CHAPTER 6
EVIDENTIARY ISSUES[1]

I. Applicability of the Rules of Evidence to Hearings on Petitions for Protection and Anti-Harassment Orders

ER 1101(c)(4), which was adopted in 1999, provides that the Rules of Evidence, except for the rules and statutes concerning privileges, need not be applied during hearings for protection or anti-harassment orders. *See Gourley v. Gourley*, 158 Wn.2d. 460, 145 P.3d 11835 (2006) (Recognizing that ER 1101(c)(4) permits the admission of hearsay in hearings for protection orders).

A court may still require "a certain measure of reliability with respect to the admission of evidence in the proceedings specified in section (c). The court should have the discretion to require an appropriate level of formality." Comment to ER 1101(c)(1). In *Gourley*, the Court concluded that there was no due process violation in not requiring testimony or cross-examination at the hearing for protection order, but stated that such might be "appropriate in other cases."

However, if a protection order is being requested as part of another type of proceeding, i.e., a dissolution action, it may be appropriate to apply the rules of evidence in making any final orders. The rationale for not mandating application of the rules of evidence in protection order hearings was to further public policy in creating a simple, pro se friendly procedure. However, when the parties are afforded a full trial with sufficient time to call witnesses and engage in discovery, such as a dissolution trial, the rationales for dispensing with the rules of evidence are far less persuasive.

ER 1101(c)(4) provides that if a judge is considering information from the domestic violence database:

> …the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does *not* propose to consider. (*Emphasis added*.)

II. Privileges

A. Privileges Potentially Applicable in a Domestic Violence Case

Washington has a wide variety of privileges, some of which are potentially applicable in a domestic violence case. A partial catalog of privileges can

be found in ER 501, by way of illustration, and not by way of limitation. The following are examples of privileges recognized in this state:

a. Attorney-Client. RCW 5.60.060(2).
b. Clergyman or Priest. RCW 5.60.060(3), 26.44.060, 70.124.060.
c. Dispute Resolution Center. RCW 7.75.050.
d. Counselor. RCW 18.19.180.
e. Husband-Wife. RCW 5.60.060(1), 26.20.071, 26.21.355.
f. Interpreter in Legal Proceeding. RCW 2.42.160, GR11.1 (e)
g. Journalist. [*See Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982); *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984).]
h. Optometrist-Patient. RCW 18.53.200, 26.44.060.
i. Physician-Patient. RCW 5.60.060(4), 26.44.060, 51.04.050, 69.41.020, 69.50.403, 70.124.060, 71.05.250
j. Psychologist-Client. RCW 18.83.110, 26.44.060, 70.124.060.
k. Public Assistance Recipient. RCW 74.04.060.
l. Public Officer. RCW 5.60.060(5).
m. Registered Nurse. RCW 5.62.010, 5.62.020, 5.62.030. But see, *State v. Vietz*, 94 Wn. App. 870, 973 P.2d 501 (1999) (privilege does not apply to licensed practical nurses).
n. Sexual Assault Advocate. RCW 5.60.060(7).
o. Domestic Violence Advocate. RCW 5.60.060(8), effective date 6/7/2006.

The discussion that follows briefly mentions issues that are of particular interest in domestic violence cases.

B. Husband-Wife Privilege

Washington has two husband-wife privileges, both defined in RCW 5.60.060(1). The first protects confidential communications between husband and wife, forbidding one spouse from testifying about confidential communications without the consent of the other. The second prevents one spouse from testifying against the other spouse, regardless of whether the testimony relates to a confidential communication. Neither privilege applies to quasi-marriage or meretricious relationships. *State v. Cohen*, 19 Wn. App. 600, 608-9 576 P.2d 933, 938, *review denied*, 90 Wn.2d 122 (1978).

RCW 5.60.060(1) provides:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent

of the other, examined as to any communication made by one to the other during marriage. *But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one spouse against the other*, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian . . . (*Emphasis added*).

1. When may the marital privilege be asserted?

The confidential communication applies to communications made during the marriage and bars a former spouse from testifying concerning the content of such communications even after the marriage is terminated. *State v. Thorne*, 43 Wn.2d 47, 56, 260 P.2d 331, 336 (1953). *Compare State v. Burden*, 120 Wn.2d 371, 376-7, 841 P.2d 758, 760-1 (1992) (Third party testimony about extrajudicial statements of a spouse are admissible).

In contrast, the testimonial bar applies only during the pendency of a valid marriage. Legal status is determinative. The privilege, if applicable at all, applies even after a petition for dissolution has been filed so long as the marriage has not yet been legally terminated. *State v. Moxley*, 6 Wn. App. 153,491 P.2d 1326 (1971) (*overruled on other grounds, State v, Thornton*, 119 Wn.2d 578 (1992).

Significantly, in *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, 1024 (1988), the court held that the trial court's decision to continue a criminal case at the request of the prosecuting attorney to permit entry of a dissolution order was not an abuse of discretion under CrR 3.3(h)(2).

2. The "personal violence" limitation

Although the language emphasized above appears to make either privilege inapplicable to any domestic violence case, until 1992, Washington courts applied the common law rule limiting the inter-spousal crime exception only to crimes of "personal violence." *See, e.g., State v. Kephart*, 56 Wash. 561,106 P. 165(1910). The Washington State

Supreme Court overruled *Kephart* and its progeny in *State v. Thornton*, 119 Wn.2d. 578, 583, 835 P.2d 216, 219 (1992). The statutory exception for inter-spousal crimes now applies to any crime and is not limited to crimes of violence.

In a prosecution for witness tampering, neither marital privilege applies if the defendant could not have asserted the privilege at the trial of the underlying offense. *State v. Sanders*, 66 Wn. App. 878, 884, 833 P.2d 452, 456 (1992).

3. Comment on the exercise of the spousal privilege

It is misconduct for a prosecutor to comment in closing argument on the failure of the defendant's spouse to testify. *State v. Charlton*, 90 Wn.2d 657, 667, 585 P.2d 142, 147 (1978); *State v. Smith*, 82 Wn. App. 327, 338, 917 P.2d. 1108, 1113 (1996) (*overruled on other grounds by State v. Miller*, 110 Wn. App. 283, 40 P.3d 692 (2002)). Similarly, it is misconduct for the prosecutor to call the defendant's spouse to testify to force the defendant to assert the privilege in front of the jury. *State v. McGinty*, 14 Wn.2d 71, 78, 126 P.2d 1086, 1089 (1942).

C. Physician-Patient Privilege

RCW 5.60.060(4) provides that a physician may not testify in a civil action concerning information obtained from a patient. To some extent, that privilege has been incorporated in criminal cases by RCW 10.58.010, which provides that "[t]he rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions." When applying the privilege in the criminal context, the trial court must balance the "benefits of the privilege against the public interest of full revelation of the facts." *State v. Stark*, 66 Wn. App. 423, 438, 832 P.2d 109, 117(1992). Accord, *State v. Smith*, 84 Wn. App. 813, 820, 929 P.2d 1191, 1195 *review denied*, 133 Wn.2d 1005 (1997). The privilege does not apply to statements made to a paramedic who is not acting under the direction of a physician. *State v. Ross*, 89 Wn. App. 302, 306, 947 P.2d 1290, 1292 (1997), *review denied*, 135 Wn.2d 1011 (1998).

A victim, at least in the context of a domestic violence case, cannot assert the privilege in order to prevent the State from offering evidence of his or her injuries. *State v. Boehme*, 71 Wn.2d 621, 637, 430 P.2d 527, 536-7 (1967).

In *State v. Cahoon*, 59 Wn. App. 606, 611, 799 P.2d 1191, 1194 (1990), *review denied*, 116 Wn.2d 1014 (1991), the court concluded that the privilege does not apply when the medical information is being used only to establish probable cause for a search warrant.

Discovery issues concerning medical records are discussed in Chapter 4, IV, F.

D. Psychologists

Confidential communications between a psychologist and a patient are privileged to the same extent as confidential communications between attorney and client. RCW 18.83.110.

The holder of the privilege is the patient, and the patient alone has the power to assert or waive the privilege.

The privilege is strictly construed. It is inapplicable to communications that were not intended to be confidential. *In re Henderson*, 29 Wn. App. 748, 752, 630 P.2d 944, 947 (1981). It is likewise inapplicable to forensic examinations by court-appointed psychologists. *State v. Holland*, 30 Wn. App. 366, 376, 635 P.2d 142, 148 (1981), *aff'd*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The privilege applies only to communications with a licensed psychologist. It does not apply to communications with other counselors or therapists. *State v. Harris*, 51 Wn. App. 807, 813, 755 P.2d 825, 829 (1988). Communications with other counselors or therapists may, however, have at least a measure of confidentiality under other statutes (see below).

