

5. Miscellaneous Cross Examination Issues

a. Refusal of witness to testify

In *State v. Doney*, 114 Wis. 2d 309, 338 N.W.2d 852 (Ct. App. 1983), the State's witness in a drug case would not reveal her supplier, saying that to reveal this information would endanger her life. The court held that since the defense already knew her supplier she would not have to answer. The appellate court affirmed.

However, ordinarily when a witness refuses to testify as to some fact or issue, all of the testimony will be stricken. In *State v. Gollen*, 115 Wis. 2d 592, 340 N.W.2d 912 (Ct. App. 1983), a child victim of sexual assault was afraid, and refused to testify. The prosecutor asked the judge to find the child unavailable and allow the parents to testify as to the statements of the child. There was no request to treat the statements as excited utterances. The court held that merely making a record that the child was afraid to testify is not enough for the court to be able to declare the child unavailable.

b. Defendant's Fifth Amendment protection against self-incrimination

If the court allows cross examination on other incidents to prove motive, bias or other properly joined offenses, there is no deprivation to a defendant's Fifth Amendment right not to testify. See *Nealy v. State*, 97 Wis. 2d 38, 292 N.W.2d 859 (1980); *State v. Hall*, 103 Wis. 2d 125, 307 N.W.2d 289 (1981); *State v. Hoskins*, 97 Wis. 2d 408, 294 N.W.2d 25 (1980).

In *Nealy*, the Court stated that a defendant who takes the stand on his own behalf may not claim the privilege against self-incrimination on relevant matters of cross examination. If a defendant refuses to answer certain questions on the stand, the judge can either strike all of the defendant's testimony or make the defendant assert the privilege on the stand in front of the jury, allow the prosecutor to comment on the defendant's refusal to answer, and instruct the jury to consider this when they review the defendant's credibility.

6. Practical Strategies for Cross Examination

- 1) Use only leading questions. Do not allow open-ended questions. Try not to let the witness explain.
- 2) Be prepared. Do not ask a question to which you do not know the answer. Know everything you can about the case and the witness before that person testifies.
- 3) Never re-hash the direct examination.

- 4) When you begin cross examination, start with the points where the witness is most vulnerable.
- 5) Make the points you need to make and sit down. Seldom will you ever totally “destroy” a witness.
- 6) Fire questions at the witness in a quick manner. Do not give the witness the opportunity to think of a fabricated answer.
- 7) If your case involves a weapon, always make the defendant hold the weapon if the opportunity arises.
- 8) Be sensitive, especially to child witnesses and the defendant’s mother.
- 9) Use simple words.
- 10) Always end on a high point.

30. Common Defenses / Responses to Domestic Abuse

1. Introduction
2. Justifications
3. Excuses
4. Alibi

1. Introduction

Defenses are generally split into three categories: justifications, excuses and alibi. While alibi denies any involvement in criminal activity by the defendant, justifications and excuses admit commission of the criminal act, but argue that other factors relieve the defendant from criminal responsibility.

The defense of alibi does not necessarily present any unique legal issues in domestic cases. Therefore, a brief overview of the statutory law regarding the alibi defense is presented at the end of this chapter. The bulk of this chapter focuses on the two remaining categories: justifications and excuses.

2. Justifications

Justification is a category of defenses in which the defendant admits committing the criminal act but claims the act was necessary to avoid some greater evil. Justifications most commonly include necessity, self defense, defense of others, and defense of property.

In 2011, the Wisconsin Legislature created a new subsection to the self-defense and defense of others statute known as the “Castle Doctrine.” *See* 2011 Wisconsin Act 94. This statute, effective November 1, 2011, frees a person from liability for using deadly force against another under certain circumstances. This Doctrine prevents a court from considering “whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary.” WIS. STAT. §939.48(1m)(ar). The new provision applies when the person against whom the force was used had already or was “in the process of unlawfully and forcibly entering the actor’s dwelling, motor vehicle, or place of business.” *Id.* This defense cannot be raised when the “actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.” *Id.* at §939.48(1m)(b)1. This defense may apply in a domestic context after a relationship has ended and one of the parties goes to the residence of the other. However, the defense generally does not apply to an ongoing relationship between the parties, so this section examines self-defense outside of the Castle Doctrine.

Self defense is the most commonly raised justification defense in domestic abuse cases. Be aware, however, that many of the same procedures and ideas are applicable to the other justification defenses that follow.

a. Self defense

Definition: Below are the statutes and jury instructions relevant to self defense.

WIS. STAT. § 939.48(1) SELF DEFENSE:

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

Wisconsin Jury Instruction 800 dissects the definition of self defense:

Self defense is an issue in this case. The law of self defense allows the defendant to threaten or intentionally use force against another only if:

- The defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- The defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- The defendant's beliefs were reasonable.

The standard of "reasonableness" is what a person of ordinary intelligence and prudence would have believed in the defendant's position, under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

Furthermore, a belief may be reasonable even though mistaken.

Invoking self defense: Just like any other affirmative defense, a defendant invoking self defense must first make an affirmative statement or an admission that he or she used force.

The defendant must then claim that the force he or she used was necessary to prevent an unlawful interference with the defendant's person.

If a *prima facie* case is made, the burden then shifts back to the State to overcome the defense. Below are some examples of Wisconsin case law on issues of Perfect and Imperfect self defense:

State v. Camacho, 176 Wis. 2d 860 (1993).

- This case concerned a fatal shooting of a police officer by an undocumented worker who was stopped while driving.
- The Court found that a defendant charged with attempted first degree intentional homicide must show a reasonable belief that he or she was preventing or terminating an unlawful interference with his or her person before he or she can prevail on the notion of imperfect self defense.

State v. Richardson, 189 Wis. 2d 418 (Ct. App. 1994).

- The defendant appealed her conviction of second degree reckless homicide for killing her boyfriend. She had been in a physically abusive relationship with her boyfriend for several years. She defended her actions as self defense, testifying that she was scared her boyfriend was going to kill her because he had kicked her, attempted to strangle her and threatened to kill her.
- The court found that an expert should have been allowed to compare the defendant's characteristics and profile of battered women to provide context to help the jury understand why the defendant might perceive herself to be in imminent danger at the time of the homicide.

State v. Head, 2002 WI 99, 255 Wis. 2d 194.

- The defendant was charged with first degree intentional homicide for shooting her husband. The husband had been threatening to kill the defendant, their daughter and their daughter's boyfriend because their daughter was pregnant.
- This decision overturned *Camacho*.
- This decision clarified the standard for imperfect self defense. In order to prevail on this defense, the defendant must show evidence that he or she actually believed that he or she was in imminent danger of death or great bodily harm. This is a subjective rather than an objective standard.
- A defendant who claims imperfect self defense for the charge of first degree intentional homicide may use evidence of the deceased's violent character and past acts of violence to show a satisfactory factual basis that he or she actually believed he or she was in imminent danger of death or great bodily harm and actually believed the force used was necessary to defend him- or herself, even if both beliefs were unreasonable.

State v. Peters, 2002 WI App. 243, 258 Wis. 2d 148.

- This is another case where the defendant, a victim of domestic abuse, shot and killed her husband.

- In this case, the defendant proffered evidence of verbal and mental abuse. She testified that her husband had been threatening her with his rifle both ten days before and the day before the shooting. When Peters told her husband she wanted a divorce, he threatened her, saying that “There [wouldn’t] be a divorce. Somebody might die.”
- The defendant’s conviction for first degree intentional homicide was reversed and remanded with instructions for the trial court to give both the perfect and imperfect self defense instructions, applying the “some” evidence standard as required by law. Viewing the evidence in the light most favorable to Peters, the court ruled that a jury could conclude the State had not disproved the perfect self defense theory beyond a reasonable doubt.

Other acts: Additionally, “other acts” evidence may be used to bolster a self defense claim.

Once a defendant establishes a claim of self defense, he or she may introduce evidence showing personal knowledge of the victim’s prior acts of violence in order to demonstrate that the defendant believed the victim had a turbulent and violent character. Character or reputation evidence of the victim of an assault is relevant in determining whether the victim or the accused was the aggressor, and it also bears upon the reasonableness of the defendant’s apprehension of danger at the time of the incident. *McMorris v. State*, 58 Wis. 2d 144, 149, 205 N.W.2d 559, 561-62 (Wis. 1973).

Practice Point:

If there is a sufficient doubt as to the admissibility or relevance of *McMorris* evidence, a prosecutor may want to ask for a motion *in limine* and an offer of proof. If the proffered facts are insufficient to support a self-defense theory, any evidence of the victim’s prior violent acts is irrelevant and the self-defense instruction may be unwarranted. *State v. Head*, 240 Wis. 2d 162, 622 N.W.2d 9 (Ct. App. 2000).

Preemptory challenges: The self defense statute and instruction provide the framework for invoking self defense. If that framework is not followed, the prosecutor may attack the defense and prevent the self defense instruction from ever reaching the jury. Situations ripe for challenge include when the defendant has not made any affirmative statement or presented any testimony.

Remember, self defense is an affirmative defense, not just an argument. It requires an affirmative showing, something more than a mere inference. The defendant must first admit to committing the charged crime. The defense attorney cannot raise or argue self defense if the defendant or another material witness does not testify regarding self defense during the defendant’s case in chief. If the defendant rests without presenting any self defense evidence, the prosecutor should move to exclude that jury instruction and argument. In addition, self defense cannot be used in conjunction with an argument that the battery was accidental.

In addition to being an affirmative defense, self defense is also a privilege. A defendant cannot invoke a privilege if the conduct that is argued to be privileged is also denied by the defendant.

A defendant cannot argue, “I didn’t do it, but if you think I did, I was privileged.” See *Cleghorn v. State*, 55 Wis. 2d 466, 496, 198 N.W.2d 577, 579 (1972).

Other methods to overcome a self defense claim: If the defendant is able to make a *prima facie* case for self defense, the burden shifts to the State to overcome that defense. In addition to the preemptory challenges listed above, which can also be turned into prosecution arguments to the jury, there are other key evidentiary points upon which the prosecutor may want to focus.

- **Credibility of the defendant.** By using the same techniques a defense attorney uses against a victim or police officer, a prosecutor can grill the defendant to refute a self defense claim. A prosecutor might focus on:
 - Lack of visible injuries on the defendant;
 - Bias of the witness (if any can be shown);
 - The height and weight of the defendant relative to those of the victim;
 - The immediacy of the claim;
 - Who initiated police contact;
 - The demeanor of the witness; and/or
 - Prior inconsistent statements of the defendant.

The defendant’s statements to the investigating police officer at the scene are often most devastating to a defendant’s later claim of self defense. Just as a defendant is reluctant to admit to the elements of a battery on the witness stand, he or she is often more reluctant to admit to the elements of a battery to a police officer. Look for a denial at the scene by the defendant. If the defendant does claim self defense, pay close attention to when that claim is made. A self defense claim made after the arrest is far less credible than one made when the police first arrive on the scene.

Reasonableness of force: Here, a prosecutor might focus on:

- The height and weight of the defendant relative to those of the victim;
- The urgency of the situation;
- Comparative visible injuries;
- Whether or not medical attention is sought; and/or
- The opportunity to retreat (see below).

Just as a defense attorney does not have to disprove every element of a crime, a prosecutor does not have to disprove every “element” of a self defense claim. While “reasonableness of force” may be difficult for a jury to quantify, it may also be one of the most vulnerable places for attack by the prosecutor. If the victim is noticeably smaller in stature than the defendant, and if the injuries to the defendant are minimal or non-existent, this is an area ripe for attack.

Retreat: Under common law, self defense was unavailable to a person who did not make every effort to retreat and avoid a confrontation. Under current law, however, there is no duty to retreat.

Wisconsin Jury Instruction 810:

There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

In other words, the opportunity to retreat can – in fact, must – be incorporated into the “reasonableness” argument.

Provocation: The general rule is that if a defendant provoked an attack by some unlawful conduct, the defendant cannot use that attack as a basis for self defense. This general rule is set forth in WIS. STAT. § 939.48(2), and Wisconsin Jury Instruction 815. The basic jury instruction reads:

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self defense against that attack.

Regaining the privilege: A defendant may regain the privilege of self defense despite provoking the assault if a showing of one of the following is made:

- If the defendant in good faith withdrew from the fight and gave adequate notice thereof to the defendant’s assailant; or
- If the attack which follows the provocation causes the defendant to reasonably believe that he or she is in imminent danger of death or great bodily harm.

Exception:

Even if the privilege is regained due to reasonable belief of imminent death or great bodily harm, the defendant cannot respond with force or a threat of force intended or likely to cause death or great bodily harm unless the defendant reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.

WIS. STAT. § 939.48(2)(a).

Practice Point:

The thing to keep in mind regarding the above exception to the rule is that retreat suddenly becomes a “duty” if the defendant acts with deadly force in response to fear of deadly force in response to a provoked attack by the defendant. The basic

gist is if the defendant initiates everything by provoking an attack, and the provoked person threatens death or great bodily harm to the defendant, the defendant must make every effort to get out of the situation before using deadly force.

Unintended “victims” of self defense: A defendant who intends to inflict harm on one person is covered by the self defense privilege if the actual harm caused is to a third party, unintended victim.

WIS. STAT. § 939.48(3):

The privilege of self defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of [reckless or negligent injury crimes] the actor is liable for whichever one of those crimes is committed.

b. Defense of others

Definition: Similar to self defense, defense of others allows a defendant to intentionally cause bodily harm to another if the defendant was acting to protect a third person from bodily harm.

WIS. STAT. § 939.48(4):

A person is privileged to defend a third party from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the third person would be privileged to act in self defense and that the person’s intervention is necessary for the protection of the third person.

The jury instructions provide a somewhat clearer picture.

Wisconsin Jury Instruction 825:

The law allows the defendant to act in defense of others only if the defendant believed that there was an actual or imminent unlawful interference with the person of [third person], believed that [third person] was entitled to use or threaten to use force in self defense, and believed that the amount of force used or threatened by the defendant was necessary for the protection of [third person].

Practice Point:

One way to think about it is by putting the defendant in the place of the third person. If the third person could not have legally acted in self defense, then chances

are that the defendant cannot claim defense of others. In some jurisdictions, this is known as the “alter ego rule.”

c. Defense of self or others by use of deadly force

The idea of self defense by use of, or threat of using, deadly force is not much different than regular self defense. The escalation of force used by the defendant necessitates a showing that the defendant believed the amount of force was necessary to prevent the same type of harm to him- or herself.

Wisconsin Jury Instruction 805 is used for a self defense claim involving force intended or likely to cause death or great bodily harm. The beginning of the instruction is identical to Wisconsin Jury Instruction 800. The substantive change reads:

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Wisconsin Jury Instruction 805.

Practice Point:

A defendant may encounter difficulty proving reasonableness when he or she actually prevents the unlawful interference by use of deadly force. In such situations, comparing the outcome of the occurrence from the victim’s standpoint versus the defendant’s standpoint may be a powerful tool for the prosecutor.

d. Defense of property

Keeping in mind the basic idea of “the lesser of two evils,” a defendant may defend his or her property by use of force, if such force is necessary to prevent an unlawful interference with the defendant’s property.

WIS. STAT. § 939.49 DEFENSE OF PROPERTY AND PROTECTION AGAINST RETAIL THEFT.

- (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person’s property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one’s property.

Wisconsin Jury Instruction 855 contains language similar to that of self defense: “Most of the ideas of self defense apply to defense of property. The key distinction is that force intended to cause death or great bodily harm cannot be used to defend property.”

Practice Point:

Defense of property is probably getting a little far afield of domestic abuse. One thing to think about, however, is *marital* property.

e. Defense of another’s property

WIS. STAT. § 939.49 DEFENSE OF PROPERTY AND PROTECTION AGAINST RETAIL THEFT.

- (2) A person is privileged to defend a third person’s property from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend his or her own property from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such as would give the 3rd person the privilege to defend his or her own property, that his or her intervention is necessary for the protection of the 3rd person’s property, and that the 3rd person whose property the person is protecting is a member of his or her immediate family or household or a person whose property the person has a legal duty to protect

Once again, the “alter ego rule” applies; the defendant must believe that the third person whose property was being threatened would have had standing to use or threaten to use force if in the defendant’s position.

There is one unique twist, as described in WIS. STAT. § 939.49(2) as well as Wisconsin Jury Instruction 860, that indicates that the property being defended must belong to a member of the defendant’s immediate family, or must be legally owned or occupied by the defendant, in order for this to apply.

f. More Information on Self Defense: *McMorris* Evidence

When a defendant asserts self defense in a battery or other bodily harm case, he or she may use “specific instances” evidence, regarding the propensity of the victim for violence, to bolster an argument that the victim was the aggressor. *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

In *McMorris*, the defendant was convicted of stabbing another person during a card game. The defendant attempted to introduce “specific instances” evidence at trial to bolster the allegation that the victim was the aggressor and therefore, the defendant had acted in self defense. *McMorris*, 58 Wis. 2d at 146, 205 N.W.2d at 560.

The *McMorris* trial court rejected the defendant's attempts to introduce personal knowledge of specific instances of the victim's conduct as being impermissible other acts evidence. *Id.* at 562. The trial court ruled that the only acceptable character evidence would be the general reputation of the victim in the community in which the victim lived. *Id.* The Court of Appeals reversed and remanded:

When the issue of self defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident.

Id. at 152.

This ruling departed from the traditional requirement that bad character evidence of the victim must be proven by reputation or opinion evidence only, and not with specific instances of conduct, as forbidden by statute.

WIS. STAT. § 904.05 METHODS OF PROVING CHARACTER.

- (1) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

As the statute above states, the general rule is that character evidence may only be shown at trial in the form of reputation or opinion evidence. However, where self defense is asserted by the defendant, the defendant may introduce specific instances of the victim's past conduct. The Court of Appeals further stated in *McMorris*:

The past conduct of a person markedly affects what others may reasonably expect from him in the future. When the accused maintains self-defense, he should be permitted to show he knew of specific prior instances of violence on the part of the victim. It enlightens the jury on the state of his mind at the time of the affray, and thereby assists them in deciding whether he acted as a reasonably prudent person would under similar beliefs and circumstances. In *State v. Gordon*, (1935), 37 Del. 219, 222, 223, 181 A. 361, 362, the court stated: "The question here is whether the accused may testify to specific instances, either known to him personally, or by hearsay, of an affray in which the deceased was the aggressor and had used a knife. The state of mind of the accused is material. The jury is to pass upon his belief, that the deceased was about to attack him. Without doubt,

the reputation of the deceased for violence, known to the accused, is admissible; and there seems to be no substantial reason why the belief of the prisoner should not be evidenced by knowledge of specific acts of violence, as well as by knowledge of general reputation for violence, subject, of course, to exclusion in a proper case for remoteness.”

McMorris, 58 Wis. 2d at 151.

McMorris evidence may be used only where the defendant asserts the defense of self defense against a charge of either homicide or battery. *McMorris* evidence is comprised of specific incidents of prior violent or aggressive behavior committed by the victim, which was known to the defendant at the time the defendant acted in self defense.

McMorris evidence relates to the reasonableness of the defendant’s conduct and the defendant’s state of mind. This is in contrast to character/pro propensity evidence, which focuses on the character of the victim to support an inference that the victim acted in conformity with a particular character trait. The *McMorris* inference logically follows: aggression by the victim is responded to in kind by the defendant, who acted to defend him- or herself out of fear of the victim, because the defendant was aware of prior specific violent or aggressive acts committed by the victim.

This ruling has obvious implications for domestic cases. A domestic abuse defendant may assert the defense of self-defense and attempt to introduce character evidence, in the form of specific instances of the victim’s conduct, in order to assert that it was the victim who was the aggressor.

Therefore, it is of critical importance for a prosecutor to know the history of the relationship between the defendant and the victim. If the victim has been a past aggressor in the relationship, a jury may have sympathy for the accused, and acquit the defendant.

g. Battered Woman’s Syndrome

Information about battering and its effects is sometimes used by prosecutors to determine the severity of the charge a battered woman should face at trial. During the trial, it can be used to help the jury understand the battered woman’s state of mind. It is also used during the sentencing phase to show the existence of mitigating factors in the battered woman’s criminal behavior. Information considered in charging, during the trial and at sentencing may include the history of abuse against the battered woman, the battered woman’s efforts to protect herself and obstacles to those efforts, the social and psychological impact of violence on the battered woman, and the context in which the abuse occurred.

One mitigating factor, Battered Women’s Syndrome (BWS), is often misunderstood and thought to be a claim of perfect self defense. In reality, BWS is offered as evidence at trial so that the battered woman’s abusive relationship with the victim can be considered in determining the appropriate conviction and sentence. Thus, the battered woman is held accountable for her crime

but she is not prosecuted to the fullest extent of the law because of the abuse endured at the hands of the abuser.

An earlier chapter on expert witnesses addresses BWS in more detail. As stated in that chapter, the BWS moniker reflects the trend in previous decades to label a group of common psychological reactions as “syndromes” in order to explain criminal behavior. BWS is more commonly referred to as “battering and its effects” or the “dynamics” of domestic abuse in current professional publication. This section uses the older terminology because there is a large history of case law in which courts across the country have referred to the behavior as BWS.

The body of relevant scientific and clinical knowledge in the scholarly literature strongly supports the validity of considering battering as a mitigating factor in the reactions and behaviors of victims of domestic abuse. For example, testimony may be used to explain a battered victim’s recantation of an earlier statement, lack of cooperation with the prosecution, or other conduct of the victim. A battered victim may recant an earlier statement of abuse, often at the point when he or she reconciles with the batterer or when he or she is coerced by the batterer through threats of violence or withdrawal of economic support. In some cases, a battered woman may recant an incriminating statement only after the batterer has been arrested, and it is safer to do so. BWS testimony can be useful to explain to the fact-finder the various reasons why battered victims may respond in these ways.

In addition, BWS can be used to explain to the fact-finder what may be misconceptions about domestic abuse and its effects. It has been shown that lay persons generally hold many false misconceptions related to domestic abuse. These misconceptions can negate either the occurrence or the seriousness of violence, as well as the victim’s response.

Determining potential misconceptions relevant to a particular case depends, obviously, on the facts of that case. For example, a victim’s alcohol or drug abuse history may lead the jury to believe, erroneously, that the victim did something to cause the abuse. In another example, when a woman fights back against the abuser, her behavior could be construed as evidence of mutual battering, or even that she was the predominant aggressor. BWS testimony, in combination with evidence, can be useful to assist the fact-finder in sorting out these issues.

For further information, see Malcolm Gordon, Ph.D., *Validity of Battered Woman Syndrome, in CRIMINAL CASES INVOLVING BATTERED WOMEN*.

Battered Women’s Syndrome case law in Wisconsin:

State v. Jensen, 147 Wis. 2d 240 (1988).

- Expert opinion testimony was properly admitted to explain the context in which a victim of child abuse made her allegation and to rebut the defense’s theory that the victim fabricated the sexual assault charge against the defendant.
- The circuit court has discretion to determine whether a witness is an expert.

- Experts may give an opinion about the consistency of a complainant's behavior with the behavior of victims of the same type of crime, only if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.

State v. Bednarz, 179 Wis. 2d 460 (Ct. App. 1993).

- An expert opinion on Battered Women's Syndrome was admissible to prove one possible explanation for the victim's recantation.
- The court held that the State acted well within the parameters of accepted Wisconsin statutory and common law practice by having its expert testify only as to Battered Women's Syndrome generally, and not to whether or not the victim in this particular case was a battered woman.
- The court held that there was sufficient evidence of each of the three stages in the "cycle of violence" (tension building, explosions, and honeymoon) for the jury to find that the victim was a battered woman; thus the expert testimony was relevant.
- The court also held that expert testimony was permissible because an untrained juror does not know that recantation is a practice that is often linked to the Battered Women's Syndrome.

State v. Mayer, 220 Wis. 2d 419 (Ct. App. 1998).

- The defendant argued that the trial court erred by submitting a witness' statement to the jury during its deliberations and by allowing an expert witness to testify about Battered Women's Syndrome.
- The court held that an expert may testify about Battered Women's Syndrome when there is sufficient evidence that the alleged victim possesses the syndrome's characteristics and where such testimony is relevant.

State v. Peters, 2002 WI App. 243.

- An expert testifying about Battered Women's Syndrome may compare the situation of a victim of domestic abuse to the profile of a battered woman so long as the comparison does not include conclusions about the victim's actual beliefs at the time of the offense, about the reasonableness of those beliefs or about the person's state of mind during or after the criminal act.

3. Excuses

Excuses, like justifications, admit that the action committed by the defendant violated criminal law. Unlike justifications, which invoke a privilege, excuses claim that the defendant should be absolved from criminal liability by virtue of special circumstances which suggest that the defendant was for some reason not responsible for his or her deeds. Excuses are often personal in nature.

Excuses can include duress, compulsion, delusion, mistake, entrapment, intoxication, and “syndromes.” This section focuses on the three most common to domestic abuse cases: mistake, intoxication, and “syndromes.”

a. Mistake

WIS. STAT. § 939.43 MISTAKE.

- (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.
- (2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is or the scope or meaning of the terms used in the section is not a defense.

Wisconsin Jury Instruction 770:

If an honest error of fact results in a person’s not having the intent [or] knowledge required for a crime, the person is not guilty of that crime.

Because the defense of mistake is only available where the crime requires the State to prove the defendant’s mental state (i.e. intent or knowledge), a defendant who raises mistake as a defense is, in essence, asserting that the State cannot prove the mental element of the crime charged.

How mistake is invoked: The crime charged must require the State to prove a mental element. The defendant invoking mistake as a defense must first make an affirmative statement or admission to criminal activity. The defendant is entitled to assert the defense of mistake once he or she establishes that his or her mistake was real, no matter how unreasonable. Once that *prima facie* case is made by the defendant, the burden then shifts to the State.

Practice Point:

Mistake cannot be invoked by a defendant who has been charged with disorderly conduct pursuant to WIS. STAT. § 947.01, as there is no mental element to that charge. Accordingly, in such a case the defendant is not entitled to the mistake instruction nor is he or she entitled to argue mistake to the jury.

As with justifications, a defendant cannot assert mistake as a defense if the defendant denies all criminal allegations. In other words, the defendant cannot assert: “I did not do it, but if you think I did, it was a mistake.”

Mistake of criminal law is not a defense: Ignorance of the law is not a defense. However, when a defendant relies upon the legal opinion of a governmental official, who is statutorily required to give such an opinion, the Wisconsin Supreme Court has suggested that the defense of mistake is available to a defendant. *State v. Davis*, 63 Wis. 2d 75, 81-82, 216 N.W.2d 31, 34

(1974). The defendant's reliance on the advice of such an official must be in good faith, open and unconcealed. *Davis*, 63 Wis. 2d at 82, 216 N.W.2d at 34.

Practice Point:

The issue of mistake of law or fact commonly arises in cases involving the violation of no-contact orders or domestic abuse injunctions. Defendants often maintain either (1) that they did not read/understand the order, or (2) that some official told them that they could return home. The former should never be a defense, even where the defendant cannot read English. The latter should only be a defense where the defendant can (a) identify the official that advised him or her, (b) the official had the authority to give the advice, and (c) the defendant relied upon the advice in good faith. This should be difficult for the defendant to establish as few officials, arguably, have such authority. Unfortunately, the courts have yet to define exactly which officials do have that authority.

b. Intoxication

When intoxication is a permissible defense: Intoxication is a permissible defense under two circumstances: (1) where the defendant was involuntarily intoxicated and, therefore, unable to distinguish between right and wrong; or, (2) the defendant was voluntarily intoxicated to such a level that the defendant could not form the requisite mental capacity to commit the charged offense.

WIS. STAT. § 939.42 INTOXICATION.

[A]n intoxicated or drugged condition of the actor is a defense only if such condition: (1) is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time it was committed; or (2) negatives the existence of a state of mind essential to the crime, except as provided in WIS. STAT. § 939.24(3).

WIS. STAT. § 939.24(3) provides that “a voluntarily-produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating unreasonable and substantial risk of death or great bodily harm to another human being.”

Involuntary intoxication or drugged condition: Wisconsin Jury Instruction 755 explains that an intoxicated or drugged condition is a defense to criminal liability if it is involuntarily produced and makes the person unable to tell whether his acts are right or wrong at the time that the acts are committed. Intoxication is involuntary when it is brought about by duress, deceit, or mistake.

How involuntary intoxication is invoked: Involuntary intoxication is essentially an affirmative defense, meaning that it does not become an issue in a case until it is raised by the evidence.

Because the prosecutor is not likely to introduce such evidence, the defendant or a defense witness must make some affirmative statement regarding this involuntary state and the commission of the crime.

The defendant must establish, then, that the intoxicated or drugged state was involuntarily induced. Involuntariness can usually only be shown by establishing either: (1) that the state was induced by force or fraud by a third party; or (2) that the defendant was mistaken as to the intoxicating nature of the thing that he or she ingested.

If the defendant establishes that his or her intoxicated or drugged state was involuntary, then the defendant must also establish that he or she was so intoxicated or drugged that he or she was incapable of distinguishing between right and wrong.

Once the defendant has established a *prima facie* showing of both the requisite elements to this defense, the burden shifts to the State to establish the absence of involuntary intoxication. *Moes v. State*, 93 Wis. 2d 756, 284 N.W.2d 66 (Wis. 1974).

Practice Point:

Merely providing evidence of an addiction to drugs or alcohol is not sufficient to meet the burden of establishing that the defendant was involuntarily intoxicated. *Loveday v. State*, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

Neither the statute nor the jury instruction provides a definition for “intoxication.” Therefore, even if the defendant sets forth sufficient evidence to be entitled to the involuntary intoxication instruction, there is usually ample room for the prosecutor to argue that the defendant was capable of determining the difference between right and wrong.

In domestic abuse cases, look for facts that show evidence of a guilty conscience or knowledge of culpable conduct on the part of the defendant, such as: (1) fleeing the scene when police are called, (2) asserting self defense, or (3) maintaining when the police arrive that he or she never hit the victim. The prosecutor should exploit facts such as these to the jury to show that regardless of how the defendant became intoxicated, that person knew his or her conduct to be wrong.

Voluntary intoxication: Wisconsin Jury Instruction 765 instructs that:

[W]hen evidence has been presented which, if believed by the juror, tends to show that the defendant was intoxicated at the time of the alleged offense, the juror must consider this evidence in deciding whether the defendant acted with (knowledge) (intent) required for this offense. If the defendant was so intoxicated that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime). Before the juror may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

Similar to the defense of mistake, this defense is only appropriate where the State must establish the defendant's mental state as an element of the crime. In other words, this defense is not available for crimes such as disorderly conduct, where the defendant's mental state is not an element.

For a defendant to be relieved of responsibility under this defense, it is not enough for the defendant to merely establish that he or she had been drinking intoxicating beverages or ingesting mind-altering drugs. The defendant must establish that he or she was entirely incapable of forming the requisite intent to commit the charged offense. *State v. Guiden*, 46 Wis. 2d 328, 331, 174 N.W.2d 488, 490 (1970).

Although the jury instruction requires a jury to consider the evidence presented regarding intoxication, it does not require the jury to believe the defense. The defendant bears the burden of production on the issue.

How voluntary intoxication is invoked: In order to invoke the defense of intoxication, the defendant must raise intoxication as an issue by proffering sufficient evidence of the intoxicated state. *State v. Strege*, 116 Wis. 2d 477, 486, 343 N.W.2d 100, 105 (1984). This evidence must show a degree of intoxication that would constitute the defense. *Strege*, 116 Wis.2d at 486, 343 N.W.2d at 105. Intoxication constitutes a defense when the defendant's mental faculties were so overcome by intoxicants that the defendant was incapable of forming the intent element of the crime. *Id.*

A mere statement that the defendant was drunk is insufficient to entitle the defendant to the intoxication instruction. To set forth intoxication as a defense, the defendant must point to some evidence of mental impairment due to the consumption of alcohol or drugs sufficient to negate the mental element of the crime. *Id.*

The burden of production does not shift to the State to negate intoxication. *State v. Reynosa*, 108 Wis. 2d 499, 322 N.W.2d 504 (Ct. App. 1982).

As with involuntary intoxication, "intoxication" is not defined by the statute or the instruction. Accordingly, the prosecutor should argue that regardless of the defendant's level of intoxication, he or she was capable of determining the difference between right and wrong. Again, the prosecutor should look for facts that evince a guilty conscience or knowledge of culpable conduct on behalf of the defendant. The prosecutor should, likewise, exploit such facts to the jury to show that regardless of the level of the defendant's intoxication, he or she knew his or her conduct to be wrong.

Remember that voluntary intoxication is not a defense when the defendant is charged with criminally reckless behavior. The State's argument in such a case is that if the defendant had been sober or not extremely intoxicated, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another.

4. Alibi

There is nothing about an alibi defense that is peculiar to domestic abuse cases. However, should the issue arise, the following are some procedures that the prosecutor should remember:

WIS. STAT. § 971.23(8) NOTICE OF ALIBI.

- (a) A defendant claiming an alibi defense must give the State notice at the arraignment or 30 days prior to trial.

The Notice of Alibi must provide specific information regarding the place the defendant claims to have been at the time of the crime, as well as the names and addresses (if known) of the witnesses the defense says can support the alibi defense.

- (d) The State must give notice of any rebuttal witnesses within 20 days of the filing of the Notice of Alibi.

The State's list of rebuttal witnesses also must contain the names and addresses (if known) of all witnesses the State intends to call.

Withdrawal: If the defendant does not call some or all of the alibi witnesses, or if the defendant withdraws the defense entirely, the State cannot comment on the withdrawal or the failure to call witnesses. Further, the State cannot call those witnesses for the purpose of impeaching the defendant's alibi defense. WIS. STAT. § 971.23(8)(a).

Default: If the defendant does not give proper notice, no evidence of an alibi shall be accepted after the statutory deadline unless the court, for cause, orders otherwise. WIS. STAT. § 971.23(8)(b).

31. Closing Arguments

1. Introduction
2. Statutory Authority
3. Order of Argument
4. Scope of Argument
5. Objections
6. Comments on the Defendant's Silence
7. Strategies and Practicalities

1. Introduction

Just like in the opening statement, you want to get the jury's attention immediately. Be passionate, but rational, when making your points. Finish forcefully and emotionally, summing up all your points. Look the jury in the eye, especially when you finish your closing.

During your closing argument, do not simply recite the testimony of the witnesses. You want to maintain and pursue your case theory, consistent with your opening and the evidence. Confidently state your case theory. Tell the jury how the evidence proved your case theory. Explain how your case theory proves the elements.

With a well-organized, logical approach, argue the facts, as well as the common sense inferences from the evidence. Always be reasonable. Do not overstate any facts or inferences. Remember that a fact is only a fact when the jury accepts it as true!

2. Statutory Authority

WIS. STAT. § 805.10 EXAMINATION OF WITNESSES; ARGUMENTS.

Unless the judge otherwise orders, not more than one attorney for each side shall examine or cross-examine a witness and not more than 2 attorneys on each side shall sum up to the jury. The plaintiff shall be entitled to the opening and final rebuttal arguments. Plaintiff's rebuttal shall be limited to matters raised by any adverse party in argument. Waiver of argument by either party shall not preclude the adverse party from making any argument that the adverse party would otherwise have been entitled to make. Before the argument is begun, the court may limit the time for argument.

Criminal courts utilize the evidentiary rules and civil rules of procedure unless the context of a rule or section manifestly requires a different construction, according to WIS. STAT. § 972.11(1). The trial court has vast discretion in terms of limiting the length of argument as well as the number of attorneys who can argue the closing argument to the jury.

In *In the Interest of C.E.W.*, 124 Wis. 2d 47, 368 N.W.2d 47 (1985), WIS. STAT. § 805.10 was interpreted to authorize the judge to allow more than two attorneys on each side to sum up to the jury, but the judge could not limit to fewer than two attorneys on each side. The Wisconsin Supreme Court stated:

It is generally assumed that the right to be represented by counsel embraces the right of counsel to argue the case to the court or jury. Indeed, the right of a litigant to address the jury on the facts is considered an important and effective aid to the fact-finder in ascertaining the truth. The object of closing statement is the “elucidation of the truth . . . by full and fair forensic discussion. . . . Forensic strife, our court has said, is a mighty method to ascertain the truth.” *Brown v. Swineford*, 44 Wis. 282, 290, 293 (1878).

...

[WIS. STAT.] § 805.10 provides that “[u]nless the judge otherwise orders . . . not more than 2 attorneys on each side shall sum up to the jury.” [Emphasis added by court.] This section embodies the long-accepted concept that the litigants have a basic right to have fact issues argued orally to the jury. The statute gives the court the power to limit the number of attorneys who will sum up before the jury. § 805.10 does not, however, grant the circuit court power to limit to fewer than two the number of attorneys arguing to the jury on each side.

C.E.W., 124 Wis. 2d at 68-69, 368 N.W.2d at 58.

3. Order of Argument

WIS. STAT. § 972.10(6) provides that “[i]n closing argument, the state on the issue of guilt and the defendant on the issue of mental responsibility shall commence and may conclude the argument.” This means that in closing arguments in criminal cases, the State goes first, the defendant goes next, and then the State gives a rebuttal argument.

According to WIS. STAT. § 805.10, the party having the burden of proof on the principal claim is entitled to the opening and final rebuttal arguments. The waiver of argument by either party shall not preclude the adverse party from making any argument that he or she would otherwise have been entitled to make.

However, note that rebuttal argument is limited to matters raised by the adverse party in his or her argument. See WIS. STAT. § 805.10. The plaintiff’s closing argument on rebuttal is limited to matters discussed in the defendant’s argument. *Hunter v. Kuether*, 38 Wis. 2d 140, 149, 156

N.W.2d 353, 357 (1968). The plaintiff cannot introduce a new line of argument in rebuttal, upon which the defense has had no opportunity to comment. The Supreme Court of Wisconsin has written on this subject:

This court has stated “[c]onsiderable latitude is to be allowed counsel in closing arguments, subject only to the rules of propriety and the discretion of the trial court.” *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16 (1970). Generally, however, the opening final argument for the state is intended to permit full discussion of the facts upon which he believes the conviction should lie. Counsel is permitted to argue all points upon which he relies in his case. Opposing counsel is then permitted to address the jury concerning the defense’s theory of the case. He may also comment upon all points upon which he relies in his defense. Likewise, defense counsel is permitted to answer all points raised by the state in its opening final argument.

At the close of the defense summation, the state is permitted a rebuttal summation so as to refute those points previously brought up by the defense. The state may not, however, introduce any new line of argument to which the defense has had no chance to comment upon. Such would be unfair and improper. *Johnson v. State*, 192 Wis. 22, 25, 211 N.W. 668 (1927).

Marks v. State, 63 Wis. 2d 769, 774-75, 218 N.W.2d 328, 330-31 (1973).

Marks provides a good explanation of the process of closing arguments. While *Marks* does not address the remedy for the State’s failure to adhere to a rebuttal of the defense’s arguments only, the court may allow the opportunity for a “sur-rebuttal” argument to the defense in order to allow a chance for comment on any new lines of argument.

4. Scope of Argument

The content, duration and form of arguments are within the trial court’s sound discretion. *State v. Lenarchick*, 74 Wis. 2d 425, 457, 247 N.W.2d 80, 98 (1976).

Attorneys should be allowed considerable latitude; however, the trial court has the discretion to determine the propriety of the argument. The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him or her and should convince the jurors. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979), citing *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16, 24 (1970); *O’Neil v. State*, 189 Wis. 259, 263, 207 N.W. 280 (1926); *Embry v. State*, 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970).

The *Draize* Court quoted *State v. Genova*, 242 Wis. 555, 561, 8 N.W.2d 260 (1943), for the premise that “[t]he aim of the prosecutor in a judicial inquiry should be to analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably

drawing inferences and arriving at a just conclusion upon the main or controlling questions.” *Draize*, 88 Wis. 2d at 454, 276 N.W.2d at 789.

The *Draize* Court stated that the “line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.” *Draize*, 88 Wis. 2d at 454, 276 N.W.2d at 789, citing *State v. Cydzik*, 60 Wis. 2d 683, 695, 211 N.W.2d 421(1973).

5. Objections

WIS. STAT. § 805.11 OBJECTIONS; EXCEPTIONS.

- (1) Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error. An objection is not necessary after a ruling or order is made.
- (2) A party raising an objection must specify the grounds on which the party predicates the objection or claim of error.
- (3) Exceptions shall never be made.
- (4) Evidentiary objections are governed by § 901.03.

In addition to WIS. STAT. § 805.11, case law provides the following guidelines about objections:

- Objections must be made promptly. *State v. Holt*, 128 Wis. 2d 110, 137, 382 N.W.2d 679, 692 (Ct. App. 1985).
- Failure to object waives the right to object on appeal. *State v. Norwood*, 161 Wis. 2d 676, 468 N.W.2d 741 (Ct. App. 1991); *State v. Seeley*, 212 Wis. 2d 75, 567 N.W.2d 897 (Ct. App. 1997), *petition to review denied*.
- The defense’s failure to move for mistrial, unless remarks are so egregious as to constitute plain error, waives the objection. *State v. Davidson*, 236 Wis. 2d 537, 613 N.W.2d 606 (1999).
- Note that the court should give a curative instruction in order to diffuse any potential damage resulting from improper comments or remarks of the prosecutor. *State v. Hagen*, 181 Wis. 2d 934, 512 N.W.2d 180 (Ct. App. 1994).
- The defense may not urge jury nullification. *State v. Bjerkaas*, 163 Wis. 2d 949, 472 N.W.2d 615 (Ct. App. 1991), cited *Sparf v. United States*, 156 U.S. 51, 102, 106 (1895), which discussed jury nullification: “[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.” There is no Constitutional right to urge jurors “to take the law into their own hands, and . . . disregard the directions of the court.”

[W]e have recognized that because “it is a basic tenet of our system of government that decisions are based on law, not personal whim,” an instruction telling jurors they “could ignore a statute if they felt it was unfair” could properly be denied in a criminal case. *State v. Olexa*, 136 Wis. 2d 475, 485, 402 N.W.2d 733, 738 (1987). *See also Williams v. State*, 192 Wis. 347, 352, 212 N.W. 631, 632 (1927) (jurors properly admonished they are not at liberty to disregard the law no matter what their individual views as to its wisdom). Indeed, Wisconsin juries are routinely instructed in criminal cases that they must not be “swayed by sympathy, prejudice, or passion,” and that they are to be “govern[ed] in [their] deliberations” by the “rules of law” on which the court has instructed them. Wis. Jury Instructions – Criminal 460 (1962).

Bjerkaas, 163 Wis. 2d 949, 962, 472 N.W.2d 615, 620.

6. Comments on the Defendant’s Silence

In *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976), the United States Supreme Court stated that a prosecutor’s comment on a defendant’s post-arrest silence after receiving *Miranda* warnings is unconstitutional.

Consider the following scenarios:

- When the defendant chooses to give the police a version of events post-*Miranda*, and the defendant leaves out significant facts, this evidence can be used to impeach the defendant’s credibility without running afoul of due process and Fifth Amendment rights. *State v. Wulff*, 200 Wis. 2d 318, 546 N.W.2d 522 (Ct. App. 1996). Or, if defense counsel “opens the door” by drawing attention to the defendant’s silence, you may “reflect” on silence.
- The prosecutor may comment upon pre-arrest, pre-*Miranda* silence if the defendant was not being investigated for a specific crime, no arrest was made and the circumstances lacked coercion. If the defendant does not testify, no comment can be made on silence if a coercive atmosphere existed or the defendant was being investigated for a specific crime. *State v. Brecht*, 143 Wis. 2d 297, 421 N.W.2d 96 (1988); *State v. Adams*, 221 Wis. 2d 1, 584 N.W.2d 695 (Ct. App. 1998).
- In *Jenkins v. Anderson*, 447 U.S. 231, 65 L.Ed.2d 86, 100 S.Ct. 2124 (1980), the United States Supreme Court sustained the prosecutor’s references to the defendant’s pre-arrest silence where no *Miranda* warnings were given. In *Jenkins*, the defendant raised self defense in a homicide trial, and on cross examination, the prosecutor brought out that the defendant waited two weeks before reporting the murder.
- Post-arrest, pre-*Miranda* silence may be commented upon if the defendant testifies. *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988) (*see Miranda v. Arizona*, 384 U.S. 436 (1966)). In *Fletcher v. Weir*, 455 U.S. 603 (1982), the U.S. Supreme Court held that in the absence of *Miranda* warnings,

due process is not violated by cross examination of a defendant as to his or her post-arrest silence.

- Post-arrest, post-*Miranda* silence may NOT be commented upon. *State v. Robinson*, 140 Wis. 2d 673, 682, 412 N.W.2d 535, 539 (Ct. App. 1987).
- In cases where prosecutors have referred to the defendant's request for an attorney after his arrest (which is a Sixth Amendment, rather than a Fifth Amendment, violation), courts have reversed convictions. *See Zenina v. Solem*, 573 F.2d 1027 (8th Cir. 1978); *U.S. v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974).
- You may not comment on the defendant's pre-trial silence or the defendant's failure to testify at trial. *See State v. Phillips*, 99 Wis. 2d 46, 52, 298 N.W.2d 239, 242-243 (Ct. App. 1980). For a discussion of silence during the Chapter 980 process, *see State v. Adams*, 223 Wis. 2d 60, 558 N.W.2d 336 (Ct. App. 1998); *State v. Zanelli*, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997). For a prosecutor's comment on a defendant's failure to testify, *see State v. Lindvig*, 205 Wis. 2d 100, 107, 555 N.W.2d 197, 200 (Ct. App. 1996).
 - However, note that the rule is not absolute, because if defense counsel mentions the defendant's silence, the State may then address it without violating any constitutional rules. *State v. Edwardsen*, 146 Wis. 2d 198, 214, 430 N.W.2d 604, 611 (Ct. App. 1988).
 - When a prosecutor refers to testimony as "uncontradicted" where the defendant has elected not to testify . . . and when the defendant is the only person able to dispute the testimony, such reference necessarily focuses the jury's attention on the defendant's failure to testify and constitutes error. *State v. Phillips*, 99 Wis. 2d 46, 52, 298 N.W.2d 239, 243 (Ct. App. 1980), quoting *U.S. v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978), cert. denied, 439 U.S. 871 (1978).
- In *U.S. v. Cotnam*, the court repudiated the prosecutor's conduct in describing evidence as "uncontroverted" on four separate occasions during closing arguments by stating:

Direct comment on a defendant's failure to testify is forbidden by the Fifth Amendment. We have repeatedly recognized that indirect commentary on a defendant's failure to take the stand can also constitute a violation of the defendant's Fifth Amendment privilege not to testify. A prosecutor's comment that the government's evidence on an issue as "uncontradicted," "undenied," "unrebutted," "undisputed," etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself.

We have consistently emphasized that such references violate the Fifth Amendment only when "it is highly unlikely that anyone other than the defendant could rebut the evidence." Our test for a Fifth Amendment violation of this sort is as follows: The right against self-

incrimination is violated only when 1) it was the prosecutor's manifest intention to refer to the defendant's silence, or 2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence.

U.S. v. Cotnam, 88 F.3d 487, 497 (7th Cir. 1996) (internal citations omitted).

For additional examples, see *U.S. v. Rodriguez*, 215 F.3d 110 (1st Cir. 2000); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991); *U.S. v. Rodriguez*, 260 F.3d 416 (5th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001); *People v. Johnson*, 842 P.2d 1 (Cal. 1993); *State v. Hart*, 462 P.2d 885 (Mont. 1969).

7. Strategies and Practicalities

a. DOs

- Prosecutor's role: "He [or she] may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." *State v. Bergenthal*, 47 Wis. 2d 668, 681-82, 178 N.W.2d 16, 24 (1970), quoting *Berger v. United States*, 295 U.S. 78, 88, 55 Sup.Ct. 629, 79 L.Ed. 1314 (1935).
- You may – and should – comment on the evidence, including arguing evidence to its conclusion or to a reasonable inference.
- Identify and directly confront issues that are in conflict. Make sure that you argue reasonably in terms of your assessment of the case's strengths and weaknesses.
- You may use rhetorical questions during the closing argument, anticipating the questions that the jury may have. Answer those rhetorical questions convincingly.
- Consider using analogies for persuasion purposes, especially in circumstantial cases.
- Make the defense answer their weak points. Make the defense account for inconsistencies in the defendant's testimony. Make them account for strong State's witnesses.
- Use exhibits during your closing for a balanced approach.
- Comment on the instructions is within the permitted scope of closing argument. While counsel may not make statements of dubious correctness, comments on the instructions and consideration of the evidence in terms of the instructions are accepted as appropriate trial techniques. See *State v. Lenarchick*, 74 Wis. 2d 425, 458, 247 N.W.2d 80, 97 (1976), which cited the following: 23A C.J.S., Criminal Law, § 1090; *Shelby v. State*, 258 Ind. 439, 442, 281 N.E.2d 885, 887 (1972); *State v. Davis*, 53 Wash.2d 387, 391, 333 P.2d 1089, 1091 (1959); 3 Goldstein, Trial Technique (2d ed.), §§ 22.12-22.34.
- When a *pro se* defendant addresses a jury on his or her own behalf, the State may comment on the difference between the closing argument and the evidence. In

State v. Johnson, 121 Wis. 2d 237, 242-49, 358 N.W.2d 824, 826-30 (Ct. App. 1984), the *pro se* defendant gave his own opening and closing statements. The prosecutor cautioned the jurors that the defendant was not providing evidence because the defendant was not under oath and was not subject to cross examination.

- It is an error for the trial court to prohibit outright any reading from the transcript. *State v. Lenarchick*, 74 Wis. 2d 425, 458, 247 N.W.2d 80, 97 (1976), quoting *United States v. Kuta*, 518 F.2d 947, 954 (7th Cir. 1975), states that there is little risk of undue emphasis because all of the evidence may be scrutinized during closing arguments, and there is no reason to establish a *per se* rule penalizing accuracy, thereby putting a premium on counsel's memory.
- Make eye contact with the jury during your closing. Use body language and gestures. Adjust your voice level. Keep arguments simple for the jury. Refrain from reading from notes because you will lose the positive effect of eye contact.
- Be confident. Conclude forcefully, smoothly and convincingly. Make your closing appealing to common sense and reason.

b. DON'Ts

- Never misstate evidence or overstate facts. You may not suggest that you possess evidence or information that was not testified to. You are limited to the evidence that was presented at trial. See *Emby v. State*, 46 Wis. 2d 151, 160-61, 174 N.W.2d 521, 526 (1970); *State v. McGee*, 52 Wis. 2d 736, 749, 190 N.W.2d 893, 900 (1971).
- You may not express your personal opinions during closing. *State v. Johnson*, 153 Wis. 2d 121, 132, n.11, 449 N.W.2d 545, 850 (1990), cites the ABA Standards for Criminal Justice § 3-5.8(b) (2d ed. Supp. 1986), stating that it is unprofessional for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. See *State v. Bergenthal*, 47 Wis. 2d 668, 682, 178 N.W.2d 16, 24 (1970); *Emby v. State*, 46 Wis. 2d 151, 160-62, 174 N.W.2d 521, 526 (1970). “[W]hen such an opinion is expressed [by either counsel] it must be clear that it is based solely upon the evidence in the case. . . . The independent opinion of counsel is not evidence.” *State v. Johnson*, 153 Wis. 2d 121, n.11, 449 N.W.2d 845, 850 (1990).
- In *In the Matter of Swartz*, the prosecutor first implied that the defendant drug trafficker had AIDS and lots of money, although no evidence supported these assertions. *In the Matter of Swartz*, 30 P.3d 1011, 1015 (Kan. 2001). Then the prosecutor gave his personal belief of guilt based, not on evidence, but on his “common sense of years of experience . . . and I’ve been walking around with my eyes open for 53 years.” The Kansas Supreme Court did not accept the closing statement. *Swartz*, 30 P.3d at 1031.
- In *Trump v. State*, in referencing the testimony of a fifteen-year-old sexual assault victim, the prosecutor flatly stated: “I submit to you, I think she’s telling me the truth.” *Trump v. State*, 53 A.2d 963, 966 (Del. 2000). While the court ultimately did not overturn the case, it stated: “Despite our repeated admonitions over the

past two decades, prosecutors have apparently failed consistently to heed these admonitions. Prosecutors must resist the urge to win at all costs and instead must be especially careful to let the evidence speak for itself and to choose their words in a closing argument with great care.” *Id.* at 967.

- Steer clear of inappropriate statements such as “I believe,” “I think,” “I promise,” “I am sure.” Appropriate comments begin with statements like: “The evidence shows,” “the evidence supports,” or “based upon the evidence.” Jurors must convict on the evidence.
- In *State v. Pulizzano*, the defendant alluded, during her testimony, to having been sexually assaulted as a child. The prosecutor argued that the defendant was more likely to have committed the sexual assaults alleged against her in the present prosecution due to her prior victimization as a child. The circuit court allowed these statements as a “matter of common knowledge,” likening them to common knowledge of the “Battered Parent Syndrome.” The Supreme Court rejected that analogy, instead finding that the prosecutor’s argument in closing to be improper because it was unsupported by expert testimony. *State v. Pulizzano*, 155 Wis. 2d 633, 657-58, 456 N.W.2d 325, 335-36 (1990).
- Similar to *Pullizano*, in *State v. Marr*, the prosecutor presented no evidence of the effects of sexual abuse on young children, and then discussed during closing arguments the behavior patterns of abused children. *State v. Marr*, 551 A.2d 456 (Me. 1988). The court ultimately granted the defendant a new trial. *Marr*, 551 A.2d at 459.
- Never exploit the power of your position or the credibility of your office to manipulate the jury’s assessment of the evidence. As one commentator put it:

In its simplest form, such an argument may be stated as: “This is true, because I say it is true.” This places the credibility of counsel at issue instead of the guilt of the defendant. This short-circuits the fact-finding function of the trial by telling the jury that prosecutors’ opinions are due determinative weight because they are the state’s representatives.

Gunson, “Prosecutorial Summation,” 46 ME.L.REV. 41, 249 (1994).

- In one case, the United States Supreme Court called the prosecutor’s arguments “undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.” *Berger v. U.S.*, 295 U.S. 78, 85 (1935). Expressing one’s personal beliefs during closing is specifically prohibited by S.C.R. 20:3.4(e), which states that a lawyer shall not allude to any matter that the lawyer does not reasonably believe is supported by the admissible evidence.
- In *U.S. v. Molina Guevara*, the defendant’s conviction was reversed because the prosecutor vouched for the witness and asserted facts not in evidence. *U.S. v. Molina Guevara*, 96 F.3d 698 (1996). There, the prosecutor asserted that defense counsel’s attacks on the police officer’s credibility were “insulting” and that it was “ridiculous” to think that the United States would put on a witness who

would lie. *Molina Guevara*, 96 F.3d at 702. Further, the prosecutor argued that the police officer's partner, who did not testify, would have corroborated the other officer's testimony. *Id.*

Also, consider the following improper arguments:

- *State v. Albright*, 98 Wis. 2d 663 (1980) (the prosecutor stated that police did not receive “a bonus or any brownie points or any award when making arrests”);
- *State v. Davidson*, 225 Wis. 2d 537 (2000) (the prosecutor, in referring to a sexual assault victim, stated: “the bottom line is this, do you believe Tina as I do . . .”);
- In *State v. Smith*, a conviction was overturned by the Wisconsin Court of Appeals because the prosecutor stated in closing argument: “[I]t frustrates me knowing and working in this field, and knowing these officers; and you know them now too. You know them. They work hard. They do a tough job. They come in here to testify a lot of times. They work long, long hours. You weigh their testimony against the defendant's.” *Smith*, 2003 WI App 234, ¶ 12, 268 Wis. 2d 138, 146. The court found that the prosecutor, by using this language, had vouched for the police officers' credibility and that no evidentiary basis for comment on the officer's work habits or job demands existed in the trial record.
- In *State v. Johnson*, 153 Wis. 2d 121, 132, 449 N.W.2d 845, 849-50 (1990), the Wisconsin Supreme Court allowed (somewhat disapprovingly) a prosecutor's comments describing the defendant as a “liar” and a “rapist,” only because the comments occurred in the context of an analysis of the evidence. However, the Court described the prosecutor's choice in using terms such as “perjurer” to be imprudent. Whenever possible, describe the defendant's conduct or behavior in terms of “credibility” and “believability” rather than labeling the defendant as a “liar” or “perjurer,” because those terms unnecessarily risk inciting jurors outside the context of the evidence.
- According to *Darden v. Wainwright*, 477 U.S. 168 (1986), derogatory comments made by a prosecutor may so infect a trial with unfairness that the resulting conviction may be a denial of due process. While some appellate courts give latitude to prosecutors, other courts have reversed convictions (or disciplined prosecutors) based upon remarks that appealed to the passions or prejudices of the jury.

In the following cases, the prosecutor improperly:

- Referred to the defendant as a “junky” and a “pusher.” *People v. Connette*, 475 N.Y.S.2d 682 (1984).
- Compared the defendant to “Al Capone.” *Sibiga v. State*, 499 A.2d 484 Md. (1985).
- Called the defendant a “junky, rat and sculptor with a knife.” *People v. Hickman*, 312 N.Y.S.2d 644 (1970).
- Referred to the defendant as “Pontius Pilate” and “Judas Escariot.” *U.S. v. Steinkoetter*, 633 F.2d 719 (6th Cir. 1980).

- Called the defendant a “subhuman man” and a “rattlesnake.” *U.S. v. Cook*, 432 F.2d 1093 (7th Cir. 1970).
- Called the defendant a “fiendish ghoul.” *Cronnon v. Alabama*, 587 F.2d 246 (5th Cir. 1979).
- Characterized the defendant as a “wolf” and several other animals. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).
- Referred to the defendant as a “monster,” a “pervert,” and a “child molester.” *State v. Smith*, 599 N.W.2d 344 (S.D. 1999).
- Lastly, in a capital sentencing proceeding against a defendant who beat a robbery victim to death with a two-by-four and stole crack cocaine, the prosecutor linked the death of the victim to the tragedies of Columbine High School and the Oklahoma City bombing. The prosecutor then concluded with: “You got this quitter, this loser, this worthless piece of shit, who’s mean. He’s mean as they come. He’s lower than the dirt of a snake’s belly.” *State v. Jones*, 558 N.E.2d 97 (N.C. S.Ct. 2002).

It does not appear to be advisable to ever make judgments pertaining to the defendant without attaching your comment to an evidentiary basis. If you feel the need to refer to the defendant as a “liar” or want to engage in name-calling, it is a good idea to preface your remark with words to the effect of: “The evidence shows. . . .”

Refrain from making inflammatory remarks in reference to defense counsel. In *State v. Hagen*, 181 Wis. 2d 934, 512 N.W.2d 180 (Ct. App. 1994), the prosecutor referred to the defense pulling “whatever tricks they can pull out of their sleazy bag” before accusing the defense of “unethical behavior.” The trial court instructed the jury to disregard the remarks that it held to be improper and to rely on the evidence, ignoring any appeals to prejudice or bias.

Typically, inappropriate remarks towards defense counsel will include:

- Comments regarding defense counsel’s objections;
- Insinuations that defense counsel believes the defendant is guilty; or
- Outright attacks on the defense attorney’s integrity.

Here are more examples of inappropriate remarks:

- In *People v. Kirk*, 361 Ill.2d 292, 222 N.E.2d 498 (1966), the prosecutor accused the defense attorney of copying the “doctrine of Adolf Hitler” that if one tells enough lies, the lies would be believed.
- In *People v. Steinhardt*, 173 N.E.2d 871 (1961), the prosecutor used the terms “puke” and “stinks” in describing defense counsel.
- In *People v. Lombardi*, 229 N.E.2d 200 (1967), the prosecutor sarcastically described defense counsel as the “great defender of civil liberties.”
- In *People v. Robinson*, 467 N.E.2d 291 (Ill. 1984), the prosecutor accused defense counsel of speaking “in forked tongue” and of “using tricks, using gimmicks to

get her client to beat this rap.” Prosecutor also state that defense counsel “may be small and she may be a woman, but she’s a pretty dirty trial lawyer.”

- In *U.S. v. Friedman*, 909 F.2d 705 (2d Cir. 1990), the prosecutor stated that defense counsel would “make any argument any way he can to get that guy off” and that “while some people prosecute drug dealers, there are others who try to get them off, perhaps even for high fees.”
- In *U.S. v. Carter*, 236 F.3d 777 (6th Cir. 2001), the prosecutor described the defense attorney’s argument as “one tremendous colossal lie.”
- In *U.S. v. Wadlington*, 233 F.3d 1067 (8th Cir. 2000), the prosecutor contrasted the defense attorney’s argument with the requirement that lawyers “shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”
- In *U.S. v. Rodrigues*, 159 F.3d 439 (9th Cir. 1998), the prosecutor improperly stated that defense counsel had “from the start been trying to deceive the jury and had told the jury what was ‘flat out untrue.’”
- In *U.S. v. Procopio*, 88 F.3d 21 (1st Cir. 1996), the prosecutor improperly referred to the defense attorney’s arguments as a “smokescreen” and stated: “I’ve got news for the defense counsel. This trial isn’t a game.”
- In *U.S. v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), the prosecutor called the defense attorney a “professional arguer” who “mucks up” the judicial system.
- In *Snow v. Reid*, 619 F.Supp. 579 (S.D.N.Y. 1985), the prosecutor stated that the defense attorney was “trying to cloud the waters as squid and octopi are reputed to do.”

Lastly, courts are highly critical of a prosecutor’s closing argument that implies that the defense attorney disbelieves his or her client’s innocence. See *U.S. v. Kirkland*, 638 F.2d 654 (9th Cir. 1980); *State v. Reilly*, 446 A.2d 1125 (Me. 1982); *People v. Jones*, 425 N.Y.S.2d 276 (1980).

