Manual for Prosecution of Domestic Violence

Minnesota County Attorneys Association
Minnesota Coalition for Battered Women
2012 Edition

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Minnesota Coalition for Battered Women

September 2012 Edition
Update of the 2004 Edition by Jeanne L. Schleh

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PREFACE AND ACKNOWLEDGEMENTS TO THE 2012 EDITION

This manual updates and supersedes the excellent 2004 edition by Jeanne L. Schleh. The format has been significantly altered to allow for greater integration of technology into the manual.

Like the 2004 edition, I have attempted to maintain a global perspective on domestic violence while providing enough detail for the day-to-day handling of domestic violence cases.

This manual is constructed as a guide for newer attorneys as well as a reference for experienced attorneys. As in 2004, it is intended as a single resource compiling all major issues, statutes, cases and trial considerations related to domestic abuse.
It is current for case law through July, 2012 and is intended to include all 2012 legislative and court rules changes.

A work of this scope requires the input of many individuals, many of whom are mentioned above as editors. In addition to the editors mentioned above, I would like to thank Laura Danielson for her feedback and suggestions while this project was in its infancy.

Additionally, portions of this manual have been adapted from resources developed in other jurisdictions. It would be remiss for me not to thank these organizations as well. Therefore, I would also like to thank the Crown Prosecution Services (London, UK), the Massachusetts District Attorneys Association, the Michigan Prosecuting Attorneys Association, Project Safe (Georgia), PRAXIS (St. Paul), the Urban Group LLC (Nevada), and the Wisconsin Domestic Violence Unit.

Andrew True

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PREFACE TO THE 2004 EDITION

This manual updates and supersedes the excellent 1999 edition by Julie A. Helling. I have generally followed the format used in the earlier version, which parallels that used in the MCAA Child Abuse Prosecution Manual (December 2000), because it is one prosecutors have found to be user-friendly for finding the law and statutes, both when in trial and when preparing for trial.

Systematically looking at all the statutes and cases previously cited and tracking legislative and cases in the last five years gave me a more global perspective of developments in this area of the law. I have tried to add this overview to the text while still focusing on the detail necessary for the day-to-day handling of domestic abuse criminal cases. As the changes demonstrate, domestic abuse continues to command both legislative and judicial attention, most of it positive.

This manual was written as a guide for the newer attorney as well as a reference for experienced attorneys. It is intended as a single resource compiling all major issues, statutes, cases and trial considerations related to domestic abuse.

It is current for case law through the spring of 2004 and was intended to include all 2004 legislative changes. Since the 2004 session aborted with little accomplished and it is still unknown if there will be a 2004 special session, the legislative update is not as complete as hoped. (The terms of the publication grant require that the book be printed and disseminated by June 30, 2004.) If there are major further developments this year either in case law or statutes, we hope to send out a supplement.

I would very much appreciate knowing of any errors or omissions.

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INTRODUCTION

Domestic violence comprises such a large and diverse area of law that creating a comprehensive guide covering such a large subject area is almost impossible. Even if such a guide were possible, it would prove incredibly large and unwieldy and would likely sit on shelves collecting dust instead of in a courtroom assisting prosecutors. Rather than focus on every minute detail of domestic violence law, this manual is designed for prosecutors when preparing and conducting a domestic violence case between adults. This guide focuses almost exclusively on domestic violence between adults, especially intimate partners. Many of the concepts and rules of law discussed are applicable to other areas of domestic violence law, even if those other areas are not specifically mentioned herein.

A NOTE ON LANGUAGE CHOICE

As noted above, this manual was created as a quick reference guide for prosecutors in cases involving domestic violence. As such, this guide was written in a readable but efficient manner. Because of the nature of domestic violence and the typical gender of the abused and the abuser, there are sections in the manual where gender-specific pronouns are used when discussing a case. Throughout the guide, the victim will be referred to as female and the abuser will be referred to as male. This is not meant to minimize the importance of addressing female on male or same-sex domestic violence. Instead, the use of gender-specific terms facilitates readability and is an acknowledgement that the majority of reported cases of domestic violence involve a man abusing a woman.

1 WHAT IS DOMESTIC VIOLENCE?

A. BRIEF HISTORY OF DOMESTIC VIOLENCE STUDY AND PROSECUTIONS

For most of history, intimate partner violence was viewed as a private family matter. It was only in the 1970s that perceptions began to change and the criminal justice system became involved in helping combat domestic violence. This change was precipitated by Lenore Walker's work, *The Battered Woman*. Walker identified battered women as suffering from a syndrome that resulted from their experience of cyclical violence.[1]

The Battered Woman spurred a national discussion of domestic violence and precipitated several changes. The first of these was the creation of national advocacy groups. One of the most prominent of these early advocacy groups was Minnesota Development Program, Inc. This program developed the Power and Control Wheel, which is still used in domestic violence education and is included in the supplements. Another major change was the creation of domestic violence specific laws, as discussed in this manual.

B. DOMESTIC VIOLENCE TERMINOLOGY

Like any area of law, domestic violence contains unique phrases, some of which are outdated. In this section, you will find a list of the major terms included in this manual or that you may encounter in a domestic violence prosecution, a definition of each term and whether that term is still considered appropriate.

Advocate

Definition: A person who works with domestic violence.
Still Appropriate: Yes. This manual will attempt to distinguish between those who work for independent agencies ("community advocates") and those who work directly for the prosecutor or some part of the criminal justice system ("in-house advocates") wherever possible. This distinction is made to recognize the difference in the roles and reporting duties of advocates and witness assistants. Of course, both may provide excellent information and support during a prosecution.

Battering and its Effects[2]

Definition: This term encompasses learned helplessness that causes a victim to kill her abuser as well as general testimony on common "non-criminal" victim behavior, such as a

[1] Both these terms will be further defined later in this chapter. While neither is currently believed to accurately describe Domestic Violence, they are still important to discuss because of their important place in the societal evolution of domestic violence response.
[2] Adapted from The National District Attorney's Association Manual entitled Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions.

delayed report. The definition of this term is so broad, however, that it can be ineffective at accurately describing common domestic violence victim behaviors. Moreover, because sexual and domestic violence victim behavior is individual and complex, it should not be reduced to a simple term.

Still Appropriate: Yes, in certain circumstances. As the understanding of domestic violence has evolved, the terminology used to describe domestic violence has changed. This term has replaced Battered Woman Syndrome as the generic term to describe a domestic violence situation.

Battered Woman Syndrome

Definition: Battered Women's Syndrome (BWS) was first developed as a distinct syndrome in the late 1970's.[3] In the over thirty years since its initial development, BWS has come to be recognized as a subcategory of PTSD with six common "symptoms":

- Intrusive recollections of the trauma event(s)
- Hyperarousal and high levels of anxiety
- Avoidance behavior and emotional numbing (usually expressed as depression, dissociation, minimization, repression, and denial)
- Disrupted interpersonal relationships from batterer's power and control measures
- Body image distortion and/or somatic or physical complaints
- Sexual intimacy issues[4]

It is important to note that not every person who may suffer from BWS will meet the necessary clinical definition for PTSD.

Still Appropriate: No. However, it is still used commonly by the courts and will likely be encountered when researching precedent.

"Counterintuitive" victim behaviors

Definition: "Counterintuitive" means contrary to what an individual would expect.[5] "Counterintuitive" behaviors refer not specifically to how a victim acts, but rather how the jury believes they should act. In a domestic violence situation, "counterintuitive" behaviors generally fall in the category of the victim's attempting to reconcile with her abuser or recanting her allegations. In a trial setting, it is important to identify these behaviors early and make sure you question any expert witness as to why the victim would exhibit these "counterintuitive" behaviors.

Still Appropriate: Yes.

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[3] Lenore E. Walker, The Battered Woman (Harper & Row Publishers, Inc)(.)(1980).

[4] Lenore E. Walker, Battered Woman Syndrome: Key Elements of a Diagnosis and Treatment Plan, Psychiatric Times, (July 7, 2009), http://www.psychiatrictimes.com/display/article/10168/1426560

[5] http://www.merriam-webster.com/dictionary/counterintuitive

Cycles of Violence

Definition: Cycles of Violence were introduced in *The Battered Woman*. They consist of three phases, The Tension Building Phase, The Violent Episode, and The Honeymoon Phase. Under this theory, any abusive relationship will pass through the three stages at varying rates, only to begin again.

Still Appropriate: No. While initially important in explaining domestic violence, the Cycles of Violence theory has been abandoned by advocates because the belief now is that few women suffer domestic violence that aligns with the cycles of violence as articulated in *The Battered Woman*.

Domestic violence

Definition: A pattern of abusive behaviors by one partner against another in an intimate relationship.

Still Appropriate: Yes.

Post-Traumatic Stress Disorder[6]

Definition: Post-Traumatic Stress Disorder (PTSD) is "a psychological reaction occurring after experiencing a highly stressing event."[7] Symptoms for PTSD generally fall into three categories[8]:

- "Reliving" the event
  - Flashback episodes
  - Repeated upsetting memories of the event
  - Repeated nightmares of the event
  - Strong, uncomfortable reactions to situations that remind you of the event
- Avoidance
  - Emotional "numbing," or feeling as though you don't care about anything
  - Feeling detached
  - Being unable to remember important aspects of the trauma
  - Having a lack of interest in normal activities
  - Showing less of your moods
  - Avoiding places, people, or thoughts which remind you of the event
  - Feeling like you have no future
- Arousal
  - Difficulty concentrating
  - Startling easily
  - Having an exaggerated response to things that startle you

[6] Additional information on PTSD is included in Chapter 6(B)(3).

[7] http://www.merriam-webster.com/dictionary/post-traumatic%20stress%20disorder

[8] The list below is taken from: http://health.nytimes.com/health/guides/disease/post-traumatic-stress-disorder/overview.html

- Feeling more aware (hypervigilance)
- Having trouble sleeping.

Still Appropriate: Yes, although circumstances are limited as to when it may be used.

Secondary Trauma

Definition: Reactions to the emotional demands on therapists and social network members from exposure to trauma survivors' terrifying, horrifying, and shocking images; strong, chaotic affect; and intrusive traumatic memories.

Still Appropriate: Yes.

Victim[9]

Definition: A person who has suffered physical, emotional, or sexual abuse at the hands of a spouse or partner.

Still Appropriate: Yes. Some individuals prefer to use the term 'survivor' instead of victim because they view it as empowering. For readability purposes and because of the terminology used in the criminal justice system, this manual will refer to those who suffer from domestic violence as victims.

[9] Definition adapted from the *Black's Law Dictionary* definition of "Battered Woman."

2 INITIAL INCIDENT

A. PRE-INCIDENT TRAINING

An important tool when combating domestic violence is proper training for peace officers before they respond to an incident of domestic violence. Domestic abuse incidents are distinct from other situations for peace officers because of the high likelihood that both the perpetrator and victim will be present when the peace officer arrives. While most of the procedures for law enforcement dealing with a domestic abuse complaint will be the same regardless of whether both parties are on site, there are some special considerations to be addressed when one party has fled. These special considerations are addressed *below* in Section G.

B. INITIAL RESPONSE

The initial law enforcement response to a report of domestic violence is very important to secure victim safety and establish the basis for an eventual prosecution of the abuser. Both the International Association of Chiefs of Police (IACP) and the National Sheriff's Association (NSA) have adopted model policies for responding to domestic violence calls. These polices have generally been adopted by police and sheriff departments, respectively. This guide assumes that your local law enforcement agency has adopted the model policy from either the IACP or NSA, but prosecutors should check with law enforcement to ensure this is the case.

Both the IACP and NSA policies call for two officers to be dispatched to respond to a domestic violence call, if possible. Dispatching multiple officers allows for the suspect and victim to be separated and questioned independently by officers, who then can compare notes to gain a better idea of what actually happened. Additionally, the policies discourage the responding officer from parking in front of the initial incident. Finally, the IACP policy calls for close monitoring of domestic violence calls by field supervisors, and, if possible, for the field supervisors to attend the scene. For a copy of the IACP policy, see the supplements.

C. MANDATORY VS. PERMISSIVE ARREST FOR DOMESTIC VIOLENCE

Peace officers should make an arrest when there is probable cause to believe that an act of "domestic abuse" has occurred, within the preceding 24 hours.

State law permits, but does not require, that a peace officer make an arrest when there is probable cause to believe that in the preceding 24 hours the suspect committed an act of domestic abuse. Minn. Stat. § 629.341, subd. 1 ("a peace officer *may* arrest") *but see* Minn. Stat. §§ 609.748, subd. 6; 518B.01, subd. 14 (mandating arrest for a violation of an OFP, HRO, or DANCO). However, many jurisdictions have adopted a mandatory arrest policy. Both the IACP and NSA policies are "pro-arrest" and call for the alleged predominant abuser to be taken into custody. Mandatory arrest policies remove the pressure victims face to decide whether or not the abuser goes to jail on the evening of the incident (and diverts the blame for this decision from the victim to law enforcement) and reduces the risk that an abuser will "talk his way out" of arrest.

The statute applies even when the domestic abuse committed is a misdemeanor (thus creating an exception to the general rule that a peace officer may arrest for a misdemeanor only if it occurs in the officer's presence). Though the statute says "a peace officer may arrest a person anywhere without a warrant, including the person's residence," the peace officer may not arrest in an abuser's home in the absence of exigent circumstances or consent. *State v. Anderson*, 388 N.W.2d 784 (Minn. Ct. App. 1986), *pet. for rev. denied* Aug. 20, 1986. Exigent circumstances can arise from either a single factor or the totality of the circumstances. *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). Examples of single factor circumstances include: hot pursuit of a fleeing felon, imminent destruction or removal of evidence, protection of human life, likely escape of the suspect; and fire. *Id*. (citations omitted.)

> When none of the single factor exigent circumstances is clearly implicated, [the court instead applies] a "totality of the circumstances" test, using the following factors set forth in *Dorman v. United States*, 435 F.2d 385, 392–93 (D.C.Cir.1970): (a) whether a grave or violent offense is involved; (b) whether the suspect is reasonably believed to be armed; (c) whether there is strong probable cause connecting the suspect to the offense; (d) whether police have strong reason to believe the suspect is on the premises; (e) whether it is likely the suspect will escape if not swiftly apprehended; and (f) whether peaceable entry was made.

Id. A peace officer acting in good faith and exercising due care in making the domestic abuse arrest is immune from civil liability.

D. MUTUAL ARRESTS

Mutual arrests at a scene of alleged domestic violence sometimes occur when each party accuses the other of violence and both parties have visible injuries. Both the IACP and NSA have adopted policies which strongly discourage mutual arrest. Additionally, the IACP policy requires separate reports for each party arrested, complete with a full description of the probable cause for each arrest. Because a minority of domestic abuse cases involve situations where the parties are equally culpable, mutual arrests in most cases can be avoided if peace officers exercises their best professional, objective assessment based on all the circumstances in the case of who is the predominant aggressor. Responding officers should resist the temptation to arrest both and "let the courts figure it out" because, as a practical matter, mutual arrest decreases the chance that any case will be successfully prosecuted and only further victimizes the true victim.

E. DETERMINING PREDOMINANT AGGRESSOR

The responding officers are usually in the best position to assess the credibility of the parties and to determine what really happened during the assault – if the officer cannot determine what happened, the likelihood that a prosecutor can prove it beyond a reasonable doubt is unlikely. Even if both parties have injuries, the officer should attempt to determine who was the predominant aggressor and if one of the parties acted in self-defense. The officer should:

1) Determine what happened;
2) Determine if any of the injuries are consistent with defensive injuries*;
3) Note which party is physically stronger and bigger*;
4) Determine if either party used a weapon*;
5) Investigate which party has a history of violence (e.g. criminal history, OFPs, and NCOs);
6) Note if either party is attempting to threaten or quiet the other party while the officer is present;
7) Observe the relative demeanor of the parties; and
8) Identify any other witnesses present at the time of the assault and, if still present, interview them

*Just because a party has defensive injuries, is stronger and bigger, or used a weapon does not necessarily make the other party the predominant aggressor. The victim may have tried to defend themself. Once the officer is on the scene, it is more important to ensure the

predominant aggressor is detained, rather than the person with fewer or more minor visible injuries.

NOTE: Children are often "invisible witnesses" ignored at the scene. Their excited utterances, while still under the aura of the traumatic event, may shed light on who was the predominant aggressor.

F. BUILDING THE CASE

1. Patrol Officer Response

The actions of the patrol officer who responds to a domestic abuse call are critical to any successful prosecution. As noted above, the unique nature of domestics often means that both the victim and suspect will be present when officers arrive. In addition to gathering physical evidence, officers can observe the victim's injuries and demeanor immediately after the incident. Often, the officer will have the opportunity to observe the suspect's demeanor, injuries (or lack thereof) and to obtain statements from him.

a. Arrival at the scene. Upon arriving at the scene, officers should immediately activate any recording devices in their possession. This practice will provide prosecutors with the necessary corroboration at trial when trying to admit hearsay excited utterances. Additionally, where possible and appropriate, officers should describe what happens at the scene in a narrative fashion. They should pay special attention to and note any interaction between the victim and the suspect in the officer's presence. This narrative can prove incredibly helpful during the prosecution, especially where the victim refuses to cooperate.

b. Victim statements. In order to assess the incident the officer should interview the victim out of the hearing of the suspect and other witnesses. However, special attention should be paid to the spontaneous utterances of the victim at the scene made before the interview begins. Such statements as, "He's going to kill me!" or "He hit me!" blurted out while under the stress of the traumatic event are vital evidence usually admissible at trial. It is important to quote the exact words of the victim used (in quotation marks) and to note the emotional condition (state of mind) of the victim at the time the statement was made (e.g. the victim was frightened, distraught, crying, shaking, hyperventilating, etc.). This evidence is particularly valuable if the victim later recants or is unavailable.

The victim should be asked to describe both the actions and statements of the suspect in the course of the incident and whether there were any additional witnesses to the event. Where possible, the report should include the suspect's exact words in quotation marks. The following information should be obtained: a description of how the injuries were

received, the manner in which the weapons were used and how damage to or disarray within a dwelling occurred.

In describing threats where there is no resulting injury, the officer should be particularly careful to establish the nature of the threat and what led up to it. It is not adequate to state simply that the victim was threatened. The officer must ascertain details such as what words were used, what physical acts accompanied the threats, how long the threats continued, whether and how a weapon was involved and any other details which will help the prosecutor – and ultimately the jury – assess the severity of the threat. Careful documentation of such details can be the difference between a misdemeanor charge (such as disorderly conduct or assault five) and a felony charge (such as terroristic threats or assault two).

The officer should question the victim about any history of violence in the relationship and whether an OFP or NCO is in effect. Prior incidents should be described because they may be admissible as § 634.20 evidence to show a pattern of abuse even if no prior police reports were made. The police officer will gather information regarding any previous incidents, such as: names of any witnesses, location (i.e. what police jurisdiction), whether police were called, and whether they know of any previous girlfriends who may have been abused. This information helps when tracking down prior police reports and misdemeanor records. Ultimately, the prosecutor will use the information when determining which charges to file.

The law does not require officers to record a victim's statement, but this is a best practice and potentially dramatic evidence at trial in the event of recantation. The officer should notify the victim that she is being recorded. It is also best practice to obtain names, addresses, and phone numbers of the victim's family, friends, or advocate as contacts for later follow-up. Domestic abuse victims may be difficult to locate for trial, because they are fleeing their abuser or are refusing to cooperate. Physical contact within 24-72 hours after the incident assures victims that the prosecutor is there for them and willing to assist.

Officers should ***not*** ask victims if they are willing to press charges or testify in court. Such questions may be construed by victims to mean that the decision and responsibility is theirs – and to suspects that they can undo prosecution by getting the victim to change her mind. The decision to press charges is the prosecutor's alone and will be based on an assessment of the evidence as a whole, whether or not the victim is ultimately cooperative. If victims understand that the charging decision is up to the prosecutor, they can communicate that to the abuser and thus remove the incentive for abusers to pressure victims to "drop the charges."

c. Victim injuries. The patrol officer should note and describe any visible injuries as well as complaints of pain in any area, even if the injury is not visible. Frequently, bruising becomes apparent only later and contemporaneous notation of pain can be excellent corroborative evidence. Obtain from the victim a complete explanation of how the injury was inflicted. Even medically minor injuries (such as faint finger impressions on the victim's neck) can be extremely important from a legal standpoint. Whenever possible, injuries should be documented using photographs. Photos taken shortly after the incident will often show redness but not bruising. However, even minor visible injuries should be photographed on the day of the incident to make clear that they are the source of more visible later bruising. When injuries are visible but cannot be photographed, they should be specifically described in the original report. Sequence photography, a day or two later, can be an extremely useful addition to a department's domestic abuse protocol because later photos often more clearly show the severity of the injury and any resulting disfigurement. Assault five, for example, can become a Felony Assault Three if a few days later the injury looks like substantial (but temporary) disfigurement. Also note any defensive wounds (e.g., cuts on the hand or arm defending against a knife).