E. Counselors, Social Workers, and Therapists

Under RCW 18.19, social workers, therapists, and other counselors (other than psychologists and psychiatrists) must be registered with, and certified by, the state. The same legislation creates a privilege not to disclose information acquired in a professional capacity. The statute contains a number of exceptions, including a provision for reporting child abuse, and concludes with a catch-all exception allowing disclosure "in response to a subpoena from a court of law or the Secretary." RCW 18.19.180(5).

If a litigant makes "particularized factual showing" that the records of a therapist or counselor are "likely" to contain helpful information, the court is to undertake an *in camera* review of the records. *State v. Diemel*, 81 Wn. App. 464, 468, 914 P.2d 779, 781 *review denied*, 130 Wn.2d 1008 (1996) (*quoting State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064

(1993)) (defendant's declaration was insufficient to support his request for an *in camera* review of files of a counselor who treated a rape victim). As a general matter, a request for an *in camera* review is addressed to the sound discretion of the trial court. *Diemel* at 467.

F. Sexual Assault Advocates

In the 1996 session, the Legislature added a new evidentiary privilege to complement the existing statute prohibiting discovery of the records of a rape crisis center. RCW 5.60.060(7) provides that:

> A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made by the victim to the sexual assault advocate.

"Sexual assault advocate" means an employee or volunteer from a rape crisis center, victim assistance unit, or any other program that provides information, advocacy, and counseling to a sexual assault victim. RCW 5.60.060(7)(a). There is nothing in this definition which makes the privilege inapplicable to a victim advocate employed by a prosecuting attorney. Application of the privilege to prosecution-based advocates and issues of waiver if communications are disclosed by the advocate to a prosecutor will need to be resolved by the court.

Disclosure is permitted without the consent of the victim when the advocate believes the failure to disclose is likely to "result in a clear, imminent risk of serious physical injury or death" to the victim or other person. RCW 5.60.060(7)(b).

RCW 70.125.065, which has been in effect since 1981, protects the records and professional communications of a rape counselor from discovery. A court, however, may order disclosure under appropriate conditions.

Example: In *State v. Espinosa*, 47 Wn. App. 85, 90, 733 P.2d 1010, 1013 (1987), a prosecution for rape, the trial court acted within its discretion in refusing to order disclosure of certain information to defense counsel. The court rejected a defense argument that the privilege had been waived because a police officer had been present during the counselor's interview with the victim.

Example: In *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064, 1078 (1993), the court upheld the trial court's decision not to undertake an *in camera* review of the records of a rape crisis center where there was no affidavit which set forth "specifically the reasons" why such a review was appropriate. *See also Pennsylvania v. Richie*, 480 U.S. 39, 61, 107 S. Ct.

989, 1003, 94 L. Ed. 2d 40 (1987) (where records are conditionally privileged, court should undertake *in camera* review where appropriate showing of potential materiality made).

NOTE: The court in *Kalakosky* declined to address the question of whether 42 U.S.C. § 10604(d), which purports to establish an absolute privilege for the records of a rape crisis center, preempts that part of RCW 70.125.065 which authorizes disclosure after *in camera* review.

G. Domestic Violence Advocate

In 2006 session, the Legislature added a new evidentiary privilege:

> A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate. RCW 5.60.060(8).

For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

Also confidentiality provisions in RCW 70.123 and the Violence Against Women Act (VAWA), 2005, provide protections against release of information by domestic violence programs.

NOTE: There is an *in camera* review process provided for relating to records, but there is also testimonial privilege.

III. Admissibility of Defendant's Prior Bad Acts Against the Victim

Issues concerning the admissibility of other acts of misconduct allegedly perpetrated by the defendant against the victim frequently arise in domestic violence cases. Such evidence is not admissible to show that the defendant had the propensity to commit acts of violence against the victim. It may, however, be admissible for other purposes such as showing absence of accident, intent, or motive.[2]

When deciding whether to admit ER 404(b) evidence, "the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably

occurred before admitting the evidence, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder." *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974, 977-8 (2002). This balancing must occur on the record. *See State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

The court is not required to hold an evidentiary hearing to determine whether the proponent of the testimony can establish the existence of the prior bad act by a preponderance of the evidence, even where prior acts are specifically challenged, when the finding can be made on the offer of proof. *State v. Kilgore*, 147 Wn.2d at 295. *See also State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000).

NOTE: The earlier version of this manual cited *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995) for the proposition that a trial court is required to hold an evidentiary hearing, outside of the presence of the jury, to establish the existence of prior bad acts challenged by the defendant. This portion of *Binkin* was overruled by the Supreme Court in *Kilgore.*

Example: Admissible to explain delay in reporting abuse – In *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991), a prosecution for statutory rape and indecent liberties, the defendant argued on appeal that the trial court should not have admitted evidence that he had assaulted the victim on previous occasions. The defendant argued the previous assaults were irrelevant to the crime charged, and that evidence of the prior assaults simply branded him as an abusive type of person – an inference forbidden by ER 404(b). Division II disagreed, holding the trial court properly admitted the evidence to show that the victim had reason to fear the defendant, and that, therefore, a reason existed why the victim did not immediately report the incident to others. Without this evidence, the court said, the defendant's denial of the charges "would have gained unwarranted credibility." *Wilson* at 890.

Example: Admissible to explain victim's statement minimizing abuse and her decision to permit the defendant to see her in violation of a no-contact order – In *State v. Grant*, 83 Wn. App. 98, 108, 920 P.2d 609, 614 (1996), a domestic violence case, the trial court permitted the prosecution to introduce evidence of prior assaults by the defendant against the victim. Following the reasoning of *Wilson*, the Court of Appeals affirmed the conviction concluding that such evidence was useful in explaining the victim's actions. *Accord, State v. Nelson*, 131 Wn. App. l08 (2006); *State v. Coo*, 131 Wn. App. 845, 129 P.3d 834 (2006).

Example: Admissible to explain reasonable apprehension of fear in harassment case – In *State v. Binkin*, 79 Wn. App. at 291, *overruled on other grounds*, the court upheld the admission of a prior threat made by the defendant to

the victim. The defendant was charged with felony harassment, and the court concluded that the prior threat was admissible to explain why the victim was placed in reasonable fear that the charged threat would be carried out. *Accord, State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000); *State v. Ragin*, 94 Wn. App. 407, 412-13, 972 P.2d 519, 521 (1999).

Example: Admissible to explain motive as part of "res gestae" – In *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615, 625 (1995) – a spousal murder case – the Supreme Court concluded that evidence of prior assaults by the defendant against the victim was properly admitted to permit the jury to understand the defendant's motive and to understand the entire situation. The court, however, concluded that where opportunity and intent were not at issue it was error to admit the evidence on those grounds. *Powell* at 262. *Accord*, *State v. Stenson*, 132 Wn.2d 668, 708, 940 P.2d 1239, 1260(1997), *cert. denied* 523 U.S. 1008 (1998).

NOTE: The court should strongly consider giving a limiting instruction explaining to the jury the purpose for which the prior bad acts have been admitted.

IV. Admissibility of Prior Misconduct by Victim to Show Self-Defense

If the defendant claims self-defense, prior misconduct by the victim may be admissible to show that the defendant had a reasonable apprehension of danger. The principal requirement is one of relevance – the victim's misconduct must have been of the sort to suggest danger, and the defendant must have been aware of that misconduct at the time the defendant claims to have acted in self-defense. *State v. LeFaber*, 77 Wn. App. 766, 769, 892 P.2d 1140, 1143 (1995), *rev. on other grounds*, 128 Wn.2d 896, 913 P.2d 369 (1996); *State v. Walker*, 13 Wn. App. 545, 550, 536 P.2d 657, 662 (1975) (acts of violence by victim inadmissible because defendant was unaware of them).

Specific acts of misconduct, if not known to the defendant, are not admissible to establish the victim's violent disposition pursuant to prove that the victim acted in conformity with that trait. ER 404(a) and ER 405. *Accord*, *State v. Alexander*, 52 Wn. App. 897, 901, 765 P.2d 321, 324 (1988) (character evidence must be in the form of opinion evidence, unless character trait is an "essential element" of charge of defense. Proof of a violent disposition is not an essential element of a self-defense claim).

V. Admissibility of Offers of Compromise as Proof of Guilt in Criminal Prosecutions

ER 408 prohibits evidence of "(1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount" to prove civil liability or "invalidity of the claim or its amount."