- In *State v. Wolff*, the Wisconsin Court of Appeals stated:

It is improper for the prosecutor to refer to possible penalties in closing argument. *State v. Garnett*, 243 Wis. 615, 617-618, 11 N.W.2d 166, 167 (1943). It is also true, as *Wolff* suggests, that a prosecutor’s misconduct can rise to such a level that the defendant is denied his or her due process right to a fair trial. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), *reh’g denied*, 478 U.S. 1036 (1986). The test to be applied when a prosecutor is charged with misconduct for remarks made in argument to the jury is whether those remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”

Wolff, 171 Wis. 2d 161, 491 N.W.2d 498 (Ct. App. 1992), (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

- In *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991), the court held it to be error for a prosecutor to direct the jurors’ desires to end a social problem toward convicting a

particular defendant. The *Solivan* prosecutor stated during closing arguments: “She’s been caught now. And I’m asking you to tell her and all of the other drug dealers like her that we don’t want that stuff in Northern Kentucky and anybody who brings that stuff in Northern Kentucky. . . .”

- In *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), the prosecutor improperly evoked the jury’s fear of crime by comparing the defendant to violent drug gangs. Similarly, in *U.S. v. McClean*, 138 F.3d 1398 (11th Cir. 1998), the prosecutor improperly referred to the completely irrelevant plight of “crack-addicted babies” as a blatant appeal to the fears and prejudices of jurors. Even more blatant was a prosecutor’s question to the jury during closing arguments: “Now folks, are we going to turn [the defendant] loose on society by reason of insanity?” *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000).
- In *Miller v. Lockhart*, 651 F.2d 676 (8th Cir. 1995), a prosecutor pointed to pictures of several of the deceased family members in the courtroom and stated: “You know what their presence here is asking you to do. I think you should consider their wishes.”
- Avoid the “golden rule” argument. Do not tell the jurors to put themselves in a real or imagined person’s place, and do not allow the defense to make this argument either. Don’t have them imagine themselves in the shoes of the victim. Jurors should not go beyond the reasoning attached to the evidence or consider factors other than the evidence. See *State v. Draize*, 88 Wis. 2d 445, 453-56, 276 N.W.2d 784, 789-790 (1979).

c. Rebuttal

- Don’t “sandbag,” because you may be precluded from making certain arguments. While you may be tempted to save some subtle points for your rebuttal, be careful: you are not legally allowed to do this.
- Remember your case theory. Do more than simply respond to the defendant’s closing argument. Emphasize your strong points in a manner consistent with your case theory. Often, your rebuttal argument may appeal more to emotion, as opposed to your closing argument.
- Remember to tell the jury that the defendant is guilty. Conclude with strong emphasis of the defendant’s guilt. If you do not believe the defendant is guilty, you must move the court to dismiss your case.

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32. Sentencing: Special Consideration for Domestic Abuse Cases

1. Introduction
2. Prosecutor's Mindset
3. A Brief Word on the Law of Sentencing
4. Sentencing Considerations
5. Probation
6. Probation Review Court Appearances

1. Introduction

Domestic abuse cases involve relationships between family members, intimate partners or cohabitants. Some prosecutors “stick to the facts” during the State’s presentation at sentencing. Other prosecutors prefer to hone in on the defendant’s prior record and history. Many of us refrain from talking too much about relationships, reasoning that we are not psychiatrists, marriage counselors, or therapists.

However, unlike other crimes, the victims and defendants in domestic abuse cases may want to maintain some type or level of relationship, even after the case is over. This increases the chance of repeat violence against the same victim.

How can we, as prosecutors, figure out a way to prevent future violence, while understanding that the relationships of many victims and abusers will continue (whether we like it or not)?

The court may postpone the parties’ relationship for a time, but once the jail time or probation period runs out, the relationship may resume in some form. Therefore, to increase safety and long-term protection, a greater emphasis must be placed upon changing the offender’s future behavior.

2. Prosecutor’s Mindset

When we, as prosecutors, first charge a domestic abuse case, we must remember our goals of increased victim safety and increased offender accountability. Those goals are both case-specific and community-focused.

Understanding a few of the basic dynamics of each domestic abuse relationship can help provide some insight. For example, think of a few basic questions to ask about the parties in a given case:

- In your opinion, how independent is the victim?
- Are there children in common?
- Is the victim dependent upon the defendant for childcare?
- How reliant is the victim upon the defendant for finances?
- What is your assessment of the victim's ability to leave the relationship, should he/she elect to do so?
- Is the victim emotionally independent?
- Is there a history of repeat violence or past abuse?
- Is there a need for a "safety plan" for the victim?
- Does the victim plan on maintaining a future relationship with the defendant? If so, to what extent?

Once you gain insight into the emotional, physical, financial and other levels of dependence, you can begin to understand how you, your office, community advocates, and law enforcement can support the victim and the family throughout the pendency of the criminal case and afterwards. Although the goal of the prosecution is not to aid in the maintenance of the parties' relationship, this is typically the goal of the parties.

Understanding how the goals of law enforcement may diverge from the victim's goals is perhaps the first step in preparing yourself for your case strategy; it can also help you to prepare yourself for your next domestic abuse sentencing hearing.

3. A Brief Word on the Law of Sentencing

Sentencing in Wisconsin is governed by Wisconsin Statutes Chapter 973. The judge has wide discretion in sentencing an individual. If a trial court doesn't articulate (or imply) a rational basis for imposing its sentence in the record, or if the trial court exercised discretion on the basis of irrelevant factors, then that trial court abused its discretion. *Davis v. State*, 52 Wis. 2d 697, 699, 190 N.W.2d 890, 891 (1971). *See also State v. Gallion*, 2002 WI App 265, ¶¶ 8, 27, 258 Wis. 2d 473, 654 N.W.2d 446.

There are three primary considerations when sentencing a defendant: 1) The gravity of the offense, 2) the character of the defendant, and 3) the need to protect the public. *Elias v. State*, 93 Wis. 2d 278, 286 N.W.2d 559 (1980). *See also Gallion*, 2002 WI App 265 at ¶ 26. This allows the judge a broad range of sentencing options.

The Wisconsin Supreme Court has quoted with approval Standard 2.2 of the ABA Standards relating to sentencing alternatives and procedures, which states:

The sentence imposed in each case should call for the minimum amount of custody or confinement, which is consistent with the protection of the public, gravity of the offense and the rehabilitative needs of the defendant. *See Neely v. State*, 47 Wis. 2d 330, 334, n.8, 177 N.W.2d 79 (1970) and *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

This would suggest that when recommending a sentence, the prosecutor should analyze the defendant's conduct on a continuum of increasing penalties. This analysis should take into account all of the relevant sentencing factors and may extend from a fine, to probation, to jail time, to prison time, with any number of variations in between. For instance, when considering a fine, consider the answers in § 2.2 of the ABA Standards and ask whether, if the court imposes a fine, the victim will just end up paying it and not the defendant.

4. Sentencing Considerations

As stated above, the trial court must articulate and identify its main sentencing objectives, including, but not limited to, the following:

- The protection of the community;
- Punishment of the defendant;
- Rehabilitation of the defendant, and/or
- Deterrence of others.

State v. Gallion, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197.

There are a number of other factors that the court may consider at the time of sentencing in arriving at the ranking of the objectives of the individualized sentence, and it must articulate those factors upon which it relied, and how those factors support the chosen objectives of the sentence. *Gallion*, 2004 WI 42 at ¶ 43.

These factors include:

- Past record of criminal offenses;
- A history of undesirable behavior patterns;
- The defendant's personality, character and social traits;
- The results of a pre-sentence investigation;
- The vicious or aggravated nature of the crime;
- The degree of defendant's culpability;
- The defendant's demeanor at trial;
- The defendant's age, educational background, and employment record;
- The defendant's remorse, repentance, and level of cooperation;

- The defendant’s need for close rehabilitative control;
- The rights of the public;
- Any read-in offenses; and
- The effect of the crime on the victim.

Gallion, 2004 WI 42 at ¶ 43, n.11.

In 2012, the Wisconsin Legislature enacted legislation that created an aggravated sentencing factor for domestic abuse committed in the presence of a child. *See* 2011 Wisconsin Act 273. Although this legislation did not create a penalty enhancer, the law still requires that a “court shall consider as an aggravating factor the fact that the act was committed in a place or a manner in which the act was observable by or audible to a child or was in the presence of a child and the actor knew or had reason to know that the act was observable by or audible to a child or was in the presence of a child.” WIS. STAT. §973.017(6m)(b). As the prosecutor, you should alert the court at the sentencing hearing about this aggravating factor even when the criminal complaint clearly states that a child was present.

In practice, all of these factors are important for a prosecutor to consider. However, when sentencing a domestic abuse defendant, perhaps the single most important factor is the defendant’s willingness to take responsibility for his or her actions. Consider the following hypothesis for offender accountability: Change comes from rehabilitation, which comes from responsibility, which comes from accountability.

Defendants who refuse to take legal responsibility for their behavior will typically be unwilling to accept moral responsibility for that same behavior. Without taking moral responsibility for abusive behavior, it will be much less likely that the defendant will change.

5. Probation

The most common sentencing recommendation for a misdemeanor domestic abuse defendant is probation. Probation is governed by WIS. STAT. § 973.09. This statute provides for the length of the original term of probation, and, under certain circumstances, longer terms of probation than the original term may be imposed. According to WIS. STAT. §§ 793.09(1), (1m), and (1r), for most misdemeanors the period of probation cannot be longer than one year per count. However, for misdemeanors committed under the circumstances of domestic abuse, as defined in WIS. STAT. § 968.075(1)(a), the original term of probation for a single misdemeanor cannot be less than six months, but may be up to two years. *See* WIS. STAT. § 973.09(2)(a)1. If the person is convicted of up to four misdemeanors, that original term of probation may be increased by an additional year. If the person is convicted of five or more misdemeanors, that original term may be increased by up to two years.

For a single felony, the original term of probation is either three years or the maximum term of confinement, whichever is greater. WIS. STAT. § 973.09(2)(b). *See also* Appendix 12 for a sentencing penalty chart. When a defendant is convicted of a felony, if he or she is convicted of

other crimes at the same time, the original term of probation for the original felony can be increased by up to one year for each felony conviction. WIS. STAT. § 973.09(2)(b)2.

In *Bastian v. State*, 54 Wis. 2d 240, 247-48, n.1, 194 N.W.2d 687, 690-91 (1972), the Wisconsin Supreme Court expressly adopted § 1.3 of the ABA Standards, which outlines the criteria for granting probation:

- (a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the defendant, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:
- Confinement is necessary to protect the public from further criminal activity by the defendant; or
 - The defendant is in need of correctional treatment which can most effectively be provided if he [she] is confined; or
 - It would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.
- (b) Whether the defendant pleads guilty, pleads not guilty, or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.

WIS. STAT. § 973.09(1)(a) provides that the court may impose any conditions of probation which appear to be reasonable and appropriate. Conditions of probation must meet the particularized needs of the individual case. *See also State v. Garner*, 54 Wis. 2d 100, 194 N.W.2d 649 (1972). The validity and reasonableness of the conditions will be measured by how well they serve to accomplish the goals of rehabilitating the defendant and protecting the public from future criminal conduct. *See, e.g., State v. Schell*, 261 Wis. 2d 841, 661 N.W.2d 503 (Ct. App. 2003); *Huggett v. State*, 83 Wis. 2d 790, 266 N.W.2d 403 (1978).

The sentencing court maintains broad discretion. The trial court may order confinement in the county jail (not to exceed one year per charge) as a condition of probation. WIS. STAT. § 973.09(4)(a). In addition, the prosecutor has the flexibility to tailor a recommendation to address a defendant's specific needs. The following are a few examples of conditions of probation that may be appropriate for a defendant in a domestic abuse case:

a. Batterer's Intervention Counseling (BIC) programs

The court may order the defendant to attend a batterers' intervention counseling program (BIC) as a condition of pre-trial release, as a condition of sentencing, or both (these are sometimes called by other names, such as "certified domestic abuse counseling"). The Wisconsin Coalition Against Domestic Violence (WCADV) has certification standards for BIC programs. Classes should be administered by a provider meeting those standards.

Keep in mind that there are differences between programs. An “anger management class,” while well intentioned, may not meet the needs of a seasoned abuser. An abuser may be quite different from a person who has an anger problem. For instance, an abuser may be able to handle most social situations quite well. While that abuser may get angry with his supervisor at work, the abuser typically does not punch the work supervisor. The abuser, instead, reserves his violence and abuse for his spouse or partner.

Even some therapists do not possess the requisite skill and expertise to deal with high levels of power and control manipulation from abusers. Those educational programs and therapists who understand the dynamics of domestic abuse and have experience in educating, providing therapy or facilitating groups will best help to promote accountability, responsibility, rehabilitation and change in the life of an abuser.

b. Defendant’s responsibility for counseling of victims and witnesses

If the victim needs counseling as a result of victimization, or if children who witness domestic abuse need counseling, the defendant should be ordered to pay for that counseling or treatment.

c. Financial counseling

If the defendant has mishandled or misused money in an attempt to control the victim, financial counseling may be appropriate. However, this should be ordered in conjunction with, not instead of, a BIC program.

d. Parenting classes

Whenever appropriate, do not hesitate to add parenting classes as a condition of probation. Considering the effect on children growing up in violent homes, parenting classes can be an excellent resource. Many have support groups where parents can learn from each other how to interact with and discipline their children.

e. No-contact orders and child custody / visitation issues

Before a conviction, work with the victim to obtain a restraining order or injunction, and then have the criminal court judge track the same language as a condition of probation. Make sure the conditions you ask for at sentencing do not conflict with orders from other courts (such as family court or juvenile court). For example, if victim safety concerns are such that a no-contact order is an appropriate condition of sentencing, but the family court has ordered that visitation with the child may be allowed, try to arrange for visitation through a third party or a visitation center. If the defendant violates a no-contact order imposed by the court at the sentencing hearing, you may charge the defendant with a new criminal offense. WIS. STAT. § 941.39; *see also* 2011 Wisconsin Act 267.

f. Restitution

Restitution is governed by WIS. STAT. § 973.20. Under this statute the court is required to order restitution unless the court finds substantial reason not to do so and states the reason on the record. It is the prosecutor's responsibility to obtain information relating to the amount of loss suffered by a victim. Please refer to WIS. STAT. § 973.20 for a full understanding of the law of restitution. Restitution requests should include repayment for doctor bills, time away from work due to injuries, damaged property, counseling, etc.

g. Domestic abuse assessments / surcharge

According to WIS. STAT. § 973.055(1): "If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse assessment of \$100.00 for each offense. . . ." Per WIS. STAT. § 973.055(4), the court may waive part or all of the domestic abuse assessment, "if it determines that the imposition of the full assessment would have a negative impact on the offender's family."

h. Forfeiture of property or vehicle for stalkers and violations of TROs and injunctions

WIS. STAT. § 973.075 FORFEITURE OF PROPERTY DERIVED FROM CRIME AND CERTAIN VEHICLES.

- (1) The following are subject to seizure and forfeiture under §§ 973.075 to 973.077:
 - (a) All property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime.
 - (b) 1m. . . . (A) All vehicles, as defined in § 939.22(44), which are used in any of the following ways:
 - a. To transport any property or weapon used or to be used or received in the commission of any felony.
 - f. In the commission of a crime under §§ 813.12(8) [domestic abuse TRO / Injunction], 813.122(11) [child abuse TRO / Injunction], 813.123(10) [vulnerable adult TRO / Injunction], 813.125(7) [harassment TRO / Injunction], 813.128(2) [foreign protection order] or 940.32 [Stalking].

Under WIS. STAT. § 973.076, the district attorney must begin the forfeiture action within thirty days of the seizure of the property or date of conviction. The State has the burden of satisfying or convincing the judge to a reasonable degree of certainty by the greater weight of the credible evidence that the property is subject to forfeiture under WIS. STAT. §§ 973.075 to 973.077.

Under WIS. STAT. § 973.077(1), it is not necessary for the State to negate any exemption or exception regarding any crime in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under WIS. STAT. § 973.076. The burden of proof of any exemption or exception is upon the person claiming it. Additionally, law enforcement officers or employees cannot be encumbered by liability for engaging in the lawful performance of forfeiture duties, according to WIS. STAT. § 973.077(3).

i. Community service

WIS. STAT. § 973.09(7m) says that a court may require a combination of probation and community service for a public agency or charitable organization.

6. Probation Review Court Appearances

Judicial oversight over probation and parole ensures compliance with all Department of Corrections rules and conditions. Also, it helps you meet your goal of increased offender accountability.

The prosecutor may ask the trial court to impose and stay jail time and order periodic reviews of the defendant's performance on probation. WIS. STAT. § 973.09(3)(a) permits this request. At those review hearings, the court may extend probation, modify terms and conditions, and even hand out a jail term as a condition of probation.

In practice, the defendant's probation agent submits a "Probation Status Report" to the court articulating whether the defendant is in compliance with the conditions of his or her probation. If the defendant is in compliance, the jail time remains stayed until further notice. If the defendant has violated any of the conditions, the court may choose to impose a portion or all of the jail time that was ordered at the sentencing hearing.

While supporting your goal of increased offender accountability, this practice will also assist you in meeting another of your goals: increased victim safety. The probation review court appearance gives the victim another chance to appear and formally report on progress and safety.

The probation agent has a new tool as well. No longer must the agent threaten revocation alone. The agent can simply tell the defendant: "You can tell it to the judge at the probation review why you are missing your batterers' counseling sessions or showing up late to AODA appointments." Usually, most defendants don't fare well at explaining their repeated lack of compliance with the judge's sentence in an open courtroom setting.

Probation reviews have proven to be a successful tool in many counties. If your jurisdiction does not currently utilize this tool, we suggest that you give it a try.

33. Advocate-Victim Privilege

1. WIS. STAT. § 905.045(2): General Rule of Privilege
2. Purpose of the Advocate-Victim Privilege
3. Holder of the Privilege and Waiver of the Privilege
4. Scope of the Privilege
5. Applicability of the Privilege

1. WIS. STAT. § 905.045(2): General Rule of Privilege

WIS. STAT. § 905.45 DOMESTIC VIOLENCE OR SEXUAL ASSAULT ADVOCATE-VICTIM PRIVILEGE.

(1) DEFINITIONS. In this section:

- (a) “Abusive conduct” means abuse, as defined in § 813.122(1)(a), of a child, as defined in § 48.02(2), interspousal battery, as described under § 940.19 or 940.20(1m), domestic abuse, as defined in § 813.12(1)(am), or sexual assault under § 940.225.
- (b) “Advocate” means an individual who is an employee of or a volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim.
- (c) A communication or information is “confidential” if not intended to be disclosed to 3rd persons other than persons present to further the interest of the person receiving counseling, assistance, or support services, persons reasonably necessary for the transmission of the communication or information, and persons who are participating in providing counseling, assistance, or support services under the direction of an advocate, including family members of the person receiving counseling, assistance, or support services and members of any group of individuals with whom the person receives counseling, assistance, or support services.
- (d) “Victim” means an individual who has been the subject of abusive conduct or who alleges that he or she has been the subject of abusive conduct. It is immaterial that the abusive conduct has not been reported to any government agency.

- (2) **GENERAL RULE OF PRIVILEGE.** A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated among the victim, an advocate who is acting in the scope of his or her duties as an advocate, and persons who are participating in providing counseling, assistance, or support services under the direction of an advocate, if the communication was made or the information was obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.
- (3) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the victim, by the victim's guardian or conservator, or by the victim's personal representative if the victim is deceased. The advocate may claim the privilege on behalf of the victim. The advocate's authority to do so is presumed in the absence of evidence to the contrary.
- (4) **EXCEPTIONS.** Subsection (2) does not apply to any report concerning child abuse that an advocate is required to make under § 48.981.
- (5) **RELATIONSHIP TO § 905.04.** If a communication or information that is privileged under sub. (2) is also a communication or information that is privileged under § 905.04(2), the provisions of § 905.04 supersede this section with respect to that communication or information.

2. Purpose of the Advocate-Victim Privilege

Wisconsin's advocate-victim privilege statute mirrors that of many jurisdictions nationwide, which have designated communications between domestic abuse or sexual assault counselors and victims to be legally privileged and not subject to discovery or subpoena. Wisconsin's privilege includes communications between the victim and advocate(s), as well as others under an advocate's direction. *See* WIS. STAT. §§ 905.45(1)(b); 905.45(2).

Wisconsin's law encourages battered victims to obtain counseling and the necessary advocacy to help them leave violent, controlling relationships. The new law affords domestic abuse and sexual assault victims the guarantee of a "safe haven" for free expression, without fear that their communications will be used later in a courtroom setting.

Privileges also exist for battered victims to maintain private communications with an attorney (WIS. STAT. § 905.03); clergy (WIS. STAT. § 905.06); and a whole host of medical providers including physicians, nurses, chiropractors, psychologists, social workers, marriage and family therapists, and professional counselors (*see* WIS. STAT. § 905.04).

For more information, *see* OFFICE FOR JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, <http://www.ojp.usdoj.gov/ovc/welcome.html>.

3. Holder of the Privilege and Waiver of the Privilege

The privilege may be claimed by the victim, the victim's guardian or conservator, or by the victim's personal representative (in the event of the victim's death). Note that the privilege typically will encompass the advocate's written records, such as reports, memoranda and other work product during the scope of providing counseling, assistance or support services to a victim.

Although others may claim privilege on behalf of the victim, *the victim is the only person who may waive the privilege*. See *Borgwardt v. Redlin*, 196 Wis. 2d 342, 355, 538 N.W.2d 581 (Ct. App. 1995). Also, a waiver of privilege is permanent; if a privilege holder waives the privilege, he or she can no longer claim that same privilege. However, the privilege can only be waived if the privilege holder voluntarily discloses or consents to the disclosure of any significant part of the matter or communication. WIS. STAT. § 905.11.

According to WIS. STAT. § 905.11, a privilege holder does not waive the privilege if the disclosure itself is privileged. To illustrate when a privilege holder does and does not waive a privilege when disclosing information, consider the following examples. If a victim discloses a significant part of the matter or communication with an advocate to an acquaintance over dinner, that victim has waived the privilege. However, if the victim instead discloses the same information to an attorney in a professional setting, the victim has not waived the privilege. The difference between these two scenarios is that the conversation between the victim and the acquaintance is not privileged, while the conversation between the victim and the attorney is itself a privileged conversation and as such is meant to remain confidential.

4. Scope of the Privilege

Privilege laws generally fall into one of three categories: absolute, semi-absolute and qualified. Wisconsin's advocate-victim privilege is semi-absolute, meaning that there are exceptions to the rule, which are explicitly outlined in the statute. For example, reporting of child abuse and neglect qualifies as an exemption. See OFFICE FOR JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, <http://www.ojp.usdoj.gov/ovc/welcome.html>.

5. Applicability of the Privilege

As written, the law does not explicitly include or exclude victim assistance staff, such as the victim-witness professionals who work in district attorneys' offices or for law enforcement agencies.

The question then arises: Does this privilege apply to victim advocates or victim support personnel working in prosecutors' offices? There is a difference between a government "advocate" and an "advocate" working for an outside agency. Government advocates provide support services, but the focus is upon the criminal prosecution.

From a policy perspective, since many victims recant earlier statements made to law enforcement, prosecutors need to adopt strict measures to ensure that they are closely adhering to their duties to communicate exculpatory evidence to the defense.

Many district attorneys' offices have already adopted an interpretation that the privilege is not applicable to their victim assistance staff. Advocates or victim-witness specialists working in your office need to understand your position (if it truly is your office's position) that WIS. STAT. § 905.045 does not apply to them. This information should, in turn, be communicated to victims.

Although there is no case law directly on point, there is some additional statutory support to draw the conclusion that WIS. STAT. § 905.045 is inapplicable to government advocates and victim-witness staff. Look at the definitional similarities between WIS. STAT. §§ 905.045(2) and 895.67, which provide:

WIS. STAT. § 895.67 DOMESTIC ABUSE SERVICES; PROHIBITED DISCLOSURES.

(1) In this section:

- (a) "Domestic abuse" has the meaning given in § 46.95(1)(a).
- (b) "Domestic abuse services organization" means a nonprofit organization or a public agency that provides any of the following services for victims of domestic abuse:
 - 1. Shelter facilities or private home shelter care.
 - 2. Advocacy and counseling.
 - 3. A 24-hour telephone service.
- (c) "Service recipient" means any person who receives or has received domestic abuse services from a domestic abuse services organization.

(2)(a) No employee or agent of a domestic abuse services organization who provides domestic abuse services to a service recipient may intentionally disclose to any person the location of any of the following persons without the informed, written consent of the service recipient:

- 1. The service recipient.
 - 2. Any minor child of the service recipient.
 - 3. Any minor child in the care or custody of the service recipient.
 - 4. Any minor child who accompanies the service recipient when the service recipient receives domestic abuse services.
- (b) Any person who violates this subsection may be fined not more than \$500 or imprisoned for not more than 30 days or both.

As you can see, there are some similarities between the two statutes, in their use of similar terms. Clearly, safety and the fostering of trust are top priorities in both statutes. When seeking help, victims need to feel safe with their whereabouts and their communications. From a common sense standpoint, “advocacy” and “counseling” have separate meanings. While victim-witness specialists do provide both counseling and advocacy, their aim is to counsel victims and advocate towards participation in the prosecution and ultimately, if need be, in providing testimony. The focus of a victim advocate working for a hotline or in a shelter may be to support the specific wishes and desires of the victim.

Whatever your interpretation of “advocacy” or “counseling,” prosecutors must first obey the tenets of our ethical duty to turn over exculpatory evidence. You cannot avoid the responsibility of turning over exculpatory evidence by assigning all communication with domestic abuse victims to agents within the district attorney’s office, such as victim-witness specialists.

Despite the existence of this privilege, case law in Wisconsin still gives the courts the opportunity to compel persons with privilege to produce their confidential medical or mental health records or provide testimony. The trial court determines whether it is appropriate for records and/or testimony to come into a court proceeding. *See State v. Shiffra*, 175 Wis. 2d 600 (Ct. App. 1993); *State v. Green*, 2002 WI 68.

As described by the Wisconsin Supreme Court in *Green*, the standard requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence. The information is necessary if it tends to create a reasonable doubt that might not otherwise exist. If the court finds the information that is potentially contained in the records to be relevant and finds that the defense has met the required burden, then the court will allow a private *in camera* review by the judge to determine if the otherwise-confidential records may be useful to either party at trial. The victim must consent to this review in order for it to occur; however, if the victim refuses to consent to an *in camera* review there is a chance that the criminal case may be dismissed. If the victim consents to the *in camera* review and the judge finds information that may be relevant to the case, the victim must provide a second consent in order for any portion of the confidential records to be turned over to the defense. An earlier chapter of this reference book provides a more thorough review of the *Shiffra-Green* materiality test.

It is important to note that the law of advocate-victim privilege DOES NOT interfere with any mandatory duty to report child abuse under WIS. STAT. § 48.981.

It can be implied from the language of the statutes and relevant case law that the domestic abuse and sexual assault advocate-victim privilege, like the attorney-client privilege, survives the death of the client. The United States Supreme Court held in *Swidler v. U.S.*, 524 U.S. 399 (1998), for example, that the attorney-client privilege survives even the death of the client. *Swidler* involved a criminal investigation into the dismissal of White House Travel Office employees. The Court’s reasoning in upholding the attorney-client privilege after the client’s death is that knowing communications will remain confidential even after death serves the interest of

encouraging a client to communicate fully and frankly with counsel. The same analogy can be drawn for the advocate-victim privilege.

34. Rights of Victims and Witnesses of Crime

1. Introduction
2. Definitions
3. Rights
4. Enforcement
5. Conclusion

1. Introduction

Crime victims and witnesses have enforceable rights identified in Chapter 950 of the Wisconsin Statutes. The Wisconsin Legislature created this chapter in 1980. *See* 1979 Wisconsin Act 219. The original legislation defined relevant terms and created a basic bill of rights. In 1993, the Wisconsin Constitution was amended, providing crime victims with certain constitutionally protected rights and directing the legislature to provide remedies for the violation of these rights. *See* WIS. CONST. art. 1, § 9m. Enforcement procedures and remedies were created and went into effect in 1998. Although the Legislature amended Chapter 950 on many occasions through the years, its underlying intent remains “to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity.” WIS. STAT. § 950.01.

2. Definitions

Chapter 950 defines several words and phrases within the chapter or refers to other statutes for definitions. *See* WIS. STAT. § 950.02. Although the words and phrases below are not a complete list of defined terms, several of the most significant include:

Crime: An “act committed in this state which, if committed by a competent adult, would” be “prohibited by state law and punishable by fine or imprisonment or both.” WIS. STAT. §§ 939.12, 950.02(1m).

District Attorney: The “district attorney or other person authorized to prosecute a criminal case or a delinquency proceeding” or a “person designated by [the prosecutor] to perform the district attorney’s duties under this chapter.” WIS. STAT. § 950.02(2m).

Service Representative: An “individual member of an organization or victim assistance program who provides counseling or support services . . . and charges no fee for services provided to a [victim].” WIS. STAT. § 895.45(1)(c). *See also* WIS. STAT. § 950.04(1v)(c).

Victim: A “victim” includes any of the following: (1) “A person against whom a crime has been committed,” (2) A “parent, guardian or legal custodian of the child” when the victim is a child, (3) A “person designated by the [victim] . . . or a family member of the [victim]” when the victim is “physically or emotionally unable to exercise the rights,” (4) A “family member” or a “person who resided with the [victim]” when the victim is deceased, and (5) The guardian of the victim when the victim has been “adjudicated incompetent in this state.” WIS. STAT. § 950.02(4)(a). For purposes of Chapter 950, the term “victim” does not include “the person charged with or alleged to have committed the crime.” WIS. STAT. § 950.02(4)(b).

Victim-Witness Office: An “organization or program that provides services for which the county receives reimbursement under this chapter.” WIS. STAT. § 950.02(4m).

Witness: Any “person who has been or is expected to be summoned to testify for the prosecution, or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether or not any action or proceeding has yet been commenced.” WIS. STAT. § 950.02(5).

3. Rights

a. Victims

The basic bill of rights for victims in Chapter 950 includes over three dozen identified rights. *See generally* WIS. STAT. § 950.04(1v). The first step toward protecting the rights of victims begins with the prosecutor providing the victim with the following written information: (1) A statement explaining the procedure for prosecuting a crime; (2) A list of the statutory rights of victims, including information regarding the exercise of those rights; (3) Who the victim must contact if his or her address changes; (4) The availability of crime victim compensation along with information concerning eligibility and the procedure for applying for compensation; and (5) The person the victim may contact for further information about a case. WIS. STAT. § 950.08(2r). *See also* WIS. STAT. § 950.04(1v)(u). The information shall be provided as soon as practicable, but no later than 10 days after the initial appearance or 24 hours before the preliminary examination, whichever is earlier. WIS. STAT. § 950.08(2r). In addition to proper notice, a victim has the following rights:

Privacy: A victim has the right to “be treated with fairness, dignity, and respect for his or her privacy,” which includes to “not have his or her personal identifiers . . . used or disclosed . . . for a purpose that is unrelated” to the case. WIS. STAT. §§ 950.04(1v)(ag); (dr). *See also* 2011 Wisconsin Act 283.

Advocacy: A victim has the right to “be accompanied by a service representative.” WIS. STAT. § 950.04(1v)(c). A “service representative” is “an individual member of an organization or victim assistance program who provides counseling or support services to [victims] . . . and charges no fee for services provided.” WIS. STAT. § 895.45(1)(c). Many professionals use the term “advocate” to describe a “service representative.” *Cf.* WIS. STAT. § 905.045(1)(b) (“‘Advocate’ means an individual who is an employee of or a volunteer for an organization, the

purpose of which is to provide counseling, assistance, or support services free of charge to a victim”). The victim has the right to have an advocate attend all hearings and court proceedings, including all interviews and meetings related to those hearings and court proceedings. WIS. STAT. § 895.45(2).

Consultation: A victim has the right to consult with the prosecution in a case concerning the possible outcomes, potential plea agreements and sentencing recommendations. WIS. STAT. §§ 950.04(1v)(j); 971.095(2). *See also* WIS. STAT. §§ 950.04(1v)(i); 938.265.

Waiting Area: A victim has the right to be “provided a waiting area . . . to use during court proceedings that is separate from any area used by the defendant, the defendant’s relatives and defense witnesses.” WIS. STAT. §§ 950.04(1v)(e); 967.10(2). Although the statute has an exemption when “a separate waiting area is not available or its use is not practical,” the statute still requires “other means to minimize the contact between the victim or witness and the defendant, the defendant’s relatives and defense witnesses during court proceedings.” WIS. STAT. § 967.10(2). *See also* WIS. STAT. § 938.2965(2).

Attendance: A victim has a right to be notified “of hearings or court proceedings” and also to “attend court proceedings in the case” unless the judge finds exclusion “is necessary to provide a fair trial.” WIS. STAT. §§ 906.15(2)(d); 950.04(1v)(b), (g). The presence of the victim during the testimony of other witnesses may not, by itself, be a basis for exclusion. WIS. STAT. § 906.15(2)(d). When the victim is incarcerated, the victim still maintains these rights, but the “court may require the victim to exercise his or her right . . . using telephone or live audiovisual means.” WIS. STAT. § 950.04(1v)(b).

Disposition: A victim has a right to “a speedy disposition of the case,” to minimize the time a victim must endure the stress of their responsibilities with the matter. WIS. STAT. § 950.04(1v)(k). A victim has a right to have “his or her interest considered when the court is deciding whether to grant a continuance in the case.” WIS. STAT. §§ 950.04(1v); 971.10(3)(b)3. A victim also has the right to “make a statement . . . concerning sentencing” and has the right to request restitution. WIS. STAT. §§ 950.04(1v)(L); (m); (q). Even when the victim does not attend the sentencing hearing, the victim has the right to receive information regarding the disposition of the case, including dismissal of charges and no-charge decisions if an arrest has been made. WIS. STAT. §§ 950.04(1v)(zm); 971.095(4); (5).

The victim rights identified above summarize many of those rights most commonly encountered by prosecutors. This summary does not identify every right accorded to victims, so you should familiarize yourself with all the rights granted to victims. Understanding all the rights not only ensures greater protection of these rights, but it also enhances your conversations with crime victims. For example, a victim may explain that she has unpaid medical bills and missing property resulting from a domestic assault by her unemployed ex-boyfriend. In addition to the general right of restitution, a victim has the right to a judgment for unpaid restitution, to have stolen property returned, to receive recompense through a forfeited bond, and to receive compensation under Chapter 949 of the Wisconsin Statutes. WIS. STAT. §§ 950.04(1v)(q); (qm); (r); (rm); (s). Telling the victim that you will ask for restitution at the sentencing hearing does

not fully compensate the victim for his or her loss when the defendant has little ability or desire to pay restitution. In contrast, explaining the crime victim compensation process and the other options available provides the victim with a greater likelihood his or her financial loss will be redressed. You should view the rights extended to crime victims not as a burden, but as an opportunity to reach the ultimate objectives of the prosecution.

b. Witnesses

The basic bill of rights for witnesses enumerated in Chapter 950 includes ten identified rights. *See generally* WIS. STAT. § 950.04(1w). The rights cover many of the same areas addressed within the rights of victims, such as the right to request information about the final disposition of the case. *Compare* WIS. STAT. § 950.04(1v)(zm), *with* WIS. STAT. § 950.04(1w)(a). One witness right not included under the list of victim rights is the right to protection from harm and threats of harm arising out of the witness' cooperation with law enforcement and prosecution efforts. WIS. STAT. § 950.04(2w)(c). Victims and witnesses have a recently enacted limited right to privacy; that is to say, a right to "not have his or her personal identifiers . . . used or disclosed . . . for a purpose that is unrelated" to the case. WIS. STAT. §§ 950.04(1v)(dr); 950.04(2w)(dm). *See also* 2011 Wisconsin Act 283. All witnesses – including victims – have the right to "be notified that a court proceeding to which they have been subpoenaed will not go on as scheduled, in order to save the person an unnecessary trip to court." WIS. STAT. § 950.04(2w)(b).

4. Enforcement

A crime victim has a right to the enforcement of his or her rights and the right to request a review of a complaint when asserting a prosecutor, public official, or other employee has violated any of these rights. WIS. STAT. § 950.04(1v)(zx). The victim has standing "to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim." WIS. STAT. § 950.105. *See also* 2011 Wisconsin Act 283. The victim also may request mediation of a complaint through the Wisconsin Department of Justice. WIS. STAT. § 950.08(3). Under this mediation process, the department may act as a liaison between the crime victim or witness and the alleged violator of the right. Upon the completion of the mediation process, a party may request the Crime Victims Rights Board to review the complaint. WIS. STAT. § 950.09(2). If the board determines that there is probable cause to believe a violation may have occurred, then the board has the authority to conduct an investigation, and any party or the board may request a fact-finding hearing. The board may issue a private or public reprimand, seek equitable relief on behalf of the victim, or bring a civil action to assess a forfeiture of not more than \$1,000 for one who intentionally fails to provide a right. *Id.* *See also* WIS. STAT. § 950.11. The board also may refer a violation to a law enforcement agency for possible criminal conduct or refer misconduct to an attorney disciplinary agency. WIS. STAT. §§ 950.095(2)(c); (d). The administrative code establishes the formal complaint procedure. Wis. Admin. Code CVRB ch. 1. *See also* WIS. STAT. § 950.09(5).

5. Conclusion

Prosecutors have a duty to treat “all victims and witnesses of crime . . . with dignity, respect, courtesy and sensitivity; and that the rights extended . . . to victims and witnesses of crime are honored and protected . . . in a manner no less vigorous than the protections afforded criminal defendants.” WIS. STAT. § 950.01. This responsibility is the privilege of the prosecutor because you are “in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.” *Berger v. U.S.*, 295 U.S. 78, 88 (1935). You can avoid a complaint to the Wisconsin Department of Justice or Crime Victims Rights Board simply by educating yourself on the rights granted to victims and witnesses, and concerning yourself with a vigorous enforcement of those rights.

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35. The Lautenberg Amendment: A Federal Firearms Prohibition for Domestic Abuse Misdemeanants

1. The Gun Control Act
2. Genesis of the Lautenberg Amendment
3. Rationale of the Lautenberg Amendment
4. Challenges to the Lautenberg Amendment: Political and Constitutional
5. What Qualifies as a “Domestic Violence Misdemeanor”?
6. State Trial Court Responsibility
7. Enforcement and Implementation

1. The Gun Control Act

The Gun Control Act of 1968 (*see* 18 U.S.C. § 922 (g)) outlaws gun possession for certain groups of people, including:

- Convicted felons;
- Fugitives from justice;
- Those who use or are addicted to controlled substances;
- Persons committed to a mental institution or legally adjudicated mentally defective;
- Illegal aliens and individuals admitted to the United States pursuant to a nonimmigrant visa;
- Persons dishonorably discharged from the United States Armed Services;
- Individuals who have renounced United States citizenship;
- Those subject to a pertinent court order; and
- Those who have been convicted of a misdemeanor domestic abuse offense.

The maximum sentence for violation of the Gun Control Act is a felony conviction, a fine of \$250,000, and ten years imprisonment. 18 U.S.C. § 924(a)(2).

The newest addition to the Gun Control Act is Category 9, the firearms prohibition for convicted domestic abuse misdemeanants. Commonly referred to as the “Lautenberg Amendment,” this addition to the Gun Control Act has caused some controversy and even confusion. Still, reviewing courts have rejected constitutional challenges to its validity. The Lautenberg

Amendment remains good law in Wisconsin and throughout the country. *See* T.J. Halstead, *Firearms Prohibitions and Domestic Violence Convictions: The Lautenberg Amendment*, CRS Report for Congress, Order Code RL31143 (Oct. 2001).

2. Genesis of the Lautenberg Amendment

Originally proposed by Senator Frank Lautenberg as part of anti-stalking legislation that passed through the United States Senate by a voice vote in July 1996, the Lautenberg Amendment disappeared from this legislation when the anti-stalking bill was inserted into a Department of Defense Authorization Bill. *See* P.L. 104-201, 1996 H.R. 3230. Instead, the Lautenberg Amendment became part of the behemoth FY 1997 Appropriations Bill. *See* P.L. 104-208, H.R. 3610, Omnibus Appropriations Bill. The Lautenberg Amendment is section 658.

The Lautenberg Amendment substantially departs from prior federal firearms law in that it has no “public use exemption.” The public use exemption, which applies to categories one through eight of the Gun Control Act, exempts police officers and military personnel from this prohibition, under the rationale that they use their weapons for “public use” to promote public safety. *See* 18 U.S.C. § 925(a)(1).

The Lautenberg Amendment became law with the passage of the Appropriations Bill. *See* 142 Cong. Rec. S10380 (Sept. 12, 1996). Like the other categories of the Gun Control Act, the Lautenberg Amendment is retroactively applied, meaning that any person convicted of a domestic misdemeanor, regardless of how long ago the conviction occurred, cannot legally possess a firearm. *See* 18 U.S.C. § 921(a)(33)(B) (mandating that any conviction prior to the law’s effective date, unless the conviction was expunged, set aside, or pardoned, triggers the firearm prohibition).

3. Rationale of the Lautenberg Amendment

The reasoning behind the domestic abuse gun ban is clear; it is designed to prohibit domestic abuse offenders from owning guns. The language used in promoting the Lautenberg Amendment to the United States Senate follows:

Under current Federal law, people who have been convicted of felonies may not possess firearms. However, people who engage in serious spousal or child abuse often are not ultimately charged or convicted as felons. Their crimes are not taken seriously. In fact, most people, usually men, who are guilty of domestic violence, are not even charged. Just a few years ago in Baltimore County, Maryland, a State circuit court judge sentenced a man to a light sentence of weekends in jail for shooting his wife in the head and killing her. When he gave the sentence, he apologized, saying the worst part of his job was “sentencing non-criminals as criminals.” That attitude, as horrible as it is, is common. Domestic violence frequently escalates in severity, ultimately resulting in murder. In two-thirds of the cases that result in murder, a firearm is used. Those individuals have

access to those firearms because their early crimes of domestic violence were treated as misdemeanors. To address this loophole, and thus get the guns out of the hands of the abusers before it is too late, the Lautenberg Amendment would eliminate the right to possess a firearm for anyone convicted of a crime of domestic violence, whether a felony or a misdemeanor conviction. This is an extreme response to an extreme problem.

142 Cong. Rec. S10380, Vote 289 (Sept. 12, 1996).

Historically, domestic abuse offenses have been treated less seriously than violent crimes committed against strangers. Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Another justification for the Lautenberg Amendment is that domestic abuse has uniquely deleterious effects on families and the socialization of children. Children raised in homes where they witness domestic abuse are far more likely to become abusers or victims as adults. Gena L. Durham, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 644-45 (1998).

4. Challenges to Lautenberg Amendment: Political and Constitutional

The Lautenberg Amendment has faced a barrage of constitutional challenges in the courts. It has been alleged that the Lautenberg Amendment violates the Second Amendment to the Constitution by infringing upon a person's right to keep and bear arms, and that it violates the Tenth Amendment by usurping powers reserved to the states. Courts have readily dismissed these challenges.

Three constitutional challenges, however, have been closely considered by reviewing courts. These challenges involved arguments related to violations of the Commerce Clause, the Equal Protection Clause, and the Ex Post Facto Clause.

a. Commerce Clause

Critics have argued that the Lautenberg Amendment is not a valid exercise of Congress' commerce power in light of the Supreme Court's ruling in *United States v. Lopez*, 514 U.S. 549 (1995). *Lopez* held that gun control legislation aimed at restricting gun possession near schools was not sufficiently related to commerce to fall within Congress' power to regulate. In that case, the Court found that the statute in question had no connection with commerce and noted that there was no jurisdictional element in the law which established a nexus between gun possession near schools and interstate commerce. *Lopez*, 514 U.S. at 559, 561.

In contrast, the Lautenberg Amendment, like all the other categories of prohibited persons in the Gun Control Act, does have a jurisdictional element. It is unlawful for individuals "who have been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in

interstate or foreign commerce, or pass in or affecting commerce, any firearms or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate commerce.” U.S.C. § 922(g)(9). Consequently, every court has ruled that the domestic abuse gun ban does not violate the Commerce Clause. *See, e.g., United States v. Gillespie*, 185 F.3d 693, 704-60 (7th Cir. 1999); *National Ass’n of Government Employees, Inc. v. Barrett*, 868 F.Supp. 1564, 1572 (N.D. Ga. 1997), *aff’d*, 155 F.3d 1276 (11th Cir. 1998).

b. Equal Protection Clause

Does the domestic abuse gun ban violate the Equal Protection Clause by treating domestic misdemeanants more harshly than felons and by eliminating the “public use exemption” for domestic misdemeanants only? Since the domestic abuse gun ban does not implicate a fundamental right or affect a suspect class, courts employ a “rational basis” test for this analysis. That means the law is constitutional if it is “rationally related” to the government interest it advances. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319 (1993).

One court initially found that the Lautenberg Amendment violated the Equal Protection Clause because treating misdemeanants more harshly than felons is irrational. *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998). Upon rehearing, however, that decision was reversed. The District of Columbia Court of Appeals found that it was “not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not domestic violence misdemeanants.” *Fraternal Order of Police*, 173 F.3d 898. Faced with Equal Protection Clause challenges, other courts have upheld the domestic abuse gun ban after a rational basis review. *See, e.g., Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998); *United States v. Gillespie*, 185 F.3d 693 (7th Cir. 1999).

c. Ex Post Facto Clause

Because the federal domestic abuse gun ban prevents convicted domestic misdemeanants from owning firearms for convictions occurring prior to 1996, Ex Post Facto challenges have resulted. Courts have held, however, that because the Lautenberg Amendment does not criminalize non-criminal conduct that occurred before 1996, the law does not violate the Ex Post Facto Clause. *See United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000); *United States v. Meade*, 986 F.Supp. 66, 69 (D. Mass. 1997), *aff’d*, 175 F.3d 215 (1st Cir. 1999).

d. Second Amendment

More recently, litigants have argued that the Lautenberg Amendment violates Second Amendment rights. These challenges follow the United States Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008), which identified an individual’s right to keep and bear arms for the purpose of self-defense in the home. *Heller* overturned the District of Columbia’s prohibition on handgun possession. In doing so, the Court cautioned that:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 128 S.Ct. at 2816-17.

Moreover, in a footnote, the Court said that “these presumptively lawful regulatory measures [are identified] only as examples; our list does not purport to be exhaustive.” *Id.* at n.26.

In the wake of *Heller*, federal appellate courts have sought to relate the Supreme Court’s list of presumptively constitutional categorical firearm prohibitions to the Lautenberg Amendment. The Eleventh Circuit has directly said that the Lautenberg Amendment “is a presumptively lawful longstanding prohibition on the possession of firearms” equivalent to those listed in *Heller*. *United States v. White*, 593 F.3d 1199, 1206 (2010) (internal citations omitted). Addressing this issue, the Fourth Circuit, in *United States v. Chester*, 628 F.3d 673 (2010), emphasized the need for the government to show the Lautenberg Amendment withstands intermediate scrutiny (i.e. it bears a reasonable fit to an important government objective). The *Chester* court remanded to the district court for a hearing on the matter because the government had not previously had the opportunity to meet this burden.

The Seventh Circuit has specifically held the Lautenberg Amendment is constitutional. In *United States v. Skoien*, the court, sitting *en banc*, held that “logic and data” show the Lautenberg Amendment serves an important government objective. *Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (*hereinafter Skoien II*). The full circuit vacated an earlier opinion by a three-judge panel, which was similar to the Fourth Circuit’s decision in *Chester* and would have required the government to meet intermediate scrutiny at the district court level. *Skoien II* found that domestic abuse is generally undercharged (felony convictions are rarely obtained even when the conduct is deserving of such), guns increase the lethality of domestic abuse, and domestic abusers tend to recidivate. According to the court, the veracity of these propositions justified the prohibition and made a showing at the district court level unnecessary.

There appears to be one caveat related to the *Skoien II* decision. In that case, the court did not foreclose the possibility that a future litigant could claim a lifetime ban was unjustified as applied. However, the court noted that Skoien was poorly situated to make this argument because he was twice convicted of domestic abuse in roughly a three-year period and was convicted under the Lautenberg Amendment just one year after his second conviction.

5. What Qualifies as a “Domestic Violence Misdemeanor”?

Per the Lautenberg Amendment, a “misdemeanor crime of domestic violence” is an offense that:

- (i) Is a misdemeanor under Federal or State law; and

- (ii) Has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. §§ 921(a)(33)(A)(i); (ii).

In Wisconsin, several domestic misdemeanor offenses (defined as such in WIS. STAT. § 968.075) would not be considered “domestic violence misdemeanors” under the Lautenberg Amendment, because they are not crimes in which the State must prove use or attempted use of physical force, or, in the alternative, use of a deadly weapon.

For example, criminal damage to property (WIS. STAT. § 943.01) in most circumstances would not be considered a “domestic violence misdemeanor” under the Lautenberg Amendment. Criminal damage to property is not a crime subject to the mandatory arrest law. However, a conviction for criminal damage to property requires the assessment of the domestic abuse surcharge under WIS. STAT. § 973.055 if the offender and victim are married to each other, have children in common, live together, or are blood relatives.

Disorderly conduct (WIS. STAT. § 947.01) may or may not be considered a “domestic violence misdemeanor” under the Lautenberg Amendment. This is because Wisconsin’s disorderly conduct statute contains disjunctive elements. The offender may be convicted for engaging in behavior that is “violent, abusive, indecent, profane, boisterous, unreasonably loud *or* otherwise disorderly conduct, under circumstances in which the conduct tends to cause or provoke a disturbance.” Only “violent” and, arguably, “abusive” conduct qualify as elements involving “the use or attempted use of physical force,” as required under the Lautenberg Amendment. 18 U.S.C. § 921(a)(33)(A)(ii).

The Office of Legal Counsel at the U.S. Department of Justice has provided guidance on when convictions under disjunctive statutes, such as Wisconsin’s disorderly conduct law, qualify for the Lautenberg Amendment gun prohibition. 31 Op. Off. Legal Counsel (May 17, 2007). “[R]ecords from the convicting court – ‘conclusive records made or used in adjudicating guilt,’” must show that the element upon which the conviction rests qualifies for the gun prohibition. With respect to Wisconsin’s disorderly conduct statute, this means there must be documentation that the defendant was actually convicted for “violent” or “abusive” conduct. If the defendant was convicted under the general disjunctive terms of the statute, the Lautenberg Amendment does not apply.

In contrast, a criminal complaint that charges the defendant specifically with the “violent” element of WIS. STAT. § 947.01 would render the Lautenberg Amendment applicable. Additionally, records from the plea colloquy that show the defendant pled to violent conduct and that judge accepted the plea based on this conduct would also qualify. Questions regarding the

relationship between the disorderly conduct statute and the Lautenberg Amendment can best be answered by the U.S. Attorney's Office.

It is also important to note that the required relationship between the victim and the offender is also slightly different under the Lautenberg Amendment than it is under Wisconsin law. Under the Lautenberg Amendment, the offender must be a current or former spouse of the victim; a parent or guardian of the victim; a person with whom the victim shares a child; or a person "similarly situated" to a spouse, parent, or guardian of the victim at the time of the offense or prior to the offense. *See* 18 U.S.C. § 921(a)(33)(A)(ii).

The Bureau of Alcohol, Tobacco and Firearms states that the Lautenberg Amendment definition of domestic abuse covers violence between persons who are married under common law and persons who live together in an intimate relationship, which is more than a "dating relationship." 27 C.F.R. § 178.11. Unlike the Wisconsin definition of domestic abuse, violence against siblings, parents or roommates is not covered under the definition of "domestic violence misdemeanor" in the Lautenberg Amendment.

6. State Trial Court Responsibility

Because the prohibition to possessing firearms arises from a body of law that is collateral to the state court proceedings, any consequence arising under that law must also be collateral. *State v. Kosina*, 226 Wis. 2d 482, 488, 595 N.W.2d 464, 468 (Ct. App. 1999). Defendants do not have a due process right to be informed of consequences that are merely collateral to their pleas. *Kosina*, 226 Wis. 2d at 488 (*citing State v. Santos*, 136 Wis. 2d 528, 531, 401 N.W.2d 856, 858 (Ct. App. 1987)).

In *Kosina*, the defendant was charged with, and pled guilty to, disorderly conduct following an altercation with his wife at their home. The trial court did not explicitly determine that the charge was related to domestic abuse. After later discovery of the federal firearms prohibition, the defendant moved to withdraw his guilty plea. The defendant maintained that the plea was not entered knowingly and voluntarily because he would not have pled guilty had he been aware of the federal firearms prohibition. The trial court denied the defendant's motion, and the defendant appealed. The Wisconsin Court of Appeals held that the federal law was a collateral consequence that did not affect the knowing and voluntary aspects of the defendant's guilty plea. *Kosina*, 226 Wis. 2d at 489, 595 N.W.2d at 468.

In upholding the trial court's ruling, the Court of Appeals noted that the defendant could contest the application of the federal law to his conviction in federal court. Even if the federal law did apply, the consequences of that law flowed from another jurisdiction. Therefore, it did not affect the knowing and voluntary nature of the guilty plea. The Court of Appeals stated:

The federal statute's consequences arise under the authority of federal law and are imposed by a federal tribunal. Because the prohibition to possessing firearms arises from a body of law that is collateral to the state court proceedings, any consequence arising under that law must also be collateral.

Kosina, 226 Wis. 2d at 488, 595 N.W.2d at 468.

Although appellate courts generally have held that the firearm prohibition is a collateral consequence of the conviction, a defendant may be able to withdraw a guilty plea when the prosecutor or court actively attempts to circumvent the firearm prohibition. In an unpublished case, *State v. Koll*, the appellate court concluded that the defendant's "plea was not knowingly and voluntarily made and, as such, he is entitled to withdraw it" because the "plea agreement was purposefully crafted so as to avoid a collateral consequence" of the firearm prohibition. *State v. Koll*, unpublished, 2009 WI App 77, ¶ 14, 319 Wis. 2d 234. The plea agreement involved the defendant entering a plea of no contest to amended charges of "non-domestic disorderly conduct" and "intimidating (non-domestic) a witness" even though the "charges stemmed from an altercation with his then live-in girlfriend." *Koll*, 2009 WI App 77 at ¶ 2. In a published companion case, a concurring opinion criticized engaging in a legal fiction by amending a charge to a "non-domestic." *Koll v. Department of Justice*, 2009 WI App 74, ¶¶ 13-21, 317 Wis. 2d 753 (Anderson, J., concurring). To avoid an appeal – and public criticism by an appellate court – a prosecutor should not structure a plea agreement that attempts to circumvent federal law.

7. Enforcement and Implementation

In Wisconsin, a conviction for battery appears on an individual's record as "battery," a violation of WIS. STAT. § 940.19(1). There is no special designation for "domestic abuse" on the judgment of conviction. In many circumstances, the only way to determine whether a conviction was a domestic abuse case is upon close examination of the facts in the police reports or a review of the criminal complaint.

Despite inherent enforcement problems, in the first year after its enactment, an estimated 2,000 people nationwide were denied the ability to purchase handguns when background checks revealed domestic misdemeanor convictions. See Adam Piore, *Law Denies Guns to 2,000 in First Year Batterers Banned from Owning Firearms*, THE RECORD, NORTHERN NEW JERSEY, Oct. 1, 1997. For example, in the state of Virginia, in a span of just two months, 165 domestic misdemeanants were prohibited from buying guns after computerized criminal record checks. See Mark Sherman, *Law Officers Sharply Divided on Domestic Violence Gun Law*, THE ATLANTA CONST., Mar. 6, 1997, at A9. Over \$200 million has been allocated to states to improve their criminal history record systems. See James E. Kessler, Jr., Section Chief Criminal Justice Information Services Division, FBI, Testifying Before the House Subcommittee on Crime, June 11, 1998.

In addition to preventing abusers from legally purchasing guns, possessing a firearm is a federal criminal offense under the Lautenberg Amendment, like other categories of the Gun Control Act. Law enforcement agents often discover individuals in violation of the Gun Control Act when

investigating alternative offenses. For example, in *United States v. Meade*, 986 F.Supp. 66, 67 (D. Mass. 1997), a defendant arrested for threatening his wife with a handgun was also charged with violating the federal domestic abuse gun ban. In *United States v. Smith*, 964 F.Supp. 286, 289 (N.D. Iowa 1997), a man arrested for shooting and killing his wife was charged with murder and being a misdemeanor in possession of a firearm because of a prior domestic abuse conviction (where he victimized his wife two years prior to the murder).

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36. Protection Orders for Victims: Temporary Restraining Orders (TROs) and Injunctions

1. Procedural Requirements for Wisconsin Temporary Restraining Orders and Injunctions
2. Requirements for Prosecution
3. Implementation and Enforcement of TROs and Injunctions
4. Interstate Enforcement
5. Definitions
6. Additional Resources

1. Procedural Requirements for Wisconsin Temporary Restraining Orders and Injunctions

a. Two-part procedure

Step One: Temporary Restraining Order (TRO)

If the petitioner requests a temporary restraining order, the court chooses whether or not to issue it.

If the court issues a temporary restraining order, the order shall set forth the date for the hearing on an injunction. If the court does not issue a temporary restraining order, the date for the injunction hearing shall be set by the court upon a motion by either party.

Step Two: Injunction (final relief)

The court shall hold a hearing on whether to issue an injunction, which is final relief.

See WIS. STAT. §§ 813.12(2m); 813.122(3)(a); 813.123(3)(a); 813.125(2m).

b. Duration of TRO

A TRO is in effect until a hearing is held on the issuance of an injunction, which shall be within fourteen days after the TRO is issued, unless an extension is granted.

A court may extend a TRO: 1) upon written consent of the parties; or 2) once, for fourteen days, upon a finding that the respondent has not been served with a copy of the TRO even though the

petitioner has exercised due diligence. NOTE: Domestic abuse TROs are not automatically voided if the respondent is admitted into a dwelling that the order directs him or her to avoid. *See* WIS. STAT. §§ 813.12(3)(c); 813.122(4)(c); 813.123(4)(c); 813.125(3)(c); *Fulton v. Lukken*, 164 Wis. 2d 192, 473 N.W. 2d 511 (Ct. App. 1991).

c. Duration of injunctions

- Domestic abuse: up to four years and for length of time requested by petitioner
- Child abuse: up to two years or age 18, whichever comes first
- Individuals at risk: up to four years
- Harassment: up to four years

See WIS. STAT. §§ 813.12(4)(c); 813.122(5)(d)1; 813.123(5)(c)1.; 813.125(4)(c); *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996).

d. Orders issued only against respondent

Dual TROs are not legal: A TRO may only be entered against the respondent named in the petition. *See* WIS. STAT. §§ 813.12(3)(b); 813.122(4)(b); 813.123(4)(b); 813.125(3)(b).

Dual injunctions are not legal: An injunction may only be entered against the respondent named in the petition. *See* WIS. STAT. §§ 813.12(4)(b); 813.122(4)(b); 813.123(5)(b); 813.125(3)(b); *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996).

2. Requirements for Prosecution

a. Notice requirements

No notice is required before a TRO may be issued. *See* WIS. STAT. §§ 813.12(3)(b); 813.122(4)(b); 813.123(4)(b); 813.125(3)(b).

The petitioner must serve the respondent with a copy or summary of the petition and notice of the time for hearing on the issuance of the injunction. *See* WIS. STAT. §§ 813.12(4)(a)2.; 813.122(5)(a)2.; 813.123(5)(a)2.; 813.125(4)(a)2.

Upon request by the petitioner, the court shall order the sheriff to serve the TRO. *See* WIS. STAT. §§ 813.12(2)(a); 813.122(9)(a); 813.123(2)(a); 813.123(8)(a); 813.125(2)(a). The court shall inform the petitioner in writing that the petitioner should contact the sheriff to verify proof of service of the petition. *See* WIS. STAT. §§ 813.122(9)(a); 813.123(2)(a); 813.123(8)(a); 813.125(2)(a). The petitioner may use a private process server at his or her own expense. *See* WIS. STAT. §§ 813.125(2)(a); 813.125(5g)(c).

Notice is required after the injunction is issued. *See* WIS. STAT. §§ 813.12(4)(a)2.; 813.122(5)(a)2.; 813.123(5)(a)2.

For domestic abuse and harassment orders, the court shall advise the petitioner of the right to serve the respondent by published notice if, with due diligence, the respondent cannot be served as provided under §§ 801.11(1)(a) or (b). *See* WIS. STAT. §§ 813.12(3)(d); 813.125(4)(a)2.

NOTE: Service by publication is NOT available for child abuse or individuals at risk orders or injunctions.

“**Constructive notice,**” also known as “**constructive knowledge,**” is the legal concept that a person knew or should have known something. A respondent who fails to attend the injunction hearing but has been served with a copy of the petition and notice of the hearing time is said to have constructive knowledge of the injunction and shall be arrested for violation of that injunction regardless of whether he or she was actually served with a copy of the injunction. *See* WIS. STAT. §§ 813.12(7)(c); 813.122(10)(c); 813.123(9)(c); 813.125(6)(c).

b. Extensions

Domestic abuse:

- When an injunction granted for less than four years expires, the court **shall** extend the injunction if the petitioner states that an extension is necessary to protect him or her. The extension shall remain in effect until four years after the date the court first entered the injunction. WIS. STAT. § 813.12(4)(c)2. *See also* *Switzer v. Switzer*, 2006 WI App 10.
- Notice need not be given to the respondent before extending an injunction. The petitioner shall notify the respondent after the court extends an injunction. WIS. STAT. § 813.12(4)(c)4. *See also* *State v. Jankowski*, 173 Wis. 2d 522, 496 N.W.2d 215 (1992).

