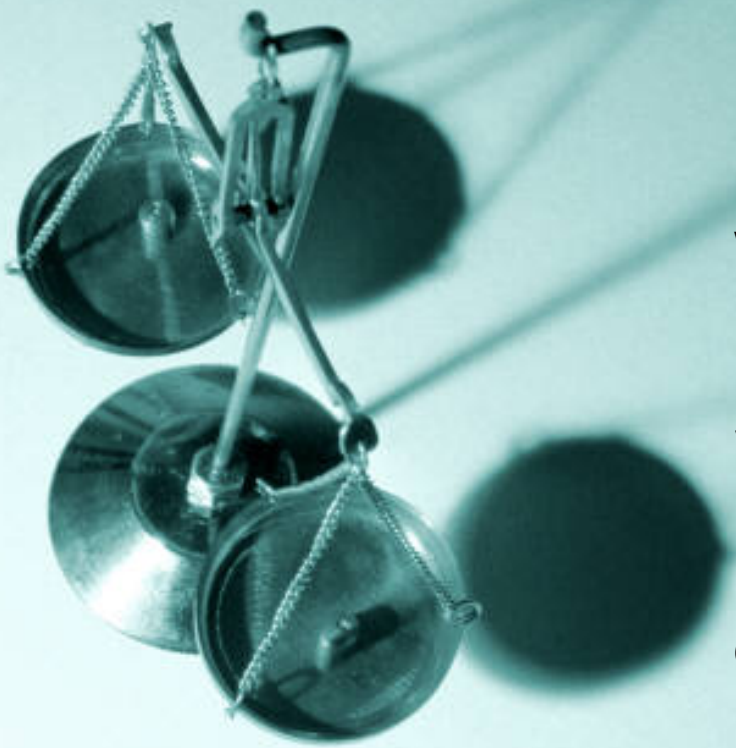
Published and distributed by the
Wisconsin Office of Justice Assistance



Wisconsin

Prosecutor's Sexual Assault Reference Book

October 2009

The Prosecutor's Sexual Assault Reference Book was developed and written by the Prosecutor's Sexual Assault Reference Book Committee and compiled and edited by Wisconsin Coalition Against Sexual Assault (WCASA) and published by the Wisconsin Office of Justice Assistance, Violence Against Women Program. Please refer questions and comments to:

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As a "living document," this reference book reflects current best practices in responding to adult sexual assault. We invite readers to contact the Office of Justice Assistance or the Wisconsin Coalition Against Sexual Assault to recommend and share information on emerging best practices that will contribute to the continued development of this guide.

This project was supported by grant # 2005-WE-AX-0009 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this publication, program/exhibition are those of the authors and do not necessarily reflect the views of the Office on Violence Against Women Program.

This reference book is dedicated to all the courageous survivors of sexual assault and to the tireless advocates and prosecutors that join them in seeking healing and justice.

Acknowledgements

The Wisconsin Prosecutor's Sexual Assault Reference Book would not have been possible without the leadership and support of the Prosecutor's Sexual Assault Reference Book Committee. Team members gave their time, shared their ideas, and assisted in the development, writing and editing of this guide. Their collective passion for encouraging a victim-centered response to sexual assault crimes is reflected within.

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Special acknowledgement should go to Ian Henderson from the Wisconsin Coalition Against Sexual Assault for his leadership in the development of this document. Appreciation should also be extended to Corey Stephen, Assistant District Attorney for Dane County for reviewing and providing feedback on the guide, and to Wade Newell, Assistant DA for Chippewa County for

his assisting with the writing of the Pre-Trial and Trial Strategies sections. Jill Poarch offered assistance with the expert witness sections, and the Justice Systems Training Committee at OJA offered feedback. A thank you also goes out to WCASA interns Doug Martin and Shannon Wendt for their assistance in writing and editing the manual, and to Professor David Schultz at the University of Wisconsin Law School for his support of this project. A special thank you should go to Karen Barber and Kittie Smith from the Wisconsin Office of Justice Assistance, Violence Against Women Program for their oversight and support. We would also like to thank the staff of the Wisconsin Coalition Against Sexual Assault for their contributions to all aspects of this project.

I. Overview of Reference Book Development

A. Background on Development of the Reference Book

In 2007, the Office of Justice Assistance (OJA) received funding under a grant from the Office of Violence Against Women (OVW) Grants to Encourage Arrest and Enforcement of Restraining Orders. The Wisconsin Coalition Against Sexual Assault (WCASA) was named as a sub grantee and was assigned to develop and implement a guide that prosecutors could use to enhance their prosecution of sexual assault crimes.

In response, WCASA convened a committee comprised of advocates and prosecutors to plan, develop, and write the guide. The project team met frequently during 2008 and 2009 to discuss best practice, identify knowledge gaps and prosecutor needs, and create an outline for the reference book. Drafting commenced in 2008 and continued into 2009.

The purpose of this resource book is to:

- increase and enhance the prosecution of sexual assault crimes in Wisconsin.

- encourage a more victim-centered, offender-focused response to prosecuting sexual assault crimes in Wisconsin

B. Organization of the Reference Book

The guide is organized into three sections, each with a particular emphasis:

- Pre-Charging Issues: Provides an overview of the dynamics of sexual assault, the need for a victim-centered and offender-focused prosecution of the crime and strategies that prosecutor's can use to maximize their success in prosecuting sexual assault cases.

- Pre-Trial Issues: Provides information on statutes and strategies prosecutors can use during the pre-trial phase, including: best practices in motion practice, use of expert testimony, preliminary hearings, discovery, the effective use of the Rape Shield law, and exculpatory evidence.

- Trial Issues: Provides information, statutes and strategies prosecutors can use during the trial phase, including: Voir Dire, opening/closing statements, use of exhibits, victim testimony, cross examination, and evidentiary issues.

An Appendix is also provided that includes sample motions for pre-trial, discovery, use of expert testimony and others. A statewide listing of Sexual Assault Service Providers is also included.

II. Victim-Centered, Offender-Focused Prosecution

The primary role of prosecution is to see that justice is accomplished.[1] In cases of sexual assault, prosecutors must work in a coordinated and collaborative fashion with law enforcement, advocates, medical professionals and crime labs. Prosecutors are responsible for assessing reports of sexual assault to determine if enough evidence exists or could be obtained to file criminal charges. Prosecutors must also consider the ethical issues of whether or not to file criminal complaint.

As a prosecutor, you also have an extraordinary opportunity to help victims heal from the trauma of sexual assault and become survivors. When a woman, man or child has been sexually assaulted, they come to you as a victim. The actions you take, and the choices you make will have a life long impact on victims. You have the power to influence how victims are treated throughout the criminal justice process. You have the power to reduce their trauma and restore their dignity. And you have the power to help them take their first steps in moving from being victims to becoming survivors – regardless of the outcome of the criminal justice process.

A victim-centered, offender-focused response to the prosecution of sexual assault crimes is predicated on the need to protect the victim's safety, privacy and well-being while holding offenders accountable.

A victim-centered, offender-focused response to the prosecution of sexual assault crimes is predicated on the need to protect the victim's safety, privacy and well-being while holding offenders accountable. The goal of this approach is to decrease re-victimization by ensuring the survivor is treated with compassion and respect. Myths and misinformation surrounding the crime of sexual assault along with the tendency of the defense and jurors to focus on the victims' actions, present unique challenges in the successful prosecution of the crime of sexual assault. Prosecutors are uniquely positioned to educate the community, jury by jury, about sexual assault dynamics and the tactics used by offenders.

The need for prosecutors to support victims' rights cannot be overstated. In communities that lack victim advocates, the District Attorney's office may be the only resource available to educate victims about their rights as crime victims – rights to participation, information, confidentiality, financial restoration and restitution. This responsibility should not be overshadowed by competing demands and responsibilities.

[1] *National Prosecution Standards* (1991) Second Edition National District Attorneys' Association.

A. Victim-Centered Response

A victim-centered response to sexual assault prioritizes the needs of victims, seeks to preserve their safety and restore their dignity, and supports victims in their efforts to seek justice and healing. It includes:

- Recognizing that victims are never responsible for the crimes committed against them.
- Recognizing that offenders are always responsible for their crimes.
- Acknowledging and respecting victims' input into the criminal justice response.
- Recognizing that the criminal justice system is not the be all and end all for victims, and that pursuing justice may not be in the best interest of every victim.

B. An Offender-Focused Response

Prosecution of sexual assault crimes should also be offender-focused. An offender-focused response acknowledges that offenders purposefully, knowingly and intentionally target victims whom they believe they can successfully assault. This includes potential victims who offenders perceive as vulnerable, accessible and/or lacking in credibility. The victim's perceived lack of credibility is seen by the offender as an assurance of their ability to escape accountability for the offense. Unfortunately, a lack of focus on the offender oftentimes is exactly what the offender needs to continue offending. Therefore, ***an offender-focused response draws attention to the actions, behaviors, characteristics and prior criminality of the offender.***

An offender-focused response requires knowledge of the nature of sex offenders and considers the following:

- Adult sex offenders are often repeat or serial offenders.[2]
- Adult sex offenders often target people they know.[3]
- Adult sex offenders are often practiced liars who have a history of avoiding detection through deception and manipulation.[4]

Prosecutors should incorporate this knowledge of sex offenders into the investigation and prosecution of sexual assault cases while keeping an open mind about the facts and not prejudging the facts during the course of an investigation.

[2] Lisak D and Miller P. (2002) Repeat Rape and Multiple Offending Among Undetected Rapists, *Violence and Victims,* 17:1.
[3] Ibid.
[4] Salter Anna C. Salter, *Predators; Pedophiles, Rapists and Other Sex Offenders* New York: Basic Books, 2004.

III.Pre-Charging Issues

A victim-centered response to the prosecution of sexual assault crimes requires an understanding of the dynamics of how sexual violence affects victim behavior during and after the assault. Our society holds deeply ingrained beliefs about how sexual assault victims should behave. These "rape myths" have very real consequences for victims during the investigation and prosecution phase. Prosecutors must therefore understand the impact of sexual violence on victim behavior, and use this knowledge to educate the public – and especially juries – to ensure that victims are treated fairly and compassionately so they have equal access to justice and healing.

A. Traumatic Responses to Sexual Violence

Sexual assault is a traumatic experience and the way a victim responds to a sexual assault has much to do with how our brains are designed to respond to trauma. The human brains' response to trauma impacts the memory functions of the brain, and that effects how a sexual assault victim is able to recall the details of the assault. Trauma caused by a sexual assault is no different than any other form of trauma. However, the impact of trauma caused by sexual assault (i.e. impaired memory, delayed reporting, freeze response) when put into the context of the criminal justice system, is often viewed as a credibility problem for the victim. These responses often directly contradict society-wide stereotypes, or rape myths, as to how a "real" victim of sexual assault should react to her/his victimization.

A prosecutor who understands trauma will learn that what is often termed "counterintuitive" victim behavior really represents a perfectly normal human response to a traumatic experience.

Understanding sexual trauma and its impact upon victims of sexual assault is critical to a prosecutor's handling of sexual assault cases. A prosecutor who understands trauma will learn that what is often termed "counterintuitive" victim behavior really represents a perfectly normal human response to a traumatic experience. With this understanding, prosecutors will be better positioned to educate juries, who often view sexual assault through a lens of ignorance, with a more informed and educated lens. Prosecutors will also be able to anticipate potential defense strategies and develop strategies of their own to overcome these defenses.

The following information on trauma and how it is experienced by victims of sexual assault may be useful to prosecutors during the investigation and prosecution of sexual assault crimes.

1. Definition of Trauma[5]

Trauma can be broken into two components: medical trauma and psychological trauma. Medical trauma is defined as "a physical injury that causes serious or critical bodily harm, wound, or shock." Psychological trauma is "an experience that is emotionally painful, distressful, or shocking which often results in lasting mental and physical effects." While it is certainly possible that a victim of sexual assault may experience medical trauma as well as psychological trauma, it is more common that a sexual assault victim experiences psychological trauma.

Psychological trauma is a normal human response to an extreme event. It can be in response to a single traumatic event – simple trauma – it can be a result of exposure to multiple types of trauma and/or a prolonged exposure to high levels of chronic stress – complex trauma. Whatever the form, the symptoms are the same.

2. Neurobiology of Trauma/Chemical Reactions to Trauma[6]

An understanding of the neurobiology of trauma and the immediate and ongoing symptoms victims experience will help prosecutors understand how victims experience sexual assault and how the trauma impacts on them.

a) Chemical Reactions

During a traumatic event, neurotransmitters in the brain set off the release of certain chemicals. Under normal amounts of stress, these chemicals facilitate a process that allows an individual to function with greater endurance, strength, and clarity. However, in extreme amounts of stress, for example sexual assault, these chemicals may often be released in amounts that are ***damaging to the brain*** and that ***inhibit memory function***. There have been studies of both children and adults which show that the continual presence of trauma on a developing brain causes the brain to be malformed.[7] This has implications for child and adolescent victims of sexual assault, particularly those who are victims of repeated sexual assaults.

b) Stress Response

The stress response is a natural defense mechanism people experience in response to danger. When a person experiences danger, the body goes into an autonomic nervous system response –a hyper arousal state. Adrenaline is released. Blood vessels and pupils dilate. There is an acceleration of heart and lung activity.

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[5] This material is adapted from a power point presentation by Jeanie Kurka Reimer, Executive Director, Wisconsin Coalition Against Sexual Assault.
[6] Id
[7] Adverse Childhood Experience Studies, (1998).

The purpose of the stress response is to mobilize an individual to cope with an immediate danger. The following behaviors are all normal reactions to the abnormal event of experiencing trauma.

- Withdrawal – FLIGHT
- Immobility – FREEZING
- Aggression – FIGHT
- Appeasement – SUBMISSION

While an individual may respond to danger in any of these ways, most people's first response to danger is to freeze and stop all movement.

c) Immediate Psychological Reactions

In addition to having a physical response to danger, people also experience psychological reactions immediately following an assault. Psychological reactions are the bodies' way of coping with the trauma a person experiences. The following emotions are also normal reactions to the abnormal event of experiencing trauma:

- Intense fear
- Panic
- Numbness/trembling
- Shock
- Dissociation
- Shutting Down

In addition, the mind may *hyper focus* on specific details of the danger and lose other details.

d) Ongoing Psychological Reactions

Our psychological response to danger does not end after the incident; it continues for quite some time, even years afterward. Normal ongoing psychological reactions to an incident include:

- Anxiety/worry
- Depression
- Preoccupation with the stressful event
- Self blaming
- Attempts to avoid situations or thoughts that are a reminder of the event
- Flashbacks of the incident
- Insomnia
- Increased startle response
- Problems with concentration and memory
- Anger or irritability

It bears repeating. These are all normal reactions to an abnormal event. When the healing process begins, victims will often experience a reduction in these symptoms, but for some, these symptoms may persist for years – even if an individual is seeking professional help.

3. Counterintuitive Victim Responses to Trauma

Many of the normal human responses to trauma run counter to the ingrained societal views as to how a victim of sexual assault should respond. For this reason, these responses are termed "counterintuitive." However, it is useful to underscore that these responses are anything but counterintuitive; they are in fact indicative of how the human brain responds to trauma. The following discussion reviews some of the more common counterintuitive victim responses. For more information on this topic, please see *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive*, published by the American Prosecutor's Research Institute.

a) Memory Lapses

Some of the chemicals that are released during a traumatic event have a direct impact on memory. These chemicals may cause certain portions of the traumatic event to be remembered clearly, while other portions of the event remain fuzzy. Additionally, memories of the traumatic event may come in pieces and the recollection of the event will likely not be chronological.

The impact of trauma on memory has major implications as to when and how a victim reports the sexual assault. A sexual assault victim who has either fragmented memory or unclear recollection of the assault may not report the assault right away because they simply have no memory or unclear memories of the assault. Furthermore, a sexual assault victim with a fragmented memory may not give a clear, coherent description of the assault when disclosing the assault, which may lead to inconsistencies in the reports. The fact that memories come in "pieces" may lead to ongoing disclosure of certain facts related to the assault – which may create credibility problems for sexual assault victims as a case makes its way through the criminal justice system.

Societal Stereotypes

These credibility problems are exacerbated by societal stereotypes, or rape myths, about how a "real victim" of sexual assault should behave. Our society expects a victim of sexual assault to have all the details of the assault seared into her memory with crystal clarity. These expectations are held by jurors in sexual assault cases and they will be exploited by the defense to argue that the victim is not credible because she did not conform to the expectations on how a "real victim" would behave. *Furthermore, because these myths are ingrained in our society, victims of sexual assault may believe them as well*. Thus a sexual assault victim may delay reporting the assault not only due to the memory impact caused by trauma, but also because of a fear of not being believed once she does come forward.

Implications for Prosecution: The impact of trauma on memory creates challenges for the prosecutor because it tends to manifest itself as a credibility problem for the victim. However prosecutors also have the opportunity to educate the jury about trauma – and explain that what is seen as a problem with the victim's memory is really a normal psychological reactions to trauma.

This can be done as early as voir dire, and can continue throughout the trial via expert testimony and direct examination of witnesses.

A Useful Strategy:
The impact of trauma on memory is understood by law enforcement officers who are involved in "critical incidents" such as officer –involved shootings. In these situations, officers who are involved in critical incidents will often only be asked to provide very basic information immediately after the incident, while waiting after some time to lapse before conducting the more comprehensive interview. Law enforcement is beginning to apply similar interviewing strategies to sexual assault victims. In fact, this is now considered "best practice" in the recently released SART protocol. http://oja.wi.gov/docview.asp?docid=16961&locid=97.[8] This approach may be useful when preparing a direct examination of an investigating officer, as the prosecutor can elicit from the officer the reasons why the victim was only asked to give general statement during the first interview with the victim and why the officer waited before conducting the comprehensive victim interview. This analogy can also be used to educate the jury on trauma and its impact on memory and may serve to debunk the societal myth that a "real victim" would report a sexual assault.

b) Cooperative Behavior of the Victim

One of the immediate psychological reactions to trauma is the feeling of intense fear and panic. In fact, many sexual assault victims report fearing for their lives during a sexual assault, whether or not weapons or violence were used by the perpetrator. As a result, a sexual assault victim may engage in some cooperative behavior with the perpetrator, both during and after the assault. For example, the victim might give the perpetrator a ride home after the assault. While this makes sense if one understands the fear and panic a victim experiences during an assault, when viewed through a lens of misinformation, this type of behavior may be seen as evidence of consensual sexual activity rather than rape.

In fact, the defense will likely latch on to these behaviors as part of a consent defense. *After all, who would give their rapist a ride home?* Prosecutors should anticipate these defense strategies in a sexual assault case, and educate juries to view these cases through an informed and educated lens.

c) Inappropriate Affect

Another common psychological reaction to sexual trauma is for a victim to "shut down." This may manifest itself as a flat affect in which the victim displays little emotion. Ongoing psychological reactions to trauma can include depression and anger or irritability. Because of this, the victim may display inappropriate affect immediately after the assault and for some time after. A victim who has a flat affect or who is angry or hostile defies the stereotype that a "real

[8]Wisconsin Adult Sexual Assault Response Team Protocol. Office of Justice Assistance, Violence Against Women Act. July 2009. Available online at http://oja.wi.gov/docview.asp?docid=16961&locid=97.

victim" of sexual assault should be hysterical. Thus a prosecutor should anticipate a range of emotions from sexual assault victims they encounter. ***They should also understand that these "inappropriate" emotions should not be equated with evidence of deception, but rather as evidence of a traumatic response.***

d) Freeze Response[9]

While many of us are familiar with the fight or flight response, another completely normal response to a traumatic event is the freeze response, which may also be known as *tonic immobility*. This response is one in which the human body enters a stage of frozen fright or terror, either until the fight or flight response is triggered or the danger has passed. What is important to understand about this response is that ***it is an automatic response, not a choice a person experiencing trauma makes.*** This is because our autonomic nervous system kicks in during traumatic events. The autonomic nervous system is governed by the brain stem, or reptilian part of the human brain, whose main function is survival. Core brain stem reactions overwhelm the cortex or logic centers of the brain.[10] Responses become hard wired in the brain, which means that a victim may respond to certain stimuli the same way every time. These "triggers" are often connected to the senses, and have major implications for victims of sexual assault who are going through the criminal justice system. Lisak adds that "to participate in that process – to endlessly recount their trauma, to appear in the court room where the rapist sits – is equivalent to the zebra choosing to return to the water hole where the lion attacked.[11]"

The freeze response, while a perfectly normal response to trauma, defies the rape myth that a "real victim" of sexual assault will resist to the utmost. While resistance is not required under Wisconsin Law[12] our society still expects victim of a sexual assault to fight back, and if she does not, her "acquiescence" is held against her in terms of her credibility. These rape myths are so ingrained in our society that victims may adhere to them as well. Thus a victim who "froze" during an assault may feel increased levels of guilt and self-blame because she did not fight back. These feelings of guilt and self-blame, in addition to other impacts of trauma, may lead to delayed reporting of the sexual assault to law enforcement.

e) Delayed Reporting

Delayed reporting of sexual assault, particularly in non-stranger sexual assaults, is the norm rather than the exception. It can be directly attributed to the consequences of trauma described above – including the inhibition of memory and the freeze response. Additionally, victims who are sexually assaulted by someone they know may not report right away because it does not fit

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[9] David Lisak, PhD (2002).The Neurobiology of Trauma. Unpublished article. University of Massachusetts Boston. Available online at: http://www.nowldef.org/html/njep/dvd/pdf/neurobiology.pdf.
[10] Ibid.
[11] Ibid.
[12] State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979). See also Wisconsin Criminal Jury Instructions Wis JI-Criminal 1200C

the stereotype that most people are sexually assaulted by strangers. Thus the victim may not even recognize that what happened to them fits the legal definition of sexual assault because the perpetrator does not fit the mold of who our society believes are perpetrators.

Delayed reporting of sexual assault is counterintuitive because our society expects (and therefore jurors) that a victim of sexual assault will report immediately to law enforcement. As a result, the presence of a delayed report in a particular case creates a credibility issue for the victim. It is critical to begin to view delayed reporting - as well as the other counterintuitive behaviors described above - as a natural reaction to trauma, rather than credibility problems for victims. Please reference Chapter V, Section B for information on the use of Expert Testimony.

4. Consequences of Trauma/Mental Health Symptoms of Trauma

While we have focused on some of the immediate reactions to trauma, there are other long term impacts that may develop in sexual assault victims. Victims often develop coping mechanisms as a way of dealing with the trauma of the sexual assault. This may include minimizing the trauma as a way for the victim to convince herself that what happened was really not that bad. It is also possible for victims of sexual assault to develop mental health issues as a result of the sexual assault. Some examples of negative coping skills may include:

- Alcohol and/or drug use
- Self-abusive behavior – including cutting, hair pulling
- Suicidal thoughts and/or attempts
- Compulsive and risky behaviors – including promiscuity
- Shutting others out of the victim's life
- Numbing behaviors

a) Dissociation

Dissociation is another completely normal psychological reaction to trauma that deserves special attention. Dissociation is "an unexpected partial or complete disruption of the normal integration of a person's conscious or psychological functioning that cannot be easily explained by the person."[13] Dissociation is a normal response to trauma, and allows the mind to distance itself from experiences that are too much for the psyche to process at that time.[14] Dissociative disruptions can affect any aspect of a person's functioning.[15] Victims of sexual violence may experience dissociation as a way of distancing themselves from the trauma of a sexual assault. Dissociation will affect what a victim remembers about the assault, whether they are even able to process the event as an assault, and how a victim behaves during and following the assault.

[13] What is Dissociative Disorder? 2009. Sidran Traumatic Stress Institute. Available online at: http://www.sidran.org/sub.cfm?contentID=75&sectionid=4.
[14] Staci Haines, *Healing Sex: A Mind-Body Approach to Healing Sexual Trauma.* Edited by Felice Newman, New York: Cleis P, 2007.
[15] Dell PF (2006) A new model of dissociative identity disorder, *Psychiatr. Clin. North Am.* 29 (1): 1–26.

b) Negative Coping Behaviors

Victims of trauma often turn to negative behaviors in an attempt to cope with the powerful physical and emotional symptoms they experience as a result of the event. Without proper support, these negative coping skills may become a way of life, leading to long term emotional and behavioral health concerns, such as:

- Depression
- Anxiety
- Post Traumatic Stress Disorder (PTSD)
- Dissociative Disorder
- Personality Disorders

The consequences of sexual violence vary from victim to victim. Likewise, because the process of healing from a sexual assault is often a spiral rather than a linear process, victims may experience negative coping behaviors and mental health problems for many years. Each victim is unique, and the fact that she/he did or did not experience mental health issues is completely normal and is in no way indicative that the victim did not experience trauma.

5. Implications for Prosecutors

The long term consequences of the trauma caused by a sexual assault can be severe. This has significant implications for the prosecution, as victims may experience some of these impacts as they go through the criminal justice system. Simply participating in the criminal justice system may "trigger" traumatic responses in the victim because of the way the human brain responds to trauma. Victims report that the criminal justice system has traditionally been a disempowering and often re-victimizing experience. Prosecutors are in a position to restore some power and control to sexual assault victims they encounter. Recommendations include:

- Decrease re-victimization by ensuring that victims are treated with compassion and respect.

- Take into account the victim's safety and privacy, while at the same time focusing on the actions of the person responsible for the crime, namely the offender.

- Use expert testimony to dispel the myths associated with sexual assault and to educate the jury on trauma. Utilizing the expert testimony of a sexual assault advocate is a useful strategy. Jurors will be more likely to give greater weight to expert testimony rather than the victim's explanation due to victim's interest in the outcome in the case. Expert testimony is discussed more fully in Chapter V, Section B.

- If you encounter a victim who is experiencing memory lapses, attempt to corroborate as much of the victim's story as possible. Develop a detailed time line of the events leading up to and after the assault, and seek to corroborate as many facts as possible. Corroboration will have the additional benefit of informing the prosecutor of areas requiring further investigation.

- Link victims to community based advocacy organizations. Advocates from these agencies take a holistic approach to working with victims and will provide support to the victim throughout the criminal justice process and long after the criminal justice process has concluded. This is critical due to the long lasting impact of trauma. A list of domestic violence and sexual assault service providers in Wisconsin is located in the Appendix.

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B. Reporting Issues

Our society expects victims of sexual assault to report the crime immediately, and remember every detail with crystal clarity. But the way that trauma manifests itself in victims directly affects the timing and manner in which victims report the crime. This can present a challenge to prosecutors, and even be a source of frustration in situations where a victim doesn't report the crime right away, or doesn't remember all the details of the crime, or recalls details of the crime (changes her story) at various points during the investigation and prosecution phase.

A skilled prosecutor who is knowledgeable about trauma and sexual assault can overcome these challenges by educating juries about the following facts:

- Numerous studies have shown that only a low percentage of sexual assault victims ever report the crime.
- Victims from marginalized populations – low-income people, women of color, non-English speaking women, undocumented women and LGBTQ people – are the least likely to report sexual assault because they face numerous barriers in seeking justice. A description of these barriers is provided later in this chapter. See Section G - Marginalized Victims.

- Victims of sexual assault will often delay reporting the assault. In fact, it is the norm rather than the exception.

- Victims often have difficulty recalling memories of their assault. This does not mean that victims are fabricating the assault in any manner. Due to the trauma of the assault, it may be easier for victims to forget the events of the crime, as it may be too painful to recall details they are so desperately trying to forget.

- Victims may recall details of the assault that were previously repressed, for weeks, months and even years later. Repression is a protective mechanism often used by victims to keep the memory of their abuse out of their consciousness. For this reason, victims may recall details over a period of time during the investigation and prosecution.

- It may also become difficult for victims who have a previous history of abuse or assault to recall specific memories of the current assault. They may also get incidents confused. This does not mean that the victim is fabricating the assault.

- Research has also shown that it takes approximately seven (7) interviews before a child victim will disclose sexual abuse. Just because a child discloses a sexual assault after previously denying it, does not mean that he made it up, or was coached into lying about the assault. A full discussion of the reasons for this is covered later in this chapter in Section E – Child Specific Issues.

1. Delayed Reporting

A very common and seemingly counterintuitive victim behavior is **delayed reporting**. Delayed reporting is actually the norm rather than the exception. Seldom does a victim of sexual assault know what to expect or do after they have been sexually assaulted. Most victims struggle with fear, shock, confusion or shame immediately following an assault.

- In fact, a large national survey of American women found that only 16% of rapes (approximately one in six) had been reported. The survey also found that among those women that did report a rape, only 25% reported the rape within 24 hours of the assault.[16]

- A study of 1,000 rape victims treated at a Hospital Rape Crisis Center in Boston over a ten year period also showed that reporting ranged from less than three hours to two weeks after the rape. Non-stranger rape victims delayed reporting to the hospital much longer than those victims raped by strangers: 90% of stranger victims reported in less than 24 hours. Among non-stranger victims, 90% reported after one week or more.

The reasons for delayed reporting include, but not limited to, fear of retaliation, fear of not being believed, fear of the criminal justice system, and fear of losing their privacy. The impact of

[16] Rape in America: A Report to the Nation. National Victim Center, 1992. Available through the National Center for Victims of Crime at: http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=35474.

trauma is also a significant factor in delayed reporting – for a full discussion, see the earlier section on Trauma.

C. Rape Myths

1. Victim Myths

We live in a culture that supports excuses and encourages sexual violence. In regards to sexual violence and rape myths, victims are blamed and held responsible for sex offender behaviors and actions. It is commonplace in our society to hear victim blaming, questioning victim credibility, implying victims "deserved" or "asked" to be raped, even claims that victims enjoyed it. These messages encourage people to internalize rape myths and actually believe them. In reality, most people don't understand what they are saying and just how damaging it can be to victims' attempts to seek justice. ***In short, rape myths encourage silence among victims.***

The following myths are some of the most common myths surrounding sexual assault which allow defendants in sexual assault cases to claim innocence.

It is highly likely that the defense will focus on victim behavior highlighting the following: alcohol, victim dress, victim behavior such as flirting, voluntary actions such as an invitation to her home, the victim consented to some of the sexual activities, and that she had a "choice" and engaged in some cooperative behavior with the offender. The victim's behavior will be glorified by the defense and jurors will buy into this because they will believe what society tells them everyday.

There are a number of rape myths and as a prosecutor it will require your attention to a better understanding of rape myths and the impact they have in the courtroom, with the jury, the judge, and on a victim. In fact, rape myths can distort the criminal justice process. Understanding rape myths will help you educate jurors and judges, as they will bring their own preconceptions, which will ultimately impact the outcome of the case. The following myths are some of the most common myths surrounding sexual assault which allow defendants in sexual assault cases to claim innocence:

Myth #1: ***If a person goes to someone's room or house or goes to a bar, she assumes the risk of sexual assault. If something happens later, she can't claim that she was raped or sexually assaulted because she should have known not to go to those places.***

This "assumption of risk" wrongfully places the responsibility of the offender's actions with the victim. Even if a person went voluntarily to someone's residence or room and consented to engage in some sexual activity, *it does not serve as a blanket consent for all sexual activity.* If a

person is unsure about whether the other person is comfortable with an elevated level of sexual activity, the person should stop and ask. When someone says "No" or "Stop," that means STOP. Sexual activity forced upon another without consent is sexual assault.

Myth #2: ***Most rapes are reported by women who "change their minds" afterwards or want to "get even" with a man.***

Reported sexual assaults are true, with very few exceptions. FBI crime statistics indicate that of assaults reported; only 2%-8% are false.[17] This is comparable to other major crime reports. The perception of false reporting may be based on low conviction rates for sexual offenders. Low conviction rates result from insufficient evidence to prosecute and reluctance of victims to testify. For these reasons, low conviction rates do not imply false reporting.

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Most women do not volunteer to disclose the intimate details of a sexual assault, for public record, if the event did occur. Although estimates of reported sexual assaults vary, sources agree that a very low percentage, for example fewer than 40%, is actually reported. The Law Enforcement Assistance Administration estimates that there are 3.36 sexual assaults committed for each one reported.[18] In a 1984 random sample survey of women in San Francisco, Russell found that only 8% of women who were assaulted filed reports[19]. Based on these statistics, one can conclude that sexual assaults remain unreported to a vast degree.

Myth #3: ***"No" means "Yes."***

Our society perpetuates a belief that when a woman says no, she actually means yes. As a result, ***date rape*** is very prevalent, though most cases go unreported. In fear of offending someone, some victims may actually smile while saying "no," giving the person conflicting messages. Others find it extremely difficult to openly say "no" and wind up being passive and retreating without saying anything.

Although the most effective and assertive response to an unwanted sexual advance would be to say "No," many people in this situation find it difficult to be assertive and sex offender's prey on that vulnerability. Another myth that goes along with "No" means "Yes" is that most women actually enjoy rape. Women do not enjoy being raped, however a women's "seduction" fantasy is frequently confused with the supposed enjoyment of rape. There are important differences. At the fantasy level, the woman is in control of her scenario, actions, and actors. During a sexual

[17] Susan Brownmiller, *Against Our Will: Men, Women and Rape*. New York: Ballantine Books, 1993.
[18] Thomas McCahill, Linda Meyers, and Arthur Fischman, *The Aftermath of Rape*. New York: Simon & Schuester, 1979.
[19] Rebecca Bolen and Diana Russell, *The Epidemic of Rape and Child Abuse in the United States*. New York: Sage Publications, 2000.

assault, however, the woman is not in control of the characters, the events, or her body. In fact, many victims report that the primary emotions they felt during the attack were fear for their lives, humiliation, intimidation, and degradation.

Myth #4: ***Women are sexually assaulted because they "ask for it."***

Society attempts to shift the burden of blame from the assailant to the victim by implying that "she asked for it." Being a victim has no connection to one's dress or "provocative manner." This apparent shift of blame directs attention to the victim's behavior and away from the offender's actions, thereby absolving the assailant of his responsibility for the attack. Rapists look for victims they perceive as vulnerable, not women who dress in a particular way.

Myth #5: ***A "real" victim can prevent sexual assault by resisting the attacker.***

Resistance may increase one's chances of injury and perhaps result in death. Every sexual assault is unique and the issue of resistance and submission should be evaluated individually. The victim must do whatever they can to get through the situation and survive. The victim often relies on instincts, and does whatever necessary to survive within their means. Even if one must submit, this does not imply consent, and in fact, may keep the victim alive. It is not uncommon for victims to also experience what is known as the "freeze response" Understanding trauma and its impacts is critical for a prosecutor handling sexual assault cases. For more information, see Section A – Traumatic Responses to Sexual Assault, earlier in the chapter.

Myth #6: ***Most sexual assault victims react hysterically.***

Individual responses to a sexual assault are as varied as the individuals themselves and may appear immediately or may be delayed. One's reaction to an event depends on many factors including personality, experience with similar events in the past, intensity of the event and reactions of others. Reactions range from hysteria to calm, rational behavior, withdrawal, anger, apathy, denial and shock with the majority of victims appearing stunned and bewildered. Reports from women who react in a calm, rational manner are frequently dismissed and discounted because these women do not exhibit stereotypical "female hysteria."

Being sexually assaulted is a very traumatic experience. Reactions to the assault and the length of time needed to process through the experience vary with each person. ***There is no "right way" to react to being sexually assaulted.*** Assumptions about the way a victim "should act" may be detrimental to the victim because each victim copes with the trauma of the assault in different ways, which can also vary over time. No other crime victim is looked upon with the degree of suspicion and doubt as a victim of rape. The earlier section on trauma provides additional information on how and why victims respond to rape the way they do.

Myth # 7: ***A real victim has severe injuries.***

Most victims of sexual assault do not sustain serious physical injury. Sexual assault is a legal definition, not medical. The judgment of sexual assault is made for the courts. Physicians furnish medical reports and impressions for the court's decision. They do not have the authority to decide if the victim was assaulted. Regardless of the legal outcome, if the victim perceives herself or himself as having been violated, the experience is a significant event in her/his life and should be treated as such.

Along those lines, another common myth is that someone can only be sexually assaulted if a weapon was involved. In many cases of sexual assault, a weapon is not involved. The offender often uses physical strength, physical violence, intimidation, threats or a combination of these tactics to overpower the victim. Most sexual assaults are perpetrated by someone known to the victim. An offender often uses the victim's trust developed through their relationship to create an opportunity to commit the sexual assault. In addition, the offender may have intimate knowledge about the victim's life, such as where the victim lives, where the victim works, where the victim goes to school, or information about the victim's family and friends. This enhances the credibility of any threats made by the offender since the offender has the knowledge about the victim's life to carry them out. Although the presence of a weapon while committing the assault may result in a higher penalty or criminal charge, the absence of a weapon does not mean that the offender cannot be held criminally responsible for a sexual assault.

Myth #8: ***Rape is only penis/vagina penetration.***

A variation on the rape myth above is that a sexual assault is only present with intercourse occurs. Rape involves a variety of sexual activities, including oral intercourse, anal penetration, and/or digital penetration.

Myth #9***: All sexual assault victims will report the crime immediately to the police. If they do not report it or delay in reporting it, then they must have changed their minds after it happened, wanted revenge or didn't want to look like they were sexually active.***

There are many reasons why a sexual assault victim may not report the assault to the police. It is not easy to talk about being sexually assaulted. The experience of re-telling what happened may cause the person to relive the trauma. Other reasons for not immediately reporting the assault or not reporting it at all include fear of retaliation by the offender, fear of not being believed, fear of being blamed for the assault, fear of being "re-victimized" if the case goes through the criminal justice system, belief that the offender will not be held accountable, wanting to forget the assault ever happened, not recognizing that what happened was sexual assault, shame, and/or shock. In fact, reporting a sexual assault incident to the police is the exception and not the norm. Because a person did not immediately report an assault or chooses not to report it at all does not mean that the assault did not happen.

Myth # 10: ***A real victim will have perfect memory of the details of the sexual assault.***

Victims may experience difficulty in remembering all details of the sexual assault due to trauma response. This does not mean they are lying or leaving out details intentionally. Often with time and as the trauma recedes, details may emerge. A skillful prosecutor will be able to overcome any disadvantage a delayed report might cause when the making the case in court.

Practice Tip: During voir dire, jurors will tell you what they believe when you ask questions surrounding rape myths. In almost every sexual assault case, the defense will attempt to put the focus on the behavior of the victim, particularly when the victim's behavior was in some way "counterintuitive." As a prosecutor, you must dismantle rape myths in the courtroom. Jurors must understand that sexual assault had nothing to do with their clothing, had nothing to do with how much they drank, and nothing to do with flirting that night. The media glorifies violence against women and jurors may bring these perceptions with them into the courtroom.
A great way to dispel rape myths is by utilizing expert witnesses such as advocates from local sexual assault service providers.

There are also a number of myths related to child and teen victims. These are discussed fully in Chapter III Sections on Child Specific Issues and Teen Specific Issues.

2. Sex Offender Myths

There are numerous misconceptions about sex offenders, and the defense will use these myths to thwart the criminal justice system's response. These misconceptions or myths extend from years of research that focus on cases that have been successfully prosecuted and resulted in incarceration for the rapist. These cases most likely had extensive coverage by the media which reinforces the perceptions and beliefs of the general public, including prosecutors. One of the most common myths is that rape is committed by a male who is a stranger that uses violence and inflicts injuries. This belief is based on the small proportion of rapists who are actually prosecuted, convicted and incarcerated.

In reality, research over the last twenty years has shown that a great percentage of rapes are not reported or not prosecuted. Research also shows that the beliefs based on research done on incarcerated sex offenders are not accurate.[20] These studies provide evidence that rape is more widespread than past crime studies have specified, that the majority of rape victims do not report their assault, and that rapes are frequently committed by non-strangers[21]

[20] David Lisak, The Undetected Rapist: Keeping Ourselves Safe. Powerpoint presentation available online at: http://www.nowldef.org/html/njep/PDFdocs/undetectedrapist.PDF.
[21] Patricia Tjaden, & Nancy Thoennes. (2000). Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women. Washington, DC: U.S. Department of Justice, National Institute of Justice. Research Report (NCJ 183781).

Sex Offender Tactics

Recent research reveals that perpetrators use specific tactics to carry out coercive events.[22] Tactics are defined as behaviors used by male perpetrators to increase the chance of coercing a prospective victim into unwanted sexual contact and reduce the possibility that the victim will report the crime. Rapists are very good at detecting victims and testing their boundaries, planning their attacks and isolating their victims, using manipulation, alcohol and threats to subdue their victims – and using only as much violence as is needed to get compliance from a victim.

In reality these sexual assault crimes are distinguished by extensive preparation and premeditation. Examples include:

- Alcohol use by both parties can be used to defend coercive behavior and erode her claim of lack of consent.
- Isolation is also used as a tool to make it easier to get away with a rape. An example would be taking someone to a separate room away from others or in a perpetrator's car or apartment.
- Overt force such as a holding a victim down by the weight of the perpetrator or having the victims arms held to her sides or implied force such as a threat of bodily harm.

The misconceptions of rapists that attack a stranger, use a weapon, and cause considerable and extensive physical injuries is based on research that focused on a very small proportion of rapists that have been convicted and incarcerated.

The reality differs sharply with the widespread beliefs about who rapists are and how they perpetrate. The misconceptions of rapists that attack a stranger, use a weapon, and cause considerable and extensive physical injuries is based on research that focused on a very small proportion of rapists that have been convicted and incarcerated. Unfortunately, when a rape occurs where the rapist does not fit this stereotype, many people do not define it as a "real rape."

Prosecutors are uniquely positioned to educate the community and juries about the tactics used by offenders. For this reason, it is important for prosecutors to identify the sexually coercive tactics used by rapists. Consistent with a victim-centered approach, prosecutors should also solicit from the victim's perspective what tactics were used. Rather that focus on the decisions made by the victim, it is essential to focus on what methods were used by the offender to coerce this particular victim into complying out of fear for her safety and well-being.

[22] Cleveland H, Koss M, Lyons J. (1999) Rape Tactics from Survivors' Perspective, *Journal of Interpersonal Violence.* Vol. 14, No. 5, 532-547.

D. Perceived Victim Credibility Issues

Victim credibility is a common theme in prosecuting sexual assault cases. An unfortunate reality is that the more we focus on "victim credibility," the less we focus on offender accountability. A goal of this section is to intentionally move the discussion from perceived victim credibility to offender accountability. The distinction is critical to prosecuting sexual assault cases, because offenders deliberately target victims who are vulnerable and who they believe will not be viewed as credible in the eyes of the justice system.

Victims who fear contact with formal systems are also the least likely to report a sexual assault.

This is especially true for marginalized populations – women of color, low-income people, non-English speaking women and undocumented women.

As has been stated earlier, the defense will often attempt to put the focus on the behavior of the victim as a strategy for taking the focus away from the offender. Strategies used by the defense to establish victim credibility issues fall within the following themes:

1. Focusing on the Victim

Our society expects flawless victims. In general, our society believes that a rape victim will be a young attractive female, who will report the assault immediately, will have obvious injuries that show they fought back vigorously, that the offender will be a stranger, and that the victim will never recant or wavers in her desire to fully cooperate with the criminal justice system and prosecution. ***This perception is rarely the case, in fact, it's the exception.***

Whenever there is a contradiction in these generally accepted myths/beliefs about sexual assault it is important to address these. Jurors will have these same preconceived thoughts or beliefs, and they will impact on how they view the case. Professor Morrison Torrey's research shows that "jurors will distort and twist evidence until it becomes consistent with their attitudes…jurors will strive to reach a verdict in a rape case that will not conflict strongly with the rape myth cognitions they hold at the beginning of the trial."[23]

a) Lack of Victim Cooperation

One of a victim's greatest concerns is being blamed for inviting or causing the sexual assault. It is this fear that prevents many from seeking medical help or reporting their assault to law enforcement. Victims may not cooperate with law enforcement or prosecutors as a result of that fear.

[23] Morrison Torrey, *Rape Myths and the Idea of Fair Trial*, 24 University of California, Davis, 1013, 1050 (1991).

Victims who fear contact with formal systems are also the least likely to report a sexual assault. This is especially true for marginalized populations – women of color, low-income people, non-English speaking women and undocumented women. Marginalized populations have faced tremendous hardships – including re-victimization – and these experiences have permeated within their cultures a fear of seeking justice because they don't believe it is possible for them.

b) Victim Behavior and Lifestyle

Victim lifestyle issues may present a challenge during prosecution. A common defense strategy is to call the victim's lifestyle into question in an attempt to imply that the victim placed herself in a high risk situation, or even "asked for" the assault.

There are also many stereotypes surrounding sexual assault that are still very prevalent in the public. Because of this, victims are often asked questions about their own behavior, attire, sexual life, and mental health. ***These questions impose blame on the victim***. As a result there are an enormous amount of rape cases that do not go on to the judicial system because of certain characteristics of the victim. Examples include: cases where the victim used alcohol, cases where the victim put herself in a high risk situation, and cases where the victim was divorced, separated, a single mother, unemployed or on governmental assistance.

Other examples of victim blaming include questioning victims who may have voluntarily accompanied the assailant to his home, or accepted a ride home from the assailant. In some of these situations, law enforcement decided the report was unfounded.[24] Just because law enforcement has found a report to be unfounded does not mean that the assault did not occur.

Victims of sexual abuse and sexual assault often suffer lifelong trauma. Many victims of sexual abuse suffer from a variety of mental illnesses, including post-traumatic stress disorder, depression and/or anxiety. Oftentimes, victims of sexual assault show other problems, including, but not limited to: inability to hold down steady employment, alcohol and drug abuse, interpersonal conflicts, commission of criminal offenses, and difficulty in maintaining long-term relationships.

Implications for Prosecutors: Prosecutors must be prepared to refute the myth that victim lifestyle plays a significant role in sexual assault. Prosecutors should remind juries that:

- Offenders deliberately target victims who they believe will not be credible or believed.

- Victims of sexual abuse and sexual assault often suffer lifelong trauma as a result of the assault. It is not uncommon for survivors to suffer from a variety of illnesses, including post-traumatic stress disorder, depression, and anxiety.

[24] Lisa Clark and Debra J. Lewis, *Rape: The Price of Coercive Sexuality*. Toronto: The Women's Press, 1977.

- Victims of sexual assault will often experience other problems following an assault, including but not limited to, inability to hold down steady employment, alcohol and drug abuse, interpersonal conflicts, commission of criminal offenses, and difficulty maintaining long-term relationships. These problems should not be used against them.

- Stereotypes about victims inviting sexual assault are still very prevalent in the public.

- Because of this, victims are often asked questions about their own behavior, attire, sexual life, and mental health. These questions impose blame on the victim when the focus should be on the offender.

c) Victim Risk Factors

Research consistently demonstrates that perpetrators capitalize on victims' vulnerabilities and inabilities to report or be believed. In fact, according to David Lisak, Associate Professor of Psychology at the University of Massachusetts***, the key to a perpetrator's success lies in identifying individual's vulnerability and exploiting that vulnerability***. For example, a perpetrator may recognize that an adolescent who is drinking is unlikely to report an assault out of fear of being "busted" for underage drinking. Perpetrators will also target undocumented women because they believe undocumented women will not report an assault out of fear of being deported.

Without implying that victims are "asking for" or deserve to be assaulted, it is important to understand factors that may increase a person's risk of victimization. These factors are less clearly understood than the risk of factors for committing sexual assault, but they may influence the prosecution of a case in which the victim is not seen as credible:

- A history of being sexually abused or assaulted, especially as a child
- Drug and alcohol use. Approximately 50% of adult sexual assaults involve consumption of alcohol by the perpetrator, victim or both.[25] In some cases, perpetrators have intentionally used alcohol or drugs to reduce victims' ability to resist an assault
- Lower socioeconomic status
- Higher number of sexual partners
- Vulnerable populations are also more likely to be targeted as potential victims. People requiring physical care are more likely to be victimized, including the elderly and individuals with disabilities – especially cognitive impairments
- Homeless people and sex workers. Sexual assault is also reported more frequently among people who are homeless and who work in the sex trade industry. These victims may be more "invisible" to mainstream society, contributing to an inaccurate impression of the prevalence of assault

[25] Abbey A, Zawacki T, Buck P.O., Clinton AM, McAuslan P. (2004) Sexual assault and alcohol consumption: What do we know about their relationship and what types of research are still needed. *Aggression and Violent Behavior:* 9(3):271–303.

d) Prior History of Sexual Abuse

Several studies have indicated that women with a history of child sexual abuse are at increased risk for later sexual victimization compared to women without such a history.[26] Women who are sexually victimized in adulthood are also at elevated risk of repeat victimization.[27] Since there is a high likelihood of victim's having more than one incident of sexual abuse/assault, it is imperative that prosecutors recognize this phenomenon. There are several factors to consider when working with a victim of who has a prior history of sexual abuse/assault.

- Prior abuse may not have been reported in the past
- Prior abuse may not have been believed by family members
- Prior abuse may have been unfounded or unsubstantiated
- Recent assaults may trigger memories and/or flashbacks from prior abuse. This may result in confusion of memories
- Fear of rejection, fear of not being believed, embarrassment may be reasons for not reporting a previous assault
- The victim may have developed poor coping skills as a result of past abuse such as alcohol and/or drug abuse

Prosecutors must educate juries that a past history of sexual assault does not mean that victim has somehow "asked for it" or placed herself in a high risk situation. The same is true for victims who may have reported a previous assault that was unfounded or unsubstantiated or a victim who reported an assault and later recanted. Prosecutors should be well versed in rape shield laws as well as resisting defense efforts to gain access to a victims confidential mental health records. Please see sections on Rape Shield and Discovery Issues for more information.[28]

e) "Counterintuitive" Victim Behaviors

Victims will often engage in "counterintuitive" behaviors that may not make sense to the average person. This is a normal reaction to trauma and is discussed in the earlier section on Traumatic Response to Sexual Assault. It is critical for prosecutors to be non-judgmental when interviewing a victim about the choices she made. There is usually a plausible explanation for a victim's behavior that will make sense to you and to others when it is explained.

Gaps in Victim's Memory

It is not uncommon for victims to have memory gaps and/or delayed recall about the events leading up to, during and following an assault. This is a normal reaction to trauma and is

[26] Messman-Moore TL, Long PJ. (2000). Child sexual abuse and revictimization in the form of adult sexual abuse, adult physical abuse, and adult psychological maltreatment. *Journal of Interpersonal Violence*;15:489–502. Also: Arata LB, and Lindeman CM. (2002). Marriage, child abuse and sexual revictimization. *Journal of Interpersonal Violence*; 17:953-971.

[27] Sorenson SB, Siegel JM, Golding JM, Stein JA. (1991) Repeated sexual victimization. *Violence and Victims*; 6: 299-309.

[28] Siffra/Green

discussed fully in an earlier section on Traumatic Response. Prosecutors who take a victim-centered approach will: (a) recognize that some memory loss may never be recovered; (b) provide multiple opportunities for victims to share new facts about the assault during the pre-charging phase; and (c) not interpret the reporting of new information as fabrication or embellishment.

Delayed Reporting
Delayed reporting has been previously discussed (See Reporting Issues). It bears repeating that delayed reporting may seem counterintuitive because society expects sexual assault victims to report the crime immediately. Prosecutors must be knowledgeable about the reasons victims delay reporting so they can educate juries that delayed reporting is the norm and not the exception.

Lack of Resistance
Society expects victims to resist a sexual assault. We now know that resistance is the exception, not the norm. It is essential to remember that victims have individual responses to trauma in opposition to these public expectations. It is crucial that prosecutors educate juries about the maze of misinformation regarding sexual assault and about victim response to trauma. Prosecutors should refer to the earlier discussion on trauma for more information about why victims don't fight back. They should also use expert witnesses to educate juries about these realities.

2. Common Defenses to Sexual Assault

There are a variety of common defenses in sexual assault cases. At the crux of many of these defenses is the implication that the victim is lying about being sexually assaulted. This is tied to the myth that there are a high number of **false reports of rape**. The defense may use a variety of explanations to argue why the victim is lying about being assaulted, however, they are mostly variations on a single theme – that the victim's claim of sexual assault is false. These defenses place the focus squarely on the victim, and when combined with other rape myths that blame the victim for her vulnerability (i.e. drinking alcohol/using drugs, a history of mental illness, lack of fighting back, consented to certain activities, etc.) they serve to diminish the credibility of the victim.

a) "He Said/She Said" Cases

One common refrain from defense attorneys is that sexual assault cases are simply classified as "he said/she said" cases.[29] The implication of this defense is that the "only" evidence of the

[29] Law enforcement officers may also refer to sexual assault cases as "he said/she said cases." These types of statements, if expressed to the victim, can have negative consequences as to future victim participation in the criminal justice system. Additionally, if these statements are reflected in investigative reports, they can be damaging to the case.

assault is the victim's own statement, which has been contradicted by the defendant. Some of this is a result of the nature of the crime itself; there are rarely witnesses to the sexual assault because offenders tend to not assault their victims in front of others. This enhances the importance of the victim's story, and again allows the defense to focus on the victim's behavior, and in particular those actions that depart from how we expect a "real" victim to behave.

The "he said/she said" problem occurs most often in cases in which: (a) the victim knows the perpetrator; (b) there is a lack of physical evidence; or (c) the physical evidence does not prove the elements of the crime. The defense will often argue that the lack of physical evidence, particularly in regard to injury, bruising, or tearing, equals reasonable doubt. This plays into the common belief that a "real sexual assault victim" is one who sustains serious physical injuries. The reality is, however, that most victims do not experience physical injuries, apart from the rape itself. Even in cases in which there is physical evidence of sexual activity, (semen for example) that evidence is no different than what would be left behind by consensual sexual activity.

In these types of cases, lack of consent is the crucial element the prosecutor must prove. Unfortunately, the legal definition of consent puts the focus squarely on the victim, and this plays into the defense's attempts to portray the case as "he said/she said." Despite these challenges, there are some ways in which a prosecutor can overcome the "he said/she said" problem:

- Look for ways to corroborate the victim's story. Taking a broad view of corroboration can be helpful. Although it may not be possible to corroborate the assault itself, what other facts else can the investigation corroborate about the victims story? Can the timeline of the events leading up to and after the assault be corroborated? What about the demeanor of the victim? These are just a few examples of ways in which the victim's story can be corroborated. The more corroboration, the less the case is a "he said/she said" case.

- It is also possible that the defendant will corroborate much of the victim's story as well. Particularly in cases in which consent is the defense, the defendant may corroborate many of the facts leading up to and after the assault. If the defendant admits to many of the facts but for the one that would convict him – consent – it opens the defendant up to attack on cross examination. For more information please refer to Chapter VI, Section F – Cross Examination.

- Consider calling an expert witness to address the confusing myths and misinformation constructed by defense attorneys. Expert testimony can help dispel some of the rape myths so that the jury avoids making a decision based on those myths or misconceptions. This type of expert testimony has been upheld by the Wisconsin Supreme Court on

several occasions.[30] See Chapter V, Section B and Chapter VI, Section G on for further discussion on the use of Expert Testimony.

b) False Report Defense

One of the most common rape myths about sexual assault is that there is a high incidence of false reports. One of the most frequently cited studies on the false reporting of sexual assaults, the Kanin study, asserted that the 41% of sexual assault reports made to a Midwestern police agency were deemed to be false over a nine year period.[31] This study has subsequently come under attack, and more methodologically rigorous research indicates that the percentage of false reports is actually somewhere between 2-8%.[32] In other words, the incidence of false reports for sexual assault cases is no higher than for any other crime.

The key point is that when the facts of a sexual assault are inconsistent with the expectations about what a "real sexual assault" looks like, there is a tendency in our society to view these cases with heightened suspicion. The defense will exploit these myths and argue to the jury that because the facts of the particular case do not meet our societal expectation of what a "real rape" should look like; it must be that the victim is lying about the assault.

Overcoming the False Report Myth

The traumatic nature of a sexual assault has a direct impact on how a victim discloses the incident. Additionally, the rape myths that exist in our society may cause a victim to experience high levels of guilt and shame because the assault did not conform to the societal expectations of what a "real" rape looks like (i.e. non-stranger perpetrator, no injures/weapon used, victim did not resist).

This self-blame may cause the victim to change the details of the assault to make it sound more like the stereotype. While this can present serious problems for the prosecution in terms of victim credibility, one of the key strategies to overcome this challenge is to view the omissions, inconsistencies, and perhaps even untrue statements as understandable. In no way should these "problems" be confused with a false report. An investigator or prosecutor who anticipates these perceived credibility challenges can then ask the victim in a non-judgmental manner for clarification of the relevant details. Other strategies that can be used to overcome the false report defense:

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[30] See *State v. Jensen*. WI 31, 279 Wis. 2d 220, 694. N.W.2d 56 (2005). Also: *State v DeSeantis* 155 Wis. 2d 774, 777 n.1, 456 N.W.2d 600 (1990).

[31] Kanin, E.J. (1994). False rape allegations. *Archives of Sexual Behavior*, 23, 81-91.

[32] Lonsway, K, Archambault, J, Lisak, D. (2009) False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault. *The Voice: Helping Prosecutors Give Victims a Voice*. Published by the National Center for the Prosecution of Violence Against Women, 3:1. Available online at: http://www.ndaa.org/publications/newsletters/the_voice_vol_3_no_1_2009.pdf.

- Prosecutors can avoid inconsistent statements made by the victim by utilizing the professional expertise of a **Sexual Assault Response Team (SART)** during the investigation. A SART is a multidisciplinary response team (comprised of advocates, law enforcement, sexual assault nurse examiners and prosecution) that provides direct intervention to sexual assault victims as they interact with the criminal justice system and coordinates effective investigative and prosecutorial efforts in connection with a report of sexual assault.[33] Participation in a SART may reduce the number of unnecessary professional contacts a victim has during the investigation and therefore, reduce the likelihood of inconsistent statements.

- **Vertical prosecution** is another strategy that will reduce inconsistent statements. With vertical prosecution, victims are able to work with the same prosecutor and investigator from the time potential charges are first reviewed through the sentencing of the offender. Vertical prosecution reduces the number of persons the victim has to share her story with, thereby reducing the likelihood of inconsistent statements. Vertical prosecution has also been shown to improve conviction rates, reduce victim trauma, and provide more consistent, appropriate sentencing. It is therefore considered best practice.

- Prosecutors can also overcome the false report myth by **corroborating** as many details of the victims account of the incident. Corroboration will highlight the accuracy of the victim's story and thus bolster her/his credibility.

- Finally, the prosecutor could consider using an **expert witness** to educate juries on rape myths as well as specific information about trauma and its impact on memory and disclosure.

c) Lack of Physical Injury

Society expects that a victim will physically resist a sexual assault implies that jurors and judges expect to see injuries in a true rape. Professionals who are educated about victim responses know that physical injuries are rare and that 70% of the time there are no injuries and 24% of the time there are minor injuries. ***Only 4% of victims of rape have serious physical injuries.***[34]

It is also important to stress that rape is a profound injury by itself. Psychological injury experienced by rape victims is often overlooked or devalued. It is imperative for judges to know the destructive quality and the extended length of this psychological injury so that offenders can receive appropriate sentences.

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[33] Wisconsin Adult Sexual Assault Response Team Protocol. Office of Justice Assistance, Violence Against Women Act. July 2009. Available online at http://oja.wi.gov/docview.asp?docid=16961&locid=97

[34] Acierno R, Resnick H, Kilpatrick DG, Saunders B, Best CL. (1999) Risk factors for rape, physical assault, and posttraumatic stress disorder in women: examination of differential multivariate relationships, *Journal of Anxiety Disorders;* 13(6): 541-63.

d) The Consent Defense

Perhaps the most common defense, particularly in non-stranger assault cases, is the consent defense. This is also known as the "rape is not regret" defense, or in other words, the victim engaged in, but now regrets, the consensual sexual activity with the defendant. This defense may be particularly common in cases in which the victim knows her perpetrator. In this strategy, the defense claims that in an effort to avoid being caught cheating on an intimate partner, or taking responsibility for engaging in sexual activity outside the relationship, the victim instead claims that she was sexually assaulted.

What makes these cases so difficult are the various rape myths that lead jurors to believe that these cases do not look like "real rape." Given that the consent defense is most common in cases in which the victim knows that defendant, we are already dealing with the myth that the defendant does not conform to the cultural belief what a rapist looks like – i.e. this is not the stranger in the ski mask who jumps out of the bushes to assault his victim. Furthermore, even if there is DNA evidence, it is not helpful in proving an assault occurred.

Defense attorneys will likely portray these cases as "He said/She said" cases described earlier in this section. Additionally, the defense will focus on the victim's behavior, particularly behaviors that contradict the rape myths that are pervasive in our culture – i.e. delayed reporting, lack of injury, no weapon involved in the assault – and they will use these myths to attack the victim's credibility.

Unfortunately, the statutory definition of consent invites this focus on the victim's behavior. Consent is defined as words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact[35] and the jury instructions for consent asks the jury "in deciding whether the victim did not consent, you should consider what the victim said and did, along with all the other facts and circumstances. In total, the word "victim" appears four times in the jury instructions. This, combined with the defenses' undoubted focus on the victim's behavior, presents a challenge for the prosecution.

Overcoming the Consent Defense[36]

There are several strategies that prosecutors can use to overcome the consent defense.

(1) Prepare

Consent defense cases require more time and resources to prosecute successfully. They will require identifying the rape myths implicated by the facts of the case, and then figuring out how to go about refuting them. They will require educating the jury, beginning in voir dire, so that they do not view these cases through a lens of ignorance brought about by the cultural stereotypes surrounding sexual assault. Victims will require a significant amount of preparation, particularly in terms of responding to questions around rape myths, such as why didn't you

[35] Wis. Stat. § 940.225
[36] Adapted from materials prepared by Tim Gruenke, District Attorney, LaCrosse County.

report right away, etc. Prosecutors will need to be very familiar with the investigation, and may need to ask for follow-up investigation to corroborate as many facts as possible. If the victim has to prove the case on her own, the case will be all the more difficult.

Analyzing the Case [37]
Analyzing the facts of a sexual assault can assist the prosecutor in anticipating any number of potential defenses as well as identifying what pre-trial motions may be necessary to eliminate or blunt the impact of those potential defenses. Part of this case analysis may take the form of creating a **good fact/bad fact analysis**. This is an activity in which the prosecutor generates a list of the facts that are "good" for one's case as well as the facts that are "bad" for the case. The bad facts list will assist the prosecutor in identifying potential defenses as well as the pre-trial motions necessary to eliminate or blunt the impact of those defenses. It will also inform the prosecutor as to the arguments to counter the potential defenses. From the good facts list, the prosecutor can determine which facts must be elicited, as well as any pre-trial motions necessary to elicit the facts. The prosecutor can then begin to anticipate how the defense may characterize the good facts, and what strategies may be necessary to prevent an unfair characterization of the evidence.

(2) Connect the Victim to Advocates

Victims of sexual assault have internalized many of the rape myths that exist in our society. As a result, sexual assault victims may experience self-blame, guilt, and shame after the assault. Victims of sexual assault also fear the loss of privacy that often accompanies an individuals experience with the criminal justice system. Finally, victims will have to deal with the consequences of the assault long after the criminal justice process has run it course.

As a result, it is vitally important that the victim be linked with supportive services during the criminal justice process. A non-governmental victim advocate can provide non-judgmental and empowering services to sexual assault victim. Non-governmental victim advocates are located as Sexual Assault Service Providers throughout Wisconsin. A victim advocate is protected by privilege in Wisconsin (Wisconsin Stat. 905.045) which may help address some of the victim's privacy concerns.

(3) Use Pre-Trial Strategies

To challenge the consent defense, prosecutors can also protect the victim's privacy through pre-trial motions and prepare the victim for testimony – both direct testimony and cross examination. This includes prepping the victim for rape myth questions as well as addressing any inconsistencies that exist in the case. For more information, see Chapter V, Pre-Trial Strategies.

[37] This material is adapted from an article by Miriam Falk, ADA Milwaukee County.

(4) Practice Offender-Focused Prosecution

One of the main ways a prosecutor can overcome the consent defense – and the inevitable defense focus on the victim – is to develop an **offender-focused prosecution**. One of the best ways to do this is to develop an offender-focused theme to the case. The theme of the case is a one-sentence statement which represents the thrust of your evidence. It is the prosecutor's read on the human dynamics in the case, or on why the defendant is guilty.

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The theme of the case is a one-sentence statement which represents the thrust of your evidence about why the defendant is guilty.

Although the theme will often depend on the facts of the particular case, there are some key traits of sex offenders that may be useful in developing an offender-focused theme. For example sex offenders target their victims based on vulnerability. This vulnerability often presents a challenge for the prosecutor in the form of credibility issues. However, an offender-focused prosecution will take some of the weaknesses/bad facts in the case – which are often about the victim – and demonstrate that these are precisely the reasons that the offender targeted the victim for the assault. As a result, the prosecutor embraces some of the weaknesses/bad facts and turns them into good facts and a strong case. Examples of strategies prosecutors can use to keep the focus on the defendant include:

- *Defendant is a predator* – This keeps the focus squarely on the defendant, and portrays the victim as a "true victim" rather than one who contributed to the defendant's acts.

- *Defendant is a manipulator* – This presents the defendant as a person who knew full well what he was doing every step of the way. All of his actions were directed toward the same goal – sexual assault.

- *Defendant is an opportunist* – While sexual assaults are premeditated crimes, there may be cases in which the facts or the nature of the defendant don't lend themselves to portraying the defendant as a predator or manipulator. This may be particularly true in cases in which the defendant is likely to appear to the jury as sympathetic. In these situations, the prosecutor can portray the defendant as someone who exploited a situation and assaulted the victim. This allows the jury to convict the defendant even if they don't believe the assault was "planned."

Finally, while the jury instructions for the definition of consent focus mostly on what the victim said or did, they also ask the jury to consider "all the other facts and circumstances" to determine whether the victim did not consent. This is the opportunity for the prosecutor to keep the focus on the defendant's behavior.

(5) Corroboration

Corroboration is probably the prosecutor's best friend in a consent defense case. As part of the analysis of the case, the prosecutor should develop a time line that includes everything leading up to the assault, including what the victim and offender did after the assault. The prosecutor should then corroborate as many facts as possible to bolster the victim's credibility. This includes what is often called ***micro corroboration***, which includes even the smallest details of her report. Even these small details can help build the credibility of the victim. During this process, the prosecutor may determine that there needs to be additional investigation. While some of this may occur before filing the complaint, corroboration should not stop once the complaint is filed. Although certain avenues of investigation may be cut-off once the complaint is filed – i.e. interviewing the suspect – the prosecutor should not cease trying to corroborate as many facts as possible leading up to trial.

Potential Areas of Corroboration:

- **Victim's Post-Assault Behavior –** What did the victim do after the assault? Who did she talk to? What was her demeanor? This type of evidence can help establish that something traumatic happened. Did the victim develop problems in school, work, or in her relationships? Any of this evidence may help corroborate that the victim was sexually assaulted, because the victim could not fake these after-effects.

- **SANE Exam –** Although injuries in sexual assault cases are uncommon, any injury discovered by a SANE exam should be used, no matter how small. Additionally, a victim who had a SANE exam may help counter the implication that she is lying. A SANE exam is an extremely lengthy and intrusive procedure, and the prosecutor may be able to elicit these facts in a way that refutes the implication that someone would put themselves through such an exam without a valid reason.

- **Expert Witnesses –** An expert witness can corroborate the victim's behavior by comparing it to other known victims of sexual assault. This evidence is often termed "counterintuitive victim behavior" evidence, and it helps disabuse the jury of common misconceptions about sexual assault victims. This type of expert testimony is admissible in Wisconsin.[38] Advocates who work with sexual assault victims can be valuable resources for expert testimony.

- **Details –** Details provide concrete evidence as to the facts of a sexual assault. Prosecutors should strive to provide and corroborate as many details as possible, including: (a) photos of the crime scene and photos of any injuries; (b) statements from any witnesses before or after the assault; and (c) any other detail, no matter how small! Above all, be creative and think big picture.

[38] Please *see State v Jensen.* WI 31, 279 Wis. 2d 220, 694. N.W.2d 56 (2005).

e) Other Potential Defenses

Although the list below is not exhaustive, it does represent some of the more common defenses a prosecutor may encounter in sexual assault cases:

- ***The victim is trying to cover up for her bad behavior***
- ***The victim is looking for revenge***
- ***The victim is a "gold digger."***
- ***The victim is looking for attention***
- ***The victim is exchanging sex for drugs***

These defenses represent further attempts to shift the focus to the victim's behavior. A prosecutor who has engaged in the good fact/bad fact analysis as described above may identify some of these potential defenses early on in the case. After performing an evidentiary analysis of these potential defenses, there may be pre-trial motions the prosecutor can file to limit these potential defenses. For more information on pre-trial motions, see Chapter V, Section A – Motion Practice.

