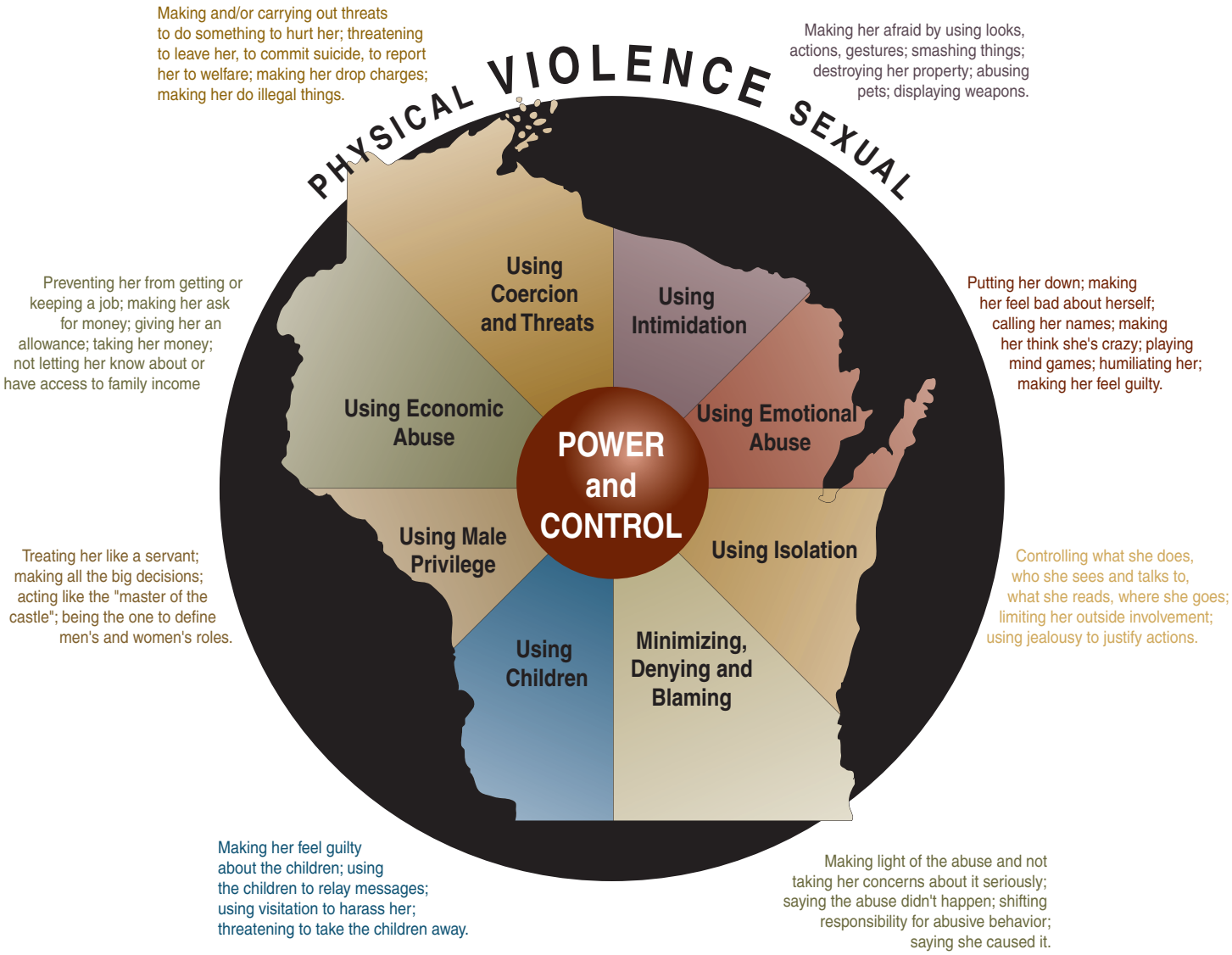
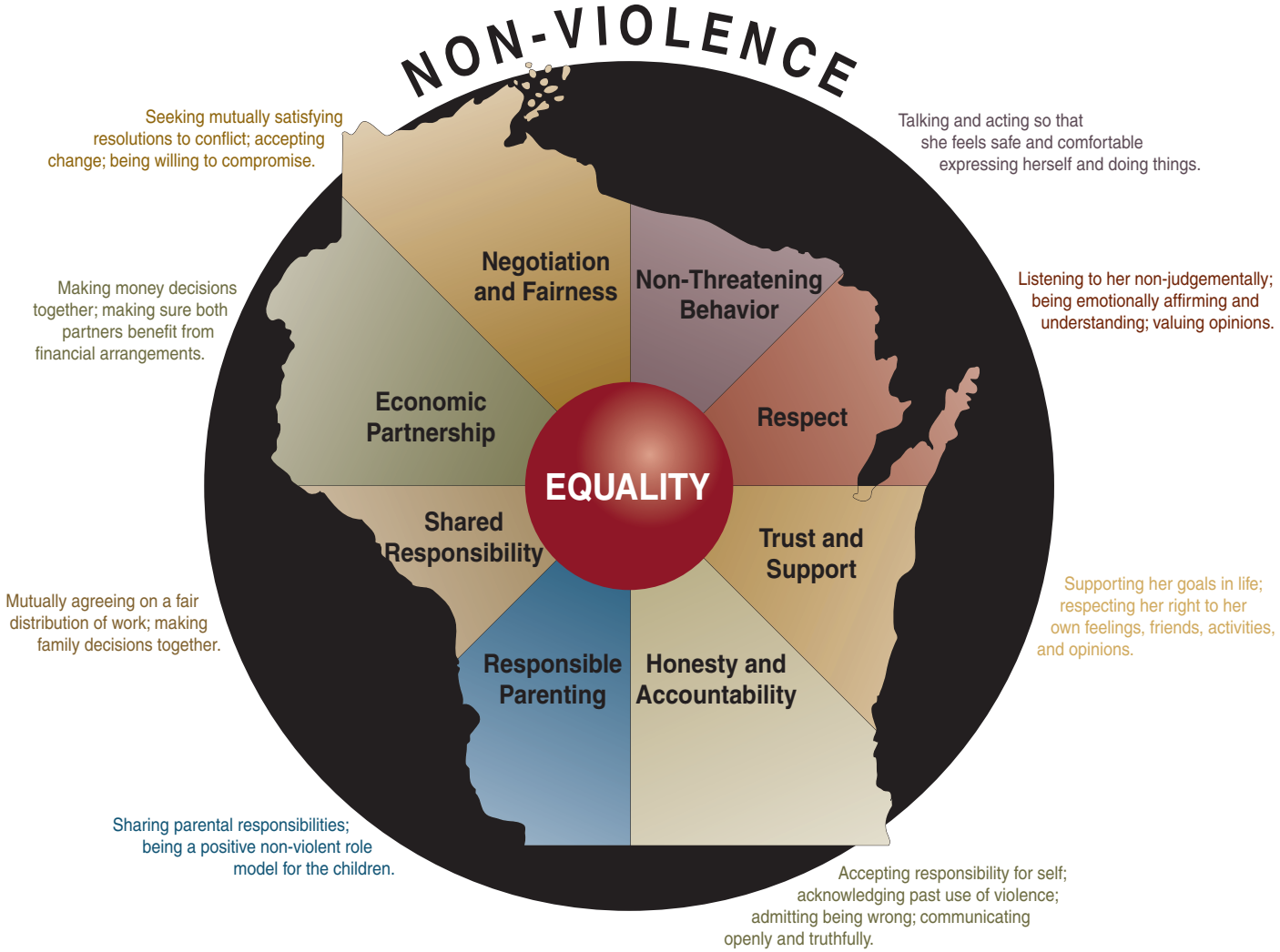
Wisconsin Domestic Violence Prosecution Manual

THE POWER AND CONTROL WHEEL



Based upon the Power and Control Wheel
Domestic Abuse Intervention Project
Duluth, Minnesota

EQUALITY


NON-VIOLENCE
Seeking mutually satisfying resolutions to conflict; accepting change; being willing to compromise.
Talking and acting so that she feels safe and comfortable expressing herself and doing things.
Negotiation and Fairness
Non-Threatening Behavior
Making money decisions together; making sure both partners benefit from financial arrangements.
Listening to her non-judgementally; being emotionally affirming and understanding; valuing opinions.
Economic Partnership
Respect
EQUALITY
Shared Responsibility
Trust and Support
Mutually agreeing on a fair distribution of work; making family decisions together.
Supporting her goals in life; respecting her right to her own feelings, friends, activities, and opinions.
Responsible Parenting
Honesty and Accountability
Sharing parental responsibilities; being a positive non-violent role model for the children.
Accepting responsibility for self; acknowledging past use of violence; admitting being wrong; communicating openly and truthfully.

Wisconsin Domestic Violence Prosecution Manual

2004

The editor and authors are pleased to present the Wisconsin Domestic Violence Prosecution Manual, 2004. However, a word of caution. The Wisconsin Domestic Violence Prosecution Manual, 2004 is intended to serve as merely a guide for prosecutors. It is intended to raise issues for legal and practical consideration. This manual should not be viewed as an exhaustive review of any one area of law relating to the various topics. This manual serves as only a beginning point. It should not be used as a replacement for thorough and solid legal research. As you understand, changes to the law will occur. Each prosecutor must keep abreast of those legal changes. Every prosecutor is individually responsible for the accuracy and overall quality of his or her own work. We encourage you to use this manual, share it with other prosecutors and improve upon its suggestions.

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1. Preface by E. Michael McCann

Successful prosecution of domestic violence begins with the realization that domestic violence is a crime. It does not constitute a "private family matter" best resolved by separating and lecturing the parties. Domestic violence is a crime against the State of Wisconsin and its people. Emphasis on prevention through increased public awareness, education and early intervention surely helps break the cycle of violence. But only vigorous prosecution signals that family violence will endure the same scrutiny by the criminal justice system as other violent crimes. Ultimately, the State must protect every citizen's right to be free from physical abuse and injury, even if the abuse and injury occurs in an intimate relationship.

Domestic violence infects everything it touches and weakens the very cohesion of our society. Consider the ripple effect caused by the domestic violence deaths of 2,000-4,000 women in this country annually. *See* Metropolitan King County Council, *'The Spiral of Violence,' Domestic/Dating Violence: An Information and Resource at 9 (1994). See also* American Prosecutors Research Institute, *Domestic Violence: Prosecutors Take The Lead at 1 (1997).*

But our communities also see the less obvious consequences of domestic violence everyday. Domestic violence-related medical expenses cost our country $3-5 billion annually. 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 at 1 (1997).* Businesses lose $100 million in wages, sick leave, absenteeism and nonproductivity annually. *Id.*

Children who witness domestic violence face a 50% chance of being abused themselves. Dr. John D. Burrington, "We Learn What We Live: The Effects of Domestic Violence on Children", *The Colorado Lawyer (Special Issue)*, Vol. 28, No. 10 at 1 (Oct. 1999). These children learn violent anti-social behavior by watching. They often repeat the cycle of violence in their intimate relationships, thus triggering a response by an already overburdened criminal justice system. *Id.*

Domestic violence lurks deep into the very tissues of our society, like a cancer that must be excised for a body to live to its full potential. Given this context, prosecutors play a vital role in the creation of the cure. To that end, I am pleased to present this Domestic Violence Manual for Wisconsin Prosecutors. It is my hope that this manual's design will make it a quick, user-friendly, ready-reference on the law, and a practical "how to" guide for successfully prosecuting DV-related cases. Prosecutors who use this manual should consider it a beginning and not an end. We hope this manual will help prosecutors "hit the ground running" in charging and at trial. But, as stated in the rules of conduct for attorneys, persons who use this resource remain responsible for the research, writing, trial preparation and trial strategies pertinent to the facts of their specific cases.

The work of prosecutors serves the noble purpose of seeking justice in every act. Thus, this work reflects one underlying theme memorialized in case law:

> The district attorney represents the commonwealth – a commonwealth which demands no victims – a commonwealth which seeks justice only – equal and impartial justice . . . . It is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes." *O'Neil v. State*, 189 Wis. 259 (1926).

Let us always seek justice in the prosecution of domestic violence cases.

E. Michael McCann
Milwaukee County District Attorney

Acknowledgements

The prosecution of domestic violence abusers has markedly changed in the past ten to fifteen years across the nation. Many exciting legal developments have prompted prosecutors to charge and prosecute cases in a new way. There is a new philosophy of prosecution for DV cases – that of an "evidence-based" prosecution model. No longer are prosecutors solely reliant upon the testimony of domestic violence victims.

In moving from a "victim focussed" method of DV prosecution to an "evidence based" model, we, as prosecutors, are necessarily pushing the envelope. It can be a confusing and challenging moment for a police officer when you first tell him or her that the State is moving forward to trial without the testimony of the victim… relying instead on that police officer's testimony of an excited utterance, as well as other corroborating evidence.

We understand that many of you may be a little hesitant to tell your county circuit court judge for the first time that you'll be proceeding on the basis of an "excited utterance" in your next DV case. It definitely takes a little courage and ingenuity. This manual was prepared to support you in that endeavor.

Several years ago, Kittie Smith, VAWA Grants Coordinator of the Wisconsin State Office of Justice Assistance, heard about many of the jury trials in Milwaukee that were occurring without the testimony of victims. These so-called "evidence-based" or "excited utterance" cases were a topic she wanted shared with all prosecutors across Wisconsin. Through her vision, the concept of this DV Prosecution Manual was borne. E. Michael McCann thoroughly supported and guided this project.

Many, many attorneys and advocates from around Wisconsin participated in the production of this manual. By and large, their work was completed on their own time… in evenings and on weekends. Their dedication to keeping DV victims safe and holding abusers accountable is profound. Without their efforts and hard work, the production of this manual would not have been possible. I wish to thank them all:

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The great work across the state of Wisconsin in furthering progress towards the safety of all victims of Domestic Violence and Sexual Abuse begins with service. The Office of Justice Assistance is fortunate to have many top-notch leaders, dedicated to forging ahead

with new and exciting initiatives across the State of Wisconsin. OJA Executive Director David Steingraber, OJA Program Manager Ray Luick, VAWA Law Enforcement Training Coordinator Tami Dzikowich, and of course, VAWA State Grants Administrator Kittie Smith are all vital to these efforts.

We are not alone in our endeavors. Many agencies and organizations and prosecutors – in Wisconsin as well as outside our state – served as our sources for producing this work. With particularity, I want to acknowledge the dedication of the National Violence Against Women office (VAWA), the Battered Women's Justice Project (BWJP), the American Prosecutor's Research Institute (APRI), the National College of District Attorneys Association and the VERA Institute.

Lastly, to all of you on the front lines every day, battling out domestic violence in the municipal and circuit courts around the State of Wisconsin case by case… on behalf of sexual assault and domestic violence victims and their children, I give thanks.

Paul Dedinsky, Domestic Violence Unit Director
Milwaukee County District Attorney's Office, 2004

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

1. Domestic Abuse Statute
2. New Prosecution Strategies for Domestic Violence
3. Purpose of the New Prosecution Strategies
4. Written Protocols
5, Suggested Readings
6. Sample County Prosecution Policy and Procedure Statement

1. Domestic Abuse Statute

When the Wisconsin Legislature adopted Wis. Stats. § 968.075, it established a "pro-prosecution" stance in cases of domestic violence:

> **§ 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 (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. New Prosecution Strategies for Domestic Violence

In Wis. Stats. § 968.075, the Legislature enunciates the factors not to be considered in "no-process" decisions. Across Wisconsin, many prosecutors believe the law encourages us to institute an alternative approach to prosecuting domestic violence. Instead of relying exclusively upon the testimony of domestic violence victims, many prosecutors aim to pursue domestic violence cases even without the presence of victims whenever possible – on the remaining evidence alone.

In practice, to effectuate a policy of pursuing cases even when a victim fails to appear at trial, we must ask ourselves a simple question:

> ***"How can we prove this case without the participation of the victim?***
>
> ***...Anticipating that the victim will recant, minimize the facts, refuse to testify, or disappear."***

If this policy of pursuing cases without victims is going to succeed, then the police who gather evidence in DV cases must be trained similarly to ask themselves: "How can we INVESTIGATE the case and gather the corroborative evidence necessary to prove the case in court, even in the absence of the victim?" See Gwinn, Casey, "Prosecuting Domestic Violence Cases without the Victim's Participation or Evidence-Based Prosecution," National College of District Attorneys Annual Domestic Violence conference (2001).

3. Purpose of the New Prosecution Strategies

1. **HOMICIDE PREVENTION**. One DV theory of prosecution argues that the prosecution of domestic violence is actually a form of *Homicide Prevention*. There is research to support this theory. The statistics teach us that the cycle of domestic violence, if untreated, will continue and the abuse will become even more violent over time. If we truly believe that prosecuting domestic violence is *Homicide Prevention*, then compliance with Wis. Stats. § 968.075 makes sense.

2. **PREVENT ESCALATION OF VIOLENCE.** Misdemeanor DV cases are very important! Behind many DV homicides exists a history of earlier domestic violence cases. Over time, violence can escalate. The relationships often become more dangerous. We want to *prevent* any further escalation of violence.

3. **PREVENT FUTURE ABUSE.** If we pursue the concept of *prevention* further, the impetus and urgency for higher numbers of "evidenced based" prosecutions without victim testimony increases. Statistics tell us that children who grow up in domestic violence homes are 6 times more likely to commit suicide and 1000 times more likely to become abusers themselves (please see Bail section for research citations). Thus, it stands to reason that an effective response in "breaking the cycle of violence" may *prevent* future abuse from occurring in that individual family.
4. **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. Remember that 85% of incarcerated individuals nationwide grew up in violent homes (please see Bail chapter for statistical citations).

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. A law enforcement officer can meaningfully and positively impact a child's perceptions on the road to breaking a family's cycle of violence.

In sum, if our main goals are to keep victims safe, hold abusers accountable, and reduce recidivism …then we must strive to alter how we prosecute domestic violence in Wisconsin. We must prepare law enforcement agencies to adopt similar strategies with the goal of collecting corroborating evidence. Each time a law enforcement officer responds to a scene, that officer must be trained to gather the evidence that prosecutors need to prove DV cases without the participation of the victim. We seek not to dissuade victims from participation in court. We merely seek to be prepared for the worst case scenario, should the victim decide on her own not to participate.

4. Written Protocols

Wisconsin is not alone. Many jurisdictions across the United States have pledged to *not* drop cases merely because the victims fail 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 prosecution.

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

Your policies and protocols may want to discuss lethality factors that you commonly consider when issuing charges. Lethality factors help you link research to practical reality in your efforts to curb family violence. Research suggests 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… can be effective measures to consider during all phases of a DV case.

5. Suggested Readings

Throughout this manual, we relied upon the good ideas and experiences of many professionals working to combat domestic violence 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. We suggest that you develop your own bibliography of materials. To gain more ideas about inclusions in your policy statements and protocols or to learn more about lethality factors, please refer to these suggested readings:

American Prosecutors Research Institute, *Domestic Violence: Prosecutors Take The Lead,* http://www.ndaa-apri.org.

Mary E. Asmus, Tineke Ritmeester and Ellen L. Pence: *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies*, from *Understanding the Dynamics of Abusive Relationships,* 15 Hamline L. Rev. 115, 149-54 (1991).

Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview, in Domestic Violence: The Changing Criminal Justice Response*, 161; esp. pgs. 162-77 (Eve S. Buzawa and Carl G. Buzawa eds., 1992).

Stacy Caplow, Article, *What If There Is No Client?: Prosecutors As "Counselors" Of Crime Victims,* 5 Clinical L. Rev. 1 (Fall 1998).

Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?,* 63 Fordham L. Rev. 853 (1994); esp. pgs. 873-81.

Casey G. Gwinn and Anne O'Dell: *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. St. Univ, L. Rev. 297 (1993); esp. p. 314 n.43.

Developments in the Law – Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498 (1993); esp. pgs. 1515-18, 1535-43.

Cheryl Hanna, Article, *No Right To Choose: Mandated Victim Participation In Domestic Violence Prosecutions,* 109 Harv. L. Rev. 1849 (June 1996).

Maureen McLeod, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 Criminology 395 (1983).

(Written by ADA Paul Dedinsky, with thanks to Attorney Ann Batio who contributed the suggested readings. Wisconsin Domestic Violence Prosecution Manual, 2004.)

6. Sample County Prosecution Policy and Procedure Statement

Milwaukee County District Attorney's Office

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

Domestic Violence is a crime against the State of Wisconsin, not a private "family matter." In recognition thereof, the policies and procedures for the Domestic Violence Unit encourage the vigorous prosecution of domestic violence 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 violence 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 violence with those of the surrounding community including law enforcement, community-based organizations, shelters, health care providers, probation and parole, churches and schools. Only though such coordination of community efforts can the underlying causes of domestic violence truly be addressed in a meaningful way.

3. A Brief History of Domestic Violence in Wisconsin

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

In the past few decades, police departments and prosecutors have begun to proactively respond to domestic violence. The law enforcement response to DV incidents has become increasingly more aggressive. Although the history has been relatively short in duration, the Criminal Justice System's improved response to DV victims and children indicates a willingness to change. That is fortuitous… for much more remains to be accomplished.

1. Historical Perspective

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 borne from Domestic Violence: a man could legally strike his wife with a tree branch, provided that it was no thicker than the size of his thumb.

"Family control" continued into the 1960s. During that time, the police response began to focus on the ***social*** aspects of domestic violence. However, in large part, the ***criminal*** aspects of domestic violence were ignored.

A woman beaten by an unrelated assailant in public would be treated as a victim of a crime. A woman beaten by her husband would be treated quite differently.

2. DV Law Enforcement Response: Mediate or Separate

At that time in our nation's history, the truth was plain. It was socially acceptable to physically control your wife as long as you did so in private… and the injuries were relatively minor. Few arrests were made. Laws required police to either witness the crime themselves or to obtain a warrant in order to 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 conference materials, p. 13, (2000).

Domestic matters received a low police priority. "Take it off the street" was an accepted police response during this time. Compounding enforcement problems was the lingering belief that domestic violence is better dealt with as a private family matter than actual criminal activity. *See* Hanna, Cheryl, "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 some place else to stay for a night or two. Criminal investigations, sadly enough, were seldom initiated.

Many police departments had clear non-arrest policies and issued officers training manuals which urged them to dissuade victims from pressing charges by emphasizing the undesirability of getting involved in the criminal justice system. See Zorza, *The Criminal*, pp 48-50. In the piece, Zorza quotes an old instructor's manual taught at Michigan's Police Training Academy. The manual directs officers to avoid arrest by appealing to the complainant's vanity; to explain the lengthy and complicated process of obtaining an arrest warrant; to stress the loss of time as well as the cost; to explain that attitudes about the incident will change over time; and to recommend postponement of the legal action because court is either not in session, or a judge is unavailable.

3. Criminal Justice System Response

The entire Criminal Justice System was blind to the issue of spousal abuse. Often termed as *wife beating*, prosecutors would commonly seek dismissal of their own charges later because: "There have been *no further problems*." During this period of time, the entire Criminal Justice System was blind to the issue of spousal abuse.

Compare the "*no further problems*" rationale with any other crime pending in the system. Did prosecutors care that an armed robber had not held up a convenient 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 3rd or 4th OWI offense? The "*no further problems*" rationale seemed to apply only to DV cases. Prosecutors were not treating Domestic Violence as a crime!

Judges were no different. A common practice: vacating a finding of guilt upon the completion of informal "probation-like" conditions …or dismissal of the charges upon evidence that the abuser had attended classes for anger control and maintenance. Of course, while a common practice for some judges… no statutory authority ever existed for the practice.

4. Time for Change

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

Victims' Rights groups formed in the 1970s, emphasizing the criminal nature of domestic violence. Their rationale seems rather obvious today: **"Battery is a crime."** Care for victims took center stage. Dating from the mid-1970s forward, grass roots efforts resulted in many shelters being openend for battered women and their children across the country. The first domestic abuse shelter for abused victims and children opened in Wisconsin in 1978.

One of the main hypotheses espoused by many Victims' Rights groups and Women's Rights groups related to the police response. Many of these leaders believed that ARREST should be the police response in each DV 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 determine the best police response to domestic violence. They evaluated 304 misdemeanor DV cases in Minneapolis. In a published 1984 report, Sherman and Beck concluded that ARREST for DV incidents had a significant impact in reducing recurring violence. The researchers cautioned that their study needed replication to verify these results. While later replication studies would not support the original findings, Sherman and Beck's initial study did impact law enforcement agencies across the nation.

Then… another incident sent shock waves throughout the law enforcement community. In a 1983 court decision, the City of Torrington, Connecticut was found liable when two Torrington police officers failed to render aid to Tracy Thurman. She suffered a savage attack from her husband, Buck Thurman. The two police officers merely stood by, never making any attempt to halt the attack or take the abuser into custody. Tracy Thurman was awarded two million dollars in damages. Now… the law enforcement community was taking notice.

(For more information on the history of domestic violence, *See American Prosecutors Research Institute (APRI)*, National District Attorney's Association, "Evolution of Domestic Violence Law Reform", Rural Domestic Violence Issues conference materials, p. 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 proper response to DV incidents. This was the beginning of a collaborative effort to combat domestic violence.

It was determined that the family, and ultimately the State of Wisconsin, suffered harm from domestic abuse. The consent of the victim was not needed to proceed with a criminal battery action.

Only a "probable cause DV battery" was needed for mandatory arrest and prosecution. In Milwaukee, the Milwaukee Police Department issued a 1986 departmental order commanding mandatory arrest for DV battery incidents. Later, Mandatory Arrest would become law. For the first time in Wisconsin history, DV issues were treated as a criminal matter instead of a social problem.

6. Replication of Research

The results of the Sherman and Beck Minneapolis study did, in fact, raise a cry from the research community for replication studies to validate its results. To address these concerns, the National Institute of Justice funded replication studies in five locations: Dade County, Florida; Atlanta, Georgia; Charlotte, North Carolina; Colorado Springs, Colorado; and Milwaukee, Wisconsin. These replication studies were conducted during 1987 and 1988.

The Milwaukee replication study targeted 1,200 domestic abuse cases and focused on three police responses, randomly selected by a computer:

1. Arrest of suspect (with a $200 bail);
2. Arrest and release of suspect (after two hours and a Personal Recognizance bond); or
3. Give the DV parties advice without arrest or further action.

For more information, feel free to review: Lawrence W. Sherman and Richard A. Beck, "The Specific Deterrent Effects of Arrest for Domestic Assault," *American Sociological Review* 49 (April 1984): 261-272.

7. State of Wisconsin Domestic Abuse Law

The Milwaukee replication study was still ongoing in 1987 when a controversial domestic abuse bill was introduced to state legislators (1987 Wisconsin Act 346). The results of the Milwaukee replication project identifying a proper and effective police response to DV incidents had not been published, so a clear directive had not yet been determined.

1987 Wisconsin Act 346 contained mandated arrest policies and procedural changes for a wide variety of domestic abuse offenses.

It would be quite an understatement to say that this bill contained sweeping changes. The entire scope of domestic abuse investigations and prosecutorial procedures were significantly changed upon passage of this bill in the 1989 version of Wis. Stats. § 968.075.

The new law defined domestic abuse offenses.

The new law mandated arrest for all probable cause domestic abuse cases.

The new law required reporting guidelines.

The new law contained a pro-prosecution mandate for the District Attorneys' offices.

The new law mandated the use of community groups with expertise in domestic abuse to train law enforcement officers.

1987 Wisconsin Act 346 set out its legislative intent and purpose of the act to create Wis. Stats. §§ 939.621 and 968.075 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.

8. Initial Reaction to Legislative Changes

After passage of 1987 Wisconsin Act 346, arrests sky-rocketed literally overnight. Many law enforcement agencies saw their resources severely taxed. For instance, during March of 1989, the Milwaukee Police Department processed 884 DV cases. During the first month of the new law in April of 1989, the Milwaukee Police Department processed 1,254 DV cases. The increased numbers ranged from 1,200 to 1,500 cases for the months that followed… and those figures only include the city of Milwaukee, not the entire county. Police overtime expenditures soared. Many changes in law were criticized as a "knee jerk" reaction to the Thurman case and the Sherman studies.

Police officers complained that all their discretion had vanished. However, all of the mandates and strict verbiage contained in the 1989 version of Wis. Stats. § 968.075 never changed the concept of "probable cause." Analyses showed that a large number of arrests occurred in DV situations where probable cause was thin and extremely questionable.

One incident illustrates the ramifications of the 1989 version of Wis. Stats. § 968.075. An 84-year old lady in a walker became involved in an argument in her home with her 64-year old son. Investigation revealed that the son had been profane, which upset the lady. The 84-year old lady threw a peanut butter sandwich at her son. The lady was arrested. Police defined the *peanut butter sandwich throwing* as an "act of violence" under the law.

Clearly, police officers were fearful of the new law. Police feared personal liability if they failed to make arrests in DV situations. Practical changes were needed.

Police agencies, Victims' Rights groups, Women's groups and legislators collaborated to modify Wis. Stats. § 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. These and other modifications were introduced and passed in 1990 in the so-called *Domestic Violence Trailer Bill*.

The results of the trailer bill were immediate and lasting. In the city of Milwaukee, 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. Arrests of "quality" over "quantity" prevailed. The collaborations of people from the Criminal Justice System with members of the community and lawmakers worked to establish a practical law for domestic abuse.

In fact, while one singular effective approach to the complex problem of domestic violence continues to elude leaders across the nation, collaborative efforts have moved the law enforcement community forward. The enormous complexities of our future tasks are lessened with the knowledge that all the resources and power of a coordinated community response are now welcome at the table.

9. Power and Control Wheel

The Power and Control Wheel was a key ingredient for increased understanding of domestic violence. The pervasive nature of domestic violence can be keenly grasped through its use. Victims benefit. Professionals in the system also benefit from the understanding the Wheel provides.

Prepared by the Domestic Abuse Intervention Project, Duluth, Minnesota, the Power and Control Wheel can be a useful investigative tool for law enforcement officers and prosecutors. Often, the Wheel helps to describe a domestic violence relationship. The prosecutor's theme at trial may very well develop into "Power and Control." Thus the center of the Wheel signifies the prosecutor's thrust in 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 necessarily gather evidence of 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, once a police officer is trained to understand how the information around the spokes of the Power and Control Wheel will support the prosecutor's case theory and theme, police officers will begin to seek out this additional information.

(Based in large part upon the work of Retired Milwaukee Police Department Captain Howard Lindstedt, who currently works as the Grants Coordinator for the Sojourner Truth House in Milwaukee, Wisconsin. Edited by ADA Paul Dedinsky, with contributions from AAG Bill Hanrahan and ADA Rebecca Blemberg.)

4. Mandatory Arrest and Primary Physical Aggressor

1. Mandatory Arrest
2. Police Department Guidelines regarding Mandatory Arrest
   (Mandatory Arrest list of Probable Cause considerations for police officers)
3. Primary / Predominant Physical Aggressor
4. Primary / Predominant Physical Aggressor Factors
   (Primary / Predominant Physical Aggressor list of considerations for police officers)
5. The Best and the Brightest Police Departments
6. Proposal for Legislative Changes for Primary / Predominant Physical Aggressor

1. Mandatory Arrest

Wisconsin implemented its Mandatory Arrest law for DV crimes on April 1, 1989. Wis. Stats. § 968.075(2) set out "Circumstances Requiring Arrest" for domestic violence.

Per Wis. Stats. § 968.075(1), "Domestic abuse" means any of the following:

1) Intentional infliction of physical pain, physical injury or illness.
2) Intentional impairment of physical condition.
3) Sexual assault (1st, 2nd and 3rd degree); or
4) 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. Stats. § 939.32(1) does apply to all felony offenses as well as misdemeanor Battery offenses included in Wis. Stats. §§ 940.19 and 940.195.]

Note that some examples of PHYSICAL VIOLENCE may include:

Hitting	Strangling	Pushing	Slapping (with open hand)	Grabbing
Kicking	Beating	Shoving	Hitting with closed fist(s)	Forcing Sex
Biting	Pulling Hair	Burning	Use of Weapon / object	Suffocating

Some examples of PHYSICAL PAIN, PHYSICAL INJURY OR ILLNESS may include:

Bruises	Abrasions	Lacerations	Minor Cuts	Complaint of Pain
Fractures	Redness	Swelling	Broken Nose	Loss/fracture of tooth
Burn	Concussion	Stitches	Loss of Consciousness, Sight or Hearing	

Those subject to Mandatory Arrest, according to Wis. Stats. § 968.075(1)(a), include adult persons (17 years of age or older) who commit DV offenses against the following:

1. Spouse;
2. Former spouse;
3. An adult (18 years of age or older) or adult relative with whom the person resides or formerly resided;
4. An adult with whom the person has created a child.

2. Police Department Guidelines regarding Mandatory Arrest

PROBABLE CAUSE for a WARRANTLESS ARREST:

Most police officers understand the basic concept of "probable cause." 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.

There are two requirements for valid warrantless arrest when the offense is not committed in the officer's presence: (1) There must be reasonable grounds to believe that a crime has been committed by the suspect; and (2) It is impractical to obtain a warrant under the circumstances. The terms "reasonable grounds" and "probable cause" as used in Wis. Stats. § 968.075(2) are essentially interchangeable.

Police Departments can benefit from including Probable Cause policy statements in their standard operating procedures (or at least a recognition of some factors which may constitute probable cause). As prosecutors who desire improved police investigations for encouragement of Evidence-based Investigations and Prosecutions, we must encourage law enforcement agencies to make wise Mandatory Arrest determinations as well as Primary/ Predominant Physical Aggressor determinations.

According to Wis. Stats. § 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-Threat or Disturbance, § 947.01; Threat to Injure, § 943.30; Intimidation of Witnesses, §§ 940.42, 940.43 or Intimidation of Victims, §§ 940.44, 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 DV offenders:

- Bodily harm or pain to the victim. (Note that a visible injury is NOT required for arrest, according to Wis. Stats. § 939.22(4)).
- Sexual contact or sexual intercourse as defined in Wis. Stats. § 940.225(5).
- Statements of 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 suspect.
- Excited utterances (res gestae) of suspect or victim.
- Observations of the scene and victim.
- Abuse History: Knowledge of previous calls at same location or with the same parties.
- Prior Abuse: Knowledge of previous threats / offenses against the victim by the suspect.
- A valid temporary restraining order or injunction order served on the suspect.
- Physical evidence. Consider the following possibilities of some evidence an officer may encounter at the scene of a domestic abuse crime:

  a. torn or ripped clothing;

  b. weapons used, including bats, knives, guns, blunt objects, furniture legs, etc.;

  c. blood-stained articles;

  d. disarray of residence, including the furniture and other items left by suspect;

  e. broken telephones and telephone wires;

  f. property damage, like phones, furniture, walls, windows, smashed dishes, etc.;

  g. blood splattered on walls, disarray of the residence;

  h. bodily damage such as hair pulled out, fingernails torn out;
- Self-Defense.

3. Primary / Predominant Physical Aggressor

The Wisconsin Legislature recognizes that DV victims, like victims of other types of violent crime, sometimes fight back. Wis. Stats. § 968.075(3)(a)1b. mandates that Police Agencies develop, adopt and implement written policies regarding arrest procedures for domestic abuse incidents, including:

> When the officer has reasonable grounds to believe that spouses, former spouses or other persons who reside together or formerly resided together are committing or have committed domestic abuse against each other, the officer does not have to arrest both persons, but should arrest the person whom the officer believes to be the primary physical aggressor. In determining who is the primary physical aggressor, an officer should consider the intent of this section to protect victims of domestic violence, the relative degree of injury or fear inflicted on the persons involved and any history of domestic abuse between these persons, if that history can reasonably be ascertained by the officer.

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

When evidence exists to believe that both parties used violence, Wis. Stats. § 968.075(3) gives police officers authority to determine the "Predominant" or "Primary" Physical Aggressor … and the discretion to arrest only the Primary / Predominant Aggressor, rather than arresting both parties.

The word, "Predominant", is preferred to the use of "Primary". "Primary" mistakenly gives some law enforcement officers the impression that the *first* individual that hits should always be the one arrested. Quite frankly, sometimes the first individual that strikes does so in self-defense. In fact, many police 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 with the most serious injuries may be the Primary / Predominant Physical Aggressor. In reality – depending upon the factual circumstances of a given case – it is not beyond the scope of imagination that a person found dead on the scene of a crime could be the Primary / Predominant Physical Aggressor.

EXAMPLE of preemptive Strike:

An older brother has repeatedly beaten up his younger brother since childhood. They become involved in a verbal dispute. In the past, this has lead to the older brother attacking and assaulting the younger brother. The younger brother strikes first, given the expectation of abuse on yet another occasion. The older brother retaliates and injures the younger brother, sustaining no visible injuries himself. The investigating police officer carefully studies the complete details of the abuse history. The police officer determines that the younger brother who struck first on this occasion was actually acting in self-defense.

Given this example, the use of "Predominant" Physical Aggressor, rather than "Primary" Physical Aggressor is preferable. However, until the legislature clarifies the language, we will utilize both terms interchangeably in this manual.

Unfortunately, we see too many "dual arrests" where DV victims are illegitimately arrested. While police officers sometimes face factually difficult circumstances, some useful guidelines may help to ensure thoughtful arrest decisions.

4. Primary / Predominant Physical Aggressor Factors

If probable cause exists that a DV offense occurred as determined by the totality of the circumstances, **the suspect must be summarily arrested and taken into custody for a State charge even if the victim declines to prosecute**.

When the officer has probable cause to believe that parties have committed DV offenses against each other, the officer does NOT have to arrest both persons, but should arrest the person whom the officer believes to be the primary, or predominant, physical aggressor.

Questions by an officer prior to an arrest to determine which spouse was the Primary Physical Aggressor under Wis. Stats. § 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 Primary / Predominant Physical Aggressor, a Police Officer should consider the intent of the State to protect DV victims, the relative degree of injury or fear inflicted on the persons involved, and any abuse / DV history between these persons, if that history can reasonably be ascertained by the officer. [Wis. Stats. § 968.075(3)(a) 1 b.]

The following is a list of some types of evidence and factors that police departments may utilize for their determinations of the Primary / Predominant Physical Aggressor:

- Age, Height and Weight of the parties.
- Strength and skill of each party.
- Criminal History.
- Whether one party is on probation/parole.
- Seriousness of injuries (including Investigation of: Offensive vs. Defensive wounds).
- Motive to lie and Credibility of each party.
- Corroboration of statements.
- Presence of fear or other emotions (core emotions: 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 detail of each statement.
- Presence of Power and Controlling Behavior.
- Consideration of legal defenses: SELF-DEFENSE, defense of others/property, ejection of trespasser, mistake, accident, etc.

NOTE: The lack of visible injury or the victim's unwillingness to prosecute, by themselves, are not legal grounds to refuse to make the mandatory arrest. See Wis. Stats. § 968.075(3)(a)1.c. and d.

5. The Best and the Brightest Police Departments

While not defined in Wis. Stats. § 968.075, the most proficient police department will be wise to train their officers to be aware of the following factors that may define many DV relationships. Although much of this behavior will fall outside the purview of criminal charges, the wisest police officers and prosecutors will come to understand the following behavior to be endemic of abuse. The most successful Police Officers will understand the "Power and Control" dynamics of DV relationships:

1. **Financial Abuse**. Some examples include refusing to give someone enough money to live, taking all of the money from a joint bank account, or refusing to support a child(ren) in common. The victim may not be permitted to go to school or to work. If the victim is employed, the abuser controls the money.
2. **Emotional and Verbal Abuse**. Some examples include name-calling, telling lies, demeaning another person privately and/or publicly with derogatory remarks, as well as manipulation.
3. **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 means to transportation, hiding car keys, or disabling telephones to prevent contact with friends and family. Abusers often express intense jealousy and possessiveness.
4. **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.

6. Proposal for Legislative Changes for Primary Physical Aggressor

In August of 2001, a forum organized by the Wisconsin Coalition Against Domestic Violence (WCADV) and the Wisconsin Department of Justice brought together participants from around the state to discuss the issue of Primary Physical Aggressor. The participants recommended that Wis. Stats. § 968.075, the Mandatory Arrest Law, be amended to better define "Primary Physical Aggressor". A summation of their proposal follows. The proposal moves "Primary Physical Aggressor" language from the "Law Enforcement Policies" (Wis. Stats. § 968.075(3)) section of the law into the "Circumstances Requiring Arrest" section (Wis. Stats. § 968.075(2)).

The proposal includes an evaluation for self-defense. It also strongly discourages dual arrests. To develop this new definition of Primary Physical Aggressor, the forum combined statutory language from California, Montana, New York, Duluth (St. Louis County law enforcement protocol), South Carolina, and Utah.

Draft of proposed statutory language changes for Primary or Predominant Physical Aggressor: (changes are in *italics*)

2) CIRCUMSTANCES REQUIRING ARREST. (a) Notwithstanding § 968.07 and except as provided in par. (b), 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} *in determining reasonable grounds to arrest, the officer shall evaluate which party is the predominant aggressor. The predominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the predominant aggressor, an officer shall consider:*

   a. the intent of the law to protect victims of domestic violence from continuing abuse;

   b. the threats creating fear of physical injury or the use of intimidation;

   c. the apparent fear or lack of fear between the parties or others present, including children;

   d. statements made by witnesses present or canvassed, including children;

   e. whether either party is threatening or has threatened future harm or use of intimidation against another party or another family or household member;

   f. the history of domestic violence between the persons involved, including childrens' and other witnesses' accounts regarding the history of domestic violence;

   g. the relative sizes and apparent strength of each party; and

   h. whether either person involved acted in self-defense as defined in Wis. Stats. § 939.48.

   The officer shall presume that arrest is not the appropriate response for the person or persons who were not the predominant agressor.

(Thanks to the Appleton Police Department and the leadership of Captain Pete Helein for his extensive contributions to this section, as well as the Milwaukee Police Department and the work of Deputy Chief Monica Ray and the MPD Family Violence Unit committee. Lastly, thanks to Patti Seger and Attorney Tess Meuer of the Wisconsin Coalition Against Domestic Violence, as well as many other forum participants from around the state of Wisconsin, for their contributions and pioneering efforts to improve and clarify the domestic violence laws and the practice of law throughout the State of Wisconsin.)

5. Charging the Domestic Violence Case

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5. Behaviors of Defendants after Charges are Issued
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14. Some Final Thoughts & Reminders

1. Introduction

Domestic Violence was once viewed as a closed, private family matter. When a prosecutor "charges" someone with a crime, a lawsuit commences *in open court*.

A prosecutor's charging decision is arguably the most powerful decision made in the Criminal Justice System. While a police officer's arrest decision and a judge's sentencing decision are extremely significant, the charging decision can have enormous ramifications upon a domestic violence victim's safety. As a steward of community protection, a charge may safeguard the victim from subsequent criminal activity. However, some victims will tell you that your decision to charge an abuser will only exacerbate the power, control, manipulation and violence…

Under these circumstances, some prosecutors view themselves as agents for social change. One thing is for certain. We are ministers of justice. As such, we must always respect the enormous power and influence of each charging decision. While this section offers a broad view of some best practices for charging, please see the "Charging Strategies and Suggestions" and "Case Preparation" sections of the Domestic Violence Jury Trial Chapter for added legal issues.

2. What Constitutes a Domestic Violence Charge?

DEFINITION of "DOMESTIC" (Wis. Stats. § 968.075(1)(a)):

1) Adults residing together or formerly residing together; or
2) Current or former spouses; or
3) Adults with one or more children in common.

DEFINITION of "DOMESTIC ABUSE" (Wis. Stats. § 968.075(1)(a)):

1) Allegation of intentional infliction of physical pain, physical injury, or illness; or
2) Allegation of an intentional infliction of impairment of physical condition; or
3) Allegation of 1st, 2nd or 3rd degree Sexual Assault under Wis. Stats. § 940.225; or
4) Allegation of a physical act that may cause the victim reasonably to fear imminent engagement in the conduct described above.

The importance of differentiating domestic abuse from other crimes:

Determining whether a case is a domestic abuse case is important for several reasons. First, Domestic Violence typically occurs in a continuum or pattern of behavior. For that reason alone, it is different from other criminal activity. A repeat abuser inflicts physical and emotional violence upon the same victim which has a domino effect upon an entire

family. Children are sometimes characterized as the "silent" victims of domestic violence. (Please refer to the Bail chapter of this manual for research and statistics relating to children who witness domestic violence in their homes.)

Secondly, your jurisdiction may be fortunate enough to have designated prosecutors, designated victim / witness staff and/or specialized judges assigned to handle DV and/or sexual abuse cases. Routing specialized cases to specialized prosecutors, law enforcement officers and judges typically increases the quality of services to victims.

Further, there may be specialized programs in your community to handle DV issues. Many communities have domestic abuse hotlines where victims receive specialized care from victim advocates, social workers or volunteers. Currently, many district attorney offices and law enforcement agencies across Wisconsin are forming partnerships with victim advocates and their agencies. With increased cooperation in education and training, as mandated in Wis. Stats. § 968.075(8), law enforcement personnel and prosecutors alike now understand the enormous value of services that can be provided to protect victims of domestic violence and sexual abuse.

Also, a defendant's rights as a DV misdemeanor convict may be implicated under the federal Gun Control Act… specifically, the defendant would be prohibited from owning or possessing a firearm.

Finally, the law mandates that each district attorney submit an annual report to the Wisconsin Department of Justice, detailing the numbers of arrests, prosecutions and convictions for domestic abuse incidents, pursuant to Wis. Stats. § 968.075(9).

3. Assessing a Potential Charge

1) **INTERVIEW of the VICTIM**.

It is imperative to allow victims to access the criminal justice system. Make reasonable efforts to consult with a DV victim before making your charging decision, either by phone or in person.

For an in-depth list of the rights of victims, see generally Wis. Stats. §§ 950.04(1v) and 971.095. Where possible, when offering victims their "opportunity to confer" during various proceedings, have a police officer or other witness present to avoid making yourself a witness.

Consider working with local victim advocates in your community during the charging phases of your case to widen the amount of safety planning, support, and other services that you offer to victims.

2) **CREDIBILITY.** Assess the credibility of the victim. When discussing the case with the victim, keep in mind WI Jury Instruction 300, which includes the following considerations for 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.

Remember that your case may ultimately result in a jury trial – so be prepared for the "Credibility of Witnesses" jury instruction from the very start. If the victim provides you with additional discoverable information, be sure to memorialize it. Be prepared to turn it over to the defense if a criminal action commences. Have police perform "follow-up" investigation based on new information.

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 DV 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.

3) **PRIOR DV HISTORY.**

Supplement your understanding of the parties' history. Understand the dynamics of a DV relationship.

- Is the suspect a repeat offender?
- Did the prior incidents involve the same victim or a different victim?
- Has the suspect been arrested before?
- Are the parties in the midst of a custody battle?
- Does the victim desire the relationship with the abuser to continue?

Research the suspect's criminal history. Ask the victim about the suspect's past. We recommend a charging conference whenever possible. It may be your best opportunity to get a sense of the background of the parties, to strategize your goals for prosecution, and to begin to develop a profile of the suspect's character to be utilized later in bail and sentencing arguments. Note that some victims will appreciate the opportunity to connect with a DV victim advocate when first coming to your office for the purpose of safety planning and support.

4) **EVIDENCE BASED PROSECUTION vs. VICTIM FOCUSED CASE.**

Wis. Stats. § 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. Still, it is necessary for the prosecutor to assess the victim's level of cooperation. Plus, Victims' Rights legislation mandates input from victims.

Should a victim be uncooperative at the time of charging, do not automatically decline charges. Instead, ask the next question:

> **"Can I prove the case beyond a reasonable doubt based upon the evidence in the case and without the participation of the victim?"**
>
> **…anticipating that the victim will recant, minimize the facts, refuse to testify or disappear."**

(Thanks to Gwinn, Casey, "Prosecuting Domestic Violence Cases without the Victim's Participation or Evidence-Based Prosecution," National College of District Attorneys conference (2001).)

5) **STATEMENTS and HEARSAY EXCEPTIONS:**

a. ***Present Sense Impressions*** occur where the person explains an event or condition while it is happening or immediately afterwards. Wis. Stats. § 908.03(1).

b. ***Excited Utterance****s* may later be admissible in court based on the officer's testimony. Wis. Stats. § 908.03(2). E.g. "My husband hit me in the face!" or "Daddy hit Mommy!" These spontaneous statements can be made to 911 dispatchers, police officers, friends, relatives and/or neighbors immediately after a "startling event or condition" while the declarant is still "under the stress of excitement caused by the event or condition." Keep in mind that you still need to prove the offense date, venue, and identification of the abuser. (See "DV Prosecutions without Victim Testimony" chapter for an in-depth analysis of the Excited Utterance exception to Hearsay.)

c. ***Declaration of Then Existing Mental, Emotional Conditio****n* statements such as "I'm afraid he's going to kill me" may later be admissible in court. Wis. Stats. § 908.03(3).

d. ***Declarations of Then Existing Physical Condition*** statements such as "I'm in a lot of pain… my stomach hurts" may later be admissible in court. Wis. Stats. § 908.03(3).

e. ***Statements made for the Purposes of Medical Diagnosis and Treatment*** to nurses and physicians under Wis. Stats. § 908.03(4), but not to social workers or counselors. See *State v. Huntington*, 216 Wis.2d 671, 575 N.W.2d 268 (1998).

f. ***911 Calls***, including tapes and transcripts of the calls, are admissible. See the 911 Call section of this manual or *State v. Ballos*, 230 Wis.2d 495, 602 N.W.2d 117 (Ct. App. 1999).

g. ***Statements by the Defendant***, either *Mirandized* custodial interrogation statements, or an unprompted statement by the defendant. Encourage police officers to memorialize in writing all statements made by suspects, even during transport of the suspect from the scene to the jail. Those statements are often inculpatory or help to thwart illegitimate defenses later on.

6) **ADDITIONAL EVIDENCE.**

Determine whether additional evidence exists, beyond what the police gathered. For instance, even if the police immediately photographed the victim's injuries, bruises may be more developed later when you meet with the victim in the D.A.'s office. Other evidence may include additional witnesses, perhaps one who heard a present sense impression or excited utterance statement. Tell victims that a defendant may send an apology letter, which usually makes for excellent evidence at trial.

7) **THE NEED FOR A SAFETY PLAN.**

When meeting with DV victims, take the opportunity to address the victim's concerns regarding safety. Discuss options with the victim to promote safety, including the benefits of a civil Temporary Restraining Order / Final Injunction. Even if a charge is issued and a "No Contact Order" included as a condition of release, a civil Restraining Order / Injunction can still be beneficial. First, it deters the suspect from contacting the victim before he or she is released. Second, it can now last up to four years, much longer than the life of most DV cases. Also, it provides the District Attorney's office the availability of two charges (Bail Jumping AND Violation of a Temporary Restraining Order / Domestic Abuse Injunction) should the abuser contact the victim.

4. When your Decision to Charge Counters the Victim's Wishes

At times, your charging decision will be at odds with the victim's wishes. Explain to the victim that you mean no disrespect. Your role is law enforcement. When you believe that the law has been broken, you must prosecute based upon the evidence.

On the other hand, where a victim desires prosecution and the facts and evidence fail to support a criminal charge, you must decline. In either circumstance, your explanation can serve to relieve the victim of the burden of "pressing charges."

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. YOU take all of the responsibility for the charging decision. Theoretically, the victim is safer. The reason? 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 "done her part" to dissuade you from charging, to no avail. The defendant must now face the reality of criminal charges, even with the victim seemingly "on his side."

A word of caution: recall your understanding of how "power and control" affects the typical DV relationship. As a prosecutor, it can be frustrating when a victim does not cooperate with your case. In fact, you may feel drawn to exert whatever means at your disposal to force cooperation upon the victim.

In these circumstances, tread carefully. In other words, ask yourself if you are using the same types of power tactics and control efforts to gain a victim's cooperation with your case as the victim experiences in her relationship with the defendant.

Keep in mind that you need to be respectful of the victim throughout the process, even if the victim does not cooperate with your prosecution. Continue to support her progress towards leaving an abusive relationship. If the victim is not ready to leave an unhealthy relationship, tell her that you will be there when she is ready. While prosecution may or may not be an alternative in the future, emotional support and victim advocacy is always an alternative.

5. Behaviors of Defendants after Charges are Issued

(See the "Intimidation of Victims: Post-Charge Behavior of the Defendant" chapter for more information.)

Despite the existence of a "No Contact Order" as a non-monetary condition of release, that doesn't mean that the defendant will not attempt to contact the victim throughout the entirety of the case, in an attempt to manipulate and control the victim's actions. This behavior is a crime: **Bail Jumping**, contrary to Wis. Stats. § 946.49.

The defendant may very well attempt to dissuade the victim from appearing in court. That behavior is a crime: **Intimidation of a Witness or Victim**, contrary to Wis. Stats. §§ 940.42 – 940.46.

Many defendants will attempt to pressure the victim into recanting and lying on the stand. That is a crime: **Solicitation to commit Perjury**, contrary to Wis. Stats. §§ 939.30 and 946.31.

If a defendant asks a victim to prepare an affidavit containing a recantation or other misrepresentation, that is a crime: **Solicitation to commit False Swearing**, contrary to Wis. Stats. § 939.30 and 946.32.

6. Interview of the Suspect

Mandatory Arrest, according to Wis. Stats. § 968.075 (2), states that if a DV report is made within 28 days of the alleged incident, a law enforcement officer shall arrest and take a person into custody if: 1) the officer has reasonable grounds to believe the person is committing or has committed domestic abuse, and 2) that the person's actions constitute the commission of a crime, and 3) if the victim is injured or if the officer reasonably believes domestic abuse is likely to continue. If the officer fails to effectuate an arrest, the police officer must still complete a written report, pursuant to Wis. Stats. § 968.075(4).

In most jurisdictions, statements of suspects are only received by police officers. In a limited number of jurisdictions, including Milwaukee, prosecutors occasionally obtain statements from suspects as well, prior to the charging decision. (After filing charges, a prosecutor should refrain from meeting or taking a statement from a suspect.) Statements of suspects can result in confessions or partial admissions. Statements may restrict a theory of defense. For example, the suspect may put himself or herself on the scene to claim self-defense… which will later preclude a false alibi defense. In short, a statement from a suspect will provide you with more information and may later narrow the defense's options.

On the other hand, the suspect may appear more credible than the victim. A legitimate defense may exist. You may believe that the police arrested the wrong person inadvertently. After talking to the suspect, you may decide that charges are inappropriate. DV cases are usually based largely on the testimony of citizen witnesses; therefore, credibility issues are always an important consideration.

- **Remember: Interview suspects and other parties only in the presence of a witness. Obviously, it is always inappropriate to interview the suspect in the presence of the alleged victim.**
- **Always 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 defendant believes that the victim controls the outcome of YOUR charging decision, the defendant will potentially attempt to manipulate or pressure the victim to influence YOU**.

7. Interviewing Third Party Witnesses

In the typical "he said / she said" case, corroboration can be very helpful. Unfortunately, most third party witnesses have a history with the parties as well. Bias immediately becomes significant. Occasionally, third party witnesses will be immune to attacks of bias.

When interviewing a witness, assess potential bias. Develop your impressions. Assess the witness' willingness to come to court. Where a DV victim's presence at trial may be unreliable, the third party witness (the victim's mother, for example) is much more likely to cooperate. Unfortunately, due to time constraints or for other reasons, an officer may not get a developed statement from the third party. A report may simply state that the "victim's sister gave the same version of events." If this is the case, it becomes your responsibility to assign the police to perform follow-up investigation and obtain full and complete witness statements.

8. Assessing the Police Reports

Read through the police reports thoroughly before you discuss the case with the parties. Does the police report describe the nature / location / size / extent / degree of injury with helpful details …or is it vague? After you have discussed the case with the parties, examine the reports again. Determine the presence of inconsistencies. If any exist, you can anticipate potential credibility issues. Again, refer to the "credibility" jury instruction.

Next, assess the reports for internal inconsistencies. Determine why the police took the call in the first place. Cross check the reason for the police dispatch to determine whether it is consistent with the report the victim and witnesses later reported at the scene. For example, if the police were responding to a "subject with gun" or "stabbing" complaint and later find that a disorderly conduct occurred with no weapon involved, an internal inconsistency exists.

Is there consistency between the alleged actions of the suspect and the observable injuries on the victim? Is there an adequate explanation for any inconsistency? Did one police officer write one section of the report and a different officer prepare a different section of the report?

Finally, corroborate the victim's statement. The most common type of corroboration is a visible injury. However, according to Wis. Stats. § 968.075(7), the lack of a visible injury can not be the determining factor in a prosecutor's decision to decline charges.

The victim's demeanor is also an important consideration. If the victim is intoxicated, credibility will later be attacked. If the victim appears frightened or scared, her behavior may corroborate the suspect's actions. Furthermore, an excited utterance by the victim allows you to proceed with an alternative trial strategy should the victim fail to appear at trial.

Other corroboration may include a statement of a witness or a statement of a suspect. Look for the officer's own observations as to the condition of the residence or to potentially damaged property.

Lastly, consider requesting follow-up investigation. That includes Dual Arrest situations. Demand that the law enforcement agency make their determination of which party is the Primary or Predominant Physical Aggressor. (See the Police Investigation chapter for more Investigation ideas.)

9. Dual Arrest Situations

As a practical matter, it is very difficult to prosecute one party where both parties were aggressors in the eyes of the police officer arresting the parties.

For example, assume that you charge one party (the "defendant"), while the other party (the "victim") testifies in your case-in-chief. During cross-examination of the arresting police officer (who arrested both parties), a wise defense attorney will ask the following question: "Isn't it true that you believed the 'victim' committed a crime?" The arresting police officer must answer "yes" to the question because that officer arrested the "victim" after believing probable cause existed that the "victim" committed a crime.

When an arresting police officer fails to make a proper Primary / Predominant Physical Aggressor determination, that same police officer's dual arrest decision can undermine the State's case.

DISORDERLY CONDUCT, Wis. Stats. § 947.01. Be aware of the disorderly conduct statutory language of "under circumstances…" If a suspect at trial accuses the victim of also being disorderly, and the police arrested the victim for that conduct, the jury may reasonably find that "under the circumstances," the suspect's behavior was justified.

MISDEMEANOR BATTERY, Wis.Stats. § 940.19(1). Be aware that misdemeanor battery charges require non-consent of the victim and that the defendant *"knows"* of the non-consent. Where both parties are arrested for fighting during a battery incident, and only one person is charged, the jury may reasonably conclude that the suspect had a reasonable belief that the victim desired to fight the suspect, thereby negating two elements.

CHARGING BOTH PARTIES. Even in a case where you think both people should be charged, use caution. For example, assume a brother punches his sister in the nose (Battery). 10 minutes later, the sister retaliates. She smashes the windows in her brother's car (Criminal Damage to Property). You may be inclined to charge both individuals with their respective crimes. The major difficulty? Reliance on the two defendants to testify against one another – both of whom you have charged with crimes.

Best Practice: Find a third party, corroborating witness (preferably with clean hands) to testify against both parties.

Remember in "dual arrest cases" that "victims" have constitutional rights as suspects against self- incrimination. Consequently, when interviewing the parties during a charging conference, proceed with caution.

For more information on this topic, see the section on "Wisconsin's Mandatory Arrest and Primary / Predominant Physical Aggressor Laws" as well as the "Police Investigation: Training and Policy" section of this manual for information relating to Primary Physical Aggressor investigative strategies.

10. Penalty Enhancers

1. **DANGEROUS WEAPONS.**

   Include penalty enhancers in the criminal complaint. For the dangerous weapon enhancer, Wis. Stats. § 939.63 requires the crime be committed "while possessing, using or threatening to use a dangerous weapon." WI Criminal Jury Instruction 910 defines a dangerous weapon as:

   i) Any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder;

   ii) Any device designed as a weapon and capable of producing death or great bodily harm;

   iii) 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;

   iv) Any electric weapon.

   Possession encompasses both actual and constructive possession. The State must prove that the suspect possessed the weapon to facilitate the predicate offense. *State v. Peete*, 185 Wis.2d 255, 517 N.W.2d 149 (1994).

2. **HABITUAL CRIMINALITY.**

   Wis. Stats. § 939.62 governs the Habitual Criminality penalty enhancer. The defendant is a repeater if: "the 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 5-year time period. The requirement that the actor be convicted of 3 misdemeanors on 3 separate occasions only requires that there be separate misdemeanor convictions; not separate court dates. *State v. Whittock*, 199 Wis.2d 664, 350 N.W.2d 647 (1984).

3. **COMMISSION OF DV OFFENSE WITHIN 72 HOURS OF A FIRST DV ARREST.**

Wis. Stats. § 939.621. Increased penalty for certain domestic abuse offenses.

If a person commits an act of domestic abuse, as defined in s. 968.075(1)(a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the crime is committed during the 72 hours immediately following an arrest for a domestic abuse incident, as set forth in s. 968.075(5). The 72-hour period applies whether or not there has been a waiver by the victim under s. 968.075(5)(c). The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the arrest. The penalty increase under this section changes the status of a misdemeanor to a felony.

11. The Decision to Charge

Wis. Stats. § 968.075(7)(b) requires the District Attorney's office to make a charging decision within two weeks of the office receiving notice of the incident, absent "extraordinary circumstances." If you issue a charge, notify the victim of your decision as soon as practicable.

The criminal complaint is governed by Wis. Stats. § 968.01 which requires "a written statement of the essential facts constituting an offense charged." It may be made upon information and belief. As a practical matter, it may be the only document concerning the allegations in the court file.

Because you may want the tribunal to have ready access to more information, you may want to include 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 non-monetary condition of release on bond, include the police officer's observations of the suspect's intoxication level when arrested.

12. The Decision to Decline Charges

If you decline to issue a criminal charge, 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 aware of options to protect their safety. Before release, inform the suspect that the statute of limitations allows you to reverse your decision upon the gathering of new information. This may be appropriate where you have a strong suspicion that the activity occurred but you feel that you cannot prove it in court.

Be wary of potential reasons why you might decline charges. Prosecutors sometimes decide not to charge immediately, only later to decline charges all together. Sometimes, the main reason for declining charges becomes: "There have been no further problems." While that reason may be one of several legitimate considerations, it should not be a controlling factor.

Compare the "no further problems" rationale with any other crime in the system. Do we care that an armed robber has not robbed the same convenience store since we first filed charges? Do we grant much weight to the fact that an OWI (4th offense) has not picked up a new OWI charge during the pendency of the matter? Treat Domestic Violence as the serious crime that it is.

Finally, whatever your reasons for declining charges, carefully document them. If the victim is re-victimized, you may need to defend your prior decision. You also may receive more information in making an assessment as to the new charges. And you can always issue the older offense with a new offense.

13. Alternatives to Prosecution

Sometimes there are cases where the elements of the offense are present, but the actions of the victim, while not constituting a legal defense for the suspect, are so distasteful that you could never picture yourself or one of your colleagues presenting the case to a jury with a straight face. Try picturing yourself making the opening statement or closing argument when you have doubts in such a case.

Some cases fall under the "de minimus" standard. That is: the harm done is so slight that criminal prosecution is not appropriate. The jury would rightly question the use of scarce judicial resources for such a minor incident: "Why are you wasting taxpayers' money on this? Why are you wasting our time with this case?"

On the other hand, watch out for the poorly written police report that deceptively minimizes a dangerous situation. Upon closer examination, you may discover that an apparently minor incident is merely the tip of the iceberg in a violent relationship or stalking situation.

1) **MUNICIPAL PROSECUTIONS.**

This manual recognizes that the general practice of giving municipal tickets/citations to those who engage in intimate partner violence or family violence is still widely practiced in some places. Nationally, this is considered to be poor practice. Municipal prosecutions are frowned upon.

Remember that Wis. Stats. § 968.075(7) mandates prosecutors to "develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses." Consider history. In the past, the Criminal Justice System did not treat domestic abuse as a crime. Do not use civil municipal tickets in lieu of criminally prosecuting domestic violence.

A municipal or county citation ensures only a low level of punishment typically with no option for treatment. Another disadvantage is that in many DV cases, a fine assessed to the suspect equally punishes the victim because the two are drawing money out of the same budget.

There are occasions where you do not have enough evidence to go forward with a criminal prosecution but you do have a modicum of evidence against the suspect. Clear and convincing evidence is the standard for civil municipal or county citations. The suspect can be called adversely to the witness stand. However, keep in mind that the benefits to municipal prosecutions are few.

2) **DIVERSIONS.**

In other cases, you may feel that you could bring a criminal action but that a criminal conviction is too harsh a penalty for the suspect's conduct. For instance:

Assume that you review a case where the victim calmly tells the suspect that he or she is having an affair. The suspect becomes enraged. The suspect grabs an object and breaks a window with it. The suspect is 45 years old and has never been arrested before. There is no history of violence, and you have no reason to suspect that there will be any future violence. You could easily charge the suspect with Criminal Damage to Property or Disorderly Conduct. During your case review, you discover that the suspect has a quick temper. You decide the suspect should attend counseling for a period of time.

Under the above circumstances, an alternative to a criminal conviction may be appropriate. The main thing to remember about diverted prosecutions is that there must be a consequence for failing to meet the requirements of a diversion agreement.

We do not typically recommend "Diversion" agreements. If you elect to forego prosecution in a case in exchange for the suspect's agreement to attend counseling, it is difficult to resurrect a DV case six months to a year later after the suspect has failed to abide by the conditions of the Diversion agreement. However, if the suspect takes responsibility, apologizes and gives a full written confession, a prosecution later may be possible, even if the victim loses interest in the case.

3) **DEFERRED PROSECUTION AGREEMENTS.**

Alternatively, you may want to consider a Deferred Prosecution Agreement. After charging, a "contract" is devised to dismiss the charge(s) if certain conditions are fulfilled. If the suspect fails to complete the requirements, then a criminal conviction results. Because a dismissal of charges is involved, Deferred Prosecution Agreements should only be considered in extraordinary circumstances. For more information about Deferred Prosecution Agreements, see Wis. Stats. §§ 971.37, 971.38, 971.39 and 971.40.

14. Some Final Thoughts and Reminders

- CLOSING ARGUMENT. When you issue a case, have your closing argument in mind.
- ELEMENTS. Make a list, connecting the facts with the elements of the crime that must be proven.
- TRIAL OUTLINE. Read all the reports thoroughly and formulate a rough trial outline before you issue the case.
- FOLLOW-UP INVESTIGATION. Get police officer(s) to commit to perform follow-up investigation if necessary. Closely consider the evidence and all corroboration. Consider what more evidence can be collected before it is destroyed or lost.
  - Existence of additional witnesses such as friends, neighbors, children, medical personnel;
  - Admission by the defendant or other statement by the defendant;
  - Physical Evidence present such as weapons, disarray, torn clothing, broken furniture, etc.;
  - 911 tape including statements from the scene;
  - Photographs of injuries (e.g. changing color of bruises) and crime scene;
  - Medical reports documenting injuries.
- DEFENSE. Anticipate all the defenses at the time of issuance of the charge. If possible, eliminate any defenses at the earliest time possible. For example, if you suspect an alibi defense, get your investigating officer to perform the investigation up front.
- SCENE of the CRIME. In a major case, go to the scene prior to charging. If you wait, the scene will undoubtedly change.
- CONSIDER a VISIT to the VICTIM. If the Victim is in the hospital, consider visiting the victim with an advocate or victim assistance person. Call the victim. Get the victim's input, per victim's rights legislation.
- RESEARCH anticipated legal issues and draft appropriate instructions.

- BASE DECISIONS on 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) abuse history; 2) the negative impact of the crime upon the children and family; 3) possible future escalation of violence. Nonetheless, you still must issue charges based upon evidence and your ability to prove the case beyond a reasonable doubt.
- LETHALITY. During the charging phase of a case, consider various risk factors in a DV case (Pence, Ellen and Paymar, Michael, *Domestic Violence: The Law Enforcement Response*, Duluth Domestic Abuse Intervention Project (rev. ed. 2001)):
  - Use and abuse of alcohol / drugs;
  - Existence of TROs / Domestic Abuse Injunctions now or in the past;
  - Death threats or suicide threats;
  - Mental illness history;
  - Use of a gun or other weapon or threat of use;
  - Presence of children in the household during the incident;
  - Extent of injuries or harm caused, including analysis of strangulation;
  - Defendant's prior history or criminal or other anti-social behavior;
  - Past history of violence or aggressive behavior (charged or uncharged);
  - Victim plans to leave relationship (danger of separation violence);
  - Totality of the circumstances of the present case.

(Written by ADA Brent Nistler and ADA Paul Dedinsky, with contributions from ADA Mark Williams and ADA Mary Smith. Wisconsin Domestic Violence Prosecution Manual, 2004.)

6. Ethical Issues facing the DV Prosecutor

1. Introduction
2. *O'Neil v. State*
3. Special Responsibilities of a Prosecutor
4. ABA Standards for Criminal Justice: Prosecution and Defense Function
5. National District Attorney's Association: National Prosecution Standards
6. Relevant Discovery Statutes
7. Key Cases relating to Exculpatory Evidence
8. Adding Charges to an On-going Prosecution
9. Plea Bargain Breaches
10. Access to Witnesses
11. Candor toward the Tribunal

1. Introduction

Financial dependence, family or childcare needs, fear, social customs and mores, love, as well as many other factors – oftentimes prompt victims to reconcile with their abusers. These victims may recant their previous statements made to the police. When a recantation occurs, prosecutors now 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 DV victims in the community.

Prosecutors must disclose recantations and any related tangible evidence. 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 District Attorney's office should be straightforward: All evidence of an exculpatory or impeaching nature in possession of the prosecution and/or police must be provided to the defense as soon as reasonably possible. No investigation should be curtailed or 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. *O'Neil v. State*, 189 Wis. 259, 261-62, 207 N.W. 280, 281 (1926):

> The district attorney is a quasi-judicial officer. *State v. Russell*, 83 Wis. 330, 338, 53 N. W. 441; *State v. Kaufmann*, 22 S.D. 433, 118 N.W. 337, 338; *Comm. v. Nicely*, 130 Pa. 261, 18 A. 737, 738. 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. "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. "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.

3. SCR 20:3.8 Special Responsibilities of a Prosecutor

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 has been given 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 (3rd Ed.)

(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.

Of similar effect is Standard 11-2.1(1)(viii) of ABA Standards for Criminal Justice – Discovery (3rd ed.).

5. National District Attorneys Association, National Prosecution Standards (2nd ed.)

25.4 The prosecutor should disclose the existence or nature of exculpatory evidence pertinent to the defense.

52.1 The objectives of pre-trial discovery are to provide information for informed pleas, expedite trials, minimize surprise, afford the opportunity for effective cross-examination, meet the requirements of due process, and otherwise serve the interests of justice.

52.2 To meet these objectives, the prosecutor and defense should diligently pursue discovery of material information and freely, fully, and promptly comply with lawful discovery requests from defense counsel.

55.1 Continuing duty. If prior to or during a hearing or trial, a party discovers additional witnesses or evidence or material previously requested or ordered which is subject to disclosure or inspection, the party or counsel should be promptly notified of the existence of the additional material or witnesses.

6. Relevant Discovery Statutes

Wis. Stats. § 971.23(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 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. Stats. § 971.23(d): A list of all witnesses and their addresses whom the district attorney intends to call at trial;

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

Wis. Stats. § 971.23(h): Any exculpatory evidence.

7. Key Cases Relating to Exculpatory Evidence

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

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith 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 (373 U.S. at 88).

B. ***United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)**, determined that even in the absence of a request, the prosecutor must volunteer exculpatory evidence to the defense.

C. ***United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)**, determined that impeachment evidence, as well as exculpatory evidence, falls under the *Brady* rule.

D. ***Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995)**, 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."

In *Kyles*, 514 U.S. at 436-437, 115 S.Ct. at 1567, the U.S. 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").

E. ***Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995)**, determined that even inadmissible evidence may be subject to the requirement of production by the prosecution under *Brady*.

F. ***Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)**, held that the government must disclose any deal reached with a witness testifying for the prosecution.

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

H. ***Delgado v. State*, 194 Wis.2d 737, 535 N.W.2d 450 (Ct. App. 1995)**, ruled that a defense counsel provided incompetent representation in failing to aggressively fully uncover a witness' alleged arrangement with the State for testifying. The court at page 756, footnote 5 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.

I. **Matter of *State ex rel. Lynch v. County Court, Branch III*, 82 Wis.2d 454, 262 N.W.2d 773 (1978)**, determined that absent a demonstrated "particularized need," a prosecutor need not provide exculpatory evidence before the preliminary hearing.

J. ***State v. Randall*, 197 Wis.2d 29, 539 N.W.2d 708 (Ct. App. 1995)**, 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 would be an "intolerable burden."

K. ***State v. Nelson*, 59 Wis.2d 474, 208 N.W.2d 410 (1973)**, held that a prosecutor has an ongoing duty to disclose exculpatory and inculpatory evidence that the State has including material that impacts only on the credibility of a State's witness.

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

Other cases dealing with exculpatory evidence and discovery issues in criminal cases are listed below. Attorneys should use these cases as a starting point, not a substitute, for their own independent research.

- ***State v. Gibas*, 184 Wis.2d 355, 516 N.W.2d 785 (Ct. App. 1994).**
- ***State v. Pettit*, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992).**
- ***State v. Mechtel*, 176 Wis.2d 87, 499 N.W.2d 662 (Ct. App. 1993).**
- ***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 the situation where the state acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. In a Pre-trial context, there is no presumption of vindictiveness. *See 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 a Post-trial context, the law sometimes presumes that the adverse action was 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 his or her 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… 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:

A. *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 district attorney's intervention. By challenging the Department of Corrections' PSI Methods, the prosecution did an "end run" around the plea agreement.

B. *State v. Williams*, 2002 WI 1, ¶ 5, 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.

C. *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.

D. *See also 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, then it is presumed that the defendant was prejudiced by that deficiency.

The United States Supreme Court has noted: 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 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).

E. *State v. Williams*, 2003 WI App 116, ___ Wis.2d ___, 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.

10. Access to Witnesses

It's no secret. Victims in DV cases often recant, minimize or simply fail to appear in court on the day of trial. As prosecutors, you have experience. You understand the realities. 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.

However, a defendant's attorney has the right to interview prosecution witnesses 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). In a criminal case, a witness cannot be compelled against his or her wishes to give an interview to the defense – a witness has the right to refuse to be interviewed.

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 6 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 at *Eugenio*, 219 Wis.2d 391, 415-416, 579 N.W.2d 642, 653 (1998):

> However, while we do not adopt the commentary, we note that prosecutors continue to be bound by the standard itself, as adopted in Simmons. 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.

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) (not the commentary to the Standard) 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.

> **Standard 3.1(c) from the ADA Standards Relating to the Prosecution Function provides that:**
>
> 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 commentary to Standard 3.1(c) provides, in pertinent part: "In the event a witness asks the prosecutor… whether it is proper for the witness to submit to an interview by opposing counsel or whether he is under a duty to do so, the witness should be informed that… it is proper… and that it is in the interest of justice that the witness make himself available…" While the commentary to Standard 3.1(c) suggests that the prosecutor must encourage a witness to talk to the defense, it is not law in Wisconsin. No Wisconsin case law has adopted the commentary.

11. SCR 20:3.3 Candor toward the Tribunal

(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, 269-270, 79 S.Ct. 1173, 1177, 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.

(Based upon the writings of District Attorney E. Michael McCann, Chief Deputy District Attorney Robert Donohoo, Deputy District Attorney Carol White, Deputy District Attorney Jim Martin, and Deputy District Attorney Jon Reddin. Wisconsin Domestic Violence Prosecution Manual, 2004.)

7. Discovery of Medical Records of Victims and Witnesses: *Shiffra* and Related Cases

1. Introduction
2. The Case of *State v. Green*
3. The Law of *Shiffra*
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5. Defense Burden of Proof
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11. Harmless Error Analysis
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1. Introduction

Confidential records of a victim or a witness of a crime, not in the possession of the District Attorney, may nonetheless be discoverable. The law concerning discovery and release of a witness' medical records is intricate. This chapter's thrust is merely to provide a familiarity with the basic concepts and legal principles. As always, you will need to conduct your own in-depth legal research.

2. The Case of *State v. Green*

In *State v. Green*, 2002 WI 68, 253 Wis.2d 356, 646 N.W.2d 298, the Wisconsin Supreme Court reviewed the law of *Shiffra*. Essentially, the Supreme Court altered the defendant's burden of proof when requesting a trial court to perform an *in camera* inspection of a witness' medical or psychiatric records, enunciating the following:

> [W]e conclude, consistent with other state standards, that a defendant must show a "reasonable likelihood" that the records will be necessary to a determination of guilt or innocence. *See Goldsmith,* 337 Md. 133-34, 651 A.2d at 877-78 ("a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense"); *People v. Stanaway,* 446 Mich. 643, 521 N.W.2d 557, 574 (Mich.1994) (a defendant must show "a good-faith belief, grounded in some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense"); *State v. Pinder,* 678 So.2d 410, 417 (Fla.Dist.Ct.App.1996) ("a defendant must first establish a reasonable probability that the privileged matters contain information necessary to his defense"); *compare Commonwealth v. Fuller,* 423 Mass. 216, 667 N.E.2d 847, 855 (Mass.1996) (a defendant must show "a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt").
>
> Although we change this threshold showing requirement from *Shiffra,* we conclude that other requirements adopted by the court of appeals in similar cases remain applicable. In particular, a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense. *See, e.g.,Navarro,* 248 Wis.2d 396, 636 N.W.2d (Ct. App. 2001). *Walther*, 240 Wis.2d 619, 623 N.W.2d 205 (Ct. App. 2001). The mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault is insufficient. *Munoz,* 200 Wis.2d at 399, 546 N.W.2d 570. Further, a defendant must undertake a reasonable investigation into the victim's background and counseling through other means first before the records will be made available. From this investigation, the defendant, when seeking an *in camera* review, must then make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records. *See State v. Darcy N.K.,* 218 Wis.2d 640, 645, 656, 581 N.W.2d 567 (Ct. App. 1998). In addition, the evidence sought from the records must not be merely cumulative to evidence already available to the defendant. A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense. *Munoz,* 200 Wis.2d at 397-98, 546 N.W.2d 570.
>
> Based on the above considerations, we set forth the following standard: the preliminary showing for an *in camera* review 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. We conclude

that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." *See Fuller,* 667 N.E.2d at 855. This test essentially requires the court to look at the existing evidence in light of the request and determine, as the *Shiffra* court did, whether the records will likely contain evidence that is independently probative to the defense.

In creating this standard, we intend to place 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. A good faith request will often require support through motion and affidavit from the defendant. Our standard is not intended, however, to be unduly high for the defendant before an *in camera* review is ordered by the circuit court. The defendant, of course, will most often be unable to determine the specific information in the records. Therefore, in cases where it is a close call, the circuit court should generally provide an *in camera* review. *See Walther,* 240 Wis.2d at 644, 623 N.W.2d at 211 (Ct. App. 2001). We have confidence in the circuit courts to then make a proper determination as to whether disclosure of the information is necessary based on the competing interests involved in such cases. *See Shiffra,* 175 Wis.2d at 611, 499 N.W.2d 719. A circuit court may always defer ruling on such a request or require a defendant to bring a subsequent motion if the record has not had time to develop. A motion for seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery.

3. The Law of *Shiffra*:

Shiffra set out the old standard for the defense burden of proof: When a defendant wishes to obtain confidential information, he or she must 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. *State v. Shiffra*, 175 Wis.2d 600, 608, 499 N.W.2d 719, 723 (1993).

In *Shiffra*, the defendant was charged with second degree sexual assault. The State provided the defendant with discovery, indicating that the victim had a history of psychiatric problems that could affect the victim's ability to perceive and relate truthful information. The defendant requested this information. The State indicated that the psychological records requested by the defendant were not in the State's possession. The defendant brought a motion requesting the records. The trial court stated that it did not have the authority to order the records released but stated that the victim had the choice of waiving the physician-patient privilege. If she refused to waive that privilege, she would be barred from testifying at trial. The victim refused to waive her physician-patient privilege, and the trial court barred her from testifying. The State appealed the trial court's pre-trial ruling. The Court of Appeals affirmed, stating at *Shiffra*, 175 Wis.2d at 605, 499 N.W.2d at 721 (Ct. App. 1993):

> Under the due process clause, criminal defendants must be given a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984). A defendant's right to discover exculpatory evidence does not include the authority to search the State's entire file. *Pennsylvania v. Ritchie*, 480 U.S. at 59. Rather, an *in camera* review of evidence achieves the proper balance between the defendant's rights and the state's interests in protection of its citizens. See *Ritchie* at 60-61. To be entitled to an *in camera* inspection, the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense. *State v. S.H.*, 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990); *In re K.K.C.*, 143 Wis.2d 508, 511, 422 N.W.2d 142, 144 (Ct. App. 1988).

Therefore, if the defendant makes the required preliminary showing, and the witness whose records are sought waives his or her confidentiality privilege …[i]t 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* at 611, 724. If the witness refuses to disclose the records, the trial court has the authority to suppress the witness' testimony. See *Shiffra* at 612, 724-725.

This analysis applies to confidential and privileged records of all types, including physician-patient records, psychologist-patient records, attorney-client records, etc.

4. Wisconsin's Discovery Statute:

Wis. Stats. § 971.23 states:

(1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO 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 is within the possession, custody or control of the state:

(b) Any exculpatory evidence.

5. Defense Burden of Proof

While *Green* has set the new burden of proof, *Munoz* still contains some useful language when fashioning your arguments. For instance, *Munoz* states that the defendant must establish more than the mere possibility that psychiatric records may be helpful in order to justify disclosure for an *in camera* inspection. *State v. Munoz*, 200 Wis.2d 391, 397-98, 546 N.W.2d 570, 572-73 (Ct. App. 1996).