Child abuse orders:

- When a child abuse injunction in effect for less than six months expires, the court **shall** extend the injunction if the petitioner states that an extension is necessary to protect the child victim. This extension shall remain in effect until six months after the date on which the court first entered the injunction, or until the child attains eighteen years of age, whichever occurs first. WIS. STAT. § 813.122(5)(d)2.
- If the petitioner states that an injunction is necessary to protect the child victim, the court may extend the injunction for not more than two years or until the child attains eighteen years of age, whichever occurs first. WIS. STAT. § 813.122(5)(d)3.
- Notice need not be given to the respondent before extending an injunction. The petitioner shall notify the respondent after the court extends an injunction. WIS. STAT. § 813.122(5)(d)4.

Individuals at risk orders:

- When an injunction in effect for less than six months expires, the court **shall** extend the injunction if the petitioner states that an extension is necessary to protect the individual at risk. This extension shall remain in effect until six months after the date on which the court first entered the injunction. If the petitioner states an extension is necessary to protect the individual at risk, the court may extend the injunction for not more than two years. WIS. STAT. § 813.123(5)(c)1.
- Notice need not be given to the respondent before extending an injunction. The petitioner shall notify the respondent after the court extends an injunction. WIS. STAT. § 813.123(5)(c)4.

Harassment orders:

- WIS. STAT. § 813.125 does not address extensions of harassment injunctions.

c. Expired injunctionsDomestic abuse:

- Any party who is eligible for a TRO or injunction may file a new petition once the four-year injunction expires. The filing party will need to meet the legal requirements and show that there are reasonable grounds to believe the respondent has engaged in, or, based on prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner. WIS. STAT. § 813.12(3)(a).

Child abuse:

- Any party who is eligible for a TRO or injunction may file a new petition once the two-year injunction expires. The filing party will need to meet the legal requirements and show that there are reasonable grounds to believe the respondent has engaged in, or, based on prior conduct of the child victim and the respondent, may engage in abuse of the child victim. WIS. STAT. § 813.122(4)(a).

Individuals at risk:

- Any party who is eligible for a TRO or injunction may file a new petition once the four-year injunction expires. The filing party will need to meet the legal requirements and show there are reasonable grounds to believe that:
 - Respondent has interfered with, or, based on prior conduct of the respondent, may interfere with an investigation of the individual at risk, the delivery of protective services under WIS. STAT. § 55.05 or a protective placement under WIS. STAT. § 55.06; or
 - Respondent interfered with delivery of services to an elder adult at risk under WIS. STAT. § 46.90(5m); and the interference complained of, if continued, would make it difficult to determine whether abuse will continue; or

- Respondent engaged in physical abuse, emotional abuse, sexual abuse, treatment without consent, unreasonable confinement or restraint, financial exploitation, neglect, harassment, or stalking of a person, or mistreatment of an animal. WIS. STAT. §§ 813.123(4)(a)1- 2.b.

Harassment:

- Any party who is eligible for a TRO or injunction may file a new petition once the four-year injunction expires. The filing party will need to meet the legal requirements and show that there are reasonable grounds to believe the respondent has engaged in harassment with intent to harass or intimidate the petitioner. WIS. STAT. § 813.125(4)(a).

d. Modifications

Chapter 813 does not discuss the process of modification of an injunction. Case law and statutes provide this information on modifications:

- Oral statements made by judges shall modify the terms of an injunction. *State v. O'Dell*, 193 Wis. 2d 333, 532 N.W.2d 741 (1995).
- In a case of domestic abuse, the court may not modify an order restraining the respondent based solely on the request of the complainant. WIS. STAT. § 813.12(4)(b).
- In a case of child abuse, if the respondent is the parent of the child victim, the judge shall modify the order to provide the parent reasonable visitation rights, unless the judge finds that visitation would endanger the child's physical, mental, or emotional health. Visitations may be supervised. WIS. STAT. § 813.122(5)(b).

e. How to prove a TRO/Injunction violation

i. The elements

Domestic abuse:

- The petition alleges the necessary facts as set forth in WIS. STAT. § 813.12(5)(a) **and**
- There are reasonable grounds to believe the respondent has engaged in, or, based on prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner. WIS. STAT. § 813.12(3)(a); **and**
- The petitioner is in imminent danger of harm. *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988).
- NOTE: A TRO may not be dismissed or denied because of the existence of a pending action or of any other court order that bars contact between the parties, nor due to the necessity of verifying the terms of an existing court order. *See* WIS. STAT. § 813.12(3)(aj).

Child abuse:

- The petition alleges the elements set forth in WIS. STAT. § 813.122(6)(a) **and**
- There are reasonable grounds to believe the respondent has engaged in, or, based on the prior conduct of the child victim and the respondent, may engage in abuse of the child victim. WIS. STAT. § 813.122(4)(a).

Individuals at risk:

- There are reasonable grounds to believe that the respondent has interfered with, or, based on prior conduct of the respondent, may interfere with an investigation of the individual at risk, the delivery of protective services under WIS. STAT. § 55.05 or a protective placement under WIS. STAT. § 55.06, or delivery of services to an elder adult at risk under WIS. STAT. § 46.90(5m) **and**
 - That the interference complained of, if continued, would make it difficult to determine whether physical abuse, emotional abuse, sexual abuse, treatment without consent, and unreasonable confinement or restraint, financial exploitation, neglect, or self-neglect has occurred, is occurring, or may recur; **or**
 - The respondent engaged in physical abuse, emotional abuse, sexual abuse, treatment without consent, and unreasonable confinement or restraint, financial exploitation, neglect, harassment, or stalking of an individual at risk or mistreatment of an animal. WIS. STAT. §§ 813.123(4)(a)1-2.b.

Harassment:

- The petition alleges the elements set forth in WIS. STAT. § 813.125(5)(a) **and**
 - There are reasonable grounds to believe the respondent has engaged in harassment with intent to harass or intimidate the petitioner.
 - NOTE: A TRO may not be dismissed or denied because of the existence of a pending action or of any other court order that bars contact between the parties, nor due to the necessity of verifying the terms of an existing court order. WIS. STAT. § 813.125(3)(e).

ii. The standard for a TRO/injunction

Reasonable grounds for all four types of orders. WIS. STAT. §§ 813.12(3)(a); 813.122(4)(a); 813.123(5)(a); 813.125(4)(aj).

iii. The conditionsDomestic abuse:

- Refrain from committing acts of domestic abuse against the petitioner.
- Avoid the petitioner's residence or any other location temporarily occupied by the petitioner, or both. However, if the petitioner and respondent are not married, the respondent owns the premises where the petitioner resides, and the petitioner has no legal interest in the premises, the court may order the respondent to avoid the

premises for a reasonable length of time until the petitioner relocates and shall order the respondent to avoid the petitioner's new residence for the duration of the order.

- Avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the petitioner unless the petitioner consents in writing.
- Any combination of these remedies.
- The court can order any other appropriate remedy not inconsistent with the remedies requested in the petition.
- The court may only grant remedies requested or approved by the petitioner. WIS. STAT. § 813.12(3)(aj).

Child abuse:

- Avoid the child victim's residence or any residence temporarily occupied by the child victim, or both.
- Avoid contacting or causing any person other than a party's attorney to contact the child victim unless the petitioner consents in writing and the court agrees that the contact is in the child victim's best interest. WIS. STAT. § 813.122(4)(a).
- NOTE: "Contact" means knowingly touching, meeting, communicating with, or being in audio or visual contact with the person. WIS. STAT. § 813.122(7).

Individuals at risk:

- Unless the individual at risk, guardian or guardian *ad litem* consents in writing and the court agrees that contact is in the best interest of the individual at risk, the respondent can be ordered to do one or more of the following:
 - Avoid interference with an investigation of the elder adult at risk under WIS. STAT. § 46.90 or the adult at risk under WIS. STAT. § 55.043, the delivery of protective services to the individual at risk under WIS. STAT. § 55.05, or a protective placement of the individual at risk under WIS. STAT. § 55.06, or the delivery of services to the elder adult at risk under WIS. STAT. § 46.90(5m).
 - Cease engaging in or threatening to engage in physical abuse, emotional abuse, sexual abuse, treatment without consent, unreasonable confinement or restraint, financial exploitation, neglect, harassment, or stalking of an individual at risk or mistreatment of an animal.
 - Avoid the residence of the individual at risk or any other location temporarily occupied by the individual at risk, or both.
 - Avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the individual at risk.
 - The court may assign any other appropriate remedy not inconsistent with the remedies requested in the petition. WIS. STAT. §§ 813.123(4)(a); 813.123(4)(ar).

Harassment:

- Cease the harassment of another person. WIS. STAT. § 813.125(3)(a).
- Avoid the harassment of another person. WIS. STAT. § 813.125(3)(a).
- Avoid the petitioner's residence or any premises temporarily occupied by the petitioner, or both. However, if the petitioner and respondent are not married, the respondent owns the premises where the petitioner resides, and the petitioner has no legal interest in the premises, the court may order the respondent to avoid the premises for a reasonable length of time until the petitioner relocates and shall order the respondent to avoid the petitioner's new residence for the duration of the order. WIS. STAT. § 813.125(3)(a)(intro); (3)(am).
- Any combination of these remedies. WIS. STAT. § 813.125(3)(a)(intro).

iv. Firearms surrender as part of TROs and injunctionsDomestic abuse and child abuse:

- For all petitions filed on or after April 1, 1996, if the injunction is granted, the respondent must surrender any firearms he or she owns or has in his or her possession. WIS. STAT. §§ 813.12(4m)(a); 813.122(5m)(a).

Harassment:

- If the court issues an injunction and determines, based on clear and convincing evidence, that the respondent may use a firearm to cause physical harm to another or to endanger public safety, the court may prohibit the respondent from possessing a firearm. WIS. STAT. § 813.125(4m)(a).

Individuals at risk:

- Firearms are not addressed in the statute.

The court shall inform the respondent named in the petition of the requirements and penalties. WIS. STAT. §§ 941.29; 813.12(4m)(a)1.; 813.122(5m)(a)1.; 813.125(4m)(c)2.

The firearms must be surrendered to:

- The sheriff of the county in which the action was commenced;
- The sheriff of the county in which the respondent resides; or
- Another person designated by the respondent and approved by the court.

Firearms may not be returned until the court determines:

- The injunction has been vacated or has expired and not been extended;
- The respondent is not prohibited from possessing a firearm under any state or federal law or by an order from any state or federal court.

WIS. STAT. §§ 813.12(4m)(b); 813.122(5m)(b); 813.125(4m)(d).

3. Implementation and Enforcement of TROs and Injunctions

a. Violation of TRO/injunction mandatory arrest

TRO: The law mandates a law enforcement officer to make an arrest for all four types of temporary restraining orders if:

- Presented with a court order or the verification from the law enforcement officer that a court order exists; and
- The officer has probable cause to believe that the person has violated the court order.

W IS. STAT. §§ 813.12(7)(am); 813.122(10)(am); 813.123(9)(am); 813.125(6)(am).

Injunction: The law mandates a law enforcement officer to make an arrest for all four types of injunctions if:

- Presented with a court order or the verification from the law enforcement officer that a court order exists; and
- The officer has probable cause to believe the person has violated the court order.

W IS. STAT. §§ 813.12(7)(am); 813.122(10)(am); 813.123(9)(am); 813.125(6)(am).

b. Arrests in public places

While there is no language in the restraining order statutes about public places, best practice dictates that law enforcement officers should follow the terms of the restraining order. If the order states the respondent is to stay away from the person or avoid contact, the officer will make an arrest if the respondent fails to stay away from a place for which there is no valid reason to be present or makes contact with the petitioner while in the public place.

Courts do not usually prohibit contact in public places. Rather, the law officer and prosecutor need to assess the situation on a case-by-case basis. For example, for what purpose was the respondent in that place? Is it a place to which the respondent routinely goes? Has the respondent only been going to this public place since the issuance of the order? Does the respondent have a valid reason to be there? Did the respondent avoid contact with the petitioner once the respondent became aware the petitioner was also in this place?

It is best practice to analyze all potentially prohibited contact, but especially those in public places, for possible stalking. While there are no studies to definitively identify those who will engage in domestic homicide, studies do show that victims are often stalked prior to being killed in such a circumstance; in fact, many domestic homicides occur when the killer is subject to a no-contact order of some sort.

c. Aiding and abetting violation

Arrest and prosecution of a victim for aiding and abetting the violation of a restraining order demonstrates a lack of understanding of the dynamics of a domestic abuse restraining order. Such an arrest will generally result in a victim not contacting law enforcement for assistance in future violations of an order or physical violence, thereby increasing the likelihood of lethality.

4. Interstate Enforcement

a. Full faith and credit

Protection orders are entitled to full faith and credit under 18 USC § 2265; WIS. STAT. § 806.247.

b. Requirements

- The order must be issued by a court of another state, United States territory or possession, Indian tribe, or the District of Columbia; **and**
- Such court has jurisdiction over the parties and matter under the law of such state, territory, or Indian tribe; **and**
- The order was issued after a hearing in which the respondent received actual notice and had the opportunity to participate, or if *ex parte*, the person received notice and had the opportunity to be heard within a reasonable time sufficient to protect his or her due process rights; and
- The order protects the spouse or intimate partner of such other person.
- The order must indicate either:
 - A finding that the respondent represents a credible threat to the physical safety of his or her spouse, intimate partner, or child; or
 - An explicit provision prohibiting the respondent from using, attempting to use, or threatening to use physical force that would reasonably be expected to cause bodily injury against his or her spouse, intimate partner, or child.
 - Federal forms CV-404, CV-414, CV-430, and CV-407 address all the requirements in restraining order cases relating to abuse victims.

18 U.S.C. § 2265; WIS. STAT. §§ 806.247; 813.128.

c. General rules

The laws of the issuing state determine the validity and extent of the protective order, regardless of the laws of the enforcing state. WIS. STAT. § 813.128(1).

The laws of the enforcing state determine the means and method of enforcement and sanctions, regardless of the laws of the issuing state. WIS. STAT. § 813.128(1).

5. Definitions

a. Abuse

“Abuse,” as defined in **domestic abuse orders**, includes:

- Any of the following conduct, engaged in by an adult family or household member against another such adult member, by an adult against his or her adult former spouse, by an adult against another adult with whom the person has a child, by an adult caregiver against an adult who is under the caregiver’s care, or by an adult with whom the individual has or had a dating relationship:
 - Intentional infliction of physical pain, physical injury or illness;
 - Intentional impairment of physical condition;
 - First, second, or third degree sexual assault;
 - Damage to the property of the individual; and/or
 - Threats to engage in any of the above conduct.

WIS. STAT. §§813.12(1)(am); 940.225(1)-(3); 943.01.

“Abuse,” as defined in **child abuse orders**, includes:

- Any of the following conduct:
 - Physical injury inflicted on a child by other than accidental means;
 - Sexual intercourse or contact under WIS. STAT. § 940.225 (first, second, third, or fourth degree sexual assault), WIS. STAT. § 948.02 (first or second degree sexual assault of a child), or WIS. STAT. § 948.025 (repeated acts of sexual assault);
 - Sexual exploitation of a child in violation of WIS. STAT. § 948.05;
 - Permitting, allowing, or encouraging a child to engage in prostitution, in violation of WIS. STAT. § 944.30;
 - Causing a child to view or listen to sexual activity, in violation of WIS. STAT. § 948.055;
 - Causing a child to expose his or her genitals or pubic area, or exposing genitals or pubic area to a child, in violation of WIS. STAT. § 948.10;
 - Manufacturing methamphetamines with a child physically present during the manufacture, in or on the premises of a child’s home, or under any other circumstances in which a reasonable person should have known that the manufacture would be seen, smelled, or heard by a child, in violation of WIS. STAT. § 961.41(1)(e);
 - Emotional damage for which the child’s parent, guardian, or legal custodian has neglected, refused, or been unable, for reasons other than poverty, to obtain the necessary treatment or to take steps to ameliorate the symptoms;
 - “Emotional damage” means harm to a child’s psychological or intellectual functioning. It is evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety, depression,

withdrawal, outward aggressive behavior, or a substantial and observable change in behavior, emotional response, or cognition not within the normal range for the child's age and stage of development.

- Threats to engage in any of the above conduct.

WIS. STAT. §§ 48.02(1)(a); 48.02(1)(b)-(gm); 813.122(1)(a).

The court may admit evidence of substantial and observable change in behavior, emotional response, or cognition not within the normal range for the child's age and stage of development for the purposes of proving the above.

“Abuse,” as defined in **individual at risk orders**, includes:

- Includes any of the following conduct:
 - Physical abuse: The intentional or reckless infliction of bodily harm. WIS. STAT. § 46.90(1)(fg).
 - Emotional abuse: Language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed. WIS. STAT. § 46.90(1)(cm).
 - Sexual abuse: Any violation of WIS. STAT. §§ 940.225(1)-(3); 940.225(3m); or 46.90(1)(gd).
 - Treatment without consent: Giving medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the medication or procedure. WIS. STAT. § 46.90(1)(h).
 - Unreasonable confinement or restraint: The intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use of a physical restraining device, or the provision of unnecessary or excessive medication to an individual. This does not include the use of these methods or devices by entities regulated by the department, if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint. WIS. STAT. § 46.90(1)(i).

See generally WIS. STAT. § 813.123.

“Abuse,” as defined in **harassment orders**, includes:

- Any of the following conduct:
 - Striking, shoving, kicking or otherwise subjecting another person to physical violence;

- Engaging in an act that would constitute child abuse under WIS. STAT. § 48.02. See “‘Abuse’ as defined in child abuse orders,” *supra*.
- First, second, third and fourth degree sexual assault under WIS. STAT. § 940.225;
- Stalking under WIS. STAT. § 940.32;
- Attempting or threatening to engage in any of the above conduct;
- Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.
 - A “legitimate purpose” is defined as “one that is protected or permitted by law . . . [which is] a determination that must be left to the fact finder, taking into account all the facts and circumstances.” *Welytok v. Ziolkowski*, 312 Wis. 2d 435, 455 (citing *Bachowski v. Salamone*, 139 Wis. 2d 397, 408 (1987)).

See generally WIS. STAT. § 813.125.

b. Adult

An “adult” is a person who is eighteen years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, “adult” means a person who has attained at least seventeen years of age. WIS. STAT. § 48.02(1d).

c. Adult at risk agency

An “adult at risk agency” is the agency designated by the county board of supervisors to receive, respond to, and investigate reports of abuse, neglect, or financial exploitation of adults at risk. WIS. STAT. § 55.01(1e).

d. Caregiver

A “caregiver” is an individual who is a provider of in-home or community care to an individual through regular and direct contact. WIS. STAT. § 813.12(1)(ad).

e. Child

A “child” is a person who is less than eighteen years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, “child” does include a person who has attained seventeen years of age. WIS. STAT. §§ 48.02(1d); 48.02(2).

f. Constructive knowledge

“Constructive knowledge,” also known as “constructive notice,” refers to the respondent’s knowledge of the possible existence of an injunction, based on his or her having received a copy of the TRO petition and notice of the injunction hearing. Regardless of whether the respondent has been served with a copy of the injunction, if the respondent makes contact with the petitioner after the issuance of the TRO and before service of the injunction, the respondent has constructive knowledge of the order and is therefore in violation of the order. WIS. STAT. §§ 813.12(7)(c); 813.122(10)(c); 813.123(9)(c); 813.125(6)(c).

g. Dating relationship

A “dating relationship” is defined as a romantic or intimate relationship between two adults. This does not include a casual relationship or an ordinary fraternization between two adults in a business or social context. A court shall determine if a dating relationship existed by considering the length of the relationship, the type of relationship and the frequency of interaction between the adult individuals involved in the relationship. WIS. STAT. § 813.12(1)(ag).

h. Elder adult at risk agency

An “elder adult at risk agency” is the agency designated by the county board of supervisors to receive, respond to, and investigate reports of abuse, neglect, or financial exploitation of elder adults at risk. WIS. STAT. § 46.90(1)(bt).

i. Family member

A “family member” is a spouse, a parent, a child, or a person related by blood or adoption to another person. WIS. STAT. § 813.12(1)(b).

j. Financial exploitation

“Financial exploitation” is defined as any of the following:

- Obtaining an individual’s money or property by deceiving or enticing the individual, or by forcing, compelling, or coercing the individual to give, sell at less than fair market value, or in other ways convey money or property against his or her will without his or her informed consent;
- Theft, as prohibited by WIS. STAT. § 943.20;
- The substantial failure or neglect of a fiscal agent to fulfill his or her responsibilities;
- Unauthorized use of an individual’s personal identifying information or documents, as prohibited by WIS. STAT. § 943.201;
- Forgery, as prohibited by WIS. STAT. § 943.38; and/or
- Financial transaction card crimes, as prohibited by WIS. STAT. § 943.41.

See generally WIS. STAT. § 46.90(1)(ed).

k. Firearm

A “firearm” is a weapon which acts by force of gunpowder. WIS. STAT. § 167.31.

The Wisconsin Supreme Court has held that the term “firearm” is appropriately defined as “a weapon that acts by force of gunpowder to fire projectiles, irrespective of whether it is inoperable.” *State v. Radon*, 185 Wis. 2d 701 (Ct. App. 1994).

l. Guardian

A “guardian” is a person appointed by the court to manage the income and assets of, and provide for the essential requirements for health and safety and the personal needs of, a minor, or an individual found incompetent under WIS. STAT. § 54.01(16), or a spendthrift under WIS. STAT. § 55.01(31).

A guardian can also be a person who has been given responsibility or authority by the court in place of a parent, in the case of a minor who is alleged to have a developmental disability. *See generally* WIS. STAT. §§ 54.01(10); 55.03(3).

m. Household member

A “household member” is any person currently or formerly residing in a location with another person under a continuous or regular living arrangement. WIS. STAT. § 813.12(1)(c); *Petrowsky v. Kruase*, 223 Wis. 2d 32 (Ct. App. 1998).

n. Imminent danger

“Imminent danger” is defined as immediate and irreparable harm. *Blazel v. Bradley*, 145 Wis. 2d 698, F. Supp. 756 (W.D. Wis. 1998).

o. Incompetent individual

An “incompetent individual” is a person adjudged by a court as meeting the requirements of WIS. STAT. § 54.10(3).

p. Individual at risk

Adult at risk: Any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her own needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, or financial exploitation. WIS. STAT. § 55.01(1e).

Elder adult at risk: A person age sixty or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. WIS. STAT. § 46.90(1)(br).

q. Protection order (for the purposes of full faith and credit & firearm possession)

A “protection order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against any of the following:

- A spouse or former spouse;
- An intimate partner;
- A person who shares a child in common with the abuser;
- A person who cohabitates with or has cohabitated with the abuser as a spouse;
- A person who is or has been in a social relationship of a romantic or intimate nature with the abuser; or
- Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state in which the injury occurred or where the victim resides.

See 18 USC § 2266.

r. Reasonable grounds

“Reasonable grounds” to believe means that it is more likely than not that that a specific event has occurred or will occur. WIS. STAT. § 813.12(1)(cg).

s. Reside

To “reside” in a place means to dwell permanently or continuously and, for purposes of this section, to be in a continuous living arrangement sufficient to establish that the parties are or were household members. *Petrowsky v. Krause*, 223 Wis. 2d 32 (Ct. App. 1998).

6. Additional Resources

If you have any questions about protection orders, feel free to contact a staff attorney at the Wisconsin Coalition Against Domestic Violence (WCADV) or an attorney at the Wisconsin Department of Justice. You may also review:

Betsy Abramson, Marsha Mansfield and Jane Raymond, *Wisconsin’s Individual at Risk Restraining Order*, WIS. LAW., Nov. 2010, at 10.

Full Faith and Credit: Guides for advocates, victims, and law enforcement;
http://www.fullfaithandcredit.org/full_faith_and_credit.aspx.

Wisconsin Coalition Against Domestic Violence, *Restraining Orders in Wisconsin*, <http://www.wcadv.org/?go=download&id=572> (Sept. 2010).

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37. Foreign Orders of Protection: Full Faith and Credit

1. Introduction
2. Mandatory Arrest and Foreign Protection Orders
3. The Provisions of Other Jurisdictions
4. Penalties for a Violation
5. Law Enforcement Response
6. Some Practical Advice
7. Relevant Statutes
8. Additional Resources

1. Introduction

A protection order from a different state or jurisdiction, which is valid and enforceable in that state or jurisdiction, is recognized and enforced in the State of Wisconsin. These are called “foreign protection orders.” *See generally* WIS. STAT. § 806.247.

A valid protection order is one that has been issued by a court which has jurisdiction over the parties and matter under the laws of such state (or Indian tribe) and in circumstances where the defendant has been given reasonable notice and the opportunity to be heard sufficient to protect that person’s right to due process. WIS. STAT. § 806.247(2)(a).

WIS. STAT. § 806.247(1)(b):

“Foreign protection order” means any temporary or permanent injunction or order of a civil or criminal court of the United States, of an Indian tribe or of any other state issued for preventing abuse, bodily harm, communication, contact, harassment, physical proximity, threatening acts or violence by or to a person, other than support or custody orders.

WIS. STAT. § 813.128(1)(a):

A foreign protection order . . . shall be enforced [in the State of Wisconsin] according to its own terms.

Jurisdictions included in the full faith and credit provisions include all fifty states, all Indian tribal lands, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Islands, and Guam. *See, e.g.*, WIS. STAT. § 115.997(2)(o).

2. Mandatory Arrest and Foreign Protection Orders

If probable cause exists to believe that an individual has violated a foreign protection order, that individual is subject to mandatory arrest in Wisconsin. A violation of a foreign protection order shall be treated in exactly the same fashion as a violation of a temporary restraining order or injunction, including effectuating a mandatory arrest. WIS. STAT. § 968.075(2).

3. The Provisions of Other Jurisdictions

In Wisconsin, domestic abuse injunctions now last up to four years. WIS. STAT. § 813.12(4)(c). However, different states have different laws, including varying time lengths for protection orders. Law enforcement officers must enforce the order for the length of time specified in the foreign protection order according to its own terms. WIS. STAT. § 813.128(1)(a).

Some states allow the possibility of up to a lifetime prohibition on contact. That lifetime prohibition is enforceable in Wisconsin, even though we cannot legally put a lifetime ban into place here. *See* WIS. STAT. §§ 806.247(2)(a); 813.12(4)(c); 813.128(1)(a).

4. Penalties for a Violation

The penalty for violating a foreign protection order is the same as the penalty for violating a Wisconsin order: a fine of not more than \$1,000 and/or imprisonment for not more than nine months (a Class A misdemeanor). WIS. STAT. § 813.128(2).

5. Law Enforcement Response

When making an arrest decision, the law enforcement officer should first consider whether there is probable cause to believe that a prohibition listed in the foreign protection order has been violated.

WIS. STAT. § 813.128(1)(b)1. states that the person who is protected under the order can present a copy of the foreign protection order to the law enforcement officer.

However, WIS. STAT. § 813.128(1)(b)1. further explains that the law enforcement officer need not have an actual copy of the foreign protection order in order to enforce it. In the absence of a copy of the foreign protection order, the law enforcement officer can determine that a valid foreign protection order exists by talking with the appropriate authorities. *Id.* If the law enforcement officer examines a copy of a foreign protection order, even with modifications, it is presumed to be valid if the order or the modification appears to be valid on its face, and circumstances suggest that the order and any modifications are in effect. *Id.*

6. Some Practical Advice

When first presented with a copy of a protection order from a different state or jurisdiction, a law enforcement officer may understandably question its validity since the officer may never have seen a court order similar to it. A police officer may wonder: “How can I tell that an injunction from New York or Hawaii is valid? I’ve never seen what an injunction from New York or Hawaii looks like. What am I supposed to do?”

Sometimes the easiest way for a law enforcement officer to determine if there is a valid foreign protection order is to talk with both parties. The suspect may simply acknowledge that a protection order from a different jurisdiction is in effect. That will usually solve the problem.

Also, law enforcement officers have *immunity*. As long as the officer has made a good faith effort to comply with the law, he or she will be granted immunity from civil and criminal liability based upon any acts or omissions arising out of the decision to arrest and detain a suspect. WIS. STAT. § 813.128(3).

Across the nation, states are asked to engage in Project Passport, an effort to have all states’ restraining orders, temporary restraining orders, and injunctions follow a similar format, in order to allow law enforcement to more easily identify an order regardless of its place of origin. Wisconsin engaged in these efforts several years ago. See NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org>. Wisconsin orders allow an officer in any jurisdiction to determine the names of the petitioner and respondent, the expiration date of the order, and the issuing state or court. This allows an officer to quickly and easily identify a valid order.

7. Relevant Statutes

WIS. STAT. § 806.247 FULL FAITH AND CREDIT FOR FOREIGN PROTECTION ORDERS.

(1) DEFINITIONS. In this section:

- (a) “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.
- (b) “Foreign Protection Order” means any temporary or permanent injunction or order of a civil or criminal court of the United States, of an Indian tribe or of any other state issued for preventing abuse, bodily harm, communication, contact, harassment, physical proximity, threatening acts or violence by or to a person, other than support or custody orders.

(2) STATUS OF A FOREIGN PROTECTION ORDER.

- (a) A foreign protection order shall be accorded full faith and credit by the courts in this state and shall be enforced as if the order were an order of a court of this state if the order meets all of the following conditions:
1. The foreign protection order was obtained after providing the person against whom the protection order was sought to a reasonable notice and opportunity to be heard sufficient to protect his or her right to due process. If the foreign protection order is an ex parte injunction or order, the person against whom the order was obtained shall have been given notice and an opportunity to be heard within a reasonable time after the order was issued sufficient to protect his or her right to due process.
 2. The court that issued the order had jurisdiction over the parties and over the subject matter.
- (b) A foreign protection order issued against the person who filed a written pleading with a court for a protection order is not entitled to full faith and credit under this subsection if any of the following occurred:
1. No written pleading was filed seeking the foreign protection order against the person.
 2. A cross or counter petition was filed but the court did not make a specific finding that each party was entitled to a foreign protection order.

(3) FILING OF A FOREIGN PROTECTION ORDER.

- (a) A copy of any foreign protection order, or of a modification of a foreign protection order that is on file with the circuit court, that is authenticated in accordance with an act of congress, an Indian tribal legislative body or the statutes of another state may be filed in the office of the clerk of circuit court of any county of this state. The clerk shall treat any foreign protection order or modification so filed in the same manner as a judgment of the circuit court.

Please note: while a victim may choose to file an order from another jurisdiction, it is not a requirement. Federal law prohibits the requirement of filing an order from another jurisdiction in order to enforce the foreign order of protection.

- (b) Within one business day after a foreign protection order or a modification of an order from the clerk under this subsection, the clerk of circuit court shall send a copy of the foreign protection order or modification of the order to the sheriff in that circuit or to the local law enforcement agency that is the central repository for orders and injunctions in that circuit.

- (c) The sheriff or law enforcement agency that receives a copy of a foreign protection order or of a modification of an order from the clerk under par. (b) shall enter the information received concerning the order or modification of an order into the transaction information for management of enforcement system no later than 24 hours after receiving the information. The sheriff or law enforcement agency shall make available to other law enforcement agencies, through a verification system, information on the existence and status of any order or modification of an order filed under this subsection. The information need not be maintained after the order or modification is no longer in effect.

WIS. STAT. § 813.128 FOREIGN PROTECTION ORDERS.

(1) ENFORCEMENT OF FOREIGN PROTECTION ORDERS.

- (a) A foreign protection order or modification of the foreign protection order that meets the requirements under s. 806.247(2) has the same effect as an order issued under s. 813.12, 813.122, 813.123 or 813.125, except that the foreign protection order or modification order shall be enforced according to its own terms.
- (b) A law enforcement officer shall arrest and take the subject of a foreign protection order into custody if all the following occur:
 - 1. A person protected under a foreign protection order presents the law enforcement officer with a copy of a foreign protection order issued against the subject, or the law enforcement officer determines that a valid foreign protection order exists against the subject through communication with appropriate authorities. If a law enforcement officer examines a copy of a foreign protection order, the order, with any modification, is presumed to be valid on its face and circumstances suggest that the order and any modification are in effect.
 - 2. The law enforcement officer has probable cause to believe that the person has violated the terms of the foreign protection order or modification of the order.

- (2) **PENALTY.** A person who knowingly violates a condition of a foreign protection order or modification of a foreign protection order that is entitled to full faith and credit under s. 806.247 shall be fined not more than \$1,000 or imprisoned for not more than 9 months or both. If a foreign protection order and any modification of that order that is entitled to full faith and credit under s. 806.247 remains current and in effect at the time that a court convicts a person for a violation of that order or modification of that order, but that order or modification has not been filed under s. 806.247, the court shall direct that the clerk of circuit court to file the order and any modification of the order.

- (3) **IMMUNITY.** A law enforcement officer, law enforcement agency, prosecuting attorney or clerk of circuit court is immune from civil and criminal liability for his or

her acts or omissions arising out of a decision related to the filing of a foreign protection order or modification or to the detention or arrest of an alleged violator of a foreign protection order or modification if the act or omission is done in a good faith effort to comply with this section and s. 806.247.

8. Additional Resources

National Center on Protection Orders and Full Faith & Credit, A PROSECUTOR'S GUIDE TO FULL FAITH AND CREDIT FOR PROTECTION ORDERS: PROTECTING VICTIMS OF DOMESTIC VIOLENCE, *available at* http://www.bwjp.org/files/bwjp/files/New_Prosecutor_031411_Web.pdf.

National Center on Protection Orders and Full Faith & Credit, FULL FAITH AND CREDIT: ENFORCING PROTECTION ORDERS POCKET GUIDE, *available at* http://www.bwjp.org/files/bwjp/files/PocketGuide_forWeb.pdf.

National Center on Protection Orders and Full Faith & Credit, FULL FAITH AND CREDIT FOR PROTECTION ORDERS: ASSISTING SURVIVORS WITH ENFORCEMENT ACROSS JURISDICTIONAL LINES, *available at* http://www.bwjp.org/files/bwjp/files/New_Advocate_031411_Web.pdf.

National Center on Protection Orders and Full Faith & Credit, PROTECTING VICTIMS OF DOMESTIC VIOLENCE: A LAW ENFORCEMENT OFFICER'S GUIDE TO ENFORCING PROTECTION ORDERS NATIONWIDE, *available at* http://www.bwjp.org/files/bwjp/files/LawEnforcement_031411_Web.pdf.

Wisconsin Coalition Against Domestic Violence, FULL FAITH AND CREDIT FOR PROTECTION ORDERS, 18 USCS § 2265, *available at* http://www.wcadv.org/sites/default/files/legal_m/VI-C_2FF%26C_Protection_Orders_VAWA.pdf.

Wisconsin Coalition Against Domestic Violence, FULL FAITH AND CREDIT OF PROTECTION ORDERS: CHECKLIST, *available at* http://www.wcadv.org/sites/default/files/legal_m/VI-C_3FF%26C_Protection_Orders_Checklist.pdf.

38. Domestic Abuse: Effects on Children

1. Introduction
2. The Risk of Physical Harm to Children from Domestic Abuse
3. Children who Witness Domestic Abuse
4. Do Abused Children Become Abusers?
5. Additional Effects on Children
6. The Prosecutor's Role: Educating the Court
7. Additional Information

1. Introduction

Domestic abuse affects the entire household. All too often, an abusive parent is not only directing aggression at his or her partner, but at the children in the home as well. In fact, child abuse is fifteen times more likely to occur in families where domestic partner abuse occurs. *See* W. Stacy & A. Shupe, *THE FAMILY SECRET* (Boston, MA, Beacon Press, 1983). Besides increases in child abuse, there are many secondary effects upon children living in a violent household.

Consider the following statistics quoted from Phil Arkow's *Breaking the Cycles of Violence: A Practical Guide*, The Latham Foundation, Alameda, CA (1995):

- Seventy percent of men who abuse their female partners also abuse their children.
- Reports by abused mothers show that 87% of children witness the abuse.
- Eight times as many women report using physical discipline on their children while living with a batterer than when living alone or in a non-abusive relationship.
- More than 50% of child abductions result from domestic abuse, often perpetrated by men using custodial access to terrorize women or to retaliate for separation. Some 30% of abducted children experience mental harm as a result.
- Of children who witness domestic abuse at home, 40% suffer anxiety, 48% suffer depression, 53% act out with their parents, and 60% act out with their siblings. Poor health, low self-esteem, poor impulse control, sleeping difficulties, feelings of powerlessness, and being at risk for substance abuse, running away and suicide are also reported.
- Between 15% and 25% of pregnant women are physically abused.

As you peruse the research, it becomes clear that the effects of domestic abuse in a home creep into the lives of children, with lasting effects. The statistics regarding children who witness domestic abuse at home are remarkable. Delinquency rates go up. School drop-out rates go up. Teen pregnancy rates go up. Adult incarceration rates go up. Suicide rates go up. Cognitive functioning suffers. Behavioral and emotional problems in children are evident through an aggressive temperament, an increased use of violence, more anxiety, poor self-esteem, more depression and lack of self-control.

Dr. Jeffrey Edleson, from the University of Minnesota School of Social Work, studied over eighty published reports of research on the effects of witnessing domestic abuse on a child's development. See Jeffrey L. Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, VAWnet, National Online Resource Center on Violence against Women (April 1997), available at http://new.vawnet.org/Assoc_Files_VAWnet/AR_witness.pdf. Dr. Edleson's review of the literature revealed that the above characteristics can be associated with children who are exposed to domestic abuse at home, although individual effects vary depending upon a variety of factors, including direct physical abuse of the child, gender, age, the child's relationship with others in the home and the time since exposure to violence. *Id.*

Dr. Edleson emphasizes that the responsibility for creating a dangerous environment should be laid squarely on the shoulders of the adult who is using the violent behavior, not upon other adult survivors in the home. *Id.* As prosecutors, we must hold the violent abuser responsible; this is the path to safety for both children and adult victims of abuse.

2. The Risk of Physical Harm to Children from Domestic Abuse

As prosecutors, we may see the same family in a variety of settings. You may prosecute an abuser in a domestic case, only later to review a case investigating that same abuser whose children appear in school with welts and bruises. Prosecutors report prosecuting delinquent teens who were abused as smaller children or were previously (or are concurrently) the subject of a CHIPS (Child in Need of Protection or Services) action for neglect.

Children in homes plagued by violence are abused at a rate fifteen times higher than the national average. Over 50% of wife (or partner) abusers also beat their children, with some studies placing the rate as high as 70 to 80%. As the severity of domestic abuse increases, the severity of child abuse also increases. In addition, daughters are over six times more likely to be sexually abused in homes where spousal (or partner) abuse occurs. Harvard Law Review Association, *Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1608-09 (1993) (internal citations omitted).

As prosecutors, we have known for many years about the effects of domestic abuse on children, simply from our own experiences. However, because of the flourish of productive research in recent years, we can now prepare ourselves for the courtroom with statistics. This research gives us the academic support for our positions to attempt to prevent perpetrators of family abuse from having visitation with their children until they have committed themselves to meaningful

treatment. Many states have even enacted statutes in the family court setting related to an abuser's custodial role.

The presence of children during an abusive incident at home must always enter our analysis of how we will prosecute the adult perpetrator of family abuse.

Older children can be injured in attempts to protect their other parent from the abuser. Children may be harmed directly as targets of physical attacks, or indirectly, as a result of their proximity to the attacks against the adult victim. Because the frequency of battering tends to increase during pregnancy, even a fetus is at risk of injury or death. Moreover, after the abuser and the victim separate, visitation puts children at a heightened risk of direct physical abuse or kidnapping. *Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1609 (1993).

3. Children who Witness Domestic Abuse

Children in abusive households do not have to be abused directly in order to be affected. Observing domestic abuse is as harmful for children as experiencing direct physical abuse. Levine, D., *Children in Violent Homes: Effects and Responses*, 68-OCT FLA. B.J. 62, 63 (1994).

The majority of children of violent families witness the abuse. Reports by battered women indicate that in 87% of cases, their children witness the abuse. Seeing one parent attack another initially traumatizes children, causing shock, fear, and guilt. Researchers have found that sons of wife-battering fathers become aggressive and violent, while daughters often become passive, withdrawn, and suffer from low self-esteem. Children of battered women may also exhibit anxiety, depression, and social deviance. *Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1609 (1993).

Children form their views of adult relationships based upon the interactions they observe at home. More than three million American children are at risk of exposure to parental violence each year. B.E. Carlson, *Children's Observations of Interparental Violence*, in A.R. Edwards (ed.), *BATTERED WOMEN AND THEIR FAMILIES*, New York: Springer, 147-67 (1984).

Some advocates argue that domestic abuse in the presence of children is a form of child abuse in and of itself. Amy Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interest of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 834-35 (2000).

Even when the violence is not personally witnessed, domestic abuse harms children. At the very least, the pressures endured by the victim impair that person's ability to care for and provide attention to children. *Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1610 (1993).

These children do not always receive the care that they need because their mothers are injured and not always available physically or emotionally. A host of environmental stresses, such as

multiple family separations and residential moves, contribute to the psychological and emotional effects upon children who witness domestic abuse. Amy Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interest of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 834 (2000).

As the Wisconsin Court of Appeals explained: “Parental violence and abuse affect ‘the interaction and interrelationship of the child’ with the parent and may affect the mental and physical health of the children. The violent and abusive spouse may have the same potential as a parent.” *Bertram v. Kilian*, 394 N.W. 2d 773, 774 (Ct. App. 1986).

4. Do Abused Children Become Abusers?

Even when abusers don’t physically strike their children, research suggests that they often create learned patterns of abusive behavior in their children. Through this “intergenerational cycle of violence,” these children learn that violence is acceptable. The chance that these children will engage in future violent behavior increases. These children are more apt to become abusive in their adult relationships or towards their own children in the future. See Amy Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interest of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 835-36 (2000).

Children learn from their parents. Witnessing domestic abuse increases a child’s propensity for future violence. *Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1610 (1993). Boys who observe their fathers abuse their mothers are three times more likely to beat their own wives as adults. *Id.* Moreover, sons of the most violent abusers are a thousand times more likely to grow up to beat their wives than are sons of nonviolent fathers. *Id.*

5. Additional Effects on Children

Researchers have found that children who witness domestic abuse suffer from a number of psychological and emotional problems. These children suffer from internalizing problems such as depression, anxiety, and withdrawal. They also suffer from externalizing problems such as aggression, acting out behaviors, and delinquency. They may experience impaired social competence and post-traumatic stress disorder. They are also at a greater risk for substance abuse and suicide. They demonstrate an impaired ability to concentrate, experience difficulty in their schoolwork, and suffer significantly lower scores on measures of verbal, motor, and cognitive skills. Amy Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interest of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 833-834 (2000).

Studies reveal that children exposed to domestic abuse are, in general, more aggressive than children who are not so exposed. These children tend to exhibit behavioral problems in their schools and communities, ranging from temper tantrums to fights. See J. Fantuzzo and W. Mohr,

Prevalence and Effects of Child Exposure to Domestic Violence, The Future of Children, DOMESTIC VIOLENCE AND CHILDREN, 9: 3 (Winter 1999), at 27.

The effects of witnessing domestic abuse are widespread and may vary based upon the age of the child exposed to the violence. “We will doom our children to an endless cycle of violence unless we acknowledge the pervasive impact that witnessing violence has upon children.” D. Levine, *Children in Violent Homes: Effects and Responses*, 68-OCT FLA. B.J. 62 (1994).

6. The Prosecutor’s Role: Educating the Court

As prosecutors, we are uniquely positioned to interrupt the cycle of violence in the home. We must educate the court about the dangers of allowing an abusive partner back into the home. Based upon a statutory change in 2012, a “court shall consider as an aggravating factor the fact that the act was committed in a place or a manner in which the act was observable by or audible to a child or was in the presence of a child and the actor knew or had reason to know that the act was observable by or audible to a child or was in the presence of a child.” WIS. STAT. § 973.017(6m)(b). *See also* 2011 Wisconsin Act 273. You may rely upon this new statute to educate the court about the dangers and significance of domestic abuse committed in the presence of a child.

If cash bail results in an abuser staying in jail during the pendency of your prosecution, the victim may have time to arrange for a safe place for the children to stay.

No-contact bail conditions may be ordered by the court to keep the defendant out of the victim’s residence during the pendency of the case. They can also be put in place later, as a condition of probation. Despite the victim’s wishes, you should still consider adopting the position that a no-contact order should remain in effect throughout the entire pendency of the case. You may advocate that no-contact order be put into place in reference to the children as well as the victim, depending upon the facts of the case. In 2012, the Wisconsin Legislature modified no-contact orders as a condition of probation to expand the protection to witnesses of crime as well as simplify the enforcement of such orders. WIS. STAT. § 973.049. *See also* 2011 Wisconsin Act 267. The statutory change also increased the penalty for defendants sentenced on a felony crime who violated the no-contact order. WIS. STAT. § 941.39. *See also* 2011 Wisconsin Act 267.

Educating the victim is another effective tool to interrupting the cycle of violence. Prosecutors and advocates should effectively communicate the effects of abuse upon children in the house, even when the abuse is not specifically directed at the children. Perhaps the victim will be motivated to end an abusive and unhealthy relationship in order to spare the children.

In addition, perhaps an understanding of the effects of violence upon children will result in greater cooperation with your prosecution on the part of the victim. Ideally, this will lead to enhanced safety for the victim and the children.

7. Additional Information

The Alabama Coalition against Domestic Violence, THE EFFECTS OF DV ON CHILDREN, *available at* <http://www.acadv.org/children.html>.

Futures without Violence, THE FACTS ON CHILDREN AND DOMESTIC VIOLENCE, *available at* http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Children.pdf.

Gayla Margolin, *Violence against children in the family and the community*, in Penelope K. Trickett, Cynthia J. Schellenbach (eds.), EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN, American Psychological Association: Washington, DC, 57-101 (1998).

UNICEF, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (2006), *available at* <http://www.unicef.org/protection/files/BehindClosedDoors.pdf>.

United States Department of Health and Human Services Administration for Children and Families, DOMESTIC VIOLENCE AND THE CHILD WELFARE SYSTEM, *available at* <http://www.childwelfare.gov/pubs/factsheets/domesticviolence.cfm>.

Joseph S. Volpe, EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN AND ADOLESCENTS: AN OVERVIEW, *available at* <http://www.aaets.org/arts/art8.htm>.

39. Coordination with Family Law Matters

1. Introduction
2. Other Legal Actions Affecting the Family
3. Is the Victim or Defendant Subject to Other Family or Civil Court Order(s)?
4. Orders of No Contact
5. Contact with a Victim or Defendant When He or She Is Represented by Counsel in a Parallel Action
6. Taking Advantage of Existing Resources in the Parallel Action: Effective Intervention Strategies
7. Multicultural Aspects
8. Conclusion
9. Additional Resources

1. Introduction

Domestic abuse prosecutions may coincide with family law cases. The defendant and victim in a domestic abuse case may also be parties in family court cases, such as divorce, child custody or placement, and child support actions. Victims may recant in criminal law actions but may be more open and forthcoming in family law cases, because they are more focused on their child(ren). Many victims express a desire to obtain sole custody and primary placement. The victim may be concerned about the defendant's behavior toward both the victim and the child(ren). Thus, victims may give information in family court which they do not reveal in criminal court. In addition, criminal cases may forbid any contact between the parties, whereas family law cases may allow or encourage such contact.

Family conflicts that result in referrals for prosecution often involve parallel litigation in family court. For victim safety, offender accountability and consistent messaging by the legal system, it is important to know whether there is past, current, or pending family court activity and the current status of such cases. This chapter outlines some of the issues that can arise when there are parallel actions occurring at the same time in both criminal and family courts.

2. Other Legal Actions Affecting the Family

The prosecutor of a domestic abuse case must investigate the existence of other actions involving the same parties. If another action exists, it may affect several components of the prosecutor's

interaction with the parties to the criminal action. The following include examples of family legal actions that may exist between the victim and defendant in a domestic abuse case:

a. Divorce or annulment

In a divorce action, parties must comply with a minimum 120-day waiting period after filing before the court will grant the divorce. Parties often have to wait longer than the minimum 120 days, depending on the county and the individual case.

Thus, a victim of domestic abuse or a defendant who is engaged in a divorce action may have legal representation, which may last for a substantial period of time. Prosecutors must be aware of the ethical considerations of working with victims or defendants who are already represented in a divorce action. WIS. STAT. §§ 767.301-767.395.

b. Child custody, placement and visitation

Statistics as cited in the WISCONSIN JOURNAL OF FAMILY LAW, 30: 4 (Fall 2010):

- 25-50% of disputed custody cases involve domestic abuse.
- There is significant overlap between domestic abuse and child abuse, with most studies finding that both forms of abuse occur in 30-60% of violent families.
- Abusive men who fight for custody win 70% of contested actions, obtaining at least joint physical and legal custody, and sometimes even sole custody of their children.

“Legal custody” and “physical placement” are distinct concepts with different definitions.

Legal custody: “The right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.” WIS. STAT. § 767.001(2)(a). “Major decisions” include, but are not limited to, decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator’s license, authorization for nonemergency health care and choice of school and religion. WIS. STAT. § 767.001(2m).

Physical placement: “The condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child’s care, consistent with major decisions made by a person having legal custody.” WIS. STAT. § 767.001(5).

Previous court orders may exist that affect the living situation and relationship of the parties. When parties are not married and/or not living together, a court order may exist awarding custody and placement of the children to one or both parents. This order may provide for visitation for a non-custodial party. Prosecutors in domestic abuse cases should be aware of these orders because they may implicate ethical issues if parties are represented by counsel, and there may also be other law violations to explore or investigate. WIS. STAT. §§ 767.401-767.481.

Scenarios may exist where one parent has sole legal custody of the children, but both parents have shared physical placement. Prosecutors must be aware that abusers may use their physical placement privileges to contact the victim and continue the abuse.

Convictions for domestic abuse and acts of domestic abuse can affect both the offender and the victim in a child custody determination. WIS. STAT. § 767.41(2)(d).

There is a rebuttable presumption that it is *not* in the best interests of the child to award joint or sole legal custody to a party if a court finds by a preponderance of the evidence that the party has engaged in a pattern or serious incident of spousal battery or domestic abuse. WIS. STAT. § 767.41(2)(d)1. “Spousal battery” is described in WIS. STAT. §§ 940.19 or 940.20(1m); “domestic abuse” is defined in the domestic abuse restraining order statute, WIS. STAT. § 813.12(1)(am).

Some practitioners claim there are studies that find that men and women abuse their partners at near-equal rates. However, confirmed studies show that men abuse at vastly higher rates compared to women. Statistically speaking, men abuse their partners more often than women do.

Statistics show that most victims of domestic abuse are female and that most perpetrators that come to the attention of the criminal justice system are male; approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States. Patricia Tjaden and Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey* iv, U.S. Dep’t of Just., NCJ 183781 (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>; Andrew R. Klein, *Practical Implications of Current Domestic Violence Research; For Law Enforcement, Prosecutors and Judges*, 13 NAT’L INSTITUTE JUSTICE (June 2009), available at <http://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

Among women, 39.2% of same-sex cohabitants and 21.7% of opposite-sex cohabitants reported having been raped. Among men, the comparable figures are 23.1% and 7.4%. These findings suggest that intimate partner violence is perpetrated primarily by men, against male or female partners. P. Tjaden & N. Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence, Findings From the National Violence Against Women Survey*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, NCJ 181867 (2000).

When asked if dual arrest policies require the arrest of persons who engage in violence for self-defense, Dr. Kevin Hamberger reported that his research on the motivations of intimate partner violence by men and women reveals that about two-thirds of men who use violence do so primarily to dominate and control their partners. About 17% of men report self-defense or retaliation from a prior assault as a motivation. The mirror opposite occurs with women; about two-thirds report that their primary motivation for violence is self-defense or retaliation, whereas only about 17-19% report domination and control as a motivation for violence. L.K. Hamberger and J.E. McCarroll, *Joining Forces joining Families*, Featured Interview, INTIMATE PARTNER VIOLENCE: FUNCTION, TREATMENT AND TYPOLOGIES 1-8 (Jul. 2009).

If the court finds under WIS. STAT. § 767.41(2)(d) that a parent has engaged in a pattern or serious incident of spousal battery as described under WIS. STAT. §§ 940.19 or 940.20(1m), or domestic abuse as defined in WIS. STAT. § 813.12(1)(am), the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse *shall be the paramount concerns* for family law courts in determining legal custody and periods of physical placement. *See* WIS. STAT. § 767.41(5)(bm).

As seen with the statutes above, a pattern or a serious incident of spousal battery can have an important influence on whether an offender is going to have custody or physical placement of the children. Therefore, it is important to be aware that if an abuser wants placement and custody of his or her children, the abuser may place additional pressure on the victim to stay silent or to recant incriminating statements in order to increase the abuser's chances of being granted placement and/or custody. Victims who later recant or attempt to "drop" charges may be doing so because of an ongoing family court matter where the victim is uncomfortable with potentially creating problems in the relationship between the abuser and the children.

Some believe that parties may attempt to obtain a domestic abuse restraining order in an attempt to gain legal custody and physical placement rights. However, while a restraining order may assist in a family law action and evidence of abuse is a factor for determining custody and placement under WIS. STAT. § 767.41(5), the burden of proof is higher in a family law action than an action to obtain a restraining order. The burden of proof to obtain a domestic abuse injunction is "reasonable grounds." WIS. STAT. § 813.12(4)(a)3. The burden of proof needed to prove a pattern or serious incident of domestic abuse, in order to use the rebuttable presumption that it is not in the best interests of the children for the abusive parent to be awarded legal custody, however, is "by a preponderance of the evidence." WIS. STAT. § 767.41(2)(d)1.

c. Paternity

Unmarried couples with children may seek paternity determinations; these usually accompany orders for child support and physical placement. WIS. STAT. §§ 767.80-767.895.

- Unmarried fathers in Wisconsin who acknowledge paternity are *not* automatically granted parental rights to the child(ren); establishment of paternity alone does not confer custody or placement rights.
- Many professionals, including law enforcement officers, presume and incorrectly tell parties that paternity confers parental rights to unmarried fathers.
- Parental rights to custody and placement are only conferred once a court specifically adjudicates those rights in a court hearing.
- The mother of a nonmarital child has legal custody of the child unless the court grants legal custody to another person or transfers legal custody to an agency. *See* WIS. STAT. § 48.435.
 - Parental rights of nonmarital children are only conferred to fathers by a court order.

- Any person without legal custody of the child, including an unmarried father who has not been formally adjudicated a custodial parent of the child, who withholds the child for more than twelve hours without the consent of the mother who has legal custody of the child, is guilty of interference of custody, a Class I felony. *See* WIS. STAT. § 948.31.

3. Is the Victim or Defendant Subject to Other Family or Civil Court Order(s)?

a. Support and maintenance

Maintenance and support orders may exist between the victim and defendant. At the time of a divorce, a court may order one party to pay child support and/or maintenance (a.k.a. “alimony”) to another party. Like placement orders, support and maintenance orders implicate legal representation issues and other legal violations of which the prosecutor ought to be aware. WIS. STAT. §§ 767.501-767.59.

b. Child support enforcement

A party may seek the court-ordered enforcement of unpaid child support against the non-paying parent. Such an action may involve prior legal representation for a domestic abuse defendant. WIS. STAT. § 767.70.

Prosecutors should communicate with county child support agencies before charging the crime of failure to pay child support. Each county is different in its handling of child support arrearages. Communication with the county child support agency will allow prosecutors to obtain more information about county practices and the specific situation with the family in question.

c. Family court orders (generally)

In an action affecting the family, all parties are prohibited from harassing, intimidating, physically abusing or imposing any restraint on the personal liberty of the other party or a minor child of either of the parties. *See* WIS. STAT. § 767.117(1)(a).

These prohibitions shall apply until the family action is dismissed, until a final judgment is entered in the action, or until the court orders otherwise. *See* WIS. STAT. § 767.117(2). However, there is no criminal sanction for violation of this order, other than a contempt of court motion under the family law action.

d. Restraining orders: Temporary restraining orders and injunctions

Colloquially referred to as “restraining orders,” a temporary restraining order (TRO) and an injunction are the two stages of a civil court order for no contact or limited contact between two parties.

Wisconsin law contains a procedure by which victims can obtain temporary restraining orders and/or injunctions against their abusers. Prosecutors must be aware that victims may seek these orders subsequent to a domestic abuse charge or may already have one in place prior to the incident.

In the first stage, the person seeking the order files a temporary restraining order (TRO) petition at the county courthouse. A court commissioner will review the petition and decide whether to grant the TRO and, if the TRO is granted, set a date for the injunction hearing. A TRO is in effect until the injunction hearing, which is usually set within fourteen days of the issuance of the TRO.

In the second stage, the injunction hearing will be held. The petitioner is required to appear at the hearing. The respondent is not required to appear, but risks having the injunction put in place by default if he or she does not contest it. At the injunction hearing, the judge will consider the facts and decide whether to issue the injunction ordering no contact or limited contact between the parties.

The four kinds of restraining orders and their respective statutes are:

- 1) Domestic abuse orders and injunctions: WIS. STAT. § 813.12.
- 2) Child abuse orders and injunctions: WIS. STAT. § 813.122.
- 3) Individuals at risk orders and injunctions: WIS. STAT. § 813.123.
- 4) Harassment orders and injunctions: WIS. STAT. § 813.125.

Some believe that a party may attempt to obtain a restraining order in an attempt to discourage the other party’s legal custody and physical placement rights. There is no evidence that victims use the restraining order process as a means to get a “leg up” in a divorce proceeding, although some believe this is sometimes the case. Studies do show that victims often do not know about the restraining order process until law enforcement intervenes in a criminal action and informs or encourages the victim to get a restraining order. In addition, victims sometimes report that they file restraining orders once the perpetrator is in custody because they feel safe to do so once the defendant is taking part in a criminal proceeding and is ordered by the court not to have contact with the victim. Victims may sometimes file restraining orders once they are involved in divorce proceedings, if they are subject to continued harassment by the other party.

4. Orders of No Contact

There are several types of orders known as “no-contact” orders. Sometimes orders providing conflicting instructions may be in place at the same time. This section will give a brief overview of these types of orders, and provide suggestions as to what a prosecutor should consider when dealing with a defendant, victim, or witness who has multiple and overlapping no-contact orders. As always, prosecutors should exercise their own discretion.

a. Family court orders are *not* no-contact orders

Family court orders, such as orders regarding the custody, placement, and visitation of children, contain language prohibiting parties from harassing or intimidating each other. Sometimes victims mistakenly believe that these orders constitute a no-contact order. Unless there is explicit language prohibiting all contact between the parties, these are *not* no-contact orders, because the subject of the order is merely prohibited from harassing or intimidating the other party. Prosecutors may need to clarify these orders with victims.

b. Criminal no-contact order / bond

This type of no-contact order is likely the most familiar to prosecutors. At the initial bond hearing, the prosecutor may ask for appropriate non-monetary conditions of bond, including that the defendant have no contact with the victim and/or witness(es).

Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing the intimidation of witnesses. WIS. STAT. § 969.01(4).

Violation of this court order may result in charges under WIS. STAT. §§ 940.42-940.45, contempt of court under WIS. STAT. § 785, and/or revocation of any form of pretrial release. WIS. STAT. § 940.48.

Whoever intimidates a witness or victim, including the prevention or dissuasion of testimony, is guilty of a crime. See WIS. STAT. §§ 940.42-940.45.

c. Additional criminal no-contact orders

The orders below can be used throughout the pendency of the criminal case as needed. Prosecutors may ask the court to order that the defendant, or others acting on the defendant’s behalf, not have any contact with the victim or witnesses.

WIS. STAT. § 940.47:

Any court with jurisdiction over any criminal matter, upon substantial evidence, which may include hearsay or the declaration of the prosecutor, that knowing and

malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, may issue orders including but not limited to any of the following:

- 1) An order that the defendant not intimidate a witness or victim and not prevent or dissuade a witness or victim from providing testimony. *See* WIS. STAT. §§ 940.42-940.45.
- 2) An order that a person before the court other than the defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, not intimidate a witness or victim and not prevent or dissuade a witness or victim from providing testimony.
- 3) An order that the persons described in sections 1 and 2 maintain a prescribed geographic distance from any specified witness or victim.
- 4) An order that the persons described in sections 1 and 2 have no communication with any specified witness or any victim, except through an attorney under such reasonable restrictions as the court may impose.

Failure to comply with these court orders can result in a contempt of court action under WIS. STAT. § 940.48. These statutes do not preclude the use of WIS. STAT. §§ 940.44 and 940.45 [victim and witness intimidation charges].

d. Conflicting orders

Conflicting orders create problems for every party in the system, including prosecutors, defense attorneys, victims, defendants, law enforcement, and others. For example, a criminal court may order that the defendant have no contact, either direct or indirect, with the victim as part of his or her bond, without realizing that the defendant currently has placement rights to children shared with the victim, as granted by a family court. Prosecutors must be aware of the interplay between orders and bring any conflicts to the judge's attention for resolution if the judge is unaware of the orders.

It is difficult and confusing for victims and defendants to know which orders to follow when they appear to conflict. Judges and counties differ as to which order takes precedence. Thus, it is not always obvious whether parties should follow family court orders or criminal court orders. Furthermore, there is no clear authority which specifies which order is dominant.

Best practices for avoiding conflicting orders:

- At the initial bond hearing, ask for one of the below three bond conditions. Which one you request depends on the seriousness of the offense, the likelihood of continued abuse and lethality factors. In most cases, and in *all high risk cases*, use the first option:

- Ask the court to put an *absolute no-contact* order on the defendant;
 - Ask the court to allow exchanges of children via a third party only;
 - Ask for limited communication between the parties; the communication must be with regard to the children only.
- Revisit this issue at the time of the initial appearance on a case-by-case basis. In high risk cases, ask the court to maintain the absolute no-contact order. In less serious cases, ask the court to impose an absolute no-contact order between the parties, except as specifically stated in a family law court order, provided the family court order accounts for victim safety such as safe exchanges of the child(ren). In the least serious cases, prosecutors can continue to strive to protect victims by asking the court to allow contact only via a third party.

