

Prosecutors' Domestic Violence Handbook

Prepared by the Washington Association
of Prosecuting Attorneys and the King
County Prosecuting Attorney's Domestic
Violence Unit.

Authors:
Carrie Hobbs, Pam Loginsky, and David Martin

Acknowledgments

We are indebted to the numerous people who shared their time, expertise, and writing skills to make this manual possible. Thank you to the following people:

- Andy Miller, Benton County Prosecutor
- Julie Long, Benton County Deputy Prosecutor
- Susan Adams, Director, Crystal Judson Family Justice Center
- Claire Bradley, Kitsap County Prosecutor, Chief District Court
- Jennifer Nugent, Vancouver City Attorney, Assistant City Attorney
- Jennifer Lord, Thurston County, Deputy Prosecutor
- Ann Summers, King County Prosecuting Attorney, Senior Deputy Prosecutor
- Dennis McCurdy, King County Prosecuting Attorney, Senior Deputy Prosecutor
- Adrienne McCoy, King County Prosecuting Attorney, Senior Deputy Prosecutor
- Jimmy Hung, King County Prosecuting Attorney, Senior Deputy Prosecutor
- Wendy Ross, King County Prosecuting Attorney, DV Advocate Supervisor
- Emily Elting, King County Prosecuting Attorney, DV Advocate
- Paul Stern, Snohomish County Prosecuting Attorney, Senior Deputy Prosecutor
- Tracy Orcutt, VAWA STOP Grant Coordinator, King County
- Ben Gauen, King County Prosecuting Attorney, Deputy Prosecutor
- Tomas Gahan, King County Prosecuting Attorney, Senior Deputy Prosecutor

Finally, our gratitude and thanks to the following organizations and groups who provided information or thoughtful comments and ideas for making this possible:

- Washington State Gender and Justice Commission
- King County Coalition Against Domestic Violence
- King County DV and Child Maltreatment Response Team
- Washington State Coalition against Domestic Violence

Contents

ACKNOWLEDGMENTS	2
CHAPTER ONE: UNDERSTANDING DOMESTIC VIOLENCE.....	6
CHAPTER TWO: WASHINGTON DOMESTIC VIOLENCE LAWS	9
A. INTRODUCTION: THE LEGISLATURE’S INTENT TO PROTECT DOMESTIC VIOLENCE VICTIMS.....	9
B. DEFINITIONAL STATUTES.....	13
i. <i>Domestic Violence</i>	13
ii. <i>Family or Household Members</i>	13
iii. <i>Dating Relationship</i>	14
iv. <i>Victim</i>	14
v. <i>Primary Aggressor</i>	14
CHAPTER THREE: INVESTIGATION AND CHARGING.....	15
A. INTRODUCTION.....	15
B. CHARGING DECISION	15
C. FILING PROCEDURES AND STANDARDS.....	16
I. <i>Getting the case from law enforcement</i>	16
II. <i>Filing Standards</i>	17
D. EVALUATION OF THE EVIDENCE.....	19
I. <i>Evidence at the time of filing</i>	19
II. <i>Evidence to be developed</i>	20
E. THE CHARGING DECISION.....	20
I. <i>Elements of the offense</i>	20
II. <i>Charging the offense that can be proven under your case's and your victim's particular circumstances</i>	20
III. <i>Charging the offense that carries the consequences desired</i>	21
F. BAIL CONSIDERATIONS	21
A. <i>In-custody defendants</i>	21
B. <i>Filing with an arrest warrant</i>	21
C. <i>Information to be included in the request for bail</i>	22
G. SELF DEFENSE AND VICTIM-DEFENDANTS	22
H. PLEAD AND PROVE CHECKLIST.....	22
D. INTIMATE PARTNER SEXUAL VIOLENCE	25
CHAPTER FOUR: BAIL AND NO CONTACT ORDERS.....	28
A. INTRODUCTION.....	28
B. BAIL.....	28
1) PRIOR TO COURT APPEARANCE.....	28
2) RELEVANT FACTORS TO CONSIDER (RISK ASSESSMENT).....	29
3) CONDITIONS OF RELEASE	31
4) DENIAL OF BAIL	32
5) RELEASE DELAYED	32
6) AMENDING OR REVOKING BAIL ORDERS	32
C. NO CONTACT ORDERS.....	32
1) FORM OF NO CONTACT ORDERS	33
2) RECALL OF NO CONTACT ORDERS	34
3) TERMINATION OF NO CONTACT ORDERS	34
4) CHILDREN AND NO CONTACT ORDERS	34

5) MANNER AND TYPES OF NO CONTACT AND PROTECTION ORDERS.....	34
vi. <i>Limitations on Access to Firearms and Other Deadly Weapons</i>	36
CHAPTER FIVE: DISCOVERY AND PRETRIAL PREPARATION.....	38
A. DISCOVERY: THE PROSECUTOR’S DUTY.....	38
1) THE VICTIM INTERVIEW.....	38
2) THE VICTIM’S ADDRESS.....	39
3) SHIELDING HARMFUL OR EMBARRASSING INFORMATION.....	40
4) LIMITING DEFENSE INTERVIEWS OF PROSECUTION WITNESSES	40
5) DEPOSITIONS	40
6) WORK PRODUCT	41
7) DOMESTIC VIOLENCE PROGRAM, RAPE CRISIS CENTER, AND COUNSELING RECORDS	41
8) DOMESTIC VIOLENCE ADVOCATES.....	42
9) MEDICAL RECORDS.....	42
I. OBTAINING MEDICAL RECORDS	42
II. PRIVILEGE	46
III. MEDICAL RECORDS AND VICTIM’S STATEMENTS	48
IV. CAUSATION V. FAULT STATEMENTS	48
10) ONGOING TESTING.....	48
11) REQUESTING DISCOVERY FROM DEFENSE COUNSEL.....	48
B. PRETRIAL PREPARATION.....	49
1) CAN THE PROSECUTION BE DONE WITHOUT THE VICTIM? THE MODERN CONFRONTATION CLAUSE AND	
D.V. PROSECUTION AFTER <i>MICHIGAN V. BRYANT</i>	50
I. THE SCOPE OF THE CONFRONTATION CLAUSE.....	50
II. THE TEST	51
III. 911 TAPES	52
IV. STATEMENTS TO THOSE OTHER THAN LAW ENFORCEMENT: FRIENDS, FAMILY, GOOD SAMARITANS, AND	
MEDICAL RECORDS.....	52
2) CAN THE PROSECUTION BE DONE WITHOUT THE VICTIM? THE MODERN CONFRONTATION CLAUSE AND	
FORFEITURE BY WRONGDOING.....	53
JAIL PHONE CALLS	54
3) SHOULD AN EXPERT BE USED TO EXPLAIN DOMESTIC VIOLENCE AND VICTIM BEHAVIOR?	56
CHAPTER SIX: WITNESSES.....	58
A. HANDLING THE UNCOOPERATIVE, RECANTING, OR HOSTILE VICTIM OR WITNESS	58
1) HOW TO PREPARE.....	59
2) AN UNEXCUSED WITNESS	62
B. MATERIAL WITNESS WARRANTS	62
1) QUASHING THE MATERIAL WITNESS WARRANT	63
CHAPTER SEVEN: EVIDENTIARY ISSUES.....	63
A. INTRODUCTION.....	64
B. PRIVILEGES	64
1) SPOUSAL OR DOMESTIC PARTNER PRIVILEGE	65
I. WHEN MAY THE SPOUSAL OR DOMESTIC PARTNERSHIP PRIVILEGE BE ASSERTED?	65
II. THE “PERSONAL VIOLENCE” LIMITATION	65
III. COMMENT ON THE EXERCISE OF SPOUSAL PRIVILEGE	65
2) PSYCHOLOGISTS	66
3) COUNSELORS, SOCIAL WORKERS, AND THERAPISTS	66
4) DOMESTIC VIOLENCE ADVOCATE.....	66
C. ADMISSIBILITY OF DEFENDANT’S PRIOR BAD ACTS AGAINST THE VICTIM.....	67

D. HEARSAY EXCEPTIONS.....	67
1) COMPLAINT OF SEXUAL ABUSE	67
2) EXCITED UTTERANCE.....	68
3) STATE OF MIND OR BODILY CONDITION.....	68
4) INTENT OR PLAN.....	68
5) MOTIVE.....	69
6) STATE OF MIND, EMOTION, SENSATION OR PHYSICAL CONDITION	69
I. THE STATEMENT MUST BE RELEVANT.....	69
II. STATEMENTS ABOUT THE PAST EXCLUDED.	70
7) STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT – 803(A)(4)	70
8) PRIOR CONSISTENT STATEMENT BY WITNESS – ER 801(D)(1)	70
9) PRIOR TESTIMONY – ER 804(B)(1)	71
10) PUBLIC RECORDS EXCEPTION.....	71
E. CHILDREN AS WITNESSES	72
1) CHILDREN’S STATUTORY RIGHTS.....	72
2) COMPETENCY.....	73
I. THE LEGAL STANDARD FOR COMPETENCY.....	73
II. PROCEDURE FOR DETERMINING COMPETENCY.....	73
III. RELATIONSHIP TO HEARSAY RULES.....	73
F. EXPERT WITNESSES	74
1) BATTERED WOMEN’S SYNDROME	74
CHAPTER EIGHT: VICTIM ADVOCACY.....	76
CHAPTER NINE: TRIAL ISSUES	80
A. INTRODUCTION:	80
B. VOIR DIRE	80
1) PEREMPTORY CHALLENGES	80
2) CHALLENGES FOR CAUSE.....	81
3) CONDUCTING VOIR DIRE	81
C. OPENING.....	83
D. CROSS OF THE DEFENDANT.....	83
E. AGG SECTION	83
F. PROSECUTORIAL MISCONDUCT	85
G. SAMPLE TRIAL CHECKLIST—SEE EXAMPLE IN APPENDIX.....	86
CHAPTER ELEVEN: SENTENCING.....	87
A. DEFERRED PROSECUTIONS.....	87
B. STIPULATED ORDER OF CONTINUANCE (SOC) OR PRE-TRIAL DIVERSION	88
C. COMPROMISE OF MISDEMEANOR.....	88
D. AFFIRMATIVE TREATMENT CONDITIONS	88
APPENDIX: IMMIGRATION AND U-VISA.....	92
APPENDIX: POLICE INVESTIGATION.....	93
A. INTRODUCTION.....	93
B. ESTABLISHING PROBABLE CAUSE	93
C. ARRESTS	97
D. FOLLOW-UP INVESTIGATION	99
APPENDIX: CHECKLISTS AND CHEAT SHEETS.....	100

Chapter One: Understanding Domestic Violence

Domestic violence (DV) is one of the most prevalent and serious crimes handled by prosecutors across the country.¹ The late King County Prosecutor Norm Maleng called domestic violence the most serious criminal justice issue communities face and called domestic violence a "crime against the human spirit." The impact of domestic violence on victims and their children is significant. According to a recent survey regarding domestic violence by The Centers for Disease Control and Prevention (CDC):

On average, 24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States, based on a survey conducted in 2010. Over the course of a year, that equals more than 12 million women and men. Those numbers only tell part of the story—more than 1 million women are raped in a year and over 6 million women and men are victims of stalking in a year. These findings emphasize that sexual violence, stalking, and intimate partner violence are important and widespread public health problems in the United States.²

Domestic violence defendants are the most violent offenders in the criminal justice system. They recidivate violent crime at a higher level than any other offender, and are most likely to be involved in homicide.³

Prosecuting domestic violence cases requires specific skills and a different mindset than prosecuting other areas of criminal law. This is in part because the key witness—the victim, who may be the only witness, is often reluctant or unwilling to cooperate with the prosecution. The victim may refuse to provide a statement to police, or later refuse to talk with prosecutors, or recant.⁴ A victim may also minimize the incident of domestic violence by denying that it happened, or indicate the violence was her responsibility. There are a myriad of reasons why a victim may recant or minimize true allegations of domestic violence, however often the recantation is due to criminal influence by the

¹ Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 Santa Clara L. Rev. 157 (2007).

² See http://www.cdc.gov/ViolencePrevention/NISVS/?s_cid=tw_cdc1082

³ See R. Barnoski & S. Aos. (2003). *Washington's offender accountability act: An analysis of the Department of Corrections' risk assessment*. Olympia: Washington State Institute for Public Policy, Document No. 03-12-1202, and Campbell, J, Webster, D & Glass, N(2009). *The danger assessment: validation of a lethality risk assessment instrument for intimate partner femicide*. *J Interpers Violence*, 24(4653-674), DOI: 10.1177/0886260508317180

⁴ Although the victim is referred to as a woman and the batterer is referred to as a man throughout this manual, domestic violence takes many forms, including female batterers against their male partners as well as same-sex domestic violence. See Satoko Harada, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing A Victim of Same-Sex Domestic Violence*, 41 U. BALT. L.F. 150 (2011).

defendant.⁵

Prosecutors and advocates have known for many years that witness tampering and witness intimidation is a significant problem in domestic violence cases, and that victims recant and/or refuse prosecution due, in part, to perpetrators' threats of retaliation.⁶ As recognized by the U.S. Supreme Court, "This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial." *Davis v. Washington*, 126 S.Ct. 2266, 165 L Ed.2d 224, 2006. The tampering often means victims recant as a survival skill, making what they believe is a rational decision to protect themselves or their families. Victims may also recant or minimize true allegations to avoid poverty, living in a shelter, or even homelessness. The reality for many domestic violence victims is that recantation is often the safest and most prudent course of action they can take. One author noted the many challenges that face a domestic violence victim, and the reasons a victim may not cooperate with police or prosecutors:

[I]n order to leave her abuser, a victim must walk away from her primary source of income and any family savings. If a victim is employed, departing the local area to escape the violent situation safely may force a victim to give up her job and risk her children's welfare. Even if a victim can avoid moving and maintain her job, a batterer can inflict additional economic harm on the victim by harassing her at work or at home until she is fired or evicted. Half of battered women who choose to leave their abusive partner drop below the poverty line. A victim may also recant based on the well-founded fear that her batterer will retaliate. One study shows that 73% of battered women who seek medical help received injuries after leaving their abuser. Two-thirds of those killed by intimate partners were separated from their batterer prior to their death. Because a batterer knows where the victim's friends and relatives live and shelters are routinely filled to capacity, a victim often has no safe place to hide.⁷

Sometimes practitioners working with cases where victims recant will treat the case less seriously, but the reality is that recantation is often the byproduct of highly sophisticated manipulation strategies by DV perpetrators. Research shows that abuse which exists before arrest continues afterwards when offenders continue "to use abusive strategies....along with other sophisticated emotional manipulation (e.g. sympathy appeals) to erode victim's agency and achieve their goal of getting out [the charge, jail]."⁸ DV victims face difficult issues in deciding whether or not testify: will the system let me down? How long will he really be in custody? I love him, we have kids together, and I just want the violence to stop, won't testifying make it worse? If I testify I know one day he will get out and kill me, isn't it better for me and my family if I just say it didn't happen? If he is convicted he will lose his job and we will lose our home and income, why should I help? The questions are reasonable under the circumstances, and the victim's choices are heavily influenced by their abuser.

⁵ For an article discussing the reasons many victims recant, see Amy E. Bonomi, et al., "Meet me at the hill where we used to park": *Interpersonal processes associated with victim recantation*, 73 *Social Science and Medicine* 1054-1061 (2011).

⁶ See Bennett, Goodman, & Dutton, 1999; Ellison, 2002; Hart, 1993; Meier, 2006.

⁷ Linell A. Letendre, Comment, *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, at 979-80 (2000).

⁸ See Amy E. Bonomi, et al., "Meet me at the hill where we used to park": *Interpersonal processes associated with victim recantation*, 73 *Social Science and Medicine* 1054-1061 (2011).

Despite a victim's recantation or reluctance to cooperate, a prosecutor has many tools available to successfully prosecute domestic violence cases. In fact, a prosecutor should be able to use the reasons for the victim's behavior as part of the central theme in the trial. The following chapters outline the tools available to prosecutors to successfully prosecute a domestic violence case, with or without the victim's cooperation. The chapters include tips on how to manage a domestic violence case from the earliest stages of investigation, pretrial preparation, trial practices, and sentencing. Chapters include case law, checklists, and practice tips. Although every effort has been made to include up-to-date case law, prosecutors should always ensure they use cases which represent current valid law.

Chapter Two: Washington Domestic Violence Laws

- [Introduction: The Legislature’s Intent to Protect Domestic Violence Victims](#)
- [Definitional Statutes](#)

a. Introduction: The Legislature’s Intent to Protect Domestic Violence Victims

Washington's domestic violence laws are found throughout the Revised Code of Washington (RCW) with the primary purpose of protecting the victim and treating domestic violence as a serious crime. An overview of the policies and laws in Washington is found in the Washington Supreme Court decision *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200 (2008). The Court in *Danny v. Laidlaw* outlined the legislature’s intent to protect domestic violence victim. In addition, briefing provided by Legal Voice⁹ outlines Washington State’s clear desire to protect domestic violence victims.¹⁰ Although the selection below is lengthy, it demonstrates the legislature's longstanding intent to protect domestic violence victims and hold offenders accountable.

The State of Washington has a well-defined and judicially recognized public policy to treat domestic violence as a serious crime, to protect victims, and to hold abusers accountable by encouraging victims of domestic violence to take actions to protect themselves and their families by seeking alternative living arrangements, social services and by utilizing the state’s legal system to obtain protection and to hold abusers accountable. *See e.g.*, RCW 10.99.010 (declaring the “importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide”) and other related statutes including but not limited to RCW 26.50.030, RCW 43.70.610, RCW 50.20.050, and RCW 59.18.570 (intent section).

Washington’s Legislature declared the purpose and intent of its domestic violence legislation as embodying the important public policy of protecting both individual victims and society as a whole from the ravages of domestic violence, which it viewed as a “crisis.” *See* RCW 26.50.030. In response to this crisis, the Legislature has enacted a comprehensive statutory scheme providing protections from domestic violence through no-contact orders, criminal prosecution, shelter services, transitional housing, domestic violence education, health services and more.

As one of its first enactments addressing the problem of domestic violence, the Washington Legislature in 1979 passed a law providing for funding and standards for shelters for victims of domestic violence. RCW 70.123.010. There, the Legislature declared, in part:

⁹ <http://www.legalvoice.org/about/>

¹⁰ *Danny v. Laidlaw* briefing available on the Legal Voice website at <http://www.legalvoice.org/focus/violence/survivors.html> (last visited November 11, 2011).

The legislature finds that **domestic violence is an issue of growing concern** at all levels of government and that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence. Research findings show that domestic violence constitutes a significant percentage of homicides, aggravated assaults, and assaults and batteries in the United States. **Domestic violence is a disruptive influence on personal and community life and is often interrelated with a number of other family problems and stresses.** Shelters provide safety, refuge, advocacy, and helping resources to victims who may not have access to such things if they remain in abusive situations...

RCW 70.123.010 (emphasis added). Five years later, the Legislature enacted the first version of the Domestic Violence Prevention Act (RCW 26.50 et seq.), which created the civil Order for Protection for victims of domestic violence. The Legislature stated:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. **Domestic violence costs millions of dollars each year** in the state of Washington for health care, absence from work, services to children, and more. **The crisis is growing.** (emphasis added)

RCW 26.50.030.

Since that enactment, the Legislature has amended the statute several times in order to improve access to this system for victims of domestic violence. *See, e.g.*, RCW 26.50 FINDINGS -- 1992 C 111 (“Domestic violence must be addressed more widely and more effectively in our state: Greater knowledge by professionals who deal frequently with domestic violence is essential to enforce existing laws, to intervene in domestic violence situations that do not come to the attention of the law enforcement or judicial systems, and to reduce and prevent domestic violence by intervening before the violence becomes severe.”).

More recently, in response to the federal Violence Against Women Act of 1994, the Legislature enacted the Foreign Protection Order Full Faith and Credit Act:

The legislature finds that existing statutes may not provide an adequate mechanism for victims, police, prosecutors, and courts to enforce a foreign protection order in our state. It is the intent of the legislature that the barriers faced by persons entitled to protection under a foreign protection order will be removed and that violations of foreign protection orders be criminally prosecuted in this state.

In 1999, the Legislature passed a comprehensive set of reforms designed to improve the criminal justice system’s response to domestic violence. This chapter, which sets forth various requirements including

criminal procedure to be used in domestic violence cases, training of law enforcement in domestic violence issues, and mandatory enforcement of restraining orders, declares:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. ... Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.

RCW 10.99.010 (emphasis added). Further, in instructing the Department of Health to establish a comprehensive domestic violence education program, the Legislature stated in RCW 43.70.610:

The legislature finds that domestic violence is the leading cause of injury among women and is linked to numerous health problems, including depression, abuse of alcohol and other drugs, and suicide. Despite the frequency of medical attention, few people are diagnosed as victims of spousal abuse. (emphasis added).

These statutes, and a host of others, reflect the understanding that victims of domestic violence face significant barriers to taking steps necessary to remove themselves from the violence to protect themselves and their families. The Legislature recognized that in enacting laws such as RCW 50.20.050, which allows an employee to retain eligibility for unemployment compensation if the employee left work to protect herself or immediate family members from domestic violence. Washington's Temporary Assistance for Needy Families plan similarly makes exemptions from its Workfirst and "Welfare to Work" requirements where those requirements would make it more difficult for individuals receiving assistance to escape family violence or would unfairly penalize victims of family violence. *See*, www.workfirst.wa.gov/about/planbody.pdf at IV-4, p. 39 ¶ 3. Similarly, RCW 59.18.570 and RCW 59.18.580 make it an act of discrimination to deny rental housing to victims of domestic violence, and allow victims to terminate leases of rental property without penalty when necessary to flee their abusers.

Further, in recognition of the financial hardship of recovery from crimes of domestic violence, RCW 7.68.070(2) permits victims of crimes of domestic violence who report the crime to law enforcement to apply for and receive funds through the Crime Victims Compensation Program. Understanding that some victims must keep their whereabouts hidden from an abuser, the Washington Legislature also created the Address Confidentiality Program, through which victims of domestic violence may obtain a confidential, private address, sufficient for all mail, public records, and service of legal process. RCW 40.24.030. Likewise, the Legislature has provided that domestic violence victims in fear of further violence may legally change their names under seal, so there is no publicly-available record of such actions. RCW 4.24.130(5).

The Legislature has also considered the connection between domestic violence and harm to

children. To help address that problem, Washington's Parenting Act requires a court to limit a parent's time with his or her child when that parent has committed domestic violence. RCW 26.09.191. Both Washington family law and the Domestic Violence Prevention Act provide for the inclusion of children in orders restraining the abuser from contact and further acts of violence. RCW 26.09.050(1), RCW 26.10.040(1)(d), RCW 26.26.130(9) and RCW 26.50.060(1)(b) and (2). And RCW 4.24.130(5), noted above, allowing for sealed name changes, includes name changes for the children of victims of domestic violence.

Finally, the Legislature has continued to respond to the concerns of victims of domestic violence in light of recent events. In the wake of the 2003 murder of Crystal Brame by her husband, Tacoma Police Chief David Brame, the Legislature passed a bill requiring all law enforcement agencies in the state to create and enforce policies designed to address officer-involved domestic violence. RCW 10.99.090. In 2006, the Legislature added domestic violence victims and their community-based advocates to the list of people between whom communications are privileged. RCW 5.60.060 (8).

Since *Danny v. Laidlaw*, the legislature has further indicated its desire to protect victims of domestic violence and provide tools for investigating and prosecuting domestic violence cases. In June 2010, House Bill 2777 became law, a bill that changed many facets of the courts' response to domestic violence. HB 2777 gave courts "tools to identify violent perpetrators of domestic violence and hold them accountable" and tools to enhance the overall response to domestic violence. Again, the legislature announced the law's specific intent:

The legislature intends to improve the lives of persons who suffer from the adverse effects of domestic violence and to require reasonable coordinated measures to prevent domestic violence from occurring. The legislature intends to give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable. The legislature intends to: Increase the safety afforded to individuals who seek protection of public and private agencies involved in domestic violence prevention; improve the ability of agencies to address the needs of victims and their children and the delivery of services; upgrade the quality of treatment programs; and enhance the ability of the justice system to respond quickly and fairly to domestic violence. In order to improve the lives of persons who have, or may suffer, the effects of domestic violence the legislature intends to achieve more uniformity in the decision-making processes at public and private agencies that address domestic violence by reducing inconsistencies and duplications allowing domestic violence victim to achieve safety and stability in their lives.

As these and other legislative pronouncements make plain, domestic violence is not simply a private wrong. It is a serious threat to the public and to the social fabric of Washington State. The Washington Legislature has repeatedly and forcefully enunciated the public policy of protecting individual victims and society generally from the ravages of domestic violence.

In an attempt to protect victims and provide tools for members of the criminal justice system, the legislature has created domestic violence laws that generally fall within four categories:

- (1) Definitional;
- (2) Preventative/Protectionist;
- (3) Substantive Crimes and Enhancements; and

(4) Sentencing and Treatment.

The section below outlines the definitional statutes applicable to domestic violence cases. The latter categories of statutes will be discussed in subsequent chapters.

b. Definitional Statutes

- [Domestic Violence](#)
- [Family or Household Members](#)
- [Dating Relationship](#)
- [Victim](#)
- [Primary Aggressor](#)

The following terms are applicable to all domestic violence cases, including those involving protection orders issued by a non-Washington state court. *See generally* RCW 26.52.010.

i. Domestic Violence

“Domestic violence” includes, but is not limited to the following crimes when committed by one family or household member against another:

- Assault 1st through 4th
- Reckless Endangerment
- Coercion
- Burglary 1st, 2nd
- Trespass 1st, 2nd
- Malicious Mischief 1st, 2nd, 3rd
- Kidnapping 1st, 2nd
- Drive-by Shooting
- Unlawful Imprisonment
- Rape 1st, 2nd
- Stalking
- Interference with the Reporting of DV
- Violation of a Restraining Order
- Violation of a Protection Order
- Violation of a No Contact Order
- Residential Burglary

[RCW 10.99.020\(3\)](#).