In *Munoz*, the defendant was charged with two counts of sexual assault. The defendant discovered that the victim had received psychiatric counseling for unrelated prior sexual assaults. The defendant requested an *in camera* inspection for the victim's mental health records. The trial court denied the request stating that the defendant had not made a showing that the records requested would have been material to his defense. The court of appeals agreed in *Munoz* at p. 400, 573:

> To satisfy *Shiffra's* standard, Munoz would have had to have offered the trial court something more than "mere possibilities" based on assertions of the victim's acknowledgement that she had suffered previous assaults for which she received psychiatric counseling.

Mere allegations, presumptions, or suppositions will not satisfy the old materiality standard that required a showing that the sought-after evidence is necessary to a fair determination of guilt or innocence. And of course, it follows that the defense would have been unable to meet the new *Green* defense burden. The defendant must show something more than the fact that the victim had received psychological counseling in the past. The records sought must be germane to the alleged incident at hand.

6. Defense Requests for Records must be Reasonable

In *State v. Behnke*, 203 Wis.2d 43, 553 N.W.2d 265 (Ct. App. 1996), the defendant was convicted of one count of sexual assault, three counts of battery and one count of false imprisonment. The victim had a history of self harm. The defendant requested psychiatric records of the victim for a possible defense on the battery charges. The defendant wanted these records to show that the bruises on the victim were self-inflicted and not the result of a battery. The trial court denied the defendant's request. The defendant appealed, claiming that he should have been given access to these confidential records. The court of appeals affirmed in *Behnke*, 203 Wis.2d at 49, 553 N.W.2d at 268-269:

> A defendant who seeks access to a witness's medical records must first make a preliminary showing that the evidence is relevant and is necessary to a fair determination of guilt or innocence. See *State v. Shiffra,* 175 Wis.2d 600, 610, 499 N.W.2d 719, 723 (Ct. App. 1993). Only if this burden is satisfied must the trial court then order that the records be produced and conduct an *in camera* inspection to determine if the evidence is indeed material to the defense. See *State v. Mainiero,* 189 Wis.2d 80, 87, 525 N.W.2d 304, 307 (Ct. App. 1994). To prevail in making the necessary preliminary showing, the defendant must establish more than the mere possibility that psychiatric records may be helpful. *State v. Munoz,* 200 Wis.2d 391, 397-98, 546 N.W.2d 570, 572-73 (Ct. App. 1996). In fact, the factual background of the published cases in this state regarding a defendant's right to an *in camera* review of a witness's mental health records show that the defendants in those cases had knowledge of the existence of mental health records and the disputes concerned whether the records

> were relevant. See *State v. Speese,* 191 Wis.2d 205, 215, 528 N.W.2d 63, 67 (Ct. App. 1995), *rev'd*, 199 Wis.2d 597, 545 N.W.2d 510 (1996); *Mainiero*, 189 Wis.2d at 86, 535 N.W.2d at 306; *see also Shiffra,* 175 Wis.2d at 603, 499 N.W.2d at 720 (noting that the State turned over information regarding the victim's psychiatric history).

In *Behnke*, the defendant's logic was too attenuated to make the showing that the records were necessary for a fair determination of guilt or innocence. The alleged battery resulted in a black eye, a bruised chest, and bite marks on the victim's genital area. While the victim may have had a history of cutting or bruising her arms, no other evidence existed that she harmed other parts of her body. The court of appeals held that the injuries inflicted by the victim upon herself – and the injuries suffered from the battery allegations – failed to justify an *in camera* review of the victim's psychiatric records.

Essentially, the defense must not assert an attenuated line of logic to force an *in camera* review of confidential records. A defense request for such records must be reasonable.

7. A Witness' Right to Privacy vs. the Defendant's Right to Exculpatory Evidence

The Court of Appeals refused to limit the analyses in *Shiffra* and *Ritchie* to only those cases where the State has the confidential records in its possession, stating in *Behnke* at pp. 55-56, 271-272:

> The State, however, misconstrues the reasoning of *Ritchie* and *Shiffra*. These decisions are not about keeping a level playing field between the State and the defendant. Rather, these decisions attempt to strike a balance between the witness's right to privacy, which is embodied in the health care provider privileges, and the truth-seeking function of our courts, which is rooted in the Due Process Clause of the Fourteenth Amendment. …Of course, the conflict between these legislative and constitutional policies most often arises in the context of criminal litigation. But that is to be expected when the legislature establishes a statutory privilege, thereby exempting certain types of information from the judicial forum. We further acknowledge that the "costs" of the health care provider privileges are principally shifted to the State. In a few circumstances, the State may have to completely forgo a case when one of its witnesses refuses to turn over the information. *See Shiffra*, 175 Wis.2d at 612, 499 N.W.2d at 724-25. Nonetheless, the Due Process Clause guarantees the defendant a right to a trial based on truth seeking which can only be accomplished by allowing him or her to present a complete defense. *See id.* at 605, 499 N.W.2d at 721. The Due Process Clause thus prevents the State from shifting the costs associated with the health care provider privileges to criminal defendants. If the State sees a problem with these privileges, it should lobby the legislature for a change in the law.

8. Confidential Records Already in the Possession of the State

Confidential records which are in the possession of the State are subject to review by the trial court even if the Defendant has not made a showing required by *Shiffra*. In *State v. Darcy N. K.*, 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), the defendant requested psychiatric records of the victim. The trial court noted that the defendant had not satisfied the old materiality burden, as was required by *Shiffra*. Nonetheless, the court ordered an *in camera* review of the psychiatric records that were in possession of the State. The court of appeals affirmed the trial court's decision in *Darcy N. K.* at p. 654-655, 573-574:

> We conclude that the trial court properly ordered the State to submit the records in its possession relating to M.F. for *in camera* inspection. Generally, when a defendant fails to make the preliminary showing required by *Shiffra*, neither the defendant nor the State gains access to any information from a complainant's psychiatric or counseling records. Here, however, the State had already acquired some of those records, and thus it had the benefit of whatever information from those files as might be relevant to the instant prosecution. Darcy K. is not M.F.'s parent, and he was not privy to the prior court proceedings involving her. He thus had no way to gain independent access to the information in the State's files. Given the nature of the records and the statutory protections afforded them under Chapters 48, 51 and 905, Stats., it was not improper for the trial court to order their submission for *in camera* review in lieu of granting Darcy K. broader or unlimited access to those records. The court properly undertook a screening function and disclosed to Darcy K. that information from the records which it deemed relevant to the criminal case, while preserving the confidentiality of the remainder of the records.

Thus, fairness dictates that information at the disposal of the prosecution should undergo an *in camera* review for a ruling as to its potential availability to the defendant. The court also stated that a defendant cannot later challenge on appeal an *in camera* review of records conducted at his own request.

9. Witness must Consent to Release of Records

The decision to release confidential record information rests with the witness whose confidential records are sought by the defendant. The witness' consent to allow a review of the records must be clear. *State v. Solberg*, 211 Wis.2d 372, 385, 564 N.W.2d 775, 781 (1997).

In *Solberg*, the defendant was charged with third degree sexual assault. The victim signed a release to allow an examination of her psychological records. The defendant wanted to discover if the victim could tell the difference between flashbacks and reality. The defendant requested an *in camera* review of the victim's psychological records and the trial court, after interviewing the victim's psychiatrist, denied the defendant's request. The

court of appeals and the Wisconsin Supreme Court affirmed in *Solberg* at p. 385, 781:

> The better practice is to have circuit court interview the victim on the record and thereby make a determination of the victim's voluntary consent. In the alternative, the release should show that the victim's consent is voluntary by using language designed to notify the victim that they need not sign the release.

If the witness chooses to release the information, the trial court will conduct an *in camera* review of the privileged information… and will allow dissemination of any information that the court believes is relevant to the defendant's defense. Whether the witness agrees to waive the privilege should be made clear. The best practice: Ask your judge to voir dire the witness on the record in court. In *Solberg*, the trial court also interviewed the victim's psychologist, allowing the defense to submit questions to the court.

10. Erring in Favor of *In Camera* Review

Where a defendant specifically alleges facts that confidential information sought would be material to a fair determination of guilt or innocence, the trial court has a duty to make an *in camera* review of such information and share with the defendant any information that could have an effect on the outcome of the case. *State v. Walther*, 240 Wis.2d 619, 623 N.W.2d 205 (Ct. App. 2000).

In *Walther*, the defendant was convicted of second-degree sexual assault of a child, second-degree sexual assault (force or violence), and child enticement. The 13-year old victim resided at a home for troubled children and had a history of contacts with law enforcement. The victim had a bruise on his forehead and gave two stories on how he received the injury, one implicating the defendant and the other implicating a staff member at the children's home. The victim complained that he was sexually assaulted by personnel at the children's home. The defendant, in a very fact specific affidavit, made a motion for an *in camera* review of the victim's psychiatric, medical and residential treatment records. The defendant believed that such records were highly relevant to ascertain the victim's credibility, perception and recall. The trial court, while noting that the decision was a "close call" denied the request for an *in camera* inspection, stating that the defense could accomplish the same goals by use of cross examination. The trial court cited to *Jessica J. L.* and *Munoz* to support its decision. The court of appeals reversed, stating in *Walther* at pp. 631-632, 211:

> In the instant case, the trial court commented that its decision to deny Walther's request for *in camera* review was a "close call." Recognizing the obvious difficulties in discerning the details of nondisclosed confidential records, we caution trial courts to carefully consider, in cases presenting "close calls," the consequences of cutting off *in camera* review. As emphasized in *Shiffra*, and as reiterated in *Munoz*, a trial court's *in camera* review "is a limited intrusion that often provides 'the best tool for resolv-

> ing conflicts between the sometimes competing goals of confidential privilege and the right to put on a defense.'" *Munoz*, 200 Wis.2d at 400 (quoting *Shiffra,* 175 Wis.2d at 611-12).

In close cases the better approach is for the trial court to make an *in camera* inspection and determine, what, if any, confidential information would be exculpatory or material to a determination of the defendant's guilt or innocence. The eyes of a trial court judge charged with discretion is a very limited intrusion into a prospective witness's privacy, and therefore, an *in camera* review of confidential records of a witness serves as a balance between the witness's right to privacy and the defendant's right to present a complete defense.

11. Harmless Error Analysis

Whether a trial court, after reviewing confidential records *in camera*, determines that records should not be disclosed is subject to the harmless error analysis. *State v. Speese*, 199 Wis.2d 597, 545 N.W.2d 510 (1996). In *Speese*, the defendant was accused of 23 counts of sexual assault of a child. The defendant sought to discover psychological records of the victim. The trial court, after an *in camera* review of the victim's confidential records, rejected the defendant's request for the records. The trial court noted that nothing in the records would be of help to the defendant. The defendant was convicted on 22 counts. The defendant appealed. The court of appeals reversed 13 counts, holding that the trial court erred when it denied the defendant the opportunity to review the victim's confidential records. The Wisconsin Supreme Court reversed in *Speese* at p. 606, 514:

> On the basis of this testimony and in consideration of the ample evidence before the jury of the victim's silence regarding the alleged abuse, we conclude that the defendant's lack of access to the victim's medical and psychiatric reports did not affect the outcome of the trial. Applying this court's longstanding harmless error analysis, we conclude that, even assuming arguendo that the circuit court erred in denying the defendant access to the victim's medical and psychiatric records, there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985).

As quoted above, the harmless error analysis is the standard to be applied to cases where the trial court denies a defendant's request for confidential records of a victim or witness.

12. Application to Other Types of Confidential Records

The governing principles of *Shiffra* apply not only to confidential medical records, but also to other kinds of confidential records. *State v. Navarro*, 2001 WI APP 225, 248 Wis.2d 396, 636 N.W.2d 481.

In *Navarro* the defendant was convicted of battery by a prisoner to a corrections officer. The defendant moved to inspect the officer's personnel records in an effort to find exculpatory evidence. The trial court denied the defendant's request stating that: 1) the records being sought were not in the district attorney's possession, 2) the defendant had not shown that any such records would contain any exculpatory evidence, and 3) the records sought were not psychiatric records. The court of appeals reversed and remanded, holding in *Navarro*:

> First, we expressly rejected in *Shiffra* the argument that access to records sought by a defendant may be denied simply because the records are not within the State's possession. *Shiffra,* 175 Wis.2d at 606-607. Next, although *Shiffra* and several other cases deal specifically with psychiatric or mental health counseling records, nothing in our analyses in these cases suggests that the governing principles apply only to mental health records. In *Shiffra*, for example, we referred generally to "sought-after-evidence," 175 Wis.2d at 605-08, and we relied in our analysis on two U.S. Supreme Court cases, neither of which dealt with psychiatric or counseling records. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 42-43, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987) ("investigative files concerning child abuse"); *Rovario v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957) (identity of government informants).

Shiffra requests cover all types of confidential records, not just psychiatric medical records. This is an important concept because *Navarro* expands the types of confidential records that defendants may request.

The defendant in *Navarro* wanted to review the personnel records of the Department of Corrections officer (victim) in an attempt to support the defendant's claim of self-defense. This differs from the usual request for confidential records where a defendant is seeking information to undermine the credibility of a testifying witness. The defendant was prepared to testify that he feared the victim and knew the reputation of the victim. The court of appeals reversed stating in *Navarro*:

> The alleged basis for the materiality to Navarro's defense of the records he seeks is not that information in the confidential files may serve to undermine the complaining witness's credibility, which has often been the claim in *Shiffra* cases. Rather, Navarro seeks access to the complaining witness's personnel file, or other confidential prison files, which may contain information to support his claim of self-defense.
>
> …Thus, a defendant's state of mind at the time of the alleged offense is relevant to his or her claim of self- defense. …Therefore, in order to introduce evidence at trial

> of the officer's reputation of violence or past violent acts toward inmates, Navarro must establish that at the time of the incident he knew of that reputation or of those acts.

Navarro involved the affirmative defense of self-defense. The court of appeals held that the defendant was able to show enough materiality to require an evidentiary hearing on this issue. Be aware that the defense may request confidential medical records, psychiatric records, or even employment personnel records to make a claim of self-defense. Because the request for confidential records includes quite a broad spectrum, care should be taken to limit requests to relevant, material information. As usual, contest all fishing expeditions.

13. Psychological Expert Testimony – *State v. Maday*:

If the State plans on presenting expert testimony concerning psychological information of a witness, the defendant must be given an opportunity to request a psychological examination of the witness by an expert witness selected by the defendant. *State v. Maday*, 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993).

In *Maday*, the defendant was charged with 3 counts of sexual contact with a minor. The State intended to call an expert witness who would testify that the behaviors of the victims were consistent with the behaviors of sexual abuse victims. The defendant requested to have his own expert examine the victims. The trial court denied the request. The Court of Appeals in *Maday* at 359-360, 372, reversed:

> When the state manifests an intent during its case-in-chief to present testimony of one or more experts, who have personally examined a victim of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault, a defendant may request a psychological examination of the victim. A defendant making such a request must present the court with evidence that he or she has a compelling need or reason for the psychological examinations. In considering the defendant's request, the trial court should consider:
>
> (1) the nature of the examination requested and the intrusiveness inherent in that examination;
>
> (2) the victim's age;
>
> (3) the resulting physical and/or emotional effects of the examination on the victim;
>
> (4) the probative value of the examination to the issue before the court;
>
> (5) the remoteness in time of the examination to the alleged criminal act; and
>
> (6) the evidence already available for the defendant's use.

The Court of Appeals in *Maday* at 361-362, 372, continued:

> Under the rules of discovery, any report generated by the defense expert's examination of the victim is discoverable by the prosecution. We point out that nothing in our opinion requires a victim to consent to an examination by the defendant's psychologist or psychiatrist. In order to protect the privacy of the victims in cases of alleged sexual assault, the ultimate decision of whether to undergo an examination is to be left in the hands of the victim. The victim is free to refuse for whatever reason. However, a victim's refusal to submit to a pretrial psychological examination must be balanced against the defendant's constitutional rights to a fair trial. Thus, where a victim refuses to submit to an examination and where the defendant has shown a compelling need for the psychological examinations, the state may not introduce evidence of the behavior of the victim through its examining expert.

14. Exceptions: Cross-Examination and Argument

Where responsive mechanisms, such as cross-examination and argument, are sufficient to guarantee the defendant a fair trial, the defendant may not be allowed to gain access to the victim's confidential records. *State v. Mainiero*, 189 Wis.2d 80, 525 N.W.2d 525 (Ct. App. 1994).

In *Mainiero*, the defendant was charged with sexual contact with a person under the age of sixteen and criminal trespass to a dwelling. The State introduced evidence at trial indicating that the victim was depressed and suffered from posttraumatic stress disorder caused by the alleged sexual assault. The victim was also grieving the death of a friend at the same time as the sexual assault. The defendant contended that because the State chose to place into issue the complainant's psychiatric hospitalization records as corroboration of the sexual assault allegation, he should have been given access to those records as well. The trial court denied the defendant's request. The court of appeals affirmed in *Mainiero* at p. 91, 308-309:

> Further, unlike in *Maday*, responsive mechanisms such as cross-examination and argument were sufficient in this case to guarantee Mainiero a fair trial. Here, the State offered testimony by the complainant that she entered the hospital for psychiatric treatment for depression related to the alleged sexual assault. The State did not rely on any expert testimony, nor did it rely on or introduce any portion of the complainant's records. Therefore, nothing precluded Mainiero from effectively challenging the State's cause and effect theory through cross-examination of the complainant. Mainiero's counsel could have asked the complainant if there were any other reasons why she might have been depressed and suicidal at the time she was admitted to the psychiatric unit. If after her answer the trial court believed that information in her psychiatric records was material to the fairness of the trial, it would have been obligated to release such information.

Where the State does not rely on expert testimony nor introduce any portion of the complainant's records, the defendant may be prohibited from obtaining the victim's confidential records. In these cases, the defendant has the opportunity to elicit the same information through cross-examination and argument.

(Written by Attorney Todd Wanta and ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004.)

8. Bail Hearings: An Opportunity to Educate the Court

1. The Law
2. Arguing Non-monetary Conditions of Release
3. General Statistics
4. Guns and Domestic Violence
5. Violence: Its potential effect upon Children
6. Stalking
7. The Phenomenon of Separation Violence
8. Workplace Violence Statistics
9. Abuse and Women with Disabilities
10. Wis. Stat. § 940.47

1. The Law

ARTICLE VIII., United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE I, SECTION 6, Wisconsin Constitution states:

> Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted.

ARTICLE I, SECTION 8 (1) and (2), Wisconsin Constitution states:

> 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 condi-

tions 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. Stats. § 969.01(1) and (4) states:

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. Stats. § 969.02(1-4, 8) states:

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. Arguing Non-Monetary Conditions of Release

As prosecutors, it sometimes falls upon our shoulders to educate the courts as well as the community. Domestic violence is not a new phenomenon. Domestic violence looms as a national problem. It so permeates American culture that it occurs with high levels of frequency in all racial, ethnic and socioeconomic groups. See Offner, Linda, "Power and Control – Dispelling the Myths Surrounding Domestic Violence", 34 APR *Ariz. Att's* 16, 19 (1998); Willis, Donna, "Domestic Violence: The Case for Aggressive Prosecution", 7 *UCLA Women's Law Journal* 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 trial court; 2) Educate 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 to 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 each domestic violence prosecution. (Please see the attached sample "Domestic Violence No Contact Order".)

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 violence upon children – will be directly relevant to your courtroom arguments.

We organized the following statistics under some convenient topics. You may want to gather additional research and statistics that you believe to be persuasive. Add them to the list below.

3. General Statistics

- **Estimates are that 4 million women are battered annually by their partners.**

  (See Ariella Hyman et al, "Laws Mandating Reporting of Domestic Violence", 273 Journal of the American Medical Association, 1781 (1995); See also Family Violence Prevention Fund, General Statistics, http://www.fvpf.org/the_facts/stats.html (reporting that almost four million American women were physically abused by husbands or boyfriends in 1997); See also Violence Against Women in the United States, National Organization for Women, http://now.org/issues/violence/stats.html (reporting that conservative estimates indicate two to four million women are battered 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. See also 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 a given year.**

  (See Bureau of Justice Statistics Factbook, Lawrence A. Greenfeld et al, Violence by Intimates, March 1998, p. 37 (noting that in 1996, 840,000 women were victims of nonlethal 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 nonlethal domestic violence and 1,581 murders in 1993.).)

- **In 2001, of the 127 homicides in the City of Milwaukee, 24 homicides were family-violence related, with 16 female victims, 3 male victims and five children.**

  (Statistics reported by MPD Deputy Chief Ray, "Establishment of the MPD Family Violence Unit" lecture, 2002.)

4. Guns and Domestic Violence

It should come as no surprise to you that guns increase the risk of death in families with histories of domestic violence. See Arthur L. Kellerman et al, "Gun Ownership as a Risk Factor for Homicide in the Home", 329 *New England Journal of Medicine*, 1084 (1993).

Even when a gun is neither fired nor brandished, it can exacerbate DV 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." Bonderman, Judith, "Firearms and Domestic Violence: Exploring the Links", HELP Network, Chicago (1997), reprinted online at http://www.jointogether.org.

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. Stevenson, George B., "Federal Anti-violence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children", 33 *Williamette L.Rev*. 847, 861-862 (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 Weapons Possession / No Guns" as a condition of release on bail.

- **Households with guns are 7.8 times more likely to have a firearm homicide at the hands of a family member than homes without guns.**

  (See Arthur L. Kellerman et al, "Gun Ownership as a Risk Factor for Homicide in the Home", 329 *New England Journal of Medicine*, 1084 (1993).)

- **When a family member shoots another, the assault is 12 times more likely to be fatal than an assault with a weapon other than a gun.**

  (See Saltzman, Linda E., "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults", 267 *Journal of the American Medical Association*, 3043, 3046 (1992) (contending 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 intimates have been killed with guns in recent years.**

  (See *Bureau of Justice Statistics Factbook*, Lawrence A. Greenfeld et al, "Violence by Intimates", March 1998, p. 42.)

- **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.**

  (See "When Men Murder Women: An Analysis of 1996 Homicide Data", Violence Policy Center, http://vpc.org/studies/dvkey.htm)

- **Nearly 30% of all inmates in state prisons incarcerated for victimizing an intimate partner report that they were armed with a firearm at the time of the incident.**

  (See *Bureau of Justice Statistics Factbook*, Lawrence A. Greenfeld et al, "Violence by Intimates", March 1998, p. 23.)

- **398 women were shot and killed by a spouse or intimate partner in the course of an argument in 1996.**

  (See "When Men Murder Women: An Analysis of 1996 Homicide Data", Violence Policy Center, http://vpc.org/studies/dvkey.htm)

- **With one or more guns in the home, the risk of suicide among women increases nearly 5 times and the risk of homicide increases nearly 3 times.**

  (Bailey, James, M.D. et al, "Risk Factors for Violent Death of Women in the Home", *Archives of Internal Medicine*, Vol 157, Aril 14, 1997, pp 777-782.)

5. Violence: its Potential Effect on Children

Consider the potential effects violence renders upon children. Ask courts to demand CHANGE from a defendant before allowing contact with children, especially those who actually observed the violence or its after-effects. Encourage your judge to ask what steps the defendant has taken to obtain treatment and counseling for abusive behavior.

When the defense counsel wants a "No Contact Order" modified to allow contact with a child, object. Be aware. Defense attorneys (and even some Judges) will criticize you for your stance… that you are trying to keep this family apart from one another. Remember that 85% of incarcerated individuals surveyed nationwide grew up in homes where there was domestic abuse. There is a strong connection between violence and the negative impact upon children. Remain firm and steadfast in your desire to root out family violence.

- **In a national survey of more than 2,000 American families, approximately 50 percent of the men who frequently assaulted their wives also frequently abused their children.**

  (Murray A. Straus and Richard J. Gelles, "Physical Violence in American Families," 1990.)

- **If a child is exposed to violence in the home and is the victim of parental violence, 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 and use violence against a child or spouse.**

  (R. Gelles, *Family Violence* 142, 1979).

- **Children in homes where domestic violence occurs are physically abused or neglected at a rate of 1,500% higher than the national average.**

(Ford, S. "Domestic Violence: The Great American Spectator Sport." Oklahoma Coalition on Domestic Violence and Sexual Assault, 3.)

- **Children who witness domestic violence kill themselves at 6 times the national rate of suicide.**

  (Buel, S.M. "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 violence 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 violence face a 50 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", *The Colorado Lawyer (Special Issue)*, Vol. 28, No. 10 at 1, (Oct. 1999).)

- **Witnessing domestic violence increases drug/alcohol abuse/teenage pregnancies. Children are present in 41-55% of homes where police intervene in domestic violence calls. Children in homes where domestic violence occurs may experience cognitive or language problems, developmental delays, stress-related physical ailments (such as headaches, ulcers, rashes), and hearing and speech problems.**

  (Department of Community Affairs. "Domestic Violence: A Guide for Health Professionals", State of New Jersey, March 1990.)

6. 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.)

- **80% of women who are stalked by former husbands are physically assaulted by that partner and 30% are sexually assaulted by that partner.**

  (Center for Policy Research, Stalking in America, July 1997.)

7. The Phenomenon of Separation Violence

- **Domestic abuse generally escalates when the abusive parent discovers or believes that the victim is about to leave him or has left him.**

  (Walker, Lenore. *The Battered Women*. New York: Harper and Row, 25-26, 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.)

- **30% to 50% of female homicide victims were killed by intimates, past or present.**
- **30% of females with violence related injuries seen in emergency rooms are there because of domestic violence. (American Medical Association)**
- **The NUMBER ONE cause of death of women in the workplace is MURDER usually stemming from domestic violence.**
- **Although divorced and separated women compose only 10% of all women in this country, 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**.

  (Caroline Wolf Harlow, "Female Victims and Violent Crime Report," Washington, D.C., 1991, p. 5.)

- **Women are likely to be victims of homicide when they separate from their husbands. 65% of intimate 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, p. 47, 1997.)

8. Effects of Domestic Violence on the Workplace Statistics

- **Domestic violence 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*, p.1, 1997.)

- **Businesses lose $100 million in wages, sick leave, absenteeism and non-productivity annually from family violence.**

  (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*, p.1, 1997.)

9. Abuse and Women 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.**
- **Others have reported a history of sexual abuse among 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.**

10. Wis. Stat. § 940.47

Once you charge a case, occasionally victims will contact you and report defendants "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. Stats. § 940.47 which states:

> **Wis. Stats. § 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.

(Prepared by ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004. We acknowledge and express gratitude for the vast body of research collected by social scientists and criminology professionals across the country. Also, thanks to the contributions of many in preparation of this chapter, including ADA Rebecca Blemberg, Liz Marquardt and the Wisconsin Coalition Against Domestic Violence (WCADV) who gathered several of the above-listed statistics.)

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

DOMESTIC VIOLENCE

Plaintiff, **NO CONTACT ORDER**

vs.

Defendant

IT IS ORDERED, as a condition of release in this case, the defendant have **ABSOLUTELY NO CONTACT** with the following person(s), their residence, subsequent residence, their workplace or other location:

Name

_____ _____ _____

"No Contact" means that YOU, the defendant, shall not contact the above person(s) or location(s) by telephone, in person, through the mail or any delivery service, by pager or fax or computer or any other electrical or electronic device, or through another person.

This is an official Order of the Court. **NO PERSON OTHER THAN THE COURT MAY CHANGE THIS ORDER.**

Any violation of this Court Order is a crime, and can result in immediate arrest. YOU, the defendant, could also be charged with the crime of Bail Jumping in violation of §946.49. This Court Order stays in effect as long as this case continues, unless the Court changes this Order. YOU MUST NOT DISREGARD THIS ORDER.

YOU are the defendant. This Order restricts YOU, and it is YOUR responsibility to avoid contact. If the person(s) named above contacts you on the telephone, YOU must hang up immediately. If the person(s) named above comes somewhere near to you, YOU must walk away. If you accidentally come into contact with the above named person(s) in any private or public place, YOU must leave immediately. The person(s) named above can not give you legal permission to change this Order. If YOU go near the above named person(s), even with permission or consent, YOU can be arrested for violating this No Contact Order.

You may pick up clothing and personal items from the above residence **ONLY in the company of a uniformed law enforcement officer** and only upon reasonable notice to the person(s) named above.

Dated at _____, Wisconsin on _____

BY THE COURT:

_____

ACKNOWLEDGEMENT OF SERVICE:
I certify that the information in this document has been read to me in my primary language.

Received a copy on_____ (date)

_____ _____

Defendant Attorney for the Defendant

9. Miranda / Goodchild Hearings

1. Miranda / Goodchild – Generally
2. The Necessity of a Hearing
3. Standard of Review
4. Miranda / Goodchild – General Questions
5. Findings

1. Miranda / Goodchild – Generally

This chapter provides only general information. A full analysis of the entire body of confession / statement law is beyond the scope of this manual. For an in-depth analysis of these issues, thorough research will need to be independently conducted.

CUSTODY

In *State v. Armstrong*, 223 Wis.2d 331, 353, 588 N.W.2d 606 (1999), the Wisconsin Supreme Court faced the issue of "Custody" for *Miranda* purposes:

> In general, a person is "in custody" for purposes of *Miranda* when he or she is "deprived of his or her freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 477. A person may be deemed to be "in custody" in a broad variety of settings. For example, a person in his or her own bedroom is "in custody" if the person has been placed under arrest and is not free to go wherever he or she wants. *See Orozco v. Texas*, 394 U.S. 324, 327 (1969). Of relevance to this case, the United States Supreme Court has ruled that a prison inmate was "in custody" for purposes of *Miranda* even though he was questioned about a situation distinct from the one for which he was incarcerated. *See Mathis v. United States*, 391 U.S. 1, 4-5 (1968).

INTERROGATION

State v. Armstrong, 223 Wis.2d 331, 356-7, 588 N.W.2d 606 (1999) also faced the issue of "Interrogation" for *Miranda* purposes:

> [T]he seminal case on interrogation is *Rhode Island v. Innis*, 446 U.S. 291 (1980). Under *Innis*, an "interrogation" occurs when a person is "subjected to either express ques-

tioning or its functional equivalent." *Innis*, 446 U.S. at 300-301. More specifically, the Court stated:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
>
> *Id*.

This court adopted the *Innis* test in *State v. Cunningham*, 144 Wis.2d 272, 276-82, 423 N.W.2d 862 (1988). We pointed out in *Cunningham* that the *Innis* test focuses on the perspective of the suspect, not the subjective intent of the police officers. *See Cunningham*, 144 Wis.2d at 279-80. This court stated:

> Even where the officer testifies that his or her actions had some purpose other than interrogation, the action must be viewed from the suspect's perspective to determine whether such conduct was reasonably likely to elicit an incriminating response. If an impartial observer perceives the officer's purpose to be something other than eliciting a response, the suspect is also likely to view the officer's purpose that way.
>
> *Id.* at 280.

2. The Necessity of a Hearing: Wis. Stats. §§ 971.31(3) and 901.04(3)

Wis. Stats. § 971.31(1-4) Motions before trial.

(1) Any motion which is capable of determination without the trial of the general issue may be made before trial.

(2) Except as provided in sub. (5), defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

(3) The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial.

(4) Except as provided in sub. (3), a motion shall be determined before trial of the general issue unless the court orders that it be deferred for determination at the trial. All issues of fact arising out of such motion shall be tried by the court without a jury.

Wis. Stats. § 901.04 Preliminary questions.

(1) 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 sub. (2) and §§ 971.31(11) and 972.11(2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

(2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) HEARING OUT OF THE PRESENCE OF A JURY. Hearing on any of the following shall be conducted out of the presence of the jury:

(a) Admissibility of confessions.

(b) In actions under § 940.22, admissibility of evidence of the patient's or client's personal or medical history.

(c) In actions under §§ 940.225, 948.02 or 948.025, admissibility of the prior sexual conduct or reputation of a complaining witness.

(cm) Admissibility of evidence specified in § 972.11(2)(d).

(d) Any preliminary matter if the interests of justice so requires.

(4) TESTIMONY BY ACCUSED. The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross-examination as to other issues in the case.

(5) WEIGHT AND CREDIBILITY. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

3. Standard of Review

State v. Armstrong, 223 Wis.2d 331, 344-351, 588 N.W.2d 606 (1999):

> As a threshold matter, we determine which party bears the burden of proof on the issue of whether a "custodial interrogation" occurred. Determining whether a custodial interrogation occurred is the first step in an inquiry of whether statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), because *Miranda* warnings need only be administered to individuals who are subjected to a custodial interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 300 (1980); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Miranda*, 384 U.S. at 444, 477; *State v. Mitchell*, 167 Wis.2d 672, 686, 482 N.W.2d 364 (1992).

We conclude that the State must establish by a **preponderance of the evidence** whether a custodial interrogation took place. Although Wisconsin courts have not yet ruled directly on the precise issue, our holding is consistent with Wisconsin precedent which places the burden of proving other aspects of *Miranda* on the State. Moreover, our holding is consistent with federal law, including the *Miranda* decision itself.

Wisconsin courts have not directly decided which party possesses the burden of establishing whether a custodial interrogation occurred, although language in *State v. Mitchell*, 167 Wis.2d 672, 696, 482 N.W.2d 364 (1992), suggests that the burden is on the State. In *Mitchell*, we stated, "Once the state has established a prima facie case of waiver of *Miranda* rights and voluntariness of a statement of an in-custody police interrogation in the absence of countervailing evidence, the statement should be admitted into evidence." *Mitchell*, 167 Wis.2d at 696 (*citing State v. Hernandez*, 61 Wis.2d 253, 259, 212 N.W.2d 118 (1973)) (emphasis added). Wisconsin courts have placed the burden of proving other aspects of *Miranda* squarely on the State. It is well established that the State must show that the defendant received and understood his or her *Miranda* warnings. *See Mitchell*, 167 Wis.2d at 696-97; *Hernandez*, 61 Wis.2d at 258. The State must show that the defendant knowingly and intelligently waived the constitutional rights protected by the *Miranda* warnings. *See State v. Santiago*, 206 Wis.2d 3, 12, 556 N.W.2d 687 (1996); *Mitchell*, 167 Wis.2d at 696-97; *Hernandez*, 61 Wis.2d at 258. The State also bears the burden on the issue of whether the warnings were sufficient in substance. *Santiago*, 206 Wis.2d at 12.

Further, in *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 262, 133 N.W.2d 753 (1965), this court held that a separate hearing before the trial judge is required in order to determine whether a defendant's admission was voluntary. *Goodchild*, 27 Wis.2d at 262. The State bears the burden on the issue of voluntariness in *Goodchild* hearings. *See Goodchild*, 27 Wis.2d at 264-65. In *Roney v. State*, 44 Wis.2d 522, 534, 171 N.W.2d 400 (1969), we ruled that *Miranda* objections also require a hearing. We went on to "adopt the procedure of the *Goodchild* hearing in determining *Miranda* questions," and to hold that the *Miranda* and *Goodchild* hearings may be held together. *Roney*, 44 Wis.2d at 534. We stated:

> [I]n each case, whether the challenge is under *Goodchild* or under *Miranda*, substantially the same type of inquiry must be made by the court. In *Miranda* the question is, was the confession or other statement obtained under such circumstances of custodial interrogation as to require the exclusion of the statement from evidence. In *Goodchild* the question is, was the statement involuntary and therefore should be excluded from evidence. . . .
>
> We therefore conclude that *Miranda*, like *Goodchild*, should require a hearing by the trial judge out of the presence of the jury.
>
> The *Goodchild* procedure has been outlined in the case bearing that same name. A similar procedure should be followed in the event of a *Miranda* objection. The court should determine the merits of that objection sitting alone, out of the presence of the jury and preferably, as in *Goodchild*, in a pretrial proceeding.

> Following such a hearing in which the facts are heard, the court's finding would have to be made beyond a reasonable doubt and the [S]tate would have the burden of proving compliance with *Miranda* or a waiver of those requirements…
> *Id.* at 533-34.

Because the State bears the burden of proof in *Goodchild* hearings as to whether a defendant's admission or confession was voluntary, it follows that the State should bear the burden of proof in *Miranda* hearings on the issue of whether a custodial interrogation occurred. *See Goodchild*, 27 Wis.2d at 264-65. A holding to the contrary would seem to be inconsistent with this court's holding in *Roney*.

Requiring the State to establish whether a custodial interrogation took place also comports with the reasoning of the United States Supreme Court in *Miranda*. In *Miranda*, the Court placed the burden of showing that the defendant waived the constitutional privilege protected by the *Miranda* warnings on the government. *See Miranda*, 384 U.S. at 475. Although the burden on the issue of waiver is distinct from the burden of establishing that a custodial interrogation took place, the Court's reasoning applies with equal force to the question we face in this case. The Court stated:

> This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.
>
> *Id.*; *see also Tague v. Louisiana*, 444 U.S. 469, 470-71 (1980) (citing this language from *Miranda* with approval).

Applying this reasoning to the current situation, we conclude that the State should be required to establish whether a custodial interrogation took place. The State is responsible for creating the custodial situation, and the State conducts and controls the interrogation. Further, as a result of its record-keeping practices, the State is more likely to reduce an interview to writing or have other "corroborated evidence" of the interrogation session. Indeed, the Court in *Miranda* noted that the atmosphere of custodial interrogation was a "police-dominated" one. *Miranda*, 384 U.S. at 445. A defendant in such an environment is less likely to be familiar with his or her surroundings or to otherwise be able to provide evidence of the circumstances of the custody or interrogation. Therefore, under the reasoning of *Miranda*, the State is the party better suited to bear the burden of establishing whether a custodial interrogation took place.

Federal and Wisconsin law are clear that the standard of proof which the State must meet in proving compliance with *Miranda* is **preponderance of the evidence**. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (stating that **preponderance of the**

> **evidence** is the appropriate standard of proof whenever the State bears the burden of proving waiver of the rights protected by *Miranda*); *Santiago*, 206 Wis.2d at 12 (holding that the State must prove the sufficiency of the *Miranda* warnings and waiver of *Miranda* rights by a **preponderance of the evidence**); *State v. Jones*, 192 Wis.2d 78, 114a, 532 N.W.2d 79 (1995) (per curiam on motion for reconsideration) (striking from the court's original opinion the statement that the State must prove waiver of *Miranda* rights beyond a reasonable doubt and instead imposing the **preponderance of the evidence** standard). As the United States Supreme Court stated in *United States v. Matlock*, 415 U.S. 164, 178, n. 14 (1974), "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a **preponderance of the evidence** . . . ." See also *Connelly*, 479 U.S. at 168 (citing this language from *Matlock* with approval); *State v. Rewolinski*, 159 Wis.2d 1, 16 n. 7, 464 N.W.2d 401 (1990) (quoting this language from *Matlock*); *State v. Lee*, 175 Wis.2d 348, 364, 499 N.W.2d 250 (Ct. App. 1993) (holding, based on *Connelly* and *Rewolinski*, that the State must prove waiver of *Miranda* rights by a **preponderance of the evidence**). Accordingly, we hold that the State must meet its burden of establishing whether a custodial interrogation occurred by a **preponderance of the evidence**.
>
> For the reasons stated, we hold that the State possesses the burden of establishing whether a custodial interrogation occurred such that *Miranda* warnings were required. The State must meet this burden by a **preponderance of the evidence**.

(Boldface emphasis added.)

4. Miranda / Goodchild Hearings – General Questions

A. GENERAL PREDICATE QUESTIONS (FOR LAW ENFORCEMENT OFFICER).

- Name?
- Occupation?
- If a police officer. . .
  - i. What law enforcement agency?
  - ii. How long so employed?
  - iii. Present duties?
  - iv. Prior experience?

B. ESTABLISH GENERAL FACTS FOR MIRANDA-GOODCHILD.

- Directing your attention to (<u>date of offense</u>), do you remember that date?
- Were you working on that date?
- Did you assist in the investigation of this case?
- When did you become involved with the investigation of this case?
- Did you participate in the INTERVIEW of any suspect(s)?

C. IDENTIFICATION OF DEFENDANT.

- Did you interview (name of defendant)?
- Would you recognize the person you interviewed if you saw him again?
- Do you see him in court today? Point to wear the person is seated and what the person is wearing. Please IDENTIFY him for the record. (Let the record reflect…)

D. CUSTODY QUESTIONS: ARREST OF DEFENDANT.

- What was the DATE of Arrest? (Custody)
- What was the TIME of Arrest? (Custody)
- What was the PLACE of Arrest? (Custody)

E. INTERROGATION QUESTIONS: INTERVIEW OF DEFENDANT.

- DATE of the INTERVIEW. (Interrogation)
- What was the TIME that the INTERVIEW began? (Interrogation)
- What was the TIME that the INTERVIEW concluded? (Length of Interview)
- Place of INTERVIEW?
- PHYSICAL LAYOUT of place of INTERVIEW?
- Who were all the PERSONS present at the time of the INTERVIEW? List names.

F. LIST THE *MIRANDA* RIGHTS.

i. RIGHT to SILENCE:

"You have the right to remain silent."

ii. ANY STATEMENTS can/will be USED AGAINST DEFENDANT:

"Anything you say can and will be used against you in a court of law."

iii. RIGHT to be REPRESENTED by COUNSEL:

"You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning."

iv. ATTORNEY can be APPOINTED if INDIGENT:

"If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish."

v. RIGHT to STOP ANYTIME, REFUSE TO ANSWER and END INTERVIEW:

> "If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning."

G. ESTABLISH *MIRANDA* RIGHTS ADVISED, UNDERSTOOD, AND WAIVED.

- Did you ADVISE the defendant of all those rights?
- How did that process occur? Explain.
- Did the defendant RESPOND in any way after being advised of the rights?
- Did defendant appear to UNDERSTAND the rights?
- How did you know that defendant understood?
- What was the defendant's demeanor?
- Were the defendant's responses appropriate when advising him of his rights?
- Did he appear to be listening?
- Was the defendant COHERENT?
- Did the defendant appear to know what he was doing?
- Previous Law Enforcement contacts?

H. ESTABLISH THAT STATEMENT GIVEN WILLINGLY AND VOLUNTARILY.

- Did the defendant request the presence of an attorney? …either before or during the interview?
- Did the defendant communicate that he did not want to talk to you or anyone else?
- Were any THREATS made in return for the defendant giving a statement?
- Were any PROMISES made in return for giving a statement?
- Did the defendant make the statement FREELY, WILLINGLY and VOLUNTARILY?
- LENGTH of questioning?
- Any DENIAL of CREATURE COMFORTS, such as food, water, sleep, medication, etc.?
- Did the defendant appear to be UNDER the INFLUENCE of any drug or alcohol? Explain.
- PSYCHOLOGICAL pressures?

I. INTRODUCE STATEMENT.

- Was the defendant's statement written?
  - [*Have statement, if written, marked for identification. Show witness the exhibit. Ask witness to identify.*]
- Describe the statement:
  - How many pages does statement consist of?
  - How was the statement prepared?
  - Was statement made in writing? On the computer?
  - Who wrote the statement? Whose handwriting?
- Did the defendant adopt the statement as his own by signature or verbal assent?
- Did the defendant sign the statement?
- Did the defendant make any corrections to the statement and initial them?
- Did the defendant read the statement before signing it?
- OR… Was the statement read to the defendant?
- Summarize contents of statement.
  - [*Move the exhibit into evidence.*]

5. Findings

ALWAYS ASK the TRIAL COURT for SPECIFIC FINDINGS of FACT and CONCLUSIONS of LAW.

After a summary of facts, it is best for the court to elucidate the following by a preponderance of the evidence standard:

a. I find that the evidence supports a finding that the defendant was fully and adequately advised of his constitutional rights as required.

b. I also find that the defendant understood the rights.

c. I also find that the defendant freely, understandingly, intelligently, and knowingly waived those rights.

d. Under the totality of the circumstances, the statements made by the defendant were the voluntary product of a free and unconstrained will, reflecting the deliberateness of choice.

Remember that, if the trial court deems the interrogation of the defendant failed to meet the above requirements, the trial court can still find the statement to be trustworthy. In that instance, while the court may declare the defendant's statement to be inadmissible in the State's case-in-chief, the court may allow the prosecutor to use it for impeachment purposes, should the defendant choose to testify.

(Wisconsin Domestic Violence Prosecution Manual, 2004.)

10. 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 Violence in General
7. Questions about Problem Elements
8. Questions about Evidence (and lack thereof)
9. Questions about Credibility
10. Questions about Uncooperative Victims
11. Questions about Same-Sex Relationships
12. Questions about Victims with Criminal Convictions
13. Questions about Domestic Violence and Divorce
14. Strategies in dealing with Affirmative Defenses
15. Conclusion

1. Introduction

Domestic Violence cases can often be won at the Voir Dire stage. Through effective questioning, jurors can be probed for stereotypes and bias regarding domestic violence, and can also be educated about DV-related issues that may arise during the trial.

Most courts will limit the time available for Voir Dire. Therefore, make it count. Prepare a list of Voir Dire topics that include standard, routine matters (e.g. expectations as jurors, follow instructions, etc.), as well as a second column of case-specific matters (e.g. domestic violence issues, transferred intent, retarded witness, party to a 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 your Voir Dire. A prosecutor should draw out the loose cannons, 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 convict.*

2. General Law of Jury Selection

A. **SWEARING** the jury prior to voir dire. Wis. Stats. § 805.08(1).

B. **VOIR DIRE** must be on the record. SCR 71.01.

C. **Wis. Stats. § 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.

D. **LEGAL ATTACK TO JURY POOL**. Be aware of possible 6th Amendment "fair cross-section requirement" challenge to the jury array (or jury "pool") from which the 12 voir dire jurors are chosen. This is a case law challenge. There is no express statutory provision that authorizes this challenge. 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. Raszkiewicz,* 169 F.3d 459 (7th Cir. 1999).

E. **STATUTORY SELECTION PROCEDURES CHALLENGE**. A challenge that the statutory provisions, which address the selection of the jury array from which the voir dire jurors for a specific case are chosen, were not followed. *State v. Coble,* 100 Wis.2d 179, 301 N.W.2d 221 (1981).

F. **AN ANONYMOUS JURY**. *State v. Britt*, 203 Wis.2d 25, 553 N.W.2d 528 (Ct. App. 1996).

G. **NUMBERS**. The number of selection jurors depends on such things as number of peremptory challenges, the complexity and anticipated length of the case, number of additional jurors, etc. *See* Wis. Stats. § 972.04. In misdemeanor cases, the normal practice is to have 30 selection jurors.

The number of jurors who hear the case can be greater than 12 because of additional / alternative jurors. Wis. Stats. § 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 12. The last sentence of Wis. Stats. § 972.02(2), which provides that: "If the case is a misdemeanor case, the jury shall consist of six persons," was declared unconstitutional.

H. **SWEARING** of the jury after the selection of the jury and prior to the trial of the case. The jurors must be sworn prior to trial of the case. Wis. Stats. § 756.08(1). Jeopardy attaches when the selection of the jury has been completed and the jury is sworn. Wis. Stats. § 972.07. Hold off as long as possible if there are any witness availability issues.

3. Strikes for Cause

A. Wisconsin law provides that a juror who is not indifferent must be excluded from a jury panel. The law presumes all prospective jurors to be unbiased. *State v. Faucher*, 227 Wis.2d 700, 596 N.W.2d 770 (1999).

B. 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).

C. A mistake by the court can be fatal to the state's case. In *State v. Ramos*, 211 Wis.2d 12, 564 N.W.2d 328 (1997), the 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 actually empanelled was impartial.

D. Juror bias is no longer divided into "actual" or "implied" bias. In *State v. Saucher*, 227 Wis.2d 700, 596 N.W.2d 770 (1999), the Supreme Court, in an effort at clarification, coined three new terms when referring to possible juror bias: "statutory," "subjective," and "objective."

1. **STATUTORY BIAS**. The first and least common type of bias is "statutory bias." A prospective juror is statutorily biased if he or she falls into one of the statutorily recognized groups in Wis. Stats. § 805.08 – persons with a financial interest in the case or 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.

2. **SUBJECTIVE BIAS**. The second type of bias is "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.

3. **OBJECTIVE BIAS**. The third type of bias is "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 to the effect that the juror can and will be impartial.

Practice Points:

- Jurors who have been victims of domestic violence are often targets of strikes for cause. However, if it is elicited that the juror may have difficulty setting aside his/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—general law.

A. Because the statutory provision that mandated six-person juries in misdemeanor cases was declared unconstitutional, use former Wis. Stats. § 972.03, which provided that:

> **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 s. 972.04(1).

In one-defendant misdemeanor cases each side gets four peremptory challenges. However, the last sentence of both former Wis. Stats. § 972.03 and present § 972.03 provides that: "Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under Wis. Stats. § 972.04(1)."

B. Wis. Stats. § 972.04 sets out the EXERCISE OF CHALLENGES, including the practice of alternating strikes (State first, defense second, State third, etc.).

C. It is a well-established principle that a defendant is denied his/her equal protection rights when a member of a distinctive group is purposefully excluded from a jury. Distinctive groups can be, among other things, gender or race based. *State v. Jagodinsky*, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997). In DV 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.

D. ***Batson*** challenges. 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 must be made prior to the jury being sworn. 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 be able to provide the court with a reasonable explanation as to why that juror was stuck. Consistent note taking (e.g. age, job, marital status, contacts with the system) – for each juror during Voir Dire – provides 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.

A. 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.

B. 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: "*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 3-5 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. Find 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: *"Are you aware of the extensive training given to police officers? Is that an important factor in why you report that you expect police witnesses to be accurate?"*

6. Questions Regarding Domestic Violence in General

A. The law is no different for DV cases. Make sure the jury understands this.

- *"How many of you believe that a different standard applies to domestic violence 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 violence victims deserve less protection than victims of crimes committed by strangers?"*
- *"How many of you feel 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, a prosecutor should try to rehabilitate and educate them. If they stick to their position, they are now eligible for a causal strike.

7. Questions About Problem Elements

If a 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 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?"*

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, but we have gone above and beyond the requirements by showing you 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 here without the victim testifying to consent. Non-consent can be inferred from a victim's actions.

- *"In order to prove 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 if someone is consenting or not 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 has the authority to, or that the court should, prohibit a person from having contact with another. A prosecutor must identify these jurors and strike them (usually for cause).

- "*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 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.

- *"Will anyone require the State to prove motive?"*
- "*If the State does not prove motive, 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, they should be stuck 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 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 the answer is "yes") *"If the judge were to instruct you regarding this crime and the State proved the elements beyond a reasonable dount, 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, NOT resulting in physical harm, should not be prosecuted?"*

8. Questions about Evidence (and Lack Thereof)

Because DV cases usually occur in the home in the absence of any outside witnesses, the bulk of a DV prosecutor's case will involve the testimony of only a limited number of witnesses – often without any physical evidence.

Battery charges often involve punching, strangling / choking, or slapping with hands and fists rather than weapons. It is not uncommon for there to be no visible injuries. Furthermore, police officers usually do not witness the incident and can testify only as to their observations made after the crime occurred. For these reasons, you are often left with little or no physical evidence or witnesses when proving a DV case.

It is imperative that the jury understand the case limitations. Jurors must have lower evidentiary expectations, if that's the situation. TV programs sometimes raise a juror's expectations of a parade of witnesses, pictures, weapons, and bloodied gloves.

- *"How many of you have read John Grisham books, or watch Law and Order or other courtroom dramas? 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 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:

- A juror might not understand that testimony is evidence. A prosecutor might want the judge to explain, through the standard jury instruction 103, that sworn testimony of witnesses is evidence.
- If a juror refuses to believe this and instead holds a prosecutor to proving a 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 someone 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 DV cases often boil down to a "he said, she said" situation, the prosecutor must address the issue of assessing the credibility of witnesses. Your goal might be to get jurors to start thinking about some of the factors for consideration listed in the Credibility Jury Instruction.

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/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

(See the chapter relating to Reluctant / Recanting Victims for further information.)

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. 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.

- "*How many of you think that the State has a responsibility to prosecute people who commit domestic violence 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. A 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 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 experiences, 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 abuse to your family and friends, did you have regrets about turning your abuser in? Were you 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 juror. Often, the person on the outside of the violent relationship will prove most useful in educating the rest of the jury.

B.) Excited Utterance Trials – When the Victim is not present.

- "*Can any of you think of reasons why a victim might not be at the trial to testify against her abuser?*"
- "*How many of you think it is possible for victims to still have strong feelings toward their individual 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' solely 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? 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 (see above), the same technique can be used to single out an individual juror who may have some personal experience with domestic violence.

11. Questions about Same-sex Relationships

Jurors are often uncomfortable talking about domestic violence. Jurors are also uncomfortable talking about homosexuality. When the two are combined, the prosecutor will have to be sensitive to potential discomfort. Yet, you still must convince the jury that victims of same-sex domestic violence deserve the same level of protection as any other crime victim in the community.

- *"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 violence, as it is defined in the Wisconsin Statutes, includes 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 14th Amendment.

12. Questions about Victims with Criminal Convictions

If testimony of the victim is introduced at trial either directly or indirectly, Wisconsin law provides that a victim can be impeached by prior convictions. Wis. Stats. § 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 DV victim.

- *"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, or 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 for cause if a juror disagrees with these ideas and cannot be rehabilitated.

13. Questions about Domestic Violence and Divorce

The defense attorney will often attack a 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 a 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.

- *"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 the divorce itself. 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' solely because the victim and the defendant were going through a divorce?"*

Practice Points:

- Objectivity is best in this circumstance. A 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, 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 Voir Dire course through affirmative defenses poses significant challenges.

Each affirmative defense has 2 parts, just like our 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 posit: *"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 motions, negotiations, prior experience, study, and common sense.
- Secondly, 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.

EXAMPLE:

A defendant initiated a confrontation which resulted in him being charged with Battery. He now claims self-defense. The KEY is the provocatour doctrine (see Wis. Stats. § 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… that there exists a distinction 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 available, not on some TV or movie-created notion of what the evidence should be.
- Because you go first, you have the opportunity to ask the "defense questions" first… but, from your perspective.
- Let the jury know that you do not fear your burden.
- Be a trustful "source" for information for the jurors. To the extent possible, teach and explain.
- The jurors will make appropriate commitments when they take their oaths. Most jurors will keep those commitments, at least for that case. However, if need be, have the 12 selected persons agree not to view your victim or witness differently solely because of race or education. 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 DV case. There are several themes common to all DV cases, such as: power and control, reluctant victims, dependence, etc. During Voir Dire, a prosecutor can and should effectively 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 open-minded jurors and to eliminate the others.

(Written by ADA David Maas and ADA Sara Purtell Scullen, with contributions from Chief DDA Robert Donohoo, ADA Douglas Simpson, ADA Callie Kidder-Lacy, and ADA Mark Williams. Thanks to Dallas County, Texas Family Violence Division Chief Prosecutor Cindy Dyer for her contributions to this chapter as well as her leadership in the domestic violence field. Wisconsin Domestic Violence Prosecution Manual, 2004.)

11. Opening Statements

1. Developing a Theory and Theme through Case Analysis
2. Components of an Opening Statement
3. Adults as Learners: What to Know to Enhance your Presentation Style
4. Content
5. Law Pertaining to Opening Statements
6. The Strategy of Advocacy in Opening Statement
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1. Developing a Theory and Theme through Case Analysis

The goal of a trial is to persuade the factfinder that your version of the facts is the true v ersion 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 ever more likely.

Your case is a **persuasive story** when you have developed a **case theory** that accomplishes the above list. A "**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 factfinder *feels* your case and *believes* it to be justified. It 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 DV case, your **theory** and **theme** will revolve around the type of abuse arising out of the facts and relationship history. For instance, should the context of a battery charge involve a defendant's intense jealousy erupting in a violent episode, "power and control" might be the **theme** of your case. Your **theory** might revolve around the factual allegations pertaining to the defendant's actions and his inability to control his emotions, which compelled police protection to ensure the victim's safety and that of her children.

2. Components of an Opening Statement

A. The ATTENTION step: presentation of **Case Theme** (Concept of ***Primacy***)

B. The FACT NARRATION: presentation of your **Case Theory**

C. The EXIT LINE: (Concept of ***Recency***)

3. Adults as Learners: What to Know to Enhance Your Presentation Style

A. ***Primacy*** and ***Recency***: first and last impressions are meaningful.

B. ***Repetition***: the "rule of 6" means that adult learners need to hear it at least 6 times to commit to memory.

C. ***Attention span***: you only have about 7 minutes with most adults!

D. ***Visual Aids***: adults hear better with their eyes than their ears.

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 your opposing counsel
- Go on and on…

5. Law Pertaining to Opening Statements

Wis JI 101 Opening Statements states:

> 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 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.

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 a prosecutor, 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 (1974). Be careful about branding the defendant with labels. For example, in *State v. Fawcett*, 145 Wis.2d 244, 426 N.W.2d 91 (Ct. App. 1988), the court frowned upon the prosecutor's reference to the defendant as a "classic child molester."

Do Not Promise What You Cannot 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 on a matter promised in the Opening Statement. *See State v. Tew*, 54 Wis.2d 361, 195 N.W.2d 615 (1972); *State v. Laabs*, 40 Wis.2d 162, 161 N.W.2d 249 (1968).

6. The Strategy of Advocacy in an Opening Statement

A. ORGANIZE CONTENT TO MAXIMIZE IMPACT.

Remember to start strong and end strong. Do not waste time on a needless introduction. Get to the point. Drop unnecessary language such as: "the evidence will show…" or "what I say is not evidence…" or "this is a roadmap/puzzle/outline."

Sequence the facts/topics to "build" your case. Make sure that the information is organized in a logical way – either a chronological method, a topical/issue-driven focus, or witness summaries (disfavored).

B. UTILIZE LANGUAGE TO YOUR ADVANTAGE.

Speak in the active voice, providing vivid descriptions. Highlight key facts. Be conversational instead of using legalese. Help the jury understand different focal points by using transitions.

Speak forcefully, clearly and with confidence. Be yourself. Do not try to imitate anyone if it does not fit your personality. Use simple and direct language. Avoid phrases and words like: "as it pertains to this case, quintessential, hopefully, probably, it seems, story, perhaps, alleged, I think, we expect, we believe." No Shakespeare! Speak forcefully. Use words like: beat, stabbed, raped, kicked, murdered, bludgeoned.

C. PREPARATION.

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 which you can expand on to the jury. But never read an opening statement. Use your body to help – 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 annoying personal habits like coin jingling, hair fussing, etc. Always be sincere.

Know the elements of the crime. Review the substantive jury instruction. 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 Opening Statement last – after you have outlined your case-in-chief and direct examination. Make a list of things you want to include while preparing your case.

Test for what you can refer to in your opening: "Will a witness testify to it?" or "Will an exhibit support it?" If you answer "no" to either question, then refrain from the questionable remark. Test your Opening Statement:

1. Does it tell jury what happened?
2. Does it tell the jurors why they should find the defendant guilty?
3. Does it make the jurors what to return a guilty verdict?
4. Does it have a structure that is clear and simple?
5. Is the delivery interesting and free from weaknesses?
6. 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).

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 them (gun, knife, 911 tape, blow ups of confessions, fingerprints, handwriting exemplars, forged documents, maps, floor plans, etc.). Consider how many television programs are about policing and the criminal justice system. People are generally interested in police work and want to learn and understand more about policing.

Demonstrative evidence will keep your presentation alive, interesting and memorable. When faced with complex cases… charts, diagrams, lists, timelines, etc. will help the jury to understand the case as it unfolds. Remove visual aids after you complete your Opening Statement to avoid any possible error. (See the "Use of Charts" chapter of this manual for further information.)

7. Additional Points for Consideration

- Your credibility is at issue, even though you are not a witness. People nowadays are not so apt to trust lawyers. Engender trust. Be honest, respectful, and competent. Pay attention to your professional appearance in dress and demeanor. Make sure there is no mistake in the mind of the jury that you represent "the people of the State of Wisconsin."
- Remember: 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 reported. SCR 71.01.
- Do not comment on defense waiting to present their opening statement. *State v. Sarinske*, 91 Wis.2d 14, 280 N.W.2d 725 (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.
- *See State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (Ct. App. 1984), for the situation where the defendant gives his or her own opening statement.
- 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."
- Even in a court trial, always give an Opening Statement because you want to show the court you care. Plus, the Judge needs a guide through the case, especially because courts 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 Statement, perhaps try: "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, just in case, by being somewhat vague. 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 develop as outlined but that what your are telling them is what you anticipate.
- 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 just highlighted 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 to the Opening Statement

EXAMPLE of what NOT to do:

> **PROSECUTOR: Thank you, Judge. Good morning. The—the start is here. This is where we begin really the whole part of this that you were selected for, that you sat here now yesterday and today, and after I speak and defense counsel speaks, as you know, the witnesses will begin to testify in this case. And this part of the trial, as the judge explained, is for us to kind of tell you what we think the evidence is going to show in this case. We're not allowed to argue about why – what conclusions you should draw. Those things come at the end. But this is to tell you about what this case is about in terms of the evidence you are going to hear. And as the Judge said, the evidence is the testimony, any physical exhibits that come in, and any agreements that the lawyers may reach during the course of the case.**

In the above example, has this prosecutor told the jury anything that they were not just told by the judge? While some important items were addressed, is this really the best way to begin an Opening Statement? Remember not to waste the jury's time. Give the jury a tour of the facts and evidence, not a tour of the courtroom and your legal knowledge. Below, you will see several strong beginnings to Opening Statements.

EXAMPLE 1:

PROSECUTOR: Ladies and gentlemen, my name is _____. I have the honor to represent the people of the State of Wisconsin, and during the course of this trial I will prove to you that Mr. _____, the defendant, deliberately, coldly and following a careful plan, entered a bank, pointed a gun at a teller, and told her he would kill her if she did not empty the cash drawer.

I will call Mrs. _____ to the stand. I will prove to you that this 28-year-old woman had worked in the bank for only 6 months before she found herself staring into the muzzle of this defendant's gun. This gun right here (show the gun). She will tell you of the terror. How she stared into the face of the gunman, looking to see a sign that he would shoot and end her life. I will prove to you that she remembers this man and has good reason to remember him…

— Excerpted from Stern, Herbert, *Trying Cases to Win*, p. 194.

EXAMPLE 2:

PROSECUTOR: Ladies and Gentlemen we are here to do justice in the murder of _____. Nothing can bring _____ back, nothing we can do will return the life that was torn from her so early. We are here, instead, to assign the blame for that horrible and premature death. This is not a pleasant story. The evidence you hear and see in this trial will show you that this is the story of a man in a rage. This is the story of a man scorned. A man who in his anger and humiliation struck out against an innocent woman who only wanted the freedom to go her own way. In his anger—not a heated anger, but a cold and vicious fury—in his fury he violated her life. He slashed her throat, not once but twice.

— Excerpted from Friedman, Philip, *Inadmissible Evidence*, p. 355.

EXAMPLE 3:

PROSECUTOR: "Put out or go to jail." That, essentially, is the choice that the defendant in this case, a uniformed, on-duty, armed police officer gave to 24 year old _____ on January 25th of this year. He had stopped _____ for a traffic violation, a license plate violation…

— Deputy District Attorney Jon Reddin

EXAMPLE 4:

PROSECUTOR: I would like to take you back to January 13 of this year. And the story starts in Chicago where a young man named _____, who lived there with his family and who was a student at Marquette University, was leaving his family home that evening to return to Milwaukee… to return to his studies. And he packed the car with his personal items, including a boom box that he owned.

The story also started in Milwaukee with another young man, _____, who is in court today. That evening he decided to leave his home and, according to what he told the police, to go to the south side. He left his home and took with him a sawed-off Marlin rifle.

— Deputy District Attorney Carol White

9. A Powerful Ending to an Opening Statement

Throughout an Opening Statement, 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.

EXAMPLES OF STRONG FINISHES FOR OPENING STATEMENTS:

"Those are the facts and I intend to prove every fact beyond any reasonable doubt."

"At the conclusion of the evidence in this case, I will ask you to return a verdict of guilty of _____."

[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 is guilty."

". . . So what I ask you to do is to listen closely to the witnesses as they testify, judge their credibility fairly, and make a fair and just judgement at the end of the case. Thank you."

10. The Defense 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 Opening Statements. Object during the defense 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 Opening Statements to avoid educating them.

This will be the first time you will get a clear picture of the defense. Take notes. Write down every word. You can then point out in closing: "What did counsel for the defense promise in his Opening Statement? To avoid any misquotation, I wrote down his words as he said them. He said…"

Also, you want to listen closely because the defense may open the door to otherwise inadmissible evidence in their Opening Statement.

Observe the jury's reaction to the defendant's Opening Statement. Object 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 Mr. _____ is going to present during this trial, not argument."

(Based upon the work of ADA Miriam Falk and ADA Christopher Liegel, with contributions from ADA Mark Williams, DDA Jon Reddin, and DDA Carol White. Wisconsin Domestic Violence Prosecution Manual, 2004.)

12. Direct Examination and the Practical Use of Physical Evidence

1. What the Prosecutor must prove legally in Case-in-Chief
2. The Questioning of Witnesses
3. Leading Questions
4. Refreshing Recollection
5. Past Recollection Recorded
6. Lay Opinions
7. Practical Suggestions for Direct Examination
8. The Use of Physical Evidence
9. Battery – General Questions

1. What the Prosecutor Must Prove Legally in Case-in-Chief

Keep in mind that the State, at a jury trial, must introduce evidence to prove the following:

A. **Date** — when the acts occurred.

B. **Elements** of the crimes (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.

C. **Elements** of the crime (statutory construction) — that these certain acts satisfy the elements of the applicable statute(s) from a statutory construction / interpretation standpoint.

D. **Venue** — that the acts occurred in the proper venue.

E. **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 appropriate.

2. The Questioning of Witnesses

Witness presentation is governed by Wis. Stats. § 906.11, which states:

> **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. Leading Questions

Wis. Stats. § 906.11(3) limits your usage of leading questions from a legal standpoint. However, from a practical standpoint, it is sometimes difficult to direct a witness without some leading questions. Most judges understand. Most judges will provide some reasonable latitude… especially in reference to transitional questions.

There are some instances where leading questions on direct examination are completely appropriate. For instance, leading questions are proper to refresh a witness' testimony. *Jordan v. State*, 93 Wis.2d 449, 287 N.W.2d 509 (1980).

Leading questions may also be utilized with hostile witnesses, a frequent occurrence with DV recanting victims. **Wis. Stats. § 972.09** addresses this situation:

> **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. When called by the defendant, a law enforcement officer who was involved in the seizure of evidence shall be regarded as a hostile witness and may be examined as an adverse witness at any hearing in which the legality of such seizure may properly be raised.

4. Refreshing Recollection

Wis. Stats. § 906.12 Writing used to refresh memory.

If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.

Keep in mind that refreshing recollection is not allowed until foundation is established. For example:

Q: "Did you see Mr. Smith commit the assault?"

A: "I don't remember."

Q: "Do you remember speaking to Officer Jones on March 12, 2003?

[If answer is "Yes," then show the witness the writing (after showing defense counsel the document) and then ask:]

Q: "Do you remember telling Officer Jones that you saw Mr. Smith assault Ms. Smith?"

A: "Yes."

[If answer is: "No, I don't remember," then you must call Officer Jones.]

5. Past Recollection Recorded

Wis. Stats. § 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.

Remember that when you impeach a witness with a past writing, you may only impeach the witness with those portions of the writing that you establish as inconsistent with the testimony.

6. Lay Opinions

Wis. Stats. § 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 rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Wisconsin law allows lay opinions. The sole requirement is that the witness be in a position to give a rationally based perception. Consider the following example:

A: "I heard a bang."

Q: "Do you have an opinion as to what the bang was?"

A: "Yes, it was a gunshot."

Q: "How do you know?"

A: "I've heard the gunshots before and that is what I heard."

7. Practical suggestions for direct examination

The Witness

- Open your case with a strong witness who can make a good impression and pique the jury's interest.
- If the witness, whether police or citizen, has a likeable personality, let them control the examination.
- Let your witness be the "star," asking questions simply and thoroughly. Let the jury make the witness the focus of attention. The jury should not be aware of you during direct examination.
- Know the Court's Pre-trial Rulings. Prepare your case well so that your witness can be diverted from areas you are aware that he or she should not be delving into.

The Examination

- Listen to the answer to your own question. You may have to approach a factual issue differently if you do not receive the information that you seek.
- Be very specific when asking questions. That way, you can control (or direct) the examination.
- Use simple words and do not use compound questions. That will make it simple for the jury.
- Hammer the points of your case again and again through different witnesses. You can never make the important points of your case too many times.
- Go slowly through direct examination with important testimony.

The Negatives in your Case

- Consider calling as few citizens as possible to prove your case. They may invariably start to contradict each other on smaller points. If they testify the exact same way, it may appear contrived to the jury. The defense may accuse the witnesses of collusion.
- Bring out the harmful points to your case. That way, at least you control the way it comes out. You will also not be accused of hiding anything.
- Some things are better ignored. If fingerprints weren't taken at a crime scene, ignore it if you can't answer why the prints were not taken.

Stylistic Points

- If you misstate something or make a mistake, admit it and apologize. The jury enjoys seeing someone humbled in the courtroom.
- Keep an orderly table. The best way is simply to keep a brief outline of the points you wish to establish with the testifying witness.
- Try to get the front table or the table closest to the jury. This often prevents the jury from looking constantly at the defendant. It also puts you in a position where the jury can hear you and will focus on you.
- If necessary, stand up during direct examination. Standing is a position of authority. If you do stand, try not to rely on notes constantly. (Be aware of your own jurisdiction's local court rules.)

Physical Evidence and Demonstrative Evidence

- Use specific testimony in conjunction with visual aids, demonstrative evidence and writings.
- Use show and tell. Try to use as much physical evidence as you can and show pictures.

Completion of Testimony

- In a trial without a victim, try to call a relative or someone who cares about the victim in order to humanize the victim. For instance, in a murder trial, it would be beneficial for the jury to see the terrible pain of loss suffered by family and friends.
- Finish strong. If possible, show the jury the suffering of the victim… they will know their purpose is to search for the truth and seek justice.
- Never "sandbag" evidence for rebuttal. If the evidence is useful, you may be unable to use it at all.

8. The Use of Physical Evidence

Jurors learn more with their eyes than their ears. The effective use of demonstrative or physical evidence is unparalleled. Carefully consider when to use your exhibits. While it normally is more effective to use an exhibit as a witness is testifying about it, sometimes it is better to use the evidence for demonstrative effect during the opening statement.

Always look at all the physical evidence in the possession of law enforcement. Decide before trial what evidence you are going to use and how you are going to use it. Make decisions early on as to what evidence should be tested or sent to the crime lab (to avoid unnecessary adjournments later on). For the admissibility standard for demonstrative evidence, *see Ellsworth v. Schelbrock*, 229 Wis.2d 542, 564, 600 N.W.2d 247 (Ct. App. 1999).

Photographs are Worth a Thousand Words

- Get blow-ups of all your pertinent pictures.
- Have photographs made as soon as possible of injuries that will heal with time.
- Have photographs made where specific evidence is located, like a blood trail.
- Enlarge the booking photograph of the defendant to make the comparisons between appearance at the time of the offense and the day of trial.
- Pictures of the defendant's injuries, wounds or lack thereof are all relevant to show the jury when proving intent, causation or combating self-defense.
- Have large photographs made concerning any tests that involve comparisons between evidence such as fingerprints, tool marks, shoeprints, etc.

Exhibits and Demonstrations

- Make your **EXHIBIT LIST** before trial.
- **WEAPONS.** If the defendant used a weapon, display it repeatedly. Have police officers or experts show the jury how the weapon functions. Allow the jury to handle the weapon. Have the jurors pull the trigger on a gun in order to show them that it takes a mental process and pressure to pull the trigger.
- Use large **DIAGRAMS** whenever possible to highlight timelines, phone or bank records, burdens of proof on NGI cases, serology or DNA results. Make smaller copies for each juror.
- **CHARTS** – *State v. Olson*, 217 Wis.2d 730, 579 N.W.2d 802 (Ct. App. 1998). See "The Use of Charts at Trial" section of this manual for more information.
- Use **MAPS** (easily accessible from the internet) to document flight. Show the route of the flight to the jury.
- Make **TRANSCRIPTS** of any **RECORDINGS**. Give copies to jurors so that they can follow along as the recording is played in court.
- **EXPERIMENTS**. If you plan an in-court experiment (like having the defendant try on gloves or shoes), make sure the experiment works. Sometimes experiments can help jurors understand, for instance, observation distances or the time it takes to travel a certain distance or perform a specific act.

9. Battery – General Questions

A. INTRODUCTORY QUESTIONS FOR A COOPERATIVE VICTIM.

1. Name?
2. Address?
3. Occupation?

B. IDENTIFICATION OF DEFENDANT.

1. Do you know (name of defendant)?
2. How do you know (name of defendant)? <nature of relationship>
3. How long have you known (name of defendant)?
4. Do you see him in court today?
5. Please IDENTIFY him for the record (Let the record reflect…)

C. NATURE OF RELATIONSHIP.

1. What is the nature of your relationship with the defendant?
2. At the time of the offense . . .
3. At the present time . . .

D. FACTS OF THE OFFENSE.

Date; Time; Place; Venue

1. Directing your attention to (date of offense), do you remember that date?
2. Why is that date memorable to you?
3. Where were you on that date? Address: _____
4. <Establish Venue> Is that address in the city/county of _____?
5. Who lives at the address? Whose apartment/home – victim or defendant?
6. At what time did your interaction with the defendant occur?

Preface to Physical Contact

1. Let's start at the beginning of your interaction with the defendant. . . Did you have a conversation with the defendant?
2. Describe your conversation… What was said? Did conversation escalate into an argument at any time?
3. Do you recall where you were standing? Where was the defendant?

4. [OPTIONAL: Did you have an opportunity to observe how the defendant was acting towards you? Did you make any assessments of the defendant's emotional state? How did the defendant appear to you? What was his emotional state? Angry? Upset? Jealous? Sad or depressed? Scared? Lonely? Sullen? What led you to conclude that the defendant was feeling that way? Have you seen the defendant like that before?… *careful: no prior bad acts*]
5. Describe some of the physical characteristics that the defendant was displaying? Physically: Voice tone and inflection? Eyes? Posture? Sitting? Standing? What did his face look like? What was he doing with his hands – pointing? fists?
6. What were you feeling based upon what you saw?
7. Was the defendant drunk or high on drugs? Describe how you could tell? Smell? Eyes bloodshot/glassy? Slurring words? Stumbling? Swaying? Other signs of intoxication?
8. Directing your attention to the conversation/verbal argument, do you recall what was said specifically? Do you remember any remarks made by the defendant?
9. How did those remarks make you feel? Angry? Hurt? Scared? Demeaned? Ridiculed? Harassed? Put down? Sad? Lonely? Used? Manipulated? Threatened?

Physical Contact

1. How did you come into physical contact with the defendant?
2. Who initiated contact? How did that happen?
3. Did you say anything to the defendant? Did the defendant say anything to you as you were being (punched, choked, kicked, slapped, scratched, etc.)?
4. Who threw the first punch?
5. Did the defendant use fists?
6. Where did the defendant hit you?
7. Did the defendant kick you? Where? How many times were you kicked? What kind of shoes was the defendant wearing?
8. Did you ever try to protect yourself? Did you hit back? Cry for help? Protest?
9. Did the defendant use or threaten to use any weapons? Describe them. How did he use them or threaten to use them?
10. Did the defendant say anything more to you at this point? How did that make you feel?
11. What was the defendant's state of mind at this point?

E. INJURIES

1. Were you injured in any way?
2. Describe injuries… where on body?
3. What physical signs did you have? Blood? Bruises (when did they show)? Scratches? Marks (coloring)? Swelling? Black and blue eye? Broken skin?
4. PHOTOS — establish foundation: were photos taken? When? By whom? Where? Have you seen the photos?

   [Mark; Identify; Are photos a fair representation of what you looked like at the time of the taking of the photo?; Ask witness to point out specific qualities of photos; Move into evidence; Publish to the jury.]
5. Did you seek further medical attention? Where – hospital or doctor office?

F. CONSENT

1. Did you ever – at anytime – give the defendant permission to (hit/choke/push/slap/punch/slap/kick/beat/touch) you?
2. Looking back – can you even remotely think of anything that you said or did that could have possibly led the defendant to believe that he had the right to beat you up?
3. Did you at any time touch the defendant? Defend yourself?
4. Did any other witnesses see what happened? Did they see the actual battery?

G. THE AFTERMATH – CONSEQUENCES SUFFERED BY VICTIM

(*The following questions depend upon relevancy*.)

1. Did you have to take time off of work? Did you lose your job?
2. Did you have to move?
3. Did you obtain a restraining order?
4. Change locks on the doors for fear of the defendant returning in the future?
5. Counseling? Divorce? Consequences to family, children?

(Written by ADA Mark Williams and ADA Paul Dedinsky, with contributions from Chief DDA Bob Donohoo. Wisconsin Domestic Violence Prosecution Manual, 2004.)

13. The Use of Charts in Trial

1. Wis. Stats. § 910.06 Summaries.
2. Wis. Stats. § 906.11(1) Mode and Order of Interrogation and Presentation.
3. *State v. Olson*
   a. The Differences between Summary Evidence and Pedagogical Devices
   b. Defense Counsel's Opportunity to Use Summary Evidence or Pedagogical Devices
   c. The Interplay of Wis. Stats. § 910.06 and Wis. Stats. § 906.11
   d. Jury Instructions

1. Wis. Stats. § 910.06 Summaries.

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.

2. Wis. Stats. § 906.11(1) 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 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.

3. *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 at *Olson*, 217 Wis.2d at 737, 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 (2nd 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).

THE DIFFERENCES BETWEEN SUMMARY EVIDENCE AND PEDAGOGICAL DEVICES

The Court of Appeals then discussed the differences between summary exhibits and pedagogical devices at *Olson*, 217 Wis.2d at 739-740:

> Thus, although 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.

In footnote 3 of the opinion, the Wisconsin Court of Appeals suggested further information could be obtained from: Emilia A. Quesada, Comment, *Summarizing Prior Witness Testimony: Admissible Evidence, Pedagogical Device, or Violation of the Federal Rules of Evidence*, 24 Fla. St. U.L. Rev. 161 (1996). *Olson*, 217 Wis.2d at 745.

DEFENSE COUNSEL'S OPPORTUNITY TO USE SUMMARY EVIDENCE OR PEDAGOGICAL DEVICES

The Wisconsin Court of Appeals then discussed the ability of defense counsel at trial to also add to, subtract, delete, correct, and otherwise edit the submission of the summary exhibit or pedagogical device introduced by the State at *Olson*, 217 Wis.2d at 741:

> 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 Johnson*, 54 F.3d at 1160 ("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.").

THE INTERPLAY OF WIS. STATS. § 910.06 AND WIS. STATS. § 906.11

In its conclusions, the Wisconsin Court of Appeals reiterated its conclusion that the trial court has discretion to admit summary exhibits under Wis. Stats. § 910.06 and pedagogical devices under Wis. Stats. § 906.11 at *Olson*, 217 Wis.2d at 742:

> Accordingly, we 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).

JURY INSTRUCTIONS

The Wisconsin Court of Appeals discussed the Jury Instructions given by the trial court with approval in stating the following at *Olson*, 217 Wis.2d at 742-744:

> 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. It even implicitly referred to the manner in which the prosecutor prepared the chart, thus allowing the jurors to correct for any inaccuracies they perceived. Standing alone, the instruction properly guided the jury's consideration of the chart. In combination with the other accurate instructions, it left no "reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution."

In footnote 4 of the opinion, *Olson*, 217 Wis.2d at 745, the Wisconsin Court of Appeals cited *United States v. Johnson*, 54 F.3d 1150, 1159 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995), where the court commented:

> [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.

In footnote 6 of the opinion, *Olson*, 217 Wis.2d at 745, the Wisconsin Court of Appeals suggested that trial courts give limiting instructions to jurors who 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 (2nd 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.")

(Wisconsin Domestic Violence Prosecution Manual, 2004.)

14. 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. Preparing your Case for Trial
5. Voir Dire
6. Sample Voir Dire Questions
7. Direct Examination of the Victim
8. Additional Applicable Rules of Evidence
9. Recanting Themes
10. Post-Incident Actions of the Victim
11. Legal Challenges
12. Prosecutor's Demeanor
13. Sample Direct Examination Questions of a DV Recanting Victim

1. Introduction

The phenomenon of the "Recanting Victim" frustrates every DV prosecutor. If you are a new prosecutor to Domestic Violence, it will not be long before you encounter the DV victim who now insists that she was not abused …and that the statements attributed to her in the police reports are incorrect, inaccurate or simply "lies."

Generally, 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) Present evidence of the victim's testimony; 2) Introduce any and all corroboration, if such evidence exists; 3) Argue credibility, truthfulness and reliability.

However, when a DV victim recants, that strategy is turned upside-down. The prosecution's key witness now appears to be the key witness for the defendant.

Domestic Violence is the only area of criminal law where, with some degree of regularity, the witness' testimony suddenly changes after the police complete their investigation. While frustrating, it is a reality that repeats itself with some frequency. This chapter was designed to help prosecutors cope with the "recanting" DV victim.

2. The Recanting Victim

How do prosecutors deal with this challenging situation? A conscientious prosecutor must first consider the possibility that the DV 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 DV victim's new version is not the truth. Usually, a DV 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 to "cut off the money" unless the victim "drops the charges."

Worse yet, the defendant may have threatened to harm the victim, children or other family members. 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).

As a matter of sound public policy, we should not – and can not – 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 not move to dismiss a criminal case simply because a victim recants.