5. Contact With the Victim or Defendant When He or She is Represented by Counsel in a Parallel Action

a. General ethics

Prosecutors must be aware of the Wisconsin Rules of Professional Conduct for attorneys when dealing with domestic abuse victims and defendants. The text of the applicable Rule suggests that prosecutors of domestic abuse cases are not required to communicate with attorneys who represent clients in family law matters. However, prosecutors may gain valuable information from and avoid alienation of other attorneys through active and open communication.

Wisconsin 20:4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

b. Suggested practice: Obtain information from family law actions

Get information from a family law case to bolster the criminal action. Prosecutors may be able to obtain useful information by contacting attorneys who represent the victim in parallel actions, usually family law cases. The prosecutor should direct all communications to the victim's attorney, and not directly to the victim.

Victims often ask their family law attorneys for updates on the criminal case instead of prosecutors, and victims may often have a closer relationship with their family law attorney than they do with the prosecutor. It is often intimidating for victims to communicate with prosecutors, perhaps due to offender pressure to "drop" the charges. Also, the victim generally has the most contact with victim-witness personnel in the district attorney's office, rather than with prosecutors themselves. Thus, the family law attorney may have helpful information about

the victim which is not known to the prosecutor. The family law attorney must first obtain consent to release information from their client/victim, but if consent is given, that attorney may be able to provide valuable information about the victim.

Information from family law cases may be helpful because there is generally more disclosure in those cases. The victim may be more open to discussing the abuse in family court than in criminal court. Furthermore, in an attempt to persuade the court to grant joint custody or physical placement, the offender may admit to the abuse and try to explain away the behavior. Prosecutors may be able to use the offender's testimony to impeach him or her in a criminal proceeding.

Family law cases may have updated information. Family law attorneys usually have ongoing regular contact with the parties. Family law attorneys may also have knowledge of more recent incidents of abuse between the parties. Information about the victim's or offender's current address can also be updated via family court cases.

Time-limited, information-specific releases should be used instead of generic, broad releases. If a party is willing to give information, it is recommended to have that person sign a limited release of information form containing a restriction on any other party obtaining the information through another means. Note that when a prosecutor receives information, it may be open to the defendant through disclosure obligations. If a prosecutor obtains medical records, the prosecutor must be careful not to release confidential health information.

Other ways for prosecutors to obtain information: Always use the Wisconsin Consolidated Court Automation Program (CCAP) to keep an eye on what is happening in the family court case. Prosecutors can also request the minutes and transcripts of testimony in the family court case.

c. Inform the victim of the role of the criminal defense attorney

Prosecutors should dissuade victims from signing generic releases of information or waivers. Instead, a release should be tailored to ask for specific information related to the incident in question and/or any injuries related to the incident. Releases must specify that they do not include access to any medical or counseling records if the victim chooses not to release those records. Defense attorneys may try to get victims to sign complete waivers for everything, so they can obtain whatever information they desire.

Sometimes public defenders may tell victims they are "the State" in order to try to obtain information from victims. Victims often sign releases without understanding that they are giving up their medical and confidential information to defense attorneys. If necessary, prosecutors may write a letter to the court requesting that such confidential information be sealed. In addition, if a criminal defense attorney or defendant gives confidential information to others, prosecutors should ask the court to admonish or sanction the criminal defense attorney or defendant.

6. Taking Advantage of Existing Resources in the Parallel Action: Effective Intervention Strategies

a. Guardian Ad Litem (GAL), WIS. STAT. § 767.407(4)

If a guardian *ad litem* (GAL) is assigned to represent the best interests of minor child(ren) in any family law matter, that attorney is statutorily required to investigate any potential prior domestic abuse and must report his or her findings to the court in those family law matters. 1A Wis. Prac., Methods of Practice § 46.2 (4th ed.).

Wisconsin 20:4.5 GUARDIANS AD LITEM.

A lawyer appointed to act as a guardian *ad litem* or as an attorney for the best interests of an individual represents, and shall act in the individual's best interests, even if doing so is contrary to the individual's wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct that are consistent with the lawyer's role in representing the best interests of the individual rather than the individual personally.

1. Role of the guardian *ad litem*:

- The guardian *ad litem* shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement, and support.
- The guardian *ad litem* shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child.
- The guardian *ad litem* shall consider the factors under s. 767.41(5)(am), subject to s. 767.41(5)(bm), and custody studies under s. 767.405(14).
- The guardian *ad litem* shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am).

WIS. STAT. § 767.407(4) (emphasis added).

2. Information sharing between the guardian *ad litem* and the prosecutor

It is important for the prosecutor to keep in contact with the GAL. If the prosecutor has information regarding the safety of the children, including, but not limited to, allegations of sexual abuse, physical abuse, neglect, and/or severe emotional abuse, the prosecutor should inform the GAL in order to protect the children.

The GAL may or may not be a source of information for the prosecutor. The GAL's standard in family law actions is the "best interests of the child." If the GAL believes it is in the best interests of the child to disclose information to the prosecutor, the GAL likely will disclose

information from the case. However, little or nothing will be disclosed to the prosecutor if the GAL believes it is not in the best interests of the child to do so.

The GAL may also choose to contact the prosecutor for information, because the GAL is required under WIS. STAT. § 767.407(4) to investigate allegations or convictions of domestic abuse. In addition, the GAL may wish to know the status of the criminal proceeding in order to formulate recommendations. Recommendations may vary if a plea negotiation is underway or if the case is set for trial.

b. Other actors

Prosecutors must understand that victims of domestic abuse are different than other victims. Domestic abuse often involves a complicated dynamic between victim and aggressor. Thus, the prosecutor must realize that the victim will rarely share the same goals as the prosecutor. It is not appropriate for the prosecutor to impose his or her own goals on the victim; it is appropriate, however, for the prosecutor to recognize that the victim is not the prosecutor's client, seeking the same objectives within the criminal justice system. Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 200 (2008). Communication with other attorneys may allow prosecutors to know victims better, thereby enhancing their cooperation and testimony.

Prosecutors, police officers, judges, and other system actors cannot fully appreciate the complexity of the relationship between the domestic abuse victim and defendant, as they are only bystanders to the relationship. *Id.* at 200-01. Therefore, prosecutors must utilize other actors outside of the criminal justice system (GALs, social workers, other attorneys, etc.) to elicit desired information and assistance from victims without alienating them and dissuading them from cooperating. For example, although most system actors view separation from the defendant as a necessary step to protecting the victim, many victims still resist separation. *Id.*

7. Multicultural Aspects

Victims from different cultural backgrounds may have beliefs and values which impact both family and criminal actions. Be aware of these differences and plan actions accordingly.

For example, a person's culture may not consider sexual behavior as criminal activity. Thus, the victim may not disclose such information in criminal court, but may disclose it in a family court setting. The victim may wish to continue contact with the defendant rather than risk estrangement from the community. Other cultures may engage in activities such as peace-keeping circles, whose philosophy may be at odds with the dominant culture. In some cases, couples may engage in a cultural divorce, which may or may not be recognized in the state's court of law.

8. Conclusion

Successful prosecution of a domestic abuse case may depend upon the careful consideration of parallel family law actions. Careful consideration of other court orders, actors involved, and implications of those orders and actors will help prosecutors avoid ethical violations and utilize other available resources.

9. Additional Resources

WISCONSIN JOURNAL OF FAMILY LAW, State Bar of Wisconsin, Family Law Section:

- *The Interplay Between Domestic Violence Victim Dynamics and Utilization of 2003 Act 130*, 30 (December 2011).
- *Domestic Violence and Act 130—Making it Work for Your Client*, 31 (June 2011).
- *Domestic Violence and Act 130—Guardians ad Litem Play a Crucial Role*, 31 (August 2011).

Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, 13 NAT'L INST. JUSTICE (June 2009), available at <http://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

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40. Elder Abuse

1. Introduction
2. Types of Elder Abuse
3. Other Types of Elder Abuse
4. Additional Resources

1. Introduction

The number of persons over 65 in the United States will approximately double in the next two decades. Persons aged 65 and older will represent roughly one in five Americans in that time, compared with one in eight today. Currently, 25% of adult women are age 60 or older. Persons 85 and older are the fastest-growing population group in the United States. The life expectancy of individuals is growing; it is likely that the average lifespan of our children will be 100. *See generally* Aging Statistics, Administration on Aging website, *available at* http://www.aoa.gov/AoARoot/Aging_Statistics/index.aspx.

Although each year the number of reported incidents of elder abuse grows, it is estimated that approximately 84% of elder abuse incidents are not reported to authorities. National Center on Elder Abuse (NCEA), Fact Sheet, *Abuse of Adults Aged 60+: 2004 Survey of Adult Protective Services* (2004), *available at* http://www.ncea.aoa.gov/ncearoot/main_site/pdf/2-14-06%2060FACT%20SHEET.pdf (*citing* The National Elder Abuse Incidence Study, Final Report, Sept. 1998).

In a recent study of 5,777 individuals age 60 and older interviewed by telephone, 11% reported having experienced at least one form of emotional, physical, or sexual mistreatment (excluding financial mistreatment) and/or potential neglect within the prior year. Acierno, Ron et al., *National Elder Mistreatment Study* (Mar. 2009), Abstract, *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/226456.pdf>. Eighty-five percent of older adults who experienced sexual abuse did not report it to police or other authorities. *Id.* at p. 10.

Currently, the elderly population in this country is growing faster than any other segment. As the elder population grows, so does the occurrence of elder abuse. National Center on Elder Abuse (NCEA), Fact Sheet, *Abuse of Adults Aged 60+: 2004 Survey of Adult Protective Services* (2004), *available at* http://www.ncea.aoa.gov/ncearoot/main_site/pdf/2-14-06%2060FACT%20SHEET.pdf. As more people live longer, their frailty and vulnerability increase, as does the potential for older people to become victims of physical, emotional, or financial abuse.

As compared with younger victims of domestic abuse, victims of elder abuse may be less likely to report the abuse, due to factors such as fear of retaliation; fear and shame; reluctance to implicate a member of the family; real or perceived power differential between older victim and partner, child, family member, or caregiver; cultural issues; isolation; loss of social network; language barriers; financial barriers; concerns about being removed from their own home (to a nursing home); and ageism. B. Brandl, et al., *ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH*, New York: Springer (2007). In addition, older victims tend to possess less information about services and resources than younger victims do and less access to them. D.J. Wilke and L. Vinton, *The Nature and Impact of Domestic Violence Across Age Cohorts*, 20 *AFFILIA* 3, 316-28 (2005).

Shockingly, family members were the alleged abusers in over 76% of the elder abuse incidents reported to researchers. Acierno, *supra*, p. 8. Fifty-seven percent of reported physical abuse was perpetrated by a partner or spouse; and 19% by adult children, grandchildren, or other family members. *Id.* at p. 44.

2. Types of Elder Abuse

Nationally, seven basic types of elder abuse are typically recognized: physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment, financial abuse and self neglect. *See generally* National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx. However, elder abuse may fall into many categories under state and local laws.

An elder adult-at-risk is defined in Wisconsin as “any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self neglect, or financial exploitation.” WIS. STAT. § 46.90(1)(br). There are five categories of abuse specifically defined in Wisconsin law: physical abuse, emotional abuse, sexual abuse, treatment without consent, and unreasonable confinement or restraint. WIS. STAT. § 46.90. Any of these forms of abuse is considered “elder abuse” in Wisconsin, although elder abuse may fall under many different criminal statutes.

Victims of one form of elder abuse (such as financial exploitation, for example) are at higher risk for other, co-occurring forms of abuse (such as neglect, physical abuse, or psychological abuse). R.J. Bonnie and R.B. Wallace, *EM: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA*, Washington, D. C.: National Academies Press (2003); M.S. Lachs, et al., *The Mortality of Elder Mistreatment*, 280 *J. AM. MEDICAL ASSN.* 5, 428-32 (1998); M.J. Quinn and S.K. Tomita, *ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTION STRATEGIES*, New York: Springer (1997).

In Wisconsin, like in other states, older victims of abuse may be reluctant or unable to seek out or accept services or support for many reasons, including those identified above. Although Wisconsin has long been a national leader in providing support and services for older victims of abuse, many domestic abuse shelter programs are set up to provide services for younger victims and their children. Older victims may not be aware of or have access to emergency shelters or

other services. For police, responding to cases of elder abuse can be more complicated than responding to other cases of domestic abuse. This is especially true when the victim is the caregiver for the abuser, the victim has complex health care needs, the victim or abuser needs assistance with daily living activities, or the victim or abuser shows signs of dementia.

Prosecutors' offices and court-based advocacy programs may not be able to readily accommodate older victims, and they may not be aware of available community resources, which could assist in holding an abuser accountable. In addition, jails may be reluctant to accept an individual with complex health care or mobility needs. Because assisting victims of elder abuse often involves knowledge of and collaboration with multiple organizations and agencies, it is recommended that prosecutors be aware of and participate in their county's Interdisciplinary Elder Abuse teams. In addition, Elder Abuse Coordinated Community Response Teams are of great assistance to prosecutors, law enforcement agencies and others in effectively responding to cases of elder abuse, neglect and financial exploitation.

For more information about Interdisciplinary Elder Abuse Teams and the agencies involved in responding to elder abuse in Wisconsin, see SafetyNetWorks, *Information for Elder-at-Risk and Adult-at-Risk Agencies*, AAR Information Memo #9, Feb. 2009, available at <http://www.dhs.wisconsin.gov/aps/Publications/snwandmemos/sn9Flowchart.pdf>.

2005 Wisconsin Act 388 (effective December 1, 2006) revised the reporting of and responses to elder abuse. See <http://www.legis.state.wi.us/2005/data/acts/05Act388.pdf>. The law revised elder abuse definitions, reporting, investigation and confidentiality of records provisions, and allowed counties other than Milwaukee County to assist individuals who were being abused, neglected or exploited. In addition, the "individual at risk" restraining order and injunction was created as another important legal tool to assist in protecting older individuals from abuse, neglect or financial exploitation. See WIS. STAT. § 813.123.

The number of reported elder abuse cases in Wisconsin continues to rise. In 2009, 5,316 cases of suspected abuse, neglect, or financial exploitation involving older adults were reported, representing an increase of 8.5 percent over the previous year. *Wisconsin's Annual Elder Abuse and Neglect Report: 2009*, Aug. 2010, at 3, available at http://www.dhs.wisconsin.gov/publications/P0/p00124_2009.pdf. Of those, tragically, one in 14 incidents involved a life-threatening or fatal situation (28 incidents resulted in death; 371 incidents were considered life-threatening). *Id.* The largest reported group of victims involved those who were age 80-89 (37%), followed by those who were age 70-79 (30%). *Id.* at 14, 15. The majority of victims were female (60.2%). *Id.* at 14. The gender of the abusers were almost equally male (47.9%) and female (48.8%). *Id.* at 23. Of those, 68.2% were spouses, intimate partners, or family members of the victim. *Id.* at 24.

a. Physical abuse

Definition: "Physical abuse" includes the use of force that may result in pain, impairment or bodily injuries. It may include striking (with or without an object), use of weapons, pushing, shaking, slapping, kicking, burning, strangulation, sexual assault, prolonged deprivation of food

and/or water, force-feeding, and the use of physical or chemical (medication) restraint. National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Physical abuse is defined in Wisconsin as “the intentional or reckless infliction of bodily harm.” WIS. STAT. § 46.90(1)(fg).

Signs and symptoms of physical abuse may include, but are not limited to:

- Bruises, black eyes, welts, lacerations, and rope marks;
- Bone fractures, broken bones, and skull fractures;
- Open wounds, cuts, punctures, untreated injuries in various stages of healing;
- Sprains, dislocations, and internal injuries/bleeding;
- Broken eyeglasses/frames, physical signs of being subjected to punishment, and signs of being restrained;
- Laboratory findings of medication overdose or under-utilization of prescribed drugs;
- An elder’s report of being hit, slapped, kicked, or mistreated;
- An elder’s sudden change in behavior; and
- The caregiver’s refusal to allow visitors to see an elder alone.

National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Potential Charges: In Wisconsin, potential criminal charges for physical abuse of an elderly person may include, but are not limited to, the following:

- Battery, substantial battery or aggravated battery. WIS. STAT. § 940.19. Note that a rebuttable presumption exists that there is a substantial risk of great bodily harm if the person is 62 years of age or older, or if the victim has a physical disability or actor has knowledge of the person’s physical disability. WIS. STAT. §§ 940.19(6)(a); (b).
- Battery—special circumstances. WIS. STAT. § 940.20.
- Battery or threat to witness. WIS. STAT. § 940.201.
- Mayhem. WIS. STAT. § 940.21.
- Reckless injury. WIS. STAT. § 940.23.
- Strangulation and suffocation. WIS. STAT. § 940.235.
- Threats to injure. WIS. STAT. § 943.30.
- Disorderly conduct. WIS. STAT. § 947.01.
- Harassment. WIS. STAT. § 947.013.
- Recklessly endangering safety. WIS. STAT. § 941.30.
- Abuse of individuals at risk. WIS. STAT. § 940.285.
- Injury by negligent handling of dangerous weapon, explosives or fire. WIS. STAT. § 940.24.

- Penalty enhancer for domestic abuse offenses. WIS. STAT. § 939.621.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

In addition to the options listed above, consider the following when the abuse occurs in regulated facilities or community programs:

- Abuse and neglect of patients and residents. WIS. STAT. § 940.295.

b. Sexual abuse

Definition: Sexual abuse is non-consensual sexual contact of any kind with an elderly person, or sexual contact with any person incapable of giving consent. It includes but is not limited to unwanted touching; all types of sexual assault or battery, such as rape, sodomy, coerced nudity and sexually explicit photographing; or when an employee of a regulated care facility or program has sexual contact or intercourse with a person who is a patient or resident of the facility or program.

Signs and symptoms of sexual abuse may include, but are not limited to:

- Bruises around the breasts or genital area;
- Unexplained venereal disease or genital infections;
- Unexplained vaginal or anal bleeding;
- Torn, stained, or bloody underclothing; and
- An elder's report of being sexually assaulted or raped.

See National Center on Elder Abuse, Major Types of Elder Abuse, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basic/Types_Of_Abuse.aspx.

Sexual abuse is defined in Wisconsin as “a violation of s. 940.225(1), (2), (3), or (3m).” WIS. STAT. § 46.90(1)(gd).

Examples: Possible examples of sexual abuse of an elder may include:

- Engaging in unwanted sexual contact which might result in torn, stained or bloody underclothing;
- Difficulty in walking or sitting; pain, itching, bruising, or bleeding in genital area, unexplained venereal disease or genital infections;
- Engaging in public sexual gratification with another person;
- Directing another person to prostitute him/herself or directing/transporting victim to a prostitute or prostitute to a victim;
- Engaging in exhibitionism, voyeuristic activity, and/or sexual harassment; and
- Using unwarranted, intrusive, and/or painful procedures in caring for the victim's genitals or rectal area, including the application or insertion of creams, ointments,

thermometers, enemas, catheters, fingers, soap, washcloths or other objects when not medically prescribed and unnecessary for the health and well-being of the individual.

Potential Charges: Potential criminal justice actions include:

- Sexual exploitation by a therapist, duty to report. WIS. STAT. § 940.22.
- First degree sexual assault. WIS. STAT. § 940.225(1).
- Second degree sexual assault. WIS. STAT. § 940.225(2).
- Sexual contact or intercourse with a person who suffers from a mental illness or deficiency. WIS. STAT. § 940.225(2)(c).
- Second degree sexual assault of a patient or resident by an employee of a facility or program. WIS. STAT. § 940.225(2)(g).
- Third degree sexual assault. WIS. STAT. § 940.225(3).
- Fourth degree sexual assault. WIS. STAT. § 940.225(3m).
- Representation depicting nudity. WIS. STAT. § 942.09.
- Incest. WIS. STAT. § 944.06.
- Sexual gratification. WIS. STAT. § 944.17(2)(a).
- Lewd and lascivious behavior. WIS. STAT. § 944.20.
- Taking or distributing photos, motion pictures, videos or other visual representations showing nudity. WIS. STAT. § 944.205.
- Pandering. WIS. STAT. § 944.33.
- Penalty enhancer for domestic abuse offenses. WIS. STAT. § 939.621.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

c. Emotional or psychological abuse

Definition: Emotional or psychological abuse includes verbal assaults, insults, verbal or non-verbal threats, intimidation, humiliation, harassment, and subjecting a person to serious emotional or mental distress through fear, treating an older person like an infant, isolation and confinement. National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx. Emotional or psychological abuse is the infliction of anguish, pain, or distress through verbal or nonverbal acts.

Emotional or psychological abuse includes, but is not limited to, verbal assaults, insults, threats, intimidation, humiliation and harassment. Additional examples of emotional or psychological abuse include: treating an older person like an infant; isolating an elderly person from his or her family, friends, or regular activities; giving an older person the “silent treatment”; and enforced social isolation.

Outward signs and symptoms of emotional or psychological abuse include:

- Being emotionally upset or agitated;
- Being extremely withdrawn and non-communicative or non-responsive;
- Unusual behavior usually attributed to dementia (e.g. sucking, biting, rocking); and
- An elder's report of being verbally or emotionally mistreated.

National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Emotional abuse is defined in Wisconsin as “language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.” WIS. STAT. § 46.90(1)(cm).

Examples: Possible examples of emotional or psychological abuse of an elder may include engaging in name calling, put downs, language intended to make the victim feel bad about him- or herself, playing mind games, humiliating the person, causing the person to feel guilty, making threats, using intimidation, using coercion, isolating, minimizing, denying and blaming, and treating the person like a servant or in a manner that is not a part of the authorized treatment plan.

Potential Charges: Potential criminal justice actions include:

- Abuse of individuals at risk. WIS. STAT. § 940.285.
- Abuse and neglect of patients and residents. WIS. STAT. § 940.295.
- Recklessly endangering safety. WIS. STAT. § 941.30.
- Reckless injury. WIS. STAT. § 940.23.
- Disorderly conduct. WIS. STAT. § 947.01.
- Endangering safety by use of dangerous weapon. WIS. STAT. § 941.20.
- Damage to property. WIS. STAT. § 943.01.
- Harassment. WIS. STAT. § 947.013.
- Mistreating animals. WIS. STAT. § 951.02.
- Threats to injure or accuse of crime. WIS. STAT. § 943.30.
- Penalty enhancer for domestic abuse offenses. WIS. STAT. § 939.621.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

d. Neglect

Definition: Neglect includes the refusal or failure to fulfill any part of a person's actual or implied obligations or duties to an older individual. It may include the failure to assist in or

provide comfort, personal safety, or personal hygiene; failure to provide life necessities such as food, clothing and shelter; and failure to provide or pay for necessary medical care for the victim. Neglect may include the abandonment of an older individual by a person with custody of, or who has assumed responsibility for providing care for, the elder. National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Neglect may also include the failure of a person who has fiduciary responsibilities to provide care for an elder (such as paying for necessary home care services) or failure on the part of an in-home service provider to provide necessary care.

Signs and symptoms of neglect may include, but are not limited to:

- Dehydration, malnutrition, untreated bed sores, and poor personal hygiene;
- Unattended or untreated health problems;
- Hazardous or unsafe living conditions/arrangements (e.g. improper wiring, no heat, or no running water);
- Unsanitary and unclean living conditions (e.g. dirt, fleas, lice on person, soiled bedding, fecal/urine smell, inadequate clothing); and
- An elder's report of being mistreated.

National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Neglect is defined in Wisconsin as:

[T]he failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. "Neglect" does not include a decision that is made to not seek medical care for an individual, if that decision is consistent with the individual's previously executed declaration or do-not-resuscitate order under ch. 154, a power of attorney for health care under ch. 155, or as otherwise authorized by law.

Wis. STAT. § 46.90(1)(f).

Examples: Possible examples of neglect of an elder may include:

- Withholding, misusing, or delaying needed support(s) (eyeglasses, hearing aids, communication devices, mobility equipment, etc.);
- Otherwise misusing medical treatment; and
- Failing to assist with mobility.

Victim may exhibit such outward signs as dehydration, malnutrition, hypothermia or hyperthermia; excessive dirt or odor; inadequate or inappropriate clothing; absence of eyeglasses, hearing aids, dentures or prostheses; unexpected or unexplained deterioration of health; bedsores; or signs of excess drugging or lack of medication or other misuse of medical treatment.

Potential Charges: Potential criminal justice actions include:

- Abuse of individuals at risk. WIS. STAT. § 940.285.
- Abuse and neglect of patients and residents. WIS. STAT. § 940.295.
- Reckless injury. WIS. STAT. § 940.23.
- Recklessly endangering safety. WIS. STAT. § 941.30.
- Administering dangerous or stupefying drug. WIS. STAT. § 941.32.
- Tampering with household products. WIS. STAT. § 941.327.
- Penalty enhancer for domestic abuse offenses. WIS. STAT. § 939.621.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

e. Financial abuse

Definition: Financial abuse is the illegal or improper use of an older individual's property, finances or assets. It includes theft, embezzlement, misuse of funds or property, and fraud. National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Signs and symptoms of financial or material exploitation include:

- Sudden changes in bank account or banking practice, including an unexplained withdrawal of large sums of money by a person accompanying the elder;
- The inclusion of additional names on an elder's bank signature card;
- Unauthorized withdrawal of funds using the elder's ATM card;
- Abrupt changes in a will or other financial documents;
- Unexplained disappearance of funds or valuable possessions;
- Substandard care being provided or bills left unpaid, despite the availability of adequate financial resources;
- Discovery of the forgery of an elder's signature for financial transactions or for the titles of his/her possessions;
- Sudden appearance of previously uninvolved relatives claiming their rights to an elder's affairs and possessions;
- Unexplained sudden transfer of assets to a family member or someone outside the family;
- The provision of unnecessary services; and
- An elder's report of financial exploitation.

See National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basic/Types_Of_Abuse.aspx.

“Financial exploitation” is defined in Wisconsin as any of the following:

- Obtaining an individual’s money or property by deceiving or enticing the individual, or by forcing, compelling, or coercing the individual to give, sell at less than fair market value, or in other ways convey money or property against his or her will without his or her informed consent.
- Theft, as prohibited in WIS. STAT. § 943.20.
- The substantial failure or neglect of a fiscal agent to fulfill his or her responsibilities.
- Unauthorized use of an individual’s personal identifying information or documents, as prohibited in WIS. STAT. § 943.201.
- Unauthorized use of an entity’s identifying information or documents, as prohibited in WIS. STAT. § 943.203.
- Forgery, as prohibited in WIS. STAT. § 943.38.
- Financial transaction card crimes, as prohibited in WIS. STAT. § 943.41. WIS. STAT. § 46.90(1)(ed).

Examples: Possible examples or signs of financial abuse of an elder may include:

- Victim exhibits disparity between income, assets and lifestyle;
- Unexplained or sudden inability to pay bills or purchase food or personal care items;
- Victim is confused, possesses inaccurate financial information or has no knowledge of finances;
- Victim exhibits fear or anxiety when discussing finances;
- Unprecedented transfer of assets from an older person to others;
- Extraordinary interest by family member in older person’s assets;
- Cashing an elderly person’s checks without authorization or permission;
- Forging an older person’s signature;
- Misusing or stealing an older person’s money or possessions;
- Coercing or deceiving an older person into signing any document (e.g., a contract or will); and
- Improper use of conservatorship, guardianship or power of attorney.

Financial exploitation may involve the use of “undue influence” on the older victim by the perpetrator, using tactics that “groom” the victim into appearing to knowingly and willingly consent to the transfer or use of the property.

Potential Charges: Potential criminal justice actions include:

- Theft or attempted theft from person. WIS. STAT. §§ 943.20(1)(a); 939.32(1).

- Embezzlement or attempted embezzlement. WIS. STAT. §§ 943.20(1)(b); 939.32(1).
- Theft or attempted theft by fraud. WIS. STAT. §§ 943.20(1)(d); 939.32(1).
- Abuse of individuals at risk. WIS. STAT. § 940.285.
- Computer crimes or attempted computer crimes. WIS. STAT. §§ 943.70; 939.32(2).
- Fraudulent writings. WIS. STAT. § 943.39(2).
- Forgery. WIS. STAT. § 943.38.
- Failure to report income. WIS. STAT. § 71.83(2).
- Security fraud. WIS. STAT. § 551.41.
- Threats to injure or accuse of crime. WIS. STAT. § 943.30.
- Robbery. WIS. STAT. § 943.32.
- Misappropriation of personal identifying information or documents. WIS. STAT. § 943.201.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

f. Unreasonable confinement or restraint

Definition: “Unreasonable confinement or restraint” is defined in Wisconsin as shown below:

[This definition] includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.

WIS. STAT. § 46.90(1)(i).

Examples: Possible examples or signs of unreasonable confinement or restraint of an elder may include:

- Holding an elderly person against his or her will;
- Engaging in behavior which results in a person not feeling able to move about freely, or not feeling able to seek assistance;
- Removing mobility devices or causes them to no longer function;
- Using restraints and/or seclusion methods that are not based on authorized emergency procedures; and
- Using timeouts that are contrary to a facility’s policies and procedures and not part of client’s treatment plan, without the consent of the individual or a guardian.

Potential Charges: Potential criminal justice actions include:

- Abuse of individuals at risk. WIS. STAT. § 940.285.
- Abuse and neglect of patients and residents. WIS. STAT. § 940.295.
- False imprisonment. WIS. STAT. § 940.30.
- Taking a hostage. WIS. STAT. § 940.305.
- Kidnapping. WIS. STAT. § 940.31.
- Intimidation of a victim or attempt to intimidate. WIS. STAT. §§ 940.44; 940.45; 939.32(c).
- Intimidation of a witness or attempt to intimidate. WIS. STAT. §§ 940.42; 940.43; 939.32(c).
- Criminal trespass to dwelling. WIS. STAT. § 943.14.
- Disorderly conduct. WIS. STAT. § 947.01.
- Damage or threat to property of witness. WIS. STAT. § 943.011.
- Penalty enhancer for domestic abuse offenses. WIS. STAT. § 939.621.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

3. Other Types of Elder Abuse

There are a number of statutes under which a police officer might arrest and/or a prosecutor might charge in a case of elder abuse or neglect. The Wisconsin Coalition Against Domestic Violence (WCADV) has collected these statutes in their pamphlet entitled Abuse Against the Elderly and Other Adults at Risk: Potential Legal Remedies, available at [http://wcadv.org/sites/default/files/resources/Abuse Against the Elderly and Other Adults at Risk.pdf](http://wcadv.org/sites/default/files/resources/Abuse%20Against%20the%20Elderly%20and%20Other%20Adults%20at%20Risk.pdf).

a. Abuse in regulated facilities and community programs

An act, omission or course of conduct by an entity or employee of an entity as defined in WIS. STAT. § 940.295(2) that is not reasonably necessary for treatment or maintenance of order and discipline in a program or facility and results in one of the following: physical abuse; emotional abuse; sexual abuse; treatment without consent; unreasonable confinement or restraint; financial exploitation; neglect; or, self-neglect – all as defined above. *Id.*

b. Denial of access

Definition: Refusing to allow entry of an elder adult-at-risk investigator, adult protective services worker, regulatory compliance inspector and/or law enforcement officer into a home or regulated health care facility where assistance is needed or requested.

Potential criminal justice actions include:

- Resisting or obstructing an officer. WIS. STAT. § 946.41.

- Refusing to aid law enforcement officer. WIS. STAT. § 946.40.
- Prohibited acts. WIS. STAT. § 50.07. Under this statute, one may not interfere with the work of the Department of Health Services' Bureau of Quality Assurance with respect to investigation of abuse/neglect in nursing homes, community based residential facilities and adult family homes. WIS. STAT. § 50.07(5c).

c. Stalking

Definition: Tracking a person in such a manner so as to cause the person to fear for his or her safety and/or the safety of others, or repeatedly following or harassing another person.

Potential criminal justice actions include:

- Stalking. WIS. STAT. § 940.32.
- Harassment. WIS. STAT. § 947.013.
- Unlawful use of telephone. WIS. STAT. § 947.012.
- Unlawful use of computerized communications systems. WIS. STAT. § 947.0125.
- Penalty enhancer for crimes against certain people or property under Chapters 939 to 948. WIS. STAT. § 939.645.

d. Abandonment

Definition: "Abandonment" is the desertion of an elderly person by an individual who has assumed responsibility for providing care for an elder, or by a person with physical custody of an elder.

Signs and symptoms of abandonment include:

- The desertion of an elder at a hospital, a nursing facility or other similar institution;
- The desertion of an elder at a shopping center or other public location; and
- An elder's own report of being abandoned.

See National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

e. Self neglect

Definition: "Self neglect" is characterized as behavior of an elderly person that threatens his or her own health or safety. Self neglect generally manifests itself in an older person as a refusal or failure to provide him- or herself with adequate food, water, clothing, shelter, personal hygiene, medication (when indicated) and safety precautions. The definition of self neglect does not include a situation in which a mentally competent older person, who understands the

consequences of his or her decisions, makes a conscious and voluntary decision to engage in acts that threaten his or her health or safety as a matter of personal choice.

Signs and symptoms of self neglect include:

- Dehydration, malnutrition, untreated or improperly attended medical conditions, and poor personal hygiene;
- Hazardous or unsafe living conditions or arrangements (e.g., improper wiring, no indoor plumbing, no heat, no running water, hoarding);
- Unsanitary or unclean living quarters (e.g., animal or insect infestation, no functioning toilet, fecal or urine smell);
- Inappropriate or inadequate clothing, lack of the necessary medical aids (e.g., eyeglasses, hearing aids, dentures); and
- Grossly inadequate housing or homelessness.

See National Center on Elder Abuse, *Major Types of Elder Abuse*, available at http://www.ncea.aoa.gov/ncearoot/main_site/FAQ/Basics/Types_Of_Abuse.aspx.

Self-neglect is defined in Wisconsin as “a significant danger to an individual’s physical or mental health because the individual is responsible for his or her own care but fails to obtain adequate care, including food, shelter, clothing, or medical or dental care.” WIS. STAT. § 46.90(1)(g).

f. Treatment without consent

Definition: Treatment without consent is defined in Wisconsin as “the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance.” WIS. STAT. § 46.90(1)(h).

4. Additional Resources

Abuse Against the Elderly and Other Adults at Risk: Potential Legal Remedies, available at http://wcadv.org/sites/default/files/resources/Abuse_Against_the_Elderly_and_Other_Adults_at_Risk.pdf.

National Clearinghouse on Abuse in Later Life (NCALL) website, available at <http://www.ncall.us>.

United States Administration on Aging, National Center on Elder Abuse website, available at http://www.ncea.aoa.gov/ncearoot/Main_Site/index.aspx.

University of California-Irvine School of Medicine, Center of Excellence on Elder Abuse and Neglect website, *available at* <http://www.centeronelderabuse.org>.

Weill Cornell Medical College, Weill Cornell Project on Elder Abuse & Neglect website, *available at* <http://www.cornellaging.com/elderabuse/>.

Wisconsin Department of Health Services website, *available at* <http://www.dhs.wisconsin.gov/aps/index.htm>.

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41. Challenges for Rural, LGBTQ and Cultural Communities

1. Rural Issues
2. APRI's List of Rural References
3. LGBTQ Abuse
4. Domestic Abuse and Culture

1. Rural Issues

In an article entitled “Special Issues in Rural Communities,” the American Prosecutors Research Institute (APRI) identified several areas of concern for prosecutors in rural domestic abuse cases:

a. Extreme isolation

Victims in rural areas face geographical and physical isolation from community support. The nearest neighbor may be miles away. Road conditions may be poor. Should an abuser remove the telephone and disable motor vehicles, a victim may not have the ability to contact help. Even when police are contacted, it can sometimes take hours for them to travel from a different part of the county to the victim's location.

b. Patriarchal family structures

Marriage is often part of social acceptance. Familial pressures can keep an abusive male in charge of the family. Financial independence may be impossible because of a lack of education. Religious leaders may encourage the family to “stick together” despite obvious abuse. Victims may be less inclined to seek support due to potential disgrace in their church and community.

c. Lack of adequate social services and transportation

Available services may be limited due to funding deficiencies. Transportation is often a significant obstacle for victims in rural communities. Shelters and advocacy programs may be far away and difficult to reach.

d. Underserved populations

Underserved populations, such as older victims, the developmentally disabled, the Deaf, LGBTQ, Hmong, Latino/a, Native American and African-American victims and their children often feel like outsiders or have trouble accessing services.

e. Poverty

According to recent statistics, the poverty rate in rural Wisconsin is 10.5%. This rate is higher than for urban families; the numbers increase when the head of the household is female. Poverty can make families more susceptible to abuse.

f. Abundance of weapons

Guns and rifles are often readily available to a rural abuser; their use is typically an accepted part of life in rural areas.

g. Lack of police intervention

Coupled with the challenges of distance and travel times, rural police officers may feel that abuse is a “private family matter.” Domestic abuse calls may receive a lower priority in rural police departments compared to urban ones.

h. Lack of court support

Some rural judges have received no training in domestic abuse dynamics and do not understand there are many different forms of power and control that may be occurring in a victim’s life. Part-time prosecutors and rural court staff may not get information about TROs and injunctions to victims.

2. APRI’s List of Rural References

The following is a list of additional references regarding domestic abuse in rural communities:

Daniel J. Bell, *A Multiyear Study of Ohio Urban, Suburban, and Rural Police Dispositions of Domestic Disputes*, 10 *VICTIMOLOGY: AN INT’L J.*, 301-10 (1985).

Kathryn Fahnestock, *Not in My County*, *THE JUDGE’S J.*, 10-36 (Summer 1992).

Kathryn Fahnestock and Maurice D. Geiger, “*We All Get Along Here*”: *Case Flow in Rural Courts*, 76(5) *JUDICATURE*, 258-63 (Feb.-Mar. 1993).

Patricia L. Gagne, *Appalachian Women: Violence and Social Control*, 20 *J. CONTEMP. ETHNOGRAPHY*, 387-415 (Jan. 1992).

J. Hirschel and Ira Hutchinson, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. LAW & CRIMINOLOGY, 73-117 (1992).

Kathleen Ann Long, *Cultural Considerations in the Assessment and Treatment of Intrafamilial Abuse*, 56(1) AM. J. ORTHOPSYCHIATRY, 131-36 (Jan. 1986).

Kathy Skaggs, *National Coalition Against Domestic Violence Rural Task Force Resource Packet*, 2d ed. (Jan. 1991).

Sallyt Navin, Robert Stockum, and Julie Campbell-Ruggaard, *Battered Women in America*, 32 J. HUMANISTIC ED. & DEV., 9-16 (Sept. 1993).

Ron Pitzer, *Roadblocks to Dealing with Domestic Violence in Rural Areas*, FAMILY LIFE PACKETS, PROVIDED BY MINNESOTA EXTENSION SERVICE, UNIVERSITY OF MINNESOTA (Dec. 1992).

Center for the Prevention of Sexual and Domestic Abuse, *WHAT EVERY CONGREGATION NEEDS TO KNOW ABOUT DOMESTIC VIOLENCE* (1994).

Eileen Ringnalda, *Rural Communities Face Challenges to Deal with Domestic Violence*, Community Connections News Release, Iowa State University Extension to Communities (Sept. 23, 1996).

Eileen Ringnalda, *Small Towns Combat Domestic Violence*, Community Connections News Release, Iowa State University Extension to Communities (Sept. 9, 1996).

Symposium on Domestic Violence, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801 (Summer 1993).

Neil Websdale, *Rural Woman Abuse*, 1 VIOLENCE AGAINST WOMEN, 309-38 (Dec. 1995).

Neil Websdale, *An Ethnographic Assessment of the Policing of Domestic Violence in Rural Eastern Kentucky*, 222 SOCIAL JUSTICE, 102-22.

Women's Advocacy Program, Inc., *There's No Excuse for Domestic Violence!*, CRIMINAL JUSTICE INTERVENTION PROGRAM INFORMATION PACKET.

3. LGBTQ Abuse

As prosecutors, we must strive to protect all victims of assault without regard to race, religion, gender, gender identity or sexual orientation. Abuse occurs in all settings. With regard to those who identify as lesbian, gay, bisexual, transgender, queer or questioning (LGBTQ) who may experience abuse, prosecutors need to understand that many barriers impact victims, including

equal or suitable access to services. Note that this chapter is limited to domestic abuse and does not discuss gender expression, which is a leading cause of bullying and hate crimes.

Some victims choose not to access the criminal justice system because they anticipate stereotyping by police officers, prosecutors and judges. They may also feel that since certain laws do not apply to them (marriage, civil unions, etc.), they are not protected as victims by the law. Your office, in conjunction with your community service provider(s), needs to be sensitive to victims' fear of "outing" and the resulting possible repercussions, among other challenges. One issue that you may face is that those who identify as LGBTQ are hesitant to report crime or work with prosecutors because they do not want to cast an even darker stigma on the LGBTQ community.

As our systems progress toward more inclusive responses for all members of the community, it is important to recognize the impact that homophobia or "gay bashing" has upon LGBTQ victims. Understanding these challenges for victims will help prosecutors provide better service starting at the initial police call, to the charging decision, through facing potential juror biases during a trial, to dealing sensitively with witnesses, facing sentencing issues, and providing appropriate services for abusers and victims alike.

If you are faced with such a case, it is important to recognize that the victim may be very reluctant to participate in the prosecution. The victim may have struggled for quite some time over his or her decision to even contact the police. Trust may be a foremost concern. Consider the value of linking that victim with a victim advocate. If your community has an LGBTQ victim services advocate, involve that person right away. Should you determine that charges are necessary, a victim advocate may be able to help that victim cope with the many barriers that he or she may potentially encounter at all stages of the criminal justice system. A victim advocate may be able to work in conjunction with other safety services to assist in obtaining restraining orders or providing protection for children in family court (child custody issues).

As a prosecutor, you may be asked to train law enforcement officers. Effective police responses to domestic abuse calls require officers to avoid dual arrests, an especially key requirement in LGBTQ abuse cases. Helping law enforcement agencies to understand the challenges faced by LGBTQ persons will promote sensitivity and will ultimately help officers to better respond to all cases of abuse.

It is important that you let the person you are working with define their own sexual orientation and gender identity. Do not label them if you do not know. Do not assume, for example, that because a woman is in a relationship with another woman that she considers herself a lesbian. The same goes for men with men. For the transgender community, if you know someone is transgender or transitioning (the process to transition from one gender to another more fitting gender), then ask their preferred pronoun.

Here is some terminology to help you working with the LGBTQ community:

- **Biological sex:** This can be considered our “packaging” and is determined by our chromosomes, our hormones, and our internal and external genitalia.
- **Gender expression:** The ways in which people externally communicate their gender identity to others through behavior, clothing, haircut, voice, and emphasizing, de-emphasizing, or changing their bodies’ characteristics.
- **Gender identity:** Our personal concept of self as “male” or “female” – what we perceive and call ourselves.
- **Gender role:** The set of roles and behaviors assigned to females and males by society. “Masculinity” and “femininity” are social constructs.
- **Queer or gender queer:** Historically a negative term used against people perceived to be LGBTQ, “queer” has more recently been reclaimed by some people as a positive term describing all those who do not conform to rigid notions of gender and sexuality.
- **Questioning:** Refers to people who are uncertain as to their sexual orientation or gender identity.
- **Sexual behaviors:** The great variety of sexual acts that people engage in, and how humans express their sexuality.
- **Sexual identity:** This is how we perceive and what we call ourselves. Such labels include “lesbian,” “gay,” “bisexual,” “bi,” “queer,” “questioning,” “heterosexual,” “straight,” and others.
- **Sexual orientation:** This is determined by our sexual and emotional attractions. Categories of sexual orientation include gay and lesbian – i.e., attracted to some members of the same sex; bisexuals, attracted to some members of both sexes; and heterosexuals, attracted to some members of the opposite sex.
- **Straight ally:** Any non-LGBTQ person who supports and stands up for the rights of LGBTQ people.
- **Transgender:** A broad term that includes transsexuals, cross-dressers, drag queens/kings, and people who do not identify as either of the two biological sexes (as currently defined) or whose identity crosses the genders.

4. Domestic Abuse and Culture

While an exhaustive discussion of cultural issues is beyond the scope of this manual, it would be remiss not to point out some of the prevailing issues surrounding domestic abuse and culture.

Excerpted from *From Sensitivity to Competency: Clinical and Departmental Guidelines to Achieving Cultural Competency*, National Resource Center on Domestic Violence, wherein Sujata Warriar, PhD, and JoEllen Brainin-Rodriquez, M.D., prepared the following summation for the Family Violence Prevention Fund:

Culture: Culture is a complex term, having different meanings to different individuals. Traditionally, culture has been often thought of as a pattern of beliefs, attitudes and behaviors

that are transmitted from generation to generation for the purpose of successfully adapting to society. The traditional definition was applied most frequently to racial and ethnic communities. More recently, the term “culture” has come to be recognized as fluid and heterogeneous, not bound by time and geography.

For the purposes of these guidelines, “culture” refers to the shared experiences or other commonalities that groups of individuals based on race, ethnicity, sexuality, class, disability status, religion, age, immigration, and other axes of identification have developed in relation to changing social and political contexts. These guidelines use the contemporary concept of culture, recognizing that it is multifaceted, often changing and contains contradictory elements.

Competence: Competence refers to a set of attitudes, knowledge and behaviors on the part of the professional that reflect openness about difference and about power differential.

Cultural competence: Cultural competence refers to the process by which the provider:

- Combines general knowledge with specific information provided by the victim about his or her culture;
- Incorporates an awareness of one’s biases; and
- Approaches the definition of culture with a critical eye and an open mind.

Whatever language is spoken in the home, the same message must be sent: Domestic abuse is a crime. As prosecutors, it is our responsibility to assert that message. Because domestic abuse does not discriminate across racial, ethnic or class boundaries, neither must prosecutors. We must ensure that investigators treat victims with respect. Children of victims should never be used as translators for their parents.

The United States is becoming increasingly multicultural. Projections estimate that by 2050, minorities will comprise approximately 47.5% of the United States population and by the year 2056, whites will no longer represent a majority in the population. R. Lavizzo-Mourey and E.R. MacKenzie, *Cultural Competence: Essential Measurements of Quality for Managed Care Organizations*, 1124 ANNALS INTERNAL MED., 919-21 (1996).

In their presentation for the National College of District Attorneys (2001), “Advocating for Members of Underserved Communities,” Attorney Rolanda Pierre Dixon and Deborah Tucker instruct that all systems must work together to assist victims of diverse backgrounds in the most helpful and least destructive manner. In so doing, prosecutors must understand the hesitation of ethnic minorities in resolving their conflicts through the criminal justice system. For that reason, a large percentage of abuse cases go unreported. Dixon and Tucker suggest that prosecutors, at a minimum, understand the following aspects of different cultural groups:

African-American families may display the following characteristics:

- A distrust of the judicial system;
- The myth of the strong matriarch;

- Lack of community support for cooperation with law enforcement and prosecution;
- Lower income; and/or
- Varying definitions of the term “abuse.”

Asian / Southeast Asian families may display the following characteristics:

- A strong sense of community.
- A distrust of “outsiders” and fear of “loss of face”;
- Inability to access resources because of a language barrier or cultural differences (shelters that limit the numbers of family members they will accept, earnings requirements, family vs. individual needs);
- Financial limitations;
- Immigration issues; and/or
- Varying definitions of the term “abuse.”

Hispanic families may display the following characteristics:

- Lack of family support for victims;
- Inability to access resources due to a language barrier;
- Financial limitations;
- Immigration issues; and/or
- Varying definitions of the term “abuse.”

Native American families may display the following characteristics:

- Cultural differences between tribes;
- Lack of family or community support for victims; and/or
- Varying definitions of the term “abuse.”
- In addition, government involvement in Native American lives spurs the question: Who is really the enemy?

Overall desire of all groups: Keep the family intact

Immigrant victims face a similar set of issues. However, fear of deportation is of utmost concern. Important to note is Title 4 of the Violence Against Women Act, 8 CFR § 216.5(e)(3). That portion of the Act allows a spouse or child to seek a legal immigration classification if he or she has been battered by, or subject to extreme cruelty committed by, a citizen or lawful permanent resident spouse or parent. The victim may become eligible for lawful permanent resident status. The U-visa, addressed in a subsequent chapter, is another option available to victims of domestic abuse.

If faced with an immigrant victim or a person that you sense may be in need of further support, it is always wise to seek the assistance of a victim advocate who can link that victim to appropriate resources.

For further information or assistance, you can also contact:

- National Domestic Violence Hotline at 1-800-799-SAFE.
- Wisconsin Coalition against Domestic Violence at 608-255-0539 or www.wcadv.org.
- The Futures Without Violence (formerly known as the Family Violence Prevention Fund) at 415-678-5500 or <http://www.futureswithoutviolence.org/>.
- Legal Momentum (formerly known as The Women's Legal Defense & Education Fund) at 202-925-6635, <http://www.legalmomentum.org/>.
- Ayuda Inc. (Legal Aid) at 202-387-4848 or www.ayudainc.org.
- National Immigration Project of the National Lawyers Guild at 212-679-5100, or <http://www.nlg.org>.
- National Network for Immigrant and Refugee Rights at 510-465-1984, or <http://www.nnirr.org>.
- National Immigration Law Center at 213-639-3900, or <http://www.nilc.org>.
- National Immigration Forum at 202-347-0040, or <http://www.immigrationforum.org>.

42. U-visas

1. Introduction
2. Eligibility
3. Certification Requirement
4. Crimes Covered by the U-visa
5. What the U-visa Does

1. Introduction

The U-visa was created in the Victims of Trafficking and Violence Prevention Act, 8 U.S.C. § 1513 (2000). The Act states that the U-visa “will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of [crimes] while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.” 8 U.S.C. § 1513(a)(2)(A).

The creation of the U-visa acknowledges that it is virtually impossible for officials who work in law enforcement and justice systems or other government enforcement agencies to punish and hold accountable perpetrators of crimes against non-citizens if the abusers and other criminals can avoid prosecution because their victims risk being deported. The U-visa encourages immigrant victims to report criminal activity while providing safety to the community by holding perpetrators accountable for criminal activity that may otherwise go undetected. These visas work well for those victims who do not reach the residency requirements of a Violence Against Women Act (VAWA) Self-Petition.

As a crime-fighting tool, the U-visa reinforces an agency’s commitment to victim safety, protection, and recovery from trauma. Victims who are out of status are more likely to report crimes if they have no reason to fear that doing so could cause them to be deported; the community will be safer as a result.

Specifically, law enforcement and prosecutors can use the U-visa to:

- Create trust between law enforcement and immigrants generally.
- Help seriously harmed victims recover and rebuild their lives.
- Remove the impunity enjoyed by perpetrators who prey on immigrant populations and neighborhoods, making those neighborhoods more accessible to police.
- Encourage reporting and cooperation by a particular victim in a particular investigation or prosecution. The U-visa helps victims cope with issues that create barriers to cooperation, such as insecurity, fear, or logistical issues.

2. Eligibility

To be eligible for a U-visa, immigrant victims must meet four statutory requirements and they must include with the application a certification from a certifying official or agency that they have been, are being, or are likely to be helpful in the detection, investigation, or prosecution of a qualifying criminal activity.

The law requires that a person who is eligible for a U-visa must:

- Have suffered substantial physical or mental abuse as a result of having been a victim of a listed criminal activity;
- Possess information concerning such criminal activity;
- Have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of a crime; and
- Have been the victim of criminal activity that occurred in the United States or violated the laws of the United States.

INA § 101(a) (15) (U); 8 U.S.C. § 1101(a) (15) (U).

Note that neither the immigration status of the victim nor the perpetrator is relevant. If the petitioner is under sixteen years of age, incapacitated, or incompetent, he or she is not required to personally possess information regarding the qualifying criminal activity. In these cases, an exception permits a parent, guardian, or “next friend” of the minor, incapacitated, or incompetent petitioner to provide information and assist in the investigation or prosecution. *See* INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

3. Certification Requirement

The U-visa statute requires that federal, state, or local law enforcement officials and prosecutors are qualified to provide certifications for victims filing U-visa applications. Law enforcement officials are the first responders to immigrant victims of crime. Police departments, sheriffs’ offices, marshals, prosecutors, etc. have first-hand knowledge of a victim’s helpfulness in reporting the crime and participating in any subsequent investigations. Therefore, law enforcement officials and prosecutors are well-positioned to provide U-visa certifications and verify a victim’s helpfulness in detecting or investigating qualifying criminal activity. By providing U-visa certifications, law enforcement officials and prosecutors add to their arsenal of crime-fighting tools, as immigrant victims will then feel safer coming forward to report crimes.

The U-visa mandatory certification form, called the I-918, must be signed by the appropriate person from the appropriate certification agency in order for the application to be complete. The certifying official must be the head of the agency or a designated supervisor. The agency must verify that the petitioner has cooperated in one of the three accepted ways in the investigation or prosecution of a qualifying criminal activity.

U-visa status does not require the actual initiation of a law enforcement investigation, nor does it require a successful prosecution. In some cases, investigation or prosecution of criminal activity is impossible because of an inability to locate an offender or the offender being deported prior to the investigation or prosecution of a case. U-visa status can be granted even when prosecutors decline to charge perpetrators or if they decide to prosecute unrelated crimes. The discretion that investigators and prosecutors have to investigate and choose whether or not to prosecute criminal activity in any particular case, does not negate the assistance, cooperation, and helpfulness that a victim may have provided, or was willing to provide, regarding that criminal activity.

4. Crimes Covered by the U-visa

A non-exhaustive list of qualifying criminal activities is provided in the statute. These include: rape, torture, trafficking, incest, domestic abuse, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, holding someone hostage, peonage, involuntary servitude, slave trade (often known as human trafficking), kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, solicitation to commit any of the above-mentioned crimes, or any similar activity in violation of federal, state or local criminal law. The list also includes attempts or conspiracy to commit any of the activities listed above. INA § 101(a)(15)(U)(iii). There is no statute of limitations on the qualifying crime. Moreover, there only needs to be “any credible evidence” that the crime occurred.

Because Wisconsin law uses different wording than some of the crimes specified in the U-visa statute, it is the spirit of the law that requires attention. For example, the statute lists domestic abuse as a U-visa qualifying crime. In Wisconsin, other charges such as the domestic disorderly conduct or battery would equate “domestic abuse,” even though these crimes are not specifically enumerated in the U-visa list.

5. What the U-visa Does

If approved for a U-visa, an applicant will receive legal immigration status for up to four years. This status will permit the crime victim to live and work in the United States for the duration of the U-visa. At the end of the third year, the U-visa recipient may be eligible to apply to adjust his or her status to lawful permanent resident (“green card” holder). Receiving a U-visa does not directly or necessarily grant lawful permanent residency. Lawful permanent residency will be granted only to those U-visa recipients who can provide evidence that they have not unreasonably refused to provide assistance in the criminal investigation or prosecution, and that their continuous presence in the country is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

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43. Links Between Animal Cruelty and Domestic Abuse

1. Introduction and Background
2. Defining Cruelty to Animals
3. Psychological and Sociological Bases for Animal Abuse
4. Causes of Animal Abuse
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6. Animal Abuse Evidence at Trial
7. How to Prove Animal Abuse
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1. Introduction and Background

“The greatness of a nation and its moral progress can be judged by the way its animals are treated.” - Mahatma Gandhi

There is an undeniable link between cruelty to animals and domestic abuse. This chapter will look at the studies showing the link between animal abuse and abuse or violence to other people. It will discuss the definition of animal abuse in Wisconsin, the penalties, and some categories of animal abusers. Finally, the chapter will discuss discovering, developing and using animal abuse evidence in domestic abuse cases. When there is evidence of animal abuse or a history of animal abuse, along with a history or allegations of domestic abuse, the animal abuse evidence can be strong evidence that the offender is, in fact, an abuser, and it can be a powerful tool for prosecutors.

“No matter whether abuse is targeted at an animal or a person, the issue is still the same: power, control, and preying on the vulnerable.”

Angela Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 BCL REV. 463 [*hereinafter* Campbell].

It stands to reason that someone who acts violently toward or abuses animals is more likely to be violent generally. In a study done by the Humane Society of the United States, it was found that almost three in ten animal abusers also hurt people, most often their children or their wives. This connection to domestic abuse was first recognized in the late 1970s by the Federal Bureau of Investigation. *See* Campbell, at 463. Police officers, social workers, and probation agents who

work closely with violent offenders know that child abuse and animal abuse often go hand-in-hand, according to Sherry DeGenova, a Hartford, Connecticut Animal Control Officer. *Id.* Miranda Lockwood, a Senior Vice President of the Forensic Science Section of the American Society for the Prevention of Cruelty to Animals (ASPCA) and Anti-Cruelty Projects has studied this area for some time. According to Lockwood, there is a fifty percent overlap between animal abuse and domestic abuse. In addition, seventy percent of pet-owning women who spent time at shelters for battered women reported that their dog or cat was abused. According to the FBI, eighty percent of the violent offenders they process had previous incidents of animal abuse. *Id.*

A study conducted by Carter Luke and sociologists Arnold Arluke and Jack Levin of the Massachusetts Society for the Prevention of Cruelty to Animals examined the records of that agency for the years 1975 to 1996, and identified 153 men who had been prosecuted for animal cruelty. C. Luke, A. Arluke and J. Levin, *Cruelty to Animals and Other Crimes: A Study by the MSPCA and Northeastern University* (Massachusetts Society for the Prevention of Cruelty to Animals 1997). They compared the criminal records of those men to a group of “next-door neighbors,” (men who were similar in age, ethnic background, neighborhood and economic standing status). *Id.* The study’s findings were convincing: “Men who abused animals were five times more likely to have been arrested for violence against humans, four times more likely to have committed property crimes, and three times more likely to have records for drug and disorderly conduct offenses.” *Id.*

The link between animal abuse and abuse to other people is clear, and studies presented later in this chapter give us more detail about that link. But in order to really understand this phenomenon, it is necessary to start with a broad understanding of cruelty to animals.

2. Defining Cruelty to Animals

Cruelty to animals in a domestic abuse situation covers much more than abuse to pets; it is defined in Chapter 951 of the Wisconsin Statutes. WIS. STAT. § 951.02 says: “No person may treat an animal, whether belonging to the person or another, in a cruel manner.”

“Cruel” is defined in WIS. STAT. § 951.01(2) as “causing an unnecessary and excessive pain or suffering or unjustifiable injury or death.”

The statutes also provide other, more specific ways that one can be cruel to an animal:

- WIS. STAT. § 951.06: Introducing or exposing any domestic animal to a poisonous substance.
- WIS. STAT. § 951.08: Instigating fights between animals.
- WIS. STAT. § 951.09: Shooting at staked animals.

Animal abuse, as defined in Chapter 951, also includes neglect of animals. For example, it is a crime to fail to provide proper food and drink to confined animals, and to fail to provide proper shelter to animals (i.e., temperature, ventilation, shelter from inclement weather, space requirements and sanitation), although minimum standards are not clearly delineated.

Note that proving negligent mistreatment of animals is very difficult. The standard is criminal negligence (defined in WIS. STAT. § 939.01(1)), which requires the belief that the act may cause death or great bodily harm to another *person*. On the other hand, however, the statutes seem to allow charging someone under the same statute with intentionally neglecting an animal. Normally, we don't see neglect cases linking with domestic abuse cases. We are more likely to see animal neglect cases intersect with mental health (i.e., hoarders) and drug cases. This chapter will not deal with animal neglect, however; it only addresses animal abuse.

Chapter 951 creates penalties for animal abuse, which are graduated based on certain aggravating factors. Almost all the criminal statutes for abuse and neglect allow for a simple violation to amount to a Class C forfeiture (up to \$500 plus costs). When the person intentionally or negligently violates any of the abuse or neglect sections, that person may be guilty of a Class A misdemeanor. When the person intentionally violates the animal abuse statute (WIS. STAT. § 951.02), and the abuse results in the mutilation, disfigurement or death of an animal, that person might be guilty of a Class I felony. Accordingly, mistreatment or cruelty to animals is usually charged as an intentional crime, and penalized based on the harm that was done.

Animal abuse cases often trigger extreme and profound reactions from the public and the media, and from the accused person as well. For whatever reason, animal abuse cases garner media attention and generate citizen letters to the editor, letters to the prosecutor, and letters to the police, often including demands for very, very strong penalties. In cases where animal abuse charges are paired with domestic abuse charges, the public often reacts strongly to the abuse of the animal, and virtually ignores the abuse to the domestic partner, or even a child victim. Interestingly, the public often views animal abuse as more outrageous than abuse to a domestic partner. Similarly, the public has a hard time seeing the “guy down the street” as an animal abuser, and offenders themselves will often admit more readily to domestic abuse than animal abuse.

3. Psychological and Sociological Bases for Animal Abuse

There are various types of animal abuse. The most commonly prosecuted type is physical abuse, where the abuser throws or hits the animal, or uses a device to beat the animal, causing pain and suffering. In 2005, Dr. Susan Krebsbach, a Doctor of Veterinary Medicine, conducted training regarding “The Effect of Domestic Violence on Pets and their People;” the similarity to domestic abuse was startling. Susan B. Krebsbach, D.V.M., *The Silent Victims: The Effect of Domestic Violence on Pets and their People*, April 23, 2005, presentation at “The Abuse Connection: Helping Practitioners Understand, Recognize, and Address the Link Between Family Violence and Animal Abuse” (PowerPoint presentation on file with Paul Humphrey, ADA, Dane County) [*hereinafter* Krebsbach].

Dr. Krebsbach talked about some indicators of animal abuse and physical signs, the most common of which are:

- Kicking;

- Punching;
- Beating with an instrument; and
- Throwing the animal (across the room, downstairs, or out of the window or out of a vehicle).

Krebsbach, *supra*.

Dr. Krebsbach talked about how animals often suffer in silence like babies and young children who cannot speak for themselves. *Id.* Due to the lack of any outward observable clinical signs or pathology, animal abuse may persist for some time before it is detected. *Id.* Plus, veterinarians sometimes feel torn between a responsibility to both the pet and the human client, who may be the abuser.