"Domestic violence" also means:

- (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members;
- (b) sexual assault of one family or household member by another; or
- (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

[RCW 26.50.010\(1\)](#).

ii. Family or Household Members

"Family or household members" includes:

- Spouses;
- Former spouses;
- State registered domestic partners;
- Former state registered domestic partners;
- Child in common, regardless of marriage or have lived together;
- Adult persons related by blood or marriage;
- Adult persons who are presently residing together or who have resided together in the past;
- Persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have had a dating relationship;
- Persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship;
- Persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

[RCW 10.99.020\(1\)](#); [RCW 10.99.901](#); [RCW 26.50.010\(2\)](#).

iii. Dating Relationship

A dating relationship is a social relationship of a romantic nature. Factors that the court may consider in making the determination include:

- The length of time the relationship has existed;
- The nature of the relationship;
- The frequency of interaction between the parties.

[RCW 26.50.010\(3\)](#).

iv. Victim

“Victim” means a family or household member who has been subjected to domestic violence.

[RCW 10.99.020\(4\)](#).

v. Primary Aggressor

The “primary aggressor” is defined as the person who is the most physically aggressive. [RCW 10.31.100\(2\)\(c\)](#). This is NOT necessarily the person who struck first. In making the determination of who is the primary aggressor, consideration must be given to:

- which person is in the greatest need of protection;
- the intent to protect victims of domestic violence under [RCW 10.99.010](#);
- the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and
- HB 2777 also requires officers to consider “the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.” This provision permits officers to consider the full domestic violence history, including other victims.

Chapter Three: Investigation and Charging

This chapter focuses on the prosecutor's steps in investigating a domestic violence case and making a charging decision. Key points in this chapter include:

- [Introduction](#)
- [Charging Decision](#)
- [Filing Procedures and Standards](#)
- [Evaluation of the Evidence](#)
- [The Charging Decision](#)
- [Bail Considerations](#)
- [Self Defense and Victim-Defendants](#)
- [Plead and Prove Checklist](#)
- [Intimate Partner Sexual Violence](#)

a. Introduction

For most prosecutors, police reports will be submitted for review prior to charging. There are some cities where police officers file charges directly with the court. A thoughtful charging decision is critical in domestic violence cases---not just because of the requirements in the RCWs, RPCs, office filing and disposition standards, and case law---but because the decision will impact victim safety. A prosecutor should strive to review cases for the filing of domestic violence charges efficiently with as few unnecessary delays as possible. Delay diminishes the quality of DV cases as it sends a message to victims and courts that the case is not a priority. Delay provides additional opportunities for the defendant to tamper, intimidate, or harm the victim. Delay also means the risk and lethality factors present in so many DV cases are not mitigated by prosecutorial action. Avoid accumulating a backlog of cases, consistently apply prosecutor standards, work closely with advocates when available, and make sure that victim safety is considered in every case.

b. Charging Decision

When making a filing decision, it is important to have as much information as possible without unduly delaying the charging decision. In addition to the police report, prosecutors should make an effort to review the following:

- 911 tapes, photos, medical records, and other incident reports when available
- District and Municipal Court Information System (DISCIS) domestic violence history. Out of state criminal history (NCIC/III) on misdemeanor and felony DV cases, including the Individual Order

- History, as required by RCW 10.99.045. The legislation mandates that both of these be provided in every single DV case if charges are filed.¹¹
- Past or current petitions for protection order. The petitions can often serve as Smith affidavits, and provide important information about the history of domestic violence with the victim and potentially other victims.
 - Whether there is information in the discovery indicating the defendant may possess, own, or have access to firearms. Whenever there is information in the discovery indicating the defendant may possess, own, or have access to firearms, the filer must complete the Firearm Surrender order (often a part of the No Contact Order) and include it in the filing paperwork. The filer should also fill out and include a copy of the "Affidavit of Compliance" and the surrender instruction sheet
 - Any contact made by an advocate. Note that some jurisdictions have an advocate make victim contact before making a filing decision. During this time, police may obtain a *Smith Affidavit*.¹² *See the appendix for a sample Smith affidavit and sample briefing asking the court to admit a Smith affidavit.*
 - If the case involves allegations of sexual assault then a joint interview (JI) should be considered. The JI should occur prior to filing where possible.¹³

c. Filing Procedures and Standards

I. Getting the case from law enforcement

10.99.030(9) requires that law enforcement forward the offense report to the appropriate prosecutor within **ten** days of making such report if there is probable cause to believe that an offense has been committed unless the case is under active investigation.

¹¹ See HB 2777 and [RCW 10.99.045](#): (b) For the purposes of (a) of this subsection, the prosecutor shall provide for the court's review: (i) The defendant's criminal history, if any, that occurred in Washington or any other state; (ii) If available, the defendant's criminal history that occurred in any tribal jurisdiction; and (iii) The defendant's individual order history. *Id.*

¹² Under Evidence Rule 801(d) (1), a prior inconsistent statement "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" is admissible. The Washington Supreme Court has determined that sworn statements given to police officers may be admissible under this rule on a case-by-case analysis. *State v. Smith*, 97 Wn.2d 856, 861 (1982).

In determining whether evidence should be admitted, reliability is the key. In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness.

Id. In considering admissibility, the court considers

- (1) whether the witness voluntarily made the statement;
- (2) whether there were minimal guaranties of truthfulness;
- (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and
- (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

State v. Nelson, 74 Wn. App. 380, 387 (1994). These factors are known as the "*Smith factors*." *State v. Thach*, 126 Wn. App. 297, 308 (2005).

¹³ Some counties have special protocols to conduct joint interviews. To view the King County Special Assault Protocol, visit http://depts.washington.edu/hcsats/pro_guidelines.html#.

It is essential that prosecutors make decisions about in custody cases while defendants are in custody and out of custody cases as soon as possible. Prosecutors should create a system that processes referrals as quickly as possible.

Police should be informed of what information is required to be submitted for a filing decision to be made, especially in in-custody cases, so that the filing decision is not delayed by requests for additional evidence required for the decision.

Prosecutors' offices should create systems that facilitate open and frequent communication with law enforcement in the field and with detectives and should have regular meetings to update police on changes in the law that affect their investigations.

II. Filing Standards

All DV filers must have guidelines to inform their filing decisions. In DV cases, these are particularly important because of the unpredictable safety issues that flow from a decision to file or not to file charges, the dynamic nature of the evidence, and the collateral consequences to victim.

Below are three areas to consider. Guided by FADS and office policies on DV filing, filers should consider information from each of the following categories in making a filing decision.

A. The Offender

i. Offender History

Prosecutors must review domestic violence arrest, charging, and conviction history, protection order history, and other violent history, before making a charging decision. Review protection order petitions when possible.

History may aid in the charging decision. For example, if you are reviewing a consensual violation of a protection order, your decision whether to file might differ between an offender with a history of violence and an offender who has no history of violence.

If you are deciding whether to file an assault 4 or an assault 2nd strangulation case where the conduct was an unsuccessful attempt to cut off air or blood, the history of the offender could be the deciding factor.

ii. Risk Assessment

Many jurisdictions are beginning to develop and use risk assessment tools to assist with release decisions and resource allocation. This is another source of information about your offender that can be considered along with criminal history in determining what charges to file.

iii. The instant offense

The conduct of the offender in the police report you are reviewing is the most important source of information about that offender in determining your charging decision.

B. Victim

Early contact with victims of domestic violence is essential to making a good charging decision and for a successful prosecution. Prosecutors' offices, in consultation with law enforcement investigators, should establish guidelines for early victim contact to inform the victim of procedures and decisions, where victim advocates are available, procedures for early contact should include those advocates.

i. Statutory Obligations

All filing procedures should comply with the statutory requirements for notifying victims of charging decisions.

10.99.060 The public attorney responsible for making the decision whether or not to prosecute shall advise the victim of that decision within five days, and, prior to making that decision shall advise the victim, upon the victim's request, of the status of the case. Notification to the victim that charges will not be filed shall include a description of the procedures available to the victim in that jurisdiction to initiate a criminal proceeding.

ii. Victim wishes

The wishes of the victim should be taken into consideration, but should not control the decision. It may not be safe for victims to support prosecution in situations where they do truly wish for charges to be filed. Offenders may tamper with victims and instruct them to "drop the charges" or "take back or change statements." The requests may be evidence that the offender is attempting to reassert control after the victim has reported to police.

Prosecutors should expect defendants to tamper with witnesses in every case. Davis v. Washington noted that domestic violence cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that he/she does not testify at trial."

iii. Victim Safety

When an in-custody case is submitted, a filing decision should be made within 72 hours before the suspect is released. Offenders booked for investigation of domestic violence should rarely be released before the court makes a finding of PC and has the opportunity to issue a no contact order.

The filing decision, especially a decision NOT to file and to release the offender, MUST be communicated to the victim before the offender is released so the victim can plan accordingly.

If an out of custody referral is delayed, the victim may be back in contact or even living with the offender. If a case is filed and the offender is sent notice in the mail to appear in court without someone warning the victim, she could be in danger. Every effort must be made to ensure the victim knows before the offender. It is always better to file and execute an arrest warrant when possible.

iv. Victim history

A victim's criminal, arrest, and order history should always be reviewed when making a charging decision, especially when there is a possible self-defense claim to the facts of the referral. A review of this history will help avoid filing on so-called victim/defendants and will give the prosecutor valuable information about the dynamics of the relationship. Wherever possible, prior police reports involving the victim and suspect should also be reviewed.

d. Evaluation of the Evidence

I. Evidence at the time of filing

It is preferable to have the 911 call, photos, witness and officer statements, and medical records before making a filing decision. This evidence informs the filer of whether the case can be proven if the victim becomes unavailable to testify. Since victims of domestic violence often do not testify, this is important information. However, delaying a charging decision in order to obtain all evidence may not be desirable or safe to the victim.

Requiring victim statements or cooperation in order to file charges is not advisable. Determination of whether to file should be based on evaluation of the available evidence with an assumption that the victim will testify at trial. A victim's level of cooperation is fluid and an unreliable guide to filing decisions. Domestic violence cases are dynamic, and evidence often develops that will allow a prosecution to proceed without the victim's cooperation.

Prosecutors' offices should develop policies that discuss how to make a charging decision when all the evidence is not available to the filing prosecutor. These policies should take into account the history of the offender, the safety of the victim, and gravity of the instant offense. Filing prosecutors must be trained in the rules of evidence as applied to DV cases in order to make good charging decisions.

Police should be informed of what information is required to be submitted for a filing decision to be made, especially in in-custody cases, so that the filing decision is not delayed by requests for additional evidence required for the decision.

Police should make every attempt to interview suspects prior to filing where allowed by law.

II. Evidence to be developed

When a case is charged, in most cases the filing prosecutor should request in writing to the detective or officer that additional evidence be submitted. Special attention should be given to preserving evidence such as 911 calls, photos, and in car videos.

If the victim has given a written or recorded statement already, careful consideration should be given to whether and why a subsequent statement should be taken. It is not usually helpful to have multiple statements about the same event. However, a subsequent statement might be taken to memorialize history of domestic violence or other unreported events. If a victim wishes to recant, then it is preferable for law enforcement to take a statement documenting the new story. **Remember exculpatory information must be disclosed to any court making a determination of probable cause.**

Prosecutors should consider asking for statements from victims' friends or family to whom the victim may have made statements about the incident or about prior abuse. Prior police reports should be requested if not submitted at filing.

If a child witnesses the event and is old enough to give a statement, consider asking law enforcement to interview the child using child interviewing specialists or police trained to interview children.

Prosecutors should anticipate defenses and seek follow up that would disprove that defense. For example, if a defendant is mentally unstable and likely to claim diminished capacity, broaden the sphere of investigation to include evidence showing the clear mental status of the defendant immediately before and after the crime. If the defense is likely to be self-defense, ask law enforcement to interview witnesses familiar with the history of the couple and who may have relevant information to disprove self-defense.

e. The Charging Decision

I. Elements of the offense

Prosecutors must have reliable evidence that establishes probable cause for each element of the offense in order to file charges. A checklist should be developed setting forth the evidence required to prove a specific level of injury or verification of court orders.

II. Charging the offense that can be proven under your case's and your victim's particular circumstances

Consider what charges are easiest to prove under the circumstances of your case. For example, if a defendant commits an FVNCO and an Assault 2, but you expect your victim will not be able to testify and you can prove only the FVNCO that may be the best charge to file. Other examples include Felony harassment/telephone harassment based on prior v. threat to kill and FVNCO v. Stalking.

C. Charging the offense that carries the consequences desired

Length of confinement: If the defendant has no prior felonies, the court can impose 12 months for an assault 4 and only 9 months for an assault 2. **Know the scoring rules** for domestic violence felonies: some felonies will double and some misdemeanors will score.

Length of NCO: A felony crime may result in a longer NCO term than a misdemeanor conviction

Charging an aggravating factor may allow a NCO to be issued to protect the children witnessing the violence

Community Custody: Changes in DOC supervision have eliminated supervision for many felonies and misdemeanors so charging a case in municipal or district court may provide supervision where not available in superior court.

Probation length: Courts of limited jurisdiction can impose up to **five** years of probation, which is more than any felony supervision. This may affect the decision of where to file a case.

f. Bail Considerations

A. In-custody defendants

In custody defendants generally have bail set before the case is referred by police for charging. Check your local rules for bail requirements. It is generally advisable to attempt to keep in custody defendants in custody as they generally meet the criteria in CrR 3.3 of being a risk to commit a violent offense and, especially in cases of violation of court orders, likely to interfere with the administration of justice. Note, RCW 10.99.045 states a defendant arrested for DV shall be required to appear in person before a magistrate within one judicial day after the arrest. As a result, bail can be refused between booking and first appearance.

Always be mindful that the judge setting bail or releasing a defendant at the first appearance may not have had complete information for making a determination of bail or release. If there is new information, consider whether to ask for an increased bail or an arrest warrant for victim safety. Be familiar with your local procedures on executing arrest warrants in court or having defendants remanded. Develop protocols for arrest with your local law enforcement partners.

B. Filing with an arrest warrant

This is often the safest way to file charges against out of custody defendants who may be in contact with victim. Consider whether telling your victim about the warrant will ensure her safety or give her the opportunity to assist the defendant in avoiding arrest. Develop protocols with your local law enforcement partners for executing arrest warrants in ways that maximize victim and police safety.

C. Information to be included in the request for bail

RCW 10.99.045 3(b) requires the prosecutor provide the following information to the court at the first appearance after arrest and at arraignment:

The defendant's criminal history, if any, that occurred in Washington or any other state; If available, the defendant's criminal history that occurred in any tribal jurisdiction; and

The defendant's individual order history.

In addition to the statutory requirements, it is helpful for bail requests to include information about prior domestic violence arrests, prior domestic violence charges that were dismissed and, if the information is available, the reason for the dismissal (which is often lack of victim cooperation), prior threats to victim or threats of suicide, prior failures to appear for court, substance abuse or mental health history, and prior incidents of violence.

g. Self Defense and Victim-Defendants

Prosecutors should have standards and model analysis for claims of self-defense and battered spouse syndrome to prevent the filing of cases against victim defendants. This protocol should include a consideration of statements made by the suspect at the scene, who called 911, the nature and location of the injuries, prior police reports involving the suspect and victim, prior reports involving the victim with others, the order history and criminal history of the victim, and information from witnesses familiar with the couple.¹⁴

h. Plead and Prove Checklist

The penalties for recidivist domestic violence felons significantly increased after August 11, 2011. DV misdemeanor convictions for "repetitive domestic violence offenses," which include assault 4, harassment, violation of a court order, and stalking count in felony domestic violence scores for crimes that occurred after August 11, 2011. DV felonies for assault, felony violation of a no contact order/protection order (assault and two prior), harassment, stalking, kidnapping, robbery, and arson multiply in the felony domestic violence score. The Department of Corrections supervision of DV

¹⁴ See Meg Crager, Merrill Cousin, and Tara Hardy, *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region* (April 2003), available at <http://www.mincava.umn.edu/documents/victimdefendant/victimdefendant.html>. The report examines survivors of domestic violence who are arrested and charged with domestic violence in Seattle and King County. The report provides a brief summary of available information from other states and counties, identifying and analyzing the increase in women arrested for domestic violence-related crimes. The report suggests revisions to policies, procedures, training, community-based services, and state statutes. The suggested changes could decrease the number of domestic violence survivors who are arrested after acting in self-defense or because they are falsely accused and misidentified as the primary aggressor. The changes would hold the battering partners of those domestic violence survivors accountable, and help increase appropriate intervention, services, and support for those domestic violence survivors who are correctly identified as the defendant in the specific incident, but are the victim of ongoing abuse in their relationships.

recidivists was also expanded. The Legislature provided these tools because it intended to "give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable." Laws of 2010, ch. 274, § 101.

In order to take advantage of these changes, the Legislature requires assistant city attorneys and county prosecutors to "plead and prove" the domestic violence relationship. Plead and prove means the domestic violence relationship in RCW 10.99.020 must be set forth in the charging document, and proven to a jury or judge beyond a reasonable doubt. The following checklist was created to help prosecutors make sure their jurisdiction is taking the necessary steps to use these new sentencing tools. In order for a DV case to qualify, jurisdictions need to ask the following:

- Do our charging documents plead/allege the family and household relationship under RCW 10.99.020?
- Do our recommendation forms incorporate plead and prove?
- Do our guilty plea forms recognize DV as being pled and proven?
- When we take a guilty plea, is there a factual basis for the "family or household" allegation?
- If there was a trial, have we introduced sufficient facts to prove the family or household relationship, and did we use the appropriate jury instructions?
- At sentencing, does our Judgment and Sentence reflect that DV has been pled and proven?

Please consider using this checklist and changing your forms in order to take advantage of these new sentencing and supervision tools for recidivist DV offenders.¹⁵

Do our charging documents plead/allege the family and household relationship under RCW 10.99.020?

Amend your charges to allege the family and household relationship. Add the bolded and italicized words to each count:

On or about the _____ day of _____, 20__, in the County of _____, State of Washington, the above-named Defendant (elements of crime); contrary to Revised Code of Washington (cite for alleged offense); ***and furthermore, the defendant did commit the above crime against a family or household member; as defined by Revised Code of Washington 10.99.020.***

Or

Following the charge add a special allegation:

And I, (enter elected official's name), Prosecuting Attorney for (enter jurisdiction) in the name and by the authority of the State of Washington *further do accuse the defendant (insert name) at said time of committing the above crime against a family or household member; a crime of domestic violence as defined under RCW 10.99.020.*

¹⁵ Checklist created by the Washington Attorney General's Office, Washington Association of Prosecuting Attorneys, Department of Corrections, , City of Bellevue, Yakima County, and King County.

* Please adopt one of these two versions for charging. If you want to do something different, please consult Pam Loginsky at WAPA.

Do our recommendation forms incorporate plead and prove?

Review and amend your plea recommendations

On felony cases did we appropriately score the offender? To avoid scoring errors make sure to account for concurrent scoring of DV offenses and distinguish between those offenses that occur before August 11, 2011 and those that occur before. *See attached scoring forms.*

For misdemeanor and felony DV do not agree to dismiss the “family or household” allegation. Defendants must plead guilty as charged; cannot plead to just the “base offense” without the agreement of the prosecutor. *See generally State v. Bowerman, 115 Wn.2d 794, 801, 802 P.2d 116 (1990). Removal or deletion of the “family or household” allegation has serious consequences:*

- (1) In some areas precludes the entry of an RCW 10.99 No Contact Order as part of the J&S;
- (2) Reduces supervision period from 5 to 3 years. *See RCW 3.66.068; RCW 35.20.255;*
- (3) Enables defendant to possess firearms and to obtain a concealed weapon’s permit. *See RCW 9.41.040(2)(a)(i); 18 U.S.C. § 922(d);*
- (4) Reduces availability of post-release supervision by DOC. *See Laws of 2011, 1st Extra. Sess. ch. 40;*
- (5) Prevents the crime from being counted in the offender score for future felony DV offenses. *See RCW 9.94A.525(21);*
- (6) Reduces the ability to order treatment. *See RCW 9.94A.703(4)(a);*
- (7) May prevent the collection of an assessment to fund DV advocacy programs. *See RCW 10.99.080.*

Do our guilty plea forms recognize DV as being pled and proven?

Please see the updated felony and non-felony plea forms in the appendix. Please make sure your plea forms are modified.

When we take a guilty plea, is there a factual basis for the "family or household" allegation? Make sure to establish a factual basis for the allegation on every DV plea. Verify that defendant’s statement regarding the crime includes a description of his relationship to the victim. If the statement does not, the prosecutor must supplement the factual basis for the crime and must ensure that the supplementation is made part of the record. *See, e.g., State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (factual basis for defendant's guilty plea may be any reliable source of information, including prosecutor's factual statement, so long as such source is made part of the record); In re Personal Restraint of Keene, 95 Wn.2d 203, 210, 622 P.2d 360 (1980) (factual basis of plea must be developed on the record at the time the plea is taken).*

Court finding. Ensure that the court, based upon the guilty plea, finds the defendant guilty of the charge crime committed against a family or household member. Example "The Court finds in Count _____ that domestic violence was pled and proven. RCW 10.99.020."

At trial have we introduced sufficient facts to prove the family or household relationship and did we use the appropriate jury instructions?

- **Introduce evidence of the defendant’s relationship to the victim.**
- **Instruct the jury regarding the “family or household relationship.”**
 - Definition of family or household member, WPIC 2.27
 - Special verdict form, WPIC 190.11
 - Concluding instruction, WPIC 160.00.

Sentencing

For County Prosecutors please know the Washington State Department of Corrections (DOC) has specific requirements on the new sentencing and supervision laws for domestic violence. If DOC does not get a Judgment and Sentence that is compliant with the following language they will dispute the offender score and will not supervise the individual. You must use the state compliant forms.

- **Determine criminal history of perpetrator and court order history (RCW 10.99.100(2)(a)).**
 - Washington State Courts
 - Tribal Courts: convictions count in state sentencing decisions under certain statutes. See RCW 9.94A.030(40)(b) (tribal court convictions fall within the definition of “repetitive domestic violence offense”) and *United States v. Cavanaugh*, No. 10-1154 (8th Cir. Jul. 6, 2011) indicates that tribal convictions should be given effect in sentencing.
 - Out-of-State and Federal Courts
- **Obtain necessary proof of prior DV offenses.**
 - DISCIS/SCOMIS or Court Dockets. See RCW 10.99.100(b);
 - “Rap” Sheets. See RCW 10.99.100(b);
 - Certified copies of J&S
- **Prepare an RCW 10.99 no contact order.**
- **Sentencing Paperwork**
 - *J&S indicates that domestic violence or family or household member was pled and proven.* The Washington State Department of Corrections requires that the judgment and sentence specifically state that "domestic violence was pled and proven." Please see the updated J&S at Washington State Court Forms: <http://www.courts.wa.gov/forms/>

Felony J&S see <http://www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=18>

Misd. J&S see <http://www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=27>

d. Intimate Partner Sexual Violence

Prosecutors should always be aware of potential Domestic Violence Sexual Assault, or Intimate Partner Sexual Violence (IPSV). IPSV occurs in many cases and is often not reported unless asked. The Washington Coalition of Sexual Assault Programs has been a leader in this area nationally and produced extensive materials on their website, see <http://www.wcsap.org/intimate-partner-sexual-violence>, also

see appendix for a more detailed analysis of IPSV. Below is a basic checklist on how to handle potential IPSV cases:

- **Document everything.** Corroboration is key to victim credibility.
- **Early Preservation of Evidence:.**
 - Search warrants
 - Documentation and processing of crime scenes and other evidence
 - Trace evidence
 - Biological evidence (including evidence from the suspect's body)
 - Interview of corroborative and alibi witnesses
 - Document relevant injuries of all parties
 - Obtain medical records
- **Suspect and Witness Interviews**
 - A complete and detailed interview shall be conducted of any person to whom the initial report of sexual abuse was made to determine facts relevant to the investigation.
- **Cover:**
 - The circumstances under which the report occurred;
 - What precipitated the report;
 - What each party said;
 - Demeanor of the witness;
 - Who was present during the report.
- **Provide interpreters when necessary.**
- **Victim interview:**
 - Obtain formal, detailed version of events from the victim;
 - Assess victim credibility and potential case problems;
 - Inform the victim about decision making processes regarding case filing, the criminal justice system, and timelines for decision making.
- **Victim concerns and Investigation:**
 - Many V's of IPSV may not cooperate as they perceive system as unable to protect her.
 - Fears about retaliation, money, living arrangement, and children.
 - V's need for safety must be addressed.
 - Believe it's not "rape."
 - Be aware correlation: DV assault and IPSV.
- **Tips for Victim interview:**
 - Consent in the past does not mean consent irrevocable.
 - V's of IPSV often blame themselves. Reassure her that it's the offender not her.

- Knowledge and referral to support services critical to provide protective environment and allow V to feel safe in divulging details of the crime. Protect against fear of retaliation.
- **Joint Interview (JI):** The purpose of a joint interview by police and prosecutors with the presence of a victim to advocate to further the investigation and provide critical information to the filing of charges. A JI is conducted prior to charges being filed:
 - To obtain the formal, detailed version of events from the victim;
 - To assess victim credibility and potential case problems;
 - To inform the victim about decision making processes regarding case filing, the criminal justice system, and timelines for decision making.
 - **Procedures:** The interview should be conducted in a thorough and open-minded way, and in a manner that enhances free recall. The interviewer should maximize the use of techniques that will elicit reliable information.
- **Goals of the JI**
 - Provide a victim centered response .
 - Meet with the victim in-person to both evaluate the case and to share information.
 - Work in a coordinated and collaborative fashion with law enforcement, and victim advocates.
 - Take into account the victims input throughout the process
 - Encourage specialization for prosecutors and facilitate vertical prosecution.
- **JI Practicalities:**
 - A joint interview should be conducted when feasible in all DV sexual assault cases. These interviews should be conducted at the prosecutor's office. An advocate must be present.
 - Detective is responsible for documentation of the interview and will include the detailed summary in the case file, to be reviewed by the prosecutor.
 - **Documentation of Interviews:** Documentation of all interviews shall be accurate and complete. Interviews will be documented and recorded in audio, videotape, or digital electronic formats or near verbatim.