In fact, we can easily reason 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 your prosecution of a DV 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 in the District Attorney's office.

As prosecutors, we are interested in curbing future manipulative 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 still meet the "beyond a reasonable doubt" standard of proof. Opposing counsel may vigorously cross-examine or present evidence to destroy the State's case.

Yet… perhaps somewhat surprisingly… prosecutors frequently succeed in building the "Recanting Victim" case. Why? Usually, 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 materials (evidence) to build a case that withstands all attempts to knock it down.

Remember… Recanting stories given by victims do not arise from the truth. Rarely does corroboration exist to support the recantation. Recantations usually lack any firm foundation. Recantations typically tumble like a house of cards when subjected to attack.

When a DV 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.

4. Preparing your Case for Trial

Trials involving recanting victims are particularly unique at two stages:

A. Voir Dire

B. 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.

5. Voir Dire

- Voir Dire is an *opportunity* to educate the jury about Domestic Violence…
- 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 prosecution perspective. This is especially true in cases involving recanting victims.
- Twelve people are about to hear a criminal case in which the primary witness is going to testify that no crime occurred.
- Voir Dire is an *opportunity* to educate the jury about Domestic Violence…

As a prosecutor, you do not want to first address a Recantation in your Opening Statement. If you do, it's too late. A DV Recantation must be addressed at the earliest possible point in the trial – Voir Dire.

6. Sample Voir Dire Questions

During Voir Dire in "Recanting Victim" cases, probe the opinions of potential jurors. Below are some suggestions. (See the Voir Dire chapter of this manual for more sample questions and illustrations.)

- **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 money judgment?**
- **How many of you believe that the State has a responsibility to prosecute people who commit domestic violence crimes, even when the victim does not want the State to prosecute?**
- **How many people here think that if a domestic violence 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 her batterer even after he has battered her?**
- **How many people here think that a victim might feel that she cannot testify against her 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 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 has been charged with, is there anybody here who will vote "not guilty" solely because the victim testifies in support of the defendant?**

7. Direct Examination of the Victim

During direct examination of a recanting victim, prosecutors are placed in the uncomfortable position of cross-examining their primary witness.

THE LAW

Testimony from a recanting victim during the State's case-in-chief is useless unless the 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.

1) Wis. Stats. § 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.

2) 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, 275 N.W.2d 180 (Ct. App. 1979). Thus, once the victim makes a statement that is different from one that she made previously, the prior statement can be introduced as substantive evidence of guilt.

3) An obvious potential loophole to this rule is for a victim to simply state that 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." 74 Wis. 2d at 436.

Often, the "Power and Control" circumstances surrounding many DV relationships is enough for the prosecution to expose a "feigned" lack of memory. Consider that the victim may have called the police or, at the least, spoken with police officers, or the fact that her husband or boyfriend was arrested and taken to jail. If a trial is held within a few months of the DV incident, it is implausible that the victim would have no recall. To the contrary, the events leading up to an explosive DV episode 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, 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 to the judge that her lack of memory is feigned.

8. Additional Applicable Rules of Evidence

Wis. Stats. § 906.07 as to Impeachment.

"The credibility of a witness may be attacked by any party, including the party calling the witness."

Wis. Stats. § 906.11(3) as to Leading Questions.

Consider requesting permission to use leading questions for a witness deemed "hostile."

Wis. Stats. § 906.13 as to Prior Statements of Witnesses.

9. Recanting Themes

THEORY: To effectively prosecute these cases, first learn to recognize the reasons why DV victims 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.

FACTS OF THE CASE: Know the facts and circumstances of the case. Ask yourself why the victim is "protecting" her abuser. Use the facts to meld with theory. Develop case strategy and theme. Prepare yourself to present your case to a jury.

Sample Themes Applicable to Many Recanting Victim Cases::

1. **Marriage** – The victim may feel that it is her duty or responsibility to keep their marriage together by trying harder to please him. Pressure to maintain loyalty to the marriage may come from within herself or from outside influences… perhaps even her own immediate family members or system of "support." For many victims, avoiding the potential humiliation and embarrassment of a failed marriage motivates the victim towards loyalty for even an especially violent and abusive spouse.

2. **Children** – The victim may feel that 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 their father again. Childcare can be a serious issue.

3. **Financial Dependence** – Many abusers financially support the family. Where the victim and defendant have been together for a significant period and the victim has not worked outside of the home, the victim may feel helpless to support herself financially. She may fear that she lacks necessary job skills to support herself. Moreover, even if she stays with the defendant, she may fear that he may lose his job if he is convicted of a crime.

4. **Safety** – Though counterintuitive, a victim may have made the determination that it is safer for her to stay with her abuser. "Separation Violence" is the phenomenon where some victims experience the most danger. The victim may be more comfortable in the relationship because she believes that she can sense when he will become violent. She reasons that her "knowing" can help protect her and her children. The victim may also fear retaliation against her or her children if she leaves or testifies against her abuser. This fear may even be the result of veiled or overt threats made by the defendant.

Plenty of other themes exist in support of why a victim would change her account between the incident and the trial. Incorporate these and any other applicable themes into your direct examination and closing argument.

10. Post-incident Actions of the Victim

In many cases, the victim's post-incident actions are not consistent with someone who knows that a loved family member is being wrongly prosecuted. Many times victims only have contact with the police or district attorney's office when law enforcement initiates the contact. Expose inaction.

EXAMPLES:

- Why did you allow an innocent person to be prosecuted to this extent?
- Why didn't you initiate earlier attempts to stop the case from proceeding forward?

Because some victims will attempt to recant, Victim/Witness Specialists generally will not want to discuss case facts with the victim. Instead, the V/W Specialist should direct the victim to recant to law enforcement. If a victim does recant to a V/W Specialist, that V/W Specialist may be called as a witness later. Should that occur, turn your V/W Specialist into your expert witness and explain why recantations so often occur in DV cases. If a victim gives inconsistent recantations, expose the differing versions. For instance, a victim may blame her injury on a "fall in the shower" when talking to your V/W Specialist, while testifying later that she "slipped on the ice."

11. Legal Challenges

When the alleged victim of a DV dispute recants his or her story on the stand, it is for the trier of fact to assess the credibility of the victim-witness 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 Arrest. 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 Arrest.

The defendant appealed. The defendant's argument? Since the testimony by all of the witnesses was conflicting, the trial court could not prove the defendant guilty beyond a reasonable doubt. The Court of Appeals upheld the conviction, stating at *Pulcine, unpublished*, 169 Wis.2d 466, 487 N.W.2d 660:

> 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).

THE RULE: Weight and credibility of evidence is exclusively decided by the trier of fact. Deference will be shown to the trier of fact unless the verdict reached is completely without merit.

In another unpublished opinion, *State v. Marshall, unpublished*, 204 Wis.2d 279, 554 N.W.2d 685 (1996), the court of appeals reversed the defendant's guilty verdict. The prosecutor argued to the jury that the victim's recant of her accusations occurred because she was a victim of domestic violence… without any supporting evidence in the record.

THE RULE: Get an expert opinion or some type of evidence. *State v. Bednarz*, 179 Wis.2d 460, 507 N.W.2d 168 (Ct. App. 1993) allowed an expert to testify on the cycle of violence:

1. **"Tension-building stage" in which a 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 her story in an attempt to exonerate the abuser.**

***Bednarz*, 179 Wis.2d at 463-464, 506 N.W.2d at 170.).**

12. Prosecutor's Demeanor

It is important to remember to remain calm and collected when questioning a recanting DV victim. If a prosecutor appears frustrated or upset, for even an instant, the defendant's violent actions may "appear" validated. You want to avoid any potential "victim blaming" arguments from the defense.

The more effective response: Express understanding.

Remember, you are attempting to persuade the jury that the victim currently suffers through a "power and control" DV relationship. You understand. You expect recanting reactions from DV victims. It happens all the time in DV cases. You don't like it… but you understand. You sympathize, but you move forward with your case because the law has been broken, and the defendant needs to be held accountable.

Ideally, the jury should perceive that you understand the victim's predicament. Any perception of frustration on your part will only add credence to "victim blaming" defense arguments.

(Written by ADA Jeremy Resar. Edited by ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004. Thanks to the American Prosecutors Research Institute (APRI), "Victim Direct and Cross," http://www.ndaa.org/apri/.)

13. Sample Direct Examination Questions of DV 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 Victims" 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, 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 "The Violence Stops Here", by Charles G. Reynard (January, 1999). Both works are excellent outside resources.

Establish the Relationship:

- The man seated at the table in front of you is your husband? Boyfriend? Father of your child?
- (Establish IDENTITY. Let the record reflect…)
- When did you get married?
- You have known him for *x* years?

Establishing the Familial Relationships and Identifying Family Pressure:

- You are close with members of the defendant's family?
- You respect his family? Get along with his mother? Father?
- Have you discussed this case with any members of his family?
- Have they told you that you should "drop the charges?"
- How did you get to court today?
- Were (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 you were 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:

- You have children? Any children with the defendant?
- What are their names?
- Ages?
- Do they miss their father? Love their father?

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 make more money than you?
- Are you worried he might lose his job if he is convicted?
- Do you have a mortgage payment each month?
- Who is responsible for making the mortgage 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?
- Do you take care of the children and the house?
- Does the defendant take care of the finances?
- 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)):

- 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 voice? Throw things? Break things? Get really angry? Scare you?
- What usually happens after an argument? How long after argument do you normally make up?
- Does the defendant apologize? Does he sometimes blame you for starting the fight?
- So… he has a hard time saying he is sorry?
- Does the defendant admit when he was wrong?
- So… he has a hard time admitting when he was wrong?

The Incident:

- You had an argument with the defendant on date? That occurred at _____ (establish VENUE).
- Who was present during this argument? You were the only two present at the time?
- Kids present?
- Defendant intoxicated? You intoxicated? What was he/you drinking?
- He was mad?
- Raised his voice?
- Got so upset that at one point he _____ (describe battery: hit, punched, pushed, strangled, kicked, 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 knows 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?
- You called immediately after the defendant hit you?
- Where was the defendant while you were on the phone with the 911 operator?
- Could he see 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 her if it would refresh her recollection if she heard the tape. Then play the tape.)

Police Officer Investigation:

- Knowing that they were there to help you, when the officers arrived, you told them _____ (describe battery)?
- Defendant was in another room with another officer when you told them what occurred?
- You knew that the police were going to write down what you told them, right?
- Defendant was in another room with another police officer when you told them what happened?
- You told the police that you had pain to your _____ (describe battery)?
- You were also injured to 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 PHOTOGRAPHS, show the photos to the victim: Recognize these photos?
  - Taken by Officer _____ on _____date?
  - This is how you looked on _____ date?
- Remember telling the police officer that you received those injuries from the defendant…
- So your testimony now is that you don't remember?
- OR that you never said that and the officer is lying?
- OR that you lied to the officer?
- OR that you received the injuries prior to that time?

IF VICTIM says she LIED, explore further:

- You never told the police officer that you started the fight? OR that you hit the defendant first?
- You never told the police not to arrest him that day?
- You never told the police that they had the wrong person in handcuffs?
- You wanted the defendant arrested so that he wouldn't hurt you anymore, didn't you?
- You signed the _____ (Police Arrest report; DV Supplementary Report; Victim Statement form, etc.)?
- You asked for information about Temporary Restraining Orders and Injunction Orders?
- You told the police where they could go and find the defendant?

DIAGRAMS OF THE CRIME SCENE:

Occasionally, police officers ask victims to draw "rough" sketches of the apartment or residence where the DV incident occurred. If you are fortunate to have evidence of this nature from your police investigation, utilize it. Examine the witness thoroughly about where the police officer, or even the victim herself, marked the diagram.

Many jurisdictions currently do not receive diagrams during DV police investigations. Train your officers to start utilizing diagrams with regularity. The "rough" sketches need not be drawn to scale. Police officers are used to drawing diagrams for car accident investigations. There is no reason why DV incidents can not receive the same attention.

Train your police officers to have DV victims mark "rough" drawings/sketches of the layout of the residence. If the victim tells the officer 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 a different place on the diagram where she was kicked (e.g. the kitchen). Finally, she can mark yet a different room on the diagram where she was strangled (e.g. the living room).

During examination of the "Recanting DV Victim," have her explain the differences between her testimony and the rough drawing of the crime scene.

Prior Consistent Statements:

- You spoke with a Victim/Witness Specialist from the District Attorney's Office _____ days after the incident?
- You told her what happened?
- You told her about your injuries?
- You remember telling her: _____
- And that was while the defendant was still in jail after being arrested?

(note: tread carefully regarding confinement issues)?

- You never told 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, you never asked 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?
- Never called 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 _____ days?

OR:

- And the phone conversation (recantation) to the Victim/ Witness Specialist occurred after the defendant was released from jail and returned home? You were back living together when you called?
- Was he at home with you while you were talking on the phone?
- Did he 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?
- You took him back?
- Did he intimidate you?
- Did he harass you?
- Did he promise you that he would change?
- Was that before or after he learned of the pending charges against him?
- Did the defendant call you from jail? When? How many times?
- Was he angry at you? Did he apologize?
- Did he tell you to drop the charges? Did he ask you to get him out of jail?
- Did he tell you to say that you started the fight? Did he tell you to say that you hit him first?
- As you testify today, the defendant wrongly sat in jail for something you now say he did not really do, but he never called you from jail?
- He never got angry with you?
- He never told you to get the police or prosecutor to drop these "false" charges against him???

Questions Relating to the Pending Charges:

- On the same night as the incident, the defendant was arrested for battering you, correct?
- You knew that he was charged with battery?
- When did you find out? How? You posted bail for the defendant?
- You received a letter from the District Attorney's office (or Victim/Witness Specialists) on date?
- That letter contains telephone numbers of Victim/Witness Specialists at the District Attorney's office?
- Certainly at that time, 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 man 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 with the District Attorney's office contacted you? And that was *x* days/weeks/months after you knew that this supposed innocent man was charged?
- Today you've testified . . . 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 his 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 was in jail?
- When he came home from jail, what did the defendant say to you?
- Did the defendant blame you? Apologize to you? Admit that he 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?
- You would rather 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?

Attitudes and Feelings about Testifying:

- Are you reluctant to testify today?
- Why? Comfortable with the court process?
- Has the defendant threatened you or intimidated you in any way?
- Have his family or friends threatened or intimidated you?
- Did he tell you what to say today?
- Did you tell him 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 nervous 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 him? But you want him to learn to control his anger? To stop hurting you?

15a. DV Prosecutions Without Victims: The Excited Utterance Exception to Hearsay

1. Introduction
2. The Law of Excited Utterance
3. The Excited Utterance Witness
4. Standard of Review
5. A "Startling" Event
6. Still Under the Stress of the Event
7. A "Statement which relates to…"
8. Excited Utterances and Children
9. The Confrontation Clause
10. Other Hearsay Exceptions
11. Practical Trial Strategy
12. DV Checklist for Prosecutors
13. Sample Questions for Excited Utterance Hearings/Trials

1. Introduction

Prosecutions take their toll on DV victims. 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 DV victims during the course of a prosecution.

Over time, DV victims experience enormous stress. Lots of DV victims 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 exponentially more important for DV prosecutors and the police officers who investigate and collect evidence.

We prosecute homicides without the testimony of victims. Can we prosecute DV cases without the presence of victims? The answer is yes. Across the nation, DV prosecutors now regularly pursue cases without the testimony of victims… based solely on the remaining existing evidence.

2. The Law of Excited Utterance

The most applicable exception to the hearsay rule in DV prosecutions is the Excited Utterance exception. Wis. Stats. § 908.03(2) states:

> **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. 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 in the absence of victims. The burdens of the prosecution shift to the State, rather than the abused. 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 evidence. *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 caused by the event or condition.

3. The Excited Utterance Witness

Analysis begins with the witness who heard the Excited Utterance. A responding police officer or 911 operator may be your Excited Utterance witness. Neighbors or family members hear Excited Utterances during (or immediately following) DV altercations as well. Other responders like paramedics or medical personnel might witness an Excited Utterance.

Often, the witness speaks with the declarant (usually the victim) in person and learns about the stressful event through the declaration. Other family members – even young children – can be declarants as well.

Keep in mind that 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. Stats. § 908.03(2). *Martinez*, 150 Wis.2d at 78. While these statements should be admitted by trial courts, expect a defense attack as to the credibility of the statement made by an intoxicated person later at trial.

4. Standard of Review

Upon completion of your analysis of the Exited Utterance witness's perspective, suppose you determine the presence of a valid Excited Utterance. The next step is approaching admissibility before the court.

The trial court must find that the foundational elements are present for the Excited Utterance statement by a **preponderance of the evidence**.

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 admissibility 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).

Discretion contemplates 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." *See In 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." *See 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).

5. 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* (2nd 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).

DV offenses, by their very nature, are startling events. Even the most minor DV charge, such as Disorderly Conduct, inherently requires that the act, at a minimum, tend to cause or provoke a disturbance.

Reasonable defense attorneys will concede that DV incidents qualify as startling events. Physical pain, visible injuries, emotional trauma and/or threats accompany DV crimes. Conditions such as these are easily construed as startling events.

Much legal support exists to deem homicides as startling events. Examples of other types of assaultive behavior as "startling" include:

1) Domestic Violence Stabbing. *See State v. LaBarge*, 74 Wis.2d 327, 246 N.W.2d 794 (1976) and *State v. Patino*, 177 Wis.2d 348, 502 N.W.2d 601 (Ct. App. 1993).
2) Threatening Phone Calls. *See Muller v. State*, 94 Wis.2d 450, 289 N.W.2d 570 (1980).
3) Domestic Violence Threats. *See State v. Teynor*, 141 Wis. 2d 187, 414 N.W.2d 76 (1987).
4) 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).
5) 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).

Proof of a "startling" event rarely prohibits admissibility for Excited Utterances in DV 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."

6. 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." 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 6 John Henry Wigmore*, Evidence Section 1747, at 195 (J. Chadbourn rev. 1976).

"Time for reflective thought" is precisely what the hearsay rule is supposed to prevent. When a declarant has too much time for the potential fabrication of facts, the statement itself is unreliable and thus, inadmissible.

"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 indications are that he or she is still under shock of injuries or other stress due to a "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).

EXAMPLE:

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.

EXAMPLE:

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).

7. 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* (2nd 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.

EXAMPLE:

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 incident. The court found that reasonable competing inferences could easily be drawn. *See State v. 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 breadth of the statement itself. Courts have refused to mandate that statements must somehow describe a "startling" event. All that is required: the statement must relate to the "startling" event.

EXAMPLE:

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. Stats. § 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, broach all redaction stipulations with caution, obtaining court approval first.

8. 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) and *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).

EXAMPLE:

In *State v. Lindberg*, 175 Wis.2d 332, 500 N.W.2d 322 (Ct. App. 1993), a 3-year old victim's out of court statements made at the hospital while being examined were held to be admissible as an Excited Utterance. The *Lindberg* court explained that "[s]tatements 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." *State v. Lindberg*, 175 Wis.2d at 343.

EXAMPLE:

In *State v. Moats*, 156 Wis.2d 74, 457 N.W.2d 299 (1990), the court allowed a 5-year old child a time lag of about 7-10 days between the time of last sexual assault incident and the time the victim told mother.

EXAMPLE:

In *State v. Padilla*, 110 Wis.2d 414, 329 N.W.2d 263 (Ct. App. 1982), a three day time period between alleged assault and utterance of the statement was held admissible under the Excited Utterance exception because of the court's recognition of prolonged stress.

EXAMPLE:

In *Bertrang v. State*, 50 Wis.2d 702, 184 N.W.2d 867 (1971), a 9-year old victim made a statement one day after the sexual assault.

EXAMPLE:

In *Love v. State*, 64 Wis.2d 432, 219 N.W.2d 294 (1974), a 3 1/2-year old sexual assault victim made a statement the day following the incident.

9. The Confrontation Clause

A common defense objection: the assertion that the Confrontation Clause has been violated under State and Federal law. These objections rarely pass muster.

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.

The United States Supreme Court held that "spontaneous declarations" [Excited Utterances] are made in contexts that provide "substantial guarantees of their trustworthiness" and that the Excited Utterance exception, as embodied in § 803(2) of the Federal Rules of Evidence, is firmly rooted for Confrontation purposes. *See White v. Illinois*, 502 U.S. 346, 355-356, 112 S.Ct. 736 (1992). [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. *White v. Illinois*, 502 U.S. at 357, *citing United States v. Wright*, 497 U.S. 805, 820-821, 110 S.Ct. 3139 (1990).

The Wisconsin Supreme Court faced a confrontation clause analysis in *State v. Weed*, 2003 WI 85, 263 Wis.2d 434, 446-447, 666 N.W.2d 485, 491, in the context of the hearsay exception pertaining to a Statement of Recent Perception. The court first set out the standards for the admission of a hearsay statement and its standard of review relating to confrontation analysis:

> A circuit court's decision regarding the admissibility of a hearsay statement is within the discretion of the circuit court. *Christensen v. Econ. Fire & Cas. Co.*, 77 Wis. 2d 50, 55, 252 N.W.2d 81 (1977). The circuit court has broad discretion in determining the relevance and admissibility of evidence and its decision will not be reversed absent an erroneous exercise of discretion. *State v. Oberlander*, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). This court will uphold a circuit court's decision to admit or exclude evidence if the court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a rational process. *Martindale v. Ripp*, 2001 WI 113, P28, 246 Wis. 2d 67, 629 N.W.2d 698.
>
> Whether admission of a hearsay statement violates a defendant's right to confrontation presents a question of law that this court reviews de novo. *Lilly v. Virginia*, 527 U.S. 116, 136-37, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999).

In *State v. Weed*, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485, the court continued:

> We next examine whether admitting the statement violated Weed's right to confrontation. The right to confront a witness is guaranteed by Article 1, Section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. The threshold question in examining whether a defendant's right to confrontation is violated by the admission of hearsay evidence is whether that evidence is admissible under the rules of evidence. *State v. Bauer*, 109 Wis. 2d 204, 210, 325 N.W.2d 857 (1982). Only after it is established that evidence is admissible pursuant to a hearsay exception is it necessary to consider the confrontation clause. *Id*. We have stated that the "overarching objective of the right of confrontation is to promote the reliability of the truth-determining process in a criminal trial." *State v. Thomas*, 144 Wis. 2d 876, 887, 425 N.W.2d 641 (1988) (*citing United States v. Inadi*, 475 U.S. 387, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986)). Thus, the right to confrontation has a similar purpose as the hearsay rule and its exceptions: "to ensure that the trier of fact has a satisfactory basis for evaluating the truthfulness of the evidence admitted in a criminal case." *State v. Tomlinson*, 2002 WI 91, P40, 254 Wis. 2d 502, 648 N.W.2d 367 (*citing*

Bauer, 109 Wis. 2d at 210). Although similar in purpose, the admissibility of evidence pursuant to a hearsay exception is insufficient to ensure compliance with a defendant's constitutional right to confrontation. *Id*. (*citing Ohio v. Roberts*, 448 U.S. 56, 63, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)).

The United States Supreme Court has established a two-step approach for analyzing the admission of hearsay evidence under the confrontation clause. *Roberts*, 448 U.S. at 65-66. First, the witness must be "unavailable" for trial. *Id*. Second, the statement of the unavailable witness must bear some "indicia of reliability." *Id*. at 65 (*quoting Dutton v. Evans*, 400 U.S. 74, 89, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970)). With respect to the second prong, "reliability is shown "if the evidence falls within a firmly rooted hearsay exception" or "upon a showing of particularized guarantees of trustworthiness"." *State v. Moore*, 82 Haw. 202, 921 P.2d 122, 144 (Haw. 1996) (*quoting State v. Ortiz*, 74 Haw. 343, 845 P.2d 547, 555 (Haw. 1993), quoting in turn *Roberts*, 448 U.S. at 66).

It is undisputed that Michael was "unavailable" to testify due to his death; therefore, we next turn to whether his statement falls within a firmly rooted hearsay exception or if the statement is supported by particularized guarantees of trustworthiness. A hearsay exception is "firmly rooted" if "in light of 'longstanding judicial and legislative experience,' it 'rests [on] such [a] solid foundation that admission of virtually any evidence within [it] comports with the substance of the constitutional protection'." *Lilly*, 527 U.S. at 126 (*quoting Idaho v. Wright*, 497 U.S. 805, 817, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990); *Roberts*, 448 U.S. at 66). In *Lilly*, the U.S. Supreme Court noted that the hearsay exception for spontaneous declarations is "firmly rooted" because it is at least 200 years old and is widely accepted among the states. *Id*. In contrast, the recent perception exception has not been deemed firmly rooted since it is a relatively recent exception that has only been adopted by a few states, and is not based in the common law. See, e.g., *State v. Ross*, 1996 NMSC 31, 919 P.2d 1080, 1089, 122 N.M. 15 (N.M. 1996). Assuming that the recent perception exception is not firmly rooted, we next consider whether Michael's statement was supported by particularized guarantees of trustworthiness. Even if a hearsay exception is not firmly rooted, it may satisfy a defendant's right to confrontation if the hearsay statement has particularized guarantees of trustworthiness. See, e.g., *State v. Bintz*, 2002 WI App 204, 257 Wis. 2d 177, 650 N.W.2d 913; *State v. Murillo*, 2001 WI App 11, 240 Wis. 2d 666, 623 N.W.2d 187.

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." *Wright*, 497 U.S. at 819. 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. *Id*. at 821. 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…." *Id*. at 820. In other words, we examine whether the statement is "so trustworthy that adversarial testing would add little to its reliability." *Id*. at 821.

The Confrontation Clause is not to be read literally to eliminate the use of all out-of-court statements for the truth of the matter asserted in a criminal trial. The right of confrontation is not an absolute right. Thus, hearsay evidence may be admitted without causing a confrontation problem in some circumstances. *State v. Bintz*, 2002 WI APP 204, 257 Wis.2d 177, 650 N.W.2d 913.

"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). *See also Muller v. State*, 94 Wis.2d 450, 464, 289 N.W.2d 570 (1980).

State v. Ray, 166 Wis.2d 855, 481 N.W.2d 262 (Ct. App. 1992), further explains:

> Ray argues that the admission of Natale's statements was a violation of Ray's constitutional right to confront his accusers. *See* U.S. Const. Amend. VI; Wis. Const. Art. I, sec 7. The Confrontation Clause is not to be read literally to eliminate the use of all out-of-court statements in a criminal trial, but instead is to be read to reflect a preference for face-to-face confrontation. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). In *Roberts*, the court recognized that 'competing interests, if "closely examined," may warrant dispensing with confrontation at trial.' *Id*. at 64 (*quoting Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). Hearsay evidence may be admitted without causing a confrontation problem in some circumstances. *Id*. at 66.
>
> *Ray*, 166 Wis.2d at 866.

In *State v. Kirschbaum*, 195 Wis.2d 11, 535 N.W.2d 462 (Ct. App. 1995), the court stated:

> The *Thomas I* court recognized the constitutional preference for actual confrontation of witnesses at trial, but noted that the right of confrontation is not absolute and 'must occasionally give way to considerations of public policy and the necessities of the case.' *Thomas I*, 144 Wis.2d at 888, 425 N.W.2d at 645-46.
>
> *Kirschbaum*, 195 Wis.2d at 32.

"While in a popular sense we say an accused has a right to face his accusers, we mean 'witnesses against him'." *Gaertner v. State*, 35 Wis.2d 159, 166, 150 N.W.2d 370 (1967). *See also State v. LaTender*, 86 Wis.2d 410, 434, 273 N.W.2d 260 (1979).

In sum, while not all aspects of the Confrontation Clause are addressed here in this manual, remember that the constitutional right of confrontation does NOT:

1. Require the state to produce any particular witness;
2. Give the defendant the right to insist that the state call any particular witness;
3. Require the state to call as a witness the victim or the person who swore to the complaint;
4. Guarantee the defendant the right to face his accusers.

When facing confrontation clause challenges to your attempt to admit an Excited Utterance, remember that the hearsay exceptions exist for a reason. In and of themselves, 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.

10. Other Hearsay Exceptions

Wis. Stats. § 908.03(1) Present Sense Impressions. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Wis. Stats. § 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.

> **EXAMPLE:**
>
> **Statements such as "I'm in a lot of pain… my stomach hurts" or "I'm afraid he's going to kill me" may later be admissible as a declaration of then existing mental or emotional state.**

Wis. Stats. § 908.03(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.

Statements before and after *Miranda*. Statements by a defendant when not in custody or not in response to questions are NOT hearsay statements.

Prosecutors are urged to consider these hearsay exceptions (and others) when statements may fit in other exceptions, including the residual hearsay exception.

11. Practical Trial Strategy

DO I PROCEED WITH AN EXCITED UTTERANCE WHEN A RECANTING DV VICTIM IS PRESENT IN COURT?

The State has no obligation to call a recanting witness to the stand in its case-in-chief. You may choose not to call the victim in your case-in-chief. Instead, you may elect to proceed to trial under an Excited Utterance theory of prosecution, without regard to the victim's presence.

Sometimes, an uncooperative DV victim, aware that the State will proceed to trial in her absence, decides to attend court to recant, minimize or otherwise provide testimony that you believe to be false. This maneuver is often orchestrated by the defendant.

While you are always welcome to call a Recanting DV victim to the stand in your case in chief (and impeach her testimony through inconsistent statements), you may elect to proceed strategically on the basis of the Excited Utterance alone. See the Recanting Victim section of this manual for more information. Also, see below for the Excited Utterance Strategy section of this manual.

Should you suspect that a DV victim desires to thwart your prosecution of the abuser, skilled and well prepared prosecutions can proceed solely on the basis of an Excited Utterance. This allows you to cross-examine, rather than directly examine, an otherwise uncooperative victim, witness, or other declarant.

Suppose you decide not to call a recanting victim. Suppose 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 the victim 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.

12. Checklist for Prosecutors

Use this checklist to analyze whether an Excited Utterance applies in your DV case.

___ Witness has personal knowledge of the declarants' statement (observation/heard the statement).

___ The facts of the incident support a "startling" event or condition.

___ The statement is 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.

OR

___ The identity of the defendant must be established through other evidence.

Corroborating evidence:

___ 911 Evidence
___ Injury Documentation
___ Photographs
___ Medical Reports/Records
___ Witness corroboration
___ Statements by defendant
Other evidence: _____
_____

The Confrontation Clause is raised by the defense.

– Victim is present in court, but recanting; therefore, State will not call victim but is available for the defense. ____ YES ____ NO

– State nevertheless cites on record its efforts to locate, subpoena and compel the victim's testimony at trial. ____

13. Sample Questions for Excited Utterance hearings/trials

A. General Predicate Questions for the Law Enforcement Officer

- Name?
- Occupation?
- If a police officer. . .
  a. What law enforcement agency?
  b. How long so employed?
  c. Present duties?
  d. Prior experience investigating domestic violence cases? Explain. Approximately how many DV cases have you investigated in the past? Have you had occasion to view the demeanors of victims in DV cases?

B. Facts of the Offence: Date; Time; Place; Venue

- Directing your attention to (**date of offense**), do you remember that date?
- Were you working on that date?
- In what part of the County/City/Town/Village were you working?
- Were you in a squad car? Who was driving?
- Did you receive a call/dispatch that (evening, morning, afternoon)?
- What was the nature of the dispatch? What were you told about the report? (e.g. DV 911 call, Neighbor/Child/Victim report, Weapons offense, etc.)
- To what address did the dispatch send you? Adress: _____
- VENUE: Is that address in the City/County of _____?
- At what **time** did you receive the dispatch?

C. Action of the Police Officer

- In reaction to the dispatch, what did you do?
- At what time did you arrive at the address?
- What happened when you arrived on the scene?
- Did you encounter any person upon your arrival?
- Describe what happened . . .
- Prior to entering the residence to you hear or observe anything occurring inside the residence from your vantage point/perspective?
- Describe the scene for the jury.
- What, if anything unusual, did you observe regarding the scene? [residence in disarray commonly corroborates violent offenses]
- Did you observe any individual(s) at the scene? (Male/Female)

  (IDENTIFY DEFENDANT IF ON SCENE)

D. Encouter and Assesment of Victim's, Physical and Emotional State

- When you arrived on the scene, did you have an opportunity to view the victim's demeanor?
- PHYSICAL: Please describe what you saw… In particular:

  a) Male or Female

  b) Physical Appearance: Clothing: neat, torn, stained, bloodied or in disarray, etc.

  c) Face: Swollen? Bloody? Black and blue?

  d) Eyes: Crying? Sobbing? Tearful? Tears beginning to well? Color/redness of eyes?

  e) Breathing: Catching breath? Heavy breathing? Unable to catch breath? Able or unable to complete sentences with/without difficulty? Stuttering? Wheezing? Hyperventilating?

  f) Describe position of victim: Standing? Shaking? Sitting? Curled in fetal position? Cowering? Able to look the officer in the eyes?

  g) Hair: Combed or disturbed?

  h) Hands/Arms – What was the victim doing with her hands and arms? Wringing hands? Waving dramatically? Pointing (to defendant or weapon or other)? Fists?

  i) Voice tone and inflection: Screaming? Whispering? Voice fluctuation?

  [If defendant is on scene] Did you observe the defendant's demeanor? – Angry? In a rage? Irritated? Upset? Sad? Embarrassed? Combative? Controlled? Describe…

- EMOTIONAL state of victim:

  Did you have an opportunity to observe the victim's emotional state?

  Emotionally: Angry? Upset? Excited? Sad? Scared? Lonely? Embarrassed?

- What led you to conclude that the victim was feeling that way?

E. 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 herself to you? Name? Address?
- Describe your conversation . . . What was said? Did conversation escalate at any time?
- Did the victim's emotional state change in any way during your conversation?
- Did you have to calm the victim down at anytime? Did you have to slow the victim down at anytime?
- Do you recall where you were standing? Where was the victim?
- Who lives at that address? Whose apartment/home – victim or defendant?
- CONTENT: What did the victim tell you?

  a) Argument? Subject of argument?

  b) How did the physical contact occur with the defendant?

  c) Who initiated contact? How did that happen?

  d) Did victim and defendant exchange words during the physical contact? …as victim was being punched, choked, kicked, slapped, scratched, etc.?

  e) Who threw the first punch? Open hand? Fists? How many times?

  f) Where did the defendant hit the victim? Kick the victim? How many kicks?

  g) Did victim try protecting herself? Did she hit back? Cry for help? Protest?

  h) Did the defendant use or threaten to use any weapons? Describe them? How did he use them or threaten to use them?

  i) Did the victim explain the defendant's state of mind? Emotional state?
- As VICTIM described the facts of what occurred, did the victim remain excited? Did the victim continue to exude the same excited/upset emotional state throughout the description of what occurred?

F. Injuries

- Did you personally observe any injuries during the time you spent with the victim?
- What areas of body specifically? List body parts.
  Description of injuries:
  (Complaint of pain? Blood? Bruises? Cuts? Lacerations? Bumps? Scratches? Marks? Scarring? Redness? Swelling? Black and blue eyes? Broken skin? Marks around neck (signs of strangulation)?
- Did the victim point out these injuries for you? (e.g. "Look what he did to me!")
- Did you attend to these injuries? Stop the bleeding?
- Did the victim seek further medical attention? Where – hospital or doctor office?

G. Identification of defendant

- Do you know (**name of defendant**)?
- Can you identify (**name of defendant**)?
- Did the victim explain who injured her body? What was said? Description?
- Was the defendant on the scene (address)? Do you see him in court today?
- Did the victim point out the defendant to you? Please describe her emotional state as she identified the defendant to you?
- Please IDENTIFY him for the record . . . (Let the record reflect . . .)
- Was the defendant drunk or high on drugs? Describe how you could tell? Smell? Eyes bloodshot/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?

H. Nature of Relationship

- Did the victim describe the nature of her relationship with the defendant?

I. Consent

- Did the victim – at anytime – give the defendant permission to (hit/choke/strangle/ push/slap/punch/kick/beat, etc.)?

J. Any Further Issues

- DEFENDANT'S MOTIVE for committing battery (Establish, if possible).
- PREPARE for possible SELF-DEFENSE claims by defendant.
- CONSEQUENCES TO THE VICTIM (Establish, if known):
  - Employment consequences? Did victim lose job?
  - Did victim relocate/move that evening?
  - Did victim ask about obtaining restraining order/injunction?
  - Did victim ask questions about divorce or separation?
  - Change locks on the doors for fear of the defendant returning in the future?
  - Counseling?
  - Consequences to family, children?
  - Call to DV Hotline for assistance?
- PHOTOS – establish foundation: Were photos taken? When? By whom? Where? Have you seen the photos?
  - [Mark; Identify; "Are photos a fair representation of what victim looked like at the time of the taking of the photo?"; Ask witness to point out specific qualities of photos; Move into evidence; Publish to the jury.]

(See the Photography in the Courtroom chapter of this manual for further information.)

(Written by ADA Jeffrey Greipp and ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004.)

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case Number 03CF00_____

JONATHON DOE,

Defendant

STATE'S NOTICE OF MOTION and MOTION TO INTRODUCE VICTIM'S STATEMENTS as an EXCITED UTTERANCE HEARSAY EXCEPTION, PURSUANT TO Wis. Stats. § 908.03(2)

The State of Wisconsin, by Assistant District Attorney _____, hereby gives notice to the Court and Defense Counsel of the State's intention to introduce statements of the victim during the course of the trial.

FACTS

According to Police Department reports prepared in relation to the investigation of this case, Mr. Rogers is a neighbor of Jane and Jonathon Doe. As an offer of proof, the State believes that Mr. Rogers would testify as follows:

> On the evening of Friday, _____, 200__ at approximately 11:30 p.m., Mr. Rogers was lying on his couch watching television when he heard a 'loud pounding' on his front door. Mr. Rogers answered the door, to find Jane Doe crying hysterically. Her face was smeared with blood. Her eyes were red and swollen. Her make-up was smeared amongst the blood and tears that flowed from her face. Once the door fully opened, Jane Doe ran inside. She yelled: "He's trying to kill me!" She further exclaimed that she couldn't get away from him, saying, "He just kept hitting me and hitting me." Mr. Rogers called 911. Mr. Rogers would further testify that Jane Doe's face was cut badly, and there was blood in her hair. She had additional blood splatters on her leg. Jane Doe was wearing one sock with no shoes on either foot, and her shorts had the zipper ripped open. Her pants were urine-soaked. Jane Doe explained the details of the beating to Mr. Rogers in its entirety, all the time crying hysterically. It should lastly be noted that the police reports indicated that the 911 telephone operator had a difficult time getting information from Jane Doe over the telephone because she was so hysterical.

The Police Department responded to the address of Mr. Rogers. As a further offer of proof, the State believes that Police Officer Schmidt would testify as follows:

> Police Officer Schmidt reported that she initially had contact with the victim, Jane Doe, at Mr. Rogers' apartment where she was lying on a bed, the left side of her face bloodied. There was a laceration under the victim's left eye, as well as dried blood on her shirt and in her hair. Paramedics were contacted. Officer Schmidt notes that Jane Doe was upset and crying.

> Because Jane Doe was crying and attempting to catch her breath due to the incessant crying, it was difficult for Police Officer Schmidt to obtain information about what had occurred between herself and her husband, the above-named defendant. Jane Doe did relate to Officer Schmidt that she was thrown, hit, pinned down, strangled, and her hair was pulled. Jane Doe stated that she was beaten for a long time all over her body. The defendant tore an expensive bracelet and necklace from her neck and wrist. She tried to get out of the house away from the defendant, but he kept pulling her back into the residence. Finally, she was able to exit through a patio door and run to the neighbor's house.

After supplying Police Officer Schmidt with this initial information, she then went through the entirety of the incident starting at the beginning of the evening. She described the defendant as "awesomely intoxicated." The police detected a strong odor of an intoxicant on Jane Doe's breath as well, and she did admit to drinking alcohol.

THE LAW

Admission of hearsay testimony under the Excited Utterance exception of Wis. Stats. § 908.03(2), depends upon the interval between the incident and the declaration. This interval is measured, not by the mere lapse of time, but rather, by the duration of excitement relative to the incident. *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Ct. App. 1982), review denied 111 Wis. 2d 704, 333 N.W.2d 729 (1983).

The Excited Utterance Hearsay exception is based upon the premise that, if the declarant made the statement while under the stress of excitement caused by the event, the stress and the spontaneity of the statement endow it with sufficient trustworthiness to overcome reasons for exclusion of Hearsay. Further, "a broad and liberal interpretation is given to what constitutes an Excited Utterance when applied to young children." *Id.*, 329 N.W. 2d at 266.

The Wisconsin Supreme Court has recognized the inherent trustworthiness of statements which fall into the Excited Utterance exception and has noted that:

> The excited utterance exception which was formerly part of the res gestae exception, is based upon spontaneity and stress which endows such statements with sufficient trustworthiness to overcome the reasons for the exclusion of hearsay. In determining whether a statement qualifies as an excited utterance, the important factors for the judge's consideration are the timing and stress. *Christensen v. Economy Fire and Casualty Company*, 77 Wis.2d 50, 56, 252 N.W.2d 81 (1977).

This widely recognized exception to the Hearsay rule, was further clarified by the court in *State v. Moats*, 156 Wis.2d 74, 457 N.W.2d 299 (1990). In *Moats*, the court stated that "the time between the triggering event and utterance is the key factor. However, this court has said that "time is measured by the duration of a condition of excitement rather than mere time elapsed from the event or condition described." *Moats* at page 97, citing *Muller v. State*, 94 Wis.2d 450, 289 N.W.2d 570 (1980).

In *Muller v. State*, *supra*., the court set forth the following rule: first, "there must have been (1) a startling event or condition and (2) declarant must have made the statement relating to the startling event or condition while under the stress of excitement caused by the event or condition." *Muller*, 94 Wis.2d at 466.

Muller dealt with an Excited Utterance testified by a police officer. The startling event or condition in *Muller* was a threatening telephone call, where the victim subjectively believed that the caller could possibly carry out the threats. Ultimately, the *Muller* court found that the victim of the threatening telephone call, who was wearing a robe and slippers and standing in the driveway appearing nervous and frightened was "still under the stress of excitement caused by the event or condition." *Muller*, 94 Wis.2d 466, 467. Consequently, the *Muller* trial court ruled that the statements of the victim, made to a police officer, were plainly admissible under the Excited Utterance exception to the Hearsay rule.

Certainly, the allegations of the beating in the complaint before this court would qualify as a "startling" event, especially if one considers the fact that a threatening telephone call has previously met the standard. Also, the statements made to Mr. Rogers and to Police Officer Schmidt occurred within a short span of time between the "startling" event and the actual utterance of the statement.

The State also invites this court to look at the case of *State v. Boshcka*, 173 Wis.2d 387 (Ct. App. 1992). In *Boshcka*, the defendant repeatedly sexually assaulted a victim and threatened to kill her. The witness who offered the Hearsay statement testified that the victim was crying and trembling and appeared very upset while telling him of the incident. Sounds like a strikingly similar factual scenario to the facts in the present case.

Finally, the United States Supreme Court decision of *White v. Illinois*, 112 S.Ct. 736, 743 (1992), held that when proferred out of court statements fit within a firmly rooted Hearsay exception, the Confrontation Clause of the Sixth Amendment is satisfied; nothing more is required. *White* concluded that the imposition of additional requirements beyond those inherent in the firmly rooted Hearsay exceptions was of little true utility.

In sum, the statement is admissible as an Excited Utterance to the Hearsay rule. It was made while the victim was under the stress of the event, and it meets the criterion of spontaneity. For those reasons, the victim's statements guarantee sufficient trustworthiness to be considered reliable.

Dated at Milwaukee, Wisconsin this _____ day of _____, 200__.

_____
Assistant District Attorney
State Bar No. _____

cc: defense attorney

15b. Excited Utterance Strategy: Assessment Process and Common Defenses

1. Introduction
2. Words of Caution
3. Your Case Assessment and Evaluation
   A. Excited Utterance: Is it there?
   B. Corroboration
   C. Visible Injury
   D. Photographs
   E. 911 Recording
   F. Intoxication Level
   G. Other Witnesses and Children
   H. Intimidation and Manipulation Tactics
   I. Restraining Orders
   J. Defendant's Prior Record
   K. Police Reports and Medical Reports
   L. Disorderly Conduct Charges
4. Voir Dire is the Key to your Case
5. Wis. Stats. § 908.06
6. Common Defense Trial Theories
   – Attacking the Merits of the Excited Utterance Statement
   – Burden of Proof Arguments: The "Empty Chair" Defense
   – "The Victim's Not Here. Why Should We Care?"
   – Self-Defense
   – Surprise! Guess Who Came to Testify After all?

1. Introduction

This section contains perhaps the most crucial discussion pertaining to the use of Excited Utterance statements in lieu of DV victim testimony at trial:

A. How to assess your case to decide whether you should proceed on the basis of an Excited Utterance in lieu of a victim, and

B. The common defense theories you will undoubtedly encounter at trial.

For this discussion, interviews were conducted with many prosecutors who have a wealth of experience assessing and prosecuting cases without victims: ADA John Chisholm, ADA Jeff Greipp, AAG Bill Hanrahan, ADA Dan Humble, ADA Julius Kim, ADA Chris Liegel, ADA Kent Lovern, ADA Paul Sander and ADA Audrey Skwierawski.

Together, these prosecutors have reviewed literally thousands of cases to assess whether to proceed forward with an Excited Utterance in lieu of a victim. More importantly, they have taken hundreds of Excited Utterance cases forward to trial. They were selected because they are skilled prosecutors who have faced many defense challenges… and achieved success. A summary of their insights and advice is contained below.

2. Words of Caution

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 Violence prosecutor grows, the mechanics 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. But they are not. Once you have mastered the skills,

prosecutors agree that these cases become quite easy. All the prosecutors interviewed reported great success over time.

Though not present in the courtroom, you can paint a vivid picture of the victim 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. 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 DV case. Defense attorneys are accustomed to attacking the victims' motives, by portraying victims as liars or jealous revenge-seekers, or by pointing out their upset state in an attempt to portray them as "crazy" or irrational witnesses. 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. **Defense counsel does not have a victim to cross-examine.** If the defendant has prior convictions, chances are less likely that he will testify. The defense may not have any witnesses at all to call to the stand.

3. Your Case Assessment and Evaluation

A. EXCITED UTTERANCE: IS IT THERE?

It may seem obvious, but prepare. Talk to your witness, either a police officer or other person. Ensure that all the elements of the charged offense (as well as the Date, Venue and Identity of the defendant) can be proven by the totality of available evidence.

B. 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. Skilled prosecutors agree that proceeding without any corroboration is a potentially reckless misuse of discretion.

C. VISIBLE INJURY:

You must have evidence of a visible injury. This will be your most important piece of corroboration. 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.

D. 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.

E. 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 be swayed with these attacks upon the officer's credibility.

F. INTOXICATION LEVEL:

If the victim was severely intoxicated, 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.

G. 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 Violence 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 influence the jury in your favor.

Also, a prosecutor 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.

EXAMPLE:

In a self-defense case, one prosecutor cited a powerful example. When the police responded to the scene, both parties were present, as well as a 3-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.

H. INTIMIDATION AND MANIPULATION TACTICS:

Cards and letters of apology, receipts of flowers, phone records, and recordings of phone calls from jail can corroborate the incident. (See the Intimidation of Victims chapter of this manual.)

I. RESTRAINING ORDERS:

Restraining Order petitions coupled with transcripts from hearings may offer additional corroborative evidence to supplement your case.

J. 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 long criminal records keep most defendants off the witness stand, you may be able to better anticipate what defense theory can be expected at trial.

K. POLICE REPORTS AND MEDICAL RECORDS:

Check all available reports to validate consistency between them. Will different pieces of evidence presented by the State conflict?

L. DISORDERLY CONDUCT CHARGES:

The worst time to proceed to trial without a victim is a lone Disorderly Conduct charge. Do not utilize an Excited Utterance (one person's word against another) without corroborative evidence.

4. Voir Dire is the Key to each Excited Utterance Case

Your case will be won or lost in voir dire. Believe in your case. "Tell a story" in voir dire. Prepare your questions to educate the jury about the dynamics of Domestic Violence. You must tell the jury that you do not expect the victim to testify at trial. If you first tell the jury during your opening statement, it is too late.

Sample Excited Utterance Voir Dire Questions:

- Anyone's life touched by Domestic Violence… either yourself, a friend, relative, 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?
- Why was it difficult for the person to cooperate with the police?
- [If person called the police], were criminal charges issues?
- Did the person follow through with the charges? Did the person tell you it was difficult to testify?
- How many of you on this jury panel require the victim's presence?
- Will anyone want 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 think of 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 victim confide in you?
- When the person was confiding in you, did the person keep it a secret from others? Was it difficult for that person to tell others? Would the victim 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 believed the abuse would end; Victim believed that the person would change; Victim scared to leave or be alone; Victim concerned about children; Victim 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 victim testimony must be struck because of inability 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:

a. With all abuse, there is a level of discomfort. The victim feels ashamed, embarrassed, humiliated, sad, scared, etc.

b. With the victim's discomfort, the victim feels vulnerable.

c. A victim of domestic abuse will behave differently than a victim beaten by a stranger on the street.

d. The likelihood of NOT APPEARING in court is the rule for DV victims, not the exception.

As long as you prepare the jury, it will be OK for you NOT to have the victim's testimony in court. The jury's common sense will dictate that a DV victim will NOT appear for the trial. The same is true for evidence. As long as you prepare the jury, it will also be OK for you NOT to have a plethora of evidence, like jurors are used to seeing on television programs or in the movies. While a juror may be *looking for science*, we all know that trying cases is *an art*.

5. Wis. Stats. § 908.06

The defendant knows every detail of the victim's life. Be aware of the nuances of the hearsay rules, especially Wis. Stats. § 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. Stats. § 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.

6. 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 by cross-examination 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 police officer can elude to the seriousness of the incident, the emotional state of the victim, as well as the extent of the victim's injuries. If the defendant fails to 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.

"Attacking the merits of the Excited Utterance statement" will succeed, however, if the prosecution has a weak case without any corroborative evidence. See above Case Assessment and Evaluation section in order to determine the viability of your case 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 Violence, the jury is prepared for the victim's non-appearance and understands the reasons why a DV victim would 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? Look who is in charge. 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 this defendant's abusive behavior.

Make sure to ask the judge during pre-trial motions in limine to admonish defense counsel from speculating 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 Violence. 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. Defense attorneys can effectively argue that the police and prosecutor have simply rushed to judgment. If both parties sustained injury, the prosecutor must evaluate whether the defendant has a legitimate claim of self-defense.

With no prior record, expect the defendant to testify. In a misdemeanor DV case with very minor injuries or no visible injury at all, the defendant has a wide-open claim of self-defense. The defendant may bring pictures of injuries, claiming that the bruising appeared the next day after police completed their investigation.

In asserting a claim for 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: "I 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 himself 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? 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 seminal.

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 him. Ask the defendant when was it that he first told anyone about his self-defense. 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.

The prosecution may have grounds to re-open its case-in-chief at this point. No witness may 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, good or bad. (See the Reluctant / Recanting Victim chapter of this manual for additional information and sample questions.)

However, many 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/recanting victim:

- Ask the victim how she was informed of the trial date.
- Ask the victim if 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 she has spoken with defense counsel prior to trial.
- Establish that the victim and defendant have an on-going relationship.
- Because the victim still cares for the defendant and relies on the defendant, establish that she wishes no harm to come to him.
- Ask if the victim and 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 on the night 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. Consult the Reluctant / Recanting Victim chapter of this manual for more sample questions, strategies, and ideas.

In summary, the Exceptions to the Rule of Hearsay exist for a reason. The Exceptions are inherently reliable. Excited Utterances are no different. Never should you pursue a case with nothing more than the sole evidence of the Excited Utterance statement.

This tool is not for beginners. It is an advanced trial technique. It is case specific. Excited Utterances are frequently used for homicides, shaken baby cases, and child sexual assaults. Now, with the widespread acceptance of their use in Domestic Violence 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, be sure in your own mind and your gut that the defendant is guilty.

(Prepared by ADA Paul Dedinsky, based upon interviews conducted with the following prosecutors: ADA John Chisholm, ADA Jeff Greipp, AAG Bill Hanrahan, ADA Dan Humble, ADA Julius Kim, ADA Chris Liegel, ADA Kent Lovern, ADA Paul Sander, and ADA Audrey Skwierawski. Wisconsin Domestic Violence Prosecution Manual, 2004.)

16. The Admissibility of 911 Calls and Caller I.D. as Evidence in the Courtroom

1. Introduction
2. Defense Objections and Challenges to 911 Call Evidence
   a. The Law as to 911 Call Evidence
   b. Practical Application of the Law Pertaining to 911 Call Evidence
3. The Admissibility of Caller I.D. Evidence
   a. What is Caller I.D. Evidence?
   b. Precedence for the Use of Caller I.D. Evidence
   c. Expert Witness Unnecessary to Establish Foundation
   d. Caller I.D. Evidence is Not Inadmissible Hearsay
   e. Admission of Caller I.D. Evidence does Not Violate the Best Evidence Rule

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" DV prosecution.

Photographs, medical records, and eyewitness testimony all provide great corroboration. However, in most circumstances, 911 audio recordings are literally "cries for help." More than one prosecutor's case strategy and theme has 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. Not many defense attorneys will want to stipulate to your introduction of the 911 Call at trial.

2. Defense Objections and Challenges

THE LAW AS TO 911 CALL EVIDENCE

The defense objections typically challenge 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 (Ct. App. 1999) is the seminal case for a prosecutor's use of 911 Call evidence at trial. *Ballos* analyzed 911 Call recordings in a two-fold hearsay application.

FIRST LEVEL. 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:

Present Sense Impression. Wis. Stats. § 908.03(1):

> …Satisfied when the 911 caller describes or explains an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. *Ballos* recognized this hearsay exception by citing *U.S. v. Bradley*, 145 F.3d 889, 892-894 (7th Cir. 1998), which affirmed admission of tape recording of 911 Call both as a present sense impression and an excited utterance. See *Ballos*, 230 Wis.2d at 505. See also *U.S. v. Hawkins*, 59 F.3d 723, 730 (8th Cir. 1995), *vacated on other grounds*, 516 U.S. 1168, 116 S.Ct. 1257, 134 L.E.2d 206 (1996).

Excited Utterance. Wis. Stats. § 908.03(2):

> …Satisfied when the 911 caller is 'promptly' reporting a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition. *Ballos*, 230 Wis.2d at 506.

Statement of Recent Perception. Wis. Stats. § 908.045(2):

> Where a declarant is *unavailable*, such as an anonymous 911 Call, this hearsay exception can apply. …Satisfied when the 911 Call, by its nature, is spontaneous, 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 declarant's recollection was clear. As to the 'good faith' requirement, *Ballos* cites *State v. Williams*, 225 Wis.2d 159, 176, 591 N.W.2d 823, 831 (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. See *Ballos*, 230 Wis.2d at 507.

SECOND LEVEL. As to the second level of hearsay, *Ballos* held that the manner with which such evidence is introduced is satisfied when offered as Records of Regularly Conducted Activity, Wis. Stats. § 908.03(6). Hence, the business records exception may include 911 Call evidence. See *Ballos*, 230 Wis.2d at 508, citing *State v. Gilles*, 173 Wis.2d 101, 113-114, 496 N.W.2d 133, 138 (Ct. App. 1992). See also *Abdel v. United States*, 670 F.2d 73, 75 n.3 (7th Cir. 1982).

PRACTICAL APPLICATION OF THE LAW PERTAINING TO 911 CALL EVIDENCE

911 OPERATOR. In practice, while well situated to testify for the purpose of establishing foundation, the 911 Operator is not required to testify. 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 DV victims recant, minimize, or fail to appear for trial, use 911 Call evidence to corroborate the commission of a crime. 911 Call evidence can be compelling since it brings the jury inside the residence as the violent 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 consistent injuries.

3. The Admissibility of Caller I.D. 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 I.D." display unit.

To date, no Wisconsin appellate case has dealt with the issue of admissibility of Caller I.D. evidence. However, the state of Kansas has dealt with the issue. In *State v. Schuette*, 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 I.D. 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 I.D. evidence was inadmissible hearsay, and (3) admission of testimony concerning the Caller I.D. 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 I.D. unit, (2) the device was working properly and reliably on the date in question, and (3) the operator of

the Caller I.D. unit was sufficiently qualified to use the device. *Schuette*, 44 P.3d at 462.

WHAT IS CALLER I.D. EVIDENCE?

At *Schuette*, 44 P.3d at 462-63, 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 I.D. system to a computer-generated "phone trap" record.

> 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.' 13 Kan.App.2d at 112.

Pertaining to the "phone trap" or "call tracer" system, *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. 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 (1985), and the case of *State 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.2d at 462.

Schuette further quoted *Estill'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.' 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 occur-

> rences, 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.' 432 So.2d at 840. *Estill*, 13 Kan.App.2d at 114.
>
> *Schuette*, 44 P.2d at 462-63.

PRECEDENT FOR THE USE OF CALLER I.D. EVIDENC*E*

At *Schuette*, 44 P.3d at 463, the Supreme Court of Kansas quoted several sources as persuasive precedent:

> 1. "Caller I.D. 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 I.D. 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).
> 2. "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 I.D. evidence. After first holding that Caller I.D. 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 I.D. The court found that this was sufficient to show the Caller I.D. device attached to the witness' phone was reliable."
> 3. "In *Culbreath v. State*, 667 So.2d 156, 162 (Ala.Crim. App. 1995), Caller I.D. 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 I.D. 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 I.D. device was shown through the victim's testimony, specifically that each time she received the harassing phone calls she would activate her Caller I.D. and the same number would appear for each call."

At *Schuette*, 44 P.3d at 464, the Supreme Court of Kansas cited several other cases which have utilized Caller I.D. evidence:

> [W]hile only a few courts have squarely addressed the issue of admissibility of Caller I.D. 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).

EXPERT WITNESS UNNECESSARY TO ESTABLISH FOUNDATION

Schuette, 44 P.2d at 463, concluded that an expert was not a necessary witness to establish foundation for its admissibility into evidence. The court recognized that the operation of a Caller I.D. display unit demands only the pressing of arrow buttons. There is no advanced training required for the unit's operation. At this point, Caller I.D. units are very familiar to people in their operation.

CALLER I.D. EVIDENCE IS NOT INADMISSIBLE HEARSAY

Schuette, 44 p.2d at 463, held that Caller I.D. displays are "merely computer generated read outs and not hearsay statements of persons or electronically regenerated hearsay statements. (*citing Bowe v. State*, 785 So.2d 531, 532 (Fla. Dist. App. 2001); *Inglett v. State*, 239 Ga. App. 524, 526, 521 S.E.2d 241 (1999).

The Caller I.D. display is not the output of statements from an out-of-court declarant but merely the result of the device's operations, which is not hearsay. *Schuette*, 44 P.2d at 464.

ADMISSION OF CALLER I.D. EVIDENCE DOES NOT VIOLATE THE BEST EVIDENCE RULE

The defense also argued that the only proper method of introducing the evidence would be to introduce the Caller I.D. display unit itself. In rejecting this argument, the court found at *Schuette*, 44 P.2d at 464, that:

> Caller I.D. 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.' Schuette'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.

(Written by ADA Jeff Greipp and ADA Paul Dedinsky, Wisconsin Domestic Violence Prosecution Manual, 2004.)

17. Digital Photography in the Courtroom

1. Introduction
2. Police Standards for Photography and Crime Scene Condition
3. The Digital Image: What is it?
   - 5 Points to Know about Digital Image / Photograph Technology
   - How the Law Defines Digital Images
   - "Originals" vs. "Duplicates" of Digital Images
   - Challenges: "Tampering" vs. "Enhancements"

1. Introduction

If done well, photography can be a powerful ally for the State's case presentation. Pictures document injuries suffered following a Domestic Violence episode. Follow-up photographs the day after, 48 hours later, and even 72 hours later …help to document the changing colors and shapes of bruising.

Pictures can also help document the long-term wounds that some victims suffer …and true enough, some scars will never disappear.

Photographs have many other utilitarian purposes. Crime scene photos bring police report descriptions of "disarray" to life. Photographs of the suspect may later help to stave off illegitimate claims of self-defense. Photographs also help police and prosecutors to discern who is the primary or 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 DV cases. Police agencies should develop guidelines to establish the minimum expectations for their officers. 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 least the following guidelines for photographs and crime scene condition:

1. Photograph the disarray of furniture, broken windows, damaged walls and other property items on scene. Ideally, evidence such as damaged property, the broken furniture, broken dishes, broken telephones, torn and damaged telephone cords and wires, and smashed dishes should be photographed on scene and then impounded and inventoried.
2. Photograph the injuries of the victim 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 exhibit the color and size changes of bruises.
3. Photograph and then collect Physical Evidence such as blood splattered on walls, hair pulled out, fingernails torn out, etc. Photograph the evidence first on scene and then collect it.
4. Collect, impound and inventory any item used as a weapon after photographing at crime scene.
5. Photograph, collect and inventory phones 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. Don't forget the telephones either.
6. 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 on scene may look different than his/her appearance at trial six months later.
7. 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 Gwinn, Casey, "Prosecuting Domestic Violence Cases without the Victim's Participation or Evidence-Based Prosecution," National College of District Attorneys conference (2001).)

3. The Digital Image: What is it?

5 POINTS TO KNOW ABOUT DIGITAL IMAGE / PHOTO TECHNOLOGY

1. A digital image is nothing more than a collection of on/off switches, recorded numerically as a series of binary digits (bits), each digit being either a one or a zero.
2. 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.

3. Thus, the visual information is recorded directly as digital data, without creating an analog representation of the image.
4. The resulting array of data may be intended to represent a "picture" or a written document.
5. The digital image may be stored in the short-term memory of a computer, or it may be recorded using a floppy disk, hard disk or CD-ROM.

HOW THE LAW DEFINES DIGITAL IMAGES

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. Stats. § 910.01(1) states:

> (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.***

A photograph is defined as follows:

> (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."

"ORIGINALS" VS. "DUPLICATES" OF DIGITAL IMAGES

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 "altered" image was, in fact, altered since it was first captured.

Wis. Stats. § 910.01(3) appears to address this issue. It states:

> (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 "photography" as evidence in criminal and civil cases. Duplicates are addressed in Wis. Stats. § 910.01(4):

> (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 saw 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.

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 guarded very carefully. We enhance photocopies on a copy machine all the time to make them lighter or darker.

A 35mm photograph can be enhanced in a dark room. We are used to viewing photographs that are over or under exposed. Nonetheless, most of us are not photographers who have spent a lot of time in dark rooms. The perception of "access" is limited.

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 protestations of tampering with evidence. Get into the habit of relaying information of all digitized enhancements – major or minor – to all of the parties to the legal action, or better yet, refrain from making any enhancements in the first place.

This Chapter was based upon the following List of Works:

28 Man.L.J 61, *The Manitoba Law Journal*; "Regarding Digital Images: Determining Courtroom Admissibility Standards" (2000).

25 Ohio N.U.L. Rev 585, *Ohio Northern University Law Review*; "Pretidigitation, Magic, Evidence and Ethics in Forensic Digital Photography" (1999).

20 T. Jefferson L.Rev 303, *Thomas Jefferson Law Review*; "Perspective: A Paradigm for the Authentication of Photographic Evidence in the Digital Age" (1998).

10 Wash.U.J.L. and Pol'y 267, *Washington University Journal of Law and Policy*; "Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images" (2002).

Azcarate, Penney, "Digital Imaging Technology and the Prosecutor," *The Prosecutor*, p. 26-30, (2000).

Berg, Erik C., "Legal Ramifications of Digital Imaging in Law Enforcement." *Forensic Science Communications*, Volume 2, Number 4, (October, 2000).

Knoerlein, "Digital Dave", "Forensic Imaging Passes Intense Legal Scrutiny." *Frye Hearing: State of Florida vs. Victor Reyes*.

Scientific Working Group on Imaging Technologies (SWGIT), "Definitions and Guidelines for the Use of Imaging Technologies in the Criminal Justice System." *Forensic Science Communications*, Volume 3, Number 3, (July, 2001).

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(Written by ADA Daniel Humble. Edited by Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004.)

18. Establishing Identity... Creatively

1. Introduction
2. Police Investigations of Identity
3. Police Training
4. Establishing Identification through a Booking Photo
5. Questions: ID of a defendant through a 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 a defendant is on scene, IDENTITY is explicit. Most times, the defendant identifies himself with an explanation of what happened to the police. If the defendant's rendition of the facts completely contradicts the victim's version, the defendant may still admit the date, time, place and parties involved in the incident.

However, when the suspect has fled the scene prior to police arrival, the police only hear one side of the story. While the police officers may diligently capture facts to support the elements of a crime, venue, and the date and time of the DV incident, their collection of IDENTITY evidence may fall short of proof beyond a reasonable doubt.

If a Domestic Violence victim fails to appear later in court, you may be able to proceed with your case on an alternative theory, such as utilizing an Excited Utterance as a Hearsay exception.

However, if the defendant was not on scene during the investigation, the police officer or other witness may not be able to identify the defendant as 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*, through the use of the defendant's booking photograph.

2. Police Investigations of Identity

Police are trained to elicit IDENTITY during their crime investigations. Most officers obtain detailed information regarding the identity of the suspect/abuser, including:

1) Name
2) Date of Birth
3) Relationship to the victim
4) Work address and phone number
5) Home address and phone number
6) Physical description
7) Race
8) Build
9) Weight
10) Sex

This information serves as the basis for the issuance of warrants, and even 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 the information alone enough to support IDENTITY beyond a reasonable doubt at a trial?

Best case scenario to prove IDENTITY at trial: The victim points to the defendant in open court and says: "That's him. He's the person who beat me up!"

However, when a Domestic Violence victim fails to appear in court, and the defendant was not on scene to be IDENTIFIED to the police officer during the course of the victim's Excited Utterance statement, you need more proof of IDENTITY to proceed to 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, tell the DV victim to provide a photograph of the suspect during the course of the investigation.**

A recent photograph will suffice. A wedding photograph will suffice. A photograph of the abuser and the victim together will usually work… especially if you can contrast what the victim looked like in the "family" photo versus what she looks like with bruises all over her face!

Later at trial, as the officer testifies as to the contents of the DV victim's excited utterance statement, you can present the "family" photo(s) of the person who the victim IDENTIFIED as her abuser during the course of her Excited Utterance to the police officer.

B. ABUSER MAIL

Your next strategy is to train police officers to tell the DV victim the following:

> **"Give me the letters and cards that the suspect has given you after he has abused you in the past."**

While not proof positive, "apology" letters and cards can help you to establish IDENTITY 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 utilize it at sentencing.

(For more information about investigative strategies, see Gwinn, Casey, "Prosecuting Domestic Violence Cases without the Victim's Participation or Evidence-Based Prosecution", National College of District Attorneys conference (2001).)

C. CORROBORATION

Train police officers to obtain corroboration. You never know if a random "passerby" will be the key to estblishing IDENTITY or another important facet of your case. Have police interview neighbors, friends and relatives separately.

4. Establishing Identification through a Booking Photograph

Many offenders flee the scene once the police have been summoned. 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 DV victim to provide police with an accurate physical and background description of the abuser is simultaneously asked to the defendant himself, once arrested and booked.

During the "Booking" process, the defendant will be queried regarding basic IDENTITY issues.

Questions commonly asked by Law Enforcement Officers during the Booking process include:

- Name, Sex, Race, DOB.
- Address.
- Social Security Number and Driver's License Number.
- Home Phone.
- Scars, Marks, Tattoos.
- Emergency Contact Person and Phone and Address.
- Height, Weight, Build.
- Eye Color, Hair Color and Use of Glasses.
- Complexion.
- Mustache/Beard, Chin, Teeth, Hand.
- Marital Status.
- Occupation and Name of Employer.
- Grades Completed in School and Military/Branch, if applicable.
- Birthplace and Country of Citizenship.

It is not uncommon for defendants to provide information, while being Booked, 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 DV 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 photograph the defendant in a "Booking" photo, or "Mugshot" photograph. The "Booking" photograph is typically taken simultaneously as "Booking" questions are asked of the defendant. Law Enforcement Officers can later testify that the information provided to them during the Booking process came from the person photographed in the "Booking" or "Mugshot" photograph.

Then… you can publish the "Booking" photograph to the jury. At this point, the jury will be able to see that the "Booking" photograph matches the defendant. This is how you can successfully prove IDENTITY through the evidence provided by the police "Booking" process.

Because the on-scene answers that DV 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 have been designed to avoid, such evidence used to establish the IDENTITY of an offender is acceptable.

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, 654-655, 307 N.W.2d 200, 210-211 (1981); *State v. Haynes*, 118 Wis.2d 21, 345 N.W.2d 892 (Ct. App. 1984).

5. Sample Questions: I.D. of a Defendant through a Booking Photo

Presuming that you have elicited earlier DV victim Excited Utterance statements, including the identification information provided to the on-scene investigating officer, you are now ready to call the law enforcement officer who "booked" this defendant. Alternatively, you may call a law enforcement officer who is an expert in the "booking" process for that 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 so employed?
- Previous law enforcement experience?
- Present duties? (Supervisor of booking/identification/records process for county jail or police department)

B. Specific Training and Experience Questions

- What does it mean for a criminal defendant to be "booked" in the county jail? (Note: Have your witness actually explain the history and meaning of where the term originated. FYI: "Booking" finds its origin prior to the advent of computers. Law enforcement agencies inscribed every defendant's name, address, DOB, SS#, fingerprint, etc. in the same large "Book".)
- Explain your duties in the supervision of "Booking" and Identification process for the County jail / your police department?
- Why is it important for every Arrested Person to be "Booked" and Identified?
- Have you ever 'booked' an Arrested Individual, utilizing an official "Booking" process or procedure?
- Can you estimate how many Arrested Individuals you have "Booked"? 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? If so, approximately how many?
- 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"? 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 the purpose and significance of each stage. E.g. Questioning, property inventory, searching, fingerprinting, photographing.)

- 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. Stats. § 908.03(6), "Records of Regularly Conducted Activity" Hearsay Exception: 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.)

- How long has the Sheriff's Department (or police department) utilized this procedure?
- Why does your department utilize a specific procedure? (Implemented to protect the same information)
- What are the specific duties, responsibilities and procedures?
- Where does the "Booking" process occur in ____ County?
- FOR JAIL FACILITIES: Do police reports from the arresting law enforcement agency accompany each defendant as he enters the "Booking" process, after first being transported to the County Jail?

  (e.g. 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 supplied "Booking" identification information?
- After the defendant is photographed in a "Booking" photo, does he receive a corresponding "Booking" 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? (Name, age, address, ht., wt., DOB, race, sex, emergency contact information, etc.)
- Is the suspect providing the biographical information simultaneously as he is being photographed?
- What is done with the biographical information/data? (entered in computer database)
- Once the information is entered into the computer, what document can be 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 County Jail, to run a check to see if _____ (defendant's name) was "Booked" in the county 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 netted 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?
- Are these the reports you obtained for trial today?
- What information is contained in these exhibits with regard to the individual by the name of (Offenders Name) that you testified was booked in the _____ County Jail on _____?

NOTE: The questions placed to the Excited Utterance witness regarding the victim's description, should mirror those asked of this witness. For example: 1) name, 2) DOB, 3) home address, etc. …thereby establishing a mirroring list of IDENTITY evidence.

- All of this information was obtained directly from the individual named _____ (defendant's name)?
- Does it 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/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 ID 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, feel free to have the witness ID the defendant.)

- Do you see the identical person, memorialized in this photo in court today?
- Can you point to him and describe what he is wearing?

"LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT AS THE PERSON PICTURED IN THE 'BOOKING' PHOTO FROM EXHIBIT # _____."

MOVE EXHIBIT INTO EVIDENCE. PUBLISH TO JURY.

(Wisconsin Domestic Violence Prosecution Manual, 2004.)

19. Experts and "Character-Related" Evidence in Domestic Violence Cases

1. Introduction
2. A Primer: What is "Character" and When May It Be Used as Proof of Conduct?
   - The Definition of "Character."
   - Permissible Uses of Character Evidence.
   - Forms of Lay Character Evidence.
3. Expert Character Evidence: Conduct in Conformity.
4. Expert Witnesses: Cross-Examination and Impeachment.
5. Expert Character and DV Cases.
6. Expert Evidence: Credibility of the Victim.

1. Introduction.

In order to understand when and how "expert" character evidence may be introduced, it is (regrettably) important to understand the "grotesque" contours of character evidence in general.

"Character-related" evidence is a broad term that sweeps within its compass a wide range of evidentiary issues, including the use of character witnesses (lay and expert) and when they may testify to opinions, reputation, or specific instances of behavior by the defendant, the victim, or both. Such evidence may be offered as "propensity" evidence of how the defendant or victim behaved at the time of the offense or as relevant to either one's credibility.

The complex rules governing lay character evidence are compounded by the use of expert witnesses, whether offered as circumstantial evidence of conduct or as bearing on witnesses' credibility.

Expert testimony may raise issues about whether the victim or defendant should be subjected to a psychological examination, for example, by the opponent's experts. Moreover, since experts may base opinions on "inadmissible" evidence, their use may trigger special issues on direct or cross-examination.

2. A Primer: What is "Character" and When May It Be Used as Proof of Conduct?

THE DEFINITION OF "CHARACTER"

"Character" evidence is a perplexing topic in large part because "character" itself is such an amorphous concept. Left undefined by the federal and state rules of evidence, "character" refers to "a generalized description of a person's disposition, or the disposition in respect to a general trait, such as honesty, temperance, or peacefulness . . .." McCormick, *Evidence*, 5th ed., (1999), § 195. *See also Hart v. State*, 75 Wis.2d 371, 392 n.9, 249 N.W.2d 810 (1977) (relying on McCormick to distinguish "habit" from "character").

In Domestic Violence cases, one may expect to encounter proof of a defendant's "peaceful" disposition or the victim's "belligerent" or even "violent" disposition, where the defense relies on provocation or self-defense. In short, the vacuous nature of "character" as a legal concept all but assures that it embraces any generality about human behavior, including whether someone is a "good" person. Blinka, *Wisconsin Evidence*, 2d. ed. (WestGroup, 2001), § 404.1.

PERMISSIBLE USES OF CHARACTER EVIDENCE

The use of character as circumstantial evidence of conduct is tightly regulated by the rules of evidence. Specifically, prosecutors are *foreclosed* from offering any evidence of the defendant's or the victim's character as circumstantial evidence of their conduct on a particular occasion. See Wis. Stats. § 904.04(1). For example, the prosecutor cannot initiate proof that the victim is a "peaceful," "gentle," or "tranquil" person in order to show that she did not provoke or initiate (somehow) an assault.

The defendant, however, may "elect" to place either his own or the victim's character into issue as circumstantial evidence of conduct. Thus, the defendant may elect to offer proof of a "pertinent trait" of his character to show that he behaved in accord. Wis. Stats. § 904.01(a). Although the rule requires only that the "trait" be "pertinent" (i.e., relevant), common sense and trial strategy dictate that it will be a positive trait that places the defendant in a good light. For example, a defendant charged with domestic violence may offer proof that he is a "kind," "peaceful," "law-abiding," or "good" person from which to argue that he would not have battered the victim as alleged.

A defendant may also elect to offer proof of the victim's "pertinent trait" in order to show that she behaved in accord. Wis. Stats. § 904.01(a). In such instances the defense has scant incentive to say anything good about the victim, so invariably the proof tends to paint the victim in a negative light; e.g., she is "violent." The rule permits the use of the victim's character as circumstantial evidence of her character. For example, the defendant may offer evidence that she is a "violent drunk" to support the inference that she was intoxicated and violent when she assaulted the defendant, who acted in self-defense.

Finally, a defendant may offer so-called *McMorris* evidence in cases of self-defense. In essence, *McMorris* evidence consists of the defendant's knowledge (or belief) at the time of the offense that the victim had engaged in certain violent or dangerous behavior.[1] Obviously, such evidence portrays the victim as a violent, dangerous, or aggressive person, but *McMorris* evidence is admissible – in theory – only as proof of the defendant's "fear" of the victim as relevant to self-defense; it is *not* used – assuming proper limiting instructions – as circumstantial evidence of the victim's behavior (i.e., she is a violent person, thus it is more likely that she attacked the defendant who defended himself). The advantage of *McMorris* evidence is that it permits the defense to introduce specific instances of (alleged) violent behavior by the victim, albeit for the limited purpose of showing the reasonableness of the defendant's apprehensions and self-defense measures.

FORMS OF LAY CHARACTER EVIDENCE

The rules of evidence tightly control not only when and how character may be used as circumstantial evidence of conduct, they also regulate the form that the evidence may take. Specifically, when a defendant "elects" to offer evidence of his or the victim's character, Wis. Stats. § 904.05 limits him to proof by opinion or reputation. The prosecutor may cross-examine the defendant's character witnesses by inquiring into specific instances of conduct.

Opinion testimony by a lay character witness is governed jointly by Wis. Stats. § 904.05 as well as Wis. Stats. § 907.01. Section 907.01 requires that any lay opinion be the product of the witness's personal knowledge and helpful to the trier of fact. Thus, the proponent must show that the lay character witness has had sufficient firsthand acquaintance with the victim or defendant in order to have formed an opinion regarding the pertinent trait. In establishing personal knowledge of the character trait, however, the proponent may not elicit "specific instances" of conforming behavior. Section 904.05 limits the use of specific instances to cross-examination.

Reputation testimony consists of accumulated gossip. Since such gossip constitutes hearsay, it is excepted from the hearsay rule by Wis. Stats. § 908.03(21). The proponent's foundational questions should elicit testimony that the witness has personal knowledge of such gossip about the victim or defendant.

Wis. Stats. § 904.05(2) provides that only the cross-examiner may elicit testimony about specific instances of character-related conduct.[2] Put differently, on direct examination the defense is limited to the tepid forms of reputation and opinion testimony which are deliberately devoid of the colorful details that give life (and probative value) to such evidence. On

1. See Blinka, *Wisconsin Evidence*, § 404.5. *McMorris* evidence is discussed in *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413.

2. The ban on the defense use of character evidence as set forth in Wis. Stats. § 904.05 has no application to *McMorris* evidence, which is described above in this chapter.

cross-examination, the prosecutor is free to inquire about specific instances of behavior. Here again, common sense and the nature of the adversary system dictate that this will assume the opposite tone of the direct examination.

Thus, a defendant who elects to offer proof that he is a "good" or "peaceful" person may expect that his character witnesses will be cross-examined about any specific instances of "bad" or "unpeaceful" behavior for which the prosecutor has a good faith basis. And where the defense elects to introduce "negative" character evidence regarding the victim, the prosecutor may cross-examine regarding specific instances of "positive" behavior.

3. Expert Character Evidence: Conduct in Conformity[3]

There is a compelling argument that "character" is an entirely lay construct on which expert testimony is neither helpful nor permitted. *See* Blinka, *Wisconsin Evidence*, § 405.2. The Wisconsin Supreme Court, however, has ruled definitively that expert "character" evidence is admissible, subject to the trial court's discretion.

In *State v. Davis*, 2002 WI 75, 254 Wis.2d 1, 645 N.W.2d 913, ¶ 15, the Wisconsin Supreme Court held that a criminal defendant "may introduce expert testimony to show that he or she lacks the character trait of a sexual offender and that therefore he or she is unlikely to have committed the assault in question." *Davis*, 2002 WI 75 at ¶ 46. Such evidence was denominated "*Richard A.P.* evidence" based on an earlier court of appeals decision that had also approved its use. *State v. Richard A.P.*, 223 Wis.2d 777, 589 N.W.2d 674 (Ct. App. 1998).

Under Wis. Stats. § 904.04(1)(a), as construed by *Davis*, a defendant is permitted to introduce "pertinent traits" of his or her character, "regardless of whether this character evidence is founded on knowledge prior to the alleged assault or based on tests conducted after criminal charges have been filed." *Davis*, 2002 WI 75 at ¶ 19. This approach, said the court, is consistent with the "broad admissibility to expert testimony" fostered by Wisconsin law, especially the case law regarding "behavior profiles" of crime victims and witnesses, and the long-standing determination that the reliability of an expert's methodology is for the trier of fact and not a predicate for admissibility.[4]

Davis does not automatically admit anything and everything proffered by an expert "character" witness. Trial courts retain the discretion to exclude or to limit the proffered testimony, depending on the circumstances. Cautionary instructions are also in order, lest the jury overvalue such expert assistance. The court explained:

3. This comment is based on discussion of this subject at Blinka, *Wisconsin Evidence*, §§ 404.1–404.5.

4. *Davis*, 2002 WI 75 at ¶ 19 ("broad admissibility"), ¶ 21 (discussing victim and witness "profile" evidence), and ¶ 22 (reliability for the trier of fact).

> We entrust the circuit court to act as gatekeepers to unduly prejudicial evidence . . ., and when admitted, we conclude that juries in light of an instruction from the court, will afford the proper weight to such evidence on character traits which is admitted to show circumstantial evidence that the defendant is not guilty. We recognize that impermissible inferences may be more likely to occur in instances where the expert testifies that, based on his or her lack of character traits of a sexual offender, the defendant is unlikely to have committed the crime. It therefore must be emphasized that the circuit court retains discretion in admitting such evidence and must carefully scrutinize such *Richard A.P.* expert testimony in each case for its admissibility.
>
> *Davis*, 2002 WI 75 at ¶ 21.

Thus, based on the precedent provided by the victim/witness "profile" cases, a trial court may, for example, limit the expert to a lecture on the traits or behavior of sexual offenders in general without specific reference to the defendant or the facts of the particular case. Indeed, this may be the only assistance the jury really needs. The admissibility of expert testimony, then, rests within the discretion of the trial judge.[5]

Moreover, criminal defense counsel may elect to so limit their own expert's testimony for strategic reasons, particularly to avoid subjecting defendants to probing examinations by the State's retained experts. *Davis* held that courts may order defendants to undergo compulsory psychological examinations under certain circumstances.