Dr. Krebsbach also spoke about the behavioral signs of animal abuse. *Id.* The animal may show fear of a guardian or a family member, including behavior such as hiding, trembling, running away when approached, or snapping. *Id.* The animal may appear subdued or openly frightened in a person's presence, but may become open, happy, and affectionate at other times. *Id.* Sometimes animals will be overly aggressive or overly defensive. *Id.* Finally, look for other care issues relative to the pet, such as oozing sores, unusual stool and urine patterns, and so on. *Id.*

Abuse can also be in the form of withholding veterinary care. *Id.* In a domestic abuse situation, abusers may use the withholding of care to a beloved pet of the victim as a way to control that person. Finally, dog fighting or other fighting cases are a special type of abuse, because of the obvious extreme cruelty and suffering to the animal.

4. Causes of Animal Abuse

There are four basic categories of animal abusers:

- Accidental abusers;
- Abusers who see animals as tools or machines;
- Those who abuse because of a personality disorder; and
- Those who abuse for power and control reasons.

The first two on the above list generally do not link to domestic abuse. Sometimes, animals are abused accidentally, and sometimes the abuse isn't really seen as abuse at all. In some areas and cultures, even in the United States, a person acting in what many of us would consider an abusive way may view his or her animals as commercial items, merchandise, machines, or tools, rather than as living things with feelings. That person may be concerned with the well being of the animal only as a function of its commercial or utilitarian use. Often this type of behavior is seen on ranches, farms and in rural areas, where what may seem cruel to some people might be more culturally acceptable to others.

Perhaps the most extreme subset of this group is the animal fighters, who use their animals cruelly almost by definition, and see their animals as mere weapons. These abusers may cross over into the next group, those with personality disorders.

Many animal abusers do so because they have a personality disorder. The Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”) characterizes animal abuse not just as a phenomenon, but as an actual clinical diagnosis. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed., text revision (2000) (*hereinafter* DSM-IV). Animal abuse may be the result of a minor personality flaw in the abuser, or the symptom of a deep mental disturbance. As early as 1987, the DSM-IV began characterizing animal abuse as one of the criterion of a diagnosis of a “conduct disorder.” AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed., text revision (1987).

Often this personality disorder begins when an abuser is young. Because abusers are often male, the excuse “boys will be boys” is often given when adolescents and pre-adolescents hurt animals for what appears to be sport; this behavior is often viewed as “harmless.” However, it may also be much more. The Columbine High School shooters Eric Harris and Dylan Klebold, for example, boasted about mutilating animals. *See Animal Abuse & Human Abuse: Partners in Crime: Information for Prosecutors, Judges, and Law-enforcement Officers*, People for the Ethical Treatment of Animals (PETA), available at <http://www.mediapeta.com/peta/PDF/AnimalAbuseHumanAbuse.pdf>. In addition, the infamous serial killers Jeffrey Dahmer, Ted Bundy, David Berkowitz (aka the Son of Sam) and Joseph DeSalvo (the Boston Strangler) were discovered to have been abusive with animals in their youth. *Id.*

The following examples (some of which are close to home, unfortunately) link animal abuse to later anti-social and dangerous behavior:

- Serial killer and sexual deviant Jeffrey Dahmer, who confessed to killing, dismembering, and in some cases cannibalizing seventeen men and boys, impaled frogs, decapitated dogs, and staked cats to trees in his backyard as a youngster.
- Serial killer and rapist Theodore Bundy, who was ultimately convicted of two murders, but was suspected of killing over forty women, witnessed his father’s brutality toward animals as a child and tortured animals himself.
- Serial killer David Berkowitz (New York City’s “Son of Sam” gunman, who pled guilty to thirteen charges of murder and attempted murder) had earlier shot a neighbor’s Labrador dog.
- Lee Boyd Malvo, who was involved in the 2002 Washington, D.C., sniper attacks, reportedly hunted and killed stray cats, starting before the age of ten.

Richard T. Girards, *Animal Cruelty*, American Prosecutors Research Institute (*citing* THE HUMANE SOCIETY OF THE UNITED STATES, *THE TANGLED WEB OF ANIMAL ABUSE: THE LINKS BETWEEN CRUELTY TO ANIMALS AND HUMAN VIOLENCE* (1997)). *See also* People for the Ethical Treatment of Animals (PETA), *Animal Abuse & Human Abuse: Partners in*

Crime: Information for Prosecutors, Judges, and Law-enforcement Officers, available at <http://www.mediapeta.com/peta/PDF/AnimalAbuseHumanAbuse.pdf>.

Robert K. Ressler, founder of the Federal Bureau of Investigation's Behavioral Sciences Unit, has stated that while murderers kill for many reasons, "very often they start out by killing and torturing animals as kids." People for the Ethical Treatment of Animals (PETA), *Animal Abuse & Human Abuse: Partners in Crime: Information for Prosecutors, Judges, and Law-enforcement Officers*, available at <http://www.mediapeta.com/peta/PDF/AnimalAbuseHumanAbuse.pdf>.

Of course it's easy to look backwards from serial murderers or significant domestic abuse cases, see animal abuse in the offender's background, and draw certain conclusions. What is much harder is to recognize animal abuse at an earlier time as an indicator of a person with a personality disorder or as a potential domestic abuser.

Most prosecutors' offices and police departments can recount an anecdote of at least one horrific animal abuse case that suggested this type of personality disorder; often it is tied to a domestic abuse situation. In a Dane County case, the defendant was convicted of felony animal abuse for, among other things, breaking the leg of one small dog belonging to his domestic partner, and poking out the eye of another of her dogs using a knitting needle. The defendant would sneak out of the bed that he shared with the victim and abuse the two dogs at night. His actions ultimately caused the death of one of the dogs and the crippling of the other. The next morning, the defendant would act as if he was surprised that the animals were injured and volunteer to take the animals to the vet. The victim in the case took a long time to see that the defendant was the only one in a position to have abused the animals. She could not believe that the defendant, with whom she shared her bed and who seemed so concerned about the injuries to her beloved pets, could be so disturbed and violent. Here, the defendant had a personality disorder, had injured animals as a child, and was acting out because he was bigger and stronger, and out of jealousy because the dogs held a very close relationship with his partner.

[M]ale perpetrators were involved in 71% of all animal abuse cases and 87% of cases involving intentional abuse. Females perpetrated 49% of the neglect cases Eighty-four percent of all incidents involved adults and 16% were adolescents or children. Data suggest that law enforcement agencies and the media may be seriously overlooking the extent to which violence against animals may be perpetrated by juveniles.

Richard T. Girards, *Animal Cruelty, American Prosecutors Research Institute* (citing The Humane Society of the United States, *THE TANGLED WEB OF ANIMAL ABUSE: THE LINKS BETWEEN CRUELTY TO ANIMALS AND HUMAN VIOLENCE* (1997)).

"Animal Abuse is symbolic homicide. They're practicing a murder in their head. When you see that, you realize that this is a dangerous situation." Michael Lindsey, Domestic Violence Administrator, Miami Police. . . . "Some offenders kill animals as a rehearsal for targeting human victims and may kill or torture

animals because to them, the animals symbolically represent people.” FBI Special Agent Alan C. Brantley.

People for the Ethical Treatment of Animals (PETA), *Animal Abuse & Human Abuse: Partners in Crime: Information for Prosecutors, Judges, and Law-enforcement Officers*, available at <http://www.mediapeta.com/peta/PDF/AnimalAbuseHumanAbuse.pdf>.

The purposeful abuse of animals should be seen for what it is: a person who is acting out in a violent way towards another living thing, one who is smaller and less powerful than the abuser.

The personality disorder that allows a person to abuse animals signals a developing likelihood that the abuser will progress to abusing a domestic partner. Serious animal abuse may go beyond just a personality flaw in the abuser; it may also be a symptom of a deeply disturbed family. Phil Arkow, *BREAKING THE CYCLES OF VIOLENCE*, The Latham Foundation (1995). This personality disorder may be the same one that leads to domestic abuse. For more on this connection, see Frank R. Ascione, Ph.D., *Latham Letter, Winter of 1996, in Domestic Violence and Cruelty to Animals*. See also People for the Ethical Treatment of Animals (PETA), *Animal Abuse & Human Abuse: Partners in Crime: Information for Prosecutors, Judges, and Law-enforcement Officers*, available at <http://www.mediapeta.com/peta/PDF/AnimalAbuseHumanAbuse.pdf>.

5. Power and Control Basis for Animal Abuse

Although it is closely related to the personality disorder reasons for animal abuse, and coupled with the notion that a person who is violent towards animals is generally violent, the closest link between animal abuse and domestic abuse is the abuse of animals based on power and control.

“Power and control” issues relate to self-esteem and the exertion of power over smaller, weaker beings to maintain or reaffirm that power. Abusing animals can be a form of substituting violence towards a smaller living creature instead of physically harming a human victim, but abuse or the threat of abuse of a beloved pet can also be a form of control and intimidation of another person. The abuse may be just to provoke fear, or a way to prevent the victim from revealing the abuse. Abusers can act out through jealousy because the beloved pet occupies a closer position to the victim than the abuser, as in the Dane County case mentioned earlier. Domestic abuse victims may cling to their pets as their “only true friend,” because that pet does not hurt the victim. In the end, these are all manifestations of power and control.

Animal abuse in a domestic abuse setting is not that unusual. It is extremely likely that an animal or pet will be living in a home that contains domestic abuse. Statistics show that dogs live in 34.6 million American homes, and cats live in 29.2 million American homes. Phil Arkow, *BREAKING THE CYCLES OF VIOLENCE*, The Latham Foundation (1995). Including other pets such as birds, horses, and small animals (such as hamsters, rabbits, and the like), pets now live in 54.8 million American households. *Id.* Parents with children comprise 50% of pet-owning households. *Id.*

A 1995 study of battered women in Wisconsin revealed that in four out of five cases, abusive partners had also been violent towards pets or livestock. Turner, *Animal Abuse and the Link to Domestic Violence*, THE POLICE CHIEF, 28 (June 2000). In most situations, the women indicated that the abuse of the animals had been carried out in front of them and their children. *Id.* In addition, the abusive parties often threatened to give away the pets as a way to control victims. *Id.* A study of families receiving services for child abuse showed that pets had been abused in 60% of those families. Phil Arkow, *Breaking the Cycles of Violence*, The Latham Foundation, Alameda, CA (1995). In 88% of families in which physical abuse of humans occurred, an animal was also abused. *Id.* In another study, 23% of women entering domestic abuse shelters and 11% of women seeking restraining orders reported that animals had been abused or killed in their homes. *Id.*

[C]ases of animal abuse were nearly equally divided between intentional abuse (beatings, torture) and extreme neglect (starving, failure to provide care). In cases of intentional cruelty, the most common offenses involved shooting (25%); beating, kicking or dragging (25%); drowning, hanging, choking or crushing (approximately 15%); and stabbing, beheading, or mutilating (approximately 15%).

Richard T. Girards, *Animal Cruelty*, American Prosecutors Research Institute (citing The Humane Society of the United States, THE TANGLED WEB OF ANIMAL ABUSE: THE LINKS BETWEEN CRUELTY TO ANIMALS AND HUMAN VIOLENCE (1997)).

In another Dane County case, a defendant, over time, took each of his domestic partner's kittens and suffocated them in coffee cans in the trunk of his car. He did this in order to make a point and to control the behavior of his victim. This is the power and control that lies at the heart of domestic abuse.

When an abuser threatens, abuses, or kills an animal, several messages are relayed to the human victim. Animal abuse or threats to abuse display the domination and control which the abuser wields over the victim. Abuse of a pet frequently manipulates a partner or a child into compliance with the abuser's wishes. Animal abuse frightens, intimidates, punishes, or leads to retaliation against a partner or child. Melissa Trollinger, *The Link Among Animal Abuse, Child Abuse, and Domestic Violence*, 30-SEP COLO. LAW. 29, 30 (2001).

6. Animal Abuse Evidence at Trial

How can evidence of animal abuse help the prosecutor in a domestic abuse trial? Because there are so many studies showing a strong link between animal abuse and domestic abuse, and due to the common reaction of the public to hearing about animal abuse, using animal abuse evidence at trial can be extremely helpful. Convincing a jury that the quiet, well-behaved, nicely dressed defendant sitting in front of them in court is, at his or her core, an abuser is one of the most important aspects at trial. This is especially true when the victim recants. "The solution to a violent home lies in the characterization of the offender as an abuser, rather than each individual

victim as an abused [person].” Charlotte Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 3 (1998).

The best and easiest way to use animal abuse evidence in a domestic trial is to file criminal charges for that behavior. While charging criminal abuse brings public scrutiny to a zenith, proof of animal abuse makes it very difficult for a defendant to argue that he or she is not an abuser. The notoriety may cause problems in some trials, particularly against the defendant. Evidence of animal abuse casts the defendant as an abuser. As the studies show, and as the public knows, it is a short step from animal abuse to domestic abuse.

The second way to use animal abuse evidence at trial in a domestic case is as “other acts” evidence, or *Whitty* evidence under WIS. STAT. § 904.04(2). *Whitty v. State*, 34 Wis. 2d 278 (1967). See also *State v. Sullivan*, 216 Wis. 2d 768 (1998); Wisconsin Jury Instruction-Criminal 275. Many courts don’t like to admit *Whitty* evidence, and there will probably need to be a motion hearing to show both the connection and the sociological link between animal abuse and domestic abuse.

Other acts evidence under WIS. STAT. § 904.04(2) is evaluated based on *State v. Sullivan*, in which the Wisconsin Supreme Court outlined a three-part test for the admission of other acts evidence (first, whether it is offered for an acceptable purpose under the statutes; second, whether it is relevant under WIS. STAT. § 904.01; and, third, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant). *Sullivan*, 216 Wis. 2d 768, 789, 790 (1998).

The sociological data presented earlier in this chapter shows the relevance to the abuse and whether this defendant is an abuser. Then the question becomes whether it is evidence of motive, intent, preparation, plan, or absence of mistake or accident, or to complete the picture. The evidence must be material and probative, and it must add something to the case. The lower the probative value, the more likely it is that the evidence you seek to admit will be “substantially outweighed” by unfair prejudice, confusion, or other considerations. Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence*, Section 403.1 at 11.4 (2d ed. 2001). In order for the evidence to be admitted, there must be a strong connection with the proof.

- Plan: Part of common scheme or ploy. See, e.g., *State v. Balisteri*, 106 Wis. 2d 741 (1982); *State v. DeKeyser*, 221 Wis. 2d 435 (Ct. App. 1998).
- Motive: A state of mind that causes a person to act a certain way. See, e.g., *State v. Fishnick*, 127 Wis. 2d 247 (1985).
- Intent: Similar incidents show the defendant didn’t blunder into this. *State v. Roberson*, 157 Wis. 2d 447 (Ct. App. 1990).
- Absence of mistake or accident. See generally *State v. Evers*, 139 Wis. 2d 424, 443 (1987).
- To complete the picture. In *State v. Foster*, 915 P.2d 567 (Wash. App. 1 1996) and in *State v. Pugsley*, 911 P.2d 762 (Idaho App. 1995), the defendants used animal abuse as a threat to children in order to control them and in order to prevent them from telling anyone about the abuse. In both cases, the trial courts

admitted the other acts evidence, in part because it provided a complete picture of the charges of abuse. The evidence also helped to explain why the victims delayed in disclosing the abuse. Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C. L. REV. 463, 482 (2002). See also *State v. Pharr*, 115 Wis. 2d 334 (1983).

The evidence may also be admissible as character evidence under WIS. STAT. § 906.08, if the defense raises the defendant's character as an issue at trial.

The evidence should include photos and veterinary records of the animal. Prosecutors need to tie this to the crime by the timing, a threat, or through the victim's testimony. Is it the prosecution's theory that the defendant beat the animal in order to make a point to the victim? Did the defendant make a threat to the victim regarding the animal? Was the victim intimidated by the injuries sustained by the pet? Does the animal abuse explain a late report or recant? We need to establish the circumstances surrounding the other act, in this case the animal abuse, to make it relevant to the crime charged. Finally, a limiting instruction can be used to instruct the jury not to use the other acts evidence as general character evidence or propensity evidence. *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990); *State v. Pitsch*, 124 Wis. 2d 628 (1985).

Once we have probative evidence that relates to one of the elements, the final part of the three-part *Sullivan* test is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. The *Sullivan* Court described "unfair prejudice" this way:

Unfair prejudice results when the proffered evidence has a tendency to influence the jury by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Sullivan, 216 Wis. 2d 768, 789-90 (1998).

Keep in mind that the very proof needed to show the abuse the best may be photographs and veterinary records. This is also the very same evidence the court may consider to be overly prejudicial.

In *State v. Sanchez*, a domestic homicide case, the State introduced testimony that the Sanchez bit the head off a live racing pigeon and strangled the dog. *Sanchez*, unpublished, 441 N.W.2d 756 (1989). The State moved for admission of this evidence to show that the victim and the witness who reported it were afraid of Sanchez. *Id.* The trial court admitted the evidence, agreeing that it was relevant to the witness' fearful state of mind and his nine years of silence regarding the animal abuse. *Id.*

In *State v. Bellows*, Theresa Bellows was convicted of child neglect and negligent treatment of an animal for failing to provide proper shelter. *Bellows*, 218 Wis. 2d 614, 582 N.W.2d 614 (Ct. App. 1998). The Bellows home was in poor and unsanitary condition, and the Wisconsin Court

of Appeals determined that both the animal mistreatment and the child neglect charges were based on the same act or transaction. *Bellows*, 218 Wis. 2d at 624. The court analyzed the prejudice to determine if it was unfair and sufficient, and concluded that the defendant did not submit enough evidence to overcome the probative value. *Id.* The Court of Appeals found that evidence to support the animal mistreatment charges could also be used as evidence to show child neglect. *Id.*

In conclusion, animal abuse may be relevant and admissible to the State as evidence in a criminal prosecution for domestic abuse:

- When the defendant places the victim's or the witness' credibility at issue due to his/her failure to timely report the abuse or fear, etc.;
- If a victim or witness recants prior statements, evidence of animal abuse can show the context of why that person might recant;
- To prove any other exceptions under WIS. STAT. § 904.04(2); and/or
- The prejudicial effect of evidence of animal abuse may be softened by a curative instruction because it is not used to prove that the defendant is a bad person, but to explain the victim's actions.

7. How to Prove Animal Abuse

Proving animal abuse can be an expensive and frustrating proposition, but the first step is detection. The police have to know to look for animal abuse, and then they need to know what to look for and how to recognize it.

To properly prove animal abuse, it is very important to document it independently from the statements of the victim, either with photographs and veterinary reports or a necropsy. These are expensive, but it is preferable to have concrete proof of actual injuries to the animal, as well as an indication of where those injuries might have come from or how they occurred. Sometimes, animals have to be removed from the home if they are severely injured, so they can recover in a safe place. Keep in mind that by allowing treating an animal and allowing it to recover, veterinarians are in essence destroying the evidence of the abuse. This is why it is so critical to preserve the evidence of the abuse at the time it occurs, with photos, tissue samples, veterinary reports and testimony of witnesses.

Veterinary records are important and powerful evidence because these are generally reports of the veterinarian who treated the animal regularly, or perhaps who had not been treating the animal regularly. Sometimes a veterinarian will attempt to claim some sort of doctor-patient privilege, but there is no legal basis for that claim when the patient is an animal. The owner of the animal may be a client of the veterinarian, but the person is not the patient, so the policies behind the doctor-patient privilege do not apply. Many times, the family veterinarian might initially object to turning over veterinary records, but may only be looking for some sort of court order, such as a subpoena for documents or a search warrant, to require them to turn the records over. Keep in mind that often veterinary records show certain clinical findings and observations,

but do not contain the veterinarian's diagnosis, opinion, or causes of injuries. That information may need to be obtained from the veterinarian by interview.

8. Conclusion

Animal abuse is strongly linked to domestic abuse. The studies prove this, and anecdotally we can see that the violence that goes into animal abuse is likely the same that goes into violence against humans, be it domestic abuse, child abuse, or even homicide. Animal abusers may have a personality disorder, but it is the power and control issues that are most compelling and create the strongest link between the two kinds of abuse.

Evidence of animal abuse can be very powerful for a prosecutor who wishes to show the jury that the defendant is an abuser, particularly when that evidence is paired with all of the studies and findings regarding the link between abusing animals and abusing humans. At the same time, it may be rare when you can actually charge an animal abuse case and provide that backdrop or link to the abuse of a human victim.

Additional Resources

American Humane Association, *Animal Abuse & Domestic Violence*, available at <http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/animal-abuse-domestic-violence.html>.

American Prosecutors Research Institute (APRI), Special Topics Series, *Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence*, U.S. Department of Justice and ASPCA (2006), available at http://www.ndaa.org/pdf/animal_cruelty_06.pdf.

A. Arluke, J. Levin, C. Luke & F. Ascione, *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, 14 J. INTERPERSONAL VIOLENCE 963-75 (1999).

CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION (F.R. Ascione and P. Arkow, eds.) (1999).

Bill C. Henry, *The Relationship between Animal Cruelty, Delinquency, and Attitudes toward the Treatment of Animals*, 12 SOC. & ANIMALS 185-207 (2004), available at https://www.animalsandsociety.org/assets/library/537_s1231.pdf.

People for the Ethical Treatment of Animals, *Human Abuse Linked to Cruelty to Animals*, available at <http://www.peta.org/issues/companion-animals/human-animal-abuse.aspx>.

44. Coordinated Community Response Teams: A Community Based Approach to Preventing Abuse

1. Introduction to CCR Teams
2. Stakeholders
3. Goals
4. Additional Resources

1. Introduction to CCR Teams

A vital part of creating a violence-free society is including the entire community in the solution. With this idea in mind, one goal should be for each community to have a coordinated community response (CCR) team. In different communities the makeup of the CCR teams might look very different, but the basic premise is the same: to bring people from different parts of the community together to work toward the common goal of eliminating domestic abuse. This process begins by identifying the actual problem(s) relating to domestic abuse. Once local issues are identified, the CCR then identifies problem-solving action steps on how to resolve them and identifies the key stakeholders who can have an impact on creating those changes.

2. Stakeholders

When thinking about these key stakeholders, consideration should be given to those who are committed to working on creating a solution to the problem. The stakeholders make up a multidisciplinary team, which can include – but is not limited to – the local administration (i.e. the mayor), local law enforcement, representatives from the judicial and criminal justice systems, the Department of Corrections, the Department of Health and Human Services, members of the health profession, and landlord and housing associations, as well as advocates from local non-profit agencies, the faith-based community and the school system. The team should not simply look to current stakeholders in your community, but future ones as well. Most importantly, when composing the CCR team, be sure that victims' voices are represented at the table. The CCR team cannot make good informed decisions about what is best for victims in your community if they are not included in the process every step of the way.

3. Goals

Of course, each community should create its own goals and action plans, but below are some examples of what the team's focus could be:

- Working to increase the consistency of intervention and prevention of domestic abuse by improving and maintaining coordination and cooperative efforts among agencies or groups that commonly deal with domestic abuse such as law enforcement, prosecution, corrections, health care, schools, victim and children's service providers, and the community at large.
- To increase safety and increase the availability of protection and intervention services for all domestic abuse victims and their children.
- Create and communicate a community standard of non-violence.
- Shift responsibility for holding the abuser accountable, away from the victim and onto the justice system and the community at large.
- Enhance your county's ability to hold all domestic abuse offenders responsible for their violent behavior while offering them an opportunity to change.

4. Additional Resources

For additional resources and information, please see the Wisconsin Sexual Assault and Domestic Violence Coalitions joint publication of the Coordinated Community Response model. It is a collection of resources for establishing and/or maintaining a CCR team. This resource includes a tool kit that provides step by step directions for creating a CCR team in your community. It also provides an overview of the coordinated community response model, outlining the concept of multidisciplinary collaboration and providing a foundation for understanding the needs, goals and implementation of CCR community work.

This information can be found on the Wisconsin Coalition on Domestic Violence (WCADV) website at www.wcadv.org.

Wisconsin Prosecutor's Domestic Abuse Reference Book

APPENDIX

- Appendix 1:** Domestic Abuse Protocol
- Appendix 2:** Power and Control Wheel
- Appendix 3:** Predominant Aggressor Chart
- Appendix 4:** Domestic Abuse Worksheet—including Victim Consent/Contact Form, Statement of Your Rights, Statement Form, Conditional Release Form, Sexual Assault Worksheet, Strangulation/Suffocation Worksheet, Stalking Worksheet, Stalking Warning Letter
- Appendix 5:** Stalking Supplement—including Service of Warning Letter
- Appendix 6:** Response to *McMorris* Evidence
- Appendix 7:** No Contact Order
- Appendix 8:** The Domestic Abuse Jury Trial Primer
- Appendix 9:** Admitting Testimonial Statements Motion—including Forfeiture by Wrongdoing Brief
- Appendix 10:** Admitting Non-Testimonial Statements Motion—including Memorandum of Law Regarding Admission of Non-Testimonial Statements
- Appendix 11:** The Excited Utterance Exception Primer
- Appendix 12:** Sentencing Penalty Chart
- Appendix 13:** Supplement for LGBTQ Section
- Appendix 14:** Supplement for Animal Cruelty Section



**DANE COUNTY DISTRICT ATTORNEY'S OFFICE
DOMESTIC VIOLENCE UNIT
BEST PRACTICE PROTOCOL**

DANE COUNTY, WISCONSIN

1998
Revised 1999
Revised 2009

MISSION STATEMENT

The Domestic Violence Unit of the Dane County District Attorney Office works towards ending Domestic Violence in our community. We believe all individuals have the right to live free of violence regardless of gender, race, religion and/or sexual orientation. In our work place we will strive to create a caring community that supports and empowers victims of Domestic Violence, the community and ourselves.

INTRODUCTION

The purpose of this office protocol is to formally state procedures for the handling of domestic violence prosecutions within the Dane County District Attorney's Office. The objective of the Dane County District Attorney is to reduce domestic violence in our community by positively intervening in these cases. The focus is on holding the abusers accountable for their violence while offering the victims the support and advocacy necessary to help them to be safe. It is the position of the District Attorney that aggressive prosecution of domestic violence cases will ultimately reduce the number of domestic-related homicides, domestic sexual assaults, battering incidents and other crimes including street violence, sexual assaults, and drug activity.

The Dane County District Attorney first developed a formal response to domestic violence in 1984. At that time, the office created a Domestic Violence Specialist (DVS) position to provide domestic violence victims additional support and advocacy as the criminal cases proceed through the system. Eventually the office dedicated prosecutors to work solely on DV cases. Today the unit consists of 4 specialized DV prosecutors, 3 Domestic Violence Specialists, and one (1) specialized domestic violence paralegal. In addition to the four specialized prosecutors, remaining adult criminal/traffic prosecutors may also prosecute domestic violence cases if the defendant had other open non-DV cases prior to committing the DV case. The Dane County District Attorney's Office reviews approximately 3,300 domestic violence cases each year. Although the Dane County Sheriff's Department also has 5 specialized Domestic Violence Detectives who work very closely with the Domestic Violence Unit, all law enforcement agencies in Dane County will assign a detective/officer if follow up is needed.

DEFINING THE PROBLEM

Domestic Violence is extremely common. It is serious criminal behavior that dramatically affects the lives of the adult victims and the children who are often present. Domestic violence can be defined as the use or threat of physical violence, which is coupled with emotional, verbal and psychologically abusive tactics, by one person over a current or former intimate partner generally for the purpose of exercising power and control over that partner. The combination of ongoing physical and psychological abuse leads to an environment of coercive control and terrorism. Domestic violence usually represents a repeated pattern of behavior, rather than a single isolated event. The batterer uses this pattern of abusive behaviors as a method to gain total power and control over the victim. Abuse presents itself in the form of physical violence such as: slapping, pushing, punching, strangulation, burning, stabbing or wounding with other weapons. The injuries that result from physical violence can range from minor to fatal. Physical violence rarely occurs in isolation from other behaviors. Domestic violence offenders can use sexual

violence/abuse, psychological abuse, threats, intimidation, manipulation of children, economic control, blaming and denial as a means to control the victim.

GENERAL OVERVIEW

The Dane County District Attorney's Office recognizes domestic violence as serious criminal activity which will not be tolerated simply because it occurs in a domestic setting. The District Attorney's Office will not normally dismiss a criminal case solely because the victim is uncooperative or reluctant to testify. The office recognizes that it is common for victims of domestic violence crimes to confront significant barriers to safe and effective participation as a victim/witness in the criminal justice process. We understand that many domestic violence victims are at elevated risk for retaliatory violence at the hands of their perpetrator during a criminal prosecution. Given their increased risk, domestic violence victims may be much more concerned about preventing future violence to themselves, their children or their immediate family than about the state's interest in penalizing the defendant for crimes previously committed and seeking to deter that individual from connecting crimes again in the future. With this understanding, we recognize that many victims will fail to "cooperate" with the prosecution of the case yet desperately need the protection of an aggressive law enforcement and prosecution response to stem the violence of their abusive partners.

The Dane County District Attorney's Office utilizes the following criteria to facilitate our approach and philosophy regarding the prosecution of domestic violence crimes:

- Victims of domestic violence crimes are not required to sign a criminal complaint against their abusers. The complaint is signed by the law enforcement agency, which has presented the charges.
- Domestic violence victims cannot "drop" charges once the case is submitted to the District Attorney's Office from the law enforcement agency. The decision of whether or not to file and pursue charges is made the District Attorney's Office.
- The decision to issue charges will be based upon the determination where there is sufficient evidence to corroborate the commission of a crime. The District Attorney will determine the ability to prove the case *beyond a reasonable doubt* with or without the cooperation of the victim.
- Once charges are issued, the prosecutor will not move to dismiss the case solely because a victim is reluctant to cooperate.

DOMESTIC ABUSE PROTOCOL

ARREST

In Wisconsin, law enforcement officers are required to make an arrest in domestic violence incidents when certain criteria are met under Sec. 968.075, Wis. Stats. When the legislature passed the "Mandatory Arrest" law, they intended that there be an official response to cases of domestic violence, which stresses the enforcement of laws, protection of victims, and to communicate an attitude that violent behavior will not be condoned or excused. The purpose of this law is to recognize that domestic violence is a serious criminal behavior and to provide increased safety and protection for victims of domestic violence. The legislature wanted to

communicate that criminal laws should be enforced without regard to the relationship of the persons involved. Additionally, under this law, district attorneys' offices must document and report the extent of domestic violence incidents requiring law enforcement intervention to the Office of the Attorney General. All law enforcement agencies in Wisconsin are encouraged to provide adequate training to officers that are assigned to investigate domestic abuse incidents.

In Wisconsin, domestic abuse for the purpose of mandatory arrest has been defined under sec. 968.075. Wis. Stats as 1) the intentional infliction of physical pain, physical injury or illness; 2) intentional impairment of physical condition; 3) violation of secs. 940.225(1),(2), or (3), Wis. Stats. (1st, 2nd, or 3rd degree sexual assault); and/or 4) any physical act that may cause the other person to reasonably fear physical or sexual assault. For the purpose of domestic violence prosecution, the District Attorney may consider any crime enumerated in the Wisconsin Statutes committed between persons described in sub 2.or similarly situated.

Law enforcement officers should evaluate whether or not they are required to make an arrest of an adult¹ suspect under sec. 968.075 Stats., based upon the following criteria:

1. The officer has reasonable grounds (probable cause) to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime. Se 968.075(2)(1), stats.
2. The relationship between the suspect and the victim can be defined as "domestic" by one of the following statements as defined in Sec. 968.075(1)(a), stats:
 - a. Spouse
 - b. Former spouse
 - c. Adult with whom the person resides or formerly resided with
 - d. Adult with whom the person has a child in common
3. The suspect's acts constitute domestic abuse as defined in sec. 968.075(1)(a)1-4 Wis. Stats.
 - a. Intentional infliction of physical pain, injury or illness.
 - b. Intentional impairment of a physical condition.
 - c. A violation of Sec. 940.225(1), (2), or (3),stats. (sexual assault statutes).
 - d. A physical act that may cause the other person to reasonably fear imminent engagement in any of the conduct described in the above three statements.
4. Either the officer has a reasonable basis to believe that continued domestic abuse against the victim is **LIKELY** (sec. 968.075(2)(a)2.a.) and/or there is **EVIDENCE OF PHYSICAL INJURY** to the victim (sec. 968.075(2)(a)2.b).
5. The domestic abuse is reported within 28 days of its occurrence. Sec. 968.075(2)(b), stats.

This office encourages officers to follow guidelines regarding the arrest of the predominant aggressor when the officer has reasonable grounds to believe that spouses, former spouses, persons residing or formerly residing together or persons with a child in common are committing

¹ In Wisconsin, 17-year-old suspects are considered as adult offenders.

or have committed domestic abuse against each other. Under sec. 968.075(2)(a) 2.C., the officer should arrest the person whom they believe is the predominant aggressor. In determining who is the predominant aggressor, an officer should consider the intent of Sec. 968.075, stats, to protect victims of domestic violence, the relative degree of injury or fear inflicted on the persons involved and any history or domestic abuse between the persons if it can reasonably be determined by the officer. Sec. 968.075 (3)(a) 1.b., stats.

A law enforcement officer's decision not to arrest the suspect may not be based on the consent of the victim to any subsequent prosecution or on the relationship of the persons involved in the incident under section 968.075(3)(a) 1.c., stats. Also officers' decisions on whether or not to arrest may not be based solely upon the absence of visible indications of injury or impairment under section 968.075(3)(a) 1.d., stats. If an officer does not make an arrest when the officer has reasonable grounds to believe that a person is committing or has committed domestic abuse and that person's acts constitute the commission of a crime, the officer shall prepare a written report stating why the person was not arrested. The report shall be sent to the District Attorney's Office immediately after the investigation of the incident has been completed. Sec. 968.075(4), stats.

The Dane County Sheriffs Department has 5 dedicated Detectives who provide follow up to each case that is received by their department. Their role is to gather further information regarding the incident as well as gather any back round information relating to how long the violence has been occurring and if there are any other incidents that need to be reported. These Detectives gather evidence, take photos of injuries, secure medical releases, provide resource/referral information, respond to gun prohibit violations, assist with service of injunctions, assist with service of stalking letters and assist with ADT alarm set up.

INTAKE/CHARGING DECISIONS

Domestic violence cases are submitted to the Dane County District Attorney's Office by all units of Dane County law enforcement. Once a case is received in the District Attorney's Office, it is logged into the PROTECT database for case tracking. All domestic violence cases are specifically marked as DOMESTIC in the PROTECT system. The case is then forwarded to the Deputy District Attorney or one of the specialized domestic violence assistant district attorneys for review.

Criminal charges are filed in domestic violence cases where the charging prosecutor can find that there is or reasonably will be sufficient evidence to present to a jury that satisfies the elements of the crime beyond a reasonable doubt. The prosecutor will charge all crimes for which there is a reasonable expectation of conviction either by plea at a jury trial. When making the charging decision, the prosecutor will consider all corroboration of the incident, which should be documented in police reports and from other sources. Corroboration may include, but is not limited to any of the following which would be admissible at a trial:

- Statements of the victim about the incident;
- Extent of violence;
- The number of offenders prior convictions as they bear on his credibility;
- Excited utterances with the victim present;
- Injuries observed by a person other than the victim (i.e., police officer);

- A medical report which indicates injuries;
- Witnesses (including children) who saw the actual crime take place;
- 911 tape with victim/witness/suspect's statements;
- Physical evidence such as weapons, broken furniture, torn clothing, disarray;
- Witnesses who heard noises indicating that a domestic violence incident was taking place, i.e., screams, furniture being thrown, etc.;
- Prior history of violence or any other form of power and control in the relationship; including child abuse or sexual abuse.
- Impact on violence on child as victim/witness
- Safe Harbor video tape of child victim/witness statements
- Pending conditions related to bail;
- Pending injunctions;
- Admissions by the suspect either to police or others.

All the DV cases that are charged are then sent to the DV paralegal to be drafted and typed. The paralegal also orders all medical records and photos to be used during the court process. The paralegal is also a vital part of the team when working on serious court trials, which include homicide cases.

Once a charging decision is made, the victim is contacted by a Domestic Violence Specialist (DVS). The DVS will inform her/him of the decision, provide information regarding the criminal justice process, refer her/him to community resources, assist in development of a safety plan if necessary and solicit her/his input on conditions of the defendant's bail release and charges or expectations regarding prosecution. The latter is documented and placed in the file so that it can be referred to during any court proceeding and considered at plea negotiations.

INITIAL APPEARANCES AND RELEASE ON BAIL

At the defendant's first court appearance, the initial appearance, a court commissioner considers terms and conditions for the defendant's release from jail custody. The Assistant District Attorney appearing on behalf of the State will generally consider that a condition of the defendant's release on bail will be NO CONTACT WITH THE VICTIM and any other appropriate conditions. Domestic violence victims may request a variety of conditions, which may be taken into consideration, that range from No Contact to No Threatening or Violent Contact. Special requests may include No Contact Within 24 Hours of Consuming Alcohol or Non-prescription Controlled Substances, No Contact Except By Phone, and/or No Contact Except for Purposes of Child Visitation. The victim makes their wishes known to the Domestic Violence specialist during the bail contact (see below), which is then documented and discussed with the ADA at initial appearance and any future bail hearings.

A Domestic Violence Specialist (DVS) attempts to contact all domestic violence crime victims prior to the initial appearance. The purpose of this contact is to provide the victim with information about the case and the criminal justice process, to give the victim an opportunity to provide input into the defendant's terms of release, and to assist in the development of a preliminary safety plan with the victim. The input of a domestic violence victim into the conditions of the defendant's release on bail may vary according to the specific needs of the

victim. The domestic violence victim has the right to provide the District Attorney's Office with input, however, the presiding court commissioner or judge will make the ultimate decision regarding conditions of release. At times, the Assistant District Attorney may argue for No Contact even when the victim's input indicates otherwise. The Assistant District Attorney will consider the history of violence, extent and nature of violence, likelihood of continued risk to the victim and children, the potential for intimidation to the victim not to appear or cooperate and the existence of other court-ordered conditions of no contact such as conditions of the defendant's probation/parole or existence of any injunctions/family court orders.

Our office recognizes that victims of domestic violence crimes may face many obstacles when choosing whether or not to continue to have contact with the defendant. Factors such as safety of the victim, children, and/or immediate family; financial concerns; housing; and transportation issues are very practical considerations that must be faced. Domestic violence staff actively refers victims to the services of Domestic Abuse Intervention Services (DAIS), the local, community-based domestic violence program. It is also at this time, if appropriate, a screening for the ADT alarm system is reviewed and set up. This may resolve some of the victim's concerns and contribute to the overall safety of the victim and the children.

SPECIAL MARKING FOR ALL DOMESTIC VIOLENCE CASES

Each domestic violence police report is specially marked by law enforcement through a court officer prior to being reviewed by the District Attorney's office. If it has not been marked as a DV case, the DVS, who reviews the reports prior to initial appearance will mark it accordingly. The intake clerical staff then marks each case within the office as follows: the misdemeanor cases (in green files) are stamped with "DOMESTIC ABUSE" while the felony cases (red files) are marked with a green dot. All DV cases are appropriately checked in PROTECT as such. Any cases that also include child abuse and elder abuse also have a special coding that can be checked.

VICTIM SERVICES AND NOTIFICATION

Victims of domestic violence have special concerns, which may not be present for other types of crimes. The relationship of the victim to the offender and the possibility for further violence to the victim elevates the need for additional support and services to this population. Domestic violence victims are treated with respect regardless of their willingness to cooperate in a criminal prosecution and their level of antagonism towards law enforcement or members of the District Attorney office.

Each domestic violence case is assigned to a Domestic Violence Specialist (DVS). The assignments are made based on the offender. That way there is consistency between cases where the offender may have more than one victim. The purpose of the DVS is to establish rapport with victims and to explain the nature of each court proceeding. The DVS provides court support, referrals to community resources, and assists in the development of safety plans and strategies and is available to the victim throughout the duration of the criminal case. The victim may communicate information to police, which assists in the prosecution of the case and also provide input to the DVS, which aids the prosecutor in determining the best disposition for the

case. Although we abide by Chapter 950 requirements, our best practice policies usually go above and beyond that.

The victim notification procedures include:

1-Prior to the initial appearance the victim will be notified of the charges being filed. The DVS will call the victim if there is a phone. In the absence of a phone, if the timing permits a letter is sent to the victim informing her of the charges. At that time, the DVS will also solicit input from the victim regarding conditions of defendant's release on bail.

2-Following the defendant's initial appearance, each victim will receive notification in writing of the conditions of bail ordered by the court and notice of upcoming court proceedings. Included in this information are the DV Unit's brochures as well as the local DV agencies information. The DVS will solicit further input from the victim regarding the case and possible disposition. Victims will be informed of their right to restitution. Crime Victim Compensation is also discussed at this time if it is an appropriate option

3. The DVS will provide written notification to the victim, if requested, prior to any hearing or trial. Every victim has a right to present at each court proceeding. The DVS will also respond to requests for any information from the victim regarding outcomes of court proceedings related to pending criminal charges, including informing the victim of the disposition of the case should the victim chose not to attend.

4. Victims may be provided with post-conviction information that includes sentencing disposition, referrals to obtain the name/number of assigned probation agents, and referrals to Department of Corrections for Victim Information and Notification Everyday (VINE) and Parole Notification (PENS) registry. If a pre sentence investigation (PSI) is ordered, the DVS will work with the victim and the Department of Corrections to coordinate a meeting to provide the victim a voice in the PSI.

Domestic Violence Specialists will also address the needs of victims in terms of referrals to community resources which may assist them in obtaining additional legal protection (i.e., restraining orders), housing, and/or financial assistance. The DVS will refer victims to local community agencies that address issues related to DV, Sexual Assault, Developmental Disabilities, Child and Elder Abuse.

If the person is on supervision with the Division of Community Corrections (DCC) the DVS will contact Master Records (608) 240-3750 and obtain current agent and will send the agent the criminal complaint and add agent's information as contact in Protect. Information is shared throughout the pendency of the case to assist the agent if they are proceeding to revocation and to keep the victim up to date with the status of offender with DCC.

The University of Wisconsin campus is located in Dane County and we have a direct relationship with the Dean of Students office. When we have a victim who is student, we notify the University of this so that they can provide the victim with resources, assistance safety planning.

If the defendant is a student, they are notified to take the appropriate steps needed to address any concerns the UW might have in regards to the student.

All victims whose cases are either given a county ordinance or a case decline are sent letters with referral/resource information as well.

Domestic Violence and Children

Whether children witness the violence, intervene physically to protect the victim or calm the abuser, contact 911, or disclose that they, too, have been abused, it is clear that children are often involved in domestic violence. The District Attorney's Office established a position to specialize in working with cases in which children are involved in an incidence of domestic violence or in which there is a co-occurrence of domestic violence and child abuse. Cases involving domestic violence and children are complex. Therefore, the DV/CA Specialist is aware of the dynamics of domestic violence, the impact of domestic violence on children, and issues surrounding child abuse within the context of domestic violence. While the DV/CA Specialist follows the protocol of the Domestic Violence Specialist, he/she also provides additional services.

Since all domestic violence cases are reviewed prior to initial appearance, any cases that have either a child/children as a victim(s)/or witnesses are forwarded to the DV/CA specialist for further review. Where children are involved and in which there is a co-occurrence of child abuse the DV/CA Specialist will be assigned. When assigned a case, the DV/CA Specialist reviews the case and if necessary and not already done by law enforcement, reports it to Dane County Department of Human Services (DCDHS). DCDHS, the prosecutor, and the DV/CA Specialist collaborate to determine whether or not a child should go to Safe Harbor, an agency that conducts forensic interviews of children with the goal of reducing the number of times he/she will have to talk about his/her experience and reducing, although not necessarily eliminating, the amount of testifying he/she will have to do in court. Safe Harbor also allows for a team approach, as representatives from the DA's Office, DCDHS, Law Enforcement, and Safe Harbor are all present. If a Safe Harbor interview takes place, the DV/CA Specialist will attend the interview and meet with the family.

While the case is pending, the DV/CA Specialist will collaborate with professionals from DCDHS, Safe Harbor, the child's school, mental health professionals, and Law Enforcement. The purpose of this collaboration is to ensure the safety of both the adult victim of domestic violence and the child victim/witness. The DV/CA Specialist will also work closely with the adult victim of domestic violence by addressing safety issues and supporting him/her through the court process. If a child is needed to testify either at the Preliminary Hearing or trial, he/she will come to the DA's Office to meet with the prosecutor and the DV/CA Specialist. The DV/CA Specialist will help prepare the child for testifying and will familiarize him/her with the courtroom. The process of testifying can be very anxiety producing for children, particularly if he/she is testifying against a parent, as is often the case in domestic violence. The DV/CA Specialist will assist the child through the process and attempt to make him/her feel as comfortable as possible.

The DA's Office encourages Law Enforcement to recognize the serious impact that witnessing domestic violence has on children and to do the following:

- Screen for child abuse when investigating for domestic violence and screen for domestic violence when investigating for child abuse (Dane County has developed a COP card that officers can carry with them that assist with these investigations)
- Interview children that are present during an incident of domestic violence
- Report to DCDHS when necessary
- Consider Safe Harbor
- Seek out training on issues related to children and domestic violence

PRELIMINARY EXAMINATIONS IN FELONY CASES

All defendants charged with a felony(ies) are entitled to a preliminary examination under sec. 970.03 (Wis. Stats.). The purpose of the preliminary examination is to determine if there is probable cause to believe a felony has been committed by the defendant.

The prosecutor may require testimony from the victim at the preliminary examination. If this is the case, the victim will be issued a subpoena requiring his/her appearance. The DVS assigned to the case will contact the victim to provide information regarding the subpoena and about the nature of the court proceeding. The DVS will also provide assistance with court prep work, court accompaniment and support at any court proceeding. The victim may also request additional support from any local agency that works with DV issues.

When children have been victims and/or witnesses of domestic violence, the DA's office will consider alternatives to children's live testimony such as the use of videotapes, excited utterances or transactional related offenses.

If testimony is required, it will provide the prosecutor with a statement in addition to the police report that corroborates the incident. However, it is also possible that the victim may have been directly or implicitly threatened by the defendant or otherwise, due to the nature of the relationship to not testify and therefore may refuse to cooperate. Although this is a difficult situation when it occurs, it also provides the prosecutor with an opportunity to evaluate the strengths and weaknesses of the criminal case at an early stage and the DVS role allows the prosecutors to focus on the law and facts while the DVS provides the victim with support and encouragement.

PRETRIAL CONFERENCES/PLEA NEGOTIATIONS

The District Attorney's Office will prosecute domestic abuse incidents involving criminal conduct as we do all other criminal activity. We will bear in mind that the specific incident(s) of domestic violence we prosecute are generally part of a larger cycle of violence that will continue, and may escalate, in the absence of meaningful intervention.

During plea negotiations the prosecutors will focus on holding the abuser accountable for the violence. The general purpose of plea negotiations is to successfully resolve the criminal case in

lieu of a jury trial. Our office recognizes that many domestic violence victims are fearful of their abuser and may have difficulty participating in a cooperative manner during trial. The successful resolution of domestic violence criminal cases without requiring the testimony of the victims is generally the preferred practice.

TRIAL

Once a domestic violence case is set for trial, the victim will be informed by the DVS regarding the trial date. Subpoenas will be served either by the Dane County Sheriff's Office or by a District Attorney's Office Investigator. If required, the DVS will arrange a pre-trial meeting with the prosecutor. At this meeting the prosecutor and the DVS will review with the victim any possible questions and answers and any responsibility concerning testimony at the trial.

On the Monday prior to the trial date, the prosecutor, the defendant and the defense attorney will select the jury. The prosecutor can utilize voir dire as a tool to educate the jury about domestic violence. The District Attorney's Office has developed a guideline of specific questions, which can be asked during voir dire. The prosecutor can evaluate the biases and attitudes that potential jurors may bring with them into a domestic violence jury trial through the voir dire process.

Although by the time of jury trial, each prosecutor will have evaluated the strengths of the criminal case, generally the cooperativeness of a domestic violence victim is not the sole factor upon which to proceed or not proceed. Our office recognizes that many victims of domestic violence crimes are reluctant to cooperate for a variety of reasons including that the victim's safety may be in jeopardy. As a general rule, if sufficient evidence exists, the prosecutor will proceed to trial with or without the cooperation of the victim.

Please refer to the Domestic Violence Prosecution Statewide Manual prepared by the Office of Justice Assistance with funds provided by the Violence Against Women Act.

In order to effectively prosecute domestic violence crimes without a cooperative victim, the prosecutor must develop collateral information for presentation at trial. Such information can include the following:

- Prior inconsistent statements
- 911 dispatch
- Excited utterances (Crawford Law issues)
- Photographs, videos, letters
- Jail recordings
- Other physical evidence
 - Torn, bloody clothing
 - Weapons/objects used during the incident
 - Damage to household items
- Witnesses
- Confessions of the defendant
- Medical experts
- Presentation of expert witnesses (stalking/strangulation/DV)
- Safe Harbor videotape

During and after trial the DVS provides critical support for any victim who desires it, remaining with them during the trial and the time of jury deliberation. It is especially important for a victim to have support through out the entire process.

SENTENCING

When a prosecutor recommends the most appropriate sentence for a domestic violence offender, the prosecutor will consider the severity of the offense, the offender's prior criminal history, and continued risk to the community, including risk to the victim as well as other factors required by law. The goal in most domestic violence cases is to provide an intervention, which will contribute to the safety of the victim and the family. The prosecutor will address the potential for rehabilitation of the domestic violence offender and will offer the offender an opportunity to change his/her pattern of violent behavior through counseling. If the offender is appropriate for counseling, s/he will be supervised by either the District Attorney's Office Deferred Prosecution Program or by the Division of Probation/Parole. Other sentencing options include jail or prison, fines, or a combination of probation, jail, prison, and/or fines.

In domestic violence cases, fines are generally considered the least appropriate sentence. When fines are imposed, the entire family may suffer the loss of critical finances or the offender may force the victim to pay the cost.

DEFERRED PROSECUTION PROGRAM (DPU): (see 971.37-971.40)

In Dane County, the District Attorney's office utilizes pre-sentence diversion as a case resolution for approximately 10% of the totally criminally charged domestic violence crimes. The formal Deferred Prosecution Program (DPU) provides structured supervision to offenders. The DPU staff are called counselors, who are certified social workers. The program receives approximately 900 referrals per year from the DA's office. In 2003, of the 291 DV offenders who were admitted to the program, 207 completed successfully. Except for special circumstances, almost all offenders who complete DPU have completed an abuser treatment program. All cases referred to the Deferred Prosecution Program have been charged criminally prior to their referral. An offender must meet certain criteria in order to be accepted into the Deferred Prosecution Program. In some circumstances, a pre screening is required to be sure a defendant is eligible for this program. The eligibility requirements are:

- The offender must have no previous criminal conviction or record. Some exceptions are made on a case-by-case basis.
- The offender must be 17 years of age or be waived from juvenile jurisdiction to adult jurisdiction.
- The offender must have consent of the Assistant District Attorney assigned to the case to participate in the program.
- The offender must accept responsibility for the offense. In most cases, a plea of guilty to the crime must occur prior to referral to the program. The judge will accept the plea and withhold adjudication pending successful completion of the program.

- The offender must voluntarily agree to participate in the program.
- The offender must meet with a member of the Deferred Prosecution Program staff for a personal interview to determine eligibility and meet the precise conditions of participation.
- The severity of the offense.

If a domestic violence offender is accepted into the Deferred Prosecution Program, s/he will be required to sign a contract and comply with any conditions required by the program staff. The length of the contract may vary depending upon the severity of the offense and/or the conditions required. In domestic violence cases, contract conditions generally include participation in certified domestic violence counseling, alcohol/drug assessment and treatment if recommended, restitution, parenting classed, compliance with existing conditions of bail, and/or community service. If the offender successfully completes the program, the courts will dismiss the case.

A domestic violence offender may be terminated from the program for a variety of reasons. If the offender fails to adhere to any of the set of conditions in the contract or if s/he becomes involved in any new/additional criminal offenses that lead to criminal proceedings during the term of the contract, s/he will be terminated from the program. If the contract terminates before completion of the program, the prosecutor resumes criminal proceedings. This usually results in the offender's conviction of the crimes for which s/he pled and a sentence is imposed by the judge. The offender will then have a criminal conviction.

Through out this process the DVS in is contact with the victim and will continue to provide information relating to progress and respond to any concerns. If a defendant is referred back to court, notification of any court hearings is provided. A DVS will also accompany the victim to any hearing that may occur as a result of the termination.

PROBATION

When a domestic violence offender is placed on probation, it is preceded by a plea of Guilty or No Contest to some or all of the crimes originally charged. A probation agent through the Division of Community Corrections supervises the offender. The prosecutor will generally recommend that the offender receive specific conditions to follow while on probation supervision. The judge usually imposes these conditions at the time of sentencing. Examples of conditions, which an offender may be required to fulfill while on probation supervision, are:

- Certified Domestic Violence counseling
- Alcohol/Drug Assessment and treatment if recommended
- Psychiatric Evaluation and treatment if recommended
- Conditions prohibiting contact or violent/threatening contact with the victim
- Requirement of full-time employment or schooling
- Restrictions on possession of firearms

- Condition/jail time
- Parenting classes

If an offender fails to comply with probation or commits new/additional offenses, s/he may have probation supervision revoked and may be required to serve a jail or prison term based on seriousness of offense, prior convictions or repeated acts of violence.

At the time of disposition, if the victim has requested notification of the disposition, a letter is sent and will include the appropriate brochures based on that disposition. If it is a Department of Corrections disposition, the VOICE brochure is included. If it is a DPU disposition, we include their brochure. Our goal is to be sure that victims know how to maintain communication with those in the system whom are supervising the offender.

TRAINING COMPONENT

This protocol would not be complete without mentioning the commitment that the DA's office makes to training on the issue of Domestic Violence. We have several teams that do law enforcement training annually, sometimes several times within the year. We use the team training concept that includes a prosecutor, a DV specialist and a Law enforcement officer. At some of the trainings, the local DV provider is also present. Madison Police Department and Dane County Sheriff have created manuals that are used in the trainings.

SUMMARY

Domestic violence is a serious and prevalent problem in our community. We have taken steps to formally address domestic violence by using the criminal justice system to intervene and, hopefully, reduce domestic violence while protecting victims and their children. This protocol is advisory in nature. It is a proposed standard for the handling of most domestic violence cases. However, the individual prosecutors must weigh the merits of each case based upon its own unique characteristics. The over-riding goal of domestic violence prosecution is to provide safety for victims and children while holding abusers accountable for their violent behavior.

This document was originally prepared by staff with in the Domestic Violence Unit in 1998. It has recently been revised by Marlys Howe, Manager of the Domestic Violence Unit. Special thanks to District Attorney Brian Blanchard, Deputy District Attorney Tim Verhoff, Assistant District Attorney Robert Kaiser, Former Deferred Prosecution Unit Manager Nancy Gustaf and Domestic Violence/Child Abuse specialist Rebecca Foell for their assistant in reviewing the protocol and providing me with the updated material.

Appendix 2: Power and Control Wheel

The Legal Response to Power & Control Using Wisconsin Laws

This document, compiled by the Wisconsin Coalition Against Domestic Violence Legal Department, does not constitute legal advice.

Using Coercion and Threats:

- 943.30** Threats to injure or accuse of crime
- 940.42-45** Intimidation of victim/witness
- 941.23** Carrying concealed weapon
- 946.31 & 939.30** Solicitation to commit perjury

Using Intimidation:

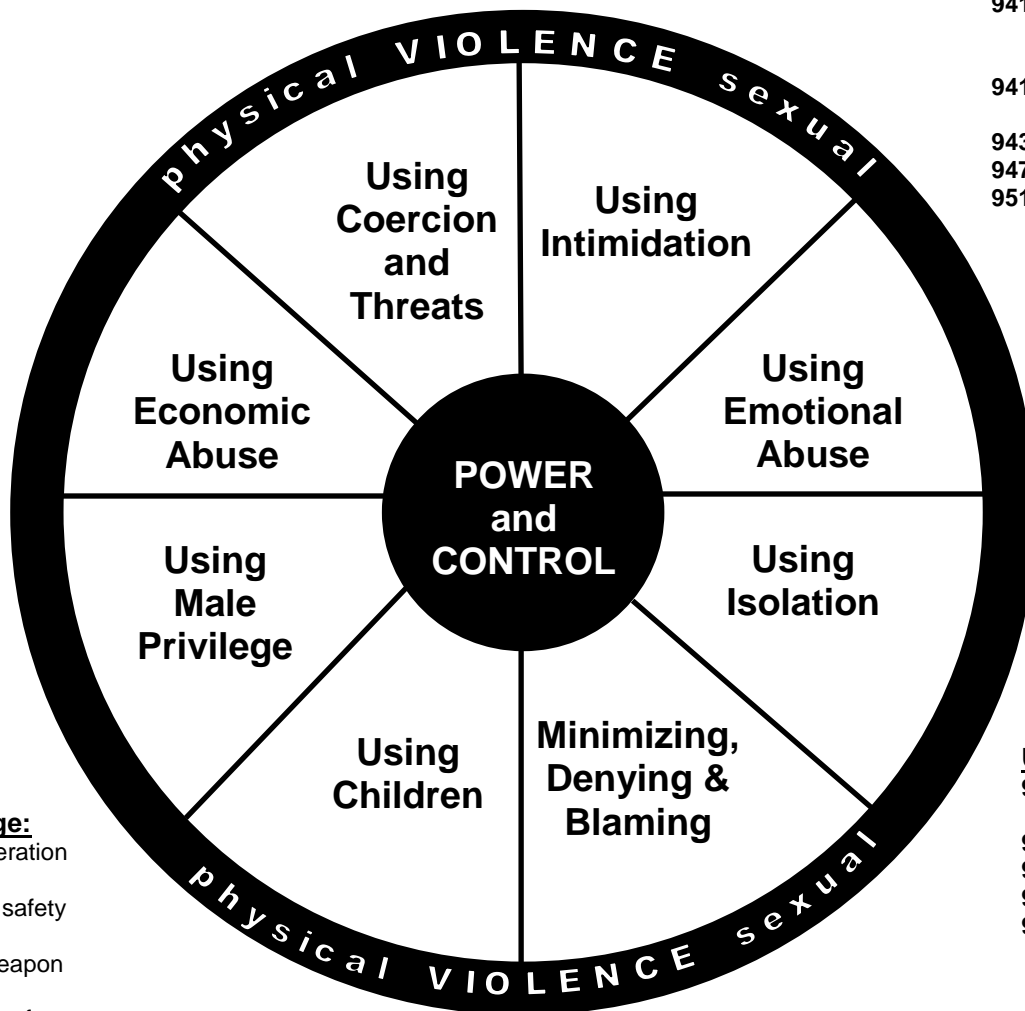
- 940.32** Stalking
- 940.42-45** Intimidation of Victim/witness
- 943.14** Criminal trespass to dwelling
- 947.013** Harassment

Using Emotional Abuse:

- 941.20** Endangering safety by use of a dangerous weapon
- 941.30** Recklessly endangering safety
- 943.01** Damage to property
- 947.013** Harassment
- 951.02** Mistreating animals

Using Economic Abuse:

- 943.02** Arson
- 943.10** Burglary
- 943.20** Theft
- 943.32** Robbery
- 943.38** Forgery
- 943.39(2)** Fraudulent writings
- 940.285** Abuse to vulnerable



Using Male Privilege:

- 941.01** Negligent operation of vehicle
- 941.20** Endangering safety by use of a dangerous weapon
- 941.30** Recklessly endangering safety
- 941.01** Criminal damage to property

Using Isolation:

- 940.30** False Imprisonment
- 940.305** Taking a hostage
- 940.31** Kidnapping
- 942.05** Opening letters
- 943.14** Criminal trespass to dwelling

Using Children:

- 940.31** Kidnapping
- 940.32** Stalking
- CH.948** Crimes against children
- 948.31** Interference with custody

Minimizing, Denying & Blaming:

- 946.41** Resisting or obstructing an officer
- 947.01** Disorderly conduct
- 947.012** Unlawful use of telephone
- 947.0125** Unlawful use of computerized systems

Appendix 3: Predominant Aggressor

Predominant Aggressor means the most significant, but not necessarily the first, aggressor in a domestic abuse incident.

Determining The Predominant Aggressor

In order to protect victims from continuing domestic abuse, a law enforcement officer shall consider all of the following when identifying the predominant aggressor:

- ✓ The history of domestic abuse between the parties
- ✓ Statements made by witnesses
- ✓ The relative degree of injury inflicted on the parties
- ✓ The extent to which each person present appears to fear any party
- ✓ Whether any party is threatening or has threatened future harm against another party or another family or household member
- ✓ Whether either party acted in self-defense or in defense of any other person

In accordance with Wisconsin State Statutes, if a law enforcement identifies the predominant aggressor, it is generally not appropriate to arrest anyone other than the predominant aggressor.

Absent exceptional circumstances, approved by a supervisor, _____ Police Department Policy prohibits the arrest and or referral of two or more people for a domestic abuse related crime when the investigating officer is able to identify the predominant aggressor.

General Guidelines

- An officer should arrest and take a person into custody if the officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime.
- An officer's decision as to whether or not to arrest may not be based on the consent of the victim to any subsequent prosecution or on the relationship of the parties.
- An officer's decision not to arrest may not be based solely upon the absence of visible injury or impairment.
- An officer may not release a person whose arrest was required until the person posts bail or appears before a judge.
- If an officer does not make an arrest when the officer has reasonable grounds to believe that a person is committing or has committed domestic abuse and that the person's acts constitute the commission of a crime, the officer shall prepare a report stating why the person was not arrested and that report shall be sent to the District Attorney.