Additionally, an offender-focused prosecution can also help ensure that the focus is not squarely on the victim. As discussed above, offenders target their victims based on vulnerability. While this vulnerability often presents challenges for the prosecution in terms of credibility, if the prosecutor is able to demonstrate that it is precisely because the victim was vulnerable that she/he was targeted for victimization, some of these more victim-focused defenses will lose some of their impact.

- ***The defendant is impotent/did not ejaculate.***

This defense falls under the rape myth that sexual assault means penis/vagina penetration. Obviously, our statutory definitions of sexual intercourse and sexual contact broaden the definition of sexual assault to include acts other than penis/vagina penetration (i.e. oral intercourse, digital penetration, etc). Keeping the focus on the statutory definition of sexual assault, which includes other non-consensual sexual acts helps to limit the impact of this defense. Additionally, sex offenders are motivated by a desire to exert power and domination over their victims. While there is a sexual component to their behavior, sex offenders are aroused by sexually deviant stimuli in which they take advantage of the victim's vulnerability. Thus the fact that the defendant is impotent does not negate his ability to be aroused by sexually deviant stimuli.

- ***The victim is trying to get a leg up in a custody battle.***

This references the common belief that false allegations of child sexual abuse are very common in the context of divorce or child custody litigation. The claim is that the allegations of child sexual abuse are manufactured by a parent to gain an advantage in the divorce/child custody proceedings. Like all rape myths, the evidence does not support the view that false allegations of

child sexual abuse are rampant.[39] It may be that much of the support for this rape myth stems from the timing of when the abuse is revealed. However, it should not be surprising that the disclosure of the abuse and the filing of family court proceedings are in close proximity.

First, the disclosure of the abuse may be the precipitating event for the initiation of a divorce or child custody proceeding. Additionally, the child(ren) may disclose the abuse once the divorce is filed because the offender is no longer living in the home. As a result, the child victim may feel safer to disclose the abuse with the knowledge that the offender is no longer able to exert control over the child. Or the child victim may be concerned about having to spend more time alone with the offending parent. It is also possible that the stress of divorce/custody proceedings may precipitate a parent to offend against a child. The offending parent may have more opportunity to offend now that the family is splitting up, and fewer resources to resist the desire to offend.[40]

There are also issues regarding how children disclose sexual abuse. Often times child victims of sexual assault will be forced to experience a series of interviews with various professionals associated with the criminal justice system. The disclosure of sexual abuse has been characterized as a "process with definable phases and characteristics" which includes denial, disclosure, recantation, and affirmation.[41] This process of disclosure, which includes denial and recantation, can present credibility problems for a prosecutor. However, if the process of disclosure is viewed as normal and expected, the prosecutor may be better equipped to handle such problems. For suggestions on evidentiary strategies to overcome these problems, please see "What Children Can't Tell Us and Why: Child Sexual Abuse, Hearsay and the Rule of Completeness," by Hon Charles B. Schudson. Also reference Chapter III, Section E – Issues Specific to Children.

3. Recanting Victims

It is critically important to know that recanting is not the same as a false report. ***A false report is when the investigation factually proves the sexual assault never occurred.*** Recantation is when there is a retraction or withdrawal of a reported sexual assault. A recent study found that the actual percentage of false reports in sexual assault is between 2-8%.[42] This is no different than false reports for any other crime.

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[39] McDonald, Merrilyn. 1998. The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases. Court Review, Spring Issue. Available online at: http://www.omsys.com/mmcd/courtrev.htm.
[40] Ibid.
[41] Hon. Charles Schudson. (1991). What Children Can't Tell Us and Why citing Sorenson and Snow, "How Children Tell. 70 *Child Welfare* 3.
[42] Lonsway, K, Archambault, J, Lisak, D. (2009) False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assaults. *The Voice: Helping Prosecutors Give Victims a Voice*. Published by the National Center for the Prosecution of violence Against Women, 3:1. Available online at: http://www.ndaa.org/publications/newsletters/the voice vol 3 no 1 2009.pdf.

There are many reasons why a victim would recant a reported sexual assault even if the sexual assault really did occur. Victims of sexual assault may recant because:

- They did not realize the toll that the criminal investigation (lengthy court delays, etc.) would take on them mentally, emotionally, physically, and financially. They just want it to end and try to go on with their life and put it behind them.

- Pressure from the offender or offender's family to recant because the offender is the sole breadwinner in the family, or that prosecuting the sexual assault is breaking up the family.

- Pressure that they are the whole case for the prosecution and therefore they are responsible for sending the offender to prison. Many times victims do not want the offender to go to prison – they just want the abuse to stop. A victim may also worry about the offender, worry about whether the offender is okay while waiting for the outcome of the trial, and worry if the offender will be okay in prison.

- Victims are dealing with the trauma of the sexual assault and are unable to cope with even the basic life tasks, such as working or school, let alone testifying in a courtroom.
- Victims fear that they will be blamed or attacked within the system for the sexual assault and therefore drop out to avoid further attacks and doubt from others in their life (family, criminal justice professionals, friends, etc).

Because recantation is used by victims to halt criminal justice involvement, it should never be viewed, in and of itself, as an indication of a false report.[43] A victim-centered response necessitates that prosecutors and police investigate whether a recantation is a result of a system failure, witness tampering or other factors that are outside the control of investigators or responders. While recantations present challenges for the criminal justice system, they should not deter prosecutors from considering the viability of the case. In the event that a recantation is the result of duress the victim experienced, prosecutors may be able to successfully educate the judge and jury on the causes of the recantation. Prosecutors should carefully consider all of the victim's needs in making a decision.

E. Issues Specific to Children

In cases involving children and adolescents certain issues are present simply due to the fact that children and adolescents are not the developmental equals of adults. Current brain research

[43] False Allegations, Case Unfounding and Victim Recantations in the Context of Sexual Assault. Oregon Attorney General's Sexual Assault Task Force. Available online at: http://www.oregonsatf.org/resources/docs/LE_Rec_Practice_False_Reports_Unfounding.pdf.

supports the common-sense notion that children and adolescents simply do not have the same abilities as adults to understand and process the world around them. Their judgment is compromised by their youth. They cannot make "decisions" in the same "rational" way that adults can. Nor do they have equal abilities of adults in communication and language comprehension. Even a child's or adolescent's fund of information about the world is less than that of an adult. These deficits make children easy targets for predators, and affect not only how the child can be manipulated, but also how the child views his/her experience, and all the decisions he/she makes concerning his/her experience.

In addition, a child or adolescent's "world view" is very different from that of an adult's. They lack power and authority. They cannot necessarily extricate themselves from their living situation. And, of course, they "need" the adult figures in their lives for their very existence. Following is a more detailed discussion of some common issues which frequently arise in cases involving children and adolescents.

1. Developmental Limitations

Understanding Brain Development

The human brain has different parts which develop over the course of a person's childhood into their adolescence and early adulthood before the brain is fully developed. The human brain develops essentially from the bottom up and from the inside out. The most inner and bottom part of the brain is already developing and starting to function even before birth, and controls the automatic body responses to stimuli like pain. The second "layer" proceeding up and out, is the limbic system, which addresses emotions. Much of childhood and adolescence are consumed with these two layers. The last part of a person's brain to develop is the pre-frontal cortex, which regulates rational thinking. While adolescents' brains are starting to develop this area of the brain, full development is not completed until the early to mid-twenties. Further, fear or trauma inhibits even a fully formed adult's brain from operating at this highest level when they are experiencing the fear or trauma.

There are three primary areas of limitation connected directly with a child's development: (1) cognition, or how their brain processes information; (2) language, which refers to a child's understanding of words and grammar and how that child uses language to communicate about events or feelings; and (3) the child's fund of information, or what facts the child knows about the world around him/her.

a) Cognition Limitations

This very basic explanation demonstrates why a child does not and cannot understand an experience in the same way as an adult. Consequently, a child's perceptions, observations and decision-making in reference to that experience are also reflective, at best, of the child's highest level of development at the time. For instance, younger children are able to accurately describe a

series of events in a concrete manner: first, A happened; then B happened, then C. However, a younger child may not be able to explain why C happened, even if it would be obvious to an adult observer. Cause and effect are more difficult concepts which children do not understand until they are somewhat older. Another example is seen when asking a younger child to try to identify what someone else is feeling in a particular situation. While a child can state with accuracy that the person yelled at them, it is much more difficult for the child to identify what the person is feeling (fear, anger, and frustration) or to explain why the person is yelling beyond restating what the person is saying to them.

As children move into adolescence, they are far more capable of understanding these concepts, but still not at the same level as an adult. And, adolescents view the world through the "emotional" lens of the limbic system, which can affect perception and certainly affects an adolescent's reactions to a situation.

b) Language Limitations

Language abilities are also a function of development. Language is more than merely vocabulary, although it almost goes without saying that a child's vocabulary is generally not the same as that of an adult. As a result of their more limited vocabulary, children often do not even know the words they need to use to describe an event they have experienced. Or, the words they have heard are "bad" and therefore embarrassing or wrong to use. In addition, children and teens often use words, seemingly correctly, when they do not really understand them. Children also guess at a word's meaning, and try to answer what they think you might be asking them. Relational words like "under/over" and "yesterday/tomorrow" or words involving size or time comparisons can be misused or completely not understood.

c) Limitations on Fund of Knowledge

Finally, a child's fund of information, or what the child knows about the world, is necessarily not equal to that of an adult. This limitation is affected by both the child's developmental level (for instance, a five year old does not typically know that a year has 365 days) and also by the child's environment. While many five year olds can recognized and name the alphabet, there are many children whose living situations lack any adult or older sibling who has taught them about the alphabet. The same is true for colors, numbers and many other "facts" that one might assume the child would know simply by virtue of his/her age.

Implications for Prosecutors: Prosecutors who are working with child victims must understand developmental limitations and ensure that children are not held to the adult expectations during the investigation and prosecution of a sexual assault. The implications of developmental limitations for prosecutors include the following:

- Assume that there may be some communication gaps which require you to ask for explanation.

- Expect to spend some time just conversing with the child so you can assess where this child fits into the communication spectrum.

- Come prepared to use your imagination to come up with ways to aid the child in telling his/her story to you – allow the use of dolls, or demonstrations, or drawings if that helps the child communicate more effectively.

- Do not assume that, because a child is a certain age, he/she will have communication abilities equal to the "average" child of that age.

- Use short one-concept questions.

- Use easy words.
- Use the child's words back to them.

- Have the child clarify important words. If the reference is to a person's "private," ask the child to tell you what that "private" is used for.

- Use looping questions which repeat the end of the child's last answer, guiding them to the "next thing" in order of occurrence.

- Do not assume that the child's world is the same as yours – you may sleep in a bed, but this child may never have slept in a bed.

- Be careful to avoid asking questions that are outside the understanding of the child. For example, asking a five year old "how many times" a penis "went in" is not only very confusing, but also invites the child to guess or make up answer – "100 times" is pretty typical for a young child who means "a lot" … and what is "went in?"

- If talking to children is not your forte', read up on children's language using a text like Ann Graffam Walker's, or take a forensic interviewing class to help you develop a skill set and comfort level. And, of course, practice talking with children every chance you get!

2. Lack of Parental Support

Children are dependent upon their caretakers for virtually their every need. Since most child perpetrators are known to the child or adolescent, it is likely that the offender is also someone known to the parent of the child. Relatives, friends of parents and live-in boyfriends/girlfriends are quite commonly those who prey on children and adolescents. A child's parents, therefore, may either not believe or not support the child's disclosure. The conundrum in which this places

a child is no small matter. Studies have shown that parental reaction to a disclosure of sexual abuse is a key factor in whether there will be a subsequent recantation of the disclosure by the child.

Practice Tips: As a pre-charging concern, a lack of parental support should raise the concern as to whether there will be continued cooperation on the part of the custodial parent if and when the child is needed to testify. Strategies prosecutors can employ to increase child safety and participation in prosecution include:

- Consider whether the local child protection agency should become involved. Does the situation warrant removal from the non-supportive parent as a matter of safety for the child?
- A recorded interview of the disclosure is powerful, even in the face of a later recantation.
- Conduct medical examinations early in the investigation to detect possible injury and/or STD's. This is also part of the safety concern issue noted above and may create an additional basis for removal of the child if there is a lack of parental cooperation.
- Link the child to a supportive therapist. Living in a home where they are disbelieved after making a sexual abuse allegation takes an emotional toll on the child. A supportive therapeutic setting is important, even if the child remains in the non-supportive parent's home. While the child may not initially be in physical danger (if the offender is in custody) a qualified therapist may be able to address and/or alert the prosecutor to issues of emotional safety that may arise.

3. The Unlikable Parent

Similar to the non-supportive parent, children may also be in the care of the unlikable parent. While this is not the child's fault, juries seem to place great emphasis on the unlikable parent's choices and lifestyle in a way that unfairly prejudices the child's credibility. Most often the parent is "unlikable" because they have been consistently making lifestyle choices that are detrimental to both themselves and the child, such as the woman who persists in remaining with the man who abuses both her and her child. Another common scenario is the Mom who learns about the abuse from her child, but does not contact police in response. She may not want to lose her relationship with the perpetrator, she may not believe the child, she may fear the child will be placed into foster care, or she may offer any of a number of other excuses for her decision not to report.

Unlikable parents tend to be extremely self-involved. They make lots of excuses for their behaviors, and may not stop making bad choices in reference to your case. For instance, Mom may visit the offender while he is in jail, or she might put money in his jail account, or she might put the child on the phone when the offender calls the house. It is understandable why jurors view them unfavorably, but your job is to separate the parent's behavior from the child's victimization.

Implications for Prosecutors: As a pre-charging concern, you must make some assessment about whether you can overcome the same bias against this parent that the jury is going to experience:

- Are you able to proceed without having to place this parent before the jury?
- Can you effectively use voir dire to separate out moral judgments on the part of the jury about the parent's behavior from their credibility assessment of the child?
- Can you corroborate the child's report outside of the disclosure to this parent?

4. Intra-Family Dynamics

Intra-family dynamics is an issue larger than whether the non-offending parent is supportive. Since it is most likely that children will be perpetrated against by a relative, or someone in a close family-like relationship to them, children can have a variety of emotional connections or reactions to this person. Often children may love the offender, but simply want the abuse to stop. They may worry about the impact of disclosing on the family's financial stability. They may be concerned about the impact of their disclosure on others who care about he offender – their parents, siblings, important aunts or uncles, grandmas or grandpas. Children may also worry about being removed from their family, or about "breaking their family up."

Children who have been abused frequently act out in negative ways. Thus, they can be viewed by family members as "liars" or "troublemakers." In pure credibility cases, having a parade of family members willing to offer such opinions about a victim may prove to be challenging to prosecution. But remember this: the offender also knows that the child is viewed as a "trouble maker" who will not be believed – and he may have targeted the child specifically because of this.

In addition, children who are aware of the offender's power within the family structure, whether it is physical power or psychological power, either real or as perceived by the child, may be reluctant to disclose abuse for fear of retaliation. When there is disclosure, it can be fragile and incomplete.

Implications for Prosecutors: Intra-family dynamics must be explored at the pre-charging time, since safety is a most immediate concern. Moreover, knowing that disclosures in these cases are piecemeal and fragile, prophylactic measures to preserve the potential case can be taken early on, such as video-recording a forensic interview, removing the child from dangerous or unsupportive circumstances, and interviewing other children within the family constellation both as possible witnesses and victims.

5. Child Grooming Behaviors

Quite often in child sexual abuse cases there is a pattern of escalating behaviors done precipitated by the offender that was intended to set the stage for the later acts of abuse. This is generally called "grooming" the victim. Examples of grooming behaviors include:

- Making verbally sexually suggestive statements
- Engaging in "innocent" playing that includes opportunities for the offender to be in physical contact with the child, often in the form of "wrestling" games, where seemingly innocent touching gradually includes touching of the genitals which the offender might say was "accidental"
- Engaging in more provocative touching (like backrubs) that push the envelope further and further toward the sexual contact that later occurs
- Gradually escalating touching, starting on ambiguous "private parts" using "ambiguous" kinds of touching, and moving toward more obvious sexual touching under the clothes
- Removing of some of the offender's clothes
- Removing of some of the victim's clothes
- Displaying sexually suggestive photos or movies and later displaying actual pornography
- Taking photos which require more and more removal of clothes by the victim
- Giving special treats or rewards to the child after any of these activities, including money, objects, food or fun activities like movies
- Making the child believe that any touching was accidental by stating so, or apologizing
- Making the child feel complicit by saying things like "you liked it" or "if you don't like it, you can tell me to stop"
- Giving the child illicit "treats" either before or after the abuse, like alcohol, drugs or cigarettes
- Providing reasons to the child why he/she should not report such as "it's our secret," "you/I will get in trouble," "no one will believe you," "it will break the family up" and other fear based threats.

The goal of grooming is to: (a) desensitize the child to the abuse, thus making it easier to be able to move into more and more abusive behavior; (b) make the child feel complicit; and (c) make it more difficult for the child to be able to report the abuse.

The goal of grooming is to: (a) desensitize the child to the abuse, thus making it easier to be able to move into more and more abusive behavior; (b) make the child feel complicit; and (c) make it more difficult for the child to be able to report the abuse. It is much more difficult for the child to recognize the behavior as abuse when there has been a previous pattern of grooming behavior, because the grooming is either a confusing and ambiguous experience for the child, or it looks like "innocent" behavior to the child. Offenders will also groom the child's caretakers, in an effort to create doubt on the part of the caretakers if the child does disclose abuse.

Implications for Prosecutors: There are several important points about grooming that can inform prosecutors during the pre-charging phase:

- The child probably does not know that he/she was being "groomed."

- Grooming often contributes to a delay in reporting. Fleshing out the facts of the events leading up to the abuse is an important part of the investigation, because it can reveal why a child delayed disclosure.

- Grooming can also provide a more complete picture of the dynamics of the relationship between the offender and the child, revealing the level of manipulation used by the offender.

- The grooming process may also involve pieces of evidence which can be helpful in corroborating the allegations of abuse.

- Within the grooming process there are often other crimes that may be easier to prove (as they may involve physical objects like photos or movies) than the acts of sexual contact. Additionally, having an arsenal of possible additional charges makes for a better position when negotiating to resolve a case.

- The presence of grooming also opens the door for potential expert witness testimony, something that can enhance your case and bolster the child's credibility should the case proceed to trial.

Grooming can also have the effect of creating an unhealthy allegiance between the victim and the offender. This is particularly true then the offender was perceived as "nice" or "fun" or "helpful" by the victim. Just as this allegiance may be a significant factor in any delay in disclosure, it may also contribute to ambiguous or outright negative feelings on the part of the victim toward the prosecution. Such feelings can result in a refusal to cooperate or recantation by the victim.

6. "Consent"

In Wisconsin, children under the age of 18 cannot consent to sexual intercourse in any of its forms. In addition, children under the age of 16 cannot consent to sexual contact in any of its forms, either. While this is the law, the child victim may view his or her "consent" in very different terms. Sometimes those who will serve as jurors will also have views different than what the law states.

a) The "Consenting Child" Myth

As a rule, most people have an easy time accepting that children under about age 10 simply cannot "consent" to sexual contact or intercourse. However, in spite of the black and white letter of the law, many child victims and some adults (and jurors) view a child's cooperation in sexual behaviors with an adult as negating the adult's culpability for the crime. The idea of the "promiscuous 7-year old" is out there, and must be addressed early on should the case proceed to trial. However, the existence of this myth within some segments of the community should not deter one from charging a child sexual assault case.

The issue of the "consenting child" arises most frequently in cases where there is some sort of perceived "boyfriend/girlfriend" relationship between an adult and child, although it is also present in cases where the ages of the participants are close, as well. The 17 or 18 year old boyfriend with a 15 year old girl is really a very different case from the 12 or 13 years old girl who is convinced that she is "in love" with the 21 year old neighbor, and these cases need to be evaluated on an individual basis.

When a child considers himself or herself the "love interest" of the offender, there is always a concern about victim cooperation in the prosecution. While the child may, at some future point, understand the exploitative nature of this "relationship," it is usually not apparent to them at the time you are considering charging the case. In addition, there are also concerns that the child may respond to the case by becoming a runaway, or engaging in other risky behavior.

b) Assisting "Consenting" Child Victims

Developing a rapport that involves honest responses to the child's concerns is important. At the same time, it is also important at this stage to communicate why the laws concerning adults having sex with children are considered to be so important to the community. Discussion of appropriate consequences for this choice on the part of the adult and telling the child that he/she will have the chance for input at sentencing may increase victim cooperation and/or decrease the chances for more extreme responses from the child that would place the child at risk. Linking the child to an advocate and therapist at this stage is also critical to successful prosecution.

c) Addressing Community Beliefs

Considerations of community beliefs or sentiments concerning "cooperative" sex involving younger teens with older adults should be addressed in voir dire. Considerations of how to

develop evidence that demonstrates the exploitative and unequal nature of these relationships - including the potential need for expert testimony - are also issues to address pre-charging. One method is to highlight that "consent" is not an issue.

In cases where the "boyfriend" and "girlfriend" are closer in age, issues relating to jury sympathy for a younger (yet "of age") offender also come into play. At the pre-charging stage, the various equities of the case should be seriously considered. "Boyfriend/girlfriend" cases where the age range is two or three years may deserve resolution via charges that are substantially less than the most serious available or via resolution using a tool other than conviction.

7. "Coaching" of the Child Victim

A common defense attack in child sexual assault cases is that the child has been "coached" by some adult who seeks to harm another adult (usually an ex-spouse or boyfriend/girlfriend) by having the child fabricate an allegation of sexual abuse against the target adult. This sort of defense is typically known early on and may be offered by the defendant.

While it is true ***coaching has occurred in relatively rare cases***, there are several angles of analysis to consider in deciding whether such is the case, and/or whether, in spite of this defense, a prosecution would prevail.

- First, the comprehensive interview of the child outside the presence of the alleged "coach" is important. It is extremely hard to maintain a lie, especially an elaborate one. Thus, the more incidents are involved, the more details, places or dates are part of the scenario, the less likely it is that the case was "coached."

- The presence of sensory or peripheral details embedded in the context of the child's story is often a sign of the child having actually experienced the events. Coaches tend not to plant this sort of information.

- Just as for the jury, examination of the child's demeanor is also important – fabricating emotion is possibly even more difficult than maintaining a lie.

- Consider whether the child has the capacity, intellectually or emotionally, to be able to be coached such that she or he could be relied upon to carry out such a plot.

- Evaluate whether the accusation of the motivation to cause harm actually borne out by the facts. Is it believable that the purported coach would use his or her child in this fashion? And why is the "coach" trying to "get back at" the other in the first place? Is there corroboration of the child's information? Physical evidence? Other witnesses?

What are the circumstances of disclosure, and are those consistent with the theory of fabrication proposed?

8. The Myth that Children "Fantasize" About Sex or Sexual Assault

Common sense might suggest that a child cannot "fantasize" about something he or she knows nothing about. Yet, this myth persists within the community, and it is a convenient theory that defendants use to try to convince others that a child's disclosure is a lie. Experts in child sexual abuse are available to dispel this myth.

A corollary to this is that children have learned about sex through exposure to inappropriate movies or from seeing adults engaged in sexual behaviors or prior abuse to themselves. This is the *Pulizzano* situation.

Developmental Limitations
The older the child, the more information that child has about sexual matters, since school and parents do start educating children about these issues usually somewhere between 4th -6th grade. However, being taught the "mechanics" of the birds and the bees is not the same as experiencing and understanding sexual behavior. At those grade levels, the typical school curriculum does not include information that goes much beyond how babies are made, menstruation and wet dreams. Oral sex, anal sex, masturbation, and various sexual positions are not typically part of the common curriculum at these ages for most children.

Children younger than about 4th grade have a limited understanding about sex. Even those children who have had some sex education in school will be hard-pressed to provide detailed sensory information that would be consistent with a true sexual experience - without having actually experienced the act that provided the accurate sensory details. For example, even a well-educated 6th grader, age 11 or 12 would not have been taught what color semen is, what its texture is, how it looks when it is ejaculated, or what is smells like or tastes like. These are the kinds of sensory details that provide assurance that what the child is relating is something the child really experienced.

Implications for Prosecutors: When the *Pulizzano* argument is raised in your case, at the outset you must consider whether there is any basis in fact to accept that your child victim has been exposed to sexual activity and whether that exposure was such that the child could now "fantasize" or make up a sexual assault to himself or herself. To what was the child exposed? For what duration? At what age? What does the child know/recall about the exposure? Does the child provide information that is well outside of what the exposure would have provided to him/her? Also, what would the reason be for the child to fabricate or 'fantasize" about this particular offender?

The five factors in *Pulizzano* should be the guide in deciding how important any true prior exposure (either seeing something or actually having been victimized) is going to be in your case. Often, the exposure is entirely different than the current allegation. Seeing adults "humping" is hardly akin to describing having to suck on an adult penis. In a case like this, where the exposure is dissimilar to the allegation, the claim of fantasy or prior knowledge is no more than a red herring and should not deter prosecution.

9. Self-blame

In light of the grooming behaviors discussed earlier, and the interplay of intra-family dynamics in child sexual abuse cases, it is easy to understand how a child may blame himself or herself for the abuse, as well as for the consequences of reporting the abuse. Since children are egocentric, they often assume blame for situations occurring around them. We see this, commonly, in cases where a child feels responsible for his/her parents' divorce.

Self-blame is also common when a child has been victimized sexually. They may blame themselves for not having seen it coming, for not having stopped it, for not having fought off the offender, and for the fact that the abuse continued over a period of time. Perpetrators play into this by saying things to children to make them feel that the abuse is the child's fault – suggesting that the child "came on to them" or that the child "wanted" the abuse – evidenced by a lack of fighting back or saying "stop" or "no." The perpetrator may also reward the child after the abuse with money, gifts, or "adult" or "special" privileges. When the child accepts these rewards, his/her complicity in the abuse is deepened from the child's perspective, which is precisely what the perpetrator is relying upon. It is easy to understand why a child who is experiencing these feelings does not immediately report abuse, and even when abuse is reported, may not report the full extent or all the details.

Children younger than about 4th grade have a limited understanding about sex.

Even those children who have had some sex education in school will be hard-pressed to provide detailed sensory information that would be consistent with a true sexual experience.

Children may also assume the blame for negative consequences of having reported the abuse. Since most perpetrators are known to the child victim, the victim is likely to be keenly aware of the impact of the report on the perpetrator and his/her family and friends. The child victim may view it as his/her fault that the offender is in jail, is unable to reside with the family, or that the family is suffering financially, emotionally or has split apart. This is frequently compounded by these very same messages being conveyed to the child by family members. In addition, the offender may have "predicted" the negative consequences of reporting (may even have set them up within the family well before any disclosure "just in case") by telling the victim not to report "or else…" Family members may also purposely or unwittingly contribute to the child's feelings of self-blame.

Implications for Prosecutors: Knowing that these dynamics may come into play is an important factor at the charging level because these dynamics may lead to recantations. Therefore, videotaping early, and even memorializing testimony early may be strategies to consider. Defendant interviews that can corroborate part or all of a child's statement of disclosure are a significant piece in overcoming what might otherwise be a fatal turn in the course of a case. In addition, providing emotional support and education for the child, as well as finding support people within the child's family can also work toward minimizing the potentially fatal effect self-blame may have on one's ability to prosecute.

Supporting Child Victims
As persons of authority, prosecutors are uniquely positioned to reduce the level of self blame child victims' experience. Prosecutors can:

- Provide opportunities for child victims to express positive feelings about the offender and how they feel responsible.

- Charge and/or negotiate in a manner that allows the blame and responsibility to fall more squarely on the offender, taking children "off the hook" if the defendant ends up going to jail.

- Communicate to children that it is never a child's fault when abuse takes place and that only the offender is responsible for the consequences of committing the abuse.

- Ensure that child victims are connected to a qualified child therapist who has experience working with child sexual abuse.

10. Lack of Knowledge that it was Sexual Abuse

We discussed above how perpetrators groom child victims. This can take a very long time – moving from "innocent" desensitizing to out-and-out sexual abuse. In situations like this, when that line is crossed, it can be very difficult for a child to discern. The child may not like it when, during regular wrestling matches Uncle Joe always seems to grab the child's crotch, but that dislike may not translate for the child into recognition that the touching is not accidental or innocent. This is because the abuse is masked by the game or wrestling, and probably by Uncle Joe brushing it off as an accident if the child would make a complaint.

In addition to this sort of masking, children lack life experience to detect and understand sexual abuse. They may not notice the leering smile, or understand that the touch is lingering for a little too long. A child's ability to read social cues like this doesn't really start to develop until middle school at the earliest. Sometimes, simply because of the way it has been taught, a child's idea of what is a "bad touch" is limited, and may not encompass, for instance, a touch on the outside of

clothes. A child's limited life experience also means that children are more susceptible to believe it when they're told that "all Daddies do this to their daughters," or "its okay, I do this to your sister too and she likes it."

Not only does this inability to recognize abuse when it is happening hamper a child's ability to defend himself or herself, but it also means that such abuse may go unreported for a long time, if not forever. Child victims will not know what about a particular experience will be important in defining whether the contact was or was not sexual abuse. Therefore, the job of the interviewer is to ask questions designed to help the child narrate as fully as possible the totality of the experience – what was done, where, how, by whom, what was said and how the child felt. A major pre-charging issue is determining how much the child is able to share that provides a context which clearly demonstrates sexual intent on the part of the perpetrator – a fact which the child himself or herself may intuit but have a very difficult time expressing.

11. Disclosure Issues During Child Custody Cases

Children often disclose abuse when they feel safe enough to make a disclosure. When the offender is their father or mother, or a parent's new boyfriend or girlfriend, that disclosure usually occurs to the non-offending parent at a time when the child is with him or her. If there is a pending custody case concerning the child, the easiest defense is that the child has been coached by the non-offending parent in an effort to gain the upper hand in the custody case.

While some parents may engage in this behavior, most allegations of sexual abuse are not the product of this sort of coaching. The issue becomes distinguishing (for purposes of charging and for later presentation and persuasion to a jury) a real disclosure from the coached disclosure. There is no hard and fast test to determine the veracity of a disclosure, but there are some factors which may help prosecutors in making that determination:

- Who is the person to whom the child made the initial disclosure? If the person is not the parent, this would tend to weigh in favor of a "real" disclosure.

- The greater the detail, including information about the sex acts, body parts, circumstances, etc that a child can produce (especially if there are multiple acts) the less likely it is to be "coached."

- Many "coached" statements seem robotic, or contain words or phrases that the child would tend not to use.

Making an effort to locate corroborating evidence is also helpful, both to prevailing at trial and to potentially avoiding a trial all together. Evidence that corroborates a child may include DNA or injuries, but might also include others to whom the child might have told parts of the abuse even

before the disclosure that led to police involvement, or partial admissions on the part of the accused.

F. Issues Specific to Teens

Teenage victims face their own unique challenges. This section will discuss some of the negative stereotypes the defense may use and strategies prosecutors can use to educate juries about how offenders prey on teens.

1. Negative Stereotypes of Teens

Teenagers face an uphill battle when they are reporting themselves as victims of sexual abuse. There are many negative stereotypes within our society concerning teens. These include that teens are:

- Promiscuous
- Liars
- Lazy
- Untrustworthy
- Rebellious
- Drug and alcohol-using
- Delinquents
- Difficult
- Disrespectful
- Gang members
- Have bad attitudes

As with any stereotype, sometimes one or more of these generalizations may be true for a particular individual. However, most teens are not most of these things, and if one or more generalization does apply, it should not dictate an out-and-out disregard for a teen report of abuse. In fact, sometimes teens engage in these behaviors because they have been physically or sexually abused or neglected. Many of these qualities are responses to trauma, or armor which the teen wears to cover up his/her vulnerability and seem tougher than he/she really is.

Implications for Prosecutors: Knowing that you and/or the investigating officers might approach a teen case viewing it through the lens of one or more of these stereotypes is the first step in getting past the stereotype and assessing the case with a more objective lens. Knowing that your jury may also view the case through a stereotype – or that the defense might exploit these stereotypes to discredit a teen victim – requires planning during the pre-charging stage. Prosecutors can deconstruct the stereotype by taking the time to learn about the individual teen:

- What is his/her life like, and how did he/she get to this place in his/her life?
- How/why did this teen become involved with the offender?
- What did the offender exploit in his/her relationship with the teen?
- Why did the teen make the decisions he/she did concerning cooperating with abuse?
- When did the teen disclose the assault and to whom?
- How does the teen view his/her involvement with the perpetrator?
- Does the "stereotype" hold up under this scrutiny or can it be humanized and understood?

Once you start to deconstruct the stereotype, you must continue to develop ways to explain the teen's actions, not only in your presentation of the child, but also in the supporting evidence you provide. Is this the kind of case that could benefit from an expert to explain about a particular teen lifestyle or about teen developmental issues?

In addition, prosecutors should explore strategies to: (a) expose the stereotypes about teens; (b) move jurors past making a decision based upon stereotypes (starting with voir dire questions); and (c) identify ways to develop testimony designed to raise this sort of consciousness. For instance, emphasizing that teens are protected by the law, and eliciting responses as to why teens are viewed by the legislature as children and not "little adults" may be one area of topic development during voir dire. Asking an expert or a police officer to expound on how adults are able to prey on teens may develop this theme further during the presentation of evidence. This strategic planning should begin at the pre-charging level.

2. Teens Make Bad Decisions/Lie to Cover Themselves/Tell Partial Truths

Teens do not have fully developed frontal lobes, which is where rational thinking takes place. In addition, teens are, developmentally speaking, operating very much within the "emotional" world. As a result of where their brain is operating, their decision-making is frequently irrational, and emotionally driven. Consequently, teens make bad decisions. Furthermore, when asked why they made a particular bad decision, teens often cannot really provide a rational explanation – because there really isn't a rational explanation. While their decision may make sense to them at the time they are making it, these decisions usually don't measure up to the same level of rational thought that we expect from an adult decision.

Covering Behavior

When a teen's decision has placed him/her into a bad situation where a sexual assault has taken place, a frequent occurrence is that the teen will either lie about how they got into that situation,

lie about what they did prior to or during the situation, or leave out important facts. Teens do this because they believe that revealing accurate information will get them into trouble and/or they'll be blamed or disbelieved.

For example, a teen may have missed the bus to school, due to sleeping late, and then accepted a ride from a stranger, who then took the teen somewhere other than school and assaulted the teen. The teen, when disclosing the abuse, made up a story about being forced into the car in some fashion, thinking that he'd get into trouble for admitting that he (irresponsibly) missed the bus and/or that he (stupidly) accepted a ride from a stranger. The part about the abuse is true and accurate, but how and why he ended up in the car with the stranger in the first place is a lie.

Other typical topics about which teens frequently lie to cover for a bad decision include:

- Skipping school
- Drinking alcohol
- Using drugs
- Engaging in cooperative sexual activity
- Lying to the offender about their age
- Prostituting
- Runaway status

Withholding Information

In addition to outright lying, teens also may leave out this negative information. For instance, in the example given above, add that, en route, the teen smoked marijuana with the stranger. The detail about the marijuana may be completely absent from the teen's story. Investigators often find these sorts of facts out in conversation with the perpetrator, who has every motive to want to make the child look bad and unbelievable, and therefore provides lots of negative information about the child. Or, the teen may disclose the negative fact to a friend, or may be "caught" truant, drunk or high, etc.

a) Interviewing Teens:

These behaviors create credibility issues which have to be assessed at the pre-charging stage. There are several strategies that prosecutors can use to encourage youth to provide a full and accurate accounting of events:

- Get the most factually complete, accurate and truthful information from the teen victim. Utilize interview techniques that address the potential concerns of the teen, including that they may be "in trouble" should be done at the outset.

- Reassure the teen that while you don't like that he was drinking, his drinking is not the focus of your inquiry, and that a sexual assault is a serious matter that far outweighs the gravity of the teen's drinking.

- Emphasize that crime deals in reality and that you can handle whatever the truth is – in fact, that you need to know the whole truth because that is the only way that you can properly address it in your case.
- Let the teen know that lots of kids initially choose to withhold important information or even make up something they think might make them look better. Stress that the best time to set the record straight is at the beginning of the case.

b) When The Facts Don't Add Up:

When you are talking with a teen and you sense that he/she may be lying or omitting or rationalizing or minimizing, the following strategies may also be helpful in eliminating a lie or clarifying the information:

- Discuss that health needs are a concern and that there will be a health exam. Knowing that is there anything else I should know about that you haven't told me or that's not quite accurate?

- Indicate that you'll be talking to others who have information, and you wonder what they will tell you.

- Suggest switching places – have the teen question you and you report back the disclosure – ask the teen if there are facts or circumstances where someone might have trouble understanding or accepting.

- When the child does acknowledge a falsehood or omission, let them know that someone down the line might ask them about that and you need to understand what the teen would say to them.

- NEVER CALL THE TEEN A LIAR. There are always reasons (maybe even good ones) for a child to hide information, either with a lie or omission. It is better to get the truthful information and that is best done using more indirect approaches rather than confrontation. If the teen has been a victim, chances are great that the perpetrator has offended before and has not paid the price. Don't let him/her get away with it again by shutting the teen down and slamming the investigative door.

Implications for Prosecutors: The types of "lies" or omissions outlined above are not insurmountable credibility hurdles to a criminal prosecution. They will require that the teen be truthful under oath, even if that means admitting that part of what he/she said was initially a lie. This would be an area to flesh out during a direct exam of the victim at trial. It may also be appropriate to consider the testimony of an expert who is well-versed in teen issues to remind jurors that this kind of poor decision-making is typical of teens. You can also remind jurors that this is one of the reasons why we have laws protecting teens from their own bad decisions in the first place. These are also issues which should be addressed in voir dire with a jury.

Practice Tip: ***Shift the Focus to the Offender***
People who prey on teens are well aware of this bad decision-making. It is what they count on and exploit. A good person who would see a teen who missed the bus would, at worst, take that child to school. A good person would not be offering alcohol or drugs to a teen and would not tolerate their use by a teen in their presence. A good person would not engage in sexual activity with a teen. It is important to place correct emphasis on the offender's manipulation and exploitation of the teen for his own sexual ends. It is not a crime to be dumb or naïve, nor to have bad judgment. It is precisely because a teen is these things that make teens extremely vulnerable to the manipulations and exploitation of a predator. This, too, is a proper subject for voir dire, possible expert testimony, and closing arguments.

3. Adolescent Brain Development Issues

As with child victims, a basic understanding of adolescent brain development is useful to inform prosecutor's interactions with youth during the investigation and prosecution of a sexual assault. Knowledge of brain development can also be used to educate a jury on why a youth behaved the way that he/she did before, during and following the assault.

While many adolescents have a mature physical appearance, no one should be deceived into thinking that a teen is equal to an adult in maturity or cognitive development.
Research shows that the capacity for "formal operation thought" begins in adolescence, according to developmental psychologist Jean Piaget. This kind of thought characterizes adult cognition, and involves the ability to reason hypothetically, to take into account a wide range of alternatives, and to reason "contrary to fact." Studies have shown that this capability exists in only 30-40% of adolescents and adults in America.[44] A formal thinker can understand similes, allegories and metaphors. They can also think about their own thinking and about other people's thinking. They can consider someone else's motives and perspectives. They can develop theories and concepts apart from concrete reality. In contrast to these abilities, most adolescents think concretely, which is more black and white, immediate and has a more restricted perspective.

Egocentrism
In their interaction with the world, adolescents display this egocentrism. In their world, there is an "imaginary audience," (a term used by psychologist David Elkind) who, from the standpoint of the teen, knows the teens private thoughts and feelings. They feel very much like they are always being watched and judged by this "audience." Elkind also describes that adolescents have a "personal fable" which results in an unrealistic belief in their own invulnerability and uniqueness. In other words, they believe, and act like they are a lot older and more mature then they really are. As a result, a teen can put himself or herself into a situation that is way over

[44] Gardner, Howard . Art, Mind and Brain: A Cognitive Approach to Creativity. New York: Basic Books. 1982.

his/her head, but which he/she thinks he/she can handle just fine. Youth who have been sexually victimized experience the ultimate assault to their egocentric belief that they are invulnerable.

Self Blame

Adolescents may have some cognitive ability to understand how the world works, but they are psychologically predominantly egocentric. Since they are so self-focused, they have a more difficult time seeing the perspectives of others, and they also tend to blame themselves for events, even when that attribution of blame is excessive. Adolescents may blame themselves for things beyond their control. This kind of self-blame differentiates adolescent egocentrism from that of the younger child. While the younger child thinks "everything happened because of me," the adolescent thinks "I should have been able to stop it."[45] The implications for youth who have been sexually victimized are clear.

Implications for Prosecutors: An adolescent's emotional development is focused on forming his/her identity and fitting in with peers. They are far less concerned with how adults view them. Teens have been described as being more confident than competent. Most adults are familiar with adolescent emotional volatility. Some of the ramifications of adolescent brain development include that the teen may:

- Fear being disbelieved
- Be embarrassed by the topic or his/her actions
- Feel responsible
- Want to protect others, including the abuser
- Express the belief that he/she is the only one who can and should address the situation
- Be uncertain of how their actions in the situation will be judged by you
- Fear retaliation or social consequences

In addition, teens may also experience language or communication issues that result in the teen having trouble putting events in order, not completely understanding questions, answering only parts of questions, and not listening well.

For the teen, control is an important issue. Allow the teen to feel in control of as much of an interview as possible. Also, give the teen some control over decisions. Examples include asking the teen for input and feedback, and planning with the teen for future safety at pre-charging, as well as throughout the course of any case.

In cases where you have a teen who looks at lot older than he/she is cognitively or emotionally, it may be helpful to consider how you can inform the jury about this. Is there a teacher or social worker who can provide information that will be helpful to the jury in their credibility determinations, especially if you think the jury may initially have unrealistic or uninformed opinions about your victim?

[45] Deaton, W. & Hertica, M. (1993) Developmental Considerations in Forensic Interviews with Adolescents, *The APSAC Advisor*, V. 6, n. 1, p. 5.

4. Teenage Runaways

A teen runaway lives an extremely high-risk lifestyle (a risk they do not appreciate), in which his/her vulnerability is almost always exploited and manipulated. When "on the run", the teen necessarily has to find food and shelter, and generally places himself or herself at the mercy of the adult who steps in to provide those basic needs. Perhaps the teen is required to have sex with the adult. Perhaps the teen is required to prostitute himself or herself for the adult, or to pose for pornographic photos, engage in "exotic" dancing, etc. The teen may consider this to be voluntary activity on their part. In addition to these behaviors, the perpetrator will often reward the teen with alcohol or require the teen to engage in drug use – making the teen even more vulnerable and enhancing the teen's feelings of self-blame.

As a general rule, runaway teens do not come from healthy, stable homes. Many have been abused within the family and the family is unstable and dysfunctional. Life on the streets may seem safer and more appealing to the teen for this reason. It is easy to manipulate the vulnerable teen by telling her what she wants to hear, treating her like the "adult" she thinks she is, and yet providing basic needs. Often the sexual abuse is pitched as a quid pro quo for this protection and case. He's "helping her get on her feet." As time with an adult pimp continues, however, the "feel-good" techniques are replaced with more overt violence. They are watched. Runaways are also beaten and threatened. They are isolated and imprisoned, literally and figuratively.

It is very hard for this a teen to disclose his/her runaway status. He may not view himself as a victim. He might conclude that the consequences of reporting are worse than the consequences of not reporting. He may have little opportunity to report, and if she does, if faced with disbelief and blame. He might have built up a tough shell, hard to puncture. Often, teen runaways are arrested for prostitution or picked up as missing and treated as suspects instead of as victims.

Strategies for Working with Runaways

- Before an interview, get as much history about the teen as possible. CPS or prior delinquency files should be reviewed.

- Do not lecture or interrogate the teen. These are surefire ways for shutting the child down and creating impenetrable barriers. Instead, use a more open-minded, empathetic listening approach, not only in getting a disclosure, but in cementing a relationship with the child that can carry through the prosecution.

- Runaway teens present with a number of personal physical, medical and psychological needs, all of which should be attended to.
- Find out what the teen is concerned about and allay any fears you can. Stick to the truth.

- Recognize that the teen has been groomed not to disclose. Understand how the child was particularly vulnerable and how the offender used that to groom the teen.

- Prepare for the reality that the teen will likely come armed with rationalizations for what happened and probably have a history involving law enforcement that has probably negatively colored his/her views of authority figures. This will color his/her interest in cooperation.

- Talk about protecting others, about what the perpetrator may have wanted in return for being "nice." Stress a focus on the "facts" before turning to any judgments about "what should happen."

- Although tempting, do not lower your vocabulary to match the teen. Slang sounds dumb, and you probably don't know the current terms anyway. An equally fatal mistake is to engage in questioning that carries with it negative assumptions. Take care with your language to avoid judgments and don't assume that the teen felt one way or another.

- Teen runaway cases can almost always be corroborated. Make sure your investigator has obtained search warrants for the various places involved and a list of names of people who witnessed anything. This could include other teen victims, adult prostitutes, or adult "customers." Teens are sometimes advertised on Craig's List or other websites or newspapers. Motels may have security cameras or records that could yield corroborative information. The large market for child porn makes it tempting for predatory adults to film or photograph these teens, as well.

In deciding on charges, once issuance has been decided, factor in what you can prove with witness statements and outside evidence. Realistically, you may not have the runaway available for trial, as there is always the possibility that the child will run again. To this end, there may be a need to call for CPS services, even including placement in a facility where it would be difficult to run away. This is, of course, entirely dependent on the needs of the teen. Keeping track of this victim, and possibly agreeing with the teen on periodic meetings, just to keep in touch, can be helpful.

5. Teens Have Sex

They do. It's a bad idea for teens to have sex with each other, but they do. They don't think it's a bad idea. Sometimes a prosecutor will charge these teen-on-teen cases, usually when there is some aggravating factor, like a pregnancy, or a significant age difference. Teen-on-teen cases may also require, if they are going to be charged, mutual charges. Often these cases resolve with misdemeanors which can be expunged, via deferred prosecution agreements or diversion agreements. Deciding on what facts should come into play about whether to charge, what to

charge, and how to resolve these cases is good to do as a matter of policy, with an eye toward the goal of reducing irresponsible teen sex. Important points to remember include:

- It's always a crime when an adult has sex with a teen. Adults and teens are not on the same playing field, and pretty much everyone would agree that the 30 year old man cannot reasonably be said to be a legitimate boyfriend of the 14 year old girl.

- When dealing with a case where a teen has had sexual intercourse with others, cooperatively, prior to the situation you are reviewing, it is important to remember that such prior actions by the teen do not explain, excuse or justify the decisions of the adult in having intercourse with that teen. They are also excludable from any evidence presentation via the Rape Shield Law. Her reputation as the "neighborhood slut" (or whatever other charming slur the defense may come up with) is irrelevant to a determination of any of the issues in your case.

- In addition to charges relating to the acts of sexual contact or intercourse, you may also want to consider Child Enticement or Exposing a Child to Sexual Activity if your facts support it. Sometimes it's easier to negotiate a plea to these charges than to the more direct Second Degree Sexual Assault of a Child (SA2Child).

- If your teen victim is sexually active, it is important to point out to him/her that those who engage in sex with them are committing crimes and those people are prosecuted by you.

- Discuss STD's with the teen, how they are transmitted and treated, and what the symptoms are. The potential for pregnancy should also be discussed. Make sure they have gotten a medical exam.

- Discussion about therapy to help the teen make better decisions about sexual behavior is also in order. Having the teen's parent on board with this is essential.

- With teens who have engaged in "promiscuous" behavior, it is important to make mental health referrals. Sexual acting out is often a sign of other serious issues in that teen's life.

Consistent with a victim-centered approach, prosecutors must educate judges and juries about the realities about teen sexuality in our society and help juries to understand that the past sexual behavior of the teen victim does not justify the assault.

6. Teens Easily "Get In over Their Heads"

Teens place themselves in situations that move beyond their ability to effectively handle. This is because teens feel invincible, are more confident than competent, and are trying to develop their

independence. These factors all operate against the fact that their brains are not operating at the 'formal operational thinking" that characterizes good rational decision-making. Their judgments are more characterized by impulsivity and emotion. Consequently, they are easily overwhelmed in these circumstances.

Once in the situation that is "over her head," a teen may experience panic and fear, confusion about what to, and be unable to think of a way to extricate herself other than "cooperating" with the demands of the offender. This "cooperation" looks a lot like consent and the teen may even describe that she "willingly" engaged in sex. This is further confounded for her if she has had sex in the past or has been sexually abused. Teens are not good at parsing out true "consent" from buckling under pressure or subtle coercion that resulted in her cooperation. Given the teen tendency to accept blame and responsibility, the perspective that she "consented" is understandable, although flawed.

In talking with teens it is always important to try to get at the issue of "consent" from several angles.

Stop using the word "consent." Instead, talk about whether she "wanted" to have sex with Joe Blow. Ask about what led up to the sex. Ask who brought up the idea of having sex ….

Two points on this issue: First, in talking to the teen, it is always important to try to get at the issue of "consent" from several angles. ***Stop using the word "consent."*** Instead, talk about whether she "wanted" to have sex with Joe Blow. Ask about what led up to the sex. Ask who brought up the idea of having sex. Discuss how she was feeling and what she was thinking leading up to the sex. Many times the teen will say that Joe blow suggested sex, or tried to take her clothes off, and she didn't want him to. Find out what she said to let him know that – or whether she didn't know how to tell him to stop, or that she did not want to have sex.

If she initially said "no" or "stop" what was Joe's reaction? How did that make her feel? What was she thinking at that point? Why did she end up having sex? Was she planning on having sex before she went there/before Joe brought it up? Did she think Joe might bring sex up?

If it is clear from this discussion that she really did not want to have sex, follow up by pointing out where she could have indicated that if she did not. You may also want to talk about not putting one's self into a place where one feels unable to stop an activity one doesn't want to do. Often, teens will "give in" because they are afraid they won't be liked or are afraid that if they don't "consent" they'll get hurt.

These cases are most easily prosecuted when they are charged as SA2Child – avoiding the "consent" issue completely. Again, consider Child Enticement as an additional charge if the facts support it - it is a good negotiating tool.

7. Teen Grooming Behaviors

The goals of the offender in grooming a teen are the same as when an offender grooms a young child – to make sexual assaulting the child "easier" to do and to get away with. Methods used by offenders with teens can be the same as some used with smaller children: exposure to ever-increasing physical contact in the context of some initially "innocent" play, which serves to blur the place where the line is crossed from "innocent" or 'accidental" to sexual and purposeful. One might also see the use of "rewards" like money, taking the child to fun special places, or buying the child desired objects.

With teens, grooming can also include other, more "mature" rewards, like providing alcohol, drugs or cigarettes, sexy underwear or clothes (that the child may have to keep at the offender's home) and viewing adult pornography. Other offender grooming strategies specific to teens include:

- Offenders also take advantage of the teen's egocentricity and desire for independence. They become the "best friend" or the teen's confidant. They nurture the impression that they really care about the teen and plant seeds in the teen's mind that no one else understand them the way the offender does. They are "always there" for the victim, often offering the chance to get out of the house, to talk, to have dinner, a place to crash, etc. for the teen.

- Offenders also exploit any troubles (even ordinary issues) the teen might be experiencing at home and take the opportunity to offer exaggerated characterizations of how the teen's parents really don't understand, don't care, or are bad parents. If any of these things happens to be true, it works to the offender's advantage even more.

- Offenders will often play to the teen's desire to be considered competent and "adult." They may foster the belief that the teen doesn't need to be at home, doesn't need parents. They may encourage runaway behavior.

- Offenders will often compliment teens on their adult appearance, which the offender can easily manipulate into physical actions that flatter the teen. These compliments may make the teen uncomfortable, or the teen may tolerate these advances because of all the perks the offender offers.

- Sometimes the offender will characterize the relationship with the teen as an "affair" and introduce sexual behavior with the teen as though the teen is an equal partner. To the extent that the teen goes along with, or even enjoys, the sexual activity, then the offender can point out that the teen "wanted it" or that the teen even "initiated it." The offender will make the teen feel responsible by saying they "can't control themselves" because of the teen's "sexiness" or their "affection/love" for the teen.

- Teens can also be seduced by the prospect of making money in exchange for sexual pictures, films, or acts. Offenders pose as photographers who set up appointments to photograph girls in sexy clothes. These operators easily introduce sexy underwear, then require removal of some or all of the clothes. They may convince groups of girls to participate, even getting them to pose in lewd or sexually suggestive ways with each other, or to even engage in sexual contact or sexual intercourse which he photos or films. Offenders may commit sex acts during or after the filming, still under the guise of the photographer, or now as having been seduced by the teen.

As one can see, there are a number of ways that many of these grooming techniques can be corroborated – which can offer powerful evidence of intent and may provide a basis for additional crimes. Whenever there is any sort of "relationship" or longer-term contact between the offender and the teen it is worth exploring the grooming techniques he used.

8. Consent Issues

From the strictly legal perspective, no adult can ever have sexual intercourse with a child under the age of 18 and no adult can ever have sexual contact with a child under the age of 16. This is true even if the child "consents."

As a pre-charging issue, as well as a sympathy and/or equity issue, a teen's willing cooperation with sexual behaviors can be an influential factor in deciding whether and how to pursue the case.

Even though the teen cannot legally consent to intercourse, nor consent to contact if they are under age 16, when the teen is "willingly" engaging in such behavior with an adult, several factors must be taken into account:

- What is the age difference between the victim and the offender and what is the relationship between them? If they are legitimately "boyfriend/girlfriend" and are close in age, it may be more equitable to consider issuance of a lesser charge, or the use of a DPA or Diversion agreement. In addition to the equities, issuance of harsher charges may be viewed as unwarranted or unfair by a jury, who may sympathize with the defendant, or ruminate about how his life will be ruined by conviction for the greater charge, even if the facts support it.

- What are your prosecution goals? This is often determined, in part, by not only the age difference, but the nature of the acts, whether there were other types of crimes involved, whether there was manipulation of the younger victim, or whether pregnancy or an STD was involved.

- What are the victim's and his/her family's wishes?

- How will the prosecution impact the victim? Is there any potential that she will respond to the issuance of charges by running away or otherwise engaging in high risk behaviors? Even if there is potential for this, there may be significant community interests in prosecution. These interests should be communicated to the victim.

- What is the defendant's history? Is this his first run-in with the system or is he always having sex with the young neighborhood girls?

- What are the personal characteristics of your victim? Is she average or does she have special needs? Is she vulnerable for some other reason?

- Was this truly "willing" on the victim's part or more the product of subtle coercion or pressure that she was not able to overcome?

In cases where the adult offender is significantly older than the victim (usually at least five years older, although with younger teens, 18 can be a lot older than 14 and could clearly be considered a "significant" age difference) the fact that the victim and the defendant are not on the same playing field is easier for a jury to see and there is less sympathy for the older adult than there would be if he/she were much closer in age to the victim. In these cases, it is still important, with your jury pool, to develop the idea that 'statutory rape" is part of our law, and it's there for a reason. This discussion should help weed out those who simply cannot put aside the "consent" issue, and should further help in getting the jurors to focus on the elements of the crime.

9. The Teen is "In Love" with the Offender

It is often the case that the teen believes that he/she is "in love" with the offender, that they have a 'relationship" and that the offender really loves them, too. This comes, of course, from what they have been told by the offender. Teens can believe this after only a very short time of being involved with the offender.

In cases like this, the teen usually feels very guilty about having disclosed the sex (if they have disclosed it at all) and especially guilty about the fact that charges may be or have been issued. Often the disclosure is to a friend, who then disclosed to an adult who contacted parents or police. This teen accepts all blame and responsibility and will be heavily invested in reminding you and the court that they wanted to do this, that the offender did not do anything wrong, and that they do not want any bad consequences to befall the offender.

In addition, the teen may decide to foil prosecution efforts by being uncooperative, running away, or refusing to talk about the sex they had with the offender. He/she may persist in the

belief that the defendant is planning to marry them. He/she may have even been trying to get pregnant, to forge an even stronger bond between themselves and the perpetrator. Teens often do not engage in safe sex for this reason.

Offenders know that if they continue to keep in contact with a teen – writing letters, placing calls and making arrangements to meet – they can manipulate the teen to their advantage. No contact orders are important, as well as surveillance efforts to try to prevent continued manipulation.

The victim, too, may initiate contact with the defendant. It would be entirely predictable if he/she were to contact the perpetrator by phone or mail, or even go visit him/her in the jail.

These cases require continued and steady attention to the teen's medical and emotional needs. Teens with lower self-esteem seem to be especially vulnerable to oaths of love and promises of a future. The loss of that attention – whether because the offender is taken out of the picture, or the offender shows his true colors somehow to the victim – can result in self-destructive behaviors by the teen.

10. The Internet

In the broadest sense, the Internet connects with sex crimes against teens in two ways: (a) it is used to commit crimes; and (b) it is used by offenders to prejudice the community's view of the teen victim.

Predatory Use of the Internet
When used to commit crimes, the Internet can be used by offenders in multiple ways, including meeting in chat rooms, connecting with a teen using social networking sites such as Face Book, My Space, and continuing to have inappropriate contact via instant messages and texting.

Perpetrators may pretend to be a child themselves, or they may identify themselves as an adult. They introduce topics of sex and are extremely graphic in these discussions, which can be very enticing to the teen that sees herself as older, wiser and more mature than her years. Perpetrators play on these feelings. They may exchange pornographic photos with the child, or may convince the child to photos himself/herself and send it to the perpetrator. They may convince a child to actually meet them for the purpose of engaging in sexual behaviors together. They use many of the grooming techniques described above in convincing a teen to become involved.

Offenders are also adept at finding out personal information about teens, which they can use either to locate the teen, or to further manipulate the teen to engage in illegal behavior. The reader is referred to the resources cited in the Appendix for a more comprehensive treatment of computer crimes involving children.

Using the Internet to Discredit the Teen

The Internet is also a very handy tool for offenders who want to ruin the character of the teen, to turn community sentiment against the teen, and to try to fatally damage a prosecution involving the teen. Teens have been known to put compromising photos of themselves onto the internet, thinking it's funny, cute or sexy. They may also engage in vulgar, sexually explicit conversations or make those types of statements, putting them onto Face book or My Space. Of course, once this stuff is out there, it is publicly consumable, and offenders will try to use this material to suggest that the teen "wanted it" or that the teen "victimized" the offender. Offenders or their supporters may publish these materials via news media, or by sending it on to others in the community – including the victim's peers. This kind of campaign can devastate a prosecution by damaging her credibility and permanently silencing her.

Talk up front with a teen victim about what would be found if someone went into his/her Facebook or MySpace, and learn whether he/she has ever engaged in sexual conversations with peers or adults.

Prosecutors should talk up front with a teen victim about what would be found if someone went into his/her Face book or My Space, and learn whether he/she has ever engaged in sexual conversations with peers or adults. This will enable prosecutors to engage in damage control to the greatest extent possible.

Aside from preventing teens from putting things like this out there on the Internet, the prosecutor should also consider motions like Rape Shield if it appears that an offender may try to attack victim character or credibility through the use of these kinds of materials.

11. Multiple Perpetrators

The issue of multiple perpetrators arises in several scenarios. There can be many individuals who are all participating in concert to sexually assault a teen, as in cases of gang rapes. There can be cases involving individuals who are each assaulting the teen or who are connected with the assault of the teen, as in cases of a teen prostitution ring where some of the perpetrators are pimps or pimp helpers and some are the "customers." And there are cases where the same teen is assaulted first by one person, then later by another, and so on. Considerations for each are discussed below:

a) Gang Rape Cases

In "gang rape" cases, the situation is usually one where the teen has voluntarily placed him or herself into the situation in the first place. Often the teen is on the run from home or a placement, or is otherwise where he/she should not be at a time when he/she should not be there. The teen may "know" (as in "be acquainted with") one or more of the subjects who ultimately participate in the assault. Often these situations involve initial "cooperation" of the victim, which frequently becomes less "cooperative" and more "I couldn't get away," although

sometimes there is "cooperation" throughout the assaults by the victim. Almost always, the victim was not expecting that he/she would end up having sex with the number of individuals he/she has sex with. Challenges in these kinds of cases include the following:

- The victim may run away again
- While the case is pending, the victim may engage in this same sort of risky behavior
- The victim may be or become too emotionally fragile to participate in the prosecution
- The victim may have significant psychological issues that have led her to be seduced by this kind of encounter
- The victim may not be able to identify by name some or any of the participants, or may only know the nicknames used during the event
- Often there are multiple acts occurring at the same time, and the victim may not be able to say who did what in what particular order
- Drugs and/or alcohol may have been used by the victim, which might compromise his/her ability to recall things as accurately or as completely
- The teen may have difficulty articulating when events got out of hand, or when he/she was no longer 'wanting" to engage in sex, but being "forced" to do so, and there may be no overt "force" used of any kind
- Victim demeanor during the assaults, as described by the offenders, may be inconsistent with what the community expects a "victim" of a "gang rape" to look like or do
- The media may put a spin on the story that is harmful to the prosecution of the case
- There may be medical issues of a confidential nature (i.e. HIV status.)

Practice Tips: Knowing that these challenges may come into play, the best defense is a good offense. Recommendations include:

- Plan for the eventuality that you may not have the victim available to testify.
- Have your investigators work hard to get statements from those involved to try to develop other means of gaining convictions.
- These are cases where negotiating in exchange for testimony is a worthy goal.
- Make sure that all witnesses are interviewed and consider taping those interviews.
- Record the victim's statement, giving consideration to sec. 908.08, Stats.
- Secure all physical evidence, as DNA can be a helpful tool in being able to determine or identify who may have had sexual contact with the child.
- Consider a full range of possible charges, including the use of Party to a Crime (PTAC) to hold those who encouraged but did not have hands-on sexual contact with the child.

Determine whether anyone recorded the acts on a cell phone or other electronic device.

- Make sure that the teen is safe and secure. Protecting his/her identity, making sure therapy is in place and considerations of placement in or out-of-home should be addressed early.

- It is important to learn as much as possible about how this child became involved in this – what was he/she hoping to gain from this encounter? Has this happened before? What victimization issues or other serious concerns are present? Do these need to be addressed before a jury should the matter get that far? If they would need to be, would that exposure cause problems for the victim that outweighs the benefits of prosecution? For instance, if your victim is a high school student who has a serious mental health problem that others do not know about, is it likely that the mental health issue will become generally known as a result of a prosecution? Is this exposure "worth it" to the victim, or will it cause more psychological damage than is acceptable?

- Consider using expert testimony – about what, and who may be able to provide that testimony, will come into play in these sorts of cases.

b) Teen Prostitution

In cases where the child is the subject of a teen prostitution scheme, perpetrators include those who set her up into the situation (and are probably getting the money she makes) along with those who are the customers. Most prosecutors would view the pimps as being more culpable than the johns and you may be able to use that to your advantage in getting cooperation from the johns to testify against the pimp.

These kinds of cases have many forms of corroborating evidence, due to the rise of Internet use. In addition to the more traditional kinds of corroboration (hotel receipts, DNA, etc), you may want to determine whether the pimp has used any media source to advertise. For instance, Craig's List may contain the ads, including photos, of your victim that were taken and then disseminated there by the pimp. You can get some of this information from the victim, or possibly the john, or even by generally searching those kinds of sites. Search warrants should take into account that this media is probably being used.

Challenges in these cases include, again, that the teen is probably a runaway, and may run again. The teen in this case most likely has some significant issues that have led to a "choice" on her part of this risky lifestyle. Being able to understand this teen's life and her choices is important to overall credibility, and there may also be a need for enlightenment via an expert witness. The teen may not view himself/herself as a victim – this may be one in a long series of episodes of prostituting that has become a way of life. In addition, most teens in this situation perceive of themselves as equivalent to adults, who are making "choices" and are not being "forced" to do this.

c) Teens with a History of Victimization

Cases involving the teen who has been assaulted, during the course of his/her life, by more than one individual are frequent. Statistically, a person who has been victimized sexually before is at a greater risk of being assaulted again.

Defense will often use past abuse to argue that the child can't be trusted, or the child learned abuse via past acts.

They may even try to paint past abuse as a false allegation.

These efforts should be strongly rebuffed by using the Rape Shield Law.

Defense attorneys use past abuse in several ways. First, they may argue that the child is "confusing" the perpetrator with an old abuser and that his/her perceptions can't be trusted. They may also argue that the child "learned" about abuse via the past acts and that's why they are able to describe it now (*Pulizzano*). They may try to paint past abuse as a "prior false allegation" of sexual assault. Or, they may argue that the child is simply making up the current allegations to get attention, having "learned" that they get attention through allegations of sexual abuse from the past episode.

In cases involving teens, arguments that the child wouldn't otherwise know about sex but for the past abuse are generally ludicrous positions. Teens do know about sex, through school and general exposure to life by the time they are teens. The Pulizzano situation doesn't really apply. "Confusion" arguments and "learned attention-getting" arguments are devices designed to try to circumvent the prohibition in the Rape Shield Law that clearly state that other sexual behavior is not to be allowed admittance. What the defense really wants to do, in making these arguments, is to muddy the waters and get the jury to focus on matters other than the defendant's culpability. These efforts should be strongly rebuffed via the application of the Rape Shield Law.

As to prior false allegations, the *DeSantis* case requires a hearing prior to trial, where the proponent of the evidence must establish that a reasonable jury could conclude, by a preponderance of the evidence, that a "false allegation of sexual assault" was made. More often than not, the defense argument can be overcome on this first prong, since past abuse is not "false." Even if there has been a "false report," the defense must also show materiality to an issue in the case and must also satisfy the court that 904.03 is satisfied and that the probative value of the evidence is not outweighed by its potential prejudice. The court will look at the "similarity" of the past acts with the present allegations, the "remoteness" of the allegations, and the relevance of the claim of a false allegation to the specific issues in the case at hand.

12. Other Forms of Sexual Abuse: Photos and Other Exploitation

Offenders will use a variety of means to victimize and exploit youth. Other than hands-on sexual contact or sexual intercourse, a perpetrator may sexually offend by:

- Photographing or filming the teen exposing genitals lewdly or engaging in sexually explicit conduct. This can include masturbation, bestiality, or sexual behaviors with others

- Publishing photos or film depicting the teen, as described above, is a separate offense.

- Having the teen engage in sexual behaviors while the perpetrator watches is a separate offense

- Showing the teen pornography in any form is exposing a child to harmful materials

- Describing orally explicit sexual acts or having the teen listen to sexually explicit conduct that is occurring violated sec. 948.055

- Causing or attempting to cause a teen to go into a building, vehicle, room or secluded place for sex (if under age 16), to expose genitals (if over 16), or to give drugs to is all child enticement. Thus, is the offender picks up the teen and drives them from the street corner to his house, that is a crime, in addition to the sexual contact that occurs once there

- Masturbating or engaging in other sexual activity in the presence of a teen is a crime

- Setting a child up to be a prostitute or to otherwise engage in commercial sex acts is a crime

- Using a computer to engage in a child sex crime violates 948.075 – this would include setting up a meeting for the purpose of engaging in sexual activity, or any computer use that is geared toward getting a teen to go somewhere for that purpose, or to be sexually filmed or photographed

- Exposing one's genitals to a teen or causing the teen to do so, for purposes of arousal or gratification is a misdemeanor.

In addition to child sex crimes, the crimes listed under sec. 940.225 may also apply in cases where there is de facto non-consent and one of the other factors, like force. Incest involving either sexual contact or intercourse with a blood relative or step-parent is also criminal.

G. Issues Specific to Marginalized Populations

As prosecutors, you want to obtain convictions, make communities safer, and increase the safety of sexual assault survivors who are at the center of your case. In order to accomplish this, it is your responsibility as a prosecutor to: (a) know the make up of your community; (b) understand the diverse cultures who live within it; (c) understand survivor's issues and the challenges they face in coming forward and in healing; (d) hold perpetrators accountable for crimes against vulnerable populations; and (e) be familiar with local resources that are available to support sexual assault survivors in their efforts to heal from the trauma of sexual assault and seek justice.

Marginalized populations – low-income women, women of color, non English-speaking women, undocumented women, justice-involved women and LGBTQ people—are the least likely to report a sexual assault.

A victim-centered response to sexual assault also requires that prosecutors understand the strengths, challenges and needs of victims who are seeking justice. It is especially critical that prosecutors understand the needs of marginalized populations – low-income women, women of color, non English-speaking women, undocumented women, justice-involved women and LGBTQ people – because *they are the most likely victims of sexual violence*. Offenders seek them out because they are vulnerable and because offenders know that marginalized people will be the *least likely to report a sexual assault, and if they do, the chances are they won't be believed.*

1. Barriers to Seeking Justice

Marginalized populations face tremendous, sometimes overwhelming, barriers to seeking justice. These barriers fall under the following themes:

- Fear of formal systems, including law enforcement and prosecution
- Fear of repercussions from within their own communities
- Cultural myths and beliefs that prevent them from coming forward
- Lack of culturally competent resources to support them in seeking justice and healing
- Accessibility issues (language, social and environmental, etc.)