Chapter Four: Bail and No Contact Orders

- [Introduction](#)
- [Bail](#)
- [No Contact Orders](#)

a. Introduction

Special considerations for bail and no contact orders should be taken into account in domestic violence cases. Research consistently demonstrates the lethal potential of domestic violence, domestic violence escalates in frequency and severity over time, domestic violence escalates when the victim leaves the relationship, and domestic violence escalates when the batterer is arrested.¹⁶ Victim safety should be the paramount concern when an abuser is charged or arrested. Bail and No Contact Orders (NCO) are two useful tools prosecutors can use to promote victim safety. In many jurisdictions, bail and conditions of release (NCO, etc) are requested in nearly every DV case.

This chapter outlines various statutes and case law that permit bail and no contact orders. The chapter concludes with a model policy for limiting firearms and other dangerous weapons.

b. Bail

- [Held without bail prior to court appearance](#)
- [Relevant Factors to Consider \(Risk Assessment\)](#)
- [Conditions of Release](#)
- [Denial of Bail](#)
- [Release Delayed](#)
- [Amending or Revoking Bail Orders](#)

1) Prior to Court Appearance

In *Westerman v. Cary*, 125 Wn.2d 277 (1994), the Washington Supreme Court upheld a Spokane District Court Rule which required all defendants arrested for DV crimes be held without bail “pending

¹⁶ See Bureau of Justice Statistics on Intimate Partner Violence, Findings and Recommendations from the Washington State Domestic Violence Fatality Review (Washington State Coalition Against Domestic Violence, 2000-2010) J. Campbell et al., "Assessing Risk Factors for Intimate Partner Homicide," NIJ Journal 250 (2003).

their first court appearance.” The Court found that the “right” to bail under Washington State Constitution Article I, § 20, does not attach until the time of the preliminary hearing when the court will review probable cause and make individualized determinations as to bail and conditions of release.

Bail versus Summons:

Per CrR 2.2(b)(2), "The court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant (i) will not appear in response to a summons, (ii) will commit a violent offense, (iii) will interfere with witnesses or the administration of justice, or (iv) is in custody." In District Court, prosecutors may also move under CrRLJ 2.2(a) for a determination of probable cause and an order directing the issuance of a warrant for the arrest of the defendant, and fixing the bail of the defendant. Though district court warrants are less common they are an important tool to consider in misdemeanor DV cases.

Presumption of release in non-capital cases:

Per CrR 3.2(a), it is presumed in non-capital cases that a defendant will be released on PR unless: "(1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required or (2) there is shown a likely danger that the accused: (a) will commit a violent crime¹⁷, or (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice." Court shall look to factors listed in CrR 3.2(c) and (e) as guidance, but is not limited to those factors.

Note: Per the findings of the 2010 Bail Task Force, a bail bond company is not required to collect a minimum percentage of the stated bail as a premium. While some bail bond companies charge 10% of the bail as a premium, some charge far less.

2) Relevant Factors to Consider (Risk Assessment)

Factors to consider in setting bail:

- Criminal history - CrR 3.2 (C)(6); CrR 3.2(e)(1); RCW 10.99.045(3)(b); and CrRLJ 3.2 requires the prosecutor to provide the courts with the defendant’s criminal history, from within and outside Washington.
- The defendant's individual order history (or history of domestic violence orders in Washington).
- Nature of current offense - CrR 3.2(c)(8); CrR 3.2 (e)(3); RCW 10.21.050(1)
 - a. Violence or threats beyond what is reflected in charge, or prior threats - CrR 3.2 (e)(5)
 - b. Weapons or prior use/threat of weapons - CrR 3.2 (e)(8)
 - c. Large financial loss beyond what is reflected in the charge
 - d. Sophistication/planning beyond what is reflected in the charge
 - e. Number of victims
 - f. Vulnerability of victims

¹⁷ "Violent crimes" are not limited to the crimes defined as violent offenses in RCW 9.94A.030. See CrR 3.2(a).

- Failure to Appear (FTA) History (look at the number of FTAs and the underlying charges) - CrR 3.2(c)(1); RCW 10.21.050(3)(a)
- Criminal history that demonstrates lack of respect for court orders - CrR 3.2(c)(1); CrRLJ 3.2; RCW 10.21.050(3)(a)
 - a. Includes: attempting to elude, NCO, Protection Orders, bail jumping, escape, and failures to comply with court probation or supervision. See RCW 10.99.045(3)(b)
- Lack of ties to community - CrR 3.2(c)(3), (5); CrRLJ 3.2
- Detective comments suggesting a particular need to keep defendant in custody
- Defendant's status at time of crime: RCW 10.21.050(3)(b)
 - a. On community custody
 - b. On warrant status
 - c. Pending cases
 - d. Rapid recidivism
- Number of counts currently charged - (In general add the presumptive bail amounts above)
 - o Or number of incidents alleged that due to conservative filing policy we did not charge
- Enhancements (DW or FA) or statutory Aggravating Factor filed up front
- Accused's reputation, character and mental condition, including alcohol and drug abuse - CrR 3.2(c)(4); CrR 3.2(e)(4); CrRLJ 3.2; RCW 10.21.050(3)(a)
- Accused's attempts to hide his/her conduct
- The protracted nature of the crime - activity that has spanned a significant amount of time
- The weight of the evidence against the defendant – RCW 10.21.050(2)

Risk and Lethality Factors to consider in setting bail:¹⁸

- Victim's fear or perception of harm from the offender in the future.
- History of Domestic Violence including reported and unreported acts of domestic violence with the victim or with other victims including assault, threats, strangulation, sexual assault, and stalking or a history of coercive/controlling behavior.
- Threats to harm or kill towards the victim or children during the incident.
- Presence of children during the domestic violence act, and whether the children were subject to violence or threats.

¹⁸ These factors are taken from a validated domestic violence risk assessment tool, the Ontario Domestic Assault Risk Assessment (ODARA). See N.Z. Hilton, et al., *A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism*, PSYCHOLOGICAL ASSESSMENT 267-75 (2004); see also N.Z. Hilton, et al., *An In-Depth Actuarial Assessment for Wife Assault Recidivism: The Domestic Violence Risk Appraisal Guide*, LAW AND HUMAN BEHAVIOR 150-63 (2008).

- Whether the victim was pregnant at the time of the event, and whether the pregnancy was a focus or subject of the domestic violence
- Whether violence against the victim has recently increased in severity or frequency.
- Whether the victim and defendant have recently separated or ended the relationship.
- Whether the offender used, or threatened to use, a gun, knife, or other weapon against victim, and whether the offender has access to firearms.
- Whether the victim was confined during the incident.
- Indicia of stalking ,including harassing conduct or following, keeping under surveillance, cyberstalking, or using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim, the victim's children, or members of the victim's household.
- Suicidal ideation by the offender including prior suicide attempts.
- “Nature and seriousness of the danger to any person or the community that would be posed by the defendant’s release.” RCW 10.21.050(3)(c)

Note: The King County Prosecuting Attorney’s Office has presumptive bail ranges depending on the class of crime and whether it is a crime against a person or property.

3) Conditions of Release

Whenever the court releases a suspect, the court is entitled to impose conditions of release. The conditions of release must be in writing and must advise the defendants that a violation of the conditions of release may result in the immediate issuance of a warrant for the defendant’s arrest. RCW 10.21.070.

Permissible conditions of release include:

- electronic monitoring (However remember that, pursuant to *State v. Speaks, 119 Wash.2d 204, 209, 829 P.2d 1096 (1992)* (“SRA affords sentence credit for time spent in electronically monitored presentence home detention”))
- placing the accused in custody of a supervising person or organization
- placing restrictions on the accused’s travel, association or place of abode
- requiring the accused to execute a bond or cash bail
- requiring the accused to return to custody during specified hours
- prohibiting the accused from approaching or contacting certain persons
- prohibiting the accused from possessing weapons, possessing or consuming alcohol or nonprescription drugs and may be required to submit to testing to determine compliance with this condition
- requiring the accused to report to and submit to supervision of certain persons or agencies
- prohibiting the accused from committing any violations of law
- any other conditions “reasonably necessary” to assure court appearances by the accused and noninterference with the trial, as well as reduce danger to others or the community

See RCW 10.99.045(3)(a); RCW 10.21.030; CrR 3.2(b) and (d); CrRLJ 3.2(b) and (d).

4) Denial of Bail

Washington Const. article I, section 20 authorizes a court to deny bail:

- When a person is charged with a capital offense when the proof is evident or the presumption is great.
- When a person is charged with an offense punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons. *See also* RCW 10.21.040.
- The procedure for denying bail to a person charged with a non-capital offense may be found in chapter 10.21 RCW.

5) Release Delayed

CrR 3.2(f) and CrRLJ 3.2(d) authorizes a delay of up to 24 hours after preliminary appearance if a mental health interview is necessary or the person is intoxicated and release will jeopardize safety to the accused or others.

6) Amending or Revoking Bail Orders

CrRLJ 3.2(h) authorizes the court to impose additional or different conditions of release based upon a “change of circumstances, new information or showing of good cause.” *See also* CrR 3.2(L), which allows for a warrant before a hearing when there are facts before the court that find a violation of conditions of release. The court will issue a bench warrant if the facts are supported by a motion and certification. (See the appendix for a sample form). CrR 3.2 (L) (2) allows a law enforcement officer to arrest without a warrant based on probable cause and belief that the defendant, who is pending trial for a felony, has violated a condition of release under circumstances when obtaining a warrant is impractical (See CrRLJ 3.2(K)(2) and CrR 3.2 (I)(2)-no warrantless arrest in non-felony cases).

Utilizing CrR 3.2(L) is particularly important technique for prosecutors because an offender who is out of custody and violating conditions of release poses a safety risk to the victim and should be arrested as soon as possible.

c. No Contact Orders

- [Form of No Contact Orders](#)
- [Recall of No Contact Orders](#)
- [Termination of No Contact Orders](#)
- [Children and No Contact Orders](#)
- [Limitations on Access to Firearms and Other Deadly Weapons](#)

One of the most critical aspects of a domestic violence case is the issuance of a no-contact order. A no contact order may be entered by a court at any point in time, and is common as part of pretrial release. RCW 10.99.040-.044 authorizes the court to issue a no contact order (“NCO”) prior to

or at arraignment. The NCO may include conditions related to possessing or surrendering firearms and other dangerous weapons pursuant to RCW 9.41.800.

A no contact order for the maximum allowable period should always be entered when the victim requests a no contact order. No prosecutor should ever rely upon phone contact or expressions of the victim's wishes regarding a no contact order from the defendant, defense counsel or others related to the defendant. Victim advocates and/or the victim can often give an informed opinion as to whether an order is necessary. It is better to err on the side of caution and request issuance of an order if you have not had any contact with the victim and/or are unsure of whether an order is needed to protect the victim or the victim's children. If the victim appears and does not want a no contact order a prosecutor must give the victim access to the court to address the NCO.¹⁹ consider risk factors in deciding whether to object including the nature of the case, the history of violence, both reported and unreported, or if there is any indication that the victim is being coerced, intimidated or influenced on the issue of the no contact order.

It is very important to advise the victim that ANY violations of the order, regardless of how minor they may seem to the victim, should be immediately reported by calling 911. The defendant will be advised that the victim does not control the case and that the defendant will be subject to arrest even if the defendant believes the victim has initiated the contact. Also advise the victim that she should keep copies of the order in her house, car and purse so that the officer responding to a 911 call will have grounds to arrest the suspect on the spot.

If the victim lives or works outside of Washington, the prosecutor and/or legal advocate should explain how the victim can obtain full faith and credit for the order in another state.

1) Form of No Contact Orders

A NCO must substantially comply with the pattern form developed by the administrative office of the courts (AOC). RCW 10.99.040(2)(c). The AOC form contains the warnings mandated by RCW 10.99.040(2)(c). The AOC form contains warnings mandated by RCW 10.99.040(4)(b). The AOC form also alerts the defendant that the order does not modify or terminate any order in any other case and that the order is entitled to full faith and credit in all 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States.

The Court is required to make a finding regarding the defendant's relationship to the victim. A finding of "intimate partner" will subject the defendant to federal firearm restrictions and will preclude the defendant from obtaining a concealed weapons permit. See 18 U.S.C. § 922(g)(8) and (9); Laws of 2011, ch. 294, amending RCW 9.41.070 (eff. July 22, 2011). "Intimate Partner" includes former/current spouses, parents of common child, or former/current cohabitants as intimate partners. 18 U.S.C. § 921(a)(32).

The form is currently available at: www.courts.wa.gov/forms/documents

In addition to No Contact Orders, an abuser's access to his or her victim may be limited through the issuance of restraining orders, protection orders, and anti-harassment orders. A description of these

¹⁹ See Washington Courts model policy on victims requesting rescission or modification of NCOS: http://www.courts.wa.gov/programs_orgs/pos_genderandjustice/ModelPolicyForVictims.pdf

orders can be found in the subsequent appendix.

2) Recall of No Contact Orders

Each court is required to establish a procedure by which the victim may seek modification or termination of a no contact order. RCW 10.99.040(7). Because victims are not parties to the criminal matter, the procedure may simply direct the victim to contact the prosecuting attorney or the defense attorney. Some courts will authorize victims to file a motion to modify or terminate the no contact order in the criminal case. Pattern forms for victim initiated motions may be found on the AOC's website.

3) Termination of No Contact Orders

Pre-trial no contact orders will expire when charges are dismissed or the defendant is acquitted. See *State v. Anaya*, 95 Wn. App. 751 (1999); RCW 10.99.040(3). A pre-trial no contact order will also expire on the date specified in the order. This date is not extended by a defendant's fugitive status.

A victim may wish to apply for a chapter 26.50 RCW protection order while the defendant is in custody awaiting his first appearance or arraignment. A chapter 26.50 RCW can provide the victim with protection even if the charges are dismissed or the defendant is acquitted.

See the following information on the statewide model policy for rescission or termination of a No Contact Order at http://www.courts.wa.gov/programs_orgs/gjc/

4) Children and No Contact Orders

At the time of filing, and in pretrial proceedings, a court may enter no contact orders with children who have been a victim or witness to the domestic violence. However, at the time of sentence, unless there is a stipulation between the parties, there are legal restrictions on no contact orders with children: Because there is a fundamental right to parent recognized within the constitution, courts may not impose no-contact orders between a defendant and his or her own children without explicitly conducting an analysis. No matter how obvious it might be that further contact with the defendant would be harmful to the children, the record must reflect that the sentencing court conducted this analysis. Any restriction on the right to parent can only be imposed with a finding by the trial court that the restriction is "*reasonably necessary to prevent harm to the children.*" *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001). The court must also justify the length of the restriction with a greater showing of necessity required for a no contact order for years than one for months. *In re Personal Restraint of Rainey*, 168 Wn. 2d 367, 381-82, 229 P. 3d 686 (2010).

5) Manner and Types of No Contact and Protection Orders.

There are more than just criminal no contact orders that can be prosecuted in Washington. There are also domestic violence orders as detailed in the following chart from the Washington State Coalition Against Domestic Violence:

Comparison of Court Orders for Washington State

Many Tribal Courts have similar civil and criminal court orders. Check with your local Tribal Court for details.

<u>Kind of Order</u>	SEXUAL ASSAULT PROTECTION ORDER	DOMESTIC VIOLENCE PROTECTION ORDER	NO-CONTACT ORDER	RESTRAINING ORDER
<u>Nature of Proceeding</u>	Civil or criminal, in context of pending criminal action or as a condition of sentence, under RCW 7.90	Civil, under RCW 26.50.	Criminal, in context of pending criminal action, under RCW 10.99.	Civil, normally in context of pending dissolution or other family law action, under RCW 26.09, 26.10, 26.26.
<u>Who may obtain order?</u>	A person who is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident, (who does not qualify for a domestic violence protection order) may petition for a civil order. Minors under age of 16 with parent or guardian. The court may initiate issuance on behalf of victims of sex offenses when criminal charges are filed.	A person who fears violence from a "family or household member" (10.99.020), or who has been the victim of physical harm or fears imminent physical harm, or stalking from a "family or household member", (includes dating relationships). Petitioners 13 or older in a dating relationship with a Respondent, 18 or older; minors aged 13-16 with a parent, guardian, guardian ad litem, or next friend.	Incident must have been reported to the police. Criminal charges must be pending. Judge must consider issuance pending release of defendant from jail, at time of arraignment, and at sentencing.	Petitioner who is married to respondent or has child in common.
<u>Jurisdiction</u>	District, Municipal, or Superior Court. See RCW 26.50.020(5). Telephonic hearings available pursuant to court rule and in limited circumstances.	Telephonic hearings available in limited circumstances. • EPO—District, Municipal, or Superior Court. • PO—limited to Superior Court if Superior Court has family law action pending, or if case involves children or order to vacate home.	District, Municipal, or Superior Court.	Superior Court only.
<u>Cost to Petitioner</u>	No filing or service fees.	No filing or service fees.	None.	Same as dissolution. Filing fee waived if indigent.
<u>How does the respondent receive notice?</u>	Notice of civil order served on the respondent. Notice of criminal order given to defendant verbally and in writing when order is entered.	Notice served on the respondent. Notice by certified mail, or publication authorized in limited circumstances.	Verbal and written notice given at bail hearing, arraignment, or sentencing	Notice served on respondent or respondent's attorney.
<u>Consequences if order is knowingly violated</u>	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.	Mandatory arrest. Release pending trial may be revoked. Additional criminal or contempt charges may be filed. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.	Mandatory arrest. Gross Misdemeanor. Possible criminal charges or contempt.

REVISED May 2010. This information does not constitute legal advice. Laws change both as a result of legislative and court decisions.

Page 1

Kind of Order	SEXUAL ASSAULT PROTECTION ORDER	DOMESTIC VIOLENCE PROTECTION ORDER	NO-CONTACT ORDER	RESTRAINING ORDER
<u>Maximum duration of order</u>	<ul style="list-style-type: none"> • Temporary civil SAPO–14 days with service. • Full civil SAPO–Designated by court up to two years. • Criminal orders–Designated by court. • Post sentencing provision may last up to two years following imprisonment, or community supervision, conditional release, probation or parole. 	<ul style="list-style-type: none"> • EPO–14 days with service. • EPO–24 days certified mail or with service by publication. • PO–Designated by court, one year, or permanent. 	Until trial and sentencing are concluded. Post-sentencing provision lasts for possible maximum of sentence in Superior Court or two years in District or Municipal court.	<ul style="list-style-type: none"> • TRO–14 days. • Preliminary injunction–dependency of action. • RO in final decree– permanent unless modified.

Kind of Order	ANTI-HARASSMENT ORDER	VULNERABLE ADULT PROTECTION ORDER
<u>Nature of Proceeding</u>	Civil, under RCW 10.14.	Civil, Under RCW 74.34.110 and RCW 26.50.
<u>Who may obtain order?</u>	Petitioner who has been seriously alarmed, annoyed or harassed by a conduct which serves no legitimate or lawful purpose. Parties generally are not married, have not lived together, and have no children in common.	A vulnerable adult, or an interested person on behalf of a vulnerable adult, who has been abandoned, abused, subject to financial exploitation, or neglect or threat thereof. The Department of Social and Health Services may also obtain an order on behalf of a vulnerable adult.
<u>Jurisdiction</u>	District Court. Limited provisions for referring cases to Superior Court. Municipal, District, or Superior for enforcement.	Superior Court.
<u>Cost to Petitioner</u>	No filing or service fees for stalking, sexual assault or domestic violence victims.	No filing fees.
<u>How does the respondent receive notice?</u>	Notice served on respondent.	Notice served on the respondent. Notice by certified mail, or publication authorized in limited circumstances.
<u>Consequences if order is knowingly violated</u>	Gross Misdemeanor. Possible criminal charges or contempt.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.
<u>Maximum duration of order</u>	EAHO–14 days. PAHO–1 year or permanent.	EPO–14 days with personal service. EPO–24 days certified mail or with service by publication. PO–Designated by court, for a fixed period not to exceed 5 years.

GLOSSARY	
EAHO	Emergency Anti-Harassment Order
EPO	Emergency Protection Order or Temporary Order for Protection
PAHO	Permanent Anti-Harassment Order
PO	Order for Protection
RO	Restraining Order
SAPO	Sexual Assault Protection Order
TRO	Temporary Restraining Order

Consultation from Washington Coalition of Sexual Assault Programs, Olympia, WA, www.wcsap.org; voice: 360-754-7583, tty: 360-709-0305. Prepared by the Washington State Coalition Against Domestic Violence, www.wscadv.org; voice: 206-389-2515, tty: 206-389-2900. Adapted from the Domestic Violence Manual For Judges, Volume I - Criminal, 1992. The Criminal Domestic Violence Manual Subcommittee, the Office of the Administrator for the Courts for the State of Washington, Olympia, WA, updated 1998.

vi. Limitations on Access to Firearms and Other Deadly Weapons

When issuing a no-contact order pursuant to [RCW 10.99](#), the court may restrict the authority of a defendant to possess a firearm or other dangerous weapon if the court finds either that the defendant previously used or displayed a firearm or other dangerous weapon in a serious offense or that the defendant previously committed an offense (such as assault against a family member) that makes the defendant ineligible to possess a firearm. Under certain circumstances, the court must bar a defendant from possessing a firearm or other dangerous weapon. These provisions are included in the model court form for NCOs. Many jurisdictions have a surrender and forfeiture program for firearms related to domestic violence offenses.

Authority under CrR 3.2 and CrRLJ 3.2: In addition to authority granted the court pursuant to [RCW 9.41.800](#), a court may issue orders restricting the right of a defendant to possess a firearm in conjunction with an order setting bail or releasing a defendant on personal recognizance. [CrR 3.2\(d\)](#) provides: Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may prohibit the accused from possessing any dangerous weapons or firearms or under CrR 3.2(d)(10) “[i]mpose any condition other than detention to assure administration of justice and reduce danger to others in the community.”

Authority under RCW 10.21.930(2)(g): allows a court to prohibit a defendant from possessing

any dangerous weapons or firearms while on bail or personal recognizance.

Model Policy:

Given the high number of fatalities that involve firearms as the weapon of choice per the Washington State Fatality Review many jurisdictions have adopted policies and procedures for the surrender and forfeiture of firearms in DV cases.

Our new firearms procedures are as follows:

1) Filing/Arrestment: Filing DPA will conduct a firearms review for every DV case.

If firearms are identified in the police report and/or the certification for determination of probable cause, filing DPA will include a request for surrender of the firearms in the charging papers. At the time of the arrestment, filing DPA will request an order to surrender the firearms. If charges are not filed, then filing DP A will still screen the case for firearms forfeiture. If there is a legal basis for requesting forfeiture, the filing DP A will prepare form petition for forfeiture to be sent to the suspect, and schedule a hearing in either criminal presiding (on the arrestment/bond calendar) or in DV court. The petition and request for hearing shall be routed to staff to schedule a hearing and to send out written notice to the suspect

2) Compliance for Orders of Surrender:

After the arrestment, staff should send copies of the orders of surrender to the proper law enforcement agency. During pretrial, DPA or staff will ensure that proof of surrender filed. If not, the DP A should request a bench warrant or immediate compliance with the order.

At the time of arrestment, the DPA handling the calendar shall set a review hearing one week from the arrestment date. If the defendant has filed proof of compliance, the hearing can be stricken. If no compliance, then a warrant should be requested.

3) Disposition:

In every case where firearms are identified, DV unit DP As will request forfeiture/destruction of firearm as a condition. Where possible, the DP A should ensure that this is agreed by the defense (a condition of the plea that the firearms will be forfeited and destroyed). This should be included in the sentencing recommendation. In trial cases or cases where no agreement, DV DPA shall give notice to the defense that firearms forfeiture/destruction order will be requested at sentencing.

4) Sentencing: DV unit DP As will request forfeiture/destruction order from the court. If not agreed, DPAs will argue for forfeiture/destruction. If the court issues an order of forfeiture/destruction, the staff will forward forfeiture/destruction orders to law enforcement.

Chapter Five: Discovery and Pretrial Preparation

-
- [Discovery: The Prosecutor's Duty](#)
 - [Pretrial Preparation](#)

a. Discovery: The Prosecutor's Duty

- [The Victim Interview](#)
- [The Victim's Address](#)
- [Shielding Harmful or Embarrassing Information](#)
- [Limiting Defense Interviews of Prosecution Witnesses](#)
- [Depositions](#)
- [Work Product](#)
- [Domestic Violence Program, Rape Crisis Center, and Counseling Records](#)
- [Domestic Violence Advocates](#)
- [Medical Records and Victim's Statements](#)
- [How to Obtain/Compel Medical Records](#)
- [Ongoing Testing](#)
- [Requesting Discovery From Defense Counsel](#)

While the court rules, CrRLJ 4.7 and CrR 4.7, provide for reciprocal discovery to ensure that neither party is provided with an unfair advantage, prosecutors have a constitutional obligation to disclose all material exculpatory and impeaching evidence to the defense. *See generally Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). The court rules also contain a list of items that the prosecutor is required to disclose, including the names and addresses of witnesses, witness statements, prior convictions and records of prior criminal convictions of the defendant and other witnesses. CrRLJ 4.7(g)(7) and CrR 4.7(h)(7) authorize dismissal of a case if the court determines that a failure to disclose evidence was a result of a "willful violation" or "gross negligence" and resulted in prejudice to the defendant. Other remedies for a discovery violation include a mistrial or a continuance. The basic rule is "if it hurts turn it over, if it hurts bad turn it over faster."

1) The Victim Interview

The victim should be interviewed as soon as possible, if not already done by patrol or a detective, as this provides greater understanding of the scope and depth of domestic violence and increases the likelihood of success. However, there should also be sensitivity to making a victim relive the DV

experience. An interviewer should gather as much information as possible about the crime and the history between the parties, including:

- Police reports (past and present)
- Charging documents
- Photographs
- 911 tapes
- Medical Records
- Protective Orders
- Past unreported incidents including dates and other witnesses
- Friends & family members who saw the DV or who the victim confided in

When conducting the interview, address any of the victims concerns or questions. The interviewer should also attempt to gain trust and build credibility with the victim, and consider the following:

- Is the witness cooperating or recanting?
 - Should also have a 3rd party present during the interview whom you could call to testify or recording made of the interview.
- Put incident into context by evaluating the following:
 - History of the relationship
 - Facts of the crime
 - Written statement
 - Lethality Assessment
 - Pre-Trial contact from defendant, including letters, notes, answering machine messages, and contact from other friends or family
 - A prosecutor should avoid interviewing a victim alone, as this may give rise to a disqualifying conflict. See *State v. Schmitt*, 124 Wn. App. 662, 102 P. 3d. 856 (2004).