**GREEN LAKE COUNTY
DOMESTIC ABUSE WORKSHEET**

Incident Number _____
Date of Incident _____
Time of Incident _____
Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

VICTIM AND SUSPECT

Victim
 Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

Suspect
 Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

RELATIONSHIP HISTORY

1. How long have you known the suspect? _____ Years _____ Months
2. How long have you had a relationship with the suspect? _____ Years _____ Months
3. What type of relationship do you presently have with the suspect (*check all that apply*):
 Spouse Former Spouse Cohabitant Former Cohabitant Child in Common Other
 If other, explain: _____
4. If you have a child or children in common with the suspect, then please answer the following questions:
 a) How many children do you and the suspect have in common? 1 2 3 4 or More
 b) Please provide the name(s) and date(s) of birth for the child(ren): _____

 c) Where does the child or do the children presently reside? Suspect Victim Both Other
 If other, explain: _____

DESCRIPTION OF INCIDENT

1. Was any child or were any children present during this incident? Yes No
 2. Did any child or children witness (*i.e.* see or hear) this incident? Yes No
 3. Did the suspect consume any alcohol or drugs before, during, or after this incident? Yes No
 4. Did the suspect raise his or her voice at any time during this incident? Yes No
 5. Did the suspect have physical contact with or use physical violence against you during this incident? Yes No
 6. Did the suspect damage or threaten to damage any property during this incident? Yes No
 7. Did the suspect possess, use, or threaten to use a dangerous weapon during this incident? Yes No
- If the victim answered yes to any question above, then provide a detailed description in the police narrative.**
8. Did the suspect have sex or attempt to have sex without your approval during this incident? Yes No
 9. Did the suspect stalk or attempt to stalk you during this incident or previous to this incident? Yes No
 10. Did the suspect strangle/suffocate ("choke") or attempt to strangle/suffocate ("choke") you during this incident? Yes No
- If the victim answered yes to question 8, 9, or 10, then complete the appropriate supplemental worksheet.**

VICTIM STATEMENT

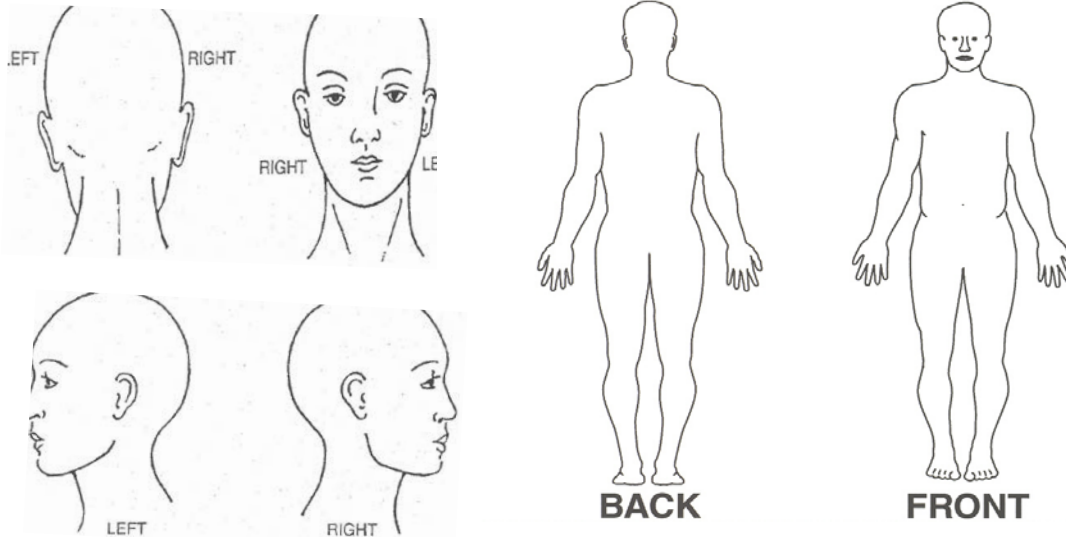
I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____ Signature: _____

DOCUMENTATION OF PHYSICAL CONTACT

Diagram: Place the letter on the diagram that identifies the type of physical contact as well as the location.

- | | | |
|-----------------------------------|------------------|----------------------|
| A. Sexual Assault | G. Shoved/Pushed | M. Banged Head |
| B. Attempted to Suffocate | H. Threw Objects | N. Stepped On |
| C. Slapped with Open Hand | I. Pulled Hair | O. Grabbed and Shook |
| D. Struck with Closed Fist | J. Kicked | P. Scratched |
| E. Chemically (Acid/Bleach/Other) | K. Burned | Q. Pinched |
| F. Strangled | L. Bit | R. Other: _____ |



Medical Release

- Will you seek medical attention immediately after this incident? Yes No Not Applicable
 If no, explain: _____
- Will you possibly seek medical attention within the next few days? Yes No Not Applicable
 If no, explain: _____
- Will you sign an *Authorization for the Disclosure of Health Information*? Yes No Not Applicable
 If no, explain: _____

PROBLEMS IN RELATIONSHIP

- How long into the relationship before the first verbal argument? _____ Years _____ Months
- How long into the relationship before the first physical contact or violence? _____ Years _____ Months
- How many verbal arguments have there been in the relationship?
 None 1-2 3-4 5-6 6-7 8-9 10-11 12 or More
- How many unwanted physical contacts or acts of physical violence have there been in the relationship?
 None 1-2 3-4 5-6 6-7 8-9 10-11 12 or More
- Who was usually the most significant, but not necessarily the first, aggressor in these prior incidents?
 Suspect Victim Other: _____
- Has the frequency or severity of violence increased in the relationship? Yes No
- Have you or the suspect ever tried to end the relationship? Yes No
- Have you or the suspect ever ended the relationship? Yes No
- Did you and the suspect still have a relationship at the time of the incident? Yes No
- Do you intend to have a relationship with the suspect after this incident? Yes No

If the victim answered yes to any question above, then provide a detailed description in the police narrative.

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____ Signature: _____

RISK ASSESSMENT

- | | | |
|--|------------------------------|-----------------------------|
| 1. Does the suspect ever exhibit violence outside of the relationship? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 2. Does the suspect have a history of alcohol or substance abuse? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 3. Does the suspect have a history of mental illness? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 4. Does the suspect seem preoccupied or obsessed with you? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 5. Does the suspect seem jealous or accuse you of cheating? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 6. Has the suspect ever destroyed cherished personal items? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 7. Has the suspect ever threatened to harm or physically harmed an animal? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 8. Has the suspect ever discouraged or prevented you from reporting an incident? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 9. Has the suspect ever strangled or suffocated ("choked") you? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 10. Has the suspect ever exhibited stalking behavior? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 11. Has the suspect ever had sex with you without your approval? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 12. Has the suspect ever threatened or harmed you while you were pregnant? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 13. Has the suspect ever used or threatened to use a weapon? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 14. Does the suspect have access to any firearm? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

If the suspect does have access to any firearm, then please answer the following questions:

How many firearms? 1 2 3 4 5 6 7 8 or More

Please provide a description of the firearm(s), including type and location of each firearm: _____

- | | | |
|--|------------------------------|-----------------------------|
| 15. Has the suspect ever injured you where you have or should have received medical attention? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 16. Has the suspect ever threatened or attempted suicide? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 17. Has the suspect ever threatened to kill you or a loved one? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 18. Are you fearful that the suspect will kill or harm you? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

If the victim answered yes to *any* question above, then provide a description: _____

COURT DOCUMENTS

- | | | | |
|--|------------------------------|-----------------------------|---------------------------------|
| 1. Is there an active or current restraining order or injunction against the suspect? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 2. Have you ever filed for a restraining order or injunction against the suspect? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 3. Has anyone else ever filed for a restraining order or injunction against the suspect? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 4. Does the suspect have a prior arrest or police contact for an act of domestic abuse? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 5. Does the suspect have a prior charge or conviction for an act of domestic abuse? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 6. Does the suspect have an active bond or bail for an open or pending criminal case? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 7. Does the suspect have a probation agent or court order presently in effect? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |

If the victim answered yes or unsure to *any* question above, then provide a description: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

OFFICER OBSERVATIONS

Victim

Demeanor

Angry Fearful Shaking
 Apologetic Hysterical Sobbing
 Calm Nervous Threatening
 Crying Other: _____

Injuries

Abrasion Laceration
 Bite Mark Loss or Chip of Tooth
 Breathing Difficulty Loss of Consciousness
 Broken Nose Loss of Hair
 Bruise Loss of Sight/Hearing
 Burn Minor Cut
 Complaint of Dizziness Petechia
 Complaint of Headache Redness
 Complaint of Pain Scratch Marks
 Complaint of Soreness Swallowing Difficulty
 Concussion Swelling
 Fracture of Bone Voice Change
 Other: _____

Impairment

Did victim appear intoxicated? Yes No
Did victim appear influenced by drugs? Yes No

Suspect

Demeanor

Angry Fearful Shaking
 Apologetic Hysterical Sobbing
 Calm Nervous Threatening
 Crying Other: _____

Injuries

Abrasion Laceration
 Bite Mark Loss or Chip of Tooth
 Breathing Difficulty Loss of Consciousness
 Broken Nose Loss of Hair
 Bruise Loss of Sight/Hearing
 Burn Minor Cut
 Complaint of Dizziness Petechia
 Complaint of Headache Redness
 Complaint of Pain Scratch Marks
 Complaint of Soreness Swallowing Difficulty
 Concussion Swelling
 Fracture of Bone Voice Change
 Other: _____

Impairment

Did suspect appear intoxicated? Yes No
Did suspect appear influenced by drugs? Yes No

EVIDENCE AND DOCUMENTATION

Evidence

What evidence exists with respect to this incident?

- 911 Recording Audio Recording Photographs Video Recording Other: _____
If audio recording, identify party recorded: Victim Suspect Other: _____

Did you or another police officer secure and document all evidence related to the incident? Yes No

If no, explain: _____

Weapon

Did you or another police officer seize and safely secure any dangerous weapon? Yes No

If yes, provide description: _____

If no, provide explanation: _____

Domestic Abuse Services

Did you or another police officer notify domestic abuse services at (800) 261-5998? Yes No

If yes, provide date and time of notification: _____

If no, explain reason for lack of notification: _____

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained in this four page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____ Signature: _____ Badge: _____

GREEN LAKE COUNTY VICTIM CONSENT/CONTACT FORM

Incident Number _____
 Date of Incident _____
 Time of Incident _____
 Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

VICTIM AND SUSPECT

Victim

Name: _____
 DOB: _____ Age: _____

Suspect

Name: _____
 DOB: _____ Age: _____

LACK OF CONSENT

I, the victim named above, hereby indicate that I did not give the suspect named above consent to _____

 Signature of Victim Date of Signature Time of Signature

CONTACT PROHIBITION

As a victim of a Domestic Abuse offense, I understand that during the 72-Hours following the arrest of the suspect named above, which occurred at _____ a.m./p.m. on _____, I have the following rights pursuant to Section 968.075(5), Wisconsin Statutes:

1. The arrested person shall avoid my residence or any residence temporarily occupied by me; and
2. The arrested person shall avoid contacting me, or causing any person, other than law enforcement officers and attorneys for the arrested person, to contact me.

I understand that the suspect named above may be arrested pursuant to Section 968.075(5)(a) during the 72-Hours following the arrest if the arrested person violates the above *No Contact Provision*. I further understand that it is my responsibility to report any violations of the *No Contact Provision* to my local Police Department or Sheriff's Department.

I understand that even if I do not waive the *No Contact Provision* at this time, I am allowed to waive the *No Contact Provision* at any time during the 72-Hours following the arrest. The officer has informed me and I also understand that it will be **MY** responsibility to contact this police agency if I want to waive the *No Contact Provision*. All changes must be in writing (an oral notice will **NOT** be sufficient).

WAIVER OF PROHIBITION

I have read the statement and understand what my rights are pursuant to the contact prohibition explained above. Knowing these rights and understanding each of them, I wish to **WAIVE** my rights at this time. I have made this waiver in the presence of an officer.

 Signature of Victim Date of Waiver Time of Waiver

SUSPECT NOTIFICATION

Suspect Notified of *No Contact Provision*: Yes No Date: _____ Time: _____

Method of Notification: _____

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained on this single page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____ Signature: _____ Badge: _____

GREEN LAKE COUNTY STATEMENT OF YOUR RIGHTS

Date of Statement _____
 Time Commenced _____
 Time Concluded _____
 Location / Place _____

Incident Number _____
 Police Agency
 BPD GLPD GLSO MPD
 PPD Other: _____

PRELIMINARY INFORMATION

Before asking any questions, an officer should document the following demographic and contact information about the person:

Name: _____ DOB: _____ Age: _____
 Address: _____ Home Phone: _____
 _____ Cellular Phone: _____

MIRANDA RIGHTS

Before we ask any questions, it is my duty to advise you of your rights:

Initials:

- You have the right to remain silent. _____
- Anything you say can and will be used against you in a court of law. _____
- You have the right to talk to a lawyer and have him or her present with you while you are being questioned. _____
- If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before any questioning. _____
- If you decide to talk to us now without a lawyer, you have the right to stop the questioning and remain silent for any question at any time; and you also have the right to stop the questioning and ask for a lawyer at any time during the questioning. _____

WAIVER

- Do you understand each of the rights I have read and explained to you? Yes: No: _____
- Understanding these rights, do you wish to talk to me now? Yes: No: _____

The above Miranda Rights were read to me (I have also read these rights). I understand my rights and have placed my initials after each right to signify that I understand my rights. I am willing to talk and answer questions at this time. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me; and no pressure or coercion of any kind has been used against me to give up my rights. I showed the officer that I understood my rights by putting my initials next to each right after it was read and explained to me.

 Signature of Person Interviewed

 Date of Waiver

 Time of Waiver

HOW THE RIGHTS WERE ADMINISTERED

- The above rights were read to the person named above by the officer named below.
- After satisfying the officer named below of the person named above's ability to read, the person named above read each of the attached rights as well.
- The person named above put his or her initials after each right indicating that this person understood these rights.

Name of Officer: _____
 (Printed)

Date: _____

Signature of Officer: _____
 (Signed)

Time: _____

Witness Name: _____
 (If Applicable)

Witness Signature: _____
 (If Applicable)

GREEN LAKE COUNTY CONDITIONAL RELEASE FORM

Incident Number _____
 Date of Incident _____
 Time of Incident _____
 Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

VICTIM AND SUSPECT

Victim Name: _____ DOB: _____ Age: _____	Suspect Name: _____ DOB: _____ Age: _____
--	---

NOTICE TO ARRESTED PERSON

An officer should complete the following notice to a person arrested for a domestic abuse related crime before releasing the person from custody:

1. You have been arrested for a domestic abuse related crime.
2. Your release is conditioned on your agreement to refrain from any threats or acts of domestic abuse against the victim named above and any other person.
3. The victim has a right to protection through enforcement of a *No Contact Provision* and your violation of this provision shall result in your arrest for a forfeiture offense under Section 968.075(5), Wisconsin Statutes. When a victim requests enforcement of this provision then you are required to do the following for the next 72-Hours:
 - a. To avoid the victim's residence and any premises temporarily occupied by the victim; and
 - b. To avoid contacting the victim or causing any person, other than law enforcement officers and your attorney, to contact the victim. This provision prohibits all forms of contact, including but not limited to contact in person, by telephone, by electronic communication, and in writing.

THIS NO CONTACT PROVISION WILL EXPIRE AT _____ AM/PM ON _____. This provision does not apply when a victim waives enforcement of the provision. If the victim waived enforcement in this case, the "WAIVED" box shall be checked:

WAIVED (Check Only When Victim Waived the *No Contact Provision*)

4. The law provides that if you commit another act of domestic abuse during the 72-Hours following your arrest and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than two years and is a **FELONY** under Section 939.621, Wisconsin Statutes.

THIS 72-HOUR PERIOD WILL EXPIRE AT _____ AM/PM ON _____.

This provision cannot be waived by the victim named above and it applies regardless of whether the victim waived the *No Contact Provision*.

5. Your release is conditioned and your signature acknowledges that you have received and understand the provisions in this notice, and the consequences of violating these provisions. Your release is further conditioned on your agreement to refrain from any threats or acts of domestic abuse against the victim and other persons.

AGREEMENT: The above notice has been read and explained to me, and I acknowledge receipt of a copy of this notice. I understand its provisions and the consequences of violating these provisions. I agree to refrain from any threats or acts of domestic abuse against the victim or any other person.

Full Name: _____ Date: _____
(Printed)

Signature: _____ Time: _____
(Signed)

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained on this single page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____ Signature: _____ Badge: _____

GREEN LAKE COUNTY SEXUAL ASSAULT WORKSHEET

Incident Number _____
 Date of Incident _____
 Time of Incident _____
 Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

RELATIONSHIP WITH SUSPECT(S)

- Did you know the suspect(s) prior to the incident? Yes No
 If yes, how long have you known the suspect(s)? _____ Years _____ Months _____ Days
- How would you describe your relationship with the suspect(s) prior to the incident (*check all that apply*):
 Spouse Former Spouse Cohabitant Former Cohabitant Child in Common Relative
 Friend Acquaintance Co-Worker Classmate Stranger Other
 If other, explain: _____

VICTIM AND SUSPECT(S)

Victim

Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

Suspect

Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

Unknown Suspect

When the victim does not know the identity of the suspect, then please have the victim provide as complete a description or estimation as possible. Leave any identifiers listed below blank when the victim cannot provide a description. Remind the victim not to guess on any identifier.

Partial Name: _____
 Nickname: _____
 Sex/Gender: _____
 Race/Ethnicity: _____
 Hair Color: _____
 Eye Color: _____
 Facial Hair: _____
 Height: _____
 Weight: _____

Tattoo/Piercing: _____

 Scar: _____
 Teeth: _____
 Odors: _____
 Description of Clothing: _____

 Other: _____

Multiple Suspects

When the victim states that the incident involved multiple suspects, whether known or unknown, then provide a detailed description in the police narrative about the identity of each known suspect or the physical description provided by the victim about each unknown suspect.

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

DESCRIPTION OF INCIDENT

1. When did the incident occur? Date: _____ Time: _____
2. Where did the incident occur?
Provide description: _____
3. Did the suspect engage in any forceful or unwanted kissing during the incident? Yes No
4. Did the suspect engage in any forceful or unwanted touching during the incident? Yes No
If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (b)
- a. What part of your body did the suspect touch in a forceful or unwanted manner (*check all that apply*):
 Breast or Nipple Genital or Pubic Area Mouth (Tongue or Lips) Other Touching
 If other touching, explain: _____
- b. Where did the forceful or unwanted touching occur in relation to any clothing on your body (*check all that apply*):
 Over Clothing Under Clothing Clothing Removed Other
 If other, explain: _____
5. Did the suspect penetrate or attempt to penetrate any part of your body during the incident? Yes No
If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (c)
- a. What part of your body did the suspect penetrate (*check all that apply*):
 Anal Penetration Oral Penetration Vaginal Penetration Other Penetration
 If other penetration, explain: _____
- b. What part of your body did the suspect attempt to penetrate (*check all that apply*):
 Attempted Anal Attempted Oral Attempted Vaginal Attempted Other
 If attempted other, explain: _____
- c. What did the suspect use to penetrate or to attempt to penetrate your body (*check all that apply*):
 Hand or Finger Mouth (Tongue or Lips) Penis Foreign Object
 If foreign object, explain: _____
6. Did the suspect hold you down or physically restrain you during the incident? Yes No
If yes, provide description: _____

7. Did the suspect threaten to harm or kill you or someone close to you? Yes No
If yes, provide description: _____

8. Did the suspect possess, use, or threaten to use a dangerous weapon? Yes No
If yes, provide description: _____

WITNESS INFORMATION

Please provide the name of anyone who either witnessed the incident or may have relevant information pertaining to the incident. Relevant information may include having witnessed events that occurred prior to or after the incident (e.g. the victim's demeanor after the incident), even when the person may not have been present during the actual incident.

Name: _____	Name: _____
DOB: _____ Age: _____	DOB: _____ Age: _____
Address: _____	Address: _____
Employer: _____	Employer: _____
Home Phone: _____	Home Phone: _____
Cellular Phone: _____	Cellular Phone: _____
Work Phone: _____	Work Phone: _____

VICTIM STATEMENT

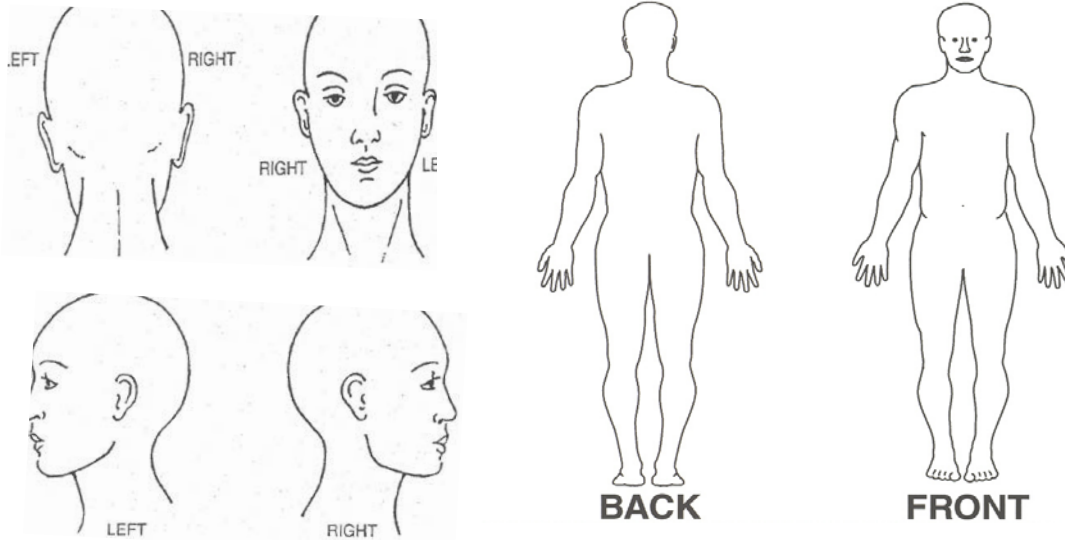
I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____ Signature: _____

DOCUMENTATION OF PHYSICAL CONTACT

Diagram: Place the letter on the diagram that identifies the type of physical contact as well as the location.

- | | | |
|-----------------------------------|------------------|----------------------|
| A. Sexual Assault | G. Shoved/Pushed | M. Banged Head |
| B. Attempted to Suffocate | H. Threw Objects | N. Stepped On |
| C. Slapped with Open Hand | I. Pulled Hair | O. Grabbed and Shook |
| D. Struck with Closed Fist | J. Kicked | P. Scratched |
| E. Chemically (Acid/Bleach/Other) | K. Burned | Q. Pinched |
| F. Strangled | L. Bit | R. Other: _____ |



Medical Release

- Will you seek medical attention immediately after this incident? Yes No Not Applicable
 If no, explain: _____
- Will you possibly seek medical attention within the next few days? Yes No Not Applicable
 If no, explain: _____
- Will you sign an *Authorization for the Disclosure of Health Information*? Yes No Not Applicable
 If no, explain: _____

OTHER ACTS

- | | | | |
|---|------------------------------|-----------------------------|---------------------------------|
| 1. Did the suspect ever engage in a prior forceful or unwanted sexual act against you? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 2. Did the suspect ever engage in a prior forceful or unwanted sexual act against someone else? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 3. Did anyone ever report any prior sexual act by the suspect to police or law enforcement? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 4. Did the police ever arrest the suspect for any prior forceful or unwanted sexual act? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 5. Did any prior sexual act ever result in a criminal charge against the suspect? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 6. Did the suspect ever receive a criminal conviction related to any prior sexual act? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |
| 7. Do you have any records or documents pertaining to any prior act by the suspect? | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Unsure |

If the victim answered **yes** or **unsure** to any question above, then provide a description: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____ Signature: _____

OFFICER OBSERVATIONS

Victim

Demeanor

- Angry
- Apologetic
- Calm
- Crying
- Fearful
- Hysterical
- Nervous
- Other: _____
- Shaking
- Sobbing
- Threatening

Injuries

- Abrasion
- Bite Mark
- Breathing Difficulty
- Broken Nose
- Bruise
- Burn
- Complaint of Dizziness
- Complaint of Headache
- Complaint of Pain
- Complaint of Soreness
- Concussion
- Fracture of Bone
- Other: _____
- Laceration
- Loss or Chip of Tooth
- Loss of Consciousness
- Loss of Hair
- Loss of Sight/Hearing
- Minor Cut
- Petechia
- Redness
- Scratch Marks
- Swallowing Difficulty
- Swelling
- Voice Change

Impairment

- Did victim appear intoxicated? Yes No
- Did victim appear influenced by drugs? Yes No
- Did alcohol appear to be involved? Yes No
- Did drugs appear to be involved? Yes No

Suspect

Demeanor

- Angry
- Apologetic
- Calm
- Crying
- Fearful
- Hysterical
- Nervous
- Other: _____
- Shaking
- Sobbing
- Threatening

Injuries

- Abrasion
- Bite Mark
- Breathing Difficulty
- Broken Nose
- Bruise
- Burn
- Complaint of Dizziness
- Complaint of Headache
- Complaint of Pain
- Complaint of Soreness
- Concussion
- Fracture of Bone
- Other: _____
- Laceration
- Loss or Chip of Tooth
- Loss of Consciousness
- Loss of Hair
- Loss of Sight/Hearing
- Minor Cut
- Petechia
- Redness
- Scratch Marks
- Swallowing Difficulty
- Swelling
- Voice Change

Impairment

- Did suspect appear intoxicated? Yes No
- Did suspect appear influenced by drugs? Yes No
- Did alcohol appear to be involved? Yes No
- Did drugs appear to be involved? Yes No

EVIDENCE AND DOCUMENTATION

Evidence

What evidence exists with respect to this incident?

- Blanket
- Night Clothing
- Skirt
- Other: _____
- Bra or Lingerie
- Pants
- Sheet or Bedding
- Coat or Jacket
- Pillow
- Shoes
- Cushion
- Rug or Carpet
- Sock or Stocking
- Dress or Gown
- Shirt or Sweater
- Towel

What additional evidence exists with respect to this incident?

- 911 Recording
- Audio Recording
- Photographs
- Video Recording
- Other: _____
- If audio recording, identify party recorded: Victim Suspect Other: _____

Did you or another police officer secure and document all evidence related to the incident? Yes No

If no, explain: _____

SANE Notification

Did you or another police officer notify a Sexual Assault Nurse Examiner (SANE) at (920) 361-5525? Yes No

If yes, provide date and time of notification: _____

If no, explain reason for lack of notification: _____

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained in this four page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____ Signature: _____ Badge: _____

GREEN LAKE COUNTY STRANGULATION/SUFFOCATION WORKSHEET

Incident Number _____
 Date of Incident _____
 Time of Incident _____
 Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

DESCRIPTION OF INCIDENT

1. Did the suspect apply pressure on your throat or neck during the incident? Yes No
 If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (e)
 - a. How many times during the incident did the suspect apply pressure on your throat or neck?
 1 2 3 4 5 6 7 8 or More
 - b. How did the suspect apply pressure on your throat or neck? (*check all that apply*)
 One Hand Both Hands Forearm(s) Object or Weapon
 Other: _____
 - c. How much pressure did the suspect apply on your throat or neck?
 Provide description: _____

 - d. How long did the incident last with respect to the suspect applying pressure on your throat or neck?
 Provide description: _____

 - e. What stopped the suspect from continuing to apply pressure on your throat or neck?
 Provide description: _____

2. Did the suspect block your nose or mouth during the incident? Yes No
 If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (e)
 - a. How many times during the incident did the suspect block your nose or mouth?
 1 2 3 4 5 6 7 8 or More
 - b. How did the suspect block your nose or mouth? (*check all that apply*)
 One Hand Both Hands Forearm(s) Object or Weapon
 Other: _____
 - c. How much pressure or force did the suspect apply when blocking your nose or mouth?
 Provide description: _____

 - d. How long did the incident last with respect to the suspect blocking your nose or mouth?
 Provide description: _____

 - e. What stopped the suspect from continuing to block your nose or mouth?
 Provide description: _____

3. Did the suspect say anything to you or another during the incident? Yes No
 Provide description: _____

4. Did you say anything to the suspect or another during the incident? Yes No
 Provide description: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

QUESTIONS TO THE VICTIM

Please ask the victim each of the following fourteen questions. These questions apply to what occurred during the incident and after the incident. Therefore, a "no" answer means the victim did not experience the described condition at any time during the incident and did not experience the described condition at any time after the incident.

- 1. Did you experience any pain, soreness, or headache? Yes No
- 2. Did you experience any difficulty breathing or become unable to breath? Yes No
- 3. Did you experience any feeling of lightheadedness or dizziness? Yes No
- 4. Did you experience any uncontrolled hyperventilation or coughing? Yes No
- 5. Did you experience any temporary loss of consciousness (e.g. fainting or passing out)? Yes No
- 6. Did you experience any temporary loss of sight or hearing? Yes No
- 7. Did you experience any loss of memory, including even a short-term loss of memory? Yes No
- 8. Did you experience any change in your voice (e.g. raspy, hoarse, or unable to speak)? Yes No
- 9. Did you experience any difficulty swallowing (e.g. trouble or pain while swallowing)? Yes No
- 10. Did you experience any feeling of nausea or actual vomiting? Yes No
- 11. Did you experience any change in physical appearance (e.g. swelling, redness, or discoloration)? Yes No
- 12. Did you lose control of any bodily function (e.g. uncontrolled urination or defecation)? Yes No
- 13. Did the suspect threaten to use a ligature or dangerous weapon? Yes No
- 14. Did the suspect use a ligature or dangerous weapon? Yes No

If the victim answered yes to *any* question above, then provide a description: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained above on this page. I also have reviewed all the above handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____ Signature: _____

STATUTORY REFERENCES

Strangulation and suffocation means the intentional act of impeding the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. An act of strangulation or suffocation may violate any of the following crimes against life and bodily security or crimes against public health and safety:

- | | | |
|---|-------------------------------|--|
| 940.01(1) Intentional homicide (Attempt). | 940.19(4) Aggravated battery. | 940.23 Reckless injury. |
| 940.02(1) Reckless homicide (Attempt). | 940.19(5) Aggravated battery. | 940.235 Strangulation and suffocation. |
| 940.19(2) Substantial battery. | 940.19(6) Aggravated battery. | 941.30 Recklessly endangering safety. |

The definitions for the following words and phrases provide:

- 939.22(10) "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.
- 939.22(14) "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.
- 939.22(23) "Petechia" means a minute colored spot that appears on the skin, eye, eyelid, or mucous membrane of a person as a result of localized hemorrhage or rupture to a blood vessel or capillary.
- 939.22(38) "Substantial bodily harm" means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained in this two page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____ Signature: _____ Badge: _____

GREEN LAKE COUNTY STALKING WORKSHEET

Incident Number _____
 Date of Incident _____
 Time of Incident _____
 Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

RELATIONSHIP WITH SUSPECT

- Did you know the suspect prior to the incident? Yes No
 If yes, how long have you known the suspect? _____ Years _____ Months _____ Days
- How would you describe your relationship with the suspect prior to the incident (*check all that apply*):
 Spouse Former Spouse Cohabitant Former Cohabitant Child in Common Relative
 Friend Acquaintance Co-Worker Classmate Stranger Other
 If other, explain: _____

VICTIM AND SUSPECT

Victim

Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

Suspect

Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

INTERACTION WITH SUSPECT

- Have you ever had a consensual interaction or contact with the suspect? Yes No
 If yes, explain the time period(s) of the consensual interaction or contact: _____

- Has the suspect ever initiated unwanted interaction or contact with you? Yes No
 If yes, explain the time period(s) of the unwanted interaction or contact: _____

- Have you or another ever told the suspect to stop or discontinue interaction or contact with you? Yes No
 If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (d).
 - How many times have you informed the suspect to stop or discontinue interaction with you?
 Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More
 - How many times has someone other than you informed the suspect to stop or discontinue interaction with you?
 Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More
 - Has such a discussion from you or another ever stopped the unwanted interaction or contact? Yes No
 If yes, explain the time period(s) of the discontinued interaction or contact: _____

 - Has the suspect ever continued to have interaction or contact with you after such a discussion? Yes No
 If yes, explain the time period(s) of the unwanted interaction or contact: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

COURSE OF CONDUCT

1. Did the suspect ever maintain a visual or physical proximity to you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
2. Did the suspect ever approach or confront you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
3. Did the suspect ever appear at your workplace or contact your employer or coworkers?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
4. Did the suspect ever appear at your house or contact your neighbors?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
5. Did the suspect ever enter property owned, leased, or occupied by you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
6. Did the suspect ever contact you by telephone or cause your telephone to ring repeatedly?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
7. Did the suspect ever use a mechanical device or electronic means to monitor or record your activities?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
8. Did the suspect ever send any materials by any means to you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
9. Did the suspect ever send any materials to another to obtain, disseminate, or communicate with you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
10. Did the suspect ever place or deliver an object to property owned, leased, or occupied by you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
11. Did the suspect ever deliver or place any object with another with the intent the object be delivered to you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
12. Did the suspect ever cause another person to engage in any of the acts described above?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More

If the victim answered yes or unsure to *any* question above, then provide a detailed description in the police narrative.

IMPACT TO THE VICTIM

1. Has the suspect's conduct ever caused you to feel terrified, intimidated, threatened, harassed, or tormented? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

2. Has the suspect's conduct ever caused you to fear bodily injury to yourself? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

3. Has the suspect's conduct ever caused you to fear of death to yourself? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

4. Has the suspect's conduct ever caused you to fear bodily injury to a member of your family or household? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

5. Has the suspect's conduct ever caused you to fear of death to a member of your family or household? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

If the victim answered yes to *any* question above, then provide a detailed description in the police narrative.

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

WITNESS INFORMATION

Please provide the name(s) of anyone who either witnessed any conduct by the suspect or may have relevant information pertaining to the incident. Relevant information may include having witnessed events that occurred prior to or after the incident (e.g. the victim's demeanor after the incident), even when the person may not have been present during the actual incident.

Name: _____

Name: _____

DOB: _____ Age: _____

DOB: _____ Age: _____

Address: _____

Address: _____

Employer: _____

Employer: _____

Home Phone: _____

Home Phone: _____

Cellular Phone: _____

Cellular Phone: _____

Work Phone: _____

Work Phone: _____

DANGEROUS WEAPON

1. Did the suspect ever possess, use or threaten to use a dangerous weapon against you or another? Yes No

If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (d).

a. How many times has the suspect possessed, used or threatened to use a dangerous weapon against you?

Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More

b. How many times has the suspect possessed, used or threatened to use a dangerous weapon against another?

Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More

c. When did the suspect possess, use or threaten to use a dangerous weapon against you or another?

Provide approximate date(s): _____

d. What was the weapon(s) the suspect possessed, used, or threatened to use against you or another (*check all that apply*):

Electric Weapon Firearm or Gun Knife or Bladed Weapon Other

If other, explain: _____

2. Does the suspect own or have access to any firearm or other dangerous weapons? Yes No Unsure

If the victim answered yes to the question above, then provide description of weapon(s) and the weapon(s) location:

COURT DOCUMENTS

1. Is there an active or current restraining order or injunction against the suspect? Yes No Unsure

2. Have you ever filed for a restraining order or injunction against the suspect? Yes No Unsure

3. Has anyone else ever filed for a restraining order or injunction against the suspect? Yes No Unsure

4. Does the suspect have a prior arrest or police contact for an act against you or another? Yes No Unsure

5. Does the suspect have a prior charge or conviction for an act against you or another? Yes No Unsure

6. Does the suspect have an active bond or bail for an open or pending criminal case? Yes No Unsure

7. Does the suspect have a probation agent or court order presently in effect? Yes No Unsure

If the victim answered yes or unsure to *any* question above, then provide a description: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

SUBPOENA OF DOCUMENTS

Please obtain all necessary information from the victim pertaining to any accounts or records that may provide evidence related to communication between the victim and suspect as it pertains to this investigation because such records may be available through a subsequent subpoena for documents. Include all accounts or records where there was contact between the victim and suspect, but do not include any account or record when there was no such contact.

Victim

Telephone (Primary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Telephone (Secondary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Text Message

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

E-Mail

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

Other

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

If other, provide a description: _____

Suspect

Telephone (Primary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Telephone (Secondary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Text Message

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

E-Mail

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

Other

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

If other, provide a description: _____

Additional Notes about a Subpoena for Documents: _____

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained in this four page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____

Signature: _____

Badge: _____

GREEN LAKE COUNTY STALKING WORKSHEET

Incident Number _____
 Date of Incident _____
 Time of Incident _____
 Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

RELATIONSHIP WITH SUSPECT

- Did you know the suspect prior to the incident? Yes No
 If yes, how long have you known the suspect? _____ Years _____ Months _____ Days
- How would you describe your relationship with the suspect prior to the incident (*check all that apply*):
 Spouse Former Spouse Cohabitant Former Cohabitant Child in Common Relative
 Friend Acquaintance Co-Worker Classmate Stranger Other
 If other, explain: _____

VICTIM AND SUSPECT

Victim

Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

Suspect

Name: _____
 DOB: _____ Age: _____
 Address: _____

 Employer: _____

 Home Phone: _____
 Cellular Phone: _____
 Work Phone: _____

INTERACTION WITH SUSPECT

- Have you ever had a consensual interaction or contact with the suspect? Yes No
 If yes, explain the time period(s) of the consensual interaction or contact: _____

- Has the suspect ever initiated unwanted interaction or contact with you? Yes No
 If yes, explain the time period(s) of the unwanted interaction or contact: _____

- Have you or another ever told the suspect to stop or discontinue interaction or contact with you? Yes No
 If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (d).
 - How many times have you informed the suspect to stop or discontinue interaction with you?
 Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More
 - How many times has someone other than you informed the suspect to stop or discontinue interaction with you?
 Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More
 - Has such a discussion from you or another ever stopped the unwanted interaction or contact? Yes No
 If yes, explain the time period(s) of the discontinued interaction or contact: _____

 - Has the suspect ever continued to have interaction or contact with you after such a discussion? Yes No
 If yes, explain the time period(s) of the unwanted interaction or contact: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

COURSE OF CONDUCT

1. Did the suspect ever maintain a visual or physical proximity to you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
2. Did the suspect ever approach or confront you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
3. Did the suspect ever appear at your workplace or contact your employer or coworkers?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
4. Did the suspect ever appear at your house or contact your neighbors?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
5. Did the suspect ever enter property owned, leased, or occupied by you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
6. Did the suspect ever contact you by telephone or cause your telephone to ring repeatedly?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
7. Did the suspect ever use a mechanical device or electronic means to monitor or record your activities?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
8. Did the suspect ever send any materials by any means to you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
9. Did the suspect ever send any materials to another to obtain, disseminate, or communicate with you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
10. Did the suspect ever place or deliver an object to property owned, leased, or occupied by you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
11. Did the suspect ever deliver or place any object with another with the intent the object be delivered to you?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More
12. Did the suspect ever cause another person to engage in any of the acts described above?
 Yes No Unsure If yes, how many times: 1 2 3 4 5 6 or More

If the victim answered yes or unsure to *any* question above, then provide a detailed description in the police narrative.

IMPACT TO THE VICTIM

1. Has the suspect's conduct ever caused you to feel terrified, intimidated, threatened, harassed, or tormented? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

2. Has the suspect's conduct ever caused you to fear bodily injury to yourself? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

3. Has the suspect's conduct ever caused you to fear of death to yourself? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

4. Has the suspect's conduct ever caused you to fear bodily injury to a member of your family or household? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

5. Has the suspect's conduct ever caused you to fear of death to a member of your family or household? Yes No
 If yes, explain the time period(s) when you felt such an emotion: _____

If the victim answered yes to *any* question above, then provide a detailed description in the police narrative.

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

WITNESS INFORMATION

Please provide the name(s) of anyone who either witnessed any conduct by the suspect or may have relevant information pertaining to the incident. Relevant information may include having witnessed events that occurred prior to or after the incident (e.g. the victim's demeanor after the incident), even when the person may not have been present during the actual incident.

Name: _____

Name: _____

DOB: _____ Age: _____

DOB: _____ Age: _____

Address: _____

Address: _____

Employer: _____

Employer: _____

Home Phone: _____

Home Phone: _____

Cellular Phone: _____

Cellular Phone: _____

Work Phone: _____

Work Phone: _____

DANGEROUS WEAPON

1. Did the suspect ever possess, use or threaten to use a dangerous weapon against you or another? Yes No
If the victim answered yes to the question above, then continue with questions sub. (a) to sub. (d).

a. How many times has the suspect possessed, used or threatened to use a dangerous weapon against you?

Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More

b. How many times has the suspect possessed, used or threatened to use a dangerous weapon against another?

Zero 1-2 3-4 5-6 6-7 8-9 10-11 12 or More

c. When did the suspect possess, use or threaten to use a dangerous weapon against you or another?

Provide approximate date(s): _____

d. What was the weapon(s) the suspect possessed, used, or threatened to use against you or another (*check all that apply*):

Electric Weapon Firearm or Gun Knife or Bladed Weapon Other

If other, explain: _____

2. Does the suspect own or have access to any firearm or other dangerous weapons? Yes No Unsure

If the victim answered yes to the question above, then provide description of weapon(s) and the weapon(s) location:

COURT DOCUMENTS

1. Is there an active or current restraining order or injunction against the suspect? Yes No Unsure

2. Have you ever filed for a restraining order or injunction against the suspect? Yes No Unsure

3. Has anyone else ever filed for a restraining order or injunction against the suspect? Yes No Unsure

4. Does the suspect have a prior arrest or police contact for an act against you or another? Yes No Unsure

5. Does the suspect have a prior charge or conviction for an act against you or another? Yes No Unsure

6. Does the suspect have an active bond or bail for an open or pending criminal case? Yes No Unsure

7. Does the suspect have a probation agent or court order presently in effect? Yes No Unsure

If the victim answered yes or unsure to *any* question above, then provide a description: _____

VICTIM STATEMENT

I, the above named victim, have read all the printed material contained on this page. I also have reviewed all the handwritten notations and printed explanations written by the police officer. This document truthfully and accurately summarizes my statement to the officer.

Date: _____

Signature: _____

SUBPOENA OF DOCUMENTS

Please obtain all necessary information from the victim pertaining to any accounts or records that may provide evidence related to communication between the victim and suspect as it pertains to this investigation because such records may be available through a subsequent subpoena for documents. Include all accounts or records where there was contact between the victim and suspect, but do not include any account or record when there was no such contact.

Victim

Telephone (Primary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Telephone (Secondary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Text Message

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

E-Mail

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

Other

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

If other, provide a description: _____

Suspect

Telephone (Primary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Telephone (Secondary) Landline Cellular

Service Provider: _____

Account Name: _____

Phone Number: _____

Date Range: _____

Text Message

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

E-Mail

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

Other

Service Provider: _____

Account Name: _____

Account Number: _____

Date Range: _____

If other, provide a description: _____

Additional Notes about a Subpoena for Documents: _____

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained in this four page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____

Signature: _____

Badge: _____

GREEN LAKE COUNTY STALKING WARNING

Incident Number _____
Date of Incident _____
Time of Incident _____
Name of Officer _____

Police Agency
 BPD MPD
 GLPD PPD
 GLSO Other: _____

VICTIM AND SUSPECT

Victim

Name: _____ DOB: _____ Age: _____

Suspect

Name: _____ DOB: _____ Age: _____

Address: _____ Employer: _____

Home Phone: _____ Employer Address: _____

Cellular Phone: _____ Work Phone: _____

STALKING WARNING

The police agency identified above has recently investigated a complaint about your behavior toward the individual identified above as the victim. The behavior you have engaged in could be interpreted as "stalking" as defined by Wisconsin Statutes section 940.32.

Stalking can be described as intentionally engaging in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.

Your acts have caused the victim to suffer serious emotional distress or induced fear in the victim of bodily injury to or the death of himself or herself or a member of his or her family or household.

This letter serves to inform you that at least one of your acts caused the victim to suffer serious emotional distress or placed the victim in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

This police agency takes allegations of stalking very seriously. Please consider this a formal warning that any future stalking behavior done by you towards the victim could result in arrest by law enforcement and prosecution by the district attorney. This also includes causing any other person to engage in this type of conduct toward the victim.

METHOD OF DELIVERY

The standard method of delivery for the above stalking warning requires a sworn police officer to personally meet with the suspect. The officer then reads the warning to the suspect and provides a printed copy to the suspect and secures the original copy as evidence. The assistance from another police department or agency may be employed when the location of the suspect prohibits the investigating department from personally meeting with the suspect. The use of other methods of delivery, such as by telephone or mail, should only be employed after the investigating officer exhausted all reasonable opportunities for personal delivery.

1. Did you personally meet with the suspect and verbally deliver the warning? Yes No

2. Did you employ the assistance of another police officer or department to deliver the warning? Yes No

If yes, identify the name of the officer and department who delivered the warning: _____

3. Did you or another officer provide the suspect with a printed copy of the warning? Yes No

4. Did you employ some other means to deliver the warning to the suspect? Yes No

If yes, explain the method employed and the reason(s) for non-personal service: _____

5. When did the suspect receive the stalking warning? Date: _____ Time: _____

OFFICER STATEMENT

I, the above named officer, have read all the printed material contained on this single page document. I also have reviewed all the handwritten notations and printed explanations. This document truthfully and accurately summarizes my investigation into this incident.

Date: _____ Signature: _____ Badge: _____

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**DANE COUNTY DISTRICT ATTORNEY'S OFFICE
CITY OF MADISON, DANE COUNTY, WISCONSIN**

SERVICE OF WARNING - STALKING LETTER

RE _____
(Complainant)

Warning letter served to _____, _____
(DOB)

(HOME ADDRESS)

The Dane County District Attorney's Office has recently investigated a complaint about your behavior towards the above-named individual.

The behavior you have engaged in could be interpreted as "stalking" as defined by WI State Statute 940.32. Stalking can be described as intentionally engaging in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress, or place the specific person in reasonable fear of bodily injury. Your behavior has induced such fear or distress in the above named individual.

The Wisconsin law makes stalking a crime. The Dane County District Attorney's Office takes this law very seriously.

Please consider this a formal warning that any future conduct by you towards the above named individual could result in arrest by law enforcement and prosecution by the Dane County District Attorney's Office.

Print Name of District Attorney

Signature of District Attorney

Served in hand _____ by _____
(date) (Name of investigator)

of the Dane County District Attorney's Office

at _____
(location)

Filling in the blank on p. 2 of WI JI-CRIM 1284, Stalking, for "course of conduct" in element 1. [wherever it says "the victim", their name should be filled in there]

No. = the paragraph of 940.32(J)(a) from which each potential language choice is derived

1. Maintained physical proximity to the victim.
Maintained visual proximity to the victim.
2. Approached the victim.
Confronted the victim.
3. Appeared at the victim's workplace.
Contacted the victim's employer.
Contacted the victim's coworker(s)*.
4. Appeared at the victim's home.
Contacted the victim's neighbor(s)*
5. Entered property** owned by the victim.
Entered property leased by the victim.
Entered property occupied by the victim.
6. Contacted the victim by telephone.
Caused the victim's telephone to ring repeatedly or continuously where a conversation ensued.
Caused the victim's telephone to ring repeatedly or continuously where a conversation did not ensue.
Caused another person's telephone to ring repeatedly or continuously where a conversation ensued.
Caused another person's telephone to ring repeatedly or continuously where a conversation did not ensue.
- 6m. Photographing the activities of the victim.
Videotaping the activities of the victim.
Audiotaping the activities of the victim.
Through any other electronic means monitoring the activities of the victim.
Through any other electronic means recording the activities of the victim.
(This subdivision applies regardless of where the act occurs.)
7. Sent material by any means to the victim.
Sent material by any means to a member of the victim's family for the purpose of obtaining information about the victim.
Sent material by any means to a member of the victim's household for the purpose of obtaining information about the victim.
Sent material by any means to the victim's employer(s)* for the purpose of obtaining information about the victim.

Sent material by any means to the victim's coworker(s)* for the purpose of obtaining information about the victim.

Sent material by any means to the victim's friend(s)* for the purpose of obtaining information about the victim.

Sent material by any means to a member of the victim's family for the purpose of disseminating information about the victim.

Sent material by any means to a member of the victim's household for the purpose of disseminating information about the victim.

Sent material by any means to the victim's employer(s)* for the purpose of disseminating information about the victim.

Sent material by any means to the victim's coworker(s)* for the purpose of disseminating information about the victim.

Sent material by any means to the victim's friend(s)* for the purpose of disseminating information about the victim.

Sent material by any means to a member of the victim's family for the purpose of communicating with the victim.

Sent material by any means to a member of the victim's household for the purpose of communicating with the victim.

Sent material by any means to the victim's employer(s)" for the purpose of communicating with the victim.

Sent material by any means to the victim's coworker(s)* for the purpose of communicating with the victim.

Sent material by any means to the victim's friend(s)* for the purpose of communicating with the victim.

8. Placed an object on property owned by the victim.

Placed an object on property leased by the victim.

Placed an object on property occupied by the victim.

Delivered an object to property owned by the victim.

Delivered an object to property leased by the victim.

Delivered an object to property occupied by the victim.

9. Delivered an object to a member of the victim's family with the intent that the object be delivered to the victim.

Delivered an object to a member of the victim's household with the intent that the object be delivered to the victim.

Delivered an object to the victim's employer(s)* with the intent that the object be delivered to the victim.

Delivered an object to the victim's coworker(s)* with the intent that the object be delivered to the victim.

Delivered an object to the victim's friend(s)* with the intent that the object be delivered to the victim.

Delivered an object to property owned by a member of the victim's family with the intent that the object be delivered to the victim.

Delivered an object to property leased by a member of the victim's family with the intent that the object be delivered to the victim.

Delivered an object to property occupied by a member of the victim's family with the intent that the object be delivered to the victim.

Delivered an object to property owned by a member of the victim's household with the intent that the object be delivered to the victim.

Delivered an object to property owned by the victim's employer(s)* with the intent that the object be delivered to the victim.

Delivered an object to property leased by the victim's employer(s)* with the intent that the object be delivered to the victim.

Delivered an object to property occupied by the victim's employer(s)* with the intent that the object be delivered to the victim.

Delivered an object to property owned by the victim's coworker(s)* with the intent that the object be delivered to the victim.

Delivered an object to property leased by the victim's coworker(s)* with the intent that the object be delivered to the victim.

Delivered an object to property occupied by the victim's coworker(s)* with the intent that the object be delivered to the victim.

Delivered an object to property owned by the victim's friend(s)* with the intent that the object be delivered to the victim.

Delivered an object to property leased by the victim's friend(s)* with the intent that the object be delivered to the victim.

Delivered an object to property occupied by the victim's friend(s)* with the intent that the object be delivered to the victim.

10. Cause a person to [fill in here any of the above listed choices].

* = there may be more than one, and each one of those is one of the "two or more acts" required to be proved for the course of conduct.

** = "Property" for purposes of 5. and generally as a matter of law includes all things that would be in the "close" or "curtilage" of the residence (rented or owned) or business. *See e.g. State v. Martwick*, 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552, ¶¶s 25.- 42; Section 70.03, Stats: "The terms **real property**, **real** estate' and 'land' ... shall include not only the land itself but all buildings and improvements thereon ... "; also, Black's Law Dictionary, 1996, definition of "real property" to include the land and whatever is attached to it or built on it.

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Id. at 152. (emphasis added). Such evidence may enlighten the jury regarding the defendant's state of mind at the time of the incident and assists the jury in deciding whether the defendant acted as a reasonably prudent person would under similar beliefs and circumstances. See *State v. Daniels*, 160 Wis. 2d 85, 94 (1991), citing *McMorris*, 58 Wis. 2d at 151.

In *Werner*, the Wisconsin Supreme Court clarified that under *McMorris*, a defendant who claims self-defense may testify about prior specific acts of violence by the victim only when this conduct was “*within his knowledge to show his state of mind*” at the time of the alleged offense. *Werner*, 66 Wis. 2d 736, 744 (emphasis added). Thus, “[e]vidence of prior specific conduct may *not* be used to prove that the victim acted in conformity with that conduct.” *Id.* (emphasis added). In other words:

The purpose in allowing such testimony is not to support an inference about the victim's actual conduct during the incident; rather, the testimony relates to the defendant's state of mind, showing what his beliefs were concerning the victim's character. Such evidence helps the jury determine whether the defendant ‘acted as a reasonably prudent person would under similar beliefs and circumstances’ in the exercise of a privilege of self defense.

Id. at 743 (internal citation omitted).

In *McAllister v. State*, 74 Wis.2d 246 (1976), the Wisconsin Supreme Court further clarified *Werner* and *McMorris*. The Court held that although a defendant claiming self-defense may testify about specific instances of violence by the victim, testimony by other witnesses is inadmissible to prove that the victim acted in conformity with that conduct, but a defendant may “produce supporting evidence to prove the reality of the particular acts of which he claims knowledge, thereby proving reasonableness of his knowledge and apprehension and the credibility of his assertion.” *McAllister*, 74 Wis. 2d at 250-51.

The defendant's proof of the victim's prior violent acts of which he was aware is not limited to the accused's own testimony. *Daniels*, 160 Wis. 2d at 95. The self-serving nature of the defendant's testimony about the victim's prior violent acts makes corroborating evidence of those acts important for the defendant's self-defense claim. *Id.* As such, within the trial court's discretion, the defendant should be allowed to produce supporting evidence to prove that the reasonableness of the accused knowledge and apprehension of the victim and the credibility of his assertions about his state of mind.” *Id.* (discussing *McAllister*, 74 Wis. 2d 246 (1976)).

The admissibility of evidence proffered to show the reasonableness of the self-defense claim is within the court's discretion. *State v. Head*, 2002 WI 99, 255 Wis. 2d 194 (2002). As with any other acts evidence, the evidence is subject to the application of the balancing test involving the weighing of probative value against the danger of unfair

prejudice, and considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See Wis. Stats. § 904.03. Assuming its probative value outweighs such considerations, courts have in previous cases established the defendant's right to put on such evidence once a factual basis has been set forth for a self-defense claim, and also established the court's responsibility to vet the evidence prior to admission to be sure it is valid *McMorris* evidence. See, e.g., *McAllister*, 74 Wis. 2d 246.

When corroborating evidence of the victim's prior specific violent acts is cumulative, courts have excluded it on grounds that it surpassed the legitimate purpose of establishing what the defendant believed to be the victim's character, and instead, demonstrated the victim's violent propensity. See *id.* at 251; *Daniels*, 160 Wis. 2d at 106-07.

Finally, in *State v. McClaren*, 318 Wis. 2d 739 (2009), the Wisconsin Supreme Court held that a trial court has inherent authority to order the defendant to provide a summary of evidence in question relating to *McMorris* evidence of prior violent acts by the victim supporting a self-defense claim, so that admissibility determinations could be made prior to trial. The Court held in that case that the Constitution does not guarantee a criminal defendant the right to surprise the prosecutor. *Id.* at 745. The Court further held that requiring disclosure in advance of trial does not violate the defendant's right against self-incrimination or his right to due process. *Id.* at 758-62.

[Insert Discussion of Case Facts as Applied to Law on *McMorris* Evidence]

Conclusion

Based on the above, the State requests that the court grant in part, on a limited basis per the court's discretion at trial, consistent with the State's argument, and deny in part the defendant's motion based upon the above analysis.

Dated this ____ day of _____, 20__.

Assistant District Attorney
State Bar No. _____

cc: Defense attorney

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This primer, although also applicable to a felony jury trial, is primarily intended to address misdemeanor domestic abuse jury trials. It is intended to raise issues and provide direction, but does not address every possible issue that can arise at trial. Legal mechanics and practical strategies and suggestions are interwoven throughout this section. Please note that the different procedures applicable to NGI defense trials are not addressed in this chapter.

Charging Strategies and Suggestions

Below is a list of general strategies and suggestions to consider when charging a domestic abuse case:

- When you charge a case, have your closing argument in mind.
- Make a list, connecting the facts with the elements of the crime that must be proven.
- Read all the reports thoroughly and formulate a rough trial outline before you charge the case.
- Ask the police to perform follow-up investigation if necessary.

Closely consider the evidence and all corroboration. Consider what, if any, additional evidence can be collected before it is destroyed or lost. Additional evidence may include:

- Interviews of additional witnesses such as friends, neighbors, children, and medical personnel;
- Admissions or other statements by the defendant;
- Physical evidence present at the scene such as weapons, mess, torn clothing, broken furniture, etc.;
- The 911 tape(s), including statements from the scene;
- Photographs of the crime scene;

- Photographs of injuries over time (e.g. changing color of bruises); and/or
- Medical reports documenting injuries.

Below are additional suggestions and strategies to consider in more detail:

Anticipate the defense. Eliminate any defenses at the earliest time possible. For example, if you suspect an alibi defense, get your investigating officer to perform the relevant investigation up front.

Meeting with the victim. Consider consulting with the victim pre-charge in the presence of an advocate or victim assistance professional

Base your decisions on the evidence. Do not issue charges simply because the defendant has a bad record or you personally find the defendant to be unsavory. It is always important to weigh: 1) any history of abuse between the parties, 2) the negative impact of domestic abuse upon the children and family, and 3) possible future escalation of violence. Nonetheless, you still must issue charges based upon the available evidence and your ability to prove the case beyond a reasonable doubt.

Lethality factors. Consider various lethality factors in a domestic abuse case which may warrant more stringent intervention, result in requests for conditions of bail, sentencing considerations and/or safety planning for the victim. *See* Pence, Ellen and Paymar, Michael, *Domestic Violence: The Law Enforcement Response*, DULUTH DOMESTIC ABUSE INTERVENTION PROJECT (rev. ed. 2001). Some of these factors may include:

- Use and abuse of alcohol and/or drugs;
- Existence of TROs and/or domestic abuse injunctions between the parties, now or in the past;
- Death threats or suicide threats;
- History of mental illness;
- The use, or the threat of use, of a gun or other weapon;

- The presence of children in the household during the incident;
- The extent of injuries or harm caused, including whether a strangulation was involved;
- The defendant's prior history of criminal or other anti-social behavior;
- The defendant's past history of violence or aggressive behavior (charged or uncharged);
- Whether the victim plans to leave the relationship (thereby creating the danger of "separation violence"); and
- The totality of the circumstances of the present case.

Case Preparation

Keep in mind that the State, at a jury trial, must introduce evidence to prove the following:

- *Date*: When the acts occurred.
- *Elements of the crime(s) (sufficiency of the evidence)*: That certain acts occurred, which satisfy the elements of the applicable criminal statute(s). This includes both physical acts and statements.
- *Elements of the crime(s) (statutory construction)*: That these certain acts satisfy the elements of the applicable statute(s) from a statutory construction and interpretation standpoint.
- *Venue*: That the acts occurred in the proper venue.
- *Identification*: That the acts, either directly or pursuant to some other theory of liability, are attributable to the defendant. This includes the in-court identification of the defendant if possible.

Witness issues. Know which witnesses you will be relying upon at trial before you issue your case. Get criminal records of the defendant and all witnesses. Check to see if any possible witnesses

have any pending cases (ask them, check CCAP, CIB, NCIC, etc.). If the answer is yes, that information must be disclosed to the defense pursuant to *State v. Randall*, 197 Wis. 2d 29, 539 N.W.2d 708 (Ct. App. 1995).

- *Prior record of adult criminal convictions and juvenile adjudications*: The issue of any prior convictions or adjudications of a witness is covered by WIS. STAT. § 906.09. Delinquency adjudications are included in this analysis. This rule applies to both prosecution and defense witnesses. Note the requirement of a hearing, pursuant to WIS. STAT. §§ 906.09(3), 901.04 and 904.03, as well as how to determine and prove the correct number and nature of a person's prior convictions and adjudications.
- *No prior record*: If the defendant has no prior record, request from the court an order excluding this evidence, on the grounds that such evidence is irrelevant and is also impermissible character evidence. *State v. Bedker*, 149 Wis. 2d 257, 440 N.W.2d 802 (1988), *rev. denied*, 443 N.W.2d 312. This request can also be included in a motion *in limine*.
- *Determine bias of witnesses, if any*: When possible, interview your major witnesses before charging. Do not rely entirely upon the police reports. In cases where you need corroboration, sometimes the witnesses may be defendant-friendly. If you are heavily relying upon defendant-friendly witnesses, then that testimony should be locked in through an interview.
- *Interview witnesses before trial*: This is important, in order to prevent any surprise testimony and give yourself enough time to deal with any problems. Also, make sure your witnesses dress appropriately for trial.
- *Child witnesses*: If one of your witnesses is a child, take the child to the courtroom before the trial. Practice your direct examination with the child on the witness stand. Prepare the child for cross examination. Probe the child for the ability to discern truth from lies, as well as the potential consequences for telling a lie.

- *The importance of court rulings regarding the evidence:* After the trial court rules on motions *in limine*, discuss with the witnesses any areas that they need to be careful about – or that they must avoid – during their testimony. This includes reference to the defendant’s silence (both direct and indirect silence), reference to the defendant’s probation or parole status, reference to a probation or parole revocation hearing, and any court ruling which relates to a specific type of evidence. Make sure your discussion with the witness is in plain English and that the witness understands what you are conveying. If possible, have the witness repeat back to you what you just explained. Do not delegate this important function. When dealing with challenging witnesses, have someone else present during the discussion, in case testimony is needed later as to what the witnesses were told and their comprehension of the matters discussed.
- *Witness availability:* This includes the issue of starting a trial without a key witness. See *State v. Barthels*, 174 Wis. 2d 173, 495 N.W.2d 341 (1993). Not immediately swearing a jury until absolutely necessary is one way to alleviate the issue of a mistrial because of witness unavailability.
- *The sequestration and exclusion of witnesses:* WIS. STAT. § 906.15 provides that the court shall order witnesses to be excluded so that the witness cannot hear the testimony of other witnesses.
- *Law enforcement witnesses:* Do not assume that they are prepared, and that they know how to testify in court. Insist that they review reports and memo books. Prepare these witnesses as you do any other; meet with them ahead of time. Also discuss any areas of testimony that they need to be careful about, or that they must avoid, during their testimony. This includes references to probation/parole status or impermissible other acts evidence.
- *Contact with other witnesses during trial:* Advise witnesses how to conduct themselves if they have contact with persons associated with the defendant, or with other witnesses.