A domestic abuse victim should always be asked to sign a medical release immediately when medical attention is sought. Responding officers should routinely have medical release forms available for this purpose. (The printed original report forms in some departments include a medical release signature line.)

d. Victim demeanor and appearance. The patrol officer should note and document the demeanor of the victim. This can be used to corroborate the victim's statements if the victim's demeanor is consistent with suffering a trauma, being terrorized, etc. The description should not be merely conclusory, e.g., the victim was upset. The factual basis for the conclusion should be provided, e.g., she was crying, shaking, and having difficulty regaining her composure. The report should also include details of the victim's appearance which relate to the allegations. Evidence that clothing is torn, hair disheveled, etc. should be noted. When appropriate, such evidence should be seized.

e. Suspect statements. In addition to documenting the suspect's statements as reported by the victim, officers should carefully note (using quotation marks) any spontaneous remarks made by the suspect in their presence which reflect his attitude or culpability ("The bitch deserved it!"). Sometimes the most incriminating evidence against a suspect is a statement he believes to be exculpatory. An explanation which contradicts physical evidence and defies common sense can be as good as a confession. It is not necessary to advise a suspect of his Miranda rights unless he is in custody. Spontaneous statements, not in response to interrogation, are admissible regardless of custody status. If the suspect is interrogated in a custodial setting, the interrogation must be recorded

whenever possible (recognizing that this may not be feasible in the field). *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

Frequently in domestic abuse cases, the defendant will threaten the victim in front of police, and make threatening comments about the victim in the squad car on the way to jail. Where these statements are spontaneous (not in response to questions from the officers), *Scales* does not apply. Transporting officers and jailers should make their own reports about the defendant's statements, quoting exactly what the defendant said ("that bitch is going to pay," etc.). Officers sometimes erroneously assume that because, they did not advise the defendant of his rights or record the statement, that it is "illegal" and therefore do not note it in a report. The chief investigating officer should always check with transporting officers and jailers about the existence of such statements. When in doubt, it is better to have the officer report the statement and include a note about how they came to know of it rather than not report the statement.

f. Suspect injuries. The presence – or absence – of injuries on the suspect should also be noted in the report and photographed. The officer should be looking for injuries sustained as a result of assaulting another (e.g., abrasions on the knuckles) and any injuries that appear to have been inflicted upon the suspect by another person. If the officer detects either of these types of injuries, the suspect should be asked about how the injury was received. It can be equally important to note in the report that the suspect has no injuries. This may aid in defeating a later claim of self–defense.

g. Suspect demeanor. The officer should note the demeanor of the suspect (e.g., hostile, angry, threatening) including any facts which support that conclusion (e.g., the subject yelled at officers, demanded they leave, used profanity, etc.). Any threats made in the officer's presence, whether directed at the victim, an officer or any other person should be noted verbatim. Such conduct can form the basis for a separate terroristic threats conviction even if at victim later recants the earlier domestic abuse. The officer should also note whether the suspect appears to be under the influence of alcohol or drugs.

h. Physical evidence. All physical evidence that appears relevant to the domestic abuse incident should be seized and inventoried. Any weapon or object used as a weapon should ***always*** be seized. Only the object itself can adequately convey the danger the object may have presented and the fear the victim felt when threatened or harmed with the object. The exact location where the evidence was found should be documented. Whenever possible, the evidence should be photographed in the location found before it is seized. Officers should be trained to observe any other physical evidence which may help establish that there was a struggle, such as dents or blood spatter on a wall, furniture tipped over, broken phones, other damaged property, and torn clothing. It is not uncommon for a phone

to be damaged when a victim attempts to call for assistance. If the telephone is damaged, it should be seized, particularly if the damage is visible. This also holds true for any other object which, although not used as a weapon, is found under circumstances that help establish what happened in the incident, e.g., a radio or similar item smashed apart or damaged in a way that tends to establish that a violent struggle occurred. If there is evidence of a struggle, scene photos should be taken.

i. Witness statements. All witnesses at the scene should be questioned. This includes children, neighbors, and friends of the family of the defendant. Obtaining each of these statements at the scene helps to establish the facts and reduces the chance of surprises later. Any other witnesses not available at the scene should be identified by name and notation should be made regarding their date of birth and an address and phone number for follow-up investigation. When collecting witness statements, it is also important to note the location of any children who were present during the incident, and what they saw, heard, and were doing at the time. This may serve later as the basis for an aggravated sentence. *See Chapter 10.C, C below*. If children were present, it may prove beneficial to have an interviewer who is specially trained in interviewing children.

When determining which witnesses to interview, it is important to take a broad view of the scene. Neighbors especially may have heard something and be willing to talk about it, but may not come forward unless asked. Also important to interview are friends and coworkers of the suspect and the victim. Finally, these witnesses may also provide the basis for an upward departure. *See Chapter 10.C C below* for a more complete discussion on upward departures and the factors which can lead to an upward departure.

j. Medical treatment. Patrol officers should document any medical treatment given to the victim of which they have knowledge. Any first aid administered, transport to a hospital or doctor, or a statement of intent to obtain treatment should all be noted. Medical reports, including a victim's statements to medical personnel, can even be used to shore up the resolve of a victim who later wavers on the brink of recantation. A department protocol in which the victim's medical release is routinely and immediately obtained goes a long way toward minimizing problems later. However, it is not enough to simply obtain the release. Officers need to quickly follow-up with the treatment provider to get a copy of the victim's medical records. Speed is essential because the victims in domestic abuse situations frequently recant and withdraw their consent. The victim withdrawing her consent to the release of medical records prevents officers from obtaining them, but does not prevent prosecutors from using them if they have already been obtained.

k. Notification of domestic abuse victim rights and services available. Minn. Stat. §§ 611A.02 and 629.341 require the officer taking a domestic abuse report from a victim to notify the victim of specific rights and local shelters and advocacy services available to them. This contact benefits a criminal prosecution because it provides an additional means of later contact with a victim. Additionally, connecting a victim with advocacy services provides important support to the victim.

In times of crisis, victims may need help finding safe shelter, childcare, a change in employment, and obtaining an OFP. Advocates can assist with these inquiries. Investigation and prosecution in general will benefit from a good working relationship with advocates.

Because victims speak to victim advocates in confidence, advocates often know more about the abuse than anyone in the criminal justice system. Staff at battered women's shelters often takes photos of injuries, but these are not released without the victim's consent. If a victim has used advocacy services in the past, the investigator may obtain consent from the victim to obtain information from the victim advocate.

2. Follow-up Investigation

a. Follow-up interview of the victim. The most important witness in a domestic abuse case is the victim. A follow-up investigative interview of the victim should always be done at the earliest opportunity. Expediency at this stage will make recantation less likely and will provide the clearest picture of the incident because the victim's memory is still fresh. The victim should be asked precisely how her injuries occurred, what the suspect said and did, how she felt during the incident, and whether there were any eye or ear witnesses to the assault. This evidence may be used as corroboration of an excited utterance at the scene even if the victim later recants. This is also the best opportunity to obtain details concerning the suspect's prior abuse of the victim (including witnesses to and medical records for those incidents and whether any of these incidents were reported to other law enforcement agencies) as well as the suspects history of abuse of others (such as others in the family or prior girlfriends). Since misdemeanor records do not necessarily show up on BCA record checks, this is often the best way to obtain a lead on police records from other jurisdictions. The latter may be admissible as history of the relationship or *Spreigl* evidence. (*See Chapter 8.D*, *below*) The victim also frequently knows if the suspect has prior convictions or if an OFP is in effect or was previously in effect. If medical attention was sought, the victim should be asked to sign a release for every medical provider seen, if they have not already. The victim should also be asked if the suspect has any firearms and their location and whether the firearm was used in any way in connection to this assault or any other assault. *See* Minn. Stat. § 609.2242, subd. 3.

The law does not require peace officers to record a victim's statement, but this is a useful practice. These recordings should be inventoried and retained until after the trial. If a victim recants at trial, an audio or video recording provides compelling evidence of the victim's story immediately after the assault. The investigator should also ask for confidential contacts to pass on to the prosecutor for reaching the victim in the future (including whether the victim is staying at or has stayed at a shelter in the past or is working with an advocate).

b. Follow-up photos. The severity of the injury, such as bruising, will often not be evident the same day an incident occurs. In many cases, it is helpful to obtain follow-up photographs a day or two after the incident when discoloration will be more evident. The suspect's booking photo may also be useful.

NOTE: A common error with the use of automatic focus cameras is taking photos of the injuries closer than the limits of the camera's range. It is important that each officer receive training on the use of cameras.

c. Follow-up interview of the defendant. Follow-up custodial interviews of a defendant require that the defendant be Mirandized and must be recorded. *Scales, supra*. Non-custodial interviews have neither requirement. However, even when the setting is not custodial, it can be helpful to record the interview. This allows the jury to see and hear the defendant directly and removes any argument that the investigator misconstrued or fabricated the defendant's statements or was coercive.

During an interview, even if the suspect does not confess, the investigator should establish as many of the basic facts as possible such as: admission of presence at the crime scene at the time of the assault; what exculpatory claim the suspect is making (such as self-defense, accident or that the injuries were self-inflicted or inflicted at another time) and, if so, what objective evidence supports or contradicts this claim; admission of presence of anyone other than the suspect and victim at the scene; admission of facts constituting domestic relationship (e.g., that he resided with the victim or that they have a child in common); timeline of events according to suspect; suspect's version of when, where and how any injury to the victim occurred; who else might have seen victim's injury if it supposedly occurred prior to the arrest incident; admission that suspect was not afraid of the victim; where, when and how any injury occurred to suspect; admission that suspect was aware of OFP against him; whether suspect has any weapons, particularly firearms, and the location of the weapons; and whether any drugs or alcohol were consumed by either party and how much.

d. Other witnesses. Witnesses who were not present at the time the patrol officers were at the scene should be located and interviewed. This should be done as soon as possible after the incident in order to limit the possibility of communication between the suspect and the witness. Persons who have knowledge of past abuse or any facts relevant to any defense asserted should also be identified and interviewed.

e. Medical records. Any time a victim has received medical attention as a result of physical abuse, records should be obtained. These records may show broken bones or other injury that might support a higher level of prosecution. They also frequently contain statements by the victim admissible as statements for purposes of medical diagnosis. Minn. R. Evid. 803(4). The victim should also be asked about any prior incidents of abuse that resulted in seeking medical care, and a release for those records should also be requested.

Medical records may only be obtained if the victim (or a parent on behalf of a minor victim) signs a medical release, and the medical witness may testify only if the victim waives medical privilege. Minn. Stat. § 595.02, subd. 1 (d) and (g). A separate release is needed for each medical provider and, in many jurisdictions, for paramedic service providers as well. Because ambulance personnel are often the first to respond to the scene, they often hear excited utterances from the victim. The paramedics may also have heard the defendant say something. Although statements made for the purpose of medical treatment are generally covered by the medical privilege, many statements made by the victim and defendant in the presence of the ambulance personnel may not be covered by the privilege. It is important to identify the emergency medical team and document anything they might have heard. As noted previously, it is important to get these documents as early as reasonably possible in case the victim withdraws her consent to their release.

f. 911 recordings. 911 calls should be routinely retained in every charged domestic abuse case. In some jurisdictions, the investigator automatically orders a copy of the call in every charged case. In others, it is up to the prosecutor to request the call be copied. Most departments retain the master recording for at least thirty days which is generally sufficient to give prosecutors an opportunity to review non-custody cases and order copies of the 911 call as needed. The potential value of these recordings should not be underestimated. The calls often paint a graphic picture of an incident and frequently contain excited utterances of the victim, witness or even the suspect which are admissible hearsay. The recording may also help identify a previously unknown witness who should be interviewed. Additionally, the Supreme Court has ruled unequivocally that these recordings are admissible as non-testimonial statements. *Davis v. Washington*, 547 U.S. 813 (2006).

g. Prior domestic reports. Police reports of previous domestic incidents involving the parties - or the suspect and past domestic partners - should be obtained. These frequently will be of use to the investigator making his assessment of a case. They may also be useful in interviewing witnesses who have knowledge of the history of the relationship. Finally, they help put the incident in context and may be admissible evidence at any trial on charges arising out of the current incident. This evidence may be admissible under Minn. Stat. § 634.20 and/or pursuant to Minn. R. Evid. 404(b). (*See Chapter 8.D, below*)

h. Victim's family, friends and co-workers. Victims should always be asked for the names of family, friends, and co-workers to serve as contact people. Often, these people will also have witnessed past acts of domestic abuse against the victim, seen the victim's injuries, or heard the victim recount past abuse. All of this serves to corroborate the victim's story and helps future prosecution.

i. Probation officer. If the defendant is currently or was previously on probation, the probation officer may be an excellent source of information. Probation files often have a complete record of the defendant's past offenses, including the police report for those offenses. In many cases, the defendant's booking photo will serve as the only record of defendant's demeanor and injury (if any).

j. Physical evidence. The follow-up investigation may reveal additional physical evidence not noted at the time of the original report or only later available (such as x-rays). All physical evidence should be property inventoried with chain of custody noted. Later crime laboratory analysis (such as DNA or fingerprint) may be appropriate in some circumstances. Juries like to see physical evidence such as weapons and torn or bloody clothing. Note that under the Minnesota Conference of Chief Judges Potentially Hazardous Exhibit Procedures (effective 1/1/04, as modified 2/20/04); there are specific packaging requirements for this evidence to be admitted in court. All biohazard evidence must be contained in heat-sealed plastic bags. See the Supplements for an example of Potentially Hazardous Exhibit Procedures.

k. Recorded communications from the defendant. Defendants often call from jail, or send notes or cards, to apologize or threaten victims. Communications between the defendant and victim after the incident are well worth monitoring. Voicemail of a defendant's "sweet talk" or threats to a victim may contain direct evidence of the crime charged or constitute an additional chargeable offense and may be admissible under Minn. Stat. § 634.20. In the event the victim is intimidated into not appearing for trial, such recordings may also provide a basis for admitting the hearsay of an unavailable witness under the theory of forfeiture by wrongdoing. *See Chapter 8.C.4 below* for a complete discussion on Forfeiture.

Jails should have procedures in place to help identify who made the call. The victim can also identify the voice (or, if victim is reluctant or recanting, often other family members or friends can do so). Victims may also have saved messages of defendants' prior threats. When searching for these calls, begin by searching on the suspect's personal identification number (PIN), but also search on the victim's phone number, in case the suspect switched PINs, made a three-way call, or had someone else call on his behalf.

l. Phone records. There are two methods of determining the origination of a phone call if the victim is cooperating: the *57 method and the "trap and trace" method. The "trap and trace" method requires that the customer keep a log of incoming calls. The *57 method is much quicker and easier, where that service is available.

Pressing *57 immediately after a phone call and following the recorded instructions will result in the phone company computers showing where the call came from. The customers are usually charged a fee, but the phone company may credit the customer the money if an investigation is started. The information about where the call originated from is not shared with the customer but is available to local law enforcement through administrative subpoenas.

Long distance calls are traceable if *57 service is available at every point the call "touched down" as it transferred across the country. Many cellular phone calls and calls coming from a main "trunk" line where the caller had to dial 9 to get out are not traceable to a specific extension. Although the phone company may not be able to pinpoint a specific extension in a trunk line, many businesses have phone systems that keep records of every call made in the entire system. Therefore, if the call traces back to a business, always check with the business itself about the capabilities of its phone system. Caller ID also provides an excellent record of defendant's attempts to contact the victim. Photos can be taken of the caller ID box's list of incoming calls.

G. GONE ON ARRIVALS

Research has shown that the most dangerous domestic violence situation is where the suspect has fled before officers arrive. Therefore, in addition to the initial investigation procedures included in this manual, responding officers should also obtain the following information when the suspect has already left the scene:

- Suspect's name, date of birth, and physical description, including clothing
- Suspect's direction and mode of travel upon leaving the premises
- Description of the suspect's vehicle, if applicable

- Where the suspect might have gone
- Where the suspect stays when not with the victim
- Whether the suspect has ever interfered with the victim's attempts to seek help, especially from police

Responding officers should also take the following actions:

- Search for the suspect on the premises, in the immediate area, and in the direction and area where the suspect might have fled.
- Check with the data channel for other addresses where the suspect might be located. Issue a squad pick-up.
- Encourage the victim to call 911 if the suspect returns.
- Provide information to the victim about restraining orders, the right to request that the prosecutor file a criminal complaint, advocacy services, and shelter.
- Offer to transport the victim or arrange for transport to shelter or another safe place if needed.
- Provide whatever assistance is reasonable to help the victim to secure broken doors or windows.
- Remain at the scene until the officer believes the likelihood of further violence has been eliminated.
- After leaving the scene, drive by the residence over the next few hours and return to look for the suspect as time and call load permit.
- Prior to clearing the scene, ensure that the victim receives information about victim advocacy services, orders for protection, and the right to request criminal charges.
- Make a connection between the victim and local advocacy services.

H. CRIMINAL HISTORY

In domestic violence cases, there is often a documented history of violence between the parties or against other victims that will greatly aid the prosecution of the case. This record is also relevant to bail setting. The paper trail includes:

1. Local Criminal Court Documents and MNCIS

Check the county where the charged crime occurred as well as any other jurisdiction where the suspect is known to have lived and where the victim reports other abuse took place. In addition, perform a search on both the suspect and victim in MNCIS to determine whether there are any previous records involving either party. Tracking misdemeanor and gross misdemeanor convictions of qualified domestic violence related offenses ("QDVROs") may allow the offense charged to be enhanced to a higher level. A long history of arrests, even if convictions do not result, and/or bench warrants are important factors in any bail determination.

2. BCA Criminal History

The Bureau of Criminal Apprehension maintains a statewide computer database of felony criminal convictions. Fifth degree assaults, domestic assaults and violations of OFPs or HROs are "targeted misdemeanors" for which the BCA requires fingerprinting in connection with arrest and should therefore also be in the data base. Minn. Stat. § 299C.10. Even if the BCA database shows an arrest without disposition, it is a useful clue to other jurisdictions in which a defendant was active in which court records may be checked.

3. NCIC Criminal History

The FBI provides the national criminal history database known as the National Crime Information System. Only felony-level crimes are reported to NCIC. The court of each county in which the defendant is known to have resided should be checked directly for other possible criminal convictions not reported to NCIC (especially for QDVRO-like offenses from other jurisdictions which may enhance a Minnesota charge).

4. Booking Records

The jail maintains separate records of its bookings, which may be a longer list than is found at the local courthouse. In addition, the booking sheet will often note if the suspect was booked for a warrant from another county or state – another place to check the suspect's criminal history.

5. Police Reports

There will often be a police report of domestic violence even if the suspect was gone on arrival and never arrested or questioned. Every city in which the suspect and victim lived can be checked for police reports containing the suspect's name or the victim's name (or the name of other victims, if known).

6. Protective Orders

Some of the best documentation of past abuse can be found in the petitioner's affidavit in support of an order for protection or harassment restraining order. District court records should always be checked for both criminal cases and civil cases involving orders for protection, harassment restraining orders, Domestic Abuse No Contact Orders and family court cases involving the suspect and the victim or past known victims. Furthermore, these documents can establish the "family or household member" element of the crime if the victim is unavailable. Finally, the victim's statements in documents can also help answer questions in the lethality assessment and can be used as § 634.20 or relationship evidence. *See Chapter 8.D.2 below*.

Orders for Protection are currently accessible from all counties in Minnesota through the Minnesota OFP computer database and from other states through the NCIC system. In order to be in the NCIC database, the OFP must be verifiable 24/7 by a telephone contact which dispatchers can access. However, the courts are currently in the process of updating their systems and in the near future, all OFPs will be in MNCIS.

NOTE: Just because an order is not entered into the Minnesota OFP database or the NCIC system does not mean that it is invalid. Federal law ***requires*** that local officers enforce all active OFPs in their jurisdiction, regardless of service or jurisdiction where it was issued. 18 U.S.C. § 2265(a) (2006).

7. Driver's License Records

A Minnesota driver's license record check may assist in documenting a history of chemical abuse (DWI-related arrests). The record also notes the county in which each traffic offense occurred, so it provides another indication of where the suspect may have lived in order to check criminal, OFP or family court cases.

I. SPECIAL CONSIDERATIONS FOR HIGH-PROFILE SITUATIONS

Rightly or wrongly, certain types of domestic violence situations garner more attention and/or place more stress on a police department.

When responding to a call involving a high-profile individual, such as an elected official, sports figure, entertainment personality, peace officer, or family member or close friend of an officer, officers should call their supervisor and request the supervisor's presence on the scene. The department's public information officer should also be notified to prepare him or her for the possibility of inquiries from the press. Additionally, the responding officers, and the department as a whole, should take extra precautions to ensure the victim's information is not disclosed unless the victim specifically gives her or his written approval.

Cases involving police and military members have other considerations. Both professions are generally held in high regard. Additionally, members of both professions generally have a higher level of hand-to-hand combat training than the average citizen. Their additional training makes any abuse they deliver potentially more lethal, because they have been trained to inflict the most damage with the least energy expended.

Moreover, even if the suspect does not know the investigating officer, they work in a similar capacity, which could engender sympathy for the suspect. For this reason, as well as the increased media scrutiny which accompanies peace officers investigating one of their own, many departments have adopted or are in the process of adopting a special procedure, such as the one included in the St. Paul Blueprint, for these situations.[10]

In the event the suspect is a peace officer, the responding officers should contact their supervisor immediately after securing the safety of everyone at the scene. In the event the suspect is a police chief, the responding officers should summon the assistant chief to the scene. Additionally, the responding officers, under the direction of their supervisor, should obtain the suspect's badge number, and if possible, the suspect's service weapon.

[10] The St. Paul Blueprint and an example procedure for high profile situations can be accessed at: http://stpaulblueprintspip.org/.

3 CHARGING CONSIDERATIONS

A. GENERAL GUIDELINES

1. *Written Plan Required.*

All county and city attorney offices are required to have a written plan for domestic abuse cases which addresses early assignment of trial prosecutor, early contact between the victim and the prosecutor, procedures to coordinate with any advocate involved, methods to identify and gather evidence to enhance prosecution when a victim is reluctant to testify, law enforcement training and office policy on the use of subpoenas on domestic abuse victims. Minn. Stat. § 611A.0311, subd. 2.