All of these barriers converge to drive the crime of sexual assault underground, keep perpetrators from being held accountable, and re-victimize sexual assault survivors who do not have access to justice and healing. Prosecutors who understand these barriers – and who actively work with victims and advocates to remove victim barriers – will experience increased victim participation in the successful prosecution of sexual assault crimes in their communities.

2. Culture Specific Barriers

Wisconsin is a vibrant state comprised of richly diverse communities. We are fortunate that so many people of different cultures that have made our state their home. While we enjoy the benefits of having neighbors who bring a wealth of diversity to our state, we must also appreciate that they bring different beliefs and values with them.

We are fortunate that so many people of different cultures that have made our state their home. While we enjoy the benefits of having neighbors who bring a wealth of diversity to our state, we must also appreciate that they bring different beliefs and values with them.

Marginalized populations are not homogenous. While they do face similar barriers to seeking justice, they are also unique communities with their own unique strengths, challenges, and culture specific needs. Having at least a basic understanding about the cultural differences between these communities – and how those differences shape victim participation in prosecution – will better equip prosecutors to provide the support and assistance marginalized people need in order to seek justice.

A full discussion of the unique needs and challenges experienced by marginalized populations is beyond the scope of this document. However, in the interest of encouraging prosecutors to learn more, this section will describe some of the most predominant cultures that comprise marginalized populations in Wisconsin. It is our hope that this information will educate prosecutors about the values and intricacies of each community, how they respond to sexual assault, and encourage prosecutors to show victims that they respect their unique cultural difference.

a) Native American Women

Native American Women experience the highest rates of sexual assault of any marginalized population – they are 2.5 times more likely to experience sexual assault as other women of color. One in three Native American women has experienced sexual assault in their lives. And 80% of the perpetrators who prey on them are non-Native American.[46]

Native American survivors of sexual assault also face tremendous cultural barriers to seeking justice. The Native American culture places a huge emphasis on harmony and getting along. Most Native American communities are close knit communities. Native American victims who come forward therefore risk disrupting the very fabric of their community. Native American women also stand a high risk of losing their children in instances of physical or sexual abuse. They often stay with abusive husbands in order to keep their children. For these reasons, they may be reluctant to report or participate in prosecution. And most never see their cases

[46] Maze of Injustice: The failure to protect indigenous women from sexual violence in the USA. Report by Amnesty International. April 24, 2007. Available online at: http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070424001.

prosecuted due to the alleged confusion by law enforcement about federal and tribal jurisdictions – when as a matter of fact, these laws are clearly defined.

The issue of statutory rape in the Native American community also presents a challenge for prosecutors. Native American women receive mixed messages from within their culture. While it is looked down upon by tribal elders, there is an unspoken message in some Native American communities that young Native American women (as young as 15 or 16) somehow caused the rape - and because of this myth it is sometimes accepted.

b) African American Women

It is important for a prosecutor's to recognize that most African American view formal systems with suspicion. They do not believe that systems are there to help them; in fact, many believe that the justice system will fail them. Many African American women have had negative experiences with law enforcement or know someone who has. They are also keenly aware that African American men are disproportionately represented in the criminal justice system and they believe that men in their culture are treated unfairly. For these reasons, some will be reluctant to participate in prosecuting an African American assailant because they won't want to do that to "one of their own." If the offender is kin, they will also resist breaking up the family, subjecting the family to shame, or putting their children at risk of involvement with the child protective services.

African American women also fear that they will not be believed simply because they are women of color. Rather than seeking justice through formal systems, African American women are more likely to seek assistance through informal supports – kin, clergy and neighbors. They also face multilayered issues that have a direct effect on their ability to participate in the prosecution of a crime – poverty, housing, child care, lack of supportive resources, etc.

Their inclination to choose race over gender, and informal systems over formal systems, presents a challenge to prosecutors. But the challenge can be overcome when prosecutors make an effort to acknowledge their lack of trust and make an attempt to earn it.

c) Latina Women

Latina women are among the least likely to report a sexual assault. Latina survivors face a number of cultural barriers to coming forward – sexual assault and abuse continues to be an "off-limits" subject in the Latino community. Deeply held stereotypes in the Latino community make it difficult for women to share a history of sexual violence with their partners and families. Survivors fear that coming forward may result in their being ostracized, labeled as "damaged goods," or even blamed for the assault.

Some Latino males have an extremely difficult time dealing with the sexual assault of a loved one by a stranger, believing that a woman's chastity is broken during an assault. Latina women know this and they may be unlikely to report a sexual assault out of fear of the long term damage

it will create in her relationship with her male partner. Latina women are also fearful of causing shame to their families and this may present another barrier to participating in prosecution.

Latina women are also fearful of formal systems. Like African American women, many have experienced unequal treatment by law enforcement, health care and other systems that are supposed to protect them. Many believe they will not be treated fairly or will be subject to brutality. They are more likely to seek help through informal supports like clergy.

The lack of bilingual service providers, support systems and sexual assault providers in many communities also presents a challenge for Latino women – making it even more difficult for survivors to seek help.

d) Undocumented Women

Undocumented women are among the marginalized groups who are the least likely to seek justice. The primary reasons for this are a belief that justice is not available to them and a fear of retribution and deportation by law enforcement. This distrust of law enforcement and prosecution often follows them from their countries of origin where the law enforcement and justice systems are viewed as opportunistic, corrupt and not helpful to victims of crime.

Undocumented victims also fear retaliation from the offender, who is likely to have threatened to have them deported if they report the crime. Like many women of color, they fear not being believed. They also fear that their own community will not support them or will turn against them to side with the offender – particularly if the offender is also undocumented. The power imbalance in these types of relationships always favor the person with documentation.

Finally, given the current political climate in the U.S., many undocumented women fear drawing any attention at all to the undocumented community at all. For this reason, many victims will put the needs of the community before their own.

e) Hmong Women

The most important social structure in the Hmong community is the Hmong kinship, defined by blood relationships or clans. There are about twenty Hmong clans ("xeem") in the world. Clan membership comes through birth, marriage, or adoption. All children acquire membership into the father's clan group at their birth. Women acquire the clan membership of their husbands upon their marriage. All Hmong cultural norms are dictated by the beliefs of their clan. Hmong victims of sexual assault face tremendous cultural barriers. It is important to note that in the Hmong language there are no words equivalent to "rape" or "sexual assault." Hmong women who are raped do not even have the language to describe their experience within their own culture.

When a Hmong woman is raped she is expected to seek help of the clan leader – and not involve outsiders. All problems are to be resolved within the clan. Because the clan system is driven by

male privilege, wives are viewed as possessions. Hence, a wife cannot claim to have been raped by her husband. She is expected to have sex with him is part of her "duty" – whether she wants sex or not. If a Hmong woman charges her husband with sexual assault, she will likely face scorn from her own community who will take the position that "he is your husband and you have to have sex with him and you must have children." If a woman is disowned from her husband's clan, she will be forced to return to her clan of origin, where she may also be disowned. Thus, if a Hmong woman reports a sexual assault she risks losing all connections to family.

Hmong families will preserve clan dignity and avoid shame at all costs. If a Hmong woman is sexually harassed or fondled against her will, she is expected to accept this violation. Otherwise her family might minimize it or claim that she brought it on herself. Hmong women who are sexually assaulted by a stranger are often expected to marry the perpetrator so as not to shame their family. The message Hmong women receive is that if you are raped it is your fault.

International marriages present another challenge for prosecutors. It is not an uncommon practice for a married Hmong man to travel to Laos to marry a second wife. The wife will likely be underage, sometimes as young as 11-14 years old. Hmong men will bring the child back to the U.S. with promises of securing her an education and a better life. Once here, he will expect both "wives" to live under the same roof. This implicit polygamy often falls under the radar of formal systems because more often than not, the child comes to the U.S. with a forged birth certificate. Prosecutors may actually encounter cases where a Hmong man is having sex with a minor who lives in his home – tolerated by a wife who has few options. Prosecutors may also have difficulty corroborating the age of the child without an authentic birth certificate.

Prosecutors should move cautiously when working with Hmong victims of sexual assault, and respect the victim's decision about whether or not to participate in the investigation and prosecution. Developing strong ties with Hmong resource providers is critical to increasing your understanding about the unique cultural beliefs of this population – especially in communities where there is a significant Hmong presence.

f) Justice Involved Women

Poverty, trauma, substance abuse and abusive relationships with men are the primary pathways for women into the criminal justice system. Research has shown that approximately 90% of justice involved women have experienced repeated sexual assaults and abuse throughout their lives. The trauma of abuse not only shapes their lives, it also creates a mistrust of law enforcement, prosecutors, and most formal systems. Formal systems have failed them. Formal systems have put them in jail. Formal systems have returned them to their communities upon their release with few resources to help them escape the cycle of poverty and abuse that put them there in the first place.

Justice involved women are more likely to have been involved in the sex trade industry at some point in their lives. For this reason they fear they won't be believed or treated fairly if they are sexually assaulted. They also face tremendous challenges when they return to their

communities: finding a safe place to live, securing employment, and reunifying with their children. These priorities will often trump any desire they have to seek justice for a sexual assault committed against them.

It is important for prosecutors to educate juries that just because a woman has committed a crime it doesn't mean that she is not a victim of sexual assault.

g) LGBTQ Populations

LGBTQ people (Lesbian, Gay, Bisexual, Transgender and Questioning) are subject to the same spectrum of sexual violence as the general population. In fact, according to many statistics, they are subject to more. Approximately 10% of hate crimes against gay men and lesbians include sexual assault.[47] This percentage may be higher, since it is sometimes difficult for lesbians to discern whether they were attacked because of being identified as a lesbian or as a woman. In a study of 162 gay men and 111 lesbians, 52% reported at least one incident of sexual coercion by same-sex partners. Gay men experienced 1.6 incidents per person; while lesbians experienced 1.2 incidents per person.[48] In a survey of 412 university students 42% of LGBTQ students indicated they had been forced to have sex against their will compared to 21% of heterosexual students.[49]

Unfortunately, LGBTQ people may also face further victimization when dealing with sexual violence. Often a perpetrator will use homophobia/heterosexism as a weapon to threaten victims. Their tactics include suggesting that:

- No help is available because the police/justice system is homophobic.
- The victim/survivor will not be believed because LGBTQ people do not sexually assault.
- LGBTQ people deserve to be sexually assaulted for being LGBTQ.
- The victim/survivor will be "outed" or threatened with being outed to friends, family, employer, police, church, or others if the victim/survivor reports a sexual assault experience.

Because of this, LGBTQ victims may not come forward. They may also fear that they are betraying their close knit LGBTQ community, which is already under attack, by "accusing" another LGBTQ person of sexual assault. Some LGBTQ victims may fear that they are exposing their assailant to a homophobic criminal justice system if they pursue a legal solution. Most importantly, many fear that they have nowhere to turn for help because they expect hostile and homophobic responses from the police, courts, and service providers.

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[47] Gary David Comstock, *Violence Against Lesbians and Gay Men*. New York: Columbia University Press, 1995.
[48] Waldner-Haugrud, Lisa K., and Vaden Gratch, Linda. (1997). Sexual Coercion in Gay/Lesbian Relationships Descriptives and Gender Differences. *Violence and Victims*, 12 (1), 87-98.
[49] LGBTQ Populations and Sexual Assault. Fact Sheet by the Wisconsin Coalition Against Sexual Assault. Available online at: http://www.wcasa.org/info/factsheets/lesbigay.htm.

3. Victims of Human Trafficking[50]

Human trafficking is a complex social and legal problem that requires specialized attention from prosecutors. Human trafficking is modern day slavery. Article # 3 of the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines human trafficking as: "*the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs*."

US Federal Legislation addressing human trafficking, the TVPA - Trafficking Victims Protection Act passed in 2000 (reauthorized in 2003, 2005 and 2009), is grounded in this international law.

As of 2008 Wisconsin also has a new statute criminalizing both Labor and Sex Trafficking, which can be found in the criminal code (940.302), as well as child trafficking (948.051).

A full discussion of the needs of human trafficking victims is beyond the scope of this document. However, the crime of human trafficking does intersect with sexual assault because victims of trafficking are often subjected to sexual assault, torture and other inhumane treatment by their traffickers. While trafficking affects men, women and children of all ages, races and social standings, ***populations most vulnerable to trafficking are impoverished women and children.***

Nature of Human Trafficking

- Victims include men, women, and children of any age, race or class.
- Human trafficking includes labor, sex and other forms of
- exploitation.
- Elements of trafficking often overlap (e.g. labor trafficking cases with sex component)
- Women and children from poverty stricken areas are disproportionately affected
- Victims include foreign nationals and U.S. citizens (often referred to as victims of international and domestic trafficking)
- Crime may originate in Wisconsin, in a different state or in another country

Prosecutors who are working with a sexual assault victim who they suspect may also be a victim of human trafficking should familiarize themselves with federal and state efforts to address the issue.

[50] This section is based on recommendations of the group developing the Human Trafficking Protocol.

- Human trafficking occurs in urban (especially large metropolitan areas or centers of tourism) as well as rural settings (especially large farming communities)
- Perpetrators may be part of an organized crime group or act on their own

One of the greatest challenges of addressing human trafficking is that it is a hidden crime. Prosecutors may encounter victims of sexual assault who are also victims of human trafficking. Unfortunately, identifying victims of human trafficking is a challenge, because traffickers are experts at controlling victims and coaching them about how to respond to questions. In most cases trafficking victims will not self identify – in fact, they may not understand what the term "trafficking" means, or even view themselves as a victim.

There are a number of "red flags" that may indicate a sexual assault victim is also a victim of human trafficking.

- Is anyone forcing the victim to do anything that they do not want to do?
- Can the victim leave their situation and/or job if they want?
- Has the victim been physically harmed in any way or threatened?
- Has the victim been recruited for one purpose and forced to do some other job?
- Is the victim's salary being garnished?
- Was the victim forced to perform sexual acts?
- Is the victim a juvenile engaged in commercial sex?
- Has the victim been harmed or deprived of food, water, sleep, medical care, or other life necessities?
- Can the victim freely contact friends or family?
- Has the victim or family been threatened with harm if the victim attempts to escape?
- Is the victim allowed to socialize or attend religious services?
- Was the victim coached on what to say to law enforcement or immigration officials?
- Is the victim in possession of identification and travel documents; if not, who has control of those documents?
- Has the victim been threatened with deportation or other law enforcement action?

Prosecutors are uniquely positioned to identify victims of human trafficking and support them in seeking justice and restoration of their human rights. Prosecutors who are working with a sexual assault victim who they suspect may also be a victim of human trafficking should familiarize themselves with federal and state efforts to address the issue. The Wisconsin Office of Justice Assistance, Violence Against Women Program is currently collaborating with the Wisconsin Coalition Against Sexual Violence to develop a Human Trafficking Protocol that can be used by law enforcement, prosecution and community advocates to more fully respond to the needs of trafficking victims in Wisconsin.

4. Victims with Cognitive or Developmental Disabilities

Historically, people with disabilities have experienced discrimination because of their disabilities. They have been viewed as incapable or helpless, separated from society at large, and denied opportunities for education and other life experiences. Misperceptions and stereotypes about people with disabilities – and a subsequent history of oppression – put people with disabilities at increased risk to experience sexual assault.

Statistics indicate that women with developmental disabilities are sexually assaulted at twice the rate of women without disabilities. According to one study 90% of people with developmental disabilities will experience sexual abuse at some point in their lives and 49% of them will experience 10 or more abusive incidents. Only 3% of sexual abuse cases involving people with developmental disabilities are ever reported.[51] Of that 3%, only 22% of the offenders are charged and only 8.5% are convicted.[52]

- In a 1991 study by Sobsey and Doe they estimate that more than half of the abuse perpetrated against people with disabilities is generally by family members and peers with disabilities, and that disability professionals (i.e., paid or unpaid caregivers, doctors, nurses) are generally believed to be responsible for the other half.

- There are few studies that document sexual assault against women with physical and /or sensory disabilities, but Young, M.E., et al. reported that 40% of women with physical disabilities reported being sexually assaulted.[53]

It is critically important to remember that sexual offenders deliberately seek out individuals they perceive to be vulnerable and those they believe may be easier to manipulate, control, and groom for the sexual abuse. Offenders target people with disabilities because they think they will be able to get away with abusing a victim who may be unable to communicate what has happened to them and who is unlikely to be believed even if they are able to disclose. In addition, people with disabilities are often isolated from services and supports and denied education about sexual abuse. As a result, individuals may have no one to disclose the abuse to, and/or may not understand that what happened to them is abusive.

Many people within the society at large, as well as people within the criminal justice system have preconceived notions about who are the victims of sexual assault; generally speaking most

[51] Valenti-Hein, D., Schwartz, L. *The Sexual Abuse Interview for those with Developmental Disabilities.* Santa Barbara: James Stanfield Company. 1995.
[52] Janet Kelly Ace and Mary Catherine Roper, *Assisting Victims and Witnesses with Disabilities in the Criminal Justice System: A Curriculum for Lawyers*, End the Silence, Temple University, Philadelphia, PA, 2002.
[53] Young, M.E., Nosek, M.A., Howland, C.A., Chanpong, G., Rintala, D.H. Prevalence of Abuse of Women with Physical Disabilities. *Archives of Physical Medicine and Rehabilitation Special Issue.* Vol. 78 (12, Suppl.5) (1997).

people do not think of people with disabilities as potential or likely victims of sexual crimes. Some of the common myths are about this population are: (a) that they are oversexed; (b) they are grateful for any sexual attention; (c) they are too undesirable to be targeted for sexual abuse; and (d) they are unreliable, lie and are more prone to fantasizing. It is important to address these preconceived ideas and myths with juries when prosecuting a case with a victim with disabilities.

Despite the disturbing frequency of sexual assaults against people with disabilities, few perpetrators are held accountable. There are numerous reasons for this. Some victims with disabilities may not report the assault because they are not aware that the experience was abusive. Some may not report because they fear reprisal from the perpetrator, fear they won't be believed, or are afraid of entering the legal system. Barriers related to communication and accessibility may also prevent victims from reporting the assault. Additionally, some prosecutors may believe that juries will not perceive individuals with disabilities as credible witnesses; therefore, they may choose not to prosecute. Prosecutors may also aim for plea agreements (which often come with lesser sentences) as a means of "protecting" victims with disabilities from jury trials.

As with any victim who reports, navigating the legal system and retelling the details of the assault can be traumatic. Advocates can help minimize the possibility of further trauma by providing support to victims who are coping with an assault and facing the prospect of potentially lengthy or emotional court procedures.

For more information see *Accessible Justice – Preparing Sexual Assault Victims with Developmental Disabilities for the Criminal Court Process*. Wisconsin Coalition Against Sexual Assault Inc.

5. Victims with Mental Health Problems

Previous sections have discussed the impact of sexual trauma on victim's mental health. Mental illnesses affect a person's psychological or emotional functioning and ability to think, feel, and ability to relate to others to a mild, moderate, or severe degree. Most mental illnesses are considered to be a biological occurrence or the result of trauma, such as a sexual assault. Offenders target victims they perceive to be vulnerable, including those who had mental illnesses that preceded the assault. In addition, individuals with trauma related mental health issues are targeted for repeat assaults.

- A 2001 study found that women with a psychiatric disability had a high rate of sexual victimization. They also found that 74% of women with co-occurring mental health and substance abuse related problems have histories of sexual abuse.[54]

- Another study found that the lifetime risk for violent victimization was so high for homeless women with severe mental illness (97%) as to amount to normative experiences for this population.[55]

- For individuals with psychiatric disabilities, the rate of violent criminal victimization including sexual assault was 2 times greater than in the general population (8.2% vs. 3.1%).[56]

The stigma associated with mental illnesses and difficulty survivors have finding trauma informed services and supports can have a profound effect on individuals. Systems often focus on what they think is wrong with the person instead of what has happened to them. As a result, victims with mental illness may develop alcohol and other drug problems, eating disorders, and other health problems, as a result of efforts to cope with a sexual assault. Systems that overlook the holistic needs of victims will tend to see individuals as problematic, hopeless, and/or lacking credibility.

People with mental illnesses face many barriers to reporting a sexual assault. These include fears that they will not be believed, fears that people will think they "made up" the sexual assault because of their illness, and fears about having their mental illness revealed to their families and community. Cases involving victims with a mental health diagnosis may be dropped because of assumptions that evidence will not be considered reliable. Mental health issues may also be used to discredit victims, no matter how far in the past it occurred. Some victims with serious and persistent mental illness may also be so overwhelmed by the assault that they can't imagine coping with the stress of a trial. For victims with mental illness, the assault often exacerbates their symptoms of anxiety, depression, worthlessness and hopelessness. For these reasons, victims with mental illnesses may not believe they are even worthy of justice. Or, they may make their healing from the assault a necessary priority over justice. Therefore, it is important that victims feel supported by trauma informed advocates and prosecutors in order to overcome many of these barriers.

[54] Newmann, J.P., Ziege, A., Sallmann, J. Women in a Publicly Funded Mental Health and Substance Abuse Services in Dane County, Wisconsin: A Preliminary Report. Madison: Women and Mental Health Study Site, School of Social Work, University of Wisconsin-Madison (2001)
[55] Goodman, LA. Dutton, MA, Harris, M. Episodically Homeless Women with Serious Mental Illness: Prevalence of Physical and Sexual Assault. *American Journal of Orthopsychiatry*. 1995
[56] Hidday, V.A., Swartz, M., Swanson, J., Borum, R., and Wagner, H.R. 1999. "Criminal Victimization of Persons with Severe Mental Illness." *Psychiatric Services* 50: 62-68.

6. Considerations in Working with Marginalized Populations

An understanding and appreciation of the unique world view of marginalized populations can guide prosecutors in their interactions with underserved victims and provide the support and encouragement that marginalized people need to seek justice. Strategies that prosecutors can use to increase their own cultural competency include:

It is your responsibility to know your community and the resources that are available to support marginalized victims of sexual assault in seeking healing and justice.

- Practice vertical prosecution whenever possible. It will help you gain and retain the trust of marginalized victims
- Remember that trust is not a given. It must be earned
- Listen and don't judge
- Acknowledge the injustice that marginalized people have experienced in their lives
- Learn key phrases in other languages. It is not necessary to speak fluently. However a few common phrases like "I'm sorry." "Thank You" and "You are courageous" "I believe you" will help to build rapport with non-English speaking people. This genuine gesture will also go a long way to demonstrate your compassion and respect.
- Increase your visibility within communities of color. Attend cultural events in your community where marginalized people gather
- Know your community and reach out to community-based agencies and resources that support specific cultures and populations
- Seek to increase your knowledge about marginalized populations by reaching out to advocates and/or agencies that reach communities of color for guidance
- Understand that communities of color are small and because of this they are interconnected. Be cautious to use interpreters who are independent and not connected to the victim's immediate family, friends or distant relatives.
- Coordinate interviews with victims to include advocates from within the victim's community.
- Seek to increase diversity in your staff. If you do not have staff from the victim's culture, reach out to community advocacy agencies – they may have staff available to assist
- Engage the victim's informal support people – clergy, friends and kin – if the victim chooses

- Identify resources to address barriers to participation that are often experienced by marginalized people, e.g. safe shelter, transportation, child care, immigration status, and emergency assistance

- Become knowledgeable about Federal and State statutes related to human trafficking, and state and regional resources available to support trafficking victims

For additional information on how to assist marginalized victims, prosecutors should contact the Wisconsin Coalition Against Sexual Assault (www.wcasa.org). ***WCASA can also link you to resource providers and advocates who work with marginalized people***. The Appendix also includes a statewide listing of ***Sexual Assault Service Providers*** who can provide individual assistance and consultation.

IV. Charging Decisions and Strategies

Prosecutors play a pivotal role in the outcome of sexual assault cases. They decide who will be charged, what charge will be filed, and whether plea negotiations will be considered. Prosecutors typically also recommend the offender's sentence. Although each of these decisions is important, none is more critical than the decision to prosecute or not to prosecute. Prosecutors have broad discretion in making the charging decision.

Prosecutors have an ethical obligation to prosecute sexual assault cases that the prosecutor knows are supported by sufficient admissible evidence.

Prosecutors also have an ethical obligation to prosecute sexual assault cases that the prosecutor knows are supported by sufficient admissible evidence. That includes the obligation to assess how the entire case is likely to appear to a jury based on all reasonable inferences arising from the admissible evidence. Prosecutors have an obligation to recognize the danger that in some cases they may focus too narrowly on what appear to be negative victim characteristics or conduct.

An offender-focused approach to the case is the best practice, carefully considering all offender conduct, behaviors and characteristics. This includes the frequent offender practice of targeting as victims persons who are vulnerable and who may not report the crime or may appear unsympathetic or not credible. Any history of sex offenses or other predatory or abusive conduct by the offender is highly relevant in all prosecutorial decision making.

A. Goals of Prosecution

A victim-centered and offender-focused response to the prosecution of sexual assault is predicated on the need to protect the victim's safety, privacy and well-being while holding offenders accountable. The goal of this approach is to decrease re-victimization by ensuring the survivor is treated with compassion and respect. The myths and misinformation surrounding the crime of sexual assault, along with the tendency of the defense and jurors to focus on the victims' actions, present unique challenges in the successful prosecution of the crime of sexual assault. Prosecutors are uniquely positioned to educate the community, jury by jury, about sexual assault dynamics and the tactics offenders use.

1. Victim-focused Goals

a) Victim Safety

Ensuring the physical and emotional safety of victims during the prosecution phase is critical. In some cases, victims may be subject to intense pressure and harassment from the assailant and/or his friends and family members to recant. In some cases, the risk to the victim's safety may outweigh the potential benefits of charging the offender. Including the victim in this decision-making process is critical to making a decision that will ensure the victim's personal and emotional safety. To support victim safety, prosecutors should:

- Advocate for bail conditions that consider the safety of the victim and the community.
- Ensure that no contact orders are written and not oral.
- Inform victims about the terms of bail conditions for the offender.
- Seek information about and educate victims about the potential risk of retaliation or harassment by the defendant and/or the defendant's family members and friends.
- Assist victims to develop a safety plan in the event of retaliation or harassment.
- Be mindful of the need to separate victims and defendants during any events that occur at the courthouse.

For more information on victim safety protections see Chapter IV, Section B – Bond/Protection issues. Also see Victim Privacy Issues later in this chapter.

b) Victim's Perspective of the Assault

Sexual assault cases are not like other kinds of crimes in terms of the impact of the crime on the victim. This is partly due to the unique "personal" aspect of the crime, which violates the actual physical integrity of the victim in the most intimate ways. In addition to the nature of the crime itself, sexual assault carries with it the burden of the myths and views held by the community, which is not only a challenge to successful prosecution but is a large part of what a victim of sexual assault must address in his/her own life after the assault. A victim's ability to handle these views, to move toward healing, and to withstand the scrutiny of the often overly-judgmental system on a personal level is important to the prosecutor.

Each victim comes to the prosecutor with his/her own unique set of life experiences which impact on the way that he/she has handled crises and trauma in the past. Each victim must approach his/her victimization with whatever strengths or weaknesses he/she possesses, which may or may not include a healthy support network, healthy coping methods, or financial or other resources.

Interviewing the Victim

No prosecutor should presume to know what is best for the victim or what the victim wants. To do so is not only dangerous (because you could be very wrong), but also amounts to a subtle way of communicating to that victim that she is not really in control (again) of his/her fate. It is critically important to allow the victim to express not only the facts of the events, but also her concerns about the facts, the impact thus far on his/her life, and his/her fears about the continuing impact, as well as concerns about the prosecution. Many times, a victim fears expectations that are generated by her interpretations from cases in the media, or what she has been told will happen by friends or family. Sometimes a victim has been through "the system" before, either as a victim, witness, or defendant. Her perspective may be colored by that experience.

Prosecutors should always interview the victim prior to making a charging decision.

Giving the victim an opportunity to share her experience and to tell you what she wants from the justice system is at the very heart of a victim-centered response.

Once you have listened to the victim's views, you are in a much better position to allay unfounded fears, and to know what might create a problem down the line, either for the prosecution or for the victim personally. Often you learn about facts that are essential to address that you otherwise would not have learned had you not afforded this forum to your victim. Obviously, it is much easier to address problems that have been identified early on than to address them after being blindsided during a trial.

You also engage the victim as a partner in the process and help her feel she is not just a piece of evidence or "a case" on your desk. When your victim feels she is a person to you, she is far more inclined to trust you with her continuing concerns, as well as trust your judgments on the case itself.

Part of meeting with the victim in a sexual assault is to determine not only how the victim will present to and be able to communicate with a jury, but also to assess what the impact of taking a case to trial will be on her. An extremely fragile person may not be best served by a contentious hearing or by a long-drawn-out case that would require many motions before trial. You may decide, upon speaking with the victim, and in consultation with her, that it is more important to resolve the case than to get a conviction on the most serious charge. This might be because emotional safety is paramount, or because family issues or other concerns are too important for her.

Collateral Victim Issues

In this meeting at the outset, prior to charges, it is also important to a successful prosecution (and fair to the victim) to identify collateral issues for the victim and the impact that a prosecution may have on those issues.

- Will the victim have to move or go into witness protection?

- Is there a mental health history that might be exposed to public view that could harm the victim within her community?

- Are there medical conditions that will have to be exposed or medical conditions that may be exacerbated should the victim be subjected to stress?

- Will prosecution alienate her family and is she prepared for that possible consequence?

- Does she have a drug or alcohol problem that needs services?

- Is she homeless?

- Does her family know, and if not, would they find out?

- Have there been past false allegations that may impede successful prosecution or are the circumstances of that past behavior sufficiently different?

Once you have addressed these issues with the victim, you are in a better position to assess whether you will have a victim who is able to participate in prosecution and you will know what that person's liabilities might be. You will be able to solve some problems before they crop up by some prophylactic measures. And you will have a better sense of your comfort level in proving the case beyond a reasonable doubt. You may have uncovered important additional information that supports additional charges or can lead to significant corroboration. And you will have made important steps toward helping the victim in the process of healing.

Sometimes what you learn is that the victim already is or is likely to become uncooperative. Teens present this challenge, as do children, who may recant or run away. In domestic cases, the victim will continue to be under pressure to recant or minimize. The homeless, drug users, prostitutes and others with marginal lifestyles may disappear. Persons with serious medical problems or the elderly may physically and/or mentally deteriorate as a result of the impact of the assault to them. When the potential loss of the victim is a probable issue, identifying what the problem is, and trying to "fix" it up front is possible in some cases. Depositions can be arranged. Testimony can be taken at a preliminary hearing. Mental health and other issues can be addressed in therapy. Establishing independent methods of proof might be available.

In addition, with uncooperative victims, it is generally helpful to have a discussion with them about what their perspective is, what yours is, and why you feel you need to pursue a criminal charge based on your responsibility to uphold the law and/or consider community interests. Sometimes, while they may not agree with you, or they may not like your view (at least that's what they're saying to you), they may understand or appreciate why you are taking the action you believe you have to take. Moreover, you may be able to continue to provide the uncooperative victim with an outlet for expressing disagreement, and may ultimately resolve the

case in a manner more palatable to him/her while still meeting all your goals if you are frank with him/her at the outset.

c) Chapter 950 Considerations

The State of Wisconsin recognizes the necessity for victims of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies. Wis. Stat. § 950.01 (2007). In order to promote this cooperation, victims of criminal offenses enjoy privileges and protections in the Wisconsin Constitution and various Wisconsin statutes.

Victim Privileges and Protections

Wis. Const. Art. I, § 9m states, "*This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy*." A crime "victim" defined according to Wis. Stat. § 950.02(4)(a)1., includes the person against whom a crime has been committed. However, if the criminal act was against a child, then a parent, guardian or legal custodian of the child would also be defined as a victim, § 950.02(4)(a)2., unless that parent, guardian or legal custodian was the person alleged to have committed the crime, § 950.02(4)(b). Similar expansions of who might be considered a "victim" for the purpose of asserting victims rights is seen where a person against whom the crime has been committed is physically or emotionally unable to exercise their rights, is deceased, or has been adjudicated incompetent. §§ 950.02(4)(a)3.-5.

The Wisconsin Supreme Court held that the Wis. Const. Art. I, § 9m sentence referred to above, "is a statement of purpose that describes the policies to be promoted by the State [but] does not provide an enforceable, self-executing right." *Schilling v. State Crime Victims Rights Board*. 2005 WI 17, ¶ 28, 278 Wis. 2d 216, 235. Thus, the court invalidated a private reprimand issued by the Crime Victims Rights Board to a district attorney for allegedly violating Art. I, § 9m's broad statement of purpose. *Id.*

Wis. Const. Art. I, § 9m further states that Wisconsin "shall ensure that crime victims have all of the following privileges and protections as provided by law:

- Timely disposition of the case;
- The opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant;
- Reasonable protection from the accused throughout the criminal justice process;
- Notification of court proceedings;
- The opportunity to confer with the prosecution;
- The opportunity to make a statement to the court at disposition;
- Restitution;
- Compensation; and
- Information about the outcome of the case and the release of the accused."

The above privileges and protections are codified in Wis. Stat. § 950.04(1v), the "basic bill of rights for victims and witnesses," § 949, "Awards for the Victims of Crimes," and § 971.095, "consultation with and notices to victim."

Additional statutorily provided rights that should be noted include the following:

- The right of a sexual assault victim to not be the subject of a law enforcement officer's or district attorney's order, request, or suggestion that he or she submit to a lie detector test. §§ 950.04(1v)(dL) and 968.265
- The right to request testing of the defendant for a communicable disease. §§ 950.04(1v)(d), 968.38, 938.296
- The right of crime victims to consult with intake workers, district attorneys and corporation counsel. §§ 950.04(1v)(i) and 950.04(1v)(j)
- The right to have his or her interests considered by the court in determining whether to exclude persons from a preliminary hearing. § 950.04(1v)
- The right to have his or her interest considered regarding the grant of a continuance. § 950.04(1v)(a)
- The right to be accompanied by a § 895.45 service representative. § 950.04(1v)(c).

Wis. Stat. § 950.08(2r) requires a district attorney to make a reasonable attempt to provide the victim with written information on certain matters. A few of the § 950.08(2r) written requirements include the following:

- A brief statement of the procedure for prosecuting a crime;
- A list of the rights of victims under § 950.04(1v) and information about how to exercise those rights;
- The availability, eligibility, and procedure for applying for compensation;
- The person a victim can contact concerning the prosecution of a case in which he or she was a victim.

Victim Impact Statements

Although the victim impact statement occurs during the sentencing phase, it warrants discussion. The victim impact statement presents an important opportunity for a victim of a sexual assault to share with the court: (a) the physical and emotional impact of the assault on her personally; (b) the impact of the sexual assault on her relationships with loved ones; and (c) what she would like to see happen to the offender. Most sexual assault victims will choose to complete a victim impact statement because it presents a profound opportunity to advance their healing. It is critical that prosecutors encourage and support victims who choose to complete an impact statement. Some may choose to read it to the court directly. Others may choose to have someone read it for them. Victim advocates are excellent resources to assist victims in completing this important step in healing.

Informing the Victim About Charging Decisions

A victim-centered response to sexual assault takes into account the potentially lifelong impact that charging decisions have on victims. Victims of sexual assaults that are not charged are likely to feel re-traumatized because the pathway to achieve closure through the justice system has been closed for them.

It is the prosecutor's responsibility to notify a victim of sexual assault that a decision has been made not to charge the case. The notification should occur promptly, and if possible, before the defendant is notified. This will prevent the victim from hearing the disposition from the defendant or other people first. The best practice is to make notification in person or by phone whenever possible. Notification should include an honest explanation of the reasons for the decision not to charge.

It is the prosecutor's responsibility to notify a victim of sexual assault that a decision has been made not to charge the case.

The notification should occur promptly, and if possible, before the defendant is notified.

Wisconsin law supports this need. If a person is arrested but not charged, the district attorney is required to make a reasonable attempt to inform the victim that the person arrested will not be charged at that time § 971.095(4). Likewise, if a person has been charged and the charge is subsequently dismissed, the district attorney is required to make a reasonable attempt to inform the victim that the charge has been dismissed. § 971.095(5).

Increased sensitivity and attention is owed to two sections in particular: the right to test a defendant for a communicable disease, § 950.04(1v)(d), and the right to not be subjected to a lie detector test, § 950.04(1v)(dL).

Communicable Disease Protections

In sexual assault criminal actions victims have the right to request the district attorney to apply for a court order requiring the defendant to submit to a test for sexually communicable diseases. §§ 950.04(1v)(d) and 968.38. The district attorney shall seek the order as soon as possible, § 968.38(3), which can be as early as the initial appearance, § 968.38(3)(a), or as late as post-conviction, § 968.38(3)(c). "If the court finds probable cause to believe that the defendant has significantly exposed the victim or alleged victim, the court shall order the defendant to submit to a test." § 968.38(4).

Probable cause to believe a defendant significantly exposed a victim was found in a case where the defendant sexually assaulted a teenage boy. *State of Wisconsin v. Parr*, 182 Wis. 2d 349, 366, 513 N.W.2d 647 (Wis. Ct. App. 1994). In *Parr*, the court noted the presence of probable cause from the victim's detailed and plausible account of a sexual assault and the presence of physical evidence corroborating the story. *Id.* at 365, 366. "Significantly exposed," defined in detail in Wis. Stat. § 252.15(1)(em), essentially covers sexual contact leading to a transfer or secretion of fluid.

Lie Detector Tests

Law enforcement may not order, request, or suggest that a person reporting to be a victim of sexual assault submit to a lie detector test. §§ 950.04(1v)(dL) and 968.265(2). Nor shall a district attorney order, suggest or request a person reporting to be a victim of sexual assault to submit to a lie detector test without first providing the person with notice and an explanation of his or her right not to submit to such a test. § 968.265(3).

In order to receive victim cooperation, prosecutors must respect the rights of victims and treat victims of crime with fairness and dignity.

Though not expressly required, respect for victims should also cause prosecutors to explain the nature of their relationship. Victims are not the clients of prosecutors. Thus, victims should be made aware that there is no attorney/client privilege or any requirement of confidentiality as there otherwise would be. Victims should also be made aware of the requirement that all exculpatory evidence a prosecutor receives must be disclosed to the defense.

To be successful ministers of justice, prosecutors must receive full and voluntary cooperation with the victims of crime. In order to receive this cooperation, prosecutors must respect the rights of victims and treat victims of crime with fairness and dignity.

2. Offender-Focused Goals

a) Sex Offender Registration

The Wisconsin Sex Offender Registry provides the public with automated access to information about offenders who are required to register with the Department of Corrections. Registration serves as a means for monitoring and tracking an offender's whereabouts. Access to the Registry information is available for law enforcement agencies, victims, public or private organizations, and the general public. It is intended to promote public safety and help detect and prevent crime.[57] Sex offender registration requirements and procedures are laid out in §301.45 of the Wisconsin Statutes. For prosecutorial purposes, it is necessary to determine what violations are classified as a sex offense, who is required to comply with the reporting requirements and how long, and when and to whom exceptions may apply. There are situations that will mandate registration and others where registration will be based on the court's discretion.

What is a "sex offense"?[58]

A sex offense under §301.45 means a violation, or the solicitation, conspiracy, or attempt to commit a violation, of:

[57] http://www.wi-doc.com/offender.htm
[58] Wis. Stat. §301.45(1d)(b)

- 940.225(1) First degree sexual assault
- 940.225(2) Second degree sexual assault
- 940.225(3) Third degree sexual assault
- 940.22(2) Sexual exploitation by a therapist
- 944.06 Incest
- 948.02(1) First degree sexual assault of a child
- 948.02(2) Second degree sexual assault of a child
- 948.025 Engaging in repeated acts of sexual assault of the same child
- 948.05 Sexual exploitation of a child
- 948.051 Trafficking a child
- 948.055 Causing a child to view or listen to sexual activity
- 948.06 Incest with a child
- 948.07(1)-(4) Child enticement
- 948.075 Use of a computer to facilitate a child sex crime
- 948.08 Soliciting a child for prostitution
- 948.085 Sexual assault of a child placed in substitute case
- 948.095 Sexual assault of a child by a school staff person or a person who works or volunteers with children
- 948.11(2)(a)(am) Exposing a child to harmful material or harmful descriptions narrations
- 948.12 Possession of child pornography[59]
- 948.13 Child sex offender working with children
- 948.30 Abduction of another's child
- 940.302(2)(a)1.b. Human trafficking *if* the trafficking is for the purposes of a commercial sex act
- 940.30 False imprisonment *if* the victim was a minor and the person who committed the violation was not the victim's parent
- 940.31 Kidnapping *if* the victim was a minor and the person who committed the violation was not the victim's parent

Who Is Covered?[60]

A person is required to comply with reporting requirements if, as of December 25, 1993 (unless otherwise stated), he or she is:

- Convicted of a sex offense[61]
- In prison or on supervision for a sex offense or a comparable WI law

[59] Please see *State v. Lala* for an interpretation of "sexually explicit conduct." Wisconsin Appeals Court decision 2008 AP 2893 (recommended for publication).

[60] Wis. Stat. §301.45(1g)

[61] These criteria may qualify for an exception. See the section, "What are the Exceptions?"

- Is found not guilty by reason of mental disease or defect, and is committed civilly under §51.20 or under §971.17 for a sex offense
- Is in institutional care or on conditional transfer under §51.35(1) or conditional release under §971.17 for a sex offense or a comparable WI law
- Is on supervision in this state from another state under §§304.13(1m), 304.135, or 304.16 for a violation of another state's law that is comparable to a sex offense
- Is a juvenile in this state on or after May 9, 2000, and is on supervision in this state from another state pursuant to §938.988 for a violation of another state's law that is comparable to a sex offense
- Is placed on lifetime supervision based upon his or her status as a serious sex offender under §939.615 on or after June 26, 1998
- Is in institutional care or on supervised release under ch. 980 on or after June 2, 1994
- Is ordered by the courts to comply with the reporting requirements of §301.45
- Was required to register under §301.45(1)(a), 1997 stats., based on a finding that he or she was in need of protection or services and is ordered to continue complying with the requirements of this section by a court acting under 1999 Wisconsin Act 89, section 107(1)(e)
- On or after December 1, 2000, is registered as a sex offender in another state or with the FBI and is a resident, student, or employed in WI
- Has been found to have committed a sex offense by another jurisdiction and, on or after December 1, 2000, is a resident, student, or employed in WI and 10 years has not passed since the date on which the person was released from prison or placed on parole for the sex offense

How Long is a Person Required to Report?

In most situations and for most sex offenses a person will be required to report under §301.45 for 15 years after the discharge of his or her probation or extended supervision for the sex offense.[62] However, there are some situations which require a person to report until his or her death. These situations are found in Wis. Stat. §301.45(am) and (b). They include:

- Serious sex offenders as defined in §939.615
- A person who has 2 or more convictions for a sex offense
- First degree sexual assault
- Second degree sexual assault
- First degree sexual assault of a child
- Second degree sexual assault of a child
- Engaging in repeated acts of sexual assault with the same child
- Sexual assault of a child placed in substitute care
- A sexually violent person under ch. 980
- Court ordered compliance until death

[62] Wis. Stat. §301.45(5)(a)

What are the Exceptions? [63]

A person is not required to comply with reporting requirements if all of the following apply:

- The person meets the criteria under 301.45(1g)(a)-(dd)[64] based on a violation of:
  - 948.02(1) First degree sexual assault of a child
  - 948.02(2) Second degree sexual assault of a child
  - Engaging in repeated acts of sexual assault of the same child
  - Sexual assault of a child placed in substitute care
- The violation did not involve sexual intercourse by use of threat of force or violence or with a victim under the age of 12 years
- At the time of the violation the person had not attained the age of 19 years and was not more than 4 years older or younger than the child
- It is not necessary, in the interests of public protection, to require the person to comply with the reporting requirements

Discretionary Registration

The discussion to this point has focused on mandatory registration for sex offenders.[65] However there are also situations where a court may, in its discretion, impose registration. This sentencing discretion is granted to courts under §973.048(1m) of the Wisconsin Statutes. Violations of the following may be considered for discretionary registration:

- Ch. 940 Crimes against life and bodily security
- Ch. 944 Crimes against sexual morality
- Ch. 948 Crimes against children
- 942.08 Invasion of privacy
- 943.01-.15 Certain crimes against property

A court may require a person to comply with the reporting requirements of §301.45 if a court determines that the conduct underlying one of the crimes listed above was sexually motivated *and* that it would be in the interest of public protection to have that person register. "Sexually motivated" is defined in §980.01(5) as "one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation of degradation of the victim." To determine whether registration would be in the interest of public protection, the court may consider any of the following:[66]

- The ages of the person and the victim at the time of the violation
- The relationship between the person and the victim
- Whether the violation resulted in bodily harm to the victim
- Whether the victim suffered from any mental illness or mental deficiency
- The probability that the person will commit other violations in the future

[63] Wis. Stat. §301.45(1m)
[64] See the first four bullet points of the section, "Who is Covered?"
[65] Wis. Stat. §973.048(2m)
[66] Wis. Stat. §973.048(3)

- Any other factor the court determines may be relevant

Practice Tip:
The sex offender registration requirement is not a direct punishment; it is a safeguard to protect past victims, the public in general, and assist law enforcement.[67] Because registration is not "punishment," a trial court is not required to notify a defendant of sex offender registration for a plea to be valid. Therefore, failing to advise a defendant of this does not render a plea unknowing and unintelligent, and is not a basis for withdrawal.[68]

b) Punishment

One of the underlying policies of the criminal justice system is punishment. Those people who break the law should be punished for their actions. This creates an orderly and safe society. Just desert is a theory of punishment that argues one should be punished for the commission of a crime because that is what one justly deserves. The level of punishment should be proportionate to the seriousness of the offense. The threat of punishment has a significant restraining effect and punishment, if regularly imposed, can significantly reduce the frequency of most forms of criminal behavior.[69]

c) Rehabilitation

Rehabilitation is a process that seeks to improve an offender's character, outlook, or resources. The ultimate goal is for the offender to function in society without re-offending, the desire or necessity to re-offend would no longer exist. It has been argued that rehabilitation is a more long-term solution to crime than incapacitation because it has a more lasting effect on individuals. Ideally, if a person can learn how to better adapt to society, he or she will be discouraged from committing future crimes. Rehabilitation programs can include: education in academics or trade skills, employment assistance, drug or alcohol therapy, psychological counseling, family counseling, and sex offender treatment.

d) Specific Deterrence

Specific deterrence focuses on dissuading a particular offender from committing crimes in the future. This is done through fear or threats of serious, legal consequences if the offender reoffends. It also may deter the offender because he or she will realize that criminal activities have serious and real consequences. Similar to a cost/benefit analysis, if an offender realizes the costs (consequences) of breaking the law, the costs of committing the crime will hopefully outweigh the benefit of committing it.

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[67] *State v. Bollig* 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.
[68] *Id.*
[69] Remington, Frank J., *Fair and Certain Punishment*, 29 Vand. L. Rev. 1309 (1976)

e) Record of Activity

Charging a person with a crime, even if it does not lead to a conviction, is a way to track a person's criminal activity. The fact that a person was previously charged with a crime may be useful in convicting the defendant of a crime in a future trial. It is also a way for law enforcement and the community to monitor the defendant's activity in the future.

3. Community-focused Goals

a) General Deterrence

Deterrence is the prevention of criminal behavior by fear of punishment. General deterrence is a goal of criminal law generally, or of a specific conviction and sentence, to discourage people from committing crimes.[70] The goal of general deterrence is to deter people from committing crimes through threats of formal or informal sanctions. The certainty and severity of punishment may also effect overall general deterrence. General deterrence instills fear in society as a whole, as opposed to a single, specific person.

b) Community Safety

Rehabilitation, specific deterrence, and general deterrence can all reduce crime within a community and improve the safety and security of its citizens. Additionally, incapacitation, discussed below, can also increase safety within a community.

c) Incapacitation

Incapacitation refers to restraining an individual offender's freedom and time in a way that would make him or her less likely to commit a crime. The logic behind this theory is fairly straight forward – an offender is imprisoned to physically restrain him or her from re-offending during the confinement period. During the confinement period the community is safer because that particular offender is no longer free to commit crimes. Incapacitation can also include community service. In that scenario, the offender's time is restrained and the hope is that without the extra time, the offender will not reoffend. Critics believe incapacitation is only a temporary solution to crime while the offender is incapacitated, and other theories, such as rehabilitation, may have a longer term effect on reducing crime.

B. Bond Issues/Protection Issues

The *Eighth Amendment* to the *United States Constitution* and *article I, section 6* of the *Wisconsin Constitution* states that "excessive bail shall not be required." In *Carlson v. Landon*, 342 U.S. 524 (1952), the Court rejected the idea that the *Eighth Amendment* granted defendants a right to

[70] Black's Law Dictionary.

bail. Thus, in *U.S. v. Salerno et al.*, 481 U.S. 739, 754 (1987), the Court stated that the only substantive limitation of the *Eighth Amendment* is that the Government's proposed conditions of release or detention should not be "excessive" in light of the perceived evil. Therefore, the *Eighth Amendment* is satisfied when a condition of release is designed to accomplish a compelling governmental interest. *Id.* A compelling governmental interest, other than preventing flight, could even prevent a defendant's release on bail and still satisfy the *Eighth Amendment*. *Id.* at 754, 755.

A criminal defendant awaiting trial 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." Wis. Stat. § 969.01(1) (2007). Cash bail may be imposed as a condition of release only when there is a reasonable basis to believe it is necessary to assure the defendant's appearance in court. *Id.* A defendant's appearance at future court proceedings may be questionable for the following reasons:

- The defendant lacks meaningful ties to the community
- The defendant has a poor record of court attendance and/or a poor record of complying with court ordered supervision
- The defendant is charged with a serious offense carrying a substantial penalty
- The defendant is likely to be convicted
- The defendant has outstanding warrants in other jurisdictions
- The defendant's identity is uncertain

Release Conditions

Non-monetary conditions of release may be imposed for the purposes of protecting members of the community from serious bodily harm or preventing the intimidation of witnesses. § 969.01(4). Dangerousness of the defendant is the critical issue here. Examples of non-monetary conditions of release placed on defendants charged with sexual assault and sexual assault of a child include the following:

- Defendant shall have no contact with the victim alleged in the complaint or the victim's family. Contact includes, but is not limited to face-to-face, telephone, mail, electronic, including email and text messaging, and third party contact.
- Defendant shall have no contact with persons under the age of 18. Contact includes, but is not limited to face-to-face, telephone, mail, electronic, including email and text messaging, and third party contact. (An alternative version might substitute, "no contact with persons under the age of 18 unless supervised by an adult who is 25 years of age or older.")
- Defendant shall not visit or be on the premises of any location near the victim's residence, school, or place of employment. ("Near" could be defined as within 'X' number of feet, on the same street, or on the same block.)

- Defendant shall not visit, be employed at, or be on the premises of any schools that enroll individuals under the age of 18.
- Defendant shall not attempt to engage in an occupation or participate in volunteer activities that place him in direct contact with children under the age of 18.
- Defendant shall not purchase, possess, or consume alcohol.
- Defendant shall remain within the State of Wisconsin and must receive prior court approval in order to travel outside the state.

A prosecutor may ask the court to deny the pretrial release of a defendant from custody when that defendant is accused of sexual assault or the sexual assault of a child, or the attempt thereof. § 969.035. The prosecutor must allege "that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses." § 969.035(3)(c).

Conditions of release should be designed to assure a defendant's appearance in court, to protect members of the community, and to prevent the intimidation of witnesses. When thinking of the conditions of release they should request, prosecutors should consider conditions that are necessary to serve the interests of the court. They should also consider conditions necessary to protect the interests of the victim(s), witnesses, and any potential victims.

C. What Charges do the Facts Support?

1. Use of Non-Sexual Assault Charges in the Complaint

Frequently there are a multitude of non-sexual assault charges that are supported by the facts. These may include:

- Burglary
- Robbery or Armed Robbery
- Theft From Person
- Kidnapping
- Child Enticement
- False Imprisonment
- Car Jacking
- Battery, Substantial Battery or Aggravated Battery
- First or Second Degree Recklessly Endangering Safety
- Any of a number of misdemeanors

There are a number of reasons to include these charges in your original complaint. These crimes may provide corroboration of the victim as to the circumstances of non-consent. They may offer corroboration of identity in stranger cases. The sexual assault may be part of a larger crime spree, with escalating violence due to increased bravado, increased anger or frustration or increased use of alcohol or drugs on the part of the offender. Thus, their inclusion offers the jury

the bigger picture of who the offender is and how he operates. In addition, including them in the original complaint avoids the necessity of "other acts" motions. Finally, these charges may be stronger than the sexual assault and it may be possible to negotiate from a position of strength to accomplish the goals of your prosecution. Many of these charges, when there are "sexual undertones," provide a basis for future Ch. 980 consideration even though the charge itself is not a sexual assault charge. For instance, ***false imprisonment*** is a potential predicate charge. Many of these charges carry substantial potential penalties, and since it may be easier to corroborate a non-sexual charge, or to get an admission to one, it may be a great advantage to your prosecution to include these provable non-sexual charges if they are supported by the evidence.

2. Statutes Related to Conduct Against the Victim

As a condition of release, defendants may be prohibited from having contact with their victims. However, in some circumstances a defendant will remain in custody unable to post bail and will contact or attempt to contact the victim from jail. The issue then arises as to what tools are available to prevent a defendant who remains in custody from contacting the victim or attempting to contact the victim and punish the defendant who does so.

Bail Jumping
It is possible in unique circumstances to file additional charges of bail jumping when a defendant, in custody, attempts to contact the victim. In *State of Wisconsin v. Dewitt*, 2008 WI App 134, 758 N.W.2d 201, a defendant was initially charged using three separate criminal complaints. A misdemeanor offense carried conditions of release that included a $500 signature bond and a no-contact order. *Id.* The defendant signed the signature bond, but remained in jail because he was unable to post the cash bonds ordered for the two felony cases. *Id.* When he later contacted the victim from jail, the court allowed the district attorney to charge the defendant with bail jumping for violating the conditions of release for the misdemeanor offense. *Id.*

Intimidation
The intimidation or attempted intimidation of victims and/or witnesses is covered by Wis. Stat. §§ 940.42-940.45, resulting in either a Class A misdemeanor or a Class G felony charge, depending upon the circumstances of the act.

No Contact Orders
Wisconsin Statute § 940.47 protects a victim or witness through a court order, commonly referred to as a "No Contact Order." The court can order the defendant not to violate §§ 940.42-940.45. Additionally, courts may order persons other than the defendant to not intimidate a victim or witness in violation of §§ 940.42-940.45. *See* §§ 940.47(1)-(2). Courts may also order persons to maintain prescribed distances from a specified witness or victim, § 940.47(3), and/or order persons to refrain from having any communications with a specified witness or victim, §940.47(4).

If an individual violates the court order, he or she can be held in contempt of court under chapter 785. *See* § 940.48. Thus, §§ 940.47 and 940.48 offer punishment alternatives in addition to those available in §§ 940.42-940.45, possible bail jumping charges, and if the individual posted bail, then forfeiture of bail.

Practice Tips:
A prosecutor's efforts in this area should not be restricted to simply punishing defendants. ***The goal should be to prevent any contact or intimidation from the outset***. Prevention best serves the interest of court proceedings and best serves the interests of victims and witnesses.

Defendants and their attorneys should be made aware that law enforcement will find out about any attempts to contact victims, whether the attempts occur directly or through third parties. It might be in a victim's best interest to have the defendant explicitly made aware that county jails track and record phone calls. If the defendant calls the victim from jail, it will result in an easy conviction. This knowledge could prevent victims from being directly contacted, harassed, and intimidated by their perpetrators.

If the defendant tries to secretively contact the victim through a third party, the defendant's contact with the third party will be known to law enforcement. That contact will then connect the victim to the defendant. Thus, secretive methods will not successfully escape review either.

Lastly, defendants should be aware that any attempt to contact the victim and any attempt to harass or intimidate a victim and/or witness will be dealt with harshly by the district attorney's office.

Additional information on how to protect victims is discussed earlier under Bond Issues.

3. Identifying Offender-Focused Themes

Offender-focused themes has been discussed earlier,[71] but it bears repeating. One of the main ways a prosecutor can overcome the consent defense – and the inevitable defense focus on the victim – is to develop an offender-focused prosecution. One of the best ways to do this is to develop an offender-focused theme to the case. The theme of the case is a one-sentence statement which represents the thrust of your evidence. It is the prosecutor's read on the human dynamics in the case or on why the defendant is guilty. The prosecutor can use several approaches, depending on the facts of the case:

[71] This material is adapted from an article by Miriam Falk, Assistant District Attorney, Milwaukee County.

- Defendant is a predator – This keeps the focus squarely on the defendant, and portrays the victim as a "true victim" rather than one who contributed to the defendant's acts.

- Defendant is a manipulator – This presents the defendant as a person who knew full well what he is doing every step of the way. All of his actions were directed toward the same goal – sexual assault.

- Defendant is an opportunist – While sexual assaults are premeditated crimes, there may be cases in which the facts or the nature of the defendant don't lend themselves to portraying the defendant as a predator or manipulator. This may be particularly true in cases in which the defendant is likely to appear to the jury as sympathetic. In these situations, the prosecutor can portray the defendant as someone who exploited a situation and assaulted the victim. This allows the jury to convict the defendant even if they don't believe the assault was "planned."

Finally, while the jury instructions for the definition of consent focus mostly on what the victim said or did, they also ask the jury to consider "all the other facts and circumstances" to determine whether the victim did not consent. This is the opportunity for the prosecutor to keep the focus on the offender. For additional information, see Chapter III, Section D, Common Defenses – Overcoming the Consent Defense.

4. Use of Enhancers

Prosecutors should consider the use of enhancers to strengthen the State's response to a sexual assault. A list of potential enhancers is provided below.

§939.615 – Lifetime Supervision of Serious Sex Offenders
A court may place a person who is convicted of a serious sex offense[72] on lifetime supervision by the Department of Corrections if the person has notice of the lifetime supervision and if the court determines the lifetime supervision is necessary to protect the public.[73]

§939.616 – Mandatory Minimum Sentence for Child Sex Offenses
The Wisconsin Legislature has created mandatory minimum sentences for certain child sex offenses under §939.616. Below is a list of child sex offenses and the appropriate minimum sentence for each offense.

[72] See Wis. Stat. §939.615(1)(b) for the definition of a "serious sex offense"
[73] Wis. Stat. §939.615(2)(a)

Offense	Statutory Section for the Offense	Mandatory Minimum	Statutory Reference
First Degree Sexual Assault of a Child	948.02(1)(am)	25 years of confinement in prison	939.616(1g)
Repeated Acts of Sexual Assault of the Same Child	948.025(1)(a)	25 years of confinement in prison	939.616(1g)
First Degree Sexual Assault of a Child	948.02(1)(b) or (c)	25 years for the confinement in prison portion of bifurcated sentence	939.616(1r)
Repeated Acts of Sexual Assault of the Same Child	948.025(1)(b)	25 years for the confinement in prison portion of bifurcated sentence	939.616(1r)
First Degree Sexual Assault of a Child	948.02(1)(d)	5 years for the confinement in prison portion of bifurcated sentence	939.616(2)
Repeated Acts of Sexual Assault of the Same Child	948.025(1)(c)	5 years for the confinement in prison portion of bifurcated sentence	939.616(2)

§939.617 – Minimum Sentence for Certain Child Sex Offenses
Minimum penalties have been imposed for other child sex offenses, in addition to those laid out in §939.616. For the offenses in this section the court shall impose a bifurcated sentence under §973.01.

The term of confinement portion of the bifurcated sentence shall be at least five years for:

- Sexual Exploitation of a Child – §948.05
- Use of Computer to Facilitate a Child Sex Crime – §948.075

The term of confinement portion of the bifurcated sentence shall be at least three years for Possession of Child Pornography – §948.12.

A court may impose a lesser sentence or probation for violations of the listed offenses, only if the court finds that the best interests of the community will be served, the public will not be harmed, and the court places its reasons on the record.[74]

§939.618 – Mandatory Minimum for Repeat Serious Sex Crimes
A serious sex crime for this section means a violation of first or second degree sexual assault. If a person has one or more serious sex crime convictions and later commits another serious sex crime, the court shall impose a bifurcated sentence under §973.01. The term of confinement portion of the bifurcated sentence shall be at least three years and six months.[75]

[74] Wis. Stat. §939.617(2)
[75] Wis. Stat. §939.618(2)(a)

This section also increases the maximum term of imprisonment for a violation of first degree sexual assault, §940.225(1), when the person has one or more prior convictions under §940.225(1), to life imprisonment without the possibility of parole or extended supervision.[76] First degree sexual assault is a Class B felony, which means without this section the maximum term of imprisonment for first degree sexual assault could not exceed 60 years.

§939.62 – Increased Penalty for Habitual Criminality

Under Wis. Stat. §939.62 a person may receive an increased penalty if that person is a repeater. An actor is a repeater if he or she was convicted of a felony during the five years prior to the commission of the crime for which he or she is currently being sentenced.[77] An actor also qualifies as a repeater if he or she was convicted of three misdemeanors during that same time period (five years prior to the commission of the current crime).[78]

Additionally, the term of imprisonment for a felony committed by a persistent repeater is life imprisonment without the possibility of parole or extended supervision.[79] An actor can be classified as a persistent repeater in two different situations. The first is when an actor has been convicted of a serious felony[80] on two or more occasions preceding the serious felony for which he or she is currently being sentenced for.[81] The second situation is where the actor has been convicted of at least one serious child sex offense[82] prior to the violation of the serious child sex offense he or she is currently being sentenced for.[83]

Other Possible Penalty Enhancers

The maximum term for imprisonment for a crime may also be increased if a dangerous weapon is involved,[84] if the crime was committed in a school zone,[85] or if the offender intentionally selects a victim based on race, religion, color, disability, sexual orientation, national origin or ancestry.[86]

5. Use of Attempt Charges

To convict a defendant of an attempted crime under Wisconsin Statute §939.32 the State must prove to elements:

- The defendant intended to commit the charged crime.

[76] Wis. Stat. §939.618(2)(b)
[77] Wis. Stat. §939.62(2)
[78] Wis. Stat. §939.62(2)
[79] Wis. Stat. §939.62(2m)(c)
[80] See Wis. Stat. §939.62(2m)(a)2m for the definition of a "serious felony"
[81] Wis. Stat. §939.62(2m)(b)1
[82] See Wis. Stat. §939.62(2m)(a)1m for the definition of a "serious child sex offense"
[83] Wis. Stat. §939.62(2m)(b)2
[84] Wis. Stat. §939.63
[85] Wis. Stat. §939.632
[86] Wis. Stat. §939.645

- The defendant did acts toward the commission of the crime which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime except for the intervention of another person or some other extraneous factor.[87]

A person can be charged with an attempt to commit a felony, which includes first through third degree sexual assault and first and second degree sexual assault of a child, or any of the other crimes listed in §939.32(1). The list provided in §939.32(1) is an exhaustive list, which means that Wisconsin law does not recognize the offense of "attempted fourth degree sexual assault."[88]

Attempt and a Fictitious Child:

Child Enticement

In *State v Robins*, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, the Wisconsin Supreme Court ruled that a conviction of attempted child enticement does not need to involve an actual child victim. The fact that, unbeknownst to the defendant, the child is fictitious is the extraneous factor that intervenes to make the crime attempted rather than completed child enticement. *Robins* affirmed previous Wisconsin Court of Appeals' opinions and essentially legalized internet "sting" operations conducted by law enforcement or government agencies. In *State v Grimm*, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, the Wisconsin Court of Appeals extended the reasoning in *Robins* to charges of attempted second degree sexual assault of a child when the child is fictitious.

Intentional Touching

Grimm also stated that attempted second degree sexual assault of a child by means of sexual contact involves the necessary attempt element of intent because sexual contact is defined by "intentional touching." *State v Brienzo*, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700 extended this to attempted second degree sexual assault of a child by means of sexual intercourse because sexual intercourse necessarily involves sexual contact, which involves intentional touching. The court in *Brienzo* held that "the crime of attempted sexual assault of a child by means of sexual intercourse is a crime known to law. A defendant may have the intent to engage in sexual intercourse and may engage in acts in furtherance of that intent. When he or she does, he or she is liable for that attempt."

As a result of the cases mentioned above, specifically *Robins*, in order for a defendant to be convicted of attempted second degree sexual assault of a child, through sexual contact or intercourse, the state must prove that the defendant believed the person he or she was communicating with was a child under the age of 16. This is necessary because the defendant's belief must match the element of the crime.[89]

[87] Wisconsin Criminal Jury Instructions, Attempt, #580, 2002.
[88] *State v Cvorovic*, 2001 WI App 101, 243 Wis.2d 117, 627 N.W.2d 548.
[89] Wisconsin Criminal Jury Instructions, Attempted Second Degree Sexual Assault of A Child, #2105B, 2005.

6. List of Potential Charges

Prosecutors should carefully consider a number of possible charges to enhance the prosecution's response to a sexual assault. A list of potential charges includes:

Crimes Against Bodily Security

- 940.22 Sexual exploitation by a therapist; duty to report
- 940.225 Sexual assault (first through forth degree)
- 940.285 Abuse of individuals at risk
- 940.295 Abuse and neglect of patients and residents
- 940.30 False imprisonment
- 940.302 Human trafficking
- 940.31 Kidnapping
- 940.32 Stalking

Crimes Against Sexual Morality

- 944.05 Bigamy
- 944.06 Incest
- 944.15 Public fornication
- 944.16 Adultery
- 944.17 Sexual gratification
- 944.20 Lewd and lascivious behavior
- 944.21 Obscene material or performance
- 944.23 Making lewd, obscene or indecent drawings
- 944.25 Sending obscene or sexually explicit electronic messages
- 944.30 Prostitution
- 944.31 Patronizing prostitutes
- 944.33 Pandering
- 944.35 Keeping place of prostitution

Crimes Against Children

- 948.02 Sexual assault of a child (first and second degree)
- 948.02(3) Sexual assault of a child – Failure to act
- 948.025 Engaging in repeated acts of sexual assault of the same child
- 948.05 Sexual exploitation of a child
- 948.051 Trafficking of a child
- 948.055 Causing a child to view or listen to sexual activity
- 948.06 Incest with a child

- 948.07 Child enticement
- 948.075 Use of a computer to facilitate a child sex crime
- 948.08 Soliciting a child for prostitution
- 948.085 Sexual assault of a child placed in substitute case
- 948.09 Sexual intercourse with a child age 16 or older
- 948.095 Sexual assault of a child by a school staff person or a person who works or volunteers with children
- 948.10 Exposing genitals or pubic area
- 948.11 Exposing a child to harmful material or harmful descriptions or narrations
- 948.12 Possession of child pornography
- 948.13 Child sex offender working with children
- 948.14 Registered sex offender and photographing minors
- 948.30 Abduction of another's child
- 948.50 Strip search by school employees
- 948.51 Hazing

Other

- Ch. 975 Sex crimes law
- Ch. 980 Sexually violent persons committed

7. Statute of Limitations Issues

The statute of limitations is the amount of time the state has to commence a prosecution after the commission of a crime. A prosecution has commenced when one of the following occurs:

- A warrant is filed
- A summons is filed
- An indictment is found
- An information is filed[90]

The statute of limitations typically starts to run when a crime occurs. The statute of limitations varies depending on the severity of the crime. The current time limitations for sexual assault and abuse crimes are as follows:

[90] §939.74(1)

Offense	Statutory Section for the Offense	Statute of Limitations	Statutory Reference
1st Degree Sexual Assault of a Child	948.02(1)	No SOL	939.74(2)(a)
Repeated acts of sexual assault of the same child	948.025(1)(a), (b), (c), or (d)	No SOL	939.74(2)(a)[91]
1st Degree Sexual Assault	940.225(1)	6 years	939.74(1)
2nd Degree Sexual Assault	940.255(2)	6 years	939.74(1)
3rd Degree Sexual Assault	940.225(3)	6 years	939.74(1)
Causing a child to view or listen to sexual activity	948.055	6 years	939.74(1)
Sexual exploitation by a therapist (*can be longer in some circumstances*)	940.22	6 years	939.74(1)
4th Degree sexual assault	940.225(4)	3 years	939.74(1)
Sexual intercourse with a child age 16 or older	948.09	3 years	939.74(1)
Exposing genitals or pubic area	948.10	3 years	939.74(1)
2nd Degree Sexual Assault of a Child	948.02(2)	Victim reaches age 45	939.74(2)(c)
Repeated acts of sexual assault of the same[92]	948.025(1)(e)	Victim reaches age 45	939.74(2)(c)
Sexual exploitation of a child	948.05	Victim reaches age 45	939.74(2)(c)
Incest with a child	948.06	Victim reaches age 45	939.74(2)(c)
Child enticement	948.07(1)-(4)	Victim reaches age 45	939.74(2)(c)
Use of computer to facilitate a child sex crime	948.075	Victim reaches age 45	939.74(2)(c)
Soliciting a child for prostitution	948.08	Victim reaches age 45	939.74(2)(c)
Sexual Assault of a child placed in substitute care	948.085	Victim reaches age 45	939.74(2)(c)
Sexual assault of a student by a school staff person	948.095	Victim reaches age 45	939.74(2)(c)
Child enticement	948.07(5), (6)	Victim reaches age 26	939.74(2)(cm)
Trafficking of a child	948.051	Victim reaches age 24	939.74(2)(d)

[91] IMPORTANT: Currently the Wisconsin Statutes are conflicting about the statute of limitations for this crime. Corrective legislation is pending. This chart reflects the authors' understanding of the legislature's intent.
[92] Id

DNA Evidence and Statute of Limitations
DNA evidence may extend a statute of limitations in some circumstances, the following must occur for the extension to apply:

- The state collected biological material before that statue of limitations expired
- The biological material is evidence of the identity of the person who committed the crime
- A DNA profile is identified from the biological material
- An identification of the offender is not available from the DNA profile at the time
- An identification of the offender (a "match" or a "hit") is later made from the DNA profile after the original statute of limitations expired

For first degree sexual assault (§940.225(1)), the state may commence prosecution of the person who is the source of the biological material at any time following a proper DNA identification.[93] For the following list of crimes, the state may commence prosecution within 12 months of proper DNA identification:[94]

- Second degree sexual assault – §940.225(2)
- Second degree sexual assault of a child – §948.02(2)
- Repeated acts of sexual assault of the same child – §948.025(1)(e)
- A crime related to a violation of first degree sexual assault of a child (§948.02(1))
- A crime related to a violation of repeated acts of sexual assault of the same child (§948.025(1)(a), (b), (c), or (d))

Crimes are related if they are:

- Committed against the same victim,
- Proximate in time, and
- Committed with the same intent, purpose, or opportunity so as to be part of the same course of conduct[95]

Tolling of a Statute of Limitations
When computing time limitations under §939.74, the time during which the actor was not publicly a resident with the state of Wisconsin or the time during which a prosecution against the actor for the same act was pending shall not be included.[96]

[93] §939.74(2d)(b)
[94] §939.74(2d)(b), (c), (d)
[95] §939.74(2d)(am)
[96] §939.74(3)

Past Abuses
The statute of limitations for certain sexual assault crimes against children have been changed many times by the legislature. In determining whether a particular statute of limitations has expired it is important to consider:

- Date of birth of the victim
- Date of the sexual assault
- The statute of limitations at the time of the offense
- The legislative history for the applicable statute of limitations

Legislative History for Statute of Limitations for Child Sexual Assault Crimes:
Careful research of legislative history provided below and review of relevant cases is required. This manual should not replace effective lawyering.