2) The Victim's Address

RCW 10.99.040(1)(c) requires the court in domestic violence cases to waive disclosure of the victim's address to anyone except defense counsel "if there is a possibility of further violence." The court is also given the discretion to prohibit defense counsel from disclosing the address to the client. See also CrR 4.7(h)(3) and (4) (custody of materials and protective orders); CrRLJ 4.7(g)(3) and (4) (same).

Note, SHB 2363 effective July, 2012, creates additional protections: prohibits courts from ordering that the confidential addresses of domestic violence programs be disclosed in court proceedings unless the court finds by clear and convincing evidence that disclosure is necessary, considering the safety and confidentiality concerns of other residents of the program as well as the party before the court, and other alternatives to disclosure.

In preparing documents for disclosure, the best practice is to redact the victim's address from all police reports, medical records, and other documents that are provided to defense counsel. If defense counsel wishes to interview the victim, a contact phone number may be provided to counsel separately to facilitate the interview or the prosecutor's office may agree to serve as an intermediary through a victim advocate or the prosecutor.

If a prosecutor's office agrees to act as intermediary in arranging interviews the office must act diligently to obtain the victim's presence at all scheduled interviews or face sanctions such as exclusion of testimony or dismissal of charges. See, e.g. *State v. Wilson* 149 Wn. 2d 1, 65 P.3d 657 (2003).

3) Shielding Harmful or Embarrassing Information

The court rules provide a number of mechanisms for protecting a victim or other witnesses from harassment or intimidation. See CrRLJ 4.7(e)(2) and CrR 4.7(e)(2) (restricting disclosure of information not covered by CrRLJ 4.7(a), (c), and (d) or CrR 4.7 (a), (c), or (d)); CrRLJ 4.7(h)(5) or CrRLJ 4.7(g)(5) (excision of information contained in discovery covered by CrRLJ 4.7(a), (c), and (d) or CrR 4.7 (a), (c), or (d)); CrRLJ 4.7(g)(4) and CrR 4.7(h)(4) (providing for delayed disclosure of information governed by CrRLJ 4.7(a), (c), and (d) or CrR 4.7 (a), (c), or (d)). Filing a motion and submission of the discovery for *in camera* review triggers all of these protective mechanisms. When submitting documents for *in camera* review, it is critical to include one non-redacted version and two redacted versions (one for the appellate record and one for the court to provide to the defendant).

4) Limiting Defense Interviews of Prosecution Witnesses

CrRLJ 4.7(g)(1) and CrR 4.7(h)(1) prohibit an attorney from advising witnesses to refrain from discussing a case or showing relevant material to opposing counsel. In domestic violence cases, prosecutors should routinely advise victims of their right to have a prosecutor present at a defense interview, but the prosecutor must be extremely careful not to give the victim the impression that the prosecutor wishes the victim to refuse an interview unless the prosecutor is present. See generally *State v. Hofstetter*, 75 Wn. App. 390, 878 P.2d 474, review denied 125 Wn. 2d 1012 (1994). In addition to advising the victim that she has the right to have a prosecutor present for the interview, it is proper to advise victims that they are in control of the time and place for a defense interview. The victim should also be advised of her right to refuse to have the interview taped, *State v. Mankin*, 158 Wn. App. 111, 241 P.3d 421 (2010), review denied 171 Wn. 2d 1003 (2011), and of her right to refuse to have the defendant present during the interview. The prosecutor should offer a secure setting for the defense interview, whenever possible.

5) Depositions

Unlike in civil cases, the parties to a criminal case must secure the permission of court before noting a deposition. [CrR 4.6 has been modified over the objection of prosecutors](#). The State Supreme Court has adopted an amendment to CrR 4.6 proposed by the Superior Court Judges Association. This amendment gives the superior court broad discretion to order a deposition of a witness upon a showing of "good cause." Specifically, "...there is good cause shown to take the deposition. The court at any time after arraignment may upon motion of a party and notice to the parties, order a deposition and require that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. A witness who is sought to be deposed, or a party, may seek a protective order as provided in the Civil Rules." This circumvents the previous requirement that the witness had to refuse to discuss the case with either counsel, or be unavailable for trial, before the court could order a deposition. A witness may seek a protective order as provided in the civil rules. The new rule becomes effective September 1, 2012. [CrR 4.6\(a\)](#). [CrR 4.10\(c\)](#) specifically requires the court to release a material

witness from custody “unless the court determines that the testimony of such witness cannot be secured adequately by deposition.”

The deposition itself is not physically admitted into evidence at the trial (although it may be admitted at the time of the pre-trial hearing to preserve the record on matters excluded by the court). Deposition testimony is normally admitted at trial in what amounts to a “staged reading.” The proponent of the testimony secures the services of a reader who will sit in the witness box and read the answers of the declarant (the person deposed) while the attorney for the proponent reads the questions. Matters excluded in the pre-trial hearing are not read to the jury.

If the deponent is unavailable for trial, deposition testimony may be admissible under the Former Testimony Hearsay Exceptions of [ER 804\(b\)\(1\)](#). No deposition may be admitted into evidence against a defendant if the defendant was not given notice of the deposition and/or the defendant was barred from participating and attending the deposition. See CrR 4.6(c); CrRLJ 4.6(c).

6) Work Product

CrRLJ 4.7(f)(1) and CrR 4.7(f)(1) exempt an attorney’s work product from disclosure. Work product includes “legal research of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusion of investigating or prosecuting agencies,” except for reports of expert witnesses as provided for in subsection (a)(1)(iii). Work product does not include a prosecutor’s notes of a witnesses statements made during an interview. See *generally State v. Garcia*, 45 Wn. App. 132, 137-38, 724 P.2d 412 (1986).

7) Domestic Violence Program, Rape Crisis Center, and Counseling Records

Records maintained by a domestic violence program are non-discoverable absent a court order. RCW 70.123.075 and 70.23.076 governs records of domestic violence programs. An *in camera* review is required to determine relevance and whether the probative value is outweighed by the victim’s privacy interest. Specifically, whether the “records are relevant and whether the probative value of the records is outweighed by the victim’s privacy interest in the confidentiality of such records taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records.” RCW 70.23.075(1)(c). Before the hearing proceeds, make sure the defense gave proper notice of the hearing to the victim and program records custodian. Note, SHB 2363 effective July, 2012, creates additional protections for programs: provides restrictions relating to requiring a domestic violence victim in revealing confidential information about her or his address, employer, or school, and provides address confidentiality participants enhanced protections against disclosure of their addresses.

RCW 70.125.065 exempts a victim’s records held by a Rape Crisis Center from disclosure as part of discovery unless an *in camera* review occurs and the defense establishes the relevancy and necessity for such records. *State v. Kalakosky*, 121 Wn.2d 525, 543-45 (1993); *State v. Lubers*, 81 Wn. App. 614, 623 (1996). The court can refuse to conduct an *in camera* review of the victim’s counseling records under RCW 18.19.180 when the relevance is speculative and other evidence is available to establish intoxication, etc. *State v. Diemel*, 81 Wn. App. 464, 914 P.2d 779, *review denied*, 130 Wn.2d 1008 (1996).

8) Domestic Violence Advocates

See generally Chapter 8.

Advocate Notes: It is common for advocates employed by a prosecutor's office or police department to keep notes. Those notes are not confidential under RCW 5.60.060, but they are frequently non-discoverable under CrR 4.7. Victim's advocates must be well trained to disclose all Brady material, but the lack of privilege does not expand the State's duty under CrR 4.7 or create an entitlement to materials in the advocate file that defense would not be entitled to if they were in the prosecutor's file. If the State is in compliance with the rules of discovery, and has provided the defense with all discoverable evidence under CrR 4.7(a)(1), the defense demand is necessarily for discretionary disclosures under CrR 4.7(e), which does require defense to make a particularized showing of materiality, or make a factual showing to support the claim that the prosecutor has not complied with the rules of discovery. The Court then must determine whether defense has made a sufficient showing to warrant an *in camera* review of the advocate file belonging to the prosecuting attorney's office. Please see briefing on this subject in the appendix.

9) Medical Records

- [Obtaining Medical Records](#)
- [Privilege](#)
- [Medical Records and Victim's Statements](#)
- [Causation v. Fault Statements](#)

The victim's statements to medical professionals and mental health professionals for purposes of diagnosis and treatment (as opposed to forensic purposes) are admissible under ER 803 (a)(4) and the Confrontation Clause. See *State v. Beadle*, 173 Wn.2d 97, 265 P.3d 863 (2011) (victim's out-of-court statements to family members and therapist were admissible)

i. Obtaining Medical Records

The easiest method of obtaining the victim's records is to obtain a medical release from the victim. This should be done during your first meeting with the victim if an officer has not previously obtained the release. If a release is obtained, the prosecutor has an obligation to obtain the records and to disclose the records to the defense unless a protective order is obtained.

If the prosecutor is unable to obtain a release, or if a release is not available, medical records will only be obtainable by the prosecution through the procedures set forth in RCW 70.02 which requires advance notice to the health care provider and to the victim or the victim's attorney. Notice must be provided at least fourteen days before the "service of a discovery request or compulsory process" is served on the health care provider so that the patient may seek a protective order. Although compulsory process is a common procedure, it is important to note that a search warrant for medical records is the preferred method of obtaining medical records by the Washington Hospital Association. A search warrant also avoids continuing HIPAA involvement. Finally, in a pending case, medical records

may also be obtained pursuant to CrR 4.7. See below for a breakdown on how one can obtain or compel medical records:

SCENARIO #1:	SCENARIO #2:	SCENARIO #3:
<u>NOTICE:</u> 14 day notice letter served on V or sent by 1 st class mail <u>and</u> 14 day notice letter served, faxed, or sent by 1 st class mail to medical treatment provider.	<u>NOTICE:</u> 14 day notice letter served on V or sent by 1 st class mail <u>and</u> 14 day notice letter served, faxed, or sent by 1 st class mail to medical treatment provider.	<u>NOTICE:</u> 14 day notice letter served on V or sent by 1 st class mail <u>and</u> 14 day notice letter served, faxed, or sent by 1 st class mail to medical treatment provider.
<u>PROTECTIVE ORDER/OBJECTION:</u> V properly receives notice and does not obtain protective order or object. Medical treatment provider properly receives notice.	<u>PROTECTIVE ORDER/OBJECTION:</u> V properly receives notice and does not obtain protective order or object. Medical treatment provider properly receives notice.	<u>PROTECTIVE ORDER/OBJECTION:</u> V or V's counsel properly receives notice and obtains protective order (or more likely notes/voices objection which court accepts as protective order request).
<u>RELEASE:</u> Medical treatment provider releases requested records.	<u>RELEASE:</u> Medical treatment provider fails to release medical records.	<u>RELEASE:</u> Hearing is set at which the moving party (State) must make a showing of materiality so as to overcome privacy interest. Court makes <i>in camera</i> review of records to determine release.
<u>PA FOLLOW-UP:</u> PA receives records, immediately sends copy to defense for discovery and then subpoena's appropriate medical personnel.	<u>PA FOLLOW-UP:</u> PA moves court for Subpoena <i>Duces Tecum</i> to compel disclosure of medical records from treatment provider. PA receives records, immediately sends copy to defense for discovery and then subpoena's appropriate medical personnel.	<u>PA FOLLOW-UP:</u> Logistics of hearing can be difficult, need to brief materiality for the court and counsel, and need to make sure medical treatment provider deposits records with the court (some may ask for a Subpoena <i>Duces Tecum</i> at this point, creating another legal issue with Court).

Search Warrant for Medical Records

The records can also be obtained by search warrant. Per the Washington Hospital Association Hospital and Law Enforcement Guide to Disclosure of Protected health Information (2010) "Health care providers must provide law enforcement with medical records when the court issues a court order pursuant to a warrant. RCW 70.02.050(2)(b)." See http://www.wsha.org/files/62/HIPAA_Guide_2010.pdf. Medical records are admissible as business

records pursuant to RCW 5.45.020. *State v. Garrett*, 76 Wn. App. 719 (1995). The physician preparing the statement OR “one who has custody of the record as a regular part of his work or has supervision of its creation” may testify as to its contents. *Id.* Certain statutes, moreover, have been adopted in response to HIPAA.

Medical Records Exception for Law Enforcement

The following statutes specifically authorize the release of information to police officers in certain instances:

i. RCW 70.02.050(1)(k):

(1) A health care provider or health care facility may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

(k) To fire, police, sheriff, or another public authority, that brought, or caused to be brought, the patient to the health care facility or health care provider if the disclosure is limited to the patient's name, residence, sex, age, occupation, condition, diagnosis, estimated or actual discharge date, or extent and location of injuries as determined by a physician, and whether the patient was conscious when admitted;

ii. RCW 70.02.050(2)(c):

(2) A health care provider shall disclose health care information about a patient without the patient's authorization if the disclosure is:

(c) To federal, state, or local law enforcement authorities, upon receipt of a written or oral request made to a nursing supervisor, administrator, or designated privacy official, in a case in which the patient is being treated or has been treated for a bullet wound, gunshot wound, powder burn, or other injury arising from or caused by the discharge of a firearm, or an injury caused by a knife, an ice pick, or any other sharp or pointed instrument which federal, state, or local law enforcement authorities reasonably believe to have been intentionally inflicted upon a person, or a blunt force injury that federal, state, or local law enforcement authorities reasonably believe resulted from a criminal act, the following information, if known: The name of the patient; The patient's residence; The patient's sex; The patient's age; The patient's condition; The patient's diagnosis, or extent and location of injuries as determined by a health care provider; Whether the patient was conscious when admitted; The name of the health care provider making the determination in (c)(v), (vi), and (vii) of this subsection; Whether the patient has been transferred to another facility; and The patient's discharge time and date;

iii. RCW 26.44.030. Requires health professionals and certain other professionals to report alleged abuse or neglect of children.

IV. RCW 74.34.035. Requires health professionals and certain other professionals to report alleged abuse of vulnerable adults.

v. RCW 70.41.440:

(1) A hospital shall report to a local law enforcement authority as soon as reasonably possible, taking into consideration a patient's emergency care needs, when the hospital provides treatment for a bullet wound, gunshot wound, or stab wound to a patient who is unconscious. A hospital shall establish a written policy to identify the person or persons responsible for making the report.

(2) The report required under subsection (1) of this section must include the following information, if known:

(a) The name, residence, sex, and age of the patient; (b) Whether the patient has received a bullet wound, gunshot wound, or stab wound; and

(c) The name of the health care provider providing treatment for the bullet wound, gunshot wound, or stab wound.

(3) Nothing in this section shall limit a person's duty to report under RCW 26.44.030 or 74.34.035.

(4) Any bullets, clothing, or other foreign objects that are removed from a patient for whom a hospital is required to make a report pursuant to subsection (1) of this section shall be preserved and kept in custody in such a way that the identity and integrity thereof are reasonably maintained until the bullets, clothing, or other foreign objects are taken into possession by a law enforcement authority or the hospital's normal period for retention of such items expires, whichever occurs first.

(5) Any hospital or person who in good faith, and without gross negligence or willful or wanton misconduct, makes a report required by this section, cooperates in an investigation or criminal or judicial proceeding related to such report, or maintains bullets, clothing, or other foreign objects, or provides such items to a law enforcement authority as described in subsection (4) of this section, is immune from civil or criminal liability or professional licensure action arising out of or related to the report and its contents or the absence of information in the report, cooperation in an investigation or criminal or judicial proceeding, and the maintenance or provision to a law enforcement authority of bullets, clothing, or other foreign objects under subsection (4) of this section.

(6) The physician-patient privilege described in RCW 5.60.060(4), the registered nurse-patient privilege described in RCW 5.62.020, and any other health care provider-patient privilege created or recognized by law are not a basis for excluding as evidence in any criminal proceeding any report, or information contained in a report made under this section.

(7) All reporting, preservation, or other requirements of this section are secondary to patient care needs and may be delayed or compromised without penalty to the hospital or person required to fulfill the requirements of this section.

vi. RCW 18.73.270:

(1) Except when treatment is provided in a hospital licensed under chapter 70.41 RCW, a physician's trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, or first responder who renders treatment to a patient for (a) a bullet wound, gunshot wound, powder burn, or other injury arising from or caused by the discharge of a firearm; (b) an injury caused by a knife, an ice pick, or any other sharp or pointed instrument which federal, state, or local law enforcement authorities reasonably believe to have been intentionally

inflicted upon a person; (c) a blunt force injury that federal, state, or local law enforcement authorities reasonably believe resulted from a criminal act; or (d) injuries sustained in an automobile collision, shall disclose without the patient's authorization, upon a request from a federal, state, or local law enforcement authority as defined in RCW 70.02.010(3), the following information, if known: (i) The name of the patient; (ii) The patient's residence; (iii) The patient's sex; (iv) The patient's age; (v) The patient's condition or extent and location of injuries as determined by the physician's trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, or first responder; (vi) Whether the patient was conscious when contacted; (vii) Whether the patient appears to have consumed alcohol or appears to be under the influence of alcohol or drugs; (viii) The name or names of the physician's trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, or first responder who provided treatment to the patient; and (ix) The name of the facility to which the patient is being transported for additional treatment.

(2) A physician's trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, first responder, or other individual who discloses information pursuant to this section is immune from civil or criminal liability or professional licensure action for the disclosure, provided that the physician's trained emergency medical service intermediate life support technician and paramedic, emergency medical technician, first responder, or other individual acted in good faith and without gross negligence or willful or wanton misconduct.

(3) The obligation to provide information pursuant to this section is secondary to patient care needs. Information must be provided as soon as reasonably possible taking into consideration a patient's emergency care needs.

ii. Privilege

Physician-patient privilege is a legal concept, related to medical confidentiality that protects communications between a patient and his or her doctor from being used against the patient in court. In Washington, the privilege is defined in RCW 5.60.060.

The rationale behind the rule is that a level of trust must exist between a physician and the patient so that the physician can properly treat the patient. If the patient were fearful of telling the truth to the physician because he or she believed the physician would report such behavior to the authorities, the treatment process could be rendered far more difficult, or the physician could make an incorrect diagnosis,

This privilege extends to information acquired by licensed physicians, surgeons, osteopathic physicians, podiatric physicians, and psychiatrists. A similar privilege extends to information acquired by registered nurses. *See* RCW 5.62.030. Statements made to a physician assistant, paramedic, licensed practical nurse and other medical professionals will be privileged if this medical professional is acting under the direction or supervision of a physician at the time the statement was made and the statements was for a medical purpose, rather than for a clerical purpose.

The physician-patient privilege is not absolute. The privilege may not apply to blood tests performed for purposes of treatment in a hospital's emergency room when the patient is later charged with an offense related to drunk driving. *See, e.g., State v. Smith*, 84 Wn. App. 813, 929 P.2d 1191

(1997). The physician-patient privilege does not apply in any judicial proceeding, including a search warrant application, regarding a child's injury, neglect, or sexual abuse or the cause thereof. See RCW 5.60.060(4); RCW 26.44. Cf *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454, review denied, 171 Wn.2d 1024 (2011) (the mandatory disclosure provisions regarding sexual abuse in RCW 26.44.030 took precedence over the therapist-client privilege in RCW 18.83.110). The physician-patient privilege should also not apply in any judicial proceeding regarding a vulnerable adult's injury, neglect, or sexual abuse or the cause thereof. See RCW 74.34. Cf *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454, review denied, 171 Wn.2d 1024 (2011) (the mandatory disclosure provisions regarding sexual abuse in RCW 26.44.030 took precedence over the therapist-client privilege in RCW 18.83.110).

The defendant cannot claim the patient/doctor privilege on behalf of the patient. *State v. Boehme*, 71 Wn.2d 621, 636, 430 P.2d 527 (1967). Where little additional humiliation or embarrassment will arise from medical testimony, a victim's invocation of the privilege to suppress evidence will not be allowed to derail a criminal prosecution.

In addition to the physician-patient privilege, federal Health Insurance Portability and Accountability Act (HIPAA) rules may limit the information a health care professional may release to third parties. A health care facility or professional must release records to a police officer when the police officer is in possession of a search warrant. See generally *State v. Hyder*, 159 Wn. App. 234, 252-53, 244 P.3d 454, review denied, 171 Wn.2d 1024 (2011). See also Washington State Hospital Association, *Hospital and Law Enforcement: Guide to Disclosure of Protected Health Information*, at 19, 21, 35 (4th ed. Aug.2010) (http://www.wsha.org/files/62/HIPAA_Guide_2010.pdf).

Psychologist/Client Privilege

Communications between a psychologist and client or patient are privileged in Washington. See RCW 18.83.110. The privilege is available only to licensed psychologists, but therapists, social workers, and other counselors who are not licensed psychologists have their own, more limited, privilege.

The privileges do not arise unless the client's intent to have a confidential conversation is reasonable in light of the surrounding circumstances. The privileges may not apply when the counseling session was court ordered, or when the counseling session involves two or more patients. See *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994).

The counselor-client privileges do not apply to communications regarding a child's injury, neglect, or sexual abuse or the cause thereof. See RCW 26.44.030; *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454, review denied, 171 Wn.2d 1024 (2011) (the mandatory disclosure provisions regarding sexual abuse in RCW 26.44.030 took precedence over the therapist-client privilege in RCW 18.83.110). The same is probably true as to communications regarding a vulnerable adult's injury, neglect, or sexual abuse or the cause thereof. See RCW 74.34. These privileges may not be asserted in certain kinds of mental commitment proceedings.

Case law allows a counselor to reveal privileged information to law enforcement and/or to a third party when the psychotherapist or counselor determines that a patient presents a serious danger of violence to another. See generally *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). Information received from a counselor or therapist under these circumstances may be considered in determining the existence of probable cause for arrest or a search warrant.

iii. Medical Records and Victim's Statements

The victim's statements to medical professionals for the purpose of medical diagnosis or treatment are admissible regardless of whether the victim testifies. See ER 803(a)(4); *State v. Ackerman*, 90 Wn. App. 477, 484 (1998) Such statements are considered reliable on the basis that the declarant will be truthful in order to obtain beneficial medical treatment. See, e.g., *State v. Carol M.D.*, 89 Wn. App. 77, 85, 948 P.2d 837 (1997); *State v. Sims*, 77 Wn. App. 236, 239-40, 890 P.2d 521 (Div. 1, 1995) (statements made by victim to social worker and physician were admissible over hearsay objections as statements for the purpose of medical diagnosis or treatment). The admission of statements to medical personnel will generally not run afoul of the confrontation clause. See *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012). Medical reports created for treatment purposes are not testimonial under the confrontation clause and are admissible as business records. *State v. Doerflinger*, COA 66694-1 J, ___ Wn. App. ___ (Sep. 17, 2012).

iv. Causation v. Fault Statements

Although "causation statements" are allowed (i.e. — I was hit), "fault statements" are generally disallowed (i.e. — John hit me). *In re Penelope B.*, 104 Wn.2d 643, 656 (1985). However, there are exceptions for domestic violence and child abuse. In *State v. Sims*, 77 Wn. App. 236, 239, 890 P.2d 521 (1995), the court recognized that "a statement attributing fault to an abuser can be reasonably pertinent to treatment in domestic sexual assault cases involving adults." Citing, *United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993), the court noted that "...for example the treating physician may recommend special therapy or counseling or instruct the victim to remove herself from the dangerous environment by leaving home and seeking shelter elsewhere ..." *Id.* Statements as to fault may therefore be admissible under *Sims* if the prosecution has evidence that treatment of referrals for treatment would be different for domestic violence victims. It should be noted, however, that the court in *Sims* declined to address the confrontation clause issue or whether the motive for such statements was for treatment purposes and therefore inherently reliable because such issues were not raised at the trial court level. Similarly, a child abuse victim's statement attributing fault to a household member is a recognized exception to this general rule because it is "relevant to the prevention of recurrence of injury." *State v. Butler*, 53 Wn. App. 214, 221 (1989).

10) Ongoing Testing

Continuances beyond the court rule time for trial period may be obtained by the prosecution in the interests of justice to allow for the completion of forensic testing. *State v. Cauthron*, 120 Wn.2d 879 (1993). Neither dismissal nor suppression of evidence are proper for late release of forensic test results so long as the prosecution used due diligence in obtaining the test results and the results were released to defense counsel as soon as they were received from the laboratory. CrR 4.7(h)(1); CrRLJ 4.7(g)(1). See also *In Re Personal Restraint of Lord*, 123 Wn. 2d 296, 329, 868 P.2d 835 (1994).

11) Requesting Discovery From Defense Counsel

Prosecutors should always request discovery from the defense. In order to avoid inadvertent failures to make such requests, the request should be contained in a form letter to the defense at the time the prosecution's discovery is forwarded to the defense. If the defense does not provide discovery in compliance with CrR 4.7(b) or CrRLJ 4.7(b), the prosecutor may file a Motion to Compel Discovery.

The defense will occasionally attempt to avoid producing discovery on the grounds of "work product." The courts, however, have narrowly construed the work product privilege. See, e.g., *State v. Hutchinson*, 135 Wn.2d 863, 876-77, 959 P.2d 1061 (1998) (Defendant who asserts a diminished capacity or insanity defense waives the work product privilege as to all defense obtained evaluations and must submit to a State examination); *State v. Hamlet*, 133 Wn.2d 314, 944 P.2d 1026 (1997) (same); *State v. Yates*, 111 Wn.2d 793, 765 P.2d 291 (1988) (Defense notes of witness interviews may be discoverable if the author of the notes is called to impeach the witness. The court, however, must conduct an *in camera* review of the notes prior to turning them over.); *State v. Strandy*, 49 Wn. App. 537, 540, 745 P.2d 43 (1987), *review denied*, 109 Wn.2d 1027 (1988) (Defense counsel's taped interview of a prosecution witness was not work product).