2. *General Factors.*

At all stages of the case, the prosecutor should consider victim safety before taking any action.

There are many things to consider when deciding what, if any, charges to file. At each point of intervention in the criminal justice system, including charging, practitioners should document and be attentive the context and severity of the violence and adjust the response in each case based on the level of risk and dangerousness.

When considering what to charge, it may be helpful to look to the supplemental tables for this section. They include a list of common, relevant offenses, QDVROs, and what certain actions could be charged as. If two or more statutes are appropriate crimes to charge, the prosecutor may elect to charge the crime with the least number of or simplest elements to prove. However, multiple counts may be appropriate if there are alternate theories a jury might use to find the defendant guilty or if another charge carries a heavier potential sentence or a longer period of probation. The prosecutor should also consider whether the case may warrant an aggravated sentence. *See Chapter 10.C below*. The Supplements also contain a table of important considerations to consider when deciding if and what to charge.

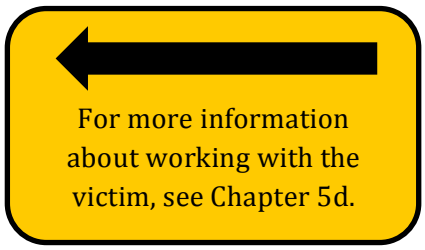
Office policies differ regarding charging. Some offices require that the prosecutor determine that there is a fifty-percent or greater chance of a conviction after a jury trial before charging or pursuing a case. Some offices have a policy of charging the highest level offense supported by probable cause while other offices charge the offense which appears, at the time of charging, to be the appropriate plea count even though the evidence might support a higher charge. When this latter approach is used, it is usually with the expectation that the trial prosecutor will amend up in the event of trial. Some offices charge

multiple counts covering the range of conduct encompassed in the offense. Of course, additional evidence obtained after the case is charged may also result in an amendment to a higher or lower charge. *See* Minn. R. Crim. Pro. 17.05 (Amendments).

Multiple offenses may be charged in separate counts for a single behavioral incident. Because most cases entering the criminal justice system are cases of systematic abuse, all charges supported by the evidence should be filed. The exception to this guideline would be if filing all available charges would be counter to victim safety. However, if found guilty of multiple counts, a defendant may generally only be sentenced on the most serious offense for a single behavioral incident. There are exceptions to this general rule: If the conduct involves more than one victim, the defendant may receive a separate sentence for each victim. In addition, if any of the counts involves kidnapping, burglary, or Criminal Sexual Conduct 1 to 4 with force or violence, the defendant may be sentenced on those offenses as well as the underlying offense. Minn. Stat. § 609.035, subds. 1, 6.

Whether to charge is a decision solely for the prosecutor based on a professional assessment of all these factors and should never be contingent upon victim cooperation. For victim and community safety, it is important to convey the message to a domestic abuser that it is the prosecutor, and only the prosecutor, who can begin or end a criminal case. Furthermore, it is important to combat the perception that the victim is the one "pressing charges" because in Minnesota, unlike some other jurisdictions, it is not possible for a victim to pursue a criminal complaint against the abuser if police or the prosecutor decline to proceed.

In some jurisdictions, prosecutors identify the victim in complaints only by initials (sometimes including date of birth) and as "a known adult female," or in some other general way. (This is an even more widespread practice if the victim is a child or a sexual assault victim.) This affords the victim some privacy and may provide some protection to victims from retaliation by people who side with the defendant. The downside is that in later domestic violence prosecutions it may be somewhat more difficult to identify the earlier victim in order to prove the prior offense involved a domestic relationship for enhancement purposes or to prove past similar conduct, either pursuant to Minn. Stat. § 634.20 or as a *Spreigl* offense. If the victim is not named in the complaint, the probable cause portion of the complaint should always spell out the domestic relationship.



3. Rapid Charging

Speed when filing charges in domestic violence cases is important. Studies have indicated that gone on arrival suspects are the most likely to revictimize. When the defendant is in custody, this presents no problem. However, issues arise when the defendant is gone on arrival. In those situations it is important to have a policy in place where local law enforcement notifies the prosecutor's office promptly about any domestic gone on arrival calls from the previous evening. Upon notification, if necessary, prosecutors should then make every effort to file charges against the gone on arrival defendant. Additionally, it is important for a prosecutor to file a complaint warrant to get the abuser to appear in court. Rationales which can be used to argue for the issuance of the warrant include that it is necessary to address victim and public safety as well as set release conditions.

4. Probation Revocation as an Alternative

When a potential defendant is already on probation, it may be in the prosecutor and victim's best interests to conduct a probation revocation hearing before the new charges have been completely litigated.

When a domestic abuse defendant is already on probation, the prosecutor may consider pursuing a probation revocation instead of, prior to or in addition to issuing a new charge. This approach may be simpler and preferable if, for example, the new offense is relatively minor and the judge who has the defendant on probation has made clear that any violation will lead to execution of the prior sentence. Additionally, some research suggests that the swift and sure imposition of consequences is a more effective deterrent than the severity of the punishment.

It is possible for a prosecutor to pursue a probation revocation, even in the absence of a cooperating probation officer. Minnesota Rule of Criminal Procedure 27.04 only lays out the procedure for probation revocation hearings, but it does not place limits on who may initiate a probation violation proceeding.

The sentencing judge has discretion to determine whether a probation revocation hearing can take place before resolution of any underlying new criminal charge. Minn. R. Crim. P. 27.04, subd. 2(4) ("the court may postpone the revocation hearing pending disposition of the criminal case") (emphasis added); *State v. Phabsomphou*, 530 N.W.2d 876 (Minn. Ct. App. 1995), *rev. denied* (Minn. June 29, 1995) (district court need not postpone a probation revocation hearing pending resolution of criminal charges that form basis for the probation revocation). The actual terms of probation may determine whether a probation violation can be pursued. Some judges have a condition of "no arrests," while others say "no new convictions" or "no violation of the no contact order."

When appearing at a probation revocation hearing, it is important to convince the judge of the importance of the revocation as opposed to simply allowing the new charges to be dealt with separately. Research has shown that swift and sure consequences (revocation as opposed to waiting for a new trial) are the most effective deterrent. Additionally, a revocation hearing allows the prosecutor to have the victim testify under oath and subject to cross-examination shortly after the event. This allows the victim's testimony to be preserved for trial and used in the event the victim later recants. Finally, prosecutors can argue to the judge that the new incident calls for revocation because it is a violation of the terms set at the end of the previous case, which is independent of any new case which may or may not arise.

NOTE: The practice of pursuing a probation revocation before or instead of a new charge is open to debate. Some prosecutors believe that the decision to proceed on a probation revocation is properly left to the probation officer. Others believe that any provable new charge should be prosecuted regardless of the existence of a possible probation revocation. Virtually all would agree that if the new offense is more serious than the probationary offense, it should be charged. Regardless of the prosecutor's view, it is within the discretion of the court to postpone probation revocation pending outcome of the new charge, notwithstanding the law cited above.

Because the rules of evidence do not apply at a probation revocation hearing (Minn. R. Evid. 1101 (b)(3)), a prosecutor could theoretically prove the case without a victim by having the officers testify as to what the victim said at the crime scene. This has been explicitly extended by Minnesota Courts to allow the receipt of hearsay testimony at probation revocation hearings. *State v. Johnson*, 679 N.W.2d 169 (Minn. Ct. App. 2004). But, many judges continue to impose the rules of evidence on probation revocation proceedings because they feel that the defendant has a constitutional right to confrontation, especially when the revocation consequences are severe. However, the Supreme Court has held that the confrontation clause does not apply in parole revocation hearings. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Several circuits have relied on *Morrissey* to hold that the Confrontation Clause also does not apply to probation-revocation hearings. *See, e.g.*, *United States v. Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005); *United States v. Kirby*, 418 F.3d 621, 627-628 (6th Cir. 2005); *United States v. Hall*, 419 F.3d 980, 985-6 (9th Cir. 2005); *United States v. Aspinall*, 389 F.3d 332, 342-43 (2nd Cir. 2004); *United States v. Martin*, 382 F.3d 840, 844 n. 4 (8th Cir. 2004). While Minnesota courts have yet to rule on this issue, the Court of Appeals has indicated that it would likely follow the circuit courts in refusing to extend the confrontation clause to probation revocation hearings. *State v. Behrends*, A10-908 (Feb. 8, 2011) (UNPUBLISHED) ("We see no reason to follow a course rejected by [the circuits], but we need not decide the constitutional issue here.").

The benefits of proceeding on a probation revocation immediately, instead of awaiting the outcome of any new charge, include:

1) The standard of proof for a probation violation is clear and convincing evidence, Minn. R. Crim. P. 27.04, subd. 3(3), while a new charge requires proof beyond a reasonable doubt;
2) The Rules of Evidence do not apply to a probation revocation proceeding. Minn. R. Evid. 1101(b)(3) (rules inapplicable);
3) There is no jury in a probation revocation proceeding;
4) The original sentencing judge is more invested in the case and has a greater awareness of the defendant's history than a judge on a new charge; and
5) A violation hearing is more expeditious than a trial (an in-custody defendant has a right to a hearing within 7 days and a hearing is shorter than a trial).

5. Charging Other Crimes.

Taking a global view of domestic abuse and not limiting charging considerations to assault even if that is how the police initially characterize the offense is essential. Looking more broadly at the facts presented, including seeing where the facts presented are incomplete and requesting further investigation to develop them further, may suggest other, particularly felony, options. For example, misdemeanor assault converts to burglary in the first degree if the assailant entered the home in violation of an OFP and assaulted the victim therein; a pattern of stalking a victim in connection with misdemeanor violation of an OFP, assault or trespass may elevate the offense into pattern of harassing conduct, a Level 5 ten-year felony; the "fear" type of assault, if more facts are articulated, may become terroristic threats (threatening a crime of violence in reckless disregard of the risk of causing terror in another); medical records and/or sequence photos may demonstrate that the harm inflicted has reached the felony threshold. Additionally, consider charges stemming from conduct by the defendant after law enforcement arrived on the scene, regardless of who this conduct was directed at. When considering charging other crimes, it is also important to consider whether an upward departure would be appropriate. These are discussed in more detail in Chapter 10.C, *below*.

6. City and County Jurisdiction: Working Together to Identify Felony Domestics.

In Minnesota, the county attorney has exclusive jurisdiction over felonies, but city attorneys may prosecute misdemeanors and gross misdemeanors. Two statutes cover whether the city or county will have jurisdiction over a specific crime. Minn. Stat. § 388.051; Minn. Stat. § 484.87. Exactly which crimes fall under county jurisdiction and which crimes will fall under city jurisdiction varies depending upon the city and county in which they occur.

Domestic abuse, perhaps more than most other kinds of crimes, is often initially reported as a misdemeanor but, when all relevant facts are known, may be prosecutable as a felony. Many times, however, the case has already been presented to a city attorney. It is critically important, therefore, that city prosecutors screen these cases for felony potential at the time presented. In addition to being alert to facts in the offense which could potentially elevate the charge, the city prosecutor is uniquely well-situated to access misdemeanor court records to determine whether the defendant has predicate QDVRO convictions which can enhance the offense charged and to spot potential felony enhancements as soon as possible.

Since QDVRO offenses include targeted misdemeanors in the BCA database, law enforcement should provide this initial record check whenever a domestic abuse case is presented for charging to either a city or county attorney. This should at least provide a good starting point for identifying which court jurisdictions need to be contacted for further detail. Priority should be given to identifying enhanceable offenses as soon as possible so that the case does not languish through an extended charge, dismissal, and recharge process. A good county-wide working relationship between city and county attorneys and with all law enforcement agencies in the county combined with a uniform, express commitment to identifying and expediting domestic abuse cases which should be prosecuted at the felony level will greatly enhance a county's response to domestic violence.

B. CRIME-SPECIFIC CONSIDERATIONS

1. Intent

Specific (Particular) Intent: Requires a specific state of mind.

General Intent: Simply prohibits a person from intentionally engaging in the prohibited conduct, no state of mind is required.

Very generally, there are two types of crimes: "Specific Intent" and "General Intent" crimes. "Specific Intent" crimes are also sometimes referred to as "particular intent." Either way, these types of crimes require "intent to cause a particular result" and "the most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (citations omitted). The phrase "with intent to" is often used by the Legislature to express the "Specific Intent" requirement. *State v. Mullen*, 577 N.W.2d 505, 510 (Minn. 1998). Conversely, "General Intent" crimes lack the phrase "with intent to" in their statutory language. Instead, "General Intent" crimes stem from

statutes which prohibit "a person from intentionally engaging in the prohibited conduct." *Fleck*, 810 N.W.2d at 308.

When considering what to charge, it is important to carefully read the statutes which supply the basis for the charge. This is especially true in instances where the defendant may be raising an intoxication defense. In the event that intoxication or other lack of intent defense is anticipated or likely, it is advisable to charge a "General Intent" crime as well as a "Specific Intent" crime, if possible. More information relating to how to address an intoxication defense is included in Chapter 8 – Handling the Defense Case.

2. Assault

Assault is:

1) An act done with intent to cause fear in another of immediate bodily harm or death; **OR**
2) The intentional infliction of or attempt to inflict bodily harm on another.

Minn. Stat. § 609.02, subd. 10

The same underlying definition of assault applies whether a misdemeanor, gross misdemeanor or felony-level assault is charged. Minn. Stat. § 609.02, subd. 10, provides that assault may be either (1) an act done with intent to cause fear in another of immediate bodily harm or death or (2) the intentional infliction of or attempt to inflict bodily harm upon another. The next two paragraphs provide a general overview of intent. Sub-Section 1, above, provides a more complete discussion of intent.

The "fear" type of assault does not require that the defendant actually intended to harm the victim, only that the defendant intended to cause fear of harm. See CRIMJIG 13.01 (Assault-Defined). This type of assault is a specific intent crime. Intent may be proved circumstantially: pointing a gun at a person has been held to supply the requisite intent to cause fear. *State v. Patton*, 414 N.W.2d 572, 574 (Minn. Ct. App. 1987). Such conduct may be charged either as Second Degree Assault or Fifth Degree Assault. *State v. Ott*, 189 N.W.2d 377 (Minn. 1971). In either case, the jury would be read the fear prong of the assault definition. The jury may take the fact of intoxication into consideration in determining whether the defendant could formulate the requisite intent. See, Minn. Stat. § 609.075 (intoxication as defense). *State v. Fleck*, 810 N.W.2d 303 (Minn. 2012).

The "harm" type of assault is a general intent crime; i.e., the defendant must intentionally inflict or attempt to inflict bodily harm. There is no need to prove intent to inflict a specific degree of bodily harm. *State v. Gorman*, 532 N.W.2d 229 (Minn. Ct. App. 1995). Voluntary intoxication is not a defense to a general intent crime. *State v. Fortman*, 474 N.W.2d 401

(Minn. Ct. App. 1991); *State v. Lindahl*, 309 N.W.2d 763 (Minn. 1981). Whether this type of assault is charged as a misdemeanor, gross misdemeanor or felony, the jury must be instructed on the applicable assault definition(s) in CRIMJIG 13.01. *State v. Charles*, 634 N.W.2d 425 (Minn. Ct. App. 2001) (felony murder conviction reversed because trial court failed to instruct on the intent element of the underlying assault). The instruction is particularly critical when, as in *Charles*, the defense is accidental infliction of bodily harm.

If the case proceeds to trial and the evidence supports both theories of assault, charge assault/fear and assault/harm as separate counts. This emphasizes for juries the difference between the two types of assault and requires them to go through separate decision-making processes to reach a decision. For either type of assault, no physical contact is necessary with the body of the person assaulted. CRIMJIG 13.02 (Assault-Physical Contact Unnecessary).

Domestic assault may be prosecuted through Minn. Stat. § 609.224 (fifth-degree assault) and/or Minn. Stat. § 609.2242 (domestic assault). Although charging an assault under the domestic assault statute adds the additional element of "family or household member" to the state's burden, a domestic assault conviction has greater consequences for sentencing requirements. The following chart illustrates the differences:

Fifth-degree Assault 609.224	**Domestic Assault 609.2242**
Do not have to prove relationship	Must prove relationship as an element
Conviction may enhance a later charge for 10 years for the same victim and 3 years for any other victim	Conviction may enhance a later charge for 10 years for any victim
May be no presentence investigation	Presentence investigation mandated by Minn. Stat. § 609.2244
Counseling may not be ordered	Counseling almost always ordered
No mandatory minimum sentence	Gross misdemeanor mandatory minimum sentence of 20 days; felony, 45 days under Minn. Stat. § 609.2243
Firearm ban only if included as part of specific sentence	Federal firearm ban for life; State pistol ban for at least 3 years

Because of the additional penalties associated with domestic assault, prosecutors should always file a charge as a domestic assault, unless they believe they will be unable to fulfill the relationship element. Additional considerations when discussing plea differences between fifth-degree assault and domestic assault are included in Chapter 5A.

Because both of these offenses are enhanceable, a misdemeanor fifth-degree or domestic assault with no visible injury can be a gross misdemeanor or a felony if the perpetrator has the appropriate predicate QDVRO convictions within the requisite time period. It, therefore, becomes particularly important to expend the extra effort to determine final disposition of any misdemeanor arrest for these offenses.

3. Enhanceable Offenses

When considering which charges to file, a complete criminal history is important. In certain situations, even juvenile adjudications may serve as QDVROs. For more information, see the enhancements chart included in the supplements. *See Chapter 3 Supplements, page 15.*

4. Stalking

> Stalking means to engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim, regardless of the relationship between the actor and victim.
>
> Minn. Stat. § 609.749

The Minnesota stalking law is codified in Minn. Stat. § 609.749. The Minnesota stalking law received significant updates during the 2010 session. These updates included removing all language relating to harassment. This was done because of certain misconceptions which had emerged in minds related to differences in conduct between harassment and stalking.

Under § 609.749 subd. 1b (a), any stalking crime may be prosecuted in any county where any part of the act occurs. Moreover, under § 609.749 subd. 1b(b) if the stalking conduct is a phone call or electronic message, it may be prosecuted in the county where the call was received, made, or, if made from wireless technology or cell phone, in the county were the stalker or victim resides. Therefore, in certain situations, there may be up to four counties where the charges could be filed.

When charging stalking cases, it is especially important to get a pre-trial DANCO, NCO or OFP. Not only will these orders potentially provide greater victim safety, they may also provide for additional charges if violated. Also, when charging stalking cases, keep in mind potential federal charges as well. 18 U.S.C. § 2261A. In this age of easy travel across state lines, it is easier than ever for an individual to be stalked across state lines.

5. Strangulation

> Strangulation means intentionally impeding normal breathing or circulation or the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.
>
> Minn. Stat. § 609.2247

Strangulation qualifies as a "Specific Intent" crime and is more difficult to prosecute than assault because in addition to proving assault, prosecutors also need to prove a qualifying 518B relationship and that the strangulation occurred. Minn. Stat. § 609.2247. However, this difficulty should not turn prosecutors off to charging strangulation. Instead, prosecutors should charge assault as well. This approach will undermine a common defense of admitting to the underlying assault but denying the intent behind the strangulation. Additional information relating to strangulation is included in the Supplements, Chapter 5.F: Special Preparation for Strangulation Cases *below*, and Chapter 9.D.2: Claim of Lack of Intent: Strangulation *below*.

6. Terroristic Threats

> One who threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or in reckless disregard of the risk of causing such terror is guilty of terroristic threats.
>
> Minn. Stat. § 609.713, subd. 1.

The word "terrorize" in the terroristic threats statute (Minn. Stat. § 609.713) means, "to cause extreme fear by use of violence or threats." *Sykes v. State*, 578 N.W.2d 807, 811 (Minn. Ct. App. 1998). In the domestic violence context, a charge of terroristic threats is most commonly proven by proving that the defendant threatened violence to the victim. This only requires a showing of general intent. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. Ct. App. 2009). However, Minnesota courts have held that transitory anger without requisite intent may not be punishable under Minn. Stat. § 609.713. *In re Welfare of M.J.S.* C3-00-76, *2 (Minn. Ct. App. July 25, 2000) *See also State v. Jones*, 451 N.W.2d 55, 63 (Minn. Ct. App. 1990). Threats punishable under the terroristic threats statute "may be physical acts or words; the critical question is whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Tellinghuisen*, A11-993, *5 (Minn. Ct. App. May 7, 2012) (citing *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996). When considering charging terroristic threats, it can be helpful to ask yourself: what crime of violence was threatened? *See* Minn. Stat. 609.1095, subd. 1(d).

4 EARLY APPEARANCES

A. FIRST APPEARANCE

1. *Bail*

All criminal offenses in Minnesota are bailable. Bail may not be excessive and cannot be used as a punishment. What is reasonable bail in a particular case depends on the facts of the case and the defendant's past record, including any record of failing to comply with court orders or to appear in court as directed.

Minn. Stat. § 629.72 (Bail) governs the setting of bail specifically in cases of domestic abuse, harassment, violation of an OFP or violation of a domestic abuse no contact order. The prosecutor is required to present to the judge information from the victim or the victim's family about the alleged crime. *Id.*, subd. 2. In determining release status, the judge shall review the facts of the arrest and determine whether:

1) release of the person poses a threat to the alleged victim, another family or household member or public safety; **or**
2) there is a substantial likelihood the person will fail to appear at later proceedings.