The Court of Appeals recently held that ER 408 does not prevent the use of evidence of attempts to compromise civil claims in criminal trials "arising from the same conduct, as between the alleged offender and victim, where relevant to establishing guilt." *State v. O'Connor*, 119 Wn. App. 530, 547, 81 P.3d 161 (2003). In *O'Connor*, the defendant appealed a felony domestic violence conviction stemming from a tire slashing incident. The defendant argued that ER 408 should have prevented the admission of evidence by the prosecution that he offered to pay the victim for the tire damage. The Court explained that because the defendant's criminal charge was not subject to compromise, the policy behind ER 408, encouraging out of court settlement, would not be advanced by its application to criminal prosecutions. *Id.*

VI. The Hearsay Rule and Its Exceptions

All of the exceptions to the hearsay rule are, of course, potentially available in a domestic violence case. In practice, however, only a handful of exceptions are normally applicable to the out-of-court statements of the victim or other witnesses.

As will be seen, Washington has a body of case law governing the availability of the normally invoked exceptions, making it somewhat easier to predict the outcome in a given factual situation.

Nevertheless, the discretion inherent in the rules has afforded trial courts considerable leeway in ruling on the admissibility of such evidence.

This portion of the domestic violence manual emphasizes issues that may arise in domestic violence cases. The material in the domestic violence manual is not, however, a comprehensive discussion of all aspects of the hearsay rule, and the reader is referred to the standard evidence treatises for more detail. *See, e.g.*, K. Tegland, 5B, *Washington Practice: Evidence Law and Practice*, 4th ed., at ER 802 (2006).

A. The Relationship Between the Hearsay Rule and the Confrontation Clause

Over the past decade, the appellate courts have, to some extent, struggled to define the relationship between the Confrontation Clause contained in The Sixth Amendment to the United States Constitution and the hearsay exceptions embodied in the Rules of Evidence. Compare *State v. Heib*, 107 Wn.2d 97, 727 P.2d 239 (1986) (Court did not hold but appeared to assume that the trial court erred in admitting excited utterance where no showing of unavailability of declarant but concluded that error was harmless under constitutional harmless error standard) and *State v. Palamo*, 113 Wn.2d 789, 783 P.2d 575 (1989) (The constitution does not require a showing that the declarant be unavailable before the admission of excited utterance). The broad issue now appears to be resolved. In 2004, the United States Supreme Court issued the landmark decision of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

As summarized by the court in *State v. Moses*, 129 Wn.2d 718 *at* 724, 119 P. 3d 906 (2005),

> Before Crawford, an out-of-court hearsay statement was admissible and did not violate the Confrontation Clause if the statement was reliable. A statement that qualified for admission under a firmly rooted hearsay exception established reliability. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Thomas*, 150 Wn.2d 821, 855-56, 83 P.3d 970 (2004). The excited utterance exception is a firmly rooted hearsay exception and an out-of-court statement was admissible if it qualified as an excited utterance. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001).

The Supreme Court in *Crawford*, rejected its decision in *Ohio v. Roberts* and held that the Confrontation Clause prohibits testimonial hearsay without regard to whether a firmly rooted hearsay exception applies or there is adequate indicia of reliability. The "unpardonable vice of the *Roberts* test . . . [was] not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63. The Court held that an out-of-court testimonial statement cannot be admitted unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.

1. Impact of *Crawford* if declarant testifies at trial

In considering the reach of *Crawford*, it must be emphasized that the prohibition against admitting evidence that falls within a hearsay exception only applies when declarant does not testify at trial. If the declarant testifies and is questioned about the incident, even if she recants or indicates that she remembers little or nothing about the incident, there is no constitutional bar to the admission of the hearsay testimony. *State v. Mobley*, 129 Wn. App. 378, 118 P.3d 403 (2005), *review denied*, 157 Wn.2d 1002 (2006) (*Child hearsay*). Hearsay exceptions that are otherwise supported by the record continue to apply in such a situation.

In contrast, a witness on the stand who simply refuses to answer questions has not testified within the meaning of the confrontation clause. *In re Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004) (Contrasting child who says, "I don't want to talk about it," with child who says, "I can't remember," after being questioned about the incident).

2. What is "testimonial evidence?"

Courts are struggling to define what constitutes "testimonial evidence." As summarized by the Court in *State v. Walker*, 129 Wn. App. 258, at 267, 119 P.3d 935 (2005) (Most internal citations omitted):

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Additionally, the Court determined "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard" whether or not they are sworn statements. The Court indicated that "[p]olice interrogation" should be given

its colloquial meaning and that a recorded statement "knowingly given in response to structured police questioning, qualifies [as interrogation] under any conceivable definition." And in a subsequent case, the United States Supreme Court found that "police questioning during a Terry stop qualifies as an interrogation," and that "responses to such questions are testimonial in nature." *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 124 S. Ct. 2451, 2463, 159 L. Ed. 2d 292 (2004).

Crawford also refers to types of hearsay that are not testimonial. These include: (1) "[a]n off-hand, overheard remark;" (2) "a casual remark to an acquaintance;" (3) "business records or statements in furtherance of a conspiracy;" and (4) "statements made unwittingly to an FBI informant" by a co-conspirator.

The type of evidence most likely to be the subject of a *Crawford* objection in a domestic violence prosecution is evidence of statements a non-testifying victim made to law enforcement. Most commonly, these statements have been admitted as present sense impressions (ER 803(a)(3)) or excited utterances ER 803(a)(2). Statements made for the purposes of medical diagnoses or treatment pursuant to ER 803(a)(4) may also present issues.

The Court provided further clarification in the 2006 case of *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224, (2006). The opinion embraced two separate cases: *Davis*, in which the trial court had admitted statements to a 911 operator, and *Hammon v. Indiana*, in which the trial court admitted obtained by the police at the scene as part of the police investigation. In each case, the complainant did not appear to testify at trial. The court stated:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id* at 126 S. Ct. 2273-74.

The court determined that the statements to the 911 operator in *Davis* did not offend the confrontation clause and affirmed the Washington State Court's opinion in *State v. Davis*, 154 Wn.2d

291, 111 P.3d 844 (2005). The *Indiana* conviction was reversed because the affidavit had been improperly admitted.

a. Statement to law enforcement officers-excited utterance

As stated above, the United States Supreme Court in *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224, (2006) concluded that a statement made to law enforcement during an existing emergency is properly admitted, even when the declarant does not testify at trial. Presumably, such statements would invariably qualify as excited utterances under ER 803(a)(2).
Division I and Division II have developed somewhat different approaches to analyzing the applicability of the excited utterance exception to domestic violence prosecutions. In *State v. Ohlson*, 131 Wn. App. 71, 125 P.3d 990 (2005), the trial court admitted a statement made by a witness/victim to the investigating officer approximately five minutes after defendant assaulted him and while the victim was under the stress of the exciting event. Division II concluded that, by its very definition, an excited statement is not testimonial as the declarant, when making the statement, had no intent to "bear witness."

In contrast, Division I, *State v. Walker*, 129 Wn. App. 258, at 267, 119 P.3d 935 (2005), held that the constitutional analysis differs from the analysis required to determine whether a statement qualifies as an excited utterance and that a per se rule is inappropriate.

The Washington State Supreme Court opinion in *Davis*, contains a detailed discussion of the circumstances under which statements made to a 911 operator may properly be admitted when the declarant doesn't testify at trial. The court determined that the "whole statement" approach is inapplicable and that each part of the statement to the 911 operator should be scrutinized separately. The court determined that the victim's statement identifying her assailant was properly admitted but that "certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril." *State v. Davis*, 154 Wn.2d 291 at 304.

b. Statement for the purposes of medical diagnosis

At least where there is no indication that the patient made statements to medical personnel, including social workers, with the belief that they would be used at a subsequent trial, the statements are not testimonial. *State v. Moses,* 129 Wn. App. 730-731. *See also In re Personal Restraint of Grasso*, 151 Wn.2d at 21.

c. Governmental records

As discussed in Chapter 4, Section III, G, a defendant who is convicted of violating a protection or no-contact order following two prior convictions for such an offense may be charged with a felony. Admission of certified copies of the judgment and sentences from the prior convictions does not violate *Crawford. State v. Benefiel*, 131 Wn. App. 651, 128 P.3d 1251 (February 2006); *See also State v. Kronich,* 131 Wn. App. 537, 128 P.3d 119 (February 2006) (Certified copy of driving record).

d. Statements not admitted for their truth

When a statement of a non-testifying declarant is admitted for some purpose other than its truth, there is no constitutional bar to its admission. *In re Personal Restraint of Theders,* 130 Wn. App. 422, 123 P.3d 489 (2005).