Act	Effective Date	Statute Of Limitations
1987 Wis. Act 332	July 1, 1989	Victim reaches age 21 or 6 years, whichever is later
1993 Wis. Act 219	April 22, 1994	Victim reaches age 26
1997 Wis. Act 237	June 16, 1998	Victim reaches age 31
2003 Wis. Act 279	May 1, 2004	Victim reaches age 45
2005 Wis. Act 276	April 20, 2006	No SOL for §948.02(1) and §948.025(1)(a)

There are two Wisconsin Supreme Court decisions that are important to determining the statute of limitations for cases involving past child sexual assault: *State v MacArthur*[97] and *State v Haines*.[98] *MacArthur* states that the statute of limitations for any sexual assault that occurred before 1989 is not altered by any future legislative amendments. Essentially, prosecutions are barred for assaults that occurred prior to July 1, 1989, unless some kind of tolling provision applies. *Haines* provides an example of how the amendments to the statute of limitations should be utilized and how to determine whether a statute of limitations has expired for an assault that occurred after July 1, 1989.

D. Further Investigation Issues

1. Is the Investigation Complete?[99]

[97] *State v MacArthur*, 2008 WI 72, 310 Wis.2d 550, 750 N.W.2d 910.
[98] *State v Haines*, 2003 WI 39, 261 Wis.2d 139, 661 N.W.2d 72.
[99] Material in this section was informed by the Sexual Assault Prosecution Manual (Adolescent and Adult Victims). Written by Fred Karasov, Senior Hennepin County Attorney. Published January 2006. Available online at: www.mcaa-mn.org.

It is important that the law enforcement investigation is complete before filing charges against the accused. Once charges are filed the investigation ceases. Before charging a case it is important to consider the following items (or lack of the following items):

- Formal statement from the victim
- Formal statement from all critical or potentially hostile witnesses
- Narrative statements from an other witnesses
- Formal statement from the suspect
- Documented and properly inventoried physical evidence
- Photographs (crime scene, victim's injuries, etc.)
- Medical evidence or a sexual assault examination
- Medical report from a Sexual Assault Nurse Examiner (SANE)
- Corroborating evidence (including a search warrant, if necessary)
- DNA, if available
- Prior record of defendant
- Other acts of the defendant
- Possible motives of the victim, witnesses, or suspect
- Anything that will corroborate the victim's story

Skilled prosecutors will address any problems or concerns before filing charges, as well as be prepared for the defense attorney's arguments. For more information, see the Racine County SART Case Review Checklist that appears in the Appendix of the Wisconsin Adult Sexual Assault Team Protocol, available online at http://oja.wi.gov/docview.asp?docid=16961&locid=97.

2. Search for Corroborating Evidence

Corroboration is essential to the prosecution. As part of the analysis of the case, the prosecutor should develop a time line that includes everything leading up to the assault, including what the victim and offender did after the assault. The prosecutor should then corroborate as many facts as possible to bolster the victim's credibility. This includes what is often called ***micro corroboration***, which includes even the smallest details of the story. Even these small details can help build the credibility of the victim. During this process, the prosecutor may determine that there needs to be additional investigation. While some of this may occur before filing the complaint, corroboration should not stop once the complaint is filed. Although certain avenues of investigation may be cut-off once the complaint is filed – i.e. interviewing the suspect – the prosecutor should not cease trying to corroborate as many facts as possible leading up to trial.

Potential areas of corroboration are discussed more fully in Chapter IV – Common Defense Strategies as well as in Chapter VI .

3. Search for Outside Witnesses/Other Victims

Searching for outside witnesses and other potential victims will also strengthen your charge. This is discussed more fully later in this chapter. See "Once the Complaint is Issued."

4. Multidisciplinary Teams

Multidisciplinary teams (MDTs) are a valuable tool in the successful prosecution of sexual assault cases. Multidisciplinary teams promote consistency and coordination by and between community agencies and departments, sexual assault centers and providers of care and services. Additionally, MDTs: (a) provide a comprehensive set of recommended "best" practice responses to sex crimes; (b) provide guidance to communities in strengthening the community response to sex crimes; (c) assist communities in the evaluation of their current policies and practices; (d) provide communities with a uniform response to sexual violence; and (e) support communities in holding perpetrators accountable for their actions. MDTs also enhance community safety. They do this by:

- Ensuring an approach that results in more comprehensive care, better access to support services, clearer communication between team members, higher rates of victim reporting and higher rates of successful prosecutions.

- Recognizing the importance of communication between and among other multidisciplinary teams to facilitate the transfer of services between jurisdictions.

- Providing a proficient fact-finding process which helps to ensure the apprehension, prosecution and conviction of the sexual offender. The use of consistent procedures and protocols provides the framework for the comprehensive investigation of each sexual assault report.

- Treating a victim of sexual assault with fairness, dignity, compassion and respect resulting in a victim who is more likely to support the investigation and prosecution processes. Stronger victim involvement results in an increase in the apprehension, prosecution and conviction of sexual offenders.

Other advantages to multidisciplinary teams are that:

- The evidence collection process will be more proficient and reliable

- The evidence will be preserved and presented as required in any subsequent prosecution

- The victim will be seen in a timelier manner

- The victim is also more likely to consent to the evidence collection process and receive appropriate follow-up care and information on resources

- MDTs provide support, advocacy, and information to help empower the victim to make informed choices about reporting the assault, medical care, evidence collection, and counseling.

- Reduce the victim's anxiety and increase the victim's participation in the multidisciplinary team process.

- Ensure the quality and integrity of the investigation, making it more likely that the goal of law enforcement: to apprehend the perpetrator of the sexual assault, will be achieved.

- Specially trained individuals on multidisciplinary teams minimize further trauma to child sexual abuse victims, promote healing of the child, and facilitate a successful prosecution.

By coordinating with the appropriate agencies, the prosecuting attorney will be well informed and will be in the best position to pursue a prosecution and hold the offender accountable.

The Wisconsin Adult Sexual Assault Response Team Protocol, published by the Wisconsin Office of Justice Assistance provides additional information on the benefits to prosecution participation in Sexual Assault Response Teams.

E. When Should the Prosecutor File Charges?

Prosecutors should carefully consider a number of issues in making a decision about the timing of filing charges. At the time that charges are filed, there are a number of investigative avenues that are closed. However, the investigation is not over because there are some activities (under certain conditions) that prosecutors can engage in to strengthen their cases even after charges are filed. This section presents a brief discussion of those considerations.

1. Considerations Before Filing

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense." "The Supreme Court has applied the Sixth Amendment right to counsel to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Dagnall*, 2000WI 82, ¶ 28. The Sixth Amendment right to counsel arises after a criminal complaint has been filed or an arrest warrant has been issued. *Id.* ¶ 30. After formal charges have been initiated, if the defendant has not retained an attorney or had one appointed to him for those specific charges,

"[t]he right must be 'invoked' by the accused to terminate police questioning." *Id.* ¶ 52. Fifth Amendment rights are still relevant, thus Miranda is still required. *Id.*

a) Contact with the Defendant

"After an attorney represents the defendant on particular charges, the accused may not be questioned about the crimes charged in the absence of an attorney." *Id.* ¶ 53. However, "an accused person may initiate contact with authorities without consulting his or her attorney," and any incriminating statements may be used if authorities can show that they were in fact, voluntarily given after initiation by the defendant. *Id.* ¶ 54. Further, the Sixth Amendment right attaches to the particular offenses charged. Therefore, the defendant may be treated as a "suspect" on uncharged crimes, unless the uncharged crimes serve "as a pretext to interview the accused about the crimes charged." *Id.* ¶ 55.

b) Law Enforcement Contact

In summary, if criminal charges have been formally initiated against a defendant and the defendant has retained counsel, law enforcement may not initiate communications with the defendant about those specific charges. If a defendant initiates the communications, the court has stated that "an accused's unsolicited contact with the police [will] be viewed with skepticism and will require authorities to show that incriminating statements were in fact voluntarily given." *Id.* ¶ 54.

c) Prosecutor Contact

Wisconsin Supreme Court Rule 20:4.2 states, "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." ABA comments on Rule 4.2 shed further light on what is required by attorneys. Comment [1] states the goal is to protect individuals "against possible overreaching by other lawyers." Comment [3] states the rule applies even when communication is initiated by the represented individual or the individual consents to the communications. Comment [4] states that Rule 4.2 does not prohibit communications if they concern matters outside the representation.

In the event a defendant is not represented by counsel, communications between a prosecutor and the defendant would still be restricted by SCR 20:3.8. Rule 3.8(b) requires a prosecutor to "inform the person of the prosecutor's role and interest." Rule 3.8(c) requires a prosecutor to "inform the person of the right to counsel … and shall give that person a reasonable opportunity to obtain counsel." Rule 3.8(d) restricts a prosecutor from providing legal advice, but does allow prosecutors to discuss the matter and negotiate resolutions, including the waiver of constitutional and statutory rights. Rule 4.3 is similar in its restrictions and requirements.

Therefore, if a prosecutor knows a defendant is represented by counsel, the prosecutor should not communicate with the defendant outside the presence of defense counsel. However, law enforcement officers are not restricted by the Supreme Court Rules regarding ethical conduct for

attorneys. Thus, in situations where a prosecutor would be ethically prevented from communicating with a defendant, law enforcement officers may have such communications, needing only to look at the constitutional restrictions described above.

d) Voluntary Disclosure by Defendant

A defendant who has retained counsel after formal charges have been brought may provide admissible statements to law enforcement officers outside the presence of his or her attorney if the defendant initiated those communications and they were voluntarily given. However, certain procedural safeguards should be performed to ensure the admissibility of those statements. First, all communications should be recorded. The recordings should note that the defendant initiated the communications with law enforcement and that the statements were voluntarily given. Second, after being contacted by the defendant, the defendant should be read the Miranda warnings. Third, law enforcement should again clarify the situation. They should obtain voluntary verbal and written statements made by the defendant that he understands his rights, has waived his rights, has initiated the communications, and that he wishes to speak with law enforcement outside the presence of his attorney.

If a defendant has retained counsel, prosecutors should not communicate with the defendant outside the presence of defense counsel. If a defendant wishes to speak with a prosecutor, the prosecutor should contact the defendant's attorney and request the attorney's presence during any communications.

Sixth Amendment limitations might be relevant considerations when deciding when to formally initiate criminal prosecutions. Access to the defendant will be severely restricted. That restricted access could impede further investigation and possibly prevent a defendant from voluntarily confessing.

2. Timing of Filing the Complaint

The decision when to file a criminal complaint in a sexual assault case requires balancing several factors. On the one hand, it is desirable for the investigation to be complete before filing the criminal complaint as law enforcement investigation efforts tend to cease after the complaint is filed. While a prosecutor should not give up on investigation and corroboration after the complaint is issued, certain avenues of investigation – namely access to the defendant – will be cut off.

On the other hand, safety concerns for the victim may weigh in favor of issuing the complaint quickly due to the availability of no contact orders and other bond restrictions. Much of this will depend on the facts of the particular case. However, prosecutors should carefully balance the desire for a full and complete investigation with safety concerns of the victim when deciding when to issue a criminal complaint in a sexual assault case.

3. No Contact Orders: Wisconsin Stat. § 940.47[100]

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:

Wisconsin Stat. § 940.47. Court Orders
Any court with jurisdiction over any criminal matter, upon substantial evidence, which may include hearsay or the declaration of the prosecutor, that knowing and malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, may issue orders including but not limited to any of the following:
(1) An order that the 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 victim, except through an attorney under such reasonable restrictions as the court may impose.

4. The Investigation is Not Over Once a Complaint is Filed

Although once the defendant has been charged many issues are closed to a prosecutor, there are still many things that need to be investigated and/or corroborated before the case proceeds to trial. Once a defendant is charged in a complaint, investigators will no longer be able to gain any information from the defendant. Likewise, the defendant's friends and family and even the victim's friends may become less cooperative knowing the case is now in the court system and they may called upon to testify or "take sides."

But there are still many things that can be done from the victim's standpoint if they were not done prior to the complaint being filed. Continue to find ways to corroborate the victim's statements and behavior through such things as phone records, e-mails and internet postings, medical records, witnesses who have not yet been contacted by police, and anything else that can either corroborate the victim's statement or discredit the defendant's.

[100] This section was informed by information contained in the Wisconsin Domestic Violence Prosecution Manual, 2004. Available online at: http://oja.wi.gov/docview.asp?docid=11685&locid=97.

Often in sexual assault cases, the post-assault behavior of the victim can help corroborate that something traumatic happened. Continue to be in contact with the victim to look for things such as school records verifying a drop in attendance or grades, counseling appointments or post-traumatic stress disorder symptoms, employment status or problems, relationship problems, and anything else that can verify something traumatic happened to the victim.

Although once the defendant has been charged many issues are closed to a prosecutor, there are still many things that need to be investigated and/or corroborated before the case proceeds to trial.

The defendant's background can also be investigated. The police may not have had time to completely investigate the defendant. Any prior cases involving sexual assault or domestic violence can be further investigated for a potential other acts motion. The defendant's friends, relatives, past girlfriends, or co-workers may have helpful information to the case and should be contacted if at all possible.

F. Special Tips to Ensure a Victim-Centered Response

A victim-centered approach to prosecution emphasizes the need to protect the victim's safety and dignity throughout the justice process. Prosecutors play a pivotal role in ensuring that the victim's are heard and treated respectively. Use of the following strategies will not only maximize success for the prosecution, they will also prevent re-traumatizing the victim and ensure that victims have equal access to justice.

1. Multidisciplinary Teams

Prosecutors are strongly encouraged to utilized Multidisciplinary Teams or SARTs to inform the investigation and prosecution. The benefits of prosecution participation in MDTs and SARTs has been described in detail in this document. Additional information on SARTs is available in the Wisconsin Adult Sexual Assault Response Team Protocol, available online at: http://oja.wi.gov/docview.asp?docid=16961&locid=97.

2. Vertical Prosecution

Vertical prosecution is a practice where one prosecutor is assigned to a particular case from start to finish, or from "cradle to grave." The same prosecutor will handle the case from the time it is submitted for prosecution until the trial, sentencing hearing, or possibly until the offender's

probationary period is over.[101] The alternative, horizontal prosecution or the rotational method, may involve many different prosecutors throughout the different stages of a prosecution.

Vertical prosecution has been used in many different contexts, such as gang member prosecution, cases involving juvenile victims or juvenile offenders, domestic abuse, statutory rape and other sexual assault prosecutions. Many times specialized vertical prosecution units will be created within a state or county to address one specific category of crimes.[102] This strategy is intended to improve prosecutor expertise, responsiveness, and care.[103] Although horizontal prosecution is used more frequently, there are many benefits associated with vertical prosecution, particularly in sexual assault cases.

Advantages to Vertical Prosecution

The main advantage of vertical prosecution in sexual assault cases is to provide support to the victim. Vertical prosecution ensures that the victim only has to tell his or her story and history to one prosecutor. Prior to vertical prosecution, victims would rarely see the same prosecutor twice and would have to retell the events of the abuse over and over again.[104] Dealing with a single prosecutor helps to create an atmosphere of trust between the victim and the prosecutor.[105] Victims are able to become familiar with the prosecutor and are not required to meet a different legal professional at each stage of the trail.[106]

Vertical prosecution of sexual assault cases means the same prosecutor, who has specialized training in sensitive crime issues, is assigned to the case from beginning to end.

There is also a legal advantage in having one prosecutor who is very familiar with the details of a case. A single prosecutor will provide consistent and continuous case processing.[107] Additionally, individual prosecutors will have a personal stake in the outcome of a case when he or she takes it from start to finish.[108] It will also prevent the loss of critical information during a transfer and ensure efficiency.[109] At minimum, vertical prosecution does not allow a defendant an advantage by having the same defense attorney throughout a case.

States, communities, and citizens benefit from vertical prosecution as well. This method allows for resources to be focused and consolidated in one prosecutor and one research team.[110] Vertical

[101] Strack G and Hyman E. Your Patient, My Client, Her Safety: A Physician's Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence." *DePaul Journal of Health Care*, Fall 2007.
[102] Levine, K. L., The New Prosecution. *Wake Forest Law Review*, 2005.
[103] Levine.
[104] Strack.
[105] http://www.da-tulareco.org/domestic_violence.htm
[106] http://www.ndaa.org/publications/newsletters/apri_update_vol_12_no_3_1999.html
[107] Carter, Madeline, Kurt Bumby, and Thomas Talbot, "Promoting Offender Accountability and Community Safety Through the Comprehensive Approach to Sex Offender Management," *Steton Hall Law Review*, 2004.
[108] Mason, Kari A., "The Three Ps – Prosecution, Problem-Solving, and Prevention," *Prosecutor*, July/August, 2006.
[109] Carter.
[110] Mason.

prosecution may also improve efficiency, which would result in utilizing fewer resources and less time for each case. It sends a message that the prosecution will stand firm and may increase the opportunity of obtaining meaningful consequences and successful rehabilitation.[111]

3. Meeting with the Victim is Essential

It is recommended that prosecutors meet with the victim prior to making a determination about whether or not to charge the offender. Meeting with the victim gives prosecutors a feel for the case they cannot get just reading reports. Meeting with the victim is also part of being victim-centered and demonstrates to the victim that the prosecution is taking the case seriously.

If the prosecutor's office has a policy of meeting with the accused prior to charging or declination, the prosecutor should always meet with the victim prior to meeting with the defendant or defense attorney. It is necessary that a law enforcement witness be present during any interviews with the victim if any facts of the case will be discussed. Failure to have a witness present could result in the prosecutor becoming a witness. In addition, law enforcement personnel will memorialize for purposes that include mandated discovery any factual assertions by the victim that may need to be disclosed to the defense in a prosecution. Prosecutors should determine who will attend the meeting so that all individuals present will aid in the investigation and prosecution of the case and secure the presence of a witness who can testify at any hearing, and at trial concerning information disclosed by the victim during meetings.

Include Community Based Advocates
Meetings with victims should include a community based advocate whenever possible. An advocate can provide emotional support to the victim and encourage the victim to share details that are important to reviewing and potentially charging the case. Advocates maintain a privilege not to disclose communication between the advocate and the client. Advocates, therefore, can not be used by the prosecutor as a witness to document the facts discussed by the victim during meetings.

Meetings with victims should include a community based advocate whenever possible.

Interviewing the victim provides an opportunity to review the case from the victim's perspective, explain the process, uncover details that may have been overlooked in the initial investigation, and determine what outcome the victim is seeking. Creating a safe environment for the victim to explain all relevant facts and her/his perspective regarding the sexual assault is essential to obtaining a full picture of the case. To ensure the best outcome, prosecutors should:

- Allow adequate time for the interview.

[111] Backstrom, James C. and Gary L. Walker, "The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community," *William Mitchell Law Review*, 2006.

- Conduct the interview in a place where the victim feels safe and able to speak freely.
- Ensure that the defendant is not present or in the vicinity.
- Adopt a "seeking to understand" perspective in questioning the victim.
- Review the victim's rights and explain the victim's role in the prosecution process, including the rape shield law, preliminary hearing, plea, trial, potential settlement, etc.
- Inquire about any threats suspects have made toward victims and respect and support the victim's efforts to maintain their safety.

A victim-centered approach also means that prosecutors should support victims who choose not to cooperate in moving the case forward.

4. Communicable Disease Protections

In sexual assault criminal actions victims have the right to request the district attorney to apply for a court order requiring the defendant to submit to a test for sexually communicable diseases. §§ 950.04(1v)(d) and 968.38. The district attorney shall seek the order as soon as possible, § 968.38(3), which can be as early as the initial appearance, § 968.38(3)(a), or as late as post-conviction, § 968.38(3)(c). "If the court finds probable cause to believe that the defendant has significantly exposed the victim or alleged victim, the court shall order the defendant to submit to a test." § 968.38(4).

Probable cause to believe a defendant significantly exposed a victim was found in a case where the defendant sexually assaulted a teenage boy. *State of Wisconsin v. Parr*, 182 Wis. 2d 349, 366, 513 N.W.2d 647 (Wis. Ct. App. 1994). In *Parr*, the court noted the presence of probable cause from the victim's detailed and plausible account of a sexual assault and the presence of physical evidence corroborating the story. *Id.* at 365, 366. "Significantly exposed," defined in detail in Wis. Stat. § 252.15(1)(em), essentially covers sexual contact leading to a transfer or secretion of fluid.

5. Interviewing Victims and Witnesses

Interviewing witnesses and victims of crimes is an important part of the criminal justice system. A great deal of factual information comes from interviews, so it is important for prosecutors to work diligently at their interviewing techniques and skills.

Preparation

Preparation is the key to a successful interview. Prior to any interview, the interviewer should attempt to learn as much background information about the interviewee as possible. This will help to personalize the interview and may also help the interviewer better understand certain answers or descriptions. Preparing questions before hand is a necessity, however an interviewer should be flexible and not stick too rigidly to the prepared questions. The interviewer should let the interviewee dictate the flow of the interview and ask relevant follow-up questions. It may be useful to rank questions from most important to less important beforehand. Be sure to go over the most important questions during the interview, while possibly saving the lesser questions for another time. Allowing the interviewee to construct a narrative may lead to useful information that the interviewer could not have obtained through a planned question.

Silence[112]

In a social situation silence can be uncomfortable and many times people will jump to fill it. The same is true in a legal interview. The goal is not to make the interviewee uncomfortable, but if the interviewer remains quiet at certain points, the interviewee may break the silence and volunteer additional information. Also, allow an interviewee time to think if he or she does not remember something right away. An interviewer could ask what or who would help the interviewee remember. Do not rush the interviewee and be sure there are not any interruptions or distractions during the scheduled interview time.

Active Listening[113]

Active listening involves more than just sitting silently as another person speaks. It does not involve interruptions and interjections, it is an active engagement with a person as he or she speaks. An active listener is supposed to hear what is being said, but also try to place himself in the story. It is important to be empathetic and understanding. The listener should also communicate his or her understanding of the situation back to the speaker. A listener should be hearing more than just spoken words, the meaning and feelings behind the words are also important. Tips to improve active listening skills:

- Convey a desire to help.

- When seeking more information from an interviewee, do so in an empathetic manner, ask for help rather than asking accusatory questions.

- Explain why probing and personal questions will be helpful to you, probing for no apparent reason may make a person defensive.

- Open-ended questions are more effective than "cross-examination" questions. A lawyer should be seeking information not merely a "yes" or "no" answer.

[112] Dessem, R. Lawrence, *Pretrial Litigation*, Thompson/West, 2008.
[113] Shaffer, Thomas L. and James R. Elkins, *Legal Interviewing and Counseling*, Thompson/West, 2005.

- Let the interviewee set the pace of the interview.

Questions[114]
An interviewer needs to be aware of the questions he or she asks a witness or a victim. It is important to gather facts, but falling into a question-answer pattern may not elicit the full story. An interviewee may come to rely on being prompted by a question from the interviewer instead of volunteering information freely. Also, it is best to avoid the "why" questions when conducting a friendly interview. These questions connote blame and disapproval. Therefore an interviewee may feel he needs to defend his actions when asked a "why" question.

Non-verbal Communication[115]
Witnesses and victims may also speak to interviewers through non-verbal communication and it is important for an interviewer to be cognizant of these non-verbal cues. Non-verbal communication may include posture, facial expressions, tenseness, stance, appearance, gait, eye contact, etc. It is also important for an interviewer to be aware of his or her own non-verbal cues when communicating with another person. If the goal is to make that person feel comfortable, this must be done through all possible avenues. The non-verbal cues mentioned previously are important, but an interviewer must also consider seat arrangement and office set-up.

Sensitive Subjects[116]
It may be difficult for a person to talk about certain subjects, such as sexual assault. If this is the case, an interviewer should not immediately ask the details of the sensitive subject. It is best to begin with less sensitive topics such as employment, place of residence, or school attended. When it is time to ask about a sensitive subject, be sure to acknowledge the sensitive nature of the information. It is also helpful to explain why the information is relevant to the legal process.

6. Victim Privacy Issues

In the aftermath of a sexual assault, one of the most pressing concerns a victim has is the concern over privacy. A large part of this is due to the unique, highly personal nature of the crime. However, we also know that there a variety of negative stereotypes about victims of sexual assault which further necessitate a concern for privacy. Prosecutors should be aware that privacy concerns may be predominant in many victims' minds and they should work to protect victim privacy wherever possible.

However, because prosecutors are also required to turn over exculpatory evidence to the defense, prosecutors are not always in a position to guarantee victim privacy. This is all the more reason why it is critical to meet with a victim before making the charging decision. Providing victims

[114] Shaffer.
[115] Shaffer.
[116] Dessem.

with the limits of what a prosecutor can keep confidential reduces the possibility of confusion down the road if the prosecutor is in a position to turn over certain evidence to the defense. However, even if the prosecutor is required to turn over certain evidence to the defense – photos for example – there may be safeguards the prosecutor can put in place to prevent further revictimization.

Listed below are some ways a prosecutor can protect victim privacy.

Privilege Statutes
There are several sources of privilege found in the Wisconsin statutes. These include: therapist-patient and sexual assault victim advocate and victim privilege. When possible, prosecutors should resist defense efforts to gain access to this protected information. There are certain situations in which the defense may be able to access otherwise privileged communications. This is described in much greater detail in the Discovery Issues section of the Pre-Trial Strategies Chapter. However, in these situations, prosecutors should hold the defense to their burden under the relevant case law, see *State v. Green* et. al. For additional information, see Discovery Issues in the Pre-Trial Chapter.

Prosecutors should also pay close attention to Wis. Stat. § 905.12 which states "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Rape Shield
Rape Shield is discussed in much greater detail in the Pre-Trial Strategies Chapter. However, prosecutors should be resisting defense attempts to introduce this type of inflammatory and prejudicial evidence.

Sealing Records During or After a Case
Prosecutors should consider filing motions to seal documents in cases involving child pornography/child sexual assault cases in which there is photographic or video evidence of children engaged in sexually explicit conduct. Additionally, if prosecutors are filing Other Acts motions that may contain identifying information about other victims of sexual assault, the prosecutor could consider filing a motion to seal the supporting documents that contain identifying information. Prosecutors could then use the initials of the victim(s) and date of birth in the brief/motion supporting the introduction of Other Acts evidence.

Discovery Protective Orders
Wis. Stat. § 971.23(6) provides for the court to issue protective orders surrounding discoverable evidence. This may be particularly useful regarding the use of sensitive photos. Discovery Protective Orders are discussed further in Pre-Trial Strategies. Prosecutors should discuss with the victim about what to do with sensitive photos, which should include a discussion of not using the photos at trial. The victim should be informed that if photos are used, they may have to be

turned over to the defense. In cases in which photos must be turned over to the defense, a Discovery Protective Order should be requested by the prosecutor. This could include a request that the defense attorney will maintain possession of the photo, will not reproduce the photos, and will return them to the state once the case is concluded. ***Prosecutors should be creative in the use of these limiting orders. This is an opportunity for prosecutors to protect victim privacy.***

Non-disclosure of identifying information – Wis. Stat. § 904.13 governs the disclosure of victim and family address and employment information. This information is prohibited from disclosure unless it meets the relevancy criteria under § 904.01. Prosecutors are required to object to the disclosure of this evidence if they believe the evidence is not relevant.

7. Detective Perspectives

The investigating detective is not immune from falling prey to the myths and biases surrounding sexual assault cases, any more than is the prosecutor, the judge, or the jury. Sometimes those "negative" or judgmental views can find their way into the text of the detective's police reports. Even worse, they may affect whether the detective puts forth the required effort and conducts a thorough investigation. If, at the outset, the detective decides that the case is false, he/she may slack off on the investigation, seeing it as a waste of time and resources.

This is not acceptable. Knowing what we do about sexual assaults – that truth is stranger than fiction – no sexual assault report should ever be dismissed or deprived of a fair and full investigation on the basis of anyone's initial reaction to the facts. Offenders count on such responses, and our falling prey to them – whether it is the investigating Detective or the prosecutor – it amounts to playing into the offender's hands.

Implications for Prosecutors
Victims will only receive equal access to justice when law enforcement and prosecution are on the same page and work together. Prosecutors are well positioned to educate law enforcement about the realities of sexual assault and the need to adopt a victim-centered, offender-focused approach. The following recommendations are examples of how prosecutors can work with law enforcement to ensure that the investigation is conducted within this context.

- Insist on a full and fair investigation regardless of the detective's views. A full and fair investigation will reveal a false allegation if it is, in fact, one of those rare cases just as a full and fair investigation reveals a false report of arson or a false report of a burglary. But a halfway investigation does not do justice to the true report, and rewards the offender for preying upon the myths. Poisoning an investigation by insinuating that the victim is a liar, or by not taking the case seriously is an excellent weapon of the offender.

- Review police reports carefully. Opinion information should not be in the text of a police report. This would include opinions that the victim is being truthful, as well as opinions that he/she is lying. That is not to say that, if a victim ***tells the officer*** that he/she was not forthcoming about a fact or omitted a fact, that should not appear in the report, but such information should be included along with the victim's explanation for why it was wrongly reported or omitted in earlier discussions, as well as the fact that the victim brought out the correct information. The police report should not become a weapon used by the defense to attack victim credibility on the basis of the opinion of the investigating officer, and including such opinion statements opens the door to that sort of inappropriate and unfair attack.

  In addition, such opinions could affect the ability of the victim to receive crime victim compensation. This is a significant impact on a victim, who may have had to endure lengthy and expensive medical treatment or other treatment as a result of the crime. A too-quick judgment, inappropriately placed in a police report that operates to deny a legitimate victim of needed funding and support is a terrible result. In either case, if a Detective is routinely putting this kind of information into reports, you may need to have a conversation with him/her about why that type of information, while important, should be reserved for his/her conversation with you. In addition, when you have training opportunities, explain what you want to see in police reports and why you do or do not want to see certain kinds of information, like opinions about truthfulness, in those same reports.

- Solicit detective's opinions in making charging decisions. A detective's opinions, however, are important to know and to consider in reaching decisions about whether and/or how to charge a case. They may reveal potential juror issues that could result in difficulties in the prosecution. They may illustrate the need for additional evidence to enhance victim credibility or to explain common, but often misunderstood, victim behavior. The opinions of an experienced detective should always be appreciated. Getting those opinions prior to speaking with the victim may help you address potential problems and issues with her and may result in a different decision than what might have been reached without that input. Or, that information may reveal ways in which you can focus and turn the case toward the offender.

V. Pre-Trial Strategies

A. Motion Practice

Careful thought and planning at the initial decision/charging phase needs to occur with respect to anticipating defense strategies and preparing motions in limine in anticipation of trial. Issues that commonly occur in sexual assault cases include attempts by the defense to make the victim the center of the trial. A standard motion in limine in a sexual assault prosecution should address that the Court prohibit:

- The introduction of rape shield evidence (section 972.11(2)
- The introduction of specific instances of conduct of the complaining witness by extrinsic evidence
- The defense from introducing, or attempting to introduce, evidence of the defendant's out-of-court statements through the State's witnesses
- The introduction of any confidential or privileged evidence about the complaining witness that is in possession of the defense prior to the court ruling on the relevance and admissibility of the evidence

Information concerning rape shield evidence needs to be investigated by law enforcement in advance of charging, and should also be discussed in detail when meeting with the victim.

Similarly, investigation by law enforcement and conversation with the victim needs to take place regarding knowledge by witnesses or the defendant concerning impeachment evidence which may be admissible under 906.08 as specific instances of conduct that are relevant to the victim's credibility.

It is also vital to the successful prosecution to understand the significance of the impact of specific instances of conduct of the victim and its potential impact on the jury and the trial. Case law indicates that the introduction of rape shield evidence may be admissible both on cross examination of the victim and by extrinsic evidence of a prior inconsistent statement. See *State v. Pulizzano*, 155 Wis. 2d 633, 653, 456 N.W.2d 325 for a discussion of the interplay between 906.08(2), 972.11(2) and 906.13(2) Wisconsin Statutes.

Determine if investigation about specific instances of conduct concerning the defendant's behavior, especially in the context of other acts evidence as it relates to the offender's sexual offense history, has taken place. Evaluate its admissibility at trial at the earliest stages of the review for prosecution. In cases where the prosecutor believes that other acts evidence may be admissible, prosecutors should file with the court a thorough affidavit, motion, and brief in

support of the motion concerning matters related to other acts evidence and the basis for its admissibility both in the State's case in chief and in cross examination of the defendant and other witnesses for the defense.

Please see sample motions/briefs included in the Appendix. However, these sample motions are only a starting point. Firm understanding of the law and cases cited is necessary for effective and successful argument of the motion in court. Effective lawyering requires a full understanding the motion filed.

1. Specific Instances of Conduct - §906.08 Evidence

Section 906.08(1) of the Wisconsin Statutes allows the credibility of a witness to be attacked through reputation or opinion evidence. See *State v. Cuyler*, 110 Wis. 2d 133, 138, 327 N.W.2d 662, 665 (1983). However, the scope of the § 906.08 allowance is limited to the character of a witness for his or her truthfulness or untruthfulness. *Id.*

Except for an accused testifying on his or her own behalf, reputation or opinion evidence supporting the truthful character of a witness is only admissible after the truthful character of that witness was previously attacked. § 906.08(1)(b).

Opinion evidence of a witness's truthfulness or untruthfulness can be excluded if the witness giving the evidence lacks personal knowledge. § 906.02. See also *Cuyler*, 110 Wis. 2d at 139. It may also be excluded for reasons set forth in § 904.03. *See also Cuyler*, 110 Wis. 2d at 139. However, opinion evidence does not require (a) familiarity with the community of the person about whom one will be testifying, (b) any specific length of acquaintance, or (c) recent knowledge. *Cuyler* at 139.

Section 972.11(2), deals with the sexual conduct of a complaining witness, limits and/or qualifies § 906.08(1).

Section 906.08(2) deals with specific instances of the conduct of a witness when offered for the purpose of supporting or attacking a witness's credibility. Specific instances of conduct are admissible in limited circumstances. One circumstance that allows inquiry into specific instances of conduct is on cross-examination when probative of truthfulness or untruthfulness and not remote in time. (§ 906.08(2)). See *State v. Missouri*, 2006 WI App 74, ¶¶ 20-21, 291 Wis. 2d 466, 477-478, 714 N.W.2d 595. Specific instances of conduct may not be proven by extrinsic evidence, § 906.08(2), and they may not "be inquired into on direct examination in the guise of qualifying a witness, *State v. Spraggin*, 77 Wis. 2d 89, 102 n12, 252 N.W.2d 94 (1977). Thus, establishing the foundation upon which a witness has based his/her opinion of the truthfulness or untruthfulness of another witness cannot be laid through specific instances of conduct. *Id.*

Prosecutors should also use provisions in the Rape Shield law to protect victims. Section 972.11 (2), dealing with the sexual conduct of a complaining witness, limits and/or qualifies §906.08 (2). For additional information, see Chapter V, Pre-Trial Strategies, Section H – Effective Use of the Rape Shield Law, and Chapter VI, Trial Strategies, Section G – Evidentiary Issues.

B. Expert Testimony

The expert is in court for one reason: to educate. Sec. 907.02 allows the State to use anyone with knowledge, training, education, or experience to introduce evidence of victims' behaviors in a sexual assault case. The best expert witnesses are people who have experience with sexual assault victims: psychologists, psychiatrists, social workers, and other mental health professionals as well as community based victim advocates, law enforcement professionals, and counselors.

Why use experts?
Many jurors believe societal myths about rape discussed in the earlier Pre-Charging Chapter. It is difficult for a prosecutor to try to explain them in the course of a trial is because the prosecutor is seen as an advocate in the case. Victims may also be unable to completely explain their counter-intuitive behaviors, and even if they can jurors will be less likely to believe them because victims have an interest in the outcome of the case.

Role of the Expert Witness
The role of the expert in a sexual assault case can include more than simply providing courtroom testimony. The expert can also assist the attorney by:

- Review and assessment of records
- Determine whether standard procedures followed appropriately
- Interpretation of records
- Writing an expert report to outline issues
- Identifying the need for other expert witnesses
- Explaining common, yet counter-intuitive victim behaviors such as failing to fight, delayed reporting, inconsistent statements, blaming oneself for the assault, loss of memory, etc.
- Overcoming the "CSI effect"

Discovery Requirements
For prosecution and defense discovery requirements relating to expert witnesses, please see 971.23. This should include a CV of any expert witness you intend to use at trial.

1. Expert Testimony by Medical Professionals

It is very important that any medical professional who testifies in a sexual assault case regarding the examination of the victim (or suspect) and the forensic evidence collected have specialized training and experience. It is also very important that a medical professional has knowledge and understanding of current research and its limitations. Forensics is an ever evolving science, and much of its inquiry and knowledge base is relatively new. The first case of DNA being used to solve a crime was in 1986. The use of SANE to assess victims of sexual assault began in the 1970's.

Jurors and others expect the medical professional to be able to "diagnose" a sexual assault and it is important to note that this is impossible. However, the medical professional can conclude whether there is evidence of sexual contact and/or recent trauma. The forensic examiner can also make a conclusion regarding consistency between the physical findings and the victim's account of what happened. It is critical that the medical professional provide a non-biased opinion.

Medical professionals may also assist in overcoming the "CSI effect." Jurors often have unrealistic expectations regarding what evidence can be collected in a sexual assault case. These expectations are based on what they see on television and in the movies. A SANE can explain the realities of the process and correct false assumptions regarding DNA and other types evidence collected during the examination of the victim (or suspect).

Jurors also expect that the true victim of sexual assault should have physical injury which can be seen, documented, photographed. Most victims of sexual assault do not sustain significant injury and the SANE can assist in explaining why there is often a lack of injury in sexual assault.

Locating a SANE
The Wisconsin Coalition Against Sexual Violence has a SANE Faculty whose members have been training new SANE from throughout the state of Wisconsin for more than a decade. The WCASA SANE Faculty have a total of 75+ years of experience in assessing victims (and suspects) of sexual assault. You can reach them through www.wcasa.org.

2. Expert Testimony by Law Enforcement

Law enforcement professionals with extensive experience with sexual assault cases and victims can provide the jury with information about victim behaviors that may be seen as confusing or unexpected. They can testify to the dynamics of sexual assault perpetrators, including their motivations and methods used to identify potential victims and commit the crime. ***It is highly recommended to use someone other than the person responsible for investigating the case at trial.***

3. Expert Testimony by Victim Advocates

Victim advocates can be asked to testify based on their experiences with common reactions of sexual assault victims. They can also play an important role in dispelling common rape myths. ***The victim advocate serving as an expert should not be the advocate who worked with the victim personally.*** This will protect the confidentiality of privileged communications and allow the advocate working with the victim to continue providing direct services throughout the court process.

Locating a Victim Advocate Expert
A list of Sexual Assault Service Providers is included in the Appendix. For additional assistance, please contact the Wisconsin Coalition Against Sexual Assault at www.wcasa.org.

4. Relevant Case Law

Wisconsin case law supports the use of expert testimony in sexual assault cases.

State v Jensen
State v. Jensen, 147 Wis. 2d 240, 432 N.W.2d 913 (1988) is a case that holds that the State can use an expert witness to give an opinion that the victim's behavior is **consistent with** victims of the same type of crime. The witness cannot testify to the truthfulness of the witness, only that their behavior is consistent.

The State should seek to introduce a *Jensen* expert to explain the types of behaviors exhibited by sexual assault victims, and then compare those behaviors to the victims in the present case and offer an opinion that those behaviors are consistent with known victims of sexual assault.

State v Rizzo
State v. Rizzo, 250 Wis. 2d 407, 640 N.W.2d 93 (2002), holds that if the State uses an expert to introduce *Jensen* evidence, and that expert has personally seen the victim as a therapist or counselor, the defendant may be able to have their own expert perform a psychological evaluation of the victim. This can easily be avoided by using an expert who has not personally seen the victim to introduce *Jensen* evidence.

5. Working with an Expert

Expert testimony can play an important role in educating the jury about the realities of sexual violence, but their success in the courtroom is dependent in large part on how prepared they are. Recommendations include:

- Consult your expert in a timely manner. Your expert will need time to review materials, research and prepare their testimony.

- Provide your expert with materials to be reviewed in a timely manner. Make sure that the materials provided are legible. Provide transcripts of 911 tapes which are not clearly audible.

- Meet with your expert prior to trial.

- Ask your expert if visual aids might be helpful in their presentation. Visual aids may include drawings, diagrams and Power Point presentations.

- File a motion before trial to ensure that the judge allows the expert to testify and that any issues related to expert testimony can be resolved prior to trial.

- Compensation for expert witness testimony should be reasonable and commensurate with the time and effort involved.

6. Tips for Introducing an Expert

- Start with qualifying the expert's experience, education, or any other relevant qualifications.

- Identify a rape myth, for example, "Do most victims fight back during a rape?"

- Ask the expert to explain the myth, reasons behind the behavior.

- Use statistics, research, and personal experience with clients.
- Ask the expert if this victim's behavior is "consistent with" known victims of sexual assault.

A review of the impact of trauma on sexual assault victims will assist prosecutors in preparing for expert testimony. See Chapter III, Pre-Charging Issues, Section A - Traumatic Responses to Sexual Assault. Also see Chapter VI, Trail Strategies, Section E – Direct Examination of Expert Testimony. Also helpful is *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* published by the American Prosecutors Research Institute.[117]

[117] Jennifer G. Long *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecution.* Published by the American Prosecutors Research Institute. August 2007. Available online at: http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

C. Exhibits

Whenever possible, it is good to use exhibits that are available and appropriate at trial. Exhibits help a jury understand a point more clearly, and they provide needed help in focusing the jury on what is important (and in staying awake). They can often go back to the jury during deliberations if requested. In sexual assault cases you may want to utilize the following kinds of exhibits:

- Physical evidence from the scene, along with photos of the scene itself. Even the smallest details of corroboration can make or break the credibility of a victim in a sexual assault case, showing that the "stuff" of the scene is as the victim has described is valuable to the jury. In cases where there is evidence which reveals an element of the crime – like the use of force – the investigative significance of this can be highlighted by your detective or other professional

Exhibits can help strengthen your case by showing tangible evidence that corroborates the victim's account of the assault.

Even the smallest detail will add to the credibility of the victim.

- Photos of obvious injury, disheveled appearance, torn clothes, etc. can be used to demonstrate elements of coercion or force. The items themselves may also reveal this

- Paper documents, like medical records or business records, can be helpful to establish objective information pertaining to victim and/or defendant appearance, height/weight, when a particular person was present at a place, use of a credit card or alias, attendance at school, etc. Cell phone records can also establish that there was contact, when, and sometimes even where. Texts can be blown up and shown to a jury

- Surveillance videos can establish who was where when and also what they were doing and wearing

- Computer records can show the existence of communications between persons, as well as establish certain interests of a defendant

- Diagrams of the scene or of portions of medical exams can be helpful to show where significant objects or injuries were located

- Film or video may exist of the victim (taken by the defendant) that may establish the connection to the defendant or even establish a crime. This includes: (a) still photos or video taken on a cell phone; (b) a search warrant execution that shows the defendant's home or storage area that can corroborate a victim's information or reveal important information about the defendant; (c) when pornography has been used with a child, the

portions of the film the child is able to describe, or the jacket or title of the film may serve to corroborate the victim

- Audiotapes can reveal not just what was said, but how it was said, and provide important demeanor evidence. Consider 911 tapes, forensic interviews and defendant statements, including tapes of calls made by the defendant while incarcerated, which often contain admissions or efforts to manipulate or bribe witnesses or manufacture evidence

- Charts can be extremely helpful to explain difficult concepts, to organize evidence, to summarize evidence or to demonstrate a chronology. Consider charts with serial offenders or on-going or longer-term crimes to show DNA evidence, M.O. or chronology of crimes. Charts can also keep a jury focused on the elements of the crimes charged, or remain organized as to which charges involve which victims at what place and on what date. This is especially helpful when there are multiple victims, multiple defendants, multiple crimes, or multiple places where the crimes have occurred. See *State v. Olson*, 217 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998) for a discussion about summary exhibits

- Dolls, demonstrations and models are sometimes permitted, with limitations, to demonstrate how an act occurred. With smaller children, using dolls can be very effective to show how a crime happened, while they verbally explain and/or you make a record of what they are demonstrating

- Writings of the defendant can be helpful in establishing his state of mind, his intent and his consciousness of guilt

Pieces of physical evidence provide concrete information to the jury. Not all adults can "learn" simply by listening to someone talking – they need to see or experience in order to truly understand. The introduction of physical evidence will assist adult learners on your jury in following your case.

In addition, physical evidence is not only seen, but can be touched, smelled, etc. Since a good part of the reality for the victim will come from these sensory perceptions of the objects and surroundings of the crime, finding ways to make these sensory details become "real" for the jury will aid in helping them more fully assess her perceived credibility.

Pre-Trial Considerations

As you are planning out your case pretrial, consider how you can use exhibits to make the victim's story become "real." Considerations include:

- What physical or other evidence do you have already available to help you do that?

- What can you create for the jury to aid their understanding?

- List elements and issues and identify the various potential exhibits to better organize your presentation. Hone in on how to highlight your strongest points.

- It also helps to organize witnesses in ways to emphasize important points, and remind jurors of key pieces of evidence.

- Preparing exhibits ahead of time enables you to present any potentially controversial ones to the court and defense counsel prior to trial, just in case modifications are necessary.

- Consider the presentation of any expert testimony. Does your DNA evidence require additional highlighting via the use of a chart? Would the jury pay more attention to the cycle of violence if they were able to look at a drawing explaining it while the expert testifies?

Finally, in light of your overarching theme, ***is there one piece of evidence*** that deserves being blown up and used in opening, during trial and in closing?

D. Negotiations

Prosecutors should always consider and pursue settlement negotiations in sexual assault prosecutions whenever feasible. Settlement negotiation should always include a victim-centered and offender-focused approach with a view toward individual deterrence, general deterrence and community safety.

Settlement negotiation considerations must begin at the earliest stages of prosecution review. What outcomes can be achieved at sentencing are contingent on what charges are initially filed.

1. Consulting with the Victim

Prosecutors should meet with the victim and discuss recommendations to the court for sentencing when a decision to prosecute has been made. One important consideration in a prosecutor's initial meeting with the victim is ascertaining the unique perspectives of individual victims, whether there are particular safety issues that will need to be addressed at disposition, collateral issues for victim, and the impact of the case and the criminal process on the victim.

A victim-centered response prioritizes the participation of victims in deciding the State's recommendation for the outcome. A victim-centered response includes explaining the rationale for seeking a settlement and asking victims for their feedback when settlement options are being considered. Minimally, prosecutors should:

A victim-centered response includes explaining the rationale for seeking a settlement and asking victims for their feedback when settlement options are being considered.

- Educate the victim about the impact that the defendant's decision to plead other than not guilty would have on the process and the potential outcome.

- Discuss settlement options with the victim and solicit their feedback about what the prosecution is seeking.

- Keep the victim informed of what settlement is being offered to the defendant before any settlement offer is made.

- Advocate for including a sex offender registry designation in a settlement agreement when appropriate.

- Educate the victim on the process of plea negotiations including the very broad options available to Wisconsin judges.

- Be upfront with the victim. Make sure she/he is aware that while their thoughts and opinions are very important, and will be given due consideration, ultimately it is up to the prosecutor to determine the optimal way to proceed with settlement negotiations.

Victims should be aware that the settlement negotiation process is fluid, and that issues may arise during the course of the case that may impact or change negotiation strategies. The victim should be aware that the plea offer may change based upon these new factors. The impact of the new factors should be addressed with the victim, before modification of the offer. ***A settlement offer should never be presented to a defendant without first attempting to contact the victim.***

2. Offender-Focused Approach

The prosecutor should also approach settlement of the prosecution from an offender-focused perspective. This includes consideration of the need for:

- The offender to be subject to Sex Offender Registration
- Prison/punishment
- Sex offender treatment - as part of a probation term or a prison term as a condition of extended supervision
- Specific deterrence – sending a message to the defendant that the conduct will not be tolerated and punished
- Making a record of defendant's activity for future monitoring by law enforcement and the community

An offender-focused approach to settlement negotiations that carefully considers all the offender's actions, behaviors, character is consistent with best practice. ***Any history of sex offenses or other crimes should be fully considered when determining a possible outcome through settlement***

E. Notice Requirements

Discussed below are some of the more relevant notice requirements for sexual assault cases.

Wis. Stat §971.23(1) What a district attorney must disclose to a defendant.[118]

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

(a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.

(b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.

(e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any audiovisual recording of an oral statement of a child under s. 908.08."

971.23(2)(m) What a defendant must disclose to the district attorney.

"Upon demand, the defendant or his or her attorney shall, within a reasonable time before trial, disclose to the district attorney and permit the district 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 defendant:

(a) A list of all witnesses, other than the defendant, whom the defendant intends to call at trial, together with their addresses. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

(am) Any relevant written or recorded statements of a witness named on a list under par. (a), including any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial.

(b) The criminal record of a defense witness, other than the defendant, which is known to the defense attorney.

[118] Please refer to Wis. Stat. §971.31(3) for requirements on admissibility of any statement by the defendant at trial.

(c) Any physical evidence that the defendant intends to offer in evidence at the trial."

971.23(9) Deoxyribonucleic acid evidence.

"Notwithstanding sub. (1) (e) or (2m) (am), if either party intends to submit deoxyribonucleic acid profile evidence at a trial to prove or disprove the identity of a person, the party seeking to introduce the evidence shall notify the other party of the intent to introduce the evidence in writing by mail at least 45 days before the date set for trial; and shall provide the other party, within 15 days of request, the material identified under sub. (1) (e), or par. (2m) (am) [sub. (2m) (am)], whichever is appropriate, that relates to the evidence."

Practice Tip: Prosecutors could include a DNA notice in their boilerplate discovery demand. For example, "Pursuant to Wis. Stats. 971.23(9), Plaintiff intends to introduce deoxyribonucleic acid profile evidence at trial, when applicable.

For additional information, see the following section on Preliminary Hearing Materials and § 908.08.

F. Preliminary Hearings

The purpose of a preliminary hearing in Wisconsin is to determine "if there is probable cause to believe a felony has been committed by the defendant." Wis. Stat. § 970.03(1) (2007). The hearing demonstrates that "a substantial basis for bringing the prosecution" exists. *State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151 (1984). "[P]robable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony." *Id.* "If the court finds probable cause to believe that a felony has been committed by the defendant, it shall bind the defendant over for trial." Wis. Stat. § 970.03(7).

A good strong preliminary hearing can settle the case for you. The goal of the preliminary hearing is keeping it simple and making it as painless as possible for your victim. However, with a strong witness who is able to testify consistently with incident reports, it may be useful to let the victim go into the entirety of the event.

1. Holding the Offender Accountable

The preliminary hearing in a sexual assault case is a good time to start impressing upon the defendant that he/she is no longer in control and that he will be held accountable for his actions. It is an opportunity to impress upon the defendant that no matter how talented defense counsel is, the prosecutor will confidently and assuredly hold him/her responsible for his actions.

While it is easiest if the defendant waives his right to a preliminary hearing, this will not happen with regularity until defense attorneys realize and understand that there is nothing for them to gain by making the state go through the preliminary hearing. That said, the prosecutor must also understand that the defendant has an absolute right to a preliminary hearing and should show no disdain or repercussions should the defendant avail himself of that right. The best thing the prosecutor can do is make the defendant regret he forced the exercise. ***The prosecutor should never offer to amend the charge to misdemeanors if the defendant waives the right to a preliminary hearing.*** This is frequent request from the defense. When such offers arise, the question for the prosecution becomes - why bother bringing the felony charge in the first place?

Remember that you are an advocate at this point and everything you do needs to be done with an eye toward assuring justice is done and that the defendant will be held accountable for his actions. ***It is imperative that you be well prepared for the preliminary hearing.*** The rules for preliminary hearings are favorable for the prosecution going ahead with the case without much room for the defendant or his attorney to cause problems with extraneous matters.

Preliminary hearings can be particularly rewarding when you have a judge who understands the evidentiary rules and issues that apply to preliminary hearings in sexual assault cases. If the judge does not understand them, then the judge must gently be educated for in this way you can best protect your victim as your case starts on the road to trial.

2. Preparing the Victim

Preliminary hearings are also a time in which the prosecutor can provide some assurance and confidence to the sexual assault victim that the state knows what it is doing in the prosecution and that the state in essence believes her and is on her side. Obviously the goal of the preliminary hearing is to have a "neutral and detached magistrate" hear the facts to support probable cause, look directly at the defendant, and declare that the court finds that it is probable that a crime was committed, that the crime was a felony, and that the defendant probably committed it.

Prosecutors should strive to get past the preliminary hearing without having the victim testify.

If the victim must testify, it is the prosecutor's job to make it as painless as possible.

Whenever possible, prosecutors should strive to get past the preliminary hearing without having the victim testify. But if the preliminary hearing is required, the victim will often have to testify. When this occurs, it is the prosecutor's job to make the process the least painful and least prolonged as possible. The laws involving preliminary hearings are particularly helpful in this endeavor. The preliminary hearing can assist your victim in getting over the initial fear of testimony and hopefully relieve some of the anxiety about testifying before the jury at trial. Testifying at this

preliminary stage (where victim exposure can be limited by the rules of evidence) may also provide the victim with an initial taste of testifying.

Wisconsin Statutes § 970.03(5) provides defendants the right to cross-examine witnesses. However, the scope of the cross-examination is limited. "Cross-examination at a preliminary examination may not be for the purpose of exploring the general trustworthiness of the witness." *State ex. rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 614, 267 N.W.2d 285 (1978). Because the purpose of the hearing is to determine the presence of probable cause, the cross-examination is limited to questions regarding plausibility. *State v. Stuart*, 2005 WI 47, ¶ 30, 279 Wis. 2d 659, 673, 695 N.W.2d 259. Credibility of a witness is not properly within the scope of a preliminary hearing. *Id.*

Wisconsin Statutes § 970.03(5) also provides defendants with the right to call witnesses on their behalf at a preliminary examination, "[b]ut this is not an unrestricted right." *State v. Knudson*, 51 Wis. 2d 270, 280, 187 N.W.2d 321, 327 (1971). Defense counsel may not call witnesses at a preliminary hearing to effect pretrial discovery or to "fish for elements of the State's case." *Id.* Further, because inconsistent statements made by the victim goes toward credibility of the victim, uncovering or exposing those inconsistencies is not properly within the scope of a preliminary examination. *Id.*
A victim-centered approach recognizes the need to fully prepare victims for the realities of the trial process. This means educating victims about the timeline, what is expected of them, what support the prosecution team can provide, and where they can go for additional help. Keeping victims informed about continuances and other delays is also important. In addition to preparing the victim for the preliminary hearing, prosecutors should also prepare victims for trial.

Involving victims in preparing the prosecution's case will empower them and improve their testimony. In return, the defendant's hope that the victim will be too scared or too timid to testify will be dashed, and he will begin to adjust his thinking from a feeling of power and control to one of settlement.

3. Strategies to Support the Victim

In determining whether the victim has to testify, look to see if there are other ways to get that same information introduced. Take a look at the elements of the offense to see which elements if any, you can only prove through your victim. Use all the evidentiary rules at your disposal, particularly the hearsay exceptions under 908.03 Wis. Stats., to avoid having to put your victim on the stand.

You can often find ways to cover the necessary element of the crime by getting the victim's statements in through third parties. This exercise will come in handy later as you plan for trial and want to corroborate your victim's testimony. In Wisconsin, "there is no constitutional right to confront witnesses at a preliminary examination." *State v. Padilla*, 110 Wis. 2d 414, 422-23,

329 N.W.2d 263 (Ct. App. 1982) (citing *Mitchell v. State*, 84 Wis. 2d 325, 336, 267 N.W.2d 349 (1978)).

Evidentiary Rules to Limit the Need for Victim Testimony at Preliminary Hearings

You may use some of the following evidentiary rules to avoid or lessen the need to call your victim to the stand. If you need to call the victim you may be able to limit the testimony to any remaining elements of the offense to be proven. Some of the rules that allow you to cover the elements of the offense traditionally given through the victim, or rules that allow you to get the victim statements in through third parties, include:

Defendant's Admissions or Admission by Party Opponent 908.01(4)(b)

Defendants often give us the best opportunity to avoid putting the victims on the stand. Short of outright denial or refusal to talk, the defendant's statement to law enforcement is often the primary evidence at the preliminary hearing in sexual assault cases. Defendants often admit to sexual contact but not to intercourse, they admit to penetration with their hands but not their penis. They admit to sexual intercourse but claim it was "consensual." They had sex but the 14 year old "wanted it."

In each of these cases the defendant gives you many if not all the elements you need to prove before you ever put the victim on the stand. (On occasion, a side benefit is looking over at the defense attorney staring at his client in shocked disbelief that the client admitted everything to the police when an hour earlier the client denied everything to his attorney.) If the defendant has given you the opportunity to use his words against him for some of the elements you have less to put the victim through.

Excited Utterance 908.03(2)

Excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This exception is the one you may use most often. While it is easiest to use when the assault is immediately reported, it covers any statement made by the victim while the victim was "under the stress of excitement caused by the event or condition," which for this crime can be quite prolonged. One can imagine a friend or family member indicating the victim was unusually quiet or sullen for a period of time, but after prodding eventually blurted out that she had been assaulted.

This exception can also be used by witness such as the 911 dispatch operator,[119] the officer responding, family friends or neighbors whom victim spoke to while still under the stress of

[119] Evidence of 911 calls, including tapes and transcripts of the calls, is not inadmissible hearsay. Admission does not violate the right to confront witnesses. State v. Ballos, 230 Wis.2d 495, 602 N.W.2d 117 (Ct.App. 1999), 98-1905.; US v. Brun , No. 04-4208 (8th Cir. August 01, 2005) A call to a 911 operator was an excited utterance, was

excitement caused by the assault. Be sure and put on the requisite foundation for admission of these statements including, as the exception indicates, the excited state of the victim.

The advantage of this exception over a related exception (present sense impression) is that you have a longer time period after the event for which it may apply. (See the Evidentiary Issues discussions in the chapter on Trial Strategies.) In the above case, you can use the recipient of the exited utterance to testify the victim called frantic and upset stating she had just been raped by the defendant.

Present sense impression and Then existing mental, emotional, or physical condition
908.03(1) (1)Present sense impression. "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

908.03(3) Then existing mental, emotional, or physical condition.
"A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

These exceptions are similar to Excited Utterance, however are more limited in the applicable time period. They can be used to bolster the excited utterance or provide an alternative method of admission. Victim's statements can be used in any number of ways, including to infer lack of consent, degree of intoxication, and physical injury.

Statements for Purposes of Medical Diagnosis or Treatment. 908.03(4)
Statements for purposes of medical diagnosis or treatment are defined as "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

This exception is particularly helpful when the victim has received a medical examination relating to the assault. Preferably a SANE nurse did the examination, but you may find emergency room nurses or doctors completing the sexual assault exam. Part of any appropriate diagnosis protocol would be to get the patients version of events that led to the seeking of the examination in order for medical personnel to properly diagnose and treat the patient (including the diagnosis and treatment for the risk to exposure of Sexually Transmitted Diseases (STDs).) Therefore the examiner may testify to the facts of the sexual assault described by the patient. Please refer to Evidentiary Issues in the Chapter V, Pre-Trial Strategies.

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reliable, and was admissible as an exception to the hearsay rule even though the declarant was unavailable. http://caselaw.lp.findlaw.com/data2/circs/8th/044208p.pdf

Child Victims

When a child is the victim, an essential tool to prevent putting the child on the stand is 908.08 Wis. Stats on Audiovisual Recordings of Statements of Children. This is discussed in more detail on page 158. This statute allows the prosecutor to present audiovisual recordings of an oral statement of a child under the age of 16 in any criminal trial or hearing, juvenile fact-finding hearing or revocation hearing.

With the exception of a preliminary hearing, the child must be available to testify. However, at a preliminary hearing if the recorded statement is shown and the party who offers the statement does not call the child to testify, the court may **not** order that the child be produced for cross-examination. See 908.08(5)(b) and 970.03(14)(b) Wis . Stats.

While this statute is invaluable to the prosecutor in child sexual assault cases, it takes planning and preparation – especially if your county doesn't have a child advocacy center available or if your law enforcement and social services agencies are not properly trained. We strongly recommend that you with your local Child Advocacy Center or Multi Disciplinary Team (MDT) to set up the proper protocols and facilities to make use of opportunities presented by this statute to protect our children. For a list of Child Advocacy Centers see the Appendix.

There are procedural steps that must be taken by the prosecutor in order for the recording to be admitted, such as a 10 day notice prior to hearing. Therefore, you may wish to serve a motion to admit the statement with the service of the summons and complaint or, even better at the initial appearance if you are fairly confident the court will grant a lesser notice period if the defendant objects and the preliminary hearing will be held within the 10 day period.

If all the procedural hoops are met, and the court makes the required findings under 908.08(3) then the recording shall be admitted. Under 908.08(3)(a)1. If the child is under the age of 12, the court does not need to find the admission of the statement is in the "interests of justice." One of the most protective provisions of this statute is that at unlike at trial, at the preliminary hearing once the recording is admitted, the court may not order that the child be produced for cross-examination. See 908.08(5)(b).

In Conclusion

If your victim must testify, it is not the end of the world. Some victims relish the opportunity; some are scared to death. Whatever the case, be prepared to protect your victim and your case by arming yourself with all the evidentiary rules and case law at your disposal.

4. Preparing for the Preliminary Hearing

Preparation for your preliminary hearing at begins at the charging level if not before. Once it is determined that the defendant should be bound over for trial on at least one count, the purpose of the preliminary has been satisfied and the prosecutor may, in his discretion, allege such other

offenses," in the information, subject to certain limitations. *State v. Burke*, 153 Wis.2d 445, 453, 451 N.W.2d 739 (1990).

Wis. Stat. § 971.01(1) states, "The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03(10), shall file an information according to the evidence on such examination." Section 970.03(10) "does not prohibit a prosecutor from including in the information … charges in addition to those advanced at the preliminary hearing." *Burke*, 153 Wis.2d at 453 (citing *Bailey v. State*, 65 Wis.2d 331, 341, 222 N.W.2d 871 (1974)).

The Wisconsin Supreme Court has also stated that "a prosecutor may bring additional charges in the information so long as the charges are not wholly unrelated to the transactions or facts considered or testified to at the preliminary examination, irrespective of whether direct evidence concerning the charges had been produced at the preliminary hearing." *Burke* at 457. The following factors determine the relatedness of charges: the parties; witnesses; geographical proximity; time; physical evidence; motive; and intent. *Id.* at 457, 458.

Therefore, in *Burke*, a prosecutor was allowed to show probable cause at a preliminary hearing on one count of sexual assault and then later add four related counts in the information. *Id.* Probable cause at the preliminary hearing was shown through statements the defendant gave to the police. Additional counts were then allowed in the information because they were not wholly unrelated to the single count which served as the basis for binding the defendant over. *Id.* The prosecutor did this in order to spare the victim from having to testify at the preliminary hearing. *Id.*

If a prosecutor chooses to file a single complaint that includes multiple counts, probable cause needs to be shown for only one felony count within the family of transactionally related counts. *State v. Williams*, 198 Wis. 2d 479, 483, 544 N.W.2d 400, 401 (1996). The State does not have to show probable cause for every felony count contained in a complaint. *Id.*

Absent defense counsel's waiver of the preliminary hearing, there are two ways a felony count can be included in the information. First, probable cause was shown to exist at a preliminary hearing for that specific count. Second, the count is transactionally related to another felony count that satisfied the preliminary hearing examination for probable cause. Thus, sometimes a prosecutor can spare a victim from having to testify at the preliminary hearing. However, it may be beneficial to have some victims and other witnesses testify at preliminary hearings. They will gain experience as witnesses, their performance can be evaluated for strengths and weaknesses and improved accordingly, and their testimony may cause the defendant to more readily accept a plea offer.

One caveat to this is approach: know your local judges, and court practices. If you believe that your judge will not bindover on all charged counts if you only prove one, then only allege during charging the one offense you plan to prove at the preliminary hearing. ***It is important to note***

that this does not preclude you from alleging all the facts that will make up the other counts you anticipate filing with the Information. In fact, it puts the defendant on notice about what he is facing, and provides the court both with the context and seriousness of the count charged and the dangerousness of the defendant.

Alleging facts that support your other anticipated counts also helps with any arguments later that the "new" counts are related and fairly charged. Some jurisdictions recognize that only one felony be proven and have had no problem binding over on a multi felony complaint in which only one count was arguably proven. Be familiar with local practice.

5. Questioning the Victim

Imagine what it must be like to have been the victim of a sexual assault being asked to come to an open hearing, having to describe in graphic detail how you were sexually assaulted. Adequately preparing the victim to testify is the best way to allay the victim's fears. Preparing the victim is also essential to preventing the defense counsel from laying the foundation for a painful cross examination later.

Once you have chosen the felony you will prove at the preliminary hearing, limit your questioning to that one felony, this will preclude the defense attorney from trying to get into the facts of the other counts that are anticipated. Therefore carefully craft questions for the victim, and when you prepare the victim explain why you've crafted the questions they way you have and encourage the victim not to go astray.

This is not the trial. The preliminary hearing need not provide all the facts and buildup. Simply get to the point, cover the elements and sit down. The less you ask, the less opportunity defense counsel will have to go on an exploratory expedition. Many defense attorneys want to use the preliminary hearing for "discovery." However, that is precisely what preliminary hearings cannot be used for (*State v. Knudson*). The following scenario illustrates this point.