Obviously they are not allowed to discuss the case at all.

- *As a final important point:* Make certain that witnesses know that they should always, always tell the truth!

Discovery. Resolve all issues prior to trial, if possible. Make sure all discovery issues are addressed and resolved to the fullest extent possible, either by resolving all the issues prior to trial OR by resolving some issues pre-trial and leaving others to be resolved later on during the trial. See WIS. STAT. § 971.23. At a minimum, confer with defense counsel before trial to obtain their position as to all discovery issues, and to make certain that they possess all available discovery. File reciprocal discovery motions and motions *in limine* in the early stages of the case. Do not sandbag evidence. Turn it over immediately and deal with any problems that arise. Always be confident in your case at pre-trial discussions with the defense. Don’t be afraid to ask the defense attorney what he or she is going to do.

Knowledge of pre-trial evidentiary rulings. Make certain that you know exactly what pretrial court rulings have been made, including all pretrial motions and motions *in limine*. Make sure that all pretrial motions have been handled adequately and that you know what the resolution of each motion was. Keep track of any motions whose resolution has been delayed to a certain point during the trial or whose resolution is based upon the possible occurrence of one or more events.

Exhibits. Mark all the exhibits you can prior to starting the trial; this helps things move smoothly when the jury is seated. Prepare a list of the exhibits for the trial court if you can. This saves time, especially when many exhibits are anticipated. You should of course always have an exhibit list for yourself as well; the most helpful ones have places to check boxes when the evidence has been marked, identified, moved into evidence, accepted by the court, and allowed to publish to the jury.

Charts. Wisconsin law governing the use of charts is addressed by *State v. Olson*, 217 Wis. 2d 730,

579 N.W.2d 802 (Ct. App. 1998); and Wisconsin Jury Instruction 154.

Other acts evidence. The issue of evidence of other crimes or acts includes the proper use of the three-step analytical framework. This issue is discussed more fully elsewhere in a chapter of the reference book.

Stipulations. The parties may stipulate to any facts. Both sides must agree, obviously, in order for a stipulation to be valid. A good practice is for you to volunteer to write up those stipulations for the court; that way, you can choose exactly how they are worded. When you write them, use numbers or bullet points, write as clearly as possible, and sign the document before giving it to the court. The defense attorney and the defendant should also sign. These stipulations will then be read to the jury.

Miscellaneous Procedural Items

Questioning by jurors. In *State v. Darcy N.K.*, 218 Wis. 2d 640, 581 N.W.2d 567 (Ct. App. 1998), the court adopted the recommendations in Wisconsin Jury Instructions-Criminal 8, which suggested that, in criminal cases, the jury should not be prohibited from questioning a witness. Many judges have personal preferences regarding whether jurors should be allowed to ask questions during the trial.

Multiple defendants. Trials involving two or more defendants can be in front of the same jury or before two or more juries simultaneously. See *State v. Avery*, 215 Wis. 2d 45, 571 N.W.2d 907 (Ct. App. 1997).

Juror note-taking. WIS. STAT. § 972.10(1)(a) provides that, as with juror questioning, many judges have personal preferences regarding note-taking. Some feel it is distracting to the jurors; others feel it helps them stay on track.

Calling and interrogation of witnesses by the court. WIS. STAT. § 906.14(2) governs the interrogation of witnesses by a judge. While the judge may question any witness, he/she must be careful not to function as a partisan or advocate. *State v. Garner*, 54 Wis. 2d 100, 104, 194 N.W.2d 649, 651 (1972).

“[T]he judge should not take an active role in trying the case for either the state or the defense.” *Id.* In *Garner*, the judge took a somewhat active role in questioning witnesses. There is a fine line which divides a judge’s proper interrogation of witnesses and interrogation which may appear to a jury as partisanship. A trial judge must be sensitive to this fine line. However, the trial judge is more than a mere referee. The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the State. A judge does have some obligation to see to it that justice is done, but must do so carefully and in an impartial manner.

State v. Asfoor, 75 Wis. 2d 411, 437, 249 N.W.2d 529 (1977). For an additional examination of this topic, see *State v. Carprue*, 2004 WI 111, 247 Wis. 2d 656, 683 N.W.2d 131.

Off-the-record sidebar conferences. The Wisconsin Court of Appeals has acknowledged that:

[A]t times, trial judges and trial attorneys are understandably reluctant to interrupt the flow of testimony. Under such circumstances, brief side-bar conferences certainly are appropriate. Whenever possible, however, they should be on the record. When they are not, it is essential that the subsequent on-the-record comments repeat or summarize the arguments and confirm exactly what was presented to the trial court at the time of its ruling.

State v. Mainiero, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994). In *State v. Hughes*, 248 Wis. 2d 133, 635 N.W.2d 661, filed September 11, 2001, an unpublished opinion, the Wisconsin Court of Appeals stated in footnote 1: “Off-the-record conferences, such as the one held here, violate SCR 71.01(2) and SCR 71.02(2). We again caution trial judges not to hold off-the-record conferences with counsel. See *State v. Mainiero*, 189 Wis.2d 80, 95 n.3, 525 N.W.2d 304, 310 n.3 (Ct. App. 1994).”

Six-person juries. WIS. STAT. § 972.02(2): “At any time before verdict the parties may stipulate in writing or by statement in open court, on the record, with the approval of the court, that the jury shall consist of any number less than 12. If a case is a misdemeanor case, the jury shall consist of six persons.” In order to have a jury of any number other than twelve in a misdemeanor case:

- It may be agreed to any time before the verdict is returned.
- Both parties must agree.
- The approval of the trial court is also required.
- The agreement must be stated in writing or by statement in open court, on the record.

Please note that six-person juries (but not twelve-person juries) may be used for tickets or forfeitures, if the defendant follows the proper procedures. The rules for trials involving forfeitures are different than those involving criminal charges; forfeitures are not addressed in this document. Six-person juries, though unconstitutional in some instances, are not inherently unconstitutional. *See State v. Huebner*, 2000 WI 50, ¶ 25, 235 Wis. 2d 486, 496-97.

Jeopardy. In a jury trial, jeopardy attaches when the selection of the jury has been completed and the jury is sworn. WIS. STAT. § 972.07(2).

Child testimony. The issue of allowing a child witness to sit on someone's lap while testifying is addressed in *State v. Shanks*, 2002 WI App 93, 253 Wis. 2d 600, 644 N.W.2d 275.

Starting a trial without a necessary witness. In *State v. Barthels*, 174 Wis. 2d 173, 495 N.W.2d 341 (1993) (overturned on other grounds in *State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822), the Wisconsin Supreme Court addressed the situation where the State moved for a mistrial because the prosecution was unable to locate a key witness. *See also State v. Seefeldt*, 2003 WI 47, ¶¶ 29-34, 261 Wis. 2d 383, 399-400, 661 N.W.2d 822, for the correct appellate review standard when the state moves for a mistrial.

Restraint of the defendant. If the defendant is in custody at the time of trial, proper procedures must be followed to ensure that the jury is not aware of that prejudicial fact. *See State v. Knighten*, 212 Wis. 2d 833, 569 N.W.2d 770 (Ct. App. 1997); *State v. Grinder*, 190 Wis. 2d 541, 527 N.W.2d 326 (1995).

Jury Selection, Voir Dire, and Swearing the Jury

Jury list. If you can, try to obtain a list of the jurors in your pool prior to *voir dire* and conduct background/criminal record checks on each one. That way you will know if a juror has a pending criminal case, and you will know if they are telling the truth in response to questions about criminal behavior.

Know your role as a prosecutor. Understand what you want to accomplish at this stage:

- Remember, you are in a unique position; the prosecutor represents a “client” of which the jury (and the defendant) is a part.
- *Voir dire* is the jury’s “first impression” of you. Make a good impression. Do not antagonize the jury at this point. It is better to ask a few neutral questions and sit down. Be natural in asking questions. Talk to the jurors like you would speak to someone in a social setting. Do not read to them from a text. Be prepared and professional, or at least appear as if you are.
- The prosecutor must “weed out” the emotionally unstable because it is assumed that a reasonable, law-abiding and intelligent citizen is as interested in the successful prosecution of criminals as the prosecutor is. Also, consider screening out experts, egocentric or independent persons.
- Examine jurors about their bias, interests, personal experiences, and attitudes toward the system and its components.
- Determine the issues of the case and formulate questions to explore the issues.
- Domestic abuse: Has it touched anyone’s life? The lives of friends? Family?
- Self defense: Has any juror been attacked?
- Police misconduct: Has any juror had experience with the police, bad or good?
- In a domestic case, be sure that jurors are willing to differentiate between “intent” and “premeditation.”

- If you must rely upon “practically certain” to prove intent, make sure the jury understands the concept and is willing to distinguish.
- Tell the jury that you have the burden of proof. Diffuse it as an issue for the defense.

More strategies:

- Dispel quickly any sympathy for the defendant. For example: “You understand that this case involves the beating of a young woman. The defendant is charged with that offense.”
- Exploit a juror’s view that is favorable to you. For example: A police officer’s wife says she would believe the police under any circumstances. Ask her why.
- Try to ask defense questions your way. For example: “Regarding the presumption of innocence. . . . This defendant is presumed innocent until I prove to you beyond a reasonable doubt that he is guilty.”
- Do not allow the defense to ask “promise” questions. Jurors should not promise anything to anyone but the judge. Also, do not let the defense use *voir dire* as a mechanism to enamor him- or herself to the jury.

Legal attack to jury pool. Be aware of possible 6th Amendment “fair cross-section” challenges to the jury pool. This challenge is based in case law; there is no express statutory provision that authorizes this challenge. Cases you can cite include *State v. Pruitt*, 95 Wis. 2d 69, 289 N.W.2d 343 (Ct. App. 1980); *Wilson v. State*, 59 Wis. 2d 269, 208 N.W.2d 134 (1973); *Brown v. State*, 58 Wis. 2d 158, 205 N.W.2d 566 (1973). See also *United States v. Raszkiewicz*, 169 F.3d 459 (7th Cir. 1999).

An anonymous jury. The disclosure of juror information should be restricted to ensure an anonymous jury. *State v. Tucker*, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374; *State v. Britt*, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1996).

Statutory selection procedures challenge. This is a challenge that the statutory provisions in Chapter 756, which address the selection of the jury pool from which the jurors for a specific case are chosen, were not followed. See *State v. Carlson*, 2003 WI 40, 261 Wis. 2d 97, 661 N.W.2d 51; *State v. Coble*, 100 Wis. 2d 179, 301 N.W.2d 221 (1981). The defendant does not have an absolute right to be present with counsel when a court questions jurors under Wis. STAT. § 756.03, but the defendant does have the right to be present in that case. *State v. Gribble*, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488. Deviating from the statutory procedures to place one or more persons on a jury panel because of race, etc. is not permitted. *Oliver v. Heritage Mut. Ins. Co.*, 179 Wis. 2d 1, 505 N.W.2d 452 (Ct. App. 1993).

Numbers. The number of people in the jury pool depends on such things as number of peremptory challenges, the complexity and anticipated length of the case, number of additional jurors, etc. See Wis. STAT. § 972.04. The number of jurors who hear the case can be greater than twelve because of additional or alternative jurors. Wis. STAT. §§ 972.02(2); 972.04(1). In both misdemeanor and felony cases twelve jurors must decide the case unless the parties and the court agree to a number less than twelve. In misdemeanor cases the normal practice is to have thirty people in the jury pool.

Voir dire of the jury. The *voir dire* must be on the record. SCR 71.01. Wis. STAT. § 805.08(1) provides that:

QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court’s examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

The general order is the court goes first, then the State, and then the defense. The court has wide discretion as to the number of questions and the type of questions, and has control over the *voir*

dire process. Know the practice of the judge in your case.

Challenges for cause. Always ask if there is anyone on the jury who has a moral, religious, or philosophical reason why they cannot sit in judgment of another human being. In *State v. Saucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), the Wisconsin Supreme Court, in an effort at clarification, outlined three types of juror bias: “statutory,” “subjective,” and “objective.”

- **Statutory bias.** Of the three types, this is the least commonly seen. A prospective juror is statutorily biased if he or she falls into one of the statutorily recognized groups in Wis. STAT. § 805.08, which includes persons with a financial interest in the case, or who are related to a party or attorney appearing in the case. Statutorily biased jurors are ineligible to serve as jurors regardless of their ability to be impartial.
- **Subjective bias.** A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have, and listen objectively to the facts of the case. Subjective bias is revealed through the words and demeanor of the prospective juror, showing his or her state of mind. See *State v. Carter*, 2002 WI App 55, 250 Wis. 2d 851, 641 N.W. 517, for a discussion of subjective bias and a subsequent remand for a new trial.
- **Objective bias.** Objective bias exists when the prospective juror’s relationship to the case is such that no reasonable person in the same position could possibly be impartial, even if the juror promises to set aside any bias. Objective bias can be detected from the facts and circumstances surrounding the juror’s answers. The juror’s statements that he or she can and will be impartial are irrelevant to this analysis. See *State v. Smith*, 2006 WI 74, 291 Wis. 2d 569, 716 N.W.2d 482.

Ask the court to describe the judge’s preferred method of addressing any challenges (i.e., challenge in open court, sidebar, etc.).

Peremptory challenges. WIS. STAT. § 972.03
PEREMPTORY CHALLENGES:

Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section. When the crime charged is punishable by life imprisonment the state is entitled to 6 peremptory challenges and the defendant is entitled to 6 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment, the total peremptory challenges allowed the defense shall not exceed 12 if there are only 2 defendants and 18 if there are more than 2 defendants; in other cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2. In misdemeanor cases, the state is entitled to 3 peremptory challenges and the defendant is entitled to 3 peremptory challenges, except that if there are 2 defendants, the court shall allow the defense 4 peremptory challenges, and if there are more than 2 defendants, the court shall allow the defense 6 peremptory challenges. Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under s. 972.04 (1).

Exercise of peremptory challenges. The practice consists of alternating strikes, beginning with the State. There is a practice in many courts of the judge talking to the jury during this procedure. See Wis. STAT. § 972.04.

Swearing of the jury after selection and prior to trial. The jurors must be sworn prior to trial of the case. Wis. STAT. § 756.08(1). If you have witness unavailability issues, hold this off as long as possible; jeopardy attaches as soon as the jury is sworn. Wis. STAT. § 972.07.

Preliminary Jury Instructions

Wis. STAT. § 972.10(1)(b):

The court may give additional preliminary instructions to assist the jury in understanding its duty and the evidence it will hear. The preliminary instructions may include, without limitation, the elements of any offense charged, what constitutes evidence and what does not, guidance regarding the burden of proof and the credibility of witnesses, and directions not to discuss the case until deliberations begin. The additional instructions shall be disclosed to the parties before they are given and either party may object to any specific instruction or propose instructions of its own to be given prior to trial.

Opening Statements

With respect to opening statements: (1) The statements must be recorded by the court reporter (SCR 71.01); (2) The State gives its opening statement first; (3) The defense may give an opening statement after the State gives its opening statement or the defense may reserve their argument until the presentation of its case and the prosecutor may not comment on the defense waiting to present their opening statement (*State v. Sarinske*, 91 Wis. 2d 14, 280 N.W.2d 725 (1979)); and (4) The defendant may give his or her own opening statement (*State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984)).

The State's Case-in-chief

WIS. STAT. § 971.10(3) provides in part: “The state first offers evidence in support of the prosecution.” Prove the elements by direct and/or circumstantial evidence. Best practice: Use a checklist to avoid inadvertent omissions. With regard to reopening testimony, see WIS. STAT. § 972.10(3), which provides that: “If the state and defendant have offered evidence upon the original case, the parties may then respectfully offer rebuttal testimony only, unless the court in its discretion permits them to offer evidence upon their original case.” See also WIS. STAT. § 906.11(1); *State v. Harvey*, 242 Wis. 2d 189, 198, 625 N.W.2d 892 (Ct. App. 2001).

Defense Motion to Dismiss

WIS. STAT. § 972.10(4) provides that: “At the close of the state’s case and at the conclusion of the entire case, the defendant may move on the record for a dismissal.” See also *State v. Scott*, 2000 WI App 51, 234 Wis. 2d 129, 608 N.W.2d 753.

The best practice is for trial courts to decide the motion at the close of the State’s case. The appropriate test to be applied by the trial court when the defendant makes a motion to dismiss or for a directed verdict at the conclusion of the State’s case is “whether, considering the state’s evidence in the most favorable light, the evidence adduced, believed and rationally considered, is sufficient to prove the defendant’s guilt beyond a

reasonable doubt.” *State v. Duda*, 60 Wis. 2d 431, 439, 210 N.W.2d 763, 767 (Wis. 1973) (citations omitted).

Once the motion is denied, the defendant has the option of either not presenting any evidence on his or her own behalf and preserving the ruling for appeal or abandoning the motion and introducing his defense. See generally WIS. STAT. § 802.06.

See *State v. Scott*, 2000 WI App 51, 234 Wis. 2d 129, 608 N.W.2d 753, which provides that if the defense needs to know the court’s ruling in order to determine whether to present evidence, defense counsel should say so and, to preserve its potential appellate challenge, should object to any deferral of the decision. If the court does defer its ruling, a different standard of review exists. Specifically, the reviewing court will only consider the evidence presented by the State when determining if it was sufficient to uphold the conviction. *Scott*, 2000 WI App 51, ¶ 10. If the court dismisses the case, the State cannot appeal. See WIS. STAT. § 974.05(1)(a).

Amendment of the Complaint or Information

WIS. STAT. § 971.29(2) provides in part that:

At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

At the conclusion of either the State’s case or the entire case, the evidence may be insufficient to support the crime that is charged in the complaint or information, but it may be sufficient to support a conviction of a lesser-included crime of that charged crime. In this situation, the complaint or information may be amended to a lesser-included crime pursuant to WIS. STAT. § 971.29(2). This, rather than dismissal of the charge, is the appropriate action if the evidence is sufficient to support the lesser-included crime. *Bere v. State*, 76 Wis. 2d 514, 526-27, 251 N.W.2d 814 (1977); *Moore v. State*, 55 Wis. 2d 1, 4-8, 197 Wis. 2d 820 (1972). See also *State v. Fleming*, 181 Wis. 2d 546, 559, 510 N.W.2d 837 (Ct. App. 1993).

The Defense's Case-in-Chief

WIS. STAT. § 972.10(3) provides in part that “the state first offers evidence in support of the prosecution. The defendant may offer evidence after the state has rested.” Of course, the defense may also give its opening statement at this time if it was not given earlier.

Since the defendant's right to testify is a fundamental constitutional right, it is personal to the defendant and the decision must be made by the defendant him- or herself after consulting with counsel. The right may be waived only by the defendant.

In order to determine whether a defendant is waiving his or her right to testify, a circuit court should conduct an on-the-record colloquy with the defendant outside the presence of the jury to ensure that the defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify. The colloquy should consist of a basic inquiry to ensure that the defendant is aware of his or her right to testify and that the defendant has discussed this right with his or her counsel. *State v. Weed*, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485.

When a defendant testifies, and perjury is suspected, see the Wisconsin Supreme Court's decision in *State v. McDowell*, 2004 WI 70, 272 Wis. 2d 488, 618 N.W.2d 500.

Rebuttal Evidence

WIS. STAT. § 971.10(3) provides that:

If the state and defendant have offered evidence upon the original case, the parties may then respectively offer rebuttal testimony only, unless the court in its discretion permits them to offer evidence upon their original case.

In *Simpson v. State*, 83 Wis. 2d 494, 512-13, 266 N.W.2d 270 (1978), the Wisconsin Supreme Court stated:

The standard governing rebuttal evidence was set forth in *Rausch v. Buisse*, 33 Wis. 2d 154, 167, 146 N.W.2d 801 (1966) [citation added]:

The general rule is that the plaintiff, in his rebuttal, may only meet the new facts put in by the defendant in his case in reply. This rule is not inflexible and

the court may in its discretion allow or refuse to receive such evidence. An exception is generally made when the evidence is necessary to achieve justice.

In *State v. Watson*, 46 Wis.2d 492, 499-500, 175 N.W.2d 244 (1970), this court elaborated on the considerable discretion possessed by a trial court over the admission of evidence on rebuttal:

The determination of what is admissible on rebuttal is primarily for the discretion of the trial court. The court may even admit in rebuttal evidence which should have been introduced upon the examination in chief, provided the adverse party is allowed to reply thereto. The appellate court will not reverse the action of the trial court in admitting rebuttal evidence, in the absence of a clear abuse of discretion.

Second Defense Motion to Dismiss

WIS. STAT. § 972.10(4): “At the close of the state's case and at the conclusion of the entire case, the defendant may move on the record for a dismissal.”

The appropriate test to be applied by the trial court when the defendant makes a motion to dismiss at the conclusion of the entire case is the same test as that employed when the defendant makes the same motion at the conclusion of the State's case: whether, considering the evidence introduced by the State as well as that introduced by the defense in the most favorable light to the State, the evidence adduced, believed and rationally considered, is sufficient to prove the defendant's guilt beyond a reasonable doubt. *Duda*, 60 Wis. 2d at 439, 210 N.W.2d 763, 767 (Wis. 1973) (citations omitted).

Again, if the court dismisses the case, the State cannot appeal. *See generally* WIS. STAT. § 802.06.

State's Motion for a Directed Verdict

A court may not direct a verdict for the State, no matter how overwhelming the evidence, on the issue of the defendant's guilt or innocence. The trier of fact – the jury – must make the decision. *State v. Koput*, 142 Wis. 2d 370, 392, 418 N.W.2d 804 (1988).

Jury Instructions

WIS. STAT. § 972.10(5) provides that:

When the evidence is concluded and the testimony closed, if either party desires special instructions to be given to the jury, the instructions shall be reduced to writing, signed by the party or his or her attorney and filed with the clerk, unless the court otherwise directs. Counsel for the parties, or the defendant if he or she is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and to present and argue to the court objections to the adoption or rejection of any instructions requested by counsel. The court shall advise the parties of the instructions to be given. No instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such instruction is the fact the name of the witness appears upon a list furnished pursuant to s. 971.23. Counsel, or the defendant if he or she is not represented by counsel, shall specify and state the particular ground on which the instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection shall specify with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection. All objections shall be on the record. The court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.

The court shall instruct the jury before or after closing arguments of counsel. WIS. STAT. §§ 805.13(4); 972.01.

In *State v. Kuntz*, 160 Wis. 2d 722, 735, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court required that circuit courts must inform counsel of any changes they make to jury instructions following the jury instructions conference.

Jury instruction areas include: (1) General law; (2) Substantive instructions of the crime(s), including lesser-included crimes; (3) The defense, including affirmative defense; and (4) Cautionary jury instructions.

The Discharge of Additional Jurors

WIS. STAT. § 972.10(7) provides that: “If additional jurors have been selected under § 972.04(1) and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them.” Alternatively,

the parties may agree on what juror or jurors to eliminate.

Closing Arguments by Counsel

WIS. STAT. § 972.10(6) provides that: “In closing argument, the state on the issue of guilt and the defendant on the issue of mental responsibility shall commence and may conclude the argument.”

The State goes first, the defendant goes next, and then the State gives a rebuttal argument. WIS. STAT. § 972.10(6).

The prosecutor must not comment improperly on the defendant’s silence. This includes both direct and indirect silence.

The defendant may give the closing argument him- or herself. *State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984).

With regard to timing, the court shall instruct the jury before or after closing arguments of counsel. WIS. STAT. §§ 805.13(4); 972.01.

The concession of guilt by the defense attorney during closing arguments is covered by *State v. Silva*, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385; and *State v. Gordon*, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765.

Jury Deliberations

The bailiff(s) must be sworn prior to jury deliberations. WIS. STAT. § 756.08(2).

The issue of what items and/or exhibits should be sent to the jury room is decided upon by the judge, usually with the agreement of the parties. See *State v. Jensen*, 176 Wis. 2d 240, 260, 432 N.W.2d 913 (1988).

Jury questions are allowed during deliberations. When the court receives a question, the parties will be called back to the courtroom and the question read and discussed on the record. A response will also be formulated on the record.

Sometimes the jury will request to have some testimony read back to them. Whether and how to do that is up to the judge.

Instructions may be repeated to the jury, and supplemental jury instructions can be given after the jury deliberations have commenced. The State, the defense attorney, and the defendant are required to be present for the reading. The defendant may also formally waive the right to be present. For information pertaining to the giving of a lesser-included offense jury instruction for the first time during jury deliberations, *see State v. Henning*, 2003 WI App 54, 261 Wis. 2d 664, 660 N.W.2d 698.

Allowing the jurors go home during deliberations is covered by Wis. STAT. § 972.12.

The use of a sealed verdict is based on convenience and custom, not statutory authority. *State v. Cartagena*, 140 Wis. 2d 59, 62, 409 N.W.2d 386 (Ct. App. 1987).

Return of Verdict

A guilty verdict must be unanimous. *Cartagena*, 140 Wis. 2d at 61. A jury's verdict is not accepted until it is received in open court, the verdict is announced, the jury has been individually polled, and judgment has been entered. *State v. Reid*, 166 Wis. 2d 139, 144, 479 N.W.2d 572 (Ct. App. 1991). Note that when a trial court discovers a dissent during the polling, it must refuse the verdict and direct the jury to re-deliberate. *Reid*, 166 Wis. 2d at 144. In *Cartagena*, the court stated:

As a corollary to the unanimous verdict, a defendant has the right to have jurors polled individually. *State v. Wojtalewicz*, 127 Wis. 2d 344, 350, 379 N.W.2d 338, 341 (Ct. App. 1985). He does not, however, have the right to cross-examine the jurors on their verdict. *State v. Ritchie*, 46 Wis. 2d 47, 56, 174 N.W.2d 504, 509, cert. denied, 400 U.S. 917 (1970). Consequently, the trial court need not allow voir dire as a matter of course. We agree with the cases from other jurisdictions which hold that the court should interrogate a juror who, during the poll, creates some doubt as to his vote. *See, e.g., State v. Brown*, 168 N.E.2d 419, 422 (Ohio Ct. App. 1953); *People v. Kellogg*, 397 N.E.2d 835, 837-38 (Ill. 1979). Doubt may result from the juror's demeanor or tone of voice as well as the language he uses. Prior to further questioning, however, the court should make a determination that the juror's answer was ambiguous or ambivalent. Because demeanor

and tone of voice play a large role in understanding the proper meaning of a response, we will accept the trial court's finding on the issue of assent unless the record shows that the trial court foreclosed dissent.

Cartagena, 140 Wis. 2d at 61-62.

Entry of a Judgment of Conviction

Wis. STAT. § 972.13(1) provides in part: "A judgment of conviction shall be entered upon a verdict of guilty by the jury."

Final Thoughts for the Trial Prosecutor

Your goal is justice. Always do what is fair even if it hurts your case. Do not be afraid to lose. The weakest prosecutors are those who do what is easy, rather than what is right. The only bad thing about losing a jury trial is not learning how to win your next one. A good prosecutor is tough and pure in heart.

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to secure Jane Victim's presence for the upcoming trial as demonstrated by the affidavit attached to this motion.

- 3) The State of Wisconsin learned through its investigation that John Doe engaged or acquiesced in wrongdoing. The investigation uncovered the following wrongdoing relevant to this motion: . Attached to this motion is a copy of the investigation into the wrongdoing reportedly committed by John Doe.
- 4) John Doe engaged in the wrongdoing, at least in part, with the intent to procure Jane Victim's unavailability. The State provides the following information in support of this assertion: .
- 5) John Doe's wrongdoing procured Jane Victim's unavailability because .

See *State v. Bentley*, 201 Wis. 2d 303, 316-18 (1996) (discussing the sufficiency of facts required in a motion to schedule a matter for an evidentiary hearing).

The State respectfully asks this court to hear this motion prior to the commencement of the jury trial. See *State v. Rodriguez*, 306 Wis. 2d 129, 137 (Ct. App. 2007) ("the trial court is to determine before trial whether the defendant caused the unavailability of the witness"). At that hearing, this court may consider hearsay evidence, including Jane Victim's out-of-court statements. See *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (quoting *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005)); see also *U.S. v. Carlson*, 547 F.2d 1346, 1352-53, 1359 (8th Cir. 1976) (upholding the district court ruling of misconduct by the defendant, which relied upon hearsay statements of an unavailable declarant introduced through two law enforcement officers); *State v. Frambs*, 157 Wis. 2d 700, 703-04 (Ct. App. 1990) (quoting Wis. Stat. § 901.04(1) but examining the situation where a witness is unavailable because of misconduct by the *proponent* seeking to introduce the hearsay); Wis. Stat. § 911.01(4)(a) (). A brief in support of this motion is attached.

Dated this day of , 20 .
Respectfully Submitted:

cc: , Attorney for Defendant

STATE OF WISCONSIN	BRANCH	COUNTY
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STATE OF WISCONSIN,
Plaintiff

- vs -

Case No.

JOHN DOE,
Defendant

STATE'S BRIEF ON FORFEITURE BY WRONGDOING

The United States Supreme Court recently reaffirmed the forfeiture by wrongdoing doctrine, which the Court previously explained “extinguishes confrontation claims on essentially equitable grounds.” *Giles v. California*, 128 S. Ct. 2678, 2682-83 (2008) (explaining that the common-law doctrine permits “testimonial statements . . . even though they were unconflicted”); *Crawford v. Washington*, 541 U.S. 36, 62 (2004). The Supreme Court’s affirmation continues the bedrock principle that if a defendant “keeps the witnesses away, [the defendant] cannot insist on his privilege” to confront witnesses at trial. *Reynolds v. U.S.*, 98 U.S. 145, 158 (1878). The recognition that the defendant may forfeit his right of confrontation through his own wrongdoing “has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.” *Id.* at 159. Congress ultimately codified the “doctrine as an exception to the hearsay rules by permitting the admission of hearsay statements ‘offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.’” *U.S. v. Dhinsa*, 243 F.3d 635, 652 (2nd Cir. 2001) (quoting Fed. R. Evid. 804(b)(6)); see also *Giles*, 128 S. Ct. at 2687.

The Wisconsin Supreme Court formally recognized the forfeiture by wrongdoing doctrine in *State v. Jensen*. 299 Wis. 2d 267, 289-90 (2007). *Jensen* placed the burden upon the State to prove the application of the doctrine by a preponderance of the evidence. *Id.* at 302-03. *Giles* superseded *Jensen* in that *Giles* held that forfeiture

by wrongdoing applies only when the defendant acted with the intent to prevent the witness from testifying. See 128 S. Ct. at 2683 (requiring proof that the “defendant engaged in conduct designed to prevent the witness from testifying”). This narrower application of forfeiture by wrongdoing, which *Giles* found was codified in the section 804(b)(6) of the Federal Rules of Evidence, now governs Wisconsin. See generally *State v. Baldwin*, 330 Wis. 2d 500, 517-23 (Ct. App. 2010), citing 128 S. Ct. at 2682-87, 2693 (citing Fed. R. Evid. 804(b)(6)). Federal cases interpreting Rule 804(b)(6) are therefore persuasive in interpreting the forfeiture by wrongdoing doctrine under the Confrontation Clause. See *State v. Boettcher*, 144 Wis. 2d 86, 96-97 (1988) (finding federal cases persuasive with interpreting a state rule); *State v. Evans*, 238 Wis. 2d 411, 415, n.2 (Ct. App. 2000) (“where a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority”).

ARGUMENT

In support of the previously submitted motion for forfeiture by wrongdoing, the State of Wisconsin argues that John Doe forfeited the right of confrontation because: (1) John Doe engaged or acquiesced in wrongdoing, (2) John Doe intended to procure Jane Victim’s unavailability, and (3) John Doe’s wrongdoing did procure Jane Victim’s unavailability. See *U.S. v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *U.S. v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *Dhinsa*, 243 F.3d at 653-54; *U.S. v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996). A defendant forfeits confrontation protections not only on direct procurement but also upon “involvement in a conspiracy, one of the members of which wrongfully procured a witness’s unavailability.” *U.S. v. Cherry*, 217 F.3d 811, 815, 820 (10th Cir. 2000). Moreover, “[t]he government need not . . . show that the defendant’s sole motivation was to procure the declarant’s absence; rather, it need only show that the defendant ‘was motivated in part by a desire to silence the witness.’” *Dhinsa*, 243 F.3d at 654 (quoting *Houlihan*, 92 F.3d at 1279). Once the defendant engages in misconduct designed to prevent a declarant from testifying, any of the missing declarant’s statements are admissible against the defendant “without regard to the nature of the charges at the trial in which the declarant’s statements are offered”

because the rule does not limit the subject matter of admissible statements only to “the events at issue in the trial in which the statements are offered.” *Gray*, 405 F.3d at 241. The rule requires expansive admissibility of the missing declarant’s statements on equitable grounds because the “admission of the victim’s prior statements at least partially offsets the perpetrator’s rewards for his misconduct.” *U.S. v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997). This brief provides specific analysis for each of the three elements considered under the forfeiture by wrongdoing doctrine.

I. JOHN DOE ENGAGED OR ACQUIESCED IN WRONGDOING

Courts have ruled that a defendant engaged or acquiesced in wrongdoing when the defendant, acting alone or in conspiracy with others, employs an action to silence a witness. *See Houlihan*, 92 F.3d at 1279 (citing several cases where courts found misconduct by the defendant). The most evident form of misconduct occurs when the defendant murders the declarant, but misconduct also includes the use of threats and violence. *White*, 116 F.3d at 911. Wrongdoing also occurs in more subtle ways, such as when the defendant refused to disclose the whereabouts of a witness against him. *Houlihan*, 92 F.3d at 1279, *citing Reynolds*, 98 U.S. at 158; *see also Commonwealth v. Szerlong*, 933 N.E.2d 633, 640 (Mass. 2010) (“the wrongdoing that may justify forfeiture need not be criminal”). An appellate court properly has noted that “a defendant need only tacitly assent to wrongdoing in order to trigger the Rule’s applicability” so the actions of others may be attributed to the defendant when the defendant either engaged in conduct with co-conspirators or acquiesced to the conduct of others. *U.S. v. Rivera*, 412 F. 3d 562, 567 (4th Cir. 2005). The United States Supreme Court also properly recognized that “domestic violence . . . is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” *Davis v. Washington*, 126 S. Ct. 2266, 2279-2280 (2006); *see also Georgia v. Randolph*, 126 S. Ct. 1515, 1537-39 (2006) (Roberts, J., dissenting) (criticizing the majority opinion on a Fourth Amendment question because the decision failed to recognize the unique nature of domestic abuse situations). The criminal complaint issued against John Doe in this case involves an allegation of domestic abuse, which courts already have recognized

creates greater opportunity for misconduct by John Doe than defendants in other criminal cases. See *Giles*, 128 S. Ct. at 377.

John Doe engaged in wrongdoing by . In particular, John Doe . The wrongdoing committed by John Doe is more aggravated and more clearly documented than actions by previous defendant's where courts have found misconduct. See, e.g., *Steele v. Taylor*, 684 F.2d 1193, 1199, 1202 (6th Cir. 1982) (where the appellate court upheld the district court's finding that the witness was "under the control of the defendants who had procured her refusal to testify" despite no finding that the defendants threatened her); *U.S. v. Carlson*, 547 F.2d 1346, 1353, 1359 (8th Cir. 1976) (finding misconduct on the part of the defendant despite having only general information about the defendant's threats, described simply as "highly suggestive of threats and intimidating overtures directed toward [the declarant] by [the defendant]"); See also *U.S. v. Mastrangelo*, 693 F.2d 269, 273-74 (2nd Cir. 1982) ("Bare knowledge of a plot to kill [the victim] and a failure to give warning to appropriate authorities is sufficient"). The actions of John Doe are analogous to the actions by the defendant in , where the court held that . Therefore, this court should find by a preponderance of the evidence that John Doe engaged or acquiesced in wrongdoing.

II. JOHN DOE INTENDED TO PROCURE JANE VICTIM'S UNAVAILABILITY

Courts have ruled that a defendant intended to procure the declarant's unavailability when "the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's sole motivation." *Houlihan*, 92 F.3d at 1279 (emphasis added); see also *Dhinsa*, 243 F.3d at 654; *Szerlong*, 933 N.E.2d at 641 (a court does "not need to find that making her unavailable as a witness was the defendant's sole or primary purpose . . . it is sufficient that it was a purpose"). A court must discern intent "from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent." Wis. J.I.-Criminal 1292 (2010) (Intimidation of a Witness); Wis. J.I.-Criminal 1296 (2010) (Intimidation of a Victim). On a question of intent, the proponent to a forfeiture by wrongdoing motion may rely upon circumstantial evidence as the

defendant rarely provides an explanation for his or her purpose but such reliance on circumstantial evidence does not diminish the strength of the proponent's position because this element "may be based in whole or in part upon circumstantial evidence." *State v. Koller*, 87 Wis. 2d 253, 266 (1979) (holding that a conviction may rely entirely upon circumstantial evidence); see also *People v. Banos*, 100 Cal. Rptr. 3d 476, 492 (Cal. Ct. App. 2009) (permitting a court to "reasonably . . . infer[]" intent through "implied findings"). Therefore, the prosecution need only demonstrate, either directly or circumstantially, that the defendant's wrongdoing occurred, in part, to silence a potential witness against him.

John Doe intended to procure Jane Victim's unavailability as demonstrated by In this case, John Doe The evidence in this case establishes John Doe's intent to procure the unavailability of Jane Victim more clearly than in prior cases where the court recognized only partial intent on the part of a defendant but still granted the prosecution's forfeiture by wrongdoing motion. See *Szerlong*, 933 N.E.2d at 641 (finding that "[e]ven if the idea to marry originated with the victim, the defendant agreed to marry, and the victim's spousal privilege existed only because of his agreement" so the court found "that the defendant intended to make her unavailable to testify by agreeing to marry her"). Moreover, the type of wrongdoing in this case demonstrates intent more convincingly than in prior situations where the link between the wrongdoing and intent was more attenuated. See, e.g., *U.S. v. Aguiar*, 975 F.2d 45, 46-47 (2nd Cir. 1992) (holding the defendant forfeited confrontation by sending letters reminding a witness that the defendant could expose criminal conduct committed by the witness without directly threatening the witness in the letters). The wrongdoing of John Doe is similar to the wrongdoing by the defendant in , where the court found that the defendant intended to silence the witness based upon the nature of the wrongdoing. Therefore, this court should find by a preponderance of the evidence that John Doe intended to procure the unavailability of Jane Victim.

III. JOHN DOE'S WRONGDOING DID PROCURE JANE VICTIM'S UNAVAILABILITY

In addressing unavailability, the circuit court must answer the following two questions: (1) Is the witness unavailable; and (2) Did the wrongdoing procure the unavailability? See Wis. Stat. § 908.04(1); *Scott*, 284 F.3d at 762. In answer to either of these questions, the court may consider hearsay statements in the form of testimony or affidavit. See Wis. Stat. §§ 901.04(1), 911.01(4)(a); see also *State v. Baker*, 169 Wis. 2d 49, 55-56, 58-59 (1992) (permitting a party to introduce an affidavit at a motion hearing). In this case, Jane Victim is unavailable because . See Wis. Stat. § 908.04(1)(). For the first question, this court should find that Jane Victim is unavailable and the State exercised due diligence and good faith in attempting to secure the witness' presence. See *Baldwin*, 330 Wis. 2d at 523-25. The remainder of this brief will affirmatively answer the second question of whether John Doe's wrongdoing procured the unavailability of Jane Victim. In considering this question, "a trial court need only determine that the defendant's actions were a cause of the witness's absence; defendant's conduct need not be the only cause." *State v. Rodriguez*, 306 Wis. 2d 129, 138 (Ct. App. 2007), citing Wis. J.I.-Criminal 901 (2004).

John Doe succeeded in procuring the unavailability of Jane Victim based upon Jane Victim's absence coupled with the nexus between the wrongdoing and unavailability. See *Giles*, 128 S. Ct. at 2693 ("Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions"). In some situations, the nexus is self-evident, such as in a case where the defendant kills a witness because the defendant fears the witness may incriminate the defendant. *U.S. v. Johnson*, 219 F.3d 349, 355-56 (4th Cir. 2000); see also *U.S. v. Miller*, 116 F.3d 641, 669 (2nd Cir. 1997). Courts also have found the wrongdoing responsible for the declarant's unavailability in less dramatic situations; for example, a defendant allegedly threatened a witness prior to the defendant's incarceration and the witness later moved to an unknown out-of-state location with no direct information presented to show the witness moved because of the defendant's threats. *State v. Frambs*, 157 Wis. 2d 700, 702-03, 706-07 (Ct. App. 1990) (examining the situation

where a witness is unavailable because of misconduct by the *proponent* seeking to introduce the hearsay). Similarly, another court found the defendant's alleged wrongdoing resulted in the declarant's unavailability, despite the declarant claiming that his refusal to testify "was totally his own decision . . . [and] that he would refuse to testify even if the defendant wanted him to testify." *State v. Hallum*, 606 N.W.2d 351, 353-54, 358 (Iowa 2000), *cited in State v. Hale*, 277 Wis. 2d 593, ¶ 95 (2005) (Prosser, J., concurring). The wrongdoing by John Doe clearly poses a stronger nexus between John Doe's wrongdoing and Jane Victim's unavailability than the previously cited cases. In this case, the wrongdoing clearly resulted in the unavailability because . The nexus is similar to the situation in , where the court found forfeiture by wrongdoing. Therefore, this court should find by a preponderance of the evidence that Jane Victim is unavailable as defined by statute and John Doe's wrongdoing procured the unavailability.

CONCLUSION

For the reasons stated above, the State of Wisconsin asks this court to find by a preponderance of the evidence the defendant forfeited the right of confrontation through the defendant's misconduct thereby permitting the introduction of hearsay statements by the State of Wisconsin. The State asks this court to issue the orders presented previously in the State's forfeiture by wrongdoing motion.

Dated this day of , 20 .
Respectfully Submitted:

cc: , Attorney for Defendant

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STATE OF WISCONSIN _____ **COUNTY**

STATE OF WISCONSIN

Plaintiff,

vs.

DA Case No.: ___-CF-_____

Defendant,

**NOTICE OF MOTION AND MOTION TO ADMIT
NON-TESTIMONIAL STATEMENTS BY VICTIM/WITNESS**

The State of Wisconsin, by Assistant _____ District Attorney _____ hereby provides notice that it will move the Honorable _____, presiding judge, Branch ___ of the _____ County Circuit Court, on _____, 20__, for an Order admitting the non-testimonial statements by a victim/witness in the above-captioned case, despite his/her failure to appear for the scheduled jury trial. In support of its motion, the State has files its accompanying Memorandum of Law Regarding Admission of Statements over the Defendant’s Right to Confrontation under the Sixth Amendment of the United States and Wisconsin Constitutions and Crawford v. Washington and its Progeny, which is incorporated herein by reference.

Dated at _____, Wisconsin, this _____ day of _____, 20__.

Respectfully submitted,

Assistant District Attorney
State Bar # _____

STATE OF WISCONSIN _____ **COUNTY**

STATE OF WISCONSIN

Plaintiff,

vs.

Court Case No.: ____ -CF- ____

_____ **Defendant,**

**MEMORANDUM OF LAW REGARDING ADMISSION
OF NON-TESTIMONIAL STATEMENTS**

The State of Wisconsin, by Assistant _____ County District Attorney _____, will move the Honorable _____, presiding judge, Branch ____ of the _____ County Circuit Court, on _____, 20__, for an Order admitting the non-testimonial statements by a victim/witness in the above-captioned case regardless of whether he/she appears for the scheduled motion hearing/jury trial.

STATEMENT OF FACTS

The State will rely upon [police reports,] [medical records,] [and] [other specified evidence]. The State will further rely upon testimony as adduced from the following witnesses, including but not limited to _____, at the scheduled motion hearing/jury trial.

[Add Information about the Facts of the Case]

ARGUMENT

The State argues that the victim/witness's statements are non-testimonial. As non-testimonial statements, the statements are admissible because the victim/witness is unavailable and the statements bear an adequate indicia of reliability. The State further

contends that the victim/witness's statements are admissible under hearsay exceptions for present sense impressions, excited utterances, statements of a then existing mental, emotional, or physical condition, statements made for purposes of medical diagnosis or treatment, and/or statements within records of regularly conducted activity, fall under a firmly rooted hearsay exception and/or contain particularized guarantees of trustworthiness because they have circumstantial guarantees of trustworthiness. Therefore, the statements are not barred from admission by the Confrontation Clause of the Sixth Amendment of the United States Constitution or the Wisconsin Constitution.

I. THE STATEMENTS ARE NON-TESTIMONIAL

Under the United States Constitution, criminal defendants are entitled to confront their accusers: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. CONST. amend. VI. The same right is guaranteed by the Wisconsin Constitution. WIS. CONST. art 1, § 7.

In Crawford v. Washington, 541 U.S. 36, 68 (2004), the United States Supreme Court held a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. Crawford articulated two overlapping considerations for determining whether an out-of-court statement was testimonial: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51.

The Supreme Court elaborated on the distinction between testimonial and non-testimonial statements in Davis v. Washington, 547 U.S. 813, 822, 826-27 (2006), which involved, in part, a recording of a 911 call. The Davis court stated:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to meet an

ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 822.

The Court concluded that statements in the 911 recording were not testimonial. *Id.* at 829. The Court noted the 911 caller was describing events as they were happening, not merely past events, and "any reasonable listener would recognize that [the caller] was facing an ongoing emergency." *Id.* at 827. The Court further stated the call was "plainly a call for help against bona fide physical threat," and "the nature of what was asked and answered again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than to simply learn what had happened in the past." *Id.* [emphasis omitted]. The primary purpose of the call "was to enable police assistance to meet an ongoing emergency. [The caller] was not acting as a witness; [the caller] was not testifying." *Id.* at 828 [emphasis omitted].

[Add a Discussion of *Michigan v. Bryant*, 562 U.S. ___, 131 S.Ct. 1143 (2011)]

In *State v. Rodriguez*, 295 Wis. 2d 801 (2006), ¶23, the Wisconsin Court of Appeals discussed the *Davis* decision, noting that "[i]nsofar as a victim's excited utterances to a responding law-enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial." The Court of Appeals stated that an out-of-court declaration must be evaluated to determine whether it is, on one hand, overtly or covertly intended by the speaker to implicate the accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main purpose is to get help and succor, or to secure safety, and are thus devoid of the "possibility of fabrication, coaching, or confabulation." *Id.*, ¶26 (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)).

[Add a Paragraph Explaining Why the Statements are Non-Testimonial]

II. THE STATEMENTS ARE ADMISSIBLE.

[Add an Introductory Paragraph incorporating the Facts of the Case]

A. The Witness is Unavailable and the Statements Bear an Indicia of Reliability.

A determination that an out-of-court statement is non-testimonial does not end inquiry regarding a statement's admissibility under the Confrontation Clause of the Wisconsin Constitution. WIS. CONST. art 1, § 7. With respect to non-testimonial statements, the Crawford Court did not decide the form and substance of the constitutional analysis to be applied; instead, it expressly left that decision to the states, indicating that the states may continue to apply the pre-Crawford constitutional analysis of Ohio v. Roberts, 448 U.S. 56 (1980). However, in Davis, 547 U.S. 813, 826 (2006), the U.S. Supreme Court held that the Sixth Amendment of the U.S. Constitution does not apply to non-testimonial statements. Nevertheless, in State v. Manuel, 281 Wis. 2d 554, 584 (2005), which was decided before Davis, 547 U.S. 813, 826 (2006), the Wisconsin Supreme Court adopted Ohio v. Roberts, 448 U.S. 56 (1980) for determining the admissibility of non-testimonial statements under the Wisconsin Constitution.¹ WIS. CONST. art 1, § 7. Roberts established the following two-part test to determine the admissibility of out-of-court statements under the Confrontation Clause:

First, the witness must be "unavailable" at trial. Second, the statement of the unavailable witness must bear adequate "indicia of reliability." This second prong could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception² or upon a showing of "particularized guarantees of trustworthiness."

1. The State concedes that absent an appeal to the Wisconsin Supreme Court, the circuit court (and court of appeals) is bound by Manuel for purposes of the state constitutional question at this time. 281 Wis. 2d 554, 584 (2005). Nonetheless, the State would note that, should the Wisconsin Supreme Court subsequently review the 911 admissibility issue, the State reserves the right to argue that insofar as Manuel, 281 Wis. 2d 554, relied on the Sixth Amendment of the U.S. Constitution, the U.S. Supreme Court effectively overruled it in Davis. 547 U.S. 813, 826. As such, the State would argue on appeal that, like the Davis Court, the Wisconsin Supreme Court should overrule Manuel's adoption of the Roberts' test. 448 U.S. 56 (1980).
2. A hearsay exception is firmly rooted if, "in light of longstanding judicial and legislative experience" it "rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with

Hale, 227 Wis. 2d 593, ¶ 45, citing Roberts, 448 U.S. at 66.

In this case, there is obviously no issue as to Roberts' first step, as the victim/witness failed to appear, and therefore will not be available to testify.

[Add Information about Attempts to Locate and/or Subpoena the Victim/Witness]

With respect to the second step, the confrontation clause is satisfied so long as the evidence bears “particularized guarantees of trustworthiness.” Manuel, 275 Wis. 2d 146, 165-166; Id., citing State v. Weed, 263 Wis. 2d 434 (2003). The Supreme Court instructs that:

“In evaluating whether a statement evinces particularized guarantees of trustworthiness, we consider the “totality of the circumstances, but ... the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” Some factors that have been considered in assessing the reliability of a statement include spontaneity, consistency, mental state, and a lack of motive to fabricate. We look to see “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility....” In other words, we examine whether the statement is “so trustworthy that adversarial testing would add little to its reliability.”

Id., ¶ 25 (citations omitted). Statements of a declarant’s then existing mental, emotional, or physical condition bear adequate indicia of reliability if the court finds that there are particularized guarantees of trustworthiness in the statements under the aforementioned analysis. Furthermore, the court can find that statements that fall under the other hearsay exceptions may qualify as having particularized guarantees of trustworthiness and therefore be admissible.

[Add Discussion about How Law Applies to Facts of the Case]

the substance of the constitutional protection.” Manuel, 275 Wis. 2d 146, 164, citing Lilly v. Virginia, 527 U.S. 116, 126 (1999) (citations omitted).

B. The Statements are Admissible under the Hearsay Exception regardless whether the Declarant is Available.

The State argues that the victim/witness's non-testimonial statements are admissible under hearsay exceptions for present sense impressions, excited utterances, statements of a then existing mental, emotional, or physical condition, statements made for purposes of medical diagnosis or treatment, statements within records of regularly conducted activity, and/or the residual exception, having circumstantial guarantees of trustworthiness.

First, regardless of whether the declarant is available as a witness section 908.03(1), Wis. Stats., allows for the introduction the statements under the circumstances presented in this case. It provides for the following hearsay exception:

PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Section 908.03(1), Wis. Stats.

Second, regardless of whether the declarant is available as a witness, section 908.03(2), Wis. Stats., allows for the admissibility of the statements. It provides the following hearsay exception:

EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Section 908.03(2), Wis. Stats.

Third, regardless of whether the declarant is available as a witness, section 908.03(3), Wis. Stats., allows for the admissibility of the statements. It provides the following hearsay exception:

THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.
A statement of the declarant's then existing state of mind, emotion,

sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Section 908.03(4), Wis. Stats.

Fourth, regardless of whether the declarant is available as a witness, section 908.03(4), Wis. Stats., allows for the admissibility of the statements. It provides the following hearsay exception:

STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Section 908.03(4), Wis. Stats.

Fifth, regardless of whether the declarant is available as a witness, section 908.03(6), Wis. Stats., allows for the admissibility of the statements. It provides the following hearsay exception:

RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Section 908.03(6), Wis. Stats. As noted, statements contained within records of regularly conducted activity would be admissible, including without an authentication witness when the records are certified and notice of intent to offer those patient health

care records into evidence at a trial or hearing is served upon all parties and/or made available for inspection as required under § 908.03(6m)(b), Wis. Stats.

Sixth, regardless of whether the declarant is available as a witness, section 908.03(24), Wis. Stats., what is referred to as the residual exception, allows for admissibility of the statements. It provides the following hearsay exception:

OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Section 908.03(24), Wis. Stats.

[Add Discussion about How Law Applies to Facts of the Case]

Conclusion

For the reason presented above, this court should find the non-testimonial statements admissible. The State will supplement its Memorandum of Law with argument as it relates to the facts of the above-captioned case as adduced evidence and testimony by witnesses at the scheduled motion hearing/jury trial.

Dated at _____, Wisconsin, this ____ day of _____, 20__.

Respectfully submitted,

Assistant District Attorney

State Bar # _____

Prosecutions take their toll on victims of domestic abuse. By and large, the challenges faced by victims can be numerous and multi-faceted. Emotional burdens, financial strains, child care needs, fear of retaliation, feelings of isolation, loneliness, even a desire to forgive – all of these issues and more increase in dimension for victims during the course of a prosecution.

Over time, victims of domestic abuse experience enormous stress. Many choose to distance themselves from the criminal case. Ultimately, many fail to appear in court for trial. Therefore, alternative strategies of prosecution – independent of the victim – become increasingly more important for prosecutors and the police officers who investigate and collect evidence.

We prosecute homicides without the testimony of victims. Can we prosecute domestic cases without the presence of victims? Of course! Across the nation, domestic abuse prosecutors regularly pursue cases without the testimony of victims, based solely on the remaining existing evidence.

The Law of Excited Utterance

The most often used exception to the hearsay rule in domestic abuse prosecutions is the excited utterance exception.

WIS. STAT. § 908.03(2) EXCITED UTTERANCE.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The admissibility of excited utterances as an exception to the hearsay rule is well established and firmly rooted in the law. See *State v. Martinez*, 150 Wis. 2d 62, 77, 440 N.W.2d 783 (1989).

The excited utterance exception enables the State to prosecute abusers without the victim's testimony. The burden of the prosecution is upon the State, not the victim. See C.T. McCormick, McCormick on Evidence, (3d ed.) § 297, West Publishing Co. (1984).

The excited utterance exception to the hearsay rule is based in the spontaneity of the statements and the stress of the incident, which endow the statement with the requisite trustworthiness

necessary to overcome the general rule against admitting hearsay. *State v. Moats*, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990), citing *State v. Padilla*, 110 Wis. 2d 414, 418, 329 N.W.2d 263 (Ct. App. 1982). The rationale for the excited utterance exception lies in "the special reliability which is regarded as furnished by the excitement suspending the declarant's powers of reflection and fabrication." *State v. Martinez*, 150 Wis. 2d 62, 77, 440 N.W.2d 783 (1989), citing C.T. McCormick, McCormick on Evidence, § 297 at 855 (3d ed. 1984).

Excited utterances emphasize the belief that a person is not likely to fabricate a statement relating to a startling event or condition while that person is under the excitement that was caused by the startling event or condition.

The Excited Utterance Witness

Analysis begins with the witness who heard the excited utterance. A responding police officer or 911 operator may be your witness. Neighbors or family members hear excited utterances during (or immediately following) domestic altercations as well. Other responders like paramedics or medical personnel might also witness an excited utterance.

Often, the witness will have spoken with the declarant (usually the victim) in person and learned about the stressful event through that person. Other witnesses – even young children – can be declarants as well.

Even excited utterances made by intoxicated individuals are admissible. In *State v. Martinez*, 150 Wis. 2d 62, 440 N.W.2d 783 (1989), the Wisconsin Supreme Court held that statements made by an intoxicated individual do not significantly affect the reliability of an otherwise admissible excited utterance under WIS. STAT. § 908.03(2). *Martinez*, 150 Wis. 2d at 78. While these statements should be admitted by trial courts, expect an attack at trial by the defense on the credibility of the statement made by an intoxicated person.

Standard of Review

Upon completion of your analysis of the excited utterance witness' perspective, suppose you determine the presence of a valid excited utterance. The next step is asking the court to find that the statement is admissible under that exception.

The trial court must find that the foundational elements are present by a preponderance of the evidence in order for the excited utterance statement to be admissible.

The decision of whether to admit an out-of-court statement under a particular hearsay exception is within the trial court's discretion. The trial court's determination of the admissibility of a statement as an excited utterance will not be disturbed "unless the record shows that the ruling was manifestly wrong and an abuse of discretion." *See State v. Moats*, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). *See also State v. Buelow*, 122 Wis. 2d 465, 476, 363 N.W.2d 255 (Ct. App. 1984).

The discretion of the court includes factual findings based upon an examination of the evidence and the application of those facts to proper legal standards. *See State v. Fishnick*, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985).

The "abuse of discretion" standard grants trial courts great latitude. Appellate courts deferentially review trial court determinations that evidence is admissible as a hearsay exception, because a trial court "is best situated to weigh the reliability of the circumstances surrounding the declaration." *See State v. Brown*, 96 Wis. 2d 238, 245-246, 291 N.W.2d 528 (1980).

Appellate courts must affirm a circuit court's discretionary ruling "if it is supported by a logical rationale, is based on facts of record and involves no error of law." *In the Interest of Shawn B.N.*, 173 Wis. 2d 343, 367, 497 N.W.2d 141 (Ct. App. 1992) (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 414-415, 320 N.W.2d 175 (1982)).

The appellate courts will uphold a circuit court's discretionary decision "unless the use of discretion is wholly unreasonable." *State v. Johnson*, 118 Wis. 2d 472, 481, 348 N.W.2d 196

(Ct. App. 1984), *citing Hayzes v. State*, 64 Wis. 2d 189, 200, 218 N.W.2d 717 (1974).

A "Startling" Event

An excited utterance statement must relate to a "startling" event.

"[E]motional stress suspends the process of reflective thought necessary for conscious fabrication, and the recentness of the exciting event minimizes the danger of faulty memory." Lilly, Graham C., *An Introduction to the Law of Evidence* (2d Ed.), p. 239, West Publishing Co. (1987).

"The [excited utterance] exception is based upon spontaneity and stress, endowing such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay." *State v. Padilla*, 110 Wis. 2d 414, 418, 329 N.W.2d 263 (Ct. App. 1982), *citing Muller v. State*, 94 Wis. 2d 450, 466-67, 289 N.W.2d 570 (1980).

Domestic offenses, by their very nature, are startling events. Even the most minor charge, such as disorderly conduct, inherently requires that the act, at a minimum, tended to cause or provoke a disturbance.

Reasonable defense attorneys will concede that domestic abuse incidents qualify as startling events. Physical pain, visible injuries, emotional trauma and/or threats accompany domestic crimes. Conditions such as these are easily construed as startling events.

Much legal support exists to deem homicides as startling events. Some other types of assaultive behavior that has been determined by courts to be "startling" include:

- The stabbing of a victim of domestic abuse. *See State v. LaBarge*, 74 Wis.2d 327, 246 N.W.2d 794 (1976); *State v. Patino*, 177 Wis.2d 348, 502 N.W.2d 601 (Ct. App. 1993).
- Threatening phone calls. *See Muller v. State*, 94 Wis.2d 450, 289 N.W.2d 570 (1980).

- Threats of domestic abuse. *See State v. Teynor*, 141 Wis. 2d 187, 414 N.W.2d 76 (1987).
- Physical “fights.” *See State v. Martinez*, 150 Wis. 2d 62, 72, 440 N.W.2d 783 (1989) (where the court found that a fight outside a bar at night, during which the declarant was being physically assaulted, was a startling event or condition).
- Sexual assaults. *See State v. Moats*, 156 Wis. 2d 74, 457 N.W.2d 299 (1990); *State v. Padilla*, 110 Wis. 2d 419, 329 N.W.2d 263 (Ct. App. 1982); *Love v. State*, 64 Wis. 2d 432, 219 N.W.2d 294 (1974); *Bertrang v. State*, 50 Wis. 2d 702, 184 N.W.2d 867 (1971).

Whether or not an event has been proven to be “startling” is rarely the reason for the prohibition of excited utterances in domestic cases. If your trial court bars an excited utterance from admissibility, usually the decision is based upon the timing of statements or the level of a victim’s stressful condition.

Still under the Stress of the Event

Historically, excited utterances were based on the premise that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” *See* 6 John Henry Wigmore, *Evidence* Section 1747, at 195 (J. Chadbourn rev. 1976). This statement is then considered “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock” rather than a statement based on reflection or self-interest. *See* Wigmore at 195.

“Time for reflective thought” is precisely what the hearsay rule is supposed to prevent. When a declarant has too much time (between the event and the statement) for the potential fabrication of facts, the statement itself is unreliable and thus, inadmissible. *See* Wigmore at 195.

Timing is an important factor to admissibility. Time is not measured by minutes, or hours, but by the duration of the excited condition:

[T]he time factor between the triggering event and the utterance is the key factor in determining whether or not a statement is admissible as an Excited Utterance. However, “time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described.”

State v. Johnson, 153 Wis. 2d 121, 131 n.8, 449 N.W.2d 845 (1990), quoting *Muller v. State*, 94 Wis. 2d 450, 467, 289 N.W.2d 570 (1980). *See also State v. Padilla*, 110 Wis. 2d 414, 419, 329 N.W.2d 263 (Ct. App. 1982).

The time between the triggering event and the utterance is the key factor in determining whether or not a statement is admissible as an excited utterance. *See State v. Moats*, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990). *See also State v. Johnson*, 153 Wis. 2d 121, 131 n.8, 449 N.W.2d 845 (1990). The statement need not have been made contemporaneously with the event to which it relates. *See State v. Jenkins*, 168 Wis. 2d 175, 189, 483 N.W.2d 262 (1992).