B. Hearsay Exceptions

NOTE: This section provides a brief summary of hearsay issues that frequently arise in domestic violence prosecutions. In light of *Crawford*, care must be taken, when the declarant has not testified, in relying on this summary.

1. Hearsay Exceptions – Complaint of Sexual Abuse

At common law, the courts made an exception to the hearsay rule to allow an out-of-court complaint of a sexual offense to be introduced as evidence. *State v. Hunter*, 18 Wash. 670, 672, 52 P. 247, 248 (1898). This exception, sometimes called the "fact of complaint" or "hue and cry" rule, was a relatively narrow exception in the sense that only the fact of the declarant's complaint and the general nature of the crime could be related by the witness. "Evidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not

admissible." *State v. Alexander*, 64 Wn. App. 147, 151, 822 P.2d 1250, 1253 (1992).

Although the common law rule is nowhere to be found in the Evidence Rules, it continues to be available. *See, e.g., State v. Ackerman*, 90 Wn. App. 477, 481, 953 P.2d 816, 819 (1998).

Example: In *State v. Ferguson*, 100 Wn.2d 131,137, 667 P.2d 68, 72 (1983), a prosecution for indecent liberties, the trial court properly allowed the victim's school teacher to testify that the victim reported "some sexual advances" towards her, but the trial court should not have permitted the teacher to testify that the victim had identified the defendant as the offender.

2. Hearsay Exceptions – Excited Utterance – ER 803(A)(2)

Under ER 803(a)(2), a statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition, is not objectionable as hearsay. The rule presumes that the element of spontaneity reduces the chance of misrepresentation to an acceptable level.

In a domestic violence case, the rule has many potential applications when the victim or another witness is unwilling or unable to testify, or is reluctant to testify fully and openly. Prosecuting attorneys have, for example, often succeeded in using this exception to introduce statements describing an assault or sexual abuse.

A statement, alleged to be an excited utterance which contains an intentional misrepresentation, is not admissible as an excited utterance. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d. 549, 564 (1995). However, the mere fact that a victim recanted after making the excited utterance does not render the original statement inadmissible as an excited utterance. *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097, 1103 (2000); *State v. Briscoeray*, 95 Wn. App. 167,174, 974 P.2d 912, 916, *review denied*, 139 Wn.2d 1011 (1999).

A trial court's decision to admit a statement as an excited utterance is reviewable for abuse of discretion. "[W]here the trial judge is required to assess body language, hesitation, or lack thereof, manner of speaking, and all the other intangibles that go into the evaluation which cannot be reflected on a written record, the trial judge is entitled to absolute deference." *Williamson* at 257.[3]

NOTE: In domestic violence cases, the excited utterance is frequently contained on a 911 tape. In such a situation, other foundational requirements – particularly authentication of the voice of the person allegedly making the statement – must be satisfied. *See State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949, 951 (1996).

Example: Admissible – In *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808,, review denied 116 Wn.2d 10126, 812 P.2d 102 (1991), a prosecution for rape, the victim testified that she fled from her assailant and hid under a tarp for seven hours before she called the police to report the rape. According to the victim, she was sure her assailant was looking for her during the seven-hour period, and she feared for her life. At trial, the prosecution was properly allowed to replay a tape recording of the victim's call to the police, on the theory that it was an excited utterance. The Court of Appeals said it was clear that the victim was still "under the continuing stress of the event" when she called the police. *Guizzotti* at 296.

In some cases, the courts seem to have stretched the traditional boundaries of the rule to allow the statements to be admitted, particularly when no other hearsay exception is available.

Example: Admissible – In *United States v. Napier*, 518 F.2d 316, 317-18 (9th Cir), *cert. denied*, 423 U.S. 895 (1975), the startling event was victim unexpectedly seeing a photograph of her assailant in a newspaper two months after her attack after which she blurted out the statement, "He killed me." *Compare State v. Chapin*, 118 Wn.2d 681, 689, 826 P.2d 194, 198 (1992) (statement of anger made by impaired elderly man, who had been raped, upon seeing caregiver and subsequent statement attributing rape to caregiver not admissible as excited utterances).

Example: Admissible – In *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774, 781 (1985), a prosecution for rape, hearsay evidence of the victim's statement to her daughter that "I was raped," made seven hours after the incident was admissible as an excited utterance because the statement was part of a "continuous process" caused by stress.

Example: Admissible – In *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779, 782 (1980), a prosecution for rape, the victim's description of the incident to a friend, three hours later, and to the police, three to six hours later, were admissible as excited utterances.

Example: Admissible – In *State v. Woodward*, 32 Wn. App. 204, 207, 646 P.2d 135, 136 (1982), a child's statement that the defendant had sexual intercourse with her, given 20 hours later in response to her mother's question, was held admissible as an excited utterance.

In some cases, however, defense attorneys have been successful in barring the State from introducing an allegedly excited utterance – usually by persuading the court that the element of spontaneity was not present.

Example: Inadmissible – In *State v. Bargas*, 52 Wn. App. 700, 763 P.2d 470 (1988), *review denied* 112 Wn.2d 1005 (1989), a prosecution for rape, the victim's statements during her interview at police headquarters, one day after the alleged rape, were inadmissible as excited utterances. The court said that a statement by a rape victim "while in a state of emotional turmoil" might be admissible, but that in this case, the victim "made her statements after having gone back to sleep, bathing, and talking to her friend." The court concluded that "[u]nder these circumstances, the statement cannot be characterized as spontaneous." *Bargas* at 704 (error, however, was harmless).

Example: Inadmissible – In *State v. Doe*, 105 Wn.2d 889, 719 P.2d 554 (1986), a prosecution for indecent liberties, the child's description of the incident to her foster mother, three days later, was inadmissible as an excited utterance. The court stated, "No case in Washington has ever allowed such a long period of time to elapse between the event and the statement and still hold the statement admissible under ER 803(a)(2)." *John Doe* at 894.

Example: Inadmissible – In *State v. Brown*, 127 Wn.2d 749, 756, 903 P.2d. 549, 463 (1995), the Supreme Court reversed the admission of a statement that had been admitted as an excited utterance where it was established that, at the time the statement was made, the declarant had intentionally included false information. The statement in that case involved a call to 911 to report a rape. The victim falsely told the operator that she had been kidnapped because she was fearful that she would not be believed about the rape if she had honestly indicated that the original contact was a consensual act of prostitution.

Example: Inadmissible – In *State v. Owens*, 128 Wn.2d 908, 913, 913 P.2d 366, 368 (1996), child made a statement concerning sexual abuse to mother and grandmother after lengthy questioning.

The statement differs from earlier statement to the physician and was held not admissible.

3. Hearsay Exceptions – State of Mind or Bodily Condition – ER 803(a)(3)

ER 803(a)(3) defines the hearsay exception in the following language:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In a domestic violence case, the rule has many potential applications. The rule, for example, might be used by the prosecuting attorney to introduce the victim's out-of-court statements expressing fear of the defendant, or describing the pain of injuries inflicted by the defendant. The scope of the rule is developed more fully in the subsections that follow, with emphasis on issues that may arise in domestic violence cases.

a. Intent or plan

ER 803(a)(3) establishes a hearsay exception for expressions of intent or plan. Thus, a statement by A that she intends to go to Vancouver is admissible as proof that A went to Vancouver, a statement by B that he plans to talk to C is admissible as proof that B talked to C, and so forth.

In a criminal prosecution, a statement of intent by the defendant, suggesting that he planned to commit the crime charged, would be admissible on the issue of guilt.

However, it is ordinarily unnecessary to resort to the instant hearsay exception in this situation because the defendant's out-of-court statement would be party admission, excluded from the definition of hearsay altogether by ER 801(d)(2).

More often, the instant hearsay exception is invoked in an effort to introduce a statement by the victim or some other person. The victim's intentions are, of course, often irrelevant in a criminal case and may be excluded on that basis. However, in a variety of situations, prosecuting attorneys have succeeded in establishing some link between the intent of the victim or a third person and the crime charged – a link sufficient to satisfy the requirement of relevance.

Example: Admissible – In *State v. Terrovona*, 105 Wn.2d 632, 642, 716 P.2d 295, 300 (1986), a prosecution for murder, the State was properly allowed to introduce evidence that after hanging up the telephone, the victim had said that the caller was the defendant and that he, the victim, was going to go to 116th Street to meet the defendant. The court held that the evidence was admissible to implicate the defendant in the crime charged.

Example: Admissible – *State v. Alvarez*, 45 Wn. App. 407, 410, 726 P.2d 43, 46 (1986), a prosecution for being an accomplice to murder, a statement by the accused murderer, in the defendant's presence, that he and the defendant intended to kill the victim was admissible to prove the underlying offense for which the defendant was charged as an accomplice.