Id. These criteria are broader than the general bail criteria for other offenses which focus solely on whether release will be inimical to public safety or will not reasonably assure reappearance. *See* Minn. R. Crim. P. 6.02, subd. 1. Bail evaluation in domestic abuse cases should include an assessment of lethality.

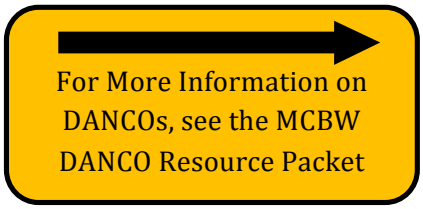
Minn. Stat. § 629.72, subd. 2(b) expressly provides that the court may impose both bail and conditions of release. If the defendant is released (with or without bail), it is crucial in domestic abuse cases that conditions of release be set.

2. *Domestic Abuse No Contact Orders (DANCOs)*

The DANCO is a prosecutorial tool to limit contact between the victim and defendant during the pendency of a criminal trial in order to protect the victim from abuse and to prevent witness tampering.

A domestic abuse no contact order (DANCO) is a stand-alone criminal court order that may be issued in a domestic abuse related criminal case prohibiting the defendant from contacting specific individuals. Minn. Stat. § 629.75. Requesting a DANCO is a prosecutorial tool that serves to protect the victim, witnesses and the judicial proceedings. A DANCO may be issued without the consent of the victim and stays in effect even if the victim has recanted because of outside pressure. Given the broad protections afforded by DANCOs,

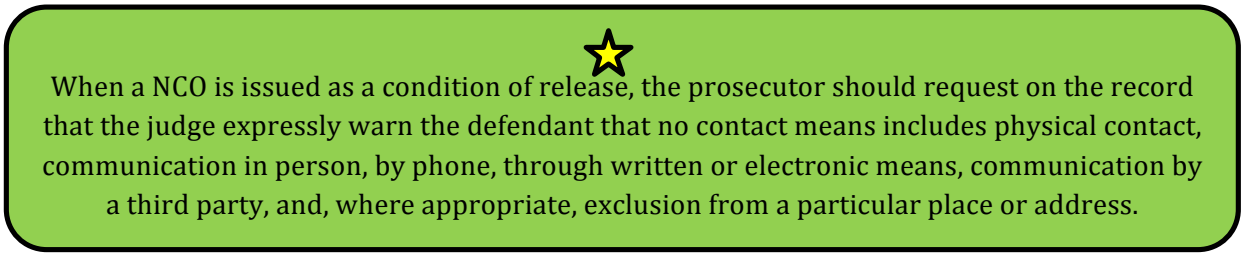
issuance is limited and only available if the underlying criminal proceeding is for domestic abuse, stalking committed against a family or household member, violation of an OFP or violation of a pre-trial DANCO. Unlike an ordinary no-contact order, the violation of a DANCO is a QDVRO which may serve to enhance future domestic crimes – and may be enhanced in turn from a misdemeanor up to a felony based on prior QDVROs.



A DANCO may be issued as a pre-trial order or as a post-conviction probationary order.

Pre-trial, the prosecutor can request a DANCO after an arraignment or a proceeding where the pre-trial conditions are decided. The intention of the legislature in drafting the "separate proceeding" language into subdivision 1 (c) was to emphasize that courts can issue a DANCO in a separate proceeding immediately following any proceeding pertaining to pretrial release or sentencing. Operationally, the DANCO is distinct and independent of conditions of release. Unlike conditions of release, DANCOs are entered into the database system and broadcast to law enforcement and copied to the victim. DANCOs apply regardless of the defendant's incarceration status and law enforcement can arrest a defendant for violating a DANCO, whereas, law enforcement officers do not have the authority to arrest a person for violating a condition of release.

3. No Contact Orders (NCOs)



Perhaps the most common condition of release set in domestic abuse cases is a court order that the defendant has no contact with the victim. To avoid ambiguity (and the temptation many defendants have to exploit loopholes), it is helpful to have the prosecutor request on the record that the judge expressly warn the defendant that no contact includes physical contact, communication in person, by phone, through written or electronic means (such as by e-mail), communication by a third party, and (where appropriate) exclusion from a particular place or address (such as home, work, or school). Many jurisdictions have no

contact order forms which are filled out ahead of time and signed by the judge in court in the defendant's presence, with a copy handed to him on the spot. Copies should also be forwarded to the victim and to local law enforcement.

An emerging issue involves judges requiring the victim's full name and address to be included on the NCO provided to the defendant. While this generally is not a problem as the defendant usually knows this information, issues can arise in certain, limited circumstances. For instance, the defendant may not know the victim's full name or address, the victim may have relocated to an address not known by the defendant, or the victim may be a minor. In those situations, some prosecutors have found success in having an off-the-record hearing with the judge and completing an NCO containing only the information the defendant knows. This approach protects the victim by not giving the defendant any new information about the victim as well as protecting the victim's confidentiality when the victim is a minor. However, issues can arise when an NCO is completed without the victim's address and the defendant later unknowingly goes near the victim's residence. In those situations, it would be difficult to prosecute the defendant for a known violation of the NCO because he was unaware the victim was living in that vicinity. Therefore, each office should adopt a policy about how to proceed when the defendant does not know certain information about the victim.

Many jails have some ability to monitor the calls that defendants make, or to block outgoing calls to particular numbers. Prosecutors should acquaint themselves with the capabilities of the local jail and request that the victim's number be blocked if that is possible. In addition, prosecutors could request that the jail not admit the victim as a visitor for the defendant if the judge has issued an NCO on the theory that a jail should not facilitate disobeying a court order.

NCOs orders are difficult to enforce if they are difficult to verify. An oral order is essentially unverifiable. A written order on file in the court alone is cumbersome to verify and only verifiable during court hours. It is recommended that city and county attorneys coordinate efforts to make copies of these orders available to and verifiable 24/7 by their own local law enforcement agencies. Some jurisdictions do this by keeping them on file with a central dispatcher. However, this system will only work if pretrial orders are vacated and removed from these files when they are no longer in effect. A pretrial order is only valid until further order of the court or final disposition of the case (sentencing or dismissal). Because this end date cannot be known with certainty at the time the order is issued, any jurisdiction attempting a 24/7 verification system must make sure the system put in place purges expired orders. Victims should be provided with copies of the order to carry with them at all times.

At sentencing, a separate probationary NCO may be issued. This copy of this order may also be forwarded to law enforcement to maintain on file. This order, however, should contain the period of probation as the end date of the order, and probationary orders can therefore automatically be purged.

4. Orders for Protection (OFPs)

An OFP issued in a Criminal Proceeding under Minn. Stat. § 629.72, subd. 2(d) expires at the conclusion of the criminal proceeding. Even if one is issued as a condition of release, it is advisable for the victim to seek a civil OFP under Minn. Stat. § 518B.01, subd. 6

Generally, victims who desire orders for protection must go through a separate civil process to request an OFP. However, Minn. Stat. § 629.72, subd. 2(d) provides that if a judge imposes a condition of no contact as part of the defendant's release conditions, the judge may also issue a temporary OFP under Minn. Stat. § 518B.01, subd. 7 at the same criminal court appearance. This order can be issued on a motion from the prosecutor, a request from the victim, or on the court's own motion. The OFP is valid until the defendant is convicted or acquitted or the charge is dismissed. *Id.*

Although statutorily permitted, many jurisdictions disfavor this approach because the criminal court is not the preferred venue for dealing with issues other than no contact (such as child support and visitation) and because the OFP issued under the authority of Minn. Stat. § 629.72 ends upon conviction, acquittal or dismissal thus providing no extended protection. An OFP obtained in civil court in the usual manner may be issued for two years or longer. Minn. Stat. § 518B.01, subd. 6. In addition, a 2004 amendment to this section allows for extension of the OFP when a convicted criminal defendant is released from incarceration or on supervised release.

If an OFP is issued, it would then be on file and accessible statewide through the OFP computer database thus facilitating enforcement. In addition, any violation of an OFP is new and enhanceable crime.

An ex parte Order for Protection requires a petition and affidavit detailing the circumstances from which relief is sought. Minn. Stat. § 518B.01, subd. 4. The victim could prepare this petition through the normal procedure and the prosecutor could present it to the court. The statute does not specify who must sign the affidavit. The prosecutor could also make an affidavit detailing the charging of the criminal case and the underlying allegations to present to the court and have a proposed order for protection available for the court's signature.

5. Other Conditions of Release

Minn. Stat. § 629.72, subd. 2 (b) expressly authorizes the following additional conditions of release in harassment and domestic abuse-related cases:

1) Enjoining the defendant from further domestic abuse or harassment against the alleged victim;
2) Prohibiting the defendant from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, directly or indirectly;
3) Directing the defendant to stay away from the alleged victim's home or any other location the alleged victim is likely to be;
4) Prohibiting the defendant from possessing a firearm or other weapon specified by the court;
5) Prohibiting the defendant from possessing or consuming alcohol or controlled substances; and
6) Specifying any other matter required to protect the safety of the alleged victim and to ensure the appearance of the defendant at later proceedings.

It is also good practice for prosecutors to ask for the defendant to be required to surrender all firearms. Minn. Stat. § 629.715.

6. Working with the Victim at the First Appearance

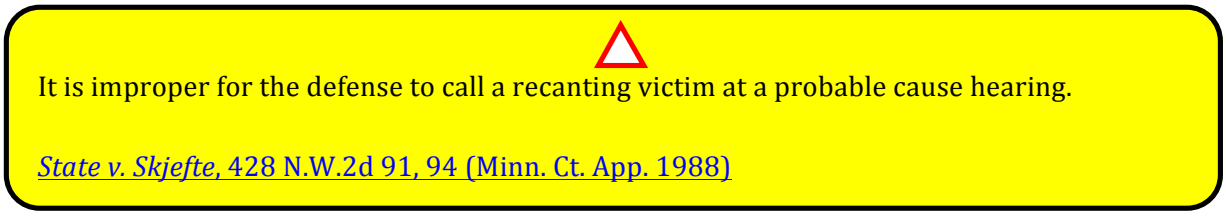
Victims may appear at arraignment recanting their original report of assault or attempting to get the defendant released from custody. The prosecutor must present the victim's account of the alleged crime to the court when making the bail argument, but the victim has no right to address the court directly. Minn. Stat. § 629.72, subd. 2(a). If there is a recantation, the prosecutor may be obligated to acknowledge this but should always include a summary of the facts from the original report, including any corroboration of what the victim said then, and ask the court to make an independent assessment of all facts and circumstances in setting bail.

Some judges want a recanting victim to give sworn testimony. The defense will want this as potential sworn impeachment if the victim later cooperates with the prosecution at trial. This should be strenuously resisted by the prosecutor. This is not the appropriate time for an evidentiary hearing. Any recantation should be heard only at trial when both sides will have full opportunity to explore all the circumstances of the alleged crime as well as whatever pressures may have been brought to bear on the victim. The defendant is only allowed to call witnesses at the bail hearing following a persuasive offer of proof that the witness' testimony will lead either to release without bail or a reduction in the bail amount to a level that would result in the defendant's release. *State v. LeDoux*, 770 N.W.2d 504

(Minn. 2009). Because of the inherently suspect nature of a recantation in a domestic violence situation, it is highly unlikely that a victim's recantation would meet the *LeDoux* requirements.

If the victim is not present at first appearance, the prosecutor should notify the victim of bail, custody status and any conditions of release.

B. PROBABLE CAUSE HEARINGS



A probable cause determination may be made on the basis of the entire record, including reliable hearsay. *State v. Rud*, 359 N.W.2d 573, 577 (Minn. 1984); *State v. Florence*, 239 N.W.2d 892 (Minn. 1976). Typically, prosecutors simply provide the complaint with sworn probable cause statement by the investigator (with or without police reports) and call no witnesses to testify at the probable cause hearing. Usually, the defense also submits the matter on the record at this stage. Even if the defendant provides witness testimony, however, the prosecutor is not required to provide rebuttal testimony. *Rud*, 359 N.W.2d at 577.

In the case of a recanting domestic abuse victim, defense counsel may seek to call the victim as a witness at the probable cause hearing. Recantations of domestic abuse victims are inherently suspect. Our courts have held the defense shall not call a recanting victim at a probable cause hearing. *State v. Skjefte*, 428 N.W.2d 91, 94 (Minn. Ct. App. 1988), *rev. denied* (Minn. 1998) (defendant improperly called victim as exonerating witness at probable cause hearing where recantation was made, inter alia, in response to pressure); *Rud, supra* at 578-79 (defense cannot call witness at omnibus hearing for discovery purpose or victim as exonerating witness without persuasive proof offer that victim's testimony will lead to dismissal).

In general, the State must give notice of its intent to seek an aggravated sentence (i.e., upward departure) at least seven days before the omnibus hearing. Minn. R. Crim. P. 7.03. *See Chapter 10.C, below* for more information on upward departures. Any upward departure must be supported by facts found by the jury. *Blakely v. Washington*, 542 U.S. 296 (2004). *See also State v. Rourke*, 773 N.W.2d 913, 921 (Minn. 2009)

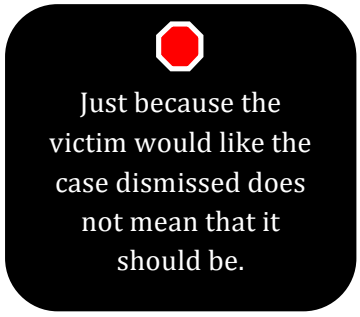
5 PREPARING FOR TRIAL

A. DIVERSION; PLEA BARGAINS

1. *General Considerations*

Negotiate a disposition which will contribute to protecting victims of domestic abuse from future violence and deterring abusers from committing violent acts against both this victim and other persons.

Prosecutors are required to make reasonable and good faith efforts to notify victims of any pretrial diversion or any proposed plea agreements in domestic abuse cases. Minn. Stat. § 611A.031 (victim input regarding pretrial diversion); Minn. Stat. § 611A.03 (notification of plea agreements). Prosecutors must communicate to the court any objections to the plea agreement by the victim. *Id*. Many prosecutors' offices, as a matter of policy, do not allow diversion in domestic abuse cases.



Many considerations enter into plea negotiating in a domestic abuse case. Prosecutors are required to consider the victim's express wishes (and to notify the victim of her right to express them orally or in writing to the judge herself or, in her absence, to inform the judge accordingly) but are not bound by them. Minn. Stat. § 611A.03; § 611A.037. The prosecutor does not represent the victim, but a primary concern of the prosecutor in domestic abuse cases should always be the protection of the victim. Domestic abuse is criminally prosecuted in order to send a message to abusers, victims, and the community at large that it is a crime and will not be tolerated. The sanction must hold the defendant criminally accountable but should also be designed to deter future acts of domestic violence. The prosecutor must also weigh community safety. Plea bargains and sentences should take into account the severity and context of the violence and reflect the circumstances of the offense, the danger the defendant poses and the safety needs of the victim.

Crafting a sentence that balances all these factors is greatly aided by a good presentence investigation and report to the court (PSI). Presentence investigations are required whenever a defendant is arrested for domestic abuse (as defined in Minn. Stat. § 518B.01, subd. 2) and convicted of one of these offenses or another offense arising out of the same circumstances or is convicted of violation of an OFP or HRO or harassing phone calls against a family or household member. Minn. Stat. § 609.2244 (presentence domestic abuse investigations). Thus, a plea to a different charge (such as disorderly conduct) will not eliminate the need for a PSI. The PSI must include recommendations on:

1) Any limitations on contact with the victim and other measures to ensure victim safety;
2) Domestic abuse counseling or other programming;
3) Chemical dependency evaluation and treatment whenever drugs or alcohol were found to be a contributing factor;
4) Other appropriate remedial action; and
5) Consequences for failure to abide by these conditions

Id. While prosecutors most commonly negotiate limitations on jail or prison time, plea negotiations should also consider these factors, especially when it is anticipated that the defendant will be on probation. Prosecutors should be wary, however, of assuming the role of treatment evaluators and stipulating to a particular counseling program for a defendant.

Many prosecutors feel that it is important even at the misdemeanor or gross misdemeanor level that a defendant in a domestic abuse case serves some jail time to make clear to the defendant that this is a crime and that it has a penal consequence. A defendant should not get the message that if he talks the talk in court nothing will happen – especially when this is precisely the type of defendant who has so much potential for continuing control and manipulation of the victim. For repeat domestic assault, the statute itself provides a mandatory minimum sentence (gross misdemeanor, 20 days; felony, 45 days), albeit with loopholes. Minn. Stat. § 609.2243.

While not always possible, at the felony level, especially when the defendant has no prior convictions, it may be desirable to give a defendant a chance to succeed under strict conditions of probation supervision rather than immediate commitment to prison, especially where this is the strongly expressed wish of the victim. This is frequently done by allowing a plea to a lesser felony offense with a presumptive probationary disposition under the Minnesota Sentencing Guidelines (such as third-degree assault or terroristic threats instead of second-degree assault) but may also be accomplished by a joint recommendation to a downward dispositional departure from an offense for which the sentence is presumptively executed. The prosecutor may insist on a plea to the highest level offense charged even if there is agreement on probation in order to have a long term "or else" in the event of future violation. If victim safety can adequately be monitored and it genuinely appears that the defendant is amenable to probation and, therefore, that it is in the long term best interests of the victim and family, a probationary disposition may still be appropriate. Whenever there is a downward dispositional departure, the court must state the grounds for departure (usually amenability to treatment) on the record. In some cases, because of problems of proof (including victim recantation), a negotiated plea to a lesser offense is better, from the prosecution and community safety viewpoint, than the risk of

acquittal or trial with a non-cooperative victim. From a defendant's perspective, the negotiated settlement gives him a chance to turn his life around and avoid the risk of being convicted of a greater offense.

The bottom line is to negotiate a disposition which will contribute to protecting victims of domestic abuse from future violence and deterring abusers from committing violent acts against both this victim and other persons.

Finally, when considering what plea bargain to make, make sure to consider effects on future charges. Because enhanceable offenses are listed by statute number, even if a conviction on a non-enhanceable offense requires meeting the elements of an enhanceable offense, unless the conviction also includes the enhanceable offense, it is not enhanceable. For example, a conviction or plea to Burglary-Assault (Minn. Stat. § 609.582, subd. 1(c)) does not qualify as an enhanceable offense, even if it was charged in conjunction with domestic assault. So, if possible, any deal with an enhanceable Offense and a non-enhanceable Offense should include the enhanceable offense in the final plea agreement.

2. Collateral Consequences

Because of the professional licensing requirements, firearm restrictions, and deportation consequences of a domestic assault conviction, prosecutors are under increasing pressure to offer pleas to non-deportable offenses. There is no requirement for prosecutors to take collateral consequences into account, or even inform the defendant of them when negotiating a plea. However, there is a requirement for defense attorneys to inform their clients of collateral immigration consequences of a plea or conviction. *See*, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (defense counsel's failure to inform the client of potential deportation for guilty plea amounted to ineffective assistance of counsel); *Campos v. State*, A10-1395 (Minn. June 20, 2012) (*Padilla* does not apply retroactively); *Sames v. State*, 805 N.W.2d 565 (Minn. 2011) (*Padilla* does not extend to firearm rights). Because of this requirement on defense attorneys, they may use these collateral consequences as a negotiating tool with prosecutors to try and get a better deal for their client.

3. Accepting a Plea

Minnesota Rule of Criminal Procedure 15 governs the procedures surrounding taking a guilty plea. Following the 2012 amendments to the Rules of Criminal Procedure, Felony cases are covered by Rule 15.1, while Gross Misdemeanor and Misdemeanor cases are covered by rules 15.2 and 15.3. The Supplements contain copies of example plea petitions contained in the Minnesota Rules of Criminal Procedure. While use of these forms is encouraged, it is not required. *See Perkins v. State*, 559 N.W.2d 678, 686 (Minn. 1997).

When accepting a plea in open court, the prosecutor should make every attempt to make the defendant's statements a narrative of the facts. The more the defendant tells what happened in a narrative, the more useful the plea agreement will be in prosecuting any future instances of domestic abuse.

B. SETTING A TRIAL DATE; CONTINUANCES; SPEEDY TRIAL

Set a trial date as soon as possible in domestic violence cases and make every effort to reduce or minimize continuances. The longer a trial is delayed, the less likely it results in a conviction.

Except where the defendant is in custody (and sometimes even then), it is virtually always in the defendant's interest to set the trial date as far in the future as possible. The chance of the victim recanting or failing to appear increases dramatically as the shock of the assault wears off and the defendant has an opportunity to reconcile with or threaten or instill guilt in the victim or the victim is in prolonged economic straits because of lack of the defendant's financial support or because the victim is simply ready to move on. The longer before the case is called, the more likely that the State will be simply unable to locate the victim or another key witness.

Domestic assault cases have docket priority after cases where the defendant is in custody and child abuse cases. Minn. Stat. § 630.36, subd. 1(4) (order of calendar). An in-custody misdemeanor trial must take place within 10 days of the speedy trial demand. Minn. R. Crim. P. 6.06. In other cases, the defendant and the prosecutor have the right to demand a trial within 60 days. Minn. R. Crim. P. 11.09. The victim has the right to request that the prosecutor make such a demand. Minn. Stat. § 611A.033 (speedy trial). The prosecutor should aggressively use and make the court aware of these rules and statutes to bring the matter to trial as soon as possible and resist, or at least minimize, defense continuances.