On January 30, 2009, John and Marsha had been out drinking. At Marsha's invitation, John went to Marsha's home after the bars closed. At Marsha's house they sat on the couch and had a few more beers while they watched TV and kissed. At about 3:30 am, Marsha decided it was time for bed and told John he could sleep on the couch. She then went to her own bedroom. John followed her to the bedroom and wanted to have sex with her. Marsha declined his advances. Disappointed John shoved Marsha onto her bed, held her down by laying on her with his body, called her a few derogatory names and penetrated her vulva with his penis.

In order to keep the preliminary hearing short and simple, make use of introductory questions that go to the heart of the elements of the charge you need to prove without the need for long narratives explaining the historical events leading up to the offense. For example, the defendant needs to be identified, and jurisdiction needs to be proved:

Q: Do you know a, [defendant's name]?
Q: Is he present in the courtroom today?
Q: Please ID him for the court. [Make record the victim identified the defendant]
Q: Was the defendant at your home [location of assault] on January 30, 2009?
Q: Is your home located in [jurisdiction] County, Wisconsin?

In sexual assault cases, we need to prove that a sexual intercourse or contact took place. One way to get to this element as directly as possible is by defining the sexual act or contact that is intended to be proven. For example:

Q: Ms. Witness, I am going to define for you the term, "Sexual Intercourse." "Sexual Intercourse" is when a man puts his penis in a woman's vagina. Do you understand that term as I have defined it for you?

A: yes

Q: Did the defendant have sexual intercourse with you at your home on January 30, 2009?
If the victim was under the age of 16 at the time of the assault and you have established the victim's age, all questioning may end there. You should also be sensitive to terms that your witness is more comfortable with and use those if necessary.

If Consent is an issue, then go on:

Q: Did you consent to having sexual intercourse with the defendant?
A: No

Often you can stop questioning your witness at this point. At this point, you have proved all the necessary elements of Sexual Intercourse without consent, a Class G felony under 940.225(3). You have identified the defendant as the perpetrator of the felony in the courts jurisdiction. What, if any, additional facts you may wish to bring out depends on your witness, your judge and your defense counsel.

Legally, the above is all that is needed for a probable cause bindover. This scenario leaves the defense attorney (and sometimes the judge) frustrated and limits his room for cross to draw out more information. If you further wish to prove an element of use of force, you will open the cross up a bit. Simply ask:

Q: Did the defendant use force to have sexual intercourse with you?
A: Yes.
Q: What force did he use?
A: He threw me on the bed and laid on me so I couldn't get away.

At this point you have opened cross to more areas of investigation, so you might want to get into additional details to protect your witness such as did the defendant say anything to you while this was happening etc. to bring out intent and vileness of the offense. If this is what your judge needs, so be it. Sometimes it is what the victim needs to say, so be sensitive to the victim's needs but always keep in mind the purpose of the Preliminary Hearing and the goal of short and simple.

Once you have completed direct, be prepared to object to any defense question that is not relevant to the purposes of the preliminary hearing:

(a) If the question is not relevant to the felony you have just shown probable cause for, then object.
(b) If the question goes to the credibility of the victim/or witness, then object. Victim/Witness credibility is not entitled to shake the victim's credibility or Trustworthiness.
(c) If the question goes to whether the defendant was given Miranda, then object.

6. Preparing Your Witnesses

All witnesses must be prepared to provide testimony. From the ordinary citizen who has never testified before, to the seasoned officer, they all take the stand with certain trepidation and concern. You should meet with each witness ahead of time to discuss the scope and nature of their testimony. The witnesses should generally be aware of what they will be asked and why. Some witnesses need to know each question they will be asked. This simple exercise will often help ease the fears of the most timid of witnesses. It is an opportunity for you to show you care about the case and are confident in what you are doing.

Preparation also lets witness know you will cover everything that needs to be said so the witness doesn't have to worry about cramming it all into their response to your first question. While going over the testimony with your witnesses, be sure and listen to what they tell you. You will get invaluable information from your witnesses that are not reflected in any report.

With Law Enforcement, it is an opportunity to refresh their memory of the facts of this one of many cases they handle. As a practice tip, I like to ***have the officer review the complaint prior to testimony rather than his report***. This avoids the inevitable questions by defense counsel, such as "Did you review your reports prior to testifying here today? You did? Please produce them for me to review…" and the long review and the line by line questioning on the report by counsel. If the review of the complaint by the officer was enough to refresh her memory, the inquiry ends.

7. Cross Examination

Prosecutors should be prepared for the defendant's cross-examination of the victim and other witnesses. The goal is to provide as little discovery to the defendant as possible. Ideally, the preliminary hearing gives the defendant less information than what was provided in the complaint.

Remember that the purpose of the preliminary hearing is to prove that a probable felony crime was committed, and that the defendant committed it while in the jurisdiction of the court. Recall what information you provided the court through your witnesses, and limit the defendant's

questioning to those presented facts. Anything else is discovery or not relevant to the purpose of the preliminary hearing. For a good discussion on the purposes and limited nature of the preliminary hearing, as well as the legal basis for many of the objections available to the prosecutor, see *Preliminary Hearing – General Law* by Robert Donohoo available on WILENET which highlights this.

Despite the statutes and case law, defense attorneys can't resist trying to use the preliminary hearings for discovery, impeachment or in some cases to intimidate or scare the victim. The prosecutor must be on guard to prevent this misuse of the process.

Common Objections
There are a number of common objections that can be used to counter attempts made by the defense to solicit discovery, impeachment or to intimidate the victim:

Not relevant for the purpose of the preliminary hearing
If the question does not go any of the facts presented by the state, then the question is not relevant and should be objected. This is true even if it goes to a count in the complaint that was not addressed at the preliminary hearing. This could include Other Acts evidence.

Discovery not allowed at the preliminary hearing
This objection is a subset of a relevance objection.[120]

Credibility is not at issue at the preliminary hearing
The defendant often wants to try to damage the credibility of the witness before the court. This is not appropriate. The court can only determine the plausibility of the witness's testimony. If the witness provides testimony from which a reasonable inference may be made to support probable cause the court must accept that testimony, weight or credibility of the testimony is for a jury to decide.

Evidence of character and conduct of witness (908.06)
As discussed above this is improper inquiry in a preliminary hearing.

Rape Shield Violation
Reference to acts of the victim is absolutely improper for reasons stated above. The court is to look at the present case for probable cause. Did the witness testify to facts that could support probable cause, if so there must be bindover. The defendant cannot go into other matters.

See also: *State v. Schafer*
Defense has no right to compel reports or nonprivileged materials by subpoena prior to the preliminary examination.

[120] *State v. Knudson* 51 Wis. 2d 270, 187 N.W.2d 321 (1971).

See the Appendix for a sample brief on bindover and evidentiary issues.

8. Audiovisual Recordings of Children – 906.08

Requirements for 908.08
The requirements that must be met before the recording of the child's statement can be admitted are fairly straightforward and are outlined in the statute. When the child's statement is being recorded certain protocols should be followed to meet the requirements of 908.08(3)(b-d)

- The recording needs to be accurate and free from excision, alteration and visual or audio distortion.

- The child's statement must be made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, then the interviewer should establish that the child understands that false statements are punishable and that the child understands that it is important to tell the truth.

  The age upon when a child must be put under oath is debatable. It is often a question of the "developmental level" of the child. Clearly, when a child is 12 or older the oath should be given barring unusual circumstances. The oath should be given by a notary or court official.[121] The closer to the age of 12 the child is, the more advisable it is to give the oath.

  Keep in mind, not giving the oath is the exception. It is advisable in any case to establish that (a) the child knows the difference between the truth and a lie; (b) the child is aware that lying can result in punishment; (c) the child understands importance of telling the truth; and (d) the child agrees to tell the truth. This should occur before any discussions that are intended to be used as evidence.

- That the time, content, and circumstances of the statement provide indicia of its trustworthiness. This often is established by the professional low key interview taking place in a relaxed setting during the child's normal daytime hours, without family members or parties to the action present in the interview room.

Offer of Proof Filing
Procedurally 908.08(2) also requires an offer of proof be filed with the court laying the foundation for the admission of the statement providing:

- Caption of the case

[121] 887.01 describes who may administer an oath. "An oath or affidavit required or authorized by law, except oaths to jurors and witnesses on a trial and such other oaths as are required by law to be taken before particular officers, may be taken before any judge, court commissioner, clerk, deputy clerk. . court reporter, notary public . . ."

- Name and present age of the child giving the statement
- Date, time and place of the statement
- Name and business address of the camera operator
- The Filing must be made 10 days or more before the trial or hearing (or such later time as the examiner permits upon cause shown).
- The party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity to view the statement before the hearing[122]
- Either provide a copy of the recording to the defendant or give him reasonable opportunity to view it at the District Attorney's office

Admission by the Court

The court must admit the child's statement upon making the findings required under 908.08(3):

- That the trial or hearing in which the recording is offered will commence before the child's 12th birthday; or in if before the child's 16th birthday that the interests of justice warrant its admission under 908.09 (4)
- That the protocols described above have been met
- That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement

Considerations for Children Between the Ages of 12-16

As indicated, when the child is between 12 and 16 years of age, the court must make the additional finding that "the interests of justice warrant the admission" of the recording. The factors the court needs to consider in order to make this finding are included in 908.08(4):

- The child's chronological age, level of development and capacity to comprehend the significance of the events, and to verbalize about them

- The child's general physical and mental health

- Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused

- The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding

[122] See victim privacy issues in Chapter IV, Section F – Victim Privacy Issues and Chapter V, Section G – Discovery Issues. See also *State v. Ruiz-Velez* 314 Wis. 2d 724, 762 N.W.2d 449, which states 908.08 evidence needs to be on the record and it needs to be transcribed by the court reporter.

- The child's familial or emotional relationship to those involved in the underlying proceeding

- The child's behavior at or reaction to previous interviews concerning the events involved

- Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony

- Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, re-experiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships

- Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify

Use of the child's recorded statement does not preclude calling the child to testify and the statutes do not require any special order in which to present the evidence. ***It is often preferable to play the recording of the child before calling the child.*** This may present the child in the most sympathetic light to the jury and put the defense attorney in a difficult position when the attorney tries to impeach or go after the child. Keep in mind the prosecutor, when presenting the child witness, can still use the special protections afforded the child under 972.11(2m) and 967.04(7) Wis. Stats.

See the Appendix for sample motion/offer of proof to admit the audiovisual recording of a child's statement.

G. Discovery Issues

It takes tremendous courage for a victim to come forward and report a sexual assault. Protecting the victim's privacy is crucial to ensuring her participation in the prosecution. The materials below are intended as an overview of some of the more important issues that may come up in Discovery.

1. Discovery of Confidential Records of Victims and Witnesses

The Wisconsin Supreme Court "conclud[ed] that the standard to obtain an *in camera* review [of a victim or witness's patient records] requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 19. The defendant may not "engag[e] in what can be characterized as a 'fishing expedition'" because "[m]ere speculation or conjecture as to what information is in the records is not sufficient." *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105, ¶ 23, ¶ 26 (Ct. App. 2003). Therefore, "the test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense." *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 34. This test generally followed the rule discussed in an earlier court of appeals decision, but the court heightened the defendant's "threshold showing requirement." *Id.* at ¶ 33. The prior leading case, *State v. Shiffra*, applied a similar rule where "the defendant's burden should be to make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence." 175 Wis. 2d 600, 608, 499 N.W.2d 719, 723 (Ct. App. 1993). The Wisconsin Supreme Court adopted most of the requirements from *Shiffra* but "conclude[d] that a slightly higher standard is required before the court must conduct an *in camera* review of privileged counseling records . . . [i]n light of the strong public policy favoring protection of the counseling records." *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 32.

To better understand the case law, it is necessary to recognized that the Wisconsin Statutes have multiple rules governing the disclosure of a patient's privileged records. The statutes begin with a general rule that a patient has a right to refuse to disclose records related to diagnosis or treatment. Wis. Stat. § 905.04(2) (2007-08). However, a criminal defendant has a right to due process, which includes the right to a meaningful opportunity to present a complete defense. See *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 23. Therefore, the district attorney "must disclose to a defendant . . . any exculpatory evidence." Wis. Stat. § 971.23(1)(h).

a) Confidentiality of Patient Records

The general rule of privilege states that a patient has the right to refuse to disclose and to prevent any other person from disclosing confidential communications related to diagnosis or treatment, but the rule also permits a judge to review the records under certain circumstances. The relevant statutory provisions read as follows:

Wis. Stat. § 905.04

Physician-patient, registered nurse-patient, chiropractor-patient, psychologist-patient, social worker-patient, marriage and family therapist-patient and professional counselor-patient privilege.

(2) General rule of privilege. *A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.*

(3) Who may claim the privilege. *The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.*

(4) Exceptions. *(b) Examination by order of judge. If the judge orders an examination of the physical, mental or emotional condition of the patient, or evaluation of the patient for purposes of guardianship, protective services or protective placement, communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.*

Although the statute refers to this as a privilege given to a patient, courts commonly refer to this as a privilege given to a victim because the motions for disclosure often arise when a defendant seeks to obtain confidential treatment records from the victim in a criminal case. Therefore, patient and victim often are used interchangeably.

b) Disclosure of Exculpatory Evidence

A district attorney has the duty to disclose any exculpatory evidence, that is to say, any evidence tending to establish that a criminal defendant may be innocent. The relevant statutory provision reads as follows:

Wis. Stat. § 971.23: Discovery and inspection.
(1) What a district attorney must disclose to a defendant. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
(h) *Any exculpatory evidence.*

The duty to disclose exculpatory evidence applies not only to evidence directly within a district attorney's office, the rule also applies to some material not stored or maintained by the prosecutor. See, e.g., State v. DeLao, 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480, ¶ 21

("Under § 971.23, the State's discovery obligations may extend to information in the possession of law enforcement agencies but not personally known to the prosecutor").

c) The *Shiffra-Green* Materiality Test

A request by a defendant to review confidential records of a victim requires the defendant to overcome a four-step materiality test, discussed by the Wisconsin Supreme Court in *Green* and the Wisconsin Court of Appeals in *Shiffra*, along with other related decisions. 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19; 175 Wis. 2d 600, 499 N.W.2d 719. The test begins with the defendant having the burden to show that "there is a reasonable likelihood that the evidence is relevant and necessary to a determination of guilt or innocence." *Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105, ¶ 17. Once "the defendant satisfies this standard, the trial court reviews the records only if the victim consents to the review." *Johnson v. Rogers Mem'l Hosp., Inc.*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 73. Assuming that the victim consents, the circuit court conducts the *in camera* inspection of the records and then determines "whether disclosure of the information is necessary based on the competing interests involved in such cases." *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 35. As a final protection to the victim, the court only discloses the relevant records to the defendant provided the victim consents to the final disclosure. *Johnson*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 73. Each of these four steps is explained in more detail below.

(1) The Defendant's Offer of Proof and Burden

The process begins with a defendant presenting a written offer of proof in a motion that "describ[es] as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 33. The test "place[s] the burden on the defendant to reasonably investigate information related to the victim before setting forth an offer of proof and to clearly articulate how the information sought corresponds to his or her theory of defense." *Id.* at ¶ 35. Therefore, the defendant's offer of proof should allege "material facts . . . [that] list what records actually exist . . . [and] explain[ ] why any such records may be relevant." *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, ¶ 33. Additionally, the defendant bears the burden to demonstrate that the sought-after records are "not merely cumulative to other evidence available to the defendant." *Id.* at ¶ 31, *quoting Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 34. An offer of proof that provides only the defendant's opinion or provides only a bare-bones conclusionary statement may be denied without a hearing. *State v. Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481, ¶¶ 16-17 (holding that an evidentiary hearing was required in this particular case because the allegations were sufficient to merit a hearing); *see also Smith v. State*, 60 Wis. 2d 373, 380, 210 N.W.2d 678, 682 (criticizing the defendant's "bare-bones allegation . . . that is no more than a 'conclusionary allegation'"). Even assuming the written offer of proof entitles the defendant to a hearing, the defendant still must overcome his or her burden to "show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence," particularly "[i]n light of the strong public policy favoring protection of the counseling records. *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 32.

(2) The Victim's Consent to an In Camera Inspection

Once the defendant overcomes his or her burden, "the trial court reviews the records only if the victim consents to the review." *Johnson*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 73. The privilege belongs solely to the patient, not the prosecutor, so only the patient (often the victim in a criminal case) may waive the privilege to permit an *in camera* review by the circuit court. *See* Wis. Stat. § 905.04(3). The Wisconsin Supreme Court held that the best practice for determining consent "is to have the circuit court interview the victim on the record and thereby make a determination of the victim's voluntary consent." *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775, ¶ 19, n. 6 (1997). A less desirable alternative would be for the victim to sign a written release. *Id*. A complication arises when the patient is a minor child, which may require the court to appoint a guardian ad litem or counsel for a victim to resolve the question of whether the victim consents to the release of the records. *See In re Jessica J.L.*, 223 Wis. 2d 622, 630, 589 N.W.2d 660, 664, n. 3 (Ct. App. 1998), *citing State v. Speese*, 199 Wis. 2d 597, 607-08, 545 N.W.2d 510, 515 (1996). The victim is not obligated to waive the confidentiality of the records, but when "the victim does not consent, there is no *in camera* review and the victim is barred from testifying." *Johnson*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 73. The Wisconsin Supreme Court noted that preventing the victim from testifying is necessary to protect a defendant's right to present a defense. *Speese*, 199 Wis. 2d at 610, 545 N.W.2d at 516, n. 12 (1996). When the victim's testimony is critical to the presentation of the case, then the absence of the victim at the trial may require the prosecutor to dismiss the case given the limitations upon permitting hearsay at trial. *See generally Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) (limiting the use of testimonial hearsay).

(3) The Court's In Camera Inspection

In *Green*, the Wisconsin Supreme Court stated that it had "confidence in the circuit courts to . . . make a proper determination as to whether disclosure of the information is necessary based on the competing interests involved in such cases." 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 35, *citing Shiffra*, 175 Wis. 2d at 611, 499 N.W.2d at 724. The *Shiffra* court explained, "It is the duty of the trial court to determine whether the records have any independent probative value after an *in camera* inspection of the records." 175 Wis. 2d at 611, 499 N.W.2d at 724. A circuit court essentially examines the records to determine whether they contain any relevant evidence. *See* Wis. Stat § 904.01. A circuit court also should recognize that this situation involves competing public interests between protecting confidential privilege and the right to put on a defense. *Shiffra*, 175 Wis. 2d at 611-12, 499 N.W.2d at 724. Therefore, a court should not turn over all evidence simply on the grounds that the evidence is relevant; instead, the court should only authorize the release of relevant evidence that is "material to the defense of the accused." *Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775, ¶ 22 (internal quotation and citation omitted). A court also has the authority to prevent the use of relevant evidence when the "probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of . . . needless presentation of cumulative evidence." Wis. Stat. § 904.03; *see also Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19, ¶ 19 (noting that the records should not be "merely cumulative to other evidence available to the defendant"), *but cf. Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481, ¶ 18 (disagreeing with the argument "that, where

information can be obtained from non-confidential sources, the court should not compel disclosure of confidential information"). The court ultimately must balance the competing policy interests and then determine whether to rule in favor of disclosing any portion of the confidential records. *Johnson*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 76.

(4) The Victim's Consent for Release to the Defendant

The Wisconsin Supreme Court provided the victim with a second and final opportunity to decide whether to consent to the release of patient records before the court turns any such records over to the defendant. *See Johnson*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 73 ("If after the *in camera* review, the circuit court determines that the records contain relevant evidence, it should be disclosed to the defendant *if the patient again consents*." (emphasis added)). This second opportunity to the victim recognizes that the victim alone has the privilege against the release of treatment records. *See* Wis. Stat. § 905.04(2). There are circumstances or situations where a victim may not object to the general disclosure to the court for an *in camera* inspection, but the victim does object to the release of specific treatment records to the defendant. The court should employ the same method for determining consent as employed previously by the court during the second step in the examination. *See Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775, ¶ 19, n. 6 (recommending that the consent be stated by the victim on the record); *Speese*, 199 Wis. 2d at 607-08, 545 N.W.2d at 515 (recognizing the need for the court to appoint a guardian ad litem or counsel for a victim in special circumstances). Once again, the victim is not required to consent to the disclosure, but the victim is barred from testifying when the victim does not consent. *Johnson*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, ¶ 73. It is only upon consent by the victim at this stage in the proceeding that the court turns over the relevant portion of the confidential records to the parties. *See id*.

Summary

When a prosecutor receives a motion from a defendant for the release of confidential records of a victim or witness, the prosecutor should ask the court to hold the defendant to his or her burden under the first step in the materiality test. *See generally Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 19. The prosecutor also should ensure that the court's process protects a victim or witness' right to refuse the release of such records, which may require the court to appoint a guardian ad litem or counsel for a victim because the prosecutor does not represent the victim and cannot counsel the victim on the question of consent. *See Speese*, 199 Wis. 2d at 607-08, 545 N.W.2d at 515. As a final cautionary warning, much of the supporting case law associated with these motions predates the governing decision in *Green*. Therefore, a prosecutor should always review both the pre- and post-*Green* case law to determine whether it applies to the specific facts and circumstances in a given case.

2. Discovery Protective Orders

Wis. Stat. §971.23(6) states in part: "Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses required under this section be denied, restricted or deferred, or make other appropriate orders." For more information see Chapter V, Charging Decisions, Section F – Victim Privacy Issues. Relevant case law that supports this statute relative sexual assault includes:

***State v. Bowser* 2009 WI APP 114**
The Court of Appeals upheld a circuit court's protective order requiring the defense to analyze a hard drive containing child pornography at the Department of Justice Criminal Division of Investigation (DCI) in accordance with the DCI's protocol. The Court of Appeals stated that it was not unreasonable for the circuit court to order this because of the serious harms of child pornography and the ease of dissemination through electronic channels. A partial summary of the findings in presented below:

> "We begin with the proposition that it is reasonable for a court to seek to minimize, within its discretion under WIS. STAT. § 971.23(1) and (6), the risk of distribution of the type of harmful material at issue here. The serious harms associated with the distribution of child pornography are well known. *See, e.g.* ***United States v. Goldberg***, 491 F.3d 668, 672 (7th Cir. 2007) (dissemination of child pornography fosters consumer demand that results in creation of more child pornography); ***United States v. Sherman***, 268 F.3d 539, 547 (7th Cir. 2001) ("The possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy…."); ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234, 249 (2002) (child pornography constitutes a permanent record of a child's abuse, publication of which "cause[s] new injury to the child's reputation and emotional well-being."). As the circuit court noted, the advent of digital electronic storage and the Internet have dramatically increased the ease with which child pornography is created and disseminated. Once posted to the Internet, a pornographic image of a child may be further disseminated by file sharing applications, swaps between collectors, and by reposting to other sites.
>
> We agree with Bowser that there is no reason to think that the members of the defense team were any less trustworthy than the members of the prosecution team. Still, we disagree with Bowser that the State must produce evidence that one or more members of a defense team are not trustworthy to show good cause for an order that limits the risk of dissemination of the evidence. The circuit court could have reasonably concluded that the risk of improper use and dissemination increases when more persons possess copies of the child pornography – whether they are government employees or members of a defense team. It follows that it

> is reasonable to limit the number of persons who possess a copy of the illegal material."

Use of §908.08 evidence
The use of this type of evidence – namely the use of audiovisual recordings of an oral statement of a child under the age of 16t – is also ripe for the use of Discovery Protective Orders. For more information on the use of this type of evidence, please see the section on Preliminary Hearings. For a sample motion and sample protective order for this type of evidence, please see the Appendix.

State v. Schaefer *308 Wis. 2d 279, 746 N.W.2d 457 (2008)*
The Supreme Court of Wisconsin upheld the circuit court's decision to quash a subpoena duces tecum by the defendant that sought to obtain police investigation reports prior to the preliminary examination. In so doing, the court stated:

> "We conclude that a criminal defendant does not have a statutory or constitutional right to compel production of police investigation reports and other nonprivileged materials by subpoena duces tecum prior to the preliminary examination. A criminal defendant who employs the subpoena power in this manner is attempting to engage in discovery without authority in either civil or criminal procedure statutes and in conflict with the criminal discovery statutes. Although a reasonable argument can be made for prosecutors to open their files to defendants at an early point in criminal prosecutions, this argument does not translate into an enforceable right to subpoena police investigation reports and nonprivileged materials before a preliminary examination. Consequently, we affirm the order of the circuit court granting the State's motion to quash Schaefer's subpoena duces tecuum." Id.

H. Effective Use of Rape Shield Law

Rape Shield issues are required to be addressed prior to trial, by virtue of an adequately prepared motion by the defense, which has been timely filed. Sec. 971.31(11). Note that the court must find that the proposed evidence is material to a fact at issue in the case, and is of sufficient probative value to outweigh its inflammatory and prejudicial nature. Common challenges include:

1. That the Victim Has Made Prior Untruthful Allegations of Sexual Assault.

If a person has lied about being sexually assaulted in the past, that is, indeed, a very powerful tool, as unlike with any other kind of "other act" issue, this allows the defense to argue that the victim is lying again, acting in conformity with her past behavior. For this reason, "prior untruthful allegation" motions are somewhat common in sexual assault cases.

There is one key case in this area: *State v. DeSantis*, cited in the Rape Shield outline (see Appendix). Getting evidence of a "prior untruthful allegation" in is not automatic, and the State should object to its admission. Here are the critical points, and failure to meet even one is sufficient to have this evidence excluded.

The Rape Shield Law provides prosecutors with a powerful tool that can be used to protect victim privacy and prevent the defense from introducing personal information that will be used against the victim.

First, based upon an evidentiary hearing, the court must be able to conclude that a reasonable jury could conclude that a prior false allegation had actually been made. There must always be an evidentiary hearing. Do not acquiesce to an offer of proof, or an affidavit, as you will find that those who are claiming to have "heard" the alleged prior untruthful allegation are frequently inconsistent, or substantially back off of what is necessary to be able to conclude that what they heard really was "untruthful." You will more likely than not have to call the victim if the defense does not. Once the testimony is taken, prior to trial, the first attack by the prosecution can be that there is insufficient credible evidence for a reasonable jury to conclude that a prior false allegation had been made.

Second, the prosecutor can also focus, as in the *DeSantis* case, on the nature of the prior statements, arguing that they are not "false" statements. They may be: (a) mischaracterized as "false;" (b) mis-described by the others or misunderstood by the others; or (c) truthful allegations that were simply not believed by those who are now reporting them as false. It can be helpful if the victim made a prior report of the sexual assault to law enforcement. Also, if the victim made an allegation and is not now retracting it, it is not "false" even if it was never reported to police.

Even if the court concludes that a reasonable jury could find that a prior false allegation has been made by this victim, the inquiry is not over. The second part of the analysis required by the court is to determine the relevance of any prior false allegation to a fact at issue in the case. This can sometimes turn on the similarity of the false allegation to what is being currently alleged – if they are very dissimilar, the probative value is reduced. In addition, what the issues are going to be should be identified, and the defense should be required to connect how the prior false allegation advances a legitimate issue in the case.

Finally, many prior false allegations are really mountains out of molehills, figuratively speaking. In legal terms, using the sec. 904.03 balancing that is required, the evidence of the prior false allegation has extremely minimal probative value relative to the potential for that information to result in jury confusion or a "trial within a trial" concerning whether the prior false allegation occurred. Many times the "falseness" is tenuous or vague or ambiguous. Other times, the allegation, though clearly false, was made remotely in time, or under circumstances that are so different from the case at hand that the probative value is nil. For instance, an adult victim of a stranger sexual assault can hardly be "impeached" by a prior false allegation that as a child (and in the midst of a custody battle) she reported her Dad touched her when in fact he did not.

Even if the court permits the introduction of a prior false allegation, the prosecutor should strive to limit the amount and nature of this information by asking the court to make specific determinations about what specific questions can be asked, etc.

2. Prior Sexual Conduct with the Defendant

When there is a prior relationship between the victim and the defendant, many times the defense will attempt to introduce this prior behavior more to paint the victim as "whore-ish" or weird than for any truly legitimate reason. Since the full extent of the sexual relationship is only known by the defendant and the victim in most cases, this is an opportunity for the defendant to try to smear the reputation, and the credibility of the victim.

As with the prior false allegations, these kinds of questions are to be presented to the court in a timely, adequate motion, and addressed with an evidentiary hearing prior to trial. If no such motion has been filed, if the defense attempts to introduce this during the trial, he should be met with vigorous objection, and a hearing outside the presence of the jury.

The most important issue in the case of this type of evidence is its relationship to some fact at issue in the trial. The mere fact that someone has consented to sex with someone else in the past is an entirely different animal than giving consent at the present time. If that is what the offered evidence shows, and nothing more, it should be precluded on the grounds of relevance. Also, if the prior acts constitute behavior which is markedly different than the crime charged, they have no relevance and should be excluded. The case of *State v. Herndon* sets forth an excellent overview of the policy reasons underlying the rape shield law. Those policies are supposed to be difficult to overcome, and simply because the behavior may fall within the ambit of an enumerated exception to the Rape Shield Law does not mean that the evidence should necessarily come in at trial. The materiality and probative value analyses frequently operate to require exclusion of this evidence, even though it is technically an exception.

3. The Presence of Semen Other Than the Defendant's

There are two primary ways that someone else's semen on or in the victim comes into play. One way is when the victim is an adult, and there is another person's semen present. The other is when there is a child victim.

Adult Victims: In cases where there is an adult, the presence of the other person's semen is only relevant if there are allegations of injury, disease, or pregnancy caused by the assault and it is possible that the other person caused either condition. Usually, the other semen is the result of consensual sex between the adult victim and another adult partner who can be identified. If there is no allegation of injury, pregnancy or disease, it doesn't matter if the victim has 500 other people's semen in or on her – it is not relevant and should be excluded.

Child Victims: The case is different when the semen is in or on a child, since that implies victimization by another person instead or in addition to the charged defendant. A defendant may try to use this information to suggest that the child is mistaken about who sexually assaulted her. If the contributor of the other semen is known, and the child is able to distinguish between what was done to him/her by this other person, this evidence loses any probative value. In addition, given the circumstances of this being a child, it is very likely to cause jury confusion and unwanted speculation.

In either case, absent the very limited situations where there is the possibility that someone else caused injury, pregnancy or disease, the fact of semen from some source other than the defendant is generally irrelevant and very prejudicial. Using a 904.03 test, it should be excluded.

I. Exculpatory Evidence

A district attorney has the duty to disclose any exculpatory evidence, that is to say, any evidence tending to establish that a criminal defendant may be innocent. This section is meant to provide a brief overview of the relevant law regarding exculpatory evidence. This section should only be used as a starting point, not a substitute, for independent research.

a) Relevant Case Law

***Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963):**[123]
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) Relevant Wisconsin Law

Wis. Stat. § 971.23: *Discovery and inspection.*
(1) What a district attorney must disclose to a defendant. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:

(h) Any exculpatory evidence.
The duty to disclose exculpatory evidence applies not only to evidence directly within a district attorney's office, the rule also applies to some material not stored or maintained by the prosecutor. *See, e.g., State v. DeLao*, 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480, ¶ 21

[123] Wisconsin Domestic Violence Prosecution Manual, 2004.

("Under § 971.23, the State's discovery obligations may extend to information in the possession of law enforcement agencies but not personally known to the prosecutor").

c) Ethical Considerations

SCR 20:3:8 states a prosecutor 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 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;"

As a result, prosecutors are under constitutional, statutory, and ethical duties to disclose exculpatory evidence to the defense. These obligations should always be explained to the victim. As discussed earlier in this reference book, we encourage prosecutors to meet with sexual assault victims before charging the case. For more on this topic, please see Chapter IV, Pre-Charging – Victim's Perspective of the Assault. This is an ideal time to explain to a victim that there may be certain information you are required to turn over to the defense.

d) Considerations Specific to Sexual Assault Cases

Prosecutors are also required turn over inculpatory or impeachment evidence disclosed by the victim. ***United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Randall, 197 Wis.2d 29, 539 N.W.2d 708 (Ct. App. 1995); Strickler v. Greene,* 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)**. In sexual assault cases, this could take the form of prior false allegations of sexual assault by the victim, or other credibility issues known to the prosecutor. However, this does necessarily mean this evidence is admissible. In these situations, prosecutors should be prepared to argue the admissibility of this evidence either in pre-trial motions or at trial.

J. Other Acts Evidence

1. Introduction

The Wisconsin Statutes provide that evidence of other crimes, wrongs, or acts is admissible when offered for a legitimate legal purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a) (2009-10). Wisconsin courts repeatedly have affirmed that the statutory examples are an illustrative, not an exhaustive, list of acceptable purposes for other acts evidence. *State v. Plymesser*, 172 Wis. 2d 583, 592, 493 N.W.2d 367, 371 (1992); *see also State v. C.V.C.*, 153 Wis. 2d 145, 161, 450 N.W.2d 463, 469 (Ct. App. 1989). Therefore, in addition to the statutory examples, courts have permitted other acts evidence when the evidence relates to "elements of the specific crime charged," shows a "system of criminal activity," "impeach[es]

credibility," assists in the "assessment of the credibility issue," "corroborate[s] the victim's testimony," demonstrates "consciousness of guilt," "establish[es] the background relationship between the witness and the defendant," is "necessary to fully understand the context of the case," and "show[s] character in cases where character is put in issue by the defendant." *Plymesser*, 172 Wis. 2d at 595, 493 N.W.2d at 373 (corroborates the victim's testimony); *State v. Bettinger*, 100 Wis. 2d 691, 697, 303 N.W.2d 585, 588 (1981) (complete the story of the crime); *State v. Midell*, 39 Wis. 2d 733, 737, 159 N.W.2d 614, 616 (1968), *quoting Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557, 563 (1967) (elements of the crime charged, system of criminal activity, impeach credibility, character when character is an issue); *State v. Neuser*, 191 Wis. 2d 131, 144-45, 528 N.W.2d 49, 54-55 (Ct. App. 1995) (consciousness of guilt); *State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994) (assessment of the credibility issue); *State v. Shillcutt*, 116 Wis. 2d 227, 236-37, 341 N.W.2d 716, 720 (Ct. App. 1983) (background relationship between the witness and defendant, context of the case).

Wisconsin courts have long "followed the usual rule of admitting evidence of other occurrences" when offered for an acceptable purpose. *State v. Lombardi*, 8 Wis. 2d 421, 438, 99 N.W.2d 829, 839 (1959). The Wisconsin Supreme Court reaffirmed that the Wisconsin Statutes favors admissibility of evidence when offered for an acceptable purpose and the "case law in no way indicates that a circuit court should predispose itself against the admission of other crimes evidence." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429, 433 (1993). The court noted that the statute "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *Id.*; s*ee also State v. Grande*, 169 Wis. 2d 422, 434, 485 N.W.2d 282, 286 (Ct. App. 1992) (noting that the rules "favor admissibility"). When circuit courts have excluded such evidence inappropriately, appellate courts have reversed the decision of the circuit court because "excluding . . . this evidence constituted prejudicial error." *Johnson*, 184 Wis. 2d at 334, 516 N.W.2d at 465.

2. Proving the Other Acts

The other acts analysis begins with the preliminary task of determining by a preponderance of the evidence whether the prior acts occurred. *State v. Schindler*, 146 Wis. 2d 47, 54-55, 429 N.W.2d 110, 113 (Ct. App. 1988). The Wisconsin Supreme Court ruled that "[i]t is not necessary that prior-crime evidence be in the form of a conviction; evidence of the incident, crime or occurrence is sufficient." *Whitty*, 34 Wis. 2d at 293, 149 N.W.2d at 564; *see also State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918, ¶ 52 (1999) (holding that uncharged criminal offenses may be admitted at a jury trial for another criminal charge under a motion for other acts evidence); *Cheney v. State*, 44 Wis. 2d 454, 460, 171 N.W.2d 339, 341-42 (1969) (ruling that "[i]t is not necessary that [other] conduct result in a conviction . . . [and] it is established that evidence of this other conduct does not have to be limited to prior to the crime charged but can be, and often is, related to conduct occurring after the crime charged but prior to the trial"), overruled on other grounds in *Byrd v. State*, 65 Wis.2d 415, 425, 222 N.W.2d 696, 702 (1974);

State v. Silva, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385, ¶¶ 27-28 (Ct. App. 2003) (upholding the circuit court's ruling at a sexual assault trial to permit other acts evidence about an uncharged allegation of sexual assault involving a different victim); *State v. Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶ 10, ¶ 22 (Ct. App. 2002) (supporting the circuit court's decision to admit evidence at a sexual assault trial about a non-prosecuted sexual assault allegations involving different victims); *Neuser*, 191 Wis. 2d at 144-45, 528 N.W.2d at 54-55 (permitting testimony from a victim about an alleged threatening telephone call that she received from the defendant following the underlying crime without requiring a preceding conviction for victim or witness intimidation). A subsequent court of appeals noted, a "jury verdict in the criminal case . . . did not negate the possibility that a reasonable jury could find by a preponderance of the evidence that [the defendant] had sexual contact with [the victim]." *State v. Landrum*, 191 Wis. 2d 107, 120, 528 N.W.2d 36, 41 (Ct. App. 1995) ("An acquittal does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."). Therefore, "[t]he difference in the burdens of proof allows a reasonable jury to find by a preponderance of the evidence that [the defendant] committed the other act, despite his acquittal." *Id*.

3. Admissibility in Sexual Assault Cases

a) Greater Latitude Rule

For over one hundred years, the Wisconsin Supreme Court has ruled that "[a] greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes." *Proper v. State*, 85 Wis. 615, 630, 55 N.W. 1035, 1040 (1893); *see also State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 51 (2000) (reaffirming the greater latitude rule). The Wisconsin Supreme Court explained that the greater latitude rule "is not so much a matter of relaxing the general rule . . . as it is a matter of placing testimony concerning other acts or incidents within one of the well established exceptions to such rule." *Hendrickson v. State*, 61 Wis. 2d 275, 279, 212 N.W.2d 481, 482 (1973). In particular, the court held that other acts or incidents within sexual crimes "comes within (1) the general scheme or plan; and (2) the proof of motive or intent exceptions to the general rule." *Id*. at 282, 212 N.W.2d at 484. The Wisconsin Supreme Court's rule is so well established that "[i]t would be patently erroneous and usurpative for [a lower court] to reexamine the rule of 'greater latitude' and abandon it." *State v. Tabor*, 191 Wis. 2d 482, 486, 529 N.W.2d 915, 917 (Ct. App. 1995). Therefore, courts have "observe[d] that greater latitude is allowed as to other acts evidence in sex crimes cases. *State v. Kourtidias*, 206 Wis. 2d 574, 582, 557 N.W.2d 858, 862 (Ct. App. 1996), *citing State v. Friedrich*, 135 Wis. 2d 1, 20, 398 N.W.2d 763, 771 (1987); *see also State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629, ¶ 23 (2000) ("In a sex crime case, the admissibility of other acts evidence must be viewed in light of the greater latitude rule.").

b) Prior Convictions

In addition to the greater latitude rule, Wisconsin provides another mechanism for the introduction of other acts when the defendant has a conviction for a first-degree sexual assault

and then faces a similar charge for first-degree sexual assault. In 2006, the following new provision was added to the Wisconsin Statutes:

Wis. Stat. § 904.04(2): Other crimes, wrongs, or acts.
(b) In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

The Wisconsin Legislative Council published a memorandum following this statutory change in the law. *See* 2005 Wisconsin Act 310 [2005 Assembly Bill 970]: Admitting Evidence of Prior Sexual Assault Convictions, *available at* www.legis.state.wi.us/2005/data/lc_act/act310-ab970.pdf. The memo explained that "[u]nder ***prior law***, evidence that a person was previously convicted of first-degree sexual assault or first-degree sexual assault of a child was not admissible in a court proceeding for the purpose of proving that the person has a propensity to commit crimes or has a character or disposition that makes him or her more likely to commit a crime." *Id*. The ***current law*** now "provides that in a criminal proceeding in which a person is accused of committing first-degree sexual assault or first-degree sexual assault of a child, evidence that a person was convicted of a violation of first-degree sexual assault or first-degree sexual assault of a child may be admitted to prove the character of the person in order to show that the person acted in conformity with the demonstrated character traits." *Id.*

Despite the significance to this new statute in certain sexual assault prosecutions, the remainder of this section on other acts evidence focuses on the more common method for introducing other acts evidence; that is, the statutory provisions under subsection (a) of the statute.

4. Wisconsin Statutes

Before proceeding with the test for admissibility, it is necessary to understand that the test involves the interplay between three statutes contained within Chapter 904 of the Wisconsin Statutes. The first statute permits the introduction of other acts evidence whenever offered for a purpose other than for propensity:

Wis. Stat. § 904.04(2): Other crimes, wrongs, or acts
(a) Except as provided in par. (b), 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 second statute requires that the evidence is relevant to the case because relevant evidence is generally admissible and irrelevant evidence is inadmissible. Wis. Stat. § 904.02. Therefore, the other acts evidence must have the tendency to make the existence of a fact that is of consequence to the determination of the case more probable or less probable than it would be without the evidence:

Wis. Stat. § 904.01: Definition of "relevant evidence"
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Relevant other acts evidence offered for an acceptable purpose still may be excluded by a court when the probative value of the evidence is substantially outweighed by a competing interest, such as when the evidence creates the danger of unfair prejudice to the other party:

Wis. Stat. § 904.03: Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

By understanding these three statutes and the competing interests that each serves, the test for admissibility follows a straightforward process where a court must consider each statute before answering the ultimate question of whether to permit the introduction of other acts evidence.

5. Test for Admissibility

The Wisconsin Supreme Court adopted the following three-step analytical framework to determine the admissibility of other acts evidence: (1) "Is the other acts evidence offered for an acceptable purpose under [the statute];" (2) "Is the other acts evidence relevant considering the two facets of relevance [with] . . . [t]he first consideration . . . [being] whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action [and] [t]he second consideration . . . [being] 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;" and (3) "Is the probative value of the other acts evidence substantially outweighed by the danger or unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needles presentation of cumulative evidence." *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶¶ 5-8 (1998).
At a motion hearing, the circuit court must apply a "neutral application" of the law with "neither a presumption of exclusion nor a presumption of admissibility" when considering the three parts of the test. *Speer*, 176 Wis. 2d at 1116, 501 N.W.2d at 434. While applying this neutral

application of the law, the circuit court must place the burden upon "the proponent of the evidence . . . to show that the other crimes evidence is relevant to one or more named admissible purposes." *Id*. at 1114, 501 N.W.2d at 433. The burden then shifts to the opponent in the third step because "[i]f relevancy for an admissible purpose is established, the evidence will be admitted unless the opponent of the evidence can show that the probative value of the other crimes evidence is substantially outweighed by the danger of undue prejudice." *Id*.

a) Step #1: Acceptable Purpose

The three-part test for admissibility begins with the circuit court determining whether the other acts evidence is offered for an acceptable purpose. *See Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 6. As stated previously, the statute provides that such evidence is admissible "when offered for . . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a). The Wisconsin Supreme Court noted that the statutory examples are not an exhaustive list and other purposes may justify the introduction of such evidence, especially when the 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." *Whitty*, 34 Wis. 2d at 292, 149 N.W.2d at 563. The Wisconsin Supreme Court confirmed that the statute "mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *Speer*, 176 Wis. 2d at 1115, 501 N.W.2d at 433.

The party seeking to introduce the other acts evidence must articulate the purpose behind the request for the introduction of such evidence. The purpose may be one of the specifically articulated purposes offered under the statute. *See State v. Veach*, 2002 WI 110, 255 Wis.2d 390, 648 N.W.2d 447, ¶ 125 (2002) ("the government is guaranteed the opportunity to seek admission of evidence if there is a justification for receiving evidence of the nature of prior acts on some issue . . . [such as] to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (internal quotation and citation omitted)); *see also Hammer*, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629, ¶ 28 (providing for the introduction of evidence related to absence of mistake or accident), *Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 60 ("Evidence of other crimes may be admitted for purpose of establishing a plan or scheme when there is a concurrence of common elements between the two incidents"), *Friedrich*, 135 Wis. 2d at 23-24, 398 N.W.2d at 773 (permitting the introduction of evidence to show intent), *State v. Cydzik*, 60 Wis. 2d, 683, 689, 211 N.W.2d 421, 425 (1973) (holding that "other-crimes evidence which tends to show intent may be admitted"), *Kwosek v. State*, 60 Wis. 2d 276, 281, 208 N.W.2d 308, 310 (1973) (allowing for the introduction of evidence barring on knowledge). The purpose need not be limited those articulated in the statute. For example, a prosecutor may seek to introduce other acts of sexual deviance committed by the defendant when the acts directly relate to at least one element of a charged offense in the case. *See Hammen v. State*, 87 Wis. 2d 791, 798-99, 275 N.W.2d 709, 713 (1979) (holding that other acts evidence is admissible when introduced to show an element of the charged offense). A prosecutor also may request the introduction of other acts evidence to "show the context of the crime and to provide a

complete explanation of the case." *State v. Hunt*, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771, ¶ 58; *see also Shillcutt*, 116 Wis. 2d at 236-37, 341 N.W.2d at 720 (admitting evidence "to establish the background relationship between the witness and the defendant . . . to fully understand the context of the case"). Other acceptable purposes are to show consciousness of guilt on the part of the defendant or present evidence that bears upon the credibility of a witness. *See, e.g.*, *Whitty*, 34 Wis. 2d at 292, 149 N.W.2d at 563 (holding that other acts evidence that impeaches credibility is admissible as an acceptable purpose). Wisconsin courts have disagreed on whether statements by the defendant following the crime even belong within the confines of other acts analysis, but courts have agreed that consciousness of guilt evidence clearly is admissible against a defendant. *Compare Cheney*, 44 Wis. 2d at 460-64, 171 N.W.2d at 341-44 (applying other acts analysis when admitting statements by a defendant), overruled on other grounds in *Byrd*, 65 Wis.2d at 425, 222 N.W.2d at 702, *with Neuser*, 191 Wis. 2d at 144, 528 N.W.2d at 54-55 (distinguishing other acts evidence from consciousness of guilt evidence when permitting statements by a defendant); *see also State v. Jeske*, 197 Wis. 2d 905, 914-15, 541 N.W.2d 225, 228 (Ct. App. 1995) ("It is well established that verbal statements may be admissible as other-acts evidence even when not acted upon."). Acts related to consciousness of guilt may be complex schemes by a defendant to fabricate a defense or more mild forms of guilt. *See State v. Riley*, 2005 WI App 203, 287 Wis. 2d 244, 704 N.W.2d 635, ¶ 16 (admitting the introduction of jail recordings); *see also Hardy v. State*, 150 Wis. 176, 180, 136 N.W. 638, 640 (1912) (upholding the introduction of evidence "that when defendant was in the presence of the children who accused him he said nothing but looked down" as "acts indicat[ing] a consciousness of guilt").

As long as the party seeking to introduce the evidence articulates a purpose other than propensity, the court should find that the party has offered the evidence for an acceptable purpose. *Speer*, 176 Wis. 2d at 1115, 501 N.W.2d at 433. Therefore, the first step in the test presents only a modest barrier for prohibiting the use of other acts evidence. The greater barriers occur when advancing to the second and third step in the test.

b) Step #2: Relevancy

The second step in the three-part test requires the circuit court to determine whether the other acts evidence is relevant. *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 7. This step in the analysis requires a two-part inquiry beginning with the first consideration of "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id*. Second, the court considers "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." *Id*. Essentially, the evidence is admissible "if its relevance does not hinge on a defendant's propensity to commit the act charged." *Id*. at ¶ 43. The burdens rests on the proponent of the evidence "to articulate the fact or proposition that the evidence is offered to prove." *Id*. at ¶ 51.

(1) Relation to a Fact or Proposition

In addressing relevance, "[i]t is a maxim in our jurisprudence that all facts having a rational or logical probative value are admissible in evidence unless excluded by some specific rule." *Whitty*, 34 Wis. 2d at 291, 149 N.W.2d at 563. Therefore, under this maxim, there is a presumption that evidence is admissible as being relevant to the determination of a case. *See id.* Subsequent court decisions have affirmed that evidence is relevant when the evidence relates to an element of a charged crime, impeaches credibility of a witness, or provides proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See*, *e.g.*, *Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 65 (elements of a charged crime); *Johnson*, 184 Wis. 2d at 340, 516 N.W.2d at 468 (assessment of the credibility issues). The Wisconsin Supreme Court noted that, "[u]nder the multiple-admissibility rule, evidence inadmissible for one purpose may be admissible as probative for another purpose." *Whitty*, 34 Wis. 2d at 292, 149 N.W.2d at 563. Therefore, the prosecutor need only show that the other acts evidence relates to at least one fact or proposition that is of consequence to the determination of the action. *See id.*

Additionally, the Wisconsin Supreme Court repeatedly has held that "[t]he state must prove all the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements." *Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 65, *quoting Plymesser*, 172 Wis. 2d at 594, 493 N.W.2d at 372. The court continued by noting that "[e]vidence relevant to motive is therefore admissible, whether or not defendant disputes motive." *Id*., *quoting Plymesser*, 172 Wis. 2d at 594-95, 493 N.W.2d at 372; *see also id.*, *quoting Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629, ¶ 25 ("If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the element."); *Silva*, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385, ¶ 12 ("the State must prove every element of the crime, even those elements that are undisputed"). In *State v. Wallerman*, an appellate court attempted to circumvent the Wisconsin Supreme Court's rulings by allowing a defendant the unilateral authority to stipulate to elements of a crime, thereby binding the prosecution and the court to the defendant's stipulations. *See generally* 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996). The Wisconsin Supreme Court was quick to rebut the lower court by overturning *Wallerman*, ruling "the state and the court are not obligated to accept stipulation to elements of a crime." *Veach*, 2002 WI 110, 255 Wis.2d 390, 648 N.W.2d 447, ¶ 118. The ruling recognized "the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Id*. at ¶ 125 (internal quotation and citation omitted). Therefore, evidence may be relevant even when the defendant does not dispute the fact or proposition that forms the basis to admit the evidence.

(2) Probative Value

In *Sullivan*, the Wisconsin Supreme Court ruled that "[t]he second consideration in assessing relevance is probative value, that is, whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." 216

Wis. 2d 768, 576 N.W.2d 30, ¶ 52. The probative value of the other acts evidence depends upon a variety of factors, including the degree of similarity between the other act and the charged offense, the number of prior other acts, and the other incident's nearness in time, place, and circumstance. *Id*. at ¶ 53. The Wisconsin Supreme Court noted that probative value "cannot be formulated as a general rule;" rather, the circuit court must examine the prior acts and assess their probative value on a case-by-case basis. *Id*. at ¶ 54 (noting that "[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence").

(i) Degree of Similarity

The Wisconsin Supreme Court ruled that "the probative value lies in the similarity between the other act and the charged offense" because "it is the improbability of a like result being repeated by mere chance that carries probative weight." *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 53. Therefore, "[t]he stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." *Id*. Courts have clarified that "[t]he required degree of similarity between the other act and the charged offense and the required number of similar other acts cannot be formulated as a general rule." *Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶ 16, *quoting Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 54. Courts have considered a variety of characteristics that bear upon the level of similarity between the other act and the charged offense. *See, e.g., Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 61 (similarity in the defendant's choice of victims); *Sanford v. State*, 76 Wis. 2d 72, 76-78, 250 N.W.2d 348, 349-50 (1977) (similarity in location); *Hough v. State*, 70 Wis. 2d 807, 814, 235 N.W.2d 534, 537 (1975) (similarity of conduct by the defendant); *Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶ 17 (similarity of a "familial or quasi-familial" relationship). Therefore, while the other acts evidence must contain some similar aspects to the charged offense, the "evidence need not be identical to the charged conduct." *State v. DeRango*, 229 Wis. 2d 1, 21, 599 N.W.2d 27, 38 (Ct. App. 1999).

(ii) Number of Acts

The Wisconsin Supreme Court ruled that the probative value of other acts evidence increases as the number of prior acts increase because when "a like occurrence takes place enough times, it can no longer be attributed to mere coincidence." *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 53, *quoting State v. Evers*, 139 Wis. 2d 424, 443, 407 N.W.2d 256, 264 (1987); *see also Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶ 22 (finding that the "other acts suggest a pattern of consistent activity that in its totality is significantly more probative than would be the constituent parts standing alone"). There is not a precise number of prior acts required because "[h]ow many similar events are enough depends on the complexity and relative frequency of the event rather than on the total number of occurrences." *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 54. Moreover, courts commonly find that a single prior act is sufficient, particularly when other factors such as the degree of similarity or the nearness in time, place, and circumstance illustrates the probative value of the single prior occurrence. *See, e.g., Sanford*, 76 Wis. 2d at 76-78, 85-86, 250 N.W.2d at 349-350, 353-54 (granting the admission of a single

prior sexual offense), *Hough*, 70 Wis. 2d at 809-12, 815, 235 N.W.2d at 535-37, 538 (admitting a single prior allegation of attempted rape), *Whitty*, 34 Wis. 2d at 284-95, 149 N.W.2d at 559-564 (upholding the circuit court's admission related to a prior attempted child enticement), *State v. Bustamante*, 201 Wis. 2d 562, 567-68, 577, 549 N.W.2d 746, 748, 752 (Ct. App. 1996) (introducing a single subsequent assault against a child), *State v. Clark*, 179 Wis. 2d 484, 488-90, 507 N.W.2d 172, 173-74 (Ct. App. 1993) (permitting a single prior battery).

(iii) Nearness in Time, Place, and Circumstance

The Wisconsin Supreme Court ruled that "[t]here is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis." *Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629, ¶¶ 5-16, ¶ 33 (permitting the introduction of a sexual assault that remained unreported for years with the victim only able to estimate the date of the occurrence as being five to seven years earlier), *citing State v. Kuntz*, 160 Wis. 2d 722, 749, 467 N.W.2d 531, 541-42 (1991) (upholding the admissibility of sixteen-year-old evidence); *see also Gray*, 225 Wis. 2d 39, 590 N.W.2d 918, ¶¶ 2-6, ¶ 52 (permitting the introduction of a 1990 prescription fraud conviction years later at a jury trial for another prescription fraud offense that occurred in 1994); *Plymesser*, 172 Wis. 2d at 586, 493 N.W.2d at 369 (upholding the introduction of evidence of a 1976 sexual assault in a sexual assault trial for a 1989 incident against a different victim); *Silva*, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385, ¶¶ 27-28 (finding the circuit court properly admitted information about criminal convictions from 1990 and 1994 at a jury trial for a crime occurring in 2000); *Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶¶ 19-22 (permitting evidence about a sexual assault that occurred over a quarter of a century before the sexual assault charged). Moreover, a court may consider the defendant's whereabouts during the time between the prior act and the current criminal offense in deciding whether to permit the prior act into evidence. *State v. Rutchik*, 116 Wis. 2d 61, 75, 341 N.W.2d 639, 646 (1984) (noting that the defendant's confinement in prison for some of the time between the two acts made the earlier incident "not so remote as to lose its probity"); *see also Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶ 20; *quoting Kuntz*, 160 Wis. 2d at 747, 467 N.W.2d at 541 ("[i]n considering time, we must take into account . . . not only the time that has passed, but also the opportunities presented over that period for the defendant to repeat the acts"). Additionally, courts have repeatedly held that acts committed by the defendant after the charged crime may be just as relevant and probative as acts committed prior to the crime. *See, e.g.*, *Bustamante*, 201 Wis. 2d at 566-68, 577, 549 N.W.2d at 747-48, 752 (upholding the circuit court's decision to permit the defendant's acts toward newborn child in 1989 at a jury trial for a cold case shaken baby death from 1978); *State v. Wagner*, 191 Wis. 2d 322, 327-31, 528 N.W.2d 85, 87-89 (Ct. App. 1995) (allowing the prosecution to introduce evidence of an alleged assault committed by the defendant in July of 1992 at the jury trial for assaults committed previously in October of 1990 and June of 1991).

c) Step #3: Unfair Prejudice

The final step in the three-part test requires the circuit court to determine whether "the probative value of the other acts evidence [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." *Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 8. The opponent to the evidence bears the burden to overcome this third step because the Wisconsin Supreme Court ruled that "the evidence will be admitted unless the opponent of the evidence can show that the probative value of the other crimes evidence is substantially outweighed by the danger of undue prejudice." *Speer*, 176 Wis. 2d at 1114, 501 N.W.2d at 433. Moreover, the circuit court shall conduct its examination of prejudice with an application of the greater latitude rule because the "rule applies to the entire analysis of whether [to admit] evidence of a defendant's other crimes." *Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 51.

The Wisconsin Supreme Court ruled that, in regards to the third element of the test, the Wisconsin Statutes "favors admissibly in that it mandates that other crimes evidence will be admitted unless the opponent of the evidence can show that the probative value of the evidence is substantially outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115, 501 N.W.2d at 433. The court explained that "[t]he term 'substantially' indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted." *Id.* The court's deference to the admissibility of such evidence recognizes that "the obvious purpose of all relevant evidence is to prejudice the individual against whom it is offered." *State v. LaBine*, 198 Wis. 2d 291, 299, 542 N.W.2d 797, 800 (Ct. App. 1995); *see also Neuser*, 191 Wis. 2d at 144-45, 528 N.W.2d at 54-55 (ruling that the evidence was "admissible even in light of its substantial prejudice to [the defendant]" because "[n]early all evidence operates to the prejudice of the party against whom it is offered"). Moreover, courts repeatedly have favored admissibility over defendants' claims of prejudice particularly in those cases when the other acts evidence related to an element of the charged crime or provided a motive for the defendant's conduct. *See, e.g.*, *Holmes v. State*, 76 Wis. 2d 259, 270, 251 N.W.2d 56, 62 (1977) (finding no prejudicial effect because the other act evidence "provided the motive for the charge[d]" crime); *Grande*, 169 Wis. 2d at 434, 485 N.W.2d at 286 (holding that when evidence of a sexual assault was the only evidence to an element of the charged offense, withholding the "evidence from the jury on the basis of unfair prejudice or misleading the jury" would unfairly prevent "the state . . . from prosecuting a serious criminal allegation").

In sexual assault cases, a defendant's prior conduct generally is not the sort to unfairly prejudice the defendant especially when balanced against their probative value. First, when "the nature of the crimes was highly sensitive to begin with," the danger of unfair prejudice related to sexually explicit other acts evidence is dramatically reduced because the charged crime in itself will "provoke[ ] a strong reaction from the jury." *DeRango*, 229 Wis. 2d at 24, 599 N.W.2d at 39 (admitting the other acts evidence because "[w]hile it is likely that the note containing the words 'Erica-17,' 'Katie-18-Ass' and 'Melissa, Big Black Dildo' aroused a sense of disgust in the jury, such evidence addressed [the defendant's] interest in videotaping sexually explicit conduct"); *see also Whitty*, 34 Wis. 2d at 295, 149 N.W.2d at 564 (permitting evidence of a previous attempted child molestation). Second, when the other acts relate to conduct by the defendant equal or less serious than the crime charged, the danger of unfair prejudice is dramatically reduced, as noted by the Wisconsin Supreme Court when the court ruled that "[s]ince the earlier incident did not involve an actual rape, it was not the kind of an incident that would have prejudiced the jury to

the extent of outweighing its probative value." *Hough*, 70 Wis. 2d at 815, 235 N.W.2d at 538. Third, the probative value to the evidence generally exceeds the prejudicial effect when the evidence is offered to prove an element of the crime. *See Clark*, 179 Wis. 2d at 496-97, 507 N.W.2d at 176-77 (finding no unfair prejudice because the evidence was offered to prove the element of intent); *see also Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 75 (finding that highly probative evidence generally outweighs the danger of prejudice). Fourth, when a familial or quasi-familial relationship exists between the defendant and a witness or victim, courts repeatedly have held that the probative value to the other acts evidence trumps the prejudicial impact because such background is necessary "to fully understand the context of the case" and "provide[s] an independent source as to the victims' credibility." *Hunt*, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771, ¶ 4 (victim credibility); *Shillcutt*, 116 Wis. 2d at 238, 341 N.W.2d at 720-21 (context of case). Finally, the greater latitude rule applied to sex assault cases generally requires the admission of probative evidence even when "the other acts evidence in this case was graphic, disturbing, and extremely prejudicial." *Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, ¶ 91; *see also Sanford*, 76 Wis. 2d at 82-83, 250 N.W.2d at 352 (finding that the "probative value exceeded the prejudicial effect" related to other acts evidence of a sex assault crime).

Prior Conduct of the Defendant

The introduction of the prior conduct by a defendant also generally does not confuse the issues, mislead the jury, or create a situation of undue delay, waste of time, or needless presentation of cumulative evidence. The other acts evidence does not confuse the issues because the acts address critical issues to a case. *See Whitty*, 34 Wis. 2d at 292, 295, 149 N.W.2d at 563, 564. Therefore, instead of misleading the jury, the other acts evidence assists the jury in answering critical questions in a case, such as assessing the credibility of witnesses or deciding whether the defendant acted intentionally. *See Clark*, 179 Wis. 2d at 495, 507 N.W.2d at 176 (ruling that cumulative other acts evidence was necessary to thoroughly sort out intent). Additionally, the evidence generally does not create a situation of needless cumulative evidence resulting in undue delay or waste of time because the other act evidence often is independent from the charged act; that is to say, while it may be cumulative to produce multiple witnesses to describe a single act, it is not cumulative to present several witnesses to describe multiple acts. For example, in *Opalewski*, the court of appeals permitted evidence about sexual assaults committed by the defendant against four different victims with the assaults occurring at different periods in the defendant's life with a collective time span stretching over a quarter of a century. 2002 WI App 145, 256 Wis. 2d 110, 647 N.W.2d 331, ¶¶ 3-10, ¶¶ 19-22. The court noted that the length of time and repetitive nature of the defendant's conduct increased the relevance and probative value of the evidence because the pattern of activity "in its totality is significantly more probative than would be the constituent parts standing alone." *Id.* at ¶ 22. In *Sullivan*, the Wisconsin Supreme Court specifically addressed this situation when the court ruled that repetitive behavior is highly probative and, therefore, the evidence is admissible. *See* 216 Wis. 2d 768, 576 N.W.2d 30, ¶ 53 (noting that "[i]nnocent intent will become improbable . . . [i]f a like occurrence takes place enough times" (internal quotation and citation omitted)). Therefore, a prosecutor may ask a court to find that the defendant's past conduct does not confuse the issues, mislead the jury, or create a situation of undue delay, waste of time, or needless presentation of cumulative evidence.

When a circuit court finds the probative value of evidence substantially outweighed by unfair prejudice, the court should remedy the prejudice through the least restrictive means such as limiting the scope of the other acts evidence or reading a cautionary instruction to the jury. The presentation of other acts evidence generally occurs through the testimony of the appropriate witness, but courts have restricted the introduction of such evidence by limiting the scope of the evidence or introducing the evidence through a stipulation of the parties. *See Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 78; *see also Clark*, 179 Wis. 2d at 497, 507 N.W.2d at 177. Although limiting the scope may be necessary in some situations "a reasonable judge could allow some details of the prior acts in order to show the similarities of the two events, thereby increasing the probative value of the prior act" so the limitation should not be overly restrictive so as to unduly sanitize the evidence. *State v. Anderson*, 230 Wis. 2d 121, 132, 600 N.W.2d 913, 919 (Ct. App. 1999). The preferred corrective measure requires the court to present the jury with a cautionary instruction related to the other acts evidence. *See* Wis. J.I.-Criminal 275 (2003); *see also Hunt*, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771, ¶ 73 (ruling that any confusion "caused by the admittance of the other-acts evidence [can be] substantially mitigated by the circuit court's cautionary instructions to the jury"). The Wisconsin Supreme Court repeatedly has recognized that the circuit court reading a cautionary instruction to the jury helps "alleviate and limit the potential for unfair prejudice." *Speer*, 176 Wis. 2d at 1118, 501 N.W.2d at 435; *see also Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629, ¶ 36 (holding that "[c]autionary instructions eliminate or minimize the potential for unfair prejudice"); *see also Anderson*, 230 Wis. 2d at 132, 600 N.W.2d at 920 ("a cautioning instruction is normally sufficient to cure any adverse effect attendant with the admission of other acts evidence"); *Kourtidias*, 206 Wis. 2d at 582-83, 557 N.W.2d at 862 ("By delivering a cautionary instruction, the trial court can minimize or eliminate the risk of unfair prejudice."); *DeRango*, 229 Wis. 2d at 23, 599 N.W.2d at 39. Therefore, a court may eliminate any potential prejudicial effect by reading Wisconsin Jury Instruction (Criminal) 275 because "jurors are presumed to follow such cautionary instructions." *State v. Kimberly B.*, 2005 WI App 115, 283 Wis. 2d 731, 699 N.W.2d 641, ¶ 41, *citing Grande*, 169 Wis. 2d at 436, 485 N.W.2d at 286.

6. A Defendant's Request for Other Acts Evidence

The Wisconsin Supreme Court held that the three-step *Sullivan* test "provides the proper framework when a defendant seeks to introduce other acts evidence." *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661, ¶ 2 (1999); *see also State v. Kimpel*, 153 Wis. 2d 697, 704, 451 N.W.2d 790, 793 (Ct. App. 1989) ("conclud[ing] that other-wrongs evidence is not limited solely to a defendant's acts"). Therefore, a defendant denied the opportunity to use such evidence in support of his or her defense may constitute prejudicial error by the circuit court and result in the defendant receiving a new trial. *See, e.g., Johnson*, 184 Wis.2d at 334, 516 N.W.2d at 465. A defendant may seek to introduce other acts evidence that bears upon the credibility of the victim or provides a motive that the victim lied about the incident. *See id.* at 334-335, 516 N.W.2d at 465-66. A defendant also may request the introduction of other acts evidence involving prior violent acts by the victim when "the issue of self-defense is sufficiently raised."

McMorris v. State, 58 Wis. 2d 144, 149, 205 N.W.2d 559, 561-62 (1973).[124] A circuit court has the statutory authority to order a defendant, prior to trial, to disclose the *McMorris* evidence he or she will use to present a claim of self-defense. *State v. McClaren*, 2009 WI 69, --- N.W.2d ---, ¶ 47. The opportunity by the defendant to request the introduction of other acts evidence does not mean that the defendant automatically may introduce any such evidence during his or her presentation of the case. To the contrary, the defendant bears the burden under the first two-steps of the *Sullivan* test to show that the evidence is relevant and offered for an acceptable purpose. *Speer*, 176 Wis. 2d at 1114, 501 N.W.2d at 433. In *State v. Muckerheide*, the Wisconsin Supreme Court denied a request by a defendant for the introduction of other acts evidence because the propensity evidence in question was not relevant to the case. 2007 WI 5, 298 Wis. 2d 553, 725 N.W.2d 930, ¶ 34. Additionally, statutory provisions may provide an additional layer of protection to prevent a defendant from introducing certain categories of prior acts, such as evidence of the victim's prior sexual conduct. See, *e.g.*, Wis. Stat. § 972.11(2)(b); *see also* Tracey A. Berry, *Prior Untruthful Allegations under Wisconsin's Rape Shield Law: Will those Words Come Back to Haunt You?*, 2002 Wis. L. Rev. 1237 (providing an in-depth examination into the rape shield law). Therefore, a court should prohibit a defendant from introducing other acts evidence unless the defendant overcomes the *Sullivan* test as well as any other statutory prohibition regarding the admissibility of such evidence.

7. Conclusion

A prosecutor confronted with a case where other acts evidence exists must exercise discretion and reasoned caution when deciding how to proceed on an other acts motion. For example, the introduction of other acts evidence by the prosecutor may result in a reversal of the case when an appellate court disagrees with the circuit court's decision approving the introduction of the other acts. *See, e.g., State v. Payano*, 2008 WI App 74, 312 Wis. 2d 224, 752 N.W.2d 378, ¶ 1. Conversely, a defendant may be denied his or her opportunity to present a defense when the circuit court denies the defendant's other acts motion. *See, e.g., Johnson*, 184 Wis.2d at 334, 516 N.W.2d at 465. Despite these risks, the greater latitude rule in sexual assault cases demonstrates that a prosecutor should not fear the introduction of other acts when the evidence is relevant to the case and the evidence is not offered for propensity purposes. See Appendix for sample motions and briefs relating to Other Acts evidence.

[124] A defendant raising a claim of self-defense may open the door to permit the prosecution to introduce other acts evidence to rebut that claim. See State v. Payano, 2009 WI 86, 768 N.W.2d 832, ¶¶ 105-07 (permitting other acts evidence to rebut the defendant's claim of self-defense); see also State v. McClaren, 2009 WI 69, 767 N.W.2d 550 (authorizing a court to resolve the admissibility of self-defense allegations prior to the trial).

K. Joinder and Severance

Section 971.12, generally, governs when charges can be joined against one defendant, or when two or more defendant can be joined together. This section also controls when severance of charges or defendants must occur.