Example: Admissible – In *State v. Bernson*, 40 Wn. App. 729, 738, 700 P.2d 758, 766, *review denied* 104 Wn.2d 1016 (1985), a prosecution for murder in which the defendant was accused of killing a woman who applied to him for a job, the trial court properly admitted evidence that shortly before the killing, the victim said she had received a job offer to sell women's apparel.

b. Motive

In the context of assault and homicide prosecutions, statements by the defendant expressing hatred or ill-will towards the victim are clearly within the rule and relevant to the issue of guilt. The usual reasoning is that the statements show motive or

intent. *See, e.g., State v. Hoyer*, 105 Wash. 160, 177 P. 683 (1919); *State v. Spangler*, 92 Wash. 636, 159 P. 810 (1916).

c. State of mind, emotion, sensation or physical condition

ER 803(a)(3) establishes an exception to the hearsay rule for statements describing the declarant's then-existing state of mind, emotion, sensation, or physical condition. Although the rule is potentially applicable in a variety of situations, the most common use of the rule is to introduce out-of-court statements describing pain and suffering in personal injury litigation, to show the nature and extent of injury, and in prosecutions for assault and homicide.

Illustrative cases are scarce, not because the rule is seldom used, but because the rule is straightforward and has seldom required appellate interpretation.

As mentioned above, the rule applies only to statements of present pain or bodily condition. The rule does not allow the introduction of statements describing previous pain or bodily condition, though such statements may be admissible under another hearsay exception when they are made to physicians or other medical personnel (*See* Section 4., *infra*).

d. Limitations on the admissibility of state of mind testimony

(1) The testimony must be relevant.

A major limitation, easily overlooked, is that a statement may be within this hearsay exception and yet the statement may be inadmissible because it is irrelevant. In other words, if the state of mind of the declarant is not at issue in the case, a statement expressing the declarant's state of mind remains inadmissible.

As stated above, threats by the defendant towards the victim are generally admissible under this subsection. More troublesome issues arise with respect to the relevance of statements by the *victim*,

typically expressing fear of, or anxiety about, the defendant. Is the victim's statement admissible as evidence of the defendant's guilt?

The general answer is no; the victim's statement is not admissible (even though within this exception to the hearsay rule) because the victim's state of mind is irrelevant to the issue of whether the defendant committed the act charged. The connection between the victim's fears and the defendant's guilt is too remote to justify admissibility. *State v. Parr*, 93 Wn.2d 95, 100, 606 P.2d 263, 265 (1980).

Example: Inadmissible – In *State v. Cameron*, 100 Wn.2d 520, 530, 674 P.2d 650, 655 (1983), a prosecution for murder in which the defendant claimed insanity, the trial court should not have admitted the victim's out-of-court statements to the effect that she was having problems with the defendant and that she feared him. The court rejected the State's argument that the statements were admissible to show the victim's state of mind, saying that the victim's state of mind was irrelevant because it did not relate to either premeditation or insanity, the two principal issues in the case.

However, if the defendant interposes a defense of accident or self-defense, the victim's state of mind may become relevant in the sense that suggests that the victim may not have acted as claimed by the defendant. Thus, in the leading case of *State v. Parr, supra*, at 106 , the defendant claimed that the victim had grabbed a gun and lunged at him, and that he acted in self-defense but did not intend to actually kill the victim. The court held the victim's out-of-court statement that she feared the defendant was admissible because it was relevant to rebut the defendant's theory that the victim was the first aggressor.

Likewise, previous threats against the defendant by the victim may be offered by the defense to show that the victim was the first aggressor, *i.e.*, in support of a claim of self-defense. *State v. Reuben*, 156 Wash. 655, 661, 287 P. 887, 889 (1930).

(2) Statements about the past excluded.

It must be remembered that the instant rule is concerned with statements describing the declarant's then-existing state of mind or bodily condition. Statements describing a previous state of mind or bodily condition – termed statements of memory or belief – are not admissible under the instant rule. It has often been said that if statements of memory or belief were admissible, the hearsay rule would be virtually eliminated.

In the leading Washington case, *State v. Parr*, 93 Wn.2d 95, 106, 606 P.2d 263, 269 (1980), a prosecution for murder, a witness was allowed to recount the victim's out-of-court statement that she feared the defendant. By contrast, the witness was not allowed to recount the victim's statement that the defendant had threatened her. The latter statement was a factual assertion about something that had happened in the past and was not within this exception to the hearsay rule.

Since *Parr*, two decisions by the Court of Appeals have seemingly stretched the rule a bit in favor of admissibility, perhaps signaling a trend towards broader admissibility in the future.

Example: Admissible – In *State v. Flett*, 40 Wn. App. 277, 288, 699 P.2d 774, 781 (1985), a prosecution for rape, hearsay evidence of the victim's statement to her son that "[s]omething upset me," made 2 1/2 hours after the incident, was admissible under the instant rule. The court stated, "[t]he fact [that the statement] . . . refers to a past event does not take it out of the scope of the rule, since it is reasonable to believe the condition existed at the time of the utterance, as well." *Flett at* 288.

Example: Admissible – In *State v. Hubbard*, 37 Wn. App. 137, 147, 679 P.2d 391, 397 (1984), *rev'd on other grounds*, 103 Wn.2d 570, 693 P.2d 718 (1985), a prosecution for murder, the court had ruled that under ER 404(b), the State was permitted to introduce evidence that the defendant had

burglarized the victim's home on a previous occasion. As proof, the State was properly allowed to have a witness relate statements by the victim, after a telephone conversation between the victim and his wife, in which his wife had expressed her suspicion that the defendant had burglarized their home. The court rejected the argument that the evidence was double hearsay and held that the evidence was admissible under ER 803(a)(3) to prove that the victim believed that the defendant had burglarized his home.

(3) Statement admitted to show effect on the hearer.

An out of court statement offered to prove the mental or emotional effect upon the hearer or reader is not objectionable as hearsay. The result is usually based not upon the theory that the instant hearsay exception applies, but upon the theory that the statement is not offered to prove the truth of the matter asserted, *i.e., the statement is not within the definition of hearsay in the first place.*

The rule is often invoked in civil litigation to show that the hearer or reader received notice of some fact, had knowledge of some fact, or the like. Although the rule is less frequently invoked in criminal cases, some applications can be found in the case law.

Example: Admissible – In *State v. Mounsey*, 31 Wn. App. 511, 523, 643 P.2d 892, 899 (1982), the prosecution sought to prove that the defendant had entered a home with the intent to commit rape. The defendant sought to prove that he could not have intended to commit rape because he had heard from a friend that the victim was accustomed to late night visitors and that, in fact, he expected to be welcomed. The court stated that the statement by the friend was not hearsay when offered to prove the defendant's state of mind.

Example: Admissible – In *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d. 892, 898 (1996), the prosecution was permitted to introduce a threat allegedly made by the defendant to a third party to

explain why the third party had not reported the crime earlier. The statement was not hearsay because it was not being admitted to prove that defendant intended to carry out the threat but simply to show the effect on the hearer.

However, if the out of court statement is offered to prove the state of mind of a third person (a person other than the declarant or the hearer or reader), the statement is hearsay.

4. Statements for Medical Diagnosis or Treatment – ER 803(a)(4)

Under ER 803(a)(4), statements made for the purpose of, and reasonably "pertinent to," medical diagnosis or treatment are not objectionable as hearsay. This exception is "firmly rooted." *State v. Woods* 143 Wn.2d 561, 602, 23 P.3d 1046, 1069 (2001) (internal citation omitted). Unlike the hearsay exception for state of mind (above), the rule is not limited to statements describing the declarant's present symptoms. The instant rule is much broader and includes statements of past symptoms as well as statements of medical history.

The rule is based upon the assumption that a person making such a statement is motivated to be truthful by the hope for an accurate diagnosis and successful treatment.

The rule is not limited to statements made to physicians. Statements made to hospital employees, ambulance drivers, and the like are included so long as the requirements of the rule are met. *In re Welfare of J.K.*, 49 Wn. App. 670, 675, 745 P.2d 1304, 1307 (1987), *review denied*, 110 Wn.2d 1009 (1988).

In a domestic violence case, the rule has many potential applications. Prosecuting attorneys have succeeded in using this exception to introduce statements by victims of assault or sexual abuse under a variety of circumstances.

Example: Admissible – In *State v. Robinson*, 44 Wn. App. 611, 616 n. 1, 722 P.2d 1379, 1383 n.1, *review denied* 107 Wn.2d. 1009 (1986), a prosecution for indecent liberties, a three-year-old child's description of the incident to an emergency room nurse and a physician were admissible.