C. WITNESS LIST; SUBPOENAS

1. Victim Safety

Generally, the prosecutor is required to disclose the names and addresses of any witnesses the prosecutor intends to call at trial, or even of all people who might have information relating to the case. Minn. R. Crim. P. 9.01, subd. 1. Generally speaking, it is possible for a prosecutor to negotiate with the defense about what information is actually necessary for the defendant to prepare an adequate defense, if there are concerns about revealing names and addresses to the defense. As a last resort, a prosecutor may file a certificate with the court. If the prosecutor files a written certificate with the trial court that disclosure of the witnesses and persons may endanger the investigation or subject the people to harm, the

court may rule the information non-discoverable. *Id.*, subd. 3.

2. Subpoenas

It is recommended that prosecutors have all civilian witnesses personally served with a subpoena if there is any doubt about the witness appearing, particularly victims. This makes it clear to the victim and defendant that the prosecution of the case does not turn on the input of the victim and thus helps take the pressure off the victim. Victims are often difficult to find. It may be helpful to serve a victim at a meeting between prosecutor and victim or at a court appearance. If the victim is present at a pretrial hearing, the prosecutor may also request that the court expressly order the victim to appear on the trial date. The prosecutor may also request that the court require the victim to sign a promise to appear, or recognize, under Minn. Stat. § 629.54.

3. Requiring the Victim to Recognize; Bond; Contempt

This is an extreme step and the prosecution should consider the impact this action will have on a victim-witness before proceeding.

When a person charged with a criminal offense is admitted to bail or held in custody, the judge may also bind by recognizance any material witness. If the court is satisfied that there is good reason to believe a witness will not appear unless some security is given, the court may order a recognizance bond for the witness's appearance. Minn. Stat. § 629.54. In unusual circumstances, this may be an appropriate action for a prosecutor to take in a domestic abuse case. An order for recognizance is usually sought upon affidavit of the prosecutor indicating why the witness is material and the grounds for believing the witness will not appear in response to a subpoena (such as failure to appear on the trial date despite a subpoena, failure to make earlier appearances or other evasive action). The order may state a time and place when the witness must appear and that, if the witness fails to appear, a warrant will issue for his or her arrest. Failure to comply with such an order may be chargeable as contempt of court, a misdemeanor. Minn. Stat. § 588.20.

D. Working with Victims

Prosecutors should meet with the victim early and often to explain the status of the case, what comes next, and respond to victim concerns. These meetings may make the difference between a cooperative witness and a recanting witness.

Prosecutors are required to make every reasonable effort to notify victim of domestic assault of the decision to decline criminal prosecution or dismiss a criminal charge. Minn.

Stat. § 611A.0315, subd. 1. If the defendant is in custody, the notification attempt must be made prior to the suspect's release. *Id.* The prosecutor must make a record of the reasons for dismissal, including the specific reason a witness is unavailable. *Id.*
Prosecutors should meet with victims as early as possible in the process to inform the victim about the criminal justice system, the use of subpoenas, the victim's role as a witness, and the victim services that are available. Minn. Stat. § 611A.0311, subd. 2.

In offices with in-house victim-witness assistants, much of this function is often delegated to these assistants who work for and are arms of the prosecution - with the caveat that these assistants are not lawyers and cannot give legal advice. However, by handling non-legal informational and support functions, assistants can free up prosecutors to focus what is too often limited time on the evidence and legal issues when meeting with the victim. The witness assistant can help victims understand the system and formulate realistic expectations as well as help with emergencies and/or make appropriate referrals. However, victim contact with an In-House Advocate should not replace direct contact between a prosecutor and the victim.

Prosecutors should also coordinate prosecution efforts with those of victim advocates from independent agencies working with the victim outside the county attorney's office. *Id.* (*See* Section E *below*).

Early and regular contact between a prosecutor (or victim-witness assistants) and the victim often makes the difference between a victim who will testify and one who becomes reluctant or unavailable. By cooperating with the criminal justice system, victims are taking a huge risk – both emotionally and with their physical safety – and they deserve to know the people they are depending upon. Some victims will still recant, but if a victim meets the prosecutor face-to-face and sees that the prosecutor is respectful, honest and concerned for the victim's welfare, the likelihood of recantation will greatly diminish.

For members of certain potentially disenfranchised groups such as rural and immigrant/refugee battered women, African-American, Native American, Latina and Latino, Asian Pacific Islander, and victims from gay/lesbian/bi-sexual/transgender communities, it is a daunting prospect to trust "the system." Prosecutors should be sensitive to special situations, such as the rural victim who is miles from help, or a lesbian victim who are not comfortable being "out," or the victim who is in the country illegally.[11] Witness assistants and advocates can help with this as well.

[11] Such victims may petition under the Violence Against Women Act to remain in the United States legally and/or may seek a U visa (for persons aiding prosecution). See, 8 U.S.C. § 1101 (a)(15)(U). For more information, contact the Immigrant Law Center at (651) 291-0110/ (800) 223-1368.

In meeting with a victim, the prosecutor should define the prosecutorial role carefully and stress that the prosecutor represents the state, not the victim. The prosecutor should be frank and realistic about the strengths and weaknesses of the case while emphasizing the benefits of prosecution. The prosecutor cannot guarantee results, such as conviction, victim safety or a "cured" perpetrator but can show genuine interest and honestly convey that he or she takes these concerns seriously. The prosecutor should stress that while victim input is important, it is not determinative. This has the side benefit of allowing the victim to tell the defendant that the case is "out of her hands."

In some jurisdictions, prosecutors may meet with the victims prior to actual charging (although this is a luxury most offices cannot imagine). There are pluses and minuses to this approach. On the one hand, discussing the case face-to-face with a prosecutor allows the victim to understand the charging decision more fully (particularly if the case is declined); it may also allow the victim to convey the seriousness of the situation to the prosecutor better than any paper report ever could and frequently results in additional pertinent information that was not included in the report. Perhaps most significantly, it permits the prosecutor to make a face-to-face assessment of the victim's likely credibility at trial which, particularly in a one-on-one unwitnessed case, can persuade a prosecutor to take a chance on charging a close case. On the negative side, few prosecutors have the time and resources to do this – especially since such interviews must be witnessed and documented for disclosure purposes.

A new phenomenon is victims retaining an attorney and then refusing to cooperate. There are two situations where this may occur, when the victim retains a defense attorney or a divorce attorney. The defense attorney presents a difficult situation because they will usually refuse to allow prosecutors to contact the victim and claim the victim is no longer willing to cooperate for Fifth Amendment reasons, but fail to elaborate, even if there are no current charges pending against the victim. Prosecutors should consult their office policy on how to contact the victim in the event they have hired an attorney.

Generally speaking, victims who contact a divorce attorney and then either recant or refuse to aid the prosecution are married to licensed professionals who would have the license impacted by a domestic violence conviction. Because of the strong financial implications which may exist if the abuser is convicted, it may be difficult to get the victim to cooperate with the prosecution. However, the other attorney is usually less opposed to having the victim meet with the prosecutor than the defense attorney.

E. WORKING WITH ADVOCATES

1. *In-House Advocates vs. Community Based Advocates*

Within the current system for handling domestic violence cases in Minnesota, there are two types of advocates: in-house advocates and community based advocates. For the purposes of this manual, in-house advocates are advocates who are employed by the prosecutor's office to provide services to the victim and community based advocates are those who have no official ties to the prosecutor's office. Because of the significant differences in working with each group, they are each discussed below.

The situation becomes more complicated in offices which contract out the in-house advocate role. This is a more common situation in smaller offices which do not have the budget or case-load for a full-time in-house advocate. In those situations, it is important to know whether the advocate, or the group the advocate works for, is currently under contract as an in-house advocate.

2. *In-House Advocates*

Communications between a victim and In-House Advocate are not privileged. In-House Advocates should avoid receiving factual information from victims. Prosecutors should fight defense requests to disclose In-House Advocate notes or having the In-House Advocate testify.

An office's In-House Advocate provides an invaluable asset in a domestic violence prosecution. These advocates are intimately familiar with the inner workings of the court system and the process of a case. Additionally, these advocates are generally more familiar with the prosecutor handling the case. This familiarity will hopefully facilitate a more comfortable atmosphere when meeting with the prosecutor.

In-House Advocates also have some drawbacks. Primary among these is the lack of confidentiality between the victim and the in-house advocate. This lack of confidentiality stems from the close relationship between the prosecutor and the in-house advocate should be made clear to the victim from the very beginning of any prosecution.

Defense attorneys will sometimes request or demand the notes and testimony of the in-house advocate. This can usually be avoided if the In-House Advocate is trained to not get any facts from the victim. If the defense persists in its request, the prosecutor should fight it as strenuously as possible. If the Court appears likely to grant the request, the

prosecutor should then request to provide the Court with the materials for an *in camera* review before it decides what materials to release to the defense.

3. Community Based Advocates

Community based advocates are an important ally for any prosecutor. Even before an incident of domestic violence occurs, it is important for a prosecutor to establish relationships with several different advocacy groups which operate in the area. It is important to remember when working with a community based advocate that they cannot share anything the victim has told them without the victim's permission. Much like attorney-client privilege, the communications between a victim and community based advocate are protected by a privilege which belongs to the victim.

Expect that community based advocates may work with women who have been charged with crimes. Many battered women get arrested and/or charged with crimes while responding to an ongoing assailant or defending themselves. Sometimes they commit acts of violence that are not defensive (by a legal definition) but a reaction to prior victimization. Community based advocates must evaluate the context in which women are acting out with violence. Prosecutors should expect that community based advocates work with charged women on occasion and afford them the same respect they would show to defense counsel. Additionally, even when working with women who were victims of crimes, advocates may be supporting women who do not favor prosecution for one reason or another.

F. Special Preparation for Strangulation Cases

1. Situations Where There is Visible Evidence of Strangulation

Visible evidence of strangulation can be some of the most powerful evidence available to a prosecutor in a strangulation case. However, only about 15% of strangulation cases have photographs which can be used at trial. Of the other 85% of cases, police report no visible injuries in about 50% of cases and injuries too minor to photograph in the remaining approximately 35% of cases. When photographs are available, it would be beneficial for the prosecutor to bring in an expert to testify about the underlying strangulation facts, discussed further below, as well as what caused the wounds in the photographs. The testimony about what caused the injuries would be especially powerful because it would give the jury a better picture about what exactly caused the injury.

2. Situations Where There is no Visible Evidence of Strangulation

Of the two types of strangulation cases, these are the more difficult, and more common, to prosecute. These cases will generally lack the powerful photographic evidence of strangulation that cases with visible evidence will have. If there is photographic evidence of other abuse, it is especially important for the prosecutor to get those photographs admitted. These other photographs show the jury that while there may not be photographic evidence of the strangulation, there is still evidence of the other abuse. Additionally, when visual evidence of strangulation is lacking, a medical expert is incredibly important. This expert will be able to explain to the jury why there is no visible evidence of strangulation.

3. Medical Experts

In addition to a domestic abuse expert, prosecutors should strongly consider bringing in a medical expert in strangulation cases. Medical expert preparation will be largely identical to preparing a domestic abuse expert, except as it relates to subject matter. Unlike domestic abuse experts, medical experts are allowed to testify about the specific case on trial, as opposed to simply general information about the subject matter of the case. *See*, *State v. Mitchell*, 163 N.W.2d 310 (Minn. 1969). The general information about strangulation it would be useful for a medical expert to testify to is contained in the supplements to this chapter.

G. THE PROSECUTOR AS WITNESS: HOW TO AVOID

During every contact with a witness, especially a victim, the prosecutor must be cognizant of the potential for becoming a witness. *See*, *State v. Thompson*, 520 N.W.2d 468, 471 (Minn. Ct. App. 1994), rev. denied (Minn. Oct.27, 1994) (prosecutor removed from case because of her involvement with victim's recantation). Whenever possible, the prosecutor should have an investigator or witness assistant present and have the investigator prepare a statement for disclosure to the defense of any new facts that are revealed (such as a victim recantation). If having an investigator present is not possible, the prosecutor should attempt to find another individual to sit in on the meeting if the prosecutor is the least bit unsure of what the victim is going to say. Even if the prosecutor meets alone with the victim, the prosecutor must disclose any statement about the facts, including any exculpatory evidence, to the defense, whether or not the defense makes a specific request. Minn. R. Crim. P. 9.01, subd. 1(6); *Brady v. Maryland*, 83 S. Ct. 1194 (1963) (prosecution must disclose exculpatory evidence).

6 EXPERT WITNESSES

A. EXPERT WITNESSES ON DOMESTIC VIOLENCE

1. *Deciding Whether to Use an Expert*

Experts are a useful tool for prosecutors, especially in cases where the victim is behaving in a manner which the uninformed typical juror may find confusing or unusual.

The members of the jury will come to the trial with their own preconceived notions about how the victim "should" act if she were a victim of domestic violence. These notions do not always line up with the truth of how the victim actually acts. In those cases, an expert in domestic violence can be an invaluable ally to help correct any juror misconceptions. An expert can help explain that a victim of domestic violence acts in counterintuitive ways, such as recanting a truthful description of the assault, failing to appear to testify, and acting hostile toward the prosecution. However, Minnesota law generally does not allow experts to render an opinion as to the facts in the case, such as whether a person was in fact abused. Rather, they can only testify in general to common characteristics of someone who has suffered from domestic violence. *See* *State v. Grecinger*, 569 N.W.2d 189 (Minn. 1997) and *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989). The Supplements to this chapter contain a table of types of cases which may benefit from expert testimony.

Case law differs somewhat on the use of experts in domestic violence and sexual assault cases. For more information, see the Prosecutor's Manual for Sexual Assault Crimes.

Expert testimony has only recently been allowed in adult sexual assault cases. *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011). However, a more complete discussion of the implications of this case is better left to the Prosecutor's Manual for Sexual Assault Crimes.

2. *Finding the Correct Expert*

An expert witness may include *anyone* who has "scientific, technical, or other specialized knowledge" that would "assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. This specialized knowledge need not come from formal education or research – it may come from "knowledge, skill, experience, or training" as well, *Id.* Thus, although traditional experts such as academic researchers have been held to qualify as experts, others who work regularly with domestic violence victims, such as advocates and police officers, have been held to qualify as well. *See, e.g.*, *State v. Valentine*, 787 N.W.2d 630 (Minn. Ct. App. 2010) (officer qualified as expert).

Since an expert on domestic violence is not allowed to render an opinion as to the facts, the expert's testimony is often fairly straightforward and short – simply providing background

information to the jury about common behaviors of domestic victims. In that situation, the most appropriate and cost-effective expert may be the investigator on the case, as he or she is already familiar with it and is already testifying. The supplements contain a list of job descriptions of people who have been qualified as experts in domestic violence.

3. *Preparing the Expert*

Curriculum vitae

Prosecutors should meet with their expert before trial. Especially if the expert has not testified before, it is likely that the expert will be nervous about giving their testimony.

Trial preparation with experts is an important element, regardless of how experienced the expert witness is. The first step when preparing an expert to testify is to review the expert's curriculum vitae (CV). This review should ensure that the CV is in the proper format and up to date.[12] The CV should include all of the expert's relevant experience in the area of domestic violence. Additionally, it is important to include any trainings and publications.

Trial Prep (review the case or not review the case)

After ensuring the CV is up to date, the prosecutor should then explain to the expert the necessary steps to qualify as an expert witness at trial under Minn. R. Evid. 702. A prosecutor should rarely agree to stipulate to qualifying the expert as an expert. To do so would undermine the expert's testimony by not allowing either the judge or jury to hear about the expert's wealth of knowledge and experience on the subject of domestic violence.

During this stage, the prosecutor should also inform the expert about the "area" they will be seeking expert testimony in. Two common areas where experts on domestic violence may be qualified are in "Sexual or Domestic Violence" or "Battering and its Effects." If your expert has testified previously, they may have additional suggestions as to how to qualify them as an expert. There is significant case law supporting experts being qualified in "Battered Women's Syndrome," however, most advocates no longer believe that is an appropriate phrase to use when discussing domestic violence.[13]

Again, an expert witness is not permitted to render an opinion as to the facts in the particular case. Nevertheless, many such experts will want to review as many of the facts in the case as possible in discussion to understanding the general issues and themes of the

[12] For a CV example, the Supplements for Chapters 5 and 6.
[13] For a more complete discussion, see Chapter 1.B.

case. The better the expert understands the case, the better the expert will be able to help the jury to understand the dynamics that may be at issue.

Finally, prosecutors should meet with the experts to go over the scope and purpose of the direct testimony. This is a good time for the prosecutor to explain the theme of the case to the expert and make sure the expert's testimony helps further develop that theme. At this meeting, prosecutors should also prepare the expert for cross-examination. This is especially important if the expert has not testified extensively in the past. A good discussion point for experts who have testified before is questions they like to be asked. There may be some questions the expert has found to be either very useful or very difficult to explain in the past. Finally, every expert should be asked about any concerns they may have concerning word choice, either in regards to phrases to use or phrases to avoid.

Subpoena

While not always required, it would be advisable to issue a subpoena to your expert. Some experts may not be willing to testify on a case if they are not issued a subpoena. Additionally, by issuing a subpoena, you allow the expert to testify to that effect when the defense asks why the expert is there. The existence of the subpoena also reduces the appearance of collusion between the prosecutor and the expert when preparing the trial. Finally, issuing a subpoena ensures that your expert will be at the trial when you expect them to be and greatly reduces the chances of miscommunication.

B. USE OF EXPERTS AT TRIAL

1. Use of Experts on Domestic Violence Behaviors in General

Expert testimony on battering and its effects – i.e., counterintuitive victim behavior –can provide a context for the judge and jury, helping explain:

1) Recantations
2) Victim's continued involvement in an abusive relationship, including:
    a. Calling the Defendant
    b. Visiting the Defendant in Jail
3) Victim's fear of retaliation
4) Victim's emotional attachment to abuser
5) Victim's use of physical aggression toward abuser
6) Victim's lack of cooperation in prosecuting the abuser

A major report prepared for Congress by the National Institute of Justice found a strong consensus among the researchers, judges, prosecutors and defense attorneys interviewed that the term "battered woman's syndrome" did not adequately reflect the depth of

scientific knowledge now available. Validity and Use of Evidence Concerning Battering and Its Effect in Criminal Trials at 4, NIJ Report to Congress, May 1996 (hereinafter "*Battering*"). The report determined that the more accurate term is "evidence concerning battering and its effects." Expert testimony on battering and its effects has now been admitted in all fifty states and the District of Columbia, though much of the testimony has been offered on behalf of the defense. *Battering* at 9. The Battering report noted the "striking trend" to allow expert testimony offered by the prosecution on the effects of battering in domestic abuse cases, particularly in cases where the victim recanted. *Battering* at 65; *State v. White,* A07-1801 (Minn. Ct. App. 2009) (UNPUBLISHED); *State v. Borrelli*, 629 A.2d 1105 (Conn. 1993); *State v. Cababag*, 850 P.2d 716 (Haw. App. 1993); cert. denied, 853 P.2d 542 (1993); *State v. Bednarz*, 507 N.W.2d 168 (Wis. Ct. App. 1993); pet. for rev. denied, 513 N.W.2d 406 (Wis. 1994).

NOTE: It may be helpful to discuss the above issues during voir dire and thus "set the stage" for the expert's testimony.

The state may present evidence regarding battering and counterintuitive victim behavior in its case-in-chief. *State v. Grecinger*, 569 N.W.2d 189, 197 (Minn. 1997) (expert testimony on battered woman syndrome properly admitted in state's case-in-chief, when victim's credibility was attacked). To ensure the defense is not unfairly prejudiced, the trial court may give a limiting instruction. *Id.* For strategic reasons, some prosecutors reserve experts on battering for rebuttal, after the defendant has testified, in order to "get the last word." Whether to admit expert testimony is within the trial court's discretion and a reviewing court will not reverse this decision absent an abuse of discretion. Myers, supra. 54.

2. Rule 702 and Frye-Mack Test

The admission of testimony by an expert in Minnesota is governed by Minn. R. Evid. 702:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under this standard, anyone who works with victims of Domestic Violence will likely qualify as an expert by experience.

The relevant inquiry is whether the expert testimony is helpful to the trier of fact. *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982).

In addition to Rule 702, the *Frye-Mack* test has been generally followed in Minnesota:

1) Is the theory/knowledge reliable?
2) Is the theory generally accepted within the scientific community to which it belongs?
3) Is the information helpful to the trier of fact in resolving the issues presented?

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980)(applying Frye test to testimony from hypnosis); *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989) (applying Frye test to DNA typing).

The U.S. Supreme Court relaxed the Frye rule so that general acceptance within the scientific community is not required for admission. *Daubert v. Merrell Down Pharmaceuticals*, 113 S. Ct. 2786 (1993). However, Minnesota has refused to adopt the *Daubert* standard, instead choosing to remain using the *Frye-Mack* standard. *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000).

Establishing Relevance—M.R.E. 402

Expert testimony in sexual and domestic violence cases is relevant because, many victim behaviors may seem counter-intuitive to the average juror. Without an explanation from an expert as to why the victim would act in a counter-intuitive manner, the juror would be much less likely to judge the victim as a credible witness. Furthermore, without expert testimony to explain the victim's counter-intuitive behavior, the defense will be free to attack that behavior and further undermine the victim's credibility.

Discovery of Experts – Minn. R. Crim. P. 9

The use of an expert in a domestic violence case triggers some mandatory discovery disclosures. Minn. R. Crim. P. 9.01, 9.02, 9.04. Specifically, the prosecutor (and defense attorney, if applicable) must disclose all scientific reports they generated when preparing their testimony. If there are no scientific reports generated in advance of the testimony (i.e. the expert is an expert on Battering and its Effects) then the prosecutor must provide the expert's "written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications." Minn. R. Evid. 9.01, subd. 1(c).