There are many advantages to charging a defendant with charges that relate to multiple victims. These can be joined when they are of the same or similar character or are based on the same or similar transactions or constitute parts of a common scheme or plan. The old adage "there is strength in numbers" applies, since the likelihood of being falsely accused by a number of people of the same thing in the same way is remote. Thus, even when a prosecutor has several victims from the same perpetrator who may be vulnerable to defense challenges, joining their cases together becomes more winnable. Consequently, it is always a good idea to revisit old cases that had previously been no processed to see if they might be provable now that there is more than one victim. Perhaps the defendant's M.O. becomes more clear, and can overcome the weaknesses of credibility that the individual victims might share. This is particularly true, and often seen, in cases involving children, prostitutes, inmates, drug users, teens, and those with cognitive or developmental limitations. Certainly, stranger sexual assaults may also be the result of a "serial" rapist, and should be charged and tried together, too.

To be of the same or similar character goes to the nature of the crime(s) involved. Being "sexual" is generally sufficient, although the argument for Joinder gains in strength with every similarity that can be shown. The analysis that is used for "other acts" applies here. State v. Hall, 103 Wis. 2d 125, 307 N.W.2d 289 (1981). When one charge would be used as an "other act" in the trial of the other, then Joinder is appropriate. In addition, the more there are similar peculiarities among the charged victims, the greater the likelihood of Joinder being granted. For sample Joinder motions see Appendices R and S.

Defendant's can also be joined together for trial if they are involved in the same set of crimes. However, if either defendant is prejudiced by Joinder, the court must grant a severance motion. The biggest occasion when severance is granted is when one of the defendant's makes a statement that implicates the other defendant.

In sexual assault cases it can be very difficult for a victim to testify once, let alone twice. If the situation is right, a prosecutor may conclude that doing one trial before two juries is the way to proceed, in order to spare the victim the additional trauma of having to testify twice, and also to promote judicial economy. In the Appendix is a letter containing a list of cases that involve the use of dual juries when there has to be severance, but there is also great reason to want to try the case only once. Dual juries do present challenges in keeping one jury from hearing what only the other is supposed to hear, and would require a good deal of planning both by the court and by the parties. The greater the overlap of testimony, the more traumatizing testifying is going to be for the victim based on that victim's individual attributes. However, the greater the "savings" in time and expense, the more likely the prosecutor should be to consider a dual jury.

VI. Trial Strategies

The need to adopt a victim-centered, offender-focused approach to prosecuting sexual assault crimes is essential to a successful trial outcome. The overarching goal of the trial phase is to encourage a jury to adopt that same victim-centered, offender focus that has guided the prosecutor's actions during the investigation, charging and pre-trial phases. ***The importance of helping the jury see the crime through the victim's point of view cannot be overstated.***

A. Voir Dire

Voir dire, the process by which the parties select the 12 jurors who will be the fact-finders in a trial, provides the prosecutor in the sexual assault case with several important opportunities. There are several goals specific to voir dire in sexual assault cases, and each goal warrants the prosecutors focus.

1. Selecting Jurors Who Can Make a Fair and Unbiased Assessment

First, the obvious purpose of voir dire is to select individuals who will be open to listen to your case and make a fair, unbiased assessment of whether the evidence proves the elements of the crime(s) charged beyond a reasonable doubt. The flip side of this, is that it enables you to eliminate those individuals who have obvious biases against your case. One strategy of voir dire, therefore, is to craft questions that will serve to reveal those who have biases that would make it impossible for them to be fair to the prosecution side of the case. In fairness, (which is part of the prosecutor's role), obvious improper prejudices against the defendant should also serve as a basis for elimination as a juror. Part of this process necessarily requires a determination of whether anyone on the panel, or someone close to them, has ever been the victim of a sexual assault (whether reported or not) or accused of a sexual assault. Keep this discussion as open-ended as possible, and provide ample opportunity for response. Even if the judge has touched on this, go back to it in some form to make sure that prior experiences with sexual assault are all out on the table.

2. Addressing the "Weaknesses" of Your Case

A second, related purpose of voir dire for the sexual assault prosecutor is to address the "weaknesses" of your case. Those might include beliefs on the part of one or more jurors in the many myths about sexual assault that are commonly held within the community. Consequently, in preparing to conduct voir dire, the prosecutor must identify ahead of time what myths about sexual assault apply in the particular case, and what other factual challenges exist that could be the basis for unfair prejudice on the part of the juror. Refer back to Chapter III, Pre-Charging

Issues, Section A – Traumatic Response to Sexual Assault and Section C - Rape Myths to identify what the "myths might be.

For instance, did the victim dissociate during the assault such that there are blank spaces in her memory about the assault? If so, you will want to ask about whether anyone has ever heard that term? Has anyone has ever, themselves or someone close to them, experienced a traumatic event where they felt like they were "gone" or watching it from outside their body? One way to introduce this topic is by talking about the common experience of driving a familiar route, and then, after reaching your destination, not being able to remember making the necessary turns.

Prosecutors should anticipate where the juror's questions or issues are going to be, and then educate them about the reality of this crime.

This will raise jurors to a higher level of integrity in their decision-making about the case.

Perhaps the victim engaged in some counter-intuitive response during or after the assault. Talking about expectations around how a victim "should" respond is one way to bring this out in the open. The goal is to get the discussion to evoke from the jurors that all people respond differently, and that while one person may respond one way, someone else may respond in a very different way to that same situation.

If there is a delay in reporting, prosecutors should prepare jurors for expert testimony in this regard. Does this victim live a risky or unhealthy lifestyle? Questions concerning the purpose of the law, and its application to every citizen, even when we don't like their choices, or even when their choices might have created an opportunity for a predator to target their vulnerability, can be useful in this discussion.

In this second "goal," the prosecutor should anticipate where the juror's questions or issues are going to be, and then educate them about the reality of this crime. This serves to soften the blow of defense attacks later on in the case by encouraging jurors to think from a more accurate perspective about the case, rather than making assessments from a viewpoint based on false assumptions. In addition, it raises the jurors to a higher level of integrity concerning their decision-making about the case. While "they" might not ever have been in or be in the vulnerable position of the victim, they can still "walk in her shoes" when assessing victim credibility.

3. Exposing the Defendant

A third purpose is to begin to expose the defendant for what he is. These prosecutions need to be ***offender-focused***. Too often, historically, prosecutors spend their time apologizing for victim mistakes in judgment or lifestyle, and lose focus on the fact that it is the offender who "drove the bus here." He chose the victim, often for obvious reasons. He groomed the victim. He set up his

chances for improved "success" in being able to sexually assault the victim. He played on the myths concerning sexual assault in the hope that he would be able to get away with his crime – hoping that she wouldn't report because she knew no one would believer her. Questions that place the focus on the MO of the defendant begin the process of moving the jury from a "blame the victim" approach to a more offender-focused, ***See how he did this?*** view of the crime.

4. Demonstrate the Prosecution's Control

Finally, voir dire is the first chance you get to demonstrate your fairness and your control of the case. It is not a time to stumble or bumble, but to deftly direct the conversations in helpful ways. Therefore, avoid asking "stampede" questions that will almost always result in a large number of people jumping on a band-wagon.

For example, a poor question in a teen sexual assault case might be, "Who thinks its okay for a teen to have sex?" This question is vague (what is "okay"?) and allows jurors to say that they had sex when they were teens, and that teens can make judgments about having sex. A better question might be, "The law says that adults cannot have sex with anyone under age 18. Who can think of a reason why our legislature would want to protect teens in this way?"

Make sure you emphasize the important words so that the larger concept is not lost. Asking a "stampede" question causes you to lose control, and that never looks good. If you do get a stampede-type response, you need to steer away from the negative influences and look for a juror who can provide some balance. The "leaders" of the stampede should be considered strongly as potential strikes, and you may find a basis for a strike for cause, depending on what a specific juror said.

Other questions that you should ask elevate the integrity of your position because they point out that you are fair, and you want them to be. Of course, if you don't prove a case beyond a reasonable doubt you expect them to acquit the defendant. And likewise, if you do prove the case beyond a reasonable doubt, which is a burden of proof you gladly accept, then they should be willing to hold the defendant accountable for his actions.

The language you choose begins to frame the case for the jury. Make sure you echo your theme in how you ask your voir dire questions. Also, highlight, illuminate and emphasize your points with common experiences (not necessarily sexual assault) that can tap into juror's own experiences. As much as possible, get the jury to provide the information you need to you, and not the other way around. This helps the jury "own it," and they are more likely to remember and use it later.

There are sample voir dire questions that touch on a number of the specific issues addressed in this manual. New ideas will hopefully come to you as you prepare your own voir dire, using the strategies discussed above. See the Appendix for Sample Questions.

B. Opening/Closing Statements

1. Opening Statement

Every sexual assault is unique. When a sexual assault case proceeds to a jury trial the goal of the prosecution is to convince the jury that the assault occurred and that the defendant's conduct meets all of the elements of the offense charged.

The best way to meet the goal of establishing the defendant's guilt is to relate an account of the events that makes sense, explains undeniable facts, and provides reasons for why people acted the way they did through the story of credible witnesses. In other words, you have to have a theory to explain what it is that the defendant did and relate the account in such a way that the jury understands and believes what happened during the assault.

The best way to meet the goal of establishing the defendant's guilt is to relate an account of the events that makes sense, explains undeniable facts, and provides reasons for why people acted the way they did through the story of credible witnesses.

The opening statement should be relatively brief, quickly grab the attention of the jury, succinctly relay important facts for the jury through the witnesses they will hear from during the trial, tell them what to look for during the presentation of evidence, and tell them what you expect them to do after they hear all the evidence.

The jury should be immediately drawn into the trial during the initial phase of the opening statement. Here are three recommended methods to draw the attention of the jury.

One method is to use a short phrase that quickly and accurately summarizes what the central issue of the case is. Another method is to provide a theme that the jury will be readily able to identify with and provide a perspective through which to view the evidence as it is presented. Another method is to immediately shock the jury with a statement that the defendant made during the course of the assault that they will remember when it is repeated. Selection of the best method depends on the style of the prosecutor and a careful evaluation of the evidence that will be presented at trial.

After the introduction, tell the jury through a narrative about the ***key facts*** you expect to present in evidence. The narrative should be compelling, using descriptive words and active voice verbs. Other strategies for an effective opening include:

- Use some visual aids, for example, an exhibit such as a photograph you are certain will be admitted at trial, which is simple and presented so that it is easily viewable by all members of the jury.

- Some prosecutors elect to use a PowerPoint presentation during opening statement. If you decide to use the PowerPoint, make certain that you are familiar and comfortable with its use so that it does not interfere in the message you are trying to convey.

- Hold the jury's interest. Use gestures and body language appropriate to the story you are telling. Vary your voice in pitch, rate or pace, volume, and tone. Pause when appropriate to focus attention on the point you want the jury to remember. Look all individual jurors in the eye, but do not make them feel uncomfortable.

- Set the scene, identify the critical players and establish important time sequences and significant events. Continue to introduce the theme of the trial. Identify for jurors the human values present in the facts of the case. Select a point of view from which to narrate the facts and stick with it throughout your opening statement.

- Don't argue the case. The opening statement is not an opportunity to argue the case, nor is it the time to bore the jury with details that in the end are not going to matter one way or the other how the jury is going to find the defendant guilty. Style is just as important as having a command of the facts. It is vital that you relate the facts of your case without being condescending, wooden, argumentative or inarticulate.

Finally, end your opening statement by telling the jury what you expect them to do when they deliberate their verdict. Tell them to find the defendant guilty. Engage the jury in the process by having them adopt your perspective and the theme that you selected for the trial.

2. Closing Statement

Your closing argument is also prepared before the trial begins and should carry through the themes that were developed throughout the entire trial and lead the jury to return a verdict of guilty on the charges that are being tried. Many of the techniques about style and presentation that are contained in the section regarding opening statements are equally applicable in closing statements

Your primary objective in closing is to get and keep the jury's attention. The themes that were developed throughout the trial are now brought together and repeated again for the jury as the facts support the theme and theory. Now is the time to argue what the jury knows to be the case based on the evidence that was presented, and how that evidence meets the elements of the charges that the jury is considering. Remind the jury by showing them again the particular pieces of evidence that establish and corroborate the assault as recounted by the victim during the trial

A well organized logical approach to the evidence, the arguments to be made arising from those facts, and a common sense approach to the inferences are all critical to persuading the jury.

Emphasize portions of testimony, exhibits and other evidence which forcefully and succinctly establish the guilt of the defendant and do so in a manner that is consistent with your style and personality.

Consider whether to save elaboration on some arguments for rebuttal based on what you expect the defendant to argue in the defendant's reply. A strong opening in rebuttal with an emphasis that refocuses the jury's attention on the defendant's conduct will add to a strong rebuttal.

This is not a time to shy away from and avoid weaknesses in your case. Confront problems head-on and give the jury compelling reasons based on the evidence to reject or overlook the problems they may be considering that may prevent them from finding the defendant guilty. Remind them of the original themes developed in opening and repeated throughout the trial and explain why the problems are not consistent with the State's presentation of the case.

This is not a time to shy away from and avoid weaknesses in your case. Confront problems head-on and give the jury compelling reasons based on the evidence to reject or overlook the problems they may be considering that may prevent them from finding the defendant guilty.

Remember that an improper closing argument that violates ethical rules or that inappropriately violates constitutional principles can result in a mistrial or a reversal on appeal. Know the ethical rules and constitutional principles that govern the prosecutor's closing argument. Occasionally the appellate courts will reverse a conviction in a sexual assault case solely based on impermissible closing argument by the prosecutor. Therefore, you should:

- Know the arguments not allowed in your jurisdiction
- Not comment on defendant's right to not testify
- Not refer to defendant's invocation of *Miranda*
- Not shift the burden of proof
- Not ask the jurors to put themselves in another's place
- Not attempt to make the jury feel responsible or feel guilty
- Not assert personal beliefs
- Practice the Golden Rule

You must also tell the jury what they have to do. Explain how the facts evidence and exhibits tie into the crucial elements that have to be found. Explain and embrace the burden of proof. Emphasize that the jury is a truth finding device, not a device for searching for doubt or sympathy. Explain the differences as outlined in the jury instruction about what is and is not a reasonable doubt.

Finally you must tell them that you expect them to find the defendant guilty based on the evidence that was presented at trial. Have a final exhortation ready to present at the end of your closing argument and one for rebuttal as well.

C. Exhibits

1. General Recommendations

Do not underestimate the importance of exhibits. Sometimes, just the tiniest tear on a pair of panties can be the corroboration the jury needs to tip the credibility scale. Actually seeing the items and places described by a victim draws the jury into that reality, in ways that mere oral explanations are not able to achieve.

Exhibits add drama to testimony, and can be used to liven up otherwise long, boring verbal explanations. The introduction of an exhibit should not, however, detract from important information. Rather, the exhibit should serve to underscore a point that has already been put out there for the jury to consider.

In addition, exhibits should be able to be seen by the jury – either through blow-ups, or by publishing the exhibit to the jury in some appropriate manner. Remember – every time you can make a key point again through the use of an exhibit, try to do so – the more often a key point is made, the more likely the jury will be to both understand it and remember it during later deliberations.

a) Selecting The Person To Introduce The Exhibit

Handling and introduction of exhibits at trial should be done in a manner that causes the jury to focus their attention on the items such that the importance of the particular item in connection to the overall proof of the elements of the crime is emphasized. It is essential for smooth introduction of exhibits that they be prepared ahead of time and marked ahead of time if at all possible. The prosecutor should know what the foundational questions are, and should have decided who might be able to provide that necessary foundation.

When more than one person can provide the foundation, the prosecutor should pick the person to introduce the exhibit based on maximum impact first, and then also the ease with which the witness will be able to establish the foundation. The impact of the exhibit is determined by: (a) who the witness is and what effect the exhibit will have on them personally; (b) when during the witness' testimony the item will come forth; and (c) the ability of that witness to draw out the connection between the exhibit and its relationship to the evidence in the case overall.

For example, when there is a photograph of the victim who has been battered, and the victim was observed by a police officer in the condition and at the time depicted in the photo, either the victim, the photographer, or the police officer can lay the foundation for the

Remember—every time you can make a key point again through the use of an exhibit, try to do so—the more often a key point is made, the more likely the jury will be to both understand it and remember it during later deliberations.

photo. It may be that the victim will have an emotional reaction to seeing himself as he appeared after the assault that you want to capitalize upon. In that case, you should use the victim to introduce the photo, at a point in the testimony right after the victim has just explained the nature of the physical assault and the injuries he sustained. The photo will not get lost in the shuffle of evidence, and will have maximum impact if testified to, admitted and then published at that point in the trial.

However, it may be that your victim is recanting at the trial, and that the injuries sustained were among the worst ever seen by the testifying officer. Since you don't want to give the victim a chance to explain away the photo, or to minimize it, in this case it is better to introduce the photo through the officer, who may also later be able to testify about domestic cases and the sad reality of recantation even in spite of the terrible injuries the victim may have received. You want also want to introduce the photo before the victim testifies, so that the jury has been exposed to the harsh reality of domestic violence through the photo, and will be less inclined to accept the victim's denials or watered down version of what happened.

b) Complex Exhibits

With complex exhibits, it is best, if possible, to practice with the witness ahead of time, so that introduction is smooth. When making a chart that will be used with a witness, create it with the assistance of the witness, who may be able to provide good ideas about how best to lay out the information, or in what order for the best flow of information.

c) Introducing Exhibits

The reader is referred to the statutes, and general trial advocacy manuals for the foundations for any specific kind of evidence, should the reader not know what the foundation might be. As a general practice pointer, keep the foundation as simple and streamlined as possible. When introducing a large number of similar exhibits (i.e., photos of the scene) have the witness introduce them with minimal one-by-one testimony, then establish the remaining foundation for the group, and move the entire group into evidence. You can and should go back into the most significant pieces in the group to highlight via testimony the portions that have particular relevance to your case. Your goal is to have the jury exposed to the significant part during testimony so that they can reflect on it, and even find it again, during deliberations.

2. Types of Exhibits in a Sexual Assault Trial

There is a wide breadth of exhibits that can be used to address the theme you have created for the case, and corroborate victims' and witness' testimony. A brief description of how to best use various types of exhibits is provided below:

Physical evidence

Physical evidence is a thing – a gun, a blanket, a piece of clothing, etc. What the thing is may require only you to handle it (and not the witness) – and any handling you do of the objects of

the trial should be done with "professional drama." Make sure to have the witness testify to any particularly significant aspects of the physical object, including its appearance, where it was found and its smell. Physical objects from the crime scene may evoke emotion from the victim. Don't dilute the impact of this by information you can obtain through another witness later in the case. Sometimes the physical object is "changed" from its original appearance due to testing done by police or lab personnel. Have the witness identify any changes.

Photos
In lieu of physical object, photos are sometimes necessary, such as when the object is too large to fit into a court room. As with introduction of the objects themselves, any important characteristics or features should be orally discussed.

Victim Photos
Photos of the victim or defendant appearance often tie into the element of force. It is usually best to introduce victim photos at the point when you have already had the victim go through the story once, and are now going back to highlight aspects of the information. This allows the victim to retell an important part of the story, and a photo imprints that information on the jury's mind.

Be mindful that some photos of the victim may be embarrassing. If you must use photos of breasts, vaginas, buttocks, or the male genitalia, try to use those that show what you need the jury to see without showing more than necessary. With colposcopic photos, be careful that the injury will be obvious to the jury, who is not trained to see or understand the micro-trauma the most often makes up the physical trauma of sexual assault. Have a discussion with the victim ahead of time so she understands what the jury will be seeing, and why you feel it is absolutely necessary for them to view that particular photo.

Photos of the Crime Scene
Photos of the scene can be used either with the victim, or with the investigating detective, and usually both. With the victim, focus on the most key aspects of the photos – showing where events occurred, items left behind or damaged, etc. With the detective, spend more time laying out the scene more meticulously for the jury. Scene photos are often used in conjunction with a diagram of the scene. Use the detective to do any orienting of the photo to the diagram.

Documents
Paper documents can be all sorts of things. If it is something written by the victim, introduce it through the victim. Have the victim read into the record any important parts. This can include letters of disclosure or feelings, or diaries, or even letters of love to a defendant.

Paper documents that are business records may need to be introduced through the records custodian, or by the person who created the document. Included in these sorts of papers might be credit card receipts, motel registration forms, etc. These can be helpful to prove who bought what, who registered when, etc. They should be presented in order, after the big picture has been laid out for the jury.

Phone Records
Cell phone records need a custodian, and can be useful for corroborating that a person was in communication with another particular person. For example, when they were in communication? Where they were communicating from? Depending on the type of case, these records can be coordinated with cell tower maps or other grids to track movement. The investigating detective can put together the significance of what these records reveal and the disputed issues in the case.

Communications on cell phones or computers containing text can reveal many of the same things as cell phone records. However, text also provides insight into intent, interests, plans, etc. This is often the hard evidence that corroborates what the victim has already described occurred.

Computer Evidence
Computer evidence apart from text can also reveal interests, and may even establish entire crimes – like possessing child pornography. When considering showing pornography, whether commercial or created by the defendant, it is necessary to prepare the jury for the shock of seeing this. Pornography is offensive to many people, and child pornography is especially disturbing. Take care, therefore, to maintain a serious and professional demeanor when this evidence is being displayed, and consider exactly how much and for how long a jury needs to be exposed to this kind of evidence. Prepare them not only in voir dire and opening, but also with the testimony of a witness who can verbally describe the images. The jury will know what they are looking for and what they need to focus on, and can then spend as much or as little time as they need actually looking at the images.

Diagrams or Maps
Diagrams or maps of the scene or surrounding area, portions of medical records or of particular objects can be helpful to orient a jury. Unless the victim has shown you an ability to draw maps well, don't make him/her draw a map or try to follow one. Victims are good, however, at placing X's on prepared diagrams to show locations of people or objects. Make sure you warn the victim ahead of time, and have multiple markers available. Instructed them to make a big enough X, and always orally describe for the record what color you are instructing them to take, and what they have marked. If you need more technical information, like dimensions or direction, use an officer who has experience in describing these topics and in using a diagram or map.

Medical Records
Medical Records are best testified to by the person who created them, since they understand any abbreviations, and seeing the record often sparks independent memory of the exam. Records, or portions of them, can be blown up for the jury to see and follow along with once the exhibit has been received. To highlight injuries, separate charts with outlines of bodies, or blow-ups of genitals can be used by the witness, who can illustrate where an injury is located on the body by marking with big red or bright purple markers. Different kinds of injuries, especially if there are a lot of them, should get different colored marks, and the witness can create a key – i.e., lacerations = red; bruises = purple. Since injuries in sexual assault cases are not entirely

common, you may also want the medical person to bring with them objects that help explain why the body is tolerant of penetration. Scrunchies have been used to show, for instance, what a hymen is like, which is very helpful in debunking the myth that a sexual assault will rip the hymen. As a matter of practice, medical evidence tends to corroborate the victim, and therefore this evidence should, if at all possible, follow the testimony of the victim close in time – possibly right after, or within one or two witnesses.

Films and Video

Films or videos that show or memorialize a crime are hugely powerful pieces of evidence. Make sure the room is sufficiently dark so that the images can be seen. Also, if there is audio, make sure it can be heard. Depending on what the tape shows, any of a variety of witnesses may be the right one to introduce this. If it is of the victim, determine whether the victim is easily recognizable. If not, you will probably have to have her identify herself in the film, and also describe where and when it was created. This can be a very emotionally traumatizing event for the victim, and you must discuss this with her ahead of time. You will want to control who can actually see the images, and may want to ask the court to excuse certain people from the court during the viewing. If the victim is easily recognizable, you may be able to introduce the item through another witness who won't be emotionally traumatized by the evidence. Surveillance videos might need the building supervisor or security officer, but usually the investigating detective can lay sufficient foundation. Sometimes these kinds of tapes are very grainy and hard to see – make sure that you provide some oral descriptions of what the jury can expect to see or maybe even have the detective manually stop the tape and point out the suspect, for instance. If possible, create a still shot of the most critical places on the tape to enhance the utility of the tape. Pornography, both adult and child, may have to be shown to the jury. When it is child pornography that is video, the audio is often just as disturbing as the visual images. As noted above, it is important to prepare the jury for any such viewings.

Audiotapes

Audiotapes can be of victim statements, defendant statements, 911 calls or jail calls from the defendant, among other things. Some courts are now requiring the preparation ahead of time of transcripts of the audiotape. The transcript can be used, if agreed that it is accurate, in conjunction with the audiotape. When you have a scratchy tape, providing a transcript to each juror can help ensure that they hear what is being said. When to play an audiotape depends a great deal on what it is and what it shows. 911 tapes are best played near the beginning of the trial. Defendant's admissions are often a nice way to end a trial. Jail calls can be very effective either right before or right after the recanting witness, or at the end of a trial if they contain admissions of the defendant. Audiotapes can be authenticated by any person who is able to recognize the voices on the tape and can say when the conversation took place. Professional tapes, done in cases where police are using a one-party-consent call or are calling a person they "met" on the Internet while posing as a child can certainly come in through the detective.

Charts

Charts that help organize a jury may not, ultimately, be "evidence," but can be helpful throughout the trial to help direct and focus the flow of evidence or to connect certain evidence

with certain charges. When there are multiple victims or defendants, charts that identify faces, names, nicknames, dates of birth, and other relevant information can also be useful organizing tools. These can usually be introduced through a detective, and can often be used, with notice, during opening statements. Charts that an expert uses to help explain or organize scientific findings or concepts will necessarily come in through the expert. Abbreviations and layout should be explained, so that later the jury can meaningfully use the chart, if necessary. Summaries or flowcharts that document similarities from one crime scene to another are usually entered through the testimony of the lead detective. Summary evidence like this – perhaps explaining how the police were able to ultimately identify this particular perpetrator, are nice devises to use toward the end of the case, or after the individual victims have testified.

Defendant's Writings
Writings of the defendant are also best introduced via the detective who can explain the significance of the written content or where the item was located. It is also necessary to establish that it is the defendant's. This should be done prior to any discussion of its importance.

Dolls or Models
Dolls or models can help jurors visualize hard-to-describe concepts of actions, and can also aid children in being able to fully explain what happened in a particular event. The dolls, in the latter case, are not themselves exhibits. Models, on the other hand, can be exhibits. For instance, a model showing the entry angle of a bullet can help a jury to see what happened. These are best introduced through the expert who will be explaining the model.

Having run through the various kinds of exhibits most typically seen in sexual assault trials, a few recommendations are provided.

- Exhibits allow for the important parts of the story to be told again. Because of this, try to use the most powerful pieces with the victim, but also consider the impact of exhibits during those parts of the testimony which can get long or boring. A well-placed exhibit can re-energize the jury and re-gain their attention if it is waning.

- Being organized is important. Disorganization makes you look unprofessional, and can make the jury dislike you. Don't waste their time. Your witnesses, likewise, should be ready when it is time to address an exhibit. Don't embarrass them.

- Think about what you don't need, and don't introduce something just because you have it. If there is no dispute that the blood on the sheet is the defendant's, don't waste time with cuttings from the sheet and buccal swabs. On the other hand, a meticulous presentation of all the evidence can be effective in showing the care that went into the investigation, and can help overcome arguments of sloppiness or pre-conceived ideas.

Lastly, use the exhibits in your closing. It is a very visual reminder to the jury of the strength of whatever point you are making. The most important and damning exhibits should be prominently featured throughout your closing.

D. Order of Witnesses

Presentation is key in a jury trial. Juries do not want to hear a collection of facts, they want to hear a story that convinces them that the victim was sexual assaulted by the defendant. Any good story should begin strong and end strong. If the victim is not a strong witness it may be better to call the initial officer or SANE nurse as the first witness, so that the jury can understand the emotional impact or trauma of the assault. In some cases it is the actual testimony of the victim giving graphic details about the assault that will grab the attention of the jury. Presentation is always case specific.

Prosecutors must also pay close attention to the order of witnesses presented at trial in order to facilitate the jury's understanding of the context in which the sexual assault took place. Corroboration of the victim's account of the assault is essential to the jury's understanding of the case. Typically, witnesses who can establish the facts and circumstances which made it possible for the defendant to commit the assault assists the jury and should be presented before the victim testifies in order to place the victim's testimony in proper context. The victim's testimony should be the focal point of the State's case after the context is set with remaining expert witnesses used to corroborate the victim's testimony. Corroborating testimony typically are fact witnesses who corroborate the victim's version of the event and can include observations by lay witnesses, documentary evidence including bank transactions telecommunication and computer records, medical expert testimony, forensic expert testimony, and/or expert testimony on reactive behavior of victims.

Witness order is important throughout the prosecutor's presentation of the case from beginning to end. The conclusion of the story (case in chief) should end as strongly as it began. It is important that the last witness have a powerful impact upon the jury, convincing the jury of the defendant guilt.

E. Direct Examination

1. Victim testimony

No one knows better what happened, how she felt and why she responded as she did during and after the sexual assault than the victim. This is the reason why the victim is the most fundamental aspect of your case, and why her credibility is crucial. In order for the jury to properly assess the credibility issues in your case, they must be able to figuratively "walk in her

shoes" and look at the assault from her perspective rather than judging and second-guessing from the comfort of their 20-20 hindsight juror seats.

The ***victim's experience*** needs to be made known to them, especially in cases where consent is the defense, which means that you must, through her, tell the ***whole story*** and paint a vivid and clear picture of the crime for the jury. A good place to start in preparing for direct exam, therefore, is by asking the victim to tell you about what she wants to say.

As you listen to her, you will gain information about how the offender observed vulnerability and capitalized upon it. Her vulnerability is, therefore, a key aspect that must be explored in her testimony. Accordingly, the direct exam of the victim must:

- Humanize the victim and allow the jury to get to know her.
- Allow the jury to see, hear and feel what the victim had to say, what she heard and how she felt (physically and emotionally) during the assault and after.
- Provide evidence, in the testimony itself, and in addition to any physical evidence you have, that proves every element of the crime(s) charged beyond a reasonable doubt. At the end of the direct, any corroboration is icing on the cake – the jury should be viewing all corroboration as almost expected, because they find themselves believing what the victim had to say.
- Explain the facts fully so that the jury is not left to speculate.
- Make your victim invulnerable to cross-examination.

In order for the jury to properly assess the credibility issues in your case, they must be able to figuratively "walk in her shoes" and look at the assault from her perspective rather than judging and second-guessing from the comfort of their 20-20 hindsight juror seats.

By this point, you have a developed theme and theory of your case. How does your victim fit into the plan of proving the elements of the crime? How can you ensure that blame is falling where it should – on the offender, and not on the victim? Your theme should be pointing in the direction of the offender.

Preparation is key to an effective victim testimony. During an effective direct examination of the victim you are going to have to go into excruciating detail with her, and she is going to have to trust you to get her safely through what is going to be an ordeal. She must feel prepared, non-defensive and confident in both her ability to field all questions, and in your ability to present her story. Therefore, you cannot be a stranger to her. Developing a good working relationship with

the victim is essential for effective presentation of her case. In your pre-trial preparation you must:

- Allow you victim to express herself as she does.
- Allow her to voice her concerns.

- Identify any special skills or problems she has – does she have a somewhat limited vocabulary? Does she think long before she answers? You will have to adjust to, and help the jury adjust to and expect her idiosyncrasies.

- Assess her ability to introduce exhibits.

- Thoroughly vet all the facts.

- Explore apparent "inconsistencies" – is it inconsistent, or something else?

- Prepare the victim for expected defense questioning.

- Assure her that you are not afraid of the truth, that knowledge is power.

Once the victim can approach the witness stand with confidence and dignity, you are prepared to proceed before the jury to:

- Introduce her. Let her show her strengths, her more complete self. Ask about school, family, skills and goals.

- Introduce the advent of the defendant into the victim's life – have her explain any relationship, and any changes in the way she feels about him now, vs. before she was attacked.

- Move into a slower, quieter discussion of the events leading up to the assault itself. Begin focusing on every possible sensory and peripheral detail, asking specific questions about what she saw, heard, felt, etc.

- Allow the victim to narrate, and go back over and into details as necessary. As she relates the events of the assault, slow the pace of the questions down even more, and take her and the jury back through important segments, getting more details. Include any words said by either, what the offender looked like, how his voice sounded, how his face, voice or body changed during the assault, how he reacted to her words or actions, what she was thinking at very major point during the assault.

- Have her explain what options she considered, and why she chose the options she did.

- Have her explain any physical sensations.

- Have her explain her perceptions of the defendant before, during and after the attack. Remember to include words and phrases that echo your theme, and emphasize the words and phrases she uses that help further the theme, too.

- When consent is an issue, spend time on how she communicated to the defendant through her words and actions that she was not freely and voluntarily engaging in the acts. Use any corroboration available to show her unequivocal "No"

- Discuss her decision to report and her experiences with the police and medical personnel.

- If possible, have her describe the immediate physical and mental impact of the assault on her, as well as any longer term effects on her life. Include any expressions of humiliation and/or degradation.

- Anticipate areas of cross-examination and defuse them

- End on a strong note

2. Expert Testimony

In many sexual assault cases there are issues that fall outside the realm of what most people in the community know. To further complicate sexual assaults, as discussed earlier, many community members think they do know a lot about sexual assaults. Sadly, their information and beliefs are often completely wrong. A jury cannot properly evaluate the behavior of a sexual assault victim, her credibility or the culpability of the offender if that evaluation is going to be based on mistaken impressions and outright falsehoods.

The first step in addressing these concerns is to identify what mistaken beliefs, falsehoods and myths are likely to come into play in your specific case. Once you have identified these, then you can make a determination as to who is going to be the best expert to address which myth. If the primary issue is going to be a lack of injury, then the SANE will be your best witness. If counter-intuitive victim behavior during the assault (like "compliance") is present, then you may prefer to utilize a community-based sexual assault advocate or an experienced sexual assault detective, although many SANEs are trained and experienced in the psychosocial dynamics of sexual assault, as well. Perhaps you have a child or teen victim who delayed reporting, or engaged in piecemeal reporting. A well-trained child forensic interviewer may be able to be your expert, or a trained detective or officer who has specialized in child sexual assault investigations. Maybe there is a social worker available who can properly address these issues.

Once you have decided on the topics of expert testimony, and who that expert will be, you must notify the court and counsel of who the expert is and at least summarily, what your expert is going to say. There are sample Notices of Expert Testimony in the Appendix.

a) Pre-trial

If the defense challenges your ability to introduce your proposed expert, you must be prepared with both argument and supporting case law. Chapter 907, Stats., sets out the parameters and requirements for the introduction of expert testimony. Sec. 907.02 sets forth the relatively low standard in Wisconsin that permits someone with special knowledge or expertise, derived from experience, training or education, to testify about their specialized knowledge when that information will assist the trier of fact in understanding the evidence or determining a fact in issue.

In Wisconsin, our courts have dealt with expert witness issues in both child and adult sexual assault contexts. In general, our courts recognize that there are many myths and misunderstandings about sexual assault and sexual abuse, and that dispelling those myths is important for correct and accurate evaluation of the facts of a sexual assault or sexual abuse case. See *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988); *State v. Bednarz*, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993); *State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93.; *State v. Delgado*, 2002 WI App 38, 250 Wis. 2d 689, 641 N.W.2d 490 for some examples of cases where the court has allowed expert testimony in to explain victim behaviors in sexual assault or abuse cases. See Expert Testimony discussed in Chapter V, Section B for a full discussion.

b) Trial

Expert testimony is best placed when it is near in time to the testimony that needs the explanation. Often, calling the expert immediately prior to the victim to lay the groundwork for an understanding of hard-to-understand counter-intuitive behaviors is an effective placement. At other times, calling the expert immediately after the victim, to echo commonly-offered explanations and feelings, as were just described by the victim, is also effective.

When the expert is called, the first area of inquiry is establishing the individual's expertise. Why should this jury pay any attention to what this expert has to say? At times the defense may offer to stipulate to your expert's expertise. Do not forego the opportunity to provide full testimony to the jury concerning your expert's qualifications. There are some qualification questions in the Appendix for your review. Make sure to talk with your expert ahead of time. He might have additional experience that you don't know about that could greatly enhance his qualifications, such as work outside of his regular job, or past work experience that is relevant to what he will be testifying about. He may teach others on the topic, or have published research or articles of which you are unaware. See Appendices W and Y for sample questions.
Asking the court to find that your expert is qualified – tending her as an expert – varies from court to court. Know how your court wants this done – do it if allowed (it sounds great), but don't ask for the court's blessing if that court is going to admonish you that such a finding by the

court is unnecessary. You may want to mark a copy of the expert's CV (which you have previously provided to opposing counsel) and introduce that through the expert.

Once you are ready to get to the point of the expert's testimony, get to the point. Do not muck around in unnecessary foundation or pre-cursers. Put the point in your question, then repeat it back in the next question. Walk your expert through the issues in your case, allowing the expert to narrate as much as possible, then looping back parts of the answers in your next question. Use topic headings when there are more than one issue to be addressed. Have your expert summarize. Include facts directly from your case whenever possible when asking for specifics, clarifications or examples. Rephrase answers in simpler terms if needed. If your expert is comfortable, use charts or diagrams to help the jury focus. This also aids those on the jury who are more visual learners. Utilize words, phrases and/or concepts from your theme in your questions of the expert. Sample substantive questions are included in the Appendices X, Z, and AA. At the conclusion of your expert's testimony, ask the expert whether the opinions and information he has offered were made to a reasonable degree of "professional"/"medical" certainty.

F. Cross-Examination

The purpose of cross examination of the defendant in a sexual assault case is typically governed by the same basic principles for cross examining any witness at trial. Remember the defendant has a lot at stake and will most likely attempt to portray an account of a forcible sexual assault as consensual in nature, or that in some way the victim is accountable for what occurred. This is true if the defendant has not given a previous statement to law enforcement, but is equally true if the defendant provided a statement to law enforcement that may initially appear to be inculpatory. Prepare for testimony from the defendant that is substantially different than the initial encounter with law enforcement, and inconsistent with the victim's account of the assault..

Preparation for cross examination of the defendant needs to occur at the earliest stages of the investigation and prosecution. The prosecutor needs to be well prepared on the rules of evidence and the techniques used to impeach in order to conduct a cross examination of the defendant with as little interruption from the court and opposing counsel as possible.

The main goals of cross examination are to:

- Provide favorable information for your case.
- Discredit unfavorable information to your case.
- Discredit the defendant as a witness.
- Discredit other defense witnesses.
- If necessary, establish the foundation for the later introduction of other evidence.

It is extremely likely that the testimony of the defendant will have been well prepared, and in addition, the defendant has had the opportunity to hear all of the testimony in the case and will

be prepared to exploit any weaknesses in the State's case. This is not the time to get into an argument with the defendant as to how the assault occurred. Evaluate the direct testimony of the defendant using these criteria: Did what the defendant say hurt the State's case? Can the damage done by the defendant's direct testimony be fixed by cross examination? Can I establish favorable facts with this witness?

Often, the best approach on cross examination is to establish favorable facts already testified to by the victim. For example, in an alcohol facilitated sexual assault cross examination should be designed to elicit concessions to signs of intoxication testified to by the victim or other witnesses who observed the victim's behavior before and after the assault.

The cross examination should be organized by topic and needs to ***be thoroughly prepared before the defendant testifies*** and should be conducted in a different organizational format from the defendant's direct testimony. For example, in alcohol facilitated sexual assaults, the topics could be what corroborating witnesses were present, physical layout of where the assault took place, and the degree of intoxication of the victim. The main focus of the defendant's cross examination should be preparing for the jury to hear your closing argument, establishing in advance which facts and exhibits support the conclusion you want the jury to reach. Questions should be designed and executed in such a way as to lead the jury to reach a conclusion. You do not want to ask the defendant to agree to the conclusion you want the jury to reach because it is unlikely that the defendant will concede it. You will also have to be prepared for executing alternative cross examination questions as you force the defendant to choose one path over another.

1. Maintaining Control over the Defendant

Because the defendant will have been well prepared to withstand cross examination, control over the defendant and the examination is critical to its success. Control is maintained by preparation in advance, careful planning of the words of the question posed to the defendant, and the manner in which the question is posed by the prosecutor.

If the defendant is reluctant to answer the question as posed it is essential that the prosecutor maintain control over the defendant. The primary way to maintain control over the defendant during cross examination is by asking questions that: (a) are short, one fact questions that are based on facts; (b) are not conclusions or opinions; (c) do not require the defendant to make an evaluation in answering the question; and (d) do not contain words that are subject to disagreement.

The prosecutor should also maintain control over the defendant in the manner the prosecutor allows the defendant to answer the question. If the defendant expresses reluctance in answering the question posed it can demonstrate to the jury that the defendant is untruthful. If there is an

escalation of hostility between the prosecutor and the defendant during cross examination it is vital that the jury becomes upset with the defendant and not the prosecutor.

If you are having difficulty with the defendant during cross examination there are a number of quick assessments you can use to see if the problem that is developing can be fixed by making sure the questions are properly framed:

- Your question is not leading
- Your question is too complex/multiple
- You are arguing with the witness
- You mischaracterize the witness's previous answer
- Your questions wander and do not progress to a conclusion

2. Impeachment of the Defendant

A key component of cross examination is impeachment of the defendant. The decision on whether to impeach a defendant on cross examination can be the difference between a successful cross examination and a failure that results in the defendant becoming credible in the minds of the jury. However, impeachment should not be conducted simply for its own sake. Impeachment should be done only when it will occur on an issue that is significant to the case, when what the defendant is asserting is truly implausible, unless there is a significant amount of impeachment on several minor issues such that the number impacts the defendant's overall credibility.

Keep in mind that the defendant will have an opportunity to address the impeachment on redirect examination through his attorney. Familiarity with the evidentiary rules for the basis of impeachment is also essential. Execution of the impeachment needs to be flawless in order to be successful. There are several ways under the Wisconsin rules of evidence to conduct impeachment. They include:

- Refreshing recollection
- Implausibility of direct testimony
- Prior inconsistent statement
- Prior statement of witness 906.13
- Impeachment by omission
- Specific instances of conduct 906.08(2)
- Other Acts 904.04

Ethical rules require that prosecutors be fair to the opposing party and counsel, and only ask questions that anticipate an answer for which there is good faith basis to believe will be admissible at trial.

G. Evidentiary Issues

This discussion is not intended as a substitute for a complete trial advocacy primer, nor for the rules of evidence. It is, rather, intended to address some of the most common evidentiary issues that arise in sexual assault cases, and to provide some guidance on how to deal with those issues.

1. Hearsay

Hearsay evidence can be a very important aspect of the prosecution case, so figuring out how to get what would otherwise be inadmissible in is an important pretrial issue. Sometimes, the out-of-court statements are not being offered for the truth of the matter asserted, and therefore are not "hearsay." This should be your first line of analysis. Why/for what purpose is the out-of-court statement being offered? Is it to show what actions the police officer took in response to what he had just been told? Then you are not offering it to prove the truth of the matter asserted in the out-of-court statement, but rather to demonstrate someone's reaction to that information.

a) Non-Hearsay Statements

Section 908.08(4) identifies other kinds of out-of-court statements which are, by definition, ***not hearsay*****.** The first kinds of statements are those that occur ***when the declarant testifies at trial and is subject to cross-examination concerning the statement, and:***

The statement is inconsistent with the declarant's testimony

This is a prior inconsistent statement. This happens a lot when witnesses are being asked to recall many pieces of information and their testimony is different in some respect. When a victim testifies, and that testimony is different than what he/she told to the police, you can introduce that different information through the officer as long as you have questioned the victim about the statement and the defense has an opportunity to cross-examine on the out-of-court statement. For instance, a witness at trial may recall clothing of a suspect differently than what was reported shortly after the incident. You are permitted to ask about what she described to the police concerning the clothing, and then later can introduce what she told the officer concerning the clothing. Of course, defense attorneys use these inconsistent statements to try to show that the victim is not credible and/or that her testimony is not reliable. If you don't introduce it, the defense most likely will. Take care to ensure that the defense attorney is not unfairly characterizing semantic differences as "lies." In addition, if the defense is painstakingly going through the inconsistencies, make sure that under the "rule of completeness (*State v. Sharp*), you introduce all the consistencies.

Out-of-Court Statements

Out-of-court statements that are ***consistent*** with a witness' testimony are also admissible as non-hearsay ***if they are offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.*** The critical point of analysis here is the charge of recent fabrication or improper influence or motive. You can point to defense questions

in voir dire and defense statements in opening argument that attack your victim's credibility, reliability or motive, in addition to pointing to questions asked directly of the victim that are designed to attack credibility to establish the basis for a prior consistent statement. Putting in statements of the victim that were made at some point prior to trial that are consistent with trial testimony are powerful for a number of reasons: (a) they allow for the jury to hear the information more than one time and that's always a good thing; (b) It enables the prosecutor to make the argument that the victim is being consistent over a long period of time, concerning many details--- a feat which is hard, if not impossible, to do if one is lying; and (c) the prosecutor is able to enhance victim credibility by getting in not just *what* was said, but also to whom, how, when, in what manner, where, under what circumstances, and what the victim's demeanor was as the revelation of the information continued. All of these are important subtle pieces of information that can provide the basis for strong credibility arguments in the end. Witnesses who can provide prior consistent statements can include the person(s) to whom the victim first disclosed, and even disclosure witnesses who came after the first disclosure if there is significant attack on victim credibility or motive; police officers, social workers or other professionals to whom the victim gave more formal information; prior testimony.

Admissions by a Party Opponent

Admissions by a party opponent are admissible as non-hearsay regardless of whether the party opponent testifies. These statements are offered ***against a party*** and are either the party's own statement or one made by a someone authorized by the party or working with or for the party, or one which the party manifests adoption or belief in the truth of the statement. Included in these kinds of statements are:

- The defendant's own words of confession
- Someone else's statement inculpating the defendant which the defendant does not dispute. For instance, the defendant is on a recorded jail call where he is asked "why did you do XXX?" and the defendant does not dispute that he did XXX.
- A co-actor of the defendant who is involved with the defendant in a conspiracy makes a statement that inculpates the defendant during the course of the conspiracy.

These are the most common. A prosecutor can introduce any of these kinds of statements against the defendant without having to call the defendant. However, the defendant is not allowed to introduce, under this theory, his own statements of denial. ***If the defendant wants to introduce his denial, then he has to take the witness stand***. Thus, when you have the detective who investigated the case on the stand, the defendant cannot ask him to report what the defendant said to him, since, as to the defendant, that is hearsay. You can ask the detective to report what the defendant said, however, because he is a party opponent to you. Be careful of the defendant trying to circumvent the rules by getting in his denials through the investigating officer.

b) Exceptions to the Hearsay Exclusion

Even if an out-of-court statement does not fall within the parameters of non-hearsay, you may be able to introduce it as an exception to the general exclusionary rule. Sec. 908.03 addresses hearsay exceptions without regard to whether the declarant is available. These rules apply even under the rubric of the *Crawford v. Washington* case if they are "firmly rooted" hearsay exceptions – which most except the "residual hearsay exception" generally are. The most common exceptions used in sexual assault cases include:

Present sense impressions

Present sense impressions are statements describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

Excited Utterances

Excited Utterances are statements relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition. These first two exceptions (and the third – then-existing mental, emotional or physical condition – although less-used) are considered to be 'firmly rooted" hearsay exceptions. They are considered reliable statements because the declarant, at the time of the making of any of these three kinds of statements, is believed not to have sufficient time to consider his/her words and plan them out – the spontaneity of the statements makes them reliable.

These statements are tied, in time, to when the event about which the statement is being made occurred. In the case of (1) and (3) of sec. 908.03, these statements must be made essentially contemporaneously with the event. In the case of the excited utterance, there is some leeway permitted between the event's occurrence and the making of the statement. Cases have held that a statement can be considered an excited utterance even hours (or, in the case of a child declarant) even days after the event itself. What is critical is that there is evidence that the declarant is still under the stress of excitement caused by the event.
This can be shown by demeanor both before and during the making of the statement – such as crying, becoming hysterical, appearing excessively frightened, etc. Also, in the case of the excited utterance, the declarant need to have personally observed the startling event. Excited utterances can include the statements made to the first (or first few) people a sexual assault victim is encountering after the sexual assault – this can include a police officer if the foundation can be laid. Excited utterances can be found in 911 tapes, or portions of them, as well.

Statements made for purposes of medical diagnosis or treatment

Statements made for purposes of medical diagnosis or treatment under sec. 908.03(4) include the information provided to the evaluating SANE or ER personnel about what happened to them – the argument is that the treating medical people need to know what happened so that they can properly address any potential medical situations, including injury or the transmission of disease. In addition, it is important, from the medical perspective, to know who committed the acts, since the relationship of the victim to the perpetrator can be an on-going health concern – will the perpetrator have continued access to the victim? Will the victim suffer additional emotional

trauma as a result of the nature of the relationship between victim and perpetrator? These considerations are "medical" in nature, and statements made which answer these questions are also made, from the viewpoint of the treating medical personnel, "for purposes of medical diagnosis or treatment."

History of domestic violence can also be a legitimate medical concern, so statements made concerning the longer term aspects of an on-going domestic violence relationship also fit within this exception. There are times when there is more information than is "medically necessary" to know – for instance, the description of the clothes of a stranger perpetrator. The court may rule that that type of information is not a statement that falls under sec. 908.03(4). Portions of medical records may need to be redacted if this is the case. However, if these pieces of information are important to your case, consider other available methods for gaining their admission. Also, you'll want to review 908.03(6m), healthcare provider records, which allow for the admission, without even calling a witness, of certain enumerated health care records

Recorded recollection

Recorded recollection, an exception under sec. 908.03(5) can include diary entries, log entries, etc, that were made at a point when the witness had knowledge of the information, but now has insufficient recall to be able to testify fully and accurately.

Records of regularly conducted activities

Records of regularly conducted activities, such as data collections, reports or records which were made by a person with knowledge of the information, made at or near the time of the events, in the course of regularly conducted activities, is also hearsay that is seen in SA cases with some regularity. This relates to situations like checking in to motels, signing in/out of certain places, etc.

Residual hearsay exceptions

Residual hearsay exceptions include those statements that are not specifically covered by any of the other 23 exceptions of sec. 908.03, but have comparable circumstantial guarantees of trustworthiness. This subsection is most often seen in cases of child sexual abuse cases, where the court is directed by case law to consider the attributes of the child, the person to whom the statement was made, the circumstances under which the statement was made, the content of the statement, and corroborating evidence. *State v. Gerald L.C.*, 194 Wis. 2d 549, 535 N.W.2d 777 (Ct. App. 1995); *State v. Huntington*, 216 Wis. 2d 671, 575 N.W.2d 268 (1998). Spontaneous statements of disclosure of sexual abuse by a child to a teacher, for instance, right after a general discussion in class about the importance of telling when someone has hurt you, might qualify for admission under this subsection. These are not firmly rooted hearsay exceptions, and there may be issues of confrontation involved.

Hearsay exceptions when the declarant is unavailable bring the issue of confrontation squarely into play. First, the proponent of the out-of-court statement has to demonstrate that the witness is unavailable, as that is defined in sec. 908.04, and there can be no "bad faith" or wrongdoing on the part of the proponent of the statement which has prevented the declarant from being present

at the trial. Once unavailability of the declarant has been shown, then sec. 908.045 comes into play. This section outlines the possible ways such an out-of-court statement may be admitted. These include former testimony and statements against interest. Preliminary hearing testimony of the victim may be permitted under this section, even if you no longer have the victim available to testify. In order for this testimony to be admitted there had to have been an opportunity to develop testimony by the defense, or from a preliminary hearing of a co-actor who has a motive and interest similar to the defendant. *State v. Norman*, 2003 WI 72 discussed the use of preliminary hearing testimony, noting that the inability of the defendant to develop memory, credibility or bias testimony at the preliminary hearing, when these were not issues at trial, did not preclude admission of the testimony and did not violate the defendant's right to confrontation.

Hearsay within hearsay

Hearsay within hearsay requires pretrial attention. Each level or layer of hearsay will demand it's own exception. For instance, in the declarant victim's statement may be information about what happened to her, as well as what the offender said to her. You would need to be prepared to identify the exception for the victim's description of what happened to her, as well as the exception for her statement of what the defendant stated to her. Laying this out for the court in a methodical way is best practice. In fact, if you are able to identify any of these hearsay issues ahead of time you should also alert the court to the fact that they will be issues at trial, and provide the court with your statutory and case law cites to pave the way for a favorable ruling.

2. Reputation/Character Evidence

As has been stated previously, the defense will be relentless in its efforts to introduce evidence that will disparage the victim. Prosecutors must be vigilant in countering these attacks.

a) Reputation For Truthfulness/Untruthfulness

This is a common strategy of defense counsel. The credibility of a witness may be attacked by evidence in the form of reputation or opinion, but must only refer to character for truthfulness or untruthfulness. Sec. 906.08. Evidence of your victim's truthful character may only be admitted after her character for truthfulness has been attacked by opinion or reputation evidence or otherwise. What you will usually see is a parade of people who all support the defendant willing to say that the victim is a known liar.

There are several methods of getting some control over this evidence. First, prepare a motion in limine which asks for offers of proof as to what these sorts of "character witnesses" are going to say, including the foundation needed for being able to make a legitimate claim of having an opinion or of knowing a reputation. If the defense cannot set forth the needed foundation, you may be able to have the witness struck. In addition, at some point the parade become cumulative which wastes the jury's time. Argue that the defendant should be limited in the number of these types of witnesses that he is permitted to call.

You can also anticipate what the witnesses might say and address the reputation issue with your victim up front. Lying about having one's homework done is a different animal than making up a story such as a sexual assault.

Specific instances of conduct of the witness are not allowed to be proved by extrinsic evidence. Collateral matters, like how someone is doing in school, should not be coming before a jury, according to Sec. 906.08(2). However, note that if there are specific instances of conduct, not remote in time, which bear directly on truthfulness or untruthfulness, those may be inquired into on cross-examination. Thus, your victim should be prepared to address these issues on cross if they exist. Again, bringing a motion in limine to exclude this kind of evidence on the basis of remoteness or lack of probative value is worth your while, since it can prevent a circus of a trial, and preserve legitimate victim credibility. See Motions in Limini and Motion Practice in Chapter V, Pre-Trial Strategies.
The case of *State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998) held that allegations of a single instance of falsehood do not imply a character for untruthfulness. Reputation testimony must be an assertion that the victim is a liar generally. Eugenio also indicates that if the victim's credibility is attacked in opening statements, it opens the door to evidence which is allowable during the State's case-in-chief that the victim has a reputation for being truthful.

b) Impeachment By Evidence Of Conviction Of A Crime

Sec. 906.09 allows the impeachment of any witness's credibility by virtue of the fact that he has been adjudicated delinquent or convicted of a crime. However, this issue must be addressed prior to the witness testifying, as the court must make a determination about whether the probative value of the conviction is substantially outweighed by the danger of unfair prejudice.

c) Evidence Of A Certain Character Trait Of A Defendant

In the *Richard A.P.* case[125] the defendant was permitted to introduce that he had (or lacked) certain character traits which he argued were connected to his ability to commit the crime with which he was committed. In other words, the implication is that there is a certain "profile" of this sort of criminal, and the defendant doesn't fit that "profile." For instance, a defendant in a child sexual abuse case may attempt, using the *Richard A.P.* analysis to show that he does not have the traits required for a diagnosis of "pedophile." There are several avenues of attack for this kind of evidence. Again, starting with motions before trial, the defense should have to show that such a trait is needed in order to commit the crime. In the example given, research would indicate that one does not have to be a pedophile in order to be committing sexual assaults of children. You can demonstrate your point using expert testimony and learned treatises. The defense may respond by arguing that such a trait makes it "more likely" that the person would commit the offense. This is a statistical-type of argument that can also be addressed by your own expert. If the court still allows this kind of evidence in, you will want to work with your expert to develop testimony and/or exhibits that rebut what the defense has implied. Further, you will want to extract from the defense expert, during your cross, that there is no one "profile" of those

[125] 223 Wis. 2d 777, 589 N.W.2d 674.

who commit the type of offense, or that lacking the profile does not necessarily mean that a person could not commit the crime.

d) Reputation Or Opinion Evidence That The Witness Does Not Believe That The Defendant Committed The Offense, Or That The Defendant Hasn't Victimized Someone The Witness Knows Who Fits In The Same Category As The Victim.

Often the defendant seeks to introduce testimony from friends of family members who would want to state that: (a) they don't believe that he committed the crime; (b) he "doesn't have the character" to commit the crime (i.e., he's a "nice guy"); or (c) that they have children and he's never assaulted them. This, too, is the proper subject of a motion in limine, and objection at trial, since all of this is irrelevant, and amounts to impermissible comments on the credibility of the victim. *State v. Haseltine, State v. Tabor.* See, also, a standard "character" motion on this subject in the Appendix. The motion expands on the idea that whether the defendant assaulted anyone else is not relevant to a determination of whether he committed this crime.

e) Prior Acts/Other Acts To Show the Character of the Defendant

Sometimes the thrust of the defendant's case is an effort to paint the defendant as a really nice person who, therefore, could not possibly have committed the offense with which he is charged. Defense may attempt to use other acts of the defendant to make this point. This is tantamount to impermissible character evidence. Sec. 904.04(1). The flip side of this coin is an effort to paint the victim as promiscuous, etc. The defense is limited to a discussion of ***pertinent character traits***, which means that this evidence must be both relevant and withstand the 904.03 criteria which precludes evidence that has low probative value and it would tend to be unfairly prejudicial, wasteful of the court's time, confusing or misleading. ***Being perceived as "nice" is not a character trait, and this sort of evidence should not be allowed.*** The reader is directed to review the section on "other acts" in this manual, which pertains to situations when there is an effort to introduce other behaviors of either the defendant or the victim, and what must be established in order to gain admission of this kind of evidence. In addition, the reader should also be aware that other sexual behaviors are governed by sec. 972.11, which details Wisconsin's Rape Shield law. There are very circumscribed situations when other sexual behavior is admissible into evidence.

3. Objections at Trial

The primary reason to object at trial is to prevent the introduction of impermissible evidence. Often, the Court has made prior rulings on potential evidence, and the objection can refer back to the court's ruling. This would include rulings on Rape Shield issues, exclusions of various medical/psychological information from evidence. It is always to the benefit of the prosecutor to obtain these sorts of rulings prior to trial and/or outside the presence of the jury, because once the information is out there in the form of the question, the jury has heard it, and may not be able to forget it or may speculate about it even when they are specifically told not to do so.

Objections generally take the form of the word "objection" along with a succinctly stated legal basis for the objection. Some courts are loathe to have counsel arguing their case in the form of their objections, and the prosecutor should avoid admonishments by the court in the presence of the jury for not following this rule. However, there are occasions when the content of the basis for your objection can operate as a sort of argument in the presence of the jury. Several key instances when a more fully explained objection is necessary are:

- When the defense is misstating or misquoting the witness or providing a characterization of prior witness statements that is unfair

- When the defense is getting information completely wrong – whether due to human error or a more purposeful effort at confusing the witness or the jury. Sometimes the defense is putting incorrect facts into the question based on testimony, and sometimes based on information from reports

- When it is clear that the defense is confusing the witness in some way, such as using a word or phrase in a different way than the witness understands it, or by using words that are not part of the witness' lexicon. This can occur particular when the victim is a child, a person with a cognitive disability, or a person with limited English proficiency

- When the question is so long and convoluted that any answer can be misconstrued by the defense or when any answer would not reflect a true answer to the question due to witness misunderstanding

- When the question has been asked and answered several times by the witness

- When the tone or language of the attorney is harassing, disrespectful, or is designed to embarrass the witness

While the prosecutor can always clean these areas up in re-direct, it is never inappropriate, especially when it is an ongoing issue in a trial, or is part of the style adopted by the defense in the case, to bring up, in an objection, the fact that the judge should exercise reasonable control over the mode and order of interrogating witnesses, first and foremost to make the evidence effective for the ascertainment of the truth. Sec. 906.11(1)(a)

In addition, defense counsel will often utilize editorials in their objections. This, in itself, should be objected to, in the presence of the jury, by the prosecutor. Often, these editorials are meant to inform the jury about matters which are not admissible, but which the defense wants the jury to hear anyway. Or, they are an inappropriate platform for argument that should be reserved for closing argument, assuming that the evidence comes before the jury in a legitimate way. You will want the jury to know that there are rules which are to be followed by the lawyers, and that the defense attorney is trying to circumvent those rules by virtue of these editorials. You may want to consider, if it is a large and persistent problem during your trial, to ask the court to instruct the jury using Criminal JI 157 and 160.

H. Common Defenses

For a discussion on common defenses to sexual assault, see Chapter IV, Pre-Charging Issues, Section D2 Common Defenses to Sexual Assault.

VII. Appendix

Appendices are organized by topic in the following order and presented by alpha assignment.