A defendant's refusal to comply with lawful discovery orders or a delay in making required disclosures may result in a continuance beyond the speedy trial period, in a contempt finding with incarceration, or in the suppression of evidence. *State v. Hutchinson*, 135 Wn.2d 863, 881-82, 959 P.2d 1061(1998) (Capital defendant's mental expert's testimony was properly suppressed after the defendant repeatedly refused to participate in a State examination and no other sanction would have been effective); *State v. Nelson*, 14 Wn. App. 658, 545 P.2d 36 (1975) (Defendants found in contempt and incarcerated for refusing to provide discovery); *State v. Grant*, 10 Wn. App. 468, 474-75, 519 P.2d 261 (1974). Speedy trial is appropriately tolled while the court waits for the defendant to purge the contempt finding. See *State v. Miller*, 74 Wn. App. 334, 873 P.2d 1197 (1994) (Tolling of defendant's court rule speedy trial rights during 14 month incarceration under order of civil contempt for her failure to provide handwriting exemplar to prosecution was proper).

1. See generally *State v. Yates*, 111 Wn.2d 793, 798-99, 765 P.2d 291 (1988).

2. See *State v. Oughton*, 26 Wn. App. 74, 79, 612 P.2d 812 (1980) ("The State would have us make a distinction between inculpatory and exculpatory evidence and find no duty to produce the former. CrR 4.7(a)(i) makes no such distinction and neither do we.").

3. *State v. Linden*, 89 Wn. App. 184, 194, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018 (1998); *State v. Dunivin*, 65 Wn. App. 728, 733, 829 P.2d 799, *review denied*, 120 Wn.2d 1016 (1992).

See the appendix for a stock motion to compel.

b. Pretrial Preparation

Just like in any other cases, careful preparation is the key to success. The police report and initial investigation provided ample support for a finding of probable cause. Additional information that might be sought to assist in convincing a jury that the defendant is guilty beyond a reasonable doubt in a domestic violence prosecution includes the following:

1) Can the prosecution be done without the victim? The Modern Confrontation Clause and D.V. Prosecution after *Michigan v. Bryant*

Victims in domestic violence cases are frequently reluctant to testify and some may not appear at all. There are many legitimate reasons for that reluctance or non-appearance: fear of retaliation by the defendant, prior bad experiences with the legal system, the defendant's response (repeat violence escalates over time), and dependence on the defendant through children/family/culture/faith/financial reasons.

Over the past several years, prosecutors' ability to proceed in domestic violence cases without the victim (known as "victimless" or "evidence based" prosecutions) has changed significantly. What was once a question of whether a statement qualified as an "excited utterance" is now a question in whether the statement was made in response to police questioning, what was the primary purpose of the police questioning, and whether the totality of the circumstances indicated an ongoing emergency. Though the number of victimless cases has narrowed, the courts have recently begun to expand this area, and have provided new tools, that when properly understood, allow victimless prosecutions. The law in this area begins with the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,** and to have the Assistance of Counsel for his defense.

(emphasis added; Confrontation Clause in bold).

i. The scope of the Confrontation Clause

- The clause applies to witnesses. When is someone a witness? When they are "bearing testimony" against the accused. Testimony is "a solemn declaration or affirmation made with the purpose of establishing or proving some fact." *Crawford v. Washington*, 124 S. Ct. 1354, 1364; 158 L. Ed. 2d 177 (2004). If a declarant is doing "precisely *what a witness does* on direct examination" then he is a witness. *Davis v. Washington*, 126 S. Ct. 2266, 2278 (2006); 165 L. Ed. 2d 2241 (italics in original; discussing Hammon).
- Only some hearsay is prohibited by the Confrontation Clause; most hearsay exceptions deal with non-testimonial statements because they "rest on the belief that certain statements are...made for a purpose other than prosecution..."
- The Confrontation Clause is implicated by testimonial statements, i.e. those that look and feel like testimony.

- Not all interrogations by law enforcement produce testimonial statements; it is necessary to determine the "primary purpose" of the interrogation.
- "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."
 - "...because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not [apply]...This logic is not unlike that justifying the excited utterance exception in hearsay law."
- When the "primary purpose" of the interrogation is to respond to an ongoing emergency, the statements are outside the Confrontation Clause (because the purpose is not to create a record for trial).

ii. The Test

1. Whether the "primary purpose" of an interrogation is to enable police (or fire or medics) to meet an ongoing emergency is an objective inquiry.
- The totality of the circumstances and the statements and actions of the participants are objectively evaluated. The subjective (actual) purpose of the people involved is not part of the inquiry. The court will use a reasonable person standard to evaluate the statement(s).
 - The contents of both the answers and the questions during the interrogation.
 - The "emergency" is considered, not in hindsight, but as it would have appeared to a reasonable person at the time.
 - A situation can evolve from emergency to non-emergency; statement then goes from nontestimonial to testimonial. See *State v. Reed*, 168 Wn. App. 553, 278 P.3d 203 (Div. 1, 2012) (Inquiry guided by four relevant factors: (1) timing of statements relative to when the described events occurred, (2) nature of what was asked/answered and purpose, (3) threat of harm posed by situation as judged by "reasonable listener", and (4) evaluate level of formality of the interrogation.)
 - Private dispute vs. more general public threat? Whether the threat is limited to the victim or extends to others. Targeted crime vs. random crime. D.V. has "narrower zone of potential victims" Bryant, at 1158.
 - Was a weapon used? Fists / Firearm / knife? Does the weapon suggest a broader threat to the public?
 - The severity of a victim's injury (severe injuries suggest questioning needed to resolve emergency; minor injuries, no such need; seriously injured "reasonable" person is not "bearing testimony;" severity of injury might also suggested greater public threat)

- Whether location of suspect is known. If so, perhaps less need to question.
 - The extent to which "the elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past."
2. The existence of an ongoing emergency alone does not determine the primary purpose of the interrogation, the court must assess the informality of the encounter between the police and the victim.
 - "...the situation was fluid and somewhat confused..." vs. stationhouse interview or Hammon interview.
 3. Although the Confrontation Clause may not bar a hearsay statement, a Due Process violation could arise when wholly unreliable evidence is admitted contrary to hearsay rules.

iii. 911 Tapes

The key in many victimless prosecutions is the admissibility of the 911 tape. If admissible pursuant to *Davis v. Washington, supra* discussion, 911 tapes will often accurately reflect the victim's fear and demeanor at the time of the incident and can often be used to persuade a recanting victim that the incident was more serious than the victim has now come to believe. 911 tapes should be promptly ordered and reviewed because many jurisdictions destroy the tapes after 90 days.

A 911 recording is admissible at trial as a business record under RCW 5.45.020 if "the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the . . . event, and if, in the opinion of the court, the sources of the information, method and time of preparation were such as to justify its admission." See *State v. Ross*, 42 Wn. App. 806, 810 (1986). The contents of the tape may also be admissible under ER 803(a)(2) as an excited utterance or ER 803(a)(1) as a present sense impression. For a thorough discussion of this issue, a Memorandum in Support of the Admission of 911 Tapes is contained in the forms and sample memos appendix. The forms and sample memos appendix also contains a sample direct examination to lay the foundation for admission of a 911 tape and a sample 911 brief for admission.

iv. Statements to those other than law enforcement: friends, family, good Samaritans, and medical records.

Victimless prosecutions can also be presented by independent evidence. Although a victim's statements to law enforcement may not be admissible, in full or in part, other statements may be admissible. A victim may call friends or family before reporting to law enforcement, a victim may flee a scene and tell a neighbor what happened, or a victim may disclose what occurred in medical records. Each instance provides important evidence for a prosecutor to put on a victimless case.

2) Can the prosecution be done without the victim? The Modern Confrontation Clause and Forfeiture by Wrongdoing

The confrontation clause of the Sixth Amendment to the United States Constitution protects an accused person's right to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266 (2006). However, the right of confrontation is subject to forfeiture. The doctrine of forfeiture by wrongdoing holds that a criminal defendant waives his Sixth Amendment confrontation rights if the defendant is responsible for the witness's absence at trial. *State v. Mason*, 160 Wn.2d 910, 924, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008). The doctrine stems from the principle that a defendant who has wrongfully procured the unavailability of a witness cannot profit from that wrongdoing by asserting the right to confront the witness:

“[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’ That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”

Davis, 547 U.S. at 833, quoting *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004).

- Forfeiture motion should be conducted at pre-trial hearing in which rules of evidence do not apply and trial court may consider wide array of information, including hearsay, in making its ruling. See ER 104; *Davis*, 547 U.S. at 833.
- State needs to prove by clear, cogent, and convincing evidence that (1) defendant engaged in wrongdoing with the specific intent to prevent witness's testimony at trial, and (2) defendant's wrongdoing caused witness's absence at trial. See *State v. Fallentine*, 149 Wn. App. 614, 620, review denied 166 Wn.2d 1028, 215 P.3d 945 (2009) (Held testimonial statements under forfeiture doctrine are admissible only when evidence shows the wrongdoing was intended to prevent the testimony).
- Wrongdoing does not just mean threats or intimidation. Intent can be reasonably inferred from the totality of the defendant's actions. Do you have evidence that the defendant is manipulating the victim? (e.g. using emotional appeals, apologies, bribes, promises to change, or inducing guilt, etc.?) Is the defendant repeatedly violating the pre-trial no-contact order? Is the defendant using his network of family/friends to pressure the victim?
- Court may also consider prior acts of DV within the relationship as prior DV can be relevant to forfeiture inquiry. See *State v. Dobbs*, 167 Wn. App. 905, 914, review granted __ Wn. 2d __ (October 10, 2012), 276 P.3d 324 (2012) (Evidence showed that defendant engaged in repeated and persistent acts of violence against the victim that had escalated over time). The *Dobbs* Court relied on USSC decision in *Giles v. California*, 554 U.S. 353, 377, 128 S.Ct. 2678 (2008) (Court suggests that a DV relationship is highly relevant to forfeiture determination because “[a]cts of [DV] 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.”)

- If the court finds that the defendant forfeited his confrontation rights, then the court should also find that the defendant has forfeited his right to hearsay objections regarding evidence presented under the doctrine. See *Dobbs*, 167 Wn. App. at 917-18, review granted, ___ Wn.2d___ (Oct. 10, 2012), (*Dobbs* Court 's rationale taken from *Giles v. California*, 554 U.S. at 365-67). A proposed amendment to ER 804 will exempt from the hearsay rule statements offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. This proposal was approved by the WSBA Board of Governors. It is expected that the Washington Supreme Court will publish the proposal for comment in 2013.

Jail Phone Calls

Jail calls have become important evidence in domestic violence prosecution. Many jurisdictions in Washington utilize a digital phone system that records all outgoing inmate calls from its institutions, with the exception of calls to defense lawyers. In many places the calls are retained for one year online and for two years in archive before being erased. The calls have become a critical part of proving domestic violence cases and show what is well known among prosecutors and victim advocates: witness tampering is a significant problem in domestic violence cases. A study of jail calls in DV cases in Washington state showed sophisticated efforts by defendants to undermine the DV prosecution:

A victim's recantation intention was influenced by the perpetrator's minimization of the abuse and appeals to her sympathy through descriptions of his suffering from mental and physical problems, intolerable jail conditions, and life without her...Once the victim arrived at her decision to recant, the couple constructed the recantation plan by redefining the abuse event to protect the perpetrator, blaming the State for the couple's separation, and exchanging specific instructions on what should be said or done.

Direct threats were rarely used to influence victims...While the threat of further violence may have been present in all couples, the detained perpetrators in our study used other sophisticated strategies to persuade their victim, namely, minimization.....The perpetrator's use of sympathy appeals through descriptions of his suffering from mental and physical problems, intolerable jail conditions, and impending life without the victim and their children were highly successful in manipulating the victim's emotional state shifting her from a place of maintaining her agency in moving forward with prosecution to resuming caretaking of the perpetrator. See Bonomi, A. E., et al., "Meet me at the hill where we used to park": Interpersonal processes associated with victim recantation, *Social Science & Medicine* (2011), doi:10.1016/j.socscimed.2011.07.005

As defendants are sophisticated in how they undermine the case against them, they also are sophisticated in how they make their jail calls. Often they will use a different inmate's pin number, call a third person to route their call to the victim, have the victim purchase a disposable phone (and disposable number), or simply believe that prosecutors and law enforcement have too much to do to review the jail calls. Making jail calls a key part of pretrial preparation will result in greater accountability for offenders and safety for victims. See appendix for case law and briefing.

Below is a list of suggested jail call custodian of the records predicate questions. Once you have created the exhibit CD containing just the calls or excerpts of calls you will offer into evidence, you still have a "dance" to do for the admission and for the record. The two goals are: (I) Have both the full CD (plus

printout of the call log) and the Excerpt/Exhibit CD (plus the extract of the printed call log) marked as exhibits and kept in the court record; and (II) Then offer the disc of specific calls you need for your case admitted into evidence (with the printout of the portion of the call log that goes with the admitted calls). So when you are done, both will have exhibit numbers and remain in the court record, and the admitted exhibit(s) will get played for the jury's consideration.

Here are the dance steps:

1. Give the Custodian advance opportunity to listen to both the full disc and the edited one. They like to take the discs back to their own desk to listen and compare a day before, or at least really early the morning of testimony, have them re-initial and date the cd's when they are satisfied that:
 - a. The full disc (and the spreadsheet report of calls) is accurate (what they pulled from a reliable system)
 - b. The exhibit disc is an accurate subset of the full disk (and excerpt of the spreadsheet if you are using that – I would)
2. Get your Voice ID witness to also listen to the exhibit CD in our offices before going to the courtroom initial the disc after confirming recognition of the voices
3. In the courtroom:
 - a. In front of the jury with Jail phone system witness:
 - i. Have both discs marked
 - ii. Have Custodian go through their custodian of records stuff;
 - iii. Confirm that both of these are the discs they recently reviewed by their initials and date; and
 - iv. **Offer** the jury exhibit disc (and printout of the excerpt of the spreadsheet) *** at this point, an objection to admission may be on the basis of voice authentication – that's your next witness
 - b. Still in front of jury with voice authentication witness:
 - i. Ask witness to recognize disc recently reviewed by witness' own initials and date
 - ii. Ask witness if they could recognize the people speaking and how familiar they are with the voices. Probably no big deal if defendant voice isn't well known to witness because the Custodian probably already testified that it was the inmate's PIN number initiating the calls. So this voice authentication witness is testifying to identify the call receiver/victim. But if they can id the defendant's voice also, by all means let them.
 - iii. Offer the disc of the calls you want to go to the jury (also the excerpt of the call log spreadsheet that the jail system witness already). The full disc was only marked to remain in the record with the rest of the file for later appellate review.
 - c. Move to publish the exhibit:
 - i. Have enough copies of the transcript of the admitted calls ready to have the bailiff pass copies to the jurors if the Court will permit it (they should, who wants to listen to audio without a transcript).
 - ii. Play the disc
 - iii. Take back the transcripts and save them in case the jury wants to hear the disc again during deliberations (they probably will)

*** See Appendix for Direct of Jail Call Records Custodian

WARNING:

The phone system will occasionally record a call between an inmate and the inmate's attorney. This generally occurs when the attorney has not provided jail administration with the information required to block the recording of such calls. A prosecutor or police officer's intentional review of such a call will result in the dismissal with prejudice of all charges. See *State v. Cory*, 62 Wn. 2d 371 (1963).

If an officer or prosecutor office personnel inadvertently access a call that appears to be a communication between the inmate and the inmate's lawyer, the person accessing the call should:

1. **Immediately discontinue listening**
2. **Make a record of their actions—including the date and time of the call that was inadvertently accessed and how many minutes and/or seconds of the call were listened to before the listener realized the call was privileged.**
3. **Immediately send a report of what happened to the prosecutor assigned to the case, but do not include in your report what was heard in the conversation. If that information is needed it will be requested later.**
4. **Not repeat what they heard on the call to other police officers, prosecutors, etc.**
5. **Alert the jail that this defendant's attorney calls are being inappropriately recorded.**

3) Should an expert be used to explain domestic violence and victim behavior?

Evidence Rule 702 permits experts to testify if such testimony would be helpful to the trier of fact. Evidence Rule 702 states:

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.

Experts can be used to educate your jury. Prosecutors should evaluate their case to determine if a witness, including a detective or officer, can testify as an expert about the case and domestic violence. Sample questions for your expert are listed below:

- Name
- Educational background
- Occupation – how long, duties?
- Training – literature, hours
- How many victims of DV do you think you've counseled in your career?
- Can you explain what domestic violence is?
- Is domestic violence a common phenomenon in our culture? Statistics?
- What is the cycle of violence?
- How do victims typically react during these cycles? Feelings of helplessness?
- Are you familiar with the term battered woman syndrome? Can you explain what that is?
- Does the cycle of violence have anything to do with battered woman syndrome?

- Why might a victim of domestic violence stay in an abusive relationship?
- Do all victims of DV report it? Statistics?
- Why might a victim of domestic violence either delay reporting it or not report it at all?
- Why might victims of domestic violence be unwilling to cooperate with prosecuting their batterer?
- Is it common for victims of domestic violence to minimize any instances of abuse?
- Is it common for victims of domestic violence to think that the abuse is their own fault?
- Does domestic violence have an effect on children whose parents engage in domestic violence?

Experienced prosecutors conflict on whether or not experts should be called. Some prosecutors believe that experts should be called anytime you can call them while other prosecutors believe that experts should be used sparingly. See http://www.ndaa.org/pdf/the_voice_vol_1_no_4_2006.pdf. Take care not to ask your expert for opinions that encroach on the province of the jury. Do not ask your witness to assess the victim's credibility, such as by asking if he or she believed the victim. See ER 608(a)

Chapter Six: Witnesses

-
- [Handling the Uncooperative, Recanting, or Hostile Victim or Witness](#)
 - [How to Prepare](#)
 - [Legal Implications of Recanting Victim](#)
 - [An Unexcused Witness](#)
 - [Material Witness Warrants](#)
 - [Quashing the Material Witness Warrant](#)

a. Handling the Uncooperative, Recanting, or Hostile Victim or Witness

It is not necessarily bad for the case when a victim or witness is uncooperative, recants, or is hostile. A victim or witness is not defined by cooperation, but by their factual or equitable contribution to the case. Difficult witnesses are often the most meaningful to the case outcome. A strong prosecutor is one who can take a perceived negative, such as an uncooperative witness, and turn that into a positive. Professional prosecutors understand that it is not about them, and they do not make it personal.

Simply because someone says they do not want to cooperate or actively fights cooperation means little, for the professional prosecutor that just means additional analysis and inquiries:

- What is the source of the lack of cooperation?
- When did this lack of cooperation start to happen?
- Where did lack of cooperation occur?
- How is it happening?
- Why is this happening?
- Does lack of cooperation end the case?
- Does lack of cooperation force case reduction?
- Does lack of cooperation improve the case?
- What does it mean? What could it mean?

There has been research finding that recantation is a byproduct of the actions of sophisticated perpetrators. Sometimes a prosecutor working with cases where a victim recants handles the case less seriously, when study results showing highly sophisticated manipulation strategies (e.g., sympathy appeals) suggest that the prosecutor should double his or her efforts to hold perpetrators accountable for their actions.

Many victims will testify once ordered to do so by the court. Many feel considerable relief at being able to tell the defendant that the decision to testify is out of their hands, as they have been ordered to do so by the court. This reinforces to the defendant that the court, not the victim, controls

the proceedings, and that any attempt to manipulate or intimidate the victim in an effort to avoid criminal prosecution will be unavailing.

No matter the circumstance a prosecutor must adhere to the victim's bill of rights:

The Rights of Victims [RCW 7.69.030](#) requires that the court make reasonable efforts to ensure that victims, survivors of victims, and witnesses of crimes be treated with dignity and respect. Specific provisions require that the court ensure the physical safety of the victim (and any other witness) both in and out of the courtroom and also to be notified of significant events in the case.

In felony cases, [RCW 7.69.030\(12\)](#) mandates that the victim (or survivor) be informed of the time and place of sentencing. Victims are also entitled to submit a victim impact statement which is to be included in the court file. The victim impact statement must also be sent to the institution if the defendant is to be incarcerated. In order to reduce the trauma of being present in court, the statute gives the victim the right to be provided, whenever practical, with a secure waiting area to shield the victim from contact with the defendant and family or friends of the defendant. [RCW 7.69.030\(6\)](#).

1) How to Prepare

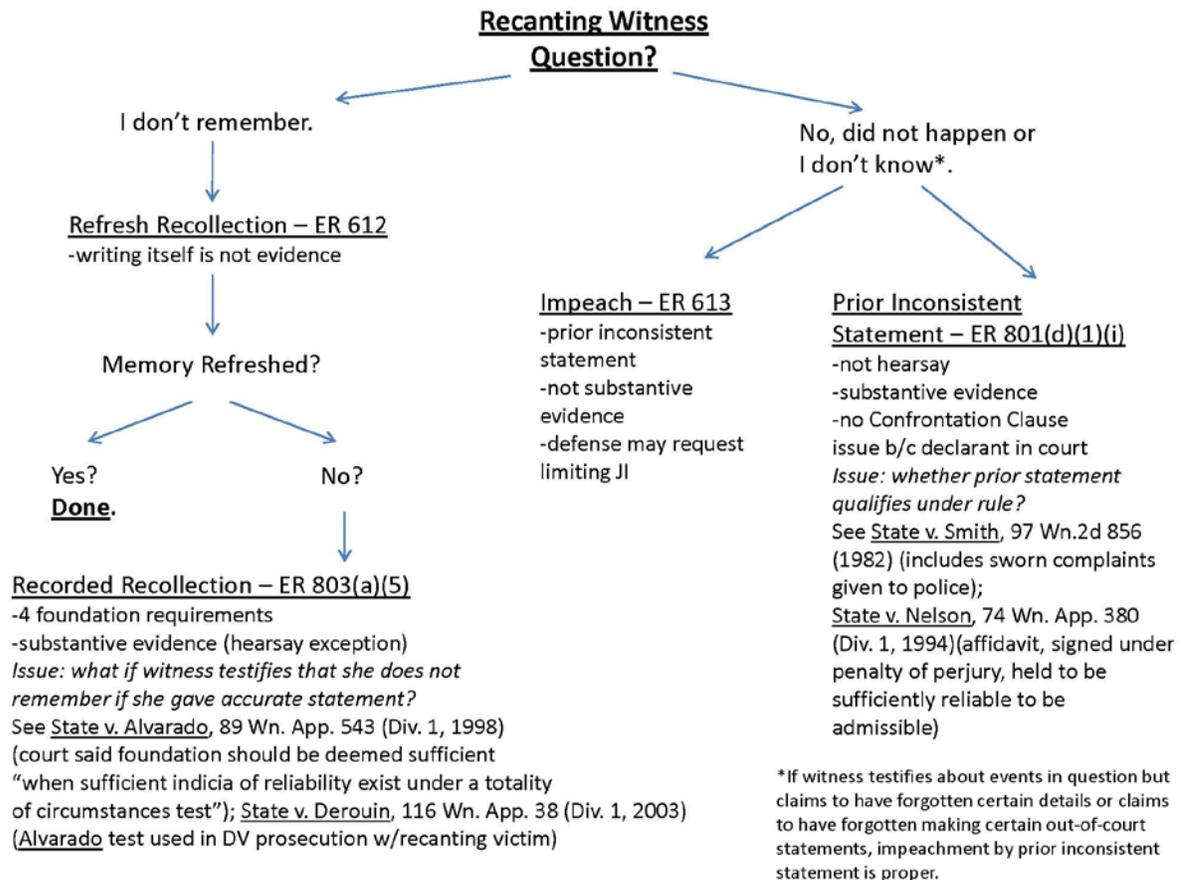
- Have a thorough and objective understanding of your case in the context of the big picture.
- Prepare for or expect a recanting or hostile victim.
- Prepare to present the case to the jury within this context (step back from the incident itself and paint the picture of the broader context/circumstance)
- Research – know applicable case law and evidence rules. Evaluate case from all sides (prosecution, defense, and bench) to minimize surprises.
- Interview – know your case and what your witnesses are likely to say in court
 - Consider Good Cop v. Bad Cop v. Professional Cop (professional interrogation techniques)
 - Investigate the recantation/lack of cooperation to discover the source of the difficulty
 - Check jail phone records for tampering and intimidation
- What if it just happens, and there was no way to prepare for it? As a prosecutor, you have to be prepared to expect the unexpected. By stepping outside your prosecutor box and evaluating the case from all sides well in advance of trial, you will be better prepared if/when things go sideways in court.
- *Understand that cooperation is fluid. Sometimes it just depends on a person's mood or perception of consequence to alter the degree and level of cooperation*

A recanting or uncooperative victim/witness could be powerful evidence of guilt. When people are trying to hide things or prevent a jury or judge from finding out what really happened, their uncooperative actions and statements will often prove the crime.

Legal Implications of Recanting Victim

In some cases a domestic violence victim will appear for trial but minimize or recant the statements they have given. The confrontation clause question does not apply as the victim is present and able to be

confronted, but the question becomes how to prove the case when the victim will not cooperate. One method is to use the victim's statements as substantive evidence, either as an exception to the hearsay rules, or as an admissible past recollection. Importantly, Washington case law is clear that a victim's recantation (and generally their credibility – see case law below) will make the past history of domestic violence admissible. How to approach a recanting witness is diagrammed below:



Evidence Rule 404(b): Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a DV case the ability to explain the victim's behavior with the history of domestic violence is a critical factor in proving a DV case with a recanting or minimizing victim.

For example, in *State v. Grant*, 83 Wn. App. 98, 107-09, 920 P.2d 609 (Div. 1, 1996), evidence of the defendant's prior assaults was admissible under ER 404(b) because it was relevant and necessary to assess a domestic violence victim's credibility as a witness and accordingly to prove the crime of assault actually occurred. See *State v. Magers*, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008) (Court adopted rationale in *Grant* holding prior acts of DV, involving the same defendant and victim, are admissible in order to assist the jury in judging the credibility of a recanting victim). Evidence of prior assaults against a domestic violence victim showed why she minimized and recanted the degree of violence subsequent to charged assault. However, admissibility of prior domestic violence has recently been expanded to

include cases of any inconsistency requiring additional context in assessing victim credibility. See *State v. Baker*, 162 Wn. App. 468, 475, 259 P.3d 270 (Div. 1, 2011)(Full knowledge of the dynamics of the relationship requires context of all inconsistencies, even absent a recantation). Typically a *Baker* analysis becomes appropriate when defense attacks the credibility of the victim thereby opening the door, e.g. victim delays reporting of assault or victim consents to contact despite no-contact order protecting the victim. See appendix for the latest in DV 404(b) materials and briefing.