3. *Scope of Testimony*

The Subject of the Expert Testimony—M.R.E. 702

An expert on domestic violence can only testify to the characteristics of domestic violence and the common behaviors of victims but may not render an opinion as to the facts in the case.

Upon establishing the relevance of the expert testimony, the prosecution must then seek to prove that the expert testimony satisfies the requirements of Minn. R. Evid. 702. These requirements were discussed above and can be briefly restated as: the testimony must have "foundational reliability" and general acceptance in the relevant scientific community.

Experts who testify about "battering and its effects" may only offer a general description of the characteristics which are present in an individual suffering from battering and its effects. *See* *Hennum*, 441 N.W.2d at 799 (referring specifically to "Battered Women's Syndrome"). The expert may not testify to the "ultimate fact" that a particular person actually was battered. An expert may not express an opinion as to whether a defendant was a batterer. *Grecinger*, 569 N.W.2d at 197.

Limitations of Expert Testimony on Victim Behavior

The methods for introducing expert testimony on victim behavior in domestic violence prosecutions appear analogous to methods employed by defense attorneys in support of a self-defense or duress claim.

> The 'battered woman syndrome' has been invoked by women to support pleas of self-defense in murder cases […] Prosecutors in sexual abuse cases have relied on rape trauma syndrome to negate a claim of consent, to explain conflicting statements or actions of the complainant, to prove criminal sexual penetration, and defendants have introduced evidence that a complainant did not experience the syndrome's symptoms.

McCormick on Evidence 352 (Kenneth S. Brown ed., 6th ed. 2006).

Prosecutors should consult with experts and carefully read case law to understand how such expert testimony has been explored in the literature and utilized in criminal prosecutions. For example, a case discussing expert testimony on BWS allegedly present in a female defendant accused of murdering her husband (the alleged batterer) may not be applicable and likely is distinguishable from a domestic violence case where the male defendant is the batterer and the prosecution is seeking to introduce expert testimony

regarding victim behavior in its case-in-chief. The methodology used by defendants with the goal of ultimately arguing justification or affirmative defense for a defendant requires critical adjustments in its implementation and in the construct of the arguments if the prosecution seeks to rely on it. Adjustments include utilizing more accurate terms to describe behavior and adjusting the protocol for introducing it. Without these adjustments, prosecutors risk making errors in arguments for admission of such testimony, misusing the expert testimony, diluting the effectiveness of the evidence, and, at worst, introducing objectionable or inadmissible evidence.

Character Evidence

It is a commonly accepted evidentiary principle that the prosecution may not introduce character traits of either the victim or accused in order to show the person acted in conformity with those traits. However, the prosecution would be allowed to introduce evidence of character traits if those traits are specifically attacked by the defense.

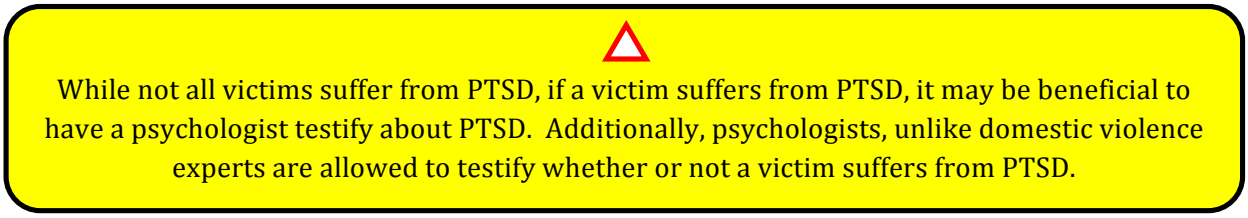
"When profile evidence is used defensively (to show good character, to restore credibility, or to prove apprehension in connection with a claim of self-defense), it falls under an exception to the rule against character evidence. Admissibility [in these cases turns on] the extent to which expert testimony would assist the jury viewed in light of the usual counterweights. The [court must consider the] qualifications of the expert, the degree of acceptance of the appropriate scientific community, the reliability and validity of using the profile, the need for the evidence in light of what most jurors know about the behaviors in question, whether the expert crosses the line between the general and the specific or tried to evaluate the truthfulness of the witness or class of witnesses, and, of course, the weight of the evidence." Id. at 353. Additionally, an expert may generally not testify about the truthfulness or credibility of the victim unless the defense opens the door. See, *Maurer v. Department of Corrections*, 32 F.3d 1286 (8th Cir. 1994) (Minnesota conviction reversed because of improper vouching); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (expert opinion allowed in sexual abuse case because defense opened the door).

Limitations on the Use of "Battering and Its Effects" to Explain Victim Behavior

"Battering and Its Effects" describes both the psychological effects of battering on an individual and common behaviors of victims of domestic violence. This is a vast amount of information which would need to be covered in order to completely inform a jury about the effects of battering. As a practical matter, it is simply not possible to cover all this information in anything resembling a reasonable manner at trial. Therefore, when examining an expert about "Battering and Its Effects," the questions should be limited to characteristics the victim is demonstrating.

Another important consideration in Minnesota is that domestic violence advocates who serve as expert witnesses cannot testify as to whether or not a victim suffered from domestic violence. *Hennum*, 441 N.W.2d at 798. Therefore, when asking an expert about characteristics of victims, it is instead advisable to ask about specific actions of the victim in this trial with which the jury would be familiar.

Limitations on the Use of PTSD to Explain Victim Behavior



The introduction of a PTSD explanation for victim behavior can pose some problems for prosecutors. As noted above, not every DV victim will meet the DSM-IV-TR definition of PTSD. Additionally, as the common perception of PTSD is associated with a military veteran, jurors may have a difficult time believing that any event in the house would be so traumatic as to cause the victim to suffer from PTSD. The final potential problem is that the expert may not have examined the victim. As noted previously, in most domestic violence cases, an expert cannot testify specifically to whether the victim suffers from the syndrome. *Hennum, supra*. Therefore, it is not always advisable to have the victim and expert meet beforehand. However, this lack of meeting and evaluation may lead to credibility issues in the jury's mind. The advantage to using an expert on PTSD as an expert is testimony by psychologists relating specifically to whether or not a person suffers from PTSD has been found admissible. *See* *State v. Maddox*, A10-372 (Minn. Ct. App. 2010) (UNPUBLISHED).

Use of Exhibits by the Expert

When an expert testifies, prosecutors may find it beneficial to have the expert use an exhibit. Having the expert use common domestic violence teaching tools, such as the power and control wheel, allows the expert to more easily explain their topic to the jury. Additionally, having an expert use an exhibit lends credibility to the expert in the mind of the jury.

7 BEGINNINGS OF TRIAL

A. MOTIONS IN LIMINE

It may be appropriate for the prosecutor to make a motion *in limine* requesting the exclusion of any mention of the victim's criminal history or other relationships. These are frequent areas of attack for the defense. It is not unusual for a domestic abuse victim to have a criminal history for anything from prostitution to theft to possession of controlled substances. Impeachment of a victim by a criminal conviction is governed by Minn. R. Evid. 609. In the absence of a criminal conviction, Minn. R. Evid. 404(b) and the *Spreigl* analysis govern the admission of any other act by the victim. *State v. Spreigl*, 139 N.W.2d 167 (1965).

History of relationship issues (what is relevant and admissible and what is not) are generally worth hashing out by motions *in limine* in advance of trial, if only to make the trial run more smoothly. Alternatively, this evidence can be addressed ad hoc in the event the defense makes a relevancy objection. The defense may also bring a motion *in limine* to have its own relationship evidence ruled admissible.

Additionally, questions (i.e., special interrogatories) to be given to the jury in support of an upward departure should be presented to the court in advance of trial, often along with other pre-trial motions. *See Chapter 10.C, below.*

B. RASMUSSEN HEARING

A *Rasmussen* or suppression hearing is held if the defendant challenges the constitutional admissibility of evidence obtained from the defendant by law enforcement (such as confessions, searches or identification procedures). *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3 (Minn., 1965). A *Spreigl* notice refers to evidence of additional offenses by the defendant which the state seeks to offer for the specific and limited purposes of Minn. R. Evid. 404(b). *State v. Spreigl*, 139 N.W.2d 167 (Minn., 1965); *State v. Billstrom*, 149 N.W.2d 281 (Minn. 1967). Notice of these additional offenses is required by Rule 7.02. (This evidence is discussed in greater detail in Chapter 7)

C. VOIR DIRE

Ask open-ended questions so that the prospective juror must provide real information rather than a simple yes or no answer. Jurors should be prepared by the questions for aspects of the case including a recanting/uncooperative victim, alcohol or drug use by victim, and victims who are gay or lesbian or members of a particular racial or ethnic group. Caveat: A judge may properly limit voir dire if he or she feels it is being used to

indoctrinate the jury on your facts or to get a commitment to your theory of the case. See the Supplements for sample Voir Dire questions.

D. Opening Statements

An opening statement must be confined to the facts the prosecutor expects to prove at trial.

Minn. R. Crim. P. 26.03, subd. 11(c)

The defense will point out anything promised in opening but not delivered at trial, so choose the facts presented in opening carefully. The prosecutor must have a ruling from the court regarding the method of analysis of evidence of other acts. If the evidence is reviewed under *Spreigl* only, the prosecutor will generally not be able to allude to the evidence during the opening statement. If the evidence is admitted under Minn. Stat. § 634.20 or as evidence of the history of the relationship, the prosecutor will be able to mention the other acts during opening.

8 STATE'S CASE-IN-CHIEF

A. ORDER OF WITNESSES

If the victim testifies first, this provides a powerful opening witness and hopefully makes the importance of the case clear to the jury. It also provides a basis for admission when the police officers testify later about the victim's prior consistent statement at the scene. See, Minn. R. Evid. 801(d)(1)(B). If evidence of other conduct against the victim is admitted under the *Spreigl* analysis, the victim may have to be the first and last witness. The victim will testify in the case-in-chief about the charged assault, and after the court has weighed the state's case-in-chief and ruled the other acts admissible, the state must re-call the victim to testify about the other acts.

The initial reporting officer can also be a strong opening witness because he or she, as a trained, neutral observer, can "set the stage" for the victim's testimony. If the victim is going to recant, it may be best to present the officer first and lay an evidentiary foundation for admission of the victim's initial report. However, if the officer testifies first, they will likely have to be recalled later in the trial to provide additional information after the victim has testified.

When questioning the victim on direct examination, the prosecutor may want to explore the issue of defendant's contact with the victim since the incident. This may serve to prove the element of a "significant romantic or sexual relationship" or show the pressure the victim is under in testifying. The defendant may have made admissions to the victim during these contacts. If the defendant is in custody, these conversations may be corroborated on jailhouse recordings. The prosecutor should give the defense notice of these incidents, though no formal *Spreigl* notice is required to show evidence of history of the relationship. *State v. Boyce*, 170 N.W.2d 104, 115-16 (Minn. 1969).

B. VICTIM DOES NOT APPEAR

Forcing the victim to appear for trial may engender further mistrust of the system. Instead, Prosecutors should consider proceeding without the victim or having an officer offer the victim a ride to the courthouse.

If the victim fails to appear at all for trial after having been properly served, the prosecutor must make a decision on whether to request a warrant for the victim's arrest. In requesting an arrest warrant, the prosecutor should weigh the harm done to the victim if the victim is arrested, the ability to proceed without the victim, the likelihood of victim testifying to

abuse if found, the seriousness of the case, the perceived danger to victim from defendant, and the perceived reasons victim is not responding to the subpoena. Even if a warrant is issued for the victim to appear, the prosecutor should still refrain from having the victim arrested, if possible. Instead, prosecutors should send an officer to the victim's location, if known, and have the officer offer the victim a ride to the courthouse. It may be necessary for the officer to inform the victim of the warrant. However, actually arresting the victim should only be done in the most extreme of situations.

If the victim does not appear at trial, the hearsay exceptions of state of mind or body, medical diagnosis, excited utterance and the "catch-all" provision may be admissible if these statements are not deemed "testimonial." If they are testimonial, under *Crawford*, the defendant's right to cross-examination under the Confrontation Clause trumps these exceptions-unless the state can prove that the defendant's wrongdoing caused the unavailability. (See more detailed discussion of *Crawford* below)

C. TESTIMONY

1. *Admissibility of Out-of-Court Statement*

The admission of a domestic abuse victim's out-of-court statements is critical to the success of a prosecution. In a one-on-one case with no other witnesses, evidence of what the victim said at the time of the crime and her physical condition, demeanor and emotional state when she said it will assist the jury in assessing her in-court credibility. Similarly, if a victim recants at trial, the same evidence can serve to convince a jury that hearsay admitted substantively should be believed instead of the victim's in-court testimony.

This section analyzes the rules of evidence relating to out-of-court statements and how they can be applied in a domestic abuse case. See the Supplements for a Sample Memo on Admissibility of Recanting Victim's Statements.

What is Hearsay?

Hearsay is any statements or actions made outside the courtroom by someone other than the person giving the testimony in order to prove the truth of what they are saying.

Two issues are key to understanding the admissibility of out-of-court statements as discussed in this section.

The first issue is: understanding what hearsay is and what it is not. In Minn. R. Evid. 801(c), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If the statement is offered for a purpose other than the truth of the matter

asserted, it is not hearsay and the rules of evidence regarding hearsay do not apply. However, the out-of court statements may be admissible non-hearsay. (See discussion under Minn. R. Evid. 801(d) below.)

The second key is: understanding the difference between evidence which is admitted substantively and evidence which is admitted for a non-substantive purpose.

Evidence which is, by the Rules of Evidence, admitted substantively may be considered by the jury for all purposes. Out-of-court statements which are admitted substantively either as hearsay or non-hearsay are, in an evidentiary sense, equal to other substantive evidence in the trial: The fact-finder is free, if it wishes, to credit the out-of-court statement over a contradictory one made by a declarant in court. On the other hand, evidence which is admitted for a non-substantive purpose may be considered not for all purposes but only for the limited purpose for which it is offered. When out-of-court statements are admitted for a limited non-substantive purpose, they may only be considered for that purpose. Most commonly, the limited purpose of non-substantive out-of-court statements is for impeachment. In short, the fact-finder may use non-substantive evidence to assist in deciding whether the substantive evidence is credible.

A jury is not expected to understand the distinction between substantive and non-substantive evidence. When out-of-court statements merely corroborate the in-court testimony of a witness, no special instruction is required. Most inconsistent out-of-court statements are used only to assist in assessing the credibility of a witness's in-court testimony; i.e., for impeachment. When a witness testifying at trial recants a substantive out-of-court statement, however, the jury must be instructed that it may use that statement "for all purposes," just as it can any statement of the defendant. The simplest way to include this instruction is by modifying CRIMJIG 3.15 (3) (Impeachment by Prior Inconsistent Statement).

To admit out-of-court statements substantively, the trial court must find the evidence admissible under one or more of the alternative rules set forth below. Often, the court's ruling is made in the course of the trial in response to a hearsay objection. If a particular ruling is critical to the case, it may also be presented pretrial. *See*, *In re Welfare of L.E.P.*, 594 N.W.2d 163 (Minn. 1999) (successful state's appeal of adverse ruling by both the trial court and the court of appeals on admission of video of 7-year-old victim). If the hearsay rule relied upon is Rule 807 (the catch-all provision), pretrial notice and hearing are mandatory.

Non-Hearsay Admissible Substantively

PRIOR INCONSISTENT STATEMENTS UNDER OATH – RULE 801(d)(1)(A)

The rule states that if a witness testifies at trial subject to cross-examination, any prior inconsistent statement made under oath is admissible. Pursuant to *Crawford*, testimony before a grand jury would be inadmissible as substantive evidence at trial because it was not subject to cross-examination by the defendant and therefore violates his right to confrontation. The result would be different in a mistrial situation: the prior testimony from the earlier trial could be used at a new trial because the defendant did have an opportunity to cross-examine.

PRIOR CONSISTENT STATEMENT HELPFUL IN EVALUATING DECLARANT'S CREDIBILITY – RULE 801(d)(1)(B)

In certain situations, a witness' prior consistent statement is admissible to assist the trier of fact in determining the witness' credibility.

A victim or other witness who testifies at trial or hearing and is subject to cross-examination may testify about his or her prior out-of-court statements if the statements are consistent with declarant's testimony and helpful to the trier of fact in evaluating the witness's credibility. *See*, *State v. Christopherson*, 500 N.W.2d 794, 798 (Minn. Ct. App. 1993) (child sex abuse victim's out-of-court statements, including video recording of interview, properly admitted as substantive evidence under Minn.. R. Evid. 801(d)(1)(B)); *In the Matter of the Welfare of K.A.S.*, 585 N.W.2d 71 (Minn. Ct. App. 1998) ("reasonable" consistency is sufficient); *State v. Stillday*, 646 N.W.2d 557 (Minn. Ct. App. 2002) (officer's testimony as to whom victim identified as assaulter admissible); *State v. Manley*, 664 N.W.2d 275 (Minn. 2003) (although trial court found admissible both under this rule and 803(24), affirmed under prior consistent statement rule). *But see*, *State v. Nunn*, 561 N.W.2d 902 (Minn. 1997) (evidence not automatically admissible; witness's credibility must be challenged and statement used to bolster credibility); *State v. Bakken*, 604 N.W.2d. 106 (Minn. Ct. App. 2000), rev. denied Feb. 24, 2000 (a few prior consistent statements cannot be used to bootstrap otherwise inadmissible inconsistent statements; however, harmless error here).

This evidence may also be used to rebut a charge of fabrication. See, *State v. Gardner*, 328 N.W.2d 159, 161 (Minn. 1983) (sheriff's investigator allowed to read at trial victim's formal statement taken two days after incident to rebut charge of fabrication and to corroborate her testimony); *Slater v. Baker*, 301 N.W.2d 315, 319-20 (Minn. 1981) (vigorous cross-examination of witness suggesting untruthfulness and suggestions that witness's memory is inaccurate justify admission of prior consistent statements under Minn. R. Evid. 801 (d)(1)(B)); *State v. Sullivan*, 360 N.W.2d 418, 422 (Minn. Ct. App. 1985), rev. denied Apr. 12,

1985 (video of victim's interview with police admissible to rebut charge of fabrication where 801(d)(1)(B) criteria were met).

IDENTIFICATION OF A PERSON (DEFENDANT) – RULE 801(d)(1)(C)

In *United States v. Owens*, 484 U.S. 554 (1988), the Supreme Court said that the state could introduce the victim's prior statements identifying the defendant as his assailant substantively under Federal Rule 801(d)(1)(C) (identical to the Minnesota rule) where the victim testified at trial that he could no longer remember what happened. The defense is entitled to the "opportunity" to cross-examine but nothing guarantees him the right to "effective" cross-examination. *See, State v. Hogetvedt*, 623 N.W.2d 909 (Minn. Ct. App. 2001).

This rule also requires that the witness testify at trial subject to cross-examination. It could be useful in domestic cases when the victim either testifies at trial that she cannot remember what happened or will not talk about it.

PRIOR STATEMENT BY A WITNESS (PRESENT SENSE IMPRESSION) – RULE 801(d)(1)(D)

Under the Minnesota rule, statements which describe or explain an event or condition made while the declarant was perceiving the event or condition or immediately thereafter are not hearsay and are admissible as substantive evidence if the declarant testifies at trial. This rule may provide an avenue for a victim to testify about statements he or she made during or right after the incident.

If a declarant testifies and is subject for cross-examination about a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter," the statement is not hearsay and may be received as substantive evidence. Minn. R. Evid. 801(d)(1)(D). The rule does not require that the statement of present sense impression be consistent with the declarant's testimony at trial, only that it was a statement describing the event while the declarant was perceiving the event or immediately thereafter. Thus, the victim's statement that "he hit and choked me," given to the 911 operator or responding officer to explain the event (the abuse) could be admissible as non-hearsay under this rule. Note that, unlike the excited utterance hearsay exception, there is no requirement that the statement be made while still under the aura of the traumatic or startling event. *See*, *State v. Pieschke*, 295 N.W.2d 580, 583-84 (Minn. 1980) (oral statements made by witnesses in DWI case admissible because they were made only a few minutes after event and before declarants had opportunity to discuss incident or otherwise fabricate account; however, written statements to the same effect made within one hour of event were not sufficiently contemporaneous to be admitted under this rule); *State v. Taylor*, 650 N.W.2d 190 (Minn. 2002) (911 call by defendant's sister on night of murder admissible alternatively under 801 (d)(1)(D) and 803(2)).

Hearsay Admissible Substantively

EXCITED UTTERANCE – RULE 803(2)

An excited utterance requires:

1) That there be a startling event or condition,
2) That the statement relates to the event or condition, **and**
3) That the statement is made under the stress caused by the event or condition.

State v. Daniels, 380 N.W.2d 777, 783 (Minn. 1986).

An excited utterance is admissible as exception to the hearsay rule. Minn. R. Evid. 803(2). The trial court must determine whether the declarant was sufficiently under the "aura of excitement." *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986). See also *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999) (domestic abuse murder victim's "very agitated" phone call to brother asking him to take husband's gun because he threatened to shoot her); *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (statements to 911 operator 1-2 minutes after event and to police officer less than 10 minutes after event).

Statements of a domestic abuse victim to the 911 operator and to the first responding officer (or to any other witness) immediately after the traumatic event likely are admissible under this theory whether or not the declarant testifies. *See Statements of Non-Testifying Witnesses* below.