To summarize, where the defense expert "will testify, either explicitly or implicitly, on facts surrounding the crime charged," the trial court may compel (on the State's motion) the defendant to undergo a compulsory examination conducted by the State's expert.[6] Defense counsel who wish to assert a *Davis*/*Richard A.P.* defense (e.g., "my client does not fit the profile of a sex offender; thus there is a reasonable doubt") without subjecting their client to a potentially damaging interview by the State's expert, thus may restrict their proffered expert to generalized information about sex offenders. The State may, of course, counter with its own expert lecture series on characteristics of pedophiles, intra-family sexual abusers, and the like. Nonetheless, *Davis* provides that a defense expert may present an opinion about the defendant's psycho-sexual character based on "standardized tests" and the like which do not delve into the facts underlying the charged offense. The *Davis* court carefully outlined the procedures that govern when such compulsory examinations are appropriate:

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5. *State v. St. George*, 2002 WI 50, 252 Wis.2d499, 643 N.W.2d 777, ¶ 59. ("Indeed, we conclude that had the circuit court exercised its discretion to admit the expert testimony in the present case, that discretionary decision would have been upheld by this court. Dr. Stonefeld has sufficient qualifications to testify as a person knowledgeable about the meaning of statistical data and about interviewing processes and techniques. On the basis of his training and knowledge. Dr. Stonefeld had expertise in the limited topics upon which he was going to testify. He did not have to match the specific credentials of the State's experts. He did not have to be familiar with the recantation paper upon which the State's witness relied.").

6. *Davis*, 2002 WI 75 at ¶ 46. The *Davis* court resolved the constituionality of such compulsory examinations at ¶¶ 27–45.

> A defendant who seeks to introduce Richard A.P. evidence must notify the court and the state that he or she intends to introduce this evidence at trial and precisely identify the exact testimony that the expert will provide at trial and the bases for the expert's opinion. Upon this disclosure, the state may then bring a motion requesting the court to compel the defendant to undergo an examination by an expert from the state. On this motion, the circuit court must then carefully examine the defendant's disclosure regarding his or her expert's testimony and the expert's basis for his or her opinion. *If this disclosure statement shows that the expert will either explicitly or implicitly provide testimony regarding relevant facts surrounding the alleged crime that amounts to the defendant's own denial of the crime, the court may then order the defendant to undergo a reciprocal examination from the state based on the fact that the defendant has waived his or her right against self-incrimination.* In this way, the defendant is permitted to introduce expert opinion testimony pursuant to Richard A.P., but restricted from introducing statements that amount to nothing more than the defendant's own statements on the crime.
>
> *Davis*, 2002 WI 75 at ¶ 40 (emphasis added).

On the record before it, the court held that where a defense expert's opinion is based on "standardized tests" that do not inquire into "the facts surrounding the case," there has been no waiver of the right against self-incrimination and therefore the State is not entitled to a compulsory examination. *Davis*, 2002 WI 75 at ¶ 41. The State may adequately challenge the defendant's expert opinion testimony on cross-examination and by the use of rebuttal experts. *Davis*, 2002 WI 75 at ¶ 41-42. Cautionary instructions regarding such expert testimony may also be used.

4. Expert Witnesses: Cross-Examination and Impeachment

An expert may be cross-examined about information or material that he or she reviewed or relied upon in rendering an opinion. Indeed, experts may be cross-examined about information they should have considered but did not, for whatever reasons. Moreover, such cross-examination is appropriate even when the evidence is "inadmissible," provided it is of a type reasonably relied upon by experts in the field. See Wis. Stats. § 907.03 and § 907.05.[7]

In *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458 (1977), the defendant was charged with murdering his girlfriend. During his case-in-chief, the defense called two experts who testified that he suffered from a "passive-aggressive" personality order that made it unlikely that he would initiate violent behavior. The prosecutor cross-examined the experts about

7. *See Karls v. Employers Ins. Of Wausau*, 78 Wis.2d 284, 300, 254 N.W.2d 255 (1977); *Liles v. Employers Mut. Ins. Of Wausau*, 126 Wis.2d 492, 505, 377 N.W.2d 214 (Ct. App. 1985).

their knowledge of prior acts of violence inflicted on the victim by the defendant. One expert was asked a hypothetical question by the prosecutor that embraced several acts of such violence. In its rebuttal case, the prosecutor called several witnesses who testified to the prior acts of violence by the defendant.

Affirming his conviction for murder, the Wisconsin Supreme Court held that the defense was "entitled to place into evidence . . . expert opinion testimony concerning his general character trait of nonhostility and nonaggressiveness." *King v. State*, 75 Wis.2d at 38-39. And once the defense offered such expert character evidence, the prosecution was entitled to cross-examine regarding specific instances of violent behavior, as provided by Wis. Stats. § 904.05, as well as to use hypothetical questions. *King v. State*, 75 Wis.2d at 40-41.

The defense, however, argued that Wis. Stats. § 904.05 explicitly barred the use of extrinsic evidence (i.e., the rebuttal witnesses) in order to prove up the prior acts of violence (the defense experts claimed not to have heard about some of them). Put differently, the defense claimed that the prosecutor had to "take the answer" on cross-examination. The Wisconsin Supreme Court disagreed. Experts may be cross-examined with hypothetical questions, and where "the expert has responded to such questions in an evasive and equivocal manner (or indicates that these facts would change his opinion), then it is within the trial court's discretion to give the prosecution opportunity to establish those specific incidents averred to in the hypothetical." *King v. State*, 75 Wis.2d at 43.

5. Expert Character and DV Cases

The impact of *Davis* and *Richard A.P.* on Domestic Violence prosecutions is uncertain and problematic. Both *Davis* and *Richard A.P.* were sexual assault prosecutions where the defense proffered psychological profiles. In short, *Davis* requires that the proffered profile be "pertinent" to the facts of the case. Although its "reliability" is left to the trier of fact, the profile must nonetheless assist the jury and the expert must have "specialized knowledge" regarding it, as required by Wis. Stats. § 907.02.

A defendant charged with domestic violence who offers only evidence of his "peaceful" or "law-abiding" character is invoking lay concepts for which experts are neither helpful or appropriate. Yet, case law supports the proffer of expert evidence of a defendant's "passive-aggressive" personality to support an inference that he would not have initiated violent behavior. *See King v. State*, 75 Wis.2d, 248 N.W.2d 458 (1977)(summarized above). Where the defense elects to offer such expert character evidence, the prosecutor may cross-examine the expert about specific instances of violent behavior that conflict with the proffered trait. Moreover, the prosecutor may elect to cross-examine using hypothetical questions the factual predicates of which may be proven during the State's rebuttal case, if necessary (see the previous section).

In short, it is imperative that prosecutors closely watch how the defense is using character and the form of the evidence. Motions in limine are extremely helpful to the courts in identifying and resolving the thicket of issues that arise.

When facing questionable applications of "expert" character evidence, prosecutors must also carefully measure their objections so that the defendant's constitutional right to present a defense is not violated. In *State v. St. George*[8] the court held that the exclusion of expert testimony offered by the defense contravened both the Wisconsin Rules of Evidence and the defendant's constitutional rights.[9] The *St. George* court provided the following outline for analyzing a defendant's constitutional right to present evidence:

> ¶53. For the defendant to establish a constitutional right to the admissibility of the proffered expert witness testimony in the present case, the defendant must satisfy a two-part inquiry, similar to the inquiry this court has developed in determining whether the application of the rape shield statute excluding certain evidence deprives an accused of constitutional rights to present a defense. This two-part inquiry enables a circuit court to determine the accused's interest in admitting the evidence and to determine whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion "undermine[s] fundamental elements of the defendant's defense."
>
> ¶54. In the first part of the inquiry, the defendant must satisfy each of the following four factors through an offer of proof. The defendant must show:
>
> 1) The testimony of the expert witness met the standards of Wis. Stat. §907.02 governing the admission of expert testimony.
> 2) The expert witness's testimony was clearly relevant to a material issue in this case.
> 3) The expert witness's testimony was necessary to the defendant's case.
> 4) The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect.
>
> ¶55. After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence. [FN 4]

8. *State v. St. George*, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777.

9. *St. George*, 2002 WI 50, ¶¶ 57-59.

Thus, in ensuring that a proper record has been made, prosecutors objecting to defense experts should also address the constitutional dimension of the problem. Defense counsel's failure to raise the constitutional grounds might constitute ineffective assistance of counsel, so little is gained by ignoring this issue other than the creation of a postconviction morass.

6. Expert Evidence: Credibility of the Victim

Domestic Violence cases often feature a "swearing" contest between the victim and defendant in which the victim's credibility is often determinative, especially in the absence of corroborating evidence. The victim's credibility may become particularly tangled where the victim later recants or refuses to cooperate with the prosecution. Faced with serious inconsistencies and seemingly puzzling "about faces" by victims, juries may need the assistance of an expert with specialized knowledge of Domestic Violence. (See the example motion following this chapter.)

Such credibility experts may help the jury better understand the emotional and psychological dynamics of Domestic Violence, but the courts have tightly controlled their testimony.

The starting point for analysis is the so-called "*Haseltine* rule," which provides that no witness, lay or expert, may offer opinion testimony about whether *another* witness's testimony is truthful or accurate, or whether a crime in fact occurred. *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Thus, for example, a party may call a character witness to testify that another witness has a character trait for untruthfulness, but the witness may not testify whether that other witness is lying. Wis. Stats. § 906.08. *See* Blinka, *Wisconsin Evidence*, §§ 608.1-608.3. More concretely, the prosecution's credibility expert cannot testify that the victim is being truthful or that she had "in fact" been abused.

In *State v. Rizzo*, 2002 WI 20, 250 Wis.2d 407, 640 N.W.2d 93, the Wisconsin Supreme Court analyzed the scope of permissible expert testimony on credibility, which it labeled "*Jensen* evidence" after the progenitor case. In essence, *Jensen* evidence consists of expert opinion testimony "about the consistency of a complainant's behavior with the behavior of victims of the same type of crime" which is admissible "only if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." *Rizzo*, 2002 WI 20 at ¶ 12, n. 3. (Thus, expert testimony consisting only of exposition (e.g., a lecture) about such behavior, and without any reference to the particular victim or case, does not fall technically within the orbit of *Jensen* evidence.) Declining to take a "mechanistic approach" that confined *Jensen* evidence to "magic words" which explicitly called for the expert's opinion about the consistency of the victim's behavior with a class of victims generally, the court held that an expert's "detailed description of her interactions with and treatment of the victim" was sufficient on the record before it. In short, the rule is

triggered whenever the substance of the expert's testimony is such that "a jury would interpret" it "to provide the comparison that is the essence of *Jensen* evidence."[10]

Whether *Jensen* evidence is present is important for two reasons. First, neither *Rizzo* nor earlier case law provides automatic admissibility. *Jensen* evidence is predicated upon the need to " 'help juries avoid making decisions based on misconceptions of victim behavior.' " *Rizzo*, 2002 WI 20 at ¶12, quoting *Jensen*. Absent this predicate, *Jensen* evidence is inadmissible. Second, the presence of *Jensen* evidence is necessary, although not sufficient, to warrant subjecting the victim to a psychological examination when requested by the defense, as permitted by the *Maday* case. (See below.) To put the matter starkly, the unwary prosecutor who stumbles by presenting ill-considered *Jensen* evidence risks a mistrial or reversal, and exposes the victim to the rigors, embarrassment, and trauma of a compelled examination.

The burden is on opposing counsel, usually the defense, to "police" testimony to ensure that the *Haseltine* rule is not transgressed. Failure to object in a timely and specific manner results in waiver. Put differently, even a "standing objection" is insufficient.[11] Nonetheless, prosecutors should not invite plain error or claims of ineffective assistance of counsel by unreasonably pushing the otherwise shadowy borders of the rule.

The presence of *Jensen* evidence may permit the defense to move the court for an order compelling the victim to undergo a psychological assessment under what is known as the *Maday* rule. *State v. Maday*, 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993). In *State v. Rizzo*, 2002 WI 20, 250 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993), the Supreme Court modified and reinforced the *Maday* rule, the "core rationale" of which is to assure "basic fairness":

> If one side is to introduce testimony by a psychological expert who has examined the victim, the other side must also be able to request such an opportunity in order to level the playing field. A jury will generally give the opinion of a psychological ex-

10. *Rizzo*, 2002 WI 20 at ¶¶20-23. The court found that in combination "the phrasing of the prosecutor's questions and the substance" of the expert's testimony "combined to send a clear message to the jury that [the victim's] behaviors were consistent with those of known sexual assault victims." *Id.* at ¶22.

11. *State v. Delgado*, 2002 WI App 38, 250 Wis.2d 689, 641 N.W.2d 490, ¶¶11-13 ("[W]e hold that when an expert witness is permitted to testify in a sexual assault case as to common characteristics of sexual assault victims, and to the consistency of those characteristics with the victims in the case at trial, and when the expert presents extensive testimony on those and related subjects, a standing objection is insufficient to preserve challenges to *Haseltine* violations. . . . Here, when ruling on Delgado's motion to preclude Ortiz's testimony, the trial court specifically found that the law permitted Ortiz to testify with regard to common behavioral patterns exhibited by sexual assault victims in general, and whether the victims here exhibited behavioral patterns consistent with those of sexual assault victims. The trial court ruled that Ortiz would not be permitted to testify as to the credibility of the victims, or Ortiz's belief that the victims were telling the truth. The trial court's ruling put Delgado's counsel on notice as to the specific areas that constitute objectionable testimony. The standing objection preserved the issue of whether or not Ortiz should be permitted to testify at all and whether her testimony would be helpful to the jury. Defense counsel did not make any specific *Haseltine* objections, which are now raised on appeal. Accordingly, we must conclude that Delgado waived his right to have this issue addressed on appeal.").

> pert who has examined a party greater weight than the opinion of an expert who has not. The State's position suggests that the key fact in *Maday* was that its experts were the prototypical "hired guns." However, in *Maday*, the key fact was that the psychological experts had personally interviewed and examined the complainant.
>
> *Rizzo*, 2002 WI 20 at ¶26 (citation omitted).

The court explicitly rejected the State's contention that *Maday* is restricted to experts specially hired or retained for purposes of testimony.[12] The record showed that the State's expert was "a clinical psychologist who had an extensive, ongoing relationship" with the victim. The expert had examined, interviewed, diagnosed, and treated the victim. "In short," the "extent and nature" of the expert's contacts with the victim brought "her within the ambit of *Maday*." *Rizzo*, 2002 WI 20 at ¶ 33.

Rizzo stops short, however, of imposing *Maday* whenever the State calls the victim's treating psychologist as a witness:

> It is important to emphasize that our decision does not tie the State's hands in presenting expert witnesses in sexual assault trials. It does not require that a defendant receive a determination under Maday whenever the State calls a complainant's treating psychologist as a witness. *Here, the State would have been free to elicit factual and opinion testimony from Dr. Pucci without triggering Maday if it had called a different witness in order to introduce Jensen evidence.* Indeed, before trial, this is precisely the course the State represented that it would follow if it determined that Jensen evidence was necessary.[13]
>
> *Rizzo*, 2002 WI 20 at ¶ 37 (emphasis added).

Finally, even where the State uses *Maday* evidence, *Rizzo* underscores the continuing vitality of the seven-factor balancing test originally set forth in *Maday*, which requires that defendants demonstrate a "compelling need" for the examination. "A conclusion that a defendant is entitled to a *Maday* determination," said the court, "is not equivalent to a conclusion that the defendant is entitled to a psychological examination."[14]

(Written by Marquette University Law Professor Daniel D. Blinka, Wisconsin Domestic Violence Prosecution Manual, 2004.)

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12. *Rizzo*, 2002 WI 20 at ¶ 32 (citation omitted). Later the court reiterated that "even if the State had not compensated or reimbursed" the expert, "she would still have been a *Maday* expert." Id. at ¶ 35.

13. *Rizzo*, 2002 WI 20 at ¶ 37 (emphasis added).

14. *Rizzo*, 2002 WI 20 at ¶ 38. The case was remanded for the trial court to conduct a hearing on whether there was a compelling need for a psychological examination.

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

CRIMINAL DIVISION

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____

Defendant

STATE'S PRETRIAL MOTION TO INTRODUCE AN EXPERT ON BATTERED WOMEN'S SYNDROME OR MEDICAL EXPERT

PLEASE TAKE NOTICE that the State of Wisconsin, by Assistant D. A. _____, will move the court for an order permitting the introduction of the testimony of an expert on the Battered Women's Syndrome (or medical expert) at the trial of this matter.

This case involves a scenario between a man and woman who have had a longstanding relationship. This relationship reflects a course of conduct typical of the pattern of cycle of violence often observed in DV cases.

The specific charges involve a dispute that erupted from the defendant's accusations that the victim was seeing another man. According to the criminal complaint, the defendant beat her after complaining to her that the two of them were not having sex. The defendant told the victim that he had invested three years in their relationship and that he was not going to give it up. According to the complaint, the defendant told the victim that he would see her dead first. The victim protested, but the defendant violently assaulted her.

The criminal complaint notes that the victim was confused as to whether or not she should call the police. Only after the defendant came into her home without her permission the next day did she realize that the defendant was not going to leave her alone. The defendant threatened to kill the victim. The defendant was armed with a gun when he made the threat.

The victim reports that her support network of friends and relatives was hampered

through isolation tactics employed by the defendant. Emotional abuse occurred through repeated demeaning name-calling.

The victim in this case delayed her reporting of this incident due to the presence of her child and the controlling nature of the defendant's actions. The criminal complaint alleges the use of a belt to intimidate the victim.

A case such as this does not occur in a vacuum. An on-going relationship exists. Whilst the allegations occurred in the criminal complaint, the defendant was still proposing marriage. The defendant was further "keeping tabs" on the victim, in the later hours of the day after the sexual assault allegedly occurred. The defendant appeared to be fearful that the victim might contact the police. These actions of the defendant occurred in the context of the aforementioned relationship — one which included control and manipulation.

This case involves several complicated emotional issues, including but not limited to: the defendant's jealousy, the defendant's rage, the defendant's violent temper and behavior, the defendant's control of the victim, etc. It should be further noted that the defendant has been convicted of the DV offenses of: _____ from the date of _____, _____ from the date of _____, and _____ from the date of _____. There are also several dismissed and no processed cases, all appearing to be similar in nature. The victim does relate that she was the victim in all of the previously mentioned cases.

The State believes that the victim's testimony will reflect the dynamics of her relationship with the defendant in the context of experiencing the Battered Woman's Syndrome. In order to fully assess the credibility of the testimony of the victim in this case, the jury must be well informed as to the manner in which a woman who is, as the State contends, operating as a Battered Woman, behaves, thinks and acts. This information is generally outside the realm of the ordinary person's experience. In fact, many behaviors of battered women make little or no sense to the person on the outside, looking in.

For instance, a common response (from a person unfamiliar with Domestic Violence) to the facts alleged above might be: "Well, why doesn't the victim just leave the defendant. No one has to put up with that type of abuse." An expert witness can help the jury understand the psychosocial dynamics of these relationships.

Allowing an expert to testify as to these issues will aid the fact-finder. Most jurors do not necessarily think of sexual assaults and violence occurring in the midst of an on-going relationship between two people. An expert will help to educate the jurors as to issues of control in the context of a domestic violence relationship. To a trained professional, the victim's conduct in this case may seem normal while a typical person may find it bizarre.

This situation is similar to *State v. Bednarz*, 507 N.W.2d 168 (Wis. Ct. App. 1993). There, the court agreed that the State could introduce the testimony of an expert to explain the

victim's recantation. The expert testimony functions as a tool for the jury to use in assessing the credibility and truthfulness of the victim. It is necessary for a complete understanding of the facts of the case. *See also State v. Jensen*, 432 N.W.2d 913 (Wis. 1988) and *State v. C.V.C.*, 450 N.W.2d 463 (Wis. Ct. App. 1989) for other kinds of situations involving the appropriate use of experts in relation to the explanation of significant, often misunderstood dynamics. Another case involving the Battered Women's Syndrome is *State v. Richardson*, 525 N.W.2d 378 (Wis. Ct. App. 1994), wherein the court held that use of such an expert by the defense was appropriate.

The State plans to call the following expert: _____. (list credentials; highlight work experience and specifics from resume; consider attaching resume to the motion). It should be noted that _____ has testified previously as an expert on issues of Domestic Violence and Sexual Assaults.

Respectfully submitted this _____ day of _____, 20____.

_____

Assistant District Attorney

State Bar No. _____

cc: defense counsel

20. Cross Examination Techniques

1. Introduction
2. Statutory Authority
3. Purpose of Cross Examination
4. Attacking the Credibility of a Witness Through 8 Means
   A. Prior inconsistent statements.
   B. Bias, interest, and prejudice.
   C. Attack character.
   D. Perception problems of witnesses.
   E. Witness being contrary to others at trial.
   F. Witness contradicting himself or herself at trial.
   G. Prior convictions.
   H. Supporting your Theme in the DV context.
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 meet your legal burden to withstand dismissal….but you want to do more. You want to persuade the jury to find the defendant guilty beyond a reasonable doubt.

And 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 no meaningful defense really exists. 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 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 want to set up your final argument to the jury. You want to demonstrate that while the defense may have posited a "doubt," it is not a ***reasonable*** one. To the contrary, the defense is positing an ***UNreasonable*** doubt.

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. Stats. § 906.11, which states:

> **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. Purpose of Cross Examination

1. ***Attacking the credibility of witnesses.***
2. ***Reinforcing the proof of an element of your case.***
3. ***Re-emphasis of 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 typically are 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-examine a witness recklessly because you feel you have to ask something. It usually will result in costly error.

Prepare your cross-examination. Know that witness' prior statements. Have those statements ready to impeach, if necessary. Rapid-fire your cross-examination so the witness doesn't have time to think. Often, your points will be drawn out more by inference than direct confrontation. In fact, belligerent or hostile treatment to a witness usually backfires.

4. Attacking the Credibility of a Witness through 8 Means

A. PRIOR INCONSISTENT STATEMENTS

1. **PRIOR INCONSISTENT STATEMENTS** may be oral, written, testimonial or even non-verbal.
2. **FOUNDATIONAL REQUIREMENTS.** As stated in *Bullock v. State*, 53 Wis.2d 809, 193 N.W.2d 889 (1972), you must lay a foundation. With particularity, *Bullock* articulates the foundational requirements for impeachment of a prior statement:
   a. Asking witness if he made the prior contradictory statement asserting the date and person to whom the statement was made.
   b. Affording the opportunity to view the statement, if in writing, by the defense lawyer at the completion of that part of the examination, according to Wis. Stats. § 906.13(1). Always mark as an exhibit and enter into evidence. It becomes substantive evidence.
   c. Fairness requires an opportunity for the witness to explain the prior statement.
3. **WHO CAN IMPEACH.** According to Wis. Stats. § 906.07, the credibility of a witness may be attacked by any party, including the party calling the witness. Once you impeach your own witness, it becomes substantive evidence. *State v. Lenarchek*, 74 Wis.2d 425, 247 N.W.2d 80 (1976).
4. Make sure impeachment is with a prior inconsistent statement. A prior consistent statement is hearsay unless used to rebut an inference of recent fabrication or improper influence or motive. Wis. Stats. § 908.01(4)(a)(2).
5. 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 lawyer from trying to impeach the detective on his testimony at the suppression hearing since no transcript was available to determine accuracy of the impeachment. This occurred, even in light of Wis. Stats. § 906.13(1), which says the statement does not have to be shown to the witness on the stand.

6. 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

1. **RELATIONSHIPS.** Examine the relationship with a witness or defendant.

   a. *Olden v. Kentucky*, 109 S.Ct. 480, 488 U.S. 277, 102 L.Ed. 513 (1988), held it was reversible error to prohibit the defense lawyer 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 the prejudice of revealing her 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.

   b. *In the Interest of Michael R.B.*, 175 Wis.2d 713, 499 N.W.2d 641 (1993).

   The defendant wanted to call witnesses to show that the defendant and victims' family did not get along. The judge prohibited this testimony, concluding that these allegations were unsubstantiated and vague and that these were not the parties involved. The court was upheld in prohibiting this type of bias testimony.

   c. *State v. Williamson*, 84 Wis.2d 370, 267 N.W.2d 337 (1978).

   To show bias, the State 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.

2. **TESTIMONY IN EXCHANGE FOR SOMETHING OF VALUE.** A deal given to testify or a benefit derived from testifying.

   a. *Genova v. State*, 912 Wis.2d 595, 283 N.W.2d 483 (1979).

   The defense lawyer was prohibited from examining the 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.

   b. *State v. Lindh*, 156 Wis.2d 768, 457 N.W.2d 564 (Ct. App. 1990). *Reversed* 161 Wis.2d 324, 468 N.W.2d 168 (1991).

   The Court of Appeals held it was reversible error for the court to prohibit the defense from cross-examining psychiatrist Leigh Roberts, the State's psychiatrist, on the truthfulness of possible criminal charges being issued against him, and the possibility he is testifying for the State to curry favor. The Supreme Court reversed holding that the questioning was immaterial.

3. **RAPE SHIELD.** Wis. Stats. § 972.11(2). Evidence of past sexual conduct of the victim is prohibited in Wis. Stats. §§ 940.225, 948.02, 948.025, 948.05 or 948.06, except:

   a. Evidence of the complaining witness's past conduct with defendant.

   b. Evidence of specific instance 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.

   c. Evidence of prior untruthful allegations of sexual assault made by the complaining witness. *Also see State v. Rognrud*, 156 Wis.2d 783, 457 N.W.2d 573 (Ct. App. 1990). *Also State v. Olson*, 179 Wis.2d 715, 508 N.W.2d 616 (Ct. App. 1993).

   This is limited to cross-examination. 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.

4. **BIAS.** Examine a Defense Witness for the Following Areas of Bias:

   a. Anti-police attitude.

   b. Financial interest – are you being paid and how much?

   c. Member of a group sympathetic to defendant (e.g. battered women group for battered women's syndrome defense).

   d. Dislike of victim.

5. **CORRUPTION** – a "professional" witness or "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)

6. **WHY THE SURPRISE STORY NOW?** Explore with the witness (NOT THE DEFENDANT!!) why the story is just now coming out and why the witness did not go to police earlier to clear the defendant. Why wait until the day of trial? Why allow an innocent person to continue to be unfairly prosecuted?

   But exercise extreme caution. You cannot question the defendant as to why he did not tell police earlier, when after arrest and Miranda rights were given!

   a. *State v. McLemore*, 87 Wis.2d 739, 275 N.W.2d 692 (1978). You can question an alibi witness as to why he did not tell the alibi story earlier. Again, use extreme caution when questioning the defendant after arrest and Miranda rights given.

   b. *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). You cannot use the defendant's right to silence at arrest if Miranda Rights are given… or anytime after Miranda Rights are given. You can use the defendant's "failure to explain" or silence prior to Miranda Rights.

c. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1970). Post-*Miranda* silence cannot be used. It is a due process violation (although it may be non-substantial and not require reversal).

d. *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 lawyer from cross-examining the witness about this topic, ruling that it is not a matter bearing on credibility.

C. ATTACKING CHARACTER

1. **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 (truthfulness or untruthfulness), pursuant to Wis. Stats. § 906.08(1).

2. **PROHIBITION ON COLLATERAL EVIDENCE TO IMPEACH.** You cannot use collateral evidence to impeach. If the witness or defendant say it didn't happen you are stuck with the answer. Wis. Stats. § 906.08(2). *See State v. Sonnenberg*, 117 Wis.2d 159, 344 N.W.2d 95 (1983).

3. **COLLATERAL EVIDENCE AS OTHER ACTS EVIDENCE.**

   a. *State v. Simpson*, 83 Wis.2d 494, 266 N.W.2d 270 (1978):

      Allowed the defendant to be crossed on an incident that occurred four months prior to the charged incident, where defendant threatened to kill victim. If defendant answered that the incident did not occur, court could still allow other acts evidence to show intent, per Wis. Stats. § 904.04(2).

   b. *State v. Rutchik*, 116 Wis.2d 61, 341 N.W.2d 639 (1983):

      Other crimes evidence admissible on cross-examination to rebut the defendant's testimony of intent. Collateral evidence is admissible not only to question credibility, but also to show a Wis. Stats. § 904.04(2) exception during cross-examination.

4. **IMPEACHING THE DEFENDANT.** You can impeach a defendant on statements he made at a prior suppression hearing. You can even impeach him on suppressed statements or evidence that result 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).

5. **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).

   a. **FOUNDATION** must be laid by the defendant before self-defense evidence is admissible. There are two ways the defense can lay the foundation:

1) Through the testimony of the defendant that he acted because of certain facts he knew about the victim; 2) If the State introduces the defendant's statement and it contains elements of self-defense that pertain to specific acts of the victim that made the defendant act.

b. **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 did.

c. **STATE MAY CHALLENGE "VIOLENT" CHARACTERIZATIONS OF THE VICTIM.** The State can rebut these challenges to the victim's character by showing evidence of the peacefulness of the victim, according to Wis. Stats. § 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 the peaceful character of himself. Wis. Stats. § 904.04(1)(a) and (b).

d. **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 stated 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 effect the defendant's actions at the time of the crime, it can be prohibited.

e. **MOTION IN LIMINE TO OBJECT TO SELF-DEFENSE.** Always make a motion in limine demand in the early stages of the proceedings to stop everything from coming in. You can also claim lack of notice if you are not apprised of the victim's *McMorris* prior bad acts.

D. PERCEPTION AND RECOLLECTION PROBLEMS OF A WITNESS

1. **IMPEACHMENT THROUGH PHYSICAL PROBLEMS** such as sight disabilities, hearing disabilities, etc.

2. **IMPEACHMENT THROUGH IMPOSSIBILITY**, highlighting the witness' inability to see or hear the thing testified to. Wisconsin courts have limited the use of a defense expert 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.

3. **PRACTICAL SUGGESTIONS:** 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.

Q: "Where were you when you saw the accident?"

A: "About two blocks away?"

Q: "How could you see the accident two blocks away?"

A: "I was on top of the highest building in town and had binoculars."

4. **STRATEGY TO ATTACK A WITNESS' ABILITY TO RECOLLECT.**

a. **PASSAGE OF TIME.** The time lapse from the point of the event to the point of testimony. If there is different recollection from the point of the incident to the point of the testimony, always ask the witness if it is true his recollection at the point of the incident would have been more accurate and fresher than his recollection at the present point of testimony. Invariably the answer will be: " My recollection was more accurate when the incident occurred."

b. **MENTAL AFFLICTIONS / COMPETENCY TO TESTIFY.** Competency is described in Chapter 906 of the Wisconsin statutes. If there is a possible mental affliction of a witness, the court can appoint a psychiatrist to examine the witness to determine competency 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).

c. **ALCOHOL / DRUG USAGE.** Evidence of alcohol or drug use is relevant if not remote to the incident. *Desjarlois v. State*, 73 Wis.2d 480, 243 N.W.2d 453 (1976).

d. **PRACTICAL SUGGESTIONS:** Again, do not ask too many questions. The below examination occurred with a defense alibi witness in a murder case:

Q: "You saw the defendant at your hotel at the time of the murder which happened across town?"

A: "Yes."

Q: "How long have you worked at the hotel?"

A: "9 years."

Q: "How many people have you waited on in those 9 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."

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 motion of one of the parties to the action, a judge must order witnesses excluded so that they cannot hear the testimony of other witnesses, according to Wis. Stats. § 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 HIMSELF ON THE WITNESS STAND.

At times a witness will testify differently on cross-examination than he did on direct examination. When this occurs bring it to the jury's attention in closing argument, and if possible, get a transcript of his contradictions.

You can cross-examine a defendant on statements he made at a guilty plea hearing, providing it is stipulated 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 he and his father had nothing to do with the rape. The prosecutor was permitted to ask the son about his "no contest" plea to the sexual assault charge in juvenile court. Despite protections regarding juvenile proceedings, Wis. Stats. § 906.13 treats the "no contest" plea as a prior statement of a witness and is admissible.

G. IMPEACHMENT THROUGH PRIOR CONVICTIONS.

Wis. Stats. § 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?**
- **How many times?**

1. **NECESSITY OF A HEARING.** 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. Stats. §§ 906.09(2), 904.03 and 901.04.
2. **WHEN THE DEFENDANT GIVES THE WRONG ANSWER.** If the witness gives the wrong answer as to the number of convictions you can ask his about specific convictions and the year and county they occurred in. For instance, a follow-up question may be asked: "Mr. Jones, weren't you convicted of burglary in Polk County on 1992?" If the witness refuses to answer, you can impeach him with certified copies of his judgment of conviction.
3. **WHEN THE DEFENDANT GIVES THE CORRECT ANSWER.** If the witness answers correctly as to whether he was convicted of a crime and how many times on direct examination, you are prohibited from asking it again on cross-examination. *State v. Adams*, 257 Wis. 433, 43 N.W.2d 446 (1950).

4. **ERRORS IN DETERMINING PRIOR CONVICTIONS.** Be careful if a prosecutor makes a mistake as to the number of convictions. A mistrial can be declared. Since the mistake was the State's fault, 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).

   a. In *State v. Bowie*, 92 Wis.2d 192, 284 N.W.2d 613 (1979), the prosecutor stated and impeached the defendant with four convictions when he really only had one conviction. The court ruled the prosecutor's mistake as 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.

   b. In *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-examination the prosecutor asked the defendant if he had broken into a home while armed in 1975. The court held that Wis. Stats. § 906.08 permits the use of specific incidents of conduct of a witness to attack his credibility on cross-examination. But under Wis. Stats. § 906.09 you are stuck with his answer. Extrinsic evidence can not be utilized.

   c. In *State v. Basheka*, 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 was clear that the defendant had been convicted of armed robbery while masked and the judge counted them as separate convictions rather than one. Thus, the defendant had been convicted of four crimes, not five. The court rules that this was harmless error and would only be reversible error if it contributed to the conviction.

   d. In *Moore v. State*, 83 Wis.2d 285, 265 N.W.2d 540 (1978): After the defense witness testified as to the number of convictions, the prosecutor asked the defense witness how many of those convictions occurred with the defendant. The court found this was improper impeachment, but harmless error.

5. **PRACTICAL SUGGESTIONS:** 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 where the defendant or witness was not represented by counsel or the conviction was reversed. *See Lewis v. U.S.*, 100 S. Ct. 915 (1980).

H. SUPPORTING YOUR THEME IN THE DV CONTEXT

When your Case Theme is: "Exertion of *Power and Control* in a DV Relationship"

You must strategize your cross-examination to point out the improbabilities of the defendant's rendition of the facts. At the same time, you must develop your case theme through cross-examination of the defendant.

Prosecutors understandably like 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 DV relationship in your case, you may choose some form of "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 a "Power and Control" theme. 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 from the "Power and Control Wheel":

1. **EMOTIONAL ABUSE.** Putting a victim down. Making the victim feel bad about himself or herself. Mind games. Put downs. 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 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. Running down the victim's parenting skills. Abuse of children. Overuse of physical punishment of children.
5. **THREATS.** Threaten to take away the children or report victim to Child Protective Services agencies. Threats to kill or commit suicide. Making or carrying out threats to injure or harm victim, children, family members, or even victim's property.
6. **USING MALE PRIVILEGE.** Treating victim like a servant while acting like the "master" or "king of the castle." Making all the "big" decisions. Treating opposite sex as inferior beings or as stupid.

7. **INTIMIDATION.** Using fear. Putting victim in fear by using looks, gestures, actions, loud voice, breaking / smashing things, hurting the family pets, destroying victim's sentimental property.
8. **ISOLATION.** Controlling what the victim does, whom 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.

When a DV Defendant Testifies: Some Practical Ideas and Suggestions

When a DV defendant testifies, typically that person will appear much differently than on the night of the incident. Chances are that the defendant will wear a more polished garb to court. The defendant will normally 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 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 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 agrees with each and every allegation. Occasionally, you will encounter a DV defendant who will show his annoyance, frustration and anger at your questions. If you are in control of the witness, consider asking him if his frustration displayed 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 sure the jury wants you to go after the defendant.

5. Miscellaneous Cross-examination Issues

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 source of drugs, since she said to reveal this 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 aspect of examination, 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 was afraid to testify in a child sexual assault case. The prosecutor asked the judge to find the child unavailable and allow parents to testify as to the statements of the child. There was not a 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 to declare the child unavailable.

DEFENDANT'S 5TH 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); and *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 in his own behalf may not claim a privilege against self-incrimination on relevant matters of cross-examination. If a defendant refuses to answer certain questions on the stand, the judge can strike all of his testimony or make the defendant assert his 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 you do not know the answer to. Know everything about a given case and the witness before the witness testifies.
3. Never re-hash 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. Always make the defendant hold the weapon if the opportunity arises.
8. Be sensitive to child witnesses and the defendant's mother.
9. Use simple words.
10. Always end on a high point.

(Written by ADA Mark Williams, Chief DDA Robert Donohoo and ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004.)

21. Common Defenses to Domestic Violence

1. Introduction
2. Justifications
   A. Self-defense
   B. Defense of Others
   C. Defense of Self or Others Using Deadly Force
   D. Defense of Property
   E. Defense of Another's Property
3. Excuses
   A. Mistake
   B. Intoxication
4. Alibi
5. More Information on Self-Defense: *McMorris* Evidence

1. Introduction

Defenses are generally split into three categories: (1) Alibi; (2) Justifications; and (3) Excuses. 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 DV 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 justifications and excuses.

Special thanks to two resources relied upon in fashioning this section on Common Defenses to Domestic Violence: Schmalleger, Frank, *Criminal Law Today: An Introduction with Capstone Cases*, 2nd Ed., Prentice Hall: 2002. The Wisconsin State Bar, *Wisconsin Judicial Benchbook*, Judicial Education Office, 2002.

2. Justifications

Justification is a category of defenses in which the Defendant admits committing the criminal act but claims it was necessary to avoid some greater evil. Justifications most commonly include necessity, self-defense, defense of others, and defense of property.

Self-defense is the most commonly raised justification defense in domestic violence cases. Therefore, the focus of the first section of this chapter is on self-defense. You should be aware, though, that many of the same procedures and ideas are applicable to the other justification defenses that follow.

A. SELF DEFENSE

1. **DEFINITION** of Self-Defense.

   a. Self-Defense is defined by Wis. Stats. § 939.48(1). It reads:

   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[1] 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.

   b. **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.

   For the Defendant's beliefs to be reasonable, the standard 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 reason-

1. For purposes of self-defense, "unlawful" means "either tortuous or expressly prohibited by criminal law or both." Section 939.48(6), Stats.

ableness 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.

2. How Self-Defense is **INVOKED**

   a. Just like any other affirmative defense, a Defendant invoking self-defense must first make an affirmative statement or an admission of use of force.

   b. The Defendant must then claim that the force used was necessary to prevent an unlawful interference with the Defendant's person.

   c. If a *prima facie* case is made, the burden then shifts to the State to overcome the defense.

3. **"OTHER ACTS" EVIDENCE** and ***McMorris***

   Once a Defendant establishes a claim of self-defense, the Defendant 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, 205 N.W.2d 559 (1973).

Practice Points:

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 a proffer. If the proffered facts are insufficient to support a self-defense theory, any evidence of the victim's prior violent acts are irrelevant and the self-defense instruction may be unwarranted. *State v. Head*, 240 Wis.2d 162, 622 N.W.2d 9 (Ct. App. 2000).

4. **PREEMPTORY CHALLENGES** to invoking self-defense.

   The self-defense statute and instruction provide the framework for invoking self-defense. If that framework is not followed, a prosecutor may attack the defense and prevent the self-defense instruction from ever reaching the jury. Situations ripe for challenge include:

   a. The Defendant has not made any affirmative statement or presented any testimony.

Practice Points:

Remember, self-defense is an affirmative defense, not just an argument. It requires an affirmative showing, not just an inference. 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, a prosecutor should move to exclude that instruction and argument.

b. The Defendant has not admitted to committing a battery or other charged crime.

Practice Points:

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."

c. The Defendant denies using intentional force. *Cleghorn v. State*, 55 Wis.2d 466, 198 N.W.2d 577 (1972).

Practice Points:

Self-defense cannot be used in conjunction with an argument that the battery was accidental.

5. **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 from section (C) above, which can also be turned into prosecution arguments to the jury, there are other key evidentiary points that the prosecutor may want to focus upon.

a. CREDIBILITY of the Defendant. By using the same techniques a defense attorney uses against a battery victim or investigating 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
- height and weight of the Defendant versus the victim

- immediacy of the claim
- who initiated police contact
- demeanor of the witness
- prior inconsistent statements of the Defendant

Practice Points:

The Defendant's statements to the investigating police officer at the scene are often most devastating to a Defendant's claim of self-defense. Just as a Defendant is reluctant to admit to the elements of a battery on the witness stand, a Defendant is oftentimes 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 after the arrest decision is far less credible than one made when police arrive on scene.

b. REASONABLENESS of FORCE. A prosecutor might focus on:

- height and weight of the Defendant versus the victim
- urgency of the situation
- comparative visible injuries
- whether or not medical attention is sought
- opportunity to retreat (see below)

Practice Points:

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.

6. RETREAT

At common law, self-defense was unavailable to one 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 reads:

> 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 be incorporated into the "reasonableness" argument.

7. **PROVOCATION**

   a. **GENERAL RULE**. 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. Stats. § 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.

   b. **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:

      i. if the Defendant in good faith withdrew from the fight and gave adequate notice thereof to the Defendant's assailant; or

      ii. 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.

Practice Points:

There are certainly a lot of "reasonables" in that last exception. The thing to keep in mind 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.

8. **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. Stats. § 939.48(3) reads:

> 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 in committed.

9. **BATTERED WOMAN'S SYNDROME**.

Battered Woman's Syndrome (BWS) may sometimes fit under the rubric of self-defense, although the common attacks against BWS include "reasonableness of force" and "imminent harm." Therefore, BWS is usually considered an excuse rather than a justification, and will be covered in another section of this Manual.

B. DEFENSE OF OTHERS

1. How it is defined. 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. Stats. § 939.48(4)** reads:

> 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. **Jury Instruction 825** reads:

> 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 Points:

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 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 himself 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 JI 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).

Practice Points:

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. Stats. § 939.49(1)** reads:

> 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 Points:

Defense of property is probably getting a little far afield of domestic violence. One thing to think about, however: martial property.

E. DEFENSE OF ANOTHER'S PROPERTY

This defense is covered in **Wis. Stats. § 939.49(2)**, and reads, in pertinent part:

> 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 . . . .

Those familiar with the LSAT can think of this section in the following manner:

defense of own property : defense of another's property :: self-defense : defense of others

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. Also, deadly force can not be used.

There is one unique twist, as described in the statute as well as Wisconsin JI 860, is that the property defended must belong to a member of the Defendant's immediate family, or must be under the official legal protection of the Defendant.

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 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 DV cases: mistake, intoxication, and syndrome.

A. MISTAKE

1. **DEFINITION** of Mistake.

   a. Mistake is defined by **Wis. Stats. § 939.43(1)** as follows:

   > 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.

Wis. Stats. § 939.43(2) provides that:

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.

b. **Wisconsin Jury instruction 770** further explains that:

If an honest error of fact results in a person's not having the (intent)(knowledge) required for a crime, the person is not guilty of that crime.

c. 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.

2. How Mistake is **INVOKED**

a. The crime charged must require the State to prove a mental element.

b. The Defendant invoking mistake as a defense must first make an affirmative statement or admission to criminal activity.

c. The Defendant is entitled to assert 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 Points:

Mistake cannot be invoked by a Defendant charged with disorderly conduct pursuant to Wis. Stats. § 947.01, as there is no mental element to that charge. Accordingly, 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."

3. Mistake of Criminal law is not a Defense.

a. Ignorance of the law is not a defense.

b. However, when a Defendant relies on the legal opinion of a governmental official, statutorily required to so opine, the court suggests 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. *State v. Davis,* 63 Wis.2d 75, 82, 216 N.W.2d 31, 34 (1974).

Practice Points:

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 so advise, and (c) the Defendant relied on the advice in good faith. This should be difficult for the Defendant to establish as few officials, arguably, have such authority to opine. Unfortunately, the courts have yet to define which officials have such authority.

B. INTOXICATION

1. When Intoxication is a permissible defense.

   a. 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.

   b. Specifically, **Wis. Stats. § 939.42** states that:

      an 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. Stats. § 939.24(3).

   c. Wis. Stats. § 939.24(3) further 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.

2. Involuntary Intoxication or drugged condition.

   a. Wisconsin Jury Instruction 755 explains that: "An intoxicated (a 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 (a drugged condition) is involuntary when it is brought about by duress, deceit, or mistake."

b. How Involuntary Intoxication is invoked.

i. Involuntary intoxication is essentially an affirmative defense, meaning that it does not take 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.

ii. The Defendant must establish 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 inhibitor that he or she ingested.

iii. 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.

iv. 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 (1974).

Practice Points:

Mere addiction to drugs or alcohol is not sufficient to establish 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 between right and wrong. In DV cases, look for facts that evince a guilty conscience or knowledge of culpable conduct such as: (1) the Defendant fleeing the scene when police are called, (2) the Defendant asserting self-defense, or (3) the Defendant maintaining on scene 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, the Defendant knew his or her conduct to be wrong.

3. Voluntary Intoxication.

a. Wisconsin Jury Instruction 765 instructs a jury that: "Evidence has been presented which, if believed by you, tends to show that the Defendant was intoxicated at the time of the alleged offense. You 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 you may find the Defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the Defendant (describe mental state)."

b. 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.

c. 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).

d. 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.

e. How Voluntary Intoxication is invoked.

   i. [T]he Defendant must produce evidence sufficient to raise intoxication as an issue. To do so he [or she] must come forward with some evidence of the degree of intoxication which constitutes the defense. . . . There must be some evidence that the Defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime. *State v. Strege*, 116 Wis.2d 477, 343 N.W.2d 100 (1984).

   ii. 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. *State v. Strege*, 116 Wis.2d 477, 343 N.W.2d 100 (1984).

   iii. 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).

Practice Points:

Voluntary Intoxication cannot be invoked by a Defendant charged with disorderly conduct pursuant to Wis. Stats. § 947.01, as there is no mental element to that charge. Accordingly, the Defendant is not entitled to the Voluntary Intoxication instruction nor is he or she entitled to argue Voluntary Intoxication to the jury.

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 intoxication, the Defendant was capable of determining 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, the Defendant knew his or her conduct to be wrong.

Remember that Voluntary Intoxication is not a defense where the Defendant is charged with criminally reckless behavior … 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 DV cases. However, should the issue arise, the following are some procedures that the prosecutor should remember:

A. Statutory Requirements for the **Defendant**. Wis. Stats. § 971.23(8)(a).

1. A Defendant claiming an Alibi defense must give the State notice at the arraignment or 15 days prior to trial.
2. The Notice of Alibi must provide specific information regarding the place the Defendant claims to have been, as well as the names and addresses (if known) of the witnesses to be called in support of the Alibi defense.

B. Statutory Requirements for the **State**. Wis. Stats. § 971.23(8)(d).

1. The State must give notice of any rebuttal witnesses within 10 days of the filing of the Notice of Alibi.
2. The State's list of rebuttal witnesses also must contain the names and addresses (if known) of all witnesses the State intends to call.

C. **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. Furthermore, the State cannot call those witnesses for the purpose of impeaching the Defendant's Alibi defense. Wis. Stats. § 971.23(8)(a).

D. **Default**. If the Defendant does not give proper notice, no evidence of an Alibi shall be received unless the court, for cause, orders otherwise. Wis. Stats. § 971.23(8)(b).

5. 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 to bolster the 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 allegation that the victim was the aggressor; 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:

> 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. Stats. § 904.05 states:

> **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 court of appeals further stated in *McMorris*, 58 Wis.2d at 151, 205 N.W.2d at 562-63:

> 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 evidence may be used only where the defendant asserts the defense of self-defense against either a homicide or a battery charge. *McMorris* evidence is comprised of specific incidents of prior violent or aggressive behavior committed by the victim, which is known to the defendant when 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/propensity evidence which focuses on the character of the victim to support an inference that the victim acted in conformity with a particular character. The *McMorris* inference logically follows: Prior specific violent or aggressive acts, committed by the victim and known to the defendant, is responded to by the defendant as he acted in fear of the victim to defend himself because the defendant is aware of the victim's prior violent acts.

This ruling has obvious implications for DV cases. A DV 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.

(Written by ADA Sara Purtell Scullen and ADA David Maas. Wisconsin Domestic Violence Prosecution Manual, 2004.)

22. 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 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 Argument.

During your Closing Argument, do not simply recite the testimony of the witnesses. You want to maintain and pursue your case theory, congruent with your Opening Statement and the evidence. Confidently state your case theory. Tell the jury how you 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. Stats. § 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 which 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. Stats. § 972.11(1). The trial court has vast discretion in terms of limiting the time of argument as well as the numbers 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. Stats. § 805.10 was interpreted to authorize the judge to allow more than 2 attorneys on each side to sum up to the jury, but the judge could not limit to fewer than two attorneys on each side. In *C.E.W.*, 124 Wis.2d at 68-69, 368 N.W.2d at 58, 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 summation 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).

The Wisconsin Supreme Court continued in *C.E.W.*, 124 Wis.2d at 69, 368 N.W.2d at 58:

> [Wis. Stats.] § 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.

3. Order of Argument

Wis. Stats. § 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. Stats. § 972.10(6).

According to Wis. Stats. § 805.10, the party having the burden of proof on the principal claim shall be 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 shall be limited to matters raised by the adverse party in his or her argument. See Wis. Stats. § 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 can not introduce a new line of argument to which the defense has had no opportunity to comment. In *Marks v. State*, 63 Wis.2d 769, 774-775, 218 N.W.2d 328, 330-331 (1973), the Supreme Court of Wisconsin stated:

> The defendant complains that the district attorney improperly used his reply portion of his closing argument to the prejudice of the defendant. Such improper use, the defendant contends, consisted of the district attorney's making but a brief argument in the first segment of closing argument and after the defendant's counsel had commented thereupon, launching into a detailed rebuttal argument in which several new lines of argument were developed.
>
> 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 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, perhaps a "surrebuttal" argument would be permitted for 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 argument 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 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).

Draize quoted *State v. Genova*, 242 Wis. 555, 561, 8 N.W.2d 260 (1943), for the premise that: "The 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.

Draize 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. Stats. § 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.

- **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*.
- **FAILURE to MOVE for MISTRIAL.** 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).
- **CURATIVE INSTRUCTION.** 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).
- **JURY NULLIFICATION.** 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 federal constitutional right to urge jurors "to take the law into their own hands, and… disregard the directions of the court." *Bjerkaas* continues at 163 Wis.2d 949, 962, 472 N.W.2d 615, 620:

> [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).

6. Comments on the Defendant's Silence

In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), the United States Supreme Court held inadmissible a defendant's custodial statements unless the police first warned him or her of the right to remain silent. 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:

A. **POST-*MIRANDA* STATEMENTS.** Where 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 5th Amendment rights. *State. 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.

B. **PRE-ARREST, PRE-*MIRANDA* SILENCE** may be commented on 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 murder trial, and on cross-examination, the prosecutor brought out that the defendant waited two weeks before reporting the killing.

C. **POST-ARREST, PRE-*MIRANDA* SILENCE** may be commented on if the defendant testifies. *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77 (1988). 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 post-arrest silence.

D. **POST-ARREST, POST-*MIRANDA* SILENCE** may NOT be commented on. *State v. Robinson*, 140 Wis.2d 673, 682, 412 N.W.2d 535, 539 (Ct. App. 1987).

E. **DEFENDANT'S REQUEST FOR AN ATTORNEY.** Where prosecutors have referred to the defendant's request for an attorney after his arrest (6th Amendment rather than 5th 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).

F. **DEFENDANT'S PRE-TRIAL SILENCE and DEFENDANT'S FAILURE TO TESTIFY.** 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 silence, during the Chapter 980 process, *see State v. Adams*, 223 Wis.2d 60, 558 N.W.2d 336 (Ct. App. 1998) and *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 once the defense counsel focuses attention on the defendant's silence, the state may reflect on the defendant's silence 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 *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978), *cert. denied*, 439 U.S. 871 (1978).

In *U.S. v. Cotham*, 88 F.3d 587 (7th Cir. 1996), the court repudiated the prosecutor's conduct in describing evidence as "uncontroverted" on 4 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. (Cites omitted.)
>
> 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." (Cites omitted.) 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. (Cites omitted.)

For additional examples, *see U.S. v. Rodriguez*, 215 F.3d 110 (1str Cir. 2000); *Lesko v. Lehman,* 925 F.2d 1527 (3rd 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

DO'S

- **PROSECUTOR'S ROLE:** "He 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, 681-682, 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).
- **EVIDENCE.** The rule is that you may comment on the evidence, including arguing evidence to its conclusion or to a reasonable inference.

- **IDENTIFY and directly CONFRONT issues in conflict.** Make sure that you argue reasonably in terms of your assessment of the case's strengths and weaknesses.
- **RHETORICAL QUESTIONS.** You may utilize rhetorical questions during the closing argument, anticipating the questions that the jury may have. Answer those rhetorical questions convincingly.
- **ANALOGIZE.** Consider using analogies for persuasion purposes, especially in circumstantial cases.
- **STRENGTHS/WEAKNESSES.** 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.
- **EXHIBITS.** Use exhibits for a balanced approach.
- **JURY INSTRUCTIONS.** Comment on the instructions is within the permitted scope of closing argument. While counsel may not make statements of dubious correctness, comment on instructions and consideration of the evidence in terms of the instructions are accepted as an appropriate trial technique. *See State v. Lenarchick*, 74 Wis.2d 425, 458, 247 N.W.2d 80, 97 (1976) which listed the following cites: 23A C.J.S., *Criminal Law*, § 1090 and *Shelby v. State*, 258 Ind. 439, 442, 281 N.E.2d 885, 887 (1972) and *State v. Davis*, 53 Wash.2d 387, 391, 333 P.2d 1089, 1091 (1959) and referenced 3 Goldstein, *Trial Technique* (2d ed.), §§ 22.12-22.34.
- **PRO SE DEFENDANT.** When a pro se defendant addresses a jury on his own behalf, the state may comment on the difference between the closing argument and evidence. In *State v. Johnson*, 121 Wis.2d 237, 242-249, 358 N.W.2d 824, 826-830 (Ct. App. 1984), the pro se defendant gave his own opening statement and closing statement. 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.
- **READING FROM TRIAL TRANSCRIPT.** It is error for the trial court to prohibit the reading from the transcript altogether. *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) for the premise 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.
- **EYE CONTACT.** Make eye contact. Use body language and gestures. Adjust voice level. Keep arguments simple for the jury. Refrain from reading from notes because you will lose the positive effect of eye contact.
- **CONFIDENT STYLE.** Conclude forcefully, smoothly and convincingly… appealing to common sense and reason.

DON'TS

- **EVIDENCE ONLY. 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 presented! *See Emby v. State*, 46 Wis.2d 151, 160-161, 174 N.W.2d 521, 526 (1970); *State v. McGee*, 52 Wis.2d 736, 749, 190 N.W.2d 893, 900 (1971).

- **NO PERSONAL OPINIONS.** Generally speaking, you may not express your personal opinions. *Johnson*, 153 Wis.2d at 132, n. 11, 449 N.W.2d at 850, cites the ABA Standards for Criminal Justice § 3-5.8(b)(2nd ed. Supp. 1986) which provides 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); *Embry v. State*, 46 Wis.2d 151, 160-162, 174 N.W.2d 521, 526 (1970), for the premise that: "[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 the *Matter of Swartz*, 30 P.3d 1011 (Kan. 2001), the prosecutor first implied that the defendant drug trafficker had AIDS and lots of money, although no evidence supported these assertions. 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."

  In *Trump v. State*, 753 A.2d 963 (Del. 2000), in referencing the testimony of a 15 year old sexual assault victim, the prosecutor flatly stated: "I submit to you, I think she's telling me the truth." 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."

  Steer clear of inappropriate statements such as "I believe…" or "I think…" or "I promise…" or "I am sure…" Appropriate comments begin with statements like: "The evidence shows…" or "The evidence supports…" or "Based upon the evidence…" Jurors must convict on the evidence.

- **STICK TO THE RECORD. NEVER MISSTATE EVIDENCE OR OVERSTATE FACTS.** You may not comment on facts outside the record, especially when arguing what you may know and understand about the dynamics of domestic violence. Call an expert witness to put this information into 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, 657-658, 456 N.W.2d 325, 335-336 (1990).

Similar to *Pullizano*, in *State v. Marr*, 551 A.2d 456 (Me. 1988), the prosecutor presented no evidence of the effects of sexual abuse on young children, and then later discussed the behavior patterns of abused children during closing arguments.

- **DO NOT VOUCH FOR THE WITNESS**. Never exploit the power of your position or the credibility of your office to manipulate the jury's assessment of the evidence. 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 *Berger v. U.S.*, 295 U.S. 78, 85 (1935), the Supreme Court called a prosecutor's arguments "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." Conduct of expressing personal beliefs are specifically prohibited by S.C.R. 20: 3.4(e), providing that a lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is supported by the admissible evidence.

  In *U.S. v. Molina Guevara*, 96 F.3d 698 (1996), the conviction was reversed because the prosecutor vouched for the witness and asserted facts not in evidence. 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. Further, the prosecutor argued that the police officer's partner, who did not testify, would have corroborated the other officer's testimony.

  Also, consider the following improper arguments: *U.S. v. Loayza*, 109 F.3d 257 (4th Cir. 1997), where prosecutor commented during closing arguments that the government's witness was telling the truth. In *U.S. v. Garza*, 608 F.2d 659 (5th Cir. 1979), a prosecutor repeatedly vouched for the credibility of witnesses and claimed that she would not have charged the defendant if she had not known the defendant was guilty. In *U.S. v. Cornett*, 232 F.3d 570 (7th Cir. 2000), a prosecutor's comments that police officers "take an oath to follow the law" were viewed as vouching for the witness' good faith. In *Hance v. Zante*, 696 F.2d 940 (11th Cir. 1983), prosecutor talked about police witnesses by stating: "Thank God for them, I might add, and for the Columbus police department, too. I'll sleep better tonight and I feel that each of you will too because of the work they did in this case." *State v. Albright*, 98 Wis.2d 663 (1980), where 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), where prosecutor, in referring to a sexual assault victim, stated: "...the bottom line is this, do you believe Tina as I do..."

  A recent Wisconsin case, *State v. Smith*, Ct. App. (October 21, 2003) (recommended for publication), was overturned by the Court of Appeals because the prosecutor stated:

"...it 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..." The court found that the prosecutor 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.

- **INFLAMMATORY REMARKS TOWARDS THE DEFENDANT.** Never use inflammatory words or unflattering language unless supported by the evidence. Further, never reference the defendant in such a way.

  In *State v. Johnson*, 153 Wis.2d 121, 132, 449 N.W.2d 845, 849-850 (1990), the Wisconsin Supreme Court allowed (somewhat disapprovingly) a prosecutor's comments referencing 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. For additional cases, *Johnson* cites the following: *United States v. Spain*, 536 F.2d 170, 175 (7th Cir.) *cert. denied* 429 U.S. 833 (1976) (citing *United States v. Isaacs*, 493 F.2d 1124, 1166 (7th Cir.) (reference to defendant's statements as "lies" is proper argument)); *United States v. Holt*, 817 F.2d 1264, 1276 n. 10 (7th Cir. 1987) (quoting *United States v. Peterson*, 808 F.2d 969 (2nd Cir. 1987) ("'use of the words "liar" and "lie" to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or likely to be inflammatory.'")).

  According to *Darden v. Wainwright*, 477 U.S. 168 (1986), derogatory comments by a prosecutor may so infect a trial with unfairness, 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. Consider prosecutors' remarks:

  a) Referred to defendant as "junky" and "pusher." *People v. Connette*, 475 N.Y.S.2d 682 (1984).

  b) Compared defendant to "Al Capone." *Sibiga v. State*, 499 A.2d 484 Md. 1985).

  c) Called defendant "a junky, rat and sculptor with a knife." *People v. Hickman*, 312 N.Y.S.2d 644 (1970).

  d) Referred to defendant as "Pontius Pilate" and "Judas Escariot." *U.S. v. Steinkoetter,* 633 F.2d 719 (6th Cir. 1980).

  e) Called defendant a "subhuman man" and "rattlesnake." *U.S. v. Cook*, 432 F.2d 1093 (7th Cir. 1970).

  f) Called defendant a "fiendish ghoul." *Cronnon v. Alabama*, 587 F.2d 246 (5th Cir. 1979).

g) Characterized defendant as "wolf" and several other animals. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

h) Referred to defendant as "monster," "pervert," and "child molester." *State v. Smith*, 599 N.W.2d 344 (S.D. 1999).

i) Lastly, in a capitol sentencing proceeding against a defendant who beat a robbery victim to death with a 2 x 4 to purchase crack cocaine, the prosecutor linked the death of the victim to the recent 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 ____, 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 judgements pertaining to the defendant without attaching your comment to an evidentiary basis. If you must 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…."

- **INFLAMMATORY REMARKS TOWARDS DEFENSE COUNSEL.** Refrain from such antics when referring 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:

  a. comments regarding defense counsel's objections;

  b. insinuations that defense counsel believes his client is guilty;

  c. downright attacks on defense attorney's integrity.

  For instance, 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 "she (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 (2nd 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 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 "smoke screen" 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 occupi 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).

- **CREDIBILITY.** Generally speaking, avoid calling the defendant a liar. Use the Credibility Jury Instruction.
- **PENALTIES.** Never refer to possible penalties.

In *State v. Wolff*, 171 Wis.2d 161, 491 N.W.2d 498 (Ct. App. 1992), 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." *Id.*, (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

- **DO NOT SUBSTITUTE EMOTION FOR EVIDENCE.** Do not incite or arouse the passions, prejudices, or biases of jurors …or appeal to the jury to act as the "CONSCIENCE of the COMMUNITY."

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 reversing the case because of the egregious conduct of the prosecutor, the *Solivan* court cited numerous cases such as *Viereck v. United States*, 318 U.S. 236, 247-248, 87 L.Ed. 734, 63 S.Ct. 561 (1943), where a prosecutor explicitly incited the "harsh, cruel, murderous war (World War II)"… where there are "those who are plotting your death and my death" and "we do not agree with their ideas of persecution and concentration camps." These comments occurred in the context of a prosecution for the Willful Omission of a Material Fact on a Registration Form filed with the Secretary of State.

The *Solivan* court referenced *United States v. Barker*, 553 F.2d 1013, 1024-1025 (6th Cir. 1977), where in a bank robbery case, the prosecutor stated: "If you can't take this evidence and find these defendants guilty on this evidence that [sic] we might as well open all the banks and say, 'Come on and get the money, boys, because we'll never be able to convict them.'"

- **JURY IS NOT RESPONSIBLE.** Do not infer that the defendant will go out and commit new crimes if the jury does not find him or her guilty. Again, do not try to make the jury the "CONSCIENCE of the COMMUNITY" or appeal to some greater sense of duty.

  The *Solivan* court referenced: *United States v. Barlin*, 686 F.2d 81, 93 (2d Cir. 1982), where the prosecutor summed up the jury's job as "the one occasion on which you have a duty to do something about the drug traffic in our community."

  In the bank robbery case of *United States v. Alloway*, 397 F.2d 105 (6th Cir. 1968), the prosecutor exclaimed: "You, the jurors, are called upon in this case to be the world conscience of the community. And I'm calling on this jury to speak out for the community and let the John Alloways know that this type of conduct will not be tolerated, that we're not going to tolerate [armed robbery]…"

  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 (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 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."

- **SHIFTING THE BURDEN.** Do not suggest that the defense has the burden to prove anything, except in the mental responsibility phase of a trial.

- **OTHER ACTS EVIDENCE.** If the court has allowed Other Acts Evidence in for one purpose, do not argue during your closing argument that it should be used for another purpose. For additional information, please see the section in this manual regarding Character Evidence in DV Cases.
- **AVOID THE "GOLDEN RULE" ARGUMENT.** Do not tell the jurors to put themselves in a real or imagined person's place. 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, 453-456, 276 N.W.2d 784, 789-790 (1979).
- **RESPECT THE APPARENT INTELLIGENCE OF THE JURY (OR LACK THEREOF).** While one should never talk down to a jury, do not assume that the jury heard, appreciated or remembered the evidence.

REBUTTAL

- **SANDBAGGING.** 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.
- **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 in contrast to your closing argument.
- **REMEMBER TO TELL THE JURY THAT THE DEFENDANT IS GUILTY.** Conclude with strong emphasis of the defendant's guilt. If the defendant is not guilty, then move the court to dismiss your case.

(Based on the writings of ADA John Burr and DDA Patrick Kenney, with contributions from ADA Mark Williams and DDA Jon Reddin. Useful in compiling these materials and suggested for further reading are the following: *Ethical Issues in Prosecution* by John Jay Douglas; *Prosecutorial Misconduct* by Bennett L. Gershmon; *Prosecution Techniques* by Mimier and Humphrey. Edited by ADA Paul Dedinsky, Wisconsin Domestic Violence Prosecution Manual, 2004.)

23. Sentencing: Special Consideration for Domestic Violence 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

Relationships... Domestic Violence 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 DV cases may want to maintain some type or level of relationship. 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 DV 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 DV case, we must remember our goals of **Increased Victim Safety** and **Increased Offender Accountability**. Those goals are contemporaneously case specific and community focused.

Understanding a few of the basic dynamics of each DV relationship can help provide some insight. For example, think of a few basic questions to ask yourself 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 she elect to do so?
- Is the victim emotionally independent?
- 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 relationship with the defendant? To what extent?

Once you gain insight into emotional, physical, financial and other levels of independence, you can begin to understand how you, your office, community advocates and law enforcement can support the victim and the entire family throughout the pendency of the criminal case and post-dispositional phase of the case. 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 your law enforcement goals may diverge from the victim's goals is perhaps the first step in preparing yourself for your case strategy… and it can also help you to prepare yourself for your next DV sentencing hearing.

3. A Brief Word on the Law of Sentencing

Sentencing in the State of Wisconsin is governed by Wis. Stats. § 973. The judge has wide discretion in sentencing an individual. An abuse of that discretion can only occur if there is no rational basis for the imposition of the sentence or the rationale is not articulated in, or inferable from, the record, or where discretion is exercised on the basis of clearly irrelevant or improper factors. *Davis v. State*, 52 Wis.2d 697, 699, 190 N.W.2d 890, 891 (1971).

There are three primary considerations when sentencing a defendant: 1) the gravity of the offense; 2) the character of the defendant; 3) the need to protect the public. *Elias v. State*, 93 Wis.2d 278, 286 N.W.2d 559 (1980). 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.

4. Sentencing Considerations

As stated above, the court must consider the three main sentencing factors: 1) the gravity of the offense, 2) the character of the defendant, and 3) the need to protect the public. There are a number of other factors that the court may consider at the time of sentencing. A few examples articulated by the Wisconsin Supreme Court in *State v. Tew*, 54 Wis.2d 361, 367-68, 195 N.W.2d 615 (1972), are as follows:

- 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; and
- The rights of the public.

In practice, all of these factors are important for a prosecutor to consider. However, when sentencing a Domestic Violence defendant, perhaps the single most important factor is the defendant's willingness to take responsibility for his/her actions. Consider the following hypothesis for Offender Accountability: CHANGE flows from REHABILITATION which flows from RESPONSIBILITY which flows from ACCOUNTABILITY.

A defendant who fails to take **legal** responsibility for his behavior typically will be unwilling take **moral** responsibility for that same behavior. Without an individual taking moral responsibility for abusive behavior, it will be much less likely that the defendant will change.

A defendant who fails to take responsibility for violent behavior can still be placed on a term of probation. However, be sure that you recommend that the court add incentives to increase the negative cost in order to prevent recidivist abuse.

5. Probation

The most common sentencing recommendation for a misdemeanor DV defendant is probation. Probation is governed by Wis. Stats. § 973.09. In *Bastian v. State*, 54 Wis.2d 240, 247-248, n.1, 194 N.W.2d 687, 690-691 (1972), the Wisconsin Supreme Court expressly adopted 1.3 of the ABA Standards that lays out 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 :

i. confinement is necessary to protect the public from further criminal activity by the defendant; or

1. 54 Wis. 2d 240, 247-248, n.1, 194 N.W.2d 687, 690-691 (1972).

ii. the defendant is in need of correctional treatment which can most effectively be provided if he [she] is confined; or

iii. 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. Stats. § 973.09(1)(a) provides that the court may impose any conditions which appear to be reasonable and appropriate. The sentencing court maintains broad discretion. The trial court may order confinement in the county jail (not to exceed one year) as a condition of probation. Further, the prosecutor has flexibility in tailoring a recommendation that will address a defendant's specific needs. The following are a few examples of conditions of probation that may be appropriate for a DV defendant:

A. BATTERER'S INTERVENTION COUNSELING PROGRAMS (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. 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 adjustment disorder. For instance, an abuser may be able to handle most social situations quite nicely. 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 violence 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 RESPONSIBILITY FOR COUNSELING FOR VICTIMS AND WITNESSES

If the victim needs counseling as a result of her victimization, or if children who witness domestic violence need counseling, a 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 for any probationer. Considering the damage done to 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 discipline (or "disciple") their children.

E. NO-CONTACT ORDERS AND CHILD CUSTODY / VISITATION ISSUES

Before a conviction takes place, work with the victim to obtain a restraining / injunction order, and then have the criminal court judge track the same language in the sentence he or she hands down as a condition of probation. Make sure the conditions you ask for in sentencing do not conflict with orders from other courts (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.

F. RESTITUTION

Require payment for doctor bills, time away from work due to injuries, damaged property, counseling, etc.

NOTE: Restitution is governed by Wis. Stats. § 973.20. Under the 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. Stats. § 973.20 for a full understanding of the law of restitution.

G. DOMESTIC ABUSE ASSESSMENTS

According to Wis. Stats. § 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 $50.00 for each offense…" Per Wis. Stats. § 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. CONTRIBUTIONS

Besides paying court costs and surcharges (Wis. Stats. § 973.06), the domestic abuse assessment (Wis. Stats. § 973.055), and any fine (Wis. Stats. § 973.05) ordered by the court, a "reasonable contribution" to a private nonprofit organization can be ordered directly under Wis. Stats. § 973.06(1) or as a condition of probation under Wis. Stats. § 973.09(1x). According to Wis. Stats. § 973.06(1), private nonprofits that promote crime prevention or encourage the public to report crime or assist law enforcement agencies in the apprehension of criminal offenders qualify. Any law enforcement agency with a crime prevention fund also qualifies as a potential recipient.

I. FORFEITURE OF PROPERTY OR VEHICLE FOR STALKERS AND VIOLATIONS OF TROS / INJUNCTIONS:

Wis. Stats. § 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)ll 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 / Injunctions], 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. Stats. § 973.076, the district attorney must begin the forfeiture action within 30 days of the seizure of the property or date of conviction. The state has the burden of satisfying or convincing 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.

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

J. COMMUNITY SERVICE: SEE WIS. STATS. SEC. 973.09 (7M).

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. Stats. § 973.09(3)(a) permits this request. The trial court may extend probation, modify any 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 trial court articulating whether the defendant is in compliance with the conditions of his/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 trial court may choose to impose a portion or all of the jail time ordered by the court at the sentencing hearing.

While supporting your goal of **Increased Offender Accountability**, you will help to meet your goal of **Increased Victim Safety**. The Probation Review court appearance gives the victim another chance to appear and 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 court appearance why you are missing your Batterers' Counseling Sessions or showing up late to AODA appointments." Usually, most defendants don't fare well explaining their repeated lack of compliance with the judge's sentence in an open courtroom setting.

Probation Review Court Appearances have proven to be a successful tool in Milwaukee, Wisconsin. If your jurisdiction does not utilize Probation Review Court Appearances, we suggest that you give it a try.

(Written by ADA Jacob Corr. Wisconsin Domestic Violence Prosecution Manual, 2004. Special thanks to the National District Attorneys Association at the National Advocacy Center in South Carolina who shared materials from their "Rural Domestic Violence Issues" workshop, incorporated into this particular section on Sentencing. In conjunction with the American Prosecutors Research Institute (APRI), the Office of Justice Programs' Violence Against Women Grants Office and the Battered Women's Justice Project, we thank them for designing materials beneficial to prosecutors nationwide and acknowledge their service in helping us to formulate ideas to share in this manual with prosecutors in Wisconsin.)

24. The Legal Mechanics and Strategies of a Domestic Violence Jury Trial

1. Introduction
2. Charging Strategies & Suggestions
3. Case Preparation
4. Miscellaneous Procedural Items
5. Jury Selection / Voir Dire / Swearing of the Jury
6. Preliminary Jury Instructions
7. Opening Statements
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16. Jury Instructions
17. The Discharge of Additional Jurors
18. Closing Arguments by Counsel
19. Jury Deliberations
20. Return of Verdict
21. Entry of a Judgment of Conviction
22. Some Final Thoughts for the Trial Prosecutor

1. Introduction

This outline, although also applicable to a felony jury trial, is primarily intended to address misdemeanor Domestic Violence jury trials. It is intended to raise issues and provide direction. Legal mechanics and practical strategies & suggestions are interwoven throughout this section. Note that the different procedures applicable to insanity defense trials are not addressed in this outline.

2. Charging Strategies and Suggestions

(Please refer to the Charging section of this manual for more discussion and information.)

- **Closing argument**. When you issue a case, have your closing argument in mind.
- **Elements**. Make a list, connecting the facts with the elements of the crime that must be proven.
- **Trial outline**. Read all the reports thoroughly and formulate a rough trial outline before you issue the case.
- **Follow-up investigation**. Get police officer(s) to commit to perform follow-up investigation if necessary. Closely consider the evidence and all corroboration. Consider what more evidence can be collected before it is destroyed or lost.
    a. Existence of additional witnesses such as friends, neighbors, children, medical personnel;
    b. Admission by the defendant or other statement by the defendant;
    c. Physical Evidence present such as weapons, disarray, torn clothing, broken furniture, etc.;
    d. 911 tape, including statements from the scene;
    e. Photographs of injuries over time (e.g. changing color of bruises) and crime scene;
    f. Medical reports documenting injuries.
- **Defense**. Anticipate all the defenses at the time of issuance of the charge. If possible, eliminate any defenses at the earliest time possible. For example, if you suspect an alibi defense, get your investigating officer to perform the investigation up front.
- **Scene of the crime**. In a major case, go to the scene prior to charging. If you wait, the scene will undoubtedly change.
- **Consider a Visit to the Victim**. If Victim is in the hospital, consider visiting the victim with an advocate or victim assistance person. Get the victim's input, per victim's rights legislation.
- **Research** anticipated legal issues and draft appropriate instructions.
- **Base decisions on 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 im-

portant to weigh: 1) Abuse history; 2) The negative impact of Domestic Abuse upon the children and family; 3) Possible future Escalation of Violence. Nonetheless, you still must issue charges based upon evidence and your ability to prove the case beyond a reasonable doubt.

- Consider various **lethality factors** in a DV 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)):
  - Use and abuse of alcohol / drugs;
  - Existence of TROs / Domestic Abuse Injunctions now or in the past;
  - Death threats or suicide threats;
  - Mental illness history;
  - Use of a gun or other weapon (or threat of use);
  - Presence of children in the household during incident;
  - Extent of injuries or harm caused, including analysis of Strangulation;
  - Defendant's prior history or criminal or other anti-social behavior;
  - Past history of violence or aggressive behavior (charged or uncharged);
  - Victim plans to leave relationship (danger of Separation Violence);
  - Totality of the circumstances of the present case.

3. Case Preparation

A. WHAT PROSECUTOR MUST PROVE LEGALLY

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 crimes (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** of the crime (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.

- **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 appropriate.

B. WITNESS ISSUES

i. **Background of witnesses**. Know whom you are relying upon before you issue your case. Get criminal records of the defendant and all witnesses before you issue the case. Check to see if any possible state witnesses have any pending cases (ask them, a CCAP check, a CIB check, 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).

ii. **Prior record of adult criminal convictions and juvenile adjudications**. The issue of any prior convictions or adjudications of a witness. Wis. Stats. § 906.09. Delinquency adjudications are included. This applies to both state and defense witnesses. Note the requirement of a hearing, pursuant to Wis. Stats. §§ 906.09(3), 901.04 & 904.03, as well as how to determine and prove the correct number and nature of a person's prior convictions and adjudications.

iii. **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), review denied, 443 N.W.2d 312.

iv. **Determine bias of witnesses**. When possible, interview your major witnesses. Do not simply rely entirely upon the police reports. In DV cases where you desire corroboration, sometimes the witnesses may be defendant-friendly. If you are heavily relying upon defendant-friendly witnesses, then testimony should be locked in through an interview.

v. **Interview witnesses before trial**. (You need to prevent any surprise testimony and give yourself time to deal with any problems.) Also, make sure your witnesses dress appropriately for trial.

vi. **Child witnesses**. If you plan to utilize a child witness, take the child to the courtroom before the date of 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 consequences for telling a lie.

vii. **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.

viii. **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.

ix. **Sequestration / exclusion of witnesses**. The issue of the exclusion and sequestration of witnesses. See Wis. Stats. § 906.15.

x. **Law enforcement witnesses**. Do not assume that they are prepared. Insist that reports and memo books are reviewed.

xi. **Contact with other witnesses during trial**. Advise witnesses how to conduct themselves if they have contact with persons associated with the defendant.

xii. **Admonish witnesses to tell the truth**!

C. DISCOVERY

(Please refer to the Ethics section of this manual for further information.)

i. Make sure all discovery issues are addressed and resolved to the fullest extent possible (either all issues resolved prior to trial OR resolving some issues pre-trial and others resolved later on during the trial out of necessity). See Wis. Stats. § 971.23. At a minimum, confer with defense counsel to obtain the attorney's position as to all discovery issues.

ii. File reciprocal discovery motions and motions in limine at the early stages of the case. Do not sandbag evidence. Turn it over immediately and deal with the problems.

iii. Always be confident in your case at pre-trial discussions with defense. Don't be afraid to ask the defense attorney what he or she is going to do. Never tell the defense the weaknesses of your case. Let them figure it out themselves (many attorneys won't figure it out).

D. KNOWLEDGE OF PRE-TRIAL EVIDENTIARY RULINGS

Make sure 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. Make sure you keep track of any motions whose resolution has been delayed to a certain point during the trial or whose resolution is based upon one or more event(s) occurring.

E. EXHIBITS

Consider all issues, including marking exhibits correctly prior to their use at trial. The preparation of a list of the exhibits for the trial court saves time, especially when many exhibits are anticipated.

F. CHARTS

The use of charts. *State v. Olson*, 217 Wis.2d 730, 579 N.W.2d 802 (Ct. App. 1998); Wis JI-Criminal 154 (summary exhibit). (See the Charts section of this manual for further information.)

G. OTHER ACTS EVIDENCE

The issue of other acts/crimes evidence. This includes the proper use of the three-step analytical framework, the use of a motion in limine, and the discussion of a *Wallerman* stipulation. (Please see the "Other Acts & Character Evidence in DV Cases" chapter of this manual for further information.)

H. STIPULATIONS

I. THE USE OF DNA EVIDENCE

J. JURY INSTRUCTIONS AND LESSER-INCLUDED OFFENSES

Know all lesser-included crimes of the charged offense(s).

K. MULTIPLE DEFENDANTS

Trials involving two or more defendants warrant close consideration of the use of the statement of either or both defendants. Wis. Stats. § 971.12(3).

4. Miscellaneous Procedural Items

A. 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 Wis JI-Criminal SM-8 (juror questioning of witnesses).

B. 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).

C. JUROR NOTE-TAKING

Wis. Stats. § 972.10(1)(a).

D. JURY VIEW

Wis. Stats. § 972.06.

E. THE CALLING AND INTERROGATION OF WITNESSES BY THE COURT

Wis. Stats. § 906.14. According to *State v. Asfoor*, 75 Wis.2d 411, 437, 249 N.W.2d 529 (1977):

> Wis. Stats. § 906.14(2) governs the interrogation of witnesses by a judge. While a judge may question any witness, he 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 this case, 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.

For recent examination of this topic, *see State v. Carprue*, 2003 WI App 148, ___ Wis.2d ___, 667 N.W.2d 800.

F. OFF-THE-RECORD SIDE-BAR CONFERENCES

i. According to *State v. Mainiero*, 189 Wis.2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994):

> We acknowledge that, at 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*.

ii. According to *State v. Hughes*, 00-3176-CR, filed September 11, 2001, an unpublished opinion, the Court in footnote 1 stated:

> 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).

G. 6-PERSON JURIES

Do not use the present Wis. Stats. § 972.02(2), because the use of 6-person juries in misdemeanor cases was declared unconstitutional. Use the former Wis. Stats. § 972.02(2), which provided that: "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."

i. May be agreed to anytime before verdict.

ii. Requires agreement by the state prosecutor.

iii. Requires approval of the trial court.

iv. In writing or by statement in open court, on the record.

H. JEOPARDY

In a jury trial, jeopardy attaches when the selection of the jury has been completed and the jury is sworn. Wis. Stats. § 972.07(2).

I. CONSIDERATION OF PUBLICITY

The exposure of jurors to extraneous information including publicity or media coverage of a pertinent trial issue.

J. CHILD TESTIMONY

The issue of allowing a child witness to sit on someone's lap while testifying. *State v. Shanks*, 2002 WI App 93, 253 Wis.2d 600, 644 N.W.2d 275.