Evidence Rule 803(a)(5) Recorded Recollection. ER 803(a)(5) is a hearsay exception that allows the following type of evidence to be admissible as substantive evidence: A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable to witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly is admissible as an exception to the hearsay rule. If admitted the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

In a DV case the ability to use a recorded recollection is an especially important skill in prosecuting a DV case with a recanting or minimizing victim. The recorded recollection provides the prosecution with additional substantive evidence in certain situations. It is common for recanting or hostile victims to respond to a question with the response, "I do not remember." After exhausting the prosecutor's ability to refresh the victim's memory (see ER 612), the prosecutor might be able to lay the foundation for a recorded recollection. Even if the victim says that she does not remember if she gave an accurate statement at/near the time of the event, the foundational requirements can still be satisfied. See *State v. Alvarado*, 89 Wn. App. 543, 552-53, 949 P.2d 831 (Div. 1, 1998) (Court said foundation should be deemed sufficient "when sufficient indicia of reliability exists under a totality of circumstances test."); *State v. Derouin*, 116 Wn. App. 38, 45-47, 64 P.3d 35 (Div. 1, 2003) (*Alvarado* test used in DV prosecution with a recanting victim).

Smith Affidavits (Prior Inconsistent Statement – ER 801(d)(1)(i))

In *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982), the court held that a witness' sworn statements to investigating officers as a prior inconsistent statement is admissible as substantive evidence pursuant to ER 801(d)(1)(i) if there is sufficient evidence of reliability. Admissibility requires the following:

- The victim must testify and be subject to cross-examination;
- The statement must be voluntarily written by the victim or by another in the victim's own words;
- The statement must be sworn under oath with penalty of perjury; and
- The statement must be taken as part of a standard procedure in one of four legally permissible methods for determining the existence of probable cause (i.e. — it resulted in the filing of an information, a complaint before a magistrate, a grand jury indictment or an inquest proceeding).

In order to lay a foundation at trial, the officer must be able to testify about the date, time, place and circumstances of the statement, whether the victim understood the perjury language or read it, and that she was not coerced into writing the statement. While a declaration that complies with RCW 9A.72.085, should be sufficient, some courts demand a notarized statement. For those courts, a sample "*Smith Affidavit*" is contained in the forms and sample memos appendix.

Many police departments are now moving to oral or recorded *Smith* affidavits, in which the victim provides a statement through an audio or video recording. The admissibility requirements outlined above still apply. However, instead of a written statement, victims must provide an oral statement that they understand that their statement is sworn, under oath, and subject to the penalty of perjury. Courts have not addressed whether or not oral *Smith* affidavits are sufficient.

If the prosecution is unable to satisfy all of the criteria for admission of a *Smith* affidavit, the prior inconsistent statement can be used for impeachment alone (not substantive evidence) pursuant to ER 613(b). If the evidence is solely admissible under ER 613(b), the defendant is entitled, upon request, to a limiting instruction. See *State v. Thorne*, 43 Wn.2d 47, 53, 260 P.2d 331 (1953); *State v. Johnson*, 40 Wn. App. 371, 378, 699 P.2d 221 (1985). The victim may not, however, be called by the prosecution solely for the purpose of impeachment. See, e.g., *State v. Lavaris*, 106 Wn.2d 340, 345, 721 P.2d 515 (1986).

2) An Unexcused Witness

The “unexcused absence of a subpoenaed witness is not good cause for a continuance. . .” *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 84, 605 P.2d 1265 (1980). However, the Washington Supreme Court has granted a continuance when the prosecutor exercised due diligence in attempting to secure a co-participant’s attendance and there was no prejudice to the defendant in the delay. *State v. Nitschke*, 33 Wn. App. 521, 524-25, 655 P.2d 1204 (Div. 1, 1982). A trial court’s decision to not grant a continuance and to dismiss charges pursuant to CrR 8.3(b) and CrRLJ 8.3(b) will be reviewed under an abuse of discretion standard. See, e.g. *City of Kent v. Sandler*, 159 Wn. App. 836, 247 P.3d 454 (2011) (dismissal affirmed when subpoenaed trial witness twice failed to appear at scheduled time); *City of Seattle v. Lewis*, 159 Wn. App. 842, 247 P.3d 449 (2011) (affirming the denial of a motion to dismiss when subpoenaed witness did not appear as directed). The witness must be available within a reasonable time, though the “availability within reasonable time” condition is relaxed when the witness is absent due to illness. See, e.g., *State v. Koerber*, 85 Wn. App. 1, 5, 931 P.2d 904 (Div. 1, 1997) (Trial judge abused his discretion by dismissing case when key prosecution witness became ill with the flu the day before trial and the prosecution did not know when the witness would become available).

b. Material Witness Warrants

A material witness warrant, though sometimes necessary, is typically a sign of failure. It can mean the prosecutor did not do enough to find their witness or convince them to attend. Cases with reluctant or problematic witnesses are hard work, they demand intense effort from prosecutors, and warrants can be an easy way out. However, a warrant is not a panacea-- courts are reluctant to hold material witnesses, and when they testify invariably (as you have put them in jail for simply being a witness) they are hostile.

Furthermore, there is debate over the equity of requesting a material witness warrant when a domestic violence victim fails to appear in court. One may feel that successful prosecution of a defendant is crucial to prevent further violence. On the other hand, arresting the victim serves to re-victimize the victim and could deter future complaints of violence. Often advising the victim of the prosecution’s ability to obtain a material witness warrant will provide the incentive for an appearance.

A sample forms for a “Motion and Certification for Order to Apprehend and Detain Material Witness” and an “Order to Apprehend and Detain Material Witness” are contained in the forms and sample memos appendix. Material Witness Warrants are issued pursuant to CrR 4.10.

****Always consult with a supervisor prior to obtaining a material witness warrant.****

NOTES ON MATERIAL WITNESS WARRANTS

- Always consult with a supervisor or a senior colleague prior to obtaining a warrant. There may be other ways of proceeding, other than putting a victim in custody,. Also, there are ways to limit the impact of the warrant (victims should be brought directly to court and not booked if possible).
- Ex Parte Proceeding: no need to give notice to defense or have them present.
- Need certification, motion, and order.
- Make sure to include an expiration date on the order.
- Make sure to quash the warrant at the conclusion of the case.
- Work with paralegal to get the warrant on line.
- When warrant served, you must notify your jurisdiction’s public defender office to get witness/victim a lawyer.
- Issuance of warrant is reviewed under a manifest abuse of discretion standard. *City of Bellevue v. Vigil*, 66 Wn. App. 891, 892, 833 P.2d 445 (Div. 1, 1992).
- Do not ask the witness about the warrant during direct testimony. *State v. Bourgeois*, 133 Wn. 2d 389, 401-02, 945 P.2d 1120 (1997).
- Not extraditable.
- Just putting the warrant on line is not enough.
- Work with police to execute warrant.
- Work with warrant detectives.
- If in custody, witness will need street clothes for the testimony.

1) Quashing the Material Witness Warrant

- Key action is quashing the warrant—the point is not having the witness custody, but in having the witness appear in court.
- Utilize warrant so as not to put your witness/victim in custody (how do you think they will be on the stand?). Set up time for them to appear to quash, write conditions of release, use it to sustain relationship, not destroy it.
- Utilize their lawyer to help gain cooperation.
Let witness know that your goal is to get them into court. It is the witness’ decision what they will say.
Remember, the witness/victim is likely not cooperating because she/he feels that is the best way to stay safe.

- [Introduction](#)
- [Privileges](#)
- [Admissibility of Defendant's Prior Bad Acts Against the Victim](#)
- [Hearsay Exceptions](#)
- [Children as Witnesses](#)
- [Expert Witnesses](#)

a. Introduction

Prosecutors in domestic violence cases must become experts on a range of evidentiary rules, including the use of medical testimony, forensic testimony, use of non-victim witnesses, exceptions to the hearsay rule, and laying the foundation for the introduction of a host of documents. They must become experts with strategies to deal with complex cases such as strangulation, allegations of an assault committed by the victim, or victim recantation. Prosecutors should also put a high priority into the briefing and admissibility of prior acts of domestic violence and create and disseminate model guidelines for prosecutors on how to bring prior acts of domestic violence before the court when charging, making bail recommendations, prosecuting, and sentencing domestic violence-related crimes.

There are additional areas, however, to keep in mind when handling domestic violence prosecution at pretrial and trial. The time it takes for a domestic violence case to come to trial should be frequently examined. Delay is the enemy of many domestic violence prosecutions. Delay affords offenders an opportunity to reestablish a relationship with the victim and increases hardship (both economic and other) on victims and their children, making it more difficult for them to cooperate. Reducing time to trial and making efficiency and timeliness an important part of domestic violence prosecution will yield positive results.

Be consistent in negotiations on domestic violence cases and negotiate according to professional disposition standards. Balance the safety of the victim and the community with holding the offender accountable and expediting prosecution goals. Consider the seriousness of the offense, past record of the defendant, likelihood of rehabilitation, likelihood of future violence and intimidation, effective impact of jail time, availability of community supervision, and victim's bill of rights. Inform the victim of the negotiated plea process and seek her input. Consider the needs of the victim in accepting a plea (e.g., restitution, protection or emotional security).

b. Privileges

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:

1) Spousal or Domestic Partner Privilege

Washington has two spousal privileges, both defined in [RCW 5.60.060\(1\)](#), spousal and domestic partner. Both privileges apply to spouses and to state registered domestic partners. The first protects confidential communications between husband and wife, forbidding one spouse or domestic partner from testifying about confidential communications without the consent of the other. The second prevents one spouse or domestic partner 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). An actual marriage license, however, may not actually be required. *State v. Denton*, 97 Wn. App. 267, 983 P. 2d 693 (1999).

i. When may the spousal or domestic partnership 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).

In contrast, the testimonial bar applies only during the pendency of a valid marriage or domestic partnership. 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)). The testimonial privileges do not prevent third party testimony about extrajudicial statements. See *State v. Burden*, 120 Wn. 2d 371, 841 P. 2d 758 (1992).

ii. 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).

iii. Comment on the exercise of 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 or domestic partner 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).

2) 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).

Mandatory disclosure statutes regarding child abuse and abuse of vulnerable adults take precedence over the privilege. *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454, review denied, 171 Wn. 2d 1024 (2011).

3) 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*, 81 Wn. App. at 467.

4) Domestic Violence Advocate

"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.

c. Admissibility of Defendant’s Prior Bad Acts Against the Victim

Issues concerning the admissibility of other acts of misconduct 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 credibility of the victim, *res gestae*, rebut recantation or minimization (as above), showing absence of accident, intent, to show the victim’s “reasonable fear,” or motive.

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, 291-93, 53 P.3d 974(2002). This balancing must occur on the record. *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; *State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000).

d. Hearsay Exceptions

1) 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. *State v. Ackerman*, 90 Wn. App. 477, 481, 953 P.2d 816, 819 (1998).

2) Excited Utterance

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."

3) State of Mind or Bodily Condition

In a domestic violence case, [ER 803\(a\)\(3\)](#) 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.

4) 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.

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

6) 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.

i. The statement 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).

ii. 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. Note, the victim's statements that she feared the defendant may be barred by the confrontation clause. See *State v. Fraser*, No. 66276–7–I, 282 P.3d 152 (2012).

7) Statements for Medical Diagnosis or Treatment – 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 including social workers, EMT's, 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. The admission of statements to medical personnel will generally not run afoul of the confrontation clause. See *State v. O’Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012).

8) 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. Furthermore, the rule may be useful with a recanting victim, who

gave a prior statement that qualifies under the rule.

9) 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, *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.

10) 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.

The confrontation clause is not an issue here if the certification simply attests to the authenticity of the attached document:

In sum, the Court considered any document prepared for use in a criminal proceeding to be testimonial. It observed one exception: “a clerk’s certificate authenticating an official record—or copy thereof—for use as evidence.” *Id.* Yet, the Court stressed that at common law, “a clerk’s authority in that regard was narrowly circumscribed. He was permitted ‘to certify to the correctness of a copy of a record kept in his office,’ but had ‘no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.’” *Id.* at 2538–39). Thus, “[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against the defendant.” *Id.* at 2539, 75 So. 95. See *State v. Jasper*, 174 Wn.2d 96, 115-16, 271 P.3d 876 (2012) (Violation of Confrontation Clause because DOL representative prepared documents solely for purpose of prosecution).

e. 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. See *Children and Domestic Violence: Challenges for Prosecutors*, (NCJ 185355; grant 99–WT–VX–0001) <https://www.ncjrs.gov/pdffiles1/jr000248b.pdf> for a good primer on children in domestic violence cases.

1) 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\(2\)](#).

2) Competency

i. 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.” Both children and adults are presumed competent until proved otherwise by a preponderance of the evidence. *State v. Brousseau*, 172 Wn. 2d 331, 341, 259 P. 3d 209 (2011).

The following factors are to be considered in evaluating competency:

- The child’s understanding of the obligation to speak the truth on the witness stand;
- The child’s mental capacity, at the time of the events in question, to receive an accurate impression of the events;
- Whether the child’s memory is sufficient to retain an independent recollection of the events;
- Whether the child has the capacity to express in words his or her memory of the events; and
- 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.

ii. Procedure for determining competency

The party objecting to the child’s competency bears the burden of proof. The challenger is not entitled to a competency hearing as a matter of right, but must instead make a threshold showing of incompetency. *State v. Brousseau*, 172 Wn. 2d. at 343-45. Age alone is insufficient to trigger a competency hearing. The child is not required to testify at a pretrial competency hearing.

iii. 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-year old 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).

f. 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 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.

1) 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. Testimony addressing these characteristics may be of considerable assistance to the trier of fact.

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 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).

In *State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165, 1173 (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, 105, 920 P.2d 609, 612 (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, 766, 770 P.2d 662, 669 (1989) (expert testimony admissible to explain why abused children may be reluctant to testify).

Chapter Eight: Victim Advocacy

Victim advocacy is a critical component of any domestic violence prosecution. Advocacy takes two forms: one that is offered to an individual victim and the other that promotes systemic change. Prosecutors handling domestic violence cases should work in close conjunction with victim advocates. Working with an advocate who has an ongoing relationship with the victim greatly facilitates communication between the prosecutor and the victim, and brings about a higher level of justice for victims. Victim advocates provide important background information about the victim, the perpetrator, and the family circumstances. Case handling, plea negotiations, and trials should include victim advocates as a partner in the criminal justice process. It is also important to recognize that domestic violence victims and their advocates may not always share the same goals as prosecutors. They may have their own objectives separate and distinct from those of the prosecutor.

- Prosecutors should employ professional well-trained domestic violence advocates in their offices, or if resources are limited, prosecutors should work closely with community-based domestic violence programs in order to provide advocacy to victims. Prosecutors should value the input of proactive advocacy and acknowledge that a healthy tension between prosecutors and advocates leads to better decision-making.
- Advocates should serve as more than a liaison between the criminal justice system agencies and the victim. Advocates should use their expertise in domestic violence to help achieve justice for victims. Advocates must be proactive to make sure the criminal justice system, from prosecutors to law enforcement to judges, is hearing from the victim.
- Advocates should help victims develop safety plans within a support system outside the criminal justice system. Rather than seeing themselves as the victim's support network, advocates and prosecutors should assist domestic violence victims in building support networks in their community among friends, family, neighbors and co-workers.
- Early, consistent contact with victims and immediate referral to appropriate support services is critical to preserving a case. A prosecutor's office should utilize available resources to create a dialogue with the victim to address their joint or individual concerns.
- Advocates and prosecutors must stay in contact with the victim throughout the court process, providing her with pertinent case information (e.g., give her the criminal court docket number to help her keep apprised of the court dates and pending motions), and making sure she is not

- being intimidated or threatened. Advocates should confirm service of subpoenas and protection orders, provide the victim with a courtroom orientation and accompaniment through hearings, if desired, and ensure the victim is notified of offender release information. Advocates and prosecutors should assess the likelihood of continued violence by the suspect from the time of arrest until after sentencing, if resources allow .
- Advocates and prosecutors should encourage and guide the victim in collecting further evidence e.g. advise her to keep a chronology of all defendant contact and the history of abuse; encourage the victim to call the police if the offender violates existing court orders.
 - Maximize legal strategies to protect the victim and the integrity of the case (e.g., no-contact provision, restraining orders, and trial motions).
 - Provide the victim with information about legal remedies, victim rights and community referrals. Work collaboratively with community-based advocates to address the full range of victim needs.
 - Advocates must notify the victim of her rights under the state constitution and to victim compensation. Further, advocates should assist the victim with applications for crime victims' compensation and other financial aid.
 - Advocates and prosecutors should always ask a victim about the abuser's suicidal behaviors. If there is a history of suicidal ideation, they should inform/educate women about the risk of homicide and intensify safety planning. Advocates should also be sensitive to the impact that prosecution can have upon victims' mental health.
 - Prosecutors should work with advocates to jointly develop a process to maintain the confidentiality of the victim's location when necessary, but also with clear understanding for all of the public disclosure laws and the confidentiality differences in advocacy systems (community versus system).
 - Advocates and prosecutors should acknowledge that victims may be using alcohol, other drugs, and/or be involved in criminal behavior and address the impact of these issues on their safety, sobriety, and ability to access resources.
 - Some best practices give specific pronouncements on the use of subpoenas/material witness warrants for victims at trial. Each case and each jurisdiction is unique. What is important is to have safe guards and appropriate guidelines for handling such critical situations. These policies should be transparent to the community.
 - Professionals and service providers must take extra care to ensure that their familiarity with a victim (either as a result of informal contact, rumors, or stories) does not affect providing the best possible advocacy and intervention. Conflict of interest policies and objective case handling are important.

Types of advocates working in DV cases:

Community-based DV advocates

Community-based DV advocates are employed mainly by non---profit agencies. They provide voluntary and confidential services to DV and sexual assault survivors, which may include crisis intervention, emergency shelter, transitional housing, and other programs. The function of a community---based DV advocate’s role may vary from one community agency to another.

Community---Based DV Advocates Roles and Services:

Community---based DV advocates work with adult and teen DV survivors. Some advocates have specialized training and work with sexual assault survivors. Some advocates have specialized training to support and advocate for the legal needs of DV survivors. There are also children’s advocates, who primarily support and advocate for children affected by DV. Communications with community---based DV advocates, CA and other agencies are limited through DV confidentiality and privileged communication laws. This is needed to best protect the safety and wellbeing of DV survivors and their children. Their communications with DV survivors and records cannot be released without a release of information or a valid court order. Many of the community---based DV agencies and advocates’ addresses are confidential. The following describes the roles and functions of community---based advocates.

- a. Work with any DV survivor who requests services, including survivors who are defendants in criminal cases.
- b. Provide voluntary advocacy services when requested by DV survivors.
- c. Have a strong belief in survivor self---determination, and tailor services based on what the client or their children identify as needs.
- d. Provide advocacy---based counseling to DV survivors including DV education, support, information, referral to resources, and safety planning. DV advocates do not have an evaluative or monitoring role with DV survivors and their children.
- e. Offer support groups, and a 24 hour crisis line. Provide specialized services for children and teens. Assist survivors in accessing resources and services they need, such as housing, financial assistance, employment training, childcare, counseling, and legal assistance. Provide community education, outreach and professional trainings on DV. Collaborate with legal, medical, LE, social service and health agencies, and participate in relevant community task forces and social change committees.
- f. Provide support, legal information, and referrals for civil/legal services. DV legal advocates cannot provide legal representation or advice. Assist DV survivors with protection order process, and accompany DV survivors to legal appointments and court hearings. Organize legal information sessions for DV survivors. Coordinate and collaborate with various legal and criminal justice system entities, and advocates on behalf of client.

Systems-based DV advocates

Systems-based DV advocates may be employed by prosecution agencies, LE agencies, Department of Corrections, or cities. They provide advocacy services to DV survivors who are involved in the legal

system. They may provide education about court processes, accompany DV survivors in court, and make referrals to community services. Their specific role varies by their employer. Information that DV survivors discuss with systems-based advocates may be recorded in court records and documents.

Systems-based DV advocates are employed by prosecution agencies, LE agencies, Department of Corrections or cities. Advocates may be referred to as victim liaisons, coordinators or specialists. Relationships advocates have with DV survivors are limited primarily to the life of the criminal case. Advocates may be able to directly affect change and awareness within the legal system on behalf of the survivors they work with. Systems-based DV advocates roles and services are as follows:

- a. Provide support and case management to DV survivors during criminal proceedings.
- b. Assess and address survivors' safety needs and other concerns related to prosecution,
- c. Provide crisis support and ongoing safety planning,
- d. Work cooperatively with community-based DV advocates and advocacy programs,
- e. Convey DV survivors' input to detectives, prosecutors, judges probation, and other relevant system-based professionals,
- f. Explain legal processes, options and potential outcomes to DV survivors, Accompany DV survivors to joint interviews, defense interviews, and court hearings,
- g. Consult closely with prosecutor on DV survivors' issues and case concerns
- h. Provide DV survivors with appropriate referrals to community resources, ensure that DV survivors' rights are honored in the system, and provide some assistance with protection orders.
- i. Initiate contact with survivors upon receipt of a DV incident report or criminal complaint. Relationships with DV survivors are approached with a philosophy of DV survivor self-determination; however, LE and/or prosecutors control decisions about the criminal case.
- j. Work with the person listed as "victim" in the criminal case; however, systems-based DV advocates cannot work directly with DV survivors who are arrested.
- k. Provide advocacy and referrals for children who are witnesses or similarly involved in the DV criminal case as requested.
- l. Provide information and records to the court, prosecutors, and LE personnel with whom they work with. Although criminal defendants rarely have access to actual records prepared and maintained by system-based advocates, some of the information contained in them may be required, under certain circumstances, to be disclosed to the defense pursuant to the rules of discovery or to comply with the defendant's due process rights. (See CrR 4.7 and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed2d 490 (1995).

Case Staffing and role of the DV advocate

Some jurisdictions employ case staffing models to make offers in domestic violence matters. Sometimes called case consults, case reviews, or staffings, is any meeting where an advocate might be brought into a conversation with the prosecutor and others to discuss the specific circumstances of a case or individual. Case staffing is an important feature of a collaborative approach to DV cases, and requires advocates to act for what an individual survivor wants in a case. Advocates should not go to case staffing to be an impartial or neutral observer. They should know what is possible within the rules and laws of the system (no small task there), and promote resolution that supports, to the absolute greatest degree possible, a survivor's safety.

Chapter Nine: Trial Issues

a. Introduction:

A domestic violence trial is a dynamic event. The positions of witnesses change, and it may be that a defendant will attempt to undermine the case through tampering or intimidation. It is always best to be as prepared as possible, while also understanding that everything one prepared for could change. The topics addressed below are a basic introduction to DV trials.

b. Voir Dire

Voir dire serves several purposes, including finding jurors who can be fair and impartial in deciding your case without bias to either side. Another purpose is to educate the jurors about domestic violence through your questioning and their answers. The goal of voir dire is not to find the “best” jurors, but to get rid of the worst. The prosecutor should let the jurors know that you are human and one of them with such language as “We know that...” This is also an opportunity for the prosecutor to introduce the theme that she will use throughout the trial.

Voir dire is important in domestic violence cases, particularly if the prosecutor has a difficult, recanting, or no-show victim. Although questionnaires may be useful in DV-Sex Assault cases, the prosecutor should avoid allowing defense to offer a questionnaire. It is highly likely that the majority of prospective jurors will have a close connection to a DV victim. It is important to keep in mind that a DV victim will not necessarily be the best juror. Of course, the DV batterer will *never* be a good juror. Finally, jurors with a close relationship to DV victims can be invaluable to your voir dire.

1) Peremptory Challenges

CrRLJ 6.4(e) and CrR 6.4(e) provide state that a peremptory challenge “is an objection to a juror for which there is no reason given...” Each party may make three peremptory challenges in a court of limited jurisdiction and six peremptory challenges in superior court and an additional challenge is given to each defendant if co-defendants are tried together. The court also has the discretion to award additional challenges to the prosecution in such cases. Peremptory challenges may be done silently (on paper so that only the judge and the parties know which party challenged each juror) or verbally. A common way to make a verbal challenge is by stating: “The City/State respectfully thanks and excuses juror number X.”

Peremptory challenges may not be based upon race or gender. *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel.*, 511 U.S. 127 (1994). These restrictions also apply to defense counsel, *Georgia v. McCollum*, 5-05 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

2) Challenges for Cause

Challenges for cause are governed by RCW 4.44.150-.190. A valid challenge for cause only arises when the party challenging the juror can establish:

- **Implied Bias:** Implied bias arises when a juror has some relationship with either party; with the case itself; or has served as a juror in the same or a related action. RCW 4.44.170(1).
- **Actual Bias:** Actual bias is defined as the existence of a state of mind which satisfies the judge that the challenged juror "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).
- **Physical Incapacity:** A juror must be excused for cause if s/he has a "defect in the functions or organs of the body" that would render him or her incapable of performing his or her duties without prejudicing the substantial rights of the party making the challenging. RCW 4.44.170(3).

3) Conducting Voir Dire

Introduction

- Reintroduce yourself to jury
- Let them know why you are asking them questions
- Let them know that you are not there to embarrass them
- Let them know this is an open discussion, and you are simply looking for honest, truthful answers
- Let them know that if they do not volunteer, you will call upon them, because you need a chance to talk to everyone

Domestic Violence in General

- What think when heard charge of "DV?" [Do all judges read this part of charge? (If not, you'll have to introduce it)]
- Believe you would have had different initial reaction if it was just "assault" or "rape" without DV? (Why?)
- Anyone have strong reaction?
- Anyone think State should not get involved if victim doesn't want them to? Why/why not?
- Victims of DV
 - Must be careful not to alienate people with these questions
 - If you have a victim in the group, ask them to discuss their experience
 - a. Report first incident? Why not?
 - b. Tell friends/family? Why not?
 - c. How did abuser react after abuse?
 - d. Ever think if leaving? Why stay?
 - e. Ever call police? Why/why not?

- f. If called police, what happened? (Follow through to prosecution/conviction/treatment/etc...)
- o If have close friend/relative to DV victim, ask them to discuss
 - a. When did you find out?
 - b. Did you know it was going on? Do anything about it? Why/why not?
 - c. What was outcome?
- o Ever been accused/know someone accused of domestic abuse? (You're going to hear some great excuses here)
 - d. What happened?
 - e. Outcome?