STATEMENT OF THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION – RULE 803(3)

A statement of a declarant's existing mental, emotional or physical condition, including "pain" or "plan" is not excluded by the hearsay rule. Minn. R. Evid. 803(3). Thus, the victim's statements that "I hurt all over because he beat me," or "I'm terrified of him," or "I need to go to a shelter right now," are all likely admissible at trial under this rule. These hearsay exceptions are available to the state whether or not the victim appears to testify, and whether or not the statements are consistent with trial testimony. *Id. See*, *State v. Wright*, 726 N.W.2d 464, 474 (Minn. 2007) (recording of victim's telephone call to police reporting the assault admissible); *State v. Steinbuch*, 514 N.W.2d 793 (Minn. 1994) (admission of murder victim's statement that she intended to leave defendant not abuse of discretion because showed motive and history of relationship); *State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984) (evidence of victim's physical and emotional condition shortly after incident admissible as bearing on her mental state at the time of the offense (fear shows lack of consent)).

But caution: The key issue in the case law analyses of this exception is whether or not the victim's state of mind is relevant. *See* *State v. Miller*, 754 N.W.2d 686, 704 (Minn. 2008) (victim state of mind in homicide cases is usually only relevant when the defendant raises a claim of accident, suicide, or self-defense); *Bauer, supra* (state of mind testimony of murder victim's friend concerning her hysteria and fear of defendant prior to murder irrelevant and error but harmless); *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982) (murder victim's state of mind only relevant if defendant raises defense of accident, suicide or self-defense). Also, criminal defendants cannot use this exception as subterfuge. *See*, *State v. Ashby*, 567 N.W.2d 21 (Minn. 1997) (defendant precluded from introducing victim's girlfriend's statement that she heard third parties say they intended to kill victim; girlfriend's state of mind irrelevant); *State v. King*, 367 N.W.2d 599 (Minn. Ct. App. 1985) (trial court properly excluded female murder defendant's attempt to introduce her own "state of mind" hearsay statements that victim had abused her in the past to avoid testifying).

MEDICAL DIAGNOSIS – RULE 803(4)

Statements by a witness are admissible as a hearsay exception if the statement is for the purpose of medical diagnosis or treatment and:

1) describe medical history or past or present symptoms,
2) pain or sensations, or
3) the inception or general character of the cause or external source as is reasonably pertinent to diagnosis or treatment.

The declarant must know that the statement is being given to medical personnel for the statement to be admissible. *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993). Statements identifying the abuser are admissible if pertinent to treatment. *State v. Larson*, 453 N.W.2d 42, 47 (Minn. 1990), vacated, 111 S. Ct. 29 (1990), affd on remand, 472 N.W.2d 120 (Minn. 1991) (statement identifying abuser by child victim of sexual abuse to medical personnel relevant to diagnosis and treatment and admissible under medical diagnosis exception and the residual hearsay exception).

The admissibility of these statements has been upheld after *Crawford* and *Davis* as well. *See* *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006) (victim's statements about what caused her injury were admissible under Rule 803(4), but the statement about who caused the injury was not admissible under 803(4), due to a lack of record about why knowing who caused the injury is important to providing treatment). The Minnesota Court of Appeals recently affirmed this holding in *State v. Spears*, where it held that the victim's statement that "she was punched, kicked, and choked would be admissible for all purposes. The assertion that her boyfriend caused the injuries would be admissible for impeachment purposes only." *State v. Spears,* A10-464 *3 (Minn. Ct. App. 2011) (UNPUBLISHED).

"CATCH-ALL" EXCEPTION – RULE 807

There are four factors to consider when determining whether to admit recanted testimony:

1) The witness was available for cross-examination regarding the statement, thereby assuaging any confrontation problems;
2) There was proof that the prior statement was made;
3) The statement was against the declarant's penal interest; and
4) The statement was consistent with all the other evidence introduced.

State v. Obara, A07-1689 (Minn. Ct. App. Nov. 4, 2008) (UNPUBLISHED) *citing* *State v. Ortlepp*, 363 N.W.2d 39 (Minn. 1985)

The state may present prior trustworthy statements of the victim as substantive evidence under residual or "catch-all" exception to the hearsay rule, 807. To be admissible under this rule, the statements must have "equivalent circumstantial guarantees of trustworthiness" to those presumed for the "firmly rooted exceptions" such as those described *supra*. The catch-all provisions have generally been used in child abuse cases and were particularly useful where the child was too young to testify and therefore unavailable due to incompetency.

The admissibility of hearsay under this section when the declarant is unavailable and the statement is deemed testimonial is now in doubt because of *Crawford, infra*. If the declarant does testify at trial, there is no *Crawford* problem, and hearsay under this exception has been admitted when the declarant recants at trial. *See*, *State v. Skiefte*, 428 N.W.2d 91, 95 (Minn. Ct. App. 1988), rev. denied Aug. 29, 1988 (rape victim recants on issue of consent at probable cause hearing but her prior statements to police admissible under 803(24) [now 807] where statements were consistent with eyewitness testimony and victim testified they were true and correct); *State v. Ortlepp*, 363 N.W.2d 39, 43-44 (Minn. 1985) (prior statement admissible under 803(24) [now 807] even though declarant recants it where statement was particularly reliable, declarant testifies and admits making prior statement); *State v. Soukup*, 376 N.W.2d 498, 501 (Minn. Ct. App. 1985), rev. denied Dec. 30, 1985 (admission under Minn. R. Evid. 803(24) [now 807] of victim's statements to others concerning abuse by defendant not error where victim recants at trial but admits making statements and statements had circumstantial guarantees of trustworthiness).

If the state wishes to introduce a statement under the "catch-all" exception into evidence, it must provide notice to the defense in advance of trial to allow the defense a fair opportunity to prepare to meet it and have a hearing in advance of trial at which the judge must make findings about the trustworthiness of the statement.

NOTE: When the court rules evidence is admissible substantively under any exception to the hearsay rule, that evidence may be considered by the jury for all purposes, not just for impeachment.

2. *Impeachment*

Impeachment of Victim

Prosecutors should be careful when attempting to impeach a victim of Domestic Violence.

Any party, including the party calling the witness, may attack the credibility of any witness. Minn. R. Evid. 607 (who may impeach). Thus, when the victim takes the stand and recants, the state can impeach the victim even if it was the state that called the victim as a witness.

In examining a witness concerning a prior statement, the statement need not be shown to the witness during the examination, though it must be shown to the opposing counsel upon request. Minn. R. Evid. 613 (prior statements). If the state wishes to impeach the victim with extrinsic evidence of prior inconsistent statement, the witness must be given an opportunity to explain or deny the prior inconsistent statement. *Id.*

Prosecutors must exercise caution when calling a witness they know they will have to impeach. *See*, *State v. Ortlepp*, 363 N.W.2d 39, 42-43 (Minn. 1985) (discussing "Dexter" problem); *State v. Dexter*, 269 N.W.2d 721, 721-722 (Minn. 1978) (discussing problems raised by party's impeachment of its own witnesses with prior inconsistent statements). Courts have shown concern when it appears that a prosecutor has called a witness to the stand for the purpose of introducing prior statements by impeachment where the prior statements do not have a valid evidentiary foundation. *See*, *State v. Anderson*, 298 N.W.2d 63, 65 (Minn. 1980) (such a tactic makes prosecutor "guilty of misusing the [impeachment] rule to expose the jury to hearsay"); *See also State v. Thames*, 599 N.W.2d 122 (Minn. 1999).

However, in domestic abuse prosecutions, courts have admitted evidence gathered through impeachment of a recanting victim by prior statements under Minn. R. Evid. 807, Minn. Stat. § 634.20, and as evidence of the history of the relationship. *See State v. Word*, 755 N.W.2d 776 (Minn. Ct. App. 2008); *State v. Meldrum*, 724 N.W.2d 15 (Minn. Ct. App. 2006) (distinguishing "relationship evidence" from *Spriegl* evidence). If the evidence is admissible as substantive evidence under any exception to the hearsay rule, there is no *Dexter* problem in admitting the evidence as impeachment. *Ortlepp*, 363 N.W.2d at 44.

If the victim has recanted, the defense may attempt to impeach her with her prior statements favorable to the defendant during the cross-examination. But this allows the state to rehabilitate her credibility by providing evidence on why she recanted. *See, State v. Harris*, 560 N.W.2d 672 (Minn. 1997). In *Harris*, the former girlfriend of the defendant testified on his behalf in the first trial. At the second trial, she incriminated the defendant. When her credibility was attacked, the state was allowed to present evidence of the defendant's abuse of the former girlfriend to explain why she perjured herself.

Impeachment by Prior Conviction

To determine whether the probative value outweighs the prejudicial effects of admitting a prior conviction for impeachment purposes, the court must consider and record:

1) The impeachment value of the prior crime;
2) The date of the conviction and the defendant's later history;
3) The similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach);
4) The importance of the defendant's testimony, and
5) The centrality of the credibility issue

State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998); *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978).

Impeachment by evidence of a criminal conviction is only admissible if (1) the crime was punishable by more than one year and the court determines the probative effect outweighs its prejudicial effect, or (2) the crimes involved dishonesty or false statement. Minn. R. Evid. 609. This rule, therefore, normally excludes most misdemeanor and gross misdemeanor convictions. The issue should be raised pre-trial so that the lawyers and the court can discuss the form the question will take. Depending on the exact nature of the crime charged and the previous conviction, the court may require the State to "sanitize" any reference to the conviction. *See State v. Hill*, 801 N.W.2d 646, 650 (Minn. 2011). If the State is required to "sanitize" the offense of conviction, they would only be allowed to refer to "a [conviction] in [month] [year]," but not to any specifics related to that conviction. *Id.*

Generally, a criminal conviction is not admissible as impeachment if ten years have elapsed since the date of conviction or release from confinement, whichever is later. Minn. R. Evid. 609 (b). "Release from confinement" means the date of release from custody, not discharge from parole or probation. *State v. Ihnot*, 575 N.W.2d 581, 584 fn. 2 (Minn. 1998). The end of the ten year period is measured from the date the new offense occurred (not from when the case went to trial). *Id.* at 585. However, it is possible for a conviction which is more than ten years old to be admitted following a proper motion. Minn. R. Evid. 609 (b).

The time calculation standard expressed in *Ihnot* does not extend to non-party witnesses. *See* *State v. Munger*, 597 N.W.2d 570 (Minn. Ct. App. 1999). For these witnesses, the ten year period is measured from the date the trial began (not when the offense occurred). *Id.* at 573.

3. Statements Made by an Unavailable Witness

Crawford and its progeny are still relatively recent and their complete effects are still being determined. What follows is a cursory overview and analysis. For a more detailed analysis, please refer to the *Crawford* specific materials maintained by the Minnesota County Attorney's Association.

In 2004, the Supreme Court drastically altered 24 years of federal and state jurisprudence with regard to a defendant's right to confront witnesses against them. *Crawford v. Washington*, 541 U.S. 36 (2004). While the majority refused to call this decision an outright reversal of *Ohio v. Roberts*, 448 U.S. 56 (1980), the Rehinquist concurrence does call the majority opinion a reversal of *Roberts*. *Crawford*, 541 U.S. at 69. The decision in *Crawford* recharacterized the right of confrontation as a procedural right requiring that reliability of "testimonial" evidence be established through "the crucible of cross-examination." *Id.* at 61. However, the opinion also explicitly left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. In Minnesota, this right of confrontation has been extended all the way to include sentencing trials. *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008).

The Supreme Court has never offered an explicit list of what is and is not testimonial. The supplements contain a list of statements which have been deemed non-testimonial.

The court began to address the definition of 'testimonial' two years later in the companion cases of *Davis v. Washington* and *Hammond v. Indiana*, 547 U.S. 813 (2006).[14] In *Davis*, a woman called the police and told them her ex-boyfriend is "here jumpin' on me again" and went on to further describe the abuse to the 911 operator. *Id.* at 817-818. Conversely, in *Hammond* the victim calmly opened the door to police and only when being questioned separately from her husband did she mention that her husband had abused her. *Id.* at 819-820. Ultimately, the court held that the statements in *Davis* to the 911 operator were non-testimonial because they were

[14] For the remainder of this section, any reference to '*Davis v. Washington*' will be a reference to both *Davis* and *Hammond*. Any reference to '*Davis*' or '*Hammond*' will be a reference to that specific case.

made in the course of an ongoing emergency whereas the statements in *Hammond* were made after the emergency had passed and were therefore inadmissible. *Id.* at 834 (the court remanded *Hammond* to consider the issue of forfeiture, discussed in Section 4 *below*).

While the court in *Davis v. Washington* squarely addressed one issue, it created a highly subjective test for another issue. Namely, in *Davis v. Washington*, the court clearly enunciated what had been implied in *Crawford*, that non-testimonial statements were admissible when the witness was unavailable. *Id.* at 823-824. However, the Court provided only hazy guidance on when a statement should be classified as either testimonial or non-testimonial. Specifically Justice Scalia stated:

> [S]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.[15]

Justice Scalia's statements were somewhat clarified in *Michigan v. Bryant,* 131 S.Ct. 1143 (2011). The majority opinion reaffirmed *Davis*, stating, "When, as in *Davis,* the primary purpose of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." *Id.* at 1155. The Court went on to emphasize that "we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 1156. The court also emphasized that the purpose behind the statements was not the only factor to consider when determining whether or not a statement was testimonial. The Court also found that:

> The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a

[15] For a detailed analysis of the results of the "primary purpose" and "ongoing emergency" test in domestic violence situations nationally See Eleanor Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There be a Doctrinal Exception*, 17 Mich. J. Gender & L. 175 (2011).

> testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

Id. at 1159.

In addition to analyzing the circumstances surrounding the interrogation, the contents and motives of the interrogation are also important factors when determining whether or not a statement is testimonial in nature. However, as the court notes, parties, especially police officers, may have mixed motives for giving the statements. *Id.* at 1161. While the Supreme Court held that the trial court must consider these factors when determining whether or not a statement qualifies as testimonial, the Supreme Court provided little to no guidance as to the relative weight of these factors. Other than providing some of the factors to be considered, the only other guidance provided in *Bryant* was that the logic behind the *Crawford* rule is "not unlike that justifying the excited utterance exception […]. Statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," […] are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood." *Id.* at 1157 (citations omitted).

There are a wide variety of reasons why a witness may be unavailable at trial. These can range from the benign (i.e. witness died in an unrelated incident), to the difficult (i.e. witness refusing to participate in the prosecution)[16], to the malicious (i.e. witness killed by the defendant). The first two types of reasons are analyzed under the same analysis and discussed in Subsections 1 and 2 below. The third type of reason presents its own analysis and is discussed in Subsection 3 below.

NOTE: The Supreme Court recently decided *Williams v. Illinois*, 2012 WL 2202981 (June 18, 2012). This was a plurality decision where the opinions making up the plurality did not agree on anything other than the result. Therefore, this opinion will not be discussed further. For more information on this opinion as well as forensic experts in light of *Crawford*, see the Minnesota Prosecution Manual for Sexual Assault.

[16] The special situation of the recanting witness will be discussed in Section D below.

Witness Testified Previously and was Subject to Cross-Examination

If an unavailable witness has been subject to cross-examination previously then the admission of that witness' testimony will likely be admissible in a later proceeding on the same matter. *See State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (citing *Crawford*, 541 U.S. at 68). When receiving objections from the defense on this matter, especially if defense counsel has changed, it is important to note that the defense is entitled to the "opportunity" to cross-examine but nothing guarantees him the right to "effective" cross-examination. *See State v. Hogetvedt*, 623 N.W.2d 909 (Minn. Ct. App. 2001).

Witness Did Not Testify Previously

In Minnesota, statements are testimonial if:

1. They are made after an emergency has passed; **and**
2. They are made in the context of an interrogation conducted for the primary purpose of establishing or proving past events.

State v. Wright, 726 N.W.2d 464, 474 (Minn. 2007).

When the witness has not previously testified and been subject to cross-examination, their statements fall squarely under the *Davis v. Washington* analysis. Aside from the explanations presented above, "the Court explicitly did not attempt to provide an exhaustive clarification of testimonial and not testimonial statements." 17 Mich. J. Gender & Law 175, *198. (Citation omitted). The Court went on to further reject the "implication that virtually any 'initial inquiries' at the crime scene will not be testimonial [and] we do not hold the opposite – that no questions at the scene will yield non-testimonial answers." *Davis*, 547 U.S. at 832.

The ambiguity about what will and will not qualify as testimonial statements under the *Davis v. Washington* and *Crawford* analysis creates special problems in the domestic violence context. This ambiguity has led to great deference being given to trial court decisions. In a study of 82 cases nationally which involved domestic violence and Confrontation Clause issues, 85% of the opinions found at least some of the disputed statements ultimately admissible. 17 Mich. J. Gender & L. 175, *197.[17] A possible rationale for this is that the courts are providing an expansive reading of77 the *Davis v. Washington* opinion that all statements made during an ongoing emergency in the course of an

[17] Of the 70 cases where the statements were found to be admissible, 39 admitted the statements under harmless error or forfeiture. Two of the 82 cases in the study were reversed on other grounds.

interrogation for the primary purpose of resolution of that emergency are admissible. *Davis*, 547 U.S. 813.

In Minnesota, statements are testimonial if "(1) they are made after an emergency has passed; and (2) they are made in the context of an interrogation conducted for the primary purpose of establishing or proving past events." *State v. Wright*, 726 N.W.2d 464, 474 (Minn. 2007). The Minnesota Supreme Court has also reaffirmed the *Davis v. Washington* factors to determine when a statement is considered non-testimonial. These factors include:

> (1) the victim described events as they actually happened and not past events; (2) any "reasonable listener" would conclude that the victim was facing an ongoing emergency; (3) the questions asked and answers given were necessary to resolve a present emergency, rather than only to learn what had happened in the past; and (4) there was a low level of formality in the interview because the victim's answers were frantic and her environment was not tranquil or safe.

State v. Warsame, 735 N.W.2d 684, 690 (Minn. 2007).

There is some suggestion the Supreme Court might entertain an ongoing abusive relationship as an "ongoing emergency". *See Giles v. California*, 554 U.S. 353, 380 (2008) (Souter, J. and Ginsburg, J. concurring.). Specifically, the concurrence states that a classic abusive relationship is meant to isolate the victim from any source of potential help. *Id.* The opinion goes on to argue that if a domestic abuse relationship is shown, the defendant should forfeit his right to confront the victim. Forfeiture is discussed further in subsection 4 below. Additionally, the court has repeatedly pointed out that the focus of non-testimonial statements is on ending a threatening situation. *Bryant*, 131 S.Ct. at 1157; *Davis*, 547 U.S. at 832.

4. Forfeiture by Wrongdoing

In order to establish Forfeiture by Wrongdoing, the state must establish that:

(1) The declarant-witness is unavailable,
(2) The defendant engaged in wrongful conduct,
(3) The wrongful conduct procured the unavailability of the witness **and**
(4) The defendant intended to procure the unavailability of the witness.

State v. Cox, 779 N.W.2d 844, 851 (Minn. 2010)

Intimidating, coercing, or otherwise preventing a witness from testifying against them is the most common crime committed by batterers, as well as the least charged, prosecuted, and sentenced. Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. Davis L. Rev. 1295, 1322-1323 (2010) (citations omitted) (hereinafter "*Forfeiture*"). In *Giles v. California*, 554 U.S. 353 (2008), the Supreme Court recognized a common law exception which allowed the admission of testimonial statements by a witness who the defendant kept from testifying. *Id.* at 359. In *Giles*, the Supreme Court established a high bar for admitting out of court statements by a witness made unavailable by the defendant's conduct. In order to admit such evidence, the State must prove that "the defendant has in mind the particular purpose of making the witness unavailable." *Id.* at 367. The Minnesota Supreme Court has adopted the Supreme Court's Giles opinion as a four prong test. See *State v. Cox*, 779 N.W.2d 844, 851 (Minn. 2010). In order to meet the four part test, the state must establish that:

(1) The declarant-witness is unavailable,
(2) The defendant engaged in wrongful conduct,
(3) The wrongful conduct procured the unavailability of the witness **and**
(4) The defendant intended to procure the unavailability of the witness.

Id. (emphasis added). Additionally, both the Supreme Court and the Minnesota Supreme Court have acknowledged that the nature of domestic violence is relevant to a forfeiture analysis. In *Giles*, the Supreme Court stated:

> "Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture

> doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

554 U.S. at 377. *See also* *State v. Her*, 781 N.W.2d 869, 877 (Minn. 2010) (citing the above passage). When Forfeiture is claimed, there should be a separate hearing to establish an adequate record on the point and at this hearing; the judge should make specific findings. *State v. Wright*, 701 N.W.2d 802 (Minn. 2005), vacated 126 S.Ct. 2979 (2006), on remand 726 N.W.2d 464 (Minn. 2007).

Explicit Evidence

The witness who was prevented from or intimidated into not testifying by the defendant presents a difficult case for a prosecutor. In these situations, the prosecutor should maintain contact with the witness, if possible, in case the witness changes their mind. Threats of arrest or subpoenas are unlikely to work with a witness who has been intimidated because of their fear of the defendant. Instead of motivating them to testify, the witness may see arrest and incarceration as a way to free themselves from the defendant without risking themself.