K. STARTING A TRIAL WITHOUT A NECESSARY WITNESS

In *State v. Barthels*, 174 Wis.2d 173, 495 N.W.2d 341 (1993), *affirming State v. Barthels*, 166 Wis.2d 876, 490 N.W.2d 814 (Ct. App. 1992), 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.

L. RESTRAINT OF THE DEFENDANT

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).

M. EXAMINATION OF ONE WITNESS AS TO WHETHER ANOTHER WITNESS IS LYING

See State v. Bolden, 2003 WI App 155, ___ Wis.2d ___, 667 N.W.2d 364.

5. Jury Selection / Voir Dire / Swearing of the Jury

(For full discussion of practical suggestions and trial strategies, see Voir Dire chapter of this manual.)

A. JURY LIST

Try to obtain it prior to Voir Dire and conduct background/criminal record checks.

B. KNOW YOUR ROLE AS A PROSECUTOR

Understand what you want to accomplish.

- Unique position. The prosecutor represents a client of which the jury is a part.
- Voir Dire represents 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.
- The prosecutor must "weed out" the emotionally unstable because it is assumed that a reasonable, law-abiding and intelligent citizen of the community is as interested in the successful prosecution of criminals as is the prosecutor. Also, consider screening out experts, egocentric or independent persons.

- Examine jurors about their bias, interest, personal experience, attitudes toward the system and its components.
- Determine the issues of the case and formulate questions to explore the issues.

  E.g. Domestic Violence – touched anyone's life? Friends? Family?

  E.g. Self Defense – Juror been attacked?

  E.g. Police Misconduct – Juror had experience with police?
- In a DV 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.
- Accept and inform the jury that you have the Burden of Proof. Diffuse it as an issue for the defense.

C. MORE STRATEGIES

- Dispel quickly any sympathy for the defendant. E.g. 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. E.g. A police officer's wife says she believes police under any circumstances. Ask her why.
- Try to ask defense questions your way. E.g. Presumption of Innocence – This defendant is presumed innocent until I prove him guilty beyond a reasonable doubt.
- Do not allow the defense to ask "promise" questions. Jurors need 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.

D. LEGAL ATTACK TO JURY POOL

Be aware of possible 6th Amendment "fair cross-section requirement" challenge to the jury array (or jury "pool") from which the 12 voir dire jurors are chosen.

i. This is a case law challenge—there is no express statutory provision that authorizes this challenge.

ii. 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. Raszkiewicz,* 169 F.3d 459 (7th Cir. 1999).

E. AN ANONYMOUS JURY

Restricting the disclosure of juror information including 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).

F. STATUTORY SELECTION PROCEDURES CHALLENGE

i. A challenge that the statutory provisions in Chapter 756, which address the selection of the jury array from which the voir dire jurors for a specific case are chosen, were not followed. *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).

ii. The questioning of the jurors by the court under Wis. Stats. § 756.03 (Excuse; deferral) including the right of the defendant to be present. *State v. Gribble*, 2001 WI App 227, 248 Wis.2d 409, 636 N.W.2d 488.

iii. Deviating from the statutory procedures to place one or more persons on a jury panel because of race, etc. *Oliver v. Heritage Mut. Ins. Co.*, 179 Wis.2d 1, 505 N.W.2d 452 (Ct. App. 1993).

G. NUMBERS

Selection jurors and the number of jurors who hear and decide a case.

i. The number of selection jurors depends on such things as number of peremptory challenges, the complexity and anticipated length of the case, number of additional jurors, etc. *See* Wis. Stats. § 972.04.

ii. The number of jurors who hear the case can be greater than 12 because of additional / alternative jurors. Wis. Stats. § 972.04(1).

iii. In both misdemeanor and felony cases twelve jurors must decide the case unless the parties and the court agree to a number less than 12. For less than 12 jurors *see* the discussion under 4.G. above. The last sentence of Wis. Stats. § 972.02(2), which provides that "If the case is a misdemeanor case, the jury shall consist of six persons," was declared unconstitutional.

iv. In misdemeanor cases the normal practice is to have 30 selection jurors.

H. SWEARING THE JURY PRIOR TO VOIR DIRE

Wis. Stats. § 805.08(1).

I. VOIR DIRE OF THE JURY

i. The voir dire must be on the record. SCR 71.01.

ii. Wis. Stats. § 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.

iii. The general order is the court, the state, and then the defense.

iv The court has wide discretion as to the number of questions and the type of questions. Know the practice of the judge in your case.

v. Juror information sheets and their effective use: Use abbreviations; Use your court officer; Customize the jury information sheet to your courtroom.

J. CAUSE CHALLENGES—GENERAL LAW

i. 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.

ii. Juror bias is no longer divided into "actual" or "implied" bias. In *State v. Saucher*, 227 Wis.2d 700, 596 N.W.2d 770 (1999), the Supreme Court, in an effort at clarification, coined three new terms when referring to possible juror bias: "statutory," "subjective," and "objective."

iii **Statutory bias**. The first and least common type of bias is "statutory bias." A prospective juror is statutorily biased if he or she falls into one of the statutorily recognized groups in Wis. Stats. § 805.08 – persons with a financial interest in the case or 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.

iv. **Subjective bias**. The second type of bias is "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.

v. **Objective bias**. The third type of bias is "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 to the effect that the juror can and will be impartial.

vi. The procedure to handle cause challenges, removal for cause, and replacement jurors and how to tactically handle cause situations. Inquire (the court, court reporter, clerk, other attorneys, etc.) as to the procedure used by the court.

vii. A mistake by the court can be fatal to the state's case. In *State v. Ramos*, 211 Wis.2d 12, 564 N.W.2d 328 (1997), the 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 actually empanelled was impartial.

K. PEREMPTORY CHALLENGES—GENERAL LAW

i. Because the statutory provision that mandated six-person juries in misdemeanor cases was declared unconstitutional, use former Wis. Stats. § 972.03, which provided that:

> **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 impaneled under s. 972.04(1).

ii. In one-defendant misdemeanor cases each side gets four peremptory challenges.

iii. *Batso*n issues. *See State v. Lamon*, 2003 WI 78, 262 Wis.2d 747, 664 N.W.2d 607. (See Voir Dire chapter for additional information.)

iv. Extra peremptory challenges if additional jurors are picked. The last sentence of both former Wis. Stats. § 972.03 and present § 972.03 provides that: "Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under Wis. Stats. § 972.04(1)."

L. EXERCISE OF PEREMPTORY CHALLENGES

Wis. Stats. § 972.04. The practice of alternating strikes (State first, defense second, State third, etc.). There is a practice in many courts of talking to the jury during this procedure.

M. SWEARING OF THE JURY AFTER THE SELECTION OF THE JURY AND PRIOR TO THE TRIAL OF THE CASE

i. The jurors must be sworn prior to trial of the case. Wis. Stats. § 756.08(1).

ii. Jeopardy attaches when the selection of the jury has been completed and the jury is sworn. Wis. Stats. § 972.07.

iii. Hold off as long as possible if there are any witness availability issues.

6. Preliminary Jury Instructions

Wis. Stats. § 972.10(1)(b), provides that:

> 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.

7. Opening Statements

(See Opening Statement chapter for strategic considerations.)

A. Must be reported. SCR 71.01.

B. The state gives its opening statement first.

C. The defense can give its opening statement after the state gives its opening statement. However, the defense has the right to reserve their argument until the presentation of its case.

i. Do not comment on defense waiting to present their opening statement. *State v. Sarinske*, 91 Wis.2d 14, 280 N.W.2d 725 (1979).

ii. Be careful if the defense reserves its argument and then does not present any evidence. If this occurs, be conscious of the ineffective assistance of counsel argument and take the appropriate steps.

D. The situation where the defendant gives his or her own opening statement. *State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (Ct. App. 1984).

8. States Case-in-chief

A. Wis. Stats. § 971.10(3) provides in part: "The state first offers evidence in support of the prosecution."

B. Prove the elements by direct and/or circumstantial evidence. Best Practice: Use a checklist to avoid inadvertent omissions.

C. **Reopening of Testimony**

i. The last sentence of Wis. Stats. § 972.10(3), 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."

ii. *State v. Harvey*, 242 Wis.2d 189, 198, 625 N.W.2d 892 (Ct. App. 2001).

iii. *See also* Wis. Stats. § 906.11(1).

D. **Cautionary Jury Instructions**

9. Defense Motion to Dismiss at the end of State's Case-in-chief

A. Wis. Stats. § 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."

B. *State v. Scott*, 2000 WI App 51, 234 Wis.2d 129, 608 N.W.2d 753.

C. **Timing of the court's decision**. The better practice is for trial courts to decide the motion at the close of the State's case.

i. 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."

ii. There are different appellate review standards if the motion is denied and the defendant does or does not present evidence.

iii Once the motion is denied, the defendant has a dilemma: If the motion to dismiss is denied, the defendant "has the option of either not presenting any evidence on his behalf and preserving the ruling for appeal or abandoning his motion and introducing his defense."

D. **Deferment of ruling**. The situation where the court wants to defer its ruling.

i. *Scott* addresses this situation.

ii. 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.

iii. If the court does defer its ruling, a different standard of review exists.

E. **Amendment of the complaint or information to a lesser-included crime**. *See* the discussion below.

F. **Upon dismissal**. If the court dismisses the case, the State cannot appeal.

10. Amendment of the Complaint or Information to a Lesser-included Crime at the Conclusion of the State's Case-in-chief

A. Wis. Stats. § 971.29(2), in part provides 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.

B. At the conclusion of either the State's case or the entire case, the evidence, although not sufficient to support the crime charged in the complaint or information, may be sufficient to support a conviction of a lesser-included crime of the charged crime. In this situation, amendment of the complaint or information to a lesser-included crime pursuant to Wis. Stats. § 971.29(2), rather than dismissal of the charge, is the appropriate action if the evidence is sufficient to support the lesser-included crime. *Bere*, 76 Wis.2d at 526-27; *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).

11. The Defense Case-in-chief

A. Wis. Stats. § 972.10(3), in part, provides 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 if it was not given earlier.

B. **Defendant's decision**. The decision of the defendant to testify or not to testify.

i. Since the defendant's constitutional right to testify is a fundamental constitutional right, this right is personal to the defendant and the decision whether to testify must be made by the defendant after consulting with counsel—the right may be waived only by the defendant.

ii. 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 (1) the defendant is aware of his or her right to testify and (2) 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.

iii. When a defendant testifies, and perjury is suspected, see the Wisconsin Supreme Court's decision in *McDowell*.

C. The **reopening of testimony**. *See* section above.

D. **Cautionary jury instructions**.

12. Rebuttal Evidence

A. Wis. Stats. § 971.10(3), provides that: "The state first offers evidence in support of the prosecution. The defendant may offer evidence after the state has rested. 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."

B. In *Simpson v. State*, 83 Wis.2d 494, 512-13, 266 N.W.2d 270 (1978), the Court stated:

The standard governing rebuttal evidence was set forth in *Rausch v. Buisse*, 33 Wis.2d at 167:

> 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.'

C. **Ending**. At a certain point rebuttal testimony has to end.

13. Defendant's Motion to Dismiss at the End of the Entire Case

A. Wis. Stats. § 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."

B. **Test**. The appropriate test to be applied by the trial court when the defendant makes a motion to dismiss/motion for a directed verdict 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.

C. **If dismissal occurs**. If the court dismisses the case, the State cannot appeal.

14. Amendment of the Complaint or Information to a Lesser-included Crime at the Conclusion of the Entire Case

See the discussion above.

15. 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. *State v. Koput*, 142 Wis.2d 370, 392, 418 N.W.2d 804 (1988).

16. Jury Instructions

A. Wis. Stats. § 972.10(5) provides that:

> (5) 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.

B. The court shall instruct the jury before or after closing arguments of counsel. Wis. Stats. §§ 805.13(4) and 972.01.

C. The pattern/standard jury instructions. Don't forget the civil instructions.

D. **Jury Instruction Conference**

E. Preparation, submission, objection and final instructions.

F. In *State v. Kuntz*, 160 Wis.2d 722, 735, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court, pursuant to its superintending authority under article VII, sec.3(1) of the Wisconsin Constitution, ordered that the circuit courts of Wisconsin must inform counsel of changes they make to jury instructions following the jury instructions conference.

G. **Jury Instruction Areas**

   i. General law.

   ii. Crime, including lesser-included.

   iii. The defense, including affirmative defense.

   iv Cautionary jury instructions.

H. The issue of **lesser-included crimes**.

   i. The law as to when they can be given.

   ii. Who can request them.

I. **Reinstruction and Supplemental instructions**. *See* JURY DELIBERATIONS below.

17. The Discharge of Additional Jurors

A. BY LOT

Wis. Stats. § 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."

B. BY AGREEMENT

The practice of agreeing on what juror or jurors to get rid of.

18. Closing Arguments by Counsel

(See Section on Closing Arguments for more information.)

A. Wis. Stats. § 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."

B. **Sequence**. The state goes first, the defendant goes next, and then the state gives a rebuttal argument. Wis. Stats. § 972.10(6).

C. **Commenting on the defendant's silence**. Don't comment improperly on the defendant's silence …both direct and indirect silence.

D. **Where defendant gives the opening statement**. The situation where the defendant himself or herself gives the opening statement and/or closing argument. *State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (Ct. App. 1984).

E. **Timing of jury instructions**. The court shall instruct the jury before or after closing arguments of counsel. Wis. Stats. §§ 805.13(4) and 972.01.

F. The concession of guilt by the defense attorney during closing arguments. *State v. Silva*, 2003 WI App 191, ___ Wis.2d ___, 670 N.W.2d 385; *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

19. Jury Deliberations

A. **Swearing of the bailiffs** prior to jury deliberations. Wis. Stats. § 756.08(2).

B. **Items / exhibits sent to jury room**. The issue of what items and/or exhibits should be sent to the jury room. The issue of "originally" versus "later on", or if the jury requests an item or exhibit.

C. **Jury questions during deliberations**.

D. **Reading testimony back**. A request by the jury to have some testimony read back.

E. **Re-instruction and supplemental jury instructions** after the jury deliberations have commenced. The issue pertaining to the required presence of the state, the defense attorney, and the defendant or a waiver of the right to be present. Also, 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.

F. Letting the jurors go **home** during deliberations. Wis. Stats. § 972.12.

G. **A sealed verdict**. 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).

20. Return of Verdict

A. UNANIMITY OF CRIMINAL VERDICT

A guilty verdict must be unanimous. *State v. Cartagena*, 140 Wis.2d at 61.

B. REQUIREMENTS OF ACCEPTING A JURY'S VERDICT

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).

C. POLLING OF THE JURY

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 *State v. Cartagena*, 140 Wis.2d 59, 61-62, 409 N.W.2d 386 (Ct. App. 1987), 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.

D. A PARTIAL VERDICT

21. Entry of a Judgment of Conviction

Wis. Stats. § 972.13(1) in part provides: "A judgment of conviction shall be entered upon a verdict of guilty by the jury . . ."

(Written by Milwaukee Chief Deputy District Attorney Robert Donohoo. Wisconsin Domestic Violence Prosecution Manual, 2004.)

22. Some "Final Thoughts" for the Trial Prosecutor

- You are a minister of justice. Always do what is fair even if it hurts your case.
- Remember that innocent victims of crime deserve the best lawyers.
- Treat all people with dignity, unless you are positive the jury doesn't want a particular witness treated that way.
- Do not be afraid to lose. The weakest prosecutors are those who do what is easy… not what is right.
- The only bad thing about losing a jury trial is not learning how to win your next one.
- Don't be afraid to admit a mistake in front of a jury. Jurors may enjoy seeing someone humbled in the courtroom.
- Never assume the jury understands or knows information. Explain it to them.
- Don't worry about being scared before a trial – a little fear will make you prepare better.
- There is always divine providence with you when you prosecute a child abuser or baby killer.
- A good prosecutor is only as good as his last trial.
- If you do this job simply for the money, you are in the wrong occupation.
- A good prosecutor is tough and pure in heart.

25. Common Domestic Violence Charges: Battery, Criminal Damage to Property and Disorderly Conduct

1. Battery, Wis. Stats. § 940.19
2. Jury Instruction for Misdemeanor Battery
3. Lesser-Included Crimes of Battery
4. Battery: Common Definitions
5. Criminal Damage to Property, Wis. Stats. § 943.01(1)
6. Jury Instruction for misdemeanor Criminal Damage to Property
7. Legal / Case Notes for Criminal Damage to Property
8. Disorderly Conduct, Wis. Stats. § 947.01
9. Jury Instruction for Disorderly Conduct
10. Legal / Case Notes for Disorderly Conduct

1. Battery, Wis. Stats. § 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.

Former subsection (3), a form of Substantial Battery, has been repealed. It read:

> **Whoever causes substantial bodily harm to another by an act done with intent to cause substantial bodily harm to that person or another is guilty of a Class D felony.**

Further, subsection (5) has been amended to remove the words "either substantial bodily harm or" so that it now provides that:

> **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.**

The Wisconsin Criminal Penalty Study Committee explained the changes to Wis. Stats. § 940.19:

> While classifying the various permutations of the basic battery offense, the Criminal Penalty Study Committee noted how confusing Wis. Stats. § 940.19 had become with the adoption of various amendments over time. The battery statute has been revised to return simplicity and straightforwardness to the law of battery. Preserved are traditional forms of misdemeanor battery (causing bodily harm with intent to cause bodily harm) and felony aggravated battery (causing great bodily harm with intent to cause great bodily harm). Also maintained are intermediate offenses of causing great bodily harm or substantial bodily harm by an act done with intent to cause great bodily harm. Finally, the section of the statute that classifies as more serious batteries committed against victims who are 62 years of age or older and victims with a physical disability is preserved without change. The provision making it a battery to cause substantial bodily harm is repealed.

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

Offence 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

2. Jury Instruction for Misdemeanor Battery

WIS JI—Criminal 1220 Battery – § 940.19(1):

Before the finder of fact may find the defendant guilty of the crime of battery, the State must prove by evidence beyond a reasonable doubt that the following four elements were present:

1. The defendant caused bodily harm to the victim. "Cause" means that the defendant's act was a substantial factor in producing the bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.
2. The defendant intended to cause bodily harm to the victim [another person]. "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his)(her) conduct was practically certain to cause bodily harm to another human being.
3. The defendant caused bodily harm without the consent of the victim.
4. The defendant knew that the victim did not consent.

3. Lesser-included Crimes of Battery

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

In *Vassos*, the defendant was charged with substantial battery. Both parties requested the trial court to include both the substantial battery jury instructions and the simple battery instructions. The trial court denied the request and did not include the simple battery instructions. The trial court stated 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, 579 N.W.2d at 37. The defendant was acquitted on the felony battery charge and the state subsequently charged the defendant with misdemeanor battery. 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, the *Blockberger* test or the Double Jeopardy clauses of the United States and Wisconsin Constitutions. *Vassos*, 218 Wis.2d at 345, 579 N.W.2d at 41. 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. §§ 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).

Like the defendant in *Vassos*, a domestic violence 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. 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.

4. Battery: Common Definitions

Wis. Stats. § 939.22(4): "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

Wis. Stats. § 939.22(38): "Substantial bodily harm" means bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

Wis. Stats. § 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. Stats. § 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. Stats. § 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.

5. Criminal Damage to Property, Wis. Stats. § 943.01(1)

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.

6. Jury Instruction for Criminal Damage to Property

WIS JI-Criminal 1400 Criminal Damage to Property – Wis. Stats. § 943.01.

Before the finder of fact may find the defendant guilty of the crime of criminal damage to property, the State must prove beyond a reasonable doubt that the following five elements were present:

1) The defendant caused damage to physical property. The word "damage" includes anything from mere defacement to total destruction.

2) The defendant intentionally caused the damage. The term "intentionally" means that the defendant must have had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.

3) The property belonged to another person.

4) **The defendant caused the damage without the consent of the owner (or owner's agent).**

5) **The defendant knew the property belonged to another person and knew that the other person did not consent to the damage.**

7. Legal / Case Notes for 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 wife or husband has an ownership interest in the property. *State v. Sevelin*, 204 Wis. 2d 127, 129, 554 N.W.2d 521, 522 (Ct. App. 1996).

In *Sevelin*, the defendant threatened his family with a knife and damaged several rooms in his marital home. The defendant was convicted of battery to a law enforcement officer, obstructing an officer, disorderly conduct, and criminal damage to property. The defendant argued that he could not be convicted of criminal damage to property because the property damaged was his own marital home.

In addressing the issue of jointly owned property (marital property in Wisconsin), the court of appeals upheld the conviction in *Sevelin*, 204 Wis.2d 127, 131, 554 N.W.2d 521, 523:

> [Wis. Stats. § 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.

Just because a defendant has an ownership interest in property he or she destroyed, you are not precluded from charging criminal damage to property.

While a misdemeanor charge requires no finding of reduction in value, note varying gradations of monetary damages associated with sundry felony classifications. If the total property damaged is reduced in value by more than $2,500, the violation will merit a Class I felony charge, in violation of Wis. Stats. § 943.01(2)(d). For the purposes of ascertaining monetary value, the property is "reduced in value" by the amount which 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. For more analysis and critical development of this issue, see Wis. Crim. JI-1400, note 8.

As a practical matter in DV 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 DV cases is Wis. Stats. § 943.011, making criminal damage to property or threat to property of a witness or a witness's family member a Class I felony.

In a DV 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 (1980).

8. Disorderly Conduct, Wis. Stats. § 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.

9. Jury Instruction for Disorderly Conduct

According to ***WIS JI-CRIMINAL 1900 DISORDERLY CONDUCT – § 947.01***, the State must prove by evidence beyond a reasonable doubt that the following two elements were present:

1. The defendant engaged in (violent)(abusive)(indecent)(profane)(boisterous)(unreasonably loud)(or otherwise disorderly) conduct.
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WIS JI-CRIMINAL 1900 discusses the "Meaning of 'Disorderly Conduct'":

> Disorderly conduct may include physical acts or language or both. The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance. It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provokes a disturbance.

> The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community. This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.

WIS JI-CRIMINAL 1900 defines the "Meaning of 'Tend to Cause or Provoke a Disturbance'":

> It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance, under the circumstances as they then existed. The jury must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

10. Legal / Case Notes for Disorderly Conduct

Disorderly Conduct charges are commonly utilized in domestic abuse cases, in accordance with Wis. Stats. § 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 violation of 1st, 2nd or 3rd degree sexual assault.

The law states that there need not be a stated Victim for a Disorderly Conduct charge to properly lie. However, the reality for DV cases is that a Victim will exist. *See State v. Vinje*, 201 Wis.2d 98, 548 N.W.2d 118 (Ct. App. 1996).

Prosecutors do not have to mention every type of conduct listed in the statute in order to submit an acceptable complaint. They 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 (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*, 253 Wis.2d 1, 644 N.W.2d 666 (2002).

Speech can alone serve as the basis for a Disorderly Conduct charge under appropriate circumstances. *See State v. A.S.*, 243 Wis.2d 173, 626 N.W.2d 712 (2001) for a discussion of speech utterly devoid of social value. Written speech constitutes Disorderly Conduct if constitutionally unprotected "abusive" conduct (meaning: injurious, improper, hurtful, offensive or reproachful… including true threats). *See State v. Douglas D.*, 243 Wis.2d 204, 626 N.W.2d 725 (2001).

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. *See State v. Perkins*, 243 Wis.2d 141, 626 N.W.2d 762 (2001).

(Attorneys David Weber and Ann Batio's research served as a basis for this section, Wisconsin Domestic Violence Prosecution Manual, 2004.)

26. Bail Jumping Charges

1. Introduction
2. Bail Jumping for Failure to appear for Court Appearances
3. Purpose of the Issuance of Bail Jumping for failing to appear for Court Appearances
4. Prosecutor's Sentencing Recommendations
5. Wis. Stat. § 940.47 (2002)

1. Introduction

Violations of court ordered conditions of bail will result in Bail Jumping charges. Most typically, these charges will address "No Contact Order" violations. However, increasingly, jurisdictions nationwide are recognizing the importance of charging offenders with Bail Jumping for failing to come to court appearances.

Wis. Stats. § 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 for Court Appearances

Failing to appear for scheduled criminal court appearances violates the law. It is a crime. The premise for issuing these charges in DV cases stems from recognizing the impact a defendant's failure to appear in court can have on the state's ability to prosecute the offender.

In Milwaukee County, the practice of issuing Bail Jumping charges for missed court appearances began in the Drug and Gun courts. Gun and Drug prosecutions, however, are different in kind from Domestic Violence prosecutions. Typically, unlike Domestic Violence cases, Drug cases and Gun cases do not squarely depend upon the involvement of victims and witnesses from the community. Moreover, the level and types of evidence typically do not deteriorate over time.

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

Particularly for DV cases, manipulation and control of victims is omnipresent. The longer a case lingers in the system… the greater potential for a DV victim to be 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 jury trial court appearances. 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. Purpose for the Issuance of Bail Jumping for Failure to Appear

- Conditions of release on bond mandate defendants to appear for all scheduled court appearances. Failure to appear in court for scheduled court appearances is a violation of the court's order. Therefore, it is a crime.
- **Victim Safety** is of utmost importance. The Criminal Justice System exerts an emotional strain and physical toll upon all crime victims. In particular, Domestic Violence victims often report being threatened, controlled and manipulated during pending criminal proceedings. It is not uncommon for defendants to face new charges stemming from the original underlying DV charges (such as Bail Jumping or Intimidation of Victim or Witness charges).
- For victims who cooperate with the prosecution, it is patently unfair for them to repeatedly appear at court proceedings while an individual defendant might choose not to appear.
- The Criminal Justice System has a strong interest in the expeditious resolution of its cases. The State must support the integrity of the Criminal Justice System.
- The expeditious handling of criminal cases benefits defendants, victims, and society. Fast-track cases preserve evidence. Fast-track cases aid in the search for truth and the type of justice the Criminal Justice System strives to achieve.
- Trial courts must be respected by all members of society. The administration of justice is thwarted by those who fail to abide by Court Orders, including the scheduling of court cases and court business.

- Particularly for Domestic Violence cases, manipulation and control of victims is omnipresent. The longer a case lingers in the system… the greater potential for a victim of domestic violence to be controlled or manipulated.
- Defendants may avoid "judgment day" by simply failing to appear in court – especially when victims cooperate with the prosecution's case. Prosecutors need to ensure that defendants do not manipulate the justice system.
- In a case where a skipped pre-trial court appearance by a defendant results in a lengthy delay of several months or years, a prosecutor may be unable to proceed at a later date. The defendant will avoid accountability for criminal behavior because perhaps the victim has now relocated or a police officer no longer recalls an aged incident.

4. Prosecutor's Sentence Recommendations

The goals of prosecuting Domestic Violence cases should reflect your values as a community prosecutor, namely:

1. **Increasing Victim Safety.**
2. **Holding Abusers Accountable.**
3. **Reducing Recidivism.**

Let's say that your prosecution for an underlying offense of Assault and 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 failure of the offender to appear in court), the Judge may feel reluctant to sentence the offender to a typical DV-type of sentence.

Do not allow the Judge's reluctance to limit your recommendations. Do recommend typical DV sentences for 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: 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. Other offenses – even unproven offenses – can be considered as evidence of a pattern of behavior which is an index of the defendant's character. "Character" is a critical factor at sentencing. The standard of proof for a trial court at a sentencing hearing

is the standard 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*, 510 N.W.2d 799, 181 Wis.2d 333 (Ct. App. 1993); *U.S. v. Watts*, 117 S.Ct. 633; *MacMillan v. Pennsylvania*, 106 S.Ct. 2411.

Courts must consider the character of the defendant at the time of sentencing. Dismissed Domestic Violence counts or cases may reveal much about the character of a defendant. Manipulative behavior such as "playing the court system" may reveal much about the tendencies of a defendant to similarly manipulate and control a victim.

In sum, remember that even dismissed DV cases are relevant to a trial court's sentencing decision. Consequently, as a prosecutor, feel free to argue for a full range of DV sentencing options.

5. Wis. Stat. § 940.47 (2002)

Once you charge a case, occasionally victims will contact you and report defendants "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. Stats. § 940.47 which states:

> Wis. Stats. § 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.

(Wisconsin Domestic Violence Prosecution Manual, 2004.)

27. The Nightmare of Stalking: Crime of Obsession

1. Introduction
2. Prior Law
3. Wisconsin's new Stalking Law
4. Investigation of Stalking
5. Challenges facing a Stalking Investigation
6. Special Sentencing Considerations for Stalkers
7. Understanding Stalkers through Stalker Typology

1. Introduction

Stalking is a violent crime that incites terror in countless citizens across the nation annually. 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. Stats. § 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 DV charges do not. The vigorous prosecution of Stalkers is an aggressive step towards meeting the goal of homicide prevention.

2. Prior Law

Quite frankly, before the recent legislative changes in Wisconsin's Stalking statute, most prosecutors figured 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 of a Class A misdemeanor. However, the crime of Stalking now carries more felony options.

Under prior law, a person committed the offense of Stalking if:

(1) he or she 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 himself or herself or a member of his or her immediate family (the **"reasonableness of the fear"** element);

(2) the person knows or should know that the victim will reasonably fear bodily injury to or death of himself or herself or a member of his or her immediate family (the **"knowledge"** element); and

(3) the person'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 within the prior six months regularly resided in the household.

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:

(a) the [defendant] engaged in intentional, repetitive conduct directed at a specific person;

(b) the conduct must be of a type that would objectively (reasonable person standard) induce fear of personal harm in the victim or for a member of the victim's family;

(c) the State must also prove the defendant had knowledge, actual or imputed, that such fear will result from the defendant's conduct, and that the conduct did produce such fear.

Under prior law a person who committed the offense of Stalking was guilty of a Class A misdemeanor. More severe penalties could be imposed for Stalking under certain circumstances.

Wisconsin law stated that a first time offender was guilty of a Class A misdemeanor. The offense, however, increased to a Class E felony (Truth in Sentencing I) if the act resulted in bodily harm to the victim or if the actor had a previous conviction under the Stalking or Harassment statute. 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 New Stalking Law

Wisconsin's new Stalking law went into effect on July 30, 2002, thereby modifying the elements of the offense of stalking and establishing a new penalty structure.

THE BASIC ELEMENTS FOR A CLASS I FELONY

Element #1:

Defendant intentionally engaged in a course of conduct directed at a specific person (victim) that induced fear (in the specific person) of bodily injury to or the death of himself or herself or a member of his or her family or household.

+

Element #2:

The course of conduct would have caused a reasonable person under the same circumstances to fear bodily injury or death.

+

Element #3:

Defendant intends 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 of himself or herself or a member of his or her family or household.

"COURSE OF CONDUCT"

According to Wis. Stats. § 940.32(1)(a), "Course of conduct" means a series of 2 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) Sending material by any means to the victim for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim;

8) Placing an object on or delivering an object to property owned, leased, or occupied by the victim;

9) 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;

10) Causing a person to engage in any of the acts described in subds. 7 to 10.

"REASONABLENESS OF THE FEAR" ELEMENT

The new Stalking legislation revises the "reasonableness of the fear" element. In determining whether fear resulting from the course of conduct is reasonable, the key consideration is whether the course of conduct would induce fear not just in a reasonable person, but in a reasonable person *under the same circumstances as the victim*.

Therefore, "reasonable fear" 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.

KNOWLEDGE VS. INTENT

The new Stalking legislation replaces the "knowledge" element with an element based on the actor's "intent." In order for a course of conduct to constitute Stalking, the actor must intend that at least two of the acts that constitute the course of conduct, will place 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.

"Intentionally" means that the defendant acted with the purpose to engage in a course of conduct directed at the victim.

NEW DEFINITIONS FOR RELATIONSHIPS

The new Stalking legislation replaces the term "immediate family" with separate definitions for "member of a family" and "member of a household."

"Member of a family" is defined to mean: *(1) a spouse, parent, child, or sibling; or (2) any person who is related to another individual by blood or adoption.*

"Member of a household" is defined to mean: *any person who regularly resides in the household of another, or who, within the prior six months, regularly resided in the household of another.*

Further, the definition of "Domestic Abuse" for the purposes of Stalking has the same meaning as Wis. Stats. § 813.12(1)(am) [Domestic Abuse Injunction section], rather than the meaning in Wis. Stats. § 968.075 [Domestic Abuse statute]. Keep in mind that Wis. Stats. § 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. Even adult caregivers of the elderly or of persons with disabilities are included in its purview.

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. Stats. § 940.32(2e)(a, b & c), a Class I felony Stalking offense can be alleged for only ONE 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 intends 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; and

(4) the person's acts induce such fear 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. Stats. § 939.632(1)(e)1. [which includes crimes such as homicide, felony battery, felony sexual assaults, sexual assault behavior with children, mayhem, kidnapping, arson, endangering safety by use of a dangerous weapon, etc.] (See Wis. Stats. § 940.32(2m)(a)).

A Class H felony Stalking may be charged if the defendant has a prior conviction for criminal harassment under Wis. Stats. § 947.013(1r), (1t), (1v), or (1x) or a prior Stalking conviction within the past 7 years.

Within the last 7 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 (See Wis. Stats. § 940.32(3)(b)).

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 (See Wis. Stats. § 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 (See Wis. Stats. § 940.32(2m)(d & e)).

A Class F felony may also be charged if the Stalking results in bodily harm to the victim or a member of the victim's family or household (See Wis. Stats. § 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 (See Wis. Stats. § 940.32(3)(c)).

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 history of domestic violence between the actor and the victim; however, they are not trained to inquire about the actor's conduct since the relationship with the victim ended.

Typically, an actor's Stalking behavior begins or is exacerbated when the relationship with the victim ends. This concept has been coined: "SEPARATION VIOLENCE."

Because a victim may not immediately recognize that he or she is being stalked, prosecutors and law enforcement should keep a keen eye for signs of Stalking behavior. To do so 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 or in writing?**
- **Has the victim had any recent unusual encounters with the actor such as the actor showing up uninvited to an event, "coincidentally" meeting at the grocery store, or seen the actor 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 unexplained property damage?**

The investigating officer should detail these encounters or contacts in a report and begin to seek out evidence to corroborate each report incident.

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 to effectively prosecute a stalking case.

Prosecutors should encourage victims to keep a detailed dairy or a 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, the prosecutor must strongly encourage the victim to obtain a Domestic Abuse Injunction 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 ripe to charge. Of course, both the prosecutor and the law enforcement agent should refer the victim to community advocates who can properly address the creation of a safety plan with the victim.

5. Challenges Facing a Stalking Investigator

1. 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; Spying on the victim; Tapping a victim's phone; Reporting a victim to CPS 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 / Injunctions; Actual assaults.
2. Law Enforcement Communication. Acts occur in multiple jurisdictions and at varying times, involving different police agencies and different shifts of investigators. Someone must head up a Stalking investigation.
3. Extended time periods. Stalking can last for years.
4. Arrest & Prosecution may aggravate the Stalker and exacerbate the situation, thereby increasing the law enforcement time and resources necessitated to keeping the victim safe.

INVESTIGATIONS INVOLVE CRUCIAL FUNCTIONS

- **Assessment and evaluation.** Typically, a stalker has a Method of Operation. Interview the victim. Gauge the victim's level of fear. Find out about relationship history, history of violence, past threats, mental health history of stalker, substance abuse issues, prior record, and any examples of the above-listed behaviors.
- **Corroboration.** Gather evidence to corroborate such as taped phone messages, letters, cards, gifts, items sent to victim, statements of neighbors and other witnesses, as well as any surveillance equipment. Consider utilizing search warrants of the stalker's auto and home, always being alert for evidence of photos of victim, diagrams of the victim's home or workplace, diaries written by stalker, personal items of victim, surveillance footage, keys to victim's car or home, etc.
- **Collaboration.** Work with other law enforcement agencies to gather evidence and develop safety plans for victims.
- **Safety planning for victims.** While no stalker is exactly like another and not all victims can rearrange their lives accordingly, generally it is sound advice for victims to cease all communication with stalkers; Obtain TRO / Injunction; Keep a diary; Collect evidence of letters and phone messages; Alter work times if possible and routes to and from work; Advise co-workers, friends, neighbors and relatives; Move; Obtain unlisted phone number; Arrange for a phone tap; Arrange for 3rd party visitation if children in common. Refer victim to an advocate agency to devise a safety plan.

(Thanks to the Pence, Ellen & Paymar, Michael, Duluth Domestic Violence Intervention Project, *Domestic Violence: The Law Enforcement Response*, (2001); APRI, "Violence Against Women: The Prosecution of Domestic Violence and Stalking Cases", for their research and ideas pertaining to the investigation of Stalking.)

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. Stats. § 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)ll 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 / Injunctions], 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. Stats. § 973.076, the district attorney must begin the forfeiture action within 30 days of the seizure of the property or date of conviction.

The state has the burden of satisfying or convincing 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.

Under Wis. Stats. § 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.

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

7. Understanding Stalkers Through Stalker Typology

By categorizing different types of Stalking behavior, many researchers have devised "typologies" based on 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. **Erotomanic.**
4. **False Victimization.**

In 1999, "Mullen *et al*" categorized stalkers:

1. **Rejected.**
2. **Intimacy Seeking.**

3. **Incompetent.**
4. **Resentful.**
5. **Predatory.**

The following summary originates from several sources: "Stalkers and Their Victims", by Paul E. Mullen and Michele Pathe, *Psychiatric Times*, April 2001, Vol. XVIII, Issue 4; "The Dynamics of Ex-Intimate Partner Stalking", by P. Kropp, *BC Institute Against Family Violence Newsletter,* Summer 2000; and stalkinghelp.org.

1. 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 going on. The Stalker's motivation may be to continue the relationship or 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 (rage).

Wild mood fluctuations can become very dangerous. For instance, many Rejected Stalkers put their victim on a pedestal. Then suddenly, 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 self worth. When the partner leaves, the Rejected Stalker may be left with feelings of emptiness and worthlessness. 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 DV history 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. Rejected Stalkers typically are the most resistant to efforts aimed at ending their Stalking behavior. However, many do curb behavior with the threat of judicial intervention.

2. THE INTIMACY SEEKER

(Corresponds to Zona's Erotomania and Love Obsessional Stalker)

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. Intimacy Seekers are prone to interpret any response from their victim (positive or negative) as encouragement.

Intimacy Seekers are often shy, isolated persons 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 undying love for the victim. Psychiatric intervention and treatment is often needed to extinguish the Stalking behavior.

3. 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 or after seeking counseling.

4. 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 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.

5. 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 the victim, 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. Predatory Stalkers do not 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. As you can readily ascertain, 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 the development of an effective safety plan for a victim of Stalking.

(Written by ADA Sara Scullen, DDA Robert Donohoo and ADA Paul Dedinsky, in conjunction with the typology research of the Wisconsin Coalition Against Domestic Violence (WCADV) and the investigation resources from the American Prosecutor's Research Institute (APRI) and the Duluth Domestic Abuse Intervention Project cited above. Wisconsin Domestic Violence Prosecution Manual, 2004.)

28. Intimidation of Victims: Using Abuser Tactics of Manipulation and Control Techniques Against the Defendant at Trial

1. Introduction
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1. Introduction

Post-DV Charge Offenses is a coined term for an array of crimes that DV abusers commit following the issuance of criminal charges of domestic violence. Bail Jumping charges comprise the majority of these *Post-DV Charge Offenses* due to repeated violations of non-monetary bail conditions of "No Contact" court orders.

In Milwaukee, Wisconsin, a recent surge of *Post-DV Charge Offenses* has riddled the Domestic Violence courts because of the use of taped recordings of the defendants' phone calls from jail. These taped telephone conversations serve as the evidentiary basis for many new charges. The Domestic Violence Unit of the Milwaukee County District Attorney's office is now issuing in volume charges of:

- Intimidation of Victims and Witnesses (Wis. Stats. §§ 940.42-940.45)
- Solicitation to commit Perjury (Wis. Stats. § 946.31)
- Solicitation to commit False Swearing (Wis. Stats. § 946.32)
- Bribery of Witnesses (Wis. Stats. § 946.61)
- Bail Jumping (Wis. Stats. § 946.49(1))

With relative frequency, the Milwaukee District Attorney's office utilizes Jail / Prison facilities as the resource for the taped telephone conversations between DV defendants and their victims and family members. The Jail / Prison facilities record all outgoing calls. The contents of these recordings demonstrate the great lengths to which many offenders will attempt to thwart the criminal prosecution.

Prosecutors and their staff now educate victims to recognize evidence. For instance, victims 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.

Our experience has shown that in victim / witness intensive cases – such as domestic violence 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 DV defendants and victims. Vast levels of manipulation and intimidation of victims occur from inside our jail and prison facilities.

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

- *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 her…*
- *Dictating the lies the victim is to testify to upon appearance in court…*
- *Soliciting "hit men" to injure the victim…*
- *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.

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 designed to prevent the victim from appearing in court. To actually have the defendant's conversations from your jail on tape… that 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 DV case, remember that the community has stepped squarely into the middle of a 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 violence. Following a *Tension-Building phas*e in the relationship (Escalation of Anger) and the *Anger Release* (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 for you to realize that the *Honeymoon Period* is part of the Cycle of Violence. The *Honeymoon Period* is a facet of Power and Control dynamics.

Even if your prosecution results in a "No Contact" order as a non-monetary condition of release, the defendant will likely violate that "No Contact" order to actively participate in the typical *Honeymoon Period* of that relationship's Cycle of Violence. Because the defendant so desires to be in control, the defendant often feels compelled to get to the victim somehow. It is part of the Cycle of Violence that this abuser has engaged in 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, as the prosecutor, 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 from the flowers or candy given to the victim by the defendant. The defendant sends flowers to apologize. An apology is an acknowledgement that the defendant believes he has done something wrong… resulting in evidence of an abuser's consciousness of guilt.

The majority of jails and prisons across the nation record the audible conversations of all out-going phone calls from their facilities. Listening to inmate phone calls (other than properly placed calls to attorneys) reveal apologies and other statements whereby the defendant acknowledges guilt.

After you charge a defendant with physically abusing a victim, take an inventory of all the different types of evidence that might occur during that relationship's *Honeymoon Period*. Enlist the support of the victim, if possible. You may be able to gather damaging evidence of guilt to convict the defendant. Simply put, prosecutors can turn the tables on the defendant. You can use abusers' manipulative tactics against them at trial.

Simply put: Their own words end up convicting themselves!

5. Opportunity to Break the Cycle of Violence

The majority of communities enter into the relationship's Cycle of Violence, beginning with a call for help. Each time a 911 call is made by a victim, that victim reaches out. In essence, even if only momentarily, the victim steps outside that pattern of the Cycle of Violence. When a victim of abuse calls, a community has an opportunity to help the victim put a "crack" in that Cycle of Violence.

If a 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, a statement of: "I am sorry" usually equals: "I Confess." Educating victims that "I am 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-DV Offenses

The content of jail recordings is increasingly more 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.

The following statute should be utilized when the defendant (or a third party) contacts a witness and attempts to dissuade the witness not to appear in court to testify:

Wis. Stats. § 940.42 Intimidation of witnesses; misdemeanor.

Except as provided in § 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.

The following statute should be utilized when the defendant (or a third party) contacts the victim and attempts to dissuade the victim from appearing in court to testify:

Wis. Stats. § 940.44 Intimidation of victims; misdemeanor.

Except as provided in § 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.

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

Wis. Stats. § 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.

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

Wis. Stats. § 940.43 Intimidation of Witnesses; felony.

Whoever violates § 940.42 under any of the following circumstances is guilty of a Class H 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 or 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.

In Wisconsin, any offender that commits 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. Also, a previous conviction raises the penalty to the felony level even though the offender would otherwise be convicted of a misdemeanor intimidation.

Wis. Stats. § 940.45 Intimidation of victims; felony.

Whoever violates § 940.44 under any of the following circumstances is guilty of a Class H 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 or 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/witness to lie in court, through an affidavit, or other matter the offender has violated:

Wis. Stats. § 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. Stats. § 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. Stats. § 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 2 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. Wis. Stat. § 940.47 (2002)

Once you charge a case, occasionally victims will contact you and report defendants "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. Stats. § 940.47 which states:

Wis. Stats. § 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. The Law Pertaining to Admissibility of Inmate Jail or Prison Recordings into Evidence

Generally speaking, federal law prohibits the "interception" of telephone calls absent a particularized court order. 18 U.S.C. § 2510 (1970) et seq. 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.

Two exceptions to this general prohibition, however, apply to the interception of inmate telephone calls at correctional institutions. Telephones used by law enforcement in the *ordinary course of their duties* and where telephone users *consent* to the recordings are exceptions to the general prohibition.

1. 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 18 U.S.C.S. § 2510(5)(a)(ii) (1993)'s 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 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. *Amati*, 176 F.3d 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. Rewolinksi*, 159 Wis. 2d 1, 25 n.9, 464 N.W.2d 401 (1990) (dictum) (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 its earlier decisions that upheld 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) and *United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989). *See also* Fishman & McKenna, *Wiretapping and Eavesdropping*, § 2:40 (2d ed. 1995). *See also In 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 house 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* at 1565. In so doing, the court placed emphasis on the fact that the prison 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.

2. CONSENT

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. Stats. § 968.31(2)(b).

The interception of telephone calls where one of the parties to the conversation consents to the interception is the second exception to this general prohibition against the interception of inmate telephone calls in correctional settings. 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:

a. Notice of the monitoring policy was published in the Code of Federal Regulations;

b. 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;

c. Every inmate received a handbook which explained the monitoring and taping procedures;

d. 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." *Id.* 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. (Whether or not the inmate actually signs the form would be irrelevant to the *Amen* court, for even his refusal to sign it provides further evidence that he is aware of the monitoring procedures. *Amen* at 379.)

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), and *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*, 879 F.2d 1562 (7th Cir. 1989), found the ruling in *Amen* "troubling." *Id.* at 1565. While not reaching the issue of whether consent occurred in *Feekes*, the court nonetheless expressed "apprehension" over the broadly defined concept of implied consent exhibited in *Amen*. *Id.* at 1565.

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.'" *Id.* 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) (1970). 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.

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) (1970) 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."[1]

1. Section 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 his direction would fall within this definition. See section 302.07, Stats., 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. Stats. § 968.27(7)(a)(2). The cases appear to be unanimous in their 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 (D. Conn. 1980), and *U.S. v. Feekes*, 879 F.2d 1562 (7th Cir. 1989).[2]

9. Legal Challenges and Objections

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.

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 chief chose to activate the recording equipment on that line as well. Despite their 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.

LAW ENFORCEMENT AGENCIES ARE NOT REQUIRED TO PROVIDE NOTICE OF THE TIME WHEN SPECIFIC 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 better 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 an agency's employee. Information concerning an

2. *Also see*: *In the Interest of JAL*, 162 Wis. 2d 940, 471 N.W.2d 260 (Ct. App. 1990), where the court noted 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 sections 968.27-.31 because the institution's need for security and safety sometimes outweighs an individual's right to privacy. In addition, section 968.27(7)(a)2. which provides that electronic monitoring is not prohibited with respect to a "law enforcement officer in the ordinary course of his or her duties," might very well apply to such monitoring. JAL, 162 Wis. 2d at 971.

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 an informed decision about whether to engage in potentially privileged conversations on the agency's telephone.

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).

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) and (c), and 18 U.S.C.S. § 2511(2)(c) (1993). *See 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).

EQUAL PROTECTION CLAIMS

Inmates may attempt to bring equal protection claims. Because there are no 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 policy is established as a rule or as an institution policy, that document should explain why telephone monitoring is necessary at the facility where you find it necessary to implement such policy and not at the other correctional institutions. 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."

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), suggests that prison authorities are ordinarily prohibited from monitoring a prisoner's telephone conversations with an attorney.

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 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 the 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), and *U.S. v. Montgomery*, 675 F. Supp. 164 (S.D.N.Y. 1987).

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. Stats. § 968.30, are not admissible in criminal court as evidence-in-chief except in a proceeding where a person is accused of a felony under chapter 961 (controlled substances violations). See: Wis. Stats. § 968.29; *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. Stats. § 968.27(7)(a)(2) applies, as discussed above, then the monitoring is not an interception under Wis. Stats. § 968.27(9) and this prohibition against admissibility may not apply.

10. Bail Jumping for Failure to Appear for Court Hearings

In the mid-1990's, the Milwaukee County District Attorney's office broadened the number of Domestic Violence Victim Witness Specialists working directly with domestic abuse victims. Their central function is to establish a rapport with victims of abuse in order to:

1. secure improved family safety;
2. to answer questions and provide information about the Criminal Justice System;
3. to encourage victims to break the cycle of abuse through full cooperation with the Criminal Justice System.

Their work today supports victims as well as the ten DV Unit prosecutors who work with thousands of felony and misdemeanor DV cases.

Each year, the Milwaukee County District Attorney's office reviews well over 10,000 felony and misdemeanor DV offenses. With annual prosecutions in the thousands, the challenges to achieve successful prosecutions are many. It is no wonder that we have wholeheartedly embraced the philosophy of "Evidence-based / Victimless" prosecution in Milwaukee County. Creative tools are needed to hold abusers accountable.

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

In 2000-2001, the Milwaukee County District Attorney's office began to assess the levels of manipulation exerted upon DV victims. In recent decades, like many prosecutors across the nation, we came to understand the cycle of abuse in domestic abuse relationships. We became keenly aware of the pressures placed upon DV victims.

Violations of court ordered conditions of bail will result in Bail Jumping charges. Most typically, these charges will address "No Contact Order" violations. However, increasingly, jurisdictions nationwide are recognizing the importance of charging offenders with Bail Jumping for failing to appear for court appearances. We suggest that you consider adopting a policy of actively pursuing these matters.

Wis. Stats. § 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.

Failing to appear for scheduled criminal court appearances violates the law. It is a crime. The premise for issuing these charges in DV cases stems from recognizing the impact a defendant's failure to appear in court can have on the state's ability to prosecute the offender.

Unlike other prosecutions for crimes such as drug or gun violations, Domestic Violence cases often squarely depend upon the involvement of victims and witnesses from the community.

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

Particularly for DV cases, manipulation and control of victims is omnipresent. The longer a case lingers in the system… the greater potential for a DV victim to be 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.

11. Purpose of Issuing Bail Jumping for Failure to Appear

It is imperative to aggressively prosecute all defendants who fail to appear for jury trial court appearances. 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.

- Conditions of release on bond mandate defendants to appear for all scheduled court appearances. Failure to appear in court for scheduled court appearances is a violation of the court's order. Therefore, it is a crime.
- **Victim Safety** is of utmost importance. The Criminal Justice System exerts an emotional strain and physical toll upon all crime victims. In particular, Domestic Violence victims often report being threatened, controlled and manipulated during pending criminal proceedings. It is not uncommon for defendants to face new charges stemming from the original underlying DV charges (such as Bail Jumping or Intimidation of Victim/Witness charges).
- For victims who cooperate with the prosecution, it is patently unfair for them to repeatedly appear at court proceedings while an individual defendant might choose not to appear.
- The Criminal Justice System has a strong interest in the expeditious resolution of its cases. The State must support the integrity of the Criminal Justice System.

- The expeditious handling of criminal cases benefits defendants, victims, and society. Fast-track cases preserve evidence. Fast-track cases aid in the search for truth and the type of justice the Criminal Justice System strives to achieve.
- Trial courts must be respected by all members of society. The administration of justice is thwarted by those who fail to abide by Court Orders, including the scheduling of court cases and court business.
- Particularly for Domestic Violence cases, manipulation and control of victims is omnipresent. The longer a case lingers in the system… the greater potential for a victim of domestic violence to be controlled or manipulated.
- Defendants may avoid "judgment day" by simply failing to appear in court – especially when victims cooperate with the prosecution's case. Prosecutors need to ensure that defendants do not manipulate the justice system.
- In a case where a skipped pre-trial court appearance by a defendant results in a lengthy delay of several months or years, a prosecutor may be unable to proceed at a later date. The defendant will avoid accountability for criminal behavior because perhaps a victim has now relocated or a police officer no longer recalls an aged incident.

12. Prosecutor's Sentence Recommendations

The goals of prosecuting Domestic Violence cases should reflect your values as a community prosecutor, namely:

1. **Increasing Victim Safety**.
2. **Holding Abusers Accountable**.
3. **Reducing Recidivism**.

Let's say that your prosecution for an underlying offense of Assault and 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 failure of the offender to appear in court), the Judge may feel reluctant to sentence the offender to a typical DV-type of sentence.

Do not allow the Judge's reluctance to limit your recommendations. Do recommend typical DV sentences for 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: Courts may freely consider prior convictions, pending cases, "no processed" cases, uncharged offenses, and in some jurisdictions… courts may even consider charges where a jury has returned a verdict of "not guilty".

***NOTE:** 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. Other offenses – even unproven offenses – can be considered as evidence of a pattern of behavior which is an index of the defendant's character. "Character" is a critical factor at sentencing. The standard of proof for a trial court at a sentencing hearing is the standard 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*, 510 N.W.2d 799, 181 Wis.2d 333 (Ct. App. 1993); *U.S. v. Watts*, 117 S.Ct. 633; *MacMillan v. Pennsylvania*, 106 S.Ct. 2411.

Courts must consider the character of the defendant at the time of sentencing. Dismissed Domestic Violence counts or cases may reveal much about the character of a defendant. Manipulative behavior such as "playing the court system" may reveal much about the tendencies of a defendant to similarly manipulate and control a victim.

In sum, remember that even dismissed Domestic Violence cases are relevant to a trial court's sentencing decision. Consequently, as a prosecutor, feel free to argue for a full range of DV sentencing options.

(Written by AAG Donald Latorraca, ADA Jeff Greipp and ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004.)

29. Advocate / Victim Privilege

1. Wis. Stats. § 905.045(2) General Rule of Privilege
2. Purpose of the Advocate—Victim Privilege
3. Holder of the Privilege
4. Scope of the Privilege
5. Applicability of the Privilege

1. Wis. Stats. § 905.045(2) General Rule of Privilege

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 supercede this section with respect to that communication or information.

2. Purpose of the Advocate—Victim Privilege

Wisconsin's Advocate—Victim Privilege statute mirrors many jurisdictions nationwide that have designated communications between DV or Sexual Assault counselors and victims 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).

Wisconsin's new law encourages battered victims to obtain counseling and the necessary advocacy to help them leave violent, controlling relationships. The new law affords Domestic Violence and Sexual Assault victims the guarantee of a "safe haven" for the free expression of their communications... without fear that their communications will be used later in a courtroom setting.

Already, privileges exist for battered victims to maintain privileged communications with an attorney (Wis. Stats. § 905.03), clergy (Wis. Stats. § 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. Stats. § 905.04).

Many victims receive counseling from service providers who, though publicly funded and more affordable, do not have the same credentials or professional licensure as psychotherapists. In the past, communications with publicly funded service providers were not afforded confidentiality protection. This is a significant distinction for many victims who may be denied access to financial resources by their abusers. While communications with psychotherapists in private practice have been protected by privilege under Wis. Stats. § 905.04, victims who could only afford counseling from rape crisis centers or domestic abuse shelters were afforded no protections. Economic status in Wisconsin is no longer a basis for denial of the privilege. *See* "Privacy of Victims' Counseling Communications", Legal Series Bulletin #8 at http://www.ojp.usdoj.gov/.

3. Holder 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 as well, such as reports, memoranda and other work product during the scope of providing counseling, assistance or support services to a victim.

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. That means there are exceptions outlined in the statute. Particularly, reporting of child abuse and neglect qualifies as an exemption. *See* "Privacy of Victims' Counseling Communications", Legal Series Bulletin #8 at http://www.ojp.usdoj.gov/.

Note that Wis. Stats. § 905.05(3)(b) supercedes the Advocate—Victim Privilege. Wis. Stats. § 905.05 states that the Husband – Wife privilege does not apply to "proceedings in which one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a 3rd person committed in the course of committing a crime against the other."

5. Applicability of the Privilege

As written, the law does not explicitly exclude victim assistance staff, such as those who may work in your district attorney office or for law enforcement agencies.

The question naturally arises: Does this privilege apply to victim advocates or victim support personnel working in a prosecutor's office? 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, you need to adopt strict measures to ensure that your office is closely adhering to your duties to communicate exculpatory evidence to the defense. (See the Ethics chapter of this manual for more information.)

Many district attorney offices have already adopted policies with an interpretation that the privilege is inapplicable to their victim assistance staff. Advocates or Victim Witness Specialists working in your office need to understand your position that Wis. Stats. § 905.045 does not apply to them. This information should, in turn, be communicated to victims.

From a legal perspective, there is some additional statutory support to draw the conclusion that Wis. Stats. § 905.045 is inapplicable to Government Advocates and Victim Witness staff. Look at the definitional similarities between Wis. Stats. §§ 905.045(2) and 895.67, which provides:

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 readily ascertain, there are some similarities between the two statutes, in their use of similar terms. Remember that 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. However, Wis. Stats. § 895.67 does not explicitly exclude Victim / Witness staff employed by a District Attorney office from the definition of a domestic abuse services organization.

From a common sense standpoint, "Advocacy" and "counseling" have differentiated meanings. While District Attorney Victim / Witness staff do provide 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. (For an excellent essay on the differences between styles of victim advocacy, please refer to "The Victim Advocate's Role", National District Attorney Association, Rural Domestic Violence conference materials, pp. 51-66 (2000).)

Whatever your interpretation of "advocacy" or "counseling", you must first obey the tenets of exculpatory evidence. You cannot avoid the responsibility of turning over exculpatory evidence by assigning all communication with DV victims to agents within the district attorney's office, such as victim / witness staff. (See the Ethics chapter of this manual for further information.)

(Wisconsin Domestic Violence Prosecution Manual, 2004.)

30. The Lautenberg Amendment: A Federal Firearms Prohibition for Domestic Violence 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
   - Commerce Clause
   - Equal Protection Clause
   - Ex Post Facto
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:

1. convicted felons;
2. fugitives from justice;
3. persons who use or are addicted to controlled substances;
4. persons committed to a mental institution or legally adjudicated mentally defective;
5. illegal aliens and individuals admitted to the United States pursuant to a nonimmigrant visa;
6. persons dishonorably discharged from the United States Armed Services;
7. individuals who have renounced United States citizenship;
8. persons subject to a pertinent court order; and
9. persons who have been convicted of a misdemeanor domestic violence offense.

The maximum sentence for violation:

Felony conviction, a fine of $250,000, and ten years imprisonment. (See 18 U.S.C. § 924(a)(2)).

The newest addition to the Gun Control Act is Category 9, the firearms prohibition for **convicted domestic violence 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, October 2001).

2. Genesis of the Lautenberg Amendment

Originally proposed by Senator Frank Lautenberg as part of anti-stalking legislation that passed through the Senate by 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 1-8 of the Gun Control Act, exempts police officers and military personnel under the rationale that they use their weapons for "public use" to promote public safety. (See 18 U.S.C. § 925(a)(1)).

In an apparent attempt to weaken support for the Lautenberg Amendment, Representative Bob Barr, in the final, hectic moments of budget negotiations, proposed an amendment eliminating the "public use exemption" from the Lautenberg Amendment. (See Robert Suro and Philip Pan, "Law's Omission Disarms Some Police; Domestic Violence Act Has Some Officers Hanging up Their Guns," *The Washington Post*, Dec. 27, 1996, at A16.) Representative Barr's amendment eliminating the "public use exemption" from the Lautenberg amendment passed.

The Lautenberg Amendment passed by a vote of ninety-seven to two in the Senate and became law with the passage of the Appropriations Bill. (See 142 Cong. Rec. S10380 (September 12, 1996)). Like the other categories of the Gun Control Act, the Lautenberg Amendment is retroactively applied, meaning that any person convicted of a DV misde-

meanor, 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 DV gun ban is apparent. It is designed to prohibit DV 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.
>
> (See 142 Cong. Rec. S10380, Vote 289 (September 12, 1996).)

Historically, DV offenses have been treated less seriously than violent crimes committed against strangers. (See 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 violence has uniquely deleterious affects on families and the socialization of children. Children raised in homes where they witness domestic violence are far more likely to become DV abusers or victims as adults. (See 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

While the rationale supporting the Lautenberg Amendment may seem simple enough, implementing it in practice has posed tough challenges for courts, policy makers, law enforcement agencies and the military.

In the aftermath of the passage of the Lautenberg Amendment, Representative Helen Chenoweth proposed its repeal. Representative Bart Stupak proposed adding a "public use exemption" for police officers and military personnel. Representative Bob Barr proposed eliminating the bill's retroactivity, so that the Lautenberg Amendment could only be invoked for offenses committed after September 30, 1996. (See H.R. 445, 105th Cong. (1997); H.R. 26, 105th Congress (1997).) To date, none of these proposals has become law. The Lautenberg Amendment retains the same form it had at its inception.

The Lautenberg Amendment has faced a barrage of constitutional challenges in the courts. It has been alleged that the Lautenberg Amendment violates the 2nd Amendment by infringing upon a person's right to keep and bear arms and the 10th 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.

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 *Lopez*, 514 U.S. at 559, 561, 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.

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 DV gun ban does not violate the Commerce Clause. (See e.g. *United States v. Gillespie*, 185 F.3d 693, 704-760 (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).

EQUAL PROTECTION CLAUSE

Does the DV gun ban violate the Equal Protection Clause by treating DV misdemeanants more harshly than felons and by eliminating the "public use exemption" for DV misdemeanants only? Since the DV gun ban does not implicate a fundamental right or affect a suspect class, courts utilize 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, 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." (*See Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999).) Faced with Equal Protection Clause challenges, other courts have upheld the DV gun ban after a rational basis review. *See Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998); *United States v. Gillespie*, 185 F.3d 693 (7th Cir. 1999).

EX POST FACTO

Because the federal DV gun ban prevents convicted DV misdemeanants from owning firearms for convictions occurring pre-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).

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...
>
> *See* 18 U.S.C. § 921(a)(33)(A)(i) & (ii).

In Wisconsin, several DV misdemeanor offenses (defined as such in Wis. Stats. § 968.075) would not be considered "domestic violence misdemeanors" under the Lautenberg Amendment. Why? 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. Stats. § 943.01) in most circumstances would not be considered a "domestic violence misdemeanor" under the Lautenberg Amendment …but it is considered a Domestic Violence offense in Wisconsin if the offender and victim are married, have children in common, live together, or are blood relatives.

Disorderly Conduct (Wis. Stats. § 947.01) may or may not be considered a "domestic violence misdemeanor" under the Lautenberg Amendment, possibly depending upon the factual allegations in the criminal complaint. As of now, the question of whether Disorderly Conduct in Wisconsin would trigger the Lautenberg Amendment remains unresolved.

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; 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 violence 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 DV definition in Wisconsin, siblings or roommates are 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 482, 489, 595 N.W.2d 464, 468, 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 Disorderly Conduct following an altercation with his wife at their home. Kosina plead guilty. The trial court did not explicitly determine that the charge was related to domestic violence. 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 plead guilty had he been aware of the federal firearms prohibition. The trial court denied the defendant's motion. The 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 in *Kosina*, 226 Wis.2d at 488, 595 N.W.2d at 468:

> 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.

7. Enforcement and Implementation

Enforcement of the Lautenberg Amendment has been problematic. Domestic violence misdemeanants in some states have been able to escape the law's reach for a variety of reasons. Some states, for example, do not grant jury trials for misdemeanor crimes. (Nevada is one example. See "Federal Gun Law Expands," *Las Vegas Rev. J.*, Dec. 10, 1996, at 3B.) That means all domestic violence misdemeanants in those states cannot be prosecuted under the Lautenberg Amendment because the law requires that the "domestic violence misdemeanor" be one for which the accused has the right to counsel and a jury trial. (See 18 U.S.C. § 922.)

In addition, states can shield citizens from the Lautenberg Amendment by erasing or expunging "domestic violence misdemeanor" convictions. For example, for a period of time in California, a DV misdemeanant who was not arrested since his DV conviction could have his record expunged simply by paying a $100 fee. (See Maris C. Hunt, "New Gun Law for Batterers Comes Armed with Loopholes," *The San Diego Union Tribune*, Jan. 20, 1997 at A1.)

Variance in state record keeping is the most difficult administrative problem the Lautenberg Amendment faces. To prevent domestic violence misdemeanants from buying guns, the National Instacheck System (NIC) which came into operation in November of 1998, must include DV conviction data from all 50 states. The National Consortium for Justice Information and Statistics reports that record keeping challenges hinder the success of the Lautenberg Amendment. (See Gerry Washington, Director of Information Systems, Testifying before the House Committee on the Judiciary, Guns and Domestic Violence Change to Ownership Ban, March 5, 1997.)

Among the most daunting challenges:

1. States have kept incomplete records of DV arrests.
2. States that have kept records often report only the most serious misdemeanors to state central repositories.

3. Often, it proves difficult to discover the disposition in some DV cases.
4. In most states, including Wisconsin, the penal code citation on the record does not indicate whether a conviction is from a misdemeanor DV assault or some other assault crime.
5. Data as to whether the accused had the right to counsel or a jury trial must be tallied.
6. Research may be necessary to determine if convictions were set aside.

(See "Battle Against Domestic Violence Hampered by Flawed Data," *The Washington Post*, Jan. 1, 1996 at A7.)

In Wisconsin, a conviction for Battery appears on an individual's record as "Battery," a violation of Wis. Stats. § 940.19(1). There is no special designation for "Domestic Violence-related" on the judgment of conviction. In many circumstances, the only way to determine whether a conviction was a DV 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 DV 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.) In the state of Virginia, in a span of just two months, 165 DV misdemeanants were prohibited from buying guns after computerized criminal record checks of 1,200 people. (See Mark Sherman, "Law Officers Sharply Divided on Domestic Violence Gun Law," *The Atlanta Constitution*, March 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 contrary to the Lautenberg Amendment, like other categories of the Gun Control Act, is a federal criminal offense. Law enforcement agents often discover individuals in violation of the Gun Control Act when investigating alternative offenses. 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 DV 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 misdemeanant in possession of a firearm because of a prior DV conviction (where he victimized his wife two years preceding the murder).

For some U.S. Federal Districts, the investigation and enforcement of the DV gun ban does not appear to be a top priority. The Eastern District of Wisconsin prosecuted its first case in late 2002. On November 26, 2002, defendant Warren Kruse was sentenced to 22 months in prison. In sentencing the defendant, U.S. District Judge J.P. Stadtmueller remarked that the defendant was "infatuated with the notion of having firepower present." (See Gina Barton, "Abuser Gets 22 Months in Prison for Gun Possession," *Milwaukee Journal Sentinel*, November 27, 2002.)

(Written by ADA Rebecca Blemberg. Edited by ADA Paul Dedinsky, Wisconsin Domestic Violence Prosecution Manual, 2004.)

FIREARMS SURRENDER LAWS

STATE Laws	FEDERAL Laws		
Wisconsin Statutes	**Violence Against Women Act (VAWA)**	**Brady Bill**	**Domestic Violence Offender Gun Ban (Lautenberg Amendment)**
1. Domestic Abuse Restraining Order **Wis. Stats. § 813.12(4m)(a) [Civil Law]** Automatic surrender of any firearms he/she owns or has in his/her possession if the injunction (not TRO) is granted. **2. Child Abuse Restraining Order** **Wis. Stats. § 813.122(5m)(a) [Civil Law]** Automatic surrender of any firearms he/she owns or has in his/her possession if the injunction (not TRO) is granted. **3. Harassment Restraining Order** **Wis. Stats. § 813.125(4m)(a) [Civil Law]** Firearms surrender is not automatic. The petitioner must request firearms surrender at the injunction hearing. If the court finds 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. **4. Possession of a Firearm** **Wis. Stats. § 941.29 (1) [Criminal Law]** A person can not possess a firearm if he/she has been: (a) Convicted of a felony in this state. (b) Convicted of a crime elsewhere that would be a felony in this state. (c) Found not guilty of a felony in this state by reason of mental disease or defect. (d) Found not guilty of or not responsible for a crime elsewhere that would be a felony in this state by reason of insanity or mental disease, defect or illness.	**1. 18 U.S.C. § 922(g)(8) [Civil Law]** A person who is subject to a **final restraining order** is prohibited from purchasing, receiving, or possessing firearms. This applies to orders that restrain a person from harassing, stalking, threatening, or engaging in other conduct that would place an intimate partner* or child of intimate partner in reasonable fear of bodily injury. * Intimate Partner: spouse, former spouse, parent of the child of the person [respondent], or an individual who currently or formerly cohabited with the person. Does not include dating relationship where cohabitation did not occur. **See 18 U.S.C. § 921(a)(32)**	**1. 18 U.S.C. § 922(g)(1),** **See also 18 U.S.C. § 922(d)(1), 3559(a) [Criminal Law]** Federal law prohibits persons who have been convicted of any felony [a crime punishable by imprisonment for more than one year] from purchasing, receiving or possessing firearms.	1. **18 U.S.C. § 921(a)(33), 922(d)(9), (g)(9) [Criminal Law]** Federal law prohibits persons convicted* of misdemeanor crimes of domestic violence** from purchasing, receiving or possessing firearms. * See next page for qualifiers. ** Misdemeanor crime of domestic violence: state or federal misdemeanor that includes as an element the use or attempted use of physical force or threatened use of a deadly weapon committed by a current or former spouse, a parent or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated. **See 18 U.S.C. § 921(a)(33)(A)**

Prepared by Maria Hanson, Tess Meuer & Amy Uhlenbrauck of the Wisconsin Coalition Against Domestic Violence (WCADV), last revised 2002.

PERSONS EXEMPT FROM FIREARM SURRENDER LAWS

WISCONSIN STATE STATUTES	VAWA – FEDERAL LAW	Brady Bill – FEDERAL LAW	DV Offender FEDERAL Gun Ban
1. Domestic Abuse Restraining Order **Wis. Stats. § 813.12(4m)(ag) [Civil Law]** If the respondent is a peace officer*, respondent does not have to surrender a firearm he/she is required, as a condition of employment, to possess whether or not he or she is on duty. **Wis. Stats. § 941.29(10)(b) [Civil Law]** A person who is a member of the U.S. armed forces or national guard may possess a firearm **only while in the line of duty.** **2. Child Abuse Restraining Order** **Wis. Stats. § 813.122(5m)(ag) [Civil Law]** If the respondent is a peace officer,* respondent does not have to surrender a firearm he/she is required, as a condition of employment, to possess whether or not he or she is on duty. **Wis. Stats. § 941.29 (10)(b) [Civil Law]** A person who is a member of the U.S. armed forces or national guard may possess a firearm **only while in the line of duty.** **3. Harassment Restraining Order** **Wis. Stats. § 813.125(4m)(cg) [Civil Law]** If the respondent is a peace officer,* respondent does not have to surrender a firearm he/she is required, as a condition of employment, to possess whether or not he or she is on duty. **Wis. Stats. § 941.29(10)(b) [Civil Law]** There is no reference under Wis. Stats. § 813.125 [harrassment restraining order] to persons in the U.S. armed forces or national guard, so it appears they **could** be prosecuted if possessing a firearm even while in the line of duty. **4. Possession of Firearm Wis. Stats. § 941.29 (5) [Criminal Law]** If respondent received a pardon for the crime or felony in § 941.29 (1), and has been expressly authorized to possess a firearm, he/she may possess a firearm. If respondent is a correctional officer employed before May 1, 1982, respondent may possess a firearm **only while in the line of duty.** ***Peace Officer:** any pereson vested by law with the duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes. Wis. Stats. § 939.22(22).	**18 U.S.C. § 925(a)(1) [Civil Law]** Law enforcement officers may possess a firearm on duty.** A person who is a member of the U.S. armed forces or national guard may possess a firearm **only while in the line of duty.** **This exemption from surrender of firearms for law enforcement officers is for a service weapon only, when the service person is on duty or is required to possess a weapon off-duty. This exemption does not apply to personal weapons. **See interpretation by Bureau of Alcohol, Tobacco and Firearms (ATF)** **See <http://www.atf.treas.gov/pub/qaunda.htm>**	**18 U.S.C. § 925(a)(1) [Criminal]** Law enforcement officers may possess a firearm on duty. A person who is a member of the U.S. armed forces or national guard may possess a firearm **only while in the line of duty.**	**18 U.S.C. § 925(a)(1) [Criminal]** Law enforcement officers and U.S. armed forces or national guard members may **not** possess a firearm at any time. **[NO EXEMPTIONS]**. **BUT SEE:** **18 U.S.C. § 925(a)(33)(B)(i)** A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence for purposes of the gun ban unless: (1) the person was represented by counsel in the case or knowingly and intelligently waived the right to counsel, and, (2) if the person was entitled to a jury trial in the jurisdiction in which the case was tried either the case was tried by a jury, or the person knowingly and intelligently waived the right to have the case tried by a jury by guilty plea or otherwise. **18 U.S.C. § 925(a)(33)(B)(ii)** A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence if any of the following*: (1) the conviction has been expunged or set aside (2) it is an offense for which the person has been pardoned (3) it is an offense for which the person has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense). * Exception: if the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

31. Battery to Pregnant Women: Fetal Homicide

1. Introduction
2. Fetal Homicide
3. Proof of Intent
4. Proof of Causation
5. Immunity
6. *Cornelius* (Born-Alive Rule)
7. Pregnant Victims, Miscarriages and Great Bodily Harm

1. Introduction: Pregnancy as an Aggravating Factor

The pregnancy of any victim ought to receive careful consideration during a prosecution, whether or not the abuser knew of that pregnancy. To analogize: 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 ignorant of how many occupants are inside.

It is not unusual for pregnant victims, at any stage of pregnancy, to have very strong feelings of loss. The victim may very well express a strong desire for separate punishment in vindication of a miscarriage or still birth 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

(Wis. Stats. §§ 940.01(1)(b), 940.02(1m), 940.05(2g) and (2h), 940.06(2), 940.09(1)(c, d or e) and (1g)(c or d), 940.10(2));

(2) Reckless Injury

(Wis. Stats. § 940.23(1)(b) and (2)(b));

(3) Battery to an Unborn Child, Substantial & Aggravated Battery to an Unborn Child

(Wis. Stats. § 940.195).

When charging any of the above crimes, simply substitute the words "an unborn child" for "a human being." 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, 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 (attempt) fetal homicide even if the attacker is unaware his victim is pregnant.

4. Proof of Causation

In theory, fetal homicide applies throughout the entire pregnancy, even in the earliest stages. In practice, 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 last trimester will be the medical examiner's best opportunity of establishing causation.

Proving causation will often be an insurmountable hurdle in early pregnancy before "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. Stats. § 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. Stats. § 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* (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 prenatal conduct caused the death of a child – viable or not – who was born alive. In other words, if an unborn child (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 *Cornelius* and Wis. Stats. § 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 these circumstances, two possible felony theories might apply:

1. RECKLESSLY ENDANGERING SAFETY (OF THE MOTHER)

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

EXAMPLE:

Attacker beats his six-month pregnant girlfriend 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.

2. 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. Stats. § 940.19(4), (5) or (6). Note that statutorily, a miscarriage cannot be **substantial** bodily harm (see Wis. Stats. § 939.22(38)).

Wis. Stats. § 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. Stats. § 939.22(14) was found to broaden the scope of the statute rather than limit it, leaving for 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:

Attacker beats a woman he does not know is ten weeks pregnant and she miscarries immediately, requiring hospitalization and surgery to complete the miscarriage.

(Written by ADA Thomas Potter, Wisconsin Domestic Violence Prosecution Manual, 2004.)

32. Other Acts and Character Evidence in DV Cases

1. Character Evidence Generally
2. Other Acts Evidence Generally
3. The Importance of Limiting Instructions
4. Probative Value vs. Potential Prejudice
5. *Sullivan* and the Three-Step Analytical Framework
6. Other Acts Evidence to prove "Plan"
7. Other Acts Evidence to prove "Knowledge"
8. Other Acts Evidence to prove "Intent"
9. Other Acts Evidence to prove "Identity"
10. Other Acts Evidence to prove "Method of Operation"
11. Other Acts Evidence in a DV case
12. Sexual Assault cases involving Children
13. Other Acts Evidence introduced by the Defense
14. When the defense is Self-Defense: *McMorris* evidence
15. In summary: The case of *State v. Gray*

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, the defendant, based on character, is not the type of person who would commit a DV offense. The rules for introducing this evidence, and rebuttal evidence refuting the assertion, are limited.

Wis. Stats. § 904.04(1) states:

> **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 character 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 assertions. The rule is stringent. Only if the defendant first introduces evidence of his good character, may the prosecutor introduce evidence of the defendant's bad character. If the defendant does not introduce evidence of his 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 (rebut) the defendant's alibi testimony. The Wisconsin Supreme Court in *Whitty*, 34 Wis.2d at 291-92, 149 N.W.2d at 563, *affirmed in part and reversed in part*:

> 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, sec. 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.

2. Other Acts Evidence Generally

Wis. Stats. § 904.04(2) states:

> **Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> (2) OTHER CRIMES, WRONGS, OR ACTS. Evidence 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*, 34 Wis.2d at 297, 149 N.W.2d at 565-66, 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.

This ruling ensures that the defendant, if convicted, will be convicted on the merits of the charged crime, and not because the defendant is "a bad man" as a jury may conclude based on the defendant's previous wrongs.

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

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 (e.g. Federal Rule is

ten year previous), or occurred in a different place, or are different in form (circumstances) from the crime charged, 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 these cases 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, heroin. Upon a search of the defendant's house, two bags of marijuana were found on the premises. At trial, the State introduced the two bags of marijuana, and also weapons and stolen goods recovered from the search. 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. Neither did the trial judge read a limiting instruction to the jury. The Wisconsin Supreme Court reversed and remanded in *Spraggin*, 77 Wis.2d at 97, 252 N.W.2d at 97-98:

> 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.

At *Spraggin*, 77 Wis.2d at 100, 252 N.W.2d at 99, the Wisconsin Supreme 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.

If introducing other acts evidence, you must specify the purpose for the evidence by establishing a connection between the evidence and the crime charged. Further, request the trial court to read a limiting instruction of 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: probative value versus the prejudice to the defendant. If the evidence is not relevant, it certainly should not be admissible and the balancing test becomes a moot point. In *Spraggin*, 77 Wis.2d at 100-101, 252 N.W.2d at 99, the Wisconsin Supreme Court stated:

> 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.

The "probative value vs. potential prejudice" prong of the test is based on Wis. Stats. § 904.03 which states:

> **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.**

In DV cases, 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. Stats. §§ 904.03 & 904.04(2). Regardless of relevance, if the evidence is unfairly prejudicial, the trial court judge will prohibit the introduction of such evidence.

5. *Sullivan* and the 3-Step Analytical Framework

Where other acts evidence is proffered by the state, a 3-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 (1998).

In *Sullivan*, the defendant was charged with DV battery, false imprisonment, intimidation of a witness and disorderly conduct in an altercation with his live-in girlfriend. The State introduced evidence of other wrongs, a verbal argument between the defendant and the defendant's ex-wife, at trial. The jury convicted the defendant of battery and disorderly conduct. The court of appeals affirmed. The Wisconsin Supreme Court reversed and remanded, ruling that the other wrongs evidence should not have been admitted. According to a 3-step analysis, the Supreme Court decided that the evidence was unfairly prejudicial. The court stated:

> The three-step analytical framework is as follows:
>
> 1. Is the other acts evidence offered for an acceptable purpose under Wis. Stats. § 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. Stats. § 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. Stats. § 904.03.

Under the previous two-step analysis, numbers 1 and 2 are combined.

The State introduced testimony of the defendant's ex-wife and a neighbor indicating that two years earlier, the defendant 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 offense charged that it was not probative on the issue of intent or absence of mistake. In *Sullivan*, 216 Wis.2d at 773, 576 N.W.2d at 33, the Court stated:

> (1) The other acts evidence in this case was proffered to establish the defendant's intent or absence of accident under Wis. Stats. § 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.

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 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. In *Sullivan*, 216 Wis.2d at 773-774, 576 N.W.2d at 33, the Wisconsin Supreme Court commented:

> 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.

While the dissent in this case found enough similarities between the proffered evidence and the crime charged, the majority did not. In *Sullivan*, 216 Wis.2d at 789-90, 576 N.W.2d at 40, the Wisconsin Supreme Court enunciated this explanation of "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)).

In many cases the difference between probative other acts evidence and unfairly prejudicial other acts evidence is a fine line. Review with the trial court the proffered other acts evidence, in specific detail, in accordance with the 3-step analysis cited in *Sullivan*.

6. Other Acts Evidence to prove "Plan"

Where other acts evidence indicates a "plan," as listed in the exceptions of Wis. Stats. § 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 murder. 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 in *Pharr*, 115 Wis.2d at 343-44, 340 N.W.2d at 502, 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. *Id.*"

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

Courts have examined "plan" and the other exceptions repeatedly since *Pharr*. You will need to research the caselaw in depth. Some recent cases dealing with the admissibility of other acts evidence include: *State v. Silva*, 2003 WI APP 191; *State v. Hunt*, 2003 WI 81, 263 Wis.2d 1, 666 N.W.2d 771; *State v. Opalewski*, 2002 WI APP 145, 256 Wis.2d 110, 647 N.W.2d 331; *State v. Gribble*, 2001 WI APP 227, 248 Wis.2d 409, 636 N.W.2d 488; *State v. Meehan*, 2001 WI APP 119, 244 Wis.2d 121, 630 N.W.2d 722; *State v. Bauer*, 2000 WI APP 206, 238 Wis.2d 687, 617 N.W.2d 902; *State v. Cofield*, 2000 WI APP 196, 238 Wis.2d 467,

618 N.W.2d 214; *State v. Koeppen*, 2000 WI APP 121, 237 Wis.2d 418, 614 N.W.2d 530; *State v. Hammer*, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629; *State v. Derang*o, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833; *State v. Davidson*, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606; *State v. Anderson*, 230 Wis.2d 121, 600 N.W.2d 913; *State v. Edmunds*, 229 Wis.2d 67, 78-81, 598 N.W.2d 290 (Ct. App. 1999); *State v. Thoms*, 228 Wis.2d 868, 599 N.W.2d 84 (Ct. App. 1999); *State v. Gray*, 225 Wis.2d 39, 590 N.W.2d 918 (1999); *State v. DeKeyser*, 221 Wis.2d 435, 585 N.W.2d 668 (Ct. App. 1998).