Difficult/Recanting/No-show Victim

- Can't hide this fact, so turn it to your advantage and get jury to talk about why a victim would recant/not want to show up/lie
- You may not know what your victim is going to say on the stand, so you need to go over these issue if you think there's a chance victim is going to go south on you
- If jurors don't give you all of the reasons, offer them up yourself and see if they agree

DV Sexual Assault Cases

- Very difficult, but not impossible (just ask your fearless leader)
- Good case for use of hypos (examples)
- Can a man rape his wife? (You'd be surprised with the answers)
- Does a woman ever "ask for it?" (Again, you'd be surprised)

NCOs

- Hard to get jury to care, especially if victim is recanting
- Need to convince them to care
- Stress fact that it's a court order and put in place to prevent a future harm and is to work and be enforced with every violation

Other Standard Voir Dire Issues

- Credibility (especially important with recanting victim)
- Reasonable Doubt
- Able to follow the law (NCO)

Bias and Ability to Follow the Law

- Do you have any feelings that crimes that take place in the home should not be prosecuted?
- Do you feel that family problems that lead to violence should be handled outside of court
- Will you base your decision in this case apart from any feelings of sympathy for or prejudice against either the defendant or the victim of this case?
- Do you have a difficult time sitting in judgment of someone? If you were convinced of the defendant's guilt beyond a reasonable doubt, would it be difficult for you to vote that way because of religious, philosophical or moral reasons?
- Do you believe that if there are two different versions of what happened, you could never be convinced of either side beyond a reasonable doubt?

- What factors would you base your decision-making on when determining who is telling the truth?
- Can you assure the court that you can be fair and impartial to the defendant? Can you also assure the court that you can be fair and impartial to the State?

NOTE: Jurors that have strong feelings against domestic violence should not be excused for that reason. It is perfectly okay to have strong feelings against criminal behavior. The test is whether they can be fair and impartial in deciding whether the defendant committed the crime of which he is accused. (However, someone who has personal experience of a similar nature to the case (i.e. a survivor/victim) may be too emotional to handle hearing the case).

c. Opening

Pending.

d. Cross of the Defendant

Pending

e. Aggravating Factors

The legislature adopted a number of potential aggravating and mitigating factors and limited the court to considering only those factors in determining the sentence. In addition, some of the factors are to be found by the court and some to be found by the jury. [RCW 9.94A.537](#) sets out the procedures to be followed. Statutory grounds for an exceptional up are contained in [RCW 9.94A.535\(2\)\(3\)](#). A list of those statutory factors most likely to apply in a domestic violence prosecution are found in [RCW 9.94A.535\(3\)](#) Aggravated exceptional sentences have become a more common practice in felony DV cases, especially with the advent of the multiple DV Victims (MDV) sentencing aggravator adopted under ESHB 2777. Below are sample Domestic Violence Exceptional Sentence Guidelines:

The Domestic Violence Prevention Act mandates that victims of DV shall receive "the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010. Towards this end, the Prosecuting Attorney's Office recognizes the substantial and harmful impact upon society, families, children and the victims of offenses committed within a domestic relationship. We further recognize the continuing nature of domestic violence, and the lasting trauma caused by such violence. We find that the prevention of domestic violence and the proper punishment for such offenses is a compelling state interest that requires the recommendation of enhanced sanctions for certain domestic violence offenders who are not otherwise adequately punished by the imposition of a "Standard Sentence Range" under the Sentencing Reform Act (SRA).

- The aggravating factor for history of domestic violence requires the current offense involve "domestic violence, as defined in [RCW 10.99.020](#), and the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim or multiple victims (for crimes occurring after June 10, 2010 per ESHB 2777, but applying to all prior DV history) manifested by multiple incidents over a prolonged period of time." [RCW 9.94A.535](#). The following standards shall be utilized for the aggravating factor for history of domestic violence:

- The underlying offense is a felony assault, felony violation of a no contact order (assault), burglary, felony harassment, stalking, any sex crime, unlawful imprisonment, or other crime where the defendant used force or threats of force against the victim; and there does not appear to be a defense mitigating the crime; and
- There is evidence that the defendant has a significant history of domestic violence with the same victim or multiple victims (for crimes occurring after June 10, 2010). For example, the defendant has three or more prior convictions for domestic violence assault from separate incidents, or multiple prior felony domestic violence convictions, or a significant pattern of abuse across multiple victims; or
- There is evidence that the defendant has a significant history of unreported domestic violence or significant history of arrests on domestic violence charges with the same victim or multiple victims (for crimes occurring after June 10, 2010) ; or
- The defendant's history of domestic violence involves extremes of violence, sexual assault, or stalking behavior; or
- The defendant's history of domestic violence involves witness tampering or intimidation.

Benefits of Use:

- (1) Allows for a much more substantial sentence for serial DV offenders, particularly in Assault in the Second Degree cases, and can be very easy to prove -- certified copies of prior convictions alone can be enough.
- (2) The effect on the jury, court, and community.

Practical Considerations:

- Can you prove it?
- First, the current offense must qualify as a form of psychological, physical, or sexual abuse to use the aggravator at all. Consensual VNCOs will likely not qualify.
- To be safe, you will probably need at least 3 prior incidents spread out over a sufficient period of time (more than a few weeks).
- It will be easiest to prove the MDV aggravator using the prior convictions of the defendant.
- Your trial will/must be bifurcated on the issue of this aggravator.

Unresolved Issues:

- Is there a minimum number of victims?
- Is there a minimum number of prior incidents?
- Can we use prior Protection Orders issued against the defendant as evidence of the Aggravator?
- Do you need to use Jury Interrogatories or a Jury Unanimity Instruction?
 - The MDV aggravator may require you to prove a minimum number of prior incidents. You will likely need to establish that the jury found a sufficient number of the prior incidents occurred.
 - A Jury Unanimity Instruction for the MDV aggravator is currently under development. In the interim you will likely have to use jury interrogatories to make sure the jury found that sufficient incidents occurred.

WPICs and instructions you will need:

WPIC 300.6, 300.7, 300.17 (modified for multiple victims and citing to statute), 2.27, 300.51, 300.52 (needs to be heavily modified to work as your special verdict form), and a jury interrogatory page or unanimity instruction (confirm with supervisor and appellate unit).

f. Prosecutorial Misconduct

1. Do not comment on the defendant's exercise of a constitutional right or a claim or privilege. For example,

- the right to remain silent (includes silence before or at trial) *State v. Evans*, 96 Wn. 2d 1 (1981) (post-Miranda silence); *State v. Fiallo-Lopez*, 78 Wn. App. 717 (1995) (failure to testify at trial)
- the exercise of marital privilege
- the right to be present at trial, *State v. Martin*, 171 Wn.2d 521 (2011) (prosecutor may ask questions of defendant on cross-examination as to whether testimony tailored to other evidence, although perhaps only when defendant has "opened the door" in his testimony, but may not make "generic" argument in closing that defendant tailored testimony)

2. Do not make an argument that shifts the burden of proving the crime to the defendant.

For example, in a case where defense presents no witnesses, misconduct to argue "the defense has given you no reason to conclude the defendant didn't do this." *State v. French*, 101 Wn. App. 380 (2000).

3. Do not argue the "In order to acquit the defendant you must. . . "find a particular fact or believe or disbelieve a particular witness. This misstates the jury's role because they can acquit the defendant for any reason. *State v. Fleming*, 83 Wn. App. 209 (1996).

4. Do not misstate the burden of proof.

For example, the argument that "beyond a reasonable doubt does not mean that you give the defendant the benefit of the doubt" is improper, and misstates the burden of proof. *State v. Warren*, 165 Wn.2d 17 (2008).

5. Do not disparage defense counsel.

For example, contrasting your role with defense counsel's role in the following way is misconduct: "I have an oath and an obligation to see that justice is served . . . The defense has an obligation to a client." *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002).

Accusing defense counsel of "sleight of hand" in closing misconduct because it implied deception. *State v. Thorgerson*, 258 P.3d 43 (8/11). Probably would have been fine to argue counsel was trying to "distract" jury.

6. Do not comment on the defendant's demeanor during trial. This is viewed as infringing on the defendant's right to be present. *State v. Klok*, 99 Wn. App. 81 (2000).

7. Do not attempt to appeal to the jury's "passion and prejudice."

- Avoid comparing the defendant to animals, terrorists or other high profile criminals. *State v. Barajas*, 143 Wn. App. 24 (2007) ("mangy mutt"); *State v. Belgarde*, 110 Wn.2d 504 (1988).
- Avoid using "hot button" subjects that are unrelated to the facts of the case, such as wars. *State v. Echevarria*, 71 Wn. App. 595 (1993) (comparing war on drugs to Vietnam war).
- Do not ask the jury to "send a message" with its verdict. *State v. Perez-Mejia*, 134 Wn. App. 907 (2006). But it is alright to remind the jury that they are the "conscience of the community" and their verdict should be "just." *State v. Finch*, 137 Wn.2d 792 (1999).

8. Do not express your personal opinion of the witnesses or the evidence.

For example, "I believe him. . ." is improper. *State v. Sargent*, 40 Wn. App. 340 (1985).
Rephrase as, "the witness is believable, because . . ."

9. Do not refer to facts that were not presented to the jury.

For example, improper to introduce fact that child victim was incompetent to testify in closing argument. *State v. Fisher*, 130 Wn. App. 1 (2005).

10. Use PowerPoint judiciously. See generally *Personal Restraint of Glasmann*, No. 84475-5, __ Wn. 2d __, __ P.3d __ (October 18, 2012).

- Do not mix arguments with exhibits. Markings on an exhibit should be limited to highlighting significant portion. Put the argument on a separate slide.
- Don't put anything on a slide that in isolation could be considered an expression of opinion. For example, don't say "The defendant is guilty." Say "The evidence shows that the defendant is guilty." *Id.*

g. Sample Trial Checklist—See example in Appendix

Chapter Eleven: Sentencing

This chapter includes current case law that impacts the prosecution of domestic violence cases, including:

➤ [Introduction:](#)

Domestic violence is embedded in the customs of people and social institutions and stopping it requires changing both behaviors and belief systems. Such change does not occur quickly. Perpetrators are more likely to change when they have several experiences of being held accountable. It is not arrest alone, or prosecution alone, or conviction alone, or counseling alone that brings about change. It is a combination of these experiences. Domestic violence is learned through a variety of experiences and stopping it requires a variety of experiences. Abusers tend to minimize, deny, or rationalize their behavior. Often they blame others for their abusive behavior. They tend not to be internally motivated to recognize their destructive patterns nor to seek change. They are more apt to change their abusive behavior when there is external motivation for change.

Too often, victims are told to just leave the situation, to stand up for themselves, to protect the children from the batterer, to go to marriage counseling, etc. This advice is given in the hope that somehow these actions will provide the consistent motivator the batterer needs to make changes. Expecting the victim to take this role not only puts her/him in further danger, but also ignores the reality that domestic violence victims are in severe crisis and may be unable to be consistent. Instead of expecting the victim to be the consistent motivator for the perpetrator, the community, through the criminal justice system, must play that role.

a. Deferred prosecutions

Deferred prosecutions are provided for in Chapter 10.05 RCW. Chapter 10.05 RCW provides for a structured two-year program of treatment when it has been established that the wrongful conduct was caused by alcoholism, drug addiction, or mental illness. Deferred prosecutions are available only for misdemeanors and gross misdemeanors. A defendant who successfully completes a deferred prosecution program is entitled to have his or her case dismissed.

Although alcoholism, drug abuse, or mental illness may exacerbate the violence, domestic violence is not caused by any one of these factors and does not stop when these factors are resolved. The Domestic Violence Task Force has recommended that deferred prosecutions not be granted in cases of domestic violence.

b. Stipulated Order of Continuance (SOC) or Pre-trial Diversion

A Stipulated Order of Continuance (SOC) or Pre-trial Diversion Agreement (PDA) is a specialized form of a dispositional continuance. In an SOC, the defendant agrees to complete a structured domestic violence treatment program and other conditions in return for eventual dismissal of the charge. In an SOC, in return for completion of a number of conditions, a case is dismissed at the end of the monitored program. Such programs require careful screening by prosecutor and are inappropriate when the crime in question is particularly serious.

SOC programs allow for continued control of the offender and are designed to assist the repentant perpetrator in stopping the violence. The SOC program allows the court to exercise some control over the defendant but avoid the time of a trial. Note, the court is not a party to an SOC. The court's role is typically limited to (1) granting the continuance, (2) deciding whether there has been a breach of the terms (but not what the consequences of the breach should be) see *State v. Kessler*, 75 Wn. App. 634, 879 P.2d 333 (1994), and (3) whether to grant the dismissal motion made by the prosecutor.

c. Compromise of Misdemeanor

A compromise of misdemeanor is not available for domestic violence cases. See RCW 10.22.010 (4).

d. Affirmative Treatment Conditions

In December of 2012 the Legislature has directed that the Washington State Institute for Public Policy issue a report on efficacy of Batterer Intervention Programs or Domestic Violence Batterer Treatment. This section will be update after release of the report.

In order to appropriately and effectively intervene in cases involving DV close attention needs to be paid to the services that are offered or ordered. A description of what services are actually available within the community is important. Additionally, describing the best practices for services to be provided to DV survivors, DV perpetrators, and children can assist providers, courts and other agencies in ensuring that the most effective services are made available. This section focuses on those key areas.

Services that are Inappropriate in DV Cases: Participation in any service that increases the potential risk for further abuse or injury to DV survivors and their children are not recommended. Any service that blames DV survivors for the abuse, does not hold DV perpetrators fully accountable for their abusive behaviors, and does not hold DV perpetrators accountable for changing their abusive behaviors, should be avoided. Couples counseling, mediation, family group counseling, and anger management programs for DV perpetrators can increase the level of danger to adult DV survivors and children. These services are contraindicated if the abusive partner has not engaged in and successfully completed counseling to address their violent or abusive behavior towards their partners and their children. During the initial DV assessments and safety planning stages, these services should not be considered.

The overall philosophy behind anger management treatment is to help a person navigate through their anger in a given situation. In many ways, these programs assume that the anger the participant is feeling has come from a reasonable place (e.g.: someone cut them off on the road placing them in physical danger, someone said something negative or hurtful, they were goaded into a dispute,

etc.). The idea behind anger management is to give people tools so they are able to avoid inappropriate *reactions* to an event.

Anger Management courses are not therapeutic. They are classes and are referred to as such. Most of these programs are 16-hour classes. Many programs also offer condensed, one-day (8 hour) classes. The intent of this program is not to delve into an individual's life experiences, thoughts or concerns; but rather to teach ways to avoid irrational responses to conflict.

Other important tips:

- There is no contact with the victims
- No requirements that the course instructor be aware of the underlying incident
- No follow-up classes
- No standardized curriculum - anything goes

Best cases to consider for anger management: sibling disputes over property; general non-intimate violence family violence; some malicious mischief cases.

Batterer Intervention Programs:

Batterer's Intervention Programs (also known as Domestic Violence Batterer's Treatment) begin with the philosophy that the offender is engaging in abusive and unhealthy behaviors that are caused and controlled by the offender. These programs subscribe to the idea that batterers employ power and control over individuals in their lives, and the curriculum utilized is designed to combat those behavior patterns, recognizing these behaviors could exist even in the therapeutic setting. The programs are intensive, and typically last up to a year for successful completion. Batterer's Intervention is considered therapy and consists of both one-on-one as well as group settings.

Participants must be confronted with their crime(s) and must admit to their role. They are also required to understand the impact of their behaviors on their partners and/or children before being able to graduate from the program. These programs recognize that the victims are not to blame nor do they imply that the offender simply needs to change how they react to perceived wrongs.

Many of the BIPs recognize the occurrence of "reciprocating violence" or "victim defendants". These programs specifically screen potential victim defendants to determine if, in fact, they have committed violence out of retaliation or fear. Those offenders are then routed to a more victim-focused program. This is only recommended for victims who have been court ordered into BIP and, therefore, must provide proof of compliance. Otherwise, a better referral is always a domestic violence victim support agency.

Batterer Intervention Program (BIP) Limitations

- BIP treatment is most effective with first time misdemeanor level DV batterers who do not have serious mental health, chemical dependency or sexual deviancy issues.
- BIP treatment may not be effective for individuals with repeat, felony level DV incidents; chronic chemical dependency; chronic mental illness, sociopath personalities; or individuals with an absence of motivation to change. For these individuals, BIP treatment may increase the risk to

DV survivors by providing these DV perpetrators with vocabulary and new tactics to control their partners.

- Attendance and completion of a BIP results in various degrees of change in DV batterers' behavior and actions. Therefore, any increased access to children or parenting plan modifications should be conditioned upon reassessment of a perpetrator's behavior and attitude post completion of a BIP and not rely solely on completion of the program. This reassessment should be conducted by an evaluator, who is knowledgeable about the effects of DV on children, and in consultation with the survivor and BIP.
- Couples or family therapy is not a replacement for BIP.

Ganley, A. & Schechter, S. (1996). Domestic Violence: A National Curriculum For Child Protective Services. Family Violence Prevention Fund.

Other important tips:

- State Standards
 - Minimum of 26 week **consecutive** sessions
 - followed by monthly sessions until 12 months is complete
- Required contact by agency with victims, including updates, safety assessment and advocacy
- Offenders are required to report their offense(s)
- Providers are required to obtain police reports/court documents
- Providers must report violations/non-compliance to courts

Other DV perpetrator's Services:

- Cognitive Behavioral Therapy: See <http://nacbt.org/whatiscbt.aspx>
- **Individual Psychotherapy:** Psychotherapy should not be considered an appropriate substitute for participation in a BIP, except in cases where the abuser is too acutely impaired or disruptive to function in a group setting. Some abusers may have additional mental health issues that require psychotherapy, concurrent with their participation in a BIP. Any individual psychotherapist working with an abuser should be familiar with the dynamics of battering relationships, safety planning for DV survivors, and safe behavior planning for abusers. Individual psychotherapists must be willing to obtain a release of information from their client to provide information to the appropriate entities involved in the case, such as CA, the courts, other treatment agencies, and DV survivors. Training, experience, and understanding regarding DV varies among psychotherapists.
- **Chemical Dependency Treatment:**
 - Chemical dependency program staff should be knowledgeable about DV. Some chemical dependency programs use strategies that may inadvertently endanger DV survivors, such as requiring family sessions, implying that survivors' survival strategies are "enabling" the chemically affected person's addiction, or indicating that either DV survivors or DV perpetrators' chemical dependency caused the DV.
 - An appropriate chemical dependency program should also maintain close contact with the BIP. A batterer may need to address chemical dependency issues prior to being able to successfully complete BIP, and there must be discussion with treatment providers as to whether concurrent treatment is recommended. A perpetrator may need to address chemical dependency issues prior to entering or completing DV perpetrator treatment.

- When a substance abuse evaluation determines that inpatient treatment is recommended, the client must successfully complete the requirement before entering the BIP. When intensive outpatient treatment is recommended, a BIP may want the client to complete the first phase of substance abuse treatment and progress toward sobriety before starting the BIP.
- A relapse into substance abuse is often synonymous with a relapse into violent behavior and violence under the influence of drugs or alcohol, and is often associated with more serious injury.
- **Parenting Classes:** Some BIPs offer parenting components within the context of DV. These BIP parenting components are ideal. An abuser is most likely to benefit from participation in a parenting class when they have made significant progress with their underlying abuse issues. Without having made such progress, an abuser is likely to view their parenting as above reproach. Therefore, it is unlikely that an abuser will make major parenting improvements without participation in a BIP combined with experiences of structure, monitoring, and consequences. The parenting program provider for abusers should be knowledgeable about DV.

C. Services Not Recommended for DV Perpetrators:

1. **Anger Management:** Anger management is not an appropriate substitute for participation in a BIP. Most anger management programs are brief interventions, typically 8 to 16 hours, and these programs do not address the underlying belief systems that support abusive behavior and entrenched patterns of abusive tactics. In addition, anger management programs do not have protocols for DV survivor contact, and do not have procedures for ongoing lethality assessments.
2. **Victim Impact Panels (VIP):** VIPs were first developed for Driving Under Intoxication (DUI) panels so that DUI perpetrators would understand the impact of their criminal behavior on victims, families and friends. VIPs do not translate well to cases involving DV. VIPs are not an appropriate substitute for participation in a BIP. The importance of addressing the power and control dynamics of DV is best accomplished in a BIP program that provides educational tools and offers an experience similar to a VIP, but is tailored to address the unique characteristics of DV. It is not recommended to use of VIP for batterers, and VIP cannot replace BIP treatment as mandated in WAC 388--60.
3. **Couples or Family Counseling:** *Traditional couples or family counseling should not be recommended when the battering continues or has recently ceased.* Couples counseling is based on the assumption that partners, who possess equal amounts of power, can negotiate a conflict. In abusive relationships, there is an unequal balance of power between DV survivors and batterers, as well as a fear of physical violence or coercive attacks when batterers feel challenged. Couples counseling may be appropriate in the future when DV survivors feel they have regained control over their life, and batterers have completed a BIP and have demonstrated commitment to stopping all violence/reducing controlling tactics.

Appendix: Immigration and U-Visa

See *Department of Homeland Security law enforcement resource guide*:
<http://www.dhs.gov/files/resources/u-visa-law-enforcement-guide.shtm>

Appendix: Police Investigation

- [Introduction](#)
- [Establishing Probable Cause](#)
- [Arrests](#)
- [Follow-Up Investigation](#)

a. Introduction

The successful prosecution of a domestic violence offense starts with a careful and complete investigation. Special concerns in domestic violence investigations include victim safety and preserving the ability to hold the batterer accountable for his or her actions regardless of whether the victim is willing or able to cooperate with the prosecution.

The twin goals of victim protection and offender accountability are furthered by RCW [10.99.030](#), which mandates that every officer responding to a domestic violence complaint shall:

- Arrest the offender in accordance with [RCW 10.31.100](#) if the officer has probable cause to believe that a crime has been committed;
- Take a complete offense report including the officer's disposition of the case which shall be forwarded to the appropriate prosecutor within 10 days of the incident if there is probable cause to believe that an offense has been committed, unless the case is under active investigation; Prosecutors must also review cases quickly. Failure to abide by these guidelines have led to civil liability for police and others.
- Notify the victim of the victim's right to request that charges be filed if the officer has not arrested or cited the offender;
- Advise the victim of all reasonable means to prevent further abuse, including advising the victim of the availability of a shelter or other services in the community and the availability of an order for protection from domestic violence; and
- Facilitate transportation for the victim to a hospital for treatment or to a place of safety or shelter.

The failure to fulfill the above obligations may result in civil liability if the failure results in injuries to or the death of the victim. See *Roy v. City of Everett*, [118 Wn.2d 352](#) (1992).

b. Establishing Probable Cause

Once contact is made with the victim or the individual who made the initial request for assistance, the officer must conduct an adequate investigation to determine whether a crime has been committed. The

investigation should also be conducted with an eye toward enabling the prosecution to go forward regardless of whether the victim is available at the time of trial.

1. **Physical Appearance:** The officer should describe the victim's location upon arrival and describe her appearance, including any injuries, marks, redness, disheveled clothing, lack of clothing, smeared makeup, etc. The officer should also note the victim's height and weight. This information will help the officer to remember the case better and will allow the officer to present a picture to the jury, regardless of whether photos were taken.
2. **Demeanor:** The officer should describe the victim's emotional state of mind. Adjectives should be used to describe her demeanor, with special attention to whether the victim was crying and any other body language exhibited by the victim. (Example: The victim was hysterical and crying uncontrollably. She was holding her head with her hand, complaining of pain. She flinched as the defendant was led past her.)

This information will provide the foundation for the officer to testify to the victim's "excited utterances". "Excited utterances" are a "firmly rooted" exception to the hearsay rule that may be admitted as substantive evidence at trial regardless of whether the victim is available as a witness. See, e.g., [ER 803 \(a\)\(2\)](#); *State v. Robinson*, [44 Wn. App. 611](#), 722 P.2d 1379 (1986).

The officer should try to write down direct quotes from the victim indicating his/her state of mind and her feeling of pain. (Example: As I entered the apartment, the victim rushed to me and exclaimed, "oh, my God, he's going to kill me.")

3. **History:** The officer should try to get a history of the relationship between the victim and the suspect. The history should include:
 - length of relationship;
 - type of relationship;
 - any other communities/states the couple has resided in;
 - any past incidents of violence;
 - the existence of any court orders restraining the defendant from contacting the victim, including: (i) type of order; (ii) jurisdiction order was entered; (iii) whether the defendant was present when the order was entered; (iv) any prior violations of the order; and (v) whether the victim has a copy of the order in his or her possession²⁰; and
 - whether the suspect has ever been charged with a crime in the past and, if so, what charges were filed, where was the prosecution conducted, and was the suspect ever convicted of the charges.
4. **Injuries:** The officer should record the victim's injuries, regardless of how "insignificant". Photos should be taken if at all possible, and the victim should be encouraged to take additional photographs in a few days if any bruising appears. If a camera is not available, the officer should draw a body diagram, illustrating the victim's injuries. Be sure the case report contains the victim's size (height and weight).

²⁰ If the victim has a copy of the order but it is the victim's sole copy, the officer should not deprive the

If the victim requires medical treatment, the officer should attempt to obtain a signed medical release at the scene. The victim's statements to a doctor or nurse or social worker about the abuse as well as the identity of the perpetrator, are admissible at trial. See [ER 803\(a\)\(4\)](#); *State vs. Sims*, [77 Wn. App. 236](#), 890 P.2d 521 (1995); *In Re J.K.*, [49 Wn. App. 670](#), 745 P.2d 1304 (1987), *review denied*, 110 Wn.2d 1009 (1988); *State vs. Fleming*, [27 Wn. App. 952](#), 621 P.2d 779 (1980), *review denied*, 95 Wn.2d 1013 (1981).

- 5. Names of Any Witnesses:** The officer should always find out if anyone else was present when the incident occurred or if the victim has spoken to anyone about the incident. The witnesses' names, addresses, and phone numbers should be obtained so that a statement can be obtained.

The victim's excited utterances to civilians are admissible under the same conditions as excited utterances to an officer, but even better, statements to civilians can be admissible even if the victim does not attend the trial. The statement, therefore, should contain the witnesses' observation of the victim's demeanor and exact quotes. The witnesses' relationship to the victim and the suspect should also be noted.