Resources:

A. List of Sexual Assault Service Providers
B. List of Child Advocacy Centers

Sample Motions/Limine:

C. Object To Admission Of Evidence Of Defendant's Character
D. Sample Offer Of Proof To Admit 908.08 Evidence
E. Sample Motion To Admit 908.08 Evidence
F. Sample General Motion In Limine
G. Sample Motion In Limine – Prohibit Defendant's Introduction Of Rape Shield Evidence
H. Sample Motion To Introduce Expert Testimony
I. Sample Summary Of Child Sexual Assault Expert Testimony
J. Notice Of Intent To Introduce SANE Expert Testimony
K. Preliminary Hearings – Sample Language For Bindover/Evidentiary Issues

Discovery Issues:

L. Sample Protective Order 908.08 Evidence

Rape Shield:

M. Rape Shield Outline

Other Acts Evidence:

N. Brief In Support
O. Brief In Support
P. Brief In Support – Grooming Behavior

Joinder / Severance Issues:

Q. Sample Motion To Consolidate
R. Sample Motion To Consolidate Misdemeanor With Felony
S. Sample Response To Defendant's Motion For Severance

Sample Voir Dire Questions:

T. Sample Voir Dire Questions
U. Additional Questions

Sample Direct Examination Questions/ Expert Witness:

V. Child Sexual Assault Expert – Qualifications
W. Child Sexual Assault Expert – Substantive Questions
X. Victim Counterintuitive Behavior Expert – Adult – Qualifications
Y. Victim Counterintuitive Behavior Expert – Adult – Substantive Questions
Z. Expert on Adolescence – Substantive Questions

A. Listing of Sexual Assault Service Providers

Wisconsin Sexual Assault Service Providers
(Listed Alphabetically by County)

County	SASP Name	Business Phone	Crisis Line	Website
Adams	**Hope House** 910 8th Avenue Baraboo, WI 53913	(608) 356-9123	(800) 584-6790	www.hopehousescw.org
Ashland	**New Day Shelter** PO Box 88 Ashland, WI 54806	(715) 682-9566	(715) 682-9565	http://fp1.centurytel.net/newdayshelter
Barron	NONE			
Bayfield	**New Day Shelter** PO Box 88 Ashland, WI 54806	(715) 682-9566	(715) 682-9565	http://fp1.centurytel.net/newdayshelter
Brown	**Sexual Assault Center** PO Box 22308 Green Bay, WI 54305	(920) 436-8890	(920) 436-8899	www.familyservicesnew.org/SAC.htm
Buffalo	**Bolton Refuge House** PO Box 482 Eau Claire, WI 54702	(715) 834-0628	(715) 834-9578 or (800) 252-4357	www.boltonrefugehouse.com
Burnett	**Community Referral Agency** PO Box 365 Milltown, WI 54848	(715) 825-4414	(800) 261-7233	none
Calumet	**Sexual Assault Crisis Center – Fox Cities** 35 Park Place, Ste. 100 Appleton, WI 54914	(920) 733-8119	(920) 733-8119 and (800) 722-7797	www.SACC-Foxcities.org
Chippewa	**Family Support Center** PO Box 143 Chippewa Falls, WI 54729	(715) 723-1138	(800) 400-7020	www.chippewafallsfsc.org

County	SASP Name	Business Phone	Crisis Line	Website
Clark	NONE			
Columbia	**Hope House** 910 8th Avenue Baraboo, WI 53913	(608) 356-9123	(800) 584-6790	www.hopehousescw.org
Crawford	**Passages** PO Box 546 Richland Center, WI 53581 OR **Gundersen Lutheran Medical Center, Inc.** 123 16th Avenue South, Mail Stop: Annex-01 Onalaska, WI 54650	(608) 647-8775 (608) 775-3845	(800) 236-4325 (800) 362-9567, ext. 55950	www.passageswi.org/ www.gundluth.org
Dane	**Rape Crisis Center** 2801 Coho Street, Ste. 301 Madison, WI 53713	(608) 251-5126	(608) 251-7273	www.DaneCountyRCC.org
Dodge	**People Against a Violent Environment** PO Box 561 Beaver Dam, WI 53916	(920) 887-3810	(800) 775-3785	www.peopleagainstaviolentenvironment.com
Door	**Sexual Assault Center** PO Box 22308 Green Bay, WI 54305	(920) 436-8890	(920) 436-8899	www.familyservicesnew.org/SAC.htm
Douglas	**CASDA** 2231 Catlin Avenue Superior, WI 54880	(715) 392-3136	(715) 392-3136	www.casda.org/index.html
Dunn	**The Bridge to Hope** PO Box 700 Menomonie, WI 54751	(715) 235-9074	(800) 924-9918	www.thebridgetohope.com
Eau Claire	**Family Support Center** PO Box 143 Chippewa Falls, WI 54729	(715) 723-1138	(800) 400-7020	www.chippewafallsfsc.org

County	SASP Name	Business Phone	Crisis Line	Website
	OR **Bolton Refuge House** PO Box 482 Eau Claire, WI 54702	(715) 834-0628	(715) 834-9578 or (800) 252-4357	www.boltonrefugehouse.com
Florence	NONE			
Fond du Lac	**ASTOP, Inc.** 430 E. Division Street Fond du Lac, WI 54935	(920) 926-5395	(800) 418-0270	www.astop.org
Forest	**Tri-County Council on SA & DV** PO Box 233 Rhinelander, WI 54501	(715) 362-6841	(800) 236-1222	www.tri-countycouncil.org
Grant	**Family Advocates - Sexual Assault Services** PO Box 705 Platteville, WI 53818 OR **Passages** PO Box 546 Richland Center, WI 53581	(608) 348-5995, ext. 225 (608) 647-8775	(800) 924-2624 (800) 236-4325	None www.passageswi.org/
Green	**Sexual Assault Recovery Program** 423 Bluff Street Beloit, WI 53511	(608) 365-1244	(866) 666-4576	www.sarpwi.com
Green Lake	NONE			
Iowa	**Family Advocates - Sexual Assault Services** PO Box 705 Platteville, WI 53818	(608) 348-5995, ext. 225	(800) 924-2624	None

County	SASP Name	Business Phone	Crisis Line	Website
	OR **Passages** PO Box 546 Richland Center, WI 53581	(608) 647-8775	(800) 236-4325	www.passageswi.org/
Iron	NONE			
Jackson	**Bolton Refuge House** PO Box 482 Eau Claire, WI 54702	(715) 834-0628	(715) 834-9578 or (800) 252-4357	www.boltonrefugehouse.com
Jefferson	**People Against a Violent Environment** PO Box 561 Beaver Dam, WI 53916 OR **People Against Domestic & Sexual Abuse** PO Box 395 Jefferson, WI 53549	(920) 887-3810 (920) 674-6748	(800) 775-3785 (920) 674-6748	www.peopleagainstaviolentenvironment.com www.padajc.org/index.html
Juneau	**Passages** PO Box 546 Richland Center, WI 53581 OR **Hope House** 910 8th Avenue Baraboo, WI 53913	(608) 647-8775 (608) 356-9123	(800) 236-4325 (800) 584-6790	www.passageswi.org/ www.hopehousescw.org
Kenosha	**Women and Children's Horizons** 2525 63rd Street Kenosha, WI 53143	(262) 656-3500	(800) 853-3503	www.wchkenosha.org
Kewaunee	**Violence Intervention Project** 1405 Division Street Algoma, WI 54201	(920) 487-2111	(877) 847-3223	None

County	SASP Name	Business Phone	Crisis Line	Website
La Crosse	**Gundersen Lutheran Medical Center, Inc.** 123 16th Avenue South, Mail Stop: Annex-01 Onalaska, WI 54650 OR **Franciscan Skemp Healthcare – Safe Path** 800 West Avenue So. La Crosse, WI 54601	(608) 775-3845 (608) 392-7804	(800) 362-9567, Ext. 455950 (608) 392-7804	www.gundluth.org www.franciscanskemp.org
Lafayette	**Family Advocates - Sexual Assault Services** PO Box 705 Platteville, WI 53818	(608) 348-5995, ext. 225	(800) 924-2624	None
Langlade	**AVAIL, Inc.** PO Box 355 Antigo, WI 54409	(715) 623-5177	(715) 623-5767	None
Lincoln	**HAVEN, Inc.** PO Box 32 Merrill, WI 54452 OR *Upon Request:* **AVAIL, Inc.** PO Box 355 Antigo, WI 54409	(715) 536-1300 (715) 623-5177	(715) 536-1300 (715) 623-5767	www.haveninc.org None
Manitowoc	**Holy Family Memorial's Sexual Assault Resource Center** PO Box 1450 Manitowoc, WI 54221	920 320-8560	(920) 320-8555	www.hfmhealth.org

County	SASP Name	Business Phone	Crisis Line	Website
Marathon	**The Women's Community** 2801 N. 7th Street, #300 Wausau, WI 54403 OR *Upon Request:* **AVAIL, Inc.** PO Box 355 Antigo, WI 54409	(715) 842-5663 (715) 623-5177	(715) 842-7323 (715) 623-5767	www.womenscommunity.org
Marinette	**Sexual Assault Center** PO Box 22308 Green Bay, WI 54305	(920) 436-8890	(920) 436-8899	www.familyservicesnew.org/SAC.htm
Marquette	**Hope House** 910 8th Avenue Baraboo, WI 53913	(608) 356-9123	(800) 584-6790	www.hopehousescw.org
Menominee	NONE - BUT *Upon Request:* **AVAIL, Inc**. (715) 623-5177 (715) 623-5767 no website PO Box 355 Antigo, WI 54409			
Milwaukee	**Sexual Assault Treatment Center** 960 N. 12th Street, Room 2120, Heart Institute Milwaukee, WI 53201 OR **Pathfinders** 4200 N. Holton, Ste. 400 Milwaukee, WI 53202	(414) 219-5850 (414) 964-2565	(414) 219-5555 (414) 964-0102	www.aurorahealthcare.org http://pathfindersmke.org/

County	SASP Name	Business Phone	Crisis Line	Website
	OR **The Healing Center** 611 W. National Avenue, 4th Floor Milwaukee, WI 53204	(414) 671-4325	(414) 671-4325	www.thehealingcenter.org
Monroe	**Gundersen Lutheran Medical Center, Inc.** 123 16th Avenue South, Mail Stop: Annex-01 Onalaska, WI 54650 OR **Brighter Tomorrows** 505 Douglas Street Sparta, WI 54656	(608) 775-3845 (608) 374-6975	(800) 362-9567, Ext. 455950 (866) 346-0374	www.gundluth.org None
Oconto	**Sexual Assault Center** PO Box 22308 Green Bay, WI 54305	(920) 436-8890	(920) 436-8899	www.familyservicesnew.org/SAC.htm
Oneida	**Tri-County Council on SA & DV** PO Box 233 Rhinelander, WI 54501 OR *Upon Request:* **AVAIL, Inc.** PO Box 355 Antigo, WI 54409	(715) 362-6841 (715) 623-5177	(800) 236-1222 (715) 623-5767	www.tri-countycouncil.org None
Outagamie	**Sexual Assault Crisis Center – Fox Cities** 35 Park Place, Ste. 100 Appleton, WI 54914	(920) 733-8119	(920) 733-8119 and (800) 722-7797	www.SACC-Foxcities.org

County	SASP Name	Business Phone	Crisis Line	Website
Ozaukee	**Advocates of Ozaukee** PO Box 80166 Saukville, WI 53080	(262) 284-3577	(262) 284-6902	www.advocates-oz.org
Pepin	**The Bridge to Hope** PO Box 700 Menomonie, WI 54751	(715) 235-9074	(800) 924-9918	www.thebridgetohope.com
Pierce	**Turningpoint for Victims of DV & SV** PO Box 304 River Falls, WI 54022	(715) 425-6751	(800) 345-5104	www.turningpoint-wi.org
Polk	**Community Referral Agency** PO Box 365 Milltown, WI 54848	(715) 825-4414	(800) 261-7233	None
Portage	**CAP Services, Inc.** 1608 W. River Drive Stevens Point, WI 54481	(715) 343-7101	(800) 472-3377	www.capserv.org
Price	**Time-Out Family Abuse Shelter** PO Box 406 Ladysmith, WI 54848	(715) 532-6976	(800) 924-0556	www.timeoutabuseshelter.com
Racine	**Sexual Assault Services of LSS** 1220 Mound Ave., Ste. 304 Racine, WI 53404	(262) 619-1634	(262) 637-7233	None
Richland	**Passages** PO Box 546 Richland Center, WI 53581	(608) 647-8775	(800) 236-4325	www.passageswi.org/
Rock	**Sexual Assault Recovery Program** 423 Bluff Street Beloit, WI 53511	(608) 365-1244	(866) 666-4576	www.sarpwi.com

County	SASP Name	Business Phone	Crisis Line	Website
Rusk	**Time-Out Family Abuse Shelter** PO Box 406 Ladysmith, WI 54848	(715) 532-6976	(800) 924-0556	www.timeoutabuseshelter.com
St. Croix	**Turningpoint for Victims of DV & SV** PO Box 304 River Falls, WI 54022	(715) 425-6751	(800) 345-5104	www.turningpoint-wi.org
Sauk	**Hope House** 910 8th Avenue Baraboo, WI 53913 OR **Passages** PO Box 546 Richland Center, WI 53581	(608) 356-9123 (608) 647-8775	(800) 584-6790 (800) 236-4325	www.hopehousescw.org www.passageswi.org/
Sawyer	**LCO Oakwood Haven** 13394 W. Trepania Road Hayward, WI 54843	(715) 634-9360	(877) 552-7474	www.victimnomore.org
Shawano	**Safe Haven** PO Box 665 Shawano, WI 54166 OR *Upon Request:* **AVAIL, Inc.** PO Box 355 Antigo, WI 54409	(715) 524-6759 (715) 623-5177	(715) 526-3421 (715) 623-5767	www.shawanoshelter.org None
Sheboygan	**Safe Harbor of Sheboygan Co., Inc.** PO Box 582 Sheboygan, WI 53082	(920) 452-8611	(920) 452-7640	www.sheboygansafeharbor.org

County	SASP Name	Business Phone	Crisis Line	Website
Taylor	**Stepping Stones, Inc.** PO Box 224 Medford, WI 54451	(715) 748-3795	(715) 748-5140 or (866) 343-5140	None
Trempealeau	**Gundersen Lutheran Medical Center, Inc.** 123 16th Avenue South, Mail Stop: Annex-01 Onalaska, WI 54650	(608) 775-3845	(800) 362-9567, Ext. 55950	www.gundluth.org
Vernon	**Passages** PO Box 546 Richland Center, WI 53581	(608) 647-8775	(800) 236-4325	www.passageswi.org/
Vilas	**Tri-County Council on SA & DV** PO Box 233 Rhinelander, WI 54501	(715) 362-6841	(800) 236-1222	www.tri-countycouncil.org
Walworth	**Association for the Prevention of Family Violence** 35 S. Wisconsin Street Elkhorn, WI 53121	(262) 723-4653	(262) 723-4653	
Washburn	**Time-Out Family Abuse Shelter** PO Box 406 Ladysmith, WI 54848	(715) 532-6976	(800) 924-0556	www.timeoutabuseshelter.com
Washington	**Friends of Abused Families** PO Box 117 West Bend, WI 53095	(262) 334-5598	(262) 334-7298	None
Waukesha	**The Women's Center** 505 N. East Avenue Wausau, WI 53186	(262) 547-4600	(262) 542-3828	www.twcwaukesha.org
Waupaca	**CAP Services, Inc.** 1608 W. River Drive Stevens Point, WI 54481	(715) 343-7101	(800) 472-3377	www.capserv.org

County	SASP Name	Business Phone	Crisis Line	Website
Waushara	**CAP Services, Inc.** 1608 W. River Drive Stevens Point, WI 54481	(715) 343-7101	(800) 472-3377	www.capserv.org
Winnebago	**REACH Counseling Services** 1370 S. Commercial Street Neenah, WI 54956	(920) 722-8150	(920) 722-8150	www.reachcounseling.com
Wood	**Family Center, Inc.** 500 25th Street North Wisconsin Rapids, WI 54494	(715) 421-1511		www.familyctr.org

B. List of Child Advocacy Centers

Wisconsin Child Advocacy Centers
(Available at Child Advocacy Centers of Wisconsin)
www.cacsofwi.org/

Eau Claire
Chippewa Valley Child Advocacy Center
2004 Highland Avenue, Suite M
Eau Claire, WI 54701
Contact: Marnie Hersrud
E-mail: Marnie.Hersrud@cssw.org
Phone: (715) 835-5915
NCA accreditation: Associate

Fox Cities
Child Advocacy Center
Children's Hospital of Wisconsin-Fox Valley
325 North Commercial St #400
Neenah, WI 54956
Contact: Sara Schumacher
E-mail: Sschumacher@chw.org
Phone: (920) 969-7974
NCA accreditation: Associate

Green County
The ChAT Room
Monroe Hospital
515 22nd Avenue
Monroe, WI 53566
Contact: Claire MacLennan
E-mail: cmaclennan@gchsd.org
Phone: (608) 324-1116
NCA accreditation: Not accredited

Kenosha
Children's Advocacy Center
Children's Hospital of Wisconsin-Kenosha
6308 8th Avenue, Suite 3090
Kenosha, WI 53143
Contact: Rita Kadamian
E-mail: Rkadamian@chw.org
Phone: (262) 653-2265
NCA accreditation: Associate

LaCrosse
Stepping Stones
1707 Main Street, Suite 113
La Crosse, WI 54601
Contact: Jeanne Meyer
E-mail: jmeyer@fccnetwork.org
Phone: (608) 791-3882
NCA accreditation: Associate

Madison
Safe Harbor Child Advocacy Center
836 E Main St
Madison, WI 53703
Contact: Brenda Nelson
E-mail: nelson.brenda@co.dane.wi.us
Phone: (608) 661-9787
NCA accreditation: Full

Milwaukee
Child Protection Center
Children's Hospital of Milwaukee
PO Box 1997 (MS746)
Milwaukee, WI 53201
Contact: Amy Ginal
E-mail: aginal@chw.org
Phone: (414) 277-8987
NCA accreditation: Full

Racine County
Contact: Ann Rolling
E-mail: Ann.Rolling@cssw.org
Phone: (262) 635-6620

Rock County
YWCA CARE House
1126 Conde St
Janesville, WI 53546
Contact: MaryAnn Burkheimer
E-mail: carehouse@ywcarockco.com
Phone: (608) 755-4750 x 401
NCA accreditation: Associate

Waukesha
The C.A.R.E. Center
726 N. East Avenue
Waukesha, WI 53186
Contact: Faith Holley-Beal
E-mail: Faith.holleybeal@tds.net
Phone: (262) 522-3680
NCA accreditation: Associate

Wausau
Child Advocacy Center of North Central Wisconsin
520 N. 28th Ave., Suite 110
Wausau, WI 54401
Phone: (715) 848-8600
Contact: Jeff Sargent
E-mail: Jeff.sargent@cssw.org
Phone: (715) 843-1861
NCA accreditation: Associate

Wood County
Children's Advocacy Center
1000 N. Oak Ave.
Marshfield, WI 54449
Phone: (715) 387-5251
Contact: Cynthia Jurishca
E-mail: jurishica.cynthia@marshfieldclinic.org
Phone: (715) 387-5251
NCA accreditation: Associate

Developing Child Advocacy Centers:

Brown County
Phone: (800) 998-9609

Walworth County
Contact: Mark Lyday
E-mail: mlyday@chw.org

C. Sample Motion In Limine Objecting To Admission Of Evidence Of Defendant's Character.

STATE OF WISCONSIN	CIRCUIT COURT CRIMINAL DIVISION	MILWAUKEE COUNTY
STATE OF WISCONSIN, Plaintiff,		
v.		Case No. 01-CF-4337
, Defendant.		

STATE'S MOTION IN LIMINE OBJECTING TO ADMISSION OF EVIDENCE OF DEFENDANT'S "CHARACTER"

The State asserts in limine its objection to the introduction by the Defendant of what he may call "character evidence". It is the State's understanding that the Defendant may attempt to call witnesses who will testify that they have never seen the defendant commit a sexual assault to a child, nor do they have any knowledge of his doing so by virtue of a child having reported to them that he assaulted them. It is further anticipated that witnesses may be called for the purpose of offering an opinion that the defendant does not possess the "character" of a child molester, that the witness does not believe that the defendant did molest the victim, and/or that the witness has left his/her children with the defendant and does not believe that his/her children were molested by the defendant.

To characterize this as a "pertinent trait" of the defendant's character under sec. 904.04 is an incorrect characterization of this sort of evidence, since it has nothing to do with a "trait" at all, but is merely the individual's belief that the defendant has not committed a crime of a similar type to that with which the defendant is currently charged. The law is well-settled on this point. "Evidence of noncriminal conduct to negate the inference of criminal conduct is generally

inadmissible." United States v. Dobbs, 506 F. 2d 445, 447 (5th Cir. 1975). See also United States v. Winograd, 656 F. 2d 279, 284 (7th Cir. 1981), cert. denied, 455 U.S. 989 (1982).

This same logic was fully adopted by Wisconsin Courts in State v. Bedkar, 149 Wis 2d 257, 440 N.W.2d 802 (Ct. App. 1989). Whether an individual has committed the same crime against other potential victims does not make any fact at issue more or less likely. In this case, there is an additional assumption which makes this type of evidence even more problematic: one must assume that every other victim would have reported the assault , and would have reported it to the witness. Due to the very nature of the manner in which children report, such an assumption is completely unfounded.

A more recent case, also directly on point on this issue is State v. Tabor, 191 Wis. 2d 482, 529 N.W.2d 915 (Ct. App. 1995). There the court properly excluded evidence suggesting that the defendant did not molest some other child, holding that the testimony was not probative of the defendant's desire for sexual gratification, nor did it show an absence of that motive. Id., at 496-497.

This evidence would be offered to show that the defendant must have acted in conformity with the assumption generated by the lack of reports from other children, that is, that he does not sexually assault children. This is "propensity" evidence which is specifically targeted as inadmissible under 904.04. Moreover, character evidence which is admissible under 906.08 is limited to one's character for truthfulness. This "character" evidence is not relevant to that issue, and therefore is inadmissible.

Any reliance by the Defendant on the cases where defendants have been permitted to show a "trait" of peacefulness is misplaced. In those cases, the defense was truly demonstrating a "trait", as opposed to a "propensity".

The State objects to the introduction of this evidence, and asks the court to deny the defendant the opportunity to present it.

Dated this _____ day of _____, 2002.

_____

Miriam S. Falk
Assistant District Attorney
Bar # 01009765

D. Sample Offer Of Proof To Admit 908.08 Evidence

STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 08 CF 369

,

Defendant.

OFFER OF PROOF TO ADMIT AUDIOVISUAL RECORDING OF CHILD

Pursuant to sec. 908.08 of the Wisconsin Statutes, the State is seeking to admit into evidence an audiovisual recording of an oral statement of a child at the Trial in this matter, which is scheduled for June 11, 2009, at 9:00 a.m.

The State seeks to introduce an audiovisual recording of Child Victim, DOB XX/2004. The audiovisual recording was recorded on September 4, 2008, at approximately 5:50 p.m., at the Chippewa Valley Child Advocacy Center located at the University of Wisconsin - Eau Claire, Eau Claire, Wisconsin. A copy of the audiovisual recording was previously provided to Defendant's attorney. The State will also be providing a copy of the audiovisual recording to the Court, with a copy of this offer of proof.

Dated this 22nd day of May, 2009.

_____
Wade C. Newell
Assistant District Attorney

State Bar #

cc: Attorney

E. Sample Motion To Admit 908.08 Evidence

STATE OF WISCONSIN CIRCUIT COURT [NAME] COUNTY

STATE OF WISCONSIN,

PLAINTIFF,

NOTICE OF MOTION, MOTION AND OFFER OF PROOF FOR THE USE OF

AUDIOVISUAL RECORDED STATEMENT OF A CHILD AT TRIAL OR HEARING PURSUANT TO 908.08 WIS. STATS. [1]

[1] 908.08 Audiovisual recordings of statements of children.

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

(2)(a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the trial or hearing in which the recording is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the recording is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, re-experiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5)(a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

(am) The testimony of a child under par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.

(b) If a recorded statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.

(6) Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

vs.

Case No. [CASE NUMBER]

[DEFENDANT'S NAME],

DEFENDANT.

NOW COMES the State of Wisconsin, by [NAME] County District Attorney [NAME OF PROSECUTOR], and moves for a hearing before the Honorable Court for an Order allowing the State to utilize Audiovisual recorded statements of a child. Said Motion is made pursuant to Section 908.08 and 908.03(24) of the Wisconsin Statutes. As grounds to support this Motion the State asserts as follows:

1) The child, [FIRST NAME LAST INITIAL OF CHILD], dob [CHILD'S DOB], will be [AGE AT TIME OF HEARING] years of age at the time and date of the hearing.
2) That the audiovisual recording is accurate and free from excision, alteration and visual or audio distortion.
3) The child's statements were made upon the importance of telling the truth and the understanding that false statements are punishable.
4) The time, content and circumstances of the child's statement provide indicia of the statement's trustworthiness.
5) Admission of the child's statement will not unfairly surprise the defendant nor deprive him of his opportunity to meet the allegations made in the statement.
6) Compliance with the elements of Wisconsin Statute 908.08(2) and (3) are not required for an alternative ruling of admissibility under Wisconsin Statute 908.08(7) and 908.03(24). State v. Snider, 668 N.W.2d 784, 266 Wis.2d 830 (App. 2003).

The State further provides that the audiovisual-recorded statement of [FIRST NAME LAST INITIAL OF CHILD] was taken on [DATE OF STATEMENT] at approximately [TIME OF STATEMENT] , at the [PLACE AND ADDRESS OF THE STATEMENT] by [PERSON WHO TOOK THE STATEMENT AND AFFILIATION ex. Sarah Smith of the Child Advocacy Center] who was also the audiovisual camera operator [OR NAME THE NAME THE CAMERA OPERATOR IF DIFFERENT].

The State respectfully requests that the Court review the audiovisual recording prior to the hearing on this motion and [affirms that a copy of the audiovisual recording has

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(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

been made available to the defendant by the District Attorney's office] (OR) [affirms that the defendant has been given a reasonable opportunity for them to view the statement before the hearing].

Dated this ___ day of [MONTH], [YEAR].

_____

[NAME OF PROSECUTOR]
District Attorney
[NAME] County, WI
State Bar No.: [BAR #]

F. General Motion In Limine

STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

STATE OF WISCONSIN,
Plaintiff,
vs. **MOTION IN LIMINE**

, Case No. 03 CF 231
Defendant.

The State of Wisconsin by Assistant District Attorney Wade C. Newell, hereby moves the court to enter the following pretrial orders:

1. That the defense be prohibited from calling any witness, except for rebuttal or impeachment purposes, if the name and address of that witness has not been first disclosed to the State and turned over for inspection, pursuant to the State's Demand for Discovery and sec. 971.23(2m)(a), Wis. Stats.

2. That the defense be prohibited from calling any listed witness, if relevant written or recorded statements of that witness have not been first disclosed to the State and turned over for inspection, pursuant to the State's Demand for Discovery and sec. 971.23(2m)(am), Wis. Stats.

3. That the defense be prohibited from calling any expert, if any reports or statements of that expert made in connection with the case, or if the expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his/her testimony, and including the results of any physical or mental examination, scientific test,

experiment or comparison that the defendant intends to offer into evidence at trial have not been first disclosed to the State and turned over for inspection, pursuant to the State's Demand for Discovery and sec. 971.23(2m)(am), Wis. Stats.

4. That the defense be prohibited from presenting any physical evidence, if that evidence has not been first disclosed to the State and turned over for inspection, pursuant to the State's Demand for Discovery and sec. 971.23(2m)(c), Wis. Stats.

5. That the defense be prohibited from introducing any evidence as to other crimes, wrongs, or acts of any prosecution witness, either prior to or following the date of the alleged offenses charged in the complaint. If the defense intends to introduce such evidence, the State requests that it be prohibited from doing so on the following grounds:

a. The defense failed to provide the State with any notice as to the dates of any alleged "other acts," together with the names and addresses of any witnesses thereto. The State therefore has been given no opportunity to determine the nature of any such "other acts" and to determine the validity of any alleged "other acts." Without notice the State has had no opportunity to request a pretrial hearing to address the admissibility of any alleged "other acts."

b. The probative value of any "other acts" evidence, if any, is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading to the jury, pursuant to sec. 904.03, Wis. Stats.

6. That the defense be prohibited from inquiring into specific instances of conduct as a method of proving the character of a prosecution witness or a relevant trait of character of the witness. If the defense intends to introduce such evidence, the State requests that it be prohibited from doing so on the following grounds:

a. Pursuant to sec. 904.05, Wis. Stats., the general rule is that character can only be proven by testimony as to reputation or testimony in the form of an opinion, except upon cross-examination of the witness testifying as to character.

b. That any such evidence would not be relevant to a defense claim and that the probative value of the evidence, if any, would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading to the jury, pursuant to sec. 904.03, Wis. Stats.

7. That the defense be prohibited from inquiring into specific instances of conduct as a means of attacking the credibility of a prosecution witness. If the defense intends to introduce such evidence the State requests that it be prohibited from doing so on the following grounds:

a. Pursuant to sec. 906.08, Wis. Stats., the credibility of a witness may only be attacked in the form of reputation or opinion testimony as to the untruthfulness of the witness, unless the witness him/herself testifies to their own character for truthfulness. Pursuant to 906.08(2), Wis. Stats., specific instances of conduct of a witness may not be proved by extrinsic evidence.

b. That the probative value of the evidence, if any, would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading to the jury, pursuant to sec. 904.03, Wis. Stats.

8. That the State be allowed to impeach the defendant, if he testifies at the jury trial in the above referenced case, with the fact that he has been previously convicted of eight (8) crimes. This motion is based upon Sec. 906.09, Wis. Stats., and *State v. Kuntz*, 160 Wis. 2d 722, 753, 467 N.W.2d 531, 543 (1991). According to CCAP and CIB/NCIC records the defendant has been convicted of the following crimes:

Date	**Crime**	**Case No.**
08/20/1990	Battery	
08/20/1990	Forgery	
03/18/1992	Possession of Firearm by Felon	
08/17/1993	Welfare Fraud	
09/15/1994	Aggravated Battery	
09/25/2002	Disorderly Conduct	
09/25/2002	Bail Jumping (Mis)	
09/25/2002	Exposing Genitals to Child	

Dated this 11th day of November, 2003.

_____

Wade C. Newell
Assistant District Attorney
State Bar #

G. Sample Motion To Prohibit Introduction Of Rape Shield Evidence

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY
STATE OF WISCONSIN, Plaintiff, vs.	**MOTION IN LIMINE**	
, Defendant.	Case No. 08 CF	

The State of Wisconsin by Assistant District Attorney Wade C. Newell, hereby moves the court to enter the following pretrial orders:

1. That the defense be prohibited from introducing any evidence concerning the complaining witness's prior sexual conduct ["Sexual conduct" means any conduct or behavior related to sexual activity of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style, pursuant to sec. 972.11(2)(a), Wis. Stats.] or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct, nor shall any reference to such conduct be made in the presence of the jury, pursuant to sec. 972.11(2)(b), Wis. Stats.

2. That the defense shall raise any exceptions to sec. 972.11(2)(b), Wis. Stats. by pretrial motion subject to 971.31(11), Wis. Stats. Pursuant to sec. 972.31(11), Wis. Stats. any evidence admissible under 972.11(2), Wis. Stats. must be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced.

3. That the defense be prohibited from introducing any evidence concerning the manner of dress of the complaining witness, pursuant to sec. 972.11(2)(d)1., Wis. Stats.

Dated this 5th day of March, 2009.

_____
Wade C. Newell
Assistant District Attorney

State Bar #

H. Sample Motion To Introduce Expert Testimony

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Defendant.

MOTION TO INTRODUCE EXPERT TESTIMONY AT TRIAL

CASE NO.

Pursuant to Wis. Stat. Sec. 971.23(1)(c) and 907.02, the State is providing notice that it intends to introduce the testimony of , a psychotherapist at Gundersen Lutheran Behavioral Health. Ms. Curriculum vitae is attached. Ms. will testify as an expert witness regarding several issues to assist the jury in understanding the evidence.

1. Delayed reporting

In this case the sexual assault was reported to police a little over a month after the assault occurred. The jurors may believe this to be unusual or inconsistent with being sexually assaulted, and might expect a victim to report immediately. Ms. will testify that a delay in reporting is not unusual in sexual assaults and will suggest reasons why many victims do not report immediately.

2. Lack of physical resistance

The victim will testify that she did not scream for help, fight with the defendants, or otherwise physically resist during the assault. Defense counsel at the preliminary hearing questioned the victim about these facts. Many jurors have a misconception that a person would normally fight or scream when being sexually assaulted. Ms. will provide information to assist them in understanding the victim's actions during the assault. She will testify that the victim's behavior during the assault is not unusual or uncommon when compared to other sexual assault victims.

3. Lack of memory of details of the assault

Even though the victim wrote a detailed statement and testified to a number of specific facts regarding the sexual assault, she will also testify that there are segments of the actual assault that are "blurry" or that she cannot remember. This lack of memory of specific details may affect her credibility. Ms. will testify about the effects of traumatic events such as a sexual assault on a victim's ability to perceive events and her memory of those events. Ms. testimony will assist the jury to assess the victim's testimony and credibility with an understanding of the impact of trauma on memory and perception, something an ordinary jury would not have knowledge about.

ANALYSIS

Ms. Testimony is admissible to assist the jury to understand the evidence to determine facts in issue, Wis. Stat. 907.02. Ms. testimony will assist the jury in understanding the dynamics of sexual assault, and the behavior of sexual assault victims. Ms. Will base her testimony on her own experience, research, and training, as well as the victim's statement, criminal complaint, police reports, preliminary hearing transcripts, and the victim's counseling records. Ms. has not and will not interview or interact with the victim.

This testimony is permissible under State v. Jensen, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). In Jensen, the court held that courts may allow an expert witness to give an opinion about the consistency of a complainant's behavior wit the behavior of victims of the same type of crime, if the testimony will assist the trier of fact to understand the evidence. The court explained that this type of testimony is relevant both to rebut a defense claim that the charge if fabricated, and because a victim's behavior frequently does not conform to commonly held beliefs of how a victim would act.

In State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (1990), the court again upheld "the introduction of expert testimony on the behavior of sexual assault victims to educate the jury when the complainant's conduct is cast as inconsistent with the claim of sexual assault." The court also found that expert testimony is allowed if it serves the "particularly useful role [of] disabusing the jury about widely held misconceptions about sexual assault victims." Id. At 796 quoting State v. Robinson, 146 Wis. 2d 315, N.W.2d 165 (1988).

In State v. Rizzo, 241 Wis. 2d 241, 624 N.W.2d 854 (2002), the court once again upheld the use of expert testimony to explain a victim's behavior, because such behavior may be contrary to commonly held expectations on the part of the jury of how a victim would act.

The Rizzo decision also explained the previous decision of State v. Mayday, 179 Wi.s 2d 346, 507 N.W.2d 365 (Ct. App. 1993), which held that where the state introduces expert testimony of an expert that has personally examined a victim and will introduce Jensen evidence, a defendant may request a psychological examination of the victim.

The Rizzo court clearly stated that the State could avoid such an examination under Mayday by calling an expert witness to elicit Jensen evidence that did not personally exam the victim. The core rational of Mayday is one of fairness. If one side is going to introduce an expert who has personally examined the victim, the other side should have that same opportunity. The key fact is whether or not the State's expert who will provide Jensen evidence has personally interviewed or examined the victim.

In this case Ms. will testify based on evidence equally available to the defense, not a personal interview of the victim. Therefore, there is no Mayday issue.

CONCLUSION

The State asks the court to allow Ms. to testify as an expert witness to assist the jury in understanding the issues of delayed reporting, lack of resistance, post-assault behavior, and her memory, or lack of memory, of the facts of the incident.

Dated this at La Crosse, Wisconsin.

Respectfully submitted:

_____

Tim Gruenke
District Attorney
Bar No.

I. Sample Summary Of Child Sexual Assault Expert Testimony

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 04CF

,
Defendant.

STATE'S SUMMARY OF EXPERT TESTIMONY

PLEASE TAKE NOTICE that the State of Wisconsin intends to introduce the expert testimony of EXPERT at the trial of this matter. Their curriculum vitaes are attached. Following is a summary of the proposed testimony:

EXPERT will testify that children typically do not disclose sexual abuse immediately after it has occurred, contrary to a common mistaken belief,. Rather, studies, and their experience, show that many children delay the reporting of sexual abuse. She will identify several common reasons for this "delay" phenomenon, which include various fears on the part of the child (i.e., that the child won't be believed, or will get into trouble, or will get the perpetrator into trouble), and the fact that many children do not recognize sexual abuse as abuse.

The expert will also testify that when children do disclose, it is generally a process rather than a single event. "Piecemeal disclosure" occurs when a child will tell some, but not all, of the abuse events. Piecemeal disclosure occurs for several reasons, including that the child "tests" the waters in the disclosure, seeing how the adult to whom the child may react. Piecemeal disclosure can also occur because a child may not remember all of the events at the initial time of disclosing

(but may recall some additional event later), or may not consider an event 'abuse". Additionally, some abuse is "worse" in the eyes of the child, and may be more difficult to talk about. Some abusive events involve acts or body parts about which the child has trouble talking. Moreover, children may not fully understand the acts which occurred to them, and not be able to or comfortable with describing these kinds of events.

The expert will testify that, in some instances, children do not disclose about an event simply because they were not asked about it. Interviewing techniques designed to maximize the amount of accurate information obtained from a child can be helpful in obtaining more information from a child.

The expert will testify related to the interplay of a child's developmental level and that child's abilities relative to disclosure. Specifically, she will testify that younger children do not have a developed sense of time, and are unable to provide a date, or even an accurate estimate of the number of times an event occurred. However, even young children are able to describe an event accurately. Younger children are not as able as older children to relate information in chronological order, and may not appreciate what is "important" in an event in the same manner as an older child or an adult.

Finally, the expert will testify about the phenomenon of recantation, identifying the factors which may play a part in a child's recantation. One of the biggest influences in recantation is the reaction of the non-abusing parent, and the perception of the child that he/she is supported or believed by that parent. Children respond to pressures and fears generated by others, and can be influenced not to talk about abuse, or to recant.

Dated this ____ day of May, 2005.

_____
Miriam S. Falk
Assistant District Attorney
Bar #

J. Notice Of Intent To Introduce Sane Expert Testimony

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

CRIMINAL DIVISION

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-

Defendant.

STATE'S NOTICE OF INTENT TO INTRODUCE EXPERT R.N. TESTIMONY

THE STATE OF WISCONSIN, by Assistant District Attorney Miriam S. Falk, hereby provides notice to the court and counsel that it intends to introduce the testimony of two expert witnesses, NURSE 1 and NURSE 2, both of whom are registered nurses with specialized training on the area of sexual assault examinations. They examined the victim in this case.

A summary of their testimony can be found in the medical records relating to this case. They will testify consistently with the information provided therein.

Dated this 17th day of October, 2005.

_____

Miriam S. Falk
Assistant District Attorney
Bar #

K. Relevant Statutes and Case Law on Bindover and Evidentiary Issues

In *State v. Koch,* 175 Wis. 2d 684, 499 N.W.152 (1993), the Wisconsin Supreme Court summarized the statutory and case law pertaining to the preliminary examination and a trial court's review of a defendant's challenge to the bindover decision:

> "A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant." Sec. 970.03(1), Stats. If the court finds probable cause to believe that the defendant committed a felony, it must bind the defendant over for trial. Sec. 970.03(7), Stats.
>
> The probable cause that is required for a bindover is greater than that required for arrest, but guilt beyond a reasonable doubt need not be proven. *State v. Berby*, 81 Wis. 2d 677,683, 260 N.W.2d 798 (1978). A preliminary hearing is not a preliminary trial or evidentiary trial on the issue of guilt beyond a reasonable doubt. *State v. Dunn*, 121 Wis.2d 389, 396, 359 N.W.2d 151 (1984). The role of the judge at a preliminary hearing is to determine whether the facts and reasonable inferences that may be drawn from them support the conclusion that the defendant probably committed a felony. The judge is not to choose between conflicting facts or inferences, or weigh the state's evidence against evidence favorable to the defendant. Probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony. *Id.*, 121 Wis. 2d at 397-98; *State v. Cornelius*, 152 Wis. 2d 272, 276, 448 N.W.2d 434 (Ct.App. 1989).
>
> On review this court will search the record for any substantial ground based on competent evidence to support the circuit court's bindover decision. *State v. Sorenson*, 143 Wis. 2d 226, 251, 421 N.W.2d 77 (1988).

Id., 175 Wis. 2d at 703-704.

The standard of review applicable to appellate review of a bindover decision also applies to a trial court's review. *State v. Huff*, 123 Wis. 2d 397, 402, 367 N.W.2d 226 (Ct.App. 1985) (citation omitted). Moreover, the Wisconsin Supreme Court explicitly stated that a reviewing court has no authority to substitute its thinking for that of the preliminary hearing magistrate in determining whether sufficient evidence was presented at the hearing to support a bindover determination:

It is well settled in this state that the evidence at a preliminary hearing need not be sufficient to prove the charge against the defendant beyond a reasonable doubt. *The reviewing court can examine the evidence only to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate.* When the

reviewing court has discovered that there is competent evidence for the judicial mind of the examining magistrate to act on in determining the existence of essential facts, it has reached the limit of its jurisdiction and cannot go beyond that and weigh the evidence.

Probable Cause in Preliminary Hearings:

State ex rel. Cholka v. Johnson, 96 Wis. 2d 704, 712, 292 N.W.2d 835 (1980) (emphasis added)."In determining whether probable cause exists, the court is concerned with the practical and nontechnical probabilities of everyday life." *State v. Copening,* 103 Wis. 2d 464, 578, 309 N.W.2d 850 (Ct.App. 1981). The preliminary hearing magistrate may not choose between conflicting facts or weigh the evidence. *State v. Marshall,* 92 Wis. 2d 101, 115, 284 N.W.2d 592 (1979). "The magistrate must determine only whether, under any plausible set of facts, the defendant probably committed a felony. This standard weighs a preliminary hearing heavily in favor of the state, but is justified because the purpose of a preliminary hearing is to protect the accused from hasty, improvident or malicious prosecution." *State v. Dunn,* 117 Wis. 2d 487, 490-491, 345 N.W.2d 69 (Ct.App. 1984). This Court's duty, then, is to search the record for any plausible evidence which favors the prosecution and supports the bindover decision regardless of whether it may or may not be subject to a competing interpretation."

State v. Dunn, 117 Wis. 2d at 491 (emphasis supplied).
Even where a defendant suggests alternative interpretations of the preliminary hearing evidence, such contentions are irrelevant to the determination of probable cause to justify bindover. "The question is not which inference to draw, but whether either inference supports a conclusion that the defendant probably committed a felony. If *any* reasonable inference supports that conclusion, the magistrate must bind over the defendant."

State v. Hooper, 101 Wis. 2d 517, 537, 303 N.W.2d 110 (1981).
Where the challenge is to the specific charge or charges recited in the criminal information, "the trial judge's review is only as to the question of whether the district attorney abused his discretion in issuing a charge not wholly within the confines of and 'wholly unrelated to' the testimony received at the preliminary examination."

Review of the prosecutor's charging decision is very limited. The *Hooper* court pointed out that a "contrary conclusion would allow courts to encroach on the quasi-judicial authority and province of the district attorney" and that the "the case law and statutes clearly demonstrate that, after bindover, the district attorney, in the proper exercise of his quasi-judicial prosecutorial discretion, is entrusted with the responsibility of formulating a specific charge within the confines of and not wholly unrelated to the transaction or facts consider or testified to at the preliminary examination." *Id.,* at 536 (citation omitted). Thus, the *Hooper* court concluded:

[T]he only issue before the trial court was to determine whether the district attorney abused his discretion in reciting a charge that was (1) not within the confines of the evidence adduced at the preliminary; (2) wholly unrelated to the facts and circumstances testified to at the preliminary; and/or (3) of doubtful merit for the purpose of coercing the defendant to plead guilty to a less serious offense. *Id.,* at 539

State v. Doyle, 96 Wis. 2d 272, 288-289, 291 N.W.2d 545 (1980)
The defendant here has not shown that the charges recited in the criminal information were improper according to the appropriate standard of review. Moreover, his allegations concerning the lack of proper identification of the cocaine in question in court six are also deficient in that at the probable cause stage substantial or expert testimony is not required to determine the identity of an alleged controlled substance. . And finally, although the defendant may claim that the preliminary hearing evidence suggests alternative interpretations of the evidence adduced at this hearing, this Court is not empowered to entertain this debate but only to search the record for evidence supporting bindover. The function of the preliminary hearing was fulfilled according to law. The weight and credibility of the evidence, including which, if any, of the inferences to accept is solely within the province of the jury.

L. Sample Protective Order 908.08 Evidence

STATE OF WISCONSIN CIRCUIT COURT [NAME] COUNTY

STATE OF WISCONSIN,

Plaintiff

Vs. **COURT FILE: 0_CF___**

[DEFENDANT],

Defendant

STIPULATION AND ORDER FOR A PROTECTIVE ORDER PURSUANT TO SEC. 971.23(6), WIS. STATS.

The State by (Assistant) District Attorney [NAME OF PROSECUTOR] and the defendant by defendant's attorney, [NAME OF DEFENSE COUNSEL], hereby stipulate to the entry of the following protective order in the above-entitled matter.

The parties stipulate that copies of oral statements made by the alleged victim and witnesses provided to the defendant through defendant's defense attorney shall remain in the possession of the defendant's attorney for purposes of the attorney's representation of the defendant.

The parties further stipulate that no additional copies of these statements shall be made by defense counsel and that the statements shall not be provided to the defendant or anyone else without further order of the court.

Dated: _____ _____

[NAME OF PROSECUTOR]
(Assistant)District Attorney
[County Name] County

Dated: _____ _____

[NAME OF DEFENSE ATTORNEY, Attorney for defendant

ORDER

Based on the records and files herein and the stipulation of the parties, IT IS HEREBY ORDERED THAT:

Copies of alleged victim and witness statements provided to the defense attorney in this matter shall remain in the possession of the defendant's attorney for purposes of representation of the defendant no further copies shall be made by defense counsel nor shall any copies be provided to the defendant or others until further order of this court.

Dated this ____ day of [MONTH], [YEAR].

BY THE COURT:

_____
[NAME OF JUDGE]
Circuit Court Branch ___
[COUNTY NAME] County

M. Rape Shield Outline

COUNTY OF MILWAUKEE
District Attorney's Office
Inter-Office Communication

DATE: December 21, 2006

TO:

FROM: Robert D. Donohoo
Chief Deputy

SUBJECT: WISCONSIN'S RAPE SHIELD STATUTE/LAW

INTRODUCTION

THIS OUTLINE IS ALMOST THREE YEARS OLD

1. Wisconsin's rape shield law/statute is set forth at sec. 972.11(2). Section 971.31(11) is also relevant when determining the admissibility of evidence under the rape shield law. *See* Attachment A to some copies of this outline.

2. The rape shield law is divided into two parts: prior sexual conduct [972.11(2)(a)(b)&(c)] and manner of dress [972.11(2)(d)]. The discussion in this outline relates only to the prior sexual conduct part of the rape shield law.

3. In *State v. Wirts*, 176 Wis. 2d 174, 181, 500 N.W.2d 317 (Ct. App. 1993), the Court stated:

> Under sec. 972.11(2)(b), Stats., evidence of the complaining witness's prior sexual conduct is not admissible except as evidence listed in subdivisions 1-3. "Prior sexual conduct" means conduct prior to the conclusion of trial, not prior to the sexual assault or sexual contact with which the defendant is charged. *State v. Gulrud*, 140 Wis. 2d 721, 729, 412 N.W.2d 139, 142 (Ct. App. 1987). Section 971.31(11), Stats., provides that in actions under sec. 940.225, Stats., the trial court must determine upon pretrial motion that evidence admissible under one of the statutory exceptions is material

and of sufficient probative value to outweigh its prejudicial effect. If it is not, such evidence may not be admitted.

4. Section 972.11(2) is referred to as the "rape shield law" or "Wisconsin's rape-shield-law." *State v. Booker*, 2005 WI App 182, ¶¶ 3, 11, 15, 286 Wis. 2d 747, 753, 757-58, 704 N.W.2d 336; *State v. Harris*, 2004 WI 64, ¶ 6 n.5, 272 Wis. 2d 80, 90 n.5, 680 N.W.2d 737; *State v. Dunlap*, 2002 WI 19, ¶¶ 2, 19, 16-17, 250 Wis. 2d 466, 472, 475, 478-79, 640 N.W.2d 112; *State v. Dodson*, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998). It is also referred to as the "rape shield statute." *State v. St. George*, 2002 WI 50, ¶¶ 4, 12, 13, 15, 252 Wis. 2d 499, 509, 511-13, 643 N.W.2d 777; *State v. Hammer*, 2002 WI 92, ¶¶ 2, 4, 19, 38, 236 Wis. 2d 686, 693, 700, 710, 613 N.W.2d 629.

5. In *State v. Booker*, 2005 WI App 182, 286 Wis. 2d 747, 704 N.W.2d 336, the Court rejected several evidentiary contentions of the defendant including that certain evidence was ruled inadmissible under the rape shield law. The Court, however, did find that there was insufficient evidence to sustain two of the defendant's convictions. The state appealed that part of the Court's decision. The Wisconsin Supreme Court found that there was sufficient evidence to sustain the convictions and therefore reversed that part of the court of appeals decision that had held otherwise. *State v. Booker*, 2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676.

GENERAL LAW

6. The rape shield law provides that a party, almost always the defendant, may not offer evidence relating to a victim's past sexual history or reputation absent application of a statutory or judicially created exception. *State v. St. George*, 2002 WI 50, ¶ 12, 252 Wis. 2d 499, 511, 643 N.W.2d 777; *State v. Jackson*, 216 Wis. 2d 646, 657, 575 N.W.2d 475 (1998).

7. The rape shield statute reflects the view that generally evidence of a complainant's prior sexual conduct is irrelevant or, if relevant, substantially outweighed by its prejudicial effect. *State v. St. George*, 2002 WI 50, ¶ 13, 252 Wis. 2d 499, 512, 643 N.W.2d 777.

8. Wisconsin's rape shield law was enacted to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of the sexual assault allegations. *State v. Dunlap*, 2002 WI 19, ¶ 19, 250 Wis. 2d 466, 480, 640 N.W.2d 112. There are four primary policy interests furthered by the rape shield law: (1) the rape shield statute promotes fair trials because it excludes evidence which is generally irrelevant, or if relevant, substantially outweighed by its prejudicial effect; (2) it prevents a defendant from harassing and humiliating the complainant; (3) the statute prevents the trier of fact from being misled or confused by collateral issues and deciding a case on an improper basis; (4) it promotes effective law enforcement because victims will more readily report such crimes and testify for the

prosecution if they do not fear that their prior sexual conduct will be made public. *State v. Hammer*, 2000 WI 92, ¶ 39, 236 Wis. 2d 686, 711, 613 N.W.2d 629. In *State v. Mitchell*, 144 Wis. 2d 596, 618, 424 N.W.2d 698 (1988), the Court stated:

> The state is correct, however, in noting that the rape shield statute touches upon a judicial function – ruling on the admissibility of evidence at trial. More importantly, though, the statute represents a major public policy decision of the state legislature regarding sexual assault cases. The statute is one aspect of a broader legislative program to deal more effectively with the serious crime of sexual assault. Thus, while cast in evidentiary terms, the basic purpose of the rape shield statute is to protect sexual assault victims from embarrassing public exploration into their past sexual conduct unless the evidence elicited is relevant to select specified issues. The statute represents one means to overcome the reluctance of sexual assault victims to report the crime and to help prosecute the alleged offender. This law falls within the legislature's power to adopt laws for the public welfare.

9. Section 972.11 on its face does not violate a defendant's constitutional right to present evidence. *State v. Pulizzano*, 155 Wis. 2d 633, 646-47, 456 N.W.2d 325 (1990). *See* Attachment A.

10. The fact that the limitations on the admissibility of certain evidence set forth in 972.11(2) apply regardless of the purpose of the admission of the evidence [972.11(2)(c)] does not make 972.11(2) unconstitutional on its face. *State v. Pulizzano*, 155 Wis. 2d 633, 643-44, 456 N.W.2d 325 (1990).

11. There are statutory and judicially created exceptions to the rape shield law.

12. The issue of the form of the offer of proof that is required in both a statutory and judicially created exception situation was discussed in *State v. Jackson*, 216 Wis. 2d 646, 661-62, 575 N.W.2d 475 (1998); *State v. Dodson*, 219 Wis. 2d 65, 73-76, 580 N.W.2d 181 (1998); *State v. Pulizzano*, 155 Wis. 2d 633, 652-53, 456 N.W.2d 325 (1990).

13. In *State v. Dunlap*, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112, the Court addressed the relationship between the rape shield law and *Jensen* evidence (in some circumstances expert testimony about the consistency of a sexual assault-complainant's behavior with victims of the same type of crime may be offered for the purpose of helping the trier of fact understand the evidence to determine a fact in issue). The Court of Appeals had held that because the State's expert offered evidence regarding the victim's behavior that was consistent with that of other sexual assault victims, it opened the door for the defendant to explore other

behavior exhibited by the victim before the alleged assault that was common for sexual assault victims. The Supreme Court, in rejecting the position of the Court of Appeals, held that proper *Jensen* evidence does not open the door under the curative admissibility doctrine to the admission of evidence that is otherwise barred by the rape shield statute. 2002 WI 19 at ¶¶ 30-43, 250 Wis. 2d at 484-91.

> We first address the holding of the court of appeals. In its decision, the court of appeals held that because the State's expert offered evidence regarding Jamie's behavior that was consistent with that of other sexual assault victims, it opened the door for Dunlap to explore other behavior exhibited by Jamie before the alleged assault that was common for sexual assault victims. *Dunlap*, 2000 WI App 251, ¶ 19. We refuse to make such a broad statement. We have held that in limited circumstances, expert testimony about the consistency of a sexual assault complainant's behavior with victims of the same type of crime may be offered for the purpose of helping the trier of fact understand the evidence to determine a fact in issue, as long as the expert does not given an opinion about the veracity of the complainant's allegations. *State v. Jensen*, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988). If we were to adopt the court of appeals' position, we would essentially force the State to choose between attempting to rehabilitate the complainant and allowing the admission of a complainant's sexual history in every sexual assault case where the State seeks to explain the complainant's reporting behavior. This result would run counter to the legislature's purpose in enacting the rape shield law, and we refuse to promote such a consequence.

2002 WI 19 at ¶ 33, 250 Wis. 2d at 486-87.

14. In *People v. Melillo*, 25 P.3d 769 (Colo. 2001), the Court addressed the applicability of the rape shield law when the defendant alleges that evidence of the victim's prior sexual history is admissible under the "opening the door" or "rule of completeness" evidentiary theories.

PRIOR SEXUAL CONDUCT

15. The definition of "sexual conduct" for purposes of the rape shield law is set forth at 972.11(2)(a).

16. Prior sexual conduct means conduct prior to the conclusion of trial, not prior to the sexual assault or sexual contact with which the defendant is charged. *State v. Wirts*, 176 Wis. 2d 174, 181, 500 N.W.2d 317 (Ct. App. 1993).

17. Sexual conduct includes the absence of sexual activity – prior sexual conduct includes lack of prior sexual conduct (virginity) – testimony that the victim was a virgin prior to the assault is generally inadmissible under the rape shield law. *Michael R.B. v. State*, 175 Wis. 2d 713, 728, 499 N.W.2d 641 (1993); *State v. Mitchell*, 144 Wis. 2d 596, 609, 424 N.W.2d 698 (1988).

18. In *Mitchell*, the defendant was charged with sexual intercourse with a person twelve years of age or younger – the victim was eleven. The state made an extensive argument that evidence of the victim's prior lack of sexual experience (she never had sexual intercourse prior to the incident with the defendant) was properly admitted at the defendant's trial because of the specific facts of the defendant's case. The state argued that the evidence was admissible pursuant to the statutory exception at 972.11(2)(b)2. The state conceded that the evidence did not fall under either of the listed purposes but argued that it was properly admitted to show the identity of the assailant in spite of the express language of 971.11(2)(c). The state argued that: (1) it's position was consistent with the purposes and intent of the rape shield law; (2) interpreting the rape shield law to exclude the evidence would lead to an absurd result; (3) if the court construed 972.11(2) to prohibit the evidence of virginity in this case, the court must hold 972.11(2)(c) an unconstitutional invasion of the province of the judiciary, violating the doctrine of separation of powers under the state constitution. The Court, in finding that the evidence was inadmissible, rejected all three arguments of the state.

STATUTORY EXCEPTIONS

19. The rape shield law itself provides three exceptions [in subdivisions 1-3 of 972.11(2)(b)] which represent those limited circumstances in which evidence of a complainant's prior sexual conduct is generally viewed as probative of a material issue without being overly prejudicial. The exceptions are:

    1. Evidence of the complainant's past conduct with the defendant. Section 972.11(2)(b)1.

    2. Evidence of specific instances of sexual conduct used to show the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered. Section 972.11(2)(b)2.

    3. Evidence of prior untruthful allegations of sexual assault made by the complainant. Section 972.11(2)(b)3.

20. Merely offering proof of the general type described in a particular statutory exception is not enough to defeat the rape shield statute. The exceptions to the rape shield statute are also governed by reference to sec. 971.31(11), Stats. Section 971.31(11), Stats., provides that in certain actions the trial court must determine upon pretrial motion that evidence admissible under one of the statutory

exceptions is material and of sufficient probative value to outweigh its prejudicial effect. If it is not, such evidence may not be admitted. That statute inverts the normal "weighing of evidence" under Wis. Stat., § 904.03 which provides that evidence should be admitted unless its probative value is substantially outweighed by its potential prejudice. Section 971.31(11) assumes a bias in its balancing test that, absent an evidentiary showing to the contrary, the proffered evidence is more prejudicial than probative. *State v. Jackson*, 216 Wis. 2d 646, 657-58, 575 N.W.2d 475 (1998).

21. Under the terms of secs. 972.11(2)(b) and 971.31(11), the defendant must make a three-part showing that:

    1. The proffered evidence fits within one of the exceptions set forth in 972.11(2)(b)1., 2., or 3;

    2. The evidence is material to a fact at issue in the case; and

    3. The evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature.

    State v. Jackson, 216 Wis. 2d 646, 658-59, 575 N.W.2d 475 (1998).

22. What is the evidentiary burden on the defendant in relation to the first step of the three-part showing that is required as set forth in 21. above? As to the exceptions set forth in (b) 1 and 3, the defendant is required to offer sufficient evidence to allow a circuit court to conclude from the proffered evidence that a reasonable person could reasonably infer that the prior sexual conduct occurred or that the complainant made prior untruthful allegations of sexual assault. *State v. Jackson*, 216 Wis. 2d 616, 659, 575 N.W.2d 475 (1998).

23. Section 972.11(2)(c) absolutely prohibits a court from expanding the scope of the statute's listed exceptions/reading exceptions into the rape shield law. *Michael R. B. v. State*, 175 Wis. 2d 713, 730, 499 N.W.2d 641 (1993); *State v. Mitchell*, 144 Wis. 2d 596-610-19, 424 N.W.2d 698 (1988). In *Mitchell*, 144 Wis. 2d at 612-14, the Court set forth the legislative history of 972.11(2)(c) – it was meant to overrule the holding of the Court in *State v. Gavigan*, 111 Wis. 2d 150, 330 N.W.2d 571 (1983). *See* the discussion of *Mitchell* above under **PRIOR SEXUAL CONDUCT**.

24. The scope of the exception set forth in 972.11(2)(b)2., was addressed in *Michael R.B. v. State*, 175 Wis. 2d 713, 728-30, 499 N.W.2d 641 (1993) and *State v. Mitchell*, 144 Wis. 2d 596, 424 N.W.2d 698 (1988). In *Michael R.B.*, the Court rejected the contention of the defendant that a dilated hymen should be considered a disease within the meaning of sec. 972.11(2)(b)2. In *Mitchell*, 144 Wis. 2d at 612, the Court noted that the words "for use in determining the degree of sexual assault or the extent of injury suffered" were intended, for example, to address cases where

pregnancy or contraction of a disease is an element of the offense. *See* also the discussion of *Mitchell* above under **PRIOR SEXUAL ASSAULT**.

25. Cases which have discussed the statutory exceptions include *State v. Booker*, 2005 WI App 182, ¶¶ 11-16, 286 Wis. 2d 747, 757-60, 704 N.W.2d 336 (the exclusion of evidence that vaginal swabs and underwear of the victim – which were taken the night of the incident – did not contain any of the defendant's semen but did contain the semen of other men was proper in that it did not fall within any of the three statutory exceptions including 972.11(2)(b)2. since it was not admissible for use in determining the degree of sexual assault or the extent of injury suffered); *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777 (evidence of the child victim's prior sexual contact with another child did not fall within any of the statutory exceptions); *State v. Dunlap*, 2002 WI 19, ¶¶ 16-17, 250 Wis. 2d 466, 478-80, 640 N.W.2d 112 (evidence showing the sexually precocious behavior of the complainant prior to the alleged assault did not fall within any of the statutory exceptions); *State v. Dodson*, 219 Wis. 2d 65, 69-71, 580 N.W.2d 181 (1998) (evidence of a prior sexual assault committed on the victim by a third party did not fall within any of the statutory exceptions); *State v. Jackson*, 216 Wis. 2d 646, 575 N.W.2d 475 (1998) (evidence regarding a prior sexual assault perpetrated on the child victim by a third party did not fall within one of the statutory exceptions); *State v. Wirts*, 176 Wis. 2d 174, 500 N.W.2d 317 (Ct. App. 1993) (evidence that the complaining witness had sexual intercourse with her husband shortly after the alleged assault was not admissible under any of the statutory exceptions); *Michael R.B. v. State*, 175 Wis. 2d 713, 499 N.W.2d 641 (1993) (evidence that the child victim had sexual contact with her brother to show an alternate source for the victim's sexual knowledge and her physical condition – a dilated hymen – was not admissible; same evidence inadmissible to show someone else had assaulted the victim); *State v. Pulizzano*, 155 Wis. 2d 633, 642-43, 456 N.W.2d 325 (1990) (evidence of a prior sexual assault for the limited purpose of establishing an alternative source for the victim's sexual knowledge constituted "sexual conduct" as that term is defined in sec. 972.11(2)(a) and it did not fall within any of the statutory exceptions); *State v. DeSantis*, 155 Wis. 2d 774, 456 N.W.2d 600 (1990).

26. The prior untruthful allegations exception set forth at 972.11(2)(b)3 will be addressed in a subsequent version of this outline. This exception is discussed in the comment **PRIOR UNTRUTHFUL ALLEGATIONS UNDER WISCONSIN'S RAPE SHIELD LAW:WILL THOSE WORDS COME BACK TO HAUNT YOU?** which can be found at 2002 Wisconsin Law Review 1237.

JUDICIALLY CREATED EXCEPTION

27. In order to balance the interests of the defendant and the complainant, the Wisconsin Supreme Court has developed a narrow test to determine when a defendant's right to present a defense should supersede the State's interest in

protecting the complainant from prejudice and irrelevant inquiries – a judicial exception permits the defendant under some circumstances to present evidence of the complainant's prior sexual conduct that would otherwise be inadmissible to protect the defendant's constitutional right to present evidence in his defense.

28. Because a defendant's right to present evidence is not absolute, the rape shield statute excluding evidence proffered by the defendant does not on its face violate a defendant's constitutional right to present evidence. *State v. St. George*, 2002 WI 50, ¶ 15, 252 Wis. 2d 499, 513-14, 643 N.W.2d 777.

29. In *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), the Court created/codified a judicial exception to the rape shield law. *State v. Harris*, 2004 WI 64, ¶ 6 n.5, 272 Wis. 2d 80, 90 n.5, 680 N.W.2d 737. In *Pulizzano*, the Court determined that sec. 972.11(2) is constitutional on its face, but as applied, it may unconstitutionally deprive a defendant of his or her rights to a fair trial, confrontation, and compulsory process. The Court held that under certain circumstances, evidence of a sexual assault victim's prior sexual history may be so relevant and probative that the defendant's right to present it is constitutionally protected. Thus, the rape shield statute may in a given case impermissibly infringe upon a defendant's rights to confrontation and compulsory process. *State v. St. George*, 2002 WI 50, ¶ 15, 252 Wis. 2d 499, 514, 643 N.W.2d 777. The Wisconsin Courts have recognized that the rape shield law takes on a slightly different role when the complainant is a child. Because the normal presumption is that a child does not have a sexual history, it is possible that a jury might incorrectly attribute any evidence of a child complainant's sexual behavior to an assault by the defendant. Thus, the possibility of using past sexual experience to provide an alternate source of a child's sexual knowledge or a child's injury might be relevant to a defendant's case. Still, this type of evidence can be extremely prejudicial. Any evidence of a complainant's prior sexual behavior can improperly focus attention on the complainant's character and past actions, rather than on the circumstances of the alleged assault. Thus, a balance has to be struck. *State v. Dunlap*, 2002 WI 19, ¶ 19, 250 Wis. 2d 466, 480, 640 N.W.2d 112.

30. In order to balance the interests of the defendant and the complainant, the Court in *Pulizzano* developed a narrow test to determine when a defendant's right to present a defense should supersede the State's interest in protecting the complainant from prejudice and irrelevant inquires. *State v. Booker*, 2005 WI App 182, ¶ 17, 286 Wis. 2d 747, 761, 704 N.W.2d 336. In *Pulizzano*, the Court held that evidence of a child complainant's past sexual behavior (to demonstrate an alternative source for the sexual knowledge underlying the child's accusations) may be admissible in spite of/may supersede the rape shield law. The Court then established a two-part process/inquiry. First, prior to trial, the defendant, to establish a constitutional right to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, must establish his or her constitutional rights to present the proposed

evidence through a sufficient offer of proof. A sufficient offer of proof must meet five tests/criteria: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. Second, if the defendant meets the five-part showing in his or her offer of proof to establish a constitutional right to present evidence, the court must determine whether the defendant's rights to present the proffered evidence are nonetheless outweighed by the State's compelling interest to exclude the evidence. *Booker*, 2005 WI App at ¶ 17, 286 Wis. 2d at 761; *Dunlap*, 2002 WI at ¶¶ 19-21, 250 Wis. 2d at 480-81; *Pulizzano*, 155 Wis. 2d at 653. The court must closely examine and weigh the State's interests against the defendant's constitutional rights to present the evidence, as measured by the five factors listed above. In *State v. St. George*, 2002 WI 50, ¶¶ 18-20, 252 Wis. 2d 499, 515-16, 643 N.W.2d 777, the Court summarized the two-part inquiry:

> For the defendant to establish a constitutional right to the admissibility of the proffered evidence that is otherwise excluded by the rape shield statute, the defendant must satisfy a two-part inquiry.
>
> In the first part of the inquiry, the defendant must satisfy each of five factors through an offer of proof that states an evidentiary hypothesis bolstered by a statement of fact sufficient to justify the conclusion or inference the court is asked to accept. The five factors are:
>
> 1) The prior act clearly occurred.
>
> 2) The act closely resembles that in the present case.
>
> 3) The prior act is clearly relevant to a material issue.
>
> 4) The evidence is necessary to the defendant's case.
>
> 5) The probative value outweighs the prejudicial effect.
>
> After the defendant successfully satisfies the five factors to establish a constitutional right to present evidence, 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.

In *State v. Harris*, 2004 WI 64, ¶ 6 n.5, 272 Wis. 2d 80, 90 n.5, 680 N.W.2d 737, the Court stated:

> In *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), this court created a judicial exception to Wisconsin's rape shield law, Wis. Stats. § 972.11(2), that allows a defendant to present evidence of a child's past sexual behavior if the defendant demonstrates that the evidence meets a five-part test and if the court determines that the State's interest in excluding the evidence is outweighed by the defendant's right to present it. *See Dunlap*, 250 Wis. 2d 466, ¶ 20.

31. The concern pervasive throughout the *Pulizzano* analysis is the defendant's right to a fair trial, guaranteed by Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. *State v. Dodson*, 219 Wis. 2d 65, 71, 580 N.W.2d 181 (1998).

32. The exception created by the Court in *Pulizzano* is referred to as the *Pulizzano* test or the five-factor *Pulizzano* test. *State v. Harris*, 2004 WI 64, ¶ 31, 272 Wis. 2d 80, 109, 680 N.W.2d 737; *State v. Dunlap*, 2002 WI 9, ¶¶ 13, 21-23, 29, 250 Wis. 2d 466, 477, 81-82, 84, 640 N.W.2d 112. It is also referred to as the *Pulizzano* criteria. *Dunlap*, 2002 WI at ¶ 22, 250 Wis. 2d at 481; *State v. Hammer*, 2002 WI 92, ¶ 49, 236 Wis. 2d 686, 716, 613 N.W.2d 629. In *Harris*, 2004 WI at ¶¶ 31, 33, 272 Wis. 2d at 109, 111, the Court referred to a *Pulizzano* motion.

33. Whether in a particular case the application of the rape shield statute deprives a defendant of his constitutional rights is a question of constitutional fact that the Supreme Court determines independently of the circuit court and the court of appeals but benefiting from their analysis. *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis. 2d 499, 514, 643 N.W.2d 777.

34. The *Pulizzano* exception is not limited to child victim sexual assault cases. *State v. Wirts*, 176 Wis. 2d 174, 500 N.W.2d 317 (Ct. App. 1993).

35. In *Pulizzano,* the Court noted that whether the statute is unconstitutional as applied in other instances is to be resolved on a case-by-case basis. *State v. Dodson*, 219 Wis. 2d 65, 73, 580 N.W.2d 181 (1998).

36. In cases involving more than one count of sexual assault, the circuit court should analyze each count under the *Pulizzano* test. *State v. Dodson*, 219 Wis. 2d 65, 77,

580 N.W.2d 181 (1998).

37. In *State v. Dunlap*, 2002 WI 19, ¶¶ 3-10, 22-29, 250 Wis. 2d 466, 473-76, 481-84, 640 N.W.2d 112, the Court extensively discussed the second factor (whether the act resembles that in the present case). *See* Attachment B.

38. In *Pulizzano*, the State argued that the defendant's offer of proof failed to show that evidence of the prior sexual assault would be probative in establishing an alternative source for sexual knowledge – the State asserted that an *in camera* examination of the victim was required to show the similarity between the two incidents. In rejecting this position, the Court stated:

> We disagree with the State that *Padilla* requires an *in camera* examination of M.D. as a prerequisite to Ms. Pulizzano's offer of proof. The court of appeals in *Padilla* only suggested that an *in camera* examination was one means by which the defendant in that case could have made an adequate offer of proof to support his contention. *Id*. at 430-31. . . . We do not hold that an *in camera* examination is never required to determine the admissibility of this type of evidence. The peculiar circumstances of a particular case may well necessitate an *in camera* examination of the complainant. Whether that procedure is required is a matter of the circuit court's discretion. We hold only that in this case, an *in camera* examination was not required because Ms. Pulizzano's offer of proof was adequately supported by Dr. Freund's report. We disagree with the State that the showing of similarity between the two incidents must be made through the testimony of M.D. If the circumstances of the case allow it and that showing can be made by means of reliable extrinsic evidence, we find that method preferable to requiring a young child such as M.D. to go through the unnecessary trauma of recounting the tragedy of being victim to a prior sexual assault, particularly when it may subsequently be determined that the evidence is inadmissible at trial.
>
> 155 Wis. 2d at 649-51.

39. Published cases which have discussed the *Pulizzano* exception include *State v. Booker*, 2005 WI App 182, 286 Wis. 2d 747, 704 N.W.2d 336; *State v. St. George*, 2002 WI 50, ¶¶ 15-29, 252 Wis. 2d 499, 513-19, 643 N.W.2d 777; *State v. Dunlap,* 2002 WI 19,
¶ 18-29, 250 Wis. 2d 466, 480-84, 640 N.W.2d 112; *State v. Hammer*, 2000 WI 92, ¶¶ 38-49, 236 Wis. 2d 686, 710-715, 613 N.W.2d 629; *State v. Dodson*, 219 Wis. 2d 65, 580 N.W.2d 181 (1998); *State v. Wirts*, 176 Wis. 2d 174, 500 N.W.2d 317

(Ct. App. 1993); *Michael R.B. v. State*, 175 Wis. 2d 713, 499 N.W.2d 641 (1993); *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). In *Booker*, the defendant wanted to introduce evidence that vaginal swabs and underwear of the victim (which were taken the night of the incident) did not contain any of the defendant's semen but did contain the semen of other men. The defendant's defense was that the victim's report of a sexual assault was a fabrication concocted in retribution for an argument that the defendant had with another person. The Court held that the evidence was properly excluded because the prior act did not closely resemble the present case – in this case the victim claimed that the defendant sexually assaulted her by touching her and not by having sexual intercourse with her. The Court then further stated:

> Whether S.M.R. engaged in sexual intercourse with other men does not impact her complaint that Booker sexually assaulted her. His claim that S.M.R. is lying and conspiring with Donta to harm Booker is pure speculation. The girls, Donta and Booker's girlfriend, all testified that the girls were at the apartment. The three girls and Donta all testified consistently about the events that led to the assault. S.M.R. discussed the assault while still at the apartment and never reported the assault until her aunt was notified. There is little, if any, evidence supporting Booker's conspiracy theory. While it is clear that Donta and his mother's boyfriend had a strained relationship, there is no evidence to suggest that Donta and the three girls conjured up the sexual assault to harm Booker. Thus, because there was no hard evidence of improper motive for the accusation, the semen evidence was rightfully ruled inadmissible.

2005 WI App at ¶ 18, 286 Wis. 2d at 762-63. In *St. George*, the defendant wanted to introduce evidence of the child victim's prior sexual contact with another child to show an alternate source of the victim's knowledge about sexual matters and to show that the victim possessed sufficient knowledge to formulate her out-of-court accusation. The Court held that the defendant's offer of proof did meet factors one and two but failed to satisfy the final three factors. In *Dunlap*, the defendant wanted to introduce evidence of sexual behavior exhibited by the victim prior to the sexual assault (victim had touched men in the genital area, masturbated, writhed on men's laps, and humped the family dog) because the State had introduced expert testimony that the victim's behavior was consistent with sexual assault cases and it would have been inappropriate to leave the jury with the impression that the behaviors necessarily resulted from a sexual assault by the defendant. The Court held that the proffered evidence did not meet the second factor/criteria. The decision in *State v. Dunlap*, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112 was upheld in a habeas corpus challenge in *Dunlap v. Hepp*, 436 F.3d 739 (7th Cir. 2006). The Court set forth some additional reasons, besides the reasons set forth

by the Wisconsin Supreme Court, why the exclusion of the evidence did not violate the defendant's Sixth Amendment right to present a defense. 436 F.3d at 745-46. In *Hammer*, the defendant wanted to introduce evidence of the victims' alleged prior sexual conduct. The defendant argued that this evidence was needed to substantiate his claim that the victims engaged in acts virtually identical to those for which he was charged, thus demonstrating a motive to fabricate and bias by the victims. The Court held that the evidence did meet the second criteria but failed to satisfy the first, third, fourth and fifth criteria. In *Dodson*, the defendant wanted to introduce evidence of a prior sexual assault committed on the victim by a third party. The purpose of this evidence was to provide an alternate source for the child's sexual knowledge and to rebut the State's evidence of physical injury to the child. The Court held that the proffered evidence met all five factors and that the State's interest in excluding evidence under the rape shield law did not overcome the defendant's constitutional rights to present a defense. In *Wirts*, the discussion of the *Pulizzano* exception was in the context of an ineffective assistance of counsel claim. The disputed evidence was that the victim had had sexual intercourse with her husband after the sexual assault at issue and that this evidence would show another source of her injuries. After finding that counsel's unfamiliarity with *Pulizzano* made his representation deficient, the Court found that the defendant did not affirmatively prove prejudice. In *Pulizzano,* the Court held that evidence of a prior sexual assault to show an alternative source for sexual knowledge was admissible despite the rape shield law because the defendant's constitutional right to the evidence outweighed the State's interest underlying the rape shield law.

40. In *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, one of the issues was whether the circuit court's exclusion of the testimony of the defendant's expert witness was a deprivation of the defendant's constitutional right to present evidence. The Court held that for the defendant to establish a constitutional right to the admissibility of the proffered expert witness testimony, the defendant must satisfy a two-part inquiry similar to the *Pulizzano* test.