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 the admission of the evidence constituted harmless error. The Wisconsin Supreme Court stated in *Evers*, 139 Wis.2d at 440, 407 N.W.2d at 264:

> 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 404-105. Otherwise there is a risk that the evidence will establish no more than the defendant's propensity to commit crimes.

The court continued in *Evers*, 139 Wis.2d at 443-44, 407 N.W.2d at 265:

> 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.

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. Stats. § 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 what the difference is concerning the terms "plan," "knowledge," and "intent." The court of appeals stated in *Roberson*, 157 Wis.2d at 453-454, 459 N.W.2d at 612-13:

> Our supreme court has defined 'plan' under Wis. Stats. § 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.* (emphasis added). 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.' Wis JI—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* 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.

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 other acts must occur *prior* to the charged act.

In *Roberson*, the State attempted to introduce other acts evidence occurring **after** the current charge being tried 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 court of appeals in *Roberson*, 157 Wis.2d at 455, 459 N.W.2d at 613 cited to Wigmore to explain its reasoning:

> 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.

Intent can be inferred from the number of times that a defendant engaged in the same repeated behavior. This includes incidents that occurred 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 allegedly enticed a 13-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. The Wisconsin Supreme Court stated in *Fishnick*, 127 Wis.2d at 263-64, 378 N.W.2d at 280-81:

> 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.

The proffered evidence must bear the defendant's fingerprint, or signature. 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 crime charged, the more probative it becomes and the less likely that the defendant will be unfairly prejudiced by its admission.

In *Whitty*, 34 Wis.2d at 294, 149 N.W.2d at 564, the Wisconsin Supreme Court gave guidance to trial courts when facing the identity exception of Wis. Stats. § 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.

In DV cases, usually 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 other acts evidence to prove identity than when admitted to prove knowledge, intent, or other state of mind. The State will have a higher burden of persuasion in those circumstances.

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. Stats. § 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 women avoid a shoplifting charge in exchange for sexual favors, and 2) by paying the same women 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 is admissible to show preparation, plan, identity and intent.

The defendant objected to the State's attempt to introduce prior acts evidence into trial and the trial court agreed with the defense. In *Harris*, 123 Wis.2d at 235, 365 N.W.2d at 925, the court of appeals affirmed:

> *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.

Standing alone, specific incidents to show a method of operation will not be admissible at trial. A method of operation must incorporate one of the exceptions listed in Wis. Stats. § 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 in *Harris*, 123 Wis.2d at 236, 365 N.W.2d at 925, 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.

Quoting from *United States v. Benedetto,* 571 F.2d 1246, 1249 (2d Cir. 1978), footnote 2, the Wisconsin Supreme Court stated in *Harris*, 123 Wis.2d at 238, 365 N.W.2d at 926:

> 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).

11. Other Acts Evidence in a DV Case

In *State v. Volk*, 654 N.W.2d 24, 2002 WI App 274, 258 Wis.2d 584, 654 N.W.2d 24 (Ct. App. 2002), the court of appeals reviewed the use of other acts evidence to prove an abuser's intent to injure, as well as the 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 DV incidents 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 for a conclusion that the defendant is a 'bad person' and for that reason is guilty of the charged offenses. 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." *State v. Volk*, 654 N.W.2d 24, 29-30, 2002 WI App 274, 258 Wis.2d 584, 596, 654 N.W.2d 24, 29 –30 (Ct. App. 2002).

Volk argued that because the former wife's testimony did not describe any incident of the defendant putting his fingers down her throat and injuring her tongue and 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. *State v. Volk*, 654 N.W.2d 24, 30, 2002 WI App 274, 258 Wis.2d 584, 596, 654 N.W.2d 24, 30 (Ct. App. 2002). Rather, the strength of the similarity is the focus of *Sullivan*. Thus, a series of prior DV incidents 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 DV setting, one other point needs to be noted. The case is very fact specific. The other acts evidence in *Volk* fit 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 provisos:

1. Do not overreach.
2. Anticipate all of your evidence.
3. Anticipate defenses.
4. Closely analogize the other acts evidence to the facts of your case.
5. Choose the purpose for the other acts evidence wisely and apply the facts to that purpose with specificity.
6. Make certain the trial court reads a limiting instruction to the jury.

12. Sexual Assault Cases Involving Children

In *Hendrickson v. State*, 61 Wis.2d 275, 277, 212 N.W.2d 481 (1973), the Wisconsin Supreme Court stated:

> A "greater latitude of proof as to other like occurrences" is clearly evident in Wisconsin cases dealing with sex crimes, particularly those involving incest and indecent liberties with a minor child. This is not so much a matter of relaxing the general rule that it is not competent in a prosecution for one crime to introduce evidence of other offenses as it is a matter of placing testimony concerning other acts or incidents within one of the well established exceptions to such rule…

Many case precedents exist in Wisconsin for a greater latitude of proof standard for cases involving children as victims of sexual assaults. This manual seeks only to point out this difference. The bulk of the discussion is beyond the scope of this manual. If more information is sought about this topic, feel free to contact the authors of this manual.

13. 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. The defendant attempted to introduce evidence that the victim made false accusations against the defendant in an effort to misappropriate personal property owned by the defendant. The defendant sought to introduce facts that the victim during a previous marriage fabricated a similar story to have her ex-husband incarcerated, so that she could misappropriate 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 to misappropriate 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 court of appeals in *Johnson*, 184 Wis.2d at 336-67, 516 N.W.2d at 466-67, stated:

> 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.

In determining whether to admit other acts evidence, trial courts must apply a two-prong test. First, the court must determine whether the other acts evidence fits within one of the exceptions in § 904.04(2), Stats. *See State v. Fishnick*, 127 Wis.2d 247, 254, 378 N.W.2d 272, 276 (1985). This requires that the evidence be probative of some proposition (such as proof of motive, opportunity, etc.) other than the proposition that because the person did prior act X, he or she is of such a character and disposition to have committed present act Y. *Id*. The court must then determine under § 904.03, Stats., whether any prejudice re-

sulting from the admission of such evidence substantially outweighs its probative value. *Fishnick*, 127 Wis.2d at 254, 378 N.W.2d at 276. A threshold question implicit within the two-prong analysis is whether the other acts evidence is relevant to an issue in the case.

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 a trial issue. 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. Stats. § 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.

Other acts evidence may be introduced against any witness at trial, not just the defendant… another reason to thoroughly probe your case prior to charging to determine whether the victim or other State's witnesses are vulnerable to attack.

14. 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 "specific instances" evidence to bolster the 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 allegation that the victim was the aggressor; 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:

> 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. Stats. § 904.05 states:

> **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 court of appeals further stated in *McMorris*, 58 Wis.2d at 151, 205 N.W.2d at 562-63:

> 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 evidence may be used only where the defendant asserts the defense of self-defense against either a homicide or a battery charge. *McMorris* evidence is comprised of specific incidents of prior violent or aggressive behavior committed by the victim, which is known to the defendant when 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/propensity evidence which focuses on the character of the victim to support an inference that the victim acted in conformity with a particular character. The *McMorris* inference logically follows: Prior specific violent or aggressive acts, committed by the victim and known to the defendant, is responded to by the defendant as he acted in fear of the victim to defend himself because the defendant is aware of the victim's prior violent acts.

This ruling has obvious implications for DV cases. A DV 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.

15. In Summary: The Case of *State v. Gray*

Other acts evidence may be admitted as an exception to the general character rule 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, 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 the conviction.

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. 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 character rule.

To summarize the criteria that a trial court should employ when determining whether other acts evidence fits into a specific exception, the Wisconsin Supreme Court in *State v. Gray*, 225 Wis.2d 39, 590 N.W.2d 918 (1999) elucidated the following:

1. **IDENTITY** in *State v. Gray*, 225 Wis.2d at 51, 590 N.W.2d at 926:

   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).

2. **MOTIVE** in *State v. Gray*, 225 Wis.2d at 54-55, 590 N.W.2d at 927, *citing Fishnick*, 127 Wis.2d at 260:

   Motive has been defined as the reason which leads the mind to desire the result of an act.

3. **INTENT** in *State v. Gray*, 225 Wis.2d at 56, 590 N.W.2d at 928, *citing Evers*, 139 Wis.2d 424, 443, 407 N.W.2d 256 (1987):

   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….

4. **PLAN OR SCHEME** in *State v. Gray*, 225 Wis.2d at 53, 590 N.W.2d at 927, *citing State v. Spraggin*, 77 Wis.2d 89, 99, 252 N.W.2d 94 (1977) (citing 2 Wigmore, *Evidence* § 304 (3d ed. 1940)):

   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."

5. **ABSENCE OF MISTAKE** in *State v. Gray*, 225 Wis.2d at 56, 590 N.W.2d at 928:

   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).

6. **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).

7. **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).

8. **PREPARATION**

   "*Criminal law*. The act or process of devising the means necessary to commit a crime." Cf. ATTEMPT. Black's Law Dictionary (7th Ed., 1979).

Remember that the exceptions listed in Wis. Stats. § 904.04(2) are illustrative and not all-inclusive. Other exceptions, while not listed, nonetheless may apply.

(Written by Attorney Todd Wanta and ADA Paul Dedinsky. Wisconsin Domestic Violence Prosecution Manual, 2004.)

33. Temporary Restraining Orders and Injunctions

1. Legal
2. Practical
3. Combating Domestic Violence through TROs and Injunctions
4. Common Procedure for obtaining Protection Orders
5. The Issue of "Constructive Knowledge"
6. Other Clarifications to the Law
7. Prosecution of a Violation – the issue of "Validity"
8. Special Sentencing Considerations

1. Legal

Relevant Statutes:

Domestic Abuse – Wis. Stats. § 813.12
Harassment – Wis. Stats. § 813.125

Relevant Case Law:

Schramek v. Bohren, 145 Wis.2d 695, 713, 429 N.W.2d 501, 508 (Ct. App. 1988), *quoting In re Estate of Boots*, 73 Wis.2d 207, 215, 243 N.W.2d 225, 229 (1976). *Bachowski v. Salamone*, 139 Wis.2d 397, 414, 407 N.W.2d 533, 540 (1987).

2. Practical

There are four types of Injunctions available in the Wisconsin Statutes. These orders are often referred to as "Restraining Orders" or "Injunctions" in Wisconsin, or "Protection Orders" in many other states.

1. Domestic Abuse [Wis. Stats. § 813.12];
2. Harassment [Wis. Stats. § 813.125];
3. Child Abuse [Wis. Stats. § 813.122];
4. Vulnerable Adult [Wis. Stats. § 813.123].

While all four types of Injunctions can originate in the context of DV cases, this discussion is limited to the two most prevalent types of orders encountered – namely, Domestic Abuse and Harassment Restraining Orders and Final Injunctions.

Many issues arise in prosecutions involving Domestic Abuse and Harassment orders. The following discussion addresses some of the more common areas of concern.

Please note that the prosecution of violations of "72 hour No Contact Orders" and "No Contact Orders" as non-monetary conditions of Bail are not covered in this particular chapter of the Wisconsin Domestic Violence Prosecution Manual.

3. Combating Domestic Violence Through TROs and Injunctions

On an *ex parte* basis, courts provide immediate temporary relief to ensure a petitioners SAFETY. The court acts with swiftness and resoluteness to prevent danger. A Petitioner may immediately seek and gain a Temporary Restraining Order for up to either 7 or 14 days… until a Final Injunction Hearing can be heard by a civil trial court.

According to a recent study of the effectiveness of civil protection orders:

> Approximately one month after receiving a civil protection order, three-quarters of the study participants reported that the order had a positive effect upon their well-being. After 6 months, the proportion of participants reporting life improvement increased to 85%. 95% of study participants stated that they would seek a protection order again if necessary.
>
> Slightly more than 72% of the study participants reported no violation of their protection orders within the first month after issuance. Slightly more than 65% of participants reported no violation within 6 months after issuance.
>
> Study participants reported a greater number of problems with their protection orders in cases where the restrained partner had a prior criminal history. Nonetheless, these same participants were more likely to report an improved sense of well-being after issuance of the civil protection order. The study's authors suggest that these findings show the need for both civil and criminal intervention in cases where an abuser has a history of violent crime. Additionally, the authors noted that safety planning for the victim is likely to play a role in the effectiveness of protection orders and other interventions to deter domestic violence.
>
> ["Domestic Violence: A Guide to Civil & Criminal Proceedings", Chapter 7, Michigan Judicial Institute (1998) (based in part upon adaptations from Lovik, M., *The Domestic Violence Benchbook*, Office of Justice Programs, U.S. Department of Justice) "Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence", p i-xi, National Center for State Courts, pp.47-48, 48-49, 56-58, 1997].

4. Common Procedure for Obtaining TROs and Injunctions

1. Procedurally, Petitions for Harassment and Domestic Abuse Orders typically originate with a "Petitioner" making an ex parte request before the appropriate civil or family court judge or court commissioner, depending upon varying practices from county to county.
2. The Petition must allege the necessary facts as set forth in their respective statutes (See Wis. Stats. §§ 813.12 and 813.125).
3. The court must find that there are "reasonable grounds" to believe that the Respondent has engaged in prohibited behavior (or may do so, if Domestic Abuse). For a Harassment Temporary Restraining Order, the court must find "reasonable grounds" to believe that a violation of Wis. Stats. § 947.013 (the criminal harassment statute) has occurred. Wis. Stats. §§ 813.12(4)(a)3 and 813.12(1)(cg).
4. The court then grants a Temporary Restraining Order, usually effective for up to either 7 or 14 days, with the possibility of one 7-day or 14-day extension. The TRO terminates on the date of the Injunction Hearing.
5. In the intervening time period between the granting of the TRO and the actual date for the permanent Injunction Hearing, the Petition must be served on the Respondent (usually by the Sheriff's Department or other law enforcement agency). Service perfects the requirement of "Notice" of the Injunction Hearing. If the Petition has not been served on the Respondent in time for the Injunction Hearing, the court will often grant an extension at the Petitioner's request (an additional 14 days for Domestic Abuse Petitions and 7 days for Harassment Petitions).
6. If the Respondent is never served with notice of the Injunction Hearing after the one extension, the Petition is dismissed for lack of "Notice." The Petition may be resubmitted again later.
7. Assuming service of the Petition is accomplished upon the Respondent, the "Injunction Hearing" may now take place. The court then typically takes testimony from the Petitioner to support the Petition, regardless of the Respondent's presence. If the court finds the Petitioner has met the same burden as mentioned for the Temporary Restraining Order (TRO), the court may grant the requested relief in an Injunction, effective for up to four years for Domestic Abuse Injunctions and two years for Harassment Injunctions.

5. The Issue of "Constructive Knowledge"

On July 30, 2002, modifications to Wisconsin's Domestic Abuse TRO / Injunction laws went into effect. These changes did not apply to the other three types of TRO / Injunctions. As mentioned above, the period of time for service was extended from 7 days to 14 days. For Domestic Abuse TROs, an additional 14-day extension in order to perfect service can be provided for a Petitioner. Further, Domestic Abuse Injunctions now allow up to 4 years for the duration of the order.

There is now a provision allowing for the enforceability of the Domestic Abuse Injunction even if the Respondent has not been served with the Final Injunction. If the respondent has been served with the Domestic Abuse Temporary Restraining Order (TRO) and notice of hearing, yet fails to appear at the Injunction Hearing, the Respondent is still subject to a mandatory arrest for a violation of the Injunction. The law now deems that the respondent had "constructive knowledge" that a Domestic Abuse Injunction was issued.

EXAMPLE:

Suppose a Respondent was served with a Domestic Abuse TRO and failed to attend the Injunction Hearing. The Domestic Abuse Injunction is granted after default judgment due to the Respondent's failure to appear.

The Petitioner cannot find the Respondent. The Domestic Abuse Injunction is never served upon the Respondent.

The Respondent then returns to Wisconsin months later. The Respondent has contact with the Petitioner in violation of the Injunction.

Police respond. The Respondent tells the cops: "I didn't know the Injunction was in effect. I was never served with the Final Injunction."

Remember that while the Respondent was not served with the Final Injunction, Respondent was served with the Temporary Restraining Order. Because the Respondent received notice of the Final Injunction Hearing, he is presumed to possess "constructive knowledge" that the Domestic Abuse Injunction was granted, based upon a default judgment for Respondent's failure to appear.

The police officer properly makes a mandatory arrest of the Respondent.

6. Other Clarifications to the Law

- The Domestic Abuse TRO / Injunction laws now reflect a broader definition to provide protection for elderly / disabled victims of abuse from adult caregivers, pursuant to Wis. Stats. § 813.12(1)(am).
- A guardian may apply for a Domestic Abuse TRO / Injunction on behalf of an incompetent person, pursuant to Wis. Stats. § 813.12(5)(d).
- Additional language tracks the Federal VAWA definition of "dating relationships" …again, broadening the potential scope of the statute's protections on behalf of victims.
- Abusive conduct now includes damage to property belonging to an individual, pursuant to Wis. Stats. § 813.12(1)(am)5. That means that victims of violations of Wis. Stats. § 943.01 (Criminal Damage to Property) can seek protection under the Domestic Abuse TRO / Injunction law.
- The definition of "reasonable grounds" was clarified in Wis. Stats. § 813.12(1)(cg).
- Victims often complained that judicial court officers hesitated to grant Injunctions when other types of protection orders existed, such as "No Contact Orders" as conditions of bail. The law clarified the responsibilities of judicial court officers in this regard by firmly noting that the petition shall not be dismissed or denied on the basis of other pending civil or criminal orders, pursuant to Wis. Stats. § 813.12(3)(aj). Also, a Domestic Abuse TRO / Injunction is enforceable despite the existence of any other criminal or civil order restricting or prohibiting contact (Wis. Stats. § 813.12(6)(d)).
- Provisions relating to keeping a victim's address secret and confidential was included (pursuant to Wis. Stats. § 813.12(5m)).
- Provisions for service via publication and fax have been updated. Pursuant to Wis. Stats. § 813.12(2)(a), only a summary, in lieu of the full petition, must be published. The summary must include both names of the parties, notice of the TRO and notice of the date, time and place of the Final Injunction hearing.

7. Prosecution of a Violation – the Issue of "Validity"

One recurring legal issue raised during the **criminal** prosecution of a Violation of a Domestic Abuse Injunction (VODAI) or Violation of Harassment Injunction (VOHI) is the challenge of the "validity" of the **civil** Injunction order, itself.

Keep in mind: When prosecuting a **criminal** violation of an Injunction (either Domestic Abuse or Harassment), the defendant is not permitted to collaterally attack the underlying **civil** injunction. A collateral attack is an "…attempt to avoid, evade or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law

and instituted for the purpose of vacating, reviewing, or annulling it." *In re Estate of Boots*, 73 Wis.2d 207, 215, 243 N.W.2d 225, 229 (1976), *quoted in Schramek v. Bohren*, 145 Wis.2d 695, 713, 429 N.W.2d 501, 508 (Ct. App. 1988).

In other words, do not allow defendants to raise the validity of the civil Injunction itself during your criminal prosecution of a VODAI or VOHI charge. The only way for a defendant/respondent to attack the validity of an issued civil Injunction is by taking the appropriate appellate action from the civil order. The defendant cannot attack the civil order's validity in the midst of a criminal proceeding at a later time.

However, this does not absolve the duty of an ethical prosecutor from abstaining from prosecutions based on clearly invalid civil orders. By far, the most common example of an invalid Injunction order stems from a basic confusion in distinguishing these two orders – Harassment and Domestic Abuse – from one another.

First, understand the remedies. There are differences in what each type of order prohibits.

Statutorily, a Domestic Abuse TRO or Injunction can order the Respondent to:

1. Refrain from engaging in acts of domestic abuse against the Petitioner;
2. Avoid the Petitioner's residence and/or any location temporarily occupied by the Petitioner and/or;
3. Avoid contacting or causing any other person other than the Respondent's attorney or law enforcement officer to contact the Petitioner unless the Petitioner consents in writing, or any combination of these remedies (Wis. Stats. § 813.12(3)(a) and (4)(a)).

The Harassment TRO or Injunction has slightly different prohibitions. It can order:

1. the Respondent to cease or avoid the harassment of the Petitioner,
2. to avoid the Petitioner's residence or any premises temporarily occupied by the Petitioner, or combination of these remedies (Wis. Stats. § 813.125(3)(a) and (4)).

It is statutorily permissible for a Domestic Abuse Order to simply order the Respondent to have "No Contact" with the Petitioner. However, the Wisconsin Supreme Court has held that such a blanket "No Contact" order is not permitted in Harassment Injunctions.

According to the Wisconsin Supreme Court, the prohibited conduct of:

> 'harassing Petitioner, having any contact with Petitioner or coming upon Petitioner's premises' … is described too broadly. The statute contemplates that the court will ultimately determine whether acts which allegedly harass a person do in fact constitute harassment …(and) only the acts or conduct which are proven … or substantially similar conduct should be enjoined.
>
> *Bachowski v. Salamone*, 139 Wis.2d 397, 414, 407 N.W.2d 533, 540 (1987).

Should the civil judge or commissioner responsible for issuing Harassment TROs and/or Injunctions fail to properly understand the ruling of *Bachowski*, the risk of an invalid order increases. Were the trial court judge or commissioner to simply "rubber stamp" a prohibition that the Respondent have "No Contact" with the Petitioner **without the requisite findings of fact and conclusions of law**, the Injunction may be facially too broad. The TRO or Injunction could be invalid, due to a lack of specificity.

When you, as a prosecutor, encounter such a situation, it is often helpful to explain to the Petitioner why the Harassment Injunction may be invalid. Encourage the victim to re-file the Petition for a new order, armed with the informed knowledge of the legal requirement for "specific harassing conduct" to be directly and specifically described and prohibited by any Harassment Injunction.

Better yet, when speaking with Petitioners, you might determine that in fact a Domestic Abuse Injunction is more appropriate. Whenever possible, encourage Petitioners to seek Domestic Abuse Injunctions rather than Harassment Injunctions. Naturally, the Petitioner and Respondent must meet the statutorily required description for a Domestic Abuse Order (See Wis. Stats. § 813.12(1)(am)).

Unfortunately, it is not unheard of for a court official to deny that the statutorily defined type of relationship exists. Sometimes, a court may require proof of paternity regarding a common child, even in the absence of a challenge from the Respondent. If a Domestic Abuse TRO or Injunction is denied on these or similar grounds, it is advisable for the Petitioner to consider appellate options …instead of choosing the "path of least resistance" if it means a less effective Harassment Injunction, or worse, just giving up.

8. Special Sentencing Considerations

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. Stats. § 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)ll 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. Stats. § 973.076(2)(a), the district attorney must begin the forfeiture action within 30 days of the seizure of the property or date of conviction. Under Wis. Stats. § 973.076(3), the state has the burden of satisfying or convincing 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.

Under Wis. Stats. § 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. Stats. § 973.076. The burden of proof of any exemption or exception is upon the person claiming it. Also, there is no liability imposed upon a law enforcement officer or employee engaged in the lawful performance of forfeiture duties, according to Wis. Stats. § 973.077(3).

(Written by ADA Paul Sander. Edited by Attorney Tess Meuer and ADA Paul Dedinsky, with contributions from ADA Andrew Maier and Liz Marquardt, Associate Director of the Task Force on Family Violence. Wisconsin Domestic Violence Prosecution Manual, 2004.)

Type of Order	Statutory Authority	How Issued?	Duration	Impact of Violation	Possible Penalty	How to Report Violation
72-Hour No Contact Order	§ 968.075(5)	Suspect must sign agreement before release from custody; victim / suspect / police retain copies	72 hours from arrest	Possible Arrest	$1000 Forfeiture	Call police immediately
No Contact Order – Bail Condition for underlying DV Charge	§ 968.02(3)(b)	Defendant must sign before being released on bail or bond	Throughout case	MandatoryArrest & Possible Bail Jumping Charges	9-month misdemeanor / fine	Call police immediately
No Contact Order – Probation or Parole	§ 973.09(1)(a)	Signed by defendant as part of probation "sign up"; can be part of parole	Throughout probation or parole, or until probation agent lifts order	Revocation of Probation or Parole	Defendant serves imposed-but-stayed sentence or remainder of paroled sentence	Call probation / parole agent
Temporary Restraining Order (Domestic Abuse)	§ 813.12(3)	Respondent personally served after issuance	Until hearing date on injunction petition	Mandatory Arrest (§ 813.12(7)) & Possible Criminal Charges	9-month misdemeanor / $1000 fine	Call police immediately § 813.12(7)
Temporary Restraining Order (Harassment)	§ 813.125(3)	Respondent personally served after issuance	Until hearing date on injunction petition	Mandatory Arrest (§ 813.125(6)) & Possible Criminal Charges	90-day misdemeanor / $1000 fine	Call police immediately § 813.125(6)
Harassment Injunction	§ 813.125(4)	Service on respondent by law enforcement or in court	Up to 2 years from date court grants injunction	Mandatory Arrest (§ 813.125(6)) & Possible Criminal Charges	90-day misdemeanor / $1000 fine	Call police immediately § 813.125(6)
Domestic Abuse Injunction	§ 813.12(4)	Service of TRO gives respondent "constructive knowledge"	Up to 4 years from date court grants injunction	Mandatory Arrest (§ 813.12(7)) & Possible Criminal Charges	9-month misdemeanor / $1000 fine	Call police immediately § 813.12(7)

Note: Foreign Protection Orders receive the same protections as local Harassment and Domestic Abuse Injunctions.

Domestic Abuse Restraining Order Checklist
Wis. Stats. § 813.12

- **AGE: THE PETITIONER (PERSON FILING THE PETITION) AND THE RESPONDENT (PERSON WHOM THE PETITION IS FILED AGAINST) MUST BE 18 YEARS OF AGE OR OLDER**

  (Wis. Stats. § 813.12(1)(am), (5)(a)2; § 48.02(1d))

- **WHAT RELATIONSHIP MUST EXIST BETWEEN THE PETITIONER AND THE RESPONDENT?**

  (See Wis. Stats. § 813.12(1)(am); Wis. Stats. § 813.12(5)(d))

  – Adult Family Member (spouse, parent, child or person related by blood or adoption); **or**

  – Adult Household Member (currently or formerly reside with person); **or**

  – Adult Former Spouse; **or**

  – Adult with whom person has a child in common; **or**

  – Adult with whom Petitioner has or has had a dating relationship (romantic or intimate social relationship… not casual or business-related); **or**

  – Respondent is an adult caregiver to the adult Petitioner. **Also**,

  – An adult guardian of an incompetent individual may file for the Petitioner if Petitioner and Respondent have one of the above relationships.

- **WHAT TYPE OF ABUSE MUST BE ALLEGED IN THE PETITION TO OBTAIN A TRO OR INJUNCTION?**

  (Wis. Stats. § 813.12(1)(am) 1., 2., 3., 5., & 6.)

  – Intentional infliction of physical pain, physical injury or illness; **or**

  – Intentional impairment of physical condition; **or**

  – Violation of 1st, 2nd or 3rd degree sexual assault under § 940.225; **or**

  – Damage to Petitioner's property under § 943.01; **or**

  – Threat to engage in any of the above four behaviors/conduct.

  – In addition, the **TRO must** allege imminent danger of harm, per case law.

- **WHERE CAN A DOMESTIC ABUSE PETITION BE FILED (VENUE)?**

  (Wis. Stats. § 801.50(5r))

  – County where Respondent resides; **or**

  – County where Petitioner resides; **or**

  – County where cause of action arose (where incident occurred); **or**

  – County where Petitioner is temporarily residing.

- **WHAT WILL IT COST TO FILE A DOMESTIC ABUSE PETITION?**

  (Wis. Stats. §§ 814.61(1)(d) & 814.70)

  – There is no fee to file or serve the Petition or for cost of travel for the sheriff's department to serve; Petitioner pays if a **private** process server.

  – If Service by publication is needed, the Petitioner pays to publish summary.

- **WHAT IS A TEMPORARY RESTRAINING ORDER? HOW DOES ONE FILE A TRO PETITION?**

  (Wis. Stats. § 813.12(3)(c))

  A TRO is an order in effect up to 14 days until the "permanent" order, known as an Injunction, is granted. Go to the courthouse and ask for a Domestic Abuse TRO Petition. Fill out the Petition. As directed, take the Petition to a Judge / Court Commissioner, who is to sign it if the Petition contains one of the relationships and one or more types of abuse described above. You can appear *ex parte* (on your own) to file a TRO. You may wish to seek help from a domestic abuse program to file.

- **WHAT WILL HAPPEN AT THE INJUNCTION HEARING?**

  (Wis. Stats. § 813.12 (3) and (4))

  The Respondent must receive a copy of the Petition which contains **notice of the hearing**, and may, but is not required, to appear. The parties can appear on their own behalf, with legal counsel or with an Advocate. Most courts allow both parties to **testify and cross-examine** the other party. Based on what one or both parties say at the hearing, the court will decide whether to grant an Injunction for up to 4 years.

(Written for Domestic Abuse victims by Attorney Tess Meuer, Wisconsin Coalition Against Domestic Violence (WCADV). Used with permission for the Wisconsin Domestic Violence Prosecution Manual, 2004.)

Harassment Restraining Order Checklist: Wis. Stats. § 813.125

- **WHAT TYPE OF ABUSE MUST BE ALLEGED IN THE PETITION TO OBTAIN A HARASSMENT TRO OR INJUNCTION?**

  (See Wis. Stats. §§ 813.125(1), (3) and (4))

  1. Striking, shoving, kicking or subjecting another to physical contact or attempting or threatening to do the same; or
  2. Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.

- **HOW OLD DOES THE PETITIONER (PERSON FILING THE PETITION) AND THE RESPONDENT (PERSON WHO THE PETITION IS FILED AGAINST) HAVE TO BE?**

  (See Wis. Stats. §§ 48.235(4)(a)6 and 48.25(6); § 813.125)

  The Harassment Restraining Order law says any person who is being harassed may petition for an Injunction, but the law does not specify the AGE of the Petitioner. However, other laws say a minor (person under the age of 18) may not start a legal action, but a parent or guardian can file an action on behalf of the minor. Another law says a guardian ad litem or any party or any governmental or social agency may file a Petition for a child when a child is in an action for protection or services (CHIPS).

  A respondent can be a child or an adult. (Wis. Stats. § 757.69(1)(g); § 48.14(10))

- **IN WHAT COUNTY (VENUE) CAN A HARASSMENT RESTRAINING ORDER PETITION BE FILED?**

  (See Wis. Stats. § 801.50(5s))

  Where Petitioner resides; or where Respondent resides; or where incident occurred.

- **WHAT WILL IT COST TO FILE A HARASSMENT RESTRAINING ORDER?**

  If the party filing for a Temporary Restraining Order [Petitioner] is stating conduct which fits under Wis. Stats. § 813.12 (Domestic Abuse Restraining Orders) or fits under Stalking behavior, there is no cost. If the person is stating conduct which fits neither of these, the Petitioner must pay a civil filing fee, court costs, and the costs for Process of Service (as well as travel costs to serve the Petition). The court may also waive the fees if the Petitioner is indigent.

- **WHAT IS A HARASSMENT TEMPORARY RESTRAINING ORDER (TRO)?**

  (See Wis. Stats. § 813.125(3))

  A TRO is the first step to obtain a "permanent" order, known as an Injunction. The petitioner files a TRO petition, and if granted, the TRO is effective until the date an Injunction is issued. The Injunction Hearing is held within 7 days of getting the TRO, unless an extension is granted.

- **HOW DOES ONE FILE A HARASSMENT TRO PETITION / INJUNCTION?**

  (See Wis. Stats. § 813.125(3) and (4))

  Go to the courthouse in any county and ask for a Harassment Petition. Fill out the Petition. As directed, take the Petition to a Judge or Court Commissioner, who is to sign it if one or more types of abuse listed above have occurred. You can appear *ex parte* (on your own) to file a TRO. However, Domestic Abuse programs can assist one to file a TRO. The Respondent must receive a copy of the Petition which contains notice of the hearing, and may, but is not required to appear.

- **WHAT WILL HAPPEN AT THE HARASSMENT INJUNCTION HEARING?**

  (See Wis. Stats. §§ 813.125 (3) and (4))

  The Respondent must receive a copy of the Petition which contains notice of the hearing. The Respondent may, but is not required, to appear. The Petitioner MUST APPEAR at the hearing.

  The parties can appear on their own behalf, with legal counsel, or with an Advocate. Most courts allow both parties to testify and cross-examine the other party. Based on what one or both parties say at the hearing, the court will decide whether to grant a Harassment Injunction for up to 2 years. If the court orders an Injunction against the Respondent, the court is to order the person from no longer engaging in the harassing behavior which the Petitioner noted and/or from having contact. The court can also order the Respondent to avoid the Petitioner's residence or any other premises.

(Prepared for victims by Attorney Tess Meuer, Wisconsin Coalition Against Domestic Violence (WCADV). Used with permission for the Wisconsin Domestic Violence Prosecution Manual, 2004.)

Child Abuse Restraining Order Checklist
Wis. Stats. § 813.122

- **POSSIBLE PETITIONERS FOR A CHILD ABUSE RESTRAINING ORDER**

  1. Child victim, pursuant to Wis. Stats. § 813.122(2).
  2. Parent of child victim, pursuant to Wis. Stats. § 813.122(2).
  3. Stepparent of child victim, pursuant to Wis. Stats. § 813.122(2).
  4. Guardian of child victim, pursuant to Wis. Stats. § 813.122(2).
  5. Guardian ad litem in a matter involving a child found to be in need of protection or services, pursuant to Wis. Stats. § 48.235(4)(a)6.
  6. If a proceeding is brought under Wis. Stats. § 48.13 [CHIPS], any party to or any governmental or social agency involved in the proceeding, pursuant to Wis. Stats. § 48.25(6).

- **TYPES OF ABUSE THAT MUST BE ALLEGED IN THE CHILD ABUSE TRO / INJUNCTION PETITION**

  (See Wis. Stats. §§ 813.122(1)(a) and 48.02(1))

  1. Physical injury inflicted on child by other than accidental means; **or**
  2. Sexual intercourse or sexual contact under 940.225 [1st, 2nd, 3rd, or 4th degree sexual assault]; **or**
  3. Sexual exploitation of child; **or**
  4. Permitting, allowing or encouraging child to engage in prostitution; **or**
  5. Causing a child to view or listen to sexual activity; **or**
  6. Causing a child to expose or exposing genitals or pubic area to child; or
  7. Emotional damage; **or**
  8. Threat to engage in conduct under 1,2,3,4,5,6,or 7 above.

- **VENUE WHERE CHILD ABUSE TRO / INJUNCTION PETITION MAY BE FILED**

  In Wis. Stats. § 801.50(5s), Petition may be filed in the county where Petitioner resides; county where Respondent resides; or county where cause of action arose (where the incident occurred).

- **COSTS ASSOCIATED WITH FILING A CHILD ABUSE RESTRAINING ORDER**

  If the party filing for a Temporary Restraining Order [Petitioner] alleges conduct under Wis. Stats. § 813.12 (Domestic Abuse Restraining Order) or Stalking behavior, there is no cost. If the conduct does not fit under these two topics, the Petitioner must pay a civil filing fee, court costs and the costs for Process of Service as well as travel costs to serve the Petition. The court may also waive the fees if the Petitioner is indigent.

- **WHAT IS A CHILD ABUSE TEMPORARY RESTRAINING ORDER (TRO)?**

  (See Wis. Stats. § 813.122(4)(c))

  A Child Abuse TRO is the first step to obtain a "permanent" order, known as an Injunction. The Petitioner files a Child Abuse TRO petition, and if granted, the TRO is effective until the date an Injunction is issued. The Injunction Hearing is held within 7 days of obtaining the Child Abuse TRO, unless an extension is granted.

- **HOW DOES ONE FILE A CHILD ABUSE PETITION?**

  (See Wis. Stats. § 813.122(2))

  Go to the courthouse in any county and ask for a Child Abuse Petition. Fill out the Petition. As directed, take the Petition to a Judge or Family Court Commissioner, who is to sign it if one of the relationships described exists and one or more types of abuse listed above has occurred.

- **DOES CHAPTER 813 SAY ANYTHING ABOUT A GUARDIAN AD LITEM?**

  Yes. The court on its own motion or on the motion of any party may order that a guardian ad litem be appointed for the child victim. Wis. Stats. § 813.122(3)(b)1. The court **shall** appoint a guardian ad litem if the Respondent is a parent of the child victim. Wis. Stats. § 813.122(3)(bm).

(Written by Attorney Tess Meuer and Mandy Gennerman of the Wisconsin Coalition Against Domestic Violence (WCADV). Used with permission for the Wisconsin Domestic Violence Prosecution Manual, 2004.)

Vulnerable Adult Restraining Order Checklist
Wis. Stats. § 813.123

- **WHO MAY PETITION FOR A VULNERABLE ADULT RESTRAINING ORDER?**

  (See Wis. Stats. § 813.123(2))

  – Vulnerable Adult; **or**

  – Parent of the Vulnerable Adult; **or**

  – Adult Sibling of the Vulnerable Adult; **or**

  – Legal Guardian of the Vulnerable Adult; **or**

  – Adult Child of the Vulnerable Adult; **or**

  – County protective services agency.

- **WHAT TYPE OF ABUSE MUST BE ALLEGED IN THE PETITION TO OBTAIN A VULNERABLE ADULT TRO OR INJUNCTION?**

  (Wis. Stats. §§ 813.123(4)(a)2, 813.123(5)(a), 813.123(5)(a)3 and 813.123(6)(b); §§ 55.043, 55.05 and 55.06)

  – **Milwaukee County:** County protective services has reason to believe there is MISAPPROPRIATION of PROPERTY or ABUSE or NEGLECT of Vulnerable Adult, and a person interferes with, or based on prior conduct, may interfere with an investigation to determine if Vulnerable Adult needs protective services; **or**

  – **Any county:** Interference with or may interfere with delivery of protective services after offer of services is made and accepted; **or**

  – **Any county:** Interference with or may interfere with delivery of protective placement after offer of placement is made and accepted.

- **WHERE CAN A VULNERABLE ADULT PETITION BE FILED (VENUE)?**

  (Wis. Stats. §§ 801.50(2)(a) & (2)(c))

  – County where claim arose; **or**

  – County where defendant (respondent) resides.

- **WHAT WILL IT COST TO FILE A VULNERABLE ADULT PETITION?**

  (Wis. Stats. §§ 814.61(1), 814.635(1), 814.634 & 814.70)

  – No fee is collected when the Petition alleges Stalking conduct or Domestic Abuse: physical pain, injury or illness; impairment of a physical condition; 1st, 2nd or 3rd degree sexual assault; or the threat of any of Domestic Abuse behaviors.

  – If none of above behavior, (as of November or 2000) filing fee of $75; plus $9 for justice information system; plus $52 for court support services fee; for a total of $136. There is also $12 per attempt fee for Service and travel to serve the Petition (fee for travel varies according to size of county).

- **WHO IS A "VULNERABLE ADULT" FOR PURPOSES OF FILING A VULNERABLE ADULT RESTRAINING ORDER?**

  – A person 18 years of age or older who is developmentally disabled; or has infirmities of aging, mental illness or other like incapacities AND who is either substantially mentally incapable of providing for his or her needs for food, shelter, clothing or personal or health care OR unable to report cruel maltreatment without assistance.

  (See Wis. Stats. § 813.123(2); § 940.285(1)(e); § 55.01(2))

  – This law does not apply to patients or residents of state or county-operated inpatient institutions unless the interference is done by a person other than an employee of the inpatient institution.

  (See Wis. Stats. § 813.123(11))

- **WHAT CAN A COURT ORDER IF THE PETITION IS GRANTED?**

  (Wis. Stats. §§ 813.123(4)(a) & (5)(a))

  – Avoid interference with investigation of the Vulnerable Adult; or avoid interference with the delivery of protective services or avoid interference with a placement order. This law does not provide a no contact order.

- **WHAT DOES TRO MEAN?**

  A TRO is a Temporary Restraining Order, in effect for up to 7 days.

(Prepared by Attorney Tess Meuer, Wisconsin Coalition Against Domestic Violence (WCADV). Used with permission for the Wisconsin Domestic Violence Prosecution Manual, 2004.)

10 Points for Consideration... Before Choosing to File a Restraining Order

1. PURPOSE OF A RESTRAINING ORDER.

A Restraining Order is a court order. In the court order, the court can order the abuser not to hurt you physically or sexually, to stay away from you, move out of the house, have no contact with you, or stop harassing you.

2. TWO-STEP PROCESS

You start the process of obtaining the court order by requesting papers for a Temporary Restraining Order (TRO). These papers are called the "Petition". The person completing the Petition is called the "Petitioner". The person against whom the Petition is filed is called the "Respondent".

When the Petitioner files the Petition, the court decides whether or not to issue a TRO based on the information provided in the Petition. If the court grants the TRO, the Petitioner is given a hearing date within 7 to 14 days (depending on the type of requested order) to come back to ask the court to order a "final" order, known as an "Injunction". The hearing at which one asks for the "final" order is an "Injunction Hearing". An Injunction can be granted for up to 2 or 4 years, depending on the type of order.

3. SERVICE

After one obtains a TRO, the Respondent must be notified of the existence of the TRO, as well as the court date for the Injunction Hearing. This process is called "Service" of the order. It is typically done by the Sheriff's Department. The Respondent must be served with the Petition before the court can hold an Injunction Hearing. It is the Petitioner's responsibility to make sure the Petition is served.

4. ABUSER WILL GET COPY OF THE PETITION

When the Sheriff's Department serves the papers, the Respondent is given a copy of the petition. **The Respondent WILL READ all the statements in the Petition!**

5. ABUSER MIGHT COME TO COURT

The Respondent may be at the final Injunction Hearing and might argue that the statements in the Petition are not true or might argue that the court should not issue the final order (Injunction) for some reason. The Respondent is not required to come to the Injunction Hearing, so s/he might not show up. (The Respondent is only required to receive NOTICE of the hearing.)

However, the Petitioner MUST ATTEND the Injunction Hearing in order to receive an Injunction against the Respondent.

6. SERVICE REPRESENTATIVE (ADVOCACY SERVICES)

You can have an Advocate at the Injunction Hearing. You must inform the court orally or in writing of your choice of an Advocate, otherwise called a "Service Representative". This is done by either telling the court at the beginning of the hearing or by completing a form entitled: "Service Representative Selection". The Advocate must be from a Victim Service Organization.

7. FIREARMS

If a Domestic Abuse or Child Abuse Injunction is granted, the Respondent will be ordered to surrender any firearms. If a Harassment Injunction is filed, the Petitioner can request the court to order the Respondent to surrender her/his firearms if the Petitioner can show the court the Respondent may use them to cause physical harm to another or to endanger public safety.

8. ENFORCEMENT

If the police believe the Respondent violated the provisions of a Restraining Order – whether a TRO or an Injunction – they must make an arrest for the violation. The law mandates an arrest for a violation of a Domestic Abuse, Child Abuse or Harassment order. Violation of the order is a crime. However, the Respondent must have been served with the TRO or the Injunction in order to be found in violation. It is a good idea for a Petitioner to keep his/her copy of the Petition with him/her at all times to prove the existence of the order. Also, the Respondent can be served with the Petitioner's copy, if needed.

9. YOUR ORDER MUST BE ENFORCED ANYWHERE

If the court grants a Temporary Restraining Order or an Injunction, the law says the order from Wisconsin is to be enforced by a law officer in every state, territory or tribe. A Petitioner should carry an order with him/her at all times to show it to a law enforcement officer if the Respondent violates the order. Enforcement of the order in other places is a law called: granting "full faith and credit" to a foreign protection order. This law is noted on the bottom of each Wisconsin restraining order.

10. SAFETY PLANNING

A Restraining Order is not a guarantee of safety. A Respondent may still attempt to contact or harm the Petitioner. Whether or not one files a Petition or gets an Injunction, it is a good idea to discuss SAFETY PLANNING with an Advocate to figure out what to do to keep you and your children safe before, during and after an incident of domestic abuse.

(Written for victims of domestic abuse by Advocate Liz Marquardt, Associate Director of the Milwaukee Task Force on Family Violence. Used with permission for the Wisconsin Domestic Violence Prosecution Manual, 2004.)

34. 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

1. Introduction

A protection order from a different state or jurisdiction, that is valid and enforceable in that state or jurisdiction, is recognized and enforced in the State of Wisconsin. These protection orders are called foreign protection orders.

According to Wis. Stats. § 806.247, a foreign protection order includes 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 states that a foreign protection order shall be enforced in the State of Wisconsin according to its own terms.

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. 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.

3. The Provisions of Other Jurisdictions

In Wisconsin, Domestic Abuse Injunctions now last up to four years. However, different states have varying time lengths for their protection orders. A law enforcement officer must enforce the order for the length of time specified in the foreign protection order according to its own terms.

Some states allow the possibility of up to a lifetime prohibition on contact. That lifetime prohibition is enforceable in Wisconsin. Again: a lifetime ban on contact from a different state is enforceable in Wisconsin.

4. Penalties for a Violation

The penalty for violating a foreign protection order is the same as the penalty in Wisconsin: a fine of not more than $1,000 and/or imprisonment for not more than 9 months.

5. Law Enforcement Response

When making an arrest decision, the law enforcement officer should consider the following. First, the law enforcement officer must have probable cause to believe that a prohibition listed in the foreign protection order has been violated.

Wis. Stat. § 813.128(1)(b)(1) further states that the person protected under the order can present to the law enforcement officer a copy of the foreign protection order against the suspect.

However, Wis. Stats. § 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. 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 modification are in effect.

6. Some Practical Advice

When first presented with a copy of a Foreign 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 law enforcement officer has made a good faith effort to comply with the law, the law enforcement officer 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.

7. Relevant Statutes

Wis. Stat. § 806.247. Full Faith and Credit for Foreign Protection Orders.

(1) DEFINITIONS. In this section:

(a) "Bodily harm" has the meaning given in s. 939.22 (4).

(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.

(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 that $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. 807.247, 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.

35. Strangulation

1. "Choking" Cases
2. Seriousness and Severity
3. Visible Injuries that may be Encountered
4. Investigative Questions for Strangulation Cases

1. "Choking" Cases

In the past few years, a basic recognition has surfaced in Domestic Violence circles regarding the handling of a certain category of abuse offenses. "Choking" is what happens when a piece of food you're chewing on gets stuck in your throat. "Strangulation" is what happens when abusers throttle their victims tightly around the throat with their hands, a rope, or other ligature device.

> **From a medical perspective, "Strangulation" is defined as a form of asphyxia (lack of oxygen) characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck.**
>
> See Strack, G. & McClane, G. "How to Improve Your Investigation and Prosecution of Strangulation Cases", citing, *Strangulation: a full spectrum of blunt neck trauma*. Ann Otol Rhinl Laryingol. 94:6:1, Nov. 1985, 542-46. *Strangulation: a review of ligature, manual, and postural neck compression injuries*. Annotated Emergency Medicine, 13:3, March 1984, 179-85. K.V. Iserson.

Even while law enforcement officers and prosecutors have become more aware of the differences between choking and strangulation, those victimized by strangulation still refer to the event as a "choking" incident. As prosecutors continue to work with medical professionals, advancements in understanding the serious nature of strangulation cases has lead to changes in the investigation and handling of strangulation.

2. Seriousness and Severity

As you consider the typical misdemeanor strangulation case, the seriousness may not be readily apparent. Often, visible injuries may not be present, at least during the initial law enforcement response / investigative stages. Perhaps injuries occurred on the interior of the throat, rather than the exterior. Only the intervention of medical personnel armed with sophisticated equipment could probe the interior anatomy of a victim's throat and larynx to ascertain the true nature and extent of injury.

Regarding the anatomy of the neck and throat area, consider vulnerability. There is simply no protection to that area of the body. No bone. No shield. No armor-like protection. Truly, there is little, if any, protection. We all have two carotid arteries that supply blood to our brains.

> **A minimal amount of pressure against the two carotid arteries (only 11 pounds of pressure for a mere 10 seconds) can render a person unconscious.**
>
> See Strack, G. & McClane, G. "How to Improve Your Investigation and Prosecution of Strangulation Cases", citing, *Correlation of Circumstances with Pathological Findings in Asphysixial Deaths by Hanging: A Prospective Study of 61 Cases from Seattle, WA,* Journal of Forensic Sciences, JFSCA, 30:4, Oct. 1985, 1140-47.

Again… a majority of the time… there will be few signs of visible injury, at least upon the exterior of the throat and neck area of the body

3. Visible Injuries that may be Encountered

- ***Face:*** 1) Red or flushed; 2) Pinpoint red spots (petechiae); 3) Scratch marks.
- ***Eyes and eyelids:*** 1) Petechiae to either eyeball or eyelid; 2) Bloody eyeballs.
- ***Nose:*** 1) Bloody nose; 2) Broken nose; 3) Petechiae.
- ***Ear:*** 1) Petechiae to external or ear canal; 2) Bleeding from ear canal.
- ***Mouth:*** 1) Bruising; 2) Swollen tongue; 3) Swollen lips; 4) Cuts/abrasions.
- ***Under chin, chest, or shoulders:*** 1) Redness; 2) Scratch marks; 3) Bruise(s); 4) Abrasions.
- ***Neck:*** 1) Redness; 2) Scratch marks; 3) Bruise(s); 4) Abrasions; 5) Fingernail impressions; 6) Swelling; 7) Ligature marks; 8) Rope or cord burn.
- ***Head:*** 1) Petechiae (on scalp); 2) Hair pulled; 3) Bump; 4) Skull fracture.
- ***Breathing changes:*** 1) Difficulty Breathing; 2) Hyperventilation; 3) Inability to Breathe.
- ***Voice changes:*** 1) Raspy Voice; 2) Hoarseness; 3) Coughing; 4) Inability to speak.
- ***Swallowing changes:*** 1) Trouble swallowing; 2) Painful to swallow; 3) Neck pain; 4) Nausea; 5) Vomiting.
- ***Behavioral changes:*** 1) Agitation; 2) Amnesia; 3) PTSD; 4) Hallucinations; 5) Combativeness.
- ***Other:*** 1) Dizziness; 2) Headaches; 3) Fainting; 4) Urination; 5) Defecation.

The above list was created by Strack, G. & McClane, G., "How to Improve Your Investigation and Prosecution of Strangulation Cases."

4. Investigative Questions for Strangulation Cases

It is imperative that no law enforcement officer underestimate the potential seriousness of a Strangulation attack.

Documented cases reflect victims who died later… many hours after the investigation was completed. In one case, a victim died in her sleep 36 to 48 hours following the Strangulation episode. Due to internal swelling and the position of her neck, the victim asphyxiated during slumber. The importance of calling for experienced medical attention following a strangulation attack cannot be overemphasized.

Law enforcement officers must take care to arrest the primary or predominant physical aggressor. A victim may have suffered no visible injury while the Strangler has scratch marks and other visible injuries from where the victim attempted to ward off the attack. Law enforcement officers must know and understand the nature of self-defense.

To conduct a truthful, accurate and thorough investigation, we suggest that you train and subsequently require law enforcement officers in your jurisdiction to ask the following questions.

Note that many of these questions were based upon those formulated by Minnesota Program Development, Inc., Duluth, MN as well as Strack, G. & McClane, G., "How to Improve Your Investigation and Prosecution of Strangulation Cases."

- Ask Victim to describe how she was strangled (right or left hand(s), forearm, object).
- What did the Suspect say while strangling the Victim?

> Remember that a Suspect might repeatedly yell at the Victim, "I'm going to kill you! I'm going to kill you!" while strangling the victim. Depending upon the severity of the injuries and length of time of the Strangulation, the Suspect's statements could conceivably produce a significant difference in your charges… from a charge of battery to one of attempted homicide.

- What did the Victim say? (e.g. "Stop it" "Let go" "I can't breathe" etc.)
- Was the Victim shaken simultaneously while being strangled?
- Was the Victim thrown against the wall, floor or ground? Describe the facts.
- How long did the defendant strangle the Victim before he let go?
- How many times was the Victim strangled? Describe each incident and method.
- How much pressure was applied? Describe…

- Any difficulty breathing? Hoarseness? Raspy voice? Trouble swallowing? Pain?
- Any coughing or trouble swallowing? Dizzy? Faint? Loss of consciousness?
- Did Victim vomit, urinate, or defecate as a result of strangulation?
- Look for injuries behind the ears, all around the neck, chin, jaw, eyelids, shoulders, and chest area. Photograph and describe visible injury however minor.
- Ask Victim to demonstrate how she was strangled.
- Document pain, points of contact, and then photograph method of strangulation.
- Have Victim describe suspect's demeanor and facial expressions.
- What did the Victim think was going to happen? Did she think she was going to die?
- What made the suspect stop? Did Victim pass out, escape, witness intervention, etc.?
- If an object was used… describe, photograph, and inventory the object as evidence.
- Did the suspect bring the object to the residence? (Premeditation and Intent)
- Was the suspect wearing rings? Look for marks left by the rings.
- Any prior incidents of Strangulation or DV?
- Any pre-existing injuries?
- Did the Victim attempt to protect herself or himself? Describe.
- Encourage medical treatment.
- During follow-up investigation, take follow-up photos of any subsequent injuries.
- Ask Victim if s/he showed injuries to anyone, took any subsequent photos or sought medical attention.
- Ask Victim to sign medical release.
- If hoarse or raspy voice, consider tape recording the Victim's voice in order to compare it to normal voice months later at trial.

(Note the pioneering work of Gael Strack and Dr. George McClane, for preparing the above questions as well as the section relating to the symptoms and visible injuries that may be present for a victim of strangulation.)

36. Domestic Violence: Effects upon Children

1. Introduction
2. The Risk of Physical Harm to Children from Domestic Violence
3. Children who witness Domestic Violence
4. Proclivity of Children becoming Future Abusers
5. Additional Effects on Children
6. The Prosecutor's Role: Educate the Court
7. Additional Statistics

1. Introduction

Domestic Violence affects the entire family household. All too often, an abusive parent is not only directing aggression at his or her partner, but also at the children in the home. In fact, child abuse is 15 times more likely to occur in families where Domestic Violence is present. (*See* Stacy, W. and Shupe, A. *The Family Secret*. Boston, MA. Beacon Press, 1983.) Besides increases in direct 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*, The Latham Foundation, Alameda, California (1995):

- 70% of men who abuse their female partners also abuse their children.
- Reports by battered 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 Violence, often perpetrated by men using custodial access to terrorize battered women or to retaliate for separation. Some 30% of abducted children experience mental harm as a result.
- Of children who witness Domestic Violence, 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.
- 15 to 25% of pregnant women are battered.

As you peruse the research, you will learn that the effects of domestic violence in a home creep into the lives of children, with lasting effects. The associations between children who witness Domestic Violence 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 80 published reports of research on the effects associated with witnessing Domestic Violence on a child's development. Dr. Edleson's review of the literature revealed that the above characteristics can be associated with children exposed to Domestic Violence at home, although effects vary depending upon a variety of factors including direct physical abuse of the child, gender, age, child's relationship with others in home and the time since exposure to violence.

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. As prosecutors, we must hold the violent abuser responsible. That is the path to safety for children and their abused mothers. (*See* Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, VAWnet, National Resource Center on Domestic Violence, April, 1997.)

2. The Risk of Physical Harm to Children from Domestic Violence

As prosecutors, we may see the same family in a variety of settings. You may prosecute an abuser in a Domestic Violence 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 previously (or concurrently) the subject of a CHIPS (Child in Need of Protection or Services) action for neglect.

> Children in homes plagued by Domestic Violence are abused at a rate fifteen times higher than the national average. Over 50% of wife (or partner) abusers beat their children, with some studies placing the rate as high as 70 to 80%. As the severity of Domestic Violence 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.
>
> *Battered Women and Child Custody Decisionmaking,* 106 Harv. L. Rev. 1597, 1608-1609 (1993) and sources cited therein.

As prosecutors, we have known for many years about the effects of Domestic Abuse upon children, simply from our own experiences. However, because of the flourish of productive research in recent years, we can now prepare ourselves for courtroom cases with statistics. This research gives us the academic support for our positions to attempt to prevent perpetrators of family violence 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 a batterer'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 violence.

> Older children can be injured in the attempts to protect their mother from the batterer. Children may be harmed directly as targets of physical attacks… or indirectly, as a result of their proximity to the attacks against the DV victim. Because the frequency of battering tends to increase during pregnancy, even a fetus is at risk of injury or death. Moreover, after separation of the batterer and the victim, 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 Violence

Children in violent households do not have to be abused directly to be affected. Observing Domestic Violence 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), *citing* First Report of the Governor's Task Force on Domestic Violence at 5.

> The majority of children from violent families witness the abuse. Reports by battered women indicate that 87% of their children witness the abuse. Seeing one parent attack another initially traumatizes children and causes 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 deviancy.
>
> *Battered Women and Child Custody Decisionmaking,* 106 Harv. L. Rev. 1597, 1609 (1993).

Children living with this violence are affected. When witnessing the abuse children form their views of adult relationships based upon these interactions. Over 3 million children are at risk of exposure to parental violence each year. Carlson, B.E., *Children's Observations of Interparental Violence*, in Edwards, A.R. (ed.), *Battered Women and Their Families*. New York: Springer, pp. 147-167 (1984).

Some advocates argue that Domestic Violence in the presence of children is a form of child abuse in and of itself. Levin, Amy, *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, 834-835 (2000).

Even when the violence is not personally witnessed, Domestic Violence harms children. At the very least, the pressures endured by the victim impair the 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 Violence. Levin, Amy, *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 a Wisconsin court 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." *See Bertram v. Kilian*, 394 N.W.2d 773, 774 (Wis. Ct. App. 1986).

4. Proclivity of Children Becoming Future Abusers

Even when batterers don't physically abuse their children, research suggests that they often create in their children learned patterns of abusive behavior. Termed the *Intergenerational Cycle of Violence*, these children learn that violence is acceptable. The chance that the children will engage in violent behavior in the future increases. These children are more apt to become abusive in their adult relationships or towards their own children in the future.

See Levin, Amy, *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, 835-836 (2000).

Children learn from their parents. Witnessing Domestic Violence increases a child's propensity for future violence. Boys who observe their fathers abuse their mothers are three times more likely to beat their own wives as adults. Moreover, sons of the most violent abusers are 1000 times more likely to beat their wives than sons of nonviolent fathers. *Battered Women and Child Custody Decisionmaking,* 106 Harv. L. Rev. 1597, 1610 (1993).

5. Additional Effects on Children

> Researchers have found that children who witness Domestic Violence 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 or suicide.
>
> Levin, Amy, *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 Violence are more aggressive than children who are not so exposed. These children tend to exhibit behavior problems in their schools and communities ranging from temper tantrums to fights. *See* Fantuzzo, J. and Mohr, W., *Prevalence and Effects of Child Exposure to Domestic Violence*, The Future of Children, DOMESTIC VIOLENCE AND CHILDREN, Vol. 9, No. 3, Winter 1999, p. 27.

These children are also prone to depression, suicidal behaviors, anxiety, fears, phobias, insomnia, tics, bed-wetting, and low self-esteem. 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. *See* Fantuzzo, J. and Mohr, W., *Prevalence and Effects of Child Exposure to Domestic Violence*, The Future of Children, DOMESTIC VIOLENCE AND CHILDREN, Vol. 9, No. 3, Winter 1999, p. 27.

The effects of witnessing Domestic Violence 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." Levine, D., *Children in Violent Homes: Effects and Responses*, 68-OCT Fla. B.J. 62 (1994).

6. The Prosecutor's Role: Educate the Court!!

As prosecutors, we are uniquely positioned to interrupt the cycle of violence in the home. We must educate the court as to the dangers of allowing an abusive partner back into the home.

If cash bail results in an abuser staying in jail during the pendency of your prosecution, a DV victim may have time to arrange for a safe place for the children to stay.

"No Contact Orders" may be ordered by the court to keep the defendant out of the victim's residence during the pendency of the case, or 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 during the entire pendency of the case. You may advocate that the "No Contact Order" list the victim as well as the children, depending upon the facts in a given case.

Educating the victim is another effective tool to interrupt 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 directed at the children. Perhaps the DV victim will end an abusive and unhealthy relationship.

When there is no motivation to save oneself, there still may be motivation to save one's children. Perhaps an understanding of the effects upon children of exposure to violence will result in greater cooperation with your prosecution of the defendant and enhanced safety for the victim and children.

7. Additional Statistics

- Between 3.3 million and 10 million children annually observe domestic violence within their homes. *See* Davidson, H., *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 Fam. L.Q. 357, 369 (1995).
- Men who observe domestic violence in childhood are 1000% more likely to abuse their partner later in life. *See* Condon, M., *Domestic Violence and Children: The Effects of Domestic Violence on Children*, The Family Refuge Center, (http://www.familyrefuge-center.com/effecton.html), October 2000.
- Children in homes where domestic violence occurs are physically abused or seriously neglected at a rate 1500% higher than the national average in the general population. *See Domestic Violence – A Guide for Health Care Professionals,* State of New Jersey, Department of Community Affairs, March 1990 (http://www.asafeplaceforhelp.org/chil-drenstatistics.html).
- In a study of battered women's shelters, approximately 70% of the children coming into these shelters were being abused or neglected. *See* Davidson, H., *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 Fam. L.Q. 357 (1995), *citing* J. Layzer et al., *Children in Shelters*, 15 CHILDREN TODAY 5-11 (1986).
- Battered women are 6 times more likely than nonbattered women to have their children reported for child abuse. *See* Davidson, H., *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 Fam. L.Q. 357 (1995), *citing* Stark & Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT. J. HEALTH SERV. 97-119 (1988).

- Mothers are 8 times more likely to hurt their children when they are being battered than when they were safe from violence. *See Domestic Violence – A Guide for Health Care Professionals,* State of New Jersey, Department of Community Affairs, March 1990 (http://www.asafeplaceforhelp.org/childrenstatistics.html).
- Approximately 90% of children are aware of the violence directed at their mother. *See Domestic Violence – A Guide for Health Care Professionals,* State of New Jersey, Department of Community Affairs, March 1990 (http://www.asafeplaceforhelp.org/childrenstatistics.html).
- Children are in the same room or in an adjacent room in 90% of domestic violence cases. *See* Hughes, H., Parkinson, D. & Vargo, M. *Witnessing Spouse Abuse and Experiencing Physical Abuse: a "Double Whammy?,"* Journal of Family Violence, 4, (1989): 165-173.
- Children are present in 41-55% of homes where police intervene in domestic violence calls. *See* Hughes, H., Parkinson, D. & Vargo, M. *Witnessing Spouse Abuse and Experiencing Physical Abuse: a "Double Whammy?,"* Journal of Family Violence, 4, (1989): 165-173.
- The single most significant difference between delinquent and nondelinquent youths is a history of domestic violence in the home. *See* Miller, G., *Violence By and Against America's Children,* Journal of Juvenile Justice Digest, XVII (12) p.6. 1989.
- More than 85% of federal offenders jailed for violent crimes witnessed Domestic Violence or suffered from domestic abuse as children. *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (Oct. 1994).

(Written by Attorney Rebecca Kiefer. Edited by ADA Paul Dedinsky, Wisconsin Domestic Violence Prosecution Manual, 2004.)

37. Elder Abuse

1. Introduction
2. Types of Elder Abuse
   - Physical Abuse
   - Sexual Abuse
   - Psychological Abuse
   - Neglect
   - Abandonment
   - Financial
   - Self-Neglect
3. Wisconsin Law
4. Specific Elder Abuse Statutes

Mistreatment of older citizens is a substantial national problem in the United States. Experts conservatively estimate that 1.5 million elderly people are victims of moderate to severe abuse each year. This amounts to about 1 in every 25 older persons. Authorities indicate that only about 1 out of 8 cases are reported. Congressional reports conclude that Elder Abuse is increasing. Elder Abuse may be as prevalent, or perhaps even more prevalent, than Child Abuse. "Elder Abuse is a national disgrace!"

Frazier, Billie H., Ph.D., *Selected Resources on Elder Abuse,* 10/94, taken from http://www.cyfernet.org/research/elderabuse.html.

1. Introduction

As the elder population grows, so does the incidence of elder abuse. Currently, the elderly population in this country is growing faster than any other segment. As more people live longer, frailty and vulnerability increase, as does the potential for elders to become victims of physical, emotional, or financial abuse. Hempel, *Elder Abuse: The Hidden Crime,* 11-WTR Experience 24, 29 (2001).

Elder abuse is increasing because of the vulnerability of many victims …and because victims are afraid to report the crime because they fear retaliation or are ashamed to admit they have been swindled. Sometimes the victims are unable to report the crime because of illnesses such as Alzheimer's and dementia. See Earl Bolender, *Senior Population Expanding and So Is: Elder Abuse*, originally published in the *Mount Shasta News*, November 7, 2001, taken from http://www.vachss.com.

> A national incidence study conducted in 1996 found that a total of 551,011 elderly persons (aged 60 and over) experienced abuse, neglect, and/or self-neglect in domestic settings. For every reported incident of elder abuse, neglect, exploitation or self-neglect, approximately five incidents go unreported. Most victims of elder abuse were female. Most perpetrators of the abuse were younger than their victims. Elders aged 80 years and older suffered abuse and neglect two to three times their proportion of the older population. Approximately 90% of alleged abusers were related to their victims. Adult children made up the largest category of perpetrators of elder abuse.
>
> See Administration on Aging, *The National Elder Abuse Incident Study; Final Report*, Sept. 1998, http://www.aoa.gov/abuse/report/default.htm.

Domestic elder abuse generally refers to any of several forms of maltreatment of an older person by someone who has a special relationship with the elder. Examples of the typical offenders include spouses, siblings, a child, friend(s), or caregiver(s). National Center on Elder Abuse, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org.

2. Types of Elder Abuse

While we attempt to list all the types of abuse to Elderly persons that we normally encounter as prosecutors, nationally, four basic types of Elder Abuse are typically recognized:

1. **Physical:** includes beatings, sexual assault, prolonged deprivation of food and water, and the use of physical or chemical (medication) restraint.
2. **Psychological:** includes verbal threats and subjecting a person to serious emotional distress through fear, isolation and confinement.
3. **Neglect:** includes failure to assist in personal hygiene, failure to provide clothing and shelter and failure to provide medical care.
4. **Financial:** abuse includes theft, embezzlement, misuse of funds or property, and fraud.

> See Earl Bolender, *Senior Population Expanding And So Is: Elder Abuse*, originally published: *Mount Shasta News*, November 7, 2001, http://www.vachss.com/help_text/archive/senior_pop.html.

PHYSICAL ABUSE

Physical abuse is the use of physical force that may result in bodily injury, physical pain, or impairment. Physical abuse may include but is not limited to such acts of violence as striking (with or without an object), hitting, beating, pushing, shoving, shaking, slapping, kicking, pinching, and burning. In addition, the inappropriate use of drugs and physical restraints, force-feeding, and physical punishment of any kind also are examples of physical abuse. Signs and symptoms of physical abuse 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, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

SEXUAL ABUSE

Sexual abuse is non-consensual sexual contact of any kind with an elderly person. Sexual contact with any person incapable of giving consent is also considered sexual abuse. 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. Signs and symptoms of sexual abuse 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.

National Center on Elder Abuse, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

PSYCHOLOGICAL ABUSE

Emotional or psychological abuse is the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes but is not limited to verbal assaults, insults, threats, intimidation, humiliation and harassment. Additional examples of emotional/psychological abuse: treating an older person like an infant; isolating an elderly person from his/her family, friends, or regular activities; giving an older person the "silent treatment"; and enforced social isolation. Signs and symptoms of emotional/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, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

NEGLECT

Neglect is the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Neglect may also include failure of a person who has fiduciary responsibilities to provide care for an elder (such as paying for necessary home care services) or the failure on the part of an in-home service provider to provide necessary care. Neglect typically means the refusal or failure to provide an elderly person with such life necessities as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials included in an implied or agreed-upon responsibility to an elder. Signs and symptoms of neglect include:

- Dehydration, malnutrition, untreated bed sores, and poor personal hygiene;
- Unattended or untreated health problems;
- Hazardous or unsafe living condition/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);
- An elder's report of being mistreated.

National Center on Elder Abuse, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

ABANDONMENT

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;
- An elder's own report of being abandoned.

National Center on Elder Abuse, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

FINANCIAL ABUSE

Financial or material exploitation is the illegal or improper use of an elder's funds, property, or assets. Examples include: cashing an elderly person's checks without authorization/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. contracts or will); and the improper use of conservatorship, guardianship or power of attorney. 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 the elder's 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 unpaid despite the availability of adequate financial resources;
- Discovery of an elder's signature being forged 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 services that are not necessary;
- An elder's report of financial exploitation.

National Center on Elder Abuse, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

SELF-NEGLECT

Self-neglect is characterized as the behavior of an elderly person that threatens his/her own health or safety. Self-neglect generally manifests itself in an older person as a refusal or failure to provide himself/herself with adequate food, water, clothing, shelter, personal hygiene, medication (when indicated) and safety precautions. The definition of self-neglect excludes a situation in which a mentally competent older person, who understands the consequences of his/her decisions, makes a conscious and voluntary decision to engage in acts that threaten his/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/arrangements (e.g. improper wiring, no indoor plumbing, no heat, no running water);
- Unsanitary or unclean living quarters (e.g. animal/insect infestation, no functioning toilet, fecal/urine smell);
- Inappropriate and/or inadequate clothing, lack of the necessary medical aids (e.g. eyeglasses, hearing aids, dentures);
- Grossly inadequate housing or homelessness.

National Center on Elder Abuse, *The Basics, What Is Elder Abuse, What Are the Major Types of Elder Abuse?* http://www.elderabusecenter.org/basic/index.html.

3. Wisconsin Law

In Wisconsin, elder victims are the least likely of all DV victims to seek out or accept services. The law in Wisconsin takes a moderate approach. Voluntary reporting recognizes an elder person's right to privacy and self-determination. An elder who is reported as abused, unless declared legally incompetent, may refuse investigation and services. See Speltz & Raymond, *Elder Abuse, Including Domestic Violence in Later Life*, 73-SEP Wis. Law. 10, 10-11 (2000).

In Wisconsin, in 2000, a total of 3,153 reported cases of suspected abuse and neglect were reported. Of these, 19 were fatal and 264 were considered life threatening. This means that over 1 in 12 reports of elder abuse in Wisconsin in 2000 involved either a fatal or a life-threatening situation. The largest reported group of victims was the 80 to 89 year old age range. 66% of these victims were female. Nearly 94% of all reported cases involved a victim having at least one dependency or disability. See Wisconsin Bureau of Aging and Long Term Care Resources, *Wisconsin Report on ELDER ABUSE*, Sept. 2001.

There are four categories of Elder Abuse defined in Wisconsin law (Wis. Stats. Chapter 46.90). When a person of age 60 or older is subjected to any of these types of abuse of neglect, it is considered Elder Abuse.

1. PHYSICAL ABUSE

Physical abuse is the willful infliction of physical pain, injury or unreasonable confinement. It includes, but is not limited to, beating, choking or burning, inappropriate medication or tying or locking a person up. It also includes Sexual Abuse. Sexual Abuse occurs when a person has been forced, tricked, threatened or otherwise coerced into sexual contact against one's will.

2. MATERIAL ABUSE (FINANCIAL EXPLOITATION)

Material abuse is the misuse of an elder's money or property. It includes deception, diverting income, mismanagement of funds and taking money or possessions against a person's will.

3. NEGLECT

Neglect occurs when a caregiver's failure to provide adequate food, shelter, clothing, medical or dental care results in significant danger to the physical or mental health of an older person in his or her care.

4. SELF-NEGLECT

Self-neglect means a significant danger to an elder person's physical or mental health because the elder person is unable or fails to provide adequate food, shelter, clothing, medical or dental care.

See Wisconsin Bureau of Aging and Long Term Care Resources, *Wisconsin Report on ELDER ABUSE*, Sept. 2001.

4. Specific Elder Abuse Statutes

There are a number of statutes under which a police officer might arrest and/or a prosecutor might charge in the following scenarios involving elder abuse. The Wisconsin Coalition Against Domestic Violence has collected these statutes in their Elder Abuse pamphlet entitled: *Elder Abuse including Domestic Violence in Later Life; Potential Legal Remedies*. They are reprinted below with permission.

Denial of Access. Refusing to allow entry of an elder abuse investigator, adult protective services worker and/or law enforcement officer into a home where assistance is needed. Potential criminal justice actions include:

- Resisting or Obstructing an Officer, Wis. Stats. § 946.41
- Refusing to aid law enforcement Officer, Wis. Stats. § 946.40

Physical Abuse. Inflicting bruises, welts, lacerations, punctures, fractures, burns, swelling, scratches. Potential criminal justice actions include:

- Battery, substantial battery or aggravated battery, Wis. Stats. § 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.)
- Battery – special circumstances, Wis. Stats. § 940.19(6)(a)
- Battery or threat to witness, Wis. Stats. § 940.201
- Mayhem, Wis. Stats. § 940.21
- Reckless injury, Wis. Stats. § 940.23
- Disorderly Conduct, Wis. Stats. § 947.01
- Harassment, Wis. Stats. § 947.013
- Recklessly endangering safety, Wis. Stats. § 941.30
- Abuse of a vulnerable adult, Wis. Stats. § 940.285
- Injury by negligent handling of dangerous weapon, explosives or fire, Wis. Stats. § 940.24

Sexual Abuse. 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. Potential criminal justice actions include:

- First-degree sexual assault, Wis. Stats. § 940.225(1)
- Second-degree sexual assault, Wis. Stats. § 940.225(2)
- Third degree sexual assault, Wis. Stats. § 940.225(3)
- Fourth degree sexual assault, Wis. Stats. § 940.225(3m)
- Incest, Wis. Stats. § 944.06
- Photos, motion pictures, videos or other visual representations depicting obscene material, Wis. Stats. § 944.21

Confinement. Holding another person against his or her will and/or engaging in behavior which results in a person not feeling able to move about freely, or not feeling able to seek assistance. Potential criminal justice actions include:

- False imprisonment, Wis. Stats. § 940.30
- Taking a hostage, Wis. Stats. § 940.305
- Kidnapping, Wis. Stats. § 940.31
- Intimidation of a victim or attempt to intimidate, Wis. Stats. §§ 940.44, 940.45, 939.32(c)
- Intimidation of a witness or attempt to intimidate, Wis. Stats. §§ 940.42, 940.43, 939.32(c)
- Criminal trespass to dwelling, Wis. Stats. § 943.14
- Abuse of vulnerable adult, Wis. Stats. § 940.285
- Disorderly conduct, Wis. Stats. § 947.01
- Damage or threat to property of witness, Wis. Stats. § 943.011

Stalking. Tracking person in such a manner to cause the person to fear for his or her safety and/or the safety of others (see chapter regarding stalking); repeatedly following or harassing another person. Potential criminal justice actions include:

- Stalking, Wis. Stats. § 940.32
- Harassment, Wis. Stats. § 947.013
- Unlawful use of telephone, Wis. Stats. § 947.012
- Unlawful use of computerized communications systems, Wis. Stats. § 947.0125

Emotional Abuse. Engaging in name calling, put downs, making person feel bad about self, engaging in crazy making behavior, playing mind games, humiliating person, causing person to feel guilty, making threats, using intimidation, using coercion, isolating, minimizing, denying and blaming, treating person like a servant. Potential criminal justice actions include:

- Recklessly endangering safety, Wis. Stats. § 941.30
- Reckless injury, Wis. Stats. § 940.23
- Disorderly conduct, Wis. Stats. § 947.01
- Endangering safety by use of dangerous weapon, Wis. Stats. § 941.20
- Damage to property, Wis. Stats. § 943.01
- Mistreating animals, Wis. Stats. § 951.02
- Threats to injure or accuse of crime, Wis. Stats. § 943.30

Neglect. Exhibiting 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; signs of excess drugging or lack of medication or other misuse or medical treatment; failure to assist with mobility. Potential criminal justice actions include:

- Abuse of vulnerable adult, Wis. Stats. § 940.285
- Reckless injury, Wis. Stats. § 940.23
- Recklessly endangering safety. Wis. Stats. § 941.30
- Administering dangerous or stupefying drug, Wis. Stats. § 941.32
- Tampering with household products, Wis. Stats. § 941.327

Financial Exploitation. Exhibiting disparity between income, assets and lifestyle; unexplained or sudden inability to pay bills, purchase food or personal care items; inaccurate, confused, or no knowledge of finances; fear or anxiety when discussing finances; unprecedented transfer of assets from an older person to others; extraordinary interest by family member of older person's assets. Potential criminal justice actions include:

- Theft or attempted theft from person, Wis. Stats. §§ 943.20(1)(a), 939.32(1)
- Embezzlement or attempted embezzlement, Wis. Stats. §§ 943.20(1)(b), 939.32(1)
- Theft or attempted theft by fraud, Wis. Stats. §§ 943.20(1)(d), 939.32(1)
- Computer crimes or attempted computer crimes, Wis. Stats. §§ 943.70, 939.32(2)
- Fraudulent writings, Wis. Stats. § 943.39(2)
- Forgery, Wis. Stats. § 943.38
- Failure to report income, Wis. Stats. § 71.83(2)
- Security fraud, Wis. Stats. § 551.41
- Threats to injure or accuse of crime, Wis. Stats. § 943.30
- Robbery, Wis. Stats. § 943.32
- Misappropriation of personal identifying information or documents, Wis. Stats. § 943.201

Wisconsin Coalition Against Domestic Violence, *Elder Abuse including Domestic Violence in Later Life; Potential Legal Remedies*, Revised 1999 edition.

(For more information about the police investigation of Elder Abuse, please see the Investigation of Domestic Violence section of this manual.)

(Prepared by Attorney Rebecca Kiefer, with contributions from the Wisconsin Coalition Against Domestic Violence (WCADV), Wisconsin Domestic Violence Prosecution Manual, 2004.)

38. Challenges for Rural, LGBT and Cultural Communities

1. Rural Issues
2. APRI's List of Rural References
3. Lesbian / Gay Abuse
4. Domestic Violence and Culture

1. Rural Issues

In its article, "Special Issues in Rural Communities", the American Prosecutors Research Institute (APRI) identified several areas of concern for prosecutors in Rural Domestic Violence Cases which are summarized below:

1. **Extreme Isolation:** Because of the geographical and physical distance, a victim in a rural area faces the reality of isolation from any 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 take hours for police to travel from one area of the county to the victim's location.
2. **Patriarchal Family Structures:** Social acceptance often entails marriage. Familial pressures can keep an abusive male supremacy configuration in place within the family construct. Financial independence may be an impossibility because of lack of education. Fundamental Religious leaders may encourage the family to "stick together" despite obvious abuse. Victims may be less inclined to seek support due to disgrace in their church and community.
3. **Lack of Adequate Social Services:** Resources are thin with funding deficiencies. Victims may have to travel long distances to reach safety services.
4. **Abundance of Weapons:** Guns and rifles are readily available to an abuser, and their use is typically an accepted part of life in rural areas.
5. **Lack of Police Intervention:** Coupled with the challenges of distance and travel times, rural police officers may espouse the attitudes of a rural family's problems as a "private family matter." Domestic Violence calls may receive a lower priority in rural police departments compared to urban centers.

6. **Lack of Court Support:** One judicial court judge may handle part-time judicial duties in a number of counties. Some rural judges have received no training in Domestic Abuse dynamics and do not understand that beating is about power and control. Part-time prosecutors and rural court staff may not get information about TROs and Injunctions to victims. Lack of access to system remedies is the norm.

2. APRI's List of Rural References

The American Prosecutor's Research Institute lists several references to gain more information about Rural Domestic Violence issues in its article, "Special Issues in Rural Communities":

Bell, Daniel J., "A Multiyear Study of Ohio Urban, Suburban, and Rural Police Dispositions of Domestic Disputes," *Victimology: An International Journal*, Volume 10, 1985, p. 301-310.

Bennett, Larry W., "Substance Abuse and Woman Abuse by Male Partners".

Criminal Justice Intervention Program Information Packet, "There's No Excuse for Domestic Violence!", sponsored by Women's Advocacy Program, Inc.

Fahnestock, Kathryn and Geiger, Maurice D., "'We All Get Along Here': Case Flow in Rural Courts," *Judicature*, Vol. 76(5), Feb.-March 1993, p. 258-263.

Fahnestock, Kathryn, "Not in My County," *The Judge's Journal*, Summer 1992, p. 10-36.

Gagne, Patricia L. "Appalachian Women: Violence and Social Control," *Journal of Contemporary Ethnography*, Vol. 20, No. 4, January 1992, p. 387-415.

Hirschel, J. and Hutchinson, Ira, "Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment," *The Journal of Criminal Law & Criminology*, Vol. 83, No. 1, 1992, p. 73-117.

Long, Kathleen Ann, "Cultural Considerations in the Assessment and Treatment of Intrafamilial Abuse," *American Journal of Orthopsychiatry*, Vol. 56(1), January 1986, p. 131-136.

National Coalition Against Domestic Violence Rural Task Force Resource Packet, January 1991, Second Edition, Kathy Skaggs.