Example: Admissible – *In re Welfare of J.K.*, *supra*, a juvenile court dependency proceeding arising out of alleged child abuse, the

trial court properly considered a hospital social worker's testimony recounting the child's description of one incident of abuse.

As a general rule, statements attributing fault are not relevant to diagnosis or treatment and hence are not admissible under this rule. Thus, statements as to causation ("I was hit by a car . . .") would normally be admissible, but statements as to fault (". . . driven by John Smith") would not. *See State v. Butler*, 53 Wn. App. 214, 217, 766 P.2d 505, 507, *review denied*, 112 Wn.2d 1014 (1989). However, "a statement made by the child abuse victim identif[ying] the abuser as a member of the victim's immediate household" is admissible because it is relevant to preventing recurrence of the injury. *Butler* at 220-21. Similarly, in a case involving an adult domestic violence victim, a statement as to fault may be admissible because it is reasonably pertinent to treatment and diagnosis. *State v. Sims*, 77 Wn. App. 236, 239-40, 890 P.2d 521, 523 (1995).

NOTE: The record in Sims contains extensive testimony from the medical personnel as to why it is important to elicit the identity of the assailant when treating a domestic violence victim. It is unclear whether, without such testimony, statements of fault or identity are admissible.

In practice, of course, statements do not fall neatly into one category or another. It is often difficult to separate statements of causation from statements attributing fault, particularly when the declarant is a young child. In this sort of situation, the courts tend to admit the evidence.

Example – In *State v. Bouchard*, 31 Wn. App. 381, 639 P.2d 761 *review denied*, 97 Wn.2d 1021(1982), a prosecution for indecent liberties, the abused child's statements to a doctor, including a statement that "Grandpa did it," were admissible as statements of the "cause or external source of the injury and as necessary to proper treatment." *Bouchard* at 384.

5. Prior Inconsistent Statement Given Under Oath – *Smith* Affidavits

Under ER 801(d)(1), prior inconsistent statements of a witness are considered not to be hearsay when:

> The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with

> the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding . . .

In *State v. Smith*, 97 Wn.2d 856, 863, 651 P.2d 207, 211 (1982), the Supreme Court held that an affidavit sworn before a notary public fell within the "other proceeding" requirement of ER 801(d)(1)(i) and admitted the affidavit as substantive evidence after the declarant, at the subsequent trial, testified inconsistently. The court concluded that because prosecuting attorneys rely on such affidavits when deciding whether to file an information, the affidavits come within the "other proceedings" requirement of ER 801(d)(1)(i).

The *Smith* court declined to establish a bright-line rule providing for the admissibility of all such affidavits. Rather, it established a four-part test for determining whether an inconsistent statement is sufficiently reliable to be admitted as substantive evidence:

(1) Did the witness make the statement voluntarily?
(2) Were there minimal guaranties of truthfulness?
(3) Was the statement taken as standard procedure in one of the four permissible methods for determining probable cause for the instigation of a criminal proceeding?
(4) Was the witness subject to cross-examination when giving the subsequent inconsistent statement?

In *State v. Nelson*, 74 Wn. App. 380, 391, 874 P.2d 170, 177, *review denied*, 125 Wn.2d. 1002 (1994), the court followed the rationale of *Smith* to permit admission of a statement dictated by a witness to a police officer. The statement was given under penalty of perjury but not sworn before a notary public. Because the statement met the formal requirements of RCW 9A.72.085 (substitutes for affidavits) and was otherwise reliable, it was admissible as substantive evidence under ER 801(1)(i) after the declarant testified inconsistently at trial.

The *Smith-Nelson* requirements do not apply when the statement is not being admitted as substantive evidence but is admitted only for impeachment purposes under ER 613.

Example: Inadmissible – In *State v. Nieto*, 119 Wn. App. 157, 163, 79 P.3d 473, 477 (2003), prosecution for rape of a child, the victim recanted a statement that she had consensual intercourse with defendant before she was sixteen. The Court held the

statement was not sufficiently reliable to be admissible as prior inconsistent statement because the statement was not under oath, there was no notary, no other formal procedure was followed, and the declarant testified she had not read language about perjury on boiler-plate statement form. *See also State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234, 1243 (2003) (Court held a statement was not admissible as a prior consistent statement because it was not "under oath subject to the penalty of perjury.")

6. Prior Consistent Statement by Witness – ER 801(d)(1)

A statement is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. By its terms, the rule applies only when the declarant is present and has already testified as a witness. ER 801(d)(1).

Because the rule applies only to prior statements by a witness, the rule is unavailable to the prosecution in a domestic violence case if the victim refuses altogether to testify. The rule, however, may be useful to the prosecution when the defense claims the victim/witness is biased or has fabricated the allegations against the defendant.

Example: Admissible – In *State v. Smith*, 30 Wn. App. 251, 255, 633 P.2d 137, 140 (1981), *aff'd*, 97 Wn.2d 801, 650 P.2d 201 (1982), a prosecution for assault, defense counsel's cross-examination of the victim, designed to show that the victim had on previous occasions falsely accused the defendant of misconduct, justified the admission of the victim's prior consistent statements to other persons about the alleged incident involving the defendant.

Example: Admissible – In *United States v. Red Feather*, 865 F.2d 169, 171 (8th Cir. 1989), a prosecution for assault to commit rape, in which the defendant had implied on cross-examination that the victim's testimony had been coached, the prosecution was properly allowed to introduce the victim's diary to corroborate her testimony.

Example: Admissible – In *State v. Osborn*, 59 Wn. App. 1, 7, 795 P.2d 1174, 1177, *review denied*, 115 Wn.2d 1032 (1990), a prosecution for statutory rape, the victim testified and was cross-examined only briefly. Defense counsel then conducted a more extensive cross-examination of the victim's mother, designed to reveal a conspiracy by the mother and the victim to falsely accuse the defendant. Thereafter, the trial court properly allowed other

witnesses to reiterate the victim's out-of-court descriptions of the alleged incident. The appellate court said it saw "no problem" with the fact that the prior statements of the victim were offered to rebut inferences raised during cross-examination of a different witness, the mother.

Example: Admissible – In *State v. Walker*, 38 Wn. App. 841, 845, 690 P.2d 1182, 1185 (1984), *review denied*, 103 Wn.2d 1012 (1985), a prosecution for statutory rape, after defense counsel asserted that a witness was biased because of a "trade-off" deal with the prosecutor, the prosecution was properly allowed to offer the prior consistent statements of the witness through the testimony of four other witnesses.

The prior consistent statement is admissible only if it is offered to rebut a charge of *recent* fabrication. The rule is inapplicable when the defendant claims that the victim's story was a fabrication from the inception.

Example: Inadmissible – In *State v. Bargas*, 52 Wn. App. 700, 703, 763 P.2d 470, 472 (1988*), review denied*, 112 Wn.2d 1005 (1989), a prosecution for rape, a police officer should not have been allowed to recount the statements by the victim/witness during her interview at police headquarters, one day after the alleged rape. The appellate court said that the reference in ER 801 to rebutting a claim of *recent* fabrication means that a witness's out-of-court statement is admissible only if the opponent claims that the witness fabricated a new story between the time the statement was made and the time of trial. Here, the court said, the defendant's theory was that the victim had fabricated her story from the inception, long before giving her statements to the officer. (Error, however, was harmless.)

The prior consistent statement is admissible only if it was made under circumstances minimizing the risk that the declarant foresaw the legal consequences of the statement, i.e., before the existence of any motive to fabricate a new story. *State v. Ellison*, 36 Wn. App 564, 568, 676 P.2d 531, 534-5, *review denied*, 101 Wn.2d 1010 (1984).

Example: Inadmissible – In *State v. Stark*, 48 Wn. App. 245, 250,738 P.2d 684, 688, review *denied* 109 Wn.2d 1003 (1987), rev'd on other grounds by statute, a prosecution for indecent liberties and statutory rape, the defense had suggested during cross-examination of victim A that victim A's story was based upon a story she had heard from victim B, who had based her story

of sexual abuse upon something she had read in a book. Thereafter, the prosecution offered the testimony of victim A's mother, who said that victim A had told her about the incident after victim A had discussed the incident with victim B. On appeal, the court held that the mother's testimony was not admissible under ER 801 because victim A had reported the incident to her mother *after* victim A's conversation with victim B, *i.e.*, after the events which gave rise to the implied charge of fabrication. The error, however, was harmless.