BD/KL
Rape

(EVIDENCE FOLDER)

N. Other Acts – Brief in Support

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 06-CF

,
Defendant.

STATE'S NOTICE OF MOTION AND MOTION TO INTRODUCE
"OTHER ACTS" OF THE DEFENDANT IN ITS CASE-IN-CHIEF

THE STATE OF WISCONSIN, by Assistant District Attorney Miriam S. Falk, hereby moves the court, the Hon. Charles Kahn presiding, for an order permitting the introduction of "other acts" of the defendant, as identified below, in its case-in-chief. The State seeks introduction of these "other acts" pursuant to Wis. Stat. Sec. 904.04(2), in that they demonstrate the defendant's plan and his modus operandi, as well as his continuum of behavior.

FACTS OF THE CHARGED CASE

Steven Defendant is currently charged with one count of Second Degree Sexual Assault and one count of Attempted Second Degree Sexual Assault relating to events that occurred on October 18, 2005 involving Victim. He is also charged with two counts of Third Degree Sexual Assault for incidents that occurred in July or August, 2002 involving Second Victim.

Victim Incident: approximately July, 2002

The facts pertaining to the Victim incident are these: in approximately mid-July, 2002 Victim M's sister's children were having difficulties in their own home, and had run away, to Victim's home. Officer Steven Defendant was investigating this, and went to Victim's home to check on/for the children. In his discussion with Victim, he portrayed himself as there to "help her", offering his personal cell phone number for her to call if there were further issues. At this time in her life, Victim had a criminal record, drank alcohol and smoked weed. Defendant seemed very supportive of Victim, and encouraged her to contact him.

Defendant returned to Victim's house without a partner the next day, "just to check on her". He again encouraged her to call him. He asked Victim personal questions, including whether she had a boyfriend. Defendant returned to the house a third time, under the same circumstances. Thereafter, Victim called Defendant regarding the kids, and he told her to meet him at the Police Academy. She did, bringing with her her daughter and niece. While there, Defendant asked her if she would wear a skirt for him, and also asked whether she would go into the Academy basement with him to have sex, since no one would be down there. She said no to both questions.

The problems continued with Victim's sister's children, and Victim ended up calling police again. A different officer responded and took the sister's children to the sister's house. They returned later that same day, prompting Victim to call Defendant on his cell.

Early the next day around midnight, (approximately the last week of July, 2002) Victim, in her night clothes, opened the door to throw out some trash. Defendant was

standing there, unexpected and uninvited. He was in uniform. He followed Victim into the house, and then followed her into her bedroom. She asked him what he wanted as he closed the bedroom door. He winked at her and sat on the bed. Victim had been trying to put a shirt on when Defendant started touching and kissing her breasts, moving aside her low-cut nightgown top. She tried to go to the door, but Defendant grabbed her arm. He pushed her down onto the bed and performed mouth to vagina intercourse on her. Victim says she was shocked and scared, and did not know what to do. She feared that he would kill her or get her into some sort of trouble. He referenced a Playgirl magazine that was on her dresser, and asked if she liked white men. He then laid back on the bed and pulled his penis out of his pants. Victim told him to put it back, but Defendant said "now you gotta do me." He pulled on her robe and said "suck it." His penis was erect. Victim ended up grabbing some Kleenex from a box, putting them on Defendant's penis, and putting her mouth on it for a short time before she started gagging. At this point, Defendant masturbated himself, and ejaculated onto a towel. He then gave Victim $20.

When questioned about this incident, Defendant admitted that he had gone to Victim's house in uniform, but off duty. He said that as time had gone on their "relationship" had moved from professional, and they had talked about personal things. On the occasion in question, he said they began kissing and heavy petting. He asked her for a blow job, but she would not do it without a condom. He says he laid back on the bed and suddenly he realized that despite her statement about the condom, Victim was sucking on his penis, over which she had placed Kleenex. He says that she

stroked his penis until he ejaculated onto a towel. He says that he also performed mouth to vagina intercourse on her.

Victim 2 Incident: October 18, 2005

Victim 2 worked as an exotic dancer and had two outstanding warrants when she first met Defendant. Defendant and his partner were investigating a neighborhood incident at that time (around 8/05). Victim 2's mother died the next day. Victim 2 moved from that neighborhood 10/1/05.

In early October, 2005, she met Defendant by accident again. He was driving in her new neighborhood with a partner, and they stopped to talk with her. He commented on her breasts, telling her that he didn't recognize her because he was not looking at her face. Later that same evening Defendant called Victim 2 two times.

Defendant started coming by her house without a partner, in his squad. A few days after the phone calls, on October 15, Victim 2 saw Defendant parked in his squad across the street from her house, looking at her car. On this occasion he asked her breast size, and whether she "went on top." Two days later he appeared at her house again at night. He told her about her warrants and said he'd take care of them for her. She begged him not to arrest her because she had a child to take care of. He again made comments about her breasts, told her she was pretty, and that she "intrigued" him. He questioned her about whether she had a boyfriend. Over the next few days Defendant continued to stop by Victim 2's house unexpectedly and uninvited, "just to check on her".

During this same time frame, Defendant made numerous phone calls to Victim 2's house. On October 15 he made 4 calls to her house from his cell phone. On

October 17 he made three such calls, and on October 18 he made another call at 12:09 a.m.

Within two hours of this phone call, Defendant, in plain clothes, arrived at Victim 2's house, again uninvited and unexpected. It was around 2:00 a.m., and Victim 2 had been sleeping. She was wearing her night clothes when Defendant knocked on the door. When Victim 2 opened the door, he just walked in. He offered her money for her child, telling her that he felt sorry for her.

He sat on the couch and started making sexual comments to Victim 2, which Victim 2 was verbally resisting. He then grabbed her arm and started to forcibly fondle her breasts and butt. At first his hands were outside her clothes, but then he moved them inside. He was leaning over her as she sat on the couch when he did this. Victim 2 told Defendant that she had had a recent miscarriage and was still bleeding. He became angry, and grabbed her arm and her hair (which was down). He exposed his penis, and began to pull Victim 2's head down toward it. She was resisting. He then began to masturbate himself until he ejaculated in his hand. He called her a bitch, and threw a $20 bill on the floor as he left, stating that she should expect the police to come and arrest her on her warrants. Victim 2 feared that this was true. She called and reported the incident to The District 6 Police Station later in the afternoon on 10/18.

FACTS OF THE "OTHER ACTS"

Victim 3 Incident: 4/4/97

An April 4, 1997 Victim 3 had two outstanding warrants. She was at 17th and Center, a known prostitution area, at 10:30 p.m. when Defendant, alone on duty, stopped her. He asked her if she had drugs on her, and told her to lift up both her shirt

and bra to prove to him that she did not. He then told her to get into the rear of the squad. He drove her to a nearby alley, where he told her to pull her pants and panties down. He then told her to spread her legs, commenting "that's the best-looking ??? that I've ever seen." Before he drove her back, he said to her "Are you going to leave me with a hard-on?" Victim 3 said that he had stopped her a number of times before, but he had "never gone this far", although he had been inappropriate. She also said that he never did this when he was with a partner.

Incident involving Victim 4: April-May, 1997

Victim 4 reports that in April, 1997 Defendant and his partner came to her residence investigating a landlord/tenant problem. He took her personal information, and said he'd be back. Defendant returned later that night alone, and had further conversation with Victim 4, telling her that he would talk to her landlord and possibly give the landlord a citation. When Victim 4's child entered the room, Defendant immediately asked whether the child's father lived in the home. He did not. Defendant then asked Victim 4 out, but she said no.

Around midnight that same night Defendant called, again asking her out. When she again rejected him he said "You're not into white boys." She told him it wasn't that. Defendant ended the conversation telling her he'd call her later.

Over the next few days Defendant began appearing at Victim 4's house at dusk in his squad. These visits were always unannounced. During these encounters Defendant routinely made sexually suggestive comments, and was very aggressive. He commented about her breasts, referring to them as "twins." He also talked about her "big butt." He repeatedly asked to taste her breasts. On another occasion he told her

she was pretty. He told her she had nice breasts, and wondered if they were "hers" and if they were "real." This type of encounter continued for about three weeks.

Finally, Defendant came to her house in uniform in a squad, again unexpectedly. He made his way into her house, and began grabbing her breasts and buttocks. Victim 4 moved his hands off. At this point, Defendant asked her whether she had a car, and then whether she had a diver's license. He threatened to cite her and to arrest her if she did not cooperate with him.

Victim 4, who had never gotten a ticket or been arrested, was very scared. Defendant told her that he did not have to place the "driving incident" at her address. He could put it anywhere, and they would believe him. Victim 4 decided that she had better let Defendant do what he wanted.

Defendant had her go into the bedroom, where he started pulling up her shirt. Victim 4 removed her clothes from the waist down. Defendant unsnapped his gun belt and lowered his pants to his ankles. He also unbuttoned his shirt. He then grabbed her breasts, one in each hand, and squeezed hard. He sucked hard on her nipples. He took her hand, put it on his penis and said "play with it." He was very aggressive and she told him he was hurting her. His response was "Ain't that the way you black bitches like it?" He pushed her onto the bed and was kissing her neck, mouth and under her nose as he lay on top of her. He then put his penis into her vagina, and pumped a total of three times until he ejaculated. He then became very apologetic, telling her negative things about his wife. He also told her that he only dates black and Hispanic women because they have big breasts and butts. He then left.

Defendant started coming to her house, demanding mouth to vagina intercourse. He also wanted her to perform mouth to penis intercourse, but she said no. He then offered her $150.00 to do this, and she agreed. Defendant also purchased a security club for her car, and paid her cable TV bill.

Victim 4 says that Defendant came over on and off from about 4/97-1999. On occasions when Victim 4 did not agree to do what Defendant asked he would call her "black bitch." Eventually, Victim 4 stopped answering her phone and her door when she knew it was Defendant.

Incidents involving Victim 5 and Victim 6: 4/97-7/97

Victim 5 and Victim 6 were both prostitutes in 1997, working around 16th and Center. Victim 5 was on the street when Defendant approached her in an unmarked squad. He had her get in, and drove to a nearby alley. He asked her if she was a prostitute, then asked that she perform penis to mouth intercourse on him. She did, and Defendant gave her $20. During his prior encounters with Victim 5, he had said "I bet you suck a whole lot of dick. What's the biggest dick you ever had? Do you take it in the ass?" He also asked where she lived. Two days after this conversation, Defendant showed up at Victim 5's home at about 2:30 a.m., in uniform. He entered her house, uninvited and unexpected, and closed the door, putting his back against it. He started talking sex, and pulled his penis out of his pants. He then masturbated to ejaculation, the ejaculate going onto Victim 5's floor. Victim 5 was upset and offended by this. Three days after this, Defendant pulled up in an unmarked squad and gave her $10. Thereafter, He started to regularly pay her $20 for a blow job

Victim 5 related that once in July, 1997 she was on the street with Victim 6 when Defendant drove up. He was off duty, in civilian clothes. He asked Victim 5 to set him up with Victim 6, and gave Victim 5 $10 for doing so. He went off with Victim 6, with whom had had penis to vagina intercourse in his Jeep or Blazer for $20.00 He made it a point to tell Victim 6 that he was a police officer . He continued to see Victim 6, both on and off duty. He had sex with her for money only when he was off duty.

Incident involving Victim 7: July, 1997

Victim 7 was stopped by Defendant when he was on duty alone in a squad in July, 1997. He questioned her about whether she was a prostitute, then had her get into his squad. Defendant drove to an isolated parking lot, where he told Victim 7 that she had an open commitment from Brown Deer. He then had Victim 7 get out of the squad "to search for weapons." This consisted of Defendant fondling her breasts over her clothes, then having her lift her shirt to expose her bare breasts and fondling her bare breasts. Defendant then had Victim 7 turn around and bend over. He proceeded to fondle her vagina with his hands. Once he was done with this, Defendant directed Victim 7 to sit in the backseat of the squad, facing out. He again questioned her about whether she was a prostitute, and asked if she "gave good head." Defendant unzipped his pants and removed his penis. He [pulled Victim 7 by the back of the head, forcing her to perform penis to mouth intercourse on him. When he started to ejaculate Victim 7 tried to pull away, but Defendant held onto the back of her mouth, ejaculating into her mouth. She spit the ejaculate onto the ground. Defendant then told Victim 7 to lay back on the seat, and he returned he to 17th and Center, where he had first picked her up.

Incident Involving Victim 8: 9/5/98

Victim 8 reported that she was the victim of a Strong Arm Robbery on 9/4/98. Defendant and his partner were the investigating officers. Victim 8 worked third shift at a Citgo station, and was there during the early morning hours of September 5, 1998 when Defendant came into the station in uniform. He told Victim 8 that they had caught the robber, and that Defendant wanted to return some of the stolen money to her. Defendant then took Victim 8 into the back room of the gas station.

There, he told her that she had "warrants" and that he had to arrest her. He put her into handcuffs and walked her out to his personal Jeep. He put Victim 8 into the back seat, and drove off. He took her to Lindsay Park, which is near to the Citgo station. She asked why they were there, and he said "Shut up, black bitch! We're going to have to work something out."

Defendant got into the back seat, and took off the handcuffs. He pushed Victim 8 back onto the seat, and shoved his hands up her shirt, fondling her breasts. He then pulled off her jogging pants and performed mouth to vagina intercourse with her. Victim 8 laid there and cried. Then Defendant put his penis into her vagina. He told her "you taste good. You better not tell anyone." When he finished, he drove her back to work.

LEGAL ARGUMENT

The State seeks introduction of these various "other acts" of the defendant for two purposes: to demonstrate his "plan" and to establish his modus operandi, and to show the escalating progression of Defendant's behavior, leading up to the charged crimes . The test for determining the admissibility of other acts evidence involves a three-step analysis: 1) is the other acts evidence offered for an acceptable purpose

under Wis. Stat. Sec. 904.04(2), such as plan; 2) is the other acts evidence relevant (that it, does it relate to a fact or proposition that is of consequence, and does it have probative value); and 3) is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considers of undue delay, waste of time, or needless presentation of cumulative evidence. State v. Sullivan, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30, 36 (1998).

Permissible Purpose

In this case, the State seeks introduction of the identified "other acts" because they show both the defendant's "plan" /his *modus operandi,* and because they demonstrate the escalating progression of that plan over time, leading up to the charged events. "Plan" is one of the enumerated reasons that form the basis for admission of "other acts" under sec. 904.04(2). In addition, the list in the statute is not exhaustive, but illustrative. State v. Shillcutt, 116 Wis. 2d 227, 236, 341 N.W.2d 716, ___ (1983). In this case, the defendant's "plan" or "scheme" are intertwined with his M.O. His "Plan" has developed and progressed over time, resulting in his particular behaviors which form the basis of the charged crimes. These are acceptable purposes for admission of this evidence.

Relevance

The second question has two parts: Is the offered evidence related to a fact or proposition that is of consequence, and second, does the evidence have probative value. To show a "plan" or "scheme", 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 individual manifestations. State v. Pharr, 115 Wis. 2d 334, 343-46, 340 N.W.2d 498, 502 (1983). Any fact that tends to prove a material issue is relevant, even though it is only a link in the chain of facts that must be proved to make the proposition appear more or less probable. Id. Relevancy is not determined by a resemblance to, but a connection with, other facts. Id. "Plan" explains the steps taken by a person to accomplish the purpose. State v. Balistreri, 106 Wis. 2d 743, 756, 317 N.W.2d 493, 500 (1982). The acts must have "common features", and be a "scheme formed to accomplish some particular purpose." State v. Gray, 225 Wis. 2d 39, 53, 590 N.W.2d 918, ___ (1999).

All of the "other acts" have several significant features in common with each other and with the charged incidents. These include that Defendant met the victims through his work, and he was on duty as a Police Officer. Each woman knew he was a police officer. Through his position as a police officer he was able to gain knowledge of the women's personal information, including their name, criminal record/warrant status, lifestyle issues, place of work/residence, special circumstances (i.e., poverty, work as a prostitute, etc). In each case, Defendant used his position as a police officer to continue contacts with each person. Defendant portrayed himself as "helping" the women out, either by giving advice, making himself accessible, not arresting them, paying them or working things out for them. Defendant had more than one contact with each women. Defendant went to where the women lived or worked, showing up unexpectedly. Defendant's contacts were all late at night. The situation of the woman at the time of her encounter with Defendant was one of vulnerability based on lifestyle, time of day, clothing worn and information Defendant had which he could use to his advantage. In

each case, Defendant focused his comments in a sexual way, either talking about their sexual behaviors or their bodies. Defendant always initiated the sexual contact. Defendant usually started by fondling breasts. Defendant obtained sexual gratification, either through a sex act done on the woman or ultimately by self-stimulation. Defendant verbally and by his actions humiliated the woman. Defendant gave the woman money.

In addition to these common similarities, several situations also include additional features in common with the charged events. For instance, the use of the derogatory term "bitch" is used by Defendant when he encounters resistance from not only Victim 2, but also Victim 8 and Victim 4 The specific threat of arrest for warrants is used in several scenarios. Victim 4's encounter occurred at her home, as did Victim 2's and Victim's. Defendant either came to a place where the woman was isolated, using his "authority" to gain entrance, or he isolated the woman, again using his "authority" to do so.

The striking similarities between the charged events and the other acts demonstrate clearly how Defendant used his position as a police officer not only to gain information about these women and access to them, but then used his knowledge of them and his power over them to manipulate and coerce them into engaging in sexual behaviors for his gratification. Defendant then finalized these encounters with the use of money. This was Defendant's plan/scheme and his *M.O.*, as is demonstrated by the continuum of the other acts and the charged events.

The fact that this is clearly a continuum of behavior is the second reason why the other acts are relevant. Defendant clearly started out his misuse of his police position to obtain sexual gratification by targeting prostitutes and others "on the street". Within this

group of women, he became increasingly more aggressive, moving from sex talk to "viewing" to fondling to intercourse. He broadened his target group, including within the scope women who were poor and who had warrants or other potential legal issues. He started out taking women from the street to nearby alleys, then moved to going to other places of work, and ultimately to their homes. Defendant was honing his skills at executing his "plan", developing ways to target vulnerable women. He started not only not arresting them, but also actively portraying himself as their "helper".

This continuum is relevant and necessary to understand how Defendant operated when he carried out the charged events. These were not his first forays into his plan, but were well-developed and time tested behaviors that he had perfected over the span of 9 or 10 years.

The probative value of the other acts derives from the pattern of behavior exhibited over so long that resulted in Defendant's skill in gaining his objective: sexual gratification. To fully understand how Defendant could boldly gain the trust of Victim and Victim 2, how he could gain access to their homes, how he could use his position to gain little or no physical resistance from them, it is necessary to see this continuum of behavior. The other acts are strongly probative of this.

In addition, these other acts are probative of the overall credibility issues in this case. Defendant the police officer is pitted against Victim and Victim 2, the ones with the warrants and criminal records. The multiplication of Defendant's acts is an important factor in making the necessary credibility assessment. See State v. Roberson, 157 Wis. 2d 447, 454-55, 459 N.W.2d 611, 612 (Ct. App. 1990).

Probative Value vs. Prejudice

The last of the three prongs the court must consider is whether the probative value of the other acts is substantially outweighed by the potential for unfair prejudice. In this case it is not.

First, the strong similarity of each of the other acts to the charged events weighs in favor of the strength of the probative value of that evidence. Second, the need to understand the charged acts as they occurred along the continuum of Defendant's plan adds additional strength to the probative value of the evidence. The evolution of the plan and the fine tuning of Defendant's methods cannot be understood without the full history being set forth.

Third, the credibility issue in this case is paramount. Defendant has advantages in his position as a police officer that he maximized in his encounters with these women. That needs to be explored and understood in order to allow for a full and fair consideration of the evidence in this case.

The court has the opportunity to instruct the jury as to the limits for which they are entitled to use the other acts. Such an instruction will ensure that it is not used improperly. The use of such an instruction has been found to weigh heavily against a finding that other acts are not unfairly prejudicial.

CONCLUSION

The State seeks introduction of a series of other acts of the defendant in its case-in-chief. These other acts are relevant and probative of Defendant's plan/scheme and the continuum of his behavior shows the refinement of this plan in the crimes he committed against his last two victims. The probative value is particularly strong due to

the highly similar nature of the facts and circumstances of the other acts to the charged crimes, and because of the over-riding credibility issue in the case. For the foregoing reasons, the court should allow its introduction in the State's case-in-chief.

Dated this 10th day of May, 2006.

_____

Miriam S. Falk
Assistant District Attorney
Bar #

O. Brief In Support Of Other Acts Evidence

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

STATE OF WISCONSIN,

Plaintiff,

NOTICE OF MOTION AND STATE'S MOTION AND BRIEF IN SUPPPORT OF OTHER ACTS EVIDENCE

Case No. 06 CF
Defendant.

NOTICE OF MOTION

The State of Wisconsin, by Chippewa County Assistant District Attorney, Wade C. Newell, hereby gives notice that on **October 20, 206, at 10:30 a.m.**, the State will move the Chippewa County Circuit Court, Branch I, the Honorable Roderick A. Cameron presiding, for an order permitting the State to introduce "other acts" evidence.

Dated this 9th day of October, 2006.

_____
Wade C. Newell
Assistant District Attorney

MOTION

The State of Wisconsin by Assistant District Attorney Wade C. Newell, hereby moves the court for an order allowing the introduction of other acts evidence. The State seeks to introduce evidence that the defendant has engaged in a pattern of sexual activity of the same

victim from August of 2003, through October of 2003. The details of this sexual activity is outlined in an attached five page police report prepared by Detective of the Chippewa Falls Police Department, and a sixteen page statement prepared by the Defendant. The State's offer of proof may be reiterated or supplemented at any future hearing on this matter.

ARGUMENT

The admissibility of other acts evidence is subject to a three-step analysis: 1) "Is the other act evidence offered for an acceptable purpose under Sec. 904.04(2), Wis. Stats[126]?" *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). 2) "Is the other acts evidence relevant, considering the two facets of relevance set forth in Sec. 904.01, Wis. Stats ?[127]" *Id.* 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?" *Id.* at 772-73. *See also* Sec. 904.03, Wis. Stats.

In order to be admissible the other acts evidence must also be such that the jury could reasonably conclude that the defendant committed the other acts by a preponderance of the evidence. *State v. Schindler*, 146 Wis. 2d 47, 53-55, 429 N.W.2d 110 (Ct. App. 1988).

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[126] Section 904.04(2), Wis. Stats., provides:

> 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 or mistake or accident.

[127] Section 904.01, Wis. Stats., provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is in consequence to the determination of the action more probable or less probable than it would be without the evidence.

I. The Other Act Evidence Is To Be Offered For An Acceptable Purpose Under Sec. 904.04(2), Wis. Stats.

The "other acts" evidence sought to be introduced is relevant to an accepted purpose under sec. 904.04(2), Wis. Stats., and is necessary to a full and fair presentation of the State's case. The State intends to introduce other acts of sexual activity/behavior involving the defendant and the same victim from August of 2003, through October of 2003. The State intends to introduce evidence to show motive, opportunity, intent, plan, and knowledge.

The "other acts" evidence sought to be introduced is necessary to a full and fair presentation of the State's case, and will provide the jurors with a contextual framework by which they can scrutinize the evidence.

II. IS THE OTHER ACTS EVIDENCE RELEVANT?

There are two facets to the relevancy test. *Sullivan,* 216 Wis. 2d at 772. The first consideration is "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id.* The second consideration 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 without the evidence. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *State v. Hammer*, 2000 WI 92 at P31. "Similarity is demonstrated by showing the nearness of time, place, and circumstance." *Id*.

The present case and the other acts are interrelated. They all involve the same victim. They all occurred in similar locations, and involved similar behavior. The charged behavior and the other acts all occurred during a three month period from August of 2003, to October of 2003.

III. Is The Probative Value Of The Other Acts Evidence Substantially Outweighed By The Danger Of Unfair Prejudice?

"In the context of other acts evidence, 'prejudice refers to the harm in a jury concluding that, because an actor committed one bad act, he [or she] necessarily committed the crime charged." *State v. Clark*, 179 Wis. 2d 484, 496, 507 N.W.2d 172 (Ct. App. 1993). However, it is not enough that the evidence be characterized as "prejudicial" to the defendant in order to be held inadmissible, the evidence must reach the level of being "unfairly" or "unduly" prejudicial. *See State v. Grande*, 169 Wis. 2d 422, 434-35, 485 N.W. 2d 282 (1992). The State does not believe that the other acts evidence to be introduced reaches the level of "unfairly prejudicial," and the court has the ability to limit any potential prejudice or misleading effect through the use of a well crafted, curative jury instruction. It is presumed that a jury will follow all instructions given. *Id.* at 436. Therefore, such instruction will go far to cure any adverse effects attendant with the admission of other acts evidence.

Dated this 9th day of October, 2006.

_____
Wade C. Newell
Assistant District Attorney
State Bar #

P. Other Acts (Grooming) – Sample Brief in Support

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

STATE OF WISCONSIN,

Plaintiff,

STATE'S MOTION AND BRIEF IN SUPPPORT OF OTHER ACTS EVIDENCE

vs.

, Case No. **06 CF**

Defendant.

The State of Wisconsin by Assistant District Attorney Wade C. Newell, hereby moves the court for an order allowing the introduction of certain other acts evidence. This motion is to be heard on **January 9, 2006, at 3:00 p.m.** The State seeks to introduce evidence that the defendant was 'grooming" the victim for future sexual activities. The general nature of the State's offer of proof will be set forth in this document and may supplemented at the motion hearing.

ARGUMENT

The admissibility of other acts evidence is subject to a three-step analysis: 1) "Is the other act evidence offered for an acceptable purpose under Sec. 904.04(2), Wis. Stats[128]?" *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). 2) "Is the other acts evidence relevant,

[128] Section 904.04(2), Wis. Stats., provides:

> 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 or mistake or accident.

considering the two facets of relevance set forth in Sec. 904.01, Wis. Stats ?[129]" *Id.* 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?" *Id.* at 772-73. *See also* Sec. 904.03, Wis. Stats.

The Wisconsin Supreme Court has also held that there is greater latitude in allowing "other acts" evidence in sexual cases, "especially those involving assaults against children." *State v. Hammer*, 2000 WI 92, P23, 236 Wis. 2d 686, 613 N.W.2d 629 (citing *State v. Davidson*, 2000 WI 91, P51, 236 Wis. 2d 537, 613 N.W.2d 606); *State v. Fishnick*, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985). The *Fishnick* court specifically stated:

> "One reason for a "greater latitude" standard in child sex crime cases is to corroborate the victim's testimony against a credibility challenge by the defense. In child molestation cases the defense may raise the possibility of fantasy, unreliability, or vindictiveness on the part of the child-victim (citation omitted). Allowing other-acts evidence buttresses the victim's credibility against such a defense challenge (citation omitted)." *Id.* at note 4.

In order to be admissible the other acts evidence must also be such that the jury could reasonably conclude that the defendant committed the other acts by a preponderance of the evidence. *State v. Schindler*, 146 Wis. 2d 47, 53-55, 429 N.W.2d 110 (Ct. App. 1988).

I. The Other Act Evidence Is To Be Offered For An Acceptable Purpose Under Sec. 904.04(2), Wis. Stats.

The State intends to introduce evidence that the defendant was 'grooming" the victim for future sexual activities. Child grooming refers to actions deliberately undertaken with the aim of befriending a child, in order to lower a child's sexual inhibitions or establish an intimate

[129] Section 904.01, Wis. Stats., provides:
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is in consequence to the determination of the action more probable or less probable than it would be without the evidence.

friendship in preparation to the eventual introduction of sexual activities with the child. The act of grooming a child may include activities that are legal or illegal in and of themselves, by which the groomer seeks to arouse the child sexually, arouse his/her sexual curiosity, or to persuade the child that sexual activity is normal between adults and children. The groomer may use various grooming tactics to accomplish their goals.

The State intends to introduce the other acts evidence to show motive, opportunity, intent, plan, and knowledge. The "other acts" involved: 1) The defendant viewing pornography in the presence of victim; 2) The defendant made various comments about the victim's physical appearance; 3) The defendant would touch the victim in inappropriate ways; 4) The defendant would engage the victim in sexual conversations; and 5) The defendant would watch the victim as she slept.

The evidence sought to be introduced is necessary to a full and fair presentation of the State's case, and will provide the jurors with a contextual framework by which they can scrutinize the evidence.

Is The Other Acts Evidence Relevant?

There are two facets to the relevancy test. *Sullivan,* 216 Wis. 2d at 772. The first consideration is "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id.* The second consideration 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 without the evidence. "The measure of probative value in assessing relevance is the similarity between the

charged offense and the other act." *State v. Hammer*, 2000 WI 92 at P31. "Similarity is demonstrated by showing the nearness of time, place, and circumstance." *Id.*

The present case and the prior acts of grooming involve several striking similarities: 1) They all involve the defendant and VICTIM ; 2) Most of the other acts occurred in the residence shared by the defendant and victim; and 3) The present case in but a continuation of the prior "other acts."

III. Is The Probative Value Of The Other Acts Evidence Substantially Outweighed By The Danger Of Unfair Prejudice?

"In the context of other acts evidence, 'prejudice refers to the harm in a jury concluding that, because an actor committed one bad act, he [or she] necessarily committed the crime charged." *State v. Clark*, 179 Wis. 2d 484, 496, 507 N.W.2d 172 (Ct. App. 1993). However, it is not enough that the evidence be characterized as "prejudicial" to the defendant in order to be held inadmissible, the evidence must reach the level of being "unfairly" or "unduly" prejudicial. *See State v. Grande*, 169 Wis. 2d 422, 434-35, 485 N.W. 2d 282 (1992). The State does not believe that the other acts evidence to be introduced reaches the level of "unfairly prejudicial," and the court has the ability to limit any potential prejudicial effect through the use of a well crafted, curative jury instruction. It is presumed that a jury will follow all instructions given. *Id.* at 436. Therefore, such instruction will go far to cure any adverse effects attendant with the admission of other acts evidence.

Dated this 7th day of November, 2006.

_____
Wade C. Newell
Assistant District Attorney
State Bar #

Q. Sample Motion To Consolidate

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 05-CF

,
Defendant

And

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 06-CF

,
Defendant.

NOTICE OF MOTION AND MOTION TO
CONSOLIDATE CASES FOR TRIAL

PLEASE TAKE NOTICE THAT THE STATE OF WISCONSIN, by Assistant District Attorney Miriam S. Falk will move the Court, the Hon. Judge Mel Flanagan presiding, at her courtroom at 821 W. State Street, Milwaukee, WI, on July 24, 2006 at 8:30 a.m. or as soon thereafter as counsel can be heard for an order permitting the consolidation of these two cases for trial. This motion is brought pursuant to Wisconsin Statute section 971.12.

FACTS

In the case ending, DEFENDANT is charged with a number of crimes stemming from incidents occurring in the early morning hours on August 12, 2004 at ADDRESS

Street in the City of Milwaukee. At that time DEFENDANT attacked a stranger (VICTIM)) suddenly from behind when she was alone at the trunk of her car during the early morning hours. He began beating her to her face with his fists. He was telling her he did not want her to see him. He forced her back into her car, drove s short distance, and then forced her to remove clothing before he assaulted her penis to vagina. As he assaulted her, he continued to beat her face. Dunn then pushed the victim out of her car, and forced her to the dark backyard of a nearby residence, keeping himself behind her, where he assaulted her again penis to vagina after he made her put a jacket over her face and made her remove her clothing. He then forced her to move to another location on foot, and forced her to perform penis to mouth intercourse on him. He continued to hit her and threaten her during all these incidents. At the end, he told her that the attack was from her ex-boyfriend. Dunn was connected to these events by his DNA, which was from the semen recovered from the victim's vaginal and cervical areas.

In case ending 3214 DEFENDANT is charged for crimes he committed during the early morning hours on October 11, 2004 at ADDRESS, Milwaukee. In this instance, he knew the victim, who had just finished babysitting for his infant child. After DEFENDANT had left from picking up his child from VICTIM's house, Victim heard a pounding at her door. She was afraid, because she lived in the upper, and had locked the lower, outer door when DEFENDANT had left. The person knocking made it seem as if he had left the residence, and Victim went out to check the lock on the lower, outer door when she was suddenly attacked from behind on the landing by a man who began punching her in her face. She was never able to get a good look at the man, due to the punching, and also due to the fact that he had pulled a t-shirt up over his face,

concealing it. He forced Victim, who was pregnant, into the basement, keeping behind her. She dropped to the floor, trying to protect herself, and Defendant turned off the light by pulling a string. He continued to repeatedly punch her in the face. He began pulling Victim's pants off. He threatened to go upstairs and kill Victim's daughter, who was asleep upstairs, if she did not cooperate. Defendant tried to force his penis into Victim, but was interrupted by the sound of someone coming. He stated "Your baby's Daddy sent me, this is from your baby's Daddy." Victim was split up from her daughter's father at the time. He then grabbed Victim's daughter's coat, put it over his face, and fled. Defendant was connected to this crime ultimately by DNA found at the victim's vaginal area and from under her fingernails. She had scratched Defendant during the attack.

LEGAL ARGUMENT

In each of the two cases Defendant is charged with Battery, Kidnapping and Second Degree Sexual Assault. Wisconsin Statute section 971.12 allows fro Joinder of crimes is they are crimes of the same or similar character or if the acts are connected together or constitute parts of a common scheme or plan.

In undergoing this analysis, it is proper for a court to consider whether the separate acts demonstrate the same "M.O.", and there would be admissible in the other case as "other acts." Francis v. State, 86 Wis. 2d 554, 273 N.W.2d 310 (1979) and State v. Hall, 103 Wis. 2d 125, 307 N.W.2d 289 (1981). Further, acts are of the "same type" if they occur over a relatively short period of time, and the evidence as to each overlaps. State v. Hamm, 146 Wis. 2d 130, 430 N.W.2d 584 (Ct. App. 1988).

In the case at hand, it is clear that these matters could have been issued in a single complain, it the DNA results on each case had been known simultaneously. The crimes are strikingly of the same character. In fact, they could fairly be said to demonstrate Defendant's M.O. In each, Defendant chose to attack in the early morning hours a young woman who was alone. He virtually came out of no where, attacking each woman from behind. His first acts during the attacks were to repeatedly punch each woman to her face so that she could not see him. Next, in each attack he got behind the victim and moved her to an area where he would further isolate her, taking her into a dark area. There he continued to punch each victim, and to threaten them if they did not cooperate. Defendant then got the victims' clothing out of the way, and proceeded to perform (or try to perform) penis to vagina intercourse on each victim, all the while continuing to punch the victims' faces. At the end of the attacks he made a comment to each victim, indicating from whom this attack was "sent" – in each case, and "ex- boyfriend.". Also, in each case, Defendant utilized clothing that was available – a jacket in Victim's case, and his own t-shirt and Victim's daughter's jacket as he left--- to aid in concealing his identity from the victims. The crimes happened in a two-months period, and happened within several miles of each other within the City of Milwaukee.

These similarities reveal that the cases could be used as "other acts" to demonstrate Defendant's M.O. Consequently, they can also be properly joined for trial together.

CONCLUSION

Since the cases are strikingly similar, and judicial economy favors Joinder, the court should grant the State's motion to join these cases fro trial.

Dated this 20th day of July, 2006.

_____

Miriam S. Falk

Assistant District Attorney

Bar #

R. Sample Motion To Consolidate Misdemeanor With Felony

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 06-CM

DEFENDANT,
Defendant.

NOTICE OF MOTION AND MOTION TO CONSOLIDATE THIS CASE WITH FELONY CASE 06-CF

PLEASE TAKE NOTICE that the State of Wisconsin, by Assistant District Attorney Miriam S. Falk, will move the court, the Hon. Jeffrey Wagner presiding, on September 14, 2006 at 9:00 a.m. or as soon thereafter as counsel can be heard, for an order permitting the consolidation of this case with felony case 06-CF, which is scheduled for jury trial on October 3, 2006. As grounds therefore, the State relies on Wis. Stat. Sec. 971.12(1).

Sec. 971.12(1) permits Joinder of crimes , whether felonies or misdemeanors, or both, if the crimes charged are of the same or similar character or are two or more acts or transactions connected together or constituting parts of a common scheme or plan. The State incorporates herein as if fully set forth the arguments and case citations which appear in the State's response to Defendant's Motion for Severance of Counts 4 and 5 (a motion which was previously denied), as well as the arguments and case citations which are found in the State's Motion for the Introduction of "other Acts" (which has previously been granted.)

The case at hand is proper for Joinder because it falls within the common scheme or plan delineated in those other documents. As with the felony case charges,

this case involves a prostitute that the defendant met while on duty. He determined her vulnerability to be a warrant for prostitution, and took advantage of his position to sexually assault her during the arrest process. The comments that he made to this victim, sexual in nature, echo the types of things he said to the two victims in the felony case. Further, Defendant then started following through with the rest of his M.O. by coming over repeatedly, unannounced and uninvited, to the victim's house at times when he thought that she would be alone. He also provided her with his personal cell phone number, and portrayed himself to her as someone who would "help" her. This case occurred, in time, between the case involving Victim (8/02) and that involving Victim 2 (10/05), having happened on January 15, 2005, and demonstrates a clear connection between the two felony situations.

For the same reasons, it would clearly be admissible as "other acts", a factor which the court must consider when it makes a determination as to whether to join cases for trial.

The State respectfully requests that the court grant its motion, and allow this case to be joined with the felony case for trial.

Dated this 30th day of August, 2006.

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Miriam S. Falk
Assistant District Attorney
Bar #

S. Sample Response To Defendant's Motion For Severance

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 06-CF

DEFENDANT,
Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR SEVERANCE OF COUNTS 4 AND 5

THE STATE OF WISCONSIN, by Assistant District Attorney Miriam S. Falk, hereby responds to the defendant's motion for severance of counts 4 and 5. The gravamen of his argument is that having more than one accuser providing information to a jury as evidence is so prejudicial that it would deprive him of a fair trial.

It is the State's contention that not only are all five counts properly joined in the amended Criminal Complaint, but they should continue to be joined for trial. This is true because the acts against both Victim and Victim 2 are quite clearly part of a common scheme or plan on the part of Defendant.

The law in Wisconsin on Joinder is well-established. The language of the statute indicates that charges are properly joined when they are "of the same or similar character" or are "2 or more acts or transactions connected together or constituting parts of a common scheme or plan." The charges here satisfy both ways in which Joinder is appropriate.

To be of the "same or similar character" , the Wisconsin Supreme Court held in Francis v. State, 86 Wis. 2d 554, 560-61, 273 N.W.2d 310, 313-14 (1979) that this was satisfied when the charged offenses involved two or more incidents which exhibited the same modus operandi, were close in time, and occurred within the same geographic area. Such acts would be admissible in separate trials for each of the crimes, and therefore joinder was proper. The evidence as to each count "overlaps". Id.

In State v. Hamm, 146 Wis. 2d 130, 430 N.W.2d 584, 588-89 (Ct. App. 1988), the Court of Appeals discussed these criteria. It reiterated the basic tenets set forth in Francis, then went on to discuss the question of when acts occur "relatively close in time." In this discussion, the Court of Appeals looked to other decisions which had examined this issue. Specifically, the court cited the Eighth Circuit case of United States v. Rodgers, 732 F.2d 625, 629 (8th Cir. 1984), indicating that the time-period factor is to be determined on a case-by-case approach; there is no per se rule on when the time period between similar offenses is so great that they may not be

joined. Indeed, that is why we have referred to a '*relatively* short period of time' between the two offenses. The time period is relative to the similarity of the offenses, and the possible overlap of evidence."

In Rodgers a twenty month period between the offenses did not violate that "relatively short period of time" because the offenses were of the same type, the evidence would overlap, and "relative to these factors", the time period of sufficiently short." Id., at 629-30.

In the Hamm case the incidents were about two years apart, and that court concluded that the "relatively short period of time" was satisfied. Hamm, 430 N.W. 2d at 589. The court had earlier analyzed the "overlap" of the evidence of the crimes, focusing on the similarities between them, such as how the perpetrator entered the home, that he was armed with a knife, that he armed himself once he had entered the home, that it was early morning, that he disguised himself, and that they were geographically close. These facts tended to establish a common scheme or plan involving crimes of the same type.

This same analysis was applied in State v. Hall, 103 Wis. 2d 125, 307 N.W.2d 289, 295-96 (1981). The court found that the multiple incidents were properly joined for trial, noting that each of them would be admissible as "other acts" in separate trials of the other charges on the issues of both identity and intent. The court rejected Hall's argument that joining the 12 counts for trial would have an overwhelmingly prejudicial effect for the defendant. In so holding, the court noted that the interests of the public in promoting efficient judicial administration and court fiscal responsibility were important considerations, and govern in the absence of a showing of "substantial prejudice." Hall, at 296, citing Bailey v. State, 65 Wis. 2d 331, 346, 222 N.W. 2d 871, (1974). The court further noted that when evidence of the counts sought to be severed is admissible in separate trials, "the risk of prejudice arising due to a joinder of offenses is generally not significant." Id., citing State v. Bettinger, 100 Wis. 2d 691, 696, 303 N.W. 2d 585, (1981). Consequently, the analysis of this issue turns on an "other acts" question: would the evidence be admissible in the separate trials under sec 904.04(2)? Hall, 307 N. W. 2d at 297.

To this end, the State has submitted an "other acts" motion that outlines the State's theory of the case. Rather than re-stating the entire brief, the State would incorporate that brief herein. It is the State's position that both the incident involving Victim and that involving Victim 2 would be admissible in the trial of the other as admissible "other acts" which would show Defendant's "plan" and modus operandi, just as the "other acts" discussed in the Hall case and the Hamm case and the Francis case. Like the "other acts" described in the previously-filed brief show the common plan or scheme, so, too, are the Victim and Victim 2 incidents related to each other in the same way.

The two arguments Defendant raises in opposition to this lack merit. First, the contention that they are too remote in time from each other is not supported by the cases cited above. The three year span is not fatal, given the striking similarities that these cases have with each other, and how they are connected as part of an even larger, and longer-term plan. As with the "other acts" delineated in the other brief, between Victim's and Victim 2's cases there are the same similarities. The list is extensive, and includes Defendant's use of his position as a police officer to gain initial access to them; his use of his position to put himself forth as a "friend" or "helper; his repeated communications over the phone with them; his unexpected and unannounced "visits" to their homes; his showing up on the day of the assault at a time when the women were

in sleeping clothes; the vulnerability of the women by virtue of poverty and lifestyle; the potential for arrest or getting them in trouble that Defendant took advantage of; the sequence of events of the sexual assaults themselves, including fondling of the breasts outside , then inside the clothes, moving to Defendant exposing his penis, and obtaining sexual gratification to ejaculation; and Defendant ending the encounter by giving the woman $20.00. These similarities more than adequately connect these charges and support joinder. These similarities are how the evidence "overlaps."

Defendant's other argument, that two accusers versus one accuser "may influence the jury in its decision making as opposed to the evidence and law that is to be followed" is unsupported by the findings of the cases resolving this same issue to the contrary. It is speculative, and Defendant cannot point to any cases which support this argument. In addition, the jury is always presumed to follow the law, and is specifically told to treat each count separately. Anecdotally, too, there is no support for Defendant's contention, since juries routinely convict on some charges and not on others, and on one victim's charges and not on other victim's charges.

Finally, although Defendant tries to convince the court to disregard the public interests in judicial economy, the court should resist that suggestion. "Fairness" and judicial economy are not antithetical to each other, and the cases cited above have reconciled both.

The case for joinder is strongly supported by the extensive, peculiar and significant similarities between the charged offenses. It is also supported by the public policy interests in judicial economy. Defendant offers no showing that there is any "substantial prejudice" that would overcome these considerations. The court should deny his motion.

Dated this 10th day of May, 2006.

_____

Miriam S. Falk

Assistant District Attorney

Bar # 01009765

T. Sample Voir Dire Questions

General Considerations

Voir dire should be part of your overall strategy, which includes the use of persuasion. Strategic voir dire involves the calculated use of persuasion, sometimes subtle. We are hoping to convince the jury that we are prepared, that we understood their concerns and that "we are in this together". As an individual, the prosecutor should be viewed, as a result of voir dire, as a person of fairness and integrity who can be trusted and who can legitimately expect the same of the individuals selected to be jurors.

In addition, of course, we want to be identifying jurors that have to be struck because of bias.

Finally, our voir dire should be the starting place of persuasion regarding the issues in our case. Our preparation will have revealed areas of potential concern of the jurors--- our 'bad facts", which I prefer to think of as the "reality of the crime". In the words we choose, the way our questions are framed, and in our strategic use of juror experience, we can lay foundation for our trial theme, and begin to establish an offender-focused prosecution that explains why the offender chose this victim, at this time, for these reasons. We do not apologize for our victim's vulnerabilities, but rather start to frame the case to show how the offender capitalized on rape myths and those victim vulnerabilities so that he could commit his crime.

Sample Voir Dire Questions in Selected Areas

Areas of Concern: Non-Stranger Perpetrator

- Have you or someone close to you been taken advantage of or been betrayed somehow by someone close to you? Explain. Did you expect this to happen or did it take you by surprise?

- We've all heard the story about Dr. Jeckyl and Mr. Hyde--- how Dr. Jeckyl undergoes a complete personality change to become Mr. Hyde. Has anyone in their own life experience encountered someone whose personality seemed to change? Tell us about that. Did you see it coming or were you surprised?

- TV always seems to portray prosecutors (particularly women) as really glamorous and usually quite young. Obviously I am neither of those things. I've noticed that when it comes to portraying sexual assault one could get the idea from TV that only strangers commit sexual assaults. Is there anyone on the panel who would disagree with this—who thinks that sexual assaults can also be done by someone the victim knows? Tell us about your ideas.

- Does anyone know personally of someone who has been sexually assaulted by someone that they knew? Are you comfortable talking about that in open court? What was the relationship? Was the incident reported to police? If not, why not?

Area of Concern: Delayed Reporting

- What do you think would be a person's first concern if something traumatic or terrifying happened to her?

- Can you think of reasons which make it difficult or impossible to immediately report a crime that is traumatizing?

- As a juror, are you committed to hearing the victim explain what happened before you make up your mind? Are you committed to listening carefully to all of the witnesses, whether called by the State or the defense, and give everyone a fair chance?

Area of Concern: Alcohol or Drug Use By the Victim

- Has anyone on the panel ever had an alcoholic drink?

- Of those who said yes, have you ever had a drink with a friend?

- Has anyone ever seen someone who has had more than they should to drink? What was that person like? Has anyone seen anyone else? Were they different than the first person described? How?

- Based on your life experience, would it be fair to say that when someone is drinking it is possible that their judgment may not be as good as when they are sober?

- Based on your life experience, would it be easier to take advantage of the sober person or the one who has been drinking, everything else being equal?

- When someone has been drinking, does anyone believe that that person should be taken advantage of—say, having someone steal their money or their car keys? Do we agree that committing a crime against a person when they are drunk is just as wrong as committing that crime when they are sober?

- Does anyone feel it may be easier to target a person who has been drinking than one who has not? Why?

Area of Concern: Lack of "Corroborating Physical Evidence"

- Who has ever seen any of those law shows on TV? Do you notice any difference between those shows and what you are experiencing here in court now? What differences do you notice? Are there other differences?

- Is there anyone who has an expectation that what will happen here during this trial is just like what happens on TV?

- One thing I have noticed is that on TV there are always lots of toys and amazing pieces of evidence. However, our legal system is actually based on the oral testimony of witnesses, and jurors' main job is to determine whether a witness is credible and is telling the truth. Is there anyone who thinks that what a witness says is not evidence?

- If this case boils down to the testimony of one credible witness whom you believe is telling the truth, is there anyone who would feel uncomfortable or be unable to hold the defendant accountable on that alone? Is there anyone who thinks that in order to prove a case beyond a reasonable doubt the State has to have more than one credible witness?

- Is there anyone who thinks that unless there is an eyewitness to the crime (other than the victim, of course) that the case cannot be proved beyond a reasonable doubt?

Area of Concern: Unlikable Victim Characteristics/Lifestyle

- Albert Schweitzer said that the measure of a society is how the least in it are treated. I have always believed that what makes our country great is that we afford the protection of our laws to everyone—saint and sinner alike.

- The evidence in this case will who that the victim is a [prostitute/drug user/homeless person/etc]. We probably would all agree that this lifestyle is not one that we have for ourselves, or that we would want for our children. Do we all agree, too, that it is just as wrong to victimize a [-----] as it is to victimize anyone else in our community?

- Are there risks to the lifestyle of the [----] that might make them extra vulnerable? What are some of those vulnerabilities?

The victim in this case is a teenager

- Who is of the belief that it would be a good idea to put a teenager in charge as President of the US? (Select someone who is smiling----)—why not?

- Does anyone else have ideas about why a teen would be a poor choice for President?

- Are these the kinds of things that can make a teen vulnerable? Do teens think of themselves as vulnerable? Do teens have the same capacity to make good judgments as adults? Why not?

- What do you consider to be "normal" kinds of things people do on dates?
  Get dressed up, trying to look nice? How about trying to look appealing, or sexy?
  Dancing? Dancing close together?
  Having a few drinks?

Talking?
Going on a walk?
'Going on a drive?
Going to someone's apartment or house?
Holding hands?
Hugging?
Kissing? Etc (go as far as your facts require you to go)

- Do any of these things mean that you are going to have sex with someone? Do any of these things equal "consent" to sex? Do any of these things mean that you no longer have the right to say "no" to sex? At what point is the last point where a person can say "no" to sex?

- Has anyone here gotten dressed up for a date? To go out? Are you hoping people might look at you?

- The guy with the Mohawk wants you to look--- but it's not an invitation to touch. Similarly, the woman on the beach with the string bikini is sending out an invitation to look—but we all understand what's going on---= it's not an invitation to touch her or to rape her.

Area of Concern: Non-Intuitive Reactions of the Victim

- Has anyone or someone close to you been in a traumatic situation? Tell us about it. Did you/the person react in the way that you thought you would?

- Do you think everyone would react in the same way?

- Based on your life experience, do you think that all of use respond to a crisis in the same way? If a traumatic situation occurs in your life, do you know how you will respond?

- When my Mom died, I found myself laughing a lot at the funeral—which struck me as really weird, since I was actually quite sad. Has that happened to anyone else—where your reaction seemed at odds with what you were feeling? Do you think that can happen to anyone?

- Has anyone studied the issue of the reactive behaviors of victims in sexual assault cases?

- Does anyone work with people who have been just involved in a traumatic experience—like a firefighter, police officer, emergency room nurse or doctor???

- Is there any expectation that you have about how a person who has been sexually assaulted looks right after it happens? How about how she acts? Is there some one way that you feel a person should respond in a case like this?

- Over the last 100 years the laws about sexual assault have changed dramatically. It used to be that in order for it to be a 'real rape", the victim had to fight with her utmost resistance. Now, of course, the law does not require any resistance---

- Can anyone think about the reasons why a victim might not 'fight back"?

- If you told a person to stop doing something you did not like, would you expect that person to do so? Would you expect that, before they would stop, you'd also have to hit them or push them or somehow physically resist them?

- Is there anyone who feels that they would not follow the law as it is now—and instead would still require some amount of physical resistance by the victim?

U. Additional Voir Dire Possibilities

Area of Concern: Victim Did Not Fight Back

Times have changed a lot since Wisconsin first had sexual assault laws. It used to be that, in order for there to be a "real rape", the State had to prove that she fought back with her "utmost resistance." Of course, we as a society have developed a lot over the years, and now there is no requirement in the law that a woman must fight back at all. Still, ideas continue in our community that fighting back is required for there to be a rape.

Has anyone ever heard someone say that if they were assaulted, they would for sure fight back? Has anyone said that or felt that about themselves? Can anyone think of reasons why a woman might not fight back? (Have the panel generate a list of reasons.) Is there anyone who does not consider those to be legitimate reasons for not fighting back? Am I hearing that the person's decisions about resisting or not resisting should be considered based on the entire situation? Are you willing to consider all the evidence to make a fair judgment about how the situation in this case affected the victim's decision and reactions?

Is there anyone who thinks that they would not be able to follow the law, which does not require any proof of fighting back or physical resistance—In other words, although the law does not require that the woman fight back, you personally would require that of her in order to hold this defendant accountable?

Do we all promise to follow the law?

Are there other ways of not consenting that don't involve physical resistance? What are some of those ways? (Generate a list from the panel.) Has anyone heard the expression "no means no"? What does that mean to you? Do you think that saying "no "should be enough to stop a person from doing something that you don't want them to do? Does anyone feel differently, or have a different interpretation of that phrase?

Area of Concern: Rape Myth that "Boys Will Be Boys"
-that sexual assault is normal for men/boys
-that somehow the "Victim Asked For It"

My kids make excuses for their bad behavior all the time. Usually I hear "She told me to do it, Mom", or "It was her idea, Mom." Do you hear these kinds of excuses from your children? What other excuses do you hear? Do you accept these excuses from your children?

I think we, as a society, hear all kinds of excuses for sexual assault behavior, too. Has anyone ever heard the expression "Boys will be boys"? What does that mean? Does anyone hold the belief that a man is not able to control himself when he is sexually attracted to a woman? Does anyone hold the belief that a man cannot stop if his sexual partner asks him to? What other sorts of excuses have people heard? Does anyone think that these are good justifications or acceptable excuses for committing a sexual assault? Should we as a community accept these excuses from a man who commits a sexual assault?

V. Child Sexual Assault – Expert Witness Qualifications

EXPERT WITNESS: CHILD OR TEEN ISSUES - QUALIFICATIONS

- What is your profession?
- How long have you done this work?
- (Are you licensed?)
- What are you currently employed?
- How long have you worked there?
- What are your job responsibilities?
- What other positions have you held?
- What is your educational background?
- Have you received special training pertaining to issues which arise in child/teen sexual assault cases? Please describe this training.
- Are there on-going educational opportunities pertaining to children/teens that you participate in? Describe.
- Is there professional literature pertaining to child/teen sexual abuse with which you are familiar? Describe
- Have you participated as an educator relative to issues in child/teen sexual abuse cases? Describe.
- Are you involved in any studies/publications pertaining to issues in child/teen sexual assault? Describe.
- In your work, do you encounter children/teens who have been victims of sexual abuse? How many over what course of time? What is the nature of your work with these children/teens?
- Does your work/training include topics pertaining to forensic interview/child development issues/ common psychosocial aspects in child/teen sexual abuse cases? Describe.

- Have you ever been called upon to testify in court as an expert in the area of issues arising in child/teen sexual abuse cases? How many times?

- Have you been permitted to provide expert opinions in any of those cases? How many times?

W. Child Sexual Assault Expert: Substantive Questions

EXPERT CHILD SEXUAL ABUSE: SUBSTANTIVE ISSUES

Based on work, study: Are there issues which are common in child sexual abuse cases? What are those issues?

main = disclosure is difficult

Why is it difficult for a child to report sexual abuse?

dynamics = conflicting feelings
Perp = someone close to them frequently
know, trust, love
not want that person to be in trouble

abuse = gradual
escalation over time
comfort of the child
inability to discriminate by child
result = guilt, shame, fear

What does the child fear?

they'll get in trouble
it's their fault
not be believed
they'll be hurt
family will be hurt
something bad will happen to perp

What effect do actions/words by the perpetrator have on this fear?

describe how threats, overt and subtle, work to prevent disclosure

What other dynamics affect the disclosure process?

belief that they are bad, complicitous in this
or that they won't be believed

What actions/words by the perpetrator can enhance this effect?

What other kinds of words/actions can perpetrators use to garner silence from the child?
promises, rewards, special treatment

Why do these things that the adult says/does have an effect on the child?

In a circumstance where the offender is involved with or married to the parent, what effect does this have on disclosure?

Are there special issues which arise in the case where it is a <u>boy</u> who is a victim?
Describe

Are there issues that exist when the abuse has occurred to a <u>group</u> of children, in each other's presence?
Describe

What effect does the presence of a cognitive disability play in the disclosure process?

As a result of these dynamics, what is the common pattern of disclosure that is seen?

delay/describe and reasons
piecemeal/describe and reasons

What are the kinds of things that can prompt a disclosure?

Are there patterns which are apparent relating to <u>who a child will choose to tell?</u>

In the disclosing itself, what are the problems that face the child who is making the report?
language
not understanding the concepts/the terms
time
dates
the topic
serial events/many similar occurrences

Why are these problem areas?

What are typical ways in which children categorize events?

Once there has been an initial disclosure, is this the end of the disclosure process?
What is the rest of the process?
Describe

What are the common ways/manner in which there is a recantation?
Why do children minimize?

Why do children deny?

What dynamics can affect the "recantation" of a child?

Is sexual abuse considered to be a traumatic event for a child? Why?

Do children show some common reactive behaviors to sexual abuse?
What are those behaviors?

Are there any special considerations with respect to the age-grouping of a child-- for instance, children who are ___ years old?
Describe those issues

Interviewing children present certain issues?
What issues?

Interview process-- is there a technique which is widely accepted as a tool to avoid/minimize problems in interviewing children?
What?
Describe?
Why is this generally an effective tool in interviewing children?

Grooming patterns
Besides what we discussed earlier, are there other strategies/methods employed by perpetrators to gain access to potential victims?

What are those common strategies/methods?

X. Victim Counterintuitive Behavior Expert – Adult Qualifications

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EXPERT WITNESS: NON-INTUITIVE ADULT REACTIONS - QUALIFICATIONS

- What is your profession?
- How long have you done this work?
- Do you have a license?
- Where are you currently employed?
- How long have you worked there?
- What are your job responsibilities?
- What other job positions have you held?
- Describe your educational background.
- Have you received special training pertaining to issues which arise in adult sexual assaults? Please describe this training.
- Are there ongoing educational opportunities pertaining to sexual assault that you participate in? Describe.
- In your work, do you encounter people who have been victims of sexual violence?
- With approximately how many individuals have you worked who were victims of sexual violence?
- Is there professional literature that addresses issues arising in sexual assaults?
- To what literature do you subscribe/what publications do you regularly review?
- Have you published any articles in the area of sexual assault? Describe.
- Have you educated others in the area of sexual assault? Describe.
- Have you ever been called upon to testify as an expert in court in the area of issues arising in adult sexual assault cases?

- Have you been qualified to testify to those issues as an expert?
- How many times?

Y. Victim Counterintuitive Behavior Expert – Adult Substantive Questions

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EXPERT WITNESS: NON-INTUITIVE REACTIONS OF VICTIMS – SUBSTANTIVE QUESTIONS

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*Based upon your training and experience, are there common misperceptions about situations of adult sexual violence?

***Will you identify the prevailing myths or misperceptions concerning adult sexual violence:**

- *Rape is committed by strangers*
- *A person who is truly raped will offer utmost physical resistance.*
- *In a "real rape" the victim will recall every detail perfectly, and if he/she cannot, then he/she is lying to "cover up" for a mistake, or to 'get even" with someone.*
- *"Real rape" results in serious, visible physical injuries.*
- *Adults who are truly raped will always report the crime immediately.*
- *There is a higher incidence of false reports of sexual assault than of any other crime.*
- *If you have been assaulted sexually as a child you are less likely to be assaulted as an adult because you have learned to protect yourself better.*
- *A person who was raped will be "upset" during testimony.*

The following goes through the individual myths. You do not have to discuss every myth if it does not come into play in your case.

***Let's discuss the first myth—that rape is committed by strangers. What is the reality about who commits sexual assaults?**
Around 80% of all sexual assaults of adults are perpetrated by someone that the victim knows.

Can the fact that the victim knows the perpetrator affect her behavior and her choices? How so?

Does knowing the perpetrator impact the decision to report a sexual assault? How?

* **Moving on to the second myth—that victims will physically fight back. What is the reality?**
Studies have shown that 49% of sexual assault victims thought they were going to die or suffer serious bodily injury, which resulted in a strategic decision on the part of the victim not to resist.

In addition, the size and strength of the perpetrator alone may be threatening to a victim.

Threatening words or gestures can create fear

Responding in violence is not the typical way for women, who have been socialized to be "nice" to react.

Finally, most women will employ non-violent strategies (like trying to talk someone out of a behavior), for a number of reasons, including that it's more likely to succeed, that she won't get physically injured, and it's a more "comfortable" approach for a woman.

* **So a sexual assault victim is assessing, in a split second, how best to come out of the situation alive?**
In cases were there was "passive" or 'submissive" behavior, where the behavior looks "compliant" or "helpful" to the offender during or after the assault, you would want to address these reactive behaviors and choices against the backdrop of the choices and strategies more typically seen, and include explanations for why these were 'reasonable" choices on the part of the victim.

* **What about the third myth—that a trauma victim would have perfect recall of all the details?**
The reality is that sexual assault is a traumatic event, and therefore the brain actually responds to the trauma in particular ways. For instance, many people freeze when they are terrified. This "frozen fright" induces an altered state of consciousness. The person "dissociates" from the situation, which is actually a very rational and protective action on the part of the brain. However, this dissociation may result in difficulty in recalling details of the assault, particularly soon after the assault itself has occurred.

Even the way that the brain records a traumatic event within one's memory is affected by the trauma. Unlike non-traumatic memory, in which sequential details and events are easily remembered, in traumatic memory the details and events are sort of splashed onto the brain, making orderly chronological recall of the events difficult.

If there are seemingly inconsistent statements or piecemeal disclosing, you will want to address these topics more fully with the expert, including the use of analogies or examples.

* **Let's talk about the fourth myth—that there should be physical injury. What is the reality?**

Physical injuries are actually very rare. One reason is that victims tend not to physically resist, which reduces the need on the part of the offender to have to resort to more brutal forms of physical violence to gain submission of the victim. Other reasons relate to the physical properties of the human body, particularly the female genitalia, which is pretty resistant to injury, and which tends to heal quickly when there is injury.
It would simply be incorrect, and not supported by the science surrounding injuries in sexual assault situations that a lack of injury indicates consent n the part of the victim. In addition, the types of injuries typically seen in sexual assaults, when they are present at all, are microtrauma which is often overlooked by non-medical professionals, or are non-specific injuries that cannot allow the medical professional to state that it is "proof" of a sexual assault.

Note: You would want to follow up any medical references with information directly from a medical professional versed in the medical aspects of sexual assaults. That person would explain in detail the significance of any injury or the lack of injury in your case.

* **What about the idea that victims of sexual assault would immediately report—what is the reality?**

Sadly, most sexual assaults are not reported at all. There are many reasons why people do not report. These reasons also contribute to the phenomenon we see, which is that when someone does report a sexual assault, it is almost always delayed.

The reasons for the delay, or outright failure to report include fear of retaliation or of being disbelieved or blamed for the assault; not knowing that the assault was a crime; denial or minimization of the assault or its impact; emotional attachment to the offender; concerns about the impact of reporting on one's family or that of the offender; fear or misinformation about the criminal justice system; fear of loss of privacy, such as might come from media attention.

Lack of reporting is tied into the fact that most victims know the offender.

Being sexually assaulted is a humiliating and terrifying experience. Some people cannot bear the thought of talking about it. Others are buying into some of the other societal misperceptions about sexual assault, including that victims 'ask" for it, or could have prevented it. The victim may blame herself.

The topic of delay is an area that you would want to flesh out, again with hypotheticals that tie the information directly into the facts of your case.

* **What about false reports**?
About 2% of sexual assaults are "false"--- which is the same percentage of false reports of other types of crimes.

* **How can it be a myth that a sexual assault victim will be upset during trial? Isn't sexual assault a traumatic event?**
Yes, it is, but individuals can respond in very different ways to trauma. A person's response varies, and is affected by that person's individual strategies for coping already in place; her personality; where she is in the recovery process; her life circumstances, including whether she was ever assaulted before and what her present support system consists of.

There are actually several stages, or phases, that victims go through, and victims look very different from one stage to the next. Also, these phases are fluid, meaning that a victim can move back and forth through them, depending on what might be happening to her at any given time.

You may choose to go further into the recovery phases with your expert.

* **Having laid out some of the mistaken ideas that have developed about sexual assault, let's discuss what your training and experience have taught you about what is really happening for the sexual assault victim.**

* **Since we typically see a victim after the assault, what are the kinds of factors that affect a victim's response to the sexual assault?**

Relationship between victim/offender
Prior SA's
Treatment by first responders and other professionals
Response of family, friends
Victim's support system
Victim's perception of who is 'at fault"

This is the place to discuss the facts of your case as they relate to post-SA choices and behaviors, including delayed reporting, minimization and recantation.

* **We have talked about how a victim's reaction may not look like we would expect--- what are some of the "non-intuitive" ways victims frequently respond?**

Delayed report
Piecemeal or ongoing disclosure
Seemingly inconsistent statements
Non-sequential reporting of events
Minimization of the events, or recantation
Lies about some aspects of the events
Anger
Flat affect
Poor coping choices (drugs, alcohol, promiscuity…)
Nervous laughing
Isolation

* (Depending on what particular aspect is present in your case, have your expert expound on the reasons for or factors that contribute to the above phenomenon. This would be a good place for the use of hypotheticals which incorporate the specific facts of your case.)

* **What does this variety of responses indicate?**
That victims engage in a variety of behaviors that respond to SA which "make sense" when one considers that victim as an individual, against the backdrop of the nature of the assault, the effects of trauma and victim dynamics.

In judging a victim's response or behavior after a sexual assault one has to understand that victims come into the situation already having some coping mechanisms that work for her.

These are affected by the trauma itself, and have both sort and long-term ramifications for her

* **How is it that the trauma itself plays a part in the victim's reactions?**

Trauma affects the chemistry in one's brain. When someone is in danger, or thinks that are in danger, a series of innate reactions occurs, which prompts the person to either fight, or flee or freeze. These reactions are generated by a set of chemicals which are released as a result of the stress of the trauma. In cases where there are "normal" amounts of stress, a person is not debilitated by the chemical reactions. However, when there is extreme stress (as there is when there is a sexual assault occurring) the amount of the chemical that is released can both damage the brain and inhibit memory functions.

Unlike memories which are non traumatic, and are stored in a logical and verbal fashion, traumatic memories are stored as senses and emotions. Because of this, a person would have trouble reasoning about the traumatic experience, or verbally repeating it, but would recall smells, feelings, images, sounds and tastes.. These memories would tend to be retrieved in pieces, including body memories. The memories can lead to a person shutting down when talking about the assault. And talking about the assault can trigger overwhelming feelings such that the person experiences flashbacks and panic attacks which cause the body to physically respond as if the dangerous situation was again upon them)

* **In addition to memory, does the trauma have other effects?**
Yes, there are a variety of mental health issues that frequently arise for victims of sexual assault. Those include: PTSD; Depression; Anxiety: Dissociative Disorder.

If these appear in your case, and are going to play a part in how the victim is going to present at trial, have your expert describe and discuss the particular mental health concern.

At the end, reinforce that your expert's opinions and testimony have been rendered to a reasonable degree of professional certainty.

Note: The sample answers are intended to provide a very basic framework for understanding the role of victim dynamics as they play out during and after a sexual assault. These answers are not, by any means, intended to be the verbatim responses of your experts. They will be far more articulate and complete than I am here. I only hope these abbreviated answers take you down the right and productive paths in your discussions with your experts.

Miriam Falk

Z. Expert on Adolescents – Substantive Questions

EXPERT ON ADOLESCENTS – SUBSTANTIVE QUESTIONS

- Discussing adolescents generally
- Agree that teens not = adults
- Different than younger children
- Ways that teens not "equal" to adults
- Is this the way that teens see it?
- How does this cognitive "deficiency" but unwillingness to see it affect teen perceptions, behavior?
- Are there general psychological issue which attend to <u>all</u> teenagers? Explain what they are
- Go through each issue and explain how it relates to their concepts of the world, what's important to them
- As you go through, give specific examples of how issues present themselves
- Can dysfunctional situations develop for teenagers?
- What are some of the ways teenagers become dysfunctional?
- Are there ways in which, in a dysfunction situation, teenagers react, behave, with some predictability:
    - Running away behavior--- is this "typical" reactionary behavior?
    - Why do teens run
    - What are they looking for
    - Risks to teens who are "on the run"
- As risks are presented to the teen, are they capable of properly coping/addressing these risks?
- If they are less capable of properly protecting selves, what are their responses
- To what sorts of individuals can teens "fall prey" to while "on the run"
- Go through some specific examples of how adults can manipulate a teen with "love," safety, feeling or security, especially to get teen to become involved in sex, drugs, crime etc.
- Using letters of victim as examples, describe how the adult in this case has manipulated this child
- Are the victim's reactions atypical?
- What do her letters reveal about her perceptions of self?
- What is her ability to protect self from being preyed upon?