Statements made by a declarant will be admitted, where it can be shown that he or she is still under shock of injuries or other stress due to a recent startling event or condition. *See State v. Moats*, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990), citing *Muller v. State*, 94 Wis. 2d 450, 467, 289 N.W.2d 570 (1980).

It must be shown that the statement was made so spontaneously or under such psychological or physical pressure or excitement that the rational mind could not interpose itself between the spontaneous statement or utterance stimulated by the event and the event itself. *State v. Martinez*, 150 Wis. 2d 62, 73, 440 N.W.2d 783 (1989).

Here are some case examples:

- In *State v. Boshcka*, 178 Wis. 2d 628, 640-641, 496 N.W.2d 627 (Ct. App. 1992), excited utterance statements were made to the first people that the victim encountered after the assault. Testimony supported the notion that the victim appeared frightened, upset, and agitated as she related the facts of the assault to witnesses.
- In *State v. Johnson*, 153 Wis. 2d 121, 130-132, 449 N.W.2d 845 (1990), the witness testified that the victim was in an uncharacteristically

high state of stress and excitability for some hours after the incident. This caused her behavior to differ from her normal conduct. Additionally, the first individuals to talk with the victim after the attack heard the excited utterance.

Trial courts study the time lapse between the event or condition and the actual utterance of the statement. However, this is only one factor and should not be controlling. Excited utterances are not clocked with stopwatches; rather, the trial court must look to the nature of the startling event or condition and the particular facts of the case. *See* C.T. McCormick, *McCormick on Evidence*, (3d ed.) § 297, West Publishing Co. (1984).

The statements of a declarant who demonstrates the opportunity and capacity to review the accident and calculate the effect of his statements do not qualify as excited utterances. Conversely, statements of declarants whose condition at the time of their declarations indicate that they are still under the shock of their injuries or other stress due to special circumstances will be admitted under this exception. *Christensen v. Economy Fire and Casualty Co.*, 77 Wis. 2d 50, 58, 252 N.W.2d 81 (1977).

The fact that a statement is made in response to a question does not necessarily disqualify it from being an excited utterance. *See Phifer v. State*, 64 Wis. 2d 24, 35, 218 N.W.2d 354 (1974).

A “Statement which Relates to . . .”

An excited utterance must “relate to” the startling event. Remember the purpose for the excited utterance exception: “[E]motional stress suspends the process of reflective thought necessary for conscious fabrication, and the recentness of the exciting event minimizes the danger of faulty memory.” Lilly, Graham C., *An Introduction to the Law of Evidence* (2d Ed.), p. 239, West Publishing Co. (1987).

“The [excited utterance] exception is based upon spontaneity and stress, endowing such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.” *State v. Padilla*, 110 Wis. 2d 414, 418, 329 N.W.2d 263 (Ct. App.

1982), *citing Muller v. State*, 94 Wis. 2d 450, 466-67, 289 N.W.2d 570 (1980).

Challenges may arise where the statement’s relation to the startling event is questioned.

In *State v. Lindberg*, 175 Wis. 2d 332, 500 N.W.2d 322 (Ct. App. 1993), a sexual assault case, the victim made an excited utterance statement at a hospital during a medical examination. The trial court was faced with the issue of whether the victim’s “source of stress and excitement” related to either (1) the victim’s fear of the doctor or hospital setting, or (2) her injuries from the sexual assault. The court found that reasonable competing inferences could easily be drawn. *See Lindberg*, 175 Wis. 2d at 345. The appellate court noted that when two competing inferences are both reasonable, the one used to support the magistrate’s conclusion should be upheld. *See Lindberg* at 346, *citing State v. Friday*, 147 Wis. 2d 359, 370-371, 434 N.W.2d 85, 89 (1989).

Defense attorneys will attack the statement itself. Courts have refused to mandate that statements must somehow describe the startling event. All that is required is that the statement must relate to the startling event.

In *State v. Martinez*, 150 Wis. 2d 62, 74 n.5, 440 N.W.2d 783 (1989), the defendant contended that the statements at issue could not qualify as excited utterances because they were purely subjective and did not report observed facts. In rejecting this contention, the court held that excited utterances are not limited to statements that describe a startling event or condition. The language of Wis. STAT. § 908.03(2) merely requires that the statement “relate to” the event or condition.

Occasionally, portions of an excited utterance do not relate to the incident. The portion may be unrelated, irrelevant, or even prejudicial. Stipulated redaction of irrelevant statements will cure this problem. However, approach all stipulations with caution, obtaining court approval first.

Excited Utterances and Children

Children commonly witness a parent’s abuse. Violence exerts a dramatic toll on children. When

the declarant of an excited utterance is a child, age will impact a trial court's analysis.

Courts apply broad and liberal interpretations of what constitutes an excited utterance when children are involved. *See State v. Dwyer*, 143 Wis. 2d 448, 459, 422 N.W.2d 121 (Ct. App. 1988), citing *State v. Gollon*, 115 Wis. 2d 592, 598, 340 N.W.2d 912 (Ct. App. 1983); *State v. Padilla*, 110 Wis. 2d 414, 419, 329 N.W.2d 263 (Ct. App. 1982). *See also Love v. State*, 64 Wis. 2d 432, 219 N.W.2d 294 (1974); *Bertrang v. State*, 50 Wis. 2d 702, 184 N.W.2d 867 (1971); *Bridges v. State*, 247 Wis. 2d 350, 19 N.W.2d 529, rehearing denied, 19 N.W.2d 862 (1945).

Here are some case examples:

- In *State v. Lindberg*, 175 Wis. 2d 332, 500 N.W.2d 322 (Ct. App. 1993), a three-year-old victim's statements made at the hospital while being examined were held to be admissible as excited utterances. The *Lindberg* court explained:

Statements made by a declarant will be admitted where indications are that he or she is still under shock of injuries or other stress due to special circumstances. A broad and liberal interpretation governs the excited utterance exception as applied to young children because such children will tend to repress the stressful incident, will report the incident only to the mother and will be less likely than adults to consciously fabricate the incident over a period of time.

Lindberg, 175 Wis. 2d at 343.

- In *State v. Moats*, 156 Wis. 2d 74, 457 N.W.2d 299 (1990), the court allowed a five-year-old child a time lag of seven to ten days between the last sexual assault incident and the time the victim told his/her mother.
- In *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Ct. App. 1982), a three-day time period between the alleged assault and the utterance of the statement was held admissible under the excited utterance exception because of the court's recognition of prolonged stress.
- In *Bertrang v. State*, 50 Wis. 2d 702, 184 N.W.2d 867 (1971), a nine-year-old victim

made a statement one day after the sexual assault. This statement was accepted by the court as being an excited utterance.

- In *Love v. State*, 64 Wis. 2d 432, 219 N.W.2d 294 (1974), a three-year-old sexual assault victim made a statement the day following the incident. This statement was accepted by the court as being an excited utterance.

The Confrontation Clause

It is common for the defense to object to the admission of out of court statements, stating that the Confrontation Clause has been violated under State and Federal laws. These objections sometimes pass muster.

"The confrontation right is not absolute. However valuable to the accused, the right gives way to other legitimate considerations in the criminal trial process." *State v. Olson*, 75 Wis. 2d 575, 588, 250 N.W.2d 12 (1977).

Prosecutors must understand the Confrontation Clause of the United States Constitution as well as *Crawford v. Washington*, 541 U.S. 36, 68 (2004), and its progeny in order to determine whether a statement is admissible, despite the objections of the defense.

Article 1, Section 7 of the Wisconsin Constitution states:

Rights of accused. SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the United States Supreme Court held that a defendant's confrontation rights are violated if the trial court received evidence of out of court statements by someone who does not testify if those statements are "testimonial" and the defendant had no prior opportunity to cross examine the witness. *Crawford* articulated two overlapping considerations for determining whether an out of court statement was testimonial: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51.

The U.S. Supreme Court elaborated on the distinction between testimonial and non-testimonial statements in *Davis v. Washington*, 547 U.S. 813, 833, 826-27 (2006), which involved, in part, a recording of a 911 call. The *Davis* Court stated:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 811.

The Court concluded that statements in the 911 recording were not testimonial. *Id.* at 829. The Court noted that the 911 caller was describing events as they were happening, not merely past events, and "any reasonable listener would recognize that [the caller] was facing an ongoing emergency." *Id.* at 827. The Court further stated the call was "plainly a call for help against bona fide physical threat," and "the nature of what was asked and answered again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than to simply learn what had happened in the past." *Id.* (emphasis omitted). The primary purpose of the call "was to enable police assistance to meet an ongoing emergency. [The

caller] was not acting as a witness; [the caller] was not testifying." *Id.* at 828 (emphasis omitted).

In *State v. Rodriguez*, the Wisconsin Court of Appeals discussed the *Davis* decision, noting that "[i]nsofar as a victim's excited utterances to a responding law enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial." *Rodriguez*, 2006 WI App 163, ¶ 23, 295 Wis. 2d 801. The Court of Appeals stated that an out of court declaration must be evaluated to determine whether it is, on the one hand, overtly or covertly intended by the speaker to implicate the accused at a later judicial proceeding, or, on the other hand, whether is a burst of stress-generated words whose main purpose is to get help and succor, or to secure safety, and are thus devoid of the "possibility of fabrication, coaching or confabulation." *Id.* at ¶ 26 (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)).

A determination that an out of court statement is non-testimonial does not end the inquiry as to the statement's admissibility under the Confrontation Clause of the Wisconsin Constitution. Wis. Const. art. 1, § 7. With respect to non-testimonial statements, the *Crawford* Court did not decide the form and substance of the constitutional analysis to be applied; instead, it expressly left that decision to the states, indicating that the states may continue to apply the pre-*Crawford* constitutional analysis of *Ohio v. Roberts*, 448 U.S. 56 (1980). However, in *Davis*, 547 U.S. 813, 826 (2006), the U.S. Supreme Court held that the Sixth Amendment of the U.S. Constitution does not apply to non-testimonial statements. Nevertheless, in *State v. Manuel*, 2005 WI 75, ¶ 3, 281 Wis. 2d 554, which was decided before *Davis*, 547 U.S. 813, 826 (2006), the Wisconsin Supreme Court adopted *Ohio v. Roberts*, 448 U.S. 56 (1980), for determining the admissibility of non-testimonial statements under the Wisconsin Constitution. Wis. Const. art. 1, § 7.

Absent an appeal to the Wisconsin Supreme Court, the circuit court (and Court of Appeals) is bound by *Manuel* for the purposes of the state constitutional question. *Manuel*, 281 Wis. 2d 554, 584 (2005). Nonetheless, you will want to note

that, should the Wisconsin Supreme Court subsequently review the admissibility issue in your case, the State reserves the right to argue that insofar as *Manuel*, relied upon the Sixth Amendment of the U.S. Constitution, the U.S. Supreme Court effectively overruled it in *Davis v. Washington*, 547 U.S. 813, 826 (2004). As such, on appeal in your case, the State likely would argue that, like the *Davis* Court, the Wisconsin Supreme Court should overrule *Manuel's* adoption of the *Roberts* test. See *Roberts*, 448 U.S. 56 (1980).

Roberts established the following two-part test to determine the admissibility of out of court statements under the Confrontation Clause:

First, the witness must be “unavailable” at trial. Second, the statement of the unavailable witness must bear adequate “indicia of reliability.” This second prong could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception or upon showing of “particularized guarantees of trustworthiness.”

State v. Hale, 2005 WI 7, ¶ 45, 227 Wis. 2d 593, citing *Roberts*, 448 U.S. at 66.

Note that a hearsay exception is “firmly rooted” if, “in light of longstanding judicial and legislative experience” it “rest[s] [on] such [a] solid foundation that admission of virtually any evidence within [it] comports with the substance of constitutional protection.” *Manuel*, 275 Wis. 2d 146, 164, citing *Lilly v. Virginia*, 527 U.S. 116, 126 (1999) (internal citations omitted).

ANALYSIS: With respect to the first step of the *Roberts* test, you simply indicate to the court that the victim or witness failed to appear in response to a subpoena, and therefore will not be available to testify.

With respect to the second step, whether the statements bear adequate indicia of reliability, if the statement you seek to admit qualifies as an excited utterance, then it is presumptively reliable because it falls under a firmly rooted hearsay exception. See *State v. Ballos*, 230 Wis. 2d 495 (1999), citing *White v. Illinois*, 502 U.S. 346, 356 (1992). See also *Manuel*, 275 Wis. 2d 146, 164, citing *White v. Illinois*, 502 U.S. 346, 357 (1992). As excited utterances, a victim’s or witness’ statements can be found by the court, without further analysis, to be presumptively reliable under the *Roberts* Confrontation Clause analysis,

and therefore admissible. See *Hale*, 277 Wis. 2d 593, ¶ 45, citing *Roberts*, 448 U.S. at 66.

Furthermore, the Confrontation Clause is satisfied so long as the evidence bears “particularized guarantees of trustworthiness.” *Manuel*, 2003 WI App 111, ¶ 25, 275 Wis. 2d 146, 165-66 (citing *State v. Weed*, 2003 WI 85, 263 Wis. 2d 434). The Supreme Court instructs that:

In evaluating whether a statement evinces particularized guarantees of trustworthiness, we consider the “totality of the circumstances, but . . . the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” Some factors that have been considered in assessing the reliability of a statement include spontaneity, consistency, mental state, and a lack of motive to fabricate. We look to see “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. . . .” In other words, we examine whether the statement is “so trustworthy that adversarial testing would add little to its reliability.”

Manuel, 2003 WI App at ¶ 25 (citing *State v. Ballos*, 230 Wis.2d 495, 510, 602 N.W.2d 117 (Ct.App.1999) (citing *Kluever v. Evangelical Reformed Immanuel Congregation*, 143 Wis.2d 806, 813-14, 422 N.W.2d 874 (Ct.App.1988)).

The “trustworthiness” analysis is arguably circular, in that it requires you to restate conclusions you have already reached in determining that the victim’s or witness’ statements are admissible under WIS. STAT. §§ 908.03(1), (2) and/or (24). See *Manuel*, 275 Wis. 2d 146, 166.

In sum, while not all aspects of the Confrontation Clause are addressed here, remember that the constitutional right of confrontation does NOT:

- Require the State to produce any particular witness;
- Give the defendant the right to insist that the State call any particular witness;
- Require the State to call as a witness the victim or the person who swore to the complaint; or

- Guarantee the defendant the right to face his/her accuser(s).

When facing Confrontation Clause challenges to an attempt to admit an excited utterance, remember that the hearsay exceptions exist for a reason. The law views hearsay exceptions as inherently reliable. Otherwise, the exceptions would not statutorily exist in the first place. Use the above analysis to rebut Confrontation Clause challenges.

Practical Trial Strategy

You have no obligation to call a recanting witness to the stand in your case in chief. You may choose not to call the victim. Instead, you may elect to proceed under an excited utterance theory, without regard to the victim's presence.

Sometimes, an uncooperative victim, aware that the State will proceed to trial without him or her, will decide to attend court in order to recant, minimize or otherwise provide testimony that you believe to be false. This is often orchestrated by the defendant.

While you are always welcome to call a recanting victim to the stand (and impeach his or her testimony through the use of prior inconsistent statements), you may elect to proceed strategically on the basis of the excited utterance alone.

Should you suspect that a victim or other witness desires to thwart your prosecution, know that you may proceed solely on the basis of an excited utterance. This allows you to cross examine, rather than directly examine, an otherwise uncooperative victim or witness.

Suppose you decide not to call a recanting victim to the stand, and the defense attorney calls the recanting victim. At this point, you can cross examine the victim with leading questions. However, be careful. Never treat a victim of abuse with contempt; treat that person with dignity. You do not want the jury to dislike the victim. You want the jury to dislike the fact that the victim is being pressured, controlled and manipulated by the abuser to recant.

Using an excited utterance in lieu of a victim is a tool, not a weapon. Proceeding to trial with a victim is conventional. Proceeding without a victim is unconventional.

Utilizing an excited utterance can be powerful. Experienced prosecutors all agree that it is often much easier to obtain a conviction without a victim in an excited utterance trial than in a conventional trial with victim testimony.

As your experience as a domestic abuse prosecutor grows, the mechanics of trying this type of case will become relatively second nature. From an ethical standpoint, you must be sure in your own mind of the defendant's guilt. Do not just simply proceed to trial without a victim because the existence of an excited utterance allows you to do it; proceed because you are convinced of the defendant's guilt. Closely examine the defendant's history of prior violence. Proceed only when you are absolutely confident in your heart that the defendant is guilty. While aggressive and zealous prosecution is important, exercise caution and discretion. Use this tool wisely, after rendering your best judgment.

At first, from a prosecution standpoint, excited utterance trials without the victim's testimony may seem complicated. Once you have mastered the skills, however, prosecutors agree that these cases become quite easy.

Though the victim may not be present in the courtroom, you can paint a vivid picture of him or her as a sympathetic person. The police officer will testify, perhaps, that the victim was crying and upset; that she had a small physical stature; that her hair was a mess and her make-up was running; that she was injured and beaten; that she was bleeding or bruised; etc.

While jurors should not allow their sympathies to sway their judgment of the evidence, it is legally permissible for you to ask the officer as to his or her lay opinion of the victim's emotional state. The officer may respond that the victim appeared scared, sad, and upset. *See Wis. JI-Criminal 201, Opinion of a Non-expert Witness.* The officer may base his or her lay opinion upon the victim's actions of looking over her shoulder, seeking a safe place to talk, or whispering. If your *voir dire* and opening statement have been carefully

constructed, the jury will understand the victim's embarrassment and naturally understand her situation. The jurors will understand why the victim did not appear in a public courtroom to relive a shameful, humiliating abuse experience.

Most defense attorneys have little experience defending an excited utterance case. Defense attorneys are accustomed to attacking the victims' motives, by portraying them as liars or jealous revenge-seekers, or by pointing out their upset state in an attempt to portray them as "crazy" or irrational. When the victim recants or does not appear in court, defense attorneys are left without their typical defense strategy.

When you proceed without a victim in your case in chief, the defense attorney is at a serious disadvantage, without a victim to cross examine. If the defendant has prior convictions, chances are less likely that he/she will testify. The defense may not have any witnesses at all to call to the stand.

Checklist for Prosecutors

Use this checklist to determine whether an excited utterance applies in your case.

- The witness has personal knowledge of the declarant's statement (i.e., made a direct observation or heard the statement).
- The facts of the incident support a "startling" event or condition.
- The statement was made under the stress of the event.
- The statement relates to the startling event or condition.
- The statement contains all elements of the crime required.

OR...

- The statement is incomplete and needs additional evidence to proceed.
- The victim identified the defendant at the scene of the crime.

- The identity of the defendant must be established through other evidence.

Corroborating evidence may include (but is not limited to):

- 911 evidence;
- Documentation of injuries;
- Photographs;
- Medical reports or records;
- Witness corroboration; and/or
- Statements by defendant.

Your Case Assessment and Evaluation

Excited utterance: Is it there? It may seem obvious, but prepare. Talk to your witnesses, including police officers. Ensure that all the elements of the charged offense (as well as the date, venue and identification of the defendant) can be proven by the totality of available evidence.

Corroboration. You must have corroboration. If you proceed with only the excited utterance statement of the victim and no other evidence, you will lose. Quite frankly, you should lose under those circumstances. Proceeding without any corroboration is a potentially reckless misuse of discretion.

Visible injury. You must have evidence of a visible injury on the victim. This will be your most important piece of corroborating evidence. In a typical "he said/she said" case, you want to be certain of the defendant's guilt. If a defendant asserts self-defense, rebut this claim with documentation of the victim's injury. Ask yourself whether the injuries are consistent with the excited utterance statement.

Photographs. While a police officer or other witness may be able to testify as to the injury and its extent, it is preferable for the jury to see photographs of the victim's injury.

911 recording. While not necessary, a 911 recording can be an extremely useful piece of corroborative evidence. However, if the 911 call is inconsistent with the excited utterance statement given to the police, the statement will be attacked, and you should have serious doubts about your case. Defense counsel will attempt to portray the police officer as an exaggerating or fabricating witness. The jury will likely be swayed with these attacks upon the officer's credibility.

Intoxication level. If the victim was severely intoxicated at the time the incident occurred, your decision to proceed will be affected. Some prosecutors, nonetheless, have experienced success even when a victim had been drinking alcohol. Jurors understand the argument that alcohol may sometimes help to lower inhibitions and "bring out the truth" in a person. However, talk to the police officers involved. To the best of your ability, analyze the level of intoxication of both the victim and the defendant. Then make your decision whether to proceed.

Other witnesses and children. Anyone who may be able to corroborate the offense should be closely scrutinized to ensure consistency between their perspective and the excited utterance statement. Children on the scene of a domestic crime are very significant. Children may be additional sources of excited utterance statements. For example, a child may blurt out: "Daddy hit mommy!" A child's statement will often influence the jury in your favor.

Also, prosecutors can effectively argue that children are the silent victims of abuse. Defense counsel may attempt to coax the jury: "The victim is not here, so why should you care?" When children are present to witness the abuse, that defense argument will fall upon deaf ears.

For example, in a self defense case, one prosecutor cited a powerful example. When the police responded to the scene, both parties were present, along with a three-year-old child. The child hid behind the victim's legs. As the victim walked from place to place in the residence, the child followed his mom's every move, still hiding behind her and clinging to her legs. The child would not go near his father, the defendant. When the defendant later asserted self defense, the jury disbelieved him because of the child's actions.

Intimidation and manipulation tactics. Cards and letters of apology, receipts for flowers, phone records, and recordings of phone calls from jail can corroborate the incident.

Restraining orders and injunctions. Restraining order petitions coupled with transcripts from hearings may offer additional corroborative evidence to supplement your case.

Defendant's prior record. The defendant's record, especially a documented history of abuse, will help you determine whether or not to proceed to trial without the victim's testimony. An extensive abuse history will add a dose of confidence to your own ultimate judgment of the defendant's guilt. From a strategic standpoint, most defendants will shy away from testifying if they have long criminal records. Because of this, you may be able to better anticipate what defense theory can be expected at trial.

Police reports and medical records. Check all available reports to validate consistency between them. Will different pieces of evidence presented by the State conflict with each other?

Disorderly conduct charges. The worst time to proceed to trial without a victim can be with a single charge of disorderly conduct. Do not utilize an excited utterance (one person's word against another) without corroborative evidence, especially in this type of case.

***Voir Dire* is the Key to Your Case**

Your case will be won or lost in *voir dire*. Believe in your case. Begin to tell the story of the case in *voir dire*. Prepare your questions to educate the jury about the dynamics of domestic abuse. You must tell the jury that you do not expect the victim to testify at trial. If the first time you tell the jury about this is during your opening statement, it is too late.

Sample excited utterance *voir dire* questions:

- Is there anyone here whose life has been touched by domestic abuse: either in your own home, or that of a friend, relative, or neighbor?

- How did you know that person was being abused? Did you see injuries? Did you see behaviors?
- Did that person talk about it?
- Did that person report the abuse to the police?
- Was the person conflicted about calling the police?
- Did you advise the person to call the police?
- Was it difficult for the person to cooperate with the police? Why?
- [If person called the police], were criminal charges issued?
- Did the person follow through with the charges? Did the person tell you whether it was difficult to testify?
- How many of you on this jury panel require the victim's presence in order to return a conviction?
- Will anyone want to see the victim in court?
- How many of you understand that in Wisconsin, the prosecutor makes the charging decision, not the victim?
- While some people refer to "pressing charges", in Wisconsin, it is the prosecutor that actually presses charges? While citizens report crime, prosecutors press charges. Does everyone understand why? You may want to ask the panel to give you some good reasons why, such as taking pressure off of victims.
- Those of you that know a [friend, relative, neighbor, co-worker] to be a victim of domestic abuse, did that person confide in you?
- When the person was confiding in you, did he/she keep it a secret from others? Was it difficult for that person to tell others? Would the person make excuses to others and tell you the truth?

- Did that person deny that anything was going on? Did that person blame their injury on "falling down the stairs" or "running into a door knob?" But you didn't believe that person. Why didn't you believe that person?
- Did the victim take the abuser back? Why? Answers may vary: Victim loves the person and is therefore protecting that person from suffering consequences to their behavior, victim believed the abuse would end, victim believed that the person would change, the victim was scared to leave or be alone, the victim was concerned about the children, the victim was concerned about financial considerations, etc.

The law is that the State must prove its case beyond a reasonable doubt. The standard is not beyond ALL doubt. In this case, I do not expect to see the victim testify. In all likelihood, you will not hear from the victim.

- If I present evidence that convinces you beyond a reasonable doubt that the defendant is guilty, would anyone vote "not guilty" simply because the victim never testifies?
- To be sure, if I meet my burden of proving this case beyond a reasonable doubt, without the victim testifying, you are all going to find the defendant guilty, correct?

If a juror will not find the defendant guilty after meeting the "beyond a reasonable doubt" standard, because the victim or any other piece of evidence is not presented, then move to strike that juror for cause. Any juror who demands the testimony of the victim must be struck because of a clear inability or refusal to follow the law.

If the court gives you the latitude to question the jury panel in this fashion, you will help the entire jury pool understand some basic concepts:

- With all abuse, there is a level of discomfort. The victim feels ashamed, embarrassed, humiliated, sad, scared, etc.
- With the victim's discomfort, the victim feels vulnerable.

- A victim of domestic abuse will behave differently than a victim beaten by a stranger on the street.
- The likelihood of not appearing in court is the rule for victims of domestic abuse, not the exception.

As long as you prepare the jury, it will be okay for you not to have the victim's testimony in court. The jury's common sense will dictate that a victim will fail to appear for the trial. The same is true for evidence. As long as you prepare the jury, it will also be acceptable for you not to have a plethora of evidence, like jurors are used to seeing on television programs or in the movies.

Sample Questions for Excited Utterance Trials

General predicate questions for the law enforcement officer

- Name?
- Occupation?
- What law enforcement agency?
- How long have you been so employed?
- What are your present duties?
- Do you have any prior experience investigating domestic abuse cases? Explain.
- Approximately how many domestic abuse cases have you investigated in the past?
- Have you had the occasion to view the demeanors of victims of domestic abuse?

Facts of the offense

- Directing your attention to (date of offense)..
- Were you working on that date?
- In what part of the County/City/Town/Village were you working?

- Were you in a squad car? Marked or unmarked? Who was driving?
- Did you receive a call from Dispatch that (evening, morning, afternoon)?
- What was the nature of the dispatch? What were you told about the report? (e.g. 911 call, neighbor/child/victim reported, weapons involved, etc.)
- To what address did the dispatch send you?
- VENUE: Is that address in the county of (your county)?
- At what time did you receive the dispatch?

Actions of the police officer

- In reaction to the dispatch, what did you do?
- At what time did you arrive at the address?
- What did you see when you arrived on the scene?
- Did you encounter any person upon your arrival?
- Describe what happened . . .
- Prior to entering the residence did you hear or observe anything occurring inside the residence from your vantage point/perspective?
- Describe the scene for the jury.
- Did you observe anything unusual (i.e., residence in disarray, any damaged items, evidence of consumption of alcohol or drugs, etc.)?
- Did you observe any individual(s) at the scene? Who?
- ID the defendant in the courtroom, if the defendant was on scene.

Encounter and assessment of victim's physical and emotional state

- When you arrived on the scene, did you have an opportunity to view the victim's demeanor? Please describe how he/she appeared/was acting.
- Describe the victim's physical characteristics:
 - Was the person male or female?
 - Was his/her clothing neat, or torn, or in disarray, bloodied, etc.?
 - Face: Swollen? Bloody? Black and blue?
 - Eyes: Crying? Sobbing? Tearful? Tears beginning to well? Color/redness of eyes?
 - Breathing: Catching breath? Heavy breathing? Unable to catch breath? Able or unable to complete sentences with/without difficulty? Stuttering? Wheezing? Hyperventilating?
 - Describe the position of victim: Standing? Shaking? Sitting? Curled in fetal position? Cowering? Able to look the officer in the eyes?
 - Hair: Combed or disturbed?
 - Hands/arms: What was the victim doing with his/her hands and arms? Wringing hands? Waving dramatically? Pointing (to defendant or weapon or other)? Fists?
- If the defendant was on the scene:
 - Did you observe the defendant's demeanor?
 - Did he/she appear to be angry? Enraged? Irritated? Upset? Sad? Embarrassed? Combative? Controlled?
 - Please describe how you reached that conclusion.
 - Voice tone and inflection: Screaming? Whispering? Voice fluctuation?

- Describe the victim's emotional state:

- Did you have an opportunity to make any observations of the victim's emotional state?
- Was he/she angry? Upset? Excited? Sad? Scared? Lonely? Embarrassed?
- What led you to conclude that the victim was feeling that way?

Conversation with the victim

- Let's start at the beginning of your interaction with the victim . . . Did you have a conversation with the victim?
- Did the victim identify him/herself to you? Name? Address?
- Describe your conversation. What was said? Did the conversation escalate at any time?
- Did the victim's emotional state change in any way during your conversation? If so, in what way? How could you tell?
- Did you have to calm the victim down at any time? Did you have to slow the victim down at any time?
- Do you recall where you were standing? Where was the victim standing/sitting?
- Who lives at that address? Who is on the lease/mortgage: victim or defendant?
- What did the victim tell you?
 - Was there an argument? What was the subject of the argument?
 - How did the physical contact occur with the defendant?
 - Who initiated the contact? How did that happen?
 - Did the victim and defendant exchange words during the physical contact?

- Who threw the first punch? Open hand or fist? How many times?
- Where (in the house and on the body) did the defendant hit/kick/punch/slap/strangle/etc. the victim? How many times?
- Did the victim try to protect him/herself? Did he/she hit back? Call for help? Protest?
- Did the defendant use or threaten to use any weapons? Describe the weapons, or the items used. How did he/she use them or threaten to use them?
- Did the victim explain the defendant's state of mind? Emotional state? What evidence or observations led him/her to draw those conclusions?
- As the victim described the facts of what occurred, did he/she remain excited or agitated? Did the victim continue to exude the same emotional state throughout the description of what occurred?

Injuries

- Did you personally observe any injuries during the time you spent with the victim?
- On what areas of the body specifically?
- Describe the injuries you (police officer) observed.
- Did the victim point out these injuries to you (e.g., "Look what defendant did to me!")?
- Did the victim complain of any pain?
- Did you attend to these injuries? If so, in what way?
- Did the victim seek further medical attention? Where? Did EMS respond? Was the victim transported to the hospital?

Identification of defendant by officer

- Do you know (defendant)? In what capacity?

- Can you identify (defendant) in the courtroom?
- Did the victim explain who injured him/her? What was said?
- Was the defendant on the scene when you arrived?
- Did the victim point out the defendant to you? Please describe the victim's emotional state and the words used in this identification.
- Was the defendant drunk or high on drugs? What led you to this conclusion? Odor of intoxicants? Eyes bloodshot and glassy? Slurring words? Stumbling? Swaying? Other signs of intoxication?
- Did the defendant's conduct escalate the situation at the scene? How did you handle the investigation?

Nature of the relationship

- Did the victim describe the nature of his or her relationship with the defendant?

Consent

- To the best of your knowledge, did the victim, at any time, give the defendant permission to (hit/strangle/push/slap/punch/kick/beat, etc.) him/her?

Additional issues

- Establish the defendant's motive for committing battery, if possible.
- Prepare for possible self-defense claims by defendant.
- Establish any consequences to the victim, if known.
- Employment consequences? Did the victim lose his/her job?
- Did the victim move, or stay someplace else that evening?

- Did the victim ask about obtaining a restraining order or injunction?
- Did the victim ask questions about divorce or separation?
- Did the victim change locks on the doors, for fear of the defendant returning in the future?
- Did the victim mention counseling?
- What, if any, were the consequences to the rest of the family, including any children?
- Did the victim ever place a call to a domestic abuse hotline for assistance?

Photos

- Establish foundation: Were photos taken? When? By whom? Where? Have you seen the photos? Are they a far and accurate representation of _____ as you observed it?
- Mark the photos and ask the witness to identify them.
- Ask the witness to point out any specific qualities of photos that you wish to accentuate.
- Move the photos into evidence, and ask permission to publish them to the jury.

Wis. Stat. § 908.06

The defendant in a domestic abuse case often knows every detail of the victim's life. Be aware of the nuances of the hearsay rules, especially Wis. Stat. § 908.06. Remember that it can be difficult to rehabilitate a victim who is not present to testify. You may have little, if anything, to rebut the defense's credibility attacks upon the victim.

Wis. Stat. § 908.06 ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant

at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination.

Common Defense Trial Theories

Attacking the merits of the excited utterance statement. Perhaps the least successful defense challenge to the excited utterance case is the one most frequently used by defense attorneys. When the defense argues that "it didn't happen," the defense usually falters. Because there is no victim to cross examine, defense attorneys are left only with police officers to cross examine. Most reliable police officers will not get easily rattled on the witness stand. Most often, the police officer will reiterate his or her direct examination testimony, sometimes in greater detail. The jury will hear the evidence repeated and perhaps even further elucidated to them.

Should a defense attorney question the police witness about the sincerity of the victim's statement, the officer can mention the seriousness of the incident and the emotional state of the victim, as well as the extent of the victim's injuries. If the defendant does not testify, then the jury only hears police witness testimony as well as the additional corroborative State's evidence as outlined above.

Because defense attacks on the merits of the excited utterance statement are usually unsuccessful, a "shotgun" defense approach typically ensues. Jurors may see the defense attorney searching and stretching for any possible facts to exploit. If taken to the extremes of an irrelevant "fishing expedition" and waste of time, most jurors will resent this behavior and view defense counsel contemptuously.

The defense strategy of attacking the merits of the excited utterance statement will succeed, however, if the prosecution has a weak case without any corroborative evidence. Make sure to determine the viability of your case well before the trial begins.

Burden of proof arguments: the “empty chair” defense. About a decade ago, a popular defense tactic took the form of a defense attorney placing an empty chair in front of the jury box during his or her opening statement. The empty chair was then brought back during defense counsel’s closing arguments. Defense attorneys sought to dramatize the “missing” witness.

Because prosecutors have become so adept at *voir dire* in excited utterance cases, the “empty chair” tactic is rarely seen anymore. Because *voir dire* questions educate jurors about the dynamics of domestic abuse, the jury is prepared for the victim’s non-appearance and understands the reasons why a victim might not behave like a victim of a different crime.

However, defense counsel will attack and magnify all areas of weakness in the prosecution’s case. The witness that wasn’t called will be the theme of this burden of proof argument. Defense counsel will stress that no witness testified who was present at the scene of the crime. Repeatedly, defense counsel will ask the jury: “How do we know what really happened?”

If you appropriately evaluated and assessed your case prior to trial, you will be able to demonstratively answer this defense theory. Similar to a homicide case, the victim does testify: through medical records, photographs, 911 call recordings, prior restraining order hearing testimony, and other evidence gathered by the police officers.

Remind the jury that the case is not entitled “Victim vs. Defendant.” The case is entitled “State vs. Defendant.” Show the jury who has the power and control in the relationship. Who pays the bills? Who pays the rent? Who makes the decisions about the children? Tell the jury that it is easy to understand why victims may have feelings that they may not be able to easily “shut off,” but that does not mean that the State of Wisconsin should tolerate the defendant’s abusive behavior.

Make sure to ask the judge during pre-trial motions *in limine* to admonish defense counsel to not speculate as to the reasons why the victim has not appeared to testify at the trial. Then, watch and listen closely to the defense attorney’s closing

arguments. If defense counsel calls for speculation or asks too many questions, the door may open for you to answer these defense questions in your rebuttal. For example, if the defense states:

“The State failed to meet its burden. The victim is not here. She never testified. You never heard from her. How can you know what really happened? Why didn’t the victim show up for court? Probably because it never really happened. She probably lied to the police. It makes you wonder what really happened.”

Should the defense err in this fashion, you can respond. Remember that the jury has been educated in *voir dire*. They understand that victims do not want to testify against their abusers for many possible reasons. While no victim likes being abused, perhaps the victim still loves the abuser. Perhaps the victim relies upon the defendant for financial purposes or for childcare. Perhaps she is intimidated. Perhaps she has been threatened or manipulated. Perhaps she was on her way to court and the defendant sent someone to prevent her from coming. One prosecutor commented that, quite frankly, if you want to speculate, for all you know, the victim could be lying on the side of the road in a pool of blood!

During your closing arguments, return the jury to what they know from their common sense understanding of domestic abuse. If you called an expert witness, debunk the myths about domestic abuse. Show the jury that the majority of defense counsel’s attacks were directed at evidence not in consideration, instead of the facts that were presented.

Most importantly, argue the strength of your evidence. The victim called the police for a reason. The victim was in danger on the night of the assault. The victim called the police because it was an emergency. Tell the jury what their common sense tells them. Citizens call the police for protection.

“The victim’s not here. Why should we care?”

This argument is most persuasive to the skeptics on the jury panel. The most effective prosecutors will utilize *voir dire* to strike the skeptics. However, no matter what level of skepticism remains on the jury panel, this defense theory will fail if the assault was extremely serious or if the victim suffered serious injuries. Again, a quality

case evaluation and assessment will serve the prosecution. Lastly, an expert well versed in the dynamics of abuse can help your case. An expert will explain with statistics and experience how survivors of abuse react and cope with the realities of their situation.

Self defense. Perhaps the most successful of the available defense theories, self defense is difficult to combat since the prosecution typically has no witness to call in rebuttal. Claims of “she hit me first” or “it was a mutual fight” provoke thought and equity considerations in jurors. Defense attorneys can effectively argue that the police and prosecutor have simply rushed to judgment. If both parties sustained injuries, the prosecutor must spend serious time evaluating whether the defendant has a legitimate claim of self defense.

With no prior record, expect the defendant to testify. In a misdemeanor domestic abuse case with very minor injuries or no visible injury at all, the defendant has a wide-open claim of self defense. The defense may show pictures of injuries supposedly sustained by the defendant, claiming that the bruising appeared the next day, after police completed their investigation.

In asserting a claim of self defense, keep in mind that the defendant must essentially admit to beating the victim. The defendant must admit engaging in some form of violence to meet the legal quantum of proof for the judge to instruct the jury on self defense. A defendant cannot say: “I didn’t do it, but I was just defending myself.” If the defense attorney requests the self defense jury instruction, the defendant cannot claim that he or she didn’t mean to do it. If the defendant’s explanation of the incident amounts to an accident or mistake, and the defendant did not intend to protect him- or herself, then the court should deny defense counsel’s request for the self defense jury instruction.

In terms of strategizing your case, your deft trial skills will likely be tested. Evaluate the injuries of both parties. In some cases, it will appear that since the victim has not testified, the defendant now conveniently claims self defense. Thoroughly question the police officers. Did the police check the defendant for injuries? Did the jail, during the booking process, check the defendant for injuries? Make sure to check with the investigating officers

and the jail in your jurisdiction that booked the defendant because they often, as a matter of protocol, note whether the defendant has injuries. Look for ways to bolster the credibility of the police officer’s viewpoint. Police officers must elaborate on the defendant’s demeanor on the scene. If the defendant fled the scene or the defendant’s behavior was outrageous and belligerent, highlight that evidence. Sometimes, the actions of children, the 911 call recording, or other corroborative evidence will be very important.

Depicting the defendant’s version as implausible will rest upon your most effective cross-examination skills. Listen closely to the defendant’s testimony. If the defendant’s testimony varies from any previous statements, impeach that person. Ask the defendant when was it that he or she first told anyone about the self defense theory. In short, cross examination and evidence that corroborates the excited utterance statement will be your best tools to overcome a claim of self defense.

Surprise! Guess who came to testify after all? From time to time, after the prosecution rests, the victim will “magically” appear to testify for the defense. More often than not, this defense strategy backfires on the defense.

If the prosecutor’s case theory and theme is power and control, then a victim refusing to appear for the prosecution is definitely not under the prosecution’s control. Instead, the victim is under the defendant’s control. No stronger evidence exists in a domestic abuse case.

The prosecution may have grounds to re-open its case in chief at this point. Witnesses may not choose to respond only to one side’s subpoena and not the other. Some prosecutors want to present the victim in their case in chief, even if the evidence will amount to recantation testimony. These prosecutors want the jury to view the State as not attempting to hide any evidence from them, be it good or bad.

However, other prosecutors prefer to allow the defense to call the victim, reasoning that many defense attorneys lack experience in conducting direct examinations. Further, the testimony may

appear contrived and scripted to the jury. As a prosecutor, you want the jury to “smell a rat.”

Because you educated the jury about domestic abuse dynamics during *voir dire* and your opening statement, have confidence in your ability to cross examine a reluctant or recanting victim.

- Ask the victim how he/she was informed of the trial date.
- Ask the victim if he/she received subpoenas for the trial date and from whom.
- Ask the victim how many times she has spoken to the defendant, possibly in violation of a “no-contact order.”
- Ask the victim how many times he/she spoke with defense counsel prior to trial.
- Establish that the victim and defendant have an ongoing relationship.
- Because the victim still cares for the defendant and relies on him/her, establish that the victim wishes no harm to come to the defendant.
- Ask if the victim if he/she and the defendant, like normal couples, have disagreements.
- Ask whether the victim always calls the police when they have simple disagreements, and then ask what made this situation different from other arguments.
- Ask why the victim is appearing for the first time on the day of trial, instead of coming forward earlier.

During your closing argument, make sure the jury makes the connection between the defendant’s control of the relationship and the “surprise” testimony of the victim at trial. Get the jury to understand that when the victim called the police for protection at the time of the abuse, the victim had not yet considered charges, court, testimony, and consequences. Tell the jurors that the victim is trying to protect the defendant, yet the defendant nonetheless must be held accountable and convicted for the abusive behavior.

Conclusion

In summary, the exceptions to the hearsay rule exist for a reason. The exceptions are inherently reliable. Excited utterances are no different from any other exception. You should never pursue a case with nothing more than the sole evidence of the excited utterance statement. This tool is not for beginners; it is a case-specific advanced trial technique. Excited utterances are frequently used for homicides, shaken baby cases, and child sexual assaults. Now, with the widespread acceptance of their use in domestic abuse cases, you must exercise excellent judgment and vision. Your credibility as a litigant before the court and with the jury depends upon the wise and judicious use of your discretion. Advocate strongly, vigorously, aggressively, and zealously. But also, before you proceed, be sure in your own mind and your gut that the defendant is guilty.

Appendix 12: Sentencing Penalty Chart

TRUTH IN SENTENCING II -- PENALTY CHART

[as of July 27, 2005]

Judge Patrick J. Fiedler

FELONY CLASS	MAXIMUM IMPRISONMENT (BIFURCATED SENTENCE)	MAXIMUM CONFINEMENT	MAXIMUM EXTENDED SUPERVISION	MAXIMUM FINE	MAXIMUM PROBATION
A	Life	Life			
B	60 years	40 years	20 years		40 years
C	40 years	25 years	15 years	\$100,000	25 years
D	25 years	15 years	10 years	\$100,000	15 years
E	15 years	10 years	5 years	\$50,000	10 years
F	12.5 years	7.5 years	5 years	\$25,000	7.5 years
G	10 years	5 years	5 years	\$25,000	5 years
H	6 years	3 years	3 years	\$10,000	3 years
I	3.5 years	1.5 years	2 years	\$10,000	3 years
MISDEMEANOR CLASS (habitual criminality)					
A	2 years	1.5 years	1 year	\$10,000	1-2 years
B	2 years	1.5 years	1 year	\$1,000	1-2 years
C	2 years	1.5 years	1 year	\$500	1-2 years

TIS II -- §973.01, et al (as amended by 2001 Wisconsin Act 109)

- Applies to offenses committed on or after February 1, 2003
- Bifurcated Sentence [Imprisonment] = Confinement + Extended Supervision
- Minimum Term of Confinement: 1 year
- Minimum Term of Extended Supervision: not less than 25% of the term of Confinement
- Confinement + Extended Supervision may not exceed Maximum Imprisonment (Bifurcated Sentence)
- Minimum Term of Probation: 1 year for felony; 0-6 months for misdemeanor
- Does not apply to life sentences
- Unclassified felonies and misdemeanors-habitual criminality
 - Maximum Confinement = 75% of total length of Bifurcated Sentence and all remaining time must be the term of Extended Supervision

Appendix 13: Supplement for LGBTQ Section

Abusive Gay, Lesbian, Bisexual, Transgender and Queer Sexual Violence

Barriers for LGBTQ victims of rape:

- Not being taken seriously or having their experience minimized.
- Not having their experience labeled as sexual assault or rape.
- Having to explain how it happened in more detail than one would ask a survivor of opposite sex-assault.
- Having to advocate to educate those they reach out to
- Having their experiences sensationalized
- Increasing people's homophobia or being seen as a traitor to their community if they tell their story to straight people.
- Having fewer people to talk to (because the LGBTQ community can be a small one and is tightly knit)
- Mistakenly being seen as the perpetrator.
- Being blamed for the assault.
- Not being understood or being blamed if it happened in an S&M environment.
- Being treated in a homophobic manner by the police, rape crisis center and others.
- Being "outed"

A few words about "Men: Rape's Unnoticed Victim" (adapted from Susan Wachob, MSW, LCSW).

- She has found that men seeking assistance for rape around our country have called rape crisis centers and been hung up on and told that they do not work with rapists, only victims.
- There are few rape therapy groups for male victims.
- For adult male rape survivors, saying he was powerless and that he has feelings other than anger about what happened to him is by societal definition, a "female" role. The absurdity of this position damages both men and women.
- Also, other issues with rape can really damage a man's sense of well-being:
 - He had an erection and maybe even ejaculated (a very normal body reaction, even when traumatized). This doesn't mean he enjoyed it or that it wasn't an assault.
 - He was drunk or high ("It was my fault so I don't have any right to feel bad or get help")
 - He consented to some sexual acts and then was forced to do others or ("I don't have any right to call it rape since I agreed to have sex.")
 - He was in an area where men go to pick up others for anonymous sex and was forced to have sex ("I asked for it since I was there, so it's really not rape.")
 - He has consensual sex with men at other times ("I do this anyway so I have no right to cry rape.")
 - He was too scared to resist ("so it wasn't really rape anyway" theory)

Gender non-conforming Youth and Sexual Assault

- Often happens amid ongoing violence from peers...name calling, constantly being stared at, boys trying to force themselves upon the victim. Physical attacks.
- They can live in a world of continual fear and in a place where others tell them they are freaks and deserving of violence.
- They are often not deemed "appropriate" for female or male-bodied teens.
- Agencies label them as mentally ill and create barriers by these labels.

Wisconsin Select Animal Abuse Laws Commonly Violated Against an Adult When Domestic Violence or Sexual Assault Occurs**

This document, created by the Wisconsin Coalition Against Domestic Violence (WCADV) Legal Department, does not constitute legal advice. We wish to thank Atty. Megan Senatori for her contributions to this document.

I. Criminal Laws

Statute Name & Number	Crime	Definitions	Other
Abandoning Animals <u>Wis. Stat. § 951.15</u>	No person may abandon an animal.	Abandonment- the relinquishing of a right or interest with the intent of never again claiming it. <i>Black's Law Dictionary</i>	
Damage to Property <u>Wis. Stat. § 943.01</u>	Intentionally causing damage to any physical property of another without the person's consent	Property means real or personal property <u>Wis. Stat. §700.01(5)</u> Personal Property- includes all goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term "real property." Any moveable or intangible thing that is subject to ownership and not classified as real property. <u>Wis. Stat. §70.03</u> Real Property-includes not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto, except that for the purpose of time-share property, real property does not include recurrent exclusive use and occupancy on a periodic basis or other rights, including, but not limited to, membership rights, vacation services and club memberships. <u>Wis. Stat. §70.04</u>	Women will often stay to protect the animals. In all 50 states, animals are considered property. <i>Rabideau v. City of Racine</i> , 627 N.W.2d 795 (Wis. 2001).

Statute Name & Number	Crime	Definitions	Other
<p>Dognapping and Catnapping Wis. Stat. § 951.03</p>	<p>No person may take the dog or cat of another from one place to another without the owner’s consent or cause such a dog or cat to be confined or carried out of this state or held for any purpose without the owner’s consent.</p>		<p>This section does not apply to law enforcement officers or humane officers engaged in the exercise of their official duties.</p>
<p>Harassment of Service Dogs Wis. Stat. § 951.097</p>	<p>(1)(a) Any person may provide notice to another person in any manner that the latter person’s behavior is interfering with the use of a service dog and may request that the latter person stop engaging in that behavior. (b) No person, after receiving a notice and request under par. (1)(a) regarding a service dog, may do any of the following: 1. Recklessly interfere with the use of the service dog by obstructing or intimidating it or otherwise jeopardizing its safety or the safety of its user, injure, allow his or her dog to injure, or cause the death of a service dog. 2. Intentionally interfere with the use of the service dog by obstructing or intimidating it or otherwise jeopardizing its safety or the safety of its user injure, allow his or her dog to injure, or cause the death of a service dog. 3. No person may take possession of or exert control over a service dog without the consent of its owner or user and with the intent to deprive another of the use of the service dog.</p>	<p>Service dog- a dog that is trained for the purpose of assisting a person with a sensory, mental, or physical disability or accommodating such a disability. Wis. Stat. § 951.01(5)</p> <p>Service animal- as defined by the Americans with Disabilities Act is as <u>any</u> guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. www.ada.org</p> <p>Reckless- characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious disregard for or indifference to that risk; heedless; rash (reckless conduct is much more than mere negligence: it is gross deviation from what a reasonable person would do). Wis. Stat. § 939.24(1)</p>	

Statute Name & Number	Crime	Definitions	Other
<p>Instigating Fights Between Animals Wis. Stat. § 951.08</p>	<p>No person may intentionally instigate, promote, aid or abet as a principal, agent or employee, or participate in the earnings from, or intentionally maintain or allow any place to be used for a cockfight, dog fight, bullfight or other fight between the same or different kinds of animals or between an animal and a person. This section does not prohibit events or exhibitions commonly featured at rodeos or bloodless bullfights. <u>Wis. Stat. § 951.08(1)</u></p> <p>No person may own, possess, keep or train any animal with the intent that the animal be engaged in an exhibition of fighting. <u>Wis. Stat. § 951.08(2)</u></p> <p>No person may intentionally be a spectator at a cockfight, dog fight, bullfight or other fight between the same or different kinds of animals or between an animal and a person. <u>Wis. Stat. § 951.08(3)</u></p>	<p>Aid and abet-To assist or facilitate the commission of a crime, or to promote its accomplishment. <i>Black's Law Dictionary</i></p> <p>Instigate- To goad or incite (someone) to take some action or course. <i>Black's Law Dictionary</i></p> <p>Principal- One who authorizes another act on his or her behalf as an agent. <i>Black's Law Dictionary</i></p>	
<p>Leading Animal from Motor Vehicle Wis. Stat. § 951.04</p>	<p>No person shall lead any animal upon a highway from a motor vehicle or from a trailer or semitrailer drawn by a motor vehicle.</p>		

Statute Name & Number	Crime	Definitions	Other
<p>Mistreating Animals <u>Wis. Stat. § 951.02</u></p> <p>Note: This practice is most often used against victims. Thus, this is the most commonly charged crime for animal abuse.</p>	<p>No person may treat any animal, whether belonging to the person or another, in a cruel manner.</p>	<p>Animal-includes everything living warm-blooded creature, except a human being; reptile; or amphibian. <u>Wis. Stat. § 951.01(1)</u></p> <p>Cruel-means causing unnecessary and excessive pain or suffering or unjustifiable injury or death. <u>Wis. Stat. § 951.01(2)</u></p>	<p>This section does not prohibit bona fide experiments carried on for scientific research or normal and accepted veterinary practices.</p>
<p>Obscene Material or Performance <u>Wis. Stat. § 944.21</u></p>	<p>Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to penalties:</p> <p>Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, plays, or distributes any obscene material. <u>Wis. Stat. § 944.21(3)(a)</u></p> <p>Produces or performs in any obscene performance. <u>Wis. Stat. § 944.21(3)(b)</u></p> <p>Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material. <u>Wis. Stat. § 944.21(3)(c)</u></p>	<p>"Obscene material" means a writing, picture, film, or other recording that:</p> <ol style="list-style-type: none"> 1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole <u>Wis. Stat. § 944.21(2)(c)1</u> 2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way <u>Wis. Stat. § 944.21(2)(c)2</u> 3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole. <u>Wis. Stat. § 944.21(2)(c)3</u> 	

Statute Name & Number	Crime	Definitions	Other
<p>Obscene Material or Performance (Continued) <u>Wis. Stat. § 944.21</u></p>		<p>"Obscene performance" means a live exhibition before an audience which:</p> <ol style="list-style-type: none"> 1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole <u>Wis. Stat. § 944.21(2)(d)1</u> 2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way <u>Wis. Stat. § 944.21(2)(d)2</u> 3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole. <u>Wis. Stat. § 944.21(2)(d)3</u> <p>"Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals. <u>Wis. Stat. § 944.21(2)(e)</u></p>	
<p>Providing Proper Food and Drink to Confined Animals <u>Wis. Stat. § 951.13</u></p>	<p>No person owning or responsible for confining or impounding any animal may fail to supply the animal with a sufficient supply of food and water prescribed in this section.</p> <p>(1)Food- the food shall be sufficient to maintain all animal's good health.</p> <p>(2)Water- If portable water is not accessible to animals at all times, it shall be provided daily and in sufficient quantity for the health of the animal.</p>		

Statute Name & Number	Crime	Definitions	Other
<p>Providing Proper Shelter <u>Wis. Stat. § 951.14</u></p>	<p>No person owning or responsible for confining or impounding any animal may fail to provide the animal with proper shelter as prescribed in this section.</p> <p>(1) INDOOR STANDARDS. Minimum indoor standards shall include <i>ambient temperatures and ventilation</i>.</p> <p>(2) OUTDOOR STANDARDS. Minimum outdoor standards of shelter shall include <i>shelter from sunlight and inclement weather</i>. Shelter for all animals means natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided as necessary for the health of the animal. If a dog is tied or confined unattended outdoors under weather conditions which adversely affect the health of the dog, a shelter of suitable size to accommodate the dog shall be provided.</p> <p>(3) SPACE STANDARDS. Minimum space requirements for both indoor and outdoor enclosures shall include:</p> <p>(a) <i>Structural strength</i>. The housing facilities shall be structurally sound and maintained in good repair to protect the animals from injury and to contain the animals.</p> <p>(b) <i>Space requirements</i>. Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal adequate freedom of movement. Inadequate space may be indicated by evidence of debility, stress or abnormal behavior patterns.</p> <p>(4) SANITATION STANDARDS. Minimum standards of sanitation for both indoor and outdoor enclosures shall include periodic cleaning to remove excreta and other waste materials, dirt and trash so as to minimize health hazards.</p>	<p>Farm animal- any warm-blooded animal normally raised on farms in the United States and used or intended for use as food or fiber.</p> <p><u>Wis. Stat. § 951.01(3)</u></p>	<p>In the case of farm animals, nothing in this section shall be construed as imposing shelter requirements or standards more stringent than normally accepted by husbandry practices in the particular county where the animal or shelter is located</p>

Statute Name & Number	Crime	Definitions	Other
<p>Sexual Gratification Wis. Stat. § 944.17</p>	<p>Whoever does any of the following is guilty of a Class A misdemeanor:</p> <p>Commits an act of sexual gratification in public involving the sex organ of one person and the mouth or anus of another. <u>Wis. Stat. § 944.17(2)(a)</u></p> <p>Commits an act of sexual gratification involving his or her sex organ and the sex organ, mouth or anus of an animal. <u>Wis. Stat. § 944.17(2)(c)</u></p> <p>Commits an act of sexual gratification involving his or her sex organ, mouth or anus and the sex organ of an animal. <u>Wis. Stat. § 944.17(2)(d)</u></p>	<p>Sexual Relations- 1. Sexual intercourse 2. Physical sexual activity that does not necessarily culminate in intercourse</p> <ul style="list-style-type: none"> Sexual relations involve the touching of another’s breast, vagina, penis, or anus <p>Black’s Law Dictionary</p> <p>Gratification- A voluntary given reward or recompense for a service or benefit; a gratuity. Black’s Law Dictionary</p>	<p>Does not include breast feeding. <u>Wis. Stat. § 944.17(3)</u></p>
<p>Transportation of Animals Wis. Stat. § 951.05</p>	<p>No person may transport any animal in or upon any vehicle in a cruel manner.</p>		

Statute Name & Number	Crime	Definitions	Other
<p>Use of Poisonous and Controlled Substances <u>Wis. Stat. § 951.06</u></p>	<p>No person may expose any domestic animal owned by another to any known poisonous substance, any controlled substance, or any controlled substance analog of a controlled substance, whether mixed with meat or other food or not, so that the substance is liable to be eaten by the animal and for the purpose of harming the animal.</p>	<p>Poisonous substances and controlled substances included: Synthetic opiates, substances derived from opium, hallucinogenic substances, depressants, immediate precursors, stimulants, substances of plant origin, other substances, narcotic drugs, anabolic steroids, narcotic drugs containing nonnarcotic active medicine ingredients, & pseudoephedrine (See Chapter 961 for specific substances that fall under these categories.) <u>Wis. Stat. §§961.14,16,18,20,22</u> Controlled substance analog- a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance included in schedule I or II and: 1. Which has a stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of certain controlled substances. 2. With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of certain controlled substances. <u>Wis. Stat. § 961.25</u> Domestic animal- includes any of the following: An animal that is a member of a species that has been domesticated by humans, a farm-raised deer, farm-raised game bird, or farm-raised fish, or an animal that is listed as a domestic animal by rule by the department. <u>Wis. Stat. § 95.001(1)(ad)</u></p>	<p>This section shall not apply to poison used on one’s own premises and designed for the purpose of rodent or pest extermination nor to the use of a controlled substance in bona fide experiments carried on for scientific research or in accepted veterinary practices.</p>

II. Civil Laws

Statute Name & Number	Civil Law	Definitions/Other
<p>Domestic Abuse Restraining Order Wis. Stat. § 813.12(1)(am)</p>	<p>Domestic abuse means any of the following engaged in by an adult family member or adult household member against another adult family member or adult household member, by an adult caregiver against an adult who is under the caregiver's care, by an adult against his or her adult former spouse, by an adult against an adult with whom the individual has or had a dating relationship, or by an adult against an adult with whom the person has a child in common:</p> <ol style="list-style-type: none"> 1. A violation of <u>s. 943.01</u>, damage to property, involving property that belongs to the individual. 2. A threat to engage in the conduct above. <p>In all 50 states, animals are legally classified as “property.”</p> <p>NOTE: Because an animal is considered property, a victim may be able to file a domestic abuse restraining order when his or her abuser harms or threatens to harm an animal belonging to the victim.</p>	<p>Damage to property means intentionally causing damage to any physical property of another without the person's consent. <u>Wis.Stat. § 943.01(1)</u></p> <p>Property means real or personal property <u>Wis. Stat. §700.01(5)</u></p> <p>Personal Property- includes all goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term "real property." Any moveable or intangible thing that is subject to ownership and not classified as real property <u>Wis. Stat. §70.03</u></p> <p>Real Property-includes not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto, except that for the purpose of time-share property, real property does not include recurrent exclusive use and occupancy on a periodic basis or other rights, including, but not limited to, membership rights, vacation services and club memberships. <u>Wis. Stat. §70.04</u></p> <p>NOTE: In all 50 states, animals are legally classified as “property.”</p>

Statute Name & Number	Civil Law	Definitions/Other
<p>Individual at Risk Wis. Stat. § 813.123(4)(a)2.b, Wis. Stat. § 813.123(1)(fm), Wis. Stat. § 813.123(1)(ep)</p>	<p>An individual at risk can obtain a restraining for a number of reasons, including mistreatment of an animal. Mistreatment of an animal means cruel treatment of any animal owned by or in service to an individual at risk.</p>	<p>Service dog- a dog that is trained for the purpose of assisting a person with a sensory, mental, or physical disability or accommodating such a disability. <u>Wis. Stat. § 951.01(5)</u></p> <p>Cruel-means causing unnecessary and excessive pain or suffering or unjustifiable injury or death. <u>Wis. Stat. § 951.01(2)</u></p> <p>Individual at risk means an adult at risk or an elder adult at risk. <u>Wis. Stat. § 813.123(1)(ep)</u></p> <p>Adult at Risk- Any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, or financial exploitation. <u>Wis. Stat. § 55.01(1e)</u></p> <p>Elder Adult at Risk- A person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. <u>Wis. Stat. §46.90(1)(br)</u></p>

Statute Name & Number	Civil Law	Definitions/Other
Intentional Infliction of Emotional Stress	<p><u>Rabideau v. City of Racine</u>, 627 N.W.2d 795 (Wis. 2001).</p> <p>A plaintiff must demonstrate:</p> <p>(1) that the defendant's conduct was intended to cause emotional distress</p> <p>(2) that the defendant's conduct was extreme and outrageous</p> <p>(3) that the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress</p> <p>(4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct</p>	
Private Rights of Action Under Common Law: Negligence	<ol style="list-style-type: none"> 1. Duty 2. Breach of Duty 3. Causation 4. Injury/Right to Damages 	<ol style="list-style-type: none"> 1. Duty- a legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right. 2. Breach of Duty- the violation of a legal or moral obligation; the failure to act as the law obligates one to act. 3. Causation- the causing or producing of an effect. 4. Injury (civil)- physical harm or property damage caused by a breach of a contract or by a criminal offense redress able through a civil action.

Statute Name & Number	Civil Law	Definitions/Other
Property Damage or Loss Caused by Crime-Statutory Claim for Intentional Damage to Property <u>Wis. Stat. § 895.446</u>	Any person who suffers damage or loss by reason of intentional conduct that occurs on or after November 1, 1995, and that is prohibited under <u>s. 943.01</u> Damage to Property, has a cause of action against the person who caused the damage or loss.	

**This chart only includes state law. Local municipality laws or ordinances may include other civil and criminal actions for use by a victim.