Example: Inadmissible – In *State v. McDaniel*, 37 Wn. App. 768, 683 P.2d 231 (1984), a prosecution for indecent liberties and statutory rape, in which the victim had given testimony describing the incident, a caseworker should not have been permitted to testify as to consistent statements by the victim shortly after the incident. The appellate court stated, "There was no showing that the victim's consistent statements were made at a time when the motive to falsify was not present. Evidence which merely showed that the victim made similar statements to the caseworker . . . was of little probative value." *McDaniel* at 771.

7. Prior Testimony – ER 804(b)(1)

When a declarant is unavailable for trial, prior sworn testimony of the declarant may be admissible. ER 804(a) sets forth under what situations a declarant is unavailable. These include:

(1) A witness who has been exempted from testifying on the grounds of privilege;
(2) A witness who persists in refusing to testify despite an order of the court;
(3) A witness who testifies to a lack of memory concerning the subject of the proposed testimony;
(4) A witness who is unable to be present because of "death or then existing physical or mental illness or infirmity;"
(5) A witness who is absent from the hearing and the proponent has been unable to prosecute his attendance by "process or other reasonable means."

The proponent must establish that a "good faith" effort has been made to secure the presence of the witness. *State v. Dictado*, 102 Wn.2d 277, 287, 687 P.2d 172, 188 (1984), *rev'd on other grounds*, 244 F.3d 724 (9th Cir. 2001). The mere issuance of a subpoena is not enough. *State v. Rivera*, 51 Wn. App. 556, 560, 754 P.2d 701, 703 (1988). In *State v. Hobson*, 61 Wn. App 330,

338, 810 P.2d 70, 73-4, *review denied*, 117 Wn.2d 1029 (1991), the court stated that under the facts of that case the State need not have moved for a material witness warrant for the now-absent witness in order to establish a "good faith" effort to secure his presence at trial.

Medical unavailability requires more than a showing of inconvenience to the witness. The medical condition must make appearance of the witness "relatively impossible." *State v. Young*, 129 Wn. App. 468, 481, 119 P.3d 870 (2005).

ER 804(b)(1) states:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Depositions are discussed more fully at Chapter 4, Section IV, E.

8. Public Records Exception

RCW 5.44.040 creates a statutory exception to the hearsay rule for public records. In *State v. Phillips*, 94 Wn. App. 829, 836, 972 P.2d 932 (1999), the Court of Appeals affirmed a conviction for violation of a domestic violence protection order. The trial court had admitted a return of service, which had been filed in the court file during the protection order proceeding to establish that the respondent/defendant had been served with a copy of the protection order and thus had knowledge of its existence. The Court of Appeals concluded that this was admissible.

In *Phillips,* the return of service was admitted to corroborate defendant's admission and to establish independent proof of the *corpus delicti.* However, there is no reason to believe that the ruling is limited to this situation. It appears that, so long as the return of service had been filed in the court file in the protection order proceeding and otherwise meets the requirements of RCW 5.44.040 (no expertise or opinion), the return of service is admissible as substantive evidence in a subsequent criminal prosecution.

VII. Children as Witnesses

The possibility of a child's testimony in a domestic violence case raises several issues. On one hand, children are often present during the violence, so their testimony may have great probative value. On the other hand, the child may suffer great trauma from testifying and may be subject to great stress from other family members for "taking sides." Continuances can cause significant distress to child witnesses. The court can prevent the child from being further traumatized by avoiding unnecessary continuances.

A. Children's Statutory Rights

In addition to the statutory rights granted to all witnesses, children are given special statutory rights tailored to their needs. RCW 7.69A.030 states that these special rights are not "substantive rights," but that "there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section."

Of particular significance in domestic violence cases are a child's right to a secure waiting area, the right to have an advocate or support person present, and the right to a measure of privacy with respect to names and addresses.

The Washington statute expressly authorizes the child's advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child, and to provide the court with information "to promote the child's feelings of security and safety." RCW 7.69A.030(2).

B. Competency

1. The legal standard for competency

RCW 5.60.050(2) prohibits testimony by "[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." Although the statute does not mention age as a factor, the case law makes it clear that the trial judge has considerable discretion in deciding whether a child should be permitted to testify.

The following factors are to be considered in evaluating competency:

a. The child's understanding of the obligation to speak the truth on the witness stand;

b. The child's mental capacity, at the time of the events in question, to receive an accurate impression of the events;

c. Whether the child's memory is sufficient to retain an independent recollection of the events;

d. Whether the child has the capacity to express in words his or her memory of the events; and

e. Whether the child has the capacity to understand simple questions about the events.

State v. Wyse, 71 Wn.2d 434, 437, 429 P.2d 121, 123 (1967).

Each case must be judged on its own facts and on the trial court's judgment as to the competency of the particular child involved.

2. Procedure for determining competency

a. Normally the party calling the child as a witness must establish the child's competency to testify.

In one case, the appellate court noted with approval that the competency of a child was established in part by the testimony of a psychiatrist who had interviewed the child. *State v. Tate*, 74 Wn.2d 261, 266, 444 P.2d 150, 153 (1968). In another case, the court held that the competency of a child was properly established by allowing the child to respond to the prosecutor's questions by whispering answers to a social worker, who then repeated the answers to the court. *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982, 984 (1988).

b. In determining whether a child is competent to testify, the court may, but need not, question the child about the actual events that are at issue in the case. *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203, 1205 (1987).

c. The child should be examined out of the presence of the jury. *State v. Tuffree*, 35 Wn. App. 243, 246-7, 666 P.2d 912, 914-5 (1983) (noting that in previous decisions the Court of Appeals had observed it was a "better practice" to conduct hearing out of presence of jury).

d. If the child is found competent to testify, the court should administer the usual oath or at least elicit some form of declaration from the child that he or she will testify truthfully. ER 603 gives the court discretion to fashion a procedure appropriate for the circumstances presented.

3. Relationship to hearsay rules

A child might be too overwhelmed by the courtroom setting to testify accurately, and yet the child's out-of-court statements might seem reliable. Thus, as a general rule, the fact that a child is incompetent to testify does not bar introduction of a child's out-of-court statement under an exception to the hearsay rule. *State v. Robinson*, 44 Wn. App. 611, 616, 722 P.2d 1379, 1383, *review denied*, 102 Wn.2d 1009 (1986) (excited utterance by three-year-old); *State v. Justiniano*, 48 Wn. App. 572, 574, 740 P.2d 872, 874 (1987) (statement by abused four-year-old, under RCW 9A.44.120).

NOTE: At least under the facts before the court in *State v. Shafer*, 156 Wn. 2d 381, 128 P.3d 87 (2006), the statements made by a three-child about sexual abuse to her mother and to a family friend were held to be non-testimonial. *See infra* Section VI. A. for a discussion of the relationship between the Confrontation Clause and the Hearsay Rule.

NOTE: RCW 9A.44.120 – the "Child Hearsay Statute" – was amended in 1995 to broaden its scope to include physical as well as sexual abuse of a child. The statute is not available for use when the child is testifying as a non-victim witness. The statute operates only in criminal proceedings. *See In re the Dependency of Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985). The constitutionality of the statute was upheld in *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984).

C. Use of Closed-Circuit Television Testimony

RCW 9A.44.150, which expressly allows the use of closed-circuit television to convey the testimony of children, on its face refers only to cases in which a child is testifying concerning an act or attempted act of "sexual contact" or "physical abuse" on that child. Before closed-circuit television testimony can be used, the trial court must find by substantial

evidence that "requiring the child to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial." RCW 9A.44.150(1)(c). The constitutionality of RCW 9A.44.150 was upheld against both a state and federal constitutional challenge in *State v. Foster,* 135 Wn.2d 441, 472, 957 P.2d 712, 729 (1998).

VIII. Expert Witnesses

In both civil and criminal cases, experts on domestic violence are occasionally called to assist the jury. When an expert testifies, "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. However, this rule has a limitation in a criminal trial when expert testimony is introduced in a trial where the batterer is the defendant. Under no circumstances may an expert opine that, in the opinion of the expert, the defendant committed the act for which he or she is charged. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12, 19 (1987) (rape trauma syndrome). In *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199, 210 (1994), *review denied*, 126 Wn.2d 1010(1995), the court concluded that, while a social worker's testimony that a child sex-abuse victim suffered from post-traumatic syndrome was properly admitted, it was error to permit the expert to testify that that the trauma was caused by sexual abuse.

Particular care must be exercised in not admitting "criminal profile" evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426, 430 (1994) (drug sales case).

The following is a summary of some of the purposes for which expert testimony may be introduced.