Navin, Sally; Stockum, Robert; Campbell-Ruggaard, Julie, "Battered Women in America," *Journal of Humanistic Education and Development*, Vol. 32, September 1993, p. 9-16.

Pitzer, Ron, "Roadblocks to Dealing with Domestic Violence in Rural Areas," *Family Life Packets*, provided by Minnesota Extension Service, University of Minnesota, December 1992.

Religious Packet, "What Every Congregation Needs to Know About Domestic Violence," *Community Connections New Release*, Center for the Prevention of Sexual and Domestic Violence, 1994.

Ringnalda, Eileen, "Rural Communities Face Challenges to Deal with Domestic Violence," *Community Connections News Release*, Iowa State University Extension to Communities, Sept. 23, 1996.

Ringnalda, Eileen, "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.

Websdale, Neil, "Rural Woman Abuse," *Violence Against Women*, Vol. 1, Nol. 4, December 1995, p. 309-338.

Websdale, Neil, "An Ethnographic Assessment of the Policing of Domestic Violence in Rural Eastern Kentucky," *Social Justice*, Vol. 22, No. 1, p. 102-122.

Zubretsky, Theresa M. and Karla Digirolano, "The False Connection Between Adult Domestic Violence and Alcohol."

3. Lesbian / Gay Abuse

As prosecutors, we must strive to protect all victims of assault without regard to race, religion, gender or sex. Abuse occurs in all settings. With regard to lesbian / gay battering, many barriers impact victims, including suitable access to services.

Some victims choose not to access the criminal justice system, in response to traditional stereotypes from police officers, prosecutors and judges. Your office, in conjunction with your community service provider(s), needs to be sensitive to a victim's fear of "outing" and the resulting possible repercussions, among other challenges.

As our systems progress toward more inclusive responses for all members of the community, it is important to recognize the impact that homophobia and "gay bashing" has upon victims of abuse in a lesbian, gay, bi-sexual or transgender situation. Understanding these challenges for victims will help you provide better service from the point of the initial police

call, to your charging decision, through facing potential juror biases during a trial, to dealing sensitively with witnesses, to facing sentencing issues, to providing appropriate services for abusers and victims alike.

To begin with, if you are faced with such a case, it is important to recognize that the victim may be very reluctant to participate in your prosecution. The victim may have struggled for quite some time over his or her decision to even contact the police. Realize that *trust* may be a foremost concern. Consider the value of linking that victim with a Victim Advocate, in such a situation. 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 such as rendering aid in obtaining restraining orders or providing protection for children in family court (child custody issues).

As a prosecutor, you will be asked to train law enforcement officers. Effective police responses for Domestic Violence calls require officers to avoid dual arrests… an especially key requirement in lesbian / gay abuse cases. Helping law enforcement agencies to understand the challenges faced by lesbian, gay, bi-sexual or transgender persons will promote sensitivity and, ultimately, will help officers to better respond to all cases of abuse.

In her presentation at the National College of District Attorneys (2000) entitled: "Domestic Violence in the Lesbian and Gay Community," Lydia D. Walker suggests several helpful books on Lesbian and Gay Domestic Violence that can be obtained from: SAVE, P.O. Box 8283, Fremont, CA 94537:

Island, David and Letellier, Patrick, *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence*. New York, NY: Haworth Press, 1991.

Lobel, Kerry, editor, *Naming the Violence: Speaking Out About Lesbian Battering*. Seattle, WA: The Seal Press, 1986, Developed by the National Coalition Against Domestic Violence Lesbian Task Force.

Elliot, Pam, editor, *Confronting Lesbian Battering: A Manual for the Battered Women's Movement*. St. Paul, MN: Minnesota Coalition for Battered Women Lesbian Advocacy Committee, 1990.

Renzetti, Claire, M., *Violent Betrayal: Partner Abuse in Lesbian Relationships*. Newbury Park, CA: SAGE Publications, 1992.

Taylor, Joelle, and Chandler, Tracey, *Lesbians Talk Violent Relationships*. London, England: Scarlett Press, 1995.

4. Domestic Violence 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 Violence and culture.

Excerpted from "From Sensitivity to Competency: Clinical and Departmental Guidelines to Achieving Cultural Competency", Sujata Warrier, 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 her / his culture,
> - Incorporates an awareness of one's biases,
> - Approaches the definition of culture with a critical eye and open mind.

Whatever "language" is spoken, the same message must be sent. Domestic Violence is a crime. As prosecutors, it is our responsibility to assert that message. Because Domestic Violence does not discriminate across racial, ethnic or class boundaries, neither must prosecutors. And we must ensure that investigators treat victims with respect. Always remember: Never should children of victims 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 probably be a minority group. Lavizzo-Mourey, R. and MacKenzie, E.R. "Cultural Competence: Essential Measurements of Quality for Managed Care Organizations." *Annals of Internal Medicine*, 1124, p. 919-921 (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 DV 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. They suggest that prosecutors, at a minimum, understand the following items about varying groups:

African Americans

1. Distrust of the judicial system.
2. Myth of strong matriarch.
3. Lack of community support for cooperation.
4. Lower income.
5. Varying definition of abuse.

Asian / Southeast Asian

1. Strong sense of community.
2. Distrust of "outsiders," and fear of "loss of face."
3. Inability to access systems which can help because of:
   a. Language.
   b. Cultural differences (shelters which limit numbers of family members accepted, earnings requirements, family vs. individual needs).
4. Financial limitations.
5. Immigration issues / definition of abuse.

Hispanic

1. Cultural differences.
2. Lack of family support.
3. Inability to access systems (language).
4. Financial limitations.
5. Immigration issues / Varying definition of abuse.

Native American

1. Cultural differences / Tribal differences.
2. Community restraints.
3. Varying definition of abuse.
4. 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 immigration classification if he or she has been battered by, or subject to extreme cruelty committed by, the citizen or lawful permanent resident spouse or parent. The victim may become eligible for lawful permanent resident status.

If faced with an immigrant victim or a member of a culture 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.

Also, 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;
- The Family Violence Prevention Fund (FVPF) at 415-252-8900, http://www.fvpf.org;
- Now Legal Defense & Education Fund at 202-544-4470, http://www.nowldef.org;
- Ayuda Inc. (Legal Aid) at 202-387-4848;
- National Immigration Project of the National Lawyers Guild at 617-227-5495, http://www.nlg.org;
- National Network for Immigrant and Refugee Rights at 510-465-1984, http://www.nnirr.org;
- National Immigration Law Center at 213-964-7940, http://www.nilc.org;
- National Immigration Forum at 202-544-0004, http://www.immigrationforum.org;
- Center for Human Rights and Constitutinal Law at 213-388-8693, http://home.sprynet.com.

(Wisconsin Domestic Violence Prosecution Manual, 2004.)

39. Links between Cruelty to Animals and Domestic Violence

1. Background
2. Pet Ownership in the United States
3. Animal Abuse Evidence at Trial
4. Wisconsin Animal Abuse Statutes

> **"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."**
>
> Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C. L. Rev. 463, 481 (2002).

1. Background

"Power and control" issues often link animal abuse to domestic violence. People abuse animals for a variety of reasons.

Abusing animals can be a form of intimidation against another person. It may silence the person from revealing the abuse. Abusers may enjoy exerting power over another weaker being. Threats to hurt a cherished pet may serve to manipulate the actions of another person. Some abusers will practice violence on animals before hurting a person. Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C. L. Rev. 463, 478 (2002).

Serious animal abuse is not just a personality flaw in the abuser… but also the symptom of a deeply disturbed family. Arkow, Phil, *Breaking the Cycles of Violence*, The Latham Foundation, Alameda, California (1995).

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. In most situations, the women indicated that the abuse of the animals had been carried out in front of them and their children. In addition, the abusive parties often threatened to give away the pets as a way to control victims. Turner, *Animal Abuse and the Link to Domestic Violence*, "The Police Chief", June 2000, p. 28.

In one national survey of women seeking shelter from domestic violence in safe houses, 83% of women with companion animals reported that their batterers had also threatened or hurt the family pet. Ascione, Frank R., *The Abuse of Animals and Domestic Violence*, "Society and Animals", 1997 5(3), reported at www.kalcounty.com/opa/dv/animalabuse.html.

When an abuser threatens, abuses, or kills an animal, several messages are relayed to the human victim. Animal Abuse (or threats to abuse) displays domination and control which the abuser wields over the victim. Abuse of a pet frequently manipulates a partner or child into compliance with the abuser's wishes. Animal Abuse frightens, intimidates, punishes, or leads to retaliation against a partner or child. Trollinger, *The Link Among Animal Abuse, Child Abuse, and Domestic Violence,* 30-SEP Colo. Law. 29, 30 (2001).

2. Pet Ownership and Animal Cruelty in the United States

It is extremely likely that an animal will be living in a DV home. The most recent statistics? A dog lives in 34.6 million American homes. A cat lives in 29.2 million American homes. Including other pets such as birds, horses, and small animals (e.g. hamsters, rabbits, etc.), pets now live in 54.8 million American households. Parents with children comprise 50% of pet-owning households. Arkow, Phil, *Breaking the Cycles of Violence*, The Latham Foundation, Alameda, California (1995).

One study: Families receiving services for child abuse… showed that pets had been abused in 60% of these families. In 88% of families in which physical abuse occurred, animal abuse was also observed. In another study at a DV shelter, 23% of women seeking shelter and 11% of women seeking restraining orders, reported that animals had been abused or killed in their homes. Arkow, Phil, *Breaking the Cycles of Violence*, The Latham Foundation, Alameda, California (1995).

> …[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%).
>
> …[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. …84% 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.
>
> Girards, Richard T., *Animal Cruelty*, American Prosecutors Research Institute, citing: *First Strike Campaign*, The Humane Society of the United States, Executive Summary Of National Cruelty Reports (1997).

EXAMPLES of the link between Animal Abuse and Criminal Behavior

The Humane Society of the United States reminds us that some recent examples (some close to home, unfortunately) link animal abuse to later anti-social and even morbid behavior.

- Serial killer and sexual deviant Jeffrey Dahmer (who confessed to killing, dismembering and in some cases, cannibalizing 17 men and boys) impaled frogs, decapitated dogs, and staked cats to trees in his backyard as a youngster.
- Serial killer and rapist Theodore Bundy (ultimately convicted of 2 killings, but suspected of murdering over 40 women) witnessed his grandfather's brutality toward animals as a child and tortured animals himself.
- Serial killer David Berkowitz (New York City's "Son of Sam" gunman who plead guilty to 13 murder and attempted murder charges) had earlier shot a neighbor's Labrador dog.

Girards, Richard T., *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).

3. Animal Abuse Evidence at Trial

The solution to a violent home lies in the characterization of the offender as an abuser, rather than each individual victim as an abused. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 3 (1998).

Animal Abuse evidence can be admitted as evidence of a common plan or scheme to exploit and sexually abuse the victim(s).

In *State v. Foster*, 915 P.2d 567 (Wash. App. Div. 1 1996), and *State v. Pugsley*, 911 P.2d 761 (Idaho App. 1995), defendants used animal abuse as a threat to children in order to control them and prevent them from telling anyone about the abuse suffered by them. In both cases, trial courts admitted the "other acts" evidence, in part because the events provided a complete picture of the charges of abuse. The evidence helped to explain how and when the abuse started and why the victims delayed in disclosing it. Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse,* 43 B.C. L. Rev. 463, 482 (2002).

There are several options for the admissibility of animal abuse in criminal trials for domestic abuse. Wis. Stats. § 904.04(2) allows admission of prior bad acts in order to show "proof

of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Also, once the defense raises character, the prosecution may introduce prior bad acts evidence in rebuttal. Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse,* 43 B.C. L. Rev. 463, 484 (2002).

4. Wisconsin Animal Abuse Statutes

Charging animal cruelty crimes in the context of a DV case is advisable. It is also legal. In *State v. Bellows*, 218 Wis.2d 614, 582 N.W.2d 53 (Wis. App. 1998), the State charged three counts of child neglect, sixteen counts of failing to provide an animal with proper shelter, and sixteen counts of negligent treatment of an animal. All of the charges were based on "the same act or transaction." The defense failed to show any prejudice resulting from the joinder of the animal and child neglect charges. *Bellows* at 617.

Some relevant Wisconsin Animal Abuse statutes follow.

Wis. Stats. § 951.02. *Mistreating Animals*.

No person may treat any animal, whether belonging to the person or another, in a cruel manner.

Note: The statute does not require ownership of the animal.

1) "Animal" includes any warm-blooded creature, reptile or amphibian.
2) It does not include fish.
3) "Cruel" means causing unnecessary and excessive pain or suffering or death.

When analyzing the cruel nature of the behavior, consider what is socially acceptable.

Penalties:

1) A person who intentionally or negligently violates Wis. Stats. § 951.02 is guilty of a Class A Misdemeanor.
2) A person who intentionally violates Wis. Stats. § 951.02 resulting in mutilation, disfigurement or death is guilty of a Class E Felony.
3) A person who negligently violates Wis. Stats. § 951.02 resulting in mutilation, disfigurement or death is guilty of a Class A Misdemeanor.

- "Mutilation" or "disfigurement" is anything that causes permanent scarring, missing parts or pieces, etc… or anything that causes a permanent change in the animal.
- Veterinarians will testify that untreated necrotic wounds will fill in with scar tissue and result in *disfigurement*.
- Veterinarians may testify that the animal will not recover from its injuries, and this is to be considered *death*.

EXAMPLES of Wis. Stats. § 951.02 violations:

- Beating an animal with feet, fists or objects and producing an injury;
- An animal contained in a vehicle in hot weather;
- An animal in the trunk of a car;
- Any animal in poor physical condition that shows evidence of starvation, dehydration or failure to provide medical care for injuries or medical conditions (e.g. wounds, mange, mites, skin conditions, etc…);
- Embedded collar cases.

Wis. Stats. § 951.13. *Providing proper food and drink to confined animals*.

This statute requires that animals must be provided with proper food and water.

Wis. Stats. § 951.14. *Providing proper shelter*.

This statute requires that confined animals be provided with proper housing. If housed indoors, ventilation by natural or mechanical means is required. If housed outdoors, shelter from sunlight when temperatures are high is required. In cold weather, dogs must be provided with some sort of doghouse that is neither too big nor too small.

Penalties: A person who intentionally or negligently violates § 951.13 or § 951.14 is guilty of a Class A Misdemeanor.

Examples of Wis. Stats. § 951.13 and Wis. Stats. § 951.14 violations:

- The absence of available food and water to an animal in a house or backyard;
- A dog tied up in a back yard with no shelter from the sun or cold;
- Poor sanitary conditions.

FOR FURTHER INFORMATION on ANIMAL ABUSE and DOMESTIC VIOLENCE, contact your local Humane Society or see http://www.vachss.com/help_text/animal_dv.html.

(Prepared by Attorney Rebecca Kiefer and ADA Paul Dedinsky, with contributions from Attorney Marcella DePeters and Jill DeGrave of the Wisconsin Humane Society. Wisconsin Domestic Violence Prosecution Manual, 2004.)

40. Police Investigation of Domestic Violence

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1. Goals of the Police Agency

1. HOMICIDE PREVENTION

Recognize that effective investigation and prosecution of Domestic Violence seeks to prevent further violent crime, whether it be sexual assault prevention, child abuse prevention, suicide prevention, or drug prevention and gang prevention.

If police repeatedly respond to the same households, then the children in the residence have already been exposed to abuse. The situation has a great potential to become increasingly dangerous over time. Remember that the experts tell us that violence escalates over time.

The concept of "homicide prevention" is not new. A 1973 FBI study showed 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), as reported in Ellis, Jane, "Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue," *The Journal of Criminal Law and Criminology*, Northwestern University School of Law, Vol. 75, no. 1, p. 57, Spring 1984.

If we seek to end the cycle of abuse early, then children will receive less exposure to violence at home. Remember some of the statistics from the Bail section of this manual, namely, that children are 1000 times more likely to grow up and use violence against a child or spouse when exposed to violence in the home. Plus, we now know that 85% of incarcerated persons nationwide were exposed to violence at home. If children have safe, caring and nurturing environments, then theoretically, it stands to reason that children will be less apt to seek out a life of crime on gang-ridden streets and drug-infested neighborhoods.

2. TRAINING STRATEGY

…to move from a victim-focused method of investigation and prosecution to an evidenced-based or victimless method of investigation and prosecution. We need to stop relying solely upon victims of abuse and direct more attention towards the offenders and the collection of evidence.

3. THE QUESTION

Police Officers and Prosecutors need to ask the same basic QUESTION:

"How can I INVESTIGATE and PROSECUTE this case *without* the participation of the VICTIM? …anticipating that the victim will later RECANT, MINIMIZE, DISAPPEAR or simply FAIL to APPEAR to testify at trial."

4. INVESTIGATION

Prepare well-written reports. If police officers conduct truthful, accurate and thorough investigations in the early stages of an abusive relationship, then abusers can be held accountable and ordered to attend counseling for alcohol, drugs and abusive behavior.

5. VICTIM SAFETY

- **Information.** Give the Victim your name as the responding officer; connect them to the local DV hotline; give numbers for area shelters, counseling opportunities, the D.A.'s office and the legal clinics to help victims obtain restraining orders/injunctions.
- **Support** the Victim to leave an abusive relationship… never criticize or judge a Victim for staying in a relationship. The Victim may be trapped in an abusive relationship for a multitude of reasons.
- **Tell victim:** "Domestic Violence is a Crime!" "You do not deserve to be treated that way!" Remember that many Victims have been repeatedly abused and may suffer from low self-esteem.
- **Help is available.** Tell the Victim that support is available… and continue to give supportive messages. Remember that many Victims may be in a state of *learned helplessness*.
- **Legal resources**. Tell the Victim about obtaining restraining orders and injunctions.
- **Survival.** Ensure that the Victim will be safe at home. Remember that Victims will typically know how to survive… but you can still help.

(Thanks to Gwinn, Casey, "Prosecuting Domestic Violence Cases without the Victim's Participation or Evidence-Based Prosecution", National College of District Attorneys conference (2001)).

2. Police Department Policies, Procedures and Guidelines

According to Wis. Stats. § 968.075, all police agencies must develop, adopt and implement their own set of written policies for the investigation of Domestic Violence offenses, in keeping with the mandatory arrest and primary physical aggressor dictates of Wis. Stats. § 968.075(3)(a)(1)(a-d). All arrest decisions are to occur irrespective of the victim's consent to prosecution or lack of visible injury.

Police agencies must abide by state law. A police policy that mirrors the prosecution policy will encourage cooperation and collaboration. At a minimum, make sure that police agencies incorporate these basic provisions:

- A statement that the official law enforcement response to DV cases is strict enforcement of the criminal laws, protection of victims, and an uncompromising attitude that violent or otherwise criminal behavior is neither excused nor tolerated.
- Enunciation of the goals of deterring future DV acts by holding the physical aggressor accountable for his or her actions taken against the laws of the State of Wisconsin and

the protection of the rights of victims, children and all citizens to be free from physical abuse or injury.

- Mandatory warrantless arrest supported by probable cause ("reasonable grounds" language from Wis. Stats. § 968.075) for all DV cases.
- The vigorous investigation of DV offenses, emphasizing prevention through increased public awareness, education, and early intervention.
- Investigations must be based upon evidence, and not simply upon the willingness of the victim to testify or upon the relationship of the parties involved in the incident.
- Thorough, fair, impartial investigations to be conducted without regard to race, religion, gender or sexual preference of the parties.
- Coordination of efforts with those of the surrounding community including the justice system, community-based organizations, shelters, health care providers, probation and parole, churches and schools.
- Whether the victim of abuse is a child, an adult, an elderly person or other vulnerable person, investigations must occur from an "Evidenced-Based" or "Victimless" philosophy of law enforcement. That means that officers should always be seeking corroborative evidence to support a prosecution.
- In keeping with the dual goals of **victim safety** and **offender accountability**, officers must investigate matters of Family Violence in anticipation that victims will recant, minimize, refuse to testify, or simply disappear. In doing so, officers shall gather necessary evidence so that, should the matter be prosecuted, every effort has been made to proceed without the participation of the victim.

Never does a police officer or prosecutor want to dissuade a victim from participation in the prosecution of any given matter. Instead, we want to invite and encourage victim participation. However, the time has come to recognize the inherent difficulties for so many victims of Family Violence – children, vulnerable adults and elderly persons – who live in fear of retaliation from their abusers.

3. Training of Police Officers: Definitions

CRIMINAL DOMESTIC ABUSE

Per Wis. Stats. § 968.075(1), "Domestic abuse" means any of the following:

1) Intentional infliction of physical pain, physical injury or illness.

   a) Some examples of PHYSICAL VIOLENCE include:

Hitting	Strangling	Pushing	Slapping (with open hand)	Grabbing
Kicking	Beating	Shoving	Hitting with closed fist(s)	Forcing Sex
Biting	Pulling Hair	Burning	Use of Weapon / object	Suffocating

b) Some examples of PHYSICAL PAIN, PHYSICAL INJURY OR ILLNESS include:

Bruises	Abrasions	Lacerations	Minor Cuts	Complaint of Pain
Fractures	Redness	Swelling	Broken Nose	Loss/fracture of tooth
Burn	Concussion	Stitches	Loss of Consciousness, Sight or Hearing	

2) Intentional impairment of physical condition.

3) Sexual assault (1st, 2nd and 3rd degree); or

4) 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. Stats. § 939.32(1) does apply to all felony offenses as well as misdemeanor Battery offenses included in Wis. Stats. §§ 940.19 & 940.195.

NON-CRIMINAL DOMESTIC ABUSE

While not defined in Wis. Stats. § 968.075, police officers should be aware of the following:

1) **Financial Abuse.** Some examples include refusing to give someone enough money to live, taking all of the money from a joint bank account, or refusing to support a child in common.

2) **Emotional and Verbal Abuse.** Some examples include name-calling, telling lies, demeaning another person privately and/or publicly, as well as manipulation.

3) **Isolation from Support Network.** Some examples include forcing someone to stop talking to friends and relatives, cutting off means to transportation, hiding car keys, or disabling telephones to prevent contact with friends and family.

4) **Power and Control.** Some examples include threatening to take children away, generally using kids as pawns, threatening unwarranted legal or social service interventions, breaking things valued by the victim, taking away items that have sentimental value to the victim, threats of suicide, threats of homicide (criminal), verbal threats, and even intimidating looks and body language.

   Keep in mind that people from various cultures, sexual orientations and age groups may experience different types of domestic abuse, specific to their own milieu.

(Thanks to Captain Pete Helein and the Appleton Police Department for their contributions. For an excellent example of a Wisconsin police department policy and sample domestic violence police reports reflecting mastery of the above stated concepts, please contact the Appleton Police Department.)

4. Criminal Domestic Violence Offenses

A. Officers must determine if probable cause exists that a battery [as defined by Wis. Stats. §§ 940.19 and 939.22(4) & (14)] has occurred and that the battery was not in self-defense (as defined by Wis. Stats. § 939.48).

B. Officers must determine if probable cause exists that a Sexual Assault (1st, 2nd, or 3rd …or even 4th degree) has occurred as defined in Wis. Stats. § 940.225(1), (2), (3), or (4). Marriage to the victim does **NOT** prevent arrest or prosecution.

C. Officers must 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-Threat or Disturbance, § 947.01; Threat to Injure, § 943.30; Intimidation of Witnesses, §§ 940.42, 940.43 or Intimidation of Victims, §§ 940.44, 940.45; Endangering Safety by Use of a Dangerous Weapon, § 941.20, etc.).

   1. Threats alone, without the victim reasonably fearing for his or her safety, do not necessarily constitute a violation of the domestic abuse law. See Wis. Stats. § 968.075(1)(a)4., referencing the fact that the definition of domestic abuse includes a "physical act that may cause the other person reasonably to fear imminent engagement" in any of the other violent acts referenced in the statute. As non-domestic violence cases not subject to mandatory arrest, these suspects may still be arrested, within the discretion of the police agency.

   2. Complaints such as burglary, theft, entry into locked vehicle, and many criminal damage to property incidents will not qualify as domestic abuse cases. Again, there must be evidence to indicate that these physical acts will reasonably lead the victim to fear imminent engagement in a battery or sexual assault. If this connection cannot be established, the incident may be handled as a non-domestic violence case. Again, should the case not fall within the purview of the definition of domestic abuse and the law of mandatory arrest, pursuant to Wis. Stats. § 968.075, the officer can still effectuate a discretionary arrest of the suspect.

D. Officers must determine if probable cause exists for violations of the 72-hour "No Contact Order" following an arrest for a DV offense, pursuant to Wis. Stats. § 968.075(5). Keep in mind the increased penalties for offenses committed during the 72 hours following an arrest for a previous DV incident, pursuant to Wis. Stats. § 939.621.

E. Officers must determine if probable cause exists that a person violated the terms of a domestic abuse TRO / Injunction, pursuant to Wis. Stats. § 813.12(7).

F. Probable cause for warrantless arrest.

   1. Probable cause to arrest 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.

2. There are two requirements for valid warrantless arrest when the offense is not committed in the officer's presence:
   a. There must be reasonable grounds to believe that a crime has been committed by the suspect; and,
   b. It is impractical to obtain a warrant under the circumstances.

      Note: The terms "reasonable grounds" and "probable cause" as used above are interchangeable.
3. Probable cause factors for most DV offenses may include, but are not limited to:
   a. Bodily harm or pain to victim. (Visible injury NOT required for arrest. Wis. Stats. § 939.22(4)).
   b. Sexual contact or sexual intercourse as defined in Wis. Stats. § 940.225(5).
   c. Statements of victim, including non-consent to the offense.
   d. Statements of family members, including children.
   e. Statements of friends or neighbors.
   f. Statements of suspect.
   g. Excited utterances (res gestae) of suspect or victim.
   h. Observations of the scene and victim.
   i. Abuse History: Knowledge of previous calls at same location or with the same parties.
   j. Prior Abuse: Knowledge of previous threats / offenses against the victim by the suspect.
   k. A valid temporary restraining order or injunction order served on the suspect.
   l. Physical evidence.

EXAMPLES of Potential Evidence at a Domestic Abuse Crime Scene:

- torn or ripped clothing;
- weapons used, including bats, knives, guns, blunt objects, furniture legs, etc.;
- blood-stained articles;
- disarray of residence, including the furniture and other items left by suspect;
- broken telephones and telephone wires;
- property damage, like phones, furniture, walls, windows, smashed dishes, etc.;
- blood splattered on walls, disarray of the residence;
- bodily damage such as hair pulled out or fingernails torn out.

5. Entry of Private Residence Without a Warrant: Exigent Circumstances

Exigent circumstances may provide an exception to the warrant requirement in DV investigations. In the case of *State v. Mielke*, 653 N.W.2d 316, 2002 WI App 251, 257 Wis.2d 876, 653 N.W.2d 316 (Ct. App. 2002), two sheriff deputies responded to a report that a suspect had struck a woman in their home. One of the sheriff deputies had 11 years of experience and responded previously to the same address for DV calls. Upon arrival, the victim came to the door and told police that nothing was wrong. Although no injuries were observed and the scene appeared to be calm, police observed the victim to be crying, shaking and cowering in a corner. The victim turned away from police into the residence and told them not to follow her. As the victim attempted to close the door, police prevented the door from being closed. The officer continued to talk to the victim. The suspect was seen, and ultimately, he granted police permission to enter the residence.

The *Mielke* trial court acknowledged that, while police had probable cause, there were not sufficient exigent circumstances to justify entering the residence. In *State v. Mielke*, 653 N.W.2d 316, 318-319, 2002 WI App 251, 257 Wis.2d 876, 880–881, 653 N.W.2d 316, 318–319 (Ct. App. 2002), the Wisconsin Court of Appeals reversed the trial court's decision, stating in *Mielke*:

> A warrantless search of a home is presumptively unreasonable under the Fourth Amendment. *State v. Richter,* 235 Wis.2d 524, 540, 612 N.W.2d 29, 36-37 (2000). An exception to the warrant requirement arises when the State can demonstrate 'both probable cause and exigent circumstances that overcome the individual's right to be free from government interference.' *State v. Hughes*, 233 Wis.2d 280, 607 N.W.2d 621 (2000).
>
> …[A]nalysis of whether the officers acted reasonably in entering the house without a warrant is measured against the 'totality of the circumstances.' *State v. Garrett*, 248 Wis.2d 61, 635 N.W.2d 615 (Ct. App. 2001). The test is objective: what a reasonable police officer would reasonably believe under the circumstances. There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a home: 1) hot pursuit of a suspect; 2) a threat to the safety of a suspect or others; 3) a risk that evidence will be destroyed; and 4) a likelihood that the suspect will flee. *See Richter*, 235 Wis.2d 524, 541, 612 N.W.2d 29, 37 (2000).

Because the officers in *Mielke* believed that the victim's safety was threatened, and a reasonably prudent person under the totality of circumstances would be warranted in reaching the same conclusion, the court held that the entry into the residence was justified. Where competing inferences exist from the facts, the officer may reasonably conclude under the totality of the circumstances the inference that exigent circumstances existed to merit their entry into the home. *See Mielke*, 653 N.W.2d 316, 319, 2002 WI App 251, 257 Wis.2d 876, 881, 653 N.W.2d 316, 319 (Ct. App. 2002), *citing State v. Tompkins*, 144 Wis.2d 116, 124–125, 423 N.W.2d 823 (1988).

6. Mandatory Arrest for DV Offenses Required by State Law

(Please refer to the Mandatory Arrest / Primary Physical Aggressor Chapter of this manual.)

If probable cause exists that a DV offense occurred as determined by the totality of the circumstances, **the suspect shall be summarily arrested and taken into custody for a State charge even if the victim declines to prosecute**.

Adult persons (17 years of age or older) are subject to mandatory arrest for domestic violence offenses when committed against the following: 1) Spouse; 2) Former spouse; 3) An adult (18 years of age or older) or adult relative with whom the person resides or formerly resided; 4) An adult with whom the person has created a child.

The lack of visible injury or the victim's unwillingness to prosecute, by themselves, are not legal grounds to refuse to make the mandatory arrest. If probable cause cannot be established, the officer should not arrest. Contacting a supervisor for advice is the best practice.

7. Determination of Primary Physical Aggressor

(Please refer to the Mandatory Arrest / Primary Physical Aggressor Chapter of this manual.)

When the officer has probable cause to believe that both parties have committed DV offenses against each other, the officer does NOT have to arrest both persons, but should arrest the person whom the officer believes to be the primary physical aggressor. Note that "primary" does not necessarily mean the "first" person to engage in physical contact. Rather, "primary" should be considered the "predominant" physical aggressor.

In determining who is the primary or predominant physical aggressor, the officer should consider the intent of the State to protect DV victims, the relative degree of injury or fear inflicted on the persons involved and any DV history between these persons, if that history can reasonably be ascertained by the officer. See Wis. Stats. § 968.075(3)(a) 1 b.

Some additional factors for consideration in determining Primary Physical Aggressor may include some of the following:

- Age, Height and Weight of the parties, as well as strength and skill of each party.
- Criminal History, including a determination of whether one party is on probation/parole.
- Seriousness of injuries, including investigation of Offensive vs. Defensive wounds.
- Motive to lie and Credibility of each party.

- Corroboration of statements.
- Presence of fear or other emotions.
- Use of alcohol and/or illegal or prescription drugs.
- Identity of 911 reporting party, as well as the timing of the cross-complaint.
- Existing Temporary Restraining Order, Injunction, No Contact Order.
- Admissions or Consciousness of Guilt, as well as the detail of each statement.
- Presence of Power and Controlling Behavior.
- Considerations of legal defenses: self-defense, defense of others/property, ejection of trespasser, mistake, accident, etc.

If the suspect is not on the scene and cannot readily be located, the investigating officer should apply for a State warrant. It is required that a good faith effort be made to locate the suspect. Efforts to locate the suspect must be documented.

8. The 28-Day Exception to Mandatory Arrest

If the officer's "probable cause to believe" is based on a report of an alleged domestic abuse incident, the officer is required to make an arrest only if the report is received within 28 days after the day the incident is alleged to have occurred (excluding the date of the incident).

In addition, either or both of the following circumstances must be present:

a. The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely, and/or

b. There is evidence of physical injury to the alleged victim.

If an officer is acting on the basis of a domestic abuse report that is received more than 28 days after the alleged incident occurred, the officer is NOT obligated to make an arrest.

9. Police Officer Immunity: Wis. Stats. § 968.075(6m)

A law enforcement officer is immune from civil and criminal liability arising out of a decision by the officer to arrest or not arrest an alleged offender, providing the decision was made in a good faith effort to comply with the domestic abuse arrest statute. Remember that this is a state statute, not a federal statute.

10. Notification to Victim

Pursuant to Wis. Stats. § 968.075(5)(d), if an arrest has been made for a DV offense, the arresting officer(s) must inform the victim of the following while outside the presence of the arrestee:

A. During the 72 hours immediately following the arrest for a DV offense, the arrestee shall avoid the residence of the victim and any premises temporarily occupied by the victim, and avoid contacting or causing any person, other than attorneys for the arrested person and victim, to contact the victim. Law enforcement officers may contact the victim during this time period if the need arises.

B. If the arrestee violates this 72 hour No-Contact provision, he/she is subject to an immediate, mandatory arrest.

C. Any subsequent DV offense committed by the arrestee within the 72 hours following the original arrest will elevate the later offense from a misdemeanor to a felony (Wis. Stats. § 939.621).

D. The victim may waive the 72 hour No-Contact provision at any time during that period by signing a written form in person. Sufficient identification must be provided by the victim when requesting the waiver.

11. First Aid

If necessary, the officer must render first aid to the victim. Document the assistance given. If the victim requires emergency medical treatment, the investigating officer must request the appropriate medical conveyance. Additionally, police officers should document all names of medical personnel. The medical personnel – whether paramedics, nurses, or physicians – may receive "Excited Utterance" statements or even "Statements Made for the Purposes of Medical Diagnosis or Treatment" from a victim or witness.

12. Safety Planning

While at the scene, the police officer(s) must ensure that the victim or children will be safe. If a local 24-hour DV hotline or crisis response agency exists in your community, the investigating officer should advise the victim. This is done to provide the victim with immediate support and services, emergency shelter, transportation, childcare, assistance with prosecution, etc. The officer must also obtain the phone number(s) where the victim may be reached so he/she can also be notified if the suspect is released on bail.

Pursuant to Wis. Stats. § 895.67, employees and agents of a domestic abuse service provider (safehouses, advocates, counselors, and hotlines) are prohibited from intentionally disclosing the location of any services recipient to anyone, unless the recipient has given informed, written consent to do so. A "service recipient" includes any person who receives or has received domestic abuse services from a domestic abuse services organization.

13. Firearms

Police Agencies need to develop policies and procedures relating to the seizure of firearms, perhaps congruent with current policies existing for "Felon in Possession of Firearm" cases. All firearms not seized as evidence might have to be seized according to the Federal Gun Control Act or laws pertaining to Domestic Abuse Injunctions. Convicted felons in possession of any firearm must be summarily arrested for violation of Wis. Stats. § 941.29. Police officers should check for prior convictions while still at the scene. See the sections in this manual regarding "Federal Firearm Prohibitions" and "TRO / Injunctions" for further information.

14. Domestic Abuse Restraining Orders / Injunctions

Prior to making an arrest for a Temporary Restraining Order (14 days with the possibility of one 14 day extension) or final Domestic Abuse Injunction (up to 4 years), officers should ensure that the Temporary Restraining Order or Injunction has not expired. Also, police officers should verify that the petitioner has not given consent in writing for the respondent to contact him or her.

Keep in mind that the Temporary Restraining Order must be served on the defendant. Final Domestic Abuse Injunctions now have a provision for "constructive knowledge". That means that as long as the respondent/suspect was served with the Temporary Restraining Order and received notice of the Final Injunction hearing, the respondent/suspect is assumed to have received constructive notice of the existence of the Injunction, whether or not the respondent actually is served with the Final Injunction.

EXAMPLE:

Suppose a Respondent was served with a Domestic Abuse TRO and failed to attend the Injunction Hearing. The Domestic Abuse Injunction is granted after default judgment due to the Respondent's failure to appear.

The Petitioner cannot find the Respondent. The Domestic Abuse Injunction is never served upon the Respondent.

The Respondent then returns to Wisconsin months later. The Respondent has contact with the Petitioner in violation of the Injunction.

Police respond. The Respondent tells the cops: "I didn't know the Injunction was in effect. I was never served with the Final Injunction."

Remember that while the Respondent was not served with the Final Injunction, Respondent was served with the Temporary Restraining Order. Because the Respondent received notice of the Final Injunction Hearing, he is presumed to possess "constructive knowledge" that the Domestic Abuse Injunction was granted, based upon a default judgment for Respondent's failure to appear.

The police officer properly makes a mandatory arrest of the Respondent.

15. Temporary Restraining Order not Served

If a Temporary Restraining Order (up to 14 days) has not been served on the respondent/suspect, the officer must advise the respondent/suspect of its existence and that he/she is to have no contact with the victim by any means. The officer should then take the following steps:

1. The officer should obtain a copy of the TRO from the victim and serve it upon the respondent. The officer should endorse her/his rank, signature (legible), payroll number, district and shift, date and time of service and serve that copy on the suspect. The officer must document in police reports with specificity the details of service of the TRO.
2. The officer must make a similar endorsement of service on the victim's remaining copy and notify the sheriff's department or designated repository that service has been effectuated.
3. If the suspect returns to the scene, contacts the victim, or violates other terms of the order after service has been effectuated, the suspect is subject to a mandatory arrest.

16. Mandatory Arrest for DV and Harassment Restraining Orders Required

If the officer determines that a Domestic Abuse or Harassment Restraining Order / Injunction is in effect and there is probable cause to believe that the suspect violated any part of the court order, the officer shall arrest the suspect and take him / her into custody. The suspect may be prohibited from contacting the victim "at work, school, at public places or by phone or in writing." Contact may also be prohibited at the victim's residence and/ or any residence temporarily occupied by the victim.

The arrest must be made even if the victim permitted the suspect to return contrary to the Injunction or Temporary Restraining Order. No private person can authorize the violation of a court order – including the victim, unless it accords with the provisions of the order itself. Wis. Stats. §§ 813.12(7) & 813.125(6).

If the suspect violates any other criminal laws in addition to the court order, he/ she must also be charged with those additional offenses (e.g. battery, criminal trespass to dwelling, harassment, criminal damage, intimidation of a victim or witness, etc.).

17. Effective Police Reports

All the elements of each offense must be contained in the police reports, including the nature of the "physical pain or injury" or sexual assault or contact suffered by the victim. When taken into custody and questioned, the suspect must be advised of his/her Miranda rights, and all statements must be detailed.

The victim's phone number and address must be clearly marked, together with additional addresses and phone numbers. A detailed account of the offense, including all the elements of each charge, must be included with the following:

1. NATURE OF DISPATCH

How the call originated (e.g. victim, neighbor, relative, etc.) and the time and nature of the dispatch (e.g. family trouble, battery, cutting, etc.). Include names of all officers who responded to the scene as well as the address.

2. INITIAL OBSERVATIONS OF SCENE

Officer's observations of the scene and the demeanor of the parties shall be recorded. E.g. furniture overturned, broken glass, parties loud or abusive in your presence, etc.

3. INITIAL OBSERVATIONS OF THE PARTIES

Officers' observations of the demeanor of the parties such as:

- Parties loud or abusive in your presence;
- Observations of any injuries upon arrival to scene;
- Physical appearance of the parties (disheveled, messy or disturbed hair, swollen or red eyes, blood, crying, catching breath or heavy breathing, clothes torn, etc.);
- Emotional descriptions of parties upon arrival at scene (angry, upset, hysterical, excited, sad, scared, lonely, embarrassed, fearful, afraid, calm, nervous, sobbing, shaking, threatening, etc.);
- Description of voice tone and inflection of parties.

4. STATEMENTS OF VICTIM, SUSPECT AND ALL WITNESSES, INCLUDING CHILDREN

- Separate paragraphs for the detailed statements of the victim, witnesses, and the suspect, if available. Care should be taken to interview the victim, witnesses and suspect **SEPARATELY**, obtaining oral and written admissions and denials.
- List names, addresses, phone numbers and dates of birth for ALL witnesses and potential witnesses present.
- Record all "excited utterances" of victims and witnesses.
- Record all "present sense impressions" of victims and witnesses. Note that a victim's statement to a 911 dispatcher, friend, relative and/or neighbor immediately after the incident may be admissible in court as a spontaneous declaration. Statements such as "I'm in a lot of pain… my stomach hurts" or "I'm afraid he's going to kill me" may later be admissible as a declaration of then existing mental or emotional state.
- Statements made for the purposes of medical diagnosis and treatment may also be admissible at court, so include the names of all witnesses who talked to the victim, either paramedic personnel or hospital personnel.
- Statements by the suspect before and after Miranda must be recorded. Res Gestae statements made by defendants during transport must be recorded as well.

5. CHILDREN

Identify and interview all children who were present to determine if someone has physically or emotionally harmed them. Special care should be taken with each child's feelings. Even if the child is not a direct victim of violence, officers shall include the name, age, and school of attendance for each child at the residence. The school can be helpful later, especially in situations where a victim may have moved his or her residence. Sometimes the school can serve as the conduit for locating that parent. Should

an officer determine that a child has been a victim of physical, sexual or serious emotional abuse (as defined in Wis. Stats § 48.981), the officer shall immediately take special precautions.

6. STATE OF INTOXICATION

Indicate if one or both parties had been drinking and/or using illegal drugs and your judgment of the level to which you believed that party to be under the influence of alcohol or an illegal drug. In Drunk Driving training, officers learn how best to describe the physical signs and symptoms of intoxication in their police reports. That same training can be applied here to describe the state of intoxication of one or both parties in a DV investigation.

7. ABUSE HISTORY

Indicate if there is a history of abuse, or if the police had been there before.

8. HOW PAIN AND/OR INJURY INFLICTED

EXAMPLES include:

- Slapped / open hand;
- Struck or Punched / closed fist;
- Pushed / Shoved;
- Threw objects (like TV, lampshade, table, chair(s), books, utensils, etc.);
- Pulled hair or Tore out sections of hair;
- Banged head (against wall, cabinet, dresser, refrigerator, etc.);
- Scratched – Where on body? Where on scene? How? When during incident?
- Strangled / Attempted to Strangle or Choke / Attempted to Suffocate;
- Bit with teeth / mouth – Any communicable diseases?;
- Kicked or Kneed or Pinched.
- Burned – by chemical like bleach or by hot grease or other?
- Cut with knife or other sharp object;
- Sexual Abuse;
- With a WEAPON or object fashioned as weapon– Type? How? Where? When?
- Restraining – Handcuffing, Tying down, Locking in closet or room, etc.

9. INJURY / INJURIES SUFFERED BY THE PARTIES

EXAMPLES include:

- None.
- Suffered Pain – describe location(s) where pain inflicted.
- Redness and/or Blood.
- Bruise(s). Note that many bruises / marks will first appear 24-48 hours after incident.
- Minor cut(s), Scratches and/or Abrasions.
- Laceration(s) and/or Broken Skin.
- Bite Mark(s).
- Swelling, Hemorrhaging and/or Bumps.
- Mark(s) and/or Scarring.
- Burn(s) and/or Welts.
- Fractures and/or Sprains.
- Broken Nose.
- Strangle wounds such as finger marks on neck / throat. Note that many strangulation wounds will be located in the interior anatomy of the neck and throat area.
- Concussions, Temporary Loss of Visual / Hearing, Dizziness (Balance).
- Signs of confinement such as rope burns or bindings.
- Internal Damage.

10. MEDICAL TREATMENT

Did the victim need hospitalization or medical treatment? Where treated? List names and telephone numbers of paramedics or emergency responders who may be potential witnesses. At hospital or clinic, list names of nurses, social workers treating physicians, etc. If any evidence is collected by medical personnel such as photographs taken, list that information in the incident report. Remember that "Statements Made for the Purposes of Medical Diagnosis or Treatment" by a victim may be useful at trial later.

11. PHOTOGRAPHS AND CRIME SCENE CONDITION

- Photograph the disarray of furniture, broken windows, damaged walls and other property items on scene. Ideally, evidence such as damaged property, broken furniture, broken dishes, broken telephones, torn and damaged telephone cords and

wires, and smashed dishes should be photographed on scene and then impounded and inventoried.

- Photograph the injuries of the victim whenever there is visible evidence of abuse or injury.
- Photograph and collect Physical Evidence such as blood splattered on walls, hair pulled out, fingernails torn out, etc.
- Collect, impound and inventory any item used as a weapon after photographing at crime scene.
- Photograph, collect and inventory 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.
- Photograph the suspect. Picture will establish identity. Picture may thwart a suspect's claim of self-defense. Note that a suspect's appearance on scene may look different than his/her appearance at trial six months 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."

12. DISORDERLY CONDUCT / UNRULY CONDUCT / THREATENING BEHAVIOR

Were any threats made in the presence of the officers? Describe in detail all threats (violent or otherwise), loud yelling / screaming, and verbal abuse. Document all combative behavior. Include all statements made by the suspect.

Remember Plea Negotiations!! Defense attorneys will characterize their client in the best light possible during plea negotiations. It will be difficult for the defense attorney to argue the "good" character of a defendant who directed a verbal assault of profane threats against a police officer. The information will also be relevant to a Sentencing Hearing, where the judge must consider the character of the defendant.

13. ADDITIONAL INVESTIGATIVE TOOLS AND IDEAS

- For suspects not on scene, instruct the victim of abuse to give you a photograph of the suspect who is responsible for the violence or abuse (even a wedding photo will suffice). This investigative work will help to establish IDENTITY in court at a later date.
- Tell the victim: "Give me the letters and cards that the suspect has given you after he has abused you in the past." Put these items on inventory.
- Ask victims for any "house rules" written by abusers. Obtain and inventory.
- Ask victims for any "victim diary" kept by the victim. Obtain and inventory.

- Well-drawn Diagrams of the Scene (does not need to be drawn to scale), can be useful during trial cross-examination of a recanting victim who previously marked on a police diagram where in the residence she was assaulted or where she sustained certain injuries on her body.

14. WEAPONS

Were any weapons used or threatened to be used? If yes, a summary arrest is required if the suspect can be readily located.

15. "NO CONTACT ORDERS," TEMPORARY RESTRAINING ORDERS / DOMESTIC ABUSE INJUNCTIONS

State whether or not a TRO, Injunction, "No Contact Order", or 72 hour No Contact Order is in effect. If yes, a summary arrest is required by State law if the suspect can be readily located. (Please see the NCO / TRO / Injunction chart in the TRO / Injunction Chapter of this manual for more information.)

16. WHEN THE REPORT CONCERNS A POLICE OFFICER AS THE ABUSER

If the report of abuse involves a law enforcement officer as the alleged abuser, it is advisable that the investigation and report writing be conducted by supervisors only or by referral to other agencies. Only the most experienced advocates should work with victims of abusers who are law enforcement officers. Because other law enforcement officers (perhaps close associates of the defendant) could be responding to future calls and conducting future investigations, a greater potential danger to these victims may exist.

18. Elder Abuse

Wis. Stats. § 46.90 – Elder Abuse Reporting System, defines elder abuse as:

> "willful infliction on an elder person of physical pain or injury or unreasonable confinement to a person who is age 60 or older or who is subject to the infirmities of aging."

Note that Wisconsin identifies "Elder Abuse" by both age and/or vulnerability of the person.

Elder Abuse can be **acts**, or **failures to act** by one required to act, which cause harm to an elder, frail or vulnerable adult. Note that this definition excludes self-neglect, which can be and is often categorized as elder abuse.

Elder Abuse includes:

- Physical, Sexual, Emotional & Psychological Abuse, which may or may not be criminal;
- Neglect or Abandonment by a third party (either domestic or institutional);
- Financial Exploitation.

Risk Factors for Elder Abuse include:

- Level of dependency of the elderly victim on the abuser;
- Vulnerability level of elder, such as frailty, mental impairment or physical disability;
- Social isolation of the elderly person, especially for elderly persons who live alone;
- History of elder abuse and failure to report abuse due to fear of retaliation;
- Fear of hospitalization or institutionalization and removal from home;
- Inexperience in handling financial matters;
- History of substance abuse or mental pathology in either the elderly person or abuser.

PHILOSOPHY FOR ELDER ABUSE INVESTIGATIONS

All investigations must include Evidence Collection and Case Development with the assumption that the Elderly Victims, like Domestic Abuse Victims, will later recant, minimize, deny or fail to cooperate with the prosecution of the case, often to protect the abuser.

ELDER ABUSE INVESTIGATION SIGNS / FACTORS FOR CONSIDERATION

1. **Physical**

   Bruises, Welts, Lacerations, Broken Bones, Signs of Confinement such as rope burns and bindings, Hemorrhaging, Repeated Injuries and other obvious signs of physical abuse.

2. **Neglect**

   Withholding of medications; Over or Under medicating; Dehydration; Malnutrition; Weight loss; Bedsores & Pressure sores; Injuries and medical problems untreated; Soiled linens / clothing and general uncleanliness; Changing Physicians frequently and repeatedly; Frequent need for emergency care; Absence of basic necessities such as food, water, heat and needed appliances; Absence of needed dentures, hearing aids or glasses; Escape or walk away from the facility; and General Failure to Thrive conditions.

3. **Sexual**

   Venereal Disease(s), Bleeding in Vaginal area, Infections around genitalia.

4. **Emotional**

   Mistrust of people, Intense Fear reactions generally to people, Sleep disturbances, Nightmares, Extreme reactions to bathing or other general care, Phobic reactions, Self destructive/Suicidal behaviors, Aggressiveness, Coded disclosures due to fear of retaliation, etc.

DYNAMICS OF ELDER / CAREGIVER RELATIONSHIPS

Investigating Officer should exhibit a basic understanding of typical defenses to elder abuse, including the following:

- Elder refuses to comply and is difficult to manage;
- Caregiver stress;
- Caregiver does not know or understand how to care for elder;
- Physical abuse due to fall, mistake; accident, medication, or tendency to "bruise easily";
- Blaming a different person by claiming little or no responsibility for care of elder;
- Self-defense (physical) or Consent (sexual).

POLICE RESPONSIBILITIES

Investigative duties may entail the following:

1. **Statements**

   Interviews of victim, including all spontaneous statements or dying declarations of the victim; Attempted interview of possible suspects; Interview of all non-suspect family members; Interview neighbors; Interview of any hospital visitors.

2. **911 Call Review**

3. **Crime Scene and Evidence Collection**

   Locate and visit crime scene; Photograph pertinent locations of crime scene; Locate and preserve any blood and/or urine samples for possible crime lab testing for illegal or prescription drug analysis; Document all prescription medications at crime scene (list with specificity the number of pills ordered and remaining in each vial).

4. **Photograph**

   Photograph all injuries and areas where there is a complaint of pain. Follow-up should obtain additional photos over several days. Documentation of all areas of body with a "body map" or biological outline of the human body.

5. **History of Abuse**

   Prior police contact; Determine the existence of past contacts or referrals with the Department on Aging or other social service agencies; Note information (possibly legal documentation) concerning past court involvement or proceedings such as a Guardianship Action.

6. **History of Treatment**

   Investigate past medical records, including paramedic run sheets, nursing station notes, emergency room logs, x-rays, and all lab results; Identify a list of all medications, including each physician's name, dosage and date of prescription; List each medical service provider and physician that has treated elder over the last several years, including a list of medical professionals who can bear witness to the elder's level of functioning; Maintain current contact with treating hospital staff to see if elder's memory has improved due to improved care, nourishment and medical treatment.

(Prepared by ADA Paul Dedinsky. Thanks to the many contributors to this section, including the Milwaukee Police Department's Standard Operating Procedures, the West Allis Police Department SOP and the Appleton Police Department SOP. Also, thanks for the many ideas and contributions from the National College of District Attorneys, including writings from San Diego City Attorney Casey Gwinn for police investigations and Attorney Candace Heisler for her insights on Elder Abuse. Much of the information included here was based upon their helpful materials and suggestions. Thanks also to Tracy Bahm, Senior Attorney, VAWA Unit, APRI for her article entitled "DV 101.")

CHECKLIST: DV Arrest / Incident POLICE REPORT

1. TIMES (Times of Incident, Police Arrival, Victim's Statement.)
2. PARTIES PRESENT at scene, including CHILDREN. Note with particularity whether children present, not present, witnessed or involved.
3. EMOTIONAL STATE (describe) Victim / Suspect.
4. PHYSICAL STATE: Describe Injury to Victim; Describe Injury to Suspect.
5. Obtain NON-CONSENT statement from victim, if appropriate.
6. Describe SCENE.
7. Relationship of Victim / Suspect, including HISTORY. Where have parties lived the past 10 years?
8. PICTURES taken of victim/suspect and conditions of home.
9. EVIDENCE collected: phone? torn clothing? weapons? etc.
10. MEDICAL attention (where?); Obtain MEDICAL RELEASE.
11. Note when any of the following are present: TRO, Injunction, Probation or Parole Supervision, victim / suspect Intoxication level.
12. Include any Statements / Excited Utterances from parties.
13. WITNESSES: Names, Addresses, Phone Numbers, Workplace Location.
14. How can you reach victim during next 24 hours? Name, Address, Phone of person who knows how to reach victim.
15. Notes for NARRATIVE: Victim Statement; Suspect Statement; Witness Statement; Probable Cause; Abuse History; Risk factors?
16. Make request to preserve 911 tape of emergency call, if one exists.

Based on the Domestic Abuse Arrest/Incident Report Writing Checklist, Duluth Police Department

Mandatory Arrest Checklist: Wis. Stats. § 968.075

Wis. Stats.

§ 968.07 1) Is the suspect 17 years of age or older?

§ 968.075(l)(a) 2) Can the "relationship" between the victim and the adult suspect be described as one of the following?

- Spouse
- Former Spouse
- Adult with whom the person created a child
- Adult with whom the person resides or formerly resided with

§ 968.075(l)(a) 3) Can the suspect's actions be described as any of the following? [These actions are the legal definitions for domestic abuse under the mandatory arrest law.]

§ 968.075(l)(a)(1) – Intentional infliction of physical pain, physical injury or illness

§ 968.075(l)(a)(2) – Intentional impairment of physical condition

§ 968.075(l)(a)(3) – A violation of 940.225 (1), (2) or (3) (sexual assault statutes)

§ 968.075(l)(a)(4) – A physical act that may cause the other person to fear imminent engagement in conduct described by any of the above three statements

Does the investigating officer find the following items? If so, ARREST is MANDATORY:

§ 968.075(2)(1) 1) Does the investigating officer have reasonable grounds to believe that the person is committing or has committed domestic abuse (see definitions above)?

§ 968.075(2)(1) 2) Do the person's actions constitute the commission of a crime?

§ 968.075(2)(a)2 3) Are either or both of the following circumstances present?

§ 968.075(2)(a)2.a – The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely

§ 968.075(2)(a)2.b – There is evidence of physical injury to the alleged victim

§ 968.075(2)(b) 4) Was the domestic abuse reported to a law enforcement officer within 28 days of when the abuse occurred?

19. Additional Statutory Requirements Under the Mandatory Arrest Law

PRIMARY / PREDOMINANT PHYSICAL AGGRESSOR

§ 968.075 (3)(a)1.b.

When the officer has reasonable grounds to believe that spouses, former spouses, persons who currently or formerly resided together or those with a child in common are committing or have committed domestic abuse against each other, the officer does not have to arrest both parties but should arrest the person whom the officer believes to be the primary physical aggressor. In determining who this is, consider:

1) The intent of this section to protect victims of domestic violence;
2) The relative degree of injury or fear inflicted on the persons involved;
3) Any history of domestic abuse between these persons, if that history can be reasonably ascertained by the officer.

CONSENT OF VICTIM

§ 968.075(3)(a) l.c.

A law enforcement officer's decision 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 persons involved in the incident.

ABSENCE OF VISIBLE INJURY

§ 968.075(3)(a) l.d

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.

REPORT REQUIRED WHERE NO ARREST

§ 968.075(4)

If a law enforcement 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 Attorneys Office, in the County where the acts took place, as soon as investigation of the incident is completed.

CONTACT PROHIBITION

§ 968.075(5)(a)1

Unless there is a waiver under § 969.075(5)(c), during the 72 hours immediately following an arrest for a domestic abuse incident, the arrested person shall avoid the residence of the alleged victim of the domestic abuse incident and, if applicable, any premise temporarily occupied by the alleged victim, and avoid causing any person, other than law enforcement officers and attorneys for the arrested person and alleged victim, to contact the alleged victim. The law enforcement agency responsible for the arrest of a person for a domestic abuse incident shall notify the victim of the contact prohibition and the procedures for waiving the prohibition.

WAIVER OF CONTACT PROHIBITION

§ 968.075(5)3.c

The law enforcement agency shall have a waiver form available so that anytime during the 72 hour period following the arrest of a suspect for a domestic abuse incident, the alleged victim may sign a written waiver of the rights detailed in the contact prohibition.

RELEASE OF SUSPECT

§ 968.075(5)(b) 1

Unless there is a waiver under § 968.075(5)(c), a law enforcement officer or other person who releases a person arrested for a domestic abuse incident from custody less than 72 hours after the arrest shall inform the arrested person orally and in writing of the requirements under § 968.075(50(a)1, the consequences of violating the requirements and the provisions of § 939.621. The arrested person shall sign an acknowledgment on the written notice that he or she has received notice of, and understands the requirements, the consequences of violating the requirements and the provisions of § 939.621. If the arrested person refuses to sign the notice, he or she may not be released from custody.

OFFICER IMMUNITY

§ 968.075(6)(6m)

A law enforcement officer is 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 section § 968.075.

ASSESSING THE LIKELIHOOD OF CONTINUED VIOLENCE

In accordance with the Mandatory Arrest Law (Wis. Stats. § 968.075), officers should evaluate the **"likelihood"** of continued violence when determining whether an arrest is required. **Officers should consider the following questions:**

1. Does the suspect have a prior history of arrests for domestic abuse?
2. Has the suspect ever violated a restraining order?
3. Does the suspect have a prior history of assaultive behavior?
4. Has the suspect made statements that future abuse will occur?
5. Has the victim expressed fear that continued violence is likely if suspect is not arrested?

PRIMARY OR PREDOMINANT PHYSICAL AGGRESSOR

SELF-DEFENSE VS. DUAL ARREST

On occasion, officers will be assigned to investigate domestic incidents and discover that both parties involved have sustained injuries. The mandatory arrest law does not require that both parties be arrested in these situations. Instead, the mandatory arrest law requires that the investigating officer determine who is the "Primary" or "Predominant" Physical Aggressor. Considerations include:

- The intent of this section to protect victims of domestic violence;
- The relative degree of injury or fear inflicted on the persons involved;
- Any history of domestic abuse between these persons, if that history can be reasonably ascertained by the officer.

SELF-DEFENSE

In accordance with Wis. Stats. § 939.48(l), a person is privileged to threaten or intentionally use force against another person for the purpose of preventing or terminating what he/she reasonably believes to be an unlawful interference with his/her person by such other person.

§ 939.48(1)

The actor may only intentionally use such force or threat as he/she reasonably believes is necessary to prevent or terminate the interference.

§ 939.48(1)

The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless he/she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

§ 939.48(2)(a)

A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person to reasonably believe that he/she is in imminent danger of death or great bodily harm.

§ 939.48(2)(b)

The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his assailant.

§ 939.48(2)(c)

A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his assailant is not entitled to claim the privilege of self-defense.

§ 939.48(4)

A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which he/she is privileged to defend him/herself from real or apparent unlawful interference, provided that he/she reasonably believes the facts are such that the third person would be privileged to act in self-defense and that intervention is necessary for the protection of the third person.

(Section 19 of this Police Investigation Chapter was written by Captain Pete Helein, Appleton Police Department. Wisconsin Domestic Violence Prosecution Manual, 2004.)

20. Commonly Asked Questions about Wisconsin's Mandatory Arrest Law

1. **Does the Mandatory Arrest law create an additional crime called "domestic abuse"?**

   No. Mandatory Arrest laws do not create a new crime. Rather, the Mandatory Arrest laws contain a mandate requiring law enforcement officers to arrest a person under specified circumstances.

2. **Is the term "reasonable grounds" the same as "probable cause"?**

   Are the probable cause standards any different under the mandatory arrest law than in general?

   For all practical purposes, when interpreting Wis. Stats. § 968.075, "reasonable grounds" is synonymous with "probable cause." The standards and guidelines for evaluating probable cause in a Domestic Violence investigation are no different than for any other crime. See Wis. Stats. § 968.07 for further discussion and support.

3. **Does this statute change the standard constitutional rules regarding when, where and how an arrest can be made?**

   No, Mandatory Arrest laws do not alter any standard constitutional rules regarding arrest procedures.

4. **If the officer has reasonable grounds to believe that a domestic abuse crime occurred, does the officer therefore automatically have a "reasonable basis for believing that there is a <u>possibility</u> of continued violence" against the victim?**

   Yes. Based upon what is known about the repetitive cycle of domestic violence, it certainly is <u>possible</u> that continued domestic abuse against the alleged victim is likely. When the investigating officer is evaluating whether "continued violence" is likely, the officer should consider:

   - *Whether the suspect has committed prior acts of violence;*
   - *Any threats made by the suspect pertaining to future violence;*
   - *How the suspect committed the current domestic crime that is being investigated.*

5. **What is "evidence of physical injury"? Does it include pain where there are no visible injuries?**

   For the purpose of interpreting "physical injury" as used in Wis. Stats. § 968.075(2)(b)(2), evidence of physical injury includes some type of actual damage to the body of the victim (i.e., bruising, swelling, abrasion). This should not be confused with the definition of "bodily harm" when evaluating the probable cause necessary for the arrest of battery. "Bodily harm," under the elements of a battery, includes injury and/or pain.

6. Can an officer exercise discretion to not arrest in a mandatory arrest situation and instead write a "no-arrest report" under Wis. Stats. § 968.075 (4)?

No. If reasonable grounds exist to arrest, a law enforcement officer must effectuate an arrest. However, Wis. Stats. § 968.075(4) (no-arrest section) may best apply when the officer has made a reasonable attempt to locate the suspect but was unsuccessful. Other situations may include suspects that are incapacitated by alcohol or are mentally ill and are confined pursuant to 72-hour protective custody detentions.

7. Does failure to comply with the Mandatory Arrest law constitute "misconduct in public office" under Wis. Stats. § 946.12?

If an officer intentionally fails to carry out a mandatory duty such as mandatory arrest, the officer could face prosecution for a violation of misconduct in public office. That same officer may face civil liability penalties as well. However, in accordance with Wis. Stats. § 968.075(6m), an officer is 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 mandatory arrest law.

8. In a mandatory arrest situation, can the officer arrest and take the suspect into custody for an ordinance violation instead of a criminal charge? If so, can the suspect be held under Wis. Stats. § 968.075(5)(b) if he/she refuses to sign the notice regarding the contact prohibition?

The legislative intent of Wis. Stats. § 968.075 focuses on crimes (criminal violation) as the means by which an officer is supposed to evaluate the domestic abuse incident. If a crime has occurred, the officer shall arrest and take a person into custody. See Wis. Stats. § 968.075(2).

When the conduct of the suspect is not serious enough to meet the elements required for an arrest for a criminal violation, an officer may consider issuing a municipal summons to the suspect if a local city or county ordinance was violated. If a municipal summons is issued because the conduct was not serious enough to meet the elements of a criminal violation, it is unlikely that the suspect's conduct would require that the suspect be held in jail.

The "no contact prohibition" pertains to arrests that are made for criminal violations, not ordinance violations.

9. Is there a time limitation within which a domestic disturbance must be reported before the mandatory arrest provision applies?

Wis. Stats. § 968.075 requires that an arrest be made if the violence is reported to a law enforcement officer within 28 days of when the violence occurred and all other statutory requirements are met.

10. When does the 72-hour no contact period begin?

The 72-hour time period begins when the suspect is arrested for a criminal violation by the investigating officer or his or her designee.

11. How do the "no contact" and "waiver" provisions apply if both parties are arrested?

If both parties are arrested, both have to be informed of the "no contact" provisions and their respective rights. If one of them refuses to waive his/her rights to the 72-hour "no contact,"

then both must abide by the contact provisions. Both arrested parties would have to waive the contact provisions if they wanted to have contact.

12. Does an arrest for violation of the "no contact" re-trigger the 72-hour contact prohibition?

If the act that caused the violation of the "no contact" prohibition was a domestic abuse crime, a second 72-hour "no contact" period would result. If the defendant does not commit another "domestic abuse crime" in the process of violating the "contact prohibition," the incident would not result in a second 72 hour "no contact" prohibition to be set.

13. Must a law enforcement officer notify the victim of the waiver provision, or can that be done by someone authorized by the agency to do so, such as a domestic abuse program worker? Does the arresting or releasing agency make this notification under Wis. Stats. § 968.075(5)(d)?

The law enforcement officer who arrested the defendant, or an employee of his or her law enforcement agency, must inform the victim of "the no contact prohibition" and provide the victim with a written waiver form if the victim decides to waive the no contact order. The arresting agency is responsible for the notification of the victim.

14. If the defendant has already been released from custody and the victim signs a waiver form, must the officer locate the defendant and notify him/her of the waiver pursuant to Wis. Stats. § 968.075(5)(b)2?

No. The Statute generally applies to the release procedure and the notification procedure. The releasing agency (Jail) is responsible for the notification of the defendant and is only able to advise the defendant based on the waiver information available at the time of the release.

15. Can an intoxicated defendant knowingly sign the notice form required in Wis. Stats. § 968.075 (5)(b)(1)?

Police Officers must make a determination based upon the suspect's condition as to whether or not there is a significant impairment of judgment. If there is a significant impairment, the defendant may not be able to understand the provisions of the "72-hour no contact" prohibition and be unable to sign the acknowledgment.

16. Can a violation of the "no contact" provision be charged as "bail jumping" under Wis. Stats. § 946.49?

No. The "no contact" prohibition has a specific penalty ($1,000.00 forfeiture) for its violation. Generally, a more specific statute applies over a general statute.

17. Can the penalty enhancer be used if there is no conviction for the first offense?

Yes. Wis. Stats. § 939.621 states that a prior "arrest" not "conviction" is necessary for the penalty enhancer.

18. Does Wis. Stats. § 939.621 change a misdemeanor into a felony?

The increase in the term of imprisonment by a maximum of two years changes a misdemeanor into a felony.

19. Does the victim of the repeat offender need to be the same as the first offense?

No. Per Wis. Stats. § 939.621, the victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the first arrest.

20. Can agencies develop policies which exceed the requirements of Wis. Stats. § 968.075?

Yes. The law does not limit the authority of a law enforcement agency to establish policies that require arrests under more circumstances than set forth. See Wis. Stats. § 968.075(3)(c). However, other provisions of the statute (such as the 72-hour no contact provision) will not apply to the expanded portions of your policy.

21. How is the "primary physical aggressor" determined?

In determining the "primary physical aggressor," an officer should consider the intent of the law to protect victims of domestic violence, the relative degree of injury or fear inflicted on the persons involved and any history of domestic abuse between the two persons, if that history can be reasonably ascertained by the officer. See Wis. Stats. § 968.075 (3) (b).

22. Must the officer arrest only the primary physical aggressor?

When an officer has reasonable grounds to believe that spouses, former spouses, or other persons who reside together or formerly resided together are committing or have committed domestic abuse against each other, the officer does not have to arrest both persons, but should arrest the person whom the officer believes to be the primary physical aggressor. In determining the primary physical aggressor, an officer should consider:

- *The intent of this section to protect victims of domestic violence;*
- *The relative degree of injury or fear inflicted on the persons involved;*
- *Any history of domestic abuse between the persons, if it can be reasonably ascertained.*

23. Does Wis. Stats. § 968.075 apply to two people who are dating but do not live together and have never lived together?

The mandatory arrest law does not apply to two people who are dating but not living together. However, this does not prohibit a law enforcement agency from developing a policy that includes this group of victims and offenders. However, the no contact provisions will not apply to the expanded portion of your policy. Keep in mind that the language pertaining to Domestic Abuse TROs / Injunctions, in Wis. Stats. § 813.12, has recently been modified to include "dating relationships" in its definition, and a mandatory arrest applies to all violations of Domestic Abuse TROs / Injuctions.

24. When defining domestic abuse under Wis. Stats. § 968.075(1)(a)4, what is a "Physical Act"?

A "physical act" could include an act as simple as a raised fist, if under all the circumstances ***that*** *act causes the victim to reasonably fear the imminent infliction of bodily harm or sexual assault.*

These questions were edited from a version of a document originally prepared for Wisconsin law enforcement officers at the time of passage of Wisconsin's Mandatory Arrest Law by Ruth Bachman, former Assistant Attorney General. Additional questions and answers were prepared by Captain Pete Helein, Appleton Police Department.

Appendix 1: Elements to selected Wisconsin Statutes

1. Administering Dangerous or Stupefying Drugs. Wis. Stats. § 941.32; JI #1352 . . . . . A1–3
2. Attempt to Commit a Crime. Wis. Stats. § 939.32(1); JI #580 . . . . . A1–3
3. Bail Jumping by Defendant. Wis. Stats. § 946.49(1); JI #1795 . . . . . A1–4
4. Bail Jumping by Witness. Wis. Stats. § 946.49(2); JI #1795 . . . . . A1–4
5. Battery. Wis. Stats. § 940.19(1); JI #1220 . . . . . A1–4
6. Substantial Battery. Wis. Stats. § 940.19(2); JI #1222 . . . . . A1–5
7. Aggravated Battery. Wis. Stats. § 940.19(4); JI #1224 . . . . . A1–5
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1. ADMINISTERING DANGEROUS OR STUPEFYING DRUGS – § 941.32

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1352 for Sec. 941.32:*

Defendant administered a substance to victim or caused victim to take a substance

+

The substance was poisonous, stupefying, overpowering, narcotic, or anesthetic

+

Defendant acted with intent to facilitate the commission of a crime

Facilitate: To make easier or less difficult.

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2. ATTEMPT TO COMMIT A CRIME – § 939.32 (1)

Felony level and penalty varies depending on crime.

Elements *Taken from Wis. JI-Criminal #580 for Sec. 939.32:*

Defendant intended to commit the crime

+

Defendant's actions met the elements of the pertinent crime

+

Actions unequivocally demonstrate that defendant would have committed crime except for another person's intervention or extraneous factor

Intent: Defendant acted with the mental purpose to commit the crime; intent must be found from acts, words, statements, and facts and circumstances.
Unequivocally: No other inference or conclusion can be reasonably and fairly drawn from the acts under the circumstances.
Another person: Anyone but the defendant; may include the intended victim.
Extraneous factor: Something outside the defendant's knowledge or control.

3. BAIL JUMPING BY DEFENDANT – § 946.49 (1)

Class H Felony if the person is charged with a felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.
Class A Misdemeanor if person is charged with a misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1795 for Sec. 946.49 (1):*

Defendant was arrested or charged with a felony or a misdemeanor + Defendant was released from custody on bond + Defendant intentionally failed to comply with terms of bond

Intentionally: The defendant knew of the terms of the bond and knew that his or her actions did not comply with the terms.

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4. BAIL JUMPING BY WITNESS – § 946.49 (2)

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1795 for Sec. 946.49 (2):*

Defendant is witness for whom bail has been required + Defendant failed to appear

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5. BATTERY – § 940.19 (1) [Simple Battery]

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1220 for Sec. 940.19(1):*

Defendant caused bodily harm + Defendant intended to cause bodily harm + Victim did not consent + Defendant knew victim did not consent

6. BATTERY – § 940.19 (2) [Substantial Battery]

Class I Felony. The penalty for a Class I felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1222 for Sec. 940.19 (2):*

Defendant caused substantial bodily harm + Defendant intended to cause bodily harm to victim or to another person

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7. BATTERY – § 940.19 (4) [Aggravated Battery]

Class H Felony. The penalty for a Class H felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1224 for Sec. 940.19 (4):*

Defendant caused great bodily harm + Defendant intended to cause bodily harm at the time of causing it

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8. BATTERY – § 940.19 (5) [Aggravated Battery]

Class E Felony. The penalty for a Class E Felony is a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both.

Elements *Taken from Wis. JI-Criminal #1225 for Sec. 940.19(5):*

Defendant caused great bodily harm to victim + Defendant intended to cause great bodily harm to the victim or a third party at the time of causing it

Aggravated battery under s. 940.19 (5) differs from aggravated battery under s. 940.19(4) in that the defendant must have had the mental purpose to cause **great bodily** harm to another human being or must have been aware that his or her conduct was practically certain to cause this harm. See Wisconsin Jury Instructions.

9. BATTERY – § 940.19 (6) [Substantial Battery]

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1226 for Sec. 940.19(6):*

Defendant caused bodily harm + Defendant intended to cause bodily harm + Defendant's conduct created a substantial risk of great bodily harm + Defendant knew conduct created a substantial risk of great bodily harm

Substantial battery under s. 940.19 (6) differs from substantial battery under s. 940.19 (2), (3), and (4) in that **the risk** the defendant's conduct poses to the victim is included as an element. A rebuttable presumption of a substantial risk of great bodily harm occurs when the victim is 62 years of age or older or has a physical disability.

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10. BATTERY – § 940.195 (1) [Simple Battery to an Unborn Child]

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both

Elements *Taken from Wis. JI-Criminal #1227 for Sec. 940.195:*

Defendant caused bodily harm to an unborn child + Defendant intended to cause bodily harm to unborn child **OR** Defendant intended to cause bodily harm to the woman pregnant with the unborn child **OR** Defendant intended to cause bodily harm to another person

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11. BATTERY – § 940.195 (2) [Substantial Battery to an Unborn Child]

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1227 for Sec. 940.195:*

Defendant caused substantial bodily harm to an unborn child + Defendant intended to cause bodily harm to unborn child **OR** Defendant intended to cause bodily harm to the woman pregnant with the unborn child **OR** Defendant intended to cause bodily harm to another person

12. BATTERY – § 940.195 (4) [Aggravated Battery to an Unborn Child]

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1227 for Sec. 940.195:*

Defendant caused great bodily harm to an unborn child **+** Defendant intended to cause bodily harm to unborn child **OR** Defendant intended to cause bodily harm to the woman pregnant with the unborn child **OR** Defendant intended to cause bodily harm to another person

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13. BATTERY – § 940.195 (5) [Aggravated Battery to an Unborn Child]

Class E Felony. The penalty for a Class E Felony is a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both.

Elements *Taken from Wis. JI-Criminal #1227 for Sec. 940.195:*

Defendant caused great bodily harm to an unborn child **+** Defendant intended to cause great bodily harm to unborn child **OR** Defendant intended to cause great bodily harm to the woman pregnant with the unborn child **OR** Defendant intended to cause great bodily harm to another person

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14. BATTERY – § 940.195 (6) [Substantial Battery to an Unborn Child]

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1227 for Sec. 940.195:*

Defendant caused bodily harm to an unborn child **+** Defendant intended to cause bodily harm to an unborn child **+** Defendant's conduct created a substantial risk of great bodily harm to unborn child or pregnant woman or another person

15. BATTERY TO A LAW ENFORCEMENT OFFICER OR A FIREFIGHTER – § 940.20 (2)

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1230 for Sec. 940.20(2):*

Defendant caused bodily harm + Victim was a law enforcement officer or firefighter + Victim was acting in an official capacity + Defendant knew or had reason to know victim was a law enforcement officer or firefighter acting in an official capacity + Victim did not consent + Defendant acted intentionally

Officers and firefighters act in an official capacity if they perform duties they are employed to perform.

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16. BATTERY BY PERSONS SUBJECT TO AN INJUNCTION – § 940.20 (1m)

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1229 for Sec. 940.20(1m):*

Victim petitioned for domestic abuse or harassment order against defendant + Defendant was subject to the injunction at the time of the offense + Defendant's intentionally caused bodily harm to the victim + Victim did not consent to the bodily harm + Defendant knew the victim petitioned for the injunction and knew the victim did not consent to the bodily harm

17. BATTERY OR THREAT TO A WITNESS – § 940.201 (2) (a)

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1238 for Sec. 940.201(2)(a):*

Defendant intentionally caused harm

OR

Defendant threatened to cause bodily harm

+ To a person the defendant knows is or was a witness **+** The harm or threat was caused by the person having attended or testified as a witness **+** The act was done without the consent of the person injured or threatened

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18. BATTERY OR THREAT TO A WITNESS – § 940.201 (2) (b)

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1239 for Sec. 940.201 (2) (b):*

Defendant intentionally caused bodily harm

OR

Defendant threatened to cause bodily harm

+ To a person defendant knew is a family member of a witness

OR

To a person defendant knew is sharing a common domicile with a witness

+ The harm or threat was caused by person having attended or testified as a witness **+** The harm or threat was without consent of person being threatened or injured

19. DEFINITIONS FOR ELEMENTS OF BATTERY

Bodily Harm means physical pain or injury, illness, or any impairment of physical condition.

Cause means the defendant's act was a substantial factor in producing the bodily harm. There may be more than one cause of bodily harm. The act of one person alone might produce it or the acts of two persons might jointly produce it.

Doctrine of Transferred Intent indicates the defendant is guilty of batter if he or she intends to harm one person, but harms another.

Exceptions to Prosecution Under §940.195 include: induced abortions, customary medical acts, acts done by health care officials, or acts done by the pregnant woman or by authorized prescriptions used as birth control or to prevent pregnancy. If an exception has been placed in issue by trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist in order to sustain a finding of guilt.

Family Member means spouse, child, stepchild, foster child, treatment foster child, parent, sibling, or grandchild. See **§** 940.201 (1) (a).

Great bodily harm means serious bodily injury. Injury that creates a substantial risk of death, or that causes serious permanent disfigurement, or that causes a permanent of protracted loss or impairment of the function of any bodily member of organ, or other serious bodily injury is a great bodily harm.

Intent to cause bodily harm means the defendant had the mental purpose to cause bodily harm to another human being or was aware that his or her conduct was practically certain to cause bodily harm to another human being. To find intent, one can consider the statements and conduct of the defendant.

Substantial Bodily Harm means bodily injury that causes: a laceration that needs stitches; any fracture of bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of tooth.

Unborn Child means any individual of the human species from fertilization until birth that is gestating inside a woman. See **§** 939.75 (1).

Victim's Lack of Consent and Defendant's Knowledge of the Lack of Consent is an element that must be proved beyond a reasonable doubt. Usually consent is not an issue, meaning the defense attorney will not argue the victim gave consent. However, the defendant in a domestic abuse case may believe or argue that the victim gave consent.

20. BURGLARY WITH INTENT TO STEAL – § 943.10 (1)

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1421 for Sec. 943.10(1):*

Defendant intentionally entered a building + Without consent of person in lawful possession + Defendant knew entry was without consent + Defendant entered building with intent to steal

Enters with intent to steal: This requires that defendant had the mental purpose to take and carry away movable property of another without consent and that defendant intended to deprive the owner permanently of possession of the property. It requires that defendant knew the property belonged to another and knew the person did not consent to the taking of the property. The intent must be formed before the entry is made.

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21. CARRYING A CONCEALED WEAPON – § 941.23

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1335 for Sec. 941.23:*

Defendant went armed with a dangerous weapon + Defendant was aware of the presence of weapon + Weapon was concealed

Peace officers are not subject to this law.

Peace officer: a person vested by law with a duty to maintain public order or to make arrests for crimes whether that duty extends to all crimes or that duty is limited to specific crimes.

Went armed: weapon must have been on defendant's person or within defendant's reach.

Dangerous weapon: firearm, loaded or unloaded; or any device designed as a weapon and capable of producing death or great bodily harm; 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.

Concealed: hidden from ordinary observation–does not have to be completely hidden.

22. UNLAWFUL USE OF A COMPUTERIZED SYSTEM – § 947.0125 (2) (a)

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1908 for Sec. 947.0125 (2) (a)*

Defendant sent a message to the victim on electronic mail or a computerized communication system

+

In sending message, defendant intended to frighten, intimidate, threaten, abuse, or harass the victim

+

In the message, defendant threatened to inflict physical harm to or damage the property of any person

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23. UNLAWFUL USE OF A COMPUTERIZED SYSTEM – § 947.0125 (2) (c)

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1909 for Sec. 947.0125 (2) (c)*

Defendant sent a message to the victim on electronic mail or a computerized communication system

+

Defendant sent message to victim with the intent to frighten, intimidate, threaten, or abuse

+

In sending the message, defendant used obscene, lewd, or profane language, or suggested any lewd or lascivious act

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24. CRIMINAL DAMAGE TO PROPERTY – § 943.01

Depending on the circumstances, a Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1400 for Sec. 943.01:*

Defendant caused damage to physical property

+

Defendant intentionally caused the damage

+

The property belonged to another person

+

Defendant caused damage without consent of owner

+

Defendant knew that property belonged to another and that person did not consent

Damage: Anything from mere defacement of the property to total destruction.

25. CRIMINAL TRESPASS TO DWELLINGS – § 943.14

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1437 for Sec. 943.14:*

Defendant intentionally entered the dwelling of another

+

Defendant entered without the consent of someone lawfully upon the premises

+

Defendant entered under circumstances tending to create or provoke a breach of peace

+

Defendant knew entry was without consent and knew it would tend to create or provoke a breach of peace

The defendant's conduct did not need to actually breach the peace to violate §943.14.