Because of the intimate relationship involved in domestic violence cases, batterers have a significant number of options available to them to convince the victim not to testify. They can threaten the victim or victim's loved ones, cut off financial support to the victim, cause damage to the victim's property, and attempt to or threaten to deny victim the ability to see her children. Additionally, when children are the potential witnesses against a parent, the parent may threaten suicide. *Forfeiture* at 1331. The batterer may also attempt to "use the court system to intimidate the victim by filing: (1) false, retaliatory complaints with child protective services, triggering invasive investigations and records for victims, (2) unsubstantiated cross petitions for civil protective orders, (3) unfounded criminal complaints, and (4) baseless civil lawsuits to harass victims into agreeing to dismiss the criminal case." *Id. at 1330-1331*. The totality of these actions is for a single purpose, "to persuade the victim […] to change her story, […] absent herself, or otherwise become unavailable as a prosecution witness." Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context"*, 13 Lewis & Clark L. Rev. 711, 722 (2009) (hereinafter "*After Giles*").

Instead, when a prosecutor believes a witness has been intimidated or prevented from testifying, they should contact an investigator to begin an investigation. This investigation may lead to new evidence for new charges of witness intimidation against the defendant. Also, the investigation, even if it is unable to find enough evidence of intimidation to bring

new charges, may be enough to reassure the witness that testifying against the defendant will not result in additional harm to them.

Additionally, the prosecutor should attempt a forfeiture hearing if they believes the defendant's conduct rises to the level of forfeiture. At these hearings, a prosecutor's testimony showing the change in victim's story as well as fear of the defendant can prove powerful. Additionally, a record of contact, and if available jail phone calls, as well as the victim's letter of recantation and its source can provide powerful support for the prosecution's argument that the defendant forfeited his confrontation right. *See After Giles at 723* (discussing a NY case where the Court found the defendant had forfeited his right to confrontation after the State presented all the evidence mentioned above and the recantation letter came from the defense attorney's office). Additional information on recanting witness can be found in section 5 below.

Inferential Evidence

As noted previously, one element the state must prove when attempting to establish forfeiture is that the defendant intended to procure the witness' unavailability. *See e.g. Her, 781 N.W.2d 869*. It is likely that when attempting to prove forfeiture, the prosecutor will have to rely on inferential evidence as opposed to explicit evidence. This may take the form of establishing the victim's (or other witness') fear of the defendant, or the defendant's history of violence.

While the situation has not arisen in Minnesota, other jurisdictions have addressed the issue of how to proceed when a witness/victim has been killed after charges have been filed. These states have created the presumption that if a witness/victim was killed after charges have been filed against the defendant, the defendant forfeited his confrontation right. *See e.g. State v. McLaughlin, 272 S.W.3d 506 (Mo. Ct. App. 2008)*; *People v. Milan*, No. W2006-02606-CCA-MR3-CD, 2008 WL 4378172, at *14 (Tenn. Crim. App. Sept. 26, 2008); *People v. Gibbs, No. 274003, 2008 WL 4149033 at *2 (Mich. Ct. App. Sept. 9, 2008)*.

5. Recanting Witness

Approximately 85% of victims recant at some point during the prosecution of their abuser.

Recanting witnesses are not a unique problem to domestic violence prosecutions. But, because domestic violence prosecutions are usually based on the testimony of the abused against her abuser, the victim recanting is especially problematic. It has been estimated that approximately 85% of all domestic violence recant their initial allegations to the prosecution about the abuse at one point or another. *People v. Brown, 94 P.3d 574, 576 (Cal. 2004)*. In light of this staggeringly high statistic, it is important for prosecutors to be

prepared for the victim to recant her allegations at some point. These recantations can be grouped into two broad categories: (1) the victim who recants before trial and (2) the victim who recants for the first time at trial.

The Victim Who Recants Before Trial

Of all the possible recantations, the victim recanting before trial is the most difficult to address. This forces the prosecutor to reorganize the case in a manner which is less dependent upon the victim's testimony.

When the prosecutor knows the victim has recanted, getting an expert to testify is important, because the expert can help explain why the victim may recant. Additionally, prosecutors are able to take any of the actions outlined below in relation to a witness recanting at trial for a witness who recants before trial as well.

The Victim Who Recants for the First Time at Trial

The situation where the victim recants at trial presents a marginally less difficult situation for the prosecutor. When the victim first recants at trial, this enables the prosecutor to introduce all of the victim's prior statements which illustrate a situation much different than the recanted testimony.

This recanting can take many forms, including pleading the Fifth, refusing to testify, and testifying for the defense. Any of these outcomes is undesirable and potentially fatal to a domestic violence prosecution. If an expert on domestic violence was not already included on the prosecution's witness list, one should be added to help explain potential reasons for the victim's behavior, if it is still possible.

When a witness decides to testify for the defense or plead the Fifth, another important question is: who suggested this course of action to the victim? If it was the defendant or one of his friends/family, then the prosecutor should check to see if the defendant was subject to any conditions of release and whether or not those provisions were violated by suggesting this to the victim. In addition, this may serve as support for a motion for forfeiture by wrongdoing, as discussed above. If the victim appears to have decided on this course of action on her own, then the prosecutor should keep the door open for the victim to return to aid the prosecution's case, and proceed with the prosecution of the defendant, if possible. How to impeach the victim on prior inconsistent statements is discussed in 8.C.2, *above*.

D. DEFENDANT'S OTHER CONDUCT

1. *In General*

The three theories of admissibility for evidence of other conduct by the defendant are:

1) history of relationship evidence;
2) Minn. Stat. § 634.20 (similar conduct admissible in domestic abuse cases); and
3) 404(b) or *Spreigl* evidence.

For a good overview of how this evidence has been handled in other jurisdictions in domestic abuse cases, see Kovach, Andrea M., "Note: Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future," 2003 U. Ill. L. Rev. 1115.

Admission of evidence of other similar conduct of a domestic abuser is critical to a prosecutor's case, particularly when those acts are committed against the victim in the crime charged or against other family or household members. It can mean the difference between winning and losing at trial, especially when the case is otherwise one person's word against another's. This evidence is so relevant to understanding the dynamics of domestic abuse in an individual case and so powerful that merely disclosing the state's intent to introduce it under any of the three alternative theories often induces a defendant to plead guilty.

The three theories of admissibility are: 1) history of relationship evidence; 2) Minn. Stat. § 634.20 (evidence of "similar conduct" by the defendant); and (3) 404(b) or *Spreigl* evidence. In addition, evidence of other conduct by the defendant, such as records of conviction, may be admissible as impeachment evidence, *see* Sect. 7.C.2, or to prove up the existence of QDVROs.

Even if evidence is inadmissible for one purpose (such as to show bad character), it should not be excluded if it is admissible for some other proper purpose. *State v. Bolte*, 530 N.W.2d 191, 196 (Minn. 1995) (rule of "multiple admissibility").

2. *Minn. Stat. § 634.20 and "History of the Relationship" Evidence*

By definition, a domestic charge involves a defendant and victim who have a preexisting relationship, and a domestic crime is committed in the context of that relationship. Recognizing that, many years ago the courts developed the common law "history-of-the-relationship" doctrine, which permits the introduction of evidence putting the crime in the context of the relationship between the defendant and victim. Then in 1985, the Legislature

enacted a somewhat parallel statute, Minn. Stat. § 634.20, which permits the introduction of evidence of "similar conduct" by the defendant. (This legislatively-created evidentiary standard was specifically adopted by the Minnesota Supreme Court in *McCoy*. 682 N.W.2d at 161.)

These two doctrines – one statutory, one common law – are often confused, with both referred to by the shorthand "history of the relationship." But they apply in different situations, and evidence admissible under one may not be admissible under the other. *See State v. Hormann*, 805 N.W.2d 883, 890 (Minn. Ct. App. 2011) (analyzing the two bases independently).

When § 634.20 or relationship evidence is to be introduced at trial, cautionary instructions should be given, both when the evidence is introduced and again at the close of the case. *See* Minn. Crim. JIG 2.07, 3.30.

Section 634.20 has some advantages over the common law doctrine; use the former first if possible. A chart illustrating some of the differences between these bases for admission, as well as the *Spreigl* / 404(b) basis, is set forth on page 8:29.

Regardless of which doctrine is used, a cautionary instruction such as Minn. Crim. JIG 2.07 (Cautionary Instruction on Receipt of Testimony of Other Domestic Abuse Occurrences) should be given at the time any of this evidence is admitted, as should a cautionary instruction such as 3.30 (Cautionary Instruction on Receipt of Testimony of Other Domestic Abuse Occurrences) at the close of the case. *State v. Meldrum*, 724 N.W.2d 15 (Minn. Ct. App. 2006).

Minn. Stat. § 634.20

Minn. Stat. § 634.20 is a powerful tool in domestic violence cases. Its standard is very favorable to prosecutors: evidence of other domestic conduct by the defendant *must* be admitted unless the probative value is *substantially outweighed* by the danger of unfair prejudice and other concerns. "Unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006)

By its terms, § 634.20 may only be used when the current case involves "domestic abuse" as defined in Minn. Stat. § 518B.01, subd. 2(a). That definition encompasses a broad spectrum of assault and threats, but not the violation of a protective order such as an OFP or DANCO. Still, the admissibility of § 634.20 evidence "is based on whether the accused's *underlying conduct* constitutes domestic abuse under [the statute], not on whether the

particular offense that was charged is listed in [the statute]," and so the statute may be used in many cases even where the charge alone would not qualify as "domestic abuse." *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. Ct. App. 2010).

The statute permits the introduction of "similar conduct" – a defined term that, again, encompasses a wide array of conduct, including domestic abuse, the violation of an OFP or HRO, stalking (i.e., harassment), and obscene or harassing phone calls. *See* Minn. Stat. § 634.20. This list is nonexclusive ("includes, but is not limited to"), and thus has been held to encompass the violation of a DANCO as well. *State v. Dalton*, A09-1747, *7-8 (Minn. Ct. App. Oct. 12, 2010) (UNPUBLISHED).

By express statutory terms, the "similar conduct" need not have been against the current victim. Conduct against *any* family or household member of the defendant – past, present, or future – may qualify, regardless of whether that other victim has any connection with the current one. *State v. Valentine*, 787 N.W.2d 630 (Minn. Ct. App. 2010). And the "similar conduct" need not *precede* the incident at issue in the case; conduct occurring afterwards qualifies as well. *State v. Lindsey*, 755 N.W.2d 752, 755-756 (Minn. Ct. App. 2008).

With evidence under § 634.20, the State need provide no *Spriegl*-style pretrial notice to the defense, *McCoy*, 682 N.W.2d at 159, though it is generally a good idea to alert the Court and opposing counsel of the State's intent so that the issue may be addressed as much as possible in advance of trial.

History-of-the-Relationship Doctrine

Unlike § 634.20, the common law "history-of-the-relationship" doctrine may be used in *any* case – not just one involving "domestic abuse" under § 518B.01, subd. 2(a) – where evidence regarding the relationship between defendant and victim would help place the charged incident in proper context. *State v. Volstad*, 287 N.W.2d 660, 662 (Minn. 1980) Furthermore, this evidence need not qualify as "similar conduct" § 634.20. On the other hand, the standard for admissibility is not quite as favorable to the State. Relationship evidence is admissible only if its probative value outweighs the danger of unfair prejudice. *Hormann*, 805 N.W.2d at 890. And some caselaw indicates that the prior conduct itself must be proven by clear and convincing evidence. *Id.* (Note, however, that this standard may be met by the uncorroborated testimony of the victim or another witness. *Id.*)

As with § 634.20, the history-of-relationship doctrine permits the introduction of evidence of the defendant's conduct against individuals other than the current victim. But rather than family or household members of the *defendant*, the courts have interpreted the history-of-the-relationship doctrine to encompass evidence of conduct against family or household members of the *victim*, or those otherwise close to her. *State v. Blanchard*, 315

N.W.2d 427, 431 (Minn. 1982) ("[e]vidence of a defendant's assaultive conduct toward a third party related to or close friend of the victim is generally admissible;" admitting evidence of assault on victim's son); *State v. Miller*, 2004 WL 78174 at *3 (Minn. Ct. App. Jan 20, 2004) (admitting evidence of assault on victim's mother's boyfriend, in connection with attempted assault on victim) (UNPUBLISHED). The rationale is that the defendant's treatment of these people is an integral part of the relationship between the defendant and victim.

As with § 634.20, in general no *Spriegl*-style notice is required for history-of-the-relationship evidence. In the 2009 *McCurry* opinion, however, the Court of Appeals held that *Spriegl* notice – and other *Spriegl* requirements – may apply to certain relationship incidents, at least to any "prior, bad act[] … constitut[ing] an uncharged crime on its own, close in time to the charged conduct." *State v. McCurry*, 770 N.W.2d 553, 561 (Minn. Ct. App. 2009). *See also Hormann*, 805 N.W.2d at 890 ("Courts typically apply parts of the *Spriegl* / Rule 404(b) analysis to relationship evidence.") At present, it is unclear how far the holding in *McCurry* will extend.

Proving the Conduct

Most commonly, § 634.20 and relationship evidence are proven by testimony from the victim of the conduct, by an eyewitness or through admissible hearsay testimony (such as excited utterances to a friend). But this may be difficult. If so, there are a number of other forms in which this evidence may be admissible as well, particularly if the prior incident resulted in conviction:

1. *Defendant's admissions in a plea colloquy*. The full plea transcript may be marked as a court exhibit, with only that portion relating to the facts of the prior incident being read into the record. *See* Minn. R. Evid. 801(d)(2) (party's own statement offered by party-opponent).
2. *Defendant's admissions during trial.* If the defendant testifies, and if the scope of the direct examination permits, he may be cross examined about the conduct underlying the prior incident. If he denies the conduct, he may be questioned about any prior conviction resulting from the conduct.
3. *A petition for an OFP.* By its nature, a petition for an OFP contains a victim's statements regarding past abuse, possibly including the violation of a DANCO. While such a petition is rarely admissible on its own, it may be admissible if the victim testifies, either as a prior consistent statement, Minn. R. Evid. 801(d)(1)(B), or as a statement against the victim's interest in a relationship with the defendant.[18]

[18] A statement against the victim's interest may be admissible under the residual hearsay rule, Minn. R. Evid. 807. State v. Ortlepp, 363 N.W.2d 39, 44 (Minn. 1985). In 2004, the Court of Appeals expanded this concept

3. Rule 404(b); Spreigl Evidence

The legitimacy of introducing 404(b) evidence must also "be demonstrated, and the talismanic invocation of an item from the rule 404(b) list does not constitute such a demonstration."

State v. Smith, 749 N.W.2d 88, 94 (Minn. Ct. App. 2008)

Minn. R. Evid. 404(b) governs the exception to the general rule that evidence of a defendant's bad character on other occasions is inadmissible to prove that he committed the crime charged. *Spreigl* case law articulates the rationale behind this rule.

While evidence of other bad acts is generally not admissible to prove that a person acted in conformity with his bad character (Minn. R. Evid. 404(a)), the exception under 404(b) provides that such evidence may be admitted to establish:

1) Motive
2) Opportunity
3) Intent
4) Preparation
5) Plan
6) Knowledge
7) Identity
8) Absence of mistake or accident

Minn. R. Evid. 404(b). The legitimacy of introducing this evidence must "be demonstrated, and the talismanic invocation of an item from the rule 404(b) list does not constitute such a demonstration." *State v. Smith*, 749 N.W.2d 88, 94 (Minn. Ct. App. 2008); *See also*, *State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. Ct. App. 2005) ("It is not sufficient simply to recite a 404(b) purpose without also demonstrating legitimacy of that purpose."). The prosecution must also prove the other acts by clear and convincing evidence. Minn. R. Evid. 404(b).

After determining whether a Rule 404(b) exception applies, the trial court must next balance the relevance of the evidence against the potential of the evidence for unfair prejudice. *State v. Frisinger*, 484 N.W.2d 27, 32 (Minn. 1992). Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Minn.

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to encompass statements against the declarant's interest in a relationship with the defendant. State v. Plantin, 682 N.W.2d 653, 659 (Minn. Ct. App. 2004). For further information, see Section ____.page 8:8.

R. Evid. 401. Rule 404(b) requires that the probative value of the evidence must not be outweighed by its potential for unfair prejudice. Minn. R. Evid. 404(b).[19]

The Minnesota Supreme Court has called Minn. R. Evid. 404(b) "the substantive standard governing the decision whether to admit other-crime evidence" and noted that the *Spreigl* analysis is a procedural requirement of this substantive standard. *State v. Bolte*, 530 N.W.2d 191, 196 (Minn. 1995). *Spreigl* itself cites to "widely recognized exceptions to the exclusionary rule" allowing admission of other-act evidence to show "motive, to negative mistake [sic], to establish identity," or "where the previous offense is part of a scheme or conspiracy incidental to or embraced in proof of the charge on trial." *Spreigl*, 139 N.W.2d at 169. Thus, it is clear that Minn. R. Evid. 404(b) and *Spreigl* must be read hand-in-hand.

In order for other acts evidence to be admitted, the court must follow a 5-step process. *State v. Ness*, 707 N.W.2d 676, 685-686 (Minn. 2006). These steps are:

1. The State must give notice of its intent to admit the evidence;
2. The State must clearly indicate what the evidence will be offered to prove;
3. There must be clear and convincing evidence that the defendant participated in the prior act;
4. The evidence must be relevant and material to the State's case; and
5. The probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Id. at 686.

Notice Requirement

Under Minn. R. Crim. P. 7.02, the state is required to give notice of additional offenses to be proved at trial stated within the specificity of a complaint. *See, State v. Billstrom*, 149 N.W.2d 281 (Minn. 1967).

The prosecutor is not required to give a *Spreigl* notice for offenses which are part of the immediate episode for which defendant is being tried, for which the defendant has been previously prosecuted and offenses which are introduced to rebut defendant's evidence of good character. Minn. R. Crim. P. 7.02; *Spreigl*, 139 N.W.2d at 173.

[19] This standard follows the 2006 amendments to the Minnesota Rules of Evidence. Previously, courts had applied the Rule 403 standard, which required the probative value to be substantially outweighed by the potential for unfair prejudice. *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005).

Admissiblity

In order to be relevant and material, the *Spreigl* offense "should be similar to the charged offense in either time, location, or modus operandi." *State v. Dewald*, 464 N.W.2d 500, 503 (Minn. 1991). Absolute similarity is not required. *Id.*

Spreigl evidence can include acts that occur after the charged offense. *State v. Lynard*, 294 N.W.2d 322, 323 (Minn. 1980). Evidence of later acts requires only the same level of scrutiny by the court as a prior act. *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998) (rejecting court of appeals analysis requiring a higher level of scrutiny for subsequent acts).

In addition to the standard described above, the amount of time between the current charges and the charged Offense is also a relevant factor. "In general, the prior acts become less relevant as time passes. Thus, the greater the time gap, the more similar the acts must be to lessen the likelihood that the *Spreigl* evidence will be used for an improper purpose." *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005) (citing *Ture v. State*, 681 N.W.2d 9, 15 (Minn. 2004) (quotation marks omitted)). However, this requirement can be overcome with a showing that "the defendant was in prison in the interval between the prior offense and the current offense and was incapacitated from committing crime [or] if the older offense is part of 'pattern' of similar misconduct occurring over a number of years." *State v. Wermerskirchen*, 497 N.W.2d 235, 242 fn. 3 (Minn. 1993). Finally, the court may, but is not required to, consider as part of its analysis the state's case. The stronger the case, the more likely the *Spreigl* evidence will be found to be more prejudicial than probative.

When *Spreigl* evidence is admitted, the trial court should give a cautionary instruction at the time the evidence is being introduced and again as a part of the final instructions. *Frisinger*, 484 N.W.2d at 31. See CRIMJIGs 2.07 and 3.16. In the absence of a defense request for the instruction, failure of the trial court to give it is not automatically reversible error. *Frisinger*, *supra* at 31; *State v. Forsman*, 260 N.W.2d 160, 160 (Minn. 1977). However, the Supreme Court continues to warn that failure to give the instruction could lead to reversal. *State v. Williams*, 593 N.W.2d 227 (Minn. 1999). Either party may request an additional sentence specifying the particular exception to 404(b) which applies to the case. *State v. DeYoung*, 672 N.W.2d 208 (Minn. Ct. App. 2003).

Hearing; Offer of Proof

The hearing to determine the admissibility of other acts may be held before trial or outside the presence of the jury during trial. *Frisinger*, *supra* at 29, fn. 1. The trial court has broad discretion in determining whether to require the state to call witnesses or simply use the offer-of-proof procedure at the admissibility hearing. *Id.* An offer of proof may be sufficient. *See*, *Kennedy*, 585 N.W.2d 385 (separate hearing not required where *Spreigl* offense was against same victim and court had adequate offer of proof); *State v. Kasper*, 409

N.W.2d 846 (Minn. 1987) (no abuse of discretion not to require victim to testify at *Spreigl* hearing as long as trial testimony consistent with offer of proof).

A prosecutor may wish to offer the police report or conviction as an offer of proof so the victim does not have to testify twice (once at the hearing and once at trial). This method reduces the trauma to the victim and the possibility of impeachment material for the defense. On the other hand, it is sometimes useful to put the victim on the stand outside the presence of the jury, as this allows the victim to become familiar with the experience of testifying and "warm up" before appearing in front of the jury.
Based on either an offer of proof or actual testimony, the trial court must make the finding that the evidence is clear and convincing. Minn. R. Evid. 404(b).

Spreigl Testimony at Trial

Classically, *Spreigl* evidence is offered at the conclusion of the state's case. This approach, however, does not make sense in the typical domestic abuse case in which the victim is the same person for both the charged crime and the *Spreigl* offenses. For that reason alone, the admissibility of this evidence under the statute or under history of relationship case law, or both, is preferable. It permits the trial to proceed seamlessly without artificially truncating the victim's testimony.