A. Battered Women's Syndrome

The collection of specific characteristics and effects of abuse on battered women is known as the battered woman syndrome – it is sometimes also referred to as the battered person syndrome. The battered woman syndrome results in a victim's decreased ability to respond effectively to the violence. Victims may appear traumatized, withdrawn, and non-responsive. They may suffer from lowered self-esteem and may have developed coping behaviors to increase their personal safety. They may minimize and deny the danger they have endured, and at times, may rely on alcohol or drugs to cope with the severity of the violence.[4] Testimony addressing these characteristics may be of considerable assistance to the trier of fact.

The United States Attorney General's Task Force recommends that courts permit expert testimony on the syndrome in order to provide the judge and jury with a clear understanding of the dynamics and complexities of family violence:

> Cognizant of the cyclical nature of violence within the family, the emotional, economic, and psychological dependencies between the victim and the abuser, and other fundamental aspects of abuse, [judges and jurors] will be better able to understand the victim's actions.[5]

Testimony about the battered woman syndrome is generally offered by way of an expert witness. In Washington, the courts have said that the admissibility of such testimony, and testimony about related syndromes, is determined by reference to the *Frye* rule.[6] Under *Frye*, scientific testimony is admissible only if two conditions are met: (1) the theory underlying the expert's testimony must have general acceptance in the scientific community; and (2) there must be techniques, experiments or studies utilizing the theory that are capable of producing reliable results and that are generally accepted in the scientific community.

Even if scientific testimony satisfies Frye, such testimony should be admitted only if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

The existence of the battered woman's syndrome – a subset of post-traumatic stress disorder – is well established. *See, e.g., State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994); *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984); *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984).[7] Recent cases have focused on the relevance of the testimony under the particular facts before the court.

This Chapter discusses the admissibility of expert testimony. A discussion of the relevance of prior misconduct by the accused or victim is found in Chapter 6, Sections III and IV.

1. Offered By Defendant-Victim

a. Self-Defense

If a woman is accused of assaulting or killing a man who allegedly abused her, evidence of battered woman syndrome is admissible in support of a claim of self-defense. *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984); State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984); State v. Hendrickson, 81 Wn. App. 397, 914 P.2d.

1194 (1996). See *also State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) (battered child syndrome). This testimony is helpful to the trier of fact because it can show how "severe abuse within the context of a battering relationship affects the battered person's perceptions and reactions in ways not immediately understandable to the average juror." *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

The presence of battered woman syndrome alone, however, is not a defense. To justify submitting the issue of self-defense to the jury, the defendant must provide at least some evidence, other than the syndrome, that she perceived imminent danger from the batterer. *State v. Walker*, 40 Wn. App. 658, 700 P.2d 1168 (1985). In *State v. Hanson*, 58 Wn. App. 504, 793 P.2d 1001, *review denied*, 115 Wn.2d 1033 (1990), a woman was accused of murdering the man with whom she lived. She did not assert a claim of self-defense but rather claimed that the killing was an accident. The appellate court held that under this record, evidence concerning the battered woman syndrome was irrelevant. (A dissenting judge flatly disagreed, saying, "Evidence that [defendant] retrieved the gun out of fear and not anger tends strongly to make the theory that the gun discharged accidentally more probable." *Hanson* at 510 (Webster, J., dissenting). *See also State v. Callahan*, 87 Wn. App. 925, 943 P.2d 767 (1997) (self-defense available under some circumstances, even when defendant claims that act was accidental).

A defendant who testifies that she does not remember stabbing her boyfriend may still assert self-defense. Testimony concerning the battered woman's syndrome may, thus, also be appropriate. State v. Hendrickson, 81 Wn. App. 397, 914 P.2d 1194 (1996)

b. Duress

A battered woman who commits welfare fraud at the behest of her batterer should have been permitted to assert a defense of duress, even though the batterer was on a merchant marine vessel at the time the incident occurred.

Although the trial court permitted an expert to testify about battered woman syndrome, the court declined to instruct on duress because the defendant faced no immediate harm from her batterer. The Supreme Court reversed stating that

"the reasonableness of the defendant's perception of immediacy should be evaluated in light of the defendant's experience of abuse." *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

In contrast, in *State v. Riker, supra*, testimony concerning battered woman syndrome was properly excluded where the individual who allegedly placed the defendant under duress was a casual business acquaintance and was not her batterer.

2. Offered By Prosecution Against Abuser

a. Expert testimony inadmissible if invades province of jury, comments on defendant's guilt, or amounts to profile evidence.

When it is the abuser who is charged with assault or homicide, the courts have not been receptive to evidence of the battered woman syndrome. The evidence is not admissible to corroborate the victim's allegation of abuse because the expert would simply be stating an opinion on the ultimate issue of the defendant's guilt and would thus invade the province of the jury. *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (rape trauma syndrome). In *State v. Florczak*, 76 Wn. App. 55, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995), the court concluded that, while a social worker's testimony that a child sex-abuse victim suffered from post-traumatic syndrome was properly admitted, it was error to permit the expert to testify that that the trauma was caused by sexual abuse.

Particular care must be exercised in not admitting "criminal profile" evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994) (drug sales case).

b. Expert testimony admissible to explain delay in reporting domestic violence, recantation or minimizing of incident by victim.

Expert testimony in domestic violence prosecutions is often admissible to explain the actions of the victim.

In *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988), a prosecution for rape, testimony about battered woman syndrome was admissible to assist the jury in understanding the victim's delay in reporting the alleged rape and the victim's failure to discontinue her relationship with the defendant.

Similarly, in *State v. Grant,* 83 Wn. App. 98, 920 P.2d 609 (1996), the court upheld the admissibility of evidence of past acts of domestic violence perpetrated by the defendant against the victim *and* expert testimony intended to explain the victim's conduct. Specifically, the expert was permitted to give an opinion as to why the victim continued to see the defendant even after a "no-contact" order had been issued and why she minimized the extent of the violence in conversations with defense counsel. As the court stated, "[t]he jury was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." *Grant* at 108. *Accord, State v. Madison*, 53 Wn. App. 754, 770 P.2d 662 (1989) (expert testimony admissible to explain why abused children may be reluctant to testify).

B. Expert Testimony Admissible to Explain Delay in Reporting Domestic Violence, Recantation, or Minimizing of Incident by Victim

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C. In a Civil Case, Expert Testimony May Be Used to Assist the Jury in Evaluating Damages

For example, an expert may be able to explain why the victim is unable to work to assist the jury in evaluating a request for special damages. Similarly, an expert may have relevant testimony on the issue of pain and suffering.

D. Family Law Cases

1. Parenting plans

As discussed in greater detail in Chapter 11, allegations of domestic violence frequently arise in family law cases. RCW 26.09.191(1) prohibits the court from ordering joint decision-making if the court has found that one parent has a "history" of domestic violence Similarly, residential time shall be limited where one parent has a history of domestic violence. RCW 26.09.191(2)(a). Expert testimony may assist the court in evaluating the effect of domestic violence on the children so that appropriate limitations may be put into place.

2. Scope of testimony of guardian ad litems and parenting evaluators

Although technically guardian ad litems are not experts, such persons may not only testify as to their opinions and conclusions but, pursuant to ER 703, may give the basis for such opinions. *Stamm v. Crowley*, 121 Wn. App. 830, 91 P.3d 126 (2004) (Title 11 GAL); *Fernando v. Nieswandt*, 81 Wn. App. 103, 940 P.2d 1380 (1997) (Title 26 GAL). Presumably this same logic would control when the witness is a parenting evaluator appointed pursuant to RCW 26.09.220 as opposed to a guardian ad litem appointed pursuant to RCW 26.12.175.

[1] For a more thorough discussion of the evidentiary issues presented here, see 5, 5A and 5B K. Tegland, *Washington Practice: Evidence Law and Practice*, 4th Ed. (2006).

[2] Two law review articles discuss the admission of prior acts of misconduct against an abuser/defendant: L. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973 (2000); D. Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(b) to Hold Batters Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361 (1998/1999).

[3] Division III, in *State v. Sharp*, 80 Wn. App. 457, 909 P. 2d 1333 (1996), held that a decision to admit an excited utterance was reviewable *de novo*. The court stepped away from that position in *State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000).

[4] *Domestic Violence: Benchguide for Criminal Courts 11* (California Center for Judicial Education and Research (CJER), 1990).

[5] *Attorney General's Task Force on Family Violence, Final Report: Recommendations for Judges 42* (1984).

[6] The rule originated in *Frye v. United States*, 293 F. 1013, 3 A.L.R. 145 (DC Cir., 1923).

[7] *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994) involved an attempt by a defendant to introduce evidence concerning the battered woman syndrome as part of a duress defense in a case not involving her batterer. The court found that the use of such testimony for this purpose did not satisfy the second prong of *Frye*. *Riker* at 363.