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26. DISORDERLY CONDUCT – § 947.01

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1900 for Sec. 947.01*

Defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct

+

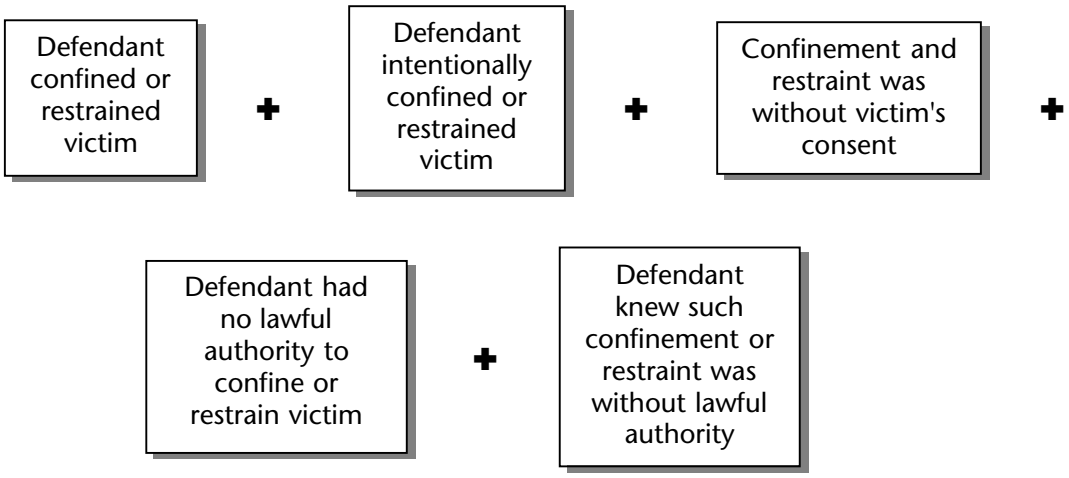
Defendant's conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance

The defendant's conduct does not necessarily have to cause a disturbance to violate §947.01.

27. FALSE IMPRISONMENT – § 940.30

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1275 for Sec. 940.30:*



The victim does not have to be in a jail for a violation of §940.30 to occur. If the defendant deprived victim of freedom of movement or compelled victim to remain where the victim did not wish to remain, the defendant confined or restrained the victim.
A person is not confined or restrained if that person knew he or she could have avoided the situation by reasonable action. A reasonable opportunity to escape does not, however, change confinement or restraint once it has already occurred.

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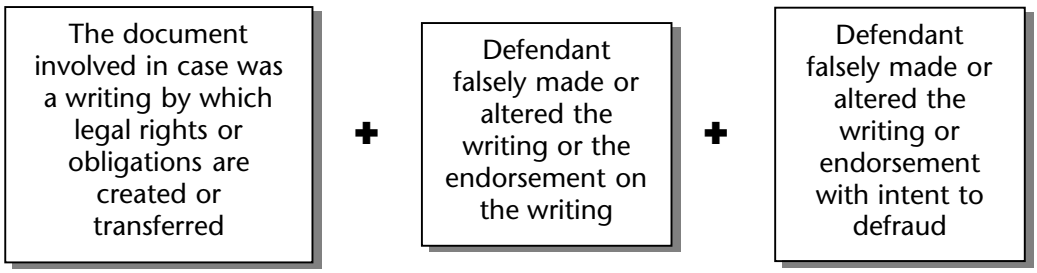
28. FORGERY – § 943.38 (1)

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1491 for Sec. 943.38(1)*



A "writing" includes a check.

The writing or its endorsement must have been falsely made or altered to appear to have been made either by another person, at another time, with different terms, or by the authority of someone who did not give such authority.

Intent to defraud: The defendant had the purpose to obtain property that defendant was not entitled to receive.

---

29. FRAUDULENT WRITINGS – § 943.39 (2)

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1486 for Sec. 943.39(2)*

Defendant obtained a signature to a writing by means of deceit

+

The writing was one by which legal rights or obligations are created or transferred

+

Defendant acted with intent to injure or defraud

Means of deceit: Making false statements or giving false impressions.

---

30. HARASSMENT – § 947.013 (1m) (a) and (1r)

Depending on the circumstances, anywhere from a Class A Misdemeanor to a Class H Felony (see § 947.013 (1t), (1v), and (1x)).
The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1910 for Sec. 947.013*

Defendant was subject to an order that prohibited or limited his or her contact with victim

+

Defendant subjugated the victim to physical contact or attempted to do so

+

Defendant engaged in such conduct with intent to harass or intimidate

+

Conduct was accompanied by credible threat that placed victim in reasonable fear of death or great bodily harm

With intent to harass or intimidate: Defendant acted with the mental purpose to harass or intimidate another person or was aware that conduct was practically certain to harass or intimidate another.

31. HARASSMENT – § 947.013 (1m) (a) and (1r)

Depending on the circumstances, anywhere from a Class A Misdemeanor to a Class H Felony (see § 947.013 (1t), (1v), and (1x)).
The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from Wis. JI-Criminal #1910.1 for Sec. 947.013*

Defendant was subject to an order that prohibited or limited his or her contact with victim

+

Defendant made credible threat of physical contact that placed victim in reasonable fear of death or great bodily harm

+

Defendant engaged in such conduct with intent to harass or intimidate

---

32. HARASSMENT – § 947.013 (1m) (b) and (1r)

Depending on the circumstances, anywhere from a Class A Misdemeanor to a Class H Felony (see § 947.013 (1t), (1v), and (1x)).
The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both

Elements *Taken from Wis. JI-Criminal #1912 for Sec. 947.013*

Defendant was subject to an order that prohibited or limited his or her contact with victim

+

Defendant engaged in course of conduct that harassed or intimidated victim and that served no legitimate purpose

+

Defendant engaged in conduct with intent to harass or intimidate

+

Defendant's conduct was accompanied by a credible threat that placed victim in reasonable fear of death or great bodily harm

Course of conduct: A series of acts over a period of time, however short, showing a continuity of purpose.

33. TAKING A HOSTAGE – § 940.305 (2)

Class C Felony. The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from Wis. JI-Criminal #1278 for Sec. 940.305:*

Defendant seized, constrained, or restrained victim + Without victim's consent + Defendant forcibly seized, confined, or restrained victim + Defendant seized victim with intent to use victim as hostage to influence a person to perform or not to perform some action demanded by defendant +

Defendant demanded by conduct or statements that another person perform or not perform some action + Prior to being arrested, defendant released victim without bodily harm

Without consent: no consent in fact, or consent was given by the victim because of fear caused by defendant's use or threat of imminent violence.

Forcibly: defendant actually used force or threatened the use of imminent force to overcome or to prevent the victim's resistance to be seized.

Imminent: "near at hand" or "on the point of happening.

---

34. TAKING A HOSTAGE – § 940.305 (1)

Class B Felony. The penalty for a Class B Felony is imprisonment, not to exceed 60 years

Elements *Taken from Wis. JI-Criminal #1278 for Sec. 940.305:*

First five elements of §940.305 (2) + Defendant did not release victim without bodily harm prior to defendant's arrest

35. INJURY BY NEGLIGENT HANDLING OF DANGEROUS WEAPONS, EXPLOSIVES, OR FIRE – § 940.24

Class I Felony. The penalty for a Class I felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1260 for Sec. 940.24:*

Defendant operated or handled dangerous weapon, explosives, or fire + In a manner constituting criminal negligence + Operation or handling caused bodily harm

Dangerous weapon: firearm, loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; 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.

Criminal Negligence: the defendant's operation or handling of the dangerous weapon, explosive, or fire created a risk of death or great bodily harm; this risk of death or great bodily harm was unreasonable and substantial; and the defendant should have been aware that his or her operation or handling of the dangerous weapon, explosive, or fire created the unreasonable and substantial risk.

---

36. INTERFERENCE WITH CUSTODY OF A CHILD – § 948.31 (1) (b)

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #2166 for Sec. 948.31(1)(b):*

Child not yet 18 years old on date of offense + Custodian had legal custody of child under court order or judgment in divorce action + Defendant caused child to leave, took child away, or withheld child for more than 12 hours beyond court-approved period of visitation or placement from custodian without custodian's consent +

Defendant acted intentionally + Defendant took away child with intent to deprive custodian of custody rights

Taking of child need not be by force or violence.
The fact a court has awarded joint custody to both parents does not preclude a finding that one parent has violated this law.

37. INTERFERENCE WITH CUSTODY OF A CHILD – § 948.31 (2)

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #2167 for Sec. 948.31(2):*

Child not yet 18 years old on date of offense + Parents were parents of the child + Defendant caused child to leave, took child away, or withheld child for more than 12 hours beyond a court-approved period of visitation or placement from custodian without custodian's consent

---

38. INTERFERENCE WITH CUSTODY OF A NONMARITAL CHILD – § 948.31 (2)

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #2167A for Sec. 948.31(2):*

Child not yet 18 years old on date of offense + Parent was the parent of child + Child was a nonmarital child + Defendant caused child to leave, took child away, or withheld child for more than 12 hours beyond a court-approved period of visitation or placement from custodian without custodian's consent

This law applies to situations where the child's parents have not married. The jury instruction is phrased in terms of the child being taken from the mother but the statute applies also to fathers with joint custody.

---

39. INTERFERENCE WITH CUSTODY OF A CHILD BY PARENT – § 948.31 (3) (a)

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #2168 for Sec. 948.31(3)(a):*

Defendant was parent of a child not yet 18 years old + Defendant concealed child from other parent + Defendant intentionally concealed child

40. INTERFERENCE WITH CUSTODY OF A CHILD – § 948.31 (3) (b)

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from statute, no jury instruction exists.*

Defendant has been served with process in an action affecting the family but has not yet been issued a temporary or final order determining child custody rights

+

Defendant takes child or causes child to leave

+

Defendant has intent to deprive other parent of physical custody

---

41. INTERFERENCE WITH CUSTODY OF A CHILD – § 948.31 (3) (c)

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from statute, no jury instruction exists.*

A temporary or final order specifying joint legal custody rights and periods of physical placement has been issued

+

Defendant takes from, or causes a child to leave, the other parent in violation of the order or defendant withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period

---

42. INTIMIDATION OF A VICTIM – § 940.44 [Misdemeanor]

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #2196 for Sec. 940.44:*

Victim was a victim of a crime

+

Defendant prevented, dissuaded, attempted to prevent, or attempted to dissuade victim from reporting the crime to law enforcement agency

+

Defendant acted knowingly and maliciously

43. INTIMIDATION OF A VICTIM – § 940.45 [Felony]

Class G Felony. The penalty for a Class G Felony is a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.

Elements *Taken from Wis. JI-Criminal #2196 for Sec. 940.45:*

All of the elements of §940.44

+

Defendant's act accompanied by attempted force or violence upon victim or relative of victim §940.45 (1)

OR

Defendant's act accompanied by damage to property of victim or relative of victim §940.45(2)

OR

Defendant's act accompanied by any express or implied threat of harm described in either of the prior two elements §940.45(3)

OR

Defendant's act was in furtherance of conspiracy §940.45(4)

OR

Defendant has prior conviction for §§940.42 to 940.45 or any federal or state law which, if prosecuted in WI, would have been a violation of these statutes §940.45(5)

OR

Defendant committed act for monetary gain or any other consideration acting on request of any other person §940.45(6)

44. INTIMIDATION OF A WITNESS – § 940.42 [Misdemeanor]

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1292 for Sec. 940.42:*

Victim was a witness + Defendant prevented, dissuaded, attempted to prevent, or attempted to dissuade person from giving testimony at proceeding authorized by law + Defendant acted knowingly and maliciously

Knowingly and maliciously: The defendant knew the victim was a witness and acted with the purpose to prevent the victim from attending the proceeding or testifying.

---

45. INTIMIDATION OF A WITNESS – § 940.43 [Felony]

Class G Felony. The penalty for a Class G Felony is a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.

Elements *Taken from Wis. JI-Criminal #1292 for Sec. 940.43:*

All the elements of §940.42 + Defendant's act accompanied by attempted force or violence upon witness or relative of witness §940.43(1) **OR** Defendant's act accompanied by damage to property of witness or relative of witness §940.43(2) **OR**

Defendant's act accompanied by any express or implied threat of harm described in prior two elements §940.43(3) **OR** Defendant's act was in furtherance of a conspiracy §940.43(4) **OR** Defendant has prior conviction for §§940.42 to 940.45 or any federal or state law which, if prosecuted in WI, would have been a violation of these statutes §940.43(5)

OR Defendant committed the act for monetary gain or any other consideration acting on the request of any other person §940.43(6)

46. KIDNAPPING – § 940.31 (1) (a)

Class C Felony.* The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from Wis. JI-Criminal #1280 for Sec. 940.31(1)(a):*

Defendant transported victim from one place to another + Defendant transported without victim's consent + Defendant transported forcibly + Defendant intended the victim be secretly confined or imprisoned, transported out of the state, or held to service against victim's will

Without consent: Includes consent given because of fear caused by use of force or threat of imminent use of force on the victim, on a third person in presence of the victim, or on a member of the victim's immediate family.

Force: means the actual use of force or the threatened use of imminent force against the victim. It includes force and threats to use force against third persons in the presence of the victim and members of the victim's family.

---

47. KIDNAPPING – § 940.31 (1) (b)

Class C Felony.* The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from Wis. JI-Criminal #1281 for Sec. 940.31(1)(b):*

Defendant seized or confined victim + Defendant seized or confined victim without victim's consent + Defendant seized or confined victim forcibly + Defendant intended victim be secretly confined or imprisoned or transported out of state or held to service against victim's will

48. KIDNAPPING – § 940.31 (1) (c)

Class C Felony.* The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from Wis. JI-Criminal #1281 for Sec. 940.31(1)(b):*

Defendant induced victim to go from one place to another

+

Defendant induced by deceit

+

Defendant intended victim be secretly confined or imprisoned or transported out of state or held to service against victim's will

*If, under §940.31 (1) (a), (b), or (c), the victim is held "with intent to cause another person to transfer property to obtain the release of the victim," the crime becomes a Class B felony under §940.31 (2) (a). But, under §940.31 (2) (b), if the defendant released the victim without permanent injury prior to the first witness being sworn at the defendant's trial, the crime is a Class C felony, even if a ransom was demanded.

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49. MAYHEM – § 940.21

Class C Felony. The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from Wis. JI-Criminal #1246 for Sec. 940.21:*

Defendant cut or mutilated a bodily member of another

+

The cutting or mutilating caused great bodily harm

+

Defendant intended to disable or disfigure

50. MISTREATING ANIMALS – § 951.02

The penalties for violating this section appear in § 951.18 (1).

Elements *Taken from Wis. JI-Criminal #1980 for Sec. 951.02:*

Defendant treated any animal in cruel manner + Treatment was intentional or negligent

Negligent: A person who fails to exercise ordinary care is negligent. Ordinary care is the degree of care that the great mass of humankind exercises under the same or similar circumstances. A person fails to exercise ordinary care when, without intending to do any harm, the person does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the animal to cruel treatment.

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51. NEGLIGENT OPERATION OF A MOTOR VEHICLE – § 941.01 (1)

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1300 for Sec. 941.01:*

Defendant operated a vehicle, not upon a highway + Defendant operated vehicle in a high degree of negligence + Defendant endangered the safety of another person

High degree of negligence: Conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another. It differs from ordinary negligence in that the defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another.

Not on highway: Element distinguishes the crime from reckless driving.

Highway: All public ways and thoroughfares and bridges on the same.

52. OPERATING A VEHICLE WITHOUT OWNER'S CONSENT– § 943.23 (1g)

Class C Felony. The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from Wis. JI-Criminal #1463 for Sec. 943.23(1g):*

Defendant intentionally took vehicle without owner's consent + Defendant knew the owner did not consent + Defendant possessed dangerous weapon + Defendant took vehicle by use or threat of use of force or weapon against another

---

53. OPERATING A VEHICLE WITHOUT OWNER'S CONSENT– § 943.23 (2)

Class H Felony. ** **The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.**

Elements *Taken from Wis. JI-Criminal #1464 for Sec. 943.23(2):*

Defendant intentionally took vehicle without consent of owner + Defendant intentionally drove vehicle without consent of owner + Defendant knew owner of vehicle did not consent to the taking and driving of vehicle

---

54. OPERATING A VEHICLE WITHOUT OWNER'S CONSENT– § 943.23 (3)

Class I Felony. ** **The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.**

Elements *Taken from Wis. JI-Criminal #1465 for Sec. 943.23(3):*

Defendant intentionally drove or operated a vehicle without the owner's consent + Defendant knew owner of vehicle did not consent to driving or operating vehicle

** Section 943.23 (3m) provides an affirmative defense to the prosecution of §943.23 (2) or (3) if the defendant abandons the vehicle without damage within 24 hours after the vehicle was taken. This affirmative defense mitigates the offense to a Class A Misdemeanor; the penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. The defendant raising this defense has the burden of proving it by a preponderance of the evidence.

55. RECKLESS INJURY – § 940.23 (2) (a) [Second degree]

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1252 for Sec. 940.23(2):*

Defendant caused great bodily harm

+

The defendant caused the great bodily by criminally reckless conduct

Criminally reckless conduct: requires that defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that defendant was aware that his or her conduct created such a risk.

---

56. RECKLESS INJURY – § 940.23 (1) (a) [First degree]

Class D Felony. The penalty for a Class D Felony is a fine not to exceed $100,000 or imprisonment not to exceed 25 years, or both.

Elements *Taken from Wis. JI-Criminal #1250 for Sec. 940.23(1):*

Defendant committed elements of §940.23 (2) (a)

+

The circumstances of the defendant's conduct showed utter disregard for human life

Utter disregard: The jury should consider all the factors relating to the defendant's conduct including: what defendant was doing; why he or she was doing it; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for human life; and all other facts and circumstances relating to the conduct.

Sections 940.23 (1) (b) and (2) (b) prohibit reckless injury to unborn children. The elements are essentially the same as ordinary reckless injury. Abortions, customary medical acts, acts done by health care officials, or acts done by the pregnant woman or by authorized prescriptions used as birth control are exempt from this section.

57. RECKLESS DRIVING – ENDANGERING SAFETY – § 346.62 (2)

The penalty for violating this statute can be found in § 346.65.

Elements *Taken from Wis. JI-Criminal #2650 for Sec.346.62 (2):*

Defendant operated vehicle on highway ✚ Defendant's manner of operation constituted criminal negligence

---

58. REFUSAL TO AID A LAW ENFORCEMENT OFFICER – § 946.40 (1)

Class C Misdemeanor. The penalty for a Class C Misdemeanor is a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

Elements *Taken from the statute, no Jury Instruction exists.*

Defendant, without reasonable excuse, refused or failed upon command to aid anybody known by the defendant to be a peace officer.

---

59. RESISTING OR OBSTRUCTING AN OFFICER– § 946.41 (1)

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1765 for Sec. 946.41:*

Defendant resisted officer ✚ Officer was acting in official capacity ✚ Officer was doing an act with lawful authority ✚

Defendant knew officer was officer acting in official capacity and with lawful authority ✚ Defendant knew conduct would resist officer

60. ROBBERY – § 943.32 (1) (a) and (b)

Class E Felony. The penalty for a Class E Felony is a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both.
Elements *Taken from Wis. JI-Criminal #1475 and #1477 for Sec.943.32 (1)(a) and (b):*

Defendant took property from the person or the presence of owner + Defendant took property with intent to steal + Defendant used or threatened force with intent to overcome physical resistance

Section 943.32 (1) (a) is robbery by the use of force. Section 943.32 (1) (b) is robbery by the threat of force.

---

61. ROBBERY – § 943.32 (2)

Class C Felony. The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both. See penalty factors below.
Elements *Taken from Wis. JI-Criminal #1480 for Sec.943.32 (2):*

Defendant violated §943.32 (1) (a) + Defendant acted forcibly + At time of taking or carrying away, defendant used or threatened to use a dangerous weapon

---

62. STALKING – § 940.32

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both. See penalty factors below.
Elements *Taken from Wis. JI-Criminal #1284B for Sec.940.32:*

Defendant intentionally engaged in a course of conduct directed at victim + Defendant's acts would have caused a reasonable person under the same circumstances to fear bodily injury or death to himself or herself or to a member of his or her household + Defendant's acts induced fear in victim of bodily injury or death to himself or herself or to a member of his or her household + Defendant knew or should have known that conduct placed victim in reasonable fear of bodily injury or death of himself or herself or a member of his or her family or household

Course of conduct: 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 victim's workplace or contacting 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 victim by telephone or causing victim's or any other person's telephone to ring repeatedly or continuously, regardless of whether conversation ensues;
7) Sending material by an means to the victim or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim;
8) Placing an object on or delivering an object to property owned, leased, or occupied by victim;
9) Delivering an object to a member of 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;
10) Causing a person to engage in any of the acts described in subds. 7 to 9.

Intentionally: Defendant acted with the purpose to engage in a course of conduct directed at the victim.
Member of a family: Spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.
Member of a household: A person who regularly resides in the household of another or who within the previous six months regularly resided in the household of another.
Reasonable fear: The standard used by Wisconsin courts: what a person of ordinary intelligence and prudence would have believed in position of the victim under the circumstances that existed at the time of the alleged offense.

Stalking Penalty Factors (once the person has been shown to have violated 940.32 (2)):

Class H Felony:
For charges under 940.32 (2m) (a), ask if the defendant has a previous conviction for the crime.
For charges under 940.32 (2m) (b), ask if the defendant has a previous conviction for a crime, is the victim of that crime the victim of the present crime, and did the present crime occur within seven years of the previous crime.
For charges under 940.32 (2m) (c), ask if the defendant intentionally gained access to, or caused another person to gain access to, a record in electronic format that contained personally identifiable information regarding the victim to facilitate the present crime.
For charges under 940.32 (2m) (d), ask if the defendant violated s. 968.31 (1) or 968.34 to facilitate the present crime.

For charges under 940.32 (2m) (e), ask if the victim was under the age of 18 at the time of the crime.

Class F Felony:
For charges under 940.32 (3) (a), ask if the act resulted in harm to the victim or to a member of his or her household or family.
For charges under 940.32 (3) (b), ask if the defendant had a previous conviction for the crime, is the victim of that crime the victim of the present crime, and did the present crime occur within seven years of the previous crime.
For charges under 940.32 (3) (c), ask if the defendant used a dangerous weapon in carrying out the act.

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63. TAMPERING WITH HOUSEHOLD PRODUCTS – § 941.327 (2) (a)

Class I Felony. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

Elements *Taken from the statute, no jury instruction exists.*

Defendant intends to kill, injure, or otherwise endanger the health or safety of any person or to cause significant injury or damage to the business or any person

+

Defendant tampers and thereby taints any household product

OR

Defendant tampers with any household product or container and renders the labeling of it materially false or misleading

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64. TAMPERING WITH HOUSEHOLD PRODUCTS – § 947.327 (2) (b) 2.

Class H Felony. The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

Elements *Taken from the statute, no jury instruction exists.*

Defendant violates elements of §941.327 (2) (a)

+

Violation creates a high probability of great bodily harm to another

65. TAMPERING WITH HOUSEHOLD PRODUCTS – § 941.327 (2) (b) 3.

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from the statute, no jury instruction exists.*

Defendant violates elements of §941.327 (2) (a)

+

Violation causes great bodily harm to another

---

66. TAMPERING WITH HOUSEHOLD PRODUCTS – § 941.327 (2) (b) 4.

Class C Felony. The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

Elements *Taken from the statute, no jury instruction exists.*

Defendant violates elements of §941.327 (2) (a)

+

Violation causes death of another

---

67. UNLAWFUL USE OF A TELEPHONE – § 947.012 (1) (a)

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1902 for Sec. 947.012(1)(a):*

Defendant made telephone call to victim

+

By making call, defendant intended to frighten, intimidate, threaten, abuse or harass

+

Defendant threatened to inflict injury or physical harm to any person or the property of any person

68. UNLAWFUL USE OF A TELEPHONE – § 947.012 (1) (b)

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1903 for Sec. 947.012(1)(b):*

Defendant made telephone call to victim + Defendant used obscene, lewd, or profane language or suggested any lewd or lascivious act + Defendant intended call to frighten, intimidate, threaten, or abuse

---

69. UNLAWFUL USE OF A TELEPHONE – § 947.012 (1) (c)

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1904 for Sec. 947.012(1)(c):*

Defendant made telephone call + Defendant did not disclose his or her identity + Defendant called with intent to abuse or threaten any person at the called number

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70. THEFT – § 943.20 (1) (a)

The classification and penalty depends on the value and type of property taken.

Elements *Taken from Wis. JI-Criminal #1441 for Sec. 943.20(1)(a):*

Defendant intentionally took and carried away the movable property of another + The owner did not consent to taking and carrying away + Defendant knew that the owner did not consent + Defendant took and carried away the property with the intent to permanently deprive the owner of possession

71. THEFT – § 943.20 (3) (e)

Class G Felony. The penalty for a Class G Felony is a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.

Elements *Taken from Wis. JI-Criminal #1441b for Sec. 943.20(3)(d)2., which was renumbered to be § 943.20(3)(e) by 2001 Wisconsin Act 109:*

Defendant intentionally took and carried a way the movable property of another + Defendant took property from person or corpse of another + Owner did not consent to the taking and carrying away of such property + Defendant knew that taking and carrying away the property was without consent

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72. VIOLATION OF A RESTRAINING ORDER – Ch. 813

Elements *Taken from Wis. JI-Criminal #2040 for Secs. 813.122(1), 813.12(7), 813.128(1), 813.125(6), 813.123(6):*

A temporary restraining order or injunction issued against defendant + Defendant committed act that violated order or injunction + Defendant knew order or injunction had been issued and this acts violated its terms

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73. ABUSE OF VULNERABLE ADULTS – § 940.285 (2) (b) 1g.

Class C or Class D Felony.* The penalty for a Class C Felony is a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both. The penalty for a Class D Felony is a fine not to exceed $100,000 or imprisonment not to exceed 25 years, or both.**

Elements *Taken from Wis. JI-Criminal #1268 for Sec.940.285(2)(b)1:*

Victim is a vulnerable adult + Defendant intentionally, recklessly, or negligently subjects the victim to maltreatment + The maltreatment was under circumstances that caused death

*** If the mental state was intentional, the person is guilty of a Class C felony. If the mental state was reckless or negligent, the person is guilty of a Class D felony.

74. ABUSE OF VULNERABLE ADULTS – § 940.285 (2) (b) 1m.

Class F or Class G Felony.** The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both. The penalty for a Class G Felony is a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.**

Elements *Taken from Wis. JI-Criminal #1268 for Sec.940.285(2)(b)1:*

Victim is a vulnerable adult + Defendant intentionally subjects the victim to maltreatment + The maltreatment was under circumstances that caused or were likely to cause great bodily harm

**** If the circumstances cause great bodily harm, the person is guilty of a Class F felony. If the circumstances are likely to cause great bodily harm, the person is guilty of a Class G felony.

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75. ABUSE OF VULNERABLE ADULTS – § 940.285 (2) (b) 2.

Class H or Class I Felony.*** The penalty for a Class H Felony is a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both. The penalty for a Class I Felony is a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.**

Elements *Taken from Wis. JI-Criminal #1268 Sec.940.285(2)(b)2:*

Victim is a vulnerable adult + Defendant intentionally subjects the victim to maltreatment + The maltreatment was under circumstances that caused or were likely to cause bodily harm

**** If the circumstances cause bodily harm, the person is guilty of a Class H felony. If the circumstances are likely to cause bodily harm, the person is guilty of a Class I felony.

76. ABUSE OF VULNERABLE ADULTS – § 940.285 (2) (b) 4.

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1269 Sec.940.285(2)(b)4:*

Defendant recklessly or negligently subjects a vulnerable adult to maltreatment	+	The maltreatment was under circumstances that caused or were likely to cause bodily harm

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77. ABUSE OF VULNERABLE ADULTS – § 940.285 (2) (b) 5.

Class B Misdemeanor. The penalty for a Class B Misdemeanor is a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

Elements *Taken from Wis. JI-Criminal #1269 Sec.940.285(2)(b)5:*

Defendant intentionally, recklessly, or negligently subjects a vulnerable adult to maltreatment	+	The maltreatment was under circumstances that did not cause and were not likely to cause bodily harm

Great bodily harm: serious 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.

"Intentionally subjects vulnerable adult to maltreatment" requires:

(1) victim was a vulnerable adult at the time of the offense
(2) defendant knew victim was a vulnerable adult
(3) defendant subjected victim to maltreatment
(4) defendant acted intentionally

Maltreatment: conduct that causes or could reasonably be expected to cause bodily harm or great bodily harm.

Vulnerable adult: any person 18 year of age or older who either is a developmentally disabled person or has infirmities of aging, mental illness, or other like incapacities and who is: substantially mentally incapable of providing for his or her needs for food, shelter, clothing, or personal or health care; or who is unable to report cruel maltreatment without assistance.

78. ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON – § 941.20 (1) (a)

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both

Elements *Taken from Wis. JI-Criminal #1320 for Sec. 941.20(1)(a):*

Defendant operated or handled dangerous weapon

+

The manner of operating or handling constituted criminal negligence

+

The criminal negligence endangered safety of another person

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79. ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON – § 941.20 (1) (b)

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1321 for Sec. 941.20(1)(b):*

Defendant operated or went armed with firearm

+

Defendant was under the influence of an intoxicant when operating or going armed with firearm

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80. ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON – § 941.20 (1) (c)

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1322 for Sec. 941.20(1)(c):*

Defendant pointed a firearm at or toward another human being

+

Defendant intentionally pointed the firearm at or toward another human being

81. ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON – § 941.20 (1) (d)

Class A Misdemeanor. The penalty for a Class A Misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Elements *Taken from Wis. JI-Criminal #1323 for Sec. 941.20(1)(d):*

Defendant discharged firearm + Defendant was on land belonging to someone else + Defendant was within 100 yards of a building devoted to human occupancy and located on land of another + Defendant did not have express permission of owner or occupant of building

82. ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON – § 941.20 (2) (a)

Class G Felony. The penalty for a Class G Felony is a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.

Elements *Taken from Wis. JI-Criminal #1324 for Sec. 941.20(2)(a):*

Defendant discharged a firearm + Defendant intentionally shot into building or vehicle + Under the circumstances, defendant should have realized a human being might be present in building or vehicle

83. ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON – § 941.20 (3)

Class F Felony. The penalty for a Class F Felony is a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

Elements *Taken from Wis. JI-Criminal #1327 for Sec. 941.20(3):*

Defendant discharged firearm from a vehicle while on a highway or in a public parking lot + Defendant discharged toward another person, building, or vehicle + Defendant acted with purpose to discharge firearm at other person, building, or vehicle

(Thanks to the Wisconsin Coalition Against Domestic Violence (WCADV) for their work in compiling this list of elements.)

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
Who May Petition?	1. Adult Family Member* 2. Adult Household Member* 3. Adult Former Spouse 4. Adult with whom have child in common 5. Adult with whom have or have had a dating relationship* 6. Adult under a caregiver's supervision * 7. Adult guardian of an incompetent individual § 813.12(1)(am); (5)(a)1 NOTE: The petitioner must be the victim with the exception of the guardian for an incompetent person § 813.12(5)(a)1 Except for investigation or prosecution of a crime, civil law or municipal ordinance, **an adult** is a person 18 years of age or older. § 48.02(1d) Except for investigation or prosecution of a crime, civil law or municipal ordinance, **a child** is a person who is less than 18 years of age. § 48.02(2) ***See definitions on last page**	1. Child victim 2. Parent of child victim 3. Stepparent of child victim 4. Guardian of child victim § 813. 122(2) for 1-4. 5. Guardian ad litem in a matter involving a child found to be in need of protection or services. § 48.235(4)(a)6 6. If a proceeding is brought under § 48.13 [child alleged to be in need of protection or services], any party to or any governmental or social agency involved in the proceeding. § 48.25(6) NOTE: As of 4-1-96, there are two forms for possible use when filing a child abuse TRO petition. Form CV-412 is most commonly used. Form JC-1690 is only used when the child victim is involved in a CHIPS (Children in Need of Protection or Services) action or when the respondent is a child.	1. Vulnerable adult 2. Parent 3. Adult Sibling 4. Adult child 5. Legal guardian of vulnerable adult 6. County protective services agency § 813.123(2) A vulnerable adult is defined as any person 18 years of age or older who either is a developmentally disabled person or has infirmities of aging, mental illness or other like incapacities and who is either substantially mentally incapable of providing for his or her needs for food, shelter, clothing or personal or health care; or unable to report cruel maltreatment without assistance. § 940.285(1)(e) Infirmities of aging include organic brain damage caused by advanced age or other reasons § 55.01(3). Developmental disability includes mental retardation, cerebral palsy, epilepsy, autism or another neurological condition closely related to mental retardation. This does not include a person affected by senility caused by aging process. § 55.01(2)	1. Any person who has been harassed. The statute refers to the petitioner as "person" but does not specify whether petitioner must be an adult. The practice of allowing a child to petition varies from county to county. A parent may wish to bring an action on behalf of his/her minor child to be safe. A guardian ad litem should be appointed if the petitioner is a minor. 2. Guardian ad litem in a matter involving a child found to be in need of protection or services. § 48.235(4)(a)6 3. If a proceeding is brought under § 48.13 [child alleged to be in need of protection or services], any party or any governmental or social agency involved in the proceeding. § 48.25(6) NOTE: As of 11/99, there are two forms for possible use when filing a harassment TRO/injunction petition. Form CV-407 is most commonly used. Form JC-1693 is only used when the child victim is involved in a CHIPS (Children in Need of Protection or Services) action or when the respondent is a child.

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
Against whom may the petitioner bring an action?	1. Adult Family Member* 2. Adult Household Member* 3. Adult Former Spouse 4. Adult with whom have child in common 5. Adult with whom have or have had a dating relationship* 6. Adult caregiver* § 813.12(1)(am) & (5)(a)2 Except for investigation or prosecution of a crime, civil law or municipal ordinance, **an adult** is a person 18 years of age or older. § 48.02(1d) Except for investigation or prosecution of a crime, civil law or municipal ordinance, **a child** is a person who is less than 18 years of age. § 48.02(2) ***See definitions on last page**	1. Although § 813.122 only uses the term respondent, changes made in the law clarify respondent can be an adult **or a child** who engages in child abuse. § 48.14(10) & § 757.69(1)(g) 2. Claim of emotional damage can be brought against parent, guardian, or legal custodian who has neglected, refused, or been unable for reasons other than poverty to obtain necessary treatment or take steps to ameliorate the symptoms. § 48.02(1)(gm) NOTE: If the respondent is a child, the court assigned to exercise jurisdiction under Chapter 48 (Children's Code) has exclusive jurisdiction & will hear the TRO/injunction. See § 48.14(10); see also § 48.065(2)(gr) NOTE: If the respondent is a child [or when the child victim is involved in a CHIPS (Children in Need of Protective Services) petition], petitioner should use Form JC-1690 rather than Form CV-412. This means the hearing will be in juvenile court, not civil court.	1. Adult who interferes with investigation of vulnerable adult **in Milwaukee County** § 55.043(1)(a) 2. Adult who **may interfere** with investigation of vulnerable adult **in Milwaukee County** § 55.043 (1)(a) 3. Adult who has interfered with delivery of protective services under s. 55.05 after offer has been made & vulnerable adult or guardian has consented to receipt of protective services 4. Adult who has interfered with protective placement under § 55.06 after offer has been made & vulnerable adult or guardian has consented to receipt of protective placement § 813.123(4)(a)2 or (5)(a)3 and § 813.123(6)(b)	1. Adult who engages in harassment. 2. Child who engages in harassment. Although § 813.125 only uses the term respondent, changes made in the law clarify respondent can be an adult **or a child** who engages in harassment. § 48.14(10), § 757.69(1)(g) & 1993 WI Act 318, Section 11 NOTE: If the respondent is a child, the court assigned to exercise jurisdiction under Chapter 48 (Children's Code) has exclusive jurisdiction & will hear the TRO/injunction. See § 48.14(10). See also § 48.065(2)(gs) regarding circuit court commissioners in TRO proceedings in which the respondent is a child. NOTE: If the respondent is a child [or when the child victim is involved in a CHIPS (Children in Need of Protection or Services) petition], the petitioner should use Form JC-1693 rather than Form CV-407. This means the hearing will be in juvenile court, not civil court.

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
What type of abuse must be alleged in the petition to obtain the TRO or injunction?	1. Intentional infliction of physical pain, physical injury or illness 2. Intentional impairment of physical condition 3. Violation of 1st, 2nd or 3rd degree sexual assault under § 940.225 (1), (2) or (3) 4. Intentional damage to physical property belonging to the individual(petitioner) § 943.01 5. Threat to engage in conduct under 1, 2, 3, 4 §§ 813.12(1)(am), 943.01	1. Physical injury inflicted on child by other than accidental means; or 2. Sexual intercourse or sexual contact under § 940.225 [1st, 2nd, 3rd, or 4th degree sexual assault], § 948.02 [1st or 2nd degree sexual assault of child], or § 948.025 [repeated acts of sexual assault]; or 3. Sexual exploitation of child; or 4. Permitting, allowing or encouraging child to engage in prostitution; or 5. Causing a child to view or listen to sexual activity; or 6. Causing child to expose or exposing genitals or pubic area to child; or 7. Emotional damage; or 8. Threat to engage in conduct under 1, 2, 3, 4, 5, 6 or 7 above. § 813.122(1)(a); § 48.02(1)	1. Adult who interferes with investigation of vulnerable adult **in Milwaukee County** § 55.043(1)(a) 2. Adult who **may interfere** with investigation of vulnerable adult **in Milwaukee County** § 55.043 (1)(a) 3. Adult who has interfered with delivery of protective services under § 55.05 after offer has been made & vulnerable adult or guardian has consented to receipt of protective services 4. Adult who has interfered with protective placement under § 55.06 after offer has been made & vulnerable adult or guardian has consented to receipt of protective placement § 813.123(4)(a)2 or (5)(a)3 and § 813.123(6)(b)	1. Striking, shoving, kicking or subjecting another to physical contact or attempting or threatening to do the same 2. Engaging in course of conduct or repeatedly committing acts which harass or intimidate another person & which serve no legitimate purpose § 813.125(1)
Where can the petition be filed (venue)?	1. County where petitioner resides 2. County where respondent resides 3. County where cause of action arose (where incident occurred) 4. County where petitioner is temporarily residing § 801.50(5r)	1. County where petitioner resides 2. County where respondent resides 3. County where cause of action arose (where incident occurred) § 801.50(5s)	1. County where claim arose § 801.50(2)(a) 2. County where defendant (respondent) resides § 801.50(2)(c)	1. County where petitioner resides 2. County where respondent resides 3. County where cause of action arose (where incident occurred) § 801.50(5s)

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
What will it cost to file a petition?	No fee may be collected to file the petition, to serve the petition or for the cost of travel to serve the petition. See § 814.61(1)(d) and 70. However, fees for the cost of filing a petition, service of the petition and travel to serve the petition may be collected from the respondent upon conviction of violation of the order. See § 814.61(1)(d) and § 814.70. If service by publication is necessary [See § 813.12(2)], the fee is paid by the petitioner.	No fee may be collected to file the petition if the petition alleges conduct that is the same as or similar to conduct that is prohibited by § 940.32 or that is listed in § 813.12(1)(a)1. to 4. See § 814.61(1)(e) No fee may be collected to serve the petition, or for the cost of travel to serve the petition See § 814.70(1) and § 814.70(3) However, fees for the cost of filing a petition, service of the petition, or cost for the travel to serve the petition shall be collected from the respondent upon conviction of violation of the order. See §§ 814.61(1)(e), 814.70(1) and 814.70(3) If a proceeding is brought under § 48.13 [CHIPS action- Children in Need of Protection or Services], any party to or any governmental or social agency involved in the CHIPS proceeding may petition the court for a TRO or injunction & no fee is required for the filing of the petition. See § 48.25(6). This means the respondent is a child. If fees are required, the petitioner may wish to inquire about an affidavit of indigency. If the affidavit is accepted, there will be no charge for the filing of the petition. The affidavit may also allow for a waiver of fees for travel & service. NOTE: Court may not order reimbursement for respondent's counsel in a child abuse restraining order when the respondent is a child. § 48.23(4)	No fee may be collected to file the petition if the petition alleges conduct that is the same as or similar to conduct that is prohibited by § 940.32 or that is listed in § 813.12(1)(a)1. to 4. See § 814.61(1)(e) No fee may be collected to serve the petition, or for the cost of travel to serve the petition See §§ 814.70(1) and 814.70(3) However, fees for the cost of filing a petition, service of the petition, or cost for the travel to serve the petition shall be collected from the respondent upon conviction of violation of the order. See §§ 814.61(1)(e), 814.70(1) and 814.70(3) If a proceeding is brought under §813.123 and does not allege domestic abuse behavior as listed in § 813.12(1)(am) to 6 or stalking behavior in § 940.32, the filing fee is $75 under § 814.61(1); $9 for justice information fee under § 814.635(1); $52 for court support services fee under § 814.634 for a total of $136. The minimum service fee is $12 per attempt under § 814.70. Counties may charge a higher fee under § 814.705. The fee for travel depends on the size of the county. § 814.70(3). If fees are required the petitioner may wish to inquire about an affidavit of indigency. If the petitioner gets an affidavit, there will be no charge for the filing of the petition. The affidavit may also allow for a waiver of fees for travel & service. In a petition that does not allege behavior prohibited by § 940.32 or § 813.12(1)(am). to 6. the petitioner can ask that the respondent be ordered to pay the costs. This will be decided at the injunction hearing.	No fee may be collected to file the petition, to serve the petition, or for the cost of travel to serve the petition when the petition alleges conduct that is prohibited by § 940.32 or any of the prohibited behavior listed in § 813.12(1)(a)1. to 4. § 940.32 (Stalking) criminalizes intentional behavior which an actor knows or should know will make the recipient fear bodily harm or death for him/herself or immediate family, and is repeatedly done on 2 or more calendar days. However, fees for the cost of filing a petition or service of the petition shall be collected from the respondent upon conviction of violation of the order. See § 814.61 (1)(e) If a proceeding is brought under § 813.125 and does not allege domestic abuse behavior as listed in § 813.12(1)(am) or stalking behavior in § 940.32, the filing fee is $75 under § 814.61(1); $9 for justice information fee under § 814.635(1); $52 for court support services fee under § 814.634 for a total of $136. The minimum service fee is $12 per attempt under § 814.70. Counties may charge a higher fee under § 814.705. The fee for travel depends on the size of the county. § 814.70(3). If a proceeding is brought under § 48.13 [CHIPS action – Children in Need of Protection or Services], any party to or any governmental or social agency involved in the CHIPS proceeding may petition the court for a TRO or injunction & no fee is required for the filing of the petition. § 48.25(6). This means the respondent is a child. NOTE: Court may not order reimbursement for respondent's counsel in a harassment restraining order when the respondent is a child. § 48.23(4)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
How long is a TRO in effect?	Until a hearing is held on the issuance of an injunction. The hearing shall be within 14 days after the TRO is issued, unless an extension is granted. § 813.12(3)(c)	Until a hearing is held on the issuance of an injunction. The hearing shall be within 7 days after the TRO is issued, unless an extension is granted. § 813.122(4)(c)	Until a hearing is held on the issuance of an injunction. The hearing shall be within 7 days after the TRO is issued, unless an extension is granted. § 813.123(4)(c)	Until a hearing is held on the issuance of an injunction. The hearing shall be within 7 days after the TRO is issued, unless an extension is granted. § 813.125(3)(c)
Who may issue a TRO?	Judge or circuit court commissioner § 813.12(3)(a); § 757.69(1) (m)	Judge or circuit court commissioner § 813.12(4)(a) A circuit court commissioner assigned to juvenile matters when respondent is a child § 757.69(1)(g) 7.	Judge or circuit court commissioner § 813.123(4)(a); § 757.69 (1) (j)	Judge or circuit court commissioner § 813.125(3)(a) A circuit court commissioner assigned to juvenile matters when respondent is a child. § 757.69(1)(g) 7.

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
When can the court extend a TRO?	1. Written consent of parties or 2. Once for 14 days upon a finding that the respondent has not been served with a copy of the TRO although the petitioner has exercised due diligence. § 813.12(3)(c)	1. Written consent of parties or 2. Once for 7 days upon a finding that the respondent has not been served with a copy of the TRO although the petitioner has exercised due diligence. § 813.122(4)(c)	1. Written consent of parties or 2. Once for 7 days upon a finding that the respondent has not been served with a copy of the TRO although the petitioner has exercised due diligence. § 813.123(4)(c)	1. Written consent of parties or 2. Once for 7 days upon a finding that the respondent has not been served with a copy of the TRO although the petitioner has exercised due diligence. § 813.125(3)(c)
What must the court find in order to grant the TRO?	1. The petition alleges the necessary facts as set out in § 813.12(5)(a) and 2. 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. § 813.12(3)(a) 3. Petitioner is in imminent danger of harm. *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988). 4. A TRO may not be dismissed or denied because of the existence of a	1. The petition alleges the elements set forth in § 813.122(6)(a) and 2. 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. § 813.122(4)(a)	1. The petition alleges the elements set forth in § 813.123 (6) **and either 2 or 3** below: 2. There are reasonable grounds to believe the respondent has interfered with, or based on prior conduct of the respondent, may interfere with, an investigation of the vulnerable adult **in Milwaukee County** under § 55.043(1)(a), or 3. Interference with the delivery of protective devices under § 55.05 or a protective placement under § 55.06. § 813.123(4)(a)	1. The petition alleges the elements set forth in § 813.125(5)(a) and 2. There are reasonable grounds to believe the respondent violated § 947.013. [This is the criminal harassment statute.] § 813.125(3)(a)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
	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 § 813.12(3)(aj)			
Does notice have to be given to the respondent before issuing a TRO?	No. Notice need not be given to the respondent before issuing a TRO. § 813.12(3)(b)	No. Notice need not be given to the respondent before issuing a TRO. § 813.122(4)(b)	No. Notice need not be given to the respondent before issuing a TRO. § 813.123(4)(b)	No. Notice need not be given to the respondent before issuing a TRO. § 813.125(3)(b)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
What can the respon-dent be ordered to do if a TRO is issued?	1. Refrain from committing acts of domestic abuse against the petitioner. 2. Avoid the petitioner's residence or any other location temporarily occupied by the petitioner or both. 3. 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. 4. Any combination of these remedies. 5. Court can order any other appropriate remedy not inconsistent with the remedies requested in the petition. § 813.12(3)(a)	1. Avoid the child victim's residence or any residence temporarily occupied by the child victim or both. 2. 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. § 813.122(4)(a)	Unless the vulnerable adult, guardian or guardian ad litem consents in writing and the court agrees that contact is in the best interest of the vulnerable adult, the respondent can be ordered to: 1. Avoid interference with investigation **in Milwaukee County** under § 55.043(1)(a). 2. Avoid interference with delivery of protective services under § 55.05. 3. Avoid interference with protective placement under § 55.06. § 813.123(4)(a)	1. Cease the harassment of another person. § 813.125(3)(a) 2. Avoid the harassment of another person. § 813.125(3)(a) 3. Avoid the petitioner's residence or any premises temporarily occupied by the petitioner or both. However, if the petitioner & respondent are not married, the respondent owns the premises where the petitioner resides & 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 & shall order the respondent to avoid the new residence for the duration of the order. § 813.125(3)(a)(intro) and (3)(am) 4. Any combination of these remedies. § 813.125(3)(a)(intro)

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
How does the petitioner serve the TRO or injunction on the respondent?	1. Upon request by the petitioner, the court shall order the sheriff to serve the TRO. § 813.12(6)(a) 2. At the petitioner's expense, the petitioner may use a private process server. See § 813.12(6)(a); See § 801.11(1) for info on private service. 3. If the court extends the time for a hearing & the petitioner files an affidavit with the court stating that personal service by the sheriff or a private server was unsuccessful because the respondent is avoiding service by concealment or otherwise, the petitioner may serve the respondent by publication of a summary of the petition as a class 1 notice & by mailing or sending a facsimile of the summary. If the mailing address or facsimile number cannot by ascertained with due diligence, they may be omitted. § 813.12(2) 6. If the respondent has been served with a copy of the petition and notice of the time for hearing under § 813.12(3), the respondent has constructive knowledge of the existence of the injunction, regardless of whether the respondent has been served with a copy of the injunction. § 813.12(7)(c).	1. Upon request by the petitioner, the court, as applicable, shall order the sheriff to assist in serving the TRO or injunction. § 813.122(9)(a) 2. § 813.122 does not address the issue of private service. However, private service is possible. See § 801.11(1)	1. Upon request by the petitioner, the court shall order the sheriff to assist in serving the TRO or injunction. § 813.123(8)(a) 2. § 813.123 does not address the issue of private service. However, private service is possible. See § 801.11(1)	1. § 813.125 does not address the issue of service. However, in most counties the sheriff's department treats harassment restraining orders as it would any other restraining order and will assist with service. 2. § 813.125 does not address the issue of private service. However, private service is possible. See § 801.11(1)

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
Can the court issue a dual TRO?	No. A TRO may be entered only against the respondent named in the petition. § 813.12(3)(b)	No. A TRO may be entered only against the respondent named in the petition. § 813.122(4)(b)	No. A TRO may be entered only against the respondent named in the petition. § 813.123(4)(b)	No. A TRO may be entered only against the respondent named in the petition. § 813.125(3)(b)
Is notice required before the court can issue a TRO?	No. See § 813.12(3)(b).	No. See § 813.122(4)(b).	No. See § 813.123(4)(b).	No. See § 813.125(3)(b).
Can law enforce-ment assist in gaining physical possession of a home?	The court SHALL order the sheriff to accompany the petitioner & assist in placing him or her in physical possession of his or her residence upon request by the petitioner. See § 813.12(6)(a). *Hayen v. Hayen*, 232 Wis.2d 477 (Ct. App. 1999)	§ 813.122 does not contain language to address law enforcement assisting the petitioner in placing him or her in physical possession of his or her residence.	§ 813.123 does not contain language to address law enforcement assisting the petitioner in placing him or her in physical possession of his or her residence. This is probably because the vulnerable adult is usually not attempting to remove the respondent from the residence, but rather is attempting to restrain the respondent from interference with needed services.	§ 813.125 does not contain language to address law enforcement assisting the petitioner in placing him or her in physical possession of his or her residence.

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
Is the TRO voided if the respondent is admitted into the home or the petitioner initiates contact with respondent?	No. The TRO is not voided if the respondent is admitted into a dwelling the order directs him or her to avoid. § 813.12(3)(c)	§ 813.122 does not contain language to address this issue.	§ 813.123 does not contain language to address this issue.	§ 813.125 does not contain language to address this issue.
For how long can an injunction be granted?	For the period of time the petitioner requests, but no more than four years. See § 813.12(4)(c). *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996), states: "Under the clear and unambiguous language of § 813.12(4)(c), the injunction is effective for the period of time the petitioner requests."	For no more than two years, or until the child victim reaches 18 years of age, whichever occurs first. See § 813.122(5)(d).	No more than two years. See § 813.123(5)(c).	No more than two years. See § 813.125(4)(c).
Who may issue an injunction?	Judge or circuit court commissioner § 813.12(4)(a)	Judge or circuit court commissioner § 813.122(5)(a) A circuit court commissioner assigned to juvenile matters when the respondent is a child. § 757.69(1)(g) 7.	Judge § 813.123(5)(a)	Judge or circuit court commissioner § 813.125(4)(a); § 757.69(1) (m) A circuit court commissioner assigned to juvenile matters when the respondent is a child. § 757.69(1)(g)(intro) 7.

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
What must the court find in order to grant an injunction?	1. Petition has been filed alleging certain elements; **and** 2. Petitioner serves petition & notice of time of hearing on respondent **or** respondent serves notice of time for hearing upon petitioner; **and** 3. Court finds there are reasonable grounds to believe the respondent a) has engaged in domestic abuse of the petitioner or b) based on prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner. § 813.12(4)(a) 4. In determining whether to grant the injunction, court shall consider the potential danger posed to petitioner & the pattern of abusive conduct of respondent but may not base decision solely on length of time since last domestic abuse or length of time since relationship ended. § 813.12(4)(aj) 5. The judge or circuit court commissioner may not dismiss or deny granting any injunction 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 § 813.12(4)(aj)	1. Petition has been filed alleging certain elements; **and** 2. Petitioner serves petition & notice of time for hearing on respondent or respondent serves notice of time for hearing upon petitioner; **and** 3. Court finds reasonable grounds to believe a) respondent has engaged in or b) based upon prior conduct of the child victim & respondent may engage in abuse of the child victim. § 813.122(5)(a) NOTE: If the respondent is the parent of the child victim, the judge shall provide reasonable visitation rights, unless the judge finds to do so would endanger the child's physical, mental or emotional health. Visitation may be supervised. See § 813.122(5)(b).	1. Petition has been filed alleging certain elements; **and** 2. Petitioner serves petition & notice of time for hearing on respondent or respondent serves notice of time for hearing on petitioner; **and** 3. Court finds reasonable cause to believe **any of these**: a. Respondent interfered with, or based upon prior conduct, may interfere with, an investigation of the vulnerable adult **in Milwaukee County** under § 55.043, **and** if interference continues it would be difficult to determine if misappropriation of property, or abuse or neglect is occurring or may recur. b. Respondent interfered with the delivery of protective services under § 55.05 after the offer has been made and the vulnerable adult or his or her guardian has consented to receipt of the protective services. c. Respondent interfered with a protective placement order under § 55.06 after the offer has been made and the vulnerable adult or his or her guardian has consented to receipt of the protective placement order. § 813.123(5)(a)	1. Petition has been filed alleging certain elements; **and** 2. Court finds reasonable grounds to believe the respondent has violated § 947.013, the criminal harassment statute. § 813.125(3)(a)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
What can the respon-dent be ordered to do if an injunction is granted?	1. Refrain from committing acts of domestic abuse against the petitioner. 2. Avoid the petitioner's residence or any other location temporarily occupied by the petitioner or both. 3. However, if the petitioner & respondent are not married, the respondent owns the premises where the petitioner resides & 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 & shall order the respondent to avoid the new residence for the duration of the order. § 813.12(4)(am) 3. 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. 4. Any combination of these remedies. 5. Order any other appropriate remedy not inconsistent with the remedies requested in the petition. 6. Firearms surrender **	1. Avoid the child victim's residence or any residence temporarily occupied by the child victim or both. 2. 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. § 813.122(5)(a) 3. Firearms surrender** . ** See next page for information on **mandated** firearms surrender.	Unless the vulnerable adult, guardian or guardian ad litem consents in writing and the court agrees that contact is in the best interest of the vulnerable adult, the respondent can be ordered to: 1. Avoid interference with investigation **in Milwaukee County** under § 55.043(1)(a) 2. Avoid interference with delivery of protective services under § 55.05. 3. Avoid interference with protective placement under § 55.06. § 813.123(5)(a)	1. Cease the harassment of another person. § 813.125(4)(a) 2. Avoid the harassment of another person. § 813.125(4)(a) 3. Avoid the petitioner's residence or any premises temporarily occupied by the petitioner or both. However, if the petitioner & respondent are not married, the respondent owns the premises where the petitioner resides & 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 & shall order the respondent to avoid the new residence for the duration of the order. § 813.125(4)(a) and (am) 4. Any combination of these remedies. § 813.125(4)(a) 5. Prohibit from possessing a firearm* if it is determined the respondent may use a firearm* to cause physical harm to another or to endanger public safety. § 813.125(4m)(a) **NOTE:** In *Bachowski v. Salamone*, 139 Wis. 2d 397, 414 (1987), the court said only the acts which form the basis of the judge's finding of harassment or substantially similar conduct can be enjoined. ***See definitions on last page**

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
Is there an automatic firearms surrender law against the respondent?	Yes. For all petitions filed on or after 4-1-96, if the injunction is granted, the respondent must surrender any firearms* he/she owns or has in his/her possession. § 813.12(4m)(a) ***See definitions on last page**	Yes. For all petitions filed on or after 4-1-96, if the injunction is granted, the respondent must surrender any firearms* he/she owns or has in his/her possession. § 813.122(5m)(a) ***See definitions on last page**	§ 813.123 does not address this issue.	No. It is not automatic. However for petitions filed on or after 4-1-96, if the court issues an injunction and determines - based on clear & 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.* § 813.125(4m)(a) ***See definitions on last page**
Are there any exceptions to who must surrender firearms?	Yes. If the respondent is a peace officer, an injunction may **not** require the respondent to surrender a firearm* that he or she is required, as a condition of employment, to possess whether or not he or she is on duty. § 813.12(4m)(ag) A person who is member of the U.S. armed forces or national guard may possess a firearm* while in the line of duty. § 941.29(10)(b) ***See definitions on last page**	Yes. If the respondent is a peace officer, an injunction may **not** require the respondent to surrender a firearm* that he or she is required, as a condition of employment, to possess whether or not he or she is on duty. § 813.122(5m)(ag) A person who is a member of the U.S. armed forces or national guard may posses a firearm* while in the line of duty. § 941.29(10)(b) ***See definitions on last page**	§ 813.123 does not address this issue.	Yes. If the respondent is a peace officer, an order may **not** require the respondent to surrender a firearm* that he or she is required, as a condition of employment, to possess whether or not he or she is on duty. § 813.125(4m)(cg) § 941.29(10)(b) does not make a reference to persons under § 813.125 in the U.S. armed forces or the national guard, so it appears they **could** be prosecuted if possessing a firearm* even while in the line of duty. ***See definitions on last page**

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
Does the firearm surrender law apply when a TRO is issued?	No. It only applies when an injunction is granted. § 813.12(4m)(a)2	No. It only applies when an injunction is granted. § 813.122(5m)(a)2	§ 813.123 does not address this issue.	No. It only applies when an injunction is granted and only when the court determines it is necessary. § 813.125(4m)(a)
To whom must the firearms be surrender-ed?	1. To the sheriff of the county in which the action was commenced; 2. To the sheriff of the county in which the respondent resides; 3. To another person designated by the respondent and approved by the court. § 813.12(4m)(a)2	1. To the sheriff of the county in which the action was commenced; 2. To the sheriff of the county in which the respondent resides; 3. To another person designated by the respondent and approved by the court. § 813.122(5m)(a)2	§ 813.123 does not address this language.	1. To the sheriff of the county in which the action was commenced; 2. To the sheriff of the county in which the respondent resides; 3. To another person designated by the respondent and approved by the court. § 813.125(4m)(c)2
Must the court surrender the gun to a person designated by the respondent?	Yes. The court **shall** approve the person designated by the respondent **unless** the court finds the person is inappropriate and places the reasons for the finding on the record. § 813.12(4m)(a)2	Yes. The court **shall** approve the person designated by the respondent **unless** the court finds the person is inappropriate and places the reasons for the finding on the record. § 813.122(5m)(a)2	§ 813.123 does not address this issue.	Yes. The court **shall** approve the person designated by the respondent **unless** the court finds the person is inappropriate and places the reasons for the finding on the record. § 813.125(4m)(c)2

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
How can the firearms be returned?	The firearms* may **not** be returned until the court determines: 1. The injunction has been vacated or has expired and not been extended. 2. 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. § 813.12(4m)(b) ***See definitions on last page**	The firearms* may **not** be returned until the court determines: 1. The injunction has been vacated or has expired and not been extended. 2. 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. § 813.122(5m)(b) *** See definitions on last page**	§ 813.123 does not address this issue.	The firearms* may **not** be returned until the court determines: 1. The injunction has been vacated or has expired. 2. 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. § 813.125(4m)(d) *** See definitions on last page**
Can the court order an injunction against the petitioner?	No. The court may enter an injunction only against the respondent named in the petition. § 813.12(4)(b) No injunction may be issued under the same case number against the person petitioning for the injunction. § 813.12(4)(b) *Laluzerne v. Stange*, 200 Wis. 2d 179 (Ct. App. 1996), states that § 813.12(4)(b) precludes the issuing of a mutual domestic abuse injunction.	No. The court may enter an injunction only against the respondent named in the petition. § 813.122(5)(c)	No. The court may enter an injunction only against the respondent named in the petition. § 813.123(5)(b)	No. The court may enter an injunction only against the respondent named in the petition. § 813.125(4)(b)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
Is the injunction voided if the respondent is admitted into the petitioner's home or if the petitioner initiates contact with the respondent?	No. The injunction is not voided if the petitioner allows or initiates contact with the respondent or by the admittance of the respondent into a dwelling that the injunction directs him or her to avoid. § 813.12(4)(c)1	§ 813.122 does not address this issue.	§ 813.123 does not address this issue.	§ 813.125 does not address this issue.
Can a court extend an injunction?	Yes. When an injunction granted for less than 4 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. § 813.12(4)(c)2 An informal Attorney General's Opinion dated 9-1-95 concludes the petitioner must ask for the extension on or before the date the injunction expires & the request may be oral or written & need not be a formal petition.	Yes. 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 child victim. This extension shall remain in effect until 6 months after the date on which the court first entered the injunction, or until the child attains 18 years of age, whichever occurs first. § 813.122(5)(d)2 If the petitioner states that an injunction is necessary to protect the child victim, the court may extend an injunction for not more than 2 years or until the child attains 18 years of age, whichever occurs first. § 813.122(5)(d)3	Yes. 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 vulnerable adult. This extension shall remain in effect until 6 months after the date on which the court first entered the injunction. § 813.123(5)(c)2 If the petitioner states an extension is necessary to protect the vulnerable adult, the court may extend the injunction for not more than 2 years. § 813.123(5)(c)3	§ 813.125 does not address this issue.

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
Must the court give notice before it extends an injunction?	Notice need not be given to the respondent before extending an injunction. The petitioner shall notify the respondent after the court extends injunction. § 813.12(4)(c)4 An informal Attorney General's opinion dated 9-1-95 says service of an extension order by law enforcement personnel is the preferred method of notifying the respondent of an extension.	Notice need not be given to the respondent before extending an injunction. The petitioner shall notify the respondent after the court extends an injunction. § 813.122(5)(d)4	Notice need not be given to the respondent before extending an injunction. The petitioner shall notify the respondent after the court extends an injunction. § 813.123(5)(c)4	§ 813.125 does not address the issue of an extension.
Are there any orders a court may not make as part of the injunction?	1. The court may not make findings or issue orders under § 767.23 [child & spousal support] or § 767.24 [custody & physical placement]. § 813.12(2)(b) 2. The court may not modify an order restraining the respondent based solely on the request of the respondent. § 813.12(4)(b)	§ 813.122 does not list any prohibited orders. **It does, however, list many orders the court may make, including orders about child support, supervised visitation and an order for a guardian ad litem**. See §§ 813.122(5)(e), 813.122(5)(b), and 813.122(3)(b), respectively.	§ 813.123 does not list any prohibited orders. **It does, however, note what the respondent is prohibited from doing.** § 813.123(7)	The petition and the court order shall not disclose the address of the alleged victim. § 813.125(5m)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
Does the law mandate a law enforcement officer to make an arrest for violation of a TRO or injunction?	Yes, if: 1. Presented with a court order or the law enforcement officer verifies a court order exists, and 2. The officer has probable cause to believe the person has violated the court order. § 813.12(7)	Yes, if: 1. Presented with a court order or the law enforcement officer verifies a court order exists, and 2. The officer has probable cause to believe the person has violated the court order. § 813.122(10)	No. However, a law enforcement officer MAY arrest and take a person into custody if: 1. Presented with a court order or the law enforcement officer verifies a court order exists, and 2. The officer has probable cause to believe the person has violated the court order. § 813.123(9)	Yes, if: 1. Presented with a court order or the law enforcement officer verifies a court order exists, and 2. The officer has probable cause to believe the person has violated the court order. § 813.125(6)
Are there other laws which might assist a petitioner?	1. § 895.73 - Victim service representative. 2. Chapter 950 - Rights of victims & witnesses of crime, if respondent is charged with crime. 3. Chapter 949 - Crime Victim Compensation, if victim has reported the crime & it is compensable.	1. § 895.73 - Victim service representative. 2. Chapter 950 - Rights of victims & witnesses of crime, if respondent is charged with crime. 3. Chapter 949 - Crime Victim Compensation, if victim has reported the crime & it is compensable.	1. § 895.73 - Victim service representative. 2. Chapter 950 - Rights of victims & witnesses of crime, if respondent is charged with crime. 3. Chapter 949 - Crime Victim Compensation, if victim has reported the crime & it is compensable.	1. § 895.73 - Victim service representative. 2. Chapter 950 - Rights of victims & witnesses of crime, if respondent is charged with crime. 3. Chapter 949 - Crime Victim Compensation, if victim has reported the crime & it is compensable.

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
Does Chapter 813 say anything about a guardian ad litem?	No.	§ The court on its own motion or on the motion of any party may order that a guardian ad litem* be appointed for the child victim. § 813.122(3)(b) The court shall appoint a guardian ad litem if the respondent is a parent of the child victim. § 813.122(3)(bm) *** See definitions on last page**	Yes. The court on its own motion or on the motion of any party may order that a guardian ad litem* be appointed under § 880.331(1) for the vulnerable adult. § 813.123(3)(b) *** See definitions on last page**	§ 813.125 does not address the issue of a guardian ad litem*. However, if the court is hearing a petition involving a minor as either the petitioner or the respondent, the court is likely to appoint a guardian ad litem* for the minor party. This can be avoided **for the petitioner** if the petition is brought by a parent or guardian on behalf of the minor petitioner. Also, see § 48.235(4)(a)(6). *** See definitions on last page**

	DOMESTIC ABUSE Wis. Stats. § 813.12	CHILD ABUSE Wis. Stats. § 813.122	VULNERABLE ADULT Wis. Stats. § 813.123	HARASSMENT Wis. Stats. § 813.125
Must the court or clerk of circuit court provide any help?	1. Yes. The court shall advise the petitioner of the right to serve the respondent the petition by published notice if with due diligence the respondent cannot be served as provided under § 801.11(1)(a), (b), (c) § 813.12(3)(d) 2. The clerk of court shall assist the petitioner with the preparation of the notice and filing of the affidavit of printing. § 813.12(3)(d) 3. The clerk of court shall provide the simplified forms provided under § 46.95(3)(c) to help a person file a petition. § 813.12(5)(b) 4. Within 24 hours after request by the petitioner, the clerk of circuit court shall send a copy of any order issued or provide notice of any order to the sheriff or to any other local law enforcement agency which is the central repository for orders & which has jurisdiction over the petitioner's premises. § 813.12(6)(b)	1.Upon request, the clerk of court shall provide, without cost, the simplified forms obtained under § 46.03(7)(d) to a petitioner. § 813.122(6)(b) 2. Within 24 hours after request by the petitioner, the clerk of circuit court shall send a copy of any order issued or provide notice of any order to the sheriff or to any other local law enforcement agency which is the central repository for orders & which has jurisdiction over the petitioner's premises. § 813.122(9)(b)	1. Upon request of the petitioner, the court shall order the sheriff to assist in executing or serving the TRO or injunction. § 812.123(8)(a) 2. Within 24 hours after request by the petitioner, the clerk of circuit court shall send a copy of any order issued or provide notice of any order to the sheriff or to any other local law enforcement agency which is the central repository for orders & which has jurisdiction over the petitioner's premises. § 813.123(8)(b)	1. The clerk of court shall provide simplified forms. § 813.125(5)(b)

	DOMESTIC ABUSE **Wis. Stats. § 813.12**	**CHILD ABUSE** **Wis. Stats. § 813.122**	**VULNERABLE ADULT** **Wis. Stats. § 813.123**	**HARASSMENT** **Wis. Stats. § 813.125**
How does a petitioner drop a TRO or injunction?	§ 813.12 does not address this issue. However, a court has authority to drop or vacate an order in at least 3 ways: § 807.03 (Vacate an Order); § 806.07 (Relief from a judgment or order); Inherent powers of court to do justice (Discussed in case law). A petitioner may wish to make a request to drop the order in writing. If possible, the petitioner **and respondent** may wish to write the letter, stating why they wish to have the order dropped. Whoever writes the letter should inquire whether anything further needs to be done to have the order dismissed & should sign the letter. After receiving the letter, a judge will **probably** set a date for a hearing to which both parties will receive notice **or** consider the request a motion to dismiss & send an order to both parties granting the request. If the judge grants the order, the order to dismiss should be sent to the sheriff's department so they can remove the order from their files. See Form CV-409	§ 813.122 does not address this issue. However, a court has authority to drop or vacate an order in at least 3 ways: § 807.03 (Vacate an Order); § 806.07 (Relief from a judgment or order); Inherent powers of court to do justice (Discussed in case law). A petitioner may wish to make a request to drop the order in writing. If possible, the petitioner **and respondent** may wish to write the letter, stating why they wish to have the order dropped. Whoever writes the letter should inquire whether anything further needs to be done to have the order dismissed & should sign the letter. After receiving the letter, a judge will **probably** set a date for a hearing to which both parties will receive notice **or** consider the request a motion to dismiss & send an order to both parties granting the request. If the judge grants the order, the order to dismiss should be sent to the sheriff's department so they can remove the order from their files. See Form CV-409, *Dismissal Order(Injunction)* available at http//www.courts.state.wi.us/circuit/search_forms.html	§ 813.123 does not address this issue. However, a court has authority to drop or vacate an order in at least 3 ways: § 807.03 (Vacate an Order); § 806.07 (Relief from judgment or order); Inherent powers of court to do justice (Discussed in case law). A petitioner may wish to make a request to drop the order in writing. If possible, the petitioner **and respondent** may wish to write the letter, stating why they wish to have the order dropped. Whoever writes the letter should inquire whether anything further needs to be done to have the order dismissed & should sign the letter. After receiving the letter, a judge will **probably** set a date for a hearing to which both parties will receive notice **or** consider the request a motion to dismiss & send an order to both parties granting the request. If the judge grants the order, the order to dismiss should be sent to the sheriff's department so they can remove the order from their files. See Form CV-409, *Dismissal Order(Injunction)* available at http//www.courts.state.wi.us/circuit/ search_forms.html	§ 813.125 does not address this issue. However, a court has authority to drop or vacate an order in at least 3 ways: § 807.03 (Vacate an Order); § 806.07 (Relief from judgment or order); Inherent powers of court to do justice (Discussed in case law). A petitioner may wish to make a request to drop the order in writing. If possible, the petitioner **and respondent** may wish to write the letter, stating why they wish to have the order dropped. Whoever writes the letter should inquire whether anything further needs to be done to have the order dismissed & should sign the letter. After receiving the letter, a judge will **probably** set a date for a hearing to which both parties will receive notice **or** consider the request a motion to dismiss & send an order to both parties granting the request. If the judge grants the order, the order to dismiss should be sent to the sheriff's department so they can remove the order from their files. See Form CV-409, *Dismissal Order(Injunction)* available at http//www.courts.state.wi.us/circuit/ search_forms.html

TERMS	DEFINITIONS	WHERE DEFINITION IS FOUND IN STATUTES
Caregiver	An individual who provides in-home or community care to another through regular and direct contact	§ 813.12(1)(ad)
Dating Relationship	A romantic or intimate social relationship between two adults, but not including a casual or business-related fraternization between two individuals in a business or social context. Courts shall determine whether a dating relationship existed by considering the length of the relationship, the type of the relationship, and the frequency of the interaction between the adult individuals involved in the relationship.	§ 813.12(1)(ag)
Family member	A spouse, a parent, a child, a person related by blood or adoption.	§ 813.12(1)(b)
Firearm(s)	Weapon which acts by force of gun powder. In *State v. Radon*, the court held the term firearm is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to a disassembly. 185 Wis.2d 701, 706 (Ct. App. 1994)	See § 167.31
Guardian Ad Litem (GAL)	Attorney who represents the interest of the child.	See § 48.235
Guardian	One appointed by a court to have care, custody and control of the person of a minor or an incompetent or the management of the estate of a minor, an incompetent or a spendthrift	§ 880.01(3)
Household Member	Person currently or formerly residing in a place of abode with another person	§ 813.12(1)(c)
Incompetent Individual	A person adjudged by a court of record to be substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging, developmental disabilities, or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incompetence.	§ 880.01(4)

Wisconsin Temporary Restraining Order (TRO), Injunction Petitions and Related Forms can be located at http//www.courts.state.wi.us/circuit/search_forms.html

Created by Attorney Tess Meuer with contributions by Katherine Teitgen, Wisconsin Coalition Against Domestic Violence, used with permission for the Wisconsin DV Prosecutor's Manual, 2004.

Please note: 1995 WI Act 306 creates a fifth type of Restraining Order - which is given full faith and credit - entitled a "Foreign Protection Order". Wis. Stats. § 806.247(1)(b) describes a Foreign Protection Order as 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, which is issued to prevent abuse, bodily harm, communication, contact, harassment, physical proximity, threatening acts or violence by or to a person other than support or custody orders. Thus, all Tribal Injunctions now issued in Wisconsin are Foreign Protection Orders.

Appendix 3: Witness Testimony Preparation

Thank you for your service as a witness. The following list of items is designed to help you better understand the Criminal Justice System and answer some of your questions about being a witness. Feel free to talk to the Victim/Witness Specialist or Assistant District Attorney assigned to your case for further information or clarification. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case. We appreciate your sacrifice of time.

Helpful Suggestions and Reminders

1. REFRESH YOUR MEMORY

Before you testify, try to picture the scene, the objects there, the distances and exactly what happened. This will assist you in recalling the facts more accurately when asked a question. If the question is about distance or time, and if your answer is only an estimate, be sure you state that you are only estimating. Beware of suggestions by attorneys as to distance or times when you do not recall the actual time or distance. Do not agree with their estimate unless you independently arrive at the same estimate.

2. SPEAK IN YOUR OWN WORDS

Don't try to memorize what you are going to say. Doing so will make your testimony sound "pat" and unconvincing. Instead, be yourself. Prior to trial, go over in your own mind those matters about which you will be questioned.

3. APPEARANCE IS IMPORTANT

A neat appearance and proper dress in court are important. The trouble with an appearance that seems very casual or very dressy is that it might distract the jury during the brief time you're on the stand. We want the jury to concentrate on your testimony.

4. SPEAK CLEARLY

Present your testimony clearly, slowly and loudly enough so that the juror the farthest away can easily hear and understand everything that you say. Although you are responding to the questions of a lawyer, remember that the answers are really for the jury's benefit.

5. DO NOT DISCUSS THE CASE

Jurors who are or will be sitting on the case in which you are a witness may be present in the same public areas where you will be. For that reason, you MUST NOT discuss the case with anyone. Also, remember that jurors may have an opportunity to observe how you act outside the courtroom.

6. BE A RESPONSIBLE WITNESS

When you are called into court for any reason, be serious. Avoid saying anything about the case until you are actually on the witness stand. Also, do not read in the courtroom.

7. BEING SWORN IN AS A WITNESS

When you are called to testify, you will first be sworn in. When you take the oath, stand up straight, pay attention to the clerk administering the oath, and say "I do" clearly.

8. TELL THE TRUTH

Most important of all: you are sworn to TELL the TRUTH. You must be truthful and honest. Every true fact should be readily admitted. Do not stop to figure out whether your answer will help or hurt either side. Just answer the questions to the best of your memory.

9. DO NOT EXAGGERATE

Don't make overbroad statements that you may have to correct. Be particularly careful in responding to a question that begins, "Wouldn't you agree that…?" The explanation should be in your own words. Do not allow an attorney to put words in your mouth.

10. LISTEN CAREFULLY TO AVOID CONFUSION

When a witness gives testimony, he or she is first asked questions by the lawyer who called him or her to the witness stand. For you, this will be an Assistant District Attorney. The questions asked are for the purpose of "direct examination." When you are questioned by the opposing attorney, it is called "cross examination." This process is sometimes repeated several times in order to clearly address all aspects of the questions and answers. The basic purpose of direct examination is for you to tell the judge and jury what you know about the case. The basic purpose of cross-examination is to raise doubts about the accuracy of your testimony. Do not get angry if you feel you are being doubted during the cross-examination. The defense counsel is just doing their job.

11. DO NOT LOSE YOUR TEMPER

A witness who is angry may exaggerate or appear to be less than objective, or emotionally unstable. Keep your temper. Always be courteous, even if the lawyer questioning you appears discourteous. Don't appear to be a "wise guy" or you will lose the respect of the judge and jury.

12. RESPOND ORALLY TO THE QUESTIONS

Do not nod or shake your head for a "yes" or "no" answer. Speak aloud so that the court reporter or recording device can hear and record your answer.

13. THINK BEFORE YOU SPEAK

Listen carefully to the questions you are asked. If you do not understand the question, have it repeated. Then, provide a thoughtful, considered answer. Do NOT give an answer WITHOUT THINKING. While no answer should be rushed, neither should there be any unnaturally long delay to a simple question if you know the answer.

14. EXPLAIN YOUR ANSWER

If necessary, explain your answer. Give the answer in your own words. If a question can not be answered truthfully with a "yes" or "no" response, then it is O.K. to explain your answer.

15. CORRECT YOUR MISTAKES

If your answer was not correctly stated, correct it immediately. If your answer was not clear, clarify it immediately. It is better to correct a mistake yourself than to have the attorney discover an error in your testimony. If you realize you have answered incorrectly, say, "May I correct something I said earlier?" Sometimes witnesses give inconsistent testimony – something they said before doesn't agree with something they said later. If this happens to you, do not get flustered. Just explain honestly why you were mistaken. The jury, like the rest of us, understands that people make honest mistakes.

16. DO NOT VOLUNTEER INFORMATION

Answer only the questions asked of you. Do not volunteer information that is not actually asked for. Additionally, the judge and the jury are interested in the facts that you have observed or personally know about. Therefore, don't give your conclusions and opinions, and don't state what someone else told you, unless you are specifically asked.

17. DO NOT SET YOURSELF UP FOR ERROR

Unless certain, don't say: "That's all of the conversation" or "Nothing else happened." Instead say, "That's all I recall," or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.

18. OBJECTIONS BY COUNSEL

Stop speaking instantly when the judge interrupts you, or when an attorney objects to a question. Wait for the judge to tell you to continue before answering any further.

19. BE POSITIVE AND CONFIDENT

Give positive, definite answers when at all possible. Avoid saying, "I think…", "I believe…", or "In my opinion…" if you can answer positively. If you do know, then say so. You can be positive about important things which you would naturally remember. If you are asked about little details which a person naturally would not remember, it is best just to say so if you don't remember. Don't make up an answer.

20. FOLLOW COURTROOM RULES

When being questioned by defense counsel, don't look at the Assistant District Attorney or at the Judge for help in answering the question. If the question is improper, the Assistant District Attorney will object. If a question is asked and there is no objection, answer it. Never substitute your ideas of what you believe the rules of evidence should be.

21. TALKING TO OTHERS ABOUT CASE

Sometimes an attorney may ask this question: "Have you talked to anybody about this case?" If you say "no," the judge knows that doesn't seem right, because a prosecutor usually tries to talk to a witness before he or she takes the witness stand. Plus, many witnesses talk to police officers. It is perfectly proper for you to have spoken with the prosecutor, police or family members before you testify, and you should, of course, respond truthfully to the question. In fact, say very frankly that you have talked with whomever you have talked with – the prosecutor, the victim, other witnesses, relatives and anyone else whom you have spoken with. The important thing is that you tell the truth as clearly as possible.

22. DO NOT DISCUSS YOUR TESTIMONY

After a witness has testified in court, he or she should not tell other witnesses what was said during the testimony until after the case is completely over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own testimony.

Glossary of Terms

Acquittal: Legal judgment that a criminal defendant has not been proven guilty beyond a reasonable doubt.

Arraignment: A proceeding in which the criminal defendant is called into court to have the complaint or criminal indictment read to him or her and to enter a plea.

Concurrent sentence: Sentences for more than one crime in which the time of each is to be served at the same time, meaning that all time served is credited to all sentences.

Consecutive sentence: Sentences for more than one crime in which the time of each is to be served successively, meaning that time served for each sentence is served one after another.

Continuance: When court hearings cannot take place as scheduled, the hearing date is adjourned to a future date. This occurs quite frequently in the criminal justice system.

Conviction: Legal judgment that a criminal defendant has been proven guilty beyond a reasonable doubt.

Defendant: The person against whom the criminal complaint has been filed.

Deposition: An oral statement, made under oath by a witness. Counsel for the case have an opportunity to question witnesses to discover what each witness knows and will testify to at trial. The deposition may be used later in the trial.

Evidence: Any kind of matter, presented at trial through witnesses, records, or documents for the purpose of persuading the court or jury of the correctness of the contentions of the parties involved.

Information: The formal accusation charging the defendant with a felony crime, brought by the District Attorney's office.

Judgement: The official and authentic decision of a Court adjudicating with finality the respective rights and claims of the parties in a lawsuit.

Perjury: Deliberate false testimony under oath. Under Wisconsin state law, perjury is a felony.

Plaintiff: The one who brings the lawsuit or legal action, asking for the enforcement of a right or the recovery of relief from wrong.

Plea: A defendant's official statement of "guilty" or "not guilty" to the charges made against him or her.

Reasonable doubt: The idea that the evidence in a criminal trial must show that the defendant is guilty to the point that the jury is convinced and morally certain that the defendant did commit the crime.

Restitution: Payments by offenders to victims as redress for the damage done in committing a crime.

Sentence: Sanction formally pronounced by a judge upon a defendant after his or her conviction.

Subpoena: A court order directing a witness to appear in court and give testimony. Failure to honor a subpoena constitutes contempt of court.

Suppress: To put a stop to a thing actually existing; a motion to suppress evidence or a confession asks the Court not to allow the use of such evidence or confession in the case.

Venue: The geographical location in which a case is tried.

Verdict: The formal decision or finding made by the jury upon the matter submitted to them at the trial.

Victim impact statement: A statement from the victim to be given to the sentencing judge. Items in the statement should include the impact of the crime on the victim emotionally, physically and financially.

(This section was prepared by the United States Department of Justice in booklet form for distribution to witnesses. It has been adapted with some modifications. Wisconsin Domestic Violence Prosecution Manual, 2004.)