The fact that a child was present during the incident may provide grounds for a longer sentence if the suspect is convicted and may help encourage the court to order treatment for the batterer.

- 6. Obtain Alternative Contact Information for the Victim:** The officer should always attempt to get an alternative phone number for the victim such as a parent's or best friend's phone number. This information will assist the prosecutor to locate the victim when a case is ready to go to trial if the victim is hiding from his or her abuser.
- 7. Signed Statement/Smith Affidavit:** In many cases there are no independent witnesses to a domestic violence incident. In other instances independent witnesses may see or hear only parts of an incident. Law enforcement officers may see only the aftermath of an incident. Neighbors may only hear screams or shouting without seeing what is happening. Often the only witness to the violence is the victim.

For many reasons, a victim of domestic violence may not wish to proceed with the prosecution of a perpetrator. In the weeks or months between an incident and a trial, the perpetrator may have overtly threatened the victim. The passage of time may have allowed the perpetrator to exercise a number of tactics of power and control to dissuade the victim from going forward. The victim may be in hiding or simply afraid to confront the perpetrator in court as an accuser. By the time of trial, a victim might minimize the initial report of violence, vary from the initial report, or recant altogether.

Despite these difficulties, it may be possible to present a victim's initial account of a domestic violence incident at trial, if the responding officer has obtained a signed statement from the victim. If the victim is able, the officer should consider letting the victim write the statement. Any victim-authored statement should be reviewed to determine whether all necessary details are included or whether additions need to be made. The written statement can be used to refresh the victim's recollection if she claims not to remember the incident. Also, it can be used to impeach the victim if she testifies adversely to the State's case. The victim cannot say the officer "misinterpreted" if she wrote the statement herself. See [ER 803\(a\)\(5\)](#); [ER 607](#).

Ideally, the written statement should take the form of a “*Smith* affidavit”.²¹ A *Smith* affidavit, named after the case in which its admissibility was recognized *State v. Smith*, [97 Wn.2d 856](#), 651 P.2d 207 (1982), is a sworn victim statement taken for the purpose of determining the existence of probable cause. Such a statement will be admissible for substantive evidence if the victim testifies inconsistently at trial. It is not substitute for a full and complete investigation of a domestic violence incident, and may not be used in lieu of live testimony from a victim, but it may be used to fill substantive evidentiary gaps at trial.

Evidentiary gaps may arise when a victim recants a report of domestic violence. The recantation may take many forms. A victim may simply ask that charges be dismissed, a victim may recant in a subsequent statement or at trial, or recantation may be made in a letter to the court, prosecutor, or defense attorney. Recantation should place advocates, law enforcement, and prosecutors on notice that issues relating to a victim may not yet have been adequately addressed.

8. Scene Observations:

- **Description:** The officer should describe the scene of the incident with as much detail as possible, especially if the scene reveals evidence of what happened. Example; "I noticed that the living room coffee table was overturned, the phone cord was unplugged from the wall and a broken vase lay on the floor in the kitchen."

If at all possible, the officer should take photos of the scene. If no camera is available, a rough diagram can still bring the scene alive for the jury and provide corroboration of the victim’s original version of events. It is difficult for a victim or a suspect to persuade a juror that nothing wrong really happened when the physical evidence supports otherwise. The description/diagram/photographs will also help the officer to remember the scene at the time of trial

- **Physical Evidence:** The officer should take into evidence any weapons or objects used in the assault or any objects that corroborate the incident. For example, if the phone cord is ripped from the wall and now useless to the victim, take it. If a ripped up photo lies on the ground, collect it. This type of corroborating evidence is extremely persuasive to juries.
- **Neighbors and Children:** The officer should always ascertain who called 911. If anyone other than the victim called, a statement should be obtained from that person, or at least their name and number for the follow-up detective. Find out exactly what they heard and saw. If at all possible, talk to neighbors or children who likely would have heard something; get their name and phone number for the detective. Find out what the children or neighbors have heard in the past.

9. Suspect Investigation:

- **Appearance:** The officer should study the suspect for injuries. Photograph the injuries if possible and determine whether the suspect needs medical attention. The description of the defendant’s appearance should also include the defendant’s height and weight and

²¹ A *Smith* affidavit form is contained in the forms and sample memos appendix.

whether the defendant's clothing is disheveled. Finally, the officer should document any indications of substance abuse. This information will help rebut a falsified claim of self-defense.

If the suspect has fled the area, the officer should ask the victim for a photograph of the suspect and for a description of his size and of any injuries. The photo forecloses a possible identification issue at trial. The description of the suspect and his lack of injuries are important to rebut a self-defense argument that may later arise.

- **Statements:** The officer should record any spontaneous statements by the suspect.

The suspect must be given *Miranda* warnings upon arrest. If the defendant is willing to answer questions after receiving his constitutional rights, the following information should be obtained:

- Ask the suspect why he was/is angry.
- Ask the suspect to describe his relationship with the victim
- Ask the suspect how long the relationship has lasted.
- Ask the suspect if police officers have ever come to his or her house in the past in response to a "family matter".
- Ask the suspect if there are any court orders that prohibit him or her from contacting the victim. If the suspect says no, follow-up questions about any orders the victim has told the officer about. If the suspect says yes, ask the suspect if he was in court when the order was entered or whether someone served him with a copy of the order.
- Ask the suspect if he or she has ever been charged with a crime in the past and, if so, what charges were filed, where was the prosecution conducted, and was the suspect ever convicted of the charges.
- Ask the suspect whether he or she would like to give a written or taped statement as to his or her side of the story.

c. Arrests

1. Mandatory Arrests:

The Legislature has mandated that an arrest **shall** be made upon probable cause to believe certain offenses have been committed. Furthermore, 10.99 requires that officers forward reports where there is probable cause to believe that a domestic violence crime has occurred within 14 days to the prosecutor

- **Assaults:**

A mandatory arrest is required pursuant to [RCW 10.31.100\(2\)\(c\)](#) when the following factors are present:

- suspect is 16 years or older;
- suspect assaulted a "family or household member" within the preceding 4 hours; and
- the officer believes that: (a) a felony assault occurred; (b) an assault has occurred which has resulted in bodily injury to the victim, regardless of whether it is observable; or (c) physical action has occurred which was intended to cause another person reasonably to

fear imminent serious bodily injury or death. Bodily injury is defined as “physical pain, illness or an impairment of physical condition”.

- **Mutual Assaults/Primary Aggressor:**

An officer is not required to arrest family or household members when there is probable cause to believe they have both assaulted the other. The “primary aggressor” is defined as the person who is the most physically aggressive. This is NOT necessarily the person who struck first. In making the determination of who is the primary aggressor, consideration must be given to:

- which person is in the greatest need of protection;
- the intent to protect victims of domestic violence under RCW 10.99.010;
- the comparative extent of injuries inflicted or serious threats creating fear of physical injury; an

HB 2777 also requires officers to consider “the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.” This provisions permits officers to consider the full domestic violence history, including other victims.

Probable cause to arrest is not negated by a claim of self-defense. *See McBride v. Walla Walla County*, [95 Wn. App. 33](#) (1999).

- **Violation of Court Orders:**

A mandatory arrest is required pursuant to RCW 10.31.100(2)(a) and (b) for violations of certain provisions of the following court orders when the suspect “has knowledge” of the order:

- [RCW 10.99.040\(2\)](#): No Contact Order issued before trial
- [RCW 10.99.050](#): No Contact Order issued at sentencing
- [RCW 26.09.050](#) and [RCW 26.09.060](#): Restraining Order in Dissolution/Separation Case
- [RCW 26.10.040](#) and [RCW 26.10.115](#): Restraining Order in Child Support Action
- [RCW 26.44.063](#): Restraining Order in Abuse of Children and Adult Dependents Action
- [Chapter 26.26 RCW](#): Uniform Parentage Act
- [Chapter 26.50 RCW](#): Domestic Violence Prevention
- [Chapter 26.52 RCW](#): Foreign Protection Orders
- [Chapter 74.34 RCW](#): Vulnerable Adult Protection Orders

Mandatory arrest is triggered by a violation of the following provisions in any of the above orders:

- a provision restraining the suspect from acts of threats of violence; or
- a provision restraining the suspect from going onto the grounds of or entering a residence, workplace, school, or day care
- a provision prohibiting the suspect from knowingly coming within, or knowingly remaining within, a specified distance of a location such as the victim’s residence, workplace, school, or day care.

Mandatory arrest is also triggered by a violation of any other provision in an order issued under RCW 26.44.063 that imposes any other restrictions or conditions upon the suspect.

Mandatory arrest is also triggered by a violation of any provision in a foreign protection order that the foreign protection order specifically indicates that such a violation will be a crime.

2. Discretionary Arrests

Even when arrest is not mandated by statute, a police officer who has probable cause to believe that a person has committed or is committing a felony has the authority to arrest the person without a warrant. [RCW 10.31.100](#).

A police officer may also arrest a person without a warrant for committing a misdemeanor or gross misdemeanor when:

- the offense is committed in the presence of the officer;
- the offense involves physical harm or threats of harm to any person or property;
- the offense involves the unlawful taking of property;
- the offense involves criminal trespass under RCW 9A.52.070 or 9A.52.080; and
- the offense is a knowing violation of a chapter 10.14 RCW anti-harassment order.

RCW [10.31.100\(1\)](#) and [\(8\)](#).

d. Follow-Up Investigation

Detective follow-up in domestic violence cases is crucial and should include the following wherever possible.

- Obtain the 911 tape.
- Re-interview of the victim only if necessary. Too many statements may have minor inconsistencies that may create problems at trial. Take photos of injuries if none are taken at the scene; follow up photos taken several days after the abuse may show the injuries even better.
- Obtain alternative phone numbers of victim's close friends or relatives to help locate victim down the line.
- Interview other witnesses including witness to the actual abusive event or witnesses who can provide corroboration to the abuse or the victim's injuries, etc.
- Obtain medical release form from the victim if on scene officers did not. Order medical records. If medics responded to scene, order trip report, which likely includes admissible statements by the victim.
- Locate prior domestic violence case reports involving the suspect and forward them to the prosecutor.
- Obtain a *Smith* affidavit if the officer at the scene did not. However, note that this may only be done before charging.
- Order a certified copy of the pleadings filed in support of any court order, a certified copy of all of the documents demonstrating service, and a certified copy of the court order.
- Interview children who were present if necessary
- In car videos of suspect or victim are always helpful
- Because prosecution of domestic violence cases often rely on jail phone calls, it is also important for officers to obtain primary phone numbers of the victim and defendant and obtain any alternate phone numbers for the parties.

Appendix: Checklists and Cheat sheets

		Offender Score									
		0	1	2	3	4	5	6	7	8	9+
Offender Score	LEVEL XVI	LIFE SENTENCE WITHOUT PAROLE/DEATH PENALTY									
	LEVEL XV	280m	291.5m	304m	316m	327.5m	339.5m	364m	394m	431.5m	479.5m
	LEVEL XIV	240-120	250-133	261-147	271-161	281-174	291-188	312-216	338-250	370-293	411-348
	LEVEL XIII	200-100	210-114	221-128	231-142	241-156	251-170	271-204	301-238	331-272	371-316
	LEVEL XII	160-80	170-94	181-108	191-122	201-136	211-150	231-184	261-218	291-252	331-296
	LEVEL XI	120-60	130-74	141-88	151-102	161-116	171-130	191-164	221-208	251-242	291-286
	LEVEL X	80-40	90-54	101-68	111-82	121-96	131-110	151-144	181-178	211-202	241-236
	LEVEL IX	40-20	50-34	61-48	71-62	81-76	91-90	111-104	141-138	171-162	201-196
	LEVEL VIII	20-10	30-24	41-38	51-52	61-66	71-80	91-94	121-118	151-152	181-176
	LEVEL VII	10-5	15-15	21-24	26-30	31-34	36-40	41-44	51-54	61-64	71-74
LEVEL VI	5-2.5	7.5-7.5	10-12	12.5-15	15-17.5	17.5-20	20-22.5	22.5-25	25-27.5	27.5-30	
LEVEL V	2.5-1.25	3.75-3.75	5-6	6.25-7.5	7.5-9	9-10.5	10.5-12	12-13.5	13.5-15	15-16.5	
LEVEL IV	1.25-0.625	1.875-1.875	2.5-3	3.125-3.75	3.75-4.5	4.5-5.25	5.25-6	6-6.75	6.75-7.5	7.5-8.25	
LEVEL III	0.625-0.3125	0.9375-0.9375	1.25-1.5	1.5625-1.875	1.875-2.25	2.25-2.625	2.625-3	3-3.375	3.375-3.75	3.75-4.125	
LEVEL II	0.3125-0.15625	0.46875-0.46875	0.625-0.75	0.78125-0.9375	0.9375-1.125	1.125-1.35	1.35-1.575	1.575-1.8	1.8-2.0625	2.0625-2.3125	
LEVEL I	0.15625-0.078125	0.234375-0.234375	0.3125-0.375	0.390625-0.46875	0.46875-0.5625	0.5625-0.675	0.675-0.81	0.81-0.96	0.96-1.125	1.125-1.3125	

First Time Offender Waiver (FTOW) (RCW 9.94A.650)

Offender Eligibility

- No prior conviction of a felony in this state, federal court, or another state; and
- Never participated in a program of deferred prosecution for a felony.

Certain felony offenses are not eligible for a FTOW sentence:

- Any offense classified as violent or sex under this chapter;
- Manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV;
- Manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers as defined in RCW 69.50.206(d)(2);
- Selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana;
- Felony driving while under the influence of intoxicating liquor or any drug;
- Felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

Sentencing

- The court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

Community Custody

In 2011, the legislature reduced the duration of community custody for FTOW sentences.

- 6 months of community custody;
- 12 months of community custody if treatment is ordered.

For further information on community custody conditions of an FTOW, see RCW 9.94A.703.

	Seriousness	Class	Supervision
DV Crime			
Assault 1	XII	A, serious violent	Y-serious V.
Rape 2	XI	A, sex	Y-sex off.
Robbery 1	IX	A, violent	
Arson 1	VIII	A, violent	
Burglary 1	VII	A, violent	
Intimidating	VI	B, non-violent	
FVNCO	V	C, non-violent	
Fel. Stalking	V	C, non-violent	
Kidnapping 2	V	B, violent	
Rape 3	V	B, sex	
Assault 2	IV	B, violent	
Arson 2	IV	B, violent	
Robbery 2	IV	B, violent	
Res. Burg	IV	B, non-violent	
Theft 1	II	B, non-violent	
Assault 3	III	C, non-violent	
Fel. Harass-kill	III	C, non-violent	
Fel. Harass-prior	III	C, non-violent	
Tampering	III	C, non-violent	
U. Imprisonment	III	C, non-violent	
Assault 4		G, misd, scores	
MVNCO		G, misd, scores	
Harassment		G, misd, scores	
Stalking		G, misd, scores	

COMMUNITY CUSTODY

Offense	Sentenced to a term of confinement for one year or less. See RCW 9.94A.702	Sentenced to the Department of Corrections. See 9.94A.701
Sex offenses (see pg 62)	Up to 12 months	36 months (if not sentenced under RCW 9.94A.507)
Violent offenses (see pg 66)	Up to 12 months	18 months
A crime against a person under RCW 9.94A.411(2) (see pg 69)	Up to 12 months	12 months
A felony offense under Chapter 69.50 or 69.52 RCW	Up to 12 months (includes conspiracy or solicitation)	12 months
A felony violation of RCW 9A.44.132(1)(Failure to Register)	Up to 12 months	12 months
A serious violent offense (see pg 59)		36 months
Offense involving the Unlawful Possession of a Firearm (RCW 9.41.040) where the offender is a criminal street gang member/associate		12 months

GENERAL NONVIOLENT OFFENSE WHERE DOMESTIC VIOLENCE HAS BEEN PLEAD AND PROVEN	GENERAL VIOLENT OFFENSE WHERE DOMESTIC VIOLENCE HAS BEEN PLEAD AND PROVEN																																													
<p style="text-align: center;"><i>NONVIOLENT</i></p> <p style="text-align: center;">OFFENDER SCORING RCW 9.94A.525(21)</p> <p>CURRENT OFFENSE BEING SCORED: _____</p> <p>ADULT HISTORY:</p> <p>Enter number of domestic violence felony convictions as listed below* _____ x 2 = _____</p> <p>Enter number of <u>repetitive domestic violence offense</u> convictions (RCW 9.94A.030(41)) plead and proven after 8/1/11 _____ x 1 = _____</p> <p>Enter number of felony convictions _____ x 1 = _____</p> <p>JUVENILE HISTORY:</p> <p>Enter number of <u>subsequent</u> domestic violence felony dispositions as listed below* _____ x 1 = _____</p> <p>Enter number of serious violent and violent felony dispositions _____ x 1 = _____</p> <p>Enter number of nonviolent felony dispositions _____ x 1/2 = _____</p> <p>OTHER CURRENT OFFENSES: <small>(Other current offenses that do not encompass the same conduct count in offender score)</small></p> <p>Enter number of other domestic violence felony convictions as listed below* _____ x 2 = _____</p> <p>Enter number of other <u>repetitive domestic violence offense</u> convictions plead and proven after 8/1/11 _____ x 1 = _____</p> <p>Enter number of other felony convictions _____ x 1 = _____</p> <p>STATUS:</p> <p>Was the offender on community custody on the date the current offense was committed? (if yes) + 1 = _____</p>	<p style="text-align: center;"><i>VIOLENT</i></p> <p style="text-align: center;">OFFENDER SCORING RCW 9.94A.525(21)</p> <p>CURRENT OFFENSE BEING SCORED: _____</p> <p>ADULT HISTORY:</p> <p>Enter number of domestic violence felony convictions as listed below* _____ x 2 = _____</p> <p>Enter number of <u>repetitive domestic violence offense</u> convictions (RCW 9.94A.030(41)) plead and proven after 8/1/11 _____ x 1 = _____</p> <p>Enter number of serious violent and violent felony convictions _____ x 2 = _____</p> <p>Enter number of nonviolent felony convictions _____ x 1 = _____</p> <p>JUVENILE HISTORY:</p> <p>Enter number of <u>subsequent</u> domestic violence felony dispositions as listed below* _____ x 1 = _____</p> <p>Enter number of serious violent and violent felony dispositions _____ x 2 = _____</p> <p>Enter number of nonviolent felony dispositions _____ x 1/2 = _____</p> <p>OTHER CURRENT OFFENSES: <small>(Other current offenses that do not encompass the same conduct count in offender score)</small></p> <p>Enter number of other domestic violence felony convictions as listed below* _____ x 2 = _____</p> <p>Enter number of <u>repetitive domestic violence offense</u> convictions (RCW 9.94A.030(41)) plead and proven after 8/1/11 _____ x 1 = _____</p> <p>Enter number of other serious violent and violent felony convictions _____ x 2 = _____</p> <p>Enter number of other nonviolent felony convictions _____ x 1 = _____</p> <p>STATUS:</p> <p>Was the offender on community custody on the date the current offense was committed? + 1 = _____</p>																																													
<p>The following crimes committed after August 1, 2011, if pled and proven with Domestic Violence special allegation after August 1, 2011, will score as outlined above:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%;">Adult DV doublers RCW 9.94A.525(21)(a)</td> <td style="width: 33%;">Juvenile Recidivist (JR) RCW 9.94A.525(21)(b)</td> <td style="width: 33%;">Scored Misdemeanors RCW 9.94A.525(21)(c)</td> </tr> <tr> <td>FVNCO</td> <td>FVNCO</td> <td>MVNCO</td> </tr> <tr> <td>Felony Harassment</td> <td>Felony Harassment</td> <td>Harassment</td> </tr> <tr> <td>Felony Stalking</td> <td>Felony Stalking</td> <td>Stalking</td> </tr> <tr> <td>Assault 1</td> <td>Assault 1</td> <td>Assault 4</td> </tr> <tr> <td>Assault 2</td> <td>Assault 2</td> <td></td> </tr> <tr> <td>Assault 3</td> <td>Assault 3</td> <td></td> </tr> <tr> <td>Burglary 1</td> <td>Burglary 1</td> <td></td> </tr> <tr> <td>Kidnap 1</td> <td>Kidnap 1</td> <td></td> </tr> <tr> <td>Kidnap 2</td> <td>Kidnap 2</td> <td></td> </tr> <tr> <td>Unlawful Imprisonment</td> <td>Unlawful Imprisonment</td> <td></td> </tr> <tr> <td>Robbery 1</td> <td>Robbery 1</td> <td></td> </tr> <tr> <td>Robbery 2</td> <td>Robbery 2</td> <td></td> </tr> <tr> <td>Arson 1</td> <td>Arson 1</td> <td></td> </tr> <tr> <td>Arson 2</td> <td>Arson 2</td> <td></td> </tr> </table>		Adult DV doublers RCW 9.94A.525(21)(a)	Juvenile Recidivist (JR) RCW 9.94A.525(21)(b)	Scored Misdemeanors RCW 9.94A.525(21)(c)	FVNCO	FVNCO	MVNCO	Felony Harassment	Felony Harassment	Harassment	Felony Stalking	Felony Stalking	Stalking	Assault 1	Assault 1	Assault 4	Assault 2	Assault 2		Assault 3	Assault 3		Burglary 1	Burglary 1		Kidnap 1	Kidnap 1		Kidnap 2	Kidnap 2		Unlawful Imprisonment	Unlawful Imprisonment		Robbery 1	Robbery 1		Robbery 2	Robbery 2		Arson 1	Arson 1		Arson 2	Arson 2	
Adult DV doublers RCW 9.94A.525(21)(a)	Juvenile Recidivist (JR) RCW 9.94A.525(21)(b)	Scored Misdemeanors RCW 9.94A.525(21)(c)																																												
FVNCO	FVNCO	MVNCO																																												
Felony Harassment	Felony Harassment	Harassment																																												
Felony Stalking	Felony Stalking	Stalking																																												
Assault 1	Assault 1	Assault 4																																												
Assault 2	Assault 2																																													
Assault 3	Assault 3																																													
Burglary 1	Burglary 1																																													
Kidnap 1	Kidnap 1																																													
Kidnap 2	Kidnap 2																																													
Unlawful Imprisonment	Unlawful Imprisonment																																													
Robbery 1	Robbery 1																																													
Robbery 2	Robbery 2																																													
Arson 1	Arson 1																																													
Arson 2	Arson 2																																													
<div style="border: 1px solid black; padding: 5px;"> <p>HOW TO QUALIFY FOR A DOSA:</p> <p>RESIDENTIAL DOSA:</p> <p>1. Only crimes where the end of the Standard Range is 12+ or more</p> <p>2. If Midpoint of the Standard Range is less than 24 months</p> <p><u>Examples where you can't get Res DOSA:</u></p> <p>1. Standard range is greater than 17-22</p> <p>2. Midpoint is > 24 months</p> <p><u>Example:</u></p> <p>Δ pleads to Burg 2, w/ off. Score of 6. range: 17-22 m Sent.: 3-6 in Tx, 24 mo of Comm. Cust.</p> <p>PRISON BASED DOSA:</p> <p>If the midpoint of the Standard Range is 24 months or more.</p> <p><u>Example:</u> Res Burg. w/ Off. Score of 6-- 33-43m (Mid-38m) Sent: 19mo DOC; 19mo Comm. Cust.</p> <p>When are you NOT eligible for a DOSA:</p> <p>1. Any Sex Offense convictions at any time</p> <p>2. Any violent crime Conviction w/in 10 years</p> <p>3. Δ is subject to deportation</p> <p>4. Δ's current offense is Felony DUI/Phys Cont</p> <p>5. Δ's current offense involves a large quantity of drugs</p> <p>6. Has been given 2 prior DOSAs w/in 10 years</p> </div>																																														

DIRECT OF JAIL PHONE RECORDS CUSTODIAN

Name

How are you employed

For how long

What is your position at the jail

What are your duties there

Does the jail have a system for recording phone calls inmates make to their friends and family

Are you familiar with the system

How are you familiar

Describe how it works

Are inmates told they are being recorded

Generally

- Calls at the jail are recorded
- All calls but calls to their attorney are recorded
- Inmates are warned that calls are recorded
- There is a message at the beginning of each call warning they are recorded
- The inmate handbook also explains that the calls are recorded
- Postings on the walls notify inmates that the calls are recorded

Are you able to record calls off of the system

Were you able to do this in _____

Requested to pull phone records for a particular inmate

How did it work then

How long are the calls retained

Can anyone change the content of the calls

Who has access to the system

Anyone else

Did you records some calls to a number

What number

How did you do that

I am showing you exhibit _____

What is this

How do you know

Is this an accurate recording of the calls made from the jail to this number

Can you tell whether the calls were made from a particular phone in the jail

How

Admit disk and admit call report

Show call report to the jury

Go down the line and explain each category

Explain PIN numbers

Defendant's can use other inmates PIN numbers

PIN same as BA? Yes

Booking photo and have Custodian match PIN and BA number

Confirm that BA and PIN numbers are unique.

Do defendants have access only phones in their current location

Does the jail track inmates' locations within the jail

How

In this case did you look at records comparing what phone was used to make these calls to where inmate was located at the time of the calls.

And what did you find.

Go back to the call report and note the "phone" section

"Phone" is the location the call is placed from

Admit movement log

Have Custodian explain movement log

Compare where the calls were made to the defendant's location in the jail

Confirm that all calls were placed from where the defendant was housed.

Confirm that facility defendant was housed in and where calls came from is in Washington.

Basic Prosecution Checklist

Δ	ΔC	Victim	Detective

Original charges	Scoring	Amend/Enhance	Scoring

EVIDENCE	Y or N	REQUESTED	RECEIVED	ISSUES / TO DO
911 TAPE				
MEDICAL RECORDS				
PHOTOS				
JAIL PHONE CALLS				
WEAPON				
VICTIM STMT/TAPE				
WITNESS STMT/TAPE				
609 FOR Δ				
609 FOR V				
EU'S				
404(B)				

Forfeiture				
3.5				

WITNESS	CONTACT INFO	TESTIMONY	EVIDENCE

TRIAL STRATEGY

THEME:

STRENGTHS	WEAKNESSES

TO DO LIST:

- _____
- _____
- _____
- _____
- _____